

STATE OF CALIFORNIA
 AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC.,	)	Case Nos. 79-CE-70-EC
	)	79-CE-170-EC
Respondent,	)	79-CE-248-EC
	)	79-CE-248-1-EC
and	)	80-CE-39-EC
	)	80-CE-110-EC
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Charging Party.)	10 ALRB No. 46
)	(8 ALRB No. 88)
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Re: Participation of Adolfo)	
Rodriguez in Case No.)	
8 ALRB NO. 88)	

DECISION AND ORDER

On December 5, 1983, the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board), acting by direction of the Board, ordered a hearing on a Request for Sanctions filed by the United Farm Workers of America, AFL-CIO (UFW or Union) to determine whether former ALRB employee Adolfo Rodriguez is prohibited from participating in the instant case, Mario Saikhon, Inc. (1982) 8 ALRB No. 88 by the conflict of interest provisions of Government Code section 87400,^{1/} et seq.

^{1/} While the UFW's Request for Sanctions did not mention Government Code section 87400, et seq., we deemed the UFW's Request a motion pursuant to Government Code section 87404. The Board maintains a policy of reading pleadings broadly so as to provide a broad review of issues. Respondent does not, and cannot, claim that it was prejudiced in any way by the Board's inclusion of the question of Rodriguez' disqualification pursuant to Government Code section 87400 et seq. The Board's Notice Setting Issues for Hearing apprised Respondent of what the hearing would encompass and Respondent was afforded an opportunity to present evidence and legal arguments on its position in this matter.

and/or Title 8, California Administrative Code section 20800.

On February 21, 1984, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions and a supporting brief and the UFW filed a reply brief.

Pursuant to the provisions of Labor Code section 1146, the Board has delegated its authority in this matter to a three-member panel. The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ as modified herein and to adopt her recommended Order.

The ALJ concluded that Adolfo Rodriguez was prohibited from participating in these proceedings by Title 8, California Administrative Code, section 20800 and by Government Code section 87400. Respondent has excepted to these conclusions.

Respondent first attacks the constitutionality of Title 8, California Administrative Code, section 20800^{2/} itself on the grounds that it is overbroad and vague. We reject this contention. The constitutional principle of overbreadth refers to legislation of such broad sweep that it proscribes constitutionally protected conduct as well as conduct which may validly be prohibited. (See Witkin, Summary of California Law,

^{2/} Section 20800 provides:

No person who has been an employee of the Board shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding which was pending during the time of his or her employment with the Board.

Eighth Edition, Constitutional Law, section 176.) "Vagueness" refers to legislation that fails to provide fair notice of what acts are prohibited. However, reasonable notice of what is prohibited is all that is required. (County of Nevada v. MacMillen (1974) 11 Cal.3d 662, 673.) Respondent has failed to establish that section 20800 prohibits constitutionally protected activity. In addition, we believe that the reach of this section is quite clear.

The National Labor Relations Board (NLRB) has also adopted a regulation which prohibits former employees of its Washington staff from involvement in cases pending before the NLRB or any regional office during the time of the employee's employment with the NLRB. (29 C.F.R. section 102.120.)^{3/} ALRB Regulation section 20800 is similar to this NLRB regulation. We adopt the ALJ's analysis of NLRB case law pertaining to 29 C.F.R. section 102.119 and 102.120 as presented by Beverly Enterprises d.b.a. Hillview Convalescent Center (1983) 266 NLRB No. 138 [113 LRRM 1034] and Alumbaugh Coal Corporation (1980) 247 NLRB 895 [103 LRRM 1210] modified on other grounds (8th Cir. 1980) 635 F.2d 1380 [106 LRRM 2001]. We also adopt her conclusion that these two cases do not require a showing

^{3/} Section 102.120 provides:

No person who has been an employee of the Board and attached to the Washington staff shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding pending before the Board or any regional offices during the time of his employment with the Board.

of actual prejudice to the party seeking disqualification as a precondition to finding Rodriguez in violation of Regulation section 20800.

Finally, Respondent argues that Regulation section 20800 applies only to attorneys. We reject this argument. Both the ALRB and the NLRB regulations refer to "persons," and are not limited to attorneys. In addition, while the two NLRB cases cited above involved former NLRB attorneys, it was the fact of their participation rather than the capacity in which they participated in the later proceedings that led to their disqualification.

We also affirm the ALJ's conclusion that Adolfo Rodriguez is prohibited from appearing in Case 8 ALRB No. 88 pursuant to Government Code section 87401.

Government Code sections 87400-87405 are part of the conflict of interest provisions of the state Political Reform Act. (Cal. Gov't Code, Tit. 9, Ch. 7, § 87100 et seq.) These sections are all included within Article 4: Disqualification of Former Officers and Employees. Article 4 restricts the post-governmental employment of certain state employees. Specifically, section 87401 prohibits former State employees from directly participating before an administrative agency by making a formal or informal appearance or by making any communication with the intent to influence the proceeding if the proceeding is one in which the former employee participated. Section 87402 prohibits former State employees from indirectly participating in proceedings in which such employee would be

prohibited from appearing under section 87401. Indirect participation includes aiding, advising, counseling, consulting or assisting in representing any person other than the State of California.

In the course of his employment with the ALRB, Rodriguez investigated three charges relating to ALRB Case 8 ALRB No. 88. He also participated in conferences and in an agenda session pertaining to these charges. This activity falls well within the definition of "participation" found in Government Code section 87400(d), which includes investigations.

We find that Rodriguez is prohibited from involvement in Case 8 ALRB No. 88 by Government section 87402. He is a former state administrative official as defined by Section 87400(b); he is acting as an agent for Respondent for compensation, the State of California has a direct and substantial interest in the proceeding (insuring that the Board's Order awarding backpay to discriminatees will be fully complied with); and the proceeding is one in which Rodriguez previously participated. As such, Rodriguez' indirect participation in this proceeding by aiding, advising, counseling, consulting, or assisting Respondent is prohibited by section 87402.

Respondent misconstrues the nature of this proceeding when it charges that it is aimed at frustrating Respondent's preparation of its case and at allowing discriminatees to illegally conceal interim earnings. Respondent is in no way precluded from putting on its case with the assistance of other investigators. It is merely prevented from utilizing the services

of Adolfo Rodriguez, in order to preserve the overriding interest of the state and this agency in the integrity of its procedures.

ORDER

By authority of Labor Code section 114.4, the Agricultural Labor Relations Board (Board) hereby orders that Adolfo Rodriguez, shall:

Cease and desist from aiding Respondent Mario Saikhon, Inc., its agents, successors, or assigns in determining the backpay liability or interviewing discriminatees or in any other manner engaging in practice before the Board or any of its agents or in any capacity in connection with this case, Mario Saikhon, Inc. (1982) 8 ALRB No. 88.

By authority of Government Code sections 87400 through 87405, inclusive, the Board hereby excludes Adolfo Rodriguez from further participating in this proceeding, Mario Saikhon, Inc. (1982) 8 ALRB No. 88 and hereby orders that Adolfo Rodriguez shall:

Cease and desist from:

Representing, aiding, advising, counseling, consulting or assisting in representing, for compensation, any person (except the State of California) in this proceeding, Mario Saikhon, Inc. (1982) 8 ALRB No. 88.

Dated: November 1, 1984

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

CASE SUMMARY

Mario Saikhon, Inc.
(Adolfo Rodriguez)
(UFW)

10 ALRB No. 46
(8 ALRB No. 88)
Case Nos. 79-CE-70-EC
79-CE-170-EC
79-CE-248-EC
79-CE-248-1-EC
80-CE-39-EC
80-CE-110-EC

ALJ DECISION

A hearing was directed in this matter to determine whether Adolfo Rodriguez is prohibited from participating in Case 8 ALRB No. 88 by Title 8, California Administrative Code, section 20800 and/or California Government Code section 87400 et seq. The ALJ found that through the course of his employment with the Board, Rodriguez had investigated two charges that are part of 8 ALRB No. 88 and had participated in a status conference and an agenda session with regard to one charge. She concluded that sections 20800 and 87400 et seq. do prohibit Rodriguez' participation in 8 ALRB No. 88. The ALJ examined the analogous NLRB regulations as well as NLRB cases interpreting those regulations. In addition, she rejected Respondent's claims that Title 8, California Administrative Code, section 20800 applies only to attorneys and that a showing of actual prejudice to the aggrieved party is required.

BOARD DECISION

The Board affirmed the ALJ's findings and conclusions. It ordered Adolfo Rodriguez to cease and desist from aiding Respondent in determining its backpay liability and from representing, aiding, advising, counseling, consulting or assisting in representing any person, except the State of California, in 8 ALRB No. 88.

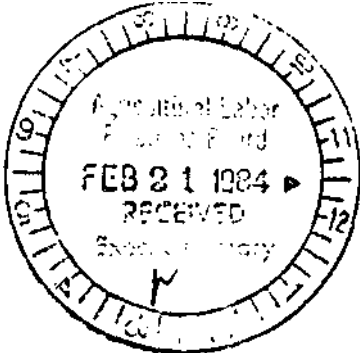
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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	Case Nos. 79-CE-70-EC
	)	79-CE-170-EC
MARIO SAIKHON, INC.,	)	79-CE-248-EC
	)	79-CE-248-1-EC
Respondent, and	)	80-CE-39-EC
	)	80-CE-110-EC
UNITED FARM WORKERS OF	)	(8 ALRB NO. 88)
AMERICA, AFL-CIO,)	
)	
Charging Party.)	
)	
)	
<u>Re Participation of Adolfo</u>)	
<u>Rodriguez in Case No. 8 ALRB 89</u>)	



Appearances:

Darrell Lepkowsky of El Centro
For the General Counsel

Chris Schneider
For the United Farm Workers
of America, AFL-CIO

Alan J. Saxe For
Respondent

Before: Barbara D. Moore
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

By an order of December 5, 1983,^{1/} and an erratum thereto issued on December 7, the Executive Secretary of the Agricultural Labor Relations Board (hereafter Board or ALRB) ordered a hearing on a Request for Sanctions (hereafter Request)^{2/} filed on October 27, by the United Farm Workers of America, AFL-CIO (hereafter UFW or Union) to determine whether Adolfo Rodriguez should be prohibited from participating in the instant case, Mario Saikhon, Inc. (1982) 8 ALRB No. 88 (hereafter 8 ALRB No. 88).

The Board directed the hearing to determine whether Rodriguez' participation was prohibited by 8 Cal. Admin. Code section 20800 (hereafter section 20800) and/or section 87400 et seq. of the California Government Code^{3/} (sections 87400 through 87405, inclusive, hereafter referred to as Article 4 when referred to collectively and otherwise by individual section numbers). Section 20800 was enacted by the Board subject to its rulemaking authority. (Labor Code section 1144.) Article 4, is part of the state conflict of interest law and, in pertinent part, provides that the presiding officer of a quasi-judicial proceeding may exclude therefrom a person covered by the article. The Board deemed the Request a petition within the meaning of section 87404.

1. All dates herein are 1983 unless otherwise specified.

2. UFW Exhibit 1. (Hereafter exhibits are referred to as UFW or Respondent. Ex. No.____.)

3. All code section references hereafter are to the California Government Code unless otherwise specified.

The Board, on December 13, issued a notice of hearing for December 20, and on that date I conducted a formal hearing in this matter.

All parties were represented at the hearing,^{4/} and after the hearing the UFW and Respondent filed post-hearing briefs.^{5/} After consideration of all the evidence, including my observation of the witnesses, arguments made at hearing and Respondent's brief, I make the following findings of fact and conclusions of law.

PRELIMINARY ISSUES

At the hearing, Respondent made various motions relative to attachments to the UFW's Request which were denominated therein as exhibits. I reserved ruling on several of those motions. Respondent moved to strike all exhibits appended to the Request, with the exception of exhibit A, for failure to authenticate. (TP. pp. 171-172.)^{6/} Respondent further moved to strike all the exhibits which are letters as hearsay.^{7/} (TR. pp. 173-174.) Respondent also moved to strike all the exhibits to the Request, except the declarations, as irrelevant (TR. p. 39) and to strike certain

4. The General Counsel appeared for the limited purpose of representing and protecting the interests of the ALRB by acting as counsel for the ALRB employees subpoenaed by the UFW. The General Counsel did not present evidence or examine any witness nor did she file a brief in this matter.

5. The UFW was given an extension of time to file its brief. When the brief was not timely filed in compliance with said extension, Respondent filed a motion to strike the brief which was granted by the Executive Secretary. Accordingly, I have not considered that brief in reaching my decision.

6. All transcript references are to the official reporter's transcript for this hearing.

7. Exhibits to the Request A-F, H and L.

declarations (denominated in the Request as Exhibits I, M, N) as improperly executed thereby failing to meet the requirements of section 2015.5 of the California Code of Civil Procedure.

I conclude that the Request and all the exhibits thereto should be considered as pleadings or moving papers which serve only to frame the issues for hearing. They are thus not relied on for the truth of the matters asserted therein nor are they treated as substantive evidence. On that basis, I deny Respondent's motions to strike. In accordance with my ruling, I have not relied on any of the documents in the Request in reaching my decision. Having denied Respondent's motions, the UFW's Request for Sanctions, offered at hearing as UFW Ex. 1, is admitted into evidence as the pleadings or moving papers for the hearing.

I also reserved ruling on the issue of whether section 20800 is unconstitutionally overbroad and vague as contended by Respondent. Assuming arguendo that an agency may determine that its rules and regulations are unconstitutional,^{8/} I conclude that it is not within the scope of my authority to determine this issue but that this is a matter for the Board itself.^{9/}

(Lyman Printing and Finishing Company (1970) 183 NLRB 1048 [76 LRPM 1799];

aff'd (4th

8. See California Constitution, article III, section 3.5, as adopted June 6, 1978, which prohibits an administrative agency from ruling its enabling statute unconstitutional.

9. Respondent raises in its brief two motions it made at hearing that I also ruled are beyond my scope of authority. Respondent moved to have the ALRB disqualified as the final adjudicator in this matter arguing that the Board has prejudged the case. (TR. pp. 19-22; Resp. brief pp. 21-23.) Respondent also moved to dismiss (TR. pp. 7-10) arguing in part that the Board could

(Footnote continued—)

Cir. 1971) 437 F.2d 1356 [77 LRRM 2033]; cert. den. (1971) 404 U.S. 829 [78 LRRM 2464].)

FINDINGS OF FACT

Adolfo Rodriguez is a former employee of the ALRB. He worked in the El Centre regional office under the direction of David Arizmendi, the Regional Director of that office. Rodriguez was discharged from the ALRB effective November 5, 1982. (TR. p. 134.)

Currently Mr. Rodriguez is employed by Mario Saikhon, Inc. (TR. 182.) He began working there in June of 1983. (TR. p. 184.) His job is to help calculate the backpay award to the discriminatees in 8 ALRB No. 88. (TR. pp. 183-184.) In this capacity, he contacted at least two of the discriminatees, Rufino Cortez and Lorenzo Ramirez.

Rosario Cortez, Rufino's wife, testified that Rodriguez came to their home on September 20 and sought information concerning where Mr. Cortez had worked after he went on strike against Mario Saikhon, Inc. in 1979. When Mr. Cortez was unable to give specific information, Mr. Rodriguez asked to see any check stubs Cortez had and further suggested that Cortez check his income tax returns in

(Footnote 9 continued—)

not conduct a hearing on whether section 20800 precludes Rodriguez¹ participation because it was beyond the Board's power since the Board's General Counsel had withdrawn from participating in the substance of the hearing. Respondent argues the same point but for different reasons in its brief. (pp. 23-26.) The Board set this matter for hearing, and I do not perceive it as within my authority to rule on the Board's power to do so. That issue should be presented to and is reserved for the Board itself.

Respondent in its brief resurrects several arguments which it presented at hearing in support of various motions that I denied, I decline to readdress those issues.

tax returns in order to determine his earnings since he left Saikhon.

(TR. pp. 154-155.)^{10/}

Lorenzo Ramirez was visited at his home by Mr. Rodriguez in late September. Rodriguez told Ramirez he was from Saikhon and wanted information about where Ramirez had worked after the strike at Saikhon. (TR. pp. 166-167.) Ramirez said he was going to check with the state to see if it was all right to give Rodriguez the information.^{11/} (TR. p. 167.) Rodriguez returned some six to ten days later. Ramirez told Rodriguez he had not yet talked to anyone from the state and thus had nothing to say. (TR. 168-169.) Rodriguez did not come back again.

While Rodriguez was employed at the ALRB, he investigated two charges, 79-CE-70-EC and 80-CE-39-EC, which are part of the instant case 8 ALRB No. 88. (TR. pp. 71-72.)^{13/} Rodriguez

10. Rosario Cortez testified that her husband had told her that Rodriguez had visited other Saikhon workers asking about their work after the strike. (TR. p. 160.) From her entire testimony, it is quite evident that Rodriguez himself told her and her husband that he was seeking information about Mr. Cortez's interim employment and wages after he left Saikhon in 1979. Mr. Rodriguez asked for whom Mr. Cortez had worked, how much he had earned, asked to see check stubs and asked Mr. Cortez to check his income tax returns. I credit Mrs. Cortez that Rodriguez asked for information for the years Mr. Cortez did not work for Saikhon. (TR. p. 163.) Her testimony is corroborated by the circumstantial evidence of Rodriguez' questions and his requests for checkstubs. Moreover, Mrs. Cortez was a sincere forthright witness and her demeanor indicated trustworthiness.

11. From the context of his testimony, it is apparent Mr. Ramirez meant the ALRB when he referred to the state. He mentioned the state agency on Waterman and gestured around the hearing room to explain what state agency he meant. I take official notice of the fact that the El Centro ALRB office is located at 319 Waterman Avenue.

12. See UFW Ex. 2.

participated in a status conference and agenda session with regard to charge number 79-CE-70-EC. (TR. p. 85; UFW Ex. 2.) Rodriguez also investigated charge number 82-CE-69-EC which relates to the compliance aspect of 8 ARLB No. 88. (TR. p. 94, 137-139; UFW Ex. 2.)

As the Board agent assigned to investigate these cases, Rodriguez had access to the working files on these charges. (TR. pp. 83-84.) The working files in the unfair labor practice case are carried over when the case goes to compliance. (TR. p. 89.) Arizmendi testified that working files normally contain confidential information although he could not say what specific types of confidential information were contained in the files of the charges Rodriguez investigated relative to 8 ALRB No. 88. (TR. p. 84.)

ANALYSIS AND CONCLUSIONS

Neither section 20800 nor Article 4 has been the subject of a formal hearing before. I note initially that, as the party seeking relief, the UFW has the burden of proving by a preponderance of the evidence the essential elements of the respective provisions in order to establish that Rodriguez is encompassed within their terms.^{13/} I will consider the application of each provision separately.

Section 20800 provides:

No person who has been an employee of the Board shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding which was pending during the time of his or her employment with the Board.

13. See Cal. Evid. Code sections 115; 190; 500.

The National Labor Relations Board (hereafter NLRB) has adopted similar regulations. 29 C.F.R. section 102.119 (1979) (hereafter section 102.119) applies to employees of the NLRB's regional offices and provides:

No person who has been an employee of the [NLRB] and attached to any of its regional offices shall engage in practice before the [NLRB] or its agents in any respect or in any capacity in connection with any case or proceeding which was pending in any regional office to which he was attached during the time of his employment with the [NLRB].

A separate rule applies to NLRB employees in the Washington office. 29 C.F.R. section 102.120 (hereafter section 102.120) provides:

No person who has been an employee of the [NLRB] and attached to the Washington staff shall engage in practice before the [NLRB] or its agents in any respect or in any capacity in connection with any case or proceeding pending before the [NLRB] or any regional office during the time of his employment with the [NLRB].

Although this is a case of first impression for this Board, there is precedent under the NLRB. This Board's rule and those of the NLRB are virtually identical. The only significant distinction is that NLRB employees in regional offices are prohibited from involvement in cases which were pending in any regional office to which the employee was attached during her/his employment with the NLRB. NLRB Washington staff are precluded from involvement in cases pending before the NLRB or any regional office during the time of the employee's employment with the NLRB. The ALRB has applied a single standard to all of its employees whether in the regional offices or the Sacramento headquarters office. This standard tracks that of the NLRB's rule for its Washington staff, namely that the prohibition against involvement applies to all cases pending anywhere in the agency during the employee's employment with the

ALRB.

Given the similarity of the rules, it is appropriate to look to applicable NLRB precedent. (Cal. Labor Code section 1148.) The most recent and most relevant NLRB case is Beverly Enterprises d.b.a. Hillview Convalescent Center (1983) 266 NLRB No. 138 [113 LRRM 1034].

In that case, Respondent moved to dismiss the complaint on the grounds that the Charging Party's attorney had violated section 102.120. Respondent moved, in the alternative, to disqualify the entire law firm representing Charging Party. The NLRB Administrative Law Judge (hereafter ALJ) denied the motion to dismiss but granted the motion to disqualify the law firm. The ALJ's ruling on disqualification was appealed to the NLRB itself.

Charging Party's attorney Lee Jackson had worked previously as an attorney in the NLRB Washington office. During the time Jackson was with the NLRB, the charge in the case in question was handled exclusively in the regional office, and the NLRB found there was no evidence that Jackson had any knowledge of the case until after he left the NLRB.

Nonetheless, the NLRB said that ". . . it is undisputed that attorney Jackson's participation in this case violated section 102.120 of the Rules and Regulations" (at pp. 5-6.) The NLRB noted it had:

. . . without exception strictly applied the provisions of section 102.120 so that an employee in the [NLRB's] Washington Office who leaves the [NLRB] is precluded from participation at any time in any case pending anywhere in the Agency prior to the employee's departure [sic] (at p. 5.)

Further, the NLRB stated: "Certainly, were the attorney involved still participating in the case, we would order that he terminate such participation." (at p. 7.) The NLRB did not discuss the nature of Jackson's involvement in the case in making its determination mentioning only in passing that Jackson withdrew his notice of appearance after the NLRB regional office advised him he was in apparent violation of the rules.

The NLRB determined that the entire law firm should not be disqualified noting that if there were evidence that some material advantage accrued to a party represented by an attorney who was in violation of section 102.120, it would disqualify the entire firm to assure that no prejudice inured to the other party or parties.

In this regard, the NLRB considered the case of Alumbaugh Coal Corporation (1980) 247 NLRB 895 [103 LRRM 1210], modified on other grounds (8th Cir. 1980) 635 F.2d 1380 [106 LRRM 2001], controlling. In Alumbaugh, a regional employee of the NLRB, Ronald Zera, left the NLRB and joined a law firm. That firm represented Charging Party in a case where the charge had been filed in the regional office where Zera worked during the time Zera was employed there. There was no evidence Zera participated in the regional office's investigation of the charge or in interrogation of the witnesses while he was an NLRB agent. While representing Charging Party, Zera spoke to two employees to discuss the facts of the case and wrote a letter to the NLRB regional office withdrawing some objections. Zera did not participate in the hearing in the case before the ALJ. The NLRB declined to dismiss the complaint because of Zera's involvement. It did not discuss whether his involvement

violated section 102.119 but simply refused to grant Respondent the requested remedy which was dismissal of the complaint. In declining to dismiss, the NLRB stated that Zera's participation was minimal and that there was no showing that Zera's conduct prejudiced Respondent's rights.

I find Alumbaugh, supra, and Beverly Enterprises, supra, consistent. Where the relief sought involves action against an entity other than the former NLRB employee, the NLRB considers whether the aggrieved party has suffered some prejudice by virtue of the employee's involvement in a case pending while he was an NLRB employee. Where there is no evidence of such prejudice, the NLRB treads cautiously. Thus it has declined to dismiss complaints or to disqualify an entire firm from representing a party. As to the former employee, however, neither case requires that there must be some showing of prejudice before the employee will be required to cease involvement in a case. The NLRB in Deverly Enterprises clearly indicated that Jackson's participation was prohibited. It made no mention of a showing of prejudice as a prerequisite to ordering the former NLRB employee to cease his involvement. To the contrary, the NLRB's construction of its rule as being strictly applied and as precluding participation at any time in any case belies such a prerequisite.

Thus, I conclude that there is no requirement, as counsel for Respondent in the case at bar argues, that the UFW must show that Adolfo Rodriguez' participation in 8 ALRB No. 88 results in prejudice to the UFW as a precondition to finding Rodriguez in violation of section 20800. Counsel's reliance on Alumbaugh in this

regard is misplaced since the discussion regarding prejudice related to the remedy sought not whether the employee violated the rule. The later case of Beverly Enterprises addresses the point at issue more precisely than does Alumbaugh and does not support counsel's position. Therefore it is not necessary to demonstrate, as counsel for Respondent contends, that, as a Board agent, Rodriguez had access to confidential information which would not be disclosed to Respondent in the compliance phase of the case.

Although both Alumbaugh and Beverly Enterprises involved NLRB employees who were attorneys, the NLRB rules apply to all its employees as does the ALRB rule. The employees' status as attorneys was not a factor discussed by the NLRB. I do not perceive that the applicability of these cases is affected by the fact that Mr. Rodriguez is not an attorney.

The UFW has established that Mr. Rodriguez was an ALRB employee at the time underlying charges in 8 ALRB No. 88 were filed. It has further established that Rodriguez investigated two of the charges as well as a third charge relating to the compliance phase of 8 ALRB No. 88. Neither the NLRB's nor the ALRB's rules require that the former employee actually have been involved in the case in question while a Board agent in order to preclude participation in the case subsequent to leaving the agency. The NLRB noted in Beverly Enterprises that there was no showing that Jackson even knew about the case while he was an NLRB employee. Nonetheless, the NLRB clearly stated that Jackson's later involvement in the case was improper and in violation of the rules. Rodriguez' significant participation in 8 ALRB No. 88 as a Board agent merely adds to the

considerations relative to precluding his current involvement in this case.

Rodriguez' current involvement on behalf of Mario Saikhon, Inc. in 8 ALRB No. 88 consists of assisting in calculating the backpay owed including talking to discriminatees to investigate their interim earnings. I find that this involvement comes within the prohibitions of section 20800. The regulation is broadly worded to prohibit practice "in any respect or in any capacity." In Alumbaugh, Zera's involvement consisted of talking to two employees regarding the facts of the case and sending a letter to the regional office. The NLRB did not distinguish between the two acts. There is no indication that the discussions with the employees were significant only because Zera also wrote a letter or because of some larger involvement by him in the case. Similarly, in Beverly Enterprises, the NLRB did not discuss the nature of Jackson's involvement on behalf of Charging Party as an element in deciding whether he was in violation of NLRB rules. Rodriguez' participation is sufficiently similar to that of Zera in Alumbaugh to bring it within the ambit of prohibited participation.^{14/} Moreover, the clear message of the NLRB in Beverly Enterprise is that the thrust of its rules is to prohibit participation by its former employees in cases which were pending while they were employed at the NLRB. The

14. The NLRB in Alumbaugh did not specifically pass on the issue of whether Zera was precluded from participating since it focused on the relief requested. The reasonable inference, especially in view of Beverly Enterprises, is that the NLRB did not question that the involvement was improper under its rules. It is improbable that it would have discussed only the remedy if it had believed that Zera had not even been in violation of the rule.

NLRB emphatically stated that were its former agent still participating in the case it would order that he terminate his involvement. The NLRB expressed no concern over the nature of the participation.

Thus I find no support for Respondent's counsel's argument in the instant case that the phrase "practice before the Board" in section 20800 should be narrowly constructed to encompass only activities such as submitting pleadings, arguing before the Board or advising clients about how to proceed before the Board. (Resp. Brief pp. 28-29.) The language prohibiting practice in any capacity and applicable NLRB precedent indicate a broader reading. Thus, I find that Adolfo Rodriguez' participation in 8 ALRB No. 88 is in violation of the Board's rule in section 20800.

Turning to the second issue, the Board has construed the UFW's Request as a petition within the meaning of section 87404 and has determined that it is the function of this ALJ, as the hearing officer in the compliance phase of 8 ALRB No. 88, to determine whether Mr. Rodriguez' participation in this case is precluded by Article 4 so that he should be excluded from any further participation.

Before examining the specific code sections, it is helpful to know the legislative purposes behind their enactment.^{15/} Article 4 is part of the Conflicts of Interests provisions of the state Political Reform Act (Cal. Govt. Code, Title 9, ch. 7, §87100 et seq.) and restricts the post-government employment of certain state

15. "In the construction of a statute the intention of the Legislature ... is to be pursued," (Code Civ. Proc. §1859.)

employees. Various legislative analyses set forth the statutory goal:^{16/}

. . . the interest of state government and the public can best be protected by (1) preventing the disclosure or use of matters revealed by reason of a relationship having confidential aspects; (2) reducing the chance that post-government employment considerations will bias the conduct of government business; and (3) imposing limitations on the opportunity for undue advantage by reason of familiarity with agency practice and procedure, and personal relationships with agency personnel.

Thus, Article 4 seeks to protect a number of interests besides the possible misuse of confidential information.

With the legislative history in mind, I move to a consideration of the specific provisions of Article 4.

Section 87404 provides:

Upon the petition of any interested person or party, the court or the presiding or other officer, including but not limited to a hearing officer serving pursuant to Section 11512 of the Government Code, in any judicial, quasi-judicial or other proceeding, including but not limited to any proceeding pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code may, after notice and an opportunity for a hearing, exclude any person found to be in violation of this article from further participation, or from assisting or counseling any other participant, in the proceeding then pending before such court or presiding or other officer.

It is clear, and no party contests, that the compliance hearing in 8 ALRB No. 88 is a quasi-judicial proceeding within the

16. Staff Analysis of Senate Committee on Governmental Organization re Assembly Bill 1048 (1979-80 Regular Session); Senate Democratic Caucus Analysis re same. Both analyses address the February 25, 1980, version of AB 1048 which is the same as the final statute except that in section 87400, subd. (b) defining "state administrative official", the words "judicial, quasi-judicial or other proceeding" replaced the words "administrative action."

meaning of Article 4.^{17/} To determine the issue of exclusion I look first to the prohibition contained in section 87402 which provides:

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

Respondent admits that Mr. Rodriguez is a former state administrative official^{18/} but argues that he does not come within the meaning of section 87401 which states:

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof:

(a) By making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if;

(b) The State of California is a party or has a direct and substantial interest; and

(c) If the proceeding is one in which the former state administrative official participated.

17. Section 87400 sets forth the definitions which apply in Article 4. Subdivision (c) thereof provides:

(c) "Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

18. Section 87400, subd. (b) provides:

(b) "State administrative official" means every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engaged in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.

"Participated" is defined in section 87400, subd. (d) as follows:

(d) "Participated" means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to department or agency staff which do not involve a specific party or parties.

The UFW has established that Mr. Rodriguez was the Board agent assigned to investigate three charges relating to the instant case. He participated in conferences and in an agenda session. This provision is written in the disjunctive so that any one of the specified acts is sufficient to constitute participation. "Investigation" is specifically included in the list. Mr. Rodriguez was the Board agent with the responsibility for investigating the charges. I find that Rodriguez took part personally and substantially as a Board employee in the investigation of R ALRB No. 88 within the meaning of section 87400, subd. (d). Therefore, Mr. Rodriguez would be prohibited from appearing in this case pursuant to section 87401 since the State of California is a party to this proceeding and Mr. Rodriguez participated in the proceeding by virtue of his investigations.^{19/}

19. I reject Respondent's contention that because this is the compliance phase of B ALRB No. 88 that it is a different case or proceeding from the unfair labor practice phase. The issues in both overlap. Compliance is simply the enforcement aspect of the same original case. The compliance decision is even denominated a supplemental decision. Respondent also argues that Mr. Rodriguez is not covered by section 87401 because there has been no showing that he received compensation for his work for Mario Sakihon, Inc. The UFVI established that Rodriguez is employed by Saikhon. I take

(Footnote continued—)

It follows that under the terms of section 87402 Mr. Rodriguez may not now, for compensation, "aid, advise, counsel, consult or assist in representing" any person other than the State of California in 8 ALRB No. 88. I find that Mr. Rodriguez' work for Mario Saikhon, Inc., at a minimum, falls within the categories of aid and assistance. His assistance in helping Mario Saikhon, Inc. assess its backpay liability and in interviewing discriminatees to determine their interim earnings which would reduce that liability comes within the meaning of aid and assistance to a party in this proceeding. Thus, pursuant to sections 87402 and 87404, Mr. Rodriguez is prohibited from further participating in 8 ALRB No. 88 and from assisting, aiding, counseling, consulting, or advising any of the participants (except the State of California) in this proceeding.

RECOMMENDED ORDER

By authority of Labor Code section 1144, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Adolfo Rodriguez, shall:

Cease and desist from aiding in determining the backpay liability or interviewing discriminatees or in any other manner engaging in practice before the Board or any of its agents in any

(Footnote 19 continued—)

official notice (Cal. Evid. Code section 451(d)) that an employee is "[a] person who works for another in return for financial or other compensation." (The American Heritage Dictionary of the English Language (New College Edition 1980) p. 428.) Moreover, I note that Respondent's argument is disingenuous since in the next breath counsel states, "The nature of this hearing is to determine whether this tribunal should seriously impair Mr. Rodriguez's ability to earn a living." (Resp. brief, p. 40.)

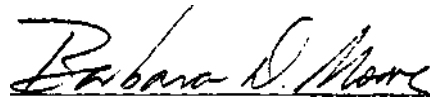
respect or in any capacity in connection with this case, Mario Saikhon, Inc. (1982) 8 ALRB No. 88.

By authority of Government Code sections 87400 through 87405, inclusive, the Board hereby excludes Respondent, Adolfo Rodriguez, from further participation in this proceeding, Mario Saikhon, Inc. (1982) 8 ALRB No. 88 and hereby orders that Adolfo Rodriguez shall:

Cease and desist from:

Representing, aiding, advising, counseling, consulting or assisting in representing, for compensation, any person (except the State of California) in this proceeding, Mario Saikhon, Inc. (1982) 8 ALRB No. 88.

DATED: February 21, 1984



BARBARA D. MOORE
Administrative Law Judge