Fresno, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| GERAWAN FARMING, INC.<br><br>Employer,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA<br><br>Petitioner. | ) | Case No. 2013-MMC-003<br><br><br><br><br><br>39 ALRB No. 13<br><br>(August 21, 2013) |

**DECISION AND ORDER**

On July 10, 2013, Lupe Garcia ("Garcia"), an employee with Gerawan Farming, Inc., ("Gerawan) filed a "Petition for Intervention" with the Agricultural Labor Relations Board ("ALRB" or "Board") in the above-captioned case. Pursuant to the Board's July 12, 2013 Administrative Order 2013-26, Gerawan and the United Farm Workers of America ("UFW") filed responses to the petition on July 19, 2013. In its response, Gerawan attempted to raise an issue on Garcia's behalf: Whether Garcia and other individual employees of Gerawan, as well as the public, had a First Amendment right to attend the Mandatory Mediation and Conciliation (MMC) proceedings between Gerawan and the UFW, the certified bargaining representative for Gerawan's employees. We declined to reach the issue because Gerawan lacked standing to assert the legal rights of Garcia and other members of the public. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 11 at p. 8.)

On August 2, 2013, Garcia filed a petition for reconsideration asking the ALRB to decide, *inter alia*, whether the public, including Garcia and other Gerawan employees, has the right to attend "on the record" MMC proceedings under article I, section 3 (b) of the California Constitution and the First Amendment of the United States Constitution. We deny Garcia's motion for reconsideration because it does not meet the standard for granting reconsideration. We grant reconsideration *sua sponte*, however, because the issue raised by Garcia – whether Garcia and the public have a right of public access to MMC proceedings under the federal and state constitutions – presents an issue of first impression which, if left unresolved, could potentially result in the deprivation of constitutionally protected rights.

Although the Board's regulations provide for motions for reconsideration in unfair labor practice and representation proceedings (Cal. Code Regs., tit. 8, §§ 20286(c) and 20393(c), respectively) and do not expressly provide for review of a Board interlocutory order in a MMC proceeding, we will treat the petition for reconsideration as a motion for reconsideration subject to the same standard of review as motions for reconsideration under the relevant regulation sections cited above.

Standard for Hearing a Motion for Reconsideration

We recently restated in *South Lakes Dairy Farms* (2013) 39 ALRB No. 2, that the standard for hearing a motion for reconsideration of a Board decision is that the moving party show *extraordinary circumstances*, i.e., an intervening change in the law or evidence previously unavailable or newly discovered. (*South Lakes Dairy Farms* (2013) 39 ALRB No. 2 at p. 2.) As we stated in the decision, "[t]he standard does not

contemplate hearing on reconsideration issues argued for the first time absent a compelling reason as to why they were not raised and/or fully argued previously." (*Id.* at p. 4.) Likewise, this is not a case where a motion for reconsideration would have been Garcia's only option for Board review of this issue. (See generally *Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App.3d 100.) Garcia could have raised the issue in the Petition for Intervention but did not. Despite the fact that Gerawan did raise the issue, the issue was not properly before the Board because Gerawan lacked standing to assert the legal rights of others.

Right of Public Access to "On the Record" MMC Proceedings

Garcia argues that there is a right of public access to the MMC proceedings at issue under both the First Amendment of the United States Constitution as well as under article 1, section 3(b) of the California Constitution. Garcia cites *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, and *Delaware Coalition for Open Government v. Strine* (D. Del. 2012) 894 F.Supp.2d 493, for the proposition that the First Amendment provides a right of access to civil trials and proceedings in general and to quasi-arbitration procedures specifically. We find both cases to be inapposite on their facts with respect to a right of public access under the First Amendment.

In *Press-Enterprise Co. v. Superior Court*, the United States Supreme Court decided whether there was a general First Amendment right of access to preliminary hearings in criminal cases conducted in California. In holding that there was, the Court noted that the California Supreme Court had concluded that the First Amendment was not implicated because the proceeding was not a criminal trial, and that

the First Amendment question could not be resolved solely on the label given an event, "trial" or otherwise, particularly where the preliminary hearing functioned much like a full-scale trial. *(Press-Enterprise Co. v. Superior Court* of *Cal.* (1986) ("*Press-Enterprise II"*) 478 U.S. 1 at p. 7.)

In determining whether there was a qualified First Amendment right of access, the Court applied what has become known as the "experience and logic" test, i.e., whether the place and process have historically been open to the press and general public, and whether public access plays a significant positive role in the functioning of the particular process in question. (*Press-Enterprise II, supra,* 478 U.S. at p. 8). The court concluded there was indeed a qualified First Amendment right of public access because preliminary hearings of the type conducted in California had traditionally been accessible to the public, and public access to criminal trials and the selection of jurors was essential to the proper functioning of the criminal justice system. The court found that California preliminary hearings were sufficiently like a criminal trial to justify public access for the same reasons. (*Press-Enterprise II, supra,* 478 U.S. at pp. 10-12). The "experience and logic" test has been applied to non-judicial proceedings as well. (See *Leigh v. Salazar* (9th Cir. 2012) 668 F.3d 1126 (reversing a district court's grant of a preliminary injunction restricting viewing of the Bureau of Land Management's horse gather for failure to conduct the *Press-Enterprise II* analysis to determine whether horse gathers were traditionally open to the public and whether public access plays a positive role in the functioning of a horse gather); *Whiteland Woods, L.P. v. Township of West Whiteland* (3d Cir. 1998) 193 F.3d 177 (holding that appellant had a First Amendment right of access to

a planning commission meeting under *Press-Enterprise II* but limitations on videotaping did not violate appellant's right of access).

Garcia cites both *NBC Subsidiary* and *Delaware Coalition for Open Government* as precedent for the proposition that, under the "experience and logic" test of *Press-Enterprise II*, the Board is compelled to allow public access to MMC proceedings.

In *NBC Subsidiary (KNBC-TV)*, the California Supreme Court held that the First Amendment right of access to trials encompassed civil proceedings, noting that no case to which the court had been cited or of which it was aware suggested or held that the First Amendment right of access as articulated by the U.S. Supreme Court did not apply, as a general matter, to ordinary civil proceedings. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of Los Angeles*, 20 Cal. 4th 1178, pp. 1208-1209.) The California Supreme Court noted that the high court's opinions in *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, *Press-Enterprise Co. v. Superior Court of Cal.* (1984) 464 U.S. 501 ("*Press-Enterprise II")* and *Press-Enterprise II* suggested that the First Amendment right of access extended beyond the context of criminal proceedings and encompassed civil proceedings. (*Id.* at pp. 1207-1208.)

In *Delaware Coalition for Open Government v. Strine*, the U.S. District Court for the District of Delaware addressed the issue of a First Amendment right of access to a confidential arbitration proceeding established by Delaware law in its Court of Chancery, giving the Court of Chancery the power to arbitrate business disputes when the parties request a member of the Court of Chancery or other person authorized under court

rules to arbitrate a dispute. In concluding that the Delaware proceeding, although labeled arbitration, was essentially a civil trial, the court noted that a Chancellor, and not the parties, selected the judge who would hear the case; the same rules governing discovery in the Chancery Court applied to the arbitration; a sitting judge presides over the proceeding; and that the judge found facts, applied the relevant law, determined the obligations of the parties, and then issued an enforceable order. (*Delaware Coalition for Open Government v. Strine* (D. Del. 2012) 894 F. Supp. 2d 493, 502-503.)

Similarly, Garcia argues that the MMC process is intended to vindicate public rights and is not purely a commercial dispute between two private parties. Public access, Garcia argues, would promote the integrity of the process. Garcia is correct that the MMC process is not purely a commercial dispute between two private parties. Indeed, MMC is not a "non-consensual adjudication" as Garcia argues, nor is it a dispute resolution proceeding in the traditional sense of resolving legal claims and rights between parties; it is the imposition of a labor contract negotiation as a result of a bargaining impasse and, as such, bears no resemblance to the civil trial proceedings addressed in *NBC Subsidiary* or the court-conducted and voluntary arbitration procedures addressed in *Delaware Coalition for Open Government.*

MMC is a quasi-legislative proceeding invoked not to resolve the legal claims of parties, but to force negotiations (mediation) that, if unsuccessful, result in a binding contract imposed on the parties (binding interest arbitration). Likening it to civil trials or court-conducted arbitration for the purpose of finding a First Amendment right of

access is unavailing, and resort to the "experience-logic" analysis of *Press-Enterprise II* is required.

MMC is more akin to a labor contract negotiation, albeit a mandatory one once invoked by one of the parties, and we know of no tradition of labor contract negotiations being open to the public, even those involving public employees. We do not see how public access would play a significant positive role in the functioning of MMC or any type of labor contract negotiation for that matter.

The purpose of the MMC process is to build a labor negotiation relationship between the parties not only to accomplish the creation of the first contract, but to further negotiations between the parties in the future. As noted by the California Court of Appeal in *Hess Collection Winery v. Agricultural Labor Relations Board* (2006) 140 Cal. App. 4th 1584, "It would thus appear that the legislative purpose is to change the attitudes toward collective bargaining by compelling the parties to operate for at least one term with either a collective bargaining agreement or the functional equivalent of a collective bargaining agreement. The Legislature hopes that employers who have been resistant to collective bargaining will learn that collective bargaining can be mutually beneficial." (*Hess Collection Winery v. Agricultural Labor Relations Board* (2006) 140 Cal. App. 4th 1584, 1600.) During labor contract negotiations, strategic compromises are often made that further the goals of achieving a contract and building a labor negotiation relationship. These compromises would not be made with the prospect of real-time publicity of those compromises and demands for explanations prior to the conclusion of negotiations. "[L]abor negotiations are conducted in private in order that negotiators may speak freely

without fear of offending their constituencies and reach compromises without appearing to be weak." (Benjamin S. Duval, Jr., *The Occasions of Secrecy* (1986) 47 U. Pitt. L. Rev. 579, 669.)

Additionally, unlike the arbitration in *Delaware Coalition for Open Government*, a Board order enforcing a contract pursuant to MMC is not self-enforcing; in the event the parties refuse to comply, the Board must seek judicial enforcement of any such order to force compliance by the parties. Applying the "experience-logic" test of *Press-Enterprise II*, we conclude that there is no First Amendment right of access to the Board's quasi-legislative proceeding known as MMC.

Garcia also argues that a right of public access to MMC proceedings exists under article I, section 3, subdivision (b) (1) of the California Constitution, which states in relevant part:

> (b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

Garcia also cites the Bagley-Keene Open Meetings Act, Government Code section 11120 et seq., which also applies to meetings of state bodies.

Article I, Section 3, subdivision (b) (2) of the California Constitution provides:

> (b) (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that

> limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

Subdivision (b) of section 3 of article I was added to the California Constitution in 2004 by Proposition 59. Proposition 59 has been interpreted as "enshrining in our state Constitution the public's right to access records of public agencies," but having little impact on the construction of the Public Records Act. (*BRV, Inc.* v. *Superior Court of Siskiyou County* (2006) 143 Cal.App.4th 742, pp. 750-751.) Similarly, Proposition 59 has little impact on the construction of the Bagley-Keene Open Meeting Act which preceded it.

MMC proceedings are not a proceeding of a state body. The Bagley Keene Open Meeting Act, Government Code section 11121, defines "state body" as, *inter alia*, a board, commission, or similar multimember body of the state created by statute or required by law to conduct official meetings. (Gov. Code § 11121, subd. (a).) No ALRB Board member sits in an official capacity during MMC proceedings or even attends them. Although Garcia correctly notes that Evidence Code sections relating to confidentiality in mediation do not apply to the final interest arbitration phase of the MMC process, *Hess Collection Winery* (2003) 29 ALRB No. 6 at 8, it does not stand to reason that the interest arbitration phase, or any phase of MMC, for that matter, is open to the public as a meeting of a state body.

When we look to the procedures allowing for the appointment of a mediator upon the declaration of an impasse by public agency and employee organizations (Gov. Code § 3505.2), public schools and their employees (Gov. Code § 3548 et seq.), and in

higher education employer-employee negotiations (Gov. Code §3590 et seq.), we see no provision for public participation. For the reasons stated previously, we do not think the public interest in the process of reaching an agreement as to the terms of a collective bargaining agreement is served by public presence during that process.

For the reasons set forth above, Garcia's Motion for Reconsideration is hereby DENIED.

DATED: August 21, 2013

Genevieve A. Shiroma, Chair

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

# CASE SUMMARY

**GERAWAN FARMING, INC.** Case No. 2013-MMC-003
(United Farm Workers of America) 39 ALRB No. 13

## Background

On July 10, 2013, Lupe Garcia ("Garcia), an employee with Gerawan Farming, Inc. ("Gerawan") filed a petition for intervention with the Agricultural Labor Relations Board ("ALRB" or "Board") in this matter. Pursuant to Administrative Order 2013-26, Gerawan and the United Farm Workers of America ("UFW") filed responses, and in its response, Gerawan attempted to raise on Garcia's behalf the issue whether Garcia and other employees, as well as members of the public, had a First Amendment right of access to Mandatory Mediation and Conciliation ("MMC") proceedings between Gerawan and the UFW. The Board declined to reach the issue because Gerawan lacked standing to assert the legal rights of Garcia and other members of the public. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 11). On August 2, 2013, Garcia filed a petition for reconsideration asking the ALRB to decide, *inter alia*, whether the public, including Garcia and other Gerawan employees, has the right to attend "on the record" MMC proceedings under Article I, Section 3(b) of the California Constitution and the First Amendment of the United States Constitution.

## Board Decision

Although the Board's regulations do not provide for motions for reconsideration of a Board interlocutory order in an MMC proceeding, the Board treated the petition for reconsideration as a motion for reconsideration subject to the same standard of review as motions for reconsideration in unfair labor practice and representation proceedings. The Board denied Garcia's motion for reconsideration on the grounds that it did not meet the standard for hearing a motion for reconsideration as reiterated in *South Lakes Dairy Farms* (2013) 39 ALRB No. 2, to wit: The moving party must show extraordinary circumstances, i.e., an intervening change in the law or evidence previously unavailable or newly discovered. The Board noted that this was also not a case where a motion for reconsideration would have been Garcia's only option for Board review of the case, as Garcia could have raised the issue in the Petition for Intervention.

The Board granted reconsideration *sua sponte* because the issue raised, if left unresolved, could potentially result in the deprivation of constitutionally protected rights. The Board held that there was no right of access under the First Amendment of the United States Constitution. Applying the "experience and logic" test from the U.S. Supreme Court's decision in *Press-Enterprise Co. v. Superior Court of California* (1986) 478 U.S. 1, the Board held that MMC proceedings are more like labor contract negotiations and that there is no tradition of labor negotiations being open to the public, nor did public access play a significant positive role in the functioning of MMC or any type of labor contract negotiation. The Board held that there was no right of public access under Article I, Section 3 (b) of the California Constitution because Article I, Section 3(b) had little impact on the construction of the Bagley-Keene Open Meeting Act, which applies to meetings of state bodies. MMC proceedings are not meetings of state bodies.

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