

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,	)	Case No.	2013-RD-003-VIS
	)		(39 ALRB No. 20)
Employer,	)		
	)		
and	)		
	)		
SILVIA LOPEZ,	)	ORDER DENYING GENERAL	
	)	COUNSEL'S REQUEST FOR	
Petitioner,	)	SPECIAL PERMISSION TO	
	)	APPEAL ADMINISTRATIVE	
and	)	LAW JUDGE'S ORDER	
	)	STRIKING EXPERT WITNESS	
	)		
UNITED FARM WORKERS OF	)		
AMERICA,	)		
	)		
Certified Bargaining Representative.	)	Admin. Order No. 2014-34	
	)		
<hr/> GERAWAN FARMING, INC.,	)	Case Nos.	
	)		
Respondent,	)	2012-CE-041-VIS	2013-CE-041-VIS
	)	2012-CE-042-VIS	2013-CE-042-VIS
and	)	2012-CE-046-VIS	2013-CE-043-VIS
	)	2012-CE-047-VIS	2013-CE-044-VIS
UNITED FARM WORKERS OF	)	2013-CE-007-VIS	2013-CE-045-VIS
AMERICA,	)	2013-CE-009-VIS	2013-CE-055-VIS
	)	2013-CE-025-VIS	2013-CE-058-VIS
Charging Party.	)	2013-CE-027-VIS	2013-CE-060-VIS
	)	2013-CE-030-VIS	2013-CE-062-VIS
	)	2013-CE-038-VIS	2013-CE-063-VIS
<hr/>	)	2013-CE-039-VIS	

On September 29, 2014, the General Counsel filed a Request for Special  
Permission to Appeal Administrative Law Judge's Order Striking Expert Witness

(“Request”) in response to the Prehearing Conference Order, Dated September 23, 2014 (“ALJ Order”) issued by Administrative Law Judge (“ALJ”) Mark Soble.<sup>1</sup>

At Prehearing Conference on September 22,<sup>2</sup> the General Counsel informed the ALJ that she intended to call Patricia Fisher, as an expert witness, to testify concerning the signatures on the first decertification petition to establish forged signatures, the identities of the forgers, and to authenticate signatures. (ALJ Order, p. 2, ll. 16-19.) The ALJ struck the witness from the General Counsel’s witness list because (1) the General Counsel failed to disclose the expert witness at the Prehearing Conference on September 9, as required, nor did she indicate the use of such expert in the discussion of facts and evidentiary issues (*Id.*, at p. 2, ll. 22-23); (2) petition signatures are confidential and allowing the expert witness to testify about the signatures would require that the signatures be disclosed (*Id.*, at pp. 2-3.) While acknowledging that genuineness of the signatures on the first petition was not at issue, the ALJ noted that the fact of forgery, “if true, it would be useful, relevant information to show . . . company instigation and/or circulation of the decertification petition.” (ALJ Order, p. 3, ll. 8-21.) In weighing the General Counsel’s need for this evidence against the policy of nondisclosure, the ALJ found “protecting the confidentiality of the petition signatures is the greater interest, especially where the General Counsel has had

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<sup>1</sup> Acting Executive Paul Starkey issued an order setting time for the parties to file statements of opposition by closed of business, October 6, 2014. No statements of opposition were filed.

<sup>2</sup> All dates are 2014 unless otherwise indicated.

ten months to attempt to establish Employer instigation and involvement using other methodologies.” (*Id.*, at p. 3, ll. 23-26.) The ALJ further reasoned that “disclosing petition signatures to the employer and bargaining representative would undermine worker confidence in the confidentiality of the petition.” (*Id.*, at pp. 3-4.)

The General Counsel argues that the expert witness is necessary to provide evidence that will “corroborat[e] percipient witness testimony regarding supervisor involvement in signature-gathering, establishing the inherently coercive nature of the signature-gathering, and showing the improper signing of the decertification petition by supervisors and/or other agents of Gerawan.” (Request, p. 3, ll. 5-8.) The General Counsel argues prejudice in establishing her case in chief and undue delay because the ALJ ruling would require re-opening or re-hearing of the case to allow expert testimony. (*Id.*, at p. 3, ll. 8-14.) The General Counsel specifically argues that (1) her disclosure of the expert witness was timely under Board regulations (*Id.*, at p. 3) and (2) a protective order would remedy concerns about confidentiality of petition signatures. (*Id.*, at pp. 4-6.) We find this argument to be unpersuasive in the context of this Request.

Board regulation section 20242, relative to appeals of Executive Secretary and administrative law judge rulings, provides that “[n]o rulings or order shall be appealable, except upon special permission from the Board.” (Cal. Code Regs., tit. 8, § 20242, subd. (b).) That section further provides that the moving party must set forth “its position on the necessity for interim relief and on the merits of the appeal.” (*Ibid.*)

In *Premiere Raspberries, LLC dba Dutra Farms* (2012) 38 ALRB No. 11, at page 11 (*Premiere Raspberries*), the Board announced its standard of “limiting Board review of interlocutory rulings sought pursuant to Regulation 20242(b) to those that cannot be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370(j)” as a means to “strike the proper balance between judicial efficiency and providing an avenue of review of rulings that would otherwise be effectively unreviewable on appeal.”

The ALJ’s order to strike the General Counsel’s expert witness from the witness list is an evidentiary ruling. As noted in *Premiere Raspberries*, an interlocutory appeal of an evidentiary ruling is not a collateral order and is effectively reviewable on appeal. (*Premiere Raspberries, supra*, at pp. 8-9.) Also, California Code of Civil Procedure section 904.1 excludes evidentiary rulings from matters that may be appealed. (*Id.*, at p. 9.) Accordingly, the request to review the motion to strike the expert witness does not satisfy the standard set forth in *Premiere Raspberries*.

Moreover, the General Counsel has not met the threshold test of the regulation to establish the need for the appeal. (Cal. Code Regs., tit. 8, § 20242, subd. (b).) In describing the purpose of the expert witness testimony, the General Counsel informs the Board that the expert witness testimony would be “corroborative” of percipient witness testimony regarding supervisor involvement in signature-gathering. (Request, p. 3, ll. 5-8.) Similarly, in striking the expert witness, the ALJ notes that the General Counsel had 10 months to develop “other methodologies” to establish employer instigation and involvement. (ALJ Order, p. 3, ll. 23-26.) That the excluded

evidence would be corroborative in nature and that the facts in question may be established by other means weighs against a conclusion that immediate appeal is necessary.

Finally, it is for the ALJ, in the first instance, to weigh the competing interests of the need for evidence against the policy of confidentiality of petition signatures, and that decision is reviewable on appeal. It is also of note that the General Counsel, for the first time in this Request, suggests that alternatives, in the nature of a protective order, were available to the ALJ to overcome policy concerns about confidentiality of signatures. These arguments do not appear to have been presented to the ALJ.

PLEASE TAKE NOTICE that the General Counsel's Request is DENIED for the reasons discussed above.

Dated: October 27, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member