

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,	)	Case No.	2013-RD-003-VIS
	)		(39 ALRB No. 20)
Employer,)		
)		
and)		
	)	ORDER DENYING	
SILVIA LOPEZ,	)	RESPONDENT'S APPLICATION	
	)	FOR SPECIAL PERMISSION TO	
Petitioner,	)	APPEAL REGARDING	
	)	INTRODUCTION OF JORGE	
and	)	RUEDA'S TESTIMONY AND	
	)	REQUEST FOR CLARIFICATION	
UNITED FARM WORKERS OF)		
AMERICA,)		
	)	Admin. Order No. 2014-38	
Certified Bargaining Representative.)		
)		
<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
	)	2013-CE-039-VIS	

On October 23, 2014, Gerawan Farming, Inc. ("Respondent") filed an Application for Special Permission to Appeal Regarding Introduction of Jorge Rueda's Testimony and Request for Clarification ("Application") in which Respondent seeks to

appeal a ruling made by the Administrative Law Judge (“ALJ”) on October 22, 2014, during the hearing in the above-captioned matter, allowing the testimony of Jorge Rueda, identified by Respondent as an FLC contract employee who worked at Gerawan as a supervisor in 2013 and 2014.¹ On October 13, 2014, in response to the calling of Mr. Rueda as a witness, the ALJ requested briefing on five issues framed by the ALJ concerning the calling of supervisory witnesses.² After extensive briefing by the parties on October 16 and 17, the ALJ gave the oral ruling in dispute here.

The gravamen of Respondent’s Application is to challenge the General Counsel’s pre-hearing contact with Mr. Rueda on the ground that such contact violates California Rule of Professional Conduct, Rule 2-100, which prohibits ex parte contact with a represented client. In its Application, Respondent appears to seek intermediary relief from the Board in two ways: 1) an advisory ruling by the Board to clarify the scope of the rule against ex parte contacts and 2) an order excluding the testimony of Mr. Rueda.³ As explained below, the Application is DENIED.

¹ Respondent did not provide the transcript copy of the oral ruling by the ALJ on the record as required by Board regulation, and the Application is defective on that basis. (Cal. Code Regs, tit. 8, § 20242, subd. (c).) Because no party opposed Respondent’s representation, we take as true, for purposes of this Application, that the ALJ “determined that the General Counsel was permitted to contact Mr. Rueda, without prior notice to Gerawan, as he was not working for Gerawan as a supervisor at the time the contact was made.” (Application, p. 3, ll. 19-21.)

² See Charging Party’s Opposition at pages 2-3.

³ The relief sought by Respondent in this interim appeal is not clearly set forth, but it is fairly understood that Respondent seeks both immediate relief from having the testimony presented and future relief in the nature of an advisory ruling.

Respondent argues that the General Counsel's contact with Mr. Rueda during the investigation of the charge was improper as an ex parte contact in violation of ethics rules, there was no fair notice concerning such contact and, as a result, Respondent is prejudiced in its defense.⁴ Further, Respondent asks the Board to issue a "clarification" so as "to prevent future prejudice and give guidance in the application of the California Rules of Professional Conduct" and to "clarify the 'bright-line' rule applicable to California Rules of Professional Conduct, Rule 2-100 to include FLC [farm labor contractor] employees." (Application, p. 6, ll. 18-21.)

The General Counsel filed a Statement of Opposition on October 29, 2014.⁵ The General Counsel argues that the contact with Mr. Rueda was not ex parte because he was not an employee of Gerawan at the time of the communication, nor an intermittent employee; the NLRB Case Handling Manual regarding ex parte contacts defers to the law of the jurisdiction; and the exclusion of testimony is not an appropriate remedy, even assuming a technical violation, because Gerawan has an opportunity to prepare for hearing.⁶

In its Statement of Opposition, also filed October 29, 2014, the UFW argues that Respondent fails to meet the Board's standard for granting special

⁴ Respondent argues that Mr. Rueda is a managing agent by virtue of his past employment with Respondent as a supervisor.

⁵ Acting Executive Secretary Paul Starkey issued an order setting time for the parties to file statements of opposition by close of business, October 29, 2014. The General Counsel and the UFW timely filed separate statements of opposition.

⁶ The General Counsel represents that Mr. Rueda is next scheduled to testify on November 14, 2014. (General Counsel's Opposition, p. 8.)

permission to appeal, as announced in *Premiere Raspberries*, described below, because Respondent can address the issues on exceptions, if taken. The remainder of the UFW's opposition takes up the merits of the issues relating to ex parte contacts, arguing that no ex parte contact was made under the ethics rules, that no prior notice was required concerning such contact, and that no remedy is therefore required in this case.

Section 20242, subdivision (b) of the Board's regulations provides that rulings and orders of an ALJ are only appealable upon special permission of the Board. 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."

Here, the ALJ's order allowing testimony of a witness 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.) On its

face, the request to review the order allowing witness testimony does not satisfy the standard set forth in *Premiere Raspberries*.⁷

Accordingly, the Application is not a proper subject of an interim appeal because it does not meet the standard for interim appeal set forth in *Premiere Raspberries, supra*.

PLEASE TAKE NOTICE that the Respondent's Application is DENIED for the reasons discussed above.

Dated: November 5, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

⁷ This situation squarely fits the rule of *Premiere Raspberries*. Here, the parties had the opportunity to brief the ALJ on the concerns presented and the ALJ has ruled. The exceptions stage affords an opportunity for effective review on appeal. While it is true that the Board has the power to make policy through adjudication and rulemaking, Respondent has not established the necessity or appropriateness for such Board action at this juncture. Just as the evidentiary issues are fully reviewable on appeal through the exceptions process, the issues of alleged ex parte contacts can be examined upon a complete record and, if necessary, remedied.