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 APPLICATION FOR SPECIAL PERMISSION TO APPEAL DENIAL OF HER PETITION TO REVOKE THE SUBPOENA OF REGIONAL DIRECTOR SILAS SHAWVER
Petitioner,	)	
and	)	
UNITED FARM WORKERS OF AMERICA,	)	
Certified Bargaining Representative.	)	Admin. Order No. 2015-03
GERAWAN FARMING, INC.,	)	Case Nos.
Respondent,	)	2012-CE-041-VIS 2013-CE-041-VIS
and	)	2012-CE-042-VIS 2013-CE-042-VIS
UNITED FARM WORKERS OF AMERICA,	)	2012-CE-046-VIS 2013-CE-043-VIS
Charging Party.	)	2012-CE-047-VIS 2013-CE-044-VIS
	)	2013-CE-007-VIS 2013-CE-045-VIS
	)	2013-CE-009-VIS 2013-CE-055-VIS
	)	2013-CE-025-VIS 2013-CE-058-VIS
	)	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 February 19, 2015, the General Counsel filed an Application for Special Permission to Appeal the Denial of her Petition to Revoke Subpoena of Regional Director Silas Shawver ("Application"), in which she seeks to appeal a ruling made by

the Administrative Law Judge ("ALJ") on February 11, 2015, during the hearing in the above-captioned matter.

On January 16, 2015, Gerawan Farming, Inc. (Gerawan or Employer) served a subpoena on Regional Director Silas Shawver requesting that he appear to testify at the hearing in the above-captioned matter on February 2, 2015.[1] On February 5, 2015, the General Counsel filed a Petition to Revoke the subpoena with the ALJ. The ALJ heard arguments on the Petition to Revoke during the hearing on February 11, 2015.

The ALJ denied the Petition to Revoke and indicated that he would allow questioning on what training was provided for Gerawan's crew bosses in late August 2013, and an overview of the training provided for Gerawan's employees at Mr. Shawver's direction.[2] The ALJ indicated that he would not allow inquiry into specific questions asked by workers during the training or into the specific answers given by Agricultural Labor Relations Board (ALRB) Staff.

The General Counsel argues in her Application that because Mr. Shawver served as the civil prosecutor in this matter (until he went on leave on January 23, 2015),

[1] The consolidated hearing on election objections and alleged unfair labor practices began on September 24, 2014, and continues to date.

[2] In late August, 2013, ALRB agents acting under the supervision of Regional Director Shawver took access at Gerawan to advise farmworkers of their right to support or oppose the decertification of the United Farm Workers of America (UFW). ALRB staff spoke to over 2,000 workers, and Mr. Shawver personally conducted training for Gerawan's supervisors and crew bosses. Gerawan voluntarily allowed the access and noticing after injunctive relief proceedings pursuant to section 1160.4 of the Agricultural Labor Relations Act (ALRA) were initiated by the General Counsel in Fresno Superior Court. The injunctive relief proceedings were initiated in the context of a decertification effort at Gerawan that began in the summer of 2013.

he is protected from testifying by the advocate-witness rule. The General Counsel also argues that requiring Mr. Shawver to testify would upset the delicate balance of duties he maintains as Regional Director and would undermine public confidence in the General Counsel and the ALRB. The General Counsel further argues that the harm that would result from his testimony could not be remedied by the exceptions process because the harm would occur as soon as he testified.

On February 23, 2015, Gerawan filed an Opposition to the General Counsel's Application, arguing that no grounds justify an interim appeal of the ALJ's order because it is an evidentiary ruling not subject to interlocutory review, and that the General Counsel has not provided adequate support for her argument that Mr. Shawver's testimony would result in irreparable harm. Gerawan argues that Regional Director Shawver's testimony is relevant and necessary because he was a first-hand participant in the ALRB's remedial efforts to cure the alleged taint caused by Gerawan's alleged involvement in the summer 2013 decertification drive. Moreover, Gerawan points out that the ALJ already ruled in his pre-hearing conference order dated September 25, 2014, that ALRB staff members including Mr. Shawver could be called as witnesses.[3]

[3] On September 11, 2014, before the hearing began, Gerawan indicated that its attorneys would call Mr. Shawver as a witness. On September 18, 2014, the General Counsel filed a Motion in Limine to exclude such testimony, and the ALJ denied in part and granted in part the General Counsel's motion. (Pre-Hearing Conference Order, dated September 25, 2014, at p. 3.) The ALJ specifically held that he would allow the testimony of ALRB staff with personal knowledge of information which may assist the ALJ in determining whether or not, as a matter of law, the workers did or did not have free choice when it came to casting their ballots in the decertification election. The ALJ also made it clear that he would not allow any party to call witnesses for the purposes of putting the General

Gerawan also argues that the General Counsel's Application impermissibly seeks to withhold relevant evidence; and that Mr. Shawver's role as Regional Director does not immunize him from testifying.

We find that the General Counsel's Application improperly seeks interlocutory review of an evidentiary ruling, and that the General Counsel has failed to state any sufficient legal reason why interim relief is necessary as required by the Board regulations (Cal. Code Regs., tit. 8, § 20242, subd. (b)); therefore, we DENY her Application for the reasons discussed below.

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. In *Premiere Raspberries* (2012) 38 ALRB No. 11, the Board stated that it would only hear interim appeals of interlocutory rulings pursuant to Regulation 20242 subdivision (b) that could not be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370(j). *Premiere Raspberries* spoke to striking the proper balance between judicial efficiency and providing an avenue for review of rulings that would otherwise be effectively immunized from appeal.

The ALJ's order denying the Petition to Revoke the Subpoena of Regional Director Shawver is an evidentiary ruling. As noted in *Premiere Raspberries*, an appeal of an evidentiary ruling is not a collateral order subject to interlocutory review. (*Premiere Raspberries, supra*, at pp. 8-9.) Also, California Code of Civil Procedure

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Counsel's or Regional Staff's motives or competence on trial. No appeal of this ruling was filed.

section 904.1 excludes evidentiary rulings from matters that may be appealed. (*Premiere Raspberries, supra*, at p. 9.) Federal law provides for interlocutory review in a civil case when a district judge certifies that the order at issue involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. (28 U.S.C. § 1292(b).) In this case, the ALJ's order allowing limited questioning of Mr. Shawver about information within his personal knowledge does not involve a controlling question of law, and an immediate appeal of the order does not materially advance the ultimate termination of the litigation.

Moreover, the General Counsel has not met the threshold requirement of establishing the necessity of interim relief as required by Regulation 20242 subdivision (b). The General Counsel argues that if Mr. Shawver were to testify the harm would have been done immediately as he is entitled to a privilege that once broken cannot be rectified. The General Counsel argues that his testifying would "upset the delicate balance of duties he maintains as Regional Director and would undermine public confidence in the General Counsel and the ALRB." This argument is bound up with the General Counsel's argument that Mr. Shawver is "protected" from testifying by the advocate-witness rule, and her argument that an evidentiary privilege should apply to preserve the appearance of impartiality of the agency. As discussed below, we find neither argument establishes the necessity for interim relief.

The advocate-witness rule applies within the criminal justice system and prohibits an attorney as appearing as both witness and advocate in the same hearing. This

rule is not a form of immunity. Rather it addresses the concern that the "prestige and prominence of the prosecutor's office" will unduly influence jurors. (*People v. Linton* (2013) 56 Cal. 4th 1146, 1186.) The Ninth Circuit Court of Appeals has noted that the concern is with a prosecutor's actions which might have "taken the advantage of the natural tendency of jury members to believe in the honesty of … government attorneys." (*U.S. v. Rangel-Guzman* (9th Cir. 2014) 752 F.3d 1222, 1225.) The purpose of the rule is to prevent the potential for jury confusion. This rule "is a corollary to the fundamental tenet of [the criminal justice system] that juries are to ground their decisions on the facts of a case and not on the integrity or credibility of the advocates." (*U.S. v. Prantil* (9th Cir. 1985) 764 F.2d 548, 553.)

The central concern expressed in the cases cited above is simply not present in the Gerawan matter. Thus, the advocate-witness rule does not provide a basis for granting interim relief.

The General Counsel's argument that the subpoena of Mr. Shawver must be revoked to "protect the public interest" and preserve the appearance of impartiality is also unavailing in the context of this case and does not provide a basis for her argument that interim relief is necessary.

The General Counsel cites to several National Labor Relations Board (NLRB) cases which she argues stand for the proposition that "the highly sensitive and delicate role of the Board Agent in processing and resolving unfair labor practice and representation cases would be seriously impaired if a real likelihood existed of the Board Agent's becoming enmeshed as a witness in cases to which he has been assigned."

(*Elizabethtown Gas Co. v. NLRB* (4th Cir. 2000) 212 F.3d 257, 263, citing *Drukker Communications, Inc. v. NLRB* (D.C. Cir. 1983) 700 F.2d 727, 731.) However, these cases are clear that any evidentiary privilege is limited and is not applied on a *per se* basis. The courts review the specific circumstances in each case to determine whether the evidentiary need outweighs the harm.

In *Stephens Produce Co. v. NLRB* (8th Cir. 1975) 515 F. 2d 1373, the court enforced the NLRB's order where the Board did not allow subpoena and questioning of a NLRB field examiner who had conducted the initial investigation of a ULP charge. The court stated that "[t]here is a limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the NLRB." (*Stephens Produce Co. v. NLRB, supra,* 515 F. 2d 1373, 1377.) The court emphasized that "the privilege for such investigatory processes is a very narrow one and need only be honored where the policy behind its invocation by the agency outweighs any necessity for the information shown by the party seeking it," and moreover, "we do not believe that the mere incantation of this stated policy is always necessarily sufficient to bring the privilege into effect." (*Ibid*, citing *J. H. Rutter Rex Manufacturing Co. v. NLRB* (5th Cir. 1973) 473 F.2d 223, 235.)

Significantly, in *Stephens Produce Co*., the information being sought included statements made to the field examiner by workers during the investigation of the case. The court noted that the company did not adequately demonstrate that the testimony sought was necessary because the company was given all of the formal written

statements of the witnesses after they testified, and the company was free to and, in fact, did utilize these documents in cross-examination of the worker witnesses.

Drukker Communications, Inc. v. NLRB (D.C. Cir. 1983) 700 F.2d 727, also cited by the General Counsel, is a case in which the court found that a Board agent's neutral position did not shield him from testifying because "permitting the testimony in the distinctive circumstances of this case would [not] create any 'real likelihood' of enmeshment in the future. The balancing of need against harm, which evaluation of this evidentiary privilege always involves, leads us to conclude that the testimony should have been required." (*Drukker Communications, Inc. v. NLRB*, *supra*, 700 F.2d 727, 733.)

The court found it significant that the testimony sought did not pertain to the internal deliberations of the agency, nor to the accuracy or completeness of its investigative work product. Rather, it concerned an external, operative event which an agency employee had witnessed. In addition the court noted that the information sought was specific as opposed to a "more generalized fishing expedition." In remanding the matter back to the Board, the court stressed that "[t] he proceeding is not a private action, but a complaint pressed by the Board itself against the party who asserts the need for the testimony. It is repugnant to notions of fairness for the government to seek sanctions for alleged wrongdoing while withholding from the proceeding evidence that would demonstrate innocence." (*Drukker Communications, Inc. v. NLRB, supra, 700 F.2d 727, 733*, citing *Brady v. Maryland* (1963) 373 U.S. 83, 87.)

In the instant case, Gerawan asserts that Mr. Shawver is the only person who instructed the crew bosses, and he also is the individual who directed other ALRB staff to conduct the noticing of the crews. The ALJ stated that, under the circumstances, the "most expeditious procedure is to allow the Company to call Mr. Shawver as a witness." In balancing need against harm, it is clear that there is not any real likelihood that the public interest and or "public confidence" in the General Counsel would be compromised if Mr. Shawver testifies. The ALJ has indicated that he would not allow inquiry into specific questions asked by workers during the training or into the specific answers given by ALRB Staff. The confidentiality of workers will not be compromised. In addition, the ALJ ruled at the pre-hearing conference that he would not allow questioning about issues related to prosecutorial discretion or investigative strategy. Rather, the ALJ ruled that he would allow questions on what training was conducted for the crew bosses and a general overview of the training provided to employees at Mr. Shawver's direction. Thus, as in *Drukker Communications*, Mr. Shawver's testimony would not pertain to the internal deliberations of the agency, nor to the accuracy or completeness of its investigative work product. As Mr. Shawver testifies, the General Counsel will be free to pose objections and have them ruled on by the ALJ. Disagreement with such rulings can be addressed effectively through the exceptions process.

The ALJ's order denying the Petition to Revoke the Subpoena of Silas Shawver is an evidentiary ruling and is not a matter subject to interim appeal. Moreover, Mr. Shawver is not protected from testifying simply by being Regional Director or the

chief prosecutor in the above-captioned matter, thus, the General Counsel's Application fails to state any sufficient legal reason why interim relief of the ALJ's order is necessary. The General Counsel's Application is DENIED.

Dated: March 10, 2015

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member