STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,	)	Case Nos. 2015-CE-011-VIS 2015-CE-012-VIS
Respondent,	)	
and	)	
RAFAEL MARQUEZ,	)	ORDER GRANTING RESPONDENT'S APPLICATION FOR SPECIAL PERMISSION TO APPEAL ALJ ORDER DENYING PETITION TO REVOKE
Charging Party,	)	
and	)	Admin. Order No. 2016-13
UNITED FARM WORKERS OF AMERICA,	)	(November 8, 2016)
Charging Party.	)	

On April 1, 2016, Respondent Gerawan Farming, Inc. ("Gerawan") filed with the Agricultural Labor Relations Board (the "ALRB" or "Board") an application for special permission to appeal (the "Application") pursuant to section 20242, subdivision (b) of the Board's regulations.[1] The Application challenges the March 25, 2016 ruling of Administrative Law Judge William L. Schmidt (the "ALJ") that required Gerawan to produce a document pursuant to a subpoena served on Gerawan by the ALRB's General Counsel. Gerawan contends that the document in question is

[1] The Board's regulations appear at California Code of Regulations, title 8, section 20100 et seq.

protected by the attorney-client privilege. The Board has considered the Application, the General Counsel's opposition to the Application, and the evidence submitted by the parties, and finds that the document in question is privileged. Accordingly, the Application is granted, and the ALJ's March 25, 2016 order is reversed in part.

1. Background

The First Amended Complaint (the "Complaint") alleges that Gerawan violated the Agricultural Labor Relations Act (the "ALRA" or "Act") by, among other things, suspending and later terminating charging party Rafael Marquez Amaro ("Mr. Marquez") for engaging in protected activity.[2] The Complaint alleges that Mr. Marquez was instructed by Crew Boss Ramiro Cruz ("Mr. Cruz") not to shout or whistle to announce the start of break times. It is alleged that when Mr. Marquez continued to do so, Mr. Cruz reprimanded Mr. Marquez and stated that he would report the incident to Compliance Manager Jose Erevia ("Mr. Erevia"). It is alleged that Mr. Marquez was suspended for ten days and was later terminated when he returned to work prior to the expiration of his suspension.

On June 1, 2016, the General Counsel, upon authorization by the Board, filed an action in Fresno County Superior Court seeking injunctive relief pending resolution of the unfair labor practice allegations pursuant to Labor Code 1160.4.[3] In the course of that litigation, Gerawan filed declarations of Mr. Erevia and Ranch

[2] The ALRA appears at Labor Code section 1140 et seq.

[3] Case No. 15-CECG-01718.

Manager Boos. Mr. Erevia's declaration stated that on April 24, 2015, he received a telephone call from Mr. Cruz regarding Mr. Marquez. Mr. Erevia took notes of his call with Mr. Boos, and then conveyed the information he received from Mr. Cruz to Gerawan's in-house counsel and management for the purpose of obtaining further direction. Mr. Boos' declaration described the information forwarded by Mr. Erevia as an "incident report summary."

On July 13, 2015, the General Counsel served upon Gerawan a subpoena duces tecum in the unfair labor practice case (the "Subpoena"). The Subpoena sought, in relevant part, "the incident report summary regarding Rafael Marquez or any other non-attorney-client privileged report related to Rafael Marquez received by Gerawan Ranch Manager Nick Boos on or about April 23, 2015."[4] The declaration supporting the Subpoena asserts that there is good cause for production of these documents because Mr. Boos based the decision to suspend Mr. Marquez on the report summary and the General Counsel should be afforded the opportunity to determine whether there were inconsistencies between the report summary and the initial report made by Mr. Cruz.

Gerawan filed a petition to revoke the Subpoena with the ALJ, arguing, among other things, that the Subpoena invaded the attorney-client privilege. After

[4] The Subpoena also sought any written notes that Mr. Erevia took during his telephone conversation with Mr. Cruz. Mr. Erevia states in a declaration that he destroyed his handwritten notes consistent with his regular practice after notifying in-house counsel and management about the information conveyed to him. The ALJ concluded that the notes no longer exist and there is, therefore, nothing to produce in response to that request in the Subpoena. No party challenges this aspect of the order.

receiving briefing from the parties, the ALJ issued an order denying the petition to revoke. The ALJ found that, although the Subpoena requested an "incident report summary," in actuality the document at issue is an e-mail sent from Mr. Erevia to Gerawan upper management, including Gerawan's in-house counsel Michael Mallery (hereinafter the "Erevia E-Mail"). The ALJ rejected Gerawan's claim that this communication is privileged. According to the ALJ, the Erevia E-Mail "amounted to no more than a factual report of a situation that had arisen between Cruz and Marquez." The declarations submitted by Gerawan showed "at best, low level officials usually follow a practice of copying in-house counsel on disciplinary issues they submit to the ownership and upper-level management for a decision." Mr. Erevia's involvement in the Marquez matter was "incidental" and the disciplinary decision was made without consultation with Mr. Erevia. Furthermore, there was no showing that Mr. Erevia could independently discipline employees based upon reports from field supervisors and, therefore, the purpose of the Erevia E-Mail was not obtaining legal advice. The ALJ concluded that the Erevia E-Mail is not a communication made in the course of an attorney-client relationship and is not privileged.

2. Discussion

a. Appealability Under Board Regulation 20242

Under Board regulation 20242, subdivision (b), rulings and orders of administrative law judges are not appealable except upon special permission from the Board. In this case, both Gerawan and the General Counsel contend that it is appropriate for the Board to hear the merits of Gerawan's Application. In *Premiere*

Raspberries, LLC (2012) 38 ALRB No. 11, the Board established a standard that "limit[s] Board review of interlocutory rulings sought pursuant to Regulation 20242(b) to those that cannot be addressed effectively through exceptions filed pursuant to Regulation 20282 or 20370(j)." We find that it is appropriate to hear Gerawan's appeal because the issue raised, the allegedly privileged status of the Erevia E-Mail, cannot be addressed effectively through exceptions. (See *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 686 ["writ review is appropriate when petitioner seeks relief from an order which may undermine a privilege … once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure"].)

b. The Erevia E-Mail is a Privileged Communication

The attorney-client privilege protects from disclosure "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence. . .." (Evid. Code, § 952.) The party asserting privilege "has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) However, once these preliminary facts are established, the communication "is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential." (*Ibid*; Evid. Code § 917.) If it is established that a communication is privileged, the protection is absolute and "disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." (*Gordon v. Superior Court* (1997) 55 Cal.App.4th

1546, 1557.) California courts have recognized that a corporate entity is entitled to the full protection of the attorney-client privilege. (*D.I. Chadbourne, Inc. v. Superior Court* (1965) 60 Cal.2d 723, 736.)

In this case, Mr. Erevia stated in his declaration that he had a telephone conversation with Mr. Cruz concerning Mr. Marquez. (Decl. of Jose Erevia, Aug. 13, 2015, ¶ 5.) After the conversation, he drafted an e-mail to Gerawan ranch management and in-house counsel (Michael Mallery) in order to obtain guidance. (*Ibid*.) Mr. Erevia also stated that he did this "to obtain legal advice . . .." (*Id.* ¶ 4.) Mr. Mallery confirmed in his own declaration that he advises Gerawan management and ownership "regarding appropriate disciplinary measures to be taken," and that he received the Erevia E-Mail and provided legal advice to Gerawan management and ownership based upon it. (Decl. of Michael Mallery, Aug. 13, 2015, ¶¶ 3-5.) Mr. Boos also stated that he received the Erevia E-Mail from Mr. Mallery and that Mr. Mallery provided him with legal advice. (Decl. of Nick Boos, Aug. 13, 2015, ¶¶ 4-5.) We find Gerawan has made a sufficient showing to establish that the communication is privileged. (*Costco Wholesale Corp. v. Superior Court, supra*, 47 Cal.4th at p. 733.) The General Counsel does not cite any evidence showing the communication was not confidential or that the privilege otherwise does not apply. (*Ibid*., citing *Wellpoint Health Networks v. Superior Court* (1997) 59 Cal.App.4th 110, 124.) We reject the General Counsel's claim that Mr. Mallery was not acting in the capacity of an attorney in this transaction.

That the communication from Mr. Erevia to Mr. Mallery may have consisted principally of factual information that Mr. Erevia learned through his

conversation with Mr. Cruz does not preclude a finding that the communication is privileged. The California Supreme Court has recognized that, while the communication of a fact to an attorney does not make the fact itself privileged, the privilege fully protects the transmission of that information to the attorney. (*Costco Wholesale Corp. v. Superior Court, supra,* 47 Cal.4th 725, 733-735; see also *Upjohn Co. v. United States* (1981) 449 U.S. 383, 390 ["the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice"].)

Likewise, the fact that Mr. Erevia may not have been responsible for deciding whether or not to discipline Mr. Marquez does not negate the privilege here. In *Upjohn Co. v. United States,* the United States Supreme Court rejected a narrow "control group" test that limited the privilege to communications from officers and agents responsible for directing the corporation's response to legal advice. Rather, the Court held that information necessary for corporate counsel to advise the corporation will often be held by "[m]iddle-level – and indeed lower-level – employees" and that the corporation may transmit information to its attorney via such employees consistent with the attorney-client privilege. (*Upjohn Co. v. United States, supra,* 449 U.S. 383, 390-393; see also *Zurich American Insurance Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1497-1498; *Kandel v. Brother International Corp*. (C.D.Cal. 2009) 683 F.Supp.2d 1076, 1081-1083 [under California law, corporate employees' transmission of factual information to attorney was privileged].)

To reiterate, "the attorney-client privilege only protects disclosure of communications between the attorney and the client; it does not protect disclosure of underlying facts which may be referenced within a qualifying communication." (*State Farm Fire and Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 639.) As Gerawan concedes, the General Counsel may question or obtain testimony from Mr. Erevia, Mr. Cruz, or others with knowledge of the underlying facts. Indeed, Mr. Erevia's declaration filed in the Fresno injunctive relief proceeding describes his conversation with Mr. Cruz. Those facts are not privileged. However, Mr. Erevia's communication of that information to Gerawan management and in-house counsel is privileged, and the ALJ erred in ordering Gerawan to disclose that privileged communication. Accordingly, Gerawan's Application for Special Permission to Appeal is GRANTED. The ALJ's March 25, 2016 order is reversed insofar as it requires Gerawan to disclose Jose Erevia's April 23, 2015 e-mail communication to Michael Mallery.

DATED: November 8, 2016

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

CHAIRMAN GOULD, dissenting

I would not overturn the ALJ's finding that "the email in question amounted to no more than a factual report" about the situation that arose between employee Marquez and his immediate crew boss, Cruz, and as such, was not privileged. As I have stated on previous occasions, "the ALJ has a vital role in the administrative process,"[5] and we must rely upon his characterization of the email as "nothing more than the transmission of a corporate record in the form of an email from respondent's human resources department about a disciplinary matter."

The ALJ correctly held that under "applicable precedent,"[6] ordinary corporate records such as Erevia's email cannot be swept within the attorney client privilege merely by copying in-house counsel on their transmission. (*Patrick Cudahy* (1988) 288

[5] *P & M Vanderpoel Dairy* (2014) 40 ALRB No. 8, at p. 38 (Chairman Gould, concurring and dissenting); *George Amaral Ranches, Inc*. (2014) 40 ALRB No. 10, at pp. 32-33 (Chairman Gould, concurring).

[6] Cal. Lab. Code § 1148. ("The board shall follow applicable precedents of the National Labor Relations Act, as amended.") My own views about the meaning of this language are set in *P.M Vanderpoel Dairy*, *supra*, 40 ALRB No. 8 at p. 34 (Chairman Gould concurring and dissenting); this position adheres to reliance upon precedent established by the Supreme Court, federal appeals courts as well as the NLRB. (See *Bud Antle, dba Bud of California* (1992) 18 ALRB No. 6 at p. 16 ("NLRA precedent" includes court of appeals' precedents;) rev'd on other grounds, *Bud Antle v. Barbosa* (9th Cir. 1994) 45 F.3d 1261.) The California Supreme Court has stated that the Board and the courts must look to "established administrative and judicial interpretations as persuasive indicants of the appropriate interpretation of state legislation." (*Highland Ranch v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 848, 855-856; Accord, *Belridge Farms v. Agricultural Labor Relations Board* (1979) 29 Cal.App.3d 551, 557; cf *Vista Verde Farms v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 307, 311-312.)

NLRB 968, 971 fn 13; *Upjohn Co. v. United States (*1981) 449 U.S. 383 at pp. 395-396; *Costco v. Superior Court* (2009) 47 Cal. 4th 725, 735.) Under the majority's approach, future parties may seek to avoid disclosure of otherwise unprivileged information by copying all communications to counsel or claiming after the fact that they intended to seek legal advice. This could lead to additional delays and litigation.

I see no inconsistency with the approach followed by the ALJ and the protections set forth in Cal. Evid. Code § 952 because Gerawan has not established that Erevia's "incident report summary" was a communication made in the course of an attorney-client relationship.

Accordingly, for the foregoing reasons, I would uphold the ALJ's denial of the petition to revoke as to Erevia's email report.

DATED: November 8, 2016

WILLIAM B. GOULD IV, Chairman

Gerawan Farming, Inc., v. Rafael Marquez Amaro,
ALRB Case Nos: 2015-CE-011-VIS;2015-CE-012-VIS

State of California
AGRICULTURAL LABOR RELATIONS BOARD PROOF OF SERVICE
(8 Cal. Code Regs.§ 20164.)
PROOF OF SERVICE

I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to the within action; my business address is 1515 Clay Street, 17th Floor, Oakland, CA 94612. On November 8, 2016 caused to be served the following documents:

ORDER GRANTING RESPONDENT'S APPLICATION FOR SPECIAL PERMISSION TO APPEAL ALJ ORDER DENYING PETITION TO REVOKE

on the parties listed below, through their attorneys of record, for service as designated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: November 8, 2016

Declarant