STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, Charging Party.	)	Case Nos.: 2012-CE-041-VIS 2013-CE-007-VIS 2013-CE-010-VIS ORDER DENYING GERAWAN FARMING, INC.'S MOTION TO DISQUALIFY MEMBER ISADORE HALL; ORDER DENYING REQUEST FOR STAY Admin. Order No. 2017-03

On April 28, 2017, Respondent Gerawan Farming, Inc. (Gerawan) filed a Motion to Disqualify Board Member Isadore Hall, III (Motion) from participating in the deliberations in case nos. 2012-CE-041-VIS, et al. Gerawan also requests that the Board stay the pending exceptions procedure until the Board has ruled on the Motion. Gerawan further argues that Member Hall may not participate in the Board's deliberations and decision on the Motion.

PLEASE TAKE NOTICE that for the following reasons, Gerawan's Motion and request for a stay are DENIED.

Gerawan alleges that Member Hall (who at the time was a California State Assemblyman) participated in an October 22, 2014 labor rally in Los Angeles in support of a resolution sponsored by the United Farm Workers of America (UFW) before the Los Angeles City Council which concerned some of the same unfair labor practice charges that are involved in case nos. 2012-CE-041-VIS, et al. Gerawan's position is that because Member Hall attended the rally, a disinterested observer would conclude that Member Hall has "in some measure adjudged the law and facts of this case" in favor of the UFW, and therefore he must be disqualified from participating in the decision making process in this matter.

In support of its motion to disqualify Member Hall, Gerawan has submitted several photographs allegedly showing then-Assemblyman Hall marching with supporters of the October 22, 2014 resolution. Gerawan also submitted a statement released by Assemblyman Hall on Facebook on October 29, 2014, upon the announcement that Maria Elena Durazo, Executive Secretary of the L.A. County Federation of Labor, was leaving her position to become Vice President for immigration, civil rights and diversity at UNITE HERE International. A second Facebook posting submitted with Gerawan's motion is from October 24, 2014, and announced that then Assemblyman Hall had received an endorsement from John Burton in support of Mr. Hall's bid for State Senate. This post also lists endorsements that Assemblyman Hall had already received as of October 24, 2014, including an endorsement by the UFW, along with 43 other endorsements by individuals and organizations. Gerawan also submitted the resolution itself, entitled "Labor Relations and Implementation of a Union Contract in

Regards to Gerawan Farming." The city council approved the resolution on October 22, 2014, and Los Angeles Mayor Eric Garcetti approved it on October 28, 2014. The resolution calls on Gerawan to implement the union contract that the Board ordered in *Gerawan Farming, Inc*. (2013) 39 ALRB No. 17. The city council resolution also states that the ALRB's General Counsel had filed charges against Gerawan alleging bad faith bargaining and excluding workers from the benefits of a union contract. Finally, Gerawan submitted a letter from Senator Andy Vidak to Senate President Pro Tempore Kevin De Leon dated March 13, 2017, requesting that the Senate floor vote on the confirmation of Board Member Hall be postponed until an investigation could be conducted regarding an incident that allegedly occurred at the Sacramento Hyatt Regency Hotel on February 28, 2017, in which Member Hall allegedly threatened several members of an agricultural growers group.

On May 8, 2017, the General Counsel of the ALRB filed an opposition to the Motion, and on May 9, 2017, the UFW filed its opposition to the Motion. The General Counsel and UFW argue that the documentary evidence submitted by Gerawan does not constitute evidence of personal bias or prejudice requiring Member Hall's recusal.

On May 9, 2017, Gerawan filed a Reply in support of its Motion (Reply) reiterating its argument that Member Hall should be disqualified because he publicly aligned himself with the UFW and against Gerawan on October 22, 2014. Gerawan also alleges that Member Hall publicly threatened to "get" Gerawan during an exchange at a Sacramento hotel in late February. Attached to the Reply is an anonymous declaration,

dated May 8, 2017, describing an alleged conversation the anonymous declarant had with Member Hall at the Hyatt Regency Hotel on the evening of February 28, 2017.

Discussion and Analysis

In order to prevail on a claim of bias violating fair hearing requirements, the moving party must establish "an unacceptable probability of actual bias on the part of those who have actual decision making power over their claims." (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236.) A party seeking to show bias or prejudice on the part of an administrative decision maker is required to prove the same with concrete facts: "[b]ias and prejudice are never implied and must be established by clear averments." (*Id*. at p. 1237; *Gray v. City of Gustine* (1990) 224 Cal. App. 3d 621, 632 ["[b]ias and prejudice are not implied and must be clearly established"]; *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1142 [bias in an administrative hearing context can never be implied, and "the mere suggestion or appearance of bias is not sufficient"]; see *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 219 ["Absent a financial interest, adjudicators are presumed impartial"].)

Thus, to establish personal bias requiring Member Hall's recusal, Gerawan must produce specific evidence that Member Hall has prejudged or appraised case nos. 2012-CE-041-VIS, et al. (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal. 4th 731, 741 [presumption of impartiality by agency adjudicators "can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias"].)

A. The Evidence Submitted by Gerawan Does Not Establish a Showing of Bias Requiring Member Hall's Disqualification

We find that the evidence submitted by Gerawan does not constitute specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias on the part of Member Hall. Comparing the evidence provided by Gerawan with the accusations Gerawan asserts in its motion, it is clear that Gerawan not only greatly exaggerates the extent of then-Assemblyman Hall's involvement in the October 2014 labor rally, but also that Gerawan assigns an unreasonable level of significance to Mr. Hall's actions. There is no allegation that then-Assemblyman Hall made any statement concerning the resolution, signed the resolution, or was in attendance when the resolution was presented to the Los Angeles City Council.

Gerawan argues that Member Hall "demonstrated his support as to the factual allegations and legal positions advanced by the union in this case." For example, Gerawan makes the unfounded claim that "this factual determination preordains the legitimacy of ALJ Schmidt's blanket disallowance of Gerawan's abandonment defense." In addition, Gerawan claims that Member Hall has "publicly disclosed [a] bias as to the adjudicative facts of *this* case," and that this bias "could not be more clear, concrete or open."

The only statement by Member Hall that Gerawan provides is specific to Maria Elena Durazo, congratulating her on her new job and praising her as a "true hero for working people" based on her accomplishments and background. The statement mentions that Assemblyman Hall listened to and was inspired by Ms. Durazo when she

spoke at the "Prima Farm Workers' march to L.A. City Hall," but the primary message of the statement is clearly one of praise and congratulations for her career and her new position. In this statement, Member Hall did not "thank those who spoke" at the march, as Gerawan contends at page 11 of its Motion, nor did he make any statement concerning the resolution or any matter that is now before the Board.[1]

Furthermore, the city council resolution itself did not contain any statements concerning the merits of the issues that are currently before the Board in this case. The resolution stated the fact that the General Counsel had issued complaints containing various allegations against Gerawan, including "illegally excluding some of its farm workers from the benefits of a [union contract]" and "failing to bargain in good faith with its employees' union . . ." (bracketed material in original.) However, the resolution contained no statement as to the merits of these allegations but, rather, exhorted Gerawan generally to "meet[] basic standards of conduct" and "refrain[] from violating state and federal laws . . ." (bracketed material added.) Thus, in addition to the fact that there is no evidence of any statement by then-Assemblyman Hall concerning the resolution, the resolution itself does not contain any statement concerning the matters now before the Board apart from the bare fact that complaints had been issued.

Moreover, it must be noted that Gerawan's allegations focus on Member Hall's attendance at the October 2014 labor rally in Los Angeles while he was a sitting

[1] As noted, above, then-Assemblyman Hall's only statement concerning the events focused on his association with Maria Elena Durazo, and not on the resolution or its content.

state legislator also campaigning for state senate. Member Hall's past political activities, affiliations, and professional relationships, and the inferences Gerawan draws from them, do not constitute evidence of actual bias or an unacceptable probability of actual bias that would mandate Member Hall's recusal in this case. (*Morongo Band of Mission Indians, supra*, 45 Cal.4th at p. 741; *People v. Vasquez* (2006) 39 Cal.4th 47, 63-64 [personal connections and relationships generally do not require recusal]; *People v. Carter* (2005) 36 Cal.4th 1215, 1243; see also *Bud Antle, Inc.* (1976) 2 ALRB No. 35, p. 4.)[2] Thus, Gerawan does not meet its burden of showing actual bias or a probability of bias with evidence that merely shows that Member Hall had past, supportive associations with labor groups when he was a state legislator. (*Sataki v. Broadcasting Board of Governors* (D.D.C. 2010) 733 F.Supp.2d 54, 64 [allegations of bias based on judge's "alleged political affiliations … are legally insufficient to warrant or justify disqualification].) "Administrative decision makers are drawn from the community at large… they are likely to have knowledge of and contact or dealings with parties to the proceeding.

[2] See also *Pennsylvania v. International Union of Operating Engineers* (E.D.Pa. 1974) 388 F. Supp. 155, 159 [judge's "background and associations" not sufficient to show personal bias requiring recusal]; *Sofford v. Schindler Elevator Corp.* (D.Colo 1997) 954 F.Supp. 1457, 1458 [judge is "obligated not to recuse [himself or herself] where the facts do not give fair support to a charge of prejudgment," and finding that "[p]rior professional relationships and the impressions arising out of them" do not constitute evidence of personal bias or prejudice requiring recusal]; *United States v. Nackman* (9th Cir. 1998) 145 F.3d 1069, 1076; *U.S. v. Black* (E.D.N.C. 2007) 490 F.Supp.2d 630, 661 ["a judge's prior membership in or affiliation with a politically related organization does not, by itself, provide a reasonable basis for questioning a judge's impartiality in cases in which that organization is a party"], citing *Sierra Club v. Simkins Indus., Inc*. (4th Cir. 1988) 847 F.2d 1109, 1117.)

Holding them to the same standard as judges, without a showing of actual bias or the probability of actual bias, may discourage persons willing to serve and may deprive the administrative process of capable decision makers." (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 233.) Similarly, "an agency member appointee is expected to join the agency not with a tabula rasa mind but with knowledge and understanding of the issues and parties facing the agency. Except where involvement with the industry involves pecuniary interest of the member, the courts have generally accepted and condoned such involvement with the industry." (*Bud Antle, Inc.*, *supra,* 2 ALRB No. 35, p. 4.)

Again, Gerawan produces no evidence that Member Hall ever made any statements concerning either the pending case or any facts relevant to the pending case. Nor is there any evidence that Member Hall made any statements concerning the resolution that was presented to the Los Angeles City Council. The most that the evidence shows is that then-Assemblyman Hall was present for some portion of the events that preceded the presentation of the resolution to the City Council (although not for the presentation itself).

In sum, the evidence presented by Gerawan does not establish bias on the part of Member Hall. His limited participation as a state legislator in the events of October 22, 2014, in no way prevents him from reaching an unbiased conclusion in this case after full consideration of the record before the Board, and the legal issues and standards involved in the case. We find a reasonable person with knowledge of the relevant facts would understand the difference between the roles that Member Hall

played as a legislator and the position he now holds at the ALRB. (See *SEIU, Nurses Alliance, Local 121RN* (2010) 355 NLRB 234, 246.)

B. Gerawan's Authorities Are Distinguishable and Do Not Support Its Allegations of Bias

Gerawan cites a number of cases which it claims support its position that proof of Member Hall's actual bias need not be shown because the appearance of bias is sufficient to create an objective probability of actual bias in this case. However, these cases involve alleged bias due to financial interest in the outcome of the dispute. These cases clearly state that the level of scrutiny given to adjudicators challenged for pecuniary interest is much higher than that afforded decision makers whose impartiality is challenged for other reasons. For example, in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, The court opined that:

> Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny. . . . Thus, while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality [citations omitted] adjudicators challenged for financial interest have not. Indeed, the law is emphatically to the contrary.

Haas v. County of San Bernardino, *supra*27 Cal. 4th at p. 1025.

Similarly, in *Andrews v. Agricultural Labor Relations Bd*. (1981) 28 Cal.3d 781, the court recognized that actual bias need not be shown when the alleged bias is due to a financial interest in the outcome of the dispute. Notably, the court also reasoned that where allegations of bias did not arise from financial circumstances (or where the decision maker had a familial relation to a party or attorney, or had been counsel to a

party), "a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal. 3d at p.792.)[3]

Gerawan also cites *Gai v. City of Selma, supra,* 68 Cal.App.4th 213, for the proposition that "an administrative officer cannot participate in an adjudicative proceeding where the appearance of bias is sufficient to create an objective probability of actual bias." However, Gerawan ignores the rest of the discussion in that case. *Gai v. City of Selma* involved allegations of bias due to financial interest, and the court found the claims of financial interest to be too speculative to require recusal. The court found that not only did the plaintiff fail to establish actual bias, he also failed to establish a direct, personal, substantial, or pecuniary stake in the outcome of the litigation which could have established a probability or likelihood of actual bias.

The law is clear that "[u]nless they have a financial interest in the outcome, adjudicators are presumed to be impartial. (*Morongo Band of Mission Indians v. State Water Resources Control Bd., supra,* 45 Cal.4th at p. 737, citing *Haas v. County of San Bernardino, supra,* 27 Cal.4th at p. 1025; *Withrow v. Larkin* (1976) 421 U.S. 35, 47.) Thus, absent "specific evidence demonstrating actual bias or a particular combination of

[3] See also *UFW v. Superior Court* (1985) 170 Cal.App.3d 97, 100 ["Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge *appears* to be biased"], emphasis in original; *In re United States* (1st Cir. 1981) 666 F.2d 690, 694-695 ["a judge once having drawn a case should not recuse himself on a unsupported, irrational, or highly tenuous speculation … a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information"].

circumstances creating an unacceptable risk of bias," it is presumed "state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions." (*Morongo Band of Mission Indians v. State Water Resources Control Bd., supra,* 45 Cal.4th at pp. 741-742.)

Here, there is no allegation that Member Hall has a personal or financial interest in the outcome of the surface bargaining case in front of the Board. Therefore, Gerawan is incorrect to the extent that its position is that that proof of Member Hall's actual bias need not be shown to support his disqualification.

To the extent Gerawan relies on cases that evaluate alleged bias of a judicial officer as opposed to an administrative adjudicator, we note that the "standard of impartiality required at an administrative hearing is less exacting than that required in a judicial proceeding." (*Gai v. City of Selma*, *supra*, 68 Cal.App.4th at p. 219; see also *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.) The California Supreme Court has reiterated this principle in *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.*, *supra*, 57 Cal.4th at p. 214.)

Further, cases that discuss standards for disqualifying a judicial officer even make it clear that "the expression of opinion on a legal issue . . . does not create the appearance of impropriety." (*Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 346.) The United States Supreme Court has held a decisionmaker is not subject to disqualification "simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular

controversy fairly on the basis of its own circumstances.'" (*Hortonville Joint School District No. 1 v. Hortonville Ed Assn.* (1976) 426 U.S. 482, 493.) In other words, "[t]he fact that a judge actively advocated a legal, constitutional or political policy or opinion before being a judge is not a bar to adjudicating a case that implicates that opinion or policy." (*Wessmann v. Boston School Committee* (D.Mass.1997) 979 F.Supp. 915, 916-917.) As the court explained in *U.S. v. Alabama* (11th Cir. 1987) 828 F.2d 1532, "[i]t appears to be an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs. . . . The fact that prior to joining the bench a judge has stated strong beliefs does not indicate that he has prejudged the legal question before him … judges have frequently heard cases concerning subjects about which they have previously expressed some views." (*U.S. v. Alabama, supra,* 828 F.2d at pp.1543-1544.)[4]

Here, Gerawan has produced no evidence of any statements by Member Hall concerning this case or the Los Angeles City Council resolution. In fact, the cases Gerawan cites actually make it clear that Member Hall's actions in October 2014 (while a state legislator campaigning for state senate) are not the "type of 'public statements touching on the facts of a proceeding' that courts have found to be indicative of

[4] See also *McBeth v. Nissan Motor Corp. U.S.A.* (D.S.C. 1996) 921 F.Supp. 1473, 1481-1483 and the cases cited therein. (A judge's remarks made outside of court do not provide a basis for recusal unless the movant shows actual bias against the particular party involved.)

prejudgment that demands disqualification." Notably, Gerawan's cases involve speeches by sitting agency members concerning matters before their agencies.

In *Antoniu v. SEC* (8th Cir. 1989) 877 F.2d 721, a Securities and Exchange Commissioner (SEC) gave a speech that outlined two cases, including Antoniu's, pending before the SEC in which the SEC had imposed sanctions. The commissioner said publicly that each of the sanctioned entities was an "indifferent violator." The court concluded that "[a]fter reviewing the statements made by Commissioner Cox, we can come to no conclusion other than that Cox had 'in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" (*Id.* at p. 726.)

Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission (D.C. Cir. 1970) 425 F. 2d 583 also involved a speech given by a sitting commissioner while the matter in question was pending before the Federal Trade Commission (FTC). The issue was whether the finishing school made representations and advertising in a manner which were false, misleading, and deceptive in violation of § 5 of the Federal Trade Commission Act. The court found the chairman of the FTC should have been disqualified because, while the case was pending, he gave a speech to a newspaper association criticizing newspapers for accepting advertisements from such types of businesses. The D.C. Circuit stated "individual Commissioners [do not have] license to prejudge cases or to make speeches which give the appearance that the case has been prejudged. Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him

to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." (*Id.* at p. 590.)

Gerawan cites *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB* (3d Cir. 1941) 121 F.2d 235 for the proposition that statements need not be made during the actual pendency of a dispute before the agency for the statements to give the appearance of prejudgment. In that case, before a complaint was filed against the employer (Berkshire) and the matter came before the NLRB, but during the time of a strike at Berkshire's mills, one of the sitting Board members wrote a letter to an acquaintance which the court found could be interpreted as the Board member encouraging a boycott on Berkshire's goods. The court found that the letter went "far beyond a general predilection either for or against labor organizations in general or one organization in particular. It is comparable to the situation of a lawyer who has represented a client in an endeavor to get a settlement of a claim and, before the claim is settled, is appointed to the bench and sits in the very case as judge" (*Id.* at p. 239.)

Pacific and Southwest Annual Conference of the United Methodist Church v. Superior Court of San Diego County (1978) 82 Cal.App.3d 72, cited by Gerawan, also is inapposite. That case involved a superior court judge whom the appellate court found had "gratuitously offer[ed] an opinion" in a pending matter on an issue not yet before him. (*Id*. at p. 84.) The appellate court also criticized the judge's conduct in sending a letter to the parties concerning an issue before him which demonstrated his prejudgment of the issue and lack of objectivity. (*Id*. at p. 85.) By this conduct, the court found the judge had "injected himself as an advocate" in the case. (*Ibid*.)

The limited evidence provided by Gerawan in no way resembles the types of disqualifying conduct found to exist in the preceding cases. Although the resolution listed allegations in the present case such as "failing to bargain in good faith with its employees' union;" and "illegally excluding some of its farm workers from the benefits of a [union contract]," it is clear that as of 2014, these were still just allegations in a complaint – a point stated in the resolution itself. Moreover, there is no evidence of any statements by Member Hall concerning the resolution, including any statements supporting or in favor of it. Nor does the evidence show Member Hall had any role in preparing it, introducing or presenting it to the Los Angeles City Council, voting on it, or even that he was present when it was presented and voted on. There simply is no evidence of any statements or conduct by Member Hall establishing he has prejudged the facts of this case. Even assuming Member Hall was familiar with the resolution itself, knowledge of the representations made in that resolution does not require disqualification. While the resolution refers to several allegations contained in a complaint issued by the General Counsel against Gerawan, courts have recognized that "mere exposure to evidence presented in nonadversary investigative procedures [is] insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." (*BreakZone Billiards v. City of Torrance*, *supra*, 81 Cal.App.4th at p. 1236.) The court in *BreakZone Billiards* further observed that "knowledge of adjudicative facts that are in dispute … does not disqualify the members of an adjudicatory body from adjudicating a dispute." (*Ibid*.) Rather, "there must be more, a commitment to a result

(albeit, perhaps, even a tentative commitment), before the process will be found violative of due process." (*Ibid*.)

Accordingly, we find the legal authorities relied upon by Gerawan to be inapposite and do not support Member Hall's disqualification in this case.

C. The Anonymous Declaration

As mentioned above, Gerawan submitted an anonymous declaration dated May 8, 2017, with its reply to the General Counsel's and UFW's oppositions to its Motion. The Board has not considered the anonymous declaration for the following reasons. Evidence Code section 1041, upon which Gerawan relies in withholding the declarant's identity, applies to the privilege of a public entity to refuse to disclose the identity of a confidential informant. (Evid. Code, § 1041, subd. (a) ["a public entity has a privilege to refuse to disclose the identity of a person who has furnished information …"].) That statute has no application here.[5] Gerawan also provides no explanation why the declaration was not provided with its initial Motion on April 27. (See *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc*. (9th Cir. 2015) 778 F.3d 1059, 1083, fn. 13 ["Because Plaintiffs did not cite any of this evidence in their first brief, we will not consider it"]; *Johnson v. Hernandez* (E.D.Cal. 2014) 69 F.Supp.3d 1030, 1032, fn. 4 [refusing to consider evidence submitted with a reply brief]; *Renna v. County of Fresno* (2000) 78 Cal.App.4th 1, 7, fn. 1 [refusing to consider issues raised for first time in a reply brief].)

[5] The purported need to maintain the anonymity of the declarant also appears questionable. Gerawan argues the declarant wishes to protect his identity, yet Gerawan also represents that the declarant will come forward if asked to do so.

The declaration is inadmissible hearsay. The allegations it contains are not supported by other corroborating evidence or any other indicia or reliability. "Uncertainty as to the identity of the declarant barely rises above the level of guesswork, and implicates the concerns which justify the general prohibition on hearsay evidence; namely, its lack of trustworthiness." (*United States v. Christopher* (11th Cir. 1991) 923 F.2d 1545, 1551; *Frierson v. Atlanta Indep. Sch. Sys*. (N.D.Ga. 2014) 22 F.Supp.3d 1264, 1291 [refusing to consider anonymous letter and anonymous complaint]; see also *Albert C. Hansen dba Sansen Farms* (1978) 4 ALRB No. 41, ALJ Dec. at p. 29 [ALJ dismissed allegation where the sole evidence in support of the allegation was an anonymous declaration].)

D. Gerawan's Reliance on Government Code Section 11512

Gerawan contends Government Code section 11512, subdivision (c), prohibits Board Member Hall from participating in the Board's deliberations or decision as to its motion.[6] Government Code section 11512 does not apply to the Board, as a

[6] Gerawan also asserts the Board is prohibited from issuing any decision on the merits of the underlying unfair labor practice charges because it has only two unbiased members, and thus lacks a three-member quorum as required by Labor Code section 1146. (*New Process Steel v. NLRB* (2010) 560 U.S. 674, 676.) Gerawan additionally argues the "rule of necessity" does not allow Board Member Hall to participate in this matter. Gerawan's argument presupposes the conclusion that Board Member Hall is biased and subject to disqualification, conclusions the Board rejects in this order. Gerawan's contentions regarding the rule of necessity are predicated on Government Code section 11512, which does not apply to the Board as explained above. This Board previously has found a Board member "is permitted to sit in judgment if his disqualification would prevent the existence of a quorum qualified to act." (*Bud Antle, Inc.*, *supra*, 2 ALRB No. 35, p. 4; see also, e.g., Gov. Code, § 87101 ["Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made"].) This rule has particular significance where the facts supporting allegations of bias against a Board member were made to the Senate during the member's confirmation process, as was the

matter of law. The ALRA adopts the provisions of the Administrative Procedure Act at "Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code" for purposes of "a hearing to determine an unfair labor practice charge." (Lab. Code, § 1144.5, subd. (a).) Section 11512 is in Chapter 5. (Gov. Code, § 11501, subd. (a) ["This chapter applies to any agency as determined by the statutes relating to that agency"].) The Law Revision Commission Comments following Labor Code section 1144.5 confirm "the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the [ALRB] under this part." (Cal. Law Revision Com. com., West's Ann. Lab. Code (1995) foll. Lab. Code, § 1144.5, citing Gov. Code, § 11501.)

Gerawan's contention that Board Member Hall may not participate in deliberations or issuance of a ruling on Gerawan's motion also lacks support in our precedent and that of the National Labor Relations Board, as well as the California Public Employment Relations Board, where Board Members and administrative law judges hear and rule on disqualification motions filed against them. (See *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1, p. 3, fn. 2; *Triple E Produce Corp*. (1997) 23 ALRB No. 8, p. 13; *Bruce Church, Inc., supra,* 2 ALRB No. 38, p. 2, fn. 1; *California Coastal Farms, Inc. v. Doctoroff* (1981) 117 Cal.App.3d 156; *SEIU, Nurses Alliance, Local 121RN, supra,* 355

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case here. (*Bud Antle, Inc., supra,* 2 ALRB No. 35, pp. 4-6; *Bruce Church, Inc*. (1976) 2 ALRB No. 38, p. 2, fn. 1.) Thus, even assuming a sufficient showing of bias had been made – which it has not – Gerawan's motion must be denied for this additional reason.

NLRB 234, 238; *Manor West, Inc.* (1993) 311 NLRB 655, 655, fn. 1; *Emeryville Trucking, Inc.* (1986) 278 NLRB 1112, 1112, fn. 1; *Cedars-Sinai Medical Center* (1976) 224 NLRB 626; *West India Fruit and Steamship Co., Inc.* (1961) 130 NLRB 343, 345, fn. 6; *Columbia Pictures Corp*. (1949) 85 NLRB 1085, 1086, fn. 6; *County of Tulare* (2016) PERB Dec. No. 2461a-M; see also, e.g., *United States v. Haldeman* (1976) 559 F.2d 31, 131 ["It is well settled that the involved judge has the prerogative, if indeed not the duty, of passing on the legal sufficiency of a" disqualification motion].)

Conclusion

For the foregoing reasons, Gerawan's motion to disqualify Board Member Hall from participating in deliberations in the above-captioned case is DENIED. Gerawan's request for an immediate stay of the proceedings is also DENIED.

PLEASE TAKE NOTICE, that this administrative order is not a "final order of the board" on the merits of the underlying unfair labor practice charges at issue in this case under Labor Code section 1160.8. Any party aggrieved by any such final Board order may seek judicial review of this administrative order at such time. (*California Coastal Farms, Inc. v. Doctoroff, supra*, 117 Cal.App.3d at p. 162; see *ALRB v. Superior Court* (1994) 29 Cal.App.4th 688, 696; *Amerco v. NLRB* (9th Cir. 2006) 458 F.3d 883, 887; *Bokat v. Tidewater Equipment Co*. (5th Cir. 1966) 363 F.2d 667, 672-673; *Vapor Blast Manufacturing Co. v. Madden* (7th Cir. 1960) 280 F.2d 205, 209; *Lineback v. Printpack* (S.D. Ind. 1997) 979 F.Supp. 831, 858; *Television Wisconsin, Inc. v. NLRB* (W.D. Wisc. 1976) 410 F.Supp. 999, 1000; *Chicago Automobile Trade Association v.*

Madden (7th Cir. 1964) 328 F.2d 766, 768-769; *Biazevich v. Becker* (S.D. Cal. 1958) 161 F.Supp. 261, 265.)

Dated: May 18, 2017

GENEVIEVE A. SHIROMA Chairwoman

CATHRYN RIVERA-HERNANDEZ, Member

ISADORE HALL, III, Member