

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,	)	Case Nos.: 2012-CE-041-VIS
	)	2013-CE-007-VIS
Respondent,	)	2013-CE-010-VIS
)	
and,	)	ORDER DENYING GERAWAN
	)	FARMING, INC.'S MOTION FOR
	)	RECONSIDERATION OF DENIAL
	)	OF MOTION TO DISQUALIFY
	)	MEMBER ISADORE HALL;
	)	ORDER DENYING REQUEST
	)	FOR STAY
)	
UNITED FARM WORKERS OF	)	Administrative Order No. 2017-06
AMERICA,)	
	)	(June 9, 2017)
Charging Party.)	
)	

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. That Motion was predicated on Gerawan's allegation that Member Hall is personally biased against Gerawan because he attended a labor rally in October 2014 (while a California State Assemblyman also campaigning for the California State Senate) after which a resolution sponsored by the United Farm Workers of America (UFW) was presented to the Los Angeles City Council. Gerawan also requested the Board stay the pending exceptions procedure until it ruled on the Motion.

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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. Also on May 9, 2017, Gerawan filed a Reply to the General Counsel's and UFW's oppositions. Attached directly to the Reply was 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. The anonymous declarant alleged that Member Hall threatened to "get" Gerawan because Gerawan had made a video about him.

On May 18, 2017, the Board issued Administrative Order 2017-03 denying Gerawan's motion and its request for a stay. The Board concluded that Gerawan failed to establish any bias by Member Hall against it, noting, among other things, that the evidence did not show that then-Assemblyman Hall made any statements concerning the Los Angeles City Council resolution sponsored by the UFW, that he signed the resolution, or that he even was in attendance when the resolution was presented to the City Council. The Board did not consider the anonymous declaration submitted with Gerawan's Reply because it was not presented to the Board in a timely manner and constituted inadmissible hearsay.

On May 23, 2017, Gerawan filed a Motion for Reconsideration of the Board's Order Denying Motion to Disqualify Member Hall, repeating its request for a stay of the proceedings pending resolution of the motion. Gerawan argues that the Board committed clear error by excluding the anonymous declaration, and now informs the Board that the declarant has agreed to reveal his identity. Gerawan thus alleges reconsideration is

required based on this new evidence and change in circumstances. Gerawan argues further that the disclosure of the declarant's identity removes any basis to disregard the declaration, that the declaration is not inadmissible hearsay, and that the Board erred by disregarding the declaration because it was offered with the Reply and not with the original motion.

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

DISCUSSION AND ANALYSIS

Gerawan argues that the identity of the previously anonymous declarant constitutes "new" and "previously unavailable" evidence warranting reconsideration.

The standard for hearing a motion for reconsideration of a Board order or decision is that "the moving party must show *extraordinary circumstances*, i.e., an intervening change in the law or evidence previously unavailable or newly discovered." (*South Lakes Dairy Farms* (2013) 39 ALRB No. 2, p. 2, emphasis in original.) Evidence is considered "newly discovered" when it was in existence at the time of earlier proceedings but the moving party was "excusably ignorant" of it. (*Labor Ready, Inc.* (2000) 330 NLRB 1024, quoting *Seder Foods Corp.* (1987) 286 NLRB 215, 216; see *New York Times Co. v. Super. Ct.* (2005) 135 Cal.App.4th 206, 213 ["the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial"]; *People v. Safety National Casualty Corp.* (2010) 186 Cal.App.4th 959, 974 ["Facts of which a party seeking reconsideration was aware at the time of the original

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ruling are not ‘new or different facts,’ as would support a trial court’s grant of reconsideration”].)

The previously anonymous declarant’s identity does not constitute “evidence previously unavailable or newly discovered.” Gerawan knew this information before it filed its Reply, but it did not disclose it. Thus, while the declarant’s identity may be new to the Board and other parties, it is *not* new to Gerawan. (*New York Times Co.*, *supra*, 135 Cal.App.4th at p. 213.) Accordingly, Gerawan fails to provide any newly discovered facts sufficient to warrant the Board reconsidering its administrative order denying Gerawan’s motion to disqualify Member Hall. (*Id.* at pp. 212-213 [reconsideration not warranted where party previously was aware of the allegedly “new” facts or the information was available to and “easily obtainable” by the moving party]; *Safety National Casualty Corp.*, *supra*, 186 Cal.App.4th at p. 974 [facts within the moving party’s knowledge, discoverable with due diligence, or of which the party was aware at the time of the original ruling are not “new”].) Nor is the declarant’s identity evidence “previously unavailable.” (*Labor Ready, Inc.*, *supra*, 330 NLRB 1024.) Again, while the declarant’s identity was not available previously to the Board and other parties, it was available to, and known by, Gerawan. Thus, just as the declarant’s identity is not a “new” fact, it also was not a fact “previously unavailable” to Gerawan.¹

¹ Gerawan contends in its motion that the declarant’s identity “constitutes ‘an intervening change in the law or evidence,’ which the Board has previously stated would constitute grounds for reconsideration.” (Motion, p. 2:17-19, citing *South Lakes Dairy Farm*, *supra*, 39 ALRB No. 2, p. 2.) Gerawan mis-cites the applicable standard, which requires the moving party show “an intervening change in the law or evidence previously unavailable or newly discovered.”

In its motion for reconsideration, Gerawan contends it was unable to disclose the declarant's identity previously due to a confidentiality agreement it entered into with counsel for the declarant's employer, and it purports describe the circumstances by which it obtained the declarant's declaration.² This explanation does not satisfy the standard for reconsideration. (*New York Times Co.*, *supra*, 135 Cal.App.4th at pp. 213-214; see *Aybar v. Crispin-Reyes* (1st Cir. 1997) 118 F.3d 10, 16.) Nor does Gerawan support its explanation with proper evidence.

Gerawan argues in its motion that it "did not seek out this witness," and that he "came forward after Gerawan filed its motion" and "offered his testimony based on Gerawan's promise not to reveal his identity." (Motion, p. 2:1-3) However, these "unsworn averments in a memorandum of law prepared by counsel do not constitute evidence." (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 454.) Gerawan's reconsideration motion is supported only by a declaration by its attorney, David A. Schwarz, dated May 23, 2017. Mr. Schwarz's declaration states that on May 5 "Gerawan was contacted by The Specialty Crop Company ('Specialty'), to inform Gerawan that one of its employees, Shaun Ramirez, had information" pertaining to Member Hall. (Schwarz Decl., ¶ 2.) The declaration further states that Gerawan and Specialty agreed to a "Memorandum of Understanding" concerning Gerawan's use of a declaration provided by Mr. Ramirez, including that Gerawan would conceal the

² Gerawan did not include any of this alleged background on how it came to obtain the declaration in its earlier Reply filing before the Board issued its administrative order, nor does Gerawan offer any explanation concerning its failure to do so.

identities of Mr. Ramirez and Specialty when it filed the declaration with the Board. (*Id.* at ¶ 3.) A copy of the confidentiality agreement is attached to the declaration. (*Id.* at ¶ 3, Exh. B.) Mr. Schwarz’s declaration states that “Specialty explained to Gerawan that it was concerned about the possibility of retaliation against it or its employees.” (*Id.* at ¶ 3.)

None of the foregoing statements in the declaration is supported by testimony based upon personal knowledge. Mr. Schwarz states in his declaration that “Gerawan” was contacted by “the Specialty Crop Company” and informed of Mr. Ramirez’ allegations.³ (Schwarz Decl. ¶ 2.) Mr. Schwarz does not identify the individuals who had this communication or the basis of his personal knowledge of the communication. (Evid. Code, § 702, subd. (a); Evid. Code, § 1200.) The entire declaration continues in this vein, with Mr. Schwarz attesting to statements or actions by “Gerawan” and “Specialty” as corporate or business entities devoid of specifics or evidence of personal knowledge. Given the stringent standard that Gerawan must meet in order to justify reconsideration, presentation of evidence in this manner cannot be accepted. As the Board expressly stated in *South Lakes Dairy Farms, supra*, 39 ALRB No. 2, p. 10, in rejecting a reconsideration request unsupported by competent evidence: “In the future, motions filed before the Board in which facts not in the record are alleged should be accompanied by a declaration filed under penalty of perjury by a person with personal knowledge of those facts.” (See *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761 [“Declarations must show the declarant’s personal knowledge and competency to

³ Mr. Schwarz’s declaration states that the term “Gerawan” as used in the declaration refers to “Gerawan Farming, Inc.” (Schwarz Decl., ¶ 1.)

testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion”]; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26 [“declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded”].)

In sum, Gerawan has failed to show extraordinary circumstances warranting reconsideration.

CONCLUSION

For the foregoing reasons, Gerawan’s motion for reconsideration of the Board’s order denying 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.

Dated: June 9, 2017

GENEVIEVE A. SHIROMA Chairwoman

CATHRYN RIVERA-HERNANDEZ, Member

MEMBER HALL, concurring:

I take this opportunity to write separately to assure the Moving Party in this case, as well as all other parties to cases that may come before this Board, that I can and will, in the words of the oath I took upon assuming this position, “faithfully discharge the duties” of a Board Member of the Agricultural Labor Relations Board. Prior to my appointment as a Board Member, I held elected office for seventeen years. I served as a State Senator from the 35th District from 2014 to 2016. I served as an Assemblyman from the 64th District from 2008 to 2014. I served as a member of the Compton City Council from 2003 to 2008, and as a member of the Compton Unified School District Board of Trustees from 2001 to 2003. I have two Master’s degrees in Public Administration and in Management and Leadership, as well as dual Doctorate degrees in Theology and Religious Studies. In all my years of public service I have made, and will continue to make, unbiased and fair decisions.

After being appointed to the Board, I became aware that there were unwarranted attacks, including videos, being made against me on social media, but I did not — and do not — attribute any of these videos to Gerawan Farming, and to my knowledge Gerawan Farming is not responsible for those videos. Also, while the declarant here alleges I inquired of him “who was Gerawan” on the eve of my confirmation hearing before the Senate Rules Committee on March 1, 2017, I was familiar with Gerawan Farming at that time. I was appointed to the Board on January 13, 2017. On January 27, I received a letter from Senate President Pro Tempore, Kevin de León, concerning my confirmation process and requesting responses to various questions, including several pertaining

specifically to Gerawan Farming. I responded to those questions by letter dated February 10, 2017.

As a large agricultural producer, I understand Gerawan Farming has contributed greatly to the economic fabric of the State of California. To be clear, I harbor no bias or hostility toward Gerawan Farming. In my deliberations on case nos. 2012-CE-041-VIS, et al., and in all other cases that come before this Board, I will consider only the record before the Board and applicable legal precedent.

For the reasons explained above, I reject the claims of bias leveled against me by Gerawan, and decline to recuse myself from participation in the deliberations in this case.

Dated: June 9, 2017

ISADORE HALL III, Member, CONCURRING