AGRICULTURAL LABOR RELATIONS BOARD

INITIAL STATEMENT OF REASONS IN SUPPORT OF PROPOSED REGULATORY ACTION TO AMEND TITLE 8, SECTIONS 20335(c)

Amend Section 20335 (c) Transfer, Consolidation, and Severance

Problem Statement

SB 126 includes new subdivision (i) of Labor Code section 1156.3, the existing provision governing elections generally. Subdivision (i) sets forth various timeframes for the resolution of challenged ballots and election objections. The timeframe for the initial evaluation of whether challenged ballots or election objections warrant an evidentiary hearing is 21 days from the filing of election objections or the submittal of evidence in support of challenged ballots. In May of 2012, the Agricultural Labor Relations Board (hereinafter Board) promulgated amendments to existing regulations, sections 20363 and 20365. The purpose of these amendments was to comply with the directions of the legislature in SB 126 to perform its work within certain timeframes. As an appropriate regulatory response, the Board chose to directly place on itself the initial processing and review of submitted election objections and challenges to be then followed by the Board determination, within 21 days, as to which, if any of the objections or challenges should be set for hearing.

Implementation of amended sections 20363 and 20365 has proceeded successfully. However, it has revealed an area of great concern that was not addressed by the legislature in crafting its amendments to 1156.3 or contemplated in the amendments to sections 20363 and 20365 which are focused on elections and their processes. Significant implications for the proper and prompt resolution of objections and challenges in the timely manner desired by both the legislature and the Board remain to be addressed. In fact, a review of the legislative history (bill analysis) regarding the amendments at sections 1156.3(i)(1) through (i)(3) reveals that they were deemed necessary by the legislature for the following reason, "In addition, this bill proposes a number of additional changes and modifications to the election and unfair labor practice procedures under the Agricultural Labor Relations Act (hereinafter Labor Code or Act), including timeframes for the ALRB to act *promptly* on certain matters" (emphasis added) (Steinberg, Bill Analysis, SB 126, as amended Sept. 2011, (2011-2012 Reg. Sess.) Sept. 6, 2011 at p.6.) As these are the only timeframes placed in a section of the Act having to deal with election objections, it is reasonable to assume that the legislature does not believe that the Board has been acting "promptly" in processing objection and challenges and that the legislature believes that through Board adherence to these timeframes the result will be prompt resolution of objections and challenges.

The overall problem in ensuring that all scenarios involving the resolution of objections and challenges are resolved promptly is that objections and challenges can also be, and often are, unfair labor practices. An action that is an objection to an election may also be an unfair labor practice. (As an example see *Gerawan Farming, Inc.*, (2013) 39 ALRB No. 20) An action that constitutes a challenge to a ballot may also be an unfair labor practice. (As an example, see *Mann Packing Company, Inc.*, (1989) 15 ALRB No. 11 where the voters whose ballots were challenged were also identified in an unfair labor practice charge as having their employment eliminated thus actually creating the challenged ballots issue.)

By policy and practice, the Board has believed it necessary to have its objections and challenged ballot hearings held together with any unfair labor practice charges (hereinafter ulps) that involve the same or similar allegations. This has been, generally, in keeping with the approach of the National Labor Relations Board (hereinafter NLRB) after which the Act is modeled as similar concerns arise, under both laws, when there is a failure to consolidate the various theories of liability. These concerns range from the practical desire to minimize costs to the litigants and to the agency by not having or needing to have more than one hearing especially where the issues, evidence and witnesses will most likely all be the same and, even more importantly, it is to avoid conflicting resolutions that could result from having separate litigation. These types of conflicts are no strangers to the law and legal rules have been created to deal with them which come under the general heading of estoppel. In that regard and noteworthy, the Board will not allow a party to relitigate in a ulp complaint hearing "the legal effect of matters which the party has already litigated and the Board has already decided in a prior representation proceeding." *Chauffers, Teamsters and Helpers of America, Local 186 (Julius Goldman's Egg City)* (1979) 5 ALRB No. 8 ALJD at p.5 and see generally *Albert C. Hansen dba Hansen Farms* (1978) 4 ALRB No. 41

The potential of conflicting resolutions on the facts, witness credibility, evidence or legal conclusions have been one of the causes for the Board to have, historically, developed the practice of not setting a hearing on such objections and placing those objections, that have mirror ulps, in abeyance and deferring the commencement of a hearing on all the other objections, in the election, until these ulps are either dismissed or have gone to complaint. In *Oceanview Produce Company* (1998) 24 ALRB No. 6 at p. 3, the Board notes that it is "standard practice" for the Board to defer to the General Counsel's ulp investigation and hold "the objections in abeyance pending resolution of the charges." However, with timeframes now in place using these methods of abeyance and deferral of hearing as a means to avoid these potential practical and legal concerns run afoul of the need to act on setting

objections and challenges in the 21 day timeframe within which the Board must now operate.

The Board concludes that, in any event and despite the issues that could be generated from unresolved mirror ulps, the Board is now constrained from placing any objections "on hold" until such time as mirror ulps are resolved either by dismissal or through complaint issuance. All of the objections and/or challenges, that merit a hearing, must now be set for hearing by no later than the end of the 21 day period barring a continuance for good cause or a stipulation of the parties. This includes objections that have mirror ulps and it will occur regardless of whether any mirror ulps have not been consolidated through a General Counsel consolidation motion.

Problems of duplicate hearings or conflicting decisions can obviously be avoided when the Board can entirely control the calendaring and consolidation of cases. This would normally be, and is, the case when only objections and challenges are involved. However, as noted above, a problem arises when unfair labor practices are involved. "It is well established that this Board has exclusive jurisdiction to administer representation matters under Chapter 5 of the Act. Similarly it is the General Counsel who, pursuant to section 1149, "shall have final authority, on behalf of the board, with respect to the investigation of charges and issuance of complaints under Chapter 6… and with respect to the prosecution of such complaints before the Board." (Chapter 6 covers unfair labor practices.) Although there are no statistics to establish the actual number of times such consolidation was needed and occurred, it has been frequent enough for the Board to have acknowledged the need for it through case decisions. (Pertinent here, as examples, are *Mann Packing, supra; Coastal Berry Farms, LLC.* (1998) 24 ALRB No. 4; *Oceanview* , supra; *Richard's Grove & Saralee's Vineyard, Inc.* (2007) 33ALRB No. 7; *Lassen Dairy, Inc.,dba Meritage Dairy Farms* (2008) 34 ALRB No. 1 and; *Gerawan Farming, Inc.*, supra, among others).

While the Board can procedurally and exclusively control the setting of objections and challenges for hearing it cannot control the investigation of ulps, the length of time needed or taken to conduct such investigations or control the determination of whether such a charge or charges should go to complaint or when such complaint should issue. All of those ulp-related decisions are, by statute and by affirming case law, exclusively within the power of the General Counsel (See Labor code section 1149 and *Belridge Farms v. ALRB* (1978) 21 Cal.3d at 557). The Board cannot order the General Counsel to expedite ulp investigations or to expedite her decision-making as to whether or when a complaint should issue and "…the Board is precluded from litigating those charges by the Act itself. To do so clearly would

usurp the authority of the General Counsel in derogation of the statute and, arguably, would be tantamount to the Board initiating an unfair labor practice proceeding." *Mann Packing*, supra at p. 9.

Within the regulations of the ALRB, there is one regulation where election objections and challenges intersect with unfair labor practice complaints: section 20335(c). In the Boards view, changes must be made to section 20335(c), due, in part, to the timeframes set by the legislature and due in part that the previous procedure of deferral and abeyance are no longer viable. When coupling these concerns to a desire to avoid the possibility of duplicative hearings and/or inconsistent determinations, the Board sees no option but to change section 20335(c) that would address these concerns but simultaneously provide a certain leeway through a limited extension of time for General Counsel use in attempting to complete the investigation and complaint processes for the purposes of consolidation.

As additional changes, the Board believes that further clarification is needed, in light of 1156.3, of the General Counsel's role in consolidated ulp/election objection and/or challenged ballot hearings and the way that current section 20335(c) speaks to that role must be revised.

With particular respect to section 20335(c), the legislative amendments to Labor Code section 1156.3 which brings the Board to make a number of the, below, regulatory changes read as follows:

(i) (1) (A) (i) The board shall, within 21 days of the filing of election objections or the submittal of evidence in support of challenges to ballots, evaluate the election objections or challenged ballots and issue a decision determining which, if any, must be set for hearing.

(2) The board may consolidate a challenged ballot hearing with a hearing on objections to an election.

(3) The board may grant extensions on the time limits specified in this subdivision upon a showing of good cause or by stipulation of all affected parties.

(Amended by Stats. 2011, Ch. 697, Sec. 1. Effective January 1, 2012.)

The Board proposes the following amendments and deletions to section 20335 (c) of title 8 California Code of Regulations (hereinafter CCR or regulations).

(Note: Language that is proposed to be deleted appears with strikethrough. All proposed changes are indicated by underline.)

Purpose

The purpose of these proposed regulatory changes by the ALRB are to:

A. In 2012 the legislature imposed on the Board mandatory timelines (Labor Code section 1156.3) within which the Board is supposed to adjudicate and resolve objections to union elections and/or challenges to (farmworker) voters in those elections. Unfair labor practices involving these same elections and/or voters often simultaneously occur. Prior to the legislative changes the Board has, historically, had a process by which it delayed holding a hearing on the objections/challenges until the General Counsel made a decision on issuing a complaint on any and all charges connected to the employer or union involved in the election. It placed these objections/challenges into a state of abeyance pending the issuance and, importantly, the consolidation of those ULPs with the objections/challenges. In light of the imposed timelines, the Board has determined that it cannot use this process anymore.
   (1) The Board determined that it must replace that process with a process providing assistance and (limited) latitude to the General Counsel in meeting a consolidation timeline that is in keeping with those timelines the Board must meet. This new process identifies the objections and challenges for the General Counsel and then provides an extension of time of 30 days, if needed, for the completion of ULP investigations and the issuance of complaint and consolidation motion in a manner consistent with Boards adherence to its timelines.
   (2) This process of assistance is further aided by limiting the types of ULPs that can be consolidated to only those that "mirror" the election objections/challenges. This allows for focused investigation as many charges can be (and are) filed in connection to elections but many of them are not "mirrors" to the objections/challenges that are filed.
   (3) It is important to understand that the lack of a unified hearing has, by Board policy, always been avoided as holding separate hearings would probably negatively impact the (mirror) ULPs if they were to be tried after the Board had reached a decision on the objections/challenges matters. It is a basic judicial principle that a judgment that has been reached cannot be overturned unless there is newly discovered evidence that had been previously unknown. These existing ULPs would not qualify under that standard.
B. Clarification will also be provided to the General Counsel as to its role in objection/challenge hearings when there are no ULPs involved in the litigation.
   (1) The General Counsel does not have the status of a party in consolidated hearings. It cannot therefore participate in any party requests for extensions of any of the section 1156.3 timelines that do not involve the motion for consolidation.

It is proposed that section 20335 (c) be amended as follows:

~~Whenever~~ Where a petition under Labor Code Section 1156.3(e ~~c~~) is filed, objecting to the conduct of the election or conduct affecting the results of the election pursuant to section 20365 or where challenges to the eligibility of voters to cast ballots are submitted to the Board pursuant to section 20363 ~~is on file~~, the Executive Secretary shall notify the General Counsel of such filing(s), under either of these sections, and provide to the General Counsel a copy of the documents filed, by no later than the close of business of the following work day on which the documents were received by the Executive Secretary. Simultaneously, the Executive Secretary will identify the date upon which the 21 day period for Board action under either section 20365 or 20363 will expire.

(1) The General Counsel may thereby proceed to determine whether there are currently any charges filed under Chapter 4 of the Act that mirror the objections or challenges received ~~and there is concurrently on file a charge under Chapter 4 of the Act alleging~~ by containing the same or some of the same matter which form the basis of said objection or challenge. ~~petition,. the Board may request that the unfair labor practice charge receive~~ Upon making this determination, the General Counsel may, at his or her option, notify the Executive Secretary that certain specified charges, in his or her view, mirror certain specified objections or challenges. ~~expedited investigation and processing and, in appropriate circumstances after issuance of a complaint,~~ Where the General Counsel has decided to seek consolidation of said mirroring charge with the objections or challenges set for hearing, the General Counsel, by motion, must request that the Board consolidate the mirror unfair labor practice charge complaint. In order for the Board to consider such motion for consolidation, the Board must receive the General Counsel's motion prior to the date set for expiration of the 21 day period under section 20365 and/or section 20363.

(2) Should the General Counsel determine that his or her investigation and/or issuance of the complaint on mirror unfair labor practices cannot occur prior to the scheduled expiration date of the 21 day period, the General Counsel may make, pursuant to Labor Code section 1156.3(i)(3), a motion to show good cause why the applicable 21 day period of time for determining which objections or challenges must be set for hearing should be extended for the purposes of consolidation. Alternatively, and also pursuant to Labor Code section 1156.3(i)(3), all affected parties may sign a stipulation extending the time period for consolidation. ~~may order that the concurrent unfair~~

~~labor practice charge and the petition under Labor Code Section 1156.3(c) be consolidated.~~ For the purposes of this subdivision, good cause will be established when the General Counsel avers that it is his or her intent to move the Board to consolidate any enumerated mirror charges he or she has determined may merit complaint but that the investigation of those charges have not been completed and additional time is required to complete the investigation and/or issue complaint and move for consolidation. As a result of this averment, the Board will grant a 30 day continuance for the purpose requested so as to allow for a motion for consolidation.

(3) No other additional continuance will be granted for the purpose of section 20335(c) consolidation and the Board will proceed after the expiration of the 30 day continuance to hearing on the objections or challenges with or without consolidated charges. For purposes of any stipulation by the affected parties to extend the timeline set by Labor Code section 1156.3(i)(1)(A)(i), and pursuant to section 20130, the General Counsel is not an affected party.

(4)Any resulting hearing will be governed by the procedures set forth in Chapters 4 and 6 of the Act. The General Counsel ~~general counsel~~ or his or her representative may participate ~~as a party~~ in any such ~~proceeding~~ hearing only when an unfair labor practice complaint has been consolidated with the objections or as required by the provisions of section 20370(c).

Explanation of Each Proposed Change

Amend section 20335(c): By replacing "Whenever" to "Where"

The need to substantively amend section 20335(c) provides the Board with the opportunity to make a "cosmetic" improvement in existing language by moving away from a legalistic word in "whenever" and replace it with "where"

Amend section 20335(c): By adding "is filed" and removing "is on file"

The use of "is filed" is seen to actually reflect the connection to the 21 day timeframe expressed in 1156,3 (i) and is accurate whereas "is on file" is now inaccurate as it makes no connection to the triggering event that, in the context of section1156.3 (i) 21 day timeframe, has great impact on ulp consolidation. To reduce the number of words used, rather than to increase the number of words used to describe that filing of objections or of challenges is a triggering event of a

timeline in which the General Counsel, if she so desires, can consolidate ulp complaints, was seen as a better alternative.

Amend section 20335(c): by re-lettering reference to subsection 1156.3(c) to now read subsection 1156.3(e)(1)

Prior to the legislative amendments to section1156.3, section 20335(c) made reference to section 1156.3(c), however the legislature moved the content of that section from 1156.3(c) to 1156.3(e)(1). Section 20335(c) must be changed in order to reflect the legislature's re-lettering. It will now be changed to read 1156.3(e)(1) instead of 1156.3(c). The alternative would be to drop reference to 1156.3 altogether from this section. However this is not a workable option because it is the filing of an objection under 1156.3(e)(1) that triggers or forms the basis for the need to consolidate the different hearings together.

Amend section 20335(c): By adding language that describes that the basis for filing objections is amended regulatory section 20365 and adding for the first time reference to challenges of eligibility and identifying the source of such challenges as regulatory section 20363.

The amendments to 1156.3 (i) introduce into that section, for the first time, references to challenged ballots, whereas before challenged ballots and the methods for their resolution were addressed only in the regulations at section 20355(b) Challenges and in section 20363(b) Post-Election Determination of Challenges. The 1156.3 amendments, for the first time, also refer to, at section 1156.3(A)(ii), the consolidation of objections and challenges for hearing purposes whereas before this was only addressed in section 20370(a) Investigative Hearings--Types of Hearings and Disqualification of IHE's.

The problem is that currently section 20335(c) does not refer to challenges whatsoever. The Board has determined that references to challenged ballots should be added to section 20335(c) because section 1156.3 places the resolution of challenges side-by-side with resolution of objections for the purpose of setting them for hearing. With the new legislative timeframes equally applying to challenges and objections, the Board believes that it is more efficient to address the consolidation of challenges in the same section as the consolidation of objections as the purpose is the same: addressing their consolidation with ulps. The alternative would be to create an additional separate regulation for challenge/ulp consolidation. There is no benefit that the Board can ascertain from creating a separate and new regulation that

would contemplate the consolidation of unfair labor practices and challenges. The wording for such a regulation would be virtually indistinguishable from either the current or proposed language of section 20335(c).

Additionally, including references to the particular regulatory sections from which objections and challenges arise helps further specify to the litigants the regulatory source of the objections and challenges. Placing upon the Executive Secretary the proposed duty to provide to the General Counsel all objections and challenges filed will help to precisely identify to the Executive Secretary what he is to provide.

Amend section 20335(c): By inserting a notification process by which the Executive Secretary provides to the General Counsel copies of all objections and challenges filed under sections 20365 and 20363.

The Board recognizes and acknowledges that the processing of objections and/or challenges to a hearing and the processing of ulps to a hearing are two totally distinct and separate processes. The Board believes that it must comply with the 21 day requirement to set an objection and/or challenge ballot hearing, when necessary. Given its lack of authority, or control, over the ulp process, the Board has determined that, for ulp consolidation to occur under the timeframe, it can act to remove any obstacles to a General Counsel effort to issue a complaint and/or motion to consolidate or good cause motion to extend time prior to the expiration of the Board's 21 day time limit.

The Board also recognizes that, previously, it has not automatically or routinely provided the General Counsel with a copy of all of the objections or challenges filed with the Board by the party or parties to the election, as such filings are not required by regulation to be served on the General Counsel. The Board has determined that implementing such a process, in the "following work day" after receipt would maximize the amount of information and time in which to determine for herself the connection between the objections and challenges and any ulps filed concerning that election. The alternative would be to require the litigants to serve their objections and challenges on the General Counsel as well as on the Board. However, based on the Board's awareness, this would be wasteful and inefficient as not every election has ulps filed.

Currently, it is the Executive Secretary on whom all objections to elections are served (See section 20365(b) Post-Election Objection Procedure) and it is the Executive Secretary who is the repository of the challenges that are served on the

Board under section 20363(a). The Executive Secretary is in the best position to transmit the required information. This "communication" will ensure that the General Counsel will know, for his or herself, which ulp charges mirror any of the filings with the Board and whether she obligates her office to expedite these ulp investigations will now solely be her obligation going forward. The short time frame for provision of the filings information will work to maximize the amount of time the General Counsel has to consider the need for consolidation of ulp complaints filed.

Amend section 20335(c): By requiring the Executive Secretary to identify for the General Counsel the date on which the 21 day period for the Board action on objections and challenges will expire.

The Board in carrying out is duties pursuant to sections 20363 and 20365 of the regulations within the timeframes set by sections 1156.6 (i)(1) through (i)(3) must for itself calculate the final day of the 21 day period to set objections or challenges for hearing. Since it makes these calculations for itself and since the Executive Secretary is already tasked by these amended regulations to provide the General Counsel with the filed objections and challenges, having the Executive Secretary also provide to the General Counsel the end date of the applicable 21 day period for objections and/or for applicable challenges is appropriate. The information is needed by the General Counsel in order for her to, if she desires, assess how best to use her investigative and prosecutorial resources in the processing of mirror ulps. There is no room for guesswork with such a critical timeframe.

Amend section203355(c): By creating subsection (1) and therein creating a process where the General Counsel and not the Board determines if there are any ulp charges that mirror the objections or challenges; and by replacing the word "concurrent" with the word "mirror" and eliminating the Board's option of requesting expedited ulp investigations

The Board also recognizes that, in all likelihood, it will not have the time or the resources (staff) available to ensure that it has met its own 21 day obligation and simultaneously review and determine what, if any, ulp investigations should cause it to request expedited investigation from the General Counsel, as currently permitted by section 20335(c). In that light, the Board believes that it should remove from itself the burden, it had previously given itself in section 20335(c), of having to determine which lodged ulp charges were "concurrent" and required expedited ulp investigation. In point of fact, in the Board's view, the new 21 day time frame

requires that all "mirror" ulps should automatically be expedited by the General Counsel; if the General Counsel wishes to avoid the problems caused by a failure to consolidate. This is a wish shared by the Board as it too will have to face the consequences of such a failure to consolidate. In that light, the Board believes a 'request' to expedite is now superfluous.

The new provision the Board has created that gives the General Counsel all of the challenge and objection filings will allow her to make a determination for herself in light of the ulp charges filed and whatever information the General Counsel's investigation has acquired as to which ulps mirror the objections and which do not and the General Counsel is free to exercise her independent authority and choose for herself whether to expedite investigations. The General Counsel is in the best position to know her own resources and how best to use them. This is an appropriate alternative to requests for expedited ulp investigations, which by nature, in the first instance, require the Board to identify, on its own, which ulps mirror any filed objections and (now) challenges.

The Board has reflected upon its experience with consolidation of ulps, with either objections or challenges, throughout the entire post-election process from the filing of the objections or challenges, determining what objections or challenges should be set for hearing through when the Board should begin its deliberative processes after hearing. In light of the new timeframes, the Board believes that greater attention must be given to limiting the types of ulps that have been allowed to be consolidated to only those that "mirror" the objections or challenges filed as opposed to allowing ulps that are merely "concurrent" to be consolidated.

Until now, it has certainly been Board and General Counsel practice that, when possible, all charges that mirror the objections and challenges that have been lodged should be and have been consolidated. Additionally, other charges that do not mirror the filed objections and challenges but that allegedly occurred within the timeframes of either the election campaign or the election where the objections/challenges were filed have also been allowed to be consolidated.

The Board now recognizes that the term "concurrent" as used in the current wording of section 20335(c) is now, in the light of the 21 day limitation, too broad a term which past Board experiences with consolidation confirms. As noted above, 20335(c) has permitted the consolidation of ulp charges that went beyond those that mirrored the objections or challenges and did not have any of these characteristics: i.e., same or similar allegations as contained in the objections or challenges.

The use of the term "concurrent" allows for, by the casting of a broad net, the consolidation of ulp charges that do not mirror the objections and challenges but did occur during the same period and same election. A procedure allowing consolidation of concurrent ulps is much too broad and cannot be afforded with the new timeframes.

Board experience leads to the belief that limiting consolidation to only ulp charges that mirror the objections and challenges will shorten hearings and shorten the deliberative processes of the Board and thereby make way for resolutions consistent with the timeframes.

The Board notes that the term 'concurrent" is defined in Black's Law Dictionary (5th ed. 1979) p. 263 as meaning "running together…contributing to the same event"; "contemporaneous"; "accompanying; conjoined; associated; concomitant; joint and equal; existing together, and operating on the same subject." Concurrent is a broader term capable of an interpretation that would allow for the inclusion/consolidation of ulp charges (complaints) that may not be necessary in order to determine whether an election petition must be dismissed.

The term "mirror" is seen by the Board to be a narrower and more focused term; it is a more appropriate description of the kinds of ulps the Board must now limit consolidation to rather than the broader term "concurrent". In a recent decision, the Board approvingly used the term "mirrored" in describing the connection between ulp charges and objections, See *Gerawan Farming, Inc.*, supra at pp.3-4, 49.

Further, as the Board has indicated in *Mann Packing Company, Inc.*, supra at pp.8-9 "It is well established that conduct sufficient to warrant the setting aside of an election need not rise to the level of an unfair labor practice, and not all unfair labor practices necessarily constitute conduct which, by an objective standard, would reasonably tend to interfere with employee free choice." Inclusion into the hearing process of alleged ulp violations that cannot lead to the dismissal of an election petition, even though concurrent, runs counter to adherence to the time frames.

Finally, it is believed that a more finely tuned definition of what types of ulps will be consolidated would aid the General Counsel in determining how best to use her investigative and prosecutorial resources. Moving forward, in order for a charge to be consolidated by the Board into an objection or challenge ballot hearing it must mirror the objections or challenges that have been set or that will be set prior to the expiration of the 21 day period of section 1156.3 (i)(A)(1).

Amend section 20335(c) in new subsection (1): By creating a process through which the General Counsel may notify the Board as to which ulp charges mirror filed objections or challenges.

The result of the proposed (above) changes to section 20335(c) that provide the General Counsel with all of the election objections and challenges filed allowing her to determine whether there are any mirror ulps is followed by this amendment that would then allow her to inform the Board of the existence of the mirror ulps . This would be at her discretion. However an exercise of her discretion would allow the Board to anticipate a potential motion for consolidation and to prepare its resources for that possibility.

Amend section 20335(c) in new subsection (1): By eliminating the language that allowed the Board to order ulp consolidation and replacing it with an exclusive process in which the General Counsel must make a motion to the Board requesting consolidation.

In the current version of section 20335(c), the Board has the option not to rely on the General Counsel to move for consolidation but rather may order it on its own motion. However, this procedure was in place without there being any timeframes within which the Board (or General Counsel) must act. Prior to the insertion of timeframes, the Board could simply wait until all known ulp charges were resolved and then be placed on notice, through the Executive Secretary, that a complaint had issued which included mirror charges thus triggering an order from the Board to consolidate. With the timeframes now in place, the Board does not perceive that it can wait for an appropriate time to arise when it can order consolidation on its own motion. By virtue of the time limitations, it will now only be the General Counsel through his/her own motion to consolidate mirror ulp charges that those charges can be consolidated with the objections and/or challenges set or being set for hearing.

Section 20335(c) has been the vehicle or mechanism by which ulps have been consolidated with objections and (now) challenges. It has been seen to be a distinct or exclusive method for this type of consolidation as opposed to consolidation of ulps with other ulps under section 20244 Severance and Consolidation.

Amend section 20335(c) in new subsection (1): By placing a time frame within which the General Counsel must make the motion to consolidate.

In effectuating the legislative mandated timeframe for determining which ,if any, objections or challenges must be set for hearing, the Board under sections 20365 and

20363, is obligated itself to make that determination within 21 days. This 21 day period must include any efforts to consolidate mirror ulps.

Amend section 20335(c): By creating a subsection (2) which, in part, creates a process for the General Counsel to file a motion for a continuance, in which to complete its processes and seek consolidation, stating "good cause" which the Board therein defines; granting the motion for a one time only continuance of 30 days

Section 1156.3(i)(3) allows for the Board to grant extensions of time of any of the timeframes but limits the Board's ability to grant extensions to only "upon a showing of good cause". Further section 1156.3(i)(3) does not (legislatively) define what will constitute "good cause" for extensions of the timeframes. As good cause" was not legislatively defined the Board believes that it can reasonably conclude that the legislature has left it to the Board to define "good cause" in the context of these timeframes.

As stated, the Board has no control over the General Counsel's investigative and complaint processes but the Board also recognizes that, at times, events occur, either externally or internally, that might impact those processes and prevent the General Counsel from completing the investigation or processing the charge to complaint/dismissal or making the motion to consolidate prior to the expiration of the 21 day period. The Board must look to taking regulatory steps that will define the "good cause" of section 1156.3 (i)(3) requirement for application to the 21 day time limit set in section 1156.3 (i)(A)(1) and in such a way so that it will permit the General Counsel to request a continuance prior to the expiration of the 21 day period and be assured of obtaining a 30 day extension of time provided that the continuance is for the purposes of completing the investigation and processing of the mirror charges to either dismissal or complaint and/or moving the Board for consolidation.

The General Counsel's motion for a continuance must aver, meaning positively assert, that it is for any one of or a combination of the purposes mentioned above. With such assertions, the Board will grant a thirty day continuance but only once for the purposes of consolidation. In keeping with the mandate of the legislature to act promptly, the Board determined that a limit to the length of time the Board believes it reasonably can wait prior to having to move forward with a hearing must be placed on the General Counsel's ability to extend out the filing of a consolidation motion.

The alternative for the Board automatically giving a thirty day continuance would be to have the General Counsel ask for a specific number of days. However, this is impractical as the Board has determined that it does not want to place the General Counsel in the position of having to request a specific number of days or range of days that he/she feels are needed in order to reach the point of consolidation or to, itself, expend the time deliberating over the merit of the number of days requested. Additionally, the Board has no desire or intent to give any continuances that would give more than a total of thirty days.

A process of having to judge the merits of the General Counsel's investigative needs could carry the danger of a descent into an effort to assert Board control over General Counsel's processes. Given the Board's observations (experience) over the years as to the length of time 'high priority investigations' take in order to reach a decision on dismissal or complaint it is believed by the Board that 30 days is an appropriate blanket amount of time, especially given the Board's need to adhere to the timeframes established by the legislature. 30 days is all the time the Board can afford to allow the General Counsel as a continuance. Based upon the previous process, under section 20335(c) that could allow for extended or lengthy abeyance and deferral of the objections and/or challenges hearing, the Board does not see any due process harms to the parties arising out of this new and much shorter delay process. To the contrary there was greater chance of harm from missing witnesses or evidence and of fading memories under the lengthy delays possible under the previous process than there will be under the new process.

Amend section20335(c) in new subsection (2): By acknowledging that the legislature also included the ability of the parties to the objections and/or challenges to extend any of the timelines by a stipulation of all "affected parties". The Board also is establishing that the General Counsel is not an 'affected party" for purposes of a stipulation for extension of the timeframes.

Besides giving the Board the ability to extend any of the timeframes through motions showing good cause, the legislature also gave the "affected parties" the ability to extend any of the timeframes through their all entering a stipulation agreeing to an extension. The Board acknowledges this additional avenue of extending timelines. At this time the Board will decline to determine whether guidance or parameters are needed for this approach and will wait to see how this novel approach is used by the affected parties.

The Board, however, believes it should to clarify to the General Counsel and to the parties that should they seek to reach a stipulation that, for the purposes of such stipulation, the General Counsel's participation is not necessary. The Board has determined that the General Counsel is not an "affected party" as that term is used by the legislature in section 1156.3

Section 20130 of the regulations reads as follows:

> The term "party" as used herein shall mean any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the Act, any person named as respondent, as employer, or as party to a contract in any proceeding under the Act, and any labor organization alleged to be dominated, assisted, or supported in violation of Labor Code Section 1153(a) or (b); but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party's participation in the proceedings to the extent of its interest only.

Further clarification of the General Counsel's status for the purposes of a stipulation by "affected parties" is found in *Kubota Farms* (1989) 15 ALRB No. 12 at p. 8, "full party" status cannot be imparted to the General Counsel/Regional Director and the "participation therein shall be scrupulously limited". (Analysis of the Board's decisions are also in accord with the view that the General Counsel/Regional Director are not parties to a representation hearing such as an objection hearing or a challenged ballot hearing. See *G. H. & G. Zysling Dairy* (2006) 32 ALRB No. 2 at p. 2 fn. 2; *Nurserymen's Exchange Inc.* (2011) 37 ALRB No. 1 at p. 2; *George Amaral Ranches, Inc.* (2012) 38 ALRB No. 5 at p. 7 fn. 3; and *Gerawan Farming Inc.*, supra at p. 16 fn. 4). In *Coastal Berry Farms*, supra at p. 6 the Board states that "The National Labor Relations Board (NLRB or national board) has long held that the only parties to an election are the employer involved, the petitioner, or any labor organization (including any intervenor union(s)) or individual whose name(s) appear on the ballot" (citations omitted) then at *Coastal Berry Farms*, supra p.7, the Board proceeds further and states, "… this Board, like the NLRB, has construed the scope of "persons" with standing in election proceedings to apply to only those individuals or entities who possess the requisite direct interest in the election. Accordingly, as has the NLRB, we have consistently interpreted the phrase "interest in the outcome of the proceeding" to apply only to the actual parties to the election."

Based on the above and because the legislature is silent as to who qualifies as an "affected party", the Board has determined that the legislature has left it to the Board to determine who receives that status for the purposes of the "stipulation". To make that determination, the Board will rely on the above cited regulation and case holdings and has thereby determined that the General Counsel is not an "affected party" for the purposes of a stipulation, under section 1156.3 seeking extensions of time. Affected parties in an election are the petitioner (union, individual or, on occasion, intervening union) and the employer. They are the only ones affected by the Board's decisions as to whether the outcome of the election is (potentially) negatively impacted by the results of any objection hearing and/or challenged ballot hearing. It must be remembered that the principal purpose of the imposition of the timelines in 1156.3(i) is to address the processing of objections and challenges which can and often do occur without companion ulps.

The Board has determined that the General Counsel is not a party to an election and cannot file objections and therefore is not an "affected party" to an objections hearing and thus does not have standing to enter into a stipulation with the parties to the election waiving any of the timeframes.

With respect to challenges, similarly, the General Counsel's role through the (appropriate) Regional Director is basically limited to conducting, at the Board's direction, any investigation sought by the Board prior to a Board decision either resolving or setting the challenges for hearing (See section 20363(a)). These challenge procedures do not convey any "status" on the General Counsel that would allow her participation in any stipulation as an affected party.

Additional reference is made to section 20370 Investigative Hearings--Types of Hearings and Disqualification of IHE's at 20370(c) which reads as follows:

Investigative Hearings--Necessary Parties
(c) The necessary parties to an investigative hearing are the petitioner, the employer, and any other labor organization which has intervened pursuant to section 20325. The regional director or a designated representative of the regional director may participate in an investigative hearing to the extent necessary to ensure that the evidentiary record is fully developed and that the basis for the Board's action is fully substantiated.

Section 20370(c) also makes clear that only necessary parties are to be conferred party status. Necessary parties in the Board's view are affected parties. General

Counsel limited participation, through the regional director, cannot be confused with or convey party status.

Amend section 20335(c): By creating subsection (3) which clarifies that no other continuances will be granted for the purposes of consolidation of mirror ulps with objections and challenges and that the Board in order to comply with the timeframes will proceed with the required objections /challenge hearing with or without consolidated charges.

The Board believes it has leeway when it comes to deviating from the timeframes but it also believes it must be cautious in extending any of the timeframes. With respect to the 21 day timeframe that intersects with section 20335(c), the Board recognizes, and presumably so does the General Counsel, that if mirror ulps and objections/challenges are not heard together a possibility of conflicting factual and evidentiary determinations may exist as a consequence. Those consequences would require the application of estoppel and potentially the resolution of such conflicts through a new and separate legal process which would unnecessarily consume time, money and human resources.

But because the use of "deferral and abeyance" of objections and challenges have been eliminated through the 1156.3 timeframes, the Board believes that it is left with little to choice but to proceed to hear the challenges and objections and that if in consequence issues of estoppel arise the Board and General Counsel will have to wrestle with them after the resolution of the objections and challenges the Board has set for hearing have been resolved.

Amend section 20335(c): By creating new subsection (4) clarifying the General Counsel's role in objections or challenge hearings with which complaints have been consolidated.

Relying on the reasoning above as to why the General Counsel is not a party, this new subsection would clarify the limits discussed above with respect to the General Counsel role in election related hearings. Current section 20335(c) presumably can be interpreted as giving the General Counsel party status with respect to all of the objections and challenges being heard as opposed to only those objections and challenges which are mirrored by ulps charges. This modification would clarify that the General Counsel role and participation is limited to the mirror charges and otherwise as is currently defined in section 20370(c).

Authority and Reference

The Agricultural Labor Relations Board (hereinafter ALRB or Board), pursuant to section 1144 of the Agricultural Labor Relations Act (hereinafter ALRA, Labor Code or Act), has the statutory authority to modify any section of its regulations: "The board may from time to time make, amend, and rescind, in the manner prescribed in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, such rules and regulations as may be necessary to carry out this part."

Reference: Labor Code Section 1156.3

Necessity

In the view of the Board, the proposed changes are necessary because in addressing and considering methods to resolve the legislatively perceived lack of promptness in the resolution of objections and challenges, the Board is aware that the legislature did not address the consolidation of ulps with the challenges or objections and did not address the application of the timeframes to such a consolidation. However, given the ramifications that can result from not consolidating ulps with the objections or challenges (discussed above), the Board believes that there are no factual or legal scenarios involving objections or challenges that can be exempted from the legislative mandate. This especially includes the consolidation for hearing of mirror ulp complaints with objections and challenges.

Chief among the Board's holdings in regards to such consolidation is that when the situation presents itself such unfair labor practices should be litigated together with the objections (or challenges) to an election which they mirror. The purpose of (current) section 20335(c) is in fact to highlight and facilitate the need to consolidate ulps with objections. The purposes of the amendments to section 20335(c) are the same but are now shaped by the creation of the 1156.3 timelines for the processing of objections and challenges.

Given that the legislature has designed the overall election scheme of the ALRB to be expeditious, minimizing delays inherent to holding two separate hearings on contentions that are the same or have similar allegations makes common sense. In addition, duplicative hearings also generate more costs. For the party-litigants it poses additional costs in attorney fees, witness fees and additional costs for the State of California, in the guise of ALRB ALJs, staff attorneys, staff investigators, staff clericals plus the costs for a hearing room, stenographer and interpreters, avoidance

of these extra and unnecessary costs ensures that parties won't have to eschew invoking their due process rights merely on the basis of (additional) costs.

The Board has had, in case decisions, the opportunity to recognize the legislature's intent with respect to its elections processes. Specifically, the Board has previously commented about the need to quickly process election matters and that the legislature's recognition of that need is reflected in the statute with respect to processing election objections. "The legislature recognized that the need to expeditiously process representation cases is greater in the agricultural context, than in the commercial context in which the NLRB has operated, because of the transient character of the work in agriculture in the short time frame for conducting elections" *Silver Terrace Nurseries* (1993) 19 ALRB No. 5 at p. 5. The Board further commented that the "…legislature consciously designed the Board's election procedures to be more expedited…because of conditions of employment in agriculture." *Silver Treasure Nurseries*, supra at pp. 9-10

The Board sees every reason to assume that this legislative desire for expeditious resolution is a continuing one and that it is reflected and reinforced in the legislature's desire that the Board move "promptly" on the election objection and challenge hearings.

The Board believes that it is, therefore, necessary for the investigative and complaint processes of the General Counsel and the hearing and deliberative processes of the Board to respond to the legislature's call for promptness.

In its analysis of how best to comport the operation of section 20335(c) to the statutory timeframes, the matter of how best to amend section 20335(c) must take into account the interplay between the authority of the Board and the authority of the General Counsel.

These spheres can 'collide' when, during elections, unfair labor practices and objections and challenges are filed over the same conduct or misconduct.

Prior to the placement of timeframes by the legislature, the Board worked around these 'collisions' in its crafting of current section 20355(c), by placing the Board in a position so that it could request expedited ulp investigation and could order consolidation of ulps with objections but only after the General Counsel issued complaint. As a necessary response to the 1156.3 21 day time limit, the Board has had to cast aside the long established procedures of deferral to the General Counsel investigative process and abeyance of going forward to a hearing on all of the

pending objections and challenges in the same case. The Board has had to craft alternative means for addressing the need to consolidate against the backdrop of the timeframes. The Board believes that the proposed amendments and deletions to section 20335(c) are necessary to achieve that need.

Finally, in creating the Act the Legislature laid out a number of purposes that the legislature expected its creation and enforcement would achieve. In the preamble to the Act, the legislature spoke of the desire of the people of the State of California for peace, justice and stability along with a sense of fair play. Of the rights afforded to farmworkers perhaps none is more sacred than the right of self-determination expressed through the provision of the right to vote for union representation for the purposes of collective bargaining. This right oftentimes can only be made effective through an administrative hearing process. At the core of the amendments to section 20335(c) is to reduce the delay that had been part and parcel of the ulp consolidation process. This will benefit the farmworkers in that they will see that their vote is meaningful as the delay which had become central to the ulp consolidation process has been removed.

Studies, Reports or Documents

There have been no technical, theoretical, and/or empirical study, reports or documents found by the Board that discuss or address the consolidation of ulps with election objections and/or challenges.

Economic Impact Assessment/Analysis

By making these proposed changes the Board will prevent a negative economic impact from occurring. Current costs and expenditures by the Board and the litigants (growers and unions) will remain the same. As a result there will be no creation of new jobs or businesses or elimination of existing jobs or businesses. However, costs will certainly rise if the Board does not create an avenue for the General Counsel to consolidate mirror ulps with the election objections and/or challenges within the timeframe now required by Labor Code section 1156.3 amendments (SB 126). There is no information as to whether the increases in costs would harm or help businesses in existence or whether it would create jobs or lose jobs or businesses.

Although a concern was raised by the General Counsel that investigative costs might increase by virtue of the need to pay for staff overtime, the Board disagrees and

believes that planning and greater efficiency will prevent overtime costs from occurring or rising.

Benefits of the Proposed Action

The legislature and the Governor have, in various ways, sought to prompt more expeditious case resolutions from the Board especially in the area of election objections and challenges. Election objections and challenges are the processes by which a (losing grower or union) challenges a farmworker vote on whether they want to be represented by a union in collective bargaining with the grower. Prompt resolution of objections and challenges can lead to the union and grower collectively bargaining for a contract. The benefits for the residents of California are derived economically when farmworker wages rise as it would then be followed by increased spending in the economy. Health, safety and environmental issues can all be addressed in the context of collective bargaining. Issues such as pesticide usage and worker safety all have implications to California's public as a whole and not just to the particular grower, union or farmworkers.

Establishing a replacement consolidation method to implement the Board policy while avoiding increased costs and additional legal problems will provide a result that benefits all participants and the general public. It caps expenditures for the Board in conducting hearings as it prevents or eliminates additional hearings and the Board's budget remains stable and staff resources do not become overburdened. It caps costs for the litigants (growers and unions) in that additional hearings would require further legal fees to be paid. It streamlines all of the processes involving election objections and challenges and thereby increases efficiency.

Evidence Supporting Finding of No Significant Statewide Adverse Economic Impact Directly Affecting Business

The proposed action will not directly affect businesses statewide, including small businesses. As the proposed action maintains the current cost and expenditure structures for businesses, the Board concludes that the economic impact, including the ability of California businesses to compete with businesses in other states, will not be significant.

Reasonable Alternatives to the Regulation and the Agency's Reasons for Rejecting Those Alternatives

There were no reasonable alternatives proposed or considered. These regulations do require a specific legal procedure to be used in order to achieve the required (intended) result.

Duplication or Conflict with Federal Regulations

Federal (labor) law and regulations do not protect or address the labor rights of farmworkers in the context of unfair labor practices, elections and collective bargaining. Therefore, there is no duplication or conflict with existing federal regulations.