

AGRICULTURAL LABOR RELATIONS BOARD

15-DAY NOTICE OF “SUFFICIENTLY RELATED” CHANGES TO PROPOSED AMENDMENTS TO TITLE 8, SECTIONS 20363, 20365, 20400

Summary of Rulemaking Process

On November 11, 2011, the formal rulemaking process was initiated with the publication of the Notice of Proposed Regulatory Action in the Notice Register. Pursuant to the Notice, the written comment period ended on December 28, 2011. The United Farm Workers of America (UFW) submitted written comment prior to the December 28 deadline. No public hearing was scheduled. However, on December 12, 2011 the Board received a request from the UFW for a public hearing. The Board scheduled and noticed a public hearing for January 20, 2012. At the hearing, the UFW, the General Counsel of the ALRB, and Carl Borden, on behalf of a group of 21 associations representing agricultural employers (hereafter referred to as "Employer Group"), provided oral testimony. The General Counsel and Mr. Borden also submitted written comment at the hearing. The Board took the written and oral comments under submission and announced that it would take up the matter again at its regularly scheduled public meeting on February 1, 2012.

At the February 1, 2012 meeting, the Board's legal staff presented a memo in which it reviewed the comment received and recommended language changes that in its view were “nonsubstantive” within the meaning of California Code of Regulations, Title 1, section 40. Based on the assumption that no additional comment period was required before adopting the proposed regulations, the Board voted 3-0 to adopt the proposed regulations with the recommended changes. Subsequently, while the proposed regulations were pending review by the Office of Administrative Law (OAL), it came to the Board’s attention that some of the changes arguably could be termed “substantive” and thus may have required a 15-comment period. Accordingly, in order to ensure complete compliance with the letter of the rulemaking requirements of the Administrative Procedure Act (Gov. Code sec. 11340, et seq.), on March 21, 2012 the Board withdrew the rulemaking file from OAL and rescinded its February 1, 2012 adoption of the proposed regulations. The Board hereby issues this Notice providing the public with the opportunity to comment on the changes recommended by legal staff on February 1, 2012.

Below are sections 20363, 20365, and 20400 with changes recommended by legal staff. The original amendments are denoted in ~~strikeout~~ (deletions) and underline (additions) format. The changes to the original proposed language are in **bold** type, with additions underlined and deletions referenced in italics. Below each section is an explanation of the changes.

§20363. Post-Election Determination of Challenges.

(a) If the tally of ballots discloses that the unresolved challenged ballots are sufficient in number to affect the outcome of the election, the regional director shall, within two (2) working days, forward to the Board all challenged ballot declarations and all other evidence in his or her possession relevant to the eligibility of the challenged voters, and shall serve the same on all parties to the election. **However, should the evidence include any declarations or statements of non-supervisory agricultural employees other than those of the challenged voters the Regional Director shall serve on the parties only a summary of such declarations, prepared in a manner that does not reveal the identity of the declarants.** Within ten (10) days of service of the challenged ballot declarations and other evidence, the parties may file with the Executive Secretary, as agent of the Board, and serve on all other parties to the election, declarations and/or documentary evidence in support of their positions as to the eligibility of the challenged voters, accompanied by argument explaining their positions and the relevance of the proffered evidence. The 21-day period set forth in Labor Code section 1156.3, subdivision (i)(1)(A)(i) shall run from receipt by the Board of the evidence submitted by all parties, or the expiration of the 10-day period to submit evidence, whichever occurs first. Within five (5) days of service of the other parties' evidence and argument, any party may file argument in response. Filing and service shall be in accordance with sections 20160, 20164, 20166, and 20168. **At any time after the tally of ballots and prior to the issuance of its decision resolving challenges and/or setting them for hearing, the Board may request that the appropriate Regional Director conduct such investigation as the Board deems necessary. Any evidence obtained as a result of such investigation shall be submitted to the Board and served on the parties in the same manner as specified above.** ~~conduct such investigation as he or she deems necessary to determine the eligibility of the challenged voters, including giving all parties an opportunity to present evidence on each of the challenges. The time period for submitting evidence shall be at the discretion of the regional director, but in no case shall be less than seven (7) days. The parties shall provide the regional director with two copies of any evidence submitted. Thereafter, the regional director shall issue to the Board a report containing his or her conclusions and recommendations and a detailed summary of the facts underlying them. A copy of the regional director's report shall be served on all parties. Where, after investigation, the regional director deems it appropriate, he or she may issue a notice of hearing on those challenged ballots which cannot be resolved by investigation and may submit his or her report to the Board containing the conclusions and recommendations and summary of supporting facts on all other challenges. A copy of the notice of hearing shall be served on all parties. Such hearing will be in accord with section 20370.~~

(b) The Board shall, after considering the evidence and the parties' arguments, determine which challenges may be resolved thereon and which require the resolution of material factual disputes, and thus must be set for an evidentiary hearing in accordance with section 20370. ~~conclusions and recommendations of the regional director, set forth in the report provided for in (a) above, shall be final unless exceptions to the conclusions and recommendations are filed with the executive secretary by personal service within five days or by deposit in registered mail postmarked within five days following service upon the parties of the regional director's report. An original and six copies of the exceptions shall be filed and shall be accompanied by seven copies of declarations and other documentary evidence offered in support of the exceptions. However, the Board will not consider, absent extraordinary circumstances, evidence that was not submitted timely to the regional director pursuant to subsection (a). "Extraordinary circumstances" includes recognized legal excuses such as where the evidence is newly discovered, and not reasonably discoverable, or the party was not on notice as to issues in dispute. Copies of any exceptions and supporting documents shall be served pursuant to section 20166 on all other parties to the proceeding and on the regional director and proof of service shall be filed with the executive secretary along with the exceptions. Upon the filing of exceptions, the regional director shall forward to the Board the entire record relied upon in the investigation.~~

(c) In serving ~~declarations~~ exceptions and supporting documents on other parties pursuant to subdivision (a) above, the ~~excepting parties~~ shall have the option of serving a detailed statement of facts in lieu of the declarations. This detailed statement of facts shall describe the contents of declarations in sufficient detail to allow an opposing party to secure its own witnesses and otherwise prepare itself to counter the ~~evidence~~ exceptions at an evidentiary hearing. ~~An excepting party~~ electing to serve a detailed statement of facts on other parties shall also file the original and six copies of this statement with the executive secretary together with the declarations.

(d) ~~In any case in which exceptions are filed to a regional director's recommendations for the disposition of challenged ballots pursuant to subsection (b) above, the record before on review by the Board shall consist of: the election petition pursuant to Labor Code Section 1156.3(a), the notice and direction of election, the tally of ballots, the evidence and argument submitted to the regional director by the parties, as well as any other evidence relied on by the regional director, and the declarations and other evidence forwarded by the regional director's report on challenged ballots, and the exceptions thereto, along with supporting evidence and briefs as provided in subsection (b) above.~~

Authority: Section 1144, Labor Code; Reference: Section 1157, Labor Code.

Explanation of Changes

1) The United Farm Workers of America (UFW) suggested in its written comment that the provision which would require the Regional Director (RD) to forward to the Board and all parties challenged ballot declarations and other relevant evidence in his or her possession potentially conflicts with other regulations that maintain the confidentiality of employee declarations until they testify at a hearing. Accordingly, the UFW urged that the Board expressly state that this provision does not affect the operation of the other provisions. Only in the unlikely event that the RD obtains employee declarations other than those of the challenged voters when investigating an election petition would the provision as originally proposed even potentially conflict with regulations that guard the confidentiality of employee declarations. While the Board believes the proposal as drafted would be read to be consistent with its regulations governing the confidentiality of such declarations, the Board decided to include language to make express that any such declarations not be included in the evidence served on the parties by the RD. Instead, the RD would summarize the content of those declarations and serve that summary on the parties along with the challenged ballot declarations and any other evidence relevant to the challenged ballots.

2) The Board concluded, after weighing the comment received, that the proposal to eliminate the role of the RD in evaluating challenged ballots should not be altered. However, there may be some situations where the Board would find it helpful for regional staff to conduct some specific investigative activity that requires "boots on the ground." This might include, for example, taking the declaration of specified individuals. Leaving this to the discretion of the Board based on the Board's evaluation of the issues involved, whether before or after the parties' submissions to the Board, would be a much more efficient use of regional staff time and resources than requiring an investigation by regional staff in all cases. While the Board would have the inherent authority to do this under the proposal as originally drafted, the Board voted to add language to the amendment to make this option express.

§20365. Post-Election Objections Procedure.

(a) Time for filing. Within five days after an election, any person may, pursuant to Labor Code Section 1156.3(ee), file with the Board a signed petition asserting that allegations made in the election petition filed pursuant to Labor Code Section 1156.3(a) were incorrect, or asserting that the Board or regional director improperly determined the geographical scope of the bargaining unit, or objecting to the conduct of the election or conduct affecting the results of the election. Except as provided in subsections (1), (2) and (3) below, the five-day period begins to run when the election ends. The election ends when the ballots have been counted and a final tally of ballots issues.

(1) If challenged ballots are outcome-determinative or the ballots are impounded, the election ends when the polls close, and the five-day period for filing election objections begins to run at that time. Neither the existence of a determinative number of challenged ballots nor the impoundment of ballots shall extend the period for filing objections, and the subsequent issuance of a revised tally or delayed tally shall not reopen the period for filing objections.

(2) The time for filing objections after a rerun election is governed by section 20372(c).

(3) The time for filing objections after a run-off election is governed by section 20375(d).

(b) An objections petition shall be filed by personal service on the executive secretary, as agent of the Board, or by registered or certified mail postmarked within the five-day period. No extensions of time for filing objections shall be permitted, and no amendments to objections petitions shall be permitted for any reason after the five-day filing period has elapsed.

(c) An objections petition filed with the ~~Board~~executive secretary shall consist of the original and six copies of the following: the petition pursuant to Labor Code Section 1156.3(ee); a detailed statement of facts and law relied upon, as required by subsection (1) below, or declarations in support of the petition, as required by subsection (2) below; a declaration of service upon all other parties, including the regional director, as provided in section 20166, of the objections petition and any detailed statement of facts and law supporting declarations, and seven copies of the following: petition for certification, the notice and direction of election, and the tally of ballots. A party exercising the option provided by subsection (2)(D) below to serve on other parties a detailed statement of facts in lieu of declarations shall file with the executive secretary the original and six copies of said statement and a declaration of service of the statement upon all other parties, as provided in section 20166.

(1) A party objecting to an election on the grounds that the Board or the regional director improperly determined the geographical scope of the bargaining unit, or that the allegations made in the petition filed pursuant to Labor Code Section

1156.3(a) were incorrect, shall include in its petition a detailed statement of the facts and law relied upon.

(2) A party objecting to an election on the grounds that the election was not conducted properly, or that misconduct occurred affecting the results of the election shall attach to the original and each copy of the petition a declaration or declarations setting forth facts which, if uncontroverted or unexplained, would constitute sufficient grounds for the Board to refuse to certify the election.

(A) If more than five declarations are submitted with a petition, each objection therein shall contain a reference, by number, to the declaration or declarations offered in support of that objection.

(B) The facts stated in each declaration shall be within the personal knowledge of the declarant. The details of each occurrence and the manner in which it is alleged to have affected or could have affected the outcome of the election shall be set forth with particularity.

(C) Allegations of misconduct shall include identification of the person or persons alleged to have engaged in the misconduct and their relationship to any of the parties, a statement of when and where the misconduct occurred; and a detailed description of the misconduct including, if speech is complained of, the contents of what was said.

(D) Copies of the declarations and supporting documents or exhibits shall be served upon all other parties with the objections petition, provided that, at the option of the objecting party, a detailed statement of facts may be substituted for the declarations. This detailed statement of facts shall describe the contents of declarations in sufficient detail to allow an opposing party to secure its own witnesses and otherwise prepare itself to counter the objections at an evidentiary hearing. An objecting party electing to serve a detailed statement of facts on other parties shall also file the original and six copies of this statement with the executive secretary together with the declarations.

(3) Documents and exhibits offered in support of the objections petition shall be identified and authenticated.

(4) All declarations shall state the date and place of execution, and shall be signed and certified by the declarant to be true and under penalty of perjury, which certification shall be substantially in the following form: "I certify (declare) under penalty of perjury that the foregoing is true and correct."

(5) No party may allege as grounds for setting aside an election its own conduct or the conduct of its agents.

(d) Disposition of objections petitions. The ~~Board executive secretary~~ shall dismiss any objections petition or any portion of such petition which does not satisfy the requirements of subsections (a), (b), and (c). ~~Such action of the executive secretary may be reviewed by the Board pursuant to section 20393.~~

(e) With respect to any portion of the petition not dismissed pursuant to subsection (d) above, the ~~Board executive secretary or the investigative hearing examiner appointed by the executive secretary to handle the case~~ may:

- (1) Direct any party to submit evidence through declarations or documents;
- (2) Order the inspection of documents by Board agents or by the parties;
- (3) Direct any party to submit an offer of proof;
- (4) Obtain declarations from Board agents or other persons;
- (5) Conduct investigatory conferences with the parties for the purpose of exploring and resolving factual or legal issues;
- (6) Dismiss any portion of the petition which, after investigation and on the basis of applicable precedent, is determined not to be a basis for setting the election aside;

~~(7) Recommend to the Board that an election be set aside the election if, after an investigation, it appears on the basis of applicable precedent it would be appropriate to do so, and there are no material factual issues in dispute. Such recommendation shall be in writing and shall be served on the parties pursuant to section 20164. Parties shall have 14 days from service of the recommendation to file with the Board an original and six copies of a statement of objection to the recommendation accompanied by a statement of reasons for objection or a supporting brief.~~

~~(8) Recommend novel legal issues to the Board for consideration and decision. Such recommendation of issues shall be in writing and served on the parties. Parties shall have 14 days from service to submit the original and six copies of briefs to the Board on the legal issues raised.~~

~~(f) An order of the executive secretary dismissing portions of the petition after investigation shall be in writing accompanied by a statement of reasons, shall be served on all parties pursuant to section 20164, and shall be subject to Board review pursuant to section 20393.~~

~~(fg) Where the objections satisfy the requirements of subsections (a), (b), and (c) and there are material factual issues in dispute, tThe Board executive secretary shall direct an investigatory hearing pursuant to section 20370 if it appears that there are substantial and material factual issues in dispute. The hearing shall be strictly limited to the issues set forth in the executive secretary's notice of hearing. Hearings of more than one day's duration shall continue on the next business day and each day following until completed. Requests for continuance shall be granted only in extraordinary circumstances.~~

~~(g) Prior to the Board certifying a labor organization as the exclusive bargaining representative **[reference to bargaining order deleted]** as authorized by Labor Code section 1156.3, subdivision (f), or an Investigative Hearing Examiner (IHE) recommending such action, the parties to the election shall be afforded the opportunity to submit written argument addressing whether **certification** is warranted under the standard set forth in Labor Code section 1156.3, subdivision (f).~~

Authority: Section 1144, Labor Code; Reference: Section 1156.3(c), Labor Code.

Explanation of Changes

The UFW suggested in its comments that the use of the term "bargaining order" in proposed new subdivision (g) of section 20365 is in conflict with the language of SB 126, which does not contain the term "bargaining order," and should be replaced by references to "certification," the term used in the statute. The Employer Group also suggested that this change in terminology be made. The UFW argued that use of the term "bargaining order" would invite litigation over whether the standards set forth in *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209 (in which the Board's authority to issue bargaining orders in unfair labor practice cases was upheld) are to be utilized in applying new subdivision (f) of section 1156.3 of the ALRA. The terms "bargaining order" and "certification" in this context clearly are synonymous and the use of term "bargaining order" will not cause the feared confusion. Nevertheless, the Board agrees that it is better to mirror the statutory language rather than to use other terms, even though they may be commonly understood as synonyms. Therefore, the Board decided that the term "bargaining order" be deleted from new subdivision (g) and be replaced with appropriate references to "certification."

§ 20400. Filing of Declaration Requesting Mandatory Mediation and Conciliation

(a) Where the certification issued prior to January 1, 2003:

A declaration pursuant to Labor Code section 1164, subdivision (a)(1) may be filed with the Board by either the agricultural employer or the certified labor organization at any time at least 90 days after a renewed demand to bargain, as defined in subdivision (2) below. The declaration shall be served and filed in accordance with sections 20160, 20164, 20166, and 20168. The declaration shall be signed under penalty of perjury by an authorized representative of the filing party, shall state that the parties are subject to an existing certification and have failed to reach a collective bargaining agreement, and shall state that (A) the parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain, (B) the employer has committed an unfair labor practice, describing the nature of the violation, and providing the corresponding Board decision number or case number, (C) the parties have not previously had a binding contract between them, and (D) the employer has employed or engaged 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration. In addition, the declaration shall be accompanied by any documentary or other evidence that supports the above statements and establishes the date of the renewed demand to bargain.

(1) The unfair labor practice referred to above is one where a final Board decision has issued or where there is a settlement agreement that includes an admission of liability.

(2) The renewed demand to bargain referred to above is one that occurred on or after January 1, 2003.

(b) Where the certification issued after January 1, 2003:

A declaration pursuant to Labor Code section 1164, subdivision (a)(2) may be filed with the Board by the agricultural employer or the certified labor organization at any time at least ~~180~~90 days after the initial request to bargain by either party following the certification. The declaration shall be served and filed in accordance with sections 20160, 20164, 20166, and 20168. The declaration shall be signed under penalty of perjury, shall state that the parties are subject to an existing certification and have failed to reach a collective bargaining agreement, shall provide the date of the initial request to bargain, and shall state that the employer has employed or engaged 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration. In addition, the declaration shall be accompanied by any documentary or other evidence that supports the above statements.

(c) Where the request for mandatory mediation and conciliation is based on **[reference to bargaining order deleted] certification of a labor organization pursuant to Labor Code section 1156.3, subdivision (f)** or the dismissal of a

decertification petition pursuant to Labor Code section 1156.3, subdivision (a)(4):

A declaration pursuant to Labor Code section 1164, subdivision (a)(3) or (a)(4) may be filed with the Board by the agricultural employer or the certified labor organization at any time at least 60 days after the date the [reference to bargaining order deleted] certification was issued or the decertification petition was dismissed, as appropriate. The declaration shall be served and filed in accordance with sections 20160, 20164, 20166, and 20168. The declaration shall be signed under penalty of perjury, shall state that the parties are subject to an existing certification and have no collective bargaining agreement currently in effect, shall provide a citation to the Board order qualifying the request pursuant to Labor Code section 1164, subdivision (a)(3) or (a)(4), and shall state that the employer has employed or engaged 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration. In addition, the declaration shall be accompanied by any documentary or other evidence that supports the above statements.

(de) For the purpose of determining the number of declarations permitted to be filed by a labor organization, the term "party" as used in Labor Code section 1164.12 shall refer to the labor organization named in the Board's certifications.

Authority: Section 1144, Labor Code. Reference: Sections 1164, 1164.11, and 1164.12, Labor Code.

Explanation of Changes

The changes made to this section mirror those made in section 20365, in that the term "bargaining order" has been replaced with appropriate references to "certification," the synonymous term used in the statute.

The ALRB invites all interested persons to submit written comments on the change to the proposed amendment to Title 8, Sections 20363, 20365, and 20400. Comments must be received at ALRB headquarters at the address listed below by 5:00 p.m. on April 9, 2012. All of the documents in the rulemaking file, including the original Notice of Proposed Rulemaking, the original text of proposed amendments, and the Initial Statement of Reasons are posted on the Board's website at www.alrb.ca.gov, and are available upon request from J. Antonio Barbosa, Executive Secretary, (916) 653-3741, Fax: (916) 653-8750, e-mail: jbarbosa@alrb.ca.gov or Joseph A. Wender, Jr., Senior Board Counsel, (916) 651-7620, same fax number as above, e-mail: jwender@alrb.ca.gov.

Address written comments or requests for documents to:

**J. Antonio Barbosa
Executive Secretary
Agricultural Labor Relations Board
915 Capitol Mall, Third Floor
Sacramento, CA 95814**