AGRICULTURAL LABOR RELATIONS BOARD

FINAL STATEMENT OF REASONS IN SUPPORT OF PROPOSED REGULATORY ACTION TO AMEND TITLE 8, SECTIONS 20363, 20365, 20393, 20400, and 20402

Summary of Board Action

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 Code sec. 11340, et seq.), on March 21, 2012 the Board withdrew the rulemaking file from OAL and rescinded its February 1, 2012 adoption of the proposed regulations. On March 21, 2012, a 15-Day Notice Of “Sufficiently Related” Changes To Proposed Amendments To Title 8, Sections 20363, 20365, 20400 was sent by the Board to all interested parties, as required by Government Code section 11346.8, subdivision (c). No comments were received in response to the 15-Day Notice. Accordingly, all of the comments discussed below are those received either prior to the original December 28 deadline for written comment or at the public hearing held on January 20, 2012.

Amend Section 20363. Post-Election Determination of Challenges

SB 126 includes new subdivision (i) of Labor Code section 1156.3, the existing section governing elections generally. Subdivision (i) sets forth various time limits for the resolution of challenged ballots and election objections. The time limit 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. Under existing regulations, challenged ballots are first evaluated by the Regional Director (RD), who issues a challenged ballot report subject to appeal to the Board. Similarly, election objections are first evaluated by the Executive Secretary (ES), with an opportunity for Board review of any objections dismissed. It is unlikely, except in the simplest of cases, that the 21-day time limit could be met under this existing bi-level review structure. In order to meet the 21-day limit, the ALRB proposed to eliminate the initial review by the RD and ES and instead have the Board do the evaluation in the first instance. The Board can absorb any increase in workload that results. This has the added advantage of redistributing workload away from the most burdened component of the agency, the regional offices.

In order to effectuate this change, section 20363 would be amended to provide that the parties submit to the Board directly any evidence and argument in support of their positions on challenged ballots. The regional directors also would be required to forward to the Board, and serve on the parties, any challenged ballot declarations or other evidence in his or her possession. The Board would then directly make the determination on which challenges can be resolved and which require an evidentiary hearing.

1) The 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 if the RD obtains employee declarations other than those of the challenged voters would the provision as proposed potentially conflict with regulations that guard the confidentiality of employee declarations. Therefore, the Board voted to include language in the amendment to clarify that any such declarations not be included in the evidence served on the parties by the RD. In addition, the language has been changed to require that the RD 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. The Employer Group applauded the service of the challenged

ballots on the parties but suggests that it be made clear that the RD does not have the option of serving a summary of those declarations. The Board believes that, particularly in light of the changes discussed above, the requirement of service of the challenged ballot declarations on the parties is clear and needs no further clarification.

2) The UFW urged in its written and oral comments that the existing role of the RDs in challenged ballot determinations be retained. The General Counsel of the ALRB also urged that the role of RDs be retained, and offered a proposed timeline to do so.

The UFW specifically opposed the proposed elimination of the role of the RDs and ES, arguing that this eliminates any opportunity to seek review of an initial decision other than under the strict standard for motions for reconsideration of Board decisions. However, the Board is the ultimate decision-maker under the present review scheme and the standard of review of an RD's challenged ballot report or an order on election objections by the ES is *de novo*. The Board's decision is subject to review on the same terms regardless of whether there is an initial recommended decision by an RD or ES. Having the matter come directly to the Board to evaluate whether challenges or objections can be resolved or must be set for hearing because of disputed issues of material facts would be more efficient without reducing due process in any regard. Furthermore, given the narrow standard of review of the Board's decisions in election cases, the priority should be to allow sufficient time to make carefully considered and well-reasoned decisions. For example, concluding both a challenged ballot report by an RD and a Board decision on review of that report within the 21-day statutory time frame would not facilitate quality decision-making.

The General Counsel's proposal would have the regional office begin an investigation of the challenged ballots immediately after the election and would require the parties to submit their evidence and argument 7 days later. The parties' submissions would trigger the start of the statutory 21-day period for a Board decision on the challenged ballots. The RD would then have 3 days to issue his or her challenged ballot report. The parties would have 5 days to file exceptions to the challenged ballot report. Assuming that the Board actually received the exceptions by the last day for filing, this would leave 13 days for the Board to review the exceptions and issue a decision resolving those challenges that may be resolved without a hearing and setting for hearing those where there are material facts in dispute. At the public hearing, the UFW expressed support for this proposal, though its representative stated that the RD could be given a week after the parties' submission of evidence to issue a report if the time for the parties' submissions was shortened to 5 days and the time for the Board to issue its decision after exceptions are filed was shortened to 11 days.

While in some cases productive investigative activity could take place prior to receiving the parties' evidence and argument, for the most part any need for further inquiry is not apparent until receiving the parties' submissions. Accordingly, conducting meaningful and nonduplicative investigations prior to receiving the parties' submissions would be difficult, and, in some cases, impossible. Such investigations also would pull regional staff away from other pressing matters such as ULP investigations. What needs to be determined at this stage of the process is, based on the parties' contentions, whether there are any material factual disputes necessitating an evidentiary hearing or whether the challenges or may be resolved based on the application of the proper legal analysis to the undisputed facts. These judgments can not be made in any meaningful way without first knowing the parties' contentions and the basis for those contentions.

The proposal to have the RD issue his or her challenged ballot report within 3 days of receiving the parties' submissions simply is not realistic except in the simplest of cases. This leaves insufficient time to consider the parties' evidence and legal arguments and draft a cogent and thorough report. It would be nearly impossible to follow up with the parties to clarify their positions or confirm whether material facts are indeed disputed when the parties' submissions leave that unclear. The UFW's suggested alteration to the GC proposal would give the RD an additional 4 days to issue his or her report, but even if that were viewed as sufficient, which it would not be in most cases, it would not cure the other problems noted above.

While the Board concluded that there is no need to retain a challenged ballot report by an RD, there may still be a need for an investigative role for the regional offices in some cases. 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.

Amend Section 20365. Post-Election Objections Procedure

The ALRB proposed to amend section 20365 for the reasons described above, i.e., in order to meet the new 21-day time period for determining whether election objections must be dismissed or require an evidentiary hearing. The adopted amendments would effectuate this change by deleting all language relating to the

evaluation of election objections by the Executive Secretary and replacing it, where necessary, with references to the Board. In addition, the amendments included language ensuring that before the Board issues a certification pursuant to new subdivision (f) of Labor Code section 1156.3 the parties have an opportunity to brief the issue.

The UFW submitted four objections to the proposed amendments to section 20365. Three of them related to the elimination of the ES's role in evaluating election objections and are based on considerations very similar to the objections to eliminating the role of the RDs in evaluating challenged ballots. The Board believes that the reasons for eliminating the ES role in election objections are even stronger than those for eliminating the role of the RDs in evaluating challenged ballots. The ES does not conduct any investigation, but merely evaluates the sufficiency of the election objections based on the objections and accompanying declarations and argument. The Board on review does exactly the same thing on a *de novo* basis and could just as easily do so in the first instance. Moreover, the existing role of the ES is a historical relic that dates to a time when the agency was much larger and the ES had attorneys under his supervision to assist him in this task. Presently, he has no such attorneys and this is not expected to change anytime soon. Given the myriad of administrative tasks that the ES must perform on a daily basis, it is difficult to perform both those tasks and the evaluation of election objections in a timely manner. It would be more efficient and consonant with the changes proposed by SB 126 to have the Board perform the function directly. Therefore, the Board voted to eliminate the role of the ES as originally proposed.

The UFW's fourth objection pertains to the use of the term "bargaining order" in proposed new subdivision (g) of section 20365. The UFW suggested that this 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 Board agrees that it is better to mirror the statutory language rather than to use other terms, even though they may be synonyms. Therefore, the Board voted that the term "bargaining order" be deleted from new subdivision (g) and be replaced with references to "certification."

The UFW also urged that the entirety of proposed subdivision (g) of section 20365 be eliminated as unnecessary, as in the normal course of events the parties would

have the opportunity to brief the propriety of certifying a union due to employer misconduct before the Board would decide upon that remedy. This is true, but the intent of the proposal was to provide assurance of that opportunity.

The Employer Group had a very different perspective on proposed subdivision (g). They suggested that the language reflected an intention to bifurcate the issue of whether an election should be set aside from the issue of whether, if so, the union should be certified based on the standard set forth in Labor Code section 1156.3, subdivision (f). In their view, this would include the evidentiary hearing as well as briefing on the issue. In fact, this was not the intended meaning of the proposed language, nor does the Board believe that it is susceptible to the meaning suggested by the Employer Group. The body of evidence that is relevant to whether an election should be set aside due to employer misconduct is the same body of evidence that is relevant to the issue of whether certification of the union is appropriate under section 1156.3, subdivision (f). In other words, in determining whether certification is an appropriate remedy, the Board will look at the proven misconduct and make a judgment as to whether that misconduct "would render slight the chances of a new election reflecting the free and fair choice of employees." Just as the Board applies an objective standard in determining whether to set aside an election, i.e., whether the proven misconduct would tend to interfere with free choice in the election, it is expected that the Board would apply an objective standard in determining if the certification remedy is appropriate.

Accordingly, the nature of the proven misconduct and its likely effect upon employee free choice will be the focus of the analysis. As a matter of course, prudent counsel for a union will offer all available evidence of employer misconduct in order to get the election set aside, regardless of whether the certification remedy also is sought. Conversely, employer counsel will offer all available evidence in defense of the allegations of misconduct. Thus, there would be no reason to reopen the evidentiary hearing to allow additional evidence by either party. It simply would be "another bite of the apple" that would delay the ultimate decision in the case. The only possible exception might be where the Board concludes that it needs evidence on an issue that the parties did not address nor had notice that they should have addressed. The Board retains the authority in such rare circumstances to reopen a hearing under the existing procedures.

Amend Section 20393. Requests for Review; Requests for Reconsideration of Board Action; Requests to Reopen the Record

The amendments to section 20393 would delete references to requests for review of the Executive Secretary's evaluation of election objections, a function that would be eliminated per the proposed changes to section 20365. The proposed

amendments also would clarify the regulation with regard to the filing of responses to a request for review. Presently, the regulation reflects a cumbersome and time-consuming two-step process in evaluating a request for review. The first step is to determine whether to grant or summarily deny review, with the provision of a response from opposing parties a matter of Board discretion. Second, if request is granted, then a response is a matter of right and then the Board determines the ultimate merit of the request for review. To avoid any confusion, in practice the Board typically provides for responses in all cases and then resolves the merits of the request. The amendments would eliminate any confusion over the procedure by making review a simple one-step process which leaves the filing of responses to the discretion of the Board.

Consistent with the UFW's objection to the elimination of the role of the ES in evaluating election objections, the UFW opposes the conforming changes to section 20393. Having decided not to change the original proposal to eliminate the role of the ES (see discussion above regarding sections 20363 and 20365), the Board voted to adopt the amendments to this section as originally proposed.

Amend Section 20400. Filing of Declaration Requesting Mandatory Mediation and Conciliation

SB 126 makes two changes to the Mandatory Mediation and Conciliation (MMC) provisions of the Agricultural Labor Relations Act. One, for certifications issued after January 1, 2003, it changes the minimum time after an initial request to bargain that must elapse before requesting referral to MMC. Second, it expands the circumstances when referral to MMC may be requested to include a) when the Board has issued a certification pursuant to new subdivision (f) of section 1156.3 of the Labor Code, or b) when the Board has dismissed a decertification petition upon a finding of unlawful employer involvement with the petition. The proposed amendments to subdivision (c) of section 20400 account for the two new circumstances when MMC may be requested.

Consistent with its objections to the use of the term "bargaining order" in section 20365, the UFW and the Employer Group urge that the term be replaced with "certification." Consistent with the change to section 20365 adopted by the Board, the Board voted that the term "bargaining order" be replaced with "certification." In addition, the Employer Group suggested that the reference to the ground for requesting MMC relating to the dismissal of a decertification petition include a citation to the statute. The Board agreed and voted to add the phrase "pursuant to Labor Code section 1164, subdivision (a)(4)" after the phrase "or dismissal of a decertification petition."

Amend Section 20402. Evaluation of the Declaration and Answer

The proposed amendment to section 20402, subdivision (a) conforms the regulation to the proposed changes in section 20400 by adding a necessary reference to the amended subdivision (c) of section 20400.

While having no objection to the proposed amendments to the section 20402, the UFW pointed out in its written comment that section 20402 contains a provision that is outdated and can be deleted. Specifically, subdivision (a) contains the following language: "[A] declaration dismissed under this regulation shall not be included in the total of seventy-five (75) declarations permitted under Labor Code section 1164.12." Pursuant to the language of section 1164.12 of the ALRA, the 75 MMC declaration limit was operative only until January 1, 2008. As there no longer is any limit, the Board agreed that this language be deleted. This is a "change without regulatory effect."

ALTERNATIVES TO CHANGES ADOPTED BY THE BOARD

The Board has identified no alternatives that would be more effective in carrying out the purpose for which the amendments are proposed or would be as effective and less burdensome to affected private persons than the proposed amendments.

LOCAL MANDATE STATEMENT

The regulatory changes adopted by the Board will not impose any mandate on local agencies or school districts.

ECONOMIC IMPACT STATEMENT

The amendments adopted by the Board will have no adverse economic impact upon any business. The amendments are procedural in nature and merely conform the Board's regulations to the statutory amendments in Senate Bill 126. Accordingly, there are no costs created by the regulations themselves.