AGRICULTURAL LABOR RELATIONS BOARD

Memo

To: Board Members

From: Legal Staff

Date: January 25, 2012

Re: Review of Public Comment on Proposed Regulations Implementing SB 126

We have reviewed the public comments and have the following observations and recommendations. This memo incorporates the previous review of the written comments submitted by the United Farm Workers of America (UFW) and addresses for the first time the comments received at the January 20, 2012 hearing from the General Counsel (GC) and a group of 21 organizations representing agricultural employers (hereafter referred to the "Employer Group"). Attached to this memo is a version of the proposed regulations that includes the Legal Staff's recommended changes.

Section 20363

1) The UFW suggests 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. The UFW urges that the Board expressly state that this provision does not affect the operation of the other provisions. The only way we believe that the proposed provision reasonably could be interpreted in a way that might conflict with other regulations that guard the confidentiality of employee declarations is with regard to employee declarations obtained by the RD other than those of the challenged voters. We think it would be prudent to clarify that any such declarations not be included in the evidence served on the parties by the RD. Instead, we recommend 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 Grower Group applauds 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 Legal Staff believes that the requirement of service of the challenged ballot declarations on the parties is clear and needs no further clarification.

2) The UFW opposes the proposed elimination of the role of the RDs in initially issuing a report on challenged ballots, arguing that this eliminates any opportunity to seek review of an initial decision (other than under the strict standard for motions for reconsideration). 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 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. Having the matter come directly to the Board to evaluate whether challenges 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, it would be in everyone's best interests, especially the parties, to allow the Board sufficient time to make carefully considered and well-reasoned decisions. 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 GC also opposes the elimination of the role of the RD in evaluating challenged ballots and submitted a proposed procedure that would retain such a role and still meet the new statutory deadline that requires an initial decision determining which, if any, challenges must be set for hearing be issued within 21 days of the parties' submittal of evidence in support of their positions. This proposal would have the regional office begin an investigation of the challenged ballots immediately after the election[1] 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 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.

For the reasons that follow, the Legal Staff does not believe that the GC's proposal is feasible or prudent.

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,

[1] The proposal has timelines running from the "election." In fact, as reflected in the existing regulations, any timelines relative to the evaluation of challenged ballots would run from the tally of ballots, which in some cases is not the same date as the election.

conducting meaningful and nonduplicative investigations prior to receiving the parties' submissions would be difficult, and, in some cases, impossible. Such investigations would pull regional staff away from other pressing matters such as ULP investigations. It is important to remember the limited nature of what needs to be determined at this stage of the process, i.e., based on the parties' contentions, whether there are any material factual disputes necessitating an evidentiary hearing or whether the challenges 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. Thus, the "investigation" of challenged ballots differs qualitatively from the investigation of unfair labor practice (ULP) charges. In ULP cases, the region must do a thorough investigation in the normative sense in order to marshal any relevant evidence and determine if a complaint should issue. In contrast to challenged ballot investigations, that determination requires a judgment as to the likely resolution of disputed factual issues.

As noted above, rushed decision-making is not conducive to good decision-making. 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. As discussed above, much, if not most, of the critical information necessary to evaluate the challenges will be contained in the parties' submissions. This leaves insufficient time to consider the parties' evidence and legal arguments and draft a cogent and thorough report, especially if the report is, as expected, drafted by a regional attorney and then reviewed by the RD. 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. Indeed, it simply would put the parties and the Board under increased time pressure.

While the Legal Staff firmly believes 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. While the Board could make follow-up inquiries to the parties if necessary, for example, to ascertain whether material facts are indeed in dispute, 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. For the reasons discussed above, the Legal Staff believes that 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, it is recommended that this authority be made express in the proposal. The attached amended proposal reflects this change.

Section 20365

The UFW has four objections to the proposed amendments to section 20365. Three of them relate to the elimination of Executive Secretary's (ES) 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 Legal Staff 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 in any sense of the term, 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. 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.

The fourth objection pertains to the use of the term "bargaining order" in proposed new subdivision (g) of section 20365. The UFW suggests that this is in conflict with the language of SB 126, which does not contain the term "bargaining order." Specifically, the UFW states that this language 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. We agree that it is better to mirror the statutory language rather than use other terms, even though they may be synonyms. The Employer Group also suggests that this change in terminology be made. Therefore, we recommend that the term "bargaining order" be deleted and replaced with references to "certification."

The UFW also urges 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. That point is well-taken, but the intent of the proposal was to provide assurance of that opportunity.

The Employer Group has a very different perspective on proposed subdivision (g). They suggest that the language reflects 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 Legal Staff believes that it is susceptible to the meaning suggested by the Employer Group. More importantly, the Legal Staff does not believe that providing for such bifurcation would be constructive in any manner.

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 would 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.

The Board could consider deleting the role of the Investigative Hearing Examiner (IHE) and make it clear that the parties need not brief the issue of the propriety of certification pursuant to Labor Code section 1156.3, subdivision (f) unless directed by the Board after receipt of the parties' exceptions to the IHE's decision. The problem with that approach is that the Board would have to decide whether the election should be set aside, then issue a preliminary decision in that regard to allow the parties to argue whether the misconduct found by the Board warranted certification in addition to setting aside the election. While this would save the parties the effort of briefing the issue if the Board is not considering certification, it would tend to lengthen rather than shorten the proceedings.

Section 20393

Section 20393 is proposed to be amended to reflect the elimination of the role of the ES in evaluating election objections. Consistent with the UFW's objection to that change in review structure, the UFW opposes the conforming changes to section

20393. The Legal Staff recommends no change to the amendments to this section as originally proposed. See discussion above regarding sections 20363 and 20365.

Section 20400, subdivision (c)

This subdivision includes language relating to the addition of two new circumstances when Mandatory Mediation and Conciliation (MMC) may be invoked, including where the Board certifies a union due to employer misconduct. 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 recommendation above regarding section 20363, we recommend that this change also be made. In addition, the Employer Group suggests that the reference to ground for requesting MMC relating to the dismissal of a decertification petition include a citation to the statute. In other words, the suggestion is that the phrase "pursuant to Labor Code section 1164, subdivision (a)(4)" be added after the phrase "or dismissal of a decertification petition." The Legal Staff agrees with this suggestion for the sake of clarity.

Section 20402

The UFW points out that existing section 20402, which is being amended to conform to the addition of the two new circumstances when MMC may be invoked, contains a provision that is outdated and can be deleted. Specifically, subdivision (a) contains a line that states: "[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. There no longer is any limit. Accordingly, we agree that this sentence of the regulation should be deleted. This is what is known as a "change without regulatory effect."

Pursuant to Government Code section 11346.8, subdivision (c), a "sufficiently related change" to amendments as originally proposed requires a new 15-day comment period, but a "nonsubstantial or grammatical change" does not. In its regulations, OAL has defined the term "nonsubstantial." See below.

> California Code of Regulations, Title 1, Division 1 (Office of Administrative Law)
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> § 40. “Nonsubstantial Changes.”
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> Changes to the original text of a regulation shall be deemed to be “nonsubstantial,” as that term is used in Government Code Section

11346.8, if they clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text.

We believe that the changes we have recommended, replacing the term "bargaining order" with "certification," making it express that nothing in the proposed amendments to section 20363 conflicts with the confidentiality of employee declarations under other provisions of the Board's regulations, making express the possibility of the Board asking the regional offices to conduct an investigation of challenged ballots, and the elimination of an inoperative portion of section 20402, all fall within the definition of "nonsubstantial." Therefore, in our view, making these changes would not trigger the need for an additional 15-day comment period. However, it must be noted this legal conclusion does not prevent the Board from offering an additional 15-day comment period if it wishes.