AGRICULTURAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1325 J STREET, SUITE 1900
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PUBLIC MEETING MINUTES

TUESDAY, OCTOBER 12, 2021
10:00 A.M.

There was no physical meeting location. Attendance was by remote meeting only (meeting number **867 6964 0482**), via the attendee's choice of either Zoom videoconference or teleconference.

Board Members:	Acting Chair Ralph Lightstone Members Barry Broad, Cinthia Flores, and Isadore Hall
ALRB Staff:	General Counsel Julia Montgomery Deputy General Counsel Franchesca Herrera Executive Secretary Santiago Avila-Gomez Administrative Services Chief Brian Dougherty Administrative Law Judge Mark Soble Regional Director Chris Schneider Regional Director Jessica Arciniega Chief Board Counsel Todd Ratshin Board Counsels Laura Heyck, Scott Inciardi, and Itir Yakir Special Counsel Ed Blanco ALRB Outreach Coordinator Daniela Ramirez Executive Assistant to the Board Chair Ed Hass Board Staff: Devaka Gunawardena and Lori Miller Field Examiners: Patricia Ochoa. Margarita Padilla, and Merced Barrera General Counsel staff: Audrey Hsia, Berenice Venegas, Christina Nielsen, Erika Flores, Flavio Bautista, Grace Esparza, Jeylee Quiroz, Kenia Acevedo, Laura Camero, Maricela Luna, Rosario Miranda, Santiago Ventura, Veronica Cervantes, Xavier Sanchez, and Yajaira Valdovinos
Interpreter:	Aimee Benavides
Court Reporter:	Marlee Nelson

These meeting minutes include Appendices, which provide additional information about topics that were addressed during this ALRB Public Board Meeting. Each Appendix is referenced at the appropriate place within these Minutes.

OPEN SESSION

1. Call to Order
    - Acting Board Chair Ralph Lightstone called the meeting to order at 10:00 a.m.
    - Board Members Broad, Flores, Hall, and Lightstone present. Board Chair Hassid absent.
2. Approval of Minutes
    a. Approval of Minutes from Public Board Meeting, August 10, 2021
        - Board Member Hall moved to approve minutes.
        - Board Member Flores seconded the motion.
        - Motion approved 4-0.
    b. Corrections to April 13, 2021, Public Meeting Minutes – General Counsel did not state that ALRB has issued some worker visas in the past. ALRB has no authority to issue visas. Correcting this statement: "General Counsel Montgomery commented that she had signed certifications in connection with some visa applications in the past."
        - Board Member Broad moved to approve this correction to the April 13 minutes.
        - Board Member Flores seconded the motion.
        - Motion approved 4-0.
    c. Approval of Minutes from Regional Directors Meeting, August 10, 2021.
        - Board Member Broad moved to approve minutes.
        - Board Member Hall seconded the motion.
        - Motion approved 4-0.
3. Acting Board Chair's Report – presented by Ralph Lightstone
    - Board Chair Victoria Hassid gave birth to a daughter, Olivia.
    - ALRB continues to protect the rights of farmworkers and to enforce regulations throughout the Covid-19 pandemic.
4. Executive Officer's Report on Elections, Unfair Labor Practice Complaints, and Hearings – presented by Santiago Avila-Gomez

    See Appendix A.
5. Litigation Report – presented by Todd Ratshin

    See Appendix B.

6. General Counsel's Report – presented by Julia Montgomery
    - Reported on hiring and recruitment for ALRB Oxnard, Salinas, Santa Rosa, and Visalia offices.
    - Reported on settlements, including back pay, reinstatements, notice readings, postings, and mailings in Fresno, Tulare, Santa Barbara, and Ventura Counties.
    - Reported on outreach events, including distribution of outreach materials, radio and TV interviews, and various training events.
7. Division of Administrative Services Report – presented by Brian Dougherty
    - Reported on State Budget, compensation, human resources, and facilities.
8. Legislation Report – presented by Todd Ratshin

    See Appendix C.

Ten-minute break at 10:28 a.m.

9. Regulations

    See Appendix D

    - Reports from the Regulations Subcommittee on Proposed Rulemaking Activity – presented by Board Member Barry Broad and Chief Board Counsel Todd Ratshin.
    - Board Member Broad summarized specific proposed regulations changes.
        - Gendered Language:
            - References to him/her would change to non-binary, to be replaced with person's title.
            - Board Member Hall moved to proceed with formal rulemaking for the gender-neutral language regulation.
            - Board Member Flores seconded.
            - Motion approved 4-0.
            - Formal rulemaking will be held until the entire proposed regulations package is finalized.
        - Mandatory Mediation and Reconciliation (MMC):
            - Proposed regulations to govern MMC cases, consistent with Labor Code section 1164.10, supplementary MMC law from 2019
            - One public comment was received.
            - Board Member Hall moved to proceed with formal rulemaking.
            - Board Member Flores seconded.
            - Motion approved 4-0.
            - Formal rulemaking will be held until the entire proposed regulations package is finalized.

- Cannabis
    - Public comments were received.
    - Board Member Broad moved to return this proposal to the Regulations Subcommittee, for the subcommittee to add proposed changes from United Food and Commercial Workers (UFCW), and to set a timeline for completing these revisions to this proposed regulation.
    - Board Member Flores seconded.
    - Motion approved 4-0.
    - Formal rulemaking will be held until the changes are made and the entire proposed regulations package is finalized.
- Filing and Service regulation
    - Requires e-filing by represented parties, and provides a choice of paper filing or e-filing by unrepresented parties.
    - Removes requirement to file multiple paper copies with Board.
    - Board Member Hall moved to proceed with formal rulemaking for the filing and service regulation.
    - Board Member Flores seconded.
    - Motion approved 4-0.
    - Formal rulemaking will be held until the entire proposed regulations package is finalized.

- Unfair Labor Practice (ULP)
    - Charging party would remain anonymous during an investigation, but would be disclosed if and when a complaint is issued.
    - ULP charge would be deemed dismissed if no complaint is issued within 12 months after filing of ULP charge.
    - New post-complaint Case Management Conference (CMC) requirement.
    - Comments received from ALRB staff and stakeholders.
    - Board Member Broad moved to return this proposed regulation to the Regulations Subcommittee, for reconsideration and modification.
    - Board Member Flores seconded the motion.
    - Motion approved 4-0.
    - Formal rulemaking will be held until the entire proposed regulations package is finalized.

- Representation (Elections)
  - Adds a timeframe for impounding ballots.
  - Add telephone numbers and emails to employee contact information.
    - Public comment: Requiring employers to provide employee cell phone numbers and email addresses to ALRB investigators, raises privacy concerns.
  - Notice of Intent to Organize would no longer require a prior Notice of Intent to Take Access.
  - Board Member Broad moved to proceed with formal rulemaking.
  - Board Member Flores seconded.
  - Motion approved 4-0.
  - Formal rulemaking will be held until the entire proposed regulations package is finalized.
- Comments received from ALRB staff. See Appendix E and F.

10. Personnel
    - None
11. Public Comment
    - None
12. Announcements
    - Regional Directors Meeting is at 2:00 p.m. today.
    - Next Public Board Meeting is on December 14.
    - No new business.
13. Adjourn Meeting
    - Member Broad moved to adjourn the meeting.
    - Member Flores seconded the motion.
    - Motion approved, 4-0.
    - Meeting adjourned at 12:43 p.m.

APPENDIX A:
EXECUTIVE SECRETARY'S REPORT

STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

AGRICULTURAL LABOR RELATIONS BOARD OFFICE OF THE EXECUTIVE SECRETARY 1325 J STREET, SUITE 1900-B
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

ALRB PUBLIC MEETING
EXECUTIVE OFFICER'S REPORT
ELECTIONS, UNFAIR LABOR PRACTICE COMPLAINTS, AND HEARINGS

DATE: October 12, 2021
TO: Agricultural Labor Relations Board
FROM: Santiago Avila-Gomez, Executive Secretary

ELECTION ACTIVITY

None.

COMPLAINTS and MAKEWHOLE SPECIFICATIONS

---------- ***Complaint*** ----------

1. *Guess Cattle Co., LLC,* Case No. 2020-CE-008-VIS (Livestock; Tulare County, CA)

---------- ***Makewhole Specification*** ----------

1. *Rincon Pacific, LLC,* Case No. 2014-CE-044-SAL (40 ALRB No. 4)

---------- ***Settled*** ----------

1. *Mark Bettinsoli,* Case No. 2019-CE-012-VIS & 2020-CE-005-VIS (parties entered into informal unilateral settlement agreement [October 5, 2021])
2. *Sun Pacific Farming Cooperative, Inc.,* Case No. 2020-CE-010-VIS (parties entered into informal bilateral settlement agreement [August 13, 2021])
3. *Braden Farms,* Case No. 2020-CE-018-VIS (parties entered into informal bilateral settlement agreement [August 6, 2021])

---------- ***Withdrawn*** ----------

1. Dominguez Farms, LLC and Mann Packing Co., Inc., Case No. 2017-CE-033-SAL et al.

(October 12, 2021)
2. *Eat Sweet Farms, LLC,* Case No. 2016-CE-027-SAL (September 23, 2021)
3. *San Miguel Produce, Inc.*, Case No. 2018-CE-062-SAL (September 20, 2021)
4. *Yergat Packing Company, Inc.*, Case No. 2019-CE-015-VIS (August 23, 2021)

HEARINGS and ADMINISTRATIVE LAW JUDGE DECISIONS

No hearings were held and no Administrative Law Judge decisions were issued.

BOARD DECISIONS

No Board decisions issued.

ADMINISTRATIVE ORDERS and PENDING MATTERS

1. Lily's Green Garden, Inc. (2021) ALRB Admin. Order No. 2021-07 (Order to Show Cause Why General Counsel's Request for Subpoena Enforcement Should Not Be Granted).

APPENDIX B:
LITIGATION REPORT

STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

AGRICULTURAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1325 J STREET, SUITE 1900
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

ALRB PUBLIC MEETING
LITIGATION REPORT

DATE: October 12, 2021

TO: Agricultural Labor Relations Board

FROM: Todd M. Ratshin, Chief Board Counsel

This report discusses updates and developments that have occurred in litigation matters involving the Board since its August 10, 2021, meeting.

Federal Court

► ***Cedar Point Nursery and Fowler Packing Co., Inc. v. Hassid, et al.***, **U.S. District Court, Eastern District of California, Case No. 1:16-cv-00185-NONE-BAM**

Summary: On remand after the United States Supreme Court held the Board's access regulation effects a taking of the growers' property and remanded the case for further proceedings. (*Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063.)

Status: On September 1, 2021, the district court entered the parties' final stipulated judgment in this case. This litigation now is final.

APPENDIX C:
LEGISLATIVE REPORT

STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

AGRICULTURAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1325 J STREET, SUITE 1900
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

ALRB PUBLIC MEETING
LEGISLATIVE REPORT

DATE: October 12, 2021

TO: Agricultural Labor Relations Board

FROM: Todd M. Ratshin, Chief Board Counsel

This report provides updates on legislative activity affecting the Agricultural Labor Relations Act or the Agricultural Labor Relations Board since the Board's August 10, 2021, meeting.

Assembly Bill No. 616 (Asm. Mark Stone - D)

This bill was introduced on February 12, 2021, and is sponsored by the United Farm Workers of America.

The bill was read a second time in the Senate on August 16, and a third time on August 26, after which it was approved by the Senate in a 24-11 vote. On September 1, the Assembly concurred in the Senate amendments in a 52-19 vote. It was enrolled and presented to the Governor on September 8. On September 22, the Governor vetoed the bill. His veto message is available at https://www.gov.ca.gov/wp-content/uploads/2021/09/AB-616-9.22.21.pdf.

This bill would have allowed agricultural employees to select a labor organization as their exclusive bargaining representative through a representation ballot card election as an alternative to conducting a secret ballot election as provided under current law. This bill also would have added new Labor Code section 1162 requiring an employer to post an appeal bond as a condition of seeking judicial review of any order providing monetary relief to agricultural employees or a labor organization.

The full text of the bill, and further information on it are available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB616.

APPENDIX D:
REPORT OF THE REGULATIONS SUBCOMMITTEE ON PROPOSED RULEMAKING ACTIVITY

STATE OF CALIFORNIA — Gavin Newsom, *Governor*

AGRICULTURAL LABOR RELATIONS BOARD

1325 J STREET, 19th FLOOR
SACRAMENTO, CA 95814
(916) 894-6810
FAX (916) 653-8750
Internet: www.alrb.ca.gov

To: Members, Agricultural Labor Relations Board

From: Barry Broad and Ralph Lightstone

Re: Regulations Subcommittee Report

Date: April 7, 2021

As directed by the Board, the Regulations Subcommittee has solicited input from both the public and ALRB staff regarding proposed changes to our regulations.

After reviewing the suggestions, we recommend the Board authorize the subcommittee to proceed with the process of developing a regulatory package that the Board can consider for formal promulgation at a future public meeting.

Specifically, we would suggest developing regulatory proposals in the following areas.

Technical Changes

1. Correct typographical errors.
2. Modify regulations to achieve gender-neutral wording.

Filing of Pleadings and Service of Process Generally

1. Eliminate outdated methods of filing and service (telegrams, mailgrams, etc.)
2. Require parties to provide email addresses on pleading captions.
3. Eliminate requirements that parties file multiple hard copies of pleadings that are filed.
4. Require parties represented by attorneys to file electronically.
5. Allow unrepresented parties the option to file electronically.
6. Permit electronic signatures on filings

Filing of Charges

1. Allow a charging party the option to request that the General Counsel protect their identity from disclosure during an investigation.

Dismissal of a charge

Allow the General Counsel to review the dismissal of a charge by the Regional Director.

Investigation of a charge by General Counsel

Allow the General Counsel to issue an investigative subpoena for testimony of a witness under oath.

1. Allow the General Counsel to issue a limited number of interrogatories during an investigation.
2. Allow the General Counsel to file a Request for Particulars regarding a respondent's answer to a charge.
3. Require parties subject to a subpoena duces tecum or request for documents to maintain a privilege log.

Issuance of a Complaint

Establish a time limit for the General Counsel to issue a complaint after an unfair labor practice charge has been filed, subject to a motion for an extension of time for just cause. Once the time limit has passed, the charge would be deemed dismissed.

Post-Complaint Procedures and ALJ Hearings

Require mandatory settlement conferences in unfair labor practice proceedings.

1. Require a party seeking an extension of time to file pleadings or motions to provide a declaration stating the position of the other party or if the other party was unavailable to communicate its position.
2. Require mandatory case management conferences in all cases to be heard before an ALJ.
3. After a hearing has commenced, extend the authority of an ALJ to grant a continuance from two days to a maximum of ten business days.

Interlocutory Appeals to the Board

1. Establish the standard to be applied by the Board to determine whether to grant special permission to appeal an interlocutory ruling of an Administrative Law Judge or of the Executive Secretary.

Enforcement of a Subpoena in Superior Court

1. Where the Board has approved a General Counsel request to apply to superior court to enforce a subpoena, either the General Counsel or the Board itself may file with the Superior Court.

Representation Proceedings

1. Allow electronic signature of a representation petition filed with an ALRB regional office.
2. Clarify that a security guard shall be deemed a person who may accept service of a representation petition on behalf of an employer.

3. Specify the circumstances or conduct which would justify the blocking of an election or require the impounding of ballots.
4. Specify that agricultural employers shall maintain accurate records of employee names, home addresses, cellular and landline telephone numbers, and email addresses and that such information shall be made available to the General Counsel for investigatory purposes and shall be included in the "Excelsior" list that is made available to a labor union seeking to represent agricultural employees.

Cannabis Industry Specific Regulations

1. Develop regulations that implement and make enforceable Labor Peace Agreements between an agricultural employer and labor union, entered into pursuant to applicable provisions of the Business and Professions Code.
2. Where state or federal law regulating the cannabis industry mandates video surveillance of a workplace, establish a procedure which guarantees employees access to a location free of such surveillance for the purpose of meeting with union representatives.

Supplemental Mandatory Mediation and Conciliation (MMC)

1. Establish regulations governing the supple mental MMC Process.

AGRICULTURAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1325 J STREET, SUITE 1900
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

DATE: September 22, 2021

TO: Agricultural Labor Relations Board

CC: Santiago Avila-Gomez, Executive Secretary

FROM: Ralph Lightstone, Board Member
Barry Broad, Board Member

RE: Regulatory Proposals – Cannabis

Below is a draft regulation based on the Regulations Subcommittee's recommendations approved by the Board at the April 13, 2021, public meeting. Changes are reflected in underline (new language) and strikethrough (deletions) formats.

CANNABIS (NEW CHAPTER 9.5)

To make clear that violations of a labor peace agreement may give rise to unfair labor practice allegations: To add new regulation 20951 to state:

§ 20951. Labor Peace Agreements

(a) An agricultural employer licensed to engage in the cultivation of cannabis as provided in the Medicinal and Adult-Use Cannabis Regulation and Safety Act, Business and Professions Code section 26000 et seq., and who is required to enter into a labor peace agreement as defined in subdivision (x) of Business and Professions Code section 26001, may enter into labor peace agreements with more than one labor organization seeking to represent an appropriate bargaining unit of agricultural employees.

(b) An agricultural employer shall not discriminate against a labor organization in terms of providing access to its employees where two or more labor organizations seek to represent the same bargaining unit of employees and shall treat similarly situated labor organizations the same; provided, however, that no labor organization has been certified pursuant to the provisions of Chapter 5 of the Act (Labor Code section 1156 et seq.) as the exclusive representative of the employer's agricultural employees.

(c) Allegations that a party has failed or refused to enter into a labor peace agreement, has discriminated against a labor organization where two or more labor organizations seek to represent the same bargaining unit of employees, or that a party has violated the terms of an existing labor peace agreement may be subject to an unfair labor practice charge where it is asserted such conduct has violated any applicable provisions of Labor Code sections 1153 or 1154.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1153 and 1154, Labor Code; Sections 26001 and 26051.5, Business and Professions Code.

AGRICULTURAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1325 J STREET, SUITE 1900
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

DATE: September 22, 2021

TO: Agricultural Labor Relations Board

CC: Santiago Avila-Gomez, Executive Secretary

FROM: Ralph Lightstone, Board Member
Barry Broad, Board Member

RE: Regulatory Proposals – Mandatory Mediation and Conciliation

---

Below is a draft regulation based on the Regulations Subcommittee's recommendations approved by the Board at the April 13, 2021, public meeting. Changes are reflected in underline (new language) and strikethrough (deletions) formats.

MANDATORY MEDIATION AND CONCILIATION PROCEEDINGS (CHAPTER 4)

To provide applicable rules to govern supplemental mandatory mediation and conciliation proceedings under Labor Code section 1164.10:

To implement the provisions of subdivisions (b) and (c) of Labor Code section 1164.10, add new regulation 20410 to state:

§ 20410. Supplemental Mandatory Mediation and Conciliation.

(a)(1) A request for referral to supplemental mandatory mediation and conciliation pursuant to subdivision (b) of Labor Code section 1164.10 shall identify the specific provisions of the collective bargaining agreement set forth in a mediator's report previously ordered into effect by the Board that the requesting party alleges have become outdated or moot as a result of the passage of time during the course of judicial review proceedings. The request must include reference to the article and section numbers, if any such numbers have been assigned, and headings of each contract provision for which supplemental mediation is requested, as well as the contract language for each such provision.

(2) Before requesting referral to supplemental mediation, a party first must communicate its intention to do so to the other party at least five (5) days before submitting such a request to the Board. This rule does not prohibit a party from providing such notice before judicial review proceedings are concluded. This prior notice must identify the provisions for which the requesting party intends to seek supplemental mediation and must seek to obtain the other party's position concerning each provision. When filing a request for referral to supplemental mediation with the Board, the requesting party must attest in a written declaration that it has complied with the provisions of this subdivision and state, if available or known, the other party's position concerning each provision subject to the request for supplemental mediation.

(3) No request for supplemental mediation shall operate to stay or delay the parties' implementation of all other provisions of a collective bargaining agreement previously ordered into effect by the Board and not encompassed in the request.

Within five (5) days of service of a request for supplemental mediation, the other party to the collective bargaining agreement set forth in a mediator's report previously ordered into effect by the Board may file an answer to the request. The answer shall respond separately to each provision for which supplemental mediation is requested.

The Board shall issue an order concerning a request for supplemental mediation within 10 days after a timely answer is, or could have been, filed. The Board may grant or deny a request for supplemental mediation in full or in part.

Where the Board has ordered the parties to supplemental mediation and the mediator who presided over the parties' earlier mediation proceedings is unavailable or if the parties cannot agree on a different mediator, either party may request the Board obtain from the State Mediation and Conciliation Service a new list of nine (9) mediators to be furnished to the parties.

(e)(1) Each party shall provide to the mediator and serve on the other party, either personally or electronically, its position on each of the provisions subject to supplemental mediation no later than 10:00 a.m. the business day before the supplemental mediation is scheduled to commence. However, in the event the mediation cannot be held within the time required by Labor Code section 1164.10(c), the mediator shall then have authority to determine the time in which the parties must provide to the mediator and serve on each other their positions on each provision subject to supplemental mediation.

The mediator shall preside at the supplemental mediation, shall rule on the admission or exclusion of evidence and on questions of procedure where the parties do not agree, and shall exercise all powers relating to the conduct of the supplemental mediation.

The parties shall have the right to be represented by counsel or other representative during supplemental mediation proceedings. The parties are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the hearing, but rules of evidence and of judicial procedure need not be observed. The testimony of witnesses shall be under oath. The failure of a party to appear or participate shall not prevent the mediator from filing a report with the Board that resolves all issues subject to the supplemental mediation.

The mediator and parties may go off the record at any time to clarify or resolve issues informally. Any communications taking place off the record shall be subject to the limitations on admissibility and disclosure provided by Evidence Code section 1119, subdivisions (a) and (c), and shall not be the basis for any findings or conclusions in the mediator's report.

All evidence upon which the mediator relies in writing the report required by section 1164.10(c) shall be preserved in an official record through the use of a court reporting service or, with the consent of both parties and approval of the mediator, by a stipulated record. The mediator shall cite evidence in the record that supports the mediator's findings and conclusions in resolving disputed terms subject to the supplemental mediation.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1164 and 1164.10, Labor Code.

AGRICULTURAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1325 J STREET, SUITE 1900
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

DATE: September 22, 2021

TO: Agricultural Labor Relations Board

CC: Santiago Avila-Gomez, Executive Secretary

FROM: Ralph Lightstone, Board Member
Barry Broad, Board Member

RE: Regulatory Proposals – Filing and Service Regulations

Below are draft regulatory changes and proposals based on the Regulations Subcommittee's recommendations approved by the Board at the April 13, 2021, public meeting. Changes are reflected in underline (new language) and strikethrough (deletions) formats. Note that a number of regulations proposed to be amended in other substantive respects also include filing and/or service provisions proposed to be amended in similar respects to those listed below. In such instances, proposals concerning such other regulations are reflected separately in the report covering the general subject matter to which the regulations pertain.

FILING AND SERVICE UPDATES

To eliminate requirements of filing multiple copies, outdated methods of service, and to require all represented parties to electronically file documents with the Board:

To amend regulation 20150 to state:

§ 20150. Format of Pleadings and Papers.

All papers not electronically filed with the Board shall be on white paper, 8 1/2 inches wide by 11 inches long~~, which shall be of at least 18 pound bond weight~~. In all filings, ~~M~~matter shall be ~~presented by typewriting~~typewritten, using not less than 12-point serif font~~or at least as large as pica type printing or other clearly legible reproduction process~~, and if not filed electronically shall appear on one side of each sheet only. All documents filed with the Board shall identify and be signed by the party or representative filing the document, contain the ~~sender's~~party's or the representative's address,~~ and~~ telephone number, and email address, and designate the title of the case, including any case number assigned by the Board. All documents filed with the Board shall use single 22.75 spacing to align with line numbers when prepared on pleading paper or otherwise be prepared with ~~space~~

~~and a half~~1.5 or double ~~specing~~spacing, except for the identification of party or representative, the title of case, footnotes, and quotations. ALRB forms and petitions may be completed by hand, provided the handwriting is legible. Handwritten declarations will be accepted where it would be unduly difficult to provide typewritten ones.

Whenever declarations which are not in English are presented for filing and service, they shall, whenever possible, be accompanied by a proposed English translation.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.4(a), 1156.3~~(a), (c)~~, 1156.7(c), (d), 1160.2, 1160.3 and 1160.5, Labor Code.

* * * * * * * * * * *

To amend regulation 20155 to state:

§ 20155. Signing of Petitions, Pleadings, Motions, Applications, Requests, Responses, Briefs and Other Papers.

Every pleading, petition, motion, application, request, response, brief, or other paper filed with the Board and every request for discovery or particulars and any responses thereto, shall be signed by the attorney or other representative of the party, or, if the party is not represented, ~~it shall be signed~~ by the party or by one of its officers or partners. T~~h~~e signature of the attorney, other representative, party, officer, or partner may be handwritten or electronic and constitutes a certification by the signer that ~~he or she~~the signer has read the petition, pleading, motion, application, request, response, brief, or other paper, that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.4(a), 1156.3~~(a), (c)~~, 1156.7(c), (d), 1160.2, 1160.3 and 1160.5, Labor Code.

* * * * * * * * * * *

To amend regulation 20160 to state:

§ 20160. Place of Filing and Number of Copies to be Filed; Requirement of Electronic Filing for Represented Parties.

(a) For parties who are not represented by counsel or other representative:

(1) Papers presented for consideration by the executive secretary, an

administrative law judge, an investigative hearing examiner or the Board itself shall be filed in the offices of the Agricultural Labor Relations Board in Sacramento. ~~A party shall submit an original and six (6) copies of all papers, other than hearing exhibits.~~

(~~b~~2) Papers presented for consideration by the general counsel shall be filed in the office of the general counsel in Sacramento. ~~A party shall submit an original and two (2) copies.~~

(~~c~~3) Papers ~~which these regulations~~ required to be filed at a regional office shall be filed in the regional office having jurisdiction of the matter. ~~A party shall submit an original and two (2)~~ ~~copies.~~

(4) Parties who are not represented by counsel or other representative may file documents electronically pursuant to section 20169 but are not required to do so.

(b) Parties represented by counsel or other representative shall file documents with the Board electronically pursuant to section 20169.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.4(a), 1156.3~~(a), (c)~~, 1156.7(c), (d), 1160.2, 1160.3 and 1160.5, Labor Code.

* * * * * * * * * *

To amend regulation 20162 to state:

§ 20162. Appearance Before the Board.

To facilitate the service of papers upon the parties and their attorneys or representatives, the executive secretary shall maintain an appearance list containing the name, address ~~and~~, telephone number, and email address for each attorney or representative of a party and for each unrepresented party, and shall make this information available upon request. Accordingly, each party, attorney, or representative of record, shall either (i) include ~~his or her~~their address ~~and~~, telephone number, and email address on the initial pleading ~~he or she files~~filed with the Board or the executive secretary and ~~serves~~served on the other parties and the appropriate regional office, or (ii) file with the executive secretary and serve on the other parties and the appropriate regional office a notice of appearance containing ~~his or her~~their address ~~and~~, telephone number, and email address. The attorney or representative of a party or any unrepresented party shall immediately notify the executive secretary and the other parties of any change of address ~~or~~, telephone number, or email address.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.3, 1151.4(a), 1156.3~~(a), (c)~~, 1156.7(c), (d), 1160.2, 1160.3 and 1160.5, Labor Code.

* * * * * * * * * *

To amend regulation 20164 to state:

§ 20164. Service of Papers by the Board or on the Board.

All papers filed by the Board or any of its agents shall be served, together with a copy of a proof of service, on the attorney or representative of each party and on each unrepresented party ~~either (i) personally, by leaving a copy at the principal office, place of business, or, if none, at the residence of the person(s) required to be served, or (ii) by registered or certified mail, with return receipt requested, addressed to the principal office, place of business or, if none, to the residence of the person(s) required to be served, together~~ in accordance with section 20169 with an appropriate proof of service. All papers filed by a party with the Board, the executive secretary, an administrative law judge, an investigative hearing examiner, any regional office of the Board, or the general counsel, ~~may be filed in accordance with any of the methods prescribed above, with a certificate of mailing, or by deposit with a common carrier promising overnight delivery~~shall be in accordance with the provisions of sections 20160, 20166, and 20169.

Service need only be made at one address of a party, or attorney or representative of a party and only to one attorney or representative of each party. Proof of ~~S~~service shall be established by a written declaration under penalty of perjury, setting forth the name and address of each party, attorney or representative served and the date and manner of their service. The Board or the party shall retain the original proof of service.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.3, 1151.4(a), 1156.3~~(a), (c)~~, 1156.7(c), (d), 1160.2, 1160.3 and 1160.5, Labor Code.

* * * * * * * * * *

To amend regulation 20166 to state:

§ 20166. Service on Others of Papers Filed with the Board.

Whenever a party files papers with the Board, the executive secretary, an administrative law judge, an investigative hearing examiner, any regional office of the Board, or the general counsel, it shall serve the same, together with a copy of a proof of service, on the attorney or representative of each party and on each unrepresented party in the same manner as set forth in sections 20164 and 20169, with the exception of an unfair labor practice charge, which, in accordance with section 20206, must be served personally or by a method that includes a return receipt. Service need only be made at one address of an unrepresented party or an attorney or representative of a party and to only one attorney or representative of each party.

(a) Service on other parties shall be made prior to, or simultaneously with, the filing with the Board, and proof of such service shall be attached to the papers when filed with the Board. Service shall be proven by means of written declaration signed under penalty of perjury, setting forth the name and address of each unrepresented party, attorney or representative of a party served and the date and manner of service.

(b) No proof of service will be required when papers are served by one party on another at the hearing when the fact of such service is stated on the record and in the presence of the party being served, or ~~his or her~~the party's attorney or representative of record.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.3, 1151.4(a), 1156.3~~(a), (c)~~, 1156.7(c), (d), 1160.2, 1160.3 and 1160.5, Labor Code.

* * * * * * * * * *

To repeal regulation 20168.

~~§ 20168. Provisions for Use of Facsimile Machines and Expedited Service.~~

~~(a) In lieu of the methods of service provided for above, the Board or any of its agents may serve papers on parties and parties may file papers with the Board or any of its agents and serve them upon other parties by means of facsimile ["FAX"] machine under the following conditions:~~

~~(1) The total length of the document(s) to be filed and/or served at any one time is no more than fifteen (15) pages. This means multiple documents concerned with the same matter -for example, a motion, supporting declarations, points and authorities, and proof of service -are to be considered together in computing the fifteen (15) page limit.~~

~~(2) The format and content of the document transmitted shall comply with section 20150 and the specific requirements of any other section of these regulations applicable to the particular matter involved.~~

~~(3) Each document so transmitted shall contain the FAX number of the sender and the sender's telephone number.~~

~~(4) For a document to be considered received on the day in question, transmission must have begun prior to 4:00 p.m. on that date.~~

~~(5) As soon as possible after transmission, but no later than 5:00 p.m. on the next business day, the sending party shall file the original and the required number of copies with the Board and serve copies on each party in the manner provided for in section 20166, and shall provide a proof of service to that effect.~~

~~Where service is effected by the Board, copies shall be served on each party in the manner provided in section 20164 along with proof of service to that effect.~~

~~(b) To the extent possible, all other parties will be served by FAX with any document filed by FAX, and the FAX transmission shall include a proof of service indicating the method of service on each party. For those parties who cannot be served by FAX, some other expedited form - mailgram, telegraph, overnight mail - may be utilized and the FAX proof of service shall so indicate. Parties filing papers who do not have an available FAX machine may file with Board and serve copies on the other parties by one of the expedited methods described above, and shall so indicate on their proof of service.~~

~~(c) The unexcused failure to comply with the above conditions shall be grounds for striking or refusing to consider the FAXed document(s) involved.~~

~~(d) In order to facilitate prompt processing and consideration of filings, the Executive Secretary may require that certain filings be by facsimile transmission.~~

~~Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.3, 1151.4(a), 1156.3(a), (c), 1156.7(c), (d), 1160.2, 1160.3 and 1160.5, Labor Code.~~

* * * * * * * * * *

To amend regulation 20169 to state:

§ 20169. Provisions for Use of Electronic Filing and Service of Documents.

(a) ~~In lieu of the methods of service provided for above, t~~The<u>Parties represented by counsel or other representative shall file and serve documents electronically. Parties who are not represented by counsel or other representative are not required to file electronically but may do so; however, by electronically filing a document in a proceeding before the Board an unrepresented party agrees to file all further documents in the proceeding electronically and agrees to accept service of documents in the case electronically. The</u> Board or any of its agents<u> shall file and serve all documents electronically, except that parties who are not represented by counsel or other representative and who have not electronically filed any document with the Board shall be served by other non-electronic means.</u>~~may serve papers on parties and parties may file papers with the Board or any of its agents and serve them on other parties by means of electronic mail [email] under the following conditions~~ <u>The following rules apply to electronic filings in Board proceedings</u>:

(1) <u>“Electronic filing” refers to the act of filing a document with the Board via the “efile@alrb.ca.gov” address. A link to this address and further information is available on the Board’s website at <https://www.alrb.ca.gov/e-file/>. The subject line of an email to the Board’s efiling address shall state the name of the case and case number, if one has been</u>

assigned, and the title of the document being submitted for electronic filing.

(2) Parties may file documents electronically at any time. However, documents electronically filed after 5:00 p.m. on a business day, or at any time on a nonbusiness day, will be deemed filed on the next regular business day.

(3) All documents electronically filed must be in portable document format (PDF) and be text searchable. When possible, electronic bookmarking should be used for the first page of the document and all tables, sections, headings, and subheadings within a document.

(4) Electronically filed documents must be paginated consecutively using arabic numerals only (1, 2, 3, etc.) beginning with the first page so that the document pagination matches the electronic page counter for the electronic document. The caption page, table of contents, table of authorities, and any proof of service included within an electronically filed document will not be counted by the Board in determining whether a filing complies with the page number limits set forth in sections 20282 or 20370.

(5) Documents filed electronically shall not exceed 25 MB in file size. Documents larger than 25 MB in file size may be split into multiple files to be submitted separately. Pagination in documents that must be split into multiple files shall remain consecutive. For example, the page numbering in the second part of a file divided into two parts shall continue where the page numbering of the first part stopped.

~~All documents may be served by email except for unfair labor practice charges and representation petitions.~~

~~(2) Electronic service of a document is authorized only when a party has agreed to accept service electronically in that action. A party indicates that the party agrees to accept electronic service by:~~

~~(A) Serving a notice on all parties that the party accepts electronic service and filing the notice with the Board. The notice must include the email address at which the party agrees to accept service; or~~

~~(B) Electronically filing any document in a case with the Board. The act of electronic filing is evidence that the party agrees to accept service of documents related to that case at the email address the party has furnished to the Board.~~

(6) The file name of any document electronically filed ~~by email~~ must be in the following format: Year (followed by a dash) month (followed by a dash) day (followed by ~~two~~one space~~s~~) followed by the ~~name~~title of the document from the caption on the face page of the document, which may be abbre~~v~~iated. For example, a document filed by email on March 12, 2016, would be named "2016-

03-12 Respondent's Exceptions to the Decision of the Administrative Law Judge,." or "2016-03-12 Resp Excepts to ALJ Dec" or using similar easily identifiable abbreviations.

(b) Whenever "service" is required by the regulations, service of electronically filed documents shall be on all parties to the proceeding and ~~may~~ be effected by copying (i.e., "cc") all such other parties on the electronic filing email to <efile@alrb.ca.gov>, except that any unrepresented parties shall be served by non-electronic means. Unfair labor practice charges must be served in accordance with sections 20166 and 20206 and representation petitions must be served in accordance with section 20300(f). Documents filed ~~by email~~electronically must include a copy of a proof of service. ~~Where service is effected by the Board, copies shall also be served on each party in the manner provided for in section 20164 along with proof of service to that effect.~~ For the exchange of documents not required to be filed, such as requests for discovery or particulars subject to sections 20235-20237, electronic service may be effected by email to the counsel or representative of a party.

(c) ~~The multiple copy requirements of section 20160, Place of Filing and Number of Copies to be Filed, are waived whenever documents are electronically served or filed.~~

(d) ~~In order to facilitate prompt processing and consideration of filings, the Executive Secretary may require that certain filings be by email.~~

(e) Once a document filed ~~by email~~electronically is received by the Board and has been determined to have met requirements of subdivision (a)~~(5) and (6)~~, a confirmation email will be sent to the filing party's email address on file by the close of the next business day.

(d) Where electronic filing of a document is not feasible due to file size or technical problems associated with the document or filing, a party may request permission from the executive secretary, or the administrative law judge if one has been assigned to the case, to file and serve the document through non-electronic means.

~~(f) The Board's website (www.alrb.ca.gov) contains a link to the email address to be used for filing documents electronically.~~

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.3, 1151.4(a), 1160.2, 1160.3 and 1160.5, Labor Code.

* * * * * * * * * *

To amend regulation 20170 to state:

§ 20170. Computation of Time Periods.

(a) The date of service shall be the day when the matter served is deposited in the mail or with a courier providing overnight delivery, delivered in person, or transmitted electronically pursuant to section ~~20168 and~~ 20169 ~~of these regulations~~.

(b) In computing time periods prescribed by these rules, the ~~day of the mailing~~ date of service as defined in subdivision (a) or other event which starts the time period running is not counted. The last day of the time period is included unless it falls on a Saturday, Sunday or a State or Federal legal holiday as defined in Government Code section 6700, in which case the time period expires on the next business day. Where a time period prescribed is less than seven days, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation.

(c) Whenever a time period begins to run from the time of service of a document on a party and such service is made by mail, ~~three~~five days shall be added to the prescribed period for response. If service is by a courier providing overnight delivery, two business days shall be added to the prescribed period for a response. No days are added to the prescribed period for a response when service is effected personally or electronically.

(~~c~~d) Except as provided in section ~~20168(a)(5) and~~ 20169(a)(4~~2~~), documents required to be filed with the Board must be received by the Board by 5:00 p.m. on the last day of the time period unless mailed by registered or certified mail postmarked by that last day, or deposited by the last day with a common carrier promising overnight delivery.

(d) ~~In case of fax transmission, the time period shall begin to run upon service of the document in the manner provided for in section 20168(a)(5).~~

(e) ~~In case of email transmission, the time period shall begin to run upon service of the document in the manner provided for in section 20169.~~

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.3, 1151.4(a), 1156.3~~(a), (c)~~, 1156.7(c), (d), 1160.2, 1160.3 and 1160.5, Labor Code.

* * * * * * * * * *

To amend regulation 20240 to state:

§ 20240. Motions Before Prehearing and After Hearing.

(a) With the exception of motions to correct the transcript, all motions made before the prehearing conference or after the close of hearing shall be filed with the executive secretary in accordance with sections 20160 ~~and 20166 and~~through 20169. Responses shall be filed within seven (7) days after the filing of the motion, or within such time as the executive secretary may direct, as provided in sections 20160~~, 20168 and~~through 20169. No further pleadings shall be filed in support of or in opposition to the motion unless requested by the executive secretary or assigned administrative law judge.

(b) The executive secretary may rule on motions or forward them for ruling to the assigned administrative law judge. The ruling shall be in writing with reasons stated, and shall be served on all parties or, at the discretion of the administrative law judge, it may be incorporated into ~~his or her~~the administrative law judge's decision.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

* * * * * * * * * *

To amend regulation 20241 to state:

§ 20241. Motions During or After Prehearing Conference and Before Close of Hearing.

(a) With the exception of requests for continuances made prior to the opening of hearing and requests for continuances in excess of ~~two~~10 days made during the hearing, motions and applications made at or after prehearing conference and prior to close of the hearing shall be directed to the assigned administrative law judge, and may be made orally on the record or in writing. If written, the motion, shall be filed and served in accordance with sections 20160~~, 20166 and~~through 20169; provided, however, ~~that a duplicate original shall be filed with the administrative law judge, and,~~ if the hearing is in progress, copies shall be personally served on each party or its representative.

(b) Any party may respond to a written motion orally, at the prehearing conference or hearing, or in writing so long as a response is made within five (5) days after filing of the motion, or such time as the administrative law judge may direct. Written responses shall be served on each party or its representative. No further pleadings shall be filed in support of or in opposition to the motion unless requested by the administrative law judge.

(c) The administrative law judge shall rule on all motions either orally on the record or in writing, as may be appropriate. Rulings shall state the reasons therefor and, if in writing, shall be incorporated in the decision or separately

served on all parties or their representatives and on the executive secretary.

(d) The administrative law judge may conduct a telephone conference call among the parties to hear argument or to rule on any motion before him/her. When the conference call method is utilized, upon request of any party, or at the direction of the administrative law judge, the conference call shall be reported or recorded by appropriate means as determined by the administrative law judge, and shall become part of the official record of the proceeding. As an alternative to a telephone conference call, the administrative law judge may utilize any other means of electronic communication which the Board has designated as appropriate.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

* * * * * * * * * *

To amend regulation 20246 to state:

§ 20246. Witnesses and Depositions.

Witnesses shall be examined orally under oath, except that after the issuance of a complaint, testimony may be taken by deposition, if the witness will be unavailable for the hearing within the meaning of Evidence Code ~~S~~section 240, or where the existence of special circumstances makes it desirable in the interest of justice.

(a) Applications to take depositions shall be in writing, and shall set forth the reasons why such depositions should be taken, the name of the witness, the matters about which the witness is expected to testify, and the time and place proposed for the taking of the deposition. Such application shall be served on the opposing party not less than 10 days prior to the time when it is desired that the deposition be taken.

(b) If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner. Depositions so taken may be used to the same extent as depositions taken pursuant to the requirements of this section.

(c) The application shall be made to the executive secretary ~~in triplicate~~ and served ~~pursuant to section 20166 up~~on ~~the~~all other parties.

(d) The executive secretary may order the deposition taken in the exercise of ~~his or her~~the executive secretary's discretion.

(e) The deposition shall be taken at a time and place and before a person designated by the executive secretary.

(f) The rules governing the manner of taking of depositions shall be the same as those set forth in the Code of Civil Procedure ~~S~~sections 2016 and following. Where these regulations conflict with the Code of Civil Procedure, these regulations shall govern.

(g) The administrative law judge assigned to preside at the hearing on the complaint shall rule upon the admissibility of the deposition or any part of it. All rulings on objections to the taking of the deposition or any part of it shall be reserved to the administrative law judge at the hearing on the complaint.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1160.2, Labor Code.

* * * * * * * * * * *

To amend regulation 20249 to state:

§ 20249. Prehearing Conference.

(a) Prior to any hearing held pursuant to ~~S~~section 20260, a pre-hearing conference shall be held. The conference shall be conducted by an administrative law judge and shall be attended by the parties or their representatives, who shall be familiar with the case and shall have authority with respect to all matters on the agenda, including settlement.

(b) Prior to the pre-hearing conference the parties shall confer in person or by telephone in an attempt to resolve or define any issues relating to compliance with the provisions of Giumarra Vineyards, 3 ALRB No. 21, or with outstanding subpoenas. Where full agreement cannot be reached, they shall agree on such matters as are reasonably susceptible to agreement, and on the time, place and manner of their compliance with such understandings and agreements. In addition, they shall also discuss and attempt to reach agreement on:

(1) Those facts which are not reasonably disputable;

(2) The identification, authentication and/or admissibility of all documents which are to be offered in evidence;

(3) Additional evidence to be subpoenaed if no agreement can be reached for its voluntary exchange;

(4) Anticipated evidentiary issues, including issues of privilege and work product;

(5) A firm estimate of hearing time; and

(6) Amendments, dismissals, consolidations, ~~severances~~severances, and transfer.

(c) The agenda for the pre-hearing conference shall include:

(1) A thorough discussion of the issues and positions of the parties, including a

careful explanation of the factual and legal theories relied upon. For any theory which is novel or unusual, parties should be prepared, or may be required, to provide the administrative law judge with offers of proof and/or appropriate legal authorities.

(2) Resolution by agreement or ruling on any remaining disputes concerning compliance with the provisions of Giumarra Vineyards, 3 ALRB No. 21, and any outstanding subpoenas.

(3) Agreement for the handling of facts not reasonably subject to dispute by stipulation or otherwise.

(4) Discussion and, where possible, resolution of anticipated evidentiary issues, including, insofar as possible, the resolution of issues involving the authentication, admissibility and relevance of documentary and physical evidence. As provided in ~~S~~section 20250(i), witnesses appearing pursuant to subpoenas duces tecum or notices to produce may be sworn and examined for the limited purpose of identifying, authenticating or marking for identification and lodging with the administrative law judge documentary or physical evidence. The parties shall also address themselves to the handling and resolution of anticipated future subpoenas or discovery.

(5) Consideration of issues involving consolidation, severance, transfer, amendment and dismissal.

(6) A firm and mutual estimate of the length of hearing, including any specific scheduling problems and the need for interpreters.

(7) Consideration of utilizing the settlement procedures of Section 20248.

(8) Any other matters as may aid in expediting the hearing or contribute to the just, efficient and economical disposition of the case.

(d) The failure to fully and adequately prepare for pre-hearing conference, including the failure to attempt in good faith to confer beforehand, and resolve problems and issues, as provided in (b) above, or failure to comply with a prehearing conference order, shall be grounds for the imposition of such sanctions, inferences or other orders, then or during the hearing, as the administrative law judge may deem appropriate.

(e) The pre-hearing conference may be continued or recessed as may be necessary. At any time after assignment to the case, the administrative law judge may, either on the administrative law judge's ~~his/her~~ own motion or upon request by a party, conduct a conference among the parties preparatory to the pre-hearing conference by telephone conference call or by any other electronic means which the Board has designated as appropriate; likewise, the administrative law judge may, where appropriate, conduct the initial pre-hearing conference or a continued or recessed pre-hearing conference by telephone conference call or by any other electronic means which the Board has designated as appropriate. When the conference call method is utilized, upon

request of any party, or at the direction of the administrative law judge, the conference shall be reported or recorded by appropriate means as determined by the administrative law judge, and shall become part of the official record of the proceeding.

(f) At or after any prehearing conference held pursuant to this section, an order shall be entered and served on all parties reciting the action taken. Absent a showing of good cause for modifying or deviating from the terms of the order, it shall control the subsequent course of the proceeding. ~~It may be served on the parties by FAX, expedited mail or other means as the administrative law judge may determine.~~ Should any party believe the order to be inaccurate or incomplete, that party shall promptly file a motion to correct the order with the administrative law judge as provided in section 20241.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

* * * * * * * * * *

To amend regulation 20262 to state:

§ 20262. Administrative Law Judges; Powers.

The hearing shall be conducted by an administrative law judge designated by the Board, unless the Board or any member of the Board presides. The duty of the administrative law judge is to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice as set forth in the complaint or amended complaint. Between the time ~~he or she~~the administrative law judge is designated and the time the case is transferred to the Board the administrative law judge shall, subject to the limitations specified elsewhere in these regulations, have authority, with respect to assigned cases ~~assigned to him or her~~:

(a) To administer oaths and affirmations;

(b) To grant applications for subpoenas;

(c) To rule upon petitions to revoke subpoenas or notices to appear or produce, and to impose sanctions for failure to comply with appropriate subpoenas or notices to appear or produce;

(d) To require and/or rule upon offers of proof;

(e)~~(1)~~ To regulate the course of the hearing, including the power, consistent with section 20800, to exclude from the hearing any person who engages in disruptive or abusive conduct.
~~(2)~~ In excluding any person from a hearing, the administrative law judge shall state on the record the specific facts upon which the order of exclusion is based and submit to the Board a written statement of the specific facts which constitute the misconduct. The statement of facts ~~with original and six copies~~ shall be filed

with the executive secretary and served on all parties to the hearing. The person excluded from a hearing may file a written response to the administrative law judge's written statement submitted to the Board. A ruling whereby any person is ejected from a hearing may be immediately appealed to the Board pursuant to section 20242.;

(f) To conduct and regulate the course of pre-hearing conferences, settlement conferences, and hearings, to inquire fully into the basis for settlement submitted to them for recommendation, and to approve settlements as provided in section 20298.;

(g) To dispose of procedural requests, motions, or similar matters; to dismiss complaints or portions thereof;

(h) To approve a stipulation voluntarily entered into by the parties;

(i) To make and file decisions in conformity with the Act and these regulations;

(j) To call, examine, and cross-examine witnesses and to require the production of and introduce into the record documentary or other evidence;

(k) To request the parties at any time during the hearing or pre-hearing conference to state their respective positions concerning any issue in the case or theory in support thereof either orally or in writing;

(l) To request that the Board seek a court order to compel compliance with a subpoena;

(m) To issue protective orders as may be appropriate and necessary; and

(n) To carry out the duties of administrative law judge as provided or otherwise authorized by these regulations or by the Act.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1145, 1160.2 and 1160.3, Labor Code.

* * * * * * * * * * *

To amend regulation 20282 to state:

§ 20282. Exceptions to the Administrative Law Judge's Decision.

(a) Within 20 days after the service of the decision of the administrative law judge, or within such other period as the executive secretary may direct, any party may file with the executive secretary for submission to the Board ~~the original and seven copies of~~ exceptions to the decision or any other part of the proceedings, with ~~an original and seven copies of~~ a brief in support of the exceptions, accompanied by proof of service, as provided in sections 20160~~, 20164, and 20166~~ through 20169.

(1) The exceptions shall state the ground for each exception, identify by page number that part of the administrative law judge's decision to which exception is taken, and cite to those portions of the record which support the exception.

(2) A brief in support of exceptions which exceeds 20 pages shall contain a table of contents and a table of authorities cited. No brief shall exceed 50 pages in length, except that upon prior request the executive secretary may permit longer briefs when necessary. The table of contents and the table of authorities cited shall not be counted as part of the 50 pages. If a post-hearing brief is incorporated by reference, the portions incorporated shall be identified by page number and shall count as part of the 50-page limitation on the brief in support of exceptions.

(b) Within ten (10) days following the filing of exceptions or within such other period as the executive secretary may direct, a party opposing the exceptions may file with the executive secretary for submission to the Board~~, an original and (7) seven copies of~~ a brief answering the exceptions. An answering brief that exceeds 20 pages shall contain a table of contents and a table of authorities cited. This brief shall not exceed 50 pages in length, except that upon prior request the executive secretary may permit longer briefs when necessary. The table of contents and the table of authorities cited shall not be counted as part of the 50 pages. The answering brief shall be filed and served in accordance with sections 20160~~, 20166 and~~through 20169.

(c) No further brief shall be filed except as requested by the Board. No extensions of time will be given to file exceptions or briefs except in extraordinary circumstances. Unless permission to file a brief exceeding the page limitations specified in ~~subsection~~ subdivision (a)(2) and (b) above has been obtained from the executive secretary in advance, only the first 50 pages of exceptions briefs and answering briefs shall be accepted and filed. Anything in excess of 50 pages ~~will be returned to the party and~~ will not be considered by the Board.

(d) No matter not included in the exceptions filed with the Board may thereafter be raised by any party before the Board.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1160.3, Labor Code.

* * * * * * * * * *

To amend regulation 20286 to state:

§ 20286. Board Action on Unfair Labor Practice Cases.

(a) If no exceptions are filed, the decision of the administrative law judge shall automatically become final 20 days after the date on which the decision of the administrative law judge is served on the parties. Unless expressly adopted by the Board, the statement of reasons in support of the decision shall be without precedent for future cases.

(b) Where one or more parties take exception to the decision of the administrative law judge, the Board shall review the applicable law and the evidence and determine whether the factual findings are supported by a preponderance of the evidence taken.

(c) A party to an unfair labor practice proceeding before the Board may, because of extraordinary circumstances, move for reconsideration or reopening of the record after issuance of the Board's final decision and order, in accordance with the provisions set forth in section 20160(a)(1), and served on the parties, in accordance with the provisions set forth in sections 20166~~, 20168~~ and 20169. The motion may alternatively request reconsideration and reopening. Such motions shall be in writing and state with particularity the grounds for reconsideration or reopening. Any motion pursuant to this section shall be filed within 10 days after the service of the Board's final decision and order. A motion filed under this section shall not operate to stay the decision and order of the Board.

(d) A party to an unfair labor practice proceeding may, because of extraordinary circumstances, move for reconsideration of the record after issuance of any Board action other than a final decision and order, in accordance with the provisions set forth in section 20286(c), except that the motion and supporting documents must be filed within five days after service of the non-final Board action.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2, and 1160.3, Labor Code.

* * * * * * * * * *

To amend regulation 20305 to state:

§ 20305. Contents of Petition for Certification; Construction.

(a) Contents--A petition for certification shall contain the following, in addition to those requirements set forth in Labor Code Section 1156.3(a):

(1) The name and address of the petitioner and its affiliation, if any.

(2) The name, location, and mailing address of the employer.

(3) The nature of the employer's agricultural commodity or commodities encompassed by the unit.

(4) A description of the bargaining unit which the petitioner claims is appropriate. If the unit sought encompasses less than all the agricultural employees of the employer, the petition shall include a specific and complete description of the unit, including its geographical limits, and a statement of inclusion or exclusion of processing or packing sheds or cooling facilities and the location of such sheds or facilities.

(5) The approximate number of employees currently employed in the alleged unit.

(6) Whether a strike is in progress for the unit involved, and if so, the approximate number of employees participating and the date such strike commenced.

(7) A statement of which languages, if any, other than Spanish and English, the petitioner requests be included on the ballots in any election conducted pursuant to said petition and the approximate number of employees who can effectively read the requested language and no other language in which the ballot would otherwise be printed.

(8) Name, ~~and~~ telephone number, and email address of one representative of the filing party authorized to make agreements with the Board and the parties and to accept service of papers.

(b) A petition shall be liberally construed to avoid dismissal. In the event that petitioner fails to provide the information required by this section, thereby preventing the regional director from determining the existence of reasonable cause to believe that a bona fide question of representation exists, the regional director may, after consultation with the parties, dismiss the petition and notify the parties of the reasons thereof.

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

* * * * * * * * * *

To amend regulation 20325 to state:

§ 20325. Intervention.

(a) Subject to the provisions of Labor Code ~~S~~section 1156.3(b), any labor organization which seeks to intervene in an election proceeding based on a petition filed under Labor Code ~~S~~section 1156.3(a) must file with the regional office of the Board in which the petition is being processed a written petition for intervention. In order to be filed, an intervention petition must be accompanied by proof of service of the intervention petition on the employer and on the original petitioner. Service of an intervention petition shall be in accordance with the provisions of ~~S~~section 20300(fe) of these regulations. Upon the filing of an intervention petition, the regional director shall notify the employer and petitioner that an intervention petition has been filed.

(b) A petition for intervention shall include: (1) the name and address of the intervening union and its affiliation, if any; (2) the name, ~~and~~ telephone number, and email address of a representative of the intervenor authorized to make agreements with the Board and the parties and to accept service of papers; and (3) a statement of what language or languages other than English or Spanish are required for the election, if any.

(c) If the intervenor contends that the geographical scope of the unit sought in the election petition is incorrect or challenges any of the allegations in the petition made pursuant to Labor Code ~~S~~section 1156.3(a), the intervenor shall raise these contentions in the petition for intervention.

(d) The petition shall also be accompanied by evidence of employee support for the intervention by at least 20 percent of the employees in the bargaining unit. The regional director shall determine administratively whether there exists an adequate showing of employee support to permit intervention. If the regional director determines that the showing of interest is inadequate, the deficiency may be corrected up to 24 hours prior to the time of the election. Sections 20300(ji)(4) and (5) with respect to challenges to showing of interest and reviewability of the regional director's determination on showing of interest shall be applicable also to showing of interest by an intervenor.

(e) In computing the 24-hour period for intervention provided for in Labor Code ~~S~~section 1156.3(b) and the 24-hour period permitted for correcting deficiencies in showing of interest as provided by subsection (d) above, Sundays and legal holidays shall be excluded. If the time for filing an intervention petition elapses at a time when the regional office is closed, such petition may be timely filed during the first hour of business on the next business day. When any election is scheduled prior to the opening of business on a Monday or on the day following a legal holiday, a potential intervenor shall notify the regional director of its intention to intervene during regular business hours, and the regional director shall make arrangements to receive the petition at a reasonable hour no later than 24 hours prior to the opening of the polls.

(f) Any labor organization which, prior to the pre-election conference, files with the appropriate regional office a written statement of intention to intervene in a particular election but has not yet filed its intervention petition accompanied by an adequate showing of interest, may send one representative to a pre-election conference which may take place before the period for intervention expires.

Note: Authority cited: Section 1144, Labor Code; Reference: Section 1156.3, Labor Code.

* * * * * * * * * *

To amend regulation 20363 to state:

§ 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~~the regional director's 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 through~~, 20164, 20166, 20168 and~~ 20169. 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.

(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.

(c) In serving declarations and supporting documents on other parties pursuant to subdivision (a) above, the 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 at an evidentiary hearing. A 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) The record before the Board shall consist of: the election petition, the notice and direction of election, the tally of ballots, the evidence and argument submitted by the parties, and the declarations and other evidence forwarded by the regional director.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1156.3 and 1157, Labor Code.

* * * * * * * * * *

To amend regulation 20365 to state:

§ 20365. Post-Election Objections Procedure.

(a) Time for filing. Within five days after an election, any person may, pursuant to Labor Code ~~S~~section 1156.3(e), file with the Board a signed petition asserting that allegations made in the election petition filed pursuant to Labor Code ~~S~~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~~ subdivisions (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 ~~S~~section 20372(c).

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

(b) An objections petition shall be filed electronically pursuant to section 20169 or, for an unrepresented party who has not consented to electronic filing, 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 shall consist of ~~the original and six copies of~~ the following: the petition pursuant to Labor Code ~~S~~section 1156.3(e); a detailed statement of facts and law relied upon, as required by ~~subsection~~ subdivision (1) below, or declarations in support of the petition, as required by ~~subsection~~ subdivision (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~~ subdivision (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 ~~S~~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

the 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 shall dismiss any objections petition or any portion of such petition which does not satisfy the requirements of ~~subsections~~ subdivisions (a), (b), and (c).

(e) With respect to any portion of the petition not dismissed pursuant to ~~subsection~~ subdivision (d) above, the Board 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) 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.

(f) Where the objections satisfy the requirements of ~~subsections~~ subdivisions (a), (b), and (c) and there are material factual issues in dispute, the Board shall direct an investigatory hearing pursuant to ~~S~~section 20370. The hearing shall be strictly limited to the issues set forth in the 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 as authorized by Labor Code section 1156.3, subdivision (f), or an Iinvestigative Hhearing Eexaminer (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).

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1156.3, Labor Code.

* * * * * * * * * *

To amend regulation 20370 to state:

§ 20370. Investigative Hearings -Types of Hearings and Disqualification of IHE's.

(a) The executive secretary shall appoint an investigative hearing examiner to conduct an investigative hearing on objections filed pursuant to section 20365, on challenges pursuant to section 20363, on extensions of certifications pursuant to section 20382, on petitions seeking clarification of a bargaining unit or amendment of a certification pursuant to section 20385, on petitions to revoke certifications on alleged violations of access rights pursuant to section 20900, or on any other representation matter. No person who is an official or an employee of a regional office shall be appointed to act as an investigative hearing examiner. An investigative hearing examiner is subject to disqualification on the same basis and in the same manner as provided in section 20263 for administrative law judges in unfair labor practice proceedings. If the investigative hearing examiner assigned to a hearing becomes unavailable for any reason at any time between the beginning of the hearing and the issuance of the decision, the executive secretary may designate another investigative hearing examiner for such purpose.

Investigative Hearings -Powers of IHE's

(b) The parties shall have the right to participate in such investigative hearing as set forth in Labor Code sections 1151, 1151.2, and 1151.3. Any party shall have the right to appear at such investigative hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses and to introduce into the record documentary evidence, except that participation of any party shall be limited to the extent permitted by the investigative hearing examiner, and provided further, that documentary evidence shall be submitted in duplicate. The investigative hearing examiner shall have the duty to inquire fully into all matters in issue and to obtain a full and complete record. In furtherance of this obligation, the investigative hearing examiner shall have all of the powers that an administrative law judge has in an unfair labor practice proceeding as enumerated in section 20262, where applicable.

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.

Investigative Hearings -Adverse Inference

(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted, if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing. Irrelevant and unduly repetitious evidence shall be excluded. The refusal of a witness at a hearing to answer any question which has been ruled to be proper may be grounds for striking the portions of the testimony of such witness on related matters and/or for making such inferences as may be proper under the circumstances, unless the refusal to answer is privileged.

Investigative Hearings -Time of Hearings and Continuance During Hearing

(e) Hearings may be held any time that the investigative hearing examiner considers appropriate. Hearings shall continue from day to day until completed or recessed. Once a hearing has commenced, continuances or recesses will not be granted except in extraordinary circumstances, and then only by order of the executive secretary or, for recesses of two (2) working days or less, by order of the investigative hearing examiner.

(f) The hearing shall be recorded by an appropriate means to be designated by the executive secretary. In any case where the investigative hearing examiner is directed to make a tape recording of the hearing, copies of the tape recording shall be made available to any party at cost. Unless otherwise directed by the executive secretary, the tape recording will not be transcribed.

(g) After any party to a representation hearing has completed the presentation of its evidence, any other party, without waiving its right to offer evidence not yet produced in support of its own position, may move for decision in its favor in whole or in part in the same manner and subject to the same inferences, standard, and review as provided in section 20243 for motions for decision in unfair labor practice cases.

(h) At the close of the taking of testimony, any party may request a reasonable period for closing oral argument on the record. Post-hearing briefs shall not be filed unless the investigative hearing examiner determines that, because of the complexity of the issues, ~~he or she requires~~ further briefs are required as an aid to decision, and then only upon such terms as the investigative hearing examiner shall direct, but shall, in any event, conform to the limitations contained in Section 20370(j)(2).

(i) Within a reasonable time after the close of taking of testimony or within a specific time as may be determined by the executive secretary, the investigative hearing examiner shall issue an initial decision including findings of fact, conclusions of law, a statement of reasons in support of the conclusions, and a recommended disposition of the case. In the absence of timely exceptions, as set forth in ~~subsection~~subdivision (j) below, such decision shall become the decision of the Board. Unless expressly adopted by the Board, the statement of reasons in support of the decision shall have no effect as precedent.

(j) Within 10 days after service of the investigative hearing examiner's decision, or within such other period as the executive secretary may direct, a party may file with the executive secretary the ~~original and six copies of the~~ exceptions and a brief in support of the exceptions to the investigative hearing examiner's decision accompanied by proof of service on all parties pursuant to section 20166.

(1) The brief in support of the exceptions shall state the grounds for each exception, shall identify by page number that part of the investigative hearing examiner's decision to which exception is taken, and shall cite to the portions of the record which support the exception. If the record of the hearing consists of a tape recording made by the investigative hearing examiner, exceptions to findings of fact shall be accompanied by a transcription of those portions of the tape recording relied upon in addition to the references to the location number on the tape where the cited portions occur.

(2) A brief in support of exceptions which exceeds 20 pages shall contain a table of authorities cited. This brief shall not exceed 50 pages in length, except that upon prior request the executive secretary may permit longer briefs where necessary to address factual or legal issues. ~~Each page shall be 8 1/2 inches wide by 11 inches long and shall contain 28 double- spaced lines of pica type.~~ If post-hearing briefs are incorporated by reference, the portions incorporated shall be identified by page number and shall count as part of the 50-page limitation on the exceptions brief. Unless permission to file a brief exceeding the page limitations specified above has been obtained from the executive secretary in advance, only the first 50 pages of briefs in support of the exceptions shall be accepted and filed. Anything in excess of 50 pages ~~will be returned to the party and~~ will not be considered by the Board.

(3) Within seven days following the filing of exceptions, or within such other period as the executive secretary may direct, a party opposing the exceptions may file ~~an original and six copies of~~ a brief in answer to the exceptions, not to exceed 50 pages in length. ~~Each page shall be 8 1/2 inches wide by 11 inches long and shall contain 28 double-spaced lines of pica type.~~ If post-hearing briefs are incorporated by reference, the portions incorporated shall be identified by page number and shall count as part of the 50-page limitation on the answering brief. The answering brief shall be accompanied by a proof of service on all other parties as required by section 20166. Unless permission to file a brief exceeding the page limitations specified above has been obtained from the executive secretary in advance, only the first 50 pages of briefs in answer to the exceptions shall be accepted and filed. Anything in excess of 50 pages ~~will be returned to the party and~~ will not be considered by the Board.

(k) In any case the Board may direct that the record, which shall include the hearing transcript or recorded tapes and all exhibits, be transferred directly to the Board for decision, accompanied by the report from the investigative hearing examiner, if any, and by such briefs from the parties as the Board may direct. If there is no conflict in the evidence to be offered at the hearing scheduled before the investigative hearing examiner, the parties may, where appropriate, file with the Board a stipulated set of facts and their briefs, and request permission to make oral argument concerning matters of law.

(l) Nothing contained in this section shall be construed as controlling a proceeding in which concurrent unfair labor practice charges under Chapters 4 and 6 of the Act have been consolidated with a representation proceeding under Chapter 5 of this Act. The procedures and rights of the parties in such a consolidated proceeding are set forth in Chapter 2 of these regulations covering unfair labor practice proceedings.

(m) The provisions of section 20250 with respect to issuance, service, revocation, and enforcement of subpoenas and notices to appear or produce shall apply to hearings conducted under this section, except that applications for subpoenas made prior to the hearing pursuant to section 20250(a) shall be filed with the appropriate regional director, and petitions to revoke subpoenas or notices which are made prior to the hearing pursuant to section 20250(b) should be filed with the executive secretary who shall refer them to the investigative hearing examiner. References in section 20250 to action by the administrative law judge or by the general counsel shall, for purposes of application of that section to proceedings under this section, be deemed to refer to actions of an investigative hearing examiner or the executive secretary respectively.

(n) The procedures for grants of immunity to witnesses set forth in section 20251 shall apply in representation cases, except that references in that section to action by the administrative law judge shall, for purposes of application of that section to proceedings in representation cases, be deemed a reference to actions of an investigative hearing examiner.

(o) The procedures set forth in section 20246 ~~of these regulations~~ shall apply to the taking of depositions of witnesses in representation cases, except that references in that section to action by the administrative law judge shall, for purposes of application of that section to proceedings in representation cases, be deemed to refer to actions of an investigative hearing examiner and references to the issuance of a complaint shall be deemed to refer to proceedings covered by this section.

(p) The procedures set forth in section 20274 ~~of these regulations~~ shall apply to the disclosure of statements of witnesses in representation cases, except that references in that section to action by the administrative law judge shall, for purposes of application of that section to proceedings in representation cases, be deemed to refer to actions of an investigative hearing examiner.

(q) In any case in which a hearing is conducted pursuant to this section, the record on review by the Board shall consist of: the petition or petitions pursuant to Labor Code sections 1156.3(a) or 1156.7(c) or (d), or the petition or petitions filed pursuant to sections 20363, 20365, 20382, or 20385~~ of these regulations~~, any petitions for intervention pursuant to Labor Code section 1156.3(b), the notice and direction of election, the tally of ballots, the order setting the matter for hearing, motions, responses, rulings, the official record of the hearing, exhibits, stipulations, depositions, post-hearing briefs, the decision of the investigative hearing examiner, and the exceptions, cross-exceptions or opposition to exceptions, along with supporting briefs as provided in section 20370(l).

(r) An attorney or representative who has made a general appearance for a party in a proceeding governed by this Chapter may withdraw as follows: (i) upon a written consent executed by both the attorney or representative and by the client or the attorney or representative who will substitute into the proceedings, which shall be filed with the executive secretary; or (ii) by the order of the executive secretary or the Board, if the matter is then pending before it, upon the application of the attorney or representative, after notice from one to the other. Withdrawal or substitution shall be permitted unless to do so would result in serious prejudice to the other parties to the proceeding. Any application or consent filed pursuant to (i) or (ii) above shall contain the address of the client or new attorney or representative for the service of subsequent pleadings and papers. Any application filed pursuant to (ii) above shall, without compromising the confidentiality of the attorney-client relationship, if any, state in general terms the reason for the application.

(s) The provisions of sections 20240 and 20241 with respect to motions, rulings and orders, and section 20242 with respect to appeals therefrom shall apply to all motions filed with the executive secretary prior to or after the close of hearing, and the procedure set forth in section 20241 shall apply to all motions filed with the investigative hearing examiner from the opening to the close of the hearing.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1142(b), 1145, 1151, 1151.3, 1156.3~~(a), (c)~~ and 1156.7(c), (d), Labor Code.

* * * * * * * * * *

To amend regulation 20375 to state:

§ 20375. Runoff Elections.

(a) Except as provided below, in any election where no party receives a majority of the valid votes cast, a runoff election between the two parties receiving the greatest number of votes shall be held within seven days from the date of the initial election. All persons eligible to vote in the initial election shall be eligible in the runoff election.

(b) Whenever challenged ballots determine whether or not a runoff will be necessary, or determine who will be parties to the runoff election, the regional director may proceed as follows if it appears that an expedited procedure will enable the Board to conduct a runoff election during the same period of peak employment:

(1) The regional director may conduct an investigation and issue a report on challenged ballots within 48 hours or such additional time as extraordinary circumstances necessitate, file the report with the executive secretary, and contact the parties by telephone or ~~telegram~~ <u>email</u> to inform them that the report is available to them.

(2) Any party wishing to except to recommendations in the regional director's report shall file such exceptions with the executive secretary and serve a copy in the appropriate regional office within 48 hours from issuance of the report. Exceptions need not be accompanied by a brief but whether or not a brief is submitted the basis for each exception must be stated in detail.

(3) Upon the expiration of the 48-hour period for filing exceptions, the regional director shall consider any exceptions which have been filed and may reconsider ~~his or her~~the recommendations and prepare and issue a brief supplemental report setting forth any changes in the original resolution. The regional director shall then open and count the challenged ballots in accordance with ~~his or her~~the recommendations, prepare and issue an amended tally and notify the parties whether a runoff election is required, and if so, which parties will appear on the ballot. The runoff election shall be conducted as soon as practicable after issuance of the amended tally, at a time and place designated by the regional director.

(c) If the ballot in the initial election provided for three or more choices, and, after determinative challenged ballots are resolved, none of the choices receives a majority of the votes cast, and

(1) the number of votes cast is equally divided among the several choices, or

(2) the same number of votes was cast for two choices, but that number is less than the number cast for the third choice, the regional director shall declare the initial election a nullity and set it aside. The regional director shall conduct another election within two days, and the ballot in that election shall contain the same choices as appeared on the ballot in the initial election. Only one such additional election may be held.

(d) In cases in which a runoff election is held, election objections filed pursuant to Labor Code ~~S~~section 1156.3(c) and ~~S~~section 20365 shall be filed within five days of the runoff election. If the regional director declares after the initial election that a runoff election appears necessary, but after resolution of challenged ballots finds that no runoff election should be held, objections to the initial election shall be due within five days from the determination that no runoff will be held. Any exceptions to the regional director's resolution of challenges under ~~subsection~~ subdivision (b) above may be filed as objections under section 20365. Any such objections shall be accompanied by the regional director's report or reports and any exceptions filed thereto, supplemented by a brief and evidence in support of the exceptions.

(e) Only one runoff election shall be held in any case. If a runoff election results in a second tie vote, the election shall be deemed void, and no certification of results shall issue. The provisions of Labor Code ~~S~~section 1156.5 shall not apply to bar the direction of a new election pursuant to a new petition after an election has been voided under this ~~subsection~~subdivision.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1156.3~~(c)~~ and 1157.2, Labor Code.

* * * * * * * * * *

To amend regulation 20382 to state:

§ 20382. Extension of Certification, Labor Code Section 1155.2(b).

(a) A labor organization certified under ~~S~~section 20380 may file a petition for extension of the certification not earlier than the 90th day nor later than the 60th day preceding the expiration of a 12-month period following the date of certification. The sole ground for the petition is that the labor organization has requested the employer to bargain, and the employer has failed to bargain in good faith.

(b) The petition for extension of certification shall be submitted under oath and contain the following:

(1) The date of certification;

(2) A description of the progress of negotiations between the labor organization and the employer, including, but not limited to, the requests made by the union to bargain, the dates of meetings between the labor organization and the employer, and the conduct that the labor organization claims constitutes a failure to bargain in good faith;

(3) Copies of documents and correspondence that support the description of the progress of the negotiations, if relevant; and

(4) The amount of time for which the labor organization requests the certification be extended.

(c) ~~An original and six copies of t~~The petition for extension of certification shall be filed with the executive secretary accompanied by proof of service on the employer pursuant to section 20166.

(d) An employer shall file a response to the petition for extension of certification within 10 days of service of the labor organization's petition. The ~~petition~~response shall be submitted under oath and contain a statement of the following:

(1) Whether the employer agrees with the labor organization's description of the progress of the negotiations;

(2) If not, the employer's description of the progress of the negotiations, along with any relevant documentation; and

(3) Whether the employer objects to an extension of the certification.

(e) ~~An original and six copies of t~~The response to the petition for extension of certification shall be filed with the executive secretary, along with proof of service on the labor organization. If the response is not filed within 10 days, the Board will rule on the petition alone.

(f) The Board shall either grant an extension of certification for a specified time following the end of the first twelve months after the original certification, deny the petition, or notice a hearing. Hearings noticed under this section shall be conducted according to the provisions of ~~S~~section 20370.

(g) The granting of a petition for extension of certification shall not constitute evidence that an unfair labor practice has been committed. A Board order extending a certification shall not be admissible in an action on an unfair labor practice proceeding under Labor Code ~~S~~section 1153(e).

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1155.2 and 1156.6, Labor Code.

* * * * * * * * * *

To amend regulation 20385 to state:

§ 20385. Clarification of Bargaining Unit; Amendment of Certification.

(a) A petition seeking clarification of an existing bargaining unit in order to resolve questions of unit composition which were left unresolved at the time of certification or were raised by changed circumstances since certification may be filed by a labor organization or by an employer where no question concerning representation exists. A petition seeking amendment of a certification to reflect changed circumstances, such as changes in the name or affiliation of the labor organization or in the site or location of the employer, may be filed by a labor organization or by an employer where no question concerning representation exists.

(b) A petition for clarification of an existing bargaining unit or for amendment of a certification shall contain:

(1) the name and address of the petitioner;

(2) the name and address of the employer, the certified bargaining representative, and any other labor organization which claims to represent any employees affected by the proposed clarification or amendment;

(3) a description of the existing certification, including job classifications of employees and location of property covered by the certification;

(4) a description of the proposed clarification or amendment and a statement of reasons why petitioner seeks clarification or amendment; and

(5) any other relevant facts.

(c) A petition under this section shall be filed in the regional office which conducted the election leading to certification, and petitioner shall serve, in the manner provided in sections 20160 and 20166, the executive secretary, all other parties, and any organization named in subsection (b)(2) above. The regional director shall conduct such investigation of the issues raised by the petition as ~~his or her~~the regional director deems necessar~~y. Thereafter the reg~~ional director shall issue to the Board a report containing ~~his or her~~the regional director's 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 and any organization named in subsection (b)(2) above. Where, after investigation, the regional director deems it appropriate, ~~he or she~~the regional director may, rather than issuing an investigative report, request permission from the executive secretary to issue a notice of hearing on the question of whether the unit clarification petition or the amendment of certification should be granted or denied. A copy of the notice of hearing shall be served on all parties. Such hearings will be in good accord with section 20370.

(d) The conclusions and recommendations of the regional director in the report provided for in subsection (c) above shall be final unless exceptions to the conclusions and recommendations are filed electronically pursuant to section 20169, or by an unrepresented party who has not consented to electronic filing by personal service on the executive secretary or by deposit in registered mail postmarked within five days following service upon the parties of the regional director's report~~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 t~~The exceptions shall be filed and shall be accompanied by ~~seven copies of~~ declarations and other documentary evidence in support of the exceptions. 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.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1142(b), 1156 and 1156.2, Labor Code.

* * * * * * * * * *

To amend regulation 20393 to state:

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

(a) A party to a representation proceeding may, because of extraordinary circumstances, move for reconsideration or reopening of the record, after the Board issues a decision or order in the case. A motion under this section must be filed with the Board within five days of service of the decision or order upon the party making the request, and served on the parties in accordance with the provisions set forth in ~~section 20160(a)(2), and served on the parties, in accordance with the provisions set forth in~~ sections ~~20166, 20168 and~~20164 through 20169. A motion for reconsideration or reopening of the record shall set forth with particularity the basis for the motion and legal argument in support thereof and shall be accompanied by proof of service of the motion and accompanying documents upon all parties ~~as provided in sections 20166, 20168 and 20169~~. Only one request for reconsideration of or to reopen the record for any decision or order will be entertained. A motion filed after the issuance of a decision of the Board may alternatively request reconsideration and reopening. A motion filed under this section shall not operate to stay the decision and order of the Board.

(b) Dismissal of a representation petition, cross-petition, or intervention petition by a regional director pursuant to section 20300(ih) may be reviewed by the Board pursuant to Labor Code section 1142(b), upon a written request for review filed by the party whose petition was dismissed. The request for review shall be filed with the Board within five days of service of the dismissal upon the party making the request. Requests for review of other delegated action reviewable under Labor Code section 1142(b), except those specifically provided for in ~~subsection~~ subdivision (b), ~~infra ,~~ shall also be filed with the board within five days of service of notice of the action for which review is requested. Such requests shall be filed ~~in accordance with the provisions set forth in section 20160(a)(2),~~ and served in accordance with the provisions set forth in sections 20160 through ~~20166, 20168 and 20169~~. The request shall set forth with particularity the basis for the request and shall be accompanied by ~~six copies of~~ the following:

(1) evidence that the aforementioned material has been served upon all parties pursuant to sections 20166~~, 20168~~ and 20169.

(c) In any case in which a request for review is filed pursuant to this section of a dismissal of a representation petition, cross-petition or intervention petition by a regional director, the record on review by the Board shall consist of: the petition pursuant to Labor Code Section 1156.3(a), the cross-petition or intervention petition where applicable, the regional director's dismissal letter, and the request for review and supporting evidence and briefs.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1142(b), 1156.3 and 1156.7, Labor Code.

(d) Review of any other actions of a regional director or ~~his or her~~ the regional director's agent pursuant to the powers which may be delegated ~~to him or her~~ under Labor Code ~~S~~section 1142(b) to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question of representation exists, and to direct an election shall be by means of a petition filed pursuant to Labor Code ~~S~~section 1156.3(e) and ~~S~~sections 20363, 20365 and 20370.

(e) The Board, in its discretion, may request a response from the opposing party or parties prior to granting or denying a request for review under ~~subsection~~ subdivision (a) above or a request for reconsideration under ~~subsection~~ subdivision (c) above. Where an opportunity for response is to be provided, the Board shall serve notice thereof upon all parties as provided in section 20164, and shall set a reasonable period within which the opposing party or parties may file a response. Unless the Board requests it to do so, the party initially requesting review or reconsideration may not submit any material in addition to the petition for review or for reconsideration and its supporting documents.

(1) the evidence and legal arguments which the party seeking review contends support the request;

(2) the regional director's notice of dismissal of the representation petition, or notice of other action reviewable under Labor Code section 1142(b), and statement of reasons therefor, where applicable; and

(3) the representation petition if the action to be reviewed concerns the dismissal of a representation, intervention, or cross-petition;

* * * * * * * * * **

To amend regulation 20400 to state:

§ 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, 20168~~ ~~and~~ through 20169. 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 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, 20168 and~~ through 20169. 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 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 1164, 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 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, 20168 and~~ through 20169. 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.

(d) 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.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1156.3, 1164, 1164.11 and 1164.12, Labor Code.

* * * * * * * * * *

To amend regulation 20401 to state:

§ 20401. Answer to Declaration.

(a) Within three (3) days of service of a declaration, the other party to the collective bargaining relationship (or alleged bargaining relationship) may file an answer to the declaration. The answer shall be served and filed in accordance with sections 20160~~, 20164, 20166, 20168 and~~ through 20169. The answer shall be signed under penaltȳ of perjury by an authorized representative of the filing party, and shall identify any statements in the declaration that are disputed. In addition, the answer shall be accompanied by any documentary or other supporting evidence. If it is claimed that the employer has not engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of the declaration seeking referral to mandatory mediation, payroll records sufficient to support the claim shall be submitted with the answer. Payroll records shall be submitted in electronic form if kept in that form in the normal course of business.

(b) All statements in a declaration that are not expressly denied in the answer shall be deemed admitted.

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

* * * * * * * * * * *

To amend regulation 20402 to state:

§ 20402. Evaluation of the Declaration and Answer.

(a) The Board shall dismiss any declaration that fails to include all of the requirements of section 20400, subdivision (a), (b), or (c), as applicable.

(b) If no answer to the declaration is timely filed, or if the answer admits the truth of all factual prerequisites to the validity of the declaration, the Board shall immediately issue an order directing the parties to mandatory mediation and conciliation and request a list of mediators from the California State Mediation and Conciliation Service, in accordance with Labor Code section 1164, subdivision (b).

(c) Where a timely filed answer disputes the existence of any of the prerequisites for referral to mediation, the Board shall attempt to resolve the dispute on the basis of the parties' filing and/or upon investigation. The Board shall issue a decision within 5 days of receipt of the answer either (1) dismissing the petition, or (2) referring the matter to mediation, or (3) scheduling an expedited evidentiary hearing to resolve any factual issues material to the question of the existence of any of the prerequisites.

(d) Where an evidentiary hearing is ordered by the Board pursuant to subdivision (c) above, the hearing shall be in accordance with the following procedures:

(1) Notice of hearing shall be served in the manner required by ~~S~~sections 20164 and 20169.

(2) Parties shall have the right to appear in person at the hearing, or by counsel or other representative, to call, examine and cross-examine witnesses, and to introduce all relevant and material evidence. All testimony shall be given under oath.

(3) The hearings shall be reported by any appropriate means designated by the Board.

(4) The hearing shall be conducted by a member(s) of the Board, or by an assigned ~~A~~administrative ~~L~~law ~~J~~judge, under the rules of evidence, so far as practicable; while conducting a hearing the ~~e~~ Board member(s) or ~~A~~administrative ~~L~~law ~~J~~judges shall have all pertinent powers specified in Section 20262.

(5) Requests for discovery and the issuance and enforcement of subpoenas shall be governed by the provisions of section 20406 ~~of these regulations~~, with the exception that references to “notice of mediation” shall mean notice of hearing, “mediator” shall mean the Board member(s) or assigned ~~A~~administrative ~~L~~law ~~J~~judges who will conduct the hearing, references to “mediation” shall mean the expedited evidentiary hearing provided for in this section.

(6) The assigned ~~A~~administrative ~~L~~law ~~J~~judge or member(s) of Board who conducted the hearing shall file a decision with the ~~E~~executive ~~S~~secretary within ten (10) days from receipt of all the transcripts or records of the proceedings. The decision shall contain findings of fact adequate to support any conclusions of law necessary to decide the matter. If the hearing was conducted by the full Board, the decision shall constitute that of the Board.

(A) Upon the filing of the decision, the ~~E~~executive ~~S~~secretary shall serve copies of the decision on all parties pursuant to section~~s~~ 20164 and 20169.

(B) Within ten (10) days after the service of the decision of the ~~A~~administrative ~~L~~law ~~J~~judge, or of less than the full Board, any party may file with the ~~E~~executive ~~S~~secretary for submission to the Board ~~the original and six (6) copies of~~ exceptions to the decision or any part of the proceedings, with ~~an original and six (6) copies of~~ a brief in support of the exceptions, accompanied by proof of service, as provided in sections 20160~~, 20166, 20168 and~~ through 20169. The exceptions shall state the ground of each exception, identify by page number that part of the decision to which exception is taken, and cite to those portions of the record that support the exception. Briefs in support of exceptions shall conform in all ways to the requirements of sections 20282(a)(2). The Board shall issue its decision within 10 days of receipt of the exceptions.

(7) Upon its resolution of the disputed facts, the Board either shall issue an order dismissing the declaration or an order directing the parties to mandatory mediation and conciliation and request a list of mediators from the California State Mediation and Conciliation Service, in accordance with Labor Code section 1164, subdivision (b).

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151, 1164, 1164.11 and ~~and~~ 1164.12, Labor Code.

* * * * * * * * * *

To amend regulation 20407 to state:

§ 20407. The Mediation and Conciliation Process.

(a) Mediation shall proceed in accordance with Labor Code section 1164, subdivisions (b), (c), and (d). The 30-day periods referred to in Labor Code section 1164, subdivision (c) shall commence on the date of the first scheduled mediation session, shall proceed for consecutive calendar days, and shall not include any pre-mediation conference. The 30-day timelines may be waived by mutual agreement of the parties and with the approval of the mediator. Premediation conferences may be scheduled at the discretion of the mediator.

(1) No later than seven (7) days after receipt of a Board order directing the parties to mandatory mediation and conciliation, and prior to their first discovery requests pursuant to section 20406 above, each party shall identify for the mediator those issues that are in dispute and those that are not in dispute, identify the standards which they propose to resolve the disputed issues, and provide agreed upon contract language for those issues not in dispute. ~~This informa~~tion shall be served on the other party immediately and on the mediator upon ~~his or her~~the mediator's selection. During the mediation, the parties shall provide the mediator with a detailed rationale for each of its contract proposals on issues that are in dispute, and shall provide on the record supporting evidence to justify those proposals. The failure of any party to participate or cooperate in the mediation and conciliation process shall not prevent the mediator from filing a report with the Board that resolves all issues and establishes the final terms of a collective bargaining agreement, based on the presentation of the other party.

(2) The mediator shall preside at the mediation, shall rule on the admission and exclusion of evidence and on questions of procedure and shall exercise all powers relating to the conduct of the mediation. All evidence upon which the mediator relies in writing the report required by section 1164, subdivision (d) shall be preserved in an official record through the use of a court reporting service or, with the consent of both parties and the approval of the mediator, by a stipulated record. The mediator shall cite evidence in the record that supports ~~his or her~~the mediator's findings and conclusions. The mediator shall retain the discretion to go off the record at any time to clarify or resolve issues informally. All communications taking place off the record shall be subject to the limitations on admissibility and disclosure provided by Evidence Code section 1119, subdivisions (a) and (c), and shall not be the basis for any findings and conclusions in the mediator's report.

(3) The parties shall have the right to be represented by counsel or other representative.

(4) The parties to the mediation are entitled to be heard, to present evidence and to cross- examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. The testimony of witnesses shall be given under oath.

(b) In determining the issues in dispute, the mediator may consider those factors commonly applied in similar proceedings, such as, but not limited to:

(1) The stipulations of the parties.

(2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer makes a plea of inability to meet the union's wage and benefit demands.

(3) Comparison of corresponding wages, benefits, and terms and conditions of employment in collective bargaining agreements covering similar agricultural operations with similar labor requirements.

(4) Comparison of corresponding wages, benefits, and terms and conditions of employment in comparable firms or industries in geographical areas with similar economic conditions, considering the size of the employer, the skills, experience, and training required of the employees, as well as the difficulty and nature of the work.

(5) The average consumer prices for goods and services, commonly known as the Consumer Price Index, and the overall cost of living in the area where the work is performed.

(c) The mediator shall issue ~~his or her~~ the mediator's report within twenty-one (21) days of the last mediation session. Upon completion of the mediator's report, the report shall be served on the parties and filed with the Board in accordance with sections 20164~~, 20168~~ and 20169. Upon the filing of the report, the mediator also shall transfer the official record of the proceeding to the Board.

(d) The issuance of any document signed by the mediator which reflects the determination of the issues in dispute and fixes the terms of a collective bargaining agreement shall be deemed a "report" pursuant to Labor Code sections 1164 through 1164.13, and these regulations.

(e) Where the parties agree to a collective bargaining agreement without the issuance of a mediator's report, as defined in subdivision (d), the parties shall notify the Board and submit a copy of the signed agreement pursuant to ~~Regulation~~section 20450.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1164, Labor Code.

* * * * * * * * * *

To amend regulation 20408 to state:

§ 20408. Board Review of the Mediator's Report.

(a) Within seven (7) days of the filing of first or second report by the mediator, either party may file a petition for review of the report. The petition shall be served and filed in accordance with sections 20160~~, 20164, 20166, 20168 and~~ through 20169. The petition shall be based on any one or more of the grounds set forth in Labor Code section 1164.3, subdivision (a) or subdivision (e). The petitioning party shall specify the particular provisions of the mediator's report for which it is seeking review, shall specify the specific grounds authorizing review, and shall cite the portions of the record that support the petition. In the event the petition is based on the grounds set forth in Labor Code section 1164.3, subdivision (e), the petitioning party may attach declarations that describe pertinent events that took place off the record, if necessary to establish the grounds for review stated in the petition.

(b) The Board shall issue a decision on the petition in accordance with Labor Code section 1164.3. Where the petition is based on the grounds specified in Labor Code section 1164.3, subdivision (e), and the Board

determines that there are material facts in dispute that are outside the official record of the mediation, the Board may order an expedited evidentiary hearing to resolve the dispute, to be conducted in accordance with the procedures set forth in section 20402~~ of these regulations~~.

(c) Where the Board orders additional mediation pursuant to Labor Code section 1164.3, subdivision (c), the mediation shall commence within thirty (30) days of the issuance of the Board's order, or as soon as practical.

Note Authority cited: Section 1144, Labor Code. Reference: Section 1164.3, Labor Code.

AGRICULTURAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1325 J STREET, SUITE 1900
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

DATE: September 22, 2021

TO: Agricultural Labor Relations Board

CC: Santiago Avila-Gomez, Executive Secretary Ralph

FROM: Lightstone, Board Member
Barry Broad, Board Member

RE: Regulatory Proposals – Procedural Provisions and Unfair Labor Practices

---

Below are draft regulatory changes and proposals based on the Regulations Subcommittee's recommendations approved by the Board at the April 13, 2021 public meeting. Changes are reflected in underline (new language) and strikethrough (deletions) formats.

RULES OF PRACTICE/PROCEDURE (CHAPTER 1.5)

To provide administrative law judges greater discretion to grant continuances of hearing dates:

To amend regulation 20190 to state:

§ 20190. Continuance of Hearing Dates.

(a) An initial hearing date will be scheduled as soon as a case is ready for presentation. Once that hearing date has been finalized as provided below, the case should proceed to hearing as scheduled. Hearing dates will be assigned so that all cases set for a particular date can proceed on that date. Finalized hearing dates should therefore be regarded by counsel as firm dates.

(b) When a notice of hearing issues for an unfair labor practice or representation case, the dates indicated in the notice of hearing and any scheduled prehearing conference, including any scheduled settlement conference in an unfair labor practice case, will be finalized unless the executive secretary receives a written communication within ~~ten~~ (10) days of the issuance of the notice of hearing, indicating that the parties have mutually agreed to a new hearing and/or prehearing date. It is the responsibility of the party objecting to the initial date(s) to contact the other parties and obtain their agreement for a modification. The objecting party is also responsible for communicating the new, agreed upon date(s) to the executive secretary.

(1) If a new date for the hearing and/or any scheduled settlement or prehearing conference is mutually agreed to and communicated to the executive secretary within the ten -day period, that date will be finalized by the issuance of a confirming notice of hearing.

(2) If the parties are unable to agree on a new date for the hearing and/or any scheduled settlement or prehearing conference, the objectingparty may submit a written request to the executive secretary within the ten -day period, with copies to the other parties, indicating the reasons the initial date(s) are objected to and requesting date(s) which are more convenient. The request will be treated as a motion to continue, and all parties will be contacted by telephone and given an opportunity to respond. No further pleading in support of or in opposition to the continuance shall be filed unless requested by the executive secretary. In ruling on the request, the executive secretary may grant the continuance to the date(s) requested, select other date(s), or retain the initial date(s). The executive secretary's ruling will be finalized by issuance of a confirming notice of hearing.

(3) If the dates set for the hearing and/or any scheduled settlement or prehearing conference in the initial notice of hearing are not objected to within the ten -day period, they will be finalized by the issuance of a confirming notice of hearing.

(4) In unusual situations where it is urgent that the hearing be held as soon as possible, (e.g., related court proceedings involving interlocutory relief), or when the agreed to dates would create scheduling conflicts, the executive secretary may decline to accept the dates mutually agreed to by the parties and instead select other dates.

(5) In computing the ten -day period, section 20170(b) allowing ~~three~~five additional days to respond to papers served by mail, shall not apply. The date(s) mutually agreed to must be communicated to the executive secretary within the ten -day period.

(c) Once the dates for the hearing and any scheduled settlement or prehearing conference have been finalized as provided in (b) above, the scheduled dates will not be subject to change unless extraordinary circumstances are established.

(1) The party seeking a continuance for extraordinary circumstances shall do so by written motion directed to the executive secretary with proof of service on all parties.

(2) The motion shall contain: (i) the dates presently assigned for hearing and any scheduled settlement or prehearing conference and the dates to which continuance is sought; (ii) the facts on which the moving party relies, stated in sufficient detail to permit the executive secretary to determine whether the conditions set forth in the applicable guidelines have been met; and (iii) the positions of all other parties or an explanation of any unsuccessful attempt made to contact a party or the circumstances excusing such attempt.

(3) Where required by this regulation or where appropriate under the circumstances, supporting declarations shall accompany the motion.

(4) Motions for continuance shall be made as soon as possible after the moving party learns the facts necessitating the motion. Except in emergencies, motions shall be received no less than five (5) calendar days prior to the scheduled hearing.

(5) Once a motion for continuance has been ruled on by the executive secretary, a motion based on the same grounds shall not again be requested at the hearing.

(6) Any party opposing a motion for continuance shall notify the executive secretary as soon as possible. Depending on the proximity to the hearing, the opposing party will be allowed to respond in writing or orally as the executive secretary may determine. Written responses shall be served on the other parties.

(7) Where there is agreement on the terms of a settlement but there is insufficient time to file a written continuance motion, the moving party may present it orally by telephone to the executive

secretary. The moving party shall thereafter promptly reduce the motion to writing and serve it on the executive secretary and the other parties.

(d) After the opening of hearing, continuances of up to ~~two working~~ten business days may be granted by the assigned administrative law judge or investigative hearing examiner upon oral motion for good cause. The record of the hearing shall reflect the reasons given for the request, the agreement or absence of agreement of the other parties to the hearing, the reasons given for the granting or denial of the motion, and the date, time and location to which the hearing is continued. After the opening of a hearing, ~~R~~requests for continuances for periods longer than ~~two~~ten ~~working~~business days shall be in writing directed to the executive secretary with proof of service on all parties. Such motions shall not be granted unless extraordinary circumstances are established. The executive secretary may delegate the authority to rule on such motions to the assigned administrative law judge. The procedures set forth in subsection (c) above shall be followed and the guidelines set forth in subsection (e), (f) and (g) below, shall apply.

(e) In ruling on a motion for a continuance of longer than ten working days, all matters relevant to a proper determination of the motions will be taken into consideration, including:

(1) The official case file and any supporting declaration submitted with the motion.

(2) The diligence of counsel in bringing the extraordinary circumstances to the attention of the executive secretary and opposing counsel at the first available opportunity and in attempting otherwise to meet those circumstances.

(3) The extent of and reasons for any previous continuances, extensions of time or other delay attributable to any party.

(4) The proximity of the hearing date.

(5) The condition of the hearing calendar.

(6) Whether the continuance may properly be avoided by the substitution of attorneys or witnesses, or by some other method.

(7) Whether the interests of justice are best served by a continuance, by proceeding to hearing, or by imposing conditions on the continuance.

(8) Any other facts or circumstances relevant to a fair determination of the motion.

(f) The following circumstances shall not constitute extraordinary circumstances warranting a continuance:

(1) The fact that all parties have agreed to continue a hearing which has already been set pursuant to a notice of hearing.

(2) Scheduling conflicts which could have been avoided by prompt action either during or after the ten -day period, or which can still be avoided by rescheduling.

(3) Circumstances which would normally constitute good cause, as described below, but which were known or should have been known to the requesting party prior to the expiration of the ten - day period or prior to the granting of any previous continuance.

(4) The willingness of the parties to enter into settlement negotiations. Continuances for settlement will only be granted to consummate a settlement, the basic terms of which have already been agreed to.

(g) The following circumstances will normally be considered extraordinary circumstances warranting the granting of a continuance; provided, however, that the conditions specified for each have been met:

(1) Unavailability of a witness only where: (i) the witness has been subpoenaed and will be absent due to an unavoidable emergency of which thatthe witness' counsel or representative did not know, and could not reasonably have known, when the hearing date was finalized or any previous continuance was granted; (ii) the witness will present testimony essential to the case, and (iii) it is not possible to obtain a substitute witness.

(2) Illness that is supported by an appropriate declaration of a medical doctor, or by bona fide representations of parties or their counsel or representative, stating the nature of the illness and the anticipated period of any incapacity under the following circumstances: (i) the illness of a party or of a witness who will present testimony essential to the case except that, when it is anticipated that the incapacity of such party or witness will continue for an extended period, the continuance should be granted on condition of taking the deposition of the party or witness in order that the hearing may proceed on the date set; with respect to such an essential witness, it must also be established that there is insufficient time to obtain a substitute witness; (ii) the illness of the hearing attorney or representative, except that the substitution of another attorney should be considered in lieu of a continuance depending on the proximity of the illness to the date of hearing, the anticipated duration of the incapacity, the complexity of the case, and the availability of a substitute attorney.

(3) Death of the hearing attorney or representative where, because of the proximity of such death to the date of hearing, it is not feasible to substitute another attorney or representative. The death of a witness only where the witness will present testimony essential to the case and where, because of the proximity of death to the date of hearing, there has been no reasonable opportunity to obtain a substitute witness.

(4) Unavailability of administrative law judge or investigative hearing examiner where there is no other available administrative law judge or investigative hearing examiner or where there is insufficient time for an otherwise available administrative law judge or investigative hearing examiner to become familiar with the case in time for the hearing. The executive secretary may act sua sponte in continuing a hearing pursuant to this subparagraph.

(5) Substitution of trial counsel or representative only where there is an affirmative showing that the substitution is required in the interests of justice, and there is insufficient time for the new counsel or representative to become familiar with the case prior to the scheduled hearing date.

(6) A significant change in the status of the case where, because of the addition of a named party or the need to amend the pleadings to add a new issue or allegation, a continuance is required in the interests of justice. The executive secretary may act sua sponte in continuing a hearing pursuant to this paragraph.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1142(b), 1156.3~~(c)~~, 1160.2 and 1160.5, Labor Code.

* * * * * * * * * * * * * * *

To require a party seeking an extension of time to file a document to include in its request the positions of the other parties:

To amend regulation 20192 to state:

§ 20192. Extensions of Time.

(a) Extraordinary circumstances do at times occur which prevent parties or their counsel or representative from complying with the time limits contained in the regulations or orders of the Board for the filing and service of papers. In those situations, parties, or their counsel or representatives, may apply for extensions of time by written motion directed to the executive secretary or assigned administrative law judge, as appropriate in accordance with sections 20240 and 20241, with service on all other parties.

(b) Requests for extensions of time shall be filed or presented in the same manner as motions for continuances, except that, absent good cause shown, they are to be received at least three (3) calendar days before the due date of the papers to be filed. The request shall include the due date, the length of extension sought, and the grounds for the extension, ~~and the position of the other parties,~~ in the same manner as required for continuances in subsection 20190(c)(2) above. The request must be accompanied by

a declaration stating the position of the other parties. If the other parties' positions were not obtained, the declaration must state in detail all efforts made to attempt to contact that party or the party's counsel, including the dates and times of any emails and telephone calls, including whether a message was left.

(c) Requests for extensions of time will be processed and ruled on by the executive secretary or assigned administrative law judge, as appropriate in accordance with sections 20240 and 20241, based on considerations similar to those described in subsections 20190(e), (f), and (g).

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1142(b), 1151.4(a), 1156.3~~(a), (c)~~, 1156.7(c), (d), 1160.2, 1160.3 and 1160.5, Labor Code.

* * * * * * * * * * * * * *

UNFAIR LABOR PRACTICE PROCEEDINGS (CHAPTER 2)

To allow a charging party the option to request anonymity during a charge investigation: To amend regulation 20202 to state:

§ 20202. Form and Contents of Charge.

The charge must be in writing and contain the following:

(a)(1) The name, address, and telephone number of the person, ~~or~~ organization, or company making the charge.

~~(b)~~(2) The name, address, and telephone number (if available) of the person, organization, or company against whom the charge is made.

~~(c)~~(3) A short statement of the facts allegedly constituting an unfair labor practice.

~~(d)~~(4) The charging party may submit declarations, signed under penalty of perjury, in support of the charge. Such declarations shall remain confidential, except as provided in section 20274(a).

~~(e)~~(5) Proof of service of the charge on the charged party pursuant to the provisions of ~~S~~section 20206.

~~(f)~~(6) The charge shall be signed by the ~~C~~charging ~~P~~party below the following statement: "I declare that I have read the above charge and the statements contained therein are true to the best of my knowledge and belief."

(b) When the charging party is an agricultural employee, the regional director shall have discretion to accept a charge for filing and to redact from the charge the information specified in subdivision (a)(1) and the signature of the charging party under subdivision

(a)(6) before service on the charged party pursuant to section 20206; provided, however, that the regional director shall maintain a fully unredacted copy of the charge. The regional director may approve such redactions only when the charging party has stated a reasonable fear of retaliation from the charged party and maintaining anonymity is necessary to permit the filing of the charge. Where redactions have been approved, the anonymity of the charging party shall be maintained during the course of the general counsel's investigation of the unfair labor practice charge, except that the charging party's identity shall be disclosed in any unfair labor practice complaint issued pursuant to section 20220. Before accepting a redacted charge for filing, the regional director shall inform the charging party that the charging party's identity will be disclosed if the general counsel issues an unfair labor practice complaint. A regional director's determination that redactions are appropriate under this subdivision is nonreviewable.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1160.2, Labor Code.

* * * * * * * * * * * * * *

To allow a regional director to propound interrogatories to a charged party during investigation of an unfair labor practice charge:

To amend regulation 20216 to state:

§ 20216. Investigation by Regional Director.

(a) The regional director shall investigate to determine whether or not there is reasonable cause to believe that an unfair labor practice has been committed.

(b) The regional director may propound written interrogatories to a charged party to be answered under oath. The regional director may propound interrogatories any time that is 10 days after service of the charge on the charged party. The scope of permissible interrogatories under this section shall be limited to threshold issues, such as the proper legal identity of the charged party; the charged party's status as a labor organization, agricultural employer, farm labor contractor, or custom harvester; whether an alleged discriminatee is an agricultural employee; and supervisory or agency status of any individual alleged to have committed an unfair labor practice. The charged party shall respond to the interrogatories within 20 days after service of the interrogatories, answering each interrogatory separately and completely, and shall sign the response under oath.

(c) If a charged party fails to respond to interrogatories propounded by the regional director, the charged party shall be barred from disputing any matters that were the subject of any such interrogatories during the remainder of the regional director's investigation and following the issuance of any unfair labor practice complaint.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151(a) and 1160.2, Labor Code.

* * * * * * * * * * * * * *

To allow the General Counsel to review a regional director's dismissal of an unfair labor practice charge:

To amend regulation 20219 to state:

§ 20219. Review of Dismissals.

(a) Within 10 days of the date of service of a dismissal, the charging party may file a request with the general counsel for review of the decision dismissing the charge. The request for review shall specifically state all reasons why the decision should be reviewed. If the charge was dismissed for lack of evidence, the charging party may provide additional evidence in support of the charge accompanied by a showing of the reasons why such evidence was not previously presented to the regional director. If the charge was dismissed for failure to legally constitute an unfair labor practice, the charging party shall provide legal authority in support of its position that the evidence constitutes an unfair labor practice. The request for review and all supporting documents shall be served upon the charged party and the regional director as provided in sections 20166 and 20169.

(b) In situations where the charging party is an agricultural employee, if the charging party has not timely requested review of a dismissal, the general counsel may grant review of the regional director's dismissal sua sponte within 10 days from the date a request for review would have been due. The general counsel shall provide notice to both the charging and charged parties when the general counsel has granted sua sponte review of a dismissal.

(c) Within 10 days from the filing of ~~such~~a request for review or from the date the general counsel provides notice of granting sua sponte review, the charged party may file a statement in opposition with service on the charging party as provided in ~~S~~sections 20166 and 20169.

(d) Extensions of time to file a request for review or a statement in opposition may be requested in accordance with section 20192, except that such requests shall be directed to and ruled upon by the ~~G~~general ~~C~~counsel.

(e) Where a request for review has been filed or the general counsel has granted sua sponte review, ~~T~~the general counsel may request an oral presentation from the parties. The general counsel may affirm the decision of the regional director, remand for further consideration or evidence, or issue a complaint.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1149, 1151.4(a), 1160.2 and 1160.5, Labor Code.

* * * * * * * * * * * *

To require the general counsel to issue a complaint within a specified period of time:

To amend regulation 20220 to state:

§ 20220. Complaint.

(a) If, after investigation, the general counsel has reason to believe that an unfair labor practice has been committed, ~~he or she~~the general counsel shall issue a formal complaint in the name of the Board. The complaint shall contain a statement of the specific facts upon which jurisdiction of the Board is based, including the identity of the respondent, and shall state with particularity the conduct which is alleged to constitute an unfair labor practice. The statement must include, where known, the dates and places of the conduct and the names of the persons who allegedly committed the acts being charged. The Board may disregard any error or defect in the complaint which does not substantially affect the rights of the parties.

(b) The complaint shall be accompanied by a statement explaining: (1) the requirements for an answer, (2) the right of respondent to a hearing, and (3) the manner in which hearings are scheduled; and it shall also include a copy of sections 20190 and 20192 dealing with continuances and extensions of time and a copy of sections 20235 through 20238 concerning discovery.

(c) If the general counsel has not issued a complaint pursuant to subdivision (a) of this section within 12 months of the date an unfair labor practice charge was filed, the charge shall be deemed dismissed. Where an amended charge has been filed, the 12-month time period in which to issue a complaint shall run from the date the original charge was filed. The general counsel may apply to the Board for an extension of time to conduct further investigation of a charge for good cause shown based upon a claim that a charged party's conduct impeded the general counsel's timely investigation of the charge or other extraordinary circumstances. The length of an extension based on a charged party's dilatory conduct may be commensurate with any delays reasonably incurred as a result of such conduct. The length of an extension based on other extraordinary circumstances shall be limited to a single extension of no more than 60 days.

(d) A dismissal pursuant to subdivision (c) of this section shall not be subject to review under section 20219.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151(a), 1160.2, 1160.5 and 1160.6, Labor Code.

* * * * * * * * * * * * *

To allow the General Counsel to make a request for particulars regarding a respondent's answer to an unfair labor practice complaint:

To amend regulation 20235 to state:

§ 20235. Request for Particulars.

(a) Where a complaint lacks specificity as to the time, place or nature of the alleged conduct, or the identity of the persons who engaged in it, or fails sufficiently to identify the individual or group against whom the conduct was specifically directed, a written request for particulars may be made by the respondent in accordance with section 20237 to obtain such information; provided, however, that in responding the general counsel need not disclose the identity of any potential witness whose primary source of income is non-supervisory employment in agriculture.

(b) Where an answer raises an issue or asserts a defense based on an agricultural employee's immigration status, a written request for particulars may be made by the general counsel in accordance with section 20237 to obtain further information concerning the facts upon which such issue or defense is raised.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1160.2, Labor Code.

* * * * * * * * * * * * * * *

Subpoenas/Discovery — To make specific an investigatory subpoena may request witness testimony, to require privilege logs, to make explicit the Board may authorize the General Counsel to seek judicial enforcement of a subpoena on behalf of the Board, and clarifying the availability of evidentiary sanctions where a party fails to comply with a subpoena:

* * * * * * * * * * * * *

To amend regulation 20217 to state:

§ 20217. Investigative Subpoenas.

(a) For purposes of investigation, the general counsel or ~~his or her~~the general counsel's agents may issue and serve subpoenas requiring the attendance and testimony of witnesses or the production by persons at the respondent's place of business, or such other location as mutually agreed to by the respondent and the regional director, of any materials, including but not limited to books, records, correspondence or documents in their possession or under their control.

(b) The subpoena shall show on its face the name, address, and telephone number of the general counsel or ~~his or her~~the general counsel's agent who has issued the subpoena. A copy of a declaration under penalty of perjury shall be served with a subpoena duces tecum, showing good cause for the production of the matters and things described in such subpoena. The declaration shall show specific facts justifying discovery and that the materials are relevant to the subject matter of the investigation or reasonably calculated to lead to the discovery of admissible evidence.

(c) Service of subpoenas shall be made pursuant to Labor Code ~~S~~section 1151.4(a) or by certified mail. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Witnesses shall be entitled to fees in accordance with Labor Code section 1151.4(a).

(d) Any person on whom an investigative subpoena is served who does not intend to comply shall, within five days after the date of service, petition in writing to revoke the subpoena. Such petition shall explain with particularity the grounds for objecting to each item covered by the petition. The petition to revoke shall be served upon the general counsel or ~~his or her~~ the general counsel's agent who issued the subpoena. The petition to revoke shall be filed with the executive secretary. When a person under subpoena objects to any request for production of materials on the basis of a claim of privilege or that the information sought is protected work product, the petition shall state specifically the privilege asserted and shall include a privilege log providing sufficient information for the general counsel to evaluate the merits of such claims.

(e) The executive secretary shall revoke the subpoena if the materials required to be produced do not relate to any matter under investigation, or the subpoena does not describe with sufficient particularity the materials whose production is required, or the testimony or records sought are privileged or confidential or deal with a matter not subject to review, or the subpoena is otherwise invalid. A simple statement of the grounds for the ruling on the petition shall accompany the ruling. Adverse rulings may be appealed to the Board through the procedures outlined in Section 20242.

(f) When a person under subpoena refuses to testify or produce the requested information on the basis of ~~his or her~~the person's privilege against self-incrimination, the general counsel or ~~his or her~~the general counsel's agents may file a written request that the Board grant immunity and compel that person to testify or produce the requested materials. Said request shall otherwise conform and be processed according to ~~S~~section 20251; however, the Board shall rule directly on said request.

(g) Upon any other failure of any person to comply with an investigative subpoena, the general counsel may request that the Board apply to an appropriate superior court for an order requiring compliance in accordance with ~~S~~section 20250(k) or authorize the general counsel to make such application. The subpoenaed party shall have five (5) days after an application pursuant to this subdivision is filed with the Board to file a response to the application.

(h) In addition to, or in lieu of, seeking enforcement pursuant to section 20250(k), the general counsel may apply to the chief administrative law judge for appropriate sanctions to be imposed against a charged party based on the charged party's failure to comply with an investigative subpoena in the event the general counsel subsequently issues a complaint pursuant to section 20220, or at any time following issuance of a complaint and before hearing, including any evidentiary sanctions specified in section 20238(b).

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151(a) and 1160.2, Labor

Code.

* * * * * * * * * * * * *

To amend regulation 20236 to state:

§ 20236. Matters Discoverable.

(a) Upon written request, a party to a hearing is entitled to obtain from any other party to the hearing the names, addresses and any statements (as defined in section 20274(b)) of all witnesses, other than those whose primary source of income is non-supervisory employment in agriculture; provided, however, that any portion of a statement likely to identify a potential witness whose primary source of income is non-supervisory employment in agriculture shall be excised.

(b) Upon written request, a party to a hearing is entitled to obtain from any other party to the hearing the name, address, field of expertise, qualifications, and a brief description of expected testimony of any expert whom it intends to call as a witness. The responding party shall also make available any report prepared for it by such expert concerning the subject matter of the testimony to be given. The failure, without good cause, to comply with the requirements of this subsection shall be grounds for excluding such expert testimony.

(c) Upon written request, a party to a hearing shall be afforded a reasonable opportunity to examine, inspect and copy, and, where appropriate, to photograph and/or test, any writing or physical evidence in the possession or control of the party to the hearing to whom the request is directed which that party intends to introduce into evidence at hearing; provided, however, that any portion of a writing which identifies a potential witness whose primary source of income is non-supervisory employment in agriculture shall be excised, except that this proviso shall not apply to otherwise unprotected or unprivileged business records. Where the writing or physical evidence to be introduced is not yet in the possession or control of the responding party, it shall be identified with reasonable specificity. A party that objects to a request under this subdivision on the basis of a claim of privilege or that the information sought is protected work product shall state specifically the privilege asserted and shall include a privilege log providing sufficient information for other parties to evaluate the merits of such claims.

(d) Upon written request, general counsel shall disclose to respondent any evidence which is purely and clearly exculpatory.

(e) In compliance proceedings, the general counsel shall, upon written request, make available to the requesting party to the hearing all information in its files, which tends to verify, clarify or contradict the items and amounts alleged in the backpay or bargaining makewhole specification unless the information is absolutely privileged, e.g., income tax returns, form W-2 (wage and tax statement), . . . etc.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

* * * * * * * * * * * * *

To amend regulation 20238 to state:

§ 20238. Orders Compelling Discovery; Sanctions.

(a) A requesting party who believes that the responding party has failed, in whole or part, to comply with a proper request pursuant to sections 20235, 20236, or 20237 may apply in writing to the chief administrative law judge for an order requiring compliance. No application will be entertained unless the applying party establishes that it first made a reasonable effort to resolve the matter by contacting or attempting to contact the responding party. The application shall include copies of the request and any response received, and shall be served on the responding party. ~~If the responding party desires to oppose the application, he or she~~The responding party shall immediately notify the office of the chief administrative law judge if the party desires to oppose the application. Depending on the proximity to hearing, the chief administrative law judge shall determine whether the opposition will be written or oral, when it will be due, and whether to assign the matter to an administrative law judge. When the dispute concerns the propriety of excising or failing to turn over a statement containing the name of a potential witness whose primary income is from non-supervisory agricultural employment, the privilege created by Evidence Code section 1040(b)(2) is waived to the extent of allowing the chief administrative law judge or the assigned administrative law judge to examine the entire unexcised document in camera to determine what, if any, portions should be disclosed.

(b) If a party or its representative fails to comply with an order requiring compliance or otherwise fails to comply with the requirements of sections 20217, 20235, 20236, ~~or~~ 20237, or 20250, appropriate sanctions may be imposed either by the chief administrative law judge or, if the matter has been assigned for hearing, by the assigned administrative law judge. Sanctions may include refusing to receive testimony or exhibits, striking evidence received, dismissing claims or defenses, or such other action as may be appropriate, but shall not include imposition of financial penalties.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

* * * * * * * * * * * * *

To amend regulation 20250 to state:

§ 20250. Issuance of Subpoenas and Notices to Appear or Produce; Petitions to Revoke; Right to Inspect or Copy Data.

(a) Any member of the Board, or the executive secretary, regional director, or any person authorized by the Board, executive secretary or regional director shall upon the ex parte request of any party, prior to hearing, issue subpoenas as provided for in this section requiring the attendance and testimony of witnesses and/or the production of any materials including, but not limited to, books, records, correspondence or documents in their possession or under their control. Requests for subpoenas during the hearing shall be made to the administrative law judge.

(b) The subpoena shall show on its face the name, address, and telephone number of the party at whose request the subpoena was issued. A copy of a declaration under penalty of perjury shall be served with a subpoena duces tecum issued before hearing, showing good cause for the production of the matters and things described in such subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the ~~witness or party has the~~ desired matters or things are in ~~his or her~~the possession or under ~~his or her~~the control of the witness or party

(c) Service of subpoenas shall be made pursuant to sections 20164, 20166, and ~~20168~~20169. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

(d) In order to obtain the attendance of a party to the matter, or of anyone who is an officer, director, supervisor, or managing agent of any such party, the service of a subpoena upon any such witness is not required following issuance of a complaint if written notice requesting such witness to attend the hearing of the matter, with the time and place thereof, is served upon the attorney for such party. Such notice shall be served at least 10 days before the time required for attendance unless the Board prescribes a shorter time. The giving of such notice shall have the same effect as service of a subpoena on the witness, and the parties shall have such rights and the Board may make and seek such orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the Board. The witness shall be entitled to fees ~~as if served pursuant to~~in accordance with Labor Code ~~S~~section 1151.4(a).

(e) If the notice specified in subdivision (d) is served at least 10 days before the time required for attendance, or within such shorter time as the Board may order, it may include a request that such party or person bring books, documents or other things. The notice shall be accompanied by a copy of a declaration under penalty of perjury showing good cause for the production of the matters and things described in such notice, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the ~~witness or party has the~~ desired matters or things are in ~~his or her~~the possession or under ~~his or her~~the control of the witness or party.

(f) Any person on whom a subpoena or a notice to appear (described in sub~~sections~~divisions (d) and (e)) is served who does not intend to comply shall, within five days after the date of service, petition in writing to revoke the subpoena or notice. Such petition shall explain with particularity the grounds for objecting to each item covered by the petition and shall have attached a copy of the subpoena or notice. If a party objects to a request in a subpoena duces tecum and refuses to produce any material responsive to the request on the basis of a claim of privilege or that the information is protected work product, the petition shall state specifically the privilege asserted and shall include a privilege log providing sufficient information for other parties to evaluate the merits of such claims. The petition to revoke shall be served as provided in sections 20160~~, 20164, and 20166~~through 20169 by or on

behalf of the person seeking revocation upon the party at whose request the subpoena was issued or who issued the notice. If the petition to revoke is filed after the issuance of a complaint but prior to the prehearing conference, the petition shall be filed with the executive secretary. A copy shall be served on the party issuing the subpoena or notice in compliance with sections 20160~~, 20164, and 20166~~through 20169. A petition to revoke filed at or after the prehearing conference or during the hearing shall be filed with the administrative law judge who may rule on the matter. If the subpoena has been served less than five days before the hearing, the petition to revoke is due on the first day of the hearing except that the administrative law judge, upon a showing of good cause, may grant up to five days for filing a petition to revoke. For a subpoena issued during the hearing, any petition to revoke shall be due at the time specified in the subpoena for compliance unless further time, up to five days, is granted by the administrative law judge. Responses to petitions to revoke shall be allowed only upon leave of the ~~E~~executive ~~S~~secretary or assigned administrative law judge, and on such terms as he or she deems appropriate.

(g) When a party serves a subpoena for the production of records of the Board or for the testimony of a Board agent, the general counsel may represent the Board or the Board agent and may, if appropriate, move to revoke the subpoena on the grounds stated in sub~~section~~division (h) below.

(h) The Board or administrative law judge, as the case may be, shall revoke the subpoena or notice in whole or in part if the evidence required to be produced does not relate to any matter in question in the proceedings, or the subpoena or notice does not describe with sufficient particularity the evidence whose production is required, or the testimony or records sought are privileged or otherwise protected or deal with a matter not subject to review, or the subpoena is otherwise invalid. The scope of a subpoena or notice may be limited if the Board or administrative law judge determines that the material sought is: (i) unreasonably cumulative or duplicative, or (ii) obtainable from some other source that is more convenient, less burdensome, or less expensive; or (iii) unduly burdensome or expensive to provide, taking into account the needs of the case, the limitation of the resources of the parties, and the importance of the issues upon which it bears. A simple statement of the grounds for the ruling on the petition shall accompany the ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall become part of the official record upon the request of the party aggrieved by the ruling.

(i) Subpoenas duces tecum (as described in sub~~sections~~divisions (a) and (b), above) and notices to produce (as described in sub~~section~~division (d), above) may be served by all parties with return dates for prehearing conferences. Witnesses may be examined orally under oath at such prehearing conferences, subject to the discretion of the administrative law judge, for the limited purpose of identifying and/or authenticating the matters and things produced pursuant to the subpoenas or notices. Such oral examination shall not be for the purpose of generally deposing the witnesses unless the same has previously been ordered by the executive secretary pursuant to the procedures in ~~S~~section 20246.

(j) Nothing in section 20250 shall compel the disclosure of information which identifies a potential witness whose primary source of income is non-supervisory employment in agriculture unless that individual is a charging party; provided, however, that when a dispute arises concerning the propriety of turning over a writing which would make such identification likely, the privilege created by Evidence Code section 1040(b)(2) is waived to the extent of allowing the administrative law judge to examine the entire document in camera to determine which, if any, portions should be disclosed and which portions should be excised before being turned over; provided further, that this subsection shall not apply to otherwise unprotected or unprivileged business records.

(k) Upon any other failure of any person to comply with a subpoena or notice, the Board may apply to an appropriate superior court for an order requiring such person to appear and produce evidence and give testimony regarding the matter under investigation or in question. A request that the Board apply for an order may be made by the general counsel during investigatory stages of the proceedings or by any party following issuance of a complaint. The administrative law judge will review any requests made in the course of a hearing., and, Iif the administrative law judge deems the request appropriate, ~~he or she~~administrative law judge shall promptly recommend that the Board seek enforcement of the subpoena or notice. The subpoenaed party shall have five (5) days after an application pursuant to this subdivision is filed with the Board to file a response to the application. The Board shall seek enforcement on relation of the general counsel, or may delegate authority to the general counsel to seek enforcement on behalf of the Board, or a party unless in the judgment of the Board the enforcement of such subpoena or notice would be inconsistent with law or the policies of the Act. If the request is granted, the record will remain open in the matter until the Board determines that the court order will not be forthcoming, or that further delay would frustrate the policies of the Act, or until the testimony sought is included in the record.

(l) In addition to, or in lieu of, superior court enforcement proceedings as provided in subdivision (k), a party may apply to the chief administrative law judge or the assigned administrative law judge, if the matter has been assigned for hearing, for appropriate sanctions as provided for in section 20238(b) based on a person's failure to comply with a subpoena or notice.

(~~l~~m) By causing the issuance of a subpoena or a notice, the attorney or representative or the party, if not represented, certifies that to ~~his or her~~their knowledge, information and belief, and after reasonable inquiry: (i) the testimony or material sought is relevant and material to the issues in the proceeding; (ii) the subpoena or notice is not interposed for any improper purpose, such as to harass or to cause unnecessary delay, or to needlessly increase the cost of litigation; and (iii) the subpoena or notice is not unreasonably or unduly burdensome or expensive, given the needs of the case, given the materials already in the hands of the party seeking the testimony or material, and given the importance of the issues upon which it bears.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151, 1160.2 and 1160.3, Labor Code.

* * * * * * * * * * * * * * *

To state in regulation the standard adopted by the Board in case precedent for determining whether to grant an application for special permission to appeal an interim ruling by an administrative law judge or executive secretary:

To amend regulation 20242 to state:

§ 20242. Appeals of Executive Secretary and Administrative Law Judge Rulings.

(a) All rulings and orders of every kind, by the executive secretary or by an administrative law judge, shall be a part of the record without the necessity of their being introduced into evidence, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 20250.

(b) No ruling or order shall be appealable, except upon special permission from the Board; except that a ruling which dismisses a complaint in its entirety shall be reviewable as a matter of right. The Board will consider an application for special permission to appeal only where the challenged ruling or order cannot be addressed effectively through exceptions filed pursuant to sections 20282 or 20370(j). A party applying for special permission for an interim appeal from any ruling by the executive secretary or an administrative law judge shall, within five (5) days from the ruling, file with the executive secretary, to be forwarded to the Board for review, its application for permission to appeal, setting forth its position on the necessity for interim relief and on the merits of the appeal. The application shall be supported by declarations if the facts are in dispute and by such authorities as the party deems appropriate. Applications and supporting papers shall be filed and served in accordance with sections 20160~~, 20166 and~~through 20169. Any party may file a ~~statement opposing~~ response or opposition to such application, with proof of service on the other parties as provided in sections 20160~~, 20166 and~~through 20169, within ~~such time as the executive secretary may direct~~five (5) days after the application is filed. No further pleadings shall be filed in support of or in opposition to the appeal unless requested by the Board ~~through the executive secretary~~.

(c) Parties intending to apply for special permission to appeal an oral ruling by an administrative law judge shall immediately notify the administrative law judge and arrange with the reporter for an expedited copy of the relevant portion of the hearing transcript which shall be lodged with the Board at the moving party's expense.

(d) Unless the executive secretary so directs, no hearing shall be delayed because an application was filed; nor shall the appeal or attempt to appeal a ruling or order delay the hearing unless the Board so directs.

(e) This section does not apply to decisions of administrative law judges as defined in sections 20279-20286.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

To require case management conferences to be held following the filing of an answer to a complaint:

To add new regulation 20247.1 to state:

§ 20247.1. Case Management Conference

(a) Within 10 days after the respondent files an answer to the complaint or timely could have filed an answer to the complaint, a mandatory telephonic case management conference shall be scheduled by the chief administrative law judge or executive secretary. The assigned administrative law judge may continue the date of the case management conference. At this case management conference, parties shall be expected to address the following issues:

(1) The expected length of the hearing.

(2) The size of the hearing room needed.

(3) For what languages, if any, an interpreter will be needed.

(4) Whether the case is expected to present any novel or complex legal issues.

(5) The appropriate timing for assignment of a settlement judge to the matter.

(6) Whether the parties intend to conduct discovery and, if so, any anticipated discovery issues.

(7) Any additional suggestions from the parties as to how the administrative law judge unit may expedite or add value to the hearing process.

(b) The parties shall meet and confer regarding the matters to be addressed at the case management conference and shall file, jointly or separately, a case management conference statement no later than 5 days before the scheduled date of the conference. The assigned administrative law judge may take the case management conference off calendar if the administrative law judge finds the parties' case management conference statement or statements sufficiently address the matters to be addressed at the conference. The administrative law judge shall issue an order summarizing the results of the case management conference as soon as practicable after the conference is held or, if taken off calendar, was scheduled to be held.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

* * * * * * * * * * * * * *

To require settlement conferences be held in unfair labor practice proceedings: To amend regulation 20248 to state:

§ 20248. Settlement Conference.

(a) ~~At any time after a complaint has issued, either on his or her own motion or upon written request by any party~~Within 30 days after issuance of the administrative law judge's case management conference order, the chief administrative law judge ~~may~~shall schedule a settlement conference to be held before an administrative law judge other than the one assigned to hear the matter and shall notify the parties, including the charging party, of its time and place. Each party attending ~~such a~~the settlement conference shall be represented by a person fully authorized to engage in negotiations for settlement. Clients or principals shall either attend or be available by telephone.

(b) ~~After assignment of a case to an administrative law judge, he/she may direct that a settlement conference be held in conjunction with any prehearing conference or independently thereof. Upon request by any party, the executive secretary shall assign another administrative law judge to conduct the settlement discussions.~~

(c) ~~Independently of (a) and (b) above, a~~At any stage of a proceeding prior to hearing, if time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity to submit for consideration by the regional director with whom the charge was filed, facts, arguments, offers of settlement, or proposals of adjustment.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

AGRICULTURAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1325 J STREET, SUITE 1900
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

DATE: September 22, 2021

TO: Agricultural Labor Relations Board

CC: Santiago Avila-Gomez, Executive Secretary

FROM: Ralph Lightstone, Board Member
Barry Broad, Board Member

RE: Regulatory Proposals – Representation Proceedings (Elections)

Below are draft regulatory changes and proposals based on the Regulations Subcommittee's recommendations approved by the Board at the April 13, 2021 public meeting. Changes are reflected in underline (new language) and strikethrough (deletions) formats.

REPRESENTATION PROCEEDINGS (CHAPTER 3)

To allow a petition for certification to be served on a security guard located on the employer's premises, and to specify conditions which may warrant blocking an election or the impounding of ballots in an election:

To amend regulation 20300 to state:

§ 20300. Petition for Certification Under Labor Code Section ~~1~~156. 3.

(a) Procedure. A petition for investigation of a question concerning representation under Labor Code ~~S~~section 1156.3(a), hereinafter called a petition for certification, may be filed as provided for in this part and in the Act.

(b) Form of the Petition. A petition for certification shall be in writing and signed by hand or electronically. Printed forms for such petitions will be supplied by the regional offices of the Board upon request. Such petition shall contain a declaration, signed under penalty of perjury, that the petition's contents are true and correct to the best of the declarant's knowledge and belief.

(c) Amendments. A petition for certification may be amended by the petitioner, upon approval of the regional director, for good cause shown. Any amended petition shall be

served upon the employer in accordance with the provisions of ~~subsection~~ subdivision (fg) below for service of the initial petition.

(d) ~~Number of Copies of Petition. An original and two copies of the petition for certification shall be filed in the regional office.~~

(e) Where Filed. A petition for certification shall be filed in the regional office having jurisdiction over the geographical area in which all or part of the unit encompassed by the petition is located.

(~~f~~e) Service of the Petition. A petition for certification shall be served upon the employer in the manner set out herein. In order to be filed, a petition must be accompanied by proof of service of the petition on the employer, either by verified return of the person making personal service or by the return receipt from the post office. Service on the employer may be accomplished by service upon any owner, officer, or director of the employer, or by leaving a copy at an office of the employer with a person apparently in charge of the office or other responsible person, ~~or~~ by personal service upon a supervisor of employees covered by the petition for certification, or by personal service upon a security guard stationed at any location where employees covered by the petition for certification work. If service is made by delivering a copy of the petition to anyone other than an owner, officer, or director of the employer, the petitioner shall immediately ~~send a telegram or facsimile transmission~~provide notice to the owner, officer, or director of the employer declaring that a certification petition is being filed and stating the name and location of the person actually served. Such notice shall be provided by email, if an email address is available, and by a courier providing overnight delivery, and the petitioner ~~and~~ shall file with the regional office proof that the ~~telegram or facsimile transmission~~notice was sent and received.

(~~g~~f) Filing of Petition. A petition for certification shall be deemed filed upon its receipt in the appropriate regional office accompanied by proof of service of the petition upon the employer. As soon as possible upon the filing of a petition for certification, the regional office in which the petition is filed shall telephone the employer and give the employer the following information: (1) the date and time of the filing of the petition and (2) the case number assigned to the petition.
Notification by ~~telegraph or facsimile transmission~~ email shall be permissible in the event that notification by telephone is unavailable or unsuccessful.

(~~h~~g) Withdrawal of Petition. A petition for certification may be withdrawn only with the consent of the regional director. Whenever the regional director approves the withdrawal of any petition, the matter shall be closed and the parties shall be notified of the withdrawal.

(~~i~~h) Dismissal of Petition.

(1) The petition for certification shall be dismissed by the regional director whenever the contents of the petition or the administrative investigation of the petition disclose the absence of reasonable cause to believe that a bona fide question concerning representation exists, or the unit petitioned for is not appropriate, or there is not an

adequate showing of employee support pursuant to ~~S~~section 20300(ji).

(2) When the regional director has determined that the petition shall be dismissed, ~~he or she~~the regional director shall issue a dismissal letter to the filing party and the employer setting forth the reasons therefor.

(3) The dismissal of a petition may be reviewed by the Board pursuant to the provisions of Labor Code ~~S~~section 1142(b) and ~~S~~section 20393.

(~~ji~~) Evidence of Employee Support.

(1) Pursuant to Labor Code ~~S~~section 1156.3(a), evidence that a majority of the currently employed employees in the bargaining unit sought in the election petition support the petitioner shall be submitted with the petition. Such evidence shall consist of either: (a) authorization cards, signed by employees, dated, and providing that the signer authorizes the union to be ~~his or her~~the signer's collective bargaining representative, or (b) a petition to the same effect signed by employees, each signature dated. No employee authorization dated more than one year prior to the date of filing of the election petition shall be counted to determine majority showing of interest.

An authorization card or authorization petition signed by an employee at a time when the employee was not working for the employer named in the election petition shall, if otherwise valid, be counted in determining majority showing of interest.

(2) The regional director shall conduct an administrative investigation to determine whether there exists an adequate showing of employee support, as required by Labor Code ~~S~~section 1156.3(a), to warrant the conduct of an election.

The administrative investigation may include solicitation from the petitioner and intervenor of their positions with respect to the accuracy and completeness of the employee list submitted pursuant to ~~S~~section 20310(a)(2). If the regional director determines that there is insufficient showing of interest, ~~he or she~~the regional director may grant the petitioner an additional 24-hour period, from the time the regional director notifies the petitioner that its showing of interest is insufficient, to submit additional showing of interest. Authorization cards or other showing of interest shall be held confidential.

(3) In determining the number of currently employed employees for the purposes of Labor Code ~~S~~section 1156.3(a) or these regulations, when the number of employees on the employer's list conflicts with the number alleged in the petition, the regional director may independently ascertain by administrative investigation the number of persons actually working in the appropriate payroll period.

(4)(A) Any party which contends that the showing of interest was obtained by fraud, coercion, or employer assistance, or that the signatures on the authorization cards were not genuine, shall submit evidence in the form of declarations under penalty of perjury supporting such contention to the regional director within 72 hours of the filing of the petition. The regional director shall refuse to consider any evidence not timely submitted, absent a showing of

good cause for late submission.
When evidence submitted to the regional director ~~gives him or her~~ establishes reasonable cause to believe that the showing of interest may have been tainted by such misconduct, ~~he or she~~the regional director shall conduct an administrative investigation. If, as a result of such investigation, the regional director determines that the showing of interest is inadequate because of such misconduct, ~~he or she~~the regional director shall dismiss the petition. Nothing in this ~~subsection~~ subdivision shall diminish the applicability of Labor Code ~~S~~section 1151.6 to instances of forgery of authorization cards.

(B) The regional director may dismiss a petition pursuant to this subdivision when there is pending an unfair labor practice complaint against the employer named in the petition alleging the employer or
the employer's representatives directly or indirectly initiated or instigated the petition or assisted in the showing of interest necessary for holding an election. If there is pending an investigation of an unfair labor practice charge for which no complaint has issued alleging the employer or the employer's representatives directly or indirectly initiated or instigated the petition or assisted in the showing of interest necessary for holding an election, the regional director may order any ballots cast in an ensuing election be impounded in accordance with section 20360(c).

(5) The regional director's determination of the adequacy of the showing of interest to warrant the conduct of an election shall not be reviewable.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1142(b), 1156.2, 1156.3, 1156.4, 1156.5, 1156.6 and 1156.7, Labor Code.

* * * * * * * * * * *

To amend regulation 20390 to state:

§ 20390. Decertification and Rival Union Petitions.

(a) Where the incumbent union presently has a collective bargaining agreement with the employer, the petition shall contain an allegation that the agreement will expire within the next twelve months or has been in existence for more than three years, and shall be accompanied by evidence of support by 30% or more of the employees currently employed in the bargaining unit.

(b) Where the incumbent union presently does not have a collective bargaining agreement with the employer, the petition shall contain an allegation to that effect, and shall be accompanied by evidence of support by a majority of the employees currently employed in the bargaining unit.

(c) The evidence of support for the petition may be in the form of signatures on a petition or, in the case of a rival union petition, on authorization cards or on a petition. In either case, each signature must be dated.

(d) All petitions for decertification and rival union petitions shall contain the following:

(1) The name, address, and telephone number of the petitioner and its affiliation, if any.

(2) The name, address, ~~and~~ telephone number, and email address of a representative of the petitioner authorized to make agreements with the Board and the parties and to accept service of papers.

(3) The name and address of the incumbent union.

(4) The name, location, and mailing address of the employer.

(5) The nature of the employer's agricultural commodity or commodities encompassed by the unit.

(6) A description of the existing bargaining unit.

(7) The approximate number of employees currently employed in the bargaining unit.

(8) A statement whether a strike is in progress in the unit involved and, if so, the approximate number of employees participating and the date the strike began.

(9) A statement of which languages, other than English and Spanish, the petitioner requests be included on the ballots, and the approximate number of employees requiring such ballots.

(10) An allegation that the number of agricultural employees currently employed by the employer named in the petition, as determined from ~~his~~ the employer's payroll immediately preceding the filing of the petition, is ~~not less than~~ 50 percent of ~~his~~ the employer's peak agricultural employment for the current calendar year.

(11) An allegation that no valid election has been conducted among the agricultural employees of the employer named in the petition within the 12 months immediately preceding the filing of the petition.

(12) An allegation that the Board did not certify the incumbent union within the 12 months immediately preceding the filing of the petition.

(e) The procedures set forth in Chapter 3 of these regulations for the service and processing of petitions for certification, election procedures, and post-election procedures shall be applicable to decertification and rival union petitions, except that service of the petition also shall be made upon an officer or director of the incumbent union, or upon an agent of the union authorized to receive service of papers. If service is made by delivering a copy of the petition to anyone other than an officer, director, or agent of the union authorized to receive service of papers of the employer, the petitioner shall immediately ~~send a telegram or facsimile transmission~~provide notice to the officer, director, or agent of the union declaring that a certification petition is being filed and stating the name and location of the person actually served. Such notice shall be provided by email, if an email address is available, and by a courier providing overnight delivery, and the petitioner ~~and~~ shall file with the regional office proof that the ~~telegram or facsimile transmission~~notice was sent and received.

(f)(1) The regional director may dismiss a petition pursuant to subdivision (h) of section 20300 when there is pending an unfair labor practice complaint against the agricultural employer named in the petition alleging any of the following: (A) conduct that, if proven,

would interfere with employee free choice in an election were one to be held, (B) the employer or the employer's representatives directly or indirectly initiated or instigated the petition or assisted in the showing of interest necessary for holding an election, or (C) the employer has failed or refused to recognize the incumbent bargaining representative or bargain with it in good faith in violation of Labor Code section 1153(e). Alternatively, if all other conditions are satisfied to otherwise warrant an election, the regional director may order the election to proceed but that the ballots cast in the election be impounded.

(2) If there is a pending unfair labor practice charge against the agricultural employer named in the petition alleging conduct as described in subdivision (f)(1) but no complaint has issued, the regional director may not dismiss the petition, but may order any ballots cast in an ensuing election be impounded in accordance with section 20360(c).

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1156.3 and 1156.7(c) and (d), Labor Code; Montebello Rose Co. (1981) 119 Cal.App.3d 1; and Cattle Valley Farms (1982) 8 ALRB No. 24.

* * * * * * * * * * * * * * *

To require that the list of employees an employer is required to produce in response to a petition for certification include employees' telephone numbers and email addresses, and to require employers to maintain such information:

To amend regulation 20310 to state:

§ 20310. Employer Obligations.

(a) Employer's Written Response to the Petition. Upon service and filing of a petition, as set forth above, the employer so served shall provide to the regional director or ~~his or her~~the regional director's designated agent, within the time limits set forth in ~~subsection~~ subdivision (d), the following information accompanied by a declaration, signed under penalty of perjury, that the information provided is true and correct:

(1) The employer's full and correct legal name, a description of the nature of its legal entity, a full and correct address, and the name, address, telephone number, email address, and the location and title of a person within the employer's organization who is authorized to accept service of papers. Such person shall also be one who is authorized to make agreements with the Board and the parties regarding the petition unless the employer has notified the regional office that it has a designated outside attorney or other outside representative who is to be contacted regarding the petition.

(2) A complete and accurate list of the complete and full names, current street addresses, landline and cellular telephone numbers, email addresses, and job classifications of all agricultural employees, including employees hired through a labor contractor, in the bargaining unit sought by the petitioner in the payroll period immediately preceding the filing of the petition. "Current street addresses" means the address where the employees

reside while working for the employer. The employee list shall also include the names, current street addresses, landline and cellular telephone numbers, email addresses, and job classifications of persons working for the employer as part of a family or other group for which the name of only one group member appears on the payroll. If the employer contends that the unit sought by the petition is inappropriate, the employer shall additionally, and within the time limits set forth in ~~subsection~~ subdivision (d), provide a complete and accurate list of the names, ~~and~~ addresses, landline and cellular telephone numbers, and email addresses of the employees in the unit the employer contends to be appropriate, together with a written description of that unit. If an employer chooses to submit, in addition to the information required, W-4 forms, social security numbers, employee signature facsimiles, or similar information, the regional director shall use such information to confirm the validity of the union's showing of interest only to the extent ~~he or she deems~~deemed appropriate in ~~his or her~~the regional director's discretion. Such information may also be used by the regional director to the extent ~~he or she deems~~deemed appropriate in ~~his or her~~the regional director's discretion in order to resolve allegations of fraud in the showing of interest pursuant to ~~S~~section 20300(ji)(4)(A) of these regulations.

(3) The names of employees employed each day during the payroll period immediately preceding the filing of the petition. This information may be submitted in the form of a copy of the employer's original payroll records or in some other form acceptable to the Board agent assigned to the case. The regional offices shall not disclose these records to any party.

(4) The duration and timing of payroll periods for the unit sought, for example, weekly, Sunday- Saturday payroll, or bimonthly payroll commencing on the 1st and 15th of each month. If employees in the unit sought are paid on more than one payroll period, the employer shall give the duration and timing of each payroll period and lists of which employees are covered by each payroll period.

(5) The names, addresses, ~~and~~ telephone numbers, and email addresses of all labor contractors supplying labor during the pertinent payroll period(s).

(6) A statement of the peak employment (payroll period dates and number of employees) for the current calendar year in the unit sought by the petition. If the employer contends that the petition was filed at a time when the number of employees employed constituted less than 50% of its peak agricultural employment for the current calendar year, the employer shall provide evidence sufficient to support that contention.

If it is contended that the peak employment period has already passed, such evidence shall include payroll records which show both the names and actual number of (agricultural) employees employed each day and the number of hours each employee worked during the peak payroll period. If it is contended that the peak payroll period will occur later in the calendar year, such evidence shall include payroll records which show both the names and actual number of (agricultural) employees employed each day and the number of hours each employee worked during the peak payroll period from the previous year(s), as well as any other information in the employer's possession which would be relevant to the determination of peak employment requirements.

(7) If the employer challenges the accuracy of any of the other allegations of the petition

required by Labor Code ~~S~~section 1156.3(a), in particular ~~subsections~~ subdivisions (a)(2), (3), and (4), the employer shall provide information to support these contentions.

(8) A statement of which languages, if any, other than Spanish and English, the employer requests be included on the ballots in any election conducted pursuant to the petition, and the approximate number of employees who can effectively read the requested language and no other in which the ballot would otherwise be printed.

(b) Form of List. The list included in the employer's written response to the petition for certification should be in the following form:

(1) Typewritten or otherwise legibly prepared.

(2) Alphabetical. However, if the payroll is prepared according to crew or work group, the list should be provided alphabetically within each crew or work group.

(3) If the employer maintains an employee list in an electronic format, it shall alphabetize the list pursuant to subdivision (b)(2) and produce such alphabetized list in its electronic format to the regional director.

(4) Where Provided. The employer's written response to the petition under ~~subsection~~ subdivision (a) above shall be presented at the regional office of the Board noted as the place of filing on the face of the petition, unless the employer is notified by an agent of the Board that the case has been transferred to another region, or unless, in any particular case, some other arrangement for making the information available at a different location is agreed to by the regional director or Board agent assigned to the case.

(d) Timing for Filing Employer's Written Response. The requirements set forth above in ~~subsections~~ subdivisions (a) through (c) shall be satisfied by making such information available in the place specified in ~~subsection~~ subdivision (c) above not more than 48 hours after the filing of a petition with proof of service. However, when said 48-hour period expires on a Sunday or legal holiday, the time to provide such information shall be extended to the corresponding hour on the next business day ~~following~~.

(e) Recordkeeping Requirement. Employers shall at all times maintain accurate records of the current street addresses, landline and cellular telephone numbers, and email addresses of all agricultural employees, including employees hired through a labor contractor, and of persons working for the employer as part of a family or other group for which the name of only one group member appears on the payroll.

(~~e~~f) Effect of failure to comply with ~~subsections~~ subdivisions (a) through (~~d~~e) above:

(1) If an employer fails to comply with the requirements of ~~subsections~~ subdivisions (a) through (~~d~~e) above, and such failure frustrates the determination of particular facts, the regional director may invoke any or all of the following presumptions:

(A) That there is adequate employee support for the petition and for any intervention.

(B) That the petition is timely filed with respect to the employer's peak of season.

(C) That all persons who appear to vote, who are not challenged by the board agent or by a party other than the employer, and who provide adequate identification, are eligible voters. This presumption shall be invoked only when no employee list is submitted or when the regional director determines that the list as submitted is substantially inadequate for the purpose of determining employee eligibility. Invocation of this presumption does not prevent the employer's observers from recommending challenges to the Board agent on the grounds listed in ~~S~~section 20355.

(2) The determination of whether or not an employee list complies with the requirements of these regulations or is timely filed will be made by the regional director. If the regional director determines that a list is not complete or accurate, ~~he or she~~the regional director shall state the reasons therefor in writing and serve ~~pursuant to section 20164~~ a copy of such written reasons on all parties.

(3) The failure of an employer to provide the information required by ~~subsection~~ subdivision (a) within the time period specified shall not be excused by the employer's desire to consult with its attorney or by the failure of the person served pursuant to ~~S~~section 20300(f~~e~~) to inform it of the service of a petition for certification on it.

(4) The failure of an employer to provide a complete or accurate employee list shall not be excused by the fact that the employer based its information on information supplied to it by a labor contractor.

Note: Authority cited: Section 1144, Labor Code; Reference: Sections 1156.3, ~~and~~ 1156.4, and 1157.3, Labor Code.

* * * * * * * * * * * * * * *

To clarify the status of ballots impounded in an election, including that a tally of ballots is not necessary to the conclusion of an election proceeding in situations where ballots have been ordered impounded:

To amend regulation 20360 to state:

§ 20360. Tally of Ballots.

(a) As soon as possible after completion of the balloting, a Board agent shall count the ballots and shall prepare both a tally of ballots and a list of the names of each person whose ballot was challenged, along with the basis for the challenge and the name of the party making the challenge, and shall furnish both the tally and the list to representatives of all parties who are present. If the ballots are not to be counted immediately after the conclusion of the election, the Board agent shall give advance notice to representatives of all parties of the time and place at which the ballots will be counted. It is the obligation of all parties who are notified of the time and place of the ballot count to have a representative present at the time ballots are counted who is authorized to receive a copy of the tally. The time for filing objections under Labor Code ~~S~~section 1156.3(~~c~~e) shall begin to run as soon as the count is completed and the tally prepared, regardless of whether or not all parties are present to receive a copy of the tally.

(b) Notwithstanding any other provision of these rules, the Board shall have the authority acting pursuant to a petition under Labor Code ~~S~~section 1156.3(~~c~~e), or on its own motion, without hearing, to issue an amended tally of ballots and appropriate certification in any election in which the Board has acted to resolve issues with respect to challenged voters or to correct mathematical errors in the previous tally of ballots. Except as provided in ~~S~~section 20375(d), nothing in this rule shall be deemed to extend the period of time for filing a petition under Labor Code ~~S~~section 1156.3(~~c~~e).

(c) Whenever it appears necessary, in order to effectuate the purposes and policies of the Act, the Board or the regional director may direct that the ballots cast in an election be impounded. When ballots are impounded based on a pending unfair labor practice complaint, they shall remain impounded until resolution of the complaint. If the impoundment order was based on an unfair labor practice charge for which a complaint had not yet issued, the ballots cast in the election shall remain impounded for no more than 60 days after the election is held unless a complaint on such charge issues first, in which case the ballots shall remain impounded pending resolution of the complaint. ~~When the ballots are so impounded, the election will not be deemed complete until a ballot count has been conducted and the Board agent has furnished representatives of the parties who are present with a tally and a list of challenged ballots in accord with subsection (a) above.~~

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1156.3 and 1157, Labor Code.

* * * * * * * * * * * * * *

To make technical amendments to the following sections based on the foregoing proposed amendments:

To amend regulation 20330 to state:

§ 20330. Cross-Petitions.

(a) Whenever a petition is filed which encompasses a unit for which a valid petition is currently on file, and no election has yet been directed, the Board or the regional director will determine which of the petitions seeks the appropriate unit, in the event the petitions do not seek the same unit. When the petitions seek the same unit an election will be directed in that unit if the regional director determines it to be appropriate. Both petitions shall be deemed to be cross-petitions. As soon as possible after a cross-petition is filed, the regional director or Board agent assigned to the case shall notify the employer and the original petitioner by telephone that a cross-petition has been filed.

(b) When a cross-petition is filed after the Notice and Direction of Election has been distributed but prior to the 24-hour intervention period set forth in Labor Code ~~S~~section 1156.3(b), the later petition or petitions will be treated as a motion to intervene. A cross-petition which is not accompanied by a majority showing of interest shall be treated as a petition for intervention if it is accompanied by at least a 20 percent showing of interest. Nothing contained in these rules shall preclude an intervenor or cross-petitioner from challenging the appropriateness of the unit in which an election was conducted by filing a petition pursuant to Labor Code ~~S~~section 1156.3(c).

(c) A cross-petitioner shall be subject to the same obligations with respect to service of the cross- petition as apply to service of the petition by the petitioner pursuant to Section 20300(fe). If the cross-petitioner contends that the allegations with respect to peak employment in the original petition are incorrect, it shall raise that contention in writing to the regional director within 48 hours of the filing of the cross-petition.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1156.3, Labor Code.

* * * * * * * * * * *

To amend regulation 20377 to state:

§ 20377. Elections Under Strike Circumstances.

(a) Where a petition for certification alleges that a majority of employees are engaged in a strike at the time of the filing, the regional director shall conduct an administrative investigation to determine whether such a majority exists, and shall notify the parties of ~~his or her~~the regional director's determination. Where the regional director determines that a majority of employees in the bargaining unit were on strike at the time of filing, ~~he or she~~the regional director shall exercise all due diligence in attempting to hold an election within 48 hours of the filing; however, this shall not be construed to require that an election be held in 48 hours. The holding of elections under strike circumstances takes precedence over the holding of other elections.

(b) The procedures set forth in Chapter 3 of these ~~R~~regulations shall apply to the conduct of elections under this section insofar as is practicable under strike circumstances. The regional director shall have authority to establish reasonable procedures for the conduct of expedited elections under strike circumstances. In particular, upon notice to and consultation with the parties, ~~he or she~~the regional director may establish procedures for expediting the receipt of information necessary to evaluate showing of interest and timeliness of the petition pursuant to Labor Code ~~S~~section 1156.4;, and may reasonably shorten deadlines specified in ~~S~~sections 20300(ji)(2) and (4), 20310(d), 20325(e), and 20350(d) ~~of these Regulations~~.

(c) Any party who contends that a 48-hour election is improper shall notify the regional director of its contention and shall submit evidence in the form of written declarations under penalty of perjury supporting the contention and the manner in which the party would be prejudiced. The notification and submission of evidence must be made prior to the pre-election conference. Absent such notice, the regional director's determination shall not be reviewable in post-election objections under ~~S~~section 20365.

Note: Authority cited: Section 1144, Labor Code. Reference: ~~Part 3.5, Division II (commencing with Section 1140)~~Section 1156.3, Labor Code.

* * * * * * * * * * * * * * *

To allow a labor organization to file a notice of intent to organize without filing a prior notice of intent to take access:

To amend regulation 20910 to state:

§ 20910. Pre-Petition Employee Lists.

(a) Any labor organization ~~that has filed within the past 30 days a valid notice of intent to take access as provided in Section 20900(e)(1)(B) on a designated employer~~ may file with the appropriate regional office of the Board ~~two (2) copies of~~ a written notice of intention to organize the agricultural employees of ~~the same~~ an agricultural employer, accompanied by proof of service of the notice upon the employer in the manner set forth in ~~S~~section 20300(f). The notice must be signed by or accompanied by authorization cards signed by at least ten percent (10%) of the current employees of the designated employer. The signatures and authorization cards must comply with the requirements set forth in subdivision (i)(1) of section 20300~~, subdivision (j)(1)~~.

(b) A notice of intention to organize shall be deemed filed upon its receipt in the appropriate regional office accompanied by proof of service of the notice upon the employer. As soon as possible upon the filing of the notice of intention to organize, the regional office in which the petition is filed shall telephone or telegraph the employer to inform ~~him or her~~the employer of the date and time of the filing of the notice.

(c) Within five days from the date of filing of the notice of intention to organize, the employer shall submit to the regional office an employee list as defined in ~~S~~section 20310(a)(2). If the employer contends that the unit named in the notice is inappropriate, it shall submit its arguments to the regional director in writing. A contention that the unit named is inappropriate shall not excuse the timely submission of the pre-petition employee list in the unit named in the notice.

(d) Upon receipt of the list, the regional director shall determine if the ten percent showing of interest requirement has been satisfied, and, if so, shall make available a copy of the employee list to the filing labor organization. The same list shall be made available to any other labor organization which within 30 days of the original filing date files a notice of intention to organize the agricultural employees of the same employer.

(e) ~~No employer shall be required to provide more than one employee list pursuant to this section within any 30 day period~~A labor organization may not file more than one notice of intent to organize an agricultural employer under this section in any 120-day period.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1152 and 1157.3, Labor Code.

AGRICULTURAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
1325 J STREET, SUITE 1900
SACRAMENTO, CA 95814-2944
(916) 894-6840
FAX (916) 653-8750
Internet: www.alrb.ca.gov

DATE: September 22, 2021

TO: Agricultural Labor Relations Board

CC: Santiago Avila-Gomez, Executive Secretary

FROM: Ralph Lightstone, Board Member
Barry Broad, Board Member

RE: Regulatory Proposals – Gendered Language Changes

Below are draft regulatory changes and proposals based on the Regulations Subcommittee's recommendations approved by the Board at the April 13, 2021 public meeting. Changes are reflected in underline (new language) and strikethrough (deletions) formats. Note that many regulations proposed to be amended in other substantive respects also include gender-neutral language corrections similar to those proposed below. In such instances, proposals concerning such other regulations are reflected separately in the report covering the general subject matter to which the regulations pertain. In other words, gender-neutral language amendments in a regulation in the chapter concerning unfair labor practices that is proposed to be amended in other substantive respects will be set forth in the separate regulation report on proposed regulatory language concerning unfair labor practice regulations.

GENDER-NEUTRALIZING UPDATES

To amend regulation 20222 to state:

§ 20222. Amendment of Complaint; Withdrawal of Complaint.

(a) The general counsel, or ~~his or her~~ the general counsel's agents, may amend any complaint without leave, no later than 10 days prior to the commencement of the hearing. Where there are less than 10 days remaining prior to the opening of the hearing, the complaint may ~~.~~ be amended on such terms as may be just, upon motion by the general counsel to the assigned administrative law judge. An amendment to a complaint shall be in writing, except that a complaint may be amended orally at hearing or prehearing if the amendment is reduced to writing, filed with the executive secretary and served on the assigned administrative law judge and on all parties no later than 10 days after the close of the prehearing conference or hearing, as the case may be.

(b) The general counsel or ~~his or her~~the general counsel's agents may withdraw any complaint, without leave, prior to the commencement of the hearing. Thereafter, the complaint may be withdrawn on such terms as may be just upon motion by the general counsel to the assigned administrative law judge.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.4(a), 1160.2 and 1160.3, Labor Code.

* * * * * * * * *

To amend regulation 20243 to state:

§ 20243. Motion for Decision for Lack of Evidence.

(a) After the general counsel or the respondent has completed its presentation of evidence, the opposing party, without waiving its right to offer evidence in support of its defense or in rebuttal in the event the motion is not granted, may move for decision in its favor in whole or in part. The motion shall be granted if the administrative law judge finds that there is no evidence in the record of sufficient substance to support a decision on the merits in favor of the party against whom the motion is directed; provided, that, in making this finding, the administrative law judge shall give to the evidence of said party all value to which it is legally entitled, making every favorable, legitimate inference which may be drawn from that evidence; provided further, that, with respect to the credibility of that party's witnesses, the administrative law judge may disregard such testimony ~~as he or she finds~~found to be manifestly unworthy of belief.

(b) Any ruling granting a motion for decision as to all issues involved in the action shall be in writing with reasons stated and shall be served on all parties and the executive secretary. Any such ruling shall include a recommended order. Such ruling and recommended order is tantamount to an administrative law judge's decision and is reviewable as provided in sections 20279 et seq. or, in the alternative, a party may elect to seek review as provided in section 20242(b).

(c) If the evidence supports the granting of the motion as to some but not all of the issues, the administrative law judge shall grant the motion as to those issues; the administrative law judge's ruling may be made orally or in writing as provided in section 20241(c) and shall be noted in the judge's decision. Such ruling is subject to review under section 20242(b), but special permission is required; such a ruling is also reviewable by way of exception to the administrative law judge's decision pursuant to sections 20279 et seq.

(d) As to any ruling pursuant to this section which is based in whole or in part on a finding that testimony is manifestly unworthy of belief, the administrative law judge shall state, orally or in writing as provided above, the reason(s) for the finding.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

* * * * * * * * * *

To amend regulation 20274 to state:

§ 20274. Production of Statements of Witnesses After Direct Testimony.

(a) After direct examination of a witness, and upon motion of any party, the administrative law judge shall order the production of any statements of the witness in the possession of any other party that relate to the subject matter of the testimony. Should the statements produced be in a language other than English, a translation of the statement shall be made by the official interpreter retained for the proceeding.

(b) A statement includes a written declaration by the witness, signed or otherwise adopted or approved by ~~him or her~~the witness, or a recording or transcription of a recording which is a verbatim recital of an oral statement that was recorded at the time the statement was made.

(c) If the party sponsoring the testimony claims that a statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony or matter which is privileged, the party shall deliver the statement to the administrative law judge for ~~his or her~~ private inspection. The administrative law judge may excise those portions of the statements which do not relate to the subject matter of the testimony or the subject matter of the hearing, or which are privileged. The remainder of the statement shall be delivered to the moving party.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151(a) and 1160.2, Labor Code.

* * * * * * * * * *

To amend regulation 20290 to state:

§ 20290. Initiation of Compliance Proceedings.

(a) If it appears that a controversy exists with respect to the compliance with a Board order, a court decree enforcing a Board order, or an administrative law judge's decision which has become final, and such controversy cannot be resolved without a formal proceeding, the regional director shall issue in the name of the Board and serve on all parties a compliance specification as provided in ~~subsections~~subdivisions (a), (b), (c) or (d) of section 20291. The specification shall be consistent with precedent under the Act and shall contain, or be accompanied by, a notice of hearing. In the alternative and in appropriate circumstances, the regional director shall issue and serve on the parties a notice of hearing without a specification as provided in section 20291(e). The notice of hearing with or without specification may provide for a hearing to be held before an administrative law judge not less than fifteen (15) days after the service of the notice; it shall be filed with the executive secretary and served on each party as provided in sections 20160 ~~and 20164~~through 20169.

(b) Whenever the regional director deems it appropriate in order to effectuate the purposes and policies of the Act or to avoid unnecessary costs and delay, ~~he or she~~the regional director may consolidate with a complaint and notice of hearing issued pursuant to section 20220, a compliance specification based on that complaint. After the opening of the pre-hearing conference, consolidation shall be subject to approval of the administrative law judge or the Board as provided in section 20244. Issuance of a compliance specification shall not be a prerequisite or bar to Board initiation of proceedings in an administrative or judicial forum which the Board or regional director determines to be appropriate for obtaining compliance with a Board order.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1160.3, Labor Code.

* * * * * * * * * *

To amend regulation 20291 to state:

§ 20291. Contents of Compliance Specification or Notice of Hearing without Specification.

(a) Contents of specification with respect to allegations concerning the amount of backpay due. With respect to allegations concerning the amount of backpay due, the specification shall specifically and in detail show, for each employee:

(1) The backpay period;

(2) The amount of gross backpay owed, the method of its computation, the data used in making the computation, and the reasons for selecting the method and data utilized;

(3) The amount and source of interim earnings, the method of allocation, e.g., weekly average, and the reasons for selecting that method;

(4) Amount and type of expenses claimed;

(5) Net backpay, including the method of calculation and the reasons for selecting that ~~,~~method.;

(6) Missing or deceased discriminatees and the requested method for handling their claims;

(7) The interest due to the date of the specification and a demand for appropriate interest thereafter; and

(8) Any other pertinent information.

(b) Contents of specification with respect to allegations concerning the amount of bargaining makewhole due. The bargaining makewhole specification shall specifically and in detail show for all employees entitled to bargaining makewhole, including employees entitled to a makewhole supplement to backpay:

(1) The bargaining makewhole period;

(2) Actual gross earnings, or gross backpay for discriminatees not working during the bargaining makewhole period;

(3) The bargaining makewhole wage rate; the comparable contract(s) or other economic measures upon which it is based, together with the reasons for their selection; and the manner in which the makewhole rate was derived from the comparable contract(s) or other economic measures;

(4) Fringe benefits owed, the contract(s) or other economic data from which they were derived, the reasons for utilizing the contract(s) or other data, and the method by which fringe benefits were derived from the contract(s) or other data;

(5) Net bargaining makewhole and/or bargaining makewhole supplement due;

(6) The interest due to the date of the specification and a demand for appropriate interest thereafter;

(7) Any other pertinent information;

(c) Contents of specification with respect to allegations other than the amount of backpay or makewhole due. With respect to allegations other than the amount of backpay or makewhole due, the specification shall contain a detailed description of the respects in which the person(s) named as respondent(s) have failed to comply with the Board order, court decree, or final administrative law judge's decision, including the remedial acts claimed to be necessary for compliance by the respondent(s).

(d) Use of Partial Specifications. Where, for good cause alleged and established at hearing, the regional director is unable to prepare a full specification as described in ~~subsection~~subdivision (a), (b) or (c) above, ~~he or she~~the regional director may issue a partial specification alleging in detail all information which is reasonably ascertainable, and the matter shall proceed on that basis.

(e) Use of Notice of Hearing without Specification. In appropriate circumstances, the regional director may issue a notice of hearing without a specification, containing a clear and detailed statement of the matter(s) in controversy and any relief sought. The regional director shall include in the notice of hearing the reason or reasons for dispensing with a specification and must substantiate such reason(s) if they are called into question during the course of the proceedings.

(f) Issues Involving Derivative Liability. Where the regional director believes that a person or persons not named in a Board order, court decree, or final administrative law judge's decision, is jointly or derivatively liable to comply with such order, decree, or decision, that liability may be determined in a compliance proceeding initiated under ~~subsection~~subdivision (a), (b), (c), (d), or (e) above, in which the regional director has named the person or persons as respondent(s) and has alleged the legal and factual basis for their joint or derivative liability.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1160.3, Labor Code.

* * * * * * * * * *

To amend regulation 20299 to state:

§ 20299. Agricultural Employee Relief Fund.

(a) This ~~subsection~~subdivision shall apply to all cases in which the Board has ordered monetary relief for agricultural employees or has issued an order approving a settlement agreement providing for payment of monies to agricultural employees, where the collection of monies pursuant to such orders or settlement agreements occurred on or after January 1, 2002. In addition, this ~~subsection~~subdivision shall apply where the collection of monies occurred prior to January 1, 2002, if the monies were not subject to an enforceable promise to return them to the employer and had not escheated to the State by operation of law as of January 1, 2002.

(1) Where, despite diligent efforts, the Board has been unable to locate employees or any person(s) legally entitled to collect money on their behalf for a period of two years after the date the Board collected monies on behalf of such employees, those monies shall be deposited in a special fund in the State Treasury that shall be named the Agricultural Employee Relief Fund (Fund).

(2) Provisions requiring that monies collected on behalf of employees who are not located within two years after the date of collection be deposited in the Fund may be included, pursuant to the mutual agreement of the Regional Director and the employer, in informal settlement agreements reached in accordance with section 20298.

(b) When a regional director has good cause to believe that the collection of the full amount of monetary relief previously ordered by the Board is not possible after reasonable efforts have been made to collect the balance from the employer, the regional director shall file a motion seeking a finding by the Board that the case is eligible for pay out from the Fund. In the case of formal settlement agreements, as defined in section 20298, where there has been a prior adjudication by the Board of the amounts owing, such adjudication shall define the full amount of monetary relief owing to employees. Where there has not been a prior adjudication of the amount owing to employees, the full amount owing to employees shall be the amount specified in the formal settlement agreement. The motion shall be filed with the Board and served on the parties to the case in accordance with sections 20160 and 20166, and shall be accompanied by a statement describing the collection efforts made to date and the basis for the regional director's belief that collection of the full amount owing is not possible. Any party to the case may file a response within ~~ten (~~10) days of service of the motion. If the Board grants the motion, the case shall become eligible for pay out from the Fund, in accordance with the provisions below.

(1) Within ~~ninety~~90 days after the end of each fiscal year, the Board shall determine the amounts to be paid to eligible employees and shall begin distribution of those amounts.

(2) Employees eligible for pay out from the Fund shall be those entitled to monetary relief pursuant to orders in cases in which the Board has made the Fund eligibility finding specified in ~~subsection~~subdivision (b) above. Such employees shall be included in the next annual determination referred to in ~~subsection~~subdivision (b)(1). Eligibility shall continue for two successive annual determinations. Thereafter, eligibility for pay out from the Fund shall expire. In no event shall an employee be paid an amount from the Fund exceeding the amount owed but not collected from ~~his or her~~the employer.

(3) The amount to be distributed to each employee eligible for pay out shall be calculated as follows. The total amount of unallocated money in the Fund shall be divided by the aggregated total of the amounts owing to eligible employees. The resulting ratio shall be multiplied by the amount owing to each eligible employee to determine the amount to be distributed to each eligible employee. However, if the ratio is greater than one, it shall be deemed to be one for the purpose of calculating the amounts to be distributed, and any monies in excess of the amounts necessary for distribution shall remain in the Fund for future distributions. For the purpose of the above calculation, the "amount owing to each eligible employee" shall not include any amounts allocated to the employee in previous fiscal years.

(4) Notwithstanding ~~subsection~~subdivision (3) above, no amount less than ten dollars shall be allocated or distributed to any employee.

(5) Where money from the Fund cannot be distributed because the employee to whom it is assigned cannot be located and/or does not claim the money, the money shall be held in the Fund for distribution to that employee until one year has elapsed from the expiration of eligibility for distribution from the Fund, at which time the claim shall be extinguished and the money shall revert to the Fund for use in making payments to other eligible employees. Eligibility for distribution shall be deemed to have expired after all allocations for which an employee is eligible or upon an employee being allocated 100% of the amount owed, whichever comes first. However, where a claimant can demonstrate that extraordinary circumstances prevented distribution or receipt of monies owing prior to the time that the claim was extinguished, the Board may approve payment of the claim.

(c) The provisions of ~~subsection~~subdivision (b) shall be applied to every distribution from the Fund, unless the Board, within ten (10) days of the determination referred to in ~~subsection~~subdivision (b)(1), finds that application of those provisions will result in manifest injustice. In the event of such a finding, the Board may alter the distribution in order to avoid such injustice.

(d) A motion to make a case eligible for pay out from the Fund pursuant to ~~subsection~~subdivision (b) of this section shall be deemed to include a simultaneous motion to close pursuant to John V. Borchard, et al.(2001) 27 ALRB No. 1. In such event, the filing requirements set forth in this section shall be controlling. In the event that a closed case is later reopened pursuant to the criteria set forth in John V. Borchard, et al.(2001) 27 ALRB No. 1 and further collection of monies from the employer is effectuated, the Fund shall be reimbursed to the extent that the combination of the amount collected from the employer and the amount paid from the Fund exceeds the full amount owed to employees in that case.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1161, Labor Code.

* * * * * * * * * *

To amend regulation 20335 to state:

§ 20335. Transfer, Consolidation, and Severance.

(a) Whenever it appears necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay, the Board or the regional director, after consultation with the parties, may order that any petition and any proceedings that may have been instituted with respect thereto:

(1) Be consolidated with any other proceedings which may have been instituted in the same region;

(2) Be transferred and continued before the Board for the purpose of investigation or consolidation with any other proceeding which may have been instituted in any regional office;

(3) Be severed from any other proceeding with which it may have been consolidated pursuant to this section; or

(4) Be transferred to and continued in another regional office for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such regional office.

(b) Whenever a petition under Labor Code ~~S~~section 1156.3(c) is properly filed, the Board may, at its discretion, sever issues relating to the appropriateness of the bargaining unit, employment peak, or the accuracy of the allegations in the petition made pursuant to Labor Code ~~S~~section 1156.3(a)(2), (3), or (4).

(c) Where a petition under Labor Code ~~S~~section 1156.3(e) 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, the ~~E~~executive ~~S~~secretary shall notify the ~~G~~general ~~C~~counsel of such filing(s), under either of these sections, and provide to the ~~G~~general ~~C~~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 ~~E~~executive ~~S~~secretary. Simultaneously, the ~~E~~executive ~~S~~secretary will identify the date upon which the 21 -day period for Board action under either section 20365 or 20363 will expire.

(1) The ~~G~~general ~~C~~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 by containing the same or some of the same matter which form the basis of said objection or challenge. Upon making this determination, the ~~G~~general ~~C~~counsel may~~, at his or her option,~~ notify the ~~E~~executive ~~S~~secretary that certain specified charges, in ~~his or her~~ the general counsel's view, mirror certain specified objections or challenges. Where the ~~G~~general ~~C~~counsel has decided to seek consolidation of said mirroring charge with the objections or challenges set for hearing, the ~~G~~general ~~C~~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 ~~G~~general ~~C~~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 ~~G~~general ~~C~~counsel determine that ~~his or her~~the investigation and/or issuance of the complaint on mirror unfair labor practices cannot occur prior to the schedule~~d~~ expiration date of the 21 -day period, the ~~G~~general ~~C~~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.

For the purposes of this subdivision, good cause will be established when the General Counsel avers that it is ~~his or her~~ the general counsel's intent to move the Board to consolidate any enumerated mirror charges ~~he or she~~the general counsel 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 ~~G~~general ~~C~~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 ~~G~~general ~~C~~counsel o~~r his or her~~the general counsel's representative may participate in any such hearing only when an unfair labor practice complaint has been consolidated with the objections or as required by the provisions of section 20370(c).

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1156.3, Labor Code.

* * * * * * * * * *

To amend regulation 20350 to state:

§ 20350. Election Procedure.

(a) All elections shall be conducted under the supervision of the appropriate regional director. All elections shall be by secret ballot and shall be conducted at such times and places as may be ordered by the regional director. Reasonable discretion shall be allowed to the agent supervising the election to set the exact times and places to permit the maximum participation of the employees eligible to vote.

(b) Each party may be represented at the election by observers of its own choosing who should be designated at the pre-election conference, but in no event less than 24 hours before the start of the election. Such observers must be non-supervisory employees of the employer, except the petitioner, if an employee, also may not be an observer. Other persons, with the exception of supervisors or the petitioner, may be observers if agreed to by all parties in writing. Observers so designated should not wear or display any written or printed campaign material or otherwise engage in any campaign activities on behalf of any party while acting as observers. The Board agent has the discretion to determine the number of observers which each party may have. Any party objecting to the observers designated by another party must register the objection and the reasons therefor~~e~~ with the Board agent supervising the election by the close of business the day immediately preceding the election. Failure to so register such objections will be construed as a waiver of the right to object to the conduct of the election on such ground. The regional director shall have the discretion to modify the time limits contained in this regulation where a strike election makes such limits impracticable or in other extraordinary circumstances.

(c) All parties shall be required, upon request by the regional director or ~~his or her~~the regional director's agent, to cooperate fully in the dissemination to potential voters of official Board notices of the filing of a petition and official Board notices of direction of an election and any other notices which, in the discretion of the regional director or ~~his or her~~ the regional director's agent, are required to fully apprise potential voters of the time and location of an election.

(d) Unless otherwise directed by the regional director after consideration of the particular circumstances of a case, a pre-election conference shall be held in each case no later than 24 hours before the commencement of the election. Subject to the above limitation, the Board agent assigned to the election shall have discretion to set the time and place of the pre-election conference after consultation with the parties.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1156.3, 1156.7 and 1157.2, Labor Code.

* * * * * * * * * *

To amend regulation 20355 to state:

§ 20355. Challenges.

(a) Any party or the Board agent may challenge, for good cause shown, the eligibility of any person to cast a ballot. Good cause shown shall consist of a statement of the grounds for the challenge, which shall be supported by evidence submitted subsequent to the closing of the polls. Any challenge must be asserted prior to the time that the prospective voter receives a ballot and be limited to one or more of the following grounds:

(1) The prospective voter is a supervisor as defined by Labor Code ~~S~~section 1140.4(j);

(2) The prospective voter was not employed in the appropriate unit during the applicable payroll period;

(3) The prospective voter is employed by ~~his or her~~ the prospective voter's parent, child, or spouse, or is the parent, child, or spouse of a substantial stockholder in a closely held corporation which is the employer;

(4) The prospective voter was employed or ~~his or her~~the prospective voter's employment was willfully arranged for the primary purpose of voting in the election in violation of Labor Code ~~S~~section 1154.6;

(5) The prospective voter is a guard employed primarily to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's property;

(6) The prospective voter is a managerial or confidential employee;

(7) The prospective voter is not an agricultural employee of the employer as defined in Labor Code ~~S~~section 1140.4(b); or

(8) The prospective voter's name does not appear on the eligibility list.

(b) Failure to challenge the eligibility of a person to vote prior to ~~his~~the person receiving a ballot shall constitute a waiver of the right to challenge that person's vote, and any post-election objection raising the issue of the eligibility to vote of a person whose ballot was not challenged at the election shall be dismissed.

(c) Prospective voters, including those whose names appear on the eligibility list, must present identification in order to vote. Identification may be in the form of an employer-provided identification card, a payroll check stub of that employer, driver's license, "green card," social security card, or any other identification which the Board agent, in ~~his or her~~the Board agent's discretion, deems adequate. The Board agent will challenge any prospective voter who fails to supply identification as required above, or any prospective voter concerning whom the Board agent concludes there is a substantial question of identity.

(d) Subsequent to the balloting but prior to the tally of ballots, the Board agent supervising the election shall have discretion to rule upon challenged ballots on which all parties agree that there is no factual or legal dispute, or to accept withdrawal of any challenge by the party making the challenge.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1156.3, Labor Code.

APPENDIX E:
PUBLIC COMMENT FROM ADMINISTRATIVE LAW JUDGES (ALJS) MARY CRACRAFT AND JOHN MCCARRICK

DATE: October 5, 2021
TO: Agricultural Labor Relations Board
FROM: John J. McCarrick, Administrative Law Judge
and Mary Miller Cracraft, Administrative Law Judge
RE: Regulatory Proposals – Unfair Labor Practices

COMMENTS ON AGRICULTURAL LABOR RELATIONS BOARD'S PROPOSED REGULATIONS

On September 22, 2021, the Agricultural Labor Relations Board, herein Board, proposed new and amended regulations to 8 C.R.R. 20100 et. seq. Pursuant to the Board's invitation, comments to these proposals are submitted on behalf of Administrative Law Judges John J. McCarrick and Mary Miller Cracraft. Thank you for your consideration of these comments.

§20220(c) – Establishment of Laches Defense

Among the regulatory changes the Board is considering is an amendment to regulation section 20220(c). The proposed amendment provides:

> (c) If the general counsel has not issued a complaint pursuant to subdivision (a) of this section within 12 months of the date an unfair labor practice charge was filed, the charge shall be deemed dismissed. Where an amended charge has been filed, the 12-month time period in which to issue a complaint shall run from the date the original charge was filed. The general counsel may apply to the Board for an extension of time to conduct further investigation of a charge for good cause shown based upon a claim that the charged party's conduct impeded the general counsel's timely investigation of the charge or other extraordinary circumstances. The length of an extension based upon a charged party's dilatory conduct may be commensurate with any delays reasonably incurred as a result of such conduct. The length of an extension based on other extraordinary circumstances shall be limited to a single extension of no more than 60 days.

It is our opinion that this proposed change to Board regulation section 20220 would do irreparable harm to the purposes and policies of the Agricultural Labor Relations Act, herein Act.

The proposed amendment to section 20220 creates the legal defense of laches to an unfair labor practice complaint where none has heretofore existed. Both the Board and the National Labor Relations Board, herein NLRB, as well as the courts have uniformly held that there is no defense of laches in an administrative proceeding. The reason is clear. As the United States Supreme Court held in *NLRB v. J.H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 264-265:

This court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. *NLRB v. Electric Cleaner Co.,* 315 U.S. 698 (1942); *Labor Board v. Katz*, 369 U.S. 736, 748 n. 16 (1962).

The NLRB in *Newark Electric Corp.,* 366 NLRB No. 145 (2018) slip op. at 1, fn. 2 has likewise held that laches is an inappropriate defense in the vindication of public rights:

> We reject the Respondents' defense of laches, which does not bar action by the Board, as a federal government agency, to vindicate public rights. See *Energy Mississippi, Inc.,* 361 NLRB 892, 893 fn. 5, enfd. in relevant part 810 F.3d 287 (5th Cir. 2015); (2014); *F.M. Transport, Inc.,* 302 NLRB 241 (1991).

The Board has consistently held that laches is not available as a defense in an unfair labor practice case. In *Mission Packing Company*, 8 ALRB No. 47 (1982) slip op. p. 2, the Board noted that, "The NLRB has consistently held that laches is not a defense in its proceedings and that administrative delay is not sufficient reason to deprive employees of their statutory rights." (Citations omitted). The Board reaffirmed this position in *Ace Tomato Company, Inc.,* 41 ALRB No. 5 (2015) slip op. at p. 32, that inordinate agency delay should not be inflicted upon wronged employees, citing the rationale in *NLRB v. Rutter-Rex Manufacturing Co., supra,* and *NLRB v. Int'l Ass'n, Bridge, Structural & Ornamental Ironworkers, Local 490* (1984) 466 U.S. 720, 724.

Labor Code Section 1140.2 provides the rationale for the creation of the ALRB. This section states in pertinent part:

> 1140.2 It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to the full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restrain, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

Proposed Board regulation 20220(c) would in effect create a laches defense contrary to the long Court and Board history of precluding this defense because to do so, in effect, lays the blame for inordinate agency delay upon employees whose rights under the Act have been violated. The creation of this defense violates the spirit and policy behind the Act by requiring general counsel to vindicate farmworkers' rights during an arbitrary 12-month period. Creating any time period for the agency to issue a complaint unreasonably places the balance in favor of wrongdoing employers and against wronged employees. Clearly such a regulation violates the purpose and policy of the Act.

Moreover, it is unclear whether proposed regulation 20220(c) would confuse extant authority regarding relation back of an amended charge to a timely filed charge. See, e.g., *Rogers Foods, Inc.* (1982) 8 ALRB No. 19 (ALJD at p. 6); *Applebee's* (2006) 346 NLRB No. 44, slip op. at 3, citing *WGE Federal Credit Union* (2006) 346 NLRB 982, 983. Finally, other measures for guaranteeing timely processing of unfair labor practice charges exist. Oversight and time targets have proven effective at the NLRB and could easily be implemented here rather than the Draconian policy of adopting a laches defense.

§20247.1 Case Management Conference

A new regulation is proposed which sets out the appropriate matters to be discussed at a Case Management Conference (CMC). Such a rule has never been included in the regulations and is long overdue. Subpart (a) of the proposed regulation sets a time requirement for a CMC (10 days after the answer is filed) and enumerates seven items for discussion at the CMC. It is submitted that some of the seven items listed for discussion at the CMC may be more fully and meaningfully addressed in the Pre-Hearing Conference (PHC). It is further submitted that holding a CMC 10 days following the filing of the answer is too early to provide informed data.

Each of the seven items enumerated in subpart (a) are worthy of consideration at the CMC. However, due to the early timing of the CMC, the information elicted should be understood as reflecting only a rough estimation. Further topic by topic explication follows. The seven topics in proposed §20247.1(a) are:

1. The expected length of the hearing should definitely be explored in the CMC but should be understood as only a rough estimate at this point in time.
2. The size of the hearing room needed is also a valid CMC topic but size is a sliding scale depending on subsequent stipulations reached, amendments to the complaint, and the effect of the current pandemic, all of which are more predictable by the time of the PHC. Further, at the time of the CMC, hearing room contracts may not be warranted.
3. Interpreter necessity is sometimes unknown by all litigants until pretrial. The interpreter contracts may not be warranted until a later date.
4. “Whether the case is expected to present any novel or complex legal issues” is, of course, another relevant CMC querry. However, further issues may develop which overcome the answers provided at the CMC.
5. The appropriate timing for appointment of a settlement judge is a total unknown during the CMC time period. Moreover, settlement judge discussions have never been a requirement. The current practice is that the parties work to settle a case on their own and request a settlement judge only when they run into roadblocks. Typically, during the CMC, the parties have not yet assessed the viability of settlement discussions. Further discussion of this issue is below, in connection with the proposed amendment to §20248.
6. Of course, intention to conduct discovery should be included as a CMC topic.
7. Additional suggestions for expediting the hearing process are always welcome. The other wording in this item, “add value to the hearing process,” is unclear.

Proposed 20247.1(b) adds wholly unnecessary elements of pre-CMC conferral and an ALJ CMC Order as follows:

> The parties shall meet and confer regarding the matters to be addressed at the [CMC] and shall file, jointly or separately, a [CMC] statement no later than 5 days before the scheduled date of the conference. The assigned administrative law judge [ALJ] may take the CMC off calendar if the [ALJ] finds the parties' [CMC] statement or statements sufficiently address the matters to be addressed at the conference. The [ALJ] shall issue an order summarizing the results of the [CMC] as soon as practicable after the conference is held or, if taken off calendar, was scheduled to be held.

The CMC has long been an informal conference between litigants and the ALJ. Requiring a formality that the parties file CMC statements 5 days post-answer is unnecessary. Requiring a further formality, a post-CMC ALJ order, is totally unnecessary. As a matter of course, the ALJs inform the Executive Secretary's Office (typically by internal email) of matters discussed at the CMC. It is submitted that requiring CMC statements and orders are pure "make work" and do not meaningfully move the parties toward focusing on litigation.

§20248 Settlement Conference

Settlement is perhaps the optimal outcome of litigation. Once a case is settled, the parties are able to continue their work without interruption. Further, the Board can focus administrative resources to further projects. The proposal to amend §20248 appears to mandate appointment of a settlement judge in each case. Current practice allows the appointment of a settlement judge at any time, as an option whenever the parties reach roadblocks in their own settlement discussions. In other words, the current practice is that a settlement judge is discretionary and appointed based on the needs of the parties. Typically, either the parties or the assigned trial judge assess the situation and only request an independent settlement judge when efficacious. The proposed change in the rule is laudable only if the parties are ready and willing to accede to the mandatory timeline and framework. At first glance, the mandatory timeline and framework appear unnecessary.

Judge McCarrick has served as an administrative law judge for the Board for over three years. Prior to his service with the Board, he was an administrative law judge for the National Labor Relations Board, herein NLRB, for 15 years, an administrative law judge with the Social Security Administration for eight years, an Immigration Judge for nine years and a trial attorney with the NLRB for ten years. Judge Cracraft has served as an administrative law judge for the Board for over four years. Prior to that time, she was an administrative law judge with the NLRB for 22 years, a member of the NLRB for 5 years, an assistant executive secretary to the NLRB for 2 years, and practiced labor litigation for eight years (four with the NLRB and four in private practice).

APPENDIX F:
PUBLIC COMMENT FROM ALJ MARK SOBLE

From: Mark R. Soble
Chief Administrative Law Judge

To: Agricultural Labor Relations Board

Date: October 6, 2021

RE: September 22, 2021 Regulatory Proposals

Here are my comments that address two of the proposed regulations that would impact the Administrative Law Judge Unit.

1. Regulation § 20247.1, subdivision (b), Case Management Conference

I think that this is an excellent proposed regulation. In particular, this regulation adds value when I look at succession planning. Right now, we have three very experienced administrative law judges (ALJs), so I am comfortable with delegating a fair amount of discretion. But in the future, as the agency expands or replenishes its ALJ staff, the regulation structure will serve the agency well, as new and less-experienced judges potentially join us.

2. Regulation § 20248, Settlement Conference

I think that this is an excellent proposed regulation. The regulation requires the initial timely scheduling of a settlement conference. It does not appear to limit the settlement ALJ's authority to thereafter deviate from the scheduled date when circumstances warrant it