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MEMORANDUM

TO: Santiago Avila-Gomez, Executive Secretary

FROM: Julia Montgomery, General Counsel

SUBJECT: Pre-Rulemaking Comments re. Proposed Regulations

DATE: October 29, 2021

The General Counsel recognizes the invaluable work of the regulations subcommittee in drafting the proposed regulatory changes. Following consultation with experienced General Counsel Program staff members, the General Counsel submits the following comments.

Section 20202(b)—Form and content of charge

The General Counsel supports the proposed addition of §20202(b), that would allow a general counsel to redact the name of a charging party "when the charging party has stated a reasonable fear of retaliation and maintaining anonymity is necessary to permit the filing of the charge." Regional offices sometimes encounter instances when a putative charging party decides not to file a charge out of fear of retaliation or blacklisting. Although ALRB staff explain to workers the protections the Act provides, this is sometimes not sufficient.

Proposed §20202(b) addresses this barrier to workers' willingness to file charges without harming respondents' due process rights. Investigating the allegations of an unnamed charging party is similar to investigating the allegations of an unnamed discriminatee. As §§20236(a) and (c) of the regulations protect the identity of non-supervisorial farmworker witnesses until they testify at hearing, respondents currently do not receive notice of all evidence against them prior to the hearing. The General Counsel frequently investigates claims of discriminatees not named in the charge and respondents routinely respond to information requests in such investigations. Per this proposed regulation, the charging party will be named if the General Counsel issues a complaint and respondent will continue to have the opportunity to prepare a defense and cross-examine the charging party and any other witnesses who testify at hearing on behalf of the General Counsel. The proposed regulation therefore does not violate respondents' due process rights.

Section 20216—Investigation by the Regional Director

Interrogatories offer a swift and efficient method to determine important, discrete facts during an investigation. Proposed §20216(b) allows the regional director to propound written interrogatories "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 General Counsel strongly supports the concept of interrogatories but believes that the proposed language is too narrow. The usefulness of interrogatories is not limited to the enumerated threshold issues. Proper use of interrogatories can speed an investigation, help avoid the need to reinterview witnesses, and limit the number of document requests. Rather than limit the subject matter of the interrogatories, the General Counsel proposes to limit the number of interrogatories to twenty-five.[1]

The General Counsel proposes that Section 20216(b) be rewritten as follows:

> "The regional director may propound up to 25 written interrogatories, including all discrete subparts, to a charged party to be answered under oath. The regional director may propound interrogatories at any time 10 days after service of the charge on the charged party. 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."

Section 20217—Investigative subpoenas

The General Counsel strongly supports the proposed changes to §20217 of the regulations concerning investigative subpoenas. Frequently, respondents object to subpoena requests citing privileges or other protections, without providing any information which would allow the General Counsel or the Board an opportunity to evaluate the merits of such claims. Attorneys for the General Counsel have long argued with respondents' counsel that the requirement of a privilege log found in California Code of Civil Procedure §2031.240 applies equally to respondents' objections to the General Counsel's subpoena request. Often respondents have failed or refused to provide such logs. The language proposed in §20217(d) would clarify this issue and permit the General Counsel, and ultimately the Board, to evaluate the merits of privilege claims.

The General Counsel, likewise, supports proposed subsection §20217(h), which adds an additional enforcement mechanism for investigative subpoenas. The General Counsel

[1] Fed. R. of C. Pro. 33(a)(1) permits a party to file 25 written interrogatories, including discrete subparts.

recommends adding "the general counsel may apply to the chief administrative law judge or to the administrative law judge assigned to the matter, for appropriate sanctions…"

Section 20220—Complaint

Section 20220(c) of the proposed regulations would dismiss an unfair labor practice charge if, after twelve months, the General Counsel has not filed a complaint. General Counsel Program staff expressed multiple concerns with this proposed change at the October public board meeting. The General Counsel's concerns fall into three categories: First, the proposed regulation likely exceeds the Board's authority as Section 1149 of the Act gives the General Counsel "final authority" over the investigation of charges and issuance of complaints. Second, the proposal punishes wronged charging parties, who have complied with ALRB rules and placed their faith in the ALRB, and rewards wrongdoing respondents. Third, the proposed regulation fails to account for the inherent challenges in investigating cases involving the agricultural industry.

The General Counsel's first concern is that the proposed regulation exceeds the Board's authority to the extent that it usurps the General Counsel's authority conferred by statute. Section 1149 of the Act states that the General Counsel "shall have final authority, on behalf of the board, with respect to the investigation of charges and issuance of complaints…and with respect to the prosecution of such complaints before the board."

In *Belridge Farms v. ALRB*, an agricultural employer sought court review of the Board's ruling upholding a general counsel's decision not to file a complaint against a union for access violations.[2] The employer argued that the phrase "on behalf of the board" in Section 1149 of the Act granted the Board authority to overrule the general counsel's decision regarding the issuance and prosecution of complaints. The court rejected that contention, noting:

> "Petitioner's proposed construction of this language, suggesting the general counsel is an agent of the board and his decisions are therefore imputable to the board, cannot be accepted. It is apparent, when this language is viewed in context as following the words "he shall have final authority," that the phrase "on behalf of the board" was intended to make it clear that any implied power the board might otherwise have to issue complaints was vested in the general counsel, not the board. Only the general counsel has authority to issue an unfair labor practice complaint. Charges of unfair labor practices must be filed with the general counsel or his agents. A complaint based upon such charges may be issued only by the general counsel, not by the board."[3]

Courts have ruled that the general counsel has "final authority…with respect to the investigation of charges and issuance of complaints." While *Belridge Farms* dealt specifically with the

[2] *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551.
[3] *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, 557-558, (citing *Lincourt v. NLRB* (1948) 170 F.2d 306, 307.)

issuance of complaints, their reasoning applies equally to the "investigation of charges," which appears in the same statutory passage.

The proposed regulation effectively usurps the General Counsel's authority to investigate charges and issue complaints by removing the General Counsel's discretion to do so after a "one-size-fits-all" time frame of 12 months expires. The proposed regulation would not merely establish a timeline for bringing complaints; it would also extinguish worker claims when the General Counsel is unable to complete an investigation within the 12-month time frame.

The General Counsel's second concern is that the proposal erroneously places the costs associated with investigation delay on the charging parties, most of whom are farmworkers, and not on wrongdoing respondents. In *J.H. Rutter-Rex Mfg. Co*., a union filed an unfair labor practice charge alleging that the employer had failed to bargain in good faith.[4] Seven years later, the regional office of the Board filed a backpay specification. The employer challenged the specification as unfairly delayed. The Court of Appeals for the Fifth Circuit found that the Board was responsible for "inordinate" delay and shortened the backpay period to an earlier date.[5] The U.S. Supreme Court, while condemning the delay, reversed. The Court ruled that "[e]ither the company or the employees had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had wrongfully failed to reinstate the employees. In an effort to discipline the Board for its delay, the court shifted part of that cost from the wrongdoing company to the innocent employees."[6] The Court found 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."[7]

This principle is well-settled in both the NLRB and ALRB contexts.[8] The Board must follow applicable precedents of the National Labor Relations Act.[9] Moreover, the ALRB has long recognized that "administrative delay is not a basis for denying employees their statutory

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[4] *NLRB v. J. H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258
[5] *J. H. Rutter-Rex Mfg. Co*., *supra*, 396 U.S. at 259.
[6] *J. H. Rutter-Rex Mfg. Co., supra*, 396 U.S. at 263-264
[7] *J. H. Rutter-Rex Mfg. Co*., *supra*, 396 U.S. at 265; citing *NLRB v. Electric Cleaner Co.,* (1942) 315 U.S. 685, 698; *Labor Board v. Katz* (1962) 369 U.S. 736, 748 n. 16.
[8] *Bufco Corp. v. NLRB* (D.C. Cir. 1998) 147 F.3d 964, 967 ["During the delay, [the employer] had use of money rightfully belonging to its workers. The return on the money belongs to the victim, not the wrongdoer…" (internal quotations omitted)]; *NLRB v. Seligman & Associates, Inc.* (6th Cir. 1986), 808 F.2d 1155, 1161 [when faced with the choice of placing the burden of Board errors on either a wrongfully discharged employee or her former employer, the Supreme Court has chosen to burden the employer]; *Int'l Union of Elec. v. NLRB* (D.C. Cir. 1970) 426 F.2d 1243, 1251-1252 [The Supreme Court has recently pointed out the propriety, within the national labor policy, of putting on the wrong-doing employer the burden of compensating employees for the loss suffered during a period of unusual Board delay…"]; and *Lodges 743 & 1746, Int'l Ass'n of Machinists v. United Aircraft Corp.* (2nd Cir. 1975) 534 F.2d 422, 458 ["Finally, while it is the duty of the Board not to condone undue delay in its processes and to take steps to eliminate it," the consequences of Board delay should not be placed upon wronged employees to the benefit of wrongdoing employers." (internal citations omitted.)]
[9] Labor Code § 1148.

rights."[10] These rulings recognize the public policy behind backpay "is not only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo that would have been obtained but for the wrongful act."[11] Dismissing charges after a 12-month time limit frustrates this public policy as it eliminates the possibility of restoring the status quo that would have existed absent the unlawful act. Proposed §20220(c) punishes innocent workers and other charging parties who have no ability to speed along ALRB investigations and encourages and rewards respondents' attempts to delay investigations.

In addition, the ALRB alone may enforce the ALRA, and no private right of action exists for parties to file an unfair labor practice claim on their own. This distinguishes the ALRB from the Department of Fair Employment and Housing, which issues a right to sue letter to parties at the end of the investigation, giving parties standing to file a private action in court to enforce the Fair Employment and Housing Act. Conversely, if the General Counsel is barred from filing a complaint on behalf of a worker because an investigation is not completed within 12 months, that worker has no other recourse to seek remedies for violations of the ALRA and their claim simply disappears. This frustrates the purposes of the Act.

The General Counsel's third concern is that proposed regulation fails to account for the many reasons that an investigation may not be able to be completed within 12 months, for reasons out of the ALRB's control and despite ALRB staff's diligent efforts. General Counsel program staff with many years of experience investigating and prosecuting cases in ALRB's regional offices commented at the October Board meeting about many of these reasons, including:

- Many farmworkers travel out of the region or out of state for extended periods of time to follow crops and are therefore difficult to locate;
- The ALRB lacks the authority to subpoena witnesses who are out-of-state and therefore staff sometimes must wait for witnesses to return for the following year's work season to conduct interviews and obtain relevant documents;
- Witnesses in the agricultural industry are often more difficult to locate because of the seasonal nature of the work, the high turnover of employees and workers' lack of knowledge about their co-workers' complete names and contact information;
- Many farmworkers change phone numbers frequently or lose phone service for prolonged periods of time, rendering it more difficult for ALRB staff to locate them and speak to them;
- Many farmworkers distrust government representatives and it takes time for ALRB staff to build rapport and trust to be able to obtain the information they need in an investigation;
- Farmworkers work long hours performing extremely strenuous jobs, making it difficult to locate witnesses and convince them to agree to interviews during peak harvest seasons;

[10] *Stamoules Produce Co., Inc.* (1990) 16 ALRB No. 13, at ALJ Dec. p. 3. See also *Rincon Pacific, LLC* (2020) 46 ALRB No. 4, pp. 7-8 and the cases cited therein.
[11] *J. H. Rutter-Rex Mfg. Co*., *supra*, 396 U.S. at 265.

- Respondents or their counsel (many of which are small firms or solo practitioners) sometimes cause delay by being slow to respond to document or interview requests, or by asking for extensions of time for good cause;
- Some respondents and their counsel intentionally obstruct ALRB's investigations by failing to provide requested information;
- The business structure of some agricultural employers makes it more difficult and time consuming to identify the proper employer leading to additional delays; and
- Subpoena enforcement proceedings before the Board and Superior Court can delay an investigation by months.

Section 20235—Request for Particulars

The General Counsel suggests that proposed section 20235(b), concerning a request for particulars where an answer asserts a defense based on an agricultural employee's immigration status be broadened. Respondents' counsel sometimes make unclear or unsupported allegations or assert bare-bone affirmative defenses in answers. Providing the General Counsel with the authority to file a Request for Particulars is an efficient manner to address such allegations would speed litigation and allow for consistency in pleading standards.

We suggest revising proposed §20235(a) as follows:

> "Where a complaint or an answer 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, or alleges an affirmative defense, a written request for particulars may be made by a party in accordance with section 20237…"

Section 20951—Labor Peace Agreements

The General Counsel suggests that proposed subsection §20951(b) be written more broadly. It is difficult to anticipate the various methods that an agricultural employer might use to discriminate against one labor organization and favor another. Therefore, the General Counsel suggests the following revision: "An agricultural employer shall not discriminate against a labor organization, including, but not limited to, in the provision of 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…" The proposed revision brings this proposed subsection into alignment with our caselaw, which recognizes that any attempt to favor one uncertified labor organization over another is an unfair labor practice.

Section 20300(e)—Service of Petition for Certification on Security Guards

The General Counsel supports permitting service of a petition for certification on security personnel. Permitting service of a petition for certification on such security personnel is little

different than allowing service on "a person apparently in charge of the office or other responsible person," which is currently permitted under section 20300(f) of the regulations.

The proposed change is needed, in part, because of the heightened security measures at cannabis operations that render it more difficult to serve documents on company officials. The language proposed in subsection 20300(e) reestablishes the ability of unions to serve petitions for certification in an efficient and timely fashion. Respondents' interests are not harmed because notice of service will also be provided by email and by overnight courier.