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October 29, 2021

Mr. Santiago Avila-Gomez
Executive Secretary
Agricultural Labor Relations Board
1325 "J" Street, Suite 1900
Sacramento, CA 95814-2944

Sent Via U.S. Mail and
Email: Santiago.Avila-Gomez@alrb.ca.gov

Dear Mr. Avila-Gomez:

Enclosed please find comments of the Ventura County Agricultural Association with reference to the Board's recent proposed regulatory changes to the ALRB's regulations. These written comments are timely submitted pursuant to a recent order of your office.

Ventura County Agricultural Association is a non-profit trade association representing the interest of over 200 agricultural employers, farm labor contractors, nurseries, packing houses and related agricultural entities.

As the in-house General Counsel to the Association, I have represented the interests of these employers since November 1977 in all aspects of the Agricultural Labor Relations Act and its regulations. During that time, I have represented agricultural employers in over 700 or more unfair labor practice charges; approximately 50 collective bargaining negotiations and renegotiations with the United Farm Workers (UFW), the Teamsters, and the United Food and Commercial Workers Union, Local 5. My office has also represented employers in a number of representation and decertification elections, some of which have been published Board decisions.

In total, my office has been involved either directly or indirectly on brief, in approximately 25 published ALRB decisions since 1976, including four decisions in the California Supreme Court. My office continues to handle number of ALRB cases on a continuous basis. Indeed, Ventura County seems to be the epicenter for the filing of most unfair labor practice charges in the State. Over the last ten years, my office has handled in excess of 75 unfair labor practice charges involving members of our Association. Currently it has fifteen (15) outstanding ULP charges that are yet to resolved in General Counsel investigations. Some of these charges are in excess of twelve (12) months in the investigative stage.

Based upon the foregoing, I believe that our office is uniquely qualified to comment on the proposed regulations and their potential impacts upon practitioners before the ALRB.

As the old adage states: "Don't change it if it ain't broke". My office believes that many of the proposed changes in the rule-making package that deal with filing of pleadings and service of process, generally; requirements for mandatory settlement conferences; the cannabis industry specific regulations; supplemental mandatory mediation and conciliation (MSC) regulations; and a number of clarifications to the representation proceedings may be warranted.

Therefore, it is the intent of the undersigned to address a number of proposed regulations that deal with the issues of filing of charges; dismissal of a charge; investigation of a charge by General Counsel; issuance of a complaint; and enforcement of a subpoena in Superior Court. I believe that many of the proposed changes are not "necessary", as required by the California Administrative Procedure Act; are in some instances in violation of the Due Process clause under the State and U.S. constitutions; and are biased in favor of farmworkers to the detriment of agricultural employers practicing before the Board.

The General Counsel and the Board are reminded of the powers and duties of the General Counsel set forth in Labor Code Section 1149. "All employees appointed by the General Counsel shall perform their duties in an objective and impartial manner without prejudice towards any party subject to the jurisdiction of the Board..." As a person who has had firsthand experience with many of the Board's personnel over the last 45 years,[1] agricultural employers have specific concerns about the focus of the Board's activities and the treatment of the agricultural employers in a fair and even-handed manner.

To the extent that some of the proposed regulations are facially neutral and are proposed as a result of changes in the law and case decisions, it is understood that they may be warranted. However, we see that many of the proposed regulations are not in the best interest of agricultural employers and are designed to enhance the power and ability of the General Counsel to promote the rights of agricultural employees to the detriment of agricultural employers.

With the foregoing concerns in mind, VCAA makes the following comments on the Board's proposed regulations:

1. **Section 20202(b)** provides for the redaction of a charging party's name. We believe that this proposed regulation is not "necessary" as defined by the APA; is overly paternalistic as it relates to unfounded and perceived violations against agricultural employers; and lastly violates the Due Process rights of agricultural employers.

First, the proposed regulation creates a presumption that an employer will always retaliate against one of its employees for filing a ULP charge, and thereby commit a ULP in doing so. Secondly, it would be impossible for an employer to investigate, respond to General Counsel's request for information, interrogatories or subpoenas, or to respond to a charge if it is not provided the information related to the charging party's name. Furthermore, to make the Regional Director's decision to perform such redactions non-reviewable, strips away a party's Due Process rights.

Section 1149 of the Act specifically requires, in part, that the General Counsel "shall perform [her] duties in an impartial manner without prejudice toward any party subject to the jurisdiction of the Board..." [Emphasis] Allowing the General Counsel to redact the charging party's name based upon [her] assumption of perceived or anticipated retaliation violates this provision. Given the requirement that the Charging Party must state to the Regional Director that there is a reasonable fear of retaliation and the lack of rights available to the employer, the Board

[1] My legal career involving the ALRA began on July 1, 1976 representing non-VCAA agricultural employers.

should insure that proper measures are put in place so that there is a real basis for alleged fear of retaliation, otherwise all employee charging parties will claim there is a fear, so as to avoid being subject to the investigation into the charge. If redaction is allowed, there should be safeguards, such as the Charging Party must be required to first make such a claim, and substantiate it with evidence, under penalty of perjury, if such information is shared with the employer-party.

2. **Section 202016(b)** which allows the Regional Director to propound written interrogatories to a Charging Party to be answered under oath…

This the first time in the history of the Agricultural Labor Relations Act since its inception on August 28, 1975, that the ALRB has now seen a necessity for providing the General Counsel with this additional power. VCAA submits that if the Board finds that this interrogatory process is necessary, it should be modified to allow the Charging Party to do the same to the General Counsel or a Charging Party's legal representative. Also, instead of having their own time limits, the regulations should incorporate the provisions of the **California Discovery Act** which apply to interrogatories. This would streamline the discovery process and also provide for a reasonable period of time for responses.

3. **Section 20216(c)** which requires that 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 General Counsel's investigation and following issuance of any unfair labor practice complaint.

VCAA submits that such a bar on a party's rights is both punitive and excessive, and a violation of Due Process. At the very least, a party should be given an opportunity to dispute such sanctions similar to those provisions found in the California Civil Discovery Act.

4. **Section 20219(b)** This proposed regulation proports to allow in situations where the Charging Party is an *agricultural employee,* the Charging Party has not timely requested review of a dismissal of the ULP charge, the General Counsel may grant review of the Regional Director's dismissal *sua sponte* within ten (10) days from the date of request for review would have been due. General Counsel shall provide notice to both the charging and charged parties when the General Counsel has granted *sua sponte* review of a dismissal.

Once again, this is a furtive effort on the part of the General Counsel to control the system of unfair labor practices filed by agricultural employees against agricultural employers. The system in place has been there for over 46 years has worked consistently well. There is no necessity of the General Counsel (who was formerly employed by the CRLA with a history of litigating against agricultural employers) to, *sua sponte*, decide whether dismissed charge that has been investigated by the Regional Director should be subject to review. At the time of a dismissal of an ULP charge, an agricultural employee is advised of his/her ability to file a request for review. There are numerous ways to accommodate this filing by referral of the employee to unions, NGOs, and other employee advisory groups who could assist in such a filing.

Allowing the General Counsel to breathe life back into dismissed cases and then be the sole judge and jury as to the decision to dismiss, investigate or issue a complaint on such charge results in a clear conflict of interest within the administrative structure. This proposed process should also not extend the one-year requirement regarding the handling of ULPs pre-complaint.

5. **20219(c) and (d)** These subsections present a clear conflict of interest in that if the General Counsel is the party reviewing a dismissal under Subdivision (a), and the Charging Party wishes for additional time to file an opposition, the same General Counsel is the party granting or denying the extension to file an opposition.

6. **20219(e)** authorizes the General Counsel to request an oral presentation from the parties after she has granted *sua sponte* review of the Regional Director's dismissal of the ULP charge.

In so doing, the proposed regulation takes away the Regional Director's regulatory discretion in all cases where the Charging Party is an agricultural employee. Furthermore, if the Charging Party's identity remains redacted at this point pursuant to proposed regulation 20202(b), it would be impossible for the Regional Director to present any oral presentation to the General Counsel that would require the affirmation of the decision. Even more concerning is that there are no limitations on what the General Counsel must consider or cannot consider, in its review of the Regional Director's decision. Oral presentation by the parties may be tantamount to a mini-trial, resulting in the Regional Director getting a "second bite" at the apple after learning what information the employer has to support its affirmative defenses to the ULP charge.

7. **20220(c)** proposes to impose a time limitation of one year for the issuance of a complaint based upon the filing of an ULP charge.

Based upon prior public comments to the Board by ALJs and public testimony of ALRB personnel, these individuals object on the basis that the Board is creating the affirmative defense of "laches" which, as a general rule, is not allowed in administrative proceedings.

The issue was first brought to light in a dissenting opinion by Board Member Broad, in the case of Rincon Pacific, LLC, 40 ALRB No. 4 (2019) at Page 44, footnote 25 (Slip Opinion). At that time, Board Member Broad astutely recommended that a specific timeline be brought forward in an administrative regulation.

In the Rincon case, **supra**, the period of time lapse was between November 26, 2014, when the charge was filed until the administrative complaint was issued on February 1, 2019. The case is currently in a backpay proceeding and has yet to be finalized.

Imposing a limitation on the General Counsel's ability to issue a complaint within twelve (12) months following the date of the filing of a ULP charge is not unreasonable and does not constitute the defense of "laches". There are many timelines contained in the ALRA and its administrative regulations. This is merely an administrative guideline to ensure that ULP charges are timely processed to allow agricultural employers the ability to defend these cases at a time when witnesses still available in a highly transitory industry.

More recently, in another case litigated by the undersigned Counsel in the matter of Cinagro Farms, Inc., Case No. 2017-CE-008-SAL, Chief Administrative Law Judge, Mark R. Soble, addressed the employer's concern about the substantial delay in the issuance of the administrative complaint. In that case, the delay in issuing the complaint was very similar to that in Rincon, i.e., March 13, 2017, until June 10, 2020. Chief Administrative Law Judge Soble, suggested the following:

"On the other hand, if the Board is concerned about case processing delays, the Board can effectively shine light in this area independently of the hearing process. For example, the Board could pass a regulation requiring the General Counsel to submit a quarterly list of cases where the charges over two years old and the complaint has not yet been filed. For each of those cases the Board could require the General Counsel to indicate (one) whether the Respondent has responded to all pending requests or subpoena for documents, and (2) whether the General Counsel has provided the Respondent with a written settlement offer. Requiring such a public report might focus attention on the reasons for case processing delays.

While Judge Soble suggestions are well intended, the undersigned organization believes that a two-year period is too excessive. Rather, it should be limited to a 12-month period with a one-time extension of up to 60 days based upon "extraordinary circumstances" demonstrated by the General Counsel's office.

Lastly, VCAA proposes that unless there is evidence of good cause, i.e., that the charged party has impeded the General Counsel's timely investigation of the charge or other extraordinary circumstances out of the control of the General Counsel, no extension of time should be permitted and the charge dismissed.

8. **Section 20300(e)** which would allow service of a representation petition upon a security guard of the employer positioned at any location where employees covered by the petition for certification are employed.

VCAA submits that the inclusion of this form of service of a critical petition for representation is not necessary, as there are already existing procedures for such service of the petition.

Many times, security guards are employed by third-party companies and are not proper agents for service of the petition. Secondly, the servers may not provide the petition to the correct employer. Third, there is no reason why a party attempting to make service cannot have the security guard call a proper agent of the employer for service to come to the gate while the server waits. In any event, there is no necessity on this change, as there have been no circumstances where election petitions have not been timely served under current regulations.

VCAA respectfully reserves its right to submit other comments to the extent that the Board makes further revisions in its regulatory package in the future.

In conclusion, VCAA respectfully submits the foregoing comments to the Board's regulations and hopes that they will be seriously considered by the Board.

Respectfully submitted,

By: _____
Robert P. Roy

PROOF OF SERVICE

I, Aggie Salanoa, declare as follows:

I am a citizen of the United States, employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the within action; my business address is: 916 W. Ventura Blvd., Camarillo, CA 93010.

On October 29, 2021, I served the attached:

COMMENTS ON THE BOARD'S PROPOSED CHANGES TO THE ALRB'S REGULATIONS

By Mail: The above-referenced documents were mailed to the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Camarillo, California; and

By Electronic Mail: The above-referenced documents were e-mailed, as noted, to the following parties at the listed e-mail addresses.

DISTRIBUTION LIST

Santiago Avila-Gomez Executive Secretary Agricultural Labor Relations Board 1325 J Street, Suite 1900 Sacramento CA 95814 E-Mail: santiago.avila-gomez@alrb.ca.gov	Jessica Arciniega Regional Director Agricultural Labor Relations Board 1901 N. Rice Avenue, Suite 300 Oxnard CA 93030 E-Mail: jessica.arciniega@alrb.ca.gov
Julia Montgomery, General Counsel Agricultural Labor Relations Board 1325 J Street, Suite 1900 Sacramento CA 95814 E-Mail: julia.montgomery@alrb.ca.gov	

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 2021, at Camarillo, California.

Aggie Salanoa