

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA,	)	Case No. 2024-RM-002
)	
	)	ORDER (1) GRANTING REGIONAL
Petitioner Labor Organization,	)	DIRECTOR'S APPLICATION FOR
	)	SPECIAL PERMISSION TO APPEAL
and,	)	INVESTIGATIVE HEARING
	)	EXAMINER'S ORDER RE: PETITION
WONDERFUL NURSERIES, LLC,	)	TO REVOKE SUBPOENA DUCES
	)	TECUM; (2) REVERSING, IN PART,
	)	AND AFFIRMING, IN PART,
Employer.	)	INVESTIGATIVE HEARING
	)	EXAMINER'S ORDER
	)	Administrative Order No. 2024-16
	)	(May 24, 2024)
)	

On February 23, 2024,¹ petitioner labor organization United Farm Workers of America (UFW) filed a majority support petition pursuant to section 1156.37 of the Agricultural Labor Relations Act (ALRA or Act).² Following a determination of majority support and the issuance of a certification by the executive secretary of the Agricultural Labor Relations Board (ALRB or Board), employer Wonderful Nurseries, LLC (Wonderful) timely filed objections to the certification pursuant to subdivision (f)(1) of section 1156.37. In *Wonderful Nurseries, LLC* (Mar. 18, 2024) ALRB Administrative Order No. 2024-04, we set for hearing Wonderful's objection nos. 1, 2, 3, 7, 8, and 13,

¹ All dates are in 2024 unless otherwise indicated.

² The ALRA is codified at Labor Code section 1140 et seq. Subsequent statutory citations are to the Labor Code unless otherwise indicated.

and dismissed the remaining objections.

The matter was assigned to an investigative hearing examiner (IHE) and set for hearing on March 25. The IHE issued an order on March 27 staying the hearing on all objections for 30 days to allow the general counsel additional time to conduct its investigation of unfair labor practice charges involving Wonderful and the UFW. Wonderful appealed, and on April 12 the Board issued an order reversing the IHE's stay order and directing the objections hearing recommence without delay, among other things. (*Wonderful Nurseries, LLC* (Apr. 12, 2024) ALRB Admin. Order No. 2024-08; see *Wonderful Nurseries, LLC* (Apr. 18, 2024) ALRB Admin. Order No. 2024-10, p. 2.)

On April 17, Wonderful issued a subpoena to regional director Yesenia De Luna requiring her attendance at the hearing and directing her to produce 16 categories of records generally related to the region's investigation of the UFW's majority support petition and later during its investigation of unfair labor practice charges involving Wonderful and the UFW. The regional director timely petitioned to revoke the subpoena, asserting objections to many of the requests. On May 2, the IHE issued an order largely overruling the regional director's objections. The regional director now applies to the Board for special permission to appeal the IHE's order. (See Board regs. 20242, subd. (b), 20370, subd. (s).)³ Wonderful filed an opposition to the application on May 14, disputing the regional director's ability to apply for special permission to appeal without addressing the merits of the regional director's appeal.

³ The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

For the following reasons, the Board GRANTS the regional director's application and reverses, in part, and affirms, in part, the IHE's order.⁴

DISCUSSION

I. Propriety of Interlocutory Review

Under Board regulation 20242, subdivision (b), interlocutory appeals are not allowed except upon special permission from the Board. As a general rule, the Board will entertain an interlocutory appeal only when the issues raised cannot be addressed effectively through exceptions pursuant to regulations 20282 or 20370, subdivision (j). (Board reg. 20242, subd. (b); *Premiere Raspberries, LLC* (2012) 38 ALRB No. 11, pp. 2-3; *King City Nursery, LLC* (Jan. 9, 2020) ALRB Admin. Order No. 2020-01-P, pp. 3-4.)

A party applying for special permission to appeal an interlocutory ruling must "set[] forth its position on the necessity for interim relief." (Board reg. 20242, subd. (b).) The regional director contends the IHE's order requires the production of confidential and privileged information, and the harms incurred in complying with the IHE's order cannot be addressed effectively on exceptions at a later date. We agree. (See

⁴ The general counsel separately filed its own application for permission to appeal the IHE's order. The general counsel's application is denied. The general counsel is not a party to this majority support proceeding. (*Wonderful Nurseries, LLC* (Apr. 30, 2024) ALRB Admin. Order No. 2024-11, pp. 6-7.) The general counsel's claim it is a real party in interest, citing Code of Civil Procedure section 367, has no merit. This objections hearing is not a "prosecution" and is not being conducted in the name of, on behalf of, or for the benefit of, the general counsel. In addition, the underlying subpoena is not directed to the general counsel, nor did the general counsel file any petition to revoke before the IHE. Accordingly, the general counsel's application is improper and we do not consider it. For these reasons, we also do not consider the UFW's joinder in the general counsel's application.

Gerawan Farming, Inc. (Nov. 8, 2016) ALRB Admin. Order No. 2016-13, p. 5.)

Notwithstanding the foregoing, Wonderful contends the regional director's application is improper because Board regulation 20242, subdivision (b) only allows "parties" to apply for permission to appeal and the regional director is not a "party" to the objections hearing. We reject this argument. While not a "necessary party" to the objections hearing, the regional director is entitled to limited participation rights at the hearing. (Board reg. 20370, subd. (c).) In addition, Wonderful's interpretation of regulation 20242, subdivision (b) as denying a person subject to a subpoena any recourse to seek relief from an order overruling objections asserted in a petition to revoke under regulation 20250, subdivision (f) produces an absurd and unreasonable result. In such situations, a person subject to subpoena who seeks review from the Board may be deemed a "party" within the meaning of regulation 20242, subdivision (b) for such limited purposes. (See Board reg. 20130 [Board may limit "any party's participation in the proceedings to the extent of its interest"].)

Accordingly, we grant the application for special permission to appeal the IHE's order. We turn now to the merits of the appeal.⁵

⁵ Wonderful does not oppose the regional director's appeal on the merits. Rather, as mentioned, Wonderful disputes only the regional director's ability to apply for permission to appeal. Wonderful requests a further opportunity to respond to the appeal if the Board grants the regional director's application. The Board rejects this request as improper. Board regulation 20242, subdivision (b) allows other parties an opportunity to respond to or oppose an application to appeal. A party is not entitled to submit piecemeal oppositions addressing only discrete issues while deferring or reserving other arguments for a later date based on whether the Board agrees or disagrees with the arguments it chooses to present. Wonderful's failure to respond to the merits of the regional director's appeal constitutes a waiver.

II. The Regional Director's Objections on Appeal

The regional director objected on various grounds in its underlying revocation petition to the following requests, paraphrased below, relating to the regional director's:

No. 1: investigation of the UFW's majority support petition in this representation proceeding;

No. 7: investigation of the allegations of misconduct in the employee declarations submitted by Wonderful;

No. 8: interviews or conversations with employees regarding requests to revoke their authorization cards;

No. 9: communications related to the authentication of authorization cards submitted by the UFW with its majority support petition in this proceeding;

No. 10: interviews or conversations with the UFW regarding employees' requests to revoke their authorization card;

No. 11: interviews and conversation with employees regarding their alleged confusion about signing authorization cards;

No. 12: interviews and conversations with employees regarding complaints about the UFW;

No. 13: training or instructions provided to regional staff investigating the UFW's proof of support submitted with its majority support petition in this proceeding;

No. 14: communications with the UFW regarding allegations the UFW harassed employees to procure signatures on authorization cards;

No. 15: communications with the UFW regarding allegations the UFW misled and/or tricked employees to procure signatures on authorization cards; *and*

No. 16: documents received and considered in deciding to remove employees from the eligibility list.

On appeal, the regional director pursues only its official information privilege and relevancy objections.

A. Official Information (Request Nos. 8, 11-12, 16)

The regional director objects to these requests on grounds the records sought are subject to the official information privilege codified in Evidence Code section 1040. This privilege allows a public entity to refuse disclosure of “information acquired in confidence” in the course its duties and not publicly disclosed. (Evid. Code, § 1040, subd. (a).) Evidence Code section 1040, subdivision (b) sets forth two privileges, one absolute and one qualified. The absolute privilege applies when disclosure is barred by a federal or state statute (Evid. Code, § 1040, subd. (b)(1)), and the qualified privilege applies when disclosure “is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.” (Evid. Code, § 1040, subd. (b)(2); *Wood v. Superior Court* (2020) 46 Cal.App.5th 562, 584-585.) The regional director contends both aspects of the privilege apply to the records sought by the subject requests.

First, the regional director contends the records sought are absolutely privileged because section 1156.37, subdivision (e)(2) expressly provides for the confidentiality of authorization cards submitted with a majority support petition. However, none of the subject requests seek the production of the authorization cards. Rather, these requests generally seek recordings or notes of interviews with any of the 148 employees purportedly on behalf of whom Wonderful submitted declarations to the regional director while the majority support petition remained pending and before the

regional director issued her tally report.

Second, the regional director asserts the qualified privilege applies because any notes taken of employee interviews reflect information acquired in confidence and disclosure is against the public interest. We agree. Confidentiality protections afforded to regional staff's communications with farmworkers, or to information provided by farmworkers to regional staff, in the course of investigating allegations of unfair labor practices have never before been seriously questioned under our Act. Indeed, the protections accorded such materials under the National Labor Relations Act (NLRA), and the reasons therefor, are well-established. (*NLRB v. Robbins Tire & Rubber Co.* (1978) 437 U.S. 214, 240-241; *J.H. Rutter Rex Mfg. Co. v. NLRB* (5th Cir. 1973) 473 F.2d 223, 233-234; *Intertype Co. v. NLRB* (4th Cir. 1968) 401 F.2d 41, 45; *NLRB v. Vapor Blast Mfg. Co.* (7th Cir. 1961) 287 F.2d 402, 407; *Caterpillar, Inc.* (1994) 313 NLRB 626, 627, fn. 4.)

The same policies apply with even greater force under our Act. (*Giumarra Vineyards Corp.* (1977) 3 ALRB No. 21, pp. 7-8.) The Board and its staff must remain constantly vigilant in pursuing our mission to protect the rights of farmworkers, mindful of “the unfortunate realities of the agricultural workforce, which is particularly vulnerable to exploitation and abuse.” (*Cinagro Farms, Inc.* (2022) 49 ALRB No. 2, p. 30.) If an employee knows the information they provide will be revealed to their employer, or union, the employee will be less likely to provide complete and truthful statements to regional staff investigating unfair labor practice allegations out of fear of retaliation or reprisal—a result that significantly impedes our Board’s ability to administer and enforce

our Act, including protecting employee rights and deterring and remediating unfair labor practices. (*Giumarra Vineyards Corp., supra*, 3 ALRB No. 21, p. 7, citing *NLRB v. National Survey Service, Inc.* (1966) 361 F.2d 199, 206.)

Here, the regional director has testified she did not investigate any employee claims of union misconduct in soliciting employee support before she issued her tally report on March 1. Rather, any investigations of such allegations occurred in the context of the multitude of unfair labor practice charges filed by and against the UFW and Wonderful beginning on March 1. The regional director further states it is the policy of regional staff investigating allegations of unfair labor practices to inform witnesses the information they provide will remain confidential to the extent permitted by law, and that workers interviewed by staff in connection with the allegations described in the subject subpoena requests were so advised.

The IHE acknowledged the regional director's concerns in maintaining the confidence of employee statements and other information in the region's files concerning its investigations, but concluded that such concerns were outweighed by the employer's right to know what the region discovered during the course of its unfair labor practice investigations. This was error.⁶ Discovery of the types of records sought by Wonderful

⁶ The IHE stated that the regional staff's assurances to workers that interviews and statements made in the course of their investigation were confidential was "inconclusive." We note it is a longstanding practice of regional staff to assure farmworkers that their statements are confidential unless the region provides otherwise. This was reiterated by Field Examiners Gabriela Vega and Veronica Cervantes in their declarations in support of the regional director's petition to revoke. The Board is troubled that the region's evidence and argument regarding this practice was so easily disregarded.

are subject to long-established rules first set forth by this Board in *Giumarra Vineyards Corp.*, *supra*, 3 ALRB No. 21, pages 9-10. Moreover, the disclosures contemplated in *Giumarra Vineyards Corp.* arise in the context of *unfair labor practice proceedings* -- not objections hearings, such as this one. We have consistently rejected efforts in this case to consolidate the unfair labor practice charges filed by or against the UFW and Wonderful with this matter. (*Wonderful Nurseries, LLC* (May 10, 2024) ALRB Admin. Order No. 2024-14; *Wonderful Nurseries, LLC* (Apr. 30, 2024) ALRB Admin. Order No. 2024-11; *Wonderful Nurseries, LLC, supra*, ALRB Admin. Order No. 2024-10; *Wonderful Nurseries, LLC, supra*, ALRB Admin. Order No. 2024-08.)

Wonderful is not entitled to discover the region's unfair labor practice investigatory records in this objections proceeding. Wonderful already is in possession of the 148 employee declarations it procured from its employees and produced to the region, and thus is aware of the allegations against the UFW that purportedly are stated by the employees in those declarations. These allegations formed the basis for Wonderful's objection no. 2, which we set for hearing. Wonderful is entitled to present whatever evidence it deems appropriate to support this objection at hearing to carry its burden in challenging the UFW's certification. However, Wonderful's curiosity into whether the region's investigative files corroborate or contradict the allegations of the declarations Wonderful assisted its employees in preparing does not approach the level necessary to defeat the region's legitimate claims and the strong and clearly established policies in favor of preserving the confidentiality of such records.

Notwithstanding the foregoing, statements of employees are subject to disclosure consistent with Board regulations 20236, subdivision (a) and 20274, subdivision (a). (Board reg. 20370, subd. (p).) Thus, if an employee testifies at hearing, and upon the request of any party, the IHE must order the production of any statements by that employee in the possession of any other party that relates to the subject matter of the employee's testimony. (Board reg. 20274, subd. (a); see *Vapor Blast Mfg. Co.*, *supra*, 287 F.2d at p. 407.) The types of statements subject to disclosure pursuant to this rule include written declarations signed, adopted, or otherwise approved by the employee, or a recording or transcription of a recording of an oral statement provided by the employee. (Board reg. 20274, subd. (b).) Notes or memoranda prepared by regional staff but not adopted or approved by the employee are not subject to production under these rules. (*Caterpillar, Inc.* (1994) 313 NLRB 626, 627, fn. 4.)

Accordingly, the IHE's order overruling in large part the regional director's official information objection to request nos. 8, 11, and 12 is reversed. The regional director's objections to request no. 16 are discussed separately, below.

B. Overbroad/Relevance (Request Nos. 1, 7-16)

1. Request Nos. 1, 7-15

As a general rule, the Board will not interfere with an IHE's or administrative law judge's evidentiary rulings on relevancy objections at this stage of proceedings. Relevancy typically is a broad standard, and the IHE is in the best position to rule on such issues and determine the weight any evidence admitted at hearing should be afforded. (Board reg. 20370, subd. (b).) However, we agree with the regional director

a narrower, more defined limit is appropriate in this case as it concerns these requests.

The hearing in this matter concerns Wonderful's objections to the majority support process and the UFW's majority support certification. The regional director's investigation of the majority support petition concluded on March 1 when she issued her tally report. Subsequent investigations or communications conducted by the region in the course of investigating the various unfair labor practice charges filed by or against the parties to this proceeding are not appropriate subjects of inquiry in this case. Again, the production of such investigatory materials is subject to established principles, and even then only in the context of unfair labor practice proceedings. (*Giumarra Vineyards Corp.*, *supra*, 3 ALRB No. 21.)

Accordingly, the regional director's objections to these requests should have been sustained, and we accordingly reverse the IHE in this regard.

2. Request No. 16

The regional director objected to this request in its underlying petition to revoke on relevancy and official information grounds. The regional director's appeal does not specifically argue these objections in the context of this request. Rather, the regional director's appeal argues in support of the official information privilege objection it previously asserted, as well as its relevancy argument that information acquired by the general counsel during its investigation of unfair labor practice charges are outside the scope of this proceeding.

The regional director's relevancy objection (i.e., regarding information obtained after issuance of the majority support tally report and during the course of investigating unfair labor practice charges) in the context of this request is overruled. The request seeks records received from and considered by the regional director in deciding to remove 40 employees from the eligibility list in this majority support proceeding. These eligibility determinations were made before the regional director issued the tally report, and any information obtained in the course of evaluating the eligibility of these workers was not in the context of investigating unfair labor practice allegations. Nor does the request seek information pertaining to any unfair labor practice investigation.

In addition, the official information privilege also is not properly asserted here and is overruled. When the region is investigating eligibility issues in a representation proceeding it is acting in a neutral fact-finding capacity, similar to its role in administering and overseeing a secret-ballot election. In election cases when the number of employees whose eligibility is challenged is in an amount sufficient to affect the outcome of the election, the regional director is required to produce to the Board, and all parties, all challenged ballot declarations "and all other evidence in the regional director's possession relevant to the eligibility of the challenged voters" (Board reg. 20363, subd. (a).) Of course, these challenge procedures do not apply in majority support proceedings. Nevertheless, the underlying principles favoring disclosure of evidence relevant to employees' eligibility do.

The Board set for hearing Wonderful's objection no. 13 asserting the regional director improperly removed seven employees from the bargaining unit on grounds they did not share a community of interest with the other employees included in the unit. Wonderful is entitled to know what information the region obtained and relied upon concerning the eligibility of these employees to be included in the bargaining unit. In addition, the records subject to this request may be relevant to Wonderful's objection no. 8 regarding the process by which the regional director made such eligibility determinations during her investigation of the majority support petition.

The Board dismissed Wonderful's objection no. 12 alleging the regional director improperly removed 33 employees from the eligibility list on grounds they are supervisors, and Wonderful is barred from litigating at hearing the merits of the alleged employee status of the individuals determined to be ineligible supervisors. Therefore, the regional director may only be compelled to produce documents related to eligibility determinations concerning the seven employees referenced above and subject to Wonderful's objection no. 13.

Accordingly, the IHE's order the regional director comply with request no. 16 is affirmed as to the production of documents received and considered by the regional director in making eligibility determinations concerning the seven employees removed from the bargaining unit, and is reversed in all other respects.

ORDER

For the foregoing reasons, the Agricultural Labor Relations Board
GRANTS the regional director special permission to appeal the investigative hearing

examiner's ruling on the regional director's petition to revoke the subpoena issued by employer Wonderful Nurseries, LLC. Having granted review, the Board reverses, in part, and affirms, in part, the IHE's order consistent with the foregoing discussion.

IT IS SO ORDERED.

DATED: May 24, 2024

Victoria Hassid, Chair

Barry Broad, Member

Ralph Lightstone, Member

Cynthia N. Flores, Member