

AGRICULTURAL LABOR RELATIONS BOARD

TEXT OF AMENDMENTS TO IMPLEMENT SB 126
TITLE 8, CALIFORNIA CODE OF REGULATIONS, WITH CHANGES
RECOMMENDED BY LEGAL STAFF IN RESPONSE TO PUBLIC
COMMENTS

§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 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, 20164, 20166, and 20168. **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.** ~~conduct such investigation as he or she deems necessary to determine the eligibility of the challenged voters, including giving all parties an opportunity to present evidence on each of the challenges. The time period for submitting evidence shall be at the discretion of the regional director, but in no case shall be less than seven (7) days. The parties shall provide the regional director with two copies of any evidence submitted. Thereafter, the regional director shall issue to the Board a report containing his or her 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. Where, after investigation, the regional director deems it appropriate, he or she may issue a notice of hearing on those challenged ballots which cannot be resolved by investigation and may submit his or her report to the Board containing the conclusions and recommendations and summary of supporting facts on all other challenges. A copy of the notice of hearing shall be served on all parties. Such hearing will be in accord with section 20370.~~

~~(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. conclusions and recommendations of the regional director, set forth in the report provided for in (a) above, shall be final unless exceptions to the conclusions and recommendations are filed 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 the exceptions shall be filed and shall be accompanied by seven copies of declarations and other documentary evidence offered in support of the exceptions. However, the Board will not consider, absent extraordinary circumstances, evidence that was not submitted timely to the regional director pursuant to subsection (a). "Extraordinary circumstances" includes recognized legal excuses such as where the evidence is newly discovered, and not reasonably discoverable, or the party was not on notice as to issues in dispute. 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. Upon the filing of exceptions, the regional director shall forward to the Board the entire record relied upon in the investigation.~~

~~(c) In serving declarations exceptions and supporting documents on other parties pursuant to subdivision (a) above, the excepting 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 exceptions at an evidentiary hearing. An excepting 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) In any case in which exceptions are filed to a regional director's recommendations for the disposition of challenged ballots pursuant to subsection (b) above, Tthe record before on review by the Board shall consist of: the election petition pursuant to Labor Code Section 1156.3(a), the notice and direction of election, the tally of ballots, the evidence and argument submitted to the regional director by the parties, as well as any other evidence relied on by the regional~~

~~director, and the declarations and other evidence forwarded by the regional director's report on challenged ballots, and the exceptions thereto, along with supporting evidence and briefs as provided in subsection (b) above.~~

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

§20365. Post-Election Objections Procedure.

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

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

(b) An objections petition shall be filed 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~~executive secretary shall consist of the original and six copies of the following: the petition pursuant to Labor Code Section 1156.3(ee); a detailed statement of facts and law relied upon, as required by subsection (1) below, or declarations in support of the petition, as required by subsection (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 (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 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 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 executive secretary~~ shall dismiss any objections petition or any portion of such petition which does not

satisfy the requirements of subsections (a), (b), and (c). ~~Such action of the executive secretary may be reviewed by the Board pursuant to section 20393.~~

(e) With respect to any portion of the petition not dismissed pursuant to subsection (d) above, the ~~Board executive secretary or the investigative hearing examiner appointed by the executive secretary to handle the case~~ 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) ~~Recommend to the Board that an election be~~ 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. ~~Such recommendation shall be in writing and shall be served on the parties pursuant to section 20164. Parties shall have 14 days from service of the recommendation to file with the Board an original and six copies of a statement of objection to the recommendation accompanied by a statement of reasons for objection or a supporting brief.~~

(8) ~~Recommend novel legal issues to the Board for consideration and decision. Such recommendation of issues shall be in writing and served on the parties. Parties shall have 14 days from service to submit the original and six copies of briefs to the Board on the legal issues raised.~~

~~(f) An order of the executive secretary dismissing portions of the petition after investigation shall be in writing accompanied by a statement of reasons, shall be served on all parties pursuant to section 20164, and shall be subject to Board review pursuant to section 20393.~~

(~~f~~g) Where the objections satisfy the requirements of subsections (a), (b), and (c) and there are material factual issues in dispute, t~~The Board executive secretary shall direct an investigatory hearing pursuant to section 20370 if it appears that there are substantial and material factual issues in dispute. The hearing shall be strictly limited to the issues set forth in the executive secretary's 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 [reference to bargaining order deleted] as authorized by Labor Code section 1156.3, subdivision (f), or an Investigative Hearing Examiner (IHE) recommending such action, the parties to the election shall be afforded the opportunity to submit written argument addressing whether certification is

(f).

Authority: Section 1144, Labor Code; Reference: Section 1156.3(c), Labor Code.

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

(a) Dismissal of a representation petition, cross-petition, or intervention petition by a regional director pursuant to section 20300(i), ~~or dismissal by the executive secretary pursuant to section 20365(f)(6) of an objections petition filed pursuant to Labor Code Section 1156.3(c), in whole or in part,~~ 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 (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 20166 and 20168. The request shall set forth with particularity the basis for the request and shall be accompanied by six copies of the following:

- (1) the evidence and legal arguments which the party seeking review contends support the request;
- (2) the representation petition if the action to be reviewed concerns the dismissal of a representation, intervention, or cross-petition, ~~or the dismissal, in whole or in part, of election objections;~~
- ~~(3) the petition pursuant to Labor Code Section 1156.3(c) where applicable;~~
- (3) 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
- (4) evidence that the aforementioned material has been served upon all parties pursuant to sections 20166 and 20168.

(b) Review of any other actions of a regional director or his or her agent pursuant to the powers which may be delegated to him or her under Labor Code 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 Section 1156.3(ee) and sections 20363, 20365 and 20370.

(c) 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, 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 and 20168. 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 and 20168. 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.

(d) 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 (a) above or a request for reconsideration under subsection (c) above. Where an opportunity for response is to be provided, ~~a request for review or a request for reconsideration is granted by the Board~~, 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.

(e) 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.

~~(f) In any case in which a request for review is filed pursuant to this section of a dismissal by the executive secretary of a petition pursuant to Labor Code Section 1156.3(c), in whole or in part, or in any case in which a statement of objections is filed pursuant to section 20365(f)(7) to the executive secretary's recommendation to set aside an election without hearing, the record on review by the Board shall consist of: the petition pursuant to Labor Code Section 1156.3(a), the notice and direction of election, the tally of ballots, the objections petition along with supporting documents, the executive secretary's order and statement of reasons as required by section 20365(h), and the request for review or statement of objections and any supporting documents and briefs.~~

Authority: Section 1144, Labor Code; Reference: Sections 1142(b), 1156.3(a), (c) and 1156.7(c), (d), Labor Code.

§ 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, and 20168. 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 ~~180~~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, and 20168. 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 **[reference to bargaining order deleted] 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 1156.3, 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 **[reference to bargaining order deleted] 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, and 20168. 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.

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

§ 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. **[deleted: A declaration dismissed under this regulation shall not be included in the total of seventy-five (75) declarations permitted under Labor Code section 1164.12.]**

(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 Section 20164.

(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 Administrative Law Judge, under the rules of evidence, so far as practicable; while conducting a hearing the Board member(s) or Administrative Law 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 Administrative Law Judges who will conduct the hearing, references to "mediation" shall mean the expedited evidentiary hearing provided for in this section.

(6) The assigned Administrative Law Judge or member(s) of Board who conducted the hearing shall file a decision with the Executive 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 Executive Secretary shall serve copies of the decision on all parties pursuant to section 20164.

(B) Within ten (10) days after the service of the decision of the Administrative Law Judge, or of less than the full Board, any party may file with the Executive 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 and 20168. 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).

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