UNITED FARM WORKERS OF AMERICA

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December 22, 2011

Sent via email and Regular U.S. Mail

J. Antonio Barbosa, Executive Secretary
Agricultural Labor Relations Board
915 Capitol Mall, Third Floor
Sacramento, CA 95814
email: JBarbosa@alrb.ca.gov

RE: UFW WRITTEN COMMENTS ON PROPOSED REGULATORY ACTION TO AMEND TITLE 8, SECTIONS 20363, 20365, 20393, 20400, and 20402

Dear Mr. Barbosa:

On behalf of the United Farm Workers of America ("UFW"), please accept these written comments concerning the proposed regulatory amendments to title 8, sections 20363, 20365, 20393, 20400, and 20402, contained in the November 2011 notice of proposed changes from the ALRB. UFW reserves the right to supplement or modify its positions taken herein.

Proposed Amendment To Board Regulation 20365

The Board proposes to add section 20365(g) to existing regulations to read as follows:

> "Prior to the Board certifying a labor organization as the exclusive bargaining representative by issuance of a bargaining order 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 a bargaining order is warranted under the standard set forth in Labor Code section 1156.3, subdivision(f)."***

(emphasis added).

ALRB Statement of Reasons in Support of Proposed Regulations

The ALRB states that this proposal "includes an amendment ensuring that before the Board issues a bargaining order pursuant to new subdivision (f) of Labor Code section 1156.3 the parties have an opportunity to brief the issue."

UFW Position

UFW is vigorously opposed to the adoption of this regulation and proposes that the Board delete this proposed regulation. The language of this regulation is clearly in conflict with the language and intent of Senate Bill 126, and would serve to effectively undermine the purpose of the statutory amendments contained in California Labor Code section 1156.3(f).

Labor Code section 1156.3(f) states in full part:

> "Notwithstanding any other provision of law, if the board refuses to certify an election because of employer misconduct that, in addition to affecting the results of the election, would render slight the chances of a new election reflecting the free and fair choice of employees, the labor organization shall be certified as the exclusive bargaining representative for the bargaining unit."

There is absolutely no language in section 1156.3 using the words "bargaining order" or referencing "bargaining order" as a remedy. The statute simply requires the board to certify a labor organization if it has refused to certify an election because of employer misconduct and finds that the employer misconduct "would render slight the chances of a new election reflecting the free and fair choice of employees." There is no reference anywhere in 1156.3(f) concerning the Board's issuance of a "bargaining order."

Adoption of the proposed regulation would invite unnecessary litigation over whether a "bargaining order" should issue in each case pursuant to the standards set out in Harry Carian Sales v. ALRB (1985) 39 Cal. 3d 209, when in fact the remedy contained in SB 126 is not a "bargaining order" but a certification. The distinction is critical to proper enforcement and application of the new law.

Existing law already provides the Board with authority to issue "bargaining orders" pursuant to the standards set out in Harry Carian Sales v. ALRB (1985) 39 Cal. 3d 209. In that case, the Supreme Court upheld the ALRB's authority to issue bargaining orders to remedy what it called "egregious" employer unfair labor practices. The Harry Carian decision involves extensive analysis and application of numerous requirements regarding whether and when an employer should be ordered to bargain. Under a conservative reading of Harry Carian, the following is required for the Board's issuance of a bargaining order: (1) A filed charge and complaint issued by the General Counsel; (2) "Egregious," "pervasive" or "outrageous" unfair labor practices by the employer; (3) A Board decision finding "egregious," "pervasive" or "outrageous" unfair labor practices and finding that there can be no fair second election.[1]

In Harry Carian, the Supreme Court found that the "Board [has] authority to issue bargaining orders in *extraordinary cases where an employer's extreme and coercive tactics* preclude the employees from expressing their choice in a free election ..." Harry Carian, Id., at 226 (emphasis added). The Court further found that in "issuing the bargaining order in this case, the ALRB held that HCS's unfair labor practices were so outrageous and pervasive" as to require a bargaining order. Harry Carian, Id. at 232. Employer may use such language to argue for limited and exceptional use of the remedy contained in Labor Code 1156.3(f).

[1] The Court found that there was a lesser category of cases that would warrant issuance of bargaining orders but no California case has applied that ruling.

By incorporating into Board regulations the words "bargaining order" and inviting parties to brief the issue of "whether a bargaining order is warranted," the Board would improperly encourage litigation concerning application of the Carian decision to objections matters under Labor Code section 1156.3. Such a result is inconsistent with the purpose of SB 126 which was to provide a greater remedy to the ALRB and labor organizations, than what is available under existing law.

The California Legislature was well aware of the existing law concerning bargaining orders under the ALRA. The Legislature is deemed to be aware of existing judicial decisions that have a direct bearing on the particular legislation enacted. See City of San Jose v. Operating Engineers Local Union (2010) 49 Cal. 4th 597, 606 *citing* Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1155 - 1156; People v. Overstreet (1986) 42 Cal. 3d 891, 897; Estate v. McDill (1975) 14 Cal. 3d 831, 837. Therefore, when the Legislature added section 1156.3(f) to the Labor Code, it properly viewed this amendment as providing broader remedies than were already existent under Harry Carian. The Board's proposed regulation conflicts with this clear purpose and thereby undermines the intent of the amended Labor Code section.

If adopted, the Board's proposed regulations would "alter or amend the statute or impair its scope." See J.R. Norton Co., Inc. v. ALRB (1979) 26 Cal. 3d 1, at 29. In such a case, the regulations would be "void" and a reviewing court would be obligated "to strike down such regulations." Id.

An additional reason to not proceed with adoption of the proposed regulations containing "bargaining order" language is that the proposed language is either unnecessary in light of the Board's Mandatory Mediation and Conciliation ("MMC") procedures or it directly conflicts with them. In 2002, the Legislature amended the Labor Code to provide parties with the ability to request MMC when parties are unable to reach agreement on a collective bargaining agreement. See Cal. Lab. Code. § 1164 et seq. Given the existence of these MMC procedures, the "bargaining order" language is superfluous or could potentially conflict with proper application of the MMC procedures. An employer could potentially argue that a Board's "bargaining order" only compels it to bargain but to not submit to the MMC procedures. While such an argument is without merit, UFW believes this is an additional reason that the Board should avoid use of the "bargaining order" language in its regulations.

For all these reasons, UFW strongly urges the Board to delete and/or not adopt this proposed regulation.

Proposed Amendment to Board regulation 20400(c)

The Board proposes to add section 20400(c) which reads in part:

> "Where the request for mandatory mediation and conciliation *is based on a bargaining order* or the dismissal of a decertification petition: 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 bargaining order was issued* or the decertification petition was dismissed, as appropriate."

(emphasis added)

UFW Position

For the reasons discussed in the previous section, UFW urges the Board to modify the regulation to delete any reference to the words "bargaining order" in this section. Alternative language in italics might appear as follows:

> "Where the request for mandatory mediation and conciliation *is based on a certification resulting from employer misconduct* or the dismissal of a decertification petition: 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 certification was issued* or the decertification petition was dismissed, as appropriate."

Proposed Amendment to Board Regulation 20363(a)

Proposed Change Number One (1)

The Board proposes that the Regional Director forward to the Board and all parties "all challenged ballot declarations" within two working days of the tally of ballots.

UFW Position

UFW believes this proposed regulation potentially conflicts with the Board's other regulations and long standing policy preventing disclosure of the identity of non-supervisory agricultural witnesses. See 8 Cal. Code Regs. §§ 20236, 20274, 20365(c)(2)(D). UFW believes that the Board needs to explicitly state that the provision of declarations to the parties in this limited circumstance does not otherwise affect the Board's policy and practice of maintaining the confidentiality of the identity of non-supervisory agricultural employees until such time as that employee testifies in a hearing. Obviously in this case, because the identity of the voter is at issue, the same concerns with confidentiality are not applicable.

Proposed Change Number Two (2)

The Board proposes to eliminate the authority of the Regional Directors to investigate challenge ballot issues and to issue a report and recommendations.

UFW Position

UFW is opposed to the Board's elimination of the existing bi-level review structure. UFW believes the existing bi-level structure creates an important division between the investigatory body, on one hand, and ultimate decision-making body on the other. Without the existing bi-level review structure, parties will be deprived of the opportunity to seek review of an initial decision regarding challenged voters. The review process serves an important goal in developing the factual and legal record necessary for the Board to make an informed decision. UFW urges the Board to formulate an alternative expedited process that will serve to maintain some bi-level structure that is important for development of the record in each case. UFW

further urges the Board to maintain some level of review so that parties can seek review of decision without meeting the standards required under a motion for reconsideration (see discussion infra regard regulation 20393).

Proposed Amendment to Board Regulation 20365

Proposed Change Number One (1)

The Board proposes to eliminate the authority of the Executive Secretary to review objections, make recommendations concerning objections, and/or to dismiss objections. The Board now seeks to place all such authority with the Board.

UFW Position

UFW is opposed to the Board's elimination of the Executive Secretary's role in the objections process. UFW believes the existing bi-level structure creates an important division between the Executive Secretary, on one hand, and the Board on the other. Without the existing bi-level review structure, parties will be deprived of the opportunity to seek review of an initial decision regarding objections. The review process serves an important goal in developing the factual and legal record necessary for the Board to make an informed decision. UFW urges the Board to formulate an alternative expedited process that will serve to maintain some bi-level structure that is important for development of the record in each case.

Proposed Change Number Two (2)

The proposed regulation at 20365(e)(7) eliminates any review process for when the Board set asides an election based upon a finding that there are no material factual issues in dispute.

UFW Position

UFW urges the Board to maintain a review process similar to what is provided in current regulation 20365(e)(7). This will provide all parties due process and will strengthen any argument for makewhole when employers engage in a technical refusal to bargain with a labor organization if their objections are summarily dismissed.

Proposed Change Number Three (3)

The proposed regulation seeks to eliminate current regulation 20365(f), which provides that an executive secretary's dismissal of portions of an objections petition "shall be in writing accompanied by a statement of reasons." 8 Cal. Code Regs. § 20365(f).

UFW Position

UFW requests that the Board maintain this regulation based on maintaining the role of the Executive Secretary in the objections evaluation process. Alternatively, UFW requests that if the Board takes on the authority of dismissing objections or any portion of objections, that it be required to provide a statement of reasons for this action.

Proposed Amendment to Board Regulation 20393

The Board proposes to eliminate any review process for dismissal of an objections petition, in whole or in part. The only review available would be a motion for reconsideration, which requires "extraordinary" circumstances.

UFW Position

UFW strongly urges the Board to provide ordinary review of a decision dismissing in whole or in part an objections petition. Current regulations provide a right to request review that is not dependent on a showing of "extraordinary circumstances." By conditioning review on "extraordinary circumstances" through a motion for reconsideration, the Board is eliminating an important right to review currently available to parties. The Board should maintain an existing review procedure by which parties do not have to meet the difficult standard of "extraordinary circumstances" required by a motion for reconsideration.

Proposed Board Regulation 20402

Section 20402(a) states that "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."

UFW Position

The language limiting a party to filing only 75 MMC requests expired in 2008. This language should now be removed from the regulations.

On behalf of UFW,

Mario Martinez,
Attorney for UFW