

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SOUTH LAKES DAIRY FARMS,	)	Case Nos.	2009-CE-028-VIS
	)		2010-CE-024-VIS
Respondent,	)		2010-CE-025-VIS
	)		2010-CE-026-VIS
and	)		2010-CE-027-VIS
	)		2011-CE-008-VIS
UNITED FOOD AND	)		
COMMERCIAL WORKERS	)		
UNION, LOCAL 5, GABRIEL	)	39 ALRB No. 2	
SAUCEDO, RODOLFO MACIAS,	)	(February 15, 2013)	
JOSE M. BARAJAS, ADAN	)		
SERNA HERRERA, JUAN	)		
CARLOS MAYO, JOSE ROBLES	)		
BERNABE RUIZ, LUIS	)		
HERRERA, and ARMANDO	)		
ROSALES GONZALEZ,	)		
	)		
<u>Charging Parties.</u>	)		

**DECISION**

On February 4, 2013, the General Counsel timely filed and served a Motion for Reconsideration of the Agricultural Labor Relations Board's (ALRB or Board) Decision and Order in 39 ALRB No. 1 (January 25, 2013) pursuant to California Code of Regulations, title 8, section 20286.<sup>1</sup> The General Counsel's motion is based on, *inter alia*, the argument that, pursuant to *Superior Farming Co. v. Agricultural Labor Relations Board* (1984) 151 Cal.App.3d 100, legal arguments not fully developed below regarding questions of procedural fairness present extraordinary

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<sup>1</sup> The Board's regulations may be found at California Code of Regulations, title 8, section 20100 et seq.

circumstances meriting the Board's consideration of these arguments for the first time in a motion for reconsideration. The General Counsel argues specifically that the hearing process was fundamentally unfair and disadvantageous to agricultural workers and the Board was excessively deferential to the Administrative Law Judge's (ALJ) credibility determinations.

For the reasons set forth below, the General Counsel's Motion for Reconsideration is hereby DENIED. We write to clarify the standard for hearing a motion for reconsideration and our expectations of all counsel in standard motion practice before the Board.

I. The General Counsel's Motion Fails to Demonstrate Extraordinary Circumstances Warranting Reconsideration

A thorough review of the Board's Administrative Orders from 2004 to the present<sup>2</sup> reveals that the Board has rarely granted a motion for reconsideration because the standard for hearing them is extremely high, intentionally so in order to avoid re-litigation of issues that have been litigated not once, but twice: Once during an administrative hearing and once on review by the Board. The standard for hearing a motion for reconsideration of a Board decision is that the moving party show *extraordinary circumstances*, i.e., an intervening change in the law or evidence previously unavailable or newly discovered. (*See generally Arie de Jong dba Milky*

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<sup>2</sup> The Board's administrative orders can be found at [http://www.alrb.ca.gov/legal\\_searches/admin\\_orders\\_default.html](http://www.alrb.ca.gov/legal_searches/admin_orders_default.html).

*Way Dairy* (2003) 29 ALRB No. 4 at p. 4, n. 8; *Mario Saikhon, Inc.* (1991) 17 ALRB No. 6 at pp. 4-5 (denying motion for reconsideration for failure to cite extraordinary circumstances and only raising arguments previously stated).<sup>3</sup> As such, the only reconsiderations of a Board decision the Board has granted since 2004 have been granted *sua sponte*. (See *San Joaquin Tomato Growers, Inc.*, Administrative Order 2010-05 (Case No. 93-CE-38-VI), Order Denying Reconsideration and Reopening and Granting Reconsideration *Sua Sponte*); *Ace Tomato Company, Inc.*, Administrative Order 2010-06, (Case No. 93-CE-37-VI), Order Denying Reconsideration and Reopening and Granting Reconsideration *Sua Sponte*).<sup>4</sup>

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<sup>3</sup> Both *Milky Way Dairy* and *Mario Saikhon, Inc.* make reference to the possibility that new legal arguments or issues not considered previously may be a reason supporting reconsideration of a Board decision. To the extent that these decisions are read to support the proposition that making new legal arguments or raising new legal issues is grounds for granting reconsideration in the absence of extraordinary circumstances, we disavow any such interpretation.

<sup>4</sup> The administrative orders cited herein are not cited as precedent and are cited for illustrative purposes only, i.e., the rarity of granting motions for reconsideration. Other failed motions for reconsideration since 2004 include: *San Joaquin Tomato Growers, Inc.*, Admin. Order 2012-08 (Case No. 93-CE-38-VI) (denying the United Farm Workers of America's and the General Counsel's motions for reconsideration for failure to demonstrate extraordinary circumstances or anything other than disagreement with the Board's judgment); *Kawahara Nurseries, Inc.*, Admin. Order 2011-24 (Case No. 2010-RC-001-SAL) (denying the United Farm Workers of America's motion for reconsideration for merely raising arguments previously addressed by the Board and failing to cite extraordinary circumstances); *Nurserymen's Exchange, Inc.*, Admin. Order 2011-20 (Case No. 2010-RC-003-SAL) (denying Employer's motion for reconsideration for merely raising arguments previously addressed by the Board and failing to cite extraordinary circumstances); *Nurserymen's Exchange, Inc.*, Admin. Order 2011-12 (Case No. 2010-RC-003-SAL) (denying Employer's and the Regional Director's motions for reconsideration because Employer reargued matters addressed in the Board's prior decision and the Regional Director lacked standing to file the motion); *Nurserymen's Exchange, Inc.*, Admin. Order 2011-01 (Case No. 2010-RC-  
(Footnote continued....))

The standard does not contemplate hearing on reconsideration issues argued for the first time absent a compelling reason as to why they were not raised and/or fully argued previously.

The General Counsel argues that extraordinary circumstances may also include a party's need to raise novel or additional arguments not fully developed or exhausted in the prior record of the case, especially when these arguments involve matters of procedural fairness, and cites *Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App. 100 ("*Superior Farming*") in support of that proposition. (General Counsel's Motion for Reconsideration at p. 1.) However, *Superior Farming* does not stand for that proposition, and nothing could be more antithetical to the concept of reconsideration than hearing not only arguments but, as demonstrated by this motion, entire issues that were either not raised in briefing or not raised at all, especially when there is no explanation as to why they were not.

In *Superior Farming*, agricultural employees of a farm labor contractor complained when the piece rate for picking plums was lowered from 70 cents to 60 cents per bucket, and they wanted their crew leader to renegotiate the rate back to 70 cents. The crew leader discussed the rate with a Superior supervisor, who told the crew

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(Footnote continued)

003-SAL) (denying Employer's motion for reconsideration for merely raising arguments previously addressed by the Board and failing to cite extraordinary circumstances); *Gallo Vineyards, Inc.*, Admin. Order 2009-01 (Case No. 07-RD-1-SAL) (denying the United Farm Workers of America's motion for reconsideration); *Gallo Vineyards, Inc.*, Admin. Order 2004-12 (Case No. 03-CE-9-SAL) (denying Employer's motion for reconsideration); *Gallo Vineyards, Inc.*, Admin. Order 2004-11 (denying Employer's motion for reconsideration).

leader the price was set and the workers would either have to go in to work or they would have to go home. The crew leader informed the crew that he had been unsuccessful in getting the raise and that the whole crew, including himself, was fired. (*Superior Farming, supra*, 151 Cal.App. 100, 109-110.) The Administrative Law Officer (ALO) who heard the complaint recommended findings that the crew had not been terminated because their crew leader was not a supervisor such that his actions could be imputed to Superior. The Board's General Counsel filed exceptions, and the Board modified the decision. Although the Board agreed with the ALO's decisions on witness credibility, the Board concluded that a discharge had occurred and the crew leader's action in informing the crew, though mistaken, was imputable to Superior. (*Id.* at 108.)

On review, Superior argued that the Board relied upon a theory not alleged in the General Counsel's complaint in finding that Superior, by virtue of the crew leader's mistake, was responsible for the dismissal of the crew, and that Superior was deprived of an opportunity to argue or present evidence to rebut the mistake theory not alleged in the complaint. The Court of Appeal responded to this argument by noting the many opportunities Superior had at its disposal to raise arguments before the Board on the mistake theory – in its post-hearing brief, where Superior conceded that low-level supervisory mistakes can be made but submitted that none had been made in this case; in its brief filed in support of a statement of exceptions, where, in response to the General Counsel's urging of the alternative mistake theory, Superior responded that

the crew chief did not tell the crew it had been fired; and, finally, in a motion for reconsideration:

Finally, we note that title 8, California Administrative Code, section 20286, subdivision (c), provides for reconsideration and/or reopening the record under circumstances such as were present in this case, but Superior elected not to pursue and exhaust that aspect of its administrative remedy. It is therefore in no position to complain before this court that it did not have an opportunity to be heard on the issue tried before the Board. [Citations omitted.] (*Superior Farming, supra*, 151 Cal.App.3d at 113-114.)

We doubt the Court of Appeal intended to set forth the grounds for the Board to hear a motion for reconsideration as much as it intended to illustrate all the opportunities Superior had to be heard on the liability theory of mistake. That said, the procedural posture in *Superior Farming* is far different than the case at bar.

The employer in *Superior Farming* might have demonstrated extraordinary circumstances if the only notice it had received that it could be liable on a theory of mistake was the Board's final decision. In that event, a motion for reconsideration would have been its only option for Board review of the issue of liability. In contrast, the General Counsel raises issues of procedural unfairness for the first time in briefing – the presence of Employer's representatives who also were witnesses during the hearing<sup>5</sup> and delays in hearing the testimony of agricultural

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<sup>5</sup> Although the Board's regulations do not address the issue of witness sequestration, Board precedent has left the issue of sequestration to the discretion of the presiding ALJ, and ALJs have allowed parties to have a designated representative present during hearings. *See Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11 at p. 27 (noting that although the Board's regulations are silent on the sequestration of witnesses, the practice is left to the discretion of the ALJ, and the Board's belief is that (Footnote continued....))

workers – of which it must have been aware prior to the close of hearing. To be specific, from the second to the fifth day of hearing, ALJ Gallop stated daily on the record that the parties’ representatives present during the hearing were the same as the previous day. (RT 177, 373, 577, 782.) The General Counsel did not move to sequester any of Employer’s representatives until day five when Employer’s counsel called Manuel Rodriguez, one of the partners in the dairy, as a witness and the General Counsel moved to sequester Employer’s representative, Ryan Schakel, the other partner. The colloquy went as follows:

Mr. Shawver: I’d like to move to sequester Respondent’s witnesses.

Judge Gallop: Any objection, Mr. Sagaser?

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(Footnote continued)

the better practice is to exclude anyone *not a party to the proceeding nor the designated representative of a party* (emphasis added). The Board’s general practice of allowing a party that is not a natural person to have a designated representative present who may not be sequestered is consistent with California Evidence Code section 777. Evidence Code section 777 provides:

§ 777. Exclusion of witness

- (a) Subject to subdivisions (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.
- (b) A party to the action cannot be excluded under this section.
- (c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

(Evid. Code, § 777). *See also Kaplan Fruit and Produce Co., Inc.* (1979) 5 ALRB No. 40, ALJD at p. 2 (Noting the exclusion of witnesses from the hearing room pursuant to Section 777 of the Evidence Code except for an employee of respondent, who was permitted to remain in the room to assist counsel pursuant to subsection (c) of Section 777). This practice is consistent with Rule 615 of the Federal Rules of Evidence as well.

Mr. Sagaser: Well, usually motions to sequester are made at the beginning of the hearing, but Mr. Schakel is the representative and if I have any questions, I'm going to – would turn to him, normally, and say, “Is there anything else you think I should cover?”

Judge Gallop: So, you oppose it?

Mr. Sagaser: I do.

Judge Gallop: He's entitled to one management representative at all times, and it is true that motions to sequester witnesses are supposed to be made at the commencement of the hearing, so for those reasons I'm going to deny the motion.  
(RT 818-819.)

Ultimately Employer's counsel *voluntarily* sequestered Mr. Schakel that day. (RT 819.)

This issue was not argued in the General Counsel's post-hearing brief or in its brief in support of its exceptions to the ALJ's decision. As such, we decline to review it for the first time on a motion for reconsideration.

As to the issue of inconvenience to the General Counsel's agricultural employee witnesses and its effect, if any, on their testimony, this, too, was an issue the General Counsel could have addressed during the hearing by working with ALJ Gallop and Respondent's counsel. The General Counsel failed to argue this issue in its post-hearing brief or in its brief in support of its exceptions to the ALJ's decision. Yet, the General Counsel not only coordinated with ALJ Gallop during the hearing to have him issue an order to a correctional facility to require the attendance of the General Counsel's incarcerated witness and charging party Armando Rosales (RT 254), but Rosales' testimony was taken out of order, ostensibly as a matter of convenience. (RT 577.)

To be clear, a motion for reconsideration before the Board is not the opportunity for parties to have the Board consider “novel or additional arguments not fully developed” (General Counsel’s Motion for Reconsideration at p. 1), or, as in this case, issues either never raised or argued at all in briefing, without providing any reason constituting extraordinary circumstances justifying the failure to do so. Nor is a motion for reconsideration the proper avenue by which to *attempt* to preserve for judicial review issues never raised or litigated below.<sup>6</sup>

Even if we were so inclined to take up the issue of procedural unfairness alleged by the General Counsel, we would not be able to do so on the record before us. The General Counsel states facts not in evidence nor sworn to in a declaration filed

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<sup>6</sup> The General Counsel argues, “In fact, not only is seeking reconsideration permissible as a means of raising arguments of procedural fairness in the hearing, it may be required in order to preserve the issue on appeal. *See NLRB v. Sambo’s Restaurant, Inc.* (9<sup>th</sup> Cir. 1981) 641 F.2d 794 (finding that a company that failed to file a motion for reconsideration contesting the appropriateness of the Board’s remedies was barred from raising such arguments for the first time in court.)” (General Counsel’s Motion for Reconsideration at p. 2.) The General Counsel either misstates or misunderstands the holding in *Sambo’s Restaurant*. In *Sambo’s Restaurant*, the Board, on exceptions, ordered additional remedies that had not been ordered by the ALJ, and the company did not seek rehearing or reconsideration of the Board’s decision pursuant to 29 Code of Federal Regulations part 102.48(d). When the Board applied for enforcement of its order, the court held that that *sua sponte* action of the Board in ordering remedies not argued before it was exactly the kind of extraordinary circumstance for which the option to move for rehearing or reconsideration is provided. (*Sambo’s Restaurant, supra*, 641 F.2d at 795-796.) Because of the availability of a rehearing before the Board, the court held that the Board’s *sua sponte* adoption of an unargued remedy was not a statutory extraordinary circumstance that would allow the company to assert an objection for the first time on appeal. (*Id.* at 796.) Here, the failure to brief or raise an issue, as opposed to the Board addressing a new issue *sua sponte*, does not present the extraordinary circumstances supporting reconsideration by the Board. However, *Sambo’s Restaurant* is consistent with *Superior Farming* in that neither supports the General Counsel’s argument for reconsideration.

under penalty of perjury, and Employer has not had a chance to respond to the General Counsel's factual allegations. In the future, motions filed before the Board in which facts not in the record are alleged should be accompanied by a declaration filed under penalty of perjury by a person with personal knowledge of those facts.

We recognize the sacrifices made by agricultural workers in filing ULP charges and attending ULP hearings. That said, they -- or any party filing a ULP charge -- deserve prosecution of their complaints by the General Counsel in the interest of the people of the State of California that is consistently zealous at all levels of proceedings and in a manner that allows all parties an opportunity to be heard on the issues raised.

Furthermore, the General Counsel's broad brushstroke characterizations that "the unequal positions of the parties at hearing contributed to the ALJ's findings that the agricultural workers' testimony was not credible" and that the worker witnesses were "hampered by the fact that they are monolingual Spanish-speakers whose testimony was filtered by an interpreter and perceived by an ALJ from a different cultural, educational and social background" are unsupported and unavailing. (General Counsel's Motion of Reconsideration at p. 4.) The truth of the matter is that many of the agricultural worker witnesses were found not credible because they either contradicted their own testimony (Rosales)<sup>7</sup> or the testimony of others (Saucedo, Ruiz)

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<sup>7</sup> See ALJD at page 14, note 8: "When asked by Respondent's counsel, Rosales denied speaking with anyone from the ALRB concerning this case, other than the investigator, prior to testifying. He specifically denied having spoken with anyone in (Footnote continued....)"

who were considered more credible. This is not an issue of cultural, educational and/or social background, especially given the length of experience ALJ Gallop has with not only this agency but also with the National Labor Relations Board and as shown by his extensive body of work.

Regardless, there are no extraordinary circumstances presented by these new issues.

## II. The General Counsel Reargues the Standard for Review of ALJ Credibility Determinations

The General Counsel asks the Board to “re-consider its decision to grant the ALJ the high degree of deference on credibility determinations that it appears to have granted.” (General Counsel’s Motion for Reconsideration at p. 9.) Any deference the Board has given to the ALJ’s credibility determinations has been based on a thorough review of the record and an absence of “well-supported inferences from the record as a whole” with which the ALJ’s credibility determinations conflict. (*United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3; *S & S Ranch* (1996) 22 ALRB No. 7). As such, the General Counsel “merely raise[s] arguments previously addressed by the Board and has failed to cite any extraordinary circumstances justifying reconsideration.” (*Mario Saikhon, Inc.* (1991) 17 ALRB No. 6 at pp. 4-5).

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(Footnote continued)

the hearing room, which included two ALRB attorneys. On further questioning, he admitted speaking with one of these attorneys, when he arrived to testify, but not about his testimony. Rosales additionally denied being interviewed in jail. After considerable coaxing by the General Counsel on redirect, Rosales admitted being interviewed by Board attorneys, in prison, where he is serving a sentence for felony drug sales.”

For the reasons set forth above, the General Counsel's Motion for Reconsideration is hereby DENIED.

Dated: February 15, 2013

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

## CASE SUMMARY

**SOUTH LAKES DAIRY FARM**  
(United Food and Commercial Workers  
Union, Local No. 5)

Case No. 2009-CE-028-VIS  
39 ALRB No. 2

### Background

On February 1, 2013, the General Counsel timely filed a Motion for Reconsideration of the Board's decision in 39 ALRB No. 1. The General Counsel argued that, pursuant to *Superior Farming Co. v. Agricultural Labor Relations Board* (1984) 151 Cal. App. 3d 100 (*Superior Farming*), legal arguments not fully developed below regarding questions of procedural fairness present extraordinary circumstances meriting the Board's consideration of these arguments for the first time in a motion for reconsideration. Specifically, the General Counsel argued that the hearing process resulting in 39 ALRB No. 1 was fundamentally unfair and disadvantageous to agricultural workers and the Board was excessively deferential to the Administrative Law Judge's (ALJ) credibility determinations.

### Board Decision

The Board denied the General Counsel's motion for failure to demonstrate extraordinary circumstances. The Board held that *Superior Farming* did not stand for the proposition cited by the General Counsel and, in any event, a motion for reconsideration was not the proper avenue by which to raise for the first time issues of procedural unfairness of which the General Counsel must have been aware prior to the close of hearing. The General Counsel did not explain the failure to raise these issues in its post-hearing brief or in its brief in support of its exceptions. The Board held that, even if it were inclined to consider the motion, the General Counsel alleged facts not in evidence and not attested to in a declaration filed under penalty of perjury. The Board required that future motions alleging facts not in evidence be accompanied by a declaration filed under penalty of perjury by someone with personal knowledge attesting to such facts.

The Board did not reconsider its rulings on the ALJ's credibility determinations, noting that any deference the Board gave to the ALJ's credibility determinations was based on a thorough review of the record and an absence of "well-supported inferences from the record as a whole" with which the ALJ's credibility determinations might have conflicted. (*United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3; *S & S Ranch* (1996) 22 ALRB No. 7).

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