

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SACRAMENTO**

**GERAWAN FARMING, INC.**

**v.**

**AGRICULTURAL LABOR RELATIONS  
BOARD**

Case Number: 34-2015-80002100

**TENTATIVE RULING**

Date: January 8, 2016

Time: 9:00 a.m.

Dept.: 29

Judge: Timothy M. Frawley

**Proceeding:** Petition for Writ of Mandate

**Tentative Ruling:** Granted in Part, Denied in Part

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Petitioner by this proceeding seeks to compel Respondent ALRB to produce documents under the California Public Records Act (CPRA). The court shall grant the requested relief, in part.

Background Facts and Procedure

Petitioner Gerawan Farming, Inc. is a family-owned farming corporation, growing peaches, plums, nectarines, and table grapes in the San Joaquin Valley. It is one of the largest employers in Fresno County.

Rafael Marquez Amaro ("Marquez") worked for Gerawan doing various harvesting tasks, including picking grapes, from approximately October 8, 2011, through April 27, 2015. On April 24, 2015, Gerawan suspended Marquez for ten-days, for refusing to comply with his foreman's "repeated warnings" to stop "whistling" for workers to take

their break.<sup>1</sup> The following day, despite the suspension, Marquez returned to work. Later that day, Gerawan terminated his employment.

On April 27, 2015, Marquez filed an unfair labor practice charge against Gerawan with the ALRB, alleging that Gerawan had discriminatorily suspended him in retaliation for his union activities and participation as a witness in a 2014 ALRB case against Gerawan. A few days later, the United Farm Workers of America filed a second unfair labor practice charge, alleging that Gerawan discriminatorily suspended and terminated Marquez in retaliation for his protected union activities. Gerawan denies that Marquez was suspended or terminated because he is a union supporter or because he participated in the ALRB case. Gerawan contends that Marquez was terminated because of his insubordinate and disruptive conduct.

ALRB's former General Counsel eventually consolidated the two charges and issued a Consolidated Complaint on June 30, 2015, alleging that Gerawan violated the California Labor Code by suspending and terminating Marquez.

Section 1160.4 of the Agricultural Labor Relations Act authorizes the ALRB to seek a temporary restraining order (TRO) in superior court in connection with unfair labor practices complaints. (Cal. Labor Code § 1160.4.) The ALRB has delegated the authority for seeking injunctive relief to its General Counsel, but requires the General Counsel first to seek approval from the ALRB.

On May 12, 2015, before filing the Consolidated Complaint, the General Counsel sought permission from the ALRB to file a petition for a TRO to reinstate Marquez to his former position pending the completion of administrative proceedings. The ALRB granted the General Counsel "conditional authorization" to seek the TRO.

At about the same time the General Counsel applied to the ALRB for permission to seek a TRO, an ALRB employee, Samantha Cooper, received a phone call from a staff member of the General Counsel's office concerning the request for injunctive relief to be filed with the Board. This "whistleblower"<sup>2</sup> apparently told Cooper that the declaration submitted by the General Counsel's office in support of the TRO is "vague and misleading" and contains "false statements." The whistleblower's allegations also suggest that a senior member of the ALRB staff may have become embroiled in the

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<sup>1</sup> It appears that Marquez was taking it upon himself to announce work breaks by "whistling" to his crew to stop work when he believed it was time for a scheduled break. Marquez had received verbal warnings from his foreman to stop whistling, i.e., to stop announcing breaks. On April 23, 2015, Marquez whistled for an afternoon break without waiting for the foreman to announce the break. The next day, Gerawan suspended him for refusing to comply with the foreman's warnings to stop whistling.

<sup>2</sup> The court notes the amusing coincidence of a "whistleblower" in a case involving the termination of a "whistle blower."

underlying dispute, by advising Marquez to return to work notwithstanding his 10-day suspension.

The ALRB treated the whistleblower's phone call to Cooper as a prohibited "*ex parte*" communication, and therefor disclosed the communication to Gerawan.

Following receipt of the notice of *ex parte* communication, Gerawan submitted several California Public Records Act requests to the ALRB, requesting copies of the "TRO packet" submitted to the Board by the General Counsel, as well as the Board's conditional approval letter. The Board has refused to produce the documents, citing the litigation privilege, the deliberative process privilege, the attorney work-product doctrine, and the attorney-client privilege. (Cal. Gov. Code § 6254(b), (k).)

On June 1, 2015, the General Counsel filed (on behalf of ALRB) a TRO petition in Fresno Superior Court. Following a hearing, the superior court denied the General Counsel's request for a TRO. The court subsequently dismissed the petition on request of the ALRB.

On June 2, 2015, Gerawan filed this proceeding, seeking to enforce its CPRA requests. On June 30, the General Counsel filed the unfair labor practice Consolidated Complaint against Gerawan.

On August 28, 2015, Gerawan served the ALRB and its General Counsel with a *subpoena duces tecum* seeking documents relating to the Board's authorization to the General Counsel to seek injunctive relief. In response, the ALRB filed a petition to revoke the subpoena, which was granted by an ALJ, who found the documents "immaterial" to the issues in the administrative proceeding. Gerawan filed an application for permission to appeal the ALJ's order, but this was denied by the ALRB.

### Discussion

The CPRA provides for the inspection of public records maintained by state and local agencies. (See Gov. Code § 6250 et seq.) The purpose of the CPRA is to fulfill the "fundamental and necessary right of every person in this state" to have access to information concerning the conduct of the people's business. (See Gov. Code § 6250; *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 901.) As stated by the California Supreme Court in *CBS, Inc. v. Block*:

Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals

must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.)

To advance this purpose, the CPRA embodies a strong policy in favor of disclosure. (See Cal. Gov. Code § 6253.) Support for a claim of nondisclosure must be found, if at all, among the specific exemptions enumerated in the Act. (*Register Div. of Freedom Newspapers, supra*, 158 Cal.App.3d at p.901.)

Under the CPRA, records may be exempted from disclosure in two ways. First, materials may be exempt from disclosure pursuant to one of the express categorical exemptions set forth in section 6254 et seq. (Cal. Gov. Code § 6254.) Second, materials may be exempted from disclosure under the residual exemption set forth in section 6255, which allows a government agency to withhold records if it can demonstrate, on the facts of a particular case, that the public interest served by withholding the records clearly outweighs the public interest served by disclosure. (Cal. Gov. Code § 6255.) These exemptions are narrowly construed, and the burden of establishing an exemption is on the public agency. (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 476; Cal. Const. art. I, § 3(b).)

At issue in this proceeding are records pertaining to the General Counsel's request to file the TRO petition against Gerawan. In particular, Gerawan seeks the "TRO packet" presented to the Board by the General Counsel, the Board's letter granting "conditional authorization" to file the TRO petition, and documents relating to the "whistleblower claim" regarding the veracity of the declarations submitted to the Board. Although Gerawan is not required to identify the purpose of its request, Gerawan argues that it has a strong interest in these documents because of the "troubling issues" raised regarding the integrity of the ALRB's investigation and the apparent embroilment of ALRB staff in the underlying dispute.

Respondent ALRB opposes the petition, arguing that the withheld documents are exempt from disclosure because they are preliminary drafts, records pertaining to pending litigation, or records subject to the deliberative process privilege, attorney work-product doctrine, and/or attorney-client privilege.

The ALRB has failed to meet its burden of demonstrating that the TRO packet and the authorization letter are exempt from disclosure.

Disclosing the documents will not, as the ALRB argues, invade the Board's "legal privileges." The documents are not attorney-client communications or attorney-work product because the General Counsel was not acting as the Board's attorney.

Due process requires the internal separation of prosecutorial and advisory functions. It is a violation of the constitutional right to due process of law for an agency attorney acting as prosecutor to concurrently advise the administrative decision maker in the same proceeding. (See *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, disapproved in part by *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737; see also *Howitt v. Superior Court* (1992) 3 Cal. App. 4th 1575, 1585 [performance of both roles by the same office is appropriate only if there are assurances that the adviser is screened from any inappropriate contact with the advocate]; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 94–95 [due process violated when the same lawyer who represented the agency as advocate also advises the hearing officer with regard to its decision].)

The Agricultural Labor Relations Act (the "Act") is designed to provide agricultural workers with protection of their collective bargaining rights comparable to that provided nonagricultural workers by the NLRA. To that end, the Act is patterned after the NLRA and incorporates the procedural safeguards of the NLRA, including the separation of prosecutorial and adjudicatory functions. (*Tex-Cal Land Management v. Agric. Labor Relations Bd.* (1979) 24 Cal.3d 335, 345; see also *The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 411-12.)

As the ALRB concedes in its Opposition, the ALRB operates as two independent bodies: the Office of the Board, which acts in a quasi-judicial capacity, and the Office of the General Counsel, which acts as the prosecutorial branch of the agency. (Opposition, p.3.) The Board neither appoints nor directs the General Counsel. Rather, the General Counsel is appointed by the Governor, subject to confirmation by a majority of the Senate. (Cal. Lab. Code § 1149.)

While it is the Board's responsibility to decide the merits of the case and to fashion an appropriate remedy, the General Counsel has final authority with respect to the investigation of charges, issuance of unfair practice complaints, and the prosecution of such complaints before the Board. (Cal. Lab. Code § 1149; *Harry Carian Sales v. Agric. Labor Relations Bd.* (1985) 39 Cal.3d 209, 234.) In the course of performing such duties, the General Counsel acts not as a Board agent, but as an independent official charged with investigative and prosecutorial functions. (*The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 412; *Stirling v. Agric. Labor Relations Bd.* (1987) 189 Cal.App.3d 1305, 1310; *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119

Cal.App.3d 1, 22; *Belridge Farms v. Agric. Labor Relations Bd.* (1978) 21 Cal.3d 551, 557-58.) It follows that when the General Counsel is serving as the prosecutor in a pending unfair labor practice case, the General Counsel may not simultaneously give legal advice to the Board in that case.

Here, an unfair labor practice case was commenced when Marquez and the United Farm Workers filed charges. (See 8 C.C.R. § 20720.) From that point forward, the General Counsel assumed the role of “prosecutor” in the case, and therefore could not simultaneously “advise” the Board.

The party claiming the attorney-client privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) Here, there is no evidence – only argument – to support the existence of an attorney-client relationship between the Board and the General Counsel with respect to the unfair labor practice case against Gerawan.

The Board’s argument is contradicted by its admission that the Office of the General Counsel, as the “prosecutorial branch,” operates independent of the quasi-judicial Board. It also is contradicted by the Board’s memorandum delegating authority to the General Counsel, which prohibits *ex parte* communications between the Board and the General Counsel when a case is pending. (See Starkey Decl., Exh. A; see also Verified Petition, Exhs. F and G; see also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 17 [a prosecutor cannot communicate off the record with an agency decision maker or the decision maker’s advisers about the substance of a case])

In addition, as discussed above, recognizing an attorney-client relationship between the Board and the General Counsel would raise serious due process concerns in the administrative case.

Thus, for all of these reasons, the court finds that the General Counsel’s communications to the Board regarding injunctive relief were not confidential or privileged communications. Rather, they were in the nature of an *ex parte* request to the agency decisionmaker. Likewise, the Board’s response to the General Counsel was not a confidential communication to counsel, but rather a public ruling on the General Counsel’s request for authority to seek an injunction.

The court also rejects the suggestion that disclosure would invade the Board’s deliberative process privilege. The deliberative process privilege protects mental

processes by which government policy is processed and formulated. There are two requirements for invoking the privilege. First, the information must be “predecisional,” meaning that it was prepared in order to assist the government decisionmaker in arriving at the decision. Second, it must be “deliberative,” meaning it is related to the internal process by which policies are formulated. (See *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1142-43.) The key question in every case is whether the disclosure of materials would expose the agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions. (*Ibid.*)

In this case, the ALRB has failed to explain how disclosing a “TRO packet” submitted to the Board by the General Counsel – a party advocate – would impair the Board’s deliberative process or undermine the Board’s ability to perform its functions.<sup>3</sup> Moreover, even if disclosure would hamper the deliberative process, not every disclosure which hampers the deliberative process triggers the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the privilege apply to protect the documents. (*Cal. First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172.)

The ALRB has failed to show that the public interest in nondisclosure of the TRO packet clearly outweighs the public interest in disclosure. Gerawan and the public have a strong interest in the documents because they may shed light on the integrity of the ALRB’s investigation and the credibility of the ALRB’s evidence against Gerawan. In contrast, there is little reason for the Board to withhold sworn statements submitted to and considered by it in deciding whether to authorize the General Counsel to seek injunctive relief.

The ALRB’s May 12 letter granting conditional authorization to the General Counsel is not protected by the deliberative process privilege because it is not a “predecisional” communication. It is the Board’s decision.

The CPRA’s exemption for “draft” documents also does not apply. That exemption applies only if the agency can show that (i) such drafts are not retained in the ordinary course of business, and (ii) the public interest in withholding those records clearly outweighs the public interest in disclosure. (Cal. Gov. Code § 6254(a).) The ALRB has not met either requirement here.

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<sup>3</sup> However, if the Board or its staff created their own documents in the course of reviewing the TRO packet, such documents would seem to implicate the deliberative process privilege.

The documents also are not protected under the “pending litigation” exemption. That exemption covers records of a public agency which have been specifically prepared by an agency for its own use in litigation, and the exemption lasts only until the litigation is completed. (*City of Los Angeles v. Superior Court* (1996) 41 Cal.App.4th 1083, 1089; *Fairly v. Superior Court* (1998) 66 Cal.App.4th 1414, 1421.) Here, the documents were prepared by the General Counsel, not the Board, for use in the court enforcement action against Gerawan. That action is no longer pending. Thus, the pending litigation exemption cannot apply, as the ALRB seems to concede. (Opposition, p.8.)

The court concludes that the TRO packet submitted to the Board and the Board’s conditional authorization letter are not exempt, and must be disclosed.

With regard to documents relating to the “whistleblower claim,” the court’s tentative ruling is that such documents are exempt from disclosure under Government Code Section 6254(k) and the provisions of the California Whistleblower Protection Act (Gov. Code §§ 8547 et seq.).

#### Disposition

The petition for writ of mandate is granted as to the TRO packet and the Board’s conditional authorization letter, but denied as to the documents relating to the whistleblower claim.

In the event that this tentative ruling becomes the final ruling of the court, counsel for Gerawan is directed to prepare a formal order, incorporating this ruling as an exhibit; submit it to opposing counsel for approval as to form; and thereafter submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

This tentative ruling shall become the ruling of the court unless a party desiring to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear. Any party desiring an official record of this proceeding shall make arrangements for reporting services with the clerk of the department where the matter will be heard not later than 4:30 p.m. on the day before the hearing. The fee is \$30.00 for civil proceedings lasting under one hour, and \$239.00 per half day for proceedings lasting more than one hour. (Local Rule 1.12 and Government Code § 68086.)