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**Agricultural Labor Relations Board**

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MEMORANDUM

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To: All Parties

From: J. Antonio Barbosa, Executive Secretary

Date: April 12, 2016

Re: Adjudication timelines

CC: William B. Gould IV, Chairman  
Genevieve A. Shiroma, Board Member  
Cathryn Rivera-Hernandez, Board Member  
Julia Montgomery, General Counsel  
Paul Starkey, Special Board Counsel

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On December 18, 2015 Chairman Gould created and announced an (internal) Expediting Committee comprised of the Executive Secretary, the Acting General Counsel, the ALJ's and selected staff members to find ways that the Board could affirmatively and positively respond to the comments of stakeholders and of Governor Brown<sup>1</sup> that, in essence, the Board's adjudicative functions were taking too long to come to conclusion which negatively affected the timely enforcement of the statute.

Once convened, the Expediting Committee was tasked with considering various methods to increase efficiencies in the adjudicative processes of the Board within the already existing regulatory framework governing the adjudication of Unfair Labor Practice charges.<sup>2</sup> Receiving serious consideration were the use of Bench Decisions (a

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<sup>1</sup> See Governor Brown's veto message of AB 561 in which he stated "...I am directing the Board to examine the current process and make necessary internal reforms to provide for more timely orders" (AB 561 sought to mandate that compliance orders would issue within one year.)

<sup>2</sup> The timelines for the adjudicative processes of the Board with respect to objections to elections and challenged ballots are addressed within Labor Code section 1156.3 (See also title 8 CCR sections 20363, 20365 and 20393). This includes the time for the setting of objections and challenges (21 days), the holding of the hearing (28 days ),

process in existence and use by the NLRB); creating a Case Management System (echoing the status conferences that occur in the State and Federal Courts); placing an emphasis on promoting/encouraging early settlement discussions post-complaint through a greater use of settlement conferences and; altering procedural timelines.

The process of analysis and discussions engaged in by the Expediting Committee<sup>3</sup> resulted in the following additional procedural steps which I, in my official capacity as the Executive Secretary, have decided to adopt and which are hereby being implemented<sup>4</sup>:

Each prospective ULP Complaint issued will proceed forward with the inclusion of a Case Management Conference (CMC).

Establishment of a CMC process is only possible because of the expansion of the number of available judges and by blocking out Mondays as a day in which all CMCs will be scheduled. However, reserving Mondays as exclusively only for CMCs would be inefficient in the event that there were no conferences scheduled. In order to protect against that possibility, I (hereinafter Executive Secretary) have also decided to use the Mondays for ALJs to hear all motions and to conduct Settlement Conferences, Mondays are now reserved for these multiple purposes. Consequently, the elimination of Mondays from trial schedules means trials are reduced to a four day week, Tuesday thru Friday.

Upon receiving an Answer to a Complaint and/or Specification<sup>5</sup>, a Notice of Hearing including provision for a CMC will go out within two weeks subsequent to receipt of the Answer by the Executive Secretary, with due allowance for the availability of an ALJ. The CMC that is included in the Notice of Hearing will be scheduled for the first Monday on which it is practicable to schedule it.

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issuance of an IHE decision ( 60 days) and the issuance of a board decision thereafter (45 days). (Note: these timelines may upon a showing of good cause or party stipulation may be extended.)

<sup>3</sup> Recognition is also given to the Labor-Management AD Hoc Committee for also providing input and comment on certain of the various elements being considered such as early settlement discussions.

<sup>4</sup> The authority for the Executive Secretary to provide direction and guidance is derived from the ALRB's regulations title 8 CCR sections:

20190(b)(4);20190(g)(4);20220;20224;20235;20237;20238;20240;20240(b);20241;20248(a);20248(b);20249(e);20261;20262(f);20262(g);20262(i);20278(e);20278(1)(ii);20278(2);20279 and ;20290(b)

<sup>5</sup> In an effort to broaden the effort to increase efficient resolution of ULP charges the General Counsel has committed to consolidating most specifications with the ULP complaints, under section 20290(b), except where preparation of a specification would be complex or lengthy.

Although designating Monday as motion day is designed to insure the availability of at least one<sup>6</sup> Administrative Law Judge every Monday, in view of the fact that motions can come in at any time, it is always possible that the number of motions requiring ruling and the number of Case Management Conferences to be held on a Monday could overwhelm the Administrative Law Judge Unit. This is especially so because the Executive Secretary expects Petitions to revoke and simple or routine motions to be decided on a three business day turnaround basis but turnaround for decisions on complex motions will vary depending on complexity. Accordingly, the Executive Secretary needs some flexibility in fixing CMC dates in order to ensure that both pending as well as possible incoming motions can be appropriately assigned and dealt with along with any scheduled CMCs. Taking into account these concerns and within the limitations mentioned in footnotes 6 and 7, the Executive Secretary nevertheless will seek to schedule and hold a CMC within two weeks from the date of issuance of a Notice of Hearing<sup>7</sup>.

As with any other matter, the setting of a case for hearing requires an ALJ to be available.<sup>8</sup> The Executive Secretary anticipates setting every case for hearing within sixty days from the date of issuance of a Notice of Hearing to the extent possible.

Like the CMC, the date of the Prehearing Conference will be set in the Notice of Hearing. Generally speaking, the Executive Secretary will set a Prehearing Conference three weeks before the date of hearing in routine or simple cases and five weeks before the date of hearing in complex cases.

The Notice of Hearing has already been revised. It will now include the scheduling of a Case Management Conference and it will now notify the parties of the ALJ's authority to hold settlement discussions and the authority to issue bench decisions.

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<sup>6</sup> As discussed above, an Administrative Law Judge may be unavailable to take part in a specific Case Management Conference on a given Monday because he is on vacation, already committed to ruling on various assigned motions, taking part in a Settlement Conference, or working to meet the timeline for a decision.

<sup>7</sup> ALJ availability for trial assignment at the time the Notice of Hearing issues could require that only the CMC is set with a date certain and that setting the pre-hearing conference would occur, at a later date, when an ALJ became available. Alternatively, circumstances could occur where no ALJ was available to do a CMC within the desired two weeks after issuance of the Notice of Hearing and the CMC scheduling would then not occur until an ALJ was available.

<sup>8</sup> In saying this, the Executive Secretary is not ignoring the fact that a hearing requires counsel to be available as well. However, since the hearing schedule for ALJ's is the same as the hearing schedule for the General Counsel's attorneys and for the ALRB-related work of the attorneys who generally practice before us, the Executive Secretary will necessarily be aware of any ALRB-related conflicts with those who practice before the Board. Since the Executive Secretary can only take into account what he is aware of, any other conflicts will have to be brought to his attention by the appropriate means.

### Bench Decisions

Bench decisions are an alternative method for an ALJ to issue a decision instead of the traditional process of oral argument, written brief followed thereafter by an ALJ decision<sup>9</sup>. It is another method to expedite the ultimate consideration of cases by the Board.

The NLRB gives guidance to ALJs, the General Counsel and parties alike on the criteria to be applied for making use of the bench decision process. Using that same guidance, the Executive Secretary expects that the ALRB Administrative Law Judges will exercise their informed discretion to utilize the bench decision procedure in cases that, following the NLRB criteria for using the bench decision procedure, involve one day trials or short single issue trials; turn on straightforward credibility determinations; raise well-settled legal issues when there is no dispute over the essential facts; or cases in which a party defaults by not appearing at the trial.<sup>10</sup>

The appropriateness of a bench decision can only be determined by the Administrative Law Judge assigned to the trial.<sup>11</sup> This is so because the regulation, under which the bench decision is authorized, title 8 CCR 20278(e), only authorizes an Administrative Law Judge to dispense with briefs and order a case submitted at the close of a hearing. The assigned trial judge should put the parties on notice of the intent to use the bench decision procedure (and that oral argument instead of post-trial briefs will be required) as soon as practicable as, but no later than, the opening of the trial.<sup>12</sup>

If a trial judge issues a bench decision on the record, it shall contain the findings of fact and conclusions of law that are essential to support the issuance of an appropriate remedial order. But it will still be necessary for the trial judge to issue a written decision within 72 hours of the close of hearing containing necessary findings of facts, conclusions of law, and the customary notice and proposed remedial order.

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<sup>9</sup> See *NLRB v. Beverly Manor Nursing Home* 174 F. 3d 13, 35 (1<sup>st</sup>. Cir. 1999), enfg. 325 NLRB 598 (1998) for affirmance of the use of the bench decision particularly leaving the ultimate decision to use the process within the discretion of the trial judge.

<sup>10</sup> The Executive Secretary expects that it would most likely be inappropriate to use bench decisions in more complex cases including cases with lengthy records.

<sup>11</sup> If it is clear from the hearing calendar that the Administrative Law Judge conducting the prehearing conference is going to be the trial judge, the prehearing conference judge may direct that the case be submitted at oral argument.

<sup>12</sup> It is very possible that with the assignment of the trial judge occurring before the pre-hearing conference advisement of the use of the bench trial procedure can occur even earlier.

### Settlement Conferences

It is contemplated that settlement discussions can occur as early as the CMC or they may be initiated (or continued) in a separate settlement conference.<sup>13</sup> Remaining in place are the requirements that the discussions between the parties and the settlement judge are confidential and inadmissible in proceedings before the Board (except by stipulation of the parties). The settlement judge would not be permitted to discuss any aspect of the case with the trial judge.<sup>14</sup> A settlement reached during a pre-hearing settlement conference would then proceed under the requirements of section 20298<sup>15</sup>.

### Board Action on Exceptions

The Board will obligate itself to issue all decisions, except those in extraordinary cases, within ninety days of the receipt of exceptions.

### Attachment

Attached is a chart prepared by the Executive Secretary which outlines the timelines at every step of the adjudicative process that falls under either the authority of the Executive Secretary or Chief Administrative Law Judge.<sup>16</sup>

The chart, Timelines For Processing Unfair Labor Practice Cases, is broken into three columns: **Trigger Event**- the various ‘triggering’ events starting with the filing of the complaint and then followed down the pages with each event the preceding event or filing triggers, the adjacent column **Affected Party** identifies whom the event affects with respect to who is acting or obligated to act in regards to the ‘event’ and the final column **Action Item/Timeline** projects the time within which action is to be taken and what the action is. (Note: Key action dates are in bold).

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<sup>13</sup> This increased adjudicative phase emphasis on seeking settlement does not replace General Counsel/ Regional efforts to settle charges pre- or post-complaint but rather augments it and may be especially helpful (post-complaint) where those efforts have failed because of unreasonable intransigence on the part of one or more parties.

<sup>14</sup> The parties are free to decide that the assigned trial judge can act as the settlement judge as well.

<sup>15</sup> Factors such as whether the agreement is informal or formal will impact the “track” down which a settlement will proceed.

<sup>16</sup> The Executive Secretary stands in the “shoes” of the Chief Administrative Law Judge as that “position” no longer exists.



		Executive Secretary, in his/her discretion, may schedule a Case Management Conference alone with the notice of hearing and prehearing conference to follow or may simply wait until an ALJ becomes available and issue a comprehensive order at that time.
Motions received prior to Case Management Conference (subpoenas, motion in limine, bill of particulars...etc.)	Executive Secretary (note: ES may exercise discretion to assign motions to available ALJ. Available ALJ may be different from ALJ assigned to the hearing.)	Petitions to revoke and routine orders should issue within <b>three business days</b> of when last brief is filed or from when last conference call on petition to revoke is held, complex matters may vary.
Motions received at or after the Case Management Conference (subpoenas, motion in limine, bill of particulars...etc.)	Assigned ALJ (note: Available ALJ may be different from ALJ assigned to the hearing.)	Petitions to revoke and routine orders should issue <b>within three business days</b> of when last brief is filed or from when last conference call on petition to revoke is held, complex matters may vary.
Prehearing Conference	Assigned ALJ	<p><b>7 days</b> before PHC, ALJ to send out instructions for PHC (<i>note: this is a change in practice</i>)</p> <p>Inform ES immediately after PHC as to number of hearing days, interpreters needed, and languages requested.</p> <p>Routine PHC orders should issue <b>within three business days</b> of when the audio recording of the prehearing conference becomes available; PHC orders involving complex matters may vary.</p>

Hearing	Assigned ALJ	Preside over hearing
Last hearing transcript received by Executive Secretary	Assigned ALJ	2 days for ALJ to issue notice setting post-hearing due dates.  <i>(note: this is a partial change in practice).</i>
ALJ receives post-hearing briefs	ALJ	ALJ has 30 days to issue decision. Timeline may be extended in extraordinary cases, i.e., cases with very complex issues and/or extended hearing days.
ALJ issues decision.	Parties	20 days or date specified by Executive Secretary to file exceptions and replies to exceptions to ALJ decision.
Exceptions Received by Executive Secretary	Chair  Parties	Assign case to Board office.  10 days to file reply to exceptions.
Reply to exceptions received by Executive Secretary	Board	90 days to issue decision