



STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

A PERFORMANCE AUDIT
of
**THE ARIZONA AGRICULTURAL
EMPLOYMENT RELATIONS BOARD**

SEPTEMBER 1979

THE ACTIVITY LEVEL OF THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD HAS NOT JUSTIFIED ITS PRESENT STAFFING LEVEL. ADDITIONALLY, THIS LOW ACTIVITY LEVEL HAS IMPAIRED THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD'S EFFECTIVENESS AS A FORUM FOR SETTLING AGRICULTURAL LABOR-MANAGEMENT DISPUTES IN ARIZONA.

A REPORT TO THE
ARIZONA STATE LEGISLATURE

DOUGLAS R. NORTON, CPA
AUDITOR GENERAL



STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

SUITE 600
112 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004
255-4385

SUITE 820
33 NORTH STONE AVENUE
TUCSON, ARIZONA 85701
882-5465

September 14, 1979

The Honorable Bruce Babbitt, Governor
Members of the State Legislature
Members of the Agricultural Employment Relations Board

Transmitted herewith is a report of the Auditor General, A Performance Audit of the Arizona Agricultural Employment Relations Board. This report is in response to a September 19, 1978, resolution of the Joint Legislative Budget Committee and a January 18, 1979, resolution of the Joint Legislative Oversight Committee.

A summary of this report is found on the blue pages at the front of the report. A response to this report from members of the Agricultural Employment Relations Board is found on the yellow pages preceding the appendices of the report.

My staff and I will be happy to meet with the appropriate legislative committees, individual legislators or other state officials to discuss or clarify any items in this report or to facilitate the implementation of the recommendations.

Respectfully submitted,

Douglas R. Norton
Auditor General

Staff: Gerald A. Silva
Dwight A. Ochocki
Kirk J. Schneider

OFFICE OF THE AUDITOR GENERAL

A PERFORMANCE AUDIT OF
THE ARIZONA AGRICULTURAL EMPLOYMENT RELATIONS BOARD

A REPORT TO THE
ARIZONA STATE LEGISLATURE

REPORT 79-7

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	1
INTRODUCTION AND BACKGROUND	2
AUDIT SCOPE AND APPROACH	4
SUNSET FACTORS	5
FINDINGS	
FINDING I	10
The activity level of the Agricultural Employment Relations Board (AERB) has not justified its present staffing level. Additionally, this low activity level has impaired the AERB's effectiveness as a forum for settling agricultural labor-management disputes in Arizona.	
CONCLUSION	23
RECOMMENDATION	23
FINDING II	24
The office facilities of the Agricultural Employment Relations Board appear to have been used by the General Counsel of the AERB to conduct private business.	
CONCLUSION	27
RECOMMENDATION	27
FINDING III	28
The number of unfair labor practice charges handled by the AERB in fiscal year 1977-78 appears to have been overstated in reports made to the Budget Office of the State Department of Administration. In addition, other AERB activities are not adequately documented.	
CONCLUSION	30
RECOMMENDATION	30

FINDING IV

31

The AERB could do more to encourage public input and participation and AERB members should be replaced or reappointed when their terms expire.

CONCLUSION

35

RECOMMENDATION

35

OTHER PERTINENT INFORMATION

36

WRITTEN RESPONSE TO THE AUDITOR GENERAL'S REPORT

37

APPENDICES

- APPENDIX I - Seasonality of Complaints (Occurrence per Month)
- APPENDIX II - Memorandum from Legislative Council Concerning Use of Office Personnel, Equipment and Supplies for Personal Use
- APPENDIX III - Letters from the Office of the Attorney General
- APPENDIX IV - Letter from the Office of the Governor
- APPENDIX V - Letter regarding General Counsel's private law practice
- APPENDIX VI - Unconstitutional Provisions of Arizona Law - Federal District Court Decision
- APPENDIX VII - Supreme Court of the United States' Decision on Arizona's Agricultural Employment Relations Act
- APPENDIX VIII - ARS 23-1381 to 23-1395

SUMMARY

The Agricultural Employment Relations Board was established on May 11, 1972 to promote labor peace and keep to a minimum the effects of uncontrolled labor-management strife. The Board is funded through the State General Fund.

Our review of the Agricultural Employment Relations Board (AERB) revealed that the activity level of the AERB has not justified its present staffing level. Additionally, this low activity level has impaired the AERB's effectiveness as a forum for settling agricultural labor-management disputes in Arizona. (page 10)

Our review also disclosed that the office facilities of the AERB appear to have been used by the General Counsel of the AERB to conduct private business. (page 24)

In addition, the number of unfair labor practice charges handled by the AERB in fiscal year 1977-78 appears to have been overstated in reports made to the Budget Office of the State Department of Administration. Further, the AERB is not adequately documenting unfair labor practice investigations and dismissed unfair labor practice charges. (page 28)

Lastly, the AERB's exposure to the agricultural community and its efforts at informing the public could be enhanced. Also, our review indicated that only two of the current six Board members have unexpired terms. (page 31)

It is recommended that:

1. The Office of the Auditor General re-evaluate the activity level of the AERB as of June 30, 1980.
2. Use of state property for personal use be prohibited. (page 27)
3. Modifications to unfair labor charges not be counted as separate and distinct charges for service measurement reporting purposes. Also, that written reports be kept to substantiate all investigations. (page 30)
4. A public awareness program be instigated by the AERB and that Board members be reappointed or replaced before their terms expire. (page 35)

INTRODUCTION AND BACKGROUND

In response to a September 19, 1978, resolution of the Joint Legislative Budget Committee and a January 18, 1979, resolution of the Joint Legislative Oversight Committee, we have conducted a performance audit as a part of the Sunset Review of the Agricultural Employment Relations Board, in accordance with ARS 41-2351 through 41-2374.

State regulation of agricultural labor relations is an important and controversial issue. Arizona agricultural employees are not included within the scope of the National Labor Relations Act (NLRA). Increased agricultural labor union activity has caused some states to enact legislation to involve the State in agricultural labor-management activities. Arizona was the first state to do so in 1972, with Kansas, Idaho and California adopting similar legislation.

The Agriculture Employment Relations Board (AERB) was established in 1972, when the governor signed into law, H. B. 2134, which added sections 1381 through 1395 to Title 23 of the Arizona Revised Statutes. The AERB consists of seven members appointed by the governor (ARS 21-1386). Two of the members represent agricultural employers, two members represent organized agricultural labor, and three members represent the general public.

The objective of the AERB is to promote labor peace and keep to a minimum the effects of uncontrolled labor-management strife. The AERB is intended to provide a forum for the State's agricultural industry and employees to settle disputes.

The AERB, which maintains an office in Phoenix, seeks impartial determinations for appropriate collective bargaining units, conducts investigations of alleged unfair labor practices, and certifies secret ballot elections to determine union representation. The activity level for the AERB during the last five fiscal years is shown below:

<u>Activity</u>	<u>Fiscal Year</u>				
	<u>1974-75</u>	<u>1975-76</u>	<u>1976-77</u>	<u>1977-78</u>	<u>1978-79</u>
Unfair Labor Practices Filed	17	10	2	15	*
Hearings Held on Unfair Labor Practices	3	-	-	1	*
Elections	2	1	-	-	*
Charges Investigated but not Filed	20	25	30	4	*

The AERB is funded entirely by a General Fund appropriation. Expenditure information during the last six fiscal years and budget information for 1979-80 fiscal year is shown below:

<u>Description</u>	<u>Fiscal Year</u>						
	<u>1973-74</u>	<u>1974-75</u>	<u>1975-76</u>	<u>1976-77</u>	<u>1977-78</u>	<u>1978-79</u>	<u>1979-80</u>
Full Time Employees	<u>6</u>	<u>6</u>	<u>4</u>	<u>4</u>	<u>4</u>	<u>2</u>	<u>2</u>
Personal Services	\$70,400	\$61,700	\$61,300	\$66,400	\$66,200	\$41,000	\$45,200
Employee Related Expenses	8,400	7,900	9,350	9,700	11,800	6,800	7,800
Professional Services	600	3,000	3,550	5,000	1,200	400	6,000
Travel - In State	6,800	5,000	2,400	5,100	4,800	500	5,000
Out of State					300		
Other Operating	9,700	8,700	7,600	6,900	7,600	3,400	6,400
Equipment	1,600	100	1,400	600			
Litigation Expense**						20,000	
Total	<u>\$97,500</u>	<u>\$86,400</u>	<u>\$85,600</u>	<u>\$93,700</u>	<u>\$91,900</u>	<u>\$72,100</u>	<u>\$70,400</u>

* No activity due to court injunction March 1978.

** Refer to other pertinent information. (page 36)

Since its inception, the AERB has been challenged by the United Farm Workers, one of the two major farm worker unions in the United States. The UFW has refused to recognize the authority of the AERB or its enabling Act, and in effect has boycotted the AERB. In 1973, the UFW filed a lawsuit in Federal District Court challenging the constitutionality of the Act that established the AERB. A three-judge Federal panel ruled in March 1978 that the Act was unconstitutional and imposed a permanent injunction preventing enforcement of the provisions of the Act. (Refer to Appendix VI for unconstitutional provisions.)

The AERB appealed the decision to the U.S. Supreme Court. On June 5, 1979, the United States Supreme Court rendered its decision (refer to Appendix VII for detail). In essence, the Supreme Court overturned the Federal District Court decision that the Agricultural Employment Relations Act was unconstitutional. According to the Supreme Court, tests of constitutionality will have to be determined at the State rather than the Federal level.

Audit Scope and Approach

The audit scope included a review of the operations of the AERB. The audit focused primarily on fiscal years 1973-74 through 1978-79.

The audit approach was to review the statutes and rules and regulations governing the AERB to ascertain its goals, objectives and procedures. The effectiveness of the AERB in protecting the public was assessed through interviews with board members, administrative staff, labor organizations, growers; examination of files, documents and other records; review of pertinent financial data; and through questionnaires mailed to members of Central Arizona Vegetable Growers and Shippers. The information obtained from these procedures is the basis for the contents of this report.

Appreciation is expressed to the Agricultural Employment Relations Board and to its General Counsel and Administrative Secretary for their cooperation and assistance rendered to the Auditor General's Office.

SUNSET FACTORS

In accordance with ARS 41-2351 through 41-2374, nine factors were considered to determine, in part, whether the State Agricultural Employment Relations Board should be continued or terminated.

These factors are:

1. Objective and purpose in establishing the AERB,
2. The degree to which the AERB has been able to respond to the needs of the public and the efficiency with which it has operated,
3. The extent to which the AERB has operated within the public interest,
4. The extent to which rules and regulations promulgated by the AERB are consistent with legislative mandate,
5. The extent to which the AERB has encouraged input from the public before promulgating its rules and regulations and the extent to which it has informed the public as to its actions and their expected impact on the public,
6. The extent to which the AERB has been able to investigate and resolve complaints that are within its jurisdiction,
7. The extent to which the Attorney General or any other applicable agency of state government has the authority to prosecute actions under the enabling legislation,
8. The extent to which the AERB has addressed deficiencies in its enabling statutes which prevent it from fulfilling its statutory mandate, and
9. The extent to which changes are necessary in the laws of the AERB to adequately comply with the factors listed in this subsection.

SUNSET FACTOR: OBJECTIVE AND PURPOSE
IN ESTABLISHING THE BOARD

The Agricultural Employment Relations Board (AERB), created in 1972, has defined its objectives:

"To seek impartial determinations of appropriate units for collective bargaining, investigations of alleged unfair labor practices and conducting and certifying secret ballot elections to determine representation; to continue to oversee labor disputes and use the powers granted by the legislature to resolve such disputes, dispensing fair and equal treatment to all parties in order to protect the interest of all concerned parties, including the general public."

The defined purpose of the AERB is:

"To establish labor peace and keep to a minimum the effects of uncontrolled labor-management strife by providing a forum for the state's agricultural industry and employees for settling disputes."

SUNSET FACTOR: THE DEGREE TO WHICH
THE BOARD HAS BEEN ABLE TO RESPOND TO
THE NEEDS OF THE PUBLIC AND THE EFFI-
CIENCY WITH WHICH IT HAS OPERATED

The AERB's authority is limited to actions between labor and management. The public is an indirect beneficiary if there is an uninterrupted flow of agricultural goods to the consuming public.

The AERB has attempted to fulfill the needs of labor and management but has had limited activity. Abstention by the UFW in using the AERB's services has been a major contributing factor to this limited activity. The general lack of activity (page 10) and circumvention of the AERB (page 17) manifests that the AERB has not been able to respond to the needs of the public.

The AERB has not operated efficiently in that its activity level does not justify its present staffing level. (page 14)

SUNSET FACTOR: THE EXTENT TO WHICH
THE BOARD HAS OPERATED WITHIN THE
PUBLIC INTEREST

In those limited instances when the AERB has been actively involved in an agricultural labor-management dispute, it has effectively fulfilled its statutory responsibilities.

SUNSET FACTOR: THE EXTENT TO WHICH
RULES AND REGULATIONS PROMULGATED BY
THE BOARD ARE CONSISTENT WITH THE
LEGISLATIVE MANDATE

After reviewing the rules and regulations promulgated by the AERB, it appears that these rules and regulations are consistent with ARS 23-1381 through 23-1395.

SUNSET FACTOR: THE EXTENT TO WHICH
THE BOARD HAS ENCOURAGED INPUT FROM
THE PUBLIC BEFORE PROMULGATING ITS
RULES AND REGULATIONS AND THE EXTENT
TO WHICH IT HAS INFORMED THE PUBLIC AS
TO ITS ACTIONS AND THEIR EXPECTED IMPACT
ON THE PUBLIC

The meetings of the AERB are open to the public. Notices of the AERB meetings are posted in the Arizona State Building. Additionally, the AERB has prepared a pamphlet for distribution to agricultural laborers which outlines their rights under the Agricultural Employment Relations Act. The general counsel of the AERB has also given public speeches on the AERB's function.

However, it appears that the AERB could do more to encourage input from the public and inform the public as to its actions. (page 31)

SUNSET FACTOR: THE EXTENT TO WHICH
THE BOARD HAS BEEN ABLE TO INVESTIGATE
AND RESOLVE COMPLAINTS THAT ARE WITHIN
ITS JURISDICTION

The effectiveness of the Board's complaint review process cannot be determined because of an absence of adequate documentation to support -

- 1) charge dismissal actions taken by the General Counsel, and
- 2) charges investigated but not filed. (page 28)

The complaints that were properly documented indicated that the AERB was able to investigate and resolve complaints within the due process of Arizona law.

SUNSET FACTOR: THE EXTENT TO WHICH
THE ATTORNEY GENERAL OR ANY OTHER
APPLICABLE AGENCY OF STATE GOVERN-
MENT HAS THE AUTHORITY TO PROSECUTE
ACTIONS UNDER THE ENABLING LEGISLATION

The AERB has the authority to prosecute actions on its own behalf. As of June 30, 1979, the only involvement the Attorney General's Office has had with the AERB was the AERB's Appeal to the United States Supreme Court (see Appendix VII).

SUNSET FACTOR: THE EXTENT TO WHICH
THE BOARD HAS ADDRESSED DEFICIENCIES
IN ITS ENABLING STATUTES WHICH PREVENT
ITS FROM FULFILLING ITS STATUTORY
MANDATE

According to the General Counsel for the AERB, he has attempted to have the statutes revised to clarify and more appropriately describe the scope of authority and jurisdiction of the AERB. Revisions to the AERB's enabling statutes have not been made primarily because of the Federally imposed injunction in March 1978. As the Supreme Court has overturned the lower court's ruling, the General Counsel has stated that he intends to introduce recommended statute revisions.

It should be noted that ARS 23-1385 (B)(7)* was found to be "unconstitutionally vague" by a Maricopa County Superior Court Judge on June 22, 1973. This particular statute subsection was not addressed by the United States Supreme Court and should be deleted or clarified.

SUNSET FACTOR: THE EXTENT TO WHICH
CHANGES ARE NECESSARY IN THE LAWS OF
THE BOARD TO ADEQUATELY COMPLY WITH
FACTORS LISTED IN THIS SUBSECTION

For a discussion of these issues, see page 23 and Appendix VIII.

* See Appendix VIII for a full text of ARS 23-1385.

FINDING I

THE ACTIVITY LEVEL OF THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD (AERB) HAS NOT JUSTIFIED ITS PRESENT STAFFING LEVEL. ADDITIONALLY, THIS LOW ACTIVITY LEVEL HAS IMPAIRED THE AERB'S EFFECTIVENESS AS A FORUM FOR SETTLING AGRICULTURAL LABOR-MANAGEMENT DISPUTES IN ARIZONA.

From July 1, 1972 to June 30, 1979, the Agricultural Employment Relations Board (AERB) has cost the Arizona taxpayers \$581,500. In those limited instances when the AERB has been actively involved in an agricultural labor-management dispute, it has effectively fulfilled its statutory responsibility. The low activity level of the AERB and the limited use of the AERB's services have however, not justified its staffing level.

Low Activity Level

One of the primary functions of the AERB is the investigation of alleged unfair labor practices. This investigation process is as follows:

- 1) A charge is filed by a complainant.
- 2) The General Counsel of the AERB investigates the charge to determine its validity.
- 3) If the charge is valid it achieves complaint status, and the General Counsel of the AERB obtains more data to prepare the complaint form.
- 4) The complainant has the opportunity to have the case heard before a Trial Examiner who hears both sides of the case and renders a decision.
- 5) If the Trial Examiner's decision is appealed, the AERB will review the decision and render an opinion.
- 6) If the case is appealed further, a Superior Court will review the case and render a decision.

Quantitative analysis of the AERB revealed that for fiscal years 1974-75 through 1978-79, only 44 charges were received by the AERB of which 29 achieved complaint status. These 29 complaints were merged into four consolidated complaints. Three of the Trial Examiners' decisions were subsequently appealed to the AERB (see Table 1).

In all cases, the Board upheld the Trial Examiner's decision. Table 1 summarizes the complaint activity of the AERB for fiscal years 1974-75 through 1978-79.

TABLE 1

SUMMARY OF COMPLAINT ACTIVITY
OF THE AERB FOR FISCAL YEARS
1974-75 THROUGH 1978-79

Activity Level at Each Stage of the AERB Complaint Process	Total	Fiscal Year				
		1974-75	1975-76	1976-77	1977-78	1978-79
1. Number of charges brought to the General Counsel of the AERB	44	17	10	2	15	*
2. Number of charges which achieved complaint status	29	12	3	-	14	*
3. Number of complaints after merger into a consolidated complaint	4	3	-	-	1	*
4. Number of consolidated complaints resulting in a formal hearing	4	3	-	-	1	*
5. Number of consolidated complaints receiving a Trial Examiner's decision	4	3	-	-	1	*
6. Number of decisions of Trial Examiner appealed to AERB	3	3**	-	-	-	*

* No activity due to court injunction.

** AERB upheld all three Trial Examiner decisions.

The second major function of the Board is to hold and validate elections for union representation.

According to ARS 23-1389 (C & D):

"The Board shall investigate any petition, and if it has reasonable cause to believe that a question of representation exists shall provide for an appropriate hearing upon due notice...if the Board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

From fiscal year 1974-75 to 1978-79, only three elections were held. Table 2 summarizes the election activity of the AERB for fiscal years 1974-75 through 1978-79.

TABLE 2

SUMMARY OF ELECTION ACTIVITY OF THE AERB
FOR FISCAL YEARS 1974-75 THROUGH 1978-79

	<u>Petition To Hold Election Submitted By</u>		
	<u>Teamsters' Local</u> <u>No. 274</u>	<u>Local</u> <u>No. 310</u>	<u>Laborer's International</u> <u>Union</u>
Election petitions filed	7	1	1
Hearings held for election	5	1	1
Elections held	1	1	1
Elections resulting in union representation	-	-	1

As a consequence of the limited AERB activity level, the AERB'S General Counsel, Investigator, and Executive Secretary have not been productively employed. For example, former General Counsel of the AERB, Bob Dickelman, indicated that:

"...many times there was absolutely nothing to do because of the nature of the harvests. There was an excessive amount of dead time."

The present General Counsel, William Gibney, estimated that:

"...because of the courts injunction since March of 1978, I have spent 80-90% of my time on concerns unrelated to Agricultural Employment Relations business."

However, Mr. Gibney also indicated that prior to March 1978 "dead time" was a problem. Table 3 summarizes the annual salaries, estimated annual work hours and percentage of productive time for the AERB General Counsel, Investigator, Executive Secretary, and Administrative Secretary during fiscal years 1974-75 through 1978-79.

TABLE 3

SUMMARY OF THE ANNUAL SALARIES, ESTIMATED ANNUAL WORK HOURS
AND PERCENTAGE OF PRODUCTIVE TIME FOR THE GENERAL COUNSEL,
INVESTIGATOR, EXECUTIVE SECRETARY AND ADMINISTRATIVE SECRETARY
OF THE AERB DURING FISCAL YEARS 1974-75 THROUGH 1978-79

Fiscal Year	General Counsel (1)			Investigator			Executive Secretary			Administrative Secretary (3)		
	Annual Salary	Estimated Work Hours (2)	% of Productive Time	Annual Salary	Estimated Work Hours (2)	% of Productive Time	Annual Salary	Estimated Work Hours (2)	% of Productive Time	Annual Salary	Estimated Work Hours (2)	% of Productive Time
1974-75	\$ 18,756	590	29%	\$11,388	494	24%	\$16,824	238	12%	N/A	N/A	N/A
1975-76	21,072	176	9	11,388	152	7	18,408	44	2	N/A	N/A	N/A
1976-77	24,624	16	1	13,584	16	1	20,940	4	-	N/A	N/A	N/A
1977-78	25,428	630	31	15,052	510	25	20,940 (4)	178	9	\$ 9,620	1,428	70%
1978-79	28,599	306 (5)	15	N/A (6)	-	N/A	N/A	-	N/A	10,911	1,224	60
Total	<u>\$118,479</u>	<u>1,718</u>	<u>17%</u>	<u>\$51,412</u>	<u>1,172</u>	<u>14%</u>	<u>\$77,112</u>	<u>464</u>	<u>6%</u>	<u>\$20,531</u>	<u>2,652</u>	<u>65%</u>

- (1) Estimated work hours and percentage of productive time for the General Counsel are based upon the primary functions performed by the AERB.
(2) Estimated work hours computed by job function. These calculations were derived by subdividing the charge/complaint and election processes into separate steps. The number of hours attributed per each step was estimated by the Board's General Counsel.
(3) Because of a change in personnel and the absence of adequate records, the Administrative Secretary, who performs various clerical and accounting functions, was analyzed for the last two fiscal years only.
(4) Vacant as of 3/17/78.
(5) Time estimation provided by General Counsel for injunctive period.
(6) An investigator was rehired 6/21/79, at a salary of \$14,436. That position had been vacant since 6/30/78.

Based upon the previous statistics, it appears that the activity level of the AERB does not justify a full-time General Counsel, Investigator and Executive Secretary. These functions could be performed more efficiently if "contracted out."*

We contacted various private attorneys-at-law who stated that a general counsel and hearing officer's experience qualification were basically the same. The Arizona Department of Health Services (DHS) contracts with attorneys to act as hearing officers. DHS hearing officers must meet certain qualifications, such as being an active member of the State Bar and having at least one year of trial practice experience. The attorney must agree to conduct prehearing conferences, legal and/or factual research, rule on admissibility of evidence and testimony, and make findings of fact and conclusions of law. The method of payment is \$230.00 for one day, \$365.00 for two days, \$500.00 for three days and \$135.00 for each day thereafter. In those instances where a hearing officer has been appointed but the parties reach a settlement prior to hearing, the hearing officer is paid at the rate of \$50.00 per hour up to a maximum of \$250.00.

* The feasibility of combining the Board with another state agency was examined. No entities were identified under which the Board could achieve an effective operation. Consideration was given to the possibilities of merging the Agricultural Employment Relations Board with the:

- 1) Industrial Commission,
- 2) Attorney General's Office, and
- 3) Department of Economic Security.

The functions of the Industrial Commission are not closely related to the Board, the Attorney General's Office felt the expertise in the labor field was lacking, and the Department of Economic Security excluded involvement with "political or unionization" activities.

By "contracting out," we estimate resultant annual savings would be: 1) \$12,940 to \$24,778 for the General Counsel position, and 2) \$5,152 to \$8,652 for the Investigator position. The Executive Secretary, Administrative Secretary, and Investigator are hired by the Board. The General Counsel is appointed by the Governor and serves at his pleasure.

There has not been an Executive Secretary since March 17, 1978, so no current cost savings would result from contracting. The possibility of consolidating the Administrative Secretary's position within the Arizona State Boards' Administrative Office was considered but the estimated cost savings were insignificant.

According to the General Counsel of the AERB, the recent Supreme Court decision will result in an increase in the activity level of the AERB. It should be noted that between June 5, 1979 (the date of the United States Supreme Court decision which overruled the lower court decision that the AERB was unconstitutional) and August 1, 1979, the AERB received the following requests for service.

- 1) Petition for election - Vukasovich, Inc.
- 2) Petition for election - Senini of Arizona
- 3) Charge against employer - The Woods Co., Inc.
- 4) Charge against employer - G & S Produce Co., Inc.

It cannot be determined, based upon the limited time that has elapsed since the Supreme Court decision, if these requests for AERB services represent an actual continuing need for the present staffing level of the AERB. Our review, however, indicates that there may not be an actual and continuing need for the present staffing level because: 1) under Arizona law it is possible to circumvent the AERB, and 2) the attitude of the major farm labor union and other farm labor groups is still negative toward the AERB.

Circumvention of the AERB

Two of the primary functions performed by the AERB are to adjudicate alleged unfair labor practices and certify secret ballot elections to determine union representation. Our review of the AERB revealed that under Arizona statutes it is not necessary to use the AERB to adjudicate alleged unfair labor practices or conduct union elections. This situation is partially responsible for the past low level of AERB activity and may preclude any significant increase in future AERB activity.

Adjudication of Alleged Unfair Labor Practices

The AERB has defined as one of its objectives to conduct:

"investigations of alleged unfair labor practices."

In order to accomplish this objective, the AERB has adopted the following procedures:

- 1) The investigator conducts his review to see if the charge is a bona fide complaint, and
- 2) If the complaint is determined to be bona fide, more information (evidence) is gathered in preparation of obtaining court relief (such as obtainment of a temporary restraining order).

If at the completion of his investigation, the General Counsel of the AERB believes that an unfair labor practice exists, he may file a petition with any Superior Court having appropriate jurisdiction to obtain a temporary restraining order on behalf of the complainant. However, under Arizona law, a complainant can petition the courts directly to obtain injunctive relief or a temporary restraining order without having to use the AERB.

Arizona Revised Statutes 23-1393(A) allows for parties other than the AERB to petition for injunctions and temporary restraining orders and states:

"Any person who is aggrieved or is injured in his business or property by reason of any violation of this article, or violation of an injunction issued as provided in this section, may sue in any superior court having jurisdiction of the parties for recovery of any damages resulting from such unlawful action, regardless of where such unlawful action occurred and regardless of where such damage occurred, including costs of the suit and reasonable attorney fees.

Upon the filing of such suit the court shall also have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper. Petitions for injunctive relief or temporary restraining orders shall be heard expeditiously. Petitions for temporary restraining orders alleging a violation of ARS 23-1385 shall be heard forthwith and if the petition alleges that substantial and irreparable injury to the petitioner is unavoidable such temporary restraining orders may be issued pursuant to Rule 65 of the Arizona Rules of Civil Procedure." (Emphasis added)

Therefore, ARS 23-1393 (A) allows for any person to petition the courts for injunctive relief or a temporary restraining order. As a result, the AERB and its adjudication of alleged unfair labor practices function can and has been completely circumvented. For example, the following cases are instances of the AERB being circumvented:

- 1) April 4, 1973, D'Arrigo Brothers v. United Farm Workers, Pinal County, No. C26803;
- 2) June 12, 1973, Safeway Stores v. United Farm Workers, Maricopa County, No. C278338;
- 3) June 21, 1974, Kennard v. United Farm Workers, Maricopa County, No. C294873;
- 4) February 20, 1976, Warren Page, d/b/a/ Page's Market and Page's Western Auto v. United Farm Workers, Maricopa County, No. C328259.

By way of contrast, California statutes require that a temporary restraining order must first be routed through the California Agricultural Labor Relations Board (ALRB), which is the California equivalent of the AERB. The General Counsel then conducts an investigation and prepares recommendations for the ALRB. If the ALRB so determines, a temporary restraining order is obtained from a court of appropriate jurisdiction.

Since its inception on June 5, 1975 to June 30, 1978, the California ALRB has investigated 399 complaints of unfair labor practices. The AERB, however, during that same period of time has investigated only 27 complaints of unfair labor practices.

Certifying Election

"Certifying secret ballot elections to determine representation" is another of the AERB's primary objectives. However, this function, like adjudicating alleged unfair labor practices, can be accomplished without using the services of the AERB. This also contributes to the limited activity level of the AERB.

In Arizona, agricultural elections to determine representation can be conducted using either the secret ballot method or the card check system. Under the secret ballot method of selecting representation, the petitioner (i.e., farm laborers' union) must have at least 30% of the designated employees of a unit mark their "authorization cards" favoring union representation. According to the AERB's Field Manual of Case Handling Procedures, "an election may not be held sooner than four days...Where the parties wish a prompt election, the employer will make the list (upon approval of an election, the employer is requested to prepare a list of eligible voters and their addresses) available in less than 10 days."

At the time of the election, voters provide proper identification and are given a ballot. The voter proceeds to the voting booth and marks the ballot. The voter leaves the booth and places the folded ballot into the ballot box. After all voters have cast their ballots, the slot in the ballot box should be sealed, with the AERB agent maintaining personal custody. The vote count should take place as soon after the close of the voting as possible. Actual participants are AERB agents and official observers. According to the Field Manual, "a union, to win, must receive one more vote than 50 percent."

However, under a card check system an employer may be required to bargain when a union obtains "authorization cards" from a majority of the workers on the employer's payroll authorizing the union to act as their bargaining agent. The signatures on the authorization cards are verified to payroll records by parties not directly involved in the election process, such as Western Growers* and a clergyman. If the union successfully obtains a verified majority of authorization cards it becomes the farm laborers' bargaining representative. Two instances of this method of "election" occurred in 1974 for Pasquinelli Produce and Vukasovich, Inc. of Yuma, Arizona.

California's agricultural labor law, approved by the Governor on June 5, 1975, "provide(s) for the holding of a secret ballot election in a bargaining unit composed of agricultural employees of an employer for the selection of a labor organization as their exclusive bargaining representative, and would provide the procedure for petitions for, the conduct of, and the eligibility of agricultural workers to vote in, such elections." According to officials of the California Agricultural Labor Relations Board (ALRB), card check system elections are not allowed in California and all union elections must be certified by the ALRB.

A comparison of Arizona's election activity to California's is shown in Table 4.

* Western Growers' Association is a non-profit organization, founded in 1926. Membership comprises approximately 80% of all growers and shippers of fresh fruits and vegetables in California and Arizona.

TABLE 4

COMPARISON OF ELECTION ACTIVITY IN THOSE STATES THAT HAVE AGRICULTURAL LABOR ACTS FOR FISCAL YEARS 1974-75 THROUGH 1977-78

<u>Fiscal Year</u>	<u>ARIZONA</u>	<u>California*</u>
1974-75	3	**
1975-76	-	423
1976-77	-	188
1977-78	-	95

* Information obtained through the INITIAL REPORT TO THE LEGISLATURE ON THE ADMINISTRATION OF THE AGRICULTURAL LABOR RELATIONS ACT OF 1975.

** Act passed in 1975, information not available.

Negative Attitude Toward The AERB

Since its inception in 1972, the AERB has been opposed by the UFW. Our review of the AERB revealed that despite the June 5, 1979, Supreme Court decision, the UFW and other farm labor groups remain opposed to the AERB. The negative attitude of these farm labor groups toward the AERB has contributed to the low level of AERB activity and may continue to do so in the future.

As part of our review we contacted several farm labor groups in order to assess the effectiveness of the AERB. We found the attitude of these farm labor groups toward the AERB to be generally negative.

For example:

- 1) The UFW, refuses to recognize the AERB and thus effectively thwarts any "forum" the AERB wishes to maintain. Even after the June 5, 1979, Supreme Court decision, Marc Grossman, the Assistant to the President of the United Farm Workers, said on June 13, 1979;:

"...the UFW will still definitely NOT USE the Agricultural Employment Relations Board."

- 2) National and local labor organizations which provide the farm laborer with services similar to those offered by the AERB are also critical of the AERB. For example:

"Both the Board and the Agricultural Employment Relations Act have been totally ineffective in resolving labor-management disputes. There is no confidence in the Board's election process primarily due to the delay or postponement provisions."

Jim Rutkowski, Attorney
United Farm Workers

"The AERB is ineffective and provides no assistance to the farm worker that we ourselves do not supply."

Lupe Sanchez, Executive Director
Maricopa County Organizing Project

"Board members do not serve the best interest of the public. They are unaware of the labor activity around them and do not have contact with the labor world."

John Blake, Representative
Teamsters Local No. 274

"While I was director for Legal Services for Farmworkers from June '76 to Aug. '78, the AERB produced not one positive contribution for the agricultural laborers of this state. The AERB lacks credibility, one of the many reasons why labor does not take advantage of the Board's services."

Gary Bryant, Staff Attorney
Migrant Legal Action Program
Washington, D. C.

Without the support of farm labor groups the effectiveness of the AERB has been and will continue to be severely impaired.

CONCLUSION

The low level of AERB activity has not justified its present staffing level or budget authorization. The historically low level of AERB activity is primarily the result of two factors: 1) in Arizona it is possible to circumvent the AERB, notably in the areas of investigating unfair labor practices and certifying elections, and 2) the UFW and other farm labor groups do not support the AERB. While there has been some requests for AERB services since the June 5, 1979 Supreme Court decision, it appears that circumvention of the AERB and the lack of farm labor support may also preclude any future increases in the level of AERB activity.

RECOMMENDATION

The Office of the Auditor General should re-evaluate the activity level of the AERB as of June 30, 1980. If the level of activity for the AERB has not increased to the point of justifying its present staffing level, either:

- ARS 23-1393(A) be amended to prevent the circumvention of the AERB,
or
- The present staffing level of the AERB be substantially reduced by replacing the full-time positions of General Counsel and Investigator with part-time positions. Any needed AERB investigations could be "contracted out" thus eliminating slack time and excessive costs from \$18,092 to \$33,430. The investigator is hired by the Board. The General Counsel however, is appointed by the Governor and serves at his pleasure.

FINDING II

THE OFFICE FACILITIES OF THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD APPEAR TO HAVE BEEN USED BY THE GENERAL COUNSEL OF THE AERB TO CONDUCT PRIVATE BUSINESS.

In the normal course of our performance audit, we became aware of the possible use of State materials and facilities by the General Counsel of the AERB for personal gain. This matter was turned over to the Attorney General's Office for further investigation.

A legal file was observed on top of the General Counsel's desk that was later identified by the Administrative Secretary as being part of a private law case that belonged to the AERB's General Counsel. According to the Administrative Secretary, she had also worked on other private law cases for the General Counsel. Not knowing the extent of the monies involved nor the extent of the confidentiality of a lawyer-client relationship, we sought advice from the Legislative Council. On May 10, 1979*, we received an opinion that stated:

"...the fact situations described...appear to be violative of state laws relating to theft."

The opinion states in part:

"There is no specific state statute prohibiting an employee of a state agency from using state resources to promote personal gain. However, we must conclude that the fact situations described in paragraph 1, items (a), (b) and (c) appear to be violative of state laws relating to theft (Title 13, chapter 18, Arizona Revised Statutes). Arizona Revised Statutes section 13-1802 provides, in relevant part:

* Appendix II is a full text of the Legislative Council opinion.

"A. A person commits theft if, without lawful authority, such person knowingly:

1. Controls property of another with the intent to deprive him of such property; or
2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use.

Relevant definitions are prescribed in Arizona Revised Statutes section 13-1801 and include:

...

1. 'Control' or 'exercise control' means to act so as to exclude others from using their property except on the defendant's own terms.
2. 'Deprive' means to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, or to withhold it with the intent to restore it only upon payment of reward or other compensation or to transfer or dispose of it so that it is unlikely to be recovered.

...

6. 'Property of another' means property in which any person other than the defendant has an interest which the defendant is not privileged to infringe, including property in which the defendant also has an interest, notwithstanding the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the defendant is not deemed property of another person who has only a security interest in such property, even if legal title is in the creditor pursuant to a security agreement.
7. 'Services' includes labor, professional service, transportation, telephone, gas or electricity services, accommodation in hotels, restaurants, leased premises or elsewhere, admission to exhibitions and use of vehicles or other movable property.

"The term 'person,' as defined in Arizona Revised Statutes section 13-105, paragraph 21, includes a government or governmental authority. Paragraph 27 of the same statute defines 'property' as meaning anything of value, tangible or intangible. We believe that the use of state office personnel services, office equipment and office supplies for private business constitutes the crime of theft as prescribed by the statutes cited above. No lawful authority exists for permitting a state employee to use such items or services for private business. Equipment and supplies clearly are state property which an employee is not privileged to infringe. Personnel services of the type described in this request are services as defined in Arizona Revised Statutes section 13-1801, paragraph 7. Conversion of those services is clearly prohibited by Arizona Revised Statutes section 13-1802, subsection A, paragraph 2."

The response from the Attorney General's Office indicated:

"...On May 18, 1979, the Office of the Auditor General informed the Office of the Attorney General of the above circumstances and an investigation was initiated by that Office. During the course of the investigation, the General Council(sic) of the AERB informed the investigator from the Office of the Attorney General that he had been given verbal permission from an assistant to then Governor Castro that he could continue his private law practice in the State office, in addition to his duties with the State. When contacted by the Office of the Attorney General, the identified former gubernatorial assistant admitted that he had given the General Council(sic) permission to continue his private law practice while in the State office, but could not recall any conversations that he had concerning the use of State property and personnel in that practice.

At the conclusion of its investigation, the Office of the Attorney General prepared an internal report and a copy was sent to an assistant to Governor Babbitt. The Office of the Attorney General, after an investigation of this matter, declined prosecution...."*

* Appendix III are the letters from the Office of the Attorney General.

The response from the Executive Assistant to the Governor was;

"Pursuant to your inquiry as to Mr. Gibney's authorization to utilize facilities of his office and personnel to conduct legal business not relating to the Agricultural Employment Relations Board, I have discussed the matter with Mr. Gibney and informed him that such activities are not authorized. Whatever past misunderstandings there may have been as to Mr. Gibney's right to enter into outside law practice, he now understands that he is not to utilize his state office, personnel, or other facilities to conduct any outside law practice."*

CONCLUSION

The General Counsel of the AERB appears to have used state property, supplies and personnel to conduct his own private legal practice.

RECOMMENDATION

We recommend that the use of state facilities, supplies and personnel for the private personal gain of the General Counsel of the AERB be stopped immediately.

FINDING III

THE NUMBER OF UNFAIR LABOR PRACTICE CHARGES HANDLED BY THE AERB IN FISCAL YEAR 1977-78 APPEARS TO HAVE BEEN OVERSTATED IN REPORTS MADE TO THE BUDGET OFFICE OF THE STATE DEPARTMENT OF ADMINISTRATION. IN ADDITION, OTHER AERB ACTIVITIES ARE NOT ADEQUATELY DOCUMENTED.

The AERB uses the number of unfair labor practice charges it handles as one means to justify its budget authorization. Our review of the AERB revealed that in some instances the AERB has counted the same unfair labor charge two times when accumulating statistical data for budgetary purposes. As a result, the AERB is submitting budget information that overstates its actual activity level to the Department of Administration and the Legislature. In addition, other AERB activities are not adequately documented.

Unfair Labor Practice Charges Are Misleading

Unfair labor practice charges are currently counted by the AERB as separate and independent charges if:

1. The name of the charged party on a previously filed charge is changed due to legal circumstances;
2. The same complaint is filed by family members with different surnames; and
3. Additional violations are added to a previously filed charge.

In fiscal year 1977-78 the AERB reported to the Department of Administration that 30 unfair labor practice charges were filed when the actual count appears to be only 15. Further, in those 15 charges only three different parties were charged. For example: In October 1977, charges were filed against MCOP (Maricopa County Organizing Project). In December 1977, these same charging parties were again recorded except that the charged party was now the United Farm Workers. Thus, these basic charges were counted two times by the AERB as separate and independent charges.

Table 5 summarizes the number of unfair labor practice charges filed with the AERB and the number of parties charged during the fiscal year 1977-78.

TABLE 5

COMPARISON OF THE NUMBER OF UNFAIR LABOR PRACTICE CHARGES FILED WITH THE AERB PER REPORTS SUBMITTED TO THE BUDGET OFFICE AND PER AUDIT

<u>Filing Date</u>	<u>Filed Against</u>	<u>Filed By</u>	<u>Unfair Labor Practice Charges Filed with the AERB</u>	
			<u>Per Reports Submitted To The Budget Office</u>	<u>Per Audit</u>
10/31/77	MCOP	B & T Farms*	1	1
10/31/77	MCOP	G. Matsumori*	2	2
10/31/77	MCOP	Evercrisp Veg.*	3	3
10/31/77	MCOP	Davis Packing*	4	4
10/31/77	MCOP	Triple T Farms*	5	5
10/31/77	MCOP	Phoenix Veg.*	6	6
10/31/77	MCOP	J. Okabayshi*	7	7
10/31/77	MCOP	Tanita Farms*	8	8
12/05/77	M. Okabayshi	M. Cardiel	9	9
12/05/77	M. Okabayshi	J. Cardiel	10	-
12/05/77	M. Okabayshi	H. Cardiel	11	-
12/05/77	M. Okabayshi	L. Cardiel	12	-
12/13/77	UFW	Tanita Farms**	13	-
12/13/77	UFW	B & T Farms*	14	-
12/13/77	UFW	Phoenix Veg.*	15	-
12/13/77	UFW	J. Okabayshi*	16	-
12/13/77	UFW	G. Matsumori*	17	-
12/13/77	UFW	Davis Packing*	18	-
12/13/77	UFW	Triple T Farms**	19	-
12/13/77	UFW	Evercrisp*	20	-
12/13/77	UFW	Tanita Farms*	21	-
12/15/77	UFW	Bodine Produce	22	10
12/12/77	UFW	Bodine Produce	23	-
01/05/78	UFW	Anthony Farms	24	11
01/09/78	UFW	Anthony Farms	25	-
01/09/78	UFW	Tanita Farms	26	12
01/09/78	UFW	Evercrisp	27	13
01/09/78	UFW	Phoenix Veg.	28	14
01/09/78	UFW	G. Matsumori	29	15
03/16/78	UFW	Motion to Dismiss**	30	-

* Charges 1 through 8 and 14 through 21 all relate to the "Green Onion Strike." The name of the charged party was merely changed from MCOP to UFW. Available records do not indicate that any additions or work was performed for charges 14 through 21.

** Erroneously included per recordkeeper.

According to the General Counsel of the AERB, any change in an original and/or subsequent charge constitutes a new charge. It should be noted however, that the ALRB in California does not for example, count a jurisdictional change to an already filed charge as a separate charge.

Unfair Labor Practice Investigations
And Dismissed Unfair Labor Practice
Charges Are Not Adequately Documented

Since 1974, the AERB has not maintained any logs or records for informal investigations and in some cases, formal investigations. In addition, unfair labor practice charges that have been dismissed by the General Counsel of the AERB are not adequately documented. As a result, it is not possible to assess the accuracy of the number of informal investigations performed by the AERB from 1974 to 1979, nor is it possible to assess the appropriateness of the General Counsel's action in dismissing unfair labor practice charges.

Agricultural Employment Relations Board service measurements indicate that since 1974, 123 informal and formal investigations have been performed. However, our review of AERB records revealed that since 1974, no logs or records have been kept for informal investigations and in some cases, formal investigations. Prior to 1974, informal investigative written reports were maintained but because of the general inactivity of the AERB informal investigative reports have been oral since 1974.

Agricultural Employment Relations Board records also indicate that since 1974, the General Counsel of the AERB has dismissed 15 charges of unfair labor practices. However, AERB records are not adequate to document the procedures used by the General Counsel when investigating the dismissed charges or to allow for an evaluation of the appropriateness of the General Counsel's actions.

CONCLUSION

The AERB counts as separate unfair labor charges any amendments to previously filed charges. As a result, it appears that the AERB overstated its activity level in a report it submitted to the Department of Administration and the Legislature during fiscal year 1977-78. Further, the AERB is not adequately documenting unfair labor practice investigations and dismissed unfair labor practice charges.

RECOMMENDATION

We recommend that the AERB not count as separate charges amendments to previously filed charges. In addition, written reports should be kept of all investigations. Finally, all unfair labor charges which are dismissed by the General Counsel of the AERB should be adequately documented.

FINDING IV

THE AERB COULD DO MORE TO ENCOURAGE PUBLIC INPUT AND PARTICIPATION AND AERB MEMBERS SHOULD BE REPLACED OR REAPPOINTED WHEN THEIR TERMS EXPIRE.

Our review of the AERB revealed two additional areas that need improvement. These areas are:

- 1) The AERB's exposure to segments of the agricultural community and its efforts at encouraging input from the public and informing the public of its actions could be enhanced.
- 2) Four of the current six AERB members have expired terms.

The AERB's Exposure To The Agricultural Community And Its Efforts At Informing The Public Could Be Enhanced

From February 27, 1974 to July 1979, the AERB held 33 public meetings. However, a member of the general public attended only one of these 33 meetings. Although the AERB 1) posts notices of meetings in the Arizona State Building as required, 2) has prepared a pamphlet for distribution to agricultural laborers which outlines their rights under the Agricultural Employment Relations Act, and 3) the General Counsel of the AERB has given public speeches on the AERB's function, additional efforts can be made by the AERB to promote public visibility.

In order to assess the manner in which the AERB encourages public input and the extent to which the AERB informs the public of its meetings, actions, and their expected impact, the Office of the Auditor General conducted two surveys. One survey was of present and past AERB members who were asked how input from the public was encouraged by the AERB when promulgating rules and regulations. Responses from AERB members included:

"The group (AERB members) has not encouraged input from the public."

"Meetings have been open but not attended by many visitors."

Agricultural Employment Relations Board members were also asked how the AERB informs the public as to its actions and their expected impact. Responses from AERB members included:

"No standard procedures are followed."

"No public relations to my knowledge."

"It does not and should not. This is the function of a free press."

"Only by news releases - to the best of my knowledge."

A second survey was conducted of the Central Arizona Vegetable Growers and Shippers. The Central Arizona Vegetable Growers and Shippers was selected for a survey as many of its members had filed complaints with the AERB. Of the 13 persons who responded to the survey, five persons (38 percent), stated that they were not familiar with the AERB.

Methods For Improving Public Participation

Mr. Ernest Gellhorn, former Dean of Arizona State University College of Law and a recognized authority on administrative procedure law, has formulated recommendations for improving the Federal Administrative Procedures Act. Many of these recommended actions are equally applicable to state regulatory bodies. According to Mr. Gellhorn*:

- "1. Agency obligations. Minimum constitutional requirements are insufficient reasons for agencies to fail to explore appropriate procedures for providing effective notice to the affected public. (Emphasis added)

* Techniques of Public Involvement, State Planning Series 11, Council of State Planning agencies, pp 12-13. This statement is a summary of Gellhorn's Article, "Public Participation in Administrative Proceedings," Yale Law Journal, Volume 81, No. 3 (January 1972) pp 398-401.

"2. Meeting public notice needs. Agencies should be required to provide identified, accessible sources of information about proceedings in which public participation is possible...At a minimum, each agency should:

- a. Strive to provide notice as far in advance of the proceeding as possible; and
- b. Prepare a separate bulletin issued periodically, identifying the proceeding and providing relevant information.

3. Attracting and focusing public attention. The public can be made aware of important agency proceedings in many ways, such as press releases to news media; requirements that applicants directly inform users; special notice to governmental bodies, citizen groups or trade associations; and separate agency listings of significant matters.

Coverage in the news media is perhaps the most effective way of reaching the average citizen, and public interest groups and agencies should make special efforts to encourage reporting of their activities. Factual press releases written in lay language should explain the significance of the proceedings and the opportunities for public participation. Releases describing important proceedings with a local geographical impact should be sent to area news media. In major matters, agencies might consider public service advertisements and announcements over local broadcasting facilities. Direct mailings are yet another alternative." (Emphasis added)

In August 1975, the then Attorney General, Bruce E. Babbitt, further amplified these ideas in a memorandum to all state agencies. Forms of public notice discussed were:

1. Newspaper Publications

In many cases, notice of meetings can be disseminated by providing press releases to newspapers published in the area in which notice is to be given. In addition, paid legal notices in such newspapers may be purchased by the governing body.

2. Mailing List

Some bodies may wish to provide a mailing list whereby persons desiring to obtain notices of meetings may ask to be placed on a mailing list. All notices of meetings issued will then be mailed to those appearing on the current mailing list.

3. Articles or Notices in Professional or Business Publications

In addition, the governing body may obtain publication of articles or notices in those professional and business publications relating to the agency's field of regulation.

Four Of The Current Six AERB

Members Have Expired Terms

Attention is needed in the appointment of AERB members. The appointment of AERB members is the responsibility of the Governor. A review of AERB records and discussions with AERB members revealed that since August of 1975, four of the six AERB members have been serving with expired terms of from one to four years, including the Chairman of the AERB whose term expired in August of 1977.

Table 6 summarizes the AERB membership and the expiration dates for their terms as of June 30, 1979.

TABLE 6

SUMMARY OF AERB MEMBERSHIP AND THE
EXPIRATION DATES FOR THEIR TERMS
AS OF JUNE 30, 1979

	<u>Original Appointment</u>	<u>Expired</u>	<u>Reappointment</u>	<u>Expires</u>
BLAKE, Gene*	8/14/72	8/14/76		
BOICE, William	8/14/72	8/14/74	7/31/74	8/14/79
CONSAUL, John*	8/14/72	8/14/75		
HOLGATE, Edward*	8/14/72	8/14/78		
MCMANUS, Jack	8/14/72	8/14/74	7/31/74	8/14/79
MONTGOMERY, Jack	8/14/72	8/14/73	8/14/73	8/14/78 (Resigned 11/15/77)
SANDERS, Milton*	8/14/72	8/14/77		
UDALL, Jessee	8/14/72	8/14/73	8/14/73	8/14/78 (Resigned 10/15/74)
WALDEN, Keith (alternate)	8/14/72			(Resigned 10/15/75)

* Membership expired

CONCLUSION

The AERB's efforts to encourage input from the public and inform the public as to its actions and their expected impact could be enhanced.

Also, AERB members have not been reappointed or replaced since July 1974. As a result, four of the six AERB members are serving with expired terms.

RECOMMENDATION

The AERB should initiate a public awareness program. Secondly, AERB members should be reappointed or replaced before their terms expire.

OTHER PERTINENT INFORMATION

As of June 1, 1979, the AERB and the Attorney General's Office have spent \$25,224 to appeal the case of Babbitt, Governor of Arizona vs. United Farm Workers National Union to the United States Supreme Court. These costs do not include time spent by the AERB's General Counsel for preparatory and research work. Table 7 summarizes the court costs incurred by the AERB and the Attorney General's Office.

TABLE 7

SUMMARY OF COURT COSTS INCURRED BY THE AERB AND
THE ATTORNEY GENERAL'S OFFICE
TO APPEAL THE CASE OF BABBITT, GOVERNOR OF
ARIZONA VS. UNITED FARM WORKERS NATIONAL UNION
TO THE UNITED STATES SUPREME COURT AS OF
JUNE 1, 1979

Agricultural Employment Relations Board

	<u>Costs</u>	
Attorneys' fees	\$8,724	
Exchange graphics	5,944	
Other printing	<u>5,332</u>	
Total		\$20,000

Attorney General's Office

Attorneys' fees	\$4,913	
Exchange graphics	<u>311</u>	
Total		<u>5,224</u>

Total State Costs as of 6/01/79 to Appeal the Case to the United States Supreme Court		<u>\$25,224</u>
--	--	-----------------



BRUCE BABBITT
GOVERNOR

AGRICULTURAL EMPLOYMENT RELATIONS BOARD

1688 WEST ADAMS, ROOM 221
PHOENIX, ARIZONA 85007
(602) 271-5989

September 5, 1979

Mr. Douglas R. Norton
Auditor General, State of Arizona
112 North Central Avenue
Suite 600
Phoenix, Arizona 85004

Dear Mr. Norton:

Enclosed please find the General Counsel's response to your draft of the Performance Audit Report for the Agricultural Employment Relations Board.

I apologize for the delay in finalizing this report for your office, however, due to the shortness of time we were allotted, and increasing activity for the Board, I have found it difficult to find adequate time to address some of the delicate issues raised by your report.

For the reasons I have stated in the introduction and as substantiated by the text of the rebuttal, I hope you will give serious consideration to my comments before you draft your final report. I see no reason why portions of Findings I, II, and III should be included if our rebuttal helps clarify some of those issues.

I should add that at all times Messrs. Kirk Schneider and Dwight Ochocki of your office were pleasant, congenial, and cooperative. If we can be of any more assistance to your office, please do not hesitate to call on us.

Respectfully yours,

William Gibney
William Gibney

WG:ms
Enclosure

THE ARIZONA AGRICULTURAL EMPLOYMENT RELATIONS BOARD

GENERAL COUNSEL'S RESPONSE TO PERFORMANCE AUDIT REPORT

TABLE OF CONTENTS

	<u>Page</u>
FINDING I	1
FINDING II	7
FINDING III	12
FINDING IV	14
APPENDICES	
Appendix I - AERB Public Docket Log	
Appendix II - Letter from Campesinos Independientes	
Appendix III - Letter from Bonnie Sharman	
Appendix IV - Letter from Michael and Esther Slater	
Appendix V - Letter from Sandra Reaney	

GENERAL COUNSEL'S RESPONSE TO PERFORMANCE AUDIT REPORT

FINDING I:

THE ACTIVITY LEVEL OF THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD (AERB) HAS NOT JUSTIFIED ITS PRESENT STAFFING LEVEL, ADDITIONALLY, THIS LOW ACTIVITY LEVEL HAS IMPAIRED THE AERB'S EFFECTIVENESS AS A FORUM FOR SETTLING AGRICULTURAL LABOR-MANAGEMENT DISPUTES IN ARIZONA.

Our files and newspaper accountings illustrate that we have had:

1. Farm workers reinstated when unjustly discharged;
2. Prevented violence, bloodshed and destruction of property;
3. Saved acres of valuable crops vital to this State's economy;
4. Allowed workers to continue working although intimidated and threatened by outside influences.

This "success" has served the needs of our agricultural community and the public interest of this State, and has demonstrated the Board's ability, when tested, to achieve the Legislative intent "to prevent the uninterrupted flow of agricultural products."

More importantly, however, it should be explained why the level of activity has been so low during the past seven years. From the very outset, the Agricultural Employment Relations Act was challenged in Federal Court by one of the largest Unions that the Act endeavors to legislatively control their attempt to organize agricultural labor - the United Farm Workers. As in the instant case, if a party challenges a law that directly affects the objectives and very existence of that party, it is only natural that they would not want to compromise their position with respect to that challenge by subjecting themselves to the constraints of the very law they seek to have abolished. That would be like losing the battle while waiting to lose the war. It was the Union's hope and intention that by abstaining organizational efforts in Arizona pending the constitutional ruling, that some day there would not be a law to prescribe labor/management constraints. No one wants to give in to legislative control if at some date the application of that law may become moot.

This was evidenced in the 1930's on the Federal level by the National Labor Relations Board, weathering the stormy first four years of its existence when they handled only 40 cases because of the wrath of lawsuits filed by the Unions sought to be controlled by the NLRA. Although the Performance Audit Report refers to the California Act on occasion, it declines to offer any of the above information. In addition, it neglects to state that Cesar Chavez, President of the United Farm Workers, was a co-author of the California Act.

The report also seems to pay very little attention to the fact that for nearly 15 months during the last 18 months, the Arizona Board was under a Court ordered injunction prohibiting it from exercising any enforcement of the Arizona Act. At one point in the report, a statement is made that the present General Counsel admits that in the past year, 80 to 90% of his time was spent on unrelated Board activities. Taking this statement out of context, the report did not bother to include the fact that:

1. The Board was enjoined from performing its duties during this period;
2. An attempt to circumvent the injunction would have subjected the General Counsel and the Board to contempt of Court violations.

Although the Auditor is still dubious, perhaps this question of activity level is now moot since the activity level in the past month has increased over the record reflected during the past seven years. (See attached Public Docket Log for Unfair Labor Practices and Petitions for Election, Appendix I).

The Auditors concluded that the Board's low level of activity may continue. Although it is impossible to predict the future of agricultural labor in Arizona, it appears the trend has reversed itself. (See Richard Garcia's letter of August 27, 1979, Appendix II). Since July 30, 1979, we have had eight unfair labor practice charges filed with the Board, and have conducted three elections, with one more to be conducted on September 19, 1979.

I have also been contacted by Lupe Sanchez concerning elections that may be held at citrus farms in Maricopa County. He stated that he has read where a Union in Yuma has been victorious in some representation elections conducted by the Board, and inquired as to what the procedures are for petitioning by Unions.

Moreover, Board Investigator, Gus Oviedo, has contacted the United Farm Worker's office in El Mirage where he learned that when the contracts now being negotiated in California are completed, an organizing committee will be coming into the Valley for purposes of organizing green onion workers. Whether the UFW chooses to organize within or without the provisions of the AERA is meaningless; regardless of their conduct it will require considerably more work for the Board.

If we can use any of the foregoing as a barometer for measuring the level of activity we can expect, it seems quite certain that it is unfair to compare the activity levels before and after the Supreme Court's decision of June 5, 1979. I might also add that the Supreme Court, in its decision, admonished the United Farm Workers to test the provisions of the Arizona law as it should have done from its inception.

Assuming *arguendo*, however, I conclude that even if current activity level decreases, that the previous low level of activity or the possibility of little activity in the future, does not warrant a reduction in work force. It is imperative when dealing with this highly volatile and sensitive area, and with thousands of workers who do not understand English, never mind the law, to establish a rapport between the Board and those it attempts to serve. To lend credibility to the Board by providing for a constant trust in the expertise of the people conducting the Board's affairs, is an important factor that cannot be taken lightly. Experts in the area of agricultural labor law are rare commodities and to interrupt or fall short in this expertise would do little to advance the reputation of the Board and objectives of the Act.

Since its inception, the Board has cost the State approximately \$80,000 a year, a small amount when compared to the peace and harmony within the agricultural industry it has provided. An additional savings of \$20,000 to \$30,000 a year, as advocated by the Auditor, appears to be of little significance when compared to the lack of continuity, trust and expertise that may result due to the State's squandering.

We must also look at the Auditor's suggestion to hire an outside attorney to sit on an ad hoc basis as general counsel for the Board. I suggest that their example only touches the tip of the iceberg. The daily costs they have quoted us might appear to be cost efficient, if all we are concerned with are the number of days

a general counsel may spend at an actual hearing or trial. Even with limited activity, the investigator and general counsel, prior to trial, must spend numerous hours interviewing witnesses, taking affidavits, perform incidental investigations, obtain materials and exhibits, prepare reports, complaints, motions, and supportive briefs before the trial even begins, and, of course, there are always post trial memorandum, motions and appeals with accompanying oral argument, and the never ending continual attempt to discover or adduce new evidence and testimony. This is all very time consuming, and only a full-time general counsel, or retired attorney, would have the time to adequately fulfill the duties. Case in point was the green onion strike of 1977. Mr. Oviedo and I worked approximately twelve hours a day, six to seven days a week, for approximately six weeks. Much of my time was spent preparing for court, and in court. Much of Mr. Oviedo's time was spent in the fields gathering witnesses and evidence for me to use at trial. A private investigator and private attorney would have to give up their full-time practice to accept a part-time job as described herein. This is true even with a low level of activity. An attorney and investigator would have to be paid by the hour or be on retainer, because they would never accept such a contract which would force them to let their own practice be handled by someone else.

I submit that although on paper, perhaps, the Auditor's recommendations look cost-effective, when in actuality, they are impractical, and probably cost-wasteful, notwithstanding the lack of continuity, trust and expertise - vital elements when achieving maximum credibility for any agency.

I also must wonder where such an attorney would be located. Would he have a background in labor law? Has he represented labor? Or management? If we hire an attorney who has a labor background to handle matters of labor and one with a management background to handle those matters of management, what would happen when counterclaims or cross-claims were filed and both sides now need to be represented by their respective general counsels. This would cause a built-in conflict of interest, having two attorneys, ostensibly representing the State of Arizona, on opposite sides of the fence. If instead, the contracted attorney has no labor background, then the reputation of the Board will lose the credibility that I have referred to earlier. The bottom line is, I find it difficult to believe that the Auditor's recommendation is in fact cost-effective. To the contrary, I find it impractical.

I find it ironic that I am now in the process of hiring a part-time investigator and clerical to supplement our current staff, so that we may more efficiently and expeditiously, and in turn, more economically, serve the needs of the people. It is our position that if the current trend continues, we will need still additional staff, offices, and the reinstatement of an executive secretary.

Possibly, we could be merged with another agency, but we would still require the same number of staff, and office space and equipment. More importantly, however, we would lose the autonomy necessary to divest and devoid ourselves of any outside or political influence.

There is no nexus or connection between the success of the limited activity with the ability for the Board to respond to the needs of the public. If there have been only minimal labor disputes, then the level of need has also been minimal. If there is little or no activity (possibly due to the impending application of legislative constraints levied by the AERA and the watchful eye of the AERB) then there is likewise little or no need. Conversely, the wish of the people has been fulfilled to insure the uninterrupted flow of agriculture, the primary need of our agricultural industry. Using the level of activity as a yardstick to measure the Board's ability to respond to the needs of the people, is an unfair and an erroneous barometer, attempting to compare apples with oranges, or, to compare an objective "need" with an uncontrolled variable "activity" that does not necessarily or may or may not affect the objective, just as when the end does not necessarily justify the means. In other words, the objective of preventing the uninterrupted flow of agricultural products could better serve the needs of the public or could be fully accomplished, if there were no labor disputes whatsoever. Therefore, the Board's record of measurable activity would be zero, but we will have achieved our statutory objectives.

Circumvention

The General Counsel agrees that Section 23-1393A should be amended so that under certain situations aggrieved parties will not be able to circumvent the duties and functions of the AERB. Moreover, I have, on numerous occasions urged this revision to the Governor, Attorney General and the Legislature. This conflict could be easily rectified by simply providing in the same provision that aggrieved parties may petition in Superior Court only for damages, done so in conjunction with unfair labor practice charges that have already been filed with the Board. This is how

it is done in California and under the NLRB. According to my information, it appears that most factions interested in the provisions of the AERA would agree to this revision. However, it should be noted that during the green onion strike of 1977, agrieved parties have discovered that the most economical and efficient way of resolving labor disputes is through the expertise of the Board, rather than the Superior Court, who seldomly handles labor matters. As per the NLRB, the AERB was created to specifically resolve labor disputes with an expertise normally lacking by courts of general jurisdiction.

On the other hand, however, it is the General Counsel's opinion that the certification procedures provided by the AERA do not allow for circumvention of the Board's operations. If informal recognition agreements are contested by outside parties the apparent circumvention of the certification procedures can be thwarted by the Board. In some cases, as is with the NLRB's informal recognition proceedings, management and labor find it mandatory if not imperative to seek expeditious resolutions of volatile labor disputes, which then requires simplified informal certification by the Board. However, it is our opinion, now that the Supreme Court has upheld the constitutionality of the Act, that more and more unions and growers will find it in their favor to be certified by the Board pursuant to a formal election rather than an informal certification procedure. Under informal agreements, there are certain advantages given to the employer in return for his cooperation to enter into the informal agreement. Conversely, the union knows now that those advantages are not worth the disadvantages that will then confront the union concerning the lack of good faith bargaining on the part of the grower. See Agricultural Employment Relations Act Section 23-1385.A(5) and B(4). This new outlook may be illustrated by the recent rash of elections held by the Board (see Appendix I).

FINDING II

THE OFFICE FACILITIES OF THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD
APPEAR TO HAVE BEEN USED BY THE GENERAL COUNSEL OF THE AERB TO CONDUCT
PRIVATE BUSINESS.

This portion of the rebuttal will be comprised of a two-pronged defense of my actions concerning the private practice I engage in from my State office. First, a substantive attack based on the authority I have been given to conduct a private practice, and secondly, a procedural attack concerning the Auditor General's authority to pursue this issue after the proper authority (the Attorney General's office) has declined prosecution of the matter and dismissed the case. (See Appendix III.)

Authority to Conduct Private Practice from State Office

In February, 1975, when I first learned of the pending appointment of the General Counsel to the AERB by the Governor, I was told by Al Rogers, a Governor's aide who hired me, Bob Dickelman the immediate past General Counsel, and a number of other attorneys who were either aware of the position or were applying for the position, that the nicest feature about the General Counsel's position was that, as a special counsel in the limited area of agricultural labor law, and due to periods of inactivity, that the General Counsel could conduct a private practice. Although I have never considered my authority to conduct a law practice from my State office, it does seem perfectly natural for me to assume, inherent in that authority to have a private practice, is the permission to conduct that practice from my office as long as I avoid conflicts of interest, and use good judgement and sound discretion. I was never told whether this practice could or could not be conducted from my State office. However, because I am a full-time exempt employee of the State, and I know that my primary responsibility, that of General Counsel, it is therefore imperative that I be totally accessible to the Board in order to fulfill those responsibilities. It is logical to me, that authority to have a private practice from my State office was implicit because of my full-time status and my responsibilities to that position. I also believe that in order to maintain my priorities, that occupying two different offices would present certain conflicts that may impair my ability to serve in either capacity to my fullest extent. Accordingly as long as my ability to serve as General Counsel has not been impaired, and as long as there are slack periods, as a special counsel, I should be allowed to continue my private practice from my State office.

I agree, however, that I should not use State supplies, which would naturally constitute an extra expense on the State, but that the use of my office space and my secretary, when convenient and appropriate, should be included under my authority to have a private practice. I conclude that as long as there are levels of inactivity for my secretary and I, assuming they may continue, neither of us should have to be idle, if there is something we could be doing. I should include, however, that in the past four years, I have only served nine clients, who are also friends of mine, in private matters. Because my associate, Michael Beers, handles most of the written material (solely to avoid the possibility of conflicts in my capacity as a State official) my secretary has only had to type two pleadings and two joint statements, in addition to some cover letters to Mr. Beers during that time frame. In fact, on several occasions, either my clients or myself, when necessary, have typed certain documents (see Appendix III). It is also our position that certainly what Mrs. Olds does on her own time, during coffee breaks, lunch hours and evening hours, in addition to the "dead periods" is her own option.

Although I have not seen a copy of the letter Mr. Beers sent to the Auditor General concerning our association, I do wish to have that letter included as part of this response.* I assume that it points out our agreement of association and the purposes that Mr. Beers is to perform as a result of that association. All of the cases that I have handled, as I stated earlier, have been for friends, and at no time have I ever represented to them, or have they ever thought that they were being represented by the State of Arizona. All of them know that my primary obligation is to my State job and that my integrity and loyalties must first lie with that responsibility as General Counsel (see Appendices V and VI).

All of the Attorneys that I have worked with or opposed, in both my private practice and my State job, know that I conduct a private practice, as a sidelight, and on many occasions I conduct both my private practice and my State business from my home, solely so that I will always be available to my private clients and to those who I serve as a State official. This has been the case day or night, weekdays or weekends. On one occasion I declined to accept a case because of the possibility of a conflict with a State agency. Likewise, one time I had to postpone a deposition, when Mr. Beers could not attend, because it conflicted with some State business I was conducting.

* See Appendix V of audit report.

I should also include the fact that last year my income, as reported to the Internal Revenue Service, included only \$600 from funds received due to my private practice. It appears this year, because one of my remaining cases has been settled, that I should have an additional income of nearly \$3,000. These amounts are not large by any means, but they do mean a great deal to me and I do not want to give them up. I think it's important for me to continue in private practice, when appropriate, in order to keep my feet wet in the private sector. My position with the State is an exempt appointed position that could be terminated at any time, and retaining private litigation is some insurance for me, if that were to happen.

I would also like to raise a rather strong objection to another statement made by the Auditor's Report that has been taken out of context and therefore is a gross misrepresentation. In Finding I of the Performance Audit Report it is stated that the "present General Counsel admits that during the past year, 80 to 90% of his time was spent on unrelated Board activity." As I pointed out in my rebuttal to Finding I, that although the statement is true, the facts should have been added within that paragraph, that during that same time period, I was enjoined from acting as General Counsel for even one per cent of the time. It also fails to indicate that when I made that statement, I also said that most of the time I have nothing to do because of the injunction, but that if I do anything at all, it was probably something unrelated to Board activity. This generally means that I spent a couple hours a week doing unrelated business. The conclusion is, therefore, that 80 or 90% of very little is even less.

I have never kept my private practice a secret from anyone. I have no reason to. It has been reported in numerous feature articles, in newspapers, and on radio and television, and it was relied upon last year by the Mayor's Committee on the Employment of the Handicapped when I was the recipient of the Runner-Up to the Handicapped Employee of the Year. Because of my service to the community in a number of areas, and my ability in the legal profession, I have been appointed by the Governor to several different advisory boards. In all endeavors, however, I am known first as a Special Counsel to the Governor, and I will not compromise that reputation.

The Auditor General's Office Does Not Have the Authority or Jurisdiction to Concern Itself with the General Counsel's Private Practice as Part of Its Performance Report.

I appreciate the fact that during the course of a routine performance audit, that the Auditor believed that they revealed some illegal conduct on the part of the General Counsel, and thereafter fulfilled their duty and obligation as both a representative of the State and a concerned citizen by notifying the proper authorities of their alleged discoveries. These apparent findings, however, were only coincidental to the purpose of a performance audit report and have no basis for inclusion in the report itself. According to the Performance Audit Report, there are nine statutory factors to be considered to properly conduct a performance audit of the AERB. Nowhere in the nine factors listed is there any statutory jurisdiction or statutory authority or other duty or obligation to continue this matter beyond that of lodging a complaint with the only agency that does have the authority to investigate and prosecute these matters. It appears to me that although the Attorney General has dismissed the matter, that for some unforeseen reason, the Auditor General's Office chooses to pursue it, even though it is beyond the scope of their authority, and therefore it seems curious to me why nearly a third of the Report concerns itself with an issue that is beyond their purview and to wit I have been exonerated by those that have the authority to prosecute.

In May I spoke with Dale Pontius, legal counsel to the Governor, who informed me of these allegations. He stated that I may continue my practice, but cautioned me to use good judgement, sound discretion, and at all costs, avoid the possibility of conflict. Mr. Pontius assured me that there would be no reason for this to be included in the Performance Audit Report. In July I spoke with Phil MacDonald, Special Prosecutor for the Attorney General's office, who informed me that the case had in fact been dismissed, and yet on August 20, I received this Performance Audit Report which continues to belabor the subject.

The Attorney General's office made a thorough and complete investigation of this matter and recommended to the Special Prosecutor that the matter be dismissed. However, based on idle curiosity and guesswork, the Auditor General's office is obliged to go outside their authority and jurisdiction to make me the major target in what is supposed to be a "performance report."

Conclusion

My devotion and unblemished record will not allow me to ignore my responsibilities to either the State, my private clients, or to the court. I feel that I have neither prejudiced nor jeopardized nor compromised myself, my clients, the State, or the Court. My actions have been completely above-board and ethical. Unfortunately, due to an accidental finding of the Auditor General's office, when conducting a performance audit, I have been unduly subjected to criminal suspicions because of an incomplete and partial report which neglects to include vital facts pertinent to the accusations. The rather cursory findings of the Auditor outlined in his report could imply that I have a large, thriving private practice which impairs my ability to fulfill my role as General Counsel when at best, my practice can only be described as limited.

In March, 1975, when I was appointed I understood that as General Counsel I would be faced with periods of inactivity. Accordingly, in a role as Special Counsel to the Governor in a specific area of law, as opposed to an Assistant Attorney General, I could carry on a private practice during those "dead periods," if it did not interfere with my ability to function as General Counsel. I was also told that although I was considered a full-time employee, my job would not always entail 40 hours a week. Accordingly, prior to the injunction, most weeks I only worked as General Counsel an average of 20 to 30 hours, with the exception of the green onion strike, when I worked an average of 60 hours a week, for approximately six weeks. During those six weeks, I put my private practice aside to fully assume my duties as General Counsel. This exemplifies my attitude when conducting my primary and secondary businesses.

I therefore conclude that I do have the authority to conduct a private practice from my State office, but that the Auditor General's office does not have the authority to continue its probe of this matter. Because I find it necessary for my welfare to maintain a limited private practice which affords me additional income, and because the matter has been resolved in my favor by the proper authorities, I urge the Auditor General to delete this issue from his report since it has been taken out of his hands and is out of his jurisdiction.

FINDING III:

THE NUMBER OF UNFAIR LABOR PRACTICE CHARGES HANDLED BY THE AERB IN FISCAL YEAR 1977-78 APPEARS TO HAVE BEEN OVERSTATED IN REPORTS MADE TO THE BUDGET OFFICE OF THE STATE DEPARTMENT OF ADMINISTRATION. IN ADDITION, OTHER AERB ACTIVITIES ARE NOT ADEQUATELY DOCUMENTED.

Although there is some merit to the suggestions found in Finding III of the Performance Audit Report (which will be discussed below) my strongest objection, I find, which I take personal exception to, is the unfounded implication that the Board's documentation system was designed to overstate its service measurements reports for budgetary purposes to the Department of Administration. Overstatement was never our intention and mere supposition should not be included in what is supposed to be an unbiased, factual audit report.

Although our system of documenting cases may appear to the Auditor to have padded the number of charges as found in our records, the controversy is purely a difference of opinion in the method of documenting cases with subsequent findings of new violations. The procedure we have followed began in 1972 as designed by the first of three executive secretaries. The primary question appears to be, how to adequately record a second violation of a related original charge. It is my opinion that if the second violation requires any additional work by the investigator or general counsel, it should be regarded as a separate and distinct charge, although related to the original. In all cases where a new violation is discovered, and additional investigation of that matter is required so that both the investigator and the general counsel must perform their ordinary, routine motions of handling the case, just as if it were the original charge. Under this example, we have in fact conducted two separate and distinct investigations and the general counsel is required to make two separate determinations, which may or may not be, later consolidated. Nevertheless, twice the amount of work was conducted. Therefore, our records must reflect the same.

The Performance Audit Report also states that more than one charge is reported, although the charges are from different members of the same family. If members of a single family elect to all file separate charges, we can only, after conducting a thorough investigation of each of the charges, consolidate the case at a later date, if appropriate, if all charges are warranted. The key, then, is whether all of the charges are warranted. Perhaps the investigation will reveal,

then, the charges should only pertain to one of the members, or something less than all of the members of the family. But in any event, a separate investigation is required for each charge to determine its validity. This, therefore, must be documented accordingly.

The same was true during the green onion strike of 1977. Judge Rapp stated that although it appears we are playing "musical unions", when the UFW took over the strike of MCOP, we still must prove that the agents for the UFW are also engaged in the same illegal conduct that was charged against the MCOP agents. Accordingly, to prove the new conduct engaged in by the UFW requires a new investigation starting over from scratch, interviewing witnesses, and gathering affidavits and exhibits, to now prove, with a preponderance of the evidence, that the United Farm Workers is in fact conducting illegal strike activity. Again, this must be somehow reflected in our records.

I do concur, however, that if an amended charge or complaint is due to legal technicalities that do not require the reopening of the entire case, or subsequent work by either the investigator or the general counsel, that they should not be included as new charges or amendments to be counted as new cases. We have therefore, developed a new system of documenting these cases so that for purposes of our records and service measurements, they will not be counted twice, whereas, all other charges and their amendments, if requiring new investigations, will be counted as separate cases for the record.

With respect to the Performance Audit Report's findings, I concur that dismissed cases and informal investigations have not been adequately documented in the public record. We have therefore initiated a new system for documenting dismissed cases and on what basis were they dismissed. We are also initiating a number of new files so that charges, petitions for elections, complaints, hearings, decisions, and both formal and informal investigative reports will be reduced to writing and properly filed.

FINDING IV:

THE AERB COULD DO MORE TO ENCOURAGE PUBLIC INPUT AND PARTICIPATION AND AERB MEMBERS SHOULD BE REPLACED OR REAPPOINTED WHEN THEIR TERMS EXPIRE.

FINDING IV, Issue I

The first issue raised by Finding IV has presented the Board continuous unresolved dilemmas.

I have continually encouraged the Board and my staff to inform agricultural employers, and agriculture employees of the goals, purposes, and functions of the Agricultural Employment Relations Act and its Board. On numerous occasions, I have also spoken to groups that have invited me to present informative programs concerning the Board and its related operations. I have also appeared on both radio and television talk shows to discuss the pros and cons of the Board, the Act, and the recent constitutional lawsuit. Finally, as illustrated by our files of newspaper clippings, I have often notified the press concerning all Board related activity.

It is the opinion of the General Counsel that it is true that not enough of the public is aware of or understands the purposes of the AERA. Accordingly, I will endeavor to further inform the public in accordance with the guidelines included in the Auditor General's report. However, we must remember that we may be faced with the paradoxical situation of distinguishing between public awareness and solicitation.

FINDING IV, Issue 2

I can concur wholeheartedly that the Board members should have been reappointed or replaced long ago. Hopefully, if we are now allowed to function for the first time without the burdens levied on us by the federal lawsuit, we will add needed credibility to the AERA and closer attention should then be paid to the needs of the Board so that they may carry out their duties, purposes, and functions.

STATE OF ARIZONA
AGRICULTURAL EMPLOYMENT RELATIONS BOARD

PUBLIC DOCKET LOG

CHARGES AGAINST EMPLOYERS

CASE NO.	DATE	NAME OF CHARGED PARTY	CHARGING PARTY	LOCATION	RESULTS
C1-7-79	7-30-79	The Woods Company 701 W 16 th St., Yuma	Campeñinos Independientes	Yuma	
C2-7-79	7-30-79	B+S Produce Co. Co. 17, Somerton	"	"	
C3-8-79	8-7-79	Vukasovich, Inc. 10 St, Az Ave, Yuma	"	"	
C4-8-79	8-7-79	Vukasovich, Inc.	"	"	
C5-8-79	8-7-79	Vukasovich, Inc	"	"	
C6-8-79	8-7-79	Senini Arizona, Inc. PO Box 5450, Yuma	Alejandro, Marquez	"	Withdrawn due to reinstatement 8-23-79
C7-8-79	8-31-79	B+S Produce Co. 17, Somerton	Richard Garcia	"	
C8-8-79	8-31-79	Senini Arizona, Inc.	Abraham Garcia Heredia	"	

CAMPESINOS INDEPENDIENTES
148½ Main Street
P. O. Box 444
Somerton, Arizona 85350
(602) 627-8691

August 27, 1979

Arizona Employment Relation Board
1937 East Jefferson, Building A
Phoenix, Arizona 85007

Dear Sir:

This is to inform you of our intentions for the future of our office. The CAMPESINOS INDEPENDIENTES are in the mist of filing more unfair labor charges and petitions for elections in the Yuma area, as long as the Board remains to work as efficient and prompt as it has been doing. We feel obligated to inform you of the necessity to open an office in Yuma, Arizona. By you establishing this office, we feel that the rights of the workers, as residents of the state, will be protected to the maximum of the law.

Our intentions are to start organizing in Wilcox, Marana, and Phoenix Area; but our organizing committee feels that in order for the Board to protect the workers it must be where the work force is at !!!

The following is a list of the reasons why this office is necessary:

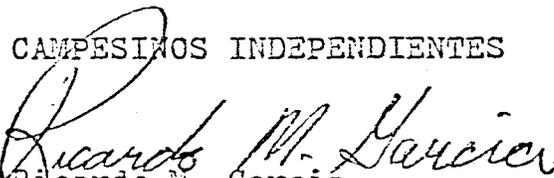
1. To establish confidence between the state, agency, and workers.
2. More convenient for all parties concerned.
(Workers, Union and Company)
3. Efficiency and promptness.
4. The protection of the rights and immediate protection of the workers.

These are only a few, but limited reasons why the Board must establish offices in Yuma, Wilcox, and Marana Area, and the Phoenix Area. Your office at the present time is doing an extraordinary job under the conditions and the distance from which we are.

I would appreciate an immediate answer.

Sincerely,

CAMPESINOS INDEPENDIENTES


Ricardo M. Garcia
President

Aug 28, 1979

Dear Mr. Noctor,
Auditor General

I am writing to you in behalf of our good friend, Bill Gibney. Bill, on several occasions has represented my husband & I both as a private attorney. He only represented us on the basis of understanding that his job with the State of Arizona came first and foremost. There was a time when I myself typed a document at home pertaining to a particular case. I also know that on several occasions Bill researched,

and typed material regarding our cases out of his home as well as gathering information over his personal phone from his residence.

He has represented us thoroughly as a private attorney but because of his job priority to the State we mutually agreed that it may involve more time.

I'm hoping this letter will serve to help eliminate any recent questions brought up regarding
Bill Libney

Sincerely,

Bonnie Shorman

August, 1979

Dear Sir,

In 1978, Mr. Bill Gibney, a close personal friend, represented us in a civil suit.

It is our understanding that Mr. Gibney has a very limited practice, for his friends only.

We are well aware of Bill's first priority, his position with the state, and always worked around his commitments to his job.

We also dealt with Mr. Mike Beers, his partner, who did the research and prepared the briefs in our case.

If there are any questions, please do not hesitate to call on us.

Sincerely,
Michael and Esther Jater

Bill Gibney and I have been friends for almost 5 years. Because of our friendship, his representing me in a personal injury lawsuit came about. During the pending trial Bill and I met several times to discuss certain information. Our meetings took place at his mother's residence in Phoenix or at his own home during afternoons or evening hours. It was clear to me at that time that Bill's State job was his first priority and his private practice only a side line. Bill's partner Michael Beers handled the research and some paperwork for this litigation.

1s/ Sandra Reaney
9/4/79

State of Arizona
Office of the Auditor General

Re: A Performance Audit of the Arizona
Agricultural Employment Relations
Board

To Whom It May Concern:

FINDING I

In my opinion, the staff of secretary and counsel are bare minimum for this Board during seasonal agricultural work periods, to be augmented by investigative employees in time of need. It appears that the Auditor General's Office investigated this Board and its activities during a period where the law was held to be unconstitutional and the Board was inoperative. I believe that since the law was declared constitutional by the United States Supreme Court, that there have been several cases involving the law, and it appears that there will be considerably more. I disagree with the second part of this Finding in that a forum was established but not used by the unions, and when the law was used by management or labor, I believe it operated efficiently.

FINDING II

Concerning Finding II, I have no comment.

FINDING III

Concerning Finding III, this is an apparent allegation that the Board's activities were padded. If this refers to the unfair labor practices filed during the "green onion strike," Judge Rapp ordered that all charges be dropped and new charges be filed when the MCOP turned their strike over to the United Farm Workers.

FINDING IV

Concerning Finding IV, never having previously served on any State Board, I am not qualified to state how much publicity a Board should seek. In my opinion, with the law on the books, users of the law should seek the Board. I don't believe it is the Board's duty to seek business. I wholeheartedly agree that the Board members should be replaced or reappointed when their terms expire. To the best of my knowledge, our Chairman has made numerous attempts to have the Governors replace or reappoint members to this Board as their terms expired. I feel that the various Governors have been derelict in their duty to the Board Members and to the citizens of this State in this regard.

In summarizing my feelings, I wish to point out that the Board, unfortunately, has had very poor media publicity recently. Members of this Board spent a great deal of time working on and writing rules and regulations covering this law. I personally feel that each member has devoted a considerable amount of thought and time to this Board. I feel that our Board's actions, and especially our Chairman, have been frugal in the spending of State monies. I helped persuade several members of the Board not to resign during this past year because I felt it was their duty to stay in their positions until the Supreme Court decided on the constitutionality of the law.

Respectfully

Jack E. Williams
Sept. 5, 1979

APPENDIX I

SEASONALITY OF COMPLAINTS
(Occurrence per Month)

APPENDIX I

SEASONALITY OF COMPLAINTS*
(Occurrence per Month)

Month	Fiscal Years									
	1974-1975		1975-1976		1976-1977		1977-1978		Total	
	<u>A</u>	<u>B</u>	<u>A</u>	<u>B</u>	<u>A</u>	<u>B</u>	<u>A</u>	<u>B</u>	<u>A</u>	<u>B</u>
January	8	0	0	0	0	0	6	0	14	0
February	0	0	0	0	1	0	0	0	1	0
March	0	0	1	0	1	0	0	0	2	0
April	0	2	0	0	0	0	0	0	0	2
May	0	3	0	0	0	0	0	0	0	3
June	0	2	0	0	0	0	0	0	0	2
July	0	0	0	6	0	0	0	0	0	6
August	0	0	0	0	0	0	0	0	0	0
September	0	0	0	1	0	0	0	0	0	1
October	0	0	0	0	0	0	8	0	8	0
November	0	0	0	0	0	0	0	0	0	0
December	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>10</u>	<u>4</u>	<u>10</u>	<u>4</u>
Total Complaints	<u>8</u>	<u>7</u>	<u>1</u>	<u>7</u>	<u>2</u>	<u>0</u>	<u>24</u>	<u>4</u>	<u>35</u>	<u>18</u>

* Complaints documented per Board's logbook
 (A) Charge filed by grower
 (B) Charge filed by laborer

APPENDIX II

MEMORANDUM FROM LEGISLATIVE COUNCIL
CONCERNING USE OF OFFICE PERSONNEL,
EQUIPMENT AND SUPPLIES FOR PERSONAL USE

ARIZONA LEGISLATIVE COUNCIL

M E M O

May 10, 1979

TO: Douglas R. Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (O-79-38)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated May 4, 1979.

QUESTIONS PRESENTED:

1. Are the following circumstances in violation of state law, and if so, what statutes apply? How significant is this as evidence?
 - a. Using office personnel services for private business (i.e., answering service, typing, correspondence provided by secretary employed by the state during normal business hours of 8:00 to 5:00)?
 - b. Using office equipment for private business (i.e., typewriter and photocopier)?
 - c. Using office supplies for private business (i.e., paper, miscellaneous)?
 - d. Using mailing address of Board's Office as private business correspondence address?
2. How far can we, as performance auditors and employees of the Auditor General's Office, investigate possible acts of impropriety? Can we obtain, copy or confiscate materials which we observe at a state agency in the normal course of the audit, even though the materials are of a private law practice? For example, a secretary employed by a state agency is finalizing (typing, etc.) a private law case that is open and visible to the auditor during normal working hours in a state agency. Are such documents open to access by us as performance auditors? Are such documents public documents?
3. Are any documents of a private business nature, whether prepared by a state employee or not, contained in a desk owned by the state and located in a state agency, open to examination by performance auditors? Are these documents more confidential in nature if they relate to a law practice as opposed to professions or business?
4. In general, what documents located in a state agency are open to perusal by performance auditors?

ANSWERS:

1. There is no specific state statute prohibiting an employee of a state agency from using state resources to promote personal gain. However, we must conclude that the fact situations described in paragraph 1, items (a), (b) and (c) appear to be violative of

state laws relating to theft (Title 13, chapter 18, Arizona Revised Statutes). Arizona Revised Statutes section 13-1802 provides, in relevant part:

A. A person commits theft if, without lawful authority, such person knowingly:

1. Controls property of another with the intent to deprive him of such property; or

2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or

Relevant definitions are prescribed in Arizona Revised Statutes section 13-1801, and include:

...

1. "Control" or "exercise control" means to act so as to exclude others from using their property except on the defendant's own terms.

2. "Deprive" means to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, or to withhold it with the intent to restore it only upon payment of reward or other compensation or to transfer or dispose of it so that it is unlikely to be recovered.

...

6. "Property of another" means property in which any person other than the defendant has an interest which the defendant is not privileged to infringe, including property in which the defendant also has an interest, notwithstanding the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the defendant is not deemed property of another person who has only a security interest in such property, even if legal title is in the creditor pursuant to a security agreement.

7. "Services" includes labor, professional service, transportation, telephone, gas or electricity services, accommodation in hotels, restaurants, leased premises or elsewhere, admission to exhibitions and use of vehicles or other movable property.

The term "person", as defined in Arizona Revised Statutes section 13-105, paragraph 21, includes a government or governmental authority. Paragraph 27 of the same statute defines "property" as meaning anything of value, tangible or intangible. We

believe that the use of state office personnel services, office equipment and office supplies for private business constitutes the crime of theft as prescribed by the statutes cited above. No lawful authority exists for permitting a state employee to use such items or services for private business. Equipment and supplies clearly are state property which an employee is not privileged to infringe. Personnel services of the type described in this request are services as defined in Arizona Revised Statutes section 13-1801, paragraph 7. Conversion of those services is clearly prohibited by Arizona Revised Statutes section 13-1802, subsection A, paragraph 2.

While the use of a state agency mailing address as a private business correspondence address certainly is evidence that state facilities possibly are being used for private business, it is less clear that this action constitutes theft. Property, as defined in Arizona Revised Statutes section 13-105, paragraph 27, can be an intangible, such as an address, but it must also have a value. We are unable to determine from the facts presented whether a court would find that the use of the address constitutes theft. The fact that a person is employed at a certain address may enable him to "infringe on that property" (see Arizona Revised Statutes section 13-1801, paragraph 6). While the use of a state address for private business correspondence may not necessarily involve a removal of anything of value from the state, there can be no doubt that innumerable abuses could arise from such behavior. As an example, persons might justifiably be misled into believing that the state or officials of it sanction, support or approve of the private business involved. Further it is obvious that the state departments would lose valuable personnel time if state telephone service, state offices and state employees were directly involved in the conduct of a private business. Additionally if a regulated profession or occupation is involved the ethical impropriety of such behavior should be manifest. Hence it is unlikely that a state department could allow the regular use of its mailing addresses by officers or employees engaged in conducting a private business without being a party to misrepresentation and a victim of the misuse of its property and personnel services for private gain.

Arizona Revised Statutes section 41-770, subsection A, paragraph 15 is applicable when an employee of a state agency uses state resources to promote personal gain. This statute provides that misuse or unauthorized use of state property constitutes cause for discipline or dismissal of an employee in state service.

Additionally, the Arizona Constitution, article IX, section 7 provides that the state shall not ever give or loan its credit or make any donation or grant to any individual, association or corporation. An argument can be made that this section is applicable if state personnel services, equipment and supplies are used to aid an individual in his private business without charge.

The evidentiary significance of the fact situations described in paragraph 1, items (a) through (d) can be determined only by a court. All relevant evidence is generally admissible (17A Arizona Revised Statutes Rules of Evid., rule 402). "Relevant evidence" is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence (17A Arizona Revised Statutes Rules of Evid., rule 401). It would appear that the circumstances described in the request could be characterized by a court as relevant evidence.

Without specific knowledge as to terms of the contractual circumstances relating to the provision of personal services it is not possible to address the issue of the propriety

of a state officer or employee using working hours to engage in activity unrelated to the work or to actually direct or allow the use of such work time in unrelated activity.

In the absence of a specific constitutional or statutory prohibition such as that applied to justices and judges in Arizona Constitution, article VI, section 28, persons who hold public office or employment may be otherwise gainfully employed to the extent that such is not in conflict with their legal duty for such office or employment. The issue becomes one of duty and one's ability to perform it. Under the English common law a person who accepted an incompatible office or employment would be found to have vacated the previous office or employment.

Questions 2, 3 and 4. The issues raised by questions 2, 3 and 4 are difficult to resolve and are likely to arise on a continual basis* until decided by a court or the attorney general. The pertinent statutory provisions are Arizona Revised Statutes sections 41-1279, 41-1279.03, 41-1279.04 and 41-1279.05. Section 41-1279.03, subsection A, paragraph 2 provides that the Auditor General shall:

/p/perform special audits and related assignments as designated by the committee, and shall conduct program audits, performance audits, special audits and investigations of any state agency . . .

Section 41-1279, paragraph 2, defines "investigation" as meaning:

an inquiry into specified acts or allegations of impropriety, malfeasance or nonfeasance in the obligation, expenditure, receipt or use of public funds of this state or into specified financial transactions or practices which may involve such impropriety, malfeasance or nonfeasance.

Section 41-1279, paragraph 3, defines "performance audit" as meaning:

a post audit which determines with regard to the purpose, functions and duties of the audited agency both of the following:

(a) Whether the audited agency is managing or utilizing its resources, including public funds of this state, personnel, property, equipment and space in an economical and efficient manner.

(b) Causes of inefficiencies or uneconomical practices, including inadequacies in management information systems, internal and administrative procedures, organizational structure, use of resources, allocation of personnel, purchasing policies and equipment.

*For example, see an earlier memo (O-79-29) issued by this office on April 27, 1979.

Section 41-1279.04 provides that:

/the Auditor General shall have access to, and authority to examine any and all books, accounts, reports, vouchers, correspondence files and other records, bank accounts, money and other property of any state agency . . . It shall be the duty of any officer or employee of any such agency having such records under his control, to permit access to, and examination thereof, upon the request of the Auditor General or his authorized representative.

Section 41-1279.05 provides that:

If the auditor general or any member of his staff or other employee knowingly divulges or makes known in any manner not permitted by law, any particulars of any record, document, or information the disclosure of which is restricted by law, he is guilty of a class 5 felony.

Read together, these statutes appear to stand for the proposition that the Auditor General is authorized to examine any records of any state agency which are necessary to enable him to carry out the duties imposed on him by Arizona Revised Statutes section 41-1279.03 (see Op. Atty. Gen. No. 72-40-L (1972)). Examinations can even extend to those documents that are considered confidential. By placing restrictions on the disclosure of certain information in Arizona Revised Statutes section 41-1279.05, the Legislature has clearly shown its intent that the Auditor General "be granted authority to inspect records otherwise made confidential by various provisions of law." Id. In other words, the Auditor General can inspect confidential documents so long as their content is not publicly disclosed.

The Attorney General has construed Arizona Revised Statutes section 41-1279.04 to apply only to "reports and records generated by state employees in the performance of their official duties" (Op. Atty. Gen. No. 72-10 (1972)). However, while private business records prepared by state employees on state premises using state supplies and on state time may not have been executed in the "performance of official duties", Id., a reasonable argument can be made supporting the proposition that for an investigation and performance audit to be effective and complete the Auditor General should have access to such records. Clearly, if a state employee prepared the records, access to them would seem to be necessary for an investigation into impropriety, malfeasance or nonfeasance concerning public funds or specified financial transactions or practices as well as for a performance audit to determine whether the employing agency is managing or utilizing its resources in an economical and efficient manner. Private business records prepared by a non-state employee would not appear to be subject to examination by the Auditor General. If a legal file is the document in question, as described in paragraph 2 of the request, the attorney-client privilege would appear to preclude access to the records, absent a subpoena. While the material constituting the records may be state property, the contents of the file are confidential information, even the name of the attorney's client is privileged. Clearly there is a strong public interest to determine if state property is being used illegally but courts have found an equally important interest in maintaining the

confidentiality of attorney-client files. An alternative would be to subpoena the records if there is a suspicion that state law has been violated.

While the time constraints on this request preclude extensive research on the subject we do not believe that the right of the Auditor General to examine agency records includes the ability to confiscate those records. However, there is legal authority to the effect that the right to copy records is a necessary incident of the right to examine or inspect records (76 Corpus Juris Secundum "Records" section 35).

We recommend that the issues raised by questions 2, 3 and 4 be directed to the Attorney General for a definitive ruling. Further it would seem appropriate for you to provide the Attorney General with a formal statement regarding the fact situations outlined in paragraph 1 in order that an investigation might be made regarding the propriety and legality of such an arrangement.

CONCLUSIONS:

1. The fact situations described in items (a), (b) and (c) appear to be violative of state laws relating to theft. We are unable to determine whether the fact situation described in item (d) constitutes theft. Only a court may determine the evidentiary significance of the described fact situations.

You may wish to recommend that the statutes be amended to specifically prohibit the misuse of state property by a state employee.

Questions 2, 3 and 4. The Auditor General may examine any records, whether confidential or not, of any state agency which are necessary to carry out his statutory duties. The right to examine records would seem to include the right to copy such records but not to confiscate them. An argument can be made that, for an effective investigation and performance audit, the Auditor General should have access to private business records prepared by state employees on state premises using state supplies and on state time. If such records are private legal files, the attorney-client privilege may preclude access to them absent a subpoena. Private business records prepared by a non-state employee would not appear to be subject to examination by the Auditor General.

At this point in time it is unclear how far the boundaries of a performance audit extend. Once serious or possibly criminal issues arise, the proper authorities (i.e., the Attorney General) should be notified. An investigation by the Auditor General could reach a stage where a subpoena would be necessary before it could proceed or where other authorities would be more appropriate to continue the investigation. Resolution of these issues should be determined by an opinion of the Attorney General.

cc: Gerald A. Silva
Performance Audit Manager

APPENDIX III

LETTERS FROM THE OFFICE
OF THE ATTORNEY GENERAL

Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert R. Corbin

August 10, 1979

Mr. Douglas R. Norton
Auditor General
Suite 600
112 North Central Avenue
Phoenix, Az. 85004

Dear Doug,

Thank you for your letter dated August 6, 1979 pertaining to what we would like to see in the report prepared by your office on the Agriculture Employee Relations Board.

In reviewing the quotes in your August 6th letter with our investigative reports, I believe there should be some changes made to conform to the evidence in our report. Therefore I suggest the following:

"...On May 18, 1979, the Office of the Auditor General informed the Office of the Attorney General of the above circumstances and an investigation was initiated by that Office. During the course of the investigation, the General Council of the AERB informed the investigator from the Office of the Attorney General that he had been given verbal permission from an assistant to then Governor Castro that he could continue his private law practice in the State office, in addition to his duties with the State. When contacted by the Office of the Attorney General, the identified former gubernatorial assistant admitted that he had given the General Council permission to continue his private law practice while in the State office, but could not recall any conversations that he had concerning the use of State property and personnel in that practice.

At the conclusion of its' investigation, the Office of the Attorney General prepared an internal report and a copy was sent to an assistant to Governor Babbitt."

The reasons for the changes are that apparently no one said anything one way or the other as to whether he could use the State property and personnel in his practice at the State office. Apparently, this matter was never discussed between the assistant from Governor Castro's Office and the General Council. He was merely told that he could continue the private practice of law in the State office, in addition to his duties with the State.

Mr. Douglas R. Norton
Page Two
August 10, 1979

Our report to the assistant to Governor Babbitt carried no recommendations and stated that it was being send to the assistant to the Governor for whatever he wished to make of them.

Thanks again Doug for letting me review this matter, and if you have any questions or if we can be of any further assistance, please let me know.

Very truly yours,



BOB CORBIN
Attorney General

BC/bc



Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert H. Corbin

August 20, 1979

Mr. William Gibney
General Counsel
Agricultural Employment Relations Board
1688 W. Adams
Room 221
Phoenix, Az. 85007

Dear Bill,

Pursuant to our conversation of Monday, August 20, 1979, please be advised that I called Mr. Dwight A. Ochocki at the Auditor General's Office and informed him that there should be an additional sentence added to the report, which is as follows:

"The Attorney General's Office, after an investigation of this matter, declined prosecution."

Hope this takes care of the matter and thanks for calling.

Very truly yours,

A handwritten signature in cursive script that reads "Bob Corbin".

BOB CORBIN
Attorney General

BC/bc



BRUCE BABBITT
GOVERNOR

OFFICE OF THE GOVERNOR
STATE HOUSE
PHOENIX, ARIZONA 85007

IN REPLY
REFER TO:

September 6, 1979

Auditor General
112 N. Central, Suite 600
Phoenix, AZ 85004

ATTN: Dwight Ochocki

Dear Mr. Ochocki:

This letter is in reference to the Auditor General's investigation and report concerning the Agriculture Employment Relations Board and specifically, your inquiry to this office concerning Mr. William Gibney, General Counsel to the board.

Pursuant to your inquiry as to Mr. Gibney's authorization to utilize facilities of his office and personnel to conduct legal business not relating to the Agriculture Employment Relations Board, I have discussed the matter with Mr. Gibney and informed him that such activities are not authorized. Whatever past misunderstandings there may have been as to Mr. Gibney's right to enter into outside law practice, he now understands that he is not to utilize his state office, personnel or other facilities to conduct any outside law practice.

Thank you very much for bringing this matter to our attention.

Very truly yours,

Dale Pontius
Executive Assistant

DP:vnr

APPENDIX V

LETTER REGARDING GENERAL COUNSEL'S
PRIVATE LAW PRACTICE

STANFIELD, MCCARVILLE, COXON, COLE & FITZGIBBONS

ATTORNEYS AT LAW

501 NORTH MARSHALL STREET (BOX 555)

CASA GRANDE, ARIZONA 85222

AREA CODE 602

TELEPHONE

836-8265

W. A. STANFIELD

THOMAS A. MCCARVILLE

FRANKLIN D. COXON

A. THOMAS COLE

DAVID A. FITZGIBBONS

KENDRA S. McNALLY

MICHAEL F. BEERS

August 23, 1979

Douglas Norton,
Auditor General
112 North Central
Suite 600
Phoenix, Arizona 85004

Re: Cases I have Handled in Conjunction with Bill Gibney

Dear Mr. Norton:

Since February of 1976 and May of 1979, I have handled five lawsuits in conjunction with Bill Gibney. In each of the lawsuits our arrangement was the same, to wit: that I was primarily responsible for all of the legal work and Bill was primarily responsible for all of the client relations.

There were two reasons for this arrangement. First, all five clients were personal friends of Bill's and it was more convenient for him to explain the various proceedings to them when he saw them socially than it was for me to contact them from Tucson, which is where I was located; and second, because I was in the process of building a practice, both my secretary and I had plenty of time to do the necessary research and paper work. For purposes of this letter I have skimmed through all five files and it appears to me that my secretary and I did in fact do at least 90 percent of the work involved in those cases.

I have written this letter because Bill has advised me that you suspect him of devoting a great deal of both his and his secretary's time to privately retained clients. While I cannot speak for any other cases he may have handled in the course of his employment with the State of Arizona, I can certainly vouch for the fact that neither he nor his secretary spent very much time on the cases in which I was involved.

Please feel free to contact me if you have any questions.

Very truly yours,



MICHAEL F. BEERS

STANFIELD, McCARVILLE, COXON, COLE & FITZGIBBONS

Date: August 23, 1979

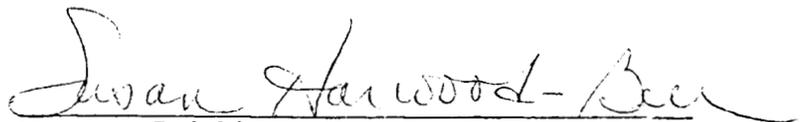
Page: 2

STATE OF ARIZONA)
)
County of Pinal)

After first being duly sworn, Michael F. Beers, deposes and says that he has prepared and read the foregoing letter and that the contents thereof are true to the best of his knowledge, information and belief.


MICHAEL F. BEERS

SUBSCRIBED AND SWORN to before me this 23rd day of August, 1979.


Notary Public

My commission expires:

March 20, 1983

APPENDIX VI

UNCONSTITUTIONAL PROVISIONS OF ARIZONA
LAW-FEDERAL DISTRICT COURT DECISION

APPENDIX VI

UNCONSTITUTIONAL PROVISIONS OF ARIZONA
LAW - FEDERAL DISTRICT COURT DECISION

<u>ARS</u>	<u>Statute</u>	<u>Federal District Court Case</u> <u>United Farm Workers v. Babbitt</u>
23-1385.B.8.	To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name.	"Invalid on its face as a violation of the free speech provision of the first amendment to the constitution."
23-1385.C.	The expressing of any views, argument, opinion or the making of any statement, including expressions intended to influence the outcome of an organizing campaign, a bargaining controversy, a strike, lockout or other labor dispute, or the dissemination of such views whether in written, printed, graphic, visual or auditory form, if such expression contains no threat of reprisal or force or promise of benefit, shall not constitute or be evidence of an unfair labor practice or constitute grounds for, or evidence justifying, setting aside the results of any election conducted under any of the provisions of this article. A statements of fact by either a labor organization or an agricultural employer relating to existing or proposed operations of the employer or to existing or proposed terms, tenure, or conditions of employment with the employer shall not be considered to constitute a threat of reprisal or force or promise of benefit. No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents.	"This section must fall because it constitutes an unconstitutional restriction on the first amendment exercise of free speech because of private property interests."
23-1389.A.	Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. If ratification of any such contract is required, the right to vote in such ratification shall be limited to the employees in the bargaining unit. Any individual agricultural employee or a group of agricultural employees may at any time present grievances to their agricultural employer and have such grievances adjusted, without the intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. The bargaining representative shall be given opportunity to be present at such adjustment.	"Groups of workers may thus be hired for the same unit at different times of the year, and yet an election among one group will bar an election by a group hired later in the year."
23-1389.B.	The board shall decide in each case whether in order to ensure to employees the fullest freedom in exercising their rights the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees of an agricultural employer working at the farm where such employer grows or produces agricultural products or both. In making unit determinations the extent of a union's extent of organization shall not be controlling. Principal factors should be the community of interest between employees, same hours, duties and compensation, the administrative structure of the employer and control of labor relations policies.	"Thus the absence in the Agricultural Employment Relations Act of any feasible alternative to a secret ballot election is in effect a condonation and an encouragement to intentional interference by the employer in the election process which could effectively prevent any meaningful election from ever being held, again frustrating the right to free assembly and association."

ARS

Statute

- 23-1389.C. The board shall investigate any petition, and if it has reasonable cause to believe that a question of representation exists shall provide for an appropriate hearing upon due notice, when such petition has been filed in good faith in accordance with such regulations as may be prescribed by the board:
1. By an agricultural employee or group of agricultural employees or any individual or labor organization acting in their behalf alleging that thirty percent or more of the number of agricultural employees in the unit in question either wish to be represented for collective bargaining and that their employer declines to recognize their representative or assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative.
 2. By an agricultural employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative or that an individual or labor organization which has previously been certified as the bargaining representative is no longer a representative.
- 23-1389.D. If the board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. If a second labor organization files a petition for an election alleging that thirty percent or more of the employees in the unit in question desire to be represented by that labor organization, then the board shall require that the names of both labor organizations shall appear on the ballot. In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the receives a majority vote, a second election shall be held. The second election shall be between the union receiving the highest number of votes and "no union". In any election a labor organization shall obtain a majority of all votes cast in that election in order to be certified as the bargaining representative of all the employees in that unit.
- 23-1389.E. In determining whether or not a question of representation exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. In no case shall the board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with ARS 23-1390.
- 23-1389.F. Within five days of receipt of such a petition, the agricultural employer may file a challenge to such petition on the ground that the authorization for the filing of such petition is not current or that such authorization has been obtained by fraud, misrepresentation or coercion. Such petition shall not act to stay the election proceeding but it if is thereafter determined that the authorizations are not current or obtained by fraud, misrepresentation or coercion the petition will be dismissed.

ARS

Statute

- 23-1389.G. (Cont'd) No election shall be directed or conducted in any bargaining unit or any subdivision thereof within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this article in any election conducted within three months after the commencement of the strike. Any agricultural employee who is found to have sought or accepted employment only for the purpose of affecting the outcome of an election shall not be eligible to vote in an election conducted pursuant to the provisions of this article for a period of twelve months from the date of that election.
- 23-1389.H. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.
- 23-1389.I. The agricultural employer, within ten days after an election is directed by the board or a consent election agreement is approved by the board and on request of the board, shall furnish to the board a list of agricultural employees in the bargaining unit who are qualified to vote, and such a list shall be made available to the organizations or other interested employees involved in the election.
- 23-1389.J. Upon the filing with the board, by thirty percent or more of the agricultural employees in a bargaining unit covered by a certification or by an agreement between their employer and a labor organization made pursuant to ARS 23-1385, of a petition alleging the desire that such representation authority be rescinded, the board shall conduct an election by secret ballot of the employees in such unit and certify the results thereof to the labor organization and to the employer.
- 23-1392 Any person who knowingly resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a class 1 misdemeanor. The provisions of this section shall not apply to any activities carried on outside the state of Arizona.
- 23-1393.B. In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities.
- "Men of common knowledge can only guess at its meaning."
- "Such unilateral compulsory arbitration constitutes a clear denial of due process under the law for when the effect of statutes has been to coerce parties to submit to arbitration, without agreement or assent on their part to do so, the courts have declared them unconstitutional."
- "We therefore strike down this section of the statute as unconstitutional in violation of the due process clause of the Fourteenth Amendment to the Constitution and the Seventh Amendment providing for right to trial by jury."

APPENDIX VII

SUPREME COURT OF THE UNITED STATES'
DECISION ON ARIZONA'S AGRICULTURAL
EMPLOYMENT RELATION'S ACT

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BABBITT, GOVERNOR OF ARIZONA, ET AL. *v.* UNITED FARM WORKERS NATIONAL UNION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. 78-225. Argued February 21, 1979—Decided June 5, 1979

Appellees (a farm workers union, a union agent, farm workers, and a union supporter) brought suit in Federal District Court in Arizona seeking a declaration of the constitutionality of various provisions of Arizona's farm labor statute, as well as of the entire statute, and an injunction against its enforcement. A three-judge court ruled unconstitutional on various grounds the provisions (1) specifying procedures for the election of employee bargaining representatives; (2) limiting union publicity directed at consumers of agricultural products; (3) imposing a criminal penalty for violations of the statute; (4) excusing an agricultural employer from furnishing a union any materials, information, time, or facilities to enable it to communicate with the employer's employees (access provision); and (5) governing arbitration of labor disputes, construed by the court as mandating compulsory arbitration. Deeming these provisions inseparable from the remainder of the statute, the court went on to declare the whole statute unconstitutional and enjoined its enforcement.

Held:

1. The challenges to the provisions regulating election procedures, consumer publicity, and criminal sanctions present a case or controversy, but the challenges to the access and arbitration provisions are not justiciable. Pp. 7-15.

(a) The fact that appellees have not invoked the election procedures provision in the past or expressed any intention to do so in the future, does not defeat the justiciability of their challenge in view of the nature of their claim that delays attending the statutory election scheme and the technical limitations on who may vote in unit elections severely curtail their freedom of association. To await appellees' participation in an election would not assist the resolution of the threshold question

Syllabus

whether the election procedures are subject to scrutiny under the First Amendment at all, and as this question is dispositive of appellees' challenge there is no warrant for postponing consideration of the election procedures claim. Pp. 8-10.

(b) With respect to appellees' claim that the consumer publicity provision (which on its face proscribes, as an unfair labor practice, dishonest, untruthful, and deceptive publicity) unconstitutionally penalizes inaccuracies inadvertently uttered, appellees have reason to fear prosecution for violation of the provision, where the State has not disavowed any intention of invoking the criminal penalty provision (which applies in terms to "[a]ny person . . . who violates any provision" of the statute) against unions that commit unfair labor practices. Accordingly, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision to present a case or controversy. For the same reasons, a case or controversy is also presented by appellees' claim that such provision unduly restricts protected speech by limiting publicity to that directed at agricultural products of an employer with whom a union has a primary dispute. Pp. 10-12.

(c) Where it is clear that appellees desire to engage in prohibited consumer publicity campaigns, their claim that the criminal penalty provision is unconstitutionally vague was properly entertained by the District Court and may be raised in this appeal. If the provision were truly vague, appellees should not be expected to pursue their collective activities at their peril. Pp. 12-13.

(d) Appellees' challenge to the access provision is not justiciable, where not only is it conjectural to anticipate that access will be denied but, more importantly, appellees' claim that such provision violates the First and Fourteenth Amendments because it deprives the state agency responsible for enforcing the statute of any discretion to compel agricultural employers to furnish the enumerated items, depends upon the attributes of the situs involved. An opinion on the constitutionality of the provision at this time would be patently advisory, and adjudication of the challenge must wait until appellees can assert an interest in seeking access to particular facilities as well as a palpable basis for believing that access will be refused. Pp. 13-14.

(e) Similarly, any ruling on the allegedly compulsory arbitration provision would be wholly advisory, where the record discloses that there is no real and concrete dispute as to the application of the provision, appellees themselves acknowledging that employers may elect responses to an arguably unlawful strike other than seeking an injunction and agreeing to arbitrate, and appellees never having contested the constitutionality of the provision. Pp. 14-15.

Syllabus

BABBITT *v.* FARM WORKERS

III

2. The District Court properly considered the constitutionality of the election procedures provision even though a prior construction of the provision by the Arizona state courts was lacking, but the court should have abstained from adjudicating the challenges to the consumer publicity and criminal penalty provisions until material unresolved questions of state law were determined by the Arizona courts. Pp. 15-21.

(a) A state-court construction of the election procedures provision would not obviate the need for decision of the constitutional issue or materially alter the question to be decided, but the resolution of the question whether such procedures are affected with a First Amendment interest at all is dispositive of appellees' challenge. P. 16.

(b) The criminal penalty provision might be construed broadly as applying to all provisions of the statute affirmatively proscribing or commanding courses of conduct, or narrowly as applying only to certain provisions susceptible of being "violated," but in either case the provision is reasonably susceptible of constructions that might undercut or modify appellees' vagueness attack or otherwise significantly alter the constitutional questions requiring resolution. Pp. 16-17.

(c) In view of the fact that the consumer publicity provision is patently ambiguous and subject to varying interpretations which would substantially affect the constitutional question presented, the District Court erred in entertaining all aspects of appellees' challenge to such provision without the benefit of a construction thereof by the Arizona courts. Pp. 18-21.

3. The District Court erred in invalidating the election procedures provision. Arizona was not constitutionally obliged to provide procedures pursuant to which agricultural employees, through a chosen representative, might compel their employers to negotiate, and that it has undertaken to do so in an assertedly niggardly fashion, presents as a general matter no First Amendment problems. Moreover, the statute does not preclude voluntary recognition of a union by an agricultural employer. Pp. 22-23.

449 F. Supp. 449, reversed and remanded.

WHITE, J., delivered the opinion for the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 78-225

Bruce Babbitt, Governor of the State of Arizona, et al., Appellants, v. United Farm Workers National Union, Etc., et al.	On Appeal from the United States District Court for the District of Arizona.
---	--

[June 5, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

In this case we review the decision of a three-judge District Court setting aside as unconstitutional Arizona's farm labor statute. The District Court perceived particular constitutional problems with five provisions of the Act; deeming these provisions inseparable from the remainder of the Act, the court declared the entire Act unconstitutional and enjoined its enforcement. We conclude that the challenges to two of the provisions specifically invalidated did not present a case or controversy within the jurisdiction of a federal court and hence should not have been adjudicated. Although the attacks on two other provisions were justiciable, we conclude that the District Court should have abstained from deciding the federal issues posed until material, unresolved questions of state law were determined by the Arizona courts. Finally, we believe the District Court properly reached the merits of the fifth provision but erred in invalidating it. Accordingly, we reverse the judgment of the District Court.

I

In 1972, the Arizona Legislature enacted a comprehensive scheme for the regulation of agricultural employment rela-

tions. Arizona Agricultural Employment Relations Act, Ariz. Rev. Stat. Ann. §§ 23-1381 to 23-1395 (Supp. 1978). The statute designates procedures governing the election of employee bargaining representatives, establishes various rights of agricultural employers and employees, proscribes a range of employer and union practices, and establishes a civil and criminal enforcement scheme to ensure compliance with the substantive provisions of the Act.

Appellees—the United Farm Workers National Union (UFW), an agent of the UFW, named farm workers, and a supporter of the UFW—commenced suit in federal court to secure a declaration of the unconstitutionality of various sections of the Act, as well as of the entire Act, and an injunction against its enforcement.¹ A three-judge District Court was convened to entertain the action. On the basis of past instances of enforcement of the Act and in light of the provision for imposition of criminal penalties for “violat[ion] [of] any provision” of the Act, Ariz. Rev. Stat. Ann. § 23-1392 (Supp. 1978), the court determined that appellees’ challenges were presently justiciable.² Reaching the merits of some of the

¹ The complaint asserted that the Act as a whole was invalid because it was pre-empted by the federal labor statutes, imposed an impermissible burden on commerce, denied appellees equal protection, and amounted to a bill of attainder. In addition, various constitutional challenges were made to one or more parts of 15 provisions of the Act.

² The District Court did not analyze section by section why a case or controversy existed with respect to each of the challenged sections. Rather, from instances of private and official enforcement detailed in a stipulation filed by the parties, the court concluded that the case was not “hypothetical, abstract, or generalized.” 449 F. Supp. 449, 452 (Ariz. 1978). It did, however, focus specifically on § 23-1392. That provision makes it a crime to violate any other provision of the Act; and although the District Court deemed this section severable from the rest of the Act, it relied heavily on its conclusion that it had jurisdiction to adjudicate the validity of this section to justify its considering the constitutionality of other sections of the Act. See 449 F. Supp., at 454. In proceeding to do so it ruled that evidence would be considered only in connection with

claims, the court ruled unconstitutional five distinct provisions of the Act.³ Specifically, the court disapproved the section specifying election procedures, § 23-1389 (Supp. 1978),⁴ on the ground that, by failing to account for seasonal employment peaks, it precluded the consummation of elections before most workers dispersed and hence frustrated the associational rights of agricultural employees. The court was also of the view that the Act restricted unduly the class of employees technically eligible to vote for bargaining repre-

§ 23-1389 dealing with the election of bargaining representatives and with respect to § 23-1385 (C) limiting union access to employer properties, although evidence was introduced at trial relative to other provisions.

³ The court did not explain the basis for selecting from all of the challenges presented the 5 provisions on which it passed judgment.

⁴ Section 23-1389 declares that representatives selected by a secret ballot for the purpose of collective bargaining by the majority of agricultural employees in an appropriate bargaining unit shall be the exclusive representatives of all agricultural employees in such unit for the purpose of collective bargaining. And it requires the Agricultural Employment Relations Board to ascertain the unit appropriate for purposes of collective bargaining. The section further provides that the Board shall investigate any petition alleging facts specified in § 23-1389 indicating that a question of representation exists and schedule an appropriate hearing when the Board has reasonable cause to believe that a question of representation does exist. If the hearing establishes that such a question exists, the Board is directed to order an election by secret ballot and to certify the results thereof. Section 23-1389 details the manner in which an election is to be conducted. The section further provides for procedures by which an employer might challenge a petition for an election. Additionally, § 23-1389 stipulates that no election shall be directed or conducted in any unit within which a valid election has been held in the preceding 12 months.

Section 23-1389 also sets down certain eligibility requirements regarding participation in elections conducted thereunder. And it imposes obligations on employers to furnish information to the Board, to be made available to interested unions and employees, concerning bargaining unit employees qualified to vote. Finally, the section specifies procedures whereby agricultural employees may seek to rescind the representation authority of a union currently representing those employees.

sentatives and hence burdened the workers' freedom of association in this second respect.⁵

The court, moreover, ruled violative of the First and Fourteenth Amendments the provision limiting union publicity directed at consumers of agricultural products, § 23-1385 (B)(S) (Supp. 1978),⁶ because as it construed the section, it proscribed innocent as well as deliberately false representations. The same section was declared infirm for the additional reason that it prohibited any consumer publicity, whether true or false, implicating a product trade name that "may include" agricultural products of an employer other than the employer with whom the protesting labor organization is engaged in a primary dispute.

The court also struck down the statute's criminal penalty provision, § 23-1392 (Supp. 1978),⁷ on vagueness grounds,

⁵ The election provision contemplates voting by "agricultural employees," Ariz. Rev. Stat. Ann. § 23-1389 (A) (Supp. 1978), which is defined in § 23-1382 (1) (Supp. 1978) so as to exclude workers having only a brief history of employment with an agricultural employer.

⁶ Section 23-1385 (B)(S) makes it an unfair labor practice for a labor organization or its agents:

"To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name."

⁷ Section 23-1392 provides:

"Any person who knowingly resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a class 1 misdemeanor. The provisions of this section shall not apply to any activities carried on outside the state of Arizona."

and held unconstitutional the provision excusing the employer from furnishing to a labor organization any materials, information, time, or facilities to enable the union to communicate with the employer's employees. § 23-1385 (C) (Supp. 1978).⁸ The court through the latter provision permitted employers to prevent access by unions to migratory farm workers residing on their property, in violation of the guarantees of free speech and association.

Finally, the court disapproved a provision construed as mandating compulsory arbitration, § 23-1393 (B) (Supp. 1978),⁹ on the ground that it denied employees due process and

⁸ Section 23-1385 (C) provides in part:

"No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor organization, as the case may be, to communicate with employees of the employer; members of the labor organization, its supporters, or adherents."

⁹ Section 23-1393 (B) provides:

"In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consump-

the right to a jury trial, which the District Court found guaranteed by the Seventh Amendment. The remainder of the Act fell "by reason of its inseparability and inoperability apart from the provisions to be invalid." 449 F. Supp. 449, 467 (Ariz. 1978).

Appellants sought review by this Court of the judgment below. Because of substantial doubts regarding the justiciability of appellees' claims, we postponed consideration of our jurisdiction to review the merits. — U. S. — (1978). We now hold that, of the five provisions specifically invalidated by the District Court,¹⁰ only the sections pertaining to election of bargaining representatives, consumer publicity, and imposition of criminal penalties are susceptible of judicial resolution at this time. We further conclude that the District Court should have abstained from adjudicating appellees' challenge to the consumer publicity and criminal penalty provisions, although we think the constitutionality of the election procedures was properly considered even lacking a prior construction by the Arizona courts. We are unable to sustain the District Court's declaration, however, that the election procedures are facially unconstitutional.

tion in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities."

¹⁰ Appellees challenged numerous provisions before the District Court not expressly considered by that court. After disapproving the 5 provisions that we address on this appeal, the court concluded that "there is obviously no need to rule on plaintiffs' other contentions including the claimed equal protection violation." 449 F. Supp., at 466. The court then enjoined enforcement of the Act in its entirety finding the provisions not explicitly invalidated to be inseparable from those actually adjudicated. *Id.*, at 467. We find insufficient reason to consider in this Court in the first instance appellees' challenges to the provisions on which the District Court did not specifically pass judgment.

II

We address first the threshold question whether appellees have alleged a case or controversy within the meaning of Art. III of the Constitution or only abstract questions not currently justiciable by a federal court. The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test. See *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Railway Mail Association v. Corsi*, 326 U. S. 88, 93 (1945); see *Evers v. Dwyer*, 358 U. S. 202, 203 (1958); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, *supra*.

A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *O'Shea v. Littleton*, 414 U. S. 488, 494 (1974). But "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pennsylvania v. West Virginia*, 262 U. S. 553, 593 (1923); see *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143 (1974); *Pierce v. Society of Sisters*, 268 U. S. 510, 526 (1925).

When contesting the constitutionality of a criminal statute, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U. S. 452, 459 (1974); see *Epperson v. Arkansas*, 393 U. S. 97 (1968); *Evers v. Dwyer*, *supra*, at 204. When the plaintiff has alleged an intention to engage in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should

not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U. S. 179, 188 (1973). But "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Younger v. Harris*, 401 U. S. 37, 42 (1971); *Golden v. Zwickler*, 394 U. S. 103 (1969). When plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," they do not allege a dispute susceptible to resolution by a federal court. *Younger v. Harris*, *supra*, at 42.

Examining the claims adjudicated by the three-judge court against the foregoing principles, it is our view that the challenges to the provisions regulating election procedures, consumer publicity, and criminal sanctions—but only those challenges—present a case or controversy.¹¹ As already noted, appellees' principal complaint about the statutory election procedures is that they entail inescapable delays and so preclude conducting an election promptly enough to permit participation by many farm workers engaged in the production of crops having short seasons. Appellees also assail the assertedly austere limitations on who is eligible to participate in elections under the Act. Appellees admittedly have not invoked the Act's election procedures in the past nor have they expressed any intention of doing so in the future. But, as

¹¹ Although appellants have contested the justiciability of appellees' several challenges to the Act's provisions, they have not contended that the standing of any particular appellee is more dubious than the standing of any other. We conclude that at least the UFW has a "sufficient 'personal stake' in a determination of the constitutional validity of [the 3 aforementioned provisions] to present 'a real and substantial controversy admitting of specific relief through a decree of conclusive character.'" *Buckley v. Valeo*, 424 U. S. 1, 12 (1976) (footnote omitted), quoting *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 241 (1937). See *NAACP v. Alabama*, 357 U. S. 449, 458 (1958). Accordingly, we do not assess the standing of the remaining appellees. See *Buckley v. Valeo*, *supra*, at 12.

we see it, appellees' reluctance in this respect does not defeat the justiciability of their challenge in view of the nature of their claim.

Appellees insist that agricultural workers are constitutionally entitled to select representatives to bargain with their employers over employment conditions. As appellees read the statute, only representatives duly elected under its provisions may compel an employer to bargain with them. But appellees maintain, and have adduced evidence tending to prove, that the statutory election procedures frustrate rather than facilitate democratic selection of bargaining representatives. And the UFW has declined to pursue those procedures not for lack of interest in representing Arizona farm workers in negotiations with employers but due to the procedures' asserted futility. Indeed, the UFW has in the past sought to represent Arizona farm workers and has asserted in its complaint a desire to organize such workers and to represent them in collective bargaining. Moreover, the UFW has participated in nearly 400 elections in California under procedures thought to be amenable to prompt and fair elections. The lack of a comparable opportunity in Arizona is said to impose a continuing burden on appellees' associational rights.

Even though a challenged statute is sure to work the injury alleged, however, adjudication might be postponed until "a better factual record might be available." *Regional Rail Reorganization Act Cases*, 419 U. S., at 143. Thus, appellants urge that we should decline to entertain appellees' challenge until they undertake to invoke the Act's election procedures. In that way, the Court might acquire information regarding how the challenged procedures actually operate, in lieu of the predictive evidence that appellees introduced at trial.¹² We

¹² Though waiting until appellees invoke unsuccessfully the statutory election procedures would remove any doubt about the existence of concrete injury resulting from application of the election provision, little could be done to remedy the injury incurred in the particular election. Chal-

are persuaded, however, that awaiting appellees' participation in an election would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all. As we regard that question dispositive to appellees' challenge—as elaborated below—we think there is no warrant for postponing adjudication of the election claim.

Appellees' twofold attack on the Act's limitation on consumer publicity is also justiciable now. Section 23-1385 (B) (8) makes it an unfair labor practice "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity." And violations of that section may be criminally punishable. Ariz. Rev. Stat. Ann. § 23-1392 (Supp. 1978). Appellees maintain that the consumer publicity provision unconstitutionally penalizes inaccuracies inadvertently uttered in the course of consumer appeals.

The record shows that the UFW has actively engaged in consumer publicity campaigns in the past in Arizona, and appellees have alleged in their complaint an intention to continue to engage in boycott activities in that State. Although

lengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment. See, e. g., *Dunn v. Blumstein*, 405 U. S. 330, 333 n. 2 (1972); *Moore v. Ogilvie*, 394 U. S. 814, 816 (1969); *Williams v. Rhodes*, 393 U. S. 23, 34-35 (1968). Justiciability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election. See, e. g., *Storer v. Brown*, 415 U. S. 724, 737 n. 8 (1974); *Rosario v. Rockefeller*, 410 U. S. 752, 756 n. 5 (1973); *Dunn v. Blumstein*, *supra*, at 333 n. 2. There is value in adjudicating election challenges notwithstanding the lapse of a particular election because "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Storer v. Brown*, *supra*, at 737 n. 8 (emphasis added).

appellees do not plan to propagate untruths, they contend—as we have observed—that “erroneous statement is inevitable in free debate.” *New York Times Co. v. Sullivan*, 376 U. S. 254, 271 (1964). They submit that to avoid criminal prosecution they must curtail their consumer appeals, and thus forgo full exercise of what they insist are their First Amendment rights. It is urged, accordingly, that their challenge to the limitation on consumer publicity plainly poses an actual case or controversy.

Appellants maintain that the criminal penalty provision has not yet been applied and may never be applied to commissions of unfair labor practices, including forbidden consumer publicity. But, as we have noted, when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not “first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.” *Steffel v. Thompson*, 415 U. S., at 459. The consumer publicity provision on its face proscribes dishonest, untruthful, and deceptive publicity, and the criminal penalty provision applies in terms to “[a]ny person . . . who violates any provision” of the Act. Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices. Appellees are thus not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity.¹³ In our view, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision proscribing misrepresentations to

¹³ Even independently of criminal sanctions, § 23-1385 (B) (8) affirmatively prohibits the variety of consumer publicity specified therein. We think the prospect of issuance of an administrative cease and desist order, Ariz. Rev. Stat. Ann. § 23-1390 (C) (Supp. 1978), or a court-ordered injunction, § 23-1390 (E), (J), (K) (Supp. 1978), against such prohibited conduct provides substantial additional support for the conclusion that appellees' challenge to the publicity provision is justiciable.

present a case or controversy within the jurisdiction of the District Court.

Section 23-1385 (B)(S) also is said to limit consumer appeals to those directed at products with whom the labor organization involved has a primary dispute; as appellees construe it, it *proscribes* "publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name" Appellees challenge that limitation as unduly restricting protected speech. Appellees have in the past engaged in appeals now arguably prohibited by the statute and allege an intention to continue to do the same. For the reasons that appellees' challenge to the first aspect of the consumer publicity provision is justiciable, we think their claim directed against the second aspect may now be entertained as well.

We further conclude that the attack on the criminal penalty provision, itself, is also subject to adjudication at this time. Section 23-1392 authorizes imposition of criminal sanctions against "[a]ny person . . . who violates any provision" of the Act. Appellees contend that the penalty provision is unconstitutionally vague in that it does not give notice of what conduct is made criminal. Appellees aver that they have previously engaged, and will in the future engage, in organizing, boycotting, picketing, striking, and collective-bargaining activities regulated by various provisions of the Act.¹⁴ They assert that they cannot be sure whether criminal sanctions may be visited upon them for pursuing any such conduct, much of which is allegedly constitutionally protected. As we have noted, it is clear that appellees desire to

¹⁴ *E. g.*, Ariz. Rev. Stat. Ann. § 23-1385 (C) (Supp. 1978) (access to employer's property); § 23-1385 (B)(7) (Supp. 1978) (boycotts); § 23-1385 (B)(12) (Supp. 1978) (picketing and boycotts); § 23-1385 (B)(13) (Supp. 1978) (striking by minorities), §§ 23-1384, 23-1385 (D) (collective bargaining).

engage at least in consumer publicity campaigns prohibited by the Act; accordingly, we think their challenge to the precision of the criminal penalty provision, itself, was properly entertained by the District Court and may be raised here on appeal. If the provision were truly vague, appellees should not be expected to pursue their collective activities at their peril.

Appellees' challenge to the access provision, however, is not justiciable. The provision, § 23-1385 (C), stipulates that "[n]o employer shall be required to furnish or make available to a labor organization . . . information, time, or facilities to enable such . . . labor organization . . . to communicate with employees of the employer, members of the labor organization, its supporters, or adherents." Appellees insist, and the District Court held, that this provision deprives the Arizona Employment Relations Board—charged with responsibility for enforcing the Act—of any discretion to compel agricultural employers to furnish materials, information, time, or facilities to labor organizations desirous of communicating with workers located on the employers' property and that the section for this reason violates the First and Fourteenth Amendments to the Constitution.

It may be accepted that the UFW will inevitably seek access to employers' property in order to organize or simply to communicate with farm workers. But it is conjectural to anticipate that access will be denied. More importantly, appellees' claim depends inextricably upon the attributes of the situs involved. They liken farm labor camps to the company town involved in *Marsh v. Alabama*, 326 U. S. 501 (1946), in which the First Amendment was held to operate. Yet it is impossible to know whether access will be denied to places fitting appellees' constitutional claim. We can only hypothesize that such an event will come to pass, and it is only on this basis that the constitutional claim could be adjudicated at this time. An opinion now would be patently

advisory; the adjudication of appellees' challenge to the access provision must therefore await at least such time as appellees can assert an interest in seeking access to particular facilities as well as a palpable basis for believing that access will be refused.

Finally, the constitutionality of the allegedly compulsory arbitration provision was also improperly considered by the District Court. That provision specifies that an employer may seek and obtain an injunction "upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities." Ariz. Rev. Stat. Ann. § 23-1393 (Supp. 1978). If an employer invokes a court's jurisdiction to issue a temporary restraining order to enjoin a *strike*, the employer "must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues." And if the parties cannot agree on an arbitrator, the court must appoint one.

On the record before us, there is an insufficiently real and concrete dispute with respect to application of this provision. Appellees themselves acknowledge that, assuming an arguably unlawful strike will occur, employers may elect to pursue a range of responses other than seeking an injunction and agreeing to arbitrate. Moreover, appellees have never contested the constitutionality of the arbitration clause. They declare that "[t]he three judge court below on its own motion found the binding arbitration provision of § 1393 (B) violative of substantive due process and the Seventh Amendment." Brief for Appellees 71 n. 153. Appellees, instead, raised other challenges to the statute's civil enforcement scheme, which we

do not consider on this appeal. See n. 10. *supra*. It is clear, then, that any ruling on the compulsory arbitration provision would be wholly advisory.

III

Appellants contend that, even assuming any of appellees' claims are justiciable, the District Court should have abstained from adjudicating those claims until the Arizona courts might authoritatively construe the provisions at issue. We disagree that appellees' challenge to the statutory election procedures should first be submitted to the Arizona courts, but we think the District Court should have abstained from considering the constitutionality of the criminal penalty provision and the consumer publicity provision pending review by the state courts.

As we have observed, "[a]bstention . . . sanctions . . . escape [from immediate decision] only in narrowly limited 'special circumstances.'" *Kusper v. Pontikes*, 414 U. S. 51, 54 (1973), quoting *Lake Carriers' Association v. MacMullan*, 406 U. S. 498, 509 (1972). "The paradigm of the 'special circumstances' that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question." *Kusper v. Pontikes*, *supra*, at 54; see *Zwickler v. Koota*, 389 U. S. 241, 249 (1967); *Harrison v. NAACP*, 360 U. S. 167, 176-177 (1959); *Railroad Commission v. Pullman Co.*, 312 U. S. 496 (1941). Of course, the abstention doctrine "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman v. Forssenius*, 380 U. S. 528, 534 (1965). But when the state statute at issue is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question," *id.*, at 535, abstention may be required "in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on

questions of state law, and premature constitutional adjudication." *id.*, at 534.

We think a state court construction of the provision governing election procedures would not obviate the need for decision of the constitutional issue or materially alter the question to be decided. As we shall discuss, our resolution of the question whether the statutory election procedures are affected with a First Amendment interest at all is dispositive of appellees' challenge. And insofar as it bears on that matter, the statute is pointedly clear. Accordingly, we perceive no basis for declining to decide appellees' challenge to the election procedures, notwithstanding the absence of a prior state-court adjudication.

We conclude, however, that the District Court should have postponed resolution of appellees' challenge to the criminal penalty provision. That section provides in pertinent part that "[a]ny person . . . who violates any provision of [the Act] is guilty of a . . . misdemeanor." Ariz. Rev. Stat. Ann. § 23-1392 (Supp 1978). Appellees maintain that the penalty provision leaves substantial doubt regarding what activities will elicit criminal sanctions. The District Court so concluded, observing that "[c]onsidering the enormous variety of activities covered by the Act [the penalty section] is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning." 449 F. Supp., at 453. The court elaborated, "There is no way for anyone to guess whether criminal provisions will apply to any particular conduct, in advance, and it is clear that the statute is unconstitutionally vague and does not adequately define prohibited conduct and is, therefore, in violation of the due process clause of the Fourteenth Amendment." *Ibid.*

Appellants, themselves, do not argue that the criminal penalty provision is unambiguous. Indeed, they insist that until the provision is enforced "it is impossible to know what will be considered a 'violatio[n]' of the Act." Brief for

Appellants 37. Appellants submit that various unfair labor practices, for example, have not been treated as yet as criminal violations.

It is possible, however, that the penalty provision might be construed broadly as applying to all sections of the Act that affirmatively proscribe or command courses of conduct. In terms it reaches "[a]ny person . . . who violates any provision of" the Act. Alternatively, the Arizona courts might conclude that only limited portions of the Act are susceptible of being "violate[d]" and thus narrowly define the reach of the penalty section. In either case, it is evident that the statute is reasonably susceptible of constructions that might undercut or modify appellees' vagueness attack. It may be that, if construed broadly, the penalty provision would operate in conjunction with substantive provisions of the Act to restrict unduly the pursuit of First Amendment activities. But it is at least evident that an authoritative construction of the penalty provision may significantly alter the constitutional questions requiring resolution.¹³

We have noted, of course, that when "extensive adjudications, under the impact of a variety of factual situations, [would be required in order to bring a challenged statute] within the bounds of permissible constitutional certainty,"

¹³ The dissent suggests that § 1392 is unambiguous and needs no construction and that abstention is therefore improper. But the District Court invalidated § 1392 on vagueness grounds, and the State's position with respect to the issue is such that we are reluctant to conclude that appellees' challenge to § 1392 on vagueness grounds is without substance and hence that it contains no ambiguity warranting abstention.

If there were to be no abstention regarding § 1392 on the basis that it clearly criminalizes any departure from the command of any provision of the Act, adequate consideration of whether the section is unconstitutionally overbroad would require inquiry into whether some conduct prohibited by the Act is constitutionally shielded from criminal punishment. But that would entail dealing with the validity of provisions about which there may be no case or controversy or with respect to which abstention is the proper course.

abstention may be inappropriate. *Baggett v. Bullitt*, 377 U. S. 360, 378 (1964). But here the Arizona courts may determine in a single proceeding what substantive provisions the penalty provision modifies. In this case, the "uncertain issue of state law [turns] upon a choice between one or several alternative meanings of [the] state statute." *Id.*, at 378. Accordingly, we think the Arizona courts should be "afforded a reasonable opportunity to pass upon" the section under review. *Harrison v. NAACP*, 360 U. S., at 176.

The District Court should have abstained with respect to appellees' challenges to the consumer publicity provision as well. Appellees have argued that Arizona's proscription of misrepresentations by labor organizations in the course of appeals to consumers intolerably inhibits the exercise of their First Amendment right freely to discuss issues concerning the employment of farm laborers and the production of crops. Appellants submit, however, that the statutory ban on untruthful consumer publicity might fairly be construed by an Arizona court as proscribing only misrepresentations made with knowledge of their falsity or in reckless disregard of truth or falsity. As that is the qualification that appellees insist the prohibition of misstatements must include, a construction to that effect would substantially affect the constitutional question presented.

It is reasonably arguable that the consumer publicity provision is susceptible of the construction appellants suggest. Section 23-1385 (B)(8) makes it unlawful "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by use of dishonest, untruthful and deceptive publicity." (Emphasis added.) On its face, the statute does not forbid the propagation of untruths without more. Rather, to be condemnable, consumer publicity must be "dishonest" and "deceptive" as well as untruthful. And the Arizona courts may well conclude that a "dishonest" and

“untruthful” statement is one made with knowledge of falsity or in reckless disregard of falsity.¹⁶ ...

To be sure, the consumer publicity provision further provides that “[p]ermissible inducement or encouragement . . . means truthful, honest and nondeceptive publicity. . . .” (Emphasis added.) That phrase may be read to indicate that representations not having all three attributes are prohibited under the Act. But it could be held that the phrase denotes only that “truthful, honest and nondeceptive publicity” is permissible, not that any other publicity is prohibited. When read in conjunction with the prohibitory clause preceding it, the latter phrase thus introduces an ambiguity suitable for state-court resolution. In sum, we think adjudication of appellees’ attack on the statutory limitation on untruthful consumer appeals should await an authoritative interpretation of that limitation by the Arizona courts.

We further conclude that the District Court should have abstained from adjudicating appellees’ additional contention that the consumer publicity provision unconstitutionally pre-

¹⁶ Although construing the section in this manner would apparently satisfy appellees, we should not be understood as declaring that the section and its criminal sanction would be unconstitutional if they proscribed damaging falsehoods perpetrated unknowingly or without recklessness. We have not adjudicated the role of the First Amendment in suits by private parties against nonmedia defendants, nor have we considered the constitutional implications of causes of action for injurious falsehoods outside the area of defamation and the ground covered by *Time, Inc. v. Hill*, 385 U. S. 374 (1967). *Linn v. Plant Guard Workers*, 383 U. S. 53 (1966), holding that application of state defamation remedies for speech uttered in a labor dispute is dependent upon a showing of knowledge or recklessness, was grounded in federal labor policy, though the case had constitutional overtones.

Furthermore, we express no view on whether the section would be vulnerable to constitutional attack if it declared false consumer publicity, whether innocent or culpable, to be an unfair labor practice and had as its only sanction a prospective cease and desist order or court injunction directing that the respondent cease publishing material already determined to be false.

cludes publicity not directed at the products of employers with whom the protesting labor organization has a primary dispute. We think it is by no means clear that the statute in fact *prohibits* publicity solely because it is directed at the products of particular employers. As already discussed, § 23-1385 (B)(8) declares it an unfair labor practice to induce or encourage the ultimate consumer of agricultural products to refrain from purchasing products "by the use of dishonest, untruthful and deceptive publicity." The provision then stipulates:

"Permissible inducement or encouragement within the meaning of this section means truthful, honest and non-deceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name.

The section nowhere proscribes publicity directed at products of employers with whom a labor organization is not engaged in a primary dispute. It indicates only that publicity ranging beyond a primary disagreement is not accorded affirmative statutory protection. The Arizona courts might reasonably determine that the language in issue does no more than that and might thus ameliorate appellees' concerns.¹⁷

¹⁷ Were the section construed to prohibit all appeals directed against the products of agricultural employers whose employees the labor organization did not actually represent, its constitutionality would be substantially in doubt. Even picketing may not be so narrowly circumscribed. *AFL v. Swing*, 312 U. S. 321 (1941). Additional difficulties would arise were the section interpreted to intercept publicity by means other than picketing. Although we have previously concluded that picketing aimed at discouraging trade across the board with a truly neutral employer may be barred

Moreover, § 23-1385 (B)(8) might be construed, in light of § 23-1385 (C), to prohibit only threatening speech. The latter provision states in pertinent part that “[t]he expressing of any views, argument, opinion or the making of any statement . . . or the dissemination of such views whether in written, printed, graphic, visual or auditory form, if such expression contains no threat of reprisal or force or promise of benefit, shall not constitute or be evidence of an unfair labor practice. . . .” On its face, § 23-1385 (C) would appear to qualify § 23-1385 (B)(8), as the latter identifies “an unfair labor practice for a labor organization or its agents.” § 23-1385 (B). Were the consumer publicity provision interpreted to intercept only those expressions embodying a threat of force, the issue of its constitutional validity would assume a character wholly different from the question posed by appellees’ construction.

Thus, we conclude that the District Court erred in entertaining all aspects of appellees’ challenge to the consumer publicity section without the benefit of a construction thereof by the Arizona courts. We are sensitive to appellees’ reluctance to repair to the Arizona courts after extensive litigation in the federal arena. We nevertheless hold that in this case the District Court should not have adjudicated substantial constitutional claims with respect to statutory provisions that are patently ambiguous on their face.¹⁵

compatibly with the Constitution, *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722 (1942); cf. *NLRB v. Fruit Packers (Tree Fruits)*, 377 U. S. 58 (1964), we have noted that, for First Amendment purposes, picketing is qualitatively “different from other modes of communication.” *Hughes v. Superior Court*, 339 U. S. 460, 465 (1950); see *Buckely v. Valeo*, 424 U. S., at 17; *Teamsters Union v. Vogt, Inc.*, 354 U. S. 284 (1957).

¹⁵ It has been suggested that the impact of abstention on appellees’ pursuit of constitutionally protected activities should be reduced by directing the District Court to protect appellees against enforcement of the state statute pending a definitive resolution of issues of state law by the Arizona courts. See *Harrison v. NAACP*, 360 U. S. 167, 178-179 (1959). But

IV

The merits of appellees' challenge to the statutory election procedures remain to be considered. Appellees contend, and the District Court concluded, that the delays assertedly attending the statutory election scheme and the technical limitations on who may vote in unit elections severely curtail appellees' freedom of association. This freedom, it is said, entails not only the liberty to join or sustain a labor union and collectively to express a position to an agricultural employer, but also to create or elect an organization entitled to invoke the statutory provision requiring an employer to bargain collectively with the certified representative of his employees. As we see it, however, these general complaints that the statutory election procedures are ineffective are matters for the Arizona Legislature and not the federal courts.

Accepting that the Constitution guarantees workers the right individually or collectively to voice their views to their employers, see *Givhan v. Western Line Consolidated School District*, — U. S. — (1979), cf. *Madison School District v. Wisconsin Employment Relations Commission*, 429 U. S. 167, 173–175 (1976), the Constitution does not afford such employees the right to compel employers to engage in a dialogue or even to listen. Accordingly, Arizona was not constitutionally obliged to provide a procedure pursuant to which agricultural employees, through a chosen representative, might compel their employers to negotiate. That it has undertaken to do so in an assertedly niggardly fashion, then, presents as a general matter no First Amendment problems.¹⁹

this is a matter that is best addressed by the District Court in the first instance.

¹⁹ We do not consider whether the election procedures deny any of the appellees equal protection of the law. Although appellees have challenged other provisions of the Act on equal protection grounds, they have not directed such an argument in this Court against the section governing election procedures. We understand appellees' equal protection challenge to embrace the sections pertaining to access to an employer's property and

Moreover, the Act does not preclude voluntary recognition of a labor organization by an agricultural employer. Thus, in the event that an employer desires to bargain with a representative chosen by his employees independently of the statutory election procedures, such bargaining may readily occur. The statutory procedures need be pursued only if farm workers desire to designate exclusive bargaining representatives and to compel their employer to bargain—rights that are conferred by statute rather than the Federal Constitution. Accordingly, at this time, we are unable to discern any First Amendment difficulty with the Arizona statutory election scheme, whether or not the procedures are as fair or efficacious as appellees would like.

Reversed and remanded.

consumer publicity. But we have determined that appellee's assault on the first provision is premature and that appellees' attack on the second should be held in abeyance pending resort to the Arizona courts.

SUPREME COURT OF THE UNITED STATES

No. 78-225

Bruce Babbitt, Governor of the State of Arizona, et al., Appellants,	} On Appeal from the United States District Court for the District of Arizona.
v. United Farm Workers National Union, Etc., et al.	

[June 5, 1979]

MR. JUSTICE BRENNAN with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join the opinion of the Court, with the exception that I respectfully dissent from the Court's holding that the District Court should have abstained and postponed resolution of appellees' constitutional challenge to § 23-1392, Ariz. Rev. Stat. Ann. (Supp. 1978), until this statutory provision had been construed by the Arizona courts.

It must be stressed that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. . . .' *County of Allegheny v. Frank Mashuda Co.*, 360 U. S. 185, 188 (1959)." *Colorado River Water Conservation District v. United States*, 424 U. S. 800, 813 (1976). If a state statute is susceptible of a construction that would avoid or significantly alter a constitutional issue, however, abstention is appropriate to avoid needless friction "between federal pronouncements and state policies." *Reetz v. Bozanich*, 397 U. S. 82, 87 (1970). But, as the Court today correctly points out, the state statute at issue must be "'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question,' [*Harman v. Forssenius*, 380 U. S. 528,] 535 [1965]." *Ante*,

at 15. (Emphasis supplied.) This is not the case with § 23-1392.¹

Section 23-1392 provides in part:

“Any person who . . . violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year, or both. Provided, however, that none of the provisions of this section shall apply to any activities carried on outside the state of Arizona.”

The District Court concluded concerning this provision that “[i]t would appear on [its] face . . . that it cuts across and covers the entire [Arizona Agricultural Employment Relations] Act, not just a limited area where a criminal penalty might be acceptable. It says in plain English that it applies to ‘any person’ and further [that] any person ‘who violates any provision of this article is guilty of a misdemeanor . . .’” 449 F. Supp. 449, 453 (Ariz. 1978). The District Court found the provision unconstitutionally overbroad.² *Ibid.*

The District Court is clearly correct that the language of § 23-1392 is “plain and unambiguous.”³ *Davis v. Mann*, 377

¹ Because of the ambiguous relationship between § 23-1385 (C) and § 32-1385 (B) (8), I concur in the Court’s holding that the District Court should have abstained with respect to § 23-1385 (B) (8).

² The District Court also found § 23-1392 to be “unconstitutionally vague.” 449 F. Supp., at 453. The Court stated:

“Considering the enormous variety of activities covered by the Act, and the fact that . . . many of these involve First and Fourteenth Amendment constitutional rights, it is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning. . . . There is no way for anyone to guess whether criminal provisions will apply to any particular conduct, in advance, and it is clear that the statute is unconstitutionally vague and does not adequately define prohibited conduct and is, therefore, in violation of the due process clause of the Fourteenth Amendment.” *Ibid.*

³ The fact that § 23-1392 is, for purposes of the abstention doctrine, “plain and unambiguous,” does not necessarily mean that it cannot be unconstitutionally vague for purposes of the Due Process Clause of the

U. S. 678, 690 (1964). The statute is not "obviously susceptible of a limiting construction" that would avoid the federal constitutional question reached by the District Court. *Zwickler v. Koota*, 389 U. S. 241, 251 n. 14 (1967). Of course, as every attorney knows, any statutory provision can be made ambiguous through a sufficiently assiduous application of legal discrimination. The Court resorts to such lawyerly legerdemain when it concludes that abstention is appropriate because Arizona courts might perhaps find "that only limited portions of the [Agricultural Employment Relations] Act are susceptible of being 'violate[d]' and thus narrowly define the reach of the penalty section." *Ante*, at 17. But the potential ambiguity which the Court thus reads into § 23-1392 does not derive from the plain words of the statute. It is simply the Court's own invention, not an uncertainty that is "fairly" in the statute.⁴

Abstention is particularly inappropriate with respect to

Fourteenth Amendment. The section may plainly and unambiguously create criminal sanctions for violations of sections of the Act which, considered as criminal prohibitions, would be unconstitutionally vague.

⁴Even if the statute were ambiguous in the manner suggested by the Court, abstention would still be inappropriate. It is extraordinarily unlikely that, in a statute as complex and far ranging as this Act, a single adjudication could definitively specify the exact reach of § 23-1392. In such circumstances, we have held that a federal court should not abstain from exercising its jurisdiction. As we stated in *Procurier v. Martinez*, 416 U. S. 396, 401 n. 5 (1974):

"Where . . . , as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. [*Baggett v. Bullitt*, 377 U. S. 360,] 378 [1964]. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather, it would require 'extensive adjudications, under the impact of a variety of factual situations,' to bring the challenged statute or regulation 'within the bounds of permissible constitutional certainty.' *Ibid.*"

§ 23-1392 because the provision impacts so directly on precious First Amendment rights. The statute creates sanctions for violations of the provisions of the Agricultural Employment Relations Act that regulate the speech of employees and employers.⁵ This potential impairment of First Amendment interests strongly counsels against abstention. "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the 'special circumstances.' *Propper v. Clark*, 337 U. S. 472, prerequisite to its application must be made on a case-by-case basis. *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496, 500; *NAACP v. Bennett*, 360 U. S. 471." *Baggett v. Bullitt*, 377 U. S. 360, 375 (1964). Relevant to the exercise of this equitable discretion, are "the constitutional deprivation alleged and the probable consequences of abstaining." *Harman v. Forssenius*, 380 U. S. 528, 537 (1965). "This Court has often remarked that the equitable practice of abstention is limited by considerations of 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' *Lake Carriers' Assn. v. MacMullan*, 406 U. S., at 509, quoting *England v. Medical Examiners*, 375 U. S. 411, 418 (1964)." *Bellotti v. Baird*, 428 U. S. 132, 150 (1976). Therefore, when "consti-

⁵ Section 1385 (B) (S), for example, makes it an unfair labor practice "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name." Section 23-1392 makes violation of § 23-1385 (B) (S) a crime.

tionally protected rights of speech and association." *Baggett v. Bullitt*, *supra*, at 378, are at stake, abstention becomes especially inappropriate. This is because "[i]n such a case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota*, *supra*, at 252.

Even assuming that appellees have the financial resources to pursue this case through the Arizona courts, appellees may well avoid speech that is perhaps constitutionally protected throughout the long course of that litigation, because such speech might fall within the cold shadow of criminal liability.⁶ The potential for this self-censorship is abhorrent to the First Amendment. It should be permitted by a court in equity only for the most important of reasons. It cannot be tolerated on the basis of the slender ambiguity which the Court has managed to create in this statute. Abstention on this issue is therefore manifestly unjustified.⁷

⁶ Appellees may be deterred from constitutionally protected speech even if the regulations which the Agricultural Employment Relations Act otherwise imposes on their speech are permissible under the First Amendment. This is because criminal sanctions discourage speech much more powerfully than do administrative regulations. Such sanctions would thus be more apt to cause employers and employees to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U. S. 513, 526 (1958), and more likely to contract the "breathing space" necessary for the survival of "First Amendment freedoms." *NAACP v. Button*, 371 U. S. 415, 433 (1963). For this reason, it does not follow that because the First Amendment permits certain speech to be regulated, it must also permit such speech to be punished. See *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 348-350 (1974).

⁷ Because of the First Amendment interests involved, my view is that the District Court on remand should issue an injunction "to protect appellees against enforcement of the state statute pending a definitive resolution of issues of state law by the Arizona courts. See *Harrison v. NAACP*, 360 U. S. 167, 178-179 (1959)." *Ante.* at 21 n. 18.

APPENDIX VIII

ARIZONA REVISED STATUTES
SECTIONS 32-1381 to 23-1395

ARTICLE 5. AGRICULTURAL EMPLOYMENT RELATIONS

Article 5, consisting of sections 23-1381 to 23-1395, was added by Laws 1972, Ch. 137, § 1, effective August 13, 1972.

Law Review Commentaries

Farm Labor Act, preliminary survey. 14 Ariz. Law Rev. 786 (1972).
Farm Labor law, a constitutional analysis. Jonathan Rose. Law & Soc. Order, 1973, p. 373.

Farm labor law, an interpretive and comparative analysis. Warren H. Cohen and Jonathan Rose. Law & Soc. Order, 1973, p. 313.

§ 23-1381. Declaration of policy

It is hereby declared to be the policy of this state that the uninterrupted production, packing, processing, transporting, and marketing of agricultural products is vital to the public interest. It is also declared to be the policy of this state that agricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts establishing their wages and terms and conditions of employment; or to refrain from engaging in any or all such activities. It is further declared that there now exists an inequality of bargaining power between agricultural employers and labor unions, arising out of the seasonable character and perishable nature of such agricultural products, the mobility of agricultural labor, and the fundamental differences between agriculture and industry. While the right to strike is a basic right of organized labor, such right must take into account the perishable character and the seasonal nature of agricultural products and must be limited and regulated accordingly. It is the intent of the legislature to provide a means to bargain collectively which is fair and equitable to agricultural employers, labor organizations and employees; to provide orderly election procedures to resolve questions concerning representation of agricultural employees and to declare that certain acts are unfair labor practices which are prohibited and subject to control by the police power of this state. The overriding special interest of the state of Arizona with respect to certain secondary boycott activities originating in this state, but extending across state lines and directed at employers in other states, must be recognized, and such acts must be made unlawful and subject to control by the police power of this state. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of *United Farm Workers Nat. Union v. Babbitt* (D.C.1978) 449 F.Supp. 448. See *Notes of Decisions, post*.

Laws 1972, Ch. 137, § 2 made an appropriation.

1. Validity

Invalidity of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. *United Farm Workers Nat. Union v. Babbitt* (D.C.1978) 449 F.Supp. 449.

If the plaintiffs were correct in contentions that many provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., are unconstitutional and void on their face, a substantial federal question would exist as to the constitutional rights infringed upon by such act thus affording three-judge district court jurisdiction. *Id.*

§ 23-1382. Definitions

In this article, unless the context otherwise requires:

1. "Agricultural employee, permanent" means any employee over sixteen years of age who has been employed by a particular agricultural employer for at least six months during the preceding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. "Agricultural employee,

temporary" means any employee over sixteen years of age who is employed by a particular agricultural employer and who has been so employed during the preceding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. If otherwise qualified, a person shall be considered an agricultural employee if an agricultural employer pays the wages of the employee for work performed for the employer's benefit or on his behalf, even though the supervision of the employee, the bookkeeping, and the issuance of payroll checks is by a person other than the employer. In calculating a work day of an agricultural employee, one hour or more of employment in any one day shall be considered a work day. "Agricultural employee" also includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. "Agricultural employee" does not include any individual:

- (a) Employed by his parent, spouse or by an immediate relative.
- (b) Having the status of an independent contractor.
- (c) Employed as a supervisor or in a confidential capacity or as a clerical employee or as a guard.
- (d) Employed as an executive, professional or technical employee.
- (e) Who has quit or has been discharged for cause.
- (f) Who is a tenant or sharecropper and reasonably directs or shares in the management of an enterprise engaged in agriculture.
- (g) Engaged in hauling or stitching functions.

2. "Agricultural employer" means any employer engaged in agriculture who employed six or more agricultural employees for a period of thirty days during the preceding six-month period, and includes any person who provides labor and services on one or more farms as an independent contractor if such person, for a period of thirty days during the preceding six-month period, employed six or more employees in such work. In calculating the number of agricultural employees employed by an agricultural employer or provided by an independent contractor, one hour or more of employment in any one day shall be considered a day of work. "Agricultural employer" also includes any employer, engaged in agriculture with less than six agricultural employees, who voluntarily elects to be subject to this article by filing a request in writing with the board.

3. "Agriculture" means all services performed on a farm as defined and described in § 23-603, including, but not limited to, the recruiting, housing and feeding of persons employed or to be employed as agricultural employees by agricultural employers.

4. "Board" means the agricultural employment relations board.

5. "Farm" means any enterprise engaged in agriculture which is operated from one headquarters where the utilization of labor and equipment is directed and which, if consisting of separate tracts of land, such tracts are located within a fifty mile radius of such headquarters.

6. "Labor dispute" means any controversy between an agricultural employer and his agricultural employees or their representative concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

7. "Labor organization" means any organization or any agency defined and described in §§ 23-1301 and 23-1321.

8. "Person" means one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers.

9. "Professional employee" means:

(a) Any employee engaged in agricultural work that:

(i) Is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work,

(ii) Involves the consistent exercise of discretion and judgment in its performance,

(iii) Is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, or

(iv) Requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.

(b) Any employee who has completed the course or courses of specialized intellectual instruction and study described in subdivision (a), item (iv), and is performing such work, or is performing such work or related work under the supervision of a professional person while acquiring such specialized instruction.

10. "Representative" means any individual or labor organization.

11. "Supervisor" means any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if such authority requires the use of independent judgment.

12. "Ultimate consumer" means the person who purchases an agricultural product for consumption.

13. "Unfair labor practice" means any unfair labor practice listed in § 23-1385. Added Laws 1972, Ch. 137, § 1.

Termination*The agricultural employment relations board shall terminate on July 1, 1980, unless continued. See §§ 41-2261 and 41-2263.***Validity***This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 443. See Notes of Decisions, post.***1. Validity**

Invalidity of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional

in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.

23-1383. Rights of employees

A. Agricultural employees shall have the right to self-organization, to bargain directly for themselves, and to form and join or assist labor organizations to bargain collectively through representatives of their own free choosing, or to engage in lawful concerted activity for the purpose of collective bargaining or other mutual aid or protection, and each such employee shall have the right, without interference from any source, to refrain from any and all of such activities.

B. Agricultural employees shall also have those rights more particularly defined and described in articles 1 and 3 of this chapter, and shall be protected from the practices described in article 4 of this chapter. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

Cross References

Unfair labor practices, see § 23-1385.

1. Validity

Invalidation of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required

conclusion that act is unconstitutional in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. *United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.*

§ 23-1384. Rights of employer

A. An agricultural employer shall have the following management rights:

1. To manage, control and conduct his operations, including, but not limited to, the number of farms and their locations, methods of carrying on any operation or practices thereon, kinds of crops, time of work, size and make-up of crews, assignment of work, and places of work.
2. To hire, suspend, discharge or transfer employees in accordance with his judgment of their ability.
3. To determine the type of equipment or machinery to be used, the standards and quality of work, and the wages, hours and conditions of work. The terms of employment relating to wages, hours, conditions of work, and matters of worker safety, sanitation, health and the establishment of grievance procedures directly relating to a job shall be subject to negotiation.
4. To work on his own farm in any capacity at any time.
5. To join or refuse to join any labor organization or employer organization. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

1. Validity

Invalidation of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional

in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. *United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.*

§ 23-1385. Unfair labor practices

A. It shall be an unfair labor practice for an agricultural employer:

1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 23-1383 and articles 1 and 3 of this chapter,¹ or to violate the protection of employees from the practices described in article 4 of this chapter.²
2. To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. An agricultural employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
3. By discrimination in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.
4. To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this article.
5. To refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 23-1389. Nothing in this article shall be construed as requiring an agricultural employer to bargain collectively until a representative of his agricultural employees has been determined by means of a valid secret ballot election.

6. To discharge or otherwise discriminate against any person because he has filed charges or given testimony before the board or a court.

7. To threaten to have discharged any agricultural employee, or threaten to have reduced wages of any agricultural employees, solely because of any labor activity.

B. It shall be an unfair labor practice for a labor organization or its agents:

1. To impose any economic sanction or to restrain or coerce agricultural employees in the exercise of their rights or to coerce or intimidate any employee in the enjoyment of his legal rights provided by this article, or to intimidate his family, picket his domicile or injure the person or property of any employee or his family. This paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

2. To threaten or impose any economic sanction or reprisal against any person not a member of the labor organization in the exercise of rights under this article, including but not limited to the right to refrain from any or all concerted activity, or against any person, not a member thereof, who refrains from compliance with a union rule, policy, or practice which establishes or affects wages, hours, or working conditions at such person's place of employment.

3. To restrain, coerce, or threaten or impose any fine or other economic sanction against any person who invokes the processes of the board, or the court, or against an agricultural employer or employee in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

4. To refuse to bargain collectively with an agricultural employer, provided it is the majority representative of his agricultural employees as determined pursuant to § 23-1389.

5. To cause or attempt to cause an agricultural employer:

(a) To pay or deliver or agree to pay or deliver any money or other thing of value for services which are not performed or are not to be performed.

(b) To establish or alter the number of employees to be employed or the assignment thereof.

(c) To assign work to the employees of a particular employer.

(d) To discriminate in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Nothing in this paragraph shall prohibit agreements between labor organizations and agricultural employers which regulate hiring and tenure of employment on the basis of seniority; provided further that the labor organization is not given power to determine seniority unilaterally.

6. To engage in a secondary boycott as defined in § 23-1321.

7. To induce or encourage or threaten, restrain or coerce any secondary employer or any executive or management employee of any secondary employer to make a management decision not to handle, transport, process, pack, sell or distribute any agricultural commodity of an agricultural employer with whom a labor dispute exists.

8. To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible in-

ducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name.

9. To restrain, coerce or threaten an ultimate consumer to prevent him from purchasing, consuming or using such agricultural product.

10. To threaten or engage in arson, libel, slander, injury to person or property or other violent conduct when the objective is to prevent the preparing for market, transporting, handling, displaying for sale, or selling of any agricultural product.

11. To intimidate, restrain, or coerce agricultural employers in the exercise of the rights guaranteed by § 23-1384.

12. To picket or cause to be picketed, boycott or cause to be boycotted, or threaten to boycott or picket, or cause to be boycotted or picketed, any agricultural employer when the objective is to induce, encourage, force or require an agricultural employer to recognize or bargain with a labor organization as the representative of his agricultural employees, or the agricultural employees of an agricultural employer to accept or select such labor organization as their collective bargaining representative unless such labor organization is currently certified as the representative of such employees:

(a) Where the agricultural employer has lawfully recognized in accordance with this article any other labor organization and a question concerning representation may not appropriately be raised under § 23-1389.

(b) Where within the preceding twelve months a valid election under § 23-1389 has been conducted.

(c) Where a petition has been filed under § 23-1389.

13. To call a strike unless a majority of the employees within the bargaining unit has first approved the calling of such a strike by secret ballot.

C. The expressing of any views, argument, opinion or the making of any statement, including expressions intended to influence the outcome of an organizing campaign, a bargaining controversy, a strike, lockout or other labor dispute, or the dissemination of such views whether in written, printed, graphic, visual or auditory form, if such expression contains no threat of reprisal or force or promise of benefit, shall not constitute or be evidence of an unfair labor practice or constitute grounds for, or evidence justifying, setting aside the results of any election conducted under any of the provisions of this article. A statement of fact by either a labor organization or an agricultural employer relating to existing or proposed operations of the employer or to existing or proposed terms, tenure, or conditions of employment with the employer shall not be considered to constitute a threat of reprisal or force or promise of benefit. No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents.

D. For the purposes of this section, to "bargain collectively" is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment which directly affect the work of employees, or the negotiation of an agreement, or to resolve any question arising thereunder. To "bargain collectively" includes the furnishing of necessary and relevant

Information in connection with the negotiation of an agreement or any issue arising under such agreement, or requiring as a condition for entering into an agreement the execution of a written contract incorporating any agreement reached if requested by either party. The failure or refusal of either party to agree to a proposal, or to the making, changing or withdrawing of a lawful proposal, or the making of a concession shall not constitute, or be evidence, direct or indirect, of a breach of this obligation. The board in any remedial order shall not direct either party to make any concession or agree to any proposal or to make any payment of money except to employees who are reinstated with back pay as provided in § 23-1390. This section shall not require any agricultural employer to bargain collectively with respect to any management rights. "Management rights", as used in this subsection, include but are not limited to the right to discontinue the entire farming operation or any part thereof, to contract out any part of the work thereof not covered by a labor contract, to sell or lease any of the real or personal property involved therein, or to determine the methods, equipment and facilities to be used in producing agricultural products or the agricultural products to be produced.

E. Where there is in effect a collective bargaining contract covering agricultural employees, the duty to bargain collectively also means that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification:

1. Serves a written notice upon the other party to the contract of the proposed termination or modification not less than sixty days prior to the expiration date thereof, or if such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.
2. Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.
3. Continues the contract in full force and effect without resorting to a strike or lockout for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

F. The duties imposed upon agricultural employers, agricultural employees, and labor organizations shall become inapplicable upon an intervening certification of the board, under which the labor organization or individual which is a party to the contract has been superseded as or ceased to be the representative of the employees subject to the provisions of § 23-1389, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any agricultural employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an agricultural employee of the agricultural employer engaged in the particular labor dispute for the purposes of §§ 23-1385, 23-1389 and 23-1390, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Added Laws 1972, Ch. 137, § 1.

¹ Sections 23-1381 et seq. and 23-1341 et seq.
² Section 23-1361.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

Reviser's Note:

In subsection D, the word "paragraph" was changed to "subsection" pursuant to section 41-1304.02.

Cross References

Agricultural employee, loss of status, see § 23-1385.

Petitions for temporary restraining orders, time for hearing, see § 23-1393.
Representation authority, petition to rescind, see § 23-1359.
Unfair labor practice, agricultural employment relations, see § 23-1382.

Law Review Commentaries

Farm labor law, a constitutional analysis. Jonathan Rose, Law & Soc. Order, 1973, p. 373.

Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.

Provision of this section relating to secondary boycotts and recognition picketing as unfair labor practices is invalid on its face as violation of free speech provision of U.S.C.A.Const. Amend. 14. Id.

Provision of this section precluding access by union to workers on employer property is an unconstitutional restriction on U.S.C.A.Const. Amend. 1 exercise of free speech because of private property interests. Id.

Provision of this section imposing restrictions and prohibitions against striking and picketing, including unilateral compulsory arbitration, is unconstitutional in violation of due process clause of U.S.C.A.Const. Amend. 14 and U.S.C.A.Const. Amend. 7 provision for right to trial by jury. Id.

1. Collective bargaining

This section permits collective bargaining for fringe benefits. Op. Atty. Gen. No. 72-24-L.

Index to Notes

Collective bargaining 1
Validity 1/2

1/2. Validity

Invalidity of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. United

§ 23-1386. Agricultural employment relations board; members; terms; appointment

A. There is established an agricultural employment relations board which consists of seven members.

B. The members of the board shall be appointed by the governor. Two of the members shall be appointed as representatives of agriculture employers, two of the members appointed shall be representatives of organized agricultural labor and the three additional members, one of whom shall be the chairman of the board, shall be appointed as representatives of the general public. The term of office of the members shall be five years. Upon the initial appointment, one of the labor representatives shall be appointed for a term of one year, one of the representatives of the general public shall be appointed for a term of one year, one of the agricultural representatives shall be appointed for a term of two years, one of the representatives of the general public shall be appointed for a term of two years, one of the agricultural representatives shall be appointed for a term of three years, one of the labor representatives shall be appointed for a term of four years and one of the public members of the board shall be appointed for a term of five years. Any individual appointed to fill a vacancy of any member shall be appointed only for the unexpired portion of the term of the member he is succeeding. Members of the board may be removed from office by the governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause.

C. Two alternate members shall be appointed to the board by the governor. One of the alternates shall be appointed as a representative of organized agricultural labor and the other as a representative of agriculture. Alternates shall be appointed for terms of five years. Any individual appointed to fill a vacancy of any alternate shall be appointed only for the unexpired portion of the term of the alternate he is succeeding. Alternates may be removed from office by the governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause. No alternate shall participate in deliberations of the board except in the absence of a board member representing his area of interest.

D. There shall be a general counsel of the board who shall be appointed by the governor. The general counsel shall be the exclusive legal representative of the board, shall have final authority, on behalf of the board, with respect to the investigation of charges and the issuance of complaints under § 23-1390 and with respect to the prosecution of such complaints by the board.

and shall have such other duties as the board may prescribe or as may be provided by law. The general counsel shall appoint such assistants as shall be needed to carry out the work of the office.

E. A vacancy on the board shall not impair the right of the remaining members to exercise all of the powers of the board and four members shall at all times constitute a quorum of the board. The board shall have an official seal which shall be judicially recognized.

F. The principal office of the board shall be in the city of Phoenix, but it may meet and exercise any or all of its powers at any other place.

G. The board may meet in executive session upon the decision of a majority of the members of the board.

H. Meetings of the board may be called by the chairman or by a majority of the members of the board by giving written notice to the chairman who shall notify all the members of the board as to time and place of the board meeting. Added Laws 1972, Ch. 137, § 1.

Termination

The agricultural employment relations board shall terminate on July 1, 1980, unless continued. See §§ 41-2261 and 41-2263.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

1. Validity

Invalidation of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional

in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.

§ 23-1387. Powers and duties

A. The board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the state. A member of the board who participates in any such inquiry shall not be disqualified from subsequently participating in a decision of the board in the same case.

B. The board shall make and may from time to time amend and rescind, in the manner prescribed by law, such rules and regulations as may be necessary to carry out the provisions of this article.

C. The board may also establish offices in such other cities as it shall deem necessary and shall determine the region to be served by such offices. The board may delegate to the heads of these offices as it deems appropriate its powers under § 23-1389, to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists and to direct an election by a secret ballot and certify the results of such election within ten days. The board may review any action taken pursuant to the authority delegated under this subsection by any regional officer upon a request for a review of such action filed with the board by any interested party. Any such review made by the board shall not, unless specifically ordered by the board, operate as a stay of any action taken by the regional officer. The entire record considered by the board in considering or acting upon any such request or review shall be made available to all parties prior to such consideration or action, and the board's findings and action thereon shall be published as a decision of the board. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

- | | |
|--|--|
| <p>1. Validity
 Invalidation of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional</p> | <p>in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. <i>United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.</i></p> |
|--|--|

§ 23-1388. **Officers and employees of the board**

- A. The board shall have authority to appoint an executive secretary and such attorneys, hearing officers, trial examiners and other employees as it may from time to time find necessary for the proper performance of its duties. * Compensation for all such personnel shall be as determined pursuant to §.38-611.
- B. The board may not employ any attorney for the purpose of reviewing transcripts of hearings or preparing drafts of opinions, except that any attorney employed for assignment as a legal assistant to any board member may for such board member review such transcripts and prepare such drafts.
- C. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the board or his legal assistant, and no trial examiner shall advise or consult with the board with respect to exceptions taken to his findings, rulings or recommendations.
- D. Attorneys appointed under this section may, at the discretion of the board, appear for and represent the board in any case in court. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

- | | |
|--|--|
| <p>1. Validity
 Invalidation of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional</p> | <p>in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. <i>United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.</i></p> |
|--|--|

§ 23-1389. **Representatives and elections**

- A. Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. If ratification of any such contract is required, the right to vote in such ratification shall be limited to the employees in the bargaining unit. Any individual agricultural employee or a group of agricultural employees may at any time present grievances to their agricultural employer and have such grievances adjusted, without the intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. The bargaining representative shall be given opportunity to be present at such adjustment.
- B. The board shall decide in each case whether in order to ensure to employees the fullest freedom in exercising their rights the unit appropriate for the purposes of collective bargaining shall consist of either all temporary agricultural employees or all permanent agricultural employees of an agricultural employer working at the farm where such employer grows or produces agricultural products or both. In making unit determinations the extent of a union's extent of organization shall not be controlling. Principal

factors should be the community of interest between employees, same hours, duties and compensation, the administrative structure of the employer and control of labor relations policies.

C. The board shall investigate any petition, and if it has reasonable cause to believe that a question of representation exists shall provide for an appropriate hearing upon due notice, when such petition has been filed in good faith in accordance with such regulations as may be prescribed by the board:

1. By an agricultural employee or group of agricultural employees or any individual or labor organization acting in their behalf alleging that thirty per cent or more of the number of agricultural employees in the unit in question either wish to be represented for collective bargaining and that their employer declines to recognize their representative or assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative.

2. By an agricultural employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative or that an individual or labor organization which has previously been certified as the bargaining representative is no longer a representative.

D. If the board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. If a second labor organization files a petition for an election alleging that thirty per cent or more of the employees in the unit in question desire to be represented by that labor organization, then the board shall require that the names of both labor organizations shall appear on the ballot. In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the choices receives a majority vote, a second election shall be held. The second election shall be between the union receiving the highest number of votes and "no union". In any election a labor organization shall obtain a majority of all votes cast in that election in order to be certified as the bargaining representative of all the employees in that unit.

E. In determining whether or not a question of representation exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought. In no case shall the board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with § 23-1390.

F. Within five days of receipt of such a petition, the agricultural employer may file a challenge to such petition on the ground that the authorization for the filing of such petition is not current or that such authorization has been obtained by fraud, misrepresentation or coercion. Such petition shall not act to stay the election proceeding but if it is thereafter determined that the authorizations are not current or obtained by fraud, misrepresentation or coercion the petition will be dismissed.

G. No election shall be directed or conducted in any bargaining unit or any subdivision thereof within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this article in any election conducted within three months after the commencement of the strike. Any agricultural employee who is found to have sought or accepted employment only for the purpose of affecting the outcome of an election shall not be eligible to vote in an election conducted pursuant to the provisions of this article for a period of twelve months from the date of that election.

H. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the board.

I. The agricultural employer, within ten days after an election is directed by the board or a consent election agreement is approved by the board and on request of the board, shall furnish to the board a list of agricultural employees in the bargaining unit who are qualified to vote, and such a list shall be made available to the organizations or other interested employees involved in the election.

J. Upon the filing with the board, by thirty per cent or more of the agricultural employees in a bargaining unit covered by a certification or by an agreement between their employer and a labor organization made pursuant to § 23-1385, of a petition alleging the desire that such representation authority be rescinded, the board shall conduct an election by secret ballot of the employees in such unit and certify the results thereof to the labor organization and to the employer. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

Cross References

Agricultural employee, loss of status, see § 23-1385.

Certification of facts, inclusion in transcript, see § 23-1390.

Delegation of powers, see § 23-1387.

Unfair labor practices, see § 23-1385.

1. Validity

Because of excessive length of procedures permitting delays of unit representation elections, coupled with seasonal nature of agricultural labor, provision of this section concerning repre-

sentation and election procedures is invalid as being in violation of U.S.C.A. Const. Amends. 1 and 14 concerning freedom of speech and assembly. *United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.*

Invalidity of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. *Id.*

§ 23-1390. Prevention of unfair labor practices

A. The board may, as provided in this section, prevent any person from engaging in any unfair labor practice.

B. When it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board, or any agent or agency designated by the board for such purposes, may issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of such complaint. No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made, unless the person so aggrieved was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the board or the member, agent, or agency conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the superior courts of the state under the rules of civil procedure applicable to such courts. All proceedings shall be reported by a phonographic or magnetic tape recorder.

C. The testimony taken by the board or such member, agent, or agency shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the board determines that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this article. Where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the testimony taken the board determines that the person named in the complaint has not engaged in or is not engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. If the evidence is presented before a member of the board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the board may authorize, such recommended order shall become the order of the board and become effective as therein prescribed.

D. Until the record in a case is filed in a court, as provided in this section, the board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

E. The board may petition any superior court in any county wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order. Upon the filing of such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and may grant such temporary relief or restraining order as it deems just and proper, and may make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. An objection that has not been urged before the board, or a member, agent or agency thereof, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, or a member, agent, or agency thereof, the court may order such additional evidence to be taken before the board, its member, agent, or agency, and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is support-

ed by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review as provided by law.

F. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in any superior court in the county wherein the unfair labor practice in question was alleged to have been engaged in by filing in such court a written petition praying that the order of the board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the board. Upon the filing of such petition the court shall proceed in the same manner as in the case of an application by the board under subsection E of this section, and shall have the same jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. 3

G. When an order of the board made pursuant to this section is based in whole or in part upon facts certified following an investigation pursuant to § 23-1389, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection E or F of this section, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript. The court shall not enforce any order of the board which rests, in whole or in part, upon evidence adduced from witnesses who have not testified under oath and who have not been subject to cross-examination by opposing parties.

H. The commencement of proceedings under subsection E or F of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

I. Petitions filed under this article shall be heard expeditiously, and if possible within ten days after they have been docketed.

J. The board may, upon issuance of a complaint as provided in subsection B charging that any person has engaged in or is engaging in an unfair labor practice, petition the superior court in any county wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper.

K. When it is charged that any person has engaged in an unfair labor practice, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the board, petition the superior court in the county wherein the unfair labor practice in question has occurred, is alleged to have oc-

curred, or wherein the person alleged to have committed the unfair labor practice resides or transacts business, for appropriate injunctive relief pending the final adjudication of the board with respect to such matter. Upon the filing of any such petition the superior court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law, provided that no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon the filing of any such petition the courts shall cause notice thereof to be served upon any person complained against in the charge and such person, including the charging party, shall be given an opportunity to appear in person or by counsel and present any relevant testimony. For the purposes of this subsection, superior court shall be deemed to have jurisdiction of a labor organization either in the county in which such organization maintains its principal office, or in any county in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

Cross References

Agricultural employee, loss of status, see § 23-1385.

Ballots, denial of place, labor organizations, see § 23-1389.

General counsel, agricultural employment relations board, see § 23-1388.

Unfair labor practices, remedial orders, see § 23-1385.

Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.

1. In general

Agricultural employment relations board is authorized to consider unfair labor practices where complaint is made before it and to decide merits of claim. Agricultural Employment Relations Bd. v. United Farm Workers of America, AFL-CIO (1976) 26 Ariz.App. 336, 548 P.2d 429.

2. Special actions

Special action proceeding brought by union in superior court to suspend proceedings before the agricultural employment relations board and to restrain board from assuming jurisdiction over unfair labor practice charges which had been subject of prior action before superior court was an appropriate remedy where it was shown that the Board was purporting to act beyond its jurisdiction. Agricultural Employment Relations Bd. v. United Farm Workers of America, AFL-CIO (1976) 26 Ariz.App. 336, 548 P.2d 429.

Index to Notes

In general 1

Special actions 2

Validity 1/2

1/2. Validity

Invalidation of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. United

§ 23-1391. Investigatory powers

A. The board, or its duly authorized agent or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The board, or any member thereof, shall upon application of any party to such proceedings forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the board to revoke, and the board shall revoke, such subpoena if in its opinion

the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the state of Arizona, at any designated place of hearing.

B. In case of contumacy or refusal to obey a subpoena issued to any person, the superior court of the county within the jurisdiction of which the person guilty of contumacy or refusal to obey is found or resides or transacts business shall, upon application by the board, have jurisdiction to issue to such person an order requiring such person to appear before the board, or a member, agent or agency thereof, to produce evidence if so ordered, or to give testimony touching the matter under investigation or in question. Failure to obey such order of the court may be punished by the court as contempt.

C. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

D. Complaints, orders and other process and papers of the board, or a member, agent, or agency thereof, may be served either personally, by registered or certified mail, by telegraph or by leaving a copy thereof at the principal office, place of business or residence of the person required to be served. The verified return by the individual personally serving or leaving the copy, setting forth the manner of such service, and the return post office receipt or telegraph receipt therefor, when registered or certified, and mailed or telegraphed as provided in this subsection, shall be proof of service. Witnesses summoned before the board, its members, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the superior courts and witnesses whose depositions are taken and the persons taking the depositions shall severally be entitled to the same fees as are paid for like services in the superior courts.

E. The departments and agencies of the state, when directed by the governor, shall furnish the board, upon its request, all unprivileged records, papers and information in their possession relating to any matter before the board. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

<p>1. Validity Invalidity of specific provisions of Arizona Agricultural Employment relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional</p>	<p>In its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.</p>
---	---

§ 23-1392. Violations; classification

Any person who knowingly resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of

duties pursuant to this article, or who violates any provision of this article is guilty of a class 1 misdemeanor. The provisions of this section shall not apply to any activities carried on outside the state of Arizona. Added Laws 1972, Ch. 137, § 1; Laws 1978, Ch. 201, § 367, eff. Oct. 1, 1978.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

For application of Laws 1978, Ch. 201, effective October 1, 1978, see note following § 1-215.

For effective date provision of Laws 1978, Ch. 201, see note following § 1-215.

Cross References

Classification of offenses, see § 13-601 et seq.

Culpable mental state, see § 13-105.

Fines, see § 13-801 et seq.

Sentence of imprisonment, see § 13-701 et seq.

1. Validity

Provision of this section imposing criminal penalties for violations of Arizona Agricultural Employment Relations Act is unconstitutionally vague in viola-

tion of due process. *United Farm Workers Nat. Union v. Babbitt (D.C. 1978) 449 F.Supp. 449.*

Criminal penalty provision of Arizona Agricultural Employment Relations Act, this section, was sufficient in and of itself, as being unconstitutionally invalid and void on its face, to give three-judge district court jurisdiction and create a case or controversy. *Id.*

Invalidity of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1381 et seq., required conclusion that act is unconstitutional in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. *Id.*

§ 23-1393. Court jurisdiction

A. Any person who is aggrieved or is injured in his business or property by reason of any violation of this article, or violation of an injunction issued as provided in this section, may sue in any superior court having jurisdiction of the parties for recovery of any damages resulting from such unlawful action, regardless of where such unlawful action occurred and regardless of where such damage occurred, including costs of the suit and reasonable attorney fees. Upon the filing of such suit the court shall also have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper. Petitions for injunctive relief or temporary restraining orders shall be heard expeditiously. Petitions for temporary restraining orders alleging a violation of § 23-1385 shall be heard forthwith and if the petition alleges that substantial and irreparable injury to the petitioner is unavoidable such temporary restraining orders may be issued pursuant to Rule 65 of the Arizona Rules of Civil Procedure.

B. In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a

market value of five thousand dollars or more shall constitute commercial quantities.

C. For the purpose of this article, superior courts shall have jurisdiction of a labor organization in this state if such organization maintains its principal office in this state, or if its duly authorized officers or agents are engaged in promoting or protecting the interests of agricultural employee members or in the solicitation of such prospective members in this state.

D. The service of summons, subpoena, or other legal process of any superior court upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

E. Any labor organization which represents employees as defined in this article, and any agricultural employer, shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of this state.

F. For the purposes of this article, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. Nothing in this section shall be deemed to preclude an agent being sued both in his capacity as an agent and as an individual. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

Law Review Commentaries

Farm labor law, a constitutional analysis. Jonathan Rose, Law & Soc. Order, 1973, p. 373.

restraining orders and injunctive relief prohibiting such conduct, but a complaint seeking damages is required as a predicate to such action. Agricultural Employment Relations Bd. v. United Farm Workers of America, AFL-CIO (1976) 26 Ariz.App. 336, 548 P.2d 429.

Where complaint in superior court case relating to unfair labor practices by union with respect to alleged secondary boycott did seek damages, superior court had jurisdiction to adjudicate claim of unfair labor practices and to grant injunctive relief and the agricultural employment relations board could not subsequently take jurisdiction to adjudicate the same issues which had been decided in the prior superior court action; defense of res judicata was also available. *Id.*

2. Special actions

Special action proceeding brought by union in superior court to suspend proceedings before the agricultural employment relations board and to restrain board from assuming jurisdiction over unfair labor practice charges which had been subject of prior action before superior court was an appropriate remedy where it was shown that the Board was purporting to act beyond its jurisdiction. Agricultural Employment Relations Bd. v. United Farm Workers of America, AFL-CIO (1976) 26 Ariz.App. 336, 548 P.2d 429.

Index to Notes

In general 1
Special actions 2
Validity 1/2

1/2. Validity

Invalidation of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1331 et seq., required conclusion that act is unconstitutional in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.

1. In general

Under this section giving jurisdiction to superior court over actions for damages resulting from unlawful actions under the Agricultural Labor Relations Act, § 23-1351 et seq., superior court has jurisdiction to determine, without prior adjudication by agricultural employment relations board, that party has engaged, or is continuing to engage in an unfair labor practice and to grant temporary

§ 23-1394. Scope of article

The provisions of this article shall apply only to such persons, labor organizations or activities as are not within the jurisdiction of the National Labor Relations Act¹ or the jurisdictional guidelines established by the national labor relations board. Added Laws 1972, Ch. 137, § 1.

¹ 29 U.S.C.A. § 151 et seq.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

- | | |
|---|---|
| <p>1. Validity
Invalidity of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1331 et seq., required conclusion that act is unconstitutional</p> | <p>in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.</p> |
|---|---|

§ 23-1395. Limitations

A. Nothing in this article, except as otherwise specifically provided, shall be so construed as to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

B. Nothing in this article shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this article shall be compelled to deem such supervisors as agricultural employees for the purpose of any law, either national or local, relating to collective bargaining. Added Laws 1972, Ch. 137, § 1.

Validity

This section was held to be unconstitutional in the case of United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 448. See Notes of Decisions, post.

- | | |
|---|---|
| <p>1. Validity
Invalidity of specific provisions of Arizona Agricultural Employment Relations Act, § 23-1331 et seq., required conclusion that act is unconstitutional</p> | <p>in its entirety by reason of its inseparability and inoperability apart from the provisions found to be invalid. United Farm Workers Nat. Union v. Babbitt (D.C.1978) 449 F.Supp. 449.</p> |
|---|---|