

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KAWAHARA NURSERIES, INC.,)	Case No. 2010-RC-001-SAL
)	
Employer,)	
)	37 ALRB No. 4
and)	(36 ALRB No. 3)
)	(November 22, 2011)
UNITED FARM WORKERS OF)	
AMERICA,)	
)	
Petitioner.)	

DECISION AND ORDER

On June 13, 2011, Investigative Hearing Officer (IHE) Mark Soble issued the attached Recommended Decision in this matter. In his decision, the IHE recommended that the challenges to the ballots of six individuals be overruled, that their ballots be opened and counted, and that the challenges to the ballots of twenty workers be sustained. Both Kawahara Nurseries, Inc. (Employer), and the United Farm Workers of America (UFW, Union or Petitioner) timely filed exceptions to the IHE's Recommended Decision.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the IHE's Decision in light of the exceptions and briefs of the parties and has decided to affirm in part and overturn in part the IHE's rulings, findings and conclusions as noted in this Decision. Specifically the Board overrules the challenges to three individuals challenged by the UFW as alleged supervisors. The Board upholds the IHE's recommendation to overrule the challenges to the three merchandisers who

testified at the hearing. Finally, the Board overrules the challenges to the ballots of twenty merchandisers. The Board holds that the IHE relied on improper evidence to overrule the challenges to three of these individuals and sustains the challenges to seventeen of them. The Board further holds the UFW failed to meet its burden of producing evidence in support of its challenges to the merchandisers' eligibility.

Background

On January 12, 2010, a petition for certification was filed by the Union to represent the agricultural employees of Employer. After the January 19, 2010 election, the initial tally of ballots was as follows: "union," 70; "no union," 68; and 28 unresolved challenged ballots. Twenty-three individuals with the job title "merchandiser" were challenged by the UFW as non-agricultural employees; four individuals were challenged by the UFW as alleged supervisors; and one person was challenged by Board agents as not on the eligibility list.

The Regional Director (RD), in his March 29, 2010 report on challenged ballots, recommended that the challenges to all 23 merchandisers be sustained, reasoning that they were not engaged in agriculture because all of their duties occurred after delivery to market. (Citing *L&A Investment Corp. of Arizona* (1975) 221 NLRB 1206.) The RD recommended that the challenges to three of the alleged supervisors be set for hearing. He also concluded that the challenge to one of the alleged supervisors be overruled and the challenge to the individual not on the eligibility list be sustained. Employer filed exceptions to the RD's report, arguing that the challenges to the 23 merchandisers should be overruled because they were engaged in primary agriculture.

(*Light's Tree Co.* (1971) 194 NLRB 229.) Employer also argued that it was not necessary to hold a hearing on the status of the three alleged supervisors as these individuals did not exercise independent judgment and were “lead persons,” not supervisors.

The Board issued *Kawahara Nurseries, Inc.* (2010) 36 ALRB No. 3 on June 10, 2010. The Board affirmed the RD’s recommendation to set the challenges of the three alleged supervisors for hearing because their status presented material issues of fact. The Board held that while the merchandisers were not engaged in primary agriculture, their work could constitute secondary agriculture because it was in connection with and incident to Employer’s farming operation rather than in connection with a separate commercial enterprise. (*Walling v. Rocklin* (1942) 132 F.2d 3 (applying the Fair Labor Standards Act’s agricultural exemption from jurisdiction)¹; *Rod McLellan Co.* (1968), 172 NLRB 1458.) However, citing *Camsco Produce Co., Inc.* (1990) 297 NLRB 905, the Board further found that the question whether any of the merchandisers regularly handle non-Kawahara plants, thereby taking them out of the ALRB’s jurisdiction, presented material issues of fact and ordered the challenges to these individuals be set for hearing.

¹ Annually, since 1946, Congress, in riders to the Appropriation Acts for the National Labor Relations Board (NLRB), has directed the NLRB to apply the definition of “agriculture” found in section 3(f) of the Fair Labor Standards Act (FLSA) 29 United States Code section 203(f) in construing the term “agricultural laborer.” (See *Bayside Enterprises v. NLRB* (1977) 429 U.S. 298, 300 and fn. 6.)

Summary of IHE's Decision

A. The Merchandisers

The IHE concluded that six of the twenty-three merchandisers did not regularly handle plants from sources other than Kawahara Nurseries and, thus, were eligible to vote (Jordan Forbes, Cristian Juarez Morales, Phyllis Penick-Logan, Angelo Imperial DeCastro, Ralph Garcia and Robert Valencia, Jr.). The IHE concluded that the remaining seventeen merchandisers were not eligible to vote because they regularly handled non-Kawahara plants.

The IHE based his conclusions regarding the eligibility of merchandisers Jordan Forbes, Cristian Juarez and Phyllis Penick-Logan on their hearing testimony, which he fully credited. As to merchandisers Angelo Imperial DeCastro, Ralph Garcia and Robert Valencia, Jr. and the remaining seventeen merchandisers, he based his conclusions solely on a letter dated January 27, 2010, from the Salinas Regional Office to counsel for both parties. This letter was generated during the challenged ballot investigation and contained summaries of the challenged ballot declarations of the twenty-three merchandisers as well as summaries of the challenged ballot declarations of the three alleged supervisors. Angelo Imperial DeCastro, Ralph Garcia and Robert Valencia, Jr. stated in their declarations that they did not merchandise non-Kawahara plants; three other merchandisers stated that they did not know whether they merchandised non-Kawahara plants; and the remaining fourteen merchandisers stated that they did merchandise non-Kawahara plants. This letter was admitted during the hearing as joint hearing exhibit (J-1).

The IHE found that, consistent with exhibit J-1 and in the absence of hearing testimony to the contrary, merchandisers DeCastro, Garcia and Valencia, Jr. also did not merchandise any non-Kawahara plants. With respect to the remaining seventeen merchandisers, the IHE found it was “more likely than not that they did handle non-Kawahara plants on a regular basis.” As to the three merchandisers who stated that they did not know whether or not they handled non-Kawahara plants, the IHE reasoned that “in the absence of any other evidence or testimony, given that fourteen out of twenty Kawahara merchandisers handled other plants, it is statistically slightly more probable that these three merchandisers did so as well.” (IHE Dec. at p. 28.)

B. The Alleged Supervisors

The IHE concluded Miguel Becerra, Maria Elena Cortes and Alfredo Elizondo are supervisors pursuant to 1140.4(j) of the Agricultural Labor Relations Act (ALRA). Specifically, the IHE found that all three individuals regularly made job assignments and responsibly directed work assignments. He also relied on "secondary indicia" of supervisory status, such as higher salaries and the perception of employees that these individuals are supervisors.

Employer's Exceptions to IHE's Decision

Employer excepts to the IHE's conclusion that Miguel Becerra Tovar, Maria Elena Cortes and Alfredo Elizondo were statutory supervisors. The Employer did not except to the IHE's findings and conclusions with respect to the merchandisers.

The Employer argues that no testimony or other evidence indicated that Becerra, Cortes or Elizondo exercised any authority or any actions independently as

supervisors. In Employer's view, most of the testimony had more to do with whether the witnesses believed these individuals were supervisors rather than their actual authority. Employer points out that whether an individual is considered a supervisor by others can be a relevant consideration; however, like salary level, it is one of the "secondary indicia" which are not considered in the absence of the primary indicia listed in 1140.4(j) of the ALRA. (*South Lakes Dairy Farm* (2010) 36 ALRB No. 5 at p. 8, citing *Pacific Beach Corp.* (2005) NLRB 1160.)

The Employer's position with respect to Becerra is that he merely translated instructions from his supervisor to other employees and therefore did not use independent judgment. The Employer argues that Cortes received batch orders from her supervisor and exercised no independent judgment in working with her co-workers to fill the orders. The Employer's position with respect to Elizondo is that he was engaged in clerical work that was incidental to the farming operation.

UFW's Exceptions to IHE's Decision

The UFW's stated exceptions are as follows:

1. The Board should find all merchandisers are commercial employees excluded from the Act;
2. The IHE failed to make rulings regarding the appropriate scope of unit and failed to find that the merchandisers should not be part of the unit;
3. The IHE based his finding that merchandisers Angelo DeCastro, Ralph Garcia, and Robert Valencia, Jr. were eligible to vote not on any evidence presented at the hearing, but on statements made in a letter from Assistant General Counsel Joe Mendoza.

The focus of the UFW's initial exception is that the Board's analysis regarding whether the merchandisers may be engaged in secondary agriculture in *Kawahara Nurseries, Inc., supra*, 36 ALRB No. 3, was incorrect, and the Board should now reconsider its decision. The UFW argues that once Employer's plants reach "the market" (Home Depot and OSH stores), any work related to those plants is commercial, not agricultural.

In addition, the UFW argues that the Board erred in ordering the IHE to determine whether any of the individual merchandisers regularly handled plants not grown by Kawahara. The UFW's position is that the issue should not have been analyzed by examining the job duties of each individual, but by asking whether Kawahara's merchandising department as a whole regularly handled non-Kawahara plants. The UFW argues that in *Camsco Produce, Inc.* (1990) 297 NLRB 905 and the cases applying *Camsco*, boards do not look at individuals' duties; rather, they examine whether an entire department or employer is engaged in commercial activity. As the IHE found that 17 merchandisers did handle "outside" plants, the UFW argues that the inquiry should end there and all 23 merchandisers be deemed to be non-agricultural workers.

Next, the UFW argues that the Board should find that the merchandisers lack a community of interest with the other nursery workers and they should be in a separate bargaining unit. This issue was not explored during the investigatory hearing but was presented as an argument in the UFW's post-hearing brief. The IHE did not

address this argument in his decision because the issue was beyond the scope of what the Board had directed him to evaluate.²

Finally, the UFW argues that the IHE erred in finding that Angelo Imperial DeCastro, Ralph Garcia and Robert Valencia Jr. did not merchandise any non-Kawahara plants. The UFW argues that it was improper for the IHE to base this conclusion on the statements in exhibit J-1, which the UFW argues is a summary of information “from an unknown source.” The UFW’s position is that it was “patently unfair” for the IHE to make factual findings using the letter. The UFW did not dispute the admission of the letter at the hearing; however, the parties did not stipulate to the facts contained in the letter. The UFW argues in footnote 7 on page 15 of its exceptions that because the RD’s challenged ballot report was favorable to the UFW’s position on the merchandisers, the Employer should be viewed as the party who has the burden to produce evidence regarding the merchandisers.

DISCUSSION AND ANALYSIS

A. Are Becerra, Cortes and Elizondo Statutory Supervisors?

Section 1140.4(j) of the ALRA provides:

The term “supervisor” means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the

² The UFW has also filed election objections arguing that the Regional office improperly allowed commercial workers to vote, and objecting to the RD’s unit determination. Those objections remain in abeyance pending the resolution of challenged ballots.

foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In 2006, the National Labor Relations Board (NLRB) issued a series of decisions expanding upon and modifying its interpretations of the terms, “assign,” “responsibly to direct,” and “independent judgment” under their governing legislation. The lead cases among these are *Oakwood Healthcare, Inc.* (2006) 348 NLRB 686 and *Croft Metals, Inc.* (2006) 348 NLRB 717. The Board followed and applied *Oakwood Healthcare, Inc.* and *Croft Metals, Inc.* in *Artesia Dairy* (2007) 33 ALRB No. 3, mod. (2008) 168 Cal.App.4th 598) and *South Lakes Dairy Farms, supra*, 36 ALRB No. 5.³ The guidelines provided by these and related cases are appropriate when evaluating the status of “lead persons” such as we have in the instant case, e.g., individuals who do not have the authority to hire, fire, promote, discipline, etc., and who often work side-by-side with other crew members, but who may still nonetheless perform some other functions within the statutory definition of “supervisor” and do so with independent judgment. (See *Croft Metals, Inc., supra*, 348 NLRB 717, which applied the *Oakwood Healthcare* test to lead persons in an industrial setting.)

It is not necessary that an individual engage in all of the 12 supervisory functions listed in the statute in order to be considered a statutory supervisor; it is

³ The language of section 1140(j) of the ALRA defining the term supervisor is virtually identical to that of section 2(11) of the National Labor Relations Act (NLRA). (29 U.S.C. § 152(11)) Under section 1148 of the ALRA, the Board shall follow applicable precedents of the NLRA; therefore, *Oakwood Healthcare, Inc., supra*, 348 NLRB No. 37 and related cases provide an appropriate framework for analyzing the status of the individuals in the instant case.

sufficient that he/she has the authority to engage in any one of those functions, so long as the authority is exercised with the use of independent judgment. (*NLRB v. Kentucky River Community Care, Inc.* (2001) 532 U.S. 706 at p. 713; *Tsukiji Farms* (1998) 24 ALRB No. 3, ALJD. at pp. 10-11.) (“[Section 1140.4(j) of the ALRA] is worded in the disjunctive, so the presence of any one element is sufficient.”)

Whether an individual is considered a supervisor by others or in his or her own view can be a relevant consideration; however, like salary level, it is considered one of the “secondary indicia” which are not considered in the absence of evidence of the exercise of one of the listed statutory (primary) indicia (such as hiring, firing, assigning work, etc.). (*Pacific Beach Corp., supra*, 344 NLRB 1160 at p. 1161.) Therefore, despite evidence of secondary indicia indicating that Becerra, Cortes and Elizondo are supervisors, ultimately the issue turns on whether there is evidence that they have the authority to exercise at least one of the statutory (primary) criteria using independent judgment. If so, the secondary indicia would bolster that conclusion.

Finally, as a general principle, the NLRB has exercised caution “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied the rights which the Act is intended to protect.” (*Oakwood Healthcare, supra*, 348 NLRB 686 at p. 688 citing *Chevron Shipping Co.* (1995) 317 NLRB 379, 381.) The ALRB has also acknowledged the necessity of proceeding cautiously in finding supervisory status. (*Milky Way Dairy* (2003) 29 ALRB No. 4 at p. 49.)

It is not clear from the IHE's decision on which specific evidence in the record he relied to reach his conclusions that Becerra, Cortes and Elizondo "assign" work or have the "responsibility to direct" workers. Nor is there a discussion whether Becerra, Cortes and Elizondo carry out these functions with "independent judgment." (See IHED pp. 31-32.) Therefore, we begin the analysis anew below.⁴

1. Miguel Becerra Tovar

a. Does Becerra Assign Work?

In *Oakwood Healthcare*, the NLRB construed the term "assign" as referring to

the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee. . . . The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g. night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as 'assign' within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'

(*Oakwood Healthcare, Inc., supra*, 348 NLRB 686 at p. 689.)

Becerra testified that part of his everyday duties was to decide which workers would do which jobs when there were several things that needed to get done in a

⁴ We note that the IHE was correct in assigning the UFW the burden of production as to the workers who were challenged by the UFW. The Board has stated that with respect to evidentiary burdens upon the parties in representation proceedings, the party supporting the challenge to the voter carries a burden of production but not one of persuasion. (*Artesia Dairy* (2007) 33 ALRB No. 3; see also *Milky Way Dairy* (2003) 29 ALRB No. 4 and *Artesia Dairy* (2006) 32 ALRB No. 3.)

day. (RT: I, 62)⁵ He also acknowledged that he decided what needed to be done on a daily basis and had the authority to correct the others' work. (RT: I 78-79; 82) Becerra testified that while there are times when the crew is doing particular jobs like building benches, most of the time the work is based on when something breaks and needs repair. When something needs to be repaired or fixed, Becerra stated that he directs other crew members to do the job, and that he might direct someone else to do the work because he might be busy doing something else. (RT: I, 71; 73-74) Becerra also stated that other crew members might tell him something needs fixing and he would fix it because the crew works as a group. (RT: I, 74) While the question whether Becerra assigns work is a close one, it does appear that Becerra has the authority to assign the other maintenance workers certain significant tasks such as making repairs.

b. Independent Judgment

The authority to assign or responsibly direct other employees does not confer supervisory status unless its exercise requires the use of independent judgment. (*Sam's Club, a Division of Wal-Mart Stores, Inc.* (2007) 349 NLRB 1007 at p. 1014.) Both the National Labor Relations Act (NLRA) and ALRA require that assignments or directions involve the exercise of independent judgment, as opposed to routine decision-making. (See *Artesia Dairy, supra*, 33 ALRB No. 33, IHED at p. 22; *Bright's Nursery* (1984) 10 ALRB No. 18, at ALJD p. 31.) The Supreme Court held in *NLRB v. Kentucky River Community Care, Inc.* that it is the degree of discretion involved in making the

⁵ References to the hearing transcript will be indicated by "RT," followed by the volume number, followed by the page number.

decision, not the kind of discretion exercised, that determines the existence of independent judgment. (*NLRB v. Kentucky River Community Care, Inc.* (2001) 532 U.S. 706, at p. 714.) Purely conclusory evidence, without specific explanation that the purported supervisor in fact exercised independent judgment, does not establish supervisory authority. (*Volair Contractors, Inc.* (2004) 341 NLRB 673, 675; *Dynamic Science, Inc.* (2001) 334 NLRB 391, 393; *Sears, Roebuck & Co.* (1991) 304 NLRB 193.)

In *Oakwood Healthcare*, the NLRB clarified that “independent judgment” means that “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data” provided that the act is “not of a merely routine or clerical nature . . . [A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company rules or policies [or] the verbal instructions of a higher authority....” (*Oakwood Healthcare Inc., supra*, 348 NLRB 686 at p. 693.)

In an effort to further illustrate the degree of discretion necessary to support a finding of independent judgment, the NLRB in *Oakwood Healthcare Inc.* presented several examples in the context of the healthcare industry. The NLRB reasoned that the decision to staff a shift with a certain number of nurses would not involve independent judgment if it were determined by a fixed nurse-to-patient ratio. On the other hand, a registered nurse who weighs the individualized condition and needs of a patient against the skills or special training of available nurse personnel would be exercising independent judgment when she makes assignments. Independent judgment is not involved where there is only one obvious and self-evident choice, for example assigning the only nurse

fluent in American Sign Language (ASL) to a patient dependent on ASL for communicating. (*Id.*) The exercise of independent judgment would be involved where a hospital has a policy that details how a charge nurse should respond in an emergency but gives the nurse the discretion to determine when the emergency exists. Finally, assignments made solely on the basis of equalizing workloads do not involve independent judgment even if they are made free of the control of others and involve forming an opinion by comparing data, because such assignments are routine and clerical in nature. (*Id.* at pp. 693-694.)

In *Croft Metals, Inc., supra*, 348 NLRB 717, lead persons in a factory's maintenance department who received lists of projects from their supervisors that needed to be accomplished each day were found to responsibly direct other employees, but there was insufficient evidence to show that they did so with a degree of discretion that rose above the merely routine or clerical and therefore did not exercise independent judgment. The lead persons mostly worked alongside other crew members who performed the same job or repetitive tasks on a regular basis and, once trained in their positions, required minimal guidance. Furthermore, there was no evidence about the factors weighed by the leads in making production decisions and directing employees. (*Id.* at pp. 721-722.)

In *Sam's Club, a Division of Wal-Mart Stores, Inc., supra*, 349 NLRB 1007, the employee alleged to have been a supervisor was a "team lead" and there was testimony that she directed the work of others and sometimes moved employees around. There was also testimony that she once let an employee go home early because the employee wasn't feeling well. However, the NLRB held she was not a supervisor

because it had not been shown she exercised independent judgment. The record showed that she either checked with management before assigning work, or her movement of personnel was either routine or simply based on the need to get work done. (*Id.* at p. 1014.)

The ALRB has held that an assistant to a ranch foreman who transported irrigators to a worksite, provided them with materials, made sure they moved main water lines, and transferred irrigators to other fields was not a supervisor because he merely carried out instructions of the supervisor and did not exercise independent judgment. (*Taylor Farms* (1994) 20 ALRB No. 8, ALJD at pp. 23-24.) The ALRB has found that foremen who relayed their supervisor's orders to their crew members, checked their work, and insured that the work was done in accordance with their supervisor's instructions did not exercise independent judgment as their decisions were routine and clerical in nature. (*Bright's Nursery, supra*, 10 ALRB No. 18, ALJD at pp. 34-35.)

In contrast, in *Milky Way Dairy*, the ALRB found, in a close case, that a herdsman who made decisions about when to move or treat sick cows and made work assignments to crew members based on their work skills did exercise independent judgment as his exercise of authority was not of a merely routine or clerical nature. (*Milky Way Dairy, supra*, 29 ALRB No. 4, IHED pp. 46-48.)

Whether Becerra exercises independent judgment while assigning work to the maintenance crew presents a very close question. There was credited testimony that due to Supervisor Bill Matsui's limited Spanish, Becerra passed Matsui's assignments on to the rest of the crew, which tends to support a finding that he is merely a conduit of

information. One witness testified that Becerra did not direct others to do work without checking with Matsui first. On the other hand, Becerra had the authority to determine who among the maintenance crew would perform certain tasks on a daily basis without Matsui's input, and he had the authority to correct work if it was not done properly. However, there was no evidence presented about how he made those decisions. Rather, the preponderance of the evidence is that overall assignments came from Matsui and Becerra passed on these instructions to the other workers.

Credited testimony also indicates that Becerra did not direct others to do work without checking with Matsui first. While Becerra admitted that he directs other crew members to do the job when something needs to be repaired or fixed, there was no evidence presented to show that he did so with a degree of discretion that rose above the merely routine or clerical. As in *Croft Metals, supra*, there is simply no evidence about the factors weighed by Becerra in assigning workers to tasks. Rather, the evidence tends to support the conclusion that his decisions were simply based on the need to get work done. Like the lead persons in *Croft Metals*, Becerra mostly worked alongside other crew members who performed the same job or repetitive tasks on a regular basis and, once trained in their positions, required minimal guidance. We find that there is insufficient evidence that Becerra used independent judgment in making assignments to the maintenance crew.

c. Did Becerra effectively recommend a pay raise or the delay of a vacation using independent judgment?

An evaluation form for employee Oscar Santa Maria recommending a pay raise lists Becerra as the reviewer and is signed by him, though the signature indicating "approval" is Matsui's. The credited testimony is that Santa Maria, Becerra and Matsui were all present when the form was filled out and Becerra translated for Matsui.

Although the evaluation comments were written in English by Becerra, the record supports the conclusion that he filled out the evaluation form at Matsui's direction while translating for him. There was no evidence presented that Becerra had any input as to how Matsui should evaluate Santa Maria. Moreover, there was no evidence to indicate that Becerra was regularly involved in employee evaluations; rather, this appears to have been an isolated incident. There is insufficient evidence to show that Becerra exercised independent judgment when filling out the form.

Also in evidence is testimony that Becerra appeared to delay a vacation that had been granted to Antero Jimenez by Supervisor George Mendoza. However, there is no objective evidence that this was Becerra's decision—the only evidence is Jimenez's perception that the delay was due to Becerra's order. The burden was on the UFW to produce evidence that Becerra used independent judgment to delay the vacation, and this burden was not met.

Based on the discussion above, we hold that the preponderance of evidence in the record does not indicate that Becerra was a supervisor under Section 1140.4(j) of the ALRA. Therefore, we overrule the challenge to Becerra.

2. Maria Elena Cortes

a. Does Cortes Assign Work?

Maria Elena Cortes has worked for Kawahara for five or six years. She works as a “lead puller” with a group of other workers who pull plants from the greenhouses and other locations to fill batch orders given to her by her supervisor, Alberto George. (RT: II, 233-237)⁶ Cortes then shares the batch orders with the other pullers in her work group, and they decide how to most efficiently gather the plants and fill the order.

While Cortes does have authority to determine who among the pullers in her zone would perform certain tasks and the order of the tasks, there is no evidence that she prepares the batch orders or chooses the general work assignments of the pullers. The batch orders come from George, and she distributes portions of the written orders to her co-workers.

As discussed above in *Oakwood Healthcare*, the NLRB stated that “the assignment of an employee to a certain department (e.g., housewares) or to a certain shift

⁶ The IHE did not credit any of Cortes’ testimony because of her “high propensity for hyperbole and exaggeration.” We find no basis to overturn the IHE’s credibility determinations. The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1, fn. 1; *Standard Drywall Products* (1950) 91 NLRB 544, enf’d. (3d Cir. 1951) 188 F.2d 362.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ’s credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*S & S Ranch, Inc.* (1996) 22 ALRB No. 7, at pp.3-4)

(e.g., night) or to certain significant tasks (e.g., restocking shelves) would generally qualify as ‘assign’ within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” (*Oakwood Healthcare, Inc., supra*, 348 NLRB 686 at pp. 688-689.) Cortes’ duties are more in line with choosing the order in which the employees will perform discrete tasks within the assignments she receives from her supervisor. This does not rise to the level of assignment within the definition provided in *Oakwood Healthcare*; however, it could constitute responsibly directing work.

b. Does Cortes Responsibly Direct Work?

The NLRB stated in *Oakwood Healthcare* that the authority responsibly to direct work arises “if a person on a shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it’ provided that the direction is both responsible and carried out with independent judgment.” (*Oakwood Healthcare Inc., supra*, 348 NLRB 686 at p. 690.) The authority “responsibly to direct” work applies to those individuals who exercise basic supervisory duties but who lack the authority to carry out other supervisory functions such as hiring, firing and disciplining. For the direction to be responsible, the person directing must be accountable for the performance of the task with the possibility of adverse consequences if the task is not completed. (*Oakwood Healthcare, Inc., supra*, 348 NLRB 686 at pp. 690-691.)

As stated above, Cortes has authority to determine who among the pullers in her zone will perform certain tasks, and she makes decisions about the order in which

the tasks will be done to make sure that the batch orders are filled efficiently and correctly. She tells pullers which plants to lift, where to pull the plants from, and where to put them. Cortes is similar to the shift leaders in *A and G, Inc. d/b/a Alstyle Apparel* (2007) 351 NLRB 1287 who assigned workers to one of five different knitting machines at the beginning of each shift. Shift leaders were aware of their co-workers' experience, so machine assignment was considered an easy matter. (*Id.* at ALJD, pp. 1290-1291, 1297-1298.) The record establishes that Cortes directs work; thus, the next question is whether she does so responsibly and with independent judgment.

(1) Is Cortes Accountable for the Crew's Performance?

“To establish accountability for the purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct work and the authority to take corrective action, if necessary.” (*Oakwood Healthcare, Inc., supra*, 348 NLRB 686, at p. 692.) In addition, accountability means that “some adverse consequence must befall the one providing the oversight if the task performed by the employee is not performed properly.” (*Id.*)

The NLRB requires evidence of actual accountability; in other words, the prospect of adverse consequences must be more than merely speculative and must have an effect on that person's terms and conditions of employment. (*Beverly Enterprises-Minnesota, Inc. d/b/a/Golden Crest Healthcare Center* (2006) 348 NLRB 727 at p. 731.) Such an effect may be positive (merit increase, bonus, promotion), or negative (some form of discipline). (*Id.* fn. 13.) The NLRB has also stated that “the concept of accountability creates a clear distinction between those employees whose interests in

directing other employees' tasks align with management from those whose interests in directing other employees is simply the completion of a certain task.” (*Loyalhanna Healthcare Associates* (2008) 352 NLRB 863, ALJD at p. 869.)

Several workers testified that Cortes has the authority to correct their work. If the wrong plant is pulled or a low quality plant is pulled, Cortes will send the puller back for a new one. There was also testimony that she rides her bicycle among the three zones she oversees to make sure the pullers are completing their assignments. There is some evidence in the record that Cortes is accountable for the performance of her group. When management observed that two other lead workers were not managing their groups well, Cortes was put in charge of both of their zones in addition to hers. Thus, there were adverse consequences when the two individuals did not perform their lead roles adequately, while there were positive effects on Cortes as she was “promoted” into a position with more responsibility. The evidence supports a finding that Cortes reviewed each batch order to make sure it was properly done before sending it to her supervisor, Alberto George, and this tends to show that her interests in helping to ensure that the customers who placed the orders are satisfied align with management. Therefore, we find that Cortes responsibly directed the work of her group.

(2) Was Cortes’ responsible direction of work exercised with independent judgment?

The final question with respect to Cortes is whether she acted with independent judgment. As discussed above, “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or

evaluation by discerning and comparing data” provided that the act is not of a “merely routine or clerical nature. . . .” To be independent, the judgment must involve a degree of discretion that rises above the routine or clerical, and the decision cannot be “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” (*Oakwood Healthcare, Inc., supra*, 348 NLRB 686, at p. 693.)

The NLRB has found that jobsite leads who oversaw routine functions and followed established prescribed practices and whose projects involved tasks that were recurrent, predictable and carried out in conformance with supervisors’ specifications did not exercise independent judgment. (*Shaw, Inc. (2007)* 350 NLRB 354 at pp. 354-355.) Similarly, “the assignment of tasks in accordance with an employer’s set practice, pattern or parameters, or based on such obvious factors as whether an employee’s workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition.” (*CGLM, Inc. (2007)* NLRB LEXIS 76 at p. 15, citing *Franklin Home Health Agency (2002)* 337 NLRB 826, 830.) Where a foreman’s designation of which crew members will perform particular functions is based on an employee’s known skills, the choices are essentially self-evident and do not involve the exercise of independent judgment. (*Shaw, Inc., supra*, 350 NLRB 354 at p. 356, fn. 9; citing *Volair Contractors, Inc., supra*, 341 NLRB 673, fn. 10; *S.D.I. Operation Partners, L.P. (1996)* 321 NLRB 111.)

Alberto George presents Cortes with batch orders specifying which plants are needed to fill each order. Cortes then relays that information to her crew, sometimes

by tearing off portions of the order and handing them to at least some of the individuals in her group. While she does have discretion to direct which workers pull which plants and how the orders get filled, she does not have the authority to deviate from the ultimate result; her choices are controlled by the instructions she receives from George. While there was testimony that it is important for a lead person to know how to manage and distribute the other workers in their group, there is no evidence that her decisions in directing the pullers involve the level of discretion exercised by the charge nurses in *Oakwood Healthcare* who weighed the individualized condition and needs of a patient against the skills or special training of available nurse personnel. One of Cortes' crew members testified that it did not matter who pulled which plants, and they all pulled the same plants on different orders. (RT: III, 503) Like the team lead person in *Sam's Club*, *supra*, 349 NLRB 1007, 1013-1014, Cortes' direction of the other pullers was either routine or simply based on the need to get work done.

Moreover, Cortes is similar to the lead persons in *Croft Metals, Inc.*, *supra*, 348 NLRB 717, who received lists of projects from their supervisors that needed to be accomplished each day, mostly worked alongside other crew members who performed the same job or repetitive tasks on a regular basis and, once trained in their positions, required minimal guidance. Cortes' duties can be described as overseeing routine, recurrent, predictable tasks when she and her crew fill the batch orders. This supports a finding that her direction of work is of a routine nature and does not involve the use of independent judgment.

While there is ample evidence that Cortes can tell a worker that he has pulled the wrong kind of plant or a plant that is not aesthetically acceptable, the type and number of plants are dictated by the batch order. As discussed above, a judgment is not independent if it is dictated or controlled by detailed instructions. (*Oakwood Healthcare, Inc., supra*, 348 NLRB 686, p. 693.)

Moreover, there is no evidence that there is a significant degree of discretion involved in deciding whether a plant is acceptable. Crew members also knew which plants to pull by selecting “the one that looks the best, the one that will sell.” (RT: III, 476) As there is not sufficient evidence to show that Cortes acted with independent judgment, we overturn the IHE's conclusion that Cortes was a supervisor under Section 1140.4(j) of the ALRA and overrule the challenge to Cortes.

3. Alfredo Elizondo

Alfredo Elizondo testified that he had worked at Kawahara for 17 years and that he is a “supervisor’s assistant.” (RT: II, 333) His supervisor is his brother, Fidel Elizondo. (RT: II, 335, 349) He has been Fidel’s assistant for approximately four years. Prior to this he was a truck driver. (RT: II, 373) Almost every day Alfredo writes down route information for the company’s truck drivers on a white board following Fidel’s instructions. (RT: II, 359-360, 368) He also testified that he assists Fidel with the Mobile Merchandising Unit employees (MMU’s). (RT: II, 334) Alfredo testified that he possibly talks to Fidel by phone, in person, or by text message between 50 and 100 times a day. (RT: II, 363) Alfredo testified that one of his job duties is to keep track of the

truck drivers' hours. (RT: V, 905) The reason for this is that there are rules limiting the number of hours they can drive in a 15-day period. (RT: V, 905-906)

Noe Martinez is a truck driver who has worked for Kawahara from 2006 until he stopped working in 2010 due to an injury. When he worked for Kawahara's Morgan Hill facility, he would get his daily work assignments from Alfredo. (RT: V, 849-851) Martinez testified that he recalled a meeting with 10 or 12 other truck drivers and Fidel Elizondo that occurred two-and-a-half to three years prior to the hearing. He recalled that Fidel told the drivers that he had taken a higher position at the nursery and would be in charge of more people; therefore, they should call Alfredo if they had any questions. (RT: V, 852-853) Martinez did not recall whether Fidel told them what Alfredo's job title or position would be. (RT: V, 853) Martinez stated that when he finished his route, he would call Alfredo, who would direct him where he needed to go. (RT: V, 854) Alfredo would tell him where to pick up empty plant racks or give him his route for the next day. (RT: V, 856)

Simon Blanco Hernandez worked at Kawahara as a MMU from March 2009 to September or October 2010. (RT:V, 877) He testified that when he started working for Kawahara, there was a meeting with the MMU's and Fidel Elizondo during which Fidel informed them that Alfredo would be in charge of them. (RT: V, 879) When Blanco arrived at work each day, he would report to Alfredo, who would give him his work assignments for the day. (RT: V, 880)

a. Did the meetings in 2008 and 2009 confer supervisory status to Alfredo?

The IHE credited the testimony that there were two meetings, one among the truck drivers and one among the MMU's in which Fidel Elizondo announced that Alfredo was "in charge" and that any questions should be directed to him. However, this alone does not establish that Alfredo had supervisory authority.

Being "in charge" does not establish supervisory authority. (*Dean and DeLuca New York, Inc.* (2003) 338 NLRB 1046, at p. 1048 fn. 13) Foremen described as being in charge at a worksite who served as conduits for carrying out the employer's assignments did not responsibly direct work. (*Shaw, Inc.* (2007) 350 NLRB 354 at p. 356) Moreover, job titles are not dispositive. As the NLRB has held, "The status of a supervisor is determined by an individual's duties, not by his title or job classification." (*T.K. Harvin & Sons, Inc.* (1995) 316 NLRB 510, 530).

b. Did Alfredo have authority to effectively recommend discipline or other actions to management?

The IHE surmised that Alfredo "had unlimited access to his brother Fidel, should he want to recommend" discipline or termination of workers. (IHED at p. 29) However, nothing in the record indicates that Alfredo ever made any such recommendations to Fidel, nor does the record support such an inference. When Noe Martinez had a dispute with management over 80 hours of vacation pay that he believed he was owed, he met with Human Resources Manager Anthony Banda, who called Alfredo into the meeting. (RT: V, 864) However, there is no evidence that Alfredo exercised any influence over Banda's decision. Because one of Alfredo's duties is to

keep track of drivers' hours, it is possible that he attended the meeting to provide records, although the record does not specify this. In any event, there is insufficient evidence to support a finding that Alfredo recommended discipline or any other actions to management.⁷

c. Did Alfredo Assign Work?

The IHE concluded that Alfredo assigned work to the Spanish-speaking drivers while Fidel Elizondo assigned work to the English-speaking drivers (IHED at p. 29); however, there was no evidence of this division. In fact, when Fidel testified at the hearing, he stated that he was more comfortable testifying in Spanish and spoke only “a little” English. (RT: V, 962)

Alfredo is similar to the lead persons in *Croft Metals, Inc., supra*, 348 NLRB 717. He does not prepare the posted route schedules, nor does he give significant overall duties to drivers and MMU employees after they have completed their regular tasks and returned to the nursery. Rather, his requests that employees help with picking up garbage, condensing plastic wrap, sending additional help to the pullers, etc., more closely resemble “ad hoc instruction that the employee perform a discrete task,” and as such do not rise to the level of assigning work. (*Croft Metals, Inc., supra*, 348 NLRB 717 at p. 722 citing *Oakwood Healthcare Inc., supra*, 348 NLRB 686 at p. 689.)

⁷ There was testimony from several truck drivers that they asked Alfredo verbally for time off and he granted it. However, authority to grant or deny time off is a secondary indicum of supervisory status which by itself is insufficient to establish supervisory status. (*Pacific Coast M.S. Industries Co.*, (2010) 355 NLRB No. 226 at p. 9 fn. 13, citing *Sam's Club, supra*, 349 NLRB 1007 at p. 1014.)

d. Did Alfredo Responsibly Direct Work?

It would be difficult to conclude that Alfredo's giving drivers their initial routes in the morning is directing work because the record supports the conclusion that the routes had already been planned by Fidel. However, when the drivers and MMU's are finished with their routes and store assignments and return to the nursery, it does appear that Alfredo has some limited authority to direct them at that point, as discussed immediately above in section c.

As previously discussed, for the direction of work to be responsible, the person directing must be accountable for the performance of the task with the possibility of adverse consequences if the task is not completed. There was no evidence presented that would support a finding that Alfredo was accountable for the performance of the drivers when he was directing them to complete tasks around the nursery. Nor was there evidence that Alfredo was accountable for the performance of the MMU's. Therefore, there was insufficient evidence to support a finding that Alfredo responsibly directed work.

e. Did Alfredo Use Independent Judgment?

Even assuming, *arguendo*, that Alfredo responsibly directed workers, his direction of work is of a routine, clerical nature and does not involve the use of independent judgment. There is not sufficient evidence to show that his decisions to send additional help to the puller zones involved independent judgment. As previously discussed, assignments made solely on the basis of equalizing workloads do not involve independent

judgment even if they are made free of the control of others and involve forming an opinion by comparing data, because such assignments are routine and clerical in nature. (*Oakwood Healthcare Inc.*, *supra*, 348 NLRB 686 at pp. 692-693.) Therefore, we find that Alfredo Elizondo was not a supervisor under Section 1140.4(j) of the ALRA. Accordingly, the challenge to Elizondo is overruled.

B. The Merchandisers

As stated above, the IHE found that six of the challenged merchandisers did not handle non-Kawahara plants and, thus, in accordance with our previous decision in 36 ALRB No. 3, were engaged in secondary agricultural work within the jurisdiction of the ALRB. Therefore, he recommended overruling the challenges to their ballots. He recommended sustaining the challenges to the other 17 merchandisers.

The UFW maintains that the work of all merchandisers is commercial work and that the Board's analysis regarding whether the merchandisers may be engaged in secondary agriculture in 36 ALRB No. 3 was incorrect. We find this exception to be an untimely request for reconsideration of the Board's initial decision in this matter, and we find no reason to revisit that decision.

The UFW next argues that the status of the merchandisers should not have been analyzed by examining the job duties of each individual, but by asking whether Kawahara's merchandising department as a whole regularly handled non-Kawahara plants. The UFW argues that in *Camsco Produce, Inc.* (1990) 297 NLRB 905 and the cases applying *Camsco*, boards do not look at individuals' duties rather, they examine

whether an entire department or employer is engaged in commercial activity. We do not find this argument persuasive.

Nothing in *Camsco* indicates that the Board can only consider whether a department as a whole is engaged in commercial activity. Rather, in that case, all of *Camsco*'s "fresh pack" employees performed the same job and all of them regularly handled mushrooms from non-*Camsco* sources. Therefore, there was no reason to evaluate the status of individual or subgroups of employees. In contrast, in some situations employees who may do similar work may or may not be within this Board's jurisdiction. For example, in *Point Sal Growers and Packers* (1983) 9 ALRB No. 57, the Board considered the status of four secretaries who worked in the same office area of the business. The Board found that one secretary performed work incidental to the employer's agricultural operation and was therefore included in the bargaining unit, while three other secretaries performed work which only concerned the employer's commercial packinghouse operation and were excluded as under the jurisdiction of the NLRB.

In the present case, the merchandisers work individually at many different stores and do not necessarily perform the exact tasks. Therefore, the Board must evaluate the merchandisers individually to determine if they are within the Board's jurisdiction.

Next, the UFW argues that the Board should find that the merchandisers lack a community of interest with the other nursery workers and they should be in a separate bargaining unit. This is not an issue that was litigated at the hearing, nor would it have been appropriate to have been absent a consolidated hearing on challenged ballots and election objections. The UFW has filed election objections concerning the placement

of the merchandisers in the bargaining unit. Those objections remain pending before the Executive Secretary pending the outcome of this proceeding. The election objections process is the proper forum for this argument.

The IHE found that the merchandisers who testified, Jordan Forbes, Cristian Juarez and Phyllis Penick-Logan, credibly testified that they do not handle plants from sources other than Kawahara. They engaged in secondary agriculture as their work was in connection with and incident to Kawahara's general agricultural enterprise rather than in connection with a separate commercial enterprise. (*Kawahara Nurseries, supra*, 36 ALRB No. 3; *Walling v. Rocklin, supra*, 132 F.2d 3 at pp. 6-7; *Rod McLellan Co., supra*, 172 NLRB 1458, 1460.) The UFW presented no evidence or witnesses at the hearing to contradict this testimony. We therefore uphold the IHE's decision to overrule the challenges to these individuals.

In finding that Angelo Imperial DeCastro, Ralph Garcia and Robert Valencia, Jr. did not handle non-Kawahara plants and that the remaining 17 merchandisers did regularly handle such plants, the IHE relied solely on the summaries of their challenged ballot declarations contained in joint hearing exhibit J-1.⁸ This exhibit is the only "evidence" in the record regarding the handling of non-Kawahara plants by these merchandisers.

⁸ While the parties stipulated to the admission of this document (see RT: II, 376-379), they did not stipulate to the facts contained in it. On page 3 of the IHE decision, he states that there were no stipulated facts at the hearing. This document was admitted during the testimony of Alfredo Elizondo solely for the purpose of explaining why he may have misunderstood the questions that the ALRB's field examiner asked when she took his challenged ballot declaration following the election. (RT: II, 378)

Exhibit J-1 constitutes double hearsay. The Board has held that in representation hearings "while hearsay testimony is admissible, mere uncorroborated hearsay evidence does not constitute substantial evidence to support a finding of the Board." (*Triple E. Produce v. ALRB* (1983) 35 Cal.3d 42 at p. 52, citing *O.P. Murphy & Sons* (1977) 3 ALRB No. 26, p. 6, fn. 3.) Board regulation section 20370(d) states that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible in civil actions."

In the absence of any corroborating evidence supporting its content, it therefore was improper to rely on Exhibit J-1 to overrule the challenges to DeCastro, Garcia and Valencia and to sustain the challenges to the remaining 17 merchandisers. The state of the record is that there is no reliable evidence indicating that any of these 20 merchandisers regularly handled non-Kawahara plants and, thus, there is no basis to believe that they arguably are under the jurisdiction of the NLRB rather than the ALRB. As the party supporting these challenges, the UFW therefore failed to meet its burden of production to provide evidence in support of the challenges. Therefore, we overrule the challenges to the ballots of these 20 merchandisers.⁹

⁹ Even though there were no exceptions filed to the IHE's decision to sustain the challenges to the 17 merchandisers who stated in their declarations that they either did not know whether they handled non-Kawahara plants or that they did handle non-Kawahara plants, the Board is addressing the status of these individuals because the IHE relied on improper evidence in making his decision to sustain the challenges to their ballots.

ORDER

The challenges to the following voters are overruled:

1. Miguel Becerra Tovar
2. Maria Elena Cortes
3. Alfredo Elizondo
4. Jordan Forbes
5. Christian Juarez- Morales
6. Phyllis Penick-Logan
7. Angelo Imperial De Castro
8. Ralph Garcia
9. Robert Valencia, Jr.
10. Manuel Vasquez
11. Dustin Corey
12. Andrew Lee Koscinski
13. Larry William Howard
14. Lyle Ray Weiss
15. Orlando Carillo
16. Jacob Patrick Morrison
17. James Camillo-Scuderi
18. Justin Coyote Suico
19. Lance Harrison-Brown
20. Eric. D. Fisher, Jr.
21. Julio Cesar Lopez
22. Keith W. Vandertuig
23. Misty Lee Wilson
24. Eric Fimbrez
25. Meg H. Frink
26. Brendan Harada

Because there are election objections pending that could possibly affect whether the merchandisers should be included in the bargaining unit, the ballots of the merchandisers shall be opened and counted separately and their ballots shall be segregated. This will result in reaching two separate tallies, one including the votes of

the merchandisers, and one excluding them. Once the objections are resolved, the appropriate tally will then be used.

DATED: November 22 , 2011

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Carole Migden, Member

CASE SUMMARY

KAWAHARA NURSERIES, INC.
(United Farm Workers of America)

Case No. 2010-RC-001-SAL
37 ALRB No 4
(36 ALRB No. 3)

Background

On January 12, 2010, a petition for certification was filed by the United Farm Workers of America (Union or UFW) to represent the agricultural employees of Kawahara Nurseries, Inc. (Employer). After the January 19, 2010 election, the initial tally of ballots was as follows: "union," 70; "no union," 68, and 28 unresolved challenged ballots. In *Kawahara Nurseries, Inc.* (2010) 36 ALRB No. 3, the Board set for hearing the challenges to three workers alleged to be supervisors. The Board also set for hearing the question of whether any of 23 "merchandisers" regularly handled non-Kawahara plants, thereby taking them out of the ALRB's jurisdiction. If they handled only Kawahara plants, the "merchandisers" were engaged in secondary agriculture, as their work otherwise was in connection with and incident to Employer's nursery operations.

IHE's Decision

The IHE found that six of the twenty-three merchandisers handled only Kawahara plants and overruled the challenges to these workers. He concluded the remaining 17 merchandisers regularly handled non-Kawahara plants and sustained their challenges. The IHE found that the three alleged supervisors made job assignments and responsibly directed work, and were therefore supervisors under section 1140(j) of the Agricultural Labor Relations Act (ALRA). He sustained the challenges to these individuals.

Board Decision

The Board upheld the IHE in overruling the challenges to the three merchandisers who testified at the hearing. The Board found that the IHE improperly relied on uncorroborated hearsay evidence in ruling on the status of the 20 merchandisers who did not testify. As the record contained no other evidence to support these challenges, the Board found that the UFW failed to meet its burden of producing evidence in support these challenges, thus requiring that the challenges to all 20 of these merchandisers be overruled. The Board overturned the IHE's recommendation to sustain the challenges to the three alleged supervisors, finding that the record evidence failed to show that the exercise of any purported supervisory authority required the use of independent judgment as required by the statutory definition of "supervisor."

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KAWAHARA NURSERIES,)	Case No. 2010-RC-001-SAL
INC.,)	
)	
Employer,)	36 ALRB No. 3
)	
and)	
)	
UNITED FARM WORKERS OF)	
AMERICA,)	
)	
Petitioner.)	
)	
)	
)	

Appearances:

For the Employer:

Ronald H. Barsamian
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For the Petitioner:

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DECISION OF THE INVESTIGATIVE HEARING EXAMINER

Before Investigative Hearing Examiner Mark R. Soble

ISSUES

1.) Whether Kawahara Nurseries employees who work inside retail stores such as Home Depot, OSH and Costco maintaining and “fluffing” plants are agricultural workers within the meaning of the Agricultural Labor Relations Act (ALRA), and thus eligible to have voted in the representation election held on January 19, 2010?

2.) Whether Kawahara Nurseries employees Miguel Becerra Tovar, Maria Elena Cortes and Alfredo Elizondo were supervisors within the meaning of the ALRA, and thus ineligible to have voted in the election held on January 19, 2010?

FINDINGS OF FACT

A. **Jurisdiction and Background**

The Investigative Hearing Examiner (IHE) is authorized to take evidence on this matter pursuant to the ALRA (Labor Code sections 1140-1166.3) and the Board’s specific directions in 36 ALRB No. 3 (June 10, 2010).

The Board specifically directed the IHE to take evidence as to whether or not twenty-three “merchandisers” were agricultural employees or not. In its decision, the Board found that the merchandisers’ work was secondary agriculture and thus required a determination of whether those workers handled non-Kawahara plants on a regular basis.

The Board additionally directed the IHE to take evidence on whether three employees were statutory supervisors pursuant to Labor Code section 1140.4, subdivision (j).

B. Stipulated Facts

None.

C. Admissions at Prehearing Conference

None.

D. Testimony

1. The Three Merchandisers Who Testified At The Hearing

a. Jordan Forbes

Jordan Forbes has worked for Kawahara for approximately eighteen months. He works for Kawahara Nursery and Creative Plant Design. He is a “merchandiser”. In January 2010, he worked for Kawahara full-time and now he works for them on weekends. He voted on a rainy day.

Forbes’ duties include going into the nursery at retail stores on non-delivery days and marking prices down, and thinning, picking, cleaning and watering the plants. On a delivery day, he may work to keep things neat and orderly. Sometimes, Forbes moves product into the store after it has been unloaded from the truck. Occasionally, Forbes may need to push a competitor’s product out of the way if it encroached into an area designated for Kawahara Nurseries.

In January 2010, Forbes handled perhaps fifteen to twenty stores including many Home Depots, OSHs and maybe a few Costco. They were located between Palo Alto and Hillsdale. When in the retail store, Forbes wears a Kawahara company shirt with the Kawahara name and logo. In January 2010, Forbes typically worked between 8:00 a.m. and 2:30 p.m., starting with Home Depot because they were open earlier. His plants

would already have on them the Kawahara sku number 748179. Forbes would work in between one and ten stores in a single day and was reimbursed for his mileage.

Forbes was paid both hourly, \$11.00, and his supervisors were Josh Kawahara and John Greiner. At some juncture, Josh Kawahara became more involved in the company and took over from John Greiner managing the merchandisers in the South Bay area. When Greiner was unavailable, Forbes could call Cecil Evans or Greg Yoshi. Forbes did not receive sales bonuses. Forbes has a different type of position than the mobile merchandisers. Mobile merchandisers swap products. Forbes “rarely” came across other Kawahara merchandisers at stores. Forbes rarely interacted with the mobile merchandisers.

b. Cristian Juarez Morales

Cristian Juarez Morales has been a merchandiser for almost three years. As such, he merchandises the product, physically displaying and maintain the plants. He is paid \$13.00 per hour and does not receive a bonus. He receives his hourly salary while driving from store to store and also is reimbursed for mileage.

Cristian Juarez Morales does not help unload the truck and he does not put tags on the plants. His supervisor is John Greiner. He wears a Kawahara company shirt or sweater, but is not required to do so. His work day typically starts at 6:00 a.m. and he works four or five days per week. There is a training or employment manual that describes his duties. Juarez Morales does not recall signing an employment agreement or contract.

On non-delivery days, Juarez Morales cleans and waters the plants. He removes dead leaves and dead flowers. He makes sure that the product looks “presentable or sellable”. He places plants based on whether the plants need full or limited sunlight. He will occasionally pull bad product for pickup. Maybe three times in three years, he has needed to move other vendors’ plants.

He works at the Concord and Martinez Home Depots and sometimes also Pittsburg and Hercules. Sometimes Home Depot employees will tell him not to water because the drains are clogged. He does not physically go to the nursery itself.

Morales rarely came across other Kawahara merchandisers at retail stores, perhaps only following two or three particularly large deliveries per year.

c. Phyllis Penick-Logan

Phyllis Penick-Logan has worked for three years as a merchandiser. Her position involves taking care of plants, cleaning and watering them, and merchandising. By merchandising, she means putting plants in their place, fluffing them and watering them.

Penick-Logan works at Home Depots and OSHs. She generally takes plants inside from a cage outside. In three years, she has had to move competitor’s plants on maybe four to five occasions when a competitor took a spot designated for Kawahara.

Penick-Logan’s supervisor is John Greiner and Greiner is supervised by Greg Yoshi. She gets reimbursed forty-two cents per mile driven.

Penick-Logan states that “once in a while” she may work with other Kawahara merchandisers at a retail store. This would only occur following a particularly large load that might occur once a month during the summer.

2. The Three Employees Being Analyzed Regarding Supervisory Status

a. Miguel Becerra Tovar

Miguel Becerra has worked for thirteen years at Kawahara. His duties included maintenance, translating and plumbing and electrical work for the greenhouses. He also built tables and laid cement. He worked as lead supervisor. He was supervised by Bill Matsui, who did not speak Spanish. Becerra translated for Matsui. Matsui was in eye-sight of him approximately three hours out of an eight-hour work day.

Becerra had three co-workers who only spoke Spanish. Becerra did not have authority to hire, fire or discipline. Nor did he have authority to grant time off or pay increases. He does not do evaluation forms nor does he make assignments. In January 2010, he earned \$13.00 per hour. Becerra could request workers from Matsui or from other supervisors. Becerra has a cell phone while his colleagues do not have a cell phone.

Becerra makes some decisions without Matsui's input. As a lead person, when there are multiple tasks to be completed, Becerra decides which person will be assigned to a particular job. He will sometimes go from location to location on the company gold cart to check on the other workers. When Matsui is not around, Becerra will assign and correct the work of the other maintenance employees.

On one occasion, Becerra signed an evaluation as the "reviewer" for employee Oscar Santa Maria. Becerra indicates that Matsui directed the content of the evaluation.

b. Maria Elena Cortes

Maria Elena Cortes describes herself as a “puller”. She is in a group that works together. There is a list of four to five persons of plants to pull. She states that she has “no job title”. Her salary is \$9.75 per hour.

There are five zones. She has responsibility for three of the five zones. Severiano Cruz and Israel Ochoa each have responsibility for a single zone. There are four or five pullers per zone. The zones are now roughly the same size.

Cortes describes herself as a distant cousin of Alfredo Elizondo Rodriguez. Alberto George is the foreman. In the morning, Cortes receives the batch orders personally from Alberto George. She tears off part of the batch sheet and gives that part to colleagues.

Cortes has been with Kawahara for approximately five to six years. While working, she gives instructions to the other pullers. Employees have “never” disagreed as to how to complete tasks. They pull three hundred to four hundred flats per day and there are more than ten plants per flat. She spends part of her time checking on the other pullers.

Alberto George is sometimes in a different zone than her. Cortes can call him using her radio/walkie-talkie. Cortes talks to Alberto George on her radio as much as three hundred to four hundred times per day.

c. Alfredo Elizondo

Alfredo Elizondo is the self-described “Supervisor’s Assistant” or Assistant Supervisor. He receives \$14.50 per hour. Alfredo has been with the company for

seventeen years and at one time worked as a truck driver. He has no authority to hire, fire, or discipline. He cannot grant wage increases or time off. Employees do sometimes give him their time-off requests for him to pass along to Fidel. Fidel responds to those requests in writing. Alfredo claims that Fidel is never “gone” as Fidel always has his telephone with him and thus can be called or texted. No other supervisor ever takes Fidel’s place. Fidel always leaves a work-plan in advance of leaving on a vacation. Alfredo could also go to Anthony in human resources if he had a question.

Fidel tells Alfredo what to put on the assignment board and Alfredo takes notes during those conversations. Basically, Alfredo indicates that he only passes along directions “by order of Fidel”.

Alfredo Elizondo is related to Fidel Elizondo, Carlos Elizondo and Maria Cortes. Fidel is Alfredo’s brother. Fidel speaks better English than Alfredo. Some of the truck drivers do not speak Spanish. Maria Cortes is his sister and Marisol Cortes is Maria’s sister. The company supervisors are Fidel, Alberto, Carlos, Bill, Larry and Eri.

There are presently seventeen truck drivers. At peak, there were twenty-four to twenty-five truck drivers and at the lowest point, only eight to ten truck drivers. Large trucks cannot go to certain stores. Presently, there are three mobile merchandisers. At peak, there were six to eight mobile merchandisers. All of the mobile merchandisers speak Spanish.

3. The Three Upper Level Managers That Testified At The Hearing

a. Fidel Elizondo

Fidel Elizondo describes himself as the distribution manager. He has worked for Kawahara Nurseries for approximately eighteen to nineteen years. Fidel receives all the seller orders and determines the truck driver routes. He supervises the truck drivers and the mobile merchandisers. Alfredo Elizondo is his brother. Alfredo is Fidel's assistant, but Alfredo is not a secretary. At his direction, Alfredo helps him put the names on the routes. Fidel talks directly with the English speaking drivers. Fidel speaks better English than does his brother Alfredo. Fidel also supervises the persons who count the plants and put them on the list. Alfredo has both a company cell phone and a company two-way walkie-talkie. Alfredo sometimes helps load trucks. Alfredo has worked as Fidel's assistant for four or five years and Fidel believes that his brother has the ability to do many of his tasks autonomously. When Alfredo gets an inquiry from a truck driver, he may be able to respond without first consulting Fidel.

Fidel has the authority to hire, fire and discipline employees. He also approves their vacation requests and time off. Fidel states that he spends one third of his time in his office or at the loading dock and the remaining time outside in the nursery. It takes him ten to fifteen minutes to give the route information to Alfredo. Part of Alfredo's job is to tell Fidel if someone does something wrong.

Fidel also supervises Alberto George. Fidel agreed with George's decision to put Cortes in charge of the three zones.

b. Alberto George

Starting in March 2009, Alberto George was the supervisor of the pullers. Alberto George stated that he decided to change the zone leaders and that Fidel was also involved in that decision. Alberto George stated that the change increased productivity.

Initially the zone assignments were Ochoa to zone one, Cruz to zone two, Cortes to zone three, Agalar to zone four and Colin to zone five. Cortes then took over zones three, four and five combined. Alberto George stated that the size of zone two was almost as big as the size of zones three, four and five combined.

Alberto George initially stated that there was no reason why Cortes was chose to handle all three zones, but then stated that Colin's attitude and Agalar's mentality made them less suited for the larger group.

George stated that there were fifteen greenhouses and up to twenty-five employees in zones three to five combined, which made it larger than any other one zone. George states that in a typical day he talks with Fidel fifty to one hundred times, Alfredo twenty times, Ochoa fifty times and Cortes seventy times.

George indicated that lead persons can decide if a plant is damaged without him looking at the plant. George indicated that a lead person has to know how to distribute the workers.

c. William Matsui

William Matsui has worked for Kawahara Nurseries for eleven years. He only speaks English and has used Miguel Becerra as a translator. Matsui's supervisor is Dave Kawahara. Matsui spends a lot of his time in his office. Miguel Becerra may ask Matsui

for additional employees to complete a project. Matsui acknowledged that Becerra's handwriting was on the evaluation for employee Oscar Santa Maria. Matsui recalls Antero Jimenez voluntarily putting off a vacation to get more work hours. Matsui states that he has never delayed an employee's vacation. Matsui is unaware of any company policy that prohibits someone from supervising a family member or relative.

4. The Two English-Speaking Truck Drivers That Testified At The Hearing

a. Mark Dowdalls

Mark Dowdalls is a truck driver. There are sixteen to seventeen truck drivers at Morgan Hill. Dowdalls works two to six days per week. His supervisor is Fidel Elizondo. Fidel Elizondo speaks English. Alfredo Elizondo will sometimes tell him where to start. Dowdalls calls Alfredo one to two times per week. There is a bulletin board with assignments that is prepared Fidel Elizondo, Alfredo Elizondo and Reynaldo.

Dowdalls also works with the chief mechanic, Aaron Hurlburtt, in the maintenance department. Dowdalls might assist mobile merchandisers with replacing bad plants with good ones of the same type. There is a training and employee manual that states that Fidel Elizondo is his supervisor.

b. Givargiz Mirzaei

Givargiz Mirzaei gave his testimony in English and also speaks Farsi. Mirzaei has been a truck driver with Kawahara Nurseries for three years. His supervisor is Fidel Elizondo. Alfredo Elizondo is Fidel Elizondo's assistant. Typically, Mirzaei calls Fidel to get his route. One day when Fidel was on vacation, Alfredo provided Mirzaei with his route. On cross-examination, Mirzaei indicated that perhaps he sometimes received his

instructions from Alfredo, but more often from Fidel. If the instructions came from Alfredo, he would be passing on what Fidel told him.

5. The Three Spanish-Speaking Truck Drivers That Testified At The Hearing

a. Salvador Benitez

Salvador Benitez started with Kawahara Nurseries on November 4, 2002 and stopped on November 18, 2010. A truck driver, Benitez earned \$18.25 at the end of his time working for Kawahara.

Benitez' supervisor was Alfredo Elizondo. The truck drivers had monthly meetings. Fidel typically runs those meetings and the drivers sign attendance sheets at the meetings. At a meeting approximately three years ago, Fidel Elizondo told Benitez and approximately nine other truck drivers that Alfredo was in charge. Alfredo would tell Benitez his start time for the next day.

Prior to 7:00 a.m., Benitez would call Fidel if he was sick. After 7:00 a.m., he would call Alfredo if he was sick. Benitez stated that he only talked with Fidel about ten times in a three year period compared to thousands of conversations with Alfredo. Benitez stated that Alfredo could recommend that he be fired. Twice Alfredo disciplined Benitez when he was doing trash or plastic work. Benitez also recalls Alfredo once disciplining a new driver for doing something wrong with the plastic.

Fidel speaks better English than Alfredo.

b. Enrique Juaraz

Enrique Juarez has worked for Kawahara for twenty-three years, including eight years as a driver. He receives \$17.00 per hour. Alfredo Elizondo gives him his routes for

the next day. Three to four days a week he drives trucks. At times, when he is not driving, Alfredo Elizondo decides other tasks for him to do, which could include pulling plants, dumping garbage, checking liquids or dealing with condensing plastic wrap. When Juarez is sick, he contacts Alfredo Elizondo. When Juarez has inquiries at the end of a delivery, he typically contacts Alfredo Elizondo, not Fidel Elizondo. When he asks Alfredo questions, Alfredo often indicates that he will check with Fidel.

c. Noe Martinez

Noe Martinez started with Kawahara Nurseries in November 2006, working as a truck driver. On February 24, 2010, Martinez had an accident and became disabled. Martinez indicates that he received his daily work assignments from Alfredo. Martinez recalls a meeting where Fidel advised the drivers that Alfredo would be handling his old responsibilities with the drivers. When Martinez returned to the nursery, he reported to Alfredo. Alfredo would be the person if he needed to call someone at work unless it was a time when only Fidel was reachable. Martinez recalled five or six instances when Alfredo approved days off without requiring completion of a form.

In addition to driving, Martinez sometimes picked up batches in the field, arranged or stacked flats in the racks, and loaded trucks.

6. Other Workers That Testified At The Hearing Regarding Miguel Becerra

a. Antero Jimenez

Antero Jimenez has worked for nine years with Kawahara Nurseries in Morgan Hill. He moves plants and earns \$9.25 per hour. His supervisor is Carlos Elizondo. Miguel Becerra is the maintenance foreman.

Jimenez has worked for Becerra on approximately fifty occasions. This work has included pouring cement and making tables. Becerra is the one who gives him the directions and who checks to make sure that his work is done correctly. Jimenez has heard on the radio Becerra contacting Carlos Elizondo to request Jimenez and Efrain Santiago to work on a particular project. Jimenez remembers one occasion when he and Santiago requested overlapping vacations and Becerra told him they could not go until they finished a job building tables on which they were working.

Jimenez considers a foreman and a supervisor to be one and the same.

b. Sandro Rendon

Sandro Rendon has worked for eighteen months at Kawahara. Miguel Becerra would supervise him under Matsui's instructions. Becerra would translate for Matsui. In January 2010, Becerra was a lead person. When Matsui was not present, Becerra would give the other maintenance workers their instructions. Becerra could also correct another work on a project.

In January 2010, Rendon received \$13.00 per hour and he now receives \$14.25 per hour. He sees Bill Matsui maybe two to three hours per day. When Matsui is not present or not reachable, Becerra could decide which worker handled which task or assignment. On occasion, Becerra would correct other workers.

c. Antonio Rico

Antonio Rico works in maintenance and, before that, he moved plants. Rico had trouble answering the question of who was his supervisor. Rico stated that if Matsui was

not there, Rendon or Becerra would be in charge. Rico did cleaning, hose repairs, pipe fixing, table building, digging and gravel work. He did not do cement work or green house repair. Rico would ask one of the “translators” for more work. Rico assumes that Matsui told Becerra what to say.

Becerra was the person who taught Rico how to put pipe together. Rico never called in sick, and he does not know who he would contact if that happened in the future. Becerra was in charge when Matsui was on vacation. In January 2010, he was paid \$9 something per hour.

d. Oscar Santa Maria

His evaluation was done by Miguel Becerra, but Bill Matsui was also there. The three of them were in Bill Matsui’s office. The evaluation was done so that he could get a pay raise. Becerra was the person who checked the boxes on the evaluation.

Santa Maria assumes that his work assignments from come Bill Matsui, translated by either Beccera or Rendon. He does not know for sure where his instructions come from. Becerra will often say “Bill says”. Becerra does not preface the remark when it is Becerra’s idea. Santa Maria did not seem clear as to the distinction between a manager and a supervisor. In January 2010, he made \$9.25 per hour.

7. Other Workers That Testified At The Hearing Regarding Marie Cortes

a. Epifanio Agalar

Epifanio Agalar has worked nine years at Kawahara Nurseries, first as a mover, and then for the past eight years as a puller. In January 2010, he earned nine dollars per hour. Agalar knows both Alberto George, who is his supervisor, and Marie Elena Cortes.

Alberto George gives authorization to Maria Cortes, and she then gives the pullers orders for them to take across the street. Specifically, Cortes then gives the pullers a piece of paper that lists the plants which they need to pull. The pullers then show the plants to Cortes for inspection. When Cortes is out, Alberto George goes directly to the pullers.

Cortes has the authority to correct his work. Cortes has the authority to discipline him and to review his work. Cortes tells Agalar when he needs to correct his work or do it better. Agalar states that Cortes is the person in charge and that he has to follow her directions or he could get in trouble. Sometimes Cortes gives work instructions to the mobile merchandisers.

Agalar has also worked three or four times with Miguel Becerra. The most recent time that Agalar worked with Becerra was approximately six years ago. Becerra was the maintenance supervisor and gave him work assignments. Agalar saw Becerra correct other workers on their tasks. Agalar also heard from his cousin that Becerra would approve sick leave requests.

b. Ruben Colin Jimenez

Ruben Colin Jimenez started working for Kawahara Nurseries in 1999. He left the company for a year and then resumed working for them in 2001. Colin was laid off from the nursery in September 2010. He has worked as a puller, mover, sprayer and doing irrigation/watering.

Colin primarily worked as a puller. He initially worked in a group with Marie Cortes and then in a different area with Israel Ochoa. Colins recalls once hearing Fidel

tell Cortes that she could change an employee to a different area if the worker was not performing well.

Colin was previously a lead person in charge of a single zone, as was Cortes and Epifiano Aguilar. Colin states that when he led a zone, he could talk to the other leads about exchanging workers and he could correct employee mistakes. Colin stated that he could discipline employees by transferring them to a different task, but that he was not authorized to write out warnings, nor to unilaterally to suspend or fire an employee. Colin could not hire a new employee, but he could make recommendations to those above him. Colin recalls getting the batch orders from Fidel or from Jorge Mendoza, not from Alberto George. Fidel told Colin, Aguilar and Cortes that Cortes was working out better as a leader and she would be put in charge of all three of those zones. He also heard Fidel indicate that Cortes had the authority to discipline an employee.

Colin stated that there were times when Cortes did not get along well with him. Colin also acknowledged that he did not get along well with her and felt that she was treated differently due to her being related to Fidel, Carlos and Alfredo Elizondo. Colin contends that Cortes made comments to workers about using the restroom and drinking water. He once saw Cortes scold a worker for using the restroom when he had previously done so once or twice earlier that day. Because of this relationship, Colin did not feel comfortable talking to Fidel about Cortes. Colin also recalls Fidel once telling him to watch people to make sure that they are not drinking too much water. Colin conceded that his pay was not cut after he was removed as a zone leader, but agreed that his change in roles was a demotion of sorts.

c. Cesar Ramirez

Cesar Ramirez is a puller. He has worked for more than a year at Kawahara Nurseries and he earns nine dollars per hour. Ramirez has worked with movers, mobile merchandisers and in the production line. Ramirez states that his supervisor is Alberto George. His daily boss is Israel Ochoa. Ochoa is his “foreman” and does not have a radio. Ochoa could recommend that he be fired. Ramirez has also worked with Marie Elena Cortes. Ramirez reports to Marie Cortes when he goes to her area and she gives him instructions. Ramirez states that Cortes can discipline him. Ramirez recalls that Cortes told “Pilar” to improve her work or be disciplined. During high season, Cortes is in charge of thirty employees, while Ochoa and Cruz each have eight to nine workers.

As a mobile merchandiser, Ramirez would receive assignments from Alfredo Elizondo. Alfredo would also give him tasks when he came back. Ramirez recalls hearing Alfredo give tasks to the truck drivers. Fidel Elizondo is in charge of the whole nursery and gives instructions to the supervisors. In Fall 2010, Fidel told Ramirez that Alfredo would be his supervisor. Fidel’s cubicle is approximately twenty to twenty-two feet from the loading dock and white board. Ramirez does not know the company distinction between a foreperson, a supervisor and a lead.

d. Josafat Salmeron

Josefat Salmeron has worked for Kawahara Nurseries for one year and ten months. Salmeron is a “puller” and earns nine dollars per hour. Salmeron indicates that Marie Cortes is a leader. Cortes can tell Salmeron that something is incorrect and he changes it.

Salmeron indicates that his immediate supervisor is Alberto George, but that Cortes is in charge of the zones. Cortes rides her bicycle around the zones and can tell any of the pullers if a plant is done incorrectly.

8. Other Workers That Testified At The Hearing Regarding Alfredo Elizondo

a. Emiliano Gomes Fernandez

Elimilano Gomes Fernandez works on the dock and as a puller. Gomes Fernandez earns \$9.25 per hour. He states that Fidel Elizondo is his supervisor and that Alfredo Elizondo is a worker like him. He states that Alfredo does the white board on Sundays and that sometimes other persons add items to the white board. Gomes Fernandez states that Alfredo is a worker, not a secretary.

During the past year, Gomes Fernandez has worked a few times with Cortes. Cortes would state what type of work needs to be done.

b. Simon Blanco Hernandez

Simon Blanco Hernandez worked for Kawahara Nurseries from March 2009 through September or October 2010. Blanco worked as a mobile merchandiser and was paid eight dollars per hour. Blanco arranged plants and swept at locations of Home Depot and Orchard. Blanco also did moving, pulling, loading and orders. Blanco recalls a March 2009 meeting with Fidel and approximately mobile merchandisers where Fidel told them that Alfredo would be their supervisor. Blanco received calls on his personal cell phone from Alfredo with directions. On approximately four occasions, Blanco asked Alfredo for days off, either in person or over the telephone.

Blanco remembers instances in which Miguel Becerra gave directions to the mobile merchandisers. Blanco believes that in the entire company, only Anthony Banda has the authority to impose discipline.

c. Reynaldo Mejia

Reynaldo Mejia loads trucks for Kawahara Nurseries. Mejia has held this position for one and a half years and earns \$9.25 per hour. Occasionally, Mejia also works as a puller or a mobile merchandiser.

When Alfredo Elizondo is out, Mejia puts the trucking routes up on the white board. To complete this task, Mejia gets the information from Fidel Elizondo. There are typically fourteen to fifteen truck drivers. The information includes the order of the stores, the number of racks, when the drivers are going to leave and where each driver is going. Fidel rarely writes the information on the white board himself.

There can be up to five trucks at the dock at the same time. Maybe three or four times a year, truck drivers ask Mejia about their routes. If Mejia received information from Fidel beforehand, he is able to respond. Otherwise, Mejia inquires with Fidel prior to responding. Alfredo does not always need to check with Fidel because of his experience. Mejia states that Alfredo does not have authority to discipline an employee. Mejia concurs with describing Alfredo as Fidel's secretary. In addition to distributing orders and writing on the white board, Alfredo also helps with loading and cleaning the racks.

Mejia stated that Miguel Becerra is in charge of cleaning the greenhouses and walkways.

E. Documents

1. Exhibit E-a

Exhibit E-a is paperwork related to Oscar Santa Maria's pay raise. Page three of this exhibit is an employee review of Santa Maria. The evaluation comments handwritten at the bottom of the page are written in English. They are in a handwriting which matches the top of the page where Miguel Becerra is listed as the "reviewer".

2. Exhibit E-b

Exhibit E-b is a declaration of Alfredo Elizondo.

3. Exhibits U-1 through U-4

Exhibits U-1 through U-4, respectively, are the affidavits of Maria Cortes, Givargiz Mirzaei, Alfredo Elizondo and Reynaldo Mejia. The affidavits of Cortes, Mirzaei and Mejia appear to be prepared by someone other than the signatory. For example, on Mirzaei's affidavit, it states that he was offered a Spanish-speaking translator. Mirzaei, however, testified that he speaks English and Farsi, not Spanish.

4. Exhibit J-I

Exhibit J-I is a nine-page letter signed by ALRB Assistant General Counsel Joseph Mendoza, dated January 27, 2010. The letter provides the tally of ballots for the election at Kawahara Nurseries and it summarizes information regarding various alleged non-agricultural workers, including three merchandisers who did not testify at the hearing, Angelo Imperial DeCastro, Robert Valencia, Jr., and Ralph Garcia. The document indicates that those three merchandisers also stated that they only handle Kawahara plants. The document also states that the three merchandisers who testified at the

hearing, Forbes, Juarez and Penick-Logan, stated that they only handled Kawahara products.

F. Excluded Evidence

Not applicable.

G. Witness Credibility and Demeanor

1. The Merchandisers

I found the testimony from the three merchandisers to be fully credible.

2. The Employer's Witnesses Regarding Supervisors, Generally

On direct examination, Employer's counsel typically would ask a series of questions along the lines of:

- Was person "X" a supervisor?
- Could person "X" discipline you?
- Could person "X" hire someone?
- Could person "X" fire someone?
- Could person "X" grant time off?

The questions would often be quickly asked, one after another, giving the witness the opportunity to fall into a pattern of simply answering "no" to each question. In most instances, there was not a lot of nuanced, open-ended inquiry along the lines of:

- Can you explain to me your understanding of the distinction between a manager, supervisor, foreperson and lead person?
- Who are the company personnel who may direct you to do a particular task?

- Who are the company personnel who may hire and fire persons working in your crew?
- Who are the company personnel to whom you would communicate vacation requests or sick leave occurrences?

This is by no means to say that counsel's approach was inappropriate. It simply meant that one word denials of authority were somewhat less persuasive than testimony which gave specific examples and was more detailed.

Additionally, the testimony of some of the witnesses seemed to defy common sense. Highly experienced and tenured employees, whether supervisors or not, typically have some discretion to undertake certain ministerial tasks. Here, the common testimony from employer's witnesses was that only the highest level managers may make even the smallest of common-place decisions.

3. For Two Witnesses, I Did Not Credit Any of Their Testimony

a. Marie Elena Cortes

I did not believe Cortes. Cortes clearly had a high propensity for hyperbole and exaggeration, like her sometimes having made three to four hundred calls per day to her supervisor, which was contrary to the supervisor's testimony. This hyperbole alone would have led me to conclude that Cortes was either failing to distinguish obvious and subtle differences among questions, or alternatively that she was being deceitful.

In addition, however, Cortes also gave some straightforward answers that I found implausible. For example, Cortes contended that she and Ruben Colin got along well, which I disbelieve. As another example, Cortes stated that her familial relationship to the

three Elizondos working at the nursery had nothing to do with her being put in charge of the three zones, which is unrealistic.

Additionally, during cross-examination, Cortes' expressions suggested that she did not always take the questioning seriously. For example, during cross-examination, she would sometimes smirk and roll her eyes while answering questions. However, it was the gross exaggeration in some of her answers, and not the seemingly out of place expressions, which foremost led me to discredit all of Cortes' testimony.

b. Salvador Benitez

During much of his testimony, Salvador Benitez was staring straight ahead in a very deliberate manner. He looked angry and uncomfortable. While Benitez testified that he loved working at Kawahara for eight years, he clearly believes that the company badly mistreated him toward the end of his tenure. Benitez is being genuine in that he truly feels slighted. However, whether warranted or not, Benitez' sincere feelings have fostered a bias on his part against the company. I did not credit his testimony.

4. Other IHE Observations Regarding Witness Credibility and Demeanor

a. Ruben Colin Jimenez

Colin was mostly a creditable witness. He seemed to answer the proffered question rather than repeating talking points like some witnesses have a propensity to do. The only exception is with respect to Colin's memory that Fidel made a comment to him about the workers drinking water. On cross-examination, Colin was unclear whether he recalled Fidel himself actually making that comment or whether Colin had instead merely heard another worker's recollection of such a comment. Accordingly, I do not credit

Colin's testimony as to Fidel's comments regarding workers and drinking water, but I credit the remainder of Colin's testimony.

b. Noe Martinez

Noe Martinez was a credible witness. Martinez thinks that the company once cheated him out of eighty hours of pay, but this issue did not seem to cloud Martinez's testimony.

c. Reynaldo Mejia

Mejia was chewing gum during part of his testimony. Nonetheless, I generally found Mejia's testimony to be credible.

d. Givargiz Mirzaei

Mirzaei claimed that he always received his routes from Fidel, with a single occasion when it was received from Alfredo. But in his earlier declaration, Mirzaei indicated that he received his routes from Alfredo, who was passing along Fidel's directions. On cross-examination, it was evident that Mirzaei either could not understand this distinction or was being evasive.

e. Cesar Ramirez

I found Cesar Ramirez to be a very credible witness.

f. Sandro Rendon

Sandro Rendon's testimony seemed questionable because of his rigidity in insisting that even the most ministerial of details always needed to be run by Matsui. Plus, it made no sense when he stated that he had recommended to Spanish-speaking workers, when they were sick, to directly call Matsui, who only spoke English.

g. Oscar Santa Maria

Oscar Santa Maria had his arms crossed, often looked confused and had a puzzled expression, and typically gave short, terse answers. Santa Maria also seemed very upset by the cross examination. It did not seem believable when he stated that Becerra would routinely preface his directions with “Bill says”.

H. Specific Factual Findings by the IHE

1. Factual Findings Involving the Merchandisers

a. The merchandisers do not work at Kawahara Nursery. The merchandisers instead drive from their personal residences to retail stores such as Home Depot, OSH and Costco. These retail stores are not adjacent to the nursery and are independently owned and operated.

b. The primary tasks of the merchandisers are to water, clean and fluff the plants. They may occasionally mark down the price on the plants as well.

c. The merchandisers have different supervisors than most nursery employees.

d. The physical working conditions and salaries of the merchandisers is significantly different from that of the workers physically situated at the nursery.

e. Merchandisers Forbes, Juarez and Penick-Logan do not regularly handle plants from sources other than Kawahara. Maybe a couple times a year, if a competitor placed a plant in a Kawahara-designated spot, the Kawahara merchandiser would push the encroaching plant out of the way. The purpose of moving the competitor’s plant on those rare occasions when it occurs is not to assist the competitor but rather to better market the Kawahara product.

f. Merchandisers Forbes, Juarez and Penick-Logan usually work alone and rarely work with another merchandiser. None of the three offered any testimony regarding whether or not the other twenty merchandisers ever handled non-Kawahara plants.

g. The only evidence submitted at hearing as to the other twenty merchandisers was the letter comprising hearing exhibit “J-I”. The parties stipulated to the admission of that document. The document is a letter from Assistant General Counsel Joseph Mendoza of the Salinas ALRB Regional Office to counsel for the parties in this matter. In pertinent part, the letter, which appears to have been issued and maintained in the regular course of business, summarizes the statements of the remaining twenty merchandisers. Each of the twenty merchandisers was asked whether or not he or she handled any non-Kawahara grown plants. In addition to Forbes, Juarez and Penick-Logan, three additional merchandisers (Angelo Imperial DeCastro, Ralph Garcia and Robert Valencia, Jr.) stated that they did not merchandise any non-Kawahara plants. Three of the merchandisers (Eric D. Fisher, Jr., Lyle Ray Weiss and Misty Lee Wilson) stated that they did not whether or not they merchandise any non-Kawahara plants. The remaining fourteen merchandisers acknowledged handling non-Kawahara plants.

h. Based solely on exhibit J-I, and in the absence of any testimony at hearing to the contrary, I find that along with Forbes, Juarez and Penick-Logan, merchandisers Angelo Imperial DeCastro, Ralph Garcia and Robert Valencia, Jr. also did not merchandise any non-Kawahara plants. With respect to the remaining seventeen merchandisers, I find that it is more likely than not that they did handle non-Kawahara

plants on a regular basis. My reasoning with respect to the three merchandisers who “did not know” whether they merchandised non-Kawahara plants is that in the absence of any other evidence or testimony, given that fourteen out of twenty of Kawahara merchandisers handled other plants, it statistically slightly more probable that these three merchandisers did so as well. Plus, it seems reasonable that a merchandiser would know whether or not he or she handled another company’s product or not.

2. Factual Findings Involving Becerra, Cortes and Alfredo Elizondo

a. Miguel Becerra was one of the more tenured members of the maintenance department. Becerra also had a higher salary than many of the workers in his department. Becerra directed other workers to handle specific tasks and when appropriate requested additional staffing from other departments. He corrected other workers on a daily basis because his boss, manager William Matsui, was often in his office or at other locations. While he may have held his position in part due to his translation skills, he was perceived to be a supervisor by other employees. Finally, Miguel Becerra completed the employee evaluation form for employee Oscar Santa Maria. It is common for employee reviews to have both a first level reviewer and a second level approver, which might help to reconcile why Becerra completed the form but Matsui also participated in the process. While the company may not consider Becerra to have been a supervisor, he was likely perceived as such by the majority of company employees.

b. Marie Elena Cortes is related to two of the top managers at Kawahara Nurseries. She supervises a much larger number of workers doing “pulling” than do two other lead persons for pullers. Cortes gave workers their assignments, directed them to

particular zones, corrected their work, and had access to higher management whenever needed. When workers made mistakes, she transferred the workers to different zones and/or advised the managers above her regarding the inadequate performance. Cortes is not merely a lead person for a single crew, but rather rides her bicycle from one zone to another to ensure that workers are expeditiously and accurately completing their assignments. The combination of supervising as many as thirty workers along with the familial relationship with top managers likely resulted in most employees perceiving Cortes as a supervisor.

c. The IHE finds that the English speaking truck drivers typically received their work assignments from Fidel Elizondo and the Spanish speaking truck drivers typically received their assignments from Alfredo Elizondo. Fidel and Alfredo are brothers and Fidel is one of the top managers at the nursery. In addition to assigning truck routes, Alfredo also assigned other tasks to drivers when their routes were completed, like dealing with plastic and garbage. There was credible witness testimony that a meeting took place where Fidel indicated that Alfredo was in charge in his absence. As a top manager, Fidel has very broad responsibilities so he was often not presenting at the loading dock. Similarly, Fidel was often unavailable to take calls from the truckers. However, because Fidel speaks better English than Alfredo, Fidel would typically take calls from the drivers who were not fluent in Spanish. Alfredo was credible to the extent that he testified that he received broad direction from his brother and that his brother was the more knowledgeable person when it came to truck routes. But because Fidel's other broader duties took him to other areas of the nursery, Alfredo also had to make decisions

regarding assignments and tasks. Some of Alfredo's dispatcher duties were non-supervisory. His colleagues acknowledged that Alfredo would sometimes pitch in and help to load or clean racks. Also, on occasion, Alfredo would move trucks if needed. Given Alfredo's authority to assign work, and the high management status of his two brothers, it is not surprising that employees perceived Alfredo to be a supervisor. To the extent that Alfredo did not himself discipline or fire workers, he had unlimited access to his brother Fidel, should he wish to recommend such action.

ANALYSIS AND CONCLUSIONS OF LAW

In its decision, the Board found that "The merchandisers' work can therefore be viewed in connection with and incident to the nursery's general enterprise rather than in connection with a separate commercial enterprise and therefore secondary agriculture." 36 ALRB No. 3, at page 16. The Board then asked the IHE to determine whether or not the merchandisers regularly handle non-Kawahara plants.

Here, a factual determination has been made that six of the twenty-three merchandisers did not regularly handle non-Kawahara plants. With respect to those six merchandisers, they spend more than a substantial amount of their time watering, cleaning and pruning the plants. Indeed, the six merchandisers spent the majority of their time engaged in those specific activities. The UFW did not present any evidence which contradicted the merchandiser testimony. (See Artesia Dairy, 33 ALRB No. 3, at page 5.) Accordingly, applying the Board's standard articulated in 36 ALRB No. 3, the six merchandisers, Jordan Forbes, Cristian Juarez, Phyllis Penick-Logan, Angelo Imperial

DeCastro, Ralph Garcia and Robert Valencia, Jr., were eligible to vote. The other seventeen merchandisers were not eligible to vote.

In its post-hearing brief, the UFW raises a new issue that was not specifically raised during the investigative hearing. Clearly the merchandisers have dissimilar jobs to the agricultural workers at the nursery. The UFW suggests that in the event the merchandisers are found to be agricultural workers, now is the time to conduct a “Coastal Berry” analysis of the scope of the unit. (See Coastal Berry Company, 26 ALRB No. 2.) There is no doubt that the merchandisers have different and non-adjacent job sites, different supervisors and different pay rates from their counterparts working physically at the nursery. Even the nursery truck drivers report to supervisors physically located at the nursery, but the merchandisers have different supervisors, too. It is common sense that the working conditions inside a large chain retail store are dramatically different than the working conditions of the typical outdoor agricultural worker. On its face, the UFW makes a compelling argument. But their argument was not presented at the hearing and the parties did not present testimony directly on the issue of community of interest and scope of the unit. More fundamentally, the issue is beyond what the Board directed the IHE to evaluate and the IHE’s authority is derived inherently from that Board directive. So while the IHE finds the UFW’s argument on the scope of the unit to be “preliminarily persuasive”, any comments by the IHE on that subject are, in a legal sense, mere dicta for the Board’s consideration.

At Kawahara Nursery, it appears that only a handful of top managers have the authority to make final hiring and firing decisions, and that those managers also reserve

final authority regarding promotions, salary increases and vacation requests. However, I found persuasive testimony that Miguel Becerra, Marie Elena Cortes and Alfredo Elizondo all regularly made job assignments and responsibly directed work activities. (For a discussion of responsibly directing and assigning,” see South Lakes Dairy Farms, 36 ALRB No. 5, at pages 8-9, and Artesia Dairy, 33 ALRB No. 3, at pages 13-14.) In addition, some secondary indicia exist, such as Becerra’s higher salary than other maintenance workers, and Alfredo’s company cell phone. Finally, when two of the top managers are brothers and they hire or promote other close relatives such as Alfredo and Cortes, there is an obvious and likely accurate perception that the relatives have greater access to management. Accordingly, I find that Miguel Becerra, Marie Elena Cortes and Alfredo Elizondo were supervisors pursuant to Labor Code section 1140.4, subdivision (j), and thus ineligible to vote.

SUMMARY OF RECOMMENDATIONS

It is recommended that the challenges to the following voters be sustained:

- 1.) Miguel Becerra
- 2.) Marie Elena Cortes
- 3.) Alfredo Elizondo
- 4.) Eric D. Fisher, Jr.
- 5.) Lyle Ray Weiss
- 6.) Misty Lee Wilson
- 7.) James Camillo-Scuderi
- 8.) Orlando Carillo

- 9.) Julio Cesar Lopez
- 10.) Dustin Corey
- 11.) Justin Coyote Suico
- 12.) Eric Fimbrez
- 13.) Meg H. Fink
- 14.) Brendan Harada
- 15.) Lance Harrison-Brown
- 16.) Larry William Howard
- 17.) Andrew Lee Koscinski
- 18.) Jacob Patrick Morrison
- 19.) Keith W. Vandertuig
- 20.) Manuel Vasquez

It is recommended that the challenges to the following voters be overruled:

- 1.) Jordan Forbes
- 2.) Cristian Juarez-Morales
- 3.) Phyliss L. Penick-Logan
- 4.) Angelo Imperial De Castro
- 5.) Ralph Garcia
- 6.) Robert Valencia, Jr.

Dated: June 13, 2011

Mark R. Soble
Investigative Hearing Examiner, ALRB

