


STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SONOMA CHO, LLC, DBA FLORA TERRA,)	Case No. 2022-RC-001-SAL
)	48 ALRB No. 1 (2022)
Employer,)	
)	
and,)	
)	NOTICE OF TRANSFER; and DECISION
INTERNATIONAL BROTHERHOOD OF)	OF THE ADMINISTRATIVE LAW
LOCAL TEAMSTERS LOCAL 665,)	JUDGE
)	
Petitioner.)	
)	
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The attached Decision of the Administrative Law Judge is deemed transferred to the Board on May 9, 2022. See Board Regulation 20280¹. Exceptions to the decision, if any, are due on or before Monday, May 30, 2022; and Reply briefs, if any, are due on or before Thursday, June 9, 2022. See Board Regulation 20282.

Dated: May 9, 2022



Santiago Avila-Gomez
Executive Secretary
Agricultural Labor Relations Board

¹ The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

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SONOMA CHO, LLC, DBA FLORA
TERRA,

Employer,

and,

INTERNATIONAL BROTHERHOOD OF
LOCAL TEAMSTERS LOCAL 665,

Petitioner.

) Case No. 2022-RC-001-SAL

) 48 ALRB No. 1 (2022)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Appearances:

For the Employer:

John H. Feldman, III
Cozen O'Connor
101 Montgomery Street, Suite # 1400
San Francisco, California 94104
JFeldmann@Cozen.com

For the Petitioner:

Lorrie E. Bradley, Esq.
Beeson, Taylor and Bodine
492 Ninth Street, Suite # 350
Oakland, California 94607
LBradley@BeesonTayer.com

For the General Counsel/Regional Director:

Yesenia De Luna, Assistant General Counsel
ALRB Salinas Regional Office
342 Pajaro Street
Salinas, California 93901
Yesenia.DeLuna@ALRB.ca.gov

This matter was heard by Mark R. Soble, Chief Administrative Law Judge (“ALJ”), State of California Agricultural Labor Relations Board (“ALRB”) on the two days of Tuesday, March 8, 2022, and Wednesday, March 9, 2022. Post-hearing briefing was completed on Tuesday, April 12, 2022.

I. JURISDICTION

The employer, Sonoma Cho, LLC, dba Flora Terra (hereafter “Flora Terra” or “Employer”), is a cannabis grower located in Santa Rosa, California.

On January 14, 2022, the International Brotherhood of Teamsters Local 665 (hereafter “Union” or “Petitioner”) filed a Petition for Certification to represent Employer’s workers. On January 21, 2022, a representation election was held. Seventeen workers voted in the election. ALRB Regional Staff challenged the ballots of four of these workers.

In its Decision and order dated February 25, 2022, the Agricultural Labor Relations Board (hereafter “Board” or ALRB”) sustained the Region’s challenges involving two of the voters. The Board directed the undersigned to serve as the Investigative Hearing Examiner to ascertain the specific facts which might determine the voter eligibility of the remaining two workers whose ballots were challenged.

II. FORMAT OF HEARING

Due to the COVID-19 pandemic and the short window of time to hold this Election Hearing, the parties stipulated to hold this hearing using a video-conference platform, namely Webex (Webex is similar to Zoom and FaceTime). The witnesses were provided with a physical notebook binder with paper copies of the exhibits.

Paper or PDF copies of these same exhibits were generally provided to all parties and counsel beforehand, as well as to the ALJ, court reporter and interpreter.

III. ISSUES PRESENTED

1. Is Kayleah Feil an agricultural worker?
2. Is Kayleah Feil a statutory supervisor?
3. Is Tim Garcia a statutory supervisor?

IV. WITNESS TESTIMONY

Four witnesses testified during this investigative hearing. The four witnesses were (1) Alicia Wingard, (2) Stephanie Lucas, (3) Mathias Vasquez, and (4) Tim Garcia.

1. Alicia Wingard

Alicia Wingard is the Flora Terra Chief Operating Officer and co-founder. (Reporter's Transcript, day one, page 19, line 20, to page 20, line 3; hereafter 1 RT 19:20-20:3) Employer's Exhibit # 3 is a company organization chart that was prepared for purposes of this hearing. (1 RT 24:4-8) The company is located at 1825 Empire Industrial Court, Santa Rosa. (1 RT 20:7-21:3) The company grows, distributes and sells cannabis.² Employer's Exhibit # 1 is a group of photographs assembled for purposes of this hearing that illustrate what the company does. (1 RT 38:17-77:5) All of this is done within a single facility that is 10,400 square feet.

² For purposes of this decision, I understand cannabis plants that contain substantial amounts of tetrahydrocannabinol to sometimes be called marijuana.

Employer's Exhibit # 2 is a diagram of the facility floorplan. (1 RT 35:10-38:1 and 1 RT 8223-83:6) Flora Terra is the only cannabis operation that the Wingards have ever owned.

Scot Vensel is in charge of cultivation. Scot's title was Cultivation Manager and then it became Director of Cultivation. (1 RT 24:11-21 and 1 RT 27:25-28:2) Scot is paid salary rather than hourly. Scot manages the cultivation team, deciding with David Wingard what plants will be grown and the harvesting schedule. (1 RT 28:8-12) Scot has the authority to fire a worker and writes the reviews for the cultivation staff. (1 RT 106:3-23) Scot approves vacation requests made by cultivation staff. (1 RT 107:4-10) Cultivation staff calls Scot if they are sick and unable to work on a particular day.

At the start of every day, Scot meets with the cultivation team. (1 RT 29:12-18 and 1 RT 91:11-13) At that meeting, Scot lays out the game plan for that day. (1 RT 29:19-30:1)

Tim Garcia is the Cultivation Lead. (1 RT 54:11-13) Tim is paid hourly. (1 RT 108:13-15) Including Tim, there are four or five members of his team. (1 RT 54:20-23) Tim does not have the authority to hire, transfer, suspend, recall, promote, discharge, discipline or reward his team. (1 RT 55:1-19) Tim does not sit in on the interviews of new cultivation staff. (1 110:9-11) Tim has never signed an annual review or performance evaluation of another employee. (1 RT 106:20-23) Tim could recommend to Scot that an employee be disciplined or, in Scot's absence, Tim could advise Human Resources to consider it. (1 RT 55:20-23) Tim does not have the authority to approve a worker taking a vacation day. (1 RT 107:4-7)

About ninety percent of the time, Tim works side-by-side with the other cultivation workers. (1 RT 31:12-14 and 1 RT 32:4-7) Tim has additional duties like get cultivation tags from the office and setting up drip line. (1 RT 31:15-25) Tim helps set the work pace. (1 RT 56:2-3) Both Scot and Tim train new employees in cultivation. (1 RT 110:19-21)

Willie Melia is the Post-Harvest Manager. (1 HT 32:10-23) Willie is paid salary rather than hourly. Post-harvest operations include two divisions, trimming and packaging. Willie meets daily with the post-harvest staff. (1 RT 90:18-91:10) It is a single meeting with both the trimmers and packers together. (1 RT 92:16-20) Willie and Laura would complete employee reviews. Packaging staff would call Willie or Laura if they were going to be out sick on a particular day.

Kayleah Feil is the Packaging Lead. (1 RT 33:17-21) Kayleah joined Flora Terra in January 2021 and is paid hourly. Kayleah does not have the authority to hire, transfer, suspend, recall, promote, discharge, discipline or reward her team. (1 RT 47:12-48:15 and 1 RT 49:23-25) Kayleah may make suggestions to Willie to suspend or discipline a team member. (1RT 49:9-50:4)

Except for about forty-five minutes per day, Kayleah is doing the same work as the rest of her team. (1 RT 34:11-23) Kayleah may spend forty minutes per day doing paperwork that logs what was produced that day and another five minutes setting up team tasks assigned by Willie. (1 RT 34:14-18) Kayleah is responsible for setting the pace and to help ensure that quotas are met. (1 RT 48:16-20) The packaging staff has never packed anything that was not cultivated in their building.

Kayleah can direct the rest of the team as to the right way to put on a sticker or put product into a jar. (1 RT 48:22-24 and 1 RT 50:5-12)

Packaging staff takes raw cannabis product from a big bag and puts it into a jar or smaller mylar bag. This does not change the natural state of the cannabis. (1 RT 54:8-10) They also sometimes make “pre-rolls” and put them into small tubes. Once or twice a month, plus on holidays, the packaging staff may help put barcodes on retail products. (1 RT 52:1-53:5)

2. Stephanie Lucas

In September 2021, Stephanie Lucas started working at Flora Terra in the packaging division of the Post-Harvest Department.³ (1 RT 124:5-10) There are four workers in the packaging division, Kayleah, Stephanie, Erick Carmona and one other. (1 RT 131:20-24) Stephanie prepares cannabis for packaging, puts stickers on packages, and creates pre-rolled joints.⁴ Her duties also include picking out stems, putting cannabis in jars, and weighing it. (1 RT 129:4-7)

Stephanie indicates that at the beginning of every day, she attends a very short staff meeting. (1 RT 114:18-22)

³ Five days prior to her testimony, Stephanie and her colleague Mathias Vasquez had a brief telephone meeting with Petitioner’s attorney. Stephanie did not retain the attorney for legal advice, rather the union was preparing for the hearing. Petitioner objected to Respondent’s attorney inquiring about the meeting, suggesting that the conversation was protected by “work product”. I overruled that objection, finding that there is no attorney-client privilege between Flora Terra’s workers and the union’s attorney. See *D’Arrigo Bros. Co. of California*, 39 ALRB No. 4, at pp. 20-24.

⁴ Stephanie indicates that pre-rolled joints are essentially cannabis cigarettes. There is a cone made out of hemp paper with a small filter end. The cone is put into a machine and then the cannabis is put inside. The machine shakes and the cannabis gets packed into the cone. The pre-rolled joints are then weighted, put into tubes that are heat sealed, and stickered for sale. The testimony of witness Mathias Vasquez confirmed this process.

The meeting is led by Manager Willie Melia and Supervisor Laura Johnson and typically takes less than five minutes. (1 RT 114:20-25) Willie and Laura go over the duties and assignments for that day. (1 RT 125:9-11) Willie and Laura are also the two persons who met with her for her oral performance review. (1 RT 163:8-15) If Stephanie is going to be late to work or request vacation time, she would contact Willie or Laura. (1 RT 164:4-9)

Kayleah is the packaging division team lead. (1 RT 125:12-23) Kayleah instructs the team as for which task each person is responsible and sets the pace. (1 RT 125:17-18)

Shortly after Stephanie started at Flora Terra, an employee named Charles Davenport was fired. (1 RT 131:19:132:6) In January 2022, Kayleah told Stephanie and a colleague that “she (Kayleah) wanted Charles gone and Willie made it happen.” (1 RT 133:1-24) Stephanie has no idea whether or not Willie conducted an independent investigation as part of the termination process.

On the morning of the representation election, Willie told staff that Kayleah was “an extension of him”. (1 RT 141:18-22) Willie told staff to address all problems to Kayleah except if the problem was with respect to Willie or Laura, in which instance the employee should speak to Human Resources.

3. Mathias Vasquez

Mathias Vasquez works in the trimming section of the Post-Harvest Department. (1 RT 184:7-9) He has been with Flora Terra for approximately thirteen months. (1 RT 200:1-2)

At the start of every day, the supervisors, Willie and Laura, hold a five to ten minutes team meeting and give assignments and instructions to the staff. (1 RT 185:16-186:5) The trim team and the packing team are four persons each. (1 RT 196:14-197:6) The trimming staff takes down plants in the drying room, destem them, separate them based on quality, and manicure them. The manicuring process is to make the product look better, not to increase potency. (1 RT 197:23-198:15)

Although it is not his primary duty, Mathias has occasionally worked with Kayleah in the packaging room. (1 RT 196:14-17) The packing team spends roughly an equal amount of time packing buds into jars, bags, pre-ground flower, and as pre-rolled joints. (1 RT 210:18-211:3) The packing team makes sure that the product is packed safely and consistently, but does not add anything to the product. (1 RT 197:24-198:25) Kayleah checks the completed packages for quality. Kayleah has the authority to reject a product or to require changes to it. (1 RT 199:7-9 and 1 RT 206:16-25)

Mathias is aware of one instance where an employee, Charles, was disciplined. (1 RT 200:4-201:3) Kayleah was the “relayer” of the initial concern to management. (1 RT 200:17-18) Mathias believes that the employee was fired. (1 RT 200:21-22) But Kayleah and Matthias work in separate rooms because he is a trimmer and she is a packager. (1 RT 189:22-25) On the morning of the representation election, Willie told staff if they had questions, they could ask Kayleah because she was an “an extension of him”. (1 RT 190:20-24 and 1 RT 192:7-14)

There is a window in the trim room that looks into the hallway. (1 RT 189:11-12) Mathias recalled a singular instance when Cultivation Lead Tim Garcia walked by and motioned for one of the trim staff to put their mask back on. (1 RT 189:15-17) Mathias asked his manager, Laura, if Tim Garcia was a supervisor and was told, “Yes”. (1 RT 189:19-20) Mathias recalled Tim directing two new hires to go back to work when it was determined that they were ineligible to participate in the representation election. (1 RT 204:14-205:2) Mathias felt that Garcia “carries himself” like a supervisor. (1 RT 204:5-6)

4. Tim Garcia

Tim Garcia is the Flora Terra Cultivation Lead. (2 RT 2:19-24) In that role, he oversees the cultivation team. (2 RT 3:1-3) All of the cultivation is done in a single building. (2 RT 4:17-20) The cultivation team grows the crops, harvests them, and replants them. (2 RT 3:2-3) Tim became the Cultivation Lead in June 2021, just a few weeks after he started working at Flora Terra. (2 RT 3:4-6) Tim is paid hourly. (2 RT 22:20-22) Tim’s supervisor is Scot Vensel, the Cultivation Director. (2 RT 3:19-21) Scot and Tim meet for approximately fifteen minutes at the start of Tim’s day. (2 RT 11:1-5) Scot and Tim then meet for about five minutes with the rest of the cultivation team. (2 RT 11:5-8) The other cultivation workers include Carlos, Dave and Kyle. (2 RT 4:8-11) Barbara from the office also sometimes helps them out part-time. (2 RT 4:15-16) Tim has more experience in the industry than the other cultivation workers. (2 RT 24:19-24)

Flora Terra has four cultivation rooms. (2 RT 5:7-8) The team harvests every two weeks. (2 RT 10:16-24) At any given time, team members mostly work in different rooms, but for harvesting and planting they are all together. (2 RT 5:16-6:6) The cultivation team also picks leaves off, removes dead plants and makes sure drippers are in the plants. (2 RT 10:1-24) Scot is rarely in any of the cultivation rooms, typically only for periodic checks that take only a few minutes. (2 RT 6:7-16)

Tim manages the team and assigns daily tasks to ensure that cultivation operations stay on schedule from cloning to harvest. (2 RT 19:2-9 and 19:10-22) Tim trains new employees regarding company standard operating procedures. (2 RT 10:12-11:1) Tim noted that the work is typically repetitive. (2 RT 20:1-2) Tim typically spends between eighty to ninety percent of his day doing the same type of work as the other cultivation workers. (2 RT 24:25-25:6)

At his meeting with Scot, they may discuss multiple tasks that need to be completed. For example, to clean up room four, fix a pump in room three and to remove nodes in room two. (2 RT 35:25-36:2) Tim is the person who assigns team members to a particular task or room. (2 RT 36:2-9) He decides the order of production.⁵ Tim evaluates the strengths and weaknesses of team members to decide which person is most suitable for a particular task. (2 RT 6:25-7:9) Tim instructs the worker how to do his tasks. (2 RT 36:3-7) If a team member does a task poorly, Tim brings the issue directly to the worker's attention and corrects them. (2 RT 8:20-25)

⁵ During his testimony, Tim Garcia confirmed the veracity of his answers on the challenged ballot declaration.

There have been a few past cultivation workers that Flora Terra needed to terminate. (2 RT 9:1-9) Tim informed Scot of his concerns.⁶ Tim provided notes to Scot and they had a short meeting. (2 RT 9:17-22) These employees were written up, but quit before the company actually fired them. (2 RT 9:11-12)

Tim has never participated in interviewing new hires. (2 RT 8:7-19) Scot has discussed with Tim which job applicants should be given an interview. A cultivation team member contacts Scot if he wants to take vacation time, or if he needs to call in sick on a particular day. (2 RT 6:17-24)

V. FINDINGS OF FACT AND CREDIBILITY DETERMINATIONS

1. Flora Terra is an agricultural employer. (California Labor Code section 1140.4, subdivision (c); California Business and Professions Code section 19322, subdivision (a)(9); NLRB Office of General Counsel Advice Mem. (*AgriKind*), 04-CA-260089 (Oct. 21, 2020).)

2. Employer's Exhibit # 2 is an accurate representation of the Flora Terra facility layout.

3. Flora Terra has one building that is roughly one hundred feet by one hundred feet which if it was an open field is approximately one quarter of an acre. The trim room and the packing room are both less than three hundred square feet each and there is a single wall between them.

⁶ In rebuttal, Alicia Wingard was recalled to testify. She testified that Tim was authorized to report personnel issues to Scot, but not to write-up an employee on his own. Scot would then independently investigate those concerns. Alicia confirmed that even if Scot was out, Tim did not have the authority to fire or discipline a worker.

4. For all pertinent time periods, Employer's Exhibit # 3 is an accurate company organization chart.

5. In combination with witness testimony, Employer's Exhibit # 1 illustrates generally the process of growing, trimming and packaging cannabis.

6. I generally found all four witnesses to be truthful. The answers of the first three witnesses sometimes seemed tailored to address NLRB definitions as to whether or not a worker is a supervisor.

7. Neither Kayleah Feil nor Tim Garcia have the authority to hire or recall an employee.

8. Neither Kayleah Feil nor Tim Garcia have the authority to promote or reward an employee.

9. Neither Kayleah Feil nor Tim Garcia have the authority to discharge, terminate, lay off or transfer an employee.

10. Both Kayleah Feil and Tim Garcia can go to their respective managers with disciplinary recommendations about team members.

11. Both Kayleah Feil and Tim Garcia can assign work to their team members.

12. Both Kayleah Feil and Tim Garcia decide which team members shall perform which tasks and have the authority to re-direct team members to different tasks.

13. The range of tasks is slightly greater for the cultivation team than for the packing team.

14. Both Kayleah Feil and Tim Garcia can require team members to do their work in a manner that is correct, of better quality, or more efficient.

15. Both Kayleah Feil and Tim Garcia are required to follow the general directions of their manager as well as follow company Standard Operating Procedures.

16. If team members have a grievance, they can bring it directly to the attention of management or they can address it to the team lead. Feil and Garcia then would bring the issue to the attention of management.

17. Tim typically spends between eighty to ninety percent of his day doing the same type of work as the other cultivation workers. The cultivation team grows the crops, harvests them, and replants them. As to this eighty or ninety percent, Tim Garcia is unquestionably an “agricultural worker” in the traditional or primary definition of the term. Tim spends the other ten to twenty percent of his time deciding which tasks to do next and assigning them, training, instructing and correcting workers as they perform their duties.

18. Approximately ninety percent of the time, Kayleah Feil does the same packaging work as the rest of her team. They only prepare and pack product grown at the ten thousand square foot site. They do not transform the attributes of the product like sugar milling or tobacco curing. Rather, aside from putting the product in containers, they mostly make the product more aesthetically pleasing, similar to a field worker stripping exterior layers of a head of lettuce. Feil also keeps track of inventory, weighs product and puts on labels.

19. The employees doing packaging spend about one fourth of their time making pre-rolled joints.⁷ This process includes using a machine to get the cannabis to settle inside the rolled hemp paper. The process does not change the product potency.

20. The employees do not trim or pack any product that is not grown in their single building. (1 RT 109:25-110:3)

VI. FINDINGS OF LAW

A. Growing and Cultivating Cannabis is “Agriculture”.

Applicants to grow cannabis in California declare as part of their paperwork that they are agricultural employers. (California Business and Professions Code section 26051 subdivision (a)(8)) Cannabis differs from most other crops primarily in that it may be used for medical or recreational drug use and that it is more expensive than most fruits and vegetables as measured by weight. The drug use aspect of cannabis results in it being more heavily regulated and monitored than most other commodities. (1 RT 88:3-89:20 and 1 RT 91:19-23) The increased regulation requires workers to maintain and transmit detailed records that would not be required for growing other agricultural commodities.

Like culinary mushrooms, cannabis can be grown inside or outside. Primary agricultural work does not need to be done outdoors. (*See Cannaseur’s Choice, LLC* (Dec. 10, 2021) case no. 19-RC-282922, Reg. Dir. Dec.(citing *William H. Elliott & Sons Co.* (1948) and *Hershey Estates* (1955) 112 NLRB 1300, 1301))

⁷ Regarding the percentage of time spent making pre-rolls, I found Mathias’ estimate of 25% more detailed and credible than Stephanie’s estimate.

The limited NLRB advice on the newly emerging area accepts that cannabis cultivation is agriculture. (*Northeast Patients Group, dba Wellness Connection of Maine* (2013) Advice Response Memo 01-CA-104979; *High Level Health* (July 31, 2015) Advice Response Memo, 27-CA-146734; *Agri-Kind* (October 21, 2020) Advice response memo 04-CA-260089; *New England Treatment Access, LLC* (October 23, 2020) Reg. Dir. Dec. 01-RC-264290; *Cannaseur’s Choice, LLC* (2021) NLRB Reg. Dir. Dec.)

The trimming work is incidental to the primary agricultural work performed by the growers/cultivators. (See *Cannaseur’s Choice, LLC* (Dec. 10, 2021) case no. 19-RC-282922, Reg. Dir. Dec., at page 14) The trimmers do not handle any product that is grown off-site.

B. Analysis of Whether the Flora Terra Packaging Staff Are Engaged in Secondary Agriculture

1. Flora Terra Staff Does Not Handle Any Products Grown Outside of Their Single Company Building

Wellness Connection of Maine had separate production and processing facilities. This is distinguishable from Flora Terra where all operations are located within a single building. The ALRB has found some packagers to be agricultural employees. (See *Transplant Nursery* (1979) 5 ALRB 49; *R.C. Walter & Sons* (1976) 2 ALRB No. 14)

2. Flora Terra Packaging Staff Does Not Significantly Change the Cannabis Plant From Its Raw, Natural State

This decision will use the term “packaging” to mean placing cannabis into a container that directly contacts the plant and that the consumer receives. The term “packing” would be used when cannabis is placed into containers that are not consumer containers. The packaging staff put the product into jars and bags that the consumer receives. The pictures in Employer’s Exhibit No. 1 are accurate representations of those containers.

a. Sugar milling and tobacco bulking change those products from their raw, natural state

Employees working in a sugar processing plant are not within the NLRB agricultural exemption of the Act because the milling operation transforms sugar cane from its raw and natural state. (*Maneja v. Waiialua Agricultural Co.* (1955) 349 U.S. 254, 264-270) Tobacco bulking changes the product by curing the plant. The bulking process takes from four to eight months, requires a large amount of equipment, and substantially changes the physical properties and chemical content of the tobacco. (*Mitchell v. Budd* (1956) 350 U.S. 473, 474-482)

b. In this instance, packaging cannabis in jars and bags is secondary agriculture

Packaging staff takes raw cannabis product from a big bag and puts it into a jar or smaller mylar bag. One hundred percent of the product packed into bags or jars is grown in the same single building.

While the packing staff tries to present the product in the most aesthetically pleasing manner, they do not transform the product or enhance its potency.⁸ However, trimming does involving removing the part of the plant that has no psychoactive drug properties. (1 RT 117:6-9) For the larger flowers and buds, this is done by hand. The unprocessed smalls are run through a cylinder machine to be processed. (1 RT 44:8-15)

To the extent that advice from the NLRB General Counsel (or from one of the NLRB Regional Directors) holds that putting cannabis in bags or jars this is not secondary agricultural activity, the undersigned disagrees under the instant facts. First, packaging is done in the same building as the cultivation and trimming and the building housing all of these functions is smaller than even the tiniest of farms, situated on roughly one-quarter of an acre. The packagers work on the “farm” and they are employed by the “farmer”. Second, no products cultivated outside of this quarter-acre site are packaged. The packaging is incidental to the growing. Finally, because the product is more expensive and more regulated, it stands to reason that it is not put in a cheap plastic sleeve. Under the instant facts, I find that the packaging of cannabis in jars and bags is secondary agriculture.

c. Using a machine to make pre-rolled joints is a manufacturing process and not secondary agriculture

⁸ Cutting, sorting or potting plants does not transform their natural state (*Rod McLellan Co.* (1968) 172 NLRB 1458, 1460); packing plants is agriculture (*Transplant Nursery, Inc.* (1979) 5 ALRB No. 49); cutting, sorting and packing roses is agriculture (*William H. Elliott & Sons Co.* (1948) 78 NLRB 1078, 1078-80); employees packing grapes are agricultural workers (*R.C. Walter & Sons* (1976) 2 ALRB 14); Cutting plants from their stalks, removing bottoms, pruning, taping on labels and hanging plants to be cured is agriculture (*Agri-Kind* (October 21, 2020) case no. 04-CA-260089, NLRB GC Advice Memo). See hearing transcript page 53, line 20, to page 54, line 10, and page 197, line 23, to page 198, line 25.

The unique aspects of cannabis are the strict regulation due to its use as a drug and the high price tag for a small physical quantity. Both of these aspects militate toward very careful weighing and preparing uniformly sized pre-rolled joints. Making pre-rolled joints is a more complex question than classifying workers who fill bags and jars. While making pre-rolled joints is done in the same single building as the growing, the packing staff uses a machine to fill the pre-rolled joints.

Agricultural technology is not static. Workers in the field now often use a heat sealer to encase heads of lettuce in plastic. This does not change the natural state of the lettuce. Workers may slice mushrooms without changing their natural state.

(Pictsweet Mushroom Farm (1999) 329 NLRB 852, 853)

Making a pre-rolled joint does not change the attributes or potency of the cannabis so it is distinguishable from cigarettes made with tobacco.⁹ To explain how a pre-roll joint is made, Alicia Wingard gave the analogy of breaking off a block of cheese and making a quesadilla. (1 HT 116:16-18) Alternatively, what if a worker used a machine to wrap an ear of corn or a russet potato in aluminum foil so that the consumer could immediately heat it on a grill or in a conventional oven? What if lollipop sticks were put inside apples? These steps do not change the physical attributes of the corn, potatoes and apples. But enable the consumer to use the product differently.

⁹ Cannabis is a psychoactive drug. You can smoke the leaves and flowers in a pipe, bong or joint, inhale a vaporized spray, bake it into foods, or take a pill or liquid. The terms joint, reefer and doobie all refer to a marijuana cigarette. Testimony indicated that packaging staff did not extract liquids or oils from the plants for sale. Nor were pills or baked goods made by packaging staff. (1 RT 22:13-16, 1 RT 53:20-23 and 1 RT 54:8-10)

A consumer cannot safely hold the cannabis leaf or flower in their hand, light it on fire, and smoke it without first creating the joint or marijuana cigarette. In the absence of a joint or cigarette, the consumer needs some other device like a pipe or a bong. So by making the joint, you create a product that can be used in a different way, coupled with the fact that a machine is used to create the joint. As a result, it does not matter if the pre-rolls are marijuana cigarettes or moo shu vegetables rolled in pancakes, I find that this comprises a manufacturing process and not secondary agriculture. This is more like shredding lettuce, putting fruit in a pie shell, and other tasks not constituting secondary agriculture. Therefore, the twenty-five percent of the time that the packaging staff spends makes pre-rolled joints is not secondary agriculture.¹⁰

3. The Amount of Time That Packing Staff Spend Logging, Weighing or Labeling of Inventory Does Not Change Their Status as Agricultural Employees

It is common for agricultural workers to log, weigh or label inventory. For decades, marijuana was an illegal drug.

¹⁰ California cannabis laws added provisions designed to support labor peace. That end is likely weakened if four packaging workers in a small room are categorized differently for organizing purposes than the four trim workers on the other side of a shared interior wall. Alicia Wingard testified that in the past, the trimmers and packagers had even been a single crew doing both tasks, but that the company determined that some workers were faster in one capacity or the other. (1 RT 109:19-24) Even in the present, there is a very small amount of time of ten percent or less where trimmers may package and packagers may trim. (1 RT 46:11-20) But laws need to be applied in a manner that enables employers and workers to predict whether the workers are covered by the NLRB or the ALRB. As a result, the outcome is guided by the agricultural exemption in NLRB law rather than by the tactical advantage of lumping the workers together into a single potential bargaining unit.

California purposefully enacted more detailed rules and regulations to govern the full spectrum of cannabis related activities. Those laws clearly contemplate that cannabis cultivation is agriculture. In this instance, the detailed recordkeeping and labeling due to psychoactive drug properties of cannabis do not change the workers' status if they are otherwise agricultural employees.

4. Packaging staff are dual role employees who spend 75% of their time doing secondary agriculture and 25% of their time performing “packing shed” duties of making pre-rolled joints

Pursuant to California Labor Code 1140.4, subdivision (b), the term “agricultural employee” or “employee” shall mean a person engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor Management Relations Act (Section 152(3), Title 29, United States Code), and Section 3(f) of the Fair Labor Standards Act (Section 203(f), Title 29, United States Code).

In *Produce Magic, Inc.* (1993) 311 NLRB 1277, the NLRB found that workers who spent half of their time doing primary agriculture and half of their time doing non-agricultural packing operations were exempt agricultural workers when doing the harvesting and covered by the NLRB when doing the packaging.¹¹

¹¹ The harvesters and packers purportedly changed roles at lunch time. Note that this packaging was being done by a custom harvester handling crops grown by other entities. (*Produce Magic, Inc.* (1993) 311 NLRB 1277, 1278)

In *Olaa Sugar Co.* (1957) 118 NLRB 1442, the NLRB found that workers who perform any regular amount of non-agriculture work are covered by the NLRB as to the portion of work that is non-agricultural.

In the instant case, packaging staff may put cannabis in jars one day and make pre-rolled joints the next day.¹² Staff rotates to different tasks so some shifts one employee may make pre-rolled joints and the next day roles could be reversed. So the Petitioner seemingly could seek a certification for the packagers only during the portion of their day when they are not making pre-rolled joints.

While it might seemingly make more sense either for the NLRB to assert complete jurisdiction over Flora Terra's mixed-function workers who regularly perform non-agriculture, or to yield complete jurisdiction to the ALRB over Flora Terra's mixed-function workers who regularly perform agriculture, that issue does not need to be resolved today. The packaging workers who perform seventy-five percent secondary agricultural work and twenty-five percent non-agriculture duties are eligible to vote. Kayleigh Feil's ballot is not subject to a challenge based upon ALRB Regulation 20355, subdivision (a)(7).

¹² "Dual function employees are those who perform more than one function for the same employer. Dual function employees who spend part of their work time performing bargaining unit work may share a sufficient community of interest with the unit to be eligible to vote, even though they do not spend a majority of their time performing unit work. The same community of interest tests are applied to dual function employees as are applied to regular part-time employees. *Berea Publishing*, 140 NLRB 516, 519 (1963). Generally, dual function employees are included in the unit and are eligible to vote if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit's terms and conditions of employment. *Ansted Center*, 326 NLRB 1208 (1998)." (*NLRB General Counsel Hearing Officer Guide* (2003), at page 122.

C. Kayleah Feil Is Not an ALRA Statutory Supervisor

Having heard the hearing testimony and reviewed the court reporter's transcripts, I am confident that Kayleah Feil does not fall within the definition of a supervisor that would be disqualified from casting a ballot in this representation election.

As the lead person for four hourly-employees who perform repetitious tasks in a small room, Kayleah has only a modicum of discretion. Kayleah does not exercise independent judgment in the performance of her duties, but rather merely follows the directions of the post-harvest manager. Those directions are outlined at the morning meeting with the manager and supervisor. (1 RT 124:23-125:1)

Kayleah spends approximately ninety percent of her time doing the same work as the other three workers on her team. Kayleah does have a quality control function with respect to the routine, repetitive work. Kayleah might make sure that the product looked nice in the jar. (1 RT 129:13-23)

Kayleah assign daily tasks to her team based upon priorities given to her daily by the post-harvest manger. Kayleah also advises colleagues when they are making a mistake on their routine, repetitive work or if they are going too slow. Kayleah is similar to the lead worker in *Kawahara Nurseries, Inc.* (2011) 37 ALRB No. 4, at page 24, and dissimilar to both the nurse in *Oakwood Healthcare, Inc.* (2006) 348 NLRB 686 and the herder in *Milky Way Daily* (2003) 29 ALRB No. 4, at page 49.

The Petitioner argued that Kayleah can recommend discipline, suspension and discharge.

Yes, Kayleah may raise those topics with the post-harvest manager, as could her colleagues. But the all of the work is monitored on video surveillance and the post-harvest manager and co-owners were typically on site within one hundred feet of the four packagers. The workers were visible through a window if a co-owner or supervisor walked by. This is very dissimilar to a foreperson leading a crew located on an isolated ranch miles from a higher-up supervisory level employee. Most importantly, the more persuasive testimony was that any recommendations made by Kayleah would be independently investigated and evaluated by the post-harvest manager.

The personnel file for the one worker fired did not show Kayleah's name on the worker's evaluation or disciplinary action form. (2 RT 45:4-17) If Kayleah was to raise the topic of any employee's performance with the post-harvest manager, then the post-harvest manager would independently investigate it. (1 RT 49:21-50:4) "The mere reporting of misconduct does not confer supervisory status if an employer conducts its own investigation prior to imposing discipline." (*Croft Metals, Inc.* (2006) 348 NLRB 717, 726 quoting *Ryder Truck Rental, Inc.* (1998) 326 NLRB 1386) In fact, Flora Terra is a small operation in a small space where the owners and managers seem involved in decision-making both big and small. Lead persons do not even have the authority to grant the usage of a single earned vacation day.

There are a lot of similarities between Flora Terra and Croft Metals in that lead persons receive from their supervisors a daily list of projects that need to be completed, but have little or no role in hiring and discharge.

(*Croft Metals, Inc.* (2006) 348 NLRB 717, 718) Kayleah is able to direct her team, but does so in ways that are merely routine and do not require the exercise of independent judgment. (*Croft Metals, Inc.* (2006) 348 NLRB 717, 720-721) Not only are the team's tasks routine, but Kayleah is given detailed instructions and must follow rigid operating procedures. This is similar to worker Maria Cortes in *Kawahara Nurseries* (2011) 37 ALRB. No 4, at page 18.¹³

The Petitioner also argued that secondary indicia suggest that Kayleah is a supervisor. The two anecdotes argued by Petitioner both relate to the representation election itself. In a pre-election call, Alicia Wingard indicated that Kayleah did not belong on the list of eligible voters. Then, on the day of the election, the post-harvest manager stated that Kayleah was 'an extension of him' and that workers could bring problems to her.

When Alicia Wingard offered her lay opinion regarding Kayleah it is safe to conclude that she did so without having first reviewed NLRB and ALRB decisions explaining the nuances of "independent judgment".

¹³ "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.)" *Kawahara Nurseries* (2011) 37 ALRB No 4, at page 22.

When the post-harvest manager made his comments, he may have meant that workers could go to Kayleah while he and other supervisors were excluded due to the election process. Regardless, his comments just moments before the election do not transform whether Kayleah served as a supervisor or not during the preceding days. The purported secondary indicia regarding Kayleah's status were not persuasive.

I find that Kayleah Feil is not a statutory supervisory and is eligible to vote in this representation election.

D. Tim Garcia Is Not an ALRA Statutory Supervisor

Neither of the Petitioner's two witnesses worked in the cultivation department. The Employer's sole witness was co-owner Alicia Wingard. I felt that this left the record incomplete as to Tim Garcia's duties. For that reason, I decided to call Tim Garcia as a witness. After my examination of Garcia, counsel had an opportunity to propound their own questions.

While not quite as routine and repetitive as the packaging work, the cultivation work is still fairly routine and repetitive. (2 RT 10:1-24 and 2 RT 20:1-2) Like the packaging team, the cultivation team has four workers, which includes the one lead.¹⁴ (2 RT 4:4-7) There are a total of four cultivation rooms. (2 RT 5:7-8) Unlike the packaging team, workers on the cultivation team may be in the same room or may be in different rooms. (2 RT 5:21-22) The cultivation team harvests every two weeks. (2 RT 5:23-24)

¹⁴ Including the manager, the cultivation team is comprised of five persons, the cultivation manager Scot, the lead Tim, and three other cultivation workers, Carlos, Dave and Kyle. (2 RT:4-7)

Tim best explained the relationship between his manager, himself, and his colleagues at 2 RT 35:24-36:4. Scot would tell Tim detailed instructions about what needs to be done in each room.¹⁵ Tim would then decide which cultivation worker goes to each room and how they do the task. The tasks are moderately routine and recurrent. Scot then checks with Tim during the day to see how things are going and sometimes walks through the rooms. (2 RT 37:13-16)

According to Tim, the company previously had a couple of workers who were doing very little. (2 RT 9:7-10) Tim brought it up with his manager, Scot. (2 RT 9:7-9) Tim does not know what type of independent investigation or deliberation Scott or other company managers/owners may have done. Tim believes that workers quit rather than fired. Overall, Tim is mostly unfamiliar with the company process for hiring interviews, discipline and termination. Tim has never served on an interview panel himself.

Petitioners point to two isolated anecdotes to suggest that Tim is a supervisor. One is a single instance where Tim gestured to a post-harvest worker to put their mask back on. The other is an instance on the day of the representation election where Tim told two brand new workers to get back to work since they were not eligible to vote. It is not surprising that these were isolated examples because Petitioner did not call anyone on the cultivation team as a witness.

¹⁵ “[A] judgment is not independent if it is dictated or controlled by detailed instructions. (*Oakwood Healthcare, Inc.*, supra, 348 NLRB 686, p. 693.)” *Kawahara Nurseries* (2011) 37 ALRB No 4, at page 22.

With respect to Tim telling two brand new workers to go back to work on the day of the representation election, this is a unique circumstance because the owners and managers were already excluded.

I accept as credible that Tim gestured through a window for a trim worker to put on their mask. But there is no evidence that Tim reported this information to a supervisor or manager or that any action was taken. The lead person in Croft metals also orally warned employees for failure to wear protective equipment. (*Croft Metals, Inc.* (2006) 348 NLRB 717, 720) Mathias Vasquez testified that after that incident, trim workers asked their supervisor Laura if Tim had “jurisdiction” to tell them that or if he was a supervisor, and that Laura responded affirmatively. (1 RT 189:15-20)

While I found Mathias to be credible on this topic, the incident is at most a small secondary indicia that Tim might be perceived as a supervisor to some persons who worked outside of Tim’s department. In context, Laura may simply have been reinforcing the point that face masks needed to be worn.

While it is clear-cut that Kayleah Feil is not a supervisor, Tim Garcia does pose a more challenging analysis.¹⁶ The cultivation work is mostly repetitive, while the packaging work is more obviously routine and repetitive. The testimony does paint Tim Garcia as having a certain level of confidence and swagger that might cause others to view him as a supervisor.

¹⁶ As noted in *Kawahara Nurseries* (2011) 37 ALRB No. 4, at page 10, “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.)”

But Tim exercises very little independent judgment and he and Scot connect regularly to discuss how the small cultivation team is progressing. Tim's main area of discretion is if he thinks one cultivation worker is better suited to handle a particular task than another, then he has the discretion to make assignments accordingly.

I find that Tim Garcia is not a statutory supervisory and is eligible to vote in this representation election.

VII. CONCLUSION AND ORDER

For the reasons stated herein, I recommend that the Board overrule the challenges to the ballots of Kayleah Feil and Tim Garcia.

Dated: May 9, 2022



Mark R. Soble
Chief Administrative Law Judge
Agricultural Labor Relations Board

**STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD**

**PROOF OF SERVICE
(1013a, 2015.5 C.C.P.)**

Case Name: SONOMA CHO LLC, DBA FLORA TERRA, Respondent, and,
INTERNATION BROTHERHOOD OF TEAMSTERS LOCAL 665, Petitioner

Case Nos. 2022-RC-001-SAL; (48 ALRB No. 1)

I am a citizen of the United States and a resident of the County of Sacramento, I am over the age of eighteen years and not a party to the within entitled action. My business address is 1325 “J” Street, Suite 1900-B, Sacramento, California 95814.

I served **NOTICE OF TRANSFER; and DECISION OF THE ADMINISTRATIVE LAW**

JUDGE, on the parties in the above-entitled action as follows:

By Email and Certified Mail by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, with return receipt requested, in the United States mail at Sacramento, California, addressed as follows:

7002 0510 0003 1168 9412
David Wingard II, Founder/CEO
1430 Madrone Avenue
Cotati, CA 94931
david@floraterraca.com

- **By Email** to the persons listed below and addressed as follows:

David Wingard II, Founder/CEO
Alicia Wingard, Founder/COO
Cressna Au, Operations Manager
1825 Empire Industrial Court, Suite A
Santa Rosa, CA 95403
david@floraterraca.com
alicia@floraterraca.com
cressna@floraterraca.com


John H. Feldman, III
Cozen O'Connor
101 Montgomery Street, Suite 1400
San Francisco, CA 94104
jfeldmann@cozen.com

Geoffrey Piller, Esq.
Lorrie E. Bradley, Esq.
Gianpaolo Ciocco, Esq.
Beeson, Tayer & Bodine
492 Ninth Street, Suite 350
Oakland CA, 94607-3865
gpiller@beesontayer.com
gciocco@beesontayer.com

Julia L. Montgomery, General Counsel
Franchesca C. Herrera, Acting Regional Director
Audrey Hsia, General Counsel
Agricultural Labor Relations Board
julia.montgomery@alrb.ca.gov
franchesca.herrera@alrb.ca.gov
audrey.hsia@alrb.ca.gov

Jessica Arciniega, Regional Director
Yesenia De Luna, Assistant General Counsel
Salinas Regional Office
jessica.arciniega@alrb.ca.gov
yesenia.deluna@alrb.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 9, 2022, at Sacramento California.



Angelique Duran
Legal Secretary