

AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST SUPPLEMENT
VOLUME 48 (2022)

***Note New Sections:**

- 400.04 Misclassification of Agricultural Employees as Independent Contractors**
466.10 Civil Penalties

SONOMA CHO LLC dba FLORA TERRA
(Intl. Brotherhood of Teamsters Local 665)

48 ALRB No. 1
Case No. 2022-RC-001-SAL

- 102.01 Generally, the determination that an employee is engaged in primary agriculture is straightforward. To come within the secondary meaning of agriculture, a practice must be performed either by a farmer or on a farm. It must also be performed either in connection with the farmer's own farming operations or in connection with the farming operations conducted on the farm where the practice is performed. In addition, the practice must be subordinate to the farmer's farming operations. SONOMA CHO LLC, 48 ALRB No. 1.
- 102.01 A determination as to whether practices are incident to or in conjunction with farming operations requires an examination and evaluation of all relevant factors. One important factor is the type of product resulting from the practice. If the raw or natural state of the commodity has been changed, this is a strong indication that the practice is not agricultural work. SONOMA CHO LLC, 48 ALRB No. 1.
- 204.03 Under both the NLRA and the ALRA, the authority to assign or responsibly direct other employees does not confer supervisory status on lead persons unless they exercise independent judgment in the performance of those duties as opposed to routine decision making. SONOMA CHO LLC, 48 ALRB No. 1.
- 324.02 A letter emailed to the executive secretary, accompanied by an unsigned typewritten statement attributed to an employee, did not satisfy filing and other procedural requirements for asserting election objections. SONOMA CHO LLC, 48 ALRB No. 1.

- 101.01 Section 1148 generally requires the Board follow “applicable precedents of the [NLRA].” This rule is not absolute, however, and the Board may depart from NLRA precedent in certain circumstances, such as where the issue involves a matter of administrative procedure, where the language of our Act differs from the NLRA, or where the circumstances of California’s agricultural industry warrants a different approach. California courts also have departed from the command of section 1148 where California law differs from federal law. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 101.01 The ALRB is bound to follow the opinions of California courts under rules of stare decisis. Thus, when confronted with an issue where the California Supreme Court rejected an argument advanced by the NLRB, our Board followed the position taken by the California Supreme Court. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 101.03 California law and public policy concerning the classification of workers substantially departs from that applied by the NLRB for concluding an employer’s misclassification of workers, by itself, does not violate the NLRA. When these differences are viewed in conjunction with our Legislature’s refusal to adopt the Taft-Hartley amendments that resulted in the NLRA’s current definition of “employee,” the Board’s departure from NLRB precedent on this issue is not only warranted but mandated. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 204.01 As a general rule, supervisors are excluded from the coverage and protections of both the NLRA and ALRA. The rationale underlying the exclusion of supervisors from the NLRA’s protections is grounded in the principle an employer should be able to insist on the loyalty of its supervisors. Thus, the discharge of supervisors as a result of their participation in union or concerted activity--either by themselves or when allied with rank-and-file employees--is not unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act, and employers largely may discipline or discharge supervisors without consequence for engaging in the same type of conduct for which it would be unlawful for the employer to retaliate against if engaged in by employees. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 204.01 The ALRB has recognized three exceptions based in NLRA precedent where a supervisor may be entitled to the protections of our Act: (1) when the supervisor was discharged for having refused to engage in

activities proscribed by the Act; (2) when the supervisor is discharged for having engaged in conduct designed to protect employee rights, such as giving testimony adverse to the employer in a NLRB proceeding; or (3) when the supervisor's discharge is the means by which the employer unlawfully discriminates against its employees. CINAGRO FARMS, INC., 42 ALRB No. 2.

- 204.01 To establish a prima facie case that a supervisor was discharged as a means to discriminate against employees for their protected activity, the General Counsel must prove [1] the employees' tenure is expressly conditioned on the continued employment of their supervisor, [2] the employees have engaged in protected concerted activities, and [3] their supervisor has been discharged as a means of terminating the employees because of their concerted activity. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 204.01 Where the record did not demonstrate the employees' continued employment was dependent on the retention of their foreman, a prima facie case entitling the supervisor to relief under the ALRA was not established. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 204.01 The Board finds the protections of the ALRA should be extended to supervisors discharged by their employers in response to the supervisors serving as a conduit for reporting to the employer employees' complaints about being misclassified as independent contractors. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 400.01 In discrimination or retaliation cases under section 1153, subdivision (a),
414.04 the General Counsel has the initial burden of establishing a prima facie case. The General Counsel must show by a preponderance of the evidence that the employees engaged in protected concerted activity, the employer knew of or suspected such activity, and there was a causal relationship between the employees' protected activity and the adverse employment action on the part of the employer (i.e., the employee's protected activity was a motivating factor for the adverse action). CINAGRO FARMS, INC., 48 ALRB No. 2.
- 400.01 Once the General Counsel has established a prima facie case of
414.04 discrimination, the burden shifts to the employer to prove that it would have taken the same action in the absence of the protected conduct. It is not sufficient for the employer simply to produce a legitimate basis for the action in question. It must persuade by a preponderance of the

evidence that it would have taken the same action in the absence of protected conduct. CINAGRO FARMS, INC., 48 ALRB No. 2.

- 400.04 Misclassifying employees as independent contractors, at the very least, implicitly conveys to the employees they have no labor rights, and therefore contains an inherent chilling effect on those employees' free exercise of protected rights. Under the ALRA, an employer's misclassification of agricultural employees as independent contractors, by itself, unlawfully interferes with or restrains employees' free exercise of rights under section 1152, and therefore violates section 1153, subdivision (a). CINAGRO FARMS, INC., 48 ALRB No. 2.
- 423.11 A discharge occurs when an employer's conduct or words would reasonably cause employees to believe that they were discharged. This inquiry focuses on the perspective of the employee, not the employer, and whether the employee reasonably believed a discharge occurred. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 423.11 Where workers reasonably believed they had been terminated, or at least that their continued employment was unclear, the burden shifts to the employer to demonstrate it clarified the ambiguity or informed the workers they were not terminated. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 453.01 Where good cause exists, administrative law judges have authority to conduct unfair labor practice hearings by videoconference, and Board regulation 20269 does not give a party a right to be physically present in a hearing room. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 457.11 Matters of remedy are within the province of the Board and may be
466.01 addressed by the Board sua sponte even in the absence of exceptions. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 466.10 The ALRB is authorized to assess civil penalties against an employer for the willful misclassification of workers as independent contractors under Labor Code section 226.8. CINAGRO FARMS, INC., 48 ALRB No. 2.
- 466.10 In determining the appropriate amount of civil penalties to assess under Labor Code section 226.8 during compliance proceedings, the following factors should be considered: (1) the nature of the violation; (2) the severity, gravity, or extent of the violation; (3) any history of prior employment related violations by the employer; (4) any good faith measures by the employer to comply with the law or other remedial measures taken; (5) the financial condition of the employer or the

employer's ability to pay; and (6) any other matters justice may require.
CINAGRO FARMS, INC., 48 ALRB No. 2.

LILY'S GREEN GARDEN, INC. 48 ALRB No. 3
(Lisbeth Jimenez) Case No. 2020-CE-025-SAL, et al.

457.01 Where a party wishes to seek review of a portion of an administrative law
457.11 judge's decision, the proper avenue by which to raise such issues to the
Board is by exceptions pursuant to Board regulation 20282. Therefore, a
motion by the General Counsel seeking clarification concerning an issue
in the administrative law judge's decision was not procedurally proper.
LILY'S GREEN GARDEN, INC., 48 ALRB No. 3.

457.01 Matters of remedy are within the province of the Board and may be
466.01 addressed by the Board sua sponte even in the absence of exceptions.
LILY'S GREEN GARDEN, INC., 48 ALRB No. 3.

ST. SUPÉRY, INC. Admin. Order No. 2022-06-P
(United Farm Workers of America) Case No. 2022-CE-015-SAL

106.03 A claim that prosecution of a charge must be deferred pending the
450.05 parties' resort to a contractual grievance-arbitration process is an
456.02 affirmative defense that may be raised in an answer to a complaint or at
hearing. The party asserting deferral carries the burden of proving
deferral is appropriate. ST. SUPÉRY, INC., ALRB Admin. Order No.
2022-06-P.

106.03 The Board will not refuse to grant authorization to seek judicial
450.05 enforcement of investigatory subpoenas based on an alleged deferral
456.02 defense because such a defense is prematurely raised before a complaint
has issued and while the matter remains subject to the General Counsel's
exercise of discretion in investigation charges. ST. SUPÉRY, INC.,
ALRB Admin. Order No. 2022-06-P.

106.03 The Board retains considerable discretion in determining whether to
452.15 defer prosecution of a charge, and will consider the following factors in
determining whether deferral is appropriate: (1) if the dispute arose
within the confines of a long and productive collective-bargaining
relationship; (2) if there is no claim of employer animosity to employees'
exercise of protected rights; (3) if the parties' collective bargaining
agreement provides for arbitration of a very broad range of disputes; (4)
if the arbitration clause clearly encompasses the dispute at issue; (5) if the

employer asserts its willingness to utilize arbitration to resolve the dispute; and (6) if the dispute is eminently well suited to resolution by arbitration. ST. SUPÉRY, INC., ALRB Admin. Order No. 2022-06-P.

- 450.05
456.02 Both our own precedent and applicable precedent under the National Labor Relations Act (NLRA) clearly establish the General Counsel’s authority to obtain records or testimony from a charged party via subpoena to aid in its investigation of an unfair labor practice charge before issuance of a complaint. ST. SUPÉRY, INC., ALRB Admin. Order No. 2022-06-P.
- 456.02 A person that does not intend to comply with an investigatory subpoena must file a petition to revoke it within five days, stating “with particularity the grounds for objecting” to the subpoena. Failure to file a petition to revoke waives any objections to the subpoena. ST. SUPÉRY, INC., ALRB Admin. Order No. 2022-06-P.
- 456.02
500.08 Courts will enforce an ALRB subpoena if the subpoena was properly issued and the records sought are relevant to the charge investigation and identified with sufficient particularity. ST. SUPÉRY, INC., ALRB Admin. Order No. 2022-06-P.
- 456.02 The Board refused to grant enforcement of a document request in a subpoena duces tecum for all records the charged party believed were relevant to the General Counsel’s investigation or upon which the charged party may rely because the request failed to specify with particularity the records commanded to be produced. ST. SUPÉRY, INC., ALRB Admin. Order No. 2022-06-P.
- 456.02
500.08 Judicial enforcement is available for a subpoena limited or modified in scope by an administrative law judge or the Board. ST. SUPÉRY, INC., ALRB Admin. Order No. 2022-06-P.
- 500.08 Labor Code section 1151, subdivision (b) contemplates the prompt enforcement of administrative subpoenas through summary proceedings commenced by the filing of a Board application. Such proceedings are not bound to the requirements of other civil litigation matters and are not to be treated like pre-trial discovery disputes, otherwise the delays attendant such proceedings would serve to frustrate the Board’s administration and enforcement of the Act. ST. SUPÉRY, INC., ALRB Admin. Order No. 2022-06-P.