

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SONOMA CHO LLC dba FLORA)	Case No.	2022-RC-001-SAL
TERRA,)		
)		
Employer,)		
)		
and,)		
)		
INTERNATIONAL)	48 ALRB No. 1	
BROTHERHOOD OF)		
TEAMSTERS LOCAL 665,)		
)		
Petitioner.)	(February 25, 2022)	
_____)		

DECISION AND ORDER

On January 14, 2022, International Brotherhood of Teamsters Local 665 (Union) filed a petition for certification to represent workers at Sonoma Cho LLC dba Flora Terra (Employer). The Employer is a cannabis producer located in Santa Rosa. The election was held on January 21, 2022, and the tally of the ballots was as follows:

Petitioner (Union)	7
No Union	6
Void	0
<u>Unresolved Challenged Ballots</u>	<u>4</u>
Total Valid Ballots Cast	17

Four voters were challenged at the time of the election by regional staff of the Agricultural Labor Relations Board (ALRB or Board) because their names did not appear on the list of eligible voters. The challenged ballots are sufficient in number to

determine the outcome of the election. Therefore, under Board regulation 20363, subdivision (b),¹ the Board must consider the evidence and arguments submitted by the parties regarding their positions on the eligibility of the challenged voters, and determine which, if any, challenges may be resolved based on the current record and which must be set for an evidentiary hearing to resolve material factual disputes.

In addition, on January 28, 2022, attorneys for the Union emailed a one-page letter to the Board's Executive Secretary alleging the Employer's post-harvest department manager held a captive audience meeting of the eight employees in his department on the morning of the election and threatened layoffs and closure of the Employer's operations if the Union won the election.²

This decision will address the disposition of the challenged ballots as well as the disposition of the Union's election objection.

I. The Challenged Ballots

The individuals whose votes were subject to challenge are Laura Johnson, Melissa Gutierrez, Kayleah Feil, and Tim Garcia. The Union raised the issue of whether the challenged voters are statutory supervisors and thus ineligible to vote. The Board has reviewed the parties' submissions regarding the challenged voters, and it is apparent that

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

² The Union styles its letter as its "post-election protest," which we treat as an objection pursuant to Labor Code section 1156.3 subdivision (e)(1).

they are in agreement that Laura Johnson and Melissa Gutierrez are supervisors. Therefore, the challenges to their ballots will be sustained, and their votes will not be counted.

As for the remaining two challenged voters, Kayleah Feil and Tim Garcia, in addition to unresolved issues regarding their supervisory status, the record before us raises a question as to whether Feil is an agricultural employee as defined in section 1140.4, subdivision (a) of the Agricultural Labor Relations Act (ALRA or Act).³ Although no party has asserted this issue, we raise it *sua sponte* as it presents a novel and important issue under our Act and its expansion to the cannabis industry. (*Bayou Vista Dairy* (2006) 32 ALRB No. 6, p. 3.)

A. Determination of Supervisory Status

Section 1140.4, subdivision (j) 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 foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

We have followed applicable precedent under the National Labor Relations Act (NLRA) in interpreting and applying this definition.⁴ (§ 1148; *Kawahara Nurseries, Inc.* (2011) 37 ALRB No. 4, pp. 8-9; *South Lakes Dairy Farms* (2010) 36 ALRB No. 5,

³ The ALRA is codified at Labor Code section 1140 et seq. Subsequent statutory references are to the Labor Code unless otherwise indicated.

⁴ The language of section 1140, subdivision (j) defining the term supervisor is virtually identical to NLRA Section 2(11). (29 U.S.C. § 152(11).)

pp. 8-9; *Artesia Dairy* (2007) 33 ALRB No. 3, mod. (2008) 168 Cal.App.4th 598; *Croft Metals, Inc.* (2006) 348 NLRB 717; *Oakwood Healthcare, Inc.* (2006) 348 NLRB 686.) The guidance provided by these and related cases is appropriate when evaluating the status of “lead persons” such as the two individuals under consideration in this case. Typically, such individuals do not have the authority to hire, fire, promote, and discipline fellow crew members and often work side by side with them, but still perform some supervisory functions. 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. (*Sam’s Club, a Division of Wal-Mart Stores, Inc.* (2007) 349 NLRB 1007, 1014; *Kawahara Nurseries, Inc., supra*, 37 ALRB No. 4, p. 12; *Artesia Dairy, supra*, 33 ALRB No. 33, IHE Dec. at p. 22; *Bright’s Nursery* (1984) 10 ALRB No. 18, ALJ Dec. at p. 31.)

For example, in *Kawahara Nurseries, Inc., supra*, 37 ALRB No. 4, at page 24, the Board concluded a lead worker was not a statutory supervisor. Although the individual had authority to direct the work of other employees by assigning tasks and making decisions about the order in which those tasks would be performed, the lead worker did not do so with the requisite level of independent judgment to support the conclusion she was a supervisor. Rather, the evidence showed that her direction of other workers was either routine or simply based on the need to get work done. (*Id.* at p. 23.) In contrast, in *Milky Way Dairy* (2003) 29 ALRB No. 4, at page 49, the Board found a herder who made decisions about when to move or treat sick cows and made work assignments to crew

members based on their work skills was a statutory supervisor. The Board concluded the record in that case supported a finding the herder exercised sufficient independent judgment that was not merely routine or clerical in nature. (*Ibid.*)

Questions of supervisory status are fact-intensive inquiries. The Board makes the determination of supervisory status on the basis of the actual job duties of each employee in question rather than their job titles. (*Salinas Valley Nurseries* (1989) 15 ALRB No. 4, p. 8.)

B. Determination of Whether an Individual is an Agricultural Employee

Section 1156.2 provides that the bargaining unit in a representation election “shall be all agricultural employees of an employer.” Section 1140.4, subdivision (a) defines agriculture as follows:

The term “agriculture” includes farming in all its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 1141j(g) of Title 12 of the United States Code), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market.

Under this definition, “agriculture” has a primary and secondary meaning. The primary meaning refers to actual farming operations, such as cultivation, tilling, growing and harvesting of agricultural commodities. The secondary meaning includes any practices which are performed by a farmer or on a farm as an incident to or in conjunction

with such farming operations. (*Kawahara Nurseries, Inc.* (2010) 36 ALRB No. 3, p. 9, citing *Farmers Reservoir & Irrigation Co. v. McComb* (1948) 337 U.S. 755, 762-763.)⁵ For example, the packing of agricultural products can be secondary agriculture. (See, e.g. *Rod McLellan Co.* (1968) 172 NLRB 1458, 1460 [“Cutting, grading, sorting, potting, and packing do not change [a nursery employer’s] flowers and plants or enhance their value; rather, these activities merely prepare them for normal marketing”].)

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. (*Mitchell v. Huntsville Wholesale Nurseries* (5th Cir. 1959) 267 F.2d 286, 290; *Farmers Reservoir, supra*, 337 U.S. 763; *Maneja v. Waialua Agricultural Co.* (1955) 349 U.S. 254; *Mitchell v. Budd* (1956) 350 U.S. 473.)

⁵ NLRA Section 2(3) excludes from its coverage “any individual employed as an agricultural laborer.” The NLRA does not define “agricultural laborer.” However, since 1946 Congress has annually reaffirmed the exclusion for agriculture under the NLRA by adding a rider to the NLRB’s annual budget appropriation bill providing that no part of the appropriation may be used in connection with bargaining units of “agricultural laborers” as agriculture is defined in Section 203(f) of the Fair Labor Standards Act (FLSA) [29 U.S.C. § 203(f)]. The ALRA’s definition of “agriculture” is identical to FLSA Section 203(f). Thus, the regulations issued by the Department of Labor (DOL) interpreting FLSA Section 203(f) provide helpful guidance in determining whether or not an individual is engaged in agriculture. (See 29 C.F.R. § 780 et. seq.)

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. For example, the Supreme Court has found that tobacco bulking and sugar milling substantially transform the product and therefore are not secondary agriculture. (*Maneja, supra*, 349 U.S. at p. 268; *Budd, supra*, 350 U.S. at pp. 481-82.)

Ultimately, the evaluation of whether an individual is engaged in secondary agriculture, and thus subject to our jurisdiction, requires a careful determination of all the facts surrounding workers' daily activities.⁶

C. The Two Challenged Voters in Dispute

1. Kayleah Feil

According to Feil's post-election challenged ballot declaration, her job title is "packing lead." She has held this position since September 2021. She states that her

⁶ The NLRB has not directly addressed the agricultural status of employees engaged in various aspects of the cannabis industry and their eligibility to vote in representation elections. However, these issues have been discussed by the NLRB General Counsel's Division of Advice, and by at least two regions. (See *Cannaseur's Choice, LLC*, case no. 19-RC-282922, Reg. Dir. Dec. (Dec. 10, 2021) [2021 NLRB REG. DIR. DEC. LEXIS 195]; *New England Treatment Access, LLC*, case no. 01-RC-264290, Reg. Dir. Dec. (Oct. 23, 2020) [2020 NLRB REG. DIR. DEC. LEXIS 430]; *Agri-Kind*, case no. 04-CA-260089, NLRB GC Advice Memo. (Oct. 21, 2020) [2020 NLRB GCM LEXIS 31]; *DMM, LLC dba High Level Health*, case no. N27-CA-146734, NLRB GC Advice Memo. (July 31, 2015) [2015 NLRB GCM LEXIS 42]; *Wellness Connection of Maine*, case nos. 01-CA-104979 and 106405, NLRB GC Advice Memo. (Oct. 25, 2013) [available at <<https://www.nlr.gov/case/01-CA-104979>>].) Although these cases are not precedent we are bound to follow under section 1148, they may provide relevant guidance to the parties and our Independent Hearing Examiner in the proceedings to follow.

supervisor is Laura Johnson.⁷ According to Feil, her boss Willie Melia gives her tasks to complete daily and she passes that information on to her team of three people. They package the Employer's product. She is in charge of quality control and if she sees that something is being done incorrectly, she corrects her team member. If one of her team members completes a project, she directs them to the next task. She gives instructions about how and what to pack, and she can implement changes to help work flow better. She has recommended that a worker be disciplined, but she cannot hire, fire, issue a warning, or grant time off. She never covers for her supervisor when he is absent.

The Union contends Feil is a supervisor and ineligible to vote, while the Employer asserts she is not a supervisor. Feil's declaration describes assigning work and directing other employees to do tasks, duties that potentially fall within the scope of supervisory duties defined under section 1140.4, subdivision (j) provided that they require the use of independent judgment. Accordingly, we conclude that an evidentiary hearing is necessary to develop a full picture of Feil's authority to assign or direct other employees and whether those duties require the use of independent judgment.

Furthermore, even if Feil is not a statutory supervisor, the record before us presents the question whether she is engaged in secondary agriculture and, therefore, properly part of the bargaining unit and eligible to vote. Her declaration states that she "package[s] Flora Terra products," which includes packing products "in jars or rolls, or

⁷ The Employer states in its response to the challenged ballot declarations that Feil's direct supervisor is Willie Melia, while Laura Johnson is the "post-harvest" supervisor and works independently of Feil.

whatever packaging is needed.” The Employer’s organizational chart indicates that Feil works in the “post-harvest” department and holds the position of “packaging lead.” The organizational chart also indicates that the Employer has a retail operation, although the relationship of Feil’s work to that retail operation, if any, is not known. Thus, there are questions as to whether her job is incidental to the Employer’s farming operations or to its retail or other non-farming operations. It is not clear from the record whether the product she is packing is essentially unchanged from its raw or natural state, is packed by hand or aided by use of equipment, or whether it has been processed and made ready for use and consumption by customers. Therefore, the record before us also raises the issue of whether Feil is an agricultural employee, an issue to be resolved in an investigative hearing.

2. *Tim Garcia*

Tim Garcia states in his challenged ballot declaration that his job title is “cultivation lead.” He has worked in this position since June 2021. His supervisor is Scott Bensco. He states that his job duties include harvesting, transplanting, and general maintenance and care of plants. He manages a team of five people.

He states that if his supervisor is not present, he will perform the supervisor’s duties, including directing work and granting time off. He covers for his supervisor once a month. Garcia states that he makes his own decisions about what instructions to provide workers, and makes independent decisions about daily tasks. According to Garcia, he can recommend discipline, hiring and firing, but he cannot complete those functions on his own.

As with Feil, the Union asserts Garcia is a supervisor while the Employer contends he is an employee eligible to vote. Garcia's declaration states that he performs job duties that may fall within the scope of supervisory duties defined under section 1140.4, subdivision (j), including assigning work or responsibly directing other employees. His declaration further states that he exercises independent judgment with respect to his job duties. Finally, his declaration states that he performs supervisory functions, including hiring, disciplining, and terminating employees when his own supervisor is absent, although the extent to which he can independently terminate or discipline employees is disputed. We conclude that the evidence before us raises material factual issues concerning Garcia's supervisory status, including the extent to which he assigns work, responsibly directs other employees, hires, disciplines, and terminates employees, and the extent to which he uses independent judgment with respect to these duties. These issues need to be resolved in an investigative hearing.

II. The Union's Election Objection

Pursuant to section 1156.3 subdivision (e)(1), within five days after an election, "any person may file with the board a signed petition ... objecting to the conduct of the election or conduct affecting the results of the election." The rules governing the filing of election objections are set forth in Board regulation 20365. Objections must be filed by personal service on the Executive Secretary, or by registered or certified mail postmarked within the five-day period. (Board reg. 20365, subd. (b).) No extensions of time or amendments to a previously filed objection are allowed. (*Ibid.*) A party objecting on grounds that misconduct occurred affecting the results of the election must include

declarations setting forth facts sufficient to constitute grounds for the Board to refuse to certify the election. (Board reg. 20365, subd. (c).) Proof of service on all other parties, including the regional director, is required. (*Ibid.*; cf. Board reg. 20166.) The Board is required to “dismiss any objections petition or any portion of such petition which does not satisfy” these requirements. (Board reg. 20365, subd. (d).)

As previously stated, the Union emailed a one-page letter to the Executive Secretary on January 28 alleging Willie Melia, Employer’s post-harvest department manager, “held a captive audience meeting of the eight employees in his department at approximately 8:15 a.m. on the day of the election, during which he threatened layoffs and closure of the employer's operations if the Union were to win the election.”

Attached to the letter was an unsigned typewritten statement attributed to an employee in the post-harvest department. This typewritten statement alleges Melia gathered the employees in the department for their usual morning meeting less than an hour before the scheduled election, and told the group that if the union won the election there would be layoffs, piece-rate payments would go away, new hires will have to be let go, and that it was possible that business would have to shut down. The employee alleges that a few workers were clearly upset by this information, and that he believed it changed some workers’ minds about how to vote in the union election.

The Union also attached to its letter a copy of unfair labor practice charge number 2022-CE-003-SAL, filed January 24, 2022. The charge alleges Melia and others threatened layoffs and stated that the company would no longer be able to pay workers by piece rate if the union won the election.

The allegations set forth in the Union’s letter and its attachments are very serious and describe conduct that, if proven, could clearly have impacted employee free choice in the election, particularly given the small workforce and the timing of the alleged conduct. Nevertheless, the Union’s submission fails to comply with the clear requirements of regulation 20365 in several important respects, and, accordingly, cannot be considered.

First, the letter and attachments were not properly filed. As described above, Board regulation 20365, subdivision (b) requires objections to be filed by personal service on the Executive Secretary or by registered or certified mail. The Union’s objections were not filed by any of these means.⁸ The Union’s submission also contains no proof of service on the Employer and Regional Director.⁹ (Board reg. 20365, subd. (c).)

Even if the Union’s objection had met these basic filing and service requirements, it still would be deficient, as the allegations are not supported by declaration — only a typewritten statement attributed to an employee and that is not signed or verified.¹⁰ (Board reg. 20365, subds. (c)(2), (c)(4).)

⁸ Although the ALRB maintains an electronic filing system, Board regulation 20365 does not permit the electronic filing of election objections. Furthermore, even if electronic filing of election objections were permitted, the Union’s objections were not submitted through the ALRB’s electronic filing system but were only emailed to the Executive Secretary.

⁹ Although the Union’s letter purports to “cc” two representatives of the Employer, neither representative was included on the Union’s email to the Executive Secretary. There simply is no proof or indication in the record before us the Employer ever received the Union’s objection. In this regard, we additionally note the Employer did not file any response to the Union’s objection, while it did respond to other filings by the Union or region concerning the challenged ballots.

¹⁰ We note it appears the Union’s attorneys attempted to cure this defect by personally delivering a signed version of the statement to the Santa Rosa Regional Office. However,

As made plain in Board regulation 20365, subdivision (d), these defects in the Union's submission are fatal to our ability to consider it.

While the Union's purported election objection is not properly before us, it did file an unfair labor practice charge alleging unlawful conduct occurring on the morning of the election. Because of the seriousness of these allegations and the need to resolve allegations surrounding election matters as expeditiously as possible, the Board urges the General Counsel to expedite her investigation of the related unfair labor practice charge.

ORDER

IT IS ORDERED THAT the Union's January 28, 2022 post-election protest is DISMISSED.

IT IS ORDERED THAT within twenty-eight days of this Decision and Order an investigative hearing be scheduled to resolve material issues of fact relating to the challenges to the ballots of Kayleah Feil and Tim Garcia. (§ 1156.3, subd. (i)(A)(ii).)

IT IS ORDERED THAT the Investigative Hearing Examiner take evidence on the issue of whether the challenges to the ballots of Kayleah Feil and Tim Garcia should be sustained or overruled on the basis of whether or not they are supervisors as defined in section 1140, subdivision (j). In addition, the Investigative Hearing Examiner is directed to take evidence, in accordance with the discussion above, on the issue of whether the challenge to the ballot of Kayleigh Feil should be sustained or overruled on the basis of whether she is an agricultural employee within the jurisdiction of the ALRB.

that statement was not filed with the Executive Secretary and also lacked any proof of service on the Employer.

IT IS FURTHER ORDERED that the challenges to the ballots of Laura Johnson and Melissa Gutierrez be sustained.

DATED: February 25, 2022

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member

Cinthia N. Flores, Member

CASE SUMMARY

**SONOMA CHO LLC dba
FLORA TERRA**

48 ALRB No. 1

(International Brotherhood of
Teamsters Local 665)

Case No. 2022-RC-001-SAL

Board Decision

On January 14, 2022, International Brotherhood of Teamsters Local 665 (Union) filed a petition for certification to represent workers at Sonoma Cho LLC dba Flora Terra (Employer). The Employer is a cannabis producer located in Santa Rosa. The election was held on January 21, 2022, and the tally of the ballots was as follows: seven votes for Petitioner (Union); six votes for “No Union;” and four unresolved challenged ballots.

Four voters were challenged at the time of the election by regional staff of the Agricultural Labor Relations Board (ALRB or Board) because their names did not appear on the list of eligible voters. The challenged ballots are sufficient in number to determine the outcome of the election; therefore, the Board considered the evidence and arguments submitted by the parties regarding their positions on the eligibility of the challenged voters, and determined that two of the challenges can be resolved based on the current record, and two must be set for an evidentiary hearing to resolve material factual disputes.

The Board ordered that an investigative hearing be set, and that an investigative hearing examiner (IHE) take evidence on the issue of whether the challenges to the ballots of two workers should be sustained or overruled on the basis of whether or not they are supervisors as defined in Labor Code section 1140, subdivision (j). In addition, the Board ordered the IHE to take evidence on the issue of whether the ballots one of the two workers should be sustained or overruled on the basis of whether she is an agricultural employee within the jurisdiction of the ALRB.

In addition, the Union submitted a letter styled as a post-election protest (which the Board treated as an election objection) on January 28, 2022. The Board found that the election objection failed to meet the basic filing and service requirements set forth in the Board’s regulations, and dismissed the objection pursuant to Board regulation 20365, subdivision (d).

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