

57 PERB P 3408

New York Public Employment Relations Board

November 7, 2024

CASE NO. CU-6713

Reporter

57 PERB P 3408

In the Matter of

UFCW DISTRICT UNION LOCAL ONE, Petitioner,

-and-

MERRELL DAIRY, LLC, Employer

Core Terms

bargaining unit, field crop, truck driver, dairy, certificate, farm worker, clean, farm, supplemental brief, compelling circumstances, per hour, herdspersons, transport, milker

Counsel

ROBERT E. SMITH, GENERAL COUNSEL, for Petitioner

FISHER & PHILLIPS LLP (JOSHUA H. VIAU and BORIS GAUTIER of counsel), for Employer

Panel: TIMOTHY CONNICK, Chair ANTHONY ZUMBOLO, Member ROSEMARY A. TOWNLEY, Member

Opinion

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Merrell Dairy, LLC (Merrell Dairy) to a decision and certification of representative and order to negotiate (Decision) of a Hearing Officer (HO) ¹on a petition for certification filed by UFCW District Union Local One (Local One). The HO certified a bargaining unit of all full-time and regular part-time agricultural workers employed by the employer, dismissing Merrell Dairy's objections to the composition of the bargaining unit.

EXCEPTIONS

¹ 56 PERB P 4408 (2023), attached as an Appendix.

Merrell Dairy filed 44 exceptions to the HO's Decision which contend, in substance, that the HO erred in excluding David Merrell, Daniel Merrell, lead milkers, lead herdspersons, clerical office workers, truck drivers, mechanic/field crop workers and general farm workers with principal duties consisting of providing transportation to workers and/or cleaning breakrooms, bathrooms, offices or housing from the bargaining unit and declining to review and compare signatures submitted by Merrell Dairy to signatures of the employees on the showing of interest.

Following our review of the record and consideration of the arguments raised by the parties, we grant review and reverse the HO's Decision, in part, and decline to review the remainder of the HO's Decision for lack of compelling circumstances, as explained more fully below.

FEDERAL COURT ACTION

On October 2, 2023, an action was commenced in Federal Court by the New York State Vegetable Growers Association, Inc., and five New York State farms seeking to enjoin FLFLPA.

²During that time, processing of this matter was paused. The Federal Court ruled on the injunction request on February 21, 2023 and, consistent with that ruling, PERB continued processing this matter.

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On April 11, 2024, Merrell Dairy submitted a supplemental brief, stating that it seeks the opportunity to address the impact of the Federal proceedings on this matter. In its submission, Merrell Dairy cites to this Board's invitation to parties in other pending matters to submit supplemental briefs, setting forth whether the Federal proceedings should impact the Board's analysis of the underlying issues raised in those proceedings.

⁴In the supplemental brief, Merrell Dairy alleges, for the first time, that § 704-b.2 (c) of the Farm Laborers' Fair Labor Practices Act (FLFLPA) had an unconstitutional chilling effect on employer speech during the pre-certification campaign period and, therefore, this underlying certification should be dismissed. The Board's invitation to submit supplemental briefs in the other matters specifically set forth that it was not an opportunity for the parties to raise new arguments; however, the parties were given the opportunity to address the impact, if any, of the Federal proceedings on the arguments and issues that were already pending before this Board.

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Initially, we note that supplemental briefs are not authorized absent a directive from the Board in accordance with § 263.67 (d) of our Rules of Procedure (Rules) so we could decline to consider it on that basis alone. Moreover, even if Merrell Dairy's submission was authorized, we find that it could have raised its first amendment argument before the HO but failed to do so. The filings in the Federal Court action did not raise any new facts that were not present at the time this certification petition was filed. Accordingly, we decline to address the allegations set forth in Merrell Dairy's supplemental brief for this reason as well.

² *New York State Vegetable Growers Assoc., Inc., et al., v. Letitia James, et al.*, 57 PERB P 7501 (2024).

³ *Id.*

⁴ *See Porpiglia Farms, Inc.*, 57 PERB P 3402 (2024); *A&J Kirby Farms, LLC*, 57 PERB P 3403 (2024); *Waffler Farms, Inc.*, 57 PERB P 3404 (2024); *Lynn-Ette & Sons, Inc.*, 57 PERB P 3405 (2024).

⁵ This directive is also consistent with our recent ruling in *Macari Vineyards, Inc.*, wherein we stated that a party must preserve any objections to a petition while it is pending before the HO, so long as the party had notice of the issue at that time.

FACTS

The facts are set forth in the HO's Decision, attached as an appendix and incorporated herein.

DISCUSSION

Section 263.29 (b) of our Rules provides that we will only grant review of a HO's decision and certification of representative under "compelling circumstances." The rule states:

The certification issued by the hearing officer shall be final and binding and the obligation to bargain shall attach. Objections to the hearing officer's decision and certification may be filed with the board in accordance with section 263.28 of this Part. The board will only grant review under compelling circumstances. Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of: (i) The absence of; or
(ii) A unexplained departure from officially reported FLFLPA or applicable SERA precedent.

- (2) That the hearing officer's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

- (4) That there are compelling reasons for reconsideration of an important board rule or policy.

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Merrell Dairy argues that the HO's Decision warrants review because "the application of the community of interest factors is contrary to Board precedent and inconsistent with the purposes and text of SERA and the FLFLPA."

⁷It further broadly asserts that the HO's Decision contains substantial factual issues, amounts to prejudicial error and raises a substantial question of law or policy, referring to the specific arguments set forth in its exceptions.

We find that compelling circumstances exist warranting review of the HO's findings pertaining to the composition of the bargaining unit. Specifically, we have reviewed the record and determined that the HO's findings excluding truckdrivers, mechanics/field crop workers and general farm workers whose primary duties are cleaning or transporting employees, to be in error and reverse those findings.

With respect to the remaining issues, we find that compelling circumstances do not exist to justify granting review of the HO's Decision. The HO's Decision is consistent with our prior decisions in certifications under FLFLPA and we find that no substantial factual, legal, or otherwise prejudicial errors were made. Accordingly, we grant review only with respect to the titles properly included in the bargaining unit. With respect to the remaining issues, we affirm and adopt the decision of the HO.

As we recently stated in *Porpiglia Farms, Inc.*, when determining the appropriate bargaining unit:

⁶ Rules § 263.29 (b).

⁷ Merrell Dairy's Objection to Certification and Request for Review.

The primary consideration is to group employees who have a mutual interest in wages, hours, working conditions, and other subjects of collective bargaining. Several factors, no one of which is controlling, enter into each particular finding of the appropriate bargaining unit, among which are the following: similarities of duties or functions, of wages, of working conditions, of qualifications or skills; interchange of employees, the desires of the employees and the extent of self-organization; the collective bargaining history in the establishment and in the industry; the size and organization of the employer's business; and the Board's prior decisions affecting the same establishment or the same industry.

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Regarding the lead milker and lead herdspersons--collectively referred to by the HO and the parties as the "Puacs"--Merrell Dairy excepts to the HO's finding that they should be excluded from the bargaining unit.

⁹The HO concluded that these employees do not meet the necessary criteria to be deemed supervisors under SERA, which we affirm. The HO further concluded that the Puacs have divergent interests from the other employees of the bargaining unit; we agree.

According to Karen Merrell, the Puacs, among other things, communicate the facts upon which she makes decisions to discipline or terminate other bargaining unit members; communicate her instructions to the other bargaining unit members on behalf of the employer; and, in the case of Ramiro and Rudy Puac, act as translator for her.

¹⁰The Puacs appear to have been the "eyes and ears" of management and perceived to be supervisors; indeed, it was the very actions of the Puacs that led employees to first contact Local One to organize.

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Under SERA, it has been held:

But even if, as Respondent and the Association contend, his authority were not sufficient to constitute him a supervisory employee, it does not follow that he must be added to the unit .. [T]he record reveals that Whalen in fact had such a close relationship to Respondent as to set him apart from the other employees and cause them to believe that he spoke for or on behalf of Respondent. Certainly an employee occupying such a position should not be included in the same bargaining unit with them.

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Accordingly, we affirm the decision of the HO to exclude the lead milker and lead herdspersons from the bargaining unit.

Turning to the truck drivers and mechanics/field crop workers, Merrell Dairy also excepts to the HO's Decision to exclude these titles from the bargaining unit. The HO determined that the truck drivers and mechanics/field crop workers should be excluded from the bargaining unit based upon distinct duties and

⁸ 57 PERB P 3402 quoting, *Woodward Mental Health Center, Inc.*, 37 SLRB 673 (1974).

⁹ More specifically, the lead milker and lead herdspersons are Ramiro, Rudy, and Elsa Puac.

¹⁰ Tr, at 20-23 (Merrell).

¹¹ Tr, at 156-157 (Hernandez).

¹² *George H. Magee, d/b/a Magee Fuel Oils*, 19 SLRB 258, 272 (1956).

qualifications, lack of regular interchange with other bargaining unit employees, and their lack of interest in representation. The record demonstrates that truck drivers and mechanics/field crop workers are provided the same benefits as bargaining unit employees including, *inter alia*, paid vacation and sick leave, IRA matching, holiday pay, and health insurance.¹³ Their pay is also like that of bargaining unit employees. Truck drivers earn between \$ 16.95-\$ 17.00 per hour and mechanics/field crop workers earn between \$ 19.00-\$ 21.00 per hour.¹⁴ The pay range of all titles included in the bargaining unit by the HO ranges from \$ 14.20 to \$ 23.00 per hour.¹⁵ We also find that there is sufficient interchange between the truck drivers, mechanic/field crop workers, and other bargaining unit employees to support including them in the unit.

Truck drivers are required to have a CDL Class A drivers' license as a condition of their employment; however, given all the above commonalities in terms and conditions of employment, we do not find this difference in qualifications to be significant enough to keep the truck drivers out of the bargaining unit. As we have stated, uniting determinations should be based upon the totality of the circumstances, and no one factor considered is controlling.¹⁶ Some differences in certain terms and conditions of employment do not necessarily preclude the grouping of employees into a single bargaining unit, so long as those differences would not preclude effective representation of the entire group.

Furthermore, while the record indicates that the truck drivers and mechanics/field crop workers did not reach out to Hernandez during her organizing campaign at Merrell Dairy, there is no evidence that they either are or are not in favor of being members of the bargaining unit. Hernandez's testimony was that employees in those titles did not reach out to her and she did not reach out to them.¹⁷ This testimony, without more, does not establish that these employees lack interest in organization. Accordingly, we reverse the decision of the HO and include the truck drivers and mechanics/field crop workers in the bargaining unit.

Regarding the field crop team leader, we affirm the HO's Decision to exclude this title from the bargaining unit. This employee is the farm's highest paid employee, making \$ 30 per hour, which is well above the highest paid bargaining unit employee who makes \$ 23 per hour.

¹⁸Furthermore, Merrell testified that the field crop team leader enjoys two weeks of paid vacation per year and six paid holidays.¹⁹ The only other employees with these benefits are office employees,²⁰ who are excluded from the bargaining unit. We find that these benefits, being considerably more generous than what is afforded to bargaining unit employees, justify excluding the field crop team leader from the bargaining unit.

¹³ Employer's Ex 6.

¹⁴ Employer's Ex 3.

¹⁵ *Id.*

¹⁶ *Porpiglia Farms, Inc.*, 57 PERB P 3402.

¹⁷ Tr, at 161-162 (Hernandez).

¹⁸ Employer's Ex 3.

¹⁹ Tr, at 60 (Merrell).

²⁰ *Id* (Merrell).

Finally, we also conclude that all general farm workers should be included in the bargaining unit. The HO excluded general farm workers whose principal duties consist of providing transportation to workers and/or cleaning break rooms, bathrooms, offices, or worker housing. The HO concluded that these employees should not be included in the bargaining unit due to distinct duties and functions.

Merrell testified that general farm workers perform various cleaning tasks, including cleaning worker housing, bathrooms, and breakrooms. She further testified that they also clean the milking parlors and the stanchions where the cows are housed.

²¹In performing cleaning duties, they also interact with facilities maintenance employees, who are included in the bargaining unit.

²²Merrell further testified that Pamela Burgess, one of the general farm workers, performs "basic facilities maintenance," such as repairing an overflowing toilet.

²³These duties are in addition to transporting bargaining unit members to and from work, the store, and appointments. Accordingly, we find that the cleaning and transportation duties performed by general farm workers compliment and overlap with the facilities maintenance bargaining unit employees. Furthermore, these employees have the same work location, benefits, and pay range as employees included in the bargaining unit. For these reasons, we conclude that all general maintenance employees should be included in the bargaining unit.

²⁴

Based upon the foregoing, the bargaining unit shall be defined as follows:

Included: All full-time and regular part-time agricultural workers.

Excluded: Supervisors, unpaid family members of the employer, as defined by § 701.3 (c) of SERA, paid family members of the employer, lead milkers, lead herdspersons, office clerical employees, mechanics/field crop team leaders, and temporary workers

Accordingly, the HO's Decision is reversed, in part, and affirmed, in part, based upon our findings above. Local One has not submitted evidence of majority support in the unit as we have currently defined it. We remand this matter to the HO for further processing consistent with this decision.

DATED: November 7, 2024

Albany, New York

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²¹ Tr, at 72-73 (Merrell).

²² The bargaining unit includes two employees with the title "facilities maintenance," who perform any needed repairs to Merrell Dairy's facilities, including worker housing. Employer's Ex 2, at 12.

²³ Tr, at 70-71 (Merrell).

²⁴ This ruling does not apply to David and Daniel Merrell, who are Karen Merrell's sons and paid general farm workers. We affirm the HO's Decision excluding David and Daniel Merrell from the bargaining unit for the reasons set forth therein.