

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of:

BERKSHIRE ROOTS, INC.

and

LOGAN EICHELSER

and

UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 1459

Case Number: CR-22-9430

Date Issued:

February 26, 2024

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly B. Strong, CERB Member
Victoria B. Caldwell, CERB Member

Appearances:

Patrice Dixon, Esq.	- Representing Berkshire Roots, Inc.
G. Alexander Robertson, Esq.	- Representing United Food and Commercial Workers Union, Local 1459
Bruce Cameron, Esq. W. James Young, Esq.	- Representing Logan Eichelser

CERB RULING ON MOTION TO DISMISS

Summary

1 The issue in this case is whether the decertification petition should be dismissed
2 or re-opened due to the settlement of blocking charges. The Commonwealth Employment

1 Relations Board (CERB) finds that the terms of the settlement agreement require that the
2 decertification petition be dismissed.

3 Statement of the Case

4 On July 7, 2021, in Case No. WMAP-21-8513, the Department of Labor Relations
5 (DLR) certified the United Food and Commercial Workers Union, Local 1459 (Union or
6 Intervenor) as the exclusive collective bargaining unit representative for agricultural
7 employees employed by Berkshire Roots, Inc. (Berkshire Roots or Employer). On July
8 12, 2022, Cameron J. Howard (Howard) filed a petition with the DLR, docketed as CR-
9 22-9430, seeking decertification of the Union. On August 3, 2022, the Union filed a Motion
10 to Intervene, which the DLR granted the same day. On August 17, 2022, Logan Eichelser
11 (Eichelser) filed an amended petition that was essentially identical to Howard's petition,
12 except that it named Eichelser as the petitioner.

13 Prior to the filing of CR-22-9430, on May 31, 2022, the Union filed a prohibited
14 practice charge, which the DLR docketed as Case No. UP-22-9339. On July 1, 2022, the
15 Union filed a second prohibited practice charge, which the DLR docketed as Case No.
16 UP-22-9404. Investigators issued complaints in both cases. Collectively, the complaints
17 alleged that Berkshire Roots failed to bargain in good faith by failing to provide the Union
18 with necessary and relevant information, and by transferring bargaining work to non-
19 bargaining unit personnel, eliminating paid breaks, changing the minimum starting wage
20 for new Cultivation Associates, and granting pay increases to certain employees without
21 providing the Union with notice and the opportunity to bargain to impasse or resolution
22 over its decisions and the impacts of its decisions on bargaining unit members' terms and
23 conditions of employment.

1 On August 24, 2022 and September 13, 2022, the Union filed motions pursuant to
2 456 CMR 15.11 to have the charges block further proceedings in CR-22-9430. On May
3 5, 2023, the CERB granted the Union's motions to block further processing of the petition,
4 in part due to the scope and character of the allegations that the CERB found to be
5 matters of major significance to the bargaining unit, and the timing of the alleged violations
6 during the certification year when the parties were attempting to negotiate an initial
7 contract. In our decision, we specifically noted that "[t]he final disposition of the
8 representation petition will depend on the outcome of the prohibited practice charges that
9 rendered the petition inactive."

10 On November 17, 2023, the parties signed a settlement agreement resolving the
11 two blocking charges and the Union withdrew them. On January 19, 2024, the Union
12 filed a Motion to Dismiss Petition Based On Extension of Certification Year Pursuant to
13 Settlement (Motion to Dismiss). On January 26, 2024, both the Petitioner and the
14 Employer opposed the Union's Motion to Dismiss. On February 1, 2024, the Union filed
15 a reply to their Oppositions. On February 6, 2024, the Employer submitted a Sur Reply to
16 the Intervenor's Reply to Oppositions to Motion to Dismiss.

17 Facts

18 During the negotiations for a settlement agreement to resolve the complaints in
19 Case Nos. UP-22-9339 and UP-22-9404, the Union and Berkshire Roots discussed
20 extending the certification year that began when the DLR certified the Union on July 7,
21 2021.¹ In a September 2023 email, a Berkshire Roots representative offered language

¹ DLR regulation 456 CMR 15.06(4) states:

1 proposing that the terms of the agreement, including references to the certification year,
2 could not be used in another case or matter. The Union objected to that language, writing:

3 I thought it was mutually understood that the union does intend to use the
4 settlement in the CR case in terms of the certification bar and whether a
5 question concerning representation was in place at the time the petition was
6 filed. Under that understanding, this language is overbroad because it would
7 prevent us from doing anything with the settlement in the CR case. We
8 wouldn't even be able to use it to argue that, if we lose on getting the petition
9 dismissed, that further processing at least should continue to be blocked
10 through the end of the extended cert year. The certification extension
11 doesn't really do anything for us unless we can use it in another matter.

12
13 In further email communication in early November 2023, a Berkshire Roots representative
14 noted that in its most recent draft of the agreement, it modified the start date for the
15 extension of the certification year to begin as of October 26, 2023. The Union's
16 representative indicated that the Union was amenable to moving the start of the
17 certification year extension to November 6, 2023, although noting that it "might be simpler
18 for the purposes of drafting just to say that the cert[tification year] is extended through
19 2/6."

20 On November 17, 2023, the Union and Berkshire Roots signed a settlement
21 agreement. In addition to other remedies, Berkshire Roots agreed to "bargain
22 retroactively to agreement or impasse with the Union regarding certain wage increases
23 issued to most bargaining unit employees on or about January 2022." The agreement
24 further noted that,

25 Berkshire Roots agrees to recognize that the certification year is extended
26 through January 31, 2024, and it will continue to bargain with the Union

Except for good cause shown, the Department shall not process a petition for an election in any bargaining unit or subdivision thereof represented by a certified bargaining representative when the Department has issued a certification of representative or certification by written majority authorization within the preceding 12 months.

1 through that time. The Union further agrees that it will not argue, before the
2 Department or in any other forum in Massachusetts, including in any trial or
3 appellate forum, that petition CR-22-9430 ("the Petition") is stale as a result
4 of the passage of time, or that the Petition being blocked by the Union's
5 prohibited practice Charges has rendered the Petition stale. The terms of
6 this Agreement, including the extension of the certification year, shall not be
7 construed as an admission by any Party or offered as evidence of any
8 concession or admission regarding their legal positions before the
9 Department, or in any other forum in Massachusetts including in any trial or
10 appellate forum.

11 Pursuant to the settlement, the Union agreed to withdraw the two blocking
12 prohibited practice charges. Berkshire Roots and the Union further agreed that the
13 settlement agreement "shall not in any way be construed as an admission by Berkshire
14 Roots or its representatives that it or they have violated any law, regulation or prohibition.
15 Berkshire Roots disclaims any such liability."

17 OPINION

18 The issue presented is whether the CERB should dismiss the decertification
19 petition due to the private settlement agreement, which requires Berkshire Roots to
20 bargain with the Union as part of the resolution of the blocking charges. The Union argues
21 that CERB precedent requires the dismissal of the petition. It contends that the purpose
22 of the certification year bar is to prevent an election petition for the first twelve months to
23 allow the new union to establish a bargaining relationship with the employer. It notes that
24 the CERB has previously determined that two prohibited practice charges could interfere
25 with the conduct of a valid election and therefore blocked further proceeding on the
26 decertification petition until the final disposition of the two charges. Citing several CERB
27 decisions, it further contends that the CERB has determined that where an employer
28 engaged in prohibited practices that interfere with certain employee rights under Chapter
29 150E (the Law) during that twelve-month period so as to deny a union a fair chance to

1 secure a contract, full remediation requires an extension of the certification bar. The Union
2 asserts that in such cases, the CERB does not limit the extension of the certification bar
3 to remedial orders but also contemplates that a settlement agreement that requires an
4 employer to bargain with an incumbent union would also extend the certification year.
5 Accordingly, the Union maintains that, under CERB precedent, the settlement agreement
6 in this matter requires the dismissal of the petition. Additionally, the Union and Berkshire
7 Roots specifically agreed to extend the certification year through January 31, 2024 in the
8 settlement agreement.

9 Conversely, the Petitioner and Employer both argue that neither the settlement
10 agreement nor the extension of the certification year justifies the dismissal of the
11 decertification petition. In this regard, they urge the CERB to adopt the National Labor
12 Relations Board's (NLRB) reasoning in Truserv Corporation, 349 NLRB No. 23 (January
13 31, 2007) and Pinnacle Food Groups, LLC, 368 NLRB No. 97 (October 21, 2019), which
14 found that absent a finding that an employer violated the law or admitted to a violation of
15 law, there is no basis for dismissing a petition based on a settlement of unproven unfair
16 labor practices. The NLRB found that to do so would “unfairly give determinative weight
17 to allegations of unlawful conduct and be in derogation of employee rights.” Truserv
18 Corporation, 349 NLRB at 228. The Petitioner and the Employer assert that because the
19 blocking prohibited practices charges were not adjudicated and the settlement agreement
20 specifically included a non-admissions clause, the CERB must dismiss the Union’s Motion
21 to Dismiss and process the decertification petition.

22 Although the CERB may look to NLRB precedent for guidance, NLRB precedent
23 is not binding on the CERB. Alliance, AFSCME, SEIU and Luther E. Allen, Jr., 8 MLC

1 1518, SUPL-2024, 2025 (November 13, 1981). It is within the CERB's discretion to
2 determine whether there is a need to look beyond Chapter 150E precedent for guidance,
3 and whether such guidance is helpful or persuasive. See, e.g., Office and Professional
4 Employees International Union, Local 6, AFL-CIO v. Commonwealth Employment
5 Relations Board, 96 Mass. App. Ct. 764 (2019).

6 The comprehensive decision in Commonwealth of Massachusetts, 17 MLC 1650,
7 1651, SCR-2201 (April 9, 1991) clearly addresses the issue before us. We therefore
8 decline to adopt the current NLRB's holdings permitting processing of decertification
9 petitions where unadjudicated prohibited practice charges are resolved by a settlement
10 agreement. Rather, we follow the reasoning in Commonwealth of Massachusetts which
11 found that the final disposition of a representation petition depends upon the outcome of
12 blocking prohibited practice charges. This decision makes clear that if a pending
13 prohibited practice complaint is dismissed or withdrawn without a remedial bargaining
14 order or a settlement agreement requiring bargaining, the election petition can be
15 reactivated and processed. However,

16 “[i]f instead a prohibited practice complaint results in issuance of a remedial
17 order *or settlement* that requires the employer to bargain with the
18 incumbent, the petition will be dismissed. Following the employer's full
19 compliance with the remedial provision of the prohibited practice case order
20 or *settlement agreement* a new petition, supported by an appropriate and
21 sufficient showing of interest, may be timely filed.
22 Id. at 1659 (emphasis added).

23 Accord Springfield School Committee, 27 MLC 20,21 MCR-4773 (September 1, 2000)
24 (citing Commonwealth of Massachusetts, 19 MLC 1069, 1097, SUP-3461 (April 24,
25 1992)). Here, the settlement of the blocking charges required Berkshire Roots to bargain

1 with the Union. For that reason, and in accordance with CERB precedent, we dismiss the
2 decertification petition.

3 Berkshire Roots argues that the 1991 Commonwealth of Massachusetts decision
4 is not applicable here because its references to a settlement agreement most plausibly
5 refers to unilateral settlements rather than private settlement agreements and because
6 the reasoning set forth in that case only pertains to situations involving rival union
7 petitions, not decertification petitions. We disagree. Nothing in Commonwealth of
8 Massachusetts states or suggests that its rationale is limited to unilateral settlements or
9 that its reasoning would not apply where the petition seeks to decertify the incumbent
10 union. As explained in Commonwealth of Massachusetts, the purpose of the blocking
11 charge policy is to ensure that prohibited practices that interfere with certain employee
12 rights under the Law do not interfere with a representation election, noting that “no
13 purpose would be served by proceeding with an election when there exists unremedied,
14 alleged conduct that would have a tendency to interfere with the free electoral choice of
15 employees.” Id. at 1652. When the CERB determines whether a prohibited practice
16 charge should block the continued processing of an election petition, it does not consider
17 whether the election is sought by a rival union or by employee seeking to decertify the
18 incumbent union. If the adjudication of blocking charges results in a remedial order
19 requiring an employer to bargain with the incumbent Union, the election petition will be
20 dismissed without regard to whether it was filed by a rival union or an employee seeking
21 decertification of the incumbent union. Correspondingly, if a settlement of blocking
22 charges, whether it be a unilateral settlement or a private party settlement, requires the
23 employer to bargain with the incumbent union, the election petition will be dismissed

1 without regard to whether it was filed by a rival union or by an employee seeking
2 decertification of the incumbent union.

3 The CERB has recognized the need to strike a balance between the right of a
4 certified bargaining representative to a reasonable period of time to conduct good faith
5 negotiations with the employer, and the rights of employees to freely choose their
6 representative. See Commonwealth of Massachusetts, 19 MLC at 1098 (extending the
7 incumbent's certification year for six months, after balancing the interests of employees
8 in preserving an insulated certification year free of prohibited practices against the
9 interests of ensuring that the collective bargaining process "does not serve to forever
10 insulate an incumbent from the pressure of outside organizing or decertification drives").
11 Here, because the Union and Berkshire Roots agreed that the certification year was
12 extended through January 31, 2024, and that Berkshire Roots would continue to bargain
13 with the Union throughout that time, the remedial period has now concluded and new
14 representation petitions pertaining to this unit are no longer barred under the certification
15 year bar set forth in 456 CMR 14.06(4).

16 In addition to its argument that Commonwealth of Massachusetts is inapplicable,
17 Berkshire Roots makes other arguments to support its contention that the DLR should
18 process the decertification petition. Berkshire Roots suggests that it is inappropriate to
19 dismiss the decertification petition due to a settlement agreement to which the Petitioner
20 was not a party. We do not find this argument to be persuasive. A petitioner is also not a
21 party to the adjudication of a blocking prohibited practice charge yet as explained above,
22 the CERB's long standing policy is to dismiss a pending petition where issuance of a
23 remedial order requires the employer to bargain with the incumbent union.

1 Berkshire Roots further argues that the settlement agreement was premised on
2 the continuing processing of the petition. We disagree. The Union agreed in the
3 settlement agreement that it would not argue that the petition in this matter was “stale as
4 a result of the passage of time, or that the Petition being blocked by the Union’s prohibited
5 practice Charges has rendered the Petition stale.” Here, the Union is not arguing that the
6 petition has become stale through the passage of time or due to the blocking charges.
7 Instead, the Union asserts that the petition must be dismissed due to the bargaining
8 obligation set forth in the settlement agreement and due to the agreed-upon extension of
9 the certification year. Additionally, the bargaining history reveals that the settlement was
10 specifically not premised on the continued processing of the petition. The Union objected
11 to proposed language that would bar it from using the settlement in the instant case and
12 made it clear that the Union intended to use the settlement in this matter “in terms of the
13 certification bar and whether a question concerning representation was in place at the
14 time the petition was filed.”

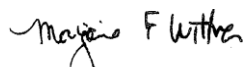
15 CONCLUSION

16 For the reasons stated above, we grant the Motion to Dismiss and dismiss the
17 petition.

18

19 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



KELLY B. STRONG, CERB MEMBER



VICTORIA B. CALDWELL, CERB MEMBER