

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

In the Matter of: *
*
NEW ENGLAND TREATMENT ACCESS LLP * Case No.: WMAP-20-8074
and * Date issued: February 1, 2021
*
UNITED FOOD AND COMMERCIAL *
WORKERS, LOCAL 1445 *
*

CERB RULING ON REQUEST TO REINVESTIGATE CERTIFICATION BY
WRITTEN MAJORITY AUTHORIZATION

1 SUMMARY

2 On November 25, 2020, the New England Treatment Access LLP (NETA or
3 Employer) filed a request with the Department of Labor Relations (DLR) to reinvestigate
4 a certification by written majority authorization (WMA) that the DLR issued on November
5 20, 2020. The DLR certified that the United Food and Commercial Workers, Local 1445
6 (Union) had been selected by a majority of employees to serve as their exclusive
7 representative for purposes of collective bargaining in a unit comprised of:

8 All full-time and regular part-time agricultural workers of [NETA], including
9 cultivation team members, cultivation technicians, cultivators, cure room
10 technicians harvesters, IPM licensed applicators, IPM scouts (except
11 wholesale), IPM team members, and IPM technicians, but excluding all
12 managers, supervisory, confidential, casual and non-agricultural
13 employees.

14 NETA contends that the certification should be reinvestigated due to a
15 “typographical error” in the employee list containing an incorrect hire date for one
16 employee. This “inadvertent error” resulted in NETA and the Union agreeing that there
17 were forty-nine, not fifty, bargaining unit employees for purposes of the WMA majority

1 verification process. NETA seeks reinvestigation of the certification as a means of
2 correcting the mistake and verifying whether the Union still has the requisite majority
3 support in a 50-person unit. If not, NETA seeks revocation of the certification. The Union
4 opposes the request for reinvestigation on numerous grounds. The Commonwealth
5 Employment Relations Board (CERB) denies the request to reinvestigate the certification
6 for the reasons set out below.

7 Background

8 On June 30, 2020, the Union filed a petition seeking to represent all of NETA's
9 "agricultural" workers, including "cultivation techs, IPM techs, R&D techs, cure room
10 techs, harvest techs, supervisors, leads and coordinator, but excluding all managerial,
11 confidential, casual and non-agricultural employees." The petition indicated that there
12 were sixty-one employees in this bargaining unit. On July 13, 2020, the Union wrote to
13 the DLR stating that the parties had not been able to agree to a neutral and thus, pursuant
14 to 456 CMR 14.19(6), the DLR was designated as the neutral (Neutral).

15 Pursuant to 456 CMR 14.19(7), on July 16, 2020, NETA provided a list of
16 employees in the proposed unit and separately sent a position statement containing its
17 challenges to the petition. NETA challenged the petition on three separate grounds,
18 including that the employees at issue were not "agricultural" employees under
19 Massachusetts law, and thus, the National Labor Relations Board (NLRB), not the DLR,
20 had jurisdiction over the petition. NETA further asserted that some of the petitioned-for
21 positions were supervisory and belonged in a separate unit. The Union filed a timely
22 response opposing the challenges. On July 21, 2020, the DLR sent a letter to the parties

1 holding the matter in abeyance “unless and until the [NLRB] specifically declines
2 jurisdiction” over all or part of the petitioned-for unit.

3 The Union had also filed a petition with Region 1 of the NLRB seeking to represent
4 a bargaining unit of all full-time and regular part-time employees of NETA at its Franklin,
5 Massachusetts facility.¹ On October 23, 2020, the Acting Regional Director of Region 1
6 dismissed the petition on the ground that a majority of the petitioned-for employees were
7 agricultural employees within the meaning of the National Labor Relations Act and thus
8 excluded from the NLRB’s jurisdiction.²

9 On November 10, 2020, the Union filed a First Amended Petition (Amended
10 Petition) that amended the original unit by removing the titles that the NLRB had deemed
11 non-agricultural as well as the Team Lead, Coordinator and Department Supervisor
12 positions. According to the Amended Petition, there were forty-eight employees in this
13 unit.

14 On November 12, 2020, the Neutral sent a letter to the parties acknowledging
15 receipt of the Amended Petition and attaching an employee list that she had revised to
16 conform to the amended unit description. The list contained forty-eight names.

17 NETA filed challenges to this list on November 16, 2020. NETA claimed the list
18 should be updated to exclude eight employees (seven whom it had terminated since the
19 date of the original petition and one non-agricultural employee) and to include ten

¹ The NLRB petition did not include team leads or coordinators.

² The Acting Regional Director’s ruling indicates that the Union declined to represent a unit comprised only of non-agricultural employees. NETA did not file a request for review of the Acting Regional Director’s decision.

1 employees whom it hired since the original petition was filed. The ten employees included
2 Tamara Richardson (Richardson), a Harvester with a stated hire date of "November 11,
3 2020."

4 Between November 16 and November 18, 2020, the parties exchanged emails
5 with the Neutral regarding NETA's challenges, in which they disagreed over which
6 employee list the DLR should use to determine majority status. The Union contended that
7 the DLR's regulations required the DLR to base its verification on the employees who
8 were employed on the filing date of the Petition for Certification. The Employer disagreed,
9 contending that because of the intervening NLRB proceeding and the Union's filing an
10 Amended Petition, it should be permitted to modify the list to reflect its current work force.

11 Richardson was specifically referenced in two of those emails. In a footnote to its
12 November 17th email, the Employer stated that:

13 Harvester Tamara Richardson was hired on November 11, 2020, prior to NETA
14 receiving the letter from the DLR. Nevertheless, if the November 10, 2020 date is
15 used to determine inclusion in the unit, NETA will agree to strike her name from
16 the list.

17 The Union wrote back on November 18th, stating in a footnote that Richardson
18 should be excluded, because, among other things, the Union had served NETA with a
19 copy of the Amended Petition on November 10, one day before Richardson was hired.
20 The Union also stated that, even if the DLR decided to include Richardson in the unit, it

1 still had submitted sufficient cards to demonstrate majority support.³ At no point in these
2 emails did NETA, the Union, or the Neutral question Richardson's actual hire date.

3 On November 18, 2020, the Union sent a second letter to the Neutral stating that
4 if the DLR used the June 30 list, i.e., certified the results based on the employees on the
5 payroll as of the original filing date, it would accede to NETA's challenges for "eight
6 exclusions and nine inclusions" to that list. The Union further stated that whichever list the
7 DLR used, the Union had demonstrated majority status.

8 On November 20, 2020, the Neutral issued a confidential inspection report
9 certifying that there were forty-nine employees in the unit, twenty-five valid WMAs
10 submitted, and zero challenged WMAs.⁴

11 Based on that report, on November 20, 2020, the DLR certified that the Union had
12 been selected by a majority of employee as their exclusive representative for purposes
13 of collective bargaining in a unit comprised of:

14 All full-time and regular part-time agricultural workers of [NETA], including
15 cultivation team members, cultivation technicians, cultivators, cure room
16 technicians harvesters, IPM licensed applicators, IPM scouts (except
17 wholesale), IPM team members, and IPM technicians, but excluding all

³ Around November 17, 2020, the Union informed the Neutral that it had obtained additional cards from employees whom the Union claimed were on NETA's proposed list of included employees. In its Opposition to the Request for Reinvestigation, the Union states that it had emailed and mailed three additional cards to the DLR on November 17, 2020, but that the Neutral did not include those cards in her count.

⁴ In an endnote, the Neutral explained that the Amended Petition sought a unit of forty-eight employees; the Employer provided a list of 50 employees in the revised unit and during the verification process, the parties had agreed that the petitioned-for unit consisted of forty-nine employees. Regarding the number of valid WMAs, the Neutral stated that the Union submitted a total of forty authorization cards, twenty-five of which were valid and fifteen of which were invalid because the employees were not in the petitioned-for unit.

1 managers, supervisory, confidential, casual and non-agricultural
2 employees.

3 Request for Reinvestigation

4 On November 25, 2020, NETA filed this request for reinvestigation. For the first
5 time, NETA stated that the list that it provided to the Neutral on November 16, 2020
6 contained a typographical error in Richardson's hire date - Richardson was hired on
7 November 1, 2020, not November 11, 2020, as previously indicated. NETA thus claimed
8 that because Richardson was hired before November 10, 2020, the date the Amended
9 Petition was filed, her name should not have been struck from the list. Relying on
10 Framingham Housing Authority, 42 MLC 340, WMAF-16-5045 (June 28, 2016) and
11 Greater Lawrence Sanitary District, MCR-4340 (slip. op. Feb 9, 1995), and decisions from
12 the NLRB and the Federal Labor Relations Authority, NETA states that good cause exists
13 to correct its inadvertent mistake and proceed with an investigation of signed cards based
14 on the actual number of employees in the actual proposed unit as of the date of the
15 Amended Petition. NETA further states that if, "based on an accurate count of fifty unit
16 employees as of the November 10, 2020 Amended Petition filing date, and it appears that
17 there are only twenty-five signed cards, the DLR should revoke the certification."

18 The Union opposes the request for three reasons: 1) NETA raised an untimely
19 challenge to the exclusion of an employee from the employee list, and the CERB is thus
20 void of jurisdiction; 2) NETA may not assert good cause for reinvestigation outside of the
21 WMA process and has not established good cause in any event; and 3) the Union
22 provided majority support based on the employee list as of the date of the original filing.

23 For the reasons below, we agree that NETA's typographical error is not properly

1 raised at this time, nor does it constitute good cause to reinvestigate the certification,
2 which we leave intact.

3 Ruling

4 We begin by examining the relevant regulations. 456 CMR 14.19(8) requires an
5 employer to submit challenges to the inclusion or exclusion of a title in the unit within three
6 days of the presentation of the list to the neutral. DLR Rule 456 CMR 14.19(10) then
7 requires the neutral to determine if the challenges are outcome determinative, and if so,
8 to investigate and resolve those challenges as part of the verification process. If the
9 challenges are not outcome determinative, the regulation requires the neutral to dismiss
10 the challenges. If the DLR certifies the unit, pursuant to 456 CMR 14.19(15), an employer
11 may, within seven days of the certification, seek review of the dismissed challenges by
12 filing a request to reinvestigate the petition pursuant to the procedure outlined in 456 CMR
13 14.15. 456 CMR 14.15 states: "For good cause shown, the Department may reinvestigate
14 any matter concerning any certifications issued by it and, after appropriate hearing, may
15 amend, revise or revoke such certification."

16 Based on the WMA regulations set out above, NETA is barred from challenging
17 Richardson's exclusion from the employee list on a request for reinvestigation for two
18 reasons. First, although NETA originally filed a timely challenge to the Neutral's revised
19 employee list seeking to include Richardson in the bargaining unit, on November 17,
20 2020, it agreed to strike Richardson's name from the list based on her November 11,
21 2020 hire date if the November 10, 2020 date was used to determine inclusion in the unit.
22 Based on that representation, the Union agreed to NETA's remaining challenges of eight
23 exclusions and what were now nine inclusions to the list, which were based on the

1 November 10 date. Based on those two agreements, the Neutral determined that the
2 parties had agreed to a 49-person unit. Although NETA now claims that it made a mistake
3 and that Richardson was hired before November 10, 2020, its failure to make this
4 argument within three days of presenting its list to the Neutral, as set forth in 456 CMR
5 14.19(8), prohibits it from doing so now for the first time in a request for reinvestigation.
6 See City of Somerville, 37 MLC 161, WMAM-10-1049 (February 10, 2011) (citing Town
7 of Wareham, 36 MLC 76, 80, WMAM-08-1017 (October 28, 2009) (failure to timely
8 provide a list or file challenges to size or validity of WMA precludes employer from utilizing
9 the reinvestigation procedure to do so)).

10 Second, because the Union ultimately acceded to the remainder of NETA's
11 challenges to exclude eight employees and include nine, there were zero challenges for
12 the Neutral to resolve. In the absence of any outstanding challenges, the reinvestigation
13 procedure set out in 456 CMR 14.19 (15) does not apply, and the WMA regulations set
14 forth in 456 CMR 14.19 et seq. provide no other grounds for NETA to seek reinvestigation
15 of the certification. Cultivate Holdings, WMAP-20-8085 (slip. op. September 24, 2020)
16 (WMA regulations provide for no review of WMA process other than review of dismissed,
17 non-outcome determinative challenges).

18 Nor has NETA established good cause to reinvestigate the petition pursuant to
19 456 CMR 14.15. The CERB has not previously considered whether a mistake in an
20 employee hire date constitutes good cause to reinvestigate a certification. In the
21 analogous procedural posture in a traditional representation case, however, NETA's claim
22 is tantamount to making a post-election challenge to employee eligibility. In accord with
23 NLRB and Supreme Court precedent, the CERB prohibits such challenges absent

1 evidence that the DLR or the party benefiting from the prohibition knew that the employee
2 was ineligible and suppressed that fact. City of Springfield, 24 MLC 109, 111, MCR-4602
3 (May 28, 1998) (citing NLRB v. A.J. Tower Co., 329 U.S.324 (1946)); Solvent Services,
4 Inc., 313 NLRB 645 (1994). In City of Springfield, the CERB agreed with the NLRB's
5 general policy against post-election challenges to voter eligibility, as described and
6 approved by the Supreme Court in NLRB v. A.J. Tower Co., supra, as "a reasonable
7 adjustment to the principle of majority rule, designed to protect the process from fraud
8 and abuse, and to bring finality to elections." 24 MLC at 111 (citing NLRB v. A.J. Tower
9 Co., 329 U.S. at 332).

10 The facts of City of Springfield are instructive. There, the employer and three
11 different unions, including AFSCME Council 93 (AFSCME), were vying to represent a
12 bargaining unit of "blue collar, non-professional employees." Id. at 109. Before the
13 election, the parties entered into an oral agreement to delete three names from the
14 employer's list of eligible voters, and the employer agreed to file a new list. Id. at 110.
15 The employer never did, however, and one of the employees who should have been
16 removed from the list voted in the election without challenge. Id.

17 AFSCME filed a post-election challenge to the conduct of the election alleging that
18 the eligibility list was inaccurate. Id. at 110. AFSCME argued that the one ineligible voter
19 prejudiced the outcome of the election because the prevailing union achieved a majority
20 by a single vote. Id. The CERB treated AFSCME's objection to the election as "in the
21 nature of a post-election challenge to voter eligibility," which it dismissed on grounds that
22 it did not fall within the narrow exception to this rule articulated in Solvent Services, supra.
23 Id. In particular, the CERB found no evidence that the DLR or any other party had

1 suppressed facts regarding the employee's eligibility. Id. at 111-112. Rather, the CERB
2 found that AFSCME, as the objecting party, was in the same position as all other parties
3 to the election but failed to timely challenge the employee's eligibility. Id. at 112. The
4 CERB therefore overruled the objection "to bring finality to the election." Id.

5 Despite the different procedural posture, the same principles apply. Here, the
6 parties agreed that Richardson should be excluded from the employee list based on the
7 Employer's repeated assertions that she was hired on November 11, 2020. There is no
8 evidence, and NETA does not claim, that the Union, the party who arguably benefitted
9 from her exclusion, knew that Richardson had been hired ten days earlier and deliberately
10 suppressed that knowledge. Rather, as the employer, NETA was in the best position to
11 know her actual hire date but, like AFSCME in City of Springfield, failed to timely challenge
12 her eligibility based on that date until after the conclusion of the verification process.
13 Under these circumstances, in the interests of election finality, we decline to entertain the
14 post-certification challenge to Richardson's eligibility, even if, as the Employer suggests,
15 including her on the list could arguably affect the Union's majority status. A similar
16 scenario in City of Springfield did not affect the CERB's holding. Id. at 112.⁵

⁵ Although the principles articulated in City of Springfield form the basis of our determination that NETA has not demonstrated good cause to reinvestigate the petition pursuant to 456 CMR 14.15, we note that in other contexts, similar concerns over eroding the finality of administrative proceedings have informed CERB decisions not to reopen closed records unless the moving party can show that it was "excusably ignorant of the evidence despite the exercise of reasonable diligence." See, e.g., City of Boston, 44 MLC 56, 60, MUP-10-5895 (August 30, 2017) (on motion to reopen record to submit an email, union's claim that it had "inadvertently omitted" the email from the record failed to meet the requisite "reasonable diligence" standard) (additional citations omitted).

1 The decisions that NETA relies upon to support its request for reconsideration do
2 not dictate a different outcome. In Framingham Housing Authority, supra, the CERB
3 examined whether a position that neither party had identified as part of the bargaining
4 unit during the verification process was a managerial employee. Unlike here, however,
5 the question was not whether that employee should have been included in the employee
6 list for purposes of determining the union's majority status, the question was whether the
7 position belonged in the bargaining unit at all. 42 MLC at 345. In Town of Harwich, 35
8 MLC 188, WMAM-08-1011 (March 9, 2009), the CERB held that the possible inclusion of
9 employees who may be found to be managerial or confidential employees within the
10 meaning of Section 1 of the Law constitutes good cause to reinvestigate the certification.
11 Similar considerations of statutory employee status are not present here. Id. at 188.

12 Moreover, in Framingham Housing Authority, unlike in this case, the managerial
13 status of an employee previously not at issue in the verification process was not the sole
14 basis of the CERB's decision to reinvestigate the petition. Rather, that issue arose only
15 after the CERB notified the parties that it was reinvestigating the petition on its own motion
16 for four reasons, including the neutral's "numerically incorrect" Inspection Report and
17 corresponding failure to "investigate and resolve" outcome-determinative challenges
18 pursuant to 456 CMR 14.19(8). 42 MLC at 340-341. Framingham is thus starkly different
19 from the situation presented here, where an employer seeks reinvestigation of a
20 certification based solely upon its claim that it mistakenly excluded an employee from an
21 employee list and seeks revocation of the certification based on its own mistake.

22 Greater Lawrence Sanitary District, supra, is also distinguishable. In that case, the
23 CERB initially dismissed a representation petition for lack of a sufficient showing of

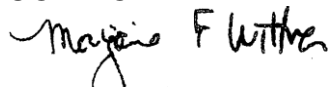
1 interest but reversed that determination once its investigation showed that there were
2 three persons in the unit and not four as stated on the amended petition. Unlike in this
3 case, this error was discovered prior to the vote or certification, and the error therefore
4 did not implicate the finality considerations at issue in City of Springfield.⁶

5 Conclusion

6 For the foregoing reasons, the CERB denies NETA's request to reinvestigate the
7 DLR's November 20, 2020 certification. The certification therefore remains unchanged.⁷

8 **SO ORDERED**

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



JOAN ACKERSTEIN, CERB MEMBER



KELLY STRONG, CERB MEMBER

⁶ The NLRB and FLRA decisions that NETA cites are also distinguishable, and in any event, are not binding on the CERB. See Board of Trustees, UMass, 8 MLC 1139, SUP-2306 (June 24, 1981) (although NLRB legal precedent can provide useful guidance at times, the CERB is not bound by it).

⁷ Because the Union ultimately acceded to NETA's challenges to exclude seven employees who were no longer working for the Employer as of the date the Union filed the Amended Petition, and to include nine employees who were, and because the Neutral did not rely on the three additional cards that the Union submitted when determining that the Union had submitted twenty-five valid cards, we do not address the Union's argument that its majority status should have been determined based on the number of employees who were employed in the amended unit on the date it filed the original petition, or its arguments concerning the additional cards that it submitted.