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 AND COMMERCIAL WORKERS UNION, LOCAL 1459	Case No. CR-22-9430 Date Issued: May 3, 2023

CERB Members Participating:

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

Appearances:

Patrice Dixon, Esq.	-	For Berkshire Roots, LLC
Bruce N. Cameron, Esq. W. James Young, Esq.	-	For Logan Eichelser
G. Alexander Robertson, Esq.	-	For UFCW, Local 1459

CERB RULING ON MOTIONS TO TREAT PROHIBITED PRACTICE CHARGES AS BLOCKING CHARGES

Summary

The United Food and Commercial Workers Union, Local 1459 (UFCW or Union) filed two motions to have the prohibited practice charges in Case Nos. UP-22-9339 and UP-22-9404 block further processing of the decertification representation petition that

Logan Eichelser (Petitioner or Eichelser) filed in Case No. CR-22-9430 (Motions). The UFCW is exclusive bargaining representative for all agricultural employees employed by Berkshire Roots, Inc. in its Pittsfield, Massachusetts cannabis facility (Berkshire Roots or Employer). The Commonwealth Employment Relations Board (CERB) grants the UFCW's Motions for the reasons set forth below.

Statement of the Case

Representation Petition

On July 12, 2022, Cameron J. Howard (Howard) filed a petition with the Department of Labor Relations (DLR) seeking decertification of the UFCW as the exclusive collective bargaining unit representative for agricultural employees employed by Berkshire Roots who are currently represented by the UFCW. The DLR docketed the petition as Case No. CR-22-9430. On August 3, 2022, the UFCW filed a Motion to Intervene, which the DLR granted on August 3, 2022. On August 17, 2022, Eichelser filed an amended petition that was essentially identical to the one that Howard filed, except that Eichelser was now the named petitioner.

Prohibited Practice Charges

On May 31, 2022, the UFCW filed a prohibited practice charge in Case No. UP-22-9339 alleging that Berkshire Roots had engaged in prohibited practices within the meaning of Sections 4(1) and 4(5) of M.G.L. c. 150A (the Law). Pursuant to Section 6 of the Law and Section 15.05 of the DLR's Regulations, 456 CMR 15.05, a DLR Investigator

(Investigator) investigated the charge on August 24, 2022. On September 20, 2022, the Investigator issued a three-count Complaint of Prohibited Practice (Complaint).[1]

Count I of the Complaint alleges that the Employer failed to bargain in good faith by transferring bargaining unit work to non-bargaining unit personnel without first providing the Union with notice and an opportunity to bargain to resolution or impasse over the decision and the impact of its decision to contract with an outside cleaning company to provide sanitation services to its facility from February through May 2022. Count II of the Complaint alleges that the Employer failed to bargain in good faith by transferring bargaining unit work to non-bargaining unit personnel when the Employer contracted with an outside company to perform bargaining unit trim work during April 2022, without first providing the Union with notice and an opportunity to bargain to resolution or impasse over the decision and the impact of its decision on bargaining unit members' terms and conditions of employment. Count III of the Complaint alleges that the Employer failed to bargain in good faith by eliminating bargaining unit employees' paid breaks without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision on bargaining unit members' terms and conditions of employment.

On July 1, 2022,[2] the UFCW filed a prohibited practice charge in Case No. UP-22-9404 alleging that Berkshire Roots had engaged in prohibited practices within the meaning of Sections 4(1) and 4(5) of the Law. Pursuant to Section 6 of the Law and

[1] The Investigator dismissed one count of the charge in UP-22-9339. The Union did not file a request for review of the dismissed count.

[2] The Union amended this charge on September 2, 2022. The investigative record does not include any objections to the amendment.

Section 15.05 of the DLR's Regulations, 456 CMR 15.05, an Investigator investigated the charge on August 24, 2022. On October 4, 2022, the Investigator issued a one-count Complaint but dismissed three other allegations (Partial Dismissal). The Union filed a request for review of the Partial Dismissal on October 21, 2022. On December 6, 2022, the CERB affirmed the dismissal of one count of the Partial Dismissal but remanded two counts to the Investigator to issue an amended complaint (Amended Complaint). Count I of the Amended Complaint alleges that the Employer failed to provide the Union with information that is relevant and reasonably necessary to perform its role as the exclusive collective bargaining representative. Count II of the Amended Complaint alleges that Employer failed to bargain in good faith by increasing the minimum starting wage rate for all new Cultivation Associates to $17.00 an hour without giving the Union prior notice and an opportunity to bargain to impasse or resolution over its decision and the impacts of its decision on bargaining unit members' terms and conditions of employment. Count III of the Amended Complaint alleges that Employer failed to bargain in good faith by granting pay increases to fifteen out of its eighteen employees without giving the Union prior notice and an opportunity to bargain to impasse or resolution over its decision and the impacts of its decision on bargaining unit members' terms and conditions of employment.

On August 24, 2022, the UFCW filed a motion pursuant to 456 CMR 15.11 to have the pending prohibited practice charge in Case No. UP-22-9339 block further proceedings in Case No. CR-22-9430. On September 13, 2022, the UFCW filed a second motion pursuant to 456 CMR 15.11 to have the pending prohibited practice charge in Case No. UP-22-9404 block further proceedings in CR-22-9430. On November 10, 2022, two attorneys from the National Right to Work Legal Defense Foundation entered notices of

appearance on behalf of Eichelser. On November 11, 2022, Eichelser filed an opposition to the motion on his own behalf.[3] On November 14, 2022, the Employer filed a response opposing the blocking of the election. On November 15, 2022, Eichelser's attorney also filed an opposition on Eichelser's behalf and filed a corrected version on November 17.[4] On December 7, 2022, the UFCW submitted a reply to the Petitioner's oppositions to the motions. The Employer filed a supplemental response to the UFCW's motions on January 20, 2023. After reviewing the record, including the parties' submissions, the CERB issues the following ruling.[5]

Ruling

Petitioner's Challenges To the Blocking Charge Doctrine

As a threshold issue, we address the Petitioner's argument that the DLR lacks the authority to block representation elections because Chapter 150A is silent as to blocking charges and that generally, blocking charges impede employees' right to free choice afforded by G.L. c. 150A, Section 3. We disagree.

First, the Petitioner fails to address the fact that the blocking charge procedures it seeks to invalidate are set forth in a regulation, 456 CMR 15.11, and thus not subject to amendment or repeal without providing interested parties the requisite notice and

[3] Eichelser signed the Opposition.

[4] There were no objections to having Eichelser's and his attorneys' oppositions filed and considered.

[5] DLR Rule 456 CMR 15.11(2) states that upon receipt of a blocking charge motion, the DLR may "investigate the matter, issue a notice to the other parties to the election to show cause why the motion should not be granted, or conduct further proceedings to dispose of the matter."

opportunity for comment set forth in Section 3 of the Massachusetts Administrative Procedures Act, M.G.L. c. 30A. See, e.g., Carey v. Commissioner of Correction, 479 Mass. 367, 373 (2018) (Department of Correction required to comply with notice and comment requirements of M.G.L. c. 30A, §3 before it could introduce a new requirement subjecting prison visitors to searches by drug sniffing dogs).

Second, Petitioner's argument that the blocking charge "regime" is unauthorized by the DLR's statutory mandate is belied by the broad rulemaking authority granted to the DLR both in its enabling statute and in Section 5 of the Law, which addresses the DLR's role in representation proceedings.[6] Pursuant to M.G.L. c. 150A, §5(c), the DLR "may establish such rules or regulations as it deems appropriate to effectuate the policies of this chapter for the filing of petitions for investigation and certification by employers or employees or their representatives." The DLR's authority to effectuate the purposes of the Law is also set forth in its enabling statute, M.G.L. c. 23, §9T, which grants the director "the authority, pursuant to chapter 30A and after consultation with the advisory council and the members of the Commonwealth Employment Relations Board, to issue any regulations for the enforcement and administration of …chapters 150, 150A and 150E." See also Goldberg v. Bd. of Health of Granby, 444 Mass. 627, 633 (2005) ("administrative agencies are charged, implicitly or explicitly, with the task of crafting regulations that are more detailed than statutes and tailored to more situations than the legislation specifies").

[6] References to the DLR include the former Labor Relations Commission (LRC). See Section 8 of Chapter 145 of the Acts of 2007, granting to the DLR all the powers formerly bestowed upon the LRC.

Here, procedures applicable to alleged blocking charges were codified as 456 CMR 15.12 in revised regulations promulgated in 1990.[7] See Commonwealth of Massachusetts, 17 MLC 1650, 1651, SCR-2201 (April 9, 1991) (describing history of blocking charge regulations). There is no evidence, and the Petitioner does not argue, that these regulations were improperly promulgated. Indeed, since 1990, the CERB and its predecessor agency, the Labor Relations Commission, have issued numerous rulings pursuant to this regulation without legal challenge or legislative response. See, e.g., Town of Palmer, 49 MLC 14, MCR-22-9034 (2022); Springfield School Committee, 27 MLC 20, MCR-4773 (2000). Accordingly, the Petitioner has a heavy burden to meet in attacking the validity of the regulation, for he must show that it has no rational relationship to the goals or policies of the DLR's enabling statute. David B. Miller v. Labor Relations Commission, 33 Mass. App. Ct. 404, 406-407 (1992) (citations omitted). The Petitioner fails to meet this burden for the reasons set out below.

The Petitioner's arguments regarding legislative history are not persuasive. The blocking charge doctrine has been in effect since 1976 and was modeled on a similar National Labor Relations Board (NLRB) policy that has been in effect since at least 1959. Commonwealth of Massachusetts, 17 MLC at 1651 (citing Town of Wareham, 2 MLC 1547, 1556, n. 8, MUP-2114, MCR-2092 (June 9, 1976) (adopting NLRB's blocking charge rule and citing Brown and Root Caribe, Inc., 123 NLRB 1817 (1959)). The

[7] Since 2016, the last time that the DLR revised its regulations, these procedures have, without substantive change, been codified, as 456 CMR 15.11. Although 456 CMR 15.11 references petitions filed pursuant to G.L. c. 150E, it also applies to Chapter 150A petitions through application of 456 CMR 2.05, which states that the provisions of 456 CMR 15.00, with exceptions not pertinent here, apply to proceedings arising under Chapter 150A.

Petitioner argues that because the NLRB's policy has been in effect for so many years, the Massachusetts Legislature must have been aware of this policy when it enacted Chapter 150A. Petitioner thus claims that the absence of any reference to the blocking charge policy in Chapter 150A demonstrates that the Legislature deliberately intended to exclude it.

This argument fails for several reasons. First, Chapter 150A was enacted in 1937, and not 1973, as the Petitioner contends. See Mass. Nurses Ass'n v. Lynn Hospital, 361 Mass. 502, 507 (1974) (detailing legislative history of Chapter 150A and its initial enactment by St. 1937, c. 436). This timing renders it unlikely that the Massachusetts Legislature was even aware of the NLRB's blocking charge doctrine when first enacting Chapter 150A.

Second, the DLR's blocking charge policy has been in effect for nearly fifty years and, in that period, the Legislature has amended both Chapter 150A and 150E multiple times without addressing the blocking charge doctrine in any way. Further, the NLRB's blocking charge policy is set forth in a rule and has never been embodied in the National Labor Relations Act (NLRA), the federal labor statute, despite the NLRB's application of the doctrine for over fifty years. Under these circumstances, the fact that the Legislature has not amended the state's collective bargaining laws to address the blocking charge doctrine in any way is most reasonably viewed as tacit approval, rather than condemnation, of the doctrine and no significance should be accorded the fact that the Legislature did not seek to embody this doctrine when enacting or amending Chapter 150A and Chapter 150E.

The Petitioner's contention that the doctrine improperly interferes with employee free choice ignores the applicable statutory scheme. The provisions of G.L. c. 150E, Section 10(a)(1) and G.L. c. 150A, Section 4(1) are expressly aimed at preventing employer interference with employees' free choice because these provisions make it a prohibited practice for an employer to interfere with, restrain or coerce them in the exercise of their rights under these laws, including their rights to bargain collectively through representatives of their own choosing or to refrain from such activities. As explained below, in circumstances where, as here, a prohibited practice complaint alleges that an employer's conduct interferes with such rights, the blocking charge doctrine exists to ensure that employees can exercise their right to vote in a representation election freely and without coercion or interference. As such, the safeguards established by Section 4(1) and Section 10(a)(1) serve to protect employee free choice, not interfere with it. Stated another way, the policies underlying blocking charges, unfair labor practice hearings, and representation petitions are not in conflict. Rather, these provisions work together and are rationally related to the Law's public policy to "protect the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." M.G.L. c. 150A, §1.

We thus reject the Petitioner's arguments regarding the validity of the blocking charge doctrine and proceed to analyze the parties' remaining arguments under the guidance of 456 CMR 15.11.

Application of the Blocking Charge Doctrine

"Any party to a representation petition filed with the DLR pursuant to Section 4 of the Law may file a motion requesting that a pending prohibited practice charge block the conduct of an election. The purpose of the blocking charge policy is to ensure that prohibited practices that interfere with certain employee rights under the Law also do not interfere with a representation election." City of Everett, 47 MLC 313, MCR-20-8331 (June 30, 2021) (citing Commonwealth of Massachusetts, 17 MLC 1650). No purpose would be served by proceeding with an election when there exists unremedied, alleged conduct that would tend to interfere with the free electoral choice of employees. Commonwealth of Massachusetts, 17 MLC at 1652.

As noted above, the DLR's procedure for processing alleged blocking charges is set forth in 456 CMR 15.11. This regulation requires the moving party to submit with its motion evidence sufficient to establish probable cause to believe that: a) the conduct alleged in the prohibited practice charge has occurred; b) the alleged conduct violated the Law; and c) the alleged conduct may interfere with the conduct of a valid election. Here, the UFCW has satisfied the first two elements of this analysis as multiple count Complaints were issued in UP-22-9339 and UP-22-9404.

"In determining whether a prohibited practice charge could interfere with the conduct of a valid election, the CERB considers the following factors: the character and scope of the charge and its tendency to impair the employees' free choice; the size of the work force and the number of employees involved in the events on which the charge is based; the entitlement and interest of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties to the labor organizations involved in the representation case; the showing of interest, if any,

presented in the representation case by the charging party, and the timing of the charge." New England Police Benevolent Association, 37 MLC 27, 28, SCR-10-2283, SCR-10-2285, SCR-10-2294 (August 6, 2010) (citing Commonwealth of Massachusetts, 21 MLC 1713, 1717, SCR-2219, 2220, 2221 (April 9, 1995)).

Several factors persuade us that the prohibited practice charges in Case No. UP-22-9339 and UP-22-9404 should block further processing of this decertification petition. In terms of the timing of the petition, it was filed within six months of each of the unfair labor practices alleged in both complaints, including the subcontracting and elimination of paid breaks allegations contained in UP-22-9339, and the unilateral increases to starting wages for new Cultivation Associates and pay increases contained in UP-22-9404. Compare Springfield Housing Authority, MCR-10-5391, slip. op. at 8 (February 4, 2011) (motion to block allowed when decertification petition was filed only weeks after the employer unlawfully disciplined the union president) with North Attleborough Electric Department, 35 MLC 54, 55, MCR-08-5330 (July 9, 2008) (insufficient nexus between an employer's alleged unlawful conduct and the filing of a decertification petition almost two years later).

With respect to the number of employees affected, the information contained in the investigation file in UP-22-9404 reflects that the wage increases that the Employer allegedly granted in January 2022 affected the majority of bargaining unit members (15 out of 18). The investigation record in UP-22-9339 similarly reflects that the allegations pertaining to transferring Trim Associates' bargaining unit work outside the unit affected a majority of bargaining unit members (11 out of 17). The alleged elimination of paid breaks affected all bargaining unit members.

As to the scope and character of the allegations -- compensation, paid breaks and the potential erosion of a bargaining unit by using outside contractors -- are clearly matters of major significance to the bargaining unit. The alleged unilateral elimination of certain benefits after a union is certified when coupled with alleged wage increases that are simultaneously being negotiated at the table could lead employees to believe, as Eichelser states in his opposition to the Motions, that there is no "true benefit to having a union," and is thus likely to taint the election process or interfere with employee free choice. Compare Commonwealth of Massachusetts, 21 MLC 1718, SCR-2219,2220,2221 (1995) (dismissing motion to block election based upon single allegations in three complaints, each of which alleged a change to a single working condition that affected only a small number of employees in a large, diverse bargaining unit) to Commonwealth of Massachusetts 17 MLC 1650, SCR-08-5330 (1991) (complaint alleging that employer's refusal to bargain in good faith during certification year by delaying submitting wage increase for eight months and terminating certain health and welfare trust fund coverage treated as blocking charge).

The Employer's claim that the alleged unfair labor practices were limited to a finite six-month period ignores the fact that they occurred during the certification year when the parties were attempting to achieve a first contract. The Employer's claim that its wage increases did not harm its employees ignores the fact that granting benefits can have the same coercive effect as denying benefits. Town of Natick, 2 MLC 1086, MUP-2098, 2102 (August 26, 1975). As the CERB has noted, "[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet globe. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which

future benefits must flow and which may dry up if it is not obliged." City of Boston, 9 MLC 1664, 1668, MUP-4926 (February 18, 1983) (quoting NLRB v. Exchange Parts Co., 375 U.S. 45 (1964) and further citing Medo Photo Supply Corp. v. Labor Board, 321 U.S. 678, 686 (1944) and Republic Aviation Corp. v. Labor Board, 324 U.S. 793, 798 (1945)).

The Employer's claim that employees were merely bystanders and not the target of the charges, even if true, ignores the fact that in determining whether an employer has interfered with, restrained or coerced employees in the exercise of their rights, the CERB does not require there to be actual harm – rather, it examines the objective effect of the employer's actions on a reasonable employee. See, e.g., Groton-Dunstable Regional School Committee, 15 MLC 1551, 1555-1556, MUP-6748 (March 20, 1989).

As to claims that the Union deliberately filed these charges to thwart an election, we note that the Union filed the charges before the decertification petition and within the six-month period of limitations set forth in 456 CMR 2.06(2). There are many reasons that a charging party may choose to wait until the end of that period before filing a charge and such motives are irrelevant to the analysis of whether the conduct alleged in the pending prohibited practice charges could interfere with the conduct of a valid election.

Finally, the Employer's claim that its conduct did not actually violate the Law because it acted in accordance with its past practice is an argument that is appropriately made to the Hearing Officer at hearing. For purposes of this ruling and pursuant to 456 CMR 15.11, it suffices that there is probable cause to believe that the Law has been violated in the manner alleged.

For all the foregoing reasons, we grant the Union's motion to treat the charges in UP-22-9339 and UP-22-9404 as blocking charges. The parties are advised that pending

representation petitions that are blocked by a prohibited practice charge will be held in "inactive status" until the resolution of the prohibited practice complaints at issue. Commonwealth of Massachusetts, 17 MLC at 1658. During its pendency in inactive status, the petition will not be considered to raise a question concerning representation and will not bar the Employer and the UFCW from fulfilling their statutory obligation to bargain in good faith. New England Police Benevolent Association, 37 MLC at 28. The final disposition of the representation petition will depend on the outcome of the prohibited practice charges that rendered the petition inactive. Id.

In accordance with the above, the DLR will not schedule an election in the bargaining unit until the final disposition of Case Nos. UP-22-9339 and UP-22-9404. The DLR shall nevertheless list Eichelser as an interested party in both of these cases for the sole purpose of receiving copies of any orders that dispose of these matters.

Conclusion

For the above-stated reasons, we ALLOW the UFCW's Motions and block further processing of Case No. CR-22-9430. CR-22-9430 will be held in inactive status. As a result, there is no pending question concerning representation.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

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MARJORIE F. WITTNER, CERB CHAIR

KELLY STRONG, CERB MEMBER

VICTORIA B. CALDWELL, CERB MEMBER