

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

BERKSHIRE ROOTS, INC.

and

UNITED FOOD & COMMERCIAL
WORKERS, LOCAL 1459

Case No. UP-22-9404

Date Issued: September 20, 2023

Hearing Officer: Meghan Ventrella, Esq.

Appearances:

Patrice Dixon, Esq.

Representing the Berkshire Roots, Inc.

G. Alexander Robertson, Esq.

Representing the United Food &
Commercial Workers, Local 1459

RULING ON MOTION TO QUASH THE SUBPOENA DUCES TECUM

Summary

The issue in this ruling is whether to quash, in part, the subpoena duces tecum (subpoena) that the Department of Labor Relations (DLR) issued at the request of the United Food & Commercial Workers, Local 1549 (Union), seeking to compel Berkshire Roots, Inc., (Employer or Berkshire Roots) to produce certain documents. For the following reasons, I deny the Motion to Quash.

Background

On July 1, 2022, the United Food & Commercial Workers, Local 1459 (Union) filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR) which alleges, as amended on September 2, 2022, that the Employer had engaged in prohibited practices within the meaning of Sections 4(5) and, derivatively, Section 4(1) of Massachusetts General Laws, Chapter 150A (the Law). The DLR investigated the charge and issued a Complaint of Prohibited Practice and Partial Dismissal on October 4, 2022. On October 24, 2022, the Union filed a request for review of the dismissed allegations with the Commonwealth Employment Relations Board (CERB). On November 9, 2022, the Employer filed a response. On December 6, 2022, the CERB issued a ruling concluding that there was probable cause to believe that Berkshire Roots had violated the Law regarding two dismissed unilateral change allegations. On or about December

6, 2022, the DLR issued an amended Complaint. The first day of hearing is scheduled for September 29, 2023. On or about August 11, 2023, the Union requested a subpoena duces tecum for a variety of documents including financial information on the Employer. On August 18, 2023, the DLR executed and issued the requested subpoena.

On or about August 18, 2023, the Employer filed a Motion to Quash the Subpoena. On or about August 25, 2023, I conducted an investigation into the Employer's Motion. At the investigation, the Employer stated that it withdrew its Motion to Quash the Subpoena except for item numbers 6 and 16 listed in the subpoena.¹ Item number 6 on the subpoena compels the Employer to produce: Documents showing the Respondent's profitability at the time in which the magnitude(s) or percentage(s) described above in Request No. 3 were set. Item number 16 on the subpoena duces tecum compels the Employer to produce: Documents showing the Respondent's profitability at the time in which the magnitude(s) or percentage(s) described above in Request No. 12 were set.

The Issues in the Case

The Complaint in this case, in relevant part, alleges that the Employer increased bargaining unit member wage rates, as well as the minimum starting wage rate for all new Cultivation Associates, without giving the Union prior notice and an opportunity to bargain to impasse or resolution over these decisions, and the impacts of its decisions on bargaining unit members' terms and conditions of employment in violation of Section 4(5) and 4(1) of the Law.

Employer's Basis for the Motion to Quash the Subpoena

First, Berkshire Roots argued that an employer's financial information is generally only relevant when an employer asserts that it is financially unable to meet a union's economic demands or as it relates to specific terms and conditions of employment. In this case, the requested information is not relevant because it did not assert that it could not financially meet the Union's demands. The Employer argued that the issue in this matter is whether it had an obligation to bargain with the Union over wage increases, or alternatively, whether it was privileged to give increases consistent with past practice but had a duty to bargain over the amount and criteria for distribution.

Additionally, the Employer asserts that the requested information is not relevant because the request does not relate to specific terms and conditions of employment. The Employer contends that if the Union requests non-unit information, such as financial records, it must demonstrate that the information is relevant or apparent under the surrounding circumstances. The Employer argued that the Union's assertion that the requested information is relevant because the Employer's employee handbook states that wage increases are, in part, dependent on the company's profitability is not a specific or sufficient reason to compel the Employer to produce financial records. The Employer

¹ Originally, the Employer's Motion to Quash included other items in the subpoena duces tecum. However, the parties were able to agree on all requested items in the subpoena except for Numbers 6 and 16.

asserts that the Union did not meet its burden in demonstrating that its request for non-unit information, such as financial records, was relevant or apparent under these circumstances.

Next, Berkshire Roots argued that it maintains confidential nonpublic financial records and is obligated to protect the privacy of customers, consumers, suppliers, and other internal and external parties. Berkshire Roots contends that an employer's confidentiality claim in certain situations may justify a refusal to provide information. In the event that the Employer does not demonstrate that its confidentiality interests are shown to outweigh the Union's need for the information, the Employer must still seek an accommodation to provide the information while protecting its confidentiality interests.

Union's Offer of Proof

The Union made an offer of proof that the subpoena would produce documents that would enable it to evaluate and demonstrate whether the Employer had a past practice regarding wage increases and if it departed from its own characterization of its past practice regarding wage increases. The Union contends that the Employer was obligated to bargain with the Union over wages, and the Employer argued that it was privileged to give increases consistent with past practice. The Union further contends that Berkshire Roots' employee handbook states that wage increases are, in part, dependent on the company's profitability. Given the Employer's defense and the Employer's employee handbook, the Union requested the information to evaluate whether there was a past practice and if the Employer complied with it. As such, the Union argued that the requested financial information is highly relevant.

Next, the Union argued that the Employer failed to demonstrate that records of its profitability are confidential because it has not shown how disclosure of its profitability would impact its business affairs. The Union contends that the Employer has not identified any specific ways in which knowledge of its profit would harm its ability to compete in producing and selling cannabis products or to accomplish commercial transactions. Additionally, the Union asserts that Rule 26 of the Massachusetts Rules of Civil Procedure permits entry of a protective order in civil discovery for "good cause" with respect to "a trade secret or other confidential research, development, or commercial information." Finally, the Union argued that if the DLR lacks the authority to issue protective orders, thus, the motion should be denied given the high degree of relevance of the requested documents.

Analysis

As required by M.G.L.c.30A, Section 12(4), I investigated whether the subpoenaed documents relate with reasonable directness to any matter in question or whether the subpoena was unreasonable or oppressive within the meaning of the statute. See Boston Police Superior Officers Federation v. City of Boston, 414 Mass 458 (March 3, 1993). Specifically, the investigation focused on the Employer's basis for the Motion to Quash the Subpoena, bearing in mind the statutory standards. See Town of Weymouth and

IBPO, Local 630, 16 MLC 1168, MUP-6839 (1989). The Union made an offer of proof as to what evidence it expects the subpoena to produce, and arguments on how the subpoena satisfied the statutory standards. Id. The Employer then responded to the Union's offer of proof and arguments.

M.G.L.c.30A, Section 12(4) provides in pertinent part that:

[a]ny witness summoned may petition the agency to vacate or modify a subpoena issued in its name...After such investigation as the agency considers appropriate it may grant the petition in whole or part upon a finding that the testimony, or the evidence whose production is required, does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested.

The Union's offer of proof established that the subpoenaed documents could demonstrate if there was a past practice and whether the Employer departed from its characterization of its past practice regarding wage increases.

As noted above, the Employer argued that the requested information was not relevant because Berkshire Roots never stated it could not financially meet the demands of the Union. In the underlying case, the Employer asserts that it was not obligated to bargain with the Union because it followed its past practice when it increased wages. The Union demonstrated that the Employer's employee handbook clearly stated that wage increases depend at least in part on the company's profitability. As such, the Employer has failed to demonstrate that the requested information does not relate with reasonable directness to the underlying case.

Next, the Employer argued that the issue in the underlying case is whether it had an obligation to bargain with the Union over wage increases, or alternatively, whether the Employer was privileged to give increases consistent with past practice but had a duty to bargain over the amount and criteria for distribution. The Employer argued that it was *not* claiming that it was entitled to increase wages and/or starting rates without bargaining because of some financial criteria or factor which could arguably entitle the Union to review financial information. Additionally, the Employer asserted that even if it did have an obligation to bargain with the Union over the amount of increases, the mere use of the word "profitability" in the handbook would not trigger an obligation to provide financial information, because the Employer is not claiming an inability to pay. Further, the Employer argued that the financial records are irrelevant because the information has no bearing on any terms or condition of employment or the alleged failure to bargain over wage adjustments which are the primary issue in the case. Therefore, the Employer is not obligated to disclose confidential financial information, and the DLR must quash the subpoena on that basis.

I disagree. This case deals with allegations that the Employer decided to increase starting wages for Cultivation Associates and increase the wages of several unit members without first providing notice and opportunity to bargain with the Union over the decisions and the impacts of the decisions on employees' terms and conditions of employment. The Employer's employee handbook clearly stated that: "Depending upon your performance and our company's profitability, adjustments in your pay may be made when there has been an improvement in or sustainment of an already good performance." Given the parameters of the Complaint and the wording of the Employer's employee handbook, the requested financial information regarding the Employer's profitability relates with reasonable directness to the matters in question.²

In addition to objecting on the basis of relevance, the Employer has asserted that the requested information contains confidential financial documents. The Employer asserted that it maintains confidential nonpublic financial records and is obligated to protect the privacy of customers, consumers, suppliers, and other internal and external parties. However, the Employer acknowledges that certain information that is available through public resources is not confidential. The Employer argued that if the DLR orders that these documents be produced, the Employer will redact "proprietary" information, including information related to its Board of Directors, customers, and vendors. The Union argued that the Employer has not demonstrated with specificity that the requested financial information is proprietary in nature.

At the subpoena investigation, the Employer acknowledged that it did not review the universe of possible documents responsive to this subpoena, and therefore it cannot specify which documents would be proprietary in nature and why the information would fall in that category. However, at the investigation, the Employer argued that documents such as day-to-day information on operating budgets, would fall under the category of proprietary information. The Union responded by explaining that it was not requesting documents on the operating budget, including department to department operating budgets or operating costs. The Union asserted that it viewed "profitability" to be a number. The Union clarified that it was looking for a global number that the Employer used during the requested timeframe to assess its profitability. Other than the above arguments regarding relevancy, the Employer did not provide any specific explanation of why the limited financial information sought by the Union was confidential and/or proprietary. For the above reasons, I do not find that the possibility that the limited scope of financial documents requested by the Union may potentially possess some confidential information is a basis for quashing the subpoena.

Finally, the Employer asked me to issue a protective order if I denied its Motion to Quash. The Union noted that Rule 26(c)(7) of the Massachusetts Rules of Civil Procedure

² Moreover, the Employer's arguments are one of relevancy for the record, rather than whether the subpoena conforms to the standard contained in M.G.L.c.30A, Section 12(4). The Employer's motion calls in part for a ruling on the relevance of the evidence before the hearing has started, and before the Union can show how these documents would be relevant to its case.

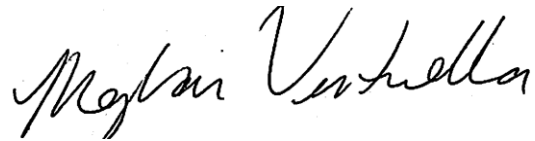
permits entry of a protective order in civil discovery for “good cause” with respect to “a trade secret or other confidential research, development, or commercial information”, but argued that the Employer failed to demonstrate that the requested financial information was a trade secret or other confidential research, development, or commercial information. I agree. The Employer did not provide good cause for a protective order at this time. Given that the Union narrowly tailored its request so as to exclude operating costs or budgets, and the Employer did not provide any arguments on why the requested information would be confidential other than relevance, I deny the Employer’s request for a protective order.³

Conclusion

Pursuant to M.G.L.c.30A, Section 12(4), I have considered the record of the investigation and the parties’ respective arguments in support of and in opposition to the Motion to Quash the Subpoena Duces Tecum. Based on the record, I find that the documents listed in the subpoena, as clarified at the investigation, relate with reasonable directness to a matter in question in this case. Additionally, I do not find that the subpoena compelling the Employer to produce the limited financial information sought by the Union is unreasonable or oppressive under the statutory standard. Consequently, I deny the Employer’s Motion to Quash the Subpoena Duces Tecum and order the Employer to produce the documents to the Union.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MEGHAN VENTRELLA, ESQ.

³ Based on the clarifications made at the investigation, the subpoena does not compel the Employer to produce documents that reflect operating costs, day-to-day operating budgets, any documents containing trade secrets or other confidential research, development, or commercial information, or confidential information on vendors or customers.