

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

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In the Matter of:	*	
	*	Case No.: WMAP-20-8085
CULTIVATE HOLDINGS	*	
	*	Date Issued: September 24, 2020
and	*	
	*	
UNITED FOOD & COMMERCIAL WORKERS	*	
LOCAL 1445	*	
	*	

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1                   CERB RULING ON REQUEST TO REINVESTIGATE CERTIFICATION BY  
2                   WRITTEN MAJORITY AUTHORIZATION

3                   SUMMARY

4           Cultivate Holdings LLC (Cultivate or Employer), a private-sector company that  
5 grows and dispenses medical and adult-use cannabis products, has filed a motion for  
6 reinvestigation of a certification by written majority authorization (WMA) that the  
7 Department of Labor Relations (DLR) issued on August 7, 2020. Cultivate’s main  
8 argument is that the certified bargaining unit is comprised of employees who are not  
9 agricultural employees within the meaning of M.G.L. c. 150A (the Law) and, therefore, the  
10 DLR did not have jurisdiction to certify the United Food and Commercial Workers, Local  
11 1445 (Union) as their exclusive representative. Cultivate also asks the Commonwealth  
12 Employment Relations Board (CERB) to reinvestigate its non-outcome determinative  
13 challenge to two manager titles. The Union opposes the request based on jurisdiction on  
14 both procedural and substantive grounds. However, the Union now agrees that the  
15 challenged employees should be excluded from the bargaining unit, and separately  
16 requests that the certification be amended to include two titles that were not in dispute

1 but were not listed in the certification. As explained below, the CERB remands the  
2 request to the DLR to address the jurisdiction question, and provisionally grants the  
3 requests to amend the certification to exclude the two manager titles but add two different  
4 titles.

5 Statement of the Case

6 On July 2, 2020, the Union filed a Petition for Certification by Written Majority  
7 Authorization (Petition) seeking to represent the following employees:

8 All full-time and regular part-time agricultural workers of Cultivate, LLC,  
9 including cultivation technicians, supervisors and leads, excluding all  
10 managerial, confidential, casual and non-agricultural employees.

11  
12 On July 20, 2020, the parties notified the DLR that they had selected it as the  
13 neutral (Neutral) to conduct the verification of written majority evidence. On July 23, 2020,  
14 the Employer filed a list of employees in the petitioned-for unit. The list included the titles  
15 of Harvest Tech and Harvest Team Lead (Harvest titles). On July 29, 2020, the Employer  
16 filed a challenge to the petition asserting that the Cultivation Manager and Assistant  
17 Cultivation Manager should be excluded from the unit because they are managerial  
18 employees.

19 On August 6, 2020, the Neutral issued a confidential inspection report (Inspection  
20 Report) which indicated that there were thirteen employees in the unit, nine written  
21 majority authorization cards and two challenges. Based on those numbers, the Neutral  
22 concluded that a majority of employees supported the Union. The Neutral separately  
23 indicated that because the challenges were not outcome determinative, she would not  
24 rule on them. Based on the Inspection Report, the DLR certified the Union as the  
25 exclusive representative of the petitioned-for unit on August 7, 2020.

1           On August 14, 2020, pursuant to 456 CMR 14.15 and 14.19(15),<sup>1</sup> the Employer  
2 filed a request for reinvestigation of the certification. For the first time in this proceeding,  
3 the Employer asserted that the DLR did not have jurisdiction over this matter. The  
4 Employer argues that, pursuant to M.G.L. c. 40A, §3 and certain regulations of the  
5 Massachusetts Cannabis Control Commission (CCC), marijuana cultivation is not an  
6 agricultural activity. The Employer thus argued that the petitioned-for employees are not  
7 agricultural employees within the meaning of Section 5A of the Law,<sup>2</sup> and therefore the  
8 DLR does not have jurisdiction to certify a unit of non-agricultural employees. The  
9 Employer requested the DLR to rescind the certification and defer jurisdiction of this  
10 matter to the National Labor Relations Board (NLRB). In the event its request was denied,  
11 the Employer alternatively sought reinvestigation of the two managerial titles that it  
12 challenged during the verification process.

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<sup>1</sup> Although these regulations pertain to Chapter 150E proceedings, 456 CMR 2.04 states that with certain exceptions not pertinent here, the provisions of 456 CMR 14.00 are applicable to all proceedings conducted under M.G.L. c. 150A, §§5 and 5A. Similarly, 456 CMR 2.08 states that the provisions of 456 CMR 14.19, pertaining to WMA proceedings, are applicable to all proceedings arising under M.G.L. c. 150A, §5.

<sup>2</sup> M.G.L. c. 150A, §5A states in part:

In the case of a person engaged in agriculture, as hereinafter defined, and having a permanent hired work force of more than four agricultural workers who are not members of his family, the provisions of section 5 shall apply....As used in this section, the term "agriculture" includes horticulture, floriculture and any other commercial enterprise involving the production of food or fiber.



1 employee organizations pursuant to the WMA process described therein. Also in 2007,  
2 pursuant to Chapter 145 of the Acts of 2007, the Legislature abolished the Labor  
3 Relations Commission (Commission) and created a new Division (now Department<sup>4</sup>) of  
4 Labor Relations that included a dispute resolution office, comprised of hearing officers  
5 and mediators, and the CERB. Pursuant to this legislation, the CERB was granted the  
6 right to, among other things, “review orders and to issue decisions.” M.G.L. c. 23, §9R.  
7 In addition, Section 8 of Chapter 145 of the Acts of 2007 granted to the DLR,  
8 “[n]otwithstanding any general or special law to the contrary, . . . all of the legal powers,  
9 authorities, responsibilities, duties, rights, and obligations previously conferred on the  
10 labor relations commission . . . including without limitation those set forth in . . . Chapter  
11 150A, and Chapter 150E of the General Laws.”

12 The Legislature did not specifically amend any part of Chapter 150A to reflect the  
13 DLR’s structure and, to date, continues to reference the “commission” throughout.  
14 Further, although the Legislature amended Sections 11(e), (f), (g) and (i) of Chapter  
15 150E to reflect the CERB’s role with respect to unfair labor practice proceedings, it did  
16 not update Sections 3 or 4 pertaining to representation matters, including investigations,  
17 hearings, elections and written majority authorization proceedings. Those sections still  
18 refer to the former Labor Relations Commission.

19 Since 2008, however, the DLR has construed the references to the “commission”  
20 in Section 5 of Chapter 150A, and in Sections 3 and 4 of Chapter 150E as granting the  
21 CERB the authority to determine appropriate bargaining units and resolve unit

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<sup>4</sup> Chapter 3 of the Acts of 2011 changed the Division of Labor Relations’ name to the Department of Labor Relations.

1 composition disputes both in the first instance and on review in traditional representation  
2 and unit clarification proceedings. See, e.g., Board of Higher Education, 44 MLC 209,  
3 CAS-16-5027, CAS-16-5211 (March 29, 2019); Wellesley School Committee, 40 MLC  
4 274, MCR-13-3091 (March 28, 2014); Town of Berkley, 35 MLC 266, MCR-09-5361 (May  
5 7, 2009); City of Boston, 35 MLC 293, CAS-08-3727 (May 21, 2009); Town of South  
6 Hadley, 35 MLC 122, MCR-07-5276 (December 23, 2008). This is due to the fact that  
7 Section 4 of Chapter 150E provides for hearings in traditional, i.e., non-WMA,  
8 representation matters, and states that such hearings may be conducted by the  
9 “commission” or by a “member or agent of the commission” whose decisions are then  
10 subject to review by the “full commission.” M.G.L. c. 150E, §4. As the CERB is the only  
11 appellate body within the DLR, the CERB has construed this provision of Section 4 as  
12 authorizing it to issue orders either in the first instance or on appeal in all matters that  
13 could be the subject of hearing in representation matters, including, most commonly,  
14 determinations of appropriate bargaining units.

15 By contrast, the 2007 WMA amendments do not expressly provide for a hearing  
16 process or for internal agency review of any determinations made before the DLR certifies  
17 the results. This is likely due to the quick, thirty-day timeline that the Legislature imposed  
18 upon the DLR to complete the verification process. M.G. L. c. 150A, §5 (c)(2). In accord  
19 with the legislature’s dictate to “establish rules and procedures for the prompt verification  
20 of evidence of a written majority authorization,” the DLR has promulgated WMA  
21 regulations with this timeframe in mind. Pertinent to this matter is 456 CMR 14.19(10),  
22 which permits the Neutral to dismiss non-outcome determinative challenges without  
23 resolving them, and 456 CMR 14.19(15), which then permits the employer to seek review

1 of these dismissed challenges by filing a request to reinvestigate the certification pursuant  
2 to the procedure outlined in 456 CMR 14.15. No other statutory or regulatory provisions  
3 provide for review of any other aspect of the WMA process. Consistent with its right to  
4 review orders, and in keeping with its traditional role as the final decision-maker on  
5 matters relating to appropriate unit composition, the CERB has decided all reinvestigation  
6 requests based on non-outcome determinative challenges in the first instance. See, e.g.,  
7 Town of Hudson, WMAM-12-2446 (August 7, 2013); Town of Harwich, WMAM-08-1011  
8 (March 9, 2009). The CERB does not, however, participate in any other aspect of the  
9 WMA process as described in the statute or regulations, including, as set forth throughout  
10 456 CMR 14.19, “filing and docketing the petition, “preparing and serving” the notice,  
11 serving as the neutral, or issuing the certification.

12 Applying these principles to the matter before us, we decline to address Cultivate’s  
13 claim that the DLR has no jurisdiction over this petition, or the Union’s response that the  
14 jurisdictional matter is untimely raised. As the Union correctly points out, the Employer  
15 did not raise the jurisdictional issue at any point before the Neutral completed the  
16 verification process or before the DLR issued the certification based on that process.  
17 Pursuant to 456 CMR 14.19(15), therefore, this issue is not properly before the CERB on  
18 a request for reinvestigation. Even if the jurisdictional issue had been raised prior to  
19 certification, either the DLR would have addressed it as a threshold matter as it did in the  
20 NETA matter described in footnote 3, or the Neutral would have resolved it as an  
21 outcome-determinative challenge. Because nothing in the statute or regulation provide  
22 for CERB review of either of those determinations, we conclude that jurisdictional issues,  
23 whether raised pre-or post-certification, are not properly before the CERB on a request

1 for reinvestigation of certification. We therefore remand this matter to the DLR for further  
2 processing.<sup>5</sup>

### 3 Provisional Rulings

4 In the event the DLR determines that it properly exercised jurisdiction over this  
5 petition and to avoid further delay, the CERB address the unit composition issues raised  
6 in the parties' submissions.

7 We provisionally amend the certification to exclude the titles of Cultivation Manager  
8 and Assistant Cultivation Manager. The Union now agrees that these titles should be  
9 excluded from the unit as management officials and there is no basis to conclude that the  
10 parties' agreement is contrary to law, public policy, or regulation. See Board of Trustees  
11 of State Colleges, 4 MLC 1428, SCR-2107, 2108 (November 2, 1977).

12 The CERB also provisionally amends the certification to include the titles of  
13 Harvest Technician and Harvest Team Lead as there has never been any dispute over  
14 their inclusion in this bargaining unit. Again, there is no basis to conclude that the parties'  
15 agreement is contrary to law, public policy, or regulation. Id.

### 16 Conclusion

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18 For the reasons stated above, the CERB remands the jurisdictional question to the  
19 DLR, but provisionally amends the certification as described above.

20 **SO ORDERED.**

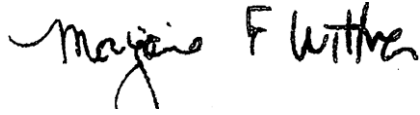
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<sup>5</sup> In so holding, we do not opine on whether Cultivate waived its right to raise jurisdiction issues by not asserting it as a challenge during the verification process.



COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



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MARJORIE F. WITTNER, CHAIR



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JOAN ACKERSTEIN, CERB MEMBER



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KELLY STRONG, CERB MEMBER