STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 338, RWDSU, UFCW,

Petitioner, **CASE NO. CU-6678**

- and -

PAUMANOK VINEYARDS AND PALMER VINEYARDS,

Employer.

GLADSTEIN, REIF, & MEGINNISS, LLP (AMELIA K. TUMINARO of counsel), for Petitioner.

BOND, SCHOENECK & KING, PLCC (HILARY MOREIRA of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Paumanok Vineyards and Palmer Vineyards (Vineyards) to a decision of the Acting Director of Private Employment Practices and Representation (Director) concerning certification of Local 338, RWDSU, UFCW (Local 338) as the exclusive negotiating agent of the unit as defined, without an election, pursuant to § 705.1-a of the State Employment Relations Act (SERA). The Director found that Local 338 had submitted evidence establishing that it represents a majority of the employees in the unit.

EXCEPTIONS

The Vineyards filed 13 exceptions to the Director's decision. In their first exception, the Vineyards assert that part-time employees should not be included in the negotiating unit. The Vineyards's second, third, and fourth exceptions contend that the

Director erred in not allowing the employers to view the dues deducation authorization cards with the names of the signatories redacted, and that the Director did not "identify what was confidential about disclosing redacted dues authorization cards."[1]

In their fifth through seventh exceptions, the Vineyards maintain that the Director erred in finding that their offer of proof "does not raise allegations of fraud and/or coercion on the part of Local 338 sufficient to require a hearing," and that she further erred in finding that the affidavits provided by the Vineyards were "insufficient to demonstrate that fraud or coercion were used by Local 338 in soliciting cards."[2]

The Vineyards claim in their seventh through tenth exceptions that the Director failed to address Local 338's not denying that it had offered Foreman Ramon Gonzales money in excess of $700, nor that it had offered other agricultural employees of the Vineyards money, or that it had financially compensated other agricultural employees of the Vineyards. Similarly, the Vineyards except to the Director's finding that Gonzales's testimony was insufficient to establish fraud or coercion, or to at least require a hearing.

The Vineyards allege in their eleventh exception that the Director did not consider "the facts in a light most favorable to them by assuming their truth and drawing all reasonable inferences in their favor."[3]

The Vineyards contend that the Director erred in finding that "Local 338 has submitted evidence that it represents a majority of the employees in the unit" on the basis that the parties have neved agreed, identified, or even discussed the appropriate dates to

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[1] Exception 4.
[2] Exception 5, quoting Decision at 8, 9.
[3] Exception 11, quoting Decision at 5.

be used to identify the number of employees at the Vineyards in order to determine whether Local 338 actually represents a majority of the employees."[4]

Finally, the Vineyards except on the basis that the Director did not address whether the dues deducation authorization cards submitted by Local 338 are required to identify the appropriate name of the employer(s) and that should the employer be misidentified, incomplete, or inaccurate, such dues authorization cards should be deemed invalid, and excluded from being counted in determining the existence of a majority.[5]

In a final unnumbered exception, the Vineyards reassert their claims of fraud and coercion and their claim regarding exclusion of cards that inaccurately reflect the name(s) of the employer(s) as stated in exception 12. These duplicative statements will not be separately considered.

For the reasons given below, we affirm the Director's decision and certify the unit.

PROCEDURAL HISTORY

Local 338 filed the petition concerning representation of agricultural laborers of Palmer and Paumank Vineyards on April 7, 2022. The petition was accompanied by signed dues deduction authorization cards numerically making up a majority of the employees sought to be certified. The petition was subsequently served at the address of Paumanok Vineyards, which timely filed an answer, asserting, among other defenses that the Vineyards were distinct and separate employers and that service upon Paumanok did not constitute service on Palmer Vineyards. The answer also sought exclusions of personel from the negotiating unit proposed. Paumanok objected to

[4] Exception 12.
[5] Exception 13.

certification of the proposed unit on the basis that it was a separate employer from Palmer. It also contended that supervisors, part-time laborers, family members working at Paumanok, and agricultural laborers working at Paumanok on an H-2A Visa for Temporary Agicultural Workers should be excluded from the unit. Paumanok also objected to the certification of the proposed unit without its being able to view the dues deduction authorization cards signed by employees.

At a conference on May 9, 2022, before a PERB Administrative Law Judge (ALJ), Paumanok reasserted the various arguments it had asserted to the petition, and added a claim that Local 338 had engaged in fraudulent or coercive conduct in obtaining evidence of support. In a May 12, 2022 letter, the ALJ directed Paumanok to file an offer of proof setting forth the specific facts it would present at a hearing, as well as stating any connection between Paumanok and Palmer Vineyards, including "any common employees, owners, officers, managers, supervisors, and the form of ownership (whether corporate or otherwise.)"[6] On May 23, 2022, Paumanok filed a letter from its counsel containing its offer of proof, accompanied by two affidavits, one from Ramon Gonzales and another from Kareem Massoud.

On May 26, 2022, Local 338 filed an amended petition, in which it named both Vineyards and provided separate addresses for each. The amended petition proposed as the appropriate bargaining unit "All full-time and regular part time agricultural laborers employed by Paumanok and Palmer Vineyards, but excluding the foreman, family

[6] ALJ Letter dated May 12, 2022.

members working as agricultural laborers, seasonal employees, temporary employees, and employees on H-2A Visas for Temporary Agricultural Workers."

On June 24, 2022, Palmer filed its response to the amended petition, objecting to the proposed unit on the ground that Palmer and Paumanok are separate and distinct employers, and also objected to the unit definition, seeking exclusion of multiple sets of workers, most of which had been excluded from the proposed unit by Local 338, except for supervisory employees other than the foreman, and joined in Paumanok's offer of proof. Palmer also objected to certification of the unit without an election on the grounds of fraud and coercion in the obtaining of signatures. Palmer also requested to view the dues deduction authorization cards with the names redacted to ensure that the appropriate employer was listed on the cards.

FACTS

The facts here are based on the offer of proof filed by Paumanok and joined in by Palmer. Paumanok was founded by Ursula and Charles Massoud, and the family has owned and operated Paumanok since approximately 1989.[7] Paumanok is an S Corporation, incorporated in the State of New York, with its own EIN number.[8] Paumanok employs eight agricultural employees, as to whom it files W-2 forms and withholds taxes. Paumanok maintains unemployment insurance, workers compensation insurance, and disability insurance for its employees.[9]

Each of Paumanok's eight employees has worked at Palmer in the last year.[10]

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[7] Massoud affidavit at ¶¶ 1-3.
[8] *Id*, ¶ 4.
[9] *Id,* at ¶¶ 10, 11-13.
[10] *Id,* at ¶ 15.

Palmer is also owned by the Massoud family and has been in operation since on or about August 1, 2018. Palmer has its own EIN number, files W-2 forms, and withholds taxes from its six employees, as well as maintaining unemployment insurance, workers compensation insurance, and disability insurance for its employees. Each of Palmer's six employees has worked at Paumanok in the last year.

The allegations of fraud and coercion stem from affidavits submitted by Kareem Massoud, Director of Operations at Paumanok, and the son of the owners of both Paumanok and Palmer, and by Ramon Gonzales, Foreman, at Paumanok. Gonzales's affidavit alleges that individuals representing Local 338 began persistently contacting him at some point in 2021, despite Gonzales's repeatedly telling these individuals that he did not want to have any further contact with them.[11]

Gonzales alleged that one of the Local 338 representatives who contacted him told him that "there would be a check waiting for him if he supplied Local 338 with more information, including information about his employer."[12] Gonzales did not identify by name or position any of the Local 338 representatives who approached him, nor does his affidavit even describe any alleged Local 338 representatives who he claims approached him.

In his affidavit, Gonzales states that it was his understanding that receipt of the check, in an amount more than $700, was contingent on his joining the union.[13] In his affidavit, Gonzales further states that "upon information and belief, the other agricultural

[11] Gonzales affidavit at ¶ 2.
[12] Decision at 5, quoting Gonzales affidavit at ¶¶ 3-4 (editing marks omitted).
[13] Decision at 5, citing Gonzales affidavit at ¶¶ 3-4 (editing marks omitted).

workers of Paumanok and Palmer were made the same offer by Local 338."[14] In his affidavit, Gonzales does not identify which workers he believed were made the same offer as he was, or the basis for his belief that such an offer was made to other agricultural workers, or any information tending to support that belief. Gonzales told Massoud of Local 338's alleged offer on May 4, 2022.[15]

On May 27, 2022, Local 338 filed a response to the offer of proof, to which a declaration by Local 338 organizer, Margaret Palmquist, was attached. In her declaration, Palmquist attested, under penalty of perjury, that she had "never made any promises to pay Ramon Gonzales or any of the other agricultural workers employed by Paumanok or Palmer money to join the Union, nor has any other representative of Local 338 RWDSU, UFCW offered to pay workers to join the Union."[16]

DISCUSSION

As a threshold matter, we address the contentions that are no longer properly before us. Pursuant to § 253.48 (c) (4) of our Rules of Procedure (Rules) in cases under the SERA, "An exception which is not specifically urged is waived." Pursuant to this Rule, we note what issues are not preserved for review by this Board.

First, no exception has been filed by the Vineyards that, should certification be granted, the Vineyards should be deemed separate employers, or that a finding as to joint employer status was required. Nor has any exception been filed to the Director's finding that in this case, "common ownership aside, a single unit encompassing both employers

[14] Gonzales affidavit at ¶ 5 (editing marks omitted).
[15] Massoud affidavit at ¶¶ 25-31.
[16] Palmquist declaration ¶ 10.

is appropriate," and that "the interchange of employees among the two companies and common supervision alone would support a finding that a single unit is appropriate."[17]

Because this is the first occasion we have had to construe the Farm Laborers' Fair Labor Practices Act (FLFLPA) in conjunction with SERA as applied to agricultural employees, we note that were this finding properly before us on the merits, we would affirm the Director's finding that the single multi-employer unit is appropriate for the reasons set forth by the Director. The Director's finding is supported both by the explicit text of § 705 (2) of SERA and the decisions rendered under it.[18] As the Court of Appeals explained in *Long Island College Hospital*, it is the duty of this Board to determine the appropriate unit under the Act, and "because of the complexity and difficulty of the problem of designating the [a]ppropriate unit, the power to make the decision has been delegated exclusively to the expert judgment of the board which has wide discretion in making the determination."[19] As the Court of Appeals had previously held, "questions as to representation, including any issue as to the appropriate bargaining unit, call particularly for the expert judgment of the [ ] Board."[20]

Nor has any exception asserted that any supervisory employees beyond the foreman, excluded by accord, are not eligible for organization. As no exceptions have

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[17] Decision at 6, citing *Clinton Dry Cleaners*, 30 SLRB No 5, 30 (1987); *Paragon Oil Co, Inc*, 8 SLRB 94, 97-101 (1945).
[18] *Metropolitan Life Ins Co v NYS Labor Relations Board*, 280 NY 194, 208-210 (1939); *see also Long Island College Hospital v NYS Labor Relations Board*, 32 NY2d 314, 322 (1973), *cert denied* 415 US 957 (1974) ("It is for the board to establish 'in each case' [a]n 'employer unit, multiple employer unit, craft unit, plant unit, or any other unit'")
[19] 32 NY2d 314, at 321.
[20] *Long Island College Hospital v Catherwood*, 23 NY2d 20, 34 (1968), *appeal dismissed* 394 US 716 (1969).

been filed as to these rulings, they are not properly reviewable before us, having been waived.

With respect to the composition of the unit, Local 338 clarified that it does not seek to represent supervisors, family members working as agricultural laborers, seasonal employees, temporary employees, and employees on H-2A Visas for Temporary Agricultural Workers.

As the Director correctly found, the only dispute remaining as to unit composition is whether part-time employees should be included in the unit, which she found they should be. The Vineyards challenge the Director's conclusion, asserting in their brief in support of their exceptions, that "as stated in the Decision, there are no part-time employees employed as agricultural workers at the Vineyards."[21] From this, the Vineyards fault the Director as having rendered a hypothetical designation.

This is not exactly correct. In her decision, the Director wrote that "Neither Paumanok nor Palmer presents any factual or legal basis on which part-time employees should be excluded. Neither even contends that they employ part-time workers."[22] In Paumanok's answer, objecting to the unit including part-time employees, there is no averment as to whether or not any of its employees were part-time employees; Palmer's answer exercised a similar discretion.[23] Nor did the offer of proof, which included the names of all employees at both Vineyards, expressly state that there were or were not part-time employees at either Vineyard.[24]

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[21] Vineyards's brief at 10.
[22] Decision at 7.
[23] Paumanok answer, ¶ 8; Palmer answer, ¶ 7.
[24] Offer of proof, ¶¶ 9, 16.

The Vineyards not having made this issue clear at any point prior to their filing exceptions before the Board is unhelpful, and would normally be deemed waived under our Rules.[25]

In its brief before us, Local 338 maintains that the Director did not err in including part-time employees in the unit, maintaining that "no citation to any authority nor any reasoning for why part-time employees should be excluded from the unit simply because there are currently no employees working part-time."[26] In support of its argument for including part-time employees, Local 338 relied upon an ALJ decision in *Maker Stables, LLC*, for the proposition that "[r]egular part-time employees are entitled to representation, and were included in an appropriate unit even when the number of employees working at one time fluctuates due to the employer's business and none of the employees worked regular fixed hours."[27]

As the ALJ correctly noted in *Maker Stables*, our predecessor Board, the State Labor Relations Board (SLRB) explained in its decision in *Wyckoff Heights Hospital,* that "[m]ost employment is at will, with no guarantee as to how long it will continue," and that it is "the Board's consistent practice and established policy to include in the unit all regularly employed employees who perform the same work."[28] In that decision, SLRB also

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[25] Rules, § 253.48 (c) (4).
[26] Local 338 response to exceptions, at 9.
[27] 54 PERB ¶ 4401, 4406 (2021), *citing Golden Arrow Line*, 29 SLRB 163, 164 (1966) (part time employees included in unit; casual employees excluded); *Charles Kessler, et al*, 28 SLRB 380 (1965) (same).
[28] 35 SLRB 313, 316-317 (1972) (discussing the inclusion of temporary workers in a unit). *See also Menorah Home and Hospital for the Aged*, 31 SLRB 354, 355-356 (1968) (including in an appropriate unit vacation replacement and call-in nurses, and noting that the issues of unit eligibility and the eligibility to vote were separate).

emphasized "that whether an individual employee had a continuing interest in terms and conditions of employment was not a matter of unit inclusion, but a separate matter to be determined when addressing employee's eligibility to vote."[29]

Under the circumstances here, we believe that the record evidence is not sufficiently clear for us to determine whether or not the Vineyards have had in the past part-time employees, especially in view of the Vineyards's admission that employees of Paumanok would work at times at Palmer, and the converse. How such employees would be classified with respect to the Vineyard at which they were not formally employed but nonetheless worked at for some period of time is not dispositive of the determination of whether such employees were part-time at one or both Vineyards, but could in fact be indicative.

We find that the policy of the Act "to include in a unit all regularly employed employees who perform the same work" is best served by including part-time employees as members of the multi-employer unit at issue here.[30] This ruling is without prejudice to the Vineyards ability to file a petition seeking to exclude future-hired part-time employees whose work and duties they belive do not equate to a community of interest with the employees within the unit.

We now turn to the most significant component of the Vineyards's exceptions, the claim that the Director failed to afford the Vineyards's claims of fraud and coercion the appropriate review, and especially failing to treat the factual allegations of the offer of proof "in a light most favorable to them [the Vineyards] by assuming their truth and

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[29] *Id*.
[30] *Id*.

drawing all reasonable inferences in their favor."[31]

We are not persuaded by the Vineyards's exceptions. The Vineyards erroneously assume that the Director's treating the statements in the offer of proof as truthful, and in drawing reasonable inferences from them, necessarily means that those statements suffice to meet the appropriate standard of review. That is, unequivocally, not the case.

Pursuant to § 705.1 of the Act, as relevant to the exceptions in this matter, the standard for challenges to employees' choice of representative under SERA is exacting:

> In the event that either party provides to the board, prior to the designation of a representative, clear and convincing evidence that the dues deduction authorizations, and other evidence upon which the board would otherwise rely to ascertain the employees' choice of representative, are fraudulent or were obtained through coercion, the board shall promptly thereafter conduct an election.

"Clear and convincing evidence" is not a self-evident standard; however, as it has been well phrased:

> Between the normal civil standard and the criminal standard lies an intermediate civil standard, variously formulated by the courts but most often described as a standard of clear and convincing evidence. Despite this description, the clear and convincing evidence standard does not refer to the quantity or kind of evidence presented, but to the apparent probability that the assertion is true: the party with the burden of proof must convince the trier of fact that it is highly probable that the facts he alleges are correct. Exactly how high the probability must be is unclear, and consequently the clear and convincing evidence standard has been criticized as unworkably vague. Nevertheless, in various categories of cases, courts regularly instruct juries to look for clear and convincing proof.[32]

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[31] Exception 11.

[32] Emily Sherwin, "Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice, 34 Connecticut Law Rev 453, 460- 462 (2002) (Citations, notes, and editing marks omitted).

In New York State, clear and convincing evidence has been treated as just such an intermediate burden of proof, resting somewhere between a preponderance of the evidence and the higher beyond a reasonable doubt standard.[33] Here, as in *Currie v McTeague*, "we find the proof inadequate to satisfy this exacting standard."[34] Even accepting, as the Director did, the veracity of the factual allegations before her, the facts alleged were vague and unsubstantiated, and in certain places self-contradictory. Gonzales's affidavit alleged that, at some unknown time in 2021, an unknown person or persons claiming to represent Local 338 began contacting him on numerous occasions, despite his informing them that he was not interested in further contact with them. He provided no names, positions, or even a description of the individual(s) with whom he spoke. Nor did he inform his employer until May 4, 2022, significantly after the events in question.

Similarly, his allegation that "there would be a check waiting for him if he supplied Local 338 with more information," including information about his employer, suffers from the same deficiencies.[35] Gonzales also averred that his "understanding" was that "receipt of the check was contingent on [his] joining the union."[36] Gonzales's account is internally inconsistent, in that it first states that receipt of the check was a fee for providing information, but then he alleges that receipt of the check was contingent on his joining the

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[33] *See, eg, Currie v McTeague*, 83 AD3d 1184, 1185 (3d Dept 2011) ("Clear and convincing evidence standard requires the party bearing burden of proof to adduce evidence that makes it highly probable that what he or she claims is what actually happened.").
[34] *Id*.
[35] Decision at 5, quoting Gonzales affidavit at ¶¶ 3-4 (editing marks omitted).
[36] Decision at 5, citing Gonzales affidavit at ¶¶ 3-4 (editing marks omitted).

union. He also alleged that the other workers at the Vineyards were made the same offer as he was, but did not identify any source of his knowledge, which workers were made the offer, or the basis for his alleged "information and belief."[37]

These inconsistencies in Gonzales's affidavit, as was the case in *Currie v McTeague*, lead us to find that "in view of these contradictions, as well as the uncorroborated nature of [Gonzales's] testimony" we are unable to find that Gonzales's proferred testimony, absent significant information not contained in the offer of proof, could conceivably rise to the level of clear and convincing evidence.[38]

We also note the Vineyards's claim that Local 338 did not deny Gonzales's claims of wrongdoing are sufficiently refuted by the express denial under oath of those claims comprised within the Palmquist declaration on behalf of Local 338. We do not rely on this factual error, as the sufficiency of the offer of proof is at issue, not the thoroughness of Local 338's denial of the alleged wrongdoing.

The Vineyards's claim that the Director erred in refusing to permit them and/or their counsel from viewing the employees' dues deduction authorization cards with the employees's names redacted is presented absent citation of relevant statutory authority, case law from this Board or its ALJs, our predecessor board, any comparable legal statutory schema, or any other legal basis to allow the Vineyards to breach the

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[37] Gonzales affidavit at ¶ 5 (editing marks omitted). To the extent that the Vineyards's exceptions can be read to argue that the Director was obligated to hold a hearing, we reject that argument. Hearings held are discretionary, not required by law, and are held only where there is a material issue of disputed fact. As the Director, and this Board for purposes of its analysis, presumed the offer of proof to be true (albeit insufficient), no such disputed fact was at issue.

[38] *Id*.

confidentiality in which this Board has long held dues deduction authorization cards.[39]

It is well-established that "Both PERB and the NLRB have always treated showings of interest as strictly confidential, whether sought by employers or unions confronted with a petition for certification or for decertification," which is "in furtherance of the statutory policy of protecting employees' rights of organization."[40]

This has been true for decades in our public sector jurisprudence, and is no less integral to our private sector duties, pursuant to the statutory mandates of SERA and our Rules. Indeed, our Rules expressly provide that dues deduction authorization cards are not part of the record, either before the courts or pursuant to the State's Freedom of Information Law.[41]

Moreover, redaction of the signer's names alone is insufficient to protect the employees's rights under the Act, as other identifying information is contained within the cards, information such as address, phone number, date of hiring, and the indivudual's handwriting.[42] This is particularly the case in view of the small workforces of each of the Vineyards (eight and six employees, respectively).

We agree with Local 338 that, under our Rules and the applicable precedents, review of dues deduction authorization cards is a purely internal administrative matter for the Director, as is necessary to preserve the sanctity of each employee's right to choose

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[39] Vineyards's brief in support of exceptions at 10-11.
[40] Opinion of Counsel, 41 PERB ¶ 5001, 5001-5002 (Dec 1, 2008); *see also Fairmont Mills, Inc*, 87 NLRB 21 (1949); *NLRB v Biophysics Sys, Inc*, 91 LRRM 3079 (SDNY 1996) ("The interest in confidentiality which attaches to a union authorization card approaches that which surrounds the secret ballot in an election.").
[41] Rules, §§ 253.50, 253.51.
[42] Local 338's response to offer of proof, at 10.

to join a union or to refrain from joining one.[43] We affirm the Director's finding that Palmer's expressed concern over misnomer of the correct employer in the cards does not raise an issue that comes anywhere near to warranting breaching the confidentiality of the cards here.

As the Director correctly noted, her finding the multi-employer unit appropriate would render the issue moot unless we reversed or annulled that finding. In view of the Vineyards's failure to except to the Director's finding that a multi-employer unit was appropriate, the issue was waived pursuant to § 253.48 (c) (4) of our Rules, thereby rendering the claim moot.

Based on the foregoing, we affirm the Director's findings as here discussed. We find the following unit as appropriate to be certified to Local 338:

Included: All full time and regular part time agricultural laborers employed by Paumanok Vineyards and Palmer Vineyards.

Excluded: Foreman, family members working as agricultural laborers, seasonal employees, temporary employees, and employees on H-2A Visas for Temporary Agricultural Workers.

Local 338 has submitted evidence that it represents a majority of the employees in this unit. Pursuant to § 705.1-a of the New York State Labor Relations Act, Local 338 has hereby satisfied the requirements for certification without an election, and is hereby

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[43] See Rules, § 251.15 (a); *see also Police Benevolent Assn of New York State v Helsby*, 84 Misc2d 17, 19 (Sup Ct Albany Co, Oct 30, 1975) (Conway, J.) ("PERB's director has the power to pass upon the sufficiency of the 'showing of interest'. Revealing the names of the employees who support one employee organization, to another incumbent employee organization, may subject employees to many forms of harassment and reprisal and would violate the long established policy of secrecy of the employees' choice in such matters."). In this case, while the names might not be revealed, the identities would be easily discerned, as discussed in the text *ante*.

certified as the exclusive negotiating agent for the unit.

IT IS, THEREFORE, ORDERED that the Director's findings are affirmed, and that the petitioned-for unit is certified. FURTHER, IT IS ORDERED that the Vineyards shall negotiate collectively with Local 338.

DATED: August 9, 2022
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, Member