The Public Employment Relations Board ("PERB") received 16 sets of comments in response to its Notice of Proposed Rulemaking ("NPR"). The NPR proposed changes to PERB's rules of procedure governing matters brought pursuant to the New York State Employment Relations Act ("SERA"), as amended by the Farm Laborers' Fair Labor Practices Act ("FLFLPA").

Parts 250 to 262 of PERB's rules govern matters brought under SERA. Part 263 of PERB's rules contain the rules applicable to matters brought pursuant to FLFLPA. PERB proposed changes to sections 251.6, 251.7, 251.13, 252.3, 252.5, 252.10, 253.9, and 251.6 of the SERA rules. PERB proposed changes to sections 263.19, 263.20, 263.24, 263.30, 263.31, 263.36, 263.38, 263.43, 263.54, and 263.67 of the FLFLPA rules. Comments were not received on each section proposed to be revised. This assessment discusses only the sections where comments were received.

Section 251.7 Response.

Comment: Section 251.7 requires the employer to submit a potentially non-current list of employees to avoid waiving its right to contest the appropriateness of the proposed unit under rule section 263.24, yet it does not fulfill PERB's independent duty to investigate all representation questions.

Response: PERB has not made any changes in response to this comment. The proposed rule requires a list of employees that is current as of the date the petition was filed with PERB, which is the relevant date for certification. PERB further notes that this proposed rule involves non-FLFLPA SERA certifications, but this comment was submitted by representatives of farm employers, whom the rule would not apply to.

Comment: The following should be added as the final sentence in section 251.7 (a): "Under no circumstances shall the amendment of the response cause the postponement of the hearing date." Additionally, in rule section 251.7 (b), the employer should be required to include the home address, phone number, email address, and work location of each employee on their provided list.

Response: PERB has not made any changes in response to this comment. PERB believes it best effectuates the purpose of SERA to leave the hearing officer discretion to proceed in accordance with the circumstances of each case. PERB also does not see the need for the further information requested at the time the response to the petition is filed.

Section 251.13. [Certification, Life of] Petitions for Decertification.

Comment: Requiring an election for decertification is inconsistent with the statute because the statute does not distinguish between certification and decertification petitions. Given that the right to decertification arises from section 705's certification provisions, employees should be able to decertify a union without any additional restrictions or requirements.

Response: PERB has not made any changes in response to this comment. Section 705 of SERA/FLFLPA relates to the requirements for certification of bargaining units. Requiring an election to decertify a bargaining representative is consistent with PERB's practice in public sector (which also allows for card check certification). Card check decertification was also not the policy of our predecessor Board

Comment: The proposed certification and contract bars in section 251.13 and 263.30 will prohibit employees from filing decertification petitions during insulated periods. These proposed insulated periods are not permitted by SERA's text because the legislature's decision to omit a statutory bar on elections in SERA must be viewed as intentional.

Response: PERB has not made any changes in response to this comment. It is not uncommon for insulated periods not to be included in labor relations statutes. Instead, insulated periods are the product of case law and associated rules, such as the rules governing cases brought under the National Labor Relations Act and New York's Public Employees' Fair Employment Act. *See also Mar-Jac Poultry*, 136 NLRB 785 (1962); *Centre-O-Cast & Engineering Co*., 100 NLRB 1507, 1508 (1952); *Cabol Cab Co*, 8 SLRB 245 (1945). We have already found that a one-year insulated period after certification exists under SERA/FLFLPA. *See Porpiglia Farms, Inc (Bell)*, 58 PERB ¶ 3402 (2025); *Cherry Lawn Fruit Farms, LLC (Estrame)*, 58 PERB ¶ 3407 (2025). The proposed change simply conforms our rules to case law.

Comment: Permitting a decertification petition to be dismissed under section 251.13 and 263.30 when a union has filed an unfair labor practice charge is not permitted by SERA and would undermine the rights of employees to be represented by a union of their choosing. Such "blocking charge" rules incentivize unions to file unmeritorious charges as a delay tactic. Additionally, such rules disregard the fact that employees may wish to be free from union representation for reasons other than alleged employer infractions.

Response: PERB has not made any changes in response to this comment. The director of private sector employment practices and representation makes an initial determination on whether the facts, as pleaded, may constitute an unfair labor practice. Assuming that the charge passes initial review, an assigned hearing officer will promptly process any unfair labor practice charges filed and will dismiss non-meritorious charges. A "blocking charge" policy is necessary for employees to exercise their free and fair choice in respect to representation. If an unfair labor practice has occurred, it must be remediated before a decertification election is held. However, only charges that interfere with employee free choice or the collective bargaining process will

serve to block a decertification election. This rule is consistent with that of the National Labor Relations Board. *See* 29 CFR Part 103.20

Comment: The "blocking charge" provision in sections 251.13 and 263.30 denies due process to petitioners because the petitioners are not a party to the unfair labor practice charge, likely have little to no knowledge of the factual basis of the charge, and are not permitted an opportunity to be heard in the matter. This lack of due process also leaves petitioners unaware of when their decertification petition can be reinstated. If PERB adopts this proposed rule, it should specifically address the petitioner's ability to receive information about how to intervene in the blocking-charge cases that threaten to delay/derail the decertification process.

Response: PERB has not made any changes in response to this comment. To the extent it is appropriate, parties filing a decertification petition will be put on notice of any alleged unfair labor practice charges which may serve to block the processing of the petition and an election. *See Porpiglia Farms, Inc (Bell)*, 58 PERB ¶ 3402 (2025).

Comment: None of the proposed changes in sections 251.13 (a), (c) - (g) and 263.30 (a), (c) - (h) should be adopted. PERB should retain the existing language in SERA and take affirmative steps to ensure its enforcement. For example, if PERB is on notice that a majority of employees do not support a union, then PERB should take immediate action to remove the union. This action would effectuate the guarantees of the New York State Constitution, art I, section 17.

Response: PERB has not made any changes in response to this comment. PERB has repeatedly received feedback, including from farm employer representatives, that decertification procedures are necessary so that employees wishing to decertify know the steps they need to take and the circumstances under which such a petition will be considered.

Comment: In rule section 251.13 (d), the sentence beginning with "Such period" should include an employer's refusal to provide requested information for the union to be able to effectively negotiate and a refusal to agree to meeting dates/places.

Response: PERB has adopted this proposed change, as it agrees that these circumstances would result in a decertification election being blocked.

Section 263.19 Petition; filing.

Comment: Removing the requirement that a copy of the petition be served lacks any discernible rationale, conflicts with the requirements in SERA section 708.5, and undermines due process rights.

Response: PERB has not made any changes in response to this comment. PERB has only removed the requirement that a *petitioner* serve a copy of the petition at the time they file with PERB. PERB itself, however, will still serve a copy of the petition on the employer, and the employer's time to respond will start to run upon receipt of the petition from PERB. PERB has found that the existing rule, requiring the petitioner to serve a copy of the petition, has caused confusion about the date when the employer's response is due.

Comment: Removing section 263.19 (h) while leaving section 263.19 (d) creates confusion about what constitutes electronic service and when the timeline for an employer's response begins to run. Businesses in general do not expect to receive consequential legal documents via email. Small farms are further disadvantaged because some do not regularly conduct business via email. Rather than repeal (h), PERB should revise it to either incorporate the same service rules as those in civil court or, alternatively, use the same language as that in the California code of regulations, tit. 8, section 20300 (e).

Response: PERB has removed the last sentence in section 263.19 (d) in its Revised Notice of Proposed Rulemaking. Because petitioners are no longer required to serve a copy of the petition on employers, the last sentence is no longer necessary. Petitions themselves may be filed by the petitioner on PERB electronically.

Section 263.20 Petition for certification filed by employee or their representative; contents.

Comment: Adding a "peak season" requirement may constitute a substantive change to the law that would be outside the scope of PERB's authority.

Response: PERB has not made any changes in response to this comment. PERB does not view this as a substantive change, as it simply defines when it is appropriate to file a petition for certification.

Comment: The term "peak season" is not clearly defined, and unions would not be required to submit proof of the fact that it is peak season. This promotes inconsistent application, undermines the validity of the requirement, and may lead to unnecessary litigation. PERB should revise the rule to define the term and to place an evidentiary burden of proof on a petitioning union. Employers should be permitted to submit evidence when factual disputes on this issue arise.

Response: PERB has made changes in response to this comment. PERB has added a definition of "peak employment" to section 263.20 (a)(7). Because employee organizations cannot be expected to have access to proof that the employer is at peak employment, PERB has not imposed an evidentiary burden on employee organizations. However, PERB has modified section 263.20 (a)(7) to require that employee organizations state, "upon information and belief" that the employer is at least at 50 percent of peak employment.

Comment: The "peak season" requirement permits a union to strategically wait until the end of the season to file a certification petition, ensure a specific payroll period of eligibility, and "gerrymander" a preferred bargaining unit.

Response: PERB has not made any changes in response to this comment. The "peak employment" requirement ensures that a majority of employees are present at the time of certification and that certification is not based on an unrepresentative segment of the employer's employees.

Comment: PERB should consider requiring a showing of interest of at least 80 percent of peak employment to ensure that the maximum number of employees are eligible to vote.

Response: PERB has considered this comment and declined to make any change. Requiring such a showing of interest is inconsistent with standard and historic labor law practice and concepts.

Comment: At a minimum, the term "peak employment" should be clearly defined, and PERB should include a method for calculating the peak employment that ensures employees have an accessible means of comporting with this requirement. However, the better approach would be to remove this provision altogether. It is unreasonable to expect employees to know detailed information about their employer's past or anticipated future employment levels, especially in the agricultural industry where employment levels fluctuate frequently. The inclusion of this requirement creates an arbitrary barrier to certification, which reflects neither the letter nor the spirit of FLFLPA.

Response: PERB has defined peak employment, partly in response to this comment. PERB believes that requiring an employer be at 50% of peak employment best ensures that a majority of employees are present at the date of certification and comports with the intent behind

FLFLPA. PERB notes that employees should submit their statement upon information and belief.

Section 263.24 Statement of position and offer of proof in certification cases.

Comment: In proposed section 263.24 (e), adding "of the petition" was needed to clarify which document filing is being referred to; however, this practice of establishing a "snapshot" for purposes of the employee list and the showing of interest does not reflect good policy. In the context of agricultural businesses with a fluctuating employee count, and especially with regards to H-2A workers who must leave the country upon completion of their work contract, this process permits the timing of petitions such that *former* employees could be counted in the showing of interest. Moreover, proving fraud or coercion would be nearly impossible because the key witnesses would be gone. PERB should align its procedures with those of the NLRB because the procedures prevent a petitioning labor organization from selecting its preferred date for determining voting eligibility and provide that the NLRB will not move forward with the certification process if a petition relies upon the support of individuals who are no longer employed.

Response: The election processes of the NLRB are inconsistent with the card check process chosen by the New York State Legislature through the enactment of FLFLPA and are not transferrable. PERB believes that the card check process requires that it take a snapshot of support at the time the petition was filed.

Comment: PERB has no statutory authority, aside from its subpoena power, to compel employers—under threat of automatic certification for failure to comply—to produce documents as part of its certification investigation. As such, PERB may not sidestep the subpoena

requirement and impose on an employer the burden of production (of a list of employees) through regulations.

Response: PERB has not made any changes in response to this comment. Section 705.3 of SERA gives PERB the authority to conduct investigations in certification matters. As part of that investigation, PERB may request and obtain necessary, relevant information. PERB notes that, in the absence of a list of employees provided by the employer, there is no evidence before PERB to counter the employee organization's claim to majority support.

Comment: With the addition of the "peak employment" requirement in other rules, PERB should add language to section 263.24 (b) requiring an employer to include whether the employer disputes that they are at 50 percent of peak employment and, if so, to provide all information they are relying on in disputing that.

Response: PERB has modified section 263.24 (b) to make it clear that an employer may dispute that it is at peak employment in their response and may submit evidence in support.

Comment: Section 263.24 (e) should require the employer to provide additional contact information and job information for all employees on the submitted list (e.g., phone numbers, mailing address, email, wage rate), and to do so in a format that would make the information accessible, preferably Excel. Additionally, employers should be required to provide job descriptions in order to help determine the accuracy of job classifications and the appropriate scope of the unit.

Response: PERB has not made any changes in response to this comment. The requested information is not necessary or relevant to the card check process, but may be obtained as part of an information request to the employer after certification.

Comment: Section 263.24 (f) should include language that seeks to enforce the employer's duties to respond and to provide complete, accurate information. Such language may include that any failure to cooperate fully with PERB's investigation of a certification petition may result in an adverse inference with regard to the employer's position.

Response: PERB has modified section 263.24 (f) to provide that failure to provide all requested information may result in the hearing officer taking an adverse inference against the employer's position(s).

Section 263.30. [Life of Certification] Petitions for Decertification.

Comment: Proposed amendments to the decertification process are highly unlikely to work in practice and—when combine with the one-year insulated period, the dismissal of petitions in the presence of an unfair labor practice charge, mandatory arbitration procedures, and the contract bar doctrine—impose nearly insurmountable barriers to decertification. The end result is certifications remaining binding in perpetuity.

Response: PERB has not made any changes in response to this comment. PERB believes its proposed rules are consistent with both the statutory language, legislative intent, and prior practice under SERA and FLFLPA.

Comment: The language in proposed rule section 263.30 (a) regarding elections conflicts with the language in SERA section 705.1 and 705.1-a. The former requires an election, whereas the latter precludes an election. As the statute unambiguously applies to any circumstances where employees choose between "selecting or rejecting" a union, it would necessarily include decertification. Thus, the provisions cannot be reconciled.

Response: PERB has not made any changes in response to this comment. The language in section 705.1-a of SERA/FLFLPA cited by the commentors about "selecting or rejecting a

single employee organization" plainly applies only to certifications. The process for decertifying a certified employee organization is not covered under SERA/FLFLPA.

Comment: PERB should enact rules which permit decertification in a fair, workable, and expedient manner and by the same process as certification; i.e., using either dues cards or an election for *both* certification and decertification. By distinguishing between certification and decertification procedures, the rules do not align with the statutory language that ensures employees a "choice" and from which PERB derives its authority.

Response: PERB has not made any changes in response to this comment. Card check certification is required in certain circumstances by SERA/FLFLPA. By contrast, the requirements for decertification are not set forth in the statute.

Comment: PERB should consider amending rule section 263.30 (a) to require that a decertification uses the same method as that of the certification of that particular bargaining unit. This change would ensure that similarly situated employees—in many cases the same employees—are treated equally under the law.

Response: PERB has not made any changes in response to this comment. As discussed above, card check certification is required by SERA/FLFLPA in certain circumstances. *See especially* section 705.1-a of FLFLPA. PERB believes that its proposed rules on decertification comply with the spirit of SERA/FLFLPA in setting forth the information required in a decertification petition and the circumstances under which such a petition shall be considered.

Comment: Rule section 263.30 (b) should include language requiring a decertification petition to include an affirmation under penalty of perjury that the petitioner did not receive any "unlawful employer assistance" in the process.

Response: PERB has not made any changes in response to this comment. Such a rule would require employees to know what "unlawful employer assistance" meant, a legal question.

Comment: The decertification filing window proposed in rule section 263.30 (g) should be changed from "ninety days to sixty days" to "sixty days to thirty days" before the contract expiration date. This would allow parties additional time to negotiate a renewal contract. The filing of a decertification petition often encourages employers not to take negotiations seriously or participate in good faith. Moving the window closer to the expiration date of the contract would not prejudice the rights of the employees who wish to file a decertification petition because they would still have a thirty-day window in which to do so.

Response: PERB has not made any changes in response to this comment. The proposed time periods are reasonable and PERB does not see a particular justification for making such a change.

Comment: The decertification procedure creates an unfair situation and an imbalanced framework by, for example, impeding the employees' ability to file a decertification petition while still permitting unions to invoke binding impasse and arbitration procedures. Additionally, it imposes a disparate burden on decertification petitioners as opposed to certification petitioners.

Response: PERB has not made any changes in response to this comment. PERB views its proposed decertification rules as consistent with the legislative intent behind SERA and FLFLPA. The petition requirements are similar to those of certification petitions and do not impose a disparate burden on decertification petitioners.

Comment: The language in proposed rule section 263.30 (a) and (d) prohibiting a decertification petition from being filed within one year of the commencement of bargaining

conflicts with the statutory requirement in SERA section 705.3 that the board "shall" investigate a question or controversy.

Response: PERB has not made any changes in response to this comment. An insulation period, during which an employee organization and employer may bargain as required by the statute, without threat of a decertification petition, is well-established in all labor relations law. This is true for both the private and the public sector, and the insulation period under SERA/FLFLPA has been recognized by our predecessor board. *See the discussion of insulated periods in Porpiglia Farms, Inc (Bell)*, 58 PERB ¶ 3402 (2025); *Cherry Lawn Fruit Farms, LLC (Estrame)*, 58 PERB 3407 (2025).

Comment: The one-year ban on decertification is too lengthy and does not promote employees' freedom of choice of representation in a timely manner, given that contracts under FLFLPA can be completed in 70 days after certification.

Response: PERB has not made any changes in response to this comment. PERB believes that a one-year insulation period is consistent with labor law principles.

Comment: The insulated periods are inconsistent with the mandatory arbitration provisions in FLFLPA. The impasse provisions of section 702-b can force arbitration as soon as 70 days after certification; therefore, there is no need for a certification bar, given that unions are able to force employers to enter into a contract before the bar expires. Subdivision (e) should be removed entirely. To the extent that PERB is modeling its rule after the NLRB's one-year insulated period, the circumstances and context for certification under FLFLPA are very different from those under the NLRA. Here, such a one-year period is not warranted.

Response: PERB has not made any changes in response to this comment. The same statutory and rule language exists in New York's public sector labor law. The purpose of the

insulation period is to allow parties to bargain without interference; the purpose of impasse arbitration is to assist parties who are unable to reach agreement. The two are not substitutes for each other.

Comment: The meaning of the final sentence in section 263.30 (d) should be clarified.

Response: PERB has not made any changes in response to this comment. PERB believes that the language is clear, but has added the language suggested in an earlier comment to mirror section 251.13 (d).

Comment: Farm employees should be able to certify or decertify a union at the time of their choosing, not within narrow and arbitrary time constraints, which serve to favor union continuance and deprive employees of their rights.

Response: PERB has not made any changes in response to this comment. The insulated period is intended to give the employee organization and employer an uninterrupted period of time after certification to bargain in good faith. As discussed above, it is a well-established tenet of labor law and is widely recognized.

Comment: Rule section 263.30 (d) neglects to define the meaning of "fully and fairly negotiated" and then also refers to a separate "actual bargaining" standard that may impose a distinct requirement. This permits arbitrary extension of the one-year period based upon the discretion of a PERB official on a case-by-case basis and not by clear and definite standards.

Response: PERB has changed "fully and fairly negotiated" to "actually negotiated" in response to this comment. A parallel change was made to section 251.13 (d). PERB does not believe that the rule allows for arbitrary extensions or dilatory tactics to avoid bargaining.

Comment: The filing of a decertification petition should stay the employer's obligation to bargain, mediate, or arbitrate with the union whose representation status has been questioned.

The current process lacks a plausible or rational basis for compelling an employer to engage with a union whose members object to continued representation, and ignores the will of the employees and the intent of SERA. At a minimum, the final rules should dictate a "pause" on all actions until PERB has investigated a decertification petition and/or held an election.

Response: PERB has not made any changes in response to this comment. As the PERB board explained in *Porpiglia Farms, Inc*, 58 PERB ¶ 3401 (2025), it has been a long-standing policy under SERA that the obligation to bargain continues when a decertification petition has been filed. Because mediation and impasse arbitration are a continuation of the bargaining process, it is proper that those obligations continue as well.

Comment: Permitting a decertification petition to be dismissed while an unfair labor practice charge is pending allows unions to stop decertification indefinitely by this means alone. The NLRB recently repudiated its former blocking-charge policy, and courts across all jurisdictions reject such a rule. If PERB moves forward with a "blocking charge" rule, only unfair labor practice charges that allege improper involvement *specifically in the decertification process at issue* should be permitted to block the petition.

Response: PERB has not made any changes in response to this comment. PERB believes that not having a "blocking charge" rule would allow a violating employer to benefit from malfeasance by failing to bargain in good faith or through conduct that interferes with employees' free choice in an election. Given PERB's structure, which requires that a charging party prosecute its case and present evidence, PERB is not subject to the delays that might come from a prolonged investigative period. PERB will prioritize the processing of any unfair labor practice charge that is blocking a decertification election.

Comment: The language in proposed rule section 263.30 (e) conflicts with the language in SERA section 703 and 706.1.

Response: PERB has not made any changes in response to this comment. PERB believes that its proposed rule is consistent with SERA.

Comment: PERB should consider an additional process in rule section 263.30 (e) other than immediate dismissal of a decertification petition if there has been a determination that an employer interfered with employees' free choice.

Response: PERB has not made any changes in response to this comment. PERB's proposed rule does not require immediate dismissal of a decertification petition; instead, dismissal is at the hearing officer's discretion.

Comment: Rule section 263.30 (e) should be revised to include language that prohibits an employer from filing a decertification petition for a specific period of time if the employer has been found to have committed an unfair labor practice related to collective bargaining; for example, three years after the date of remediation, and five years if the employer is found to have engaged in unlawful employer assistance in a decertification petition. Such a policy would help to protect employees' rights, give unions reasonable time to rebuild trust with bargaining members, and remove incentive for employers to benefit from their own wrongdoings.

Response: PERB has not made any changes in response to this comment. The hearing officer deciding an unfair labor practice charge retains the discretion to determine when remediation has occurred.

Comment: Rule section 263.30 (e)(2) should be modified to remove "conduct which would interfere with employees' free choice" and replace it with "the employer has otherwise violated employees' rights under SERA section 704 and/or 704-b." It is difficult to imagine any

scenario where a violation of SERA section 704 and/or 704-b would not "interfere with employees' free choice," and employers should not be permitted to benefit from their own illegal conduct. PERB should ensure that all unfair labor practice charges are resolved prior to considering a petition for decertification.

Response: PERB has not made any changes in response to this comment. PERB believes there must be a connection between the unfair labor practice and employees' free choice to justify not holding a decertification election.

Comment: The requirement in section 263.30 (f) that an employer be at a minimum of 50 percent of peak employment is useful to ensure equity and full participation of the workforce.

Response: PERB has modified section 263.30 (f) to include a definition of "peak employment."

Comment: PERB proposes applying the "peak employment" requirement only to decertification petitions and not certification petitions. As PERB has not provided any explanation for this change and there is no rational basis for it, PERB should correct the disparity in the application of this standard. If PERB moves forward with its proposed "peak employment" requirement only for decertification petitions, then PERB should clarify that the requirement will not apply *retroactively* to certifications issued prior to this rule adoption.

Response: PERB has not made any changes in response to this comment. The "peak employment" requirement applies to certification petitions as well as decertification petitions. *See* Rule 263.20 (a)(7).

Comment: Rule section 263.30 (a) should include language requiring that a petition for decertification is supported by "50 percent plus one" of employees.

Response: PERB has not made any changes in response to this comment. Requiring a majority showing before a decertification petition may be filed would not be consistent with PERB's other showing of interest requirements. *See* section 263.17 of PERB's existing rules.

Comment: As proposed, the decertification process will be difficult for many farm employees to complete without outside professional and/or administrative assistance. PERB should clarify the language to ensure that professional individuals, such as attorneys and consulting groups, may be retained by farm employees for both the certification and decertification processes. Also, PERB should consider clarifying whether unions are able to pay for such services on behalf of employees.

Response: PERB has not made any changes in response to this comment. PERB views the proposed change as unnecessary, as PERB does not dictate who may represent individuals.

Comment: It is impossible for petitioning farm employees to ensure compliance with *both* the explicitly defined time frames permitted for decertification under proposed rule section 263.30 (g) - (h) *and* the peak employment requirement of proposed rule section 263.30 (f). This incongruity also enables unions to manipulate the process and insulate themselves from decertification by timing the contract's expiration to fall in the off season.

Response: PERB has changed the language of proposed section 263.30 (h) to provide that if the contract expiration date falls outside a period of peak employment, then the decertification petition may only be filed during the next period when the employer is at least at 50% of peak employment.

Comment: Rule section 263.30 (d) should be revised to include language that prohibits a decertification petition from being filed once a labor organization or employer requests any assistance under the impasse procedures of SERA section 702-b. This is consistent with PERB's

current proposal to allow a one-year insulated period after the commencement of negotiations and to discount any delays in bargaining when calculating the one-year period. Likewise, rule section 263.30 (h) should be revised in the same manner. It would still allow decertification petitions in limited circumstances while also dissuading employers from dragging out negotiations once a contract has expired.

Response: PERB has not made any changes in response to this comment. PERB views the proposed changes as inconsistent with employees' decertification rights.

Section 263.36 Contents of charge

Comment: The additional requirements in rule section 263.36 (d) are welcome. PERB should also require that every charge be accompanied by an Offer of Proof.

Response: PERB has not made any changes in response to this comment. A summary of the proof to be offered is required, but requiring an offer of proof is left to the discretion of the hearing officer.

Comment: PERB should amend rule section 263.36 to include a "statute of limitations" period on the filing of an unfair labor practice charge, such as the four-month limitation under the Taylor Law.

Response: PERB has not made any changes in response to this comment. PERB does not see it as necessary to impose a statute of limitations at this time and notes that the unfair labor practice charges it has received thus far under FLFLPA have been timely filed. Nevertheless, PERB notes that a defense of laches or other equitable defenses may be available to a respondent. PERB will continue to evaluate this issue.

Section 263.54 Subpoenas

Comment: The proposed language in rule section 263.54 should permit PERB to issue subpoenas for investigative purposes in connection with unfair labor practice charges as well as representation petitions. Having investigative subpoena power will enhance PERB's ability to oversee both processes, to ensure the full development of the record, and to promote settlement between the parties. Additionally, because PERB is the agency issuing the subpoena, it is PERB that should take the necessary steps to enforce the subpoena, and language to this effect should be included in the rules. Requiring the party that requested the subpoena to enforce it would create unnecessary delay and is incongruous with current labor law in the country. Indeed, New York's civil service law section 205.5 (k) grants PERB the power to issue subpoenas and to compel attendance of witnesses and production of documents in accordance with civil practice law and rules, and New York courts have affirmed this authority. Finally, hearing officers should have the ability to draw adverse inferences or issue evidentiary sanctions if a party refuses to comply with a subpoena.

Response: Under the current rules, PERB may issue subpoenas in both investigative and representation matters. PERB does not enforce subpoenas; such would be inconsistent with PERB's position as a neutral decisionmaker and prior practice. It is the responsibility of parties appearing before PERB to present evidence and enforce subpoenas as necessary. PERB has added language that if a party or witness fails without reasonable excuse to comply with a subpoena properly served, the hearing officer shall have the ability to draw adverse inferences from the failure to comply. A parallel change has been made to section 253.9 (l).

Comment: The proposals regarding subpoenas in sections 253.9 and 263.54 would result in cumbersome, inefficient, and prejudicial case processing. The language should be modified in the following ways in order to minimize dilatory tactics and unfair surprises, strengthen the

subpoena power, and protect the rights of farm workers: (1) permit subpoenas to be issued by the hearing officer or an attorney of record for a party; (2) require subpoena requests to be served on all parties and any nonparty from whom the documents are sought; (3) set a limit of five working days to file a motion to quash or modify a subpoena; (4) authorize sanctions for failure to comply with a subpoena without good cause; (5) require production of documents in advance of the hearing as the default timeline, and parties wishing to depart from that timeline must file a motion to modify the subpoena; and (6) retain the reference to SERA section 205 because it is the statutory source of PERB's subpoena power and provides guidance for the parties that the regulation and enforcement of subpoenas follow the civil practice law and rules ("CPLR").

Response: PERB has not made any changes in response to this comment. The CPLR's provisions regarding subpoenas remain in effect. As such, subpoenas can be issued by the hearing officer or by an attorney of record for a party. PERB does not view it as necessary to retain reference to civil service law section 205, as that is the law governing the public sector.

Section 263.67 Exceptions to the Board.

Comment: PERB should consider clarifying the language in rule section 263.67 (a) that references filing "exceptions" and the language in rule section 263.29 (b) that references "objections." As a hearing officer's decision regarding certification would fall under both rules, clarifying the appropriate procedural vehicle for administrative appeals of certification decisions may be necessary.

Response: PERB has not made any changes in response to this comment. PERB believes that the clarifying language provided in proposed section 263.67 (a) adequately explains when exceptions are governed by section 263.67 or sections 263.28 and 263.29.

Comment: The proposed addition in rule section 263.67 (a), establishing that exceptions to certification decisions without an election will be reviewed under the "compelling circumstances" standard of section 263.28 and 263.29, hinders an employer's right to administrative appeal of one of the most consequential decisions that PERB makes. This grants almost unreviewable authority to hearing officers in such decisions. At a minimum, PERB should subject non-election certification decisions to the same level of scrutiny as any other ruling or order from a hearing officer.

Response: PERB has not made any changes in response to this comment. The current provision was adopted several years ago and is consistent with the legislative intent to achieve prompt certification of a bargaining unit based on card check. Court review remains available under Article 78 of the CPLR.

General Comments

Comment: Many statutory provisions of the FLFLPA are undefined and vague, and some of the proposed amendments lack any discernible rationale. Also, many aspects of the proposed rules appear designed to burden employers and benefit labor organizations.

Response: PERB has not made any changes in response to this comment. In the absence of specific language being objected to, it is impossible to formulate a response to this comment.

Comment: Many of PERB's rules exceed its statutory authority and likely will not withstand legal challenges. For example, the decertification procedures violate the constitutional and statutory rights of farm employees; removing the service requirement violates due process guarantees; and the contract bar and the insulated periods run contrary to the legislature's intent in SERA.

Response: PERB has not made any changes in response to this comment. PERB views all of its revisions as within its authority.

Comment: Although PERB states that the proposed rules are designed to be "cost-neutral," PERB will likely incur substantial costs defending legal challenges to the rules that conflict with SERA and FLFLPA.

Response: PERB has not made any changes in response to this comment.

Comment: The language of the rules and the corresponding PERB forms is not easy for the layperson to understand and thus not accessible to agricultural workers. This creates an obstacle to the exercise of their rights. The rules should be rewritten using plain language, and PERB should create a simplified form that agricultural workers can use to express their desires regarding representation.

Response: PERB has not made any changes in response to this comment. The nature of regulations is such that they need to be precise and detailed. This can sometimes present a challenge to lay-people attempting to understand and comply with the rules. PERB will consider drafting a guidance document, to be translated also into Spanish, that will be of use to both practitioners and individual employees.

Comment: The more constricted New York agriculture is, the less competitive it will be in the national market. PERB's rules and processes unjustly burden employers and allow workers to be taken advantage of by unions. This will ultimately harm small family farms who will be forced to sell their business or transition to low-labor crops.

Response: PERB has not made any changes in response to this general complaint and believes the proposed rules comply with legislative intent and will not have those effects.

Comment: Under PERB's current practices, the burden of production has been improperly shifted to the responding employer to prove employees' status in certification procedures. Such "arbitrary decisions" counsel in favor of stronger board review. PERB should amend its rules to require *de novo* review of all certification decisions and any factual determinations made by a hearing officer.

Response: PERB has not made any changes in response to this comment. PERB's standard of review of certification decisions has been set for several years and is consistent with the legislative intent to achieve prompt certification of a bargaining unit based on chard check. Court review remains available under Article 78 of the CPLR.

Comments on Sections Not Currently Being Revised

PERB received a number of comments on sections of the rules that are not currently being revised. These include: (1) PERB should define and regulate what constitutes a valid submission of dues deduction authorizations, such as by requiring that such submissions be verified, notarized, or supported by a witness signature; (2) Card-check certification is an unreliable method of measuring the desires of farm workers as it does not permit employees to change their mind and vote accordingly in an official election; (3) PERB should consider a rule requiring that dues authorization cards can be signed only inside New York State to help eliminate any confusion on the employees' part as to what paperwork they are signing during the work visa process; (4) PERB should consider a rule requiring that dues authorization cards can be signed only during the time of employment, not during the off-season when not employed; (5) PERB should conduct an investigation and/or hearing whenever a showing of interest is disputed; (6) PERB should promulgate a rule amendment confirming that the presumptive appropriate unit in farm labor cases would include all agricultural employees; (7) The rules

should be amended as follows to include a section that deems noncompliant or unproven charges subject to dismissal with prejudice; to add a requirement that a charging party submit a memorandum of law if a charge alleges facts that go beyond the statutory definition of an unfair labor practice; and to permit any decision regarding the viability of charges to be immediately reviewable by the board.

While PERB is not revising these sections of the rules at this time, PERB will take these comments under advisement as it considers future rulemaking.

To summarize, in the Notice of Revised Rule Making, PERB is proposing changes to sections 251.13 (d); 263.9 (l); 263.19 (d); 263.20 (a)(7); 263.24 (b); 263.24 (f); 263.30 (d); 263.30 (f); 263.30 (h); and 263.54 (l).