

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

ST. ANTHONY COMMUNITY HOSPITAL

Employer

and

Case 02-RC-260759

**THE NEW YORK STATE NURSES
ASSOCIATION**

Petitioner

DECISION AND DIRECTION OF ELECTION

St. Anthony Community Hospital, (the Employer) is engaged in the business of operating an acute care hospital. The New York State Nurses Association (the Petitioner) seeks to represent a bargaining unit of all full-time, regular part-time, and per diem registered nurses employed by the Employer at its 15 Maple Avenue, Warwick, New York facility, but excluding Physician's Assistants, Robotics Clinical Coordinators, Certified Lactation Consultants, Nurse Educators, Nurse Practitioners, Quality Management Nurses, Bone and Joint Coordinators (Medical Surgery), Bariatric Data Coordinators, Metabolic/Bariatric Surgical Coordinators, Scheduling Operating Room Coordinators, Clinical Coordinators OP GI Services, Clinical Coordinators OP Infusion/Chemo, Operating Room Clinical Resource Coordinators, Mt Alverno Center employees, Scherviev Pavilion employees, St Joseph's Place employees, Stress Test Registered Nurses, PACU Team Leads, Operating Room Team Leads, business office clerical employees, service employees, maintenance employees, technical employees, licensed practical nurses, and all other employees, guards, and supervisors as defined in the National Labor Relations Act.¹

The only matter in contention is whether to conduct a manual or mail ballot election.²

¹ The parties stipulate, and I find, that this bargaining unit is appropriate.

² The petition in this case was filed under Section 9(c) of the Act. The parties were provided opportunity to present evidence on the issues raised by the petition at a hearing held before Hearing Officer Allen Rose, of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer.

Both parties have expressed a preference for a manual election, primarily because they believe that a manual election will result in higher voter turnout than a mail ballot election. To that end, the Employer has suggested that the United States Postal Service might fail to deliver ballots to employees or that employees might forget to return the mail ballots. The Petitioner also notes that a manual election held on the jointly proposed date of June 25 would allow votes to be counted more quickly than the votes cast in a mail ballot election.

I have carefully considered the positions and arguments presented by the parties. As fully discussed below, despite the desires of the parties and even though a manual election would be preferable in this case in the absence of the COVID-19 pandemic, I have directed a mail ballot election. This is the safest and most appropriate method of conducting a prompt election in view of the extraordinary circumstances presented by the pandemic.

Facts

The current COVID-19 pandemic has thus far caused approximately 400,000 deaths worldwide; 112,000 deaths in the United States; 25,000 deaths in New York State; and 17,000 deaths in New York City, an unquestioned epicenter of the disease. COVID-19 is presumed to be the cause of approximately 5,000 additional New York City deaths in the past several months but laboratory tests were not available to confirm the cause of those deaths. New York City has thus far documented over 200,000 cases of COVID-19 and over 50,000 hospitalizations related to COVID-19. The first of the 17,000 confirmed COVID-19 deaths in New York City took place only three months ago, on March 11, 2020. Nationwide, there have been nearly two million confirmed cases of COVID-19.

There is no vaccine to prevent COVID-19. The virus is thought to spread mainly from person-to-person when individuals are in close contact with one another and through respiratory droplets produced when an infected person coughs, sneezes or talks. Some studies have suggested that COVID-19 can be spread by people who are completely asymptomatic. The record includes an April 2020 US Department of Health and Human Services/Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report summary of a study suggesting that pre-symptomatic transmission of COVID-19 has led to multiple clusters of infection.

The most recent guidance from the Centers for Disease Control, issued on May 18, 2020, recommends that healthcare providers cancel some elective procedures; use telemedicine when possible; limit points of entry and manage visitors; screen everyone entering the facility for COVID-19 symptoms; and implement source control for everyone entering the facility, regardless of symptoms. The guidance notes that there has been a shortage of Personal Protective Equipment (PPE) and that as a result “preferred” use of PPE to protect healthcare providers and patients is not always achievable. The Centers for Disease Control has also issued a lengthy Comprehensive Hospital Preparedness Checklist for Coronavirus Disease 2019 (COVID-19) and a set of Recommendations for Election Polling Locations. These recommendations include moving election polling locations away from long term care facilities and facilities housing older persons to minimize COVID-19 exposure among older individuals and those with chronic medical conditions; encouraging mail-in methods of voting if allowed in the jurisdiction; encouraging early

voting; encouraging drive-up voting; encouraging voters to arrive at off-peak times; and disinfection of the polling area.

As a result of this virtually unprecedented public health crisis, federal, state, and local governments have placed restrictions on whether people may gather together and whether businesses may open. On January 30, 2020, the World Health Organization designated the novel coronavirus, COVID-19, outbreak as a Public Health Emergency of International Concern; on January 31, 2020, United States Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the entire United States to aid the nation's healthcare community in responding to COVID-19. On March 7, 2020, Governor Andrew Cuomo issued Executive Order No. 202 Declaring a Disaster Emergency in the State of New York. Since that time, Governor Cuomo has issued multiple Orders Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, including Executive Order 202.14, issued on April 7, 2020. It states in part:

By virtue of Executive Orders 202.3, 202.4, 202.5, 202.6, 202.7, 202.8, 202.10, 202.11, and 202.13 which closed or otherwise restricted public or private businesses or places of public accommodation, and which required postponement or cancellation of all non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations, games, meetings or other social events), all such Executive Orders shall be continued...

Executive Order No. 202.35, issued on May 29, 2020, extends the restrictions for certain regions of New York State while relaxing restrictions for other regions:

Executive Order 202.34, which extended the provisions of Executive Orders 202.3, 202.4, 202.5, 202.6, 202.7, 202.8, 202.10, 202.11, 202.13, 202.14, 202.28, and 202.31 which each closed or otherwise restricted public or private businesses or places of public accommodation, and Executive Order 202.32 as modified by Executive Order 202.33 which required postponement, cancellation, or restriction on size of all non-essential gatherings of more than ten individuals, and which together constitute New York On PAUSE, is hereby continued until and unless later amended or extended by a future Executive Order, provided, however:

That effective at 1:00 p.m. on May 29, 2020 that the reductions and restrictions on the in-person workforce at non-essential businesses or other entities shall no longer apply to Phase Two industries...

As of May 29, 2020 the regions meeting the prescribed public health and safety metrics required for Phase Two reopening are: Finger Lakes, Central New York, Mohawk Valley, Southern Tier, and the North Country. Any additional regions which meet the criteria after such date will be deemed to be incorporated into this Executive Order without further revision and will be permitted to re-open Phase Two industries, subject to the same terms and conditions.

On June 2, 2020, Governor Cuomo issued Executive Order No. 202.36, which extends previous suspensions and modifications of laws related to the pandemic through July 2, 2020, with the exception of regions that have met metrics required to begin reopening.

New York City has presently met only five of the seven metrics which would allow it to begin to reopen; notably, the share of total hospital beds available is still below the 30% threshold.

New York City is also subject to local restrictions. On March 16, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 100. In the interest of protecting public health in New York City, this Order cancels a special election; directs hospitals to cancel or postpone elective procedures; directs entertainment venues and establishments that offer food and drink for purchase to close; and directs all agency heads to take all appropriate and necessary steps to preserve public safety and the health of their employees.

The Employer's facility is located in Warwick, New York, approximately 50 miles from New York City. The Village of Warwick has a population of roughly 6,500 people. The Employer's campus is bordered on two sides by woods. Warwick is in Orange County, which is part of the Mid-Hudson Region of New York State. The Mid-Hudson Region has met the metrics which allow it to begin reopening. At the time of the hearing, the Employer had no COVID-19 patients in its 60-bed hospital, the last patient having been discharged one week before. The Employer offers COVID-19 testing at its premises by appointment only. The Employer has placed restrictions on visitors in order to lessen the possible spread of COVID-19, but has recently resumed ambulatory outpatient surgeries.

However, Orange County has nonetheless issued a standing Public Health Alert requiring the isolation of individuals who have tested positive for COVID-19. Every doctor, hospital, or other medical provider or facility operating within Orange County is required to conspicuously place a copy of the Standing Order in their place of business. Addendum B to the Standing Order further requires that:

Any resident of Orange County, whether that person is symptomatic or not, who has tested positive for COVID-19, or who is suspected of having COVID-19 shall (a) travel directly to, if not already located there remain isolated at his/her residence, or at such other location as directed by the OCDOH, for at least 10 days...

During the mandatory isolation period, a person suspected of having COVID-19 is prohibited from visiting enclosed public spaces and sharing a bedroom or bathroom with others.

Meanwhile, on March 19, 2020, because of the extraordinary circumstances related to the pandemic, the National Labor Relations Board temporarily suspended all Board-conducted elections through April 3, 2020. The Board took this extraordinary action to ensure the safety of Agency employees and members of the public involved in elections. At the time, several of the NLRB's regional offices had been closed and other locations were operating with limited staffing such that the Board did not believe it was possible to effectively conduct elections. On April 1, the NLRB announced that it would not extend the suspension of elections past April 3, having been

advised by the General Counsel that appropriate measures were available to permit elections to resume in a safe and effective manner, and would “permit elections to resume in a safe and effective manner, which will be determined by the Regional Directors.” The Agency has indeed resumed conducting elections, but that the vast majority of these elections have been conducted via mail ballot. The Agency has not yet devised any safety protocols to conduct manual elections under the present circumstances. The Agency is currently engaged in collective bargaining negotiations with its employees’ collective bargaining representative regarding arrangements, procedures and safety protocols covering manual elections. In the absence of volunteers, it is not possible for a Regional Director to require an employee to run a manual election at this time. Furthermore, most Agency employees have been mandated to telework since March 16, 2020; mandatory telework has been extended until at least June 12, 2020.

A manual election necessarily includes many of the risks that the federal, state, and local COVID-19 guidelines seek to avoid. A manual election requires a series of “gatherings” of, in various combinations, the parties’ observers, the Board agents, representatives of the parties, and voters. These “gatherings” would arguably be contrary to current state law. A manual election also requires that both Board agents and voters touch paper ballots and a cardboard ballot box. The record contains a treatise printed in the *New England Journal of Medicine* on April 7, 2020, suggesting that COVID-19 may be viable on paper for up to 24 hours.

The Employer argues, and the Petitioner agrees, that a manual election can be conducted safely at the Employer’s Warwick premises. The Employer notes that the hospital is well-cleaned and fully in compliance with CDC guidelines. No one with a fever is admitted onto the Employer’s premises. The potential voters are registered nurses who are well-versed in the proper use of PPE and the parties are willing to instruct the unit members not to vote unless they are wearing PPE. The Employer is able to provide PPE to the Board agent running the election. The Employer has offered to provide individual pencils to each voter so as to eliminate the possibility that the virus might be transmitted via shared writing utensils. The proposed manual election would take place in conference room large enough to allow for social distancing and voters would be instructed to observe social distancing protocol. The Employer further suggests that the risk of contracting COVID-19 from paper is minimal pursuant to the most recent research. Finally, the party representatives do not intend to attend the pre-election conference so as to lessen the possibility of a large gathering.

Analysis

Although there is a preference for conducting manual elections in ordinary circumstances, *San Diego Gas and Electric*, 325 NLRB 1143 (1998), allows a Regional Director to exercise discretion and order a mail-ballot election in extraordinary circumstances. Recently, in *Atlas Pacific Engineering Company*, 27-RC-258742 (May 8, 2020), the Board, in denying the employer’s request for review, stated that the COVID-19 pandemic constitutes extraordinary circumstances warranting a mail ballot where federal, state, and local government directives have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting the election should remain on mandatory telework.

The Employer and the Petitioner argue that because conditions in Orange County now allow for some nonessential travel and the opening of some nonessential businesses, a manual election is appropriate. This argument is not persuasive while conditions in New York City, where the regional office charged with conducting such an election is located, do not allow for nonessential travel or the opening of nonessential businesses. The Board agents who would be required to conduct a manual election remain on mandatory telework. The Agency does not yet have a protocol in place which would allow it to conduct a manual election safely during a global pandemic. As noted, the Agency recently commenced negotiations with its employees' collective bargaining representative over developing protocols to ensure the safety of its employees while conducting manual elections, which may likely continue for a considerable period of time. National, state, county, and local authorities have all declared states of emergency or disaster, and public health officials continue to recommend minimizing in-person contact. At this time it is not feasible, nor safe, nor appropriate to conduct a manual election even where, as here, the Employer may have a proposed plan to make such an election as safe as possible.

The Agency does, however, have an alternative method of conducting an election via mail ballot. Contrary to the Employer's protestations that the Postal Service might fail to deliver ballots to voters, a mail ballot election has no apparent significant drawbacks. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. More importantly, a mail ballot election will minimize the risk of exposing employees, Board agents, Employer and Union representatives, their families, and the public to this virus and, thereby, maximize participation. Additionally, given the current rapidity of changes to both recommended and mandatory virus countermeasures, a manual ballot election would be fraught with uncertainty and subject to unpredictable changes. A mail-ballot election provides the certainty of process and procedure to conduct an election within a reasonably prompt period and in an effective manner.

Conclusion

The National Labor Relations Board will conduct a secret mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by The New York State Nurses Association.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On **Friday, June 19, 2020**, ballots will be mailed to voters by National Labor Relations Board, Region 02. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 02 office by close of business on **Friday, July 10, 2020**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Monday, June 29, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 02 Office at (212) 776-8629 or (212) 776-8616, or by contacting Region 02 at allen.rose@nlr.gov .

Due to the extraordinary circumstances of COVID-19 and the directions of state and local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, the ballot count will take place on a date to be determined by the undersigned Regional Director during the period from **Friday, July 24, 2020, through Friday, July 31, 2020, inclusive**. The Region will provide notice to the parties of the scheduled date for the count at least 24 hours prior to the count. For the same reasons, the parties further agree that the count will take place virtually on a platform (such as Skype, WebEx, etc.) to be determined by the Regional Director. The parties further agree that each party will be allowed to have one observer attend the virtual ballot count.

If the date the ballots are due to be deposited by Region in the mail, or the date set for their return, or the date, time, and place of the count for the mail ballot election are postponed or canceled, the Regional Director, in his or her discretion, may reschedule such dates, times, and places for the mail ballot election.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **JUNE 6, 2020**, the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available

personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **June 11, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed no later than 12:01 a.m. on **July 7, 2020**. If the Employer does not receive copies of the notice by **July 2, 2020**, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on nonposting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also,

if special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: June 9, 2020



John J. Walsh, Jr.
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