

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

GARDA CL ATLANTIC, INC.

Employer

and

Case 22-RC-261850

**SPECIAL AND SUPERIOR OFFICERS
BENEVOLENT ASSOCIATION**

Petitioner

and

**UNITED FEDERATION OF SPECIAL POLICE &
SECURITY OFFICERS**

Intervenor

DECISION AND DIRECTION OF ELECTION

The Employer, Garda CL Atlantic, Inc., provides security guard services in Fairfield, New Jersey. On June 18, 2020,¹ Special and Superior Officers Benevolent Association (the Petitioner) filed a representation petition with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act). Petitioner seeks to represent a unit of all full-time and regular part-time guards and driver/messengers who perform guard duties. Those employees are presently represented by United Federation of Special Police & Security Officers (the Intervenor).

The sole issue in this case is whether, in light of the continuing COVID-19 pandemic,² the Region should conduct an election by manual or mail ballot.

On July 9, Hearing Officer Henry Powell conducted the hearing in this matter by teleconference, during which the parties were invited to present their positions and supporting evidence regarding the sole issue of whether the election should be conducted manually or by mail. None of the parties called any witnesses to testify but instead stated their positions on the record and answered questions posed by the Hearing Officer. After the close of the hearing, the parties were allowed to submit briefs. The Employer submitted a post-hearing brief which was duly considered.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding, relevant Board law, and the extraordinary

¹ All dates contained herein are 2020 unless otherwise specified.

² Throughout this decision, the terms “COVID-19,” “COVID,” and “Coronavirus” are used interchangeably.

circumstances of a pandemic, for the reasons described more fully below, I am directing a mail ballot election.

Positions of the Parties

The **Employer** argues that a mail ballot election is not appropriate for several reasons. First, it contends that the United States Postal Service is presently impaired and has been taking longer than usual to deliver the mail. Counsel stated that, although the Region mailed the Petition, Notice of Hearing and other related documents in this case on June 18, the Employer did not receive them until June 29. Further, the Employer contends that mail balloting is generally less reliable than a manual election because, even under normal circumstances, ballots may be lost or their return delayed until after the ballot count. The Employer asserts that employees already report to the facility on a regular basis and could more easily participate in a manual ballot election without incurring any additional health risks. Finally, they contend that all parties could wear masks and gloves and the agent could “sterilize” the ballot box.

The **Petitioner** maintains that, while it would prefer a manual ballot election, it would not be opposed to an election by mail ballot given the current situation. It agrees with the Employer that employees in the petitioned-for unit are already coming to the facility, so the customary reasons for having a mail ballot are not present. The better course would be to have an in-person election if such an election could be safely conducted. The **Intervenor** argues that a mail ballot election would be the safest course of action for everyone involved.

The COVID-19 Pandemic

At the outset, I take administrative notice of the current public health crisis created by the COVID-19 pandemic. As of July 21, there have been over 3.8 million confirmed cases of COVID-19 in the United States, and 140,904 deaths.³ I also take administrative notice of the information, guidance and recommendations of the Centers for Disease Control and Prevention (CDC), an agency of the United States Government.⁴ The CDC recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of cloth face coverings, and social distancing. The CDC further states that the virus can survive for a short period on some surfaces, and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes.⁵

Although the CDC has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its “Considerations for Election Polling Locations and Voters” states that officials should consider alternative voting methods where permitted, and that

³ See *Coronavirus in the U.S.: Latest Map and Case Counts*, NEW YORK TIMES, updated July 21, 2020.

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself>.

“[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19....”⁶

The record in this proceeding contains eleven executive orders issued by the Governor of New Jersey between March 9 and June 29. Pursuant to those orders, the Governor Philip D. Murphy declared a Public Health Emergency, which declaration has remained in place. Although some of the initial restrictions set forth in the orders have been lifted, the most recent order paused the resumption of indoor dining but allowed the resumption of other indoor activities and businesses where face coverings are required. The orders acknowledge the recognition by public health experts that indoor environments present significantly increased risks of COVID transmission as compared to outdoor environments.

Board Law and Guidance Regarding Elections

Whether an election is to be conducted by mail, manually, or some other method is an administrative matter to be determined by the Regional Director. *National Van Lines*, 120 NLRB 1343 (1958). Traditionally, most Board elections are conducted by manual voting and there is a presumption in favor of conducting elections in this manner. *See* Section 11301.2, *NLRB Casehandling Manual, Part Two, Representation Proceedings*. However, when certain factors are present, this presumption may be overcome. In *San Diego Gas & Electric*, 325 NLRB 1143 (1998), the Board recognized that mail ballot elections are appropriate under specific, well-settled guidelines, such as where employees are scattered or where there is a strike, lockout, or picketing in place. The Board further found that a Regional Director may consider additional relevant factors when contemplating when to conduct a mail ballot election and that “extraordinary circumstances” could permit a Regional Director to do so. *See San Diego Gas & Electric*, 325 NLRB at 1145. The Board has recognized that the COVID-19 pandemic presents such an extraordinary circumstance. *See, e.g., Atlas Pacific Engineering Co.*, 27-RC-258742 (NLRB May 8, 2020).

On July 6, General Counsel Peter Robb issued a memorandum on Suggested Manual Election Protocols (GC 20-10), regarding manual elections during the pandemic. As GC Robb noted, GC 20-10 is not binding on Regional Directors because the Board, not the General Counsel, has authority over the manner in which elections are conducted. The memorandum recommends that manual elections only be conducted if the Employer is able to certify that certain requirements have been or can be met. Among other things, the General Counsel proposes self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, or come into contact with someone who tested positive within the preceding 14 days, and are not awaiting test results, along with identifying the number of individuals exhibiting COVID-19 symptoms. However, the CDC’s “current best estimate” is that 50% of COVID-19 transmission occurs while people are

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

pre-symptomatic and 40% of people with COVID-19 are asymptomatic⁷ and thus would neither be identified nor have sought testing.

In addition to the self-certification recommendations, GC 20-10 contains ten specific requirements to be addressed in any Stipulated Election Agreement or Decision and Direction of Election in which a manual election is to be conducted:

A. Spacious polling area, sufficient to accommodate six-foot distancing, which should be marked on the floor with tape to insure separation for observers, Board Agent, and voters.

B. Separate entrance and exit for voters, with markings to depict safe traffic flow throughout polling area.

C. Separate tables spaced six feet apart so Board Agent, observers, ballot booth and ballot box are at least six feet apart.

D. The Employer will provide markings on the floor to remind/enforce social distancing.

E. The Employer will provide sufficient disposable pencils without erasers for each voter to mark their ballot.

F. The Employer will provide glue sticks or tape to seal challenge ballot envelopes.

G. The Employer will provide plexiglass barriers of sufficient size to protect the observers and Board Agent to separate observers and the Board Agent from voters and each other, pre-election conference and ballot count attendees, as well as masks, hand sanitizer, gloves and wipes for observers.

H. The Agency will provide to the Board Agent(s) running the election a face shield, mask, disposable clothes covering if requested, hand sanitizer, gloves and disinfecting wipes.

I. An inspection of the polling area will be conducted by video conference at least 24 hours prior to the election so that the Board Agent and parties can view the polling area.

J. In accordance with CDC guidance, all voters, observers, party representatives, and other participants should wear CDC-conforming masks in all phases of the election, including the pre-election conference, in the polling area or while observing the count. Signs will be posted in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives and other participants of this requirement.

The Board has denied review of Regional Directors' decisions to conduct mail-ballot elections due to local COVID-19 circumstances although employers have offered to follow the same or similar protocols as those identified in GC 20-10. See, for example, *Johnson Controls, Inc.*, Case 16-RC-256972 (Order dated May 18, 2020) (denying review where employer had zero COVID-19 cases, daily screened all individuals accessing the facility for symptoms, mandated face coverings and social distancing, and offered an outdoor election with plexiglass barriers,

⁷ "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>

sanitizer, single-use writing utensils, floor markings for social distancing, masks, and gloves). In an Order denying a request for review in *Brink's Global Services USA, Inc.*, Case 29-RC-260969, the Board addressed a mail-ballot determination in the context of the COVID-19 pandemic and with consideration of GC 20-10. The Board noted that it “will continue to consider whether manual elections should be directed based on the circumstances then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.” (Order dated July 14, 2020, fn. 2)

Proposed Election Arrangements

Since the Petitioner initially sought a mail ballot election, it did not propose a specific date, time and location for the election. In its Statement of Position, the Employer proposed that the election take place on July 28 from 6:00 a.m. to 8:00 a.m. in the employee breakroom. The employee list attached to the Employer’s position statement shows that there would be approximately 82 voters.

Intervenor representative Charles Strebeck was the only party representative present during the Hearing who is familiar with the facility. He stated that the breakroom was “not a large area” and was “a pretty confined space.” The room has two or three four-person tables and some vending machines. There is only one door by which to enter and exit the room. The room opens onto the truck port, which is a large open space where employees load and unload the trucks. Voters would be able to line up outside of the breakroom and enter the voting area one at a time. Strebeck stated that it would be difficult for the Board agent, observers and voters to maintain a distance of six feet from each other during the voting and that it would be impossible for all the necessary parties to maintain appropriate distance during the pre-election conference.

As noted above, GC 20-10 sets forth suggested protocols for conducting manual elections during the pandemic and recommends that manual elections only be conducted if the Employer is able to certify that certain requirements have been or can be met. Counsel for the Employer stated that the polling area and the areas leading to the polling area are consistently cleaned in conformity with the established CDC hygienic and safety standards and would be done so on the day of the election. The Employer would also be able to comply with the reporting requirements set forth in the Memorandum regarding agents, employees or other persons who have been present at the facility and who have tested positive for COVID, are awaiting the results of a test, or are exhibiting symptoms of COVID. However, the Petitioner and Intervenor stated that they would probably be unable to make such verifications regarding the COVID status of employees, parties and others.

Counsel for the Employer was unable to state whether the proposed voting area was large enough to permit the Board agent to place an individual ballot on a table to then be picked up by the voter while maintaining appropriate distancing. The Employer would, if directed by the Board, mark off distancing requirements in and around the polling area and could make other directional markings indicating safe traffic flow through the voting area. The Employer was

unable to state whether it was willing to install Plexiglass barriers to separate the parties participating in the election or whether it could provide masks, hand sanitizer, gloves and wipes for the observers and voters. Although counsel for the Employer was given the opportunity to submit additional information and evidence after the close of the hearing, its post-hearing brief merely restated the position it set forth at the outset of the hearing: that a mail ballot would be unreliable and that a manual election should be held.

Analysis

The conduct of a manual election invariably requires participants to come within fewer than six feet of one another, while social distancing guidelines provided by Federal, State and Local authorities recommend that individuals remain at least six feet apart. Under the Board's manual election procedures, Board Agents conducting the election and election observers are required to spend the duration of the polling session and ballot count process together in close proximity within a confined space. Board Agents and observers will likely have to interact with voters and/or party representatives who may have questions or who may wish to raise issues about the conduct of the election. These procedures necessarily carry the risk of exposure for employees at the Employer's facility, party representatives, Board personnel, their families, and the community.

The suggested protocols for a safely conducted manual election include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board Agents and observers; the employer's certification in writing that polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board Agent; and provision of masks, hand sanitizer, gloves and disinfecting wipes.

The Employer has addressed only a few of these suggested protocols. It proposes that approximately 80 employees vote over a two-hour period in a confined room that is accessible only by a single door. The only evidence available indicates that it is unlikely that proper social distancing could be maintained during the voting and certainly not during the pre-election conference. I find that the Employer simply has not demonstrated that a manual ballot election could be safely conducted.

While I understand the Employer's concern that voters may be disenfranchised if their ballots are lost or delayed, every mail ballot election includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. Other than the single incident of the Employer's delayed receipt of the petition and related documents, there is no evidence that delivery of the United States mail has been disrupted or substantially delayed in recent months. The fact that employees are reporting to work at the facility will make it more

likely that they will know to expect ballots in the mail and, if they don't receive them promptly, how to request a replacement mail ballot kit. Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election, as there are no remote voting options under the Board's manual election rules. A mail ballot election avoids this significant pitfall and ensures that all have an opportunity to vote regardless of their exposure to COVID-19 or health status.

The safety of the voters, the observers, the party representatives, the Board Agents conducting the election, and the public must be considered in determining the appropriate method for conducting the election. Mail balloting provides no additional risk and is consistent with current guidance of limiting in-person contact and travel. Even in the midst of this pandemic, the Region has already successfully conducted a number of mail ballot elections. Based on the above and the record as a whole, I find that the COVID-19 pandemic presents an extraordinary circumstance that makes the conduct of a mail ballot election the most responsible and appropriate election method in this case.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act and claim to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The parties have stipulated that following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regularly scheduled part-time guards and driver/messenger employees who perform guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the Employer at its 210 Fairfield Road, Fairfield, New Jersey facility, excluding all office clerical employees, case vault service (CVS) employees, managerial employees, professional employees and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret 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 Special and Superior Officers Benevolent Association or United Federation of Special Police & Security Officers, or by neither labor organization.

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 **Thursday, August 6, 2020**, ballots will be mailed to voters by National Labor Relations Board, Region 22. 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 22 office by close of business on **Thursday, August 27, 2020**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **August 13, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (862) 229-7065, or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter-in-Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually on a date to be determined by the undersigned Regional Director, during the period from **Thursday, September 10, 2020, through Thursday, September 17, 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 count will take place virtually on a platform (such as Skype, Zoom, WebEx, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

If the dates 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 **July 18, 2020**, 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 service of the United States may vote by mail in the same manner and pursuant to the same voting schedule as established herein for all other Unit employee voting.

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 **JULY 27, 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 **before 12:01 a.m. on August 3, 2020**. If the Employer does not receive copies of the notice by July 30, 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 non-posting of the election notice.

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

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. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: July 23, 2020



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