

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**AAKASH, INC. dba PARK CENTRAL CARE AND  
REHABILITATION CENTER**

**Employer**

**and**

**Case 32-RC-266500**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 2015**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

AAKASH, Inc. dba Park Central Care and Rehabilitation Center (Employer) operates a residential care facility in Fremont, California. Petitioner, Service Employees International Union, Local 2015 (Petitioner or Union) seeks to include two voting groups, via an *Armour-Globe* self-determination election, to its existing unit or nursing aides and others employed at the Fremont facility (existing unit). The first voting group consists of approximately 6 registered nurses (voting group A), the second consists of approximately 15 licensed vocational nurses (LVN) (voting group B).

It is not disputed that, absent the issue in this case, Petitioner seeks a proper self-determination election; the parties stipulate the employees in each voting group sought constitute identifiable, distinct segments of the workforce that share a community of interest with the existing unit. However, the Employer asserts that the registered nurses Petitioner seeks to add are statutory supervisors within the meaning of Section 2(11) of the National Labor Relations Act (Act) and therefore voting group A cannot be added to the existing unit. Petitioner maintains the registered nurses are not statutory supervisors and voting group A is therefore an appropriate voting group for a self-determination election. Voting group B is not in dispute. The parties are also in dispute regarding the method of election, with the Employer arguing for a manual election, and Petitioner seeking a mail ballot election considering the ongoing COVID-19 pandemic.

A hearing officer of the National Labor Relations Board (Board) held a videoconference hearing in this matter on October 20, 2020.<sup>1</sup> Both parties filed briefs with me after the conclusion of the hearing. As explained below, based on the record, the briefs, and the relevant Board law, I find the record establishes the Employer has not met its burden of establishing that the registered nurses are statutory supervisors within

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<sup>1</sup> All dates 2020 unless otherwise indicated.

the meaning of Section 2(11) of the Act. Accordingly, because the petitioned-for voting groups are identifiable, distinct segments of the workforce that share a community of interest with the existing bargaining unit, I have directed the petitioned-for self-determination election in both voting group A and voting group B. Because of the ongoing risks associated with the COVID-19 pandemic, I have directed this election to take place by mail.

## ***RECORD EVIDENCE***

### **A. The Employer's Operation**

The Employer operates a 99 bed, 24-hour skilled nursing facility, providing care for both short-term rehabilitation patients and long-term residents.<sup>2</sup> The nursing department at the facility includes approximately a dozen licensed vocational nurses, six registered nurses, and sixty certified nursing assistants and restorative nursing assistants.<sup>3</sup> In addition to the nursing department the facility also has dietary, housekeeping, fiscal plan, medical records, business office, admissions and activities departments.

Nursing department management consists of a director of nursing, an assistant director of nursing, and an LVN supervisor. Although these individuals are nurses, Petitioner does not seek to include them because of their supervisory and/or managerial roles. The Employer also employs three nurses in specialized roles that may or may not also be supervisory or managerial, a director of staff development, an infection prevention nurse, and a minimum data set coordinator (MDS coordinator). Petitioner also does not seek to include these specialized nurses in the voting groups sought.<sup>4</sup> Management of the nursing department report to the facility's administrator, the most senior manager at the facility.

The existing unit is covered by a collective-bargaining agreement effective October 1, 2018, to September 30, 2021. That contract, in addition to the facility at issue here, also covers employees employed at four other skilled nursing facilities operated by the Employer.

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<sup>2</sup> I have used the term "patient" in this Decision to refer to both patients and residents.

<sup>3</sup> At hearing the certified nursing assistants and restorative nursing assistants were repeatedly collectively referred to as "CNAs." While this may reflect the everyday usage of the term by the parties, I have used the term "nursing aide" in this Decision to refer to those classifications collectively in order to avoid the confusion associated with using an abbreviation for one classification as a short-form designation for both.

<sup>4</sup> The terms "charge nurse" or "floor nurse" is used at various points in the record to refer to those registered nurses and licensed vocational nurses that work directly with patients and residents, in contrast to the six nurses mentioned.

## **B. Department of Nursing**

Nursing aides are responsible for assisting patients with the activities of daily life, including bathing, grooming, dressing, feeding, visitation and transportation within the facility. On each shift a nursing aide will be paired with a group of patients that they will assist in those activities. That assignment is made by way of a document titled, "Daily Schedule – Assignment Sheet" (assignment sheet) that includes a three by four table. Each box in this table identifies a set of patient room numbers, divided into equivalently sized groups. The name of the nursing aide assigned to each group is added to the table. Each box on the table also includes a pre-determined group designation (A, B, C, or D) for the nursing aide, which determines that employee's break and lunch times. The assignment sheet does not include tasks, responsibilities, or other information, it only matches a nursing aide with a group of patients. The only information added to the tables on the assignment sheet is the name of a nursing aide and the number of patients in their care.

A registered nurse or licensed vocational nurse will place the name of a nursing aide in each box in the table at the start of a shift. The administrator testified that the nurse making the assignment will consider factors such as patient acuity in making assignments, but he also testified that the same nursing aides will generally be placed in the same spot in the assignment sheet over the course of multiple shifts. In describing what factors a nurse considers in making an assignment the administrator provided the example of a patient that preferred a nursing aide of a certain gender assist them with the activities of daily life.

In addition to information such as the date and the registered nurse on shift, the assignment sheet also includes a line titled "Supervisor." The assignment sheets in the record contain the name of the assistant director of nursing and the LVN supervisor added to this "Supervisor" line.

The director of nursing makes the schedule that determines when the registered and licensed vocational nurses will work at the facility, on both the day and night shift. The director of staff development schedules the nursing aides. The director of nursing and assistant director of nursing are at the facility during normal business hours. The Employer maintains that, during overnight hours and on weekends, when management is not present at the facility, the registered nurse on duty is responsible for the entire facility, not only the nursing department, but also the dietary, housekeeping, maintenance and activities departments.

The hospital's administrator additionally testified that registered nurses are responsible for monitoring the work of nursing aides, and that this is a factor in the yearly evaluation of the registered nurses. No evaluation of a registered nurse is contained in the record.

The record contains a note, from 2018, from a registered nurse to the director of staff development, which the Employer maintains constitutes a verbal warning to a

nursing aide under the Employer's progressive discipline system. The note states that the nurse found an employee asleep while working, woke the employee up, and notified the aide that sleeping while on duty was misconduct. The note additionally states the employee had received verbal warnings previously for the same issue.

## **ANALYSIS**

### **A. ARMOUR-GLOBE STANDARD AND FINDING**

Whether it is appropriate to add additional employees to a preexisting bargaining unit is a question addressed by the Board's *Armour-Globe* doctrine. *Armour & Co.*, 40 NLRB 1333 (1942), and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937). Under the *Armour-Globe* doctrine, employees sharing a community of interest with an already represented unit of employees may vote whether they wish to be included in the existing bargaining unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990). An incumbent union may petition to add unrepresented employees to its existing unit through an *Armour-Globe* election if the employees sought to be included share a community of interest with unit employees and "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).

An "identifiable, distinct segment" of the workforce is one that does not unduly fragment the workforce. *Capitol Cities Broadcasting Corp.*, 194 NLRB 1063 (1972). Here, the parties stipulate the nurses in the voting groups sought constitute an identifiable, distinct segment of the workforce and I accept that stipulation based on the record evidence.

Regarding the second part of the standard, the Board looks to a variety of factors to determine whether a community of interest exists, including the nature of employee skills and functions; common supervision; the degree of functional integration; interchangeability and contact among employees; work sites; general working conditions and fringe benefits; and bargaining history. *International Bedding Company*, supra, slip op. at 2; *Boeing Co.*, supra at 153; *NLRB v. Paper Mfrs. Co.*, 786 F.2d 163, 167 (3<sup>rd</sup> Cir. 1984); *Rinker Materials Corp.*, 294 NLRB 738, 738-739 (1989).

Here, the parties also stipulate the nurses in the voting groups at issue share a community of interest with the existing unit. Further, this stipulation is supported by record evidence of community of interest factors such as functional integration, a common work site, general working conditions and terms and conditions of employment. Accordingly, based on this stipulation and the evidence in the record supporting the stipulation, I find the petitioned-for election is appropriate consistent with the Board's *Armour-Globe* doctrine.

## **B. SECTION 2(11) STANDARD**

Supervisory status under the Act depends upon whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of these authorities is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). As stated by the Board in *Oakwood*, “to exercise independent judgment an individual must at a minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood* at 692.

The burden of establishing supervisory status rests on the party asserting that status. *Croft Metals, Inc.*, 348 NLRB 717, 721. (2006). Supervisory status cannot be established by record evidence which is inconclusive or otherwise in conflict. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Any lack of evidence in the record on an element necessary to establish supervisory status is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003).

## **C. SECTION 2(11) FACTORS**

### **(1) Assign**

In the Section 2(11) context, “assignment” is defined as the “giving [of] significant overall duties, i.e., tasks, to an employee,” but “significant overall duties” do not include “ad hoc instructions to perform discrete tasks.” *Oakwood Healthcare*, 348 NLRB at 689. Assignment also includes designating an employee to a place, such as a location, department, or wing, and appointing an employee to a time, such as a shift or overtime period. *Id.* Distributing assignments to equalize work among employees’ well known skills is considered a routine function not requiring the exercise of independent judgment, but in a health care setting assigning patients to specific caregivers has been found to require the use of independent judgment where the purported supervisor “balances individualized condition and needs of a patient against the skills or special

training of available nursing personnel,” or where an employees’ “skill set and level of proficiency at performing certain tasks” is tailored to a particular patient. *The Arc of South Norfolk*, 368 NLRB No. 32, slip op. at 4, citing *Oakwood* at 689, 693, 695; *Providence Hospital*, 320 NLRB 717, 727, 731 (1996), overruled in part by *Oakwood Healthcare*, 348 NLRB at 686, fn.29.

Here, the Employer maintains placing the name of a nursing aide in a table on the assignment sheet constitutes “assignment,” in that the nurse considers the patient’s acuity, plan of care, gender preference and the workload of the nursing aides before placing the names of the nursing aides on the document.

I do not find the evidence is sufficient to meet the Employer’s burden in regard to this factor. The Employer states that clinical information, such as a patient’s plan of care and acuity is considered in making assignments, but outside this assertion there is simply no evidence of this in the record. The record does not contain evidence of a nurse choosing to assign a nursing aide to a patient, moving patients or aides, or otherwise making any decision related to the assignment sheet because of a clinical factor. Further, the record does not contain evidence distinguishing the skills and abilities of the nursing aides, and as such there is no discernable basis on which a nurse could make such a decision. The only distinction among nursing aides made in the record is not a skill, but their gender, as some patients have a preference. While the Board has found assigning patients to caregivers can involve independent judgement, this requires a demonstration that the individualized condition and needs of a patient are paired with the skills or special training of available nursing personnel. Here the record does not include evidence of particular skills or abilities among the nursing aides and, assuming for the sake of argument these exist, the record further lacks any evidence of nurses considering these differences in making assignments.

The record also indicates that nursing aides have well-established assignments within the facility, and that these do not change on a daily basis. This strongly suggests that completing the assignment sheet merely involves referring to the nursing aide schedule, a schedule that is not made by the nurses, and identifying which nursing aides are available. In short, there is no evidence of nurses exercising the use of independent judgment in completing the assignment sheet.

Finally, I refer above to “nurses” because the evidence demonstrates both registered nurses and licensed vocational nurses add the names of nursing aides to the assignment sheet. However, the Employer only maintains that completing the assignment sheet constitutes assignment in the Section 2(11) sense as it relates to registered nurses. To the extent this is a shared responsibility, and the Employer acknowledges it is performed by admittedly non-supervisory licensed vocational nurses, I find this further weighs against a finding that completing the assignment sheet is evidence of supervisory status in the manner the Employer asserts.

## (2) Responsibly Direct

The Board has defined “responsibly to direct” as: “If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’... and carried out with independent judgment.” *Oakwood*, 348 NLRB at 691. The Board explained that direction is “responsible” when the person delegating the task is held accountable for the performance of the task by others and there is the prospect of adverse consequences if the tasks are not performed properly. *Id.* at 692. For example, lead persons in a manufacturing setting were held accountable where they received written warnings because their crews failed to meet production goals. *Croft Metals*, 348 NLRB at 722. On the other hand, when a charge nurse was disciplined for failing to make fair assignments, she was held accountable only for her own performance and not that of other employees. *Oakwood*, 348 NLRB at 695.

The Employer contends the registered nurses responsibly direct nursing aides in that they are the “sole supervisory authority at the facility at certain times and are responsible for the work of the [nursing aides].” The Employer contends that because the administrator and nursing department management are not regularly at the facility overnight and on weekends the registered nurse is the “supervisor” on duty. It is true that management is typically not at the facility at these times, although it does appear management is on-call and available if needed. These overnight and weekend hours certainly provide the opportunity for registered nurses to direct the work of nursing aides, and then be held accountable for the work of the nursing aides, but the record is silent on whether this actually occurs. The record contains no information on any decisions, choices, or actions taken by a registered nurse in these overnight or weekend hours. There is no evidence linking any action of a nursing aide to any registered nurse. The evidence on this point is limited to only the administrator’s assertion registered nurses are held responsible. This statement alone, absent any other evidence, is not sufficient to meet the Employer’s burden.

The administrator also suggests that the yearly written evaluations of the registered nurses contain an assessment of their ability to direct the work of the nursing aides. However, no evaluation or other evidence in support of this contention is contained in the record. Again, I do not find the administrator’s unsupported assertions sufficient to meet the Employer’s burden, particularly when he is referring to documents that are presumably within the Employer’s control, but simply not produced.

## (3) Discipline

The actual authority to discipline, rather than “paper authority” present in job descriptions and other documents is necessary to establish supervisory status. *Golden Crest*, 348 NLRB at 731, quoting *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). The power to point out and correct deficiencies in the job performance of other employees is insufficient to establish that an employee is a supervisor under Section

2(11) of the Act. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). In addition, an employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will effect employees' job status. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). Rather, to confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel. *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001).

The Employer's contention regarding registered nurses' ability to discipline employees is based on the 2018 document. That note consists of a registered nurse notifying the director of staff development of a rule violation, and that the employee involved was corrected in the moment. It also states the employee had violated the same rule previously. The Employer contends the document demonstrates the registered nurse independently issued a verbal warning to the employee under the Employer's progressive disciplinary system. I do not agree.

The note has no context in the record, neither the nurse that wrote the note, nor the director of staff development to whom it was addressed testified. The administrator who did testify was not employed as the administrator in 2018 when the incident occurred. The only evidence of the purported discipline is the document alone, and I do not find the document alone shows the registered nurse possessed the authority to discipline nursing aides independently. The document can just as easily be read as a recommendation for the director of staff development to issue discipline. It is unknown whether the director of staff development may have acted upon or not, or that may have led to independent investigation, it is impossible to know from only the document. The Employer contends on brief that the document shows the registered nurse issued discipline "without any intervention, input, or review from any other authority." For the reasons stated, I disagree.

#### **(4) Substitution**

The Employer also argues the supervisory functions of the registered nurses should not be disregarding because they are only a portion of the registered nurses' duties. I agree that this is the Board's standard for supervisory status. If the evidence supported finding the registered nurses assigned, responsibly directed, or disciplined nursing aides in the context of Section 2(11) during the overnight hours, for example, this would not be disregarded simply because the registered nurse involved only worked overnight shifts part of the time. However, this does not advance the Employer's argument as, for the reasons stated above, I have found the evidence does not support the Employer's contentions regarding assignment, responsible direction, or discipline.

To the extent the Employer is arguing registered nurses periodically take on the role of management in the nursing department, as described in *Aladdin Hotel*, 270 NLRB 838 (1984), cited by the Employer on brief, there is no evidence of this in the record.

#### D. SECTION 2(11) CONCLUSION

The Employer asserts the registered nurses assign, responsibly direct, and discipline nursing aides. However, the factual record is thin, and on each of these points consists of little more than the administrator's contention that this is the case. Where documentary evidence has been introduced, it fails to assist the Employer in meeting its burden. Accordingly, I conclude the registered nurses are not supervisors in the context of Section 2(11), and I have directed the petitioned-for election.

#### ***METHOD OF ELECTION***

The COVID-19 pandemic has had a profound impact on daily life in the United States. Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also had an impact on the way the Board conducts its elections.

The risks presented and precautions associated with COVID-19 are well-known at this point in the pandemic. The Centers for Disease Control and Prevention (CDC), has determined “[t]he best way to prevent illness is to avoid being exposed to the virus,” as there is currently no approved vaccine or antiviral treatment, and “[m]inimizing person-to-person transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19.”<sup>5</sup> According to the CDC, “[t]he virus that causes COVID-19 is spreading very easily and sustainably between people” and “the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.”<sup>6</sup> Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people.<sup>7</sup>

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[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.”<sup>8</sup> The CDC further states the virus can survive for a short period

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<sup>5</sup> CDC, *Protect Yourself* (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>; Department of Homeland Security, *Predicting the Decay of SARS-CoV-2 in Airborne Particles* (July 16, 2020), <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet>.

<sup>6</sup> CDC, *How it Spreads* (updated October 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

<sup>7</sup> CDC, *Protect Yourself* (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

<sup>8</sup> CDC, *Considerations for Election Polling Locations*, (updated June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”); see also California Office

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," but "it is unlikely to be spread from domestic or international mail, products or packaging."<sup>9</sup> To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: "After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol."<sup>10</sup>

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2.<sup>11</sup> However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas*, supra at 1145.

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April, with many Regional Directors, including myself, directing primarily mail ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6 the General Counsel issued a

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of the Governor of the State of California, *Executive Order N-64-20* (May 8, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/05.08.2020-EO-N-64-20-signed.pdf> ("WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...").

<sup>9</sup> CDC, *Frequently Asked Questions, Am I at risk for COVID-19 from mail, packages, or products?* (updated October 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

<sup>10</sup> CDC, *Running Errands* (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

<sup>11</sup> I note that the provisions of the *Casehandling Manual* are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

memorandum titled "Suggested Manual Election Protocols," *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

In *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The Employer fails or refuses to commit to abide by *GC Memo 20-10*, Suggested Manual Election Protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

The Board ordered that this new guidance would be applied retroactively to all pending cases.

After careful examination of the record, the parties' respective positions, and the current state of the COVID-19 virus in California and Alameda County, where the Fremont facility is located, I have determined that a mail-ballot election is the appropriate option. In reaching this decision, I have applied the six considerations set forth in *Aspirus Keweenaw*, *supra*, to the facts of this case. I have concluded the first and third are not applicable in the instant case. I have addressed the other factors below.

In addressing the second consideration, whether the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher, the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or from official state or local government sources. Where county level data are not available, Regional Directors should look to state level data.

Here, regarding the first part, the 14-day trend in the number of new cases of COVID-19 in Alameda County, the number is increasing. The Johns Hopkins University COVID-19 Status Report for Alameda County, California on November 17 reports a (-1) value of 175 cases and a (-14) value of 67, an almost threefold increase.<sup>12</sup> Regarding the second part, State of California data for Alameda County indicates a 14-day test positivity rate of 2.7 percent on November 17.<sup>13</sup> The 14-day test positivity rate for the whole of California as of November 17, provided by Johns Hopkins University, is 4.99 percent.<sup>14</sup> The Board in *Aspirus* stated if either consideration was met it suggests the propriety of a mail-ballot election. Here, I find the increasing number of new confirmed cases in Alameda County supports Petitioner's argument in favor of a mail ballot election.

Regarding the fourth factor, the Employer has made general assertions regarding its willingness to conduct a safe manual election, and although it did not address GC 20-10 directly, I find its stated willingness is sufficient to satisfy any concerns under this factor. Similarly, regarding the fifth factor, whether there is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status, I find that there is no evidence of a current COVID-19 outbreak at the facility. While the Employer has not addressed this factor in precisely these terms there is no reason to believe an outbreak is ongoing, and the Employer has not refused to disclose the COVID-19 status of its facility.

Finally, *Aspirus Keweenaw, supra*, in its sixth factor allows me to also consider "other similarly compelling circumstances" in determining whether an election should be conducted by mail-ballot due to the COVID-19 pandemic. In this case, I additionally rely upon the nature of the Employer's business: operating a skilled nursing facility that houses many vulnerable patients, as demonstrated by the Employer's continuing policy that excludes the public from its facility. After indicating that a manual election could not be held in the facility as a result, the administrator referenced holding the election outdoors in the visitation area, but the Employer has not made a specific, detailed proposal regarding how an outdoor election would be conducted, beyond the comments of its representative at hearing. The Employer's policy of prohibiting visitors to its facility because of the risk to its vulnerable population is an additional consideration suggesting a mail ballot election is appropriate.

While I am directing the instant election take place by mail because of the rising number of cases in Alameda County, I find the Employer's own current policy prohibiting visitors also suggests that a manual election should not be held at the Employer's facility.

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<sup>12</sup> <https://bao.arcgis.com/covid-19/jhu/county/06001.html>

<sup>13</sup> <https://covid19.ca.gov/state-dashboard/>

<sup>14</sup> <https://coronavirus.jhu.edu/testing/testing-positivity>

## **CONCLUSIONS**

I have determined that the voting groups sought by Petitioner are appropriate, and I shall direct a self-determination election among the employees in the petitioned-for voting groups. Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are 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.<sup>15</sup>
3. The labor organization involved claims 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 following employees of the Employer constitute a voting group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

### **VOTING GROUP - UNIT A (PROFESSIONAL EMPLOYEES):**

All full-time, regular part-time, and on-calls Registered Nurses employed by the Employer at its facility located at 2100 Parkside Drive, Fremont, California; excluding Director of Nurses, Assistant Director of Nurses, MDS Coordinators, Directors Staff Development, Infectious Preventionists, employees represented by a labor organization, managers, non-professional employees, confidential employees, office clerical employees, and supervisors as defined in the Act.

### **VOTING GROUP - UNIT B (NON-PROFESSIONAL EMPLOYEES):**

All full-time, regular part-time, and on-call Licensed Vocational Nurses employed by the Employer at its facility located at 2100 Parkside Drive, Fremont, California; excluding LVN supervisors, employees represented by a labor organization, Director of Nurses, Assistant Directors of Nurses, MDS coordinators, Directors Staff Development, Infectious Preventionists, professional employees, managers,

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<sup>15</sup> During the hearing the parties stipulated to the following commerce facts:

Aakash, Inc. dba Park Central Care and Rehabilitation Center is a California corporation. The Employer operates a skilled nursing facility located in Fremont, California. During the past twelve months, the Employer has directly provided healthcare services valued in excess of \$250,000. During the same period, the Employer directly purchased and received products valued in excess of \$5,000, from suppliers located outside of the State of California.

confidential employees, office clerical employees, and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. There will be two voting groups in the election as set forth above, **VOTING GROUP - UNIT A** and **VOTING GROUP - UNIT B**. Two questions shall appear on the ballot of the professional employees in **VOTING GROUP - UNIT A**:

1. **Do you wish to be included with nonprofessional employees in a unit for the purposes of collective bargaining? The choices on the ballot will be "Yes" or "No".**
2. **Do you wish to be represented for purposes of collective bargaining by SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015? The choices on the ballot will be "Yes" or "No".**

The question on the ballot for the non-professional employees in **Unit B** will be "Do you wish to be represented for purposes of collective-bargaining by **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015?**" The choices on the ballot will be "Yes" or "No".

If the professional employees voting in **VOTING GROUP - UNIT A** vote "Yes" to the first question, indicating the employees' desire to be included in a bargaining unit with non-professional employees, they will be so included in the event that they also vote in favor of representation.

If, on the other hand, a majority of the professional employees voting in **VOTING GROUP - UNIT A** do not vote "Yes" to the first question on the ballot, the employees' votes on the second question will not be counted and the employees will remain unrepresented

#### **A. Election Details**

I have determined that a mail ballot election will be held. At the hearing, Petitioner waived eight of the ten days it is entitled to have the voter list described below. Region 32 will mail ballots to employees in the appropriate voting groups at **5:00 p.m. on November 24, 2020**. 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.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **December 1, 2020**, as well as those employees who require a

duplicate ballot, should communicate immediately with the National Labor Relations Board by either calling the Region 32 office at (510) 637-3300 or Nicholas L. Tsiliacos at (510) 671-3046.

The ballots will be commingled and counted by the Region 32 office at **10:00 a.m. on December 16, 2020**. In order to be valid and counted, the returned ballots must be received by the Region 32 office prior to the counting of the ballots.

The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending November 15, 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 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(l) 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 Friday, November 20, 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](http://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](http://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**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

### **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 10 business 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 must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.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, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. 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 at Oakland, California this 18<sup>th</sup> day of November 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney  
Regional Director  
National Labor Relations Board  
Region 32  
1301 Clay Street, Suite 300N  
Oakland, CA 94612-5224