

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

MERS Goodwill Industries

Employer

and

Holly G. Womack

Petitioner

Case 14-RD-266711

and

United Food & Commercial Workers Local 655

Union

DECISION AND DIRECTION OF ELECTION

Holly G. Womack (“Petitioner”) filed the petition herein with the National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act (“Act”), seeking to decertify United Food & Commercial Workers Union Local 655 (“Union”) as the exclusive collective-bargaining representative of between approximately 23 to 27 employees employed by MERS Goodwill Industries (“Employer”) at its facility in Festus, Missouri (“Festus store”).¹

A hearing was held on October 22, 23, 26, 27, 2020,² before a hearing officer of the Board. The parties were permitted to state their positions and filed post-hearing briefs.

I. ISSUES AND POSITIONS OF THE PARTIES

The Employer maintains that the Assistant Manager (“Assistant”) and Lead Associate (“Lead”) positions are supervisory as defined in Section 2(11) of the Act. Specifically, the Employer argues the Assistant and Leads hire employees, assign and responsibly direct work, and discipline employees using independent judgment. The Employer asserts a manual election at its facility can be conducted despite the recent surge in the ongoing Covid-19 pandemic. Although it did not propose any specific election details, the Employer stated that a manual election would likely be held in its

¹ As certified, the existing bargaining unit is:

Including all full-time and regular part-time Retail Associates employed by the employer at its facility located at 1255 North Truman Boulevard, Festus, Missouri.

Excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

² All dates are in 2020 unless indicated otherwise.

back warehouse with a release schedule for employees, including time slots for employees not scheduled to work on the day of the election. In its statement of position, the Employer proposed one 1½-hour session for the manual election. It also states it will abide by the suggested manual election protocols in General Counsel Memorandum 20-10 (“GC Memo 20-10”).

The Union contends that the one Assistant and three Leads are employees under the Act, who do not use independent judgment or effectively recommend actions of a potentially supervisory nature. It also argues the supervisory status of the Assistant and Leads should be assessed at the time the initial representation petition for the current bargaining unit was filed, August 6, 2019, because “[i]mmediately after the election, the Employer required these employees to participate in supervisory activities.” In its statement of position, the Union proposed a manual election in the back warehouse of the Festus store, consisting of one 2-hour session.

Petitioner did not submit a responsive statement of position or post-hearing brief and while present at the hearing, did not participate beyond identifying herself for the record. The original decertification petition did not indicate a preference for a manual or mail ballot election.

II. THE EMPLOYER’S OPERATION

The Employer has existed in Greater St. Louis for over a century, providing job training, job services, and other philanthropic-type services involving people with barriers to obtaining employment. Funding for the Employer comes primarily through the collection and sales of donated goods. It currently employs over 1200 retail associates throughout its 42 locations in Greater St. Louis. The instant petition involves a Board-certified bargaining unit at the Employer’s Festus store.

The Festus store is overseen by District Manager Tori Basile, who is overseen by Retail Vice Presidents and Executive Vice President of Retail (“EVP”) Mark Kahrs.³ Store Manager David Moore oversees the day-to-day operations of the Festus store, including one Assistant, three Leads, and 23 retail associates. Retail associates generally work in one of five areas: 1) dock, where furniture is received and processed; 2) wares, where household goods are processed; 3) textiles, where clothes are processed;⁴ 4) books, where books are processed; and 5) cashier, where the public purchases the aforementioned goods and the salesfloor. Processing the goods involves evaluating their quality, retaining goods that meet the Employer’s standards, and assessing their price point. The record indicates that the Leads often work in wares when not performing other duties.

³ The record does not indicate if, when, or how often, EVP Kahrs visits the Festus store, other than meeting with the “management team” following the Board-conducted election in 2019.

⁴ Employees working with textiles are called “processors.”

The Employer has an approximately 90-page Procedure Manual that addresses many aspects of work, including terms and conditions of employment, that employees review during orientation and is readily available at the Festus store as hardcopies in the breakroom for employees and the office for the management team.⁵ The manual is updated on a regular basis with changes to existing procedures and new procedures. In addition, the Employer has an approximately 50-page employee handbook that sets forth workplace policies, including some also found in the Procedure Manual, that applies to all workers at the Festus store. All workers receive a copy of the handbook, including new copies, whenever it is updated.

The Festus store is currently open seven days a week, 10:00 a.m. to 8:00 p.m., Monday through Saturday, and 10:00 a.m. to 6:00 p.m. on Sunday, for a total of 68 hours each week.⁶ Store Manager Moore works approximately 42 hours to 43 hours in an average week. Retail associates, Leads, and the Assistant are scheduled to work either a morning, midday, or evening shift in one of the five areas of the store—dock, wares, textiles, books, or cashier.

All workers, including the Store Manager, Assistant, Leads, and retail associates, are paid hourly and receive overtime when working more than 40 hours in a week.

A. The “Management Team”

The Employer considers the Store Manager, Assistant, and Leads to be its “management team” and maintains an e-mail group, “RetailManagers,” for all individuals in those positions across all its stores. The Festus store has a management team e-mail group, “FestusManager,” limited to the five workers in those positions at the Festus store—Store Manager Moore, Assistant Rebecca Mennemeyer, and Leads Carolann Canepari, Diana Jordan and Anna Vaeth. Store Manager Moore testified that he attempts to have a Festus store management team meeting at least once a month, which was corroborated by Assistant Mennemeyer.⁷

According to Store Manager Moore, there is no substantial difference between his job duties and those of the Assistant and Leads; however, the record contains minimal detail or description of his duties, and Assistant Mennemeyer testified that she sought Moore’s approval for every decision.

⁵ The manual contains sections on everything from dress code and phone use to employee purchases and breaks to store scheduling and opening and closing the store to pricing and processing goods.

⁶ Prior to the Covid-19 pandemic, the Festus store was open for 76 hours per week.

⁷ Separately, the Employer holds meetings almost quarterly for certain classifications of the management team (e.g., only Store Managers or only Assistants and Leads); however, witnesses testified that attendance at these meetings is voluntary and based on the worker’s availability. According to Lead Canepari, meetings between the Festus store management team and high-level managers such as a District Manager or EVP Kahrs happen maybe once or twice per year.

Around 2019, District Manager Dawn Dallas began assigning certain duties to the management team on a rotating monthly basis. Lead Canepari gave the examples of scheduling, ordering, online sales, and fire extinguishers. Regarding scheduling, the record reveals that the assigned individual, whether Assistant or Lead, turns in a draft to Store Manager Moore, who then makes changes and submits it to the District Manager, who may also make changes. Regarding ordering, Lead Canepari and Assistant Mennemeyer testified that they noted the needed supplies, but Store Manager Moore determined the quantity and approved their purchase.

The Festus store maintains a “captain’s log” as a way of communicating important information from one day to the next among members of the management team. Examples in the record include absences and tardies, orders for supplies and salvage trucks, altercations, disciplines, and other incidents. However, testimony indicates that the captain’s log does not record every event or instance of a given example.

According to Assistant Mennemeyer, employees can request changes to their times (e.g., if they forget to clock in) through Paycom, which the Assistant or Leads can then approve, but the Assistant and Leads do not have the independent ability to change employees’ payroll hours while EVP Kahrs testified that Assistants and Leads could change errors, change time, and award vacation or sick leave. The Festus store management team keeps an attendance log for each employee that does not report to work on time.

Members of the management team—Store Manager, Assistant, Leads—are eligible for dental and vision insurance and bonuses based on the Festus store’s performance. Retail associates are not. The Employer provides company e-mail addresses to the management team but not to retail associates. Each member of the management team has keys to the Festus store, access to the safe and overnight bank drop box, and a personal alarm code. First year Assistants and Leads make \$3 and \$2 more per hour, respectively, than first year retail associates. Assistants and leads also receive one more week of paid vacation than retail associates and are eligible for retirement benefits on their first day of work while retail associate are not eligible until their fifth year of employment.

The record does not reveal whether Assistants or Leads have different uniforms than retail associates.

B. Procedural and Bargaining History

On August 6, 2019, the Union filed a petition in Case 14-RC-246084,⁸ seeking to represent a bargaining unit of all cashiers, assistants, leads, and retail associates. In that case, the Union and Employer stipulated to a unit of retail associates (which

⁸ I take administrative notice of the record in Case 14-RC-246084, including the petition, stipulated election agreement, tally of ballots, and certification of representative.

includes cashiers) and allowed the Assistant and Leads to vote subject to challenge, without a determination as to their eligibility. The Employer maintained that the Assistant and Leads were supervisors under the Act and should be excluded from the bargaining unit while the Union asserted that they were employees and should be included in the unit.

At the election on August 29, 2019, the Employer challenged the ballots of the Assistant and Leads as supervisors. The challenges were insufficient to affect the results of the election, so a determination as to the supervisory status of the Assistant and Leads was not made at that time, and they were neither included nor excluded from the certification of representative on September 10, 2019. Following the Union's certification as the exclusive bargaining representative of the employees at the Festus store, the Employer and Union maintained their respective positions regarding the supervisory status of the Assistant and Leads.

On October 9 and 10, 2019, the Employer held meetings with all its Store Managers, Assistants, and Leads, where it distributed and discussed new job descriptions for those positions. The job descriptions of the Assistant and Lead list, among other duties, interviewing and hiring candidates for employment, supervising and directing retail associates, issuing discipline, coaching and counseling employees which could lead to further discipline, and "exercis[ing] independent judgment in assigning daily job duties." The previous job descriptions only listed supervising assigned employees and did not mention disciplining, hiring, or exercising independent judgment.

Assistant Mennemeyer and Lead Canepari were members of the Union's bargaining committee and attended the initial negotiation meeting for a first contract but did not attend any subsequent bargaining sessions, per the Employer's request. At the time of the hearing in the instant case, according to EVP Kahrs, the parties were "very close" to an agreement, with "90 or more percent certain on non-economic[s, and] with just a handful of things to work through ... on economic[s]." At no time have the Union and Employer agreed on the supervisory status of the Assistant or Leads, their inclusion or exclusion from the existing unit, or their eligibility to vote.

III. TIMING OF SUPERVISORY ANALYSIS

"The Board has consistently held that an employee's actual status as of the eligibility date and the date of the election governs that employee's eligibility to vote." *Nichols House Nursing Home*, 332 NLRB 1428, 1429 (2000) (citing *Plymouth Towing Co.*, 178 NLRB 651 (1969); *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973)). This applies to supervisory status. *Health Resources of Lakeview, Inc.*, 332 NLRB 878, 878 (2000) (assessing eligibility based on supervisory status "during the critical period" and "at the time of the election"). See also *J.C. Penney Corp., Inc.*, 347 NLRB 127, 129 (2006) (finding evidence insufficient to show supervisory "duties at the time of the election" when testimony came from witness terminated two months prior).

The Union contends the supervisory status of the Assistant and Leads should be assessed from the date it filed the initial representation petition on August 6, 2019. In support of its contention, the Union cites to *Cherokee Brick & Tile Co.*, 100 NLRB 612 (1952), and *Regency Manor Nursing Home*, 275 NLRB 1261 (1985). However, the Union's argument is misplaced, and the cases are distinguishable. As the Board noted in *Cherokee Brick*, "the timing of the alleged delegation of supervisory authority compels us to scrutinize closely the surrounding factors to determine whether or not supervisory authority was in fact delegated to the employees concerned." *Id.* at 615. It did not purport to take a retrospective approach to supervisory status.

In *Cherokee Brick*, the employer purported to confirm and clarify existing supervisory authority; however, as the Board noted, the employer had previously included the putative supervisors in a contract unit generally excluding supervisors, so it must "scrutinize closely" the alleged supervisory authority that was delegated during the pendency of the Board's proceedings. See also, *Santee Print Works*, 111 NLRB 1362, 1365 (1955) (requiring examination of supervisory authority delegated prior to the preelection hearing but after notice of the hearing). Similarly, in *Regency Manor*, the employer appointed some of the petitioned-for employees to supervisory positions between the filing of the petition and the election. In that case, the Board found certain employees never "assumed supervisory duties despite the [employer] designating them supervisors" and others were "unlawfully coerced into accepting 'supervisory' positions in a scheme ... to interfere with the employees' right to vote in the Board-conducted election [an unfair labor practice]." *Id.* at 1261, 1261 fn. 4. See also *Benson Wholesale Co., Inc.*, 164 NLRB 536, 548-549 (1967) (affirming judge's finding that employer's delegation of paper authority prior to election was unlawful). In all of these cases, the employers' actions took place before the election.

Here, unlike *Cherokee Brick* or *Regency Manor* (or *Santee Print Works* or *Benson Wholesale*), the delegation of supervisory authority occurred following the representation election and nearly one year before the instant decertification petition was filed. To the extent the Union asserts that "the Employer had no right to change [employees'] job duties in such a way as to remove them from the unit," it could have filed an unfair labor practice charge within the 6-month proscription of Section 10(b) of the Act or, in the alternative, filed a unit clarification petition following the certification of representative. As it stands, the Union inappropriately attempts to raise this issue for the first time in preelection proceedings more than 13 months after that certification and 12 months after the alleged change in duties,⁹ advocating for a standard with the potential for unlimited retrospection.

⁹ In proceedings under Section 9 of the Act, the Board will not permit litigation of whether unfair labor practices have been committed during the preelection period, even though by precluding litigation of such matters a certification might issue which would not have issued had a charge been filed alleging that same conduct. "To make such a finding in a representation case would conflict with the statutory scheme which vests the General Counsel with final authority as to the issuance of complaints based upon unfair labor practice charges and the prosecution thereof." *Texas Meat Packers, Inc.*, 130 NLRB 279, 279 (1961). See also *Paragon Products Corp.*, 134 NLRB 662, 665 (1961) ("[preelection representation]

In determining supervisory status in matters of representation, extant Board law warrants a meticulous examination of alleged supervisory authority when its delegation occurs *before* the election, during the critical period and union organizing. The record in the instant case shows any (additional) alleged supervisory authority was conferred shortly *after* the election and fails to establish the delegation of that authority was done in response to the instant petition, which was filed more than one year later. Board law does not allow for using a 1-year retrospective status for employees in representation proceedings; therefore, the supervisory status of the Assistant and Leads must be analyzed under their current conditions.¹⁰

proceedings are investigatory in character and do not afford a satisfactory means for determining matters which are more properly the subject of adversary proceedings with their accompanying safeguards”).

¹⁰ Any party is, of course, free to present evidence of any actual disenfranchisement of voters in postelection objections.

IV. SUPERVISORY STATUS

A. Board Law

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) defines a “supervisor” as:

[A]ny 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.

The 12 statutory criteria (or “primary indicia”) for supervisory status set forth in Section 2(11) are read in the disjunctive, making possession of any one of the indicia sufficient to establish an individual as a supervisor. Therefore, individuals are statutory supervisors if: 1) they hold the authority to engage in any one of the dozen primary indicia listed in Section 2(11); 2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and 3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-713 (2001); *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994); *Shaw, Inc.*, 350 NLRB 354, 355 (2007).

The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006); *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994). The authority effectively to recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. See *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1748-1749 (2011); *Children’s Farm Home*, 324 NLRB 61 (1997). See also *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 5 (2016); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights protected by the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Oakwood Healthcare*, above at 687.

Nonstatutory indicia (or “secondary indicia”) can be used as background evidence to support a finding of supervisory status but are not dispositive without evidence demonstrating the existence of one of the primary or statutory indications of supervisory status. See *Training School at Vineland*, 332 NLRB 1412, 1412 fn. 3 (2000); *Chrome Deposit Corp.*, 323 NLRB 961, 963 fn. 9 (1997). Compare *K.G. Knitting*

Mills, Inc., 320 NLRB 374 (1995) (Board found no primary indicia were present, where individual opened facility in the morning, “watche[d] everything” before the manager arrived, and processed trucks arriving at plant). Four types of secondary indicia commonly mentioned by the Board are the ratio of putative supervisors to employees, differences in terms and conditions of employment, attending management meetings, and how the individual in question is held out to (or perceived by) other employees.

Burden and Evidence

The burden of establishing supervisory status rests on the party asserting that such status exists. *NLRB v. Kentucky River*, above at 711; *Shaw, Inc.*, above at 355; *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Croft Metals*, above; *Oakwood Healthcare*, above. “Purely conclusory evidence does not satisfy that burden. Lack of evidence is construed against the party asserting supervisory status.” *Veolia Transportation*, above, slip op. at 7 (citing *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003)). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Ibid.* (citing *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)). See also *G4S Regulated Security Solutions*, 362 NLRB 1072, 1072-1073 (2015); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003). Finally, the sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Shaw, Inc.*, above at 357 fn. 21; *Oakwood Healthcare*, above at 693; *Kanawha Stone Co., Inc.*, 334 NLRB 235, 237 (2001).

I accord minimal weight to evidence from stores other than the Festus store or time periods prior to 2019, as the record fails to establish its relevance particularly when compared to recent evidence and testimony from current workers at the Festus store.¹¹ Specifically, I note the Festus store was overseen by a different Store Manager and a different District Manager prior to 2019 and record evidence, including witness testimony, regarding operations at other Employer stores or prior to 2019 is conclusory and lacks detail about its applicability to the current Festus store.

Further, the Employer frequently cites to the job descriptions for the Assistant and the Leads, highlighting that Assistant Mennemeyer and Leads Canepari, Jordan, and Vaeth each signed their respective job descriptions and responded affirmatively to its conclusory and leading questions that they “had the authority” in the job descriptions.

¹¹ The Employer attempts to argue against the credibility of certain testimony and witnesses, devoting an entire section of its post-hearing brief to this argument. However, preelection representation hearings are nonadversarial in nature, and “credibility determination are not made in preelection hearings.” *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 2 (2020) (citing *Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1084 (2001)). See also, *Grace Industries, LLC*, 358 NLRB 502, 506 fn. 24 (2012) (noting irreconcilable testimony but making no credibility determinations “in keeping with representation hearing procedures”).

Testimony of this nature runs the risk of being given little evidentiary weight, as it is conclusory, and responses to leading questions are devalued because they suffer the weakness of being the testimony of the questioner rather than the witness. *H. C. Thomson, Inc.*, 230 NLRB 808, 809 fn. 2 (1977). Such evidence does not constitute the specific, detailed evidence necessary to establish putative supervisors possess primary indicia consistent with the concern expressed that it is the actual duties and actual accountability of the worker that count when determining supervisory status. *G4S Regulated Security Solutions*, above at 1072-1073. Similarly, the Board has consistently held that such “paper” authority is insufficient by itself to establish actual supervisory authority under Section 2(11). See, for example, *Chi Lakewood Health*, 365 NLRB No. 10, slip op. at 1 fn. 1 (2016) (cases cited therein).

B. Application of Board Law to This Case

Of the 12 primary indicia for supervisory status, the Employer does not contend and the record contains no evidence that the Assistant or Leads transfer, lay off, recall, promote, discharge,¹² or reward or adjust employee grievances, or effectively recommend such action, by virtue of their independent judgment. The Employer maintains the Assistant and Leads use independent judgment to hire, discipline, including suspension, and responsibly direct retail associates and assign them work while the Union contends the actions of the Assistant and Leads are governed by detailed instructions in the Procedure Manual and disciplinary and hiring decisions require the input or approval of higher-level managers, rendering the Assistant and Leads employees under the Act.

1. Assign

The Board defines “assign” as referring “to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689 (2006). Elaborating on this definition, the Board stated that “assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night), or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ ... However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of” assignment authority. *Ibid.* As noted above, assignment of work in a merely routine or perfunctory manner, where there is only one self-evident choice, or solely on the basis of equalizing workloads does not require independent judgment. *Id.* at 693.

¹² Although the record contains evidence District Manager Tori Basile solicited the Festus store management team about their personal experiences with an employee and asked for their recommendations, it does not contain any details regarding how the ultimate decision to terminate the employee was made and, more importantly, Store Manager Moore specifically testified that the decision to terminate employees is made above his level.

At the Festus store, retail associates are scheduled in one of the five particular work areas—dock (furniture), wares (housewares), textiles, books, or cash register. Since the start of the Covid-19 pandemic, employees clean and sanitize each area on an hourly basis in addition to their regular duties processing goods. The Assistant and Leads may move employees from one work area to another based on staffing shortages or workload, or they may fill in and perform the needed tasks themselves. Assistant Mennemeyer and Lead Canepari testified that staffing shortages in a particular area were generally filled by employees trained in that work area or the Assistant or Lead would cover the work themselves. Canepari also testified that most cashiers volunteer to work in other areas when there are shortages. Lead Vaeth testified that she tries to move employees with known personal conflicts away from each other. Assignments that are based on well-known employee skills also do not involve independent judgment. *CNN America, Inc.*, 361 NLRB 436, 460 (2014), *enfd.* in relevant part 865 F.3d 740 (D.C. Cir. 2017) (citing *KGW-TV*, 329 NLRB 378, 381-382 (1999)); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996). Similarly, basing an assignment on whether the employee is capable of performing the job does not involve independent judgment. See *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3 (2016) (citing *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004)); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 1153, 1154 (2015) (citing *Croft Metals*, 348 NLRB at 722 (2006)).

The only record evidence of potential independent judgment comes from Lead Vaeth’s affirmative response to a leading question that she assigns retail associates “based on, among other things, their work ethic.” However, without more, this is not enough to establish that the Assistant or Leads exercise independent judgment when assigning work to retail associates and does not establish the Assistant or Leads as supervisors under the Act.

2. Responsibly Direct

If a putative supervisor “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 Healthcare*, 348 NLRB at 691. Responsible direction means not only being able to take action to ensure tasks are performed correctly by an employee, but also that there is a prospect of material consequences to the alleged supervisor if the directed employees do not perform their tasks correctly. *Id.* at 691-692; *Golden Crest Healthcare Center*, 348 NLRB 727, 731 and fn. 13 (2006). Accountability may be shown by either negative or positive consequences to the putative supervisor’s terms and conditions of employment as a result of the putative supervisor’s performance in the direction of others. *Golden Crest*, above at 731. See also, *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 4 (2016).

In the instant case, as noted above, much of the testimony is conclusory or general and not detailed or specific when regarding accountability for the direction of work or the use of independent judgment. The Employer asserts Lead Vaeth testified she had been disciplined for the performance of processors—retail associates working

with textiles. However, her testimony notes only that she was called into the office, and then “had to pick up their slack on everything ... to go and process and pick up on their stuff.” This fails to indicate she received discipline rather than simply having to perform additional processor work and does not establish Vaeth is accountable for the retail associates’ performance.

In the case of Mennemeyer, her corrective action form lists three infractions, two which deal solely with her own performance—participating in, and failing to report, sexual harassment. The other infraction is for a reoccurring failure to manage, which is explained in the chronological form as two instances of failing to report an accident, failing to manage and participating in employee purchase policy violations, and failing to manage and participating in unprofessional and sexual behavior. To the extent that instances involve Mennemeyer’s participation, they deal with her performance and not that of her subordinates. Her failure to report accidents is also solely her performance. This leaves her “failure to manage” employee purchase policy violations and unprofessional and sexual behavior. The record contains minimal details regarding the employee purchase violations¹³ and most of her “failure to manage” behavior deals with her own actions (e.g., touching, smelling/tasting, laughing, engaging in conversation, and failing to report). The last remaining violation is “allowing for the display of condom,” implying Mennemeyer failed to prevent the actions of other workers either through instruction or discipline and indicative of her accountability for their actions. However, this conflicts with Mennemeyer’s testimony that, consistent with the Employer’s sexual harassment policy,¹⁴ she issued the workers verbal warnings. In addition to the conflicting testimony, inasmuch as Mennemeyer’s 1-day suspension resulted from her failure to issue the appropriate level of discipline to others, it involves her deficient performance not the inappropriate performance of others. See also *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 2 (2016) (finding evidence insufficient when the only purported example of accountability was a discipline where it was unclear if it was based on the unsatisfactory performance of subordinates or the putative supervisor).

Finally, as with all primary indicia, the record must also show the use of independent judgment when the Leads direct retail associates and the Assistant directs both Leads and retails associates. Ibid. Assuming Canepari’s performance improvement plan establishes accountability for the actions of others,¹⁵ there is no evidence to suggest her direction of retail associates is more than merely routine. See, for example,

¹³ EVP Kahrs testified that Mennemeyer “actually had participated in” the purchase policy violation and “approved them,” which suggests that the resulting discipline was based on Mennemeyer’s errors and not those of the retail associates.

¹⁴ The policy also requires employees to report incidents of sexual harassment; however, as discussed above, Mennemeyer’s failure to report the harassment involves her own performance, not that of others.

¹⁵ EVP Kahrs testified generally that performance improvement plans could delay a worker’s wage increase until the plan was satisfied; however, he did not specify that Canepari’s raise was delayed or withheld.

Croft Metals, 348 NLRB at 722 (finding accountability when alleged supervisor received written warnings when subordinates failed to meet production goals but failing to find independent judgment because the direction was routine).

Based on the above, the record lacks sufficient specifics and detail to determine the Assistant or Leads responsibly direct the work of others using independent judgment to the degree necessary for establishing supervisory authority under Section 2(11) of the Act.

3. Discipline and Suspend

To establish the supervisory authority to discipline, asserted disciplinary authority “must lead to personnel action without independent investigation by upper management.” *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 8 (2016) (citing *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007); *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003)). See *Lucky Cab Co.*, 360 NLRB 271 (2014) (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)); *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965). In the instant case, there is no evidence in the record that Store Manager Moore independently investigates any of the reports made in the Assistant’s or Leads’ chronological reports or corrective action forms.

The authority to issue verbal reprimands, without more, does not establish the authority to discipline. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Washington Nursing Home, Inc.*, 321 NLRB 366, 371 (1996); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989); *Passavant Health Center*, 284 NLRB 887, 889 (1987). Similarly, “the mere factual reporting of oral reprimands and the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority.” *Ibid.* (citing *Heritage Manor Convalescent Center, Inc.*, 269 NLRB 408, 413 (1984)).¹⁶ Where the evidence is in conflict as to whether a particular type of corrective action constitutes discipline, the Board will find that the party asserting supervisory status has not met its burden. See, for example, *Veolia Transportation*, above, slip op. at 7-8 (conflicting testimony on whether mere issuance of “observation notice,” as well as coaching and counseling, constituted discipline). Warnings or counseling forms that bring substandard employee performance to the employer’s attention absent a recommendation for future discipline are merely reportorial and thus are not evidence of supervisory authority. *Id.*, slip op. at 7; *Williamette Industries*, 336 NLRB 743, 744 (2001); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). Thus, a warning that simply describes an incident without

¹⁶ See, for example, *Republican Co.*, 361 NLRB 93, 96-97 (2014) (verbal warning did not establish supervisory status where there was no evidence it had effect on warned employee’s job status or tenure); *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998) (written reprimand not disciplinary without evidence “job affecting discipline” resulted); *Azusa Ranch Market*, 321 NLRB 811, 812-813 (1996) (written warnings not shown to have any effect on employee’s employment status); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings do not establish supervisory status where merely reportorial and not clearly linked to disciplinary action affecting job status).

recommending any disposition is merely reportorial where higher management determines what discipline, if any, is warranted based on the incident. *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000). See also *Shaw, Inc.*, 350 NLRB 354, 356-357 (2007) (record did not establish writeup forms played significant role in disciplinary process).

In the instant case, the record evidence is in conflict. While Lead Vaeth gave detailed testimony regarding how she independently completed corrective action forms, including the type and level of discipline, for employees violating the Employer's policies,¹⁷ Lead Canepari and Assistant Mennemeyer testified that they reported all violations to Store Manager Moore, who told them what to write on corrective action forms. The majority of corrective action forms in the record consist of attendance or cash violations.

Regarding employee attendance, the record reveals the policy and practice of the Employer, including the Festus store, is that employees must call the Store Manager two hours prior to the start of their shift if they will be late or unable to work. Because Store Manager Moore receives employee call-offs, the Assistant and Leads do not know whether an absent or tardy employee violated the attendance policy or if they should be disciplined. Mennemeyer testified that only Moore has access to employee personnel files showing their previous violations and discipline, so only he can determine if discipline is warranted and the appropriate level to issue. However, Vaeth testified that she looked at employee's attendance history, whether there is a repetitive problem, and their personal circumstances when determining whether, and at what level, to issue discipline.¹⁸ For example, Vaeth testified that she has not always disciplined employees for attendance violations if there were transportation or childcare issues.

Regarding cash violations, the record shows any cash register with an overage or shortage greater than \$5 must be reported to the District Manager and Health & Safety (formerly Loss Prevention) pursuant to Employer policy. Canepari and Mennemeyer testified that they also reported cash violations to Store Manager Moore or the District Manager. The Employer asserts the different levels of discipline (e.g., verbal vs. written) for similar cash violations found on corrective action forms is evidence the Assistant and Leads exercise discretion and independent judgment; however, the forms do not show whether the Assistant or Lead received instruction from Moore or the District Manager in determining the discipline.¹⁹ Thus, they do not clarify the conflict in the record.

¹⁷ Store Manager Moore stated that he had never overruled Vaeth's disciplinary decisions.

¹⁸ The record is not clear where Vaeth accesses an employee's attendance history; however, the evidence shows some incidents are tracked in the captain's log and each employee has an individual attendance log.

¹⁹ Moore testified that the Assistant and Leads reported discipline to him; however, he was never questioned on whether Canepari and Mennemeyer actually reported cash and attendance violations to him or whether he told them what to write on corrective action forms.

In another example of conflicting testimony, Moore testified that Canepari sent an employee home following an altercation at the Festus store, and then notified him afterward of her actions. However, Canepari explained that she told Moore about the incident and he sent both employees home.²⁰ She also testified that Retail Vice President Kristy Lance called her and asked for her disciplinary recommendation, to which she proposed a 3-day suspension, but the employee received only a written warning. Similarly, Mennemeyer testified that she determined to issue verbal warnings to Canepari and Jordan for an inappropriate incident involving condoms that someone had donated; however, Mennemeyer was then disciplined for failing to correctly handle the situation. In a different example, Vaeth stated she had sent an insubordinate employee home without first notifying Moore, and he did not second guess or change the discipline.

Regarding suspension, the Employer cites a corrective action form signed by Mennemeyer; however, she specifically testified that she did not make, or participate in, the decision to suspend the employee at issue. Mennemeyer further testified that she did not think the suspension was “fair” given the employee’s attendance infraction.

Lead Jordan was not present at the hearing and did not testify. Nor did any other witness provide details about any instance where Lead Jordan completed a corrective action form, issued discipline, or determined not to discipline an employee.

The evidence regarding whether Assistant Mennemeyer and Leads Canepari, Jordan, and Vaeth discipline employees using independent judgment is in conflict and inconclusive and insufficient to establish the supervisory status of either the Assistant or the Leads.

4. Hire

The fact that not all of the putative supervisors have actually exercised their hiring authority does not defeat a supervisory finding. See *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001). Merely narrowing the applicant pool by screening applicants and recommending several to the ultimate decisionmaker does not constitute an effective hiring recommendation. *Wake Electric Membership Corp.*, 338 NLRB 298, 298–299 (2002); *Ohio State Legal Services Assn.*, 239 NLRB 594, 596 (1978); *The Door*, 297 NLRB 601, 602 (1990). However, effectively recommending against hiring a candidate can establish supervisory authority. *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) (superior unequivocally testified he would not hire an applicant if alleged supervisor recommended against it).²¹

²⁰ Canepari completed a chronological form regarding the incident that indicates she “called Dave [Moore]. Called Anna [Vaeth] to come to the back room. Sent both [employees] home.”

²¹ See, for example, *Berger Transfer & Storage*, 253 NLRB 5, 10 (1980), *enfd.* 678 F.2d 679 (7th Cir. 1982), supplemented by 281 NLRB 1157 (1986) (although putative supervisor’s recommendation to hire was followed by further interviews, recommendation against hiring was normally final); *HS Lordships*, 274 NLRB 1167, 1173 (1985) (bar manager’s recommendations against hiring were followed).

As with all supervisory functions, a hiring recommendation is not effective in the absence of a contention or finding that such recommendation is relied on without further inquiries. *Adco Electric Inc.*, 307 NLRB 1113, 1124 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989). Likewise, a hiring recommendation has not been shown to be effective where the influence of the recommendation on the ultimate decision is not known. *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1425-1426 (2010); *Third Coast Emergency Physicians, P.A.*, 330 NLRB 756, 759 (2000); *F.A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997).

In the instant case, Assistant Mennemeyer and Leads Canepari and Vaeth testified that they have reviewed candidate's applications and conducted telephone and in-person interviews using an Employer-provided "Interview Guide." However, Mennemeyer testified that she did not call candidates who, on the face of their applications, did not appear to be a good fit for the Festus store. The guide is a semi-structured interview, containing some required questions and some optional questions for the interviewer to ask. It has small sections for notes, check boxes for ranking the candidate's response to each question as "weak," "average," or "strong," and concludes with the question: "Are you moving forward with this candidate?" The record contains multiple guides completed by Mennemeyer and Leads Canepari, Jordan, and Vaeth.²² Vaeth also testified that she had seen Jordan interview applicants. While the record does not indicate that the Assistant or Leads were trained in how to use the guide, a lack of training suggests greater discretion in how the interviewer evaluates and ranks applicants.

According to Vaeth, she considers a candidate's punctuality, attentiveness, and presentation during interviews. Canepari testified that Moore and other managers instructed her to start doing interviews. She stated that when interviewing applicants she "determine[d] their personality, their work ethic ... are they a happy person ... because you want good, smiling people when people walk in the door, and you want good hardworking people." Mennemeyer testified that she hired at least one person "on the spot" after their in-person interview. She also testified that she went over her hiring recommendations with Moore because "he would have to tell me what we needed for sure, and ... what the budgets were, or like how many people we could have in one area." The fact that a hiring recommendation is not followed due to staffing level decisions (i.e., an individual is not hired not because a superior disagrees with the recommendation, but because the superior does not want to hire any more employees) is not inconsistent with a finding that an individual makes effective hiring recommendations. *Queen Mary*, 317 NLRB 1303, 1303 fn. 5 (1995).

The record indicates all eligible applicants that were recommended for hire were, in fact, hired by the Employer when the Festus store had openings, and those that were

²² Some guides show the interviewer decided not to proceed after the telephone portion.

not recommended were not hired.²³ Moore testified that he does not second guess or override the hiring decisions of the Assistant or Leads, and there is no evidence that Moore or another manager interviews or otherwise follows up with candidates after the initial hiring recommendation from Mennemeyer, Canepari, Jordan, or Vaeth. See, for example, *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 962-963 (2004) (alleged supervisor alone interviewed applicants, recommended them for hire, recommendations were followed based only on review of applications of recommended candidates); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001) (putative supervisors interviewed applicants on their own and made recommendations that were followed).

Given the above, the record establishes that the Assistant and Leads possess and exercise the authority to hire, using independent judgment; and, therefore, are supervisors as defined in Section 2(11) of the Act and are not eligible to vote.²⁴

5. Secondary Indicia

Although not dispositive, secondary indicia can support a finding of supervisory status where evidence indicates the existence of at least one of the primary indicia. Beyond the evidence establishing Assistant Mennemeyer and Leads Canepari, Jordan, and Vaeth hire new retail associates using their independent judgment, are the differences in terms and conditions of employment. Specifically, the Assistant and Leads receive higher wages than retail associates, are eligible for bonuses and vision and dental insurance, and qualify for retirement benefits five years before retail associates. Further reinforcing their supervisory status is the fact that the Assistant and Leads are considered part of the Festus store's management team, along with the Store Manager. As a member of the management team, the Assistant and Leads have keys to the store, access to the safe, overnight bank drop box, and areas of the Employer's computer system that retail associates cannot access. They also have the opportunity to attend certain management meetings and leadership trainings (e.g., Empathetic Leadership, Bud to Boss) that are unavailable to retail associates. Importantly, the Assistant and Leads are the highest-ranking official at the Festus store over one-third of the time, and the record does not indicate Moore or other high-level managers are accessible during those times.

²³ Although Mennemeyer testified that she went over all her recommendations to hire an applicant with Moore, the evidence indicates that her recommendations to hire were followed and fails to show that Moore's approval was required. The record also reveals that the one applicant recommended for hire (by Mennemeyer), but who was not hired, was not offered employment because she was previously employed by the Employer less than six months before her interview, and the Employer has a written policy against rehiring someone within six months of separation.

²⁴ As I find the Assistant and all three Leads are supervisors by virtue of their authority to hire, using independent judgment, I need not address the Union's argument that Lead Vaeth possesses more or greater authority than the other Leads and Assistant.

V. METHOD OF ELECTION CONSIDERING THE COVID-19 PANDEMIC

On November 9, the Board set forth “six situations that suggest the propriety of mail ballots due to the Covid-19 pandemic,” noting that “[w]hen one or more of these situations is present, a Regional Director should consider directing a mail-ballot election.” *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 1 (2020). Those six situations are:

- 1) The Agency office tasked with conducting the election is operating under “mandatory telework” status;
- 2) Either 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;
- 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 the GC Memo 20-10 protocols;
- 5) There is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and
- 6) Other similarly compelling considerations.

Id.

As the Board acknowledged, no Regional Office, including Subregional and Resident Offices, has been in a mandatory-telework status since mid-June. The Employer’s “likely” proposed polling place appears to allow for a manual election without violating mandatory state or local health orders relating to maximum gathering size. As noted above, the Employer has committed to abide by the protocols in GC Memo 20-10 and stated there are no previous or current confirmed or suspected Covid-19 cases among employees at the Festus store.

In *Aspirus*, the Board instructed Regional Directors to “generally focus their consideration on recent statistics that reflect the severity of the outbreak in the specific locality where the election will be conducted” and stated that “a mail-ballot election will normally be appropriate if either (a) the 14-day trend in the number of new confirmed Covid-19 cases in the county where the facility is located is increasing, or (b) the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.”²⁵ Id. slip op. at 5.

²⁵ As explained by Johns Hopkins University, “On May 12, 2020 the World Health Organization (WHO) advised governments that before reopening, rates of positivity in testing (i.e., out of all tests conducted, how many came back positive for COVID-19) should remain at 5% or lower for at least 14 days.” <https://coronavirus.jhu.edu/testing/>

The City of Festus, where a manual election would take place, is located in Jefferson County, Missouri. Data from the Jefferson County Health Department shows a 36.6% testing positivity rate for the most recent week reported, Week 46 (November 8-14), and a rate over 5% since Week 28 (July 5-11).²⁶ Similarly, the daily case count and 7-day average for confirmed Covid-19 cases expresses an increasing trend.²⁷

Given the high testing positivity rate, more than seven times the standard established in *Aspirus*, and the 14-day increasing trend in the number of new confirmed cases, a mail-ballot election is warranted at this time.

CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude the Assistant Manager and Lead Associates are supervisors within the meaning of the Act and ineligible to vote and find as follows:

1. The Hearing Officer's rulings made 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.²⁸
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and 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.

[testing-positivity](#) (accessed November 24). In other words, a locality with a testing positivity rate over 5% in one of the preceding 14 days would not meet this standard.

²⁶“Weekly Total Covid-19 Surveillance Report, Week 46: November 8 – November 14” (November 18). Jefferson County Health Department. <https://www.jeffcohealth.org/s/Week-46-Reports.pdf> (accessed November 24) (see Figure 7 and Table 3). Also known as “Epi Reports,” the Jefferson County Health Department typically releases new data on Wednesdays.

²⁷ Id. (see Figure 3).

²⁸ The parties stipulated to the following commerce facts:

MERS Goodwill Industries, a Missouri non-profit corporation with offices and places of business throughout the State of Missouri, including the facility located at 1255 North Truman Boulevard, Festus, Missouri, is engaged in the business of reselling donated goods in order to fund vocational training programs. In conducting its operations during the past 12 months, a representative period of time the Employer derived gross revenues in excess of \$500,000 and received goods valued in excess of \$5,000 directly from points located outside the State of Missouri.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Including all full-time and regular part-time Retail Associates employed by the employer at its facility located at 1255 North Truman Boulevard, Festus, Missouri.

Excluding Assistant Managers, Lead Associates, office clerical employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The 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 **United Food & Commercial Workers Local 655**.

A. Election Details

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate voting group at 3:00 p.m. on **Monday, December 14, 2020**, from the office of the National Labor Relations Board, Subregion 17 – 8600 Farley Street – Suite 100, Overland Park, Kansas 66212-4677. 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 **Monday, December 21, 2020**, or otherwise requires a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Subregion 17 office at (913) 275-6525.

The ballots will be commingled and counted by the Region 14/Subregion 17 office at 2:00 p.m. CT on **Monday, January 11, 2021**. In order to be valid and counted, the returned ballots must be received by the Region 14/Subregion 17 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which will be 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 21, 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.

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 **Thursday, December 3, 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.

The list must be filed electronically with the Subregion and served electronically on the other parties named in this decision. The list must be electronically filed with the Subregion 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

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.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. 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 at St. Louis, Missouri, this 1st day of December 2020.



William B. Cowen, Acting Regional Director
National Labor Relations Board
Region 14/Subregion 17
1222 Spruce Street, Room 8.302
St. Louis, Missouri 63103-2829