On a petition duly filed under Section 9(c) of the National Labor Relations Act (“Act”), a hearing was conducted before a hearing officer of the National Labor Relations Board (“Board”) on the sole issue of whether, in light of the continuing Covid-19 pandemic, the Region should conduct an election for certain employees employed by the Employer at its facility located in West Bloomfield Township, Michigan, by manual or mail ballot.1

The Employer provides short-term and long-term nursing care. Petitioner seeks to remove the Union as the exclusive collective-bargaining representative of certain employees employed by the Employer. At the hearing, the parties stipulated to the following appropriate unit of employees (“Unit”):2

All full-time and regular part-time CNA employees, housekeeping employees, laundry employees, dietary aide employees, restorative aide employees, culinary aide employees, dietary cook employees, activities aide employees, medical records employees, guest services employees and ward clerk employees employed by the Employer at its facility located at 6535 Drake Road, West Bloomfield Township, Michigan; but excluding all business officers, managers, dining room managers, managerial employees, confidential employees, technical employees, professional employees, office personnel employees, LPNs, RNs, executive chefs, registered dieticians, receptionists, casual employees,

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1 In its timely filed and served pre-hearing statement of position, the Union asserted the collective-bargaining agreement between it and the Employer barred processing the instant petitioned; however, at the hearing, the parties stipulated that there are no bars to conducting an election in the instant case.

2 I find that the Unit is coextensive with the existing bargaining unit as described in the most recent collective-bargaining agreement between the Employer and the Union, with effective dates from August 24, 2018, to August 23, 2021. Mo’s West, 283 NLRB 130, 130 (1987) (citing Campbell Soup Co., 111 NLRB 234 (1955)).
drivers, social service employees, payroll employees, account management staff employees, central supply employees, scheduler employees, maintenance employees, and guards and supervisors as defined in the Act.

There are approximately 44 employees in the stipulated unit.

I have carefully considered the record, including the parties’ positions and arguments, and, for the reasons discussed below, I find that a prompt mail-ballot election is appropriate in this case given the extraordinary circumstances currently presented by the ongoing Covid-19 pandemic.

I. POSITIONS OF THE PARTIES

The Employer provides short-term and long-term nursing care at its facility in West Bloomfield Township, Michigan. It employs approximately 88 individuals at the facility. The record does not disclose how many patients are currently at the facility or the number of visitors that access the facility.

No party has suggested that the United States Postal Service in the relevant area is unable to deliver mail, that the petitioned-for employees would be unable to understand the mail-balloting procedure, that the addresses of the eligible employees are not known or up to date, or that there are any other impediments to voter participation in a mail-ballot election.

A. Employer

The Employer does not contend that Covid-19 is no longer an issue in the community but requests a manual election and agrees to abide by the suggested manual election protocols in General Counsel Memorandum 20-10 (“GC Memo 20-10”). At the hearing, Employer’s counsel highlighted that 77 of the 88 employees at its West Bloomfield Township facility are fully vaccinated and one is partially vaccinated. The record does not disclose the vaccination status of the 44 petitioned-for employees, but the Employer “believ[es] the percentage is similar.” It also posits that testing positivity rates were “just barely” above 5% in Oakland County, where its facility is located, and trending downward at the time of the hearing. The Employer proposes two 2-hour sessions, from 6:00 a.m. to 8:00 a.m. and 2:00 p.m. to 4:00 p.m. in its private dining room, which measures 35 by 35 feet and has healthcare-level air filtering and ventilation. The proposed polling place is accessible through an exterior door to the outdoor parking lot and via an 8-foot-wide hallway from the facility’s main entrance, providing for a separate entrance and exit.

3 At the hearing, the Union stated that “the mail system has not been as reliable this year as it has been in years past” and “the mail is not very fast sometimes and mail service as we just seen very recently over the last month is being cut even more.” However, the Union presented no evidence the postal service in the State of Michigan, Oakland County, or surrounding counties, is experiencing delays. While the record fails to substantiate any vagaries of mail delivery, other factors such as the potential for eligible voters to not be regularly residing at their mailing address for Covid-related reasons (e.g., quarantining, caretaking of loved ones, etc.) indicates use of an extended polling period.
If a mail-ballot election is directed, the Employer proposes a 14-day polling period, with the ballot count occurring five days later.

**B. Union**

The Union maintains that a mail-ballot election is appropriate based on the most recently reported testing positivity rates for Oakland County, where the Employer’s West Bloomfield Township facility is located. It proposes a 28-day polling period, with the ballot count occurring seven days later, citing to the Region’s recent mail-ballot elections in Power Home Solar LLC, Case 07-RC-279542 (28-day polling period, ballot count 5 days later), and VHS Huron Valley-Sinai Hospital, Inc., Case 07-RC-272211 (same).

**C. Petitioner**

Pursuant to Sec. 102.66(d) of the Board’s Rules and Regulations, Petitioner was precluded from presenting any evidence, cross-examining any witness, or presenting arguments because she failed to file a statement of position in response to timely filed Statements of Position by the Employer and Union. See also, Sec. 102.63(b)(3)(ii). However, I note that no witnesses were called to testify at the hearing.

**II. CONCLUSIONS**

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Based on the entire record in this proceeding, I find:

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.4

3. The Union 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.

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4 The parties stipulated that Maple-Drake Real Estate, LLC d/b/a Notting Hill of West Bloomfield, a Michigan limited liability company, is engaged in the business of short and long-term nursing care at its facility located at 6535 Drake Road, West Bloomfield Township, Michigan. In conducting its operations during the calendar year ending December 31, 2020, the Employer derived gross revenues in excess of $100,000 and purchased and received at its West Bloomfield Township, Michigan facility goods valued in excess of $5,000 directly from points located outside the State of Michigan.
5. The following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time CNA employees, housekeeping employees, laundry employees, dietary aide employees, restorative aide employees, culinary aide employees, dietary cook employees, activities aide employees, medical records employees, guest services employees and ward clerk employees employed by the Employer at its facility located at 6535 Drake Road, West Bloomfield Township, Michigan; but excluding all business officers, managers, dining room managers, managerial employees, confidential employees, technical employees, professional employees, office personnel employees, LPNs, RNs, executive chefs, registered dieticians, receptionists, casual employees, drivers, social service employees, payroll employees, account management staff employees, central supply employees, scheduler employees, maintenance employees, and guards and supervisors as defined in the Act.

III. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret-ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by SEIU Healthcare Michigan.

A. The Method of Election during the Covid-19 Pandemic

The Board has delegated its discretion in determining election arrangements to Regional Directors. San Diego Gas & Electric, 325 NLRB 1143, 1144 (1998). On November 9, 2020, 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:5

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. Although the Board has occasionally referred to the Aspirus situations as “factors,” the Aspirus decision makes clear that the six situations are not part of a multifactor analysis and, as stated above, if even one of the situations is present it is not an abuse of discretion to direct a mail-ballot election.
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. The Board further held that a Regional Director who exercises discretion to direct a mail-ballot election when one or more of these situations exists will not have abused that discretion. Id., slip op. at 8.7 See also, id., slip op. at 9 (then-Member McFerran, concurring) (stating “until the pandemic ends, the strong presumption should be that a mail-ballot election is appropriate”); Sysco Central California, Inc., Case 32-RC-272441 fn. 1 (September 28, 2021) (unpublished) (Chairman McFerran stating “a default preference for mail ballots for the duration of the COVID pandemic is warranted”).

Primarily at issue in the instant case is situation 2.8 For Aspirus situation 2, 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.” Id. slip op. at 5 (italics added). For the former, the Aspirus Board did not specifically detail how the 14-day trend in the number of new cases should be evaluated, but it did direct that “the 14-day period should be measured from the date of the Regional Director’s determination, or as close to that date as available data allow” and that county-level data for the potential polling place should be accessed through the “Coronavirus Resource Center” website maintained by Johns Hopkins University. 370 NLRB slip op. at 5, fn. 20 & 22. The Johns

6 For situation 5, the Board has clarified that Regional Directors “should determine whether the Covid-19 cases at the facility would reasonably be expected to affect the conduct of a manual election. Relevant considerations in this regard include whether (1) the number or physical location of such Covid-19 cases, or the likelihood that those cases will result in unit employees being exposed to Covid-19, indicates that a manual election would pose a threat to health or safety; or (2) current Covid-19 cases among unit employees would result in their disenfranchisement by a manual election.” Rush University Medical Center, 370 NLRB No. 115, slip op. at 2 (2021).

7 “A Regional Director’s determination to conduct an election manually or by mail is subject to an abuse-of-discretion standard.” Aspirus, slip op. at 4 (citing Nouveau Elevator Industries, Inc., 326 NLRB 470, 471 (1998); San Diego Gas, 325 NLRB at 1144 fn. 4; National Van Lines, 120 NLRB at 1346).

8 Regarding the other Aspirus situations: the Regional Office has been in a permissive-telework status since mid-June 2020; the Employer’s proposed polling place does not appear to violate any mandatory state or local health orders; the Employer has committed to abide by the protocols in GC Memo 20-10; and, there are no other similarly compelling considerations. Because I find Situation 2 warrants a mail-ballot election, I need not determine whether statements by Employer’s counsel at hearing rather than a certification by affidavit or sworn witness testimony fulfill the Board’s requirements regarding the Covid-19 status of individuals at its West Bloomfield Township facility. Aspirus, 370 NLRB No. 45, slip op. at 7 (“we require that in all cases where a party requests a manual election, the employer shall certify, by affidavit, as part of its submission regarding election arrangements, how many individuals present in the facility within the preceding 14 days have tested positive for Covid-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days”)”). See also Planned Building Services, Inc., Case 02-RD-274535 slip op. at 8 (Aug. 27, 2021) (unpublished) (Member Ring, dissenting) (“the certifications specified in Aspirus, which must be sworn to by affidavit”).

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Hopkins’ data for Oakland County, Michigan, where the Employer’s West Bloomfield Township facility is located, reported on October 7, 2021,\(^9\) indicate the 14-day trend in the number of new confirmed cases has fluctuated from zero on September 23 to 936 on October 6, with daily highs within that range of 700 on September 24, 887 on September 27, 767 on September 29, 937 on October 1, and 890 on October 4, while no cases were reported on the other days.\(^10\) This strongly suggests Johns Hopkins uses only data that is publicly reported by the State of Michigan, which updates its Covid-19 data on Mondays, Wednesdays, and Fridays, rather than zero actual confirmed cases in Oakland County on particular days interspersed with days where hundreds of confirmed cases occurred. However, there is clearly no downward trend.

Regarding the latter, the Board noted that many locales do not report the 14-day testing positivity rate. Rather, experience has shown a 7-day average is more often available from federal, state, county, and municipal health agencies, and the Board has found such metrics to be sufficient. See, for example Stericycle, Inc., Case 04-RC-260851 (February 22, 2021) (unpublished) (denying review of mail-ballot election where 7-day testing positivity rate was 8.01% in county where employer’s facility was located). See also, Sysco Central California, above at fn. 1 (using 7-day percent positive data from CDC’s “COVID-19 Integrated County View” and finding 7-day percent positive in excess of 5% for county where employer’s facility is located “as justifying the direction of a mail-ballot election”).\(^11\)

Although the State of Michigan does not report an average testing positivity rate, it does report the “percent of confirmatory tests that were positive” on a daily basis. As of October 7, the State of Michigan reported the following testing positivity rates in Oakland County for the most recent 14-day period, from September 20 to October 3.\(^12\)

<table>
<thead>
<tr>
<th>Date</th>
<th>Percent Positive</th>
<th>Date</th>
<th>Percent Positive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sep. 22</td>
<td>5.61%</td>
<td>Sep. 29</td>
<td>7.04%</td>
</tr>
<tr>
<td>Sep. 23</td>
<td>6.28%</td>
<td>Sep. 30</td>
<td>6.28%</td>
</tr>
<tr>
<td>Sep. 24</td>
<td>7.00%</td>
<td>Oct. 1</td>
<td>7.11%</td>
</tr>
<tr>
<td>Sep. 25</td>
<td>6.31%</td>
<td>Oct. 2</td>
<td>8.58%</td>
</tr>
</tbody>
</table>

\(^9\) All dates are in 2021 unless otherwise indicated.


\(^12\) “Michigan Data” (Confirmatory Testing tab, sorted for Oakland County, updated Oct. 6). State of Michigan. [https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html) (accessed Oct. 7). I note that State of Michigan updates may slightly revise the data for the most recent three days reported. For example, the daily positivity rates for Sep. 26, 27, and 28 increased from the data reported on September 29 to October 1, specifically from 7.08% to 7.18%, 7.63% to 7.68%, and 7.12% to 7.46%, respectively, while the daily positivity rates for previous days remained the same. Similarly, the data reported on Oct. 3 and Oct. 5 showed an increase in positivity rates for Sep. 29 and Sep. 30—the most recent days reported at that time—from 7.04% to 7.12% and 6.28% to 6.45%, respectively, while the other days remained the same.
Therefore, the 14-day testing positivity rate is clearly above the 5% threshold established by the Board in Aspirus. Moreover, the CDC also reported a 7-day percent positivity of 6.86% for Oakland County from September 29 through October 5.13

Accordingly, I find that a mail-ballot election is warranted due to the testing positivity rate in Oakland County exceeding the Board’s 5% standard for Covid-19.

B. Election Details

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by personnel of the National Labor Relations Board, Region 7, on October 25, 2021, at 4:15 p.m. (ET). 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 by mail and do not receive a ballot in the mail by November 3, 2021, should communicate immediately with the National Labor Relations Board by calling Board Agent Matthew Ritzman at (313) 335-8069, Elections Specialist Callie Clyburn at (313) 335-8049, the Region 7 Office at (313) 226-3200, or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters should return their mail ballots so that they will be received in the National Labor Relations Board, Region 7 Regional Office by the close of business, 4:45 p.m. (ET) on November 22, 2021. All ballots will be commingled and counted at 2:00 p.m. (ET) on November 29, 2021. In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots. The method for the count will be determined by the Acting Regional Director/Regional Director and will require video participation.

C. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending October 6, 2021, 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

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13 “COVID-19 Integrated County View” (sorted for Oakland County, Michigan, updated Oct. 6), CDC. https://covid.cdc.gov/covid-data-tracker/#county-view (accessed Oct. 7). I further note the 7-day percent positivity in Oakland County has increased from the 6.04% that was reported for the 7-day period from Sep. 23 through 29, 6.59% for the 7-day period from Sep. 26 through Oct. 2, and 6.75% for the 7-day period from Sep. 27 through Oct. 3.
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.

D. Voter List

As required by Section 102.67(l) of the Board’s Rules and Regulations, the Employer must provide the Acting Regional Director/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 Acting Regional Director/Regional Director and the parties by October 13, 2021. 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.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing system on the Agency’s website at www.nlrb.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.

E. **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 Acting Regional Director/Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the ground 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.nlrb.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.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. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Acting Regional Director/Regional Director. A certificate of service must be filed with the Board together with the request for review.

Although 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, all ballots will be impounded where a request for review of a pre-election decision and direction of election
is filed within 10 business days after issuance of the decision, if the Board has not already ruled on the request and therefore the issue under review remains unresolved. 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: October 8, 2021

Elizabeth Kerwin, Acting Regional Director
National Labor Relations Board, Region 7
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Detroit, Michigan 48226