SEATTLE ART MUSEUM

Employer

and

SEATTLE ART MUSEUM VISITOR SERVICE OFFICERS UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

Seattle Art Museum (Employer) operates two museums in Seattle, Washington. On March 9, 2022, Seattle Art Museum Visitor Service Officers Union (Petitioner) filed a representation petition seeking to represent approximately 65 employees employed at the museums.

The appropriateness of the petitioned-for bargaining unit is not in dispute, the only issue in this case is the method of election. On April 4, the Employer and Petitioner entered into a stipulated record in lieu of a hearing on this matter. Pursuant to the stipulation, the Employer and Petitioner agreed to submit written statements regarding their position on the method, date, time, and place of the election ordered no later than April 7, 2022. Both parties did so, Petitioner did not state a preference, while the Employer maintains a manual election is mandated by Board precedent and the current realities of the COVID-19 pandemic.

The Board has delegated its authority in this proceeding to me under §3(b) of the Act. Applying the Board's decision in Aspirus Keweenaw, 370 NLRB No. 45 (2020), to the circumstances in the instant case, I am directing a mail ballot election for the reasons addressed below.

I. MOTION TO STRIKE AND RESPONSE

By their stipulation the parties enter into an agreement waiving a hearing and the ability to contest pre-election matters and instead proceed to an election. However, the stipulation carves out the issue of the method of election and allows the parties to submit their positions on this issue, followed by a Decision and Direction of Election consistent with §102.67(b) of the Board’s Rules and Regulations. The stipulation also reserves to the parties the right to request review of that Decision with the Board, again limited to this single issue.

1 All dates 2022 unless otherwise indicated.
Both parties submitted a timely written statement on April 7. Paragraph 13 of the parties’ stipulation addresses that submission, and states in its entirety:

13. Both parties, if they choose to, may e-file on the NLRB’s website a position in writing (herein “written statement(s)”) on the method-of-election issue by the close of business (4:45 p.m. PT) on Thursday, April 7, 2022. The written statement should also be served on the other party by the same deadline. In addition to outlining the party’s position on the appropriateness of a manual or mail ballot election, it will also address the criteria discussed by the Board in Aspirus Keweenaw, 370 NLRB No. 45 (November 9, 2020) and General Counsel Memorandum GC 21-01 “Guidance on Propriety of Mail Ballot Elections, pursuant to Aspirus Keweenaw”. If a party is a proponent of a manual election, the written statement must address how the election would be held in accordance with the factors as discussed in General Counsel Memorandum GC 20-10 “Suggested Manual Election Protocols.” Such proposal will include specifics for how a manual election could be conducted to ensure the safety and health of all participating, including among other things: whether there would be masks, gloves, and hand sanitizer available for all participants.

On April 8, the Employer filed a Motion to Strike Petitioner’s written statement on the basis Petitioner’s submission did not address the method of election issue. On April 9, Petitioner filed a Response to the Employer’s Motion.

By its submission, Petitioner states it, “respectfully defers to the Regional Director’s judgment regarding whether a mail ballot or manual election is more appropriate.” Petitioner then continues, arguably addressing unfair labor practice charges and other election issues that the Board has traditionally reserved for post-election proceedings, either by challenge or objection, if necessary. The Employer seeks to strike the entire written statement from the record because of this extraneous material.

Given the procedural posture of the case and the discretion of the Regional Director in determining the method of election I conclude it is not necessary to strike Petitioner’s written statement in whole or in part. I agree with the Employer that much of Petitioner’s submission goes beyond the method of election question, but Petitioner’s statement does contain a very minimal statement on the method of election, it simply defers to the Regional Director. To the extent Petitioner then continues with assertions or argument that is not relevant to the method of election determination I find it sufficient to simply disregard these portions of the written statement.

Petitioner does raise one additional point in its written submission that is relevant in the pre-election context. Petitioner notes an unfair labor practice charge exists regarding the discharge of former employee Aselya Keyes. Section 11338.1 of the National Labor Relations Board Casehandling Manual Part Two Representation Proceedings (CHM) directs that discharged employees that assert they have been unlawfully terminated may be allowed to vote
subject to challenge, even absent current charges. Further, if the Board Agent conducting the
election knows that such individuals may try to vote, he/she should so inform the employer and
ensure that such individuals are not excluded from the employer's premises and thus the polls.

Here, a charge has been filed over the discharge of Keyes, and she was previously
employed in a classification included in the voting group. As such, consistent with §11338.1,
Petitioner would be free to notify the Board at any point that Keyes is an alleged discriminatee
seeking to vote and Keyes would be allowed to vote subject to challenge. Although raising the
issue in a submission limited to the method of election is perhaps not the best practice, to
disregard Petitioner's point once raised would be placing form over substance. Granting the
motion to strike would not resolve the substantive eligibility question in the Employer's favor,
but simply make Petitioner raise the issue a second time. Seeing no reason this is necessary I
direct that Keyes may vote subject to challenge pursuant to this Decision. Whatever the merits of
the parties' contentions regarding Keyes discharge they will be resolved under the relevant unfair
labor practice and/or post-election procedures.

II.  METHOD OF ELECTION

A. The COVID-19 Pandemic

The COVID-19 pandemic has had a profound impact on daily life in the United States in
the last year. Despite unprecedented efforts to limit transmission, to date approximately 80
million people in the United States have been infected with COVID-19 and almost 1 million
people have died.2

The Centers for Disease Control and Prevention (CDC), has determined “[l]imiting close
face-to-face contact with others is the best way to reduce the spread of coronavirus disease 2019
(COVID-19).”3 According to the CDC, “[a]ttending events and gatherings increases your risk of
getting and spreading COVID-19.”4 Many of the measures recommended by the Federal, state,
and local governments to prevent the spread of the virus are well-known at this point: avoid
crowds, practice good hygiene, maintain at least a 6-foot distance between individuals, and use
masks when around other people.5

Because of the risk of infection associated with gatherings and in-person activities, the
pandemic has also impacted the way the Board conducts its elections. The Board has
traditionally conducted in-person, manual elections and used mail-ballot election in limited
circumstances. In 2020, in Aspirus Keweenaw, the Board addressed the circumstances where the
pandemic may dictate appropriate use of mail-ballot elections. As the pandemic has ebbed and
flowed over the years since Aspirus the result has been an increase in the use of the mail-ballot
procedures. KMS Commercial Painting, LLC, 371 NLRB No. 69, slip op. at 1 (2022) (304 mail

---

(last viewed April 21, 2022).
3 CDC, How to Protect Yourself & Others (updated February 25, 2022) https://www.cdc.gov/coronavirus/2019-
ncov/prevent-getting-sick/social-distancing.html (last viewed April 21, 2022).
4 Ibid.
5 Id.
ballot elections taking place in fiscal year 2022). Mail-ballot procedures have allowed the Board to continue conducting elections even in the face of high COVID-19 transmission rates. As the Board stated in KMS, “during the pandemic, the Board's mail ballot procedures have served the Board's mission of ensuring free and fair elections, while also ensuring the health and safety of employees, parties, and Board personnel throughout the election process.” Id.

**B. Board Standard**

Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.*, 325 NLRB at 1144-45.

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

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors, including this Region’s, directing primarily mail-ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6, 2020, the General Counsel issued a memorandum titled “Suggested Manual Election Protocols,” *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

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

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;

---

6 I note that the provisions of the Casehandling Manual are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;

3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;

4. The employer fails or refuses to commit to abide by GC Memo 20-10, “Suggested Manual Election Protocols;”

5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or

6. Other similarly compelling circumstances.

*Id.* slip op. at 4-7. The existence of one or more of these situations will normally suggest that a mail ballot is appropriate under the “extraordinary circumstances presented by this pandemic.” *Id.* slip op. at 4. The Regional Director has discretion to conduct an election by mail ballot “under the peculiar conditions of each case.” *Id.* slip op. at 3 (citing *National Van Lines*, 120 NLRB at 1346). The Regional Director’s determination to conduct an election manually or by mail is subject to an abuse of discretion standard. *Aspirus*, 370 NLRB No. 45, slip op. at 3 (citing *San Diego Gas & Electric*, 325 NLRB at 1144 n. 4). Finally, in *Aspirus*, the Board noted that a Regional Director who directs a mail-ballot election under one or more of the foregoing six situations will not have abused her or his discretion. *Aspirus*, 370 NLRB No. 45, slip op. at 8.

C. Position of the Parties

By its Responsive Statement of Position Petitioner sought a mail ballot election, although in its written statement Petitioner simply defers to the Regional Director’s judgement, as previously noted. The Employer seeks a manual election with polling times at one location from 7:00-9:00 a.m. and 3:00-5:00 p.m. and at the second location from 7:30-8:30 a.m. and 4:00-5:00 p.m. on a Friday, providing the best opportunity for employees to vote. The Employer confirms its facilities have large board rooms that can safely accommodate the voters, observers, and Board Agent and meet the GC’s strict manual election protocols. The Employer has also provided extensive photographic documentation demonstrating the spaces available for a manual election.

In support of its position the Employer maintains that while conducting manual elections was infeasible due to local, city, and national lockdown measures at the beginning of the pandemic, that time has now passed. Manual elections are no longer infeasible, particularly where, as here, employees are required to perform their work on site. Regarding the *Aspirus* factors, and particularly the second factor, the Employer contends the 14-day positivity rate is below 5 percent in King County, although it does not cite to a source for this contention. It does cite to statistics demonstrating King County is one of the most highly vaccinated counties in the United States. Further, Employer provides links to the King County website describing the current community transmission level as “low,” and a CDC publication cautioning against decision making based only on community transmission data at this stage of the pandemic.
III. DETERMINATION

Several of the Aspirus factors are not relevant to my determination in this case. The Region tasked with conducting the election is not operating under mandatory telework status, mandatory state or local health orders relating to maximum gathering size are not at issue, the Employer has committed to abide by Memorandum GC 20-10, and there is no evidence of a current outbreak at the Employer's facility. The only factor I find requires a detailed analysis is the remaining factor: whether the 14-day trend in number of new confirmed cases in the county where the facility is located is increasing, or the 14-day testing positivity rate is 5 percent or higher.

The Board in Aspirus directed Regional Directors to, in considering these statistical factors, utilize the data published by Johns Hopkins University, or from official state or local government sources. The Board further stated where county level data is not available, Regional Directors should look to state level data.

The first contingency at issue here is whether the 14-day trend in number of new confirmed cases in the county where the facilities are located is increasing. King County publishes COVID-19 data on Monday, Wednesday, and Friday.\(^7\) This reporting frequency is reflected in the data published by Johns Hopkins, with non-reporting days reflecting a “0” as a null value, not an indication of zero cases. As of April 21, the Johns Hopkins University & Medicine Coronavirus Resource Center reports a -13 day case count, the data point closest in time to -14, in King County of 1,342 cases and a -1 day case count of 661 cases, a decrease.\(^8\) However, within this period the number of cases has fluctuated significantly, with a median value of 1,612 cases, higher than either the -13 or -1 day case count. Taken together, no clear increasing or decreasing trend is readily apparent.

Regarding the second contingency, whether the 14-day testing positivity rate in King County is 5 percent or higher, King County reports positivity rate on a 7-day testing positivity rate.\(^9\) As of April 21, King County reports a 7-day average of 10.7 percent for the 7-day period ending on April 12, the most recent reporting date. Seven days prior to April 12, on April 5, the 7-day average was 8.2 percent. Taken together, this data demonstrates the testing positivity rate has been above 5 percent in King County during the most recent 14-day period for which data is available.

Aspirus directs that a mail ballot election may be appropriate where either one of the two contingencies described above are met. Here, the 14-day testing positivity rate in King County is above 5 percent, and I find this is a sufficient basis to order a mail ballot election consistent with Aspirus.

---

\(^7\) https://kingcounty.gov/depts/health/covid-19/data/summary-dashboard.aspx (last viewed April 21, 2022).

\(^8\) https://bao.arcgis.com/covid-19/jhu/county/53033.html (last viewed April 21, 2022).

IV. CONCLUSION

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

1. 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. ¹⁰

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of §9(c)(1) and §§2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of §9(b) of the Act:

INCLUDED: All full-time and regular part-time guards, as defined in the Act, employed by the Employer at the Seattle Art Museum located at 1300 1st Ave., Seattle, Washington and the Seattle Asian Art Museum located at 1400 E. Prospect St., Seattle, Washington, including Gallery Security Officers, Lead Security Officers, Security Dispatchers, and Event Security Officers.

EXCLUDED: All other employees, including casual employees, on-call employees, managerial employees, confidential employees, business office employees, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Seattle Art Museum Visitor Service Officers Union.

A. Election Details

The election will be conducted by mail. On Tuesday, May 10, 2022, the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 19.

¹⁰ The parties stipulated to the following commerce facts:

The Employer a Washington nonprofit corporation with an office and place of business located in Seattle, Washington, is engaged in the business of operating a museum. The Employer derived gross revenues in excess of $1,000,000 and purchased and received at its facility within the State of Washington goods valued in excess of $50,000 directly from suppliers outside the State of Washington. Accordingly, the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the Board. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
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 Tuesday, May 17, 2022, should communicate immediately with the National Labor Relations Board by either calling the Region 19 Office at 206-220-6300 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 19 office by 1:00 p.m. on Tuesday, May 31, 2022. All ballots will be commingled and counted by an agent of Region 19 of the National Labor Relations Board on Tuesday, May 31, 2022, at 1:00 p.m. with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count. If, at a later date, it is determined that a ballot count can be safely held in the Regional Office, the Region will inform the parties with sufficient notice so that they may attend.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately prior to the issuance of this decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board’s designated office.

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

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board’s designated office; (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. The Employer must also include in a separate section of that list the same
information for those individuals who, according to this direction of election, will be permitted to vote subject to challenge.

To be timely filed and served, the list must be received by the regional director and the parties by **Wednesday, April 27, 2022**. 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](http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency’s website at [www.nlrb.gov](http://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.

**D. Posting of Notices of Election**

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

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board’s Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board’s Rules and Regulations.

A request for review must be E-Filed through the Agency’s website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency’s E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board’s granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved; all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Seattle, Washington on the 25th day of April, 2022.

Ronald K. Hooks

RONALD K. HOOKS, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2ND AVE STE 2948
SEATTLE, WA 98174-1006