I. SUMMARY

On May 20, 2022, United Food and Commercial Workers International Union Local 99 (the Petitioner) filed a petition to represent all full-time and regular part-time Store Associates employed by The Healing Healthcare 3, Inc. d/b/a Curaleaf Camelback Dispensary (the Employer) at its facility located in Phoenix, Arizona (the Unit).

A hearing was held before a hearing officer of the National Labor Relations Board (the Board) on June 14. The parties were given the opportunity to present evidence and to state their respective positions on the record at the hearing. The petitioned-for unit is not in dispute. The sole issue which remains in this matter is the method of election. The petition filed by the Petitioner requested the Board conduct a manual election and the Petitioner’s preference is a manual election. The Employer also requests that the Board conduct a manual election. The Employer filed a post-hearing brief.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the National Labor Relations Act (the Act). Having carefully considered all evidence and arguments presented by the parties and applying the Board’s decision in Aspirus Keweenaw, 370 NLRB No. 45 (2020), I have determined that a mail ballot election is appropriate under the current circumstances, and I am therefore, directing a mail ballot election to commence on the earliest practicable date as described below.

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1 All dates are in 2022 unless indicated otherwise.
2 Excluded from the Unit are all other employees, office clerical, professional employees, Store Associate Leads, inventory leads, inventory lead specialists, managers, guards, and supervisors as defined in the Act.
3 The parties stipulated to the appropriate unit in Board Exhibit 2.
4 See testimony by Petitioner’s attorney, Richard Treadwell, on Page 11, Lines 15-17, of the Hearing Transcript.
II. THE EMPLOYER’S OPERATIONS

The Employer operates a cannabis-related dispensary in Phoenix, Arizona, which provides adult recreational use and medical marijuana products for its patients and customers. Approximately 53 employees work at the Employer’s Camelback location. The Employer does not require employees to be vaccinated against COVID-19. The Employer does not require its employees to disclose their vaccination status, but 32 out of the 53 have disclosed that they are vaccinated against COVID-19. As of June 14, the Employer does not require employees or customers to wear masks at its facility.

III. THE COVID-19 PANDEMIC

The COVID-19 pandemic has had a profound impact on daily life in the United States over the past 27 months. Despite significant efforts to limit transmission, over 86 million people in the United States have been infected with COVID-19 and over one-million people have died. Despite the advent of vaccinations against the COVID-19 virus, only 66.8% of the United States population are fully vaccinated. The CDC recommends that everyone who is eligible stay up to date on their COVID-19 vaccines, everyone ages two-years and older should wear a well-fitting mask indoors in public areas where the COVID-19 community level is high regardless of vaccination status, and that those not up to date on their COVID-19 vaccines should stay at least six-feet away from other people while indoors in public spaces.

IV. RELEVANT LEGAL PRECEDENT

Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to ensure that fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangement for an election to Regional Directors. San Diego Gas & Electric, 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 & Electric, 325 NLRB at 1144-45.

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5 Hearing Transcript, Page 14, Lines 21-23.
6 Hearing Transcript, Page 31, Lines 9-12.
7 Hearing Transcript, Page 31, Lines 13-16.
8 Hearing Transcript, Pages 31-32.
9 Hearing Transcript, Pages 32-34.
The Board’s longstanding policy is that representation elections should be conducted manually, either at the employees’ workplace or some other appropriate location. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). Thus, the applicable presumption favors a manual, not mail ballot, election. *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998). However, in *San Diego Gas & Electric*, the Board also recognized that “extraordinary circumstances” would permit the Regional Director to exercise discretion and order a mail ballot election outside of those well-settled guidelines. 325 NLRB 1143, 1145 (1998). The Board identified a few specific extraordinary circumstances, which included where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *Id* at 1145. The Board imbues the Regional Director with discretion to adapt the method of election to the “peculiar circumstances” of each case. *National Van Lines*, 120 NLRB 1343, 1346 (1958).

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors, including me, directing primarily mail-ballot elections considering the extraordinary circumstances presented by the COVID-19 pandemic. On July 6, 2020, the General Counsel issued *Memorandum GC 20-10* to assist Regional Directors in determining when a manual election could be conducted safely. GC 20-10 includes a number of certifications required of the Employer in order to ensure a safe environment for a manual election. These include cleaning in conformity with CDC standards and certifying the number of individuals present in the facility within the preceding 14 days who have either tested positive for COVID-19, are awaiting results of a COVID-19 test, are exhibiting symptoms of COVID-19, or have had contact with anyone in the previous 14 days who has tested positive for COVID-19, among other certifications. The memorandum further states where such certifications are not timely provided the Regional Director has the discretion to cancel the election.

Considering the COVID-19 pandemic and to further define the “extraordinary circumstances” standard which a Regional Director should use to determine the appropriate election method, the Board set forth six guidelines that “will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at *6 (2020). In determining the appropriate method of election, the Board directed Regional Directors to consider whether any of the following situations exist:

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. at *7-11. 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. at *4. The Regional Director’s determination to conduct an election manually or by mail is subject to an abuse of discretion standard. Id. at *3 (citing San Diego Gas & Electric, 325 NLRB at 1144 n. 4). Finally, in Aspirus Keweenaw, 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. Id. at *8.

V. ANALYSIS

A. First Factor: Agency Office Mandatory Telework Status

Region 28 of the Board is not currently operating under mandatory telework status. Therefore, this factor does not suggest that a mail ballot election is more appropriate.

B. Second Factor: Trend in Number of New Cases in County

Regarding the second consideration – whether the 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% or higher – Regional Directors are empowered to use data from state, local, and federal governments, as well as other credible COVID-19 data gathering entities. Aspirus Keweenaw, at *8 and fn. 24, 25; see, e.g., Hearthside Food Solutions, LLC, 2020 WL 7056105 at *1, fn. 1 (2020) (relying on Johns Hopkins University data) (not reported in Board volumes). The Employer’s Camelback facility is in the city of Phoenix, in Maricopa County, Arizona. Therefore, evaluating the data as it pertains to Maricopa County most accurately captures the COVID-19 conditions pertinent to the Employer’s facility.

According to the Centers for Disease Control and Prevention (CDC), Maricopa County experienced a 10.95% increase in the number of new confirmed cases from June 13 to June 20.13 Similarly, the current percent positivity rate in Maricopa County is 26.26% and the positivity rate has remained greater than 20% over the 14-day period ending June 18.14 Moreover, the percent

14 Id. – Testing in Maricopa County, Arizona (updated June 18, 2022).
positivity rate in zip code 85014, where the Employer’s facility is located, is currently at 43.48%. Therefore, I find that the available data shows the trend in the number of new confirmed cases of COVID-19 in Maricopa County, Arizona, is increasing and the 14-day testing positivity rate in the county is higher than 5%.

The Employer raises several arguments in its post-hearing brief. The Employer argues that “positivity rates are now artificially inflated as a result of the underreporting of negative tests,” and therefore, COVID-19 Community Levels are the more appropriate measure for the Regional Director to evaluate. I am not persuaded by this argument. The Board made a conscious and calculated decision to have Regional Directors consider the testing positivity rate and set the rate at 5%. In this matter, the testing positivity rate in Maricopa County is more than five times the Board’s threshold at 26.26% and the positivity rate in the Employer’s zip code is more than eight times the Board’s threshold at 43.48%. Even assuming the current positivity rate data is artificially inflated, these numbers are significant and should not be ignored. In addition, I note that this alarming surge in the percent positivity rate and the generally increasing trend in percent positivity rate make it likely that Maricopa County will continue to exceed the 5% threshold within the coming weeks. Furthermore, I have reviewed and considered the COVID-19 Community Levels in my decision. Maricopa County currently has a medium level. Although this is better than having a high level, medium is still an elevated level from low and shows that Maricopa County is experiencing an increase in COVID-19 cases. This, along with the high positivity rates discussed above and the general increase in COVID-19 cases in the county, were all considered in my decision.

The Employer also argues that almost 60% of its workforce is vaccinated and it is unlikely that Maricopa County’s high positivity rates would impact the employees gathering for an election. Again, I am not persuaded by this argument. Although a 60% vaccination rate is the majority of the employees, this still leaves 40% that are not vaccinated, which is significant. The CDC currently recommends “COVID-19 primary series vaccines for everyone 6 months and older, and COVID-19 boosters for everyone 5 years and older, if eligible.” In addition, my concern is not only the safety of the employees but that of all the parties including observers, union representatives, the parties’ counsel, and my Board Agents. Furthermore, the record does not show if any of the employees or other parties involved are in a vulnerable population or otherwise have an increased risk related to COVID-19.

18 Employer’s Post-Hearing Brief, Page 8.
Finally, the Employer points out that the Board in *Aspirus Keweenaw* does not require a Regional Director to conduct a mail-ballot election if one of the six situations is present.\(^{20}\) Although true, the Board did authorize its Regional Directors to use their discretion based on the extraordinary circumstances that the pandemic has created. Neither party has provided any compelling evidence or arguments which show that the election results or voter participation would be different and/or improved with a manual election. Consequently, based on the current COVID-19 conditions in Maricopa County discussed above and the record in this matter, I find that a mail-ballot election is appropriate under the circumstances, and I choose to exercise my discretion for the health and safety of all parties involved by directing a mail-ballot election.

C. Third Factor: Election Site Established to Avoid Violating Health Orders

Neither the State of Arizona nor Maricopa County have any current COVID-19 related bar closures, gathering bans, general closures, mask mandates, restaurant closures, or stay at home orders in place.\(^ {21}\) The Employer’s proposed voting location outside its Camelback facility appears to provide sufficient space for voters to be separated by at least six-feet and allows voters to enter from one side and exit from a different side.\(^ {22}\) Therefore, this factor does not suggest that a mail ballot election is more appropriate.

D. Fourth Factor: Employer Commits to Abide by GC Memo 20-10 Protocols

The Employer’s District Manager, Ryan Gonsalves (Gonsalves), testified that the Employer is able and willing to comply with the requirements contained in Memorandum GC 20-10.\(^ {23}\) Therefore, this factor does not suggest that a mail ballot election is more appropriate.

E. Fifth Factor: Current COVID-19 Outbreak at the Employer’s Facility

Gonsalves testified that two of the approximately 53 employees at the Camelback location have tested positive for COVID-19 in the past 90 days, and one of those was within the past two-weeks.\(^ {24}\) Gonsalves also stated that the employee who tested positive within the past two-weeks has returned to work.\(^ {25}\) The evidence does not suggest a current outbreak at the Employer’s facility. Therefore, this factor does not suggest that a mail ballot election is more appropriate.

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\(^{20}\) Employer’s Post-Hearing Brief, Page 5.


\(^{22}\) See Employer’s Exhibit 1 and Hearing Transcript, Pages 23, 34-37.

\(^{23}\) Hearing Transcript, Page 20, Lines 15-23.

\(^{24}\) Id. at Pages 14-15.

\(^{25}\) Id. at Page 15, Lines 17-19.
F. Sixth Factor: Other Compelling Consideration

None of the parties involved have provided evidence or arguments suggesting that other compelling factors exist in this matter. Therefore, this factor does not suggest that a mail ballot election is more appropriate.

G. Determination

After careful examination of the record, the parties’ respective positions, and the current state of the COVID-19 virus in Maricopa County, Arizona, I find that the COVID-19 pandemic presents an extraordinary circumstance that makes conducting a mail ballot election the most responsible and appropriate method to determine the unit employees’ union representation preferences at this time. In reaching this conclusion, I have relied upon the second Aspirus Keweenaw factor. Although I have determined that the other five factors would not preclude a manual election, the Board stated that “if one or more of these situations is present, that would normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” Aspirus Keweenaw, 370 NLRB No. 45, slip op. at *4 (2020).

VI. CONCLUSION

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

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.26

3. The Employer is engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.27

4. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein; there is no history of collective bargaining involving the unit employees; and there is no contract bar or other bar to an election in this matter.28

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26 The parties stipulated to Petitioner’s status in Board Exhibit 2.
27 The parties stipulated to the following commerce facts in Board Exhibit 2: The Employer, The Healing Healthcare 3, Inc. d/b/a Curaleaf Camelback Dispensary, an Arizona corporation with an office and place of business located in Phoenix, Arizona, is engaged in the business of operating a cannabis-related dispensary providing adult use and medical marijuana products for its patients and customers. During the 12-month period ending May 20, 2022, a representative period, the Employer, in conducting its business operations described above, derived gross revenues in excess of $500,000. During the same period of time, the Employer purchased and received at its Phoenix, Arizona, facility goods valued in excess of $50,000 directly from points outside the State of Arizona.
28 The parties stipulated to this in Board Exhibit 2.
5. The following unit is an appropriate unit within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time Store Associates employed by the Employer at its facility located in Phoenix, Arizona.

**Excluded:** All other employees, office clerical, professional employees, Store Associate Leads, inventory leads, inventory lead specialists, managers, guards, and supervisors as defined in the Act.  

**VII. 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 **UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LCOAL 99.**

**A. Election Details**

I have determined that a mail ballot election will be held. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **2:00 p.m. (Pacific Time Zone) on July 7, 2022,** ballots will be mailed to voters from the National Labor Relations Board, Region 28. 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 **July 14, 2022,** should communicate immediately with the National Labor Relations Board by either calling the Region 28 Office at (602) 640-2160 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 28 Office by close of business (4:45 p.m.) on **July 28, 2022.** All ballots will be commingled and counted by an agent of Region 28 of the National Labor Relations Board. The mail ballots will be counted by videoconference at a date and time to be determined by the Regional Director in consultation with the parties. Each party may have one representative attend the count by videoconference. A meeting invitation for the videoconference will be sent to counsel for the parties prior to the count. No party may make a video or audio recording or save any image of the count. In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

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29 The parties stipulated to the appropriate unit in Board Exhibit 2.
B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **June 24, 2022**, 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 if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, 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.

To be timely filed and served, the list must be received by the Regional Director and the parties by **June 30, 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.
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. 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 Phoenix, Arizona this 28th day of June, 2022.

/s/ Cornele A. Overstreet
Cornele A. Overstreet, Regional Director