

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

**WILLIAM BEAUMONT HOSPITAL**

**Respondent**

**and**

**MICHIGAN NURSES ASSOCIATION**

**Charging Party**

**NLRB Case No. 07-CA-244615**

**RESPONDENT'S REQUEST TO THE NATIONAL LABOR RELATIONS BOARD  
FOR SPECIAL PERMISSION TO APPEAL AN ORDER OF AN ADMINISTRATIVE  
LAW JUDGE DENYING RESPONDENT'S MOTION FOR IN-PERSON HEARING**

Pursuant to Section 102.26 of the NLRB's Rules and Regulations, Respondent William Beaumont Hospital hereby seeks special permission to appeal from the Order of The Honorable Arthur J. Amchan, Deputy Chief Administrative Law Judge, denying Respondent's Motion that the Hearing in this case scheduled to begin on August 31, 2020 be held in-person and not by videoconference. Respondent's Special Appeal is attached as **Exhibit 1**. A copy of Judge Amchan's Order that is the subject of this Special Appeal is attached as **Exhibit 2**. A copy of Respondent's Motion for In-Person Hearing is attached as **Exhibit 3**.

As more fully articulated in Respondent's accompanying Special Appeal, this case involves a substantial number of witnesses many of whom are expected to give conflicting testimony the resolution of which will hinge on credibility determinations. It is Respondent's understanding that the Division of Judges has previously determined in similar cases involving significant disputed issues of fact that will require the ALJ to make numerous witness credibility determinations, that it is not appropriate for such

hearings to be conducted via videoconference, but rather, they should be held in-person.

Judge Amchan's July 20, 2020 Order denying Respondent's Motion for In-Person Hearing relies on inapposite precedent concerning *preelection* hearings in R cases, not complex unfair labor practice proceedings like the instant case. Judge Amchan's ruling strips Respondent of fundamental rights afforded to it under the Board's Rules and Regulations for such proceedings and disregards the *minimum* safeguards that those Rules and Regulations impose on videoconference testimony. Indeed, a videoconference hearing that complies with these minimum safeguards will prolong and further complicate an already complex matter.

For these reasons, the Board should grant Respondent's request for special permission to appeal, reverse the ruling of Judge Amchan, and Order that the hearing in this case be conducted in-person.

Dated: July 23, 2020

/s/ Jonathan E. Kaplan  
Jonathan E. Kaplan

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## CERTIFICATE OF SERVICE

The undersigned certifies that on July 23, 2020, the foregoing document was filed via electronic filing with:

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# ***Exhibit 1***

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

**WILLIAM BEAUMONT HOSPITAL**

**Respondent**

**and**

**MICHIGAN NURSES ASSOCIATION**

**Charging Party**

**NLRB Case No. 07-CA-244615**

**RESPONDENT'S SPECIAL APPEAL OF ORDER  
DENYING RESPONDENT'S MOTION FOR IN-PERSON HEARING**

Pursuant to Section 102.26 of the NLRB's Rules and Regulations, Respondent appeals from an Order of The Honorable Arthur J. Amchan, Deputy Chief Administrative Law Judge, denying Respondent's Motion that the Hearing in this case scheduled to begin on August 31, 2020 be held in-person and not by videoconference. Judge Amchan's July 20, 2020 Order denying Respondent's Motion is contrary to law, as it relies on inapposite precedent and strips Respondent of fundamental procedural due process rights afford to it under the Board's Rules and Regulations.

**FACTS**

On January 31, 2020, the Region issued its Complaint and Notice of Hearing in this case. The Complaint includes a total of 36 separate allegations involving a myriad of facts, numerous unidentified employees, at least 15 identified management officials of Respondent, and one alleged agent of Respondent. There also are likely to be numerous documentary exhibits. The Complaint and Notice of Hearing scheduled the Hearing to begin on at 11:00 a.m. April 13, 2020 in-person "at the Patrick V. McNamara Federal Building, 477 Michigan Avenue, 5th Floor, Room 05-200, Detroit, Michigan." At

no time did the Region indicate, or Respondent believe, that the Hearing was to be held via videoconference.

On February 20, 2020, the Region issued an Order rescheduling the Hearing to May 11, 2020 upon request of Respondent's counsel Jonathan Kaplan, who was not available the week of April 13, 2020 due to a religious holiday. Again, the Hearing was scheduled to proceed in-person "at the Patrick V. McNamara Federal Building, 477 Michigan Avenue, 5th Floor, Room 05-200, Detroit, Michigan." At no time did the Region indicate, or Respondent believe, that the rescheduled Hearing was to be held via videoconference.

On April 15, 2020, the Region issued an Order rescheduling the Hearing to August 31, 2020 upon Joint Motion of the Parties due to the coronavirus pandemic. Respondent believed that the August 31, 2020 Hearing would be held in-person, and the Region's April 15, 2020 Order does not state otherwise. In fact, the Order again specifically states that the Hearing will take place "at the Patrick V. McNamara Federal Building, 477 Michigan Avenue, 5th Floor, Room 05-200, Detroit, Michigan." At no time did the Region indicate that the August 31, 2020 Hearing would not proceed in person.<sup>1</sup>

On May 15, 2020, the Board's Division of Judges issued a press release stating, "it will resume holding hearings on unfair labor practice complaints effective June 1, 2020." Respondent recently was informed by the Region that the August 31, 2020 Hearing is in fact scheduled to be a videoconference hearing and not an in-person hearing. Accordingly, on July 16, 2020 Respondent filed its Motion for In-Person Hearing with the Division of Judges.

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<sup>1</sup> In fact, Notices of Hearing that contemplate a Hearing by videoconference explicitly state: "a hearing will be conducted virtually, on a platform (such as Zoom, Skype, WebEx, etc.), before an administrative law judge of the National Labor Relations Board."

Many, if not most, of the 36 allegations in the Complaint to be litigated in this case involve numerous disputed facts that will likely result in conflicting witness testimony between many of the 15 plus management officials of Respondent named in the Complaint and numerous employee witnesses, the exact number being known to Counsel for the General Counsel and/or Charging Party. As such, the resolution of many, if not most, of the Complaint allegations will likely turn on numerous credibility determinations the ALJ will be required to make to resolve conflicting witness testimony. It is Respondent's understanding that the Division of Judges has previously determined in similar cases involving significant disputed issues of fact that will require the ALJ to make numerous witness credibility determinations, that it is not appropriate for such hearings to be conducted via videoconference, but rather, they should be held in-person.

### **ARGUMENT**

Section 102.38 of the Board's Rules and Regulations provides that "[A]ny party has the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence ... (emphasis added). While Section 102.35(c) establishes a procedure for applications to obtain testimony by videoconference for a particular witness upon a showing of good cause based on compelling circumstances, and under appropriate safeguards, that provision does not abrogate a Party's absolute right to an in-person Hearing under Section 102.38.

Moreover, where the videoconference testimony of a particular witness is considered under Section 102.35(c), Section 102.35(c)(2) sets forth a series of "minimum" safeguards to which videoconference testimony "must" adhere to ensure that

the Administrative Law Judge can properly evaluate the witness' credibility and the Parties have a meaningful opportunity to examine and cross-examine the witness, one of which includes "measures to ensure that representatives of the parties have the opportunity to be present at the remote location" from where the witness is testifying. Compliance with this minimum safeguard would be impossible here, where the very impetus for videoconference testimony is to avoid having various individuals present at the same location due to the on-going pandemic. Consequently, a Hearing composed entirely of videoconference testimony would seriously compromise both the ability of the ALJ to make numerous credibility determinations as well as Respondent's right to examine and cross examine witnesses.

In denying Respondent's right to an in-person hearing, Judge Amchan erroneously relied on *Morrison Healthcare*, 369 NLRB No. 76 (2020) for the proposition that "[t]he current Coronavirus (COVID-19) pandemic constitutes 'compelling circumstances' warranting a remote hearing via video technology." However, as the Board explained, the issue in *Morrison Healthcare* was "whether the Regional Director erred in scheduling a *telephonic preelection hearing*." *Id.*, slip op. at 1. The Board held that "Regional Directors shall not direct telephonic hearings when witness testimony will be taken," but "may, however, conduct videoconference hearings in representation cases." *Id.* slip op. at 2. Nothing in *Morrison Healthcare* involved the present situation – a complex *unfair labor practice hearing* involving significant disputed facts and the testimony of dozens of witnesses, many of whom are likely to present conflicting testimony that will require the ALJ to make numerous witness credibility determinations.

As an initial matter, the Board decided *Morrison Healthcare* at a time when, due to “the current Coronavirus (COVID-19) pandemic,” the Board was not conducting in-person Hearings. That is no longer the case. Indeed, contrary to Judge Amchan’s assertion that “[t]here is no evidence that it will be safe to conduct an in-person hearing at any time in the foreseeable future,” the Division of Judges’ May 15, 2020 press release – which issued after the *Morrison Healthcare* decision – expressly contemplates in-person hearings. The Board currently is conducting numerous manual on site elections and there are no compelling reasons why in-person hearings also cannot be held. Accordingly, the “compelling circumstances” for ordering videoconference testimony in *Morrison Healthcare* are not present here.

More importantly, there are significant and compelling distinctions between holding videoconference hearings in representation cases like *Morrison Healthcare* and those in unfair labor practice cases. Unlike hearings in unfair labor practice cases, hearings in Representation cases are “investigatory ... and nonadversarial.” NLRB Casehandling Manual, Part 2 §11181. In representation cases “[I]nformation is introduced into the record as it is in C case hearings, but, unlike those hearings, the rules of evidence prevailing in courts of law and equity are not controlling.” *Id.* at §11216. Indeed, in R case proceedings the hearing officer is specifically precluded from making any credibility determinations or “any recommendations or participate in any phase of the decisional process.” *Id.* at §11185; Hearing Officer’s Guide, p. 26. At the conclusion of the representation hearing, “[t]he Hearing Officer may submit an analysis of the record to the Regional Director but shall make no recommendations.” NLRB Rules and Regulations §102.66(i).

Respondent submits that there is no justifiable basis in this case for departing from the “minimum” safeguards for video testimony in Section 102.35(c)(2). Complying with those safeguards would necessarily entail the parties’ representatives shuttling from one remote location to another for the testimony of each witnesses. Even without these minimum safeguards, contrary to Judge Amchan’s speculation, a virtual hearing involving the coordination of dozens of remote witnesses – some of whom may not even have devices permitting remote video testimony – will necessarily take longer than an in-person hearing where all available witnesses are on site and can be called to testify immediately upon the conclusion of a prior witnesses testimony without regard for connection issues or other technical glitches.

Indeed, Respondent does not believe a Hearing via videoconference is feasible in this case due to the number and complexity of the factual issues to be litigated, including significant disputed facts and the testimony of dozens of witnesses, many of whom are likely to present conflicting testimony that will require the ALJ to make numerous witness credibility determinations. Witness examination via videoconference is unquestionably a far inferior method of obtaining testimony. The Board has looked to Federal Rule of Civil Procedure 43 for guidance on the use of video testimony. The Advisory Committee Notes on the 1996 amendments to Rule 43 emphasize there are compelling reasons why in person testimony is preferred: “The importance of presenting live testimony in court cannot be forgotten. *The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling.* The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.” (emphasis added).

Finally, contrary to Judge Amchan's assertion, Respondent is not requesting the Hearing be delayed and is prepared to proceed in-person on August 31, 2020. A delay of that hearing would only be necessary in the event the Region, for reasons it has not articulated, is unable to proceed with an in-person hearing on August 31, 2020.

In sum, conducting a lengthy videoconference Hearing in this case will significantly prejudice Respondent's ability to present witnesses and documentary evidence and effectively cross-examine witnesses, and will seriously impair the ALJ's ability to make numerous witness credibility determinations that will be required in this case. As such, this would improperly deny Respondent's procedural due process rights under the Board's Rules and Regulations and the U.S. Constitution.

### **CONCLUSION**

Respondent respectfully requests that the Board grant Respondent's request for Special Permission to Appeal, reverse Judge Amchan's Order denying Respondent's right to an In-Person Hearing, and Order the Hearing in this case be held in-person and not by videoconference. In the event the Region is not able to hold an in-person Hearing on August 31, 2020, Respondent requests that the Hearing be continued to a date when it can be conducted in-person.

Dated: July 23, 2020

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Attorney for Respondent

## CERTIFICATE OF SERVICE

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Jonathan E. Kaplan

Attorney for Respondent

## ***Exhibit 2***

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**BEAUMONT ROYAL OAK**

**and**

**Case No. 07-CA-244615**

**MICHIGAN NURSES ASSOCIATION**

**ORDER DENYING RESPONDENT'S MOTION FOR AN IN-PERSON HEARING OR  
POSTPONEMENT OF THE HEARING**

On January 31, 2020, the General Counsel issued a complaint and notice of hearing in this matter. The hearing was originally scheduled for April 13, 2020, then rescheduled for May 11. It was later postponed due to the outbreak of the Coronavirus pandemic and rescheduled for August 31, 2020. Recently, the General Counsel informed Respondent that the August 31, 2020 hearing is to be conducted remotely via video conference.

The complaint alleges Respondent made various statements in violation of Section 8(a)(1) of the Act, maintained illegal policies in violation of Section 8(a)(1) of the Act, and discriminatorily changed job duties for one employee and discriminatorily disciplined another employee in violation of Section 8(a)(3) and (1) of the Act. The alleged violations occurred during an organizing drive by the Charging Party.

On July 16, 2020, Respondent filed a motion requesting that the hearing be held in-person and not by video conference. Alternatively, Respondent moves that if an in-person hearing cannot be held on August 31, that the matter be continued until such time as the hearing can be conducted in-person. On July 17, 2020, the General Counsel filed an opposition to this motion.

**I deny Respondent's motion and order that the hearing be held as scheduled on August 31, 2020 remotely by video technology (Zoom or another comparable platform).**

The current Coronavirus (COVID-19) pandemic constitutes "compelling circumstances" warranting a remote hearing via video technology. See, *Morrison Healthcare*, 369 NLRB No. 76 (2020). Recent advances in video technology are such that a remote hearing by video can be conducted without sacrificing either fairness or due process, and Respondent has failed to articulate any relevant, material deficiencies with current video technology in its motion.

There is no evidence that it will be safe to conduct an in-person hearing at any time in the foreseeable future. Moreover, such a determination may depend upon a host of subjective factors, such as the risk tolerance and individual health concerns of all the individuals who may be involved in the proceeding, including witnesses, attorneys, the judge, and the court reporter. Relevant individual risk factors would include considerations such as age and other factors that might compromise an individual's immune system.

Not only might an in-person hearing potentially expose a participant to COVID-19, it might expose the families of participants to an increased risk of infection by the virus.


In sum, requiring the hearing to proceed remotely via video testimony is far more consistent with fairness and due process than postponing the hearing to the uncertain date in the future when an in-person hearing can be conducted safely.

I would also note that this does not appear to be a document heavy case. Most of the allegations appear to be matters of credibility which can be determined as easily using the current video technology as in an in-person hearing. Moreover, it does not appear that use of video technology should cause this trial to be materially lengthened.

Respondent's reliance on the Board's Rules of Procedure at 102.35 (c) is misplaced. That regulation did not contemplate the unprecedented pandemic situation that exists now and into the foreseeable future. Neither the Act nor the Board's regulations are consistent with leaving unfair labor practice charges unresolved indefinitely. Section 10(b) of the Act, by implication, is inconsistent with long, unnecessary and indefinite delays in this regard. The Board in *Morrison Healthcare* at footnote 2 stated that the safeguards in Section 102.35(c) may not apply in all respects to a hearing conducted entirely via video conference. It left it to the hearing officer in the first instance to impose appropriate safeguards, informed but not controlled by those listed in Section 102.35(c)(2) during these extraordinary circumstances. I reach the same conclusion with regard to the instant case.

**Therefore, I order that the hearing will be conducted as scheduled by video conference technology on August 31, 2020. The trial judge shall impose appropriate safeguards, informed by, but not controlled by those listed in Sec. 102.35(c)(2).**

Dated: July 20, 2020  
Washington, D.C.

A handwritten signature in black ink that reads "Arthur J. Amchan". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

---

Arthur J. Amchan  
Deputy Chief Administrative Law Judge

## ***Exhibit 3***

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 7**

**WILLIAM BEAUMONT HOSPITAL**

**Respondent**

**and**

**MICHIGAN NURSES ASSOCIATION**

**Charging Party**

**NLRB Case No. 7-CA-244615**

**RESPONDENT'S MOTION FOR IN-PERSON HEARING**

Pursuant to Section 102.31 of the NLRB's Rules and Regulations, Respondent moves that the Hearing in this case scheduled to begin on August 31, 2020 be held in-person and not by videoconference. In the event an in-person Hearing is not able to be held on August 31, 2020, Respondent requests that the Hearing be continued to a date when it can be conducted in-person. In support of this Motion, Respondent would show the following:

1. On January 31, 2020, the Region issued its Complaint and Notice of Hearing in this case scheduling the Hearing to begin on April 13, 2020.
2. On February 20, 2020, the Region issued an Order rescheduling the Hearing to May 11, 2020 upon request of Respondent's counsel Jonathan Kaplan, who was not available the week of April 13, 2020 due to a religious holiday.
3. On April 15, 2020, the Region issued an Order rescheduling the Hearing to August 31, 2020 upon Joint Motion of the Parties due to the coronavirus pandemic.
4. Respondent believed that the August 31, 2020 Hearing would be held in-person, and the Region's April 15, 2020 Order does not state otherwise. However,

Respondent recently was informed by the Region that the August 31, 2020 Hearing is in fact scheduled to be a videoconference hearing and not an in-person hearing.

5. Respondent does not believe a Hearing via videoconference is feasible in this case due to the number and complexity of the factual issues to be litigated. The Complaint includes a total of 36 separate allegations involving a myriad of facts, numerous unidentified employees, and at least 15 identified management officials and one alleged agent of Respondent. There also are likely to be numerous documentary exhibits. Respondent estimates that an in-person Hearing in this case will likely take at two weeks or longer to complete.

6. Section 102.38 of the Board's Rules and Regulations provides that "[A]ny party has ***the right to appear at the hearing in person***, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence ... (emphasis added). While Section 102.35(c) establishes a procedure for applications to obtain testimony by videoconference for a particular witness upon a showing of good cause based on compelling circumstances, and under appropriate safeguards, that provision does not abrogate a Party's absolute right to an in-person Hearing under Section 102.38.

7. Further, where the videoconference testimony of a particular witness is considered under Section 102.35(c), Section 102.35(c)(2) sets forth a series of minimum safeguards to ensure the Parties have a meaningful opportunity to examine and cross-examine the witness, one of which includes "measures to ensure that representatives of the parties have the opportunity to be present at the remote location" from where the witness is testifying.

8. Witness examination via videoconference is unquestionably a far inferior method of obtaining testimony. The Board has looked to Federal Rule of Civil Procedure 43 for guidance on the use of video testimony. The Advisory Committee Notes on the 1996 amendments to Rule 43 emphasize there are compelling reasons why in person testimony is preferred: “The importance of presenting live testimony in court cannot be forgotten. *The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth telling.* The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.” (emphasis added).

9. In sum, conducting a lengthy videoconference ULP Hearing in this case will significantly prejudice Respondent’s ability to present witnesses and documentary evidence and to effectively cross-examine witnesses, and would be an improper denial of Respondent’s procedural due process rights under the U.S. Constitution.

WHEREFORE, Respondent respectfully requests that the Hearing in this case scheduled to begin on August 31, 2020 be held in-person and not by videoconference. In the event an in-person Hearing is not able to be held on August 31, 2020, Respondent requests that the Hearing be continued to a date when it can be conducted in-person.

Dated: July 16, 2020

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## CERTIFICATE OF SERVICE

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