

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

ASPIRUS KEWEENAW

Employer,

Case No. 18-RC-263185

and

MICHIGAN NURSES ASSOCIATION

Petitioner

REQUEST FOR BOARD REVIEW OF REGIONAL DIRECTOR'S ORDER FOR MAIL-BALLOT ELECTION

NOW COMES the Respondent, Aspirus Keweenaw Hospital (“Aspirus”), by its attorneys, Michael Best & Friedrich LLP, pursuant to Section 102.67 of the National Labor Relation Board’s (“NLRB” or “Board”) Rules and Regulations, and respectfully submits this Request for Review of the Regional Director’s Decision and Direction of a Mail-Ballot Election, dated August 17, 2020 (Exhibit 1 or “Order”), currently scheduled to begin on August 24, 2020 at 4:30 p.m. (“Election”).

Please note Aspirus is concurrently filing an Emergency Motion to Stay the Election with supporting facts and legal arguments contained herein.

INTRODUCTION

The Board should grant Aspirus’ Request for Review because the Regional Director of Region 18, Jennifer A. Hadsall, abused her discretion in ordering a mail-ballot election in this matter. The factual record belies Ms. Hadsall baseless concerns about the threat of COVID-19 in Houghton County, Michigan—the location of the acute care hospital where both the Union and the Employer proposed to conduct a traditional in-person, manual election on behalf of the RNs. The Order also contains inaccurate analysis of Michigan Governor Gretchen Whitmore’s most recent executive orders, which confirm Houghton County, Michigan and the wider Upper Peninsula are the safest regions in Michigan with respect to the number of confirmed COVID-19 cases, transmission rates, and positivity rates. (Exhibit 1).

Finally, the Order contains illogical reasoning pertaining to the threat of COVID-19 to the Board Agent who, with no teleworking requirement, would be responsible for overseeing the manual election at the hospital. In short, the Order's "evidence" is clear that a Minneapolis-based Regional Director is applying her densely populated urban lens of her environs to a low density, very low COVID rate of positivity region of the country. To compound this error in thinking, the Regional Director applies her lens literally to a polling place that offers "laboratory conditions" within an acute care hospital where the voter RNs have reported to work daily without incident since the start of the pandemic.

Aspirus now respectfully requests the Board to grant its Request for Review on the following compelling grounds pursuant to Section 102.67(d)(1)-(4) of the Board's Rules and Regulations:

1. There are compelling reasons to grant review of the Regional Director's Order, and grant Aspirus' concurrently filed Emergency Motion to Stay, because this case presents the ideal "appropriate proceeding" to address the Board's policy of holding manual election during the COVID-19 pandemic. *Pace Southeast Michigan*, 2020 NLRB LEXIS 418, * 1 fn. 1 (Aug. 7, 2020) (unpublished).
2. The Order raises a substantial question of law because it embodies an unreasoned departure from the Board's strong preference for in-person, manual elections over mail-ballot elections;
3. The Regional Director's Order is clearly erroneous on various substantial factual issues related to the threat of COVID-19 in Houghton County, Michigan and, therefore, prejudices both Parties.
4. The Order has resulted in prejudicial error to the Parties, who asked for and agreed to an in-person election at the safe worksite of the RNs.

Accordingly, Aspirus respectfully requests that the Board grant its Request for Review and concurrently filed Emergency Motion to Stay.

FACTUAL BACKGROUND

I. PROCEDURAL HISTORY

On July 17, 2020, the Michigan Nurses Association (MNA) filed an RC Petition in which it requested to hold an in-person, manual election at Aspirus Keweenaw Hospital located in Laurium, Houghton County, Michigan. (Exhibit 2). On July 24, 2020, Aspirus filed its Statement of Position in which

it likewise requested to hold an in person, manual election at hospital. (Exhibit 3). There is no dispute between the Parties about whether to hold an in person election.

On July 30, 2020, Field Examiner Jessica Gibson submitted a Stipulated Record she drafted on her own accord. (Exhibit 4). Notably, although both Parties indicated their desire to hold a manual election at the hospital, Ms. Gibson identified the nature of the election, in-person or mail-ballot, as a disputed issue. Again, there was never any dispute. Ms. Gibson set an initial deadline of August 7, 2020 for the Parties to submit position statements on the artificial dispute, which she later extended to August 11, 2020.

On August 11, 2020, Aspirus submitted its written statement and exhibits in support of holding a manual election. Aspirus' written statement and supporting exhibits are attached hereto and fully incorporated herein. (Exhibit 5). The Michigan Nurses Association elected not to file a written statement or file any objection to holding a manual election at the hospital as desired. On August 13, 2020, Aspirus sent Ms. Gibson a letter confirming that the hospital stands ready to conduct a manual election consistent with CDC protocols and the Board's Office of General Counsel Memorandum 20-10, "Suggested Manual Election Protocols," while pointing out the Petition did not submit a position statement on the "dispute" or object whatsoever. (Exhibit 6).

On August 17, 2020, Regional Director Jennifer A. Hadsall issued her Decision and Direction of a Mail-Ballot Election to begin on August 24, 2020 at 4:30 p.m. (Exhibit 1).

II. CURRENT COVID-19 CONDITIONS IN HOUGHTON COUNTY, MICHIGAN.

The Regional Director is "putting her thumb on the scale" to ensure the Parties do not obtain their preferred method of holding an in-person, manual election in this matter. Although endowed with considerable discretion to select the manner of representation elections, the Order does not reflect a Regional Director who is exercising her discretion reasonably.

The Regional Director goes to some length to distort the reality of the COVID-19 situation in Michigan in order to frame Houghton County as unsafe to conduct an in-person election. As explained below, rather than evaluating the COVID-19 situation where the hospital is located with a discerning analysis, the Regional Director focuses on cherry-picked, inapposite data relating to the state of Michigan

as a whole. This failure to consider the factual circumstances as they exist where the hospital is located is a red flag for abuse of discretion and is clearly erroneous. Likewise, the Regional Director advances multiple inaccurate interpretations of Governor Whitmer's executive orders casting a in-person election as inconsistent with active government orders. Again, the Regional Director's reasoning is mistaken.

For these reasons, it is necessary to educate the Board on exactly what the COVID-19 situation looks like on the ground in Houghton County while explaining the meaning of Governor Whitmer's latest executive orders.

A. The Michigan Safe Start Plan

"Where Michigan was once among the states most heavily hit, our per-capita case rate is now roughly one third to the national average," proclaims Governor Whitmer in Executive Order 2020-161, dated July 29, 2020. (Exhibit 7). Nowhere in the entire state of Michigan does this statement hold truer than Houghton County and the Upper Peninsula, a region of the country with low population and vast geography, where individuals naturally socially distance.

On May 7, 2020, Governor Whitmer announced the state's reopening plan. (Exhibit 8). The plan, called "MI Safe Start," consists of six phases. The plan offers guidance to evaluate where the state and each of its eight component Economic Recovery Council Regions stand across these six phases of reopening. The entire Upper Peninsula, including Houghton County, comprise Region 8 for purposes of the Michigan Safe Start Plan.

On June 1, Governor Whitmer announced the rescission of her "Safer at Home" Executive Order and moved the entire state of Michigan into Phase 4 of the MI Safe Start plan. (Exhibit 9). On June 5, Governor Whitmer announced beginning on June 10, Region 8 (*i.e.*, the UP and Houghton County) could advance to Phase 5 of the Michigan Safe Start Plan. (Exhibit 10). To date, Region 6 and 8 are the only regions in Phase 5.

The MI Safe Start Plan describes Phase 5 as follows:

During the Containing phase [Phase 5], new cases and deaths continue to decrease for an additional period of time. At this point, the number of active cases has reached a point where infection from other members of the community is less common. With widespread

testing, positivity rates often fall much lower than earlier phases. Rapid case investigation, contact tracing, and containment strategies cause new cases to continue to fall. However, if distancing and other risk mitigation efforts are not continued, infections could begin to grow again because a permanent solution to the epidemic has not yet been identified.

(Exhibit 8). Stated differently, according to the Detroit Regional Chamber, Phase 5 “occurs when epidemic levels are extremely low and outbreaks can be quickly contained. Health system capacity is strong with robust testing and tracing. Most businesses can reopen given adherence to strict safety measures.” (Exhibit 11). In other words, Houghton County and the greater Upper Peninsula have extremely low transmission and positivity rates and enjoy the fewest restrictions in the state of Michigan.

B. COVID-19 Data for Region 8.

The state of Michigan tracks COVID-19 statistics across the entire state and provides a tool to assess positive test results and positive cases by region and county. Houghton County and the Upper Peninsula are in Region 8. As of August 18, 2020, Houghton County boasts one of the lowest positivity rates in the State of Michigan with a 0.2% positivity rate over a 7-day rolling average. (Exhibit 12). Consistent with this data, Houghton County records on average 7.9 new COVID-19 cases per million people—or about 0.3 cases per day in the county. In other words, the data shows there is less than one new COVID-19 case in Houghton County per day. It bears further noting that the number of daily COVID-19 tests Houghton County has administered since late July 2020 doubled during roughly the equivalent time frame. Clearly, more testing is not leading to more recorded cases. The reason is simple: Houghton County is one of the safest counties in Michigan.

Houghton County’s success story is very similar throughout the greater Upper Peninsula area. (Exhibit 13). As of August 18, 2020, the positivity rate in the Upper Peninsula region is 1.5%, which is classified as “low” under the Michigan Start Plan. Indeed, the entirety of the Upper Peninsula records only 7.6 new COVID-19 cases daily with zero deaths since late June 2020. Again, the number of tests administered in the Upper Peninsula has grown precipitously, though the number of positive COVID-19 cases has not. It is for these reasons, explained below, why Governor Whitmer applies far fewer restrictions in Region 8 than other areas of the state.

C. The Regional Director's Erroneous Interpretation of COVID-19 Data.

The Regional Director provides an inaccurate and incomplete survey of COVID-19 data in Region 8 and Houghton County specifically. The chief issue with the Regional Director's data analysis is the undue focus she places on alleged case surges elsewhere in the entire state of Michigan rather than where the Parties want to hold the election: Houghton County. Indeed, most of the state is hundreds of miles away from Houghton County, and it makes little sense to compare Region 8, a Phase 5 region with extremely low transmission and positivity rates, with, for example, Detroit. This is particularly true since none of the voters are coming from "down state". And yet, in order to make her argument, the Regional Director makes exactly this illogical comparison.

The only analysis of Region 8 COVID-19 data the Regional Director offers is nothing less than rank speculation. Acknowledging the number of cases in Region 8 has been relatively low, the Regional Director states, without any reference to medical authority, there is an alleged "surge" occurring in Houghton County. On what does the Regional Director base her observation? The fact that Houghton County had 30 new COVID-19 cases during the entire month of July 2020. Or, as the Regional Director argues, data representing "an increase of over 200 percent." (Order, pp. 4-5).

This is not the analysis of a Regional Director who is interested in undertaking a level, dispassionate assessment of the current COVID-19 circumstances on the ground in Houghton County and the Upper Peninsula. A discretionary decision like how to hold an election is meant to be an impartial decision. Here, the Regional Director shows no interest in impartiality when she considers the present state of the COVID-19 pandemic in Region 8. The Regional Director does not consider positivity rates, transmission rates, or tests administered. Instead, the Regional Director is extrapolating data without reasonable support and arguing, based on no identifiable statistical process, that Houghton County is experiencing a "surge" in new cases. This is patently false. Otherwise, the metrics defining which region is permitted to enter a certain phase of the Michigan Safe Start Plan would show Region 8 sliding from Phase 5 backwards to more restrictive phases. That is not occurring, and the data above confirms this fact.

It is further worth noting the Regional Director's brief and undeveloped analysis of supposed surges in counties neighboring Houghton County. (Order, p. 5). Rather than relying on governmental data, the Regional Director points to data from the Harvard Global Health Institute. Governor Whitmer does not consider this institutional data when she makes decisions regarding the Michigan Safe Start plan. Perhaps most perplexing, however, the Regional Director describes these "surges" as "especially concerning" given the "limited hospital capacity" in the Upper Peninsula. (Order, p. 5). This is a curious observation given the fact both Parties want to hold an in-person election at an acute care hospital. The Regional Director's analysis of COVID-19 data in Region 8 simply misses or disregards too many indicators that Houghton County is in the safest region in Michigan where the likelihood of contracting COVID-19 is practically zero. The Regional Director's failure to consider so many salient factors is textbook abuse of discretion.

D. The Regional Director Misrepresents Current Michigan Orders.

The Regional Director relies heavily on Governor Whitmer's Executive Order 2020-160 as support for her decision to order a mail-ballot election. (Exhibit 14). Specifically, the Regional Director points to Governor Whitmer's acknowledgment in that executive order that COVID-19 cases grew in the entire state of Michigan during July 2020, leading her to tighten certain restrictions in the state. (Order, pp. 4-5). Importantly, the Regional Director fails to identify any tightened rules in Executive Order 2020-160 which would apply to Aspirus or negatively impact the Parties' ability to hold a manual election at the hospital. In fact, the Regional Director fails to provide any analysis whatsoever of these new restrictions. Rather, the Regional Director merely states, as a general proposition, that there are unidentified tightened restrictions in Region 8 necessitating "greater vigilance." (Order, p. 4). This paltry analysis falls short of any thoughtful, complete analysis to which the Regional Director could claim she exercised appropriate reasonable discretion in arriving at her decision.

As it happens, Executive Order 2020-160 did not make any material changes to critical care services such as Aspirus Keweenaw Hospital or essential employees like Aspirus' nurses. It did not tighten any restrictions whatsoever on the ability of healthcare workers to perform their jobs on-site. Although Executive Order 2020-160 limits social gatherings indoors to 10 people and outdoors to 100 people, this

change will not affect Aspirus' ability to conduct a manual election with proper social distancing or disallow any voter an opportunity to cast a ballot given the fact Aspirus planned to limit the number of participants in the voting room to only necessary participants, which will count fewer than 10 at a time.¹

The Regional Director also references Executive Order 2020-161, which allegedly "amends" EO 2020-160. As an initial matter, EO 2020-161 did not amend EO 2020-160. (Exhibit 7). EO 2020-161 is the fifth iteration of workplace safeguards issued to protect Michigan's workers from COVID-19. Like its predecessors, EO 2020-161 promulgates industry-specific workplace protocols. And like previous orders, EO 2020-161 requires employers to, among other things:

- Develop a COVID-19 preparedness plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration;
- Provide COVID-19 safety training and designate worksite supervisors;
- Conduct daily self-screening protocols; and
- Provide face coverings and cleaning supplies to employees and require coverings to be worn when employees cannot consistently maintain six feet of separation.

(Exhibit 7). Aspirus, as explained at length in its August 11, 2020 written statement, is in full compliance with all these requirements, in addition to an extensive list of other virus control protocols. *See infra* fn. 1. This is simply another example of the Regional Director showing inattentiveness to the data and details relevant to determining the appropriate manner of election.

The Regional Director makes a final argument related to EO 2020-160, arguing that the order recommends that any work that can be done remotely (i.e., "without the worker leaving his or her home or place of residence") should be performed remotely. *See* EO 2020-162 (amending EO 2020-160 to clarify this recommendation with respect to Regions 6 and 8) (Exhibit 17). This argument is non-sensical. Nurses are essential workers who may only perform their job duties at their workplace. These nurses are already showing up to work to perform their job duties and are well-trained on Aspirus' enhanced virus control

¹ Please see Aspirus' written statement dated August 11, 2020 for a complete explanation of the virus mitigation protocols Aspirus currently has in place and Aspirus' ability to implement all recommended protocols in GC Memo 20-10. (Exhibit 5, pp. 5-9).

protocols, in addition to the normal safety protocols familiar to an acute care hospital. These RN's are fully conditioned after months of working at the hospital to observe all CDC recommendations and those of their own training and hospital policies. Their habits are engrained and have kept them safe during these challenging times. There is no reason to believe the nurses will forget their training at an in-person election.

ARGUMENT

I. LEGAL STANDARD FOR GRANTING REVIEW

Section 102.67(d) of the Board's Rules and Regulations provides that the "Board will grant a request for review only where compelling reasons exist therefor[e]" Accordingly a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Here, the Regional Director abused her discretion by ordering a mail-ballot election, including but not limited to ignoring or haphazardly analyzing the COVID-19 data for Houghton County and Governor Whitmer's executive orders. Her abuse of discretion is severe enough to satisfy all four grounds for review. Accordingly, the Board should grant Aspirus' Request for Review.

II. REVIEW IS APPROPRIATE BECAUSE THIS ELECTION PRESENTS COMPELLING REASONS FOR THE BOARD TO ADDRESS ITS POLICY ON MANUAL ELECTIONS DURING THE COVID-19 PANDEMIC.

There are compelling reasons to grant review of the Regional Director's Order, and grant Aspirus' concurrently filed Emergency Motion to Stay, because this case presents the ideal "appropriate proceeding" to address the when a manual election, as opposed to a mail-ballot election, is more appropriate during the

COVID-19 pandemic. § 102.67(d)(4); *see, e.g., Pace Southeast Michigan*, 2020 NLRB LEXIS 418, * 1 fn. 1 (Aug. 7, 2020) (unpublished); *Roseland Community Hospital*, 2020 NLRB LEXIS 296, *1 fn. 1 (May 26, 2020) (unpublished).

The time is ripe to address this issue on review. The most compelling reason to grant review boils down to a simple proposition. Namely, if there is ever a case for a Board to review, it is one involving an acute care hospital with enhanced virus control protocols presently in place, with trained RNs who have acted with diligence and responsibility to keep themselves and their patients safe, located in a region which the state of Michigan considers to be low risk for transmission and positivity rates, and one which is uniquely capable of implementing all of the additional recommendations for a safe manual election in GC Memo 20-10. Accordingly, there is a compelling reason to grant review under Section 102.67(d)(4).

III. REVIEW IS APPROPRIATE BECAUSE THE ORDER RAISES A SUBSTANTIAL QUESTION OF LAW RELATED TO THE BOARD’S STRONG PREFERENCE FOR MANUAL ELECTIONS.

A separate compelling reason exists to grant review because the Order raises a substantial question of law. § 102.67(d)(1). The Order reflects an unreasoned departure from the Board’s strong preference for in-person, manual elections over mail-ballot elections. *San Diego Gas and Elec.*, 324 NLRB 1143, 1144 (1998) (expressing preference for manual elections and articulating narrow circumstances when a regional director may properly direct a mail-ballot). Specifically, the Order does not meet the “extraordinary circumstances” threshold which the Board has had occasion to define for the pandemic era.²

A. “Extraordinary Circumstances” during the Coronavirus Pandemic.

In the several cases in which the Board has denied review of mail-ballot elections during the pandemic, it followed a familiar explanatory formula. Citing to the pandemic’s extraordinary circumstances, Regional Directors sometimes directed mail-ballot elections, as union organizers insisted, over employers’ objections. (*See Exhibit 15*) (collecting NLRB decisions on directed mail-ballot elections

² As Aspirus explained in its written statement, the three limited conditions identified in *San Diego Gas and Elec.* are not present in this case. (*Exhibit 5, pp. 6-8*).

during COVID-19 pandemic). The Board denied many of these requests for review based on the exact same two reasons. These reasons do not apply in the present election.

In almost all the above cases, citing to *San Diego Gas and Electric*, the Board first reaffirmed its strong policy preference in favor of in-person elections over mail-ballot elections. It then recognized Regional Directors have discretion, in “extraordinary circumstances,” to permit mail-ballot elections outside of the guidelines set forth in *San Diego Gas and Electric*.

The reasons the Board upheld the Regional Directors’ direction of mail-ballot elections are twofold and almost the same in each of these cited cases:

- (1) Reliance “on the extraordinary federal, state, and local directives that have limited nonessential travel, and required the closure of nonessential businesses”; and
- (2) Mandatory telework at the regional offices charged with conducting the various elections.

(Exhibit 5, p. 5). Based on these two consistent reasons, the Board denied many of the requests for review above and found the Regional Director did not abuse their discretion in directing a mail-ballot election based on “extraordinary circumstances.” *Id.*

Here, however, there are no recognized “extraordinary circumstances” warranting a mail-ballot election in this representation election. The Board specifically and consistently refers to (1) government directed closures; and (2) mandatory teleworking by NLRB employees as qualifying “extraordinary circumstances” under *San Diego Gas and Elec.* Neither of these conditions exist in Houghton County, Michigan or at NLRB Region 18. Aspirus is open for business with no government directed closures. All the members of the proposed unit are reporting to work as usual. The only difference are the enhanced virus control measures Aspirus has already implemented consistent with CDC guidelines and Governor Whitmer’s executive orders. (Exhibit 5, pp. 6-7). Likewise, the Board Agent responsible for conducting the election is not under a telework mandate.

B. The Regional Director’s Criticisms of Aspirus’ Plan for an In-Person, Manual Election are Contrived and Lack Evidentiary Basis.

The Regional Director criticizes Aspirus’ proposal to hold “an election includ[ing] four and half hours of polling, staggered over three polling sessions” as somehow increasing the exposure risk of

participants in the election. (Order, p. 5). The Regional Director goes on to argue that this design “amounts to substantial in-person contact,” which a mail-ballot election could avoid. (Order, p. 6). This position ignores the basics of social distancing without identifying any true deficiencies in Asprius’ enhanced virus control protocols or proposed plan to conduct a safe in-person election. By reducing the amount of participants in the voting room to only the voter and other essential participants, expanding the time to vote, regularly sanitizing the voting room, and staggering voters in shifts, Asprius is allowing for increased social-distancing and less congregation of participants in the voting room at one time. The Regional Director does not seem to grasp these basic concepts, let alone provide any justification for why the design is deficient or unsafe. To the contrary, the Regional Director simply arrives at the summary conclusion that there will be “substantial in-person contact,” though she does not identify any support for this position. This conclusory analysis therefore presents yet another example of how the Regional Director has failed to justify her decision, which amounts to an abuse of her discretion to order a mail-ballot election.

With respect to the Board Agent, the Regional Director argues this individual still needs to travel from Wisconsin to the Upper Peninsula, allegedly contradicting CDC and statewide guidance recommending people postpone travel. (Order, p. 5). This position creates an unreasonable double standard. Whereas the Board Agent receives preferential treatment from the Regional Director permitting the individual to remain at home, the nurses seeking to organize still must show up to work at Asprius without any comparable excuse to avoid traveling to the hospital. In any event, assuming the Board Agent drives from Milwaukee to Houghton County, there is no logical reason to believe there is any increased chance the Board Agent will contract the virus.

To this end, the Regional Director argues the nurses themselves increase the risk of COVID-19 exposure by virtue of their positions at an acute care hospital. (Order, p. 6). This is again rank speculation—the Regional Director has no evidence to support her assertion that nurses participating in a manual election will increase the risk of a participant contracting COVID-19. This strawman argument is pure fluff to cover for what appears to be the Regional Director’s preordained and thoroughly unsubstantiated goal to ensure the Parties are subjected to a mail-ballot election. The rigidity of the Regional Director’s decision, without

any serious consideration of the steps Aspirus has and will take to ensure a safe voting environment, flags abuse of discretion.

The Regional Director's lack of thoughtful judgment is also apparent in her discussion about nurses with potential positive cases of COVID-19. Most dramatically, the Regional Director suggests a nurse with a positive case of COVID-19 will be disenfranchised because of the individual's inability to enter the voting room. There are multiple ways to ensure this does not occur. For example, the sick voter could remain in the car and vote outside of the voting room. Board agents have routinely accommodated persons with mobility limitations who have limitations to access a polling place, to provide a ballot and allow for a secure vote of the affected voter. The Regional Director could also impound the ballots until the individual is confirmed COVID-free and able to return to work to cast a vote. Most practically, the Regional Director could order a mixed manual/mail-ballot election whereby the majority of voters cast ballots in-person while any sick individuals are sent mail ballots. The Regional Director, focusing on a hypothetical and entirely unlikely problem instead of a solution to the problem, did not consider any such alternative. It is not reasonable to conclude the Regional Director exercised reasonable discretion when she blatantly failed to consider so many ways to hold a safe in-person election.³

Yet another issue exists with the Regional Director's insistence on holding a mail-ballot election: a mail-ballot election is not the silver bullet the Regional Director claims. The Regional Director states a mail-ballot election will allow for the holding of the election "at the earliest date practicable" and provide unit employees the opportunity to "vote promptly." (Order, pp. 7-8). In practice, there is no certainty the mail-ballot election will be a success. At present, there are well-publicized issues with the U.S. Postal Service's ability to guarantee reliable and timely delivery of mail. In fact, the U.S. Postmaster General sent

³ Although the Regional Director expresses concern about participants contracting COVID-19 at a sterilized acute care hospital with virus control measures, the Order does not mention the much more realistic potential for voters to congregate at well-known "voter parties" often conducted by unions. These events are commonplace during mail-ballot elections, often are held at hotels, bars, or restaurants, and raise a significantly higher risk of transmission than voting in-person at the hospital. The MNA has two paid organizers camped out a local hotel and already have conducted group meetings at the hotel, had pizza parties, and other mass social events.

Governor Whitmer a letter to this effect as recently as last week.⁴ Further, the Union has already asked the Regional Director to postpone the ballot count date, to which the Regional Director agreed. (Exhibit 16). Clearly, the Regional Director's insistence on an expedient mail-ballot election is already compromised.

IV. REVIEW IS APPROPRIATE BECAUSE THE REGIONAL DIRECTOR'S ORDER IS CLEARLY ERRONEOUS ON VARIOUS SUBSTANTIVE FACTUAL ISSUES, THEREBY PREJUDICING THE PARTIES.

An additional compelling reason to grant review of the Order is grounded in the multitude of material factual errors underlying the Regional Director's decision to order a mail-ballot election. § 102.67(d)(2). Aspirus discusses these factual inaccuracies at length above in the Factual Background section. Suffice to repeat here are the Regional Director's consistent misinterpretation of COVID-19 data in Region 8 and similar misreading and misapplication of Governor Whitmer's executive orders. (*See* pp. 3-10 above). These factual errors prejudice both Parties because Aspirus and the petitioning union alike wanted an in-person, manual election from the start. Instead, the Regional Director's office created an artificial dispute between the Parties on whether to hold a mail-ballot election and decided the "dispute" based on unsubstantiated and cherry-picked facts. Now, as it stands, neither Party is getting an in-person election. This is clear prejudice to the Parties.

V. REVIEW IS APPROPRIATE BECAUSE THE ORDER HAS RESULTED IN PREJUDICIAL ERROR TO THE PARTIES.

The Board should grant review of the Regional Director's Order because the Regional Director's conduct in issuing the decision has resulted in prejudicial error to the Parties. § 102.67(d)(3). As stated above, the Parties both elected to hold a manual election. The Regional Director has taken every step and made every argument—no matter how baseless—in order to prevent the Parties from holding their preferred method of election. It is clear the "extraordinary circumstances" discussed above do not exist in this case, yet the Regional Director refuses to consider reasonable methods to hold a safe manual election in one of the safest counties in Michigan. Because no extraordinary circumstances exist, and no other circumstances

⁴ <https://www.nbcnews.com/politics/2020-election/u-s-postal-service-warns-numerous-states-mail-ballots-may-n1236825> (last accessed August 19, 2020).

exist to hold a mail-ballot election under *San Diego Gas and Electric*, the Order represents clear prejudicial error.

CONCLUSION

For the foregoing reasons, the Board should grant Aspirus' Request for Review because the Regional Director abused her discretion in ordering a mail-ballot election rather than an in-person election.

Dated this 19th day of August, 2020.

MICHAEL BEST & FRIEDRICH LLP

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