

Allstate Insurance Company and Carolyn Penzo.
Case 10–CA–29184

September 29, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 25, 1997, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent with this decision, and to adopt the recommended Order.

The judge found that Charging Party Carolyn Penzo was an employee within the meaning of the Act, and that a disciplinary warning issued to her by the Respondent infringed on her Section 7 rights and violated Section 8(a)(1). The primary issue before us is whether Penzo was in fact an employee within the meaning of the Act, rather than a manager or a supervisor.¹ If she were either of the latter two, she would be excluded from the Act's coverage. The Respondent, as the party seeking to exclude an individual from the protection of the Act, has the burden of proof concerning both issues.²

1. Background and the judge's decision

The Respondent sells insurance and related products and services throughout the United States and in Canada. During the fall of 1995, the relevant time period in this case, and for several years beforehand, Penzo worked for the Respondent as a "Neighborhood Office Agent" (NOA), selling the Respondent's insurance policies from a storefront office in Alpharetta, Georgia.

The record does not yield a precise definition of the NOA job position. The Respondent describes the NOA Program as allowing

agents, with Company guidance, to participate in the selection of their own office site, and to select clerical and solicitor assistance. At no cost to the NOA, Allstate provides a sign with the NOA's name and phone number, furniture, basic supplies, business forms and an office expense allowance for rent, maintenance, utilities, clerical and solicitor assistance, ad-

ditional furniture and equipment along with some other necessary business expenses. . . . Here's a program that allows you to participate in running your own show, and Allstate provides support and assistance—a real winning combination.

[R. Exh. 16(a), "What Is An NOA?" p. 1.] It is clear that, under the Respondent's program, a NOA does not have and cannot gain any proprietary interest in the business. Rather, the office's "Book of Business"—essentially the business file of clients and their insurance contracts—is owned entirely by the Respondent.

The Respondent's office expense allowance only covers the cost of "some" business expenses. The NOA decides what expenses to incur within the limited allowance and pays any additional expenses out of her own pocket. A NOA is free to invest her own funds in the storefront concern in order to further support the cost of doing business and to enhance business opportunities. A NOA's earnings are based on a minimal salary—Penzo's was \$8800 annually—and the commissions generated by the sale of the Respondent's insurance. Commissions naturally vary with the success or failure of the business.

According to Penzo, she contributed \$200,000 of her own money to the business between 1989 and 1995, with virtually nothing but debts to show for it. She was critical of the terms and conditions of her employment. Her criticisms became public knowledge after she and other of the Respondent's employees were interviewed and an article reporting her views of the NOA program appeared in *Fortune* magazine on October 2, 1995. Specifically in response to her role in the article, the Respondent issued a "job-in-jeopardy" disciplinary warning to her on October 19, 1995. The warning stated that her job was at risk because of her unauthorized contact with the news media.

This unfair labor practice proceeding followed. The complaint alleged that Penzo was an employee of the Respondent whose rights were protected by Section 7 of the Act, that her participation in the magazine article was concerted activity protected by Section 7, and that the disciplinary warning violated Section 8(a)(1). At the hearing, the Respondent asserted, *inter alia*, that Penzo was a supervisor or a managerial employee, and thus excluded from the Act's coverage.

The judge found that Penzo was neither a supervisor nor a managerial employee. On the supervisory issue, he found that Penzo, as a NOA, did possess the kind of authority set forth in Section 2(11), especially the power to hire and fire the employees who may assist her in the office. However, he also opined that some *exercise* of this authority within a reasonable period of time before the commission of the alleged unfair labor practice was required to find an individual to be a statutory supervisor.

¹ The Respondent conceded, and the judge found, that she was not an independent contractor. Thus, no independent-contractor issue is before us.

² See, e.g., *Ferguson-Williams, Inc.*, 322 NLRB 695, 702 (1996) (supervisory exclusion sought); *University of Great Falls*, 325 NLRB 83, 93 (1997) (managerial exclusion sought).

He noted that Penzo had not exercised her authority from 1991 or 1992 up to the time of the disciplinary warning in October 1995, because she had had no employees to supervise during that time. Accordingly, he concluded that she was not a statutory supervisor.

Concerning Penzo's asserted managerial status, the judge found that, through the policies and procedures guiding its NOA program, the Respondent tightly controlled all important aspects of her operation of the business. In his view, therefore, the Respondent had denied Penzo the kind of discretionary authority that marks a managerial employee.

Having rejected the managerial and supervisory contentions, the judge concluded that Penzo was a statutory employee entitled to the rights set out in Section 7. He found that her role in criticizing the employment conditions of NOAs in the Fortune article was protected concerted activity within the meaning of Section 7, because other individuals similarly situated in the Respondent's employ also participated in the article.³ Accordingly, he concluded that the Respondent's "job-in-jeopardy" warning, admittedly issued in reaction to the article, violated Section 8(a)(1).

2. Discussion

Although we adopt the judge's conclusion that the Respondent violated the Act, we do so on the basis of a different analysis of the issues of supervisory or managerial status. (As noted above, at fn. 1, no issue of independent contractor status is before us.)

With respect to supervisory status, the rule is clearly established in Board precedent that *possession* of authority consistent with any of the indicia of Section 2(11), not the exercise of that authority, is the evidentiary touchstone. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062 (1999).⁴ The absence of any exercise of the authority for a sustained and lengthy period—3 to 4 years in this case, as the judge emphasized—raises a question whether the alleged supervisor does in fact possess statutory supervisory authority. However, we find it unnecessary to pursue that line of inquiry

³ In agreeing with the judge that Penzo's role in the magazine article was "concerted" under Sec. 7, we note that her uncontradicted testimony and the article itself establish that she participated at least in part in order to alert other NOAs—there were thousands employed by the Respondent at the time—of the pitfalls she perceived in the NOA program. In this way, she was initiating or inducing group action, and her conduct was accordingly concerted. See, e.g., *Compuware Corp.*, 320 NLRB 101, 103 (1995), enfd. 134 F.3d 1285 (6th Cir. 1998).

⁴ Sec. 2(11) defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

in this case. Instead, we assume *arguendo* that Penzo possessed the kind of authority described in Section 2(11).

On the managerial question, we disagree with the judge that the Respondent's control of the NOA program so severely limited Penzo's conduct of the business that she had no significant discretion in her decisionmaking. On our review of the record, and as described below, we find that Penzo's day-to-day discretionary authority was considerable, albeit defined by the broad parameters of the Respondent's program.

With respect to both of these issues, the decisive question is: given the characteristics of both supervisory and managerial status inherent in her job, *in whose interest* did Penzo act in running her office?

a. Supervisory status

In defining what constitutes a statutory supervisor, Section 2(11) requires that such an individual have authority "in the interest of the employer." In *Tiberti Fence Co.*, 326 NLRB 1043 (1998), the Board considered the "interest of the employer" requirement in concluding that a group of foremen were not exercising the authority of statutory supervisors when they recommended that their helpers be given wage increases. The Board noted that the wages paid to each helper were subtracted from the pay of the foreman with whom the helper worked. Thus, implementation of a recommended wage increase meant that the helper would receive a larger portion of the foreman's pay. In these circumstances, the Board found that the foremen's wage recommendations were not rooted in the interest of their employer, but were made primarily in their own interest to ensure a harmonious, continuing work relationship with their helpers.

Similarly, in *Distillery Workers v. NLRB*, 298 F.2d 297, 302–305 (D.C. Cir. 1961), cert. denied 369 U.S. 843 (1962), enfg. 127 NLRB 850, 858–861 (1960), the court found that 2(11)'s "interest of the employer" requirement was not satisfied where driver-salesmen had the authority to hire helpers if they so desired but only at a cost of reducing their own pay. The Court reasoned:

In no meaningful sense was their exercise of authority "in the interest of the employer." On the contrary, we see the record before us demonstrating that the driver-salesmen were motivated by and were acting in their own interest. Engaging the helpers had the effect of reducing the manual burdens of the driver-salesmen, expediting the service to their route customers, and increasing their potential for higher commissions, even to the point of their foregoing \$15 each week which otherwise they would have received.

Id. at 304.⁵ See also *Wells Dairies Cooperative*, 109 NLRB 1450, 1451–1452 (1954) (finding driver-salesmen not to be supervisors, notwithstanding their authority to hire and fire personal helpers, where the amount of the helper’s pay is deducted from the driver-salesman’s commission, with the employer making up the difference if the commission was insufficient to cover the cost).

The record shows that a NOA like Penzo has complete discretion whether to work alone or to engage support staff to assist her.⁶ The amount available to the NOA from the office expense allowance supplied by the Respondent is based on a formula keyed to office sales in the previous year, and does not rise or fall depending on the number of assistants hired in the current year. Accordingly, a NOA can engage assistants, or agree to raise their wages, only at the risk of exceeding her allowance and having to pay her assistants’ wages out of her own pocket. If she chooses not to engage personal assistants—the choice Penzo made for more than 3 years—she is able to cover more of her rent, equipment, and other expenses out of the limited office expense allowance that the Respondent provides her.

Consistent with the precedent discussed above, we find that the supervisory authority that Penzo possesses over any assistants she may hire would be exercised principally in her own interest. The decision whether to have staff at all is entirely within her discretion. Her choice would be informed by her own determination whether adding assistants would enhance the profitability of the office, and accordingly her sales commissions. Her day-to-day supervision of the assistants, as well as her decision to raise or lower their pay, would be driven by this same motive. Depending on the financial circumstances, she may find it necessary or desirable to commit her own funds to pay for her assistants. In these circumstances, we conclude that Penzo would not be acting in the interest of the Respondent with respect to assistants employed at her office, and therefore she would not supervise them within the meaning of Section 2(11).

In our judgment, the optional use of assistants at the NOA’s own financial risk is the factor that distinguishes this case from those that have rejected arguments that putative supervisors were not exercising 2(11) authority “in the interest of the employer.” For example, in *NLRB v.*

Health Care & Retirement Corp., 511 U.S. 571 (1994), the Supreme Court rejected the Board’s holding that a nurse’s supervisory authority is not exercised in the interest of the employer “if it is incidental to the treatment of patients.” Id. at 576–584. Critical to that outcome, in our opinion, was the Court’s finding that “[p]atient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer’s customers, is in the interest of the employer.” Id. at 577. That holding reflected the Court’s more general conclusion that 2(11)’s “interest of the employer” requirement is satisfied where the supervisory duties at issue “are a necessary incident to the production of goods or the provision of services.” Id. at 580. That is not the case here. Whether a NOA serves customers with or without personal assistants is up to her. No essential component of the Respondent’s business is altered if a NOA decides to work alone, and it simply does not follow that, in making a decision to engage assistants at her own financial risk, a NOA is exercising an authority that the Respondent delegated for use solely in its interest.

Deaton Truck Lines, Inc. v. NLRB, 337 F.2d 697, 699 (5th Cir. 1964), cert. denied 381 U.S. 903 (1965), affg. 143 NLRB 1372, 1378 (1963), is similarly distinguishable from this case. There the Court sustained the Board’s finding that “multiple owner drivers” were supervisors and rejected a union claim that these drivers exercised 2(11) authority in their own interest, not that of Deaton. Importantly, Deaton’s common carrier business depended on trucks leased from owner drivers for its own exclusive use. Deaton’s payments under the lease agreements covered both the fee for the truck rental and the wages of the driver. Moreover, only drivers whom Deaton had tested and trained and whom it retained on its approved list were permitted to drive the leased vehicles and all drivers were subject to Deaton’s direction and control in their day-to-day employment. 143 NLRB at 1375–1376. In these different circumstances—where the drivers were, in effect, paid for by Deaton and performed functions essential to its business—the discretionary authority of the multiple owner drivers to decide whether or not approved drivers would be permitted to drive their own trucks and to transfer them from one truck to another is reasonably viewed as authority exercised in the interest of Deaton, and therefore supervisory within the meaning of Section 2(11). 337 F.2d at 699; 143 NLRB at 1378.

In the present case, by contrast, where the use of office or sale assistants was not a necessary incident of the Respondent’s business but at the option and the financial risk of the NOA, we are unable similarly to conclude that the NOA’s have been assigned 2(11) authority to hire or fire assistants “in the interest of the employer.” Accordingly,

⁵ The Court noted that the employer also contributed to the helper’s wages but in a lesser amount, \$12, than the driver-salesmen did. Id.

⁶ If a NOA elects to have assistants, she must comply with various restrictions imposed by the Respondent. For example, both clerical assistants and sales assistants (so-called “sales producers”) must be placed on the payroll of an approved employment agency, which then bills the expense of the support staff to the NOA. In addition, because sales producers can bind the Respondent legally in contracts of insurance, all such assistants must be approved by the Respondent as a condition of their employment.

we reject the Respondent's contention that Penzo is a supervisor and lacks a Section 7 right to engage in concerted activity.

b. Managerial status

The Supreme Court has established an outline for identifying individuals who have managerial responsibilities that exclude them from the protection of the Act:

Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." . . . These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." . . . Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. . . . Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

NLRB v. Yeshiva University, 444 U.S. 672, 682–683 (1980) (citations omitted).

The judge found that the Respondent so restricted the discretionary authority of NOAs that Penzo could not be found to be managerial. For instance, he noted that a NOA is required to use the Respondent's documents and pre-printed forms in selling the Respondent's insurance policies, and that any hiring of staff assistants must be accomplished through temporary employment agencies designated by the Respondent. We find, however, that the record also establishes that, within the boundaries set by the Respondent's general policies and its NOA program, Penzo, like other NOAs, has broad discretion in the marketing of the Respondent's insurance policies. She decides whether to hire assistants, how many, how to utilize them, how much their assistance will cost, and whether they will be paid from the Respondent's funds or her own. She runs the office without any day-to-day oversight by the Respondent. She decides where the office is to be located, limited by the Respondent's interest in avoiding a location proximate to other offices selling its insurance.⁷ She decides whether, when, and what business expenses should be incurred, for example, office equipment pur-

chases, contracts for accounting and legal services, and advertising. She then decides how the necessary funds for these expenses should be allocated, including whether to draw from the Respondent's allowance or her own funds.

Given the above and other relevant evidence in the record, we find that Penzo was invested with discretionary authority. The dispositive question, however, is whether her discretionary decision making is of a type that makes her a managerial employee. We answer in the negative, on reasoning similar to that in our supervisory analysis above.

The purpose of exempting managerial employees is to ensure "that employees who exercise discretionary *authority on behalf of the employer* will not divide their loyalty between employer and union." *NLRB v. Yeshiva University*, supra, 444 U.S. at 687–688 (emphasis added). Here, to the extent that Penzo exercises discretionary authority in renting, furnishing, staffing, and otherwise running her office she is not doing so "on behalf of the employer." Nor is she "formulat[ing] and effectuat[ing] management policies by expressing and making operative the decisions of [her] employer," id. at 682, within the meaning of the Board's traditional definition of managerial employee. Rather, she is acting in her own financial interest and at her own financial risk.

The interests of the employer are, of course, reflected by its establishment of the NOA program. The whole point of the Respondent's NOA program, as we understand it, is "to increase business and profits, while providing its agents with entrepreneurial opportunities and greater flexibility and control over their own offices."⁸ The operative management policies were formulated and effectuated by the Respondent when it structured the NOA program. The Respondent's own managerial interests are expressed and made operative by such measures as the Respondent's limiting the amount it will contribute towards the NOA's basic office expenses, its limiting the locations where NOAs can open offices, its requiring that all sales assistants must have its approval, and its requiring that any staff be kept on the payroll of an approved employment agency that bills the NOA for its services. However, within the framework established by the NOA program and its policies, the NOAs, in their own interest, are free to determine for themselves and at their own financial risk what course will maximize their earnings.

Penzo, for example, originally determined that it would be in her financial interest to engage assistants. Later, she determined that she would reduce her expenses and in-

⁷ As discussed below, the Respondent required Penzo, as a NOA, to sign the lease for her chosen office in her personal capacity, assuming all risk of liability in this regard.

⁸ *DeJesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 68 (2d Cir. 1996), cert. denied 519 U.S. 1007 (1996). See also *Deus v. Allstate Insurance Co.*, 15 F.3d 506, 511–512 (5th Cir.) (describing the NOA program), cert. denied 513 U.S. 1014 (1994).

crease her earnings by laying off her staff. In each case, she made the decision in her own interest. In neither instance was she “expressing and making operative the decisions of [her] employer,” *Yeshiva*, supra, 444 U.S. at 682, which is what our definition of managerial employee requires.

Similarly, Penzo initially determined that it was in her own interest not to share office space with another agent but instead to establish her own office. She negotiated the lease and is personally liable for the lease that she signed. She has also determined, in her own interest and at her own expense, to purchase office equipment and to contract with lawyers, accountants, and business consultants. In none of these instances was she performing functions analogous to those of buyers or other persons traditionally considered to be managerial employees. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 285–287 (1974). Those persons were deemed managerial because, without prior approval, they could make substantial purchases or other commitments binding on the employer, and as such were representative of management. *Id.* Here, by contrast, Penzo’s activities were taken in her own name and financial risk.

Nor are Penzo’s activities analogous to those found managerial in *Yeshiva*, supra, 444 U.S. at 686–690. There, the Supreme Court found the problem of divided loyalty to be presented because the faculty at issue was relied on to formulate and apply the academic policies that were the business of the university and as a result the professional interests of the faculty and the managerial interests of the university could not be separated. *Id.* at 687–689. Here, by contrast, the NOA program clearly demarcates the distinct roles and interests of management and labor. As noted, the Respondent retains complete ownership of the results of the NOAs’ efforts, the so-called “Book of Business” consisting of the client files and the insurance contracts. It provides only a minimal salary and a limited office expense allowance. In return, the NOAs are encouraged to invest their own funds and devise their own business strategies in the hope that a steady stream of commissions will reward their efforts. The choices that the NOAs make reflect their own determination of where their economic self-interest lies and they, not the Respondent, bear the risk of the discretionary judgments they make in their own interest. Penzo, for example, asserted that she invested some \$200,000 in her business over a 6-year period with little more than debt to show for it.

In sum, we find that the Respondent’s NOA program is an essentially commission-based employment scheme that leaves to Penzo’s self-interested entrepreneurial decision-making—and financial risk—certain basic choices concerning how her office is to be run. Having chosen to

minimize its own involvement and to be guided by the self-interested risk taking of Penzo—who bears the immediate financial consequences of her misjudgments in these matters—the Respondent cannot persuasively maintain that Penzo is acting on its behalf and expressing or making operative its decisions when she exercises her own discretion in renting, furnishing, staffing, and otherwise running her office. We therefore conclude that the Respondent has failed to meet its burden of establishing that Penzo is a managerial employee and, as such, outside the protection of the Act.

3. Conclusion

We have found that Penzo was neither a statutory supervisor nor a managerial employee at the time of the unfair labor practice alleged in the complaint. She was, therefore, an employee within the meaning of Section 2(3) of the Act at that time. Accordingly, as the judge otherwise detailed in his decision, the Respondent’s issuance of its “job-in-jeopardy” disciplinary warning to her on October 19, 1995, violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Allstate Insurance Company, Alpharetta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I find that Charging Party Carolyn Penzo, a Neighborhood Office Agent (NOA) for the Respondent, is a statutory supervisor.¹ In my view, Penzo has supervisory authority, and exercises that authority in the interest of the Respondent.²

As my colleagues fully describe, Penzo operates a storefront office and sells insurance for the Respondent. As part of the Respondent’s NOA program, Penzo has the authority, in her discretion, to hire and fire support staff, including office support and sales producers.

The majority concludes that the NOA, in exercising this authority, is not acting “in the interest of the Respondent.” Accordingly, they conclude that Penzo is not a supervisor. I disagree.

The Respondent has a clear interest in the functions of the NOA. The thrust of the NOA program is to allow the

¹ Having concluded that Penzo is a statutory supervisor, I need not pass on the Respondent’s additional contention that Penzo is a managerial employee.

² As my colleagues correctly note, it is the possession of 2(11) supervisory authority, not the exercise of it, that controls. Given this, I find it virtually indisputable that Penzo has this authority. The Respondent’s NOA program clearly authorizes the NOA to hire and fire support staff.

NOA to use discretion to operate in a manner that benefits both the NOA and the Respondent. (As the Respondent puts it, it seeks a “winning combination.”) Certainly, the ultimate goal is to increase compensation for the NOA *and* to increase revenue for the Respondent.

The NOA’s authority to hire sales producers is a classic example of the interest that the Respondent has in this matter. A sales producer can sell insurance and can bind the Respondent to insurance policies. Thus, a good producer will sell more policies. A poor producer will sell fewer policies. Worse, a poor producer may bind the Respondent to unacceptably high insurance risks. Because of this, the Respondent can veto the NOA’s hiring of any sales producer.³

The Respondent’s interest in the NOA is also shown by its practice of providing the NOA with an office expense allowance (OEA). This OEA is used to pay a portion of the office expenses, including the cost of staff. The amount of the OEA is based on the amount of new and renewal business generated by the NOA. That is, more business leads to a greater reimbursement by the Respondent. Thus, the Respondent is interested in, and supports, the NOA’s effort to increase business through the hiring and use of staff.

In finding that Penzo, as the NOA, does not act in the interest of the Respondent, my colleagues rely on *Distillery Workers v. NLRB*, 298 F.2d 297, 302–305 (D.C. Cir. 1961). There, the court held that driver-salesmen, who could hire helpers, were not supervisors because they could hire the helpers only at the cost of reducing their own pay. Thus, if driver-salesmen chose to hire helpers, they acted in their own interest.

That case is clearly distinguishable. In that case, the helpers performed manual labor to help the driver. Concededly, the use of a helper would permit the driver to earn greater commissions and would permit the Company to receive greater revenues. However, there was nothing to suggest that the company was interested in the selection, i.e., the hire of the helper. As noted, the helper performed only manual labor. By contrast, the Respondent here is vitally interested in the selection of the sales producers. As discussed above, a good sales producer will generate his/her own business and this will result in increased revenues for the Company. A poor sales producer will not do so, and can bind the Company to poor insurance risks.

³ The NOA may authorize a sales producer to engage in the following activities: (1) sell insurance policies that are binding on Respondent; (2) complete applications and service request forms to include the binding of coverage; (3) be involved in direct solicitation activities; (4) discuss and provide advice regarding coverage and limits; and (5) do other office work as authorized by the NOA.

My colleagues also rely on *Tiberti Fence Co.*, 326 NLRB 1043 (1998).⁴ There, a foreman’s recommendation that a helper receive a wage increase would—if followed—result in a decrease in the foreman’s pay. Thus, the Board concluded that the foreman, in exercising his authority, acted in his own interest and not that of the employer.

The case is inapposite to the instant one. In that case, the Board found that the foreman was willing to pay the helper in order to foster a better working relationship with the helper. There was no suggestion that the company had its own interest in the selection of the helper. By contrast, there is such an interest here.

In sum, these precedents do not control here. The Respondent’s NOA program seeks to increase the Respondent’s revenue and to increase the NOA’s compensation. The fact that the NOA is interested in the hiring of sales producers does not mean that the Respondent is disinterested in this matter. Both have an interest. Further, the Respondent has a particular interest of its own in the hiring of prudent sales producers.

In sum, the Respondent is in the insurance business and seeks to increase its sales of insurance products. Its NOA program is one of its means of meeting its goals. As the sales producers hired by a NOA would sell insurance and serve this Respondent interest, it follows that the NOA, in hiring and directing sales producers, acts in the interest of the Respondent. See *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994).

Finally, my colleagues make much of the fact that the NOA can choose to have, or not have, staff support. In my view, this misses the point. To be sure, the NOA will make that choice based on what is in her financial interest. However, it does not follow that the Respondent has no interest in the matter. The Respondent encourages the choice of having staff support, in that it agrees to pay for a portion of it. And, as discussed, if the choice is to have staff support, the Respondent can reap a financial advantage or can incur a substantial insurance risk.

In these circumstances, I conclude that Penzo, as a NOA with the authority to hire and fire support staff, is a supervisor. The Respondent is vitally interested in the manner in which this authority is exercised. Therefore, Penzo is a statutory supervisor.

Lesley A. Troope, Esq., for the General Counsel.
R. Brent Ballow, Esq. (King & Ballow), for the Respondent.
Carolyn Penzo, Pro Se.

⁴ I dissented in *Tiberti* and I adhere to that dissent. However, even accepting the majority decision on the facts of that case, I would not find that decision controlling here.

BENCH DECISION
STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful warning case. At the close of a 2-day trial in Atlanta, Georgia, on March 3, 1997, I rendered a Bench Decision in favor of the General Counsel thereby finding a violation of 29 U.S.C. § 158(a)(1). This certification of that Bench Decision, along with the Order, which appears below, triggers the time period for filing an appeal (“exceptions”) to the National Labor Relations Board (Board). I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the Board’s Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case *established* by the General Counsel, a case not credibly rebutted by Allstate Insurance Company (the Respondent or Company), I found the Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act) when on or about October 19, 1995, the Respondent issued a “job-in jeopardy” warning to Carolyn Penzo (Penzo) because she engaged in concerted activities protected by the Act. More specifically, I concluded that when Penzo, a Neighborhood Office Agent (NOA) for the Company, and others discussed their working conditions with a reporter for Fortune Magazine¹ they were engaging in concerted activities protected by the Act. *Meyers Industries*, 268 NLRB 493 (1984); *Meyers Industries*, 281 NLRB 882 (1986); *Cincinnati Suburban Press*, 289 NLRB 966 (1988), and *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). It is undisputed that the October 1995 “job-in jeopardy” warning given Penzo was, in substantial part, a result of the interview she gave the Fortune Magazine reporter. Thus, in concluding that Penzo’s interview with Fortune Magazine was concerted activity protected by Section 7 of the Act, the “job-in jeopardy” warning given her for doing so constitutes discrimination in violation of the Act. Arriving at my decision, I concluded Penzo was an employee within the meaning of Section 2(3) of the Act. *Heck’s, Inc.*, 277 NLRB 916, 918–919 (1985). I rejected the Respondent’s contention that the mere existence of unexercised supervisory power, without more, qualified Penzo as a supervisor within the meaning of the Act. *Automobile Club of Missouri*, 209 NLRB 614 (1974). In that regard, I concluded the Company’s reliance on a comment by Judge Richard A. Scully in *Ironton Publications*, 321 NLRB 1048, 1053 (1996), was misplaced. The Respondent’s reference was to Judge Scully’s statement “sporadic and infrequent possession of supervisory authority is to be distinguished from its constant possession but infrequent exercise. The latter indicates supervisory status while the former does not.” *Kern Council Services*, 259 NLRB 817, 818 (1981). I concluded that even under *Ironton Publications*, supra, some exercise of supervisory authority is necessary to qualify an individual as a statutory supervisor. In the instant case, Penzo had not exercised *any* supervisory authority in approximately 5 years. I likewise rejected the Company’s contention Penzo was a managerial employee who formulated and effectuated management policies, thus excluding her from the pro-

¹ The interview by Richard Behar resulted in an article “Stalked by Allstate” published in Fortune Magazine on December 2, 1995. Quotations are attributed to Penzo in the article.

tection afforded by the Act. I concluded that NOAs, such as Penzo, have little *if any* discretion in the performance of their jobs independent of the Respondent’s established guidelines, directives, and policies. Cf. *S. S. Joachim & Anne Residence*, 314 NLRB 1191 fn. 6 (1994). At the trial, the Company abandoned any contention Penzo was an independent contractor.

I order the Respondent, within 14 days from the date of this Order, to remove from its records the “job-in jeopardy” warning and any reference thereto it issued Penzo on October 19, 1995, and within 3 days thereafter notify her in writing this has been done and the October 19, 1995 “job-in jeopardy” warning will not be used against her in any way.

I certify the accuracy of the portion of the transcript (p. 343–361) containing my decision, and I attach a copy of that portion of the transcript, as corrected, as “Appendix A.”

CONCLUSION OF LAW

Based on the record, I find the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above; and, that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Respondent unlawfully issued its employee, Carolyn Penzo, a “job-in jeopardy” warning on or about October 19, 1995, I recommend the Respondent, within 14 days from the date of this Order, be ordered to remove from its files any reference to Penzo’s October 19, 1995 “job-in jeopardy” warning and within 3 days thereafter notify Penzo in writing that this has been done and that the unlawful “job-in jeopardy” warning will not be used against her in any way. I also recommend the Respondent be ordered, within 14 days after service by the Region, to post an appropriate notice to its employees, copies of which are attached hereto as “Appendix B” for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company’s obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Allstate Insurance Company, Alpharetta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing employees “job-in jeopardy” warnings because they engage in protected concerted activities.

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful "job-in jeopardy" warning it issued Carolyn Penzo on or about October 19, 1995, and within 3 days thereafter notify Penzo in writing this has been done and that the unlawful "job-in jeopardy" warning will not be used against her in any way.

(b) Within 14 days after service by the Regional Director of Region 10 of the National Labor Relations Board, post at its Atlanta area facilities copies of the attached notice marked "Appendix B."³ Copies of the notice, on forms provided by the Regional Director for Region 10 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current Neighborhood Office Agents in the Atlanta area employed by the Company on or at any time since October 19, 1995.

(c) Within 21 days after service by the Region, filed with the Regional Director for Region 10 of the National Labor Relations Board a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

APPENDIX A BENCH DECISION

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JUDGE CATES: I find that the charge in this case was filed on March 19, 1996, and thereafter, properly served upon the company. And these first few findings are made based upon the pleadings, that is the complaint and the answer.

I find also that at all times material herein, the company has been and continues to be an Illinois corporation engaged in the sale of insurance and related products or services throughout the United States and Canada and that the Respondent maintains offices and places of business in the State of Georgia, including Alpharetta, Georgia, which appears to be the location involved herein.

I find that during the past 12 month period, with the operative date being February 4, 1997, that the company, in conducting its business operations derived revenues in excess of \$1 million from the interstate sale of insurance, of which more than \$50,000

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

in insurance premiums were remitted to its home office in Illinois from its offices in the State of Georgia.

Based on that information, as alleged in the complaint and admitted in the answer, I find that the company has been and is an employer engaged in commerce within the meaning of Section 2(6)(7) of the National Labor Relations Act, hereinafter Act.

There is no dispute that the company issued a job in jeopardy warning to its employee, Carolyn Penzo, on or about

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October 19, 1995, which job in jeopardy is in evidence as General Counsel Exhibit 65. The question then becomes why did the company issue the job in jeopardy warning to its employee, and did it do so, in whole or in part, because Penzo engaged in concerted activities that are protected by the Act?

If I find that she did engage in concerted activities that are protected by the Act, I then look to the motivation of the company in doing so. And, in that regard, the Board has provided an analytical mode for resolving cases that turn upon an employer's motivation. And as each of you full well know, that is outlined in *Wright Line*, W-r-i-g-h-t, another word, L-i-n-e, reported at 251 NLRB 1083, (1980).

And in a case called *Manno. M-a-n-n-o Electric, Inc.*, reported at 321. NLRB Number 43, a May 22, 1996 case, particularly at footnote 12 and page three, the Board seemed to be re-stating the *Wright Line* burden. But then, in a very recent case, the Board seemed to be moving away from its restatement in *Manno Electric*. In the most recent pronouncement on the subject matter, the Board, in *The 3*, the number three, with a capital E, *The 3 E Company, Inc.* 322, number 192, at footnote one, a decision issued on February 12, 1997, the Board appeared to be moving away from whatever it may have said in the *Manno Electric* and going back to pure *Wright Linen* analysis.

Under the *Wright Line* analysis, the General Counsel must make a prima facie showing sufficient to support the inference that

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protected conduct was a motivating factor in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place, notwithstanding the protected conduct. It is also well settled that when a Respondent's stated motives for its action are found to be false, the circumstances may warrant an inference that the true motive is the one that the Respondent desires to conceal.

Before I can get, however, to the *Wright Line* burden, I think I need to address some preliminary issues. Did the conduct that Penzo engaged in for which the company issued its October 1995 job in jeopardy constitute concerted activities that are protected by the Act? I'm persuaded that they were activities that were protected by the Act.

The company, in its job in jeopardy warning, makes reference to the fact that Penzo went to the press or, in this case, *Fortune Magazine*, and expressed her views on the company, which views are attributed directly to her in the article.

And I find that they were not only concerted activities, but activities protected by the Act for the following reasons: Ms. Penzo testified that she spoke to other NOAs, which, for the purposes of

this decision, mean neighborhood office agents; that she spoke with others of those about the commissions that the NOAs were paid, particularly on their book of business, and other related expenses; that she discussed those with other NOAs—for example, at meetings. I believe she placed them in

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Las Vegas, Nevada and other places—that she mailed out some inquires and received responses thereto, so that when she was speaking on the matter of commissions, expenses and the overall working conditions of NOAs, she was expressing not only the concerns of herself, but of other similarly situated NOAs.

The General Counsel cited, and I am persuaded supports her proposition, that speaking with a reporter or a newspaper or a major publication, in this case the *Fortune Magazine*, constitutes conduct of a concerted nature that's protected under the Act in keeping with the Board's decision in *Meyers, M-e-y-e-r-s, Industries, Inc.*, 268 NLRB 943 (1984), as well as *Meyers Industries, Inc.*, reported at 281 NLRB 882 (1986).

Also, there is the guidance along this point in a case called *Kinder, K-i-n-d-e-r*, dash, *Care, C-a-r-e, Learning Centers*, 299 NLRB 1171 (1990), where the Board concluded that an employer may not prohibit employees from discussing terms and conditions of employment with colleagues, nor with an Employer's customers, advertisers, parent company, news reporters and the public in general. And incidentally, in that decision the Board also concluded that an employee need not exhaust internal remedies before discussing terms and conditions of employment with others.

Prohibiting employees from the discussion of their working conditions violates Section 8(a)(1) of the Act and issuing a warning thereto violates the Act., but we don't arrive at that

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point just yet. So, in summary on this particular point, I find that the activities that Penzo engaged in for which she was given the job in jeopardy warning in October of 1995 were concerted activities that are protected by the Act.

But before a conclusion can be made as to whether or not such would violate Section 8(a)(1) of the Act, we must address the issue of whether or not the Charging Party herein is an employee or whether she's a supervisor, a management representative or an independent contractor. The term employee and supervisor are mutually exclusive. She cannot be both. If she is anything other than an employee, the protection of the Act is not afforded to her.

So I feel it incumbent that I address at least three items whether she is a supervisor within the meaning of the Act, whether she is a managerial employee within case law that has been developed and/or whether she is an independent contractor.

I believe I heard Company counsel say in his closing argument that he would concede that she was not an independent contractor, as that term of art is utilized in labor relations. Let me speak very briefly to the independent contractor issue, notwithstanding Company counsel's statement that the company does not contend that she's an independent contractor, because some of the factors that will determine whether she is a managerial employee or not may perhaps overlap with some of those as to whether or not she's an independent contractor.

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When you look to independent contractor issues, you look to see whether the company has retained the right to control the manner and the means by which its agents accomplish the results sought. So, to that extent, if there is an overlap in addressing whether or not she is a managerial employee, let me simply make the following observations with respect to independent contractor.

I am persuaded, in agreement with Company counsel's statement, that she is not an independent contractor, as that term is used with reference to the National Labor Relations Act. It is of no great moment to me or to the outcome of this case that she may contend in a brief to the United States Supreme Court that she's an independent contractor, or, for purposes under the Internal Revenue Service, that she is an independent contractor. Obviously you can have internally inconsistent pleadings, depending on what the forum you are before.

This company, in my opinion, gives the agent no unfettered ability to accomplish the tasks for which she set out or held out to be, that is the selling of insurance and maintaining the book of business, that would make her an independent contractor within the understanding of the National Labor Relations Act.

Is Ms. Penzo a supervisor within the meaning of the Act? I do not mean to be speaking down to learned counsel, but let me, before addressing the issue of whether Penzo was, at material times herein, a supervisor within the meaning of the Act, it's

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helpful to review Section 2(11) of the Act and examine certain Board principles related thereto. Bear with me, please.

Section 2(11) of the Act reads: "The term supervisor means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them, or to adjust their grievances or to effectively recommend such action."

If in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, the statutory indicia just outlined in Section 2(11) of the Act are in the disjunctive and only one need exist to confer supervisory status on an individual. See, for example, *Miller Electric Company*, 301 NLRB Number 41, a 1991 decision, and *Opelika Foundry*, 281 NLRB 897, at 899, a 1986 case

However, in order for supervisory status to exist, the exercise of one or more of the above outlined powers must be accomplished with independent judgment on behalf of management in other than a routine or clerical manner. See, for example, *Hydro Conduit Corporation*, 254 NLRB 433 (1981). The statute insists that a supervisor, one have authority; two, to use independent judgment; three, in performing such supervisory functions; four, in the interest of management.

These latter requirements that I have just outlined in our

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the conjunctive. The burden of proving supervisory status rests on the party alleging that such status exists. On that point, see,

for example, *California Beverage Company*, 283 NLRB 328 (1987).

An individual's status as a supervisor is not determined by the individual's title or job classification, but rather, is determined by the individual's functions and authority. See, for example, *Mack's, M-a-c-k-'s, Supermarkets, Inc.*, 283 NLRB 1082, a 1988 case. Isolated or sporadic exercise of Section 2(11) authority is insufficient to predicate a supervisory finding on, and likewise, employees who are merely conduits for relating management information to other employees are not true supervisors.

Now, we have a little different situation in the present case that is not sometimes present in other cases, in that there is no question but what Mrs. Penzo and similarly situated NOAs have the authority to hire and fire support staff as they deem appropriate. The Company urges, by way of its pre-trial brief and in closing argument a case called *Ironton Publications*, speller I-r-o-n-t-o-n Publications, Inc., reported at 321 NLRB Number 148, a 1996 case, and specifically, Company counsel, on behalf of the Company, invites my attention to the point that sporadic and infrequent possession of supervisory authority is to be distinguished from its constant possession, but infrequent exercise.

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And in that case, the trial judge, Judge Scully, concluded that—well, let me read the sentence, before me. I'm reading from *Ironton Publications*, at slip opinion, page 13 I believe it is, in which Judge Scully states, "Sporadic and infrequent possession of supervisory authority is to be distinguished from its constant possession, but infrequent exercise. The latter indicates supervisory status, while the former does not."

And, in support of that proposition, Judge Scully cites *Kern, Kern, Council Services*, 259 NLRB 817, at 818, a 1981 case.

Now, the Board, in adopting Judge Scully's decision, to the extent they did so, did not make any comment contrary to the contention that Judge Scully announced, which perhaps was not absolutely essential to the disposition of the issue before him. But the problem that I have with that particular statement of Sub silentio law by Judge Scully and adopted, at least, by the Board, is it's infrequent exercise." Envisioned in that is that it. there be some exercise of the supervisory authority.

In the present case, there has been no exercise of supervisory authority by Ms. Penzo since at least the early '90s. Perhaps '91, '92. Somewhere in that neighborhood.

So that brings us to a case that the General Counsel invites us to review, of which Company counsel I think made reference to in his closing argument, which is called *Hecht's, Inc., H-e-c-h-t-'s, Inc.*, a case reported at 277 NLRB 916 (1985), in which Judge McLeod was speaking to the status of

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whether an individual in the toy department of Hecht's stores was a supervisor after management removed the two employees from that department that the supervisor had been supervising.

And Judge McLeod concluded that since the individual in question had no employees to supervise during February and March of 1993—and I think he means 1994 in that case because everything else in the decision would point to 1994, but that's not critical at all. Because she had no one to supervise during that

two month period of time, he concluded she was not a supervisor within the meaning of the Act, notwithstanding the fact that she had been two months earlier.

I am persuaded that current Board law, by which I am bound, has not moved away entirely from requiring some exercise of the supervisory authority. Stated differently, the mere possession of supervisory authority unexercised, does not make an individual a supervisor within the meaning of the Act.

In support of that, I invite your attention to such cases that the General Counsel cites, such as *Detroit College of Business*, in which the Board addresses, at some length, whether an individual exercising supervisory authority 50 percent of the time was sufficient to make him a supervisor. The Board indicated it was not interested in fast and hard lines with respect to whether you supervise 50 percent of the time or 25 percent of the time; however, it still said a factor that would be need necessarily looked at as relevant, would be how much time is

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spent in supervising individuals.

Now, I recognize that the case such as *Detroit College of Business*, and another case that I shall make reference to here in just a moment, do not arise in the same context that the case before me does. They're speaking in terms of an individual have someone to supervise and whether they supervise them as part of their function or whether it was just ancillary to their function.

The question before me, which I want to draw a bright line in the sand is, and the Company's position is very simple; that the mere possession, which no one disputes in the instance case, of supervisory authority, unexercised over an extended period of time, nonetheless warrants a finding that the individual is a supervisor within the meaning of the Act.

It is my conclusion that the Board has not gone that far yet. I agree with Company counsel to the extent; that the case *Ironton Publications, Inc.* tends to indicate that the Board may to it. well be moving in that direction. And if this case was before the Board, the Board might well be willing to make this the vehicle that they would state the mere possession of supervisory authority standing alone is sufficient to make one a supervisor.

I can't go that far because I don't think Board law permits me to go that far. I'm compelled to follow Board law. The National Labor Relations Act is federal legislation administered by a national agency intended to solve a National problem on a

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National scale. See, *NLRB v. Natural Gas Utility District*, 402 US 600, at 603–604 (1971).

Given that statutory objective, it has long been the Board's judgment that a uniform and orderly administration of the National Act necessitates that its Administrative Law Judges apply only established Board and Supreme Court precedents, as opposed to precedents of the Circuit Courts of Appeals, which are adverse to the Board and not the law of the case. See, *Insurance Agents International Union*, 119 NLRB 768, at 773 (1957), (I recognize that case was reversed on other grounds by the U.S. Supreme Court, at 361 US 477 (1960).)

I say all of that only to say this, that I don't think the Board has gone as far as you're asking me to go on the supervisory

issue, Company counsel, and I'm saying that *Ironton* tends to indicate the Board is moving in that direction. There are Circuit Court cases that tend to indicate the circuits are perhaps maybe already there on that issue. But I'm bound by Board law, which indicates to me that there must be *some* exercise of the supervisory authority over an extended period, or you can't be supervisory.

Now, in the case of *Automobile Club of Missouri*, 239 NLRB 614, a 1974 case, it appears that what you're asking me to find has been on the mind of the Board for a long time, inasmuch as the automobile case is a 1974 case, and in Member Kennedy's, concurring, in part, and dissenting, in part, portion of the

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decision, he would conclude, just as you are arguing, Company counsel, that the exclusion of supervisors from the Section 2(3) definition of employee rests upon whether an individual qualifies as a Section 2(11) supervisor and not upon whom he supervises.

The mere existence of the power determines whether an individual is an employee or a supervisor; however, unfortunately that was in the dissent of that decision.

So, all I'm saying on the supervisory point is that the mere possession is not enough, that she has to have exercised it within a reasonable period of time, and that her failure to exercise it, although by her own choice, since 1992, does not make her a supervisor within the meaning of the Act.

Now, another issue sort of ancillary to that issue I want to make clear that I am *not* addressing, and that is the status of the individuals a NOA would be supervising if they were supervising anyone, because it says they're not employees of Allstate that they are employees of the temporary service. I'm not addressing that issue. I don't need to reach that issue for my conclusion herein as to whether she would be a supervisor, in this case, Ms. Penzo, if she had temporary employees that were not employees of Allstate, but rather, were employees of a temporary service.

I have my beliefs on that, but it's not necessary to address such in this particular case.

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Now, before we can determine whether or not she's protected by the Act, we have to address one further matter. I have determined that she's not an independent contractor, and I have concluded that she is not a supervisor within the meaning of the Act. But finally, we come to the issue of whether or not she is a managerial employee. And here again, some of the conclusions that I will draw would apply also to whether or not she was a supervisor—as to whether or not she's a managerial employee.

First, we need to take a look, I guess, at what constitutes a managerial employee, and I don't think there's any dispute in that; the Board has long held that managerial employees formulate and effectuate management policies by expressing and making operative the decisions of their employer) and who have the discretion in the performance of their jobs, independent of the employer's established policies.

In my opinion, the Charging Party herein, Ms. Penzo, does not qualify as a managerial employee, for a number of reasons. First, every aspect of this business vis-a-vis the NOAs, that is the neighborhood office agents, is tightly controlled by the company,

Allstate Insurance. For example, starting perhaps with the most basic item, the NOA may not change the pre-printed forms and documents that are utilized to sell whatever type insurance it is.

She's not free, or the NOA is or not free, to draft, from the beginning, a contract of insurance without following

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guidelines that are clearly set down by the Company. The Company makes it clear, for example, in their employment agreement for the agent, that the company will own all business produced; that NOA's will not represent or solicit business for any other company; that NOA's will follow Company guidelines; that NOA's will open their business only where we approve; that you will only utilize certain signs to advertise your business; that you will only utilize certain advertisements in the telephone; you will only select letters, although perhaps it's a vast number of NOA's letters or correspondence may select from, to send as forms of advertisement or solicitation of business, but you must do so from those that have been pre-approved by the company

Much was made of the employees that could be hired by the NOA, but here again, the company tightly controlled who could be hired. As Ms. Wright testified, a witness that I find did so very candidly and truthfully and articulated the statement and position of the company in a fine manner, pointed out that you could not hire, an NOA could not hire an individual, regardless of how well qualified they were, unless that individual was willing to go through the temporary service designated by Allstate.

Then, in conjunction with whether she's an employee or a managerial representative, the Company's own documents speak to that and speak very clearly. For example, in the Neighborhood Office Agent Manual, it says, "As a neighborhood office agent,

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you will be a full-time employee of Allstate and enjoy all company benefits and privileges, in addition to the features exclusive to the neighborhood office agents."

Again, Ms. Wright, when she was testifying, was speaking to certain classifications, such as NSOs, LSOs, and one other category, which she said were truly independent contractors. And the brief description she gave about those would indicate that perhaps they are, in fact, true independent contractors, but I need not address that. The point being that Ms. Wright said the NOAs were employees.

She also indicated that they were paid by W2s as opposed to 1099s or 1098s—I never get those numbers quite correct—which goes more to the status of an independent contractor where you simply report on—I think it's form 1099, but doesn't matter for the purposes that I'm speaking to, whereas the NOAs are paid via W2, which also speaks to individuals being employees.

Much was made of the lease arrangements that the NOA goes through and signs the lease arrangement on his or her own. Here again, the companies own documents speak to the approval of the company. It even speaks to the—having to obtain the company's approval if you wanted to sublease any part of their office after they had leased it.

Again, much was made of the fact that the NOAs could hire solicitors, for example, to help generate more business. But

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again, the neighborhood office manual speaks to that by saying like clerical support, all solicitors must be hired through an approved service firm. And in addition, there's certain other requirements.

Much was made about advertisement, but here again, for example, in the Neighborhood Office Agent Manual, all ads must be placed through the "Woodward Direct, our national service firm, and must be approved by your regional vice president."

With respect to support that the NOAs are employees, as opposed to managerial representatives, is further buttressed by the benefit package program outlined in the Neighborhood Office Agent Manual.

There was evidence presented from both sides about the control over the NOAs in the form of requiring them to attend certain meetings, whether the individual would feel it beneficial or not, that is the NOA. And, for example, in a letter from the agency manager to the Charging Party, your attendance is required at these meetings. Another reminder, this time to all agents, NOA types, that you must observe our office hours. You must have a pre-approved answer on your answering machine.

So the control that the company places on its NOAs clearly places them in the employee status, rather than where they would have, as the law requires in order to be a managerial employee or a managerial representative. There's no indication in this

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record that they formulate and effectuate management policies or that they have the discretion in the performance of their jobs, independent of their employer's established policies. In fact, they can't do very much at all without the—at least prior approval of management.

Now, we come further. I have concluded that the individual in question engaged in concerted activities protected by the Act, and I have concluded that she is not an independent contractor, a supervisor or a managerial employee. I will go one step further before I conclude this and say that I conclude that the job in jeopardy warning that was given to her in October, on its face, indicates that it was given to her, in part, for her going to the media with her concerns about working conditions. Specifically, to the *Fortune Magazine* article, and the company has failed to show that it would have issued her the job in jeopardy absent her having engaged in these activities protected by the Act.

One final comment. I have reviewed the article in *Fortune Magazine*, and I have concluded that there is nothing in the article that is attributed to Penzo, which would be of such a derogatory nature to the company that, notwithstanding the fact she was an employee who engaged in concerted, protected activity, that what she said took her out from under the protection and the framework of the National Labor Relations Act.

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So, in summary, I find that the job in jeopardy warning issued to Carolyn Penzo, on or about October 19, 1995, violated Section 8(a)(1) of the Act, and I shall direct that the company expunge such from her records and post an appropriate notice, which I will attach to my certification of the decision.

The appeals period for filing any exceptions to my decision runs from, as I understand it, the certification of the decision, and I will certify the decision as reasonably soon after I receive the transcript as I can do so. And the court reporting service, particularly this Court Reporter, has always been faithful to get the transcript to us within approximately 10 days of the close of the hearing.

And, with that, let me say that it has been a pleasure to hear the case.

And, Madam Court Reporter, I thank you for being here and taking the proceeding down.

And, with that, the trial is closed.

(Whereupon, at 5:15 p.m., the hearing was concluded.)

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue "job-in jeopardy" warnings to our employees because they have engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful "job-in jeopardy" warning we issued Carolyn Penzo on or about October 19, 1995, and, WE WILL within 3 days thereafter, notify Carolyn Penzo in writing this has been done and that the "job-in jeopardy" warning will not be used against her in any way.

ALLSTATE INSURANCE COMPAN