

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

In the Matter of

MACY'S, INC.

Employer

and

LOCAL 1445, UNITED FOOD AND
COMMERCIAL WORKERS UNION

Petitioner

Case 01-RC-091163

DECISION AND DIRECTION OF ELECTION¹

Local 1445, United Food and Commercial Workers Union (Petitioner or Union) seeks to represent a bargaining unit of all full-time and regular part-time cosmetics and fragrances employees, including counter managers, employed by Macy's, Inc. (Employer or Macy's) at its Saugus, Massachusetts store.

The parties agree that the following employees are appropriately included in the petitioned-for bargaining unit:

¹ Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Acting Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

All full-time, regular-part time, and on-call employees who have worked an average of four hours per week during the calendar quarter immediately preceding the eligibility date, employed by Macy's in the cosmetics and fragrances departments at its Saugus, Massachusetts store, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances, but excluding MAC employees, sprayers, the cosmetics fragrances manager, the store manager and assistant store managers, department managers, account coordinators, selling floor supervisor, merchandise team managers, receiving team manager, visual manager, administrative team manager, human resource manager, operations manager, loss prevention manager, clerical employees, guards, and supervisors as defined in the Act.

The Employer, however, maintains that under *Specialty Healthcare & Rehabilitation Center of Mobile*,² the petitioned-for unit is inappropriate because it does not contain employees readily identifiable as a group who share a community of interest. The Employer argues that even if the petitioned-for employees constitute a readily identifiable group, the unit must include all other employees of the Saugus store, or alternatively, all selling employees at the Saugus store.

The Petitioner contends that the unit sought does contain employees readily identifiable as a group. Additionally, the Union takes the position that other employees, including other sales employees, should be excluded from the bargaining unit because they lack an overwhelming community of interest with the employees in the otherwise appropriate unit.³

I find, in agreement with the Union, that the unit sought is appropriate, as it contains employees readily identifiable as a group who share a community of interest and the Employer has failed to establish that employees in a larger unit share an overwhelming community of interest with the petitioned-for employees. Accordingly, I shall direct an election among the cosmetics and fragrances employees as described above.

FACTS

A. Overview

Macy's operates several department stores throughout Massachusetts and Rhode Island, including its store in Saugus, Massachusetts. The Saugus store is comprised of the following primary selling departments, housed on the store's two levels: women's shoes; handbags; ready to wear (women's clothing); men's clothing; juniors; fine jewelry; fashion jewelry; home; furniture; bridal; and cosmetics/fragrances.

² 357 NLRB No. 83 (2011).

³ The Union is unwilling to proceed to an election in any unit other than the petitioned-for unit.

Approximately 150 employees work at the Saugus store; 120 of those are sales employees. There are seven sales managers who report to a single store manager.⁴

Cosmetics and women's fragrances are located on the first floor of the Saugus store. Cosmetics are sold out of eight bays located just inside the main entrance to the store, one bay for each of eight major cosmetics lines.⁵ Women's fragrances are sold at two bays adjacent to the cosmetics counters. Sandwiched between the Lancôme cosmetics counter and the fragrances counter is the MAC cosmetics counter, which is staffed by sales employees of Estee Lauder.⁶ Surrounding the cosmetics and fragrances counters are various women's and juniors' clothing departments, as well as fine jewelry and fine watches. Men's fragrances are sold from a single bay on the second floor, adjacent to men's clothes.

B. Cosmetics/Fragrances Department Employees

The Cosmetics/Fragrances department consists of about 41 employees, seven of whom are on-call employees.⁷ Six of the eight cosmetics counters are staffed by a counter manager and a number of beauty advisors.⁸ The two fragrances counters each have their own counter manager as well as selling employees.⁹

Cosmetics employees and fragrances employees are known collectively as beauty advisors. Those working in cosmetics are assigned to one vendor line and work only at that counter.¹⁰ Fragrances employees, on the other hand, sell all the fragrance lines sold by Macy's. On-call employees are assigned as needed to men's or women's fragrances or to any of the eight cosmetics lines.

⁴ The eight managers have been excluded from the unit by stipulation.

⁵ The eight major vendor lines are: Lancôme, Clinique, Estee Lauder, Chanel, Elizabeth Arden, Shiseido, Clarins, and Origins.

⁶ These are not employees of Macy's, and are excluded from the appropriate unit.

⁷ On-call employees are assigned as needed to any of the cosmetics or fragrances counters, but never to other departments. By stipulation of the parties, on-call Cosmetics/Fragrances employees who meet the Board's *Davison-Paxson*, 185 NLRB 21 (1970) formula will be included in the unit found appropriate.

⁸ The parties stipulated that counter managers are non-supervisory employees included in the unit found appropriate.

⁹ Fragrance employees known as "sprayers" are employed by a specific product line and are excluded from the unit.

¹⁰ The sole exception described in the record is during semi-annual store inventories, when cosmetics employees may work outside their own area. However, such work is performed outside regular sales hours, and employees receive overtime compensation.

Kelly Quince is the Cosmetics/Fragrances manager.¹¹ She has no responsibility for any other department, but oversees employees assigned to all the cosmetics lines, as well as women's and men's fragrances. Other department managers might temporarily oversee Cosmetics/Fragrances if Quince is on vacation or has a day off. Vendor representatives of the cosmetics and fragrances lines sold at Macy's are assigned to the store, but do not supervise the cosmetics and fragrances employees.

Six of the cosmetics lines have a counter manager, a stipulated non-supervisory sales employee who also has responsibility for ensuring good customer service in her product line by monitoring stock, making sure the counter is appropriately staffed, and coaching employees. Women's fragrances and men's fragrances each have a counter manager as well. It appears from the record that no other department in the Saugus store has an equivalent position.

Cosmetics beauty advisors are hired by Macy's after being interviewed by representatives of both the Employer and the specific vendor. Hiring decisions are made after joint consultation. Fragrances employees and on-call employees are interviewed only by Employer representatives. For all Cosmetics/Fragrances employees, prior experience is desirable but not necessary.

Each of the major cosmetics vendors has a designated account executive who is responsible for the product line in a number of Macy's stores. These executives are employed by the vendors; they monitor the sales in their products lines, ensure that the store is adequately supplied, and provide training and assistance to the beauty advisors who are selling their products. They do not supervise the beauty advisors.

In addition, each of the major cosmetics lines has an account coordinator, a Macy's employee who acts as a coach to beauty advisors in several stores. Coordinators provide in-store support and training related to sales and customer service. They do not supervise anyone in Cosmetics/Fragrances.

Product training, which is conducted by account executives, account coordinators, and other vendor representatives, may take place at the Saugus store, at other Macy's stores, or at other locations, and often includes employees of multiple Macy's locations, and sometimes non-Macy's employees as well. At these training sessions, beauty advisors learn about new products and how they should be used with existing products. They also receive vendor manuals containing information on how to sell the new products, as well as general information to assist the beauty advisors in selling.

For cosmetics employees, training is usually limited to the product line in which an employee works. For example, Lancôme beauty advisor Civita Fulchini testified that even in-house training is focused on the product line she sells. Clinique beauty advisor Maria Francisco testified that she is required to attend all-day Clinique trainings three times a year at the Marriott Hotel in Marlborough, MA.

¹¹ Quince did not testify at the hearing.

Cosmetics and fragrances employees are paid a base hourly rate plus three percent commission on all sales. Counter managers receive a one-half percent commission on all sales made in their product line, in addition to the three percent they earn on their own sales. On-call employees receive a two percent commission. Cosmetics employees also receive a two percent commission on cosmetics sales outside their own vendor line.¹² The commission is generally paid by the vendor, although each vendor has a separate arrangement with the Employer.

Purchases made in Cosmetics/Fragrances are almost always rung up for sale in that department. Although store manager Danielle McKay testified that customers may take their cosmetics or fragrances purchases to another department for checkout, she also stated that the Employer “[doesn’t] like to make a habit of it” because no one receives the commission for the sale. Beauty advisor Fulchini testified that, in her three years in cosmetics, she has never seen a customer take a cosmetics product to check out in another department.¹³

Each beauty advisor in Cosmetics has a number of regular customers with whom she maintains regular contact. Beauty advisors refer to these regulars as “clients”, and may have as many as 400 personal clients in their registry file, where they keep track of client purchases. Beauty advisors call their clients to inform them of new products and special promotions, and to ask whether their cosmetics need replenishing. In turn, clients have their beauty advisors’ business cards and often call them personally to make a purchase, solicit advice, or request a makeover.

Beauty advisors for five of the eight vendor lines wear distinctive clothing, mandated and furnished by the vendors. Each vendor has a different uniform, worn by beauty advisors at all Macy’s stores and other department stores where its products are sold. Employees selling the other three cosmetics lines, as well as men’s and women’s fragrances employees, wear regular street clothes as dictated by Macy’s dress code.

C. Employees Working in Other Departments

A number of employees outside Cosmetics/Fragrances are classified as specialists. Like cosmetics employees, these specialists are dedicated to a particular brand, and trained by those vendors in their products. Among the vendors with

¹² A cosmetics employee might sell another vendor’s product when all the beauty advisors from that line are busy, or if the other counter is short-staffed because someone is at lunch or on break.

¹³ As a courtesy to customers, items from other departments are occasionally rung up at cosmetics or fragrances counters. For example, if a customer is holding an item from the adjacent fashion jewelry department when she makes a cosmetics purchase, the beauty advisor typically asks if she would like to pay for the jewelry there as well. No commission is paid for non-cosmetic or fragrance sales.

specialists at the Saugus store are Levis, Polo, Buffalo, Guess, Inc.,¹⁴ The North Face, and Lenox. Specialists are jointly interviewed by Macy's and the particular vendor whose product they sell.

Specialists report to a sales manager who is typically responsible for the entire department. In this regard, specialists selling Polo, the North Face, and Nautica could report to the same manager, as there is no manager dedicated to the individual vendors. Each of those brands is considered a category or department that is part of several departments. For example, The North Face products are sold in the children's, men's, and ladies' departments, and associates selling those products report to a number of different managers. For these vendor lines, there is no equivalent of the cosmetics counter managers.

Some employees outside Cosmetics/Fragrances are paid on a base plus commission compensation plan. For example, employees in fine jewelry, men's clothing, men's shoes, and "big ticket"¹⁵ receive commissions on their sales,¹⁶ although it is not clear whether those commissions are paid by Macy's or the individual vendor. Employee specialists selling products for Levis, Guess, Buffalo, and Polo are not commissioned, but do receive a bonus pay incentive from the vendor.

Like their colleagues in Cosmetics/Fragrances, sales associates in other departments receive training both on-the-job and off-site. For example, children's department employees attend back-to-school seminars; and employees selling housewares, men's clothing and shoes, North Face outerwear, and fine jewelry, and other merchandise receive relevant product training several times a year.¹⁷ These trainings are typically conducted at a Macy's location, such as its Auburn, MA training center, or at its stores in Boston or Braintree MA. Occasionally, training sessions are held at the Saugus store. Wherever they are held, the training sessions are attended only by Macy's employees.¹⁸

Store manager McKay testified that employees in at least three departments maintain client lists similar to those maintained by beauty advisors. Employees in men's clothing, bridal, and furniture and mattresses maintain client lists because they have repeat business. Other than notifying customers of special events, it is not clear what these lists are used for.

¹⁴ Inc. is a private Macy's label.

¹⁵ "Big ticket" items are furniture and mattresses.

¹⁶ Unlike cosmetics beauty advisors, those employees sell the products of multiple vendors.

¹⁷ As of the hearing date, 47 such trainings had been conducted in 2012.

¹⁸ For "big-ticket" sales associates, training sessions might include vendor representatives as well as Employer representatives. The same is true for fine jewelry employees, as well as those selling specific product lines, such as The North Face and Polo.

Outside the cosmetics and fragrances department, sales employees, including specialists, are governed by Macy's store-wide dress code and do not wear any special uniform.

Employees in all departments, including Cosmetics/Fragrances, are scheduled for work using same computerized system. They receive the same benefits, are evaluated using the same scorecard and criteria, share an employee handbook, attend the same daily store meetings,¹⁹ and use the same store entrance, break room, and time clock.

D. Employee Interchange

Employees in cosmetics and fragrances are not scheduled to work in other store departments, nor do other employees work in cosmetics or fragrances. As noted above, cosmetics beauty advisors do not even work outside their own product line except when customer assistance is needed at another counter, and on-call employees are called to work only in Cosmetics/Fragrances.

As noted above, the only situation in which Cosmetics/Fragrances employees might work alongside other sales associates occurs during store inventories, when beauty advisors may be asked – or volunteer – to take inventory in another department. No commission is paid for inventory work.

Because of their physical proximity within the store, employees in cosmetics and fragrances have incidental daily contact with employees of other departments. Additionally, Cosmetics/Fragrances employees may circulate among other store departments to try to recruit customers.

In the past two years, nine employees have applied for and received permanent transfers from other sales positions in the Saugus store into Cosmetics/Fragrances. Only one person has permanently transferred out since being promoted to a sales supervisor position in another department in the Saugus store. With that single exception, no employees have permanently transferred out of Cosmetics/Fragrances. There are no temporary transfers into or out of Cosmetics/Fragrances.

E. Bargaining History

There is no history of collective bargaining at the Employer's Saugus store. However, the record contains relevant evidence regarding a recent organizing effort at the store, as well as bargaining relationships at other Macy's stores.

¹⁹ Known as daily rallies, these meetings are used to motivate employees by informing them of the previous day's sales totals, special events in various departments, and any other pertinent news in the selling departments. All sales personnel, including managers, attend these rallies.

In March 2011, the Union filed a petition to represent a wall-to-wall unit at the Saugus store, and the Regional Director found that unit to be appropriate. I take administrative notice that an election was held pursuant to that petition on May 20, 2011, and that the Union lost the election, as certified on May 31, 2011.

The Union has collective bargaining relationships at six Macy's stores in Massachusetts and Rhode Island.²⁰ In the five Massachusetts stores, cosmetics and fragrances employees have been excluded from storewide units.²¹ In Warwick, cosmetics and fragrances employees were excluded from an overall store unit until 2005, when the Union organized them separately. Warwick beauty advisors were incorporated into the storewide unit, although many of their terms and conditions of employment are distinct from other bargaining unit employees.

ANALYSIS

In *Specialty Healthcare*,²² the Board recently reiterated its traditional principles of unit determination. Procedurally, the Board examines the petitioned-for unit first. If that unit is an appropriate unit, the Board proceeds no further. Employees may seek to organize a unit that is appropriate – not necessarily *the* single most appropriate unit. In making the determination of whether the proposed unit is an appropriate unit, the Board's focus is on whether the employees share a community of interest. In determining whether employees in a proposed unit share a community of interest, the Board examines:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.²³

In *Specialty Healthcare*, the Board further set forth the traditional standard to be applied when an employer contends that the smallest appropriate unit contains employees who are not in the petitioned-for unit. The Board first assesses whether the petitioned-for unit is an appropriate bargaining unit. The employees in the petitioned-for unit must be readily identifiable as a group, and the Board must find that they share a community of interest using the traditional criteria. If the petitioned-for unit satisfies that standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it

²⁰ Peabody, Braintree, Belmont, Natick, and Boston, MA; and Warwick, RI.

²¹ Tom Brown, the director of servicing for the Union, testified that he did not know how the Massachusetts units came into existence.

²² 357 NLRB No. 83, slip op. at 8-9 (2011).

²³ *Id.*, slip op. at 9, citing *United Operations, Inc.*, 338 NLRB 123 (2002).

seeks to include share an “overwhelming community of interest” with the petitioned-for employees, such that there “is no legitimate basis upon which to exclude certain employees from the larger unit because the traditional community-of-interest factors overlap almost completely.”²⁴

I find that the petitioned-for unit is readily identifiable as a group and that the petitioned-for employees share a community of interest with one another. Cosmetics and fragrances employees work in two distinct areas of the store, from which they rarely stray. They work in one of two job classifications – beauty advisors and counter managers. Cosmetics beauty advisors can and do substitute for one another when needed for customer service purposes, despite their training in different product lines. The petitioned-for unit is not a fractured unit, as argued by the Employer, because it reflects a departmental line drawn by the Employer itself when it established differing terms of employment, including wage structures and vendor relationships, for cosmetics and fragrances employees. The petitioned-for employees are hired and trained differently from the vast majority of sales employees at the store, including input in these matters by the vendors themselves. Most of them wear uniforms that distinguish them from other sales employees.²⁵

Having found that the petitioned-for unit is a readily identifiable group, I turn to the issue of whether other sales employees share such an overwhelming community of interest with the cosmetics and fragrances employees that there is no legitimate basis to exclude the latter from a larger unit of sales employees. I find that the cosmetics and fragrances employees do share some common interests with sales employees in other departments, and especially those classified as specialists. All sales employees are subject to the same work rules and policies as set forth in their employee handbook, and are evaluated on the same matrix that emphasizes sales volume. Thus, their performance objective is the same as other sales employees: to sell goods to customers of the store. Moreover, cosmetics employees have certain features in common with employees known as specialists: they represent a single vendor line, and are trained by the vendors in how to sell that line.

There are also meaningful differences, however. Other specialists are not paid a sales commission, but instead receive bonuses from the vendors they represent. Sales employees in fine jewelry, men’s clothing and shoes, and big ticket items may share a similar wage structure with cosmetics and fragrances employees, as they are compensated on a base-plus-commission basis, but the record is devoid of evidence regarding the specifics of their compensation. Moreover, non-specialist sales employees that the

²⁴ Id., *sup op.* at 11-13 and fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)).

²⁵ The Employer correctly notes that cosmetics and fragrances employees have some differing terms and conditions of employment even among themselves, and contends that this militates against a finding that they share a separate community of interest. However, cosmetics and fragrances employees share common supervision, a common wage structure, and similar duties – all indicia of a shared interest.

Employer would include in the unit are compensated and trained very differently from the petitioned-for employees.

Some sales employees – notably in men’s clothing, bridal, and big ticket items – keep client records comparable to those kept by Cosmetics/Fragrances employees. However, there is little evidence indicating that the records are used for anything more than promotional mailings, unlike those kept by beauty advisors, who use their client histories to aggressively solicit business from regular customers.²⁶

In the final analysis, although there are some similarities between the petitioned-for employees and other sales employees, it cannot be said that there is such complete overlap between the two groups, as required by *Specialty Healthcare*, that inclusion of sales employees from throughout the store is required.²⁷ First, the petitioned-for unit is a readily identifiable department. Although, the Employer argues that the petitioned-for unit is fractured because it divides employees within a single job classification, units including all employees within a certain job classification are not the only permissible units.²⁸ The Board has held that appropriate units may be defined by lines drawn by an employer, such as units based on departments, functions, facilities, and the like. *Specialty Healthcare*²⁹; *Odwalla, Inc.*³⁰

Next, functional integration is almost non-existent, as cosmetics employees sell their own products from the counters in their own work areas.³¹ Regarding supervision, although cosmetics and fragrances employees share common supervision at the highest level, they are supervised at the first level by their counter managers,³² and at the second

²⁶ I note that the differing nature of the products sold by Cosmetics/Fragrances suggests that the client records are used differently. Cosmetics are consumable products that must be replenished regularly, while bridal and big ticket sales, and to a lesser degree men’s clothing, are not.

²⁷ Having found that cosmetics and fragrances employees are separate and distinct from other sales employees, I need not reach the issue of whether they share a community of interest with non-sales employees, the unit the Employer argues is most appropriate.

²⁸ The Board has held that appropriate units may also be defined by other lines drawn by an employer, such as units based on departments, functions, facilities, and the like. *Specialty Healthcare*, supra, slip op. at 9, fn. 19; *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 5 (2011).

²⁹ Supra, slip op. at 9, fn. 19.

³⁰ 357 NLRB No. 132, slip op. at 5 (2011).

³¹ Occasionally, a customer will bring an outside item to be rung up at a cosmetics or fragrances counter, but such integration is strictly for the convenience of the customer, and there is no record evidence of how often it occurs.

³² Although the counter managers are not statutory supervisors, they most closely observe beauty advisors’ selling performance and coach them in both product awareness and customer service issues. They report directly to the department manager.

level by department manager, statutory supervisor Kelly Quince. *Grace Industries, LLC*³³ (common upper-level supervision outweighed by other factors).

Regarding interchange, there is little evidence of temporary interchange between cosmetics and fragrances employees and other selling employees. Sales employees from other departments never substitute for Cosmetics/Fragrances employees; nor are Cosmetics/Fragrances employees temporarily transferred to other sales departments. It appears that the only opportunity for the two groups to work together is during semi-annual store inventories, when employees from Cosmetics/Fragrances might volunteer or be assigned to assist with inventory in departments other than their own. Although such interchange is not quantified in the record, it clearly fails to meet the Board's requirement of significant interchange.

In the past two years, approximately nine employees have permanently transferred from other store departments into Cosmetics/Fragrances. No employees have transferred out of Cosmetics/Fragrances to other departments.³⁴ However, the Board has found permanent transfers to be a less significant indication of actual interchange than temporary transfers. *Red Lobster*.³⁵ The two groups have daily incidental contact by virtue of their proximity in the store, their shared use of a single break room, and their required attendance at daily store rallies. The majority of cosmetics employees wear some sort of uniform, dictated and supplied by the individual vendors, while other sales employees are governed only by the Employer's dress code. In these circumstances, it cannot be said that the overlap is almost complete.

The cases cited by the Employer do not warrant a different result. In *Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*,³⁶ the Regional Director found appropriate a unit limited to women's shoes sales associates in a multi-department retail clothing store. The Employer urges me to find that case distinguishable, arguing that: (1) cosmetics and fragrances employees, unlike the shoe salespersons, are paid on a salary structure similar to other employees; (2) unlike Macy's beauty advisors, the shoe sale associates had relevant experience before being hired; (3) the shoe salespersons rarely attended store meetings; and (4) there was little evidence of transfers into the shoe department and no transfers out. Contrary to the Employer's position, I find that the salient facts of *Bergdorf Goodman* are indistinguishable from the present case. Cosmetics employees are paid on a wage structure that is entirely different from that of the vast majority of sales employees, and they have an additional level of oversight compared to their counterparts in other departments. Significantly, beauty advisors, like

³³ 358 NLRB No. 62, slip op. at 6 (2012), citing *Hydro Constructors, Inc.*, 168 NLRB 105 (1967).

³⁴ One individual, having transferred into Cosmetics/Fragrances, was eventually promoted to a managerial position outside that department.

³⁵ 300 NLRN 908, 911 (1990).

³⁶ Case No. 02-RC-076954 (May 4, 2012); Order Granting Request for Review (May 30, 2012).

the shoe sales associates, have little interchange or functional integration with sales employees in other departments.

In *Wheeling Island Gaming, Inc.*,³⁷ cited by the Employer, the Board found a petitioned-for unit of poker dealers inappropriate, where the poker dealers could not be distinguished from other table games dealers. *Wheeling Island Gaming* was a pre-*Specialty Healthcare* case, however, in which the Board did not apply the unit determination test in the manner articulated in *Specialty Healthcare*, which requires the excluded employees to have an “overwhelming” community of interest with the petitioned-for employees.³⁸ Moreover, there are factors here that distinguish the petitioned-for employees from the other employees of the Employer in ways that were not present in *Wheeling Island Gaming*, such as differences in method of pay, vendor input in hiring and training, and dress requirements.

Accordingly, based upon the foregoing³⁹ and the stipulations of the parties at the hearing, I shall direct an election in the following unit:

All full-time, regular-part time, and on-call employees who have worked an average of four hours per week during the calendar quarter immediately preceding the eligibility date, employed by Macy’s in the cosmetics and fragrances department at its Saugus, Massachusetts store, including counter managers, beauty advisors, and all selling employees in cosmetics, women’s fragrances, and men’s fragrances, but excluding MAC employees, sprayers, the cosmetics

³⁷ 355 NLRB No. 127 (2010).

³⁸ The Employer cites a series of cases for the proposition that “no Board decision has ever approved a unit which departs from the store-wide presumption as dramatically as the unit sought here by Petitioner.” Because they are all pre-*Specialty Healthcare* cases applying a different standard than the Board currently applies, I shall not address them separately. I note however, that even prior to *Specialty Healthcare*, these facts would provide a traditional basis to find the petitioned-for department unit appropriate, especially where no other labor organization seeks to represent employees on a wider basis. E.g. *Deposit Tel. Co., Inc.*, 328 NLRB 1029, 1031 (1999) (departmental unit in utility industry case appropriate, notwithstanding longstanding appropriateness of overall units in the industry, where petitioned-for employees constitute employer administrative division, separate supervision, and little interchange).

³⁹ I note that there is no history of bargaining at the Saugus store. However, bargaining unit composition at other Macy’s stores in Massachusetts and Rhode Island is instructive, though not controlling. *International Paper Co.*, 171 NLRB 526 (1968)(history of bargaining for one group of an employer’s organized employees is not controlling with respect to the employer’s unorganized employees). In each of the five Massachusetts stores where the Union represents employees, cosmetics and fragrances employees are excluded from storewide units. In the Rhode Island store, cosmetics and fragrances employees were excluded from the storewide unit until they were separately organized by the Petitioner in 2005 and incorporated into the existing unit, albeit with differing terms of employment. The record is silent regarding whether those employees were excluded by stipulation or by Regional Director Decisions, a distinction that is significant because bargaining history determined by the parties and not the Board is not binding. *Laboratory Corporation of America Holdings*, 341 NLRB 1079, 1083 (2004). Here, I have based my decision on the various other factors described above.

fragrances manager, the store manager and assistant store managers, account coordinators, selling floor supervisor, merchandise team managers, receiving team manager, visual manager, administrative team manager, human resource manager, operations manager, loss prevention manager, clerical employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by the Petitioner, Local 1445, United Food and Commercial Workers Union.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*,⁴⁰ *NLRB v. Wyman-Gordon Co.*⁴¹ Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North_Macon Health Care Facility*.⁴² In order to

⁴⁰ 156 NLRB 1236 (1966).

⁴¹ 394 U.S. 759 (1969).

⁴² 315 NLRB 359 (1994).

be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before November 15, 2012. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 23, 2012.

In the Regional Office's original correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

/s/ Ronald S. Cohen
Ronald S. Cohen, Acting Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 8th day of November, 2012