

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

In the Matter of

MACY'S, INC.,

Employer,

Case No. 01-RC-091163

and

**LOCAL 1445, UNITED
FOOD AND COMMERCIAL
WORKERS UNION,**

Petitioner.

**EMPLOYER, MACY'S INC.'S
BRIEF ON REVIEW**

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I. INTRODUCTION

Macy's, Inc. submits this brief on review of Acting Regional Director Ronald S. Cohen's November 8, 2012 Decision and Direction of Election finding that Local 1445 of the United Food and Commercial Workers Union's petitioned-for unit limited to full-time and part-time cosmetics and fragrances selling employees working on two different floors at the employer's Saugus, Massachusetts multi-department retail department store is appropriate. The Board granted Macy's Request for Review in an order dated December 4, 2012.

A substantial question of law and policy is raised by the Acting regional Director's departure from officially reported Board precedent and the Acting Regional Director's decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of Macy's, Inc.

In finding that one selling department split between two floors in a multi-department retail store constitutes an appropriate unit, the Acting Regional Director's Decision erroneously found that:

- The cosmetics and fragrances sales employees working on two different floors are readily identifiable as a group and share a community of interest;
- The cosmetics and fragrances sales employees do not constitute a fractured unit, an arbitrary segment of what would be an appropriate unit, i.e., all selling employees or a presumptively appropriate store-wide unit; and
- The cosmetics and fragrances sales employees do not share an overwhelming community of interest with other sales employees.

II. STATEMENT OF THE CASE

Petitioner, Local 1445, United Food and Commercial Workers Union filed a petition on October 12, 2012 seeking a unit limited to "all full and part-time employees in cosmetics and men's and women's fragrances, at Macy's Saugus, Massachusetts retail department store. Board Exhibit B-1. At the hearing Macy's asserted that a unit limited to just the cosmetics and fragrances employees is not an appropriate unit because it would be a fractured unit, an arbitrary segment of what would be an appropriate unit. The appropriate unit is the presumptively appropriate store-wide wall-to-wall unit of all employees at the Saugus store or in the alternative a unit of all selling employees at the Saugus store. (T. 7-8) One year previously, in March, 2011, Petitioner filed a petition to represent a wall-to-wall unit at the Saugus Macy's store and the Regional Director found that unit to be appropriate. An election was held on May 20, 2011 and Local 1445 lost the election, as certified on May 31, 2011. (Decision at 8)

On November 8, 2012 the Acting Regional Director issued his Decision and Direction of Election and on December 4, 2012 the Board issued an order granting the employer's Request for Review.

III. FACTS

A. Saugus Store Selling Operations

The Macy's Saugus store consists of two floors with merchandise departments located on each floor. Employer Exhibit 1. There is one store manager to whom seven (7) sales managers directly report: women's shoes and handbags; juniors; fine jewelry; ready to wear; men's; furniture and bedding; and cosmetics/fragrances. (T. 10-11). There are eleven (11) primary selling departments: juniors; ready to wear (women's clothing); women's shoes; handbags;

furniture; home; men's clothing; bridal; fine jewelry; fashion jewelry; and cosmetics/fragrances. (T. 12-13). There are vendor specific and Macy's private brand departments within the primary selling department such as Levis; INC.; Buffalo; Polo; LaCoste; Guess shoes; North Bay shoes. (T. 104-109). The sales specialists assigned to those vendor specific departments sell only that particular product line because of their specialist training on that product. (T. 54-55, 104). The Saugus store employs 150 employees of whom 120 are sales employees.

B. Cosmetic Fragrances Non-Contiguous Department

The cosmetics/fragrances department has 41 sales employees including 7 on-call employees. (T. 14, 57). The cosmetics/fragrances department is split between the two floors. On the first floor is cosmetics and women's fragrances. (T. 15, 17; Employer Exhibit 1). The first floor cosmetics/fragrances counters are surrounded by and contiguous to the fine jewelry counters, women's shoes and juniors departments, Guess, Michael Kors, American Rag, classification tops, Material Girl and Jessica Simpson selling departments. (T. 16; Employer Exhibit 1). The second floor men's fragrances counter is contiguous to Calvin Klein, Men's Collections, Young Men's, and Men's Sportswear departments. (Employer Exhibit 1) The first floor cosmetics area has eight vendor line departments: Lancôme, Clinique, Estee Lauder, Chanel, Elizabeth Arden, Shiseido, Clarins and Origins. (T. 16-17, 105). Located between the Lancôme and fragrances counters is the MAC cosmetics brand counter which is staffed by sales employees employed by Estee Lauder, not Macy's. (T. 76-77). Each vendor product line has its own counter section. (T. 25). The cosmetics and fragrances department is open during all store selling hours and the employees therein work the same hours as all other selling employees. (T. 26-27). Cosmetic sales employees are assigned and dedicated to selling one of the eight particular vendor product lines. (T. 27-28). Fragrance sales employees are not dedicated to

selling only one vendor line nor are on-call employees. (T. 57, 102). On-call sales employees are assigned wherever they are needed in either fragrances or any cosmetics vendor line. (T. 58, 79).

C. Hiring

Cosmetic vendor representatives participate along with Macy's in interviewing candidates for vacancies in cosmetic sales positions. (T. 52-53). Fragrance candidates and on-call employees in cosmetics/fragrances are not interviewed by vendor representatives. (T. 78-79, 101-102). In addition to cosmetics positions, vendor representatives participate with Macy's in the hiring of selling specialists for specific brands such as Levis, Polo, Buffalo and Guess jeans. (T. 53-54). No prior cosmetics or fragrance job experience is required when hiring for a vacancy. (T. 62-63, 98, 119).

D. Training

All sales associates undergo merchandise knowledge and selling technique training both on the job and at outside locations. (T. 31-32, 68-71, 79, 97-98, 120-122, 129-130, 140-150; Employer Exhibit 2). The on-call cosmetics and fragrances employees do not attend any off-site training seminars but only on the job training. (T. 97-98). Product training is provided off-site to almost every category of sales associate at the Saugus store just as the cosmetics employees receive, e.g., back-to-school seminars for children's department sales employees; newborn/baby product seminars; housewares, bridal, men's clothing and men's shoes, North Face outerwear, furniture and mattresses, fine jewelry, watches and diamonds, and vendor representative training for sales specialists selling that particular vendor's merchandise. (T. 140-150). Forty seven (47) such training sessions have been held year to date. (T. 143).

Cosmetic employees book appointments for their customers to come in to the store and try a new product or have their makeup done or attend a special sales event. (T. 44-45). The same is true for other sales associates who develop client lists and make appointments for special events in departments such as fine jewelry, bridal, big ticket (furniture and mattresses), men's clothing. (T. 75-76). Representatives of vendors periodically visit the store to provide product training to sales associates in cosmetics, Guess, Polo, Buffalo, North Face, housewares and tabletop. (T. 28-31; 67).

E. All Sales Employees, Including Cosmetics and Fragrances, Have the Same Job Duty, to Sell, and are Evaluated On Identical Factors

Regardless of what merchandise department within which selling employees are assigned they all have the same job duty which is to sell merchandise and are evaluated on the same factors. (Employer's Exhibits 2 and 3, T. 156-159):

- Q What is your position with Macy's?
A I am the human resource manager and I am in Square One, Saugus, MA
- Q Are the sales associates at the Saugus store evaluated on their performance?
A Yes they are
- Q And how often is the evaluation conducted?
A We do an annual performance appraisal. And they also, we do have reports that give us information on their scorecard on a weekly, monthly, year to date basis.
- Q Okay. Let me start with the scorecard. What is a scorecard?
A A scorecard is really some information regarding the sales associate's sales performance. It is basically done on four criteria. One is sales per hour. The other is items per transaction, average sale, and loyalty, which is new accounts that they open.
- Q By new accounts, what do you mean, credit card?
A Macy's star reward credit accounts.
- Q What is IPT?
A Items per transaction
- Q What does that mean?
A So in any given sale that they make with a customer, how many items do they sell to that customer, so is it one shirt, a shirt and a pair of socks, how many items are included in that transaction.

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- Q So the scorecard metrics on which sales associates are graded, are they the same metrics for all sales associates at the Saugus store, regardless of what product they are selling?
- A Yes, they are
- Q Now you said that the scorecard was part of the overall annual evaluation.
- A Correct
- Q What else goes – what are the other metrics on which employees are evaluated in the annual performance review?
- A There is the store's customer service results.
- Q Now what does that mean?
- A That means we get feedback from our customers that tell us whether or not they feel they have been connected with and given assistance. It's basically the numbers that we use as a store to determine our level of customer service. And all associates are given a store's score for connect and assist. There is also a section on teamwork, which is a qualitative section that is done by their sales manager based on their performance. And I feel like there may be another area on the form. I don't have one in front of me, forgive me.
- Q You mentioned store assist, didn't you?
- A Correct
- Q And what was that again?
- A That's customers give us regular feedback if they feel that they have been assisted when they came into the store.
- Q Is there a metric called store connect?
- A Yes.
- Q What is that?
- A Along the same lines. They tell us if they have been connected with. So did we make a connection with them, meaning greet them, approach them, and did we assist them, help them find what they were looking for.
- Q Which metric is the most heavily weighted in an annual review?
- A That would be the associate's scorecard.
- Q And is it fair to say that the scorecard is primarily weighted towards how much you are selling?
- A Yes. That's the largest portion of the scorecard, yes, your actual sales.
- Q And is there anything unique or different in the annual performance review for a cosmetic and fragrance associate versus any other associate?
- A No

F. Common Benefits and Working Conditions

All Saugus store employees use the same employee entrance, break room and clocking system. Sales employees work all shifts that the store is open. All employees have the same employee handbook, benefits and Solutions-In-Store program for resolving job related issues. All employees conduct semi-annual inventory. (T. 26-27, 84-86).

All sales employees are evaluated on their job performance using a common set of metrics. Weekly, monthly and year to date Scorecard metrics measuring sales performance in four areas consist of: sales volume, IPT (items per transaction), average sale and Apps per 40 Hours (new Macy's credit accounts opened by customers). (T. 156-157; Employer Exhibit 3). The annual performance evaluation gives the greatest weight (70-80%) to Scorecard metrics results. (T. 158-159; Employer Exhibit 3).

G. Compensation

Cosmetics and fragrances employees are paid a base hourly rate plus 3% commission on sales. On-call employees receive 2% commission. (T. 58-59). Cosmetic counter managers also receive an additional ½% override on all sales of their particular product line. Cosmetic employees receive a 2% commission when they sell products from a vendor line other than the vendor line to which they are assigned. The commission pay is reimbursed to Macy's by the vendor. (T. 33-35, 37, 101). Other employees are also paid on a base plus commission compensation plan: fine jewelry, men's clothing, men's shoes and furniture and mattresses. (T. 74). Selling specialists for Levis, Guess, Buffalo, Polo receive a bonus pay incentive from the vendor. (T. 54-55, 102-103).

H. Employee Interchange

In the past two years nine (9) sales employees from other areas of the Saugus store have transferred permanently into positions in cosmetics and fragrances one of whom later left men's fragrances to assume a sales supervisor position at Saugus. R. Madrigal moved from juniors to women's fragrances; C. Heffron from staffing to Lancôme; A. Bittencourt from jewelry to Estee Lauder counter manager; E. Rosales from men's clothing to Origins; K. Portillo from juniors and fine jewelry to Origins counter manager; D. Spallone from handbags to Clinique; F. Madhay from handbags to women's fragrances; M. Martinez from women's clothing to Clinique and L. Noutal from fine jewelry to men's fragrances to sales supervisor. (T. 80-84, 95-96).

I. Employee Daily Contact

Cosmetics/fragrances sales employees go into other sales departments to recruit customers and may be directed to help out in other selling departments and during inventory. (T. 39, 50-52, 86, 90-92, 125-126). There is daily contact between cosmetics/fragrances employees and other sales employees given the contiguous location of selling departments and attendance of all employees at the daily store meetings. (T. 85-86; Employer Exhibit 1)

J. Dress Code

Five of the eight cosmetic vendor lines require distinctive clothing. Neither the remaining three cosmetics lines nor women's or men's fragrances have any distinctive clothing. (T. 49).

K. Bargaining History

There is no bargaining history at the Macy's Saugus store. (T. 19, 20). Petitioner's witness submitted evidence with respect to the exclusion of cosmetics/fragrances employees from other bargaining units of Macy's and its predecessors Filene's and Jordan March but had no

knowledge as to how that bargaining unit came to be, i.e., by stipulation of the parties or NLRB regional decision. (T. 115-117).

IV. ARGUMENT

A. The Acting Regional Director Erred In Finding That A Unit Limited To Cosmetics And Fragrances Sales Employees Is Appropriate

In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 at 13 (2011) the Board reaffirmed its position that a petitioner "cannot fracture a unit, seeking representation in 'an arbitrary segment' of what would be an appropriate unit. *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999). 'The Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis.' *Seaboard Marine*, 327 NLRB 556 (1999)...Some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries." The Acting Regional Director's approval of a unit of one selling department split between two floors in a multi-department retail department store and comprised of cosmetics and fragrances selling employees who even have differing terms and conditions of employment among themselves is an arbitrary segment of the presumptively appropriate whole-store unit or alternatively an appropriate unit of all selling employees.

Applying the Board's traditional community of interest factors to the unrebutted evidence in this case it is clear that the cosmetics and fragrances selling associates do not possess a community of interest separate and distinct from the other selling associates in the Saugus store. All sales employees perform the same basic function of selling merchandise to customers. All sales employees undergo common training in selling techniques and training in product knowledge specific to the type of merchandise each is assigned to sell. Some of the training is on the job and some off-site for both cosmetics/fragrances employees and other sales employees. Even within the cosmetics/fragrances area fragrance employees and on-call cosmetics and fragrance employees do not attend any off-site training sessions. Clientelling (booking

appointments of customers/clients for special events) is performed by employees other than cosmetics, e.g. fine jewelry, bridal, big ticket and men's clothing. All sales employees undergo the same hiring process. Although vendor representatives participate in interviewing candidates for cosmetics sales positions, the same is true for selling specialist positions in other departments. Vendor representatives do not participate in hiring for fragrance sales positions or on-call cosmetic and fragrance positions. No prior cosmetics or fragrance experience is required of any candidate. There is significant functional integration among all the selling employees. Although the selling departments have separate immediate supervision, all selling departments including cosmetics/fragrances are under the direction of one store manager. The hours of work of cosmetics/fragrances employees are the same as all other selling employees. Compensation on a base hourly rate plus commission plan applies to cosmetics and fragrance employees as well as fine jewelry, men's clothing, men's shoes and furniture and mattresses. On-call cosmetics and fragrance employees receive less commission than full and part-time cosmetics/fragrances employees. All selling employees are subject to the same employee handbook and are evaluated using the same performance metrics.

All selling employees use the same employee entrance, clocking system and break room and receive the same benefits. All selling employees conduct semi-annual inventory and have helped out in departments other than their own. Given the close contiguous location of selling departments, the cosmetics and fragrance employees have daily contact with other sales employees and all sales associates attend the daily store rally. Although some cosmetics employees wear distinctive clothing supplied by the vendor other cosmetic employees do not nor do any of the men's and women's fragrance employees. Employee interchange is significant. In

the past two years nine (9) Saugus sales employees have been permanently transferred into cosmetics or fragrances positions.

It is evident that the community of interest factors of cosmetic/fragrance employees and all other sales employees overlap almost completely. To carve out a unit of cosmetics/fragrance employees creates an impermissible arbitrary segment of an appropriate unit of all selling employees.

Despite this record evidence the decision of the Acting Regional Director is based upon erroneous factual findings and "distinctions too slight or too insignificant to provide a rational basis for a units' boundaries." *Specialty Healthcare*, supra at 13. The decision overstates differences and understates similarities. In the decision the Acting Regional Director found that the petitioned-for unit of cosmetics and fragrances employees is not a fractured unit 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.

(Decision at 9.)(emphasis added)

The evidence shows that other sales employees have the same wage structure as cosmetics and fragrances employees and similar vendor relationships. Cosmetics/fragrances employees are not hired and trained differently than the "vast" majority. Training in customer service and selling techniques is the same for all sales employees. Product training has to be specific to the merchandise an employee will be assigned to sell. This is a distinction that is irrelevant. Even amongst the unit found appropriate men's and women's fragrances and on-call employees are not interviewed by vendor representatives. The finding that "most" employees in

the petitioned-for unit wear uniforms is also unfounded. None of the women's fragrances employees wear a uniform or distinctive clothing. None of the men's fragrances employees wear any distinctive clothing. None of the cosmetics employees selling Shiseido, Channel or Elizabeth Arden cosmetics wear any distinctive clothing.

The decision goes on to 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.

(Decision at 9.)(emphasis added)

The decision makes no reference to other "common interests" such as same benefits, same clocking procedure, same break room and same commission pay plan as big ticket, fine jewelry, men's clothing and men's shoes sales employees. The decision then goes on to make unwarranted assumptions and to trivialize to the point of irrelevance record evidence of commonality in terms and conditions of employment and to inflate to the level of "meaningful" differences too slight or insignificant:

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 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.

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.

(Decision at 9, 10)

The decision finds it a "meaningful difference" that although fine jewelry, men's clothing and shoes and big ticket sales employees are compensated on a base plus commission wage structure as are cosmetics and fragrance employees "the record is devoid of evidence regarding the specifics of their compensation." In *Rockridge Medical Care Center*, 221 NLRB 560, 561 (1975) the Board described a 20% wage differential as merely a "surface distinction."

The decision finds "meaningful" that cosmetics and fragrances employees "aggressively solicit" business from regular customers but other sales employees use client records for nothing more than promotional mailings. There is no record evidence to support this. On the contrary, petitioner's witness testified merely that "periodically we need to call them." (T. 123).

Furthermore, cosmetics, big ticket, big ticket specialists and selling specialists are all evaluated on "builds clientele base; uses customer information to follow-up and identify opportunities for additional products and upcoming events." (Company Exhibit 3).

The decision also concludes that "functional integration is almost non-existent" and the cosmetics and fragrances employees "are supervised at the first level by their counter managers." (Decision at 10). These findings are in error. As to functional integration all sales associates are integral elements of the employer's selling function. As to counter managers, the record evidence is un rebutted that they do not supervise, rather merely coach on occasion. Counter managers do not discipline or schedule employees. (T. 60-61; 64-65). The Regional Director, in *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (2010), concluded:

There is also significant functional integration among all of the dealers. The poker dealers and the other table games dealers are integral elements of the Employer's gaming operations. The functional integration between these two groups of dealers is evident in the Employer's administrative hierarchy. Although the poker dealers and the other table games dealers have separate immediate supervision, all table games, including poker, are under the direction of one manager, who in turn, reports to a senior manager in charge of racing, slots, and table games. *Id.* At 6.

There is no bargaining history at the Saugus store. Petitioner submitted collective bargaining agreements covering other stores of the employer. Cosmetic employees are not part of the bargaining units except at the Warwick, Rhode Island store. There was no evidence adduced as to how those bargaining units came about. Bargaining history determined by the parties and not by the Board is not binding. *Laboratory Corporation of America Holdings*, 341 NLRB 1079, 1083 (2004). A history of bargaining for one group of an employer's organized employees is not controlling with respect to the employer's unorganized employees. *International Paper Company*, 171 NLRB 526 (1968).

In two prior First Region cases petitioner here and a sister local sought to exclude cosmetics employees from a store-wide unit at the Malden, Massachusetts and Warwick, Rhode

Island retail department stores of Macy's predecessor Jordan Marsh stores. In both cases the Regional Director included the cosmetics employees in the store-wide unit.

In *Jordan Marsh Company and Local 1445, RCIU*, Case No. 1-RC-15,563 (1978), the Regional Director found as follows:

Cosmetic Demonstrators (Cosmeticians)

There remains for disposition the unit placement of the Malden store's eleven (11) cosmetic demonstrators (herein also called cosmeticians) whom the Petitioner, contrary to the Employer would exclude. These eleven (11) employees sell and demonstrate a variety of commission and non-commission cosmetic products. At Malden, a cosmetician may sell products from more than one manufacturer, but not along a competing line basis. In addition to their weekly wages received from the Employer, cosmeticians, unlike other employees, are also paid direct commissions from manufacturers based upon their volume of product sales for that vendor. These commission rates are established by mutual negotiations between the vendors (manufacturers) and the Employer. The Employer has attempted to regulate these rates to make them uniform. Other sales employees of the Employer also work on a commission basis, but unlike the cosmeticians, their commissions are paid by the Employer. In addition to the same general training received by other store sales employees, cosmeticians may attend special training conferences conducted by manufacturers. They may also receive free samples of a vendor's products, usually for marketing study purposes. At times vendors may request that the Employer hire a certain type of individual to sell their products, and on occasion may have even recommended the hire of a particular cosmetician. However, vendors do not otherwise normally become involved in the Employer's hiring processes for cosmeticians. Although vendors could conceivably complain about the job performance of a cosmetician selling its products there is no evidence that a vendor has played any role in the actual disciplining of any cosmetician. Other than these possibilities, vendors play no other significant roles in matters affecting the employment status of the cosmeticians. Rather they work exclusively under the control of the Employer.

In addition to cosmetics, the cosmeticians sell other products, such as candy, which are also sold by other store employees. They may also at times make customer sales for products from other departments. While there is relatively little, if any, job interchange with other employees, the cosmeticians work in close proximity to other store employees and have regular working contact with them. Other than their commission arrangement, cosmeticians have the same benefits, and are subject to the

same supervision, personnel policies, and have the same overall working conditions as other store employees.

On the basis of the above, and the record as a whole, it is found that relatively few and minor factors exist which arguably set the cosmeticians apart from other store employees. On the other hand, the record does establish that the cosmeticians are subject to the same working conditions and supervisory control as other store employees, and share a substantial degree of working interests with them.

Accordingly, the cosmeticians (cosmetic demonstrators) shall be included in the unit. *Burrows & Sanborn, Inc.*, 31 NLRB 1308 (1949).

In *Jordan Marsh Company and Local 328, UFCW*, Case No. 1-RC-19,262 (1989) the Regional Director found as follows:

The Employer employs approximately 37 beauty advisors in the Warwick store whose duties are to demonstrate and sell cosmetics and perfumes. They each primarily work with the products of one particular vendor. The beauty advisors are hired by the Employer, although they also are interviewed for approval by the vendors. They are paid a base hourly wage by the Employer by a regular payroll check and also receive a commission directly from the vendor. The vendor may also pay part of the base hourly wages, although the record is unclear as to the amount paid to each advisor. They also receive the same benefits as other employees in the unit. Vendors provide training in the application and use of their particular product lines, but the beauty advisors also are required to attend regular Employer sales associate training.

The Employer and vendors perform periodic evaluations of the beauty advisors. On one occasion the Employer contravened a vendor's request to terminate an employee. There have been occasional intra-store transfers between selling positions and the beauty advisory position. During holidays and busy periods other sales associates have been assigned to sell cosmetics and fragrances in the areas serviced by the beauty advisors. Similarly, beauty advisors may handle sales of products other than cosmetics or fragrances. Thus, the record establishes that the beauty advisors are employees of the Employer and that they share a similar mode of compensation and benefits as do the other sales associates. They work near the other sales departments and may interchange and have contact with other unit employees; they have similar working conditions, and share a community of interest with other sales associates. *Jordan Marsh Company*, Case 1-RC-15,563, supra; *Burrows & Sanborn, Inc.*, 81 NLRB 1308, 1309 (1949).

Accordingly, beauty advisors are included in the unit found appropriate herein.

In *Neiman Marcus Group, Inc., d/b/a Bergdorf Goodman*, Case No. 02-RC-076954 (May 4, 2012); Order Granting Req. For Review, Case No. 02-RC-076954 (May 30, 2012), the Regional Director found appropriate a unit limited to women's shoes associates in two non-contiguous selling departments in a multi-department retail clothing store. That decision and direction of election is clearly distinguishable based upon the absence here of the major factors relied upon by the Regional Director in Bergdorf Goodman: "most notably" shoes associates are paid on a significantly different salary structure; all but one shoe associate possessed experience in fitting shoes when hired; rarely attended store meetings; and little evidence of transfers into the shoe department and no transfers out. At Saugus the cosmetics/fragrances are paid on the same salary structure as other sales associates; attend all daily store rallies with other sales associates; do not require prior cosmetics/fragrances experience; nine sales associates have transferred into cosmetics/fragrances in the past two years and one transferred out.

In *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (2010) the Board affirmed the Regional Director's finding that a unit limited to poker dealers was not appropriate because they did not have a community of interest separate and distinct from craps, roulette and blackjack dealers. Petitioner's assertion here that cosmetics/fragrances employees are sufficiently distinct because they sell makeup and fragrances as opposed to other merchandise is no different than the rejected position that poker dealers were sufficiently distinct from employees overseeing other games.

B. The Decades Long Standard Of Presumptive Appropriateness Of Store-Wide Units Applies To This Case And Requires That The Petitioned-For Unit Be Rejected.

For almost fifty years the Board has had an industry specific standard that in the retail industry a single store wall-to-wall unit is the presumptively appropriate unit. *Haag Drug Co., Inc.*, 169 NLRB 879-878 (1968). ("The employees in a single retail outlet form a homogenous, identifiable, and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from the functions of employees in other outlets..."). *Specialty Healthcare* explicitly stated that "the Board has developed various presumptions and special industry and occupation rules in the course of adjudication. Our holding today is not intended to disturb any rules applicable only in specific industries..." other than the nonacute health care industry at issue in that decision. 357 NLRB No. 83 at 13 n.29.

In *Haag Drug* the Board further elucidated its reasoning supporting the presumptive appropriateness of a single store retail unit:

We are unable to perceive any reason why retail chain operations should be treated differently. Indeed, to draw a distinction between the single-chain store and the single plant in a multiplant enterprise or the insurance district office would artificially disadvantage the organizational interests of chain store employees, simply because their employer operates a chain rather than a single-store enterprise and would vest the chain operator with absolute power alone to control the scope of the appropriate unit.

169 NLRB at 878.

The decision of the Acting Regional Director now vests the union "with the absolute power alone to control the scope of the appropriate unit." The fractured, arbitrary unit proposed by the union and approved by the Acting Regional Director also violates the requirement in

Section 9(c)(5) of the Act that "in determining whether a unit is appropriate...the extent to which the employees have organized shall not be controlling." 29 U.S.C. §159(c)(5). A compelling inference can be drawn from the record that the Acting Regional Director allowed the extent of organization to control his decision. Only a year prior Region One approved a store-wide unit at this same store and petitioner lost the election. A year later, with no evidence of any change in the employer's operations, petitioner sought a unit limited only to the cosmetics/fragrances employees. *May Dept. Stores Co. v. NLRB*, 454 F.2d 148 (1972).

Although the presumption in favor of a store-wide unit is rebuttable, no Board decision has ever approved a unit which departs from the store-wide presumption as dramatically as the unit sought here by Petitioner. *I. Magnin & Co.*, 119 NLRB 642, 643 (1957) (rejecting unit of department store's four shoe departments); *Allied Stores of New York, Inc.*, 150 NLRB 799 (1965) (approving separate units for selling employees and nonselling employees); *Wickes Furniture*, 231 NLRB 154 (1977) (approving a unit of all salespersons); *Lord & Taylor*, 150 NLRB No. 81 (1965) (nonselling employees); *Arnold Constable*, 150 NLRB No. 80 (1965) (separate units of selling, office and restaurant); *Saks & Co.*, 160 NLRB No. 59 (1966) (nonselling).

C. ***Specialty Healthcare Will Have An Adverse Impact On Retail Employers And Employees. The Board Should Return To The Pre-Specialty Healthcare Traditional Bargaining Unit Standards For The Retail Industry.***

In *Specialty Healthcare*, supra at 9n.19 the Board stated that "in determining whether employees in the proposed unit share a community of interest, the Board both insures that they can be fairly represented by a single representative and that bargaining will occur within boundaries that make sense in the employer's particular workplace..." (emphasis added)

The non-contiguous unit limited to employees selling only cosmetics and fragrances at Macy's Saugus, MA store makes no sense. The Board has long recognized that "a functional integration and mutuality of interests exist among all department store employees. *Grossman Department Store, Inc.*, 90 NLRB No. 275 (1950). The new rule in *Specialty Healthcare* will result in a proliferation of micro-units in multi department retail stores leading to competitive rather than collective bargaining and chaos and disruption of business. In *Control Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1090 (7th Cir. 1984) the court explained the concern with unit proliferation:

It is costly for an employer to have to negotiate separately with a number of different unions, and the costs are not borne by the employer alone. The different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike, thus imposing costs on other workers as well as on the employer's shareholders, creditors, suppliers and customers....Apart from concern with the impact on the employer's operations, breaking up a work force into many small units creates a danger that some of them will be so small and powerless that it will be worth no one's while to organize them, in which event the members of these units will be left out of the collective bargaining process.

Forty years prior to the concern expressed by the Seventh Circuit, the Supreme Judicial Court of Massachusetts recognized the very same concerns in the retail department store industry:

Bargaining units in a particular industry must, as far as is reasonably possible in view of all pertinent factors, be adapted to the manner in which that industry is habitually carried on, and in general stress must be laid not only upon securing groups of employees who, as the business is conducted, have common interests in the more important matters which are likely to become the subjects of collective bargaining, so that they can speak with a common voice in such matters, but also upon gathering into each of such groups the largest number practically possible of employees having such common interests, in order that discord may be minimized, and that the industry may not be continually hampered by the jealousies and conflicting or competitive claims of a large number of small rival units which must work together in the industry, but which may choose to be represented by different and possibly antagonistic unions...

Moreover, if a few of the employer's selling departments can be segregated into these two proposed units, others of the two hundred seventy-one departments can be segregated into other units as fast as petitions are filed, with the result that rival unions may struggle for the capture of one department after another, "jurisdictional" disputes may multiply, bargaining may become competitive rather than collective, and chaos and disruption of the business may follow. *Jordan Marsh Co. v. Labor Relations Commission*, 316 Mass 748, 751, 754 (1944).

Specialty Healthcare allows unions to organize by selecting a micro unit of employees simply based upon what type of product they are selling merely because they are a "readily identifiable group" such as employees selling only "big ticket" (furniture and bedding) merchandise or men's shoes or women's shoes to name just a few of the selling departments found in retail department stores. The facts in this Macy's Saugus store case also point to the likelihood that a union will organize and petition for a unit based upon the extent of organization. Only a year prior petitioner sought a traditional and presumptively appropriate wall-to-wall store unit at the Saugus Macy's and lost the election. A year later, following the Board's *Specialty Healthcare* decision, petitioner seeks an election only among the cosmetics and fragrances sales associates.

The distinct possibility of different unions representing multiple units of employees within a retail department store can lead to competitive rather than collective bargaining and the potential of a work stoppage by a small segment of the workforce disrupting the work of the majority of the employees. For all these reasons the Board should overrule *Specialty Healthcare* or at least ensure that the retail industry may be governed by the traditional bargaining unit standards which prevailed prior to *Specialty Healthcare*.

V. CONCLUSION

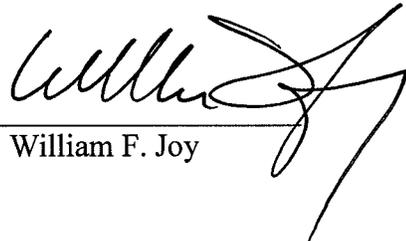
Contrary to the Acting Regional Director's conclusion, there are only two appropriate units that would include the petitioned-for employees: an all selling unit, or a store-wide wall-to-wall unit. Any other unit would be inconsistent with: (1) longstanding Board precedent; and (2) the Board's recent decision in *Specialty Healthcare*. Therefore, the Employer respectfully requests that the Board reverse the decision of the Acting Regional Director and affirm that the Board's decision in *Specialty Healthcare* does not erase the Board's longstanding precedent regarding the appropriate analysis for bargaining unit determinations in retail stores.

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By


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Dated: December 18, 2012

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2012 I caused a true and correct copy of the foregoing Employer's Brief on Review of the Acting Regional Director's Decision and Direction of Election to the National Labor Relations Board to be served via electronic filing through the National Labor Relations Board's website, www.nlr.gov, upon:

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Eight copies have also been sent by Federal Express to the Executive Secretary.

A copy was also served on counsel of record for Local 1445 UFCW and the Acting Regional Director for Region One, via electronic mail upon:

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