

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

ALLSTATE INSURANCE COMPANY¹

Employer

And

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Petitioner

Case 13-RC-20827

DECISION AND ORDER

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; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

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 herein.³

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. No 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 for the following reasons:

The Petitioner seeks to represent a nationwide unit of Exclusive Agents (“EAs”) working for Allstate Insurance Company (“Allstate” or the “Employer”).⁴ Allstate contends that EAs are not employees under the Act for two reasons: 1) the EAs are independent

¹ The names of the parties appear as amended at the hearing.

² The positions of the parties as stated at the hearing and in their briefs have been carefully considered.

³ The Employer is an Illinois corporation engaged in the business of providing insurance and financial products throughout the United States and Canada.

⁴ The Petitioner amended its petition at the hearing to clarify that it seeks to represent all exclusive agents, whether they operate as sole proprietors or are the “key person” in the situations where the agent has chosen to operate in the corporate form. Unless otherwise noted, however, this decision will refer to both sole proprietors and the key person as EAs. In addition, the Petitioner is not, for reasons that are not explained in the record, seeking to represent EAs located in New Jersey.

contractors; and 2) the EAs are supervisors. The Employer therefore argues that EAs are specifically excluded from the Act's coverage and the petition must be dismissed.

The Petitioner takes the contrary position on both of the Employer's claims. On the independent contractor issue, Petitioner relies on the factors articulated by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 259 67 LRRM 2649(1968), and as applied in a series of *Farmers Insurance* cases⁵ and the recent *Dial-A-Mattress Operating Corp.* 326 NLRB 884 (1998) and *Roadway Package System, Inc.*, 326 NLRB 842 (1998) cases. Specifically, the Petitioner claims that the Employer exerts so much control over the EAs that they cannot appropriately be deemed independent contractors. On the question of supervisory status, the Petitioner cites a recent Board decision involving Allstate in which the Board held that an Allstate employee under a different arrangement with the Employer, that is, not an EA, lacked sufficient supervisory authority to be deemed a supervisor under Section 2(11) of the Act. *Allstate Insurance Company*, 332 NLRB No. 66 (2000).

After careful consideration, I find that EAs are independent contractors and not employees under the Act. Specifically, I find that weighing all the factors incident to the relationship under the common-law of agency test leads to the conclusion that EAs are independent contractors. In particular, EAs have substantial entrepreneurial opportunity for gain or loss and have a proprietary interest in their work. EAs hire their own employees, determine their own advertising strategies, and decide the amount and type of work they will engage in on behalf of their agencies. In addition, EAs are compensated solely based on commissions, with no guaranteed minimum compensation. EAs are also permitted to engage in non-competing businesses. However, assuming arguendo that the EAs are not independent contractors, I find that the Employer has not carried its burden of establishing that they possess supervisory authority within the meaning of Section 2(11) of the Act.

I. FACTS

A. Background

Allstate Insurance Company sells insurance and financial products nationwide. In the past, agents selling and servicing Allstate products were employees of Allstate. However, over time, Allstate sought to redefine its relationship with its agents. Specifically, Allstate developed several programs whereby agents were given varying degrees of control over certain aspects of their work.

In about 1990, Allstate developed a program where, at their option, agents could become independent contractors rather than employees. One of the key changes made by the Employer in implementing this program involved providing the agents who were considered independent contractors with an economic interest in their book of business,

⁵ *Farmers Insurance Group*, 143 NLRB 240 (1963)(finding certain insurance agents employees); *Farmers Insurance Group*, 187 NLRB 844 (1971)(same); *Farmers Insurance Co.*, 209 NLRB 1163 (1974)(finding insurance agents independent contractors).

which will be discussed in detail below. Then, in about 1999, the Employer decided to convert all of its insurance agents to independent contractors.⁶ According to the Employer, one of the reasons for this change was that many of their competitors were using only independent contractors as their sales force and the change was necessary to stay competitive. At that time, all agents who were working for the Employer as employees were required to become EAs or leave the Employer. The status of those EAs is at issue here.

EAs are responsible for selling and servicing Allstate products, and, in limited situations, products of other companies that Allstate permits them to sell. Each EA reports to a market business consultant (“MBC”). The role of the MBC is essentially to assist the EAs in carrying out their duties and to ensure that they are complying with the Employer’s policies and procedures. The frequency of contact between EAs and their MBC appears to vary substantially. However, the range of frequency based on the small sample of EAs who testified at the instant hearing ranged from a high of two to five calls per month, to the low of about four visits per year. The MBC reports to a territorial manager, who, as the name suggests, is responsible for the MBCs, and indirectly the EAs, in his or her territory. Each territorial manager reports to a vice president of field operations, of which there are 14, one for each of the 14 regions of the Employer’s operations. Vice presidents of field operations report to the home office of Allstate.

Each region has its own underwriting manager and human resource manager who are responsible for their particular regions. The regional human resource department maintains files on Allstate’s employees as well as its independent contractors. As explained more fully below, the regional human resources departments serve as the conduits to the home office for terminations of the relationship between the Employer and its EAs.

B. Documents Governing the Employer’s relationship with EAs

Several documents govern the relationship between the EAs and Allstate. The first is the actual contract, signed by both parties, which establishes the foundation for the arrangement. This contract, called an Allstate R3001 Exclusive Agency Agreement, comes in two forms, one for sole proprietorships, and one for corporations. It is at the option of the EA whether to operate in the corporate form.⁷ Both versions were updated in 1999, when the R3001, for sole proprietorships, became the R3001S, and the R3001A, for corporations, became the R3001C. The significant 1999 revisions will be discussed below.

Certain aspects of the R3001 contracts have remained constant in the nearly 13 years the program has been in existence. All of the various R3001 contracts specifically

⁶ The required change to independent contractor status, for reasons that are not explained in the record, apparently did not apply to agents in West Virginia and New Jersey.

⁷ It is not clear from the record what percentage of EAs has chosen to incorporate. However, simply for the purpose of taxes and other liabilities, many of the agents who testified have chosen to operate as corporate entities.

incorporate two other documents: the Exclusive Agency Independent Contractor Manual and the Supplement for the R3001 Agreement. In addition, the updated R3001 contracts, the R3001C and R3001S, also incorporate a document called Allstate Agency Standards. The Employer also issues an Exclusive Agency Independent Contractor Reference Guide. This document is not incorporated into the R3001 contracts, and states in its preface that it is for informational purposes only and that it merely contains suggestions, not requirements.

The R3001 contracts are pre-printed forms from Allstate, with blanks where the individual's or the corporation's name is inserted. There is no evidence that an EA has ever negotiated different terms in an initial R3001 agreement, or negotiated subsequent modifications to an R3001 agreement. Nor is there any evidence that an EA has negotiated any other modifications to their relationship with the Employer. Many aspects of the R3001 agreement are the same for both sole proprietorships and corporations, both before and after the 1999 revisions.

While not an exhaustive list, the following are some key aspects of the R3001 contracts. The agreement states that the EA is an independent contractor, not an employee. Allstate reserves the right to modify the incorporated documents, including the Manual and the Supplement, at any time, without prior notice to the EA, except for the specific notice requirements regarding commissions contained elsewhere in the agreement. The Employer prohibits EAs from selling insurance for other companies without prior written approval. Allstate retains sole discretion regarding its products, including acceptance or rejection of applications, and whether to terminate, modify, or refuse to renew a contract. EAs are required to meet business objectives set by the Employer "in the areas of profitability, growth, retention, customer satisfaction and customer service." While recognizing that EAs have the discretion to have others conduct business at their offices when they are not present, EAs are required to be "actively involved" in the work.

The contract is not for a specified period, but instead clearly contemplates an indefinite duration in the event both parties are satisfied with the arrangement. The contracts do, however, provide for termination of the agreement under various circumstances. The contract automatically terminates upon the: 1) transfer of any of the EA's interest in the agreement; 2) death or permanent incapacity of the EA; 3) loss of any required license; 4) surrender or election not to renew the Employer's license to sell all lines of insurance in the EA's state or the discontinuation of insurance sales in the state. The contract can also be terminated at any time by mutual agreement of the parties or by either party with at least 90 days notice to the other party. Finally, the Employer may terminate the agreement immediately "for cause", which includes, but is expressly not limited to, breach of the agreement, fraud, forgery misrepresentation, or conviction of a crime.

Several changes were made in the 1999 versions of the R3001 contracts. Some of the significant changes are as follows. The new contracts add that the Employer retains sole discretion to decide the "type and quality of customer service received by Employer policy holders." With respect to the requirement that EAs meet the Employer's specified business objectives, the following requirements have been added: the EA must 1) build

and maintain a profitable book of business; 2) assist the Employer in achieving market penetration for “all forms of insurance offered by [Allstate]”; and 3) service customers “in a manner consistent with the {Allstate’s} goodwill, reputation and overall business strategy.” EAs are required to maintain a “professional business relationship” with Allstate, and must agree to meet at mutually convenient times to discuss business topics. The contract provides that Employer representatives “shall” be permitted access to the EA’s sales location during business hours to assess compliance with the agreement. Further, if the Employer requests it, EAs must demonstrate sufficient knowledge of its products and if they are unable to do so, Allstate may deny the EA’s right to sell its products.

C. Training

The method employed by Allstate to ensure its EAs are qualified to sell and service their products has change significantly in the past several years. Initially, it appears that agents under various predecessor programs were given the option of converting to EAs without additional training. More recently, in order to become an EA, a prospective agent had to sign a separate contract, known as an R3000 contract. The R3000 agent was apparently an employee during this training period, which lasted 18 months. At the conclusion of this 18-month training period, the individual was permitted to sign an R3001 agreement. Although it appears rare, individuals have been permitted to sign R3001 contracts prior to completing the full 18 months under the R3000 contract.

Currently, prospective EAs must enter into an education contract for the purpose of training. Since some of the training to become an EA must be specific to the state or states in which the agent will be located and conducting business, new EAs are trained through educational procedures developed on a regional basis. All potential EAs are not, therefore, trained using identical programs. However, the core aspects of the current training, which typically lasts six to eight weeks, appear relatively uniform throughout the Employer and are divided into three parts.

First, there is training on the regional level, which may last one to two weeks. This training is referred to as “pre-center”, for reasons that will become obvious shortly, and this training is tailored to the state where the agent will be located. Second, there is a two-week training session at Allstate’s National Sales Education Center in Chicago, Illinois. Third is the “post-center” training, again back in the agent’s home region. This portion of the training lasts between three and five weeks and may include mentoring by in an existing EA. At the conclusion of the training, the person receives an education bonus of \$6,500 and is permitted to sign an R3001 contract and become an EA.

The substance of the training was not explored extensively during the instant hearing. However, the training apparently includes detailed information about the products offered by the Employer, underwriting guidelines, and the methods and procedures for interacting with the Employer. In addition, topics such as complying with the Agency Standards, types of advertising, such as yellow page ads, and marketing strategies are covered.

In addition to the training required by the Employer prior to becoming an EA, Allstate conducts mandatory meetings at various times for its existing EAs. These meetings may involve training on new products, legal compliance issues, or updates regarding its computer technology. The Employer has the authority to require attendance at such meetings, but EAs may choose to send a representative from their office, rather than attending in person. Thus, an EA may send one of its employees, then have that person pass on the information learned at the meeting to the rest of the EA's staff.

D. Offices and Equipment Used by EAs

Allstate must approve the EA's office location, which may not be in the EA's home. However, the cost of renting or purchasing the office space is borne entirely by the EA. Allstate provides door and exterior signs to the EA, identifying the name of the EA's agency and the agency's affiliation with Allstate. While Allstate plays no role in selecting the name of each agency, EAs are not permitted to use Allstate's name in the name of their agency. The office space used by the EA may not be used for other businesses unless the other business is clearly separate from the work done by the EA on behalf of Allstate. While Allstate apparently used to require a separate entrance for any other business, this appears to no longer be the case, and only a clearly separate work area is now required.

Allstate provides several key pieces of office equipment used by its EAs in the performance of their duties, the most significant of which is the Alstar computer system. Specifically, Allstate provides its EAs with computers, which have the Alstar program, pre-installed. The Alstar program is used by the EA's agency to conduct numerous aspects of its work for Allstate. For example, it allows EAs to prospect for new customers, order motor vehicle reports, and complete and transmit applications to the Employer. The Employer, through the same Alstar system, can immediately accept or reject the risk, and determine the rate for the risk. The computers provided to EAs by Allstate also provide EAs with access to the Employer's intranet site, called Gateway. This site provides the communication system between the EAs and the Employer, and copies of the various manuals pertaining to EAs are posted on the site. Allstate retains ownership of the computers and maintains them, and they must be returned to Allstate at the conclusion of the EA's relationship with the Employer. In addition, the Employer prohibits EAs from adding other software programs to these computers.

The Employer also provides each agent with a sophisticated phone system that remains the property of Allstate. This system is linked to the computer so the computer can automatically dial phone numbers of prospective or current customers for solicitation or other purposes. According to Employer officials, the reason this system is used by the Employer is so that technological updates can quickly be distributed to the EAs. Like the computer system, the phone system is provided to the EA by Allstate at no cost to the EA and must be returned to the Employer when the relationship ends.

In addition, the Employer provides posters, brochures, forms, manuals, letterhead, and business cards for EAs and approved sales producers, at no cost to the EAs. However, other office equipment, such as desks and chairs, copiers, fax machines, and office decorations are the responsibility of the individual EAs. There is some evidence that the Employer currently offers packages of office furniture and equipment to prospective EAs who enter into an education contract. There is no evidence, however, that Allstate offers financial assistance, such as loans, in buying these items however. Moreover, there is no evidence in the record to determine whether the package prices offered to the prospective EAs who have entered into the educational contracts are at or below fair market value. However, it appears that EAs who converted from R3000 agents to EAs were given the option of purchasing their office furniture from Allstate at significantly reduced prices.

E. Employees of the EAs

With respect to hiring their own employees, EAs are permitted to do so freely. These workers are considered employees of the EA, not Allstate, both based on the express terms of the R3001 contract and in practice. All of the EAs who testified explained that the workers they employ are, for all intents and purposes, their individual agency's employees. Specifically, the EAs are responsible for all aspects of the employment relationship, including all hiring, direction and assigning of work, and all discipline decisions, up to and including terminations. Allstate plays no role in determining the appropriate compensation level for EA's employees. Various EAs explained the general methods they use to determine an appropriate compensation level for employees, such as doing wage comparisons in the local market.

Several witnesses testified about the background checks required by Allstate for the EA's employees. Specifically, according to Allstate, when it "appoints" licensed agents under various state laws, Allstate is, among other things, vouching for the appointee's character. Accordingly, in order to comply with these laws, Allstate pays for the cost of doing a background check on all licensed staff hired by EAs. However, the final decision regarding whether to hire someone is left up the individual EA. With respect to non-licensed staff, on the other hand, Allstate need not be notified, and may not even be aware that an EA has hired a receptionist or other support staff. In addition, while some EAs use employment agencies in connection with their staffs, this is a decision left up to the EA.

The number of employees the EAs hire varies substantially. One of the EAs who testified has an office manager working directly for his agency and eight employees he leases from a staffing agency, including one filing clerk and seven licensed sales producers. Other EAs explained that they have few, if any additional employees at any given time. However, as explained above, if an EA must be absent from his or her agency for more than brief absences, they are required to hire licensed personnel to staff the office while they are not present.

F. Financial Aspects of the Relationship

The economic aspects of the EAs relationship with Allstate include the commissions on policies that are sold by the EA. However, commissions are not the only economic interest earned by EAs during the course of their relationship with Allstate. EAs have a transferable interest in their “book of business.” Moreover, EAs have the option of participating in certain fringe benefit type programs established by Allstate.

1. Commissions

The EA’s regular compensation is based solely on commission. There is no guaranteed minimum compensation, nor is there a limit to the amount of commissions an agent can earn. Agents are not only free to, they are expected to; sell policies and other products offered by Allstate to as many customers as possible. Thus, the EAs’ selling acumen, coupled with their ability to efficiently run their agency, is key determinative factors in their compensation level. Commission rates, may, however, be revised by Allstate, pursuant to the terms R3001 contract, which provides for a 90 notice to the EAs prior to any changes.

2. Economic Interest in the EAs Book of Business

Policies sold by the EA during the term of the R3001 contract are considered part of the EAs “book of business.” The EA “owns” the book of business, insofar as the agent has a transferable interest in the future stream of commissions generated by that book. However, all business produced under the terms of the EA’s agreement with the Employer remains the property of Allstate. The EA’s interest in his or her book of business can be realized one of two ways, either through a sale of the book of business, or by a termination payment from Allstate.

a. Selling a Book of Business

The right to sell a book of business is not without limitations. Allstate must approve the buyer or buyers to whom an EA wishes to sell his or her book. The Independent Contractors Manual includes a list of criteria that potential buyers, either existing EAs or outside buyers, must meet in order to be considered for approval. For existing agents, the list includes, among several other criteria: consistently achieving expected results; being in the top 25 percent of the cash flow market for certain products; and certain licensing requirements. A sale to an outside buyer is likewise limited. For example, to be approved, the outside buyer must show “successful management/leadership experience” and must complete various education programs conducted by Allstate before executing an R3001 contract. For either type buyer, when deciding whether to approve a buyer, the Employer considers whether the seller’s office will remain open. The lists of criteria are apparently non-exhaustive as the Manual advises that buyers are nonetheless “always subject to final Employer approval.”

Allstate also exerts some control over the number or policies that an EA can purchase. Allstate currently permits an EA to purchase a maximum of 4,000 policies through multiple purchases, or a single purchase of a book of any size. Thus, an EA may buy one book of any size, or several books so long as the number of policies purchased does not exceed 4,000.

The record contains examples of the Employer's rejection of proposed buyers of books of business. In one such situation, EA Phil Pinkus found another EA who was interested in buying his book of business, however, the Employer required that any potential buyer keep the seller's office open. The potential buyer that Pinkus located, however, did not want to operate the office as a satellite, so negotiations for the sale ended. Pinkus then attempted to purchase a book of business from another EA. However, when he located a suitable book for sale, and after the parties arrived at an acceptable price, Allstate rejected him as a buyer of that book.

However, it is clear that the Employer routinely approves potential buyers as many of the witnesses testified about successfully selling or buying a book of business. For example, one former EA testified about selling his book of business for a total of over \$1 million. This sale, like several of the sales described by the witnesses herein, involved a self-financing arrangement between the parties where the buyer personally guaranteed the future payments to the seller due under the terms of the sale.

Although the buyer must be approved, the terms of the sale need not. Indeed, the Employer typically does not know the terms of the sale. The Employer, therefore, does not place a limit on the amount of money an EA can receive for his or her book of business. Rather, the only limit is what the market will bear. The Employer's Alstar system, however, does allow agents to audit their agencies to assist in accurately valuing their books.

b. Termination Payment

Upon the election of a party to terminate an R3001 contract, if the EA's interest in the book of business is not sold, the EA currently has a right to receive a termination payment. The termination payment is calculated based on a formula that considers various factors relative to the specific eligible items contained in the book of business. In the earlier R3001 agreements, the option of a termination payment was expressly included in the R3001 contract. In the 1999 versions of the agreement, however, there is no mention of a termination payment— the payment is only explained in the Supplement, which, as noted above, the Employer reserves the right to modify at anytime. Thus, while all EAs, whether they have signed the earlier or later version of the R3001 contract have a right to a termination payment at this time, only the agents who signed the earlier agreements are guaranteed this option.

It is not clear from the record precisely how the termination payment option generally compares to the fair market value of the book of business. However, according to a few of the EAs who testified at the hearing, the value of an EA's interest in his or her book of

business is significantly greater than the amount of the termination payment. Indeed, one witness testified that the termination payment was a “fraction” of his book’s value. The termination payment option, therefore, does not appear to protect the EA from the possibility that no buyer acceptable to Allstate can be found.

3. Fringe Benefits Available to EAs

Allstate does not provide health insurance or pension benefits for its EAs, or for employees of the EA’s agencies. Rather, the Employer identifies companies willing to offer benefits, such as health insurance, to EAs and their employees. It is not clear from the record whether Allstate negotiates a reduced premium amount for the benefits it so identifies. However, Allstate does not subsidize the benefits in any way and EAs are free to select whatever benefit carriers they prefer.

Allstate does provide other “benefits” to its EAs. For example, the Exclusive Agency Independent Contractor Reference Guide explains that EAs who operate as sole proprietors may participate in Allstate’s Deferred Compensation Plan for Independent Contractor Exclusive Agents. EAs must submit a W-9 form in order to participate in this plan. In addition, all R3001 EAs are permitted to participate in the Allstate Corporation Exclusive Agent Independent Contractors Stock Bonus Plan, which allows EAs to acquire and maintain common stock in the Employer. In addition, the Reference Guide explains that EAs will get incentives for taking and passing courses that result in relevant professional designations. Also, EAs may participate in the Allstate Foundation Matching Grant Program for Higher Education. In addition, EA’s dependent children may be eligible to participate in the Allstate Foundation Scholarship Program.

H. Advertising

Allstate exerts some control over certain types of advertising conducted by its EAs. If the advertisement contains the Allstate name, trademark, or logo, Allstate must approve the advertisement. In addition, when an EA uses such Allstate identifiers, they may participate in an advertising co-op established by the Employer whereby Allstate may pay up to \$1,500 to \$2,000 per year toward the cost of this advertising. For yellow page ads, Allstate requires, among other things, that EAs use a particular advertising agency. Similarly, for white pages’ listings, all EAs within the area covered by the listing must be listed under the Allstate name, alphabetically, in order of the street names where they are located. While EAs may choose to list their agency by their individual agency’s name, they may not use the Allstate name in this listing.

Nonetheless, EAs may decide whether to advertise in the name of their agency or using Allstate’s name or other identifiers. If they chose to advertise in their own names, Allstate’s approval for the ad is not required. In addition, decisions such as the type of advertising method used, who is targeted for the advertising, and how long the ad is run are all within the EA’s sole discretion and must be funded by the EA. For example, one EA testified about advertising on shopping carts. This method delivered no business that

he was aware of, so, given the cost, the agent considered the campaign unsuccessful insofar as he spent about \$2,000 with no identifiable business gain.

I. Day to Day Running of the EA's Agency

Allstate exerts some control over the day-to-day activities of its EA's agencies. For example, each agency is required to be open from 9:00 a.m. to 5:00 p.m. Monday-Friday, and for four additional hours each week. In addition, the EA's agency must be open on all days specified by Allstate, such as the day after Thanksgiving and Good Friday. Thus, EA's agencies must be open during certain core hours and on all days dictated by the Employer. However, the EAs are free to determine whether the additional hour requirement is satisfied by longer hours certain days or additional time on the weekend. More significantly, however, EAs are not required to be present during all days or at all times when their agencies are open. Rather, so long as a licensed agent is present during office hours, and the EA is still considered "actively involved" in the agency, the EA satisfying their obligation to the Employer.

All EAs are expected to service Allstate policyholders, regardless of whether the customer has a policy with that particular agent. For example, a customer who purchased his policy from one EA may make premium payments to a different EA, and that agent is required to accept the money and otherwise service the customer, if the customer requests it. In addition, EAs must properly account for all money collected on behalf of Allstate. The EA is not permitted to make any deductions from the collected funds and must make daily deposits of the money collected into banks selected by Allstate.

During all hours when an EA's office is closed, all incoming calls must be routed into Allstate's Call Information Center ("CIC"). The CIC gives the caller various options, for example, the customer may leave a message for the agent or the customer can request immediate assistance. In the later case, the customer is forwarded to an individual who can address the customer's issues. The CIC, therefore, allows customers to do business with Allstate at any time of the day or night.

The Employer's requirement that EA's phone be forwarded to the CIC may impact the agent's compensation. Specifically, if a prospective customer receives a policy quote from an EA, then calls back after hours and elects to speak with a CIC representative, Allstate can complete the sale of the policy based on the quote written by the EA. If this occurs, the EAs commission is only 2%, rather than the 10% typically provided to agents.

J. Evaluations of EA's Performance - Expected Results

Allstate measures the success of their EAs principally based on whether they are meeting their "expected results". Allstate unilaterally determines what constitutes satisfactory expected results. Currently, expected results include achieving specified property and casualty policy growth, making a set amount of sales of Allstate Financial Service ("AFS") products, and profitability, also known as loss ratio. AFS products include a

wide range of financial products, including such items as life insurance and variable annuities.

The Employer expressly reserves the right to establish different areas for evaluating EAs' performance. Currently, in addition to expected results, Allstate reviews several other areas, including compliance with policies and procedures established by the Employer, whether they are providing the appropriate type and quality of customer service, and whether the EAs are "cooperating in adopting marketing approaches consistent with the Employer's strategic direction."

Each year, Allstate representatives, typically MBCs, meet with each EA to conduct an agency status review. This review includes each of the areas identified above, with an apparent focus on the EA's expected results. In addition, MBCs may send updates to the EAs throughout the year regarding their progress toward achieving their expected results, which will be discussed in detail below.

While some EAs find the expected results do not impact how they run their agencies, others find the requirements burdensome. More than one agent testified that all of their expected results are typically met very early in the year and do not alter their business plans. Other agents, however, do not believe focusing on the products required by the expected results is a good business decision for them. Thus, these EAs view the expected results as forcing them to allocate their resources on certain products that they would otherwise not highlight.

Specifically, with respect to the agents who find the expectations impact their agency's business practices, they testified that AFS products require an inordinate amount of time to sell given the level of commissions earned for the sales. Thus, according to these EAs, the expected results force them to conduct their businesses in a manner inconsistent with their own best judgment. They argue, therefore, that they are not free to exercise independent, entrepreneurial prerogatives with respect to which what products to focus their resources on. Rather, they claim Allstate determines which products they must spend time selling based on the expected results minimum sales requirements.

K. Warnings to EAs Regarding Performance and Terminating an EA's Relationship with Allstate

There is no evidence of a specific progressive disciplinary system applicable to Allstate's EAs. The record does, however, contain various examples of circumstances where the Employer elected to terminate its relationship with an EA, purportedly for cause. In addition, the Employer at various times notifies EAs when they believe they are not performing satisfactorily or are not complying with some requirement of the relationship. Both such circumstances are illustrated with the example of John Bryant. Bryant began as an EA with the Employer in October of 1998. In March 2002, Allstate notified Bryant that it was terminating his contract effective April 2002.

At various times throughout his tenure as an EA, the Employer notified Bryant that it believed he was not fully complying with requirements imposed on him by the R3001 agreement. For example, the record contains an undated letter from Bryant's Area Manager David Jackson, where Jackson notified Bryant that he failed to comply with the Allstate Agency Standards.⁸ Specifically, Bryant failed to have his agency open on November 26, 1999, the day after Thanksgiving. The letter warns that Allstate will continue to monitor his agency, and that his continued relationship with the Employer is dependent on his willingness improve his performance in the future.

Similarly, in August 2001, Jackson followed up an earlier meeting with Bryant with a letter regarding his AFS expected results. Specifically, the letter explains that his AFS total production was only \$1,148, while his expected results were \$15,138. The letter goes on to explain that Bryant's failure to achieve his expected results "could jeopardize [his] agency's continued relationship with Allstate." The letter further explains that how he achieves the results are up to him, but Jackson offers to "help [Bryant] develop additional strategies or make changes in current strategies that could help [his] agency improve its results."

Likewise, Allstate sent other EAs letters regarding failing to forward calls to the CIC during non-business hours. For example, Allstate officials sent a Minnesota EA at least two letters explaining that his agency was not in compliance with Allstate Agency Standards due to repeated failures to forwarding calls to the CIC. The first letter warns that this conduct "jeopardizes [his] business relationship with Allstate" and concludes by stating that continuing the conduct "may result in a recommendation to terminate your agency agreement with Allstate." The second letter, sent approximately one month later, cites more dates the EA's calls were not forwarded, and ends with the admonition that continued failure to forward calls would result in the territorial manager recommending that his agreement be terminated. Since the EA persisted in failing to consistently forward his calls, the territorial manager recommended terminating his contract shortly thereafter. The record, however, does not reveal the result of the recommendation.

In Bryant's case, Allstate ultimately terminated its relationship with him. The letter sent to Bryant stated that the termination was based on "among other things" his failure to "maintain a professional and businesslike relationship with the Employer, and [his] agency's failure to meet business objectives established by the Employer." Bryant was therefore given the option of selling his book of business or accepting the termination payment provided for in his R3001 contract.

The internal document wherein Allstate's regional officials request that Allstate's home office review and approve their recommendation to terminate Bryant's contract elaborates on these reasons. The document sites his adversarial conduct toward Employer personnel and his lack of cooperation in fulfilling his obligation under the contract. In addition, it lists his "open criticism of and challenges to Employer practices" and his lack of adequate business results.

⁸ Like all area managers, Jackson's title was eventually changed to market business consultant.

The record also contains similar warning letters to other agents regarding various claimed deficiencies. For example, Allstate sent letters to EAs explaining that their continued relationship with the Employer was in jeopardy due to insufficient progress toward meeting their AFS goals for the year and failing to have their agencies open during required office hours.

There is also some evidence that Allstate may take stronger action, short of terminating the relationship, when it is dissatisfied with the EA's performance. For example, if an EA's ratio of requested motor vehicle reports for prospective customers is not appropriate for the number of policies written, the EA may have their binding authority restricted. Binding authority is, in essence, the ability to commit the Employer to insurance coverage prior to the Employer actually issuing a written policy. Thus, in situations where binding authority is restricted, an agent may not be able to immediately inform a prospective customer that a particular risk is insured. In addition to this binding restriction, under the newer R3001 contracts, the Employer may deny an EA the ability to sell its product if the EA cannot demonstrate sufficient knowledge about the products.

L. Other Businesses or Work Performed by EAs

The record contains some evidence that EAs engage in other business endeavors. For example, EA Hyman Reichbach sold mortgages for a time while he was an EA. However, due to the time commitments involved in running his Allstate agency, he found the situation unworkable. In addition, Reichbach, like one other witness, also subleases office space connected to his agency's office as an additional side business. Neither situation however, involves any unrelated property. In addition, in the event an EA wishes to operate an unrelated business, the office for the other business must be clearly separated from the EA's Allstate agency office.

II. ANALYSIS

A. Independent Contractor Status

1. Applicable Principles

Section 2(3) of the Act states that the term "employee" shall not include, among others, "any individual having the status of independent contractor." The burden of proof is on the party asserting that an individual is an independent contractor. *BKN, Inc.*, 333 NLRB No. 14 (2001). Moreover, the Board does not regard as determinative the fact that a written agreement may define the relationship as one of "independent contractor" *Big East Conference*, 282 NLRB 335 (1986); *Farmers Insurance Group*, 143 NLRB 240, 242 fn. 8 (1963), or that the employer elects not to make payroll deductions or tax withholdings. *Miller Road Dairy*, 135 NLRB 217 (1962).

In *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968), the Supreme Court held that when determining whether individuals are employees or independent contractors, the Board must apply the common-law agency test. Pursuant to this test, "all

the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *ibid.* The *United Insurance* case, like the instant case, dealt with insurance agents. There, the Court affirmed the Board’s determination that the insurance agents were employees, stating:

the decisive factors in these cases become the following: agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the 'Agent's Commission Plan' that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory. *Id.* at 258-59.

The multifactor common-law analysis, explained in terms of masters and servants, is set forth in the Restatement (Second) of Agency, Section 220, and provides that:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control, which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and

- (j) whether the principal is or is not in business.

Two recent Board cases, both involving truck drivers, reaffirmed the common law agency test for determining an individual's status as an employee or independent contractor. *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998)(drivers found to be independent contractors); *Roadway Package System, Inc.*, 326 NLRB 842 (1998)(drivers found to be employees). In *Roadway*, the Board acknowledged that the common-law agency test "ultimately assesses the amount or degree of control exercised by an employing entity over an individual." *Id.* at 850. However, the Board rejected the proposition that "those factors which do not include the concept of "control" are insignificant when compared to those that do." *ibid.* Both cases, therefore, examined other key aspects of the relationship, in addition to those listed above, in order to determine if the individuals were employees or independent contractors.

For example, the Board reviewed the extent to which the individuals had significant entrepreneurial opportunity for gain or loss. *Id.* at 851; *Dial-A-Mattress*, above at 891. Evidence of such entrepreneurial opportunities, in turn, weighs in favor of finding an individual to be an independent contractor. *Ibid.* Similarly, the Board looked to whether the disputed workers had a "substantial proprietary interest" in their work, the possession of which favors a finding of independent contractor status. *Roadway Package System*, above at 851. Also, the Board looked at the extent to which the individual hires and determines terms and conditions of work for his or her own employees, and whether the disputed individual is required to work each day. *Dial-A-Mattress*, above at 891. In *Roadway Package System*, above at 851, the Board also examined whether the individuals ordinarily engage in an outside business and whether there were restrictions placed on doing so, either expressly or as a practical matter. In addition, both cases consider whether the employer disciplines the workers in question. *Id.* at 854; *Dial-A-Mattress*, above at 892-893.

It has long been recognized that a determination as to independent contractor status can be difficult, given the fact that "[n]ot only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in another." *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982). As such, a careful analysis of the entire landscape of the relationship must be undertaken in each case.

2. The Instant Case

On balance, I find that the evidence leads to the conclusion that EAs are independent contractors. Significantly, EAs have substantial entrepreneurial opportunity for gain or loss and have a proprietary interest in the future stream of income generated by their books of business. In this regard, EAs have the ability to decide whether to hire employees to work at their agencies, when, how, and to whom to direct their advertising efforts, and whether to invest in their agencies by buying a book of business. In addition,

EAs decide the precise nature and frequency of their day-to-day activities on behalf of their agencies. Indeed, rather than controlling the method and means of selling its products, Allstate merely exerts control over the results that EAs must achieve. Moreover, EAs are compensated solely based on commissions, with no guaranteed minimum level of compensation. Also, EAs are permitted to engage in non-competing businesses, including businesses that involve selling, without prior authorization, so long as they are not insurance businesses.

EAs exercise significant entrepreneurial control over their agencies, a factor which strongly weighs in favor of independent contractor status, in at least three key areas: hiring employees, advertising, and investments in books of business. As discussed above, EAs decide for themselves whether to hire employees for their agencies and set all relevant terms and conditions of employment for them. With the minor exception of a background check, which the EA is free to disregard, Allstate exerts no control over EAs employment practices. This fact clearly militates in favor of finding that EAs are independent contractors. *Dial-A-Mattress*, above at 891.

An EA's ability to hire good employees, especially successful sales producers, can greatly affect the EA's compensation level in two ways. First, hiring and retaining good sales producers directly increases the commissions earned by the EA since all commissions go to the EA or the EA's corporate entity. Second, the EA decides how much of the profits from the sales producer's business will be passed on to the sales producer in the form of salary or bonuses, and how much will he or she will keep. An EA's ability to strike a favorable balance in terms of salary to the employee, versus commissions generated, through either the employees own sales, or through giving the EA more time to spend selling as opposed to performing other work, may greatly impact the EAs own compensation.

With respect to advertising, EAs have wide latitude in making advertising decisions for their agencies. Petitioner asserts that Allstate controls the EA's advertising to such an extent that this fact weighs in favor of employee status for the EAs. I disagree. EAs decide whether to take advantage of Allstate's name recognition by using its name in their advertising. When making this decision, EAs must balance the benefits of using Allstate's name and the possibility of Allstate subsidizing the advertising, with the burden of getting Allstate's approval. Thus, while EAs are not allowed to use Allstate's name or logo freely, they exercise substantial control over the matter. In addition, EAs are not limited in the use of their own agency names in their advertising efforts.

Contrary to Petitioner's claim, I do not find that the freedom, or lack thereof, to advertise using another entity's name or logo tends to make an individual more or less like an employee. Rather, this seems to be more indicative of an arms length business relationship where one entity is protecting its brand identity and the other business may advertise in their own name, without significant limitations. Only when one business seeks to use the other's identifier is permission required. Moreover, there is no evidence that Allstate controls the audience, to whom an EA's advertising is directed, or the manner or method of advertising used to target that audience. Accordingly, contrary to

Petitioner's argument, I find that the advertising autonomy exercised by EAs favors independent contractor status here.

In addition, EAs may elect to buy books of business from other EAs as a method to enhance their agencies. As explained above, while Allstate must approve the buyer, it is clear that book sales routinely occur. The price of a book is not reviewed or regulated in any manner by Allstate. Thus, EAs have the discretion to seek to increase their profits by negotiating a favorable price for another EA's book of business and using the contacts in that book to sell additional lines of insurance, thereby increasing their commissions and the value of their own book of business.

These entrepreneurial freedoms, in turn, allow EAs to attempt to maximize their gains. There is no maximum number of policies that an EA may sell or service. Thus, as their agencies grow, EAs are not subject to a similar type of unilateral reduction in service area that the drivers in *Roadway* experienced. *Roadway Package System Inc.*, 326 NLRB 842, 853 (1998). Rather, EAs are free to, and clearly do, hire additional employees to service their customers, as their customer base increases, or to seek to increase sales. EAs must also decide, based on their own business judgment, whether, for example, a downturn in business requires a corresponding decrease in the number of workers they employ to remain profitable or whether retaining employees is required to improve an unfavorable situation.

Petitioner argues that various controls on EAs suggest employee status. Specifically, Petitioner points to the required office hours, the required days their agencies must be open, and the fact that the Employer can require that EAs attend certain meetings. However, I find this control must be viewed within the context of the fact that EAs are free to hire their own employees. Thus, the fact that EA's agencies must be open for certain hours and on certain days does not, in this case, mean the Employer is necessarily exerting employee-like control over the agents. EAs are free to hire and assign employees to work whatever hours or days the EAs prefer. As for required meetings, the record clearly indicates that EAs are free to send their own employees as their representatives to these meetings. Accordingly, EAs have substantial and virtually unchecked discretion in setting their own schedules, and they are free to delegate these duties to others as they see fit.

Similarly, Petitioner argues that several Employer policies amount to discipline and support a finding of employee status. Specifically, Petitioner relies on the policy of restricting EAs from requesting too high a ratio of motor vehicle reports to policies actually written, and the policy of requiring EAs who do not sell enough Allstate Financial Services securities to pay a fee to maintain their securities license, to support its position. I find that such policies do not constitute discipline, but instead reflect the obvious business need to control the cost of doing business. Accordingly, this factor supports a finding of independent contractor status.

Likewise, I find that Allstate's expected results do not suggest employee status. Rather, it is clear that Allstate merely requires that EAs achieve certain minimum levels of sales

and profitability. There is no evidence, however, that Allstate controls the method used to achieve these results. Therefore, contrary to Petitioner's claim, I find that the expected results aspect of the EA's relationship with Allstate does not militate toward finding that EAs are employees.

The manner in which EAs are compensated, along with the economic interest they hold in their books of business, also strongly favor independent contractor status. EAs do not have a guaranteed minimum salary and their regular income from Allstate is solely based on commissions. In addition to the immediate financial gains made by EAs through commissions, EAs also have a proprietary interest in their books of business that can be sold when the relationship ends. For EAs who signed earlier R3001 contracts, even absent a suitable buyer, this economic interest has value, since the Employer provides for a termination payment in those contracts. The termination payment is not likewise guaranteed for EAs under the current versions of the R3001 contract since it is only provided for in the Supplement, which can be amended by Allstate. However, the fact remains that it currently exists, giving all R3001 agents, regardless of the version of the contract they operate under, some economic interest in their books of business, even if no approved buyer is found. While removing this facet of the relationship may ultimately have an impact on the independent contractor/employee analysis, it need not be undertaken here, since it amounts to nothing more than speculation.

While Petitioner is correct in that some of the factors noted by the Supreme Court in its decision affirming the Board's holding in *NLRB v. United Insurance* are present here, that does not end the inquiry. Rather, as noted above, all aspects of the relationship must be carefully evaluated and factors that carry the day in one case may fail to do so in another, based on different opposing factors. *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982). Thus, while I agree with Petitioner that indicia such as training, that EAs act in the Employer's name and sell primarily only its products, and the relative permanency of the relationship are generally indicative of employee status under *United Insurance*, I find that these factors do not outweigh those that favor independent contractor status in this case.⁹

However, I also do not agree with Allstate when it claims that the work performed by its EAs is not an integral part of its business, another factor cited in *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 259 (1968). It strains logic to claim that Allstate's business only consists of making underwriting decisions and designing risk profiles and not selling and servicing insurance, as Allstate argues in its brief. While EAs may operate in the corporate form and make numerous entrepreneurial business decisions, the actual work performed by their agencies is also clearly an integral part of the Allstate business. EAs not only sell Allstate products, they also service the products,

⁹ However, I also note that there is scant evidence that Allstate trains its EAs in how to sell insurance. Rather, it appears that the majority of the training focuses on familiarizing the prospective agents on the products offered by the Employer. Accordingly, the training aspect may, in actuality, add little force to the argument that EAs are employees. But even assuming arguendo, as I have, that the training factor supports the conclusion that EAs are employees, I find that it fails to tip the balance in favor of finding that the EAs are employees.

such as acting as the Employer's contact when customers make claims under their policies. An EA could well be the only Allstate representative the individual who purchases an Allstate policy ever sees. That customer, in turn, is likely to associate the EA with Allstate, as opposed to merely the EA's own agency. Thus, I find that, while EAs operate their own businesses, the work performed by EAs is an integral part of Allstate's business as well. Nonetheless, I find that this factor, like those noted above, while potentially indicative of an employee relationship, does not resolve the issue.

The Petitioner also cites three decisions issued by the Board dealing with Farmers Insurance Company as support for its claim that the EAs are employees. In the first two cases, as noted above, the agents were found to be employees, *Farmers Insurance Group*, 1443 NLRB 240 (1963) and 187 NLRB 844 (1971); however, significantly, in the third and later decision, *Farmers Insurance Company*, 209 NLRB 1163 (1974), the agents were found to be independent contractors. In this case, the Board based its decision on the totality of the facts, and "especially the entrepreneurial aspects of their agency operation and their opportunity for profit based on individual skill and initiative". *Id.* As discussed above, I find this factor to be likewise significant here.¹⁰

Petitioner also argues that because EAs are not permitted to sell or service insurance for competing companies, they are more like employees. However, Petitioner reads the prohibition too narrowly. Here, EAs are free to, and some do, operate other businesses. So long as the space used for the other business is clearly delineated from that used by the EAs for their Allstate agencies, an EA's other business operation may be in the same office facility. EAs may therefore use there leased or purchased office spaces, as well as their business skills and selling ability, for other endeavors. This is similar to the situation in *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 893 (1998), where drivers were not permitted to make deliveries for the employer's local competitors, but could use their trucks for other delivery work. Moreover, as Petitioner admits, EAs can and do sell insurance fir other firms albeit with Allstate approval.

Moreover, I do not find that the Employer's prohibition against the EAs using the computers and the Alstar system for other business endeavors is significant here. The Alstar system appears to act predominately as communication device, not unlike paper copies of the pre-printed forms used to apply for insurance. Whereas in the past, the forms were filled in by hand and mailed to an insurance company, now they a can be filled-in on the computer and immediately transmitted electronically. The fact that the Employer does not allow this system and the computer it runs on to be used for other purposes is substantially different from a situation where a truck driver is required to purchase a truck to perform deliveries for a company, yet is prohibited from using the truck to make other deliveries. Here, the system is tailored to Allstate. The system is

¹⁰ Petitioner also relies heavily in its brief on the factors enunciated by the Supreme Court in *United Insurance Co. of America*, above. While that case is unquestionably applicable law to the instant matter, it is also clear that several subsequent cases have shed further light on the analysis that must be undertaken to determine whether workers are independent contractors or employees, See, e.g., *Roadway Package System, Inc.*, *Supra* at 850. The mere fact that the subsequent cases involve different types of workers or are in different industries does not make these cases any less critical to the issue.

also not what actually does the work EAs are expected to perform. Rather, EAs perform the service of selling insurance for Allstate. This task is performed independent of the Alstar system and the computer; thus, limiting its use does not suggest employee status.

Similarly, I do not find, as Petitioner would have me, that the Alstar system acts as a “virtual supervisor” of the EAs. Rather, as noted above, the system is primarily a means by which EAs transmit information to the Employer. The Employer, in turn, can also communicate with the EAs through the computers it provides by, among other things, using the Gateway site. The fact that the Employer uses computers for the transmittal of information and for communications with its EAs is merely a technological advancement in the methods used for these processes. It is not, therefore, a material change from the old method of filling out forms by hand or of communicating via telephone or through face-to-face meetings. In addition, Petitioner has cited no case where the methods used by the parties to communicate was held to be a factor relevant to the independent contractor/employee determination. Accordingly, I do not find that the Alstar system acts as a supervisor of the EAs, in either a virtual or real sense, or that its use adds to the instant inquiry.

Finally, it cannot be argued that EAs are not aware that the Employer considered their status to be that of independent contractors. Rather, EAs must enter into the relationship with the clear understanding that they are considered independent contractors since the R3001 contracts all expressly state as much. In addition, Allstate does not deduct taxes or make other similar withholdings from their pay. While, as noted above, neither of these factors is determinative, I nevertheless find that both factors also support the conclusion that EAs are independent contractors as opposed to employees.

B. Supervisory Status

1. Applicable Principles

Assuming arguendo that the EAs are not independent contractors, I now turn to the issue of whether EAs are supervisors within the meaning of the Act.

Section 2(11) of the Act 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.

Section 2(11) of the Act is to be read in the disjunctive, thus, the possession of any one of the enumerated authorities listed in the section places the employees in the supervisory class as long as the exercise of the authority involves the use of independent judgment. *See e.g., Harborside Healthcare, Inc.* 330 NLRB 1334 (2000). The exercise of some

supervisory authority “in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” (Citation omitted). *Bowne of Houston, Inc.* 280 NLRB 1222, 1223 (1986); *Clark Machine Corp.*, 308 NLRB 555 (1992). In each case, the differentiation must be made between the exercise of independent judgment and the routine following of directions; between effective recommendation and the forceful suggestion; and between the appearance of supervision and supervision in fact. See *Chevron Shipping Co.*, 317 NLRB 379 (1995); *J.C. Brock Corp.*, 314 NLRB 157 (1994).

The burden of demonstrating supervisory status rest on the party seeking to establish that status. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Alois Box Co.*, 326 NLRB 1177 (1998). Moreover, in the event that “the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Further, supervisory authority must be exercised in the interest of the employer. *Allstate Insurance Company*, 332 NLRB No. 66, sl.op.at 2-3 (2000). Accordingly, here, supervisory authority must be used by the EAs in the interest of Allstate.

2. The Instant Case

All EAs can, and most apparently do, hire and set all relevant terms and conditions of employment for their own staffs. Indeed, this fact is not reasonably in dispute. The Employer therefore claims that EAs are excluded from the Act’s coverage because they are supervisors. However, because I find that EAs do not exercise their supervisory authority in the interest of Allstate, I find that they are not supervisors under Section 2(11) of the Act.

In a recent decision involving Allstate, the Board concluded that an Allstate employee, specifically an agent working for the Employer as a Neighborhood Office Agent (“NOA”) was not a supervisor. *Allstate Insurance Company*, 332 NLRB No. 66 (2000). There, like here, the agent had the authority to hire her own employees, who the agent paid out of the compensation she earned working for Allstate. *Id.* at 3. Whatever money the agent passed along to her employees was potentially less compensation to her since the Employer only provided a limited office expense allowance that might be exceeded by hiring employees. *Ibid.* Thus, the Board concluded that the agent acted in her own interest, not that of the employer, when taking 2(11) action. *Id.*

The Employer distinguishes that case from the instant matter on the fact that the agent in that case was not an EA, but instead worked for the Employer under the NOA program. Significantly, the Employer does not claim that the EA’s authority over their own staff is in any way changed based on differences in the NOA program versus the EA program. Rather, it is clear that, like the NOAs, EAs hire employees at the cost of directly reducing their own compensation. As such, the fact that the Board’s decision in that case dealt with NOAs and not EAs is a distinction without significance.

The Employer also relies on two other cases, *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994) and *Yeshiva University*, 444 U.S. 672 (1980) for its proposition that EAs are supervisors. Both cases deal with the Supreme Court's past rejections of the Board's interpretation of the phrase "in the interest of the employer." However, the Board in *Allstate Insurance Company, Supra*, carefully considered both of these cases and rejected them as a basis for finding the NOAs to be supervisors or managerial employees.¹¹ above at 3, 3-5. I find, therefore, that in accordance with existing precedent, EAs are not supervisors because they do not exercise their Section 2(11) authority in the interest of the Employer.

In sum, I find that Allstate's EAs are independent contractors as opposed to employees under the Act. However, in the event the Board reaches a contrary conclusion, I find that EAs are not supervisors under the Act.

ORDER

IT IS HEREBY ORDERED that the petition in the above matter be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by December 16, 2002.

DATED December 2, 2002 at Chicago, Illinois.

/s/Elizabeth Kinney
Regional Director, Region 13

177-2484-5000

¹¹ It should be noted that neither at the hearing nor in its brief does Allstate argue that EAs are managerial employees, as the Employer did in the previous Allstate case dealing with NOAs. Since the issue has therefore not been raised, I make no finding regarding the managerial status of the EAs.