
IN THE MATTER OF
NATIONAL EXECUTIVE SEARCH, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 8731. Complaint, Feb. 28, 1967—Decision, Dec. 23, 1969

Order dismissing complaint which charged a Washington, D.C., personnel guidance service for the placement of business executives with making false and deceptive statements in its advertising and other promotional materials.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Executive Search, Inc., a corporation, and John W. Costello and Edward F. Mischler, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission

that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Executive Search, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 1612 K Street, NW., in the city of Washington, District of Columbia.

Respondents John W. Costello and Edward F. Mischler are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and selling of their services and facilities in the preparation and distribution of personal resumes of job seekers to prospective employers and otherwise undertaking to secure employment for such persons.

PAR. 3. In the course and conduct of their business, respondents operate and conduct, and have operated and conducted, said business within the geographical limits of the District of Columbia, and now cause and for some time last past have caused, their advertisements, correspondence and customers to pass between the District of Columbia and various other States of the United States and foreign countries, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their services, the respondents have made numerous statements in advertisements in newspapers, brochures and other promotional material with respect to the nature, type and effectiveness of their employment placement program for executives.

Typical and illustrative, but not all inclusive, of the aforesaid statements and representations are the following:

1. EXECUTIVES, \$10,000 to \$72,000 U.S. and OVERSEAS.
2. As a result of NES programs, executives have made changes in over 2,800 firms.
3. You can profit now from our unequalled contacts with top management in commerce and industry.

Complaint

76 F.T.C.

4. If and when client accepts position with a company which pays to NESINC full standard fee for same, client's fee will be refunded to him.

5. The present enterprise, operating in nine major cities, maintains a staff of 106 executives, administrative, and support personnel * * *.

6. OUR 19th YEAR and OUR 20th YEAR.

7. Respondents provide "consulting, counseling, and guidance services, and offer(s) direct assistance * * * in the development and execution of individualized National Executive Search program designed to aid the * * * client in achieving new career goals."

8. Many of the staff of National Executive Search Inc., "have held key positions with some of the nation's largest industries, in the Federal Government, on University faculties, and are recognized authorities in their fields. Among them are business and industrial executives, scientists and graduate engineers, financial and marketing experts, and senior staff members at the doctorate level."

9. It is not an employment agency—neither by concept, nor intent, nor by performance of its functions.

10. Your resume, accompanied by a personalized, individually typed cover letter is mailed to the appropriate executive of each firm on the research list.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning not specifically set out herein, the respondents represent, and have represented, directly or by implication that:

1. A significant number of their clients have been placed in positions with salaries approximating \$72,000 per year.

2. The respondents have placed applicants in executive positions with over 2800 different firms at salaries in excess of \$10,000.

3. The respondents and their employees are personally acquainted with and well known to substantial numbers of executives in corporations throughout the world who regularly utilize respondents in hiring executives for their organizations.

4. The job applicants using respondents' services, in a substantial number of instances, are refunded the entire contract price as a result of the hiring corporation paying the "usual finders fee."

5. The branch offices of respondents in major cities throughout the world participate in an organized effort to secure suitable employment for each client.

6. The respondents have been engaged in locating employment for executives for a period of 19 and 20 years.

7. Respondents provide consulting, career counseling and guid-

ance services and direct assistance in developing a program designed to aid the client in achieving new career goals.

8. Respondents' clients will receive counseling and guidance by staff experts who have held responsible positions and are recognized authorities in the professional fields in which the client seeks employment.

9. The services rendered are not those of an employment agency.

10. The cover letter which is to accompany the client's resume is especially drafted for each potential employer directing attention to those parts of the resume which apply especially to that organization.

PAR. 6. In truth and in fact:

1. Respondents have placed very few, if any, of their clients in positions with salaries approximating \$72,000 per year.

2. Respondents have not placed clients in positions with over 2800 different firms at salaries in excess of \$10,000.

3. Neither respondents nor their employees are personally acquainted with or well known to substantial numbers of executives in corporations throughout the world who regularly utilize respondents in hiring executives for their organizations.

4. Refunds to respondents' clients seldom, if ever, are made by respondents or by the employer paying a "finders fee."

5. The so-called "branch offices" perform no services connected with the search for positions for clients nor do they perform any services which constitute career counseling.

6. The corporate respondent has not been engaged in the business of locating employment for executives for "19 years or 20 years" as alleged.

7. Respondents perform no consulting, career counseling or guidance services nor do they assist in developing orderly programs designed to aid the client in achieving new career goals.

8. Few, if any, staff members of respondents have had any experience or education in the particular fields of employments in which they profess to be counselors.

9. The services performed by respondents are essentially identical to those of an employment agency.

10. The cover letters prepared for the clients are mechanically

Complaint

76 F.T.C.

reproduced duplicates and are not individually prepared and directed to each potential employer nor do such letters customarily direct attention to those parts of the resume which apply specifically to that organization.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were, and are, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, and for the purpose of inducing prospective clients to enter into contracts and pay fees, respondents, through oral statements by officers and staff members in consultation and interviews with said clients, have represented, directly or by implication, that:

1. A person would not be accepted as a client by respondents unless his qualifications met the high standards required for prompt placement.

2. 80% of respondents' clients are successfully placed through its services.

3. Respondents currently have exclusive listings of job openings available which require the qualifications of a particular applicant.

4. Respondents would have no difficulty in placing the client in a new field of endeavor, or moving him from one industry to another.

5. Respondents accept only a limited number of clients at any one time so that full time and attention may be given to each client.

PAR. 8. In truth and in fact:

The qualifications of the client and the probable success of placing said client in suitable employment plays no part in the decision to accept him as a client. Almost without exception, respondents accept any one willing to enter into a contract and to pay the fees.

2. Respondents do not place 80% of their clients in suitable employment nor do they place a significant percentage of their clients in suitable employment.

3. Respondents seldom, if ever, place any of their clients in positions which are in their files as currently open, nor are there any exclusive listings of job openings available to their clients.

4. Respondents generally are unable to switch a client from one field of endeavor or industry to another.

5. Respondents do not limit the number of clients that they will accept for any reason.

Therefore, the statements and representations as set forth in Paragraph Seven hereof were, and are, false, misleading and deceptive.

PAR. 9. By use of the aforesaid advertisements, promotional literature and oral statements, respondents represent and imply that they are successful in placing a substantial percentage of their clients in suitable employment. Respondents do not place a significant percentage of their clients in suitable employment. The failure of respondents to reveal such material fact is false, misleading and deceptive.

PAR. 10. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of services and facilities of the same general kind as those sold and performed by respondents.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and into entering substantial numbers of contracts with respondents for their services and facilities by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Harry E. Middleton, Jr., and Mr. Ian M. Rodway supporting the complaint.

Mr. Edward T. Tait and Mr. William D. Matthews for respondents. *Whitlock, Markey & Tait*, 1032 Shoreham Building, Washington, D.C.

Initial Decision

76 F.T.C.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

OCTOBER 15, 1968

CONTENTS

	page
Preliminary Statement	968
Findings of Fact	970
Executive Functions and Corporate Stock Interests	970
Respondent Corporation's Business Historically and Procedures ...	971
Represented Salary Range	975
Executive Changes from NES Programs	976
Unequaled Contacts	977
Refunds	978
Intercity Staff Operation	981
Respondents' Experience Over a Number of Years	982
Services Represented	983
Background of Key Personnel	986
Nature of Respondents' Agency	991
Resume and Personalized Letters	993
Standards of Acceptance as a Client	995
Alleged Representation That 80 Percent of Respondents' Clients Are Successfully Placed Through Its Services	998
NES Policy and Fee Paid Placements	1001
Placements and Their Evaluation	1002
Availability of Exclusive Listings	1004
Changes in Fields of Endeavor	1005
Acceptance of a Limited Number of Clients	1008
Conclusions	1009
Measurement of Success	1009
Experience and Competency	1011
Service Policy	1012
Order	1015

PRELIMINARY STATEMENT

The charges alleged in the complaint herein, filed on February 28, 1967, involve certain deceptive practices of the respondents in seeking clients who pay a fee to the respondents in consideration for personal guidance services and assistance incident to the procurement of employment which the client is seeking. A contract is signed and a fee is paid precedent to the rendition of services. The agreement between the client and the corporate respondent usually provides for a refund of the prepaid fee in the event the

employer himself makes a payment for respondent services. Such reimbursements are made only to the extent that the employer makes payment.

The complaint avers that the representations hereinafter set forth were made by respondents, and that such representations are false and deceptive. Respondents either deny the falsity of the representations or disclaim that any representations were made. These alleged misrepresentations set forth in the complaint and contained in advertising or orally stated are as follows:

1. Executives, \$10,000 to \$72,000 U.S. and Overseas.
2. As a result of NES programs, executives have made changes in over 2800 firms.
3. You can profit now from our unequaled contacts with top managements in commerce and industry.
4. If and when client accepts position with a company which pays to NESINC full standard fee for same, client's fee will be refunded to him.
5. The present enterprise, operating in nine major cities, maintains a staff of 106 executives, administrative and support personnel * * *.
6. Our 19th Year and Our 20th Year.
7. Respondents provide "consulting, counseling, and guidance services, and offer(s) direct assistance * * * in the development and execution of individualized National Executive Search program designed to aid the * * * client in achieving new career goals."
8. Many of the staff of National Executive Search, Inc. "have held key positions with some of the nation's largest industries, in the Federal Government, on University faculties, and are recognized authorities in their fields. Among them are business and industrial executives, scientists and graduate engineers, financial and marketing experts, and senior staff members at the doctorate level."
9. It is not an employment agency—neither by concept, nor intent, nor by performance of its functions.
10. Your resume, accompanied by a personalized, individually typed cover letter is mailed to the appropriate executive of each firm on the research list.
11. A person would not be accepted as a client by respondents unless his qualifications met the high standards required for prompt placement.
12. 80% of respondents' clients are successfully placed through its services.
13. Respondents currently have exclusive listings on job openings available which require the qualifications of a particular applicant.
14. Respondents would have no difficulty in placing the client in a new field of endeavor, or moving him from one industry to another.
15. Respondents accept only a limited number of clients at any one time so that full time and attention may be given to each client.

It is observed that the foregoing alleged misrepresentations fall into the following categories:

Initial Decision

76 F.T.C.

1. Measure of success (enumerated items 1, 2, 3, 12, 13, and 14) ;
2. Refunds (enumerated item 4) ;
3. Service rendered or service policy (enumerated items 5, 7, 10, 11 and 15) ; and
4. Experience (enumerated items 6 and 8).

As to items 1 through 10, respondents' contention is that, although these representations were made, they are not false and misleading; and that as to items 11 through 15, complaint counsel have failed to establish by substantial evidence that the representations were made or are false.

The hearing examiner has carefully considered the proposed findings of fact and conclusions, supplemented by briefs and post-hearing conference argument, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

FINDINGS OF FACT

Executive Functions and Corporate Stock Interests

1. Respondent, National Executive Search, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 1612 K Street, NW., in the city of Washington, District of Columbia. (Complaint and Answer, Par. 1)

2. John W. Costello is president and owns 48 percent of the outstanding common stock of the respondent corporation. (Complaint and Ans., Par. 1; Tr. 5, 22-23, 25, 1198) Respondent Edward F. Mischler is a vice president and owns 33 percent of the outstanding common stock of the respondent corporation. (Tr. 23, 1315) The balance of the outstanding stock, or 19 percent, is owned by three additional stockholders unrelated to either Mr. Costello or Mr. Mischler. (Tr. 23)

3. Mr. Costello, in his official capacity as chief executive officer and owner of 48 percent of the outstanding common stock of respondent corporation, is responsible for the formulation, direction, and control of the acts and practices of the corporate respondent including the advertising and sales presentation. (Tr. 5, 22-23, 25, 1198-99, 1315) Included among his duties as vice president is Mr. Mischler's direct responsibility for the "adminis-

tration and implementation of the client programs through a series of staff officers, researchers, and other supporting personnel," which activities are not at issue in this proceeding. (Complaint and Ans.; Tr. 1316, 1368)

Respondent Corporation's Business Historically and Procedures

4. The corporate respondent is an outgrowth of National Employment Service, a partnership founded by respondent, John W. Costello, in March 1946. (Tr. 16-17, 1228-29, 1286) Subsequently, in the 1950's, the business was transferred to a newly formed corporation operating under the name NESINC, and composed of three divisions: National Employment Service, National Engineering Service, and National Executive Search. (Tr. 17-18, 21) National Executive Search was operated as a division of NESINC, performing substantially the same type of services until about 1959 when the division was incorporated as National Executive Search, Inc. (Tr. 8-9, 21-22) Today NESINC is dormant, with both its National Employment Service and National Engineering Service divisions inactive (Tr. 7-8, 1368-69) Since 1965, all functions of the National Engineering Service division have been transferred to and performed by National Executive Search, Inc. (Tr. 26, 30, 1368, 1373)

5. National Executive Search, as part of National Employment Service and later NESINC, and as a separate corporate entity since 1959, has two basic functions: "One, to assist industry in locating mid-management and top management personnel, * * * under a contractual basis, and sometimes not * * *."

"Function 2 would be to help individuals for many reasons, determine first where they are going in life, help determine this, establish an objective, and then put together a program and execute same designed to help them find their next career objective. Then, to help them with the selection of same, employment contract and myriad of personal service to this, just a number of factors there * * * ." (Tr. 9, CXs 1, 6)

Specifically, National Executive Search, Inc., enters into a written contract (see CXs 12-13) with every client agreeing "to provide consulting, counseling, guidance services, and direct assistance, as outlined below, for as long as twelve months, in the development and execution of an individualized National Executive Search program designed to aid the * * * client in achieving new career goals:

Initial Decision

76 F.T.C.

a. To assist the undersigned client in analyzing and assessing his background, professional qualifications, achievements, potentials, goals, and alternate goals.

b. To prescribe and effectuate for the client's best interests a career management, planning and search program to determine what he has to "sell," to whom, where, and for how much.

c. To prepare, for the client's approval, after interviews as described in (a) above and staff studies, a resume of the client's professional experience and background, and to have printed sufficient copies thereof to aid the client in his campaign.

d. To perform research in the client's particular field of endeavor and preferred geographic area, and from such research to compile a list of 65 or more possible enterprises to further assist the client in achieving his career objective.

e. To prepare a personalized cover-letter to accompany the client's resume. Individually typed, signed copies of said letter and printed resume to be mailed (postage included) to each of the individuals in the organizations selected by research (d, above).

f. To endeavor to reach by various other means (such as special letters, telephone calls, Telex communications, and personal contacts) fifty or more additional potential employers.

g. To follow-up, by correspondence, telephone, and/or direct contact all expressions of interest in client by others as a result of (e & f), above, at no additional expense or other charge to the client in furthering attainment of his objective.

h. To assist the client in the evaluation of appropriate career opportunities made known to National Executive Search, Inc., through the company's professional contacts and/or consulting activities.

i. To review for the client's interest and answer on behalf of the client, appropriate advertisements in various available media.

j. To continue counseling client, when necessary, on matters of conducting an interview, information, when available, regarding the opportunity and company under consideration, and selection of the most appropriate opportunity when more than one are under consideration.

k. To render additional consulting assistance, upon client's request, after selection by the client of a specific career opportunity and to offer advice relative to the client's future advancement.

l. For the service fee herein stated, National Executive Search, Inc., will provide all personnel, assistance and services related to items (a) through (k), above, and included in said fee are the costs of printing, typing, postage, and all local and long-distance telephoning initiated by National Executive Search, Inc. (CXs 11-12)

6. The pattern of providing the foregoing services is usually as hereinafter indicated. The first step in the client's program, after purchasing the NES service, is an appointment with a counselor or interviewer. (Tr. 1203-04) Prior to the interview, the client will have filled out an eight -page "Counseling Data" form for the assistance of the counselor. (Tr. 58-59; CX 13-A-H) The interview lasts from two to six hours, during which time the parties

discuss "what the client wants to do, to his geographical preferences, to companies he might like to work for, to companies he definitely does not want to work for, to conducting interviews." (Tr. 1203-04, 1597-98) The purpose of the interview is to determine what the client wants "to achieve in long range terms" and establish an objective "representing the statement of his goal." (Tr. 1597, 1204)

7. During the interview the client also fills out a "Research Data Sheet" listing firms he would like included on, or excluded from, his research list. (Tr. 1204-05; CX 15-A-B) At the conclusion of the interview, if all problems have been resolved and an objective has been established, the client indicates his approval by signing an agreement, filled out in the client's presence by the counselor, that "he is in agreement as to where they are going." (Tr. 66, 1204, 1602-03; CX 16-A-B)

8. After the interview with the counselor, the client is next introduced to a staff officer who will spend from a half hour to two hours with the client because it is the staff officer who will be responsible for the client's program (Tr. 1206) "The staff officer is generally picked by his relationship to the type of work the client is looking for. If, for example, a client was looking for something in a technical line, probably Mr. Mischler * * * would be selected as his staff officer, because Mr. Mischler among other things, has a technical background and is familiar with the jargon of that particular industry. If he were interested, say, in going overseas, he might be introduced to one of our staff officers who specialized in that field. If it were to be * * * of a sales and marketing nature, he might then be introduced to another staff officer who would * * * have a familiarity and would be specializing in that particular aspect of our business." (Tr. 1206)

9. At the conclusion the day, after interviews with the counselor and the staff officer, the client visits one of the NES officers who inquires how the program is progressing and whether the client is satisfied. (Tr. 1206) Any problems are then discussed or if the client is satisfied he departs. (Tr. 1206-07)

10. Subsequently a discussion is had by several members of the staff relative to the client and a writer is assigned to prepare an individualized covering letter and resume. (Tr. 1207) Drafts of the covering letter and resume are transmitted to the client for "his approval, disapproval or corrections." (Tr. 1207, 1603) When the resume is approved, the draft is sent to the printer and a supply of resumes is produced for use by NES and/or the client.

(Tr. 1207) The resumes are printed by a professional printer, using good stock paper, and the best printing process, employing heavy print, light print, and italics. (Tr. 1210) Printing the resume costs NES approximately \$55. (Tr. 1210)

11. NES presently has four researchers although two years ago NES employed seven researchers and a research director. (Tr. 1207-08, 1559) One of the researchers is assigned the job of preparing a research list of organizations to whom the client would be of interest or to whom his kind of work would be of the most interest. (Tr. 1208, 1555) To prepare the list, the researcher thoroughly reviews the client's background, preferences, and the comments made as a result of the client's interviews. (Tr. 1555) The researcher then discusses the proposed list with the client's staff officer. (Tr. 1555) The staff officer will suggest contacts he knows of which should be included on the list along with specific organizations for which the client may have expressed a preference. (Tr. 1555) Applicable job orders in the NES file are also included. (Tr. 1558) The researcher combines all of these organizations and produces the final research list of 80 to 100 organizations to whom letters and resumes about the client will be directed. (Tr. 1208, 1555-56)

12. NES maintains a library of several hundred reference books and "a decade or more of gathering information on firms, * * * in appropriate files," which are used by the researcher. (Tr. 66, 1208, 1556-58, 1562; CX 17A-D) Since "each client is an individual," the researcher requires "at least a day" and up to "two and three days" to prepare the research list which contains not only names of appropriate organizations, but also the "person at the right echelon in the organization * * * in a position to help this particular man." (Tr. 1208-09, 1556, 1558-59) "If you have a very technical man who wants R & D it can really go into a long protracted siege to get him names, because, after all, you are trying to get the man where people would be interested in what he has to offer." (Tr. 1559)

13. The finished research list is then sent to the client for his approval in writing. (Tr. 1209) When the list is approved, the covering letter is typed by NES and transmitted with the client's resume to the organizations on the research list. (Tr. 1210-11) NES pays all postage and mailing costs. (Tr. 1210-11) There are no additional out-of-pocket expenses to the client as charged by competitive organizations. (Tr. 1211)

14. A four-page data sheet containing 458 characteristics relative to the client's background and preferences is prepared for the client, programming him into the Jonkers Termatrix data-retrieval system in the NES offices. (Tr. 61, 1211; CX 14-A-D) The Termatrix system costs approximately \$10,000 and took over a year to install. (Tr. 1212) The client's data is then screened daily against available job openings. (Tr. 1211-12) If the information on the client matches a job opening, the client's staff counselor then contacts the potential employer regarding the client. (Tr. 1212, 1643)

15. NES employs a Telex for instant communication with companies who may have an interest in particular clients. (Tr. 1212) NES also uses WATS lines specially installed by the telephone company for immediate long distances calls throughout the country. (Tr. 1212-13) These WATS lines permit NES staff officers to call "Chicago, Atlanta, New York, * * * anywhere they want." (Tr. 1213) "They can talk for one minute, they can talk for four hours without worrying about the price of [the] phone call, and they are on those phones all the time." (Tr. 1213) NES pays approximately \$4,000 a month for the use of the telephone and Telex systems. (Tr. 1214)

16. In order to market its clients better, NES also has women in its organization who clip pertinent material "from the Wall Street Journal to Time, Fortune, Forbes, newspapers * * * " (Tr. 1214) NES receives "three Wall Street Journals a day and we try to read to see * * * who has just gotten a contract, who has just lost a contract, who has been promoted, who has just left, what firms are looking for people, what ads * * * would be apropos to * * * our people." (Tr. 1214)

Represented Salary Range

17. NES advertising is prepared by S. G. Stackig, Inc., an advertising agency in Washington, D.C. (Tr. 1225-26, 1910-11) The copy is brought to Mr. Costello and Mr. M. A. Becker, a vice president of NES, for their approval. (Tr. 1226, 1911) The advertisements containing the language "Executives, \$10,000 to \$72,000, U.S. and Overseas" were prepared by the Stackig agency under the supervision and authorization of Mr. Costello and Mr. Becker. (Tr. 1226, 1910-11)

18. The NES services are claimed to be of primary benefit to persons seeking positions between \$10,000 and \$72,000 in the United States and overseas and the advertised phrase seeking

Initial Decision

76 F.T.C.

clients "Executives, \$10,000 to \$72,000, U.S. and Overseas" (Ans. Pars. 4, 5 and 6) is a bracketing device designed to draw the attention of such persons to the NES services. (Tr. 1226, 1915-16) The range as evidenced was designed to reflect the salary range of the 400 to 800 job openings in the NES files at the time the advertising appeared. (Tr. 1226-27, 1915-17) NES generally is not interested in persons with salaries of less than \$10,000 and NES has had some positions over \$72,000. (Tr. 1226-27, 1916-17) Over the last two years the \$72,000 figure has been reduced to \$47,000 and the advertising accordingly revised because \$10,000 to \$47,000 has been about the range during the period. (Tr. 1227; compare CXs 23-29 with CX 188)

19. Independent expert witnesses from three competing executive-search firms confirmed the testimony of Mr. Costello and Mr. Stackig regarding their interpretation of the \$10,000-\$72,000 language and testified that this was how the language generally was understood within the business. (Tr. 1754, 1779-80, 1821) Dr. William Stuart, vice president of Snelling & Snelling, testified:

THE WITNESS: I would take it to be a bracket, within which the executive would fall between 10 and 72,000.

HEARING EXAMINER BUTTLE: Would you assume from that that they had positions available?

THE WITNESS: I would assume that they had at least one position for 10 and one for 72. (Tr. 1780)

Robert L. Philipson, president of Technical Personnel Consultants, Inc., testified:

Well, specifically, in relation to the heading, I think the organization advertising is interested in respondents whose salaries are in the bracket of 10,000 to 72,000. And apparently can provide a service to people in that bracket. (Tr. 1821)

20. Although complaint counsel called 28 witnesses, including two experts and 17 NES clients, none of these witnesses testified with respect to his understanding or impression of the phrase \$10,000 to \$72,000. The testimony of respondent's officers, advertising man, and three expert witnesses on this issue is uncontradicted, raising the inference that any testimony on this issue by complaint counsel's witnesses, if given, could have been unfavorable.

Executive Changes from NES programs

21. Complaint counsel have failed to adduce any evidence regarding the falsity of the statement "As a result of NES pro-

grams, executives have made changes in over 2800 firms" (Complaint Pars. Four (2), Five (2), Six (2); Ans. Pars. 4, 5, 6), which has appeared in certain NES newspaper advertisements. (CXs 23-26, 29) Such proof, which would require the presentation of complete placement records, was not offered.

Unequal Contacts

22. Complaint counsel have failed to evidence the falsity of the phrase "You can profit now from our unequalled contacts with top management in commerce and industry" (Ans. Pars. 4, 5, 6) aside from the possible incredibility of the opinion statement on its face. The courts, however, are inclined to classify this kind of self-estimation as legitimate "puffing."

The Supreme Court, in *United States v. New South Farm and Home Company*, 241 U.S. 64-67, has distinguished between legitimate puffing, *i.e.*, mere exaggeration of qualities the merchandise has, and misleading representations, *i.e.*, assigning to merchandise qualities it does not have:

A mere expression of opinion such as "The Finest" or "The Best" is quite distinct from a statement of fact which, if not true, is likely to deceive.

To the same effect, see *Kidder Oil Co. v. FTC*, 117 F. 2d 892, where the Seventh Circuit Court of Appeals stated:

*** Petitioner's representation that its product will enable a motor car to operate an "amazing distance" without oil, or that its product is a "perfect" lubrication, evidently is some exaggeration. To what extent, however, it is difficult to say. Such terms are largely matter of personal opinion. What might be an "amazing distance" to one person might cause no surprise to another. So far as we know, there is nothing "perfect" in this world, but still it is a common term, which undoubtedly means nothing more than that the product is good or of high quality. We can conceive of situations where the use of such words might be deceptive and even fraudulent. As used by petitioner, however, we are of the opinion that they are nothing more than a form of "puffing" not calculated to deceive. (P. 901)

See also *Raladam Co. v. FTC*, 42 F. 2d 430, 432-33; *aff'd* 283 U.S. 643.

23. Many of corporate respondent's present and former officers and employees testified to their personal acquaintance with substantial numbers of executives in corporations throughout the world whom they contacted on behalf of NES clients or who contacted them for executives. (Costello, 1227-28, 1245-46, 1297-1300; Mischler, 1317-22, 1344-47, 1351, 1373-75; RXs 5-A-B, 178-A-B, 179-A-C, 180; Spector, 1418; Rassiga, 1843;

Downs, 1168-72; CX 203) This evidence, of course, does not establish the literal accuracy of the statement. However, it does establish the contacts are excellent and justification for the statement in this sense.

24. A number of eminent defense witnesses were called in this proceeding, including two past presidents and a director of the District of Columbia Bar Association—all prominent Washington attorneys (Tr. 1630, 1640, 1650)—and many corporate executives including: a vice president of the Sheraton Hotel chain (Tr. 1829); the director of personnel of General Aniline and Film Corp. (Tr. 1850); a vice president of the General Instrument Corporation (Tr. 1733); and administrative manager of Vitro Laboratories, responsible for all personnel matters for the company (Tr. 1713); the president of Versitron, Incorporated (Tr. 1730); the director of administration for Atlantic Research Corporation, a division of the Susquehanna Corporation, with nine departments, including personnel, reporting to him (Tr. 1795-96); and the president of Associated Traffic Clubs Insurance Corporation (Tr. 1703). All of these witnesses were acquainted with the corporate respondent and one or more of their officers or staff officers. (Tr. 1631-32, 1642, 1651-52, 1653, 1830-31, 1851, 1854, 1733-34, 1713-14, 1730, 1796, 1703-04, 1706-07) All of the executives or their subordinates regularly contacted NES in filling openings for their respective corporations and NES officers and staff officers regularly contact them to bring qualified NES clients to their attention. (Tr. 1830-31; Tr. 1850-51; CX 178-A-B; Tr. 1734, 1713-14, 1730-31, 1796-98, 1703-04) Most of these witnesses had hired executives through NES. (Tr. 1832; CX 206; Tr. 1852, 1857; CX 167-L; Tr. 1734-35, 1797-98; 1802; CX 212; Tr. 1703-04) Similarly, this evidence does not establish the unqualified, literal accuracy of the respondent's representation, but it does establish their excellency and a reasonable justification for the selfestimation or sales puffing.

Refunds

25. Respondents represent that "If and when client accepts position with a company which pays to NESINC full standard fee for same, client's fee will be refunded to him." (Ans. Pars. 4, 5, 6)

26. Certain employers follow the policy of paying a fee to executive-search firms, such as NES, when the employer hires executives referred to it by the executive-search firm. (Tr. 1230, 1333,

1769, 1774, 1783, 1816) This fee, contingent upon placement is "usually known as a finder's fee or a placement fee." (Tr. 1230, 1333) If and when an NES employee-client accepts a position with an employer which pays NES a "finder's fee or a placement fee," NES refunds the client's service fee to him. (Tr. 1230-31, 1251-52, 1333, 1375, 1383, 1479-84, 1866; CXs 167A-167Z-19, 172, 204-220) NES is obligated to reimburse the client in this situation in accordance with paragraph 3(b) of the standard NES contract which states: "If and when the client accepts a position with a company which pays the full standard NESINC fee to NESINC, the client's service fee will be refunded to him." (Tr. 1230; CXs 11-12)

27. The terms of the contract, including paragraph 3(b), are discussed with the client. (Tr. 1230, 1508-09, 1874) The contract states and the NES representative makes it clear that the client's fee is reimbursed only "if and when" a finder's fee is paid by an employer. (Tr. 1230, 1508-09, 1874; CXs 11-12) No representations are made with respect to the client's chances of obtaining a refund of his fee or the frequency of such refunds to NES clients. (Tr. 1230, 1508-09, 1874)

28. This testimony was confirmed by 12 of the 17 client-witnesses called by complaint counsel who testified that chances of frequency of refunds were not discussed or who who were not interrogated on this issue by complaint counsel, raising the inference that their testimony, if given, would have been unfavorable. (Cooney, 222; Dudley, 271; Stafford, 350; Bauers, 419; Greene, 476-77; Przystas, 108; Conaway, 286; Doyle, 781; Murphy, 832; Lane, 901; Heller, 977; Armentano, 1004)

29. Evidence of certain refunds are found in the record, identified as CXs 167A-167Z-19 and CXs 204-220. These exhibits are copies of the respondents' accounts receivable and relate specifically to the payment of the "finder's fee" by the employers. They also reflect the instances where refunds were made to the individual job-seeking clients. The exhibits marked CX 216 through 219 are duplicates of some of those in the series marked CX 167, etc. Those marked CX 204-215 and 220 supplement the CX 167 series.

30. It is observed that each of the exhibits in the CX 167 series contains two records with the exception of the last one (*i.e.*, CX 167Z-19) which has but one card. All of the other exhibits re-

ferred to herein have but one card. Each card is marked in the upper right hand corner with a "P" number. The lowest number in the exhibits is "P10" and the highest is "P138." Of the 138 cards represented in the exhibits covering the period May 4, 1964, through April 1, 1968, only 43 are absent. There are four cards depicted which have no "P" number they appear on CX 167H; CX 167S; CX167Z-4; and CX 167Z-5. They are dated July 27, 1964, October 26, 1964, February 17, 1966, and February 16, 1966, respectively. From this it appears that the record includes all but 39 of the "P" numbered cards issued from May 4, 1964, through April 1, 1968. Thus, according to complaint counsel, in the four-year period represented, these records, if complete, reflect the respondents have actually been paid "finder's fees" in 100 instances of record with possibly 39 more which have been denied.

31. In the majority of cases the foregoing exhibits, according to complaint counsel's proposed findings (p. 18), reflect the amount of the refunds paid to the clients. However, in the table below it is shown that a number of the clients were not reimbursed even though respondents did receive "finder's fees":

CX 167 C P13
CX 167 E P15
CX 167 X P63
CX 167-Z-3 P67 Travel fee only refunded.
CX 167-Z-4 No "P" number.
CX 167-Z-5 P80
CX 167-Z-8 P83
CX 167-Z-12 P98 (Client released refund of \$650.)

32. In three instances there is a notation that the fee was to be refunded but there is no indication that this was actually done, and in one the travel was not refunded. These instances are found as indicated below:

CX 167 V P103
CX 167-Z-16 P104
CX 167-Z-18 P106
CX 167-Z-19 P110 Fee to be refunded less \$36 travel.

33. The foregoing records, which may or may not be faulty, are conjectural in the absence of account book data. They are isolated evidence at best which do not establish a pattern of nonrefundability of fees in the light of the evidence to the contrary hereinbefore set forth and in the absence of evidence fully disclosing the circumstances surrounding the failure to make a re-

fund from which deception may be imputed. The burden is on complaint counsel to adduce such prima facie proof to the point where deception may be inferred. Incomplete records are not such proof.

Intercity Staff Operation

34. The statement "The present enterprise, operating in nine major cities, maintains a staff of 106 executives, administrative and support personnel * * *" (Ans. Pars. 4, 5, 6) appears in the copyrighted NES brochure for 1965 (CX 6). At the time the statement was made, NES did have offices in nine major cities with a staff of 106 executives, administrative and support personnel. (Tr. 1199; CX 6, listing the offices)

35. The function of the branch offices in 1965 and at present is to "serve as informational offices to explain the functions of National Executive Search in Washington, D.C., to people who go to the branch offices inquiring as to what we offer in the way of career guidance and search programs." (Tr. 44, 1199) NES explains to its potential clients that all NES services will be rendered at the executive offices in Washington and that all clients will have at least one appointment with the NES staff in Washington. (Tr. 44, 84, 1199)

36. This testimony was confirmed by several of the Commission's client witnesses. Doyle stated: "I asked them if I could work out of the New York office. I was told that their primary functions were all performed in Washington, but that I was free to use the tie-line from the New York office to the Washington office to communicate with them as I saw fit." (Tr. 790)

HEARING EXAMINER BUTTLE: Did they tell you what the activities were at their branch offices?

THE WITNESS [Murphy]: No, they did not.

HEARING EXAMINER BUTTLE: Or what their function was? Did they indicate to you what the function of the branch offices was?

THE WITNESS: They did not. (Tr. 846)

Armentano stated: "I don't believe he [Mr. Blaine Wily of the New York office of NES] mentioned any of the details of the mechanics at all. This was all done, as I recall, in Washington." (Tr. 1010) Kaplan stated: "I honestly don't remember" [whether anything was said about the function of the branch offices in placing him]. (Tr. 761)

37. Nearly all complaint counsel's client witnesses were from New York or Washington areas and the NES newspaper adver-

Initial Decision

76 F.T.C.

tisements specifically state: "Services performed at Executive Offices, Washington, D.C." and identify the New York office as an "Information Office" only. (CXs 23-24) In addition, the standard NES contract states in the very first line: "It is specifically understood that the following services are to be rendered by National Executive Search, Inc., in Washington, D.C." (CXs 11-12) The record is uncontradicted that this standard NES contract is signed by every client, is discussed with the client beforehand, that the client has the opportunity to consider the contract carefully, and that the clients do consider it carefully. (Tr. 48-49, 51; CXs 11-12; Przystas, 147, 151-52; RX 158; Cooney, 203, 207-08; Dudley, 281; RX 82; Conaway, 310-11; RX 51; Stafford, 354, 366; RX 169; Bauers, 447-48; CX 101; Greene, 483, 491-92; RX 92; Kaplan, 762, 771; RX 117; Doyle, 806; RX 70; Bankes, 826, 829-30; RX 33; Murphy, 864-67, 870; RX 210; Lane, 919-20, 922-23; Shea, 937-38; Heller, 997, 1000-1001; RX 111; Armen-tano, 1031-32; RX 26; Disharoon, 1065, 1075-76; RX 62)

Respondent's Experience Over a Number of Years

38. Complaint counsel have failed to prove the falsity of the statements "Our 19th Year" and "Our 20th Year" (Ans. Pars. 4, 5, 6), which appear in NES newspaper advertisements (CXs 23-26, 29).

39. The record is uncontradicted that Respondent John W. Costello, through NES and its predecessors, National Employment Service and NESINC, has been in the personnel business since March 1946, placing executives as well as other types of personnel. (Tr. 16-17, 548-49, 1228-29, 1286, 1404, 1427, 1914-15) The corporate respondent is an outgrowth of National Employment Service, a partnership founded by Mr. Costello in 1946. (Tr. 16-17, 1228-29, 1286, 1404, 1427)

40. Many of the NES officials, past and present, had been associated with the company for years. Dr. William Spector testified that in 1945 he was director of personnel for Briggs Filtration Company, which at that time had about 5,000 employees. (Tr. 1403) "I found that National Employment Service was providing me with the best help and one day I went to see a guy by the name of Bill Costello, who was supplying all this help to me, and that is how we first met." (Tr. 1404) Subsequently, in 1946, Dr. Spector joined the staff of National Employment Service and was with the company for about a year and a half before leaving to join the National Academy of Science. (Tr. 1404) After some

years with the National Academy of Science, Dr. Spector rejoined National Executive Search in 1957. (Tr. 1405)

41. Mrs. Ann Palmer Haynes, a former employee of National Employment Service, was called as a Commission witness. (Tr. 548) Mrs. Haynes testified that she was in charge of the engineering section as early as 1950. (Tr. 549) Mrs. Haynes worked for companies throughout the United States " * * * finding them specific engineers and scientists." (Tr. 549-50) During the period she was employed by National Employment Service, there were "from one to five" persons working under her in the engineering section. (Tr. 550)

42. Mr. Edward Mischler and Mr. M. A. Becker, vice presidents of NES, have been with the organization for 12 years and nine years respectively. (Tr. 1315, 1504)

43. Long before National Executive Search was incorporated, a separate division within NESINC was performing executive-search work and Mr. Costello personally had been doing such work for 23 years or more through National Employment Service, NESINC, and NES. (Tr. 1228-29, 1914-15)

44. Complaint counsel elicited testimony with regard to the significance of the phrase "Our 19th (or 20th) Year" from only one Commission client-witness (Heller, 979). Apparently this phrase had no significance to the other 16 Commission client-witnesses who were not queried on this point. Such evidence is isolated and can hardly be considered substantial.

Services Represented

45. The respondents represent that they provide "consulting, counseling, and guidance services, and offer(s) direct assistance * * * in the development and execution of individualized National Executive Search program designed to aid the * * * client in achieving new career goals" (Ans. Pars. 4, 5, 6).

46. The record is abundantly clear the respondents provide consulting, counseling, and guidance services and offer direct assistance in the development and execution of individualized programs designed to aid the client in achieving new career goals.

47. All of the Commission's client-witnesses had at least one lengthy conference with NES counselors at the time their programs were initiated. These conferences lasted from two to six hours. (Przystas, 115, 117, 134; Cooney, 188-89, 194; Hammer, 233, 238; Dudley, 280; Stafford, 334-35, 342; Bauers, 391-92; Greene, 474-76; Kaplan, 746, 755, 759; CX 178; Bankes, 818-19;

Initial Decision

76 F.T.C.

Murphy, 843; Lane, 909-11; Shea, 938; Heller, 985, 989; Armen-tano, 1011-13; Disharoon, 1049) (See also, Miller 1862-63 and Fairclough, 1886.)

48. NES provides continuing "consulting, counseling and guid-ance" services to its clients during the course of their programs. Hammer: "Well, at the time of this counselling interview, I brought out, and the counsellor with the help of my own resume, tried to highlight certain points of my past Naval career. And then said that from that they would prepare a resume. But he stressed their research department, that the research department, taking into account the highlights of the resume, would come up with a listing of organizations in which to send my resume." (Tr. 238) Stafford:

Prior to that, of course, I had told Captain Youmans that Mr. Miller [Minner] was coming up. And Captain Youmans discussed the interview technique.

There were about two things that he said to me that I recall. (1) He said, "Be sure you are on time." He said he set up an interview for someone else here, and they were late, and this irritated Mr. Minner. "Be sure you are on time." And the other things he said: "If they want to discuss salary, leave this to me, and I will discuss salary." (Tr. 334)

Greene, Tr. 474-76; Kaplan:

Approximately a month later. They suggested some changes, such as removing technical and scientific from the interview, changing my salary requirements, perhaps deleting it, because I felt this might impose a problem—the fact that I had been out of the field for ten years and to ask for a salary of such nature, it might pose a problem—and delete this. When the interview was effected, then one could talk as regards salary requirements. (Tr. 755)

CX 178; Doyle, CX 186; Miller, Tr. 1862-63; Fairclough, 1886; Price, 1897-98) Former NES staff officer, John Downs, a Com-mission witness, spent a considerable amount of time on the NES clients assigned to him, advising them how to conduct themselves during interviews. (Tr. 1158) Mr. Downs maintained close con-tact with his clients so they would be available for interviews when needed. (Tr. 1159) Dr. William Spector, another former NES employee, testified NES gave "Counselling with regard to how to conduct an interview. How to conduct oneself [sic] during an interview. How to negotiate for a salary. How to dress. * * *" (Tr. 1421-23) See also: Mischler, 1316-17, 1396-98; Rassiga, 1843.

49. Upon receiving a job order applicable to one of its clients,

NES gets in touch with the individual and inquires if he would like to take a look at the position and "if he would you (NES) or he arranges for the transportation." (Tr. 1216)

Often we do that. We will get him a hotel room. We will try to get him a flight time. And then when the interview is over he gets in touch with us—at least that is the theory; sometimes they do, sometimes they don't—with the hope of telling us what he thinks of the job, what he thinks of the man, what we can do for him. We help him with salary negotiation. We help him with an employment contract, he not only doesn't know the answers, he doesn't even know the questions to ask. So, we help him with that.

We help him—if there is a choice of two jobs, we try to give him at least our opinion as to which one and for what reasons, or conceivabl[y] whether it is even smart to leave where he is because he might be going from a frying pan to a fire. (Tr. 1216-17)

50. NES is contractually obligated to perform these continuing services (CXs 11-12) and does perform these services for its clients. (Bauers, CXs 107, 108, 110; Conaway, CXs 139, 140 A-B; Kaplan, CX 178; Doyle, CXs 182 (forwarding application), 183 (scheduling interview), 186 (NES follow through) and 187; Armentano, CXs 196, 197, 199 (arranging interview); Greene, Tr. 473-75; RX 97-A; Przystas, RX 162 (scheduling interview); Stafford, Tr. 332-33, 345)

51. The lists of prospective employers to be contacted for each client are prepared on an individualized basis after a thorough review of the client's background, preferences, and objectives. The lists for Commission client-witnesses in this proceeding are distinctive, tailored to fit the specific background, preferences, and objectives of each individual: Przystas (construction engineer, Tr. 112) CX 70 reflecting construction and engineering companies in U.S. and abroad; Cooney (industrial and labor relations, Tr. 188), RX 59-A-F showing communications to specific corporate officers responsible for industrial and labor relations with their companies; Hammer (technical researcher requesting position in Washington area, Tr. 230-31), RX 105-A-F listing 78 potential employers in the Washington, D.C. area; Dudley (retiring army officer, requesting position where age would not be a factor, Tr. 280), RX 85-A-F listing foundations and service organizations not requiring a training program; Stafford (purchasing agent of petroleum products, Tr. 317-18), RX 172-A-F reflecting companies in the oil, refining, and chemical industries; Kaplan (retailer with chemical background desiring to return to chemical field, Tr. 736), RX 120-A-F reflecting chemical and pharmaceutical companies, RX 121-A-C reflecting chemical and pharmaceutical manufacturers as well as selected retailers in the

Initial Decision

76 F.T.C.

New York area; Doyle (engineering background with experience in operational and administrative positions, Tr. 809-10), RX 74-A-G and CX 181-A-C reflecting engineering and technical employers and utilities companies; Bankes (secretary-treasurer of coat manufacturer, Tr. 816), RX 37-A-E and RX 38 reflecting soft goods manufacturers; Murphy (attorney with trust and ICC experience, requesting location in South or Southwest, Tr. 832-33, 883), RX 212-A-E reflecting banks and transportation companies in the South and Southwest; Armentano (export traffic expediter, Tr. 1004), RX 30-A-G reflecting exporting, shipping, and transportation companies; Disharoon (finance and planning analyst requesting small or medium sized employers, Tr. 1040, 1058), RX 65-A-E, RX 66-A-C reflecting small and medium sized employers.

52. NES provides consulting, counseling, and guidance services to individual clients, when requested, on a special fee basis of \$100 to \$250, depending upon the degree of difficulty involved or the amount of time spent. (Tr. 1292)

53. NES provides consulting, counseling, and guidance services to employers. (Herrick, Tr. 1632-37; McArdle, 1642-45; Sachs, 1651-52; Jennison, 1658-59; Day, 1703-05; Harmon, 1797-99)

54. The District of Columbia Bar Association hired its present executive director with the assistance of NES and Respondent John W. Costello. (Tr. 1243-44, 1632-37, 1642-45, 1651-52; RX 219) Paul F. McArdle, president of the Bar Association at the time, testified to the type and quality of the counseling received:

And Mr. Costello told us that in his professional judgment Mr. Garrity qualified for this position, because he matched all the things that the job required.

* * * * *

*** he is working out very satisfactorily, exactly as Mr. Costello predicted he would. He has imagination. He has organizational ability. He has leadership. And these were all the things that Mr. Costello said that Mr. Garrity possessed.

* * * * *

He put me tremendously at ease, if I may use that expression, Mr. Matthews, in that he gave to the committee—and particularly to myself, because I like to speak solely from my own reaction to him—he brought, in my opinion, a professional judgment. He told us what we should be looking for, he gave us the idea of a salary range, he gave to us the ideas—what this position should be, the man that should have this kind of position. (Tr. 1644-45)

Background of Key Personnel

55. Respondents represent that many of the staff of National Executive Search, Inc., "have held key positions with some of the

nation's largest industries, in the Federal Government, on University faculties, and are recognized authorities in their fields. Among them are business and industrial executives, scientists, and graduate engineers, financial and marketing experts, and senior staff members at the doctorate level." (Ans. Pars. 4, 5, 6)

56. Complaint counsel have failed to prove the falsity of this charge. The above-quoted statement is made in the copyrighted brochures for the years 1963, 1964, and 1965. (CXs 1, 6, and 71) In conjunction with this statement, each of the brochures contains a full page captioned "Who Works For You" setting forth biographical and experience data for key NES personnel (CXs 1, 6, and 71).

57. No evidence whatsoever has been introduced to contradict the language quoted above or the detailed information under the caption "Who Works For You" regarding the competence or qualifications of the NES personnel. This failure to introduce evidence by complaint counsel raises the inference that had such evidence been introduced, it could have been unfavorable to complaint counsel's case. (CXs 1, 6, 71)

58. Mr. John W. Costello, president and founder of the company, has been in the personnel business for 23 years. (Tr. 16-17, 1228-29, 1286, 1404, 1427, 1925) He is regarded as an innovator of the type of firm which provides *both* executive search and career guidance and counseling services to its clients. (Tr. 1227, 1405, 1417, 1744, 1766, 1773-76, 1818, 1819-20) Mr. Costello is a past president of the Washington Executive Association and president of the Sales and Marketing Executives Association. (Tr. 1227-28) He has been selected as Man of the Year by the Board of Trade. (Tr. 1228) Mr. Costello is a recognized authority in the personnel field and is acquainted with thousands of executives in the Washington area and throughout the country. (Tr. 1227, 1245, 1246, 1297-1300, 1417, 1707)

59. The testimony regarding Mr. Costello's reputation and ability was confirmed by several witnesses in this proceeding: McArdle (Washington attorney and past president of the District of Columbia Bar Association): "We felt very satisfied with our initial contact with Mr. Costello and his organization. I was tremendously impressed." (Tr. 1645); Sachs (Washington attorney and past president of the D.C. Bar Association): " * * * it was very helpful to us to have a third party [Mr. Costello] who was a specialist in this field * * * I know that sometimes my clients or

sometimes friends have talked to me about placement problems, and I have told them of our experience, and have suggested that it would be constructive for them to contact such a person—Bill Costello, really.” (Tr. 1653); Herrick (Washington attorney and director of D.C. Bar Association): “* * * he advised us on all of those things. And all of us accepted his advice. We thought it was good. * * * We [the D.C. Bar Association] didn’t list with any others. We were satisfied with NESINC. * * * I had known Mr. Costello—I knew him personally—I knew him professionally actually first. And I therefore was satisfied that we didn’t have to go any further than NESINC.” (Tr. 1637–38); Lawder: “* * * I was the assistant executive vice president of the Washington Board of Trade which serves as a Chamber of Commerce for the metropolitan area. And as the number 2 man in this organization I was in contact with business generally throughout the Washington area. I had heard of National Executive Search and I have known Mr. Costello for a number of years. When I went in with the Board of Trade I got to see him more frequently because he was active in the business life of the community.” (Tr. 1572); Day (insurance company president): “* * * I have had occasion to hear Mr. Costello speak any number of places. Years ago I was a guest at the Washington Sales Executives Club and I remember he made a very—what I thought was a very stirring speech at that time; and, subsequently, I have been at four or five functions where he served as speaker, and I have known that he had been in the press a number of times—at least I certainly had the impression that he was considered a top personnel executive here in town, and for that reason I thought that he would be a fine firm with which to do business.” (Tr. 1707–08); Jennison (trade association executive): “Mr. Costello communicated with me. He was not directly seeking my services at that time. He was seeking information of the best qualified applicant. And having a rather wide acquaintance in the city, he talked to me. * * * He had been an acquaintance for some years, just, I would say, a passing acquaintance that I had met at various functions, civic functions [naming the Board of Trade and Trade Executives Association].” (Tr. 1662–63); Lane (vice president of Sheraton Corp.) knew Mr. Costello and stated that Sheraton uses NES “for help in searching out qualified candidates for employment.” (Tr. 1830–31); Piccoli (director of personnel, General Aniline & Film Corporation): “I have contacted National Executive Search, precisely the gentleman over there [indicating Mr. Costello] when I

have been seeking certain people to fill certain executive positions in our corporation." (Tr. 1851)

60. Mr. Edward Mischler, executive vice president of NES, has an engineering and technical background and is familiar with these particular fields of endeavor. (Tr. 1206, 1315) Mr. Mischler acts as consultant to 15 research, development, and production enterprises around the country and at NES is responsible for administration and implementation of the client programs through a series of staff officers, researchers, and other supporting personnel. (Tr. 1206, 1316; CXs 1, 6, 71) Prior to joining NES in 1956, Mr. Mischler was employed by the Central Intelligence Agency as Physical Science Administrator at a GS-15 level. (Tr. 1315)

61. Mr. Mischler's expertise in the engineering and technical fields was confirmed by independent third-party witnesses. Byron (administrative manager of Vitro Laboratories Division of Vitro Corporation of America) (Tr. 1713-14); Meisinger (president, Versitron, Inc.) (Tr. 1730-31); Mattes (vice president, General Instrument Corp.) (Tr. 1734); Harmon (director of administration, Atlantic Research) (Tr. 1796-98)

62. Mr. M. A. Becker is a vice president of NES and has been with the company since 1959. (Tr. 1504) Mr. Becker, a business administration graduate of Washington University in St. Louis, possesses a business background with stress on financial management. (Tr. 1504-05; CXs 1, 6, 71) Prior to 1959, Mr. Becker was executive vice president and controller of a large wholesale food distributor based in Washington with branches in Richmond and Baltimore. (Tr. 1504-05; CXs 1, 6, 71)

63. At least two of the NES staff held doctorate degrees (Tr. 586, 605, 1413, 1403) and two held law degrees (Tr. 67, 1413, 1554). Two of these persons, Dr. William Spector, a former NES employee, and Mrs. Rose Jaffin, a present NES employee, testified for the respondents in this proceeding. (Tr. 1402, 1554)

64. Dr. Spector joined NES in late 1946 after having served as director of personnel for the Briggs Filtration Company, which had some 5,000 employees. (Tr. 1403-04) Dr. Spector continued with NES until 1948 when he became Executive Secretary and Editor and Project Director of the Handbook of Biological Data of the National Academy of Science. (Tr. 1403-04) After the Hungarian Revolution, President Eisenhower appointed Dr. Spector to the President's Committee for Refugee Relief "as scientific

placement officer with the responsibility of placing Hungarian refugee scientists, engineers and high level people in United States industry." (Tr. 1405) During this same period, Dr. Spector was also selected by the Surgeon General's office to represent the United States in the field of toxicology on a science exchange program with the U.S.S.R. (Tr. 1405) Dr. Spector returned to NES on October 1, 1957, as executive director. (Tr. 1403) Dr. Spector has since left NES and presently is senior editor and a member of the editorial planning committee of Encyclopedia Britannica. (Tr. 1402)

65. Mrs. Rose Jaffin, who has performed industrial research at NES for six years, is an attorney admitted to the Bars of the State of Florida and the Supreme Court of the United States. (Tr. 1554) She graduated from college Phi Beta Kappa and cum laude, with a minor in economics. (Tr. 1554) Prior to coming to NES, Mrs. Jaffin was employed by the Securities and Exchange Commission as an attorney in the General Counsel's office and the Division of Corporation Finance. (Tr. 1554)

66. Mr. Will Allen, a NES senior counselor, was called as a witness in this proceeding. (Tr. 1595-96) Mr. Allen testified to his long experience in the personnel and industrial relations fields (Tr. 1595-96) From 1932 to 1942, Mr. Allen acted as a labor arbitrator and labor relations editor and White House correspondent for a New York newspaper. (Tr. 1595-96) From 1942 until 1962, he was a member of the board of directors and special assistant to the president of the Champion Paper Company, responsible for all personnel and industrial relations problems (Tr. 1596) Mr. Allen became semiretired in 1962, although he resumed his former occupation as a White House correspondent. (Tr. 1596) Mr. Allen joined NES in 1964 at the request of Mr. Donald McGeen, then a NES vice president. (Tr. 1596)

67. Mr. John Downs, a Commission witness, served as a placement officer for NES for nearly four years before leaving in January 1967 to join the United States Chamber of Commerce. (Tr. 1147-48) Prior to joining NES, Mr. Downs had been continuously employed in the executive search and personnel field as vice president of Purcell and Associates in Chicago for three years, and as an executive personnel officer and recruiter for New England Life Insurance Company. (Tr. 1148-50) Mr. Downs is a graduate of Northwestern University. (Tr. 1150-51)

Nature of Respondents' Agency

68. Respondents represent "It is not an employment agency—neither by concept, nor intent, nor by performance of its functions." (Ans. Pars. 4, 5, 6)

69. Complaint counsel failed to produce any evidence that NES is an "employment agency" or that any Commission client-witness understood NES to be an "employment agency."

70. NES has been an operating entity in the District of Columbia for more than 20 years, first as a division of National Employment Service and NESINC, and since 1959 as a separate corporation. During this period, NES has operated offices in the District of Columbia and the States of New York, Illinois, California, Georgia, and Ohio. (Tr. 1199; CX 6)

71. Although the District of Columbia and each of the other jurisdictions in which NES operates have statutes requiring the licensing of employment agencies, NES is not so licensed. (Title 47, Chapter 21 of the D.C. Code; Tr. 9–10) Complaint counsel did not introduce or attempt to introduce evidence of governmental proceedings requiring NES to obtain a license as an employment agency or penalizing NES for its failure to obtain an employment agency license. Complaint counsel's failure to adduce such evidence forces the conclusion that the jurisdictions in which NES operates do not constitute NES an "employment agency."

72. Several different types of organizations provide personnel services to executives. (Tr. 522–23, 1082, 1276–77, 1743–45, 1773–74, 1817–19) These include organizations performing consulting or counseling services but no placement work, executive recruitment firms retained on a contingent fee basis or otherwise to locate executive talent for employers, employment agencies which attempt to locate positions for applicants on a contingent fee basis and organizations such as NES whose functions overlap the functions of the others to some extent. (Tr. 522–23, 1082, 1276–77, 1743–45, 1773–74, 1817–19)

73. An "employment agency" has no contractual obligation to its clients to perform any services on their behalf. (Tr. 1277, 1753, 1776, 1819–20) The employment agency does not counsel its clients, prepare resumes, or perform other services for them. (Tr. 1276–77, 1762–63, 1776, 1779, 1819–20) "It is not economically feasible" for the employment agency to perform these additional functions. (Tr. 1277, 1762–63, 1820) Because the employment agency is compensated on a contingent fee basis, such agencies

devote their efforts to applicant-clients on the basis of their "placeability." (Tr. 1819) "If they think they have a good chance of placing a man, they will work in his behalf because they know they don't get paid unless they perform a service on his behalf." (Tr. 1819) "But if, on the other hand, they do not wish to help you or they thought you were a difficult placement * * * they do not have an obligation to do anything for you because you have not paid them anything for their time." (Tr. 1277, 1746-47, 1819-20) "* * * they [employment agencies] are economically bound to handle those people where they have a demand." (Tr. 1748-49) Employment agencies make an effort to place only half of the applicants in that at least one call is made for each of those clients. No effort is made for the other half. (Tr. 1824) "Frankly, if there are people we feel—we economically would have to spend too much time with, we can't spend the time with them. It may be a counseling function, in which case, anyone handling it should charge on a counseling basis, rather than a placement basis." (Tr. 1747)

74. NES is contractually obligated for a specified fee to provide "consulting, counseling and guidance services" and to offer direct assistance in the development and execution of an individualized program for each of its clients on a uniform basis for a specified period of time. (Tr. 9; CXs 1, 6, 11-12) These services include interviewing, counseling, analysis, research, preparation of a covering letter, resume, selected mailing list, personal contacts with employers, evaluation of career opportunities, review and response to advertisements, and continuing consulting services. (CXs 11-12) These services are performed for each and every NES client on a uniform basis. (Tr. 9, 1276-77, 1753, 1766, 1774-76, 1819-20; CXs 11-12)

75. Two of the three expert witnesses called by respondents—Dr. William Stuart, vice president of Snelling & Snelling and Mr. Theodore Wilson, president of Wilson Personnel Incorporated—operated employment agencies licensed in the District of Columbia, placing executives on a contingent fee basis. (Wilson, 1743-44; Stuart, 1771-72) Both were past or present members of the board of directors of the National Employment Association. (Tr. 1742, 1772-73) All three experts were familiar with the operations of NES and did not consider NES an "employment agency." (Wilson, 1766; Stuart, 1774-76; Philipson, 1819-20) The distinguishing feature in the opinion of these experts was the NES obligation to perform numerous specific services on a uniform basis for all clients as opposed to an employment agency

which is not obligated to perform any service for applicants. (Wilson, 1753, 1766; Stuart, 1774-76; Philipson, 1819-20) Complaint counsel failed to contradict the testimony of these three experts.

76. NES has never purported to be or act as an employment agency. (Tr. 129, 1874; CXs 6, 11-12) Any such intent is expressly negated by the NES brochure: "It [NES] is not an employment agency—neither by concept, nor by intent, nor by performance of its functions." (CX 6) This language is confirmed by the standard NES contract, which every client considers carefully and signs. The NES contract describes the services to be performed and states: "It is specifically understood and agreed by the parties to this agreement that National Executive Search, Inc., is not an employment agency, nor is it intended that the services to be rendered hereunder shall be construed to imply that it will act or conduct its operations in the capacity of an employment agency; and further that any fees payable in accordance with the terms of this agreement shall not be intended or construed to be placement fees and shall only be payment for services rendered to the client in assisting him to achieve and attain his career objectives." (CXs 11-12)

Resume and Personalized Letters

77. Respondents represent: "Your resume, accompanied by a personalized, individually typed cover letter is mailed to the appropriate executive of each firm on the research list." (Ans. Pars. 4, 5, 6)

78. Complaint counsel have not adduced any evidence regarding the falsity of the above-quoted statement, which appeared in the 1963 and 1964 copyrighted NES brochures. (CXs 1, 71, 195) Accordingly, the falsity of the statement has not been proven.

79. Personalized letters are prepared by NES for each client. (Tr. 1207; Armentano, RX 29-A; Bankes, CX 156; Bauers, CX 103; Cooney, RX 53-A; Disharoon, RX 63-C; Dudley, RX 84-A; Greene, RX 93-A; Hammer, CX 77; Heller, RX 112-A; Kaplan, RX 118-A; Lane, RX 125-A; Przystas, RX 159-A; Shea, RX 164-A; Stafford, RX 171-A) Drafts of the covering letter and resume are sent to the client for his "approval, disapproval or corrections." (Tr. 196-97, 1207, 1257; CX 104) The drafts of the covering letter and resume are revised in accordance with the client's comments and approved in writing by the client before final printing (Tr. 196-97, 1207; CXs 104, 125; Armentano, RX

29-A; Bankes, RX 34-A-C; Disharoon, RX 63-A-C; Doyle, RX 71-A-D; Dudley, RX 83-A-E; Greene, RX 93-A-D; Hammer, RX 103-A-D; Heller, RX 112-A-D; Kaplan, RX 118-A-D; Przystas, RX 159-A-D; Murphy, RX 213-A-C)

80. The resumes are printed by a professional printer, using good stock paper, and the best printing process, employing heavy print, light print, and italics. (Tr. 1210) Printing the resume costs NES approximately \$55. (Tr. 1210)

81. The evidence indicates a resume should contain the individual's "personal data, where the man lives, his birth, his family, those types of things that the client is interested in knowing; his experience, each of the companies, the title of his position, the duties in brief form; usually a description, again in brief form, of the company and its activities and all the positions he has held; another section on his education." (Tr. 1087-88) The resumes prepared by NES cover all these items in the recommended "brief form." (Przystas, CX 69; Hammer, CX 72; Bauers, CX 102; Bankes, CX 155; Armentano, RX 29-B; Conway, RX 50; Cooney, RX 53-B; Disharoon, RX 64-B; Doyle, RX 72-B, RX 73-B; Dudley, RX 84-B; Greene, RX 94-B; Heller, RX 113-B; Kaplan, RX 119-B; Lane, RX 125-B; Shea, RX 164-B; Stafford, RX 171-B; Murphy, RX 211)

82. The NES resume style or format is preferred by prospective employers. (Byron, administrative manager of Vitro Laboratories Division of Vitro Corporation of America, responsible for all administrative matters for the division, including personnel: "straight forward and to the point" (Tr. 1715); Piccoli, director of personnel of General Aniline and Film Corp.: "Frankly, I prefer that type of brief resume simply because I don't have the time to peruse a long winded resume" (Tr. 1854-55).)

83. Complaint counsel failed to show that the covering letters and resumes of NES clients are not mailed to the appropriate executive of each firm on the research list. The vast amount of effort devoted to preparation of the research list is a matter of record in this proceeding. "[S]he [the NES researcher] would also have selected within the organization that person at the right echelon in the organization that is in a position to help this particular man. There would be no sense in sending, as an example, a man who is looking for international placement to anyone probably less than a vice president in charge of international affairs."

(Costello, 1208) "You are trying to get the man where people would be interested in what he has to offer." (Jaffin, 1559)

84. Two of respondents' expert personnel witnesses confirmed this method of contacting employers to place executives. (Wilson, 1763; Philipson, 1826) "We would probably pick someone from one of the various sources I have mentioned, who would seem most likely to be the persons interested. For example, if you have a marketing man, you would probably send him to the vice president in charge of marketing, at any rate we would." (Wilson, 1763) "I believe that executives are hired largely at a higher level than the personnel office, either by vice presidents or presidents of an organization." (Philipson, 1826)

85. All of the employer witnesses called in this proceeding had received resumes from NES with respect to NES clients appropriate for their organizations. (Byron, Vitro Laboratories, Tr. 1714; Meisinger, Versitron, Incorporated, Tr. 1731; Mattes, General Instrument Corp., Tr. 1734; Harmon, Atlantic Research Corp., Tr. 1798-99; Lane, Sheraton Hotel Corp., Tr. 1830; Piccoli, General Aniline and Film Corp., Tr. 1851)

Standards of Acceptance as a Client

86. Complaint counsel have failed to establish by reliable, probative, and substantial evidence that the representation "A person would not be accepted as a client by respondents unless his qualifications met the high standards required for prompt placement" (Ans. Pars. 7, 8) was made by staff members in consultation or interviews with clients or that said representation is false and misleading.

87. The foregoing statement does not appear in any of the NES brochures or newspaper advertisements which have been introduced into evidence in this proceeding. (CXs 1, 6, 23-24, 26, 29, 71, 195) There is no reliable, probative or substantial evidence that any such statement was used by NES personnel in discussing the NES program with prospective clients.

88. NES does have certain qualifications regarding the type of client it may contract with and often refuses to take on clients who do not meet these minimum standards. The prospective clients are screened by NES personnel prior to the time a contract is signed and frequently prospective clients are rejected. Prompt placement is not one of the qualifications for taking on a particular client. (Tr. 1233-34, 1407-08, 1509-10, 1705, 1841-42, 1874-75)

89. NES normally accepts only clients in the \$10,000 and up salary range. The NES brochures and advertisements are directed at executives in the \$10,000 and up salary range. (Tr. 1226-27, 1754, 1779-80, 1821, 1915; CXs 1, 6, 23-24, 26, 29, 71, 195) The sole purpose of the phrase "Executives, \$10,000 to \$72,000" in the NES advertisements "is to attract the type of reader, * * * the target audience, that National Executive is interested in, and vice versa." (Stackig, 1915) NES is not generally interested in persons with salaries of less than \$10,000. (Costello, 1226-27) The lowest salaried placement recalled by Dr. William Spector, former NES vice president, occurred in 1958 or 1959. (Tr. 1420) The placement was for the position of business manager at Auburn University at a tax-free salary of \$7,500 per year, along with fringe benefits of a station wagon and furnished house on the campus in addition to the salary. (Tr. 1419) Other jobs at a slightly higher salary were executive trainee and junior management positions with "bright futures" for "young budding executives." (Tr. 1419) Dr. Spector said that the placement range was approximately \$7,500 to \$61,000 in the years from 1958 to 1963. (Tr. 1420) The desired range was, of course, higher, and in later years it was.

90. In addition to the salary range, NES accepts only clients of "the professional executive administrative type." (Spector, 1407-08) "But, generally, we consider and expect that a man who has a logical reason for coming to us for guidance, is a man who has a reasonably good education, has made approximately \$10,000 a year or more, whose experience is good to the extent that he has not rotated from one company to another for years. We consider him qualified from the viewpoint of the New York office." (Wiley, 1874-75) "The types of clients or qualifications of a client naturally are individual to the man with whom we are talking. Those qualifications would vary according to the prospect." (Becker, 1509) Almost all NES clients have a degree and make \$10,000 or better. The average client is earning from \$18,000 to \$20,000 a year. "If he has been in a * * * midmanagement or executive position, * * * he is qualified * * *." (Costello, 1231-32)

91. All of the Commission's client witnesses were well qualified. Sixteen of the 17 had college degrees. (Armentano, RX 29-B; Bankes, CX 155; Bauer, CX 102; Conaway, RX 50; Cooney, RX 53-B; Disharoon, RX 64-B; Doyle, RX 73-B; Dudley, RX 84-B; Greene, RX 94-B; Hammer, CX 72; Heller, RX 113-B; Kaplan, RX 119-B; Lane, RX 125-B; Przystas, RX

160-B; Shea, RX 164-B; and Murphy, RX 211) The only Commission client witness without a degree had been a captain in the U.S. Navy with over 20 years experience in purchasing. (Stafford, RX 171-B) Five of the 17 witnesses had graduate degrees. (Armentano, MBA; Bauer, MBA; Disharoon, MBA; Przystas, MA; Murphy, LLB) And their approved resumes reflected some post graduate studies on the part of all Commission client witnesses.

92. The respective backgrounds of the 17 Commission client witnesses reflect executive, managerial or professional experience. (Armentano, export manager, RX 29-B; Bankes, asst. treasurer and corporate secretary of manufacturing firm, Tr. 816; Bauer, partner in management consulting firm, CX 102; Conaway, management advisor reporting to Board of National Iranian Oil Company, RX 50; Cooney, administrative assistant, RX 53-B; Disharoon, assistant to executive vice president of Reynolds Metals, Tr. 1040, RX 64-B; Doyle, electrical engineer and former Navy captain, RX 73-B; Dudley, former Army colonel, RX 84-B; Greene, industrial engineer, RX 94-B; Hammer, former lieutenant commander in Navy, CX 72; Heller, executive of metals trading firm, RX 113-B; Kaplan, research chemist with supervisory functions, Tr. 735-36, RX 119-B; Lane, aeronautical engineer, RX 125-B; Przystas, construction engineer, RX 160-B; Shea, pharmaceutical sales, RX 164-B; Stafford, retiring captain, U.S. Navy, RX 171-B; Murphy, attorney, RX 211)

93. The record indicates that only one of the Commission's client witnesses earned less than \$10,000 a year at the time he went to NES. (Shea, 936) Specific evidence in the record confirms that several of the Commission's client witnesses were receiving an annual salary of \$10,000 or more. Hammer (\$11,160), Tr. 230, CX 72; Dudley (\$13,000), RX 84-B; Stafford (\$12,873 currently), Tr. 317; Greene (\$12,000), RX 94-B; Disharoon (\$15-16,000), Tr. 1051-52. This was confirmed by defense witnesses as well. Jennison (\$28,000), Tr. 1660; Miller (\$23,000), Tr. 1863; Fairclough (\$10,000), Tr. 1887.

94. The fees paid by the Commission's client witnesses shows that all 17 were seeking positions at a salary of \$10,000 per year or more.

95. NES officers and personnel cited specific examples of potential clients rejected by NES. Part-time student, Tr. 1233-34; admitted homosexual, Tr. 1408; Toledo attorney wanting position

with Washington law firm, Tr. 1510; teacher, Tr. 1510; 47 year old man with eight jobs in last 14 years, Tr. 1875.

96. The NES policy of screening candidates was confirmed by witness Floyd Day who attempted to use the NES services in 1966. (Tr. 1705) “* * * Mr. Costello advised me at that time that I would be wise to hold off from hiring that service for some period of time, because he felt that emotionally I perhaps was not ready to jump right into another hard job after I had had a hard job. So, in fact, what he was saying was ‘Why don’t you wait a while and then come back and see me subsequently!’” (Tr. 1705)

Alleged Representation That 80 Percent of Respondents’ Clients Are Successfully Placed Through Its Services (Complaint Pars. Seven (2), Eight (2) ; Ans. Pars. 7, 8)

97. There is no reliable, probative or substantial evidence that the foregoing representation was made by NES personnel, except the isolated testimony of four complaint counsel witnesses, one of whom was entirely discredited, indicative of respondents’ claim of a high percentage of success. To the contrary, 13 of the 17 Commission client witnesses indicated that no specific percentage of success, whether 80 percent or any other figure, was mentioned to them. Przystas “never discussed anticipated results,” Tr. 141; Cooney, “They did not, as I recall, give me a number.” Tr. 200; Hammer, Tr. 237-38; Dudley, Tr. 270; Conaway, “[I]t was not given to me. And I did not ask for it.” Tr. 297; Stafford, Tr. 341-42; Bauers, apparently nothing said, Tr. 373 *et seq.*; Kaplan, Tr. 760; Doyle, Tr. 781 *et seq.*, mentioning no percentage or figures; Bankes, Tr. 821; Murphy, Tr. 885; Lane, “we never got into specific figures,” Tr. 913; Armentano, Tr. 1008; Disharoon, “I would say not.” Tr. 1050-51

98. Of the 57 witnesses who appeared in this proceeding (22 of whom were former NES clients), only three, and a former NES Atlanta franchisee, testified they heard or were given a specific percentage figure of success. The alleged representations were oral and not written.

It is observed that not one testified to the same figure, which would suggest that if the representations were in fact made, this occurred in isolated instances only and not as part of any pattern or plan of misrepresentation.

Witness William Shea testified that Mr. Blaine Wiley of the New York office advised him that NES was placing an incredible 99 percent of its clients. It should be noted, however, that Mr.

Shea wrote NES on August 16, 1965 (less than six months after his conversation with Mr. Wiley) detailing the representations allegedly made to him by Mr. Wiley. (CX 193) Yet, although one would assume that a representation regarding Mr. Shea's chances of obtaining a position would be material, his 11-page letter contains no reference to the purported 99 percent figure.

On cross-examination, Mr. Shea was asked about the omission:

Q. Did you refer to Mr. Wiley's representation regarding the ninety-nine percent figure in this letter which is dated August 16th, 1965? (CX 193)

A. Yes, I did.

Q. And would you say that this portion of the letter accurately summarizes what Mr. Wiley told you?

A. I would say it does, yes, definitely. (Tr. 968)

Mr. Shea was then asked to point out the place in the letter where he referred to the 99 percent placement figure. After a search, Mr. Shea explained that he had been mistaken.

Another instance was that of Carl H. Greene, in response to a question on this point, he stated:

*** that sort of stands out in my memory, because at that time I was 54 years old. And they had given me quite a talk on the success of their operation, and the extensive amount of research that went into placing people. And I asked them, or whoever it was I was talking to at the time, what sort of success did they have. And he said, "About 75% placements." And I said, "That is very good. Would you think, in view of my age, that I could expect the same percentage of opportunity?" After all, 75 percent is pretty good. They said, oh, they didn't foresee any obstacle. They had more difficulty at age 45 than they did at age 55. (Tr. 469-70)

The evidence also indicates that when Mr. Denman, a former franchisee in Atlanta, Georgia, was being indoctrinated, he sat in on a sales presentation given by Mr. Costello and Mr. Becker. According to him, the question of success percentage was not mentioned until the client brought up the subject and the answer was that "we, National Executive Search, strike out about 10 to 20 percent of the time." (Tr. 650) This evidence is meaningless in the absence of more facts concerning the position being sought. Potentiality for success in some positions is greater than others. As herein indicated, success measurability in terms of percentages is unmeaningful unless related to particular categories of jobs and job markets. The burden of establishing the facts as to the percentage of success in particular job categories is on the complaint counsel. The unavailability of such evidence does not lessen this burden.

Other representations included such statements as "a relatively high percentage." (Tr. 238) The burden is on complaint counsel to establish what constitutes a relatively high percentage, and therefrom prove that the representations made are false. Complaint counsel's offered proof of an overall approximate 2.7 percent of successful placements is based on selective and incompletely kept records prior to 1967, without the establishment of a direct relationship between particular client contracts and successful placements thereunder. (Tr. 1999) On the other hand, the evidence adduced by the respondents reflects a total of 426 client-respondent contracts in 1967 and placements related to such contracts numbering 152, or 35.6 percent placements as related to the total number of contracts. (RXs 223, 224-A-K, and 225-A-P) These figures do include a few instances where clients have failed to report results to respondents. On the other hand, since fees are prepaid, there appears to be a reasonable explanation, as evidenced, that a few clients might not have thought it necessary to pursue the matter further with the respondents.

In the foregoing connection it must be stated that the service rendered under contract involved guidance, counseling, and the preparation of resumes incident to seeking employment on the part of the client, who pursued not only the respondents' contacts, but also contacts of his own. This feature, of course, presents considerable difficulty in measuring by percentages or numerically the success or lack of success of respondents in aiding their clients. Nevertheless, the burden of proof is on the complaint counsel to reflect by evidence the respondents' deception in representing exaggerated percentages of success. In this respect complaint counsel's case has failed. If success in attaining placements can be measured at all, which is doubtful, it must be premised upon placements ensuing from particular client contracts entered during a specific period. To merely add client contracts and placements over a particular period, as complaint counsel have done, in order to arrive at a conjectural 2.7 percent of placements based on incomplete records (since fees were not contingent on placement), does not provide a probative method of evaluation of respondents' success in aiding its clients to obtain positions under particular contracts. Assuming therefore that the pre-1967 representations were made as claimed by complaint counsel in more than isolated instances, it is unproved that they were deceptive during the period contemplated by the complaint, which was issued on February 28, 1967. Furthermore, the overall 35.6 percent

of placements incident to 1967 contracts computed by respondents does not constitute an admission on the part of the respondents that much higher percentages would not be applicable as applied to particular categories of positions. The uncontradicted testimony of the personnel experts was to the effect that overall or across-the-board statistics—unrelated to certain job categories—were particularly unmeaningful (*e.g.*, the market for the hiring of engineers might justify a claim of exceptionally high employer interest, whereas the overall average of all positions would be considerably less). (Tr. 1784, 1825)

NES Policy and Fee Paid Placements

99. It is not NES policy, as evidenced, to discuss a percentage of success and NES personnel do not discuss a percentage with prospective clients. (Costello, 1237-43; Spector, 1412-13; Becker, 1514-16; Wiley, 1875-76) This was confirmed by respondents' client witnesses. (Lawder, "there was no guaranty * * * there was no reference to their degree of success or lack of success." Tr. 1574-76; Myers, "there was not any real assurance * * *" Tr. 1668; Miller, " * * * there was nothing specific mentioned of any of the chances. I remember specifically asking that, but, obviously, I understand they told me that they couldn't tell. So I accepted on those terms, that they could not guarantee it, and they did not know any percentage of a placement." Tr. 1865; Fairclough, "no specific figures or percentages with respect to the number of people placed * * * they would do their best to aid me in making their services available * * *" Tr. 1888.)

100. Fee paid placements are placements in which the employer pays NES a fee. (Tr. 1219, 1230, 1243-44, 1251-52, 1333, 1508, 1634, 1645, 1866; CXs 167-A-167-Z-19, 172, 204-220; RXs 219-220) In such cases NES is contractually obligated to refund the client's fee and does so. (Tr. 1230-31, 1251-52, 1333, 1434, 1508, 1866; CXs 11-12 Item 3(1), CXs 167-A-167-Z-19, 172, 204-220)

101. NES only recorded fee paid placements and normally did not maintain records with respect to non-fee paid placements. (Tr. 1251-52, 1256-57, 1262-63, 1266, 1383-84, 1386, 1434-36, 1125-26; CXs 167-A-167-Z-19, 204-220) In such cases the client's file is normally marked "inactive" and closed out when a job is secured for him. Tr. 1256-57, 1263, 1266, 1434-36)

102. Fee paid placements represent a relatively small percentage of total placements. (Tr. 1263, 1333-34, 1335, 1441) Non-fee

Initial Decision

76 F.T.C.

paid placements, and even in some fee paid placements, the clients consider the job done when a position is located and fail to notify NES (Tr. 1159, 1335-36)

103. Expert witnesses confirm that this is often the case. (Banville, 546; Wilson, 1767; Stuart, 1778) When the applicants find a job, their problem is over and "they forget us." (Banville, 546)

Placements and Their Evaluation

104. Positions were secured for a substantial number of NES clients through respondents' efforts. Costello, estimating "more than 50 percent." (Tr. 1265) This estimate was corroborated by two completely independent third-party witnesses—Commission witness John Downs, former NES placement officer, who testified to "around 60 per cent" (Tr. 1160), and Dr. William Spector, former NES vice president, who estimated positions were secured for 150 out of approximately 240 NES clients in 1958 and 1959. (Tr. 1424-25, 1433-34) In 1962, the figures were approximately 200 out of 340 or 360 NES clients. (Spector, 1446-47) Statistically-computed placements appear to be over 35.6 percent as related to client-respondent contracts entered into for the year 1967. (RXs 223, 224-A-K, 225-A-P)

105. Of the 80 to 90 clients assigned to Respondent Edward F. Mischler during the year prior to his testimony, jobs were secured for 17 clients in positions in which their NES fees were paid by their new employers. (Tr. 1383-84, 1386, 1455, 1479, 1482; CXs 204-220.) In addition, for the same period Mr. Mischler estimated he had secured positions for an additional 30 to 40 clients in positions in which the clients' NES fees were not paid by their new employers. (Tr. 1385) During the year prior to his testimony Mr. Mischler personally secured positions for 47 to 57 out of 80 to 90 total clients assigned to him—or more than 50 percent. (Tr. 1383-86, 1455, 1479, 1482; CXs 204-220)

106. NES had secured positions for six of respondents' witnesses: Lawder, National Association of Homebuilders, at \$15,000, Tr. 1577; Jennison, Religious Heritage of America, at \$21,000, Tr. 1657-59; Myers, Savings Bank of Baltimore, Tr. 1665 *et seq.*; Miller, Norris Industries, at \$28,000, Tr. 1863; Fairclough, Yawman & Erbe Manufacturing Company, Tr. 1890; Price, Flight Safety Foundation, Tr. 1899-1900. At least two of complaint counsel's own client witnesses secured positions as a result of interviews arranged by NES. Przystas, Daniel Construction Com-

pany, Tr. 165-68, 1337-42, RX 162-A; Disharoon, Esso Standard Eastern, Tr. 1062, 1073-74.

107. Twelve employer witnesses hired NES clients through NES efforts: District of Columbia Bar Association, Herrick, McArdle, Sachs, Tr. 1634, 1644, 1651-52; Religious Heritage of America, Jennison, Tr. 1659-60; Associated Traffic Clubs Insurance Corporation, Day, Tr. 1703-05; Vitro Corporation of America, Byron, Tr. 1713-14, 1716; Versitron, Inc., Meisinger, Tr. 1730-31; General Instruments, Mattes, Tr. 1734; Atlantic Research, Harmon, Tr. 1797-98; Sheraton Corporation of America, Lane, Tr. 1830-31; General Aniline & Film, Piccoli, Tr. 1851-52.

108. Documentary evidence in the record reflects fee paid placements with more than 100 additional employers, including: Curtiss-Wright, Ohio Rubber (CX 167-A); Pittsburgh Plate Glass, Page Communications Engineers (CX 167-B); Olin-Mathieson, Kellogg Company (CX 167-C); Berlin Press, Atlas Chemical (CX 167-D); Electric Institute of Washington, Magazine Realty Co. (CX 167-E); General Electric, Neptune Meter (CX 167-F); Harvey Aluminum, Keuffel & Esser Co. (CX 167-G); King Kullen Grocery Co., Consolidated Leasing Corp. (CX 167-H); Trans World Airlines, Skil Corporation (CX 167-I); Wilkins Coffee, Montgomery Ward (CX 167-J); Ellicott Machine Corp., Daniels Construction Co. (CX 167-K); General Aniline & Film, Products of Asia (CX 167-L); American Trading Co., The Louis Allis Co. (CX 167-M); American Society of Travel Agents, General Precision (CX 167-N); First Western Bank & Trust Co., Purex (CX 167-O); Import Motor (CX 167-P); Standard Fruit & Steamship, Pepsi Cola (CX 167-Q); International Harvester, Container Corporation of America (CX 167-R); Armour, Jackson Sand & Mining Co. (CX 167-S); Texas Instruments, International Research & Development Co. Ltd. (CX 167-T); Miles Laboratories, Allis Chalmers (CX 167-U); General Steel Industries, AMF International Ltd. (CX 167-V); American Steel Foundries, Inc., Systems Technology Center (CX 167-W); Centre Video, Litton (CX 167-X); Bechtel Corp., M. W. Kellogg Co. (CX 167-Y); Guilford Woolen Mills, Pepsi Cola (CX 167-Z-1); Toledo Scale, Esso International (CX 167-Z-2); Operations Research, Inc., EBASCO Services, Inc. (CX 167-Z-3); Security Storage, Weyerhaeuser (CX 167-Z-4); Esso Research, Norelco (CX 167-Z-5); Jarrell-Ash, Ford Motor (CX 167-Z-6); Ferranti Electric, The Foxboro Company (CX 167-Z-7); Security Storage, Bell Aerospace (CX 167-Z-8); In-

ternational Management, Kelsey-Hayes (CX 167-Z-9); Brown Engineering Co., Ensign Bickford Co. (SX 167-Z-10); A.O. Smith, Electro Engineering Works (CX 167-Z-11); General Electric, White Electric Magnetics (CX 167-Z-14); The Watkinson School, Oklahoma Steel Castings (CX 167-Z-12); Ford Motor, General Electric (CX 167-Z-13); Foremost Dairies, The Fyr-Fyter Co. (CX 167-Z-15); General Steel Industries, UNIVAC (CX 167-Z-16); Celanese, H.K. Porter Company (CX 167-Z-17); Nestle, Sunshine Biscuits (CX 167-Z-19); Owen-Owen Ltd., RCA Service Company, Communications System (CX 172); Beech Aircraft, Deere & Co., Sheraton Corp., Davis Constructors, Xerox, Tenneco Chemical, Brazil Export Corp., The Kurt Orban Company, Atlantic Research, De Laval Turbine, Mississippi River Transmissions Corp., Gates Rubber, Bell Aerospace, White Electromagnetics, General Electric (Re-Entry Systems Department), General Electric (Missiles & Space Division), Bethlehem Steel. (CXs 204-220)

109. Although the evidence discussed heretofore reveals that positions were secured for more than 35.6 percent of NES clients, the record is uncontradicted that it would be impossible for NES or any similar organization to arrive at any "meaningful" overall percentage of success. (Costello, 1237-38; Becker, 1515) The success ratio would vary according to the client's age, occupation, salary, education, experience, job markets as related to specific categories of positions, and similar factors. (Tr. 1237-38, 1515) It would be misleading to provide prospective clients with an overall percentage of success because of the many variable factors. (Tr. 1237-38, 1515)

110. This uncontradicted testimony was confirmed by independent expert witnesses. Wilson: "I honestly couldn't give you a figure." (Tr. 1749-52); Stuart, Tr. 1784; Philipson, Tr. 1820, 1823-24, 1825-26. All three expert witnesses testified that their overall percentages of success were relatively low. Stuart, "perhaps 5 percent," Tr. 1778; Philipson, "a small percentage * * * under 5 percent," Tr. 1823; Wilson, Tr. 1748-52.

Availability of Exclusive Listings

111. Allegedly respondents have represented they currently have exclusive listings on job openings available which require the qualifications of a particular applicant. (Complaint Pars. Seven (3), Eight (3); Ans. Pars. 7, 8)

112. Between 1958 and 1965, the NES files contained from 300 to 800 available job openings in the approximate salary range of

\$10,000 to \$72,000. (Tr. 1211-12, 1214-15, 1226-27, 1297, 1317-18, 1324-25, 1418-20, 1518-19, 1843-45; RXs 178-A-B, 179-A-C, 180, 219-220) No client witness testified that he understood or was told that these job openings were exclusive listings.

113. Some of the job openings contained in the NES files since 1958 were exclusively listed with NES. (Tr. 1243-47, 1283-84, 1297-1300, 1325-26, 1414-15; RXs 219-220) Exclusive listings on job openings available have been received from the District of Columbia Bar Association (executive secretary, \$14,500), Tr. 1243-44, 1638, 1645, 1653; RX 219; Religious Heritage of America (executive vice president, at \$21,000 and director of development, at \$13,000), Tr. 1245, 1657-59; Martin-Marietta (vice president operations, vice president marketing and advanced programming, \$30,000 to \$50,000), Tr. 1218, 1246, 1326, RX 220; Jonathan Logan (South American vice president, \$80,000 with extras to \$125,000), Tr. 1216, 1245-46, 1299; Budd Corporations (manager of Washington office), Tr. 1215, 1297-98, 1798, 1802; Wallace Press (general manager, \$61,000), Tr. 1414, 1419, 1429, 1437; Rockefeller Institute Press (director), Tr. 1414; Rockefeller Foundation, Sleepy Hollow Restoration (director of public relations, \$16,000), Tr. 1414, 1420, 1431; Auburn University (business manager, \$7,500 plus house and automobile), Tr. 1414, 1419.

Changes in Fields of Endeavor

114. It is alleged, although unproved, that respondents represented that they would have no difficulty in placing the client in a new field of endeavor, or moving him from one industry to another. (Complaint Pars. Seven (4), Eight (4); Ans. Pars. 7, 8)

115. The evidence indicates it is not NES' policy to make the foregoing representation and NES personnel do not make the representation in discussing the NES program with prospective clients. (Costello, 1247-49; Spector, 1414-16; Becker, 1519-21; Wiley, 1876-77) This testimony by past and present NES personnel is confirmed by the failure of complaint counsel to elicit testimony regarding the foregoing alleged representation.

116. Only one of the 17 Commission client witnesses understood or was told anything like the foregoing alleged representations. (Kaplan, 744) Even this witness could not recall which person at NES made the alleged representation. (Tr. 744) At the time, Mr. Kaplan was in the retail business, but having a college degree and background in chemistry, wanted to return to the chemical field. (Tr. 736, 738-39, 743; RX 119-B) Although NES

completely performed its contractual agreement with Mr. Kaplan, NES was not successful in placing him. (Tr. 771, 779; RX 119-B) A resume, covering letter, and research list were prepared and initially over 100 firms were contacted. (Tr. 1342-43; RX 122) Revisions were made to Mr. Kaplan's printed resume, and two additional mailings not required by the contract were conducted at no additional expense to Mr. Kaplan. (Tr. 764-65, 776, 1342-43; RXs 120-A-F, 121-A-C, 122) Subsequently, Mr. Kaplan became employed by American Cyanamid as a research chemist and is today a supervisor in charge of several other chemists. (Tr. 735-36, 768-69)

117. Aside from Commission witness Kaplan, the only witnesses who, in the broad sense, were changing fields were the four retiring military officers who testified for the Commission: Doyle, RX 73-B; Dudley, RX 84-B; Hammer, CX 72; and Stafford, RX 171-B. In each case the client was continuing, in civilian life, an occupation the same or similar to the work performed in the military: Doyle (electrical engineer), RX 72-B-73-B; Dudley (administrative management and personnel), RX 84-A-B; Hammer (project manager), CX 72; Stafford (purchasing), RX 171-A-B.

118. General James Banville of the Retired Officers Association testified as an expert witness for complaint counsel on placing retiring military officers. (Tr. 513 *et seq.*) The retiring military officer has developed "good work habits," "knows how to get along with his superiors and subordinates, and without question has had to be a good manager and administrator." (Banville, 532) In addition, " * * * many will have special skill from one of the military specialities, that is medical, ordinance, electronic, engineering, etc." (Tr. 532) Employers are anxious to get the 12,000 to 15,000 military officers retiring each year and their experience is salable. (Banville, 536) There is a substantial demand for retiring military officers in the 45 to 55 year bracket at the intermediate management level of industry. (Banville, 542) The officer's age is no longer an obstacle. (Banville, Tr. 542)

119. The testimony of Commission witness Banville was confirmed by the experience of Colonel Thomas J. Price, a former NES client. (Tr. 1894-95) Colonel Price engaged the NES service prior to his retirement from the Air Force in 1967, after learning about NES from a friend who had used the NES service. (Tr. 1895-96) Colonel Price was in Europe and unable to meet with the NES personnel until after his program commenced.

(Tr. 1896-97) Colonel Price's first personal contact at NES was with Mr. Corbey, the staff officer assigned to his program. (Tr. 1897) In the presence of Colonel Price, Mr. Corbey made several long-distance telephone calls to prospective employers around the United States to arrange an interview tour for Colonel Price. (Tr. 1897-98) The first interviews were in New York with Butler Aviation and the Flight Safety Foundation. (Tr. 1898) Next, Colonel Price was sent to Minneapolis to talk with Van Dusen Aircraft Suppliers, to Wichita, Kansas, for interviews with Cessna Aircraft, Lear Jet Corporation, and Beech Aircraft, and finally to Kerrville, Texas, for an interview with Mooney Aircraft. (Tr. 1898) Colonel Price received job offers from both the Flight Safety Foundation and Butler Aviation. (Tr. 1898-99) Colonel Price accepted the position at the Flight Safety Foundation where he is presently employed as executive vice president at a salary of \$18,000 a year. (Tr. 1894, 1900, 1902)

120. Of the four former military officers called by complaint counsel, one discontinued his NES program and received a refund. (Dudley, 272-73; RXs 86-87) Colonel Dudley went to NES at the recommendation of his commanding officer at Fort Meade, who had a friend who had successfully used NES. (Dudley, 264) NES took a realistic view of Colonel Dudley's placement prospects as a retiring military officer at age 48. (Dudley, 269)

As a matter of fact, I feel that they had a very realistic viewpoint on the subject. They pointed out that there are many military officers, you might say, in the field looking for work, and that many times it was pretty difficult for them, and though they had had success—yet they did not give me the thought that a retired military man was in great demand, I will put it that way. In fact, they advised me that the best thing I could do was to tend to forget my military background and concentrate on the abilities that I might have to sell. (Dudley, 269)

I do not remember any specific oral expressions which would be, you might say, of the nature of guaranteeing me a job or anything like that. * * * The idea was that I was trying to get a job and they were trying to help me. (Dudley, 270)

121. Of the three other retiring military men called by complaint counsel, two had several interviews and were nearly placed. (Doyle: Citizens Utilities, Tr. 798, 1349; CXs 181-B, 183-186; California Maritime Academy, Tr. 802, 1349; CX 187; Westinghouse, Tr. 804, 1349; CX 74-C; Bethlehem Steel, Tr. 813, 1349; Winter Park Telephone Co. CXs 181-C, 182; Stafford: Bab-

cock & Wilcox, Tr. 332-36; Navy Mutual Aid, Tr. 345-46; food buyer, Tr. 346-47) The third located a position on his own with RCA Service Company in Alexandria, Virginia, on July 26, 1964, almost simultaneous with a NES communication and resume regarding the client on July 28, 1964, to Mr. J. D. O'Donnell, the RCA executive who became the client's superior. (Hammer, 245-46, 255-56; CX 77; RX 105-B)

Acceptance of a Limited Number of Clients

122. It is alleged, although unproved, that respondents represent they accepted only a limited number of clients at any one time so that full time and attention may be given to each client. (Complaint Pars. Seven (5), Eight (5); Ans. Pars. 7, 8)

123. The evidence is that it is not NES policy to make the forgoing representation, and NES personnel do not make the representation in discussing the NES program with prospective clients. (Costello, 1248-49; Spector, 1416-17; Becker, 1522; Wiley, 1877) This testimony was confirmed by respondents' client witnesses. (Lawder, 1577; Myers, 1668; Miller, 1866; Fairclough, 1887)

124. There is no reliable, probative or substantial evidence that the foregoing representation or any similar statement was made by NES personnel. Complaint counsel did not even ask 13 of the 17 Commission client witnesses about the alleged representation. (Przystas, 108 *et seq.*; Dudley, 262 *et seq.*; Conaway, 286 *et seq.*; Stafford, 316 *et seq.*; Bauers, 373 *et seq.*; Greene, 459 *et seq.*; Kaplan, 735 *et seq.*; Bankes, 816 *et seq.*; Murphy, 832 *et seq.*; Lane, 901 *et seq.*; Shea, 931 *et seq.*; Armentano, 1004 *et seq.*; and Disharoon, 1040 *et seq.*) Of the four Commission client witnesses who were asked about the foregoing representation, two denied that any such statement was made to them. (Heller, "This was not said." Tr. 996; Cooney, Tr. 200)

125. Aside from the meager evidence on this subject, it is apparent from the charge itself (see Finding 122) that it is almost impossible to prove. Even the acceptance of a large number of clients is not proof that the number is not limited. Furthermore, it is not reasonable to assume that respondents would keep records of rejections. Therefore an absence of recorded rejections would be meaningless.

CONCLUSIONS

The charges of misrepresentation alleged in the complaint fall collectively into the following categories:

1. Respondents' representations measuring their success in placing clients;
2. Respondents' representations with regard to refunds of client-paid fees on payment by employees;
3. Respondents' representations as to experience and competence; and
4. Respondents' representations as to service policy.

With regard to the foregoing, complaint counsel have established by substantial evidence, through admissions or otherwise, that some of the representations alleged have been made but have failed to prove the falsity of such representations. As to the remaining charges, there has been a failure to prove, by other than isolated and unsubstantial evidence, that the alleged representations were made or, if made, the falsity of such representations.

Measurement of Success

1. It is unestablished by substantial evidence that respondents falsely represented that they had positions available for "Executives, \$10,000 to \$72,000, U.S. and Overseas." The evidence indicates respondents, at times, had positions available over \$10,000 and in substantial salary ranges to \$72,000. At other times, the range was \$10,000 to \$47,000, as advertised. (See Findings 17-20.)

2. It is unestablished by substantial evidence that respondents falsely represented "as a result of NES' program, executives have made changes in over 2800 firms." Complaint counsel offered no evidence as to this charge from which it could even be remotely inferred that this representation was false. (See Finding 21.)

3. It is unestablished by substantial evidence that respondents falsely represented "You can profit now from our unequalled contacts with top managements in commerce and industry." If the words "unequalled contacts" are construed as meaning "especially good contacts" with top management, respondents have clearly established there is no falsity in this representation. Taking the phraseology literally, it would, of course, be realistically impossible for complaint counsel to prove its falsity or respondents to disprove it. As indicated by the cases cited herein, the hearing examiner is of the view that the use of the word "unequalled," like

the use of the word "best," constitutes sales puffing and not misrepresentation. (See Findings 22-24, including case citations.)

4. It is unestablished by substantial evidence that respondents falsely represented "It is not an employment agency—neither by concept, not intent, nor by performance of its functions." The expert testimony and other evidence overwhelmingly indicates that the function of respondent corporation was to render counseling, guidance, and the preparation of resumes incident to aiding a client to obtain employment within the salary range identified. Furthermore, complaint counsel offered no evidence indicative of the fact that respondents did register and were required to register or be licensed as an employment agency. (See Findings 4-16 and 68-76.)

5. It is unestablished by substantial evidence that respondents represented that "80% of respondents' clients are successfully placed through its services." The evidence reflects that respondents (in 1967, when complete records were kept) did place, or were instrumental in the placements of, 35.6 percent of the clients with whom they negotiated contracts. This is considerably above the average of employment agencies, who, as evidenced by experts, estimate a five percent success ratio. Complaint counsel's 2.7 percent figure is based on the incomplete records and on immaterial and irrelevant comparisons as heretofore indicated herein. The wide variance between complaint counsel's pre-1967 percentages and respondents' 1967 percentages also corroborates the incompleteness of the pre-1967 records. Complaint counsel established by four witnesses only, one of whom was entirely discredited, that a high percentage figure was represented. The evidence has clearly disclosed that respondents were entitled to represent a high percentage of success even though their figures are premised on the year 1967. Prior to that date, complete placement records had not been kept and it would have been impossible for complaint counsel to have proved—by overall percentages or by more impressive percentages applicable to particular categories of positions—the falsity of the representation even if substantial evidence indicated that the representation had been made. However, it is apparent that complaint counsel have not established by substantial evidence either the making of the representation or its falsity in the presence of overwhelming evidence to the contrary. (See Findings 97-110.)

6. It is unestablished by substantial evidence that "Respondents currently have exclusive listings on job openings which re-

quire the qualifications of a particular applicant," or the falsity of such representation if made. The evidence adduced by respondents, which is uncontradicted, indicates the availability of such openings. (See Findings 111-113.)

7. It is unestablished by substantial evidence that respondents falsely represented that they "would have no difficulty in placing the client in the new field of endeavor, or moving him from one industry to another." The difficulty in proving this charge is obvious on its face. In any event, assuming the representation was made, there is evidence adduced by respondents which indicates that they did consummate such changes. (See Findings 114-121.)

Refunds

8. It is unestablished by substantial evidence that respondents falsely represented "If and when [a] client accepts [a] position with a company which pays to NESINC [a] full standard fee for same, client's fee will be refunded to him." The evidence adduced by complaint counsel with regard to this charged falsity is based on recordings of the refunds found in the client files, in the event a "finder's fee" was paid by the employer. No evidence was adduced from the accounting records which would have accurately reflected payments or credits indicative of reimbursement for prepaid fees. Furthermore, no evidence was adduced reflective of the circumstances surrounding these transactions as a basis upon which it could be determined whether or not a refund was due under the terms of the particular contracts involved or representations made. (See Findings 25-33.)

Experience and Competency

9. It is unestablished by substantial evidence that respondents falsely represented "Our 19th Year" and "Our 20th Year." The corporate entity involved in this proceeding, as proved by complaint counsel, was not in existency 19 or 20 years. The personnel, however, particularly John W. Costello, one of the respondents herein, was engaged in rendering similar services for the period of 19 to 20 years as represented, along with some of his key personnel, as established by respondents' evidence which is uncontradicted. (See Findings 38-44.)

10. It is unestablished by substantial evidence that respondents falsely represented that many of the staff of National Executive Search, Inc., "have held key positions with some of the nation's largest industries, in the Federal Government, on University faculties, and are recognized authorities in their fields. Among them

are business and industrial executives, scientists and graduate engineers, financial marketing experts, and senior staff members at the doctorate level." Although all personnel were not in the experience categories represented, respondents did employ such personnel in their key positions as reflected by the evidence. (See Findings 55-66.)

Service Policy

11. It is unestablished by substantial evidence that respondents falsely represented that "The present enterprise, operating in nine major cities, maintains a staff of 106 executives, administrative and support personnel * * * ." At the time the representation was made by respondents, they had executives, administrative and support personnel in the major cities as indicated. The evidence indicates their functions were in part different from those of the central office in Washington, D.C. Nevertheless, the representation does not in any way suggest that the same services are to be totally rendered in the branch offices as were rendered in the central office in Washington. The evidence establishes a central office and a branch office acted collectively and cooperatively but that counseling was essentially rendered by the Washington office. (See Findings 34-37.)

12. It is unestablished by substantial evidence that respondents falsely represented they provided "consulting, counseling, and guidance services, and offer(s) direct assistance * * * in the development and execution of individualized National Executive Search program designed to aid the * * * client in achieving new career goals." In this connection, complaint counsel did offer some evidence indicating that some clients were dissatisfied with respondents' services or that, at times, the services rendered were perhaps not as aggressive as they should have been in the estimation of some clients. Obviously this is not in issue. However, the overwhelming preponderance of the evidence reflects that the services rendered were performed to the satisfaction of many witnesses who testified that they were impressed with the excellence of the services. (See Findings 4-16 and 45-54.)

13. It is unestablished by substantial evidence that respondents falsely represented that their "resume, accompanied by a personalized, individually typed cover letter is mailed to the appropriate executive of each firm on the research list." Complaint counsel's contention is that the letters were not sufficiently personalized as represented. The hearing examiner, however, on a careful examination of the letters, was impressed with the fact that they came

fully within the purview of the representation. Complaint counsel's position seems to be that each letter should have been personalized and individualized to the point of having each letter different to each employer. There was no evidence, however, justifying this interpretation which would, per se, preclude any pattern of uniformity with regard to employers contacted. The letters written, it appeared to the examiner, were personalized and individualized exactly as represented. (See Findings 77-85.)

14. It is unestablished by substantial evidence that the respondents represented "A person would not be accepted as a client by respondents unless his qualifications met the high standards required for prompt placement." Assuming, however, that such representations were made or might be inferred from respondents' approach to its clients, it is apparent from the evidence that the realistic meaning of such an assertion is that their selectivity required applicants who were seeking positions in the \$10,000 category to the \$72,000 category which subsequently was limited to \$47,000. Thus respondents' policy was in terms of assisting only those persons of the professional, executive or administrative type who could qualify for positions in the salary

15. It is unestablished by substantial evidence that respondents represented they "accepted only a limited number of clients at any one time so that full time and attention may be given to each client." There was evidence adduced from a substantial number of witnesses, however, who testified that no representation of this kind was made to them. Even if the representation was proved, an absence of recorded rejections would be meaningless evidence. (See Findings 122-124.)

16. There is no doubt that complaint counsel have offered evidence indicative of the fact that in a few instances employment has been unavailable to certain clients who testified and that others were dissatisfied with the services rendered. This decision, however, in this case cannot be predicated upon a few dissatisfied clients and isolated situations which are the exception to the rule. The pattern establishes that many clients were extremely well satisfied with the services rendered by the respondents and their competency in rendering those services. It is natural, of course, that those who procured employment via the media of the services rendered by the respondents inferred no deception and, on the other hand, that the few who were unsuccessful imagined their potentiality to be far beyond that which could be accomplished for them by such services as those rendered by NES. It appeared

to the examiner that the unsuccessful candidates were prone to infer promises that had not been made to them by the respondents. One fact that clearly cannot be overcome by any guidance service is the personality factor, regardless of the amount of counseling that may be given. Furthermore, it seems only reasonable to assume that, for the good of the clients themselves, the approach to accomplish a successful placement cannot be a morbid one but must be an approach which will instill confidence in the client. There is also the factor that, regardless of their experience or their competency, the respondents can well be mistaken in their appraisal of a particular client whom they seek to counsel and guide to employment. Evidence of this kind does not prove falsification in the absence of a pattern directed to this end.

17. As heretofore pointed out, the only exaggeration on the part of respondents was their indication that they had unequaled contacts which by reasonable inference means the best contacts. Such a meaning directed to literal construction is absurd and unprovable. Furthermore, such a representation appears to come fully within the purview of the cases cited herein as sales puffing rather than deception. (See cases cited at page 12.)

18. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of services and facilities of the same general kind as those sold and performed by respondents.

19. It is apparent from the foregoing that the respondents have not made false, misleading and deceptive statements and representations; and that respondents' statements and representations have not had, and now have not, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that such statements and representations are true and into entering substantial numbers of contracts with respondents for their services and facilities by reason of any erroneous and mistaken belief.

20. The acts and practices of the respondents, contrary to the allegations of the complaint, were not and are not to the prejudice and injury of the public and of respondents' competitors and do not constitute, and have not constituted, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

21. By reason of the functions and participation of the individual, or noncorporate, parties in the operation of the corporate party, they, as well as the corporate party, have been properly included as respondents. (See Findings 1-3.)

22. In the absence of substantial evidence reflecting deception on the part of respondents in violation of Section 5 of the Federal Trade Commission Act, a dismissal of the complaint will not contravene the public interest. Accordingly,

ORDER

It is ordered, That the complaint in the above-entitled matter is herein and hereby dismissed.

ORDER DISMISSING COMPLAINT

This matter is before the Commission on appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the complaint.

The complaint charges respondents, a corporation engaged in the sale of personnel guidance services and assistance incident to the procurement of employment, and two of its officers, in both their individual and official capacities, with making false and deceptive statements in advertising and other promotional material concerning the nature, type and effectiveness of their employment placement program; that respondents, through their officers and staff members, have made oral misrepresentations with respect to the measure of success achieved in placing clients in suitable employment; and that respondents' failure to reveal that they do not place a significant percentage of their clients in suitable employment is false, misleading and deceptive. The hearing examiner has filed an initial decision dismissing the complaint, finding that the allegations of the complaint have not been sustained by the evidence.

The Commission has reviewed the evidence and considered the arguments of the parties and has concluded that the hearing examiner's findings and conclusions of fact are correct and that dismissal of the complaint is proper.

It is ordered, That the appeal of counsel supporting the complaint be, and it hereby is, denied.

