

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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| EVIE BOYENS,                  | : | Case No. 05771 CVCV059890    |
|                               | : |                              |
| Petitioner,                   | : | <b>ORDER ON PETITION FOR</b> |
| v.                            | : | <b>JUDICIAL REVIEW</b>       |
|                               | : |                              |
| IOWA CIVIL RIGHTS COMMISSION, | : |                              |
| KELLER WILLIAMS REALTY INC.,  | : |                              |
| LEGACY GROUP REALTOR, LLC     | : |                              |
| D/B/A KELLER WILLIAMS         | : |                              |
| LEGACY GROUP, CARL WILLIAMS,  | : |                              |
| and MICHELLE BENNETT,         | : |                              |
|                               | : |                              |
| Respondents.                  | : |                              |

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Before the Court is the Petition for Judicial Review filed March 4, 2020. A phone hearing was held July 10, 2020. Petitioner Evie Boyens was represented by Danya Keller and Jill Zwagerman. The Iowa Civil Rights Commission (“ICRC”) was represented by Katie Fiala. Keller Williams Realty Inc., Legacy Group Realtor, LLC d/b/a Keller Williams Legacy Group and Michelle Bennett (collectively “Keller Williams”) were represented by Kevin Visser. Carl Williams was represented by Emma Henry and Steve Ballard. Having heard the arguments of counsel, and having reviewed the briefing and agency record, the Court enters this Order.

**Background and Procedural History**

Petitioner was a real estate agent with Keller Williams from January 2017 to March 2018. In late 2017, Petitioner entered into a team arrangement with fellow agent Carl Williams. Petitioner alleges that she was subsequently a victim of sexual harassment by Mr. Williams. The allegations of harassment are serious and disturbing. However, they will not be discussed in any detail in this Order because the scope of the harassment itself is not a factor in determining whether Petitioner was an employee or independent contractor.

Petitioner complained to Keller Williams about the harassment and alleges that Keller Williams did not make an appropriate response. Petitioner also alleges that Keller Williams put her real estate license on inactive status, effectively ending her time as an agent with the company, in retaliation for her making the complaint of harassment. Iowa Civil Rights Commission Appendix (“ICRC”) 186. Petitioner then filed a complaint with ICRC on May 15, 2018. After determining the case warranted further investigation, the case was subsequently closed on September 27, 2019. The reason was a lack of jurisdiction based on the belief that Petitioner was an independent contractor rather than an employee. ICRC 384. Petitioner successfully moved for a re-opening on the basis that a finding of non-jurisdiction may only be made by an Administrative Law Judge (“ALJ”). ICRC 383, 405. Following the re-opening, on February 3, 2020, an ALJ adopted the findings of a Civil Rights Specialist and ruled that ICRC lacked jurisdiction over the complaint because the Iowa Civil Rights Act protects employees but not independent contractors (the “Decision”).<sup>1</sup> ICRC 381, 392; Ernster v. Luxco, Inc., 596 F.3d 1000, 1003 (8th Cir. 2010). Petitioner timely appealed the Decision to this Court by filing a Petition for Judicial Review on March 4, 2020.

### **Analysis**

#### **A. There is No Error of Law in How the ICRC Defined the Term “Employee.”**

In examining whether the ICRC correctly interpreted the term “employee,” the parties agree that the Court is not required to give deference to the agency’s interpretation, and may

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<sup>1</sup> The Investigative Analysis attached to the Decision and incorporated therein is at ICRC 393-416. Because the ALJ’s Decision incorporates the reasoning of the Investigative Analysis, and because the Investigative Analysis discusses the evidence, references to the ALJ’s Decision are actually to the Investigative Analysis unless otherwise noted.

reverse the agency’s decision if it finds the commission made an error of law. Iowa Code § 17A.19(10)(c). It is not clear to the Court that the ICRC actually defined “employee” in this matter. This is unlike Renda v. Iowa Civil Rights Comm’n, 784 N.W.2d 8, 15 (Iowa 2010), where “the commission determined that ... an inmate is not an ‘employee’ for purposes of the Act.” Rather, the ICRC simply concluded that Petitioner herself was not, in fact, an employee. The ICRC did not define “employee” in a way that excluded all real estate agents from the definition.<sup>2</sup>

Petitioner directs the Court to the Iowa Supreme Court’s actions in Renda where it reversed the ICRC’s determination that inmates could not be considered employees for the purposes of the Iowa Civil Rights Act. The Court does not believe the holding in Renda goes as far as Petitioner alleges. The Iowa Supreme Court held that inmates *could* be employees, not that they were *presumptively* employees.

Given the sheer breadth of the definitions of ‘employee’ and ‘employer’ and the fact that the few exclusions that are identified are extremely narrow, we are inclined to start from the premise that inmates **may** be considered employees unless some compelling reason exists to convince us that the legislature meant to exclude them despite utilizing such expansive language.

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Our conclusion does not mean that all work performed by an inmate will constitute employment. We agree with the Baker court’s implicit holding **that the determination of whether an inmate is an employee will need to be reached on a case-by-case basis**, with a consideration of various factors, including the voluntariness of the position, whether the inmate went through an application process, and the nature and extent of similarities between the circumstances of the inmate’s job in the prison and jobs outside the penal context.

Id. at 17, 20 (emphasis added).

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<sup>2</sup> If, however, the ICRC were deemed to have defined the term “employee,” the Court would still find no error of law in the manner in which it did.

Pursuant to Renda, the ICRC is not permitted to categorically say that real estate agents are independent contractors.<sup>3</sup> Rather, the ICRC must do a specific analysis of the Renda factors to determine if a particular real estate agent is an independent contractor or an employee. That is what happened in this matter. The ALJ determined Petitioner was an independent contractor. There was no error of law. Whether there is substantial evidence supporting the ICRC's determination is discussed in the following section.

**B. There is Substantial Evidence Supporting the Finding that Petitioner is an Independent Contractor.**

Judicial review of an agency decision is controlled by the provisions of Iowa Code § 17A.19(10) (2009). The parties agree that the ICRC's finding that Petitioner was an independent contractor must be affirmed if there is substantial evidence supporting it.<sup>4</sup>

In reviewing an agency's finding of fact for substantial evidence, this Court evaluates "the finding in light of all the relevant evidence in the record cited by any party." Cedar Rapids Comm. Sch. Dis. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (citing Iowa Code § 17A.19(10)(f)(3)). The review of the record is "fairly intensive" and the Court "[does] not simply rubber stamp the agency finding of fact." Id. (citing Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 499 (Iowa 2003)).

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<sup>3</sup> Like inmates, real estate agents are not specifically exempted from the Iowa Civil Rights Act. Iowa Code § 216.6(6)(a)-(d).

<sup>4</sup> Despite the agreement of the parties, the Court believes the determination the Petitioner was an independent contractor may be an application of law to fact, which (as opposed to the substantial evidence standard) may be reversed if the agency's application was irrational, illogical, or wholly unjustifiable. Bauder v. Employment Appeal Bd., 752 N.W.2d 33 (Iowa Ct. App. 2008). The Court does not find the agency's application to be irrational, illogical or wholly unjustifiable and would accordingly affirm under this standard as well.

The Iowa Administrative Procedure Act defines “substantial evidence” as “the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1). Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. Pease, 807 N.W.2d at 845.

Although Petitioner asserts that affirming the Decision would “have broad significant implications for the hundreds of Iowans working as agents,” Brief p. 26, the ALJ and ICRC did not conclude that *all* real estate agents are independent contractors or even that they should “generally be considered independent contractors.” Brief p. 12. Rather, the Decision walked through the different factors and determined that *Petitioner* was an independent contractor. To determine whether there is substantial evidence in the record to support the Decision, the Court will examine each of the factors identified in Renda. The following 12 headings represent the 11 factors enumerated in Renda and then a twelfth, non-enumerated factor identified as the most important. The Court will discuss the relevant evidence under each factor as well as whether the factor supports a finding that Petitioner was an employee or independent contractor.

**(1) The kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;**

Petitioner would not be able to sell real estate absent a license from the State of Iowa. Iowa Code § 543.15(8). Licensed professionals are generally “specialists” favoring status as independent contractors. Petitioner argues that her license is necessarily under the supervision of a broker, pursuant to Iowa Code § 543B.62(3)(b), and this favors a designation of employee in this case. The record indicates a lack of actual day-to-day supervision given Petitioner’s minimal time in the office. Keller Williams did not assign listings to Petitioner and could not require her

to handle other projects. ICRC 160. A statutory requirement of supervision does not create an employer-employee relationship. Bauder v. Employment Bd., No. 07-0927, 2008 WL 509248 at \*3 (Iowa Ct. App. Feb. 27, 2008).

Petitioner argues that Keller Williams had a harassment policy which can be evidence of an employment relationship. Petitioner's Appendix ("Pet App.") 65-66; see Acosta v. Off Duty Police Servs., Inc., 915 F.3d 1050, 1060 (6th Cir. 2019). There are many other policies in the local and national handbooks<sup>5</sup>, but some of the policies are rather general. For example, the Keller Williams corporate dress code is to refer to local policy. Pet. App. 48, 52. The local policy requires "everyone who associates with and represents Keller Williams Legacy Group" to dress "in a professional manner" and have a "well-kept hairstyle." ICRC 168. The adoption of some policies and standards is alone insufficient to show an employment relationship. Schlotter v. Leudt, 123 N.W.2d 434, 437 (Iowa 1963) ("The employer of an independent contractor does and may properly retain control necessary to see the result is obtained according to plan.").

On the whole, the Court believes this factor is neutral.

**(2) the skill required in the particular occupation.**

As discussed above, Petitioner is a skilled, licensed professional. She has ongoing continuing education requirements. These facts were addressed in the Decision. ICRC 401. The Court agrees that this factor "weighs heavily in favor of independent contractor status." Schwieger v. Farm Bureau Ins. Co. of NE, 207 F.3d 480, 485 (8th Cir. 2000).

Petitioner argues that this factor favors employee status because Petitioner, like all real estate agents, was required to sign on with a broker. The Court rejects this argument for two

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<sup>5</sup> The Court will not address all of the policies contained in the two handbooks, but did consider them all in evaluating the Renda factors.

reasons. First, although Petitioner had to sign up with *a* broker, she could leave Keller Williams and find a new broker whenever she wanted. Second, the Iowa Code specifically recognizes that an independent contractor relationship may exist between a licensed agent and a broker. See Iowa Code § 543B.62(3)(b) (“The existence of an independent contractor relationship or any other special compensation arrangement between the broker and the salesperson or broker associate does not relieve the broker, salesperson, or broker associate of the duties and responsibilities established by this chapter.”)

**(3) whether the “employer” or the individual in question furnishes the equipment used and the place of work;**

Petitioner had to supply her own vehicle and mobile phone. She determined which Multiple Listing Services to use and paid for them herself. ICRC 159. Although Keller Williams had an office, Petitioner would have had to pay for the use of a desk or workspace. The record reflects that she worked from home a great majority of the time. On the other hand, she had to use Keller Williams’ email service and templates and pay for her own E&O Insurance through a vendor selected by Keller Williams. The Decision stated that this factor favored a finding of an independent contractor relationship. ICRC 401. The Court believes the factor is neutral.

**(4) the length of time during which the individual has worked;**

Petitioner worked with Keller Williams for 15 months. The Decision believed this factor favored a finding of independent contractor status and cited to Davis v. Heartland Homes, Inc., 2006 WL 2805255 at \*10 (D. Neb. Sept. 28, 2006), for its finding that eight years of employment was indicative of employee status. ICRC 402. Other cases have found that employment of as little as a year is indicative of employee status. Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995, 1001 (8th Cir. 2015).

Petitioner's employment was only a little more than a year, but it was designed to have open-ended status. Petitioner alleges that but for the harassment from her colleague, her employment would have been longer.

The Court disagrees with the ALJ on this point and believes this factor slightly favors a finding of employee status.

**(5) the method of payment, whether by time or by job;**

This factor was discussed in the Decision. ICRC 402. Petitioner's Independent Contractor Agreement states she will be paid by commission only. ICRC 257 (Section 3B). This factor strongly favors a finding of an independent contractor relationship.

Although Petitioner had a series of listings, she was paid following the closing of the sale on each one. Further, she, not Keller Williams, determined whether she would take on new listings. Nothing about the manner of picking up "projects" or how she was paid for them favors a finding that Petitioner was an employee.

**(6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation;**

As Petitioner states at page 21 of her initial brief, this factor is considered one of the most important factors in determining employment status. LaFleur v. LaFleur, 452 N.W.2d 406, 410 (Iowa 1990) (citing Fleming v. Foothill-Montrose Ledger, 71 Cal. App. 3d 681, 686–87 (Cal. Ct. App. 1977)).

Petitioner's Independent Contractor Agreement states: "Associate's association with the Market Center will continue for an indefinite period. Either Associate or Licensee may terminate Associate's Association with the Market Center at any time, with or without cause or prior notice." ICRC 260 (Section 7A). Petitioner argues that this favors a finding of employment because Keller Williams could terminate Petitioner at any time.

Although Keller Williams could terminate at any time without notice, so could Petitioner. Some courts find this to favor independent contractor status. See, e.g. Glascock v. Linn County Emergency Med., PC, 698 F.3d 695 (8th Cir. 2012); Wortham v. Am. Family Ins. Grp., 385 F.3d 1139, 1141 (8th Cir. 2004). Additionally, upon termination, Petitioner was able to take with her all listings she obtained and would get full commissions on any listings she left behind. Id. (Section 7C, 7D). The Decision notes this. ICRC 403. The Decision also noted that Keller Williams could not assign jobs to Petitioner. ICRC 402. An inability to assign such jobs indicates Keller Williams did not have the ability to prolong the employment relationship.

Although this is a close call, because Petitioner was not obligated to complete any particular job or work for any particular length of time, the Court finds that this factor favors a finding of an employee designation.

**(7) whether annual leave is afforded;**

As noted by the ALJ, Petitioner was given no annual leave or vacation. ICRC 402. This factor favors an independent contractor relationship. Glascock v. Linn Cty. Emergency Med., PC, 698 F.3d 695, 699 (8th Cir. 2012).

**(8) whether the work is an integral part of the business of the “employer”;**

Petitioner was hired to sell houses. Selling houses was an integral part of the business of Keller Williams. As acknowledged by the ALJ, this is a factor that favors a finding of an independent contractor relationship. ICRC 403.

**(9) whether the worker accumulates retirement benefits;**

The ALJ considered this factor and correctly noted that Petitioner received no retirement benefits. ICRC 402. This factor weighs in favor of independent contractor status. The fact that Keller Williams offers a profit-sharing program does not change the analysis.

**(10) whether the “employer” pays social security taxes;**

This factor was addressed in the Decision and strongly favors a finding that Petitioner was an Independent Contractor. ICRC 402. The Independent Contractor Agreement states that Keller Williams had “no responsibility to withhold or pay any income or other taxes on Associate’s compensation or provide any insurance, retirement or other employee benefits.” ICRC 256 (Section 2A). Petitioner received a 1099 each year. ICRC 160, 283. This factor is “highly indicative” of Petitioner being an independent contractor. Proa v. NRT Mid Atlantic, Inc., 618 F.Supp.2d 447, 458 (D. Md. 2009).

**(11) the intention of the parties;**

This factor was discussed in the Decision. ICRC 401. Petitioner and Keller Williams entered into an Independent Contractor Agreement dated January 23, 2017. ICRC 256-261. It unambiguously states that Petitioner understands “she is entering into this Agreement as an independent contractor and not as an employee.” ICRC 256 (Section 2A).

The Court disagrees with Petitioner’s assertion that “Renda cautions fact finders that the existence of a real estate agent’s [Independent Contractor Agreement] with a broker is essentially a moot point.” Reply Brief p. 3. Although the existence of an agreement stating the agent is an independent contractor is not dispositive of the issue, it does unambiguously capture the intent of the parties. Louismet v. Bielema, 457 N.W.2d 10, 13 (Iowa Ct. App. 1990) (“the mere act of signing an agreement and designating a person as an independent contractor is not controlling”); Petty v. Faith Bible Christian Outreach Ctr., Inc., 584 N.W.2d 303, 306 (Iowa 1998) (“Unless a contract is ambiguous, the court determines the parties’ intent from the language of the contract.”). The intent of the parties is a factor to be considered. Renda, 784 N.W.2d at 20.

Petitioner and Keller Williams clearly intended to have an independent contractor relationship which favors the same finding by this Court. This is an “important consideration.” LaFleur v. LaFleur, 452 N.W.2d 406, 409 (Iowa 1990).

**(12) the extent of the employer’s right to control the ‘means and manner’ of the worker’s performance.**

In Renda, the Iowa Supreme Court identified “the extent of the employer’s right to control the ‘means and manner’ of the worker’s performance” as “the most important factor to review.” Id. at 20 (quoting Spirides v. Reinhardt, 613 F.2d 826, 831–32 (D.C. Cir. 1979)). The parties disagree as to whether this factor supports the holding that Petitioner was an independent contractor.

The “means” aspect of this factor is neutral. Keller Williams dictated that Petitioner use their templates, signs, etc., and pay it for access to its intranet and email system. On the other hand, Petitioner had to supply her own vehicle and mobile phone. Pursuant to the Independent Contractor Agreement, Petitioner was “solely responsible for paying the cost of his or her own (1) real estate license fees and occupational taxes, (2) insurance, including errors and omissions liability insurance (“E&O Insurance”) and auto insurance, (3) transportation, (4) business cards, yard signs, brochures and other marketing materials, (5) entertainment cots, club dues and other expenses incident to the conduct of his/her services as an Agent, [and] (6) Internet website development and maintenance...” ICRC 258 (Section 3C).

The “manner” aspect of this factor favors a finding that Petitioner was an independent contractor. Keller Williams did not dictate Petitioner’s hours. She could work as much or as little as she liked. See Schlotter v. Leudt, 123 N.W.2d 434, 436 (Iowa 1963) (“The most important consideration in determining whether a person giving service is an employee or an independent contractor is the right to control the physical conduct of the person giving service.”). She could,

and did, form a partnership with another agent without Keller Williams' approval. ICRC 160. She could endeavor to list as many or as few houses as she liked. Her Independent Contractor Agreement stated she was "free to determine his or her own business hours and to choose his or her own target clients, marketing techniques and sales methods." ICRC 256 (Section 2B). Michelle Bennett's affidavit confirmed that Petitioner had no work hour requirements and had sole discretion to determine her own hours. ICRC 159-61.

Petitioner was required to be at the Keller Williams workplace for some meetings<sup>6</sup>, but she was not required to have her own desk or office. She was required to follow both the Keller Williams Policies and Guidelines Manual and the Local Manual, but those handbooks did not change any of the previously noted facts. ICRC 163-178; Pet App. 6-124. The previously noted facts are discussed throughout the Decision and they favor a finding of an independent contractor relationship.

With one portion of this factor neutral and one favoring an independent contractor relationship, when the factor is considered as a whole, it favors independent contractor status.

The ICRC found that only one of the Renda factors favored a finding that Petitioner was an employee. The Court believes that three of the factors favor a finding that she is an employee, seven favor a finding that she is an independent contractor and three are neutral. Although one of the factors deemed important by an Iowa Court (manner of termination) favors a finding of an

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<sup>6</sup> The parties disagree as to how much time these meetings took and how many of them Petitioner attended. Keller Williams provides attendance records showing Petitioner attending only two meetings (once in person and once via Facebook live) during her time as an agent. ICRC 160, 397. Evaluating all of the factors, the Court would make the same decision regardless of what party's version of events on this issue is accurate. Being required to attend meetings or office hours is not sufficient to render someone an employee. See Proa v. NRT Mid Atlantic, Inc., 618 F.Supp.2d 447, 458 (D. Md. 2009); Kakides v. King Davis Agency, Inc., 283 F.Supp.2d 411, 417 (D. Mass. 2003); Farlow v. Wachovia Bank of N.C., N.A., 259 F.3d 309, 314-16 (4<sup>th</sup> Cir. 2001).

employee relationship, two (means/manner and intent of the parties). In sum, although the Court believes the result is not quite as clear cut as described in the Decision, there is certainly substantial evidence supporting the ICRC's findings.

**C. The ICRC Properly Considered All Relevant and Important Matters.**

Petitioner argues that the ICRC failed to consider relevant and important matters as required by Iowa Code § 17A.19(10)(j). Specifically, Petitioner alleges that the agency "failed to consider the legal and public policy implications of such closure." Brief p. 25. Petitioner's argument is circular. Petitioner essentially argues that because the ICRC closed the complaint as non-jurisdictional, it must not have considered the public policy considerations of doing so. However, there is no evidence that the ICRC did not take its role seriously or follow the law. Once the analysis done by ICRC determined that Petitioner was not an employee, ICRC would have been abusing its power if it had not closed the complaint.

As Respondents note, Petitioner was not locked out of Iowa's courts. She could have requested a right-to-sue letter and had the Court resolve this issue. Instead, she let the process play out in the agency. Additionally, in contrast to at-will employees, independent contractors have remedies under the principles of tort law that may be exercised without going through the ICRC. See Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993) ("Greenland's alternative claims are thus preempted if she must prove discrimination to be successful in them."). Petitioner has a pending lawsuit related to these facts pending in Johnson County, Iowa. This is not a factor in the Court's decision finding that there was substantial evidence supporting the determination that Petitioner was an independent contractor. It is simply noted in response to Petitioner's argument that the Commission's failure to deem Petitioner an employee is "catastrophic." Reply Brief p. 4.

Although Petitioner strenuously argues that the ICRC engaged in a “narrow interpretive method,” the real complaint seems to be with the ICRC’s decision, not its methodology. Petitioner agrees that a factor-by-factor analysis is required under Renda. Her contention that “when a factor is a close call or can be interpreted in varying ways, the Commission should have interpreted the facts in favor of finding that Ms. Boyens was an employee,” is not supported by any citations to case law. Reply Brief p. 3. The Court acknowledges that in the workers’ compensation context, “doubt as to whether a claimant was an employee or independent contractor is resolved in favor of the former status.” Stark Const. v. Lauterwasser, 847 N.W.2d 612 (Iowa Ct. App. 2014) (quoting Daggett v. Nebraska Eastern Exp., Inc., 107 N.W.2d 102, 105 (Iowa 1961)). However, the Court believes this weighing applies after considering the record as a whole, not in shifting any individual factor that is a close call to one in Petitioner’s favor.

This is not a case of the ICRC interpreting whether certain conduct constituted discrimination or certain actions were based on an improper motive. It is a threshold question of whether a particular individual is subject to the protections of the statute. If the Legislature had wanted the ICRA to apply to all individuals, it could have said so. Instead, it limited the Act’s protections to “employees.” In determining whether Petitioner fell into that class, the ICRC appropriately followed the law.

### **Conclusion**

Petitioner has not identified any cases in Iowa where a real estate agent was deemed to be an employee for any purpose. The cases from other states where an agent was so identified are based on very different statutes or very different sets of facts than this case. Having considered all of the factors identified in Renda and viewing the record as a whole, the Court believes there is substantial evidence supporting the Decision of the ICRC. Accordingly, the Decision is AFFIRMED in all respects.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV059890  
**Case Title** EVIE BOYENS V IOWA CIVIL RIGHTS COMMISSION

So Ordered

A handwritten signature in blue ink that reads 'David Nelmark'. The signature is written in a cursive style with a large initial 'D'.

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David Nelmark, District Judge  
Fifth Judicial District of Iowa