

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**The Forward Association  
Employer**

**and**

**CASE NO: 2-UC-064975**

**Newspaper Guild of New York, Local 31003,  
Petitioner**

**DECISION AND ORDER CLARIFYING UNIT**

*Case History*

The Forward Association (“the Employer”) is a publisher of Jewish newspapers and digital media. The Newspaper Guild of New York, Local 31003, CWA, AFL-CIO (“the Petitioner”), filed a petition in Case No. 02-RC-023593 under Section 9(c) of the National Labor Relations Act, as amended (“the Act”), seeking to represent all non-editorial employees located at 125 Maiden Lane, New York, NY, excluding all other employees, and guards, professional employees, and supervisors, as defined in the Act.

On July 22, 2011, the Acting Regional Director issued a Decision and Direction of Election in Case No. 02-RC-023593 finding, in pertinent part, that the benefits administrator was not a confidential employee as contended by the Employer.

The following Unit was defined as appropriate for the purposes of collective bargaining:

Included: All full-time and regular part-time non-editorial employees located at 125 Maiden Lane, New York, NY, including but not limited to employees in the following

titles: circulation director, circulation manager, classified advertising manager, advertising sales, advertising assistant, the benefits administrator, accounts payable manager, development manager and assistant development manager.

Excluded: All other employees, including the advertising director, and guard professional employees, and supervisor as defined in the Act.

*Board Review of Case No. 02-RC-023593*

On August 5, 2011, pursuant to Section 102.67(c)(1) and (2) of the Board's Rules and Regulations, the Employer petitioned the Board for review of the Acting Regional Director's Decision and Direction of Election with regard to, inter alia, the inclusion of Benefits Administrator in the unit.

On August 18, 2011, the Board amended the Acting Regional Director's Decision solely in regard to the benefits administrator position and ordered that this position be voted subject to challenge.

On August 19, 2011, pursuant to an election by secret ballot, a tally of the ballots was issued in Case No. 02-RC-023593 in which six ballots were cast. Of the six total ballots cast, five eligible ballots had been counted in favor of the Newspaper Guild of New York, Local 31003, CWA, AFL-CIO, and the remaining ballot was the challenged ballot cast by the benefits administrator.

On August 29, 2011, a Certification of Representative was issued in Case No. 02-RC-023593, certifying Petitioner as the exclusive collective-bargaining representative of the employees in the petitioned-for unit. On September 20, 2011,

Petitioner filed the instant unit clarification petition seeking to resolve whether the benefit administrator position is included in the unit.

*Positions of the Parties*

The Employer contends that the benefits administrator, Freyda Faivus, should be excluded from the unit as a confidential employee. The Employer argues that Faivus acts and assists in a confidential capacity to those responsible for human resources and that her job duties extend far beyond merely having access to confidential payroll records. In this regard, the Employer argues that Faivus admitted to compiling confidential information reflecting the Employer's monthly cash flow needs. Moreover, the Employer asserts that Faivus also prepares confidential documents for use by the Employer's bargaining committee before they are shown to the Union in the context of collective-bargaining negotiations. More significantly, the Employer argues that Faivus is shown certain information that was intentionally being excluded from disclosure to the Union.

Petitioner asserts that the Employer has failed to meet its burden to prove that Faivus should be excluded from the unit. Petitioner contends that the benefits administrator is a functionary who merely carries out management's labor policies and does not work on labor relations issues on a regular basis. Petitioner argues that Faivus' involvement in the budgeting process amounts to simple ministerial work and that making calculations derived from the Employer's monthly cash flow needs has no connection with labor relations. Petitioner further argues that, to the extent that Faivus compiles documents in preparation for collective-bargaining sessions with the Union,

she has no access to management bargaining strategy before proposals are presented to the Union.

I have considered the evidence and the arguments presented by the parties on these related issues. As discussed below, I find that the benefits administrator is properly included in the unit for purposes of collective bargaining.

## **FACTS**

### **Overview**

The Employer is a small, not for profit, publisher and national distributor of Jewish newspapers. Recently, the Employer has expanded into digital media and has placed a renewed emphasis on establishing itself as a cultural institution for its subscribers and donors.

### **Management Structure**

The Board of Directors hold the ultimate authority for management decisions and it sets the annual budget. The Employer's two top posts are filled by Sam Norich. As the Executive Director, Norich is the chief executive reporting to the Board. As the publisher, Norich supervises the editors and is responsible for meeting the financial targets set by the Board. The following positions directly report to Norich: the assistant executive director, Janet Heiser; the associate publisher, Barry Surman; the editors of the English newspaper and the Yiddish newspaper; and the development director. Every Monday, a regularly scheduled management meeting is conducted with Norich and his top managers. Benefits Administrator Freyda Faivus is not invited to attend these meetings.

In her capacity as the Assistant Executive Director, Janet Heiser is a liaison to the Board of Directors. She is in charge of the auditing process and is involved with various personnel matters, such as preparing documents for Union contract negotiations and employee benefits.

### **Benefits Administrator**

Faivus, the benefits administrator, starts a personnel file for new employees and ensures that all of the I-9 certifications, payroll and other hiring documents are in order. She provides a general orientation, by proffering the employee handbook and explaining some of the employee benefits, like insurance, the 401(k) plan, and leave policies to new employees. The employee handbook specifically references the benefits administrator as the contact person for additional information on most benefits issues. In that regard, Faivus is the intermediary between the employees and the insurance company in the event any questions or issues arise regarding coverage and reimbursement for submitted claims. The record does not demonstrate that Faivus has the authority to grant leave or make accommodations to employees.

In the event of a discharge or resignation, Faivus informs management of the schedule of the benefits due to that employee. Faivus also processes the paperwork associated with the separation, including severance payments, collects the employee's credentials, provides information regarding COBRA and files the termination letter in the employee's personnel record.

Heiser maintained that in conjunction with the Employer's health insurance broker, Faivus makes recommendations regarding the selection of the Employer's health plans. Heiser's testimony, however, was vague as to whether Faivus was merely

a conduit of information or whether she effectively recommended a course of action that was contrary to the broker's advice. Similarly, Faivus was the contact person with the administrator of the Employer's 401(k) plan. As an example, by e-mail dated April 29, 2011, Faivus alerted management and staff that certain forms had to be completed and returned to her for processing. Likewise, a series of e-mails in July 2006, indicate that Faivus apprised Heiser that participants in a prior pension plan needed to submit forms directly to the new plan. Faivus concludes the message with: "Janet, hope you can present it so it gets through, so let me know it's not all clear to you." In response, Heiser states, "Sam is hoping to have a newsletter out this week." Also by e-mail in July 2006, Faivus informed Heiser that the timing of the Employer's pension contributions were governed by IRS regulations and the monthly payments had to be coordinated with payroll. Again, it appears that Faivus merely relayed information regarding the mechanics of the pension fund payments as dictated by law and at the recommendation of the Trust Fund Administrator.

Faivus fills out the regular payroll reports and is the main contact person for the Employer's payroll service. The administrative assistants in each department convey the timesheets to Faivus after they are approved by the departmental supervisor. Faivus tracks pre-tax allotments and withholdings. She has regular, monthly contact with the Employer's investment advisor regarding cash requirements for the operating account. She keeps petty cash amounting to \$50 and the company credit cards in a safe in her office. Faivus did not determine the amount kept or the procedure for requesting petty cash. Employees need prior approval in order to access the credit cards or request cash reimbursements. The Employer's controller, Jenny Larson keeps

the Employer's financial records and reports directly to Associate Publisher Surman. An accounting consultant and the accounts payable manager report to Larson.<sup>1</sup> The record indicates one instance where Norich sent a confidential e-mail to Heiser, Larson, the prior associate publisher and Faivus. The subject concerned the Employer's purchase of an office condominium, which necessitated a much larger payment into their operating account. This appears to be an unusual, non-recurring situation.

### *Collective Bargaining*

The record demonstrates that Petitioner represents a unit of staff employed in the business office and several employees in other departments. During the last negotiations for a collective-bargaining agreement, the Employer and Petitioner agreed to changes regarding the pension plan. At the Employer's request, Faivus compiled cost comparisons for various plans. Those calculations were used by the Employer in its collective-bargaining negotiations regarding the pension plan. Similarly, Faivus prepared spreadsheets showing the costs of various health insurance plans that were given to her by the health insurance broker. She prepared spreadsheets showing the costs to the Employer for salary increases specified over the term of the contract. Management used this information in formulating its bargaining proposals and in its presentations to Petitioner at bargaining. The negotiations resulted in a change in the health benefit plan, employee contributions and salary increases.

Heiser admitted that Faivus was not a member of the management negotiating team; instead, management sought her knowledge of certain benefit plans for clarification of the Petitioner's representations during the negotiations. As an example,

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<sup>1</sup> The consultant is an independent contractor and the accounts payable manager is a title included in the petitioned-for unit.

the Employer submitted an e-mail to Faivus dated February 9, 2009, requesting “a chart to show the Guild, containing only the information that pertains to them. It should contain none of the Oxford info, nor any breakdown for a 90/10 split of expenses.” By e-mail dated February 24, 2010, titled “healthcare proposal for union,” Norich explained to Heiser that Faivus prepared the chart that was going to be sent to the Petitioner’s negotiating team.

### *Summary*

In summary, the Employer’s evidence shows that Faivus tracks the number of days each employee is entitled to take as holidays and vacation. She is responsible for keeping records regarding sick and vacation leave. She is aware of the eligibility requirements to join the pension fund and assists employees in processing their health insurance claims. The policies in the employee handbook are determined by management. In that regard, the record demonstrates that the handbook was written by the Employer’s law firm, with input from Norich and the assistant executive director at that time. The handbook was reviewed by the compensation subcommittee of the Board, and then approved by the full Board prior to implementation. Although, Faivus testified to giving feedback during the creation of the handbook, she had no significant role in formulating the handbook or the policies contained within. The benefits set forth in the collective-bargaining agreement are negotiated terms. Faivus had no role in the Employer’s agreement to those terms.

According to Faivus, she does not participate in the hiring process. Once an employee is hired, she gives the new hire forms to fill out for payroll and for the personnel file. She gives new hires their security card, hands them an employee

manual, and makes sure that they have the forms necessary to get benefits. She explains the premium costs for both medical plans that are offered, so that the employee can choose a plan. For separations, she gets the paperwork and makes sure that the employee is paid whatever amount is owed to them. She notifies the IT department that the former employee's access to the e-mail system should be canceled.

She keeps weekly reports on employee attendance. She merely tracks employee attendance; she does not approve or decide the amount of time employees are permitted to take. She has no role in authorizing requests pursuant to the Family Medical Leave Act. The managing editor approves these requests and Faivus takes the employees off the payroll upon notification that the request was granted.

With respect to benefits, Faivus specifically denied that she had any role in selecting the vision, dental, medical and life insurance policies that the Employer uses. She testified that those decisions are exclusively within the province of Norich and the board. Every April, the Employer's major medical plan is up for renewal. Either Norich or Heiser direct Faivus to prepare worksheets costing out different premiums with the current staff to consider what different options cost. She had no role in the Employer's decision to switch pension providers. She does not administer the 401(k) plan; instead, she prepares a monthly report for the controller which shows the amount of employee contributions and produces worksheets setting forth the Employer's contributions.

She testified that she has never sat at the bargaining table on behalf of management or been involved in any negotiation strategy sessions with management. Her involvement was limited to preparing Excel spreadsheets to show costs.

Regarding the operations account, Faivus prepares a form showing the amount requested, how much has been requested for the year to date, and how much was requested that month in the preceding year. She submits that form to Norich. Upon his approval, Faivus e-mails the investment advisor with the requested amount to be transferred. Disbursement of petty cash requires a receipt and a voucher. Credit card authorization requires a purchase order which is maintained by the accounts payable manager. Faivus keeps a locked cabinet in her office with employee files, including payroll information and salary change. The file usually also contains medical information and I-9 forms.

### **ANALYSIS**

The Board applies a narrow test in making determinations as to whether an employee is confidential and should, therefore, be excluded from a bargaining unit. Employees are excluded as confidential employees only if they act and assist in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations, or if, in the course of their duties, the employee *regularly* has access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 190 (1981); *Erica, Inc.*, 344 NLRB No. 96 (2005); *In re EC Waste, Inc.*, 339 NLRB 262 (2003); *Inland Steel Co.*, 308 NLRB 868, 872 (1992). The party asserting confidential status, here, the Employer, has the burden of proving that the position is a confidential one. *Erica, Inc.*, *supra* (citing *Crest Mark Packing Co.*, 283 NLRB 999,999 (1987)).

The record demonstrates that Faivus is an intermediary between the Employer and its insurance broker, pension administrator and investment advisor. She was not involved in formulating employee policies and procedures, as argued by the Employer. The evidence indicates that Faivus reports to Surman; however, his role regarding labor relations and collective-bargaining negotiations was not explored. Faivus assists Norich and Heiser in creating monthly charts with information on the Company's monthly cash flow needs as well as yearly charts comparing the cost of various Health Plans.

The record also establishes that Faivus keeps the personnel records for the entire staff. The Board has consistently held that access to confidential payroll information is insufficient to justify excluding an employee from the right to bargain collectively. *In re E.C. Waste, Inc*, supra; *Bakersfield Californian*, 316 NLRB 1211 (1995); *Rhode Island Hospital*, 313 NLRB 343 (1993); *RCA Communications Corp.*, 154 NLRB 34 (1965); *Dinkler-St. Charles Hotel, Inc.*, 124 NLRB 1302 (1959). Evidence that Faivus has access to information that the Employer considers confidential is irrelevant to the analysis of her status, because as the Board has stated that access to nonlabor related matters, even though confidential, is irrelevant to the determination of whether an employee is a confidential employee. *Palm Court Nursing Home*, 341 NLRB 813, 819 (2004). For the aforementioned reasons, the Employer has failed to prove that Faivus is a confidential employee, and therefore, she is properly included in the unit.

The evidence in the record does not support the Employer's contention that Faivus' has extensive Human Resource duties aside from processing paperwork related to the daily upkeep of payroll, vacation time, sick time and individual 401(k) plan contributions. The main thrust of the Employer's argument relies on Faivus' typing and

preparation of charts and other documents requested by Heiser or Norich, to compare Health Plan costs and present the calculation of monthly cash flow needs for the Company. The Employer relies on *N.L.R.B v. Meenan Oil Co., L.P.*, 139 F.3d 311, 317 (2<sup>nd</sup> Cir. 1998), to support its assertion that these limited duties are sufficient to make Faivus a confidential employee. However, *Meenan Oil*, is distinguishable because that case involved a payroll personnel administrator who assisted the general manager in creating the yearly profit plan which forecasted the salary changes planned for each employee including managers and supervisors. The preparation of the yearly profit plan granted the payroll personnel administrator advance knowledge of the proposed salary increases or decreases of every employee in the employer. In contrast here, there is no evidence that Faivus prepares documents forecasting future changes in salary and instead shows that Faivus merely compiles financial information regarding the Employer's monthly cash needs based on the cash needs of the previous year and any others to date<sup>2</sup>.

In the instant case, the record falls short of showing that Faivus was privy to bargaining strategy based on operating expenses and forecast changes to current salaries. Rather, Faivus merely prepared spreadsheets compiling information that may or may not have been used to formulate strategy for collective-bargaining purposes. In this regard, the record clearly establishes that she had no role in developing or implementing the Employer's policies.

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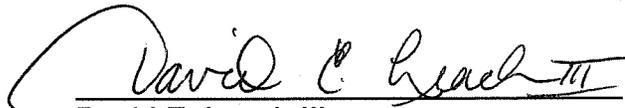
<sup>2</sup> See Employer's Request for Review Brief page 9 stating "This process involves preparing a form that shows how much it was requesting compared to last year. (Tr. 270). Ms. Faivus then has to prepare communication to the investment managers requesting the withdrawal of fund from the Forward's asset accounts. (Tr. 270)"

Accordingly, consistent with the decision in direction of election issued on July 22, 2011, I therefore find that benefits administrator position was properly included in the Unit that is appropriate for the purposes of collective bargaining.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **June 28, 2012**. The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov), but may not be filed by facsimile.

Dated at New York, New York,  
This June 14 , 2012



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