

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

The Forward Association,

Employer,

Case No. 2-UC-064975

-and-

Newspaper Guild of New York, Local 31003,

Petitioner.

REQUEST FOR REVIEW ON BEHALF OF THE EMPLOYER

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SUMMARY OF ARGUMENT

Pursuant to Section 102.67(c)(1) and (2) of the Board's Rules and Regulations, the Forward Association (hereinafter the "Forward" or "Employer") files this Request for Review of the Decision and Order Clarifying Unit ("Order") issued by the Acting Regional Director for Region 2 of the Board on June 14, 2012, finding that Freyda Faivus, Benefits Administrator, was not a confidential employee who should be excluded from the bargaining unit.

The Board has already considered and rejected the Region's determination that Ms. Faivus is not a confidential employee (Case No. 2-RC-23593). In connection with a request for review of the Region's Decision and Direction of Election ("DDE"), on August 18, 2011, the Board reversed the Region's finding that Ms. Faivus was not a confidential employee, expressly concluding that there was a "substantial issue" with the Region's decision. In accordance with the anticipated changes to election procedures, the Board deferred the matter back to the Region to re-address Ms. Faivus' status as a challenge to her ballot during the forthcoming election. Subsequently, the election was held and the Union was certified. The margin of the Union's victory was such that Ms. Faivus ballot was not dispositive as a challenge to the election.

Immediately thereafter, in contemplating how to proceed with collective bargaining, and in order to resolve the outstanding issue of Ms. Faivus' status, the Union and the Employer agreed to resubmit the identical question back to the Region, based on the identical record that was created during the original petition. No new testimony or evidence was taken.

Unjustifiably, the Region again found that Ms. Faivus was not a confidential employee based on the same erroneous reasoning and record that the Board already rejected. Accordingly, the Employer now submits the same issue back to the Board and respectfully requests the same result – reversing the Region's finding that Ms. Faivus was not a confidential employee because

it departed from Board precedent and was clearly erroneous on the undisputed record.

In particular, as shown below, the record clearly demonstrates Ms. Faivus is a confidential employee as defined by the Act. Ms. Faivus testified to numerous examples where she was privy to material confidential information **before** it was shown to the Union in the context of collective bargaining negotiations, and more significantly, shown what information was intentionally being excluded from disclosure. (Order pp. 7-8; DDE pp. 9-10; Tr. 290, 357-58). See e.g., N.L.R.B. v. Meenan Oil Co., L.P., 139 F.3d 311, 317 (2nd Cir. 1998); Associated Day Care Services, 269 N.L.R.B. 178, 181 (1984).

In establishing Ms. Faivus' role at the Forward, the Order and DDE cited examples which occurred during the last negotiations for a collective-bargaining agreement.¹ (Order pp. 7-8; DDE p. 9-10). In connection with that negotiation, Ms. Faivus was asked by the Forward's negotiating committee members to compile cost comparisons for various plans and prepare spreadsheets showing the costs and levels of benefits, copayments and deductibles of various health insurance plans that were provided by the health insurance broker.² (Order pp. 7-8; DDE p. 9). Upon receiving that information, Ms. Faivus was asked to further edit that data for bargaining with the Union, and remove certain data or exclude certain plans entirely so that they would not be shown to the Union. (Order p. 8, citing email to Faivus dated February 9, 2009).³

The latest decision completely ignores the significance of this knowledge. The Benefits

¹ The Petitioner already represents a unit of editorial employees, and the Typographers Union has a unit of production employees and the parties have negotiated numerous collective bargaining agreements over the years.

² Ms. Faivus assisted Sam Norich, Publisher, Barry Surman, Associate Publisher, and Janet Heiser, Assistant Executive Director, who are responsible for formulating and effectuating the Forward's labor relations and human resources policies, and bargaining with the Union.

³ **The DDE confirmed (now ignored by the Order) that "[t]hose calculations assisted the Forward in its collective bargaining negotiations regarding the pension plan" and "management actually used this information in formulating its bargaining proposals and in its presentations to the Petitioner at bargaining."**³ (DDE p. 9). **The DDE expressly recognized that Ms. Faivus' "...participation involved knowledge of confidential information."** (DDE p. 9-10).

Administrator, in preparing charts of various health plan options that would be presented to the Union, knew what plans The Forward would be willing to negotiate with the Union, and what plans she knew were available but were plan options The Forward was not going to present to the Union. As the record shows, Ms. Faivus admitted that management would ask her to compile costing and benefit information for ten (10) health plans, from which she would then prepare a second spreadsheet for the Union which only included those three (3) to four (4) plans which the Forward was willing to present and discuss with the Union. (Tr. 290). The Order ignores Ms. Faivus' knowledge – before bargaining - of The Forward's determination as to what it would negotiate with the Union and what it did not want to offer. Instead, the Order points to the fact that she did not attend management meetings and was not on the bargaining team at the table – all irrelevant to the issue. And it characterizes Ms. Faivus' role as merely putting the insurance plan costs on a spreadsheet. That ignores the testimony that she didn't merely put data on a spreadsheet – she was privy to which options to put on the spreadsheet for bargaining and what was not to be produced.

The testimony established that the health plan was a major issue and cost in every negotiation. And it was historically changed in the negotiations. What was available and not presented to the Union was confidential bargaining information because it revealed where the Forward was willing to go and what it did not want the Union know. Ms. Faivus testified to other similar examples **where she specifically advised management about information that they may or may not want to show to the Union.** (Tr. 357-58). As such, Ms. Faivus conceded that she is privy to the Forward's labor relations decision making process before it is revealed to the Union, and was acutely mindful that the information that she was exposed to and prepared contained elements to which the Union would not otherwise be aware. Moreover, the record

evidence contains examples where Ms. Faivus was involved in formulating the Forward's employee policies and procedures, and where she effectively made recommendations regarding the Forward's handbook, interpreting the CBA, the Union health plans, and 401k contributions.

Under these circumstances, in failing to find that Ms. Faivus was a confidential employee, the Acting Regional Director departed from long-standing officially reported Board precedent. See e.g., NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 189 (1981); E&L Transport Co., 327 NLRB 408, 409 (1998); Associated Day Care Services, 269 N.L.R.B. 178, 181 (1984). The Order, by ignoring the uncontroverted evidence of Ms. Faivus' close role in preparing documents for presentation in collective bargaining, results in precisely the prejudice that the confidential employee exception stands to prevent - Ms. Faivus now has irreconcilable divided loyalties in the performance of her regular duties. In the instant case, what if the Union said during negotiations that it would like to know the other plans that the Forward instructed Ms. Faivus to exclude from their proposal? The Region proposes no solution as to how Ms. Faivus may continue performing the essential functions of her job under these circumstances.

Moreover, the Order incorrectly focused solely on Ms. Faivus' access to confidential payroll records rather than the undisputed fact that Ms. Faivus "...regularly has access to confidential information concerning anticipated changes which may result from collective bargaining negotiations." (DDE p. 19 citing Hendricks County, et al). The Benefits Administrator, in running the costs of wage proposals, knew the costs to the employer of various proposals. This was basic information the Union would want to know in negotiating an economic package. See Pullman, Inc., 214 N.L.R.B. 762 (1974) (employees are confidential if they have access to confidential information which, if prematurely disclosed to the union, would

prejudice an employer's bargaining strategy in any future negotiations). Under such circumstances, the Board has held that an employee must be excluded from a petitioned for unit.

Thus, consistent with the Board's prior decision, the Employer respectfully seeks review of the Order and a reversal of the Region's determination with respect to the confidential status of Ms. Faivus.

STATEMENT OF FACTS

A. Freyda Faivus

Freyda Faivus is the Benefits Administrator at the Forward. (Order p. 5). As the Benefits Administrator, Ms. Faivus is in charge of payroll, benefits and petty cash, and also acts as the Forward's Human Resources department. (Order 5-7). As part of her duties, Ms. Faivus is involved in assisting the Forward with its labor relations.

i. *Labor Relations*

Throughout her career at the Forward, Ms. Faivus has worked closely with Sam Norich, Publisher, Barry Surman, Associate Publisher, and Janet Heiser, Assistant Executive Director, and their predecessor(s) before and during labor negotiations with the Union and other collective bargaining units at the Forward.

The DDE correctly found:

The record demonstrates that the 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 the Petitioner agreed to change the pension plan. Faivus compiled cost comparisons for various plans. Those calculations assisted 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 presented by the health insurance broker. She prepared spreadsheets showing the costs to the Employer for salary increases over the term of the contract. **Management used this information in formulating its bargaining proposals and in its presentations to the 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. **Her participation involved knowledge of confidential information.**

(DDE 9-10) (emphasis added).⁴

It is undisputed that negotiations on health benefit plans are one of the most important items during bargaining because large increases in medical insurance premiums exert a “major effect” on the Forward’s costs. (Tr. 257). The Forward reviewed Ms. Faivus’ analysis and selected from those options those they would present to the Union. As Ms. Faivus explained:

A. Usually, Gail Hiller [the insurance broker] will send us 10 plans and somewhere along the way Sam [Norich, the Publisher] will whittle that down to 3 or 4.

Q. Sam would?

A. Whittle it down, like lessen it to three or four.

Q. And tell you what to present, right?

A. And tell me to do a spreadsheet. Janet [Heiser, the Assistant Executive Director] would then come and say do a spreadsheet for this one, this one and this one.

Q. So you know what was going to be presented to the union and what was not, right?

A. I guess so.

(Tr. 290).

The Order similarly noted:

As an example, the Employer submitted an e-mail dated February 9, 2009, which specifically requested "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**

⁴ (Order pp. 7-8).

team.

(Order p. 7-8) (emphasis added).

Ms. Faivus' role in labor relations is not limited to collective bargaining. For example, Ms. Faivus is responsible for administering the Union benefits plans. In that role, she had to prepare a disclosure for the Union employees which contained certain comparative cost information. (Ex. 20). Ms. Faivus was acutely aware that some of the information she was processing should not be shown to the Union. As she explained:

Q. In here [Ex. 20] is a reference to an Oxford memo to the employees that you are producing evidently and it says from you to Sam Norich. And you conclude the email saying I think you might not have wanted to show the employee costs or not all of them, so can you let me know if I can include the attached with my memo. What are you referring to about not showing all of the employee costs?

A. When Gail Hiller send[s] us proposal[s], she'll include at the bottom a total cost for the Forward, so it's not per employee, it's the total cost to the Forward. And I think Sam didn't want those going to the Union. I don't think he wanted the union to see what The Forward expense was.

Q. So you asked him if you should include that number.

A. Right.

(Tr. 357-58).

Ms. Faivus also maintains files with all of the union contracts, which she keeps in her office. (Tr. 281). She keeps track of employee vacation, sick and holiday time, and uses the Union contract to determine entitlements. (Tr. 265-66). She also reads and interprets the collective bargaining agreements to determine health care coverage. (Tr. 295, 360-61).

Moreover, Ms. Faivus is involved in setting labor relations policy and resolving grievances. In the context of a labor grievance about a Union reimbursement plan, the Forward's management emailed Ms. Faivus the proposed settlement policy for her comments and suggestions. (Ex. 17, 22).

Similarly, Ms. Faivus gave guidance to the Publisher and the negotiating team regarding the interpretation of the language in the collective bargaining agreement with respect to premium contributions by Union members for their medical insurance coverage. (Tr. 291). When a question arose as to whether employees in the Forward's Yiddish unit of the Newspaper Guild were required to pay contributions, Ms. Faivus testified that she told the Publisher that the Forward had agreed not to require contributions from these employees. (Tr. 291). This was based on Ms. Faivus' reading, interpretation and familiarity with the Union contracts. (Tr. 292).

In some instances Ms. Faivus did not notify anyone before making decisions. In one example, an employee had not been paying contributions for health benefits. (Tr. 293-94). Ms. Faivus independently approached the employee and worked out a deal whereby when the employee switched health plans she would start making benefit contributions. (Tr. 294-94).

Q. So did you give anybody notice that you had made this agreement with her?

A. No.

(Tr. 294).

In the same way, when an earlier question arose as to whether members of the Forward's Yiddish unit of the Newspaper Guild Forward were required to contribute 5% of the cost of their health insurance plan, Ms. Faivus determined that the collective bargaining agreement did not require the 5% contribution.

Q. You made that determination. That's all I'm trying to ask.

A. I read it [the CBA] and acted on it, Right.

Another such example occurred when an employee from the Yiddish Forward came to Ms. Faivus and asked if she could receive a matching contribution from the Forward to a 401(k) plan. (Tr. 264). Ms. Faivus reviewed the Union agreements and determined that the Yiddish

Forward employees were not entitled to participate in the 401(k) match. (Tr. 343).

Subsequently, Ms. Faivus approached Ms. Heiser and asked if during the next round of contract negotiations the Forward would raise the issue and allow the employee to switch from the Union pension plan to a 401(k) with employer matching contributions. (Tr. 264).

ii. Human Resources Management

Ms. Faivus also testified that she has extensive human resources duties at the Forward. Ms. Faivus maintains a file for each employee in her office, which she locks each night. (Tr. 281). Ms. Faivus has access to confidential settlement agreements which were reached between the Forward and former employees. (Tr. 275). Ms. Faivus also is involved in reviewing and giving feedback about the Forward's employee polices. (Ex. 9; Tr. 304). For instance, Ms. Faivus was one of the select management team members asked to give feedback about the Forward's draft employee handbook. (Ex. 9; Tr. 304-05). The handbook that she reviewed instructs employees to direct questions regarding employee benefits to her, the Benefits Administrator. (Ex. 2).

When new employees are hired, they are sent to Ms. Faivus for orientation. (Tr. 253). Ms. Faivus explains the options regarding various health and other employee benefits and the types of plans and coverage available. (Tr. 283-84). When employees are terminated they are also sent to Ms. Faivus to complete an exit form and return their keys, electronic access cards and any other company property. (Tr. 274). If the former employee files for unemployment, Ms. Faivus receives the notice and is in charge responding as appropriate. (Tr. 277).

Ms. Faivus assists in the budget process and prepares estimates of benefit costs and company-wide employee salaries. (Tr. 275-76). She also is central to the Forward's cash management decisions, determining the timing and scale of cash withdrawals from investment

accounts, and every month estimates the liquidity needs of the Forward for the following month. (Tr. 269). This process involves preparing a form that shows how much the Forward is requesting for the month, how much it requested year to date, and how much it was requesting compared to last year. (Tr. 270). Ms. Faivus then has to prepare communications to the investment managers requesting the withdrawal of funds from the Forward's asset accounts. (Tr. 270).

Finally, Ms. Faivus is in charge of the Forward's petty cash and credit cards, and expense requests are approved at her discretion. (Tr. 271-73).

ARGUMENT

In repeating the already rejected conclusion that the Benefits Administrator, Freyda Faivus, was not a confidential employee, the Order made clearly erroneous findings on substantial factual issues in the record, and omitted other dispositive facts entirely. As a consequence, the Order failed to properly apply well-established Board precedent and resulted in substantial prejudice.

A. The Regional Director Departed From Precedent And Ignored The Record Evidence In Concluding Ms. Faivus Was Not a Confidential Employee.

The record evidence conclusively established that Ms. Faivus must be excluded from the petitioned for Unit because she is a confidential employee. The Board historically excludes employees from a bargaining unit as confidential if those employees assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations. PTI Communications, 308 NLRB 918 (1992); B.F. Goodrich, 115 NLRB 722 (1956). More specifically, in Intermountain Rural Electric Assn., 277 NLRB 1, 4 (1985), the Board stated that to satisfy the "labor nexus" test an employee must be "involved in a close working relationship with an individual who decides and effectuates management labor

policy and is entrusted with decisions and information regarding the policy before it is made known to those affected by [such decisions].” See also NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 189 (1981) (The United States Supreme Court endorsed the Board’s definition that employees in a position with a labor nexus “assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations”).⁵

The Board will find confidential status if an employee regularly has access to labor relations policy information before it becomes known to the union. Associated Day Care Services, 269 N.L.R.B. 178, 181 (1984). The rationale for the exclusion of confidential employees is that the Forward should not be forced to negotiate with a union that includes employees who in the course of their jobs may obtain advance information of the Forward’s position with regard to contract negotiations. N.L.R.B. v. Meenan Oil Co., L.P., 139 F.3d 311, 317 (2nd Cir. 1998). An employee who routinely sees data that would enable the union to predict, understand, or evaluate the bargaining position of the employer is therefore excluded from union membership. *Id.* at 318.

The Order clearly established that a regular portion of Ms. Faivus’ job is to be involved in assisting those individuals who develop the labor strategy of the Forward. Notwithstanding her concerted attempt to down play her involvement at the Forward, Ms. Faivus testified that she would compile information, conduct analysis and make spreadsheets for the Forward’s

⁵ The Order ignored the evidence of Faivus’ many documented interchanges concerning documents and spreadsheets to be used in collective bargaining or in dealing with personnel issues with Heiser and Norich who the record is clear were conducting the negotiations and formulating proposals, instead focused on the fact that she reported to Barry Surman, the Associate Publisher and found that his role in labor relations was “not explored.” However, the record is clear as to Heiser and Norich’s role and Faivus’ undertaking creation and selection of documents to present at bargaining at their specific request. (See Order pp. 7-8). “Norich explained to Heiser that Faivus and prepared a chart that was going to be sent to the Petitioner’s negotiating team.” (DDE p. 8).

management team, which would select which information to show to the Union and which to withhold, and that Ms. Faivus would prepare the selected information to provide to the Union in the course of bargaining. See Firestone Synthetic Latex Co., 201 NLRB 347 (1973) (employees assisted in the preparation of and/or had access to confidential labor relations information such as the employer's data in preparation for contract negotiations, were found to be confidential employees); The Bakersfield Californian, 316 N.L.R.B. 1211 (1995) (access to employer's labor strategy would potentially give the Union an unfair advantage during future negotiations). Ms. Faivus even recalled being called into the bargaining room to assist in elucidating certain information.

Here, it is clear that if the union were to have access during collective bargaining to the information Ms. Faivus holds, creates and uses on a regular basis, such access could severely hamper the Forward's bargaining strategy. In this way, NLRB v. Meenan Oil Co., 139 F. 3d 311, 315 (2d Cir. 1998), is instructive. In Meenan Oil, a payroll and personnel administrator was determined to be a confidential employee because she "has access to the current salary as well as salary changes forecast by the Company for all employees and supervisors." 139 F.3d at 315. The court found that the employee was confidential because she "routinely [saw] data which would enable the union to predict, understand or evaluate the bargaining position of the employer. . . ." Id. (emph. added .) See also E & L Transport Co., 327 NLRB 408, 409 (1998) (employee held to be a confidential employee where she prepared confidential documents and had regular access to confidential information regarding reports or correspondence documenting the company's position in collective bargaining and labor relations policy matters before this information was transmitted to the union or to the employees at issue).

The Region fails to distinguish Meehan Oil by claiming that there was "no evidence" that

Ms. Faivus' position gave her access to documents that forecast future changes. This conclusion is clearly unsupported by the record, and contrary to the findings in the Order, which recognize that Ms. Faivus compiled prospective costs and benefit levels regarding different health plan options **before** they were disclosed to the Union or other employees, and in anticipation of bargaining for discussions about the benefit plans and compensation to potentially be implemented – not simply culling and compiling historical data as implied by the Order.

In the instant case, what if the Union said during negotiations that it would like to know the other plans that the Forward instructed Ms. Faivus to exclude from their proposal? The Region proposes no solution as to how Ms. Faivus may continue performing the essential functions of her job under these circumstances.

Similarly, Ms. Faivus' duties and necessary access to confidential information with a direct nexus to important labor relations matters and potential collective bargaining render her a confidential employee. Ms. Faivus revealed that she is completely aware of the information that should and should not go to the Union, **even acknowledging that she sent an email to the Publisher recommending withholding certain financial data from disclosure to the Union.** Tr. 357-58, Ex. 20. See also Connecticut Light & Power Co., 222 N.L.R.B. 1243, 1976 NLRB LEXIS 1136, 91 L.R.R.M. (BNA) 1373, 1975-76 NLRB Dec. (CCH) P16678, 222 N.L.R.B. No. 188 (1976) (secretary to the district manager was a confidential employee because she was used to compile and prepare confidential reports and has access to confidential personnel files).

Additionally, the evidence demonstrated that Ms. Faivus was involved in formulating the Forward's employee policies and procedures, and effectively making recommendations regarding the Forward's employee handbook, interpreting the CBA, the Union health plans, and 401(k) contributions. In this role, it is essential that Ms. Faivus have undivided loyalties, as has

been recognized in excluding confidential employees from the bargaining unit. See National Cash Register Co., 168 NLRB No. 130; Lodgian, Inc., 332 NLRB 1246 (2000) (parties agree that human resources manager are properly excluded from the unit.); Children's Farm Home, 324 NLRB 61 (1997); (Human resources assistant is excluded from the unit in unit determination ruling as a confidential employee on the basis that she assists the HR director.); The Holliswood Hospital, 312 NLRB 1185 (1993) (parties stipulated that the director of human resources is a confidential employee and excluded from any unit.).

Accordingly, upon a correct reading of the record and applying Board precedent, Ms. Faivus should be considered a confidential employee, and excluded from the petitioned for unit.

CONCLUSION

As demonstrated herein, based upon the Order, previous DDE, record and Board precedent, the Employer respectfully submits that the Board should grant review of the Order and exclude Ms. Faivus from the petitioned for unit because she is a confidential employee.

Respectfully submitted,

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Dated: New York, New York
June 28, 2012

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

THE FORWARD ASSOCIATION,

Employer,

-and-

Case 2-UC-064975

NEWSPAPER GUILD OF NEW YORK,
LOCAL 31003,

**CERTIFICATE OF
SERVICE BY E-MAIL**

Petitioner.

Joyce Marshall hereby declares and states:

I am employed in New York County, New York. I am over the age of eighteen years and not a party to the above-captioned action. My business address is 900 Third Avenue, 8th Floor, New York, New York 10022-3298.

On June 28, 2012, I e-mailed a true and correct copy of the following document:

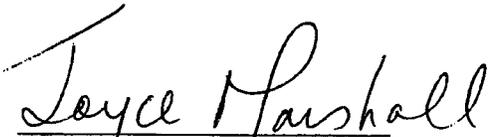
REQUEST FOR REVIEW ON BEHALF OF THE EMPLOYER
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: New York, New York
June 28, 2012


Joyce Marshall
Joyce Marshall