

National Labor Relations Board

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In the Matter of:

The Forward Association,

Employer,

– and –

Newspaper Guild of New York, CWA Local  
31003,

Petitioner.

Case No. 2-UC-064975

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**PETITIONER’S OPPOSITION TO THE EMPLOYER’S  
REQUEST FOR REVIEW**

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## INTRODUCTION

Pursuant to Section 102.67(e) of the Board's rules and regulations, the Newspaper Guild of New York, CWA Local 31003 (the "Guild") hereby submits this Opposition to the Request for Review filed by the Employer in this matter, the Forward Association (the "Forward").

The Forward's Request for Review argues that the June 14, 2012 Decision and Order Clarifying Unit ("Order") erroneously found that Freyda Faivus, the Forward's benefits administrator, was not a confidential employee. The Forward argues that the Order "departed from Board precedent and was clearly erroneous on the undisputed record." RR 3.<sup>1</sup> In fact, the Order is consistent with Board law and the record. The Request for Review should be denied.

On August 18, 2011, the Board acted on the Employer's Request for Review in 2-RC-023593 and ordered that the benefits administrator vote subject to challenge. (The Employer erroneously describes the Board's action as a reversal of the Regional Director's Decision and Direction of Election [DDE] regarding Faivus. RR 1.) Following the Guild's certification, the parties during negotiations were unable to resolve the placement of Faivus in the unit. The Union filed the instant UC petition and the parties stipulated that the Director could proceed based on the record in 2-RC-023593. Unlike the Employer, we ascribe no motive to the Board's prior action.

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<sup>1</sup> We cite to the Forward's Request for Review as RR \_\_; to the hearing transcript as T \_\_; to Employer Exhibits as E \_\_; and to Petitioner Exhibits as P\_\_.

## ARGUMENT

### 1. THE APPLICABLE LEGAL STANDARD

“Only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations” are confidential employees. B.F. Goodrich, 115 NLRB 722, 724 (1956). To qualify as a confidential employee, a person must “share a confidential relationship with managers who ‘formulate, determine and effectuate management policies in the field of labor relations,’ and . . . assist and act in a confidential capacity to such managers.” E.C. Waste, Inc., 339 NLRB 262, n. 2 (2003), quoting NLRB v. Hendricks County Rural Electric, 454 U.S. 170, 189 (1981). Even if an employee has “some labor relations work,” she is not a confidential employee unless she works “on labor relations issues on a regular basis.” E.C. Waste, 339 NLRB at 262, n.2. The party asserting confidential status has the burden of establishing that the position should be excluded as confidential. Crest Mark Packing Co., 238 NLRB 999, 999 (1987).

### 2. THE REGIONAL DIRECTOR CORRECTLY CONCLUDED THAT FAIVUS’ LIMITED LABOR-RELATIONS DUTIES DO NOT MAKE HER A CONFIDENTIAL EMPLOYEE

The Forward argues that the Order was clearly erroneous in its conclusion that Faivus’ role in labor relations did not make her a confidential employee. RR 11-14. Contrary to the Forward’s argument, the record does not establish that a regular portion of Faivus’ job is to “be involved in assisting those individuals who develop the labor strategy of the Forward.” The Regional Director was correct in finding that Faivus was not involved in formulating employee policies and procedures. Order 11; T254-255. As the Regional Director found, Faivus has almost no role in the Forward’s labor relations

policy or function. She was not a part of the negotiating team, never sat at the bargaining table on behalf of management, and he has never been part of management meetings where negotiation strategy was discussed. Order at 9, T259. The only role regular that Faivus plays in labor relations is to perform cost calculations for management. Order at 9; T153-154, 259-260.

The record supports the Regional Director's finding of Faivus' role. The job description for benefits administrator, introduced into the record by the Employer and prepared by Faivus, does not include any reference to assisting the Employer with union negotiations, rather it describes many ministerial functions related to processing personnel records and interacting with employees concerning status changes and benefits. T278-279, E 1.

a. Faivus does not play a confidential role in Guild negotiations.

Janet Heiser, Assistant Executive Director, testified that Faivus' limited role with union negotiations amounts to preparations of spreadsheets. T151-152. Faivus explained her preparation of spreadsheets for management as follows:

[S]omebody who is involved in negotiations would ask me to prepare a spreadsheet and just to multiply out costs. Just prepare an Excel spreadsheet to show whatever they are trying to determine the cost of. . . . They might say like prepare the worksheet for employees who are on staff as of April 1. This year I think we prepared other sheets which just showed the Newspaper Guild employees, you know, instead of all employees, just the Newspaper Guild. We might show how much its going to cost the Forward if the Forward contributes 90% towards the insurance or if they contribute 75% towards the insurance and what the year would look like for that kind of expense.

T259-260. Faivus would not decide what variables to use on the spreadsheet. T260. Faivus made clear that she wasn't involved in preparation for bargaining concerning healthcare. T289. She was not privy to conversations relating to the formation of proposals. T289. The only thing she does is prepare spreadsheets at the request of management. T290. Indeed, she doesn't always know the purpose of those spreadsheets – instead, she merely prepares them at the request of Heiser and returns them to her. T290-291.

Faivus also testified that she prepared estimates of health insurance costs. But here again, Faivus merely crunches numbers provided by the health insurance broker, she does not design proposals. She explained:

Janet [Heiser] has come to me and said can you figure out for next year, can you call Gail, or ask Gail, and I'll contact Gail Hiller [the Forward's insurance broker] and say what does it look like . . . . So she'll tell us . . . .

T276. Once Faivus gets a number from Hiller, she turns it over to Heiser. T276.

Thus, Faivus' only function is to make calculations of projected costs based on direction given to her by Forward's management, using variables determined by Forward management, and for purposes to be determined by Forward management.<sup>2</sup> Under Board law, Faivus' role in preparing spreadsheets for negotiations -- even if it involved confidential information -- does not transform her into a confidential employees. See Los Angeles New Hospital, 244 NLRB 960, 961 (1979) (an employee who typed eight documents relating to labor relations was not a confidential employee, even though she had access to confidential information because "mere access to confidential

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<sup>2</sup> The Employer's assertion that Faivus assisted in negotiations is not true. See RR 13. Faivus testified that during negotiations she was called into the negotiating room to deliver papers that Heiser asked her to prepare. T317-318.

material, albeit confidential labor relations material, is not sufficient to confer confidential status . . . . Further, the typing of confidential labor relations memoranda does not, without more, imply confidential status.”); United States Postal Service, 232 NLRB 556, 558 (1978).

While the Employer says Faivus testified to numerous examples where she was privy to material confidential information before it was shown to the union in context of collective bargaining negotiations (RR 3- 4), this is simply not true. The Employer relies on one piece of testimony and a single email regarding health insurance proposals to support its assertion. RR 7. Regarding preparation of documents for negotiations, Faivus testified on direct examination that Heiser has asked her in the past to prepare spread sheets based on information provided by the insurance broker or to cost out salary proposals. T256-257; 259-260. She testified on cross examination that prior to bargaining the insurance broker, Gail Hiller, sent the Forward proposals for different plans and Norich asked her to prepare a spreadsheet showing the costs of only some of the proposals received. T289-290. The Forward erroneously states that “the Forward reviewed Faivus’ analysis and selected from those options those they would present to the Union.” RR 7. There is no record evidence that Faivus analyzed or reviewed the proposals that Norich rejected, only that she prepared spreadsheets of what he asked her to prepare. In fact she specifically testified she was not involved in discussions of the options for bargaining proposals to present to the Guild; and that she was asked to prepare spread sheets and would not always know how the Employer would use them. T259; 289-290.

The Employer also points to a single email from February 2009, in which Sam Norich, the Publisher, directs Faivus and Heiser to prepare a different chart from that sent to Heiser by the insurance broker. E 10. No employer witness testified to the context of this email. Even assuming the email demonstrates that Faivus was privy to information intentionally excluded from disclosure to the union, it was an isolated incident and not sufficient to render her a confidential employee under the Act. E.C. Waste, 339 NLRB at 262, n.2 (finding employee not confidential even assuming responsibilities include some labor relations work because she does not work on labor relations on a regular basis).

Regarding access to confidential information, the Employer also points to an email dated February 24, 2009, in which Faivus asked Norich about whether he wanted to disclose certain information concerning health insurance total costs to the Forward when preparing a memo to employees. RR 8 (citing ER. Ex. 20, Tr. 357-358). However, as the Employer acknowledges, this isolated incident does not concern collective bargaining, but rather Faivus' position as a conduit for benefits information. As the Board has held, access to confidential information is not a basis to exclude an employee from the unit. Bakersfield Californian, 316 NLRB 1211, 1212 (1995)

- b. Faivus' additional labor relations responsibilities do not demonstrate she formulates policy.

The Forward argues that the Order was clearly erroneous in finding that Faivus was not a confidential employee because "the evidence demonstrates that 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, and union health plans and 401(k) contributions.” RR 14. The record does not support this claim.

With regard to 401(k) contributions, Faivus’ role was strictly ministerial. In 2007 or 2008, the Forward switched from having its 401(k) administered by ADP to having a 401(k) administered by the CWA. T257. Faivus had no role in making that decision. T258. Once the decision was made, Faivus was told to arrange for the transfer of monies from ADP to CWA and carried that role out. T258. Today, her role in connection with the 401(k) is to prepare a monthly report on the amount of contributions, which she provides to the Forward’s Comptroller. T259.

The Forward’s claim that Faivus was involved in interpreting the collective bargaining agreement similarly is simply inaccurate. Rather, Faivus’ role as an administrator is to follow and apply the contracts; and inform management of its contents and advise management as to its obligations under the contracts. T260-261, 263-264. Simply reading and applying contract language does not turn Faivus into a confidential employee.

Faivus’ role in connection with the Forward’s selection of its insurance coverage is narrow and limited. Faivus testified that “she has no role” in selecting the Forward’s current vision insurance policy. T254. Indeed, although Heiser testified that Faivus selected the current vision policy, Faivus flatly contradicted that testimony, T255. Faivus did not select the Forward’s medical insurance policy, T255. She did not select the Forward’s life insurance policy, T255. She did not select the Forward’s dental insurance policy, T255. She testified that Norich and “maybe” the Board decided the types of insurance the Forward had. T255. Indeed, the April 2011 e-mail exchange

relating to the Forward's disability policy, P1, shows that while Faivus gathered information, the ultimate decision on selecting the policy was made by Barry Surman, the Associate Publisher. P1.

In a further attempt to overstate Faivus' role, the Forward asserts that "Faivus is responsible for administering the Union benefit plans . . . . [and] . . . keeps track of employee vacation, sick and holiday time, and uses the Union contract to determine entitlements." RR. 8. Faivus has no role in selecting the Forward's benefit plans. T254-255. She tells new employees "when their benefits start," and gives them necessary forms to fill out in connection with their benefits. T253. Indeed, she does not even explain benefits to new hires. T282. Faivus does not determine the length of an employees' vacation: that is determined by the employee manual. T265. In some instances she tracks employee vacation time, and in others that is done by the employees manager. T265. She does not determine how much sick leave employees are entitled to – that is found in the employee manual. Similarly, her only role in connection with tracking sick time is to summarize reports that she receives from the various departments. T266. This ministerial role does not transform her into a confidential employee.

The Forward claims that Faivus is "involved in setting labor relations policy and resolving grievances." RR, 8. There is no record evidence that Faivus is involved with "setting labor relations policy." To the contrary, the record evidence shows that Faivus has no authority in this regard. She doesn't discuss the employee manual with new hires. T253. She had no role in selecting the Forward's insurance policies. T254-255. She had no role in selecting the Forward's 401(k) plan. T258. She had no role in

setting the employer match for the 401(k) plan. T259. She's never sat at the table for the Forward in negotiations and never been part of away from the table meetings when negotiation strategy was discussed. T259. She doesn't determine how much vacation time employees receive. T265. She doesn't decide how much sick time an employee receives. T266. She doesn't decide how many holidays an employee receives. T266. In addition, there is no evidence that Faivus is involved in resolving grievances, only that the Forward sent her a form that was the product of a settlement agreement to review. R352-353. There is no evidence that Faivus has ever attended a grievance meeting, represented management in an arbitration, or otherwise been involved in resolving grievances.

3. FAIVUS' "HUMAN RESOURCES DUTIES" DO NOT MAKE HER A CONFIDENTIAL EMPLOYEE

The Forward argues that Faivus should be excluded in part because "she has extensive human resources duties at the Forward." RR 10. However, this vastly overstates her duties in this regard. Faivus explained:

I think I am the Benefits Administrator. But I think Human Resources would extend to duties that I don't have. I don't have any position for hiring, firing, disciplining employees. When employees are hired, I haven't done any background checks. No one has ever asked me to do anything like that. I'm not involved with any point of negotiation. . . . I don't negotiate. I'm not involved in contracts. I'm not making decisions. I don't see that I would be like Human Resources.

T252. Prior to the hearing, no one from Forward management ever told Faivus that she was the Forward's Human Resource Department. T252.

Faivus has only limited duties in connection with newly hired employees. She sets them up for payroll and gives them a security card. She does not orient them. She tells them when their benefits start, and gives them benefit forms to fill out. Although she provides them the employee manual, she does not discuss it with them. T253.

The Forward argues that Faivus should be excluded because “the handbook . . . instructs employees to direct questions regarding employee benefits to her.” RR, 8. However, she testified that she does not have that role, and, that the Forward’s insurance broker handles those types of issues. T253-254.

The Forward also argues that “ Faivus also is involved in reviewing and giving feedback about the Forward’s employee policies. . . . For instance, Faivus was one of the select management team members asked to give feedback about the Forward’s draft employee handbook.” RR 10. The Forward drastically overstates the significance of this point. Faivus gave the following testimony concerning her role in providing feedback to the Forward’s draft employee handbook:

Q. Let me ask you did you have any role in formulating the handbook? A. No. Q. Were they ever shown to you? A. When they were passed around for all employees for comments I guess I got to make comments.

T303-304. After Faivus was shown an email, E9, reflecting that the employee handbook was only sent around to a select group of employees, she was asked whether that refreshed “your recollection as to whether or not you had any input into the employee guidelines?” Her answer was revealing: “I guess I gave feedback then.”

T304. Faivus’ testimony in this regard simply does not establish that she had any

meaningful role in connection with creation of the employee handbook, and cannot be a basis for concluding that she is a confidential employee.

4. FAIVUS' ROLE IN CONNECTION WITH THE FORWARD'S FINANCES DO NOT MAKE HER A CONFIDENTIAL EMPLOYEE

The Forward points to Faivus' role "in the budget process" in support of its claim that she is a confidential employee. RR 10-11. The record is clear that Faivus is not involved in the budget process, other than by supplying information. T195-196, 275

Regarding finances, on a monthly basis, the Forward receives cash from an investment account. Faivus explained her role in that process: "every month, I do a very rough estimate about what our needs are for the following month." T269. That "rough estimate" is based on "how many payrolls we have and basically a weekly number for operations." T270. She gets the "weekly number for operations," "based on what we been requesting for the last few years." T270.

Once Faivus makes that "rough estimate," she does not simply send it to the investment firm. Instead, she gives the estimate to Norich for his approval. T270. Thus, in this regard, Faivus has no authority – the decision making authority is vested with Norich. In addition, her calculation is simple – she looks at the number of payrolls in a particular month, looks at the numbers used for operating expenses in the past few years, and, making those simple calculations, prepares a chart for Norich's approval. T269-270. The simple ministerial work does not transform her into a confidential employee.

The Forward also points to Faivus' role in connection with the Forward's petty cash, credit cards, and expense requests to support its claim that she is a confidential

employee. RR 11. However, Faivus has a limited role concerning petty cash, credit cards, and expense requests. She gives out petty cash -- the maximum amount of which is fifty dollars -- based on a system established by management not her. T272-273.

Faivus also gave testimony concerning her duties with regard to the Forward's credit card. She explains that:

I keep the credit card because we need it locked up in that little lock box. So if somebody needs to charge something for the company, they can come to me and get the card. . . . The system as it is and the way it was explained is the employee needs to get a purchase order anytime they use the credit card. So I told them they have to get a purchase order. But they don't really have to show me the purchase order when they get the card. I just inform them they have to get a purchase order.

T273. Again, Faivus did not establish this rule: she was advised of it by Virginia Lawson. T274. Purchase orders are issued by the Accounts Payable Clerk, Rhonda Anderson, and Faivus has nothing to do with issuing purchase orders. T274.

An employee's access to non-labor related confidential information does not make that employee a confidential employee. Instead, the information to which the employee has access must be related to labor relations. NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 189-190 (1981). The financial information that Faivus has access to -- relating to the Forward's monthly cash needs, and the management of petty cash and credit cards -- has no connection with labor relations. Thus, as a matter of law, Faivus' role in this regard cannot support a finding that she is a confidential employee.

5. THE ORDER DID NOT DEPART FROM BOARD PRECEDENT

The Order did not depart from Board precedent. The Regional Director followed Board law and applied the “labor nexus” test as approved by the Court in NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981). All decisions the Director cited and relied upon are good law. Order 10-11. As shown from the discussion above, the Regional Director correctly summarized the relevant factual record and correctly concluded that the Employer had not met its burden to establish the benefits administrator was a confidential employee.

The Employer claims that the Regional Director erred by ignoring factual findings made in his DDE that do not appear in the Order. R. 3, n. 3; p. 6-7. This is incorrect. The Order makes the same factual findings regarding Faivus’ role in preparing spreadsheets showings costs of salary and health plans used in collective bargaining as did the DDE. See Order at 7; DDE at 9-10. The Regional Director reached the same result in both decisions: that the Employer failed to establish, and that the Record did not support, a conclusion that the benefits administrator is a confidential position. The Employer points to the omission of the sentence, “[Faivus] participation involved knowledge of confidential information.” RR 7. However, to the extent that this omission has significance, the Order is correct because there is scant record evidence that Faivus’ participation involved access to confidential information that would render her excluded from the unit under Board law. As discussed above, the evidence is limited to a single email and an unclear role in the forwarding of proposals to the Guild. See *supra* at 6-7.

The Employer also claims that the Order ignored record evidence of Faivus' role with Forward principals. RR 12 n.5. However, neither Norich nor Surman testified to their relationship with Faivus or what they relied upon her for in the course of their managerial duties or in collective bargaining. Heiser's testimony demonstrated overwhelmingly that Faivus is a conduit for information. Heiser's attempts to paint Faivus as designing policy were contradicted by Faivus, for example concerning the selection of insurance policies. T255. The vast majority of the documentary evidence that the Employer presented in support of their case was several years old and involved compiling information. See E 3-10, 14. The law is clear that serving as a conduit for confidential information, does not transform a position into a confidential one. See Bakersfield Californian, 316 NLRB 1211, 1212 (1995) (not confidential employee if aware of information in the process of disclosing it to union). Thus, the record is insufficient to meet the labor nexus test.

Contrary to the Employer's position, the Regional Director correctly distinguished NLRB v. Meenan Oil Co., 139 F.3d 311 (2d Cir. 1998). Order 12. In Meenan, the court found both an executive secretary and a payroll/ personnel administrator should be excluded from the unit as confidential employees because both had access to confidential portions of Meenan's annual profit plan that forecast wage and salaries of employees and supervisors. Id. at 314. 315-116. The court found that the information in the hands of the union would give the union "significant strategic advantage in negotiations." Id. at 318. Here, the benefits administrator has no access to the Employer's overall budget and profit plans, as she is not part of the management team; nor is she privy to projections regarding salaries of managers and supervisors. The

only record evidence that Faivus saw confidential information possibly relevant to collective bargaining concerned plan options from the insurance broker before they were “whittled down” and forwarded to the Guild. See supra at 6. There is no reason to believe that Faivus on a regular basis possessed material that could affect negotiations. Unlike the employees in Meenan, it simply is not part of her job.

In arguing that the Order “failed to properly apply well-established Board precedent,” the Forward cites Associated Day Care Services, 269 NLRB 178 (1984). RR 12. However, that case does not support the Forward’s claim. There, the Board found that certain employees were confidential because they were “expected to play a role in the investigation of grievances which will affect the decisions made by management on the merits of the grievance,” and because those employees “are expected to have regular access to, and on occasion to type memoranda concerning management proposals for collective bargaining before these proposals are presented to the Union; [and] . . . regularly see the minutes of weekly management meetings at which management proposals for collective bargaining will be discussed.” 269 NLRB at 181. Faivus has no role in investigating grievances. With the limited exception of typing charts on occasion, she has no access to memoranda concerning management proposals. In addition, she has no access to minutes of management meetings where proposals are discussed.

The Forward also cites E & L Transport, 327 NLRB 408 (1998) in support of its position. RR 13. Again, the Forward is wrong. In E & L, the issue was the status of a particular employee. The employee at issue typed a memorandum containing all of the company’s proposed changes to a collective bargaining agreement, and did so six

months before the expiration of that agreement. In addition, she typed a letter from one manager to a higher manager “regarding proposed cutbacks and layoffs for the remainder of 1990 at the Chicago Terminal.” 327 NLRB at 387. The employee at issue “prepared suspension and discharge notices . . . and interoffice memoranda concerning labor relations policies.” Id. The employee at issue maintained personnel files of employees represented by the Union, “handled correspondence between [manager] and the Union, assisted in processing grievances . . . and prepared documentation of the processing of the grievances at the local level hearings [and ] . . . prepared numerous labor related documents at [managers] directions, including correspondence from [manager] to employees and management personnel . . . and to the Union regarding labor and policy matters; correspondence concerning company policy with upper management; disciplinary notices and correspondence concerning discipline of drivers; documentation of grievances and grievance proceedings; and other management and labor related matters.” 327 NLRB at 387. Faivus engaged in none of these activities on behalf of the Forward.

In sum, the Order is not a departure from Board law; the Request for Review should be denied.

6. REMAND FOR FACT FINDING NECESSARY SHOULD THE BOARD GRANT REVIEW

The hearing in this matter was conducted in May 2011, 14 months ago. The parties agreed to process the UC petition based on that record at the time the petition was filed in September 2011. Since that time, the Employer has changed the duties of Faivus. She has not assisted in preparation of materials for the Guild contract

negotiations for the unit certified in 2-RC-023593 and has largely been cut out from work that involves the Guild. The Employer has also reduced her responsibilities and by-passed her for work that she had previously done. In short, the benefits administrator no longer performs key duties at issue in this petition. Thus, in the event that the Board seeks to grant review in this matter, we respectfully request that the case be remanded to the Region for a fact finding hearing as to the current duties of the benefits administrator. We are prepared to make an offer of proof in lieu of a hearing.

### CONCLUSION

The Order correctly found that Faivus was not a confidential employee. The Request for Review should be denied. In the alternative, the matter should be remanded for hearing on the issue of the current job duties of the benefits administrator.

Dated: July 10, 2012  
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing brief of Petitioner Newspaper Guild of New York, CWA Local 31003's Opposition to the Employer's Request for Review of the Regional Director's Decision and Order Clarifying Unit to be served by e-mail on:

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on July 10, 2012

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