

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

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In the Matter of:

MARKFEST, INC., a/k/a SKOGEN'S  
FESTIVAL FOODS

Employer,

and

Case No. 30-RD-1510

PETER ANTHONY KAISER,  
an individual,

Petitioner,

and

UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 1473,

Union.

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**EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT  
AND RECOMMENDATION TO THE BOARD ON  
DETERMINATIVE CHALLENGED BALLOTS**

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*Attorneys for Employer Markfest,  
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NOW COMES the Employer, Markfest, Inc. a/k/a Skogen's Festival Foods, by its attorneys, Melli Law, S.C., and Excepts to Hearing Officer's Report And Recommendations To The Board On Determinative Challenged Ballots issued herein on August 7, 2009 as follows:

1. Page 5, Lines 21-22 —The Hearing Officer's finding that when creating the *Excelsior* list, Mr. Andy Cveykus relied on a list of regular part-time employees on a leave of absence during the payroll eligibility period to attend college. The finding is contrary to the record evidence. (Tr. at 52:6-19<sup>1</sup>)

2. Page 6, Line 9 – Page 7, Line 1 — The Hearing Officer's finding that on July 21, 2008, following her graduation from High School, Heather Kulibert transferred to being a casual employee rather than becoming a regular part-time employee which would have required her to join the Union. The finding is contrary to the record evidence. (Tr. at 175, Er. Ex. 8, p. 1 (showing hours worked by Kulibert))

3. Page 6, Lines 2-3 — The Hearing Officer's finding that unlike other employees leaving for college in the fall of 2008, Heather Kulibert was not placed on a leave of absence. This finding is contrary to the record evidence. (Tr. at 66:18-19)

4. Page 9, Lines 2-3 — The Hearing Officer's finding that Cveykus stated to Union representative Ceil Prickett that Kulibert was not eligible to vote because she was a casual employee. This finding is contrary to the record evidence. (Tr. at 72:14-19)

5. Page 9, Footnote 9 — The Hearing Officer's finding that the Employer contended that college students on a leave of absence to attend college were eligible to vote because they

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<sup>1</sup> References to the Transcript of the July 16, 2009 hearing are identified as "Tr." followed by the page and line number. References to the Employer's exhibits are identified as "Er Ex." Followed by the exhibit number and page number. References to the Union's exhibits are identified as "Un Ex." Followed by the exhibit number and page number.

were all included on the *Excelsior* list, without objection from the Union. This finding misstates the Employer's position. (Employer's Post-Hearing Brief dated July 28, 2009 at pp. 17-20 )

6. Page 9, Lines 18-20 — The Hearing Officer's conclusion that the Union has met its burden to establish that Heather Kulibert ineligible to vote in the decertification election and recommendation that the challenge to Kulibert's ballot should be sustained. The conclusion and recommendation to the Board is not supported by the record evidence, is contrary to the record evidence and is contrary to law. (Tr. at 66:18-19; Er. Ex. 8 (showing hours worked by Kulibert and showing Kulibert's status as an employee on leave))

7. Page 11, Lines 3-4 — The Hearing Officer's finding that a discussion will occur between the employee and a manager before an employee becomes a casual employee. The finding is not supported by the record evidence and is contrary to the record evidence. (Tr. at 155:3 – 156:10)

8. Page 12, Footnote 25 — The Hearing Officer's conclusion that the Board's decision in *Romac Containers*, 190 N.L.R.B. 231 (1971) does not apply to this case because *Romac* did not involve a specific exclusion from the unit description. The conclusion is contrary to law.

9. Page 12, Lines 3-4 — The Hearing Officer's conclusion that Kulibert is not a regular part-time employee and that she is a casual employee excluded from the bargaining unit. The finding is not supported by the record evidence, is contrary to the record evidence and is contrary to law. (Tr. at 66:18-19; Er. Ex. 8 (showing hours worked by Kulibert and showing Kulibert's status as an employee on leave))

10. Page 12, Lines 7-8 — The Hearing Officer's finding that Kulibert's hours support her classification as a casual employee. The finding is not supported by the record evidence, is

contrary to the record evidence and is contrary to law. (Tr. at 66:18-19; Er. Ex. 8 (showing hours worked by Kulibert and showing Kulibert's status as an employee on leave))

11. Page 12, Lines 8-9 — The Hearing Officer's finding that Kulibert averaged less than 12 hours per week in any rolling 12-week period between July 21, 2008 and the date of the election. The finding is not supported by the record evidence, is contrary to the record evidence and is contrary to law. (Tr. at 66:18-19; Er. Ex. 8 (showing hours worked by Kulibert and showing Kulibert's status as an employee on leave))

12. Pages 12, Line 13 – Page 13, Line 1 — The Hearing Officer's finding that there is no evidence that, with respect to employees that have been classified in the employer's records as "casual," the practice of the parties has been to omit weeks that a college student performed no work when determining an employee's 12-week average hours. This finding is contrary to the record evidence. (Tr. at 73:12-22)

13. Page 13, Lines 4 – 7 — The Hearing Officer's statement that the Employer contends that Heather Kulibert was improperly classified as a casual employee on July 21, 2008 because she averaged more than 12 hours a week prior to July 21, 2008. This statement misstates the Employer's position, which is that Kulibert should have been converted to unit status when her hours average exceeded 12 hours per week beginning in July, 2008. (Employer's Post-Hearing Brief dated July 28, 2009 at pp. 17-20 )

14. Page 14, Footnote 29 — The Hearing Officer's failure to exclude weeks during which Kulibert was on a leave of absence from the calculation of her average hours. The Hearing Officer's method of calculating average hours is contrary to law and is contrary to the historical practice of the parties as established by the record evidence. (Tr. at 73:12-22)

15. Page 14, Lines 4-8 — The Hearing Officer’s finding that Heather Kulibert’s “election” to be classified as a casual employee and that her interest in being classified as a regular part-time employee is relevant to her voting eligibility. This finding is contrary to law.

16. Page 14, Lines 8-10 — The Hearing Officer’s finding that there is no evidence that Heather Kulibert no longer qualified as a casual employee after she was classified on the employer’s records as a casual employee. This finding is not supported by the record evidence and is contrary to the record evidence. (Tr. at 66:18-19; Er. Ex. 8 (showing hours worked by Kulibert and showing Kulibert’s status as an employee on leave))

17. The Hearing Officer’s failure to find that Heather Kulibert averaged over 12 hours per week of work beginning with hours worked during the week of July 21, 2008. (Tr. at 66:18-19; Er. Ex. 8 (showing hours worked by Kulibert and showing Kulibert’s status as an employee on leave))

18. The Hearing Officer’s failure to find that as of the eligibility and election dates, when Heather Kulibert was not on a leave of absence to attend college, she worked sufficient hours to meet the election eligibility criteria, as did other indisputably eligible college students. (Er. Exs. 8, 10-18)

Dated this 21<sup>st</sup> day of August, 2009



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**CERTIFICATE OF SERVICE**

I also hereby certify that on August 21, 2009, pursuant to Section 102.114(i) of the Board's Rules and Regulations, copies of the foregoing electronically-filed Employer's Exceptions to the Hearing Officer's Report and Recommendation to the Board on Determinative Challenged Ballots was served via electronic mail, as identified below.

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