

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

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

Employer

and

PETER ANTHONY KAISER

Case No. 30-RD-1510

Petitioner

and

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 1473

Union

**UNION'S OPPOSITION TO EMPLOYER'S EXCEPTIONS
TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS**

United Food & Commercial Workers Union, Local 1473 (the "Union" or "Local 1473"), by its attorneys, Sweet and Associates, LLC, files this Opposition to the Employer's Exceptions and Brief filed with the National Labor Relations Board (the "Board") on August 21¹ regarding the Hearing Officer's Report and Recommendations of August 7 in the above matter. The Union requests that the Board reject the Employer's exceptions and adopt the Hearing Officer's Report and Recommendations.

¹ All dates are 2009 unless otherwise indicated.

BACKGROUND

As noted in the August 7 Hearing Officer's Report and Recommendations to the Board on Determinative Challenged Ballots² this matter had its genesis on March 4 when Peter Kaiser ("Kaiser" or "Petitioner") filed a petition with the Board seeking to decertify the Union as the exclusive collective bargaining representative of the employees of Skogen's Festival Foods located in Marshfield, Wisconsin. The procedural history and background of the challenged ballots is set forth in the Report and Recommendations at pages 1-2 and it appears the Employer does not dispute that history.

The Hearing Officer's Report and Recommendations contain a detailed summary of the facts and a recommendation that the challenges to the ballots of Morgan Chaffin and Heather Kulibert be sustained.³ The Hearing Officer's Report and Recommendation stands on its own and accurately applies the law to the facts as developed at the hearing of July 16. This brief provides additional considerations which the Board may wish to examine in considering whether to adopt the Hearing Officer's Report and Recommendations.

FACTS

Heather Kulibert was hired in April 2006 when she was a seventeen year old a high school student. (Union Ex. 5) Kulibert worked during several weeks in 2008; then did not work for about four months; then worked a few weeks in the beginning of 2009; then worked again for two weeks; then did not work again until weeks after the Decision and Direction of Election was issued on April 23. (Union Ex. 12) Kulibert worked a total of about 55 hours in the week before and the week of the election (held on May 22). (Union Ex. 12) The records show that in January 2009 Kulibert filled out a request and was granted "a leave of absence" in order "to

² Citations to the Report and Recommendations will be "HORR" followed by the appropriate page number.

³ As noted by the Hearing Officer, there was no dispute concerning the ballot of Morgan Chaffin as all parties stipulated that she was ineligible to vote and that the challenge to her ballot should be sustained. HORR 2.

attend school” (Union Ex. 6) but there is no document showing that she requested or was granted any formal leave of absence for the period of late August 2008 through late December 2008. The Employer did not know where Kulibert attended college but she was “off to college” during the fall semester of 2008 and again “off to college” during the spring semester of 2009. (Tr. 177) The Employer considered Kulibert to be a “casual employee” when she went “off to college” in the fall of 2008. (Tr. 184)

ARGUMENT

The questions of whether or not Heather Kulibert was on a leave of absence and whether or not the Employer in good faith prepared the voter eligibility list submitted to the Region are irrelevant to the ultimate question of whether Kulibert was a unit employee during the payroll period ending April 19 pursuant to the Direction of Election issued by the Regional Director or under Board policy.⁴ If, as of the payroll period ending April 19, Kulibert was a “casual employee” as defined in the Direction of Election or under Board policy, then the fact that she might have been on an approved leave of absence is not relevant to the question of her eligibility to vote.⁵ The Union asserts that no matter what formula is used when determining the number of hours she worked per week in evaluating Kulibert’s status, she must be found to be excluded from the unit and the challenge to her ballot should be sustained.

⁴ To be eligible to vote in a Board election, the employee must be in the appropriate unit (1) on the established eligibility date, which is normally during the payroll period immediately preceding the date of the direction of election, or election agreement, and (2) in employee status on the date of the election. See, for example, *Plymouth Towing Co.*, 178 NLRB 651 (1969); *Greenspan Engraving Corp.*, 137 NLRB 1308 (1962); *Gulf States Asphalt Co.*, 106 NLRB 1212 (1953); *Reade Mfg. Co.*, 100 NLRB 87 (1951); *Bill Heath, Inc.*, 89 NLRB 1555 (1949); *Macy’s Missouri-Kansas Division v. NLRB*, 389 F.2d 835 (8th Cir. 1968); and *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993).

⁵ It would seem there are only two types of leaves of absence from work: an approved leave of absence and an unapproved leave of absence. In both situations the employee clearly is “absent” from work; the only consequence pigeon-holing a leave of absence into one or the other is whether the absence is considered some sort of “violation” of the employer’s rules or policies or not.

- A. *Kulibert was a Casual Employee as of the Payroll Period Ending April 19 within the Meaning of that Phrase as Used in the Decision and Direction of Election and as a Casual Employee Kulibert was Excluded from the Unit.*

The unit in which the Regional Director directed an election was a wall to wall unit that excluded certain categories of employees. One category excluded was casual employees, defined by the parties and approved by the Regional Director, as those employees working fewer than 12 hours a week. It should be apparent, despite any of the Employer's assertions to the contrary, that the 12 hours worked per week must be an average of hours worked over a period of time. The reason this must be so is apparent from the records relating to Kulibert: there were some weeks in which she worked more than 12 hours and other weeks in which she worked fewer than 12 hours. If the determination of whether she "worked fewer than 12 hours a week" focused on a given week instead of on an average, then she would come in and out of the unit which would seem administratively difficult for both the Union and the Employer and raise the specter that some weeks she would be covered by the collective bargaining agreement while in others she would not and in some weeks the Union would owe her a duty of fair representation while in other weeks it would not.

The evidence demonstrates that during the period July 2008 through May 2009 the average hours worked per week by Kulibert fell far below 12.⁶ The average hours worked by Kulibert (including the weeks after the issuance of the Decision and Direction of Election) are fewer than 5; if one uses the payroll period of April 19 as the cut-off date for determining her average hours worked per week, the number falls below 3. Indeed, Kulibert worked no hours during the calendar quarter preceding the voter eligibility date. If the focus is the average number of hours worked in any given calendar quarter, then averages are as follows:

⁶ See Appendix derived from Union Exhibit 12 summarizing the weeks and hours Kulibert worked between July 2008 and May 2009.

Quarter 3 2008:	Fewer than 7 hours per week
Quarter 4 2008:	About 2 hours per week
Quarter 1 2009	About 2 hours per week
Quarter 2 2009	Fewer than 2 hours per week (for the period through April 19)

Thus, no matter what period of time one uses as the denominator for computing the average number of hours worked per week by Kulibert, her average hours fall within the parameter for finding that she is a casual employee as defined by the parties and in the Direction of Election and should therefore be excluded from the unit and therefore found ineligible to vote in the election.

B. The Employer Consistently Considered Kulibert to be a Casual Employee and Never Reported her Employment Status to the Union or Listed Her Name or Information about Her in any Document Provided to the Union or to the Board until after the Election.

The Employer originally hired Kulibert as a cashier when she was in high school in April 2006. She received her 90-day review in July 2007. In November 2007 she was transferred into the Grocery department. (Union Ex. 10) Apparently Kulibert enjoyed such a privileged and secretive status as a casual employee that the Employer did not notify the Union when Kulibert was hired, when she completed her probationary period, when she transferred to the grocery department, or that she ever existed as an employee at the store before the day of the election. Indeed it was only after the election that the Employer decided that it should have included Kulibert's name on the voter eligibility list because she was on a leave of absence between January and May.

That Kulibert was considered in some sort of special status that was not "regular part-time" in nature is demonstrated by the following:

- The Employer classified Kulibert to be a casual employee on July 28, 2008 (Union Ex. 10);

- The Employer did not list Kulibert as a unit employee in a list of all unit employees provided to the Union on or about December 22, 2008 (Union Ex. 13)⁷;
- The Employer did not list Kulibert on any of the seniority reports it provided to the Union between July 2007 and July 1, 2009. (Union Exs. 15-33);
- The Employer considered Kulibert to be a casual employee for the week beginning March 9, 2009 (Employer Ex. 9, page 1);
- The Employer did not include Kulibert’s name in the list of all individuals working at the Marshfield store (including managers and casual employees) prepared on April 3, 2009 in response to a subpoena issued by the Union (Union Ex. 3);
- The Employer did not list Kulibert’s name on the Voter Eligibility list submitted to the Regional Office on or about April 30; and,
- The Employer did not list Kulibert or information about her in the extensive materials showing the hours worked by unit employees the Employer provided to the Union on or about May 15, 2009 in response to the Union’s request for information about unit employees for bargaining. (Union Ex. 14; Tr. 192)

The total absence of any information about Kulibert provided by the Employer as being in the unit before the election should result in the conclusion that the Employer never considered her to be a unit employee until after she cast a ballot in the election. The attempts by the Employer to now claim “mistake” in how the Employer classified her have been appropriately rejected by the Hearing Officer in light of the Employer’s consistent treatment of Kulibert as a casual employee since July 28, 2008.

C. Kulibert’s Employment was so Intermittent and so Sporadic that She Should not be Considered a Regular Part-time Employee in the Unit.

The Union also asserts that Kulibert is not a regular part-time employee who should be included in the unit and therefore eligible to vote. The Board generally excludes summer

⁷ The Employer asserts that an employee may not choose whether to be placed in a unit or not. That is not the issue. Here, the Employer may classify certain workers as “casual” and thus outside the unit. Any employee may request anything of his/her employer. The Employer here had the power to make the change and it could have granted or denied the request consistent with the terms of the collective bargaining agreement. See Sec 2.1 of collective bargaining agreement (Employer Ex. 2 at page 1). Moreover, it is precisely the Employer’s act of classifying her as a “casual” employee under the collective bargaining agreement and the uncertainty of Kulibert’s future continued employment that justifies a conclusion that she was a casual employee as of July 2008. See, HERR footnote 12 at page 7.

employees from the appropriate unit; such employees nonetheless are deemed eligible to vote if, upon returning to school, their employment evidences regular part-time status. This should be distinguished from “a pattern of intermittent, sporadic employment.” *Crest Wine & Spirits, Ltd.*, 168 NLRB 754 (1968). Citing *Crest Wine and Spirits*, the Board in *Davis Supermarkets, Inc.* excluded five college students from a unit because they primarily worked during summer vacation and holiday periods, just as it appears Kulibert does. The Board noted that it would exclude such college students unless they continue to work on a regular part-time basis after they return to school. *Davis Supermakets, Inc.*, 306 NLRB 426, 428 (1992), *enf’d* 2 F. 3d 1162, 1173 (DC Cir. 1993), *cert den.* 511 U.S. 1003 (1994);⁸ *see also, Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993) (finding that college students, like Kulibert, who were expected to work only during college break periods, were casual, irregular part-time employees excluded from the unit).

Saying that Kulibert was excused from work for extended and repeated periods of time does not address the question of whether Kulibert should be included in the unit. To state that Kulibert was on a leave of absence between January and May 2009 only means that she was not AWOL⁹ during the period of time in question. The fact that Kulibert was formally “on a leave of absence” for her second extended period of non-work does not convert her from an irregular-time part employee to a regular part-time employee. The fact that Kulibert was “on leave” does not answer the question of whether the minimal and sporadic times she did work (apparently when she was not “off to college” and when college was not in session and whenever she

⁸ The unit in *Davis Supermarkets* was, “All full-time and regular part-time employees employed by Davis Supermarkets, Inc. at its Hempfield Township, Pennsylvania, location; excluding confidential employees, students employed pursuant to cooperative education programs and guards, professional employees and supervisors as defined in the Act.” 306 NLRB 426, 445.

⁹ “Absent without Leave.”

showed up) renders her an irregular part-time employee who does not share a community of interest with employees in the unit. Here, Kulibert's employment was so intermittent and sporadic that she should not be deemed eligible to vote.¹⁰

The standard frequently used by the Board to determine the regularity of part-time employment is to examine whether the employee worked an average of 4 or more hours a week in the quarter preceding the eligibility date. *Davidson-Paxon Company*, 185 NLRB 21 (1970). Because Kulibert clearly did not average 4 hours per week during the quarter preceding the eligibility date (she averaged zero hours during the quarter, i.e. 13 weeks, immediately before the eligibility date), she should not be considered a unit employee eligible to vote.

It should be obvious that Kulibert is not a "full time employee" as she never once worked 40 hours per week in those weeks she actually worked. She was thus a part-time employee. Under Board policy, regular part-time employees are included in a unit with full-time employees whenever part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing community of interest with the remainder of the unit. *Fleming Foods*, 313 NLRB 948 (1994). The test for determining whether an employee is a regular part-time employee involves an analysis of such factors as the regularity and continuity of employment, length of employment, degree of similarity of work duties performed by such employee in relation to those performed by bargaining unit employees, similarity of wages and benefits, and other factors establishing whether such employee enjoys a community of interest with bargaining unit employees. *Modern Food Market*, 246 NLRB 885 (1979). It appears that

¹⁰ The Board should not focus on whether Kulibert was on a leave of absence during the payroll period ending April 19 because she may have been formally classified as being on a "LOA" at that time but at other times she was simply absent from work with no notation as to whether her leave was excused. The Board should instead focus on the regularity of her employment in determining whether to adopt the Hearing Officer's conclusion that Kulibert was ineligible to vote in the election.

Kulibert, who was a college student after the summer of 2008, was employed only for part of the summer of 2008 and again during part of the semester break in December 2008-January 2009.

Like the full-time student in *Sandy's Stores, Inc.*, 163 NLRB 728, 730 (1967) who only worked in the summer and then returned to school full time and did not continue his employment after resuming school on a full-time basis, Kulibert should be excluded from the unit.

The Employer asserts that *Pat's Blue Ribbons and Trophies*, 286 NLRB 918 (1987) and *Romac Containers, Inc.*, 190 NLRB 238 (1971) require that the Board overrule the Hearing Officer's recommendation regarding the ballot of Kulibert. At issue in *Pat's Blue Ribbons, inter alia*, was the eligibility of Judy Matthews, a regular part-time employee who went on maternity leave and then began working from her home. The Board reviewed the hours Matthews actually worked in the calendar quarter before the election cutoff date. The Board also noted the number of hours Matthews worked in the months immediately before her leave began. The Board noted that Matthews worked 43 hours in the month before the eligibility cutoff date. The Board also noted that Matthews worked substantial hours in the months of December 1985 and January 1986 (the month her leave began); she worked 140 and 108 in those months respectively. The Board found that Matthews' preleave and reemployment hours and her compensation established that her tenure, regularity, and continuity of employment and similarity of wages and working conditions rendered Matthews a regular part-time employee. Here, Kulibert worked no hours in the calendar quarter before the election eligibility date. Kulibert worked only about 18 hours in December 2008 and about 47 hours in January 2009. The factors identified by the Hearing Officer and those outlined by the Union above demonstrate that the Kulibert's tenure, regularity, continuity of employment, and the dissimilarity of treatment by the Employer of Kulibert

compared to all other employees whether college students or not¹¹ does not satisfy the criteria for concluding that she was a regular part-time employee as of the voter eligibility date. Kulibert should not be found to be a regular part-time employee and Kulibert should be deemed ineligible to vote.

A little over a decade after the issuance of *Pat's Blue Ribbons* by the Board, an Administrative Law Judge cited it in the context of deciding issues surrounding a union organizing campaign and bargaining unit issues in light of an employer's unfair labor practices and the appropriateness of the issuance of a *Gissel*¹² bargaining order. In particular, among the many issues before the Administrative Law Judge was the status of two individuals who may or may not have been college students (the record was apparently unclear in this regard) and whether they should be considered regular part-time employees or not. *Mercedes Benz of Orland Park*, 333 NLRB 1017, 1033 (2001). The ALJ noted:

For example, student-status, per se, does not necessarily preclude employees from being included in noneducational institution bargaining units. However, where a student works only during school year and summer breaks, it is well settled that such employment leaves that student a "casual, irregular part-time employee[] excluded from the unit." (Citation omitted.) *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993). Accord: *Davis Supermarkets v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993); *NLRB v. E. V. Williams Co.*, 432 F.2d 557 557- 558 (4th Cir. 1970), cert. denied 401 U.S. 937 (1971).

The Administrative Law Judge then examined the status of two particular individuals (Dean and Lounsbury) who, as noted, may have been students. The Administrative Law Judge noted, "[Whether Lounsbury ceased working for the employer and then was rehired for 1-week periods or whether Lounsbury was a student working for the employer during summer and school-year breaks, Lounsbury] lacked a community of interest with unit employees as of the dates on which

¹¹ Of particular significance is the Employer's failure to even disclose the fact of Kulibert's employment to the Union or to the Board before her attempt to vote in the election.

¹² *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

the [u]nion filed its petition and requested recognition.” *Id.* The Administrative Law Judge then applied the same analysis and came to the same conclusion concerning Dean as he had concerning Lounsbury. *Id.* Thus, *Pat’s Blue Ribbons* does not undermine the Board’s traditional tests for ascertaining whether college students are to be considered regular part-time employees and the Board will examine whether they work only during school-year breaks and summer breaks. Since Kulibert only worked on school-year breaks, on summer breaks after her graduation, and after she “went off to college,” she should not be considered a “regular part-time employee” and the Board should therefore adopt the Hearing Officer’s recommendation that she was not eligible to vote in the election.

In *Romac* the Board held that college students who were summer employees, who were covered by a union security provision, and who had joined the union were eligible to vote in a deauthorization election. This matter, of course, does not involve a deauthorization petition. In any event, Kulibert had not joined the Union, the Employer had excluded her from the unit as it was allowed to do under the collective bargaining agreement in July 2008, and the Employer had gone so far as to hide the very fact of Kulibert’s intermittent employment from the Union. Given the Employer’s classification and treatment of Kulibert, she did not share the same terms and working conditions as other employees and the Board should adopt the Hearing Officer’s recommendation that Kulibert be excluded from the unit as not being a regular part-time employee.

Kulibert was hired in April 2006 but since mid-2008 there has been no continuity or regularity to her employment. In fact, since graduating from high school and having her status changed from “high school” to “casual” by the Employer, Kulibert had many more periods of unemployment than employment. Before the election the Employer had never informed the Union of the duties performed by Kulibert or her rate of pay because the Employer never

considered her to be a unit employee. The Employer provided no information about even the existence of Kulibert to the Union until after she cast her ballot on May 22. Even then only some information about Kulibert was provided indirectly through the Regional Office during its investigation of the challenge to the ballot she cast. Indeed, the Employer omitted her name from the voter eligibility list submitted to the Region after the issuance of the Decision and Direction of Election. Clearly, Kulibert has not worked a substantial number of hours within any period of time prior to the eligibility date and the periods of employment are sporadic, depending apparently, on whenever she shows up and is available for assignments. This type of infrequent employment should lead to a finding that she is a “casual employee” or “irregular employee” under Board policy. Kulibert should thus be excluded from the unit and the challenge to her ballot should be sustained. *Royal Hearth Restaurant*, 153 NLRB 1331, 1333 (1965).

CONCLUSION

For the foregoing reasons, the Union requests that the Hearing Officer find and conclude and then recommend to the National Labor Relations Board that the challenge to the ballot of Heather Kulibert should be sustained, that a revised tally of ballots be issued and that, thereafter, the National Labor Relations Board issue the appropriate certification.

August 28, 2009

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APPENDIX
 MATRIX OF HOURS WORKED BY HEATHER KULIBERT
 FOR THE PERIOD JULY 1, 2008 THROUGH MAY 24, 2009

Week Ending	Hours worked
2008:	
July 6	12:39
July 13	0
July 20	31:40
July 27	20:00
August 3	15:13
August 10	0
August 17	5:26
August 24	0
August 31	0
September 7	0
September 14	0
September 21	0
September 28	0
October 5	0
October 12	0
October 19	0
October 26	0
November 2	0
November 9	0
November 16	0
November 23	0
November 30	0
December 7	0
December 14	0
December 21	0
December 28	17:59
2009	
January 4	26:57
January 11	20:07
January 18	0
January 25	0
February 1	0
February 8	0
February 15	0
February 22	0
March 1	0
March 8	0
March 15	0
March 22	0
March 29	0
April 5	0
April 12	0
April 19	0
April 26	0
May 3	0
May 10	0
May 17	19:43
May 24	35:00

STATEMENT OF SERVICE

I state that this day I electronically filed the Union's Opposition to Employer's Exceptions to Hearing Officer's Report and Recommendations to the National Labor Relations Board by e-mailing it to the National Labor Relations Board using the Board's electronic filing service and that I served each of the following persons by e-mail pursuant to Section 102.114(i) of the Board's Rules and Regulations:

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August 28, 2009

/s/ Mark A. Sweet