

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

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.

**EMPLOYER'S BRIEF TO THE NLRB IN SUPPORT OF EXCEPTIONS TO THE
HEARING OFFICER'S REPORT ON DETERMINATIVE CHALLENGED BALLOTS**

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I. INTRODUCTION

On August 7, 2009, the Hearing Officer in this matter issued a report to the Board recommending that it sustain a challenge to the ballot of a student employee who had recently completed a leave of absence and who worked the exact same times and similar hours as other students who were undeniably eligible to vote and also had been on leaves of absence. The Board should not adopt that report because it contains substantial legal and logical flaws. This case involves the question of whether Heather Kulibert, a college student, worked an average of 12 hours per week, which was the standard the parties agreed to for inclusion in the unit. In recommending that the Board sustain the challenge to Ms. Kulibert's ballot, the Hearing Officer did not follow, did not mention, and did not attempt to distinguish controlling Board law cited by Festival Foods, which requires work weeks during leaves of absences to be omitted when calculating an employee's average hours per week for determining whether the employee is a casual employee. The Board laid down this rule in *Pat's Blue Ribbons and Trophies*, 286 NLRB 918 (1987), but the Hearing Officer ignored it and instead expressly included leave of absence weeks in the calculation of Ms. Kulibert's average and recommended that the Board find she was an ineligible casual employee. The error resulted in the Hearing Officer reaching the incorrect conclusion that Ms. Kulibert averaged 1.67 hours per week in 2009 immediately before the representation election. Had the Hearing Officer applied *Pat's Blue Ribbons and Trophies* he would have found that Ms. Kulibert averaged 25.45 hours per week in 2009, which is well-above the 12 hour threshold and above the hours of other college students who were eligible to vote. The Board should disregard the Hearing Officer's finding that Ms. Kulibert averaged 1.67 hours per week in 2009 and should apply *Pat's Blue Ribbons and Trophies*.

The Hearing Officer also improperly relied upon Ms. Kulibert's "expressed interest" and her personal desire in being a non-unit casual employee, which the Hearing Officer used to

conclude that Ms. Kulibert would not be disenfranchised if the challenge to her ballot was sustained. The Hearing Officer's reliance on such facts conflicts with controlling Board precedent. Employees do not get to decide for themselves if they wish to prospectively "opt-out" of a bargaining unit. Instead, the Board has expressly held that an employee's personal interest and desires are neither dispositive nor persuasive factors. The Board should apply its precedent on this issue and divorce the analysis of Ms. Kulibert's eligibility from any of her expressed desires, interests, or statements. She either does or does not meet the 12 hour threshold in 2009 for voting. Any findings by the Hearing Officer that reference Ms. Kulibert's intent or desire should be disregarded.

Moreover, the Hearing Officer's discussion collapses on itself because rather than using the historical practice to determine whether Ms. Kulibert is or is not a casual employee, the Hearing Officer concluded that the historical test could not apply because Ms. Kulibert had already been labeled as a casual employee. In other words, "she is a casual employee because she said so."

Finally, the Hearing Officer improperly relied upon the 12 weeks (May 2008 to July 2008) prior to the date that Ms. Kulibert "chose" to be classified as a casual employee, but he did not consider her hours in late July or August 2008, which were high enough to raise her average above 12 hours per week and would have compelled a different result. The Hearing Officer cited no authority for the proposition that a 12 week period that began nearly a year before the election should control the analysis to the exclusion of more recent work weeks. Instead, he summarily concluded that the cited weeks, along with her expressed intent, left no doubt that Ms. Kulibert was a casual employee. This was error.

The bottom line is that the college student employees at Festival Foods, and specifically college student Heather Kulibert (who was inadvertently omitted from the *Excelsior* list), were all eligible to vote in the decertification election held at Festival Foods on May 22, 2009 because the historical bargaining unit has included college students who only work during semester breaks and Ms. Kulibert was one of them. Ms. Kulibert averaged 25.45 hours per week during the most recent weeks before and after the spring 2009 leave of absence. She was inadvertently omitted from the *Excelsior* list and there is no evidence that the creator of the list, Store Director Andy Cveykus, was aware of Ms. Kulibert's actual hours when he created the list or even aware of her hours when she showed up to vote. The Hearing Officer's recommendations should not be adopted and the challenge to Ms. Kulibert's ballot should be overruled.

II. THE RECORD¹

A. Background.

Markfest, Inc. aka Skogen's Festival Foods (hereinafter "Festival Foods" or "the Employer") operates a food store in Marshfield, Wisconsin. (Formal Ex. 1(a) at p. 2) Most of the employees at Festival Foods are represented by the United Food and Commercial Workers Union, Local 1473 ("the Union") and are considered unit employees. (Un. Ex. 5) This includes student employees. There are two groups of employees who make up the student employees – high school students and college students. (Formal Ex. 1(a) at 2; Tr. at 43) Both groups of student employees make up a portion of the bargaining unit. (Formal Ex. 1(a) at 2; Tr. at 43) Their inclusion is controlled by Section 2.1 of the Agreement and a Letter of Understanding at p. 23 for high school students. (Er. Ex. 2 §§ 2.1, Letter of Understanding, at pp. 1, 23.)

¹ References to the Official Record and Transcript are identified as "Tr." followed by the page number.

B. College Students Working at Festival Foods.

College students typically start with Festival Foods as high school employees. (Tr. at 42-43) They remain as employees of Festival Foods during each college semester when they are away and not actively working. (Tr. at 43) The college students work during the summer before a college semester, do not work during the fall college semester, and then they work again during the holiday break period in December and January of each year. (*Id.*) When the spring college semester begins in January or February, the college students leave again. (Er. Exs. 8 at p. 2; 10-18 at p. 2) During the fall and spring semesters, the college students are considered to be on leaves of absence and their employment is not terminated. (Tr. at 43) Their initial hire dates are retained and they do not complete new hire paperwork when they work during semester breaks. (Tr. at 43, 84-85) The Union and Festival Foods treat the college students as remaining in the unit without regard to their physical absence during college semesters. (Tr. at 52-53)

To monitor the hours of the college students and ensure that employees are transitioned into the bargaining unit when they are supposed to become unit employees, Festival Foods monitors the hours of employees. (Tr. at 72; Er. Ex. 9) The historical threshold for unit inclusion is 12 working hours per week, which has been applied by the parties to mean 12 hours per week when the employees are working. (Tr. at 72, 117) Festival Foods reviews the hours of employees on a 12-week rolling average lookback period and removes the college semester weeks from the consideration, so that employees are not penalized for non-working weeks that are part of the college semester. (*Id.*) This has been the historical practice and it is not just limited to employees previously considered by Festival Foods to be part of the bargaining unit. (*Id.*) The college students work during semester breaks and those weeks are included in their averages. When they are away while semesters are in session, they are treated as being on a leave of absence and those weeks are not included in their averages. When they are away at

school, their employment status remains intact and their Union status remains without regard to their absence during the semesters. (Tr. at 42-43, 52-53, 72-117, Er. Exs. 8, 10-18)

(1) Heather Kulibert Is A College Student.

Heather Kulibert is a college student that started at Festival Foods as a high school student. (Tr. 172, 174-75.) She graduated from high school in 2008 and worked at Festival Foods during the summer of 2008. (Er. Ex. 8; Un. Ex. 9) Ms. Kulibert was not transitioned into the Union. (Tr. 175.) Festival Foods did not know whether she was going to continue her employment, but she eventually decided to maintain her employment and go away to college. (*Id.*) Ms. Kulibert left for college in the fall of 2008 and did not work during the fall semester. (Tr. at 177) While a leave of absence form was not completed for the fall 2008 semester, there is no dispute that she in fact attended college in 2008, that her hire date remained the same, her employment was not terminated, and she resumed work during the semester break in December 2008 without being treated as a new employee. (Tr. at 66-67; Er. Ex. 8 at 1-2) Ms. Kulibert left for college again in January 2009 and did not work during the spring 2009 semester. (Er. Ex. 8 at 1-3) A leave of absence form was filled-out for the spring 2009 semester, which indicated that Ms. Kulibert would return to work in May 2009. (Tr. at 65, Er. Ex. 8 at 3) She returned to work at Festival Foods on May 13, 2009 and worked for two weeks before the representation election. (Er. Ex. 8, Un. Ex. 12) Other college students did the same thing and all had the same leave of absence forms completed for the spring 2009 semester. (Er. Exs. 10 at 4; 11 at 4; 12 at 5; 13 at 4; 14 at 4; 15 at 4, 7; 16 at 5; 17 at 4; 18 at 4)

Ms. Kulibert's weekly work hours establish that she surpassed the 12 hour per week average in August 2008. For the work weeks from June 2008 through the election that were not during a college semester, Ms. Kulibert averaged 14.37 hours per work week during that 12 month period. (Ex. Er. 8 at 1-2) This average includes zeros for the week of July 7, 2008 and

August 4, 2008, which fell during the weeks when she was not away at college. (*Id.*) From May 2009 (election month) to the beginning of 2009, Ms. Kulibert averaged 25.45 per work week during that period (excluding weeks during the spring 2009 college semester). (*Id.*) Ms. Kulibert should have been transitioned into the Union in August of 2008, just like the others. (Tr. at 185) Ms. Kulibert was not transitioned into the Union in August of 2008 after her hours went over 12 per week and she was consequently not included on the lists of unit employees that were produced by Festival Foods to the Union after the summer of 2008. (Tr. at 174, 188)

(2) Hours Worked By The College Students in 2008 and 2009.

All of the college students' hours for 2009 are as follows:

January 2009 through May 2009 (period excluding semester weeks).

Rank by Hours	Name	Average Hours
1.	Amanda Sternitsky	33.44 (Er. Ex. 18)
2.	Gavin Hutchinson	33.17 (Er. Ex. 13)
3.	Heather Kulibert	25.45 (Er. Ex. 8)
4.	Luke Binder	22.00 (Er. Ex. 10)
5.	Tia Nowack	19.58 (Er. Ex. 16)
6.	Elizabeth Ott	15.56 (Er. Ex. 12)
7.	Jeffrey Hayton	13.20 (Er. Ex. 11)
8.	Karina Radue	10.29 (Er. Ex. 14)
9.	Jonathon Wagner	8.25 (Er. Ex. 15)
10.	Michael Adler	7.01 (Er. Ex. 17)

C. The Creation of the *Excelsior* List.

Following receipt of the Direction of Election, Festival Foods' Marshfield store director, Andy Cveykus began compiling the information needed to prepare the *Excelsior* list. (Tr. at 42) Specifically, and because high school employees had not traditionally been required to join the union, one of Mr. Cveykus' main challenges was to identify which high school employees met the standard for unit inclusion. (Tr. at 48, 174) In developing the *Excelsior* list, Cveykus relied on 4 computer-generated data sets. (Tr. at 45) The first spreadsheet contained the universe of

employees who were considered unit employees and formed the main basis for the creation of the *Excelsior* list. (Tr. at 6; Er. Ex. 3) The second spreadsheet contained every high school student with their hours for the two-week payroll eligibility period ending April 19, 2009. (Tr. at 49; Er. Ex. 4) The third spreadsheet contained the same comprehensive listing of all high school students, like the prior spreadsheet, but it also included a calculation of the 12 week average of hours for the high school employees.² (Tr. at 47, 48; Er. Ex. 5) The final spreadsheet contained a listing of all of the college students who were considered unit employees, but were away from work at college during April 2009 on a leave of absence. (Tr. 42-53; Er. Ex. 6) Ms. Kulibert's name was not on any of the spreadsheets that Mr. Cveykus used to create the *Excelsior* list, and specifically did not appear among the listing of college students who were on a leave of absence for college during the spring 2009 semester. (*Id.*) Mr. Cveykus had no knowledge of Ms. Kulibert's actual work hours during the development of the *Excelsior* list. (Tr. at 56-57)

D. Election on May 22, 2009 – Heather Kulibert Votes.

The *Excelsior* list was reviewed by the parties on election day during the pre-election conference. There was no objection to the list, including no objection to the inclusion of the college students. (Tr. at 118) No objection came after the election either. (*Id.*) Ms. Kulibert was back from the spring college semester in May 2009 and had resumed working. She voted during the election on May 22, 2009. Ms. Kulibert was not listed on the *Excelsior* list, so the Election Officer challenged her ballot. Following the challenge to her ballot, Mr. Cveykus did not know why Ms. Kulibert was voting and he told Union Representative Cecilia Prickett that he

² In determining which high school employees to include on the *Excelsior* list, Mr. Cveykus first examined whether the individual averaged 12 hours per week during the two weeks within the payroll eligibility period ending April 19, 2009. (Tr. 50) Next, to ensure that he didn't improperly exclude any eligible high school employees, Mr. Cveykus compared the average hours from the two weeks in the payroll period with an average of the high school student's hours over the 12 weeks that preceded April 19, 2009, just like the contract provided for determining whether a high school employee should be required to join the Union. (Tr. 50-51) In this situation, however, the threshold standard was 12 hours, rather than 16. (Tr. 51-52)

believed Ms. Kulibert was a casual employee. (Tr. at 72) Mr. Cveykus showed Ms. Prickett a roster with the word “casual” written near Ms. Kulibert’s name. (Tr. at 106) The parties never reached an agreement on how the challenge should be resolved. (Tr. at 219) 66 ballots were cast in favor of representation and 65 were cast to decertify the Union. (Formal Exhibit 1(d) at 1)

E. The NLRB Requests Weekly Hours Data – Mr. Cveykus Discovers That Heather Kulibert’s Hours Are Above 12 Per Week.

After the election on May 22, 2009, the Regional Office requested categories of information from Festival Foods, including the actual hours cards for Ms. Kulibert. Mr. Cveykus pulled Ms. Kulibert’s actual hours, along with documents from Ms. Kulibert’s hard-copy personnel file. (Tr. at 58-59) In those documents, Mr. Cveykus learned that Ms. Kulibert worked more than 12 hours per week during college semester breaks and that she was on a leave of absence during the payroll eligibility period ending April 19, 2009. (Tr. at 58-59) He did not know this before he pulled those hours cards.³ (Tr. at 58-59) The Regional Director issued a Notice of Hearing, which was held on July 16, 2009. At the Hearing, the parties stipulated that the challenge to Morgan Chaffin’s ballot should be sustained. The only issue remaining before the Hearing Officer related to Ms. Kulibert’s challenged ballot. The Hearing Officer issued a Report and Recommendations to the Board concerning Ms. Kulibert’s ballot on August 7, 2009.

III. THE PROCEDURAL HISTORY, CONTRACT LANGUAGE, DIRECTION OF ELECTION, THE RECOMMENDATIONS OF THE HEARING OFFICER

A. The CBA.

The Collective Bargaining Agreement (“the Agreement”) in effect prior to the election contains the following relevant section:

³ To discover this information when he prepared the *Excelsior* list would have required Mr. Cveykus to actually pull the 2008 and 2009 hours cards for Ms. Kulibert and review her personnel file. (Tr. at 57) Had Mr. Cveykus checked the math on the hours cards and had he checked all the personnel files for leave of absence forms, he would have noticed an error with respect to how Ms. Kulibert was treated with respect to the *Excelsior* list. (Tr. at 57-58)

Section 2.1. Skogen's Festival Foods, hereby agrees to recognize United Food and Commercial Workers Union, Local 73A, chartered by United Food and Commercial Workers International Union, CLC, as the exclusive bargaining representative of the employees working in Marshfield, Wisconsin at Skogen's Festival Foods, Marshfield, Wisconsin in the following appropriate bargaining unit: All employees of the Employer, at the employer's Marshfield store, including all employees who are actively engaged in the handling of selling of merchandise, excluding department heads, casual hires and assistant managers. Company may have non-unit casual employees, up to 10% of the seniority list who work less than 12 hours per week. A list of names shall be provided to the Union. **Any employee working more than twelve (12) hours average per week shall join the Union in that month.**

(Er. Ex. 2 § 2.1) (emphasis added).

B. The Direction of Election.

On April 23, 2009, the Regional Director directed that the decertification election be held in the following stipulated unit:

All employees working at the Employer's Marshfield, Wisconsin, store, including all employees who are actively engaged in the handling or selling of merchandise, but excluding all department heads, casual employees defined as working fewer than 12 hours a week, assistant managers, assistant front-end manager, and third-shift supervisor.

(Formal Ex. 1(a) at 13.)

One issue that came to the forefront in the Regional Director's Decision and Direction of Election was whether high school student employees were included in the scope of the unit. The Regional Director concluded that high school students were within the scope of the recognized unit because the parties had included all employees at the store without regard to student status and because the parties did not specifically exclude high school employees. (Formal Ex. 1(a) at 10.) The Regional Director explained that if the students worked 12 or more hours per week, they must be included in the unit and that if they worked less than 12 hours per week, they would be excluded. (Formal Ex. 1(a) at 11-12.)

C. The Hearing Officer's Report and Recommendations to the Board.

The Hearing Officer issued a Report and Recommendation to the Board, which contained the recommendation that the challenge to Ms. Kulibert's ballot be sustained and a Certification of Representative issue.⁴ (Hearing Officer's Report p.15) Festival Foods main opposition to the Report concerns the Hearing Officer's decision to rely upon Ms. Kulibert's personal interest to be a "casual" non-unit employee as one of the factors used to determine whether she is a casual employee and the Hearing Officer's failure to properly apply Board law to the other facts in the record. Specifically, the Report contains the following findings or conclusions that the Hearing Officer relied upon in making his recommendation, Festival Foods excepts to:

- On July 21, 2008, Kulibert requested to be classified as a casual employee because she did not know, at the time, if she wanted to remain an employee after she left for college. (Hearing Officer's Report p.11)⁵
- Regular part-time employees who leave in the fall and spring to attend college but return to work during their holiday and seasonal breaks are treated as being part of the unit. Kulibert, however, is not a regular part-time employee. She is a casual employee, and casuals are explicitly excluded from the unit; (Hearing Officer's Report p.12)
- Kulibert averaged less than 12 hours per week in any rolling 12-week period between the date she became a casual employee on July 21, 2008 and the date of the election. (Hearing Officer's Report pp.12-13)
- Kulibert could have become a member of the bargaining unit and the Union following her graduation from high school, but **she chose not to do so. She elected to become a casual employee**, presumably aware that as a casual employee she was not going to be part of the unit or required to join the Union. There is no evidence that at any time thereafter she **expressed interest** in becoming a regular part-time employee, or that she no longer qualified as a casual employee. (Hearing Officer's Report pp.13-14) (emphasis added)

⁴ The Hearing Officer also recommended that the challenge to the ballot of Morgan Chaffin be sustained. (Hearing Officer's Report p.2) Festival Foods concurs with that recommendation and has not presented any argument herein with respect to Morgan Chaffin.

⁵ Although Cveykus testified that on July 21, 2004 Kulibert was "transferred" to casual status, since she had previously not exceeded 12 hours per week, she was already technically casual before that in June 2008 because her hours did not exceed an average of 12 per week. (Er. Ex. 8, p. 1)

IV. DISCUSSION

Employees **do not get to choose** based on their whims whether they are in or out of a bargaining unit. Board precedent establishes that unit status and eligibility will be controlled by community of interests standards and factors laid-down in controlling Board decisions – not arbitrary, unpredictable, and unilateral tests that bless employees and employers with the power to shape the scope of a voting unit by prospectively deeming or labeling employees as being non-unit employees. If the Board adopts the Hearing Officer’s approach, it would lay down a new rule authorizing employees and their acquiescing employers to remove employees from bargaining units, even if it violates the contract. The Hearing Officer’s Report should not be followed.

There are multiple reasons why Heather Kulibert was eligible to vote. First, Board precedent provides that eligible employees include all individuals who fall into categories that have been recognized as part of the historical unit. Since the bargaining unit includes college students who worked more than 12 hours during semester break work weeks, college students are eligible to vote.

Second, because Ms. Kulibert was identical to the other college students throughout all of 2009, and indeed had higher hours than most of them, she is eligible to vote and cannot be distinguished from her peers without applying a hyper-focus upon the label affixed to her in July 2008. The Board has never placed dispositive weight upon a subjective label to the exclusion of the totality of the circumstances. It should not start now.

Third, Board precedent requires work weeks during leaves of absences to be omitted when calculating an employee’s average hours for deciding whether the employee is eligible to vote. Eligibility turns on the employee’s actual recent hours before and after a leave of absence and not on periods a year before the election. The Hearing Officer’s Report contains no mention

or application of this rule, but instead contains an improper reliance upon the weeks in May 2008 to July 2008 as a dispositive period. This is incorrect and does not comport with Board law.

Finally, Board law does not allow employees who have the same community of interests as unit employees and work enough hours to be in the unit to be disenfranchised by an improper reliance upon an employee's "expressed intent" or desire to be a casual employee. It is well-settled that employees do not get to decide to opt-out of bargaining units by declaring themselves casual employees. The Board should not adopt the Hearing Officer's Recommendations and should not develop a new rule that would undermine the integrity of bargaining units and provide employees with a new "opt-out" right.

A. College Students Working During Semester Breaks Were Eligible Voters Because They Have Been Included Within The Historical Bargaining Unit.

The status of the college students must be discussed first because Ms. Kulibert's status cannot be analyzed in a vacuum or without identifying the community of interests at issue. Thus, the first issue is whether college students who only work during semester breaks are eligible. Students working only during summers and breaks are typically not eligible to vote in representation elections. *Crest Wine and Spirits*, 168 NLRB 754 (1967); *Int'l Mfg. Co.*, 238 NLRB 1361 (1978); *NLRB v. Davis Supermarkets, Inc.*, 2 F.3d 1162 (D.C. Cir. 1993). The Board, however, does not apply this exclusion where the college student employees at issue have historically been included in a recognized unit. The Board announced this exception to the *Crest Wine* principle in *Romac Containers*, 190 NLRB 231 (1971). In *Romac*, a deauthorization case, the Board overruled a regional director's decision that college students working summers only were ineligible to vote. *Id.* Reversing the regional director, the Board explained that because the evidence established that the parties had treated the college students as being covered by the

labor agreement, students must be eligible to vote. *Id.* The Board reasoned that the unit must be coextensive with the contractual unit:

We agree with the Regional Director that the Board generally excludes summer students from the appropriate unit because their work is temporary and that they are therefore ineligible to vote in the usual case when the parties contest their status. However, such generalization is not applicable here. It is well settled that the unit for a deauthorization election must be coextensive with the contractual unit. While the unit as defined in the instant contract does not specifically exclude or include summer students, it is clear that . . . they were in fact merged into the contractual unit.

Id. (footnotes omitted).

Although *Romac* arose in the de-authorization context, its principle applies equally in the decertification context because the unit for a decertification election must also be “coextensive with either the unit previously certified or the one recognized in the existing contract unit.” *W.T. Grant Co.*, 179 NLRB 670 (1969) (citing *Calorator Mfg. Corp.*, 29 NLRB 704, fn. 3; *Univac Div. of Remington Rand Div. of Sperry Rand Corp.*, 137 NLRB 1232; *Fisher-New Center Co.*, 170 NLRB No. 104; *Clohecy Collision, Inc.*, 176 NLRB No. 83).

In this case, just as in *Romac*, Festival Foods and the Union treated the college students working during breaks as unit employees. Indeed, the Union charged them dues to work at Festival Foods. (Er. Exs. 1, 10-18) The Hearing Officer, however, attempted to distinguish *Romac* by pointing out that the stipulated unit specifically excludes casual employees, while it did not in *Romac*. (Hearing Officer’s Report p.12, fn.25) The Hearing Officer, however, did not appear to rely upon his purported distinction because he went on to analyze some of Ms. Kulibert’s hours of employment. (*Id.* p.13, 14) In any event, the attempt to distinguish *Romac* does not diminish the impact of *Romac*’s rule that the unit for a decertification election must be coextensive with the recognized unit. *Romac* applies and it makes the college students eligible. Here is why.

First, when employees graduated high school, Festival Foods changed their status to “Union” employees when their hours exceeded 12 per week. (Tr. 53-54) For those employees that later left for college and wanted to return to Festival Foods during semester breaks and summers, Festival Foods granted them leaves of absence, allowing them to resume their jobs without having to reapply or undertake new-hire procedures. (Tr. 43) When the college students returned for the summers, they returned not as non-unit employees, but as continuing unit employees. (Tr. 56) There are at least 9 recent examples of college students that went on leaves of absence and returned to the Marshfield store during semester breaks as unit employees. Those employees were: Luke Binder (Er. Ex. 10); Jeffrey Hayton (Er. Ex. 11); Elizabeth Ott (Er. Ex. 12); Gavin Hutchinson (Er. Ex. 13); Karina Radue (Er. Ex. 14); Jonathon Wagner (Er. Exh 15); Tia Nowack (Er. Ex. 16); Michael Adler (Er. Ex. 17); and Amanda Sternitzky (Er. Exh 18). Festival Foods treated these students as unit employees and applied the Agreement to them. (Tr. 56, 85) They continued to accrue contractual benefits while on leave, including service credit for vacation and sick leave. (Tr. 84-85) The Hearing Officer did not mention these eligible college students, which allowed him to avoid comparing Ms. Kulibert with them.

Second, the Union acknowledged their unit status by billing Festival Foods for their union dues. (Tr. 42-43; Er. Exhs. 1 at p.2; Exhs. 10-18) The Agreement required Festival Foods to checkoff the dues. (Er. Ex. 2 § 2.8) Those employees were: Luke Binder, Jeffrey Hayton, Elizabeth Ott, Gavin Hutchinson, Karina Radue, Jonathon Wagner, Tia Nowack, and Michael Adler. (Er. Exhs. 1 at pp.1, 3, 5, 6, 8) The Hearing Officer did not mention this fact either.

Third, the unit stipulation entered into by the parties establishes that all students, including Ms. Kulibert, are eligible to vote unless they are casual employees as expressly defined with a 12 hour per week threshold in the stipulated unit description – not based on whether

someone affixed a “casual” label to them a year earlier. Specifically, the parties stipulated that an employee is eligible to vote unless that employee falls within one of the specified exclusions. (Formal Ex. 1(a) at 12-13) This is not a case where the broad “all employees” language in the stipulated unit description could be read to imply an exclusion of college students as casuals. To the contrary, the parties chose to expressly define the universe of casual employees as any employee working less than 12 hours per week.⁶ (*Id.*)

Finally, the Union did not object or deny the unit membership (and eligibility) of these college students when it had an opportunity to object to their inclusion on the *Excelsior* list. (Tr. at 118) It also declined to present any argument or issue at the Hearing attacking their eligibility. All of this means that the college students who work only during semester breaks and summers are eligible to vote under *Romac* because both parties have historically, and without exception, treated them as unit employees. The Hearing Officer made no mention of any of this, choosing instead to dispose of *Romac* in a footnote. (Hearing Officer’s Report p.12, fn.25) The evidence related to all of these eligible college students is important because one cannot evaluate or compare Ms. Kulibert’s status in a vacuum. There must first be a recognition of the community of interests held by the eligible college students before determining whether Ms. Kulibert shares it with them, in hours or otherwise. *Dunhams Athleisure Corp.*, 311 NLRB 175, 176 (1993) (rejecting stipulation that would disenfranchise employee as a “casual” where employee worked the same number of hours as other part-time employees found eligible). The

⁶ The Union’s pre-election brief to the Regional Director, which specifically addressed the eligibility of students, confirms that the parties intended to include all students within the stipulated bargaining unit and did not intend to create a special exception to exclude college students as casual employees. Specifically, the Union wrote “[B]oard precedent is clear that students employed by a commercial employer in a capacity unrelated to the student’s course of study are to be included in a unit of full-time and regular part-time employees if they otherwise meet the Board’s community of interest test. *St. Claire’s Hospital*, 229 NLRB 1000 (1977). *Similar tests are applied to students employed on a part-time or even a temporary basis as are applied to all regular or “nonpermanent” employees whether full or part-time.*” (Union’s April 17, 2009 Brief to the Regional Director at p.4)

Board should recognize the existence of the evidence relating to why they are eligible before comparing Ms. Kulibert to the rest of the unit. We now turn to that comparison.

B. Heather Kulibert Falls Within The Scope Of The Recognized Unit Just Like The Other Eligible College Student Voters.

A comparison of Ms. Kulibert's hours and work periods to the eligible college students demonstrates that she falls within the scope of the unit. The following chart shows the hours worked for the 1 year period between May 5, 2008 and May 23, 2009. It shows that Ms. Kulibert and the other college student employees all regularly worked only during semester breaks and when they are not away at school, they all work substantial hours. Ms. Kulibert's hours and work periods line up precisely with the other college students. While this information was in the record and set out by Festival Foods in its post-hearing brief, the Hearing Officer ignored it in its entirety.

WEEK OF / TOTAL HRS WORKED	EMP NAME:	MICHAEL	LUKE	JEFFREY	GAVIN	HEATHER	TIA	ELIZABETH	KARINA	AMANDA	JONATHON
		ADLER	BINDER	HAYTON	HUTCHINSON	KULIBERT	NOWACK	OTT	RADUE	STERNITSKY	WAGNER
5/5/08	15.00		12.63	25.00	4.85	5.08	5.17				5.08
5/12/08	15.00	8.00	14.92	4.00	6.68	8.10	0.00				5.12
5/19/08	10.23	40.00	37.25	19.17	8.27	11.53	13.20	18.08			8.00
5/26/08	10.18	24.00	22.02	31.30	28.80	0.00	5.00	21.97			0.00
6/2/08	20.05	40.00	29.63	37.90	17.33	8.88	16.08	19.77	14.17		14.25
6/9/08	9.07	40.00	23.92	38.72	6.07	13.93	0.00	20.58	5.00		5.00
6/16/08	10.10	40.00	30.01	30.83	10.50	15.65	0.00	20.98	4.07		10.50
6/23/08	20.15	40.00	38.40	39.50	5.57	20.10	21.07	34.78	20.84		19.20
6/30/08	14.72	40.00	36.15	29.40	12.65	21.91	25.28	25.30	25.40		19.19
7/7/08	14.83	40.00	21.70	24.00	0.00	11.07	9.17	26.82	13.95		14.10
7/14/08	10.00	40.00	21.79	39.93	31.67	15.60	13.80	20.43	22.58		9.82
7/21/08	0.00	32.00	20.70	39.02	20.00	18.08	9.08	27.08	21.15		14.07
7/28/08	0.00	40.00	6.95	40.00	15.22	8.72	10.53	19.43	25.65		12.68
8/4/08	13.84	37.38	16.00	37.48	0.00	7.08	18.05	23.47	19.27		17.98
8/11/08		40.00	20.81	30.45	5.43	19.07	31.20	26.00	8.90		14.42
8/18/08		34.72	19.25	35.00		9.18	13.07	8.08			
8/25/08			10.57	13.83							
9/1/08											
9/8/08											
9/15/08											
9/22/08											
9/29/08											
10/6/08											
10/13/08											
10/20/08											
10/27/08											
11/3/08											
11/10/08											
11/17/08											
11/24/08						10.62					
12/1/08											
12/8/08											
12/15/08						11.00	12.32	4.00	16.87		
12/22/08		24.00	13.02	24.00	17.98	24.38	19.08	34.62	24.75		16.00
12/29/08		21.83	13.20	21.53	26.95	26.08	11.23	15.45			8.12
1/5/09	4.65	24.00		57.40	20.12	8.22	9.07	8.60			8.08
1/12/09	9.37	16.00		13.75		8.00		11.97			4.00
1/19/09		24.00						13.72			8.03
1/26/09											
2/2/09											
2/9/09											
2/16/09											
2/23/09											
3/2/09											
3/9/09											
3/16/09											13.00
3/23/09											
3/30/09											
4/6/09											
4/13/09											
4/20/09											
4/27/09											
5/4/09											
5/11/09					19.72		10.34			31.33	
5/18/09		40.00		40.00	35.00	36.00	31.60		35.55		
Total Hours	177.19	685.93	408.92	672.21	292.81	318.28	284.34	401.13	289.48	226.64	

(Exs. Er. 8 p.1; Er. 10-18 p.1)

The above chart also establishes that looking back 12 weeks from, and including the week of, July 21, 2008, Ms. Kulibert averaged 12.69 hours per week. (Ex. Er. 8 at 1) At that point, she met the threshold under the 12-week rolling lookback period that Festival Foods

historically used and she should have been converted to Union status, just like her peers. The Agreement expressly requires it. (Er. Ex. 2 § 2.1) The Hearing Officer avoided the impact of the hours that Ms. Kulibert worked during the week of July 21, 2008, by stopping his 12 week review with the hours worked during the week of July 14, 2008. (Hearing Officer's Report p. 13) This allowed the Hearing Officer to avoid concluding that a contract violation occurred.

It cannot be disputed, however, that from the week of July 21, 2008 through the date that Ms. Kulibert left for college in August 2008, her hours exceeded 12 hours per week using the rolling 12-week lookback period. This fact compelled a change in classification from casual to unit status, but Festival Foods did not reclassify her. While that violated the Agreement (Er. Ex. 2 § 2.1), it does not affect her eligibility. Ms. Kulibert's continued employment in violation of the Agreement does not affect her status as an eligible voter because the Board will not disenfranchise employees simply because they have been employed in violation of a labor agreement. *Electrogas Furnace Co.*, 21 NLRB 1144, 1148 (1940) (eligibility to vote is not affected by violation of the contract and Board refused to exclude them from voting in the election); *Rock River Woolen Mills*, 18 NLRB 828 (1939) (10 employees hired in violation of a labor agreement's seniority provisions were still eligible to vote in a decertification election notwithstanding the violation of the labor agreement). The Hearing Officer attempted to dispose of *Electrogas* and *Rock River* by stating that in these cases "the employees at issue otherwise fell within the included positions of the unit description" and "Kulibert fell within the excluded positions." (Hearing Officer's Report p.13, fn.28) That conclusion and distinction would only be proper if Ms. Kulibert had not averaged more than 12 hours per week by August 2008. Ms. Kulibert, however, met the criteria for unit inclusion just as did the employees in *Electrogas* and *Rock River*. By ignoring her hours after July 14, 2008 the Hearing Officer avoided the

application of *Electrogas* and *Rock River*. The Board should decline the Hearing Officer's invitation to ignore her hours in the most recent weeks before she left for college in 2008, and Festival Foods excepts to the omission of her late July and August 2008 hours when determining her status. Instead, *Romac Containers*, *Electrogas*, and *Rock River* all compel a finding that Ms. Kulibert falls within the scope of the recognized unit with the other college students. The following discussion of Ms. Kulibert's specific hours in 2009 remove any remaining doubt about whether she meets the standard for inclusion in the unit.

C. **Heather Kulibert Is Eligible To Vote Under the Specific 12-Hour Per Week Standard in the Direction of Election.**

The Direction of Election expressly excludes employees who work less than 12 hours per week, but it does not provide any guidance on how to apply that 12 hour standard in the case of college students who are absent on leaves of absence. (Formal Ex. 1(a) at 13) The Hearing Officer chose to include weeks when Ms. Kulibert was on a leave of absence from his calculation of her hours. (Hearing Officer's Report p.14, fn.29) This approach is contrary to Board precedent. An employee's eligibility to vote in a representation election should be based on the hours worked during work weeks immediately before a leave of absence. *Pat's Blue Ribbons and Trophies*, 286 NLRB 918 (1987). Leave weeks that immediately precede the eligibility period should be removed from the consideration and the determination made based on the weeks in that quarter that immediately precede the leave. *Id.* at 919 (applying *Davison-Paxon Co.*, 185 NLRB 21 (1970) calendar quarter period standard to employee on leave of absence during the quarter before the eligibility date). The Board may also consider the hours worked during work weeks immediately after the leave that follow the eligibility period. *Id.* The facts at issue in *Pat's Blue Ribbons and Trophies* required the Board to analyze whether an employee who had been on a leave of absence during most of the nine months preceding the

eligibility date should have been excluded as a casual employee. *Id.* The Board reasoned that the leave of absence time should be excluded from the analysis, looking instead to the hours that the employee most recently worked before her leave, after her leave before the eligibility date, and even after the eligibility date (though the hours after the eligibility date would not be determinative alone). *Id.* The Board found the employee eligible because her hours were substantial and similar to the hours of others. *Id.* at 919. Her similarity to the others was enough to make her eligible, notwithstanding the omission of many weeks of analysis because of her leave and only a couple of work weeks that actually fell within the quarter preceding the eligibility period. In overruling the challenge, the Board stated:

Though not determinative, Mathews worked 16.5 hours in October, after the eligibility cutoff date.

She worked 140 [pre-leave] hours in December 1985 and 108 [pre-leave] hours in January.

Mathews' preleave and reemployment hours and her compensation establish such tenure, **regularity, and continuity of employment** and similarity of wages and working conditions to render her a regular part-time employee. Therefore, we overrule the challenge to Mathews' ballot and we shall order that her ballot be opened and counted.

Id. (emphasis added).

The Board later confirmed that while *Pat's Blue Ribbons and Trophies* does not establish a rigid mathematical formula, leave of absence weeks must be removed from the analysis. *Ansted Center*, 326 NLRB 1208, 1210 (1998) (employee deemed ineligible because even with leave of absence weeks removed from the analysis, his hours were still too low). This rule makes sense because employees on a leave of absence are presumed eligible to vote and are "to be regarded as an employee unless it can be established by overt action or objective evidence that

the employment relationship has been severed.” *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Air Liquide America Corp.*, 324 NLRB 661, 663 (1997).

In the present case, the Hearing Officer did not mention or follow *Pat’s Blue Ribbons and Trophies*, notwithstanding that it was the only case cited by the parties related to the treatment of leave of absence weeks. Instead, the Hearing Officer created his own standard by including leave of absence weeks into the analysis and by recommending that the Board adopt his finding that Ms. Kulibert average 1.67 per week in 2009. (Hearing Officer’s Report p.14, fn.29) The Hearing Officer cited no authority for this approach, and the Board should reject this analysis. The Board should follow *Pat’s Blue Ribbons and Trophies* and apply the 12 hour standard in the Direction of Election to the weeks immediately prior to Ms. Kulibert’s leave in mid-January 2009 as well as to her post-leave/pre-election weeks in May 2009. This requires that Ms. Kulibert’s leave of absence weeks from January 2009 to May 2009 be removed from the analysis and that her hours immediately before and after her leave be considered. Those weeks establish that she is eligible.

In the first quarter of 2009, Ms. Kulibert worked for 2 work weeks during the holiday break – the week beginning Monday, December 29 and week beginning Monday, January 5.⁷ (Er. Ex. 8 at 2) Her hours for those 2 weeks were: 26.96 hours and 20.12 hours. (*Id.*) She then left on a fixed-term leave of absence for the spring college semester, set forth in the leave of absence forms completed in January 2009 and May 2009. (Er. Ex. 8 at 3-4) Any doubt about whether she shared the same community of interests with the other college students was eliminated by January 2009 in light of the identical leave of absence forms completed for Ms. Kulibert and all of the other students. (Er. Ex. 8 at 3) She was treated just like the others in 2009. (*Id.*)

⁷ Ms. Kulibert also worked one week in Dec. 2008, but that week fell completely in a prior quarter. (Er. Ex. 8 at 2)

After January of 2009, Ms. Kulibert next worked during the 2 weeks in May 2009 following her leave of absence and before the election. (Er. Ex. 8 at 2) Her hours for those 2 pre-election weeks in May 2009 were: 19.72 hours and 35.00 hours. (*Id.*) Ms. Kulibert averaged 25.45 hours of work during these 4 most recent work weeks that fall before and after her spring 2009 leave of absence.⁸ (*Id.*) The Hearing Officer did not mention this. Here is how she compares with the other college students for the relevant period in 2009.

January 2009 through May 2009 (excluding semester weeks).

Rank by Hours	Name	Average Hours
1.	Amanda Sternitsky	33.44 (Er. Ex. 18)
2.	Gavin Hutchinson	33.17 (Er. Ex. 13)
3.	Heather Kulibert	25.45 (Er. Ex. 8)
4.	Luke Binder	22.00 (Er. Ex. 10)
5.	Tia Nowack	19.58 (Er. Ex. 16)
6.	Elizabeth Ott	15.56 (Er. Ex. 12)
7.	Jeffrey Hayton	13.20 (Er. Ex. 11)
8.	Karina Radue	10.29 (Er. Ex. 14)
9.	Jonathon Wagner	8.25 (Er. Ex. 15)
10.	Michael Adler	7.01 (Er. Ex. 17)

Ms. Kulibert worked hours before and after her leave that were just as substantial, and in most cases higher, than those worked by the other college students. The Hearing Officer did not mention this either. This is the appropriate period for analyzing the 12 hour per week standard contained in the Direction of Election. *Pat's Blue Ribbons and Trophies*, 286 NLRB at 919. Ms. Kulibert met the threshold of 12 hours per week as set forth in the Direction of Election and applied under *Pat's Blue Ribbons and Trophies*. *Id.* Like the employee's ballot in *Pat's Blue*

⁸ Basing an eligibility determination on the 2 most recent weeks before Ms. Kulibert's leave of absence and the 2 most recent weeks after her leave of absence but before the election (total of 4 weeks of actual work) is not an insubstantial number of weeks as eligibility determinations go. Even brand new employees are eligible to vote in elections. *Cf. Stockholm Valve and Fittings*, 222 NLRB 217 n.2 (1976) (noting that it is well-settled that new employees are eligible if they are employed during the eligibility period and on election day, and holding eligible new employees that averaged 4 hours per week in the 5 weeks prior to the election); *Arlington Masonry Supply*, 339 NLRB 817, 819 (2003) (considering time worked between eligibility date and election date to determine that employee worked sufficient hours).

Ribbons and Trophies, the challenge to Ms. Kulibert’s ballot should be overruled and it should be opened and counted. *Id.* That is the only result that gives effect to the historical unit, to the relevant Board law, and to the votes of the employees who share the same community of interests at Festival Foods. While this period is dispositive, it is bolstered when viewed in light of the average hours worked by all college students during the last 12 weeks before the election in which they were not away at college. This larger view establishes that Ms. Kulibert’s hours from January 2009 to May 2009 were not an aberration. Here is the “big picture”:

Average Hours for last 12 weeks before election in which these employees were not at college

WEEK OF / TOTAL HRS WORKED	EMP NAME:	MICHAEL	LUKE	JEFFREY	GAVIN	HEATHER	TIA	ELIZABETH	KARINA	AMANDA	JONATHON
		ADLER	BINDER	HAYTON	HUTCHINSON	KULIBERT	NOWACK	OTT	RADUE	STERNITSKY	WAGNER
		20.05	40.00	38.40	39.93	12.65	18.08	13.80	20.43	20.84	14.10
		9.07	32.00	36.15	39.02	0.00	8.72	9.08	27.08	25.40	9.82
		10.10	40.00	21.70	40.00	31.67	7.08	10.53	19.43	13.95	14.07
		20.15	37.38	21.79	37.48	20.00	19.07	18.05	23.47	22.58	12.68
		14.72	40.00	20.70	30.45	15.22	9.18	31.20	26.00	21.15	17.98
		14.83	34.72	6.95	35.00	0.00	10.62	13.07	8.08	25.65	14.42
		10.00	24.00	16.00	13.83	5.43	11.00	12.32	4.00	19.27	16.00
		0.00	21.83	20.81	24.00	17.98	24.38	19.08	34.62	8.90	8.12
		0.00	24.00	19.25	21.53	26.95	26.08	11.23	15.45	16.87	8.08
		13.84	16.00	10.57	57.40	20.12	8.22	9.07	8.60	24.75	4.00
		4.65	24.00	13.02	13.75	19.72	8.00	10.34	11.97	31.33	8.03
		9.37	40.00	13.20	40.00	35.00	36.00	31.60	13.72	35.55	13.00
	Average Hrs	10.57	31.16	19.88	32.70	17.06	15.54	15.78	17.74	22.19	11.69

(Exs. Er. 8 p.1; Er. 10-18 p.1)

Ms. Kulibert’s regularity of employment and similarity to the hours of the others is dispositive. She worked on a regular basis and when she worked, she worked more than 12 hours per week.⁹ *Pat’s Blue Ribbons and Trophies*, 286 NLRB at 919. In other words, even if the Board decides to consider weeks from 2008, weeks during the fall semester should be excluded from the analysis because Ms. Kulibert was on a leave of absence. Mr. Cveykus

⁹ The omission of Ms. Kulibert’s name from the Excelsior list does not make her ineligible and the Hearing Officer did not rely upon that issue in recommending that the challenge to her ballot be sustained. To the extent that the Board considers it, the omission does not control her eligibility. The relevant inquiry is whether Ms. Kulibert in fact meets the eligibility standard set forth in the Direction of Election. *See The Coca Cola/Dr. Pepper Bottling Co. v Memphis*, 275 NLRB 444, 446 (1984) (overruling challenge where employer presented evidence of eligibility despite omission from *Excelsior* list); *NLRB v. Triangle Express*, 683 F.2d 338 (10th Cir. 1982) (noting that the omission from *Excelsior* list will not disenfranchise employees, and the eligibility of employees omitted from the list should be determined through challenge procedure even in cases where employer leaves individuals off of the list).

testified that Ms. Kulibert was not sure in the summer of 2008 if she was going to stay with Festival Foods, but if she decided to stay she would be on a leave of absence during college. (Tr. 175) While there was no leave of absence form completed, we know that she in fact decided to stay at Festival Foods and Mr. Cveykus testified that the college weeks in 2008 were a leave of absence. (Tr. 66:18-19) On these facts, the only way Ms. Kulibert could be deemed ineligible to vote would be if the entire group of employees were found ineligible.

D. The Hearing Officer's Reliance Upon Ms. Kulibert's "Expressed Interest" In Being A Casual Employee Is A Dispositive Error.

The Hearing Officer ignored controlling and well-established Board precedent by basing his recommendation to sustain the challenge on Kulibert's "election" to be treated as a casual employee and her lack of an "expressed interest" in joining the unit. (Hearing Officer's Report p.14) An individual employee's desire or interest in being a casual employee has absolutely no bearing on whether an employee is included or excluded from a bargaining unit. *Pub. Serv. Co. of Colorado*, 312 NLRB 459 (1993) (holding that an employee's desire or intent has nothing to do with the employee's legal status as a unit member when the employer treated the employee as outside the unit). The Board stated:

[W]e disavow the judge's reliance on the fact that Hill, O'Callaghan, and Johnson desired to be part of the bargaining unit, because employee desire is irrelevant to a determination of whether an employee is performing bargaining unit work.

Id.

This same rationale applies in other contexts. For example, when evaluating statutory supervisor status, the Board examines whether the individual exercises any of the primary legal indicia of supervisory status and in the absence of such indicia, statements or subjective beliefs about an employee's authority are immaterial. *Williamette Ind., Inc.*, 336 NLRB 743 (2001) (finding an individual non-supervisory even though an acknowledged supervisor told employees

that “when [the putative supervisor] talks to you, tells you to do anything, directs you to do any work, you listen to him, he's got the same authority as I do.”); *California Gas Transport, Inc.*, 347 NLRB 1314, 1317 (2006) (finding that employee opinions of an individual as a supervisor or manager demonstrate only their subjective belief, not proof of the individual’s legal status).

Furthermore, the Board’s refusal to attach any weight to subjective considerations or desires when it comes to determining an employee’s unit placement also comports with the Board’s longstanding alter-ego and dual shop doctrine that prohibits a single employer from subverting its duty to adhere to a labor agreement by setting up a separate corporation or division to operate on a non-union basis where the facts demonstrate that the employees are all part of a single bargaining unit. *Cf. Vallow Floor Coverings, Inc.*, 335 NLRB 20 (2001) (finding employees of two companies found to be a single employer constitute a single unit and requiring employer to apply union contract to all employees). If the rule were anything different, employers would be free to divide employees into a company set up for those who desire to be union members and those who express no interest in being union members.

In the present case, the Hearing Officer relied upon Ms. Kulibert’s “expressed intent” to be a casual employee as a basis for his recommendation that Ms. Kulibert be deemed a casual employee. (Hearing Officer’s Report pp.13-14) The Hearing Officer cited no authority for this position or approach. (*Id.*) The Hearing Officer erred because an employee’s interests and desires are entitled to no weight when determining legal status. *Pub. Serv. Co. of Colorado*, 312 NLRB 459. Such an approach would undermine the integrity of bargaining units and provide employees and/or employers with a means to accomplish what they would otherwise have to obtain through bargaining or an election. If an employee’s personal interest or desire were enough to dissolve the community of interests, we already know that there are at least 65

employees who voted “no” in the election who might unilaterally decide to exercise their “expressed interest” to opt-out of the unit. The Hearing Officer’s approach should be disregarded in favor of an objective analysis and comparison of Ms. Kulibert’s hours with the recognized bargaining unit.

Finally, the Hearing Officer erred in relying upon the “casual” employee label placed upon Ms. Kulibert by Festival Foods in July 2008. In a circular discussion, the Hearing Officer stated:

Regular part-time employees who leave in the fall and spring to attend college but return to work during their holiday and seasonal breaks are treated as being part of the unit. Kulibert, however, is not a regular part-time employee. She is a casual employee, and casuals are explicitly excluded from the unit.

* * *

The Employer, however, contends that the calculation of Kulibert’s average should exclude those weeks in which she did not perform any work, because the parties’ practice has been to omit those weeks in calculating the 12-week average of a college student on a leave of absence. This appears true as it relates to the parties’ practice concerning regular part-time employees, but there is no evidence it is true for casual employees. Moreover, while the stipulated unit does not address the status of regular part-time employees place on a leave of absence, it expressly excludes all casual employees.

* * *

From the evidence in the record, Kulibert could have become a member of the bargaining unit and the Union following her graduation from high school, but she chose not to do so. She elected to become a casual employee, presumably aware that as a casual employee she was not going to be part of the unit or required to join the Union. There is no evidence that at any time thereafter she expressed interest in becoming a regular part-time employee, or that she no longer qualified as a casual employee.

(Hearing Officer’s Report pp.11-14)

The Hearing Officer relied upon Ms. Kulibert's and Mr. Cveykus' own views of her as a "casual" employee as a basis to determine that she is casual employee. In other words, the Hearing Officer found that she is a casual employee because Ms. Kulibert and Mr. Cveykus said so in 2008 and because they said so, the historical test for distinguishing between casual and unit employees can no longer apply. This circular approach is not helpful and it collapses the entire test into a reliance upon what Ms. Kulibert wanted to do in 2008. The Hearing Officer should have analyzed Ms. Kulibert's status under the standard contained in Direction of Election and should have used the rules from Board precedent – nothing else. The above approach cited above from the Hearing Officer's Report contains no citation to any Board authority because there is no authority for such an approach. Festival Foods quoted the relevant authority for the Hearing Officer and it was not followed, discussed, or distinguished. Any assignment of a casual employee label by Festival Foods to Ms. Kulibert is just as irrelevant as Ms. Kulibert's own interests or choices. Indeed, even if Festival Foods had asked for its casual employee label to be given effect, the Board would disregard it.

Representation case rights are too sacred to be abrogated by parties and this is not a new or novel issue before the Board. *Cactus Drilling Corp.*, 194 NLRB 839 (1972) (reversing a regional director's decision to sustain a challenge where the employer specifically asked to remove an employee from the *Excelsior* list because the employer believed that the employee was not eligible). In *Cactus Drilling*, the regional director had initially found that the challenge should be sustained in part because the employer labeled the employee as ineligible but the Board reversed, writing: **“Although the office manager, relying on his records which indicated that [the employee] was then being paid as [an excluded employee], notified the Regional Office that Walker's name should be removed from the Excelsior list, such action**

is not controlling as to his status.” *Id.* at 840 (emphasis added). Instead, the Board looked to the facts as to whether the employee indeed qualified as a unit employee. *Id.*

The policy applied in *Cactus Drilling* has its roots in the Board’s 1959 decision in *Norris Thermador Corporation*, 119 NLRB 1301 (1959), in which the Board announced that absent a signed and stipulated eligibility list, the preparation and checking of an *Excelsior* list would not prevent the parties from taking later positions inconsistent with the list. Moreover, even a formal signed stipulation cannot disenfranchise an otherwise eligible voter where similarly-situated employees are eligible. Instead, the Board protects the Section 7 right to vote so jealously that it will not approve a stipulation to sustain a challenged ballot when the facts establish that the employee at issue was indeed eligible to vote. *Dunham’s Athleisure Corp.*, 311 NLRB 175, 176 (1993) (refusing to give effect to parties’ stipulation to exclude an employee as a “casual” where the record facts established that the employee, in fact, worked the requisite number of hours to be eligible).

In sum, time and time again, the Board has considered and rejected the notion that a party’s subjective belief, labels, and statements as to eligibility or unit placement controls over whether the employee meets the eligibility criteria. Instead, the Board examines whether the individual meets the established criteria for eligibility without any circular reliance upon a party’s opinion. Here, the historical and stipulated test for voting eligibility is whether an employee works at least 12 hours per week. As demonstrated above, Heather Kulibert meets that criteria just like the other college students. Her ballot should be opened and counted.

V. CONCLUSION.

The Hearing Officer failed to follow Board precedent and erred in recommending that leave of absence weeks should be included in the calculation for determining the average hours worked per week by Heather Kulibert and that Heather Kulibert’s expressed interest in being a

casual employee be a basis for deeming her ineligible to vote. The Hearing Officer also erred in recommending that weeks from May 2008 to July 2008 be controlling for purposes of determining whether Ms. Kulibert was an ineligible casual employee in 2009. The evidence shows that Ms. Kulibert (like the other college students) did not work during semesters, only worked during semester breaks, did not get terminated or rehired when she returned, and worked more than 12 hours per week during the most recent work weeks before and after her spring 2009 leave of absence. Under these facts, the only way Ms. Kulibert could be ineligible to vote is if all of the college student employees were ineligible to vote too. There is no basis to distinguish Ms. Kulibert in 2009 from the other college students. She was eligible to vote. The Hearing Officer's recommendation that the challenge to Ms. Kulibert's ballot be sustained should be disregarded. The challenge to her ballot should be overruled and her vote should be counted.

Dated this 21st 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 Brief to the NLRB in Support of Exceptions to the Hearing Officer's Report on Determinative Challenged Ballots was served via electronic mail, as identified below.

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