

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JUDY DAVIS,

Grievant,

v.

Docket No. 2019-1283-CabED

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Judy Davis, filed this expedited level three grievance against her employer, Cabell County Board of Education, dated March 25, 2019, stating as follows: “Grievant was terminated by Respondent from her position of cook, in violation of W. Va. Code § 18A-2-8.” As relief sought, “Grievant seeks reinstatement to her position of employment, plus back pay, with interest, and restoration of any and all benefits lost as a result of the termination, including seniority.”

The level three grievance hearing was held on June 3, 2019, before the undersigned administrative law judge at the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person and by counsel, George B. Morrone, III, Esquire, General Counsel, West Virginia School Service Personnel Association. Respondent, Cabell County Board of Education, appeared by counsel, Sherrone D. Hornbuckle, Esquire, and David Tackett, Manager of Service Personnel, appeared as its representative. This matter became mature for consideration on July 19, 2019, upon receipt of the last of the parties’ proposed Findings of Fact and Conclusions of Law.¹

¹ The original mature date for this grievance was July 9, 2019, the mailing date set at the level three hearing. By email dated July 3, 2019, counsel for the parties requested a one-week extension for submitting their proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Cook II. Respondent charged Grievant with five instances of stealing from the cafeteria and suspended, then terminated Grievant's employment for violating an Employee Code of Conduct and her employment contract. Grievant denies all of Respondent's claims and asserts that she did not steal anything. Grievant asserts that she took from the cafeteria only what was hers, given to her, or authorized by her supervisors. Respondent failed to prove its claims by a preponderance of the evidence. Accordingly, the grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Cook II at Highlawn Elementary School during the 2018-2019 school year. Grievant had been regularly employed by Respondent since September 2015. In January 2014, Grievant began working for Respondent as a substitute cook.

2. Robin Harmon is the Principal at Highlawn Elementary School. Krystal Hysell is employed by Respondent as a Cook/Cafeteria Manager at Highlawn Elementary School. Rhonda McCoy is employed as the Director of Food Service. David Tackett is employed by Respondent as the Manager of Service Personnel.

On that same date, this ALJ granted the request and set July 16, 2019, as the new mailing date.

3. The kitchen at Highlawn Elementary is small, and the kitchen staff worked closely together. The only employees who worked in the kitchen at the times at issue were Grievant, Krystal Hysell, and Mary Michki.

4. Principal Harmon was responsible for completing the kitchen employees' performance evaluations. Ms. Hysell directed the work of Grievant and Ms. Michki and was in charge of running the cafeteria and ordering.

5. In performance evaluations, Grievant has always met or exceeded expectations. Grievant had received one constructive comment on an evaluation before the events leading to this grievance. The comment said something to the effect that Grievant needed to get along better with coworkers and that problems among the kitchen staff were the result of her relationships with others.

6. Grievant did not get along very well with her coworker Ms. Michki. Grievant viewed Ms. Michki as working too slowly and felt like she was having to work more to take up Ms. Michki's slack. Grievant made a number of complaints to Ms. Hysell, Director McCoy, and Principal Harmon about Ms. Michki's work performance during her time at Highlawn.² Grievant also believed that Ms. Michki was stealing from the cafeteria and did not approve.

7. School employees were supposed to enter the building each morning through the building's front entrance. Despite this, a few school employees, who were not assigned to work in the kitchen, would sneak into the building through the kitchen's back door when it was open. These employees would walk through the kitchen, and out into the part of the school where they were assigned. As they were sneaking through the

² See, testimony of Krystal Hysell; testimony of Grievant.

kitchen, these employees would say things like “we’re not here” or “you didn’t see us” to kitchen staff. Also, before the events at issue there had been a problem with employees propping the back door open so that they could improperly enter the building through the kitchen.³

8. In or about January 2019, Grievant lodged complaints with Principal Harmon and Mr. Tackett regarding Ms. Michki and cafeteria/building security. Specifically, Grievant alleged that Ms. Michki was improperly taking things from the cafeteria and Grievant raised concerns about the volume of traffic coming in and out the back door, the back door being propped open, and the back gate to the parking lot being left open.

9. On or about January 14, 2019, Grievant reported her concerns to Principal Harmon and stated that they needed to call Mr. Tackett. Principal Harmon viewed this as “threatening,” and told Grievant that she would not be threatened.⁴ It is totally unclear why Principal Harmon felt threatened. Principal Harmon stated only that Grievant’s tone and body language gave her that impression, but she did not describe the same. Principal Harmon told Grievant that she would report her concerns to Mr. Tackett.

10. Sometime in November 2018, Ms. Hysell met with Director McCoy and told her that at various times she had noticed things missing from unsecured areas in the kitchen, or not being where she had left them, such as cereal, Dawn, garbage bags, paper towels, and hamburger.⁵ It is noted that there was a cooler at the front of the kitchen that had a lock on it, but there was no key available to Ms. Hysell.

³ See, testimony of Krystal Hysell.

⁴ See, testimony of Robin Harmon.

⁵ The exact date of this meeting is unknown.

11. Also, around the time of the November 2018 meeting, Ms. Hysell reported to Director McCoy that Ms. Michki had planned to take leftover chili and grilled cheese home with her, but that Ms. Hysell had told her no. Director McCoy asked Ms. Hysell if she wanted her to speak with Ms. Michki, and Ms. Hysell said yes.

12. Director McCoy met with Ms. Michki privately in her office sometime after speaking with Ms. Hysell about the chili and grilled cheese. Only Director McCoy and Ms. Michki were present during the meeting.⁶ No one called to testify at the level three hearing was present during this meeting, and Ms. Hysell testified that she did not know what was said during the same.

13. Following her November 2018 meeting with Director McCoy, Ms. Hysell started locking the back door to the kitchen. This was an effort to cut down on the traffic in the kitchen in order to better secure the food and kitchen supplies.⁷

14. On January 10, 2019, Grievant was given permission from Ms. Hysell to take home empty apple boxes from the cafeteria. Such can be seen on the security video from that day.⁸

15. On January 14, 2019, Principal Harmon was informed by someone that a garbage bag was lying out on the concrete behind one of the dumpsters. Ms. Harmon went to investigate, and found the bag contained barbeque chicken scraps and a drinking glass. Principal Harmon asked Ms. Michki if the bag was hers. According to Principal Harmon, Ms. Michki told her that it was her glass, and nothing more. However, Mr. Tackett's investigation report states that Principal Harmon told him during her

⁶ See, testimony of Krystal Hysell.

⁷ See, testimony of Krystal Hysell.

⁸ See, Respondent's Exhibit 1, CD containing the five videos.

investigation interview that Ms. Michki admitted taking the chicken from the cafeteria, apologized for taking the chicken, and said that she had rather take it than see it thrown away.⁹

16. For reasons unknown, video of the January 14, 2019, dumpster chicken incident reportedly could not be recovered from the security camera server.¹⁰ However, footage of Grievant from that same day was recovered and such has been presented by Respondent as evidence in this matter.¹¹

17. On or about January 15, 2019, Grievant reported her concerns about Ms. Michki to Mr. Tackett. Grievant also gave Mr. Tackett photos that she had taken showing instances of what she considered suspicious behavior. Included were pictures regarding the January 14, 2019, dumpster chicken incident, and at least one photo of what appears to be packages of food in Ms. Michki's tote bag.¹² Shortly thereafter, Mr. Tackett began an investigation into Grievant's allegations.

18. During his investigation, Mr. Tackett spoke with Grievant, Principal Harmon, Director McCoy, Ms. Hysell, and Ms. Michki. Mr. Tackett also contacted Principal Harmon about reviewing security camera footage from a camera near the back door of the cafeteria. No incident reports were presented as evidence in this matter. Also, no recordings or transcripts of the interviews were presented as evidence. Mr. Tackett's investigation report contains only summaries of his interviews.

⁹ See, testimony of Robin Harmon; Grievant's Exhibit 5, photos; Grievant's Exhibit 2, Tackett Investigation Report.

¹⁰ See, testimony of David Tackett.

¹¹ See, Respondent's Exhibit 1, video recording; Respondent's Exhibit 5, March 1, 2019, Termination Letter.

¹² See, Grievant's Exhibit 5, photos.

19. At some point, Mr. Tackett's investigation into Grievant's allegations against Ms. Michki evolved into an investigation into the entire kitchen staff.

20. Mr. Tackett spoke with Ms. Hysell during his investigation and she admitted to giving extra dough to Grievant and Ms. Michki for their personal use and consumption on at least three separate occasions before Christmas. On one of these occasions Ms. Michki made cinnamon rolls for herself from the dough using school kitchen supplies and the oven.¹³

21. Mr. Tackett spoke to Grievant during his investigation. Grievant told him that Ms. Michki was taking things such as dish liquid, garbage bags, food, toilet paper, and paper towels from the school. Grievant also told him about the January 14, 2019, chicken incident. Grievant informed him that she had stopped allowing Ms. Michki to ride to work with her because of Ms. Michki's stealing, and that she had confronted Ms. Michki about the same.¹⁴ Grievant also provided Mr. Tackett with photos she had taken, and he included them in his investigation report.¹⁵

22. Mr. Tackett interviewed Ms. Michki during his investigation. She denied taking things from the cafeteria, including the January 14, 2019, chicken.

23. For at least a full day and one-half day, together Mr. Tackett and Principal Harmon reviewed hours of video footage from January 2019 from the security camera that covered the back door of the cafeteria. Mr. Tackett testified that they could not

¹³ See, Grievant's Exhibit 5, photos; Grievant's Exhibit 2, copies of photos with written descriptions.

¹⁴ See, Grievant's Exhibit 2, Investigation Report drafted by David Tackett.

¹⁵ See, Grievant's Exhibit 2, Investigation Report.

retrieve any video footage from the camera for dates before January 2019 or of the January 14 chicken incident.

24. While reviewing the hours of video footage from the security camera, Mr. Tackett and Principal Harmon saw Grievant taking various bags, boxes, and containers to her car during the workday on January 8, 2019, January 10, 2019, January 11, 2019, and January 14, 2019. Based upon this and Grievant's explanations for such, Mr. Tackett and Ms. Harmon concluded that Grievant was stealing from the cafeteria.

25. No videos of Grievant entering the school on the mornings of the days at issue were presented as evidence in this matter. As such, there is no way to see what Grievant carried into work on those mornings. Also, no videos from December 2018 were introduced.

26. There were two other dates in January 2019 on which Grievant was seen on the video recording taking things to her vehicle during the day, but Mr. Tackett deemed those two instances permissible because he found Grievant's explanation of what was being carried to her car reasonable. Those two video clips were not introduced as evidence in this matter. The dates of such are unknown as is the activity seen therein.

27. By letter dated January 24, 2019, Superintendent Ryan Saxe informed Grievant that she was being placed on paid administrative leave pending an investigation concerning possible misconduct on her part.¹⁶

28. Upon information and belief, Ms. Hysell and Ms. Michki were placed on paid administrative leave pending the investigation, just as Grievant. Ms. Hysell was only on

¹⁶See, Respondent's Exhibit 2, January 24, 2019, letter.

this leave for two days before being returned to work. It is unknown how long Ms. Michki was on administrative leave.

29. When Ms. Hysell was returned to work, she was provided a key for the cooler located at the front of the kitchen so that she could lock-up inventory to better protect it from theft.¹⁷

30. By letter dated February 21, 2019, Assistant Superintendent Tim Hardesty informed Grievant of her rescheduled appointment to meet with Superintendent Saxe, along with her counsel, to allow her to respond “to allegations of misconduct made against” her. This meeting was scheduled to be held on February 27, 2019, at the Respondent Board’s office.¹⁸

31. Upon information and belief, Grievant and her counsel met with Superintendent Saxe on February 27, 2019. The complete list of those in attendance at the meeting is unknown.

32. By letter dated March 1, 2019, Superintendent Saxe informed Grievant that she was suspended from her duties effective that same date, that he would be asking the Board to ratify the same, and that he would also be recommending to the Board that her employment contract be terminated.¹⁹

33. In the March 1, 2019, letter, Superintendent Saxe stated, in part, the following with respect to his decision to terminate Grievant’s contract:

This decision was not made lightly. I carefully considered the allegations made against you, the evidence presented to corroborate those claims, and your own explanations. After

¹⁷ See, testimony of Krystal Hysell.

¹⁸ See, Respondent’s Exhibit 4, February 21, 2019, letter.

¹⁹ See, Respondent’s Exhibit 5, March 1, 2019, letter.

weighing all the evidence and factors, I do not feel your explanations mitigated the proof presented to me.

The allegations that were presented include:

- 1) On, (sic) January 8, 2019[,] around 9:30 A.M., I was provided with film footage of you taking out the trash and boxes to the dumpster, and then removing bread from the bottom of the trash can and placing it in your personal vehicle to take home.
- 2) On, (sic) January 10, 2019[,] around 1:05 P.M., I was provided with film footage of you placing a small white box and something in aluminum foil, along with authorized apple boxes into your personal vehicle to take home.
- 3) On, (sic) January 11, 2019[,] around 10:34 A.M., I was provided with film footage of you placing a white Wal-Mart bag of items into your personal vehicle to take home.
- 4) Later on, (sic) January 11, 2019[,] around 1:18 P.M., I was provided film footage of you placing a black trash bag into your personal vehicle to take home.
- 5) On, (sic) January 14, 2019[,] around 10:04 A.M., I was provided video footage of you placing a large aluminum pan into your personal vehicle to take home.

During a previous conversation with Mr. Tackett and Ms. Harmon, you were unable to recall what these items were. You provided several explanations at our meeting on February 27, 2019. However, you also denied that you had taken any food home in the past and that you had done anything improper. Theft of any kind will not be tolerated by our employees. This violates your contract with the Cabell County Board of Education, as well as, the Employee Code of Conduct. . . .

34. At a meeting on March 19, 2019, Respondent Board voted unanimously to terminate Grievant's employment contract.

35. As a result of his investigation, Mr. Tackett brought charges against Grievant, Ms. Michki, and Ms. Hysell. Mr. Tackett had planned to use Grievant one of his

witnesses against Ms. Michki, even though he had already concluded that Grievant's explanations for her own conduct were not credible.

36. During his investigation, Mr. Tackett had found at least one video recording of an incident with Ms. Michki carrying items out of the kitchen and home with her, and such was one of the alleged instances of theft brought against Ms. Michki. Also, Mr. Tackett was using at least two photographs taken by Grievant, one showing the dumpster chicken, and of her cinnamon rolls.²⁰

37. Superintendent Saxe suspended Ms. Michki and was going to seek approval of the same from the Board in March 2019, as well as, ask for her termination. However, the suspension imposed on her was reversed and the recommendation for her dismissal was withdrawn before Board approval. Therefore, Ms. Michki received no discipline whatsoever. It is unknown who made the decision to withdraw the recommendation to terminate Ms. Michki and to reverse her suspension, and why such was done.

38. Ms. Hysell, Grievant's immediate supervisor, received only a written reprimand in her file for giving the dough to Grievant and Ms. Michki for their own use and consumption. She received no unpaid suspension and was paid for the two days she was on administrative leave during the investigation.

39. No one witnessed Grievant taking anything from the cafeteria on the dates at issue that was not authorized. Further, no one reported to administration any suspicions of Grievant stealing from the cafeteria or made any allegations that she had

²⁰ See, Grievant's Exhibit 2 containing letter dated March 1, 2019; Grievant's Exhibit 2, copies of photographs with descriptions; Grievant's Exhibit 5, photographs.

stolen things. The charges brought against Grievant resulted only from Mr. Tackett and Ms. Harmon's review of the video footage from the dates available in January.

40. No one has alleged that any particular foods or supplies were missing from the school cafeteria on January 8, 2019, January 10, 2019, January 11, 2019, or January 14, 2019.

41. Respondent's only evidence to support its claims is the video footage of Grievant carrying a white Wal-Mart/plastic bag, a white box, a foil packet, a small black trash bag, a plastic bag, and apple boxes to her car during certain workdays. No one besides Grievant ever looked inside those containers, and Grievant denies that she stole from the cafeteria. No witness has claimed to have seen Grievant place anything in these containers before taking them from the kitchen.

42. Those school administration members who testified at the level three hearing admitted that they had no idea whether the contents of the bags, boxes, and containers Grievant is seen carrying on the videos belonged to Grievant or the school system.

43. Until the events at issue in this grievance, Grievant had no prior disciplinary history.

44. There are no known rules or policies prohibiting employees from leaving their assigned buildings and going to their cars during the workday.

45. There are no known rules or policies prohibiting employees from bringing food from home to work with them, or from taking the leftovers of such home with them.

46. Krystal Hysell, Robin Harmon, David Tackett, and Grievant were called to testify as witnesses at the level three hearing in this matter. Mary Michki, Rhonda McCoy, and Ryan Saxe were not called to testify.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

This is an unusual case. Pursuant to its letter of March 1, 2019, Respondent dismissed Grievant for theft from the cafeteria in violation of her employment contract and the Employee Code of Conduct. At level three, Respondent did not introduce Grievant’s employment contract or the Employee Code of Conduct, but argued that Grievant’s theft from the cafeteria constituted immorality in its proposed Findings of Fact and Conclusions of Law. Respondent based its decision to suspend and dismiss Grievant on security camera footage that shows Grievant carrying a variety of disposable bags, boxes, and containers out of the back door of the cafeteria and placing them into her personal vehicle to take home with her. There is no way to see inside any of these bags, boxes, and containers on the video footage. Also, Respondent has not claimed that any school property was missing on the days in question. Respondent asserts that the bags, boxes, and containers held school property of some kind, and that Grievant was stealing such

each time she carried them to her vehicle. Respondent has never identified any school property that it alleges Grievant stole, other than a few leftover dinner rolls. Respondent decided to suspend and, ultimately, terminate Grievant's employment because Mr. Tackett found that Grievant's explanations for what was in the bags, boxes, and containers on the different days were not plausible, and because Grievant changed her explanations during the investigation. From this, Mr. Tackett concluded that Grievant committed theft. However, Mr. Tackett deemed reasonable her explanations of her actions on two other video clips, and did not charge her for that conduct.

Based upon the security camera recordings, it is undisputed that Grievant carried various disposable bags, boxes, and containers out the back door of the school cafeteria on January 8, 2019, January 10, 2019, January 11, 2019, and January 14, 2019, and placed the same into her vehicle and took them home. There are no known eyewitnesses to the incidents captured on the security camera, other than Grievant. Also, other than Grievant, there are no known witnesses to her readying the bags, boxes, and containers in the kitchen before taking them out the back door to her car on the days in question. Grievant denies Respondent's allegations and argues she did not steal from the cafeteria. Grievant asserts that she took home only items that were hers, those that were given to her, and those that were authorized by her supervisors. Therefore, it is disputed whether Grievant engaged in theft, and whether her unpaid suspension and, ultimate, dismissal were justified.

WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have the authority to assign, transfer, promote, demote, or suspend school personnel and to recommend their dismissal pursuant to provisions of

this chapter.” W. VA. CODE § 18A-2-7. Further, WEST VIRGINIA CODE §18A-2-8 states, in part that,

(a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. . . .

W. VA. CODE § 18A-2-8(a). Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 “must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.” Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975). Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 675 S.E.2d 907 (2009). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). See, *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or

reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). “[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.” *Buskirk v. Civil Serv. Comm’n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985). See *Blake v. Civil Serv. Comm’n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm’n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

Respondent did not mention the formal charge of immorality until the filing of its proposed Findings of Fact and Conclusions of Law. Until that point, Respondent had only alleged that Grievant violated her employment contract and the Employee Code of Conduct. Again, no specific provision of her employment contract was referenced and Respondent did not identify which Employee Code of Conduct, local or other, or any provision thereof, in its dismissal letter or at the level three hearing. Respondent did not introduce as evidence at the level three hearing Grievant's employment contract or the Employee Code of Conduct.

"Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' [Citation omitted.]" *Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar. 12, 2002); *Golden v. Board of Education of County of Harrison*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); *Snodgrass v. Wetzel County Bd. of Educ.*, Docket No. 97-52-384 (Dec. 15, 1997); *Harry v. Marion County Bd. of Educ.*, 203 W. Va. 64, 506 S.E.2d 319 (1998). "Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' See *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995), citing *Youngman v. Doerhoff*, 890 S.W.2d 330 (Mo. 1994)." *Kennard, supra*; *Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sep. 14, 1998). However, "[i]t is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence

is sufficient to substantiate that the employee actually engaged in the conduct.” *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

This case certainly presents an unusual set of circumstances. One can see Grievant’s activity in the video evidence presented; however, there is no way to determine by merely watching those videos whether she was stealing from the cafeteria. No foods, supplies, equipment, or other property clearly owned by the school is visible in the videos. Also, there is no way to see what was in the containers she was carrying. Respondent has not alleged that Grievant stole any particular items. Grievant has admitted to taking the dough given to her by Ms. Hysell and some leftover rolls, she also claims were authorized by Ms. Hysell, but she denies stealing. Therefore, whether Grievant even engaged in the alleged misconduct of theft is disputed.

Respondent asserts that Grievant changed her explanations of what she is seen carrying out of the cafeteria on the security video when she was asked during the investigation, referring to when Grievant was first asked by Mr. Tackett and Principal Harmon, then during the February 27, 2019, meeting with Superintendent Saxe. Because Grievant’s explanations changed and because Mr. Tackett did not believe Grievant’s explanations to be reasonable, Mr. Tackett concluded that Grievant was stealing on the days in question and recommended her suspension and dismissal. The only evidence presented about what was said during the two meetings was the testimony of Mr. Tackett, Principal Harmon, and Grievant. Superintendent Saxe did not testify at the level three hearing. Apparently, no transcripts or recordings of the meetings exist.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *Id.* See *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant testified at the level three hearing. Grievant was calm, and she answered the questions asked of her. She was not evasive. Grievant displayed the appropriate demeanor during the hearing. It was obvious that Grievant was upset and offended over being accused of stealing and dismissed, which is understandable. Such did not impact her credibility. Grievant has an interest in this action as she is seeking reinstatement into her former position, which could be a motive to be untruthful. There were times when

Grievant seemed a little confused, but that does not necessarily mean that she was being untruthful. Such can be explained by the passage of time and being unfamiliar with being questioned. Grievant appeared to be trying too hard at times, as well. Her explanations of why she kept her journals and the different handwriting styles on a single page were questionable. Keeping a journal is not unusual. However, detailing in one's journal all the insignificant details of who did what each workday is unusual. It is also a bit sad that one would feel so ill at ease at work he or she had to note all these goings-on. While there are certainly problems with Grievant's testimony and explanations, overall, she appeared credible.

Krystal Hysell testified at the level three hearing in this matter. Ms. Hysell was respectful and displayed the appropriate demeanor and attitude. She appeared nervous, and, at times, fearful when answering the questions asked of her. Such is understandable given that she received a written reprimand for giving the extra dough to Grievant and Ms. Michki. It also seemed that Ms. Hysell was afraid that her understanding of cafeteria rules was wrong, or that she would say the wrong thing. It appeared that the events leading to this grievance had made her question everything she believed to be correct. Also, it is only logical in this situation that she was afraid of further discipline, which could be a motive to be untruthful. At one point in her testimony, Ms. Hysell stated that she was a "nervous wreck" and that she was "afraid to give anyone an extra piece of bread." Ms. Hysell was not evasive, at least not on purpose. Ms. Hysell tended to undermine her own answers by saying "but, I could be wrong," or things to that effect, after answering a question. Ms. Hysell appeared mortified that she had violated the rules and had been disciplined. Ms. Hysell was remorseful, and even apologized during her testimony. Ms.

Hysell testified that Grievant complained about Ms. Michki every day. Her tone, as well as that of Principal Harmon, suggested that they were very tired of, or frustrated by, Grievant's repeated complaining. Such can also suggest bias against Grievant. Nonetheless, overall Ms. Hysell was a credible witness.

Principal Robin Harmon also testified at the level three hearing. Principal Harmon was calm, and she answered the questions asked of her. She did not appear evasive. She displayed the appropriate demeanor during proceeding. Principal Harmon was a little vague in recounting some of the events, and she had some trouble remembering details. For example, when talking about the events of January 14, 2019, Principal Harmon said she heard Ms. Hysell talking "about some stuff" outside her office, then later Grievant came to her with the pictures and her concerns about Ms. Michki. Principal Harmon did not get into specifics. Principal Harmon also stated that she could not remember what Grievant's explanation for the bag in the trash can was during the meeting with Mr. Tackett and her, as opposed to what Grievant stated at the meeting with Mr. Saxe. She first said that Grievant said it was dough at both meetings, then she said she really did not recall. She also testified that she did not recall what Grievant's explanation was for two of the videos at the meeting with Superintendent Saxe, but she knew that it was different than the one given at the meeting with Mr. Tackett. Principal Harmon testified she could not remember either explanation given for the fifth video she was shown.

Principal Harmon admitted during her testimony that she had "no idea" if what was in the bags, boxes, and containers Grievant carried to her car on the various days belonged to Grievant or to the school system. She testified several times that during her

meeting with Mr. Tackett and Grievant, when asked about the video clips, Grievant said that she had written journals in which she had all the details of her workdays written down. She further testified that Grievant did not ask for a chance to review them before answering their questions. However, Principal Harmon did not indicate that they offered Grievant such an opportunity either. They did not.

Principal Harmon also testified about the January 14, 2019, dumpster chicken incident. However, it is noted that her testimony does not appear to match the summary of her interview written by Mr. Tackett that was included in his Investigation Report.²¹ During her testimony at level three, Principal Harmon stated that she asked the other employee (presumably Ms. Michki) if the bag of chicken out by the dumpster was hers, and the employee stated that only the glass inside the bag was hers. That was the extent of her testimony on the subject. However, Mr. Tackett's summary states as follows:

...During the investigation, Ms. Harmon, Principal of Highlawn Elementary[,] was questioned about an incident involving hidden chicken. Ms. Harmon verified that it was reported to her that there was a bag of food hidden on the concrete behind one of the dumpsters. This incident happened on January 14, 2019. When Ms. Harmon went outside to investigate, she saw [redacted employee name] holding a trash bag near the area of the dumpsters. When Ms. Harmon asked about the trash bag [of chicken], [redacted employee name] told her it was trash and that she left her Coke glass in the bag. Ms. Harmon looked into the bag and saw a bag of chicken and the Coke glass. Ms. Harmon asked [redacted employee name] about taking the food from the cafeteria. Ms. [redacted employee name] apologized for doing so and said that she "would rather take the food instead of throwing it away". (sic) . . .²²

²¹ See, Grievant's Exhibit 2, pg. 1 of redacted Investigation Report, undated.

²² *Id.*

Principal Harmon did not mention anything about the other employee being outside by the dumpster. Also, she did not mention anything about asking the other employee if she took the chicken from the cafeteria, or that the employee apologized and said she would rather take the food instead of throwing it away. This discrepancy, or omission, is troubling and places doubt on both Principal Harmon's credibility and the accuracy of Mr. Tackett's Investigation Report. Also, the fact that Principal Harmon testified that she perceived Grievant as "threatening" even though it is undisputed that Grievant did not threaten her in any way, places her credibility in question. Principal Harmon testified that they found no other video footage of the other employee, presumably Ms. Michki, taking things from the kitchen. She corrected herself explaining that there was a video showing the other employee, but the item being carried out of the kitchen turned out to be the employee's (Ms. Michki's) coat, so there was no theft. This statement contradicts statements made in the suspension letter sent to Ms. Michki dated March 1, 2019.²³

David Tackett testified at the level three hearing. Mr. Tackett was calm, and he answered the questions asked of him. He did not appear evasive. Mr. Tackett conducted the investigation into the alleged theft from the cafeteria and made conclusions about the same. While he was not the ultimate decider on employee discipline, he was involved in discussions regarding the disciplinary actions. As such, he could be viewed as having an interest in the outcome of the case. He showed the appropriate demeanor during the proceeding. However, he made a point to note that during the meeting with Superintendent Saxe after they played the first video, Grievant's counsel "interrupted" and

²³ See, Grievant's Exhibit 2, copy of March 1, 2019, letter to Ms. Michki, whose name is redacted in this letter. There was no dispute that this letter was directed to Ms. Michki.

took Grievant out in the hall to meet with her before she answered their questions about the video. Such was outside the scope of the question asked. This statement gives the impression that Mr. Tackett resented Grievant bringing her attorney to the meeting, or that he felt such implied that Grievant did something wrong, or guilt of some kind. This was highlighted when he was questioned by Grievant's counsel. Mr. Tackett's tone and demeanor changed. His voice sounded slightly higher, and he seemed a little defiant. When asked what was the point of his statement during his direct examination that Grievant's counsel "interrupted" before Grievant could answer their questions and met with her in the hallway, Mr. Tackett testified that he wanted it to be known that there was a conversation before she answered. Grievant was allowed to bring her counsel to the meeting. Such is her right and it implies no guilt or misconduct. While he denied that he was implying anything by his comment, Mr. Tackett was certainly trying to imply some dishonesty on the part of Grievant and/or her counsel. This type of attitude negatively impacts Mr. Tackett's credibility, and can be viewed as potential bias, or a motive for being untruthful.

Mr. Tackett testified that Grievant did not ask for time to review her journals before answering their questions. However, it sounded like he was also denying that she mentioned having journals during the meeting. Respondent's counsel asked a compound question about the journals and whether Grievant asked for time to review them, and Mr. Tackett answered "no" to both parts. If he intended to testify that Grievant did not mention the journals, Mr. Tackett's testimony would contradict that of Principal Harmon. Further, Mr. Tackett testified that he found Grievant's explanations of what she was taking out of the cafeteria not to be credible. Despite this, Mr. Tackett had found her statements about

Ms. Michki stealing credible and had intended to prove it by calling Grievant as one of his witnesses, even after he had decided to charge Grievant. This does not make much sense. Also, Mr. Tackett testified that there were no videos of other employees taking things out of the cafeteria that could not be reasonably explained; however, that contradicts the March 1, 2019, letter sent to Ms. Michki.²⁴ As described herein, there were problems with both the testimony of Mr. Tackett and Ms. Harmon, whether intentional or not.

This matter is similar to the case of *Adams v. Kanawha County Board of Education*, Docket No. 2015-0968-KanED (Aug. 6, 2015). As in this case, the issue was whether the grievant actually stole food from the cafeteria. In *Adams*, a cook was accused of stealing several pounds of pepperoni from the cafeteria. The respondent suspended and, ultimately, terminated her employment for immorality and willful neglect of duty. The grievant denied stealing. The evidence demonstrated that there was no proof that grievant had stolen anything. Another employee had told the principal that there were several pounds of pepperoni in the grievant's tote bag located in the restroom. The principal did not verify this allegation at all. He never saw any pepperoni. He did not speak to the grievant that day about the allegation. He allowed the grievant to leave school premises at the end of the day, and he watched her carry her tote bag out of the building. He did not stop her, or ask to see what was in her bag. When she returned the next day, the principal called the grievant into his office and questioned her about taking pepperoni off school premises. The principal based the charges on only the word of another employee, which was totally unsubstantiated. The grievance was granted at level

²⁴ See, Grievant's Exhibit 2, March 1, 2019, letter to Ms. Michki.

three as there was no evidence to prove by a preponderance of the evidence that the grievant stole the pepperoni. Grievant was ordered reinstated to her former position. See *Id.*

As in *Adams*, there were no witnesses to the alleged theft and no one saw what was in the bags, boxes, and containers Grievant placed in her vehicle on the days in question. There are no photos or videos showing what was in the various containers Grievant carried out of the building. None of the video clips show the insides of the containers. All that can be seen is Grievant leaving the building and placing containers in her car. Further, the quality of the video is poor, and it is hard to discern the colors and details of the things Grievant is seen carrying. Some parts of the video are a bit blurry. For example, in the video where Grievant is seen carrying the small white box and the foil pouch, it is hard to see that the two things are separate. Also, the way Grievant is carrying the box with pouch on top in her arms, along with her tote bag on her shoulder, makes it difficult to see the box fully. Another example of this is that the dumpster featured in all five videos has something written in white, or light color, on its side facing the camera. However, the viewer cannot discern what the writing says. Just like *Adams*, whether the Grievant actually engaged in the misconduct is entirely disputed. Also similar, is the fact that the cooks were not getting along very well.

Similar issues of alleged employee theft have been addressed by the West Virginia Supreme Court of Appeals in the past. The Court has previously held “[t]he petty theft by state hospital employees of clothing donated for patients is worthy of discipline, but does not constitute good cause for dismissal of long-term civil service tenured employees with unblemished work records.” Syl. Pt. 1 *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310

S.E.2d 472 (1983). In *Blake*, two employees took approximately thirty shirts that had been donated to their employer, a hospital, for distribution to needy patients. When caught, the employees stated they had taken the shirts to give as Christmas presents to the patients and they returned the clothing. Both employees had been employed by the hospital for fifteen years and had no prior history of discipline. Unfortunately, the Court provided very little discussion of its reasoning, citing cases explaining the nature of civil service tenure and a handful of cases in which the Court had decided that there was not good cause, or dismissal was too severe a penalty in cases with “minor infractions,” especially when there was a long history of good service.

In the case of *Waugh v. Board of Education*, 177 W. Va. 16, 350 S.E.2d 17 (1985) (*per curiam*), an employee, Mr. Waugh, who had been employed by a Board for seven years and had been a good employee, had taken certain items from his school. The Court found that Mr. Waugh’s actions were not improper because the items had been given to him by his supervisor. The proven charge was his theft of a radio, a tool box, and a cash box containing \$25.00 from a clinic on school grounds, but not part of the school, and not during work hours. The Court found that dismissal for the proven charge was not warranted because Mr. Waugh, a seven-year employee, voluntarily admitted the theft, returned the property, was intoxicated at the time of the theft, and expressed deep remorse. The Court found a “two-year period without pay is sufficient punishment.” See *Waugh v. Bd. of Educ.*, 177 W. Va. 16, 350 S.E.2d 17 (1985) (*per curiam*)

Blake and *Waugh* demonstrate that even when the conduct is clearly wrong, dismissal from employment is not necessarily justified for a long-term employee with otherwise good performance of his/her duties. Here, Grievant had been employed by

Respondent for four years as a regular employee and one year as a substitute and had no prior history of discipline. She was described by Ms. Hysell as an excellent worker. Principal Harmon also testified that Grievant was a good worker. However, for some odd reason, Principal Harmon felt it necessary to testify that she did not see Grievant smile much during her employment. Like in *Blake*, the value of the leftover rolls Grievant admits to taking, albeit with the permission of Ms. Hysell, is *de minimis*. They were otherwise slated to be thrown in the trash. Such is worth much less than the thirty donated shirts the *Blake* grievants stole, which the Supreme Court deemed “petty theft.”

Ms. Hysell and Ms. Harmon corroborated, or supported, many of Grievant’s claims. They credibly testified that they had never seen Grievant steal anything from the cafeteria. They also confirmed that Grievant would bring her lunch to school at times, and it was not uncommon for the kitchen workers to use Walmart bags, and the like, to bring in their own food. Ms. Hysell testified that it was not uncommon for them to bring in food to share with the other kitchen staff. Ms. Hysell confirmed that a Panera lunch had been provided for the employees, and that the lunches came in the small white boxes and that the employees were allowed to take their leftovers home. Ms. Harmon also testified that there had been lunch from Panera given to the employees. Ms. Hysell further confirmed that a man named Mr. Hope brought sweet potatoes and, she believed, cabbage for the employees in early January after they came back from Christmas break, and the employees were allowed to take the vegetables home as a gift. Ms. Hysell confirmed that Grievant was allowed to take the apple boxes home with her on January 10, 2019. Ms. Hysell’s testimony largely supports Grievant’s explanations of what she was carrying out to her vehicle during the days in question, as did Ms. Harmon’s. It is noted that at the

level three hearing, Ms. Hysell was asked mostly about giving the extra dough to Grievant and Ms. Michki, and she fully admitted to doing that. She denied allowing them to take other things home. However, she was not clearly asked whether she ever allowed Grievant and/or Ms. Michki take home a few leftover rolls. Counsel kept asking about dough, which is different than rolls.

Grievant admits that her explanations as to what was in the various bags, boxes and containers changed. At the first meeting, she answered that most of what she was taking home in the various containers was bread that Ms. Hysell had allowed her to take home, and on one day was said she was not sure what as in the container. The first meeting with Mr. Tackett and Principal Harmon was not scheduled in advance. Grievant was called into the meeting and shown seven videos by Mr. Tackett and Principal Harmon. Grievant did not have any idea that she was going to be asked about select moments of certain workdays, some of which had occurred over a week before. Grievant had not seen the videos before. All of this was a surprise to Grievant, and she had not had the opportunity to look at her journal before answering.²⁵ It is not entirely clear that Grievant understood that it was being suggested that she stole from the cafeteria. When she later met with Superintendent Saxe, she had had the chance to review her journal, which she claims refreshed her memory. She testified that this is why her explanations had changed. Also to be considered, is that by the time Grievant met with Superintendent Saxe, Grievant had seen the videos, knew what dates and actions were in question, and

²⁵ Grievant testified that she routinely kept handwritten journals about what went on in her daily life, particularly about what happened during her workday. Grievant testified that she started doing this in college and when she worked as a bookkeeper. She testified that she had kept these journals for years, and she brought to the hearing a stack of filled composition notebooks purported to be the same.

she had time to think about what had happened on those dates. It is noted that Mr. Tackett found Grievant's explanations of her actions on two of the videos clips to be plausible at the first meeting; therefore, and he did not charge her for her actions on those two clips.

Grievant's explanations are plausible.²⁶ Grievant testified that the small white Walmart bag seen in the January 11, 2019, video contained what was left of the food she had brought with her for the day. Grievant further testified that the small, white box seen on the January 10, 2019, video contained the leftovers from her Panera lunch, and that breadsticks from that same lunch were in the foil pouch seen on top of it. She also testified that black trash bag seen in the January 11, 2019, video contained the vegetables given to the employees by Mr. Hope. All of these explanations are supported by the evidence presented at level three. They are much more plausible than any hunch administration may have had that she was stealing something.

As for the aluminum pan seen in the video on January 14, 2019, Grievant testified that it was a half-size aluminum pan that she bought at the store and she had brought homemade fudge to work in it to share with coworkers. As it was hers, she took it back home. While no other witness confirmed this exactly, it is certainly plausible. Aluminum pans like that can be purchased just about anywhere, and people bring candy and treats to workplaces everywhere. Also, it simply makes more sense to bring in an inexpensive, disposable pan to work for such occasions than a good pan from home. This explanation

²⁶ Grievant brought a number of demonstrative exhibits to the level three hearing to support her claims, such as an apple box, a box from Panera, her journals, a Walmart bag containing food items she normally took for lunch, a foil packet of bread, an aluminum pan, and a package of biscuits.

is entirely plausible, and there has been no evidence to contradict it. Grievant volunteered that she had a few leftover rolls in her aluminum pan, but that they were allowed to take such home with them by Ms. Hysell. Taking leftover rolls home is not permitted by the rules. Pursuant to certain rules and guidelines, none of which were presented as evidence, but all involved appear to agree, that any leftover food from the cafeteria is to be thrown away. However, if Grievant were told by her supervisor that she could take the few leftover rolls home, it was authorized. It is true that Ms. Hysell has denied allowing Grievant or Ms. Michki to take anything else home, but she was not specifically asked about a few leftover rolls on any particular dates. The questioning focused on dough. Further, it could have been another situation where Ms. Hysell looked the other way, as she did with the extra dough.

Given the evidence presented, more likely than not, Grievant was authorized to take home the two, or so, of leftover rolls. It is undisputed that the kitchen staff is permitted to eat a school lunch and breakfast, the same served to the children, while at work. While taking any scrap of food home is not allowed by the rules, there has been no allegation that the Grievant or the other cooks were making too much dough on purpose, thereby creating waste, so that they could take rolls home. There has also been no allegation that the employees were over-ordering inventory at the cafeteria at the expense of the school system. Further, Respondent has never alleged that Grievant stole anything in particular at all. These were a few leftover rolls, which were destined for the trash, and that's really all they were--trash. The rolls were *de minimis* at best.

Lastly, Respondent has accused Grievant of stealing bread on January 8, 2019, by taking it out of the cafeteria in the bottom of a trash can and placing it in her car on her

way back into the cafeteria. The video clip from this day shows Grievant exiting the cafeteria rolling a trash can to the dumpster. She can be seen taking the garbage bag out of the can and placing it in the dumpster. Then she reaches into the trash can and pulls out a small plastic bag containing something that cannot be discerned, which she puts in her vehicle on the way back into the building. Grievant claimed that the bag contained bread both times she was asked during the investigation. First, she claimed that it was bread Ms. Hysell had allowed her to take, then she said that the bag contained biscuits she had brought from home to eat, and was taking what was left home for her dog. It is certainly troubling that the bread was underneath the trash bag in the can. Grievant, however, argues that she had laid the bag of leftover biscuits aside on a counter next to the trash can in the kitchen, and that bag must have been somehow knocked off the counter into the can. While Grievant's explanation does not seem likely, it is not impossible. There is no security camera footage from inside the kitchen. There were no eyewitnesses to what was in the bag or how it got in the bottom of the trash can, except for Grievant. Further, Grievant has admitted taking a few rolls on the one day and the extra dough given to her by Ms. Hysell. Her explanations for the other four instances captured on video have been supported by other witness testimony and/or are plausible. Respondent has presented no evidence in support of its claim other than the video and Grievant's own explanations and testimony.

Based upon the evidence presented, Respondent has failed to prove by a preponderance of the evidence that Grievant stole anything from the cafeteria on the days in question. As such, Respondent has failed to prove that Grievant's conduct constituted immorality. Accordingly, Respondent has also failed to prove that Grievant violated any

Employee Code of Conduct or her employment contract. Grievant had been employed by Respondent since 2014, first as a substitute, then as a regular, full-time employee since 2015. She has always had good evaluations and was considered an “excellent” worker. She had no disciplinary history before her suspension and termination. Considering these things, as well as the evidence presented in this grievance, Grievant’s suspension and termination was arbitrary and capricious. There was no substantial evidence that Grievant stole anything from the cafeteria. Mr. Tackett and Ms. Harmon just did not believe Grievant’s explanations. Further, Ms. Hysell, who admittedly gave away extra dough, only received a written reprimand, and Ms. Michki received no discipline whatsoever, even though she made cinnamon rolls for her own consumption with the extra dough given to her at the school during work hours, using the school’s oven and other ingredients. This difference in the severity of discipline imposed on the employees further demonstrates how arbitrary and capricious Respondent’s decision to suspend and terminate Grievant’s employment was, and that such was excessive. For the reasons set forth herein, this grievance is GRANTED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May

17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. “Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. . . .” W. VA. CODE § 18A-2-8(a).

3. Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 “must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.” Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975). Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 675 S.E.2d 907 (2009).

4. “It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board’s evidence is sufficient to substantiate that the employee actually engaged in the conduct.” *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

5. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep’t of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of

the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

6. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *Id.* See *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

7. "[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985). See *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

8. Even when employee conduct is clearly wrong, dismissal from employment is not necessarily justified for a long-term employee with otherwise good performance of his/her duties. See Syl. Pt. 1 *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Waugh v. Board of Educ.*, 177 W. Va. 16, 350 S.E.2d 17 (1985)(*per curiam*).

9. Respondent failed to meet its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct constituting immorality justifying her suspension and termination.

10. Respondent failed to prove that Grievant violated any Employee Code of Conduct or any provision of her employment contract.

11. Respondent's decision to suspend and terminate Grievant's employment was arbitrary and capricious.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as a Cook II, and to pay her back pay from the date of her suspension to the date she is reinstated, plus statutory interest, less any appropriate offset, and to restore all benefits, including seniority. Further, Respondent is **ORDERED** to remove all references to this suspension and dismissal from Grievant's any and all personnel records maintained by Respondent, or its agents.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: October 3, 2019.

Carrie H. LeFevre
Administrative Law Judge