WANDA SILER,

Grievant,

v. **DOCKET NO. 94-HHR-278**

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/WEST VIRGINIA

CHILDREN'S HOME,

Respondent.

D E C I S I O N

Grievant, Wanda Siler, filed this grievance on March 12, 1993, protesting a five-day suspension without pay issued on February 18, 1993, asking for "[r]einstatement, removal of suspension from personnel record and back pay, plus costs and fees." (See footnote 1) A Level III hearing was held on February 16, 1994, and a decision rendered denying the grievance on July 7, 1994. Grievant appealed to Level IV and a hearing was held in this Board's Elkins, West Virginia office on September 2, 1994, at which time the case became mature for decision.

Issue

Ms. Siler was issued a letter dated February 18, 1993 from Ruth Ann Panepinto, Ph.D., Secretary, Department of Health andHuman Resources, suspending her for five days without pay. The letter sets forth, in pertinent part, the reasons for the suspension as follows:

1. You permitted or caused employees of the West Virginia Children's Home, during regularly scheduled work hours while they were engaged to render services to the State and for which they received compensation from the State, as well as at times they were not engaged to render services to the State, to prepare for your personal use and the personal use of others, not only food which you purchased with your personal funds, but also an undetermined amount of food which was purchased by State funds for use at the West Virginia Children's Home.

. . .

2. You permitted or caused employees of the West Virginia Children's Home, during regularly scheduled work hours while they were engaged to render services to the State and for which they received compensation from the State, to conduct personal business and errands for you.

. . .

3. You caused property of the State, namely an ironing board and cover, to be converted for your benefit and for the personal use and benefit of a former employee of the West Virginia Children's Home.

Agency Ex. 1.

Pursuant to W. Va. Code § 29-6A-6, in cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989). Each case must be determined upon the facts and circumstances which are peculiar to that case. Blake v. Civil Service Commission, 310 S.E.2d 472 (W. Va. 1983). Thus, the issue in this grievance is whether the employer has proved, by apreponderance of the evidence, that Grievant allowed or caused West Virginia Children's Home properties, goods and services to be converted for her personal use and the personal use of others, thus warranting suspension for five days without pay.

Grievant denies that she is guilty of any wrongdoing. Grievant does not deny that all of the incidents investigated occurred, but contends that they were not improper, or only appear so when taken out of context of the operations of the Children's Home.

I.

Grievant has been employed by Respondent for thirty-three years and is currently Assistant

Director of the West Virginia Children's Home ("Home") in Elkins, West Virginia. Grievant is responsible for the daily supervision of all departments within the Home, including the child care staff, the kitchen, food service, laundry, buildings and grounds, school and case management. Grievant is responsible for and maintains the budget for the Home. Grievant also conducts training in behavior observation, appropriate interaction with staff and residents, and the planning and scheduling of special activities for the residents. Tr., p. 99; G's Ex. 7. There is no question but that Grievant has been a loyal and exemplary employee during her entire tenure at the Home.

Sometime in 1992, the Fraud Management Unit for the Office of the Inspector General and the Department of Health and Human Resources received a complaint or complaints about the Home and the Grievant. Specifically, there were allegations made regardingmisuse of State time, personnel, equipment and supplies. Tr., p. 13.

James Crowder ("Crowder"), the Director of the Investigative and Fraud Management Unit, conducted an internal investigation of the Home and the Grievant as a result of these complaints. (See footnote 2) These complaints involved the first allegation in Grievant's suspension letter: That she directed employees of the Home to prepare food at the Home for her personal use, and specifically, that Grievant had taken four turkey breasts which had been purchased for the Home and directed the kitchen staff to prepare them for her niece's wedding reception. Tr., p. 13.

Crowder interviewed witnesses at the Home, procured documentation, and returned to Charleston, where he found a daily log which had been anonymously sent to him by someone at the Home. This log caused Crowder to return to the Home and conduct a second investigation. That investigation resulted in the second and third allegations in Grievant's suspension letter: That she caused employees to run errands for her during State work hours and that she caused State property to be converted for the personal use and benefit of another State employee, to-wit: an ironing board. Tr., p. 13.

Crowder interviewed at least twenty employees of the Home, took written statements, and collected items of evidence, including the daily log. Tr., p. 6. Robert Baughman, a former employee ofthe Home, told Crowder that he kept the log because there had been wrongdoing at the Home for several years and he wanted to be able to relay the information if it became necessary. Mr. Baughman mailed Crowder the log because he thought it might be helpful to his investigation. Tr., p. 11. Crowder did not investigate Mr. Baughman's background or history with the Home. Tr., pp. 11-

12.

During the second trip to the Home, a former Home employee, Catherine Stanaker, told Crowder that Grievant had given her an ironing board belonging to the Home as a wedding present. Stanaker gave Crowder a steel-top, beige-colored, ironing board with "WVACH 1921" marked on the leg in magic marker. Agency Ex. 6. Crowder offered into evidence an "added property list" for the Home, dated June 15, 1970, which lists 6 ironing boards with serial numbers 1920-21, 1922-23, and 1924-25. Tr., p. 8; Agency Ex. 2.

Crowder also presented a charge slip from the Kroger Company for the purchase of turkeys for $129.69 (Agency Ex. 3) to support allegations that Grievant used Home food for her personal use, including her niece's wedding reception. The charge account belongs to the Home and the slip was signed by Doug Phillips, an employee of the home, on June 19, 1992.

A requisition for payment was issued from the Home dated July 8, 1992, and shows a Kroger bill for June 19, 1992 for the amount of $189.99. Agency Ex. 4. The specific allegation is that Grievant appropriated four of the turkeys bought for the Home for her niece's wedding reception and directed the cooks at the Home to prepare them for the reception. There were other allegations thatGrievant frequently directed the cooks to prepare meals for her personal use which she would take home.

Crowder's investigative report was forwarded to the Office of the Inspector General for review and then to the Division of Personnel. Tr., p. 9. Based upon Crowder's investigation and report, Grievant was suspended for five (5) working days from the Home. For reasons unknown, Crowder's investigative report was not offered or admitted into evidence at the Level III or Level IV hearings; only portions of that report appear in the record. Crowder did not testify at the Level IV hearing, but did appear at Level III. Dr. Panepinto, the author of the suspension letter, was not called as a witness at either hearing and it is, therefore, unclear exactly what evidence, other than Crowder's report, she had before her when she imposed the five-day suspension upon Grievant.

II.

The majority of the evidence presented in this case consists of witness testimony. Many of the factual disputes involved must necessarily be decided on the basis of credibility resolutions. Therefore, it is necessary to summarize the substance of the witness' testimony in order to get a clear picture of the events and the environment which existed at the Home at the time Crowder conducted

his investigation. The summaries are presented in the order the witnesses testified.

Catherine Stanaker

Catherine Stanaker ("Stanaker") had been a Counseler for the Home from 1986 until 1992. She was married in or about October1989 and her co-workers threw a wedding shower for her at work. She was a member of a treatment team with Robert Baughman and Lori Ferguson. Tr., p. 15. Grievant brought an ironing board to Stanaker's office as a shower present, but did not attend the shower. Tr., p. 15. Grievant told her she bought the ironing board at K-Mart. Tr., p. 24. Another employee, Judy Roy, told Stanaker that "Randy" had gotten the ironing board out of the stockroom for Grievant. Tr., p. 16. Stanaker noticed that evening that the ironing board had the marking "WVACH 1920 or 21" on the leg in magic marker. Home inventory is normally marked with metal tags. Tr., p. 16. (See footnote 3) Stanaker saw "Polly", a cook, preparing chicken breasts and fileted fish and was told that the food was for Grievant's supper. Tr., p. 18. Employees were permitted to eat meals on the premises of the Home. Tr., p. 18. She saw Grievant taking food out to her car to take home on several occasions. Tr., p. 24.

Grievant used her office computer for class work for courses she was taking at Davis & Elkins College. Tr., p. 19.

Stanaker knew that Robert Baughman was keeping a daily log of goings on at the Home. He felt it was necessary because of the inappropriate things going on at the Home. Tr., p. 21.

Robert Baughman

Robert Baughman ("Baughman") worked at the Home for 23 years, from 1969 until May, 1993. He reported directly to CarsonMarkeley, Director of the Children's Home. Baughman started keeping a daily log in 1989 because he had concerns about inappropriate "things" going on at the Home. He felt he had to protect himself because of documentation against him from when he filed previous grievances. Tr., p. 28. Baughman gave a statement to Crowder and admitted mailing the log to him.

Baughman observed Grievant giving Cathy Stanaker an ironing board as a wedding present. Tr., p. 30. He never saw any other ironing boards at the Home and has no knowledge of how they were marked. Tr., p. 42.

In the summer of 1992, he saw the cooks preparing turkeys in the kitchen and was told they were for Grievant's niece's wedding reception. Tr., p. 30.

Some of the staff did personal errands for Grievant, including taking her children to appointments

and taking her car to the car wash. He observed Judy Roy taking Grievant's car to be washed during work hours. Tr., pp. 31-32. He had heard that some of the staff would take Grievant's children to appointments, and had seen the maintenance men washing Grievant's car. Tr., pp. 40-41.

A portion of Baughman's log was admitted as Grievant's Ex. 1. This entry indicates that Baughman took time off work to help a co-worker with his truck. He did not indicate on his attendance log, Grievant's Ex. 2, however, that he took time off from work to aid his co-worker.

Baughman made notations in his log on June 28, 1992, regarding the preparation of the turkeys for Grievant's niece's reception. Baughman admitted that the turkeys were cooked on a day that he was off, so he did not actually see them being prepared. The cooks told him they had prepared the turkeys for Grievant. Tr., p. 38.

Grievant's Ex. 3, dated August 18, 1992, is a note in Baughman's handwriting stating: "Dad-trying to get advertisement in Gazette and Channel 5/talking to guy at council mtg. tonight - 3:15 p.m. and Inter Mountain." Baughman said the note was about the Children's Home, but that he never did anything about it. Tr., p. 39. Nevertheless, on September 7, 1992, an article appeared in the "Fanny Seiler" column in the Charleston Gazette regarding the Home. Grievant's Ex. 4. The article mentioned that cooks at the Home had prepared turkeys for an employee's relative's wedding reception. The Director, Carson Markeley, responded in the article that nothing inappropriate had occurred at the Home.

Baughman received poor performance evaluations from Markeley for two or three years preceding his termination by Markeley in 1993.

Paula Bright Baughman

Ms. Baughman worked as a cook at the Home for 3-1/2 years until December 1992. She married Robert Baughman in September 1993. Ms. Baughman was one of the cooks that prepared the turkeys for the reception. Doug Phillips brought the turkeys in from Krogers and they had been purchased with a Home charge slip. Four were prepared for the reception. She took them out of the wrappers, washed them and put them in the pan on Friday. Judy Roy, a housekeeper at the Home, came in on Saturday and prepared theturkeys and other food for the reception. Ms. Baughman worked that Saturday and helped Judy slice the turkeys. Tr., p. 51. Judy did not normally work on Saturdays, but may have volunteered to help with the preparation. Tr., p. 46.

Ms. Baughman and other cooks had prepared fish, meatloaf, and chicken for Grievant to take

home. She would sometimes make kielbasa for Grievant's husband. The kielbasa was sometimes already at the Home, or Grievant would give her money to go buy it at Kroger. Tr., p. 46. The fish was taken out of boxes ordered for the Home. Tr., p. 47. When the cooks prepared meatloaf for the children, Grievant would ask them to take a small portion of it and put it in a pan for her and her family. Tr., p. 48. Ms. Baughman put the food in Grievant's car for her from time to time, and Judy Roy, Mildred Eckard and Mrs. Cross also did grocery shopping for Grievant. Tr., 48.

Ms. Baughman gave a statement to Crowder. She told him that Grievant called her at home and threatened her with her job if she told Crowder about the turkeys. Tr., p. 49. She received good evaluations from Grievant. Tr., p. 50.

Ms. Baughman testified initially that she was aware that Robert Baughman was keeping a log of events that occurred at the Home, and that she and the other cooks would tell him things that were going on. Tr., p. 52. Later, Ms. Baughman said she did not know whether he wrote things down and never saw the log until the investigation. Tr., p. 53.

Naomi Corder

Naomi Corder ("Corder") has been employed by the Home for five years as a Youth Service Worker. She gave Mr. Crowder a statement in the summer of 1992. She told him she took one of Grievant's children to the beauty shop a couple of times and used the State vehicle. Tr., p. 55. It was during the summer and she dropped her off between 3:00-3:15 p.m, but did not remember what summer it was. Corder first worked the day shift, 7-3, and then switched to night shift, 3-11 or 4-12, in October or November, 1991.

Mildred Eckard

Mildred Eckard ("Eckard") has been a cook at the Home for eight years. She helped baste the four turkey breasts on the Friday before the wedding reception. She did not work that Saturday. Tr., p. 59. Eckard had been asked to prepare food for Grievant, such as fish, meatloaf and chicken breasts. Tr., p. 60. She thought Grievant supplied the fish, but the other meats belonged to the Home. Tr., p. 61.

The policy at the Home had been that staff could take home leftovers and surplus breads supplied by Kroger. Everyone did it. Tr., p. 62. Also, at one time the staff was permitted to order food from the supplier of the Home. Grievant would pay for the food, and the staff would reimburse her, and she would then pay the supplier. Tr., p. 63. Since the investigation, the staff is not permitted to take anything home and the leftovers and bread are thrown away. Tr., p. 64.

Judy Roy

Judy Roy ("Roy") is currently a cook at the Home, and was a housekeeper before 1992. Roy ran errands for Grievant, including taking her car through the car wash, but did it during her break time. She often worked the errands into things she was already doing, such as going to Kroger. Roy always used her own car or Grievant's car. Tr., p. 66.

Roy picked up books for Grievant at Davis & Elkins College library in connection with classes she was taking. Roy believed the classes were connected to Grievant's work at the Home. Tr., p. 66.

Roy worked the Saturday of the wedding reception on her own time. She helped slice the turkeys and some ham which she assumed came from the family. Tr., p. 67.

Roy took Grievant's children to the beauty parlor and to piano lessons on her own time, although she admitted that the trip may have run over into her work time a little. She never used a State car. Tr., p. 67. Roy gave several statements to Crowder. She was confused about the questioning and told him she wanted to get a lawyer. Crowder got very upset with her and threatened to fire her if she didn't answer his questions. Tr., p. 68. Roy received a telephone call from Cathy Stanaker before she met with Crowder and Stanaker told her not to worry, that Crowder wasn't out to get the little people, just Mr. Markeley and Ms. Siler. Tr., p. 69.

Roy talked to Crowder three times. She gave him an initial statement denying going to the Davis & Elkins library, denyingtransporting Grievant's children on State time with a State car, and denying running other errands for Grievant on State time. Tr., p. 72. She then talked to an attorney and told Crowder she wanted to change her statement regarding going to the Davis & Elkins library and admitted that she did go there for Grievant during State time. Tr., p. 72; Grievant's Exhibit 4.

It was not unusual for staff members to offer to pick things up for other staff members or do errands if they were going to town themselves. Tr., p. 73.

Darrell Pine

Darrell Pine ("Pine") worked at the Home from 1985 through September 1992. Pine told Crowder that, in the summer of 1992, Grievant called him at home and told him there was a sale on coffee at the Shop-n-Save and asked him to pick up 10 cans of coffee on his way to work. The coffee cost $29.90. Grievant paid him in cash out of her purse when he delivered the coffee. She then directed him to take coffee to the Home kitchen. Tr., pp. 76-77.

Allen Harris

Allen Harris ("Harris") is the shift supervisor at the Home and has worked there for nine years. Harris was sitting in Grievant's office when she called Pine and asked him to buy the coffee. He observed Grievant pay Pine in cash out of her purse and heard her tell him to take the coffee to the kitchen. Tr., pp. 78-79.

Harris works the night shift and is responsible for securing the doors of the Home at 5:00 p.m. each night. He usually ispushing employees out of the building at 5:00 p.m. and observes Grievant leave work every day that he works. Tr., p. 79. He personally observed Grievant taking surplus Kroger bread and pastries out of the building, along with every other employee, when they were allowed to take the food. Tr., p. 79. The cooks would sometimes offer the staff leftovers of meals that the children didn't finish, including chicken. Tr., p. 79. The staff is no longer allowed to take any foodstuffs from the Home, and the leftovers and old bread are all thrown out. Tr., p. 80.

Harris has never heard the cooks complain or talk about preparing meals for Grievant, and they should have reported it to him if it was going on. Tr., p. 81. He personally observed the cooks putting leftovers in containers and taking food out of the Home covered in tin foil. Tr., p. 80. He never observed any employees requesting that the cooks prepare meals for their home use. Tr., p. 81.

Janet Rile

Janet Rile ("Rile") is the secretary for the Home. She observed Grievant paying for the 10 cans of coffee with her own cash. The coffee was bought for the Home in exchange for the four turkey breasts used for the wedding reception. Tr., p. 82. Grievant purchased the turkeys at Krogers for the Home. She added four extra turkeys to the order, which was paid for with the Home charge account and picked up by Doug Phillips. All of the turkeys were for the Home, except for the extra four. The four turkeys cost approximately $20.00. Tr., pp. 83-84. The turkeys were forGrievant's niece's wedding reception and were cooked and sliced at the Home. Grievant paid for the coffee for the Home as a straight trade for the cost of the turkeys. Tr., p. 84.

Rile told Crowder she was not aware of any staff using a State vehicle to run personal errands for Grievant. Tr., p. 85. Crowder was intimidating and responded, "She's been doing it for years and I'm going to stay here until I find out. . ." Tr., p. 85.

Delores Simmons

Delores Simmons ("D. Simmons") has worked at the Home since 1974 and worked in the kitchen and as a housekeeper. She had no knowledge of anyone preparing meals for Grievant. Tr., p. 88.

D. Simmons worked in the stockroom and has never seen an ironing board in the stockroom. The only ironing boards she ever saw were one in the laundry, a broken one "upstairs", and two in the basement. Tr., p. 89. The ironing boards were marked with little metal tags with numbers on them. Tr., p. 89. She does not recall seeing any ironing board marked with magic marker, and the only ironing boards she has ever seen at the Home have black legs, not beige. Tr., pp. 89-90. She has never seen the ironing board marked as Agency Exhibit 6. Tr., p. 91.

Patricia Simmons

Patricia Simmons ("P. Simmons") has worked at the Home for 16 years as a Youth Service Worker. She coaches all the sports activities. She does not own a car and would sometimes use Grievant's car to run errands, but never on State time. Tr., p. 94. She never ran errands for Grievant. Tr., p. 94.

P. Simmons testified that she could not answer some of Crowder's questions. He tried to force her to "guess" and clenched his fist and shook it at her and called her "offensive and evasive." Tr., p. 95.

Carson Markeley

Carson Markeley ("Markeley") has been the Director of the Children's Home for 15 years and is Grievant's direct superior. Markeley confirmed that Grievant had been taking classes at Davis & Elkins College in counseling and psychology. She graduated Magna Cum Laude in 1993. The Department of Health and Human Resources reimburses employees for tuition and encourages them to take classes. It was common and accepted practice for employees to do school work during work time when they had the extra time. Grievant used her office computer to do some of her school work and also used her computer at home. Tr., p. 103.

Markeley had sent Robert Baughman to a three-day seminar on Individual Treatment Plans (ITP) with the direction that he be responsible for developing an ITP for the Home. It was necessary for the Home to have a satisfactory ITP in order to remain licensed by the State. Tr., p. 101. Baughman never submitted any information on the ITP upon his return and never developed a plan, even after several requests. Tr., pp. 102-103.

Grievant took a practicum at Davis & Elkins and as part of that course, she designed, developed and implemented an ITP plan for the Home. Grievant's ITP is now being used as a model in other West Virginia facilities. Tr., p. 101. The books that wereobtained from the Davis & Elkins library by

Ms. Roy for Grievant were part of Grievant's studies and were ultimately for the benefit of the Home, and the use of State time to retrieve the books was not viewed by Markeley as an abuse of State time. Tr., p. 103.

With regard to the foodstuffs, Markeley acknowledged that prior to August 1992, staff took home leftovers and surplus bread supplied by Kroger. As a result of the investigation, Markeley issued a memorandum to the staff that they were no longer allowed to take food home. Tr., p. 105; Grievant's Ex. 9.

Markeley never saw or heard that Grievant was asking the cooks to prepare food for her. He did see Grievant bring food in to the Home that her mother had prepared. Tr., p. 106. Markeley never heard any reports that the State vehicle was being used for personal errands, except from Crowder. Tr., p. 107.

The Home is not a large facility and operates as a family unit. If someone was going to the store, it was not uncommon to offer to pick something up for a co-worker, and certainly was not discouraged. Tr., p. 107. Since the investigation, people have been reluctant to do anything for anyone else. Tr., p. 108.

Markeley had other problems besides the ITP incident with Robert Baughman. Baughman spent a lot of time in the kitchen, yet would have problems scheduling time to spend with his residents. Tr., p. 108. Markeley gave him negative evaluations which he grieved. The last time he was evaluated, Baughman told Markeley he could not accept a negative evaluation because he had just gotten married and it would affect him and his wife. Baughman toldMarkeley that he would "get him" and that he knew important political people. Tr., p. 109.

Markeley had never seen the ironing board in question before. Home inventory is not marked "WVACH", but "WVCH". Tr., p. 111. Grievant told him at the time that she was not going to give Cathy Stanaker a wedding gift. Tr., p. 112.

Markeley did not reprimand Grievant for having the turkey breasts prepared at the Home for her niece's wedding reception because it was common practice. Mrs. Eckard prepared things in the Home's kitchen when her daughter got married. Mrs. Cross prepared things in the kitchen when her daughter got married. The staff prepared craft items at the Home for Cathy Stanaker's baby shower. Tr., p. 112.

Markeley explained that the Home did not have a budget to buy large quantities of coffee for the

Home. However, they could buy smaller amounts for functions held at the Home. The Randolph County Board of Education met at the Home, and there were meetings of foster grandparents at the Home, and coffee was purchased for these types of events. Markeley knew about Grievant exchanging the purchase of the coffee for the turkey breasts and did not perceive any problem because it did not cause any net loss to the Home. Tr., p. 113.

Markeley told Crowder that he would consider it inappropriate for Grievant to do the things complained of if no one else at the Home were doing them, but that was not the case as those things were common and accepted at the Home. Tr., p. 114.

Randall L. Arbogast

Randall Arbogast ("Arbogast") has worked at the Home for 6-1/2 years. He testified that, despite Cathy Stanaker's testimony to the contrary, he never delivered an ironing board from the Home stockroom to the Grievant.

Wanda Siler (Grievant)

Grievant did not give Cathy Stanaker any wedding gift or baby shower gift, let alone an ironing board. Ms. Stanaker was responsible for counseling young girls, some of whom were promiscuous. Ms. Stanaker was seven months pregnant when she got married. Grievant disapproved of Ms. Stanaker as a role model and did not want to give someone whom she did not respect a wedding gift. Tr., p. 121. Grievant has never seen the ironing board marked as Agency Ex. 6, nor has she seen any ironing boards at the Home that resemble the exhibit. Tr., p. 122. Grievant personally prepared the "added property list" (Agency Ex. 2) and the subject ironing board was not one of the 6 ironing boards listed on that report. Tr., p. 122.

Grievant never asked the cooks to prepare meals for her, including fileted fish or meatloaf. The Home does not even order fileted fish, but only buys breaded squares of fish. Tr., p. 123. Grievant admitted that if the cooks were going to Kroger for something, she would ask them to pick up items for her. Tr., p. 123.

Grievant's account of the turkey/coffee trade coincides with Mr. Pine, Mr. Harris, Ms. Rile and Mr. Markeley's testimonyregarding how that transaction came about. Grievant purchased the coffee with her own money in exchange for the four turkey breasts that were bought on the Home charge account. Tr., pp. 124-125.

Grievant began having problems with the kitchen staff in the Spring of 1992. She had received

complaints from the night shift that the cooks were preparing the evening meal and snacks too early so that they could leave work early. The children would get hungry in the evening and the snacks were no longer good at that point. Tr., p. 125.

Grievant began coming in on Friday, Saturday and Sunday nights to investigate and observed the cooks leaving at 5:15 p.m. rather than their regular quitting time of 6:00 p.m. Grievant spoke with them about this three or four times and continued to get complaints. Markeley was upset with Grievant because this problem continued. Grievant had monthly staff meetings and made a written report to Markeley summarizing the meetings. Grievant's Ex. 10. Grievant continued to keep Markeley advised of the problems with the kitchen staff. At one point, the kitchen staff threatened to walk out because they were upset with her and she told them that she would just accept their resignations. They did not walk out. Tr., p. 126.

Grievant admits that some of the staff, including Delores Simmons and Judy Roy, took her children to piano lessons, but not on work time. Tr., p. 128. Grievant denies that Naomi Corder ever took her daughter to the beauty shop or used the State car. Tr., p. 129.

Grievant sometimes would have to drop her car off at K-Mart to have it serviced and someone would pick her up to take her to work or back to K-Mart. Tr., p. 129. Grievant also asked Paul Jones, a Home employee, now deceased, to put windshield wiper fluid in her car for her. Tr., p. 130.

Other Witnesses

Several other witnesses testified at Level IV, including some who had also testified at the Level III hearing. (See footnote 4) Without summarizing each individual's testimony, the consensus was that none of the witnesses had seen or heard that Grievant had requested the cooks to prepare meals for personal use.

III.

In disciplinary matters, the burden is upon the employer to prove the charges against the employee by a preponderance of the evidence. Kinney and Toler v. W. Va. Div. of Corrections, Docket No. 93-CORR-195/213 (Dec. 30, 1993). In this particular matter, a determination as to whether the employer has met this burden must necessarily be dependent upon determinations regarding the credibility and reliability of the witnesses. The matter becomes even more difficult because the employer did not present any witnesses at the Level IV hearing, but merely rested on

the Level III transcript. The Grievant presented numerous witnesses at the Level IV hearing in addition to witnesses called at Level III. Nevertheless, having observed critical witnesses for the Grievant,and after close review of the Level III transcript, the undersigned concludes that the employer has not met its burden of proving the charges against Grievant by a preponderance of the evidence.

The first charge against Grievant is that she caused or permitted employees to prepare food for her personal use, some of which was purchased for use at the Home. The evidence presented by Crowder included the charge slip from Kroger for the turkeys and the requisition form requesting repayment for the Kroger bill. There is no dispute that Grievant had Judy Roy and Paula Baughman prepare four turkeys for her niece's wedding reception. There is also no question that the turkeys were bought on the Home charge account with Krogers. Certainly if that were the only evidence presented to Dr. Panepinto by Crowder on this issue, it would appear that Grievant misappropriated food belonging to the Home for her own personal use. Couple that with an article in Fanny Seiler's column suggesting a misuse of government property, and one can understand why Dr. Panepinto would believe disciplinary action was necessary.

However, testimony from Allen Harris, Janet Rile, Carson Markeley, and Grievant establishes that Grievant reimbursed the Home for the cost of the turkeys when she bought 10 cans of coffee for the Home. Markeley and Mrs. Eckard testified that the staff used to be allowed to place food orders with the Home's supplier and reimburse later. This turkey/coffee transaction is no different than that practice.

There is no doubt that the practice creates an appearance of impropriety on its face. Markeley has since ordered the practice to cease, but there is no indication that at the pertinent time, he or anyone else at the Home considered the practice inappropriate. Also included in the first charge was that Grievant directed the cooks to prepare food, including Home food, for her own personal use. Dr. Panepinto's letter indicates that evidence was presented that she ordered them to do this at least once a week for the past three years. As no physical evidence was presented to support this charge, and the testimony of not one, but many, witnesses is in direct conflict, it is necessary to determine the credibility of the witnesses who testified on this matter.

Cathy Stanaker said she saw one of the cooks, "Polly", preparing chicken breasts and fileted fish for Grievant's supper. No "Polly" testified in this proceeding, nor was any statement by "Polly"

introduced into evidence. Stanaker also said she saw Grievant taking food out to her car on several occasions.

Paula Baughman, a cook and Robert Baughman's wife, said she prepared fish, meatloaf and chicken for Grievant, and sometimes kielbasa for Grievant's husband. Mildred Eckard, a cook, also said she prepared fish, meatloaf, and chicken for Grievant, but believed Grievant brought in the fish.

Many of the witnesses testified that employees were allowed to take home leftovers and bread donated from Krogers and all availed themselves of this benefit. Since the investigation, that practice has ceased and it appears that large quantities of foodstuffs nowgo to waste. That is a very unfortunate consequence of the paranoia that apparently attached itself to this investigation. Nonetheless, it is possible that Grievant took leftovers home which these witnesses now say they prepared solely for her own use.

Ms. Baughman's testimony is somewhat tainted through her association with Robert Baughman, whose testimony is highly incredible given his past history at the Home. In addition, it was the cooks who were upset with Grievant because she caught them leaving early from work and who threatened to walk out. It is interesting that these same cooks, who were so upset with Grievant in the summer of 1992, never complained to anyone that she was making them prepare food for her personal use before Mr. Crowder arrived at the Home.

On the other hand, Allen Harris, the night supervisor, said he never saw Grievant take any food out of the Home, nor did he ever see or hear that the cooks were preparing food for Grievant. Markeley never saw or heard about the cooks preparing food for Grievant, but did see Grievant bring food in to the Home. Patricia Simmons, the sports director, said she spent a lot of time in and around the kitchen and never saw or heard the cooks preparing food for Grievant. Delores Simmons, and many of the other witnesses who testified for Grievant, never saw or heard of any food being prepared for her at the Home. Of course it is important to remember that during this time period, the employees were allowed to take home leftovers from the children's meals and breads and pastries donated by Kroger.

Because of the suspicious nature of some of the witness' testimony, and the large number of witnesses who testified that they never saw or heard Grievant asking the cooks to prepare food for her, despite the allegation that this happened at least once a week for three years, the undersigned finds that the employer has failed to prove this charge by a preponderance of the evidence.

The second charge against Grievant is that she caused Home employees to conduct personal business and errands for her during State time, including going to the Davis & Elkins College library for her. The only witness who testified that she ran an errand for Grievant during work hours while using a State vehicle was Naomi Corder. Grievant denied that Corder ever transported her children in a State vehicle. Other witnesses testified that they ran errands for Grievant, as well as other employees, but not on State time. They indicated that if they were going to do an errand, they would ask if anybody needed anything. If the cooks were going grocery shopping (presumably on State time as part of their job), they would ask if anyone needed anything at the store. In addition, it appears that the Home employees assisted each other if they were having car trouble and indeed, Paul Jones put windshield wiper fluid in Grievant's car. Given the size and nature of the Home, this type of camaraderie among employees is not considered "inappropriate", but rather the type of cooperative relationship that should be encouraged among employees of the State. As Mr. Markeley pointed out in his testimony, as a result of thisinvestigation, the employees are now reluctant to do anything for anybody anymore. That is extremely unfortunate.

There is no dispute that Judy Roy went to the Davis & Elkins library for Grievant. However, the testimony of Grievant, Markeley, and Roy, establishes that Grievant's coursework was benefitting the Home, she was being reimbursed tuition by the Department of Health and Human Resources, and she was developing an ITP for the Home as part of her coursework. There is no evidence that this "errand" was only for Grievant's personal benefit or that it was considered inappropriate by Grievant's immediate superior, Carson Markeley. Again, the employer has failed to prove by a preponderance of the evidence that Grievant misused State employees on State time for her own personal benefit.

The third charge against Grievant is that she converted a State-owned ironing board for her benefit and the personal use of a former Home employee, Cathy Stanaker. Grievant explained that not only did she not give Cathy Stanaker an ironing board as a wedding present, but she gave her no wedding present because she had no respect for her. The only witnesses who testified about the giving of the ironing board were Cathy Stanaker and Robert Baughman, both former employees of the Home. Despite the fact that Stanaker testified that Judy Roy told her that "Randy" had gotten the ironing board out of the stockroom for Grievant, Judy Roy was never questioned about the ironing board, and Randy Arbogast denied ever getting an ironing board out of the stockroom for Grievant.

Other witnesses testified that they had never seen an ironing board like the one in evidence at the

Home. The Home ironing boards had black legs and were marked with metal tags. The exhibit board is beige and marked with magic marker. Interestingly, despite Stanaker's testimony that she noticed the "WVACH 1921" marking on the board the night she took it home from the shower, she did not report her concerns about the origin of the board until 1992 when Crowder began his investigation.

Grievant's testimony regarding Ms. Stanaker was credible and the undersigned has no reason to doubt her explanation. In fact, logic would dictate that if Grievant were guilty of the charge, she would have attempted to explain away the markings on the board, rather than deny that she gave Stanaker any wedding present at all.

Finally, the undersigned is particularly troubled by the testimony of several of the witnesses that Crowder was threatening and intimidating when interviewing them. It is also troubling that Crowder's report is not part of the record in this proceeding. It is impossible to determine what information was given to Dr. Panepinto and how it was presented. The undersigned suspects it was rather one-sided. Supporting that suspicion is the fact that, even though Crowder interviewed more than twenty employees of the Home, the employer called only Mr. Baughman, his wife, and some of the cooks as its primary witnesses.

Given the severity of the charges against Grievant, and the apparently extensive investigation into the matter, one would expect the employer to be able to prove its case by more convincingevidence than it has presented. Consequently, the undersigned finds that the employer has failed to meet its burden of proving the charges against the Grievant by a preponderance of the evidence.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. When the standard of proof is a preponderance of the evidence, it is not necessary for the employer to prove the facts to the exclusion of all reasonable doubt, but rather, the decision must be made in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. Simmons v. Insurance Co., 8 W. Va. 474, ____ S.E. ____ (W. Va. 1875); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994).

3. The employer has failed to prove any of the charges made against Grievant by a preponderance of the evidence.

Accordingly, this grievance is **GRANTED** and the employer is hereby **ORDERED** to remove the suspension from Grievant's personnel file and award her back pay and benefits for the five-day period she was suspended from employment.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

MARY JO ALLEN

Administrative Law Judge

Dated: November 16, 1994

Footnote: 1 *Ms. Siler was suspended for five working days, without pay, beginning March 1, 1993. She returned to work on March 8, 1993.*

Footnote: 2 *It is unclear from the evidence who made these complaints or how they arrived at the Fraud Management Unit.*

Footnote: 3 *There was testimony that the Home uses "WVCH" rather than "WVACH" on its inventory, but it appears that at some point in time, some inventory was marked "WVACH".*

Footnote: 4 *Naomi Corder, Michelle Chenowith, Brenda Carr, Janice Hart, Wilma Burdette, Craig Nelson, Evelyn Jones, Janice Lewis, Pat Davis, and Sue Rowe.*