

# ***Dep't of Education v. Logan***

OATH Index No. 494/19 (August 19, 2019)

Department alleged that school food service manager engaged in various misconduct including failure to supervise her staff to ensure that potentially unsafe food was not served to students, and failure to ensure that kitchen equipment was clean and in working condition. ALJ sustained most of the charges and recommended termination.

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## **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF EDUCATION**

*Petitioner*  
*- against -*

**BRITTEN LOGAN**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**JOYCELYN McGEACHY-KULS**, *Administrative Law Judge*

Petitioner, the Department of Education (“Department” or “DOE”), brought this disciplinary proceeding under section 75 of the Civil Service Law, alleging that Respondent Britten Logan, a school food service manager, engaged in misconduct, conduct unbecoming her position, and neglect of duty by failing to follow a directive from her supervisor not to serve recalled romaine lettuce to students, failing to ensure timely meal service for students, failing to submit timely requests for repairs to food service equipment, and failing to maintain accurate inventory of food items, in addition to other misconduct (ALJ Ex. 1).

At trial, the Department presented the testimony of five witnesses, in addition to documentary evidence. Respondent testified on her behalf and also presented documentary evidence. For the reasons set forth below, I find that Petitioner established most of the charged misconduct and recommend that Respondent should be terminated.

## ANALYSIS

Respondent has been a school food service manager (“SFSM”) in District 10 for eight years. Before her employment with DOE, she worked as a food inspector with the New York City Department of Health and Mental Hygiene where she was responsible for checking food temperatures, ensuring that restaurants serve fresh food, and that restaurants were clean and sanitary. She holds a Bachelor’s Degree in Food and Nutrition from Lehman College (Tr. 257-58). During the 2016-17 and 2017-18 school years Respondent was assigned to manage the school cafeterias at Public School (“P.S.”) 33, P.S. 59 and P.S. 59 Annex serving breakfast, lunch, and afterschool programs totaling approximately 1500 meals per day. She also manages 10 employees between those schools.

Petitioner alleged that Respondent neglected or failed to adequately perform her duties at those schools and that Respondent committed various misconduct that violated Department rules regarding general department, neglect of duty, incompetence, as well as meal preparation and cash collection. Petitioner also alleged that Respondent violated Chancellor’s Regulations by not serving meal with the required food components and by not adhering to cash collection protocols.

In this disciplinary proceeding, Petitioner “has the burden of proving its case by a fair preponderance of the credible evidence . . .” *Dep’t of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 08-33-SA (May 30, 2008) (citation omitted). Preponderance has been defined as “the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.” Prince, Richardson on Evidence § 3-206 (Lexis 2008); *see also Dep’t of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 11-47-A (July 12, 2011).

C. Williamson and C. Friere are district supervisors in District 10. District 10 is the largest school district in New York City encompassing 73 schools, 23 SFSMs, and over 500 employees. Ms. Williamson oversees approximately 38 schools and is responsible for 10 SFSMs and over 200 SchoolFoods<sup>1</sup> kitchen staff. She testified that she works closely with SchoolFood service managers to make sure that they have the proper training to manage their kitchen staffs.

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<sup>1</sup> The term “SchoolFoods” was used during the course of the trial to refer to food service or kitchen staff. SchoolFoods operates within DOE to provide “healthy food to children mandated by the Child Nutrition Program – United States Department of Agriculture” to New York City public schools (ALJ Ex. 2 at 3).

To ensure that food safety protocols are followed, she conducts 15 site visits per month. SFSMs are typically assigned three to four schools and are responsible for training and supervising the kitchen staff in each of their assigned schools. SFSMs are responsible for ensuring that food safety protocols are followed, that menus and recipes are followed, and that meals are compliant with federal guidelines. They have administrative duties as well including payroll, food order and inventory reconciliation. SFSMs also function as the liaison between the school administration and SchoolFoods (Tr. 20, 182-83).

Ms. Friere has been a district supervisor for over 10 years. She testified that district supervisors make sure the kitchens and food service are in compliance with USDA regulations.<sup>2</sup> Ms. Friere and Ms. Williamson meet with their SFSMs on a regular basis to advise them of any new information. District supervisors conduct Supervisor Site Reviews (“site visits”) at their schools to ensure that the kitchen staff and food service are in compliance with DOE’s operational goals. The supervisors also check to ensure that posted menus are correct, that the kitchen is clean and that all equipment is working. They also confirm that pantry items have expiration dates in red and are checked regularly to ensure that only fresh and unexpired items are being served to the school children. Ms. Friere stressed that food service staff are considered guests of the principal in every school, so they are encouraged to have a good working relationship with the administration (Tr. 25, 183-84).

*Misconduct, Incompetence, Neglect of Duty*

*Specifications 1 and 2: Between February 7, 2017 and March 8, 2017, at P.S. 59, Respondent failed to supervise proper execution of the menu and/or staff’s adherence to nutrition standards in that menu items and/or recipes were missing or unprepared. Respondent also failed to ensure that grocery items had expiration dates and failed to maintain an accurate inventory of items.*

*Specification 3: Between February 7, 2017 and September 25, 2017, at P.S. 59 and/or P.S. 33, Respondent failed to submit timely requests for necessary repairs to food service equipment and failed to ensure that preventative maintenance measures were implemented.*

Problems came to light when Ms. Friere conducted a site visit at P.S. 59 on February 7, 2017, and noted that many areas needed improvement. She observed that the posted lunch

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<sup>2</sup> In order for SchoolFoods to be reimbursed for meals provided through DOE, the meals have to be in compliance with state and federal regulations (Tr. 133).

menus were not correct and that the kitchen was not clean, “the walls were dirty, equipment looked like it hadn’t been washed or, or wiped down in a while.” She also observed that there was food stored in a freezer that was not working and that grocery items did not have required expiration dates. She testified that “it wasn’t the best site visit.” Respondent was at the school during Ms. Friere’s visit and they spent the day trying to correct issues that Ms. Friere had pointed out. Later that day, Ms. Friere had a formal conversation with Respondent regarding her observations (Tr. 25-27).

Respondent acknowledged that there were issues with food expiration dates at her schools. She maintained, however, that it was “everyone’s responsibility” to put expiration dates on food items and she instructed the staff accordingly. She explained that it was “everyone’s job” since she was not at the school every day. When she was not at the school, she expected the staff to follow her instructions (Tr. 301-02). After meeting with Ms. Friere, Respondent met with her staff to address the issues from the site report. She advised her staff what they needed to do going forward and advised them that if the work was not done, “I hand out disciplinary letters” (Tr. 310).

Several weeks later, on March 8, 2017, Ms. Friere visited the school again and noticed that there was no recipe available for the posted lunch meal and that lunch service was delayed. Ms. Friere noted that there was no low-fat milk served at lunch. She explained that federal standards require that both fat-free and low-fat milk be served at every meal and therefore the meal was noncompliant. Ms. Friere also noted that an important safety indicator, “pennies in cups,”<sup>3</sup> were missing from the freezer (Tr. 30-31). Ms. Friere documented these issues in an e-mail to Respondent stating that the visit was “nothing short of abysmal,” noting that issues from prior site visits “that required [Respondent’s] immediate attention remain[ed] unsatisfactory.” Ms. Friere concluded that Respondent “made no effort to correct these concerns” (Pet. Ex. 1).

Respondent testified that she had given the planned meal recipes to the cook but he misplaced them. Respondent later found the recipes in a drawer in her office (Tr. 267, 298). She also contended that her cook did not comply with her instructions to serve low-fat milk and she

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<sup>3</sup> Ms. Friere explained that SFSMs should place either a penny or a paperclip on top of a cup of frozen water. Over a weekend or a long break if the freezer did not operate for any significant amount of time, the ice would melt and the penny would move. This would alert the SFSM or staff if there had been a power outage or other disruption that might have caused food to become contaminated (Tr. 30).

disciplined him for that misconduct. She testified that she issued a disciplinary memo but was not able to produce a copy at trial (Tr. 300).

During the March 8 visit, Ms. Friere observed that the freezer was still not working properly as noted during her February 7 visit. She noted that the food stored in the freezer was defrosted and no longer suitable for eating so she had to discard all of the food (Tr. 28; Pet. Ex. 1). Ms. Friere stressed that food safety is the top priority and that food must be stored at appropriate temperatures. Respondent testified that the freezer was functioning properly in March 2017 and that Ms. Friere was not being truthful about her observations. She said that Ms. Friere “made that up” (Tr. 307). Respondent admitted that she submitted a request to repair the food warmer on September 8, 2017, and a request to repair the refrigerator and the freezer on September 25, 2017, despite being directed to complete these repairs during the February site visits (Tr. 272; Resp. Exs. B, C, D).

On March 20, Ms. Friere met with Respondent to discuss her performance and drafted a performance memo documenting Respondent’s unsatisfactory work. She stressed to Respondent that as SFSM, she is responsible for ordering all food and for supervising the “proper execution of the menu and the staff’s adherence to nutrition standards.” Ms. Friere further noted that Respondent was responsible for inventory reconciliation as well as confirmation of the expiration dates of pantry items (Tr. 33; Pet. Ex. 2). Respondent explained that she was having problems with her staff and that they did not follow her instructions. She told Ms. Friere that she would begin the disciplinary process with staff when appropriate (Tr. 36-37).

On September 19, 2017, K. Beckles, assistant supervisor in District 10, conducted a site visit at P.S. 33. Following the visit, he documented his findings in an e-mail to Respondent listing corrective actions to be implemented. In the e-mail he noted that “there was no structure with the entire flow of the kitchen,” fruit was not available to students for breakfast and lunch, batch cooking<sup>4</sup> was not implemented efficiently, lunch service was not set up in a timely manner, there were no ice cups with pennies in the freezer, and the food production record<sup>5</sup> was not

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<sup>4</sup> Batch cooking is a food safety protocol that involves cooking for the meal period in small batches, anticipating the food needs and students to be served. This practice avoids placing food in warmers for long periods of time thus preserving food quality and safety (Tr. 37).

<sup>5</sup> The food production record tracks food production, meal service, and the amount of food used to prepare the meals. SFSMs are responsible for recipes and planning the amount of food needed to provide meals to the school’s population (Tr. 25; ALJ Ex. 2).

written in advance, among other things (Pet. Exs. 3, 16). Respondent was on-site during this inspection and Mr. Beckles discussed these issues with her.

Regarding this site visit, Respondent acknowledged that there were no ice cups with pennies in the freezer as reported by Mr. Beckles. However, Respondent refused to accept that it was her responsibility to ensure that meals are served in a timely fashion, acknowledging only that it was “a responsibility” (Tr. 319).

*Specifications 4: On September 25, 2017, Respondent failed to inform the Principal of P.S. 59 of an interruption of student lunch service.*

*Specification 5: Between October 5, 2017 and October 25, 2017, Respondent failed to properly supervise Respondent’s staff at P.S. 59 and failed to ensure that breakfast for students was prepared in a timely manner, failed to inform Respondent’s staff of school procedures, and failed to properly maintain equipment and/or accurate inventory records.*

Further complaints were made by Ms. Basu, principal of P.S. 59. In early September 2017, Ms. Basu met with Respondent and other members of SchoolFoods and asked them to inform her of any issues in the kitchen that might affect food service. She explained that she wanted to be able to address any questions or complaints raised by parents. Several weeks later, on September 25, 2017, Ms. Basu was advised that food service was not serving a hot lunch to the students but were instead offering peanut butter and jelly, tuna, and cheese sandwiches. The cook told Ms. Basu that they ran out of food because the refrigerator was not working properly, and they could not use any of the food from the refrigerator. The cook also informed her that there would be no hot lunch for the next two days (Tr. 232).

Ms. Basu was not advised of the menu change and she was concerned because she did not know whether there were any protocols in place to identify students with food allergies. She was informed that the refrigerator and other equipment were not working previously and Respondent had not followed up to make sure that necessary repairs were made. Ms. Basu spoke with Respondent who told her that the cook was supposed to call for the repairs if Respondent was not at school. Later that day, Ms. Basu sent Mr. Beckles an e-mail complaining of problems with equipment and service in the kitchen and advising him of her concerns with “the quality of the staff in the lunchroom.” She believed that Respondent was not taking responsibility for the functioning of the kitchen (Tr. 39, 232-34; Pet. Ex. 4).

Respondent explained that on September 25, she had to plan an emergency menu because there was a recall on chicken nuggets and she changed the posted menu to reflect that lunch would be assorted sandwiches. She also revised the food production record. She acknowledged that the kitchen should not run out of any food item but denied responsibility for this shortage. She emphasized that the cook “didn’t carry out the responsibilities of being a cook” because he ran out of cheese for the sandwiches. Respondent testified that she issued disciplinary letters for failing to follow her directives but she did not have copies of the letters to corroborate her testimony (Tr. 276, 311).

On October 5, 2017, DOE Inspector R. Bright conducted a quality assurance inspection (“QAS”) at P.S. 59 and reported that the kitchen was in “unsatisfactory condition.” He observed that kitchen equipment was not cleaned properly and that “lunch helper [was] not wearing a beard net, [s]taff was not checking expiration dates, temperatures, or quality of food before giving items to students.” Regarding the cleanliness of the kitchen, Mr. Bright reported a “non-approved cleaning item at the pot washing station.” He also noted that there were no “sanitation items” in the kitchen and service areas. Regarding food safety, he reported that the kitchen staff did not use ice packs while setting up breakfast items and they did not thoroughly clean the equipment. The report was e-mailed to Ms. Friere and Mr. Beckles who then forwarded it to Respondent. Ms. Freire testified that Mr. Bright’s findings were “grievous” and that immediate action had to be taken. She testified that she had raised the same issues with Respondent previously (Pet. Exs. 6, 7; Tr. 53-55).

Ms. Basu recounted another issue with meal service that occurred on October 23, 2017. She testified that classes at P.S. 59 begin at 8:00 a.m. and that breakfast is served from 7:30 to 8:00 a.m. From 8:00 to 8:10 a.m. SchoolFoods provides “grab-and-go” breakfast service which is breakfast in a paper bag that late-arriving students take to their classes. Ms. Williamson testified that grab-and-go breakfasts have to be packed the day before and refrigerated then put on the service line in the morning (Tr. 216). At 8:25 a.m., Ms. Basu went to the cafeteria and observed a long line of children waiting for breakfast and noted that grab-and-go was not offered. Ms. Basu spoke to the cook who told her that there was a new employee serving breakfast and that he was slow, causing the long line. Ms. Basu spoke with Respondent later that day and Respondent told her that the kitchen staff were not doing their jobs and that they were responsible for the late service (Tr. 235-37). Respondent further testified that Ms. Friere had

taken time away from a kitchen worker and this “put a hardship on breakfast being prepared on time” (Tr. 278).

On October 25, 2017, Ms. Basu e-mailed Ms. Friere and Ms. Williamson complaining about the meal service in her school. Ms. Basu informed them that grab-and-go breakfast was not served for two days and that earlier in the week it was offered late. She believed that the kitchen staff was incompetent and did not “take responsibility for making sure things run smoothly.” When Ms. Basu spoke to Respondent about the meal service, Respondent blamed the cook and the kitchen staff stating that they were not doing their jobs. Ms. Basu concluded that neither the kitchen staff nor Respondent took any responsibility for the issues in the kitchen. In her e-mail, Ms. Basu stated that the kitchen staff were “the dregs.” At trial, she apologized for this reference and testified that she was very frustrated with Respondent and the cook and their refusal to take responsibility for the operation of the kitchen (Tr. 238; Pet. Ex. 8). Ms. Basu wrote that she did not believe that Respondent was capable of providing safe food service and she wanted her removed from the school. On October 30, Ms. Friere transferred Respondent from P.S. 59 to another school (Tr. 55-56).

On November 1, 2017, Ms. Friere met with and gave Respondent another warning letter documenting deficiencies in her performance. She advised Respondent that failure to improve her work performance “may lead to further disciplinary action which could include suspension or termination” (Pet. Ex. 9). Ms. Friere stated that it was very serious for a principal to ask that a manager be reviewed. Ms. Friere testified that she wanted Respondent to be successful so she worked with Respondent for several months to help her address issues in her kitchens, but there was no improvement (Tr. 58-59).

As to Ms. Basu’s complaints, Respondent contended that it was not her responsibility to communicate with the school’s administration but said that, if there were going to be an interruption in food service, she would inform the principal. She further declared that if there were a recall or hold on a food item, she would not necessarily inform the principal, but she would change it on the menu (Tr. 312, 323). Respondent testified that when the recall of chicken nuggets occurred, she did not inform Ms. Basu because, according to Respondent, she was not required to do so. Respondent said that she revised the food production record book “but my cook did not carry out his responsibilities.” Respondent later conceded that according to current

DOE policy, it is her responsibility to communicate with the principal but she was only recently made aware of that (Tr. 326; ALJ Ex. 2 at 9).

*Specification 6: January 8, 2018, at P.S. 33, failed to follow a directive from District 10 Field Office that romaine lettuce should not be served because of possible contamination and/or safety issues.*

*Specification 7: Respondent failed to properly supervise her staff and/or fulfill the duties and responsibilities of a School Food Service Manager in that Respondent failed to order food scheduled to be served on the school's menu, failed to maintain an accurate inventory of items, failed to properly store food, and failed to properly maintain equipment.*

On November 8, 2017, Ms. Friere conducted a site visit at P.S. 33 to “address gross misconduct issues” and observed that the oven was not working, menu changes had not been posted and there were no ice cups with pennies. She reported that the service was “chaotic,” and the staff offered various choices at various times during the meal service. She also observed numerous errors in the perpetual and physical inventories.<sup>6</sup> Ms. Friere spoke to Respondent after the site visit and told Respondent about her observations (Tr. 78-79; Pet. Ex. 13).

One of the most serious charges against Respondent concerned a warning about contaminated food. On January 7, 2018, Ms. Friere received an e-mail from Menu Management<sup>7</sup> informing district supervisors of possible contamination of romaine lettuce and advising that there was a hold on this lettuce. The district supervisors were instructed not to use this product, to reject any romaine lettuce deliveries, and to inform their SFSMs of these developments. On Monday, January 8 at 8:10 a.m. Ms. Friere e-mailed the Respondent and the other SFSMs in her district attaching the e-mails she received from Menu Management and advising that “romaine lettuce in house is to be held until directed otherwise and all deliveries of romaine are to be rejected” (Pet. Ex. 10). Ms. Friere, appreciating the potential health risks to the students, expressed urgency about sending this e-mail, noting that “[they] serve romaine lettuce every single day in every single school” (Tr. 59). SFSMs were expected to communicate this information to their cooks and all staff at each of the schools that they managed.

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<sup>6</sup> Perpetual inventory is the daily count of food and supplies received, used, and transferred. Physical inventory is an actual itemized count of all food and supplies at a specific time (ALJ Ex. 2).

<sup>7</sup> Menu Management is an e-mail distribution of the management teams within Food Service. The distribution list includes district supervisors, assistant supervisors, and SFSMs. As an SFSM, Respondent receives e-mails through this distribution list (Tr. 61).

On January 8, at 7:17 a.m., Ms. Williamson sent an e-mail to DOE field officer workers informing them of the hold on romaine lettuce and directing them to forward an e-mail concerning the romaine lettuce hold to the SFSMs in their clusters (Tr. 163; Pet. Ex. 19). Ms. Williamson asserted that if DOE is putting a food item on hold, “it needs to be put on hold immediately.” SFSMs have to be notified and they have to make sure that all of their schools get the information about a hold or recall. The SFSMs must insure that the food is not being served to students (Tr. 185).

Respondent’s field office worker, Mr. V. Alfaro-Osuna, testified that he arrived at work at 8:00 a.m. and called Respondent and the other SFSMs in his cluster. He informed them about the romaine lettuce hold and read the forwarded e-mail to each of the SFSMs. Mr. Alfaro-Osuna testified that he spoke directly to Respondent regarding the hold on romaine lettuce. He recalled that it was a “pretty crazy morning,” but he was certain that he did not miss calling any SFSMs. He said that he used a notepad to keep track of the SFSMs that he called. He elaborated that he wrote down the names of the SFSM’s on the notepad and had a “little check-off” to be sure that he called them (Tr. 163, 168-169). Ms. Friere called the field office to confirm that all SFSMs had been notified (Tr. 66).

Later that morning, Ms. Friere conducted a site visit at P.S. 33 and saw romaine lettuce on the salad bar and available to the students. She testified that she “picked up the pan of lettuce . . . and flung it into the kitchen.” She explained that she threw the lettuce because there was a hold on it and it should not have been served. The cook told Ms. Friere that he was not aware of the lettuce hold. Ms. Friere instructed him to take all of the lettuce “off the line” to insure that no child would be served romaine lettuce (Tr. 68). Ms. Friere then called the field office, confirmed that Respondent was notified about the romaine lettuce hold, and asked the field office to call Respondent’s other schools to make sure that the lettuce was not being served (Tr. 68). Ms. Friere noted that P.S. 33 was equipped with a computer for access to DOE e-mails and other communications (Tr. 64).

While at P.S. 33 on January 8, 2018, Ms. Friere also observed that lunch service did not offer the posted grain that she said was required for compliance with federal standards. She went to the storeroom and gathered corn chips to serve so that the meal included the required grain. She also observed that apples were improperly stored “unprotected, in the middle of the cafeteria” and noted that the apples had been there since December 2017. Ms. Friere reported

that there were still no pennies in ice cups and the inventory had not been reconciled. She documented these observations in her site visit report. She also noted that the thermometer in the freezer was broken so all the food in the freezer had to be removed (Tr. 70-74; Pet. Ex. 11). She also gave Respondent a warning letter based on her “failure to communicate important food safety information to [her] staff” and her “failure to improve [her] work performance” (Tr. 75; Pet. Ex. 12).

Respondent testified that she was not aware of the hold on romaine lettuce until after 11:00 a.m., when she received a call from an office manager from District 10. She acknowledged that the contaminated lettuce would put the health of the school children in jeopardy but she asserted that it was not her responsibility to read work e-mails if she is not on duty. Respondent acknowledged that once she is at work, it is her duty to read e-mails and admitted that she did not check e-mails that morning because she was busy serving breakfast, doing inventory, and other things. She testified that if she had known about the hold on the lettuce, she would not have served it and that Mr. Alfaro-Osuna was lying about having called her (Tr. 282, 354-55).

Respondent explained that the apples were not in the storeroom because she is required to place orders 20 days in advance and the storeroom was “packed to capacity” when the apples arrived. She asserted that it was impossible to anticipate how much food she would need in advance. At the time of this site visit, there was no place to put anything because “the deliveries just kept coming in and there was nothing we could do.” She said that “as a manager, I had no control over that. I just had to accept the food, just keep taking it” but she stacked the apples neatly in a box (Tr. 283).

*Specification 8: Between January 26, 2018 and March 6, 2018, at P.S. 33, Respondent failed to properly supervise Respondent’s staff and/or fulfill directives of Respondent’s supervisor in that Respondent failed to ensure that frozen foods were properly stored, failed to ensure that Respondent’s staff packaged and/or served food pursuant to recipes and/or regulations, failed to ensure that Respondent’s staff maintained a clean and orderly kitchen, and failed to ensure that all food was dated with expiration dates.*

On January 26, 2018, Mr. Beckles conducted another site visit at P.S. 33 and observed that kitchen equipment was still not working, perpetual inventory was not up to date, and that the chemical cleaning and food supplies were not stored separately. He also observed among other things, that frozen breakfast items were stored in a milk chest, there was an excess of milk, fresh

fruits and dried goods, and that cereal and milk were not offered for grab-and-go breakfast (Tr. 143; Pet. Ex. 17). Mr. Beckles e-mailed his findings to Respondent on February 6, 2018 and followed up on March 1, requesting a response to his initial e-mail and asking if the conditions he observed had been corrected (Pet. Ex. 18). Mr. Beckles did not receive a response to his e-mails.

Respondent conceded that she was not storing food properly. She explained that this was due to the “overwhelming” amounts of food coming in and that there was no place to store all of it. Since Respondent had to place orders 20 days in advance, she was not able to anticipate how much food she would need (Tr. 284).

On March 6, 2018, Ms. Williamson conducted an on-site investigation based on complaints she received from Respondent’s staff at P.S. 33. She observed breakfast and lunch services and noted that the recipes were not being followed and that certain items were not being served as instructed in the menu. She reported that the kitchen was “dirty and in disarray,” there were grocery items stored in the hallway, and that some grocery items did not have expiration dates. Although Ms. Williamson also testified that frozen food items were improperly stored in the refrigerator instead of the freezer, in her report, she indicated that “all items were properly stored.” Ms. Williamson noted that although breakfast started on time, service to the students was delayed because Respondent did not prepare the meals in advance. She observed the staff packing the grab-and-go breakfast bags as the children were arriving for breakfast which caused a delay (Tr. 216). She further noted that none of the violations observed in Mr. Beckles’s January 28 site visit were corrected.

Ms. Williamson met with Respondent and the kitchen staff to encourage them to work as a team. She also met with Respondent about managing the kitchen staff more effectively (Tr. 199, 204-205; Pet. Ex. 20). Respondent explained that there were “overwhelming amounts of food that was coming in and we had no places to put the food” (Tr. 283).

In April 2018, Ms. Williamson met formally with Respondent to review the findings of the March 6 and January 28 site visits. She documented the findings and detailed inventory discrepancies and advised Respondent that continued unsatisfactory performance could result in “further disciplinary actions, which can result in termination” (Pet. Ex. 21).

Respondent described her routine at each of the schools involving reviewing inventory, checking the service line to ensure that food is at the appropriate temperature, and writing the

school menus for the week (Tr. 260-61). In response to the charges, Respondent expressed that the job can be challenging and that the workload is heavy. She testified that she had challenges managing the kitchen staff, noting that in order for the kitchen to function, “you have to get the staff on board and that they have to follow the guidelines and the rules and regulations.” She explained that if everybody is not on board, “it doesn’t work out.” She acknowledged that she is responsible for the kitchens that she supervises but asserted that the staff is also responsible. She also disagreed with the various observations that her kitchens were not clean (Tr. 259, 286-87, 305).

During her testimony, Respondent disputed the credibility of Ms. Friere and Mr. Alfaro-Osuna stating that their testimony was false. It is therefore necessary to assess the credibility of Ms. Friere, Mr. Alfaro-Osuna, and Respondent to assess their credibility and determine the reliability of their respective recollections. “Resolution of questions of credibility and the weight of evidence is primarily the province of the finder of fact, who has had the opportunity to see and hear the witnesses.” *Bennett v. Phillips*, 175 A.D.2d 934 (2d Dep’t 1991). When analyzing witness credibility, it is therefore, appropriate to consider such factors as witness demeanor, consistency of witness’ testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness’ testimony comports with common sense and human experience. *Dep’t of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 98-101-A (Sept. 9, 1998); *see also Admin. for Children’s Services v. Yu*, OATH Index No. 269/13 at 4 (Apr. 4, 2013), *aff’d*, NYC Civ. Serv. Comm’n Item No. 35136 (Dec. 9, 2013).

I credited the testimony of Ms. Friere and her observations of the malfunctioning freezer. She testified in a direct and straightforward manner and did not appear to have any bias against Respondent or any reason to be less than truthful. She also documented that the equipment had not been repaired in an e-mail and a counseling memo in March 2017 and Respondent did not refute Ms. Friere’s observations at that time. By contrast, I do not credit Respondent’s account of events. Respondent’s response to the inculpatory testimony from any witness was to accuse the witness of lying. She did not offer any support for these accusations. Likewise, Respondent repeatedly claimed to have given disciplinary letters to her staff for their insubordination, but she did not produce any of these letters to support her testimony. Further, given that Respondent is

now facing possible termination of her employment with the Department, she has a strong motive to be less than truthful.

I credited the testimony of Mr. Alfaro-Osuna over that of Respondent. He offered a detailed recollection of the steps taken to ensure that all SFSMs in his cluster were contacted. He clearly recalled speaking with Respondent directly in addition to sending her an e-mail advising her of the romaine lettuce hold. However, even if Mr. Alfaro-Osuna did not speak with her, Respondent testified that she received the e-mail and conceded that she did not see it until 11:00 a.m. lending further credibility to Mr. Alfaro-Osuna's testimony.

Petitioner alleged that Respondent committed various misconduct that violated Department rules regarding general department, neglect of duty, incompetence. Sections 9.1, 9.18, and 9.7 of the Rules and Regulation Governing Non-Pedagogical Administrative Employees respectively provide that: employees should not at any time conduct themselves in a manner to cause embarrassment to or criticism of the Department of Education; employees may be charged with neglect of duty, conduct becoming his/her position, incompetence or ineffective service; DOE property be kept in good order.

Petitioner also alleged that Respondent violated Chancellor's Regulations by not serving meal with the required food components and by not adhering to cash collection protocols. Chancellor's Regulations A-815(I)(A)(2) states that meals served must contain the required food components: three out of four mandated components at breakfast and three out of five components at lunch. A-815(I)(B) requires that principals certify their school's breakfast and lunch participation and cash collections by submitting specified forms; (V)(B)(2) outlines the requirements for meal reimbursement.

Civil Service Law section 75 allows an employer to discipline and terminate an employee for misconduct or incompetence "after a hearing upon stated charges." Civ. Serv. Law § 75(1) (Lexis 2019). In order to sanction a civil service employee for misconduct, there must be some showing of fault on the employee's part, either that he acted willfully or intentionally, *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969), or carelessly or negligently, *McGinige v. Town of Greenburgh*, 59 A.D.2d 908, 908-09 (2d Dep't 1977), *rev'd on other grounds*, 48 N.Y.2d 949, 951 (1979).

"[A] finding of incompetence . . . only requires evidence of some dereliction or neglect of duty." *Dickinson v. NYS Unified Ct. System*, 99 A.D.3d 569, 570 (1st Dep't 2012) (citations

omitted). Generally, this tribunal has defined incompetence to include the inability to perform one's job as well as the persistent unwillingness or failure to do the work. *See Dep't of Education v. Nwabuoko*, OATH Index No. 1645/02 at 17 (Oct. 30, 2002); *Employees Retirement System v. Myrick*, OATH Index No. 505/95 at 33-34 (Apr. 11, 1995); *Office of Management and Budget v. Perdum*, OATH Index No. 998/91 at 24 (June 17, 1991) (finding employee incompetent not because he could not do his work but because he "failed and neglected to do so").

Undisputed testimony from credible witnesses established that Respondent was counseled on numerous occasions about her performance deficiencies. In addition, supervisors testified that they assisted her in addressing several conditions reported in her kitchens and outlined specific corrective actions for Respondent to undertake. However, Respondent inexplicably declined to implement any corrective actions and the conditions in Respondent's kitchens did not improve.

Most of the charges also involve insubordination in that Respondent refused to follow various orders or implement corrective actions given by her supervisors. To establish a charge of insubordination, Petitioner must prove three elements: (1) that an order was communicated to the employee and the employee heard and understood the order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey the order. *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007).

Here, Petitioner established that Respondent persistently failed to perform her duties as SFSM. Petitioner's undisputed and credible evidence as supported by documentary evidence established that three supervisors met with Respondent on numerous occasions, advised Respondent of performance deficiencies, and suggested corrective action. Respondent repeatedly declined to comply with those orders. The undisputed evidence also established that Respondent neglected to check her DOE e-mail advising of a hold on possibly contaminated lettuce as alleged in Specification 6. Petitioner also established that Respondent failed to comply with a critical directive regarding the food hold, resulting in the lettuce being available to students at lunch. The evidence also established that Respondent was either unable or unwilling to improve the conditions in the kitchens she supervised or implement corrective action.

Petitioner established that Respondent engaged in misconduct, displayed incompetence, and neglected her duties as SFSM and provided incompetent or ineffective service to the

Department. Petitioner established that Respondent's misconduct further included failure to properly order, inventory and store food, failure to maintain a clean kitchen and to maintain functioning equipment. Respondent also failed to supervise proper execution of the menu, to ensure that food items had expiration dates and to ensure that menu items in the food production record were available.

The cited Chancellor's Regulation provides that breakfast must contain three out of four required components and lunch must contain three out of five required components to be in compliance. Petitioner did not establish that any of the breakfasts or lunches served contained fewer than the required components. Petitioner did not produce any evidence that Respondent violated any of the cited provisions of the Chancellor's Regulations for any of the specifications.

In sum, the testimony of Respondent's supervisors, coupled with documentary evidence in the record, provided the requisite substantial evidence to support the finding of misconduct and incompetence in Specifications 1 through 8. *See Matter of Gradel v. Lilholt*, 257 A.D.2d 972, (3d Dep't 1999); *Brey v Bd. of Education of Jeffersonville-Youngsville Central School District*, 245 A.D.2d 613 (3d Dep't 1997); *Stewart v Bd. of Education of Saratoga Springs City School District*, 238 A.D.2d 838 (3d Dep't. 1997).

#### *Falsification of Inventory Reconciliation Statements*

*Specifications 9, 10, and 11 allege that inventory records prepared by Respondent and submitted on November 1, 2017 were false.*

*Specifications 12, 13, and 14 allege that inventory records prepared by Respondent and submitted on January 2, 2018 were false.*

Ms. Friere testified that SFSMs are responsible for managing inventory at the schools that they supervise. Inventory must be recorded on a daily basis but since SFSMs are not in the same school every day, SFSMs can delegate this daily recordkeeping to either the cook or the assistant cook. They are required to conduct a physical count of every food item on premises and compare it to the cook's perpetual count. SFSMs are responsible for reconciling the inventories at their schools within five days of the end of every month and correct any discrepancies between the perpetual and physical inventory counts. SFSMs must also complete and submit a monthly written Inventory Reconciliation Statement (Tr. 77-79).

During the November 8, 2017 site visit at P.S. 33, Ms. Friere reported that there were discrepancies between the physical and perpetual count for four of the five items that she checked (Tr. 79; Pet. Ex. 13). She reviewed Respondent's October Inventory Reconciliation Statement that reported reconciliation as of October 27 and testified that she was "concerned that the inventory really wasn't counted" because of the discrepancies she observed 12 days later on November 8 (Tr. 85). However, Ms. Friere did not conclude that Respondent falsified the document instead, she clarified her prior testimony stating "the inventory that I checked was wrong on the day I visited, and that is what I testified to" (Tr. 106).

During the January 8, 2018 site visit Ms. Friere again reported discrepancies between the physical and perpetual count for each of the five items that she checked (Pet. Ex. 11). She reviewed Respondent's December Inventory Reconciliation Statement indicating that inventory was reconciled on December 21, 2017, and concluded that the inventory had not been reconciled. The basis of her conclusion was her belief that there were no food deliveries to P.S. 33 between the date of the reconciliation and her visit (Tr. 85). However, Ms. Friere later testified that she was mistaken about Respondent's food delivery scheduled and that there might have been a delivery in early January (Tr. 109-10).

In order to prevail on a charge of making false statements or entries, Petitioner must show that Respondent's statements were false, then Petitioner must prove that Respondent made the false statements or entries with the intent to deceive. *See Dep't of Sanitation v. Nieves*, OATH Index No. 1683/07 at 4 (Sept. 19, 2007). Here, the Department did not present any evidence or testimony to support the allegations that the submitted Inventory Reconciliation Statements contained false information. There was no evidence or testimony to support the allegation that the inventory was not reconciled on October 27, 2017 or on December 21, 2017. Ms. Friere's testimony regarding the veracity of Respondent's representations was equivocal, speculative, and not supported by any facts in evidence.

Petitioner did not establish that Respondent engaged in misconduct related to the submitted statements. Petitioner did not present any evidence in support of the allegation that Respondent's conduct violated the cited provisions of the Chancellor's Regulations. Charges related to specifications 9, 10, and 11 alleging that Respondent made false entries in the October 2017 reconciliation statement and specifications 12, 13, and 14 alleging that Respondent made false entries in the December 2017 reconciliation statement should be dismissed.

One final issue bears mentioning. Disciplinary pleadings, like all legal pleadings, should be drafted simply and concisely to place the employee on notice of what he or she has done wrong. *See* Charter § 1046(a)(3); 48 RCNY § 1-22 (Lexis 2019). I would encourage the Department to prepare petitions that identify the rules or regulations at issue, then describe the allegedly violative conduct in associated specifications. *See Admin. for Children's Services v. Hallman*, OATH Index No. 1269/05 at 2 n.1 (Mar. 16, 2005) (where the agency was admonished for verbose and confusing pleadings, ALJ encouraged pleading identifying a single factual allegation and citation to the agency rules which are alleged to have been violated). This would improve the quality and efficiency of the adjudicative process. Identifying conduct without stating the section of the rule or regulation that is implicated requires that the ALJ match the conduct to an unspecified provision. Conversely, repeating the same conduct in specifications or repeating all stated charges after each specification in an unvaried or boiler plate fashion is equally inefficient. Here, the Department alleged that Respondent's conduct in each of the 14 specifications violated Chancellor's Regulations A-815(I)(A)(2), (I)(B), and (V)(B)(2). However, the Department did not submit sufficient evidence (or in most instances any evidence) to establish this misconduct in any specification.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner established that on or between February 7, 2017 and March 8, 2017 at P.S. 59, Respondent engaged in misconduct as alleged in Specifications 1 and 2 and violated Sections 9.1, 9.18, and 9.7 of the Rules and Regulation Governing Non-Pedagogical Administrative Employees. Petitioner did not establish that Respondent's conduct violated any of the charged provisions of the Chancellor's Regulations.
2. Petitioner established that on or between February 7, 2017 and September 25, 2017 at P.S. 59, Respondent engaged in misconduct as alleged in Specifications 3 and 4 and violated Sections 9.1, 9.18, and 9.7 of the Rules and Regulation Governing Non-Pedagogical Administrative Employees. Petitioner did not establish that Respondent's conduct violated the cited provisions of the Chancellor's Regulations.
3. Petitioner established on or between October 5, 2017 and October 25, 2017 at P.S. 59 Respondent engaged in misconduct as alleged in Specification 5 and violated Sections 9.1, 9.18, and 9.7 of the Rules and Regulation Governing Non-Pedagogical Administrative Employees.

Petitioner did not establish that Respondent's conduct violated the cited provisions of the Chancellor's Regulations.

4. Petitioner established that on January 8, 2018, at P.S. 33 Respondent engaged in misconduct as alleged in Specifications 6 and 7 and violated Sections 9.1, 9.18, and 9.7 of the Rules and Regulation Governing Non-Pedagogical Administrative Employees. Petitioner did not establish that Respondent's conduct violated the cited provisions of the Chancellor's Regulations.
5. Petitioner established that on or between January 26, 2018 and March 6, 2018, at P.S. 33, Respondent engaged in misconduct as alleged in the conduct alleged in Specification 8 and violated Sections 9.1, 9.18, and 9.7 of the Rules and Regulation Governing Non-Pedagogical Administrative Employees. Petitioner did not establish that Respondent's conduct violated the cited provisions of the Chancellor's Regulations.
6. Petitioner did not establish that Respondent engaged in misconduct as alleged in Specifications 9-14 and therefore did not establish that Respondent violated Sections 9.1 and 9.18 of the Rules and Regulation Governing Non-Pedagogical Administrative Employees or the cited provisions of the Chancellor's Regulations.

These findings of fact are final pursuant to section 1046(e) of the New York City Charter. Charter § 1046(e).

### **RECOMMENDATION**

This tribunal has found that Petitioner proved that Respondent engaged in misconduct and violated Sections 9.1, 9.18, and 9.7 of the Rules and Regulation Governing Non-Pedagogical Administrative Employees. Having made these findings, I requested Respondent's personnel record. Respondent has been employed as a school food service manager for eight years and has no record of formal discipline. Petitioner has requested that Respondent be terminated from her employment for her misconduct. After consideration of the evidence presented at trial and the persistence and seriousness of Respondent's misconduct, I find that termination of employment is the appropriate penalty regardless of Respondent's tenure or employment record.

According to the School Food Service Manual, SFSMs are responsible for managing the overall food service operation in the school cafeterias. A critical function of the SFSM is to ensure food safety in meal preparation and service to the school children. They also ensure that all SchoolFood policies are followed, including: communicating with the school principal,

ensuring that all food items are within their expiration dates, ordering according to menus, and maintaining adequate inventory levels (ALJ Ex. 2 at 9). Respondent demonstrated that she was unable to perform these duties.

Over the span of the 13 months covered in the specifications, Respondent routinely failed to perform to minimum standards and steadfastly refused to implement the most simple safety precaution – “pennies in cups.” Respondent’s failure to undertake even this small task demonstrated her unwillingness to comport her conduct to the professional standard required by DOE. The reports of unclean conditions, non-functioning equipment, and inefficient operations in Respondent’s kitchens reflected Respondent’s neglect of critical functions of her job as SFMS. Respondent’s derelictions, evident in the condition of her school kitchens, posed a food safety risk to the students in those schools. In one instance, Respondent’s mismanagement resulted in potentially contaminated food being made available to school children.

Respondent’s consistent excuse when questioned about deficiencies in her kitchens was that the fault lies with someone else’s fault or that it was “everyone’s responsibility” to do her job. During the site visits, subsequent meetings with supervisors, and at trial, Respondent denied of any personal responsibility for the meal service, condition of the kitchens or reported inadequacies. Despite assistance given by supervisors, warnings issued, and corrective actions delineated for her, the conditions observed in Respondent’s kitchens remained the same or worsened from the beginning of 2017 until March 2018. There was never a report of any improvement in any of the Respondent’s kitchens. The observations for the most part were not disputed.

Site visit reports also established that Respondent failed to reconcile inventory regularly which, on several occasions, resulted in ordering excessive amounts of perishable food which Respondent was unable to store properly. Respondent’s excuse that she could not anticipate how much food would be needed and her plaintive defense that she had no control over how much food was delivered to her school only highlight her inability to perform another important function as SFMS.

Respondent’s supervisors testified in detail regarding the numerous food safety issues that could affect the suitability of food for consumption by the children in her schools. It was further established that they advised Respondent through counseling memoranda and meetings of the various deficiencies in her performance and the need to remedy the same. Respondent failed

to respond to repeated efforts to assist in her improvement, implement corrective action, or insure that corrective or remedial measures were executed in her absence. In light of such persistent performance deficiencies, termination is appropriate. Prior cases from this tribunal support this conclusion. *See Bd. of Education v. Cook*, OATH Index No. 733/90 (Apr. 9, 1990) (food services manager who failed to keep accurate records, failed to complete reports, failed to manage ordering of food supplies, and failed to observe nutritional guidelines for school menus terminated).

Finally, given the evidence that Petitioner was simply unable to perform her job despite numerous counseling memoranda the penalty of termination is not so disproportionate as to be shocking to one's sense of fairness. *See Brey*, 245 A.D. 2d at 615; *Rowley v. Bd. of Education of Gloversville Enlarged City School District*, 192 A.D.2d 814, 816, (3d Dep't 1993).

Joycelyn McGeachy-Kuls  
Administrative Law Judge

August 19, 2019

SUBMITTED TO:

**RICHARD A. CARRANZA**  
*Chancellor*

APPEARANCES:

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