

Before: Prof. Robert T. Simmelkjaer, Esq.  
Arbitrator

## OPINION AND DECISION

John Vingara, Respondent  
Chrys Harttraft, Superintendent  
Diane Ziegler, Principal

## **BACKGROUND**

At the April 25, 2016 meeting conducted by the Somerset County Vocational Technical School Board (hereinafter the "Board" or the "District"), the Board certified tenure charges against John Vingara (hereinafter "Vingara" or the "Respondent"), a Culinary Arts Teacher at the Vocational Technical School. On or about April 27, 2016, the Respondent was served with the Certified Tenure Charges. The Charges were: "(a) conduct unbecoming of a teacher; (2) neglect of duty; and (c) theft of goods and services."

In support of the Tenure Charge, the District provided Vingara with an audit conducted by a Forensic Accountant, the notes of Virginia Fanelli, Security Guard, Big Blue Barbeque catering menus, New York Giants Football schedule, and Camp Cromwell menus. The Respondent was given "the opportunity to submit a written statement of Position and a written Statement of Evidence under oath with respect to the charge for consideration by the Board at its April 11, 2016 meeting."

Vingara did not file any reply to the charges and did not appear at the meeting. By letter dated May 12, 2016, Vingara filed an Answer to the Tenure Charges, denying the allegations in the Preamble, Charges (a) through (q), and 5-9.

In an Affidavit submitted by Ms. Raelene Catterson ("Catterson"), the Business Administrator for the District, the factual basis for the Tenure Charges was set forth as follows:

In or about August 10, 2015, I became concerned regarding items missing from the Twilight Program and requests for purchases of

goods made by John Vingara allegedly for the Culinary Arts Program. Specifically, I could not find backup for the purchases he was making and I began to investigate the history of purchasing back to June, 2015. As a result of physical examination and counting of items in the refrigerator/freezer in the Culinary Arts Department, it was determined that items were missing that had been ordered and did not correlate to menus or special events. An interview of security personnel and a review of security videotape revealed showed him leaving with items purchased by SCVTS from June 23, 2015 forward.

- a. On June 23, 2015 and July 23, 2015, two orders for vacuum sealer bags were delivered to John Vingara at SCVTS. The vacuum sealer bags are missing.
- b. On August 10, 2015, the following items were missing that were ordered for the Twilight Summer Program: cases of cereal, cases of water, a box of mayonnaise packets, half pints of milk, and half pints of orange juice.
- c. Additionally, John Vingara was observed by security personnel making trips to the school freezer with a full cart and unloaded it back at his car. He was seen to do this on June 23, 2015 at 5:32 p.m., July 13, 2015 at 6:47 p.m. where he is seen carrying crates of milk to his car. On August 10, 2015, at 11:17 a.m., he made three trips to the school freezer coming out with a full cart and unloading it into his car. On August 10, 2015, the security guard observed him returning empty crates and saw frozen ground beef and a large bag of frosted flakes boxes approximately 100 pieces, and hamburger rolls. An employee from Linkages (who oversees the Twilight Program) expressed concern to the security guard on August 10, 2015, with respect to missing four large boxes of cereal (100 pieces within each bag) from the Twilight area and 10 cases of water, all of which were to be brought to the Linkages office for students to use the following school year.
- d. On September 24, 2015 at 6:33 a.m., on the security camera he is seen entering the school, unlocking the freezer and taking out a milk crate with meatballs in it, placing it on a cart and removing it out of the school building. He then returned to the freezer and took out sautéed peppers and onions and exited the school with them. On September 24, 2015 at 6:58 a.m., he is again observed on camera loading packaged meatballs into a rectangular tray and he and a student came outside with the tray. He then went to the freezer and loaded two milk crates

with ice and wheeled them outside. On September 24, 2015 at 9:17 a.m., he is observed on the camera with a student rolling hot boxes out of the school on carts. At 6:32 a.m. that same day, he is seen coming out with a cart loaded with meatballs and putting them in his car. He then returned to the cart at 9:35 a.m., which is empty.

- e. On September 26, 2015, he arrived at 7:52 a.m. and unloaded his car with a large white cooler, unlocked the outside freezer and placed the large cooler inside. He then returned milk crates to the side of the building and exited with a cart to unload hot boxes to return them to the school.
- f. On October 6, 2015 at 8:18 a.m., he is observed on camera taking the chardonnay chicken prepared by the students the day before, repacking it in a ziplock bag, placing it in a red reusable bag and putting it back in the refrigerator. He then added another ziplock bag to the red bag in the refrigerator. At 2:13 p.m., he is seen exiting the refrigerator with the red bag; it is clear how heavy it is and when leaving the school.
- g. On October 8, 2015 he is viewed on camera at 11:33 a.m. filling a ziplock bag with two trays of items and placing them in a black bag. He then placed it in a red hot box and at 2:10 p.m. carried the black bag outside to his car.
- h. On October 9, 2015 he took a crate of ice out of the freezer and there is another item on top which is labeled beef.
- i. On October 12, 2015, he is seen on the security camera taking 26 eggs, a roast, several potatoes and spices. He also is seen bringing dirty dishes back for the students to wash.
- j. On October 14, 2015, the café freezer camera at 10:54 a.m. shows him carrying out two large bags of macaroni.
- k. On October 20, 2015, at 8:15 a.m., the security guard observed a student packaging Bolognese sauce into several heat seal bags and observed defrosted pork shoulders outside of the refrigerator on a rack. On October 20, 2015, at approximately 2:22 p.m., Vingara is seen carrying the bags to his car. The security guard observed that pork butts were defrosting. On October 27, 2015, she observed students using one pork butt for sausage, but the rest were missing.

- l. On October 21, 2015 at 10:40 a.m., he was observed slicing a roast beef into disposable rectangular large pans. When the guard inquired as to what he was doing, he said that this was for his daughter's baby shower. The guard asked where he got the meat he replied that he purchased it at Restaurant Depot and claimed he paid around \$9.00.
  - m. On October 21, 2015, the security guard, Superintendent and Business Administrator took an inventory of the refrigerator and found that the sliced beef from earlier in the day was missing and he was seen carrying bags to his car on camera.
  - n. On October 22, 2015, during the 4<sup>th</sup> period, students were observed frying parmesan crusted chicken and then loading the finished pieces into a disposal tin, approximately seven to eight pounds of cutlets. On October 22, 2015, the camera shows Vingara taking the disposal tins outside to his car from the freezer.
  - o. On November 12, 2015, Vingara was interviewed by the Somerset County Prosecutor's Office detectives and admitted he used the students to prepare food for his private business because he was lazy.
  - p. He has been observed since September, 2015, on multiple days sitting at his desk for hours during instructional time without interaction with the students.
  - q. Since September, 2015, students expressed concern to the Principal that they were not learning during culinary arts shop after freshman year and felt they were being used as free labor.
5. I reviewed menus for the Teacher lunch line, the student lunch line and for the school operated TradeWins Restaurant to see if the ingredients he ordered or removed were used for any school purpose. They were not.
6. As a result of my inquiries about missing food items from the Twilight Program the Principal told me that Vingara had a business called Big Blue BBQ. We reviewed menus from September, 2015 forward and found that on several of the dates he was observed removing food from SCVTS that were corresponding Giant football games.
7. I also investigated his school computer hard drive and discovered menus for Camp Cromwell and an invoice for Magic Chef Catering.

It appears the missing items from the summer Twilight Program corresponded to the menus at Camp Cromwell.

8. I checked with the companies through whom the school orders meat, other foodstuffs and supplies. John Vingara did not pay them for the items we saw that he took from the freezer. I found invoices for those items that were paid for by SCVTS. He did not reimburse SCVTS for these items.
9. The Board hired a forensic accountant who reviewed invoices, menus, the security guard's notes and concluded that Vingara wrongfully took items paid for by SCVTS. (Jt. Ex. #1).

#### Procedural History

Hearings were conducted on September 2<sup>nd</sup>, September 6<sup>th</sup> and October 7, 2016. At the conclusion of the District's case, the Respondent rested his case without testifying himself or calling any witnesses on his behalf. The record consists of two (2) Joint Exhibits, six (6) District Exhibits, including a flash drive (B. Ex. #F), and thirteen (13) Respondent Exhibits. In addition, the parties submitted post-hearing briefs dated November 22, 2016 and reply briefs dated December 5, 2016 (Respondent) and December 8, 2016 (District).

#### Respondent's Employment History

The Respondent has been employed by the District for more than 30 years. Over the years, he has received numerous commendations from his supervisors and other Board administrators for his performance as a Culinary Arts teacher. Vingara's annual teaching evaluations have been superior. He was rated as "outstanding" or "above average" in every category on his 2009 Professional Performance Report. R-6. Likewise, he received a rating of "above average" on his 2011 and 2012 Professional Performance Reports. R-7, R-8. In 2013, Mr. Vingara received an "Effective" rating in 2014 (missing "Highly

Effective" by only 8/100s of a point) and improved to a "Highly Effective" rating in 2015. R-10, R-11. It is noteworthy that in both of the last two years, Mr. Vingara's "'Student Growth Objective' scores – the measure of his students' improvement under his tutelage – were perfect."

In February 2015, Superintendent Chrys Harttraft wrote to Mr. Vingara to congratulate him on being nominated for "Teacher of the Year." R-12. This was, in fact, the second time that Mr. Vingara had received such a nomination. R-13, p902.

### **STATEMENT OF FACTS**

The Respondent is a Culinary Arts teacher, who teaches high school level students divided among Shops A, B and C. He shares this teaching responsibility with Mr. Mastrobatista. There are nine (9) periods per day, with both teachers having only two (2) non-instructional periods per day. Most teachers get paid for six (6) periods, and a few teachers, including Vingara and Mastrobatista, get paid for seven (7) periods. (T3 @ 121-122) (Testimony of Harttraft).

The Twilight Program, run by Linkages, is a summer program for students where they receive breakfast and lunch throughout the month of July, 4 days a week. On August 10, 2015, Catterson became suspicious when she received an invoice in June from the school's food supplier, Sysco, for vacuum bags that were not needed during the summer. Also, on that date, Linkages reported to Principal Ziegler that they were missing food. Ziegler told Catterson that the

Respondent had an outside catering business called Big Blue BBQ and a catering business at a camp called Camp Cromwell.

Given these developments, Catterson began an investigation to ascertain whether Vingara had ordered food through their food service program from Mascio's – the supplier for the student lunch line and not for the culinary arts program. She also looked into his computer to view his emails. The school then installed a camera in the culinary area that showed the walk-in refrigerator freezer, Vingara's office, and the door to the outside. (Tr. 1 @ 15-16).

Subsequently, Catterson and Harttraft contacted the Bridgewater police, who advised the administrators to look at the Respondent's computer and to install another camera. They also met with the Somerset County Prosecutor's Office on September 29, 2015 to determine whether they could assist in the investigation. The Prosecutor's office suggested that they start conducting inventories to compare the food preparation done for the TradeWins, and the lunch line with the menus for Vingara's Big Blue BBQ. (Tr. 1 @ 17-18).

TradeWins is the restaurant the culinary arts students work for in order to learn how to prepare food like an outside business. There were sandwiches served at some of these events and they were listed on menus, but no sandwich meat was ordered through Sysco. Everything ordered by the school district from Sysco is listed in Joint Exhibit No. 1.

Vingara did the ordering for the Culinary Arts program. Unless Catterson saw a Sysco invoice that Vingara signed off on, she would not pay the invoice. When the food was delivered, he was given the paperwork and had to sign off on



it to verify that everything on it was received. The Respondent's signature on the purchase order constituted verification that the food was delivered. (T3 @ 63-64).

The Respondent ran a catering business called Big Blue BBQ. The catering occurred before New York Giant football games. In 2015, there were games on September 20<sup>th</sup>, October 11<sup>th</sup>, October 25<sup>th</sup>, November 15<sup>th</sup>, December 6<sup>th</sup> and December 20, 2015. The menu states: "All menu items are professionally prepared by Chef Johnny V." (B. Ex. #A).

The Respondent's BBQ catering dates are juxtaposed against the school calendar for September, October and November 2015. (Jt. Ex. #1). The following events are noted: a Giants evening game on September 3<sup>rd</sup>; an event on September 11<sup>th</sup> at Trade Wins for a group of superintendents; a Somerset County Business Officials meeting catered at TradeWins on September 8<sup>th</sup>; sandwiches and salads for 12 to 15 people served at TradeWins; a retreat on October 1<sup>st</sup> and 2<sup>nd</sup> for 25 people (breakfast on 10/1 and lunch on 10/2); insurance breakfast for 20 people on October 6<sup>th</sup>; a tea on October 8<sup>th</sup> for guidance counselors; a school business administrators meeting/lunch on October 15<sup>th</sup> for 35 people; a student council lunch on October 16<sup>h</sup> for 20 people; continental breakfast on October 29<sup>th</sup> for 15 people; a harvest buffet lunch for 35 people on November 5<sup>th</sup>; JIF breakfast for 20 people on November 10<sup>th</sup>; a lunch for seniors and a dinner for New Jersey skills on November 11<sup>th</sup>; Fall sports banquet on November 12<sup>th</sup>.

On September 11<sup>th</sup>, Vingara attended a professional development day. On September 24<sup>th</sup>, he took half a personal day.

The last day Vingara worked was November 12<sup>th</sup>. (T3 @ 63). The last day he was paid was April 25, 2016, and he began to receive payment again in August 2016.

The Respondent also operated Magic Chef Caterers and prepared menus for Camp Cromwell in the summer. The Camp Cromwell summer camp operated out of the Martinsville Inn. On October 15, 2015, Vingara had food delivered to the VoTech for his business at Magic Chef Caterers by a company called Performer Foods. (Tr. 1 @ 56-57). The superintendent had the security guard inquire about the Performance truck. When asked about this delivery, Vingara claimed that he was doing a favor for a person named "Carlos." Later, Harttraft spoke to a woman named Gyla from Camp Cromwell, who was unaware that food was being delivered to the VoTech. "Vingara then packed up all of the items delivered by Performance Food, and Fanelli escorted him to the Martinsville Inn, which is where Gyla is located."

The District hired Eisner Amper, an accounting firm, specifically Theresa Simonds, Forensic Accountant, to provide an opinion as to the cost of the product that Vingara allegedly took. Simonds estimated the value of the missing items was \$826.00 for the period of time they reviewed the documents; that is, the beginning of September to November 12, 2015. (T3 @ 140-141).

### District Position

The District, which has the ultimate burden of proof in a Tenure Charge brought under the TEACHNJ Act, N.J.S.A. 18A:6-10, maintains that it has proven the Respondent, John Vingara, guilty of conduct unbecoming a teacher by a preponderance of the credible evidence. According to the District, "the evidence presented by way of surveillance, forensic accounting and the expert's report clearly demonstrates that 'it is more probable than not' that Vingara stole the District's food, stole time and used the students as free labor all to promote his private business."

In support of its position that Vingara "misappropriated food and supplies paid for by the District and used the District's resources for his personal catering businesses, utilized the students as free labor to prepare food for his businesses, and devoted substantial portions of his work day while being paid as a teacher to further his private business," the District relied on the testimony of the Business Administrator Catterson, Principal Ziegler, Security Guard Fanelli, and forensic account Simonds. Their testimony, in the aggregate, convinces the District that Vingara "engaged in theft of the District's Food, Supplies and Resources."

### Testimony

In addition to her affidavit submitted in support of the tenure charges, Catterson testified that after her suspicions were aroused regarding Vingara's purported "wrongful conduct on August 10, 2015," she began to compare the menus of "the events that were taking place for different functions on campus in

the early autumn 2015 time frame" to the food that Vingara was ordering and found no match. For example, "[s]he said there were sandwiches served at some of these [Trade Wins] events and they were listed on menus, but no sandwich meat was ordered through Sysco. There were thousands of dollars worth of food being ordered and none of it matched anything that was listed on a menu which correspond to a school event." (Tr. 1 @ 22).

Catterson further testified that she did find a correlation between the menu items on the Respondent's Big Blue BBQ when Giants games were taking place and when Vingara took a sick/personal day and the list of food items that Vingara had ordered from Sysco that were later discovered to have been missing, and presumably utilized by Vingara. These were the orders placed by the District beginning September 2015 through the middle of November 2015. Referring to the "schedule of missing items from our inventories that went missing from the school district that we paid for" and were verified as delivered to the school, "Catterson testified that she, the superintendent and the security guard went into the freezer before and after the dates of the Giants home games to compare what was ordered through Sysco and the food that was listed on the [Big Blue Barbeque] menus to [determine] what food that was then missing." (Tr.1@34).

Since the school never served fire braised barbeque ribs, sausage and peppers, sweet and sour meatballs, or barbeque shredded beef, but she did find those foods were ordered and paid for through Sysco by the school, Catterson deduced that the Respondent had ordered these foods for his Big Blue

Barbeque catering for sale at Giants football games. For example, Catterson testified that prior to the Giants home game of October 25, 2015, "she saw sausage and peppers, meatballs and meatballs marinara in the freezer"; however, "by game day they were all gone." (Tr. 1 @ 42-44).

Catterson also examined menus on Vingara's hard drive and found an invoice for Magic Chef Caterers and menus for Camp Cromwell. For example, she found cereal purchased on Sysco invoices that was shown on part of the menus for Camp Cromwell and discovered that this product was missing from the Twilight Program.

With respect to an anticipated Respondent defense that he paid the District for food he utilized in his business, Catterson noted that "[t]here were no procedures in place for Vingara to utilize food ordered by the school and then pay for it." (Tr.1@50-51).

Principal Ziegler corroborated the testimony of Catterson that the school's investigation began on August 10, 2015 when the security guard alerted her that food items were missing from the Twilight program. She was informed by Security Guard Fanelli that although she observed the items on August 7<sup>th</sup>, Thursday, they were discovered missing on August 10<sup>th</sup> – the next school day. Ziegler was also concerned when Vingara took a professional development day on September 11<sup>th</sup> when school had begun only two days before.

Ziegler's final concern was raised by some students coming to her in October 2015 complaining that they were not happy in their culinary arts shop because "they were not learning any new material and felt they were being used

as free labor to do work for Vingara." Shortly thereafter, she asked Fanelli to frequent the culinary arts area to let her know what was going on.

The crux of the District's case is the testimony of Virginia Fanelli, Security Guard. Fanelli, a former detective in the criminal warrant division of the Union County Sheriff's Office, where she was on loan to the drug enforcement agency for 2-1/2 years as an undercover heroine courier, worked in the summer Twilight Program. She testified that she "was first on the campus in the morning, so every day she set up breakfast for the program for which they had 70-80 students."

On August 10, 2015, at approximately lunch time, Fanelli testified that she saw Vingara "back his car up to the culinary arts section exit doors and shut his trunk to prevent her from seeing what was in the trunk." (Tr. 1 @ 134-135). Nevertheless, "she observed in the trunk black hefty garbage bag, a 10 pound log of ground beef, a case of frosted flakes containing about 100 pieces, hamburger buns and water." (Tr. 1 @ 134-135). She noted that the Twilight store room closet, from where items had been reported missing, was in an area adjacent to the culinary arts department. As the person who set up the breakfast for the Twilight program, Fanelli was familiar with the items taken. Once she saw the missing items in Vingara's car, Fanelli reported her observations to Ziegler, who then authorized her to begin an investigation.

Fanelli testified that the handwritten notes she compiled have been marked as Board Exhibit #E. "The notes in Exhibit E are her observations of the video surveillance, but also contain her personal observations of things that

happened in the culinary arts area and her conversations with Vingara." (Tr. 1 @ 140-142).

Among the equipment the District discovered missing were "hot boxes" used to store hot meals when they are transported. "There are three sets of hot boxes which were stored in the main cafeteria store rooms, then a red set and a beige set in the culinary area." (Tr. 1 @ 144-145).

Fanelli testified she started to pay attention to what the students were making around the time of the Giants' home games. She noticed they would cook similar items. For instance, chicken tenders, frying up peppers and onions, and baked sausage in the oven. Since the students did mass amounts of onions and peppers, she believed it was a regular routine for the students. Fanelli also stated depending on what the Giants' home schedule was, that would dictate what the students prepared that week. She also checked to see what was being served at the school operated TradeWins restaurant to see if any of the things she saw them cooking were being served at the restaurant. She concluded they were not being served at the school run restaurant. (T1, 148:6-25;\_\_\_\_\_).

Referring to her notes, Fanelli testified that on October 5, 2015, she observed the A shop students preparing chicken with mushrooms (chicken chardonnay) and place it in a big rectangular container. "She had taken a picture of it when it was in the refrigerator/freezer. When she went back at 10 a.m. it was gone and it corresponded with a Giants menu for that weekend." Moreover, "the expert notes that poultry and produce had been ordered on September 22, 2015 and September 29, 2015, and paid for by the school was missing." (Tr. 1 @ 149-151).

As her investigation continued, Fanelli described a "regular dish" as a food preparation that coincided with the menu for the Giants games. "The food that

she saw being prepared such as sausage and peppers, chicken fingers, chicken chardonnay, were not served anywhere else in the school during that time frame." (Tr. 1 @ 145).

Referring to the video for October 11<sup>th</sup>, showing Vingara filling in a ziplock bag with chicken chardonnay, retrieving a red reusable shop bag, placing the red bag on a red hot box, carrying the hot box to the refrigerator, and exiting the building early at 2:15 p.m., Fanelli apparently deduced that Vingara had stolen the District's food products, had the students prepare meals for the Giants game, and improperly took the items out of the building.

Pursuant to her investigation, Fanelli would arrive daily around 6:00 a.m. Using her key to the freezer, she would take photographs of the items stored in the freezer in anticipation of Giants menus listing these items. The District argues that "Fanelli used the schedule to associate the items that were being made by the students as compared to the items that were in the refrigerator, which would eventually disappear."

Fanelli testified that she had a conversation with Vingara on October 21, 2015 as he was slicing a roast beef. He explained that the roast beef was for his daughter's baby shower at the Martinsville Volunteer Fire Department and he had bought it at Restaurant Depot. However, Fanelli had recently been in the freezer and saw Butcher Block beef loins (brand name sold by Sysco) alongside a very large container of parmesan encrusted chicken cutlets, prepared by a student named Anthony Thompson, a senior in the Culinary Arts program. Pursuant to the inventory the school had begun on a Sunday, they did not see



any roast beef in the freezer labeled Restaurant Depot. Later, Fanelli called Restaurant Depot to ascertain if they carried the Butcher Block brand name. They did not. (Tr. 1 @ 161-162).

On October 20, 2015, Fanelli saw students preparing a Bolognese sauce that was not served anywhere on campus. She also observed a Sysco product of pork shoulders being thawed out, which had the Butcher Block label. On October 22<sup>nd</sup>, she also observed the students cook parmesan encrusted chicken.

According to Fanelli's notes, an inventory was performed on October 25, 2015. The parmesan encrusted chicken made by the students a couple of days earlier as well as one of the roast beefs were missing. Having learned from Vingara that these items were served at the baby shower, Fanelli made a notation in her handwritten notes, "Nicole's baby shower." On October 21<sup>st</sup>, when she saw Vingara slicing the roast beef at the end of the day, she, Catterson and the Superintendent conducted an inventory of the refrigerator and found the roast beef he had sliced earlier in the day was missing. The video footage indicates that the two bags Vingara was carrying when he left school earlier appeared to be very heavy.

On November 1, 2015, Fanelli, referring to her notes, testified that she saw "four bags of buffalo wings and a bag of kielbasa on the right side of the refrigerator." An entry in her notes indicates that "she inventoried the refrigerator and saw two bags of chicken tenders defrosted, 30 to 40 pieces, and on Monday at 10:40 a.m. when she went into the refrigerator they were gone and were not being prepared by A Shop." (Tr. 1 @ 174).

On September 6, 2016, Fanelli testified referring the videotape, which corresponds to her notes. She reviewed videotape surveillance footage from the café freezer camera, the B&G outside door camera, and the dumpster camera, and the video footage was then transferred to a flash drive. She also testified that the scenes depicted on the video camera reflect the areas on the day that the pictures were taken. (T2, 4:17-25; 5:1-8). She reviewed videotape footage showing Vingara removing items from the walk-in freezer/refrigerator, placing them in opaque bags and walking out the door of the culinary arts department with them. "Fanelli explained the café freezer camera showed the hallway where the walk -in refrigerator/freezer are [located] as well as the dry goods closet and Vingara's office. (Tr.2@6-7). She also explained that on the other side of the door, which has a view into the culinary arts section is where the buildings and grounds camera is located, where Vingara is seen leaving the building. It also shows an outside freezer where Mascio's, who sells breakfast and lunch for the students, keeps their food in an outside freezer. Their freezer is not mingled with the Sysco orders loaded in the interior freezer/refrigerator." (Tr.2 @7-8).

On October 22<sup>nd</sup> at 2:16 p.m., 14 minutes before school was dismissed for teachers, Vingara is seen on video "walking out with the parmesan encrusted chicken in a large rectangular tin that he placed in a sheet cake box." According to Fanelli, Vingara would routinely leave school carrying two full bags, "the same ones that he would use to take food from the school on a regular basis."

Fanelli testified that Vingara had a black and white reusable Shop Rite shopping bag and a yellow and black shopping bag that he came to school with

in the morning empty and left with them full. She observed these bags in his office behind a chair, laying down flat, and leaving with them full at the end of the day. He is seen leaving on October 28<sup>th</sup> at 1:15 p.m., and October 29<sup>th</sup> at 2:08 in the afternoon before school ends at 2:30 p.m.

On November 3<sup>rd</sup>, the video shows Vingara receiving an order from Sysco. He took two bags of shredded cheese and placed them on the chair in his office. Fanelli verified that the cheese had been ordered by Vingara and not Mastrobattista and was delivered to the school by reference to the invoices. Vingara is next observed changing his shirt while school is in session in the middle of the hallway, and then walking out of the two doors of the culinary department with the bag in which he had put the shredded cheese . (Tr. 2 @ 27).

Notwithstanding the assurance Vingara gave to Ziegler that he would not be on campus during non-school hours and obey the rules, in addition to the above early departures, he is seen on August 4, 2015 in the evening coming and going from the culinary arts department. Also, on September 24, 2015, he is seen in the culinary arts freezer/refrigerator at 6:33 a.m. – more than one hour prior to teachers starting the day. On this occasion, he is seen coming out of the freezer with "heat sealed zip lock bags full of meatballs which were not served in school that day. He is also seen taking items out of the dry goods store room, placing them in a cart, taking aluminum tins, and carrying out a large tray of food." These activities on September 24<sup>th</sup> at 6:30 a.m. preceded a Giants home game that Thursday night. His activities regarding the milk crates and rolling hot boxes are described above.

The video of September 28<sup>th</sup> at 2:38 p.m. shows Vingara dressed in his Magic Chef Catering shirt during the school day. Fanelli recalled that a bag Vingara had been filling up with meatballs, cheese, etc. was gone. The video was played until the end and demonstrated that when Vingara left, wearing his Magic Chef Catering t-shirt, and carrying a bag of food that Vingara placed in the refrigerator from earlier in the day. He did not return. (Tr. 2 @ 53- 54).

On October 6<sup>th</sup> at 8:18 a.m., the Respondent is seen going into the refrigerator/freezer with a heat sealed plastic bag, filling the bag, and placing it in a reusable Shop Rite shopping bag. "Vingara is viewed clearly in his office with an empty red bag taking it out and putting it outside the red hot box after loading an item into the bag." (Tr. @55-56).

The District maintains that "the theft of tortellini was clearly established by viewing the October 8<sup>th</sup> video at 11:33 a.m., the café freezer camera. He is clearly depicted with his bare hands stuffing tortellini into ziplock bags. Fanelli testified the students cooked the tortellini. (T2, 61:19-25; 62:1-25; 63:1-22; 64:1-23). Vingara is seen loading the tortellini into a black bag. Based upon Fanelli's recollection, the bag is shown being carried out by Vingara at 2:11 p.m. in the afternoon, 20 minutes before school is supposed to be dismissed. (Tr2@ 68).

Fanelli began to testify about October 12 at 16 minutes after 2 p.m. in the afternoon. In that video, Vingara is seen with his reusable red shopping bag placed on a stainless steel cart. Vingara is seen exiting the school refrigerator with a piece of meat and placing it in the red shopping bag. He then is seen to take potatoes, load them in the red bag, in addition to salt and some other dried

items. He enters the refrigerator and comes out with three dozen eggs, and he is seen trying to fold the cardboard over and putting it into his red reusable bag. At 2:26 p.m. he leaves. (Tr2@ 68-70). October 12th was Columbus Day and since there were no students in school, there was no reason for Vingara to be utilizing food products at all on that date. However, the day before October 12th was a Giants home game and the menu reflected on J1 lists a tortellini dish with pesto sauce. (Tr.2 @69-70).

On 10:54 a.m. on October 14, the café freezer camera shows that Vingara was carrying out two large bags of macaroni according to the notes provided by the security guard.

Fanelli testified that on November 12<sup>th</sup>, the day she was called to escort Vingara off campus, "he was very agitated about getting his 'Turducken' out of the school oven that he needed for Sunday's Giants game menu on November 15, 2015. Fanelli confirmed that she never saw anyone else in the security footage leaving the culinary area with food. For example, on Sunday, November 1<sup>st</sup>, she, the Superintendent and Catterson observed several bags of chicken tenders defrosting. On November 2<sup>nd</sup>, when they went back to the refrigerator at 10:40 a.m., they were gone.

Fanelli clarified her testimony regarding missing pork butts. While she initially testified that she had seen the students preparing sausage that was served for breakfast at Trade Wins, she later testified that "there were other pork butts that were not used for the sausage that were found to be missing and it is clear they were defrosting." Moreover, on October 28<sup>th</sup> at 2:15 p.m., Vingara is

seen leaving the school carrying a black and white bag filled with items and when Fanelli went to check the refrigerator that day "the pork butts that had not been used for sausage were then missing."

With respect to the Respondent's potential claim that the food he used was food he purchased through a company called Performance Foods, the District avers that "no witness corroborated deliveries from Performance Foods, with the exception of one delivery in October 2015. In this connection, Fanelli testified about a conversation she overheard between Vingara and a friend wherein he was allegedly "constructing a story about why the food was delivered to the VoTech...The person on the other end of the phone was told he would be receiving a phone call and that he was to say that he was an alumnus, that this was a fund raiser, and that Vingara was doing him a favor." (Tr.2 @ 152-155). "Additionally, on October 14, 2015, both Fanelli and Harttraft testified regarding the delivery by Performance Foods of food items to the school."

Finally, on direct examination, Fanelli testified that "once Vingara asked her about the camera being installed in the culinary arts section he changed his behavior." "Rather than place bags in the open, he started putting them in the corner and not in front of the camera as he previously did. He started putting things down by a red hot box or in his office or covering milk crates with his uniform and carrying them out because he wasn't sure if the cameras were working or not." (Tr.2 @ 217-218).

On cross-examination, Fanelli testified that in compiling her notes, her "general practice," she would start taking notes during the day and continue

when she got home. "So if I went home for that night, then the very next morning before I start any of my duties other than locking doors, I would write down everything I observed from the camera views." She would "write down whatever she observed from the security cameras." (Tr. 1 @ 82-83).

Fanelli testified that there were three different shops for students: A Shop, B Shop and C Shop. She testified that A Shop had approximately 10-15 students, but she was unsure who the instructor was. A Shop has sophomores, B Shop juniors and seniors, and C Shop freshmen. B Shop students would be scheduled for a class of 2-3 periods, approximately 2 hours. She recalled that the Respondent taught the B Shop, and Mr. Mastrobatista taught C Shop from 12:10 to 2:15 p.m.

The students prepared food for Trade Wing as well as lunch for the teachers' line. Fanelli testified that she had no knowledge of what food A Group, B Group or C Group prepared on September 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, or 30<sup>th</sup>. Similarly, she had no knowledge of the foods prepared by the three groups on October 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup> or 30<sup>th</sup>. For October 5<sup>th</sup>, Fanelli testified that A Shop prepared chicken chardonnay. She spent 5 to 10 minutes walking around the class and "they explained to me that they were making chicken chardonnay." (Tr. 1 @ 110). She also observed the ingredients being used. On October 21<sup>st</sup>, she observed students preparing a 10-12 pound beef loin. At 10:40 a.m., she testified that she was standing at the slicer when

Vingara and Mastrobatista sliced a beef loin and placed it in an aluminum tray. (Tr. 1 @ 126).

She had no knowledge of what foods any of the shops prepared on November 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> or 11<sup>th</sup>. On November 12<sup>th</sup>, A Shop prepared Turduckens. She had no knowledge of the foods prepared by B Shop and C Shop on November 12<sup>th</sup>.

Fanelli testified that she had no knowledge of a policy or procedure that governs what is to be done with what food students have prepared if there is no function at Trade Wins and there is no faculty food line. (Tr. @ 134).

Fanelli further testified that on August 10, 2015, she saw Vingara outside with a black garbage bag filled with hamburger buns, cases of water, a big box of Frosted Flakes and approximately 10 lbs. of ground beef. As a Security Officer, she did not detain him, although she believed those items were school property. She neither asked him about the items nor saw him putting any of these items into his vehicle. (Tr. 1 @ 136-137). She had not received confirmation to begin an investigation at that time. Fanelli recalled that there were 10-12 cases of water in the storage area before Vingara put two in his trunk, but didn't know how many were left afterwards. She also didn't know how many packages of ground beef were in the refrigerator after August 8<sup>th</sup> when Vingara left. (Tr. 1 @ 141-142).

Viewing the video from October 20<sup>th</sup> at 2:22 p.m., Fanelli could not determine what was in the bag Vingara was taking out. At 1:38 p.m., there is no video footage of Vingara putting something in a box at the bottom of a cart. She



could not ascertain whether the Respondent arrived for school empty-handed on October 22<sup>nd</sup>. (Tr. 1 @ 152).

On October 28<sup>th</sup> at 2:15 p.m., Vingara is seen walking out with a bag in his hand. Fanelli was not present in the culinary arts room at this time and did not see him put items in the bag. On October 29<sup>th</sup> at 2:08 p.m., Vingara is seen sitting in his office and then appears to be walking toward the exit with a bag in his hand. Fanelli did not observe him putting things in the bag that he's observed carrying out on the video. (Tr. 1 @ 156-157). On November 3, 2015 at 2:06 p.m., Vingara is seen in the hallway area wearing a tee-shirt. Next, he is seen in the video heading toward the door wearing a black jacket.

With respect to the milk crates on September 24<sup>th</sup> at 2:33 p.m., she didn't count the bags of meatballs in the refrigerator. A blip in the motion detectors of the surveillance camera stopped as Vingara was in the act of moving out of the doorway. Fanelli testified that one of the milk crates on the cart that Vingara is seen pushing toward the door contains sausage and peppers. (Tr. 2 @ 171). Although she didn't inspect the rectangular tray or knew what the student groups were preparing, Fanelli testified that it contained sausage and peppers because "I knew what was their normal routine of cooking things. Sometimes once or twice a week we'd make peppers and onions." (Tr. 1 @ 174). Also on September 24, 2015, she was neither in the culinary arts area nor saw Vingara loading the hot/black boxes.

On October 6<sup>th</sup> at 8:18 a.m., Fanelli didn't know what food was in the plastic bag. Although she had seen earlier from the surveillance camera a red

bag in the refrigerator around 8:18 a.m., she did not actually see him remove the red bag. (Tr. 1 @ 182). On October 8<sup>th</sup> at 11:33 a.m., during class time, Fanelli testified that the Respondent is packing up two tins of tortellini. Alluding to her notes for October 12, 2015, Fanelli testified that she confirmed that the red bag was empty, but at 2:16 p.m., Vingara left with a pork butt in the red bag. Prior to October 15<sup>th</sup>, she had not taken a written inventory detailing the number of pork butts in the freezer. (Tr. 1 @ 190).

On October 13<sup>th</sup> at 2:13 p.m., Fanelli could not determine what Vingara did with the garbage bag he carried out. (Tr. 1 @ 192).

On redirect examination, Fanelli testified that when she went into the refrigerator on Sunday, November 1<sup>st</sup>, she saw several bags of chicken tenders and chicken cutlets already cut and defrosting. On Monday, November 2<sup>nd</sup> at 10:40 a.m., they were no longer there. She saw no evidence that the A Shop students were using these items. On October 27<sup>th</sup>, she saw the A Shop students preparing breakfast sausage, and was informed by Mastrobatista that pork butts were used to make sausage. On October 28<sup>th</sup>, she wrote that the remaining pork butts were gone. Between October 27<sup>th</sup> and 28<sup>th</sup>, she checked the security footage and wrote "John walks out of the school carrying a black and white bag filled with items. When I had gone in to check the refrigerator that day, the remaining pork butts that they hadn't used for sausage were gone."

Referring to the October 22, 2015 footage and her notes, she testified that the students were frying parmesan-crusted chicken. Next, she saw Vingara loading the finished pieces onto a disposable tray. During an inventory on

Sunday, October 25<sup>th</sup>, she discovered that the parmesan-crusted chicken was gone. (Tr. 1 @ 212). In the period between October 22<sup>nd</sup> and October 25<sup>th</sup>, she saw no one remove any objects that were in the shape of the tin that the chicken was placed in. (Tr.1@213).

The Giants menu for October 11<sup>th</sup> included tortellini with pesto sauce. On October 8<sup>th</sup>, she saw him filling bags with tortellini, but not putting it back in the refrigerator. On November 15<sup>th</sup>, the Giants menu included Turducken and on November 12<sup>th</sup>, Fanelli saw Vingara removing them from the campus – food that the students had cooked. (Tr.1 @ 219).

On recross examination, Fanelli testified that she didn't watch everything that happened on every camera on a daily basis.

With respect to her testimony that the chicken tenders that were in the refrigerator on November 1<sup>st</sup> had disappeared by November 2<sup>nd</sup>, Fanelli could not ascertain whether they had been used by B Shop. On November 12<sup>th</sup> at 11:00 a.m., Fanelli did not actually observe Vingara cooking Turduckens, but saw him remove them from the school ovens.

Fanelli didn't know whether B Shop had prepared any chicken dish. She did not inventory the freezer on October 27<sup>th</sup> but her notes on October 28<sup>th</sup> stating "10/28. I entered the fridge and freezer to check on the remaining pork butts. All were gone." The Respondent challenged the authenticity of this entry. He claims that "the line of it is on the original document that Ms. Fanelli has been referring to the entire time was not on the page when it was photocopied." (Tr. 3 @ 21).

Finally, on re-direct, Fanelli testified that she never saw anyone other than Vingara walking out of the school with food items.

Superintendent Chrys Harttraft ("Harttraft") discussed her concerns about Vingara once she was informed that food items were missing from the Twilight Program. She clarified that Mascio's, the foodservice company that cooks the students' lunches, did not utilize the walk-in refrigerator/freezer in the culinary arts program because they had a separate freezer located outside.

Harttraft testified that in accordance with the instructions she had received from the Bridgewater Police, she and Catterson inventoried items in the refrigerator/freezer and dry goods room. Illustrative of her activities is the following:

Harttraft took the opportunity to go into the dry storage and focused on a rack that fits 150 number 10 cans. During the four inventories she went into the dry goods room and charted all of the number 10 can products which were things like caramel, tomato based items, or any kind of sauce. (T3, 46:19-25). The items are included in the report prepared by the forensic accountant which is part of Exhibit J1. She looked specifically to see things that would go missing that were peculiar either to the TradeWins menu, or also coincided with Big Blue BBQ menus and she identified that about a quarter of the page down on Exhibit 2, page 1 of 4, there were four one-gallon Frank sauce wing buffalo which is really a hot sauce, but no food served at the school in TradeWins or anywhere else involved Frank's Hot Sauce. She also kept an eye on what new items were ordered. So, if something was missing and then three more were ordered, she counted them in her inventory to come up with items that were missing and not used for in-house purposes. (T3, 48:17-24). She found 6-1/2 gallons of various barbeque sauce, 16 tomato based items were missing. (T3, 49:2-3). She reiterated it was 16 number 10 cans of tomato based products which are tomato sauce, whole tomatoes and puree. (T3, 50:3-25; 51:1-6). There was also barbeque sauce missing (T3, 51:19-21; 52:3-5). So, four one-gallon Sweet Baby Ray's BBQ sauce was ordered and paid for by the school and two were found to be missing. (T3, 52:22-25). Then, further down the page there is tomato puree, six

cans were gone; tomato whole, six of those cans, two gallons of barbeque orange chipotle sauce, one of those cans was missing; five cans of hoisin sauce; three gallons of the Frank's Hot Sauce; and 16 cans of other tomato products were missing. (T3, 53:2-25; 54:1-3). The cost of the missing number 10 cans was approximately \$150.00. (Tr. 3 @ 66).

After she did the inventory for the number 10 cans, she checked the menus for items that were served at the school Barbeque sauce was not used for anything on the school menu and she did not look at the Big Blue BBQ menus that were part of J1 and found that it was used for buffalo chicken meatballs for the September 20<sup>th</sup> game and the shredded barbeque beef which was served on October 11, the braised barbeque ribs on October 11, and sweet and sour meatballs which used the orange chipotle sauce on October 11. The value of the orange chipotle barbeque sauce that was missing was \$39.19. (Tr. 3 @ 54-56). She testified that hoisin barbeque riblets were served on the Giants menu and barbeque shredded beef on the Giants menu and barbeque shredded beef on the Giants menu on October 25 and fire braised barbeque ribs and barbeque pork were served on the November 15 game. She further identified that the Frank's hot sauce was probably used for the buffalo chicken meatballs, specifically for the buffalo sauce, and tomato based items were used for sausage and peppers for the September 20<sup>th</sup> game, the October 11<sup>th</sup> game, and the October 25<sup>th</sup> game where sausage and peppers, meatballs marinara and chicken cacciatore were on the menu and on November 15<sup>th</sup> came, buffalo chicken meatballs, sausage and peppers, jambalaya with scallions, chicken and sausage were served. (Tr. 3 @ 56-58).

A study of the amount of chicken ordered from the middle of September to the middle of October – specifically 230 lbs.—led to their conclusion that since approximately 35 pounds of chicken could be accounted for at the TradeWins events, yet every game day menu for Big Blue BBQ included chicken, school products were being stolen.

Harttraft also testified that the Respondent's sick leave on October 18<sup>th</sup> before an October 20<sup>th</sup> Giants home game, an unapproved professional development day on October 11<sup>th</sup>, and a one-half personal day on September

24<sup>th</sup> raised suspicion that "he was really working on his Big Blue BBQ because the professional days he took off in September coincided with the Giants home games." (Tr. 3 @ 60-61).

The Superintendent then reviewed the September-October 2015 calendar of events and juxtaposed these events against the Big Blue BBQ menus for Giants home games.

With respect to the \$79.00 check that Vingara submitted to show that he paid for the beef for his daughter Nicole's baby shower, Harttraft testified that the school "usually does not receive checks from teachers for anything. When they searched the backup, they found that it was for chicken, some kind of sauce, and a dessert [and] not for beef." (Tr. 3 @ 64). She added that there was no procedure for anyone to purchase goods and then reimburse the school. (Tr. 3 @ 66).

Since Vingara left the school on November 12<sup>th</sup> and the teacher lunch line started on November 18<sup>th</sup>, "there was no possibility that any of the food that he had taken and the District could not find was used in a teacher lunch line."

Harttraft was further concerned that Vingara had used the students to prepare food for his business and the limited scope of the food they were learning to prepare. After watching the videos, the Superintendent maintained that the amount of time Vingara spent at his desk "could never be characterized as teaching, and certainly on his last day of work when he was cooking Turduckens to serve at the Giants home game, it was very clear that he was

more concerned about his business and his Turduckens than he was about what was going to happen to his students."

Dr. Harttraft reiterated the particulars of the Performance Foods delivery on October 15, 2015, described supra. This episode convinced her that Vingara was "clearly having food delivered to the school, utilizing school time and school resources to promote his other business operated out of the Martinsville Inn." (Tr. 3 @ 70-74).

According to Harttraft, Vingara was never given permission to take food to school, paid for, or take out garbage bags for culinary arts, since the school provides a custodial service. "The only food students prepare officially are for TradeWins and the teacher lunch line, which did not start until November."

Ms. Theresa Simonds ("Simonds"), forensic accountant from Eisner Amper, testified that she was tasked with providing "an opinion as to the cost of the product that Vingara allegedly took." (Jt. Ex. #1). Simonds reviewed the inventory of the freezer-refrigerator prepared by the school, its subsequent investigation, portions of Fanelli's notes, the calendar showing what meals were being served at the school, and a document showing what was ordered from Sysco. These documents distinguished the items alleged to have been taken by Vingara from items used at the school as part of the lunch or breakfast program.

Simonds testified that to a "reasonable degree of accounting certainly, her opinion as to the value of the missing items was \$828.00 for the period of time between the beginning of September to November 12, 2015." Additional items

that she was told were missing were not quantified (i.e., number 10 cans, potatoes, etc.).

In addition, another level of value, rather than simply cost, such as hours of labor, could not be calculated. "There was also the cost of the time Vingara spent ordering the food. Also, if the meat was left in inventory, Vingara was not charged with the cost."

### **Respondent Position**

The Respondent, on the other hand, has argued that the District has not proven the tenure charges of "unbecoming conduct, neglect of (duty) and theft of goods" against Vingara. The Respondent maintains that "the gravamen of these allegations that Mr. Vingara was ordering food and other items from the Board's Culinary Arts program vendors, Sysco Metro NY Services ('Sysco') and then converting them to his own business use" has not been proven by a preponderance of the evidence.

In asserting that "the Board has failed to prove the factual prerequisites which are foundationally necessary to its case," the Respondent first claims that "the Board has failed to prove what food items were actually utilized by the students in the Culinary Arts Program during the relevant time period. This being the case, it is impossible to determine whether the items allegedly converted by Mr. Vingara were, in fact, used by students in class."

Second, the Board has failed to prove that Mr. Vingara failed to follow any syllabus curriculum, or other instructional guidelines pertaining to the Culinary Arts Program. Consequently, the Board cannot demonstrate that the foods



ordered by Mr. Vingara and prepared by the students in connection with the Culinary Arts Program were not educationally appropriate.

Third, the Board has failed to prove that Mr. Vingara failed to follow any policy, procedure, practice, or guidelines concerning the disposition / disposal of food prepared by students in the Culinary Arts Program.

Based on the Board's lack of proof regarding the above elements of its case against the Respondent, the Respondent concludes that since "the Board has failed that Mr. Vingara engaged in conduct unbecoming, neglect of duty and/or theft of goods/services, the tenure charges must, consequently be dismissed."

With respect to the Board's failure to prove which items were used in the Culinary Arts Program, the Respondent notes that "none of the Board's witnesses had any knowledge of what was cooked on a daily basis in the Culinary Arts Program." The Arbitrator's summary of Board witness Catterson's testimony on this subject is cited as follows:

All right. Then, Mr. Cridge, maybe you can note the fact that the witness is not his direct supervisor. She doesn't know the curriculum on any given day. Her testimony is limited to items she saw in the freezer on day one and on day two that they were missing. That's the extent of her testimony...(Tr. 1 @ 72).

Similarly, Superintendent Harttraft's testimony that she could "absolutely not" provide a day to day recitation of what the Culinary Arts students did in class each day during the relevant time period reinforces the Respondent's contention on this point.

The Respondent deems noteworthy the testimony of Superintendent Harttraft that until she heard the testimony of Fanelli that Vingara and the other Culinary Arts Teacher, Mr. Mastrobatista, taught different sections of the Culinary Arts Program, she had assumed that they "co-taught" all of the Culinary Arts sections (i.e., Group A, Group B and Group C). The Board did not call Mastrobatista as a witness to differentiate his menu and instruction from that of the Respondent.

The Respondent takes issue with the testimony of Ms. Fanelli, the District's key witness, who, in conducting her investigation, "had very little knowledge of what food items were prepared by the students in the Culinary Arts Program." Although she testified that there were three groups of Culinary Arts students, "A Shop" (sophomores and some juniors), "B Shop" (juniors and seniors), and "C Shop" (freshmen), in her responses to questions about every day on the school calendar from the beginning of school on or about September 8, 2015 until Vingara's suspension on or about November 12, 2015, she could not provide specificity regarding the food each shop prepared on a daily basis as follows:

She testified that "A Shop" students made chicken chardonnay on October 5, 2015. T2:109-3-6. She testified that "B Shop" students prepared beef loin on October 21, 2015. T2:123:23-124:13. She testified that "B Shop" students prepared parmesan encrusted chicken on October 22, 2015. T2:126:13-127:6. Finally, she testified that "A shop" students prepared Turduckens on November 12, 2015. T2:131:9-19. Besides these four dishes, she did not know what foods, dishes, or ingredients students in "A Shop," "B Shop," or "C Shop" utilized or prepared on all of the other school days. Compounding the Board's unawareness of items which were used by students is the fact that it has no record of ordering items which it knows were utilized:

The food that was ordered? No. We had sandwiches [at School events], and there was no sandwich meat ordered through Sysco. (Tr. 1 @ 22). (T1:22:1-3).

Given this testimony, the Respondent argues that "the Board's claim that certain food items/ingredients were 'missing' from the Culinary Arts Program cannot be substantiated: admittedly, the Board does not know whether or not these items were used by students." As a result, "the Board cannot demonstrate that Mr. Vingara converted these food items for his own purposes."

In addressing the Board's claim that the Respondent, in addition to taking food items, had the students cook these food items for his catering business, the Respondent contends that "the Board has failed to demonstrate that Mr. Vingara was not following the school curriculum or otherwise having his students undertake educationally appropriate work in class. "The Superintendent's admission on this point is considered significant" as follows:

The Arbitrator: I would just reiterate for the record there is no curriculum in evidence indicating what the students and the various grade levels should be doing each year of their instructional experience, sophomores, juniors, seniors, safety, training, and the like. We don't have a comprehensive curriculum document that lays that out; is that correct? (Tr. 3 @ 125).

According to the Respondent, not only did the Board fail to produce a curriculum in connection with its case, "there is no evidence that Mr. Vingara was warned, corrected or reprimanded during the Fall of 2015 with respect to his instruction of Culinary Arts students. Mr. Vingara was not required to submit menus as a part of his instructional activity." (Tr. 1 @ 21).

Moreover, prior to his suspension in November 2015, "the Board did not even stop Mr. Vingara from ordering the allegedly inappropriate food. This being the case, the Board cannot demonstrate that any item ordered from Sysco by Mr. Vingara in connection with the Culinary Arts program was not legitimately related to his teaching duties." Considering his evaluation as a "Highly Effective" teacher in prior several years, the Respondent maintains that he had no reason to believe that there was any problem with his instructional delivery."

The Respondent takes issue with the District's position that the absence of a "teacher's line" during most of the fall semester "extinguished the students' need to learn to prepare hot foods. It is unimaginable, as claimed by the Superintendent, that students, including seniors, would spend an entire semester preparing sandwiches and breakfast food in satisfaction of a legitimate Culinary Arts curriculum."

The Respondent further contends that "[u]nder these circumstances, the Board cannot demonstrate that [he] engaged in conduct unbecoming a staff member vis-à-vis either the foods prepared in the Culinary Arts Program, or the manner in which those foods were disposed."

The Respondent maintains that "the Board failed to prove that [he] violated any Board Policy or Procedure." According to the Respondent, "the Board did not offer into evidence any policy, practice or procedure which [he] violated during the time period relevant to the tenure charges." The testimony of Catterson that "she was unaware of any policy prohibiting an employee from ordering food and then reimbursing the Board for same is deemed significant.

Notwithstanding Catterson's testimony that there was a policy prohibiting "conducting business out of the district," the Respondent notes that "no such policy was actually identified or admitted into evidence." Also, "[t]here was no policy pertaining to the use of expired food in the District; however, such food could not be served to staff." (Tr. 1 @ 97-98).

Whereas Principal Ziegler testified that she gave Vingara "a directive in September 2011 not to conduct business on school property and that she directed him not to be on school property when school was not in session," there is no evidence that Vingara was warned or reprimanded for insubordination when he disregarded this directive as Ziegler claimed. In the absence of corrective discipline regarding the directive, the Respondent considers this assertion unproven. Conversely, when Superintendent Harttraft told Vingara not to have Performance Foods deliver food to him, personally, he complied with this directive.

The Respondent acknowledges that he personally purchased food which was delivered to the school, but subsequently reimbursed the school. With the exception of Fanelli's identification of the Turduckens as one of the four meals the Culinary Arts students prepared without using food supplies ordered by the school, the other food items ordered are presumably addressed by his checks. Specifically, the beef loin dish that Vingara prepared for his daughter Nicole's baby shower was paid for with a \$79.00 check made out to "Somerset County VoTech," with a memo on the check reading "Food for Nicole." Catterson testified that the check was received and deposited by the Board. (Tr. 1 @ 61).

Also admitted into evidence was a check from Vingara in the amount of \$212.03 made out to Sysco. (R. Ex. #3). An invoice from Performance Foods, listing food ordered paid for by Vingara, and delivered to the school was admitted. The invoice listed the following items:

- PERF CAB BEEF AND BRISKET BNLS
- HORMEL PORK RIB ST SOUIS FIRE BRAISE
- ROMA PASTA TORTELLINI CHEESE
- ROMA SAUSAGE HOT ROPE FZ
- STFFDS\*APTZ BUFFALO CHICKEN MEATBALL
- AUS BLU%PORK RIB TIPS ¾" SL FC
- STUFFDS\*APTZ CHICKEN SPINACH MEATBALL

The total cost of this invoice was \$1,437.96. "Even if, arguendo, Mr. Vingara paid for food delivered to the school for students to prepare in connection with a private business venture, there is no evidence that the preparation of these foods contravened school curriculum."

With respect to the allegation that the food missing from the refrigerator/freezer and storage area is attributable to theft on Vingara's part, the Respondent argues that "many people had access to the Culinary Arts Program Area. Students and staff had open access to the Culinary Arts Program facilities, including the kitchen/refrigerator area from which the food was allegedly 'missing.'" Since the Board did not review all of the footage from the security cameras in the area of the Culinary Arts Program, and "it was not clear from the camera footage offered into evidence by the Board what items Mr. Vingara brought in and out of the kitchen," the Respondent argues that "[u]nder all of these circumstances, even if the Board was to prove that a certain item was

missing and unaccounted for, the Board cannot establish that Mr. Vingara is responsible."

Finally, the Respondent argues that the Board failed to follow its own Discipline Policy Board Policy 3150 concerning Discipline. It provides:

The Superintendent shall deal with disciplinary matters on a case-by-case basis. Discipline measures will include verbal and written warnings as appropriate and will provide, wherever possible, for progressive penalties for repeated violations...

In the event disciplinary action is contemplated, notice will be given to the teaching staff member in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based; the text of the statute, policy, or rule that the member is alleged to have violated; a date when the member may be heard and the administrator who will hear the matter and the penalty that may be imposed. (R. Ex. #1).

"First, the Board did not notify Vingara that disciplinary action was contemplated. When the Board became concerned that Vingara was misappropriating food or engaged in conduct unbecoming in August 2015, it should have confronted him and taken appropriate action. "The Board concealed its investigation and, in fact, enabled Vingara to engage in the conduct\* of which it now complains."

"Second, the Board did not use progressive discipline. "There is no evidence that Mr. Vingara had ever been disciplined in connection with his instructional delivery, or ordering, or utilization of school supplies."

The Respondent did not testify as was his right. He did not call any witnesses on his behalf.

Based on the foregoing, the Respondent maintains that he should be reinstated and the tenure charges against him dismissed.

## DISCUSSION

Considering the evidence in its entirety, the Arbitrator is not persuaded that the District has met its burden of proof by a preponderance of the credible evidence. There is no dispute that the District bears the ultimate burden of proving the tenure charges of (a) conduct unbecoming a teacher, (b) neglect of duty, and (c) theft of goods and services by a preponderance of the competent, credible evidence. See, In re Polle, 99 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 43, 149 (1962).

As the Board correctly notes, in order to meet its burden of proof, it had to establish that the "evidence it presented by way of surveillance, forensic accounting and expert report clearly demonstrates that 'it is more probable than not' that Vingara stole the District's food, stole time and used the students free labor to promote his private business." Although the Respondent notes that he "may still be, the subject of a criminal investigation undertaken by the local police and/or Somerset County Prosecutor's office," the criminal standard of proof, namely beyond a reasonable doubt, is not applicable in the instant case. Also not applicable is the intermediate standard of proof of clear and convincing evidence occasionally used by arbitrators where the alleged cause for disciplinary action or discharge is misconduct recognized and punished by the criminal law such as "theft of goods and services."

As an initial matter, the Arbitrator finds that the District presented no direct evidence that Vingara had engaged in theft of goods and services. Direct evidence is evidence which proves a proposition directly, provided by an "eye



witness" to a specific event. Although the District's key witness, Ms. Fanelli, testified regarding her observations of the Respondent's behavior, made notes regarding these observations, reviewed video surveillance of the refrigerator/freezer and the area outside the Culinary Arts building, and with the assistance of District administrators conducted comparative inventories of the food products ordered by the District from Sysco and used in the preparation of TradeWins meals, no direct evidence of theft was presented.

Instead, the District has offered circumstantial evidence of the Respondent's alleged misconduct and theft. "Circumstantial evidence is a combination of persuasive facts that when taken together, leave only the one reasonable factual conclusion sought by the advocate." See, McCormick on Evidence, 6<sup>th</sup> Ed., West Group (1999). Circumstantial evidence is the use of known facts to determine if they raise reasonable inferences or concepts concerning the occurrence under investigation. As the U.S. Supreme Court held in Leary v. U.S., 395 U.S. 6, 23 (1969), "a rational connection between facts proved directly and ones to be inferred from them require substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

In other words, "the circumstances relied upon must be consistent with the theory of guilt and inconsistent with any reasonable theory of innocence." Therefore, the District has the burden of establishing a clear link between the Respondent's conduct and the property he is alleged to have stolen. In a termination entirely based on circumstantial evidence, the District has to prove

that the "web of circumstances was so persuasive that a conclusion of guilt was inescapable." See, Evidence in Arbitration, Hill and Sinicropl, BNA (1980). As the District has correctly observed, "[i]t is true that if two possibilities can be inferred from the evidence, neither can be said to have been proved by a preponderance of the evidence required to sustain a burden of necessary proof. Aluminum Co. of America v. Preferred Metal Prod., 37 F.R.D. 218 (D. N.J. 1965), aff'd, 354 F.2d 658 (3d Cir. 1966).

In the Arbitrator's opinion, the crux of the District's case relies on circumstantial evidence which, in the aggregate, does not inescapably lead to the conclusion or support the inference that Vingara stole food products the District had ordered and/or improperly converted them for use in his private catering business. The testimonial and documentary evidence adduced by the District also permits other inferences to be drawn supportive of innocence. These inferences may be drawn not only from the August 10, 2015 incident of food reported missing from the Twilight Program run by Linkages, but also with respect to several of the claims made by the District that food the Respondent had ordered from Sysco was used in his Big Blue Barbeque business rather than in the Culinary Arts Program where he taught.

Moreover, the District cannot, in lieu of meeting its burden of proof, shift the burden to the Respondent. Since the Respondent was not compelled to testify, the Arbitrator may not draw an adverse inference from his decision. Therefore, assertions by the District such as "Vingara has not presented any factual reasoning to even come close to defending his conduct" and Vingara

never introduced his lesson plans so there was no proof that his supervisor would be award that his students prepared the same food over and over again during the semester" are irrelevant absent the District's establishment of a *prima facie* case, including Board policies that Vingara violated.

The insufficiency of the evidence involving the food allegedly missing from the Twilight Program is illustrated by the District's omission of alternative explanations. Fanelli's testimony that on August 10, 2015, she observed in the Respondent's car trunk "a black hefty garbage bag, a 10 lb. log of ground beef, a case of Frosted Flakes containing about 100 pieces, hamburger buns and bottles of water" has been construed by the District as preponderant evidence that Vingara stole the missing Twilight items from that program's storage closet.

Although Fanelli testified that she saw the missing items from the storage closet in Vingara's car, she acknowledged that she did not confront him about the items in her capacity as security guard, did not observe him place any of the items in his vehicle, and could not ascertain the whereabouts of three additional boxes of Frosted Flakes also missing since August 6, 2015. (Tr. 2 @ 141-145).

Fanelli further testified that before she looked in Vingara's car she didn't see any hamburger rolls in the storage area. Moreover, there is no evidence that Vingara had exclusive access to the Twilight storage area and no inventory was taken before and after the incident of the refrigerator/freezer or other storage areas. Also, unless specifically tagged or earmarked, a fungible item such as Frosted Flakes could have been acquired at several places.

It is noteworthy, given the District's acknowledgement that since the Twilight Program had closed by August 10<sup>th</sup>, the leftover food (dried goods) were often disbursed to either the school nurse or the Linkages area for students to use during the course of the year. Therefore, it is not inconceivable that Vingara was taking food that would be used in his classes or had taken expired or disposable food. Moreover, there was no testimony from Linkages' employees or documentation to corroborate the hearsay testimony that the program was actually missing the breakfast food Vingara was accused of taking.

The impetus for the District's investigation began in August 2015, and pursuant to advice from the Bridgewater Police and Somerset County Prosecutor's Office, the District administration installed surveillance cameras in the refrigerator/freezer area and began taking inventories of the food items ordered from Sysco, from the beginning of September 2015 through the Respondent's suspension in mid-November.

The District's investigation was multi-faceted in that three dimensions were compared and contrasted to determine Vingara's alleged culpability in the theft of school property. Evidence obtained from the inventory of Sysco orders and deliveries, Fanelli's personal and video surveillance observations of Vingara's activities in the Culinary Arts area, including the freezer-refrigerator as well classroom instruction of the students, and the menus of the Big Blue Barbeque were compared to determine whether Vingara was ordering food items exclusively for his business or was ordering food items usable both for the

Culinary Arts Program and his business and misappropriating several items for his business purposes.

According to Fanelli, as she proceeded to associate the items that were being made by the Culinary Arts students, as compared to the items that remained in the refrigerator, she noticed that the items made by the students, which were also listed on the Giants menu, would begin to disappear. Implicit in Fanelli's analysis was that none of the food items which disappeared were used by the other student groups or Mr. Mastrobattista in his Culinary Arts classes.

Fanelli's testimony that the Shop A students prepared chicken chardonnay on October 5<sup>th</sup>, which was not served in the school in TradeWins or on the teacher lunch line (which did not begin until November), combined with documentary evidence that chicken chardonnay is listed on the Giants menu for October 11, 2015 is deemed evidence tantamount to finding the Respondent's theft of District food items and his use of student labor to prepare the food. According to Fanelli, the October 6<sup>th</sup> video shows Vingara filling a ziplock bag with chicken chardonnay for the October 11<sup>th</sup> Giants game menu. He is also shown retrieving a red reusable shop bag, putting it in a hot box, carrying it to the refrigerator, and leaving the building early at 2:15 p.m.

However, in the absence of a curriculum showing that the students did not or were not supposed to cook chicken chardonnay on October 5, 2015, the subsequent removal of these cooked products from the school, without a policy prohibiting such removal, cannot be construed as theft. Unless it could be shown that the ordering and preparation of chicken chardonnay deviated from

the prescribed curriculum and was made exclusively for Vingara's catering business, an inference cannot be drawn to support the allegation of theft. Moreover, given the difficulty of corroborating Fanelli's testimony with the video footage regarding what the contents were of the items that Vingara was putting in the hot box, and given the District's decision not to inspect the bag upon Vingara's departure due to its ongoing investigation, the Arbitrator finds this circumstantial evidence insufficient to sustain tenure charge.

Similarly problematic from an evidentiary standpoint is Fanelli's testimony that she observed the students cook parmesan encrusted chicken which Vingara then loaded in disposable tins. She noted that the chicken breasts were not served at any meal in school that day. Subsequently, the administration performed an inventory on October 25<sup>th</sup> and discovered that the parmesan encrusted chicken was missing. This item, along with a missing roast beef that Vingara had claimed was purchased for his daughter Nicole's shower from Restaurant Depot, was allegedly stolen. After Fanelli observed the Butcher Block brand label (sold by Sysco) on the beef loin and called Restaurant Depot to discover that they did not carry Butcher Block, Fanelli deduced that Vingara had misappropriated these food products.

Notwithstanding Fanelli's testimony that following the inventory of October 25<sup>th</sup>, both the encrusted parmesan chicken placed in a long tray and the Sysco roast beef were gone, she did not personally see or observe on video Vingara putting this item in a box. She also did not see him on the security footage remove these items from the building after he was observed loading them on to

a disposable tray. (Tr.2@ 150). Here again, there is no evidence that the preparation of these food items was inconsistent with the curriculum or constituted improper instruction for the student who cooked the food, Anthony Thompson.

Since Fanelli learned from Vingara that parmesan encrusted chicken and roast beef were served at his daughter Nicole's baby shower, the charge of theft is offset, in large part, by a \$79.00 check Vingara wrote to "Somerset County VoTech," with a memo stating "Food for Nicole." Catterson confirmed that the check was received and deposited by the Board, without questioning the Respondent. The Respondent was not confronted or disciplined when the \$79.00 check he gave the District purportedly for his daughter Nicole's shower did not match the backup invoice.

On October 28<sup>th</sup> at 2:15 p.m., Vingara is seen on the video walking out with a bag in his hand. However, since Fanelli was not present in the culinary arts area, she did not see him put items, food or otherwise, in his bag. A similar situation transpires on October 29<sup>th</sup>. Fanelli records in her notes that the bag Vingara is carrying to his car "appears to be very heavy"; however, she did not determine whether he arrived at the school with a bag or what the contents were.

On Sunday, November 1<sup>st</sup>, Fanelli testified that she observed "two bags of boneless chicken fingers defrosted – 30 to 40 pieces." On Monday, November 2<sup>nd</sup>, she could not find these items. She noted that none of these items were being prepared by A Shop.

However, there is no evidence that these missing chicken fingers weren't used by Vingara for A Shop instruction or by Mastrobattista in B Shop.

Considering Fanelli's testimony that she didn't know what any of the shops prepared on November 2<sup>nd</sup> or November 3<sup>rd</sup>, it is not inconceivable that the purported missing chicken fingers were used by one or more of the Student Shops to prepare food dishes.

Since faculty and students, other than Respondent, had access to the refrigerator/freezer in the Culinary Arts Program area and Fanelli was not able to view all of the video footage during the November 1<sup>st</sup> to November 2<sup>nd</sup> timeframe, alternative explanations for this "missing" chicken fingers food item are possible.

On October 27, 2015, Fanelli wrote in her notes that she had observed "A Shop students making breakfast sausage. I asked Mark what cut of meat do you use for that? He said they used pork butts." In her testimony, Fanelli indicated that these were the pork butts that she had observed earlier in the refrigerator. (Tr. 2 @ 207). Although Fanelli acknowledges that some of the pork butts were used for breakfast at the TradeWins, she made an entry on October 28<sup>th</sup> that "I entered the fridge and freezer to check on the remaining pork butts. All were gone. John must have walked out with pork butts on Monday afternoon."

Fanelli testified that on October 28<sup>th</sup>, she reviewed "the café freezer camera at 2:15. John walks out of the school carrying a black and white bag filled with items. When I had gone to check the refrigerator that day, the remaining pork butts that they hadn't used for sausage were now gone." (Tr. 2 @



208). Since she hadn't seen anyone else on the video from October 28<sup>th</sup>, Fanelli concluded that Vingara had removed the remaining pork butts from the refrigerator.

On cross-examination, Fanelli acknowledged that she did not take an inventory of everything in the freezer on October 27<sup>th</sup>, but rather made "a physical observation."

With respect to her conversation with Mastrobattista, Fanelli was uncertain which student shop had made the sausage or what the various shops made on October 28<sup>th</sup> – but "believed" it was A Shop.

It is noteworthy that the District did not call Mastrobattista as a witness to clarify his utilization of pork butts on October 27<sup>th</sup> or testify generally about his interaction with Vingara, the instructional program, and the disposition of food the students had cooked.

Although Fanelli testified that she had written in her notes "I observed pork butts in the fridge at 10:32 a.m.," this entry does not appear in the copy of her notes admitted in the record as Joint Exhibit No. 1. An inspection of Fanelli's notes by Respondent's counsel revealed that the contested entry was written with another pen. At this point, Respondent's counsel challenged the authenticity of the 10:32 a.m. entry and asked the Arbitrator "to strike the testimony of this witness."

The Arbitrator acknowledges the problematic aspects of the 10:32 a.m. entry and will exclude it as evidence in support of this element of the tenure charge.

Given this dubious entry, evidence that Fanelli had not conducted a complete inventory of the refrigerator on October 27<sup>th</sup>, and her inability to exclude other student groups and their instructor as possible users of the pork butts, the Arbitrator is disinclined to sustain this October 27<sup>th</sup> to October 28<sup>th</sup> element of the tenure charge.

To sustain a charge of theft, one incident is sufficient. Neither the number of times the misappropriation occurs nor the quantity of the product stolen mitigate the act of theft, which is a terminable offense. However, in an administrative proceeding, the evidence of theft must be preponderant and unequivocal. The District, at minimum, would have needed to prove that the Respondent took possession of its food product for his business purposes, left the school premises with the product for non-school purposes, and such conduct was unauthorized. Moreover, it would also have to prove that he did not reimburse the District for the product removed.

Clearly, several scenes depicted in the video surveillance entail suspicious behavior by Vingara. For example, on November 3<sup>rd</sup>, it appears on the video that a Sysco order is delivered. Fanelli testified that the delivery was made and Vingara signed for it. Next, the Respondent is seen taking what appears to be two bags of shredded cheese, walking to his desk, and placing them on the chair. Later, after changing his shirt in the hallway, and shortly after a female student is seen exiting the girls' room, Vingara is seen walking out the two doors of the Culinary Department with the bag, in which, the District alleges he put the shredded cheese.

However, Vingara is not apprehended by Security. His bag is not inspected to confirm that it contains shredded cheese. Moreover, considering the Respondent's argument that the Board had no policy prohibiting him from ordering a food item and subsequently reimbursing the Board, the Arbitrator finds that the video and testimonial evidence in support of the November 3<sup>rd</sup> element of the tenure charge is not proven by a preponderance of the evidence. Since the Respondent submitted a check dated October 6, 2015 and made out to Sysco for \$213.03, there is evidence that this practice was not prohibited by Board policy. Also, an invoice dated October 14, 2015 lists "pasta tortellini cheese." (R. Ex. #2).

On this point, Catterson testified that she was unaware of any policy that prohibited an employee from ordering food and then reimbursing the Board for same. (Tr. 1 @ 55-56). Although Catterson testified that a written policy existed prohibiting the "conducting business out of the District," this purported policy was not admitted into evidence.

The last of four foods that Fanelli identified was made by Culinary Arts students was Turducken on November 12<sup>th</sup> – the same day he was escorted off campus. She testified that to her knowledge the Turduckens that Fanelli was eager to get out of the oven on November 12<sup>th</sup> were not made with school supplies. (T3 @ 32-33).

Insofar as the incident wherein Superintendent Harttraft directed Vingara not to have Performance Foods deliver food to him personally at the school is concerned, there is no evidence that after the October 15, 2015 delivery episode

there was a recurrence. However, there is evidence that prior to October 15, 2014, Vingara personally purchased food which was delivered to the school for his Magic Chef Caterer business. An invoice dated October 14, 2015 itemizes several food items, and totals \$1,437.96. (R. Ex. #2). It is noteworthy that many of these food items are similar to food served at Giant football games.

In the absence of a clear directive prohibiting this practice prior to October 15, 2015 or a written policy to this effect, the Respondent's practice cannot be subject to discipline or support the District's tenure charge. Despite Principal Ziegler's claim that she gave Vingara a directive in September 2011 not to conduct business on school property and directed him not to be on school property when school was not in session, she did not discipline him for being on campus after hours in the 2012-2013 school year such as his evening appearance on August 4<sup>th</sup>, 2015 and arrival at 6:33 a.m. on September 24<sup>th</sup>, 2015. There is no documentary evidence that Ziegler ever disciplined Vingara for insubordination pursuant to his violation of the undocumented directive. (Tr. 1 @ 123). Clearly, Ziegler reasonably deferred any discipline of the Respondent's violation of the directive observed on the video surveillance during the District's ongoing investigation.

With respect to the one page/undated inventory of the refrigerator/freezer and storage room conducted by the administration from mid-September to mid-November and relied upon by the District's expert, the District has urged the Arbitrator to draw an inference that the amount of unaccounted for food items, such as approximately 200 lbs. of chicken, 16 Number 10 cans of tomato based

products and 3 gallons of Frank's Hot Sauce can only be attributed to the Respondent's misappropriation of these items for his off-campus business.

Considering the paucity of evidence specifying which items were used in the Culinary Arts Program, including the curricula for A, B and C Shops, the authorization given Vingara to purchase food for the program as well as no prohibition against him personally purchasing food and later reimbursing the Board, and the fact that several people had access to the Culinary Arts facilities, including the kitchen/refrigerator-freezer/dry storage areas where the food items allegedly became missing, the Arbitrator cannot sustain the theft charge given alternative explanations for the unaccounted for items.

### **Conclusion**

In the final analysis, the Arbitrator is not persuaded that the District has met its burden of proof by a preponderance of the credible evidence. While the District adduced a plethora of circumstantial evidence, predominantly provided through the testimony of Security Guard Fanelli and the video surveillance of the Respondent's activities in the Culinary Arts area, in the aggregate, this evidence does not constitute preponderant evidence of theft. Allegations of theft were either negated in full or offset, in part, by alternative explanations for the Respondent's actions.

Given the absence of the Culinary Arts curriculum, it could not be reasonably inferred that the foods he had the students prepare were inappropriate or in violation of Board policy.

When food items were deemed missing from the refrigerator/freezer, these missing items could not be solely attributed to the Respondent because others had access to the Culinary Arts storage areas. Without knowledge of the foods prepared by the other culinary arts teacher in Shops A, B and C, the Arbitrator cannot deduce that these food items were improperly ordered or used.

Assuming arguendo that Vingara had instructed the students prepare foods that he subsequently used in his catering business, rather than disposed of as waste, there is insufficient evidence that these food preparations and disposals deviated from the curriculum of the Culinary Arts Program, were otherwise educationally inappropriate, or violated Board policy.

The scenario implied by the Respondent in his post-hearing brief that "Vingara had students prepare hot food dishes which he later used in catering (as opposed to throwing out since there was no teachers' line)" has not been proven to be a violation of Board policy, administrative directive, or conduct unbecoming. Notwithstanding the problematic appearance of such conduct on Vingara's part, even if proven, it would not serve as the basis for a tenure charge in the absence of a specific prohibitive policy. Clearly, the Respondent was not warned that such conduct was prohibited and, if disciplined for a violation, a penalty of less than termination may have been appropriate.

When Vingara is seen on the video or by Fanelli leaving with bags she previously observed being filled with alleged food items, without inspecting the bags, it could not be ascertained whether Vingara had converted school

property for his own use or disposing of food that would have been otherwise discarded.

There is certainly a gray ethical area alluded to by the Respondent in his argument that in the absence of a policy prohibition, he may have used the food he purchased with the District's funds and prepared by the students in his classes, which subsequently would have been discarded as waste, for his profit-making catering business. However, the Respondent is charged with misconduct rather than being ethically challenged. Given Catterson's uncorroborated hearsay testimony based on a conversation with Mastrobattista that "the only food [the] students make is for the TradeWins or the teacher line," the disposal of the foods prepared before the teacher line began in November was not addressed by Board policy or administrative directive. Since Catterson testified that there is no policy or procedure that governs the use of expired or perishable food and such food could not be served to the staff, Vingara may have been removing perishable food prepared by his students or expired food from the freezer/refrigerator to use for his own business purposes.

Assuming Vingara was ordering food items which were not proven to be educationally inappropriate, preparing foods in his classes with his students that did not deviate from the school curriculum and disposing of perishable, expired or waste food in a manner that did not violate school policy, the Board cannot reasonably charge him with conduct unbecoming a teacher, neglect of duty, or theft of goods or services. Moreover, evidence that Vingara personally ordered food and subsequently reimbursed the Board negates the Board's claim that

some of that food was used for his catering business, since this practice was not shown to be a violation of Board policy. The Board's claim that it has a "Zero tolerance policy regarding the operation of a private business during school hours" was not proven.

Although the charge of theft is not amenable to progressive discipline, there is no evidence that the Respondent was warned or disciplined for any aspect of the District's concerns, such as his being on campus during non-school hours, ordering food for which he later reimbursed the District, deviating from the Culinary Arts curriculum, or "conducting business out of the district."

### **Remedy**

As an employee with 30 years of experience in the District, having received many commendations, and superior teaching evaluations, any discipline appropriate for his proven misconduct, except theft of property, would be mitigated by his length of exemplary service. However, since the Board has failed to prove any of the tenure charges, the charges are dismissed.

As a remedy, the Respondent, John Vingara, shall be reinstated to his tenured teaching position as a Culinary Arts Teacher at the Somerset County Vocational and Technical High School Board of Education, effective immediately. He is granted back pay for the 120 day period of his suspension pursuant to N.J.S.A. 18A:6-14.



NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

**AWARD**

- (1) The District did not meet its burden of proving its tenure charges that the Respondent, John Vingara, engaged in conduct unbecoming, neglect of duty, or theft of goods or services by a preponderance of the evidence.
- (2) As a remedy, the Respondent shall be reinstated to his tenured teaching position of Culinary Arts Teacher at the Somerset County Vocational and Technical High School, effective immediately.
- (3) The Respondent is granted back pay for the 120 day period of his suspension pursuant to N.J.S.A. 18A:6-14.
- (4) The Arbitrator will retain jurisdiction sine die to address any issues that may arise in the interpretation or implementation of the remedy portion of this award.

January 17, 2017

  
Robert T. Simmelkjaer  
Arbitrator

STATE OF NEW JERSEY}  
COUNTY OF BERGEN}

On the 17<sup>th</sup> day of January 2017, before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument and he acknowledged to me that he executed his Award in Agency Docket Case No. 261-9/15 dismissing tenure charges as set forth above.

January 17, 2017

  
Notary Public

In An  
Notary Public  
New Jersey  
My Commission Expires 5-4-2021  
No. 89087866