

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**NIKOLE KIDD,**  
**Grievant,**

**v.**

**Docket No. 2017-1874-DHHR**

**DEPARTMENT OF HEALTH AND  
HUMAN RESOURCES/BUREAU  
FOR CHILDREN AND FAMILIES,**  
**Respondent.**

## **DECISION**

Grievant, Nikole Kidd, was a probationary employee of Respondent, Department of Health and Human Resources (“DHHR”). She was employed as an Adult Protective Service Worker and her position was classified as Social Worker 2. Grievant was assigned to the Putnam County office of the Bureau for Children and Families (“BCF”). Ms. Kidd properly filed a grievance directly at level three on March 6, 2017, alleging that she was dismissed from employment without good cause and seeking to be reinstated with back pay, interest and restoration of benefits.<sup>1</sup> A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on June 6, 2017. Grievant personally appeared and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by James “Jake” Wegman, Assistant Attorney General. This matter became mature for decision on August 7, 2017, upon receipt of the last Proposed Findings of Fact and Conclusions of Law.

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<sup>1</sup> See W. VA. CODE § 6C-2-4(a)(4).

## **Synopsis**

Grievant was a probationary employee in the Social Services Worker 2 classification. She was required to attend training sessions before entering her duties on a full performance basis. Grievant was assigned to the Putnam County DHHR offices but the training took place in Flatwoods, West Virginia. Grievant was late arriving at the training on at least one day and fell asleep at various times throughout the session and during the final examination. Grievant had requested that she be allowed to stay in a motel during the courses of these trainings due to the distance she had to travel to attend. Her supervisor denied this request even though Grievant was traveling nearly twice the distance required by the travel policy for a participant to stay overnight. In spite of the long hours and driving which caused her sleeping difficulties, Grievant passed the comprehensive test at the end of the training. Grievant proved the only time that her performance lapsed was caused by Respondent's failure to follow its own policy. It was arbitrary and capricious for Respondent to terminate Grievant's employment for performance lapses caused by its own agents.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

## **Findings of Fact**

1. Nikole Kidd, Grievant, was employed by the DHHR and assigned to the Putnam County office as an Adult Protective Service Worker.

2. Grievant lives in Point Pleasant, Mason County, and has a young child. Her husband's work<sup>2</sup> requires him to alternate being on duty for three weeks straight and off for three weeks straight. This requires Grievant to provide all the care for their child when her husband is on duty.

3. Grievant began her employment for Respondent in the classification of Social Worker 2, on August 1, 2016. She had to serve a one-year probationary period which included required training for Adult Protective Services employees.

4. Maureen Rogers, is the Community Service Manager ("CSM") in Kanawha County. During the period of Grievant's employment, the Putnam County office was also under her supervision.

5. Grievant's immediate supervisor was Heather Cummings.<sup>3</sup> She is a Social Services Supervisor assigned to Kanawha County, but was supervising employees in Putnam County as well.

6. Grievant was required to complete a series of training courses taught by DHHR trainers. The goal of these courses is to familiarize employees with agency policies, problem solving in case management, and a data entry system which is utilized to record all contacts and strategies utilized in each case. The trainers of each class complete an evaluation form for each participant to apprise the participant, and his or her supervisor, about the employee's performance and progress.

7. A comprehensive test is administered at the end of the courses which each worker must pass to progress to full performance of their jobs. The examination tests

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<sup>2</sup> Mr. Kidd works for a company that operates river boats for transporting goods on barges.

<sup>3</sup> Ms. Cummings is also referred to in the transcript as Heather Krebs, which was her name before she was married.

various aspects of the training but cannot cover everything. It is important to be present and attentive at all training sessions to be able to adequately handle the caseloads assigned to social workers after their probationary period.

8. When the training courses were scheduled, Grievant requested that her supervisor authorize her to stay overnight at the testing destination during the training. Grievant supervisor originally said that she would check into this and later denied Grievant's request.<sup>4</sup>

9. DHHR policy related to training allows a participant to stay overnight if the training takes place more than fifty miles (one way) of the participant's workplace. Grievant was assigned to the DHHR office in Winfield, West Virginia. All the trainings took place in Flatwoods, West Virginia. It is 95.4 miles from Winfield to Flatwoods. (190.8 miles round trip). While Grievant's home address in Point Pleasant is not taken into consideration in determining the fifty-mile calculation, it added another 35.4 miles to each leg of the trip, requiring Grievant to drive 130.8 miles each day before the training started and the same distance after each day of training.

10. The long drive to attend the training required Grievant to leave her home at 5:00 a.m. each morning to make it to the training on time. Of course, she had to get up earlier to prepare for work. Each evening she arrived home late after the long drive home and had to repeat the cycle each day during each multi-day training.

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<sup>4</sup> Level three testimony of Nikole Kidd and Heather Cummings, Grievant's immediate supervisor.

11. Sometime near the end of the last multi-day training, Grievant was advised by her supervisor that she could stay in Flatwoods during the remainder of that course. By that time, it was too late for Grievant to arrange childcare in her absence.<sup>5</sup>

12. Grievant's first class took place during the period of September 9, 2016, through September 16, 2016. The title of the course was "Interviewing and Intake" and the trainer who completed Grievant's evaluation was Jessica Ball. (Grievant's Exhibit 1).

13. Ms. Ball checked the following indicators on the evaluation form; "Is alert and paying attention;" "Conveys a positive attitude and is enthusiastic;" "Accepts new ideas/feedback and is willing to change;" "Clearly and effectively shares pertinent information with others;" "Always engages in respectful behavior;" "Participates in class discussion/activities;" "Accepts the race/culture/gender religion/economic status of others;" "Takes only scheduled breaks;" "Returns on time from breaks;" and, "Arrives late or leaves early." In the comments area Ms. Ball note Grievant's positive and outgoing attitude during training but added:

On two occasions, another trainee who was carpooling with Nikole, contacted the trainer due to being concerned that she had not arrived and could not be contacted. Nikole stated she was not feeling well and not heard her phone on those days. She was notified that her supervisor had to give her permission to take leave and she made her supervisor aware of being late."

*Id.*

14. The next training course took place between September 26, 2016, and October 6, 2016. The title of this course was "AS 16055 Initial Case Assessment." Victoria Moon conducted this training and completed Grievant's training evaluation. Ms. Moon is

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<sup>5</sup> *Id.*

a Program Manager at the DHHR Division of Training and has years of experience conducting these and similar courses. Ms. Moon marked the same boxes as Ms. Ball, noting Grievant's positive attitude, effectiveness at sharing information, class participation, and "arrives late or leaves early." The only difference was in the category of "Alertness." In that category, she marked "Is alert and pays attention some of the time." She noted that Grievant was ten minutes late for class on September 28, 2016. In the "Additional Comments" sections Ms. Moon wrote:

Nikole is very pleasant and appears willing to learn. Participation in class was good when she was alert. She was able to navigate very well in FACTS. There were times when she was sleepy and fell asleep while typing. She had to leave the room several times to take calls regarding her child care.

(Respondent Exhibit 5).

15. The next course that Grievant attended occurred during the period of November 1, 2016, through November 3, 2016. The training was titled "Adults in Care and Court." Program Manager Moon was also a trainer at this session and completed the evaluation of Grievant's performance at this course. Again, she noted that Grievant "conveys a positive attitude and is enthusiastic;" "Participates in class discussion/activities;" and, "Clearly and effectively shares pertinent information with others." In the "Alertness" section, Manager Moon marked that Grievant, "Is not alert and/or does not pay attention." Ms. Moon also marked that Grievant only took scheduled breaks and returned from those breaks on time. She added that Grievant arrived an hour late for the training on November 3, 2016. (Respondent Exhibit 6).

16. Program Manager Moon added the following comments:

Nikole was often distracted and seemed to be alert at times, but would nod off, during lecture and while working on

FACTS.<sup>6</sup> She was unable to concentrate to complete the task of entering contacts in FACTS. She seemed to have difficulty at times understanding the concept of what sort of services would be established for the client in the John Hancock scenario. She said her son had been sick and she had little sleep and that was why she was falling asleep. I spoke with her about these issues on 11/2/16, concerning her health again nodding off at times. Her work in FACTS for the third day showed improvement, and her service plan was much better than the one done the day before. *Id.*

17. Grievant arrived on time and remained alert through the first day of this training. However, she had to stay up most of that night with her son who was ill that night. On November 2, 2016, after being up most of the night and making the long drive to the training Grievant had a lot of difficulty staying awake for the training that was mostly on the computer. The next day she was alert and attentive.

18. Grievant's final training occurred during the period of November 15, 2016 through November 17, 2016. The title for this course was "Family Assessment/Adult Residential Care." Ms. Moon was a trainer and issued the Student Evaluation for Grievant for this course. She marked all of the areas the same as she had marked them for the previous training. In the "Alertness" category she noted that Grievant "nodded off several times, almost every day. Had to wake her at least once by physically touching to arouse her." Program Manager Moon noted that Grievant was "10 minutes late for class 9/28/16." In the "Additional Comments" section Ms. Moon wrote:

This week of training was for Adult Residential Services which included service planning, client placement, contracts and demand payments. Nikole seemed to understand the concepts and procedures and knows material when asked, and will participate in class discussions. Her service planning

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<sup>6</sup> FACTS is an Electronic Data Systems used to open and track cases by social workers, record activities, and save pertinent data related to clients.

has shown improvement, however she falls asleep and nods off frequently during lectures and FACTS data entry.

(Respondent Exhibit 7).

19. In an e-mail to Supervisor Cummings dated November 17, 2016, Ms. Moon noted that the first day of the training consisted of discussion and lecture. Grievant “was attentive and an active participant in the discussion.” The second day was computer entry work in the FACTS system and Grievant had a difficult time staying awake. Ms. Moon noted that “the computers were slow to load pages in FACTS and it involved waiting for the screen to become active, and [Grievant] would nod off while waiting.” Grievant was able to stay attentive the last day. Ms. Moon ended the e-mail by stating, “The quality of [Grievant’s] work has shown improvement from the last class. She entered contracts, comprehensive assessments and a service plan that were much better than in the previous class [and] participated in discussions willingly.”

20. In a follow-up e-mail sent later that day Ms. Moon reported, “So far Nicole is doing well in class. We’re busy entering demand payments, contracts, etc. in FACTS. She has not been nodding off.” (Grievant Exhibit 2).

21. Grievant had trouble staying awake during some activities during her courses but she also had days when she was alert, attentive, and participated openly in class discussion.

22. The Comprehensive Examination given to trainees at the end of the courses is difficult, and it is not unusual for participants to fail it the first time they take it. Grievant nodded off while taking the test, but passed the examination. She could not have passed the examination without being alert during much of the course training. Grievant car-



pooled with another trainee whom she picked up each day in Winfield. That trainee did not pass the comprehensive test.

23. It is more likely than not that Grievant would not have had difficulty staying awake during the training sessions had she been allowed to stay in Flatwoods during the courses as provided in DHHR policy.

24. Grievant received three employee performance appraisals (“EPA”), dated October 21, 2016. The first was an EPA-1<sup>7</sup> which is the document required to be given to each employee within thirty days of their initial employment.<sup>8</sup> This form is designed to inform the new employee of the essential duties of his or her position as well as expectations of the employer. The second is an EPA-2, ostensibly for the reporting period 8/1/16 to 9/1/16. For this EPA-2 Grievant received an overall rating of “Good; Meets Expectations.” The third, also an EPA-2, is ostensibly for the rating. 9/1/16 to 10/21/16. On this EPA-2 Grievant was rated “Does Not Meet Expectations.” The main complaints listed in this EPA-2 deal with Grievant not reporting properly upon arriving and leaving the office. Grievance final EPA-2 was signed on November 18, 2016. Grievant received a rating of “Does Not Meet Expectations.” The main complaints regarding her performance deal with her difficulties of arriving in time and nodding off during the trainings. (Respondent Exhibit 8).

25. Grievant received a “Predetermination conference notice for dismissal” dated December 20, 2016. Grievant appeared that day with her representative, Gordon

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<sup>7</sup> Grievant Exhibit 4.

<sup>8</sup> *DOP Employment Appraisal Policy* Art. II, Section A, Paragraph A. the EPA-1 was dated October 21, 2016, 117 day following Grievant’s initial date of employment, August, 1, 2016.

Simmons. Also at the conference were; Maureen Rogers, and Melissa Sheppard. Grievant was advised that the reasons for her recommended dismissal from employment were:

- she was observed sleeping in training,
- she missed the training due to oversleeping,
- she fell asleep at the comprehensive testing, and,
- she missed a predetermination meeting.

All the reasons for the recommendation of terminating Grievant's employment were related to her difficulties in staying awake during the training courses. None of the issues cited in her EPA-2 were discussed or considered during the predetermination conference. (Respondent Exhibit 2).<sup>9</sup>

26. The only other issue discussed was her alleged missing of a previous predetermination conference, which was obviously scheduled after the decision to recommend Grievant's dismissal was made. Grievant testified that she arrived at the appointed time for the predetermination conference and found the door to the room closed. She heard voices of management personnel inside talking and laughing. She did not want to interrupt what she believed was a management meeting. She waited outside the door for reasonable period of time and then left. No one disputed this testimony. It is more likely than not that Grievant appeared for this predetermination conference but mistakenly left believing that a management meeting was taking place in the room.

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<sup>9</sup> Respondent Exhibit 2 is a copy of notes taken by one of the managers at the predetermination meeting. She testified that these notes were a true, accurate and complete representation of the discussion which took place at the predetermination conference.

27. By letter dated February 28, 2017, Grievant was notified that she was dismissed from employment effective March 16, 2017. The specific reasons given for this action were:

[S]leeping during training, sleeping during the final competency test which determines if your job duties can be completed in a professional and ethical matter, falling asleep operating a motor vehicle during work hours in which a coworker E.T. had to ask you to pull over so they could drive. . . Your training evaluations speak to your sleeping during training as well as being consistently late for training. Your probationary evaluations also speak to the issue of sleeping and lack of consistent coherence to that in the workplace which results in safety concerns for both our customer base and employees.

(Respondent Exhibit 3).

### **Discussion**

If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. See *Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). See also W. VA. CODE ST. R. § 156-1-3 (2008). See also *Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). Grievant "is required to

prove that it is more likely than not that [her] services were, in fact, of a satisfactory level.” *Bush v. Dep’t of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008). “However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance.” *Livingston v. Dep’t of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008) (citing *Johnson v. Dep’t of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence is equally balanced, the party with the burden of proof has not met that burden. See *Leichliter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The Division of Personnel (“DOP”) Administrative Rule describes the probationary period as follows:

10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

W. VA. CODE ST. R. § 143-1-10.1.a. The same rules state that an employee may be dismissed at any time during the probationary period if the employer finds his or her services are unsatisfactory. The employer must comply with the procedures set out in

subsection 12.2 of the DOP Administrative Rule when dismissing the employee. W. VA.

CODE ST. R. § 143-1-10.5.a. Those procedures provide:

12.2.a. An appointing authority may dismiss any employee for cause. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall:

12.2.a.1. meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal;

12.2.a.2. give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the dismissal; and,

12.2.a.3. give the employee a minimum of fifteen (15) calendar days advance notice of the dismissal to allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee.

The reasons listed for the termination of Grievant's probationary employment relate to her inability to stay awake during training sessions which she was required to attend in Flatwoods, West Virginia.

It was noted in her EPA-2s that she had problems being late for work and that she was inconsistent regarding signing in and out from work. Even though she was employed on August 1, 2016, her first EPA-1 was completed on October 21, 2016.<sup>10</sup> Grievant also received two EPA-2s on that date, one rating her performance as meeting expectations and one rating her performance as not meeting expectations. It is more likely than not that all of these EPA's were completed at the same time after Grievant had started her training and in anticipation of terminating her employment. Additionally, nothing noted in the

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<sup>10</sup> It is also troubling that Grievant requested copies of her EPAs at the predetermination meeting and they were not provided.

EPA's was alleged as a reason for recommending the termination of employment at her predetermination conference. The DOP Administrative Rule requires Respondent to give Grievant oral notice of the reasons for dismissal. W. VA. CODE ST. R. § 143-1-2.a.2. Respondent cannot later rely upon reasons Grievant was not given notice of a grounds for the disciplinary action. Accordingly, Respondent cannot rely upon EPA-2s for reasons for dismissing Grievant.

Grievant does not dispute she had difficulty staying awake during her training sessions in Flatwoods, and that she fell asleep during the test. However, she did prove that when she was not dozing off she was alert and paying attention, conveyed a positive attitude and was enthusiastic, participated in class discussion and asked appropriate questions. Both evaluators noted that Grievant was pleasant and willing to work and participated well in class discussion. Ms. Moon's e-mail repost to Supervisor Cummings revealed that during the last training Grievant was alert and active on the first day and last day of that training. While the comments attached to the evaluations focused on Grievant's nodding off, It was also noted in each evaluation that she was enthusiastic, participated in class discussions and activities, and effectively shared pertinent information with other trainees. Grievant had to be alert and active in the training much of the time to receive these ratings. Even though she had attention difficulties with staying attentive during the computer work, Grievant caught on to the FACTS computer tracking system and passed the comprehensive test. In short, even though Grievant was sometimes drowsy from her long daily commutes to and from the trainings, her job performance was satisfactory by all objective measures.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982).

All the reasons for the termination of Grievant's contract relate to her inability to remain awake at times during her training courses. It is more likely than not that these problems were caused by Respondent's agent's failure to follow the DHHR policy related to travel. It is axiomatic that "administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994). It is unreasonable and in complete disregard of the facts and circumstances of this case for Respondent to dismiss Grievant for performance lapses caused by its agent's failure to follow DHHR policy. Respondent's termination of Grievant's employment was arbitrary and capricious. Accordingly, the grievance is GRANTED.

## Conclusions of Law

1. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. See *Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). See also W. VA. CODE ST. R. § 156-1-3 (2008). See also *Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

2. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). Grievant "is required to prove that it is more likely than not that [her] services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

3. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence is equally balanced, the party with the burden of proof has not met that burden. See *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

4. The Division of Personnel ("DOP") Administrative Rule describes the probationary period as follows:



10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

W. VA. CODE ST. R. § 143-1-10.1.a.

5. An employee may be dismissed at any time during the probationary if the employer finds his or her services are unsatisfactory. The employer must comply with the procedures set out in subsection 12.2 of the DOP Administrative Rule when dismissing the employee. W. VA. CODE ST. R. § 143-1-10.5.a.

6 W. VA. CODE ST. R. § 143-1-12.2 requires:

12.2.a. An appointing authority may dismiss any employee for cause. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall:

12.2.a.1. meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal;

12.2.a.2. give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the dismissal; and,

12.2.a.3. give the employee a minimum of fifteen (15) calendar days advance notice of the dismissal to allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee.

7. The DOP Administrative Rule requires Respondent to give Grievant oral notice of the reasons for dismissal. W. VA. CODE ST. R. § 143-1-2.a.2. Respondent cannot

later rely upon reasons Grievant was not given notice of a grounds for the disciplinary action.

8. Grievant proved by a preponderance of the evidence that her job performance was satisfactory except for the lapses cause by Respondent's agents failure to follow DHHR policy.

9. It is axiomatic that "administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994).

10. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

11. It is unreasonable and in disregard of the facts and circumstances of this case for Respondent to dismiss Grievant for performance lapses caused by its agent's failure to follow DHHR policy. Respondent's termination of Grievant's employment was arbitrary and capricious.

Accordingly, the grievance is GRANTED.

Respondent is Ordered to immediately reinstate Grievant to her position with back pay from that date her employment was terminated until the day she is reinstated plus statutory interest, and restoration of all benefits. Respondent is Ordered to credit all time she has been dismissed toward the completion of Grievant's probationary period.

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

**DATE: October 5, 2017.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**