

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**TIMOTHY S. CARTER,**

**Grievant,**

**v.**

**Docket No. 2022-0148-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
BUREAU FOR PUBLIC HEALTH,**

**Respondent.**

**DECISION**

Grievant, Timothy S. Carter, filed an expedited level three grievance<sup>1</sup> dated August 19, 2021, against his employer, Respondent, Department of Health and Human Resources (DHHR), Bureau for Public Health (BPH), stating as follows:

I was dismissed from my position because of a conviction that occurred 10 years ago. There were two reasons given—potential to come in contact with minors and misleading information on my application. Both of these allegations are false.

My position is a Program Manager in which I oversee and implement a call center performing contact tracing and case investigation. I do not conduct contact tracing and investigation myself as evidenced in the attached job description. I schedule and coordinate resources for this task along with developing policies and procedures for the team that I assembled. Furthermore, case investigators and contact tracers are forbidden to interview minors

My application was not misleading. The only application question pertaining to criminal history asked if I had a conviction in the previous 7 years and I answered the question as “No” which was accurate. I signed form permitting a background check twice (temporary and permanent position) and no issues arose. The accusation states that I gave

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<sup>1</sup> See West Virginia Code § 6C-2-4(a)(4).

misleading information about why I left Dow Chemical putting “geographical preference”. That information is accurate—I left Dow in October of 2010 and was not arrested until February of 2011. The reason why I left Dow is because they wanted to relocate me to the gulf coast not because I was arrested.

As relief sought, Grievant states, “Reinstatement of position.”

The level three hearing was conducted via Zoom video conferencing on November 17, 2021, before the undersigned administrative law judge who appeared from the Grievance Board’s Charleston, West Virginia, office. Those participating in this hearing appeared from separate locations. Grievant appeared *pro se*. Respondent appeared by counsel, Mindy M. Parsley, Esquire, Assistant Attorney General, and its representative Michelle Neidig. This matter became mature for decision on December 20, 2021, upon receipt of the parties’ proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was employed by Respondent as a Program Manager 1 and was a probationary employee. Respondent dismissed Grievant for misconduct alleging that Grievant provided false and misleading information on his employment application and asserting that Grievant was ineligible for employment as a Program Manager 1 because of his criminal background. Grievant denied Respondent’s allegations and argued that he should not have been dismissed from employment because his position was not connected to his past conviction, and it did not violate the terms of his extended release from incarceration. Respondent proved that Grievant provided misleading information on his employment application, that his past conviction was connected to the position he had thereby justifying his dismissal, and that Respondent’s decision to dismiss Grievant from

employment was not arbitrary and capricious, or unreasonable. Therefore, the grievance is DENIED.

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

### **Findings of Fact**

1. Grievant began working for Respondent as a temporary employee on or about December 14, 2020. Grievant held the title of “HHR Specialist-Team Leader” and was placed in a leadership role within the first month of his employment.<sup>2</sup>

2. On or about June 19, 2021, Grievant was selected to fill a Program Manager 1 position and was hired as a permanent employee. Even though he was hired as a permanent employee, Grievant was required to complete a probationary work period. The length of Grievant’s probationary period is unclear from the record. At the times discussed herein, Grievant was a probationary employee.

3. At the times relevant herein, Ayne Amjad, M.D., MPH, was the Commissioner of the Bureau of Public Health and the State Health Officer. Justin Cherry was the Director of Human Resources at BPH.<sup>3</sup> Amy Adams was the Deputy Commissioner of Health Improvement at BPH. Shawn Farley, then Director of the Office of Epidemiology and Prevention Services, was Grievant’s direct supervisor.<sup>4</sup> Michelle Neidig is now the Deputy Director of the Office of Epidemiology and Prevention Services.

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<sup>2</sup> See, Joint Exhibit 3, Grievant’s Employment Application dated April 13, 2021; testimony of Grievant.

<sup>3</sup> Mr. Cherry has since left this position and now works in DHHR’s Office of Human Resources Management.

<sup>4</sup> Mr. Farley was not called as a witness at the level three hearing.

However, Ms. Neidig had been the Director of Human Resources at BPH when Grievant was first hired.

4. The Program Manager I position, for which Grievant applied and was selected, was a newly created position, designed to oversee and implement a statewide contact tracing and investigation program in response to the COVID-19 pandemic. From the first months of his employment with DHHR as a HHR Specialist-Team Leader, Grievant worked to establish and implement a contact tracing and investigation program, including a call center. It appears undisputed that Grievant developed and drafted policy and procedures with respect to the contact tracing program, participated in the interviewing and hiring of staff, trained employees, worked with county health departments and FEMA, and was instrumental in the distribution of the COVID-19 vaccine throughout the state. It appears that once Grievant was selected for the Program Manager I position, he continued performing many of the duties he had as an HHR Specialist—Team Leader and continued to oversee the contact tracing and investigation program.

5. Grievant's job performance is not an issue in this grievance.

6. On or about June 28, 2021, Respondent learned that Grievant was listed on the West Virginia Sex Offender Registry. It appears that an unidentified employee informed BPH management of the same.

7. On August 2, 2021, Mr. Farley notified Grievant that he was scheduled to attend a predetermination conference that was scheduled to be held on that same day.

In this notice, Mr. Farley informed Grievant of the following:

This meeting has become necessary based on the following allegations and/or policy violations.

Allegation & Corresponding Policy

1. WV Division of Personnel Administrative Rules section 6.4

You are not eligible for employment based on your criminal background and current status of supervised release.

You provided misleading information on your application for employment.

The purpose of the predetermination meeting is to give you an opportunity to respond to the aforementioned items and provide input for our consideration. You may present any information you believe would be supportive of your position.

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8. The predetermination conference was held on August 2, 2021, with Grievant, Shawn Farley, and Justin Cherry present. Grievant did not deny that he had been incarcerated or that he was on supervised release for at least thirty years. Grievant did not deny that, as a condition of his release, he is required to register as a sex offender and that he could not have contact with minors. However, Grievant denied providing false and misleading information on his application.

9. Immediately following the predetermination conference, Mr. Cherry and Mr. Farley met with BPH leadership to decide what, if any, discipline needed to be imposed on Grievant. Dr. Ayne Amjad, Commissioner of BPH and State Health Officer, was ultimately the decisionmaker. Dr. Amjad made the decision to dismiss Grievant from his employment. Mr. Cherry drafted the dismissal letter with the assistance of OHRM and Dr. Amjad signed the same.

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<sup>5</sup> See, Joint Exhibit 1, August 2, 2021 Predetermination Conference Notice.

10. On that same day, August 2, 2021, after meeting with BPH management, Mr. Cherry returned to the room where Grievant was waiting, and handed Grievant the signed dismissal letter.

11. The dismissal letter states, in part, as follows:

The purpose of this letter is to advise you of the decision to dismiss you, effective August 18, 2021, from your probationary employment as a Health and Human Sources Program Manager 1 with the West Virginia Department of Health and Human Resources (WVDHHR), Bureau for Public Health. . .

Your dismissal is because you are not eligible for employment based on your criminal background and current status of supervised release and as a result of your having provided misleading information on your application for employment.

On or about June 28, 2021, it was discovered that your name appears on the State's Sex Offender Registry. Upon further investigation, it was learned that you had been convicted of sexual offenses against two young females, aged 13-17. It has been determined that a rational nexus exists between your convicted crimes and your position, in that you may come in contact with young females aged 13-17 while conducting case investigation and contact tracing activities. For this reason, you are ineligible for employment at WVDHHR.

Further, your application for employment was misleading. While you had not technically been convicted of a crime within the 7 previous years (your conviction was more than 7 years ago), you were still actively serving a sentence of 50 years of extended supervision. Further, at the time of your arrest, the reason you gave for leaving your employment—was "geographical preference. . ."

During that conference, you provided the following responses for our consideration[:]

1. You state that you have taken every rehabilitation program offered and are the poster child for successful rehabilitation.

2. You state you did not lie and was accurate on your application. The only question was if you had a felony conviction in the last seven years and you said no.
3. You state that you were in a program “Jobs in Hope” offered by the State and that is what led you to the position.
4. You state that you are actively involved with your recovery of addiction and you are overcoming your past.
5. You state that your job performance is excellent and should be considered.

After considering your performance during the probationary period and your predetermination response(s), it is decided that your dismissal is warranted. . . .<sup>6</sup>

12. The application for employment with the State of West Virginia, asks the following question about felony convictions: “3. Have you been convicted of a felony within the past seven years? Conviction will not automatically bar you from employment. Conviction may be considered only as it relates to specific position requirements.” Grievant answered “No” to this question.<sup>7</sup> There is no question about older convictions or a section where applicants are instructed to elaborate on any criminal convictions they may have.

13. It is undisputed that Grievant was convicted of a felony on September 30, 2011. Grievant served eight years and seven months in prison and was released in or about 2019, at which time he was placed on probation. A condition of his release required Grievant to register as a sex offender, and he was placed upon “extended supervision”

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<sup>6</sup> See, Joint Exhibit 2, August 2, 2021, Dismissal Letter.

<sup>7</sup> See, Joint Exhibit 3, Grievant’s Employment Application.

for fifty years.<sup>8</sup> Grievant's extended supervision has since been reduced to thirty years. As Grievant is a registered sex offender, he is prohibited from contacting and interacting with minors.

14. Despite having been incarcerated for eight years and seven months, Grievant worked nearly the entire time he was serving his sentence. A review of his state employment application shows that he worked as a "Program Leader" for "Pathways Employment Solutions" from February 11, 2011, until October 2019. While working for Pathways, Grievant worked as a GED teacher, welding program director, and led a program for training dogs to become service dogs.

15. Grievant's entry on this application about his work with Pathways Employment Solutions does not indicate that this was a job he worked during his incarceration. While the name of his supervisor is not listed on his application, Grievant indicated on the document that Respondent could contact this former employer.<sup>9</sup>

16. As the reason for leaving his job at Pathways Employment Solutions, Grievant wrote that it was a "temporary position."

17. Grievant earned his bachelor's degree in chemical engineering/chemistry from West Virginia University Institute of Technology in or about 1998. Among other employment history listed on his application for the Program Manager I position, Grievant indicated that he worked for Dow Chemical in two different positions from 2007-2010.<sup>10</sup>

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<sup>8</sup> See, testimony of Grievant.

<sup>9</sup> See, Joint Exhibit 3, Grievant's Employment Application dated April 13, 2021; testimony of Grievant.

<sup>10</sup> See, Joint Exhibit 3, Grievant's Employment Application dated April 13, 2021; testimony of Grievant.

18. Despite Respondent's assertions in its dismissal letter and at the level three hearing, Grievant was arrested in February 2011, months after Grievant left his position at Dow. Grievant's departure from Dow was not because of his arrest.

19. After being released from prison, Grievant worked with a program called "Jobs & Hope" to find employment. Grievant learned of his initial HHR Specialist—Team Leader position through this program. Grievant described Jobs & Hope as being a program that assists those recently released from incarceration reenter society, and that it is funded by a grant from the state of West Virginia.

20. Given his extended supervised release, Grievant had to get approval from his probation officer and the State Police before accepting a job. Grievant asserts that his probation officer approved him taking the Program Manager I position; however, Grievant did not call his probation officer as a witness in this grievance.

21. There was no evidence offered to suggest that a criminal background check was performed on Grievant before he was hired at DHHR.

22. Neither party called Shawn Farley to testify as a witness at the level three hearing.

23. While he was working as the Program Manager I overseeing the call center and contact tracing program, Grievant did not, himself, make phone calls. Grievant trained the people who worked in the call center. No one from the call center was allowed to speak with minors when contact tracing. If a minor answered a call, the call center employee was to ask to speak with an adult and if none were available, he or she was to call back another time.<sup>11</sup>

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<sup>11</sup> See, testimony of Grievant; testimony of Michelle Neidig.

24. Grievant admitted that as the Program Manager 1 overseeing the call center and contact tracing program, he would have had access to a database that included contact information and demographic information for minors. Grievant admitted that there was a possibility for him to have phone contact with a minor if he had to make calls in the call center during a time when everyone had to do it, such as during one of the COVID-19 surges.

### **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 Res.*, 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts that it dismissed Grievant from employment for misconduct as he was ineligible for employment because of his past felony conviction and the terms of his supervised release, as well as, for providing misleading information on his employment application. Respondent also argued that allowing Grievant to remain employed in the position had the potential to expose the State to liability, given that Grievant had access to the contact tracing program database that would contain

information about minors, including their demographics and contact information. However, to be very clear, Grievant has not contacted any minors, nor has Respondent alleged that he has done so. Respondent is asserting that Grievant remaining employed in the Program Manager 1 position was not permissible because of his past conviction and that remaining in the position had the *potential* to violate the terms of his supervised release and the *potential* to expose the State to liability.

Grievant denies Respondent's allegations and asserts that he did not provide misleading or false information on his employment application, that he was eligible for employment with as the Program Manager 1, and that as a Program Manager 1 he had no contact with minors. Grievant also asserts that his probation officer and the State Police approved of him working in both the temporary HHR Specialist-Team Leader and Program Manager 1 positions; therefore, the job duties of the positions did not conflict with the terms of his supervised release. Grievant also asserts that his direct supervisor, Shawn Farley, knew about his prior incarceration because they had talked about it.

The Division of Personnel's administrative rule discusses the probationary period of employment, describing it as "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. . . ." W. VA. CODE ST. R. § 143-1-10.1(a) (2016). The same provision goes on to state that the employer "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." *Id.* A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are

unsatisfactory. *Id.* at § 10.5(a). Therefore, the Division of Personnel’s administrative rules establish a low threshold to justify termination of a probationary employee. See *Livingston v. Dep’t of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

Further,

[a] probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

*Hammond v. Div. of Veterans Affairs*, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep’t of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

Dismissal of a probationary employee is addressed in Rule 10.5, entitled “Dismissal During Probation.” Rule 10.5.a. states as follows:

[i]f at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection 12.2. of this rule. If the appointing authority gives the fifteen (15) days’ notice on or before the last day of the probationary period, but less than fifteen (15) days in advance of that date, the probationary period shall be extended fifteen (15) days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve-month probationary period.

W.VA. CODE ST. R. § 143-1-10.5.a. (2016).

“[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep’t of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep’t of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999).” *Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). An action is recognized as

arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

It is undisputed that Grievant was a probationary employee. The Division of Personnel's Administrative Rule, states in part, as follows:

6.4 "Disqualification of Applicants"

6.4.1. The Director may temporarily or permanently prohibit the reinstatement, appointment, temporary employment, promotion, reallocation, demotion, lateral class change, temporary upgrade, transfer, or examination of an applicant, or after examination, may disqualify the applicant or remove his or her name from a register or certification, or refuse to certify any eligible on a register if . . .

6.4.a.3. he or she has been convicted of a crime which has a reasonable connection to the position/class for which he or she is applying;

6.4.a.4. he or she has made a false statement or omission of a material fact or has misrepresented his or her qualifications in his or her application. . . .

Based upon the evidence presented, Respondent has not proved by a preponderance of the evidence that Grievant provided false information on his employment application. However, Respondent proved that some of the information on Grievant's application is misleading. Mr. Cherry testified at level three that the timeline of Grievant's job history listed in his employment application did not match with his conviction record; therefore, the application contained false information. It is true that Grievant's application shows no significant break in employment, if any, that would account for the time he was incarcerated. Grievant listed his employment with Pathways Employment Solutions February 2011 to 2019, without mentioning that he worked this job while he was incarcerated.<sup>12</sup> He noted that it was a "temporary position," and listed his employer's address as "Charleston, West Virginia." This is likely why Respondent

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<sup>12</sup> See, Joint Exhibit 3, employment application.

incorrectly asserted in the dismissal letter that Grievant lost his job at Dow because of his arrest and conviction, and why Respondent alleged that Grievant's response in his application as to why he left that job, "geographical preference," was false.

Looking at the employment application, nothing therein specifically directed Grievant to discuss his incarceration, but as he was required to describe his duties and responsibilities at Pathways Employment Solutions, that was the logical opportunity to mention it there. Grievant provided Respondent with the contact information for Pathways Employment Solutions, but apparently, no one called to verify Grievant's employment. Had that been done, Respondent likely would have learned of Grievant's incarceration and extended supervised release. Nonetheless, Grievant's decision to omit any reference to his incarceration when discussing his employment with Pathways Employment Solutions appears intentional and is misleading, especially as he characterized his reason for leaving that position as because it was a "temporary position."

It is noted that the form employment application asks only whether the applicant had convictions within the last seven years. Grievant had no such convictions, as his conviction was more than seven years prior to his application. Accordingly, his answer to this question was not false or misleading. There was also no question on the application asking whether an applicant is on probation or any type of supervised release. This ALJ assumes that, for some reason, Respondent did not have a criminal background check performed on Grievant at the time of his initial employment. If Respondent had done so, it would likely have found Grievant's 2011 arrest, record of incarceration, and details about his extended supervised release.

Respondent asserts that Grievant was also not eligible for state employment because he “has been convicted of a crime which has a reasonable connection to the position/class” for which he applied. Respondent argues that as the Program Manager 1, Grievant had access to the contact tracing and investigation program database which contained demographic and contact information for individuals, including for minors. The terms of Grievant’s supervised release require him to register as a sex offender, prohibit him from contacting minors, and restrict where he may go in order to prevent him from having any contact with minors. While Grievant would not normally be making calls for contact tracing, Grievant admitted that there was a possibility for him to have phone contact with a minor if he had to make calls during a time when everyone had to do it, such as during one of the COVID-19 surges. Grievant also asserts that no one was allowed to speak with minors for contact tracing. Callers were trained to ask for an adult if their calls were answered by a minor, and if no adult was available, to end the call and to try again later.

In 2011, Grievant was convicted of sexual offenses involving two minor females. As the Program Manager 1 overseeing the call center and the contact tracing and investigation program, there would always be the possibility that he would have to make calls and for minors to answer the same. Such would constitute prohibited contact with a minor, which has a reasonable connection to his prior offenses, and would violate the terms of Grievant’s supervised release. Additionally, given Grievant’s 2011 conviction, his status as a registered sex offender, and his being on a thirty-year extended supervised release, it was reasonable for Respondent to dismiss Grievant in order to prevent Grievant from accessing one of its databases that contained contact information for

minors. Given such and the low threshold to justify the termination of a probationary employee, the undersigned cannot conclude that the decision to terminate Grievant's employment was arbitrary and capricious, or otherwise unreasonable.

Accordingly, this grievance is DENIED.

### **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 Res.*, 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. The Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. See *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

3. "A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires."

*Hammond v. Div. of Veterans Affairs*, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

4. “[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999).” *Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

5. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *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.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. Respondent failed to prove by a preponderance of the evidence that Grievant provided false information on his application for employment.

7. Respondent proved by a preponderance of the evidence that Grievant provided misleading information in his employment application, that his past conviction was connected to the Program Manager 1 position, thereby justifying his dismissal, and that Respondent’s decision to dismiss Grievant from employment was not arbitrary and capricious, or unreasonable.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named.

However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

**DATE: February 3, 2022.**

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**Carrie H. LeFevre**  
**Administrative Law Judge**