**OCB AWARD NUMBER: 2116**

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| **SUBJECT:** | **ARB SUMMARY # 2116** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **KRISTEN RANKIN** |
| **OCB GRIEVANCE NUMBER:** | **29-04-20090213-0993-01-14** |
| **DEPARTMENT:** | Rehabilitation Services Commission |
| **UNION:** | OCSEA |
| **ARBITRATOR:** | Harry Graham |
| **GRIEVANT NAME:** | Chris Smith |
| **MANAGEMENT ADVOCATE:** | Bobby L. Johnson |
| **2ND CHAIR:** | David Long |
| **UNION ADVOCATE:** | Sharon Ralph |
| **ARBITRATION DATE:** | January 27, 2011 |
| **DECISION DATE:** | April 8, 2011 |
| **DECISION:** | Granted |
| **CONTRACT SECTIONS:** | Article 17—Promotions, Transfers, Demotions and Relocations; Article 25—Grievance Procedure; |
| **OCB RESEARCH CODES:** | 93.4661—Timeliness of Grievance; 119.08­­—Posting of Job Vacancies; 119.1221—Promotions-Ability and Qualifications |
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**HOLDING: Grievance Granted. The Arbitrator found that the changes to the promotion test had not been reviewed by the Union and therefore any applicant who met the MAC of 70 was entitled to advance on to the second round of testing.**

The Grievants, applicants for posted Disability Claims Specialist positions, were not advanced to the second round of testing despite meeting the minimum acceptable competency (MAC) of 70. Of the applicants for the Disability Claims Specialist position, only those who scored a 75.5 or higher were advanced to the second round of testing. There were ten applicants, the Grievants, who met the MAC requirement but did not score above 75.5 who were not advanced to the second round of testing. The test in question had been changed by the Employer, with the changes becoming effective on September 6, 2007.

The Union argued that the grievance was timely filed and that the selection process required those who met the MAC to be advanced to the second round of testing. The Union argued that the grievance was filed ten days after the Grievants were not awarded the position. Further, the Union argued that it was not aware that changes to the test had been made until it filed the grievance. On the merits, the Union argued that the Grievants must be advanced to the second round of testing because they met the applicable standard for advancement. The Union argued that because two successful exams are required to be awarded the position, if an applicant who meets the MAC is not advanced than a less qualified junior applicant could secure an open position. The Union argued that such a result would violate Article 17.

The Employer argued that the grievance was not timely filed, and therefore the dispute not arbitrable. The Employer argued that the promotional policy was put in place on September 6, 2007 and that it is the promotional policy that is at issue. Because a grievance must be filed within ten days from when the grievant become aware, or should have reasonably become aware, the fact that the grievance was not filed until February 13, 2009 makes it untimely. The Employer also argued that Union input was taken at a July 26, 2007 Labor-Management Committee meeting, where the promotional policy was distributed. The Employer pointed to the Union’s signature of the July 26 meeting minutes on August 28, 2007 as proof of the Union’s knowledge and involvement in the process.

The Arbitrator granted the grievance. The Arbitrator found that the grievance was timely filed and the dispute therefore arbitrable. The Arbitrator concluded that the dates the Employer advocated as being applicable for starting the tolling of the grievance were not correct. First, the Arbitrator determined that, at the time of the July 26, 2007 meeting, the Union could not have filed a grievance because the promotional policy had not yet been promulgated. Additionally, the Arbitrator found that the issuance of the policy on September 6, 2007 did not start the tolling of the grievance clock because at that time there were no grievants. The Arbitrator concluded that it was not until the test was administered in January 2009 that an action precipitating a grievance occurred. Second, the Arbitrator determined that the Union’s input at the Labor-Management Committee meeting was immaterial because it did not constitute review by the Union’s testing expert as required by a 2001 Consent Award. On the merits, the Arbitrator found that not advancing the Grievants to the second round of testing was a violation. The Arbitrator explained that the test explicitly stated that the MAC was 70 and that it implied that only those who did not attain the MAC would not be considered. For these reasons, the Arbitrator awarded that the Grievants be permitted to advance to the second round of testing and that they automatically be advanced to the second round for any future examination for positions at pay range 28 and above. The Arbitrator also required that the Employer promptly allow the Union’s test expert to review the exam in accordance with the 2001 Consent Award.