**OCB AWARD NUMBER: 2138**

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| **SUBJECT:** | **ARB SUMMARY # 2138** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **27-19-20101014-0286-01-04** |
| **DEPARTMENT:** | Rehabilitation & Correction |
| **UNION:** | OCSEA |
| **ARBITRATOR:** | Meeta Bass Lyons |
| **GRIEVANT NAME:** | Amy Parker |
| **MANAGEMENT ADVOCATE:** | Venita S. White |
| **2ND CHAIR:** | Jackie Milsom |
| **UNION ADVOCATE:** | Mike Hill |
| **ARBITRATION DATE:** | June 9, 2011 |
| **DECISION DATE:** | August 23, 2011 |
| **DECISION:** | GRANTED |
| **CONTRACT SECTIONS:** | Article 24—Disciple; Section 24.01—Standard; Section 24.02—Progressive Discipline; Section 24.06—Imposition of Discipline |
| **OCB RESEARCH CODES:** | 118.01—Discipline-In General; 118.311—Just Cause-Concept of; 118.801—Reinstatement From Wrongful Discharge |

**HOLDING: The Grievance challenging removal for a failure to maintain nursing license was GRANTED. The Arbitrator found that the Employer had just cause to discipline the Grievant but that removal was excessive because the Deputy Director had failed to consider mitigating circumstances provided by the Grievant. Additionally, the Arbitrator determined that the nature of the licensure lapse, a failure to pay dues, did not expose the Employer to extensive liability.**

The Grievant, a licensed practical nurse (LPN) at the Ohio Reformatory for Women, was an employee of the Department of Rehabilitation and Correction (DRC) since October 2007. The Grievant was removed from employment on October 14, 2010 for violating DRC Standards of Employee Conduct Rule 48: the Grievant had failed to maintain her license to practice nursing pursuant to Ohio Revised Code § 4723. The Employer argued that there was just cause for the removal because of the seriousness of the offense: the Grievant worked during the two week period when she did not have an active license, therefore exposing the State to potential liability. The Union argued that there was not just cause for the removal because the Employer failed to properly consider mitigating circumstances: the Grievant provided information and documents about issues relating to her juvenile son that was not provided to the Deputy Director. The Arbitrator concluded that because the decision to terminate ultimately rested with the Deputy Director, and the Deputy Director did not receive the mitigating information and documentation provided by the Grievant, there was no just cause for removal. The Arbitrator, however, did conclude that there was just cause for discipline and ordered the Grievant be given a three day suspension.

The events that led to the Grievant being removed are as follows. The Employer conducted its annual license audit on September 15, 2010. The audit showed that the Grievant’s license had been lapsed as of August 31, 2010. The Grievant was contacted at home and subsequently renewed her license the following day. Because the Grievant had worked on seven days during the two week period her license was lapsed, the Employer placed the Grievant on administrative leave the same day it conducted its license audit. A pre-disciplinary hearing was held on September 17, 2010, at which the Grievant provided documents in support of a mitigation claim. The Grievant was removed from employment on October 14, 2010.

The Employer argued that there was just cause for the removal. The Employer pointed to DRC Standard of Employee Conduct Rule 48, which provided for removal on the first offense. The Employer argued that having a non-licensed nurse perform the duties of a LPN exposed the Employer to liability. Moreover, the Employer argued that the Grievant was not truthful when she was questioned during the investigatory process about her license lapsing previously.

The Union argued that the Employer did not meet the test for just cause required for a removal. The Union argued that no consideration was given to the Grievant’s mitigating factors for not timely paying the renewal fee to keep her license active. The Union pointed to the absence of documents provided by the Grievant to support her mitigation claim in the Grievant’s disciplinary file at DRC. The Union argued that the lack of these documents showed the Deputy Director did not review evidence of mitigation prior to making the decision to remove the Grievant. The Union also argued that, while it was the duty of the Grievant to maintain her license, the Employer had a duty to ensure internal licensure compliance. As such, the Union argued that any days the Grievant worked without a license were just as much the fault of the Employer as the Grievant.

The Arbitrator found that there was just cause for discipline but not just cause for removal. The Arbitrator rejected the Union’s argument that the Employer shared in the blame for the Grievant working with a lapsed license. The Arbitrator also downplayed the Employer’s contention that the Grievant’s failure to follow DRC Standards of Employee Conduct Rule 48 represented a serious offense and threat of liability. The Arbitrator concluded that because the Grievant’s lapse was predicated on a failure to pay the license renewal fee, considered a minor violation by the state nursing board, the Employer’s exposure to liability was limited. The Arbitrator also concluded that the Employer’s contention that the Grievant had not been truthful when asked if she had ever allowed her license to lapse was not correct. The Arbitrator determined that the question the Employer based its untruthful argument upon was poorly worded and that the Grievant’s answer was therefore not clearly untruthful. The Arbitrator reinstated the Grievant with a three day suspension.