**OCB AWARD NUMBER: 2139**

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| **SUBJECT:** | **ARB SUMMARY # 2139** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **27-08-20110107-0001-0610** |
| **DEPARTMENT:** | Rehabilitation & Correction |
| **UNION:** | OEA |
| **ARBITRATOR:** | Robert Brookins |
| **GRIEVANT NAME:** | Shawn Master |
| **MANAGEMENT ADVOCATE:** | Venita S. White |
| **2ND CHAIR:** | Jackie Milsom |
| **UNION ADVOCATE:** | Mark E. Linder |
| **ARBITRATION DATE:** | April 26, 2011 |
| **DECISION DATE:** | August 21, 2011 |
| **DECISION:** | MODIFIED |
| **CONTRACT SECTIONS:** | Article 13—Progressive Discipline; Article 14—Work Rules; Section 24.02—Progressive Discipline |
| **OCB RESEARCH CODES:** | 118.01—Discipline-In General; 118.311—Just Cause-Concept of; 118.801—Reinstatement From Wrongful Discharge |

**HOLDING: The Grievance was MODIFIED. The Arbitrator found that the Employer failed to carry its burden of persuasion on one of the alleged rule violations because it only provided uncorroborated hearsay as evidence. As a result, the Arbitrator determined that removal was unreasonable.**

The Grievant, a teacher employed by the Department of Rehabilitation and Correction (DRC), was removed for allegedly violating three DRC work rules: Rules 7, 18, and 45(A). The Employer argued that it had just cause for removal, established by sufficient evidence of the rule violations. The Union argued that a higher burden of persuasion was required and that the Employer did not establish just cause because it did not satisfy the seven-part just cause test. The Arbitrator, after rejecting the Union’s argument that the threat of stigma was sufficiently substantial to require the Employer to meet a clear and convincing burden of persuasion, determined that the Employer only proved a violation of Rule 45(A): giving preferential treatment without express authorization. The Arbitrator concluded that because only one of the alleged rule violations was proved by a preponderance of evidence, removal was unreasonable. Accordingly, the Arbitrator granted the grievance for all but the Rule 45(A), and reduced the removal to a 30-day suspension.

The incidents that led to the Grievant’s removal began on July 12, 2010 when an officer at the Grievant’s place of employment, the Franklin Pre-Release Correctional Facility, filed an incident report claiming the Grievant had attempted to intimidate her. The incident report led to an investigation. Subsequently, the Grievant filed his own incident reports against two officers and an inmate that alleged workplace violence, harassment, and discrimination. The Grievant was placed on administrative leave on July 21, 2010. During the Grievant’s leave, the school administrator was unable to locate an attendance sheet for one of the Grievant’s students. As a result, the student did not receive any attendance credit and contacted the school administrator. The school administrator was told by the student that the Grievant had allowed her to keep her own attendance sheet. The school administrator filed an incident report in response. The numerous incident reports led to an investigation that led to the Grievant being charged with violating DRC Work Rules 7, 18 and 45(A). Work Rule 7 dealt with a general failure to follow orders and regulations, Rule 18 dealt with threatening or intimidating behavior and Rule 45(A) dealt with preferential treatment.

The Employer argued that the various incident reports and written statements from witnesses established just cause for the Grievant’s removal.

The Union argued that removal would cause the Grievant to be stigmatized, and that the existence of stigma required the Employer to show just cause by a heightened evidentiary standard. Additionally, the Union argued that the Employer had not me the seven-part test for just cause. The Union argued that the Employer had not conducted a full and fair investigation and that the Employer did not present adequate persuasive evidence to prove the alleged rule violations.

The Arbitrator concluded that only Rule 45(A), and as a result Rule 7, were violated. The Arbitrator explained that Rule 7 was a catch-all provision that could not be violated on its own, but was instead violated derivatively when one of the other rules was violated. The Arbitrator determined Rule 18 was not violated because the Employer was unable to provide evidence other than uncorroborated hearsay. Because the evidence presented by the Employer relating to the Rule 18 intimidation charge was only supported by written out of court statements, and the statements were neither probative nor dispositive, the Arbitrator ruled that the Employer had failed to meet its burden of persuasion. As to the Rule 45(A) violation, the only allegation that the Arbitrator sustained related to special treatment for a student.