**OCB AWARD NUMBER: 2141**

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| **SUBJECT:** | **ARB SUMMARY # 2141** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **24-13-20100930-0036-01-04** |
| **DEPARTMENT:** | Development Disabilities  |
| **UNION:** | OCSEA |
| **ARBITRATOR:** | Susan Grody Ruben |
| **GRIEVANT NAME:** | Linda Schultz |
| **MANAGEMENT ADVOCATE:** | Cornell Hale |
| **2ND CHAIR:** | Jessie Keyes  |
| **UNION ADVOCATE:** | James Hauenstein |
| **ARBITRATION DATE:** | June 29, 2011 |
| **DECISION DATE:** | September 11, 2011 |
| **DECISION:** | DENIED |
| **CONTRACT SECTIONS:** | Article 24 - Discipline; Article 29 – Sick Leave; Article 31 – Leaves of Absence; Article 44 – Misc.  |
| **OCB RESEARCH CODES:** | 116.2001—FMLA Issues; 118.301—Progressive Discipline; 118.6561—Work Rules-In General  |
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**HOLDING: Grievance DENIED. Grievance based upon an alleged improper removal was denied as the Employer had just cause to remove the Grievant. The Arbitrator determined that the Grievant’s removal for failure to report to duty was warranted because the Grievant falsified her reason for calling off sick for her assigned shift. Therefore her request for sick leave was denied. The discipline was progressive and in accordance with the discipline grid for attendance.**

The Grievant was hired on June 26, 2000. On August 27, 2010, two of the Grievant’s coworkers saw the Grievant at a bar and asked her if she was working the weekend. The Grievant stated that she was not working; the schedule showed that she in fact had to work. The Grievant left the bar between 2:00-2:15 AM on the morning of August 28, 2010. Phone records indicate the Grievant called off work at 2:02 AM, claiming she needed to use sick leave to care for an ill child. The two coworkers present with Grievant at the bar stated that the Grievant told them that her children were actually with their father for the weekend.

 The Grievant had a written reprimand for AWOL (1/6/09), a two day working suspension for Failure to Follow Attendance Policy (12/3/09), and a five day working suspension for Failure to Report for Duty (1/14/10). The disciplinary grid calls for removal for a 3rd or greater attendance offense. She was removed from her position as a Therapeutic Program Worker (TPW) on September 18, 2010. She was removed for violating the Department’s Policy, specifically Job Abandonment—Failure to Report for Duty.

The Employer arguedthat the Grievant used her son as a pretext to call off sick from work on August 28, 2010. Throughout the administrative investigation the Grievant was inconsistent about her account of the events that weekend. The two co-workers who spoke with the Grievant at the bar had been consistent in their account, bolstering their credibility as compared to the Grievant’s. Upon learning the real facts surrounding Grievant’s call off the Employer justly denied the Grievant’s request for sick leave. The Grievant then failed to report for duty and was not in an approved leave status. The discipline applied was progressive based on the Grievant’s discipline record and the attendance grid.

The Union argued that the Employer could not prove that the Grievant was untruthful in her reason for requesting sick leave. The Union argued that the Employer failed to conduct an investigation outside of the statements the Employer received from the Grievant’s two coworkers who were at the bar that evening. Further, when the Grievant attempted to provide evidence from her son that he was in fact ill that weekend, the Employer dismissed the statement from the Grievant’s son. The Union also argued that the Employer was prohibited from denying the Grievant’s request for leave under the FMLA. The Union opined there was no rule violation because the leave could not have been denied under the FMLA and therefore the Grievant could not be removed for failure to report. The Union argued the grievance should be granted and the Grievant should be made whole.

The Arbitrator foundthat there was just cause to remove the Grievant based on the record of evidence. The Grievant’s coworkers credibly testified the Grievant was at the bar when she called off sick from her assigned shift. The Grievant stated that she left the bar and upon returning home learned that her son was sick and then called off sick from work. However, the Union could provide no evidence to support Grievant’s version of events. Therefore, the Grievant’s version of events is inconsistent with the weight of the record evidence. The discipline was progressive due to the fact this was the Grievant’s fourth active discipline and the attendance grid called for removal on the fourth offense. The grievance was denied.