**OCB AWARD NUMBER: 2172**

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| **SUBJECT:** | **ARB SUMMARY # 2172** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **27-11-20110215-0011-02-12** |
| **DEPARTMENT:** | Rehabilitation and Correction/Job and Family Services |
| **UNION:** | SEIU/1199 |
| **ARBITRATOR:** | Nels Nelson |
| **GRIEVANT NAME:** | Michael Little |
| **MANAGEMENT ADVOCATE:** | Victor Dandridge |
| **2ND CHAIR:** | Tiffany Richardson |
| **UNION ADVOCATE:** | Amanda Schulte |
| **ARBITRATION DATE:** | June 4, 2012 |
| **DECISION DATE:** | July 26, 2012 |
| **DECISION:** | DENIED |
| **CONTRACT SECTIONS:** | Article 9.02 – Promotion, Demotion and Lateral Transfer Probationary Period; Article 30.02 – Awarding the Job (Transfers, Promotions and Demotions) |
| **OCB RESEARCH CODES:** | 120.01 – Transfer; 119.1221 – Ability and Qualifications |
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**HOLDING: Grievance denied. The Arbitrator found that removal of the grievant (a probationary employee) from his current position was within the Employer’s discretion. The grievant, who was an inter-agency transfer (DRC to JFS), signed a consent form which authorized the Employer to perform a background check and also authorized the removal of the employee if the results if the background check were unsatisfactory. The results of the background check were unsatisfactory. The grievant was removed.**

The grievant transferred from ODRC as a chaplain with 15 years of service to ODFJS. Prior to transferring positions and agencies, the grievant signed a consent form authorizing JFS to conduct a background check and acknowledged that if the results of the background check were unsatisfactory, the grievant could be terminated. This form was signed by the grievant on January 7, 2011. On January 19, 2011 the grievant signed a statement accepting his transfer to JFS, which was effective as of January 16, 2011. The grievant was removed from his position of Human Services Program Consultant at ODJFS on February 4, 2011 because of unsatisfactory background check (BCI) results.

Management argues that the removal of the grievant, a probationary employee, was proper and necessary based on the qualifications of the position the grievant held at ODJFS. As a Human Services Program Consultant, the grievant must have access to and be able to use, SETS. Certain types of criminal convictions would prevent the employee from being able to use SETS. The type of conviction the grievant had against him would prohibit him from using SETS. Since using SETS is an integral/necessary aspect of the grievant’s position and the fact that the grievant’s prior convictions would prohibit him from using SETS, the grievant would not be able to perform the duties of the position and was therefore removed from that position. Management states that because the grievant was a probationary employee, Management maintains the right to remove him if he fails to perform the job requirements to the Employer’s satisfaction.

Management also contends that the grievant’s removal was also based upon his attendance. In the time the grievant held the Human Services Program Consultant position at ODJFS as a probationary employee, the grievant was absent 30.2% of the total hours he was scheduled to work. This was a combination of call-offs and claims of emergency situations. While these absences were the result of approved requests for leave, Management stresses that approved leave does not indicate Management’s satisfaction of the grievant’s attendance. Since the grievant was a probationary employee, Management was unsatisfied with the grievant’s attendance record which contributed to the termination of the grievant.

The Union claims that Management’s policy on BCI results only constitutes removal if the results produce evidence of a felony conviction(s) and if the conviction(s) are directly related to the employee’s job. The grievant did not have any felonies on his BCI results and the Union claims that there was no link to the convictions the grievant did have and his position at JFS. The Union also contends that Management failed to comply with the notice requirements in the agency’s policy. If Management had followed this policy properly, the grievant would have had a chance to clear up any issues brought forth by the Employer. The Union argues that Management cannot be allowed to approve leave and then later claim that the approved leave constitutes abuse. This aspect coupled with the Union’s claim that the attendance issue was never brought up prior to the arbitration hearing makes for an arbitrary and capricious reason for the grievant’s termination.

The Arbitrator found that there was a nexus between the grievant’s criminal conviction and the grievant’s abilities to perform the job duties of the position in question at ODJFS. Given the fact that the grievant had a conviction that prevented him from being able to use SETS, a necessary and integral part of the position the grievant transferred into, and considering that the grievant signed a document agreeing to a background check the results of which determine the eligibility of continuing in that position, the Arbitrator found that there was reasonable cause for removal of the grievant from the position. The Arbitrator states that due to the grievant being a probationary employee, the contract does not mandate that Management must explain its conclusion that the grievant’s performance was unsatisfactory. The Arbitrator states that just because the grievant’s leave was approved does not signify Management’s satisfaction with the grievant’s current attendance practice and is grounds for concern on the grievant’s *future* attendance practice, all of which are grounds for concern regarding assessing an employee’s performance as “satisfactory” or “unsatisfactory.” The Arbitrator denied the grievance in its entirety.