**OCB AWARD NUMBER: 2198**

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| **SUBJECT:** | **ARB SUMMARY # 2198** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **27-14-2012201-0017-01-03** |
| **DEPARTMENT:** | **Department of Rehabilitation and Correction – LCI** |
| **UNION:** | **OCSEA** |
| **ARBITRATOR:** | **Robert Brookins** |
| **GRIEVANT NAME:** | **Kirk Saxon** |
| **MANAGEMENT ADVOCATE:** | **Richard B. Shutek** |
| **UNION ADVOCATE:** | **Lynn Kemp** |
| **ARBITRATION DATE:** | **9/27/2012** |
| **DECISION DATE:** | **3/3/2013** |
| **DECISION:** | **Modified** |
| **CONTRACT SECTIONS:** | **Article 24 - Discipline** |
| **OCB RESEARCH CODES:** | **107.01 – Sex Discrimination & Sexual Harassment; 118.01 – Discipline-In General; Work Rules-In General; 118.301 – Progressive Discipline** |

**HOLDING: Grievance modified. The Arbitrator held that while Grievant violated Work Rules 12A and 13 for sexually harassing behavior, Grievant’s actions were mitigated by his lack of discipline, 15 years of service, and the prevalence of sexual talk in the department. Further mitigation was found due to procedural errors by the Agency: failing to include the measure of discipline and investigative documents with Grievant’s pre-disciplinary notice.**

Grievant was a Corrections Officer at the Loraine Correctional Institute. Following an investigation, Grievant was terminated for violating Work Rules 12A (obscene or inappropriate statements), 13 (discrimination or harassment based on sex), and 49 (sexual conduct or contact) because he grabbed a nurse’s butt, used sexually explicit comments, grabbed his crotch, referred to himself as “Uncle Perv” and “Sexy Saxon,” and targeted only women with these comments.

The Agency argued that Grievant violated the three work rules because he engaged in inappropriate conduct: grabbed his crotch and said “suck on this,” told a female co-worker he “liked to go down on women and would like to taste her,” grabbed a female co-worker’s butt, and encourage women to sit on his lap “and see what popped up,” in addition to many other comments. The Agency interviewed many of Grievant’s female co-workers which revealed that these situations occurred and were common behavior. The Agency argued this language was not shop talk, the charges were not stacked, Grievant was not treated disparately, and Grievant's tenure hurt his case—he had 15 years of harassment training and had been required to attend special EEO training. The work rules covered different actions and were equally enforced.

The Union argued multiple procedural and substantive points: Agency had to meet burden by clear and convincing standard (as a stigmatizing charge), inadequate notice, undefined charges, disparate treatment, “victims” were not offended, stacked charges, no Zero Tolerance Policy, and disproportionately harsh discipline. Of note, the Union criticized witness testimony as failing to demonstrate offense by Grievant’s comments—the charges were also duplicative of the same misconduct, and termination was disproportionate. The Union also argued the Agency did not follow the penalty table, did not provide adequate notice of charges or witness lists, and conducted an inadequate investigation.

The Arbitrator found that the Agency was justified in disciplining Grievant, by a clear and convincing standard, for his statements and harassing only females (Rules 12A, and 13). However, because the recent butt grabbing was believed to be accidental and the other instance was too old, Rule 49 was not supported. Procedurally, the Agency conducted an adequate investigation by interviewing enough witnesses to reasonably demonstrate violations occurred—noting it is not necessary to interview every possible witness that observed the alleged misconduct. However, the Arbitrator found that Rule 49 covers the same behavior as 12A and 13 and constituted stacked charges. Further, it was found that it was not uncommon for the department to discuss sexual behavior—though no evidence of disparate treatment. The Union’s claim of a “zero tolerance” rule failed as the Agency never claimed to have a rule. Although progressive discipline was met, the Arbitrator found the Agency failed to provide proper notice of discipline. Balancing all these factors, Grievant violated Work Rules 12A and 13. His history of sexual comments and taking pride in being “Uncle Perv,” despite annual training were balanced against his lack of discipline, 15 years of service, work environment, and procedural errors. Therefore, Grievant was reinstated on a last chance agreement, but denied backpay and employment benefits.