**OCB AWARD NUMBER: 2229**

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| **SUBJECT:** | **ARB SUMMARY # 2229** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **35-07-20130205-0005-01-03** |
| **DEPARTMENT:** | **Department of Youth Services** |
| **UNION:** | **OCSEA** |
| **ARBITRATOR:** | **Robert Brookins** |
| **GRIEVANT NAME:** | **Belinda Bradley** |
| **MANAGEMENT ADVOCATE:** | **Pat Mogan** |
| **UNION ADVOCATE:** | **Jennie Lewis** |
| **ARBITRATION DATE:** | **9-16-2013** |
| **DECISION DATE:** | **12-4-2013** |
| **DECISION:** | **GRANTED** |
| **CONTRACT SECTIONS:** | **Articles: 19.01, 19.05, & 20.09** |
| **OCB RESEARCH CODES:** | **118.01 Discipline - In General; 24.351 Past Practice – In General; Contract Interp. – In General** |

**HOLDING: Grievance GRANTED. The Employer failed to adhere to the 60-day notice requirement in Article 24.06. Despite claims of past practice—where the Employer would only notify the Union of discipline after notifying the Grievant—the plain language required the employer to notify the Employer or the Union within 60 days. A plain reading trumps any circumstantial evidence of past practice where the language is clear and unambiguous.**

The Grievant was a Youth Specialist at the Scioto Juvenile Correctional Facility. On September 5, 2012 an employee was viciously assaulted by three inmates. Rather than trying to stop the inmates the Grievant hit her “Man-Down” alarm and remained outside the room. The pre-disciplinary hearing officer found just cause to terminate the Grievant. 57 days after the hearing the Employer issued a formal “order of Removal.” On the 59th day the Union notified the Employer that the Grievant had been hospitalized; the Grievant was released from the hospital on the 60th day and the Employer notified the Grievant of her removal on the 63rd day. During the arbitration, the Union raised a procedural objection to the Employer’s failure to adhere to the 60 day requirement.

The Employer argued that the Grievant failed to notify the Employer that she was hospitalized. This failure prevented the Employer from notifying the Grievant about her termination. Because the Grievant was on administrative leave, she had a duty to notify about her whereabouts under the Call-In Policy. The Employer contended that failure to notify constituted abandonment of her post. The Employer also asserted that past practice allows waiver of the deadline under a mutual understanding where the Employer would notify the Grievant of any discipline before the Union.

The Union countered that the Employer had notice of the Grievant’s whereabouts through the Union President. The Employer also paid the Grievant while she was hospitalized, thereby eliminating any claims of job abandonment. The Union argued that the 60 day requirement was extensively bargained over and allowed the Employer to deliver notice to either the Grievant or the Union. The Union never reached a mutual agreement on delivering notice to the Grievant before the Union. The plain language controls and the Employer failed to meet the 60 day time limit.

The Arbitrator did not find the Union’s constructive notice argument compelling. The Call-In Policy required the Grievant to provide notice and she failed to do so. However, the record established that the Employer was aware the Grievant’s hospitalization so the Arbitrator found mutual fault. The pivotal issue was whether a past practice excused the Employer’s failure to notify within 60 days. The language in the 60 day requirement was clear and unambiguous. The history of bargaining around the 60 day timeframe created a rebuttable presumption in favor of the plain meaning. The fact that 90% of all disciplinary orders since 2011 contained no union signatures was insufficient to show past practice. The Employer failed to rebut the presumption: there was no direct evidence that the parties mutually agreed to modify the 60 day deadline. Because the Union succeeded on their procedural objection, the Arbitration refrained from addressing the merits of the dispute and GRANTED the grievance.