**OCB AWARD NUMBER: 2250**

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| **SUBJECT:** | **ARB SUMMARY # 2250** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **35-03-20110721-0022-06-10** |
| **DEPARTMENT:** | **Department of Youth Services** |
| **UNION:** | **OEA/ NEA** |
| **ARBITRATOR:** | **Robert G. Stein** |
| **GRIEVANT NAME:** | **Jennette Wilch** |
| **MANAGEMENT ADVOCATE:** | **Wayne Patrick Mogan** |
| **UNION ADVOCATE:** | **Robert Sauter, Esq.** |
| **ARBITRATION DATE:** | **8-14-2013; 10-28-2013; 1-9-2014** |
| **DECISION DATE:** | **6-10-2014** |
| **DECISION:** | **MODIFIED**  |
| **CONTRACT SECTIONS:** | **Articles 13.01, 13.03, and 13.04**  |
| **OCB RESEARCH CODES:** | **118.01 Discipline-In General** |

**HOLDING: Grievance MODIFIED. The Employer failed to meet their evidentiary burden to demonstrate “just cause” for removing the Grievant. The video surveillance footage introduced was of a poor quality due to a high level of image compression, low frame rate, and two-dimensional format. This made it difficult to discern facial features and other details. Termination was too harsh a penalty considering the evidence presented and the Grievant’s excellent record.**

*Facts.* Grievant, serving as a personal development or family consumer science instructor at a juvenile correctional facility, chose a former student to serve as a classroom aide. An investigation concerning the relationship between the Grievant and the classroom aide began after the aide allegedly made a sexual gesture towards the Grievant. Numerous video clips were uncovered showing the Grievant and the aide making physical contact of an unclear nature. There was also video evidence of the aide using the Grievant’s state-owned computer. The Grievant was subsequently removed for engaging in inappropriate conduct with a youth and using her state computer for unauthorized purposes.

*The Employer’s Argument.* The Grievant was terminated for “just cause” based on her violation of a Level 7 work rule which can result in termination. Rule 7.05P does not exclusively apply to sexual contact, but also any inappropriate physical touching. There is clear and convincing video evidence that the Grievant made or condoned inappropriate physical contact with the youth aide in violation of Rule 7.05P. There is also evidence that the Grievant left the aide alone on her computer without authorization, in violation of multiple work rules. The Grievant engaged in prohibited conduct on multiple occasions and therefore termination was the appropriate discipline and should be upheld.

*The Union’s Argument*. The Employer has failed to meet their “just cause” standard as required by section 13.03 of the Agreement. The videos introduced have innate limitations that limit their evidentiary value. Though the videos do show physical touching between the Grievant and the aide, physical touching alone is not a violation of any work rule. The State has not provided any evidence of sexual touching. In regards to the use of the state-owned computer, the Grievant never allowed the aide to use the computer without her supervision. Discharging the Grievant was too harsh of a penalty in light of the agreement to use progressive discipline. The employer failed to provide the Grievant with all of the necessary documents under section 13.03 of the Agreement to respond to her termination.

*Holding.* The employer did not meet their evidentiary burden, of clear and convincing evidence, to demonstrate “just cause” for removing the Grievant. The video clips presented are limited and compromised and therefore cannot demonstrate clearly “inappropriate physical touching” between the Grievant and the youth aide. The Grievant’s relationship with the aide was condoned by the staff on many occasions and seen as maternal, rather than romantic. The Grievant’s conduct demonstrates a failure to maintain a professional boundary, but termination was not the appropriate level to begin discipline. Under section 13.04 of the Agreement the discipline must be commensurate with the offense. The Employer failed to notify the Grievant of her alleged rule violations before an investigation began, failed to use progressive discipline, and failed to consider the Grievant’s excellent record when deciding to terminate. The Grievant’s termination shall be vacated and replaced with an unpaid three day suspension. The Grievant shall be made whole, minus this suspension. Grievance granted in part.