

OCB AWARD NUMBER: 2501

SUBJECT: Arb Summary #2501
TO: All Advocates
FROM: Megan Schenk
OCB GRIEVANCE NUMBER: DPS-2015-50673-1
DEPARTMENT: Public Safety
UNION: OSTA
ARBITRATOR: Susan Ruben
GRIEVANT NAME: Jason Delcol
MANAGEMENT ADVOCATE: Jacob Pyles
UNION ADVOCATE: Herschel Sigall
ARBITRATION DATE: March 4, 2015
DECISION DATE: April 6, 2015
DECISION: Granted
CONTRACT SECTIONS: 19
OCB RESEARCH CODES: 118.01 – Discipline in General; 118.653 – Substance Abuse;
118.75 – Last Chance Agreements

HOLDING: Grievance **GRANTED.** Grievant’s prior, verbal notice to supervisor was sufficient to comply with a work rule requiring employees to notify their supervisor if they use a prescribed narcotic or controlled substance, where the DEA reclassified the Grievant’s prescription medication as a controlled substance after the Grievant notified supervisor of the prescription; and therefore, no violation of the Grievant’s last chance agreement.

Facts: Grievant was employed as a Trooper for approximately 14 years at the time of his termination. In 2009, Grievant began taking a prescription pain medication for chronic back and leg pain resulting from an on-duty crash. The prescription was not classified by the DEA as a “narcotic or other controlled substance” at the time. In 2012, the Grievant told his supervisor he was using this prescription. Two months later, the Grievant entered into a last chance agreement with the Employer that required termination for any violation of any work rule relating to drug or alcohol, and limiting the Grievant’s grievance rights for such a violation to arbitration only as to whether the violation occurred. One of the Employer’s work rules states, “[a] member shall not use any narcotic or any other controlled substance except as prescribed by a physician. The member shall notify a supervisor, prior to reporting for duty or operating any division equipment, that the member is taking a prescribed narcotic or controlled substance.” In 2014, the Grievant’s prescription medication that he had been taking since 2009 was reclassified by the DEA as a narcotic or controlled substance. The Grievant continued to take the prescription, but did not notify his supervisor of the change in the drug’s DEA classification. The Employer became aware that the Grievant was taking a prescription that was currently classified as a narcotic or controlled substance, and that he had not notified his supervisor he was taking it after the drug had been reclassified by the DEA. Grievant also failed to include this prescription in a list of his prescriptions in an interoffice communication he prepared two days before signing his last chance agreement.

The Employer argued: Grievant was terminated for just cause. Grievant’s failure to disclose the prescription in the interoffice communication or to notify his supervisor of the change in the drug’s classification violated the work rules relating to drugs and alcohol, and therefore violated his last chance agreement. The last chance agreement and the collective bargaining agreement prohibit a Grievant from challenging the level of discipline when the Grievant is charged with violating a last chance agreement. Since there was a violation of a rule covered in the last chance agreement, the termination is just and the grievance should be denied in its entirety.

The Union argued: Grievant was wrongfully terminated. The Greivant notified his supervisor in 2012 that he was taking this prescription drug. The fact that the DEA changed the classification of this drug in 2014 did not create an obligation to re-disclose his use of this medication. The Employer did not prove that the Grievant was aware of the DEA changing the drug's classification.

The Arbitrator found: Grievant did not violate any of the work rules listed in the last chance agreement. Although the prescription drug was not classified as a narcotic or controlled substance when he verbally told his supervisor he was taking it, the Grievant fulfilled his notice requirement. As such, there is no violation of the last chance agreement and the Grievant shall be reinstated to his former position and made whole, including back pay, seniority, and benefits.