**OCB AWARD NUMBER: 2118**

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| **SUBJECT:** | **ARB SUMMARY # 2118** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **15-03-20100311-021-04-01** |
| **DEPARTMENT:** | Public Safety |
| **UNION:** | OSTA |
| **ARBITRATOR:** | Sandra Mendel Furman |
| **GRIEVANT NAME:** | Kyle Pohlabel |
| **MANAGEMENT ADVOCATE:** | Lt. Kevin Miller |
| **2ND CHAIR:** | Marissa Hartley |
| **UNION ADVOCATE:** | Elaine Silveira |
| **ARBITRATION DATE:** | April 7, 2011 |
| **DECISION DATE:** | April 18, 2011 |
| **DECISION:** | GRANTED |
| **CONTRACT SECTIONS:** | Article 19.01 - Standard Discipline; Article 19.05 – Progressive Discipline |
| **OCB RESEARCH CODES:** | 118.08—Suspension—In General; 118.301—Progressive Discipline; 118.6561—Work Rules |

**HOLDING: Grievance GRANTED. The Arbitrator found that the employer failed to prove by a preponderance of the evidence that the grievant intentionally threw a cell phone taken from a citizen that he had stopped for a suspected traffic violation. The Arbitrator believes that the videotape of the incident is not clear and with only the statement of the citizen and the Grievant’s denial of intent to damage the phone, discipline is not warranted and the grievance is granted.**

The Grievant had been employed for seven years, as a Trooper, at the District 5 Dayton post 57. At the time of the incident he had nearly five years tenure. During a traffic stop, the Grievant encountered verbal and physical resistance from the driver of the vehicle. The driver was unwilling to provide the Grievant with her driver’s license and registration. The driver used her phone during the traffic stop and the Grievant took her phone, pursuant to protocol. The driver resisted the effort by the Grievant to take the cell phone and during the ensuing scuffle, the phone landed in front of the car. The phone was never recovered. A response to resistance (RTR) investigation was conducted and the Grievant was cleared of any wrongdoing. The RTR committee suggested that the Patrol consider whether the Grievant violated Patrol Rule 4501:2-6-02 (W) when he failed to properly secure and protect the property of the citizen during the traffic stop. An Administrative Investigation was conducted and the Patrol determined that the Grievant deliberately threw the phone to the front of the car thus failing to ensure the security of the property. The driver’s written statement states that the Grievant snatched her phone and threw it. The Grievant specifically denied throwing the phone; claiming that it inadvertently left his hands during the struggle for control. The Grievant was charged with violation of work rule 4501:2-6-02(W) Evidence and Recovered Property. The Grievant received a one (1) day suspension.

The Employer arguedthe Grievant violated a work rule. He failed to preserve and protect property. The Employer relied on the videotape and the statement by the citizen. The Employer believes it is highly unlikely that the phone would land in front of the car if it was taken from the driver in the manner viewed on the videotape. The Employer believes the Grievant took the phone from the citzen and intentionally threw the phone in violation of policy. The grievance should be denied.

The Union arguedthe Grievant inadvertently lost control of the phone during the struggle with the driver. There was no intentional throwing of the phone. The Grievant was the only eye witness to the incident, and he must be credited. The Patrol was searching for blame in the incident. The grievance should be granted in its entirety.

The Arbitrator foundthat the videotape was less than definitive as to what in fact happened. It is not clear as to the method by which the telephone left the struggling parties’ hands. The administrative investigation’s statement that the phone was thrown is not a binding fact but rather a conclusion made by the writer. There was insufficient corroborating evidence to meet the preponderance standard that the Grievant acted so as to violate the rule with intent and deliberation. What really happened with the phone must be more than mere assumption about a deliberate toss, rather than an unintentional result of a struggle with a noncompliant citizen in order to sustain just cause for discipline. The grievance is granted.