**OCB AWARD NUMBER: 2158**

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| **SUBJECT:** | **ARB SUMMARY # 2158** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **15-03-20110816-0087-04-01** |
| **DEPARTMENT:** | Public Safety |
| **UNION:** | OSTA |
| **ARBITRATOR:** | Robert G. Stein |
| **GRIEVANT NAME:** | Tyler Brown |
| **MANAGEMENT ADVOCATE:** | Kevin Miller |
| **2ND CHAIR:** | Marissa Walter |
| **UNION ADVOCATE:** | Herschel M. Sigall |
| **ARBITRATION DATE:** | November 22, 2011 |
| **DECISION DATE:** | February 13, 2012 |
| **DECISION:** | MODIFIED |
| **CONTRACT SECTIONS:** | Article 19—Disciplinary Procedure; Section 19.01— Just Cause; Section 19.05—Progressive Discipline; Article 20—Grievance Procedure |
| **OCB RESEARCH CODES:** | 118.01—Discipline-In General; 118.311—Just Cause-Concept of; 118.6481—Dishonesty-In General |
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**HOLDING: Grievance MODIFIED. The Grievant’s discharge for falsely claiming an illness when he was unable to switch days off with another Trooper was granted. The Employer determined that the Grievant made up an illness in order to extend his vacation by two days, but the Arbitrator concluded that the evidence insufficient to establish just cause. The Arbitrator did find that the Grievant had failed to properly alert his Employer of his illness when he became aware of it and the discipline was modified to a written warning.**

The Grievant, a trooper with the OSHP for four years, had secured approved time off from Friday, May 27, 2011 until Tuesday, May 31, 2011. The Grievant’s request for leave on Wednesday, June 1, 2011 had been denied. However, had the Grievant been able to switch days off with another trooper, he would have been able to extend his vacation by two days. The Grievant was unsuccessful in getting another trooper to switch off days with him prior to his departure for vacation in Myrtle Beach. The Grievant continued to attempt to switch off days with another trooper while on vacation without success and was eventually contacted by Sgt. Call on May 30 and directed to report as scheduled on May 31. The Grievant sent a text message to the on-duty supervisor ninety minutes prior to when he was to report on May 31 stating that he was not feeling well and would need to use sick leave for the shift. The Grievant then responded to his supervisor’s directive to call in, and informed his supervisor over the phone that he had obtained a form from a doctor detailing that he had a headache, was vomiting, and had passed two kidney stones. Upon the Grievant’s return to work on June 3, a pre-disciplinary hearing was held and it was determined by the hearing officer that there was not just cause for discipline. The Employer rejected the hearing officer’s finding, as well as a recommendation by the Human Relations Department that a last chance agreement be offered to the Grievant. The Grievant was ultimately removed for violating Rule 4501:2-6-02(E)(1)(3) by not being truthful when reporting off on sick leave on May 31.

The Employer argued that the conduct of the Grievant prior to calling off, only ninety minutes prior to the beginning of his shift, provided clear and convincing evidence that the illness was made up so that the Grievant could extend his vacation. To support this argument, the Employer pointed to how the Grievant responded when told, while still in Myrtle Beach, that he would have to report on May 31 as scheduled. The Employer also used the Grievant’s own assessment of his pain level and lapse of time between seeking treatment to bolster its argument that the Grievant had simply used an illness he was known to have in order to avoid reporting as scheduled.

The Union argued that the Employer failed to establish just cause for the removal. The Union argued that the dispositive issue was whether or not the Grievant lied about his illness when he called off on May 31. The Union pointed to the pre-disciplinary hearing findings and the Grievant’s exemplary record as proof that there was not clear and convincing evidence that the Grievant had lied.

The Arbitrator found that the Employer had not satisfied the just cause requirement because the circumstantial evidence provided did not meet the clear and convincing standard. The Arbitrator concluded that, while the evidence presented established a great deal of suspicion about the Grievant’s condition when he called off sick, the evidence was not decisive. The Arbitrator did find that the Grievant had failed to meet his duty to inform his Employer of his absence as soon as possible. Because the Grievant waited almost ten and a half hours to report his illness and call off, the Arbitrator modified the discipline from a removal to a written warning.