**OCB AWARD NUMBER: 2184**

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| **SUBJECT:** | **ARB SUMMARY # 2184** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **15-03-20111209-0129-04-01** |
| **DEPARTMENT:** | **Department of Public Safety** |
| **UNION:** | **OSTA** |
| **ARBITRATOR:** | **Thomas Nowell** |
| **GRIEVANT NAME:** | **Paul Gerke** |
| **MANAGEMENT ADVOCATE:** | **Sgt. Corey Pennington** |
| **UNION ADVOCATE:** | **Herschel Sigall** |
| **ARBITRATION DATE:** | **10/22/2012** |
| **DECISION DATE:** | **11/21/2012** |
| **DECISION:** | **Modified** |
| **CONTRACT SECTIONS:** | **Article 19.01 – Standard; Article 19.05 – Progressive Discipline** |
| **OCB RESEARCH CODES:** | **118.01 – Discipline in General; 118.301 – Progressive Discipline** |

**HOLDING: Grievance modified. The Grievant was charged with providing False Statements and failing to make the appropriate payments for his OTC issued cell phone bill. The Arbitrator found that there was no solid evidence to suggest that the grievant purposely lied to or mislead Management. The grievant did, however, fail to make his cell phone bill payment and for that his discipline was modified from a removal to a 5 day suspension.**

The grievant was a 19 year employee with the Department of Public Safety as a State Trooper at the time of his termination on December 7, 2011. The grievant was terminated for violating Rules 4501:2-6-02 (E)(1) – False Statements/Truthfulness and 4501:2-6-02 (B)(1)(5), by failing to make the appropriate cell phone payments regarding his work issued cell phone.

Investigation into the grievant’s actions arose from an altercation with the grievant and his then partner. The grievant and his partner were potentially going to a different shift assignment. The grievant’s partner construed the shift change as a desire by the grievant to more easily pursue an extra-marital affair. The grievant’s partner left a voice mail to the grievant’s home phone directed towards the grievant’s wife revealing the grievant’s infidelity. The grievant requested a transfer from his partner and an investigation was started. During the investigation, the grievant’s partner revealed that the grievant was having an extra-marital affair, insinuating that the grievant was partaking in this activity while on duty and also that the grievant had engaged in illegal activity – drug use.

A different investigation was then administered into the allegations purported by the grievant’s partner revealing that the grievant had a rather extensive cell phone bill (an OTC provided cell phone) that was outstanding in payment. The investigation showed that the grievant had paid 5 months and missed 8 months over a 13 month span. The investigation also revealed that the phone number of the person (here on out noted as Jane Doe) that the grievant was allegedly having an affair with was showing up constantly on the phone logs. During the investigation, it was also noted that the grievant had visited Jane Doe’s place of residence with his patrol car. The investigation discovered that there were a few occasions where the grievant logged off of duty (which would indicate that he and the patrol car are at the grievant’s residence), at Jane Doe’s residence instead. During the investigation the grievant was asked multiple times and in various ways if he was having an affair with Jane Doe, and whether or not he was familiar with the phone number of Jane Doe, and the address of her residence. The grievant denied having an affair, but admitted to going to her residence when he logged off for duty.

Management argued that the grievant provided false statements during the investigatory process by changing his story regarding his relationship with Jane Doe during the several investigatory interviews that took place. Management stated that the grievant denied having an affair and feigned ignorance of Jane Doe’s address and phone number. Management stated that after interviewing Jane Doe, she stated that they were having an affair and that he had been to her address on a few occasions. Management contends that the grievant’s untruthful statements are just cause for his termination. Given the fact that this was coupled with the grievant’s failure to pay his state issued cell phone bill for personal calls, only compounds the issue further. Management argued that the missed payments were not an oversight, but a conscious decision to not pay his bill.

The Union argued that there is no conclusive evidence that the grievant lied to, misdirected or said false statements to Management during the investigatory process. The Union argued that whether or not the grievant was having an affair is not the point of the investigation and that the grievant admitted to the locations and times regarding his supposed interactions with Jane Doe. The Union argued that the grievant, after being told by Management, that he had an outstanding cell phone bill immediately paid the total amount. The Union contended that Management was not consistent with its billing procedure which can lead to confusion as to what amount is due and when it is due by. The Union also argued that the when he did meet with Jane Doe, it was only after he had logged off of duty.

The Arbitrator found that Management did not successfully show proof that the grievant intentionally lied or said misleading statements during the investigatory interviews. The Arbitrator stated that while it could be construed that there was intent to miss payments on the phone calls, there is also no proof to suggest that it wasn’t just an oversight, as stated by the grievant. Regarding the extramarital affair, again, the Arbitrator found no proof that the grievant intentionally mislead or lied to management regarding his affair. He was forthright with the locations of his vehicle, and the two occasions that he was actually at Jane Doe’s address was when the grievant had logged off of duty, which was at the end of his shift anyway. The Arbitrator found that the grievant did miss his cell phone payments, however. Regardless of the intent, he had an outstanding bill regarding his state issued cell phone. This coupled with the fact that on the two occasions that the grievant logged off of duty at Jane Doe’s residence and not his own residence, are grounds that some discipline is warranted. The Arbitrator modified the discipline from a removal to a 5 day suspension. The grievant was reinstated to his position as Trooper.