**OCB AWARD NUMBER: 2188**

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| **SUBJECT:** | **ARB SUMMARY # 2188** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **15-03-20120802-0073-04-01** |
| **DEPARTMENT:** | **Department of Public Safety** |
| **UNION:** | **OSTA** |
| **ARBITRATOR:** | **Thomas Nowell** |
| **GRIEVANT NAME:** | **David Shockey** |
| **MANAGEMENT ADVOCATE:** | **Lieutenant Charles Linek** |
| **UNION ADVOCATE:** | **Herschel Sigall** |
| **ARBITRATION DATE:** | **10/10/2012** |
| **DECISION DATE:** | **12/12/2012** |
| **DECISION:** | **Granted** |
| **CONTRACT SECTIONS:** | **Article 19.01 – Standard Discipline; Article 19.05 – Progressive Discipline** |
| **OCB RESEARCH CODES:** | **118.01 – Discipline in General** |

**HOLDING: Grievance granted. The Aribtrator found that the Employer did not have just cause in removing the grievant from his position for supposedly violating his last chance agreement regarding being intoxicated during work hours as well as failing to submit a proper medical evaluation regarding calling off two days in a row for medical concerns. The grievant was fully reinstated and made whole.**

The grievant was a 13 year employee with the Department of Public Safety as a State Trooper at the time of his removal. The grievant had been recently diagnosed with gout and his condition was FMLA certified. The grievant was also an admitted alcoholic. The grievant was terminated for being intoxicated during work hours in 2007, but was reinstated and agreed to a Last Chance Agreement (LAC) – which lasted until January 13, 2013.

The grievant called off of work on May 1, 2012 because of a severe attack of gout. On May 1st, he called off for May 2nd relating the same issue. On May 2nd, the grievant walked to a convenient store and then to a bar. The grievant became severely intoxicated and was transported to the hospital after he was found passed out in his apartment hallway. It was said that the grievant had a BAC of .450 by the Marion Police Officer that escorted the grievant to the hospital, after hearing it from a treating nurse. The grievant’s supervisor was notified by the police department. The grievant’s supervisor left a message to the grievant directing him to not report to work the following day, May 3rd, until he procured a specific medical form from his physician clearing him for duty. The form was delivered to the grievant’s home and his gun and badge were taken. The grievant was instructed to get a physician to fill out a specific medical form to clear him for duty as well as make daily calls to his supervisor. No calls were made, and a completed form was not turned in and accepted until July 2nd.

Management argued that the grievant violated work rules: Use of alcohol, and Compliance to Orders. Management contends that since the grievance called off work on May 2nd and became intoxicated with a .450 BAC, he was unfit to show up to work on May 3rd. He would have therefore been intoxicated during his normal working hours and violated his LAC. Management, after finding out his BAC, could not have let the grievance show up to work without having the grievant do so still intoxicated, therefore remanded him to not come in. Management also argued that the grievant violated Compliance to Orders by not abiding by the time frame set forth to successfully turn in a completed medical form clearing him for duty by the specified date. Management contended that either one of these actions alone merited termination.

The Union argued that Management did not produce any evidence to support the termination of the grievant. There was no actual testing done by the Patrol regarding the grievant’s BAC and the Patrol never attained a definitive assessment of the grievant’s intoxication level. The grievant’s supervisor was told over the phone by a Marion Police Officer the BAC of the grievant, but no documentation proving this statement was ever produced or verified. The grievant told Management he was ready to report to work on May 3rd but Management refused this and ordered the grievant go to a physician to have a medical screening. The grievant complied with these orders and went to 3 separate physician’s visits over the course of his absence. The first two physician’s visits denoted that the grievant could return to work with restrictions. The Union argued that Management did not accept the grievant’s medical reports with this assessment and therefore caused him to go over the time frame set forth. The grieavant finally attained a “clear for duty” assessment that Management accepted, but by this time an investigation was under way and the grievant was placed into administrative work, which he would have been able to perform with the original physician’s assessment.

The Arbitrator found that Management did not meet their burden of proof. The grievant was clearly intoxicated on May 2nd when he went to the hospital, but since he was not on duty it had no bearing on his work situation. While he may have been too drunk the following day, there is no conclusive evidence to support this claim as Management’s evidence is strictly hearsay. Had Management found some type of transportation for the grievant in order for him to get to his regularly scheduled shift on May 3rd, and then administered some type of test, there may have been evidence to support their claim of alcohol use, but that was not done. The Arbitrator also found that the grievant did not violate the Compliance to Orders rule regarding the medical screening. The grievant clearly obeyed this request multiple times. Management chose to not accept the grievant’s documentation and therefore caused the grievant to go over the acceptable time limit. The Arbitrator found that there was no just cause for termination and granted the grievance in its entirety.