

# **OPINION AND AWARD**

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO STATE TROOPERS ASSOCIATION

AND

THE OHIO DEPARTMENT OF PUBLIC SAFETY,  
DIVISION OF OHIO STATE HIGHWAY PATROL

Grievance #: DPS-2016-03643-15  
Grievant: Trooper Steven Mahl

Date of Hearing: February 28, 2018  
Place of Hearing: Gahanna, Ohio

Arbitrator: Sherrie Passmore

Date of Award: May 10, 2018

Advocates for the State: Lieutenant Darrell Harris, Lieutenant Cassandra Brewster,

Advocate for OSTA: Elaine N. Silveira, Esq.

## **INTRODUCTION**

This arbitration arises pursuant to the collective bargaining agreement (“Agreement”) between the parties, The Ohio Department of Public Safety, Division of State Highway Patrol (“Employer”) and The Ohio State Troopers Association (“Union”). Sherrie Passmore was appointed as the Arbitrator under the authority of the Agreement.

A hearing was held on February 28, 2018. Both Parties were represented by advocates who had a full opportunity to introduce oral testimony and documentary evidence, cross-examine witnesses, and make arguments. Post-hearing briefs were electronically filed on March 26, 2018.

## **JOINT STATEMENT OF ISSUE**

Did the Employer violate Article 21.03, 27.01, 27.03 and 39 when it continued to keep the Grievant in a light duty status after he submitted a Medical Appraisal of Work Capacity form (DPS 0066) that indicated he was released for full duty? If so, what shall the remedy be?

## **RELEVANT PROVISIONS OF THE AGREEMENT**

### **Article 4 – Management Rights**

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged,

deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

\* \* \*

### **Section 21.03 – Work Rules -- Application**

All work rules and directives must be applied and interpreted uniformly as to all members. Work rules and directives cannot violate this contract. In the event that a conflict exists or arises between a work rule and the provisions of this Agreement, the provisions of this Agreement shall prevail.

### **Section 27.01 - - Overtime and Compensatory Time**

Because of the unique nature of the duties and emergency response obligations of the Division, management reserves the right to assign employees to work overtime as needed.

1. Any member who is in active pay status more than forty (40) hours in one week shall be paid one and one-half (1.5) times his/her regular rate of pay including shift differential if ordinarily paid for all time over forty (40) hours in active pay status. The regular rate of pay includes all premium pay routinely received.

\* \* \*

### **Section 27.03 – Overtime Assignments**

\* \* \*

Mandatory overtime, assigned by the Employer, shall be assigned as equitably as practical...

\* \* \*

### **Section 39.01 Submission to Medical Examination**

The Employer may require that an employee submit to a medical or psychological/psychiatric examination pursuant to the Administrative Rules of the Director of Administrative Services (Ohio Administrative Code Section 123:1-30-03) in effect as of the date of the Agreement. No approval by the Director of Administrative Services is required.

### **BACKGROUND**

The Grievant, Sergeant Steven Mahl, is an Ohio State Highway Patrol Trooper assigned to the Motorcycle Unit. On July 19, 2016, the Grievant [REDACTED] [REDACTED] At the time of the accident, he was working a special detail at the Republican National Convention (RNC) in Cleveland, Ohio. He notified his co-supervisor, Sgt. Streicher, [REDACTED] and continued to work full-duty as a sergeant on the Motorcycle Unit for the duration of the RNC.

On July 25, 2016, the Grievant filed a Bureau of Workers' Compensation (BWC) claim based on his July 19 [REDACTED]. Grievant's physician, Dr. Lisa Lowery, submitted medical documentation to BWC in support of this claim. The paperwork

Indicated Dr. Lowery had diagnosed Grievant's injury on July 25, 2016 [REDACTED]. On a BWC Physician's Report of Work Ability signed July 27, 2016, Dr. Lowery certified that Grievant was released to return to work on July 19, 2016, but did not complete the remainder of the form, including the section on the injured worker's capabilities.

Jennifer Tipton, human resources benefits manager for the Employer, received a copy of the BWC claim and medical documentation on July 26, 2016. After reviewing it, Tipton was concerned about whether Grievant should continue to work in a full duty capacity with [REDACTED]. She forwarded Grievant's paperwork to a nurse at CompManagement and consulted with Captain Charles Linek of the Office of Personnel. Both shared her concerns. Because of these concerns, the Employer sought a second opinion from Highway Patrol's Physician, Dr. Roman Kovac. The Employer also asked Grievant to have his physician complete a DPS-0066 Medical Appraisal of Work Capacity.

On August 4, 2016, Dr. Lowery signed and faxed a prescription pad slip to Grievant's supervisor Lt. Mark Leach indicating Grievant was "OK to work full duty beginning 7/19/16." This was not the DP-0066 the Employer had requested.

Grievant was placed in a light duty status on August 30, 2016 pending Dr. Kovac's review of Grievant's medical records. Grievant was told by Captain Lee that he would need a DP-0066 filled out by his physician releasing him to return to work without restriction before he could be taken off light duty. Grievant submitted a DP-0066 completed by Dr. Lowery to Lt. Leach on the same date.

After reviewing Grievant's medical records and speaking personally to Dr. Lowery on the telephone, Dr. Kovac sent an email to Captain Linek on September 7, 2016 expressing concern about Grievant being able to fulfill all of his duties. He noted, "Per Dr. Lowery's suggestion, a Functional Capacity Evaluation may be helpful to determine Sgt. Mahl's fitness for duty." Dr. Lowery ordered a Functional Capacity Evaluation on August 31, 2016, but the evaluation was never done.

Grievant was then scheduled for a third party medical evaluation on September 12, 2016, with Dr. John Wolfe. A notice of the appointment was sent to Grievant's chain-of-command on September 8 to provide to him. His chain-of-command replied that Grievant had informed them the day before, September 7, 2016, that [REDACTED] on September 12, 2016. The medical evaluation appointment was then cancelled.

## **POSITIONS OF THE PARTIES**

### **Position of the Union**

The Union's position is that Grievant was punished and treated differently for filing a Worker's Compensation claim. It contends that Grievant was fit for duty as attested to by his physician. His fitness was demonstrated by the fact that he worked on the Motorcycle Unit up until August 29, 2016. It was only when he filed a BWC claim that the Employer determined he was no longer fit.

Sgt. Streicher, Grievant's co-supervisor at the 2016 RNC motorcycle detail, also [REDACTED] prior to the RNC and [REDACTED] until after the 2016 elections. He never filed a Worker's Compensation claim and was never put on light

duty. He earned 160 hours of overtime during the campaign season. After filing a Worker's Compensation claim, Grievant was arbitrarily and summarily put on light duty. As a result, he was denied the opportunity to also earn those 160 hours of overtime.

The Union argues that the Employer cannot justify treating Streicher differently because "it didn't know." Sgt. Streicher testified that his superiors were aware of [REDACTED] and he was not stopped from working on the Motorcycle Unit. It reasons that if Sgt. Streicher's superiors failed to notify the Office of Personnel that should not be held against the Grievant.

### **Position of the Employer**

The Employer's position is that it became concerned about Grievant's ability to perform his duties with the [REDACTED] listed on the paperwork it received from BWC, [REDACTED], even though his physician released him to full duty. This led the Employer seek a second medical opinion from Dr. Kovac, the Patrol's medical doctor. Dr. Kovac also questioned whether Grievant could perform his full duties based on his review of the medical records and, therefore, Grievant was scheduled for an independent medical examination.

The Employer argues it was clearly within its rights to have Dr. Kovac review the Grievant's medical documentation and to have him examined by a third party medical professional. In support, it cites Article 4 – Management Rights, Ohio Administrative Code 4501:2-6-02 (T) (2) Personal health and job related injuries, Health and Physical Fitness Programs and Testing (HPFP) Policy 500.23 and Ohio

Administrative Code 4501:2-6-02 (T) (2) – Personal health and job related injuries.

The Employer further argues that it has been past practice to use Section 39.01 of the Agreement in conjunction with those OAC and HPFP provisions when deciding to have an Employee examined by a third party physician.

The Employer contends there was no disparate treatment of Grievant because he was not similarly situated Sgt. Streicher

### **DISCUSSION**

This grievance alleges that Article 21.03, 27.01, 27.03 and 39 were violated by keeping the Grievant in a light duty status after he submitted a Medical Appraisal of Work Capacity form (DPS 0066) that indicated he was released for full duty. Because this case is a matter of contract interpretation, the burden of proving those violations is on the Union.

#### **Article 39**

No violation of the Article 39 was proven. Article 39 permits the Employer to require that an employee submit to a medical or psychological/psychiatric examination “pursuant to the Administrative Rules of the Director of Administrative Services...in effect as of the date of the Agreement”. The Article makes a parenthetical reference to Ohio Administrative Code Section 123:1-30-03 (A), which only concerns medical or psychological examinations related to a disability separation or a reinstatement from disability separation. It was not proven that this parenthetical reference was intended to limit the use of medical examinations to



those situations. The purpose of the Article 39 parenthetical is unclear. Consideration of past practice is, therefore, appropriate in interpreting the Article. The unrefuted testimony was that the practice has been to use Article 39 as authority for ordering fitness for duty examinations pursuant to OAC 4501:2-6-02 (T) (2) as well as the rule cited in the parenthetical.

Administrative Rule, OAC 4501:2-6-02 (T) (2)) – Personal health and job related injuries, was in effect when the Agreement was negotiated and provides in part,

2) A member may be periodically examined by the patrol medical staff or other designated medical or professional personnel to determine the member's level of physical or psychological fitness

The third party medical examination that was scheduled for Grievant is authorized by this rule and incorporated into the Collective Bargaining Agreement by Article 39.

Article 39 is not the Employer's only authority for ordering fitness for duty examinations. Article 4 gives the Employer the right to manage its workforce. That includes making sure all Employees are fit for duty. It has long been recognized that management has the right, unless restricted by the agreement, to require employees to submit to physical examinations where reasonably exercised under appropriate circumstances.

Article 4 also gives the Employer the right to make any and all rules and regulations not in conflict with the Agreement. The Employer exercised that right in promulgating Health and Physical Fitness Programs and Testing (HPFP) Policy 500.23. The Policy is incorporated into Section 40.02 of the Agreement. Section

(C)(1) Of the Policy states in part: “A physical examination conducted by a physician named by the Division may be required of an employee returning to duty after an injury or illness....” This section of the policy also states in part: “The Human Resource Management Commander may order a physical or psychiatric examination of an employee to determine fitness for duty if circumstances warrant....”

It was argued that the Employer could not or should not have ordered a medical evaluation of Grievant’s ability to perform after it received his DPS-0066 Medical Appraisal of Work Capacity. No such restriction under the Agreement was proven. Nor was it proven that it was unreasonable for the Employer to order a medical evaluation at that point. Jennifer Tipton, a CompManagement nurse, Captain Linek, and Dr. Kovac all had concerns about Grievant’s ability to perform based on the information contained in his medical records. The records show Dr. Lowery diagnosed [REDACTED] and she noted that he was [REDACTED] Their concerns about these notations were reasonable. Motorcycle Unit members are required to handle various traffic situations, respond to emergencies and operate the motorcycle in extreme conditions. Captain Linek testified a Motorcycle Unit member is required to lift the 1000-pound motorcycles up in the event the member is involved in a situation where the motorcycle and rider went down. Dr. Kovak explained his concerns in a September 7, 2016 email as follows:

...I think it’s at least somewhat questionable whether or not he could fulfill all of his duties at a 100%. There is much pathology that needs to be addressed surgically and eventual rehabilitation.

Based on the Employer's legitimate concerns about Grievant's ability to perform, it was not unreasonable to put Grievant on light duty pending resolution of those concerns and there was no unreasonable delay in resolving those concerns. Grievant was placed on light duty on August 30, 2016. Dr. Kovac completed his review and provided a written opinion on September 7, 2016. On September 8, Grievant's chain-of-command was emailed a notice to provide to Grievant of a third party fitness for duty examination scheduled for September 12, 2016. The examination was canceled because Grievant had notified his chain-of-command the day before, September 7, that he had scheduled surgery for the same day.

The record does not support Grievant's claim that the review process drug out so long that it forced his decision to go ahead and [REDACTED]. When Grievant [REDACTED], he was aware that this examination was being scheduled. Grievant testified that he contacted his Union representative Larry Phillips about his status several days after he was placed on light duty. Phillips got back with him several days later and informed him a medical examination was being scheduled. Phillips testified similarly. Based on this timeline, Grievant waited only a few days at most to [REDACTED] after learning an independent medical examination was being scheduled to resolve his light duty status.

### **Article 21.03**

This provision prohibits disparate treatment in the application of work rules and directives. The disparate treatment claim in this case is that Grievant was treated differently than Sergeant Streicher. No violation of this provision was

proven because the evidence shows that Grievant and Sgt. Streicher were not similarly situated.

Sergeant Streicher informed his chain of command of his injury; however, his chain of command did not notify Tipton or the Office of Personnel. Unlike Grievant, Sergeant Streicher did not file a Bureau of Workers' Compensation claim. If he had, Tipton would have received medical documentation as she did in the Grievant's case. Streicher did not submit any medical documentation to Tipton until after [REDACTED]. Captain Linek testified he was never made aware of Streicher's injury. Both Linek and Tipton testified that if they had been made aware of his injury, Streicher would have been required to go through the same process as the Grievant to determine if he could fully perform his duties.

**Section 27.01 - - Overtime and Compensatory Time and Section 27.03 - Overtime Assignments**

No violation of these sections was proven. Section 27.01, in part, governs how overtime is to be paid and Section 27.03 governs how overtime is to be assigned. The Union argues that Grievant missed out on overtime assignments and pay because he was improperly kept on light duty after providing a DPS-0066 Medical Appraisal of Work Capacity form and treated differently than Sgt. Streicher. These arguments are rejected for the same reasons discussed above.

**Conclusion**

The Employer had the right to have Dr. Kovac review the Grievant's medical documentation and to have Grievant examined by a third party medical

professional. None of the provisions alleged to have been violated abridged that right or required the Employer to accept the Grievant's physician's assessment that he was capable of returning to full duty without further inquiry. Nor was it proven that the Employer acted in an arbitrary, unreasonable, or disparate manner.

#### **AWARD**

For the reasons stated above, the grievance is denied.

A handwritten signature in black ink, reading "Sherrie J. Passmore". The signature is written in a cursive, flowing style.

Sherrie J. Passmore  
Arbitrator

May 10, 2018