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The arbitrator after hearing discussion between the parties rules as follows:

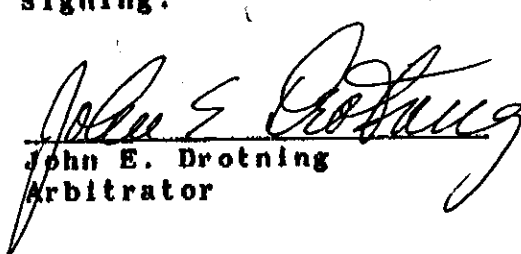
There is currently a Sergeant position in the Crash Reconstruction Unit occupied by Sergeant T. J. Tuttle. If this position is vacated for any reason including but not limited to, demotion, promotion, retirement, or attrition, Sgt. G. L. Montgomery will be appointed to the position in accordance with the following conditions:

The selection of Sergeant Montgomery may be denied for just cause, which includes but is not limited to, any suspension on Sergeant Montgomery's department record at the time of consideration.

This position will not be posted in accordance with the contract. The appointment of Sgt. Montgomery will not be subject to grievances filed by other members of the bargaining unit.

Additionally, the above criteria will apply to the contested sergeant position or any newly created sergeant vacancy in the Crash Reconstruction Unit. This decision is in no way precedent setting, and shall not be introduced, referred to, or in any other way utilized in any subsequent arbitration, litigation, or administrative hearing.

This agreement shall expire four (4) years from the date of signing.


John E. Drotning
Arbitrator

Date:

7/31/92

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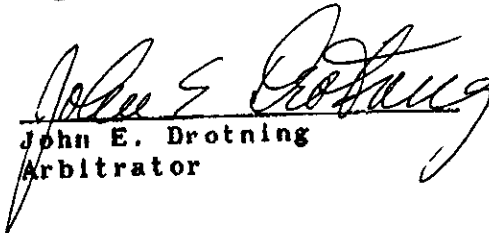
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This position will not be posted in accordance with the contract. The appointment of Sgt. Montgomery will not be subject to grievances filed by other members of the bargaining unit.

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Arbitrator

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ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 893

OCB GRIEVANT NUMBER: 15-03-920722-0065-04-01

GRIEVANT NAME: Hughes, Norma

UNION: FOP 1

DEPARTMENT: Highway Patrol/Highway Safety

ARBITRATOR: Goldberg, Mitchell

MANAGEMENT ADVOCATE: Van Scoy, Anne

2ND CHAIR: McMillen, Donald

UNION ADVOCATE: Cremeans, Kay

ARBITRATION DATE: June 28, 1993

DECISION DATE: July 19, 1993

DECISION: Granted

**CONTRACT SECTIONS
AND/OR ISSUES:**

Section 47.07; the Grievant underwent surgery for carpal tunnel syndrome and was granted disability benefits until August 16, 1991. The Grievant, however, was not released by her doctor to return to work until October 15, 1991 but was not granted an extended disability benefits for the time between August 16, 1991 and October 15, 1991.

HOLDING:

The Arbitrator felt that there are no requirements in the Agreement that disability benefits will only be paid if there are objective findings to support a claim. There need only be a determination that the Employee is incapable of performing the duties of her position. The Grievant's physician felt that she could not adequately perform her job duties. The physician's opinion was based upon his knowledge of the Grievant's medical condition and the extent of her recovery. The Arbitrator felt that there was no evidence in the records to refute the treating physician's opinion, therefore the Grievant should have been granted the disability benefits in question.

ARB COST: \$726.44

ARBITRATION

In the Matter of Arbitration : Case No. 15-03-920722-0065-04-01
Between : Grievance of Norma S. Hughes
THE STATE OF OHIO/OHIO :
HIGHWAY PATROL :
Employer : DECISION AND AWARD
And :
FRATERNAL ORDER OF POLICE, :
OHIO LABOR COUNCIL, INC. :
Union :

This hearing took place on June 28, 1993
in Columbus, Ohio

Appearances:

For the Employer:

Anne K. Van Scoy, Management Advocate/OSHP
Donald P. McMillen, OCB-2nd Chair
Michael Scholl, Disability Claims Specialist

For the Union:

Kay Cremeans, General Counsel, FOP/OLCI
Norma Hughes, Grievant
Ed Baker, Staff Rep. FOP/OLCI

I. INTRODUCTION

The grievance in this case involves a claim for disability benefits for the period from August 16, 1991 through October 14, 1991. The Employer denied disability benefits to the Grievant for this period pursuant to Article 47.07 of the Collective Bargaining Agreement which provides that the Employee bears the burden of providing medical documentation to substantiate a disability claim. The Employer maintains that the documentation supplied by the Grievant and her physician was insufficient to award her disability benefits.

II. FACTS

The Grievant, Norma Hughes, has been employed as a dispatcher with the Ironton Highway Patrol Post for over twenty (20) years. For a period of at least two (2) years prior to May of 1991, the Grievant had suffered pain and discomfort in both of her wrists and hands. Her medical condition caused her to miss a substantial amount of time from work. The Grievant's medical condition was diagnosed as bilateral carpal tunnel syndrome. Her physician prescribed surgery for both of her wrists. The Grievant underwent surgery for her right wrist on May 3, 1991 and on Jun 21. 1991 she underwent surgery for her left wrist. The Grievant applied for and was granted disability benefits until August 16, 1991. The Grievant, however, was not released by her doctor to return to work until October 15, 1991. The Employer denied disability benefits to her from August 16, 1991 through October 14, 1991. It is undisput-

ed that the Employer would not permit the Grievant to return to work without a doctor's release.

III. ISSUE

The issue for determination by this Arbitrator is whether or not the Grievant was disabled from the period of August 16, 1991 until October 15, 1991 and otherwise entitled to disability benefits pursuant to the terms of the Collective Bargaining Agreement.

IV. POSITION OF THE UNION

The Grievant testified that she had not sufficiently recovered from her surgery until October 15, 1991. Her pain and discomfort was such that she could not adequately perform her work duties. She described her work duties in great detail and she summarized that approximately 95% of her duties involved the use of her hands. She operates the radio and takes radio transmissions from troopers and other persons. She must log and record messages which involve continuous handwriting. She must use the typewriter to complete accident reports and fill out complaint forms. She must manually operate a computer in order to check social security numbers and license numbers. She operates a teletype or fax machine which has a keyboard similar to a typewriter. She must manually cut messages from long strips of paper with a scissors. She assembles messages on to a clipboard. She constantly uses the telephone and maintains various logs.

Her recovery was complicated by the fact that she had surgery on both wrists within a short period of time. After the June

surgery on her left wrist she was forced to begin using her right hand earlier than would otherwise have been the case. As a result, it took longer for both wrists to heal. She could not grasp or hold on to objects. She could not twist knobs or jar lids and she could not write or type. She did purchase a typewriter in order to begin practicing so that she could return to work as soon as possible.

V. POSITION OF THE EMPLOYER

Mr. Scholl, a disability claims specialist, testified on behalf of the Employer. The Grievant was given the maximum standard recovery period of eight (8) weeks of disability benefits for the medical condition of bilateral carpal tunnel syndrome. The employee has the burden of proof and the obligation to supply medical documentation under Section 47.07 of the Collective Bargaining Agreement to obtain extended disability benefits. The Employer reviewed the Grievant's circumstances and considered her request to extend disability benefits; however, the medical information presented by the Grievant was insufficient to extend disability benefits for the period in question.

The Grievant did not supply specific medical information with respect to her healing status and there were no test results provided such as grip strength, range of motion, restrictions or other specific information from which it could reasonably be determined that the Grievant's disability benefits should be extended. The Grievant consented to a third party medical review pursuant to Section 47.11. Dr. Lockhart reviewed the Grievant's file and issued an opinion that there were no objective evidence or

findings sufficient to establish the Grievant's disability for the period in question.

The Grievant appealed the Employer's decision denying her claim and a Section 119 hearing was held to consider the issue. The hearing examiner, Carol Pierce Mix, upheld the denial of the Grievant's claim, finding that the Grievant did not offer any additional medical evidence to lend support to her claim or to dispute the findings of the independent third party medical reviewer.

VI. DISCUSSION

The Employer's decision to deny disability benefits for the period in question is based upon the medical opinion of Dr. Lockhart which was issued on December 30, 1991. Dr. Lockhart reviewed the medical records of the Grievant's treating physician, Dr. Foster, and concluded that the Grievant reported swelling and pain in her hands and fingers. However, Dr. Foster only found "bilateral incisional tenderness." Dr. Lockhart stated that there were no other objective findings to support a disability condition between August 16 and October 13, 1991. Dr. Lockhart further stated that the Grievant's medical condition is not a severe impairment which would require more than two (2) months of post operative incapacity without surgical complications. However, it is undisputed that Dr. Lockhart never examined the Grievant. Her opinion is based solely upon a review of the medical records.

A review of Dr. Foster's chart reveals the following: On July 10, 1991 it was noted that the Grievant's pre-operative

paresthesias had resolved but she still has incisional tenderness bilaterally. She was to begin massage therapy on her left hand. On August 14 the Grievant still had incisional tenderness. On September 11, 1991 it was noted that the incisional tenderness on both sides has improved but the Grievant still had bilateral tenderness. Dr. Foster indicated a return to work date of October 14, 1991. Dr. Foster noted on November 19, 1991 that the Grievant still had bilateral incisional tenderness and also pain along the radial aspect of each wrist in line with the first extensor compartment. The Grievant had returned to work but she continued to have pain from the use of her hands on her job. The Grievant was continuing to wear splints at night to rest her hands and she was taking pain medication.

The Employer denied disability benefits to the Grievant solely on the basis that there were no objective findings to support the Grievant's complaints of pain and discomfort. There is no requirement, however, in the Collective Bargaining Agreement that disability benefits will only be paid if there are objective findings to support a disabling condition. There only need be a determination that the employee is incapable of performing the duties of her position. The medical finding of disability may be based not only on objective findings but also on a medical opinion based upon reasonable medical certainty within the realm of probability that a particular disabling medical condition exists. Dr. Foster, the Grievant's treating physician, recorded that the Grievant was suffering from pain and discomfort to the extent that

she could not adequately perform her job duties. Dr. Foster's opinion was based upon his knowledge of the Grievant's medical condition, the nature and extent of her recovery, the consideration of the Grievant's circumstances, and the fact that the doctor believed the Grievant when she was reporting pain and discomfort. There is no evidence to suggest that the Grievant was not accurately reporting her pain and discomfort, that she was untruthful in any respect, or that her pain and discomfort did not actually exist. Her treating physician is trained to determine whether or not the Grievant's reports of pain and discomfort were accurate. Dr. Foster opined that the Grievant had complications during her recovery from the surgery to both of her wrists. There is no medical evidence in the record to refute the treating physician's opinion.

Dr. Foster's opinion is further corroborated by the Grievant's testimony as to her problems during her recovery and her continuing pain and discomfort. The Grievant's testimony was credible and there was no evidence to suggest that the Grievant was not being truthful.

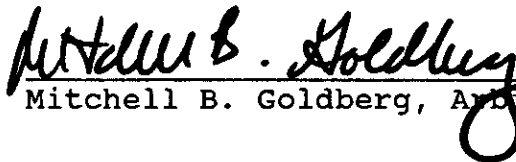
The evidence presented to this Arbitrator establishes that the Grievant was not able to return to work and perform her job duties without undergoing considerable pain and discomfort during the period in question. Her claim for disability benefits, therefore, must be approved.

VII. AWARD

The grievance is sustained and disability benefits shall be paid to the Grievant for the period of August 16, 1991 through October 14, 1991.

IT IS SO ORDERED:

Date: July 19, 1993



Mitchell B. Goldberg, Arbitrator

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