

ARBITRATION

In the Matter of Arbitration : No. 15-03-920924-082-04-01  
Between :  
STATE OF OHIO : GRIEVANCE OF STEVEN CLICK  
and :  
FRATERNAL ORDER OF POLICE : DECISION AND AWARD  
OHIO LABOR COUNCIL, INC.  
UNIT 1 :

This matter was heard on March 26, 1993 in Columbus, Ohio

Appearances:

For the State:

Lt. R. E. Brooks, State Advocate  
Anne K. Van Scoy, 2nd Chair  
Gretchen J. White, Disability Claims Specialist  
Terri Decker, 2nd Chair - OCB

For the F.O.P.:

Kay Cremeans, General Counsel  
Jim Roberts, Staff Representative  
Steven M. Click, Grievant

## **I. INTRODUCTION**

The State of Ohio ("Employer") and the Fraternal Order of Police Ohio Labor Council, Inc. Unit 1 ("F.O.P.") are parties to a Collective Bargaining Agreement covering the terms and conditions of employment for all permanently appointed full and part time employees employed in the Department of Highway Safety, Division of the Ohio Highway Patrol. The Agreement is effective from March 29, 1989 until January 31, 1992. ARTICLE 20 contains the grievance procedure with the steps or levels leading to arbitration in the event the particular grievance is not resolved along the way. The undersigned was selected as the Arbitrator to decide the pending grievance pursuant to the grievance procedure and the Collective Bargaining Agreement. The parties have stipulated that all procedural matters have been complied with and that this matter is properly before this Arbitrator for decision.

The grievance which is the subject of this arbitration was filed by Trooper Steven Click on September 16, 1992. The grievance alleges that the Employer breached ARTICLE 47 of the Collective Bargaining Agreement by disallowing the Grievant's request for a disability leave for the period of October 11, 1991 to November 11, 1991. The Grievant was required to use sick leave or sick time during this period and requests as a remedy that his sick time be replaced and that his disability leave be granted for that time period.

## **II. APPLICABLE LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT**

### **§47.03 Waiting Period**

An employee eligible for disability leave benefits under this Article may receive disability benefits for an initial period of three (3) months if it is determined that the employee is incapable of performing the duties of the position held by the employee immediately prior to becoming disabled. If during that initial three (3) month period it is determined that the employee is capable of performing the duties of the position held by the employee immediately prior to becoming disabled, then disability benefits shall be discontinued. After three (3) months of receiving disability leave benefits, the employee's claim shall be reviewed to determine if the employee is capable of:

a. Performing light physical work activities; or

b. Performing non-stressful activities requiring the ability to remember and carry out simple procedures independently and respond appropriately to work pressures, co-workers, and supervisors.

If it is determined that the employee is capable of performing light physical work or non-stressful activities, then the Superintendent may provide such work for the employee and disability leave benefits will terminate.

If the Superintendent is unable to provide the employee with light physical work or non-stressful activity, then the employee will continue to receive disability leave benefits until he or she is capable of performing the duties of the position held immediately prior to becoming disabled or until the Superintendent is able to provide light physical work or non stressful activity, whichever is earlier.

## **III. ISSUE**

The issue for determination is whether or not the Grievant was capable of performing the work which was assigned to him for the

period of October 11, 1991 to November 11, 1991 such that he was not entitled to disability benefits.

#### IV. FACTS

The Grievant contracted a serious disease of the colon known as Crohns disease. The symptoms of the disease include, among other things, severe weight loss, fatigue, pain, nausea, diarrhea, and arthralgia. Because of the recurrence of the disease, the Grievant was placed on disability leave in June of 1991. His disability leave was approved through October 11, 1991. Prior to October 11, 1991 the Grievant was offered a light work assignment as a dispatcher on the midnight shift in the Communication Center. The Grievant's was formerly employed as a road trooper. The Grievant's treating physician issued an opinion that the Grievant should not return to work on the midnight shift because night shift duty was too stressful and, in the physician's opinion, the Grievant would likely receive further complications of his disease which would result in further disability. The Grievant subsequently did return to duty on November 11 on the night shift and thereafter he ultimately resumed his duties as a road trooper.

Two physicians employed by the State reviewed the Grievant's medical file and issued opinions to the effect that the Grievant was able to perform the light duty assignment during the period of October 11 to November 11 and that working nights would not, in their opinion, cause the Grievant to incur further medical problems. As a result, the Grievant's request for disability leave for the period of October 11 to November 11 was denied and the

Grievant was required to use sick time instead of a disability leave.

#### **IV. POSITION OF THE F.O.P.**

The Union argues that the Grievant was eligible for disability benefits and that he was not capable of performing the light work assignment on the night shift as a dispatcher. The Grievant's treating physician issued an opinion that the Grievant should not perform the assignment because working nights would aggravate his disease. The State employed physicians merely reviewed the Grievant's medical file. They were not treating physicians and neither of them conducted a physical or medical examination upon the Grievant.

It is true that the Grievant subsequently, on November 11, reported for duty on the night shift and worked the night shift for a period of weeks. The reference to these circumstances, however, involved hindsight. The Grievant's physician should not have been second-guessed by the State for issuing an opinion that working nights would aggravate the Grievant's condition for the period involved.

#### **V. POSITION OF THE EMPLOYER**

The Grievant was denied disability benefits at every stage throughout the administrative process. The Grievant's request for disability leave was denied in the first instance. His appeal of the denial with the Director of Administrative Services was also denied. The Director of Administrative Services obtained medical opinions from independent third-party doctors who issued opinions

to the effect that the Grievant was able to perform the light duty assignment during the night shift for the period in question. The hearing officer who reviewed the Grievant's case found that there was no evidence that the Grievant could not perform the light duty assignment and the reports and findings of the physicians employed by the State were endorsed.

In all of the reports issued by the Grievant's physician prior to October, the physician did not mention any restrictions to performing duties on the night shift. It was not until the Grievant began to work nights that his physician issued an opinion stating that the change in shifts would aggravate the Grievant's medical condition. From November 11, 1991 until March 29, 1992, the Grievant worked as a dispatcher during the night and he only used six hours of sick time during this period. This should be confirming evidence that the assignment of the Grievant to night shifts could not have and would not have aggravated his medical condition.

## **VI. DISCUSSION**

The voluminous medical file of the Grievant was reviewed by this Arbitrator in detail. The medical issue of whether or not the Grievant could reasonably perform the light duty dispatching duties during the night shift is a medical determination which was required to be made prior to the time when the Grievant was to actually perform the assignment. The Employer and the physicians engaged by the Employer state that the Grievant supplied no evidence of his inability to perform services at night. This is

not true. The Grievant supplied evidence in the form of a medical opinion by his treating physician. Physicians are classified as "expert witnesses" who may issue opinions which are received as evidence in the proceedings. The opinions, if believed, constitute evidence of the same quality as any other type of evidence. The weight given to the opinions determines the outcome of the matter. In this case, the Arbitrator was required to review the opinion evidence of the Grievant's physician against the opinion evidence provided by the physicians employed by the State.

In weighing these opinions, consideration must be given to the particular knowledge and expertise of the physicians, the extent to which the physicians have knowledge of the Grievant's medical history, his medical condition and his symptoms. The Grievant's physician, Dr. Spagna, is a specialist in internal medicine. He has treated the Grievant for the disease since August of 1990. Dr. Spagna must be considered an expert in the treatment of this particular disease and it is undisputed that he has the most knowledge with respect to the Grievant's entire medical condition, medical history and symptoms.

Dr. William R. Griffin, Jr. reviewed Dr. Spagna's report and issued an opinion for the State. Dr. Griffin disagreed with Dr. Spagna's opinion stating that he could see no problems with the Grievant's night shift assignment so long as the work shifts were stable to permit the Grievant to develop regular sleep patterns.

The State further contacted and employed Dr. Sarah Long during the administrative process to review the Grievant's medical file.

Dr. Long also disagreed with Dr. Spagna's opinion. She does not believe that there is a valid medical basis on which to find the Grievant disabled during the relevant period. Dr. Long found that the Grievant successfully worked the night shift for two months without any problem and she does not believe there is any medical basis for finding that working the night shift would aggravate the Grievant's condition. It was on the basis of Dr. Long's decision that the Grievant's request for disability leave was denied.

Dr. Griffin is a general practitioner employed by the State to review disability files. Dr. Long is a specialist in internal medicine. However, neither Dr. Long nor Dr. Griffin examined the Grievant at any time.

The fact that the Grievant ultimately returned to work on the night shift without substantial complications to his medical condition is not particularly relevant. The relevant issue is whether or not there was a reasonable basis for the Grievant's physician, Dr. Spagna, to issue an opinion that returning to work on the night shift would complicate the Grievant's medical condition. Medicine is as much an art as it is a science. Dr. Spagna was exercising his best judgment by looking out for the best interest of his patient. The fact that his prognosis did not materialize is irrelevant.

This Arbitrator must defer to the Grievant's treating physician when the original disability opinion was issued. Weight and consideration must be given to the fact that Dr. Spagna was familiar with the Grievant's entire medical history and he rendered



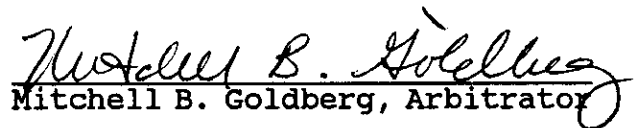
treatment to the Grievant since 1990. These factors must carry more weight than the opinions of physicians who have only examined the Grievant's medical file. They have not had the benefit of treating the Grievant over a long period of time. The opinion of the treating physician should not be second-guessed after the fact. This Arbitrator finds that Dr. Spagna's original opinion that night duty would aggravate the Grievant's condition was a reasoned opinion based upon reasonable medical certainty and upon Dr. Spagna's more complete knowledge of the Grievant and his medical condition.

#### VII. AWARD

The grievance is sustained and the Grievant is hereby granted a disability leave from October 11 to November 11 and all sick time used by the Grievant during that period shall be restored to the Grievant's sick time bank. The Grievant is entitled to receive disability benefits for the period in accordance with the Collective Bargaining Agreement.

IT IS SO ORDERED:

Date: April 22, 1993

  
Mitchell B. Goldberg, Arbitrator