

ARBITRATION

In the Matter of Arbitration :

Between : Case No. 15-03-921106-0106-04-01  
OHIO STATE HIGHWAY PATROL, : Grievance of Kathy Clary  
Employer :  
And : DECISION AND AWARD  
FRATERNAL ORDER OF POLICE, :  
OHIO LABOR COUNCIL, INC., :  
Union :

This matter was heard on June 29, 1993  
in Columbus, Ohio

Appearances:

For the Employer:

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

For the F.O.P.

Kay Cremeans - General Counsel-FOP/OLC  
Ed Baker - Staff Representative  
Kathy Clary - Grievant

## **I. INTRODUCTION**

The grievance in this case was filed because the Employer denied disability benefits to the Grievant, Kathy Clary for the period of December 31, 1991 through May 6, 1992. The issue for resolution is whether or not the Grievant was disabled for this period of time. Section 47.03 permits disability benefits to be paid 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.

## **II. FACTS**

In September, 1991 the Grievant discovered that she was pregnant. Thereafter, in November and December, 1991 the Grievant was experiencing physical and emotional problems. She had severe headaches, she was depressed and she suffered from anxiety episodes. The Grievant's physician determined that the Grievant's condition was disabling and it was recommended that she not work. The Grievant, based upon her doctor's recommendations, was granted disability benefits from November 19, 1991 through December 30, 1991. The Grievant delivered her child on May 7, 1992 and was granted disability benefits from May 7, 1992 until June 19, 1992. She returned to work on June 20, 1992.

Dr. Marianne Herr-Paul, D.O. issued an opinion letter on November 19, 1991 stating that the Grievant was over sixteen (16) weeks pregnant. The Grievant was experiencing increasingly severe mental stress from the rotational shift upon which she was working. The Grievant had increasingly disabling headaches which was

unrelieved by Tylenol, sleeplessness, anxiety and depression. This constellation of symptoms according to Dr. Herr-Paul was detrimental to the Grievant's pregnancy and the health of the Grievant. Dr. Herr-Paul recommended that the Grievant be off work indefinitely.

On November 25, 1991 the Grievant filed an application for disability leave benefits. The employee statement describing her disability was similar to Dr. Herr-Paul's opinion letter above. Dr. Herr-Paul diagnosed the Grievant's condition as "adjustment reaction to adult life with associated anxiety and depression."

The request for additional medical advice was requested by the Department. On February 12, 1992 Dr. William R. Griffin, Jr. issued the following medical opinion based upon his review of the Grievant's medical file:

"(1) This is not a pregnancy claim - per AMA guidelines no physical basis for inability to work.

(2) Diagnosis is Anxiety/Depression. Patient is on Tylenol only, receiving counselling - Suggest IME - Psychiatric - now."

On February 18, 1992 the Department requested that the Grievant attend a consultative psychiatric examination by Dr. Hong S. Kang. Dr. Kang's diagnosis summary indicated that the Grievant did not have a mental disorder but she had a history of adjustment disorder. The Grievant was seven (7) months pregnant with psychosocial stressors of moderate severity. Dr. Kang further stated that the Grievant "would seem to have difficulty performing her job at this time because of her pregnancy." and, "being seven months pregnant, it is difficult for her to perform her duties at

this time; however, after she delivers her baby, she would seem to have no problem in this area."

The Department re-evaluated the Grievant's medical file by obtaining third party opinions from R. D. Huestis, M.D. and William R. Griffin, Jr., M.D. The Department approved additional disability benefits for the Grievant through December 30, 1991. The Grievant was offered a non-rotating work schedule on December 16, 1991. Her work hours would be from 2:00 o'clock p.m. to 10:00 o'clock p.m. The Grievant declined this opportunity based upon her physician's recommendation. The Department thereafter denied the Grievant disability benefits from December 31, 1991 through May 6, 1992. The Grievant appealed the Department's decision pursuant to Section 119.09 of the Ohio Revised Code and the hearing was held before Hearing Examiner Sidney H. Golden on July 23, 1992. He issued a report and recommendation modifying the Department's determination which permitted the Grievant to obtain disability benefits from March 7 through May 6, 1992.

The Department of Administrative Services thereafter, pursuant to Ohio Revised Code Section 119.09, disapproved the recommendation of the Hearing Examiner and reinstituted the original decision of the Department which denied the Grievant any disability benefits from December 30 through May 6, 1992.

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

The Grievant had been a dispatcher since July of 1989. She worked rotational shifts in the Fall of 1991. For example, one shift would be between 6:00 a.m. and 2:00 p.m. Then she would work

two (2) evenings from 2:00 p.m. to 10:00 p.m. and one night shift from 10:00 p.m. to 6:00 a.m.

The Grievant was a dispatcher in the Jackson, Ohio District Headquarters. The Headquarters bears responsibility for five (5) highway patrol posts. On many occasions the Grievant would be required to work alone. She was responsible for five (5) telephone lines as well as a weather advisory system and another communication system in which she was in touch with three (3) other police departments, two (2) county sheriffs departments, four (4) fire departments, a life squad, automobile wrecker services, a "jaws of life" unit, an agency or department dealing with chemical leaks and the local airport.

The Grievant testified that her dispatcher's job was very stressful because of recurrent emergencies. She was required to monitor communications from other highway patrol posts, answer phone calls and issue dispatches. She was also responsible for monitoring prisons. Because she was a dispatcher at the District Headquarters she had additional duties. She was required to contact the District Office in Columbus whenever there was a fatal accident. She was required to enter data on to a computer and keep statistics for the Headquarters. She regularly issued teletypes, various warrants and she was required to keep and file various records. She was also responsible to keep payroll records at the end of the month.

The Grievant's physician recommended a leave of absence in the Fall of 1991 because the Grievant had been suffering from severe

headaches, sleeplessness, memory losses and impaired judgment. The Grievant was fatigued, lost concentration and suffered from nausea. Furthermore, the Grievant was not gaining sufficient weight for her pregnancy. All of the above problems prevented the Grievant from performing her duties.

In December, 1991 the Grievant's Sergeant offered to place her on a regular work shift beginning at 2:00 o'clock p.m. until 10:00 o'clock p.m. The Grievant's physician, however, would not permit her to work on this shift because of her continuing stress problems. Her physician would release her for a clerical job but the Highway Patrol could not release the Grievant out of her job classification.

The Grievant testified that during the period of December 31, 1991 until May 6, 1992, the period in which she had been denied disability benefits, her physical condition worsened. She had fluctuating unstable blood pressure. She was required to lie down for six (6) hours on her left side per day. She had fainting spells in January, 1992. In April, the fetus' heartbeat was too fast and this required the Grievant to lay on her side for one hour.

The Grievant offered an opinion letter from Dr. Herr-Paul dated April 6, 1992. Dr. Herr-Paul opined that the Grievant was medically disabled since November 18, 1991 because of complications with her pregnancy which endangered the health of the Grievant and her unborn child. According to Dr. Herr-Paul, the Grievant was not able to be gainfully employed during this period. The stress and

complications of pregnancy compromised the Grievant's ability to concentrate, handle on the spot judgment calls, make sound decisions, and handle emergency situations as might be expected to come across a Police Department's dispatcher's desk.

#### **IV. POSITION OF THE EMPLOYER**

The diagnosis of the Grievant's medical condition in the Fall of 1991 by the Grievant's physician identified mental and emotional problems of the Grievant and not physical problems related to her pregnancy. The Employer attempted to accommodate the Grievant by changing her rotating shifts to a fixed shift schedule. Nevertheless, the Grievant's physician still would not release her for work. The Grievant then was referred to a psychiatrist, Dr. Kang for a psychiatric evaluation. Dr. Kang found that the Grievant did not have a mental disorder and that her mental condition had improved. Dr. Kang stated in his opinion that, because of the Grievant's pregnancy, she would be uncomfortable at work. Dr. Kang was not requested to render an opinion on the Grievant's physical condition and whether or not the Grievant would be "uncomfortable" at work is irrelevant to a determination of her disability.

Dr. Herr-Paul's report of April 6, 1992 which refers to fluctuating blood pressure was not presented to the Department until April 6, 1992, after the Grievant had been examined by Dr. Kang and after her records had been reviewed internally. Dr. Huestis opined that the Grievant's blood pressure was in the normal range, notwithstanding that it had been fluctuating. Dr. Heustis

extended disability benefits from December 11, 1991 through December 30, 1991.

Dr. Herr-Paul's opinions should be questioned because she did not approve the Grievant being assigned to a regular work shift. Dr. Kang did not state that the Grievant could not perform the work duties. He only stated that the Grievant would be uncomfortable.

#### V. DISCUSSION

The following represents the medical evidence presented relative to the disability period in question. Dr. Griffin reviewed the medical file on February 12, 1992. He found there was no physical basis for the Grievant's inability to return to work. The diagnosis was anxiety/depression. On that basis he referred her for a psychiatric examination. Dr. Kang found no mental disorders but he concluded nevertheless that, because the Grievant was seven months pregnant, she would seem to have difficulty performing her job as of February 24, 1992. Dr. Kang is a psychiatrist but a psychiatrist is also an M.D. and, therefore, Dr. Kang's opinion should not be ignored.

The DAS requested a clarification of Dr. Kang's opinion on March 16, 1992. Dr. Kang further explained that the pregnancy might affect the Grievant's emotions but would not be disabling. He went on to state that because the Grievant was seven (7) months pregnant it would be uncomfortable for her to sit and perform her job duties.

Dr. Huestis reviewed the Grievant's medical file and concluded that by February 24, 1992 the Grievant had no psychiatric disorder



and no disability. The statement from Dr. Huestis was dated May 11, 1992. He obviously did not interpret Dr. Kang's opinion establishing a disability and he did not have the benefit of Dr. Herr-Paul's April 6, 1992 opinion letter.

On May 20, 1992 Dr. Griffin reviewed the Grievant's medical file and concluded that the Grievant's blood pressure was normal and that in accordance with AMA guidelines she should be able to perform her job duties. Dr. Griffin supplemented his opinion on September 21, 1992 wherein he found that the Grievant's pregnancy was devoid of physical symptomology and her psychiatric problem had been resolved by December 30 so that she should have been able to perform her duties.

Dr. Herr-Paul was the Grievant's treating physician and because of her longstanding doctor-patient relationship with the Grievant, Dr. Herr-Paul's opinion should be given great weight. The opinions of Dr. Huestis and Dr. Griffin were based only upon a review of the medical files and records and were not based upon any examination or time spent with the Grievant. Dr. Kang examined the Grievant and his opinions support the conclusions of Dr. Herr-Paul and not the conclusions of Dr. Huestis and Dr. Griffin. Dr. Herr-Paul stated in her April 6 report that the Grievant has been medically disabled since November 18, 1991 because of complications with her pregnancy. The weight of the medical evidence supports this conclusion. Furthermore, the Grievant's own testimony supports these conclusions. There is no evidence presented by the

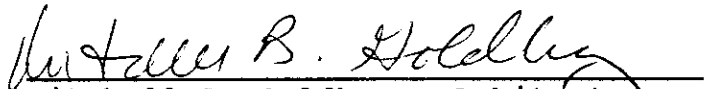
Employer which discredited the Grievant's testimony in any material respect.

**VI. AWARD**

The Grievant is hereby granted disability benefits pursuant to the terms of the Collective Bargaining Agreement from December 31, 1991 through May 6, 1992.

IT IS SO ORDERED:

Dated: July 21, 1993

  
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Mitchell B. Goldberg, Arbitrator

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