ARBITRATION DECISION NO.:
348

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Mental Health
Central Ohio Psychiatric Hospital

DATE OF ARBITRATION:
April 17, 1990

DATE OF DECISION:
May 23, 1991

GRIEVANT:
Latonya Wilson

OCB GRIEVANCE NO.:
G-87-2178

ARBITRATOR:
John E. Drotning

FOR THE UNION:
John Porter, Esq.

FOR THE EMPLOYER:
Mr. Elliot Fishman

KEY WORDS:
Occupational Injury Leave
Appendix K

ARTICLES:
Article 34-Service Connected Injury and Illness
§34.04-Occupational Injury Leave
Appendix K-Occupational Injury Leave Guidelines

FACTS:

The grievant, a Hospital Aide for the Central Ohio Psychiatric Hospital (COPH), was denied Occupational Injury Leave (OIL) payments from May 7, 1987 through July 31, 1987. The grievant was injured in January of 1987 while escorting a patient to the shower. The grievant's arm and shoulder were sprained and her doctor recommended that she take whirlpool treatment, and undergo hot pack and heat lamp treatments. She received a total of 560 hours of OIL. The grievant went on a trip to the Bahamas and sent her co-workers a postcard. In May the OIL payments stopped and after seeing a doctor selected by the Department

of Administrative Services the grievant was ordered back to work. The grievant returned to work and took sick leave when the pain from her injury became too much to bear. The Union asks that the grievant receive 400 hours of OIL and be recompensed for the accrued sick leave she used during the period she was injured.

UNION'S POSITION:

The grievant was examined by four or five doctors and all but one said that she was unable to return to work. It was difficult and painful for the grievant do such tasks as carry dinner trays. When the grievant returned to work the pain was unbearable. The trip to the Bahamas was not evidence that the grievant was not injured. The grievant's personal physician wrote that she was able to travel without aggravating her injury. The grievant consulted with her doctor before leaving on the trip and brought her medication on the trip. The plane tickets for this trip were bought prior to her injury. The vacation was not evidence of fraud. The State's examination of her injury in which she was ordered back to work took a total of ten minutes. This examination was far from thorough. The grievant did not know that she could request a second examination and this factor should not stop the grievant from collecting her proper OIL payments. The OIL payments were wrongfully denied by the employer. The grievant should not have to continually reapply for these benefits.

EMPLOYER'S POSITION:

The State asserts it must determine the ability of the employee to return to work. The postcard from the grievant from the Bahamas prompted questions over her OIL benefits. The doctors who said the grievant could not return to work were not State doctors. The final decision of an employee's ability to return to work should be made by a doctor selected by the Department of Administrative Services. There are other reasons why the grievance should be denied. The grievant did not apply for OIL benefits beyond the 560 hours she received and should be estopped from asking for these benefits now. The grievant did not exercise her option to ask for another examination when the in-house doctor told her that she could return to work.

ARBITRATOR'S OPINION:

The arbitrator narrowed the issue to whether the grievant should receive the additional 400 hours of OIL. Although the Section on OIL, 34.04, states 960 hours as the maximum that is allowed, this is a limit but not a requirement. The Union's argument that since the State's doctor only spent ten minutes with the grievant that the examination was not valid is not persuasive. The doctor did test the grievant for pain and still cleared the grievant to return to work. The grievant's vacation to the Bahamas does not necessarily mean that she was suffering some type of disability. The grievant's personal physician did not document any medical restrictions at the time of the trip but wrote a letter three months afterwards. The arbitrator found that the only rational conclusion to draw from this time lapse is that the document was written on behalf of the grievant. The Union's claim that three or four doctors found the grievant unable to work is not correct. Two doctors advised that the grievant should return to work as soon as she feels able to perform her regular duty. Even the grievant's personal physician who wrote a note about the grievant's vacation did not preclude the grievant from returning to work. The grievant was only cautioned not to lift or do strenuous exercises. The arbitrator decided that in the OIL payment program there must be some control by physicians, otherwise the subjective feeling of the grievant would be the controlling factor. It is the task of the designated physician to determine the impairment and disability in light of the job demands. The physician statements introduced were not strong enough evidence that the grievant should be granted an additional 400 hours of OIL.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION
BETWEEN

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO

AND

STATE OF OHIO

ARBITRATION AWARD

Case Number:
OCB #G87-2178
Grievant:
Latonya Wilson

Arbitrator:
John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on April 17, 1990 at the 1680 Watermark Drive, Columbus, Ohio. Appearing for the Employer were: Mr. Elliot Fishman, Ms. Meril Price, Ms. Patti Betts, and Mr. Gene Brundige. Appearing for the Union were: John T. Porter, Esq., Mr. Dane Braddy, and the grievant, Ms. Latonya Wilson.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 4/17/91. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly agreed on the question; namely:

Did the State of Ohio violate Article 29, Article 34.04
and Appendix K of the Contract by its actions in denying
Latonya Wilson pay for the period from May 7, 1987
through July 31, 1987?

If so, what shall be the remedy?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 through #16.

The parties stipulated to the following:

1. This grievance is properly before the Arbitrator.

Grievance Trail:

2. The grievant Latonya Wilson was employed by COPH as a Hospital Aide beginning in 1982.

3. The grievant Latonya Wilson was injured at work by a patient on January 18, 1987.

4. As a result of the grievant's injury of January 18, 1987 she received payment for Occupational Injury Leave pursuant to the contract from January 18, 1987 through May 6, 1987, for a total of 560 hours. Under the contract employees may receive a maximum of 960 hours of Occupational Injury Leave.

5. On May 5, 1987 the grievant was examined by Dr. Richard Slager, an examination which was ordered by DAS. Dr. Slager's finding was that the grievant was no longer incapacitated.

6. The grievant was examined by her own physician on or about May 5, 1987. The grievant's personal physician found that she was still incapacitated from performing her work at COPH.

7. The grievant was ordered to return to work by management at COPH on May 15, 1987 and (she) did return to work on that day. Before she was allowed to return to work she was required by management at COPH to be examined by COPH physician Dr. Tenezer, who stated that she could return to work as soon as she felt she was able to perform her regular duties. The grievant did not feel that she was physically capable of performing her duties on this date, or at anytime up until August 1, 1987 when her doctor released her to return to work.

8. On or about June 2, 1987, the grievant was again ordered to return to work. She worked for 2 hours on that day and went home because she felt that she was unable to perform hospital aide work due to her injury suffered on January 18, 1987.

9. The grievant received no pay of any type for the period from May 7, 1987 through August 3, 1987.

10. The grievant returned to work on August 3, 1987.

11. The grievant furnished doctor's excuses for her absences during the periods from June 1, 1987 through July 1, 1987, and from July 1, 1987 through July 31, 1987.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. UNION

1. TESTIMONY AND EVIDENCE

Latonya Wilson testified that she was employed by Central Ohio Psychiatric Hospital (COPH) between November of 1982 and January of 1991 and she went on to say that she is not now employed. Wilson testified that she worked in A-4 on 1/18/87 and essentially these are people who have mental problems.

Wilson testified that she worked from 3:00 to 11:00 on 1/18/87. She went on to say that a patient on the unit urinated on herself and she was with her on a one to one basis. She said that she took the patient to the shower room and the patient then pushed her into the doors and they wrestled a bit and the patient knocked her down and hit her. As a result, Wilson said she filled out Joint Exhibit #2.

Wilson went on to say that she saw a doctor on that date, 1/18/87, and he asked her what happened and also examined her. Wilson said she then saw her personal physician on 1/19/87 and he talked about a muscle strain or sprain. She said she received treatments in the whirlpool and hot packs as well as a heat lamp and she received these treatments three times a week (see Joint Exhibit #3).

Wilson testified she filed a claim for occupational injury leave (O.I.L.) which is a 100% claim if one is injured on the job. That claim was approved, said Wilson.

Wilson testified that she went to the Bahamas on vacation between February 3rd and February 10th of 1987 and she discussed that trip with a Dr. Cristales. Wilson said she took her medication with her. Moreover, Wilson said she received tickets to the Bahamas from her husband well before the injury (see Joint Exhibit #8).

Wilson testified that she did not hide the fact that she was going to the Bahamas and, in fact, sent her co-workers a post card noting "fun in the sun" while in the Bahamas.

The O.I.L. payments stopped on May 6, 1987, said Wilson, and she said she was ordered to see a Dr. Slager. He found no objective disability and he saw her for about ten minutes, said Wilson. She was ordered back to work on May 15th for the first time (see Joint Exhibit #11) and she was seen by a doctor and he said to return to work when she was capable and he checked her shoulder in a ten minute examination (see Joint Exhibit #13). Wilson said she was then ordered back to work on June 2nd and she reported to A-4.

Wilson testified that she worked for two hours and the pain in her arm and shoulder was unbearable and she turned in a form saying she was disabled up until June 12th (see Joint Exhibit #15). She said she had pain in her shoulder and neck and she filed a leave slip for 6/2.

Wilson said she had sick leave coming to her between 1/18/87 and 8/3/87 and she was always covered by a doctor's excuse.

Wilson said she was found to have unapproved leave status on two days between 1/18/87 and 8/3/87.

Wilson said her O.I.L. benefits were stopped and she was told that she could not apply again for such benefits.

Wilson went on to say that her doctor said to return to work on 8/3 or 8/1. She said she had a 5% permanent partial disability between 1/18/87 and 3/8/87.

Wilson said she has been examined by four or five doctors and all but one said that she was unable to return to work. She went on to say that her injuries make it difficult for her to do work like carrying dinner trays, etc..

Wilson said the State did not order her to appear before another doctor after being examined by Dr. Tenezer.

On redirect, Wilson said she was re-examined after June 1st and that occurred on June 12th.

The Union cross examined Management witnesses. Gene Brundige testified that Article 124.381 is similar to Appendix K. He went on to say the Union acknowledged Appendix K and there have been second examinations by a DAS appointed physician.

Ms. Patti Betts testified that she takes care of all records at COPH and there are five people in her office. She testified that her immediate supervisor is Beth Mundy and that Harold Palmer is the Director.

Betts said that she knew Mary York, the Personnel Director, and she was present during the time in question from January to August of 1987.

2. ARGUMENT

The Union argues that Latonya Wilson did everything she could in the sense that she consulted with the doctor and took treatments, etc.

Management, notes the Union, argues that Wilson did not reapply for O.I.L. benefits, but the Union goes on to say that she did apply or discuss it with Mary York and it was apparently not granted.

The Union points to the fact that Dr. Slager found no objective evidence of her injury, but pain can be felt without a physician's decision. The Union points out that a number of medical doctors examined Wilson and all but one found her disabled.

The Union goes on to say that a Dr. Slager examined her and said no disability but after she returned and saw Dr. Tenezer, he told her that she should go home because of her disability. The Union goes on to say that after Dr. Tenezer's judgement, the State called and ordered a second physician's opinion by a different State doctor. Such a request is not required by the Collective Bargaining Agreement and neither the Union nor Wilson knew about the request.

The Union argues that the State should grant 400 hours of O.I.L. to Wilson for the period May 7th to July 31st and she should be recompensed for accrued sick leave which she used during that period.

B. MANAGEMENT

1. TESTIMONY AND EVIDENCE

Mr. Gene Brundige testified he understood the Contract and that if an employee needs, say for example, 240 hours, he/she receives it. He said he oversaw Appendix K on page 96 of the Collective Bargaining Agreement (see Joint Exhibit #1).

Brundige said that the DAS determines an employee's fitness to return to work. He said at times, presumably, the employee's personal physician submits a report and if the DAS accepts it, the person is assigned to a private doctor appointed by the DAS.

In any event, Brundige said that the DAS makes the final decision. He also testified that Management can order an examination if there is a question about Occupational Injury Leave.

Brundige went on to say that if there is a difference between the DAS appointed physician and the patient's doctor, the DAS's physician makes the final decision.

He also pointed out that the O.I.L. program is a separate and a brand new benefit to the Contract. He noted that one cannot get O.I.L. as well as Worker's Compensation.

Ms. Patti Betts testified that she is a Benefits Coordinator and she keeps personal records and distributes the O.I.L. forms. These forms are given to employees at their request.

She said that the COPH wanted to terminate the O.I.L. payments on April 10, 1987 because Wilson was absent in part and also in part because the friends at work received a postcard from Wilson from the Bahamas.

Betts went on to say that the DAS asked to have Wilson examined by an independent doctor and she was found capable of returning to work by Dr. Slager. She was ordered to return to work on May 15, 1987. She was subsequently examined by a Dr. Tenezer who told her to return to work when she was better. She did return to work on June 2, 1987 for two hours.

Betts said that between May 15th and June 3rd, she did not file O.I.L. benefits. She also said that Wilson did not apply for sick leave benefits between June 3rd and August 15th.

Betts acknowledged that Wilson could have applied for additional O.I.L. and/or sick leave benefits.

Management also cross examined Latonya Wilson who testified she was aware of the procedure for applying for O.I.L. benefits as well as sick leave benefits. She said she did not apply for O.I.L. benefits after May 15th and she did not apply for such benefits after June 12th. She testified she requested sick leave after June 1st and that she filled out a sick leave request on June 12th.

2. ARGUMENT

The Employer asserts that Management negotiated an Occupational Injury Leave benefit program and there were guidelines for that program noted in Appendix K of the Contract (Joint Exhibit #1).

The State asserts that it must determine the ability of an employee to return to work. It points out a postcard from the Bahamas sent by Wilson to employees triggered the questions over her O.I.L. benefits. The Employer went on to say that given the postcard and Wilson's past record of absenteeism, there was a decision to deny occupational injury leave benefits.

The Employer notes that Betts said that after meeting with an in-house physician, Wilson could have applied for additional O.I.L. benefits and she knew the process and the employee is always given the appropriate leave forms. Moreover, the Employer asserts that Wilson could have asked for an additional examination.

The Employer notes that Dr. Cristales indicated that Wilson could travel (see Joint Exhibit #8) but that document was written after the fact and the Employer points out that doctors always write on behalf of their patients.

The O.I.L. program must be handled with care, asserts the Employer.

The Employer notes that a doctor told Wilson she could return to work when she felt she could and that was her decision. However, the Employer notes that Dr. Tenezer who told her that she could return at her

decision is not a State doctor.

Wilson applied for benefits previously and she could have applied for benefits after June 4th. The fact that she did not means she is estopped from such benefits.

The Employer also notes that the O.I.L. benefits are paid in lieu of Worker's Compensation.

For all these reasons, the Employer asks that the grievance be denied.

V. DISCUSSION AND AWARD

The issue is whether Ms. Wilson should receive an additional 400 hours of Occupational Injury Leave?

Article 34.04 of the Contract is as follows:

"**34.04 - Occupational Injury Leave**

Employees of the Department of Mental Health, The Department of Mental Retardation and Developmental Disabilities, The Ohio Veterans' Home, The Ohio Veterans' Children's Home and Schools for the Deaf and Blind shall be entitled to a total of nine hundred sixty (960) hours of occupational injury leave a year. The Office of Collective Bargaining shall issue guidelines (see Appendix K).

Appendix K reads:

1. An employee of . . . who suffers bodily injury inflicted by an inmate, patient, client, youth or student in the facilities' of the above agencies shall be eligible for his/her regular rate of pay during the period he/she is disabled as a result of such injury but in no case to exceed 960 hours. The form of compensation shall be in the lieu of worker's compensation.

2. Pay made regarding this leave shall not be charged to the employee's accumulation of sick leave credit.

3. A statement of circumstances of the injury shall be filed with the Director of Administrative Services by the employee's appointing authority. This statement shall show conclusively that the injury was sustained in the line of duty and was inflicted by an inmate, patient, client, youth or student and did not result from accident or from misbehavior or negligence on the part of the employee.

4. The appointing authority shall also obtain and file with the Director of Administrative Services the report of a physician designated by the Director of Administrative Services as to the nature and extent of the employee's injury.

5. The employee shall be obligated to receive necessary medical treatment and to return to active work status at the earliest time permitted by his/her attending physician.

6. An employee on Occupational Injury Leave shall be exempt from the accumulation of vacation leave credit and sick leave credit as set forth in Sections 28.01 and 19.01 of this contract.

7. If an employee's injury or disability as covered by the above guidelines extends beyond 960 hours, he/she shall immediately become subject to Article 29, "Sick Leave", of this contract.

8. Employees who think they are eligible for this type of leave may apply to their Agency Designee.

Wilson was injured on 1/18/87 and she received 560 hours of injury leave from 1/18/87 through 5/6/89 (see Joint Exhibit #4, pp. 1, 2, & 3). Dr. Slager examined Wilson on May 7, 1987 and indicated she could return to work (see pg. 3 of Joint Exhibit #4). Wilson's claim that Dr. Slager only spent ten minutes with her and was unable to find anything wrong is not persuasive. Perhaps pain can be felt, but normally a doctor would manipulate a patient to test for pain and Slager found none as noted in his letter (Joint Exhibit #10). Therefore, at this juncture, there is no real basis to award an additional 400 hours.

Another aspect of this case deals with Wilson's Bahama vacation between 2/3 and 2/10/87. That she was in the Bahamas does not mean that she was not suffering some disability. The extent of her physical problem is unclear and her doctor wrote that she could travel to the Bahamas in February "as long as she does not lift or does not do any strenuous exercises". If Dr. Cristales had written a note in February indicating that Ms. Wilson could not lift in February and followed that letter up in his letter of May 12, 1987, one would conclude that her injuries or physical problem still existed. But, Dr. Cristales's letter was written on May 12, 1987 about three (3) months after her trip to the Bahamas. The only rational conclusion is that the document was written for the patient, as the Employer claims.

The next question involves the decisions of Dr. Slager (Joint Exhibit #10) and Dr. Tenezer (Joint Exhibit #13). Dr. Slager's discussion of Ms. Wilson's ailments are clear and he notes some lingering physical problems, but he finds no “objective evidence of disability” and encourages "her to return to active employment at the earliest date".

Dr. Tenezer simply states that:

“The employee claim(s) to have difficulty to move her neck, her back, and her lt. arm due to persistent pains. May return to work as soon as she feel(s) she is able to perform her regular duty.”

It is clear that neither physician found her totally unable to work. Dr. Tenezer in effect said she should make her own decision. He did not say she was unable to work.

The grievant had her return date changed a number of times, but essentially, the Employer terminated her O.I.L. as of May 7, 1987. She also had a 5% permanent partial disability (see Joint Exhibit #14). Thus, the question is whether she should be granted an additional 400 hours of O.I.L. as noted earlier.

Appendix K of the Contract (Joint Exhibit #1) requires a physician designated by DAS to report the nature and extent of the impairment or disability resulting from the injury as was done by Drs. Slager and Tenezer (see Joint Exhibits #10 and #13). The results of their examinations indicate that Wilson was capable of returning to work. Dr. Cristales's of May 12 said that Wilson's physical condition in February did not preclude her from going to the Bahamas but she should "not lift" or "do strenuous exercises" during her trip. His letter says nothing about her ability to work on May 7, 1987.

The Office of Collective Bargaining put forth guidelines in Appendix K and there is no guarantee that injured employees receive 960 hours (see items 4 and 5). There must be some control by physicians (see Slager and Tenezer reports); otherwise the subjective feeling of the employee might be the determining factor and that is not the sense of Appendix K. It is the task of the designated and attending physicians to assess impairment and disability in light of the demands of the job and the physician statements are not strong enough to allow a conclusion that Wilson should have an additional 400 hours.

In addition, Wilson claimed that after working for two hours on June 2nd, she experienced "unbearable pains", but there was no evidence of that any treatment or therapy followed that occurence to reduce or hasten relief of pain.

For all these reasons, Wilson's grievance must be denied.

John E. Drotning,
Arbitrator

Cuyahoga County, Ohio
May 23, 1991