GEORGE FULLEN,

Grievant,

v. **Docket No. 97-BOT-460**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, George Fullen, was employed by the Board of Trustees as a Swimming Pool Attendant at West Virginia University (WVU or Respondent) on December 17, 1996, when he was advised of his dismissal for medical reasons. After an informal conference was conducted at Grievant's request on January 14, 1997, the matter was denied at levels one and two. Grievant elected to bypass consideration at level three as is permitted by W. Va. Code §18-29-4(d), and filed a level four appeal on October 23, 1997. Both parties agreed that a decision could be issued based upon the very substantial level two record, supplemented with proposed findings of fact and conclusions of law submitted on or before May 4, 1998. (See footnote 1)

The following Findings of Fact pertinent to this matter are undisputed.

Findings of Fact

1. Grievant was first employed at WVU on August 16, 1984, and was classified as a Swimming Pool Attendant for the duration of his employment.

2. Grievant was assigned to service the pools in Elizabeth Moore Hall on the downtown campus, and the Natatorium on the Evansdale campus. 3. Respondent made relevant training available to Grievant, including the following: in 1986 (seminar on chlorine gas), 1988 (safety precautions when filling chlorine tanks), 1990 (handling chemicals and use of Material Safety Data Sheets (MSDS)), 1992 (asbestos awareness training), 1993 (chlorine safe handling seminar and swimming pool operators' training class), and 1996 (training on new ozone equipment). Grievant either attended, or was expected to have attended, these sessions.

4. During his employment Grievant was exposed to a number of chemicals, including calcium hypochlorite (granular chlorine), calcium chloride, chlorine gas, muriatic acid, liquid chlorine, sodium

hypochlorite, sodium bicarbonate (soda ash), sodium thiosulfate, phenol red, sulfuric acid, and ozone.

5. Grievant was absent from work from February 20, 1995, through June 12, 1995, due to back surgery necessitated by an accident while cutting trees at his home. Grievant was again absent from November 12, 1995, through January 27, 1996, due to a bladder operation. On February 20, 1996, Grievant suffered a heart attack. Following bypass surgery, he did not return to work until July 1, 1996. On July 15, 1996, he was taken to the hospital out of concern that he was having a second heart attack, and did not return to work.

6. Because Grievant was assigned to two campuses, various transportation alternatives were offered by Respondent, including providing a parking pass, making a Personal Rapid Transit (PRT) pass available, and renting a state car from the motor pool for Grievant and his co-workers.

7. It was frequently necessary for Grievant to transport chemicals from one campus to another. This transportation could not be done on the PRT, and Grievantusually used his personal car for this task. No compensation was made for use of his personal vehicle.

8. The only personal safety equipment used by Grievant in the performance of his duties were gloves. There is no evidence that Grievant ever requested other safety equipment.

9. In 1993, the Swimming Pool Attendants were placed in the Medical Monitoring Program. At that time it was determined that Grievant could not use a respirator due to his heart disease. Evidence indicates that this restriction had little or no practical effect on Grievant's ability to perform his duties at this time.

10. An Industrial Hygiene Specialist from the Office of Environmental Health and Safety observed Grievant at work for a period of one week. As a result of this review, Grievant was no longer required to clean the pools with muriatic acid, and was provided training on safe procedures in handling the chemicals.

11. Grievant never filed a Workers' Compensation claim as the result of any injury sustained from his exposure to chemicals.

12. In August 1996, Grievant's physician advised Respondent that Grievant suffered permanent functional limitations due to his heart condition. He was not to be exposed to dust, fumes, extreme temperatures of less and 40 degrees or higher than 80 degrees, and high humidity.

13. Upon receiving this information, Respondent determined that no reasonable

accommodation could be made to allow Grievant to retain his assignment as Swimming Pool Attendant, and placed him under Americans with Disabilities Act (ADA) monitoring from August 13, 1996, through December 12, 1996. 14. While under the ADA monitoring, Respondent attempted to locate an alternative assignment for Grievant. Under the regulations, the placement had to be commensurate with his skills and ability, and within his current pay scale.

15. When no viable alternative assignment was available to Grievant during the four month period, Respondent terminated his employment for medical reasons.

16. An informal grievance conference was conducted for Grievant by Sharon Sisler, Senior Office Administrator of the School of Physical Education, on January 14, 1997.

17. Ms. Sisler provided a verbal response on or about January 28, 1997.

18. A level one grievance was dated January 20, 1996 [presumably 1997], but was not received by Respondent until March 25, 1997.

Argument

Grievant argues that Respondent is generally in violation of federal industry standards, and specifically, provisions regarding employee training for working with hazardous chemicals, medical surveillance, and personal protective equipment. Violations of the West Virginia State Board of Health “Swimming Pool and Bathing Beach Regulations”, the WVU Employee Medical Monitoring Program, and the WVU Hazard Communication Programs, are also cited. Grievant asserts that Respondent has a duty to provide a safe working environment, free of known hazards and health risks, for the employee, and suggests a failure to maintain compliance with these rules and regulations could reasonably have led to his health problems, or aggravated them in such a way as to render him disabled from his job as Pool Attendant.

Initially, Grievant's request for relief consisted of permanent, long-term disabilitybenefits, backpay with interest, or instatement to a position with the same salary, backpay and interest. The level two decision indicates that the relief was amended to $14,000.00, after taxes, for use of his personal vehicle for twelve (12) years, at approximately five (5) miles per day. He also requests compensation for his health related injuries in the amount he would have likely earned between the ages of fifty-five (55) and sixty-five (65), including general salary increases and longevity increments, with interest, and payment for his health insurance, effective January 1997, currently at $272.70 per month.

Respondent argues that the grievance was not timely filed at level one, and must be denied on

that basis. Addressing the merits, Respondent asserts that Grievant's permanent limitations, as defined by his physician, were the result of his cardiac condition. When a comparable position could not be found for Grievant after four months of monitoring, Respondent argues that the termination for medical reasons was proper.

Discussion

The issue of timeliness will first be addressed. The termination of Grievant's employment was effective December 12, 1996. An informal conference relating to this grievance was held on January 14, 1997. Ms. Sisler's claim that she provided a response to the informal conference on January 28, 1997, is not contradicted by Grievant. A grievance report form dated January 20, 199[7], would not appear to be accurate since that would pre-date the informal response. While the inquiry of Grievant's representative as to when the level one decision would be issued implies that a grievance was filed at level one, Respondent did not receive a written grievance form until March 25, 1997.

Grievant offers no grievance form dated after receipt of the informal conference response, or any other documentation to substantiate a filing at level one prior to March 25, 1997. A delayfrom January 28, 1997, to March 25, 1997, results in an untimely filing under the provisions of W. Va. Code §18-29-4(a)(3), which provides in pertinent part that “within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor by the grievant or the designated representative on a form furnished by the employer or agent.” Therefore, it must be determined the grievance was not timely filed.

Even if the grievance had been pursued in a timely manner, Grievant could not prevail. By letter dated August 13, 1996, Ms. Sisler advised Grievant that following a review of a Medical Assessment Form completed by John J. Wurtzbacher, M.D., stating permanent functional limitations, it was determined that he could not return to the position of Swimming Pool Attendant, because he was unable to perform the essential duties with reasonable accommodation. She further advised Grievant that he would be on a leave of absence for a period of four (4) months while Human Resources monitored job openings and considered him for reassignment consistent with his abilities and limitations, but that if reassignment did not occur by December 12, 1996, he would be separated from his employment for medical reasons,

The report completed by Dr. Wurtzbacher, referred to by Ms. Sisler, stated that while Grievant's coronary bypass surgery was successful, he would have permanent functional limitations limiting

lifting and carrying in excess of thirty (30) pounds, must avoid working in extreme temperatures and high humidity, and avoid exposure to fumes and dust. Thus, Grievant's loss of employment was due to cardiac health problems.

Although Grievant had made efforts to be tested for allergic reactions to chemicals, it does not appear that was ever completed due to his cardiac condition. Further, while therecord includes an accident report completed by Grievant on January 10, 1993, in which he claims that he was overcome with muratic acid, and his testimony addresses other events with the chemicals, there is no medical verification or other documentation to substantiate that Grievant actually sought medical assistance, or suffered any health problems, from his exposure to the chemicals. There is no evidence that Grievant has been treated for any health problem incurred as a result of his work. Finally, there is no evidence that Grievant ever filed a grievance during the term of his employment regarding unsafe working conditions. Lacking any connection between working conditions and Grievant's various medical conditions, he has failed to prove entitlement to reinstatement or compensation.

The record shows that Swimming Pool Attendants are currently paid mileage for using their personal vehicles to transport chemicals. This practice was not in place at the time of Grievant's employment, and other alternatives were available to him. Grievant is not presently entitled to be paid an unsubstantiated amount for mileage claimed during a period of time when it was not an option offered by Respondent.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following conclusions of law.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees grievance Bd. 156 C.S.R. 1 §4.19 (1996); Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993). See W. Va. Code §18-29-6. 2. Grievant has failed to prove that the medical termination of his employment was related to his work with chemicals as a Swimming Pool Attendant.

3. Grievant is not entitled to reimbursement for mileage expenses for a period of time he transported chemicals in his personal vehicle when Respondent had made other options available,

and was not reimbursing employees.

4. Grievant failed to file a level one grievance within tens days of receiving the response from his immediate supervisor following the informal conference, as is required by W. Va. Code §18-29-4(a)(3).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: June 18, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by Diane Ridgway of Laborers' Local 814; Respondent was represented by Assistant Attorney General Samuel R. Spatafore.