**EARLIE R. DELANEY, JR.,**

**Grievant,**

**v.** **Docket No. 98-HHR-019**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES,**

**Respondent.**

**D E C I S I O N**

Grievant, Earlie R. Delaney, Jr., employed by the Department of Health and Human Resources , Bureau for Public Health, Office of Environmental Health Services (Respondent), as an Engineer I, filed a level one grievance on October 22, 1997, in which he alleged "[m]y employer has refused to allow me to return to work because of my disability (below knee amputat[ion]). This has been more than 20 days and has the same effect as a suspension. My finances have been strained to the point that it may affect my credit rating. In addition, my employer did not consider me for a promotion to Engineer II." For relief, Grievant requested back pay and leave accrual, promotion to Engineer II, and specified accommodations.

Respondent waived consideration at level one. The level two evaluator lacked authority to grant the requested relief, and the grievance was denied at level three. Grievant advanced his appeal to level four on January 22, 1998. An evidentiary hearing was conducted on May 27, 1998, and the grievance became mature for decision with the submission of Respondent's proposed findings of fact and conclusions of law on June 24, 1998. (See footnote 1) The following findings of fact are made upon review of the record in its entirety.

Findings of Fact

1. Grievant was employed by the West Virginia Department of Health and Human Resources, Bureau for Public Health, Office of Environmental Health Services as an Engineer I, in June 1995.

2. The position description of Engineer I establishes that Grievant was responsible for the following duties in pertinent part:

- Performing public water system inspections and sanitary surveys which require evaluation of raw water intakes, well fields, sedimentation basins, filters, chemical feed systems, pump stations,

distribution systems and finished water storage tanks. This requires the ability to climb stairs and ladders into filters, tanks, and pits to inspect and evaluate unit processes.

- Preparing reports of survey and inspection findings and recommendations.

- Providing professional technical services to treatment plant operators which requires on-site assistance to assist the operator optimize treatment techniques. The ability to survey unit operations of chemical mix facilities, sedimentation filtration and disinfection is essential.

-Reviewing proposed project sites to assess acceptability of future drinking water and wastewater facilities **.** Many of these sites are on unimproved land with limited vehicle access requiring walking over rough terrain.

- Providing on-site field consultation with system managers, consulting engineers and contractors.

3. Grievant's duties and responsibilities in administering the Safe Drinking Water Act consisted of field surveillance of public water supplies, completion of sanitary surveys, sampling, evaluating, and inspecting public water supplies which are frequentlylocated in areas of rough terrain, and require climbing on ladders and tanks. These on-site activities are documented in reports which are later completed in the District office. Respondent estimated the duties to consist of approximately 80% field work and 20% office work.

4. Respondent's normal business hours are from 8:30 a.m. to 4:30 p.m.

5. At the time of his employment Grievant was advised that the two hour and twenty-five minute commute from his home in Mt. Claire to the Wheeling office would not be considered part of his work day.

6. A diabetic, Grievant began having medical problems with the onset of a foot ulcer on or about September 19, 1996. Following surgery, Grievant returned to work on October 4, with restrictions effective through December 4, 1996.

7. Grievant was required to undergo a second operation on November 5, 1996, but provided a doctor's statement dated November 27, 1996, which allowed him to return to work without restriction upon his obtaining custom-molded padded orthopedic shoes. Grievant's doctor provided that “[s]pecifically, he may walk, climb stairs, drive, and climb a ladder without restriction.”

8. Upon his return to work, Grievant continued to experience health problems. On July 18, 1997, Grievant's right leg was amputated below the knee as a result of complications from the diabetes.

9. From July 1997 through September 4, 1997, Grievant submitted monthly requests for medical leaves of absence without pay.

10. Grievant returned to work on September 4, 1997, restricted only in that he could not climb stairs until September 24, 1997. 11. Five days after returning to work, Grievant requested a medical leave of absence without pay from September 11, 1997, through October 1, 1997.

12. Grievant inquired about the possibility of returning to work prior to October 1, and was advised by Victor Wilford, Assistant Director of the Environmental Engineering Division, that he must be able to complete all the core functions of his job, including climbing stairs and ladders, traversing steep, uneven terrain, performing water treatment plant inspections and surveying water storage tanks and booster stations which are often located where access is steep. Mr. Wilford advised Grievant that he must submit a doctor's statement releasing him to work without limitations which would prevent him from performing these duties.

13. On September 24, 1997, Grievant submitted a doctor's statement releasing him to work with the restrictions of not being permitted to climb stairs or traverse rough terrain. Respondent determined this release did not meet its requirement that Grievant be able to complete the core functions of his position.

14. By letter dated October 1, 1997, Grievant suggested the following accommodations:

-Inspection of transient or non-transient non-community systems which do not have storage tanks or booster stations.

-Concentrate on site visits which do not involve distribution system in lieu of sanitary surveys which do.

-Instruct the operator who accompanies the inspector on checking the top of the tank and obtaining a sample for visible inspection while the inspector remains on the ground.

-Inspect systems where storage tanks and pumping stations are readily available for inspection without traversing steep terrain. Most large systems have 4 wheel drive vehicles fortransportation to these sites.

15. On October 6, 1997, Grievant suggested the following additional accommodations be considered:

-A flextime four day 10 hour per day work week to allow scheduling of medical appointments on my off day. This schedule could be the same as the one allowed in the past during the summer work period.

-Reassignment to a vacant position that could better accommodate my disabilities.

-In lieu of using the plant operator already on site, hire an engineering technician part time/full time to accompany me in the field and help in obtaining needed information for my inspection reports.

-Allow me to write up my reports at home. This would reduce my work day from 12 ½ hours/day to a more manageable 8 to 10 hours/day. (The 10 hours per day is based on the flex time schedule mentioned earlier in this letter.)

16. By letter dated October 14, 1997, Grievant reasserted his requested accommodations under the Americans with Disabilities Act, and also cited those rights under the West Virginia Human Rights Act. As an alternative to the suggestion that he be allowed to complete his reports at home, Grievant offered as an alternative that he be allowed to work out of the Philippi District Office.

17. Respondent determined that the accommodations requested by Grievant would have relieved him of the essential duties of the Engineer I civil service job classification.

18. Respondent advised Grievant on October 8, 1997, that it would be necessary for him to provide a doctor's statement setting forth the extent and duration of his limitations before it could determine whether reasonable accommodation could be made. Respondent requested, and Grievant granted permission, for Respondent to correspond with his physician to gain the relevant information it needed to assess his physical abilities.

19. By letter dated October 23, 1997, Dr. Russell Biundo advised Russell Rader, Director of the Office of Environmental Health Services, that Grievant was not yet ambulatory on his prosthesis because he had a break down over the distal aspect of the stump. He stated that Grievant “cannot work in an environment where there will be dangerous terrain or that will require him to walk up and down hills or ladders or into water systems at all at this point. Currently he basically would do best in a wheelchair accessible work area in clerical type duties at this point . . . this is only temporary and in

the future we are hoping to advance him to more demanding type activities."

20. Grievant continued to submit requests for medical leaves of absence without pay, along with accompanying physician's excuses, through December 1997.

21. Respondent concluded that Grievant could not perform the essential functions of his job.

22. Respondent scheduled a meeting with Grievant to discuss his medical situation as it pertained to his job duties on November 6, 1997. Grievant canceled the meeting and did not respond to a request to reschedule.

23. Respondent received a revised statement from Grievant's physician, dated December 8, 1997. At this time Respondent was advised that Grievant could:

climb steps with handrails and catwalks with handrails and walkways. He can drive an automobile. He can squat to some degree. Duck walking will be very difficult for him. However, crawling, he will be able to initiate at times. At this point he cannot climb ladders and he can definitely negotiate mild terrain for short distances without much difficulty. Although he uses a wheelchair at times, most of the time he is notwheelchair bound. Currently, actually he is ambulating without a wheelchair without difficulty, however on rare occasions when his prosthesis is not working, or there are problems with it, he will require a wheelchair at times, or if necessary, an alternative prosthesis in the interim.

24. Respondent interpreted this statement to mean that Grievant was released to return to work and would be able to perform the essential functions of his job as Engineer I, without the previously requested accommodations.

25. By letter dated December 10, 1997, Respondent directed Grievant to return to work on December 12, 1997. He was advised to keep the office advised of any and all problems so that proper and reasonable accommodation requests could be arranged.

26. Other than a flexible work schedule to attend doctor appointments, Grievant made no requests for accommodation after returning to work, and did not report any problem areas.

27. Grievant's request to work ten hours per day, four days a week, was denied, consistent with office policy. Respondent has developed this policy based upon a need that its employees must be available to respond to the public's needs relating to drinking water, during normal agency business hours. With only one other Engineer in the Wheeling office, it was determined that four day work weeks would compromise the agency's ability to function effectively.

28. Grievant subsequently requested that his schedule be adjusted to allow twenty to thirty

hours per month at doctor's appointments. Respondent adjusted Grievant's schedule to allow the requested time for January and February, 1998. Sick and annual leave accrued by Grievant for the month was supplemented by allowing him to work holidays, and he was permitted to work longer days, commencing as early as 7:30 a.m.and concluding no later than 5:00 p.m., with a thirty minute lunch break.

29. Grievant indicated that Respondent's plan was not acceptable, and made a counter-proposal which Respondent deemed would not allow him sufficient work time to complete the essential duties of his job and would place an unreasonable work burden on the only other Engineer in the office.

30. On January 23, 1998, Grievant verbally advised his supervisor, Clyde Emigh, P.E., in the Philippi District Office, that he was terminating his employment with Respondent to accept a position at the City of Shinnston's water treatment facility.

31. C. Russell Rader, Jr., P.E., acknowledged Grievant's verbal notice of resignation by letter dated January 26, 1998.

32. Sometime in August or early September 1997, Respondent posted a job for an Engineer II in the St. Albans District Office. Grievant notified the appropriate individuals of his interest in the position, and was advised that a formal application was not necessary because he was a current employee, and his original job application and resume were on file. Grievant was not required to appear for an interview but was considered for the position.

33. When evaluating Grievant for the position of Engineer II, Respondent considered that prior to the time he began experiencing medical problems, Grievant had demonstrated considerable difficulty in accurately completing written reports, and observing written agency policies and directives. Grievant had been advised in writing in 1996 and 1997 of the need to complete his reports in a timely manner.

34. The position of Engineer II requires a higher level of competent performance with less supervision than that expected of an Engineer I. 35. Grievant was notified on September 24, 1997, that he would not be offered the position of Engineer II.

36. Grievant did not initiate grievance proceedings until October 22, 1997.

## Argument

Grievant argues that Respondent improperly denied his return to work on September 22, 1997, did not provide him with reasonable accommodation, and denied him a promotion due to his disability. Respondent asserts that the Grievance Board does not have jurisdiction for claims made under the ADA, but may grant relief for acts of discrimination, favoritism, and/or harassment. Respondent then argues that Grievant did not make a prima facie showing of discrimination, because he did not establish that he had been treated differently from any other employee in complying with return to work requirements.

Respondent further asserts that Grievant failed to prove that the delay in returning to work was not based on his actual job responsibilities and/or the specific medical directives given by his attending physician, who did not release him to return to work until December 8, 1997. Respondent acknowledges that it could have allowed Grievant to return to work at less than full duty, but that he has not established an abuse of discretion with respect to the decision not to allow his return to work at less than full duty.

Respondent next asserts that it did not discriminate against Grievant by failing to accommodate his disability, because the employee must be able to perform the essential functions of the job before an employer is required to accommodate a handicapped employee. Upon submission of a physician's release, Grievant was returned to work with the directive that he relay any reasonable accommodation requests. Respondent notesthat the only request was for a flexible work schedule, and that it was granted to the extent it could reasonably do so. Therefore, Respondent asserts that Grievant failed to prove discrimination with respect to his request for accommodations.

Respondent additionally denies that Grievant's physical disability was the basis for denying him the position of Engineer II. Respondent asserts that it hired the most qualified applicant, and that Grievant failed to establish that he was more qualified than the successful applicant, that the decision was otherwise arbitrary and capricious or clearly wrong, or that his physical impairment was a factor in the hiring decision. Respondent next maintains that the grievance was not timely filed. While noting that a grievant may be excused from compliance with the statutory timelines, if prevented by sickness or injury, Respondent asserts that Grievant offered no reason why this exception was applicable to his situation.

To the contrary, Respondent cites Grievant's claim that he was ready, willing and able to return to work on September 22, 1997, and that he was notified of his non-selection on September 24, 1997.

Respondent further notes that Grievant corresponded with his co-workers by telefax and U.S. Mail a total of seventeen times between September 24 and October 22, 1997, but did not file this complaint until well past the ten-day time limit. Finally, Respondent asserts that Grievant's claim that he had hoped to informally resolve the issue does not excuse the failure to file his grievance in a timely manner.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his 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);Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §18-29-6.

The first matter to be addressed is whether Respondent improperly delayed Grievant's return to work. W. Va. Division of Personnel (DOP) Rule15.08(d)(2) provides:

If the leave of absence without pay was granted due to personal illness, the employee must furnish from the attending physician/practitioner a prescribed physician's statement form indicating the ability of the employee to return to work. The appointing authority may permit an employee to return to work at or before the expiration of the leave of absence at less than full duty, but the terms of return are subject to the same conditions specified in section 15.04.(g)(5)[sic] of this rule.

DOP Rule 15.04(h) provides that the appointing authority may permit an employee to return to work from sick leave at less than full duty, but the terms of the return shall be in writing and are subject to review by the Director. This type of request may be denied under a number of conditions, including:

(a)the employee cannot perform the essential duties of his/her job;

(b)the nature of the employee's job is such that it may aggravate the employee's medical condition; or

(c)the approval of the request would seriously impair the conduct of the agency's business.

Respondent's request for a physician's statement releasing Grievant to return to work, including information relating to whether Grievant was able to perform the essential functions of his job was proper, and required by the previously cited DOP rule. Respondent's concern that Grievant be able to

perform his duties is particularly relevant in this case considering the physical nature of many of those duties. It is understandablethat Grievant may have felt that he was ready to return to work on September 22, 1997; however, an employer may reasonably need official documentation to substantiate his capability.

The physician's statement of September 24, 1997, includes a number of limitations which confirms that Grievant was not able to perform the duties of his position at that time. Because of the physical demands involved, Respondent's determination that Grievant was unable to perform the essential duties of his job, and that his return to work at less than full duty would seriously impair the conduct of the agency's business, was reasonable. Mr. Wilford testified at level four that to allow Grievant to return to work solely to perform duties in the office would result in assigning the bulk of the work to the only other Engineer at that location. Mr. Radar confirmed that Respondent did not have a desk job, such as that recommended by Grievant's physician in September 1997, available for him to assume. It was also noted that prior to Grievant suffering from medical problems he had not been completing his reports in a satisfactory manner. In consideration of all the foregoing, Grievant did not prove that Respondent acted improperly when it refused to allow him to return to work in September 1997. Upon submission of documentation which indicated that Grievant could perform the essential functions of an Engineer I, Respondent properly allowed his return to work in December 1997.

The next issue is whether Respondent denied Grievant reasonable accommodation to perform his duties. Although Grievant made a number of suggestions as to how he could complete his work with accommodations prior to his actual return, those need not be considered, because they were apparently made in consideration of his physical limitations at that time. When Grievant was released to work in December 1997, he requested onlythat he be granted a flexible work schedule to accommodate his medical appointments. Mr. Radar's testimony established that he had developed a plan whereby Grievant could work holidays, and then use that time at his discretion to keep his appointments.

A schedule had been developed for January and February 1998, prior to Grievant's resignation, and Mr. Radar stated that he had intended to continue developing personalized schedules for Grievant on an on-going basis. Mr. Rader testified that Grievant had indicated he was not pleased with the schedule, stating that he could not have a vacation. Because Grievant did not request any

other accommodation upon his return to work, he has failed to prove that Respondent denied him any assistance.

The next issue to be addressed is whether Grievant's claim regarding his nonselection for the position of Engineer II was timely filed. W. Va. Code §29-6A-3(a) provides in pertinent part:
A grievance must be filed within the times specified in section four [§29-6A-4] of this article . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

Respondent argues that this exception does not apply to Grievant because he was fully capable of exercising his rights in a timely manner, and had demonstrated that ability by engaging in a number of other communications with Respondent during the time period in question. Respondent notes that while the timelines may seem strict, their existence was included by the Legislature in an effort to balance the respective rights of taxpayers, governmental employees, and public employees.

Certainly, the facts of this case are somewhat unusual in that while Grievant wason leave, it appears he was capable of filing the grievance. Nevertheless, Grievant was given a statutory extension while on personal leave. There are no exceptions or contingencies attached to the mandatory extension, and none may be applied in this matter. Therefore, it must be determined that the portion of this grievance addressing Grievant's non-selection for the position of Engineer II was timely filed.

Addressing the merits of the non-selection claim, it is noted that Grievant did not introduce any evidence that he was more qualified than the successful applicant. Grievant clearly had more seniority than the individual who was a new hire; however, the seniority preference set forth in W. Va. Code §29-6-10(4) applies only when the applicants' qualifications are substantially equal or similar. Sheppard and Gregory v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-186/187 (Dec. 29, 1997).

Respondent notes that prior to Grievant's medical disability, his failure to work at a satisfactory level had been brought to his attention through memoranda and annual evaluations. (See footnote 2) Respondent concluded that Grievant was not the best candidate for a position that required an employee who could perform at a higher level of work, and with less supervision, than an Engineer I. Based upon the foregoing, Grievant has failed to prove that his physical impairment was a factor in

Respondent's hiring decision.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his 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); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code §18-29-6.

2. Grievant failed to prove that his return to work from a medical leave of absence was improperly delayed by Respondent's request for a physician's statement verifying that he could perform the core duties of his position.

3. Grievant failed to prove that Respondent denied any request for reasonable accommodation made after his return to work in December 1997.

4. W. Va. Code §29-6A-4(a) provides that a level one grievance be filed within “ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance . . . .”

5. W. Va. Code §29-6A-3(a) provides that the time limits specified in Code §29- 6A-4 “shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.”

6. Because Grievant was on personal leave during the period of time following notification that he did not receive the position of Engineer II, the time limits were extended, and the grievance must be determined timely filed.

7. Grievant failed to prove that his non-selection for the position of Engineer IIwas based upon his physical impairment.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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: August 28, 1998 _____

Sue Keller

Senior Administrative Law Judge

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*Footnote: 1*

*Grievant appeared pro se, Respondent was represented by Sarah L. Brack, Esq., Assistant Attorney General.*

*Grievant elected not to file any post-hearing statements or proposals.*

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*Footnote: 2*

*Grievant's 1996 evaluation includes the following remark by his supervisor: "[t]ypically fails to complete written reports in required time period. Untimely (late) completion of reports results in reduction of job effectiveness. Fails to regularly observe written policies/directives."*