KATHERINE J. LEISERING,

Grievant

v. Docket No. 97-BOD-074

BOARD OF DIRECTORS/WEST VIRGINIA

NORTHERN COMMUNITY COLLEGE,

Respondent

D E C I S I O N

Grievant, Katherine J. Leisering, PhD., employed by the Board of Directors as a professor of speech at West Virginia Northern Community College (Respondent), filed a level one grievance on October 2, 1996, in which she complained that Respondent's President, Dr. Linda Dunn, refused to provide her compensation for the entire Spring 1996 semester while she was absent for medical reasons. Following denials at levels one and two, Grievant waived consideration at level three in accordance with W. Va. Code §18-29-4(c), and advanced her appeal to level four on February 13, 1997. The parties agreed to submit the matter for decision based upon the lower-level record, supplemented with proposed findings of fact and conclusions of law submitted by Grievant on May 28, 1997. (See footnote 1)

The following Findings of Fact have been derived from the evidence of record and are undisputed by the parties.

Findings of Fact

1. Grievant, a tenured professor of speech, has been employed at West Virginia Northern Community College since August 1985, and holds a nine month contract.

2. In January 1996, Grievant became ill early in the semester and was unable to performher duties through the remainder of that contract period.

3. Grievant requested a medical leave of absence, and submitted a letter dated January 29, 1996, from her physician which stated that he concurred with her assessment and her request for an indefinite leave of absence. The letter did not contain Grievant's diagnosis or

prognosis.

4. President Dunn responded by letter dated February 26, 1996, stating in pertinent part "I am willing to grant a medical leave of absence without pay effective March 1, 1996. In order to authorize this status, the following information is required from your physician: diagnosis, prognosis and projected date of return."

5. In March 1996, Grievant provided President Dunn a second letter from her physician dated February 29, 1996, which stated a return to work date of June 1, 1996. Grievant continued to decline to provide a diagnosis and/or prognosis.

6. Pursuant to Board of Trustees Policy, 131 C.S.R. 35, §2.1.3 "[e]mployees working less than 1,040 hours are not eligible for leave benefits."

7. Board of Trustees Policy, 131 C.S.R. 35, §6.1 provides that "[a]ny employee requesting a medical leave of absence without pay must provide the institutional president . . . with satisfactory medical evidence (such as a statement from the attending physician) that he/she is unable to work. The medical statement shall include a diagnosis, prognosis, and expected date that the employee can return to work. If the evidence is satisfactory, the president or his/her designee may authorize a medical leave of absence without pay only for the period of disability specified by the attending physician."

8. Respondent has established a past practice of awarding nine month employees paid medical leave. Elizabeth Gast testified that during a serious illness she had originally been granteda full year leave of absence under the prior administration; however, after Dr. Dunn assumed the Presidency, the leave was reduced to one semester.

9. President Dunn produced an undated, written statement of policy, "Presidential Practice Regarding Faculty Absence (1994 --)" regarding medical leave for faculty members. This policy, clarified November 18, 1996, provides for up to 16 weeks paid medical leave contingent upon the employee providing a medically verified diagnosis, prognosis and expected date of return to work.

Grievant argues that she was deprived of due process when President Dunn failed to timely furnish her with a clear statement of the policy specifying the prerequisites and conditions regarding a paid medical leave of absence. By failing to provide her with the requirements for a paid medical leave of absence, Grievant claims that Respondent has

deprived her of approximately $13,750.00 in salary, plus retirement benefits. Respondent argues that Grievant has been provided the opportunity to submit the required information, but has never done so.

The record does not contain a written request from Grievant to President Dunn regarding a medical leave of absence with pay, and it is not clear why President Dunn determined it was to be without pay, as indicated in her letter of February 26, 1996. Clearly, President Dunn was on notice that Grievant was asking for leave with pay when she inquired as to why it was being denied in her letter of March 27, 1996. President Dunn's letter to Grievant, dated April 25, 1996, is confusing in that it states that the leave was granted in compliance with Board Policy 35, yet she had previously granted at least one paid leave and her written policy provides for such leaves. Although Grievant failed to comply with Policy 35 and President Dunn's policy, by refusing to provide a diagnosis and prognosis, based upon a concern for privacy, to deny her a paid leave of absence after informing herof the requirements and her compliance with policy, would amount to discrimination as defined by W. Va. Code §18-29-2(m).

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

Conclusions of Law

___1. In order to prevail in nondisciplinary matters, the grievant has the burden of proving each element of her claim 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); See W. Va. Code §18-29-6.

2. Grievant has proven that another, similarly-situated employee, i.e., a nine month faculty member, has been provided paid medical leave of absence, while she was not.

3. Discrimination is defined under the grievance procedure as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code §18-29-2(m).

4. Failure to grant Grievant a paid leave of absence, upon her submission of the documentation required by policy, would constitute discrimination, in that no other reason has been given to support the denial of such leave.

Accordingly, the grievance is GRANTED to the extent that if Grievant submits a physician's statement including the diagnosis and prognosis of her illness, within thirty (30) days of the date of this decision, a medical leave of absence will be granted from March 1 to May 20, 1996. This would entitle Grievant to all backpay, corresponding pension, and interest.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County and such appeal must be filed within thirty (30) days of receipt of thisdecision. 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: October 8, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***This matter was transferred to the undersigned for administrative reasons on August 15, 1997.***