**PAUL WINGFIELD,**

**Grievant,**

**v.** **Docket No. 99-CORR-265**

**WEST VIRGINIA DIVISION OF CORRECTIONS,**
**HUTTONSVILLE CORRECTIONAL CENTER,**

**Respondent.**

## D E C I S I O N

On May 14, 1999, Paul Wingfield (Grievant), initiated this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondent West Virginia Division of Corrections, Huttonsville Correctional Center (DOC), had improperly refused to honor his request for a shift change. The grievance was denied at Levels I and II, and Grievant appealed to Level III on June 2, 1999. A Level III evidentiary hearing was conducted on June 8, 1999, and a decision denying the grievance was issued by DOC Commissioner Paul Kirby on June 11, 1999. Grievant appealed to Level IV on June 17, 1999. Following a continuance which was granted to Grievant for good cause shown, a Level IV hearing (See footnote 1) was held in this Grievance Board's office in Elkins, West Virginia, on September 16, 1999. The parties waived closing arguments, and this matter became mature for decision upon receipt of the Level III hearing transcript on November 5, 1999.

Based upon a preponderance of the credible evidence contained in the record established at Levels III and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

## FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Division of Corrections (DOC) as a Correctional Officer (CO) assigned to the Huttonsville Correctional Center (HCC).

2. Since 1990, HCC CO's have been permitted to apply for transfer to any posted vacancy on

any shift. The decision on whether to grant a shift assignment transfer request is within the discretion of the Chief Correctional Officer and the Shift Commander of the shift on which the vacancy occurs. R Ex 1 at L IV.

3. In order to assure effective performance of its mission of providing a safe secure, and humane correctional system for the public, staff and offenders, HCC attempts to maintain a balance of senior CO's on each shift. HCC has hired 40 new officers in the last two and one-half years. L III HT at 5.

4. On April 1, 1999, Warden W.S. Haines notified HCC employees that requests to transfer to another shift needed to be submitted not later than April 15, 1999. R Ex 2 at L IV.

5. Grievant submitted a timely request for reassignment to the day shift. Grievant has been assigned to the night shift at HCC for over four years. 6. Grievant was not selected for reassignment to the day shift. Grievant was 1 of 22 applicants for the day shift. Only 10 applicants were selected. L III HT at 5.

7. Less senior CO's were selected for assignment to the day shift.

8. On May 6, 1998, Grievant's physician wrote to Warden Haines advising that Grievant suffers from asthma, and should work in a smoke-free environment, if one is available. Warden Haines told Grievant he would consider his request, but did not promise a reassignment.

9. Except for one lounge or “day room” on each unit, smoking is prohibited in the dormitory areas where Grievant works during the night shift. However, the rules against smoking are not strictly and uniformly enforced.

10. Because CO's rotate from one assignment to another on each shift, it was not established that Grievant could be placed in a smoke-free environment, or would experience significantly less exposure to second-hand smoke, by being reassigned to the day shift.

**DISCUSSION**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6. Grievant contends that his request for reassignment to the day shift should have been granted. However, Grievant has not explained what particular statute, policy, rule,regulation, or written agreement was violated when DOC failed to honor

his request for reassignment.

This Grievance Board has previously determined that, with regard to assignments to work units and work shifts, DOC officials have “very broad discretion” in transferring employees, absent some improper motivation. Shannon v. W. Va. Div. of Corrections, Docket No. 97-CORR-466 (Apr. 29, 1998). See Stoneking v. W. Va. Div. of Corrections, Docket No. 93-CORR-530 (Nov. 30, 1994); Titus v. W. Va. Div. of Corrections, Docket No. 93-CORR-528 (Nov. 22, 1994); Crow v. W. Va. Div. of Corrections, Docket No. 89-CORR- 116 (June 30, 1989). See also Forth v. W. Va. Dep't of Transp., Docket No. 98-DOH-433 (July 22, 1999); Jarrett v. Dep't of Admin., Docket No. 98-ADMN-165 (Jan. 29, 1999).

Grievant initially contended he should have been granted reassignment to the day shift based upon either his overall seniority or the amount of time he has served on the night shift at HCC. Although the day shift may be the preferred assignment for the majority of CO's, it was not established that HCC is required to consider seniority in deciding which employees will be reassigned to a particular requested shift. HCC explained that it was desirable to maintain a balance of experience on each shift, rather than having the experience level dictated by the shift preferences of the employees with the most seniority.

Grievant did not demonstrate that this was not a reasonable consideration, or that HCC usually made shift assignments on the basis of seniority, declining only to honor his seniority in this one instance. In these circumstances, Grievant has not established a valid basis for obtaining the relief he seeks: reassignment to the day shift, or implementation of a policy directing that shift assignments be determined on the basis of seniority. Grievant also introduced evidence that he suffers from asthma, and he is currently exposed to second-hand smoke on the night shift which aggravates this medical condition. (See footnote 2) However, there was no persuasive evidence that reassignment to the day shift would necessarily place Grievant in a smoke-free environment. Indeed, proper and consistent enforcement of the standing policy on smoking in the inmate dormitories could result in a greater diminution of Grievant's exposure to second-hand smoke than assignment to a different shift. Accordingly, beyond encouraging HCC to consistently enforce its existing rules intended to protect employees from exposure to second-hand smoke, there is no legal basis for awarding any relief to Grievant on this basis. See Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this

matter.

## CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving 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. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Division of Corrections officials have broad discretion in transferring employees among work units and work shifts, absent some improper motivation for suchactions. Shannon v. W. Va. Div. of Corrections, Docket No. 97-CORR-466 (Apr. 29, 1998).

3. Grievant did not establish that Respondent violated any law, policy, rule, or regulation applicable to his employment by failing to approve his request for reassignment from the night shift to the day shift.

Accordingly, this 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

**LEWIS G. BREWER**

**ADMINISTRATIVE LAW JUDGE**

**Dated: November 8, 1999**

---

*Footnote: 1*

*Grievant was represented by his union steward, John Jeffers. Respondent was represented by Assistant Attorney General Leslie Kiser Tyree.*

---

*Footnote: 2*

*Grievant did not claim, or establish, that he suffers from a disability and is entitled to a reasonable accommodation under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12112-14 (1994).*