JAMES R. DAVIDSON,

Grievant,

v. **DOCKET NO. 02-CORR-340**

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

In a grievance filed September 5, 2002, Corporal James Davidson stated that he had improperly been denied a transfer to the Northern Regional Jail and Correctional Facility. As relief, he seeks to be transferred to that facility.

His grievance was denied at all lower levels, and a level four hearing was held in the Grievance Board's Charleston office on December 2, 2002. Grievant appeared *pro se*, and Respondent was represented by Heather A. Connolly, Esq., Assistant Attorney General. The matter became mature for decision at the close of the hearing.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant is employed as a corporal at Mount Olive Correctional Complex (Mount Olive).

2. Grievant has on three occasions requested a transfer to the Northern Regional Jail and Correctional Facility (Northern). 3. Upon his first request, Northern offered him a position as a Correctional Officer II, which is a lower pay grade than his current position. Grievant declined the offer.

4. Grievant applied for a posted opening for a Correctional Officer III at Northern in December, 2001, and was sent a notice that interviews would be held on December 18, 2001. Grievant did not appear for the interview and did not contact Northern regarding his absence.

5. Grievant again applied for a position at Northern in June 2002, and was one of several

applicants interviewed by Captain Barry Milbert and Major Rick Lohr. Messrs. Milbert and Lohr did not recommend Grievant be hired, and another applicant was chosen for the position.

DISCUSSION

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id.

Unfortunately, Grievant presented no evidence at all. He offered no material testimony at either level three or level four, called no witnesses, and submitted no exhibits. At level three, his entire testimony was:

> My evidence is I still don't understand why they're denying me. They offered it to me in the first place if I take a reduction in pay and reduction in rank. Just because I wanted to stay Corporal and move up there and get a job up there, I still don't understand why they're denying me. It took me 20-some years just to make corporal.

Level three transcript, p. 8. On cross-examination, he stated that he knew that Northern had no obligation to transfer him just because he wanted them too, but stated he did not understand why it would offer him a position once, but decline to transfer him on subsequent occasions.

Since Grievant presented no evidence and no legal authority to support his claim that he should be transferred from Mount Olive to Northern, he clearly has not met his burden of proof.

Nevertheless, it appears that there may be some benefit to answering Grievant's question as to why he would be offered one position at Northern, but not chosen for subsequent positions. The answer is simply that he turned down the first position he was offered, and he did not meet Northern's needs for the subsequent openings it had. The first position was for a Correctional Officer II, which is different from the subsequent Correctional Officer III openings. He was obviously treated differently on those occasions because the positions and needs of the facility were different. It appeared likely that as soon as Northern's needs match Grievant's abilities, he will be offered a position there, but Grievant's employer is Mount Olive and the decision is not under Mount Olive's control. The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See* Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996); Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. Id.

2. Section 11.6(a) of the Division of Personnel Administrative Rule controls transfers, and it states in part, “the facility does not have to accept the transfer if the person in question I snot wanted and if the facility prefers to do in-house promotions. The decision is at the discretion of the warden.” Therefore, Grievant had no right to be transfer only because he wanted to transfer. The decision is at the discretion of Northern's warden.

3. Grievant presented no evidence to support his claims, therefore he did not sustain his burden of proof.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: December 6, 2002 _____

M. Paul Marteney

Administrative Law Judge