**LESTER J. ROBBINS,**

**Grievant,**

**v.** **Docket No. 02-CORR-166**

**DIVISION OF CORRECTIONS/**
**HUTTONSVILLE CORRECTIONAL**
**CENTER,**

## DECISION

Lester J. Robbins ("Grievant"), employed at Huttonsville Correctional Center ("HCC") as a correctional counselor, initiated this proceeding on May 14, 2002, claiming his current assignment is exposing him to secondhand smoke. He seeks transfer to a different unit. After a denial at level one, Grievant appealed to Warden William Haines at level two. Warden Haines sought information from Grievant regarding accommodations which could be made and medical information from Grievant's physician, along with offering Grievant reassignment to another position, away from smoking areas. After Grievant refused the reassignments and failed to provide requested medical information, the grievance was denied at level two on May 21, 2002. A level three hearing was held on June 4, 2002, and the grievance was denied in a written decision dated June 5, 2002. Grievant appealed to level four on June 11, 2002. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on September 6, 2002. Grievant was represented by counsel, Gregory R. Tingler, and Respondent was represented by Assistant Attorney General Heather A. Connolly. This matter became mature for consideration upon receipt of the parties' final fact/law proposals on November 25, 2002. The following findings of fact are made based upon a preponderance of the evidence of record.

## Findings of Fact

1. Grievant has been employed by HCC as a correctional counselor for approximately 2½ years.
2. Prior to his employment at HCC, Grievant underwent heart bypass surgery.

3. When initially employed as a correctional counselor, Grievant was assigned to Unit G. He had no complaints about the air quality while assigned to that unit.

4. While working on Unit G, Grievant was verbally counseled for failure to timely submit paperwork required as part of his job duties. He also had conflicts with his supervisors regarding scheduling.

5. In early May, 2002, Grievant was notified that he was being transferred to Unit D. Another correctional counselor, Michael Jackson, was being transferred to Unit G, pursuant to a physician's slip stating that his asthma was being aggravated by second hand smoke on Unit D.

6. Approximately one week prior to beginning his assignment on Unit D, on May 8, 2002, Grievant inquired of the unit manager where his office would be located. Upon being informed that his office would be located in the dorm, he informed the supervisor that he was going to obtain a doctor's slip stating he could not be exposed to second hand smoke.

7. Grievant provided his superiors with the following physician's statement, dated May 14, 2002:

> Mr. Robbins is a patient that has coronary artery disease status post bypass surgery. Cigarette smoke, whether first hand or second hand is detrimental to his health and should be avoided. Any indoor environment with cigarette smoke should be avoided by Mr. Robbins.

8. Each unit at HCC has two “day rooms”, a large one and a small one, where inmates can watch television, smoke cigarettes, and socialize. The small day room is located within the large day room, and is separated by a door. The counselor's office is next to the large day room on all units.

9. Smoking has not been prohibited for inmates, because DOC officials believe that doing so could create security issues.

10. In response to this grievance, Warden Haines ordered that smoking be confined to the small day rooms, and industrial fans have been installed in the small day rooms to draw the smoke outdoors.

11. After he was transferred to Unit G because of his asthma, Mr. Jackson discovered that the smoke conditions on Units G and D are basically the same.

12. After filing this grievance, Grievant was offered the option to work in a smoke- free environment at the front gate or at the switchboard, both of which would have required training for the

new position. Grievant refused these positions.

13. On four occasions in May and June of 2002, Grievant visited medical services at HCC, complaining of shortness of breath and/or chest pains. Each time, his symptoms were relieved by taking nitroglycerin tablets. Although nursing staff at HCC recommended that he follow up with his physician after these incidents, Grievant did not do so. 14. Although requested by Warden Haines after filing this grievance, Grievant has provided no further medical information regarding his heart condition or related limitations.

## 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 § 4.21 (2000); 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 he should be transferred back to Unit G, because he has established that the conditions on Unit D have aggravated his medical condition. The undersigned disagrees. Although Grievant may very well have a legitimate complaint that he is exposed to some second hand smoke at his job, he has not established the extent to which it has affected his medical condition, even after being asked to do so by Warden Haines. In addition, all other witnesses who testified in this proceeding stated that the smoking conditions are no different on any of the units, due to the location of the counselor's office next to the day rooms and the installation of exhaust fans. If Grievant's concern is truly smoke exposure, it is inexplicable why he is seeking to be transferred back to Unit G, where conditions are the same as on Unit D.

The Division of Corrections has broad discretion in transferring employees among work units and shifts, absent some improper motivation for such actions. Wingfield v. W. Va. Div. of Corrections, Docket No. 99-CORR-265 (Nov. 8, 1999); Shannon v. W. Va. Div. of Corrections, Docket No. 98-CORR-042 (Apr. 29, 1998). Legitimate concerns regarding Grievant's job performance and difficulty with his supervisors on Unit G were reasonablemotivations for his transfer. Moreover, the evidence does not establish that his transfer back to Unit G would alleviate his exposure to second hand smoke. It has been previously determined by this Grievance Board that employees of correctional institutions are not entitled to a smoke-free environment. Shannon, supra.

Finally, Grievant contends that Respondent has violated DOC's “Equal Employment Opportunity Policy Statement” regarding disabled employees. In part, the policy states that “[r]easonable accommodations, such as special equipment, job restructure or other accommodations will be made for employees . . . provided the accommodation does not impose an undue hardship on the Division.” Unquestionably, HCC has taken all action which could be expected to accommodate Grievant's condition. Although Grievant failed to provide the detailed medical information requested to assist HCC officials in deciding how to accommodate him, it is clear that every possible option was covered. To work in a totally smoke free environment, Grievant could have accepted a transfer and training for a different position. He has refused that option, although he has known since assuming his duties as a correctional counselor that he would have contact with inmates and smoke. In addition, Respondent has established that the designation of smoking areas only in the small day rooms, along with the installation of industrial fans designed specifically to cleanse the air, has equalized and reduced the smoke conditions on all units. Accordingly, all possible accommodations have been made, and Grievant has failed to prove that a transfer back to Unit G would change his working conditions with regard to second hand smoke.

Under the circumstances presented, Grievant has failed to prove entitlement to the relief requested. The following conclusions of law support the decision reached.

## Conclusions of Law

1. 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 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. The Division of Corrections has broad discretion in transferring employees among work units and shifts, absent some improper motivation for such actions. Wingfield v. W. Va. Div. of Corrections, Docket No. 99-CORR-265 (Nov. 8, 1999); Shannon v. W. Va. Div. of Corrections, Docket No. 98-CORR-042 (Apr. 29, 1998).

3. Employees of correctional institutions are not entitled to a smoke-free environment. Shannon, supra.

4. Grievant has failed to prove by a preponderance of the evidence that he is entitled to a

transfer to Unit G at Huttonsville Correctional Center, or that such a transfer would improve his medical condition.

5. Respondent has made and offered reasonable accommodations to Grievant with regard to exposure to second hand smoke at the facility, which have been refused by Grievant.

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, and 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.

**Date: December 9, 2002** _____

**DENISE M. SPATAFORE**

**Administrative Law Judge**