KENNETH MORRIS,

Grievant,

v v.

DOCKET NO. 02-ADMN-151

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/GENERAL SERVICES DIVISION,

Respondent.

D E C I S I O N

Grievant, Kenneth Morris, filed this grievance against his employer, the West Virginia Department of Administration/General Services Division ("GSD") on April 3, 2002, protesting a written reprimand issued by his supervisor, Jim Bumpus, on March 22, 2002. The grievance was denied at levels one and two, and proceeded to level three, where a hearing was held on May 10, 2002. The grievance was denied by Grievance Evaluator William J. Charnock on May 20, 2002, and Grievant appealed to level four on May 28, 2002. The level four hearing was held on July 23, 2002, and the grievance became mature for decision at the close of the hearing. Grievant represented himself, and GSD was represented by Amy Haynie, Esq.

SUMMARY OF EVIDENCE

LIII Administration Exhibits

Ex.1 -

March 22, 2002 letter from Jim Bumpus to Kenneth Morris.

LIII Grievant's Exhibits

Ex. 1 -

March 21, 2002 statement of Kenneth Morris, written by James Bumpus.

Ex. 2 -

Custodian Classification Specification.

LIV Grievant's Exhibits

Ex. 1 -

Picture of third-floor women's restroom.

Ex. 2 -

General Services Division Housekeeping Checklist, with handwritten notes.

Ex. 3 -

General Services Division Custodial Survey Form.

Testimony

GSD presented the testimony of Violet Burns, James Bumpus, and Randy Bentley. Grievant testified in his own behalf, and presented the testimony of Violet Burns, James Bumpus, Tim Lee, Keith Curnutte, Mike Bailey, and Don Jerrell.

FINDINGS OF FACT

1. Grievant is employed by GSD as a custodian, and has supervisory duties over other custodians, including Violet Burns.
2. Grievant and Ms. Burns both work the evening shift, 4 p.m. - midnight.
3. On March 15, 2002, Jim Burgess, Deputy Director, and James Bumpus, Administrative

Services Manager, met with Grievant at the beginning of his shift, to discuss a complaint they had received from Violet Burns. Ms. Burns had told them Grievant had spoken to her in a raised voice about her work performance, and had made a sarcastic comment about her physical limitations, and that she felt he was treating her in a “hostile” manner. 4. That same day, Ms. Burns accompanied a co-worker, Randy Bentley, to Building 6 to talk to Tim Lee about a grievance Mr. Bentley had filed.

5. Ms. Burns returned to her work site between 5:00 and 5:30 p.m., and proceeded directly to the third floor, where she was assigned, but before commencing her duties, she went in to use the third-floor women's restroom.

6. Keith Curnutte was buffing the third floor in the West Wing of the Capitol Building when Grievant came up and asked if he had seen Ms. Burns. He told Grievant she was either in the restroom or “back there vacuuming.” Mr. Curnutte turned around once while buffing and saw Grievant standing at the women's restroom with the door ajar a few inches. Mr. Curnutte did not hear Grievant knock or announce himself, but he had the buffer running at the time.

7. While in the restroom, Ms. Burns heard the restroom door open, and when she came out of her stall, and rounded the corner, she saw Grievant standing in the doorway of the restroom. He asked her if she had filed a grievance, and then he left.

8. Ms. Burns did not hear Grievant announce himself, or knock on the door.

9. Mr. Bumpus conducted a brief investigation of the incident, and spoke to Grievant, who told him he had knocked three times, and announced himself, and when no one responded, he opened the door to the restroom.

10. There is no written procedure which the custodians rely upon when entering restrooms. However, it is the practice of all custodians to knock on the restroom door, announce themselves, and if there is no response, then enter the restroom. The restroom doors are propped open while the custodian is working in the restroom. 11. Mr. Bumpus consulted with Division of Personnel staff, and wrote Grievant a letter of reprimand on March 22, 2002, for entering the women's restroom unannounced while Ms. Burns was in there to ask her about a grievance.

12. Although Grievant has a practice of inspecting the restrooms periodically during his shift to check on the progress of the custodians, his purpose in entering the third-floor women's restroom on March 15, 2002, was to question Ms. Burns about a grievance.

13. Grievant knocked on the restroom door and announced himself before opening the door to the women's third-floor restroom.

DISCUSSION

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer to prove the charges against the employee by a preponderance of the evidence. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997).

GSD maintains that a letter of reprimand was necessary in order to get Grievant's attention, especially since Ms. Burns had complained about his recent “hostile” treatment of her. Mr. Bumpus concluded, based on his brief investigation, that Ms. Burns' version of events was more credible than Grievant's, thus warranting the disciplinary action.

Grievant denies he entered the women's restroom without knocking or announcing himself first, but admits he did ask Ms. Burns about a grievance when he saw her. Grievant's testimony conflicts with the testimony of Ms. Burns, requiring a determination as to which testimony is truthful. In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id., Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dept. of Health and Human Services, Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Ms. Burns reported the restroom incident to Mr. Bumpus. Mr. Bumpus heard her version of the story, and sent her to the EEO officer to make a statement. Mr. Bumpus then talked to Grievant, and wrote a statement based on his conversation with Grievant. Mr. Bumpus concluded Grievant was evasive and nervous, and determined that Grievant had not knocked or announced himself before

entering the restroom. Apparently, Mr. Bumpus did not have the benefit of Mr. Curnutte's testimony at the time he made his decision, nor did Mr. Curnutte testify at level three. (See footnote 1) Mr. Curnutte testified that he was present on the third-floor West Wing outside the women's restroom when Grievant came up and asked him if knew where Ms. Burns was. Mr. Curnutte indicated she was either in the restroom or “back there vacuuming.” Mr. Curnutte was running the buffer at the time, which is very loud. Mr. Curnutte testified he glanced over his shoulder for an instant, and saw Grievant at the doorway of the women's restroom with the door ajar a few inches. He turned back around, and then later saw Grievant and Ms. Burns leaving the hallway. Mr. Curnutte testified he did not hear Grievant knock or announce himself, but he was running the buffer and would not have heard him.

Ms. Burns testified she did not hear Grievant knock, announce himself, or hear the buffer, while she was in the restroom. She was just coming out of her stall and around the corner, straightening her shirt, when she saw Grievant in the doorway, which startled her.

Grievant testified he did knock and announce himself, and when he got no response, opened the door to the restroom. Grievant presented witnesses who testified it is the usual practice of custodians to knock and announce themselves before entering restrooms, and that Grievant had instructed all of them on the importance of this procedure. LIV Test., Bailey, Jerrell.

I find that it is more likely than not that Grievant did knock and announce himself before entering the restroom. However, Grievant's testimony as to the reason he proceeded into the restroom after knocking changed during these proceedings. Initially, Grievant admitted he went into the restroom looking for Ms. Burns to ask her whether she filed a grievance. Later, Grievant stated it was his practice to periodically inspect the restrooms during his shift to check on the custodians' progress. Clearly, had Grievant merely been checking on the cleanliness of the restroom, there would be no basis for acharge of misconduct. However, the undersigned finds it more likely than not based on Grievant's own testimony as well as that of Mr. Curnutte's, that Grievant was seeking out Ms. Burns to ask her about a grievance. There is no reason he could not have waited until Ms. Burns exited the restroom to ask a question about a grievance.

CONCLUSIONS OF LAW

1. In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer to prove the charges against the employee by a preponderance of the evidence. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997).

2. GSD has proven by a preponderance of the evidence that Grievant more likely than not entered the third-floor women's restroom on March 15, 2002, with the intent of questioning Ms. Burns about a grievance, and while the undersigned finds Grievant did knock and announce himself, he did not enter the restroom in the usual course of business, but merely to question Ms. Burns. As such, Grievant had no business going into the restroom, and his conduct warranted a letter of reprimand.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 5, 2002

Footnote: 1

The parties stipulated that Grievant is a very nervous man, and therefore, the fact that he may have appeared nervous to Mr. Bumpus would not have been unusual.