DERRICK HOMESLEY,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BOARD OF EDUCATION FOR PRINCE GEORGE'S COUNTY,	OF EDUCATION
Appellee.	Opinion No. 14-56

OPINION

INTRODUCTION

Derrick Homesley (Appellant) appeals the decision of the Prince George's County Board of Education (local board) terminating him from his position as acting director of transportation. The local board submitted a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded to the motion and the local board replied.

FACTUAL BACKGROUND

Appellant began working for Prince George's County Public Schools (PGCPS) on February 8, 1998. At the time of his termination on May 9, 2011, he was the acting director of transportation, a position he had held for approximately four months. In that role, he was responsible for bus transportation, the operation of all school system vehicles, and a budget of roughly $105 million. (T3. 89-92).[1] His termination concerns a series of inappropriate emails that were sent from his personal email account to other PGCPS employees.

On March 24, 2011, Employee 1, a resident principal at a PGCPS school, began receiving unsolicited emails at her work email from a "David Jasmin" at the email address manwithpower68@yahoo.com. The first message arrived at 5:04 p.m. and read as follows: "Your very sexy, I would love your personal email to share something that should not be on your work email. Hope you like chocolate. Kisses!"[2] This email was followed by a second email from David Jasmin at 6:08 p.m. with the subject line "Open slowly and alone – chocolate for you!" The email contained a pornographic image of a couple engaging in sexual intercourse. A second email arrived at 6:14 p.m. containing the same image and a similar subject line. (T1. 108-110, 115-117; Supt. Ex. 2-4). Employee 1 reported the emails to the PGCPS IT department for further investigation.

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[1] The transcripts will be referred to as follows: T1 (March 27, 2012); T2 (June 21, 2012); T3 (August 7, 2012); T4 (January 8, 2013); T5 (January 9, 2013).

[2] The emails contain numerous misspellings and grammatical errors.

On March 28, 2011 at 11:12 a.m., Employee 1 received another email from David Jasmin. The subject line was "Open Alone!" and the message inside read "I just want to know if you like what you see?" With the email message was a picture of a man's penis. David Jasmin later sent another message which read "You didn't like your chaocolate stallion picture boo? Good Morning." Later that evening, Employee 1 replied to the email by asking "Who is this and how did you get my email address?" She received a response at 5:53 p.m. which read "Send me your personal email address and I will tell you don't want to bother you at work sorry." Employee 1 received another email from David Jasmin at 8:41 p.m. that read "You going to send me your personal email." (T1. 129, 136; Supt. Ex. 6-9).

After receiving this email, Employee 1 decided to perform a Google search of the email address manwithpower68@yahoo.com. That search led her to a motorcycle webpage that contained a reference to a person who identified himself as a "transportation manager." She realized that she had been at an event with the Appellant, the acting director of transportation for PGCPS, on March 24, 2011, the same day that she received her first email from David Jasmin. The event was a panel presentation on support services for new principals and included representatives from school security, food and nutrition, transportation, and maintenance. Employee 1 was among roughly half a dozen principals who attended the event. Although Employee 1 was not personally introduced to Appellant, she did stand up and introduce herself to the panel and wore a nametag during the event. Based on her Internet searches, Employee 1 also learned that Appellant was born in 1968, which she connected to the "68" in the manwithpower email address used by David Jasmin. (T1. 101, 146-49).

Employee 1 received another email from David Jasmin on March 31, 2011 at 2:42 p.m. The message read: "Hi, just stopped in to say hello, hope your day is well." At 4:52 p.m. she received another email that read "So you not talking to me no more." A final email arrived at 11:12 pm. with the subject line "Open alone and carefully/Your eyes only!" Included in the body of the email was an image of a penis and a man's hand. (Supt. Ex. 13).

In response to Employee 1's complaints, Laurie Tranmer, the email service manager for PGCPS, began an investigation. (T2. 30). As part of the investigation, Appellant's laptop computer and two Blackberry work phones were confiscated.[3] Investigators discovered that one of his Blackberry phones was automatically signed in to the David Jasmin Yahoo account and another had accessed the Yahoo account previously, but was not automatically signed in. At some point, his computer browser had been set so as not to record the history of web sites he visited. (T2. 38-42, 45). Appellant acknowledged that the David Jasmin account belonged to him, but denied having sent the emails to Employee 1. (T3. 155). He explained that David Jasmin is a "pseudo name that I had attached to my email address after my daughter's mom, who lived with me . . . compromised my e-mail one time, sneaking around to see if I was doing anything she wouldn't approve of." (T4. 59).

PGCPS has an email archiving program that saves copies of all emails sent to or from employees. Ms. Tranmer worked with IT staff to pull records of Appellant's use of the PGCPS computer network and to catalog instances in which employees received emails from, or sent emails to, the David Jasmin email address. (T2. 30-31, 51-52). The investigation revealed that

[3] According to the record, Appellant did not have a desktop computer, only the assigned laptop. (T3. 55).

the David Jasmin account sent emails to several other employees in addition to Employee 1. The details are as follows:

> - Employee 2 received two emails at her work email. The first arrived at 9:12 p.m. on October 11, 2010 and read: "I would like to see some pics of that juicy. Might send. You something interesting." The next day, at 9:06 a.m., the David Jasmin account sent a message reading "Did you get my email!" Employee 2 did not recall receiving the emails and said she likely deleted them without reading the contents because they were not sent by someone she knew.
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> - Employee 3 received five emails over a two-day period from the David Jasmin account. The first was received at 9:55 a.m. on March 28, 2011. It read "You know your secy right! LOL!" She replied "Thank you. Have we met?" At 11:45 a.m., the David Jasmin account responded by writing "Briefly, but I will not disclose that just yet LOL! Hope you like chocolate LOL!" At 12:06 p.m., David Jasmin wrote "Cat got your tongue, you like chocolate!" She responded "Yes." At 12:40 p.m., he wrote back "Yes to cat got your tongue or you like chocolate. If you have a personal email, I can send you some chocolate, might make you melt though LOL! You cool with me LOL!" After not receiving a response, David Jasmin sent a final email on March 29 at 4:19 p.m. that read "So you don't want your chocolate treat."
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> - Employee 4 received two emails from David Jasmin, both sent on March 28, 2011. The first email was sent at 12:50 p.m. and read "Just wanted to stop by and say that all dure respect you have such a sexy booty! Enjoy!" A second email followed at 3:35 p.m. that read "I know you got my email sexy. Send me your personal email and I will send you something back. Its all good trust me." She did not respond to either email and deleted the messages, believing that they were spam.

(Supt. Ex. 22, Attachments A16-28).

The investigation revealed that Employee 5, a PGCPS employee in Appellant's department, forwarded an inappropriate email to Appellant's work account on September 23, 2010. That email, with the subject line "FW: xxx Nice Assets XXX eye candy" contained 22 pictures of models in underwear or bikinis, many posing in a suggestive manner. (Supt. Ex. 22, Attachment A29-30, 32). Appellant forwarded the email to his David Jasmin account that same day. Appellant explained that he immediately realized the email was inappropriate and forwarded it to his personal account without opening it. He claimed he chastised Employee 5 and asked him not to send similar emails in the future. (T3. 152-53). In addition to the September 23 email, there were other instances in which Appellant sent emails to his David Jasmin Yahoo account and forwarded emails from his Yahoo account to his work email, but there was no indication in the record that these emails were inappropriate.[4] (Supt. Ex. 22,

[4] As part of the investigation, PGCPS learned that someone had installed a "local account" on Appellant's computer without authorization. (T2. 39-40; T3. 60). The local account would allow someone to access Appellant's computer, but would not give them access to his account or the PGCPS network. This type of account was prohibited by PGCPS policies. There was no evidence, however, that Appellant had installed or used this local

Attachment A33-34).

Ms. Tranmer summarized her findings in a series of reports. These reports analyzed Appellant's web activity on the PGCPS network and compared it to the dates the emails were sent by David Jasmin. According to the reports, Appellant's work account accessed Yahoo mail at the same time that ten of the inappropriate emails were sent to PGCPS employees.[5] The reports also showed that Appellant sent work-related emails from his PGCPS account near the times in which the inappropriate emails were sent from his David Jasmin Yahoo address. For instance, Employee 3 received an email from David Jasmin at 9:55 a.m. on March 28, 2011. She also received a work-related email from Appellant at the same time from his PGCPS account. The reports included more than a dozen examples of work emails that were sent close in time to emails from David Jasmin. (Supt. Exs. 18-20).

Ms. Tranmer concluded from this evidence that Appellant was the likely source of the inappropriate emails and that it was unlikely that a third party could have gained access to his computer. She also concluded as part of her investigation that Appellant's account had not been "spoofed." Spoofing occurs when someone creates an account purporting to be from a particular user, but the messages actually are sent from a different account. The header of the email, which identifies the address the email was sent from, would indicate whether spoofing had occurred. For instance, an account that was spoofed would tell a recipient that an email had arrived from Appellant, but the address of the sender would actually be from another email address. Ms. Tranmer's examination of the emails led her to conclude that spoofing did not occur. (T2. 75-76, 140-141).

On April 8, 2011, PGCPS placed Appellant on administrative leave with pay. A pre-termination hearing occurred on April 26, 2011, during which Appellant was represented by counsel. On May 9, 2011, then-Superintendent William Hite terminated Appellant for violation of administrative regulations and conduct which reflects unfavorably on the school system. (Appeal, Ex. 9; Hearing Examiner Recommendation at 40).

Appellant appealed the termination decision and the matter was referred to a hearing officer. The hearing took place on five days over the course of approximately nine months. The hearing dates were March 27, 2012; June 21, 2012; August 7, 2012; January 8, 2013; and January 9, 2013. At some point during this time, Appellant and the local board both substituted counsel.

During the course of the hearing, Appellant testified in his defense, called other witnesses on his behalf, and introduced various pieces of evidence. A PGCPS employee who had worked for Appellant testified that she was present for meetings that took place around the time when some of the inappropriate emails were sent, but did not see Appellant send any emails. Appellant's martial arts teacher testified that Appellant would have been occupied between the

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account and he was not disciplined for it. (T2. 39-40). A local account would not have allowed a person to gain access to Appellant's email or files. (T3. 78-79).

[5] No records were kept of web activity that occurred after business hours, which was defined as being between 9 a.m. and 5 p.m. on weekdays.

hours of 6 to 9 p.m. on Tuesdays and Thursdays when some of the emails were sent. A former security officer and director of tech support services for PGCPS expressed his opinion, as an expert in computer security, that the PGCPS investigation was flawed and that Appellant did not send the emails. (T1. 76-80; T3. 14-21; T4. 159-197).

Appellant denied sending the emails during the hearing. He testified that he had an open door policy in his office and always left his work computer open and unlocked, with his email accounts logged-in. Appellant had a busy work schedule and spent some of his time outside the office. He explained that he could not have sent any inappropriate emails in the evening because he would have either been at martial arts training or would have had custody of his daughter, whom he picked up from daycare and took care of on some evenings. Appellant offered his belief that other PGCPS employees sent the emails in an attempt to get him in trouble because they were either jealous of his promotion to acting director of transportation or upset with him for other reasons. (T3. 94-188).

On November 26, 2013, the hearing examiner issued a 69-page report recommending that the local board uphold the termination decision. The hearing examiner concluded that the Appellant received appropriate due process protections prior to termination. He found Ms. Tranmer's testimony to be credible and that the evidence established that Appellant likely sent the inappropriate emails from his personal account. The hearing examiner determined that it would have been easy for Appellant to switch between his work and personal email accounts and that there was a direct correlation between the inappropriate emails and Appellant's use of the PGCPS network. Among the evidence cited by the hearing examiner was the fact that one of the emails used the phrase "all due respect," a phrase often used by Appellant. The hearing examiner also pointed out that Appellant admitted to forwarding the email with the inappropriate images from Employee 5 to his David Jasmin account. He found no evidence that other employees were "out to get" the Appellant and concluded that Appellant's accusations undermined his credibility. (Hearing Examiner Recommendation).

The hearing examiner also addressed the evidence offered by Appellant, but found it lacking. He concluded that the defense expert misunderstood underlying facts and that his opinions lacked probative value. As a result, the hearing examiner declined to accept the defense expert's opinion that Appellant's account had been compromised. The hearing examiner found the testimony of the PGCPS employee who was in meetings with the Appellant to be too speculative because she could not recall the dates of the meetings or provide specifics about Appellant's behavior before and during the meetings. The hearing examiner dismissed Appellant's explanation that he could not send emails during his martial arts class because the record showed that Appellant had sent work emails during that time frame. (Hearing Examiner Recommendation).

The hearing examiner concluded based on "the totality of the evidence" that "it is more likely than not that Appellant sent the emails which form the basis for the decision to terminate him." In addition, the hearing examiner found that Appellant failed to follow PGCPS policies regarding email and electronic devices by failing to keep his work laptop secure and using PGCPS work email to forward the inappropriate email from Employee 5 to himself. (Hearing Examiner Recommendation).

On May 14, 2014, the local board affirmed Appellant's termination and adopted the hearing officer's findings of fact and conclusions of law. The local board concluded that the hearing officer's report "more than adequately" addressed Appellant's arguments. The local board determined that "the record evidence does not support Appellant's arguments" and that there was "sufficient evidence" to support his termination. (Local Board Decision).

This appeal to the State Board followed.

STANDARD OF REVIEW

A non-certificated employee is entitled to administrative review of a termination pursuant to § 4-205(c) of the Education Article. *See Brown v. Queen Anne's County Bd. of Educ.*, MSBE Op. No. 13-37 (2013). The decision of the local board is presumed to be *prima facie* correct and the State Board will not substitute its judgment for that of the local board unless the decision is shown to be arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

Appellant challenges the decision of the local board to terminate him on several grounds: (1) the delay in providing him a *Loudermill* due process hearing violated his rights; (2) his defense was prejudiced by being unable to examine his computer and cell phones after they were confiscated; (3) the local school system offered to settle his case which suggests he did not commit the offenses he was accused of committing; (4) the PGCPS policy he violated did not specifically list termination as a punishment; (5) he was illegally discriminated against because other employees who committed similar or more severe misconduct were not terminated; and (6) the evidence was insufficient to support his termination.[6]

Delay in holding the hearing

Appellant argues that he was not provided with an expeditious *Loudermill* due process hearing prior to termination. He also complains about the delays that occurred during his post-termination appeal hearing before the local board.

Appellant was placed on administrative leave with pay on April 8, 2011. A pre-termination *Loudermill* hearing occurred on April 26, 2011, during which the Appellant was advised of the accusations against him and offered an opportunity to respond. Appellant was terminated on May 9, 2011.

The U.S. Supreme Court held in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), that the core requirement of due process is that an individual be given notice of the intended action and an opportunity to be heard prior to being deprived of any significant property interest. Appellant received this opportunity prior to his termination. Therefore, we conclude

[6] One of Appellant's reasons in support of his appeal is merely a citation to a 75-page document available online titled "Hacking Secrets Revealed." He does not explain how the document supports his appeal. Appellant also accuses the local board of "changing the original transcript testimony" but offers no support for this allegation.

there was no *Loudermill* violation prior to Appellant's termination.

Appellant also asserts that his due process rights were violated post-termination as part of his appeal to the local board. After Appellant appealed the termination decision, the case was referred to a hearing examiner. The hearing took place over five days, beginning on March 27, 2012 and ending on January 9, 2013. There was also a delay between the end of the hearing on January 9, 2013, and the hearing examiner's decision on November 26, 2013. The time between Appellant's termination and the local board's decision upholding that termination was about three years. The local board has not provided a clear explanation for these delays, though the record indicates that some delays could be attributed to coordinating schedules between the hearing examiner and counsel.

Whether or not a delay in an administrative proceeding rises to the level of a due process violation depends in large part on whether a party appealing has been prejudiced. In the context of attorney disciplinary proceedings, the Court of Appeals has concluded that "a mere delay . . . is not a basis for dismissal, absent a showing of prejudice." *Atty. Griev. Comm'n v. Braskey*, 378 Md. 425, 442 (2003). Even in cases where a delay is "gross and inexcusable," the Court has held that a dismissal is unwarranted. *Id.* at 443. The Court looks to whether a party "can show actual prejudice to the defense" in order to determine if a due process violation occurred. *Id.* at 444.

We are mindful that this was a complicated termination centering on computer technology and featuring expert testimony. The five days of hearings resulted in more than 900 pages of transcript testimony and hundreds of pages of documents. Although the delays were lengthy in Appellant's appeal, Appellant has not asserted that these delays alone prejudiced his ability to present a defense. Indeed, Appellant presented numerous witnesses on his behalf, his counsel cross-examined the local board's witnesses, and he presented various exhibits to support his case. A more expeditious appeal would have been desirable, but, in our view, the delay alone was not an illegal one.

Inability to examine cell phones and computer

Appellant argues that it was illegal for the local board to have "wiped" his computer and returned it to service because it prejudiced his ability to defend himself. He maintains that, because his termination could end up in court, the local board should have preserved his computer and phones.

Appellant's counsel asked to examine his computer and mobile devices on November 28, 2012, about 18 months after Appellant's termination. The school system's counsel responded that Appellant had no right to pre-hearing discovery nor the ability to subpoena witnesses or documents. The school system explained that "[t]hose computers have long been recycled in the computer inventory of the school system, making it unlikely, if not impossible, to retrieve anything that was sent or received on them at the time (over 18 months ago) that such information was sent and/or received." The school system did, however, make available to Appellant a CD that contained copies of the emails in the case. (Appeal, Ex. 5). The local board explains that Appellant's computer was secured during the investigation and that there was no evidence anyone tampered with it.

The local board acknowledges that no evidence of pornography or other inappropriate materials was found on Appellant's computer or phones. The case against Appellant was based not on information found on his electronic devices, but in the records of his activity stored on the local board's computer network and the copies of emails received by various PGCPS employees from Appellant's personal email account. Thus, even if Appellant's devices had been preserved, it does not appear they would have contained any further probative evidence.

Offer of settlement

Appellant states that he was offered $300,000 to withdraw his appeal. He raises this to suggest that he would not have been offered this amount of money to settle if he had actually committed the acts he was accused of committing. The local board argues that this is an improper ground for appeal and was not an argument raised before the local board.

In civil litigation, the Maryland Rules of Evidence do not allow "offers to compromise" to be used to prove that a claim is valid or invalid. Md. Rule 5-408. "The purpose of Rule 5-408 is to encourage the settlement of lawsuits by ensuring that parties need not fear that their desire to settle pending litigation and their offers to do so will be construed as admissions." *Bittinger v. CSX Transportation, Inc.*, 176 Md. App. 262, 276-77 (2007). We find this rationale equally applicable in the context of an administrative appeal. A party can wish to settle a claim for a variety of reasons. The local board's apparent interest in settling the claim alone does not render the local board's decision arbitrary, unreasonable, or illegal.

Termination as an available form of discipline

Appellant argues that PGCPS Administrative Procedure 0700, which he was accused of violating, does not mention termination as a punishment for violating the policy. Procedure 0700 requires employees to "use the school system technology within the scope of their employment" and follow "accepted and established guidelines for technology usage." The 12-page document lists numerous acceptable and unacceptable uses of school technology. The "consequences" section of the policy states that punishments "may include, but are not limited to" several forms of discipline, including "immediate suspension of equipment access," "disciplinary action by school/office administration," and "letter of reprimand." The end of the section states that "additional disciplinary action may take place as outlined."

There is no question that propositioning fellow employees by sending unsolicited sexual images to their work email addresses is not an appropriate use of school technology. Procedure 0700 clearly states that discipline for violating the policy is not limited to the examples provided. Therefore, termination was an available option.

Inconsistent discipline and discrimination

Appellant argues that other employees who committed similar misconduct received lesser punishments and were not terminated. The only concrete example provided by Appellant of disparate treatment was that of Employee 5, the co-worker who received a 30-day suspension for

forwarding an inappropriate email to Appellant. The local board distinguishes the two punishments by arguing that Employee 5 was a "rank-and-file employee" who forwarded a single inappropriate email, whereas Appellant was a "cabinet level administrator" who sent multiple emails to female employees that included sexually explicit pictures and suggestive propositions. We agree that there are significant differences between the two situations that justified different forms of discipline.

Appellant also alleges that his termination is evidence of a "disparate impact" under Title VII of the Civil Rights Act. Appellant appears to be reiterating his claim, filed with the U.S. Equal Employment Opportunity Commission (EEOC), that he was discriminated against on the basis of his race, sex, and age in violation of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. (Supt. Ex. 25). The only specific example Appellant has provided of discrimination is, again, the case of Employee 5, who was the same race and gender as the Appellant and was in the same age group (more than 40 years old). (T4. 113-116). The State Board has consistently held that an Appellant must support allegations of illegality with factual evidence. *King v. Baltimore City Board of Sch. Comm'rs*, MSBE Op. No. 14-19 (2014). Appellant has provided no evidence to support his claim of discrimination.

In addition, Appellant argues that, because he had no prior disciplinary problems, that termination was too severe of a punishment. As noted previously, termination was an available option in response to Appellant's behavior. His prior lack of discipline was something the local board could consider in mitigation, but it did not prohibit it from upholding his termination.

Lack of evidence to support termination

Several of Appellant's arguments can be characterized as an assertion that there was not enough evidence to support his termination. Appellant maintains that no pornographic images or videos were found on his computer. He also explains that not all of the witnesses who could have provided evidence testified, including the other women who received emails from the David Jasmin email address. He argues that the emails could not have been sent from his cell phone because they would have had a tagline stating that they had been sent from a mobile device. He also criticizes Ms. Tranmer because she was not a qualified forensic computer expert. Appellant claims that her testimony about a local account being found on his computer undermined the evidence against him.

The local superintendent was required to demonstrate that it was more likely than not that Appellant was responsible for sending the inappropriate emails. The hearing examiner considered these arguments raised by Appellant, but concluded that the school system had met its burden. The fact that some evidence supports Appellant's claims does not mean that the local board acted in an arbitrary, unreasonable, or illegal fashion. The question here is whether a reasoning mind could come to the decision made by the local board.

After reviewing the record, we find ample support for the local board's decision. The record reveals that multiple PGCPS employees received inappropriate emails from a Yahoo account belonging to the Appellant. The school system demonstrated that some of these emails were sent while Appellant was logged into the PGCPS network and sending work-related emails

that were unquestionably from him. The evidence shows that the pattern of emails was not random, which would be suggestive of spam. All of the employees targeted were female and worked for PGCPS, making it possible for Appellant to know who they were. The emails demonstrate an awareness of the risks involved and came from an account that used Appellant's pseudonym David Jasmin rather than his actual name. The emails continually request personal email addresses and the sender is hesitant to reveal more information otherwise. The number of emails, spread out over many days and times, make it unlikely that someone was impersonating Appellant, as he contends. The evidence also indicated that the local account on his computer, cited by Appellant as exculpatory evidence, would not have allowed an outside party to gain access to his email accounts. In short, the totality of evidence provided the local board with sufficient reasons to uphold Appellant's termination.

CONCLUSION

For all these reasons, we affirm the decision of the local board because it is not arbitrary, unreasonable, or illegal.

Charlene M. Dukes
President

Mary Kay Finan
Vice President

James H. DeGraffenreidt, Jr.

Linda Eberhart

S. James Gates, Jr.

Absent
Larry Giammo

Luisa Montero-Diaz

Absent
Sayed M. Naved

Madhu Sidhu

Donna Hill Staton

Guffrie M. Smith, Jr.

September 23, 2014