

Circuit Court for Prince George's County
Case No. CAL15-33770

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2360

September Term, 2016

SCOTT DEVINE

v.

PRINCE GEORGE'S COUNTY
PERSONNEL BOARD

Eyler, Deborah S.,
Berger,
Fader,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 30, 2018

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

Scott Devine, the appellant, filed a grievance with Prince George's County Office of Human Resources Management ("OHRM"), alleging that his former employer, the Prince George's County Department of Corrections ("DOC"), violated Prince George's County Code ("PGCC") section 16-240, which prohibits employment discrimination based on retaliation. Specifically, he claimed that he was denied a promotion for speaking with a reporter from *The Washington Post* about sensitive information concerning the DOC.

OHRM denied Devine's grievance. He appealed that decision to the Prince George's County Personnel Board ("Board"). The Board found that the DOC did not retaliate against Devine and upheld its decision to promote another person instead of Devine. In the Circuit Court for Prince George's County, Devine filed an action for judicial review. The court vacated the Board's decision because it had followed an improper procedure and remanded the matter for further proceedings.

On remand, the Board held a new hearing. It found no evidence of retaliation and again upheld the DOC's decision to promote someone other than Devine. Devine filed another action for judicial review, which was unsuccessful. This timely appeal followed.

Devine presents four questions for review, which we have reworded and rephrased:

1. Did the Board commit errors of law?
2. Were the Board's factual findings unsupported by substantial evidence?
3. Did the Board's decision result from an unlawful procedure?
4. Was the Board's decision arbitrary or capricious?

We answer each question in the negative and affirm the circuit court’s judgment.

FACTS AND PROCEEDINGS

In 1997, Devine became employed as a correctional officer by the DOC. In June 2006, he was promoted to the rank of Lieutenant.

According to Devine, in early January 2007, he learned that inmates at the Prince George’s County jail were able to breach their cell doors by jamming objects into the locks. On January 16, 2007, he submitted a memorandum to his superior, then-Lieutenant Colonel Gregory Harris, reporting this information.¹

On February 1, 2009, inmates in Housing Unit 8 of the jail breached their cell doors and created a disturbance. On February 6, 2009, Harris issued a memorandum to “All Security Staff” at the jail directing officers to inspect the cell locks to make sure inmates were not disabling them. The same day, *The Washington Post* published an article about the February 1 disturbance, reporting that the jail had a problem with inmates disabling their cell locks and that the DOC had known about the problem for at least two years.

On April 10, 2009, *The Washington Post* published an article reporting that the cell lock problem was continuing. This article cited Devine’s January 16, 2007 memorandum, which was “provided [to *The Washington Post*] by the officers [sic]

¹ Harris does not recall receiving any such memorandum and maintains that he already knew before then that there were problems with jail inmates being able to manipulate cell locks.

union.” Devine spoke with *The Washington Post* reporter who wrote the article and stated that he had written the memorandum and had delivered it to Harris.

In April 2009, Devine and several other Lieutenants took the promotional examination for the position of Captain. The examination functioned as a minimum qualifications test that Lieutenants were required to pass in order to become eligible for promotion. *See* PGCC §§ 16-156 & 157. Lieutenants who passed the examination were placed on an eligibility register and were ranked according to score. *See* PGCC § 16-162(d). When a vacancy in the position of Captain would occur, the Director of the DOC (“Director”), as the appointing authority, would select a Lieutenant from the eligibility register to fill it. *See* PGCC §§ 16-107(a)(2) & 16-162. The Director usually promoted from the eligibility register in order of score ranking, but that practice was not required.

The results from the April 2009 examination were certified in June 2009. Devine passed the examination, as did four other Lieutenants, making them all eligible for promotion. Devine ranked second on the register behind Christopher Chubb. Cedric Gamble ranked third.

In August 2009, Director Mary Lou McDonough promoted Chubb to the position of Captain to fill a vacancy that had come up.

Devine received outstanding performance evaluations, including after *The Washington Post* articles were published. He received an overall performance appraisal of “outstanding” on April 9, 2010, which Director McDonough signed on April 30, 2010.

In August 2010, Devine cut a lock from a locker assigned to another officer. Lockers were assigned to Corporals who were on the emergency response team. At one point, the locker was assigned to Devine. Lieutenants are not assigned lockers, so when Devine was promoted to Lieutenant, the locker was reassigned to another Corporal. Unhappy that somebody was using the locker that once had belonged to him, Devine cut the lock off and removed the Corporal's belongings from the locker. Devine was not disciplined for the incident, but was ordered to pay restitution to the Corporal. Devine paid the restitution.

In October 2010, a vacancy for Captain opened. Director McDonough considered the remaining candidates on the eligibility register and decided to promote Gamble, even though he ranked second below Devine (who had moved to first place following Chubb's promotion). Before making her decision, Director McDonough consulted with OHRM to confirm that she was not required to promote from the eligibility register in order of ranking. In her email to OHRM, she explained that Devine and Gamble seemed to be similar candidates "on paper," but that at the time Gamble would be better suited for the position of Captain. She noted that Gamble had more experience as a Lieutenant and he had served "with distinction" as an "acting" Captain for one year. She also expressed concern about Devine's maturity. She stated that she expected another vacancy to open in the upcoming months and that she would promote Devine then, but in the meantime he

needed to hone his leadership skills.² OHRM responded to Director McDonough, informing her that she could “choose anyone from the” eligibility register.

In reaching her decision to promote Gamble, Director McDonough also consulted with Harris, who was then serving as Deputy Director of Operations, and Lieutenant Colonel Harry Hilton, the Chief of Operations for Security. Both men recommended that Gamble be promoted. They each advised Director McDonough of specific instances exemplifying Devine’s immaturity around the time of his promotional eligibility. One instance was the lock-cutting incident.

A second instance concerned an interaction between Devine and a subordinate. On September 3, 2010, Hilton, Harris, and Chubb had met with Devine to talk about his unkempt appearance and to advise him that, with a promotion pending, he should try to improve his decision-making abilities. According to Hilton and Harris, the purpose of the meeting was to help Devine.

A few days later, Devine, Chubb, and two other Lieutenants were in the shift commanders’ office when Chubb and the other Lieutenants had a discussion about problems with Sergeant Shawn Jones’s attendance. Afterward, Devine approached Jones and warned her that certain people, including Chubb, were “out to get [her] because of [her] attendance” and “to watch [her] back.” This information resulted in Jones filing a

² The vacancy that Director McDonough expected to open later did not open until July 2011. By then, the eligibility register had been updated to reflect the results of the most recent promotional examination. Devine did not pass the 2011 examination and therefore was not on the eligibility register and could not be promoted.

complaint with the union. Hilton was troubled that Devine divulged to a subordinate “confidential information that was discussed in a meeting with . . . co-supervisors” and saw his actions as “an attempt to pit the sergeant against the other commanders.” In Hilton’s view, supervisors, such as Lieutenants and Captains, are supposed to hold subordinates accountable for problems with attendance and performance. Hilton called Devine into his office to explain himself. When he asked if there was any merit to the complaint, Devine refused to answer any of Hilton’s questions. Ultimately, Hilton issued a letter of reprimand to Devine, on September 29, 2010, stating that his noncompliance in the matter “demonstrate[d] defiance and conduct unbecoming of a manager.”

Hilton and Harris also believed that Devine had character flaws that he needed to address before he would be able to handle the responsibilities of Captain. For example, Hilton maintained that Devine needed to improve his decision-making ability:

[A]s a commander . . . when things occur, you have to make a decision, good, bad, or indifferent. For some reason it’s been Lieutenant Devine’s habit to ask other people what they think he should do or if he does make a decision . . . , he needs to be reassured . . . you know, do you think I did a good decision or did I make a good decision. [A]m I doing a good job[?]

It’s like he needs to be reassured. . . . [M]ore often than not, . . . he just seemed incapable of making a decision without getting some advice from . . . a co-lieutenant. And there’s been cases where he’s even asked subordinates did they think he made the right decision.

Hilton also was of the view that Devine was too temperamental:

Lieutenant Devine will let certain things get to the point where he takes them personal. As a commander, we try to explain that . . . you can’t take things personal regardless of what they are or who they are with. . . . [Y]ou have to learn to deal with things professionally[.]

That was one of Lieutenant Devine's major downfalls that I've always tried to mentor him on, was his display of – you know, he would let it be known if he wasn't happy with a decision that someone made if it wasn't to his liking. He would just clam up and shut down.

* * *

His coworkers that I discussed the issues with . . . w[ere] aware of it[.] If he got mad, he would carry a grudge for weeks, a week or two on end. Finally, when things blow over, he'd come back to his old senses.

Harris believed that Devine needed to mature before being promoted to Captain.

In his view, Devine was not yet “the team player that . . . the [DOC] needed.” He qualified that with an example:

There was one example where Lieutenant Colonel Hilton and Captain Chubb came to me and expressed some concerns for Devine. On Captain Chubb's shift, he had, I believe at that time, three or four lieutenants, Devine being one of them.

Devine was not getting along well with the other lieutenants. It was causing problems within the ranks of the lieutenants. They . . . thought it best that if Lieutenant Devine would be moved to another shift because of the disruption he was causing[.]

Despite their reservations about Devine's ability to perform as Captain, Hilton and Harris agreed that he was an excellent Lieutenant. They both had reviewed and approved Devine's outstanding performance appraisals. As noted, Hilton and Harris recommended to Director McDonough that Gamble be promoted to the Captain position, not Devine. They considered Gamble to be more qualified based on his experience, decision-making skills, and ability to work well with his subordinates.

After Director McDonough made the decision to promote Gamble, she met with Devine to explain her decision. She told him she did not think he was ready for the job,

but that there were things he could do “to be[come] captain material.” She informed him that he needed to become more mature, to learn how to take criticism, and to make decisions more confidently. She moved Devine to a daytime shift so he could gain more experience in a leadership role, and she also discussed sending him to leadership classes. He attended some.

On October 25, 2010, Devine filed a grievance with OHRM, asserting that his non-promotion was in retaliation for speaking with *The Washington Post* reporter in April 2009. Specifically, he stated, “Director McDonough . . . [is] discriminating against me and [she is] retaliating against me by not promoting me to the rank of Captain. I have been targeted and harassed by . . . Harris since my name appeared in the Washington Post[.]” In his grievance letter, Devine claimed that in September 2009 he was off work with preapproved leave, but that Hilton (on Harris’s behalf) called him and threatened to report him as absent without leave (“AWOL”). Devine also stated that Harris, Hilton, and Chubb had harassed him during the September 3, 2010 meeting by falsely accusing him of “act[ing] out” when “things don’t go [his] way” or of not speaking to co-workers when he gets upset. Finally, Devine asserted that the facts giving rise to the September 29, 2010 letter of reprimand for noncompliance were not true.³

³ Devine said the letter of reprimand stated that Jones filed a grievance, but that technically she never did. Devine did not dispute that he was noncompliant in the investigation, however, and that was the basis for the reprimand.

On December 3, 2010, OHRM denied the grievance and Devine appealed that decision to the Board.⁴ In 2011, the Board, which consisted of five members, held three days of evidentiary hearings over a five-month span. Between the second and third hearing days, a new Prince George's County Executive took office and removed and replaced four of the five Board members. The newly-constituted Board read the transcripts from the first two hearing days and held the final hearing day on August 24, 2011. On April 16, 2012, the Board issued its decision, finding that Devine had not been retaliated against for speaking with *The Washington Post* reporter.

On April 27, 2012, Devine filed an action for judicial review. On October 29, 2013, the circuit court vacated the Board's decision and remanded the matter for the Board to hold a new hearing. The court found that the Board could not reasonably have assessed the credibility of the witnesses as it said it did because there was only one Board member who was present on *every* day of the hearing. The court thus found that Devine was not afforded adequate due process.

On remand, the Board held a new evidentiary hearing over the course of three days. On October 27, 2015, it issued an amended decision again finding no retaliation. The Board found that Devine had engaged in a protected activity when he spoke with *The Washington Post* reporter and that he had been deprived of a valuable employment benefit by not being promoted. It also found, however, that Devine did not prove a

⁴ While his grievance was pending with OHRM, Devine submitted a grievance based on the same allegations to Director McDonough. She also denied the grievance.

causal connection between his speaking with *The Washington Post* and his non-promotion. It noted that there was a “lack of temporal proximity between Devine’s protected activity and the [negative] employment action . . . [g]iven the 17-month lapse of time”; and that following the publication of *The Washington Post* article, he continued to receive positive performance reviews and was not reprimanded for the lock-cutting incident. The Board was not convinced that Hilton’s threat to mark Devine as AWOL was evidence of retaliation, finding it “was a simple mistake about Devine’s leave status at that time” that was not attributable to any “ill motive[.]” The Board found that Director McDonough provided “several legitimate, non-discriminatory reasons for not promoting Devine[.]” It noted that Director McDonough was a “change agent” who sought to promote the best candidate and that she could have legitimately found Gamble to be the better candidate: “Gamble is mature, is a college graduate, makes good decisions, and is more experienced, and had worked in an acting capacity as a captain for more than 12 months and performed well.” The Board also found that Director McDonough did not think Devine was ready to be promoted, citing his instances of misbehavior. Finally, the Board concluded that Devine had failed to prove that Director McDonough’s proffered reasons for his non-promotion were a pretext for retaliation. It stated that “Devine offered little [evidence] of employer’s intent to retaliate outside of the evidence that 17 months after his protected activity he was not promoted to captain.”

On October 30, 2015, Devine filed another action for judicial review, which resulted in a December 7, 2016 judgment upholding the Board’s decision. This timely appeal followed.

We shall set forth additional facts as necessary.

DISCUSSION

“We review an administrative agency’s decision [such as the Board’s] under the same statutory standards as does the [c]ircuit [c]ourt.” *Colburn v. Dep’t of Public Safety & Corr. Servs.*, 403 Md. 115, 127 (2008) (quoting *Kane v. Bd. of Appeals of Prince George’s Cty.*, 390 Md. 145, 159 (2005)). “Therefore, we reevaluate the decision of the agency, not the decision of the lower court.” *Annapolis Mkt. Place, L.L.C. v. Parker*, 369 Md. 689, 703 (2002) (quoting *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439 (2002)). On review, we adhere to the principle that “[j]udicial review of administrative agency action is narrow [and that t]he court’s task . . . is not to substitute its judgment for the expertise of those persons who constitute the administrative agency[.]” *People’s Counsel for Baltimore Cty. v. Loyola College In Maryland*, 406 Md. 54, 66–67 (2008) (quoting *United Parcel Serv. Inc. v. People’s Counsel for Baltimore County*, 336 Md. 569, 576–77 (1994)).

Maryland’s Administrative Procedure Act, Md. Code (1984, 2014 Repl. Vol., 2016 Cum. Supp.), sections 10-101 to 10-305 of the State Government Article (“SG”), governs judicial review of decisions made by administrative agencies. Pursuant to SG section 10-222(h)(3), the court may

reverse or modify [an agency’s] decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:

...

(iii) results from an unlawful procedure;

(iv) is affected by any other error of law;

(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; [or]

...

(vii) is arbitrary or capricious.

Subsections (iii) and (iv) “deal[] with judicial review of agency conclusions of law[.]” *Spencer v. Maryland State Bd. of Pharmacy*, 380 Md. 515, 528 (2004). We review an agency’s conclusion of law *de novo*. *Schwartz v. Maryland Dep’t of Natural Resources*, 385 Md. 534, 554 (2005). However, “an administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts.” *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 69 (1999) (citing *Lussier v. Maryland Racing Comm’n*, 343 Md. 681, 696–97 (1996)).

Subsection (v) “deals with judicial review of agency factual determinations.” *Spencer*, 380 Md. at 528. We review an agency’s factual findings to determine if they are supported by substantial evidence. “In applying th[e substantial evidence] test, we ask, after reviewing the evidence in a light most favorable to the administrative agency, ‘whether a reasoning mind reasonably could have reached the factual conclusion the

agency reached.” *Colburn*, 403 Md. at 128 (quoting *Banks*, 354 Md. at 68). It is “the agency’s province . . . to resolve conflicting evidence and to draw inferences from that evidence.” *Id.*

Finally, subsection (vii) “deals with judicial review of any other agency determination—for instance, . . . determinations over matters committed to the agency’s discretion.” *Spencer*, 380 Md. at 528. “[T]here are circumstances when an agency acts neither as a finder of fact nor as an interpreter of law but rather in a ‘discretionary’ capacity.” *Id.* at 529 (citing *Maryland State Police v. Zeigler*, 330 Md. 540 (1993)). We afford a higher degree of deference to an agency’s discretionary decision than we do to an agency’s legal conclusion or factual finding and will only reverse a discretionary decision if it is made arbitrarily or capriciously. *Id.* at 529–30.

Devine contends the Board’s decision is reversible based on each of the four grounds mentioned above, namely that it was affected by an error of law, that it was not supported by substantial evidence, that it resulted from an unlawful procedure, and that it was arbitrary and capricious. We disagree.

I.

Error of Law

There are three elements to an employment discrimination claim based on retaliation: 1) the employee engaged in a protected activity, 2) the employer took an adverse action against the employee, and 3) the adverse action was causally connected to the protected activity. *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 199

(2013). Employment discrimination claims such as these are subject to their own unique burden shifting framework, established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973). Under the *McDonnell Douglas* framework, the employee bears the initial burden to produce evidence to establish a *prima facie* case of retaliation. *Edgewood*, 212 Md. App. at 199. “If [the employee] meets this threshold burden of production, the burden of production then shifts to the [employer] to offer a non-retaliatory reason for the adverse employment action.” *Id.* at 199–200. If the employer meets its burden, the burden of production shifts back to the employee, who must demonstrate that the employer’s proffered reasons for the adverse employment action were pretextual.⁵ *Id.* at 200. Although the burden of production shifts between the parties under this framework, the burden of persuasion remains with the employee at all times. *See Killian v. Kinzer*, 123 Md. App. 60, 68 (1998).

In this case, the Board found that Devine engaged in a protected activity under PGCC section 16-237⁶ and the First Amendment of the United States Constitution when he spoke with *The Washington Post* reporter. It also found that Devine suffered an

⁵ This could be accomplished, for example, by “showing ‘. . . weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons[.]’” *Nerenberg v. RICA of Southern Maryland*, 131 Md. App. 646, 675 (2000) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994)).

⁶ PGCC section 16-237 provides that “[a]n employee may publicly or privately comment upon any matter of public policy of general interest and upon any subject that is not prohibited from disclosure by the Maryland Public Information Act.”

adverse employment action by not being promoted. It concluded, however, that the DOC did not retaliate against Devine, finding that there was no causal connection between Devine's speaking with the reporter and the non-promotion.

Devine contends the Board erred as a matter of law by only considering evidence of temporal proximity between the protected activity and the adverse action when determining causation. He asserts that the Board should have considered additional evidence of intervening acts of retaliation, as well as direct evidence of retaliation.

In advancing this contention, Devine ignores critical findings in the Board's opinion. To be sure, the Board found that there was a lack of temporal proximity because of the 17-month gap between *The Washington Post* article and his non-promotion. *See Edgewood*, 212 Md. App. at 205 ("in wrongful discharge action, temporal proximity between protected activity and discharge was evidence supporting an inference that the protected activity was the proximate cause of her termination" (citing *Bleich v. Florence Crittenton Servs. of Baltimore, Inc.*, 98 Md. App. 123, 142 (1993))). It also found that there were no intervening acts of retaliation, as demonstrated by Devine's positive performance reviews, which weighed in favor of there being no connection between the protected activity and the non-promotion. As the Board put it: "If the appointing authority or Devine's supervisors . . . wanted to retaliate against Devine, they would not have given him outstanding performance evaluations." And, as noted, the Board found as "counter-evidence of retaliation" that Devine "was not reprimanded for having cut off the

lock of a subordinate employee[’s locker] and removing the employee’s personal belongings[.]”

Devine complains that the Board should have considered his letter of reprimand as an intervening act of retaliation. This argument lacks merit because the facts in evidence were sufficient to show that he was legitimately reprimanded for his refusal to cooperate in the Jones matter. Additionally, the Board could not have considered direct evidence of retaliation, as Devine suggests it should have, because none existed.

Even though the Board (correctly) found that Devine failed to meet his threshold burden of producing evidence to demonstrate causation, it nevertheless engaged in the *McDonnell Douglas* burden-shifting analysis and further found that Director McDonough offered reasonable, non-retaliatory justifications for promoting Gamble over Devine; and that Devine failed to prove that Director McDonough’s reasons for not promoting him were pretextual. In sum, the Board properly considered each element of a retaliation claim and also applied the proper burden-shifting framework. There was no error of law.

II.

Substantial Evidence

Next, Devine contends there was not substantial evidence to support the Board’s finding of no retaliation because no “reasoning mind” could conclude that he was denied the promotion to Captain for a reason other than retaliation. This argument overlooks all the evidence in the record that was unfavorable to Devine. There was record evidence that Gamble, unlike Devine, was college educated; Gamble had served with distinction as

acting-Captain; Devine struggled to make decisions; Devine could not accept criticism and needed reassurance; Devine misbehaved on multiple occasions; Devine was given “outstanding” performance reviews even after *The Washington Post* interview; Director McDonough had the authority to select any name from the eligibility register; and Director McDonough, Harris, and Hilton all were of the opinion that Gamble was the better candidate.

Devine insists that, despite this overwhelming evidence supporting the Board’s no retaliation finding, testimony by Director McDonough that he characterizes as an admission of retaliation should have compelled a finding in his favor.

There was no admission of retaliation by Director McDonough. In response to a question about whether Devine’s 2009 contact with the press concerning cell locks affected her decision to promote Gamble instead of Devine, she stated:

I took over the Department in 2008 as [D]irector. It was a very tense time in the Department. We were receiving a lot of bad publicity following the suspicious death of an inmate less than a month after I took over. Prior to that, there had been the missing guns from the armory and several other incidents. We had a reporter that was doing almost daily stories about the jail. I was definitely put in there as a change agent to start over in the Department. *So I was looking for good managers.* I think all of that did have an effect on my decision [to promote Gamble over Devine].

(Emphasis added.) This answer lent credence to her non-retaliatory reasons for promoting Gamble and not Devine. Given that the DOC was going through a turbulent period when she took over, Director McDonough was seeking to promote capable, mature people to leadership roles.

There was substantial evidence in the record to support the Board’s finding of non-retaliation.

III.

Unlawful Procedure

a.

Stuckey’s Involvement

As explained in the first action for judicial review, the circuit court vacated the Board’s decision because only one Board member presided over all three days of evidentiary hearings. That was problematic because a majority of the Board members could not have considered witness credibility in rendering a decision. On remand, the Board held a hearing that lasted three days. Four members presided over the first two days.⁷ On the third day, the fifth Board member, Delores Stuckey, who was recently appointed, was present. Counsel for both sides expressed skepticism about Stuckey’s presence, but the Board chairwoman explained that, as a member, Stuckey would be permitted to be present and participate in the evidentiary phase. She would not be allowed to deliberate or vote on the matter, however. In its decision, the Board confirmed that “Stuckey did not participate in the consideration and decision of Mr. Devine’s” case.

⁷ Pursuant to Prince George’s County Personnel Board’s Rules of Administrative Procedure (2015), the Board only needed a quorum, *i.e.*, three members, to render a decision.

Devine contends that Stuckey’s presence and participation in the hearing violated his right to procedural due process because it must have affected the deliberative process. For support, he points to three instances during the hearing. First, when he (Devine) testified that Harris was vindictive, Stuckey asked whether he could provide examples. Second, Stuckey requested a copy of a document that had been admitted into evidence. Third, also during Devine’s testimony, Stuckey asked him whether it is possible to appeal a letter of reprimand.

We fail to see how Stuckey’s two clarifying questions and request to view a document in evidence affected the deliberative process so as to have violated Devine’s due process rights. Additionally, we reject Devine’s argument that this “Court can reasonably assume that Ms. Stuckey was both present and participated in the deliberative process.” There is no evidence to support that assumption; indeed, all of the evidence is to the contrary.

b.

Excluded Evidence

Next, Devine contends the Board violated its own evidentiary rules by declining to admit three items of evidence he offered. Hearings before the Board are governed by the Prince George’s County Personnel Board’s Rules of Administrative Procedure (2015). In relevant part, those Rules state:

The Board . . . *may* admit and give probative effect to evidence which possesses probative value commonly/accepted by reasonable and prudent men in the conduct of their affairs. The Board . . . shall give effect to the

rules of privilege recognized by law. The Board . . . may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

(Emphasis added.) The Board is bound by this rule, which affords it wide discretion in admitting or declining to admit evidence. The question for us is whether the Board's evidentiary rulings were arbitrary or capricious. SG § 10-222(h)(3)(vii); *Spencer*, 380 Md. at 528–29.

First, Devine complains about the Board's refusal to admit a particular Corporal's disciplinary records. The Corporal in question had no involvement in this matter, but Devine wanted to introduce his personnel records to show that Director McDonough has been willing to promote people with disciplinary blemishes. The Board declined to admit the documents because it did not want confidential information from an employee's personnel file to be made part of a public record. Given the Board's reasoning, we cannot say that its decision was arbitrary or capricious. This is especially so because Director McDonough had acknowledged in her testimony that she had promoted people with disciplinary blemishes on their records.

Second, Devine complains that the Board did not allow him to question Director McDonough in order to elicit testimony that in 2013 she promoted a Lieutenant to Captain when that Lieutenant had less experience than he (Devine) had. Devine's counsel argued that this evidence was “probative as to the voracity [sic] of [Director McDonough's] contention that she was looking for somebody who was experienced, seasoned, and ready.” The Board did not allow the testimony, explaining that the promotion of the Lieutenant in question in 2013 occurred a few years after Gamble's

promotion and that Devine needed to focus his line of questioning on events occurring in the 2009–10 timeframe. This proffered evidence had virtually no probative value and was collateral. The Board did not act arbitrarily or capriciously by excluding it.

Finally, Devine complains that the Board acted arbitrarily and capriciously by not allowing him to call a witness to testify about the outcome of his own personal grievance and that Harris had a propensity for retaliation. The witness in question had no involvement in anything concerning Devine. Devine’s counsel argued, however, that the witness’s testimony about his own grievance would show that the DOC often promoted from the eligibility register in order of score ranking. This evidence was redundant, as there was ample evidence already admitted showing that the DOC’s general practice was to promote in order of ranking, but that Director McDonough was not statutorily required to do so.

c.

Counsel for the Board

During the hearing, the Board was represented by counsel, Manuel Geraldo, who served as its legal advisor. In oral argument before this Court, Devine’s counsel acknowledged that Geraldo was allowed to ask the witnesses questions during the hearing. Nevertheless, Devine contends that Geraldo functioned as an advocate for the DOC because he asked Director McDonough about a fact that was not in the record and objected to a question posed by Devine’s counsel on the ground that it called for

speculation. Thus, Devine argues, Geraldo acted in an “improper role,” and the hearing was conducted by means of a “reversible unlawful procedure.”

As counsel to the Board, it was Geraldo’s duty to clarify information for the Board and to ensure that improper testimony was not elicited. Objecting to a question because it called for speculation was within his bailiwick.

Following re-direct examination of Director McDonough, Board members asked her questions. As a follow-up question on the topic of Devine’s maturity, Geraldo asked Director McDonough whether she recalled an incident in which Devine emptied out a subordinate’s locker. She responded only that she remembered hearing about it. Later in the hearing, Harris and Hilton testified about the locker incident, with which they were personally familiar. Clearly, even if counsel should not have asked that question (and we do not say he should not have) and even if it had elicited a response more specific than what was given, there was no prejudice to Devine because the locker incident later came into evidence. And even if Geraldo exceeded the scope of permissible questioning by asking about an incident he had learned about in the original hearing, his question did not make him an advocate for the DOC and made no difference in the case.

IV.

Arbitrary or Capricious

Finally, Devine contends the Board’s decision was arbitrary and capricious because the Board made an error of law, made factual findings that were not supported by substantial evidence, and engaged in an improper procedure. He recounts his earlier

arguments and concludes that the Board acted arbitrarily and capriciously. As we have explained, the arbitrary and capricious standard applies when the Board acts in a discretionary capacity and is inapplicable when the Board acts as a fact finder or makes conclusions of law. *Spencer*, 380 Md. at 528–29. Devine fails to specify any discretionary decision the Board made that violated the arbitrary and capricious standard, other than those we already have rejected.

**JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE'S
COUNTY AFFIRMED. COSTS TO
BE PAID BY THE APPELLANT.**