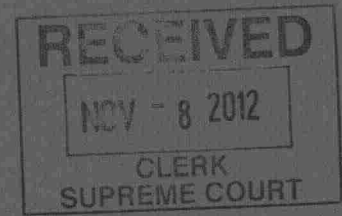


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-000104-D



STEPHEN DERRICK HILL

MOVANT

v.

CITY OF MT. WASHINGTON

RESPONDENT

MOVANT'S BRIEF

* * * * *

Kentucky Court of Appeals No. 2011-CA-000378-MR

On Appeal from Bullitt Circuit Court
Case No. 09-CI--00341
Hon. Rodney D. Burress

* * * * *

CERTIFICATE

This to certify that ten (10) copies of this Movant's Brief were mailed to Susan Stokley Clary, Clerk of the Supreme Court, New Capitol Bldg., 700 Capitol Avenue, Frankfort, KY 40601-3488 via Federal Express on this 7th day of November, 2012. True and accurate copies of the original were mailed, postage prepaid, on this same day to the following:


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INTRODUCTION

This is a police officer discipline case in which movant Hill ("Hill") appeals the lower courts' holdings that KRS 15.520 only applies to citizen complaint initiated internal investigations and hearings.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(c)(ii) Hill desires oral argument because of the inconsistent interpretations of the statute's application and the important ramifications affecting police officers across the Commonwealth, and also acknowledges receipt of this Court's order entered September 12, 2012 concerning scheduling oral argument.

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Since this Discretionary Review presents a question of law, review is *de novo*. *Bd of Comm'rs v. Davis*, 238 S.W.3d 132, 135 (Ky. App. 2007).

KRS Ch 446., case law regarding statutory construction and KRS 15.520 control.

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STATEMENT OF THE CASE

The parties agree on the facts herein. Plaintiff was administratively disciplined for insubordination in writing on November 10, 2008, receiving a five (5) day suspension, reduction in rank from Sergeant to Patrol Officer, and reassigned from night shift to day shift (Defendant's Memorandum in Support of Motion For Summary Judgment, Exhibit "B", Appendix No. 4). Plaintiff, by counsel, requested in writing on November 14, 2008 a hearing on the disciplinary action pursuant to KRS15.520 and Mt. Washington Police Procedures 6036 to appeal the discipline (dep. Rosselli, Exhibit "3", Appendix No. 5).

On November 19, 2008 Chief Rosselli wrote to Plaintiff's counsel that KRS 15.520 does not apply to Plaintiff, as Plaintiff was not terminated as a police officer or even for that matter "demoted" (Defendant's Memorandum In Support Of Motion For Summary Judgment, Exhibit "C", Appendix No. 6). On January 10, 2007, Plaintiff had received written notification by then Chief Hockenbury informing Plaintiff of his promotion to Sergeant (dep. Rosselli, Exhibit "1", Appendix No. 7).

Plaintiff, by counsel, requested in writing on December 1, 2008 his third request for a Hearing on the disciplinary action, and stated it is Plaintiff's position that the 60 day period pursuant to KRS 15.520 in which to hold the hearing began to run when he requested the hearing, in the November 14, 2008 letter (dep. Rosselli, Exhibit "7", Appendix No. 8). No hearing was ever held pursuant to KRS 15.520.

Hill's Complaint reiterated the chronology above and respectfully demanded dismissal of all administrative charges with prejudice, damages as proven, reinstatement to Sergeant, all back pay, attorney's fees and all relief to which he may appear entitled.

Following discovery both parties moved for Summary Judgment. The basis for Hill's Motion For Summary Judgment was KRS 15.520 applies to Mt. Washington police officers and was not followed. (CD, Bullitt Circuit Court, Division 1, No. 09-CI-00341; 7/30/10; 08:39:12), Appendix No. 9. The parties briefed the case and the Circuit Court held oral argument.

On January 7, 2011 the Court granted Defendant's Motion for Summary Judgment and dismissed this action with prejudice.

Hill appealed to the Kentucky Court of Appeals which, after briefing and without oral arguments, on January 20, 2012 unanimously affirmed the Circuit Court.

Hill then moved for discretionary review in this Court.

ARGUMENT

1. STANDARD OF REVIEW

This case presents the statutory interpretation of a statute, a question of law, therefore full *de novo* review applies. *Bd. of Comm'rs v. Davis*, 238 S.W.3d 132,135 (Ky. App. 2007). Appellate Courts are not bound by the Circuit Court's interpretation. *Id.*

2. PROPER STATUTORY CONSTRUCTION REQUIRES FINDING
KRS. 15.520 APPLIES TO ALL COMPLAINTS AND
INVESTIGATIONS OF POLICE OFFICERS WHO QUALIFY
PURSUANT TO KRS 15.520(4).

KRS 15.520(4) states: "The provisions of this section shall apply only to police officers of local units of government who receive funds pursuant to KRS 15.410 through 15.992". All sworn police officer personnel of the Mt. Washington Police Department receive funds pursuant to the Kentucky Law Enforcement Foundation Program Fund ("KLEFPF") for increased training, and therefore KRS 15.520 applies. KRS 15.420(1) (Appendix No. 10) defines "local unit of government" to include any city, and subsection (2) defines "police officer" to include a full time member of a lawfully organized police department of city government.

OAG 83-114, Appendix No. 11, last paragraph (discussed below) states: "The purposes of KRS 15.520 are to establish a system for professional conduct for the police officers of units of local government, to establish administrative due process rights for police officers of local units of government and to provide a means of redress by citizens for wrongs allegedly done to them by police officers".

As pointed out in the OAG, Hill too argues KRS 15.520(1) states the statute's three intentions: to establish a minimum system of professional conduct, set administrative due process rights for police officers and

providing a means for redress by citizens for wrongs allegedly done to them by police officers.

Hill argues the third intention, to provide a means for redress by citizens, complements the statute's first two intentions. KRS 15.520(1)(a)(3) expressly allows a department to charge an officer of misconduct without a sworn citizen's complaint if the department's investigation independently substantiates the allegations, and KRS 15.520 applies to such a hearing.

KRS 15.520 (1)(a)(4) states "Nothing in this section shall preclude a department from investigating and charging an officer both criminally and administratively."

The Court of Appeals' opinion interpreted this subsection to mean "From these provisions, there seems no doubt that police departments may initiate their own disciplinary proceedings, in the absence of a citizen's complaint, outside the scope of KRS 15.520". *Hill v. City Of Mt. Washington*, 2011-CA-000378-MR, Opinion Affirming January 20, 2012, Appendix No. 1, p 4. That Court's Opinion then rejects Appellant Hill's rebuttal that "... because KRS 15.520 (1)(a)(4) expressly contemplates that a police department may investigate and charge an officer on its own initiative, KRS 15.520(1)(a)(4) is necessarily applicable to such occasions." *Id.*

The Court's rejection states "However, as we read it, KRS 15.520(1)(a)(4) affirms that intradepartmental investigations are not

precluded and that they differ from citizen complaint investigations". *Id.*

Hill respectfully argues the Court of Appeals misinterpreted the language of KRS 15.520(1)(a)(4). Hill argues the section makes clear, as occurs regularly, a police officer can face both criminal charges and administrative charges, with discipline up to termination. Hill notes that despite the language of the subsection a police department actually has no authority to actually criminally charge anyone, that only the county or Commonwealth's Attorneys' offices may.

Regardless, Hill argues nothing in the subsection remotely suggests an administrative charge contemporaneous with a criminal one is outside the scope of KRS 15.520. Expressing the non-preclusion of both types of charges within KRS 15.520 furthers the intention the statute applies, and that the statute applies to both types of charges, not just an "either or" application.

The Court of Appeals' response to Hill's rebuttal, that KRS 15.520 (1)(a)(4) affirms intradepartmental investigations are not precluded and that they differ from citizen complaint investigations, adds language and intent not expressed in the language used, in violation of the basic tenets of statutory construction. KRS 15.520(1)(a)(4) makes no mention of citizen complaints, much less distinguishing them from intradepartmental complaints. The department charges a police officer administratively whether the charge originates from a citizen's complaint or within the

department. "All words and phrases shall be construed according to the common and approved usage of language. . ." KRS 446.080(4), Appendix No. 12. "Statutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required". *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002).

Hill argues KRS 15.520(1)(b)'s first sentence "No threats, promises, or coercions shall be used at any time against any police officer while he or she is a suspect in a criminal or departmental matter." applies to ALL criminal and ALL departmental matters. If the legislature intended KRS 15.520 to only apply to citizen complaint investigations the sentence would have included language limiting departmental matter. The legislature easily could have added language something like "regarding a citizen complaint" to the sentence. The legislature did not and the courts should not.

Likewise, KRS 15.520(1)(c)'s first sentence "No police officer shall be subjected to investigation in a departmental matter involving alleged misconduct on his part. . .", while clearly correctly omitting the phrase "a criminal or" included in the 15.520(1)(b) immediately above, yet again makes no limitation of a departmental matter involving alleged misconduct to such matters only alleged by a citizen.

The due process rights expressed in KRS 15.520(1)(d) apply in "any" criminal investigation, not just one based on a citizen complaint.

KRS 15.520(1)(e) applies to "Any charge involving violation of any

local unit of government rule or regulation . . .". Again, the subsection states it applies to "any" charge, not just to one based upon citizen's complaint.

KRS 15.520(h) contains the minimum administrative due process rights afforded any police officer when a hearing is to be conducted, one of the statute's purposes, as expressed in KRS 15.520(1). The subsection's rights apply "When a hearing is to be conducted. . .". Nothing limits the protections to hearings involving a citizen complaint investigation and hearing.

Hill respectfully argues KRS 15.520(1)(h)(3) unequivocally reveals the legislature's intent that KRS 15.520 applies to all departmental investigations and hearings. By stating "If any hearing is based upon the complaint of an individual. . ." there can be no other grammatically correct or reasonable interpretation of the express language than the statute also applies to investigations and hearings NOT based upon a complaint of an individual, i.e., the department. That the remainder of the subsection provides notice requirements to a complaining individual further bolsters Hill's argument other hearings, not based on an individual's complaint, exist since there is no need to notify by certified mail those involved in an intradepartmental hearing. The Chief simply orders the accused officer and any accusing members of the department to attend. The Court of Appeals Opinion on review dismissed such an interpretation as "a bare hint of

legislative intent", Appendix No. 1, p 4, and declined such a statutory construction. The Opinion's declination also expressly included Hill's argument above, regarding KRS 15.520(1)(c)'s language "in a departmental matter involving alleged misconduct". Hill argues in addition to violating *Plowman, supra*, and KRS 446.080(4) regarding common language and meaning, such statutory construction interpretation violates *Bob Hook Chevrolet, Inc., v. Transportation Cabinet*, 983 S.W.2d 488 (Ky. 1998), in which this Court stated "A statute should be construed, if possible, so as to effectuate the plain meaning and unambiguous intent expressed in the law (citation omitted). A corresponding rule of construction is that a statute should be construed, if possible, so that no part of its provisions are rendered meaningless" *Id at 492*. The Court of Appeals' Opinion renders the conditional ["If" any hearing is based on the complaint of an individual. . .] meaningless, since the Opinion declined to interpret the subsection as also applying to any other hearings, those not based on a complaint of an individual i.e., an intradepartmental complaint. The subsection clearly should be construed so the subsection also applies to hearings not based on the complaint of an individual. Since the subsection states no other limitations than the beginning "If. . ." the statute applies to ALL hearings.

3. OPINIONS OF THE ATTORNEY GENERAL OF KENTUCKY APPLY KRS 15.520 TO ALL INVESTIGATIONS AND HEARINGS OF POLICE OFFICERS WHO QUALIFY PURSUANT TO KRS 15.520(4), NOT JUST SUCH INVESTIGATIONS AND HEARINGS BASED ON A CITIZEN'S COMPLAINT.

OAG 81 - 48, Appendix No. 13, p 2 states "We believe that KRS 15.520 when read in conjunction with the act as a whole clearly implies that police officers against whom complaints are filed are entitled to a due process hearing as provided therein though admittedly the statute is somewhat ambiguous". The OAG states the ambiguity refers to KRS 15.520(1)(h)'s "When a hearing is to be conducted . . ." which may be interpreted to mean not requiring a hearing in all cases. The opinion later states the language simply means the body designated to take action had not found the complaint frivolous and thus warrants a full investigation.

In *OAG 81 - 132*, Appendix No. 14, final paragraph, the Kentucky Attorney General unequivocally opines if the police department is funded under the Law enforcement program, the officer can only be fired pursuant to a hearing as provided in KRS 15.520.

OAG 81 - 133, Appendix No. 15 paragraph 4, states the mayor of a fifth class city may fire a non-elected officer at will, but specifically excepts police departments who participate in KLEFPF. The paragraph's last sentence states "We should mention that under the Law Enforcement

Foundation program no police officer can be removed without just cause and a hearing as provided in KRS 15.520".

OAG 81 - 134, Appendix No. 16, primarily addresses latter enacted statutes general rules of statutory construction, but also discusses KRS 15.520's requirements regarding complaints against police officers.

OAG 81 - 200, Appendix No. 17, requires a hearing pursuant to KRS 15.520 with respect to complaints against full time police officers who receive KLEFPF funds. The complaints considered were based on citizens' complaints, but the Opinion no way limits KRS 15.520's application to citizen complaints, only to full time officers who receive KLEFPF funds.

OAG 83 -114, Appendix No. 11, responds to a City Attorney's question "...Whether the provisions of KRS 15.520 are applicable if the police chief uses the form prepared by the city to document the insufficiencies of his police officers." The OAG, as outlined above, states the three purposes of KRS 15.520. The Opinion's last sentence answers the question posed with "Thus if the city's proposed policy documenting the work performances of its employees involves charging police officers with professional misconduct or with violations of municipal rules and regulations, the city must adhere to the provisions of KRS 15.520 requiring in part notification to the police officers of the charges and a hearing relative to those charges, assuming the city and its police officers are participating in the Kentucky Law Enforcement Foundation Program Fund."

OAG 83- 231, Appendix No. 18, relies on *McCloud v. Whitt*, 639 S.W. 2d 375 (Ky. App. 1982) to respond to three questions by a City Attorney and states in part "The Court did point out that if the chief's removal was predicated upon a complaint of professional misconduct in violation of KRS 15.520, then the procedure under this statute would have to be followed."

All of the 1981 OAGs cited above were written within a year of KRS 15.520's effective date. None of the OAGs cited above even mention anything close to the statute's application being limited to a citizen complaint investigation and hearing, yet all of them apply KRS 15.520 to complaints against police officers who qualify pursuant to KRS 15.520(4). Two of the *OAGs*, *81 - 132* and *83 - 114* clearly refer to complaints not involving a citizen complaint. *OAG 81 - 132*'s last paragraph answers the question of whether the mayor can fire the police chief for insubordination (the same charge resulting in the discipline Hill appeals here) by executive order by stating, as above, only by a KRS 15.520 hearing if funded by KLEFPF. *OAG 83-114* considers the use of city proposed forms by department heads and the city manager to determine whether an employee deserves an increase in salary or, as quoted above, using the documented work performances in possibly charging the police officer with professional misconduct or violations of municipal rules and regulations. Any such charge clearly would be intradepartmental.

State officials seek Attorney General opinions concerning official duties because the Attorney General is the legal advisor of all "state offices, departments, commissions and agencies of the Commonwealth. " KRS 15.020. The opinions are not binding on the Courts, but are highly persuasive and given great weight. *York v. Commonwealth*, 815 S.W. 2d 415, 417 (Ky. App. 1991).

The Court of Appeals' Opinion appealed herein completely ignores and does not address at any point Hill's citation to and reliance on the longstanding and clear OAGs.

4. KENTUCKY CASE LAW SUPPORTS HILL'S ARGUMENT KRS 15.520 APPLIES TO ALL COMPLAINTS AND INVESTIGATIONS OF POLICE OFFICERS WHO QUALIFY PURSUANT TO KRS 15.520(4).

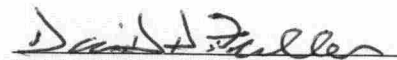
Since this Court's *de novo* Opinion in this action will determine to which complaint investigations and hearings KRS 15.520 applies, and since the precise issue herein has never been previously presented, in the interest of judicial economy Hill will not extensively address how the appellate courts previously applied KRS 15.520 beyond referencing Pearce's brief in *Pearce v. University of Louisville*, 2011 -SC-000756-D, pending in this Court along with the present case, which contains a concise analysis of prior appellate construction of KRS 15.520. Hill hereby adopts the analysis in *Pearce, Id.* Hill argues this Court and the Court of Appeals have published

opinions, as cited by Pearce, which applied KRS 15.520 to charges other than citizen complaints. Hill also notes the shift in the Court of Appeals' panels' decisions beginning in 2006 that KRS 15.520 applies only to citizen complaint investigations and hearings.

CONCLUSION

For the foregoing reasons, Hill respectfully requests this honorable Court to reverse the January 20, 2012 Court of Appeals' Opinion Affirming the Bullitt Circuit Court Order entered January 10, 2011, to hold KRS 15.520 applies to all investigations and hearings of police officers who qualify pursuant to KRS 15.520(4) for complaints of professional misconduct, violations of rules and regulations of the local unit of government and all complaints of violations of criminal law and to remand the case to Bullitt Circuit Court with instructions to enter an Order for Mt. Washington to dismiss with prejudice all charges against Hill, to reinstate him to his former position and pay rate of Sergeant, all back pay and other economic benefits and to reinstate him to his former night work shift.

Respectfully submitted,


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