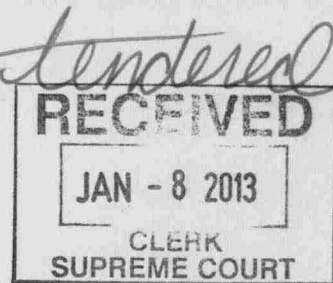


SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-000756-D



JEFFERY T. PEARCE

MOVANT

v.

UNIVERSITY OF LOUISVILLE,
BY AND THROUGH ITS BOARD OF TRUSTEES

RESPONDENT

REPLY BRIEF

* * * * *
Kentucky Court of Appeals No. 2009-CA-001813-MR

On Appeal from Jefferson Circuit Court
Case No. 08-CI-002524
Hon. Irv Maze, Judge

* * * * *

CERTIFICATE

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A. Application of the Statute to Non-Citizen-Complaint-Based Discipline

1. The Statute Applies by Its Own Terms

The University's argument asks this Court to ignore KRS 15.520's careful delineation of the contingencies that stem from the different potential sources of disciplinary action that the statute recognizes. There is nothing "illogical" in having different provisions for the divergent types and sources of discipline. That is not "elevating" one section over another, but rather is addressing the contingencies in a manner appropriate for each.

The University cites KRS 446.140 (Brief p. 22 n. 8), but in arguing that 15.520's title should be considered in construing it, disregards the content of 446.140:

Title heads, chapter heads, section and subsection heads or titles, and explanatory notes and cross references, in the Kentucky Revised Statutes, do not constitute any part of the law, except as provided in KRS 355.1-109

See *Holt v. West Kentucky Coal Co.*, 350 S.W.2d 155, 157 (Ky. 1961).

The University argues that the term "departmental matter" simply means discipline beyond citizen complaints; however, the distinction between disciplinary proceedings based on a citizen complaint and proceedings based on internal departmental charges is manifest throughout the statute, as delineated at Pearce Brief pp. 11-13. A "departmental matter" is not simply a citizen complaint.

Finally, the University disputes that subsection (4) applies the statute to all police departments receiving KLEFPF moneys, but the University fails to rebut the point that this Court, in *Sheldon*, citing subsection (4), stated that because a department "receives funds from the law enforcement foundation program" it "thus is required to adhere to KRS 15.520." 977 S.W.2d at 498. The application of 15.520 to all departments receiving KLEFPF funds is not limited to any particular "factual circumstances."

2. The Routine Application to All Police Discipline, Until Mid-2000s

The University's attempt to discredit the catalog of published cases in which the application of 15.520 to non-citizen complaint discipline matters was assumed, misses the point. Each of the cases cited at Pearce Brief pp. 14-15 clearly indicates that the discipline resulted from departmental charges—which of course can be brought even where a citizen originally provided the information but declined to provide a sworn complaint (KRS 15.520(1)(a)(3)), or pursuant to departmental investigation (id. subsection (1)(a)(4)). Those cases include the decisions of this Court in **Brown v. Jefferson County Police Merit Bd.**, 751 S.W.2d 23, 24, 26-27 (Ky. 1988), and **Louisville by Kuster v. Milligan**, 798 S.W.2d 454, 458 (Ky. 1990). That the courts of Kentucky until the mid-2000s routinely applied 15.520 to all police discipline cannot genuinely be disputed.

3. S.B. 169, Which Was Never Put to a Vote, Has No Significance

S.B. 169 was never put to a vote of any Senate committee, much less to a vote of either the full Senate or the House. Nonetheless, the University asserts with no reference to authority that the Senate's lack of action on the bill "conclusively proves the General Assembly was satisfied with the Court of Appeals' existing interpretation of KRS 15.520's scope." (Appellee's Brief p. 23.) This assertion is incorrect. In **United States v. Craft**, 535 U.S. 274, 286-287 (2002), the Court observed:

[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute,' [since] 'congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'

(Citations omitted.) See also *United States v. Wise*, 370 U.S. 405, 410-411 (1962) (“Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change”). Sound principles of statutory construction require that “courts determine the Legislature’s intent from its words, not from its silence.” *Nawrocki v. Macomb County Rd. Comm’n*, 615 N.W.2d 702, 720 (Mich. 2000). The failure of the Senate to vote on SB 169 tells us nothing about the proper interpretation of KRS 15.520.

4. OAGs Do Not Support Limited Application of the Statute

The Attorney General’s Office has *never* opined that 15.520 applies only to citizen-complaint-derived discipline, and indeed has indicated quite the opposite. The University cites OAG 81-48, but that opinion nowhere suggests that the right to a hearing is limited to citizen complaints. Other Attorney General opinions make broader statements about the application of KRS 15.520:

- OAG 81-133 concludes: “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.” (Thus in original.)
- OAG 81-132 states that if “the police department is funded under the law enforcement program, [then] the officer can only be removed pursuant to a hearing as provided in KRS 15.520.”
- OAG 83-114 states: “[I]f the city’s proposed policy of 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...assuming the city and its police officers are participating in the Kentucky Law Enforcement Foundation Program Fund.”

- OAG 81-134 states that KRS 15.520 “provides that the minimum rights afforded any police officer charged with misconduct shall be, among other things, that the accused officer be given at least seventy-two (72) hours’ notice of any hearing and also furnished copies of the charges not less than twenty-four (24) hours prior to the hearing.”

5. **Application of the Statute by Judicial Estoppel**

The University’s argument that judicial estoppel does not apply because “the University never asserted, much less ‘unequivocally asserted,’ that KRS 15.520 applied to this matter,” is incorrect. In *Hisle v. Lexington-Fayette Urban County Gov’t*, 258 S.W.3d 422 (Ky. App. 2008), the court stated that “[a]lthough there is no absolute general formula” for judicial estoppel,

several factors have been recognized such as: (1) whether the party’s later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”

258 S.W.3d at 434-35.

And application of KRS 15.520 raises no “jurisdictional” issue; the courts of Kentucky are Constitutionally vested with the authority to review administrative action for arbitrariness. See *Kewall v. Beilling*, 175 S.W.2d 489, 491 (1943).

B. **Violation of the Statute, and Resulting Prejudice and Harm to Pearce**

1. **Investigative Violation**

The University, by assuming (without actually stating) that only Maj. Bringhurst’s knowledge of the allegations against Pearce could be attributed to the Department, disputes that it violated 15.520(1)(c)’s time limitations on compelling an officer’s report. But it was Lt. Rick Brown’s knowledge on the day of the MDR Building events (Nov.

14) that is first attributable to the University. Lt. Brown was the ranking command officer on duty, "in charge of the late night shift" on Nov. 14, 2006 (Tr. Vol. 2 p. 10), making his knowledge that of the Department. Pearce's next tour of duty after Lt. Brown's knowledge was the next day, Nov. 15. (Tr. Vol. 4, p. 40.)

The University also argues that the term "charges" as used in subsection (1)(c) means that section is not triggered until formal charges have been preferred against an officer. But police departments are not "made aware" (the statute's phrase) of the formal disciplinary charges they prefer—the departments draft and serve those charges. The University's construction of section (1)(c) would (as with many of its arguments) make the section meaningless, since formal charges come after statements and reports are taken, not before; hence reports would always have been obtained before the section applied. The term "charges" as used there denotes the facts of an event, and not formal disciplinary charges, or it has no effect.

The Internal Affairs investigator on the case, Lt. John Tarter, conceded, ultimately, that he used Pearce's untimely-required report (Exh. 5) during the interrogation of Pearce. (Tr. Vol. 1 p. 123.)¹ Furthermore, Pearce's wrongfully-required report triggered Maj. Bringhurst to convene the "Review Board," which issued a determination that Pearce was guilty of disciplinary violations. Bringhurst testified that he looked at Pearce's and Lt. Rick Brown's responses to his [Bringhurst's] directive to give reports on the incident, was unhappy, and decided to convene the Review Board. (Tr. Vol. 2 p. 11.)

¹ See, e.g., Exh. 1 p. 0066, where Tarter, in a question to Pearce, paraphrased a passage from Pearce's memo, and p. 00076 where Tarter first paraphrased another passage from the memo, and then quoted from the memo.

2. The Pre-Termination “Hearing”

The University argues that Pearce’s refusal to participate in the pre-termination “hearing” without Counsel as provided for in KRS 15.520 constituted some sort of waiver. To the contrary, if 15.520 applies to the pretermination hearing as we have shown it does, it would have been foolish for Pearce to appear without Counsel. It was certainly not a waiver of 15.520 rights to refuse to participate with representation as provided for in the statute.

3. The Review Board

The University concedes that the Review Board found that “Pearce had violated four DPS policies” but paradoxically asserts that “[t]he board did not assign discipline or find ‘guilt’[.]” (Brief p. 7.) It is beyond dispute that the Review Board conducted a hearing, calling witnesses and receiving documentary evidence, and concluding that Pearce was guilty of policy violations. And it is equally indisputable that the Review Board did not afford Pearce a single one of the procedural rights set out in KRS 15.520, as the University in fact admits at pp. 34-35. The absence of required procedural safeguards at the Review Board hearing —notice, the right to counsel, and confrontation of witnesses (15.520(1)(h)(1), (5), and (7))—allowed the University to collect admissions and evidence which it used against Pearce to his detriment in the Hearing Officer trial, as shown at Pearce Brief pp. 10-13.

4. Incurable Prejudice In the Post-Termination Proceedings

a. Failure of Adequate Notice

Perhaps the greatest prejudice to Pearce derives from the statutorily and constitutionally deficient notice of charges.² The deficiencies include the following:

- Including in the charging documents allegations that (a) did not state a violation of policy, and (b) were set out only in the Bringhurst portion of the charging documents and not in the Chief's portion. The second Bringhurst letter (App. G pp. 2-4) states: "you failed to respond to the fire alarm until the third radio call concerning the incident." But it is now undisputed that not responding to the MDR Building is not part of the actual charges. "[N]one of Pearce's superiors found fault with the fact that he [Pearce] completed the escort first."³ (University Brief p. 4 n.3.) The radio transcript is devoid of any transmission sending Pearce to the fire scene until after the fire department had left. But in the hearing, the University introduced many pages worth of trial testimony devoted to establishing that Pearce did not report to the MDR building until after he completed the escort run,⁴ even though failure to make the MDR scene was not mentioned in the Chief's charges, and the Chief expressly disavowed that as being one of the charges. The University's Brief continues the error, dwelling at length on the timing of Pearce's response to the MDR building.

² The University erroneously asserts that "Pearce was provided pretrial discovery" in the administrative proceedings. (Brief p. 1.) No discovery was afforded—no depositions, no interrogatories, etc.—only an exchange of standard prehearing disclosures mailed June 6, 2007 (Ad.R. pp. 87-91 and 92-95), seven days before the June 13 start of the hearing, per the Hearing Officer's Scheduling Order (Ad.R. 71). The two depositions now in the record were taken during the Circuit Court proceedings.

³ The University's assertion in the first half of that sentence that "fire alarms took precedence over student escorts per Departmental policy" is unsupported by reference to the record and is incorrect—there is no such policy. See Major Bringhurst's testimony at Tr. Vol. 2, p. 67.

⁴ See, e.g., Tr. Vol. 1 pp. 47 ll.1-3; 49 ll.10-12; 52 ll.22 – 53 l.14; 57 ll.10-18; 58 ll.14-21; 66 l.10 – 68 l.13; 93 l.22 – 94 l.10; 168 ll.3-13; id. Vol. 2 pp. 78 ll.15-21; 95 ll.6-25; 97 l.6 – 98 l.5; id. Vol. 3 pp. 52 l.8 – 53 l.18; 72 l.22 – 73 l.8; 80 l.25 – 81 l.10; 131 ll.18-25. Those references exclude the many cross-examination questions on the same topic.

- The charging documents contain no explanation of how Pearce could have violated either the “incompetence” policy or the “truthfulness” policy. The charges quote the incompetence policy, but fail utterly to suggest how “facts supporting” the allegation of dishonesty have anything to do with “incompetence,” including as defined in the University policy. Precisely the same is true of the “dishonesty” charges.
- The Chief’s letter is even less informative than Bringhurst’s, stating only the four points quoted at p. 30 of Pearce’s Brief. The quotations from University policy that follow provide no facts of any kind concerning the two incidents or how Pearce’s conduct in the incidents could have violated University policy.
- As the University states, the charging documents refer briefly to the MDR alarm investigation, and to the Jackson Street wrong-way vehicle investigation. However, simply to refer to an incident at the MDR Building, or on Jackson Street, in no way provides notice of what the officer is alleged to have done wrong. Likewise, simply knowing that he “was being investigated for both the MDR fire alarm and Jackson Street incidents” (University Brief p. 37) is in no way proper notice of disciplinary charges based on those incidents.
- Neither Bringhurst’s letter nor the Chief’s mentions vehicular pursuits. The University admits that it “never charged Pearce with violation of its vehicle pursuit policy” (Brief p. 39), yet in the hearing, the University plunged directly into testimony regarding the pursuit policy with its very first witness, Internal Affairs investigator Lt. John Tartar, asserting that Pearce engaged in a “pursuit” of the Jackson Street wrong-way vehicle, and explaining the University’s policy prohibiting pursuits.⁵ In each of the next two days of hearing, the University continued to elicit testimony regarding the pursuit policy.⁶ Yet ***the charging documents nowhere mention pursuits or the pursuit policy.*** Pages of trial testimony were devoted to

⁵ Tr. Vol. 1, pp. 76 l.10; 83 ll.8-9; 89 l.14; 91 l.15; 149 ll.12, 20, 24, 25; 150 ll.11, 15, 21; 151 l.11; 155 ll.5, 7, 12.

⁶ Tr. Vol. 2 pp. 72 l.17; 73 ll.15, 23; id. Vol. 3 pp. 104 l.20; 134 l.22; 135 l.16; 181 l.5. These references, and those in the prior footnote, omit the extensive questioning on cross examination.

an alleged wrongful act of which Pearce was not given notice and for which he was never charged.

The University dismisses the requirement of adequate notice of charges set out in this Court's decisions in **Osborne v. Bullitt County Bd. of Educ.**, 415 S.W.2d 607 (Ky. 1967), **Goss v. Personnel Board**, 456 S.W.2d 819 (Ky. 1970), and **Goss v. Personnel Board**, 456 S.W.2d 822 (Ky. 1970), with the suggestion that they are too old, and are limited to special statutes. The University is wrong. "Adequate notice is a fundamental due process principle and **only in the rarest of circumstances will an adjudicative process be acceptable without it.**" Charles H. Koch, Jr., **Admin. L. & Prac.** Vol. 2 § 5:32 (3d ed. West 2012) (emphasis added). "One of the most fundamental requirements of due process is that an individual must receive adequate notice of the charges or claims being asserted against him." **U.S. v. Baker**, 807 F.2d 1315, 1323 (6th Cir. 1986). The requirement of adequate notice of charges remains fundamental in Kentucky public employment law. See **Com. of Ky. Transp. Cab. v. Woodall**, 735 S.W.2d 335, 338 (Ky. App. 1987), where the court held that notice of termination sent to merit employee was fatally defective because it lacked specificity.

b Some Charges Failed to State a Violation

The remaining charge based on the Nov. 13, 2006, incident hinges on the fire incident report. But the charge on the report does not state a violation of policy, as even the University tacitly concedes with the term "technical" violation. (Brief p. 45.) With no policy requiring Pearce to complete the report, this cannot be the basis of a violation. The Hearing Officer is completely incorrect in stating that "The police officer at the scene of the fire alarm is required to complete the report" (Appendix A. p. 6 ¶ 30), since

there is no policy so stating.⁷ The University's statement that Pearce admitted in his Circuit Court Brief that he failed to file the report omits the main part of the sentence quoted: "The charge of failure to make or file a report is true, **but is not a violation of any University policy...**" (Emphasis added.)

C. Errors in the Hearing Officer's Decision

1 "Merging" of Charges that Were Not Sustained

The University's attempt to explain the Hearing Officer's "merging" of charges at p. 13 n.6, and at p. 40 of its Brief clarifies nothing. The Hearing Officer's conjuring up of the concept of "merger" remains inexplicable.

2. Failure to Address Degree of Punishment

Kuster, 798 S.W.2d at 458, clearly states that a reviewing court may address the degree of discipline if it has found that the administrative agency acted arbitrarily.

D The Appropriate Remedy—Remand for Hearing, with Reinstatement and Back Pay in the Interim

The statement of the dissent in the Court of Appeals, that the case should be remanded "for a hearing applying these due process rights," is in no way inconsistent with the overwhelming authority cited at p. 48 of Pearce's Brief, and in n. 21 on that page, showing that until a due process-compliant hearing is provided, the employee (in this case Pearce) is to be reinstated with back pay in the interim.



⁷ The University's assertion of fact at Brief. p. 44 that "Pearce admitted to this responsibility [to file a fire incident report] at the post-termination hearing" cannot be checked because unsupported by any reference to the record.