RENDERED: APRIL 10, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000698-MR

JOSHUA CROMER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CI-01216

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: FORMTEXT LAMBERT AND TAYLOR, JUDGES; GRAVES, SENIOR JUDGE.

TAYLOR, JUDGE: Joshua Cromer brings this appeal from a March 19, 2008, Opinion and Order and a March 21, 2008, Amended Opinion and Order of the Fayette Circuit Court affirming a decision by the Council of the Lexington Fayette Urban County Government (Council) to dismiss Cromer for misconduct as a police

officer with the Division of Police of the Lexington Fayette Urban County Government (Police Division). We affirm.

The following is a procedural history outlining the allegations of misconduct made against Cromer and dispositions thereof:

- 03/29/06 - 10/03/06 Several Form 111 complaints served upon Cromer relieving Cromer of sworn duty with pay on March 29, 2006.
- 11/08/06 Official suspension without pay; recommended for termination by police chief.
- 12/07/06 Charges against Cromer filed with clerk of Council.
- 12/12/06 Original hearing scheduled.
- 02/20/07 Hearing before Council; Cromer dismissed for misconduct.
- 03/12/07 Appeal to Fayette Circuit Court.
- 03/19/08 Fayette Circuit Court Opinion and Order affirming dismissal.
- 03/21/08 Fayette Circuit Court Amended Opinion and Order affirming dismissal.

Cromer now seeks review with the Court of Appeals. Cromer sets forth numerous allegations of error. Many of these allegations involve alleged violations of Kentucky Revised Statutes (KRS) 95.450 and KRS 15.520. KRS 95.450 and KRS 15.520 provide a police officer certain administrative due process protections in connection with a disciplinary proceeding. Judicial review of a police disciplinary proceeding has been succinctly set forth as follows:

> [T]he circuit court review of actions taken by a hearing body under that statute as "a quasi trial de novo". *Stallins v. City of Madisonville*, 707 S.W.2d 349, 350 (Ky.App. 1986). "The trial court in its review is to consider both the transcript and the additional testimony and it is limited to a determination of whether the administrative body acted arbitrarily in deciding whether the employee violated the rules and regulations of the police department." *Id.* On appeal from the circuit court, this Court is guided by the "clearly erroneous" standard set out in CR 52.01. *Id.* at 351. We are not to disturb the determinations of the trial court unless they are not supported by substantial evidence. *Id.* (Citations omitted). While the hearing body's determination of whether an officer has violated departmental regulations is subject to judicial review, the punishment imposed is not. *Id.* at 350, *citing* *City of Columbia v. Pendleton*, 595 S.W.2d 718 (Ky.App. 1980). Of course, as with any appeal from a decision of an administrative agency, we review the trial court's application of the law to the facts *de novo*. *See* *Reis v. Campbell County Board of Education*, 938 S.W.2d 880, 885-886 (Ky. 1996).

Howard v. City of Independence, 199 S.W.3d 741, 743 (Ky.App. 2005)(footnote omitted). In consideration of the above standard of review, we shall now address Cromer's specific contentions of error.

Cromer contends the circuit court erred by failing to dismiss the charges against him because he was not provided a hearing before the Council within sixty days of the Form 111 complaints as required by KRS 15.520(1)(h)(8). For the reasons hereinafter delineated, we disagree.

KRS 15.520(1)(h)(8) provides:

> Any police officer suspended with or without pay who is not given a hearing as provided by this section within

> sixty (60) days of any charge being filed, the charge then shall be dismissed with prejudice and not be considered by any hearing authority and the officer shall be reinstated with full back pay and benefits[.]

KRS 15.520 was initially enacted by the General Assembly in 1980 and provides police officers certain administrative due process protections in disciplinary proceedings. To properly interpret KRS 15.520 in our case, we must also consider KRS 95.450. KRS 95.450 was initially enacted by the General Assembly in 1956 and concomitantly provides administrative due process protections in disciplinary proceedings to police officers of, among others, government entities and urban-county governments. As KRS 15.520 and KRS 95.450 both provide administrative due process protections to Cromer, a proper reading of KRS 15.520(1)(h)(8) may only be obtained by juxtaposing these two statutes.

Under KRS 15.520(1)(h)(8), a police officer must be given a hearing within 60 days of being suspended and upon a "charge being filed." The controversy in this case surrounds the phrase "charge being filed." Cromer asserts that a charge was filed under the statute when he was served with the Form 111 complaints. In particular, Cromer argues:

> As a direct result of these Form 111 complaints, Officer Cromer was given detailed notice of misconduct allegations and subsequently disciplined pursuant to KRS 95.450(1). Other than not using the word "charge" on a Form 111, for all legal purposes, these Form 111 complaints are used as charging documents to initiate KRS 95.450(1) discipline which has resulted in various levels of suspension of Officer Cromer. . . . (Citations omitted.)

Cromer's Brief at 7.

In rejecting Cromer's argument that the Form 111 complaints were tantamount to charges being filed under KRS 15.520(1)(h)(8), the circuit court pointed to the unambiguous language of KRS 95.450(1) and (2), which provide:

> (1) Except as provided in subsection (5) of this section no member of the police or fire department in cities of the second and third classes or urban-county government shall be reprimanded, dismissed, suspended or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination or violation of law or of the rules adopted by the legislative body, and only after charges are preferred and a hearing conducted as provided in this section.
>
> (2) Any person may prefer charges against a member of the police or fire department by filing them with the clerk of the legislative body who shall immediately communicate the same to the legislative body. The mayor shall, whenever probable cause appears, prefer charges against any member whom he believes guilty of conduct justifying his dismissal or punishment. The charges shall be written and shall set out clearly the charges made. The person preferring the charges may withdraw them at any time prior to the conclusion of the hearing. The charges may thereupon be dismissed.

The circuit court held that the Form 111 complaints did not trigger the 60 day period under KRS 15.520(1)(h)(8). The court stated that KRS 15.520(1)(h)(8) specifically provides that a hearing must be held within 60 days of charges being filed. While KRS 15.520 does not indicate how such charges are filed, KRS 95.450(2) does. KRS 95.450(2) provides that "[a]ny person may prefer charges

against a member of the police . . . by filing them with the clerk of the legislative body who shall immediately communicate the same to the legislative body." Thus, the circuit court reasoned that charges were filed under KRS 15.520(1)(h)(8) when such charges were filed with the clerk of the legislative body per KRS 95.450(2). We view the circuit court's above legal analysis as sound and as representing the proper interpretation of KRS 15.520(1)(h)(8). Accordingly, we conclude that the circuit court correctly determined that Cromer was given a hearing within 60 days of charges being filed under KRS 15.520(1)(h)(8).

Cromer next contends that the circuit court erred by concluding that Charges I-VII were not violative of RKS 15.520(1)(h)(3) and (4) and, thus, not subject to dismissal.

KRS 15.520(1)(h)(3) and (4) read as follows:

> 3. If any hearing is based upon a complaint of an individual, the individual shall be notified to appear at the time and place of the hearing by certified mail, return receipt requested;
>
> 4. If the return receipt has been returned unsigned, or the individual does not appear, except where due to circumstances beyond his control he cannot appear, at the time and place of the hearing, any charge made by that individual shall not be considered by the hearing authority and shall be dismissed with prejudice[.]

Cromer points out Charges I-VII before the Council originated from Form 111 complaints signed by two police officers, Assistant Chief Cecil and Assistant Chief Bastin. As such, Cromer argues that KRS 15.520(1)(h)(3) and (4) required that

both assistant chiefs be notified of the hearing by certified mail and that both appear at the hearing. Cromer states that it is uncontroverted that neither Assistant Chief Cecil nor Assistant Chief Bastin received proper notification of the hearing or "appeared" at the hearing by giving testimony. Consequently, Cromer maintains that Charges I-VII must be dismissed with prejudice as violative of KRS 15.520(1)(h)(3) and (4).

It must initially be observed that both Assistant Chief Cecil and Assistant Chief Bastin were present at the hearing before the Council. Under the plain terms of KRS 15.520(1)(h)(4), dismissal of a charge with prejudice is mandated only if "the return receipt has been returned unsigned, or the individual does not appear." As Assistant Chief Cecil and Assistant Chief Bastin were present at the hearing, we believe they "appeared" at the hearing within the meaning of KRS 15.520(1)(h)(4). Simply put, we do not read KRS 15.520(1)(h)(3) and (4) so narrowly as to require dismissal of the charges under the circumstances of this case. We, thus, reject Cromer's contention that Charges I-VII should have been dismissed as violative of KRS 15.520(1)(h)(3) and (4). The circuit court committed no error in this regard.

Cromer also alleges that the circuit court erred by failing to dismiss Charge VIII[1] as violative of KRS 15.520(1)(h)(9). Specifically, Cromer contends that the police department failed to comply with the provisions of KRS

[1] This charge relates to Joshua Cromer's insubordination during an interview concerning his conduct that formed the basis of Charges I-VII.

15.520(1)(c) while interrogating him, thus mandating dismissal of count VIII under KRS 15.520(1)(h)(9). In particular, Cromer argues:

> No police officer shall be subject to interrogation in a departmental matter until forty eight (48) hours have expired from the time the request is made to the officer in writing. No interrogation shall be conducted while the officer is not on duty. In regards to charge eight, [Cromer] was contacted verbally and required to attend an interrogation the same day, which was on September 25, 2006, while he was off duty on approved Federal Family Medical Leave. . . . (Citations omitted.)
>
> . . . .
>
> The purpose of KRS 15.520 is to avoid the above situation, not to originate a new charge (eight) against [Cromer]. Interrogating someone while they are on Family Medical Leave for stress and high blood pressure without giving them any notice as required by law flies in the face of state law and is so materially prejudicial to a police officer that the charge must be dismissed pursuant to KRS 15.520(1)(h)(9).

Cromer's Brief at 14-15.

KRS 15.520 (1)(c) and (1)(h)(9) read:

> (1)(c) No police officer shall be subjected to interrogation in a departmental matter involving alleged misconduct on his or her part, until forty-eight (48) hours have expired from the time the request for interrogation is made to the accused officer, in writing. The interrogation shall be conducted while the officer is on duty. The police officer may be required to submit a written report of the alleged incident if the request is made by the department no later than the end of the subject officer's next tour of duty after

the tour of duty during which the department initially was made aware of the charges[.]

(1)(h)(9) The failure to provide any of the rights or to follow the provisions of this section may be raised by the officer with the hearing authority. The hearing authority shall not exclude proffered evidence based on failure to follow the requirements of this section but shall consider whether, because of the failure, the proffered evidence lacks weight or credibility and whether the officer has been materially prejudiced.

As pointed out by the circuit court, KRS 15.520(1)(h)(9) does not mandate dismissal; rather, it simply provides that evidence acquired in violation of the statute may be excluded if the officer was "materially prejudiced." Here, the circuit court found that "[a]fter examining the record, there is no evidence suggesting [Cromer] was materially prejudiced." And, we are, likewise, unable to conclude that Cromer suffered material prejudice. Thus, we reject Cromer's contention that the circuit court erroneously failed to dismiss Charge VIII as violative of KRS 15.520(1)(h)(9).

Cromer further argues that the "cumulative violations of KRS 15.520 were so prejudicial, they warrant dismissal of all charges" pursuant to KRS 15.520(1)(h)(9). Herein, Cromer alleges a plethora of violations of KRS 95.450 and KRS 15.520 requiring dismissal of all charges. In the circuit court's opinion, it concluded that these alleged violations neither materially prejudiced Cromer nor

required dismissal of the charges. Upon the whole, we cannot say that the circuit court erred in so concluding.

Cromer next contends that the "decision to terminate [him] from the Department was arbitrary and capricious." In affirming the decision of the Council to terminate Cromer, the circuit court found that the Council's findings of fact were supported by substantial evidence of a probative value and, thus, were not arbitrary and capricious. Based upon the record, we also conclude that there existed more than substantial evidence to support the Council's findings of fact and termination of Cromer.

In his brief, Cromer admits that he sent "questionable messages over the internet as alleged in charge (1)" but maintains that he received harsher treatment because he arrested a "Country Music celebrity." Also, Cromer points out that the evidence was conflicting upon the other charges against him. Specifically, he questions the weight afforded testimony of a "convicted criminal" at the hearing:

> At the hearing, Lt. Compton was asked the following question:
>
> Q: "*And when you met with Mr. Montgomery, that was after he was convicted of a crime?*"
>
> *A: "Yes."*
>
> This shows that the Department sided with a convicted criminal instead of a police officer when investigating the allegations of misconduct against the police officer. Given the condition of Mr. Montgomery's severe in-coherency during the time of the arrest as

> documented by the arrest records, it is absurd to consider his account of what happened as legitimate, especially in light of his conviction, yet Internal Affairs met with a person convicted of DUI to discuss what the police officer did wrong during that DUI arrest and subsequently charged [Cromer] after the meeting. There is no rhyme or reason or police department policy for that matter, that says that the word of a person convicted of a DUI after being intoxicated, should be taken over that of the arresting officer's, especially when the person making the accusations does not sign a sworn complaint. (Citations omitted.)

Cromer's Brief at 23.

We remind Cromer that issues relating to weight and credibility of evidence are within the sole province of the fact-finder and generally will not constitute grounds for reversal on appeal. *See Caudill v. Com*., 240 S.W.3d 662 (Ky.App. 2007). Moreover, the record does not support Cromer's allegation that he received harsher treatment than warranted under the circumstances. Rather, the record aptly supports the Council's decision to terminate Cromer for misconduct, inefficiency, and insubordination. Thus, we hold that the circuit court properly concluded that the Council's decision to terminate Cromer was not arbitrary or capricious.

Cromer lastly maintains that he was erroneously denied "the opportunity to Voir Dire the Hearing body for bias." Neither KRS 95.450 nor KRS 15.520 provides the right to *voir dire* the legislative body conducting the disciplinary hearing. In the absence of a specific statutory authorization, we are

unwilling to conclude that reversible error resulted from denying Cromer the opportunity to *voir dire* the Council.

In sum, we hold that the circuit court properly upheld the Council's decision to terminate Cromer.

For the foregoing reasons, the Opinion and Order and Amended Opinion and Order of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Shane C. Sidebottom
Covington, Kentucky

BRIEF FOR APPELLEE:

Michael Keith Horn
Leslye M. Bowman
Lexington, Kentucky