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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001813-MR

JEFFERY TODD PEARCE APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 08-CI-002524

UNIVERSITY OF LOUISVILLE,
BY AND THROUGH ITS
BOARD OF TRUSTEES APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Jeffery Todd Pierce (Appellant) appeals from an Opinion and Order of the Jefferson Circuit Court affirming an administrative

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

decision allowing the University of Louisville (the University) to terminate his employment as a university police officer. Appellant raises various issues, including a primary contention that KRS 15.520 is applicable to his case, and an assertion that the administrative decision upholding his termination was arbitrary. After extensive review of the record on appeal and consideration of the parties' arguments, both written and oral, we affirm.

FACTS AND PROCEDURAL HISTORY[2]

Appellant was terminated from his position as a police officer with the University's Department of Public Safety (the Department) on April 6, 2007, for work-related misconduct after the University discovered that he had violated a number of university and departmental policies during two separate incidents. Specifically, the University concluded that Appellant had: (1) failed to timely respond to a fire alarm at the university's Medical Dental Research (MDR) building and to timely file a written report about that incident; and (2) that he improperly engaged in a wrong-way traffic pursuit. The facts of each incident are set forth herein.

1. The MDR Building Fire Alarm Incident

[2] The following facts are taken from the administrative record presented on appeal – specifically the transcript of Appellant's post-termination administrative hearing – and the Findings of Fact, Conclusions of Law, and Recommended Order entered by the hearing officer who upheld Appellant's termination.

In the early morning hours of November 14, 2006, Appellant was working at the University's Health Science Center campus in downtown Louisville. At approximately 4:47 a.m., Shannon Adams, a Department dispatcher, notified Don Martin of the Health Science Center's Physical Plant Division that a fire alarm was going off at the MDR building. There had been several false alarms at the building that week, but it was not known if this particular alarm was false. Adams called the Louisville Fire Department (LFD).

Adams notified Appellant of the fire alarm at approximately 4:54 a.m. and told him, "Sir, just to let you know I went ahead and contacted LFD on that alarm."[3] Appellant responded, "Okay, so what are we doing?" to which Adams replied, "Per Don, he got over there within a couple of minutes and said that it's still acting up, however, it's not reading the same; so just to be on the safe side, we went ahead and notified LFD but he doesn't see any fire in the building at all." To this, Appellant responded, "Okay." Appellant subsequently notified Adams that he was escorting a student to a campus building, an assignment he had received prior to being told about the fire alarm.[4] This assignment was completed at approximately 5:06 a.m.

At approximately 5:12 a.m., Martin contacted Adams and asked her why a police officer had not been sent to the scene. Adams, referring to Appellant,

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[3] Quotations from the exchanges noted above are taken directly from a transcript that was made part of the administrative record.

[4] The record reflects that although fire alarms took precedence over student escorts per Departmental policy, none of Appellant's superiors found fault with the fact that he completed the escort first.

responded, “I got him. I’ve already called him,” to which Martin replied, “He never did show up over here.” Adams then radioed Appellant and asked him if he was going to the MDR building. When Appellant told Adams that she had never dispatched him to the alarm, she responded, “Sir, I, uh, I advised you that we had LFD en route; that [Don Martin] wanted me to go ahead and contact them.” Subsequently, at the administrative hearing concerning Appellant’s termination from employment, the hearing officer found that Appellant knew he had the responsibility to respond to the fire alarm in accordance with established protocol since the LFD had been dispatched “and that he had acknowledged that responsibility when he responded ‘Okay.’ ” Appellant actually arrived at the MDR building at 5:17 a.m. – approximately twenty-two minutes after he had responded “Okay” to Adams’ report that the fire department had been dispatched to the scene.

Appellant explained that he was “upset” and “irritated” when he arrived at the MDR building because he believed that an officer from the Belknap campus should have been sent to cover the fire alarm or at least to assist him. By the time Appellant arrived, the LFD had already left the scene.

Physical plant representative Martin then approached Appellant to provide him with information that was necessary for preparation of the fire alarm incident report required by state law. However, Appellant told Martin that he was not going to write the report. Appellant then left after talking to his supervisor, Lieutenant Rick Brown, and being told to go home. According to Appellant, Lieutenant Brown did not tell him to complete the report prior to leaving, but

Lieutenant Brown denied this. Appellant later acknowledged that completing a fire alarm incident report before the end of his shift was his responsibility whenever he was dispatched to a scene, and multiple officers within the Department testified that officers responding to a fire alarm have the responsibility to prepare fire alarm incident reports.[5]

The following day, Lieutenant Brown instructed Appellant to prepare the report after news of the incident reached Major Robert W. Bringhurst, Department Operations Commander, and after an inquiry had been made as to why a report had not been submitted. According to Lieutenant Brown, he was unaware that Appellant had failed to write the report after his shift. Appellant complied with the request.

Upon this evidence, the hearing officer concluded that Appellant would have failed to complete the mandatory report if not for Lieutenant Brown's direct order. As such, the hearing officer found that "although [Appellant] filed the report within a day of the incident and within the time period allowed by state law for submitting reports to the state fire marshal, those facts did not excuse failure to draft a report until he was directed to do so by his supervisor."

On November 18, 2006, Major Bringhurst instructed Appellant to produce a detailed written account of the incident, including an explanation of why he had failed to go to the scene when told of the alarm and why he did not

[5] Appellant later acknowledged that during his time with the University police department he had responded to thirty-seven fire alarms, and he admitted that he had completed a fire alarm incident report in each of those cases.

immediately prepare a report afterwards. As a result of his dissatisfaction with Appellant's response to this order, Major Bringhurst created a "review board" to examine the incident to determine if it was caused by any training, policy, or communications problems or if it had been caused by Appellant's wrongful actions. The review board concluded that the latter was the case, a determination which led to the subject administrative proceeding against Appellant.

2. The Jackson Street "Wrong-Way" Incident

At the beginning of his shift on February 23, 2007, Appellant drove Officer Robin Skaggs to the Chestnut Street garage in downtown Louisville so that Officer Skaggs could pick up his vehicle. After the officers entered the garage, Appellant saw a white vehicle traveling the wrong way on "one-way" Jackson Street. At least one witness testified that this was not uncommon because the roads around the Health Science Center campus are somewhat confusing.

Appellant asked Officer Skaggs to remain in the cruiser with him while he pursued the vehicle. Officer Skaggs agreed. Appellant indicated that when he pulled onto Jackson Street, he could no longer see the vehicle in question since it had presumably turned onto Broadway. Despite this fact, Appellant drove his cruiser the wrong way on Jackson Street in pursuit of the vehicle.

Officer Skaggs testified that Appellant's cruiser reached a speed of up to fifty miles per hour for one and a half blocks on Jackson Street before turning onto Broadway. For vehicles traveling in the proper direction on this one-way street, the posted speed limit is thirty-five miles per hour. Neither Appellant nor

Officer Skaggs could recall whether Appellant had turned on his emergency lights before turning onto Jackson Street. Appellant eventually caught the white vehicle on Broadway and Appellant initiated a traffic stop. The driver was let go with a verbal warning.

Appellant's supervisors became aware of this incident when Officer Skaggs asked about receiving overtime pay for his time spent on the traffic stop. Officer Skaggs's supervisor expressed concern about Appellant's conduct and reported the incident to Appellant's supervisor. The Department subsequently began an investigation of the incident and ultimately concluded that Appellant had failed to show adequate care and caution under the circumstances.

3. Disposition

On April 6, 2007, following the Department's initial investigation of the aforementioned incidents, Appellant was notified that Department Chief of Police Wayne Hall had recommended that Appellant's employment with the University be terminated. One of the letters provided four reasons for the recommendation: (1) failing to complete the required fire alarm incident report following the incident at the MDR building; (2) driving the wrong way on a one-way street; (3) incompetence; and (4) dishonesty. A pre-termination hearing was scheduled for the same day; however, Appellant refused to participate in this hearing because his counsel was not allowed to attend. Chief Hall subsequently issued an official recommendation that Appellant be terminated as a University police officer.

After his employment was terminated, Appellant sought and was granted a comprehensive *de novo* post-termination administrative hearing facilitated by the Attorney General's Office of Administrative Hearings (OAH). Over the course of four days in June and August 2008, the University and Appellant, with counsel, were afforded the opportunity to present witness testimony and other evidence before an OAH hearing officer and to cross-examine the other parties' witnesses. The parties were also allowed to tender post-hearing briefs arguing their positions.

In a comprehensive order, the hearing officer concluded that Appellant had violated a number of University policies and procedures. Accordingly, the hearing officer found that the University had a reasonable basis to terminate Appellant's employment. The hearing officer rejected the University's claim that Appellant had been dishonest but found that the evidence supported his termination on grounds of incompetence, failure to file a timely fire alarm incident report, and responding inappropriately to the "wrong-way" driver on Jackson Street.[6]

Appellant brought this claim in the Jefferson Circuit Court alleging that he had been denied the procedural protections of in KRS 15.520, and that the hearing officer's decision was arbitrary and capricious. Affirming the administrative determination, the circuit court held that KRS 15.520 was inapplicable because the University's investigation and termination of Appellant

[6] The hearing officer actually found that the incompetence charge essentially merged with the other two charges for purposes of this action because they were based on the same facts.

were not initiated by a citizen's complaint. The Court concluded that the procedural protections afforded by the statute did not apply; that the hearing officer's findings of fact and conclusions of law were supported by evidence of record; and that there was no error in the grievance procedure used to terminate Appellant's employment. This appeal followed in a timely fashion.

ISSUES

1. Applicability of KRS 15.520

The first question presented is whether KRS 15.520, frequently referred to as the "Police Officer Bill of Rights," applies to departmental disciplinary actions against police officers that are not triggered by citizen complaints. Appellant claims that the statute applies to him, and that reversal is required because the Department and the University failed to comply with the statutory provisions.

KRS 15.520, the statute under review, delineates a number of administrative due process rights afforded to police officers who are faced with allegations of misconduct. Although there are a number of unpublished decisions from this Court dealing with whether KRS 15.520 applies to intradepartmental

misconduct claims such as the one before us,[7] there appears to be no published authority directly on point.[8]

Appellant first contends that the University is judicially estopped from arguing the inapplicability of KRS 15.520 because it initially conceded the point at the post-termination hearing. However, in its post-hearing reply brief, the University argued that KRS 15.520 was inapplicable because Appellant's termination was not initiated by a citizen complaint. The hearing officer agreed with this interpretation of the statute.

Judicial estoppel is a subset of the "quasi-estoppel" principle, which contemplates that "any voluntary act by a party, with the knowledge of the facts, by which he expressly or impliedly recognizes the validity and correctness of a

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[7] In those cases where the issue has been explicitly presented, however, we have held that KRS 15.520 applied only to instances where citizen complaints had been filed against a police officer. *See, e.g.*, *Moore v. City of New Haven*, 2010 WL 4295588 (Ky. App. Oct. 29, 2010) (2010-CA-000019-MR); *Ratliff v. Campbell County*, 2010 WL 1815391 (Ky. App. May 7, 2010) (2009-CA-000310-MR); *Marco v. University of Kentucky*, 2006 WL 2520182) (Ky. App. Sept. 1, 2006) (2005-CA-001755-MR); *Leonard v. City of Lebanon Junction*, 2005 WL 327153 (Ky. App. Feb. 11, 2005) (2004-CA-000328-MR).

[8] With this said, we note that in *Howard v. City of Independence*, 199 S.W.3d 741 (Ky. App. 2005), a police officer was charged with being an inefficient, ineffective, and insubordinate employee. It does not appear that these charges were initiated by a citizen complaint, yet this Court held that the officer "was entitled to the due process protections provided by KRS 15.520 in his disciplinary proceeding." *Id.* at 743; *see also City of Madisonville v. Sisk*, 783 S.W.2d 885, 885-86 (Ky. App. 1990); *Stallins v. City of Madisonville*, 707 S.W.2d 349, 351 (Ky. App. 1986). Moreover, in *McDaniel v. Walp*, 747 S.W.2d 613 (Ky. App. 1987), we indicated that we do "not believe a fair reading of KRS 78.445 and 15.520 requires that disciplinary proceedings must necessarily emanate from a citizen's sworn complaint." *Id.* at 614. We further noted that while "[i]t is true that disciplinary action may rest upon the sworn allegation of a complaining citizen," this did not "preclude disciplinary action by departmental authority based upon initiation from within and upon any source of information." *Id.* However, since it does not appear that the precise issue before us was raised in those appeals to the extent it is here, we decline to rely on those decisions as mandatory authority.

judgment will operate as a waiver of his right to challenge the error, such as where he receives affirmative relief under the judgment or takes a position inconsistent with his right of review." *Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422, 434 (Ky. App. 2008). Judicial estoppel is intended to prevent duplicity in judicial proceedings. *Id.* Although there is no absolute formula for applying this principle, we have expressly recognized three factors for consideration: "(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." *Id.* at 434-35.

The University appears to have initially conceded that KRS 15.520 applied but reversed its course before the administrative proceeding was over. Following an adverse decision, Appellant sought relief in the Court of Justice. He was unrestricted in arguing the applicability of KRS 15.520 and those arguments were considered *de novo* without deference to the hearing officer's determination. Appellant suffered no prejudice in the trial court. This Court will consider the issue entirely on the merits. Judicial estoppel is strong medicine that should be administered sparingly and only where needed to prevent unfair advantage or prejudice. Accordingly, we decline to apply judicial estoppel here.

Upon the question of whether KRS 15.520 applies to these facts, our review is *de novo* since the issue is entirely a matter of law. *Commonwealth v.*

Garnett, 8 S.W.3d 573, 575 (Ky. App. 1999). We are guided by the standard principle that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature[.]" KRS 446.080(1). Moreover, "[a]ll statutes should be interpreted to give them meaning, with each section construed to be in accord with the statute as a whole." *Commonwealth, Transp. Cabinet v. Tarter*, 802 S.W.2d 944, 946 (Ky. App. 1990). "[S]tatutes 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). "All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." KRS 446.080(4).

"If there is any doubt from the language used by the legislature as to the intent and purpose of the law, then courts in interpreting the statute should avoid a construction which would be unreasonable and absurd in preference to one which is reasonable, rational, sensible and intelligent." *Executive Branch Ethics Com'n v. Stephens*, 92 S.W.3d 69, 73 (Ky. 2002). "General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy." *County of Harlan v. Appalachian Reg'l Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky. 2002).

The University relies on *City of Munfordville v. Sheldon*, 977 S.W.2d 497 (Ky. 1998), as definitive authority that KRS 15.520 only applies to citizen complaints. There, the Supreme Court of Kentucky expressly prohibited "a mayor or other local executive authority from receiving a citizen's complaint against a police officer, then firing the officer based on that complaint, without ever affording the officer a right to publicly defend against the complaint as required by KRS 15.520." *Id.* at 499 (footnote omitted). The Supreme Court continued: "To hold otherwise would encourage the mayor to avoid the time and expense of providing every officer the due-process hearing to which he or she is entitled upon the filing of a citizen complaint, by simply couching the decision to fire in the guise of a simple act of discretion." *Id.*

The University contends that these passages conclusively hold that KRS 15.520 applies only to incidents where citizens have filed complaints against a police officer, but this interpretation is too broad. In our view, the question presented here, *i.e.*, whether KRS 15.520 applies to disciplinary procedures not initiated by a citizen's complaint, was not decided by the Supreme Court since these facts were not before it. While *City of Mundfordville v. Sheldon* certainly provides a context, a more extensive analysis of the statute is necessary.

KRS 15.520 was enacted "[i]n order to establish a minimum system of professional conduct of the police officers of local units of government of this Commonwealth" by creating standards of conduct "to deal fairly and set administrative due process rights for police officers . . . *and at the same time*

providing a means of redress by the citizens of the Commonwealth for wrongs allegedly done to them by police officers. . . . ."[9] KRS 15.520(1) (emphasis added). This language suggests that the purpose of the statute is to provide procedural due process to police officers who are accused of wrongdoing by citizens.

Further suggesting this purpose, KRS 15.520(1)(a) addresses itself to "[a]ny complaint taken from any individual alleging misconduct on the part of any police officer" and sets the procedures to be followed in cases involving allegations of criminal activity, abuse of official authority, or a violation of rules and regulations of the department. KRS 15.520(1)(a)(1)-(3). Perhaps most insightful, KRS 15.520(1)(a)(4) explicitly provides that "[n]othing in this section shall preclude a department from investigating and charging an officer both criminally and administratively." From these provisions, there seems no doubt that police departments may initiate their own disciplinary proceedings, in the absence of a citizen complaint, outside of the scope of KRS 15.520. Because Appellant's termination was based on an internal departmental investigation, the requisites of KRS 15.520 seem not to apply.

In rebuttal, Appellant responds 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 is necessarily applicable on such occasions. However, as we read it, KRS 15.520(1)(a)(4) affirms that

[9] KRS 15.520 is generally applicable to University of Louisville police officers since the University receives funding via the Kentucky Law Enforcement Foundation Program Fund (KLEFPF). *See* KRS 15.520(4); KRS 15.410 *et seq.*

intradepartmental investigations are not precluded and that they differ from citizen complaint investigations.

Appellant also relies on KRS 15.520(1)(h)(3). The provision begins, "**If** any hearing is based upon a complaint of an individual, the individual shall be notified to appear . . . ." (Appellant's emphasis). However, this language gives only a bare hint of an expansive legislative intent, and we decline to construe the statute as such. Taking account of the entirety of the enactment, we conclude that it does not apply to disciplinary actions initiated by internal departmental concerns.

Upon holding that KRS 15.520 applies only to disciplinary actions initiated by a citizen's complaint, we note that the statute is lacking in artful construction and irrefutable disclosure of legislative intent. Nevertheless, we have no doubt that the decision reached here is entirely consistent with the language used and purpose of the statute.[10]

2. Do Procedural Irregularities Merit Reversal?

Appellant next contends that a number of "procedural irregularities" occurred during the course of the disciplinary proceedings against him. The hearing officer rejected all such claims as follows:

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[10] We also note that even if KRS 15.520 were applicable here, a failure to provide any of the rights or to follow any of the provisions contained therein would not necessarily trigger an automatic reversal of a disciplinary determination. Instead, the overriding concern is whether the officer has been materially prejudiced by any failure in this regard. *See* KRS 15.520(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."). The hearing officer and the circuit court ultimately determined that no such prejudice occurred in this case given the fact that Appellant was afforded a full *de novo* post-termination evidentiary hearing. We see no error in this position.

> Furthermore, any procedural violations that may have occurred as part of the Department of Public Safety's internal inquiry are irrelevant to this action. [Appellant] was provided in this action with a de novo hearing which allowed him to present evidence to defend against the charges, and the hearing officer's decision was based exclusively upon the evidence admitted at this hearing. Therefore, any procedural errors that may have occurred in investigative hearings had no relevance to the procedural rights afforded to [Appellant] in this action and did not have any impact on the hearing officer's findings and conclusions in this action.

However, Appellant argues that despite his full post-termination evidentiary hearing, there was no cure for the University's alleged prior procedural missteps. For reasons that will follow, we disagree.

We first note that most of Appellant's arguments regarding procedural irregularities rely upon the assumption that the statute applies. Because we are holding that it does not, those arguments can be summarily rejected. We further note that Appellant's arguments regarding violations of University policy similarly hinge on the applicability of KRS 15.520 to his situation, and these are similarly rejected. A party could not candidly contend that he was prejudiced by failure to follow an inapplicable statute.

Appellant also complains that he was deprived of required procedural protections with respect to the initial "review board" convened by Major Bringhurst to investigate the fire alarm incident. Appellant argues that this board was actually a "Disciplinary Review Board" as provided for by University policy

and that the Department failed to follow the procedural requirements set forth in corresponding rules regarding those boards.

However, the record and the Department's policies and procedures suggest that the review board in question was not a formal "Disciplinary Review Board" per University of Louisville Department of Public Safety Policy and Procedures Section 1900.02(M)(2) and (3). Those provisions contemplate that such boards "may be convened for the purpose of reviewing and making recommendations concerning *initiated disciplinary charges*" and "*after formal disciplinary charges have been initiated against an officer*." (Emphasis added). Neither of these circumstances prevailed here at the time that the first review board was established, and Appellant has directed us to nothing to suggest that such boards can be convened in the absence of existing disciplinary charges.

Instead, the initial review board simply reviewed the circumstances surrounding the fire alarm incident but did not dispense any discipline. Major Bringhurst testified that he set up a review board to examine the incident in order "to see if there[are] violations of policy, violations of problems in communication, problems in supervision, problems in training, or whether it's just a problem that we need to deal with a disciplinary action." Major Bringhurst also testified that an internal investigation into Appellant's conduct was commenced only "after the review board met and found that they felt that there [weren't] any training problem or policy problems or communication problems. They felt that it was officer's actions that created the problem." Major Bringhurst additionally noted that the

review board indicated what policies it believed had been violated but made no disciplinary recommendations. This depiction of the review board was also reflected in the testimony of Chief Hall. Thus, while the creation of the first review board was unusual,[11] Appellant did not suffer any prejudice as a result of its use. Indeed, Chief Hall did not initiate an internal investigation into possible discipline until after the review board's findings had been made.

Appellant also argues that he was deprived of departmentally mandated procedural protections at the pre-termination hearing held without his participation on April 6, 2007. As noted above, Appellant refused to attend the hearing because his attorney was not allowed to accompany him or to otherwise participate. Appellant also complains that he was provided with insufficient notice of the charges against him and that he was not allowed to present witnesses and evidence in his own defense at this proceeding. Nearly all of Appellant's arguments rely upon KRS 15.520 and, consequently, must be rejected. However, since Appellant also contends that he was deprived of procedural due process, further consideration is required.

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[11] Major Bringhurst testified that there was no actual University policy providing for a non-disciplinary review board. However, Department Policy and Procedures Section 1900.02(I) provides that the performance of an employee is subject to review at any time via an "Internal Inquiry." The rule further provides that such inquiries do "not require the existence of a formal complaint" and "are not necessarily allegations of misconduct; they well may be a simple investigative reaction to information." Thus, Major Bringhurst is possibly mistaken in his assertion since it would seem that the type of review board created here could fall under this classification. We also note that this provision cautions officers that refusing to respond to an internal inquiry by citing the protections afforded by KRS 15.520 may place them in "administrative jeopardy."

The United States Supreme Court has held that prior to termination, a public employee with a property interest in his public employment is entitled to a limited pre-termination hearing. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494 (1985). However, where state law provides for a full administrative post-termination hearing and judicial review, such "predeprivation hearings are intended only to be an 'initial check' on the employer's decision, and 'need not definitively resolve the propriety of ' the action." *Leary v. Daeschner*, 228 F.3d 729, 744 (6th Cir. 2000), quoting *Loudermill*, 470 U.S. at 545, 105 S. Ct. at 1487.

Accordingly, the pre-termination hearing is not required to be elaborate, and the employee is only entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his or her side of the story to the employer. *Loudermill*, 470 U.S. at 545-46, 105 S.Ct. at 1495. Pre-termination hearings provide an opportunity to determine "whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.*

Although Kentucky courts appear not to have considered the issue, other courts have consistently recognized that there is no right to counsel at a pre-termination hearing when the employee will be granted a more substantial post-termination hearing with full due process protection. *See, e.g.*, *Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1533 (10th Cir. 1996); *Panozzo v. Rhoads*, 905 F.2d 135, 140 (7th Cir. 1990); *Buschi v. Kirven*, 775 F.2d 1240, 1254-56 (4th Cir. 1985);

Frumkin v. Board of Trustees, Kent State Univ., 626 F.2d 19, 21 (6th Cir. 1980). Thus, Appellant's non-participation in the pre-termination hearing because his counsel was not allowed to attend affords him no relief. By refusing to participate, Appellant effectively waived any claim of a due process violation emanating from that proceeding. *See Leary*, 228 F.3d at 744.

We are firmly convinced that the requirements of *Loudermill* were met in this case. Appellant was afforded a comprehensive *de novo* post-termination evidentiary hearing in which he was represented by counsel and afforded the opportunity to present evidence and witnesses on his own behalf and to cross-examine the University's witnesses. Before the hearing, Appellant was given copies of all of the University's exhibits and the names of all persons the University would be calling as witnesses. Moreover, the hearing officer's decision specifically provided that it "was based exclusively upon the evidence admitted at [the post-termination] hearing" and that because of this, any prior procedural errors "did not have any impact on the hearing officer's findings and conclusions in this action." Consequently, Appellant suffered no prejudice to his right to defend against the University's charges.

Appellant additionally complains that he did not receive adequate notice of the basis for his termination. However, following the pre-termination hearing, Appellant received letters describing the subject incidents in detail, setting forth the nature of Appellant's deficient conduct, and providing the specific provisions of University policy that he was accused of violating. Appellant was

provided with ample information regarding the basis for his termination from employment.[12] Consequently, Appellant's claim that he was deprived of procedural due process with respect to the University's pre-termination proceedings is rejected.

3. Was the Hearing Officer's Decision Arbitrary?

Appellant next argues that several crucial findings of fact made by the hearing officer were without basis in the record, thereby rendering his decision arbitrary and creating reversible error. The standards used in reviewing the substance of police disciplinary decisions are well established.

> The function of the hearing body in instances of charges against police officers is to make two determinations: first, whether the officer has violated the rules and regulations of the department and if so, second, it must exercise its discretion in imposing a penalty. The first is subject to judicial review; the second is not.

Stallins v. City of Madisonville, 707 S.W.2d 349, 350 (Ky. App. 1986). When police disciplinary determinations are appealed to a circuit court, "[t]he discharged employee is entitled to something less than a trial de novo – a quasi trial de novo as it were." *Id.* In such instances, "[t]he burden shifts to the employee who has the obligation to furnish a transcript of the evidence before the hearing body and who has the right to call such additional witnesses as he may desire." *Id.* The circuit court then "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

[12] Appellant also complains that one of the letters was signed by Major Bringhurst and not Chief Hall, but we fail to see how this is relevant for purposes of notice.

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 Kentucky Rules of Civil Procedure (CR) 52.01. *Id.* at 351. Accordingly, we may not disturb the determinations of the circuit court unless they are unsupported by substantial evidence. *Id.* "The appeal is not the proper forum to retry the merits. It is limited only to the question of whether the Board's action was clearly unreasonable." *Crouch v. Jefferson County, Kentucky Police Merit Bd.*, 773 S.W.2d 461, 464 (Ky. 1988). Here, the only evidence before the circuit court was the transcript of evidence presented to the hearing officer and the findings and order of the hearing officer. Accordingly, our judicial review must be limited to the decision of the hearing officer based on the administrative record. *City of Louisville By and Through Kuster v. Milligan*, 798 S.W.2d 454, 458 (Ky. 1990). In any appeal from a decision of an administrative agency, we review the circuit court's application of the law to the facts *de novo*. *Reis v. Campbell County Bd. of Educ.*, 938 S.W.2d 880, 885-86 (Ky. 1996).

Appellant first argues that no University policy required him to file a fire alarm incident report; that instead, the dispatcher had that responsibility. Department Policy and Procedures Section 2215.01 requires that accounts of all fires, fire alarms, arson cases and criminal mischief regarding fire suppression equipment be reported on the Fire Incident Report form. The hearing officer concluded that since Appellant was the only police officer who responded to the

fire alarm, he alone was responsible for filing that report by the end of his shift. However, he failed to do so and had no intention of doing so until such was ordered by his supervisor. The hearing officer found this to be a violation of Department policy subjecting Appellant to discipline.

Appellant argues that there was no substantive basis for this finding, and that per University policy it was actually the duty of the "First Shift Telecommunicator," *i.e.*, the dispatcher, to prepare and "to e-mail the daily fire alarm reports not involving an actual fire to the State Fire Marshall's Office before the end of their shift[.]" However, Appellant acknowledged that completing a fire alarm incident report was his responsibility when he was dispatched to a scene. Moreover, the record reflects that Appellant had responded to fire alarms on thirty-seven previous occasions and had filled out reports on each of those incidents. Chief Hall, Major Kenneth Brown, Major Bringhurst, and Lieutenant Brown – all officers with the Department – also testified that officers responding to a fire alarm have the responsibility of preparing fire alarm incident reports. From this evidence, there is nothing to suggest that the hearing officer acted arbitrarily in concluding that Appellant had the duty to render a fire alarm incident report in a timely fashion and that he failed to do so. We further disagree with Appellant's characterization of Department Policy and Procedures Section 2216.00 in that this policy simply requires the dispatcher to forward reports to the State Fire Marshall's Office upon report preparation by the officer on the scene.

Appellant also argues that there was no evidence that he untimely filed the fire alarm incident report. Instead, he asserts that the report was timely filed the next day since the University is allowed twenty-four hours to report a malfunctioning alarm. Thus, "there was no harm whatsoever." The hearing officer found that although Appellant filed the report within a day of the incident and within the time period allowed by state law, "those facts did not excuse failure to draft a report until he was directed to do so by his supervisor." The hearing office concluded that Appellant "simply ignored his duty because he was upset." Thus, his conduct constituted grounds for discipline. There was no error in this conclusion.

Appellant also argues that the hearing officer acted arbitrarily in finding that Appellant's response of "Okay" to dispatcher Shannon Adams' statement advising him that the fire department had been called about the fire alarm at the MDR building "was an acknowledgment of his responsibility to proceed to the scene of the fire alarm" because of "the 'natural language' radio communications system and other procedures used by university police." During the post-termination hearing, Appellant indicated that his response was intended to acknowledge the transmission but that he did not intend to suggest that he would proceed to the building. The hearing officer found that this assertion lacked credibility. The hearing officer further noted that Department Policy and Procedures Section 2203.01 required that "University Police officers will respond to any report of a fire or fire alarm and assume immediate initial control and

command of the situation (assuming the responsible fire-fighting agency has not yet arrived)." (Emphasis in original). Thus, the hearing officer properly rejected Appellant's self-serving version of the exchange.

Remarkably, Appellant now contends that this finding was "ludicrous" and "preposterous." We note that multiple witnesses testified that Appellant had an obligation to proceed to the scene when he was advised that the fire department was en route, and his response of "Okay" was uniformly viewed by those same witnesses as an acknowledgment of that duty. The finding against Appellant falls somewhat short of being either "ludicrous" or "preposterous."

Appellant next contends that there was no evidence to support the hearing officer's finding that the "wrong-way" driver "no longer presented a danger" when Appellant turned onto Jackson Street. As for this incident, the hearing officer concluded that Appellant:

> . . . seemed to have little appreciation for the dangerousness of his conduct. In spite of the fact that the offending vehicle was no longer a threat to other cars or pedestrians on Jackson Street, [Appellant] initiated a dangerous high speed chase against the flow of any potential traffic on the one-way street, and yet, he could not verify that he had taken the most basic precaution of activating his emergency lights to warn others of his actions.[13]

Agreeing with testimony from Chief Hall, the hearing officer further concluded that "there was no justification for [Appellant's] conduct since he could have caused a serious accident if another vehicle or pedestrian had entered Jackson

[13] Appellant had apparently been involved in another incident earlier in his career in which he had failed to terminate a pursuit of another vehicle even after being ordered to do so.

Street before his police cruiser passed." The hearing officer also noted that Department policy prohibited such pursuits.

The record reflects that the driver of the white vehicle had turned onto Broadway by the time Appellant pulled onto Jackson Street. Therefore, any immediate danger caused by that driver going the wrong way had ended. Moreover, Chief Hall testified at the post-termination hearing that drivers frequently drove the wrong way on Jackson Street because of the confusing nature of the traffic layout surrounding the campus. Furthermore, after pulling the driver over, Appellant merely issued a verbal warning. This tends to diminish the need for Appellant to have pursued the driver. Moreover, Appellant could not recall whether he activated his emergency lights. Based on the evidence of record, we cannot say that "the administrative body acted arbitrarily in deciding whether the employee violated the rules and regulations of the police department." *Stallins*, 707 S.W.2d at 350.

Appellant next argues that there was no basis in the record for the hearing officer's finding that he was driving at a speed of up to fifty-five miles per hour on Jackson Street. Appellant is correct. Officer Skaggs testified that Appellant's vehicle reached a speed of up to fifty miles per hour, not fifty-five, still well over the posted speed limit of thirty-five miles per hour for vehicles traveling in the proper direction on the one-way street. This error is meaningless.

Appellant next argues that the record did not support the hearing officer's finding that he was incompetent. He specifically challenges the hearing

officer's finding regarding the fire alarm incident reports, noting that the evidence conclusively established that he was well-versed in how to prepare such reports. However, the hearing officer's decision in this regard was based on the fact that Appellant had initially refused to complete a report in this case even though such was his responsibility. The hearing officer relied upon Department Policy and Procedures Section 808.00, which provides that incompetence may be demonstrated by "[a]n unwillingness or inability to perform assigned tasks,"; "[t]he failure to conform to work standards established for the employee's rank, grade, or position,"; or "[t]he failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention." From the record before us, we cannot say that the hearing officer's finding of incompetence was arbitrary and unsupported by substantial evidence. Appellant admittedly refused to complete a fire alarm incident report because he was irritated by the fact that he had to proceed to the scene and was not provided backup. It is unremarkable that the hearing officer viewed this as incompetence under Departmental policy.

Appellant finally argues that the hearing officer and the circuit court erred in upholding his termination from employment because such a result was unnecessarily harsh in light of the fact that he had not received any previous discipline. Our courts have held that sound public policy dictates that the matter of disciplining a police officer – including the severity of punishment – be left to the officer's employer. *See Stallins*, 707 S.W.2d at 350; *City of Columbia v.*

Pendleton, 595 S.W.2d 718, 719 (Ky. App. 1980). Thus, Appellant's argument lacks merit.

Appellant nonetheless cites to *Mulligan*, *supra*, for the proposition that such a determination may be reversed if it is arbitrary and capricious. He argues that a lesser punishment, such as a suspension, was merited pursuant to a policy of "progressive discipline." Department Policy and Procedures Section 1900.02(D) provides that the Department "supports the theory of progressive discipline," but notes that "[a]n incident may be so serious, however, as not to require progressive discipline." Under the circumstances, even utilizing the standard espoused by Appellant, we cannot say that the hearing officer's decision was arbitrary and capricious. Therefore, we discover no error in the determination that Appellant's employment was properly terminated.

In sum, after reviewing the record and the hearing officer's findings of fact and conclusions of law, we agree with the circuit court that the University did not act arbitrarily and that its determinations were supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is affirmed.

WINE, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTS: I dissent because I believe that a plain reading of KRS 15.520 makes it applicable to all complaints against police officers.

First, KRS 15.520(1) states that its purpose is twofold. It states that the "standards of conduct are stated as the intention of the General Assembly to deal fairly and set administrative due process rights for police officers . . . and at the same time providing a means for redress by the Citizens of the Commonwealth . . . ." If the General Assembly had meant to limit KRS 15.520 to complaints by individuals, then the language could simply have been drafted to say it was their intent to establish administrative due process rights for police officers when the departmental authority was processing complaints from individuals. Also, a plain reading of the phrase "and at the same time" strongly suggests the General Assembly intended the statute to have two separate purposes. If it was the intent of the General Assembly to limit KRS 15.520 to the singular purpose of administrative handling of complaints from individuals, then it could easily have used the suggested language above and it would have likely deleted the phrase "and at the same time," which appears to be superfluous under the majority's opinion. It was not so drafted and, thus, I do not believe such was the intent.

Second, section (1)(a) is the only subsection that addresses a complaint filed by an individual, *i.e.*, a citizen. The remaining subsections do not use the word "individual." More specifically, section (1)(b) addresses a "criminal or departmental matter"; section (1)(c) references "a departmental matter"; and

section (1)(e) references "[a]ny charge," all without reference to an individual. Why would the General Assembly conspicuously delete the word "individual" from the remainder of the statutory subsections if it intended the statute be limited to a complaint only from an individual? I believe that the singular reference to an individual in section (1)(a) is a manifestation of intent of the General Assembly that the remaining subsections of KRS 15.520 apply to all proceedings involving police officers regardless of the source of the complaint. Additionally, it is important to note that subsection (1)(a) is merely a subsection of KRS 15.520. Thus, I find it illogical to elevate subsection (1)(a) as controlling the application of the remaining subsections and thereby disregard their reference to a criminal matter, a departmental matter, or to any charge. I believe this to be particularly true where, as here, KRS 15.520 is by its terms to have a twofold purpose. I believe that the intent of the General Assembly was to give KRS 15.520 a twofold purpose and, in doing so, to allow the subsections to further define and give effect to each of its two stated purposes.

I would find that KRS 15.520 applies to all proceedings against police officers and would reverse and remand for a hearing applying these due process rights *sub judice*.

BRIEFS/ORAL ARGUMENT FOR APPELLANT:

David Leightty
Louisville, Kentucky

AMICUS CURIAE BRIEF FOR THE KENTUCKY STATE LODGE FRATERNAL ORDER OF POLICE, INC:

Mary W. Sharp
David D. Fuller
Louisville, Kentucky

BRIEF FOR APPELLEE:

Craig C. Dilger
Jeffrey A. Calabrese
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Craig C. Dilger
Louisville, Kentucky