

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

JEFFERY T. PEARCE

MOVANT

vs.

UNIVERSITY OF LOUISVILLE
BY AND THROUGH ITS BOARD OF TRUSTEES

RESPONDENT

BRIEF AMICUS CURIAE

On Behalf of the Kentucky State Lodge, Fraternal Order of Police, Inc.,
and Fraternal Order of Police, River City Lodge 614

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

On Appeal from Jefferson Circuit Court

Case No. 08-CF-02524

Hon. Ivy Maze, Judge

Certificate of Service

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PURPOSE OF THE BRIEF

The Kentucky State Lodge, Fraternal Order of Police, Inc. and the Fraternal Order of Police, River City Lodge 614 (collectively "FOP") submit this brief to stress the importance of the Court's ruling on the scope of KRS 15.520. The Court of Appeals panel, with one Judge dissenting, held that KRS 15.520 applies strictly to disciplinary actions against police officers initiated by citizen complaints, and that the statute does not apply to discipline resulting from internal departmental investigations. The FOP, a professional organization representing thousands of law enforcement officers statewide, intends to argue that the court below has misread the statute in such a way as to make it nearly meaningless to those sworn officers that have come to depend on the due process protections KRS 15.520 has afforded them for decades.

The issues that the FOP intends to address in this brief are straightforward. First, that KRS 15.520 by the plain meaning of its terms applies to all charges brought against officers that affect their employment, whether they are initiated by a citizen complaint or by an internal investigation into alleged violations of departmental policies and procedures. Second, that the published cases which have dealt with KRS 15.520, though seeming to support the broader reading of the statute advocated here, have not directly addressed in a clear manner whether the statute encompasses all disciplinary actions against officers, or just those initiated by citizen complaints. Further, as a corollary to this last point, that a recent series of unpublished decisions have erroneously restricted the application of the statute in such a way as to render it an empty statutory pronouncement, requiring this Court to speak.

Ultimately, it will be clear to the Court that KRS 15.520 expresses the policy of the Legislature that law enforcement officers are entitled to the due process protections contained in the statute any time charges leading to discipline are brought which threaten the careers of these incredibly important public servants. Perhaps the Court of Appeals was correct when it observed that the statute was not artfully constructed. However, this should not lead the Courts to interpret it in such a restrictive way as to strip the statute of all functional meaning, and to defeat the policy expressed that officers are entitled to defend their reputations and careers in the face of allegations of wrongdoing, whatever the source of those allegations.

ARGUMENT

I. KRS 15.520 APPLIES TO ALL DISCIPLINE AGAINST POLICE, INCLUDING PEARCE, BY ITS PLAIN MEANING

Whether KRS 15.520 applies to Pearce is purely a question of law and therefore, the Court's review of this issue is *de novo*. *Commonwealth v. Garnett*, 8 S.W.3d 573, 575 (Ky.App. 1999). When interpreting statutory provisions, this Court is guided by KRS 446.080: "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state." KRS 446.080(1). "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 meaning in the law, shall be construed according to such meaning." KRS 446.080(4). This Court has accordingly observed that "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).

However, if the statute in question is not without ambiguity, “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 Comm’n v. Stephens*, 92 S.W.3d 69, 73 (Ky. 2002). Finally, when a court engages in statutory construction, it “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 Regional Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky. 2002). With these guiding principles in mind, we turn to the plain language of KRS 15.520.

The intent of the Legislature in enacting the statute is expressed in KRS 15.520(1):

In order to establish a minimum system of professional conduct of the police officers of local units of government of this Commonwealth, the following standards of conduct are stated as the intention of the General Assembly to deal fairly and set administrative due process rights for police officers of the local unit of government 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 covered by this section(.

A plain reading indicates that the legislature clearly intended a dual purpose, i.e., to provide officers with due process rights *and* to provide citizens a means of redress. Thus, the stated intention of the legislature, as written, does not exclude due process rights for

officers except upon citizen complaints, as was held below.

While subsection (1)(a) deals primarily with complaints of an “individual,” presumably that of a citizen, subsection (1)(a)(3) allows a department to bring *charges* if the individual refuses to swear under oath, but the department can independently substantiate the allegations. Likewise, subsection (1)(a)(4) allows a department to investigate and *charge* an officer criminally and administratively irrespective of the existence of an individual complaint, sworn or not. The meaning and use of the word “charge” plainly contemplates the hearing and other procedures provided later in the statute; to assert otherwise would be to substitute “discipline” for “charge” and defeat the intention of the legislature.

That a “charge” is to precede a hearing is bolstered in subsection (1)(e) in which “any charge” shall be in writing and specific enough so that the officer is able to “properly defend himself.” The use of “charge” occurs throughout the statute and clearly contemplates the hearing procedures laid out in subsection (1)(h), whether originated by complaint or by departmental investigation. So, in subsection (1)(c) dealing with interrogations in “departmental matters,” and requiring the officer to submit a written report within a specified period of time after the department has been made aware of the “charges.” Put simply, the statute does not distinguish between citizen complaints and departmental investigations or matters, but uniformly refers to charges, which can only mean allegations that are, as of yet, unproven until the hearing procedures in subsection (1)(h). Thus, the charges preceding a hearing may emanate from sworn complaints or from interdepartmental investigations, and to distinguish between complaints and

departmental matters in regards to the due process protections contained in the statute is to defeat the intention of the legislature despite the statute's plain language.

Lastly, under subsection (1)(h), the intention of the legislature to provide officers charged with wrongdoing the due process rights irrespective of the source of the charges is again made manifest. Specifically, subsection (1)(h)3 provides, "(i)f 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." This language clearly means that hearings not based on citizen complaints are not only not excluded under the statute, but expressly contemplated, and that the due process protections in the statute also pertain to hearings on interdepartmental charges.

The most reasonable, rational, sensible and intelligent reading of the statute's plain language indicates that the due process rights provided in KRS 15.520 are not dependent solely upon a citizen's complaint, but rather depend upon charges being levied against an officer, whatever the source of the allegations. Were this Court to hold otherwise, the clear intention of the legislature would be thwarted, and police officers would be denied their statutory rights provided under KRS 15.520. The problem with limiting KRS 15.520 due process rights to citizen complaints would be the wholesale evaporation of those rights. The majority of disciplinary actions against officers already begin with departmental investigations and charges unsupported by citizen complaints. Further, the statute provides a mechanism whereby a department could easily take any citizen complaints and convert them into departmental investigations, thereby avoiding the necessity of adhering to the due process mandates of KRS 15.520. The plain

language, as shown above, does not support the holding of the Court of Appeals decision in this case, and this Court should take this opportunity to correct the now common misapprehension of KRS 15.520 by the courts below.

**II. THE PUBLISHED AUTHORITY ADDRESSING KRS 15.520
IS UNCLEAR REQUIRING CLARIFICATION**

The Court of Appeals found that the cases which addressed KRS 15.520 provided no mandatory authority on the question presented by this aspect of the instant appeal. A review of the cases cited in the lower courts' opinions disclose that there is general confusion regarding the scope of the statute in question and whether it applies to all disciplinary matters or only to those discipline actions predicated on a citizen's complaint. The published cases appear to support the idea that KRS 15.520 applies to all disciplinary matters, though in most cases, the specific issue was not addressed under facts similar to those of Pearce. On the other hand, a recent series of unpublished decisions have specifically held that the due process protections of KRS 15.520 are limited to disciplinary matters which stem from citizen complaints. It is for this reason that the FOP believes it imperative that this Court clearly hold that the statute is not so limited, but rather that the due process protections for police officers pertain to all charges leading to discipline.

In *Stallins v. City of Madisonville*, 707 S.W.2d 349 (Ky.App. 1986), the Court of Appeals affirmed the trial court's review under KRS 15.520; though no citizen complaint was implicated, the question of the statute's limitation to citizen's complaints was not in issue. Similarly, in *Howard v. City of Independence*, 199 S.W.3d 741 (Ky.App. 2005),

the Court of Appeals upheld Howard's termination under KRS 15.520, without addressing any limitation on the scope of the statute. In *McDaniel v. Walp*, 747 S.W.2d 613, 614 (Ky.App. 1987) the Court of Appeals reversed the circuit court's decision overturning the Jefferson County Police Merit Board's dismissal of Walp, finding that discipline under KRS 15.520 was not limited to sworn complaints, but could include initiation from within the department.

Likewise, a number of opinions of this Court have addressed KRS 15.520, but in none of them was the question presented here addressed, i.e., whether the statute's due process protections were limited to discipline stemming from citizen's complaints. See *Brown v. Jefferson County Police Merit Board*, 751 S.W.2d 23 (Ky. 1988); *Louisville by Kuster v. Milligan*, 798 S.W.2d 454 (Ky. 1990); *City of Munfordville v. Sheldon*, 977 S.W.2d 497 (Ky. 1998). Thus, it would appear that the published authority of Kentucky supports KRS 15.520 as extending to all disciplinary matters, though the issue does not appear to have been fully litigated.

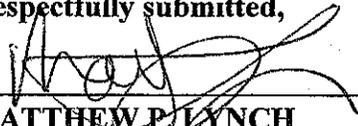
However, a series of recent unpublished decisions of the Court of Appeals have expressly held that the protections afforded police officers under KRS 15.520 are limited to disciplinary matters initiated by citizen complaints. See *Montgomery v. Aubrey*, 2004 WL 362380 (Ky.App. 2004); *Marco v. University of Kentucky*, 2006 Ky. App. Unpub. LEXIS 6 (Ky.App. 2006); *Ratliff v. Campbell County*, 2010 Ky. App. Unpub. LEXIS 397 (Ky.App. 2010), and; *Moore v. City of New Haven*, 2010 Ky. App. Unpub. LEXIS 858 (Ky.App. 2010). Based on the arguments above regarding the plain language of the statute, these unpublished decisions are clearly in error, and this Court must correct the

now rampant misunderstanding related to the scope of KRS 15.520.

CONCLUSION

Based on the foregoing, the FOP, as amicus curiae, respectfully request this Court to reverse the Court of Appeals, specifically as it relates to the application of KRS 15.520, and to hold that KRS 15.520 applies to all disciplinary actions brought against police officers regardless of the source of the charge. Additionally, the FOP respectfully requests this Court to remand this case to the Court of Appeals for further consideration in light of the Court's holding that KRS 15.520 applies to Pearce.

Respectfully submitted,



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