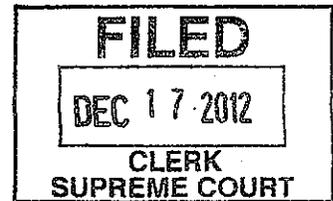


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
2011-SC-000756-D



**JEFFERY T. PEARCE,**

**APPELLANT,**

**v.**

**BRIEF FOR APPELLEE**

**UNIVERSITY OF  
LOUISVILLE,**

**APPELLEE.**

\*\*\* \*\*

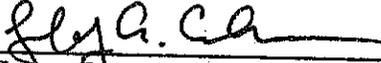
KY. COURT OF APPEALS NO. 2009-CA-001813-MR

ON APPEAL FROM JEFFERSON CIRCUIT COURT,  
CASE NO. 08-CI-02524; HON. IRV MAZE, JUDGE.

  
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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has been served this 17<sup>th</sup> day of December, 2012 via hand delivery upon Hon. Susan Stokely Clary, Clerk, Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601; and via U.S. mail, postage-prepaid, upon Hon. David Nicholson, Clerk, Jefferson Circuit Court, 2<sup>nd</sup> Floor, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202; Hon. Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and David Leighty, Esq. and Ben Basil, Esq., Priddy, Cutler, Miller & Meade, PLLC, 800 Republic Building, 429 West Muhammad Ali Blvd., Louisville, Kentucky 40202.

  
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Counsel for Appellee

**STATEMENT CONCERNING ORAL ARGUMENT**

Respondent agrees that oral argument is warranted.

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**APPENDIX**

A – Text of Proposed Senate Bill 169

## COUNTERSTATEMENT OF THE CASE

Pursuant to CR 76.12 (4)(d)(iii), Appellee University of Louisville (the "University") rejects Appellant Jeffery Pearce ("Pearce")'s statement of the case, and provides the following counterstatement of the relevant facts and procedural history.

### **A. INTRODUCTION.**

This case requires the Court to review a University hearing officer's order upholding the termination of a police officer's employment. Pearce was employed as a police officer with the University's Department of Public Safety ("DPS"). Pearce's employment was terminated on April 6, 2007 after he violated several sections of University and DPS policy. The University's decision was based upon two separate incidents: (1) Pearce's refusal to complete a written report for a November 14, 2006 fire alarm at the University's Medical Dental Research ("MDR") Building; and (2) Pearce's reckless response to a wrong-way traffic violation on February 23, 2007. Pearce's termination originated from internal investigations within the Department.

Shortly after being notified of the University's intention to terminate his employment, Pearce was afforded a pre-termination hearing, but he purposefully chose not to participate. After the University proceeded with Pearce's termination, Pearce utilized an internal University appeal proceeding facilitated by the Attorney General's Office of Administrative Hearings. Pearce was provided pretrial discovery, witness and exhibit lists, and a public, four-day *de novo* hearing before an independent hearing officer (the "Hearing Officer") where, through experienced and able counsel, he entered documents into evidence, examined and cross-examined witnesses, and was able to make motions and objections. Subsequently, the parties engaged in post-hearing briefing.

After considering the evidence and arguments offered at and after this four-day hearing, the Hearing Officer recommended in an extensive, factually detailed 23-page opinion (“Findings of Fact, Conclusions of Law, and Recommended Order”) (the “Hearing Officer Order”) that the University uphold Pearce’s termination. Notably, the Hearing Officer determined that a University policy mirroring KRS 15.520 did not apply to the proceeding because the University’s investigation and termination of Pearce was not initiated by a citizen complaint. The Hearing Officer also determined, however, that even if KRS 15.520’s procedural standards applied, and the University was deemed to have technically violated those standards, Pearce had not suffered any prejudice to his ability to defend against the University’s charges. The University subsequently adopted the Hearing Officer’s recommended order..

Pearce sought judicial review of his termination in Jefferson Circuit Court. The Circuit Court affirmed the Hearing Officer’s findings and conclusions. Pearce then appealed to the Court of Appeals, where, in a rigorous, to-be-published opinion, a three-judge panel affirmed the Circuit Court and Hearing Officer. Both courts agreed that KRS 15.520 did not apply to the case at bar, but even if it *did*, Pearce had not been prejudiced by any potential violation of that statute, in light of the full *de novo* post-termination hearing he had been provided.

The decision of the Court of Appeals rests on sound legal and factual analyses, and should be affirmed in full.

**B. PEARCE REFUSES TO COMPLETE A ROUTINE FIRE ALARM REPORT.**

The first incident upon which Pearce’s termination was based took place on Wednesday, November 14, 2006. At that time, Pearce’s principal assignment was to

patrol the University's Health Science Campus in downtown Louisville, and his work shift was from 10 p.m. to 6 a.m. (Tr. Vol. 4 p. 20).<sup>1</sup>

**1. A Fire Alarm Sounds at the MDR Building.**

At approximately 4:47 a.m., Shannon Adams, a DPS radio dispatcher, notified Don Martin of the Health Science Campus's Physical Plant Division that a fire alarm was going off at the MDR Building.<sup>2</sup> (R. 352). There had been several false alarms at the building that week, but it was not known if this particular alarm was false. *Id.* Martin arrived promptly at the MDR Building, but could not determine whether the alarm was false or not. (R. 353). Accordingly, he requested that Adams contact the Louisville Fire Department. *Id.* Adams complied. *Id.*

**2. Adams Dispatches Pearce to Investigate the Fire Alarm.**

At 4:54 a.m., Adams notified Pearce of the fire alarm, and another minute later, she told Pearce, "Sir, just to let you know I went ahead and contacted LFD on that alarm." (R. 354). Pearce, who was aware that there had been several false fire alarms in the MDR Building during the past week, asked Adams, "Okay, so what are we doing?" *Id.* Adams responded, "Per Don [Martin], he got over there within a couple of minutes and said that it's acting up; however, it's not reading the same; so just to be on the safe

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<sup>1</sup> Citations to the hearing transcript are noted by the volume and page number(s) ("Tr. Vol. \_ p. \_"); citations to the documentary administrative record filed in the Circuit Court are noted by the corresponding page number(s) ("R. \_").

<sup>2</sup> The University may choose to institute a "four minute rule" for potential false fire alarms in non-residential buildings. (R. 439-40, citing Section 4314.00). If the "four minute rule" is in effect, the fire department is not immediately notified of the alarm to afford DPS or the Physical Plant Division the opportunity to investigate the alarm. *Id.* Because of the recent false alarms, the four minute rule was in effect for the MDR Building. (R. 356-57). Consistent with this "four minute rule," Martin asked the dispatcher to delay calling the fire department until he had a chance to investigate the alarm. (R. 352).

side, we went ahead and notified LFD, but he doesn't see any fire in the building at all."

*Id.* To this, Pearce responded, "Okay." *Id.*

**3. Pearce Completes An Escort, But Does Not Proceed to the Alarm.**

At 4:59 a.m., Pearce notified Adams that he was proceeding with an escort run to a campus building, an assignment which he had received from Adams prior to the fire alarm dispatch.<sup>3</sup> (R. 354). A few minutes later, at 5:06 a.m., Pearce informed Adams that he had completed the escort. (R. 355). Pearce, however, did not proceed to the MDR Building.

**4. Adams Follows Up on Her Dispatch.**

Six minutes later, at 5:12 a.m., Martin called Adams and asked why an officer had not been called. (R. 355). Adams responded "I got him. I've already called him." *Id.* Adams then radioed Pearce and asked if he was going to go to the MDR Building. *Id.* Pearce responded, "No, you never dispatched me." *Id.* Adams replied, "Sir, I, uh, I advised you that we had LFD en route, that Don [Martin] wanted me to go ahead and contact them." *Id.* Pearce arrived at the MDR Building at 5:17 a.m., some twenty-two minutes after he responded "Okay" to her report that LFD had been dispatched. R.357.

**5. "Upset," "Irritated" Pearce Tells Martin He Will Not Complete A Fire Incident Report.**

Pearce subsequently testified that he was "upset" and "irritated" when he reached the MDR Building, as he believed another officer from the University's main Belknap campus should have been dispatched to cover the fire alarm while he completed the student escort. By the time Pearce arrived at the MDR Building, the LFD had already

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<sup>3</sup> Though fire alarms took precedence over student escorts per Department policy, none of Pearce's superiors found fault with the fact that he completed the escort first.

left the scene, and Martin approached Pearce to provide him with the information necessary for preparation of a Fire Incident Report. (R. 355, 357).

During his tenure with DPS, Pearce had responded to thirty-seven fire alarms, and had completed Fire Incident Reports in each and every one of those instances. (Tr. Vol. 1, p. 94). At Pearce's post-termination hearing, Chief Wayne Hall and three other superior officers testified that officers responding to a fire alarm have the responsibility of preparing Fire Incident Reports, consistent with DPS policy. *See, e.g.* R. 491, DPS Policy and Procedures Section 2215.01 (requiring all fire alarms to be reported on Fire Incident Report). Nevertheless, Pearce told Martin that he was not going to complete this required Report. (Hearing Officer Order at 6, para. 30).

Pearce then radioed Adams and asked her if *Martin* was going to complete the Report. (R. 357) Adams responded, "Sir, I don't know. He's inside the building." *Id.* Pearce later testified he asked this question out of frustration. (Hearing Officer Order at 6, para. 32). Pearce later testified that the responsibility to complete a Fire Incident Report never falls on Don Martin or any other staff of the Physical Plant department. (*Id.* at 7, para. 35).

#### **6. Pearce Complains to Lt. Brown.**

At approximately 5:36 a.m., Pearce radioed his supervisor, Lt. Rick Brown, to ask why no one else assisted him. (R. 357). Pearce testified at his post-termination hearing that he also asked Lt. Brown at this time whether he needed to complete the Report, but Lt. Brown denied this, and testified that he had in fact instructed Pearce to complete the Report before the end of his shift. (Hearing Officer Order at 7, para. 36).

**7. Pearce Fails to Complete the Report Before His Shift Ends.**

DPS officers are required to complete their paperwork by the end of their shift, but Pearce failed to complete the Fire Incident Report before he left that day.

**8. Pearce's Superiors Instruct Him to Complete the Report A Second Time.**

The next day, Friday, November 15, 2006, Maj. Robert Bringhurst contacted Lt. Brown to ask why a Fire Incident Report had not been completed for the MDR Building fire alarm as required by federal and state law. Lt. Brown, who was not aware that Pearce had failed to comply with his instructions and complete the Report, contacted Pearce and directed him to do so. (Tr. Vol. 4 p. 38). At that point, Pearce complied. *Id.*

**9. The Department Reviews the Incident.**

On Monday, November 18, 2006, Maj. Bringhurst instructed Pearce to produce a written report addressing the facts of the MDR Building alarm incident, and explaining why he had not initially completed the required Report. (R. 358). Pearce produced his report in an "interoffice memo" on November 20, 2006. (R. 359)

Partially in response to this "memo," DPS convened an officer review board on December 7, 2006 for the purpose of conducting an "Internal Inquiry" of the November 14 incident pursuant to DPS Policy 1900.02 (I). (R. 391-92, R. 496). The board consisted of five DPS officers. (R. 391, 393). The board's stated objective was to "determine if any violation of law or policy exists with regard to the above response [to the November 14 incident] as it relates to Clery or Minger compliance and State Fire

Marshall [sic] involvement as required by the Clery or Minger Acts.”<sup>4</sup> (R. 393). The board interviewed Adams, Pearce, Lt. Brown, and Don Martin. *Id.*

On December 18, 2006, the chair of the review board, Lt. John Schafer, sent DPS Chief Wayne Hall a letter providing the board’s findings and recommendations. (R. 393-95). The Board determined that “all policies and procedures pertaining to [the November 14] incident are clear, with no needed corrections or recommendations.” *Id.* The Board also concluded that, while Adams had appropriately dispatched the alarm run in accordance with DPS policies and procedures, Pearce had violated four DPS policies through his response to this dispatch and his failure to timely complete the required Fire Incident Report. *Id.* The board also found that Lt. Brown had violated one DPS policy by not addressing Pearce’s failures sooner. *Id.* The board did not assign discipline or find “guilt,” however. *Id.*

Shortly thereafter, DPS initiated an Internal Affairs investigation into Pearce’s conduct to determine if formal disciplinary charges were warranted. (R. 224-232, 244). Before DPS took any action on the results of this investigation, Pearce was involved in another incident that was the subject of a separate Internal Affairs investigation.

**C. PEARCE SPEEDS THE WRONG WAY DOWN ONE-WAY JACKSON STREET.**

The second incident upon which Pearce’s termination was based took place on Friday, February 23, 2007. Pearce, who was about to start his 10:00 p.m. shift, had given Officer Rob Skaggs a ride to Skaggs’s personal automobile in a parking garage on

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<sup>4</sup> Universities are required to report fire alarm incidents to the State Fire Marshal, and violations of the law can result in substantial civil and criminal penalties. *See* the Michael Minger Act, KRS 164.948, *et seq.*, and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092 (f) (respectively, the “Minger” and “Clery” Acts).

Jackson Street in downtown Louisville. (Tr. Vol. 3, pp. 94-95, Tr. Vol. 4, p. 41). Skaggs's shift had just ended for the evening. *Id.*

**1. Pearce Sees A Vehicle Going the Wrong Way Down One-Way Jackson Street.**

After Pearce and Skaggs entered the parking garage, Pearce saw a white vehicle traveling in the wrong direction on Jackson Street, which is a one-way street northbound. (Tr. Vol. 4 p. 43). The urban streets surrounding the University's Health Science Campus were often confusing to drivers, and it was common for the officers to see vehicles traveling the wrong way on one-way streets. (Hearing Officer Order at 10, para. 56). Pearce asked Skaggs to remain with him in the police cruiser while Pearce pursued the vehicle. (Tr. Vol. 3 p. 96).

**2. Pearce Quickly Accelerates Well Beyond the Posted Speed Limit Going the Wrong Way Down Jackson Street to Catch the Vehicle.**

Upon exiting the garage onto Jackson Street, Pearce did not see any traffic, as the white vehicle had already turned right from Jackson onto Broadway Street. (Tr. Vol. 3 pp. 97, 106-07). Pearce then turned right (south) onto northbound Jackson Street and, within the space of a block-and-a-half, accelerated to a top speed of forty-five to fifty miles per hour in an effort to catch up to the white vehicle. (Tr. Vol. 3 pp. 96, 100, Tr. Vol. 4 pp. 43, 45). The posted speed limit was thirty-five miles per hour. At the subsequent post-termination hearing, neither Pearce nor Skaggs could recall whether Pearce activated his emergency lights and siren before turning onto Jackson Street. (Tr. Vol. 3 p. 105, Tr. Vol. 4 p. 37).

**3. Pearce Conducts A Traffic Stop.**

At the intersection of Broadway and Jackson, Pearce spotted the white vehicle traveling in the correct direction on Broadway. (Tr. Vol. 3 p. 97-98). Pearce turned onto

Broadway, approached the vehicle, and initiated a traffic stop. *Id.* At some point before this traffic stop, Pearce activated his cruiser's emergency lights and siren. The driver of the white vehicle stated that she had just left the hospital and was lost. (Tr. Vol. 3 p. 99). The driver gave no indication that she was intoxicated, and Pearce issued her a verbal warning for the traffic violation. (Tr. Vol. 3 pp. 99-100).

**4. The Department Investigates the Incident.**

The following Monday morning, Skaggs asked his supervisor about receiving overtime pay for the time involved in the traffic stop. Upon receiving Skaggs' explanation of the extra time, the supervisor expressed concern about the propriety of Pearce's conduct and reported it to his own supervisor.<sup>5</sup> As a result, DPS began an Internal Affairs investigation of the incident. (R. 6).

**D. PEARCE RECEIVES AMPLE DUE PROCESS IN A THOROUGH UNIVERSITY DISCIPLINARY PROCESS.**

**1. The University's April 5, 2007 Recommendation of Termination Letter.**

On April 5, 2007, Pearce received a letter from Chief Hall entitled "Recommendation of Termination." (R. 386-89). The letter began: "After careful consideration and review of the facts and documentation surrounding the incidents occurring in November 2006, and February 2007, I have decided to terminate your employment with the Department of Public Safety, University of Louisville." *Id.* The letter went on to explain that Pearce's termination would become effective unless he provided justification to the contrary at an April 6, 2007 pre-termination hearing. *Id.* "That hearing," the letter stated, "provide[s] you the opportunity to present any reason(s)

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<sup>5</sup> Pearce had previously been involved in a disciplinary action in which he allegedly failed to terminate the pursuit of another vehicle.

why the action(s) should not be taken.” *Id.* The letter also explained that while Pearce could be accompanied by, and consult with, an attorney before or after the proceeding, the attorney could not be present during the pre-termination hearing itself. *Id.* Finally, the letter explained Pearce’s post-termination appeal rights, and invited Pearce to call Chief Hall with questions. *Id.*

**2. Pearce Appears for His Pre-termination Hearing But Chooses Not to Participate.**

On April 6, 2007, Pearce appeared at the correct time and place for his pre-termination hearing, along with his counsel. (R. 17-18). Despite the instructions provided in the University’s April 5 letter, Pearce insisted his counsel be permitted to take part in the proceeding. *Id.* When the University declined, Pearce and his counsel refused to participate, and left. *Id.*; *see also* R. 373.

**3. The University’s April 6, 2007 Letters**

Later that day, the University sent three letters to Pearce. The first letter stated, in relevant part:

A pre-termination hearing was held in the Department of Human Resources today, April 6, 2007. Although you appeared for the hearing, you refused to participate. Had you participated, you would have been informed of the reason the department was recommending termination of your employment. Consequently, your failure to participate forfeited your rights to produce evidence as to why you should not be terminated. Your employment with the university is terminated effective immediately.

(R. 373). A second, three-page letter explained the Department’s factual findings with respect to the November 14, 2006 and February 23, 2007 incidents, as well as the specific DPS policies that were violated by Pearce’s conduct. (R. 374-76). This letter concluded that it was “the combination of the above violations that Chief Hall has moved to terminate your employment with [DPS].” *Id.*

The University also sent Pearce a revised version of its April 5, 2007 "Recommendation of Termination" letter including two new sections. (R. 377-385). The first new section, "Reason for the Recommendation of Termination," stated:

The reason(s) you are being recommended for termination is:

- failed to complete the necessary report of a Fire Alarm at the MDR Building of the Health Sciences Center Campus (Internal Affairs Investigation #07-001);
- going the wrong way on a one way street (Internal Affairs Investigation #07-002);
- incompetence;
- dishonesty.

*Id.* at 377. The second new section, "Policies and Regulations," set forth the following categories of offenses listed under University policy PER 5.01 ("Disciplinary Action") as justification for Pearce's discharge:

A. violation of university bylaws, policies, or procedures, including unit, departmental, or office handbooks and rules;

H. neglect of or refusal to perform one's duties;

R. knowingly furnishing false, misleading, or incomplete information or reports to the university;

S. careless, negligent, or intentional acts or failures to act in the workplace or in the scope of employment that contribute to the harm of or the unacceptable risk of harm to individuals or property; or

T. Any other act or omission that in the university's judgment threatens the well-being of the university or any of its employees, its students, or the public.

(R. 373 at 1) (citing attached "revision of the Recommendation of Termination letter, which includes university policies violated."); (R. 377) (University termination policy).

**4. Pearce Appeals His Termination to a Full *De Novo* Post-termination Appeal Hearing.**

Pearce timely filed an internal appeal of his termination with the University. (R. 23-25). The University subsequently arranged for a hearing officer from the Office of the Attorney General's Division of Administrative Hearings to conduct a hearing and prehearing proceedings and issue a written report containing findings of fact and recommended actions. R. 33; *see generally* University Policy PER-5.04, "Appeals", found at R. 382-84 (setting forth internal disciplinary appeal standards and procedures). The applicable standard of review for this internal appeal hearing was stated in University Policy PER-5.04.III:

**III. STANDARD FOR REVIEW**

An appealable action may be reversed on appeal for only two reasons: (1) there was no reasonable basis for the university action; or (2) there was a substantial departure from university procedures which prejudiced the employee against whom the action was taken.

*Id.* at 382. The assigned Hearing Officer held prehearing conferences with the parties and presided over a four-day evidentiary hearing that concluded on August 14, 2007. (R. 96-97). Pearce was represented by counsel at each of these conferences and hearing dates, and enjoyed the opportunity to subpoena, examine, and cross-examine witnesses, introduce evidence, make arguments, and submit post-hearing briefs.

**5. The Hearing Officer Recommends Pearce's Termination Be Upheld.**

On February 4, 2008, the Hearing Officer issued a comprehensive, twenty-three page "Findings of Fact, Conclusions of Law, and Recommended Order" recommending the University proceed with the termination of Pearce's employment. (R. 192 - 215). Hearing Officer Order, pp. 22-23. The Hearing Officer correctly determined at the outset of his Order that the issue presented was "whether the university properly

terminated Pearce's employment based upon misconduct that is in violation of the university's policies and procedures." *Id.*, p. 1; R. 192.

With respect to the November 2006 MDR fire alarm incident, the Hearing Officer found that because Pearce was the only police officer dispatched, and the only officer who responded to the alarm, "he alone was responsible" for completing the Fire Incident Report. *Id.*, p. 16. The Hearing Officer further determined that Pearce did not complete the Report by the end of his shift as required, and did not intend to ever prepare the Report, because he was "upset and frustrated by what he perceived to be the failure to provide him with necessary assistance and backup." *Id.*, p. 17. The Hearing Officer concluded Pearce's unjustified refusal violated DPS Policy 808.00 (B), (C) and (D) ("Incompetence") and University Policy PER-5.01 (A) and (H). *Id.*, p. 15-17.

With respect to the February 2007 Jackson Street incident, the Hearing Officer found that by failing to operate his cruiser in a careful and prudent manner, he violated DPS Policy 825.00 ("Operating Vehicles") and University Policy PER-5.01 (A) and (S). *Id.* at 18-19. Noting the potentially life-threatening conduct Pearce had engaged in by speeding the wrong way down a one-way street, as well as Pearce's repeated disregard of DPS policy, the Hearing Officer agreed that "the appropriate discipline for Pearce's misconduct [wa]s termination of employment." *Id.* at 19-20.<sup>6</sup>

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<sup>6</sup> The Hearing Officer also evaluated the University's allegations that Pearce had been dishonest during DPS's investigations of the MDR building fire alarm and Jackson Street incidents. Hearing Officer Order at 8-10, 13. The Hearing Officer found that Pearce had not been provided notice of the factual basis for the MDR building-related dishonesty charge, and accordingly dismissed that charge. *Id.* at 13. The facts supporting that charge, however, "merged" with, and supported, the MDR building-related incompetence charge. *Id.* at 9. The Hearing Officer also found that the preponderance of the evidence showed Pearce had not been dishonest during DPS's investigation of the Jackson Street incident, and accordingly dismissed that charge as well. *Id.* at 13. Finally, the Hearing

The Hearing Officer next determined, consistent with the applicable standard of review, that the University had “followed the applicable policies and procedures in investigating the incidents at issue in this action and in imposing discipline against Pearce.” *Id.* at 20. The Hearing Officer acknowledged arguments Pearce had made that the provisions of KRS 15.520 applied to DPS’s investigation and the University hearing process, and that those policies had allegedly been violated. *Id.* While some of DPS’s investigatory policies mirrored KRS 15.520, the Hearing Officer observed, those internal policies specified that they applied only as to investigations initiated by a citizen complaint. *Id.*, citing DPS Policy 1900.02 (H) (found at R. 493-497). Even if KRS 15.520 did apply to the DPS investigation, moreover, any violations of that statute were irrelevant to the Hearing Officer’s findings and conclusions, which were based solely on the evidence admitted at the post-termination evidentiary hearing. *Id.* at 21.

The Hearing Officer did not decide if KRS 15.520 applied to the administrative hearing, holding instead that “irrespective of whether any of the procedural requirements of that statute apply to this action, a violation of those requirements does not prevent the admission of any evidence obtained in the university’s investigations but only requires the hearing officer to consider what weight to give the evidence and to determine whether the officer has been materially prejudiced by the admission.” *Id.* at 21-22, citing KRS 15.520 (1)(h)(9). The Hearing Officer then concluded Pearce had suffered no prejudice:

Even if there had been a substantial departure from university procedures in its investigation, the preponderance of the evidence does not support the conclusion that Pearce has suffered any prejudice to his ability to defend against the charges.

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Officer found that Pearce had not been provided notice of the factual basis for the Jackson Street-related incompetence charge; the facts supporting that charge, however, “merged” with, and supported, the Jackson Street-related “operating vehicles” charge. (Hearing Officer Order p. 13, para. 79).

In anticipation of the hearing Pearce received copies of all exhibits that were to be offered into evidence by the university and the names of all persons to be called as witnesses. At the hearing Pearce was presented with the opportunity to call his own witnesses, to cross-examine the university's witnesses, to introduce exhibits, and to file post-hearing briefs. Therefore, Pearce had a full and fair opportunity to defend against all allegations at issue in this action.

*Id.* at 22. The University accepted the Hearing Officer's recommended order in full on February 4, 2004. (R. 61).

**E. THE COURT OF JUSTICE REVIEWS AND UPHOLDS PEARCE'S TERMINATION.**

On June 11, 2008, Pearce filed an action in Jefferson Circuit Court pursuant to KRS 15.520 (2) alleging that he had not been afforded some of the procedural protections cited in KRS 15.520 (1), and that the Hearing Officer's termination decision was arbitrary and capricious. Pearce sought an order "nullifying" his termination, reinstating him to his position as a DPS officer, and awarding him back pay and costs. After conducting further discovery, the parties submitted Pearce's claims to the Circuit Court on written briefs.

On September 4, 2009, the Circuit Court entered an opinion and order fully affirming the Hearing Officer's findings and conclusions. First, relying on the text of 15.520 and this Court's case law, the Circuit Court determined that KRS 15.520 "applies to citizen complaints and is [thus] not applicable to [the] present situation." Circuit Court Order at 6-7. Second, the Circuit Court found "no error in the grievance procedure utilized in the employment termination of Pearce," citing the extensive pre- and post-termination proceedings the University had provided Pearce. *Id.* at 8. Finally, the Circuit Court found that the Hearing Officer's specific findings and conclusions were properly reached, stating:

Review of the record reveals that there was no error on the part of the Hearing Officer's decision to recommend the employment termination [of Pearce] for policy violations. The Hearing Officer's findings of fact are supported by substantial evidence. The Hearing Officer applied the correct rule of law to the facts so found. As such, the Hearing Officer's findings that Pearce be terminated for misconduct were not clearly erroneous or arbitrary.

*Id.* at 8. Pearce timely filed his notice of appeal to the Court of Appeals on September 30, 2009, pursuant to KRS 15.520 (3).

On November 18, 2011, after briefing and oral argument, the Court of Appeals issued a "to-be-published," 2-1 opinion affirming the Circuit Court. *Pearce v. Univ. of Louisville*, 2011 Ky. App. LEXIS 230 (Ky. App., Nov. 18, 2011). The Court of Appeals first determined that KRS 15.520 only concerned departmental disciplinary actions that were triggered by citizen complaints, and thus was inapplicable in this case. *Id.* at \*11-20. The Court took care to note, however, that even if that statute had applied here, it would not have required a reversal of Pearce's termination, as Pearce had not been prejudiced by any of the alleged procedural deficiencies identified. *Id.* at \*20, n. 10. The Court of Appeals further held that Pearce had received all due process required under the federal Constitution. Finally, the Court of Appeals agreed with the Circuit Court that the University had not acted arbitrarily in terminating Pearce's employment, and that its determinations were supported by substantial evidence. *Id.* at \*29-39.

The dissenting opinion argued that KRS 15.520 applied to all disciplinary proceedings against police officers. *Id.* at 40-42. However, even this dissent rejected Pearce's proposed remedy of reinstatement with an award of back pay, instead preferring Pearce be given a new hearing providing KRS 15.520's statutory due process rights. *Id.*

## ARGUMENT

### **I. INTRODUCTION.**

The opinion of the Court of Appeals correctly decided each of the issues raised in this case, and should be affirmed in full. The General Assembly never intended KRS 15.520 to apply to police disciplinary actions that were not triggered by a citizen complaint; this is evident from, among other things, the text of the statute, the General Assembly's recent refusal to broaden the statute's scope, and the reasoned analyses of every Kentucky court that has studied the question. Pearce's appeal exemplifies the inevitable end result of expanding KRS 15.520 beyond its intended scope: endless, costly litigation and re-litigation of basic intradepartmental decisions that are already subject to a number of officer-friendly checks. This Court should not make it more difficult for the Commonwealth's police departments to remove officers who disregard departmental policies and jeopardize public safety.

Even if KRS 15.520 did apply, the statute does not require reversal here by its own terms. Pearce received extensive due process from the University, and suffered no prejudice to his ability to defend himself. The Hearing Officer's determinations are supported by the record, and the Court of Appeals, reviewing those findings pursuant to CR 52.01, properly concluded those determinations were not clearly erroneous. In its analysis, the Court of Appeals persuasively rebutted each of Pearce's various objections and arguments. Tellingly, Pearce has completely ignored the Court of Appeals's treatment of his case here, and has simply parroted the same unsuccessful points made below hoping for a different result. This Court should affirm the sound reasoning, and result, of the Court of Appeals.

## II. STANDARD OF REVIEW.

The Court of Appeals correctly held that the “clearly erroneous” standard of review set forth in CR 52.01 governs Pearce’s appeal.<sup>7</sup> *Pearce*, 2011 Ky. App. LEXIS 230 at \*29-31, citing *Stallins v. City of Madisonville*, 707 S.W.2d 349, 351 (Ky. App. 1986). Thus, this Court “may not disturb the [factual] determinations of the circuit court unless they are not supported by substantial evidence.” *Howard v. City of Independence*, 199 S.W.2d 741, 743 (Ky. App. 2005). This deference is consistent with an appellate court’s constitutionally limited function of protecting against arbitrariness. *Crouch v. Jefferson Cty.*, 773 S.W.2d 461, 463-64 (Ky. 1988), citing *American Beauty Homes Corp. v. Louisville and Jefferson Cty. Planning and Zoning Comm’n*, 379 S.W.2d 450, 456 (Ky. 1964) (“Basically, judicial review of administrative action is concerned with the question of *arbitrariness*.”) (emphasis original).

For these reasons, “[t]he appeal is not the proper forum to retry the merits. It is limited only to the question of whether the [hearing authority]’s action was clearly unreasonable.” *Crouch*, 773 S.W. at 464. Questions of law, however, are reviewed *de novo*. *Reis v. Campbell Cty. Bd. of Educ.*, 938 S.W.2d 880, 885-86 (Ky. 1996).

## III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT KRS 15.520 ONLY APPLIES TO POLICE DISCIPLINE TRIGGERED BY A “CITIZEN COMPLAINT.”

### A. The Court of Appeals’s Analysis.

As several of Pearce’s arguments in favor of reversal relied upon procedural standards described in KRS 15.520, the Court of Appeals initially sought to determine whether that statute applied to the case at bar. *Pearce*, 2011 Ky. App. LEXIS 230 at \*11.

<sup>7</sup> See CR 52.01 (“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”).

After surveying existing Kentucky case law authority on the point, the panel concluded that while several recent unpublished Court of Appeals decisions had held that KRS 15.520 applied only where a citizen complaint had been made against an officer, no prior Supreme Court of Kentucky or published Kentucky Court of Appeals decision had squarely addressed the question. *Id.* at 17-18. Accordingly, without a binding opinion to follow, the Court of Appeals decided a more extensive exercise in statutory construction was necessary. *Id.* at 18.

First, the Court of Appeals examined KRS 15.520's preface, which explains that its provisions were 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...". *Id.* at 18, citing KRS 15.520 (1) (emphasis original). The Court of Appeals correctly concluded that "[t]his language suggests that the purpose of the statute is to provide procedural due process to police officers who are accused of wrongdoing by citizens." *Id.* Indeed, this prefatory section clearly reflects the General Assembly's intent that the statute's procedural standards apply simultaneously ("*and at the same time...*") with citizen complaint procedures. This express "link" provided by the General Assembly between the two policy objectives forecloses the "either/or" reading urged by Pearce, and the dissenting opinion of the Court of Appeals.

Second, the Court of Appeals highlighted KRS 15.520 (1)(a)(1)-(3), which concerns "[a]ny complaint taken from any individual alleging misconduct on the part of

any police officer” and establishes “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.” *Id.* at 18-19. The Court of Appeals found these leading subsections – addressing both citizen complaints *and* police officer protections – supported its reading of the General Assembly’s intent. *Id.*

Third, the Court of Appeals highlighted KRS 15.520 (1)(a)(4), which states that “[n]othing in this section shall preclude a *department* from investigating and charging an officer both criminally and administratively.” *Id.* at 18-20 (emphasis added). The panel held that this subsection distinguished disciplinary actions initiated by a *police department*, which KRS 15.520 does not “preclude,” with disciplinary actions initiated by a citizen complaint, to which KRS 15.520 applies. *Id.* The Court of Appeals also summarily rejected Pearce’s argument that this subsection acts to “expressly authorize” internal police department investigations and disciplinary actions, and thus somehow bootstraps the standards contained within the rest of the statute to those internal actions. *Id.* at 19-20. Police departments have always had the prerogative and authority to investigate and discipline officers, and nothing in the subsection suggests the General Assembly was granting new powers to police departments. *See* KRS 164.365, 164.830 (giving University authority over range of personnel decisions, including termination). Instead, the Court of Appeals found the legislature had “affirmed that intradepartmental investigations are not precluded” by KRS 15.520 and “that they differ from citizen complaint investigations.” *Pearce*, 2011 Ky. App. LEXIS 230 at \*19-20.

Fourth, the Court of Appeals acknowledged Pearce’s argument, repeated here, that KRS 15.520 (1)(h)(3) reflects the General Assembly’s intent that 15.520’s standards

may apply to both hearings based on a citizen complaint and intradepartmental hearings. Pearce's argument is based solely on the use of one word ("if") in the subsection. *Id.* at 20; KRS 15.520 (1)(h)(3) ("If any hearing is based upon a complaint of an individual, the individual shall be notified to appear...") (Pearce's emphasis). The Court of Appeals correctly concluded that even if this single word had the connotation Pearce claimed, it constituted "only a bare hint of an expansive legislative intent," and, in reading the statute in its entirety, could not carry the day. *Pearce*, 2011 Ky. App. LEXIS 230 at \*20.

While acknowledging that KRS 15.520 was "lacking in artful construction and irrefutable disclosure of legislative intent," the Court of Appeals had "no doubt that the decision reached [as to the statute's scope]...is entirely consistent with the language used and purpose of the statute." *Id.* at 20-21.

**B. Each of Kentucky's Three Branches of Government Have Determined KRS 15.520 Applies Only In the Event of a Citizen Complaint**

In addition to the statutory analysis conducted by the Court of Appeals, there are other persuasive legal authorities from Kentucky's legislative, executive, and judicial branches that support the lower courts' conclusion that KRS 15.520 applies only where officer disciplinary proceedings are initiated by a citizen complaint.

**1. The Legislature Has Repeatedly Demonstrated Its Limited Intent.**

While KRS 15.520's preface is the clearest statement of the legislature's intent, the General Assembly has signaled in other compelling ways that KRS 15.520's procedural standards must be linked to a citizen complaint. The statute's title – "Complaints against police officers – Manner of investigation and hearing" – plainly reflects that what follows are procedures to be followed where there are "[c]omplaints

against police officers.”<sup>8</sup> Similarly, the 1980 legislative acts creating KRS 15.520 entitles and describes itself as “AN ACT relating to procedures for hearing complaints against police officers.” 1980 Ky. Acts ch. 333, sec. 1. The 1990 and 1994 legislative acts amending KRS 15.520 entitle and describe themselves as “AN ACT relating to complaints against police officers.” 1990 Ky. Acts ch. 127, sec. 1, 1994 Ky. Acts ch. 282, sec. 1. No similar evidence exists that suggests the General Assembly intended the scope of KRS 15.520 to be as broad as Pearce urges here.

Any question about the General Assembly’s intended scope for KRS 15.520 was answered during the last legislative session, when Senate Bill 169 was unsuccessfully proposed. This bill sought, among other things, to broaden KRS 15.520 (1) to include just the sort of intradepartmental complaints at issue in this case. See Ky. Legis. Res. Comm’n, Local Mandate Fiscal Impact Estimate for SB 169, at <http://www.lrc.ky.gov/record/12RS/SB169/LM.doc> (last visited Dec. 7, 2012) (“The purpose of SB 169 is to extend procedural due process rights to police officers in intradepartmental disciplinary matters.”) The proposed amendment to KRS 15.520 includes the following text:

- (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 all complaints against police officers, regardless of the source of the complaint, against ~~of the local unit of government and at the same time providing a means for redress by the citizens of the Commonwealth for wrongs allegedly done to them by~~ police officers covered by this section:
  - (a) Any complaint~~[ taken from any individual ]~~ alleging misconduct on the part of any police officer, as defined herein, shall be taken as follows:
    1. ~~[ If the complaint alleges criminal activity on behalf of a police~~

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<sup>8</sup> Cf. KRS 446.140 (addressing statutory titles).

~~officer, the allegations may be investigated without a signed, sworn complaint of the individual;~~

2.] If the complaint alleges abuse of official authority or a violation of rules and regulations of the department, an affidavit, signed and sworn to by the complainant, ***whether a private citizen or a member of the police officer's department,*** shall be obtained;

2[3]. If a complaint is ~~required to be~~ obtained and the ***complainant is a private citizen who***~~individual~~, upon request, refuses to make allegations under oath in the form of an affidavit, signed and sworn to, the department may investigate the allegations, but shall bring charges against the police officer only if the department can independently substantiate the allegations absent the sworn statement of the complainant;

3[4]. Nothing in this section shall preclude a department from investigating and charging an officer both criminally and administratively.

Ky. Legis. Res. Comm'n, Bill Status Information for SB 169, at <http://www.lrc.ky.gov/record/12RS/SB169.htm> (last visited Dec. 14, 2012) (bold, italicized emphasis indicates proposed additions; strikethroughs indicate proposed deletions) (full text of proposed SB 169 as found from LRC site included at Appendix Tab A). As this excerpt illustrates, SB 169 would have severed the existing "link" between procedural standards and citizen complaints and made KRS 15.520 applicable to "all complaints...regardless of the source of the complaint[.]" even if the complainant was a "member of the police officer's department." That SB 169 was even proposed shows Pearce's expansive interpretation has no support in the existing language of KRS 15.520. The fact that SB 169 failed to become law in the 2012 Regular or Extraordinary Sessions, moreover, conclusively proves the General Assembly was satisfied with the Court of Appeals' existing interpretation of KRS 15.520's scope. See Ky. Legis. Res. Comm'n, Local Mandate Fiscal Impact Estimate for SB 169, at

<http://www.lrc.ky.gov/record/12RS/SB169/LM.doc> (last visited Dec. 7, 2012) (reflecting Court of Appeals' decisions in this case and *Hill v. City of Mt. Washington*, 2012 Ky. App. Unpub. LEXIS 66 (Ky. App., Jan. 20, 2012) as motivation behind SB 169).

**2. The Office of the Attorney General Has Interpreted KRS 15.520 to Apply Only in the Event of a Citizen Complaint.**

The Office of the Attorney General has also expressed its opinion that the General Assembly intended KRS 15.520 to apply only in the instance of a citizen complaint. In letter OAG 81-48 (1981), the Office answered a question about whether KRS 15.520 afforded a police officer the right to a due process hearing as follows:

You next raise the question of whether or not KRS 15.520 affords a police officer the right to a due process hearing in view of the language found in subsection (1)(h) which uses the phrase "when a hearing is to be conducted by any appointing authority," *which does not appear to mandatorily require a hearing in all cases.*

*We believe that KRS 15.520 when read in conjunction with the act as a whole clearly implies that police officers against whom complaints are filed are entitled to a due process hearing as therein provided though admittedly the statutory language is somewhat ambiguous.*

It would seem to us that the use of the phrase mentioned above simply means that a hearing is predicated on the initial finding by the authority or body designated to take action in the matter, *that the complaint is not frivolous* and thus warrants a full investigation to determine its authenticity. *This, we believe, is the intent of the legislature in enacting this statute.*

(emphasis added). This letter came less than a year after the enactment of KRS 15.520.

**3. The Court of Justice Has Uniformly Held that KRS 15.520 Applies Only in the Event of a Citizen Complaint.**

Finally, Kentucky's judicial branch has held – in each and every decision of record bearing directly on the issue – that KRS 15.520 applies only where an officer's discipline has been triggered by a citizen complaint. In addition to the instant case and *Hill v. City of Mt. Washington*, where this Court has also granted review, no less than five

panels of the Court of Appeals have reached this holding. See *Beavers v. City of Berea*, -- S.W.3d --, 2012 Ky. App. LEXIS 1 (Ky. App. 2012); *Moore v. City of New Haven*, 2010 Ky. App. Unpub. LEXIS 858 (Ky. App. Oct. 29, 2010) (2010-CA-000019-MR); *Ratliff v. Campbell County*, 2010 Ky. App. Unpub. LEXIS 397 (Ky. App. May 7, 2010) (2009-CA-000310-MR); *Marco v. Univ. of Ky.*, 2006 Ky. App. Unpub. LEXIS 6 (Ky. App. Sept. 1, 2006); *Leonard v. City of Lebanon Junction*, 2005 Ky. App. Unpub. LEXIS 210 (Ky. App. Feb. 11, 2005) (2004-CA-000328-MR). Virtually all of the trial courts in these appellate cases had also determined that KRS 15.520 applied only in the event of a citizen complaint.<sup>9</sup> Accordingly, a statewide consensus exists on this question of Kentucky law.

Pearce's brief cites several published cases that allegedly "apply" KRS 15.520 and thus "manifest no doubt" that KRS 15.520 applies regardless of the origin of the allegations against the officer.<sup>10</sup> Pearce Brief at 14-15 (briefly discussing cases). Pearce vastly overstates the substance and significance of these cases, however. As a threshold matter, none of the cases cited by Pearce reveal whether the initial source of the information leading to the respective officer's discipline was gathered from a citizen complaint or an intradepartmental complaint. The cited case law is silent. Thus, Pearce cannot even salvage a partial inference in support of his argument from these cases.

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<sup>9</sup> In *Leonard, supra*, the trial court did not rule on the applicability of KRS 15.520, but the Court of Appeals held, in assessing the merits of the plaintiff officer's complaint as part of its review of CR 37 sanctions, that the officer's KRS 15.520-related claims were inapplicable, as there had been no citizen complaint. *Leonard*, 2005 Ky. App. Unpub. LEXIS 210 at 12-13.

<sup>10</sup> These cases include *Stallins v. Madisonville*, 707 S.W.2d 349, 350 (Ky. App. 1986), *Brown*, 751 S.W.2d at 24, 26-27; *Louisville by Kuster v. Milligan*, 798 S.W.2d 454, 458 (Ky. 1990); *Madisonville v. Sisk*, 783 S.W.2d 885 (Ky. App. 1990), and *Howard v. City of Independence*, 199 S.W.3d 741, 745 (Ky. App. 2005).

More importantly, however, none of the cases cited by Pearce expressly address the applicability of KRS 15.520. There is not even an indication that the parties to those cases contested the point. There was no “shift” in the jurisprudence on this point in 2005-06, *contra* Pearce’s brief (pp. 17-18); the first time the scope of KRS 15.520 was squarely addressed was in *Leonard* and *Marco, supra*, and the courts of the Commonwealth have been of one mind on that point ever since.

Pearce also argues that *City of Munfordsville v. Sheldon*, 977 S.W.2d 497, 499 (Ky. 1998) expands KRS 15.520 to all police discipline cases motivated by “cause,” including those not initiated by a citizen complaint. Pearce’s Brief at 15-16. *Sheldon*, however, actually emphasizes the prerequisite of a citizen complaint in KRS 15.520 cases:

Rather, our holding merely forbids a mayor or other local executive authority *from receiving a citizen’s complaint against an 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. 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.* at 499 (emphasis added). Thus, in *Sheldon* this Court expressly acknowledged that KRS 15.520 is conditioned on a complaint.<sup>11</sup>

In sum, a wide range of authorities over the past thirty-two years support the Court of Appeals’ conclusion here about the scope of KRS 15.520. Pearce cannot say the same.

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<sup>11</sup> The University’s interpretation of *Sheldon* on this point was shared by the Court of Appeals in *Gardner v. City of Hickman*, 2004 WL 1699915 at \*13 (Ky. App., July 30, 2004) (“[T]he [Supreme] Court merely held [in *Sheldon*] that where a city is required to adhere to the procedural requirements of KRS 15.520, the city may not fire a police officer *based on a citizen complaint* without affording the officer an opportunity to ‘publicly defend against the complaint as required by KRS 15.520.’”) (emphasis added).

**C. Pearce's Other Arguments In Favor of Expanding KRS 15.520 Are Unavailing.**

Pearce's brief tries to fashion an argument out of other, isolated terms found in KRS 15.520, but these snippets do not help his position. Pearce claims that if KRS 15.520 applied only to citizen complaints, KRS 15.520 (1)(c)'s reference to "interrogation in a *departmental* matter involving alleged misconduct" would be meaningless, "since citizen complaints are extradepartmental matters." Pearce Brief at 12 (emphasis original). Pearce points to no authority, however, supporting his position that the General Assembly intended to use the word "departmental" to exclusively describe disciplinary actions originating internally. In fact, the General Assembly could have used the term to refer to internal, administrative matters originated through any source (as opposed to criminal matters), or disciplinary actions involving alleged violations of departmental policies (as opposed to violations of civil or criminal law). No basis exists upon which to ascertain a different legislative intention than that clearly communicated elsewhere in the statute.

Pearce, and the dissenting opinion below, also urge that the various subparts of KRS 15.520 (1) should be analyzed in isolation from one another. *See Pearce*, 2011 Ky. App. LEXIS 230 at 40-42. This argument fails, however, because it runs aground of both the structure of KRS 15.520 (1) and basic canons of statutory construction. The general limitation to "complaints" set forth in the prefatory language of KRS 15.520 (1) necessarily applies to each of that section's subparts. It would be illogical for general terms of a statutory provision to only apply to some of its subparts, especially without an express indication in the statutory text that this was the case. The Court need not "elevate" any subsection of KRS 15.520 (1) over another; it need only read the subparts

in light of the express legislative intent set forth over the entire section. Pearce's approach also neglects well-established precedent eschewing a term-by-term analysis of statutes in favor of one that considers the entire statute in context. *See, e.g., Jefferson Cty. Bd. of Educ. v. Fell*, 2012 Ky. LEXIS 148 at \*11 (Ky. 2012) ("The particular word, sentence or subsection under review must also be viewed in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent.") (citations omitted).

Finally, Pearce's argument that KRS 15.520 (4) requires the application of sections (1) – (3) to all officers of police departments that receive Kentucky Law Enforcement Foundation Program Fund ("KLEFPF") money begs the question: in what factual circumstances do those sections apply to those officers? As discussed above, the General Assembly answered that question by limiting the statute's procedural standards to proceedings originated through a citizen complaint.

**D. The Court of Appeals Properly Found that the University Should Not be Judicially Estopped From Arguing the Correct Scope of KRS 15.520.**

Pearce complains that the University should be "judicially estopped" from contesting the applicability of KRS 15.520. This argument is groundless. Pearce has used KRS 15.520 (2) and (3) as a basis for bringing his claim before the Court; and, as a basic proposition, defects in subject matter jurisdiction cannot be waived or estopped and can be reviewed, even *sua sponte*, at any stage in litigation, including while on appeal. *Nordike v. Nordike*, 231 S.W.3d 733, 738 (Ky. 2007), *Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001). Thus, the University's right to challenge the applicability of KRS 15.520 can never be estopped.

Pearce's judicial estoppel arguments fail for additional reasons. The doctrine of judicial estoppel "protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one *successfully* and *unequivocally* asserted by the same party in a prior proceeding." *Colston Investment Bd. v. Home Supply Co.*, 74 S.W.3d 759, 763 (Ky. App. 2001) (emphasis added); *see also Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422, 434 (Ky. App. 2008) (cited by Court of Appeals in instant case) (setting forth similar elements).<sup>12</sup> Here, the University never asserted, much less "unequivocally asserted," that KRS 15.520 applied to this matter. During the internal University appeal hearing, University counsel clearly stated that the only pertinent standards at issue were those specified by University policy. University counsel clarified through its post-hearing briefing that University Police PER-5.04.III contained the proper standard of review, and that KRS 15.520 was inapplicable, a position with which the Hearing Officer, Jefferson Circuit Court, and Court of Appeals ultimately agreed. The University neither "successfully" or "unequivocally" argued that KRS 15.520 applied to the internal University appeal process – in fact, the University successfully and unequivocally advocated the opposite position, as it did in the courts below, and as it does now in this Court.

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<sup>12</sup> Pearce's brief ignores Kentucky case law addressing *judicial* estoppel in favor of inapplicable decisions involving promissory estoppel and equitable estoppel. *See* Pearce Brief at 21 (citing *Stewart v. Siddens*, 687 S.W.2d 536 (Ky. App. 1984) (promissory estoppel), *Hitachi Auto. Prods. USA, Inc. v. Craig*, 279 S.W.3d 123 (Ky. 2008) (estopped statute of limitations defense resulting from the defendant's failure to provide required notice to a workers' compensation plaintiff), *Bd. of Trustees v. Grant*, 257 S.W.3d 591 (Ky. App. 2008) (case remanded to address potentially estopped reduction in retirement benefits arising out of the defendant's failure to provide accurate information to pensioner)). These decisions are inapposite here.

Pearce, moreover, presents no authority for the proposition that judicial estoppel applies to positions taken at internal university termination appeal hearings. The hearings, which are not conducted pursuant to KRS Chapter 13B or any other statute, are intended to be informal in nature. See University Policy PER-5.04.IV.D.2, R. 12. Applying judicial estoppel in these circumstances would have the effect of unnecessarily complicating what is intended to be a convenient, efficient, and layman-friendly internal employment procedure for both the University and its employees, many of whom appear at these hearings *pro se* and without an appreciation for the effects estoppel could have on subsequent proceedings. Permitting the application of estoppel in this context would inevitably present unfortunate and unforeseen consequences for these appeal hearing participants. See *Bd. of Educ. of Covington v. Gray*, 806 S.W.2d 400, 403 (Ky. App. 1991) (estoppel does not apply in unemployment compensation proceedings because of “untenable burden which would be placed on the system were [the Court] to hold that any findings could conceivably bind all parties in later proceedings.”).

Finally, Pearce has suffered no prejudice. Pearce conducted his defense before the Hearing Officer, and drafted his responsive post-hearing brief, under the assumption that KRS 15.520 applied; accordingly, he had a full and fair opportunity to make all of the 15.520-related arguments he desired – and, in fact, the Hearing Officer considered those arguments and weighed whether he had been prejudiced by any violation of 15.520. The applicability of KRS 15.520 is a legal question, and Pearce has had the benefit of *de novo* review on this question before the courts below. The Court of Appeals correctly found that the “strong medicine” of judicial estoppel was inappropriate here, and that the case should be decided on its merits. *Pearce*, 2011 Ky. App. LEXIS 230 at \*13-15.

**IV. THE COURT OF APPEALS CORRECTLY DETERMINED THAT, REGARDLESS OF THE APPLICABILITY OF KRS 15.520, ANY PROCEDURAL IRREGULARITIES DID NOT REQUIRE REVERSAL.**

Even if this Court finds KRS 15.520 applies to this case, however, reversal is not warranted, as Pearce suffered no prejudice to his ability to defend against the University's charges. To ensure KRS 15.520 was not misused by police officers as a technicality-driven "get out of jail free" card, the General Assembly amended KRS 15.520 in 1990 to include what is now subsection (1)(h)(9), which reads as follows:

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.

KRS 15.520 (1)(h)(9); 1990 Ky. Acts ch. 127, sec.1. The Court of Appeals addressed this critical subsection in its opinion, noting that "a failure to provide any of the rights or to follow any of the provisions contained [within 15.520] 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." *Pearce*, 2011 Ky. App. LEXIS 230 at \*20-21 n.10. Consistent with KRS 15.520 (1)(h)(9), the Hearing Officer expressly considered whether the alleged violations of KRS 15.520 raised by Pearce had actually served to adversely affect his defense -- and concluded they had not. See Hearing Officer Order, pp. 21-22, paras. 31-33 (concluding that Pearce suffered no prejudice from the introduction of any evidence or departure from University procedures in light of post-termination hearing); Circuit Court Order, pp. 7-9 (affirming Hearing Officer's findings). The Court of Appeals found no error in this position. *Pearce*, 2011 Ky. App. LEXIS 230 at \*20-21 n.10.

Here, Pearce does not address, or even cite, KRS 15.520 (1)(h)(9). Pearce does not acknowledge the Court of Appeals's alternative holding, *supra*, that the Hearing Officer and Circuit Court correctly concluded that Pearce had not been prejudiced in light of his post-termination hearing. Instead, Pearce simply repeats the same series of alleged "procedural irregularities" rejected below, and, without providing any explanation for how those irregularities actually prejudiced his defense, asks for reversal. For the following reasons, this Court should affirm the Court of Appeals's position.

• **Maj. Bringhurst's request for an explanation of the MDR fire alarm incident did not violate KRS 15.520 and did not prejudice Pearce.** KRS 15.520 (1)(c) states that an officer "may be required to submit a written report" of an incident "involving alleged misconduct on his...part" by 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." Here, Major Bringhurst's request was not preceded by any disciplinary "charges," and there had been no determination at the time of his request that Pearce had committed any "misconduct." Maj. Bringhurst's request preceded the DPS Internal Inquiry into the incident that concluded, among other things, that Pearce had violated DPS policies. Bringhurst was simply seeking background information about the incident from Pearce. Even if this request did violate 15.520 (1)(c), furthermore, Pearce suffered no prejudice from Bringhurst's request.<sup>13</sup> There are, for example, no allegations that Pearce could no longer remember important details of the incident at the

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<sup>13</sup> Pearce's timeline for this report is incorrect. Maj. Bringhurst did not learn of the issue in question – Pearce's failure to complete a Fire Incident Report – until November 15, 2006. It is not clear from the record when Pearce's next tour of duty after November 15 took place. Accordingly, it is not at all clear this request would have been untimely even if KRS 15.520 (1)(c) governed that request.

time of Bringhurst's request, or that Pearce's "interoffice memo" would have persuaded Lt. Tarter not to initiate an internal inquiry had it been drafted 72 hours earlier. Pearce's apparent position is that if a written report is not requested from an officer on time, the entire underlying incident automatically becomes "off limits" to further inquiry. This is not how KRS 15.520 (1)(h)(9) operates, however.

- **Lt. Schafer's officer review board conducted an Internal Inquiry, not a Disciplinary Review Board.** The Court of Appeals rejected Pearce's argument that DPS had convened a "Disciplinary Review Board" without providing certain procedural protections, explaining:

[T]he 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). The 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." [...] Thus, while the creation of [this] first review board was unusual, Appellant did not suffer any prejudice as a result of its use.

*Pearce*, 2011 Ky. App. LEXIS 230 at \*23-24 (emphasis original, underline added). This analysis mirrored that of the Hearing Officer. Hearing Officer Order, pp. 20-21.<sup>14</sup> The

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<sup>14</sup> Additional support for this conclusion can be found by contrasting the DPS policy governing Disciplinary Review Boards (DPS Policy 1900.02.M) (R. 496-97) with the review board proceedings depicted in Major Bringhurst's November 30, 2006 (R. 391-92) and December 18, 2006 (R. 393-95) letters. DPS Policy 1900.02.M.1 states that

Hearing Officer and the Court of Appeals both determined that the officer review board had conducted an "Internal Inquiry" authorized under a specific DPS policy, during which employee performance is subject to review at any time, even without a formal complaint.<sup>15</sup> *Pearce*, 2011 Ky. App. LEXIS 230 at \*23-24; Hearing Officer Order, pp. 20-21 (citing DPS Policy and Procedures Section 1900.02(I)); *see also* December 18, 2006 Schafer Letter (characterizing review board as an "internal inquiry") (R. 393-95).

This Internal Inquiry did not constitute a disciplinary "hearing" for purposes of DPS policy or KRS 15.520 (1)(h). There was not an individual officer defending against disciplinary charges; there were multiple employees being interviewed for a general evaluation of a fire alarm incident. The proceeding was not intended to adjudicate Pearce's rights. No one was placed under oath, there were no witnesses subpoenaed, there were no sworn statements or affidavits used, there were no attorneys present, and there was no complaining individual present – all elements contemplated by KRS 15.520

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Disciplinary Review Boards apply only to "sworn police officers," yet this board reviewed the actions of Shannon Adams, a civilian dispatcher. DPS Policy 1900.02.M.5 requires that a Disciplinary Review Board consist of four officers, the Director of the department, and an administrative representative, yet this board only contained five officers. DPS Policy 1900.02.M.11 requires a Disciplinary Review Board to make a recommendation on the appropriate "degree of discipline"; none was made here. Finally, DPS Policy 1900.02.M.2 states that a Disciplinary Review Board "may" be convened for the purposes of review and making recommendations concerning initiated disciplinary charges (meaning, of course, that DPS may choose not to use a Board at all); yet this review board looked at a number of issues, none of which included initiated disciplinary charges.

<sup>15</sup> This policy (R.496), which describes the review board's efforts here, reads: "Internal Inquiries. The performance of the Department and the individual employee is subject to review at any time. This review may take the form of an Internal Inquiry. The Internal Inquiry does not require the existence of a formal complaint. Most intradepartmental complaints will be handled as an Internal Inquiry. They are not necessarily allegations of misconduct; they well may be a simple investigative reaction to information. Officers are cautioned that to refuse to respond to these inquiries by citing the protections of KRS 15.520 (Police Officer's Bill of Rights) may place them in administrative jeopardy."

(1)(h). More importantly, there is no proof that any of the alleged procedural shortcomings identified by Pearce prejudiced him. The only consequence of the Internal Inquiry for Pearce was the initiation of a separate, independent Internal Affairs investigation – which itself did not result in any recommendation of discipline until *after* the Jackson Street “wrong way” speeding incident had occurred and been the subject of a second Internal Affairs investigation. The Hearing Officer, moreover, evaluated the propriety of Pearce’s termination solely through the evidence provided at the August 2007 post-termination hearing.

• **Had Pearce participated in his pre-termination hearing, he would have received all the procedural protections to which he was entitled.** The Court of Appeals’s opinion accurately described the role and purpose of the April 6, 2007 pre-termination hearing. Where, as here, state law permits for a full post-termination hearing and judicial review, a public employee’s pre-termination hearing need only operate as an “initial check” on the employer’s termination decision that “provides an opportunity to determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Pearce*, 2011 Ky. App. LEXIS 230 at \*26, citing *Leary v. Daeschner*, 228 F.3d 729, 744 (6th Cir. 2000) and *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985). “Accordingly,” the Court of Appeals found, “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.” *Pearce*, 2011 Ky. App. LEXIS 230 at \*26-27, citing *Loudermill*, 470 U.S. at 545. The Court of Appeals also found, based on long-standing federal appellate

authority, that no right to counsel existed at pre-termination hearings when a more substantial post-termination hearing was forthcoming. *Id.* at 27, citing, *inter alia*, *Frumkin v. Bd. of Trustees, Kent State Univ.*, 626 F.2d 19, 21 (6th Cir. 1980). Finally, the Court of Appeals concluded that by refusing to participate in the pre-termination hearing, Pearce had waived any claim of a constitutional due process violation from that proceeding.<sup>16</sup> *Pearce*, 2011 Ky. App. LEXIS 230 at \*27, citing *Leary*, 228 F.3d at 744 (“In sum, the plaintiffs were afforded due process and waived their right to it by refusing to participate in the hearing offered to them by the [employer].”). Pearce’s brief does not address the Court of Appeals’s discussion.

While the analysis of the court below is directed at constitutional concerns, it provides useful insight as to why Pearce’s KRS 15.520-related objections are also off the mark (assuming that statute even applies here). In this case, the “hearing” addressed in KRS 15.520 (1)(h) clearly refers to the full, post-termination hearing provided by the University, and not the “initial check” afforded to Pearce before the termination had been decided. Like the DPS Internal Inquiry discussed above, Pearce’s pre-termination hearing was not intended to be a formal, adversarial proceeding that reached a final determination as to Pearce’s discipline. *See Pearce*, 2011 Ky. App. LEXIS 230 at \*26, citing *Loudermill*, 470 U.S. at 545 (pre-termination hearing “need not definitively resolve the propriety of” action under review). Applying KRS 15.520 (1)(h) to this preliminary proceeding *and* a post-termination hearing would be illogical and unnecessarily duplicative, given the context of the University’s termination process. *See Shawnee*

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<sup>16</sup> The Court of Appeals summarily dismissed Pearce’s KRS 15.520-related complaints based on its earlier holding that the statute did not apply here. *Pearce*, 2011 Ky. App. LEXIS 230 at \*22.

*Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) (“We also presume that the General Assembly did not intend an absurd statute[.]”).

Of course, even if KRS 15.520 (1)(h) did apply to his pre-termination hearing, Pearce waived any deficiencies under that subsection by intentionally refusing to participate in that proceeding. Pearce cannot on the one hand decide not to participate in a pre-termination hearing, and on the other hand complain that he might have been prejudiced had the hearing taken place.

Finally, the Hearing Officer correctly found, pursuant to KRS 15.520 (1)(h)(9), that Pearce had not suffered any prejudice as a result of the University’s pre-termination procedures. Hearing Officer Order, p. 21, para. 32. Pearce did not participate in the pre-termination hearing, so there was no testimony or other evidence procured. The Hearing Officer conducted a *de novo* post-termination hearing, and made his findings and conclusions based solely on the evidence and argument offered at that hearing. Nothing that happened, or did not happen, in the pre-termination process prejudiced Pearce.

• **Pearce received ample notice.** The Court of Appeals found that “following the pre-termination hearing, [Pearce] received letters describing the subject incidents [leading to his termination] in detail, setting forth the nature of [Pearce]’s deficient conduct, and providing the specific provisions of University policy that he was accused of violating.” *Pearce*, 2011 Ky. App. LEXIS 230 at \*28-29. The court below correctly concluded that Pearce “was provided with ample information regarding the basis for his termination from employment” and rejected Pearce’s objections to the contrary. *Id.*

The record supports these findings. Pearce knew he was being investigated for both the MDR fire alarm and Jackson Street incidents when he received a letter on April

5, 2007 advising him of Chief Hall's recommendation of termination. R. 386-89. This letter also informed Pearce of the April 6, 2007 pre-termination hearing. *Id.* Had Pearce participated in this hearing, he would have had a full opportunity to ask questions about the factual basis for this recommendation, as well as the specific policies that he was found to have violated.<sup>17</sup> Pearce voluntarily decided to forego this opportunity, and should not be heard to complain now that he or his counsel was confused as a result.

On April 6, 2007 DPS mailed Pearce three letters. The first letter explained that the University was proceeding with Pearce's termination. R. 373. The second letter set forth detailed factual summaries of the two incidents involved, as well as the specific DPS policies that were violated. R. 374-76 (4/6/07 Bringhurst letter to Pearce). Pearce's refusal to complete the MDR report violated DPS policies on "Incompetence," "Truthfulness," and "Departmental Reporting." *Id.* Pearce's wrong-way speeding incident on Jackson Street violated DPS policies on "Truthfulness," "Operating Vehicles," and "Incompetence." *Id.* The third letter contained a factual recap of the reasons for termination, and then set forth the University policy regarding termination ("PER 5.01, Disciplinary Action") and the five types of disciplinary "offenses" Pearce's actions constituted. R. 377-85. Together, the letters provide notice of the facts upon which the University's termination decision was based on, the DPS policies that had allegedly been violated, and the applicable University policy authorizing termination. Before the post-termination hearing and again before submitting his "quasi *de novo*"

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<sup>17</sup> The University's first April 6, 2007 letter to Pearce made this clear. R. 373 (4/6/07 Bringhurst letter to Pearce) ("Had you participated, you would have been informed of the reason the department was recommending termination of your employment.").

appeal to the Circuit Court, moreover, Pearce had the opportunity to take discovery and clarify the bases for his termination.

Against this context, Pearce's notice-based objections fail. *See* Pearce Brief at 29-34 (stating objections). First, the University's letters are not contradictory or inconsistent. Maj. Bringham's letter explained the substantive DPS policies that had been violated; Chief Hall's letter set forth the relevant University disciplinary policy.

Second, the University's decision not to discipline Pearce for his delayed response to the MDR fire alarm did not foreclose the Hearing Officer from making other, relevant factual findings about the circumstances surrounding Pearce's dispatch to that alarm. These findings established Pearce's improper motive for refusing to timely complete the corresponding Fire Incident Report, i.e., he was "upset" and "irritated" that Adams followed up on her initial dispatch and asked him to attend to the MDR Building alarm instead of another officer.

Third, the University never charged Pearce with violation of its vehicle pursuit policy, and thus the Hearing Officer could not have upheld Pearce's termination on that basis. The Hearing Officer found that Pearce had violated the DPS policy for "Operating Vehicles," and determined that no *other* DPS policy, *including the DPS pursuit policy*, authorized or excused Pearce's reckless driving. Pearce's representations to the contrary (Pearce Brief at 31, 43-45) are simply not correct.

Fourth, the Hearing Officer properly found that Pearce's failure to timely complete the Fire Incident Report and reckless driving both violated the DPS Policy proscribing "incompetence." Hearing Officer Order, pp. 10, 13, 15-16, citing DPS Policy 808.00 (B), (C), (D). As "incompetence" is defined by DPS policy in broad terms, an

officer's act or omission could both violate a conduct-specific policy (e.g., "Operating Vehicles," "dishonesty") as well as the more general incompetence policy – and *vice versa*. This is why the Hearing Officer described certain disciplinary charges as "merging." The Hearing Officer found the University had not provided notice to Pearce about the basis for its MDR Building-related "dishonesty" charge, so he dismissed that charge, but properly found that Pearce's lack of candor was a predicate fact for the University's MDR Building "incompetence" charge, of which Pearce did receive notice. Conversely, the Hearing Officer found the University had not specifically explained what separate facts constituted "incompetence" in relation to the wrong-way Jackson Street incident, and dismissed that charge, but determined that any facts the University did establish with respect to that incident were appropriately considered part of the University's "operating vehicles" charge, of which Pearce did receive notice. Thus, the Hearing Officer ensured that Pearce was only disciplined for policy violations of which he had notice – but considered all evidence offered at the hearing when evaluating those policy violations. This was not error.

Finally, Kentucky law does not support Pearce's claim that these alleged notice-based deficiencies require reversal and/or reinstatement. The cases upon which Pearce relies for this argument, *Osborne v. Bullitt Cty. Bd. of Educ.*, 415 S.W.2d 607 (Ky. 1967), *Goss v. Personnel Bd.*, 456 S.W.2d 819 (1970) and *Goss v. Personnel Bd.*, 456 S.W.2d 822 (1970) are over forty years old, concern either non-existent or completely generic descriptions of the accused employees' misconduct, and turn on statutory notice standards unique to teachers and merit employees that have since been amended and/or repealed by the General Assembly. Those old statutes, moreover, provided that

employment could only be properly terminated if its conditions were met – thus necessitating reinstatement if notice was insufficient. *Osborne*, 415 S.W.2d at 609-10 (citing KRS 161.790); *Goss*, 456 S.W.2d at 821-22 (citing KRS 18.210). These statutory standards, and restrictions on termination, do not apply here. Pearce received a detailed description of the incidents at issue, including specific dates and places, as well as a word-for-word copy of the DPS and University policies that were implicated. Pearce had ample information to properly defend himself against the charges on which the Hearing Officer recommended termination.

In sum, none of these procedural objections merit reversal, individually or collectively. Had DPS proceeded in the manner Pearce now prefers, it would have had the same facts before it and arrived at the same disciplinary decisions. More importantly, at the post-termination hearing, the Hearing Officer would have considered the same testimony and exhibits about the events in question, and reached the same recommended order. Thus, Pearce's termination should be upheld regardless of whether KRS 15.520 applies to this case.

**V. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE HEARING OFFICER'S FINDINGS AND CONCLUSIONS WERE SUPPORTED BY THE RECORD.**

The Court of Appeals properly found, after reviewing the record, that the Hearing Officer's factual findings were based on substantial evidence. *Pearce*, 2011 Ky. App. LEXIS 230 at \*29-39. In reaching this conclusion, the Court of Appeals analyzed, and rejected, several examples of alleged "improper fact finding" offered by Pearce. *Id.* Here, Pearce fails to address the Court of Appeals's treatment of his objections, choosing instead to simply repeat the same unsuccessful points offered before. These arguments fail now for the same reasons they failed before the Hearing Officer, Circuit Court, and

Court of Appeals. As the following demonstrates, the Hearing Officer's credibility determinations and inferences were grounded in the evidence of record, and were not clearly erroneous.

**A. The MDR Fire Report Incident.**

The Hearing Officer's findings regarding the November 2006 MDR fire report incident are supported by substantial evidence. In fact, Pearce actually *admitted* in his Circuit Court briefing that he failed to make or file a fire report as required. Pearce's Circuit Court Brief at 40 ("The charge of failure to make or file a report is true...").

The Hearing Officer's material findings regarding this incident are as follows:

- Pearce acknowledges to Adams that he had a responsibility to proceed to the scene of the MDR fire alarm. The Hearing Officer found that in response to Pearce's question "Okay, so what are we doing?" Dispatcher Shannon Adams told him that Physical Plant employee Don Martin had looked into the fire alarm at the MDR building, and had notified the Louisville Fire Department ("LFD"). Hearing Officer Order at 4, para. 14. Pearce responded "Okay." The Hearing Officer found, in accordance with DPS's natural language radio communication procedure, this response was an acknowledgement of his responsibility to proceed to the scene of the fire alarm, consistent with DPS policies requiring officers to respond to any report of a fire alarm. *Id.* at paras. 15-17. See DPS Policy and Procedures Section 2203.01 (requiring "University Police officers [to] respond to any report of a fire or fire alarm and assume immediate initial control and command of the situation") (R. 487), Section 2215.01 (requiring that accounts of all fire alarms be reported on a Fire Incident Report). (R. 491).

- Adams questions Pearce as to why he did not proceed to the scene of the MDR fire alarm, and is puzzled at his response. The Hearing Officer found that after Pearce had completed an intervening escort call, Adams asked him over the radio if he was going to go to the MDR building. When Pearce told Adams she had never dispatched him to the alarm, Adams replied, “Sir, I, uh, I advised you that we had LFD in route, that [Don Martin] wanted me to go ahead and contact them.” Hearing Officer Order at 5, paras. 23-25. The Hearing Officer concluded from this exchange that Adams understood “the protocol that required a police officer to respond to every fire alarm when the LFD had been dispatched” and that Pearce had acknowledged this responsibility by saying “Okay” in their earlier radio exchange. *Id.* at 26. While Pearce offered an alternative explanation for his use of the term “Okay” (Pearce Brief at 38-39), the Circuit Court and Hearing Officer had a reasonable basis to favor the University’s version of these events.

- Pearce arrives at the MDR Building upset, and defiantly tells Martin he will not complete the fire incident report. The Hearing Officer found that when Pearce finally arrived at the MDR Building, he was “upset” and “irritated”, because he believed another officer should have been sent to cover the fire alarm. Hearing Officer Order at 6, paras. 28, 31. The Hearing Officer found that when Martin approached Pearce to provide him with the information necessary to prepare the necessary fire incident report, “Pearce told Martin that he was not going to do it,” even though the police officer at the scene of the alarm is required to complete this report. *Id.* at paras. 29-32, 34.

- Pearce asks Adams if *Martin* is going to complete the report. The Hearing Officer found that Pearce also asked Adams “out of frustration” if Martin was going to

complete the fire incident report, knowing full well that officers always complete such reports, and that Don Martin was not the University employee responsible for completing the report. Hearing Officer Order at 6-7, paras. 32, 35. That responsibility was Pearce's, who had completed Fire Incident Reports on each of the thirty-seven previous instances he had responded to an alarm. *Id.* at 6, paras. 32-34. Pearce admitted to this responsibility at the post-termination hearing.

- Pearce contacts Lieutenant Brown to ask why no one else assisted him.

The Hearing Officer found that Pearce contacted his supervisor, Lieutenant Rick Brown, to ask why no other officers had been sent to cover the fire alarm for him. Hearing Officer Order at 7, para. 36. The Hearing Officer also found that Pearce's allegation that he had asked Brown "whether he needed to complete the [fire incident] report" was not credible, as he was the only officer who responded to the alarm. *Id.* at paras. 37-38.

- Lieutenant Brown asks Pearce that night to complete a report, but Pearce fails to do so. The Hearing Officer found that Brown ordered Pearce to complete a fire incident report. Hearing Officer Order at 7, para. 38. The Hearing Officer further found that while officers are required to complete their paperwork by the end of their shift, Pearce failed to do so because he was upset. *Id.* at 7-8, paras. 39, 43. Pearce argues that because DPS policy does not specifically state that *an officer* has to complete the report, his failure to follow Lt. Brown's direct order – when he was the officer who accepted responsibility for the alarm – was excusable. Common sense suggests otherwise, and the Hearing Officer was justified in finding Pearce's dereliction of duty *inexcusable*.

- Pearce only completes the report because Brown asks him a second time to do so. The Hearing Officer found that the next day, Major Bringhurst asked Brown

why a fire incident report had not been submitted for the MDR alarm incident. *Id.* at para. 40. Brown, who was unaware Pearce had failed to write the report, contacted Pearce again and ordered him again to complete the fire incident report. *Id.* at para. 41. The Hearing Officer further found that this second command was the only reason Pearce completed this routine, required report. *Id.* at para. 42.

• The Hearing Officer's summary of Pearce's misconduct in this incident is supported by substantial evidence. The Hearing Officer concluded as follows:

The sequence of events involving the November 14, 2006 fire alarm and Pearce's response to them show that he was upset and frustrated by what he perceived to be the failure to provide him with necessary assistance and backup. That is the reason why he told Martin that he would not prepare the report, why he failed to complete the Fire Incident Report by the end of this work shift, and why he did not write the report until directed to do so by his supervisor. Pearce had no intention to draft the report, and he would not have completed the Fire Incident Report but for Brown's demand that he do so.

Hearing Officer Order at 8, paras. 43-44. Pearce does not dispute that he failed to complete the report by the end of his work shift or in response to Brown's command – that has been admitted – but instead argues that this failure was someone else's fault, and didn't *technically* violate any rules, and so his failures should be overlooked. These arguments quibbling with the Hearing Officer's fact-finding discretion should be rejected. Ample evidence supports the Hearing Officer's findings here.

**B. The Wrong-Way Jackson Street Traffic Incident.**

The Hearing Officer's findings regarding the February 2007 Jackson Street traffic incident are also supported by substantial evidence. Pearce has admitted, among other things, that he drove the wrong way on a one-way street in excess of the speed limit to make a traffic stop. Pearce's Brief at 5-6. Again, while Pearce may disagree with the

inferences and conclusions supported by the facts, he cannot dispute the evidentiary basis for the Hearing Officer's findings. These findings are as follows:

- Drivers often went the wrong way on the one-way streets surrounding the University's Health Science Campus. The Hearing Officer found that "it was not uncommon for the officers to see a vehicle traveling the wrong way on a one-way street" around the Health Science Campus. Hearing Officer Order at 10, para. 56. Pearce's brief does not contest this finding, which contradicts Pearce's suggestion that seeing a vehicle act in this fashion was a cause for immediate concern.

- When Pearce pulled out onto Jackson Street, the wrong-way driver no longer presented an immediate danger. The Hearing Officer found that upon exiting the Jackson Street garage, Pearce saw no traffic, as the wrong way driver had cleared one-way Jackson Street and had entered two-way Broadway Street. *Id.* at paras. 58-59. The Hearing Officer concluded as a result that the driver "no longer presented a danger on Jackson Street." *Id.* at 11, para. 59. Pearce's brief admits that Pearce could not see the wrong-way driver when he pulled out onto Jackson Street. Pearce's Brief at 5. Pearce, however, disagreed with the Hearing Officer's conclusion that the car ceased posing a threat on Jackson Street, even though (1) the car had physically left Jackson Street; (2) drivers commonly went the wrong way on one-way streets in the area of the Health Sciences Campus, *supra*, and (3) the driver actually posed no threat to anyone, and was not issued so much as a traffic ticket. Hearing Officer Order at paras. 65-66.

- Pearce reacted to the wrong-way driver by speeding the wrong way down the same one-way street. The Hearing Officer found that Pearce believed the wrong-way driver should be followed because Pearce believed, without any evidence, that she "was

going to cause a serious wreck.” *Id.* at para. 60. The Hearing Officer further found that Pearce reacted to this possible threat to public safety by – incredibly – accelerating to “a speed between 45 – 55 miles per hour” over a one-and-a-half block distance driving the same wrong direction down Jackson Street.<sup>18</sup> *Id.* at para. 61. Pearce could not even remember if he turned his emergency lights on when he did this. *Id.* at para. 62. As the Hearing Officer summarized:

Pearce 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, Pearce 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.

*Id.* at 12, para. 72. Importantly, Pearce’s brief admits that (1) Pearce drove the wrong way on a one-way street between 45-50 miles per hour; (2) the vehicle had turned off of Jackson by the time Pearce left the parking garage; and (3) Pearce could not remember if he turned on his emergency lights and siren when he left the garage. Pearce Brief at 5-6. In spite of these facts, Pearce argued he should not have been terminated. While the Hearing Officer considered these arguments, he decided Chief Hall’s view of these events was more persuasive:

Chief Hall’s assessment of Pearce’s conduct had substantial merit. If the white vehicle had still been visible, if he had turned on his emergency lights, and if he had proceeded with some caution on the road and at intersections, there could have been some justification for giving more deference to the officer’s judgment and for a lesser sanction or penalty for his conduct. When considering the totality of his conduct in light of the applicable policies and procedures, however, there was no justification for Pearce’s conduct since he could have caused a serious

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<sup>18</sup> The record reflects that Officer Skaggs testified Pearce reached a top speed of fifty, not fifty-five, miles an hour on Jackson Street. Whether Pearce drove fifty or fifty-five miles per hour, however, it still exceeded the posted thirty-five mile per hour speed limit. Accordingly, the Court of Appeals correctly deemed that a “meaningless” error. *Pearce*, 2011 Ky. App. LEXIS 230 at \*36-37.

accident if another vehicle or pedestrian had entered Jackson Street before his police cruiser passed.

Hearing Officer Order at 12, paras. 73-74. The Hearing Officer adequately considered all of the circumstances and decided the significance Chief Hall and the University assigned to Pearce's actions was persuasive, and justified termination. Pearce may disagree with this judgment, but cannot (and does not) dispute the evidence at the core of the incident. The Hearing Officer's findings regarding this incident are supported by ample, undisputed evidence.

**C. Pearce Was Properly Charged for "Incompetence."**

The Hearing Officer found, based on the facts discussed above, that Pearce violated three subsections of the Department's incompetence policy in the MDR fire alarm incident, justifying in part his termination under DPS/University policy. Hearing Officer Order at 16-17, paras. 6 - 7, 13-14. Pearce argues that the University had the obligation to prove a record of repeated incompetence; even a brief glance at the Department's incompetence policy, however, indicates that no such record is required. 4/6/07 Bringhurst letter to Pearce, R. 2-3, *citing* Department Policy Chapter 8, Section 808.00. An officer can be terminated for a single incident of incompetence if, as here, the Department and University deem that incident serious enough. *Id.*

The Hearing Officer's findings were based on substantial, largely uncontroverted evidence. Pearce's objections are better suited for a post-hearing brief than an appeal, and do not establish that these findings are arbitrary or unreasonable.

**VI. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE DEGREE OF DISCIPLINE IMPOSED ON POLICE OFFICERS BY THEIR EMPLOYERS IS NOT SUBJECT TO JUDICIAL REVIEW.**

The Court of Appeals appropriately held that Pearce's termination was an appropriate disciplinary action by the University that should not be disturbed.<sup>19</sup> While the Hearing Officer's determination of whether an officer has violated University policy is subject to judicial review, the punishment imposed is not. *Howard*, 199 S.W.3d at 742 (citations omitted), *City of Columbia v. Pendleton*, 595 S.W.2d 718, 719 (Ky. App. 1980). The courts of the Commonwealth have purposefully left the severity of employee discipline to employers. *Id.* Furthermore, through KRS 164.830 the University "has been given the responsibility and authority [by the General Assembly] to decide how their employees are to be disciplined and the proceedings to be conducted." Circuit Court Order at 7-8.

Pearce cites *Louisville by Kuster v. Milligan*, 798 S.W.2d 454, 458 (Ky. 1990) as authority for overturning a termination if the underlying grounds are arbitrary and capricious. *Milligan*, however, simply incorporates the standard of review applicable to all police disciplinary cases, and further emphasizes that "in reviewing the decision of the administrative agency, [a court] may not substitute its view of the penalty or discipline assessed by the agency." *Id.*

Here, the Hearing Officer thoroughly addressed whether termination was justified. Hearing Officer Order at 19-20, paras. 22-27. The Hearing Officer concluded that "the appropriate discipline for Pearce's misconduct [was] termination of employment due to the seriousness of the misconduct" related to the Jackson Street incident, and

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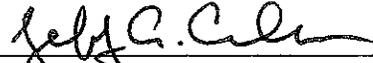
<sup>19</sup> In fact, even the dissenting opinion rejected summary reinstatement in favor of a new hearing for Pearce. *Pearce*, 2011 Ky. App. LEXIS 230 at \*40-42.

further found that the MDR Building fire alarm incident “provide[d] additional support for the [U]niversity’s action.” *Id.* at paras. 24, 26. The Hearing Officer also correctly found that the Department and University were not *required* to resort to progressive discipline, *i.e.*, discipline less than termination, if the misconduct at issue were deemed severe enough. *Id.* at 19, paras. 22-23. Finally, as set forth at length above, there was clearly substantial evidence to support the University and Department’s charges meriting termination. Thus, Pearce’s arguments for overturning his termination are groundless, and should not dissuade this Court from affirming the tribunal below.

### CONCLUSION

Pearce has failed to establish that KRS 15.520 applies to this case, and has failed to satisfy his burden of showing that the Circuit Court and Hearing Officer’s findings are clearly unreasonable. Pearce received appropriate due process, including a four day *de novo* hearing with the assistance of experienced counsel, and his termination was upheld on a solid foundation of substantial evidence. For all these reasons, the University respectfully requests that this Court fully affirm the decision of the Court of Appeals.

Respectfully submitted,

  
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COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
2011-SC-000756-D

JEFFERY T. PEARCE,

APPELLANT,

v.

APPENDIX TO APPELLEE'S BRIEF

UNIVERSITY OF  
LOUISVILLE,

APPELLEE.

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APPENDICE A – PROPOSED TEXT OF KENTUCKY SENATE BILL 169