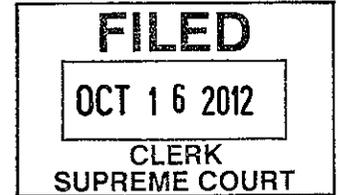


SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-000756-D



JEFFERY T. PEARCE

MOVANT

v.

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

RESPONDENT

MOVANT'S BRIEF

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

On Appeal from Jefferson Circuit Court
Case No. 08-CI-02524
Hon. Irv Maze, Judge

* * * * *

CERTIFICATE

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INTRODUCTION

In this police-officer discipline case, the decisions below have erroneously held KRS 15.520 (the “Police Bill of Rights” statute) inapplicable because the discipline did not arise out of a citizen complaint, and made multiple other errors. We ask this Court to reverse the decisions and remand for appropriate relief.

STATEMENT CONCERNING ORAL ARGUMENT

Movant submits that the complexity and importance of the issues in this case warrant oral argument.

STATEMENT OF POINTS AND AUTHORITIES.

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- A. Feb. 4, 08 Decision of Hearing Officer (Ad.R. 192-215)
- B. Sep. 4, 09 Final Order of Circuit Court (“Opinion and Order) (R. 178-86)
- C. Nov. 18, 2010 Court of Appeals Opinion
- D. Exh. 3, Transcript of Radio/Telephone communications during MDR false alarm (Ad.R. 352-57)
- E. Exh. 22, University Policy Chapt. 2200 (Ad.R. 486-91)
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- G. Exh. 10, Apr. 6, 2007 charging documents (Ad.R. 373-84)
- H. Exh. 12, Nov. 26, 2006, memo, Pearce to Bringhurst, re MDR false alarm (Ad.R. 390)
- I. Exh. 4, Nov. 18, 2006, Bringhurst email, ordering Pearce to submit a report on MDR alarm (Ad.R. 358)
- J. Exh. 5, Nov. 26, 2006, Pearce report to Bringhurst on MDR false alarm (Ad.R. 359)
- K. Exh. 23, University Policy Chapt. 1900 (Ad.R. 492-97—an incomplete copy; complete copy located in the Circuit Court Record as tabbed Exh. 23 to the bound “Brief for Plaintiff” noted on the “Certification of Record on Appeal” as “ONE VOLUME BRIEF FOR PLAINTIFF”
- L. Exh. 14, Dec. 18, 2006 Schafer letter reporting Review Board findings (Ad.R. 393-95)
- M. Exh. 11, Apr. 4, 2007 “recommendation” to terminate Pearce (Ad.R. 386-89)
- N. ***Laux v. City of Oak Grove***, 2004 U.S. Dist. LEXIS 27768 (W.D. Ky. 2004)
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- S. Exh. 1, Internal Affairs investigative file (excerpts) (Ad.R. 224, 244, 263-64, 328-2-)
- T. Exh. 13, Nov. 13, 2006 letter ordering convening of Review Board (Ad.R. 391-92)

SUMMARY

The threshold issue here is whether the “Police Bill of Rights” statute, KRS 15.520, applies to police discipline beyond simply that arising out of sworn citizen complaints—an issue of enormous significance to the Commonwealth’s law enforcement community.

Additional issues ride on the coattails of the threshold question. In the process of firing Jeff Pearce for two minor incidents, the University violated the requirements of the “Police Bill of Rights Statute,” KRS 15.520, and its own policies (which follow the statute’s language) at every juncture:

- Demanding, after the time period allowed in KRS 15.520(1)(c), that Pearce provide a written report on one of the incidents.
- Convening a “Review Board” hearing where Pearce and other witnesses were required to testify, without providing any of the protections set out in KRS 15.520(1)(h).
- Setting up a pretermination hearing without proper notice and without allowing representation by Counsel (as the statute requires).
- Preferring disciplinary charges that provide inadequate notice of the alleged violations.

Then, at the post-termination hearing, the violations were compounded:

- The University pursued violations that were not included in the charges preferred against Pearce and the Hearing Officer found against Pearce on those violations.
- Violations that were without support in the evidence were found to have occurred.
- Acts that did not violate University policy were found to be violations.
- KRS 15.520 was held not to apply, because no citizen complaint was involved—a ruling that contravened a holding made at the hearing’s outset as well as the University’s agreement on the record that it did.
- All pretermination violations were summarily found to have been “cured.”

The violations require reversal and remand for appropriate relief.

STATEMENT OF THE CASE

Note on citations to the record:

The four days of the video-recorded administrative hearing were transcribed into four separate transcript volumes, cited herein as “Tr. Vol. __, p. __.”

Citations to the documentary administrative record are designated “Ad.R. __.”

Citations to the Circuit Court record are designated “R. __.”

(Many of the exhibits and pleadings are included in the appendix, for ease of reference, and are cited as “**Appendix __, p. __**”.)

Also, two depositions were filed in the Circuit Court and are cited as customary.

A. The Incidents Giving Rise to the Disciplinary Charges

When he was terminated by notice given April 6, 2007, Jeff Pearce was a six-year veteran University of Louisville police officer assigned to the University’s Health Sciences Campus (“HSC”) in downtown Louisville (not the main “Belknap” campus south of downtown). (Tr. Vol. 3 pp. 93-94.) Two incidents were charged, as reviewed below.

1. The Nov. 14, 2006 MDR Building False Alarm Incident

The first of the two incidents concerns a false fire alarm at the Medical-Dental Research (“MDR”) building located on the HSC. The incident occurred between 4:45 a.m. and 5:45 a.m. on November 14, 2006. Jeff Pearce worked the late shift, which began at 10:00 o’clock p.m., continued through midnight, and ended at 6:00 a.m. the next day. (Tr. Vol. 4 p. 20.) Pearce began work at 10:00 p.m. on Nov. 13, 2006, but the subject incident took place during the Nov. 14 portion of that shift, between 4:45 a.m. and 5:45 a.m. When Pearce began work on that shift, the fire alarm at the MDR building

had been going off on false alarms for several days. (Hearing Off. decision, **Appendix A**, p. 3 ¶ 7; Radio transcript, Ad.R. 352-57, **Appendix D** p. 000063.)

At 4:47 a.m. on Nov. 14, on-duty dispatcher Shannon Adams received yet another fire alarm from the MDR Building. (**Appendix D** p. 000059; Hearing Off. decision, **Appendix A**, p. 3 ¶ 7.) Presumably because the building's alarm had been sounding false alarms repeatedly, Adams did not comply with University policy requiring her to notify an officer immediately upon receipt of the alarm;¹ instead she called Physical Plant (the University's title for its maintenance and repair department). (**Appendix D**, p. 000059.))

Two and one-half minutes after calling Physical Plant, Adams dispatched Pearce² to make an escort run.³ (**Appendix D** p. 000059, 04:49:52 entry.) This was Adams' first contact with Pearce after receipt of the MDR fire alarm; however, as the radio transcript shows, **Adams did not mention the alarm to Pearce.** (Id.)

At 04:54:12, Adams **for the first time told Pearce of the MDR alarm** (**Appendix D** p. 000061), without mentioning that the Louisville Fire Department ("LFD") had been called at 04:53 (id. 000060). However, Pearce was preparing for the escort run, and **Adams gave no indication that Pearce should instead respond to MDR.** Adams stated: "321's gonna check it since we've had it several times in the past couple days." ("321" was the radio code for Physical Plant employee, Don Martin.)

¹ DPS Policy 2203.03 (Exh. 22, Ad.R. 486-91, **Appendix E** p. 2) and Policy 4314.00, (Exh. 20, Ad.R. 442-43, **Appendix F**, at pp. 2-3).

² "212" as used in Exh. 3 is Pearce's assigned number. (Tr. Vol. 4 p. 36.)

³ An escort run is the dispatch of an officer to escort a University student or employee on the downtown HSC campus area, usually at late or pre-dawn hours. (Tr. Vol. 4 p. 22.) The Chief has instructed that escorts are priority runs. (Id.; Tr. Vol. 2, p. 67.)

At 04:55:07 Adams told Pearce that LFD had been called. (**Appendix D**, p. 000061.) But again Adams gave no indication that Pearce (who was still on the escort run) should make a run to the scene. She said: “Sir, *just to let you know* I went ahead and contacted LFD on that alarm.” (Id.; emphasis added.) And the rest of the exchange between them confirms that Pearce took her statements as for information only:

Pearce: ***Okay so what are we doing?***

Adams: Per Don, he got over there within a couple of minutes and said that it’s still acting up, however it’s not reading the same; so just to be on the safe side, we went ahead and notified LFD but he doesn’t see any fire in the building at all.

(Id., emphasis added.) Based on Adams’ words, Pearce understood that he had not been dispatched to MDR. (Tr. Vol. 4 pp. 31-32.) (The Hearing Officer expressly found that Pearce “reasonably” asked Adams, “Okay, so what are we doing?” (**Appendix A**, p. 4 ¶ 13.))

At 05:12, after his escort run was completed, Adams radioed Pearce to ask if he was going to MDR, and Pearce replied, “No, you never dispatched me.” After a brief discussion Pearce said “10-4” and proceeded to MDR. (**Appendix D**, p. 000062.)

At 05:36:32, Pearce contacted his supervisor, Lt. Brown, and they switched to another channel. (**Appendix D** p. 000064.) The University did not provide a transcript of the communication on that channel; however, Pearce testified that he understood Brown to say, in effect, don’t worry about doing a fire alarm report—go home. (Tr. Vol. 4 p. 38.)

On the day after the incident: Lt. Brown called Pearce on the phone and said Major Bringhurst⁴ had instructed him to order Pearce to complete a fire alarm report; Pearce responded “Yes sir,” (Tr. Vol. 4 p. 38) and complied.

Contrary to the charging documents (Exh. 10, Ad.R. 373-84, **Appendix G**), it was not “two days after the incident” before Pearce made the report (see *id.*, p. 2, 2d paragraph)—it was the next day, as Pearce’s report shows on its face. (Exh. 12, Ad.R. 390, **Appendix H**.)

2. The Feb. 23, 2007 Wrong-Way Car Incident

The second incident occurred on February 23, 2007. Pearce (who was about to start his shift at 10:00 p.m.) gave Officer Robin Skaggs (who was getting off his shift) a ride to Skaggs’ personal vehicle in the Jackson Street garage. (Tr. Vol. 3 pp. 94, 95; Tr. Vol. 4 p. 41.) While in the garage and facing the Jackson Street side (Tr. Vol. 3 pp. 95-96), Pearce saw a vehicle going south on Jackson—the wrong way on that one-way street. (Tr. Vol. 4 p. 43.) Pearce asked Skaggs to stay in the police car while they pulled that vehicle over. (Tr. Vol. 3 p. 96.) Pearce proceeded to the garage exit gate, stopped for it to rise, and then drove up to Jackson Street. (Tr. Vol. 3 p. 96; Tr. Vol. 4 p. 43.) Pearce turned southbound on Jackson—the same direction the wrong-way vehicle had gone. (Tr. Vol. 4 p. 45.)

At that point the street was empty—there was no traffic at all in sight, not even the wrong-way car. (Tr. Vol. 3 pp. 97, 106-07.) Pearce drove south on Jackson, to Broadway (Tr. Vol. 3 p. 97), a distance of one and one-half blocks (Tr. Vol. 1 p. 138, ll.

⁴ I.e., Major Robert Bringhurst, the executive-level commanding officer who pursued the investigation and charges against Pearce.

6-9). Skaggs gave an estimate of their top speed on Jackson as “I’d say we reached 45, 50 miles per hour[.]” (Tr. Vol. 3 p. 100.) That is the sole estimate of Pearce’s speed.

Skaggs (called as a witness for the University) frankly testified that he could not remember whether the emergency lights were on as they went down Jackson—asked, he stated, “I can’t be sure.” (Tr. Vol. 3 pp. 105. See also, *id.* pp. 97-98, 98, 107.) Pearce, likewise, could not remember. (Tr. Vol. 4 p. 37.)

On reaching Broadway, Pearce turned west (right), in the correct lane of that two-way street. (Tr. Vol. 3 p. 97.) They saw the vehicle and made the traffic stop just past the next intersection, between Preston and Floyd streets. (Tr. Vol. 3 p. 98.)

The driver said she was lost, and that she had just left the hospital. (Tr. Vol. 3 p. 99; Tr. Vol. 4 pp. 47-48.) There was no indication of intoxication on her part (Tr. Vol. 3 p. 99), and Pearce simply issued a verbal warning. (Tr. Vol. 3 p. 100.)

Pearce stated without contradiction or impeachment why he believed he had to pull that car over, even after it was out of sight—the driver might have been impaired, posing a danger to public safety:

21 [T]hat vehicle going the wrong
22 way can cause a wreck, a harm to an innocent
23 bystander, an innocent pedestrian, we don't
24 know if it's drunk, we don't know if the
25 individual's drunk, we don't know if they're
1 high on narcotics, we don't know that[.]

(Tr. Vol. 4 pp. 45-46.) It was merely good luck that the driver was not impaired.

B. The University's Processing of Termination of Pearce

These events are discussed in greater detail below, in the Argument part C.

1. Order to Submit Written Statement, Outside the Time Limit of 15.520

It is undisputed that the University's Lt. Brown learned of the MDR November 14, 2006, false alarm incident on the tour of duty on which it happened.⁵ Thus, the University was chargeable with knowledge of the incident.

But Maj. Bringhurst did not order Pearce to make a written report "no later than the end of the subject officer's next tour of duty after the tour of duty" during which the Department learned of the incident, as required by KRS 15.520. Pearce's next tour of duty was Nov. 15. (Tr. Vol. 4, p. 40.) Instead, it was not until Nov. 18 when Bringhurst used an email (Exh. 4, **Appendix I**) to order Pearce to provide a written account of the incident. (Tr. Vol. 2 pp. 15-16 (Bringhurst testimony).) Pearce complied. (See Exhibit 5, Ad.R. 359, **Appendix J**.)

2. The "Review Board" Hearing

On December 7, 2006, a "Review Board" was convened with expressly assigned tasks that included "to investigate and determine any violations of any Departmental Policy" in the MDR false fire alarm incident. (See Exh. 13.) It was presided over by Lt. John Schafer, who issued the report of its findings (Exh. 14).

⁵ Lt. Brown was "in charge of the late night shift" on Nov. 14 (Tr. Vol. 2, p. 10), and had discussed the incident with Pearce that night (Tr. Vol. 4, p. 38.)

University policy provides for disciplinary review boards (policy 1900.02.M (part of Exhibit 23,⁶ **Appendix K** pp. 5-7)), but nowhere for non-disciplinary review boards.

As shown below in Argument part C.2, this Review Board was created in the same manner as a disciplinary review board, and did all the things required of a disciplinary review board including making a finding of guilt.

Maj. Bringhurst stated that he told Chief Hall he wanted a review board to look into the Nov. 14, 2007, MDR alarm incident, to see if there were any violations of policy and other concerns, and *whether disciplinary action was needed*. (Tr. Vol. 2 p. 11.) The Review Board held a hearing, received testimony and evidence, and found Pearce guilty of disciplinary infractions. (Exh. 14, Ad.R. 393-95, **Appendix L**.)

3. The Internal Affairs Investigation

After receipt of the Review Board's finding of guilt against Pearce, and in express reliance on the Review Board's findings, the University began an Internal Affairs ("I.A.") investigation of Pearce. In the process of the I.A. investigation, the lead investigator (Lt. John Tartar) relied on Pearce's report on the MDR alarm (Tr. Vol. 1, p. 41), a report that Pearce was compelled to provide outside the time limits set in KRS 15.520.

4. The Notice of "Pretermination Hearing" and Subsequent Termination

By letter of April 4, 2012, (Exhibit 11, Ad.R. 386-89, **Appendix M**), delivered on April 5, and before serving any written charges on Pearce, the University advised that it would provide him with a pre-termination "hearing" on April 6. The letter advising of

⁶ The copy of Exhibit 23 included in the University-provided Administrative Record (Ad.R. 492-97) is incomplete, omitting the last two pages—which happen to be the pages on which the cited language appears. The copy used for **Appendix K** is that provided to the Circuit Court as tabbed "Exhibit 23" (the last) in the separately bound "Brief for the Appellant" filed Oct. 30, 2008 with the Circuit Court, included in the record as noted on the "Certification of Record on Appeal" as "ONE VOLUME BRIEF FOR PLAINTIFF."

the pre-termination hearing failed to set out any charges or allegations of disciplinary infractions. (Id.) It simply stated that the Chief had decided to recommend termination and that it was “an opportunity for you to present any reason(s) why the action(s) [termination] should not be taken. The notice of the hearing stated that he could be “accompanied” by an attorney, but the attorney “may not be present during the proceeding.” (Id.) However, based on the provisions of KRS 15.520, Pearce brought his attorney with him to the appointed time and place (id.), and the request was made for the attorney to participate. When that request was denied, Pearce declined to take part, and the pretermination hearing did not occur. (See Ad.R. 17-18.)

The University thereupon purported to prefer disciplinary charges against Pearce. These are set out in Exhibit 10 (**Appendix G**.) The document is a confusing admixture of three different writings that failed to provide clear notice of what was being charged. It states that Pearce’s last paycheck will be April 20.

5. Appeal to Administrative Hearing

Pearce appealed to a hearing (Ad.R. 20-25), as provided for in University policy and in the notice of his termination. The University obtained a hearing officer from the Kentucky Attorney General’s Office (Ad.R. 33) and a hearing, spanning four days spread over a period of months, was held. On February 4, 2008, the Hearing Officer issued a recommended decision to deny Pearce’s appeal (**Appendix A**) and the University adopted that recommendation.

Pearce timely filed exceptions to the Hearing Officer’s decision (Ad.R. 219-22), but the University did not respond.

On March 4, 2008, Pearce timely sought judicial review as set out below.

C. Judicial Proceedings Below

Following the Hearing Officer's ruling against Pearce (adopted as final action by the University), Pearce filed this action in Jefferson Circuit Court. The Complaint alleged:

- Violation of various due process requirements specified in KRS 15.520⁷ (Complaint (R. 1-8, Count I, ¶¶ 7-9, pp. 2-3);
- Failure of the University to comply with its own policies (id. Count II, ¶¶ 10-12, p. 3);
- Failure to provide adequate Due Process notice of the charges against Pearce (id. Count III, ¶¶ 13-15, pp. 3-4);
- Failure of the written administrative decision to explain adequately its basis and to make necessary determinations (id. Count IV, ¶¶ 16-17, p. 4);
- Errors in the written administrative decision including consideration of allegations not stated in the charging document, findings not supported by evidence in the record, and other errors rendering the decision arbitrary and capricious (id. Count V, ¶¶ 18-29, pp. 4-5); and
- Failure to provide a hearing within 60 days of suspension of the Plaintiff as required by KRS 15.520(1)(h)(8) (id. Count VI, ¶¶. 30-31, p. 5).

Limited discovery was taken, after which the case was briefed. The Circuit Court on September 4, 2009, issued an Opinion and Order affirming the administrative decision (R.178-86, provided as **Appendix B**).

⁷ The statute expressly provides in Section (2) for judicial review: "Any police officer who shall be found guilty by any hearing authority of any charge, may bring an action in the Circuit Court in the county in which the local unit of government may be located to contest the action of that hearing authority, and the action shall be tried as an original action by the court."

Appeal to the Kentucky Court of Appeals followed. That resulted in the November 18, 2011, two-to-one decision affirming the Circuit Court. (Copy provided as **Appendix C.**)

Pearce then moved for discretionary review in this Court.

ARGUMENT

A. KRS 15.520 Applies Regardless of Whether There Is a Citizen Complaint

Ordinarily, the argument in a public employee discharge case such as this would begin with a discussion of the standard of review. However, in this case the standard of review depends to some extent on whether KRS 15.520 applies. Since the question whether KRS 15.520 applies is the initial issue, and the issue in this case with the greatest significance to the law of Kentucky, we shall address it first.

The three forums below (the administrative proceeding, the circuit court, and the Court of Appeals), held that KRS 15.520 did not apply to this case because the disciplinary action was not triggered by a citizen's complaint. This was error for multiple reasons.

1. The Statute Applies by Its Own Terms

The statute provides that investigations may be initiated, and charges brought not only pursuant to the citizen complaint provisions of 15.520(1)(a)(1) and (2), but also ***anytime the department makes its own investigation and brings charges*** (15.520(1)(a)(4)). Another alternative for initiation of an investigation is where a citizen, although reporting a rule violation, refuses to sign a sworn complaint; the department may act if it can independently verify the allegations (15.520(1)(a)(3)). Thus the statute's

express authorization for disciplinary processes not based on citizen complaints is contrary to an interpretation limiting the statute to citizen-complaint cases.

The statute's preamble sets out its purposes, clearly stating that fairness to citizens who complain about police officers is only one aspect of a larger purpose:

In order to establish a minimum system of professional conduct of the police officers of local units of government of this Commonwealth, the following standards of conduct are stated as the intention of the General Assembly to deal fairly and set administrative due process rights for police officers of the local unit of government and at the same time providing a means for redress by the citizens of the Commonwealth for wrongs allegedly done to them by police officers covered by this section

(KRS 15.520(1), emphasis added.) The statute nowhere states that it is limited to citizens' complaints—something the General Assembly easily could have said if it so intended.

In addition:

- If the statute applied only to citizen complaints, the provision in subsection (1)(c) expressly referring to “interrogation in a **departmental** matter involving alleged misconduct” would be meaningless, since citizen complaints are extra-departmental matters. A statute must be construed so that no part of it is meaningless. See *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth Transportation Cabinet*, 983 S.W.2d 488 (Ky. 1998); *Kidd v. Board of Educ.*, 29 S.W.3d 374 (Ky. App. 2000), disc. rev. den.; and *George v. Scent*, 346 S.W.2d 784 (Ky. 1961).
- The enumeration of rights in a disciplinary hearing expressly contemplates the possibility of hearings without a citizen complaint: “***If*** any hearing is based upon a complaint of an individual, the individual shall be notified to appear...” (Subsection (1)(h)(3).)
- Each subsection of the statute setting out an officer's right states the precise circumstances to which it applies. For example, subsection (1)(c) (requiring 48-hour notice of interrogations) begins: “No police officer shall be subjected to

interrogation *in a departmental matter involving alleged misconduct on his or her part...*” This right is not limited to cases based on a citizen complaint. Similarly, subsection (1)(e)’s requirement of adequate written notice of charges applies to “**Any** charge involving violation of any local unit of government rule or regulation” (emphasis added), and the hearing requirements of subsection (1)(h) apply “When a hearing is to be conducted”—and not simply to hearings on citizen complaints.

As the dissent in the Court of Appeals decision below (as well as in *Beavers v. City of Berea* (see n. 8 below)) noted, the statute “states that its purpose is twofold”—to provide standards “to deal fairly with police officers” and simultaneously to provide an avenue for citizen redress. *Pearce*, 2011 Ky. App. LEXIS 230 at *40. Further, the dissent observed that the only part of the statute addressing an “individual” complaint is the language in a subsection, (1)(a), and noted that it seems “illogical to elevate subsection (1)(a) as controlling the application of the remaining subsections and thereby disregard their reference to a criminal matter, a departmental matter, or to any charge.” *Id* at **41-42.

A broader view of the statute confirms the legislative intent for it to apply to all discipline given police officers in an agency receiving state-provided training remuneration. Subsection (4) provides that the statute applies to officers of “local units of government who receive funds pursuant to KRS 15.410 through 15.992”—which funds are disbursed through a program entitled the Kentucky Law Enforcement Foundation Program Fund, known as “KLEFPF.” KRS 15.396(2) and 15.440(8). *Pearce*, like other U of L police officers, received the state KLEFPF pay supplement in his compensation. (Tr. Vol. 4, p. 19.) Covered officers specifically include “state university police officers.” KRS 15.420(2). As the Kentucky Supreme Court has stated, because a police

department, “receives funds from the law enforcement foundation program pursuant to *KRS 15.410 et seq.*, [it] thus is required to adhere to *KRS 15.520*.” ***City of Munfordville v. Sheldon***, 977 S.W.2d 497, 498 (Ky. 1998)

Thus the language of the statute, alone, establishes the legislative intent to apply it to all police discipline, and not just to discipline triggered by a citizen complaint.

2. This and Other Courts Have Applied KRS 15.520 Regardless of Origin of the Charges

a. The line of published cases through 2005

The case at bar is the first instance where a to-be-published decision has held that KRS applies only where the disciplinary charges originate with a citizen complaint.⁸

However, in the period from the mid-1980’s until the mid-2000’s, Kentucky courts, in published decisions involving disciplinary action not derived from citizen complaints, but rather triggered by internal agency charges, routinely applied KRS 15.520. Those decisions manifest no doubt that 15.520 applied regardless of the origin of allegations against the officer. The published decisions (listed in chronological order) include:

- ***Stallins v. Madisonville***, 707 S.W.2d 349, 350 (Ky. App. 1986), where the officer was terminated by the city council based on charges of violation of a specific city policy; although finding that the officer’s termination was supported by substantial evidence, the court in reviewing the case “pursuant to KRS 15.520(2),” showed no concern that the discipline did not stem from a citizen complaint.

⁸ At least one other to-be-published decision was issued not long after the Court of Appels decision here: ***Beavers v. City of Berea***, 2012 Ky. App. LEXIS 1 (Ky. App. 2012), motion for discretionary review held in abeyance pending resolution of the case at bar, in Ky. Sup. Ct. case no. 2012-SC-000079. Unpublished decisions are discussed below.

- ***Brown v. Jefferson County Police Merit Bd.***, 751 S.W.2d 23, 24, 26-27 (Ky. 1988), where this Court reviewed a case involving discipline imposed by the chief of police, and not pursuant to a citizen complaint; this Court, in rejecting the officer's appeal, reviewed the matter under the standards of KRS 15.520.
- ***Louisville by Kuster v. Milligan***, 798 S.W.2d 454, 458 (Ky. 1990), where this Court, addressing "[t]he scope of judicial review pursuant to K.R.S. 15.520(2)," affirmed a judicial decision that the officer should have been reinstated based on a civil service board finding that his discharge was not justified. There was no citizen complaint, but rather the officer's "employment was terminated by the safety director[.]" *Id.* at 456 (Ky. 1990).
- ***Madisonville v. Sisk***, 783 S.W.2d 885, (Ky. App. 1990), where the court, noting that "[s]ince Madisonville, a fourth-class city, participates in the law enforcement foundation program fund pursuant to KRS 15.410 et seq., it is required to adhere to certain standards and procedures for the investigation of complaints filed against police officers as set out in KRS 15.520," affirmed the decision below reinstating an officer fired based on charges of "neglect of duty, insubordination, disobedience, and unauthorized absence from duty," with no citizen complaint involved.
- ***Howard v. City of Independence***, 199 S.W.3d 741, 745 (Ky. App. 2005), where the court, although affirming the termination of the officer, nowhere suggested that KRS 15.520 did not apply, but rather held that its requirements were satisfied, in a case involving no citizen complaint but instead discipline triggered by a "charging document" by which "the city" "listed each of the specifications filed against Howard and referred to the sections and subsections of the City of Independence Personnel Policies Manual allegedly violated in each specification," and which accused the officer, under "six separate specifications" of "being an inefficient and/or ineffective, and insubordinate employee."

This Court has plainly stated that KRS 15.520 applies where the discipline is imposed "for cause":

[B]ecause [the appointing authority] clearly fired [the officer] for cause, [the officer] was entitled to his due-process rights pursuant to KRS 15.520

City of Munfordville v. Sheldon, 977 S.W.2d at 499.⁹ “Cause” refers to a disciplinary infraction or some reason for termination other than the exercise of termination at will.

See, e.g., *Life Care Ctrs. of Am., Inc. v. Dexter*, 65 P.3d 385, 392 (Wyo. 2003), defining “cause” in the employment context as:

fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.

Quoting from *Cotran v. Rollins Hudig Hall International, Inc.*, 948 P.2d 412, 422 (Cal. 1998). It cannot be disputed that the University’s disciplinary process is one based on “cause.” Indeed, University policy is directed at verifying and acting on disciplinary “violations.” See, e.g, policy 1900.02.D.1. (**Appendix K**, 3rd page.)

In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), the U.S. Supreme court established the application of constitutional Due Process rights to public employees with “for cause” disciplinary protection. Public employees who “can be terminated only for cause, and may obtain administrative review if discharged” (470 U.S. at 535), are thereby vested with “property rights in continued employment” (*id.* at 539), which triggers entitlement to constitutional Due Process should the public employer seek to deprive the employee of continued employment (*id.* at 538).

⁹ The *Sheldon* case did involve a citizen complaint, as the opinion notes. However, the opinion makes clear that it is the existence of disciplinary action, for cause, rather than the citizen complaint, that requires compliance with the statute.

b. Unpublished decisions—the shift in 2006

The statute was also routinely applied in unpublished decisions. See, e.g., the unpublished decision in *Laux v. City of Oak Grove*, 2004 U.S. Dist. LEXIS 27768 (W.D. Ky. 2004) (copy provided as **Appendix N**), holding that an officer fired by the mayor based on a complaint by a fellow officer, and not a citizen complaint, must be reinstated for failure to comply with the requirements of KRS 15.520. See also *Montgomery v. Aubrey*, 2004 WL 362380 (Ky. App. 2004) (copy provided as **Appendix O**), where a complaining citizen failed to make a sworn complaint but the court nonetheless found the investigation and charges to be authorized by KRS 15.520, stating:

On direct appeal, appellants contend that the trial court erred by finding that the board inappropriately applied KRS 15.520(1)(a)(3) in vacating Montgomery's one-day suspension. We disagree.

But in an unpublished decision rendered in September 2006, the Kentucky Court of Appeals held that KRS 15.520 did not apply in the dismissal of a university police officer because “The investigation was not initiated upon the basis of a ‘complaint’ as contemplated by KRS 15.520.” *Marco v. Univ. of Ky.*, 2006 Ky. App. Unpub. LEXIS 6 (Ky. App. 2006) (copy provided as **Appendix P**).¹⁰

Subsequent unpublished decisions expressing the same holding as that in *Marco* include: *Ratliff v. Campbell County*, 2010 Ky. App. Unpub. LEXIS 397 (Ky. App. 2010) (“The statutory language applies to police officers who are subject to citizen complaints as opposed to an internal investigation”); *Moore v. City of New Haven*,

¹⁰ The *Marco* opinion observes that the statute “is captioned “Complaints against police officers; manner of investigation and hearing.” Id at *4-5. But statutory titles are supplied by the Legislative Research Commission and are not part of the enactments. See KRS 446.140.

2010 Ky. App. Unpub. LEXIS 858 (Ky. App. 2010) (“Since Moore was not terminated as a result of a citizen’s complaint, the holding in Sheldon is not persuasive to his case”); and *Hill v. City of Mt. Wash.*, 2012 Ky. App. Unpub. LEXIS 66 (Ky. App. 2012), where the court relied on the above cases as well as the Court of Appeals decision in this (the *Pearce*) case, and which is pending before this Court along with the present case.¹¹

Those decisions, culminating in the case at bar as well as *Hill* and *Beavers*, represent a sharp change in the construction of KRS 15.520. Not only had there been no holding, from the statute’s enactment in 1980 into the mid 2000’s, that the statute applied only in citizen-complaint cases, but in fact the courts of Kentucky had applied the statute in non-citizen-complaint cases on a routine and regular basis.

3. Judicial Estoppel Precludes Denial of the Statute’s Application

An additional reason, unique to the case at bar, exists requiring application of KRS 15.520 to this case—estoppel. The application of KRS 15.520 to the administrative proceedings below was acknowledged on the record by the University, and decided on the record by the Hearing Officer, at the outset of the hearing. *Pearce* assumed and relied upon the agreement and decision that the statute applied, in trying and briefing this case.

¹¹ Both *Hill* and the Court of Appeals’ decision in the instant case, characterize *Leonard v. City of Leb. Junction*, 2005 Ky. App. Unpub. LEXIS 210 (Ky. App. 2005), as a case “where the issue has been explicitly presented [and the court] held that KRS 15.520 applied only to instances where citizen complaints had been filed against a police officer.” *Pearce*, 2011 Ky. App. LEXIS 230 at *12 n.7; *Hill*, 2012 Ky. App. Unpub. LEXIS 66 at *7. That is incorrect, as the discipline in *Leonard* in fact did derive from a complaint, and the decision’s determination that the statute had no application was based on the officer’s probationary status. There is a sentence in *Leonard* stating that the statute “specifically applies to the manner of investigation and hearing required when a complaint is filed against an officer” (2005 Ky. App. Unpub. LEXIS 210 at *13); however, that sentence is dictum and not part of the holding of the case.

Later, however, the University reversed its position and the Hearing Officer disregarded his prior decision in a reversal that was highly prejudicial to Pearce.

Pearce, by Counsel on June 1, 2007, filed a written pre-hearing motion to amend the scheduling order to reflect that at issue in the case was whether there had been a violation of KRS 15.520. (Petitioner's Motion to Amend ¶ 7 of Sched. Order (Ad. R. 71-73), provided as **Appendix Q**.)

The University filed no response to that motion. When the hearing convened, the Hearing Officer's first action was to address Pearce's motion. Noting that "we have a motion regarding the additional procedures that are contained in KRS 15.520," he asked University Counsel, "is there any dispute as to whether those—that statute applies to this action or not?" (Tr. pp. 5-6.) The University's response at that point did not dispute the statute's application:

3 MR. DILGER: Judge, I don't think we have
4 a dispute per se. I guess the one point that I would
5 make is that the -- is our belief that the
6 appropriate standard for your review is your --- is
7 the standard that you noted first. And the
8 appropriate standard is whether or not the University
9 followed its policies and procedures in terminating
10 Officer Pearce. So to the extent --
11 HEARING OFFICER: We'll address all of
12 that in a little bit.
13 MR. DILGER: Okay.

Shortly, the Hearing Officer returned to the question, questioning the University regarding the receipt by its officers of funds under KRS 15.410 and 15.492 (which triggers application of 15.520), and obtaining the University's agreement that it did, and then ruling that the statute's protections "certainly apply, then, to this action." Tr. Vol. I pp. 9-10. The Hearing Officer went on to discuss how the statute affected the issues to be

heard. The discussion concluded with an unequivocal consensus—and ruling—that KRS 15.520 applied:

23 So it doesn't seem to be that there's any
24 dispute in terms of the scope of the application of
25 that statute and how they apply to this action.
1 Is there any question?
2 MR. DILGER: No, Judge. You actually
3 answered my -- that was the issue I had earlier, but
4 I think we're all on the same page.

Id., pp. 10-11.

Pearce's case was tried and briefed based on the University's stated acknowledgment, and the Hearing Officer's express ruling, that KRS 15.520 applied.

But in post-hearing briefing, the University made a 180 degree reversal. And, as it turned out, so did the Hearing Officer.

The briefing schedule established was that the University would file its brief-in-chief, Pearce would next file a responsive brief, and then the University would be allowed to file a reply brief. (Order setting Briefing Schedule, Ad.R. 99-100, **Appendix R**.)

In its initial brief, the University did not refer to or mention KRS 15.520. However, in its Reply Brief, the University, for the first time in the proceedings, argued that “the protections of KRS § 15.520 only apply in situations where police officers are investigated on the basis of citizen complaints” and that since the charges against Pearce were not based on a citizen complaint, the statute did not apply.

Not only does the University's policy on discipline of its officers (Policy 1900) mimic the language of KRS 15.520, but in addition the policy states that “This section is in compliance with KRS 15.520.” (**Appendix K** p. 1.)

The University should not be heard to contend, in contradiction of its own policy, that the statute does not apply, after having agreed at the hearing's outset that the statute applied and thereby causing Pearce to present his case and write his brief in reliance on the understanding that the statute's applicability was not in dispute. The governing principle is that of "judicial estoppel"—under which a party is estopped from denying the existence of something when he has previously taken the opposite position and the opposing party has relied on that. See, e.g., *Stewart v. Siddens*, 687 S.W.2d 536 (Ky. App. 1984), disc. rev. den., holding that a person is estopped from questioning the existence or effect of contract when he has asserted its existence to his benefit or to another party's detriment. Here, Pearce forwent the chance to brief the statute's application in reliance on the University's statements to the Hearing Officer, and forwent the presentation of evidence on that point.

Estoppel principles unquestionably apply in administrative proceedings. See, e.g., *Hitachi Auto. Prods. USA, Inc. v. Craig*, 279 S.W.3d 123, 125 (Ky. 2008) (applying estoppel in a workers compensation matter); and *Bd. of Trs. v. Grant*, 257 S.W.3d 591, 595 (Ky. App. 2008) (applying estoppel in a retirement systems administrative proceeding).

B. Standard of Review

1. The Standard Under KRS 15.520

KRS 15.520(2) provides for de novo review of police discipline decisions by administrative entities::

Any police officer who shall be found guilty by any hearing authority of any charge, may bring an action in the Circuit Court in the county in which the local unit of government may be located to contest the action of that hearing

authority, and the action shall be tried as an original action by the court.

The Kentucky Court of appeals has held that the review provided for in KRS 15.520(2) is a “quasi-de-novo review,” limited to the record of the administrative proceeding and additional evidence going to the question whether the administrative body acted arbitrarily in its decision. *Howard v. City of Independence*, 199 S.W.3d 741, 743 (Ky. App. 1996). That standard of review is consistent with this Court’s decisions in *Brady v. Pettit*, 586 S.W.2d 29 (Ky. 1979), and *City of Henderson Civil Service Commission v. Zubi*, 631 S.W.2d 632 (Ky. 1982), as expressly applied to all public employee discharge cases in *Crouch v. Jefferson County*, 773 S.W.2d 461, 462 (Ky. 1988):

We hold that the *Brady* and *Zubi* standard of de novo review applies in all public employee discharge cases. The circuit court shall review administrative decisions by reviewing the record, briefs and any other evidence relevant to the narrow issue of arbitrariness in the discharge of an employee.

In a quasi-de-novo review of the administrative decision in a public employee discharge, the question is whether the administrative body “acted arbitrarily.” *Brady*, 586 S.W.2d at 33.

Factual determinations are reviewed to determine whether they are supported by “substantial evidence”— i.e., “evidence that ‘when taken alone or in light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men.’ ” *Kentucky Retirement Systems v. Heavrin*, 172 S.W.3d 808, 814 (Ky. App. 2005).

Questions of law, in contrast, are subject to full, de novo judicial review. *Bd. of Comm’rs v. Davis*, 238 S.W.3d 132, 135 (Ky. App. 2007); *W.T. Sistrunk & Co. v.*

Kells, 706 S.W.2d 417, 419 (Ky. App. 1986); *WDKY-TV, Inc., v. Revenue Cabinet Commonwealth of Kentucky*, 838 S.W.2d 431, 433 (Ky. 1992). Similarly, in “a situation in which the Board has misapplied the legal effect of the facts,” this Court has held “the courts are not bound to accept the legal conclusions of the administrative body. 2 Am.Jur.2d, Administrative Law, Section 676.” *Commonwealth, Dep’t of Highways v. Cardwell*, 409 S.W.2d 304, 306 (Ky. 1966).

2. The Standard in the Absence of KRS 15.520

If KRS 15.520 did not apply to this matter, then judicial review would be pursuant to “the inherent power of the courts to scrutinize the acts of such administrative tribunals[,]” which power is based in Ky. Const. §§ 2 and 14. *Kendall v. Beiling*, 295 Ky. 782, 786-87 (Ky. 1943). As the *Kendall* court went on to state, “It is a question of law whether a board has acted arbitrarily or capriciously, such as without having competent evidence to support its finding or decision. In such a case, as it is in all questions of law, the courts will intervene and exercise the judicial power without restriction to protect private rights.” *Id.*

See also *Reis v. Campbell County Bd. of Educ.*, 938 S.W.2d 880, 885 (Ky. 1996):

Judicial review does not hinge upon whether the Board has a property or liberty interest at stake, but upon whether the tribunal or administrative body acted arbitrarily and without substantial evidence. It is well settled in Kentucky that an aggrieved party, including a corporation, has an inherent right to seek judicial review of arbitrary administrative actions.

C. The Disciplinary Process Violated Statutory & Constitutional Due Process, as Well as University Policy

The process of bringing disciplinary charges against Pearce, investigating them, and providing for hearing on the charges violated KRS 15.520 in multiple respects. It also violated both constitutional Due Process and University policy. The Hearing Officer determined that all such violations were “cured” by the post-termination hearing. As shown below, that sweeping determination is error, for not only did the post-termination hearing fail to cure the pre-termination violations, but the post-termination hearing added to the errors occurring before the termination.

Following is a review of the violations at each stage of the disciplinary process.

1. Untimely Order to Make a Written Report

The violations of KRS 15.520 began a few days after the November 14, 2006, MDR Building false alarm incident. The University’ Police Department knew of the incident on the day it happened, through on-duty commander Lt. Brown. Pearce’s next tour of duty was the next day, Nov. 15. (Tr. Vol. 4, p. 40.)

But Maj. Bringhurst disregarded the mandate of KRS 15.520(1)(c) that a written report had to have been required “no later than the end of the subject officer's next tour of duty after the tour of duty” during which Bringhurst learned of the incident. Instead, Bringhurst waited until November 18—three days after the statute’s deadline—before ordering Pearce, via an email of that date (**Appendix I**), to provide a written account of the incident). (Tr. Vol. 2 pp. 15-16.) Pearce complied with a written report. (**Appendix J**.)

The University thereby violated not only KRS 15.520(1)(c), but also its own policy echoing that statute—Policy Chapt. 1900, **Appendix K**.

The prejudice to Pearce was real. The Internal Affairs (“I.A.”) investigator on the case, Lt. John Tarter, conceded that he used Pearce’s wrongfully-required response to Bringhurst’s email during the I.A. interrogation of Pearce. (Tr. Vol. 1 p. 123.)¹² Further, Bringhurst testified that he was dissatisfied with Pearce’s report, which caused him to convene the Review Board. (Tr. Vol. 2 pp. 10-11.)

In determining that all violations were cured by the post-termination hearing, the Hearing Officer declined to consider the prejudicial impact on Pearce of this error.

2. Omission of Required Protections at “Review Board” Hearing

On December 7, 2006, a “Review Board” was convened with assigned tasks entailing “to investigate and *determine any violations of any Departmental Policy*” regarding the MDR alarm incident. (See Exh. 13, Ad.R. 391-92, provided as **Appendix T**.) It was presided over by Lt. John Schafer, who issued the report of its findings. The record establishes that the Review Board (a) was a disciplinary review board (“DRB”) as provided for in University policy (which nowhere mentions a non-disciplinary review board (Tr. Vol. 2, p. 22)), and (b) held a hearing rife with violations of KRS 15.520, constitutional Due Process, and University policy.

Maj. Bringhurst testified that he told Chief Hall he wanted a review board to look into the November 14, 2006, MDR alarm incident, to see if there were any violations of

¹² See, e.g., Exh. 1, the I.A. investigative file (Ad.R. 224-87) selected pages provided as **Appendix S**, at p. 263, where Tarter, in a question to Pearce, paraphrased a passage from Pearce’s memo, and at p. 273 where Tarter first paraphrased another passage from the memo, and quoted from it.

policy, and “whether it’s just a problem that we need to deal with with a disciplinary action.” (Tr. Vol. 2 p. 11.) The Chief told Bringhurst to proceed. (Id.)

Bringhurst thereupon sent to Lt. Schafer the November 30, 2006 memo, instructing Schafer to convene the Review Board. (**Appendix T.**) The memo expressly includes discipline and violations of policy in the matters for the Board to take up:

The Review Board will submit their findings and, if needed, any recommendations on policy revisions, **discipline**, report tracking, training and/or other issues to the Director of Public Safety.

(**Appendix T**; emphasis added.) The memo goes on to direct the Board to meet on a specific date (Dec. 7), and to interview specific individuals, including “Police Officer Jeffery Pearce.”

The Board conducted its hearing on Dec. 7 as directed, receiving testimony from three witnesses—one of whom was Pearce—and reviewing documentary evidence and listening to the recording of communications during the MDR incident. (Schafer depo. pp. 25-26.)

The Review Board on Dec. 18, 2007, issued its report, in which “Jeffrey Pearce was found to be in violation” of four different university policies. (Exh. 14, Ad.R. 393-95, **Appendix L.**) Indeed, **the Board’s only findings were of disciplinary violations.** (Id.; see also Schafer depo. p. 21.)

But in that hearing Pearce was not afforded the right to representation by counsel, or the opportunity to present witnesses and evidence, or to cross-examine witnesses against him, nor was Pearce given notice of charges against him. (Schafer depo. p. 27.)

Subsection (1)(h) of KRS 15.520 sets out an officer’s “minimum rights” “when” a hearing is held. Those rights include both at least 72 hours’ notice of any hearing, and

representation by counsel at the hearing. Almost word-for-word identical rights are set out in University policy 1900.02.M.8. (**Appendix K**, p. 6.)

The Hearing Officer, however, found that the Review Board could not have been a “disciplinary review board” as contemplated in University Policy because University policy states that a disciplinary review board “is convened ‘after formal disciplinary charges have been initiated against an officer,’ ” and no formal charges had yet been made when the Review Board was convened here. (App. A, p. 21 ¶ 30.) This conclusion is wrong for multiple reasons:

- University policy cannot excuse a failure to comply with statute. The Review Board conducted what can only be called a “hearing,” calling witnesses and receiving evidence—and KRS 15.520’s requirements for “when” a hearing is conducted were not met.
- If the Hearing Officer were correct in his reading of the policy—that a disciplinary review board is to be convened only after formal charges are made—then that would simply be yet another provision of University policy violated here.
- There is no U of L policy providing for a non-disciplinary review board, as Maj. Bringhurst admitted. (Tr. Vol. 2 p. 45.) The only policy provision is for a **disciplinary** review board. See DPS Policy 1900.02.M (**Appendix K**, pp. 5-7.)
- Finally, the Hearing Officer’s reading of the policy is wrong. The policy provides that the board “**may** be convened after formal disciplinary charges...” (1900.02.M.3, emphasis added.) The time for convening of the board is permissive, and may be before charges are preferred. The Hearing Officer’s reading of the policy is wrong.

3. Omission of Required Protections at the “Pretermination Hearing”

By letter dated April 4, 2007 (received the next day), Pearce was notified that he was being charged with disciplinary infractions, and that the penalty contemplated was

termination. (Exhibit 11, Ad. R. 386-89, provided as **Appendix M**.) The letter informed Pearce that a “pretermination hearing has been scheduled for Friday April 6, 2007 at 8:30 a.m.,” and stated the location.

However, this letter failed to state anything about the allegations against Pearce.

The letter was hand-delivered by Maj. Bringhurst on April 5—only 24 hours before the hearing. (Tr. Vol. 3, p. 112 (Chief Hall’s testimony).) Thus, Pearce received only 24-hours’ notice of the pretermination hearing rather than the 72 hours required by the statute (KRS 15.520(1)(h)(1)), and the notice was defective in failing to articulate the charges against him (id. (1)(e)). Pearce was not afforded the opportunity to be represented by counsel, or the right to present witnesses and evidence in his own defense (id. (1)(H(5&7)).

Pearce appeared for the hearing, accompanied by his attorney. However, upon being informed that his attorney would not be allowed to be present or to participate, Pearce declined to proceed with the pretermination hearing. (Tr. Vol. 2 p. 63.).

Chief Wayne Hall unequivocally testified that the term “hearing” accurately describes the pretermination proceeding. (Tr. Vol. 3, p. 142) That is consistent with the use of the word “hearing” in the case law concerning public employee pretermination process. See, e.g., **Cleveland Bd. of Educ. v. Loudermill**, 470 U.S. 532 (1985); **McMurphy v. City of Flushing**, 802 F. 2d 191 (6th Cir. 1986).

As reviewed above, the failure to provide at least 72 hours’ notice of any “hearing,” refusal to allow representation by counsel at the “hearing,” and the denial of the right to present witnesses and evidence violated KRS 15.520(1)(h), and the failure to provide any written notice of the charges violated KRS 15.520(1)(e).

Those omissions furthermore constituted a denial of constitutional Due Process as set out in *Loudermill* and associated cases. See, e.g., *Harris v. Huston*, 48 F. Supp.2d 1167, 1169 (E.D. Wisc. 1999), where the court held that the Plaintiff did not receive adequate notice of the allegations against him before his pretermination hearing:

...I find that the plaintiff did not receive adequate notice. It is undisputed that the plaintiff received no notice, written or oral, of the charge against him until he arrived at the hearing. Under the circumstances, this 'contemporaneous' (rather than advance) notice does not meet the requirements of procedural due process.

See also, *Gorman v. Robinson*, 977 F.2d 350, 358 (7th Cir. 1992) where a notice of pretermination hearing stating only summary charges¹³ was not adequate notice of the charges: "this boilerplate notice failed to convey to Gorman the specific reasons for his discharge. See *Loudermill*, 470 U.S. at 546." Far worse is the notice in the present case, which states nothing at all about the charges.

4. Failure to Provide Adequate Notice of the Basis for the Termination

a. The charging document

On April 6, the day set for the pretermination hearing, the University issued three letters to Pearce. (All contained in **Appendix G**.) First was a cover letter from Maj. Bringhurst, stating that Pearce was "terminated effective immediately" and indicating that two other letters were enclosed. These constitute the charging documents against Pearce.

The second letter (**Appendix G** pp. 2-4, one of the two "enclosures"), referred to the two separate incidents involved here (MDR false alarm and Jackson Street driving).

¹³ "1. Failure to follow rules, regulations, policies and procedures of the Chicago Housing Authority. 2. Unsatisfactory performance of duties. 3. Insubordination. 4. Other acts of a serious nature that are detrimental to the Procurement and Inventory Control Department and the Chicago Housing Authority." 977 F.3d at 357-58.

The letter makes various charges, some of which are not mentioned in the third letter and, as shown below some of which were disavowed by the Chief at the hearing. It is signed by Maj. Bringhurst and not by the Chief.

The third and final letter (**Appendix G** pp. 5 et seq., the second “enclosure”) is the one document signed by the Chief—the appointing authority with power to terminate. Oddly, it has no “page 1” but begins with “page 2,” states that Pearce is being terminated, and gives these reasons:

The reason(s) you are being recommended [sic] 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

The absence of any facts in the final two bullets above, and the inconsistent and sometimes outright contradictory statements in and between the different letters render the charges so garbled and confusing as to be incomprehensible

b. Omission of charge on failure to respond to MDR false alarm

Conspicuously absent from the Chief’s charges was any charge relating to failure to respond to the MDR Building, but only failure to complete the alarm report. Chief Hall expressly acknowledged that (regardless of the contents of Bringhurst’s accompanying letter) his reasons for terminating Pearce did not include failing to respond to the fire alarm run; instead, Chief Hall testified, the failure to make a report was the real issue. (Tr. Vol. 3 p. 147.) Nonetheless the Hearing Officer made extensive findings on this allegation—determining that Pearce, by saying “Okay,” “acknowledged his responsibility to proceed to the scene of the fire alarm” and that failing to do so promptly

violated University policy. (**Appendix A**, pp. 4-5 ¶¶ 14-27.) (See further discussion in Argument part D.2 below.)

c. Omission of charge of unauthorized vehicle pursuit

Equally conspicuous in its absence was any allegation of engaging in an unauthorized “pursuit”—although the University began its case making just such a claim (see e.g. Tr. Vol. 1 pp. 83, 89, 91, and 148-51), and abandoned it only after cross-examination established that Pearce’s stop of the wrong-way vehicle was not a “pursuit,” but a traffic stop. (Tr. Vol. 1 p. 126; Vol. 3 pp. 173-74.) And even though the University abandoned the claim, the Hearing Officer expressly found that Pearce knowingly violated the University policy prohibiting vehicle pursuits. (**Appendix A**, p. 12 ¶¶ 71-72, and p. 18 ¶¶ 16-17.)

d. Omission of facts in “incompetence” charge

The “incompetence” charge contains no facts of any kind. The Hearing Officer’s decision acknowledges the charges’ omission of any “facts to support a charge of ‘incompetence’.” (**Appendix A**, p. 13, ¶ 79.) (And, as shown below, there is no evidence in the record to support the charge.) But the Hearing Officer’s decision determined that this charge “merges with the charge of failing to complete a fire alarm report (App. A p. 10 ¶ 52), and also “merges” with the charge related to driving the wrong way on a one-way street.” (**Appendix A**, p. 13, ¶ 79.) There is no explanation for these rulings, which have no basis in law or common sense, and are perfectly opaque.

e. Omission of facts in “dishonesty” charge

The “dishonesty” charge was similarly barren of any statement of supportive facts. The Hearing Officer acknowledged the inadequacy of the dishonesty allegation in connection with the MDR alarm incident: “Chief Hall asserted in the *Recommendation*

of Termination that one ground for his recommendation does not state any facts in support of that allegation.” (Appendix A, p. 8 ¶ 47, citing to the third document in Exh. 10.) The Hearing Officer also notes that Bringhurst’s second April 6, 2007 letter (also in Exh. 10) “also does not provide any facts in support of that charge.” (Id., p. 9, ¶ 48.) The decision goes on to concede that “there is a substantial question whether Pearce ever received sufficient notice of the basis for the “dishonesty” charge to allow him to prepare a defense...” (Id. p. 9 ¶ 50.)

But although the Hearing Officer ultimately dismissed the dishonesty charges as unsupported by the evidence (Appendix A p. 19 ¶ 21, and p. 13 ¶ 78), the decision did not do so until after determining that the charge “merges” with the charge of “incompetence”: “Irrespective of the merits of the legal issue of adequate notice, the alleged factual basis for the dishonesty charge merges with the issue of his alleged incompetence for failing to prepare the report.” (Appendix A, p. 9, ¶ 51.) The decision offers no rationale for this merging of a “dishonesty” charge into a charge of failing to file a required report.

f. The omissions are fatal to the charges in question

Those conclusory allegations are insufficient as a matter of law. KRS 15.520(1)(e) requires provision of written notice of charges sufficiently specific to allow the officer to mount a defense. Similarly, University policy 1900.02.Q.3.d, in language parroting that of the statute, provides the same right. (Appendix K, last page.)

Standards for adequacy of notice are set out in case law. In *Osborne v. Bullitt County Bd. of Educ.*, 415 S.W.2d 607, 610 (Ky. 1967), this Court, reversing the judgments below, held that conclusory allegations of insubordination and incompetency provided insufficient notice, and stated: “We deem the foregoing statement of charges to

be too vague and indefinite to furnish the appellant with sufficient information upon which he could base a defense.”

In *Goss v. Personnel Board*, 456 S.W.2d 819, 821 (Ky. 1970), this Court held that failure to provide proper notice of the grounds for termination rendered it “void ab initio.” The court stated: “In the absence of a notice stating dates, places and names the employee would not have a fair opportunity to reply...” 456 S.W.2d at 821. In a companion decision of the same name (but different citation), *Goss v. Personnel Board*, 456 S.W.2d 822 (Ky. 1970), this Court dealt with the following charges which had been made against the public employees:

- (1) "Inefficiency in the performance of the duties of your job."
- (2) "Falsifying official records."
- (3) "Inefficiency in the performance of the duties of your job."
- (4) "Continued absence."
- (5) "Insubordination."
- (6) "Inefficiency in the performance of the duties of your job."
- (7) "Unauthorized absence in connection with a drinking problem."

456 S.W.2d at 833. No facts were given. As it did in the companion case, the court held that “[I]t is our opinion that none of the reasons was sufficiently specific and therefore all of the discharges were void.” *Id.*

Here, the charges fail to provide adequate notice of the charges upon which the termination is based, as required by KRS 15.520 and constitutional Due Process, as well as by University policy, in that they fail to describe any facts regarding “incompetence,” fail to cite which policy was violated by not immediately filing the alarm report (there was none), fail to cite what policy was violated by following up on a potentially impaired auto driver, and fail to provide any dates or concrete facts.

In addition, the Bringhurst letter includes allegations¹⁴ not included in the letter signed by the appointing authority (the chief of police).

The failure to provide a comprehensible statement of the charges against Pearce was so severe that Counsel was forced to complain to the Hearing Officer about the “enormous difficulty preparing to defend my client simply because I couldn't figure out what he's charged with.” (Tr. Vol. 4 p. 75.)

The charging documents are so confusing as to be incomprehensible. That alone is independent ground for reversal.

5. Erroneous Disregard of Investigative and Procedural Violations

The Hearing Officer's decision shrugged off all of those investigative and procedural violations as “irrelevant to this action” on the theory that Pearce later was given the hearing held before the Hearing Officer. (**Appendix A**, p.21, ¶ 31.)

The Hearing Officer found that “Pearce chose not to participate in the pre-termination hearing” (**Appendix A**, p. 14, ¶ 81), without mentioning the University's failures to provide the required procedural protections that prompted that decision. (See Counsel's letter of April 6, 2007 at Ad. R. 17-18.) Quite simply: the University attempted to force Pearce to accept a pretermination hearing that was statutorily and constitutionally inadequate.

The Review Board plainly conducted a hearing on the MDR matter, calling witnesses and receiving evidence. The statute requires provision of its specified procedural protections “when” a hearing is to be conducted by an administrative body

¹⁴ Specifically: (a) failure to respond promptly to the scene of the MDR false alarm and (b) telling the maintenance employee that because not dispatched on the incident Pearce would not make the fire report.

(KRS 15.520(1)(h)), but those protections were disregarded. Pearce had no opportunity to defend himself, with representation by counsel, before the Review Board. He did not even know what documents or other witnesses the Board reviewed and heard. The Board's finding of guilty—which triggered the Chief's directive for an I.A. investigation—was made without affording him the required process.

And those omissions had consequences: The Review Board's report caused the Chief to initiate the I.A. investigation—in directing Maj. Brown to begin the I.A. investigation, Chief Hall expressly stated, in his email of January 11, 2007 to Maj. Brown, that the Review Board's findings were the trigger for that decision:

After reviewing the Review Board's findings I am requesting that you began [sic] an internal affairs investigation into this incident. Please look into all violations of rules, regulations and policies.

(Appendix S p. 0047.) Indeed, the stated reason for having an Internal Affairs investigation was the same as that given for convening the Review Board: as described by Maj. Bringhurst, to determine “possible violations of policy.” (Tr. Vol. 2 pp. 58-59.) Lt. Tarter (the I.A. investigator) testified that he used the information received from the Review Board in his I.A. investigation. (Tr. Vol. 1 p. 41)

The investigative and procedural violations, singly and cumulatively, are serious and not “cured” by having a post-termination hearing.

6. The University's Disregard of Its Own Policy Is Inherently Arbitrary

Kentucky has unequivocally recognized that “it is axiomatic that failure of an administrative agency to follow its own rule or regulation generally is per se arbitrary and capricious.” *Commonwealth of Ky., Transportation Cabinet v. Weinberg*, 150

S.W.3d 75, 77 (Ky. App. 2004).¹⁵ The court there held that “the Cabinet acted arbitrarily and capriciously” in its “fail[ure] to follow its own regulation”. 150 S.W.3d at 77, 78.

Among the reasons why it is inherently arbitrary and capricious for an agency to disregard its own policies is that government policies have the force of law:

Management directives announcing detailed policies, responsibilities, and procedures that are relatively permanent in nature and which have been signed by the head of any commission under the governor’s jurisdiction have the force of law when they are based upon authority or duty conferred by constitution, statute, or regulation.

73 CJS, *Public Administrative Law and Procedure* § 175; see also *Mirarchi v. Dept. of Corrections*, 811 A.2d 1096, 1100 (Pa. Commw. 2002), stating the same.

That principle has been applied specifically regarding public employees. In *Said v. Lackey*, 731 S.W. 2d 7 (Ky. App. 1987), the court held that where an employee manual established a grievance procedure for county deputy jailers, a deputy was entitled to due process, through those grievance procedures, regarding his discharge. 731 S.W.2d at 8-9. The court held that the employee had been denied those procedural rights and reversed the summary judgment that had been entered against the employee’s claim of wrongful termination.

Hence, the University’s failure to comply with its own policies here is an intrinsically arbitrary act, in violation of law.

¹⁵ Citing *State ex rel. Wyoming Workers’ Compensation Div. v. Brown*, 805 P.2d 830 (Wyo. 1991); and 2 Am. Jur. 2d *Administrative Law* § 499 (2004).

D. Fact Findings Inconsistent with the Record

The University bore the burden of proof at the hearing to establish a basis for the termination of Officer Pearce, as the Hearing Officer himself ruled (Tr. Vol. 1 p. 13), and as the law provides. See *Com. Transp. Cab. v. Woodall*, 735 S.W.2d 335, 337 (Ky. App. 1987).

But the Hearing Officer effectively relieved the University of the burden of proof, and in addition repeatedly made fact-findings that were without support in the record, and in some cases contrary to the record. These errors are yet another independent ground requiring reversal of the decisions below.

Following is a review of the major instances of erroneous fact-finding:

1. No University Policy Required Pearce to File an Alarm Report

The Hearing Officer's Report concludes that Section 2215.01 of the University's Dept. of Public Safety Policies (**Appendix E** p. 6) delineate that Pearce, as the responding officer, "alone was responsible for filing that [fire alarm] report." (**Appendix A**, p. 16, ¶¶ 8-10.¹⁶) But that policy section in no manner suggests that the officer is the sole person who can or should file that report. It simply states that such alarms "shall be reported" by someone:

All fires, fire alarms, arson case and criminal mischief of fire equipment shall be reported on the Fire Incident Report form.

There is no University policy stating that it is the officer's responsibility to complete a fire alarm report. Instead, University policy states that the dispatcher on the first shift (starting at 6:00 a.m.) is responsible for filing a report with the state fire marshal:

¹⁶ The Hearing Officer also erroneously found that "The police officer at the scene of the fire alarm is required to complete the report..." (**Appendix A**, p. 6, ¶ 30.)

It will be the duty of the First Shift Telecommunicator to e-mail the daily fire alarm reports not involving an actual fire to the State Fire Marshal's Office before the end of their shift...

(Policy 2216.00 4th paragraph, **Appendix E** p. 6.) The record does not contain any rule or policy stating that Pearce was required to complete the report, or that he was required to complete it before the end of his shift, or that he was responsible for seeing that the report was filed with the State Fire Marshal.

If there was no policy to violate, then Pearce cannot be found guilty of violating policy. Pearce committed no disciplinary infraction regarding the report on the fire.

2. Response to MDR Was Not Shown to Be Required

The Hearing Officer's finding that Pearce's saying "Okay" in response to information about the false alarm constituted an acknowledgement that Pearce knew he was to proceed to the scene (**Appendix A**, ¶¶ 16-18 p. 4), is not supported by the evidence. Dispatcher Adams had just sent Pearce to do the escort run, and she made no suggestion that he should drop that run and proceed to the false alarm. As reviewed above, Pearce's response to the information about the alarm was not simply "Okay." He said "Okay so what are we doing?" And the dispatcher did not reply that he should proceed to the alarm, but instead told him that Don Martin was at the scene handling things. (Radio transcript, **Appendix D**, p. 000061.)

As the transcript of communications shows, "Okay" was Pearce's standard response to a piece of information. Pearce used the word "okay" multiple times in those

communications, always in a manner consistent with casual usage.¹⁷ The three other officers on duty that night each answered “okay” to Adams’ status check at 04:59:51. (Id. p. 000061.)

In contrast, when actually dispatched to the MDR scene at 05:12:11, Pearce did not say “okay,” but instead said “10-4.” (Id. p. 000062.)

Indeed, Adams explained to Martin that she hadn’t dispatched Pearce to the MDR scene because Martin was handling the situation:

Adams: Cause I sent him on an escort and I told him, I said, “Don’s gonna run over and check an alarm, a fire alarm, at LFD, I mean at MDR, the same one we’ve had several times,” and I think we’ve had like 4?”

(Appendix D, p. 000063.)

The charge that Pearce should have responded to the false alarm is unsupported by the evidence which shows that Pearce was properly engaged in an escort run when the fire alarm incident occurred, was never dispatched to the alarm, and had no reason at all to believe he should have gone.

3. There Is No Evidence of “Incompetence”

Even if the incompetence charge had been made with adequate notice, and even if there had been a policy requiring Pearce to complete a fire alarm report, the charge nonetheless should have been dismissed because it was unsupported by the evidence.

¹⁷ See the following points in **Appendix D**: 04:19:52, “K” (obviously “okay” with the first syllable cut off in the transmission), when dispatched on the escort run (p. 000059); 04:54:12, “Okay” to Adams’ statement that Martin was going to check on the alarm (p. 000061); 04:55:28, “Okay so what are we doing?” (000061); 04:55:54, “Okay” to Adams explanation in answer to the foregoing question (000061); and 05:17:50, to Adams after leaving the MDR scene, “Okay, then go ahead and put me back in service” (000064).

The evidence conclusively showed that Pearce was well-versed in how to file the fire reports. As the Hearing Officer found, “During his career with the University of Louisville Police, Pearce had responded to thirty seven fire alarms, and he had acknowledged that he had completed Fire Incident Reports in each of those instances.” (App. A, p. 6 ¶ 34.)¹⁸ As Lt. Tarter testified, the MDR incident was the first time Pearce had ever failed to make a fire alarm report. (Tr. Vol. 1 p. 124 ll. 12-16. See also **Appendix S** p. stamped 264.) Maj. Brown conceded that it was “not characteristic of Jeff Pearce at all” to fail to respond to alarms or other dispatches. (Tr. Vol. 1 p. 200; see also id. p. 198 ll.18-24.)

“Incompetence” is defined as “The quality or state of being incompetent,” and “incompetent” in turn is defined as “Inadequate for or unsuited to a particular purpose or application,” or “Devoid of those qualities requisite for effective conduct or action.” *American Heritage Dictionary*.¹⁹ An incompetent person would not know how to complete a fire alarm report. The evidence here indisputably shows that Pearce did know how, and had done so often. The charge of “incompetence” is unsupported by the record, as well as unsupported by proper notice to Pearce or a policy that Pearce could have violated.

¹⁸ That was undisputed. Lt. Tarter testified that Pearce had previously responded to 37 different fire alarms as a U of L police officer, and had filled out a report for every one of those prior incidents. (Tr. Vol. 1 p. 94.)

¹⁹ We have omitted the same dictionary’s additional definition of “incompetent” in legal usage—“Not qualified in legal terms: a defendant who was incompetent to stand trial.”

(Tr. Vol. 1 p. 137.)

There was not another vehicle in sight when Pearce drove less than two blocks south on Jackson, as all witnesses concur.

The sole evidence of Pearce's speed on Jackson Street was Officer Skaggs' casual estimate of "45, 50 miles per hour." (Tr. Vol. 3 p. 100.) That lasted one and one-half blocks. There is no basis for the Hearing Officer's elevation of top speed to include 55 miles per hour (see **Appendix A**, p. 11, ¶ 61.)

Nor is there any support for a finding as to whether or not Pearce turned on his emergency lights. Neither the University's witness, Officer Skaggs, nor Pearce himself could remember, as indeed the Hearing Officer found (App. A. p. 11 ¶ 62). The Hearing Officer chided that Pearce "could not verify that he had taken the most basic precaution of activating his emergency lights" (id. p. 12 ¶ 72)—but the burden of proof was on the University. The record has no proof on this allegation, which was not included in the charges in any event.

The finding that the Jackson Street wrong-way driver "no longer presented a danger" when Pearce was proceeding south on that street (**Appendix A**, p. 11, ¶ 59) is also unsupported in the evidence. The University—on whom the burden of proof rested—presented no proof that the potential danger had somehow vanished when the driver turned a corner. Yet the Hearing Officer concluded that it was a "fact" that "the offending vehicle was no longer a threat to other cars or pedestrians" when it got out of Pearce's immediate sight. (**Appendix A**, p. 12, ¶ 72.) There is no evidence to support a finding that Pearce should have known that vehicle posed no threat.

Case law on law enforcement matters cautions against such armchair second-guessing of a police officer doing his job. See, e.g., *Graham v. Connor*, 490 U.S. 386 (1989), where the U.S. Supreme Court stated that the assessment of an officer's actions must be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." 490 U.S. at 396. The University's second-guessing of Pearce, the officer on the scene, is mere speculation devoid of evidentiary support.

One of the strangest conclusions in the Hearing Officer's Report is that Pearce's uncertainty regarding whether or not he turned on the emergency equipment supports a finding that he operated the vehicle unsafely:

The degree to which Pearce operated in an unsafe manner is only highlighted by the fact that he could not recall whether he had engaged his emergency lights before driving down the street at a speed well in excess of the posted speed limit.

(Appendix A p. 18 ¶ 19.) The University's offer of testimony regarding Pearce's inability to remember on that point was solely to support the improperly alleged and wholly unproven charge of "dishonesty." By no stretch of logic does Pearce's subsequent memory or lack thereof support a claim of unsafe vehicle operation. The burden of proof was on the University to show unsafe operation, and there was no such showing.

Those findings contributed, singly and in mass, to the Hearing Officer's conclusion that Pearce operated his vehicle unsafely. (Appendix A, pp. 18-19, ¶¶ 17-20.) That line of reasoning is unlawfully arbitrary.

5. The Vehicle Pursuit Policy (Not Charged)

The charging documents do not include an allegation that Pearce violated the University pursuit policy—apparently the University brought up that policy in connection with its (dismissed) allegation of untruthfulness. Nonetheless, the Hearing Officer

concluded that Pearce violated the University policy prohibiting vehicle pursuits.

(Appendix A, p. 18, ¶¶ 16-17.)

The U of L policy prohibiting vehicular pursuits is clear that a “pursuit” exists only where the driver of the subject vehicle is actively trying to get away from the officer, by using speed or evasive tactics. The policy’s definition of “pursuit” is:

The initiation of some action taken by a police officer while operating a police vehicle, in an attempt to apprehend the operator and/or occupant(s) of a motor vehicle ***which is fleeing and attempting to avoid apprehension through the use of speed or other evasive tactics.***

(Policy 1500.01, Appendix S, p. stamped 328; emphasis added.) And one of the two elements of a “pursuit,” set out in the policy is the attempt to evade an officer who is trying to overtake the vehicle:

The operator and/or occupant(s) of a motor vehicle intentionally engage in conduct that ***attempts to evade the police officer that has attempted to overtake and stop the operator and/or occupant(s).***

(Id., emphasis added). No “fleeing” or “attempts to evade” were entailed in this traffic stop.

Lt. Tarter squarely testified that Pearce’s actions on Jackson Street and Broadway on Feb. 23, 2007, were not a “pursuit,” but simply a traffic stop, because there was no indication that the subject driver ever attempted to flee or get away:

17 Q. Now, you would agree with me, I gather,
18 that what happened on Jackson Street and Broadway was
19 not a vehicle pursuit at all, right? It was a
20 traffic stop?
21 A. It was a traffic stop.

(Tr. Vol. 1 p. 126. Emphasis added.) It is not against policy for a U of L officer to make a traffic stop, as Tarter acknowledged. (Tr. Vol. 1 p. 138.)

Chief Hall ultimately concurred with Tarter that the traffic stop was not a “pursuit” as described in the policy. (Tr. Vol. 3 p. 173.) Hall stated that the pursuit policy was not the policy he felt Pearce had violated (Tr. Vol. 3 pp. 173-74), that the pursuit policy could be “put aside” for purposes of this case (Tr. Vol. 3 p. 174), and that an improper pursuit was not what he (Hall) thought Pearce did wrong (id.).

The Hearing Officer’s Report dispenses with those dispositive reasons not to find violations of the pursuit policy by stating there is no other policy:

Although Pearce asserts that he was not engaged in a “vehicle pursuit” as that term is defined in Section 1500.01 based upon the fact that the driver of the vehicle was not attempting to evade arrest, there is no other policy or procedure that would even arguably authorize or condone a police officer undertaking a high speed chase of a vehicle in order to perform the traffic stop.

(**Appendix A**, p. 18, ¶ 17.) That passage simultaneously (a) concedes that Pearce violated no known policy, (b) effectively shifts the burden of proof to Pearce to show that there was some policy permitting him to pull that vehicle over, and (c) finds that Pearce engaged in a “chase” in direct contravention of the evidence. Indeed, the term “chase” is nothing but a synonym for “pursuit,” which the record showed did not happen.

The Hearing Officer’s decision thus contains numerous findings of dispositive fact not supported by substantial evidence, rendering it unlawfully arbitrary.

E. The Decisions Below Erroneously Upheld the Severity of Punishment

1. The Presence of Arbitrariness Authorizes Review of the Penalty

Where the punishment is itself arbitrary or unsupported by substantial evidence, judicial review can include the degree of punishment:

The circuit court is without authority to change the penalty *in the absence of a finding that the decision of the Board was arbitrary and capricious*

or a clear abuse of discretion.

Louisville by Kuster v. Milligan, 798 S.W.2d 454, 458 (Ky. 1990) (emphasis added).

Where, as here, the record indicates the Hearing Officer failed to make any consideration of whether the severity of the punishment was justified, where the evidence showed the charges were substantially based on improper processing, and where the University's own policies provided for progressive discipline (reprimand or suspension before leaping to termination), it is proper for this Court to reverse the affirmation of the ultimate penalty of termination as arbitrary and capricious.

2. Absence of Progressive Discipline

Maj. Brown stated that he did not review Pearce's "total record," but looked only at the subject incidents, in his report to the Chief. (Tr. Vol. 1 p. 199.) Maj. Brown acknowledged that based on the case summary log for Pearce's activity (Exhibit 9, Ad.R. 365-72), there did not appear to be a problem with inactivity on Pearce's part. (Tr. Vol. 1 p 200, ll 6-9.) Several witnesses pointed out that Pearce had made 37 fire alarm runs before, and had never failed to complete a fire alarm report.

Yet the University jumped straight to termination, with no intervening progressive discipline, despite the absence of any similar prior incident in Pearce's record.

That is contrary to University policy, which plainly states an adherence to progressive discipline. See DPS Policy 1900.02.D:

D. Punitive Actions as a Function of Discipline (KACP 12.2.B)

1. The Department supports the theory of progressive discipline and employees should understand that a record of recent minor infractions might result in proceedings against the employee for incompetence. This produces the potential for a severe penalty even though the penalty may be mild for the individual violations. A similar circumstance exists in situations in which an employee's one act of misconduct may violate more than one rule. These multiple violations may result in an alteration of the

penalty. An incident may be so serious, however, as not to require progressive discipline.

(Appendix K, pp. 2-3.) The policy goes on to list a progression of increasing penalties, starting with a “counseling” continuing through reprimand and suspension, and ending with termination.

The leap to terminate Jeff Pearce contravenes the policy of progressive discipline. As shown above (Argument part C.6), a governmental entity’s disregard of its own policies is inherently arbitrary.

3. No Harm Resulted

It is clear that no harm whatsoever resulted from any of Pearce’s actions. Chief Hall testified:

- No injury resulted from either of the two incidents:
19 in neither of
20 these two incidents did anybody get hurt; is that
21 correct.
22 A. No, sir.[meaning no one got hurt].

(Tr. Vol. 3, p. 174.)

- No one was endangered:
25 [N]obody was endangered, because there was nobody
1 on the street; isn't that correct?
2 A. Yes, sir.

(Tr. Vol. 3, pp. 174-75.)

- The State Fire Marshall was not concerned about the MDR alarm incident:
7 Duane Archer called the
8 State Fire Marshal, told him what had happened, and
9 they were O.K. with that.

(Tr. Vol. 3, p. 176.)

Termination is the ultimate penalty in employment. Without a record of a progression of minor offenses, and without harmful consequence from the employee's conduct, termination is simply not appropriate.

F. The Proper Remedy Is Reinstatement with Back Pay

When the procedural requirements of KRS 15.520 have not been provided, the remedy is reinstatement until such time as those procedural requirements are provided.

See the remedy provided in *Munfordville* which was stated as follows:

The trial court's summary judgment in favor of Sheldon, ruling that he was improperly terminated and that he continues to occupy the position of Chief of Police for the City of Munfordville is affirmed...

977 S.W.2d at 499 (language from the Court of Appeals decision adopted by the Supreme Court).²¹

²¹ See also cases holding that failure to provide a pre-hearing opportunity to respond, when that is required, warrants reinstatement and back pay until such time as the required opportunity is provided: *Baird v. Bd. of Educ. for Warren Community Unit Sch. Dist. No. 205*, 389 F.3d 685, 692 (7th Cir. 2004) (reinstatement is "normally an integral part of the remedy for a constitutionally impermissible employment action" quoting from *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1101(5th Cir. 1987)); *Irizarry v. Cleveland Public Library*, 727 F.Supp. 357, 365 (E.D. Ohio 1989) (where employer improperly failed to provide a public employee with a pre-termination opportunity to respond "the plaintiff is entitled to reinstatement to his employment with the Library pending a pretermination hearing. The plaintiff shall receive back pay from the date of his termination... The plaintiff shall continue to receive pay until the date, if and when, the plaintiff is discharged following a pretermination hearing"); *Hogue v. Clinton*, 791 F.2d 1318, 1325 (8th Cir. 1986) (the requirement that an employee be given a pre-termination opportunity to respond "clearly imposes in public employers an obligation to retain an employee on the payroll until a pretermination hearing satisfying the ... notice and hearing requirement is conducted"); *Duchesne v. Williams*, 821 F.2d 1234, 1987 U.S. App. LEXIS 7593 (6th Cir. 1987) vacated en banc on other grounds, 849 F.2d 1004 (6th Cir. 1988), ("We hold that it is appropriate for a district court to order that a plaintiff who has been deprived of a constitutionally protected interest in employment without due process be reinstated and awarded back pay pending constitutionally protected sufficient notice... and the opportunity to be heard" 1987 U.S. App. LEXIS 7593 at **36-37).

CONCLUSION

The forums below erred both in holding that KRS 15.520 did not apply, and in holding that it wouldn't have made any difference in any event. The disciplinary process violated the statute, as well as constitutional Due Process and University Policy, at every stage. The administrative hearing continued and compounded those errors.

We therefore respectfully request this Court to reverse the decision of the Court of Appeals and to remand this case to the Circuit Court with instructions to order the University of Louisville to reinstate Jeff Pearce, with back pay, until such time as the University complies with the procedural requirements of KRS 15.520, constitutional Due Process, and the University's own policy.

RESPECTFULLY SUBMITTED,



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