

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2012-SC-00104
(2011-CA-00378-MR)

STEPHEN DERRICK HILL

APPELLANT

v.

**AMICUS CURIAE BRIEF ON BEHALF OF
KENTUCKY LEAGUE OF CITIES**

CITY OF MT. WASHINGTON

APPELLEE

Appeal from Bullitt Circuit Court
Civil Action No. 09-CI-00341
Honorable Rodney D. Burrese, Judge

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CERTIFICATE OF SERVICE

I hereby certify that I have served ten (10) copies of the brief in accordance with CR 76.12 to Susan Stokley Clary, Clerk of the Supreme Court, New Capitol Bldg., 700 Capitol Avenue, Frankfort KY, 40601-3488, via Federal Express on this 20th day November, 2012. True and accurate copies were served via First Class U.S. Mail on this the same day to the following: Honorable Rodney D. Burrese, Judge, Bullitt Circuit Court, P.O. Box 746, Shepherdsville KY 40165; Layne Abell, Bullitt Circuit Court Clerk, P.O. Box 746, Shepherdsville KY 40165; David D. Fuller, Esq., 517 West Ormsby Avenue, Louisville KY 40203; Patsey E. Jacobs, Esq. and Charles David Cole, Esq., 333 W. Vine Street, Suite 1400, Lexington KY 40507; and Norman R. Lemme, Esq., 833 Twelve Oaks Drive, Mt. Washington KY 40047.


Stacey A. Blankenship

STATEMENT CONCERNING ORAL ARGUMENT

Amicus Curiae believes that oral argument would assist the Court in reaching a full understanding of the issues presented, and therefore requests same.

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STATEMENT OF THE CASE

The issue this Court is asked to decide is whether KRS 15.520 gives procedural due process rights to police officers only in the context of disciplinary proceedings initiated against them as a result of a citizen's complaint, or whether a more expansive interpretation applies, making the statute applicable as well in cases of police officer disciplinary actions arising from internal departmental investigations. The issue has never been directly presented to this Court. *Amicus Curiae* Kentucky League of Cities ("KLC") is an association of over 350 Kentucky cities; sixty-four percent of its member cities, including Respondent City of Mt. Washington, participate in the Kentucky Law Enforcement Foundation Program ("KLEFP") pursuant to KRS 15.410 *et seq.* That statute entitles police officers employed by those cities to certain rights under KRS 15.520, if a city attempts to take disciplinary action against an officer based on a citizen's complaint. (Motion for Leave to File *Amicus Curiae* Brief, p. 1). The KLEFP was established in 1972 by act of the Kentucky General Assembly (Act of Mar. 17, 1972, ch. 71, 1972 Ky. Acts 288, 288-93), in part "to attract competent, highly qualified young people to the field of law enforcement and to retain qualified and experienced officers [as well as to] offer a state monetary supplement for local law enforcement officers while upgrading the educational and training standards of such officers." KRS 15.410. KRS 15.520, commonly referred to as the "Police Officer Bill of Rights," was enacted in 1980 (Act of Apr. 9, 1980, ch. 333, § 2, 1980 Ky. Acts 1095, 1096), and applies "only to police officers of local units of governments who receive funds pursuant to [the KLEFP]." KRS 15.520(4). Because of the relationship between the KLEFP and KRS 15.520 and the number of KLC member cities that participate in the KLEFP, this Court's ruling

regarding the interpretation of KRS 15.520 will affect each one of these cities. Further, the Court's decision could expose these member cities to liability immediately upon publication if any of those cities have treated KRS 15.520 as inapplicable to police officer discipline arising from internal departmental investigations based on a plain reading of the statute and the long line of Kentucky Court of Appeals opinions that have held it to be so. (Motion for Leave to File *Amicus Curiae* Brief, p. 3).

STANDARD OF REVIEW

This case involves statutory interpretation. Because the construction and application of statutes is a matter of law, this Court's standard of review as to the breadth and scope of KRS 15.520 is *de novo*. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

ARGUMENT

- A. The Court of Appeals was correct in its determination that KRS 15.520 does not apply to a departmental disciplinary action against a police officer unless the action is the result of a citizen's complaint.**

A fundamental rule in the interpretation and construction of statutes is that the court should "ascertain and give effect to the intention of the Legislature and that intention must be determined from the language of the statute itself if possible." *Moore v. Alsmiller*, 160 S.W.2d 10, 12 (Ky. 1942); *Commonwealth v. Garnett*, 8 S.W.3d 573, 575-76 (Ky. App. 1999). Put another way, "[a] statute should be construed, if possible, so as to effectuate the plain meaning and unambiguous intent expressed in the law." *McCracken County Fiscal Court v. Graves*, 885 S.W.2d 307, 309 (Ky. 1994).

Carrying out the intent of the legislature is, in fact, the primary purpose of judicial construction of statutes, and in doing so, courts must "use the plain meaning of the words

used in the statute.” *Revenue Cabinet v. O’Daniel*, 153 S.W.3d 815 (Ky. 2005). This principle is also codified in KRS 446.080(4). If a statute contains ambiguity or if its meaning is uncertain, then a court should attempt to ascertain legislative intent “by considering the whole statute and the purpose intended to be accomplished. *Hopkins v. Dickens*, 222 S.W. 101, 104 (Ky. 1920); *Department of Motor Transportation v. City Bus Co.*, 252 S.W.2d 46, 47 (Ky. 1952). To find such intent, “a court must consider the policy and the purpose of the statute, the reason and the spirit of the statute, and the mischief intended to be remedied. *Barker v. Commonwealth*, 32 S.W.3d 515, 516-17 (Ky. App. 2000) (citing *City of Louisville v. Helman*, 253 S.W.2d 598, 600 (Ky. 1952)); *Kentucky Region Eight v. Commonwealth*, 507 S.W.2d 489, 491 (Ky. 1974).

Finally, the court’s interpretation of the statute should produce a practical and reasonable result. *Brown v. Hoblitzell*, 307 S.W.2d 739 (Ky. 1956); *Walker v. Kentucky Department of Education*, 981 S.W.2d 128, 130 (Ky. App. 1998). Finally, a statute should be construed, if possible, so that no part of its provisions is rendered meaningless. *Hardin County Fiscal Court v. Hardin County Board of Health*, 899 S.W.2d 859, 862 (Ky. App. 1998). Where, as here, a statute contains no ambiguity, the reviewing court’s task is further proscribed: “statutes must be given a literal interpretation unless they are ambiguous and *if the words are not ambiguous, no statutory construction is required.*” *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002) (emphasis added).

In *Hill v. City of Mt. Washington*, 2011-CA-000378-MR, slip op. (Ky. App. Jan. 20, 2012), the Court of Appeals applied such principles of statutory construction and found evidence of legislative intent within the language of the statute itself. The court found the statute’s purpose—providing procedural due process rights to police officers

accused of wrongdoing by citizens (*Hill*, slip op., p. 4)—in the statute’s preamble, which provides:

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).

Since the precise question issue of the applicability of KRS 15.520 to all police officer disciplinary matters was first squarely framed, the Kentucky Court of Appeals has unwaveringly held that it only applies to investigations of police officers based on complaints received from citizens and not to investigations based on internal complaints. *See Marco v. University of Kentucky*, 2005-CA-001755, slip op., (Ky. App., Sept. 1, 2006); *Ratliff v. Campbell County*, 2009-CA-000310-MR, slip op., (Ky. App., May 7, 2010); *Moore v. City of New Haven*, 2010-CA-000019-MR, (Ky. App., Oct. 29, 2010).

The case *sub judice*, its companion case, *Pearce v. University of Louisville*, 2009-CA-001813-MR, slip op. (Ky. App. Nov. 11, 2011), which is also before this Court on discretionary review, and a third case, *Beavers v. City of Berea*, 2012-CA-001522-MR, slip op., (Ky. App., Jan. 6, 2012), which has been held in abeyance pending the Court’s ruling herein, are simply the most recent in an ever-lengthening list of cases that have consistently held that the statute does not apply to disciplinary actions against police officers that arise from internal departmental investigations.

By referencing the legal analysis from Movant’s Brief in *Pearce v. University of Louisville*, Movant Hill has joined in the argument raised by Pearce that a paradigm

“shift” in the Kentucky Court of Appeals occurred in 2006. According to the argument, prior to that year, Kentucky appellate courts routinely applied KRS 15.520 to cases of police officer termination that were based on internal investigation rather than a citizen’s complaint. However, a closer look at the cases cited for this proposition shows that there is no evidence that such a shift occurred, because the precise issue before the Court today was never presented in any case prior to 2006.

In *McCloud v. Whitt*, 639 S.W.2d 375 (Ky. App. 1982), the Court of Appeals easily reached the conclusion that “KRS 15.520 has no application to the removal” of the police chief by the mayor of a city of the fifth class, in a case where the chief’s removal “was not predicated upon any complaint of professional misconduct [but rather] resulted from action of the mayor under the discretionary power given him by KRS 82.080(2).” *Id.* at 377 (footnote omitted). Of additional interest to the present issue, the *McCloud* opinion contains a direct refutation to an argument that Hill made in his Brief for Movant, namely, that “KRS 15.520(1) expresses the statute’s *three* intentions: to establish a minimum system of professional conduct, set administrative rights for police officers and providing [sic] a means for redress by citizens for wrongs allegedly done to them by police officers.” Brief for Movant, pp. 3-4 (emphasis added). The third intention, Hill argues, “complements the statute’s first two intentions.” *Id.* p. 4. The *McCloud* court read the statute quite differently, finding the overarching purpose of the statute to be the establishment of a minimum system of professional conduct, while the balancing of an officer’s due process rights against a citizen’s method of redress of grievances served as the means to reach that end. *McCloud* was issued just two years after KRS 15.520 was enacted, and completely undermines the string of Attorney General Opinions cited in

Hill's brief. While opinions of the Attorney General have some persuasive value in the absence of any judicial or legislative statements on a particular issue, the opinions cited by Movant Hill have no value at all to this case, as they directly contradict the holding in *McCloud*. Further, the *McCloud* court found that a judicially-imposed expansion of the statute's reach would have been "an impermissible intrusion into the prerogatives of the legislative branch." *McCloud*, 639 S.W.2d at 377. Such a violation of the separation of powers doctrine was anathema to the *McCloud* court, and should be to this Court as well. As this Court has stated, "[o]ur present constitution contains explicit provisions which, on the one hand, mandate separation among the three branches of government, and on the other hand, specifically prohibit incursion of one branch into the powers and functions of the others." *Legislative Research Commission ex rel. Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984). By seeking to expand the scope of KRS 15.520, Movant Hill asks this Court to make just such an incursion into the powers and functions of the legislative branch of government.

The case of *Stallins v. City of Madisonville*, 707 S.W.2d 349 (Ky. App. 1986) also fails to support Hill's claim. In *Stallins*, a City of Madisonville police officer converted to his own use a weapon and other items seized during an arrest of a man whose name—Robert Caudill—figures prominently in the opinion. After being formally charged with a violation of department policy, the officer was terminated following a hearing before the legislative body of Madisonville. The opinion of the court does not contain any discussion regarding the applicability of the statute to the facts presented; rather, the parties appear to have assumed its applicability as they argued over sufficiency of the evidence. More important, the opinion gives no indication that the charge arose from an

internal investigation. In fact, since Mr. Caudill is named in the opinion, it is just as likely that the charge arose from a complaint he filed against the officer. Either way, the opinion says nothing in support of Hill's argument.

In *McDaniel v. Walp*, 747 S.W.2d 613 (Ky. App. 1987), the issue faced by the Court of Appeals concerned how disciplinary proceedings against a police officer should have proceeded when a citizen made an oral complaint against the officer, but failed to file an affidavit as required by both KRS 78.445(2) [the Jefferson County civil service statute] and KRS 15.520. Despite some ambiguous *dicta* toward the end of the opinion, that court never squarely addressed the issue presented to this Court today.

The Kentucky Court of Appeals examined the requirements of KRS 15.520 against the backdrop of a mayor's hiring and firing authority over non-elected officials in a city of the fourth class in *City of Madisonville v. Sisk*, 783 S.W.2d 885 (Ky. App. 1990). In reaching its decision, the Court of Appeals noted that the statute granting the mayor hiring and firing authority over non-elected city officials, KRS 83A.080(2), contained an exception to such authority if another statute served to proscribe that discretion. The court found that KRS 15.520 and 95.765 indeed applied under the particular facts presented to limit the mayor's ability to terminate an otherwise at-will employee, following a variety of charges "stemming from an incident which occurred several days earlier." *City of Madisonville v. Sisk*, 783 S.W.2d at 885. However, the Court of Appeals never indicated in its opinion whether the "incident which occurred several days earlier" had resulted in an internal departmental investigation or gave rise to a citizen's complaint, which, of course, would have triggered the due process requirements of KRS 15.520. Because the *City of Madisonville* decision never clarifies this point, Movant

Hill's claim that the case provides clear precedent for the proposition that KRS 15.520 applies to every case of police officer discipline is simply not supported by the language in the opinion. Certainly, the litigants in that case never raised the issue presented to the Court today.

In the case of *City of Louisville by and through Kuster v. Milligan*, 798 S.W.2d 454, 455-56 (Ky. 1990), the Kentucky Supreme Court addressed "whether K.R.S. 90.190(2) provides authority to the civil service board to modify a disciplinary penalty imposed by the appointing authority." The possible applicability or relevance of KRS 15.520 did not enter at all into the Court's deliberations, its only mention coming near the end of the opinion in the Court's discussion of which portions of the civil service board's ruling were subject to judicial review and which were not.

At first glance, the opening sentence from the case of *City of Munfordville v. Sheldon*, 977 S.W.2d 496 (Ky. 1998), might appear to support Hill's position regarding an expansive reading of KRS 15.520, because the Court noted that the case "deals with the effect of KRS 15.520 on a mayor's ability to fire at will a police chief." (*Id.*). Because Munfordville was a fifth-class city, KRS 83A.080(2) and 83A.130(9) gave the Munfordville mayor unfettered discretion to fire non-elected city officials, such as the police chief, unless another statute circumscribed that discretion. This Court found that KRS 15.520 applied to curtail the mayor's ability to fire the chief for cause, following a complaint by a local businessman, *i.e.*, a citizen's complaint. Again, the issue before this Court was never squarely presented to the *City of Munfordville* court, but the fact that a citizen's complaint was involved diminishes the power of Hill's argument. As the Court stated in its conclusion:

[O]ur holding merely forbids a mayor or other local executive authority from receiving a citizen's complaint against a police officer, then firing the officer based on that complaint, without ever affording the officer a right to publicly defend against the complaint as required by KRS 15.520. . . . Nothing in our holding prohibits a mayor from discharging an officer at his or her discretion, so long as the reason behind the discharge does not trigger the hearing requirement of KRS 15.520, or fall into one of the exceptions to the at-will employment doctrine.

City of Munfordville, 977 S.W.2d at 499 (emphasis added; footnote omitted). Clearly, the fact that the disciplinary proceedings arose from a citizen's complaint weighed heavily in the court's analysis.

The applicability of KRS 15.520 was not even discussed in *Howard v. City of Independence*, 199 S.W.3d 741 (Ky. App. 2006). The statute is only mentioned in passing towards the end of the opinion, when the Court of Appeals made the unremarkable observation that KRS 15.520 "limits a mayor's ability to discharge a police officer at will *if grounds set out in the statute apply.*" *Id.* at 745 (emphasis added). The opinion makes no reference to any disagreement between the parties over whether the statute applied to the facts presented in that case. Again, the precise issue *sub judice* was not presented to the court in *Howard*.

Although certainly not binding on this Court, it is significant to note that at least one federal court has examined the language of KRS 15.520 and reached the same conclusion regarding the limited applicability of the statute. In *Perry v. City of Oak Grove*, 2011 WL 5525936, *4 (W.D. Ky., Nov. 14, 2011), Judge Thomas B. Russell found that an argument identical to that made by Movant Hill "ignores the obvious cues from KRS § 15.520's language." Judge Russell believed the "diction [used in the statute's preamble] shows a *singular focus* by the legislature: balancing the rights of officers with public grievances leveled against them and the public's right to complain

about improper treatment at the hands of law enforcement” (emphasis added). Although Judge Russell did not ignore the trend in Kentucky appellate opinions, his analysis of the statute’s language preceded any reference to published or unpublished Kentucky authority. In completing his analysis of the statute’s language first, Judge Russell merely followed this Court’s principles of statutory interpretation, as noted *supra*.

B. Practical considerations also support a more restrictive interpretation of KRS 15.520.

Practical considerations and policy concerns also support a view of the statute’s limited applicability. Under an expansive reading of the statute, one that encompasses the interpretation given by *Movant Hill*, police departments and city officials would be subject to its provisions in all instances of employee discipline, no matter how slight or severe the infraction. A mayor or police chief faced with a police officer employee who is consistently late to work or regularly fails to report for shift, or one who commits acts of direct insubordination or is caught drinking on the job, or even an employee who has committed more serious rule violations, such as driving under the influence or stealing drugs from the evidence locker, would be required to conduct the same type of investigation in each instance.

Once the statute is implicated, the rights and duties of employers are strictly proscribed: the employer must provide the accused officer with forty-eight hour notice before any questioning or interrogation may occur, and the interview must occur while the accused is on duty; in certain instances, the accused officer would even have the right to counsel during any interview and to be informed of his *Miranda* rights. While these statutory requirements may not appear to be particularly onerous in the case of an accused officer who has stolen large quantities of cocaine from the department’s evidence

locker, they would be wholly inappropriate in the case of an employee who was consistently late for work. In such a situation, the employee's supervisor would not be allowed to question the employee regarding the reason for the excessive tardiness. Instead, the supervisor would be forced to file a formal charge, give the employee a 48-hour notice of interrogation, and then conduct the interrogation, where the employee would likely have an attorney present. Of course, if the accused is represented by counsel, then the department would also want counsel present, and all of this would have to occur just to allow the supervisor to ask the employee why he or she was late to work.

It defies reason to believe that the General Assembly intended to impose a set of rules that would lead to such an incredible waste of a city's resources. In addition, there is nothing in the statute to indicate that police officers are to be protected in such instances to a much greater degree than other city employees would be. An employee in a city's public works or accounting department would certainly not be allowed such protections, and it is unreasonable to extend them to police officers, other than in instances where the investigation stems from a citizen's complaint.

Police officers interact with citizens on a daily basis, often in situations where the citizen is not happy with the result. Consequently, there is a compelling reason to give police officers additional protection during an investigation instigated by a disgruntled citizen who may have been less than truthful in his or her complaint. However, as it relates to internal investigations concerning mundane and commonplace issues that all employers face—late employees, insubordinate employees, disrespectful employees, employees who violate internal policies—the General Assembly did not see fit to provide police officers with any more protection than the average government employee

possesses. Likewise, this Court should not extend the protection beyond the expressed language of the statute.

C. Presentation of Senate Bill 169 to the General Assembly's Senate Judiciary Committee provides clear evidence of statute's limited scope.

Finally, and perhaps the strongest evidence that Hill's position is incorrect, is a recent attempt to amend the language of the statute, found in Senate Bill 169, which was presented to the General Assembly during its 2012 Regular Session. The language of the proposed bill completely undermines Hill's argument that the statute currently applies in all cases of police officer discipline. The relevant portion of the proposed amendment reads as follows:

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 of 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 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.

S.B. 169, 2012 Reg. Leg. Sess. § 1 (Ky. 2012). The purpose of Senate Bill 169 could not be clearer—to broaden the scope of KRS 15.520 so that it becomes applicable to disciplinary actions taken against police officers based on internal departmental investigations, as well as to those based on a citizen’s complaint. If the extant version of KRS 15.520 already reached that far, as Hill argues, there would have been absolutely no reason for the existence of Senate Bill 169. The fact that it was presented to the General Assembly at all is an indisputable indication that KRS 15.520 does not in fact reach as far as Hill claims.

D. Most police officers in Kentucky are afforded employment protections by other statutes.

The argument that KRS 15.520 cuts with a broad swath, and covers all instances of police officer discipline, is undercut by the fact that the statute itself excludes an entire group of officers from its purview, specifically, those officers who work for cities that do not accept KLEFP funds. Further, all officers in cities of the second and third classes are protected by KRS 95.450, in cases of officer discipline arising from internal departmental investigations, and police officer employees of cities of the fourth and fifth classes can be protected as well, if the legislative bodies of those cities choose to enact KRS 95.765. Further, Movant Hill had available a means of contesting the disciplinary action through the Mt. Washington Police Department’s grievance procedures, of which he apparently declined to avail himself, opting instead to seek a hearing under KRS 15.520 to which he was not entitled. In addition, since Mt. Washington is a city of the fourth class, the City

Council of Mt. Washington was statutorily authorized to adopt KRS 95.765, which would have required a hearing before that legislative body prior to Movant Hill's termination even in the absence of KRS 15.520. Apparently, however, the city council did not enact that legislation. Therefore, if KRS 15.520 did not apply to the internal departmental investigation that led to Hill's termination, then he had no right to a hearing at all.

Under Hill's argument, even a city of the sixth class would be required to expend its often scant resources in meaningless procedures and wasteful hearings before a non-performing police officer—often the only one in that city's employ—could be terminated and replaced. Certainly the General Assembly did not intend such a result, and there is no evidence in the language of the statute that it did.

CONCLUSION

Wherefore, *Amicus Curiae* Kentucky League of Cities respectfully requests that this Court affirm the decision of the Kentucky Court of Appeals, which upheld the Bullitt Circuit Court's ruling that KRS 15.520 affords administrative due process rights to police officers only in the context of a citizen's complaint.

Respectfully submitted,

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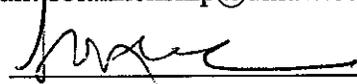
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