

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-CA-000104-D

STEPHEN DERRICK HILL

MOVANT

v.

CITY OF MT. WASHINGTON

RESPONDENT

AMICUS CURIAE BRIEF ON BEHALF OF
THE KENTUCKY STATE LODGE, FRATERNAL ORDER OF POLICE

Submitted by:

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CERTIFICATE

This is to certify that ten (10) copies of this Amicus Curiae Brief on Behalf of the Kentucky State Lodge, Fraternal Order of Police were mailed to Susan Stokley Clary, Clerk of the Supreme Court, New Capitol Bldg., 700 Capitol Avenue, Frankfort, KY 40601-3488 via U. S. Registered Mail on this the 21st day of November, 2012. True and accurate copies of the original were mailed, postage prepaid, on this same day to the following:

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STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES.....i-ii

PURPOSE OF THE BRIEF.....1

ARGUMENT.....1-12

A. The Legislature’s intent in enacting KRS § 15.520.....1

Commonwealth vs. Garnett, 8 S.W.3d 573 (Ky. App. 1999).....1

 KRS § 446.080(1).....1-2

 Acts 1980, Ch. 333, § 1, effective July 15, 1980).....2

 KRS § 15.520.....passim

 KRS § 15.410.....2

 KRS § 15.440(1), (d), (e).....3

 KRS § 15.460(1).....3

 KRS § 15.450(3).....3

 KRS § 136.392.....3

 2012-2014 Budget of the Commonwealth, Operating Budge – Volume I
(Part B), pg. 223.....3-4

**B. A common and approved usage of the language in KRS § 15.520 is
that the statute had two simultaneous, concurrent purposes – (1) to
provide due process rights for police officers and (2) provide a means
for redress for citizens allegedly wronged by police officers.....7**

 KRS § 446.080(4).....7

**C. The provisions of KRS § 15.520 as a whole provide guidance to this
Court that the statute had two simultaneous, concurrent purposes –
(1) to provide due process rights for police officers and (2) provide a
means for redress for citizens allegedly wronged by police officers.....7**

Exec. Branch Ethics Comm'n v. Stephens, 92 S.W.3d 69, 73 (Ky. 2002)..8

Johnson v. Frankfort and Cincinnati R.R., et al., 197 S.W.2d 432 (Ky.
1946).....8

	<u>County of Harlan v. Appalachian Reg'l Healthcare, Inc.</u> , 85 S.W.3d 607, 611 (Ky. 2002).....	8
	<u>Democratic Party of Ky. v. Graham</u> , Ky., 976 S.W.2d 423 (Ky. 1998).....	8
	11 Ky. L. Summary 24 (1998).....	8
D.	Kentucky case law interpretation of KRS § 15.520	8
	<u>Pearce vs. University of Louisville</u> , 2011-SC-000756-D.....	8-9
E.	The proposal of Senate Bill 169 during the 2012 Regular Session of the General Assembly should not be seen as a concession by Officer Hill or considered to undermine his or the FOP's stance on the current interpretation and purpose of KRS § 15.520	9
	Ky. CR 76.28(4)(c).....	9
F.	A practical application of KRS § 15.520	11

PURPOSE OF THE BRIEF

Article II, Section 1 of the Constitution and By-Laws of the Kentucky State Lodge, Fraternal Order of Police (hereinafter "FOP") provide that "[t]his organization is formed for the purpose of bettering existing conditions of Law Enforcement Officers by solidifying their strength and promoting their mutual welfare in this State and Nation through our affiliation with the National Order of the Fraternal Order of Police." The issue to be decided by this Court is whether the due process protections of KRS § 15.520 apply to department disciplinary actions of police officers that are not triggered by citizen complaints.

In promoting its stated purpose of bettering the conditions of police officers, the Kentucky State FOP, with 10,000 members, has a considerable interest in ensuring that this issue is decided in accordance with the fundamental purpose of KRS § 15.520. The purpose of this Brief is to address specific issues not already addressed by the Movant's Brief relating to the Legislature's intent and object in enacting KRS § 15.520 as well as provide additional support as to why KRS § 15.520 should be interpreted to encompass all disciplinary actions against police officers of this Commonwealth, regardless of the source.

ARGUMENT

A. The Legislature's intent in enacting KRS § 15.520.

The focus of this case is the Bullitt Circuit Court's construction of a statute and therefore this Court's review of this case is *de novo*. Commonwealth vs. Garnett, 8 S.W.3d 573, 575 (Ky. App. 1999). KRS § 446.080(1) provides that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the

intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.” KRS § 15.520 was enacted in 1980 (Enact. Acts 1980, ch. 333, § 1, effective July 15, 1980). The FOP has been in existence since well before 1980 and was the driving force behind the enactment of KRS § 15.520.

In July 1972 the Kentucky Law Enforcement Foundation Program Fund (KLEFPF) was established by the Legislature. Briefly stated, KLEFPF is a program in which the Commonwealth of Kentucky pays for police officers to undergo initial and annual in-service training at an approved training facility. Local units of government who participate in KLEFPF benefit by employing highly trained officers and the officers themselves benefit by receiving an annual salary supplement to undergo the training.

KRS § 15.410 provides that “[i]t is the intention of the General Assembly to assure that the criminal laws of the Commonwealth are enforced fairly, uniformly and effectively throughout the state by strengthening and upgrading local law enforcement; to attract competent, highly qualified young people to the field of law enforcement and to retain qualified and experienced officers for the purpose of providing maximum protection and safety to the citizens of, and the visitors to, this Commonwealth; and to offer a state monetary supplement for local law enforcement officers while upgrading the educational and training standards of such officers.” Thus, the purposes were:

- (1) assuring laws are fairly enforced;
- (2) strengthening and upgrading law enforcement;
- (3) attracting competent and highly qualified officers to law enforcement;
- (4) retaining those highly qualified officers in law enforcement;

- (5) offering a state monetary supplement to officers; and
- (6) upgrading the educational and training standards of officers.

In order for a local unit of government to participate in KLEFPF, the local unit must require its police officers to (1) successfully complete an initial basic training course of at least 640 hours' duration within 1 year of the date of employment at a school certified or recognized by the Kentucky Law Enforcement Council, and (2) successfully complete an annual in-service training course of at least 40 hours' duration at one of those schools. See KRS 15.440(1)(d), (e). If a local unit of government participates in KLEFPF and adheres to its requirements, the local unit receives from the general fund of the Commonwealth of Kentucky the following:

- (1) an annual supplement of \$3,100 for each qualified police officer it employs [See KRS § 15.460(1)]; and
- (2) an amount equal to the required employer's contribution on the supplement to the defined benefit pension plan to which the officer belongs [See KRS § 15.460(1)].

The Justice and Public Safety Cabinet (through the Department of Criminal Justice Training) provides entry-level and in-service training for approximately 20,000 officers each year. The Commonwealth also reimburses from its general fund to the Justice and Public Safety Cabinet the salaries and costs of administering the KLEFPF fund, including, but not limited to, council operations and expenses. See KRS 15.450(3). The KLEFPF agency resources are derived from property and casualty insurance premium surcharge proceeds, which accrue pursuant to KRS 136.392. The Budget of the Commonwealth includes \$47,523,900 in fiscal year 2013 and \$48,168,600 in fiscal year

2014 for KLEFPF.¹ Cities and counties benefit by employing highly trained officers to protect their citizens, and the officers themselves benefit by being paid an annual supplement and pension contribution to undergo training.

Thus, by establishing the KLEFPF fund, the Commonwealth acquired a direct pecuniary interest in the job protection of trained police officers employed by local units of government within the Commonwealth. The Commonwealth has an interest in ensuring that the police officers they pay to train keep their jobs unless there is a good and legitimate reason to fire them. Otherwise, the Commonwealth runs the risk of paying excessive amounts of money to agencies who participate in KLEFPF if those agencies were to have a high rate of police officer transiency, especially in light of the costs for the initial training being greater than the costs for the annual in-service training. To protect against that risk, KRS § 15.520 was enacted in 1980 to provide trained police officers with a “bill of rights” – due process protections designed to ensure that if a police officer is disciplined, it is for a good, valid reason, regardless of the source.

Police officers were provided with due process rights designed to ensure that discipline is imposed only when warranted, whether by way of citizen complaint or by internal departmental action. It prevents police officers from being disciplined for illegitimate reason(s) or no reason at all. If a disciplinary charge stems from a departmental action, the police officer has the right to formal written notice of the charge, sufficient time to respond, opportunity to have a hearing, etc. to determine whether the charge can be substantiated. And if the charge stems from a citizen complaint,

¹ See 2012-2014 Budget of the Commonwealth, Operating Budget - Volume I (Part B), pg. 223.

procedures are in place to ensure that the complaint is legitimate before any disciplinary action can be taken against the officer.

Thus, the Legislature's object and intent in enacting KRS § 15.520 were to ensure that police officers are only disciplined for good reason. Regardless of whether the disciplinary charge is based upon a departmental investigation or a citizen complaint, if the officer is fired, the Commonwealth still pays. This is the reason why it makes absolutely no sense, and is contradictory to the Legislature's object and intent in enacting KRS § 15.520, to restrict the procedural due process rights to only police officers who are accused of wrongdoing by citizens.

Additionally, the Legislature at the time it enacted KRS § 15.520 recognized that disciplinary charges against police officers sometimes originated from the complaint of a private citizen. Another purpose of KRS § 15.520 was to provide a "means for redress by the citizens of the Commonwealth for wrongs allegedly done to them by police officers." See KRS § 15.520(1). However, not all citizen complaints against police officers are warranted. When someone is arrested, it is usually not a pleasant experience for the arrestee. KRS § 15.520(1)(a) requires a sworn statement by the complainant, and if the complainant refuses to provide that statement, disciplinary charges can only be brought against the police officer if the department can independently substantiate the allegations absent the sworn statement of the complainant. These are protections designed to protect police officers from unsubstantiated charges, i.e. a citizen who is unhappy about a lawful arrest. If a complaint is legitimate, KRS § 15.520(1)(a) provides a process for disciplinary charges to be brought against the police officer, i.e. the citizen has a "means

for redress.” At the same time, the police officer is protected from facing discipline stemming from unwarranted citizen complaints.

KRS 15.520(4) provides that only those local units of government that receive KLEFPF funds need abide by these protections afforded to police officers by KRS § 15.520. By including that subsection, the Legislature clearly indicated its intent to protect the Commonwealth’s pecuniary interest in providing due process protection for police officers faced with disciplinary charges. As such, the FOP disagrees with the holding of the Court of Appeals that the protections of KRS § 15.520 only apply upon citizen complaints because, as stated above, if the officer is fired, the Commonwealth still pays, regardless of the source of the charges.

As a final consideration regarding the intent and object of the Legislature in enacting KRS § 15.520, if this Court agrees with the Court of Appeals that the procedural due process rights of KRS § 15.520 only apply to police officers who are accused of wrongdoing based upon a citizen complaint, the ultimate effect would be that few, if any, employing local units of government would ever actually accept a citizen complaint. If the protections are triggered only upon the receipt of a citizen complaint, why would an employing local unit of government choose to accept one? Doing so would require compliance with KRS § 15.520. Instead, the employing local unit of government could simply receive notification by the citizen of what allegedly happened (not formally accept a complaint) and then handle the potentially disciplinary charges interdepartmentally, without having to follow KRS § 15.520. Not only would this harm police officers, it would essentially nullify and make non-existent all citizen complaints of police wrongdoing. Such an effect was certainly not the object and intent of the Legislature.

- B. A common and approved usage of the language in KRS § 15.520 is that the statute has two simultaneous, concurrent purposes – (1) to provide due process rights for police officers and (2) provide a means for redress for citizens allegedly wronged by police officers.**

KRS § 446.080(4) provides, in reference to statutory construction, that “[a]ll words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.” KRS § 15.520(1) states a dual purpose, “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.”

The “common and appropriate usage” of the phrase “and at the same time” is to indicate concurrence, or something overlapping in duration with something else. By its very meaning, “concurrence” means simultaneous occurrences (plural). Thus, a plain construction of the KRS § 15.520(1) is that the statute had two simultaneous, concurrent purposes – (1) to provide due process rights for police officers and (2) provide a means for redress for citizens allegedly wronged by police officers. It would then be incorrect to find that the application of the due process protections of KRS § 15.520 is restricted to citizen complaints because the first purpose listed above would not be served concurrently, or simultaneously, with the second purpose.

- C. The provisions of KRS § 15.520 as a whole provide guidance to this Court that the statute has two simultaneous, concurrent purposes – (1) to provide due process rights for police officers and (2) provide a means for redress for citizens allegedly wronged by police officers.**

If there is any doubt from the language used by the Legislature as to the intent and purpose of the law, then courts in interpreting the statute should avoid a construction which would be unreasonable and absurd in preference to one which is reasonable, rational, sensible and intelligent. Exec. Branch Ethics Comm'n v. Stephens, 92 S.W.3d 69, 73 (Ky. 2002), *citing* Johnson v. Frankfort and Cincinnati R.R., et al., 303 Ky. 256, 197 S.W.2d 432 (1946). General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy. County of Harlan v. Appalachian Reg'l Healthcare, Inc., 85 S.W.3d 607, 611 (Ky. 2002), *citing* Democratic Party of Ky. v. Graham, Ky., 976 S.W.2d 423, 45:11 Ky. L. Summary 24 (1998).

Here, KRS § 15.520(1)(a) refers to procedures based upon citizen complaints. However, section (1)(b) does not distinguish between citizen and departmental complaints and (1)(c) refers generally to “a departmental matter involving alleged misconduct.” The due process requirements of sections (1)(d) – (h) must be complied with whether or not the action was initiated by a citizen complaint. As such, looking at the statute as a whole, the due process protections apply regardless of whether the disciplinary charges stem from a citizen complaint. Section (1)(a) is the only subsection, and it must be emphasized that this is a **subsection**, that addresses citizen complaints.

D. Current case law interpretation of KRS § 15.520.

Pearce vs. University of Louisville, 2011-SC-000756-D, is under discretionary review in this Court along with the present case and deals with the same issue as this case. The FOP filed an Amicus Curiae Brief in Pearce which addressed how Kentucky

courts, from the enactment of KRS § 15.520 in 1980 through 2005, routinely applied KRS § 15.520 to disciplinary matters involving police officers not derived from citizen complaints, but rather triggered by internal agency charges. However, a shift occurred in 2006 regarding the application of KRS § 15.520. In the interest of judicial economy, the FOP will not repeat that analysis herein but instead adopt the analysis set forth in the Amicus Curiae Brief it filed in Pearce.

E. The proposal of Senate Bill 169 during the 2012 Regular Session of the General Assembly should not be seen as a concession by Officer Hill or considered to undermine his or the FOP's stance on the current interpretation and purpose of KRS § 15.520.

Senator David Givens sponsored Senate Bill 169 during the 2012 Regular Session of the General Assembly. The Local Mandate Fiscal Impact Estimate indicates that “[s]everal courts have found that due process rights guaranteed by KRS § 15.520 are only applicable to police officers accused of wrongdoing by citizens and are not applicable to internal departmental disciplinary matters.” (Citations omitted). As such, Senate Bill 169 “amends KRS 15.5200 commonly known as the ‘Police Officer Bill of Rights’ to “extend procedural due process rights to police officers in intradepartmental disciplinary actions.”

As indicated above, beginning in 2006, three unpublished decisions from the Kentucky Court of Appeals held that the due process protections of KRS § 15.520 only apply when triggered by a citizen complaint. No appeals were taken from those decisions. As such, those decisions [although unpublished and therefore not binding per Ky. CR 76.28(4)(c)], as well as the holdings of the Court of Appeals in this case and Pearce, set forth how KRS § 15.520 is currently interpreted. Senate Bill 169 was a

measure designed to clear up any ambiguities in how KRS § 15.520 should be interpreted, e.g. to avoid this issue in the future.

Additionally, Senate Bill 169 was introduced at a time when this case and Pearce were pending motions for discretionary review. There was no way of knowing at the time Senate Bill 169 was introduced whether those motions would be granted by this Court. As such, the Court of Appeals holdings in this case and Pearce, both of which held that the protections of KRS § 15.520 were only triggered upon a citizen complaint, represented the current law on the interpretation of KRS § 15.520. This matter, as well as Senate Bill 169, are both measures geared towards the achievement of a common goal – to ensure that due process protections of KRS § 15.520 apply regardless of the source of the disciplinary action. And obviously as it relates to this case, the Court of Appeals was incorrect in holding that the protections of KRS § 15.520 did not apply to the disciplinary action taken against Officer Hill.

Senate Bill 169 should not be seen as a concession by Officer Hill or considered to undermine his or the FOP's stance on the current interpretation and purpose of KRS § 15.520. Officer Hill and the FOP both believe that KRS § 15.520, as it is currently worded, should be interpreted to apply to all disciplinary actions against police officers, regardless of the source. Senate Bill 169 was designed to prevent a future situation similar to this matter by clearing up any potential discrepancy (and there is a discrepancy, obviously, or else this matter would not currently be before the Supreme Court of Kentucky) regarding the interpretation of KRS § 15.520.

F. A practical application of KRS § 15.520.

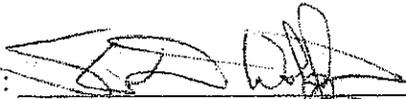
Police officers serve the important function of serving and protecting communities across this Commonwealth. As such, ensuring the integrity of the profession and merit of those who serve is of great importance to its citizens. Police officers should be entitled to statutory protections of KRS § 15.520, similar to teachers and firefighters, who also enjoy due process protections in their employment based upon their important functions in serving the citizens of this Commonwealth.

Due to the interactive nature of their employment, police officers become familiar with the residents who live in the communities they protect, as well as the problems associated with those communities. Interpreting the protections of KRS § 15.520 to apply only upon the existence of a citizen complaint would mean a local unit of government could terminate the employment of a highly qualified, seasoned police officer for an illegitimate reason, or no reason at all. It is the position of the FOP that the employment of such an officer should only be terminated for reason(s) that can be substantiated, and not at the mere whim of his or her employing local unit of government.

KRS § 15.520 provides police officers with a certain degree of job security, i.e. they know that they will only be disciplined if there is a good reason for the discipline. Take that away from them, and it could lead to sub-par performance. They are employed in high risk, high stress positions requiring the ability to quickly think and react on their feet – the last thing they need to be worried about is the risk of losing their job even if they do nothing wrong. It is reasonable to infer that the Legislature factored these considerations in enacting KRS § 15.520.

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