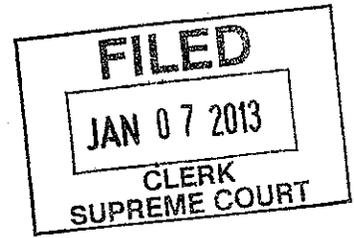


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
2012-SC-000104-D



STEPHEN DERRICK HILL

MOVANT

v.

CITY OF MT. WASHINGTON

RESPONDENT

RESPONDENT'S BRIEF

\*\*\*\*\*

Kentucky Court of Appeals No. 2011-CA-00328-MR

On Appeal from Bullitt Circuit Court  
Case No. 09-CI-00341  
Hon. Rodney D. Burress

\*\*\*\*\*

CERTIFICATE

The undersigned certifies that the record on appeal was not withdrawn from the Bullitt Circuit Court Clerk by the party filing this brief. The undersigned further certifies that copies of this brief were served upon the following named individuals by First Class Mail on this the 7<sup>th</sup> day of January, 2013:

Hon. Samuel P. Givens, Jr.  
Clerk of the Court of  
Appeals  
360 Democrat Drive  
Frankfort, KY 40601

Hon. Rodney D. Burress, Judge  
Bullitt Circuit Court, Division I  
Bullitt Judicial Center  
PO Box 746  
Shepherdsville, KY 40165

David D. Fuller  
David D. Fuller, PLLC  
517 West Ormsby Avenue  
Louisville, KY 40203

Respectfully submitted,  
STURGILL, TURNER, BARKER & MOLONEY, PLLC

CHARLES D. COLE  
PATSEY ELY JACOBS  
DERRICK T. WRIGHT  
333 West Vine Street, Suite 1400  
Lexington, Kentucky 40507  
Telephone: (859) 255-8581  
Facsimile: (859) 231-0851  
COUNSEL FOR RESPONDENT

## STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(d)(i), Appellee believes that oral argument would assist the Court in light of the wide range of statutes, legislative history, cases, and Opinions of the Attorney General that have been relied upon by the parties and may need further explication. In addition, Appellee further recognizes that oral argument appears to be anticipated by the Court's September 12, 2012 Order consolidating oral arguments in this case with *Pearce v. University of Louisville*, No. 2011-SC-000756-D.

## COUNTERSTATEMENT OF THE CASE

### *Undisputed Facts*

This lawsuit arises out of employee disciplinary action taken against Appellant Stephen Derrick Hill, who was a police officer with Appellee City of Mount Washington. The discipline was based on statements by Hill to other officers during roll call on October 27, 2008 about then Police Chief Thomas Rosselli. Chief Rosselli initiated an investigation into Hill's comments. After interviewing Hill and three other officers, Chief Rosselli issued a November 10, 2008 Memorandum to Mayor Joetta Calhoun recommending a five-day suspension and reassignment from sergeant to patrol officer for insubordination under Standard Operating Procedure ("SOP") 3011.00. R. at 15-16 (Def.'s Mem. Supp. Summ. J.); R. at 26-28 (Ex. A to Def.'s Mem. Supp. Summ. J.).

Mayor Calhoun approved Chief Rosselli's recommendation and signed the memo. *Id.* A separate November 10, 2008 Memorandum from Chief Rosselli was issued to Hill regarding the disciplinary action that had been recommended and approved. R. at 29 (Ex. B to Def.'s Mem. Supp. Summ. J.)(Tab 4 to Appellant's Appendix). Chief Rosselli's memo to Hill did not reference KRS 15.520, but advised that Hill could pursue internal remedies under SOP 6036.00. *Id.*

A November 14, 2008 letter by attorney Mary W. Sharp on behalf of Hill requested to appeal Hill's discipline. Ex. 3 to Rosselli Dep. filed of record (Tab 5 to Appellant's Appendix). Sharp's letter purported to invoke both KRS 15.520 and SOP 6036.00. *Id.* Chief Rosselli responded in writing that KRS 15.520 was inapplicable, but advised that he would discuss Hill's grievance with him in accordance with internal SOP. R. at 30 (Ex. C to Def.'s Mem. Supp. Summ. J.)(Tab 6 to Appellant's Appendix).

Discussions between Chief Rosselli and Hill occurred on November 20, 2008. However, Chief Rosselli found no reason to change his initial recommendation at that time. R. at 16 (Def.'s Mem. Supp. Summ. J.). Chief Rosselli's reported his determination to Mayor Calhoun and Hill in separate memos dated November 20, 2008 and November 21, 2008. R. at 31-33 (Ex. D and E to Def.'s Mem. Supp. Summ. J.).

In a December 1, 2008 letter, Sharp submitted another request for hearing to Chief Rosselli on behalf of Hill that again referenced both KRS 15.520 and SOP 6036.00. Ex. 7 to Rosselli Dep. filed of record (Tab 8 to Appellant's Appendix). However, the City determined that Hill was not entitled to a hearing at that point. Hill subsequently filed this lawsuit in Bullitt Circuit Court in March 2009 alleging that failure to provide a hearing to him violated KRS 15.520 and internal policy. R at 1-3 (Compl. ¶ 4).

#### *Procedural History*

After discovery in the circuit court action, both parties moved for summary judgment. R. at 37-38 (Def.'s Mot. Summ. J.); R. at 77-78 (Pl.'s Mot. Summ. J.). The operative facts were not in dispute. Therefore, whether KRS 15.520 or internal policy required a hearing based on the circumstances of this case was a pure issue of law for the trial court to decide.

The City argued that KRS 15.520 requires a hearing only when triggered by complaints from members of the public outside of the police department (*i.e.*, aggrieved citizens). In this case, the disciplinary issue (Hill's insubordinate comments to other officers about Chief Rosselli) and investigation (Chief Rosselli interviewing Hill and

three other officers) were purely internal matters. KRS 15.520 is inapplicable under these circumstances.<sup>1</sup> R. at 18-19 (Def.'s Mem. Supp. Summ. J.).

A hearing is also available under the City's SOPs (though not necessarily subject to the same formalities as KRS 15.520). However, that internal grievance process has several levels of review with varying filing prerequisites. The City argued that Sharp's letters to Chief Rossellie on behalf of Hill did not follow SOP protocol. R. at 19-23 (Def.'s Mem. Supp. Summ. J.).

Bullitt Circuit Judge Rodney Burress agreed with the City on both points and granted the City's summary judgment motion. R. at 94-97 (Jan. 7, 2011 Order)(Tab 2 to Appellant's Appendix). Hill appealed the trial court's judgment, but review only focused on whether KRS 15.520 required a citizen's complaint to trigger a hearing under that statute. The Kentucky Court of Appeals affirmed the trial court's ruling with respect to KRS 15.520's scope. *Hill v. City of Mount Washington*, No. 2011-CA-000378-MR (Ky. App. Jan. 20, 2010)(Tab 1 to Appellant's Appendix).

In addition to Hill's lawsuit, the Kentucky Court of Appeals has directly considered the same statutory issue under KRS 15.520 in several other cases. *Beavers v. City of Berea*, 2010-CA-001522-MR, 2012 WL 28690 (Ky. App. Jan. 6, 2012)(Tab 1 to Appellee's Appendix); *Pearce v. University of Louisville*, No. 2009-CA-001813-MR (Ky. App. Nov. 18, 2011)(Tab C to Pearce's Appendix); *Moore v. City of New Haven*,

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<sup>1</sup> Beyond KRS 15.520, Mount Washington is a fourth class city pursuant to KRS 81.010(4) given discretion by KRS 95.761(1) to adopt civil service through which police officers are entitled to due process under KRS 95.765. However, Mount Washington has not adopted civil service and Hill has not argued otherwise during this lawsuit. In the absence of a citizen's complaint triggering a hearing under KRS 15.520 or an ordinance adopting civil service hearing requirements under KRS 95.765, Hill may be terminated or disciplined at will pursuant to KRS 83A.130(3) and (9). *See, e.g., City of Munfordville v. Sheldon*, 977 S.W.2d 497, 498-99 (Ky. 1998).

2010-CA-000019-MR, 2010 WL 4295588 (Ky. App. Oct. 29, 2010)(Tab 2 to Appellee's Appendix); *Ratliff v. Campbell County*, 2009-CA-000310-MR, 2010 WL 1815391 (Ky. App. May 7, 2010)(Tab 3 to Appellee's Appendix); *Marco v. Univ. of Kentucky*, 2005-CA-001755-MR, 2006 WL 2520182 (Ky. App. Sept. 1, 2006)(Tab P to Pearce's Appendix). The decisions in all of those actions are consistent with *Hill*. Only Judge Michael Caperton, in both *Pearce* and *Beavers*, has dissented.

Hill moved for discretionary review, which this Court granted. The issue on review is confined to KRS 15.520. Whether the City's internal policy required a hearing is no longer at issue. This Court also granted discretionary review in *Pearce* and has consolidated oral arguments in that case with this lawsuit. Hill's brief expressly adopts Pearce's KRS 15.520 arguments. Hill Br. at 12 ("Hill hereby adopts the analysis in *Pearce*"). The Fraternal Order of Police ("FOP") and Kentucky League of Cities ("KLC") have also tendered amicus curiae briefs in this case that raise additional issues relating to KRS 15.520.

Finally, while some of this KRS 15.520 litigation was pending in the court system, legislative activity concerning that statute was also afoot. During the General Assembly's 2012 Regular Session, Senate Bill ("SB") 169 proposed substantive amendments expressly intended to extend KRS 15.520 to police disciplinary actions outside of citizens' complaints specifically in response to *Pearce* and *Beavers*. S.B. 169, 2012 Reg. Sess. (Tab 4 to Appellee's Appendix); Local Mandate Fiscal Impact Estimate (Tab 5 to Appellee's Appendix). However, the General Assembly did **not** pass SB 169.

The City's brief fully responds to all of the KRS 15.520 issues pursued by Hill, Pearce, and the FOP. In addition, both KRS 15.520 litigation and legislative activity by

the General Assembly is addressed. For the reasons stated below, judgment entered in favor of the City by the trial court and upheld by the Court of Appeals should be affirmed.

## ARGUMENT

### *Standard of Review*

The sole issue before the Court is the scope of KRS 15.520: whether KRS 15.520 requires hearings only when triggered by complaints from aggrieved citizens and Hill is otherwise employed at will, or whether every police officer covered by KRS 15.520 is subject to discipline only “for cause” and entitled to hearings for “all” disciplinary actions. Statutory construction is a question of law subject to *de novo* review by this Court. *Maynes v. Commonwealth*, 361 S.W.3d 922, 924 (Ky. 2012); *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

In construing statutes, the Court’s “goal” is to give effect to the “intent” of the General Assembly. *Maynes*, 361 S.W.3d at 924; *Shawnee Telecom*, 354 S.W.3d at 551. Intent is derived, if at all possible, from the language that the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. *Maynes*, 361 S.W.3d at 924; *Shawnee Telecom*, 354 S.W.3d at 551. However, the language used by the General Assembly cannot be scrutinized in isolation. The Court must “read the statute as a whole and in context with other parts of the law.” *Petitioner F v. Brown*, 306 S.W.3d 80, 85-86 (Ky. 2010).

The Court presumes that the “General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.” *Maynes*, 361 S.W.3d at 924; *Shawnee Telecom*, 354 S.W.3d at 551.

The Court also presumes that the “General Assembly did not intend an absurd statute or an unconstitutional one.” *Maynes*, 361 S.W.3d at 924; *Shawnee Telecom*, 354 S.W.3d at 551. If the statute is ambiguous, statutory canons of construction and legislative history may be referenced. Relevant legislative history includes “[b]ills presented but not passed,” which underscores SB 169’s significance in this case. *Fiscal Court of Jefferson Co. v. City of Louisville*, 559 S.W.2d 478, 480 (Ky. 1977).

All of these principles factor into the City’s statutory analysis. From the statute’s plain language to its legislative history, the City’s narrower statutory interpretation should be affirmed that limits hearings required by KRS 15.520 to complaints by aggrieved citizens.

#### *Summary of Argument*

Hill’s lawsuit against the City of Mount Washington hinges on the scope of KRS 15.520. However, the statutory dispute in this case has much broader significance beyond these parties. KRS 15.520 extends to all police officers who receive Kentucky Law Enforcement Foundation Program (“KLEFP”) funds, which include members of county, urban-county, and municipal police departments, sheriffs and full-time deputies, and university campus police officers. KRS 15.520(4); KRS 15.420(2). The statute thus covers most police officers in the Commonwealth, including Hill, who received KLEFP funds while employed by the City.

The lawsuit’s widespread significance is further underscored by the deep gulf that divides the parties on this issue. Hill, Pearce, and the FOP believe that every police officer covered by KRS 15.520 is subject to discipline only “for cause” and entitled to hearings for “all” disciplinary actions. Hill Br. at 14 (“KRS 15.520 applies to all

investigations and hearings of police officers ...."); Pearce Br. at 13 (arguing that KRS 15.520 applies "to all discipline") and 16 n. 9 (arguing that KRS 15.520 applies to "disciplinary action, for cause, rather than the citizen complaint"); FOP Br. at 4 (arguing that KRS 15.520 "prevents police officers from being disciplined for illegitimate reason(s) or no reason at all" and applies to all discipline "whether by way of citizen complaint or by internal departmental action"). Such sweeping statutory application has substantial consequences given the statute's expansive coverage – local governments of every size will be subject to hearings and potential appeals to circuit court for any disciplinary action against police officers.

The City counters that KRS 15.520 contemplates hearings only when triggered by complaints from aggrieved citizens and that other statutes control whether police officers are otherwise employed at will or entitled to disciplinary hearings in contexts outside of a citizen's complaint. This narrower statutory application comports with KRS 15.520's plain language considered as a whole and in context with related police discipline statutes. In addition, the balance of authority applying KRS 15.520 also weighs in favor of the City's narrower statutory interpretation. Both of those points are summarized below.

To begin, KRS 15.520 has no express guarantee that police officers are subject to discipline only "for cause" or that "all" disciplinary actions are subject to formal hearings and appeals to circuit court. In contrast, other statutes governing police officer discipline and employment specify if discipline based on charges initiated either internally (by the employer) or externally (by an aggrieved citizen) are subject to cause and review. The

absence of similar language and design in KRS 15.520 is highly persuasive that KRS 15.520 has less sweeping application.

Furthermore, other statutes governing police officer discipline and employment create **mandatory** disciplinary procedures for police in second and third class cities and merged urban-county governments, but similar police civil service systems and merit boards are **optional** for smaller local governments, including the City of Mount Washington, and those police officers are otherwise employed **at will**. Limiting hearings under KRS 15.520 to complaints by aggrieved citizens harmonizes KRS 15.520 with these related statutes and gives greater meaning and effect to all parts of the law by preserving discretion vested in small local governments.

In addition, having a hearing and potential appeal to circuit court in every police disciplinary action is likely impractical for some, if not most, small local governments. Longstanding Kentucky precedent further recognizes that due process has limits within police departments that are “structured in the traditional military chain-of-command mode” and that hearings for every internal disciplinary matter would be “ridiculous.” *Hockensmith v. City of Frankfort*, 723 S.W.2d 855, 857 (Ky. App. 1986). The City’s statutory interpretation, narrowly construing KRS 15.520 in conjunction with other related statutes, allocates such burdens among local governments more reasonably.

Recent legislative activity also reinforces that KRS 15.520 is not intended to require hearings for purely internal disciplinary issues. During the General Assembly’s 2012 Regular Session, SB 169’s express “purpose” was to substantively “amend[]” KRS 15.520 to “extend” to police disciplinary actions outside of citizens’ complaints. S.B. 169, 2012 Reg. Sess. (Appellee’s Appendix Tab 4); Local Mandate Fiscal Impact

Estimate (Appellee's Appendix Tab 5). SB 169, however, failed to pass. "Bills presented but not passed" are entitled to "some bearing" on legislative intent under Kentucky law. *Fiscal Court of Jefferson Co.*, 559 S.W.2d at 480.

Finally, the balance of authority applying KRS 15.520 also weighs in favor of the City's narrower statutory interpretation. "For cause" employment is inconsistent with *City of Munfordville v. Sheldon*, 977 S.W.2d 497 (Ky. 1998). *Sheldon* underscores two significant points: (i) other parts of the law vest "discretion" in small local governments to remove or discipline police officers "at will"; and (ii) KRS 15.520 overrides such discretion only if "triggered." *Id.* at 498-99. The triggering event based on the statute's plain language and *Sheldon* both point to citizens' complaints. In addition, six decisions by the Kentucky Court of Appeals, including this case and *Pearce*, have directly considered whether KRS 15.520 contemplates hearings in the absence of a citizen's complaint and all of those decisions determined that no hearing was required. Hill and Pearce cite several other cases and Opinions of the Attorney General, but those authorities involved distinguishing factors or KRS 15.520's text and relationship to other statutes was not fully considered.

**I. The statute's plain language considered as a whole and in context with other laws, relevant canons of statutory construction, and legislative history support the City's application of KRS 15.520 and refute the arguments by Hill, Pearce, and the FOP.**

The statutory dispute before this Court begins with the statute's plain language, but that initial inquiry must consider the statute "as a whole and in context with other parts of the law." *Petitioner F*, 306 S.W.3d at 85-86. To the extent that KRS 15.520 is unclear or ambiguous, statutory canons of construction and legislative history may be referenced. The City scrutinizes KRS 15.520 in accordance with these principles. For

the reasons stated below, KRS 15.520 contemplates hearings relating to complaints by aggrieved citizens, but has no requirement that police officers are subject to discipline only “for cause” and entitled to hearings in “all” disciplinary actions.<sup>2</sup> The statutory arguments by Hill, Pearce, and the FOP are insufficient and should be rejected.

- a. **In considering KRS 15.520’s plain language “as a whole,” the statute has no hearing requirement for all disciplinary actions and only contemplates hearings based on complaints by aggrieved citizens.**

KRS 15.520(1) sets out the legislative intent behind the statute. That subsection 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 Assemble to deal fairly and set administrative due process rights for police officers of the local unit of government and at the same time providing a means of redress by the citizens of the Commonwealth for wrongs allegedly done to them by police officers covered by this section ....

Hill, Pearce, and the FOP refer to KRS 15.520(1), but that subsection does not guarantee “for cause” employment or hearings for every disciplinary action. The statute’s purpose appears to contemplate due process in conjunction with redress for citizens aggrieved by police wrongdoing. KRS 15.520(1) (purporting to provide due process and redress “at the same time”).

KRS 15.520(1)(a) implements the statute’s objective with respect to citizens by mandating police departments to take complaints that allege police misconduct. *Id.* (“Any complaint taken from any individual alleging misconduct on the part of any police

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<sup>2</sup> Although Appellant’s Appendix has a copy of KRS 15.520, Tab 6 to the Appellee’s Appendix includes another copy of that statute for ease of reference since the City cites it so frequently.

officer, as defined herein, **shall** be taken as follows....”)(emphasis added).<sup>3</sup> The statute further contemplates hearings based on citizens’ complaints. KRS 15.520(1)(h)(3) (“If any hearing is based upon a complaint of an individual, the individual shall be notified to appear at the time and place of the hearing by certified mail, return receipt requested....”). This Court has held that dismissing a police officer covered by KRS 15.520 based on a citizen’s complaint triggers a hearing under that statute. *City of Munfordville v. Sheldon*, 977 S.W.2d at 499.

An opportunity for a hearing before elected leaders, those persons who would be most sensitive to aggrieved citizens, is reasonably necessary to give complete redress. Even though police departments are mandated to take complaints, citizens could question whether redress is actually available if police departments have sole discretion to screen and dispose of those complaints without a hearing. To counterbalance citizen redress,

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<sup>3</sup> Litigants in other KRS 15.520 cases have argued that “any individual” in KRS 15.520(1)(a) could include members of the public or police department. *See, e.g., Beavers*, 2010-CA-001522-MR, 2012 WL 28690 at \*2 (Tab 1 to Appellee’s Appendix). Arguments by Hill, Pearce, and the FOP before this Court have not stretched KRS 15.520(1)(a) that far. Even Judge Caperton, who dissented in *Beavers* and *Pearce*, equates individuals in KRS 15.520(1)(a) to citizens. The issue has no merit. The phrase “any individual” has meaning and effect only if strictly equated to aggrieved citizens. If the General Assembly had intended police departments to process all misconduct issues through complaints under KRS 15.520(1)(a), then KRS 15.520(1)(a) would simply apply to “any complaint” and the additional language “taken from any individual” would be impermissibly “superfluous.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’ ”). Indeed, SB 169 proposed deleting that language from KRS 15.520 in order to extend the statute to complaints initiated both internally and externally, but that bill failed to pass. S.B. 169, 2012 Reg. Sess. (Tab 4 to Appellee’s Appendix). Furthermore, the term “individual” reappears in KRS 15.520(1)(h)(3)-(4). Hill acknowledges that KRS 15.520(1)(h)(3) is referring to an “individual” as a citizen (who must be notified to appear at a hearing by “certified mail”) and not a fellow police officer (who could be “simply order[ed]” to attend). Hill Br. at 7. Based on the statute’s overall context, the term “individual” used by both KRS 15.520(1)(a) and (h) clearly corresponds to the word “citizens” used in KRS 15.520(1)’s preamble.

however, the statute also has due process rights for accused police officers consistent with the statute's dual intent. KRS 15.520(1) (purporting to provide due process and redress "at the same time").

Other police discipline statutes also have remedies for citizens. KRS 95.450(2) and KRS 95.765(1) ("Any person may prefer charges against a member of the police or fire departments ...."); KRS 70.270(3) and KRS 78.445(2) ("Any citizen who makes written charges of misconduct ...."); KRS 70.273 and KRS 78.450 (providing for "written charges of misconduct preferred on its own initiative or the initiative of any citizen"). However, only KRS 95.450(2) is mandatory (for second and third class cities and merged urban-county governments) while the other statutes are part of optional statutory schemes. KRS 95.761(1) (allowing fourth or fifth class city to create civil service commission); KRS 70.260(1) (allowing county to create deputy sheriff merit board); KRS 78.405(1) (allowing county to create county police force merit system). KRS 15.520 supplements state law by requiring police departments and local governments across the Commonwealth to be responsive to citizens by taking complaints and holding hearings.

Furthermore, the hearing provisions in KRS 15.520(1)(h) fill in gaps for local governments that lack such procedures because either mandatory requirements under KRS 95.450 do not apply or discretionary schemes under KRS 95.761(1), KRS 70.260(1), and KRS 78.405(1) have not been adopted. In addition, the statute manifests an open-ended intent to set minimum standards that overlay hearings required by other police discipline statutes. KRS 15.520(1)(h) ("When a hearing is to be conducted by any appointing authority, legislative body, or other body **as designated by the Kentucky**

**Revised Statutes ....**”(emphasis added). Indeed, a prior Opinion of the Attorney General has similarly recognized that KRS 15.520 interacts with other laws that regulate police discipline and employment. OAG 81-134 (analyzing KRS 15.520 hearing requirements in conjunction with police discipline procedures under KRS 95.450)(Tab 16 to Appellant’s Appendix).

However, discipline only “for cause” or hearing requirements for “all” disciplinary actions against police officers is **not** in KRS 15.520. Some parts of KRS 15.520 purport to apply to every police officer who is under investigation. KRS 15.520(1)(b) (prohibiting “threats, promises, or coercions” if a police officer is a “suspect”); (c) (implementing “interrogation” procedures); and (d) (extending rights to a police officer who is a criminal “suspect”). But the statute stops short of expressly mandating disciplinary hearings after every investigation is over. The line-drawing reflects legislative intent. To be fair to aggrieved citizens and accused police officers consistent with the statute’s dual objectives, KRS 15.520 requires hearings within that limited setting. In the absence of a citizen’s complaint, other laws control whether Hill is at will or entitled to a disciplinary hearing following an investigation. Construing KRS 15.520 in context with these other laws is a separate factor discussed below in detail.

- b. In considering KRS 15.520 “in context with other parts of the law,” statutes other than KRS 15.520 expressly govern whether police officers are entitled to disciplinary hearings in the absence of a citizen’s complaint.**

A range of laws govern whether Hill, a police officer in a forth class city, has due process rights or is employed at will. KRS 15.520 must be considered “in context” with all these “other parts of the law” that relate to police officer discipline and employment.

*Petitioner F*, 306 S.W.3d at 85-86.

Under Kentucky common law, employment is ordinarily “at will” unless the employer and employee agree otherwise. *Grzyb v. Evans*, 700 S.W.2d 399, 400 (Ky. 1985). In cities with mayor-council formats, such as the City of Mount Washington, KRS 83A.130(9) defines the general employment framework, which provides:

The mayor shall be the appointing authority with power to appoint and remove all city employees, including police officers, except as tenure and terms of employment are protected by statute, ordinance or contract....

KRS 83A.130(9) specifically extends to “police officers.” Hill’s default employment status is accordingly at will unless another “statute, ordinance, or contract” applies. Other law enforcement within KRS 15.520’s scope also have default at will employment. KRS 70.030(1) (deputy sheriffs serve at the “pleasure” of the sheriff unless merit board is adopted); KRS 164.950 (campus police officers serve at the “pleasure” of the governing board).

KRS 15.520 is just one of several statutory exceptions to at will employment for police officers covered by that statute. Second and third class cities and merged urban-county governments have mandatory police disciplinary procedures under KRS 95.450.<sup>4</sup> A police civil service system (very similar to, though not identical with, KRS 95.450) has been devised by KRS 95.765 for fourth and fifth class cities, but KRS 95.761(1) gives those cities discretion whether to adopt it. KRS 70.260 and KRS 78.405 also allow discretionary merit boards to be created for sheriff departments and county police forces.

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<sup>4</sup> KRS 90.120 through 90.230 have discipline procedures for first class cities, but those statutes no longer have application because Louisville is the only the first class city under KRS 81.010 and has since transitioned to a merged urban-county government.

Notably, all of these other police discipline statutes are clearly distinguishable from KRS 15.520 in both form and substance.<sup>5</sup>

Other statutory schemes expressly prohibit a specific range of police discipline except for a particular “cause” or “reason” and only with review. In relevant part, second and third class cities and merged urban-county governments are subject to the following:

[N]o member of the police or fire department in cities of the second and third classes or urban-county government shall be reprimanded, dismissed, suspended or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination or violation of law or of the rules adopted by the legislative body, and only after charges are preferred and a hearing conducted as provided in this section.

KRS 95.450(1).

The optional police civil service system for third and fourth class cities substantially tracks KRS 95.450. KRS 95.765(1) (“No member of the police or fire departments shall be removed from the department or reduced in grade upon any reason except inefficiency, misconduct, insubordination or violation of law, or violation of the rules adopted for the departments.”); KRS 95.765(2) (“No member of the police or fire department ... shall be reprimanded, removed, suspended, or dismissed from the department until written charges have been made, or preferred against him, and a trial had as herein provided.”).

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<sup>5</sup> The City’s brief quotes from or cites to only selected portions of those statutes applicable to various forms of local governments. Reviewing the statutes as a whole and in full context, however, further underscores the comparison to KRS 15.520. For the Court’s convenience, KRS 95.450 (for second and third class cities and merged urban-county governments) is Tab 7 to Appellee’s Appendix, KRS 95.765 (for fourth and fifth class cities) is Tab 8, KRS 70.270 to KRS 70.273 (for deputy sheriff merit boards) are collectively Tab 9, and KRS 78.445 to KRS 78.460 (for county police force merit boards) are collectively Tab 10.

Deputy sheriffs covered by merit boards may only be “removed, suspended, or laid-off by the sheriff for any cause which will promote the efficiency of the department.” KRS 70.270(1). In addition, “every action in the nature of a dismissal, suspension, or reduction made by the sheriff shall be subject to review by the board[.]” KRS 70.270(2). The board also has independent power to “remove, suspend, lay off or discipline any deputy sheriff”, but only if “charges,” “notice,” and a “complete public hearing” are provided. KRS 70.273(1).

A similar framework exists for county police officers subject to merit boards. KRS 78.445(1) (county police officers may be “removed, suspended, laid-off, reduced in grade, or fined by the chief for any cause which will promote the efficiency of the service”); KRS 78.455(1) (disciplinary action by the police chief is “subject to review by the board” with “notice” and “public hearing”); KRS 78.450(1) (merit board has independent power to “remove, reduce, suspend, lay off, fine or discipline any officer” subject to “charges,” “notice,” and a “complete public hearing”).

In addition, other statutory schemes expressly cover police discipline initiated either externally (by citizens) or internally (by the employer). KRS 95.450(2) and KRS 765(1) (providing “[a]ny person may prefer charges against a member of the police or fire department” and further providing that the “mayor shall, whenever probable cause appears, prefer charges”); KRS 70.270(1)-(3) (addressing discipline “by the sheriff” as well as “[a]ny citizen who makes written charges of misconduct, under oath”); KRS 78.445(1)-(2) (addressing discipline “by the chief” as well as “[a]ny citizen who makes written charges of misconduct, under oath”); KRS 70.273(1) and KRS 78.450(1)

(addressing charges “preferred on [merit board’s] initiative or the initiative of any citizen”).

Comparing KRS 15.520’s structure to these other laws reinforces that KRS 15.520 has a different function. If the General Assembly had intended KRS 15.520 to extend to internal and external discipline as well as require “cause” or “reasons” subject to review by hearings, the legislature knew how to implement such procedures based on other laws that do so clearly and thoroughly. Instead, the General Assembly’s failure to plainly express such coverage in KRS 15.520 compared to other statutes is “highly persuasive of a contrary intent.” *Rosen v. Watson*, 103 S.W.3d 25, 29 (Ky. 2003). A wholesale shift from “at will” employment to discipline only “for cause” for every police officer covered by KRS 15.520 is too large-scale to be derived from that statute’s limited language.

The legislative intent to be gleaned from KRS 15.520 in combination with other laws is more refined: KRS 15.520 is responsive to citizens and implements previously unregulated protections for police officers who are under investigation, but KRS 15.520 interacts with other laws regarding whether disciplinary hearings are required after the investigatory phase is over. KRS 15.520 contemplates hearings when a police officer is accused by an aggrieved citizen to be fair to both sides in accordance with the statute’s dual objectives. Outside of the citizen’s complaint context, however, the statute manifests an intent to defer to other statutes whether a disciplinary hearing is required. KRS 15.520(1)(h) (“**When** a hearing is to be conducted by any appointing authority, legislative body, or other body **as designated by the Kentucky Revised Statutes** ....”)(emphasis added).

In addition, the other police discipline statutes manifest legislative intent to allocate burdens among local governments based on size and discretion – second and third class cities and merged urban-county governments have mandatory police discipline procedures, but smaller local governments have the option to create police civil service systems or merit boards. Sensitivity to smaller local governments with potentially fewer resources is imminently reasonable. Indeed, Mount Washington is a fourth class city pursuant to KRS 81.010(4) that has elected not to adopt a police civil service system based on its discretion under KRS 95.761(1).

However, the balanced framework devised by the General Assembly and utilized by Mount Washington is effectively displaced if KRS 15.520, which extends uniformly to local governments of every size, requires hearings for all disciplinary actions against police officers. Hill, Pearce, and the FOP usurp wide ranging due process protections through KRS 15.520 at the expense of all of these other statutes. KRS 15.520 should not be interpreted so as to render these related statutory schemes “duplicative,” “superfluous,” or “void of any significant meaning or purpose.” *MPM Fin. Group, Inc. v. Morton*, 289 S.W.3d 193, 198 (Ky. 2009).

In sum, other police discipline statutes – which have broader scope and which reasonably allocate the burdens on local governments based on size and discretion – appropriately govern whether Hill is at will or entitled to due process in the absence of a citizen’s complaint. Hill, Pearce, and the FOP overextend KRS 15.520 by only focusing on that law and overlooking other statutes that directly apply. The City’s narrower statutory interpretation properly considers KRS 15.520 in context with other laws.

Effectively weaving KRS 15.520 together with the range of legislation regarding police officer discipline and employment is the next factor discussed below.

- c. **To harmonize KRS 15.520 with other related statutes and to give meaning and effect to all parts of the law, hearings under KRS 15.520 should be limited to complaints by aggrieved citizens and not required for “all” police disciplinary actions.**

The City’s narrower statutory interpretation harmonizes KRS 15.520 with other related statutes and gives greater meaning and effect to all parts of the law consistent with Kentucky precedent. 289 S.W.3d at 198 (“[S]tatutes dealing with the same subject matter should be harmoniously construed so far as possible to allow both to stand and to give force and effect to each.”); *see also Maynes*, 361 S.W.3d at 924 (explaining that the Court must “presume” that the “General Assembly intended for the statute ... to harmonize with related statutes”).

Here, some parts of KRS 15.520 may apply whenever police officers are under investigation. KRS 15.520(1)(b) (prohibiting “threats, promises, or coercions” if a police officer is a “suspect”); (c) (implementing “interrogation” procedures); and (d) (extending rights to a police officer who is criminal “suspect”). That subject matter is not addressed by other police discipline statutes and could apply equally, without conflict, to police officers who are employed at will or entitled to due process under other laws if the investigation establishes probable cause.

To be fair to aggrieved citizens and accused police officers, KRS 15.520 further contemplates disciplinary hearings within that limited setting (which gives full force and effect to that statute’s dual objectives). However, KRS 15.520(1)(h) defers to other statutes that expressly govern whether disciplinary hearings are required for internal

matters outside of a citizen's complaint (which gives full force and effect to many related laws that extend discretion to local governments on how to manage internal issues).

Furthermore, most other statutes relating to police discipline were in effect before KRS 15.520 was enacted in 1980. KRS 95.450 (for second and third class cities and merged urban-county governments)(Tab 7 to Appellee's Appendix); KRS 95.765 (for fourth and fifth class cities)(Tab 8 to Appellee's Appendix); KRS 78.445 to KRS 78.460 (for county police force merit boards)(Tab 10 to Appellee's Appendix). The Court "presume[s]" that the General Assembly was "aware" of these pre-existing statutes that expressly give small local governments discretion to replace at will employment and implement due process rights for police officers. *Morton*, 289 S.W.3d at 199. If the General Assembly had intended KRS 15.520 to jettison such discretion among smaller local governments, the legislature would have done so more clearly. *Id.*

In addition, those statutes giving small local governments discretion to implement merit boards have been created or amended after KRS 15.520 was enacted. KRS 70.270 and KRS 70.273 (for deputy sheriff merit boards)(Tab 9 to Appellee's Appendix); KRS 78.445 and KRS 78.460 (for county police force merit boards)(Tab 10 to Appellee's Appendix). Such ongoing legislative activity also cuts against KRS 15.520 displacing or severely diminishing the utility that other police discipline statutes are assumed to have. In sum, the City's narrower statutory interpretation more effectively reconciles KRS 15.520 with other statutes and ongoing statutory amendments that relate to police officer discipline and employment.

- d. To avoid impermissibly absurd and impractical results, hearings under KRS 15.520 should be limited to complaints by aggrieved citizens and not required for “all” police disciplinary actions.**

The Court further presumes that statutes are not intended to have “absurd” results. *Maynes*, 361 S.W.3d at 924; *Shawnee Telecom*, 354 S.W.3d at 551. However, a hearing and potential appeal to circuit court in every police disciplinary action is likely impractical for some, if not most, smaller local governments. SB 169 expressly recognizes that higher legal costs “will result” by extending due process rights to police officers “during all phases of internal disciplinary matters.” Local Mandate Fiscal Impact Estimate (Tab 5 to Appellee’s Appendix). The “full cost” is “indeterminable” according to SB 169’s Fiscal Impact Estimate, but common sense dictates that internal disciplinary issues are likely to be far more common than citizens’ complaints. *Id.* Statutory constructions that impose “impractical consequences” or render performance “expensive” should not be adopted based on longstanding Kentucky precedent. *Petroleum Exploration v. Superior Oil Corp.*, 232 Ky. 635, 24 S.W.2d 259, 260 (1930).

The City’s statutory interpretation, narrowly construing KRS 15.520 in conjunction with other related statutes, allocates such burdens among local governments more reasonably. Hearings and appeals under KRS 15.520 are limited to complaints by aggrieved citizens, which are less frequent and will not overly burden small local governments that are subject to that statute. Other statutes then balance whether local governments must spend additional time and resources on hearings and potential appeals to circuit court for internal disciplinary issues – large local governments with greater resources have mandatory police discipline procedures, but smaller local governments with potentially fewer resources are given discretion whether to assume those

responsibilities. Indeed, the City of Mount Washington has not adopted a police civil service system under KRS 95.761(1) and has implemented less formal grievance procedures to deal with the sort of internal disciplinary problems at issue here.<sup>6</sup>

Furthermore, due process necessarily has limits within police departments that are “structured in the traditional military chain-of-command mode.” *Hockensmith v. City of Frankfort*, 723 S.W.2d 855, 857 (Ky. App. 1986). *Hockensmith* was construing KRS 95.450(1), which requires a hearing even for a “reprimand.” However, the Court of Appeals limited KRS 95.450(1) only to reprimands by the employer and not from superiors to subordinate officers; otherwise, “the chief of police would be powerless to correct his subordinates without a hearing – a ridiculous requirement.” *Id.* *Hockensmith* sets reasonable, well established due process boundaries within the police department setting.

However, Hill, Pearce, and the FOP extend KRS 15.520 to all internal disciplinary matters without any apparent limitation. The opposition’s unbounded statutory interpretation either oversteps reasonable limits recognized by *Hockensmith* or requires the Court to add language to KRS 15.520 to impose reasonable limits on the statute’s application. Both outcomes are unsatisfactory and should be rejected because

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<sup>6</sup> Instead of accounting for higher costs to be imposed on local governments, the FOP argues that KRS 15.520 protects the Commonwealth’s investment through KLEFP to train police officers by implementing broad job security that prevents high turnover. FOB Br. at 1-6. Guaranteed job security for police officers is not a requirement for local governments to participate in KLEFP under KRS 15.440. And KRS 15.520 manifests no intent to jettison at will employment outside of the citizen’s complaint context. Again, other statutes specifically govern whether local governments may terminate or discipline police officers at will or only with cause. Although the FOP argues that “it makes absolutely no sense” to “restrict” hearings under KRS 15.520 to “only police officers who are accused of wrongdoing by citizens,” it overlooks how the General Assembly has allocated the cost of police officer due process under other statutes based on size and discretion among local governments. FOB Br. at 5.

the City's narrower statutory interpretation, limiting hearings under KRS 15.520 to complaints by aggrieved citizens, comports with the statute's plain language and avoids the sort of "ridiculous" interference within the "chain-of-command" setting that *Hockensmith* eschews.

Finally, the FOP argues that limiting hearings under KRS 15.520 to complaints by aggrieved citizens unreasonably discourages police departments from taking such complaints. FOB Br. at 6 ("If the protections are triggered only upon the receipt of a citizen complaint, why would an employing local unit of government chose to accept one?"). This argument has no merit because the statute expressly mandates police departments to take complaints that allege police misconduct. KRS 15.520(1)(a) ("Any complaint taken from any individual alleging misconduct on the part of any police officer, as defined herein, **shall** be taken as follows....")(emphasis added). The FOP cannot fairly bolster its statutory interpretation by anticipating that police departments will violate the law. Practical construction and application of KRS 15.520 weighs in favor of the City.

- e. **Recent legislative activity further shows that KRS 15.520 is not intended to require hearings for "all" disciplinary actions against police officers.**

From its enactment in 1980 through three amendments in 1986, 1990, and 1994, KRS 15.520's basic language and structure -- having no express requirement for hearings and appeals to circuit court in the absence of a citizen's complaint -- has been unchanged. However, new amendments to KRS 15.520 were proposed by SB 169 during the General Assembly's 2012 Regular Session. SB 169's Local Mandate Fiscal Impact Estimate highlights two points relating to the bill's background: (i) the legislature was aware of

recent decisions by the Kentucky Court of Appeals in *Beavers* and *Pearce* limiting KRS 15.520 to complaints by aggrieved citizens; and (ii) the bill's express "purpose" was to substantively "amend[]" KRS 15.520 to "extend" to police disciplinary actions outside of citizens' complaints in response to those decisions. Local Mandate Fiscal Impact Estimate (Tab 5 to Appellee's Appendix). Significantly, the General Assembly declined to redefine KRS 15.520's purpose in the wake of *Beavers* and *Pearce* because SB 169 failed to pass.

"Bills presented but not passed" have "some bearing" on legislative intent under Kentucky law. *Fiscal Court of Jefferson Co.*, 559 S.W.2d at 480. In this case, SB 169's demise directly reinforces that KRS 15.520 is **not** intended to require hearings in all disciplinary actions against police officers. The FOP argues that SB 169 was only "designed to clear up any ambiguities," but *Hill*, *Pearce*, and other recent decisions by the Kentucky Court of Appeals "set forth how KRS 15.520 is currently interpreted" and the General Assembly chose to leave those statutory interpretations in place. FOP Br. at 9-10. Therefore, the FOP's attempt to minimize SB 169 should be rejected. Whether police officers are entitled to wide-ranging due process is a policy-making issue that the General Assembly has considered and rejected. The FOP also supported SB 169 on behalf of its members, but argues that its lobbying is not a "concession" by Hill that KRS 15.520's current form has limited scope. FOP Br. at 10. The FOP again misses the point. Only the legislative intent reflected by SB 169's failure to pass has legal significance; whatever spin the FOP gives its lobbying efforts is irrelevant.

**f. The statutory arguments by Hill, Pearce, and the FOP are insufficient based on the principles above and should be rejected.**

Hill, Pearce, and the FOP rely on selective portions of KRS 15.520. All of the statutory arguments by Hill, Pearce, and the FOP cannot withstand full scrutiny and should be rejected for the reasons stated below.

Both Hill and Pearce argue that KRS 15.520(1)(a)(3) contemplates charges and disciplinary hearings without a citizen's complaint. Hill Br. at 4; Pearce Br. at 11. However, that provision actually relates to aggrieved citizens who invoked the complaint process but refused to make complaints that are "signed and sworn to." Inferring broad legislative intent to entitle police officers to hearings in all disciplinary actions goes well beyond the limited context of that subsection. KRS 15.520(1)(a)(3) neither expresses nor implies having any application to purely internal disciplinary issues, such as Hill's discipline for insubordination.

KRS 15.520(1)(a)(4) has been another point of focus in this case and others. That subsection provides: "Nothing in this section shall preclude a department from investigating and charging an officer both criminally and administratively." Hill has argued that KRS 15.520(1)(a)(4) contemplates investigations and charges by a police department "on its own initiative" without a citizen's complaint. Hill Br. at 4. The Court of Appeals held that "KRS 15.520(1)(a)(4) affirms that intradepartmental investigations are not precluded and that they differ from citizen complaint investigations." *Hill v. City of Mount Washington*, No. 2011-CA-000378-MR, at 4 (Tab 1 to Appellant's Appendix).

Whether KRS 15.520(1)(a)(4) refers to "intradepartmental investigations" outside of the citizen's complaint context is unclear. KRS 15.520(1)(a)(4) could merely clarify that criminal and administrative charges arising out of citizens' complaints under

subsections (1)(a)(1)-(3) are not mutually exclusive. However, even if KRS 15.520(1)(a)(4) has broader application, the subsection's open-endedness preserves discretion expressly vested in small local governments by other statutes on how to manage internal issues. KRS 15.520(1)(a)(4) does not preclude intradepartmental investigations and disciplinary charges, but does not mandate procedures or require hearings either. The Court of Appeals was correct that KRS 15.520(1)(a)(4) contemplates internal procedures that may "differ."

Hill, Pearce, and the FOP further emphasize that KRS 15.520(1)(b)-(d) apply with or without a citizen's complaint to police officers who are under investigation. Hill Br. at 6; Pearce Br. at 12-13; FOP Br. at 8. Judge Caperton's dissent in *Pearce* and *Beavers* echoes that same point. The City does not dispute that interpretation – such application comports with KRS 15.520's plain language and does not conflict with other police discipline statutes (which do not address that subject matter). Instead, Hill, Pearce, and the FOP misframe the issue. KRS 15.520(1)(b)-(d) may apply to every investigation, but disciplinary hearings are **not** expressly required after every investigation is over. The line-drawing, again, reflects legislative intent when KRS 15.520 is construed as a whole and in context with other laws.

To be fair to aggrieved citizens and accused police officers consistent with the statute's objectives, KRS 15.520 contemplates disciplinary hearings within that limited setting. In the absence of a citizen's complaint, however, KRS 15.520(1)(h) manifests an intent to defer to other laws that expressly govern whether hearings are required for purely internal disciplinary issues, such as Hill's insubordination in this case. Furthermore, these other laws contemplate small local governments, like Mount

Washington, having discretion on how to manage internal issues, which has a rational, legitimate basis considering the higher costs associated with hearings and potential appeals to circuit for every disciplinary action.

Hill and Pearce (as well as Judge Caperton) also refer to KRS 15.520(1)(e), which sets minimum standards for “[a]ny charge.” Hill Br. at 6-7; Pearce Br. at 13. Subsection (1)(a) contemplates charges when an aggrieved citizen invokes the complaint process. KRS 15.520(1)(e) accordingly fills in gaps for local governments that lack such procedures because either mandatory requirements under KRS 95.450 do not apply or discretionary schemes under KRS 95.761(1), KRS 70.260(1), and KRS 78.405(1) have not been adopted. Outside of the citizen’s complaint context, KRS 15.520 does not expressly impose charging requirements or hearings. When KRS 15.520 is considered as a whole and in context with other laws, such statutory silence manifests legislative intent to defer to other police discipline statutes that directly apply and give discretion to small local governments over internal disciplinary issues.

Hill heavily focuses on KRS 15.520(1)(h)(3). That subsection only applies “[i]f any hearing is based upon a complaint of an individual.” Based on the word “if”, Hill infers that KRS 15.520(1)(h)(3) “unequivocally” contemplates hearings not based on complaints by aggrieved citizens. Hill Br. at 7. However, Hill improperly construes KRS 15.520(1)(h)(3) in isolation. Subsection (1)(h) specifically manifests an open-ended intent to set minimum standards that overlay hearings required by other police discipline statutes. KRS 15.520(1)(h) (“**When** a hearing is to be conducted by any appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes ....”)(emphasis added); *see also* OAG 81-134 (analyzing KRS 15.520 hearing

requirements in conjunction with police discipline procedures under KRS 95.450)(Tab 16 to Appellant's Appendix). The "if" recognizes that KRS 15.520(1)(h) has application to hearings required by other statutes in contexts outside of a citizen's complaint. In addition, KRS 15.520(1)(h)(3) also dovetails with KRS 15.520(1)(a)(3), which contemplates discretion to investigate and charge police officers based on unsworn complaints by aggrieved citizens if "independently substantiated" by the police department.

The Court of Appeals accurately observed that isolated portions of KRS 15.520 give "only a bare hint of expansive legislative intent" and that the "entirety of the enactment" cuts the other way. *Hill v. City of Mount Washington*, No. 2011-CA-000378-MR, at 5 (Tab 1 to Appellant's Appendix). The full range of factors – KRS 15.520 having no express "for cause" limitation or hearing requirement for "all" disciplinary actions; other statutes specifying what, if any, due process is required in the absence of a citizen's complaint; other statutes reasonably allocating burdens among local governments based on size and discretion; and recent legislative activity rejecting amendments expressly intended to extend KRS 15.520 to internal disciplinary issues – are overwhelming. The "bare hint" derived from selected KRS 15.520 provisions by Hill, Pearce, and the FOP is plainly insufficient compared to the "entirety" of all these additional factors.

**II. The weight of authority applying KRS 15.520 favors the City's narrower statutory interpretation.**

The gulf that divides the parties relating to KRS 15.520's scope is wide: Does KRS 15.520 require hearings only when triggered by complaints from aggrieved citizens and Hill is otherwise employed at will, or is every police officer covered by KRS 15.520

subject to discipline only “for cause” and entitled to hearings for “all” disciplinary actions? The weight of authority applying KRS 15.520 balances in favor of the City’s narrower statutory interpretation.

a. **“For cause” employment is inconsistent with this Court’s decision in *City of Munfordville v. Sheldon*.**

In *City of Munfordville v. Sheldon*, 977 S.W.2d 497 (Ky. 1998), the mayor dismissed the chief of police without a hearing based on a citizen’s complaint. This Court recognized that mayors have “discretion” pursuant to KRS 83A.080(2) and KRS 83A.130(9) to remove police chiefs and subordinate police officers, but further noted that KRS 95.765 (if adopted) and KRS 15.520 (if triggered) are exceptions. Although Munfordville had not passed an ordinance “adopting” KRS 95.765 (just like Mount Washington), this Court ruled that KRS 15.520 had been “triggered” because the police chief’s dismissal was “predicate[d]” on a citizen’s complaint (unlike Hill’s insubordination). *Id.* at 498-99.

*Sheldon* construes KRS 15.520 in context with other laws that relate to police officer discipline and employment under Chapters 83A and 95 consistent with the City’s statutory analysis. The end of the Court’s opinion emphasizes:

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.

*Id.* at 499. The City’s statutory interpretation aligns with *Sheldon*. That decision upholds “discretion” to remove police officers (accounting for Chapter 83A), references KRS 15.520 only in relation to a “trigger” (accounting for citizens’ complaints), and recognizes that other at will “exceptions” may apply (accounting for mandatory police

disciplinary procedures under KRS 95.450 and discretionary police civil service systems under KRS 95.765).

If police officers covered by KLEFP are terminable only “for cause,” the citizen’s complaint filed in *Sheldon* and the mayor’s discretion under other statutes would have been irrelevant. Instead, both of those issues factored prominently into the Court’s decision. *Sheldon* contemplates KRS 15.520 being triggered and mayors having discretion to remove police officers without triggering that statute. The triggering event based on the statute’s plain language and *Sheldon* both point to citizens’ complaints. Otherwise, discipline only “for cause” and hearings for “all” disciplinary actions would leave no room for discretion. KRS 15.520 has to have less sweeping application in order to be reconciled with *Sheldon*.

- b. Every decision by the Kentucky Court of Appeals that has directly considered the issue before this Court has found no hearing requirement under KRS 15.520 in the absence of a citizen’s complaint.**

Six decisions by the Kentucky Court of Appeals have directly considered whether KRS 15.520 requires a hearing in the absence of a citizen’s complaint. Every opinion has found that no such hearing was required. *Hill v. City of Mount Washington*, No. 2011-CA-000378-MR (Tab 1 to Appellant’s Appendix); *Beavers v. City of Berea*, 2010-CA-001522-MR, 2012 WL 28690 (Tab 1 to Appellee’s Appendix); *Pearce v. University of Louisville*, No. 2009-CA-001813-MR (Tab C to Pearce’s Appendix); *Moore v. City of New Haven*, 2010-CA-000019-MR, 2010 WL 4295588 (Tab 2 to Appellee’s Appendix); *Ratliff v. Campbell County*, 2009-CA-000310-MR, 2010 WL 1815391 (Tab 3 to Appellee’s Appendix); *Marco v. Univ. of Kentucky*, 2005-CA-001755-MR, 2006 WL

2520182 (Tab P to Pearce's Appendix). Only Judge Caperton, in *Beavers* in *Pearce*, has dissented. The sheer weight of all of these decisions is compelling.

Hill and Pearce portray those six, on-point decisions as a "shift" or "sharp change in the construction of KRS 15.520," but that characterization is disingenuous. Hill Br. at 13; Pearce Br. at 18. The Court of Appeals accurately notes that the "precise issue" in this lawsuit was not raised in other prior cases involving KRS 15.520. *Hill v. City of Mount Washington*, No. 2011-CA-000378-MR, at 6 (Tab 1 to Appellant's Appendix). Furthermore, at least one decision by the Court of Appeals relied, in part, upon *Sheldon*, which upheld discretion to remove police officers at will unless KRS 15.520 is "triggered." *Beavers v. City of Berea*, 2010-CA-001522-MR, 2012 WL 28690, at \*3 ("Moreover, in [*Sheldon*], the Kentucky Supreme Court specifically held that the filing of a citizen complaint triggers the hearing requirements of KRS 15.520.")(Tab 1 to Appellee's Appendix). Again, the triggering event based on the statute's plain language and *Sheldon* both point to citizens' complaints. Therefore, recent decisions by the Court of Appeals are consistent with binding precedent by this Court and are not a "shift" or "sharp change" from prior case law.

- c. **Other cases cited by Hill and Pearce either involved distinguishing factors or the "precise issue" before this Court was not raised and considered.**

Hill and Pearce list several cases that reviewed whether internal police disciplinary proceedings initiated without a citizen's complaint complied with KRS 15.520. The statute's application was assumed and not contested in some of those cases. See *Stallins v. City of Madisonville*, 707 S.W.2d 349 (Ky. App. 1986); *Howard v. City of Independence*, 199 S.W.3d 741 (Ky. App. 2005). The Court of Appeals correctly

determined that those decisions are not binding or persuasive because the “precise issue” was not raised. *Hill v. City of Mount Washington*, No. 2011-CA-000378-MR, at 6 (Tab 1 to Appellant’s Appendix)

If the “precise issue” had been presented in those cases, the courts may have ruled differently. Indeed, *Laux v. City of Oak Grove*, No. 5:03-CV-00141-R, 2004 U.S. Dist. LEXIS 27768 (W.D. Ky. Dec. 1, 2004)(Tab N to Pearce’s Appendix), the only federal KRS 15.520 case cited by Hill and Pearce, is a prime example. *Laux* ordered reinstatement under KRS 15.520 for an officer discharged based on an internal complaint, but the statute’s application was never disputed in that case. However, the result changed in a subsequent lawsuit before the **same judge** involving the **same local government** that directly contested whether KRS 15.520 applied to internal complaints. *Perry v. City of Oak Grove*, 5:11-CV-00134-R, 2011 WL 5525936 (W.D. Ky. Nov. 14, 2011)(Tab 11 to Appellee’s Appendix).

Based on “obvious cues from KRS 15 .520’s language” and “trends within Kentucky’s courts,” *Perry* ruled: “KRS 15.520 is triggered by civilian complaints and inapplicable where the investigation of the officer has other origins.” *Id.* at \*4. The federal opinion further recognizes its conclusion with respect to KRS 15.520’s application is “buttress[ed] by *Sheldon*. *Id.* *Perry* accordingly aligns with the City’s narrower statutory interpretation. Thus, both federal precedent and decisions by the Court of Appeals that have considered the “precise issue” before the Court uniformly hold that KRS 15.520 does not require hearings in the absence of a citizen’s complaint.

Other cases cited by Hill and Pearce are distinguishable. *Brown v. Jefferson County Police Merit Bd.*, 751 S.W.2d 23, 24 (Ky. 1988) involved a county police force

with a merit system under KRS 78.405 through 78.460, and *Montgomery v. Aubrey*, 2002-CA-002523-MR, 2004 WL 362380, at \*1 (Ky. App. Feb. 27, 2004)(Tab O to Pearce's Appendix) involved a deputy sheriff merit board pursuant to KRS 70.260 through 70.273. *City of Louisville v. Milligan*, 798 S.W.2d 454, 455-56 (Ky. 1990) involved a civil service system for first class cities under KRS 90.120 through 90.230, and *City of Madisonville v. Sisk*, 783 S.W.2d 885, 886 (Ky. App. 1990) involved an optional civil service system for fourth and fifth class cities pursuant to KRS 95.765.

All of these cases are consistent with the City's statutory interpretation that KRS 15.520 interacts with procedures required by other police discipline statutes. *Brown*, 751 S.W.2d at 26 (assuming reinstatement remedy under KRS 78.460 is supplemented by entitlement to back pay and benefits under KRS 15.520(1)(h)(8)); *Milligan*, 798 S.W.2d at 458 (borrowing judicial review standard for appeals under KRS 90.190 by reference to KRS 15.520(2)); *Sisk*, 783 S.W.2d at 886 (discussing appropriate hearing authority under KRS 95.765 in relation to KRS 15.520); *Montgomery*, 2002-CA-002523-MR, 2004 WL 362380, at \*3 (importing KRS 15.520(1)(a) citizen complaint standards to deputy sheriff merit system that is open to citizens' complaints under KRS 70.270 and KRS 70.273).

- d. **The opinions by the Attorney General relied upon by Hill have minimal significance because the opinions are not binding, lack relevancy, have cursory or unsound reasoning, and are overwhelmed by precedent that cuts the other way from this Court, the Court of Appeals, and the federal Western District of Kentucky.**

Finally, Hill cites to seven Opinions of the Attorney General ("OAG"). OAGs are not binding on courts. *Carter v. Smith*, 366 S.W.3d 414, 420 n. 2 (Ky. 2012). An OAG may or may not be given weight depending on its reasoning. *Woodward, Hobson & Fulton, L.L.P. v. Revenue Cabinet*, 69 S.W.3d 476, 480 (Ky. App. 2002). In this case,

Hill's reliance on some OAGs is misplaced in this case while other OAGs lack persuasiveness because their reasoning is cursory or unsound.

OAG 81-48 merely anticipates KRS 15.520(1)(a)(3) by recognizing police department discretion to investigate and charge police officers based on independently substantiated evidence if an aggrieved citizen "declines to make his complaint under oath." The opinion has no persuasive value in this case because it neither analyzes nor determines whether hearings are required in the absence of a citizen's complaint. In fact, OAG 81-48 observes that the statute "does not appear to mandatorily require a hearing in all cases" based on subsection (1)(h), which aligns with the City's statutory interpretation.

OAGs 81-200 and 83-231 recognize that KRS 15.520 requires hearings on complaints against police officers covered by that statute, but both opinions again have no persuasive value in this case because neither opinion analyzes nor considers whether the statute's hearing requirement only applies to citizens' complaints.

OAG 81-134 analyzes KRS 15.520 hearing requirements in conjunction with police discipline procedures under KRS 95.450 that are mandatory for second and third class cities and merged urban-county governments. Similar to some of the cases cited by Hill and Pearce, OAG 81-134 is consistent with the City's statutory interpretation that KRS 15.520 overlays procedures required by other police discipline statutes.

OAGs 81-132 and 81-133 suggest that police officers covered by KRS 15.520 are removable only for "just cause" and pursuant to a hearing. However, both opinions are cursory – mentioning KRS 15.520 in passing in only one paragraph and not critically or fully analyzing that statute's scope. These opinions lack any reasoning and accordingly

have no persuasive value. Furthermore, this Court's subsequent holding in *Sheldon* contemplates mayors having discretion to remove police officers without necessarily triggering KRS 15.520. A "just cause" requirement, however, would eliminate any such discretion. In addition to lacking reasoning, OAGs 81-132 and 81-133 are also unsound as inconsistent with *Sheldon*.

Finally, OAG 83-114 recommends extending KRS 15.520 to supervisors placing documentation of poor performance in a police officer's personnel file. Such board statutory application exceeds reasonable, well established due process boundaries within the police department setting recognized by *Hockensmith v. City of Frankfort*. In *Hockensmith*, the Court determined that a "reprimand" by a supervisor is not subject to a hearing under KRS 95.450(1). The Court reasoned:

We think that the term "reprimand" in KRS 95.450(1) means a reprimand by the employer. To hold otherwise would mean that the chief of police would be powerless to correct his subordinates without a hearing—a ridiculous requirement in an organization structured in the traditional military chain-of-command mode.

723 S.W.2d at 857. OAG 83-114's application of KRS 15.520 has similarly "ridiculous" scope and lacks persuasiveness.

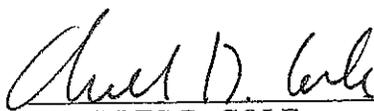
On balance, the OAGs relied upon by Hill have minimal significance with respect to the issue before the Court. Furthermore, the non-binding, cursory opinions are greatly outweighed by precedent from this Court (*Sheldon*), the Court of Appeals (*Hill*, *Pearce*, *Beavers*, *Moore*, *Ratliff*, and *Marco*) and the federal Western District of Kentucky (*Perry*). Unlike the OAGs, all of these cases fully and persuasively show that KRS 15.520 only contemplates hearings relating to complaints by aggrieved citizens.

**CONCLUSION**

For all of the reasons stated above, the City respectfully requests the Court to affirm judgment entered in favor of the City by the trial court and upheld by the Court of Appeals.

Respectfully submitted,

STURGILL, TURNER, BARKER  
& MOLONEY, PLLC



CHARLES D. COLE  
PATSEY ELY JACOBS  
DERRICK T. WRIGHT  
333 West Vine Street, Suite 1400  
Lexington, Kentucky 40507  
Telephone: (859) 255-8581  
Facsimile: (859) 231-0851  
ATTORNEYS FOR APPELLEE

## INDEX TO APPENDIX

1. *Beavers v. City of Berea*, 2010-CA-001522-MR, 2012 WL 28690 (Ky. App. Jan. 6, 2012).
2. *Moore v. City of New Haven*, 2010-CA-000019-MR, 2010 WL 4295588 (Ky. App. Oct. 29, 2010).
3. *Ratliff v. Campbell County*, 2009-CA-000310-MR, 2010 WL 1815391 (Ky. App. May 7, 2010).
4. Senate Bill 169, 2012 Reg. Sess.
5. SB 169 Local Mandate Fiscal Impact Estimate.
6. KRS 15.520.
7. KRS 95.450.
8. KRS 95.765.
9. KRS 70.270 to KRS 70.273.
10. KRS 78.445 to KRS 78.460.
11. *Perry v. City of Oak Grove*, 5:11-CV-00134-R, 2011 WL 5525936 (W.D. Ky. Nov. 14, 2011).