

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

STEPHEN DERRICK HILL

MOVANT

v.

CITY OF MT. WASHINGTON

RESPONDENT

**REPLY BRIEF**

\* \* \* \* \*

Kentucky Court of Appeals No. 2011-CA-000378-MR

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

\* \* \* \* \*

**CERTIFICATE**

This to certify that copies of this Brief were served upon the following named individuals by First Class Mail, postage prepaid, on this the 22<sup>nd</sup> day of January, 2013.

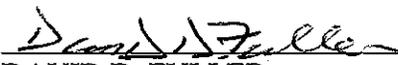
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## **PURPOSE**

Movant Hill's ("Hill") Reply Brief's purpose is to reply to arguments made in Respondent Mt. Washington's ("Respondent") Brief.

Particular issues include:

- 1) Statutory construction of KRS 15.520
- 2) Statutory interpretation of KRS 15.520 in conjunction with other KRSs
- 3) Interpretation of OAGs

## ARGUMENT

### A. STANDARD OF REVIEW

This case presents the interpretation of a statute, a question of law, therefore full *de novo* review applies. *Bd. of Comm'rs v. Davis* 238 S.W.3d 132, 135 (Ky. App. 2007). Respondent's brief's Argument also states this Court's *de novo* review standard.

### B. THE STATUTE APPLIES BY ITS OWN TERMS TO ALL INTERNAL INVESTIGATIONS AND HEARINGS

Respondent's brief argues KRS 15.520 only applies to police department internal investigations when triggered by complaints from citizens (Resp. Br. p.7). Respondent argues KRS 15.520's language supports Respondent's position since KRS 15.520(1)(a) states " Any complaint taken from any individual shall be taken as follows:" (Resp. Br. pp. 10-11). Hill replies to conclude that the subsection thereby limits the entire statute to citizen complaints is an overbroad misinterpretation, and ignores other subsections which support the interpretation the statute applies in investigations and hearings which do not involve a citizen's complaint, as outlined in Hill's brief. The subsection outlines the differences which may be taken depending whether the complaint is of a criminal or administrative nature, or both.

### C. THE STATUTE APPLIES TO ALL INTERNAL INVESTIGATIONS AND HEARINGS

Respondent argues other statutes address police discipline and that KRS 15.520 merely supplements them, to address citizens complaints (Resp. Br. p. 12, Tabs 7, 8, 9 and 10). Hill replies that KRS 95.450 (Resp. Br. Tab 7) clearly applies to members of the police or fire departments in cities of the second and third classes or urban-county

government, and that KRS 95.450(2) already includes citizen complaints since it begins "Any person may prefer charges against a member of the police or fire department by filing then with the clerk. . .". KRS 95.765(1), applicable to cities of the fourth or fifth class, also states "Any person may prefer charges against a member of the police or fire departments. . .". Both statutes were enacted in 1942 and last amended in 1978, well before KRS 15.520. Hill replies KRS 15.520 expressly and purposely limits its protections to such members whose " . . . police officers of local units of government receive funds pursuant to KRS 15.410 through 15.992" ("KLEFPP funds"). KRS 15.520(4). Since both 1942 statutes include insubordination as one of the reasons for discipline (as in Hill), clearly the statutes apply to both intradepartmental and citizen complaints. KRS 15.520 does not supplement the other statutes to be responsive to either type complaints, but provides additional protections to members facing any such complaints who receive the KLEFPP funds, regardless of the complaint's source. In addition, Respondent argues the hearing provisions in KRS 15.520(1)(h) merely "fill in gaps" (Resp. Br. p. 12) when KRS 95.450 does not apply or discretionary statutory schemes have not been adopted. Hill replies the provisions apply when the members qualify pursuant to KRS 15.520(4).

Respondent next argues KRS 15.520 " . . . manifests an open ended intent to set minimum standards that overlay hearings required by other police discipline statutes". (Resp. Br. p. 12). Respondent refers to an Opinion of the Attorney General and states it " . . . recognized KRS 15.520 interacts with other laws that regulate police discipline and employment". (Resp. Br. p. 13) The brief then cites OAG 81-134 (Hill Br. Tab 16) and argues it analyzes KRS 15.520 hearing requirements in conjunction with procedures

under KRS 95.450. Hill replies OAG 81-134 states in part "KRS 15.520(1)(h) sets forth the procedure for conducting a hearing with respect to complaints against police officers governed by the law enforcement foundation fund and provides that the minimum rights afforded any police officer charged with misconduct shall be. . .". The OAG clearly states KRS 15.520 applies to complaints of police officers charged with misconduct who receive funds as stated in KRS 15.520(4). Hill replies rather than "fill in gaps" if KRS 95.450 or other police discipline statutes do not apply, the OAG clearly states that, under the general rules of statutory construction, as a later enacted statute, requirements under KRS 15.520 prevail, and further states requirements under KRS 95.450 be "superseded" by, not analyzed in conjunction with, KRS 15.520.

The OAG explains since KRS 15.520 appears to be silent as to the person with whom the charges are to be filed the requirements under KRS 95.450 would prevail. Hill replies such is the intent of the language in KRS 15.520(1)(h) "When a hearing is to be conducted by an appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes. . .". The subsection plainly expresses the statute's intention for its protection to apply to all police officers to whom the statute applies pursuant to KRS 15.520(4), regardless of the forum, charging person or body.

Respondent's brief cites and quotes KRS 83A.130(9) (Reply Br. Tab 1) then argues in cities such as Mt. Washington, with mayor-council formats, since the subsection specifically extends to police officers Hill's employment status is accordingly at will. (Resp. Br. p. 14). Respondent's brief also quotes the statute's language " . . . unless another statute, ordinance, or contract . . ." applies. Hill replies KRS 15.520

applies to KRS 83A.130(9) under the "... except as ... protected by statute. . ."  
language.

Respondent's brief cites KRS 70.030(1) (Reply Br. Tab 2) and KRS 164.950 (Reply Br. Tab 3) concerning, respectively, deputy sheriffs and safety and security officers of public institutions of higher education serving at the pleasure of the sheriff (unless a merit board is adopted) or governing body. Hill replies that KRS 70.030(5) authorizes, upon written request, that a sheriff's office may participate in the KLEFPF fund with or without establishing a deputy merit board. KRS 15.520 applies if the sheriff's office does so participate, pursuant to KRS 15.520(4), and KRS 70.030 applies if the office does not. KRS 164.950 has not been amended since enacted in 1972, prior to KRS 15.520's 1980 enactment.

Respondent's brief refers to various statutes concerning police discipline, and argues KRS 15.520 does not apply to smaller local governments such as Mt. Washington (Resp. Br. p. 18). Respondent's brief states "Furthermore, most other statutes relating to police discipline were in effect before KRS 15.520 was enacted in 1980.", then cites and includes KRS 95.450 and KRS 95.765 (Resp. Br. p. 20, Tabs 7 and 8) and KRS 78.445 to KRS 78.460 (Resp Br. Tab 10). Respondent argues if the legislature, in enacting KRS 15.520 meant to implement due process rights for police officers it would have made KRS 15.520's application "more clearly". (Resp. Br. p. 20). Hill replies the very specific language of the limitation of KRS 15.520 protections to only those police officers who qualify pursuant to KRS 15.520(4) cannot be clearer.

Respondent's brief states "... those statutes giving small local governments discretion to implement merit boards have been created or amended after KRS 15.520

was enacted", then cites and includes KRS 70.270, KRS 70.273, KRS 78.445 and KRS 78.460. (Resp. Br. p. 20, Tabs 9 and 10). Respondent's brief sums up its narrower statutory interpretation of KRS 15.520 by stating such ". . . more effectively reconciles KRS 15.520 with other police officer discipline statutes. . .". (Resp. Br. p. 20). Hill replies that neither KRS 78.445 nor KRS 78.450 (Resp. Br. Tab 10) have been amended after, respectively, 1978 and 1970, since their enactment in 1952. That KRS 78.445(2) states "citizen" who makes written charges of misconduct, and KRS 70.270, enacted in 1992, likewise states "citizen", the legislature clearly could have and would have stated in 1980 that KRS 15.520 only applies to "citizen" complaints if that were the statute's intent.

Respondent's brief argues that SB 169 ". . . expressly recognizes. . ." that [higher legal costs "will result" by extending due process rights to police officers "during all phases of internal disciplinary phase"] citing Local Mandate Fiscal Impact Estimate (Resp. Br. p. 21, Tab 5). Hill replies that page two of the Local Mandate Fiscal Impact Estimate lists as its Data Source(s): Kentucky Association of Chiefs of Police; Kentucky League of Cities. Hill further replies the [www.lrc.gov/record](http://www.lrc.gov/record) website states SB 169's amendments include to ". . . clarify reference to police officers to whom provisions apply". (Reply Br. Tab 4).

Hill replies the bias of both sources against Hill's argument could not be higher, as the Chiefs of Police obviously initiate internal investigations and impose discipline. The extent of Kentucky League of Cities overwhelming bias against Hill's arguments resulted in the League's filing an *Amicus Curiae* brief in this case requesting this court limit the administrative due process rights to citizen complaints. Hill replies no reliance should be had concerning such a biased document.

Respondent's brief argues the FOP's *Amicus Curiae* brief's argument that limiting hearings under KRS 15.520 to complaints by aggrieved citizens discourages police departments from taking such complaints is without merit since the statutes expressly mandate police departments to take such complaints, and that such an argument attempts to unfairly bolster the FOP's interpretation by anticipating that police departments will violate the law. (Resp. Br. p. 23).

Hill replies that in *City of Munfordville v. Sheldon*, 977 S.W. 2d 497 (Ky. 1998) (Reply Br. Tab 5) this Court recognized the exact same scenario possible if the Court holds KRS 15.520 applies only to citizen complaints: "To hold otherwise would encourage the mayor to avoid the time and expense of providing any officer the due-process hearing to which he or she is entitled upon the filing of a citizen complaint, by simply couching the decision to fire in the guise of a simple act of discretion." *Id.*, at 499.

Hill argues the same, improper avoidance of KRS 15.520 can occur if the Court holds KRS 15.520 does not apply to intradepartmental investigations, since the department could hear from the complaining citizen, not have a citizen complaint filed, then conduct its own internal investigation and not abide by KRS 15.520.

To rebut Respondent's claim that "Practical construction and application of KRS 15.520 weighs in favor of the City" (Resp. Br. p.23) Hill further states that such a violation has occurred.

The front page of the September 13, 2012 Hart County News - Herald (Reply Br. Tab 6) reported "Munfordville City Hall was filled to capacity . . . " with citizens protesting former Munfordville police officer David King's tasing and arrest of a citizen (Note - the article does not continue on p.7).

Munfordville police department hired Advanced Investigative Solutions, Inc. to investigate. In the September 28, 2012 written report obtained through an Open Records Request, the investigator's report recommended Officer King be immediately reinstated and his personnel file reflect his actions have been investigated and determined to be proper and acceptable. (Reply Br. Tab 7).

The first paragraph on page three of the report reads: "As of the date of this report, Mr. Thompson has never filed a written complaint with the City of Munfordville or the Munfordville Police Department. Thompson stated that he has not complained to anyone in an official position with the City of Munfordville though he acknowledges calling the Mayor the following morning."

To make matters worse, despite the fact City Hall had been "filled to capacity" with "protesters", not mere complainants, and the investigation's recommendations, at the next Munfordville City Council meeting the City Attorney said, according to the October 4, 2012 front page of the News - Herald "The investigation is complete. David King is no longer with the city". (Reply Br. Tab 8). The City Attorney later said King had been "terminated".

Former Officer King received KLEFPF funds. Clearly the case should have been considered a citizen complaint investigation, if only under KRS 15.520(1)(a)(3).

Officer King was never afforded any protection of KRS 15.520. Hill replies such an example fully rebuts Respondent's claim practical construction and application of KRS 15.520 weighs in favor of the City.

**D. SB 169 HAS NO EFFECT ON THE STATUTE'S APPLICATION**

Respondent's brief argues that [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*<sup>1</sup> 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" the police disciplinary actions outside of citizens' complaints in response to those decisions] (Resp. Br. pp 23-24, Tab 5). In truth, there is no purpose stated or implied in SB 169, only proposed modifications (Resp. Br. Tab 4).

Hill replies that Respondent incorrectly argues that the legislature was aware of recent Kentucky Court of Appeals decisions and that those decisions were why SB 169 (Resp. Br. Tab 4) was not adopted. Hill replies for Respondent to claim, among all the many modifications, that the bill was not adopted indicates the legislature intended the statute to only apply to citizens complaints is error. Hill vehemently denies Respondent's claims SB 169's "express" purpose was to substantively "amend" KRS 15.520 to "extend" it to intradepartmental disciplinary action. Respondent's brief merely parrots the inaccurate portrayal of SB 169 by the Kentucky Association of Chiefs of Police and the Kentucky League of Cities. Respondent's brief also concludes that since SB 169 did not pass, such means the legislature intended KRS 15.520 to only apply to citizen complaints, that ". . . the "General Assembly chose to leave these statutory

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<sup>1</sup> Hill notes that the Local Mandate Fiscal Impact Estimate actually cites *Todd v. University of Louisville* and *Hill v. City of Mt. Washington*. Hill presumes *Todd* refers to *Pearce*.

interpretations in place", and that " . . . the General Assembly has considered and rejected" SB 169. (Resp. Br. p.24) .

While the proposed modifications include clarifying that the statute applies to all complaints against police officers regardless of the source, the proposed bill plainly contains many additions and deletions, most of which do not address to which type of complaints the statute applies. Any or all of the disparate changes could be why the legislation did not pass.

SB 169 was never put to a vote of any Senate committee, much less either the full Senate or House. As noted in the *Amicus Curiae* brief by the Kentucky State Lodge, Fraternal Order of Police, SB 169 was introduced prior to discretionary review being granted.

As the Reply Brief in *Pearce* states, in *United States v. Craft*, 535 U.S. 274, 286-287 (2002) the United States Supreme Court states:

[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute', [since] 'congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'

That the Senate did not vote on SB 169 has no bearing on the correct interpretation of KRS 15.520.

Respondent's brief responds to arguments in Hill's brief and Hill replies that Hill stands on arguments made in the brief.

**E. EXISTING CASE LAW DOES NOT BIND THE COURT'S DECISION**

Respondent's brief cites case law and concludes it supports Respondent's argument and that cases cited by Hill and *Pearce* involved distinguishing factors or the

"precise issue" was not raised (Resp. Br. pp 25-33). Hill replies he disagrees with Respondent's arguments but concludes the cases will be moot on this issue following the Court's opinion.

**F. EXISTING OAGS APPLY THE STATUTE TO ALL COMPLAINTS**

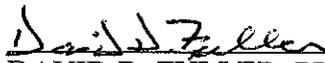
Respondent's brief states the OAGs relied upon in Hill's brief have minimal significance since the Opinions are not binding, lack relevancy, have cursory or unsound reasoning and are overwhelmed by precedent (Resp. Br p 33), then offers self serving analyses of the opinions. Hill replies that the OAGs unequivocally and in well-reasoned opinions apply KRS 15.520 to both citizens complaints and intradepartmental investigations, as previously outlined in Hill's brief.

**CONCLUSION**

For the foregoing reasons, Hill respectfully requests this honorable Court to reverse the January 20, 2012 Court of Appeals' Opinion Affirming the Bullitt Circuit Court Order entered January 10, 2011, to hold KRS 15.520 applies to all investigations and hearings of police officers who qualify pursuant to KRS 15.520(4) for complaints of professional misconduct, violations of rules and regulations of the local unit of government and all complaints of violations of criminal law and to remand the case to Bullitt Circuit Court with instructions to enter an Order for Mt. Washington to dismiss

with prejudice all charges against Hill, to reinstate him to his former position and pay rate of Sergeant, all back pay and other economic benefits and to reinstate him to his former night work shift.

Respectfully submitted,

  
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2. KRS 70.030
3. KRS 164.950
4. [www.lrc.ky.gov/record/12RS/SB169.htm](http://www.lrc.ky.gov/record/12RS/SB169.htm)
5. *City of Munfordville, v. Sheldon*, 977 S.W.2d 497 (Ky. 1998)
6. NEWS - HERALD, September 13, 2012
7. open records Report/September 28, 2012 report of Advanced Investigative Solutions, Inc.
8. NEWS - HERALD, October 4, 2012