RENDERED: FEBRUARY 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000822-MR

JOHN ARTRIP

APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 08-CI-00778

CITY OF HOPKINSVILLE

APPELLEE

OPINION
AFFIRMING IN PART
AND VACATING IN PART

** ** ** ** **

BEFORE: ACREE AND MOORE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

ACREE, JUDGE: The issues before this Court concern the City of Hopkinsville's (City) decision to discharge John Artrip from his duties as a police officer. We must determine whether KRS 15.520 prohibited the City from bringing charges

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580. Sr. Judge Buckingham dissented in this opinion prior to the expiration of his term of senior judge service. Release of the opinion was delayed by administrative handling.

against him in 2008, and whether the City's determination that Artrip was guilty[2] of misconduct was based on substantial evidence. For the following reasons, we affirm in part and vacate in part.

Facts and Procedure

Artrip was employed as a police officer in Hopkinsville, Kentucky, in the autumn of 2004. Approximately one year later, following his involvement in two minor motor vehicle accidents in Tennessee which occurred only moments apart, he was arrested for reckless endangerment, driving under the influence (DUI), violation of Tennessee's implied consent law, and reckless driving. Hopkinsville Chief of Police Kermit Yeager suspended Artrip the following day, providing him with a memorandum which stated, "You are suspended from duty without pay pending the outcome of charges placed against you in Montgomery County, Tennessee**.**"[3] No complaint was filed with the city council at that time, and no hearing was conducted regarding Artrip's suspension.[4]

Artrip filed a wrongful suspension claim against the City of Hopkinsville in federal court, alleging he has been suspended in violation of KRS 95.450 and KRS 15.520, commonly known as the "Police Officers' Bill of Rights." The federal court agreed with Artrip, concluding, "Chief Yeager had no authority to

[2] Use of the word "guilty" here is not intended to connote criminal guilt but is consistent with the terminology used by the City in its administrative disciplinary proceedings against Artrip.

[3] The memorandum also instructed Artrip to turn in his identification and weapon and forbade him from representing the police department or entering the police building for the duration of his suspension.

[4] Artrip eventually pleaded guilty to reckless driving and violation of Tennessee's implied consent law.

indefinitely suspend Mr. Artrip pending the disposition of the criminal charges filed against him [in Tennessee]." *Artrip v. City of Hopkinsville,* No. 5:07-CV-10-R, 2008 WL 77715, at *4 (W.D. Ky. 2008).

Undisputed facts critical both to the federal case and to Artrip's case now before this Court are that "[t]o date[, January 4, 2008, the date the federal opinion was rendered], Mr. Artrip has not been reinstated to active duty, *no administrative charges have been filed against him*, no hearing has been conducted regarding his suspension, and the criminal charges filed against him in Tennessee are still pending." *Artrip*, 2008 WL 77715 at *1 (emphasis supplied).

In the absence of Kentucky caselaw on the issue, the federal court relied on advisory opinions of the Kentucky Attorney General. *Id.* at *2 - *4 (citing Opinion of the Attorney General (OAG) 80-655 (1980) and OAG 81-134 (1981)). Based on these advisory opinions, the federal court concluded that

> Chief Yeager had no authority to indefinitely suspend Mr. Artrip pending the disposition of the criminal charges filed against him [in Tennessee]. Instead, upon Chief Yeager's decision to suspend him, *Mr. Artrip was entitled, under KRS 95.450, to have charges preferred against him and a hearing held on those charges*.

Artrip, 2008 WL 77715 at *4 (emphasis supplied). For Artrip's remedy, the federal court ordered his "reinstatement with full back pay and benefits." *Id.* at *5. A subsequent order sent the parties to mediation to determine the amount of back pay and benefits. Following that mediation, the parties entered into a confidential settlement agreement. This restored the *status quo* existing prior to Chief Yeager's order of suspension.

On April 15, 2008, very soon after Artrip was reinstated in accordance with the settlement agreement, the City formally preferred charges against him and suspended his employment. This time, a written complaint was filed with the City's clerk, and Artrip was provided a document detailing the charges. There were three charges: Count I, inefficiency; Count II, violation of law;[5] and Count III, violation of the rules adopted by the legislative body. The final Count was based upon an alleged pattern of unprofessional conduct. Following a hearing, the city council concluded Artrip was guilty of Counts I and II and fired him.

Artrip appealed the decision to the Christian Circuit Court where the parties soon filed cross-motions for summary judgment. The circuit court determined that the city council's decision was based on sufficient evidence and a correct application of the law. Appeal to this Court then followed.

On appeal, Artrip presents three arguments: (1) KRS 15.520 precluded the City from bringing charges against him in 2008 because of his 2006 suspension; (2) the mayor made erroneous evidentiary rulings in the proceedings before the city council; and (3) the council's factual conclusions with respect to Count I, inefficiency, and Count III, violation of rules, were not supported by substantial evidence. Consequently, he claims, the circuit court erred in affirming the City's decision.

Standard of Review

[5] Artrip stipulated to having violated the law; he bases his argument for reversal of this charge on KRS 15.520 only.

This Court has described the circuit court review of actions taken by a hearing body under that statute as "a quasi trial de novo." *Stallins v. City of Madisonville*, 707 S.W.2d 349, 350 (Ky. App. 1986). "The trial court in its review is to consider both the transcript and the additional testimony and it is limited to a determination of whether the administrative body acted arbitrarily in deciding whether the employee violated the rules and regulations of the police department." *Id.* On appeal from the circuit court, this Court is guided by the "clearly erroneous" standard set out in Kentucky Rule(s) of Civil Procedure (CR) 52.01. *Id*. at 351. We are not to disturb the determinations of the trial court unless they are not supported by substantial evidence. *Id.* (citations omitted). While the hearing body's determination of whether an officer has violated departmental regulations is subject to judicial review, the punishment imposed is not. *Id.* at 350 (citing *City of Columbia v. Pendleton*, 595 S.W.2d 718 (Ky. App. 1980)). Of course, as with any appeal from a decision of an administrative agency, we review the trial court's application of the law to the facts *de novo*. *See Reis v. Campbell County Board of Education*, 938 S.W.2d 880, 885-86 (Ky. 1996).

The City was not precluded from preferring charges against Artrip in 2008.

The gist of Artrip's first argument is that no hearing was conducted within sixty days of his October 19, 2006 suspension and, therefore, KRS 15.520(1)(h)(8) prohibits the preferring of charges against him in 2008. We disagree. Artrip disputes the circuit court's determination that because administrative charges were never preferred against him, the City of Hopkinsville had not violated any

provision of the Police Officer's Bill of Rights. "This determination," argues Artrip, "flies in the face of the Federal Court's ruling . . . that: 'Mr. Artrip was entitled to a hearing on such charges within sixty days of the date of his suspension, October 19, 2006.'" (Emphasis in original).

We note first that no Kentucky court is bound by a federal court's interpretation of Kentucky law. *LKS Pizza, Inc. v. Com. ex rel. Rudolph*, 169 S.W.3d 46, 49 (Ky. App. 2005)(citing *Embs v. Pepsi-Cola Bottling Co.*, 528 S.W.2d 703 (Ky. 1975)). Second, the federal court erroneously measured the sixty-day period from the date of the suspension even though the applicable statute clearly says

> Any police officer suspended with or without pay who is not given a hearing as provided by this section within sixty (60) days *of any charge being filed*, the charge then shall be dismissed with prejudice and not be considered by any hearing authority . . . .

KRS 15.520(1)(h)(8)(emphasis supplied).[6] No charges had been filed when the federal court issued its order so there were no charges to be dismissed as required by the statute. Clearly then, neither KRS 15.520(1)(h)(8) nor any other statutory or regulatory provision of which we are aware prohibited the City from preferring charges for the first time on April 15, 2008.

[6] We recognize the conflict between KRS 15.520 and KRS 95.450. KRS 15.520(1)(h)(8) requires that a hearing be conducted within sixty days, while KRS 95.450(3) requires that the hearing be held within three days. The Kentucky Attorney General has determined that KRS 15.520(1)(h)(8) supersedes KRS 95.450(3). Opinion of the Attorney General (OAG) 81-134 (1981). The parties have not raised this as an issue on appeal, and indeed seem to agree that the sixty-day limitation applies to the instant case. We therefore need not determine whether we agree with the Attorney General's determination, and this opinion should not be read as having done so.

When we read KRS 95.450(1) and (5) together, and in the context of the entire statutory scheme, we conclude that Chief Yeager was permitted to suspend Artrip prior to preferring charges against him. In pertinent part, those sections read as follows:

> (1) Except as provided in subsection (5) of this section no member of the police . . . 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.
> . . . .
>
> (5) When the appointing authority or the head of the department has probable cause to believe a member of the police or fire department has been guilty of conduct justifying dismissal or punishment, he or it may suspend the member from duty or from both pay and duty, pending trial, and the member shall not be placed on duty, or allowed pay, until the charges are heard. If the member is suspended, there shall be no continuances granted without the consent of the member accused.

KRS 95.450(10, (5). Section (1) prohibits discipline of a police officer prior to both the preferment of charges and a hearing except when, under section (5), the police chief determines that there is "probable cause to believe [the police officer] has been guilty of conduct justifying dismissal or punishment[.]" Under such circumstances, suspension can precede the preferment of charges.

However, we agree that a suspension under KRS 95.450(5) does not allow a police chief to suspend an officer indefinitely without preferring charges and

without ever conducting a hearing. Considering the statutory scheme as a whole, we conclude that it was incumbent upon Chief Yeager to prefer charges against Artrip within a reasonable time after suspending him;[7] the preferring of those charges within a reasonable time after the suspension, not the suspension itself, would begin the sixty-day period identified in KRS 15.520(1)(h)(8). Therefore, we agree with the remedy ordered in the federal case because Chief Yeager failed to prefer charges within a reasonable time, not because the hearing was not conducted within sixty days of the suspension. We affirm the circuit court's determination that the 2008 preferment of charges against Artrip for his Tennessee arrest was permissible.

Substantial evidence supported the city council's finding that Artrip was "guilty" of Count I, inefficiency, and Count III, violation of rules adopted by the legislative body.

Artrip next argues that the evidence was insufficient to support the City's findings of "guilt" with respect to the first charge, inefficiency, and the third charge, violation of local rules established by the legislative body. We disagree.

Our review of the City's decision has not revealed any finding with respect to the third charge. Rather, the decision states,

> Following closed session and in open session, [the City] Council returned and voted to find Officer Artrip guilty on Count I by unanimous vote and guilty on Count II by unanimous vote. By unanimous vote, Council dismissed

[7] Chief Yeager would prefer such charges in the same manner as any person may file written charges against a police officer for misconduct. KRS 95.450(2). A complainant prefers charges by "filing them with the clerk of the legislative body[.]" *Id.* Chief Yeager's suspension of Artrip was not the equivalent of preferring charges against him.

> Officer Artrip from employment as a Patrol Officer within the City of Hopkinsville.

By omitting any discussion of Count III, the city council implicitly found Artrip "not guilty" of that charge. It was improper for the circuit court to affirm the administrative finding of guilt on Count III because no such finding existed, and we vacate that portion of the circuit court's order.

On the other hand, with respect to the circuit court's ruling regarding Count I, we affirm. As the circuit judge noted, there was sufficient support for a finding of "guilty" on the inefficiency charge. This evidence included testimony that as a result of his arrest and conviction, Artrip's driving status was questionable and that, even if he could legally drive in Kentucky for work-related purposes, permitting him to do so could create liability issues for the City. Witnesses for the City further testified that permitting an officer to continue to serve, despite having broken the law of another state and having refused to cooperate with law enforcement officials, would dampen department morale and damage the department's image within the community. That constitutes substantial evidence to support the City's factual determinations with regard to Count I.

Artrip asserts members of the city council were motivated to discharge him because they were biased against him. He claims this bias arose because he had recently prevailed against them in the federal district court. This allegation is mere speculation, however. There is no evidence to indicate city council members were,

in fact, biased. The circuit court's ruling on this matter does not constitute an abuse of discretion.

The circuit court's affirmation of the mayor's evidentiary rulings is moot.

Artrip contends Mayor Daniel Kemp erroneously granted the City's motion to exclude evidence of other police officers' conduct in violation of the rules of the legislative body that Artrip claimed was similar to his own but which did not result in termination of their employment. He claims such evidence should have been admitted because it was relevant to the matter before the council. The circuit court disagreed, finding the proffered evidence was not relevant and affirming the mayor's ruling. We see no abuse of discretion in that ruling.

More to the point, however, this argument is moot. The evidence Artrip wished to present was relevant, if at all, to Count III only, violation of local rules by evincing a pattern of misconduct. Indeed, Artrip's argument on this matter is presented in the portion of his brief in which he contends there was insufficient evidence to support a finding he was "guilty" of Count III. Because the council did not make a finding with respect to this charge, and because we have already vacated the circuit court's affirmation of this matter, the argument has no practical significance. We need not address it further.

Conclusions

That portion of the circuit court's order which affirms the City's supposed finding on Count III, that Artrip had committed a violation of local rules,

is vacated. The remainder of the circuit court's order was based upon substantial evidence and correct application of law and is therefore affirmed.

MOORE, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART.

BUCKINGHAM, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I concur with most of the majority opinion, I respectfully dissent from the portion of the opinion that vacates the finding of guilt as to Count III. In my opinion, this court should not reverse or vacate a decision of the trial court on grounds not raised by the appellant on appeal.

"[W]e, as an appellate court, may affirm the trial court for any reason sustainable by the record." *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991). I know of no case or other authority, however, which holds we may reverse for any reason sustainable by the record, even though the appellant failed to raise the issue on appeal. "Failure to raise an issue on appeal waives it[.]" *Personnel Bd. v. Heck*, 725 S.W.2d 13, 18 (Ky. App. 1986).

Even if this court had the discretion to vacate or reverse based on an issue from which no appeal was taken, I do not believe the court should exercise such discretion and do so in this case, since the city council found guilt on Count III and the parties addressed it in that manner in this appeal.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Kenneth Ray Haggard Hopkinsville, Kentucky	David L. Kelly Paducah, Kentucky