RENDERED: DECEMBER 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002832-MR

JOHN KEABLER — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 97-CI-01412

CITY OF ELIZABETHTOWN, KENTUCKY;
AND CITY OF ELIZABETHTOWN CIVIL
SERVICE COMMISSION — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: John Keabler has appealed from the decision of the Hardin Circuit Court entered on October 29, 1999, which affirmed the ruling of the Elizabethtown Civil Service Commission upholding the decision of Police Chief, Ruben Gardner, to demote Keabler from the rank of Sergeant to that of Patrolman. On appeal, Keabler argues that the Circuit Court erred in concluding (1) that he had waived his right to a hearing before the

Commission within 60 days as provided in KRS[1] 15.520[2], (2) that the City complied with the requirement to give notice to the Commission within the time constraints mandated by KRS 90.360, and (3) that the Commission's findings were supported by substantial evidence. Having concluded that no error occurred, we affirm.

The events leading to Keabler's demotion occurred on June 10, 1997. On that day, a nine-year old boy was brought to the police station and detained after it was reported to police that he was attempting to break into vehicles parked in a lot near a local business. The child was obviously hyperactive and refused to cooperate with the officers or to answer their questions designed to elicit basic information such as his name, age and address. The child was placed in an interrogation room with Officer Mark Johnson and constantly climbed onto furniture and handled the equipment. The testimony of various officers, as well as the video recording of the activity in the interrogation room, reveal that Officer Johnson was not successful in his efforts to control the child.

Several officers, including Keabler, were standing outside of the interrogation room. Although not asked to assist with the juvenile, Keabler went inside the room and, using a loud voice and a harsh tone, cautioned the child as follows:

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[1]Kentucky Revised Statutes.

[2]This statute is commonly referred to as the "Police Officer's Bill of Rights." City of Munfordville v. Sheldon, Ky., 977 S.W.2d 497 (1998).

> You sit your ass down in that chair and shut your mouth or I'm going to knock the shit out of you. You understand me? I'm tired of your shit. Now, don't you come in here doing that. Now, you sit down here and act like you've got some sense.

At this point, Keabler was interrupted by the Acting Chief, Mark Sharman, who told Keabler to go back to his own office. Keabler did not immediately obey Sharman's order, but attempted to explain to Sharman what was happening. Sharman was not interested in hearing what Keabler had to say, and twice more ordered Keabler to return to his office. Sharman testified that Keabler's face was red and his fists were clinched. Two days later, Chief Gardner informed Keabler that he would be suspended pending an investigation of the incident.

Upon the conclusion of the investigation, Keabler was found by Chief Gardner to be in violation of multiple sections of the police department's policies, including the failure to "use discretion, tact and control" when dealing with the juvenile, mistreating persons in custody, and being insubordinate when he was ordered to remove himself from the situation. In addition to being demoted, Keabler was advised to seek counseling for "anger and rage control."

Over the next several weeks, Keabler, through his attorney, attempted to reach a different result with respect to the discipline imposed by Chief Gardner. However, when it became apparent that the Chief would not alter his stance, Keabler demanded a hearing. On July 28, 1997, the City informed the Civil Service Commission of the demotion and of the fact that Keabler desired a hearing. The Chairman of the Commission wrote

to the parties' attorneys to suggest that the three of them get together to set the hearing date. The hearing was conducted on August 27, 1997 (77 days after Keabler's suspension), and the Commission rendered its ruling and adopted the findings and punishment of Keabler imposed by Chief Gardner the next day.[3]

Keabler obtained new counsel and pursued an appeal of the Commission's decision in the Hardin Circuit Court. For the first time, Keabler raised an issue concerning the timing of the hearing, and the City's failure to notify the Commission of the charges against him within a reasonable time as required by KRS 90.360(2). The Circuit Court determined that Keabler waived any right to a hearing within 60 days of his suspension or demotion as he made no objection prior to, or at the time of, the hearing. Further, the Circuit Court concluded that the Commission's ruling

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[3]The ruling reads in part as follows:

> The Commission feels, finds, and adjudicates by a preponderance of the evidence that Officer Keabler, on June 10, 1997, was verbally abusive to the juvenile in question and that his further actions amounted to insubordination of a superior officer.
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> Officer Keabler, otherwise has had a rather exemplary carreer [sic] with the Elizabethtown Police Department and the Commission regrets that this incident mars his carreer [sic] to any extent, but nevertheless the Commission does not feel that it can support or countenance the conduct exhibited by the Officer in question on June 10, 1997, and believes that a higher standard of conduct should be expected of all officers in uniform of the Elizabethtown Police Department above what was exhibited by Officer Keabler on June 10, 1997.

was supported by substantial evidence. In this regard, the Circuit Court reasoned that

> [m]ore than one police officer testified that they believed Officer Keabler's conduct to be improper and worthy of the punishment he received. It is undisputed that he used profane language in threatening the child and had to be given an order three times by a superior officer before he obeyed it. This evidence makes the Commission's conclusions reasonable and supported by substantial evidence.

Following the Circuit Court's affirmance of the Commission's ruling, Keabler sought further review in this Court.

As his first argument, Keabler insists that the Circuit Court erred in concluding that he waived his right to an evidentiary hearing within 60 days of either the date he was suspended, June 12, 1997, or the date he was charged with misconduct and demoted, June 26, 1997, as required by KRS 15.520(1)(h)(8). This statute provides:

> In order to establish a minimum system of professional conduct of the police officers of local units of government of this Commonwealth, the following standards of conduct are stated as the intention of the General Assembly to deal fairly and set administrative due process rights for police officers of the local unit of government and at the same time providing a means for redress by the citizens of the Commonwealth for wrongs allegedly done to them by police officers covered by this section:
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> . . .
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> When a hearing is to be conducted by any appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes, the following administrative due process rights shall be recognized and these shall be the minimum rights afforded any police officer charged:

. . .

> 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 and the officer shall be reinstated with full back pay and benefits[.]

Relying on City of Munfordville,[4] and the fact that the hearing that was ultimately conducted on August 27, 1997, was outside the 60-day window from either Keabler's suspension on June 12, or his demotion on June 26, Keabler contends that he is entitled, as a matter of law, to have the charges against him dismissed and to be reinstated to his former position of sergeant.

The City responded to this same argument in the Circuit Court by arguing that Keabler waived the 60-day time limit in two ways: (1) by his attorney agreeing to the hearing date being outside the time limit; and, (2) by his failure to raise any issue with respect to the timeliness of the hearing before the Commission. Keabler has never contested the fact that his counsel agreed to the hearing date being beyond the 60-day time period proscribed by KRS 15.520(1)(h)(8). Nor is there any dispute, as the transcript of the hearing reveals, that this issue was not raised at any time before the Commission. Thus, confronted with an obvious waiver, Keabler asserts in his brief filed in this Court that he should not be bound by the actions of his attorney. His attorney argues that

[4]Unlike Keabler, the officer fired in Munfordville was not afforded any of the due process rights contained in KRS 15.520, nor does that case involve an issue of waiver.

> [i]naction or silence by Sgt. Keabler through his then counsel should not constitute a waiver of his right to a timely hearing as provided in the statutes. A waiver of due process rights must be clear and unequivocal. Keabler's acquiescence through his then attorney, in the setting of a hearing date beyond the sixty (60) days allowed by statute should not be found to be an implied waiver of his statutory right to a hearing within sixty (60) days. . . .
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> [T]he implicit waiver of the sixty (60) day hearing requirement as propounded by [the City] was without [Keabler's] consent, knowledge or approval. As submitted in [Keabler's] brief herein, Sgt. Keabler never voluntarily or knowingly waived his right to a timely hearing. In addition, [the City] never sought or obtained a waiver from Sgt. Keabler of the mandatory hearing requirement.

The weakness of this argument is obvious. First, since the issue was not raised at the Commission level, there is no evidence of record of Keabler's awareness, or lack thereof, of his rights pursuant to KRS 15.520, and thus no evidence of whether he knowingly waived his right to a hearing within 60 days of his suspension or demotion. More fundamentally, it is settled that a litigant is bound by the actions of their legal counsel performed within the scope of their authority.[5] Even in criminal cases where liberty interests are in jeopardy, due process rights are subject to waiver by one's attorney.

For example, in discussing whether defense counsel's agreement to a trial date outside the time limits mandated by the

[5] See Clark v. Burden, Ky., 917 S.W.2d 574, 575-76 (1996) (although the Court held that "express client authority" was required before an enforceable settlement agreement comes into existence, it recognized that generally an attorney is an agent for the client with broad power to act for and on the client's behalf).

Interstate Agreement on Detainers constituted a waiver of defendant's right to a speedy trial, the United States Supreme Court held as follows:

> We have, however, "in the context of a broad array of constitutional and statutory provisions," articulated a general rule that presumes the availability of waiver, and we have recognized that "[t]he most basic rights of criminal defendants are . . . subject to wavier[.]" . . .
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> What suffices for waiver depends on the nature of the right at issue. . . . For certain fundamental rights, the defendant must personally make an informed waiver. For other rights, however, waiver may be effected by action of counsel. "Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has — and must have — full authority to manage the conduct of the trial." As to many decisions pertaining to the conduct of the trial, the defendant is "deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Thus, decisions by counsel are generally given effect as to what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence[.] . . .
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> Scheduling matters are plainly among those for which agreement by counsel generally controls [citations omitted].[6]

Clearly, Keabler's argument that the City or the Commission should have obtained his personal waiver to a hearing outside the 60-days mandated by KRS 165.520, is simply untenable. Likewise, his contention that the Circuit Court erred in

[6] New York v. Hill, 528 U.S. 110, 120 S.Ct. 659, 664, 145 L.Ed.2d 560, 566-67 (2000).

concluding that he waived his right to a hearing within 60 days is without merit.

Next, Keabler argues that the City failed to comply with the provisions of KRS 90.360(2), which provides:

> Any person may prefer charges in writing against any employee by filing them with the mayor or other appointing authority who shall communicate the charges without delay to the civil service commission of the city. The charges must be signed by the person making them and must set out clearly each charge. The appointing authority shall, whenever probable cause appears, prefer charges against any employee whom he believes guilty of conduct justifying his removal. Upon the filing of charges the clerk of the civil service commission shall notify its members and serve a copy of the charges upon the accused employee with a statement of the date, place and hour at which the hearing of charges will begin, this hearing not to be held within three (3) days of the date of the service of charges upon the accused employee. The day on which the charges are served on the accused employee shall count as one (1) of the days of notice. The person accused may in writing waive the service of charges and demand trial within three (3) days after they have been filed with the clerk of the civil service commission.

It is Keabler's argument that the statute required the City, through its Police Chief, to report the charges which resulted in his demotion to the Commission "without delay," and that by doing so on the thirty-second day, the City failed to so comply. Assuming that this statute has any application to the case sub judice, Keabler does not suggest how he was prejudiced by the failure to report the matter to the Commission sooner. Certainly, when the Commission was ultimately informed of the

charges on July 28, 1997, there was sufficient time remaining to conduct a hearing within the 60-day window.[7]

In any event, we do not believe this statute has any application to the instant case. KRS 90.360 concerns adverse employment actions against employees of second or third class cities.[8] KRS 15.520, a later enacted statute which provides procedures specific to hearings in the event a police officer is charged with misconduct, is the statute governing the rights afforded to Keabler.[9] As discussed earlier, Keabler was either afforded all the rights provided to him by KRS 15.520, or, in the case of the timeliness of the hearing, the right was waived.

Finally, Keabler argues that the Circuit Court erred in its determination that the Commission's action upholding his demotion was supported by substantial evidence. He insists that although his actions and conduct

> may [have been] inconsistent with the rules and regulations of the Elizabethtown Police Department, his act of shouting at the juvenile and using profanity to accomplish an end consistent with the best interests of the

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[7]In his brief Keabler suggests that "it should be clear to this reviewing Court that the primary reason a hearing was not conducted within sixty (60) days of the demotion was Chief Gardner's failure to timely communicate his charges against Sgt. Keabler to the Civil Service Commission." However, it is not clear to this Court that the delay was the "primary" reason for the failure of the Commission to conduct its hearing within the limit constraints of KRS 15.520. For all we know, since the issue was not raised below, the hearing may have been scheduled on August 27, for the convenience of Keabler or his attorney.

[8]KRS 90.360(1).

[9]See Shannon v. Burke, 276 Ky. 773, 125 S.W.2d 238, 239 (1939) (conflict, if any, between two statutes must be resolved by following "the later statute dealing with the specific subject").

> Elizabethtown Police Department simply does not rise to the level of a career ending demotion.

The evidence does reveal that Keabler had an exemplary career, untainted by any disciplinary action prior to June 1997. Further, we have no reason to doubt his testimony that his treatment of the juvenile was motivated by a desire to prevent the child from either hurting himself, or destroying property belonging to the department.[10] However, even if we believed that his decision to use profane words to get the juvenile's attention did not rise to the level of misconduct sufficient to warrant a demotion in rank, Keabler's argument overlooks the charge, and the Commission's finding, that he was insubordinate and refused to obey his superior officer's command that he leave the area and go to his office. The evidence was uncontradicted that the Acting Chief had to tell Keabler three times to go to his office

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[10]Keabler testified at the hearing as follows:

> Well, he was still acting up pretty well and he was moving around and trying to get out and well, Officer Johnson was having a pretty hard time with him. I was not mad when I entered the room and told the boy what I told him. The only reason I did that was to try to get about one step above the way he was acting to try to get him to settle down. He could have hurt himself by the things he was doing; he could have torn up equipment in the room. I was not mad at the boy, the boy didn't say one word to me, he didn't say anything to me. This was just my attempt to get him to at least cooperate, settle down and maybe save us from losing some equipment or maybe from the boy hurting himself. . . I was merely using a tactic that's used lots of times by Police Departments and Police Officers to attempt to get somebody under control somewhat.

before Keabler complied. This behavior distinguishes this case from Kentucky Board of Nursing v. Ward,[11] upon which Keabler relies. We do not believe that it can be concluded that the Commission's determination that Keabler's behavior was insubordinate was unreasonable, and thus, arbitrary. Likewise, the Circuit Court's decision affirming the Commission's decision was not clearly erroneous.[12]

Accordingly, the opinion of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Mark L. Miller Louisville, KY	Jerry M. Coleman Elizabethtown, KY

[11]Ky.App., 890 S.W.2d 641 (1994) (conduct of nurse who, using a stern tone of voice, told an elderly patient,"If you don't sit down and be quiet, I will take you to your room and tie you in the bed and you won't be able to get up," held not to constitute verbal abuse of patient sufficient to establish unfitness to provide nursing).

[12]See Crouch v. Jefferson County, Kentucky Police Merit Board, Ky. 773 S.W.2d 461, 464 (1989) (judicial review of an adverse employment action affecting a police officer is limited to the question of arbitrariness, that is whether the board's decision is clearly unreasonable).