RENDERED: SEPTEMBER 12, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001706-MR

JIMMIE LEE HAWKINS — APPELLANT

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 00-CI-00205

CITY OF LAWRENCEBURG, KENTUCKY
AND GARY CHILTON, MAYOR — APPELLEES

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Jimmie Lee Hawkins (Hawkins) appeals from an order of the Anderson Circuit Court affirming a police disciplinary decision of the City Council of the City of Lawrenceburg. The disciplinary decision, among other things, determined that Hawkins was guilty of incompetency, inefficiency, and the accumulation of minor infractions, and demoted Hawkins from Chief of Police of the Lawrenceburg Police

Department to the rank of Patrolman 2. For the reasons stated below, we affirm.

On August 19, 1982, Hawkins was hired by the City of Lawrenceburg as a police officer. In January 1999, appellee Gary Chilton took office as the Mayor of Lawrenceburg. On April 12, 1999, Chilton appointed Hawkins Chief of Police of the Lawrenceburg Police Department. During the following months, various incidents involving Hawkins occurred and were reported to Mayor Chilton. Among these were allegations that Hawkins verbally abused and berated police officers; used inappropriate language when disciplining police officers; disciplined police officers in front of others; created a hostile work environment; and threatened to commit suicide.

On August 23, 2000, Mayor Chilton sent Chief Hawkins a letter placing him on administrative leave with pay pending a psychological evaluation. On August 31, 2000, Hawkins underwent an evaluation by Dr. Dan Langer. On September 8, 2000, Dr. Langer issued a report concluding, among other things, that "[b]ased upon the evaluation, Mr. Hawkins appears psychologically fit for duty in the field of law enforcement."

During this period Mayor Chilton continued to investigate conditions at the Police Department by visiting police headquarters and talking to various police officers. As a result of his inquiries, Mayor Chilton concluded that Hawkins

should not remain in his position as Chief, and on September 20, 2000, Chilton presented Hawkins with an offer to take a demotion to the rank of Sergeant "performing such police and public safety duties as the Mayor may direct, including but not limited to enforcement of the existing codes of the City." By letter dated September 21, 2000, Hawkins rejected the offer, asserted that he was entitled to the protections contained in KRS[1] 15.520,[2] and threatened legal action against the City.

Following Hawkins' rejection of his offer, on September 22, 2000, Chilton issued a letter to Hawkins placing him on suspension. The letter charged Hawkins with incompetency, inefficiency, and the accumulation of minor infractions. The letter also scheduled a hearing on the charges.

The same day, September 22, 2000, Hawkins filed a "Verified Complaint with Jury Demand" in Anderson Circuit Court.[3] Named as defendants were Mayor Chilton and the City of Lawrenceburg. The complaint alleged, among other things,

[1] Kentucky Revised Statutes.

[2] KRS 15.520 addresses complaints against a police officer, the manner of investigating a complaint, and provides a police officer with the right to a hearing upon the filing of a complaint. The statute is sometimes referred to as "The Police Officers' Bill of Rights." See City of Munfordville v. Sheldon, Ky., 977 S.W.2d 497 (1998).

[3] While not relevant to the issues in this appeal, we note at the time of this filing Hawkins had not exhausted his administrative remedies. "[P]roper judicial administration mandates judicial deference until after exhaustion of all viable remedies before the agency vested with primary jurisdiction over the matter." Board of Regents of Murray State University v. Curris, Ky. App., 620 S.W.2d 322, 323 (1981).

wrongful discharge and extreme and outrageous conduct, and sought, among other things, Hawkins' reinstatement as Chief of Police and monetary damages, including monetary damages for past and future wages and benefits, past and future mental anguish, psychological pain and suffering, and punitive damages. In conjunction with the complaint, Hawkins also filed a motion for temporary injunctive relief requiring that he be reinstated as Chief of Police. On October 10, 2000, Hawkins filed an amended motion for injunctive relief requesting the additional relief that the defendants be enjoined from conducting any hearings regarding disciplinary action against Hawkins. On October 16, 2000, Hawkins filed a motion for a temporary restraining order preventing the defendants from holding a hearing regarding Hawkins' situation. These motions to stop the hearing were denied.

On October 17, 2000, a hearing was held before the Lawrenceburg City Council addressing the disciplinary issues contained in Mayor Chilton's September 22, 2000, letter. The City Council subsequently announced its decision in its undated "Findings, Conclusions and Order." Under the decision, Hawkins was found guilty of incompetency, inefficiency, and the accumulation of minor infractions. Further, he was demoted to the rank of Patrolman 2 with his salary not to exceed that of the highest paid officer of that rank in the Lawrenceburg Police

Department. In addition, Hawkins was suspended from duty without pay for six months, and at the conclusion of his suspension, was to be assigned to the duties of code enforcement officer.

On October 23, 2000, the defendants filed a notice in Anderson Circuit Court that they were removing Hawkins' lawsuit against the City and Mayor Chilton to Federal District Court on the basis that Hawkins' complaint had raised federal constitutional issues. On November 28, 2000, the Federal District Court issued an order dismissing Hawkins' federal due process claim and remanding the case back to Anderson Circuit Court for final determination.

On March 7, 2001, Hawkins filed an amended complaint. The amended complaint substantially mirrored his September 22, 2000, complaint except that the amended complaint sought the additional relief that the circuit court reverse the Findings, Conclusions, and Order of the Lawrenceburg City Council. On March 16, 2001, the defendants filed their answer to the amended complaint.

On June 25, 2001, Hawkins filed a motion for judgment on the pleadings pursuant to CR[4] 12.03. On August 6, 2001, the defendants filed a response to Hawkins' motion for judgment on

[4] Kentucky Rules of Civil Procedure.

the pleadings and, in addition, filed their own motion for judgment on the pleadings.

On October 23, 2001, the circuit court entered an order denying Hawkins' motion for judgment on the pleadings. The order did not address the defendants' outstanding motion for judgment on the pleadings. Hawkins subsequently filed a notice of appeal with this Court.

On June 7, 2002, this Court entered an order dismissing Hawkins' appeal as interlocutory. See Hawkins v. City of Lawrenceburg, Case No. 2001-CA-002569-MR. On July 1, 2002, Hawkins filed a motion in the circuit court requesting that the circuit court enter findings of fact, conclusions of law, and a judgment based upon the record as submitted together with the briefs of the parties.

On June 12, 2002, the circuit court entered an order again denying Hawkins' motion for judgment on the pleadings, affirming the Lawrenceburg City Council's findings, and dismissing Hawkins' appeal with prejudice. This appeal followed.

First,[5] Hawkins contends that general principles of due process mandate a reversal of the circuit court and that the

[5] To facilitate continuity, we address the arguments raised by Hawkins in a different order than presented in his brief.

findings of the City Council should be reversed as its findings are clearly erroneous and not based upon substantial evidence.

Hawkins has appealed the City Council's disciplinary decision pursuant to KRS 15.520(2)[6] and KRS 15.520(3).[7] As KRS 15.520(2) is a trial de novo statute, the duty of the circuit court in this case is as set forth in Brady v. Pettit, Ky., 586 S.W.2d 29 (1979), as follows:

> [I]n public employee discharge cases where there is a trial de novo statute, the discharged employee is entitled to something less than a classic trial de novo in circuit court. In this proceeding in circuit court the burden of proof shifts to the discharged employee. After review of the transcript of evidence or hearing the witnesses, the trial court is limited in its decision. The trial court may not substitute its judgment for that of the administrative body, that is, there may not be a substitute punishment. The trial court may find the discharged employee has failed to meet the burden of proof and affirm the action of the administrative board; or if it is found that the employee has sustained the burden of proof, the trial court may set aside the punishment.
>
> . . .

[6] KRS 15.520(2) provides as follows: "Any police officer who shall be found guilty by any hearing authority of any charge, may bring an action in the Circuit Court in the county in which the local unit of government may be located to contest the action of that hearing authority, and the action shall be tried as an original action by the court."

[7] KRS 15.520(3) provides as follows: "The judgment of the Circuit Court shall be subject to appeal to the Court of Appeals. The procedure as to appeal to the Court of Appeals shall be the same as in any civil action. As the provisions of this section relate to a minimum system of professional conduct, nothing herein shall be construed as limiting or in any way affecting any rights previously afforded to police officers of the Commonwealth by statute, ordinance, or working agreement."

> [R]eview of the transcript of evidence in circuit court is a corollary to the burden of proof which has shifted to the discharged employee. In circuit court the transcript of evidence is reviewed but the proceeding is not limited to this review; the discharged employee is accorded the right to call such additional witnesses as he may desire. The trial court's review is limited to a determination of whether the administrative body acted arbitrarily. (emphasis original).

Id. at 32–33.

To determine arbitrariness, the appellate court may review the record, the briefs, and any other evidence or testimony which would be relevant to that specific, limited issue. The appeal is not the proper forum to retry the merits. It is limited only to the question of whether the hearing body's action was clearly unreasonable. Crouch v. Jefferson County, Kentucky Police Merit Bd., Ky., 773 S.W.2d 461, 464 (1988).

The decision of the hearing body, though resting ultimately on opinion as distinguished from pure fact, represents a factual finding and is not to be disturbed unless it is arbitrary or unreasonable. "Arbitrary" means "clearly erroneous," which, in turn, means unsupported by substantial evidence. "Unreasonable" means that under the evidence presented there is no room for difference of opinion among reasonable minds. Crouch at 464 (quoting Thurman v. Meridian Mutual Insurance Company, Ky., 345 S.W.2d 635, 639 (1961)).

In its July 12, 2002, order, the circuit court affirmed the findings of the City Council, including its finding that Hawkins was guilty of all charges proffered against him. The findings of the City Council were, in relevant part, as follows:

> Based on the evidence presented at hearing, the majority of which was uncontested and demonstrated a pattern of abusive and obscene language and discourtesy to other members of the department rising to the level of abusive behavior, City Council finds that Mr. Hawkins has lost the confidence of a considerable number of officers of the Lawrenceburg Police Department, and that this failure of leadership constitutes incompetency as chief of police pursuant to Part III, D.,2.,a. of the personnel policy and has made it impossible for Mr. Hawkins to perform his duties as chief in an efficient manner constituting inefficiency pursuant to Part III, D.2.,b. of the personnel policy. There was further evidence of an extensive accumulation of minor infractions on the part of Mr. Hawkins contrary to Part III, D.,2.,s. of the personnel policy.
>
> The Council concludes that Hawkins is guilty of all charges proffered in the September 22, 2000, letter against him.

The City Council's finding that Hawkins was guilty of incompetency, inefficiency, and an extensive accumulation of minor infractions in violation of the City of Lawrenceburg's personnel policies is supported by substantial evidence.

At the October 17, 2000, hearing, extensive testimony regarding Chief Hawkins' tenure as Chief of Police was

presented. Among the witnesses called were various current and former police officers, other Police Department employees, and Mayor Chilton. The witnesses called by Mayor Chilton testified that, among other things, under Hawkins, morale was very low, that there was a tense mood in the office, that working for Chief Hawkins "was like walking on pins and needles," and that Chief Hawkins underwent significant mood swings. Many of the officers testified that they had considered leaving the Department as a result of Hawkins' conduct.

A primary complaint was Hawkins' method of discipline. Many witnesses testified that they had seen, or were aware, that Hawkins frequently, as a method of discipline, berated and criticized officers in front of others using obscene language. For example, in June 1999, Officer Chris Atkins was conducting an observation prior to administering a DUI test when he was informed that Chief Hawkins wanted to talk to him. Atkins completed the DUI test prior to reporting to Hawkins, and Hawkins told Atkins, in the presence of others, "When I tell you I need to talk to you, that means f_ _ _ing right now." The witnesses testified to several incidents of this type.

Jason Briscoe, and several other officers, testified regarding an incident involving Briscoe in which Hawkins berated Briscoe in front of others by stating to the effect that Briscoe "was just like his father and that he [Hawkins] had to have duct

tape on his slapjack because he wore his [Briscoe's father] head out so many times with it." Again, the witnesses testified regarding several instances where Hawkins berated officers in this manner.

In addition, there was testimony to the effect that Hawkins had various problems involving his girlfriend and that these problems would affect his mood. There was testimony that Hawkins was heard to say that he "would be better off dead" and other statements which could be interpreted as suicide threats. Witnesses also testified that Hawkins had told them not to patrol in the downtown area, apparently because he did not want the officers around his girlfriend's workplace.

As a final example of inappropriate conduct, Officer Kevin Crum testified that on an occasion he had arrested an African-American and had transported the prisoner to the station. Crum asked Hawkins if he wanted to see the prisoner, and Hawkins replied, "I don't want anything to do with that n _ _ _ _." Chief Hawkins later tried to rationalize his comment by stating that he "didn't mean anything derogatory by it."

The above examples provide a representative sample of the testimony concerning Hawkins' misconduct as Police Chief. In consideration of this testimony, the findings of the City Council, including the finding that Hawkins was guilty of the charges contained in the September 22, 2000, letter were

supported by substantial evidence. Moreover, the City Council's decision was not unreasonable, as even if another hearing body would have found differently, there is room for difference of opinion among reasonable minds.

Next, Hawkins contends that the circuit court erred by failing to make findings of fact pursuant to CR 52.01 even though he had requested findings pursuant to CR 52.04.

Following this Court's dismissal of Hawkins' interlocutory appeal, on July 1, 2002, Hawkins filed a motion requesting the circuit court to "enter Findings of Fact, Conclusions of Law and a Judgment in this case based upon the record as submitted to the Court together with the Briefs of the parties." The circuit court entered its order on July 12, 2002, and on August 12, 2002, Hawkins, without filing a motion for entry of additional findings of fact, filed his notice of appeal to this Court.

CR 52.01 provides that "[I]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" As the proceeding in circuit court was an action pursuant to KRS 15.520(2), a modified trial de novo action, it is questionable whether CR 52.01 applies. As previously noted, judicial review of Hawkins' challenge to the City Council's

decision is limited to the question of arbitrariness. Hawkins chose not to present any additional testimony, so it is unclear what "findings of fact" he believes should have been made by the circuit court. Moreover, the circuit court specifically affirmed the City Council's findings of fact.

Further, the record discloses that following the entry of the trial court's July 12, 2002, order, Hawkins filed his notice of appeal to this Court without any additional filing bringing to the attention of the circuit court its failure to make proper findings. See CR 52.02 and CR 52.04. As Hawkins elected not to request more specific findings, any alleged error relating to the circuit court's failure to make findings is waived on appeal. CR 52.04; Crum v. Commonwealth, Cabinet for Human Resources, Ky. App., 928 S.W.2d 355, 357 (1996).

Next, Hawkins contends that the trial court erred by failing to grant his motion for judgment on the pleadings even though the Mayor and the City Council failed to follow the applicable statutes and procedures for police officer discipline.

When a party moves for a judgment on the pleadings, he admits for the purposes of his motion not only the truth of all his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all his own allegations which have been denied by his adversary. Archer v.

Citizens Fidelity Bank & Trust Co., Ky., 365 S.W.2d 727, 729 (1963). The judgment should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief. Spencer v. Woods, Ky., 282 S.W.2d 851, 852 (1955).

Accepting as true all of the instances of Hawkins' misconduct alleged by the City, and accepting as untrue all of the allegations of procedural deficiencies alleged by Hawkins but denied by the City, under this rigorous standard, Hawkins was not entitled to a judgment on the pleadings.

Next, Hawkins contends that his due process rights provided under KRS 15.520 were violated because he was not advised in writing prior to or within 24 hours of his suspension from duty of the reasons therefore pursuant to KRS 15.520(1)(b). Hawkins' argument is based upon the premise that he was first suspended on August 23, 2000, when he was placed on administrative leave with pay and directed to attend an appointment with Dr. Dan Langer for "counseling and evaluation." The August 23, 2000, letter stated, in relevant part, as follows:

> Effective immediately, I am placing you on administrative leave with pay. I have scheduled you an appointment with Dr. Dan Langer . . ., for counseling and evaluation.
>
> You will remain on administrative leave until such time as Dr. Langer has diagnosed

> your condition and provided the City with his report, at which time a determination will be made on your position with the City. I must ask you not to return to the police station or perform any policing activity of any type, while on this leave. I will hold your administrative car, badge, identification card and any assigned police equipment in safety during this time.

Hawkins argues that, in reality, he was first suspended, and the notification provisions of KRS 15.520 were first triggered, on August 23, 2000, when he was notified that he was being placed on administrative leave with pay. However, the August 23, 2000, letter placing Hawkins on administrative leave, in combination with Mayor Chilton's testimony, discloses that the purpose of the August 23 suspension was in connection with Mayor Chilton's concern regarding statements made by Hawkins which could be construed as suicidal, not for disciplinary reasons. The letter specifically states that the purpose of the leave is for "counseling and evaluation" by Dr. Dan Langer, and, further, the text of the letter lacks any suggestion that the purpose of the personnel action is related to discipline.

The record reflects that Hawkins was first suspended from duty for disciplinary reasons on September 22, 2000, in a letter delivered to him on that day. In addition, the subject matter of the hearing, and the charges which led to Hawkins' demotion, are related to the September 22 letter, not the

August 23 letter. The City Council's Findings, Conclusions, and Order specifically states that "The Council concludes that Mr. Hawkins is guilty of all charges proffered in the September 22, 2000, letter to him." As such, the August 23 letter placing Hawkins on leave of absence did not trigger KRS 15.520, and, in the September 22 letter, Hawkins was notified of the charges against him simultaneously with his suspension, thereby complying with KRS 15.520(1)(b).

In the alternative, Hawkins contends that the September 22, 2000, letter was not specific enough to comply with KRS 15.520(1)(e). KRS 15.520(1)(e) provides as follows:

> Any charge involving violation of any local unit of government rule or regulation shall be made in writing with sufficient specificity so as to fully inform the police officer of the nature and circumstances of the alleged violation in order that he may be able to properly defend himself. The charge shall be served on the police officer in writing;

The September 22, 2000, letter proffering charges against Hawkins stated, in relevant part, as follows:

> Pursuant to the Personnel Policies of the City of Lawrenceburg, this letter confirms my decision of which you were informed last evening that you have been suspended without pay from the your [sic] position with the City. Also, pursuant to the policies of the City, this suspension could lead to dismissal from employment with the City. As you and your counsel have been informed, this action is not being taken on the basis of a citizen complaint as the City has not

> received one. Rather, it appears that you have lost the confidence of the members of the police department.
>
> Although I continue to believe that under state law you are an employee at will of the City, and therefore subject to dismissal without cause, I respect your desire to have a hearing in this matter and will observe the provisions of KRS 15.520 as I believe that is in the best interest of the City and the public. For purposes of complying with subsection (1)(b) of that statute, the reasons for the suspension are as follows:
>
> 1. Incompetency (Part III, D.,2.,a. of the Personnel Policy): Maintaining the confidence of the members of the police department is one of the primary competencies of a chief.
>
> 2. Inefficiency (Part III, D.,2.,b. of the Personnel Policy): Without the confidence of the members of the police department, it is impossible to fulfill the other duties of the chief in an efficient manner.
>
> 3. An accumulation of minor infractions (Part III, D.,2.,s. of the Personnel Policy): I have been made aware of and have discussed with you your repeated use of abusive and obscene language and discourtesy to other members of the police department (Part III, D.,2.,l. and m.).
>
> You are hereby notified that, pursuant to Part III, D.,3,d.,(4) of the Personnel Policy and subsection (1)(h)l. of KRS 15.520 that a hearing in this matter will be held before me at City Hall on October 9, 2000, at 9:00 a.m.

The letter complies with the requirements of KRS 15.520(1)(e). The contents of the letter notified Hawkins of his suspension, the reasons for his suspension, and cited to

particular sections of the City Personnel plan. The letter specifically notifies Hawkins that the charges relate to incompetency, inefficiency, and an accumulation of minor infractions. Given this level of specificity, we do not believe any violation occurred regarding the level of detail included in the September 22, 2000, letter. Compare Mason v. Seaton, 303 Ky. 528, 198 S.W.2d 205 (1946); and Bregel v. City of Newport, 208 Ky. 581, 271 S.W. 665 (1925).

Next, Hawkins contends that his due process rights were violated because the appellees failed to provide him with a hearing on charges filed against him within 60 days pursuant to KRS 15.520(1)(h)(8). In support of his argument Hawkins states "[s]ince all of the alleged complaints made by witnesses who testified at the October 17th hearing were of events that had occurred well before Chief Hawkins' original suspension on August 23, 2000, but were never reduced to any written, filed charges, all of those charges were dismissed with prejudice per KRS 15.520(1)(h)(8) by operation of statute, and can not support the Findings, Conclusions and Order made by the City Council as a result of the October 17th hearing."

KRS 15.520(1)(h)(8) provides as follows:

> 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;

By its plain language, KRS 15.520(1)(h)(8) does not establish a general statute of limitations period beyond which a specific instance of misconduct may not be considered in a disciplinary proceeding. Rather, the statute is only triggered once a charge has been filed and the officer has been suspended; and then a hearing has to be held within 60 days following the filing of the charge. The statute does not limit what may be considered in a disciplinary proceeding to events which occurred within 60 days prior to the suspension.

Next, Hawkins contends that the appellees erred by considering allegations against him which were older than 60 days in contravention of KRS 15.520(1)(h)(8).

This argument is, in substance, merely a rehash of the previous argument. However, again, the 60-day requirement established in KRS 15.520(1)(h)(8) refers to the time in which a hearing must be held after the filing of charges. The plain language of the statute does not prohibit the consideration of events older than 60 days from the date charges are filed.

Finally, Hawkins contends that the Mayor and the City violated the terms of their own personnel plan. Specifically, Hawkins contends that under the applicable provisions of the personnel plan, the first infraction calls for a verbal

reprimand of the employee; the second violation calls for a written warning; and after repeated violations, suspension may be imposed.

The function of the hearing body in instances of charges against police officers is to make two determinations: first, whether the officer has violated the rules and regulations of the department and if so, second, it must exercise its discretion in imposing a penalty. The first is subject to judicial review; the second is not. Sound public policy requires that the matter of punishment and discipline of a police officer be left to the city. City of Columbia v. Pendleton, Ky. App., 595 S.W.2d 718, 719 (1980); Stallins v. City of Madisonville, Ky. App., 707 S.W.2d 349, 350 (1986).

As this argument is concerned with the penalty imposed by the City Council, this issue is not subject to our review.

For the foregoing reasons the judgment of the Anderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Mark A. Bubenzer Frankfort, Kentucky	Dave Whalin Louisville, Kentucky