

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-002375-MR

SEAN DALY

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE EDWIN M. WHITE, JUDGE  
ACTION NO. 04-CI-00234

THE CITY OF HOPKINSVILLE,  
HOPKINSVILLE, KENTUCKY; and  
THE CITY OF HOPKINSVILLE POLICE  
DEPARTMENT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Sean Daly appeals from a summary judgment entered by the Christian Circuit Court dismissing his complaint alleging due process violations relating to the termination of his employment. For the reasons stated hereafter, we affirm.

The underlying facts are undisputed. In January 1998, Daly was hired by the appellee Hopkinsville Police Department as a police officer for the appellee City of Hopkinsville (City).

He continued in his employment as an officer in good standing until February 3, 2003, when he was arrested and charged with fourth-degree assault relating to a domestic dispute with his estranged wife. A domestic violence order (DVO) was issued and Daly immediately was suspended without pay from his employment.

More than four months later, on June 13, the criminal charge against Daly was dismissed. On June 18 Daly sought reinstatement to his prior position, asserting that he had not been provided a timely hearing within sixty days pursuant to KRS 15.520(1)(h)8. The Hopkinsville Police Chief responded the following day by notifying Daly that he was "hereby suspended without pay pending an administrative review of the events that occurred on February 3, 2003 and thereafter." On July 10 the City notified Daly that charges of inefficiency, as well as misconduct and violation of law, had been brought against him. Although Daly demanded on July 14 that the City reinstate him to his position, on July 15 the City proceeded with a hearing and terminated his employment. Daly neither attended the hearing<sup>1</sup> nor appealed from the termination of his employment.

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<sup>1</sup> A letter from Daly's attorney to the assistant city attorney, dated July 14, 2003, clarifies that Daly's attorney advised him not to attend the July 15 administrative hearing "due to the fact that KRS 15.520(1)(h)(8) [sic] along with KRS 95.450 require my client to be immediately reinstated due to the City's failure to provide him with the proper due process outlined in those statutes."

Instead, some seven months later on February 24, 2004, Daly filed the underlying complaint alleging that because he did not receive a hearing within sixty days of his February 2003 suspension "as required under KRS 15.520(1)(h)8.," the City's subsequent termination hearing deprived him of due process pursuant to KRS 15.520 and 42 USC § 1983. Daly sought compensation for lost wages and mental anguish, as well as punitive damages and attorney's fees. Appellees responded and then filed a motion seeking summary judgment and dismissal of the complaint because Daly did not timely appeal the City's administrative decision within thirty days pursuant to KRS 95.460. On October 20, 2004, the trial court granted summary judgment and dismissed the action. This appeal followed.

KRS 95.450 pertains to the discipline of appellees' police officers, providing in pertinent part as follows:

(1) Except as provided in subsection (5) of this section no member of the police or fire department . . . 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.

. . . .

(3) . . . Within three (3) days after the charges have been filed with the legislative body, that body shall proceed to hear the charges. . . .

. . . .

(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.

(6) The legislative body shall fix the punishment of a member of the police or fire department found guilty, by a reprimand, suspension for any length of time not to exceed six (6) months, by reducing the grade if the accused is an officer, or by combining any two (2) or more of those punishments, or by dismissal from the service.

KRS 95.460(1) permits a sanctioned police officer to appeal the legislative body's decision to the local circuit court within thirty days of the legislative body's decision.

These provisions must be viewed in conjunction with those later established by KRS 15.520, which specifically addresses the investigation and hearing of complaints against police officers. In particular, KRS 15.520(1)(h)8. provides that the minimum due process rights afforded to a charged police officer shall include that, as to

[a]ny 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[.]

Further, KRS 15.520(2) permits a police officer to contest a finding of guilt by filing a circuit court claim which "shall be tried as an original action," although the review itself "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."<sup>2</sup>

Here, Daly's allegation that appellees failed to comply with statutory requirements, and that he therefore was denied due process, constituted a defense to the charges against him. However, Daly waived that defense by deliberately refusing to appear and raise it either during the scheduled hearing or during an appeal from the administrative order terminating his employment

Although KRS 15.520(2) permits a police officer to contest an administrative action in a subsequent circuit court proceeding, nothing in the applicable statutes authorizes the bypass of long-established rules requiring the exhaustion of administrative remedies prior to the filing of a collateral action such as that now before us. As stated in *Board of*

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<sup>2</sup> *Stallins v. City of Madisonville*, 707 S.W.2d 349, 350 (Ky.App. 1986)

*Regents of Murray State University v. Curris*,<sup>3</sup> "proper judicial administration mandates judicial deference until after exhaustion of all viable remedies before the agency vested with primary jurisdiction over the matter." Moreover, as Daly failed to timely appear and raise his due process defense to the administrative proceedings below, he was estopped from later raising the matter as an issue in a collateral attack.<sup>4</sup> It follows, therefore, that the circuit court did not err by granting appellees' motion for summary judgment and dismissing the matter below.

The court's summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Walter Aden Hawkins  
Bowling Green, Kentucky

BRIEF FOR APPELLEES:

Stephen E. Underwood  
Hopkinsville, Kentucky

Timothy L. Mauldin  
Bowling Green, Kentucky

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<sup>3</sup> 620 S.W.2d 322, 323 (Ky.App. 1981). See also *Kentucky Personnel Board v. Elkins*, 723 S.W.2d 877, 879 (Ky.App. 1986).

<sup>4</sup> See *Ward v. Commonwealth, Natural Resources and Environmental Protection Cabinet*, 814 S.W.2d 589, 591 (Ky.App. 1991).