SC96496

IN THE SUPREME COURT OF MISSOURI

GRAYLAND NOWDEN,

Appellant,

vs.

DIVISION OF ALCOHOL & TOBACCO CONTROL, MISSOURI DEPARTMENT OF PUBLIC SAFETY,

Respondent.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon Beetem, Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Appellant Grayland Nowden was employed as a special agent for the Division of Alcohol & Tobacco Control in the Department of Public Safety. LF 91. But that changed after Nowden gave state prisoners access to weapons. In February 2013, Nowden took his service vehicle to a state-run garage for repairs. LF 91. That garage employs state prisoners who repair vehicles. LF 93. Yet Nowden left in his vehicle, in plain view, bullets, condoms, and several items containing knife blades. LF 91.

That serious infraction prompted an investigation that led to the discovery of other significant infractions. The Division discovered three arrest reports in Nowden's car that he never filed, LF 92, 96, and discovered confiscated evidence, marked and sealed in an evidence bag, that he never logged. LF 91. The Division also discovered that Nowden was a party to a lawsuit that he had never disclosed, contrary to the policy of the Department. LF 95.

But most critically, the Division discovered that Nowden was substantially involved with a liquor business even though his duties included inspecting that business as a neutral officer. Nowden inspected A&D Mini Mart less than three months before bringing his car in for service. LF 94. Yet the Division discovered in Nowden's car receipts for the store representing thousands of dollars in purchases. An investigation by the Division revealed

that Nowden was an authorized purchaser for the store and had been issued a Sam's Club card affiliated with the store. LF 92. That card had been used at least 52 times, although Nowden asserted that he had not made any purchases "in a couple of months." LF 92, 94. Nowden's involvement extended much further. Nowden told investigators that he worked as a bookkeeper for the store while simultaneously working for the Division. LF 94. And Nowden also assumed liability for various of the store's utilities. LF 94.

Nowden admitted everything. He admitted that he worked for the store as a bookkeeper even though his tasks as an employee of the Division included inspecting that store. LF 94, 105. He admitted that he inspected the store less than three months before bringing his service vehicle in for repairs. LF 94, 105. He admitted that the items in the vehicle were his. LF 93, 105. He admitted that he had a Sam's Club card in his name for A&D Mini Mart and that he had used it to make purchases. LF 93-95, 105. He admitted involvement in a lawsuit he failed to disclose to the Division. LF 95, 105. And he admitted that he was familiar with statutory law that prohibits an employee of the Division from working for or having any interest in an establishment that sells liquor, § 311.640, RSMo. LF 95, 105.

On September 26, 2013, just five days before Nowden's employment was terminated, a member of the Division presented Nowden with a copy of the investigation into his conduct. LF 90. Not only did the investigation

report detail the factual findings against Nowden, but it also identified seven policies that Nowden violated and critically stated that Nowden had violated section 311.640, which requires immediate termination. LF 95-96. The Division then invited Nowden to participate in a hearing where Nowden could submit a written response to the findings in an attempt to refute them. LF 90. Nowden signed a form acknowledging that he had received a copy of the investigation report, had been informed him of that hearing opportunity, and had 72 hours to respond. LF 90. Yet Nowden never took advantage of that hearing and never attempted to refute the findings against him. LF 88.

The Division forwarded the investigation and Nowden's signed form to the director of the Division. LF 90-91. After reviewing the uncontroverted investigation, the director issued a letter to Nowden on October 1, 2013, terminating Nowden's employment. LF 99-100. In the letter, the Division identified multiple infractions, each of which independently justified termination. Most critically, the Division determined that Nowden's employment as a bookkeeper for A&D Mini Mart violated Missouri law that bars employees of the Division from having "any interest, directly or indirectly" in "any premises where intoxicating liquor is distilled, brewed, manufactured or sold" or from being an "agent or employee" of that kind of business. § 311.640, RSMo; LF 100. The Division also determined that Nowden's substantial financial entanglement with the store violated the

same provision. LF 100. And the Division stated that a violation of that provision required immediate termination. LF 100 (citing § 311.620.4, RSMo). The Division further stated that Nowden violated agency policies when he made weapons accessible to prisoners, purchased inventory for the store, failed to timely submit arrest reports, failed to log and submit evidence, and failed to disclose his involvement in a lawsuit. LF 99.

The termination decision was subject to administrative review by the Department of Public Safety. Had Nowden pursued that appeals process, he would have received an additional hearing. Department Policy G-2 provides that an employee has "seven (7) calendar days from the official date on the Notification of Disciplinary Action form to submit an appeal." LF 124. Except in cases of "suspension or demotion," the director cannot finalize a disciplinary action without first holding either an informal or a formal hearing. LF 125. If the director determines that the disciplinary action "is not appropriate or is excessive," then the director "may attempt to resolve the issue through an informal hearing" at which parties or witnesses are asked to respond to questions. LF 125. The policy also provides the opportunity for a formal hearing that "will substantially follow the requirements for a hearing outlined in Chapter 536," which details the procedures for formal hearings. LF 125-26. The director, in his discretion, may initiate a formal hearing at

any time, and he is required to do so if he agrees that termination is proper. LF 125.

The Division took great pains to inform Nowden that he could seek administrative review under the policy. The first paragraph of the termination letter stated that the termination was "subject to [Nowden's] right to appeal as set forth in Missouri Department of Public Safety's Policy G-2." LF 99. The last paragraph reiterated that notice. LF 100. The Division also attached to the letter a copy of the policy. LF 100. And Nowden signed a one-page form that specified when the appeal was due and to whom Nowden had to submit the appeal. LF 101.

Nowden never made use of that administrative review. Although Nowden submitted appeals papers, he chose not to submit those papers until October 10, 2013, two days after the appeal deadline. LF 103, 105-07.

Rather than pursuing administrative review under Policy G-2, Nowden filed a complaint with the Administrative Hearing Commission. The Commission promptly dismissed the complaint for lack of jurisdiction. LF 23-25. Nowden then filed this action in the Circuit Court, which granted summary judgment in favor of the Division. It concluded that Nowden's failure to exhaust administrative review "deprives this [Circuit] Court of authority to proceed." LF 168-69. This appeal arises from that judgment.

In the Circuit Court, Nowden filed a flurry of amended petitions, attempted to withdraw some, and attempted to reinstate others, leading to some confusion as to which of Nowden's four petitions is operative. Nowden bases his brief on the assumption that his Second Amended Petition is operative. Pl. Br. 7-9, 14. But the Circuit Court docket and the motions reveals that it is the First Amended Petition that is operative. After Nowden successfully amended his petition twice, he attempted to amend his petition a third time—more than a year and a half after submitting his initial petition. LF 7. The Division opposed that belated attempt, LF 7, and the Circuit Court never ruled on that motion. Nowden later moved to withdraw his Second Amended Petition. LF 10. The Circuit Court granted that motion the next day, leaving in place only his First Amended Petition and ordering that the suit "proceed on first amended petition." LF 10. After waiting more than a month, Nowden then attempted to amend his motion—even though the court had already granted it—to withdraw his never-accepted *Third* Amended Petition and reinstate his Second Amended Petition. LF 10-11. But the Circuit Court "never ruled on this motion, thereby implicitly overruling it." *Am. Family Mut. Ins. Co. v. Mo. Dep't of Ins.*, 169 S.W.3d 905, 915 n.6 (Mo. App. W.D. 2005). And when the Circuit Court granted summary judgment in favor of the Division, it expressly ruled "that the cause, including all claims raised in the *First* Amended Petitioner [sic], are dismissed, with prejudice."

LF 169 (emphasis added). The First Amended Petition is therefore the operative petition.

This distinction matters because the petitions were brought through different statutory vehicles. Missouri administrative law includes two different kinds of administrative cases: "contested" cases and "noncontested" cases. Judicial review of "contested cases" is brought through section 536.100, and "noncontested" cases are brought through section 536.150. Although Nowden sought review under the statute for noncontested cases in his Second Amended Petition, LF 44, he sought review under only the statute for contested cases in his First Amended Petition, SLF 1, 4, 6. Nowden therefore brought this case as a "contested" administrative case.

SUMMARY OF THE ARGUMENT

Three critical facts each independently undermine Nowden's appeal. First, Nowden's failure to pursue administrative remedies is fatal to his claim. Second, the plain text of the relevant statute undermines Nowden's case. And third, no matter how long Nowden draws out this case, or how much process he receives, one thing will not change: Nowden will never obtain relief on the merits. Nowden admitted that he worked as a bookkeeper for a liquor establishment while he was simultaneously employed by the Division. Missouri law provides that an employee of the Division who takes that action must be fired immediately.

The details in this case can be technical, but the resolution is simple. The technical issue involves the difference between "contested" cases and "noncontested" cases. The essential difference between the two is that "contested" cases are reviewed by judges on a full record created by an agency. "Noncontested" cases, in contrast, require courts to create new records from scratch. But this Court need not concern itself with the line that divides one kind of case from another because Nowden's appeal fails regardless of whether the agency proceeding was contested or noncontested.

First, Nowden's petition is self-defeating. Nowden acknowledges that a plaintiff cannot bring suit under the statute reserved for review of "contested" cases unless the plaintiff first exhausts administrative remedies. But

Nowden has attempted to do just that. It is undisputed that Nowden did not exhaust the internal appeals process provided by the Department. Nowden does not deem that failure a problem because he mistakenly thinks that the Circuit Court ruled on his Second Amended Petition. But Nowden withdrew that petition, and the court plainly ruled on his First Amended Petition. Nowden brought that petition under the statute reserved for review of contested cases, so he was required to exhaust administrative remedies, which he did not do.

Second, even if Nowden had pleaded that the case was "noncontested," his suit would still be improper. The plain text of the statute reserved for noncontested cases prohibits judicial review of any decision "subject to administrative review." Nowden's termination was "subject to administrative review" because the Department provided Nowden with an internal appeals process he could use to challenge the termination of his employment. To be sure, this Court once deviated from the plain text of this statute and held that plaintiffs need not exhaust administrative review in noncontested cases, but this Court reversed that decision three years ago and has also abrogated the rationale behind that decision. Moreover, no compelling reason exists to limit the requirement of exhaustion to contested cases. The exhaustion requirement is a general rule premised on judicial efficiency and comity

between state courts and agencies. Those concerns are equally present in both noncontested and contested cases.

Nowden attempts to sidestep these first two issues by arguing that he had no right to appeal internally under Department policy. But that argument contradicts his earlier demonstrated understanding. Nowden submitted appeals papers to the Department. They were simply rejected because he filed them too late. The Department also made clear that the appeals policy applied to Nowden, curing any ambiguities in the policy. And even if the policy did not apply to Nowden's specific situation, Nowden has cited no authority to suggest that the Department could not extend the procedures in the policy to Nowden, affording him the benefit of additional process.

Third, even if Nowden were to prevail on all the exhaustion issues, his underlying claim that he was entitled to additional process before termination of his employment is meritless. Nowden received notice of the factual findings against him and of the determination that he violated a statute that required immediate termination—a statute he admitted he was familiar with. Because Nowden admitted that he worked as a bookkeeper for a liquor establishment while he was simultaneously employed by the Division, the Division was required by law to fire him. The Division also possessed numerous other independent reasons to fire Nowden. Nowden

received substantial process, which carried no risk of error. Any additional process would have been cumulative.

STANDARD OF REVIEW

"The standard of review on appeal of summary judgment is *de novo*, and summary judgment will be upheld on appeal if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law." *Mo. Prosecuting Attorneys & Circuit Attorneys Ret. Sys. v. Pemiscot Cty.*, 256 S.W.3d 98, 102 (Mo. banc 2008). Where, as here, the relevant facts are not in dispute, the Court need only determine whether the judgment of the Circuit Court was correct as a matter of law. *Id.*

ARGUMENT

This Court should affirm the judgment of the Circuit Court for three independent reasons. First, Nowden's operative petition seeks review of a "contested" case, which undoubtedly requires exhaustion of administrative remedies, but Nowden failed to exhaust those remedies. Second, exhaustion is required even if an action seeks review of a noncontested case. Third, regardless of whether exhaustion was required, Nowden was not entitled to any additional process before termination.

I. Nowden was required to exhaust all administrative remedies but did not do so—responding to Points I and III.

The Circuit Court granted summary judgment in favor of the Division because Nowden failed to exhaust administrative remedies. LF 168-69. Nowden challenges the ruling by arguing that exhaustion is required only in

actions seeking review of contested cases. But that argument fails for two reasons: Nowden brought an action seeking review of a "contested" case, and exhaustion is required even in actions seeking review of noncontested cases.

A. Nowden brought an action seeking review of a "contested" case, which indisputably requires exhaustion of administrative remedies.

"The Missouri Administrative Procedure Act provides for two types of cases: contested cases and non-contested cases." *Furlong Cos., Inc. v. City of Kansas City*, 189 S.W.3d 157, 165 (Mo. banc 2006). "The difference is simply that in a contested case the private litigant must try his or her case before the agency, and judicial review is on the record of that administrative trial, whereas in a non-contested case the private litigant tries his or her case to the court." *Id.* That is, contested cases concern review of records already created, and noncontested cases entail the creation of records from scratch.

Although the parties dispute here whether a plaintiff must exhaust administrative remedies for a court to review a noncontested case, it is indisputable that a plaintiff must do so for a court to review contested cases. The statute plainly provides that review of contested cases can be brought only after a plaintiff has "exhausted all administrative remedies." § 536.100, RSMo. Nowden admits this is true. SLF 6, ¶ 37. And courts routinely hold the same. *E.g.*, *Impey v. Mo. Ethics Comm'n*, 442 S.W.3d 42, 47 (Mo. banc 2014).

This Court should affirm the judgment of the Circuit Court because Nowden brought an action seeking review of a "contested" case yet failed to exhaust administrative remedies. This Court is bound by the factual allegations in the operative petition, Mo. Sup. Ct. R. 55.05, and "cannot grant judgment on a cause of action not pleaded," *Cent. Tr. & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 323 (Mo. banc 2014) (quoting *Allen Quarries, Inc. v. Auge*, 244 S.W.3d 781, 783 (Mo. App. S.D. 2008)). Nowden pleaded that this case "constitutes a 'contested case'" and invoked the jurisdiction of the Circuit Court by citing only statutes that concern contested cases. SLF 1, 4, 6 (citing § 536.100, 536.010(2)). And it is undisputed that Nowden failed to timely appeal to the Department. This Court should affirm the judgment of the Circuit Court because Nowden brought this suit seeking review of a contested case through section 536.100 but failed to exhaust administrative remedies.

Nowden appears to assume in his brief that his *Second* Amended Petition is operative instead of his First Amended Petition. *E.g.*, Pl. Br. 7-9, 14. But Nowden asked the Circuit Court to withdraw his Second Amended Petition, and the Court granted that request. LF 10. Although Nowden later moved to reinstate the Second Amended Petition, the Circuit Court never ruled on that motion. LF 10-11. The Circuit Court instead granted summary judgment dismissing with prejudice "all claims raised in the *First* Amended

Petitioner [sic]." LF 160 (emphasis added). By declining to rule on the motion to reinstate the Second Amended Petition, the Circuit Court "implicitly overrul[ed] it." *Am. Family Mut. Ins. Co.*, 169 S.W.3d at 915 n.6.

Even if this Court determined that the Second Amended Petition were operative, the administrative case would still be reviewable only as a contested case. Missouri law defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." § 536.010(4), RSMo. "[I]n a contested case the private litigant must try his or her case before the agency." *Furlong Cos., Inc.*, 189 S.W.3d at 165. But application of this principle can be difficult when a plaintiff sues before the agency has an opportunity to trigger the requirement of a hearing.

This Court resolved this difficulty when it held that a case is contested so long as a possibility remains that rights or duties will be decided after a formal hearing. *Hamby v. City of Liberty*, 20 S.W.3d 515 (Mo. banc 2000), concerned a statute that permitted, but did not compel, a formal hearing. That section vested the decision to hold or not hold a hearing "in the *judgment* of the chairperson of the commission." § 213.075.5, RSMo (emphasis added). But even though that section did not require the agency to conduct a hearing, the Court nonetheless held that cases under that section were contested because of the "*availability* of a formal hearing." *Hamby*, 20

S.W.3d at 518 (emphasis added). Because the "procedures under section 213.075 do, in fact, *include* a formal hearing," however optional, cases under that statute are contested at least until the "availability of a formal hearing" ceases. *Id.* (emphasis added).

Hamby thus prevents plaintiffs from transforming what would be a contested case into a noncontested case merely by suing before the option to hold a hearing is exercised. That rule makes sense in the light of the efficiency concerns that underlie exhaustion requirements. Under *Hamby*, a case that may lead to a formal hearing remains a contested case so long as there remains "availability of a formal hearing"—that is, until the agency chooses not to conduct a formal hearing. *Id.* That rule ensures that agencies will have greater opportunity to conduct hearings and create records. And it preserves judicial resources because courts will less frequently have to spend time and resources facilitating the development of a record.

Under this rule, this case is contested. Policy G-2 provides that the director can call for a formal hearing at his discretion, and he is required to do so if he agrees with a termination decision. LF 125. Although the director can avoid a formal hearing if he determines that a termination is "not appropriate or is excessive," the case is contested because the policy still provides "availability of a formal hearing." Specifically, it requires that the Department conduct a formal hearing before affirming termination. The

director never foreclosed the opportunity for Nowden to have his rights determined after a formal hearing. *Hamby*, 20 S.W.3d at 518. Just as the statute in *Hamby* left the decision to call for a formal hearing to the discretionary "judgment" of the administrative officer, § 213.075.5, RSMo, so too the director of the Department of Public Safety can call a formal hearing "[a]t the Director's discretion," and he is required to do so if he agrees that termination is proper. LF 125. This case is therefore contested.

It makes no difference that the director of the Department, who makes the ultimate decision, is not required to be present at or participate in the hearing. The practice of making a decision on the record created by a separate officer is common. *E.g.*, § 536.083, RSMo (permitting hearing officers to construct records); *City of Springfield v. Belt*, 307 S.W.3d 649, 653 (Mo. banc 2010) (recognizing the practice of having a proceeding "overseen by a hearing examiner, not a municipal judge"); *cf.* 28 U.S.C. § 636(b)(1)(B) (permitting federal magistrate judges "to conduct hearings" and make recommendations to Article-III judges).

Nor is this case one of those situations where a decisionmaker is free to rove outside the record. The Court of Appeals held that a case was noncontested despite a formal hearing because the "record developed by the PAB proceeding, as prescribed by the City's Code, did *not* serve as an *exclusive* record to which the decision maker was limited in arriving at a

final decision." *Sanders v. City of Columbia*, 481 S.W.3d 136, 138, 143 (Mo. App. W.D. 2016) (emphases in original). Unlike in *Sanders*, Policy G-2 states that the director is required to base his or her decision on the "relevant portions of the record of the hearing." LF 82. Nothing permits the director to consider material outside the record. This case is therefore contested, so Nowden was required to exhaust administrative review. § 536.100, RSMo.

B. Even if this case involved review of a noncontested case, the text of the statute for that review, the decisions of this Court, and sound judicial policy still require exhaustion of administrative remedies.

Regardless of whether this case involves review of a contested or noncontested case, this Court can affirm the judgment of the Circuit Court on the ground that noncontested cases also require exhaustion of administrative remedies.

a. The plain text of section 536.150 bars Nowden's suit because it requires plaintiffs to exhaust administrative review before a court can review a noncontested case.

Even if Nowden's First Amended Petition had invoked section 536.150, the statute used to seek review of noncontested cases, his suit still would be improper. Nowden's principal contention is that he was required to exhaust administrative review by appealing his termination to the Department only if his case was contested. Pl. Br. 25. But that argument disregards the plain

text of section 536.150, which permits judicial review of an administrative decision only if the administrative officer or body "rendered a decision which is not subject to administrative review." § 536.150, RSMo. The Department supplied Nowden with an opportunity for administrative review that he could use to appeal his termination. LF 99. Nowden's decision to sue instead of accessing that appeals procedure means he has sued over a decision "subject to administrative review." *Id.* The plain text of section 536.150 bars this suit.

b. The decisions of this Court require exhaustion in noncontested cases.

In an attempt to avoid this plain text, Nowden relies on a decision that is no longer good law on the point for which he cites it. Nowden invokes *Strozewski v. City of Springfield*, Pl. Br. 25, where this Court deviated from the text of statute and stated that, in reviews of noncontested cases brought under section 536.150, "exhaustion of administrative remedies is not a jurisdictional prerequisite." *Strozewski v. City of Springfield*, 875 S.W.2d 905, 907 (Mo. banc 1994). Notwithstanding this statement in *Strozewski*, this Court recently reaffirmed that the plain meaning of the statute governs, holding that section 536.150 "only applies when the administrative decision 'is not subject to administrative review.'" *Impey v. Mo. Ethics Comm'n*, 442 S.W.3d 42, 48 n.5 (Mo. banc 2014). The plaintiff in *Impey* sued over a decision

that was "subject to reconsideration" by an administrative body, so this Court held that he could not sue under section 536.150. *Id.* at 46, 48 n.5.

Although this Court did not cite *Strozewski* when deciding *Impey*, the relevant point in *Strozewski* is no longer good law because it is inconsistent with this Court's more recent, considered decision in *Impey*. When a prior decision in this Court is "inconsistent with the later . . . case, it should no longer be followed, and it is overruled." *Belding v. St. Louis Pub. Serv. Co.*, 215 S.W.2d 506, 514 (Mo. banc 1948); *see also* Bryan A. Garner, Neil M. Gorsuch, et al., *The Law of Judicial Precedent* 300 (2016) ("A court of last resort generally follows its decision in the most recent case, which must have tacitly overruled any truly inconsistent holding."). To the extent any inconsistency lies between the two cases, this Court's decision in *Impey* controls.

Although this Court can affirm the judgment of the Circuit Court on numerous independent grounds, it should consider clarifying that *Impey* controls over *Strozewski* and reaffirm that the plain text of the statute requires exhaustion of administrative remedies, even in noncontested cases. Not only did *Strozewski* deviate from the text, but the Court of Appeals has continually followed the approach this Court followed in *Impey*. That is true of cases decided before *Strozewski*. *E.g.*, *State ex rel. Forget v. Franklin Cty.*, 809 S.W.2d 430, 434 (Mo. App. E.D. 1991) (rejecting the argument that

section 536.150 "provides jurisdiction" because it "expressly applies only when the decision of an administrative body is 'not subject to administrative review'"); *St. Peters v. Dept. of Nat. Res.*, 797 S.W.2d 514, 516 (Mo. App. W.D. 1990) ("[T]he City of St. Peters must exhaust its rights to administrative review in order to invoke this section."). Even after *Strozewski* held that exhaustion was unnecessary in noncontested cases, the Court of Appeals, despite *Strozewski*, continued to enforce the plain text of the statute. *E.g.*, *In re Wright*, 397 S.W.3d 924, 927 (Mo. App. S.D. 2013) ("Section 536.150 simply is inapplicable" because "a decision of the Director is subject to administrative review."); *Gray v. Humphries*, 960 S.W.2d 553, 556 (Mo. App. E.D. 1998) ("Section 536.150 does not furnish any basis for circuit court jurisdiction in this matter" because "the superintendent's decision was subject to the school board's review."). Despite this pattern in the Court of Appeals, the statement in *Strozewski* may sow confusion. This Court should eliminate that possibility by stating that *Impey* governs on this point of law.

Moreover, this Court has rejected any basis to conclude that *Strozewksi*'s reasoning on the relevant point is persuasive. *Strozewski* determined that section 536.150 did not require exhaustion solely because the statute provided that "[n]othing in this section shall be construed . . . to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section." *Strozewski*, 875 S.W.2d at 907 (quoting § 536.150.3,

RSMo). The majority interpreted that provision to mean that even the failure to exhaust remedies could not "limit the jurisdiction" of the court. *Id.* But the three-judge concurrence cogently explained why that interpretation was incorrect. Not only was the interpretation contrary to the requirement that a decision not be "subject to administrative review," but the clause the majority construed merely clarified that section 536.150 does not create a jurisdictional negative implication; it does not erase cause of action a plaintiff might otherwise have absent the statute, such as suing over a contract claim. *Id.* at 908 (Price, Thomas, & Limbaugh, JJ., concurring). Indeed, six years after *Strozewski*, this Court adopted the position of the concurrence and held that subsection 536.150.3 means only that the statute does not foreclose bringing "another cause of action" such as one based on "contractual rights." *Hamby v. City of Liberty*, 20 S.W.3d 515, 518 (Mo. banc 2000). This Court should clarify that section 536.150 means what it says: a plaintiff cannot sue under that statute without first exhausting administrative review.

c. The well-established purposes underlying exhaustion support applying the exhaustion requirement in noncontested cases.

Even if section 536.150 and this Court's jurisprudence did not require exhaustion of administrative review, sound judicial management would. Multiple purposes underlie the doctrine of exhaustion. One "purpose of the exhaustion of remedies doctrine is to preserve the efficiency in the

relationships between agencies and the courts." *Coleman v. Mo. Sec'y of State*, 313 S.W.3d 148, 154 (Mo. App. W.D. 2010) (citing *Premium Standard Farms, Inc. v. Lincoln Twp.*, 946 S.W.2d 234, 237 (Mo. banc 1997)). Not only do "[a]gencies have a special expertise" in their affairs, *id.*, but requiring exhaustion often causes a matter to "be resolved by the agency, rendering review by the court unnecessary" and preserving judicial resources, *id.* Another purpose of the doctrine is "to maintain comity between the courts and administrative agencies." *Exhaustion of Remedies*, *Black's Law Dictionary* (10th ed. 2014). Requiring exhaustion "encourage[s] agencies to correct their own errors," preventing the need for courts to routinely interfere with the agency operations. *Id.* (citing *Farm Bureau Town & Country Ins. Co. of Mo. v. Angoff*, 909 S.W.2d 348, 352 (Mo. banc 1995)).

No reason exists here to deviate from the time-honored policy of requiring exhaustion. The Division did not make a mistake when it terminated Nowden in the light of Nowden's admission of wrongdoing. But even if the Division did err, it deserves the first opportunity to correct its mistakes. Requiring exhaustion would also boost judicial efficiency. This case has dragged on for several years, and the parties are still arguing over whether exhaustion is required. Litigation over this issue could have been avoided had Nowden properly appealed the termination to the Department. And any time the agency reverses a previous decision through administrative

review, recourse to the judiciary will be unnecessary, saving tremendous judicial resources.

II. The Division afforded Nowden an opportunity to exhaust administrative review—responding to Point IV.

Nowden attempts to sidestep the issue of exhaustion by arguing that he never had the opportunity to appeal his termination. His sole support for this argument is his contention that Policy G-2 "speaks of 'recommendations' for discipline," not discipline that has already been imposed. Pl. Br. 27. That argument lacks merit for several reasons.

First, Nowden's insistence that the policy did not apply contradicts his previous actions in this case. The Division clearly and repeatedly informed Nowden that he had a right to appeal the termination. But Nowden did not seek clarification or ever contend that the policy attached to his letter did not apply. Nowden instead submitted an appeal. The reason he failed to exhaust administrative review is because he submitted his appeal too late. LF 101. His assertion that the appeals process never applied carries little weight in the light of his demonstrated understanding that it did apply.

Second, even if the policy were ambiguous as to when it applies because it discusses "recommendations" for discipline, the Division cured any such ambiguity by repeatedly informing Nowden that the policy permitted Nowden to appeal. In a letter just over one page long, the Division twice

informed Nowden that the policy provided a procedure through which Nowden could appeal. The Division also attached to its letter a copy of the policy and attached a separate "Notification of Disciplinary Action" that identified the due date for an appeal. LF 99-101. Even if a person who read the policy in isolation might conclude that it did not apply to Nowden's situation, no reasonable person could conclude that the policy was ambiguous after reading the policy in context with the Division's numerous statements that Nowden could appeal the termination—and Nowden's subjective understanding that the policy granted him a right to appeal.

Third, even if the policy did not expressly create the right to appeal for plaintiffs in Nowden's situation, nothing prevented the Division from enabling Nowden to use the procedures outlined in the policy. The policy covers not just the Division and not just terminations, but also various forms of discipline and other agencies within the Department of Public Safety. The Department had to draft the policy broadly enough that administrators could apply it flexibly to situations that arose within the Division, the Fire Marshal's Office, the State Highway Patrol, or the Gaming Commission. LF 121-22; § 650.005, RSMo. Nowden's situation is unique because a statute required his immediate termination and because that statute applies only to employees of that Division. § 311.620.4, RSMo. The Department understandably did not draft a policy in exhaustive detail for every possible

situation that might arise. And Nowden has cited no authority that would prohibit the Division from extending the appeals process to Nowden.

III. Nowden has no right under Policy G-2 or the Constitution to additional pre-deprivation process—responding to Points I, II, and V.

Nowden attempts to skirt the issue of administrative exhaustion by arguing that he was entitled to additional process before termination, regardless of whether exhaustion is required. That argument fails. Nowden cannot avoid the exhaustion requirement merely by raising a constitutional claim, and neither Policy G-2 nor the Constitution mandated that Nowden receive additional process before termination.

A. Raising a constitutional challenge does not eliminate the need to exhaust remedies.

Nowden argues that "[w]hen the issue is a constitutional challenge to a statute, exhaustion of administrative remedies is not required." Pl. Br. 13 (citing *Farm Bureau Town & Country Ins. Co. of Mo. v. Angoff*, 909 S.W.2d 348, 353 (Mo. banc 1995)). He therefore contends that this Court can reach the issue of due process regardless of how it decides the issue of exhaustion. But that argument misstates the law. *Angoff* holds that exhaustion of administrative remedies is not required when "there is a constitutional challenge to a statute which forms the *only* basis" for a request for relief. *Id.* (emphasis in original). That rule does not apply because Nowden chose to

raise nonconstitutional claims in both his First and Second Amended Petitions. LF 45, SLF 3. It also does not apply because the rule concerns suits that challenge legal provisions as "facially unconstitutional." *Angoff*, 909 S.W.2d at 353. Nowden raised an as-applied challenge because his argument that he suffered a violation of due process is necessarily situational. *Jamison v. State, Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

B. Nowden is not entitled to additional pre-deprivation process under the policy.

Nowden argues that, under the policy, the Division could not terminate his employment without first providing him with notice of the findings against him. Pl. Br. 29. That argument lacks merit for several reasons.

First, Nowden's argument is improper because he never raised the policy as a ground for relief in his First Amended Petition. "It is axiomatic that a trial court cannot grant judgment on a cause of action not pleaded." *Cent. Tr. & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 323 (Mo. banc 2014) (quoting *Allen Quarries, Inc. v. Auge*, 244 S.W.3d 781, 783 (Mo. App. SD 2008)); *accord Goings v. Mo. Dep't of Corr.*, 6 S.W.3d 906, 907 (Mo. banc 1999) ("Since this issue was not raised in his petition, we need not address it here."). Although Nowden pleaded that he had a constitutional

right to additional pre-deprivation process, SLF 6, ¶ 40, he never pleaded that he had a similar entitlement under the policy. Nowden cannot now argue an issue never raised in the petition.

Second, the argument fails because the Division complied with the policy. Nowden complains that the policy afforded him a right to notice of the findings against him before termination, Pl. Br. 29, but the Division provided him with a copy of the investigation into his conduct months before his termination. LF 90. Not only did that investigation inform him of the factual findings against him, but it also implicitly recommended termination. Not only did the investigation report identify a multitude of policies that Nowden violated, but it also expressly stated that Nowden had violated section 311.640, which *requires* termination. LF 95. The Division also informed Nowden that he had 72 hours to respond to the findings against him if he wanted to refute those findings, and Nowden signed a form acknowledging that he had been informed of that right. LF 90. Nowden received all the notice to which he claims he was entitled.

But even assuming that Nowden could raise this issue on appeal and that the Division did not comply with the letter of the policy, Nowden's argument that he was entitled to additional procedures before termination would still fail. Although the policy states that the Division should make a disciplinary recommendation to the Department before imposing discipline,

Missouri law contains a contrary requirement. Division employees cannot have "any interest, directly or indirectly" in "any premises where intoxicating liquor is distilled, brewed, manufactured or sold," and they cannot be an "agent or employee" of that kind of business. § 311.640, RSMo. Missouri law requires that the Division "immediately discharge[]" anyone who violates that provision. § 311.620.4, RSMo. Nowden plainly violated this law both when he worked as a bookkeeper for A&D Mini Mart and also when he entangled himself financially with the store, so the Division was required to terminate his employment immediately, notwithstanding Department policy.

Contrary to Nowden's unsupported counterargument that only a "super statute" could preempt the policy, Pl. Br. 15, it has long been established that when a policy sits in conflict with statutory law, "any provision in the policy contrary to such statutes is rendered null and void." *W. & S. Life Ins. Co. v. New Madrid Cty. Farmers' Mut. Fire Ins. Co.*, 99 S.W.2d 506, 509 (Mo. App. 1936). This Court has squarely held that an agency "manual cannot trump a statute." *City of St. Peters v. Roeder*, 466 S.W.3d 538, 546 (Mo. banc 2015). That rule makes sense because the Department itself is a creature of state statute. § 650.005, RSMo. It cannot preempt the legislature that created it.

Even if the statute did not preempt the application of the policy here, it would still control because it is the more specific provision. "[W]here one statute deals with the subject in general terms and the other deals in a

specific way, to the extent they conflict, the specific statute prevails over the general statute." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010); *see also Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 33 (Mo. banc 2015) (applying the same canon). The Department constructed a policy that applies to multiple kinds of disciplinary proceedings across multiple divisions, but the legislature crafted a specific requirement for specific employees who violate specific legal provisions. The statute therefore applies in place of the policy where the two conflict.

It is no counterargument to assert that one could interpret the statute to require the Department (rather than the Division) to determine whether Nowden violated Missouri law. The Division interpreted the statute to mean that Nowden's employment had to be terminated as soon as the Division discovered that Nowden violated Missouri law. That interpretation is entitled to the "considerable deference" afforded to agencies when "the agency's interpretation of a statute is reasonable and consistent with the language of the statute." *State ex rel. Webster v. Missouri Res. Recovery, Inc.*, 825 S.W.2d 916, 931 (Mo. App. S.D. 1992). The Division's interpretation of the statute is plainly consistent with the statute because the statute does not specify who must determine that Nowden violated the law. The interpretation is also

reasonable. Policy G-2 provides an opportunity to "appeal." But the existence of an appeal necessarily means that a determination already exists. Nowden had nothing to appeal until the Division disciplined him or recommended that he be disciplined. But the Division could not do so unless it first determined that Nowden violated the statute. As soon as the Division made that determination, Missouri law required that the Division immediately discharge Nowden. § 311.620.4, RSMo.

Nowden further contends that the government cannot argue that subsection 311.620.4 required the Division to discharge Nowden immediately. That argument lacks merit. Nowden contends that the Division did not take this position before the Circuit Court, but that argument is demonstrably incorrect. LF 68, 70, 71, 109, 110, 114, 115, 153, 155. Nowden points out that the Division did not make this legal argument before the AHC, so he asserts that the Division is "judicially estopped from changing [its] position." Pl. Br. 24. But the Division was entitled to adopt its legal argument in response to Nowden's shifting arguments in his four petitions before the Circuit Court. Moreover, Nowden's argument fails because judicial estoppel "does not usually apply to shifting *legal* arguments; it typically applies to shifting *factual* arguments." *Law Office of John H. Eggertsen P.C. v. Comm'r*, 800 F.3d 758, 766 (6th Cir. 2015); *accord Emergency One, Inc. v. Am. Fire Eagle Engine Co.*, 332 F.3d 264, 274 (4th Cir. 2003) ("This is not a factual assertion

for purposes of judicial estoppel; rather, it is a legal argument about what issues were raised and resolved at trial."). Judicial estoppel also requires the party to be estopped to have convinced another tribunal to adopt a contrary position, so judicial estoppel cannot be premised on a mere failure to raise an issue. *E.g.*, *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600 (5th Cir. 2005).

Quoting an irrelevant statute, Nowden also argues that the Division could not terminate his employment without first given him "a written statement setting forth in substance the reason [for his termination] and fil[ing] a copy of such statement with the director." Pl. Br. 18 (quoting § 36.380, RSMo). That argument fails. Not only did the Division did give Nowden a statement of findings against him five days before termination, but Chapter 36 applies only to state personnel in the Merit System. That system excludes employees of the Division. § 36.030, RSMo.

C. Nowden has no due process right to additional pre-deprivation process.

As this Court has repeatedly affirmed, claims that due process required a formal, pre-deprivation hearing are reviewed under the familiar test established in *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). *E.g.*, *Jamison v. State, Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 408 (Mo. banc 2007) (invoking *Mathews*). "[A] court must weigh three factors when determining what process is required: (1) the private interest at stake; (2) the

'risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any' of different procedures; and (3) the State's interest." *Id.* (quoting *Mathews*, 424 U.S. at 335). This analysis is necessarily situational. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 405 (citation omitted). And because due process rights are situational, "there is no reason to require a judicial-type hearing in all circumstances." *Parham v. J. R.*, 442 U.S. 584, 608 n.16 (1979). Indeed, "[a] claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Mathews*, 424 U.S. at 331. In this situation, each of the *Mathews* factors weighs decidedly against Nowden.

The second *Mathews* factor (risk of erroneous deprivation) weighs so heavily against Nowden that it is virtually dispositive. Had the Department provided Nowden with additional pre-deprivation process, the risk of erroneous deprivation would not be any lower than the nonexistent risk created by the post-deprivation procedures. The Division had numerous, independent reasons to terminate Nowden based on Nowden's own admissions. To take just one example, Missouri law prohibits anybody who works for the Division from simultaneously working for a business that sells liquor. § 311.640, RSMo. The Division is required to terminate the employment of a person who violates that provision. § 311.620.4, RSMo.

Nowden admitted he worked as a bookkeeper for A&D Mini Mart while employed with the Division, LF 94, 105, so he would have been fired regardless of how much pre-deprivation process the Division gave him. The procedures used carried no risk of error.

Nowden also admitted that he left bullets and knife blades in his service vehicle, within eyesight and reach of the prisoners working on the car. LF 93. He admitted that he had a Sam's Club card in his name under the account for A&D Mini Mart. He admitted purchasing items using that card while employed with the Division. LF 93-95. He admitted assuming responsibility for utilities bills for the store. LF 93-94. He admitted he did so to help out a family member who ran the store even though his duties for the Division included inspecting that store as a neutral officer. LF 93-94. He admitted familiarity with the law that prohibits Division employees from working for or having any interest in an establishment that sells liquor, § 311.640, RSMo. LF 95. And he admitted failing to catalog evidence and submit arrest records. LF 92, 96. A pre-deprivation hearing would have provided no "probable value" in the light of these uncontroverted findings.

A pre-deprivation hearing conducted by the Department also would lack value because it would be cumulative. The Division provided Nowden with pre-deprivation process. It informed him of the findings against him and expressly stated that he had violated a specific statute. LF 95. Nowden

admitted he was familiar with the statute, LF 95, and a violation of that statute required immediate termination. The Division also provided Nowden with a hearing opportunity five days before termination. It gave Nowden a copy of the investigation findings and invited him to contest those findings in writing. To be sure, that process did not afford an opportunity for oral presentation, but a hearing need not include the opportunity for oral statements so long as a party has the ability to "comment, to object, or to make some other form of written submission." *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 241 (1973). Because Nowden received the opportunity for a pre-deprivation hearing—one that Nowden chose not to use—any additional pre-deprivation process provided by the Department would have been cumulative.

The first *Mathews* factor (Nowden's private interest) also weighs against Nowden. Nowden attempts to argue that his private interest is his interest in keeping his job, which is a property right, Pl. Br. 15. But that argument misunderstands the first *Mathews* factor. That factor concerns the private interest in having an earlier hearing, not the interest in the underlying property right. Because back-pay would be available if Nowden prevailed, SLF 8, 22-23, "his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim." *Mathews*, 424 U.S. 319 at 340.

The U.S. Supreme Court has made clear that the private interest in avoiding a delay in pay will rarely justify an entitlement to a pre-deprivation hearing. "[T]he ordinary principle," the *Mathews* Court held, is "that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 343. The "crucial factor" that can permit a court to "depart from the ordinary principle" is whether the benefit at issue is, like food stamps benefits, "based upon financial need." *Id.* at 340, 343 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

Nowden's benefits are not "based upon financial need," so his private interest in avoiding a delay in pay cannot justify entitlement to additional pre-deprivation hearing. Nowden's private interest, in fact, is far less serious than that of the plaintiff in *Mathews*, and the U.S. Supreme Court denied Mathews relief. Mathews faced deprivation of disability benefits, his disability meant he had "little possibility" of obtaining employment, and he would have to wait "between 10 and 11 months" before receiving an agency decision. *Id.* at 341-42. Nowden's private interest is substantially less serious. Although the stigma of being fired might limit Nowden's employability, that stigma is nowhere near as severe as Mathews' inability to work because of his disability. And Nowden, unlike Mathews, was afforded a pre-deprivation hearing when the Division invited him to submit a response to the findings

listed in its investigation. Nowden has insufficient private interest to justify entitlement to more pre-deprivation hearings than he has already received.

The third *Mathews* factor (the public interest) also weighs decisively against Nowden. The final factor requires consideration not only of "the administrative burden," but also of "other societal costs" of an additional pre-deprivation hearing. *Id.* at 347. One of those costs is the "benefits [that] would continue until after such hearings." *Id.* That cost must be measured in the aggregate because the availability of continuing benefits is an "attractive option" that will cause people ineligible for those benefits to drag out procedures as long as possible—as Nowden's conduct in this case vividly demonstrates. *See id.* The public has a substantial interest of avoiding continuing to pay people's job benefits—which can cost several thousand dollars per person, per month—when those individuals are ineligible to receive those benefits. That is especially true where, as here, Nowden has never contested the findings against him and Nowden admitted that he worked for a liquor company while also working with the Division, an offense that left the Division with no choice but to fire him immediately. Nowden never suffered a violation of constitutional due process.

CONCLUSION

Terminating the employment of public employees is often difficult. It need not be here. Nowden openly admitted that he engaged in conduct that

left the Division with no choice but to fire him. Indeed, the Division was required by law to terminate him immediately. Nowden was required to exhaust administrative remedies, and he suffered no violation of due process in the light of his admission that he committed an offense for which the Division was required to fire him. The judgment of the Circuit Court in favor of the Division should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on December 18, 2017, to all counsel of record. The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 8,653 words.

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