SC 89605

IN THE SUPREME COURT OF MISSOURI

TIMOTHY COFFER,
Respondent,

vs.
ANGELA WASSON-HUNT, et al.,
Appellants.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI SIXTEENTH JUDICIAL CIRCUIT
DIVISION THREE
THE HONORABLE THOMAS C. CLARK, JUDGE

SUBSTITUTE BRIEF OF APPELLANTS
FILED AS RESPONDENTS' BRIEF UNDER MO.R.CIV.P. 84.05(e)

Lisa S. Morris MO #43181
Daniel J. Haus MO #45678
Kansas City, Missouri Police Dept.
1125 Locust Street
Kansas City, Missouri 64106
Telephone: (816) 234-5056
Facsimile: (816) 234-5333

William E. Quirk MO #24740
Anthony W. Bonuchi MO #57838
Shughart Thomson & Kilroy, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEYS FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This action originated as a contested hearing before the Board of Police Commissioners of Kansas City, Missouri ("Board") under Sections 84.600 and 84.610.[1] The Board affirmed the termination of Kansas City Police Officer Timothy Coffer ("Coffer"). He appealed his termination under Section 536.140.6 to the Circuit Court of Jackson County, Missouri, which reversed the Board's ruling. Acting under Section 536.140 and Section 18, Art. V, of the Missouri Constitution, the Missouri Court of Appeals for the Western District also reversed the Board's ruling. The Board's Rule 83.04 application for transfer to this Court was granted. Like the court of appeals, the Supreme Court of Missouri has jurisdiction to review the Board's ruling under Section 18, Article V of the Constitution of Missouri and Section 536.140, as well as under Section 4, Article V of the Constitution of Missouri and Rule 83.04.

[1] All references to "Section" are to R.S.Mo. (2000), and all references to "Rule" are to the Missouri Rules of Civil Procedure (2007) unless otherwise noted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On or about June 18, 2004, the Kansas City, Missouri Police Chief filed written Charges and Specifications recommending termination of plaintiff Timothy Coffer, a police officer with the Department (L.F. 1, 162), for violation of Department Personnel Policy 201-7, Section III, Paragraphs 1, 9. 12, 15, 44, 59 and 60. (L.F. 11-12.) The violations charged were based on four allegations: that Coffer used excessive force on an arrested individual, spat on him, directed profanity toward him, and was uncooperative and deliberately distorted the truth in connection with the investigation into the incident. (L.F. 11-12.)

On the evening of September 12, 2003, Coffer and Police Officer Aaron Bryant (Bryant) saw a car at the intersection of Independence Avenue and Delaware Street being operated by Halgene Lucas (Lucas). (L.F. 147-50.) Coffer and Bryant saw the car driving at a high rate of speed with the right front tire blown out, emitting sparks from the wheel. (L.F. 150). After the car hit a guardrail, Coffer and Bryant conducted a traffic violation stop. While the stop was captured on their patrol car's video system,[2] neither officer activated the police vehicle's audio recording system. (L.F. 7, 155.)

[2] The videotape of the incident, introduced as Exhibit 6 at the hearing below ("Videotape Exhibit"), is part of the record and has been deposited with this Court.

After approaching the car, Coffer asked Lucas to step out of the vehicle several times. (L.F. 155.) Lucas placed his hands up and out of the driver's side window, but did not immediately exit the vehicle. (L.F. 141, Videotape Exhibit.) Coffer attempted to drag Lucas from the vehicle by grabbing Lucas's neck and shoulders. (L.F. 141, Videotape Exhibit.) As Coffer pulled Lucas from the vehicle, Lucas's hand made incidental contact with Coffer's duty weapon. (L.F. 141, Videotape Exhibit.) Coffer then struck Lucas in the head numerous times with a closed fist, although Lucas's hand was no longer near Coffer's weapon. (L.F. 62, 141, Videotape Exhibit.) At least two of those strikes came after Bryant had restrained Lucas's hands behind his back. (*Id.*)

Later, while Lucas was lying face-down in the street handcuffed, Coffer picked Lucas up off the ground and then dropped him back face-down onto the street. (L.F. 141, Videotape Exhibit.) Coffer then spat at Lucas as he was lying on the ground handcuffed. (L.F. 32; L.F. 21; and L.F. 141, Videotape Exhibit.) During the encounter, Coffer also called Lucas a "stupid son of a bitch." (L.F. 8-9.) Andrew Marr, the civilian who was riding along with Coffer and Bryant that night, confirms that Coffer used profanity toward Lucas. (L.F. 8-9.) When asked by the Internal Affairs Unit of the Kansas City, Missouri Police Department whether Coffer called Lucas a "stupid son of a bitch," Marr said, "I believe so." (L.F. 9.)

Coffer was lawfully and timely served with the written Charges and Specifications and given notice of the hearing on those charges. (L.F. 11-12.) Pursuant to Board Resolution 02-05, Coffer voluntarily waived his right to a hearing before the Board by signing the Board Hearing Waiver. (L.F. 144.) He opted to present his case to a hearing officer, and retired Jackson County Circuit Judge John Moran was designated by the parties as the hearing officer to hear testimony, receive evidence and submit to the Board recommended findings of fact, conclusions of law and, where appropriate, punishment. (L.F. 17.) Coffer was present at the adversarial public hearing held on June 14, 2005, and was represented by counsel (L.F. 33-34).

At the hearing before Judge Moran, Sergeant William Conroy ("Conroy"), who Coffer stipulated was an expert with twenty-nine years of experience with the Department, and who Judge Moran found was highly qualified as an expert and "very credible" (L.F. 40, 44, 163), testified that Lucas's incidental contact with Coffer's weapon was not a "gun grab" because Lucas was not pulling on the weapon; Lucas simply hit the weapon as he fell down. (L.F. 57.) Conroy testified that members of the Department are trained that when there is an attempt to disarm an officer, the officer should complete a "rear handgun secure", a "front cross secure" or secure the gun with two hands. (L.F. 57.) Although Coffer alleges Lucas's incidental contact with his gun was a "gun grab," Coffer made no attempt

to secure his weapon as he had been trained. (L.F. 57, 59) He never glanced down at his gun as he had been instructed or followed any other training he had received on handgun retention. (*Id.*)

Conroy concluded that Coffer overreacted by delivering two unnecessary punches after Lucas appeared to have been subdued, by picking Lucas up and dropping him face-down on the street, and by spitting in his direction. (L.F. 64-67, 163.) Conroy further testified that Coffer had an anger control problem or lost control, that emotions were running wild, and that Coffer's actions were unnecessary and unprofessional. (L.F. 64-66, 163.)

The videotape of the incident shows Coffer punching Lucas in the head twice well after his hand is restrained and is no longer anywhere near Coffer's weapon. (L.F. 61-64; 141, Videotape Exhibit.) Coffer testified at the hearing that he did not spit at Lucas. (L.F. 89.) But the videotape depicts Coffer spitting at Lucas. (L.F. 64; 21; 141, Videotape Exhibit.) Coffer himself conceded, after viewing the arrest video, that his superiors had a reasonable basis upon which to impose some discipline against him based on his conduct as shown in the video. (L.F. 31; 96-97.)

Former Chief of Police Richard D. Easley viewed the incident between Coffer and Lucas as "an extremely serious situation involving excessive use of force," and he considered the spitting incident as causing an "extremely negative

perception of the police department," noting that it is "one of the more degrading things that you can do to somebody." (L.F. 20.) Current Chief of Police James D. Corwin testified that he agreed with the termination recommendation made to the Board by Chief Easley. (L.F. 77.)

Following the hearing before Judge Moran, and pursuant to its statutory duty under Sections 84.600 and 84.610, the Board considered the disciplinary case involving Coffer. The Board reviewed the transcript of the proceeding before the hearing officer, the exhibits including the videotape, and the Recommended Findings of Fact, Conclusions of Law and Suggested Sanctions/Punishment prepared by Hearing Officer Moran. (L.F. 167.) Following deliberation on the matter, the Board issued its Findings of Fact and Conclusions of Law and unanimously voted to terminate Coffer's employment with the Department. (L.F. 165-69.)

Coffer appealed his termination to the Circuit Court of Jackson County, Missouri, which, in a "judgment" dated October 5, 2006, ordered that the Board reinstate Coffer. (L.F. 210.) The Board filed a Motion to Clarify and Reconsider Judgment (L.F. 232) on November 2, 2006, less than 30 days after October 5, to which Coffer filed Suggestions in Opposition on November 15, 2006. (L.F. 250.) The trial court took no further action in connection with the Board's motion, and the Board filed its timely appeal to the court of appeals on January 25, 2007. (L.F.

232.) In the interim, unknown to the Board, the trial court clerk entered the October 5, 2006 judgment on the docket on November 22, 2006. During this appeal, after discovering the belated docket entry, the Board filed on May 16, 2007 a "precautionary motion" for a special order in the court of appeals allowing an untimely appeal under Rule 81.07(a), which the court of appeals denied without comment.

The court of appeals in its opinion accepted the Board's appeal as timely but, like the circuit court, reversed the Board's ruling. The court of appeals found that the Board acted outside its authority in allowing Coffer to waive his right to a hearing before the Board. This Court then granted the Board's application for transfer.

SUMMARY OF THE ARGUMENT

The Board's decision to terminate Coffer should be affirmed. Coffer's first point is a convoluted assertion that the Board's January 25, 2007 notice of appeal from the circuit court's judgment was somehow not timely filed. But the Board filed its authorized post-judgment motion on November 2, 2006, within the required 30 days of the trial court's October 5, 2006 judgment, and this motion was never ruled, thereby making the Board's January 25, 2007 notice of appeal early, not late. Coffer's argument that the Board's motion to reconsider was not an authorized post-judgment motion cannot overcome this Court's repeated holdings that the substance, not the form, of a motion prevails when considering whether it was an authorized post-judgment motion that tolls the time for appeal. As a result, Coffer's first point should be denied.

The second and third points in Coffer's appeal are equally flawed in that they both essentially ask this Court to review the administrative record and replace the Board's judgment with its own. It is well-established that where substantial evidence supports either one of two conflicting determinations, the agency's decision as to which one is correct should prevail. Here, Coffer simply points to testimony and evidence suggesting he was justified in striking the suspect repeatedly and that he did not spit on him or use profanity. But at the very least, this evidence is contradicted by the videotape of the incident, which shows an

angry police officer spitting on and repeatedly punching a subdued, inebriated suspect who no longer posed any threat (if he ever did). This substantial evidence is more than enough to support the Board's decision. Although Coffer had notice of the charges against him, and conceded that at least some discipline against him was justified, the record is also clear that Coffer's conduct violated any conceivable standard of acceptable police conduct. Coffer's second and third points should thus be denied.

Finally, Coffer's fourth and fifth points both fail under Section 84.600, which grants the Board the authority to terminate a police officer if it first gives the officer a copy of the charges against him, the opportunity to a full hearing before the Board, and, after hearing the charges, votes on whether or not to terminate. The simple fact that an officer declines to exercise his right to a full hearing before the Board does not deprive the Board of jurisdiction. Moreover, Coffer himself requested a hearing before a hearing officer, and the record disclosed at that hearing was reviewed by the Board before it made its decision. Thus, the pre-termination process Coffer was given was no sham and was wholly within the Board's jurisdiction. Accordingly, Coffer's fourth and fifth points should be denied and the Board's decision to terminate should be affirmed.

ARGUMENT

RESPONSE TO POINT I

I. The Court Has Jurisdiction Over This Appeal Because The Board's January 25, 2007 Notice of Appeal Was Timely In That Judgment Was Entered On October 5, 2006 And The Board's Timely And Authorized Post-Judgment Motion, Filed November 2, 2006, Was Never Ruled By The Trial Court.

Standard of Review

Whether a party's notice of appeal was timely filed and, therefore, whether this Court has jurisdiction, is a question of law over which appellate courts exercise plenary review. *Dunkle v. Dunkle*, 158 S.W.3d 823, 827 (Mo. App. 2005). Likewise, determining whether a court's ruling is a "judgment" is a question of law necessitating de novo review. *See Blue Ridge Bank and Trust v. Hart*, 152 S.W.3d 420, 425 (Mo. App. 2005).

Argument

Coffer goes to great lengths to claim that the Board's notice of appeal was not timely filed. During a confusing series of alternative (and inconsistent) timelines and analyses of the Missouri Rules of Civil Procedure pertaining to appeals, consuming more than twelve pages of his brief, Coffer always manages to

arrive at the same convenient conclusion: The Board's January 25, 2007 notice of appeal was untimely and this appeal must be dismissed.

The analysis is not so complicated, nor the conclusion so bleak. The Board's January 25, 2007 notice of appeal was not only unquestionably timely, it was *early*. Any confusion that exists on the present record was caused by procedural problems in the trial court clerk's office that should not be attributed to the Board.

The starting point for the analysis is straightforward. The trial court issued a "Judgment" on October 5, 2006, and that "Judgment" was sent to the parties on that same date, as the clerk is required to do upon the purely ministerial act of "entry" under Rule 74.03. (L.F. 210; 226.) *See Floyd v. Brenner*, 542 S.W.2d 325, 327 (Mo. App. 1976). When there is "a material discrepancy between the oral pronouncement of the trial court's judgment and sentence, and the written judgment entry, the oral pronouncement controls." *State v. Patterson*, 959 S.W.2d 940, 941 (Mo. App. 1998). "A 'judgment derives its force from the rendition of the court's judicial act and not from the ministerial act of its entry upon the record.'" *State v. Collins*, 154 S.W.3d 486, 492-93 (Mo. App. 2005) (quoting *Patterson*, 959 S.W.2d at 941).

The Board filed a timely motion to reconsider the October 5, 2006 Judgment on November 2, 2006, within 30 days of October 5. (L.F. 232.) Because that post-

judgment motion for reconsideration was never expressly ruled, it was deemed overruled 90 days later (on February 1, 2007) and the October 5 Judgment became final for purposes of appeal on that same date under Rule 81.05(a)(2)(A). The Board's notice of appeal from the Judgment, however, had been filed a week *earlier*, on January 25, 2007. (L.F. 258.) The notice of appeal automatically became effective on February 1 by operation of Rule 81.05(b)[3], and this appeal was therefore timely.

If, as the Board believes, the trial court's October 5, 2006 "Judgment" is the operative one, Coffer's only argument raised against the timeliness of the present appeal is that the Board's November 2, 17-page "Motion to Clarify and Reconsider Judgment" (L.F. 232) was somehow not an authorized post-judgment motion. As Coffer appears to concede, however (Substitute Br. at 30), similar "motions for reconsideration" *have* been considered to be authorized post-judgment motions, and any failure to invoke a specific rule has *not* been held to be necessary. *See, e.g., Blue Ridge Bank & Trust Co. v. Hart*, 152 S.W.3d 420, 425 (Mo. App. 2005).

Although Coffer admits to being "mindful" of the *Hart* decision, he complains that here the Board *did* reference a specific rule (although not in the title

[3] "In any case in which a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal." Rule 81.05(b).

of the motion) and that this reference is fatal to the motion's being considered "authorized." The problem with this argument is that the particular rule the Board referenced – Rule 75.01 – is not a true substantive rule, but is instead a rule that merely clarifies that the trial court retains authority to reconsider its judgments within a 30-day window. *See* Rule 75.01 (stating in relevant part that "[t]he trial court retains control over judgments during the thirty-day period after entry of judgment . . ."). As such, the Board's reference to Rule 75.01 adds nothing substantive to its otherwise-generically styled "motion for reconsideration" that Missouri courts have expressly recognized as an authorized post-judgment motion.

Coffer's authority is not to the contrary. Although the 1996 opinion on which he relies heavily, the Western District's opinion in *State Dep't of Labor & Indus. Relations v. Ron Woods Mechanical, Inc.*, 926 S.W.2d 537, 540 (Mo. App. 1996) ("*Ron Woods*"), suggests that a failure to cite a specific rule may be fatal, that case is no longer good law, if it ever was. The Western District's 2005 opinion in *Hart* specifically held, based on controlling precedent from this Court, that post-judgment motions should be evaluated based on their substance rather than their form. 152 S.W.3d at 425. In so holding it expressly stated that its earlier decision in *Ron Woods* should no longer be followed:

> Refusing to consider the allegations of a motion solely because the motion fails to cite the specific rule under which it is authorized, however, exalts form over substance.
>
> This practice also appears to be contrary to Missouri Supreme Court cases that espouse treating after-trial motions based upon the allegations contained in the motion, regardless of the motion's style or form . . . . To the extent that *Ron Woods* and other cases from this court can be read to require a party to cite the specific rule under which its substantively-sufficient after-trial motion is made or else the motion will not be considered or reviewed as an authorized after-trial motion, they appear to be in conflict with [Missouri Supreme Court cases] *and, therefore, should no longer be followed*.

Id. (citations omitted) (emphasis added).

This Court's holdings are fully consistent with *Hart* and the principle that a pleading's substance should govern over its form. *See Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000)(although motion entitled "Special Appearance For Purpose of Quashing Service" did not invoke statute authorizing appeal from special orders, this Court held that substance of the motion attacked the enforcement of the judgment and was thus appealable). In *Taylor v. United Parcel Serv., Inc.*, 854 S.W.2d 390, 393 (Mo. banc 1993), this Court dismissed an appeal

because the appellant's time for filing a notice of appeal was cut short by the trial court's denial of authorized post-judgment motion under Rule 81.05. This Court held that a motion to reconsider was essentially a motion for a new trial because it alleged claims of error with the trial court's judgment. *Taylor*, 854 S.W.2d at 393; *see also In re Franz' Estate*, 221 S.W.2d 739, 740 (Mo. 1949) (holding that a motion to "set aside judgment" was a motion to reconsider or a motion for a new trial, which postponed finality of judgment for appeal purposes); *Massman Constr. Co. v. Missouri Highway & Transp. Comm'n*, 914 S.W.2d 801, 803 (Mo. banc 1996) (holding that motion for additur was similar to motion for new trial for purposes of ascertaining the time within which an appeal can be taken).

No reasonable person could construe the Board's 17-page "Motion to Clarify or Reconsider Judgment" (L.F. 232-249) as anything other than a request for the trial court to alter or amend its October 5 Judgment by affirming rather than reversing the Board's termination of Officer Coffer. *See, e.g.*, L.F. at 248 ("Board respectfully requests that the Court reconsider its Judgment dated October 5, 2006 based on the evidence and arguments presented herein, and enter it [sic] Judgment affirming the decision of the Board.…"). The motion's reference to Rule 75.01 – a general rule that merely authorizes trial courts to revisit their rulings within a 30-day period – cannot change this basic fact.

If there were any doubt on this point, however, it is dispelled by the Western District's opinion in *Svejda v. Svejda,* 156 S.W.3d 837, 839 (Mo. App. 2005). There the Western District rejected an essentially identical argument to that now raised by Coffer, recognizing that a mere reference to Rule 75.01 does not make a post-judgment motion "unauthorized": "[I]f a Rule 75.01 motion is directed to errors of fact or law in the trial, it can be treated as a motion for new trial, thus extending the trial court's jurisdiction over the judgment to ninety days." *Id.* at 839. Again, it is the *substance* of the motion that controls, and here that substance was plainly to effect a change in the trial court's October 5 Judgment. Because the Board's timely motion for reconsideration was undeniably directed at altering or amending the trial court's October 5 Judgment, it was an authorized post-judgment motion that stayed the operation of the trial court's judgment and made the Board's January 25, 2007 notice of appeal timely.

Coffer separately argues that dismissal is proper based on the notion that the October 5 "Judgment," which was forwarded to the parties on or about that date and never substantively amended, may not actually have been a "Judgment" until November 22, 2006, when the trial court clerk, *without apparent notice to anyone*, seems to have first formally entered it on the docket. But as noted, the purely ministerial act of a clerk's entering a judgment on the record is *not* dispositive as to when a judgment becomes final. *See, e.g., State v. Collins*, 154 S.W.3d at 492-93.

Coffer points to *Sparks v. Sparks*, 82 S.W.3d 210, 212 (Mo. App. 2002), in support of his argument that the judgment is considered filed not when the judge signed it, but on the date the clerk "filed" it. But that case does not discuss what physical act constitutes "filing," nor does it take into account the authority discussed above, which states that a judgment derives its force for the rendition of the court's judicial act, not the ministerial act of entry by the clerk. Moreover, unlike *Sparks*, the clerk's actions certifying and mailing the judgment on October 5, 2006 conclusively show that the judgment was filed on that date. (L.F. 22).

Even if Coffer's arguments were valid, and judgment was not entered until November 22, he offers no persuasive reason why the November 2 authorized post-judgment motion should not have been fully applicable to it as well. Even if the October 5 "Judgment" had technically been "entered" by the clerk on November 22, it is undisputed that no substantive change was ever made to the original October 5 "Judgment" that the Board sought to have reconsidered. Although everyone agrees the clerk should have performed the ministerial act of "entering" the Judgment immediately, the fact that the clerk may have failed to do so until November 22 should not affect the validity of the Board's November 2 motion. The most apt analogy is a prematurely-filed notice of appeal, which is deemed to be filed automatically when the judgment to which it is directed

becomes final. *See* Rule 81.05(b). If for some reason the October 5 document denominated "Judgment" did not technically become a "Judgment" until November 22, an earlier-filed motion to reconsider directed to *that identical document* should clearly be deemed filed on the date the original Judgment became technically "final." To hold otherwise would be to subject parties operating in the utmost good faith to the whims of trial court clerks who fail to comply with their ministerial duties.

It would in any event be manifestly unfair to somehow now consider the Judgment as not having been entered until November 22, 2006, so as to make making this appeal untimely. As noted, the trial court clerk never informed the parties about the belated docket entry. When the Board discovered this surreptitious entry during the present appeal, it recognized the potential for confusion, and filed on May 16, 2006 a "precautionary motion" in the Western District for a special order for leave to file its notice of appeal out of time in case Coffer argued, or the court of appeals found, that November 22 was the operative date of the Judgment. *See* Board's Precautionary Motion for Special Order (filed in the court of appeals on 05/16/07 and assigned Case No. WD68385). That motion was denied without comment (see Docket entry 06/18/07 in Case No. WD68385), even though it had been timely filed within six months of December 22, 2006 (the date any November 22 Judgment would have become

final under Rule 81.07(a)), presumably because the court of appeals believed, as the Board had stated in its precautionary motion, that the real "Judgment" had actually been entered on October 5. Again, it would be the height of unfairness to hold on this record – where the Board specifically tried to address in a timely manner any failing on the part of the trial court clerk – that the present appeal is somehow untimely.

Coffer's first point should thus be denied. Under clear precedent from this Court and the court of appeals, the Board's November 2, 2006 "Motion to Clarify and Reconsider Judgment" was an authorized post-judgment motion that stayed the time for filing a notice of appeal from the trial court's October 5, 2006 Judgment. Alternatively, even if the October 5 Judgment was for some reason not "entered" until November 22, 2006, that same motion for reconsideration should be equally applicable to it, because the Judgment itself that the Board sought to have reheard never changed. Either way, the Board's January 25, 2007 notice of appeal was timely, and Coffer's convoluted arguments to the contrary lack merit.

RESPONSE TO POINTS II & III:

II. The Board Did Not Err In Terminating Coffer's Employment Because its Decision Was Supported By Competent And Substantial Evidence Upon The Whole Record, In That The Videotape of The Incident Showed That Coffer Struck an Unresisting Arrestee Multiple Times on the Head While Using Profanity and Spitting on Him.

Standard of Review

The scope of review for a "contested case" is found in Section 536.140 under which a court can reverse a decision of an administrative body if it:

(1) Is in violation of constitutional provisions;

(2) Is in excess of the statutory authority or jurisdiction of the agency;

(3) Is unsupported by competent and substantial evidence upon the whole record;

(4) Is, for any other reason, unauthorized by law;

(5) Is made upon unlawful procedure or without a fair trial;

(6) Is arbitrary, capricious or unreasonable; or

(7) Involves an abuse of discretion.

This Court reviews a ruling of the agency, not the judgment of the reviewing court. *Morton v. Missouri Air Conservation Comm'n.*, 944 S.W.2d 231, 236 (Mo. App. 1997). In determining whether the agency action is supported by the record a

"reviewing court should simply decide: whether, considering the whole record, there is sufficient competent and substantial evidence to support the [agency's decision]." *Lagud v. Kansas City Bd. of Police Commissioners*, 136 S.W.3d 786, 791 (Mo. 2004); *see also Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222-23 (Mo. banc 2003). Only in the "rare case" in which the agency's decision is contrary to the overwhelming weight of the evidence is a reversal proper. *Lagud*, 136 S.W.3d at 791. In conducting its review, the Court "must look to the whole record in reviewing the Board's decision, not merely at that evidence that supports its decision." *Id*.

This does not mean courts re-weigh the evidence on appeal. *Id*. Instead they must simply look at the entire record to determine whether the ruling is supported by competent and substantial evidence. *Hampton*, 121 S.W.3d at 222-23. Substantial evidence is merely that which, if true, has probative force upon the issues, "*i.e.*, evidence favoring facts which are such that reasonable men may differ as to whether it establishes them." *Fujita v. Jeffries*, 714 S.W.2d 202, 206 (Mo. App. 1986).

This Court may not substitute its judgment on the evidence for that of the agency, and it must defer to the agency's determinations on the weight of the evidence and the credibility of the witness. *Moses v. Carnahan*, 186 S.W.3d 889, 907 (Mo. App. 2006). If evidence permits either of two opposing findings, the

Court must defer to the findings of the administrative body. *Lagud*, 136 S.W.3d at 791, n. 5 (If the ruling is supported by substantial and competent evidence it "will be affirmed, even though the evidence would also have supported a contrary determination.").

Argument

Coffer's second and third points will be considered together because both wrongly claim that the Board's decision was against the weight of the evidence. Each point fails for the same reason: the entire incident appears on videotape, where Coffer can be seen beating a drunken and unresisting arrestee and spitting on him. Nevertheless, Coffer argues in point two that his own testimony, Officer Bryant's testimony and Mr. Conroy's testimony all conclusively show that no excessive force was used, and that Coffer did not spit on Mr. Lucas or direct profanity at him. And in point three Coffer alleges that the evidence was lacking because the specific police policies he was charged under were supposedly never introduced into evidence.

The videotape of Coffer punching the restrained arrestee – which is a violation of universally-recognized standards of acceptable police behavior, not to mention specific policies of the Kansas City, Missouri Police Department – alone constitutes substantial evidence supporting the Board's decision to terminate. At the very least this record supports one of two conflicting conclusions and thus by

definition cannot result in a reversal of the Board's ruling. Certainly, on this record, the Board's decision to terminate Coffer cannot be one of those "rare" cases where the agency decision "is contrary to the overwhelming weight of the evidence." *Lagud*, 136 S.W.3d at 791.

A. The Videotape Of The Incident Depicts The Use Of Excessive Force By Coffer.

Substantial evidence supports the Board's determination that Coffer used excessive force against Lucas. Both the videotape of the incident and the expert testimony of Sergeant Bill Conroy, who both sides agreed was qualified as an expert witness, show that termination of employment was proper. Moreover, the investigative reports also show that Coffer's use of excessive force was outside the bounds of acceptable behavior.

At the hearing, Sergeant Conroy narrated the videotape of the incident involving Coffer and Lucas. Sergeant Conroy had field experience, experience in the tactical response unit, and experience in the street narcotics unit (LF. 43, ll. 20-25 and LF. 44, ll. 1-2), and Coffer conceded his expert credentials. (L.F. 12.) While Lucas's hand does appear to make incidental contact with Coffer's gun, Sergeant Conroy was very clear that the contact was not a true "gun grab" because Lucas was not pulling on the gun. (L.F. 57, ll. 15-17.) Although Sergeant Conroy acknowledged that the initial strikes, while tactically unsound, were justified (L.F. 72), Coffer continued to hit Lucas in the head with his closed fist well after the

tape shows Lucas's arms were under control and behind his back. (L.F. 72, ll. 8-10.) Sergeant Conroy categorized those extra hits as "pay back," unnecessary, and an indication that Coffer was angry at Lucas. (L.F. 64, ll. 1-4, 23-25 and L.F. 72, ll. 20-25.)

Coffer characterizes the discipline in this case as "Monday-morning quarterbacking" and suggests that his subjective belief as to the danger he was in should control. But this argument ignores the proper standard of review. Here the videotape shows four quick blows to Lucas's head and then, after a pause and after Lucas's hands are restrained behind his back, two *additional* blows. The tape is an unquestionably clear and accurate depiction of the events involving Coffer and Lucas. Reasonable persons viewing it could conclude that Coffer used unreasonable force, as easily as they could conclude that Coffer's conduct was not unreasonable. Because the evidence supports two competing outcomes, the Board's decision must be upheld. *See Lagud*, 136 S.W.3d at 791, n. 5.

As evidence that what Lucas did was not a true "gun grab," Sergeant Conroy discussed the fact that Coffer did not employ any disarming technique when he felt Lucas's hand on his gun. Conroy testified at length about the techniques officers are taught to secure their guns if they believe their gun is being taken. According to Conroy, the techniques to secure the weapon are known as a rear handgun grab, a front cross gun grab, or securing the gun with two hands. (L.F. 57, ll. 19-25.)

Once the gun is taken by a suspect, Conroy noted that officers are trained to complete a disarming technique. (L.F. 58, ll. 1-5.) Conroy noted that officers have all those "tools in your bucket and you've got a lot of options" (L.F. 58, ll. 9-11), but Coffer exercised none of those options. Instead Coffer chose to repeatedly punch Lucas in the head while Lucas was lying flat on the concrete.

The testimony of the accompanying officer on the scene, Officer Bryant, does not change this result. Bryant, when specifically asked if he saw how many times Coffer struck Lucas, answered "several and the driver continued to resist arrest." (L.F. 159). But Bryant's testimony cannot so easily overcome the videotape evidence of this same arrest. There is no suggestion whatsoever on the tape that the driver ever resisted arrest. The tape depicts an inebriated suspect who has little physical control of his body being pummeled by a police officer. The lack of resistance to the arrest is further illustrated by Lucas's response to the officer's apparent commands to show his hands when Coffer initially approaches the vehicle–Lucas puts his hands up and out of the driver's side window of the car. The tape shows that Lucas was so drunk that, despite his attempts, he was not able to exit the vehicle under his own power.

Moreover, the department's investigation reports corroborate Conroy's conclusions. The report from Sargeant Ramona Arroyo, Coffer's supervisor, reveals conflicting evidence but notes that Coffer "continued punching the suspect

although he was immobile on the ground," and that Coffer "might have said something" profane. (L.F. 05-06). In his report, Captain Roger Lewis notes that

> **After** the hand/arm is cleared from the area of the weapon, Officer Coffer strkes the first fisted blow to the suspects head. This is immediately followed by three (3) more fisted blows….Officer Bryant then strikes one (1) fisted blow, which is followed by two (2) more fisted blows from Officer Coffer…As stated below, the blows thrown by both officers occur after the threat of the 'gun grab' is neutralized. The actual threat felt by Officer Coffer is questionable, as he is never observed to visually or physically check the security of his weapon within the holster.

(L.F. 08). (emphasis original)

Major Dale Barlow agreed that Coffer's conduct was unacceptable:

> These issues are indeed serious and demand they be accounted for. In his statements . . . Coffer does not appear to accept responsibility for his actions, i.e., violation of procedure relating to conducting vehicle stops . . ., repeated blows to the subject's head after the

> ‘gun grab’ threat is neutralized, and the coup de grace of spitting on the subject, which I believe was intentional. (L.F. 10).

The record thus supports the decision to terminate Coffer’s employment. The test is not whether, in Coffer’s words (Br. at 33), the Board’s decision is “against the weight of the evidence.” The test is instead whether the substantial and competent evidence on the record as a whole supports the Board’s decision, *even though it could also have supported a contrary determination. See Lagud*, 136 S.W.3d at 791, n. 5. Here, because reasonable persons could differ as to whether Coffer violated acceptable standards of police behavior, this Court should defer to the Board’s findings. *Id.* The Board’s decision to terminate should be affirmed for this reason alone.

B. The Record Supports The Charge That Coffer Used Profanity Toward Lucas.

Coffer did not admit or deny that he called Lucas a “stupid son of a bitch.” He simply was not asked about it. The record contains references to Lucas’s allegations on two occasions that Coffer called him that name and the statements of Andrew Marr, a civilian who was riding along with Coffer and who confirms that Coffer did use profanity toward Lucas. (L.F. 8.) Marr stated “I believe so” in his statement to the Internal Affairs Unit of the Kansas City Missouri Police Department when asked whether Coffer called Lucas a “stupid son of a bitch.”

This testimony is substantial evidence that Coffer directed profanity at Lucas while arresting him. Again, this Court should defer to the Board's finding even if a contrary result could have been reached. In addition, this evidence further supports the fact that Coffer committed the acts charged and was subject to termination.

C. The Videotape Of The Incident Involving Coffer And Lucas Depicts Coffer Spitting On Lucas.

The last charge against Coffer stems from the videotape, which shows him spitting on Lucas after Lucas was arrested and handcuffed. The video alone is sufficient evidence to support the charge that Coffer spat on Lucas. (L.F. 141, Videotape Exhibit.) Upon careful examination of the video, it is apparent that Coffer waited to spit at Lucas until the other individuals at the scene had walked away. Coffer clearly leans over Lucas just before spitting. While Coffer asserts that he chews tobacco and that he had to spit at that particular time, he is not depicted spitting at any other time on the videotape. Nor does he explain why, although he could have spat in another direction, he chose to lean over Lucas before spitting. The spitting, coupled with Coffer's unnecessarily picking up and deliberately dropping the handcuffed Lucas on the pavement, persuaded the Board that Coffer was angry with Lucas, and further supports its decision in this case. (L.F. 65, ll. 3-5, 15-20.)

D. Evidence Of The Specific Policies Coffer's Conduct Violated Was Part Of The Record, But Unnecessary In Light Of Coffer's Egregious Behavior And The Express Language Of Section 84.600.

Coffer argues for the first time on appeal that there was insufficient evidence in the record of the policies he was charged with violating. He specifically claims that the policies themselves were never introduced in evidence.

There are at least three problems with Coffer's argument. First, he never raised it below – in fact, he *conceded* that some form of discipline against him was warranted, thereby foreclosing his current argument. Coffer points to no authority, nor can he, that the specific police policies at issue must be in evidence before the Board can terminate an officer. Finally, and most fundamentally, the language of the policies effectively *was* in evidence and fully known to both the Board and Coffer.

Coffer conceded below that some discipline was appropriate for his actions. *See* L.F. 96 (admitting that the "Chief of Police had the right to impose discipline" on him based on his actions as shown in the video). And he never complained that he lacked notice of the charges against him, nor did he question the proof of the applicable policies before the Board. In these circumstances, Coffer has waived any argument that the policies were not in evidence or that they were somehow unknown to him. *See, e.g., Donovan v. Temp. Help*, 54 S.W.3d 718, 719 (Mo.

App. 2001) (holding that issues that could have been raised before administrative agency cannot be raised for first time on appeal) (citing *Chambliss v. Lutheran Med. Ctr.*, 822 S.W.2d 926, 932 (Mo. App. 1991), *overruled on other grounds by Hampton*, 121 S.W.3d 220; *Crabill v. Hannicon*, 963 S.W.2d 440, 444 (Mo. App. 1998), *overruled on other grounds by Hampton*, 121 S.W.3d at 222; *Vinson v. Curators of Univ. of Missouri*, 822 S.W.2d 504, 508 (Mo. App. 1991)).

Coffer now argues that he was only conceding that he used poor tactics. But his testimony at the hearing belies that position:

> Q. But you basically told the court that you – your actions, *as alleged in Count I* of the Charges and Specifications, were sufficient – a sufficient basis for the Chief of Police to impose discipline?
>
> A. Yes.

(L.F. 97) (emphasis added). Count I contains the allegation that Coffer used excessive force in beating Mr. Lucas, directing profanity at him and spitting on him. (L.F. 011).

Even if Coffer had preserved his right to assert it, this point separately fails under Section 84.600. That statute specifically allows for termination upon a Board vote once the officer has been made aware of the "charges" against him and been afforded the opportunity for a hearing. Coffer was admittedly aware that his

conduct deserved some reprimand. In other words, there was "cause" for some punishment. And the Board likewise heard the charges against Coffer before ruling. That is all that was required under Section 84.600 for the Board to terminate Coffer.

Coffer's new argument in any event lacks merit on its face. The conduct at issue – beating a defenseless man lying on the pavement, dropping him face-down on the ground, spitting on him, and shouting profanity at him – violates any conceivable standard of police conduct, so that Coffer could not have been prejudiced by any lack of notice of the specific procedures he violated, even if he had preserved this argument.

Finally, the specific policies Coffer was charged with violating in any event *were* in the record below. *See, e.g.*, L.F. 1 (charging Coffer with violating Kansas City, Missouri Police Department Personnel Policy 201-7, and quoting from subsections 9, 12 and 59 of that policy regarding conduct expected of Kansas City, Missouri police officers). Disciplinary charges against police officers "need not be stated with such technical precision as in an indictment or information." *Roorda v. City of Arnold*, 142 S.W.3d 786, 794 (Mo. App. 2004). It is instead sufficient if an officer is simply "fairly apprised" of what conduct will violate the rules, and of what offense has been committed. *Id.* (citing *Milani v. Miller*, 515 S.W.2d 412, 416 (Mo. 1974). Here this standard was easily met. Not only was language from

paragraphs 9, 12 and 59 of Policy 201-7 quoted verbatim, but the essence of the "excessive force" rule was also set out in the record (L.F. 1):

> Police officers will never employ unnecessary force or violence and will use only such force in the discharge of duty as is reasonable in all circumstances. While the use of force is occasionally unavoidable, police officers will refrain from applying the unnecessary infliction of pain or suffering and will never engage in cruel, degrading or inhuman treatment of any person.

On this record, Coffer's new argument lacks merit. He knew what the charges were against him, and he admitted that some form of discipline was appropriate. Not only did his conduct violate any conceivable policy governing police behavior, but the policies themselves were effectively in evidence. Coffer's arguments in his second and third points should be denied.

RESPONSE TO POINTS IV & V

III. The Board Did Not Err In Terminating Coffer Because It Had Jurisdiction To Allow Coffer To Decide To Have His Case Heard First By A Hearing Officer Instead Of The Board And The Board was Not Bound To Accept The Hearing Officer's Recommendation.

Standard of Review

Coffer's fourth and fifth points are directly linked and thus will be dealt with together. In both points Coffer appears to argue that his termination is reversible as being made "upon unlawful procedures or without a fair trial" under Section 536.140.2(5) or in excess of the Board's authority or jurisdiction under Section 536.140.2(2). The Board's jurisdiction and the procedures owed Coffer are governed by Section 84.600. While the interpretation of a statute is a question of law, an agency's interpretation of a statute that it is charged with implementing, like the Board and Section 84.600, is entitled to "great weight" by a reviewing court. *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197 (Mo. banc 1972); *see also Dep't of Social Services, Div. of Medical Services v. Senior Citizens Nursing Home Dist. of Ray County*, 224 S.W.3d 1, 15 (Mo. App. 2007); *Four Rivers Home Health Care, Inc. v. Dir. of Revenue*, 860 S.W.2d 2, 4 (Mo. App. 1993); *Morton v. Missouri Air Conservation Comm'n*, 944 S.W.2d 231, 236 (Mo. App. 1997).

Argument

The process by which the Board terminated Coffer was neither a "sham" nor outside the Board's jurisdiction. Coffer concedes in point four that he had the right to and did waive a hearing before the Board and go before a hearing officer. He complains instead that the Board's *ultimate decision* ignored the hearing officer's recommendations and thus made a "sham" of the process. In point five, on the other hand, Coffer now claims that the Board had no authority to allow him to voluntarily forgo the hearing before the Board in the first place. While these points are at odds with one another, they are both defeated by Section 84.600. Moreover, for different but related reasons, well established rules of appellate procedure render these points unreviewable by this Court.

A. The Board Had The Jurisdiction And Authority To Terminate Coffer.

The Board derives its authority to terminate non-probationary officers from Section 84.600. That statute also separately provides for certain procedures available to those officers. In other words, Section 84.600 contains both jurisdictional and procedural aspects. The relevant portion of Section 84.600 dealing with non-probationary officers states:

> [S]uch policemen and police officers shall be appointed to the police force of said city and shall thereafter be subject to discharge or removal only for cause and upon

> compliant being made or charges being preferred against them, a copy of which compliant or charges setting forth the ground thereof shall be given to such policeman or police officers, not less than forty-eight hours prior to the time the complaints or charges are to be heard by the board, and *they shall have the right to appear before the board* at a public hearing to be held within fifteen days after the filing of such complaint or charges, and be confronted by the witnesses against them and to be defended by counsel and the board after hearing the charges shall take a vote of yeas and nays to be entered upon the records whether or not the charges have been sustained and what punishment, if any, shall be imposed.

Section 84.600 (emphasis added).

This statute explains precisely when the Board obtains jurisdiction to discharge an officer like Mr. Coffer. First, charges or complaint must be preferred against and delivered to the officer. Section 84.600. The Board must then give the officer *the opportunity* to appear before it. *Id*. The final jurisdictional aspect of Section 84.600 is the requirement that "after hearing the charges" the Board shall act by voting to sustain or overrule the charges. The Board cannot terminate a

non-probationary police officer if these steps are not taken. They are, in a word, jurisdictional.

But that is not to say that every process described in the statute must occur before the Board may act. Contrary to Coffer's fifth point, Section 84.600 merely gives Coffer a "*right*" to appear before the full Board, and does not require full Board hearings as a matter of agency jurisdiction. The rights included here are essentially due process rights, *e.g.*, notice of the charges against him, the right to a hearing, to confront witnesses and to be represented by counsel.

Coffer conflates how the board obtains the jurisdictional authority to terminate a police officer under § 84.600 with the due process rights that statute separately grants officers. To hold that otherwise waivable due process rights provided for in the statute were jurisdictional would lead to absurd results. For example, what would the result have been here had Coffer refused to appear at all before the Board or any hearing officer, and had simply waived his right to any hearing whatsoever? Surely no court would hold in these circumstances that the Board lacked the *jurisdiction* to act. The situation here is effectively no different.

Even the most fundamental due process rights can be waived and are not considered jurisdictional. Criminal defendants, for example, can waive their right to testify in their own defense. *See Meuir v. State*, 182 S.W.3d 788, 792-793 (Mo. App. 2006)("The right to testify in one's own defense is fundamental and may only

be waived by the individual."); *see also State v. Green*, 189 S.W.3d 655, 657 (Mo. App. 2006) (allowing waiver of fundamental right to appeal). Here, the provisions of § 84.600 allowing police officers the "right" to appear before the Board, to confront the witnesses against them, and to be represented by counsel are quintessential due process rights that parties like Coffer are similarly free to waive.

Moreover, like all other legal rights, the right to a hearing can be waived, as both the statute and the Board Hearing Waiver 02-06 (L.F. 144) recognize. A waiver is an intentional relinquishment of a known right. *State ex rel. Kansas City Life Ins. Co. v. Trimble*, 310 Mo. 446, 467 (Mo. 1925). As early as 1916, Missouri courts have recognized that statutory rights may be waived. "A statutory right or benefit given for its protection can be waived the same as any other right." *Shearlock v. Mutual Life Ins. Co. of New York*, 182 S.W. 89, 91 (Mo. App. 1916). *See also Boone County ex rel. Butcher v. Blue Cross Hosp. Serv., Inc. of Missouri*, 526 S.W.2d 853, 860 (Mo. App. 1975). By voluntarily signing the hearing waiver, Coffer exercised his right to waive the hearing provided for by Section 84.600.

The only other decisions that considered whether a police board has the authority to employ hearing officers for contested cases are *Rogers v. Bd. of Police Commissioners of Kansas City*, 995 S.W.2d 1 (Mo. App. W.D. 1999) and *State ex rel. McGull v. St. Louis Bd. of Police Commissioners*, 178 S.W.3d 719, 721 (Mo. App. 2005). Both condemned hearing procedures based on policies that had

required officers to attend hearings before a designated hearing officer rather than the full Board. In the present case, of course, the option of a full Board review was at all times available to Officer Coffer, who instead deliberately chose to forgo it. In these circumstances, as Coffer himself argued below, his statutory "right" to appear before the Board can plainly be waived. *See* Respondent's Substitute Br. at 45 ("Officer Coffer has the right to a hearing before the full Board of Police Commissioners (or proper quorum thereof). This right is to protect an officer's procedural due process, which the Board cannot take away from the officer. *However, like all rights, including those under our Constitution, said rights may be waived*.") (emphasis added) (citations omitted).

The differences between the statute at issue in *McGull* and the one at play in this case illustrate the distinctions between jurisdictional provisions and those that are merely procedural. In *McGull,* the St. Louis Board of Police Commissioners had the authority to remove officers under Section 84.120 (1998), which at the time stated[4] (emphasis added):

[4] The statute has since been amended to expressly allow for hearing officers to conduct hearings like the one at issue here. *See* 84.120 (2008). But the fact that only the St. Louis statute was amended is of no relevance here because, as noted, the Kansas City statute needs no other provision to allow officers to waive their

> The patrolmen and turnkeys hereafter appointed shall serve while they shall faithfully perform their duties and possess mental and physical ability and be subject to *removal only for cause after a hearing by the boards, who are hereby invested with the exclusive jurisdiction* in the premises.

This language unambiguously states that removal is only "for cause after a hearing by the boards" who enjoy "exclusive *jurisdiction*." *Id*. (emphasis added). This is a jurisdictional provision. On the other hand, the statute now at issue, Section 84.600, requires only that the officer be given a copy of the charges against him and that the Board take a vote deciding whether dismissal is appropriate after "hearing the charges." Contrary to its St. Louis companion, the Kansas City statute simply requires that the officer be given the right to a hearing. Thus, the Kansas City Board was well within its jurisdiction to act because it informed Coffer of the charges against him and presented him with an opportunity to a full hearing before the Board – which he waived. Only then, after hearing the charges and reviewing the record (including a videotape of the entire incident), did it vote to terminate him.

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right to a hearing before the Board and instead have their cause heard first before a hearing officer.

B. The Process Was Not A Sham Because The Board Was Not Bound To Follow The Recommendation Of The Hearing Officer.

Underlying Coffer's assertion that the process he received was a sham is the notion that the Board was somehow bound by the judgment of the hearing officer. But Coffer cites no authority for this idea. In fact, Missouri law is clear that agencies acting on the recommendations of hearing officers, or reviewing the decisions of hearing officers, are free to make their own independent determinations. *See McCuthchen v. Peoplease Corp.*, 195 S.W.3d 421, 424 (Mo. App. 2006) (court affirmed commission's reversal of findings made by ALJ); *Lebanon Properties I v. North*, 66 S.W.3d 765, 770 (Mo. App. 2002) ("The Commission is not bound to yield to [the hearing officer's] findings, including those relating to credibility, and is authorized to reach its own conclusions.").

Coffer again suggests that his procedural due process rights were violated. But this contention is at odds with his admitted, unambiguous waiver of those same rights. A police officer only has an absolute right to a hearing in front of the full Board, which carries with it the right to be heard, to confront witnesses and to be represented by counsel, *if* the officer so desires. *See* Section 84.600. Having knowingly waived his right to a board hearing, and requesting a hearing officer, Coffer cannot now be heard to object to the very procedure he requested and that was used below.

In any event, the actual process held here was anything but a sham. In this case the hearing before Judge Moran was open to the public and both sides were represented by counsel during this proceeding. Both sides called witnesses, introduced evidence, took sworn testimony and conducted cross-examination. Procedural due process requires the administrative hearing afford the parties a hearing and contain rudimentary elements of fair play. *See Tonkin v. Jackson County Merit Sys. Comm'n,* 599 S.W.2d, 25, 32-33 (Mo. App. 1980); *Clark v. Bd. of Directors of School Dist. of Kansas City*, 915 S.W.2d 766, 772 (Mo. App. 1996). The delegation of the Board's authority to the hearing officer at the request of Coffer more than satisfied the requirements of Missouri law and afforded Coffer with all the process he was due.

Following the hearing, the Board conducted its own review of the evidence. The Board reviewed the transcript of the hearing, the videotape of the incident, all of the exhibits introduced during the hearing and then deliberated over the entire record – the same record now before this Court – and the Board unanimously voted, based on its evaluation of the entire record, to terminate Coffer's employment. (L.F. 178.) As shown above, the record before the Board supported that decision.

C. Point Five Preserves Nothing For Review.

Coffer's fifth point was in any event not properly preserved for review. Coffer concedes that he had the ability to waive a hearing before the full Board. *See, e.g.*, Respondent's Substitute Br. at 45 ("[A]n officer cannot be forced to use a hearing officer and must be given a hearing before the full Board, if he so desires; but an officer may knowingly and willingly waive this right."). He in fact has repeatedly maintained that he had the ability to, and in fact did, waive his right to a hearing before the full Board. *See, e.g., id.* It is thus beyond question that Coffer has not challenged the hearing officer procedure on this appeal.

A reversal here would be particularly incongruous if it relies on the purportedly improper use of a hearing officer, because Officer Coffer was the party who requested that very procedure. Ordinary appellate principles of invited error preclude any reversal on this ground. *See, e.g., Williams v. Jacobs*, 972 S.W.2d 334, 345 (Mo. App. 1998)(stating that party may not "take advantage of error of his own making that is self-invited")(citing *City of Kansas City v. Hayward*, 954 S.W.2d 399, 403 (Mo. App. 1997)); *see also Kettler v. Kettler*, 884 S.W.2d 729, 732 (Mo. App. 1994)(holding that appellant may not challenge "invited error" on appeal). If that were not enough, Coffer himself confessed below (after the Circuit Court reversed the Board's ruling on jurisdictional grounds) that he invited any procedural error that might exist with the hearing officer process. (L.F. 252) ("It is

axiomatic that a party may not complain of errors that he invites into the proceedings. Thus, it would be disingenuous and potentially unfair to respondent for petitioner to now take umbrage with the procedure used below . . . .").

Similarly, because Coffer failed to raise the claim in the court of appeals, he cannot argue before to this Court.[5] Rule 83.08(b), under which Coffer filed his substitute brief here, states plainly that the brief "shall not alter the basis of any claim that was raised in the court of appeals brief . . . ." Appellants cannot hinder their opponents by continually moving the target throughout the stages of an appeal. *See Blackstock v. Kohn,* 994 S.W.2d 947, 952-953 (Mo. banc 1999); *Linzenni v. Hoffman,* 937 S.W.2d 723, 726-727 (Mo. banc 1997). And there is no doubt that Coffer's briefs in the court of appeals did not contain any argument that the hearing officer procedure was unlawful. In fact, he expressly stated numerous times that had the right to waive a full hearing before the Board and have his case

[5] It should be noted that Coffer's fifth point grows entirely out of the opinion of the court of the appeals which, contrary to the Rules of this Court, constructed an argument on Coffer's behalf concerning the supposed invalidity of the hearing officer procedure that Coffer himself had not raised. Rule 84.04 exists "to ensure that appellate courts do not act as advocates by speculating about facts or arguments that have not been made." *State ex rel. Nixon v. Worthy,* 247 S.W.3d 8, 15 (Mo. App. 2008).

heard first by a hearing officer. *See* Coffer's Opening Brief, 45; Coffer's Reply Brief, 12.

Coffer's reluctance to call into the question the hearing officer procedure at any stage of this litigation, including this appeal, prevents any appeal based on any supposed flaw in that process. This Court has refused to review claims of error, even jurisdictional ones, that were not preserved. In *Bodenhausen v. Missouri Bd. of Registration for the Healing Arts*, 900 S.W.2d 621 (Mo. banc 1995), although this Court did reverse one agency determination for lack of jurisdiction, it separately refused to set aside a second analogous decision because the alleged error had not been preserved. In *Bodenhausen*, there were two alleged agency errors – one challenging a 1992 imposition of discipline, and the other an earlier 1990 discipline. The 1992 discipline was based solely on the 1990 discipline, which was a one-year prohibition on distributing or prescribing controlled substances. But because only the 1992 error had been preserved,[6] this Court *rejected* the 1990 challenge, holding that the improper procedure used in 1990 – the same one that had deprived the agency of jurisdiction in the 1992 proceeding – was "voidable" rather than "void." *Id.* at 623. Even though the 1990 issue was necessarily jurisdictional in nature – as shown by the fact that this Court held as

[6] The appellant in *Bodenhausen* did not appeal the 1990 discipline within the mandatory time to appeal. 900 S.W.2d at 623.

part of the 1992 determination that the board in *Bodenhausen* lacked the power to impose discipline on its own without a Commission proceeding – the 1990 challenge was still rejected. *Id.* Applying *Bodenhausen* to the present facts necessarily yields the same result – Coffer cannot obtain a reversal of the Board proceeding based on the hearing officer procedure because he never challenged it. Not only was the issue never raised in his Point Relied On, but he in any event invited this same "error" by requesting the hearing officer procedure.

In sum, the Board had jurisdiction to terminate Officer Coffer because it had informed Coffer of the charges against him, allowed him the opportunity – which he declined to take – to a full hearing before the Board, heard the charges, and voted to terminate him. Coffer's fourth and fifth points should be denied.

CONCLUSION

For all of the reasons set out above, the Court should uphold the decision of the Board of Police Commissioners of Kansas City, Missouri to terminate Officer Coffer's employment.

Respectfully submitted,

Lisa S. Morris MO #43181
Daniel J. Haus MO #45678
Kansas City, Missouri Police Dept.
1125 Locust Street
Kansas City, Missouri 64106
Telephone: (816) 234-5056
Facsimile: (816) 234-5333

William E. Quirk MO #24740
Anthony W. Bonuchi MO #57838
Shughart Thomson & Kilroy, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief contains the information required by Mo. R. Civ. P. 55.03 and complies with the limitations contained in Mo. R. Civ. P. 84.06 (b) (1). According to the word count function of MS Word 2003 by which it was prepared, this brief contains 11,138 words, exclusive of the cover, Certificate of Service, this Certificate, signature block and appendix.

In addition, the undersigned certifies that the disk filed herewith complies with Mo. R. Civ. P. 84.06(g) in that it has been scanned for viruses and is virus free.

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Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2008, one (1) copy of the above Brief of Appellants, Filed as Respondents' Brief Under Mo. R. Civ. P. 84.05(e), including a diskette, was served upon, via U.S. Mail, postage prepaid:

Mr. John P. O'Connor
4740 Grand Avenue, Suite 300
Kansas City, Missouri 64111
Attorney for Respondent

_____
Attorney for Appellants