

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1923

WILLIAM DeFORTE,
Appellant

v.

BOROUGH OF WORTHINGTON;
KEVIN FEENEY, Individually and as Mayor of the Borough of Worthington;
BARRY ROSEN, Individually and as a member of
Council of the Borough of Worthington and in his capacity as
elected constable for the Borough of Worthington and in his capacity as
Public Safety Director for the Borough of Worthington;
GERALD RODGERS, Individually and as a police officer of the Borough of
Worthington

No. 17-1924

EVAN TOWNSEND,
Appellant

v.

BOROUGH OF WORTHINGTON;
KEVIN FEENEY, Individually and as Mayor of the Borough of Worthington;
BARRY ROSEN, Individually and as a member of Council of the Borough
of Worthington and in his capacity as elected constable for the
Borough of Worthington and in his capacity as Public Safety Director
for the Borough of Worthington;
GERALD RODGERS, Individually and as a police officer
of the Borough of Worthington

On Appeal from the United States District Court
for the Western District of Pennsylvania
District Court Nos. 2-13-cv-00356; 2-13-cv-00357
District Judge: The Honorable Mark R. Hornak

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
January 18, 2018

Before: SMITH, *Chief Judge*, GREENAWAY, JR., and KRAUSE, *Circuit Judges*

(Filed: April 19, 2018)

PETITION FOR CERTIFICATION OF QUESTION OF STATE LAW

SMITH, *Chief Judge*.

This matter came before the United States Court of Appeals for the Third Circuit, on appeal from a final judgment of the United States District Court for the Western District of Pennsylvania, granting summary judgment in favor of Defendants on Plaintiffs' due process claims. *See DeForte v. Borough of Worthington*, Nos. 2:13-CV-356-MRH & 2:13-CV-357-MRH, 2017 WL 1102653 (W.D. Pa. Mar. 24, 2017).

This appeal raises a due process claim that requires an understanding of the interplay between two Pennsylvania statutes: the Borough Code and the Police Tenure Act. The panel (Smith, C.J., Greenaway, and Krause, JJ.), having read the briefs and submissions of the parties, and having reviewed applicable cases of the Pennsylvania courts, believes the appeal raises an important and unresolved question

concerning the proper interpretation of these two Pennsylvania statutes. The panel unanimously agreed to certify this question to the Supreme Court of Pennsylvania by way of the certification procedure outlined in 3d Cir. L.A.R. Misc. 110 and 3d Cir. I.O.P. 10.9. Accordingly, we respectfully request that the Supreme Court of Pennsylvania accept this certification.

I. Factual Background

The parties do not dispute the following facts:

- (1) Plaintiff William DeForte (“DeForte”) was employed by the Borough of Worthington (the “Borough”) as a police officer between July 2009 and November 2012.
- (2) Plaintiff Evan Townsend (“Townsend”) was twice employed by the Borough as a police officer. His first term of employment lasted from January through July 2011. The second term began in February 2012 and ended in November 2012.
- (3) Both DeForte and Townsend were terminated by the Borough on November 5, 2012.
- (4) At the time of Plaintiffs’ terminations, the Borough employed four part-time officers, including DeForte and Townsend.
- (5) DeForte and Townsend were paid an hourly wage by the Borough.
- (6) While employed by the Borough, both DeForte and Townsend were employed by other police forces.

Following their terminations, DeForte and Townsend sued the Borough, arguing, *inter alia*, that their terminations constituted a deprivation of their

procedural due process rights. In particular, DeForte and Townsend argue that either the Pennsylvania Borough Code or the Police Tenure Act provides them with a property interest sufficient to support their procedural due process claims. Defendants filed motions for summary judgment, asserting that neither of those two state statutes provided DeForte or Townsend with any basis to assert a constitutionally protected property interest in their employment. The District Court granted the Defendants' motions for summary judgment, and additionally dismissed Plaintiffs' state law claims without prejudice so that Plaintiffs could assert those claims in state court. *DeForte*, 2017 WL 1102653, at *11.

II. Legal Background

To successfully assert a procedural due process violation, Plaintiffs must first establish that they had a property interest encompassed within the Fourteenth Amendment's protections of "life, liberty or property," and second that the procedures available to the Plaintiffs did not provide them with due process of law. *Robb v. City of Philadelphia*, 733 F.2d 286, 292 (3d Cir. 1984). As the United States Supreme Court has explained, "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colleges v. Roth*, 408 U.S.

564, 577 (1972). Plaintiffs argue that either the Pennsylvania Borough Code, previously codified at 53 Pa. Cons. Stat. §§ 46171–46195,¹ or the Police Tenure Act, codified at 53 Pa. Cons. Stat. §§ 811–816, provides them with a sufficient property interest in their employment to support their procedural due process claims.

In granting the Defendants’ motion for summary judgment, the District Court concluded that Plaintiffs do not have a property interest in their employment under either the Borough Code or the Police Tenure Act. Specifically, it concluded: (1) Plaintiffs were *not* “members” of a “police force” as defined by the Pennsylvania Borough Code, and (2) Plaintiffs *were* “members” of a “police force” within the meaning of the Police Tenure Act. *See DeForte*, 2017 WL 1102653, at *7. Thus, when considered in isolation, each of these two statutes appears to define “members” differently. Plaintiffs argue that the Pennsylvania Legislature intended these two statutes to be read *in pari materia*, such that all police forces in Pennsylvania must be governed by either the Pennsylvania Borough Code or the Police Tenure Act.

¹ The Pennsylvania Borough Code is now codified at 8 Pa. Cons. Stat. §§ 1101 *et seq.* At all times relevant to this litigation, the pertinent provisions of the Pennsylvania Borough Code were codified at 53 Pa. Cons. Stat. §§ 46171–46195. Sections 46171 through 46195 were repealed effective June 17, 2014, by 2014 Pa. Legis. Serv. 432, No. 37, § 3(2) (West). Except where otherwise noted, we cite to the Pennsylvania Borough Code as it was codified during the times relevant to this litigation.

A. The Pennsylvania Borough Code

When Plaintiffs were terminated in November of 2012, the Pennsylvania Borough Code contained certain civil service protections for police officers. 53 Pa. Cons. Stat. §§ 46171–46195. As the Borough Code proclaimed, “[n]o person shall be suspended, removed or reduced in rank as a paid employee in any police force or as a paid operator of fire apparatus of any borough, except in accordance with the provisions of this subdivision.” § 46171. The Borough Code, however, did “not apply to any borough having a police force of *less than three* members.” *Id.* (emphasis added).

In 2012, the Borough Code defined “[p]olice force” as:

a police force organized and operating as prescribed by law, the members of which *devote their normal working hours* to police duty or duty in connection with the bureau, agencies and services connected with police protection work, and who are paid a stated salary or compensation for such work by the borough. Police force as used in this subdivision shall *not* include:

- (1) Any special police appointed by the mayor to act in emergencies,
- (2) Any person appointed solely for parking meter enforcement duties,
- (3) Any special school police,
- (4) *Any extra police serving from time to time or on an hourly or daily basis*, or,
- (5) Any auxiliary policeman appointed under the act of January 14, 1952 (P.L. 2016).

§ 46195 (emphasis added). As the District Court highlighted, *DeForte*, 2017 WL 1102653, at *5, this statutory language explicitly excludes “extra police serving from

time to time or on an hourly or daily basis” from the Borough Code’s definition of “police force.” 53 Pa. Cons. Stat. § 46195.

Noting that Plaintiffs were part-time officers paid by the Borough on an hourly basis, the District Court concluded that neither DeForte nor Townsend qualified as a “member” under the Borough Code. *DeForte*, 2017 WL 1102653, at *5. Moreover, given that both Plaintiffs were simultaneously employed by other police forces, the District Court concluded that neither Plaintiff devoted “their normal working hours” to the Worthington Borough, since it was “legally unreasonable to conclude that either officer, if engaged in an emergency police situation in another municipality, would have been free to simply leave the situation in order to handle a less emergent situation in Worthington Borough.” *Id.* at *7 (citing *Mullen v. Borough of Parkesburg*, 132 Pa. Cmwlth. 321, 324, 572 A.2d 859, 861 (1990) for the proposition that a plaintiff was not a full-time police officer in the relevant borough when the plaintiff could only be available during the time that the plaintiff was not on duty in another municipality).

Under the District Court’s interpretation of the Borough Code, neither DeForte nor Townsend qualified as a “member” of a “police force” under that state statute. If this interpretation of state law is correct, it would mean that the Worthington Borough’s police force—which, without dispute, consisted of only four officers including both DeForte and Townsend during the relevant time periods—

fell outside the scope of the Borough Code. *See* 53 Pa. Cons. Stat. § 46171 (“This subdivision shall not apply to any borough having a police force of *less than three members.*”) (emphasis added).

B. The Police Tenure Act

The Police Tenure Act provides that:

No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act, with the exception of policemen appointed for a probationary period of one year or less, shall be suspended, removed or reduced in rank except for [five enumerated reasons].

53 Pa. Cons. Stat. § 812. The Police Tenure Act, however, states that the Act “shall apply to each township of the second class, [and] to each borough and township of the first class having a police force of *less than three* members *and* not subject to [the Borough Code].” § 811 (emphasis added). It is undisputed that at all times relevant to this litigation, the Worthington Borough’s police force consisted of four part-time officers.

As the Pennsylvania Superior Court noted in *Mullen v. Borough of Parkesburg*, 132 Pa. Cmwlth. 321, 324, 572 A.2d 859, 861 (Pa. Commw. Ct. 1990), both part-time and full-time officers count when determining the size of a police force under the Police Tenure Act. In *Mullen*, the Superior Court noted that other than the plaintiff in that case, “the Borough only employed a Chief of Police and a

Sergeant. It directly follows that [the plaintiff], whether full-time or part-time, constitutes the third member of the Borough's police force. Therefore, again, the trial court was correct in concluding that the Act cannot apply." *Id.* at 324, 572 A.2d at 861.

C. Apparent Conflict

Because the Police Tenure Act applies to "borough[s] and township[s] of the first class having a police force of *less than three members*," 53 Pa. Cons. Stat. § 811 (emphasis added), the Act would not seem to apply to the Worthington Borough's police force since—under *Mullen*—the Worthington Borough's police force consisted of four qualifying officers. On the other hand, because Plaintiffs were paid "on an hourly . . . basis" and Plaintiffs may not have devoted "their normal working hours" to the Worthington Borough police force because of their commitments to other police forces, it would seem that the Worthington Borough police force also fails to qualify as a "police force" under the Borough Code. 53 Pa. Cons. Stat. § 46195. Therefore, considering each statute in isolation would permit this Court to conclude that a police force could be lawfully authorized in Pennsylvania but not governed by either statute.

In ordinary circumstances, such a conclusion would not warrant certifying a question of law since a legislature need not enact legislation to govern every particular entity or group within its jurisdiction. In the immediate instance, however,

such a conclusion may be contrary to the Pennsylvania Legislature's intent as construed by some Pennsylvania courts. For example, some Pennsylvania courts have suggested that the phrases "normal working hours" and "regular full time police officer" were intended to be read coterminously so that courts can more easily determine the size of a borough's police force. *See, e.g., Huntley & Williams v. Boswell Borough*, 25 Pa. D. & C.3d 101, 107 (Pa. Com. Pl. 1981) ("[I]n order to qualify as a member of a borough police force for purposes of determining the size of the force under the above cited job protection statutes, a borough police officer must be [a] regular full time officer within the meaning of the Police Tenure Act who also meets the criteria of [the] Borough Code[.]"); *Ambrose v. DuPont Borough*, 33 Pa. D. & C.3d 362, 369–70 (Pa. Com. Pl. 1984) ("It is obvious that, if a determination is to be made whether a case falls within the civil service provisions of the borough code, on the one hand, or within the provisions of the Police Tenure Act, on the other hand, a uniform method of determination of the number of officers to be included in the 'police force' must be employed, and we believe that the guidelines set forth in *Petras* are those to be applied.").

In *Petras v. Union Twp.*, 409 Pa. 416, 417, 187 A.2d 171, 174 (1963), the Supreme Court of Pennsylvania explained that "full-time" employment was not a question of "the number of days, length of hours, or terms of employment" but rather involved consideration of "whether or not the duties were such that [an employee]

was ‘available for full employment,’ that is on call at any and all times.” *Id.* at 417, 187 A.2d at 174 (quoting *Harlan v. Washington Nat. Ins. Co.*, 388 Pa. 88, 92, 130 A.2d 140, 143 (1957)). If this Court were to graft the *Petras* test onto the Borough Code’s definition of “police force,” then even police officers with alternative, part-time employment may be considered to “devote their normal working hours to police duty” so long as they are persons fulfilling “normal policing functions as opposed to those who were employed for special circumstances, unusual conditions or emergencies.” *Id.*

Additionally, concluding that a police force might fail to fall within the governance of either the Borough Code or the Police Tenure Act might conflict with guidance previously offered by the Supreme Court of Pennsylvania in *George v. Moore*, 394 Pa. 419, 147 A.2d 148 (1959). In *George*, the Supreme Court of Pennsylvania concluded that it was “evident that the legislature intended to establish civil service removal procedures for all police officers regardless of the size of the police force or the political classification of the municipality.” *Id.* at 421, 147 A.2d at 149. Were we considering this case immediately following the Supreme Court of Pennsylvania’s announcement in *George*, it would be clear that the two statutes would have to be read *in pari materia*—since federal courts are required to defer to a state supreme court’s interpretation of state law.

Seven years after *George*, however, the Pennsylvania Legislature amended the Borough Code in a way that suggests the Supreme Court’s guidance in *George* may no longer be applicable. Specifically, in 1966, the Pennsylvania General Assembly amended the Borough Code to clarify that “police force” did not include “[a]ny extra police serving from time to time or on an hourly or daily basis.” 53 Pa. Cons. Stat. § 46195 (“Borough Code 1966: . . . The final sentence in paragraph 1, beginning, ‘Police force as used in this subdivision shall not include:’ was added for clarification.”). Given this 1966 amendment, we believe that further guidance from the Supreme Court of Pennsylvania is appropriate. Such guidance would assist this Court in determining whether the 1966 amendment to the Borough Code abrogated the *George* Court’s interpretation of the Pennsylvania Legislature’s intent.

III. Conclusion

In light of the discussion above, we are persuaded that the proper meaning of “member” under both the Pennsylvania Borough Code and the Police Tenure Act remains unresolved with significant implications for multiple boroughs in the Commonwealth. Given the need to resolve this issue of Pennsylvania law, NOW THEREFORE, the following question of law is certified to the Supreme Court of Pennsylvania for disposition according to the rules of that Court:

Whether, under Pennsylvania law, (1) the Pennsylvania Borough Code and the Police Tenure Act must be read *in pari materia*, such that every legally authorized police force in Pennsylvania fall under the governance of one of

those two state statutes, and (2) if not, whether the same test should be used to determine whether the Tenure Act's two-officer maximum and the Borough Code's three-officer minimum is satisfied.

This Court shall retain jurisdiction of the appeal pending resolution of this certification.



A True Copy:

Patricia A. Dodszeit

Patricia S. Dodszeit, Clerk