

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Terryn F. Risk,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1917 C.D. 2007
	:	
Municipal Police Officers' Education and Training Commission,	:	Argued: May 6, 2008
	:	
Respondent	:	

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: May 29, 2008**

Terryn F. Risk (Risk) petitions for review of an adjudication of the Municipal Police Officers' Education and Training Commission (Commission) revoking Risk's certification as a municipal police officer, pursuant to 37 Pa. Code § 203.14(a),<sup>1</sup> on the basis that such certification was issued in error. The

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<sup>1</sup> Section 203.14(a) of the Commission's regulations provides, in relevant part, that:

(a) The Commission maintains the right to revoke certification after notice and an opportunity to be heard . . . for one or more of the following:

*(Continued...)*

Commission found that Risk’s certification had been issued in error because Risk was never employed as a full-time police officer in Ohio and, thus, did not qualify for a waiver of training under the Commission’s regulations.<sup>2</sup> We have consolidated the issues raised by Risk on appeal into the following three issues: (1) whether the Commission’s findings that Risk was not employed as a full-time police officer in Ohio and that his certification was issued in error are supported by substantial evidence; (2) whether the Commission should be estopped from revoking Risk’s police officer certification either because the Commission certified Risk as a municipal police officer after a full investigation, or because Risk has been working as a municipal police officer in Pennsylvania for three years; and

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- (1) Failure to maintain employment as a police officer under the act.
  - (2) Failure to maintain first aid or CPR certification.
  - (3) Failure to qualify with firearms as specified in the Commission newsletter.
  - (4) Failure to successfully complete annual mandatory in-service training as specified in the Commission newsletter.
  - (5) Physical or psychological impairment which renders the officer permanently unable to perform his duties.
  - (6) Conviction for a disqualifying criminal offense.
  - (7) Submission to the Commission of a document that the police officer knows contains false information including fraudulent application.
  - (8) *A certification issued in error*
  - (9) Cheating.

37 Pa. Code § 203.14(a) (emphasis added).

<sup>2</sup> The Commission’s regulations provide that an applicant may obtain a waiver of training if, among other things, he or she was “[p]reviously or currently employed as a full-time police officer of another state and met the certification standards of that state, provided that certification had been based on completion of an approved basic police course comparable to that of the act.” 37 Pa. Code § 203.12(2)(iv).

(3) whether Risk’s constitutional rights have been violated because the term “full-time,” as used in 37 Pa. Code § 203.12(2)(iv), is undefined.<sup>3</sup>

The relevant facts in this case are as follows. Risk worked as a police officer for the Amsterdam Police Department in Amsterdam, Ohio. The Burgettstown Borough Police Department later offered Risk employment pending certification as a municipal police officer in Pennsylvania.<sup>4</sup> (Hearing Officer’s Proposed Adjudication and Order, Finding of Fact (FOF) ¶ 4.)

Risk submitted an Application for Certification under a Waiver of Training (Application) to the Commission in January of 2003. (FOF ¶ 3.) One way that an applicant may qualify for certification under a waiver of training is if the applicant was previously or currently employed as a full-time police officer in another state.

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<sup>3</sup> In his brief, Risk presents seven questions for our review, which are as follows: (1) whether the Commission’s finding that Risk was not employed as a full-time police officer in Ohio is supported by substantial evidence; (2) whether the Commission’s finding that Risk’s certification was issued in error is supported by substantial evidence; (3) whether the Commission erred in concluding that Risk’s certification was issued in error; (4) whether the Commission erred in concluding that Risk was not employed as a full-time police officer in Ohio; (5) whether the Commission erred in determining that the Commission is not estopped from revoking Risk’s certification as a municipal police officer since the Commission approved his Application for Certification under Waiver of Training after conducting a full inquiry and investigation and since the waiver was granted through no fault of Risk; (6) whether the Commission erred as a matter of law in determining that the Commission is not estopped from revoking Risk’s certification as a municipal police officer because of Risk’s three plus years of experience with the Burgettstown Police Department; and (7) whether Risk’s constitutional rights have been violated because the Commission does not have a written policy concerning the definition of full-time employment. (Risk Br. at 4-5.)

<sup>4</sup> Burgettstown Borough is located in Washington County, Pennsylvania. (FOF ¶ 4.)

(FOF ¶ 5.) On his Application, Risk indicated that he was currently employed by the Amsterdam Police Department.<sup>5</sup> (FOF ¶ 6.) However, Risk did not specify on his Application whether his employment with the Amsterdam Police Department was full-time, part-time, etc. After reviewing Risk's Application, the Commission sent a letter to the Amsterdam Police Department requesting confirmation that Risk was employed as a full-time police officer. (FOF ¶ 8.) In response, John R. Weston, former Chief of the Amsterdam Police Department (Chief Weston), faxed a letter to the Commission advising that Risk was "working at a full-time capacity with . . . [the] Department." (FOF ¶ 9.) Based on Risk's Application and the supporting documentation from Chief Weston, the Commission waived the normal training requirements and certified Risk as a municipal police officer in Pennsylvania in or around February or March of 2003. (FOF ¶ 22.)

In early 2006, the Commission received an anonymous telephone call that caused it to doubt that Risk had worked as a full-time police officer in Ohio. (FOF ¶ 23.) As a result, Major John M. Gallaher, Executive Director of the Commission (Major Gallaher), sent a letter to Steve Hamann, the current Chief of the Amsterdam Police Department (Chief Hamann), requesting verification of Risk's employment history. (FOF ¶ 24.) In response, Chief Hamann sent a letter to the Commission indicating that Risk had been employed by the Amsterdam Police Department, from January 17, 2003 to May 5, 2003, as an auxiliary officer, that he

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<sup>5</sup> Risk also worked part-time as a Deputy Marshall for the Wellsville Police Department in Wellsville, Ohio, from February 20, 2002 to March 8, 2002; however, Risk did not list his employment with the Wellsville Police Department on his Application. (FOF ¶ 7.)

was only required to work 16 hours per month to maintain his certification, and that the only paid position was held by the Chief of Police. (FOF ¶ 25.)

On July 19, 2006, the Commission sent Risk a letter advising him that the Commission intended to revoke his certification because he had not met the waiver qualifications and was, therefore, ineligible for certification as a municipal police officer in Pennsylvania. (FOF ¶ 30.) Risk was also advised that he had the right to an administrative hearing before his certification could be revoked.

Risk exercised his right to an administrative hearing, and such hearing was held before Jackie Wiest Lutz, Hearing Officer, on October 24, 2006. During this hearing, the Commission presented the testimony of E. Beverly Young, Administrative Officer 3 with the Commission, and Chief Hamann. The Commission also presented the following documentary evidence: Risk's Application (Commonwealth Ex. No. 1); the January 4, 2003 letter from Chief Weston to the Commission regarding Risk's employment (Commonwealth Ex. No. 2); a letter dated May 22, 2006 from Major Gallaher to Chief Hamann requesting Risk's employment history (Commonwealth Ex. No. 3); a letter dated July 17, 2006 from Chief Hamann to the Commission providing Risk's employment history (Commonwealth Ex. No. 4); a letter dated July 19, 2006 from Major Gallaher to Risk notifying him of the Commission's intent to revoke his certification (Commonwealth Ex. No. 5); and a letter dated September 20, 2006 from Vickie L. Finchum of the Certification and Standards Division of the Ohio Attorney General's Office to Tara L. Patterson, counsel for the Commission, with

Risk's Ohio certification and employment records enclosed (Commonwealth Ex. No. 6).

Risk appeared and testified on his own behalf and presented the testimony of Chief Weston. Risk also submitted his W-2 forms from 2003 and 2004, which reflect the wages that he earned while working for the Burgettstown Borough Police Department. (W-2 forms, Exs. A1 and A2.)

Ms. Young, on direct examination, testified about the requirements for a waiver of training and the procedures that are followed by her office in reviewing an application for certification under a waiver of training. (Hr'g Tr. at 18-19.) Ms. Young also testified as to the procedures that were followed by the Commission in reviewing Risk's Application, which included sending a letter to the Amsterdam Police Department requesting verification of Risk's full-time employment. (Hr'g Tr. at 20-25.) Ms. Young further testified that the Commission's practice is to allow the out-of-state employing department that is submitting a letter to make the determination whether the person met that department's standards of full-time employment based on its own governing civil service laws and payroll records. (Hr'g Tr. at 24-25.) Ms. Young testified that the letter that was sent by Chief Weston in response to the Commission's request for verification of Risk's full-time employment initially satisfied her that Risk was employed full-time as a police officer in Ohio. (Hr'g Tr. at 20-21, 34.) Ms. Young testified that the Commission later received a telephone call which raised doubt as to whether the Amsterdam Police Department had employed Risk full-time. (Hr'g Tr. at 21.) Ms. Young further testified that the Commission sent a second letter to

the Amsterdam Police Department requesting verification of Risk's employment history and that a response was received from Chief Hamann that contradicted the initial letter sent by Chief Weston. (Hr'g Tr. 21-22.) On cross-examination, Ms. Young stated that the Commission does not have a written policy defining "full-time" employment. (Hr'g Tr. at 27.) However, Ms. Young reiterated her prior testimony about the practice that is followed by the Commission in determining whether an applicant was previously or currently employed full-time as a police officer in another state. (Hr'g Tr. at 29-30.)

Chief Hamann, on direct examination, testified that Risk was employed by the Amsterdam Police Department as an auxiliary officer. (Hr'g Tr. at 57.) Chief Hamann further testified that auxiliary officers are only required to work 16 hours per month and are unpaid. (Hr'g Tr. at 57.) Chief Hamann also testified that the only paid position with the Amsterdam Police Department is the Chief of Police and that such position is full-time. (Hr'g Tr. at 57.) On cross-examination, Chief Hamann testified that, as the Chief of Police, he is required to work 38 hours per week. (Hr'g Tr. at 61.) Additionally, Chief Hamann testified that even if an auxiliary officer worked 38 hours per week, he did not believe that would be considered full-time because anything over the 16 hours per month was voluntary. (Hr'g Tr. at 63.)

Risk, on direct examination, testified that although he was employed by the Amsterdam Police Department as an auxiliary officer, he had full police powers identical to those of any full-time police officer. (Hr'g Tr. at 67.) Risk further testified that he wore a uniform and badge, carried a gun, drove a police car, and

made arrests. (Hr’g Tr. at 67-68.) Risk also testified that he typically worked eight-hour shifts and that, at times, he worked more than the minimum number of hours required. (Hr’g Tr. at 69.) On cross-examination, Risk testified that he was aware that the State of Ohio has several different classifications for police officers, including full-time, part-time, and auxiliary. (Hr’g Tr. at 98-99.) Risk also testified that although he had indicated in a deposition that his employment with the Amsterdam Police Department was part-time and that he had only worked three or four shifts, such testimony was provided in error. (Hr’g Tr. at 103-04.)

Chief Weston, on direct examination, testified that he had sent the Commission a letter indicating that Risk was working in a full-time capacity with the Amsterdam Police Department. (Hr’g Tr. at 117.) He did this based on his understanding of the meaning of an auxiliary officer, as explained to him by Kerry Curtis, the person in charge of certification with the Ohio Peace Officers Training Academy. (Hr’g Tr. at 118-19.) On cross-examination, Chief Weston explained that he used the language “full-time” in his letter to the Commission because Risk had the ability to perform the same functions as a full-time police officer, and not necessarily because of the number of hours that Risk worked. (Hr’g Tr. at 123-24.)

After reviewing the testimony and evidence that was presented, the Hearing Officer found that Risk’s certification was issued in error. (Hearing Officer Proposed Adjudication and Order at 15.) The Hearing Officer found that “if a full-time police officer for the Amsterdam Police Department is expected to work 38 hours per week and an auxiliary officer is expected to work only 16 hours per



month, then regardless of Risk's functions and authority while serving as an auxiliary officer, he was not employed full-time." (Hearing Officer Proposed Adjudication and Order at 15.) For these reasons, the Hearing Officer recommended that the Commission revoke Risk's certification as a municipal police officer. By letter dated September 13, 2007, the Commission issued an adjudication adopting, verbatim, the findings of fact and conclusions of law that were made by the Hearing Officer and revoking Risk's certification. Risk now petitions this Court to review the Commission's adjudication.<sup>6</sup>

On appeal, Risk first argues that the Commission's findings that he was not employed as a full-time police officer in Ohio and that his certification was issued in error are not supported by substantial evidence. Risk contends that the Commission should have relied on the testimony of Ms. Young and Chief Weston, which establishes that Risk was employed full-time by the Amsterdam Police Department and that his certification was not issued in error. We disagree.

"Substantial evidence has been defined as such evidence as a reasonable mind might accept as adequate to support a conclusion." Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Products), 580 Pa. 470, 479, 861 A.2d 938, 943 (2004). When the findings of the Commission are supported by substantial evidence, they will not be disturbed on appeal. See

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<sup>6</sup> Our review of an administrative decision is "limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are not supported by substantial evidence." DiSalvatore v. Municipal Police Officers' Education & Training Commission, 753 A.2d 309, 313 (Pa. Cmwlth. 2000).

Salters v. Municipal Police Officers' Education and Training Commission, 912 A.2d 347, 353-54 (Pa. Cmwlth. 2006).

Here, while Risk contends that the testimony of Ms. Young and Chief Weston supports his position that he was employed full-time by the Amsterdam Police Department, such testimony, when considered in its entirety and in conjunction with the other testimony and evidence contained in the record, actually supports the Commission's findings. Ms. Young testified that the Commission's practice is to defer to the out-of-state employing department's determination of whether an applicant was employed full-time. (Hr'g Tr. at 24-25; 29-30.) Ms. Young also testified that she was initially satisfied by the letter from Chief Weston indicating that Risk was employed by the Amsterdam Police Department in a full-time capacity. (Hr'g Tr. at 34.) Ms. Young further testified that Chief Hamann's response to the second letter contradicted Chief Weston's initial response. (Hr'g Tr. at 21-22.) The response from Chief Hamann indicated that Risk was employed by the Amsterdam Police Department as an auxiliary officer, that he was only required to work 16 hours per month, and that the Chief of Police was the only paid position. (Commonwealth Ex. No. 4.) The accuracy of the information contained in Chief Hamann's response was verified through Chief Hamann's testimony. (Hr'g Tr. at 57.) Moreover, when questioned, Chief Weston testified that he used the language "full-time" in the response letter that he sent to the Commission because Risk had the ability to perform the same functions as a full-time police officer, and not necessarily because of the number of hours that Risk worked. (Hr'g Tr. at 123-24.) Furthermore, the Notice of Appointment and Notice of Termination, which were completed by Chief Weston contemporaneously with

Risk's employment with the Amsterdam Police Department, indicate that Chief Weston considered Risk to be an auxiliary employee, and not a full-time employee.<sup>7</sup> (Notices of Appointment and Termination, Commonwealth Ex. No. 6.) This testimony and evidence clearly constitutes substantial evidence to support the Commission's findings that Risk was not employed as a full-time police officer by the Amsterdam Police Department and that his certification was issued in error. As the Commission's findings are supported by substantial evidence, we will not disturb those findings on appeal.

Risk next argues that the Commission should be estopped from revoking his police officer certification. Risk contends that the doctrine of collateral estoppel prohibits the Commission from revoking his certification because a full investigation into his employment background was conducted prior to him receiving his certification. Risk further contends that any deficiency that existed at the time of his initial certification regarding a lack of training has now been cured because he has been working as a municipal police officer in Pennsylvania for three years. We disagree.

According to our Supreme Court:

[t]he doctrine of collateral estoppel precludes relitigation of an issue determined in a previous action if: (1) the issue decided in the prior

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<sup>7</sup> On the Notice of Appointment, Chief Weston indicated that Risk's title/position was "Aux Patrolman" and checked the box labeled "auxiliary." Chief Weston did not check the box labeled "full-time." (Notice of Appointment, Commonwealth Ex. No. 6.) On the Notice of Termination, Chief Weston indicated that Risk's title/position was "Patrolman (Aux)" and checked the box labeled "auxiliary." Again, Chief Weston did not select the box labeled "full-time." (Notice of Termination, Commonwealth Ex. No. 6.)

case is identical to the one presented in the later action; (2) there was a final adjudication on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

Office of Disciplinary Counsel v. Kiesewetter, 585 Pa. 477, 484, 889 A.2d 47, 50-51 (2005). Here, the Commission's initial investigation into Risk's employment status did not constitute a final judgment or adjudication on the merits, and there was no prior action or proceeding in which the Commission had the opportunity to litigate the issue of Risk's qualifications for certification. Therefore, the doctrine of collateral estoppel is not applicable to this case.

Moreover, Risk does not cite to, nor are we aware of, any authority that permits a deficiency in the requirements for certification to be cured by Risk's subsequent service as a police officer in Pennsylvania. Creating such a rule here would have the effect of encouraging applicants, who do not otherwise meet the certification requirements, to provide inaccurate information to the Commission in hopes of circumventing the traditional certification process. Thus, we decline to conclude that the Commission is estopped from revoking Risk's certification.

Finally, Risk argues that his constitutional rights have been violated because the term "full-time," as used in 37 Pa. Code § 203.12(2)(iv), is undefined. Risk contends that the Commission's failure to define the term "full-time" renders 37 Pa. Code § 203.12(2)(iv) void for vagueness. We disagree.

Void for vagueness challenges may take two forms—facial or as applied. Oppenheim v. State Dental Council and Examining Board, 459 A.2d 1308, 1315 (Pa. Cmwlth. 1983). A facial vagueness challenge may only be entertained where a First Amendment issue is involved. Id. When a First Amendment issue is not involved, a vagueness challenge is to be evaluated based on the particular facts at hand. Commonwealth v. Mayfield, 574 Pa. 460, 467-68, 832 A.2d 418, 422 (2003). “[I]n order for a statute to survive a ‘void-for-vagueness’ challenge, the statute must be written in a manner which affords an ordinary person fair notice of what conduct is prohibited [or required] and describe [such] conduct in a manner that does not encourage arbitrary or discriminatory enforcement.” Meade v. Department of Transportation, 813 A.2d 937, 941 (Pa. Cmwlth. 2002).

Here, Risk has not raised a First Amendment issue. Thus, we must determine whether the term “full-time,” as used in 37 Pa. Code § 203.12(2)(iv), is vague as applied to Risk’s conduct. According to 37 Pa. Code § 203.12(2)(iv), an applicant must establish that he or she was “[p]reviously or currently employed as a full-time police officer of another state and met the certification standards of that state . . . .” As an auxiliary police officer for the Amsterdam Police Department, Risk was required to work a minimum of *16 hours per month* and *did not receive any compensation* for his services. Although the term “full-time” is not specifically defined by the Commission, we believe that ordinary persons are on fair notice that the language “[p]reviously or currently employed as a *full-time police officer* of another state” *requires more than working only 16 hours per month without receiving compensation*. In addition, if there was any question in Risk’s mind as to whether or not his working 16 hours per month without pay as an

auxiliary officer for the Amsterdam Police Department satisfied the full-time employment requirement of 37 Pa. Code § 203.12(2)(iv), he could have easily contacted the Commission and inquired about the same prior to submitting his Application. Therefore, based on the facts of this case, we conclude that 37 Pa. Code § 203.12(2)(iv) is not void for vagueness as applied to Risk.

Accordingly, for the reasons discussed above, the Commission's adjudication revoking Risk's certification as a municipal police officer is affirmed.

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**RENÉE COHN JUBELIRER, Judge**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Terryn F. Risk,	:	
	:	
Petitioner	:	
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v.	:	No. 1917 C.D. 2007
	:	
Municipal Police Officers' Education	:	
and Training Commission,	:	
	:	
Respondent	:	

**ORDER**

**NOW**, May 29, 2008, the adjudication of the Municipal Police Officers' Education and Training Commission in the above-captioned matter is hereby **affirmed**.

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**RENÉE COHN JUBELIRER, Judge**