

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JANE DOE and CHARLES BOONE,)	
Plaintiffs Below, Appellants,)	
)	
v.)	No. 403, 2013
)	
WILMINGTON HOUSING AUTHORITY)	Certification of
FREDERICK S. PURNELL, SR.,)	Questions of Law from
in his capacity as Executive Director)	the United States Court
of the Wilmington Housing Authority,)	of Appeals for the
Defendants Below, Appellees.)	Third Circuit
)	No. 123433
_____)	

**AMICI CURIAE BRIEF OF LAW ENFORCEMENT LEGAL DEFENSE
FUND, LAW ENFORCEMENT ACTION NETWORK, INTERNATIONAL
LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION,
CONGRESS OF RACIAL EQUALITY, AND ACTIVE-DUTY AND
RETIRED DELAWARE POLICE OFFICERS HOSFELT, SMITH,
MONAGHAN, ROE, KENT, BRIGGS, BRODE, UNTERKOFER,
HESTER, AND BERNA IN SUPPORT OF APPELLANTS**

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Dated: September 20, 2013

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are the Law Enforcement Legal Defense Fund (“LELDF”), Law Enforcement Action Network (“LEAN”), International Law Enforcement Educators and Trainers Association (“ILEETA”), the Congress of Racial Equality (“CORE”), and the following active-duty and retired Delaware police officers: Chief James Hosfelt, Chief J. Richard Smith (Ret.), Capt. Francis T. Monaghan III (Ret.), Lt. Gary A. Roe (Ret.) , Lt. Carl B. Kent (Ret.), Lt. Lewis W. Briggs (Ret.), Sgt. Harold K. Brode (Ret.), Sgt. Jay Unterkofler (Ret.), Patrol Officer 1st Class Mark S. Hester, and Patrol Officer Nicholas Berna (Ret.) (collectively, “Amici”).¹

As law enforcement groups and officers, Amici are well-positioned to provide law enforcement insight into the two issues presented by this case: 1) whether the Common Area policy imposed by the Wilmington Housing Authority (“WHA”) is unconstitutional, and whether that policy is supported or undermined

¹ More detailed descriptions of the Amici and their interests in this case are set forth in the accompanying Motion for Leave to File.

by the interests it purports to serve; and whether WHA's Reasonable Cause policy that allows employees of the authority to demand concealed carry permits or other paperwork from public housing residents can withstand scrutiny under the Delaware Constitution. For both issues, Amici strongly believe that any asserted public policy rationales for such limitations are not supported by valid interests in public safety, and may instead lead to increased danger for residents, guests, employees, and law enforcement personnel.

Appellants consent to the filing of this amicus brief. Counsel for Appellees has stated that Appellees do not object to its filing, but "our position is that if the Court grants the respective motions for filing of an amicus briefs, WHA (the Appellee) should be granted the right to additional pages in its Answering Brief to the extent necessary to respond to any argument that is not cumulative, that is, not presented by Appellants in their Opening Brief."

SUMMARY OF ARGUMENT

Amici generally concur in the arguments in Appellants' Opening Brief that the challenged policies of the Wilmington Housing Authority regarding firearms are unconstitutional under DEL. CONST. art. I, § 20. Not only do those policies encroach on protected rights, but they also suffer from two fatal flaws from a law enforcement perspective which undermine any purported governmental interests. First, the Common Area policy purports to ban conduct which is not against

statutory law, which creates confusion, calls law enforcement authority into question, and makes enforcement of that policy by law enforcement personnel extremely problematic. Second, to the extent that enforcement of the Reasonable Cause policy against persons who are possibly armed may be attempted by untrained, non-law enforcement personnel, serious risks to residents, household members, guests, and other personnel are nearly inevitable. Because WHA's Revised Policies unjustifiably encroach upon constitutionally and statutorily protected conduct, they should be held to violate DEL. CONST. art. I, § 20, for the reasons stated by in Appellants' Opening Brief and in this amicus brief.

ARGUMENT

I. WHA'S COMMON AREA POLICY IS UNCONSTITUTIONAL, IMPOSES RESTRICTIONS BEYOND STATE LAW, AND CREATES DANGERS AND UNCERTAINTIES FOR LAW ENFORCEMENT.

The revised "Common Area" Policy adopted by WHA provides in part that residents, household members, and guests:

(3) Shall not display or carry a firearm or other weapon in any common area, except where the firearm or other weapon is being transported to or from the resident's unit, or is being used in self defense.²

² Appellants' Opening Brief at 4 refers to this provision as the "Common Area" policy. That brief notes that amended rule 24, applicable to The Park View House where plaintiff/appellant Jane Doe resides, is substantially identical. *Id.* at n.3. As has been the practice in prior stages of this litigation, Amici will refer to these policies and rules jointly as the Common Area policy.

As the parties earlier stipulated, Delaware law generally permits carrying of firearms openly without a license. Federal District Court Opinion at 37. State law also allows individuals to carry concealed weapons, including firearms, if the individual has a concealed carry license issued pursuant to 11 DEL. C. §1441. In addition, Delaware recognizes concealed carry permits from certain other states, allowing nonresidents of Delaware to carry concealed weapons. 11 DEL. C. §1441(j).³ The statutes of this state also provide for the issuance of temporary concealed carry permits to out-of-state residents. 11 DEL. C. §1441(k). Police and other peace officers are exempted from the concealed carry license requirements. 11 DEL. C. §1441(g).

State law specially provides for issuance of concealed carry permits to retired police officers in certain circumstances. 11 DEL. C. §1441(h). In addition, by the provisions of 11 DEL. C. §1441A, Delaware has implemented the federal Law Enforcement Officers Safety Act of 2004, 18 U.S.C. §§ 926B, 926C, which permits active and retired law enforcement officers to carry concealed weapons within or outside of their home jurisdictions provided certain conditions are met. Off duty Delaware police officers may also carry firearms, openly or concealed. **[check](Dan, 11 Del. C. § 1441(g) does not differentiate between on-duty and**

³ For the list of states with which Delaware has reciprocity, see <http://attorneygeneral.delaware.gov/crime/concealedweapons.shtml>.

off-duty. The vast majority of police agencies consider their officers to be “on-duty” 24/7 and/or when “off-duty” have an obligation to take police action/law-enforcement action when and where required for the preservation of life and property. The plain language of the statute has always been interpreted as meaning what it says – with no differentiation between on & off-duty. Law enforcement officers have arrest authority at all times within their jurisdiction and when asked for aid by officers outside their jurisdiction. Therefore, I would be comfortable with the language you have, above.)

Thus, there are numerous circumstances in which a resident, family member, or guest may legally carry a firearm in a common area under Delaware law.⁴

The restrictions on carry imposed by the Common Area policy plainly infringe upon the constitutional right to keep and bear arms described in the Delaware Constitution. Article I, § 20, states that “A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.” DEL. CONST. art. I, § 20. The right to bear arms means to “carry” them. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008). That right clearly

⁴ Although much of the briefing in the federal court case seems to focus on television rooms, laundry facilities, and other indoor activity areas, presumably “common areas” would also include sidewalks, porches, parking lots, yards, driveways, and other outdoor areas on properties owned or managed by WHA.

extends beyond the boundaries of one's home or rental unit.⁵ Otherwise, the constitutional provision would not protect both "keeping" arms (generally at home) and "bearing" them. Hunting and recreational uses, which are specifically protected, occur outside the home. In addition, Article I, § 20 would not separately enumerate defense of "self," "family," and "State," as well as "home," if only a right to defense within the home was intended to be recognized.

Accordingly, the Common Area policy, which directly prohibits the carrying of firearms for defense⁶ or other lawful purposes, is an insupportable infringement on the right to keep and bear arms recognized by the Delaware Constitution.

That infringement becomes even clearer when the nature of the Common Area policy, and the purported governmental interests behind it, are examined. An important, unanswered question is: who is to enforce the Common Area provision? The Revised Policy does not say. If local police were summoned ~~to~~-by a call that someone was carrying a gun in a common area, they would have no choice but to respond. But Delaware law enforcement officers receive training in

⁵ Amici take no position on whether particular "common areas" in WHA facilities are part of the homes of the facilities' residents.

⁶ Although the Common Area policy purports to permit a firearm outside the dwelling unit when it "is being used in self defense," that exception is illusory. "Using" a firearm in self-defense or defense of others means pointing it at someone to deter an attack, or actual firing of the gun. But criminals don't give advance warning. The only way to protect oneself while in common areas is to have the firearm at the ready on one's person, either openly or legally concealed, and that is precisely what the Common Area policy prohibits.

applicable Delaware criminal laws,⁷ where the legislature has determined the conditions and circumstances under which either open or concealed carry is permissible as a matter of state law. They are not trained on, and cannot be expected to know and to enforce, a far different, more restrictive set of limitations against residents of public housing that depart from state criminal law.

Furthermore, the restrictions imposed by the WHA Common Areas policy are only lease provisions, not violations of state criminal statutes. In its Third Circuit brief, WHA emphasized that “The Revised Policy is, in essence, a contractual provision,” and that “WHA has established a mere lease provision.” Appellee’s Third Circuit Brief at 39. Police officers have legal authority to enforce the law, not to enforce contracts or leases. Significantly, the Delaware Code defines “police officer” as “a sworn member of a police force or other law-enforcement agency of this State or of any county or municipality who is responsible for the *prevention and the detection of crime* and the *enforcement of laws of this State* or other governmental units within the State. 11 DEL. C. § 8401(5) (emphasis added). Lawful carrying of a firearm in a common area is not a

⁷ See Delaware Admin. Code Title I, 801, § 16.9, for mandatory instruction on the Delaware Criminal Code as part of police basic training.

“crime.” The lease provisions are not “laws of this State,” or laws of any kind⁸, which the police are charged with enforcing and have authority to enforce.⁹

So if police officers are summoned by a report that a resident or guest is carrying a firearm in a common area, what are they to do? Are they to arrest or attempt to disarm the resident or guest who lawfully possesses a firearm, because doing so is in violation of a lease, even though it is legal under Delaware law? Or are they to engage in a needless, fruitless confrontation with an armed individual who is not violating a statute, when they have no lawful authority to arrest or detain that individual based on his actions?

To the extent that law enforcement officers might attempt to enforce a “mere lease provision,” they could open themselves or their departments to serious legal

⁸ At least, it is the position of WHA that the Revised Policies are not laws or ordinances. As WHA states in prior briefing, “WHA, by contrast, has not enacted, nor is it capable of enacting, laws, regulations, or ordinances.” WHA Third Circuit Brief at 39. Amici take no position on the characterization of the Revised Policies for purposes of pre-emption arguments.

⁹ The Wilmington Code of Ordinances, in the section entitled “Powers of Police Officers” further stresses that powers of the police are defined by statutes and ordinances, and that their role is to take enforcement action in cases of “violation of any statutes and ordinances in force” in the city:

Wilmington police officers shall have all the *powers conferred by statute and ordinance* upon constables, sheriffs and state police of the State of Delaware. They shall have power to make lawful searches, seizures and arrests for *violation of any statutes or ordinances in force* in the city, and all city parks, in or outside the city limits, to serve subpoenas when ordered to do so by their superior officers, and to do such other acts as may be required of them by statutes or ordinance.

Wilmington, Delaware, Code of Ordinances, Part I, Subpart A, Article V., Ch. 2, § 5-201 (emphasis added).

liability in the form of citizen suits under 42 U.S.C. § 1983. It is well established “that municipalities or supervisors may face liability under section 1983 where they breach duties imposed by state or local law.” *O’Quinn v. Manuel*, 773 F.2d 605, 608 (5th. Cir.1985). Residents of public housing retain their rights to be free of unreasonable searches and seizures, both of which require probable cause that an actual crime has been or will be committed. U.S. Const. Amend. IV; Del. Const. Article I, § 6. Violation of a lease provision is not a crime, and certainly does not constitute probable cause for an arrest.

Section 1983 liability may be imposed directly on individual police officers who violate the Fourth Amendment rights of an individual whom they stop or take into custody. *Graham v. Connor*, 490 U.S. 386, 390 (1989). The Supreme Court has recognized that “the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Id.* at 396. Whether the degree of force is reasonable depends on “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* But if the individual is simply carrying openly and peaceably in a common area, there is no violation of Delaware laws. If the individual is peaceably carrying with a concealed carry license, there is also no crime. The

calculus of liability under Section 1983 and the Fourth Amendment does not favor a police officer who stops or arrests an individual with a firearm when carrying it is not a crime, there is no immediate threat, and the only countervailing interest is enforcement of a contract or lease.

On the other side of the equation, the residents of WHA facilities are not deprived of their constitutional rights simply because they live in public housing. *See, e.g., Dawson v. Milwaukee*, 930 F.2d 1283, 1285 (7th Cir. 1991) (living in publicly subsidized housing is not the equivalent of being “in custody”). To the extent that the WHA’s Revised Policies contemplate a legal regime to be enforced by law enforcement officers, those Policies create legal confusion, liability, and a hopeless muddle. They also foster tensions between police and public housing residents, who may infer that they are being denied rights by the police that are available to all other citizens.

Good policing is based on cooperation between law abiding citizens and police agencies. As a report from the U.S. Department of Justice states:

[G]ood policing involves a partnership between police and citizens. Police cannot carry out their responsibility acting alone. . . . Only when sound values, mutual respect, and trust are shared—among all groups that make up the community—can the police-citizen partnership work as it should.

U.S. Department of Justice, Community Relations Service, *Principles of Good Policing: Avoiding Violence Between Police and Citizens* (Revised September 2003). Respecting the constitutional rights of public housing tenants—the same rights available to all citizens who do not reside in public housing—is valuable for effective law enforcement as well as for simple justice.

II. WHA’S “REASONABLE CAUSE” POLICY IS UNCONSTITUTIONAL, IMPOSES RESTRICTIONS BEYOND STATE LAW, AND CREATES RISKS FOR RESIDENTS, HOUSEHOLD MEMBERS, GUESTS, AND ENFORCEMENT PERSONNEL.

The Revised Policy adopted by WHA provides in part that residents, household members, and guests:

(4) Shall have available for inspection a copy of any permit, license, or other documentation required by state, local, or federal law for the ownership, possession, or transportation of any firearm or other weapon, including a license to carry a concealed weapon as required by 11 DEL. C. § 1441, upon request, when there is reasonable cause to believe that the law or this Policy has been violated.

This “Reasonable Cause” policy is equally unconstitutional. Without entering into a discussion of standard of review or levels of constitutional scrutiny, all such standards require, at minimum, a strong state interest to support the restriction imposed. [cite **Heller; Marzarrella; Griffin II, 47 A.3d at 490–91.**]

But here, the state interest is unidentified. Residents are required to produce on demand any “permit, license, or other documentation required by state, local, or federal law for the ownership, possession, or transportation of any firearm” What, exactly, is that documentation, and what interest is served by the requirement to produce it?

Neither the State of Delaware nor the City of Wilmington requires firearms to be registered. Neither the State nor the City requires a permit or license to own or possess handguns, rifles, or shotguns. No documentation is required by the State or City to transport a handgun, rifle, or shotgun.¹⁰

There is no federal permit, license, or other documentation that an owner must have in order to own, possess, or transport ordinary firearms. The only types of firearms for which a federal registration is required are those required to be registered under the National Firearms Act (“NFA”), principally machine guns. *See* 26 U.S.C. Chapter 53. Except for transactions between dealers, written federal authorization is generally required to transport NFA weapons such as machine guns across state lines. 27 C.F.R. § 478.28 But possession of machine guns is illegal in Delaware, except under certain conditions for the police, military, or for “scientific or experimental research and development purposes.” 11 DEL. C. §

¹⁰ *See generally* the synopsis of Delaware firearms laws at <http://www.nrila.org/gun-laws/state-laws/delaware.aspx>.

1444. Manufacture of machine guns for the civilian market has been prohibited since 1986. 18 U.S.C. § 922(o). The supply is limited and dwindling, and they generally cost thousands or tens of thousands of dollars. They are not likely to be owned by residents in public housing projects.

Thus, the extraordinarily implausible case of NFA weapons aside, the *only* type of “permit, license or other documentation” required to be produced under the Reasonable Cause policy would be a concealed carry license. And, it appears, WHA disregards the validity of concealed carry licenses issued under state law, and under the Common Area policy prohibits licensed persons from carrying concealed in common areas even if they have a license. Thus, the effect of the Reasonable Cause policy is to allow residents, household members, and their guests to be stopped outside their dwelling unit, and their paperwork demanded, when that paperwork either 1) is non-existent for anyone; or 2) in the case of concealed carry licenses, will be disregarded under the Common Area policy. There is no important state interest underlying this futile scheme.

It is also likely to be productive of mischief. Again, it is unclear who is expected to enforce this policy. Residents, household members, and guests are required to produce a permit, license, or other documentation “upon request”—but upon request by whom?

Apparently, WHA intends that some kind of WHA personnel will have this power to confront individuals and require that they produce their licenses and permits for a firearm. The Revised Policies are silent on exactly who will make this request of the resident, household member, or guest. In its Brief in the Third Circuit, WHA states that the Revised Policy “*permits WHA to ask for a copy of a resident’s license to carry a concealed deadly weapon (“CCDW”) when there is reasonable cause to believe that the resident has violated the Revised Policy or the law.*” Appellees’ Third Circuit Brief at 8 (emphasis added). That Brief reiterates that it is “reasonable” to “for *WHA to request to review a tenant’s permits*, where the tenant is required by law to possess such permits, and *where WHA has good cause to believe that the Policy or the law has been violated.*” WHA Brief at 35-36 (emphasis added).

To the extent that the Reasonable Cause policy contemplates that such a request will be made by WHA personnel of a person who is or may be armed, it creates risks both for the individual making the request, and for the person to whom the request is made. Because the Revised Policy permits possession within the dwelling unit, such requests will be made only to persons who are suspected of violating the law or the policy regarding carry in common areas. Confronting a person who does or may have a firearm, and demanding that he produce his papers,

is a task that demands training and experience, and there is no evidence that WHA personnel have such training.

Police officers in Delaware receive extensive training, both at the police academy and through ongoing training in their local departments or units.

Delaware Regulations require that:

Each applicant for the position of police officer in the State of Delaware must satisfactorily complete the Police Basic Training Course as prescribed in 11 Delaware Code §8405(a) (Amended 07/08/93) prior to being given or accepting an appointment as a police officer.¹¹

[cite to regulations 5.1.1.1]

The mandatory curriculum for police basic training reflects 568 hours of training. Delaware Admin. Code Title I, 801, § 16.1 This includes, among other topics pertinent to interactions with persons who may have firearms, 40 hours of instruction in the “Laws of Arrest, Laws of Evidence, and Search and Seizure.” *Id.* §16.23.

The curriculum also includes 60 hours on “Patrol Procedures/ Officer Survival.”

Id. §16.28. Among other things:

This course is designed to acquaint the new officer with the basic street survival techniques as accrued from years

¹¹ The Council on Police Training has certified six agencies as approved police basic training academies. Those agencies are: The Delaware State Police; New Castle County Police; Wilmington Department of Police; Newark Police Department; Dover Police Department; and Delaware River and Bay Authority Police Department. Delaware Admin. Code Title I, 801, § 5.1.1.2

of experience from actual encounters on the street. Practical application of avoidance, deterrence, and handling of actual scenarios will familiarize officers with what to do when confronted with an armed combatant as well as what not to do.

Among numerous other courses, the Delaware State ~~Policy~~ Police Training Academy offers a three day, 24 credit hour course in Officer Survival. Major topics include suspicious persons, high risk stops, and handling armed suspects. Delaware State Police Training Academy, *2014 Elective Training Courses*.¹²

This training is provided, and is continued while officers remain in service, because the act of confronting an individual who may be armed, even if he is legally armed with peaceable intentions, can be fraught with peril and the potential for misunderstandings. Examples of bulletins issued to officers in Pennsylvania, Washington State, and Connecticut, while not reflecting the law in Delaware, are attached as illustrative. See Exhibits 1-4. A police training video issued by the City of New York (though New York City laws are far more restrictive than in Delaware) also gives a sense of the keen tactical skills that an officer must display under such circumstances. See <http://www.youtube.com/watch?v=zMlt37sVJOs>

As noted, the record in this case does not appear to contain any information about who may make the request under the Reasonable Cause policy. Based on publicly available information, it appears that some WHA facilities have security

¹² Available at <http://dsp.delaware.gov/2014%20Elective%20Catalog.pdf>

guards or security patrols, whereas others may not. The WHA website mentions a security patrol for the Village of Eastlake, and security guards or personnel are referred to for Compton, Crestview, and Herlihy. No security staff is mentioned on the WHA sites for Kennedy, Northeast, Park View, Eastlake, or Southbridge.¹³ In any event, security guards, if used, are not qualified police officers and have neither the powers nor the training that police officers possess.

It is also worth noting that the population against which the Revised Policies are to be enforced is overwhelmingly African-American. In 2010, 86.1% of Wilmington's public housing households were categorized as "black," 6.9% were "white," and 7.1% were "other." Delaware State Consortium, *Analysis of Impediments to Fair Housing Choice* (July 2011). The Supreme Court has noted that the right to keep and bear arms "protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials." *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3049 (2010). The need to respect that right with all due consideration is important in law enforcement. As part of their basic training, Delaware police officers receive a minimum of twelve hours of training on "Cultural Diversity and Community Relations," to "prepare the officer to deal fairly and effectively with minority groups in society" and to

¹³ For each site, the web address follows the format <http://www.whadelaware.org/Communities/kennedy.php>, with the name of each "community" substituted before the .php. The website is currently "under construction"; the information above was obtained from cached webpages maintained by Google.

“bring about increased understanding and respect” between police officers and minority groups. Delaware Admin. Code Title I, 801, § 16.8. Attempts by untrained individuals to confront armed persons in public housing could easily lead to unfortunate results.

Ordinary employees of WHA would be utterly lacking in training regarding the relevant law. They would also be untrained in the tactics to employ to deal with the situation effectively, while at the same time respecting the privacy and constitutional rights of residents and others, promoting safety, and preventing escalation.

CONCLUSION

The Common Area and Reasonable Cause provisions should be held to violate Del. Const. Art. I, § 20.

Respectfully submitted,

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