

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8405
Summary Calendar

RONALD G. MURPHY,

Plaintiff-Appellant,

VERSUS

CITY OF ROGERS,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CV-160)

(February 24, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

In this action removed to federal court because the plaintiff alleges deprivation of a federal property right in public employment, the district court dismissed for failure to state a cause of action, holding that the plaintiff, Ronald Murphy, terminated from his position as a police officer, was not a "municipal officer" within the meaning of TEX. LOCAL GOV. CODE ANN.

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

§ 22.077, which is the only basis for relief that Murphy asserts.¹

We hold that the district court erred in dismissing Murphy's complaint. Murphy served as a police officer for the City of Rogers, a Type A municipality. Under TEX. LOCAL GOV'T CODE ANN. § 341.001(e)(1) (West 1988), a police officer of a Type A municipality has "the powers, rights, and jurisdiction of a marshal of a Type A general-law municipality." A marshal is an "officer" of the municipality. TEX. LOCAL GOV'T CODE ANN. § 22.071(a) (West 1988). As we read the plain language of these statutes, a police officer obtains the same rights as a marshal²; the code does not limit this grant to any specific rights.

Because a police officer must be treated as a municipal officer, he may be removed only pursuant to the procedures outlined in TEX. LOCAL GOV'T CODE ANN. § 22.077 (West 1988). This section provides two methods for removing a municipal officer. First, the governing body may remove him for incompetency, corruption, misconduct, or malfeasance after providing him with due notice and an opportunity to be heard. Murphy alleges he was entitled to such notice. Second, the governing body may remove him for lack of confidence on a two-thirds vote.

The City argues it removed Murphy using the latter procedure

¹ We do not consider the issues Murphy raises for the first time on appeal.

² Hamilton v. City of Wake Village, 593 F Supp. 1294 (E.D. Tex. 1984), is not to the contrary. This case merely found that a police officer had no property interest in his job and that the city had properly complied with the procedures now mandated by § 22.077(b).

by unanimous vote. If true, this fact would be a complete defense to Murphy's claim that he was entitled to notice and an opportunity to be heard. At this stage of the litigation, however, we may only consider the allegations in the complaint. The city, of course, may introduce competent evidence that it followed section 22.077(b) and may move for summary judgment, but we cannot rule on this issue now.

On remand, the district court should consider whether Murphy truly has a property interest in his job even if the City was required to comply with section 22.077(a). If the district court finds Murphy has no property interest, the district court also should consider whether Murphy's state law claims should be remanded to state court, rather than dismissed. We express no opinion on either of these issues.

The judgment of the district court is VACATED, and this matter REMANDED for further proceedings in accordance with this opinion.