CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 42-07 A

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOHN LUNA,

Appellant/Petitioner,

vs.

DENVER SHERIFF'S DEPARTMENT, DEPARTMENT OF SAFETY, and the City and County of Denver, a municipal corporation,

Agency/Respondent.

This matter is before the Career Service Board on Appellant's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision dated July 15, 2008, on the grounds outlined below.

I. FACTUAL BACKGROUND

Appellant was employed by the Agency as a deputy sheriff until his dismissal on July 9, 2007. As a deputy sheriff, Appellant was required to carry a firearm. **Exhibit 20; Transcript, May 30, 2008, pp. 15-21.**

On November 5, 2002, Appellant was charged with misdemeanor child abuse (02 M 5605) for an incident involving his son. **Ex. 8-3.** At the career service hearing, Appellant admitted that during an argument he grabbed his son's arm after his son refused to search for a DVD. **Transcript, May 29, 2008, p. 52.** On March 17, 2003, Appellant was charged with child abuse resulting in serious bodily injury (03 CR 717), a class 4 felony, for an incident involving his stepson. **Ex. 9-6,7,8,9,10.** At the hearing, Appellant admitted that during an argument he used a wrestling move to take his stepson down to the ground. **Transcript, May 29, 2008, p. 49.**

As part of a plea agreement in 03 CR 717, Appellant pled guilty to an added second count of misdemeanor child abuse resulting in bodily injury as to both children, and in exchange for his guilty plea, the original felony charge as well as 02 M 5605 were dismissed. **Ex. 10.** By pleading guilty to the added charge, Appellant admitted that he

knowingly or recklessly caused an injury to a child and permitted a child to be unreasonably placed in a situation which posed a threat of injury to a child's life or health and which resulted in injury other than serious bodily injury. **Ex. 10-8.**

The Agency was unaware until 2007 that the Lautenberg Amendment to the Gun Control Act applied to child abuse convictions. Relying upon an opinion from the Colorado Bureau of Investigation that Appellant's conviction was a misdemeanor crime of domestic violence which prohibited him from carrying a firearm, the Agency disqualified him from employment. The Career Service Hearing Officer affirmed Appellant's disqualification and this appeal to the Board follows.

II. FINDINGS

Appellant raises two arguments on appeal. First, he contends that his child abuse conviction is not a misdemeanor crime of domestic violence under federal law and second, he argues that carrying a firearm is not an essential duty for a deputy sheriff. The Board will address each of these arguments separately.

A. A Misdemeanor Crime of Domestic Violence (MCDV)

The Lautenberg Amendment to the Gun Control Act makes it unlawful for any person who has been convicted of a misdemeanor crime of domestic violence to possess a firearm. 18 U.S.C. § 922(g)(9). A MCDV has three components: 1) it is classified as a misdemeanor under federal, state or tribal law; 2) has as an element the use or attempted use of force, or the threatened use of a deadly weapon; and 3) occurs between parties who share a domestic relationship. 18 U.S.C. § 921(a)(33). Here, Appellant disputes only the second component.

Relying on *United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008), Appellant argues that because misdemeanor child abuse under Colorado law may be committed knowingly or recklessly, it does not necessarily require the use or attempted use of force as defined by a MCDV under the Gun Control Act. While *Zuniga-Soto* was decided after the career service hearing, the Board is charged with the responsibility of determining independently whether the Lautenberg Amendment applies in this case, *Woods v. City and County of Denver*, 122 P.3d 1050, 1055 (Colo. App. 2005), and therefore must consider Appellant's legal arguments and the case law he presents.

In *Zuniga-Soto*, the Court had to decide whether the defendant's prior conviction for assault on a public servant under Texas law was a "crime of violence" for purposes of federal sentencing guidelines. A "crime of violence" under those guidelines is defined as an offense that has as an element the use, attempted use or threatened use of physical force. First, the Court noted that the defendant pled guilty to a subsection of the Texas statute that defined assault in only one way and therefore it was not necessary to examine judicial records to determine which kinds of alternative elements might be required for conviction. Looking to Texas case law for interpretive guidance, the Tenth Circuit determined that assault on a public servant could be committed by conduct that

intentionally, knowingly, or recklessly caused bodily injury. The Court then reasoned that reckless conduct is the same as accidental conduct, and accidental conduct does not involve the use of force. 527 F.3d at 1122-1125. Therefore, the defendant's conviction did not meet the "use of force" requirement for purposes of sentence enhancement.[1] While the Court's reasoning that reckless and accidental conduct are synonymous may be true under the Texas assault statute, it does not appear to be true under the Colorado child abuse statute.

Section 18-6-401(1)(a) C.R.S. describes at least three different ways that child abuse may be committed. In *People v. Dunaway,* 88 P.3d 619 (Colo. 2004), the Colorado Supreme Court discussed two of them – causing an injury to a child, or permitting a child to be unreasonably placed in a situation that poses a threat of injury to the child – and defined the mental states required for these alternative theories of liability:

> We have also stated that "knowingly" under the statute "refers to the actor's general awareness of the abusive nature of his conduct in relation to the child or his awareness of the circumstance in which he commits an act against the well-being of the child." . . . As pertinent to the endangerment clause, "a person acts 'recklessly' when he consciously disregards a substantial and unjustifiable risk that, in light of the child's circumstances, a particular act or omission will place the child in a situation which poses a threat of injury to the child's life or health." . . .

88 P.3d at 625. Based on this definition, recklessness requires an offender to consciously disregard substantial and unjustifiable risks, and in order to do so, the offender must have "an awareness of what the risks are." *People v. Deskins*, 927 P.2d 368, 373 (Colo. 1996). One does not consciously disregard known risks by accident. Thus, recklessness is not synonymous with accidental conduct under the Colorado child abuse statute.

Similarly, the second argument raised in *Zuniga-Soto* does not apply to the Colorado child abuse statute. Mr. Zuniga-Soto argued that his assault conviction was not necessarily a crime of violence under federal sentencing guidelines because the guidelines focus on the type of conduct that causes an injury (the use of force), while the Texas statute focuses on the result of different kinds of conduct – bodily injury. 527 F.3d 1126, ftn. 3. See also, *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005). The Board notes that Appellant raised this same argument before the Hearing Officer. **Transcript, May 30, 2008, pp. 122-123.** But Colorado courts have repeatedly recognized that "the culpable mental states applicable to a crime of child abuse relate not

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[1] In reaching this decision, the Tenth Circuit relied on *Leocal v. Ashcroft*, 543 U.S. 1 (2004) in which the Supreme Court held that a Florida drunk driving statute did not meet the "use of force" requirement for federal sentencing guidelines because an individual could be convicted under the statute for negligence or accidental conduct. *Id.* at 11. Although the Supreme Court specifically did not decide whether the reckless use of force would qualify as a crime of violence, *Id.* at 13, nevertheless, the Tenth Circuit concluded that "recklessness falls into the category of accidental conduct that the *Leocal* Court described as failing to satisfy the use of physical force requirement under either of § 16's definitions of 'crime of violence.' " 527 F. 3d. at 1124.

to a particular result but rather to the nature of the offender's **conduct** in relation to the child or to the circumstances under which the act or omission occurred." (emphasis added). *Dunaway*, 88 P.3d at 625; *Deskins*, 927 P.2d at 371; *Lybarger v. People*, 807 P.2d 570, 575 (Colo. 1991).

Finally, the Court in *Zuniga-Soto* discussed the review of judicial records established by *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005). When a statute provides multiple ways in which a crime may be committed, some of which involve the use of force and some of which do not, federal courts have resolved the ambiguity by reviewing judicial records, including the charging documents, jury instructions, the terms of a plea agreement or admissions made by the defendant on the record. *Shepard,* at 26. The Colorado Court of Appeals, however, has taken a broader approach in determining whether a prior conviction contains an element of force for purposes of the Lautenberg Amendment, including the review of incident reports and the factual findings made by the trial judge in a bench trial. *Ward v. Tomsick*, 30 P.3d 824, 826-827 (Colo. App. 2001).

With this in mind, child abuse under 18-6-401(1)(a), unlike the statute at issue in *Zuniga-Soto*, may be committed in at least three different ways and Appellant pled guilty to two of them: causing bodily injury and unreasonably placing a child at risk of bodily injury. **Ex. 10-8.** Moreover, there are two different victims listed in the charging document (**Ex.10-1**), and it is not clear which theory applies to which child, nor what facts the state would have proven as to each child under each theory if the charge had been decided by a jury instead of a plea agreement. These ambiguities, however, may be resolved by any admissions made by Appellant, and those admissions represent the most significant difference between *Zuniga-Soto* and the career service hearing.

Zuniga-Soto and all the cases cited by the Tenth Circuit involve criminal prosecutions. Federal courts trying to determine whether a prior conviction in state court is a "crime of violence" under federal law have been reluctant to engage in post-conviction evidentiary disputes about the facts involved in the conviction because doing so could impinge upon the defendant's constitutional right to have a jury determine disputed issues of fact. *Shepard*, 544 U.S. at 25. Hence, federal courts might not rely upon police reports or other documents that could contain disputed facts, but will rely upon the defendant's admissions to a factual basis for his plea. In this case, Appellant waived the reading of a factual basis when he entered his guilty plea and, if this were a criminal case, a federal court would not have that factual information before it.

But the career service hearing is not a criminal prosecution; it is a civil administrative proceeding. There is no constitutional right to a trial by jury. In fact, it is a *de novo* hearing that requires the Hearing Officer to consider all the evidence on all the issues presented in the appeal as though no previous action had been taken. *Turner v. Rossmiller*, 532 P.2d 751 (Colo. App. 1975). Additionally, when those issues involve the application of the Lautenberg Amendment to continued employment within the City, there must be sufficient factual findings to support the Board's legal conclusions about the Amendment's applicability. *Woods v. City and County of Denver*, 122 P.3d at 1055.

Here, Appellant requested a *de novo* hearing when he appealed his disqualification. At that hearing, he testified and admitted that during an argument with his son over a missing DVD, he grabbed his son's arm, and during another argument with his stepson, he took his stepson down to the ground using a wrestling move. Thus, Appellant admitted a factual basis for his plea of guilty to child abuse and admitted to using physical force as to both children.

For all these reasons, the Board finds that Appellant's conviction met the "use of force" requirement of a misdemeanor crime of domestic violence under the Lautenberg Amendment to the Gun Control Act.

B. Carrying a Firearm

The Agency disqualified Appellant from employment because deputy sheriffs are required to carry a firearm and the Lautenberg Amendment prohibits him from doing so. The Hearing Officer made a specific finding that carrying a firearm is an essential duty of a deputy sheriff. On appeal, the Board understands Appellant's argument as challenging the sufficiency of the evidence on this finding.[2] Pursuant to CSR 19-61 D., the Board may reverse this finding only if it is not supported by the evidence in the record and is clearly erroneous. Appellant fails to meet this burden of proof.

The Hearing Officer's finding is supported first, by a written Agency policy that requires all deputy sheriffs to carry firearms to and from their place of duty, and second, by the detailed testimony of Director of Corrections Lovingier on this issue. **Ex. 20; Transcript, May 30, 2008, pp. 13-21.** The record demonstrates a rational basis for requiring all deputy sheriffs, regardless of assignment, to carry a firearm – in order to respond effectively and ensure public safety in emergency situations, such as a riot, a jailbreak, or other exigent circumstances. **Transcript, May 30, 2008, pp. 15-16.**

The Hearing Officer's finding that carrying a firearm is an essential duty of a deputy sheriff is amply supported by evidence in the record and the Board finds it is not clearly erroneous.

III. ORDER

IT IS THERFORE ORDERED that the Hearing Officer's Decision of July 15, 2008 is **AFFIRMED.**

SO ORDERED by the Board on January 15, 2009, and documented this 30th day of January, 2009.

[2] Although Appellant's entire argument on this issue discussed the sufficiency of the evidence, the last sentence of his argument suggests the Hearing Officer erroneously interpreted the Career Service Rules. Opening Brief, pp. 11-12. However, Appellant does not say how the rules were erroneously interpreted, how those rules should have been interpreted, or even what rules are at issue. A one-sentence conclusory statement is not sufficient to invoke the Board's appellate jurisdiction under CSR 19-61 B. The Board finds that Appellant has waived this ground for appeal by presenting no argument on it.