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

Appeal No. 57-06

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

ANDRE RAY,

Appellant/Petitioner,

vs.

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

Agency/Respondent.

This matter is before the Career Service Board ("Board") on Appellant's Petition for Review. Having reviewed and considered the full record on appeal, the Board **REVERSES IN PART** the Hearing Officer's Decision, dated December 4, 2006, and **REMANDS** this appeal for a limited hearing, on the grounds outlined below.

I. JURISDICTION

Appellant seeks review under CSR 19-61 A. (new evidence); 19-61 B. (erroneous rules interpretation); and 19-61 D. (insufficient evidence). The Board accepts jurisdiction under CSR 19-61 D.

II. FACTUAL BACKGROUND

As a deputy sheriff, Appellant is required to carry a firearm. On January 14, 2006, Appellant was charged with assault and battery under the Aurora Municipal Code. He appeared in court on January 17, 2006, and a Municipal Protection Order was entered prohibiting Appellant from contacting, harassing, intimidating or threatening the victim of the alleged assault. In addition, the Order contained the following language: "Unless the box immediately below is checked, the Court finds that the Defendant is/was a [sic] intimate partner, as that term is used under 18 USC Section 922 (d)(8) and (g)(8) of the Brady Handgun Violence Protection Act." The box was not checked. (Exhibit Notebook, p. 225). At the request of the victim, the "no contact" provision of the Protection Order was vacated on January 30, 2006; however, the other provisions of the Order remained in

effect. (Ex. Notebook, p. 226). The Court did not check the box indicating that Appellant was prohibited from possessing a firearm.

On June 22, 2006, a jury convicted Appellant of assault and battery. Thereafter, the Agency consulted with the Colorado Bureau of Investigation as to whether Appellant's conviction prevented him from carrying a firearm. CBI Agent-In-Charge Susan Kitchen gave an advisory opinion that Appellant's conviction was a misdemeanor crime of domestic violence under the Lautenberg Amendment to the Gun Control Act, which would prohibit him from possessing a firearm. As a result of this opinion, Appellant was disqualified from his employment on July 31, 2006. The Hearing Officer affirmed the disqualification and this appeal follows.

III. FINDINGS

A disqualification because of a federal firearms disability is an issue of first impression in a Denver Career Service hearing. The Board recognizes that the law in this area is not only complex, but is complicated by the fact that terms like "domestic violence," "intimate partners," and "intimate relationship" have different meanings and different applications under state and federal law. As a further complication, there are two separate federal firearms provisions involved in this case – one that applies to law enforcement officers and one that does not – and each has different elements of proof in subsequent proceedings.

18 USC § 922 (g)(8) provides that it shall be unlawful for any person to possess a firearm who:

> is subject to a court order that restrains such person from harassing, stalking, or threatening **an intimate partner** of such person . . .

(emphasis added). In a subsequent 922 (g)(8) criminal prosecution for possession of a firearm in violation of a restraining order, a defendant cannot collaterally attack the validity of the restraining order as long as it was issued in a hearing where the defendant had actual notice and an opportunity to participate. *United States v. Arledge*, 2007 U.S. App. LEXIS 8054 (10th Cir. 2007); *United States v. Young*, 458 F. 3d 998 (9th Cir. 2006).

Here, CBI relied on the language of the Aurora restraining order in its advisory opinion. The Hearing Officer found that because Appellant had notice and the opportunity to participate in the municipal court hearing on January 17th , he could not re-litigate the court's finding that he was an "intimate partner" for purposes of 922 (g)(8). The Board would agree with the Hearing Officer's conclusion if Appellant had been disqualified under 922 (g)(8). But law enforcement officers are exempt from a firearms prohibition under 922 (g)(8) and the restraining order did not prohibit Appellant from on-duty possession of a firearm. See, 18 USC Section 925 (a)(1); Agency's Exhibit No. 10, Ex. Notebook, p. 153; Transcript, Kitchen testimony, pp. 139, 152.

Instead, Appellant was disqualified for a firearms disability under 18 USC § 922 (g)(9), which provides that it shall be unlawful for any person to possess a firearm who:

> has been convicted in any court of a misdemeanor crime of domestic violence.

A misdemeanor crime of domestic violence ("**MCDV**") is defined as an offense that --

> (i) is a misdemeanor under Federal or State law; and
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> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, **by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.**

18 USC § 921 (a)(33)(A) (emphasis added). While this definition is far from artfully drafted, a MCDV has three distinct components: 1) it must be a misdemeanor, 2) it must have an element of physical force or the threatened use of a weapon, and 3) it must occur between parties to a domestic relationship. *Woods v. City and County of Denver,* 122 P. 3d 1050, 1054 (Colo. App. 2005). The relevant inquiry here is whether Appellant's assault conviction involved one of the domestic relationships described in section 921 (a)(33)(A).[1]

Unlike a 922 (g)(8) criminal prosecution where the validity of the underlying restraining order is almost immaterial, a 922 (g)(9) criminal prosecution for possession of a firearm following a misdemeanor conviction requires that the domestic relationship of the prior conviction must be charged and proven as an element of the 922 (g)(9) violation. *United States v. Heckenliable*, 446 F.3d 1048, 1051 (10th Cir. 2006). The Board finds the different elements of proof under 922 (g)(8) and 922 (g)(9) significant. Because 922 (g)(9) requires actual proof of a domestic relationship, an agency seeking to disqualify a city employee under this statute must prove in a career service hearing that the employee's prior misdemeanor conviction, upon which the agency is relying for disqualification, involved one of the domestic relationships described in 921 (a)(33)(A). See, *White v. Dept. of Justice*, 328 F.3d 1361, 1369-71 (Fed. Cir. 2003) (in a personnel hearing where the employee was disqualified under 922 (g)(9), the agency must prove the domestic nature of the employee's relationship with the victim as of the time of the assault, or any time before the assault, irrespective of the findings of the court for purposes of a restraining order after the assault.)

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[1] On appeal to the Board, Appellant contests only the third component of a MCDV, and therefore he has waived any challenge to the Hearing Officer's findings on the first or second component.

Woods v. City and County of Denver also offers guidance on this issue. Woods, a Denver police officer, appealed his disqualification under 922 (g)(9). In his civil service hearing, factual evidence was introduced from which the hearing officer made specific findings about the parties' relationship. *Woods*, at 1055. On a Rule 106 appeal, the Court held these findings were sufficient evidence to support the legal conclusion that, prior to the assault, Woods and the victim were "similarly situated" to spouses for purposes of a firearms disability. *Id.* at 1055-56.

What concerns the Board here is that the Hearing Officer's conclusion finding Appellant and the victim "similarly situated" to spouses is not supported by any independent findings about the parties' domestic relationship. The Hearing Officer's conclusion was based **solely** on the conclusion of CBI Agent-In-Charge Susan Kitchen, (Decision, p. 6), while Ms. Kitchen's conclusion that the parties were "similarly situated" to spouses was based **solely** on the language of the Aurora restraining order.[2] (Transcript, pp. 141-143, 159). Specifically, the Hearing Officer found: "The Aurora Municipal Protection Order contains sufficient findings . . . upon which Kitchen could properly conclude the Appellant and victim were similarly situated to spouses as defined at 18 U.S.C. 921 (a)(33)(A)." (Decision, p. 6.)

While the Board respects the Hearing Officer's deference to CBI's opinion, that opinion is not binding on the Hearing Officer and the Board. *Woods*, at 1055. Moreover, a determination of "similarly situated to a spouse" is an ultimate conclusion of fact, meaning it is a mixed question of law and fact which the Hearing Officer, not CBI, must decide. *Id.* at 1053. Thus, it was for the Hearing Officer to determine the correct legal standard for "similarly situated to a spouse," and then determine, based on factual evidence, whether the relationship between the Appellant and the victim met that legal standard.[3] As the Hearing Officer correctly noted: "The City Charter requires the Hearing Officer to determine the facts in an appeal *de novo*, meaning hearing the evidence as though no previous action had been taken." (Decision, p 2.)

For these reasons, the Board finds the Hearing Officer's legal conclusion that Appellant and the victim were "similarly situated" to spouses for purposes of a MCDV is

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[2] CBI did not conduct an investigation into the parties' relationship. (Transcript, p. 161). Although the Sheriff's Department did conduct a limited investigation, (Ex. Notebook , pp. 87-91), neither CBI nor the Hearing Officer relied on that investigation in reaching their conclusions.

[3] Appellant argues that the factors outlined in *United States v. Costigan,* 2001 U.S. App. LEXIS 16769 (1st Cir. 2001) provide the correct legal standard in this case. However, the domestic relationship at issue in *Costigan* was whether the parties "cohabited" as spouses. Here, the parties seem to agree that the domestic relationship at issue is whether Appellant and the victim were "similarly situated" to spouses, a relationship that may, or may not, require cohabitation. For a discussion of factors that may be considered in determining whether persons are "similarly situated" to spouses, as opposed to "cohabiting" as spouses, see, *United States v. Heckenliable,* 2005 U.S. Dist. Lexis 6485 (D. Utah 2005), aff'd., *United States v. Heckenliable,* 446 U.S. 1048 (10th Cir. 2006).

not supported by sufficient evidence in the record and, without factual support, is clearly erroneous. Because the Agency bears the burden of proof in a disqualification, on remand, both parties must be given the opportunity to present testimony and evidence relevant to the Hearing Officer's determination of whether Appellant's assault conviction involved one of the domestic relationships found in 18 USC section 921 (a)(33)(A).

IV. ORDER

IT IS THERFORE ORDERED that Appellant's Petition for Review is **GRANTED,** the Hearing Officer's Decision of December 4, 2006 is **REVERSED IN PART** on those issues addressed by the Board on appeal, and this case is **REMANDED** for a limited hearing consistent with the Board's findings herein.

SO ORDERED by the Board on August 2, 2007, and documented this 14th day of August, 2007.

BY THE BOARD:

Co-Chair

Board Members Concurring:

Luis Toro
Tom Bonner
Nita Henry