HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 57-06

DECISION 11/16/07

IN THE MATTER OF THE APPEAL OF:

ANDRE RAY
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Andre Ray, a deputy sheriff, appealed his disqualification from the Denver Sheriff's Department (the Agency). The Agency requires all deputy sheriffs to carry a service weapon while on duty. The Agency determined the Appellant was disqualified based on the investigation and conclusion by the Colorado Bureau of Investigations that, due to his jury trial conviction in Aurora Municipal Court for assault and battery against Haley Torres, the Appellant was prohibited from possessing a firearm under the Lautenberg Amendment[1] to the federal Gun Control Act of 1968. I affirmed the Agency's decision to disqualify the Appellant. The Appellant appealed to the Career Service Board, challenging the applicability of Lautenberg.

The Board remanded this case for the limited purpose of conducting a hearing to determine the applicability of Lautenberg to the Appellant's assault and battery conviction. A hearing concerning the remand was conducted by Bruce A. Plotkin, Hearing Officer, on October 9, 2007. The Appellant was present and was represented by Reid Elkus, Esq. The Agency was represented by Karla Pierce, Assistant City Attorney. In addition to exhibits endorsed at the November 2, 2006 hearing, Agency exhibits 16-19 were admitted, while the Appellant offered no additional exhibits. Haley Torres testified for the Agency. The Appellant presented witnesses Sheila Raphiel, Darren Turner, and Lilly Ray. The findings from the earlier Decision dated December 4, 2006 are incorporated into this Decision.

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[1] 18 U.S.C. 922(g)(9)(1996) (hereinafter "Lautenberg")

II. ISSUES

The sole issue presented upon remand is whether the Appellant's conviction for assault and battery, on June 22, 2006, in the Aurora Municipal Court, involved one of the domestic relationships found in 18 U.S.C. §921(a)(33)(A). If the issue is resolved in the affirmative, then Lautenberg applies to the Appellant and the Agency's disqualification of the Appellant must be affirmed. If the issue is resolved in the negative, then Lautenberg does not apply to the Appellant and the Agency's disqualification of the Appellant, which was based solely upon the application of Lautenberg, must be reversed.

III. FINDINGS AND ANALYSIS

A. Introduction.

Under Lautenberg it is unlawful "for any person...who has been convicted in any court of a misdemeanor crime of domestic violence" to posses a firearm. 18 U.S.C. §922 (g) (9). The term "misdemeanor crime of domestic violence" means an offense that

> (i) is a misdemeanor under federal, state, or tribal law; and
> (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 U.S.C.S. §921(a) (33) (A).

Thus, there are three elements to establish a violation under Lautenberg: 1) the crime must be a misdemeanor, 2) the crime must have an element of physical force or threatened use of a weapon, and 3) the crime must occur between parties to one of the listed domestic relationships. In re Ray, 57-06, 3 (CSB 8/14/07), *citing* Woods v. City and County of Denver, 122 P.3d 1050, 1054 (Colo. App. 2005). The Appellant appealed only the third element. He therefore waived his right to challenge the first two elements which were established at the appeal hearing on 11/2/06. In re Ray, 57-06, n.1 (CSB 8/14/07). According to Lautenberg, the third element may be established one of three ways: if the victim shares a child in common with the Appellant, if the victim cohabited with the Appellant, or if the victim was similarly situated as a spouse of the Appellant.

B. Child in common.

The Agency did not claim the victim and the Appellant had a common child. Lautenberg, therefore, does not apply to the Appellant's assault conviction on this basis.

C. Cohabitation.

The second domestic relationship defined under Lautenberg is cohabitation. Some of the factors which determine cohabitation are: the length of the relationship; shared residence, as indicated by spending the night and keeping one's belongings at the residence; intimate relations; expectations of fidelity and monogamy; shared household duties; regularly sharing meals together; joint assumption of child care; providing financial support; moving as a family unit; joint recreation and socialization; and recognition of the live-in relationship by family and friends, as indicated by visits to the residence. U.S. v. Heckenliable, 2005 U.S. Dist. LEXIS 6485 (D. Utah 2005) (*citing* U.S. v. Costigan, 2000 U.S. Dist. LEXIS 8625 (D. Me. June 16, 2000)), *aff'd,* U.S. v. Heckenliable, 446 F. 3d 1048; 2006 U.S. App. LEXIS 10475 (10th Cir. 2006).

The Agency alleges the victim, Haley Torres, cohabited with the Appellant. This claim is based entirely on Torres' testimony. I considered the following evidence in determining whether the Appellant and Torres cohabited. My conclusions regarding the evidence follow.

1. Torres testimony.

Torres stated the Appellant stayed at her apartment occasionally throughout their relationship from June 2004 to January 2006. They separated during a four to six week period, from October to November 2005, when Torres felt the relationship was not progressing toward a lasting relationship. During that separation she dated another deputy sheriff. According to Torres, when the Appellant found out about her new relationship, he made new and more substantial overtures in mid-November 2005. For the next six weeks, Torres claimed the Appellant became much closer. They looked at a house together to move in as a family. Her lease was due to expire at the time the Appellant stated he was to close on the new house, January 2006, so she was not concerned that he did not move into her apartment. They talked about the placement of furniture in the new house. The Appellant also asked Torres to look at engagement rings in a Jared jewelry store. Rather than leave early in the morning, as he previously did when he stayed overnight, the Appellant stayed with Torres all night during the six weeks from mid-November until the assault on January 9, 2006. He kept more personal items at her apartment including a spare uniform, a set of toiletries and workout clothes. Torres' daughter was close to the Appellant and referred to him as "Ray Ray." They had dinner together frequently, traveled to and stayed at her father's ranch in Texas, where she introduced the Appellant as her boyfriend. While Torres was aware the Appellant lived with Sheila Raphiel and had dated her, she believed the Appellant's explanation that they were no longer romantically involved and that he lived at Raphiel's house as a matter of economic convenience. [Torres testimony 10/9/07].

2. Lilly Ray testimony.

The Appellant's mother stated she speaks almost every day with the Appellant, and that he generally tells her what's going on in his life. [Lilly Ray testimony 10/9/07]. She did not remember meeting Torres, and did not know the Appellant had a sexual relationship with Torres during 2005 and 2006. When asked "you probably wouldn't

have been happy to learn that either, right?" the Appellant's mother answered vehemently, accompanied by a look that can be described only as appalled, "[n]o I wouldn't have!" [Lilly Ray cross-exam 10/9/07]. Mrs. Ray's demeanor made it clear she would not brook being told by her son that he maintained two relationships at the same time.

3. Turner testimony.

Deputy Darren Turner testified that since he began working with the Appellant at the Denver Sheriff's Department in 2002 he regards the Appellant as a brother. Beginning in the spring of 2005, and until the Appellant's disqualification, Turner picked up the Appellant to drive him to work for their noon shift two to four times per week, arriving between 11:15-11:30 a.m. at the house the Appellant shared with Raphiel. Turner believed the Appellant was engaged to Raphiel for as long as he has known the Appellant up to January 6, 2006. Turner stated the Appellant never mentioned Torres, and he was unaware if they were dating. [Turner testimony] Turner acknowledged the Appellant didn't share information about who he was dating, and Turner wouldn't know if the Appellant co-habited with Torres. [Turner cross-exam].

Turner's testimony was credible. His testimony was also consistent with that of Torres in that when the Appellant stayed at Torres' apartment, he would leave early in the morning, so that when Turner picked up the Appellant at Raphiel's house, later in the morning, Turner would not know if the Appellant was home at night unless the Appellant told him, and that, according to Turner, was not the sort of information they shared. [Turner cross-exam]. As further evidence the Appellant did not share information about his dating relationships with Turner, Turner seemed surprised to learn there was a period when the Appellant was not engaged to Raphiel. *Id.* Thus, while credible, Turner's testimony was not helpful in determining whether the Appellant co-habited with Torres.

4. Raphiel testimony.

Raphiel was inconsistent concerning critical statements she made under oath both during the Appellant's trial for assault and battery against Torres, as well as during the Appellant's Career Service appeal hearing on October 9, 2007. During the Aurora trial, she testified she had not been engaged to and had not even dated the Appellant for more than two years prior to his January 9, 2006 assault of Torres, [Exhibit 19, p.67-69, 86-88, Raphiel cross-exam 10/9/07] while at hearing, she stated she was engaged to the Appellant continuously from 2002 until the January 9, 2006 assault. [Raphiel cross-exam 10/9/07]. Raphiel also explained she decided from the moment Torres called to say she was dating the Appellant, that she (Raphiel) decided she was no longer engaged. Raphiel also testified that she lied to Torres two years earlier when she (Raphiel) told Torres she was not in a relationship with the Appellant "just to save face," and lied again to Torres on January 9, 2006 when Raphiel said she was not in a relationship with the Appellant, because Raphiel "just wanted to see what she had to say." [Raphiel cross-exam 10/9/07]. Raphiel explained this inconsistency by testifying she needed to save face vis-à-vis Torres. However, during the day of, but before the assault on January 9, 2006, Raphiel also told a close friend that she was not dating the

Appellant, and Raphiel had no reason to save face with her friend. Raphiel also changed stories as to whether she first called Torres or the other way around. [*Compare* Exhibit 19, pp. 88-89 and Raphiel cross-exam]. Raphiel also changed testimony as to whether she even knew Torres before the assault. [*Compare* Exhibit 19 p.65 (where she claimed not to know Torres) *and* p. 87-88 (where, after being told only "a nurse at the Sheriff's department" was claiming to be in a relationship with the Appellant, Raphiel then telephoned Torres, something that should have been difficult to do without knowing the nurse's identity)]. It was evident during hearing that Raphiel was having difficulty keeping her myriad stories straight. Most telling was Raphiel's reply, when questioned about the reliability of her testimony under oath in the Aurora trial. "If the municipal court wanted to hear what really went on, I would have told them."

5. Appellant testimony.

At the first appeal hearing, the Appellant assiduously denied all of Torres' claims, and testified that he was only a casual friend. He specifically denied ever staying overnight at Torres' apartment, although he admitted having sex with her "three to five times" during their relationship, and admitted "hanging out" occasionally with her. He denied having any clothes or personal items at Torres' apartment, and denied regularly sharing meals together, or socializing with her. He denied traveling with Torres or meeting her parents, except once briefly in Colorado. [Appellant testimony 11/2/06]. He did not explain, however, the picture Torres brought to his house on January 6, 2006 which showed them together on horseback at her father's ranch in Texas. The Appellant explained he did not look for a house with Torres, rather that she simply wished to "hang out" with him while he viewed a potential rental house. [Appellant testimony 11/2/06].

6. Conclusions regarding cohabitation.

a. Credibility.

It was apparent the Appellant did not share the sort of personal information with his mother or friend that would place either on notice if he co-habited with Torres from mid-November 2005 to early January 2006. It was also apparent they would not have found out otherwise unless the Appellant told them.

Regarding Raphiel's testimony, even the Appellant's attorney, who called Raphiel as a witness for the Appellant, recognized the inconsistencies in her testimony. [Appellant closing argument]. There were so many critical inconsistencies in her testimony that I disregard Raphiel's testimony in its entirety as untrustworthy.

With Raphiel's testimony discredited, and the testimony of the Appellant's mother and friend credible, but unhelpful to the issue, the remaining determinative evidence comes down to who is more credible, the Appellant or Torres.

The Appellant admitted he had a sexual relationship with Torres that was more than a one-night stand. He had much to lose – his career and his fiancée, Raphiel - if he admitted his sexual relationship with Torres. Several key pieces of the Appellant's

evidence are inconsistent. The Appellant's stated relationship with Torres as simply a casual friendship, does not comport with his admission that he had an ongoing sexual relationship with her; nor is it logical, if the relationship were casual, that he would assault her.[2] The photograph of the Appellant and Torres together at her father's ranch in Texas belies the Appellant's denial of ever traveling with Torres and his denial that he ever met her parents.

On the other hand, Torres' testimony was filled with details about their long term relationship: his first infrequent stays at her apartment; their brief separation during which she dated another deputy sheriff; the Appellant's sudden warming overtures toward her when he found out about the new relationship; his newfound commitment to her; promises of moving into a specific house with many details about the house; shopping for a ring at Jared jewelry store; the Appellant's close relationship to Torres' daughter; and many other details. [Torres testimony].

The Appellant did not assail Torres' motives, only her recollection. Thus, if Torres were seeking revenge as a jilted lover and therefore lied at hearing, the Appellant never claimed such a motive. No ill-motive was otherwise apparent from the evidence, and Torres was otherwise convincing in the details of her recollection. For these reasons, Torres' testimony was more credible, by a preponderance of the evidence, than that of the Appellant. What remains to determine is whether Torres' testimony is sufficient to establish she cohabited with the Appellant.

b. Cohabitation factors under Heckenliable.

(1) Length of the relationship. The Appellant and Torres shared an ongoing intimate relationship for one and one half years.

(2) Shared residence as indicated by spending the night and keeping one's belongings at the residence. The Appellant stayed with Torres six nights per week during a six-week period from mid-November 2005 to early January 2006. There is no magical number of days under Lautenberg beyond which a sexually intimate couple who stays together under one roof is deemed to be cohabiting as spouses. The courts have found cohabitation where a couple shared a residence in a sexual relationship for between two and four months (U.S. v. Shelton, 325 F.3d 553, 563 (5th Cir. 2003), *cert. denied*, 540 U.S. 916, 124 S. Ct. 305, 157 L.Ed. 2d 210 (2003); U.S. v. Thompson, 134 F. Supp. 2d 1227, 1229, 2001 U.S. Dist LEXIS 1872 (D. Utah 2001), *aff'd,* 354 F. 3d 1197 (10th Cir. 2003), *cert denied* 541 U.S. 1081, 124 S. Ct. 2438, 158 L.Ed. 2d 997 (2004) (four months). The time spent living together is not, by itself, determinative. The Appellant's living with Torres for six weeks does not preclude a finding of cohabitation, but must be weighed along with the following additional factors.

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[2] It is axiomatic that male violence against females is most frequently inflicted by an intimate partner. *See, e.g.* World Health Organization "Multi-country Study on Women's Health and Domestic Violence against Women" (2005); University of Minnesota, Minnesota Advocates for Human Rights, "What is domestic Violence?"(2003) ("men most often use [violence] against their intimate partners, which can include current or former spouses, girlfriends, or dating partners"), http://www1.umn.edu/humanrts/svaw/domestic/explore/1whatis.htm. (last viewed 11-8-07); National Institute of Justice "Full Report of the Prevalence, Incidence and Consequences of Violence Against Women" (2000) ("Violence against women is primarily intimate partner violence"). http://www.ncjrs.gov/txtfiles1/nij/183781.txt (last viewed 11/8/07).

(3) Intimate relations. The Appellant and Torres shared an intimate relationship for approximately one and one half years.

(4) Expectations of fidelity and monogamy. Clearly, Torres' expectations of monogamy were not shared by the Appellant.

(5) Shared household duties. There was no evidence of shared household duties.

(6) Regularly sharing meals together. While the Appellant and Torres went out to dinner, it was not established that these were regular meals together.

(7) Child care factors. The Appellant and Torres did not have a child in common.

(8) Providing financial support. While there was evidence the Appellant gave some money to Torres once or twice, it was not established that there was either regularity or an ongoing commitment to do so.

(9) Joint recreation and socialization. The Appellant went out only occasionally with Torres.

(10) Recognition of the live-in relationship by family and friends as indicated by visits to the residence. While some of Torres' family was aware of her relationship with the Appellant, the Appellant kept it hidden from his friends and family.

On balance, the Appellant's relationship with Torres does not meet the Heckenliable factors sufficiently for me to conclude they cohabited as spouses under Lautenberg. Therefore, the Appellant's relationship with Torres must next be examined to determine whether they were similarly situated to spouses.

D. Similarly situated to a spouse.

Lautenberg is to be read expansively to include relationships that never involved co-habitation, but where there was such frequent contact that a risk of deadly violence would exist if firearms were present. U.S. v. Heckenliable, 2005 U.S. Dist. Lexis 6485, 13 (D. Utah 2005), *aff'd*, U.S. v. Heckenliable, 2006 U.S. App. Lexis 10475 (10th Cir. 2006). Thus, even non-intimate domestic relationships may be "similarly situated." For example, the Heckenliable court hypothesized two sisters who had a violent relationship that led to assault convictions would be prohibited from possessing firearms under Lautenberg. More specific to the present case, the Heckenliable court found sufficient evidence to send to the jury the question of whether the victim was similarly situated to a spouse where she had an intimate relationship with the defendant and they were living together for about a month. Heckenliable at 17-18.

Thus, while the Heckenliable court reads Lautenberg to include some non-intimate relationships, not all relationships may be considered similarly situated to a spouse, since the danger of deadly violence from possessing a weapon that Lautenberg intends to proscribe emanates from a certain degree of intimacy beyond, for example, plain

friendship, or a student/teacher relationship. The Heckenliable court seems to infer a certain degree of closeness or intimacy is required, [3] albeit not necessarily sexual or familial.

I do not decide here the extent of intimacy required between a convicted misdemeanant and his victim to bring the misdemeanant under the proscription of the Lautenberg amendment; however, the court's discussion in Heckenliable makes it clear the relationship of former boyfriend/girlfriend falls under the ambit of "similarly situated to a spouse." The Heckenliable court cited as an example of "similarly situated to a spouse" an extramarital affair between a married man and his secretary. Heckenliable at 15, *citing* U.S. v. Cuervo, 354 F. 3d 969 (8th Cir. 2004) (vacated on alternative grounds).

The Appellant claimed he never had a close relationship with Torres, rather they were simply friends. [Appellant testimony 11/2/06]. However, the Appellant's claim is contradicted by his ongoing, intimate relationship with Torres. The credible evidence, while insufficient to support a finding that Appellant cohabited with Torres, nonetheless establishes the Appellant and Torres shared an intimate relationship as contemplated by Lautenberg. Their relationship was ongoing for almost one and one half years, and during a six-week period between mid-November 2005 and early January 2006, the Appellant shared a residence with Torres as indicated by Appellant's spending the night and keeping personal belongings at Torres' residence.

Thus, where the Appellant and victim had an intimate relationship, the relationship was continuous for almost one and one half years, and included a six-week period in which they shared a residence; they were similarly situated as spouses under 18 USC. §921(a) (33) (A) (ii). U.S. v. Heckenliable, 2005 U.S. Dist. LEXIS 6485; In re Woods, 122 P.3d 1050 (Colo. Ct. App. 2005), *cert denied* 2005 Colo. LEXIS 1025 (2005). Consequently, the Appellant's conviction by jury in the Aurora Municipal Court for assault and battery against his victim, was a misdemeanor crime of domestic violence under Lautenberg, and as further defined at 18 USC §921(a)(33)(A)(ii).

IV. ORDER

For reasons stated above, the Agency's disqualification of the Appellant on July 31, 2006, is AFFIRMED.

DONE November 16, 2007.

Bruce A. Plotkin
Career Service Hearing Officer

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[3] The court cited, with approval, the broadly stated comment by Senator Lautenberg that his bill "aimed at keeping weapons away from the hypothetical misdemeanant who 'loses control, flies into a rage and then strikes out violently at those closest to him.'" Heckenliable @ 14. Add'l citation omitted.