

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

Appeal No. 42-07

DECISION

IN THE MATTER OF THE APPEAL OF:

JOHN LUNA, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, John Luna, appeals his disqualification from the Denver Sheriff's Department (the Agency) on July 5, 2007. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, on May 29 and 30, 2008. The Agency was represented by Assistant City Attorney Joseph Rivera, while the Appellant was represented by Jeff Town, Esq. Agency Exhibits 2, 3, 7-15, 20, and Appellant's Exhibit C were admitted. The following witnesses were called to testify for the Agency: the Appellant, Deputy District Attorney Steve Jenson, former Colorado Bureau of Investigations Agent-in-charge Susan Kitchen, Major Michael Horner, Undersheriff William Lovinger, and Manager Alvin LaCabe. The Appellant offered no additional witness.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Agency's disqualification of the Appellant was proper under Career Service Rule 14- 20 *et. seq.*
- B. whether the Agency was estopped from disqualifying the Appellant.

III. FINDINGS

The Appellant was employed by the Agency since 1992 as a deputy sheriff until his dismissal. As a deputy sheriff, the Appellant is required to carry a firearm. As part of his training as a deputy sheriff, the Appellant learned how to apply force to subdue inmates. [Appellant testimony]. He wrestled in high school and college. *Id.*

The Appellant married his second wife in 2000. Each had minor children from their previous marriages, including the Appellant's son, A., and his wife's son, W.

A. and W. lived with the Appellant and his second wife. The Appellant claimed both children as dependents. [Exhibits 14-16].

On November 5, 2002, the Appellant entered A's room to tell him to return a DVD to Blockbuster, because it was overdue. An argument ensued. The Appellant told A., then 14 years old, "to get his body out of bed." When A did not, he grabbed A's arm and told him "you will." [Appellant testimony]. The Appellant's wife called the police. The Appellant was charged with criminal negligence for "cause[ing] an injury to, or permit[ting] to be unreasonably placed in a situation that posed a threat of injury to the life or health of a child," a class two misdemeanor under Colorado state law.

On March 6, 2003, the Appellant told W., then 13 years old, to go to his room. W. refused and an argument ensued with both of them yelling and swearing at each other. The Appellant grabbed W.'s arm, and "I took him down." [Appellant testimony]. When W. tried to pull away, he heard a crack in his arm, which later was confirmed to be a broken elbow, requiring a referral to an orthopedic specialist for further medical examinations and treatment. During his first interview with police, the Appellant said W. injured his arm wrestling with a friend, but at his second interview, he admitted the incident took place as described above. He told the investigating detective he was untruthful during his first interview because he was due in court the following month stemming from child abuse charges involving his son, A., and that made him afraid. The Appellant told the investigating detective he took full responsibility for his actions. [Exhibit 9-4]. The Appellant was then charged with felony child abuse.

Both cases were resolved in Jefferson County District Court by the Appellant's plea of guilty to an added single count of child abuse against both A. and W., a class one misdemeanor, with dismissal of the original charges. [Exhibit 8-5, 8-6, 9-16, 10-2, 10-3]. The Appellant was represented by an attorney-at-law at the time of his plea, and was advised by the court as to the rights he gave up by entering his plea as well as the effect of his plea. The Appellant acknowledged there was a factual basis for his guilty plea, and admitted he used force against both children. [Exhibit 10-6 through 10-13; Jenson testimony]. Specifically, he admitted 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 to the children. [Exhibit 10-8].

While the Appellant had been prohibited under the conditions of his bond, from possessing a firearm, the condition was modified on April 18, 2003, to allow him to carry a firearm while at work. After his conviction, there was no restriction on the Appellant's ability to carry a firearm pursuant to any Jefferson County District Court order.

The day after the March 2003 incident, the Appellant informed his supervisor about the incident, and told them he was prohibited from carrying a firearm. His supervisor

gave him seven days to resolve the prohibition. [Horner testimony; Exhibit C]. The Appellant obtained a modification of his bond conditions to allow him to carry a firearm at work. His subsequent guilty plea, resulting in the release of his bond, removed all restrictions from his possession of a firearm. The Agency made no attempt to disqualify the Appellant under Lautenberg from the time his bond was modified in 2003 until 2007, when the Agency notified the Appellant that disqualification was contemplated. [Exhibit 3]. The Agency was unaware that Lautenberg applied to family child-abuse cases until another deputy appealed his Lautenberg disqualification in 2007. In re Ray, CSA 57-06 (11/16/07). [Lovingier testimony].

In June 2006 the Appellant was charged with felony sex assault. The 2007 trial resulted in a hung jury and charges were not re-filed.

The Agency served a letter in contemplation of discipline on the Appellant on June 5, 2007. A pre-disciplinary meeting was held on June 21, 2007. The Appellant attended with his attorney. On July 5, 2007 the Agency delivered its notice of disqualification to the Appellant. This appeal followed on July 13, 2007.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A. 1. d., as a direct appeal of the Appellant's disqualification. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant's disqualification was proper under CSR 14-20 *et. seq.* The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Disqualification.

Disqualification under CSR 14-20 *et. seq.* must be supported by proof that 1) the employee has a legal, physical or mental impairment, 2) the impairment occurred or was discovered after appointment, and 3) the impairment prevents the satisfactory performance of the essential functions of the position. In re Cullen, CSA 165-04, 3 (CSB 1/18/2007). The Agency claims the Appellant was disqualified under CSR 14-22 C) which states, in pertinent part, "[a]n employee shall be deemed to be disqualified if any of the following conditions occur...[w]hen laws require a license, certification, or other authorization by a federal, state or local governmental entity to perform the duties of a position and the employee does not have the required authorization." The Agency claimed deputies are required to carry a firearm, but the Appellant forfeited his right to possess a firearm under federal law when he was convicted of misdemeanor child abuse in 2003.

1. Legal Impairment.

Whether the Appellant had a legal impairment depends entirely upon the determination whether his conviction in Jefferson County Court for misdemeanor child abuse constitutes “a misdemeanor crime of domestic violence” as defined by the Lautenberg Amendment to the federal Gun Control Act of 1968. In re Ray, CSB 57-06, 3 (8/14/07). A misdemeanor crime of domestic violence, in turn, is defined as an offense that (1) is a misdemeanor under federal or state law, (2) has an element of physical force or the threatened use of a weapon, and (3) occurred between parties to a domestic relationship. *Id.*, citing Woods v. City and County of Denver, 122 P.3d 1050, 1054 (Colo. App. 2005).

a. misdemeanor under federal or state law. The Appellant did not contest this element. His misdemeanor conviction of child abuse in Jefferson County District Court satisfies this requirement.

b. physical force or the threatened use of a weapon. At hearing, the Appellant admitted to using physical force against both his son and step-son, [Appellant testimony], namely shoving his son in the chest, and applying force to his step-son that resulted in his step-son’s broken elbow. He also admitted he caused injury to both boys when he pled guilty voluntarily, and while represented by legal counsel, in his Jefferson County child abuse case. [Exhibit 10-8]. This element is established.

c. domestic relationship. The Appellant admitted the boys against whom he used force were his son and step son, both living at home with him and his wife. In addition, he claimed both boys as dependents. This element is established under 18 USC §921 (a)(33)(A), “committed by a current or former...parent, or guardian of the victim...”

The Appellant’s reference to the Jefferson County District Court’s failure to find a domestic relationship under state law, is unpersuasive. The state definition of a domestic relationship, which is restricted to intimate relationships, differs from, and does not control, the federal definition, which includes a parent-child and parent-guardian relationships, as in the present case. As all three elements, above, are established, then the Appellant was prohibited from possessing a firearm under Lautenberg.

2. Impairment discovered after appointment. The Agency discovered the Appellant’s prohibition after it referred the matter to the Colorado Bureau of Investigation’s Instacheck Unit and received an opinion that the Appellant was proscribed from firearm possession pursuant to Lautenberg. This occurred after the Appellant’s appointment. This element is established.

3. Whether the impairment prevented satisfactory performance of Appellant’s essential duties. The Appellant argued other deputy assignments at the county jail do not require the possession of a firearm, such as control center, library, and in the gym. While this is true as far as it goes, these same deputies are required to carry a firearm to and from work. [Exhibit 20]. The Appellant then argued that deputies on restricted medical duty are not required to carry a firearm. This analogy is inapplicable for reasons stated below at

IV. D. 3. In addition, all deputies are required to re-certify their proficiency in the use of a firearm every quarter. The Appellant's assertion would make it dangerous, in an emergency such as a jail break, for supervisors to determine who may be armed in response. I conclude the obligation to carry a firearm is an essential duty for all deputy sheriffs. Consequently, the Appellant's legal incapacity to carry a firearm prevents him from performing satisfactorily an essential duty of his position.

D. Appellant Claims.

1. Promissory Estoppel

The Appellant claimed even if he was disqualified from carrying a firearm under the Lautenberg Amendment, the Agency is estopped from disqualifying him from employment due to the promise made by Major Horner that if he pled guilty to the Jefferson County child abuse case, he would not lose his job. The notion of promissory estoppel is an attempt to return someone to the same status he would have occupied had it not been for the unfulfilled promise of someone in a position of authority to make the promise. The Appellant must establish each of the following elements in order to prove promissory estoppel: (1) someone with authority to represent the Agency, and who should have known the Appellant would rely on it, made a promise to the Appellant (2) the Appellant relied on the promise; (3) in relying on the promise, the Appellant changed his position to his detriment. See Struble v. American Family Ins. Co., 172 P.3d 950 (Colo. App. 2007).

Horner denied making such a promise. [Horner testimony]. Moreover, the only person empowered to make such a promise is the Manager of Safety, Alvin LaCabe, who stated he did not and would never have made such a promise. [LaCabe testimony]. Neither side is more credible than the other on this point, and the Appellant introduced no extrinsic evidence proving such a promise was made. Consequently this claim fails.

2. Pretense

The Appellant claims his disqualification was a pretense to fire him after his arrest on charges of sex assault to a minor in 2006, even though the case was eventually dismissed. The Appellant failed to state, even if true, what Career Service Rule, or other applicable authority was violated. The Appellant also failed to prove his pretense claim. His own statement of the claim accurately identifies the extent of his proof. "Appellant was recently charged with Felony Sex Assault; however, was not found guilty of those charges. Coincidentally, the Department is now looking to disqualify Appellant on the heels of that recent felony trial." [Appellant amended pre-hearing statement]. More than coincidence is required to prove pretense. Moreover, when the Agency undertook a pre-disciplinary process following the Appellant's arrest for felony sex assault, LaCabe rejected the disciplinary process as inadequately investigated. This is not the response of an agency looking for a reason to dismiss an employee. Finally, the Agency explained that it was unaware of the application of Lautenberg to family child abuse cases until it came to light with the Ray appeal in 2007. This contention was not

rebutted by the Appellant. For these reasons, the Appellant's pretense claim is not proven by a preponderance of the evidence.

3. Failure to Provide Reasonable Accommodation.

The Appellant alleged that, even if he was under a legal disability to possess a firearm, the Agency could have but failed to accommodate his disability by assigning him to a post that does not require a deputy to carry a firearm. He gave the example of medical disability. First, unlike some circumstances in a medical disability, the Agency is never obligated to provide an accommodation for a legal disability. "If it is determined that an employee is not disabled within the meaning of the ADA, the agency or department need not attempt to make a reasonable accommodation and disqualification may be initiated." CSR 14-21. Second, while the Agency acknowledged some assignments at the county jail do not require the carrying of a firearm, Agency rules require all deputies to bring a firearm to work. "Deputy Sheriffs shall carry firearms to and from their place of duty..." [Exhibit 20]. The use of the word "shall" makes it mandatory for all deputies to carry a firearm, regardless of assignment. For these reasons, the Appellant failed to prove this claim by a preponderance of the evidence.

4. Improper Reliance on State Agency to Disqualify Appellant.

Appellant claims the Agency's reliance on the opinion of the Colorado Bureau of Investigation's Instacheck Unit was an improper basis upon which to disqualify the appellant, since Lautenberg is federal law, and should be interpreted only by federal authority. I disagree. First, an agency is free to consult any source it deems appropriate to interpret the laws that apply to it. More importantly, this appeal is a de novo hearing in which I am required to make findings independently of the Agency and its advisors, in deciding whether the facts of this case establish a Lautenberg disqualification. See In re Ray, CSB 57-06 (8/14/07). Thus, this claim also fails.

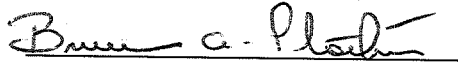
V. CONCLUSIONS

The Appellant's conviction in Jefferson County District Court on a charge of misdemeanor child abuse constitutes a misdemeanor crime of domestic violence as defined by Lautenberg. The Appellant is therefore legally impaired from possessing a firearm under CSR 14-22 C. The impairment was discovered by the Agency after the Appellant's employment. The Appellant was required to possess a firearm as an essential function of his position. The Appellant's claims failed to rebut any of these conclusions and failed to state any exception to the rule on disqualification.

VI. ORDER

The Agency's disqualification of the Appellant on July 5, 2007, is AFFIRMED.

DONE July 15, 2008.


Bruce A. Plotkin
Career Service Hearing Officer