

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 **AFFIRMS** the Hearing Officer's Decision dated November 16, 2007 on the grounds outlined below.

I. PROCEDURAL AND FACTUAL BACKGROUND

As a deputy sheriff, Appellant was required to carry 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 the conviction was a misdemeanor crime of domestic violence (MCDV) under the Lautenberg Amendment to the Gun Control Act, which prohibited Appellant from possessing a firearm. As a result of this opinion, Appellant was disqualified from his employment. Appellant appealed to the Career Service Hearings Office and the Hearing Office, relying on Agent Kitchen's opinion, affirmed the disqualification. Appellant then appealed to the Board.

The Board reversed the Hearing Officer, in part, and remanded this case for the limited purpose of determining, factual and legally, whether Appellant and Ms. Torres shared one of the domestic relationships giving rise to a MCDV under the Lautenberg Amendment. A second career service hearing was held on October 9, 2007, during which both parties presented testimony about the relationship. The Hearing Officer

concluded that Appellant and Ms. Torres were “similarly situated” to spouses within the meaning of the Lautenberg Amendment and affirmed the Agency’s disqualification. This appeal follows.

II. FINDINGS

Appellant seeks review under CRS 19-61 B. and 19-61 D. The Board will address both jurisdictional grounds for appeal.

CSR 19-61 B., Erroneous rules interpretation: the Hearing Officer’s decision involves an erroneous interpretation of the Rules.

Appellant asserts that the Hearing Officer violated CRE 201 by improperly taking judicial notice of evidence not in the record, and in so doing, erroneously interpreted CSR 19-30 A. This career service rule sets forth the general authority of CSA hearing officers to hear and decide appeals permitted by the rules and “to maintain a fair and efficient process” for those appeals. Appellant’s argument is based on the Hearing Officer’s brief footnote reference to several treatises that were not admitted into evidence. As part of his explanation for finding Appellant’s characterization of the relationship as a casual friendship not credible, the Hearing Officer cited to sources which generally supported his conclusion that Appellant would not have assaulted Ms. Torres unless they shared an intimate relationship.

However, the Hearing Officer’s eight-page decision clearly demonstrates that this single conclusion was only a small piece of the evidentiary foundation upon which he formulated the ultimate conclusion that Appellant and Ms. Torres shared a sufficiently close, on-going, intimate relationship to be considered “similarly situated” to spouses within the meaning of the Lautenberg Amendment. While the Board does not approve of the Hearing Officer supporting his conclusions with scientific or academic treatises not found in the record, in light of all the factual evidence presented on the relationship of the parties and the extensive factual and legal analysis by the Hearing Officer, the Board finds this brief citation harmless.

More importantly, it does not create a jurisdictional ground for appeal that otherwise does not exist. There is no indication that the Hearing Officer ever invoked CRE 201 to take judicial notice of what was cited in the footnote and CSR 19-50 A. provides that “strict rules of evidence shall not apply” in career service appeals. Moreover, even if the Hearing Officer may have misapplied an evidentiary rule he was not required to follow, Appellant has failed to demonstrate that the Hearing Officer erroneously interpreted any career service rule for purposes of invoking the appellate jurisdiction of the Board.

CSR 19-61 D., Insufficient evidence: the Hearing Officer’s decision is not supported by the evidence. The Board may only reverse a decision on this ground if the Hearing Officer’s decision is clearly erroneous.

Appellant argues that the Hearing Officer's decision is unsupported by the evidence in the record, but this argument is nothing more than a disagreement with the Hearing Officer's credibility determinations. At the October 9th hearing, the Agency provided testimony from the victim of the assault, Ms. Torres, while Appellant relied on testimony from his one-time fiancée, Ms. Raphael, his mother and a friend. Appellant did not testify at the second hearing but relied on his testimony from the first hearing.

The Hearing Officer found Ms. Raphael's testimony so blatantly contradictory to her previous testimony at Appellant's assault and battery trial that he dismissed it as completely untrustworthy. Although Appellant's mother and friend were found to be credible witnesses, their testimony was unhelpful to the Hearing Officer as they had no personal knowledge about Appellant's relationship with Ms. Torres. Not surprisingly, the determinative evidence came down to the testimony of Ms. Torres and Appellant and each characterized their relationship differently.

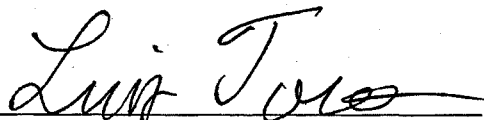
It is certainly within the Hearing Officer's province to assess the credibility of witnesses. The fact that the Hearing Officer found Ms. Torres more convincing than Appellant does not transmogrify his factual findings into insufficient evidence. Indeed, Ms. Torres' testimony provides ample factual support for the Hearing Officer's ultimate conclusion that she and Appellant were "similarly situated" to spouses for purposes of a MCDV under the Lautenberg Amendment. Given this testimony, Appellant has failed to demonstrate that the Hearing Officer's ultimate conclusion is clearly erroneous.¹

III. ORDER

IT IS THEREFORE ORDERED that Appellant's Petition for Review is **DENIED** and the Hearing Officer's Decision of November 16, 2007, is **AFFIRMED**.

SO ORDERED by the Board on May 15, 2008, and documented this
20th day of May, 2008.

BY THE BOARD:


Luis Toro, Co-Chair

¹ On appeal to the Board, Appellate contests only the Hearing Officer's factual findings regarding his relationship with Ms. Torres, not the Hearing Officer's legal interpretation of the phrase "similarly situated to a spouse" found in 18 USC § 921 (a)(33)(A).