

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

Appeal No. 57-06

DECISION

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, appeals his disqualification from employment in the Denver Sheriff's Department (the Agency). The Agency determined the Appellant was disqualified from his job as a deputy sheriff based on the investigation and conclusion by the Colorado Bureau of Investigations that, due to his conviction in Aurora Municipal Court for assault and battery, federal gun control legislation prohibited the Appellant from possessing a firearm, an Agency requirement. The Appellant disputes the applicability of the federal law. I affirm the Agency's decision to disqualify the Appellant.

II. FINDINGS

The essential facts are not substantially in dispute. As a deputy sheriff for the Agency, the Appellant was required to possess a firearm. On January 14, 2006, the Appellant was charged with assault and battery under the Aurora Municipal Code. A jury subsequently convicted him of both charges at trial on June 22, 2006. The court record contained, *inter alia*, the following evidence.

Haley Torres had been dating Andre Ray...[S]he found out that Andre had been living with Sheila Raphiel...during [Haley's relationship with Andre]...and that Sheila and Andre owned the house at 412 Nile together...[S]he text messaged Sheila and told her they needed to talk...Sheila telephoned her and they began talking...Sheila told her to come over to her house so they could talk...[O]n 1/09/05 at approximately 0930 hours [Haley and her 2 year-old daughter] had gone over to 412 Nile to talk with Andre and Sheila as Sheila suggested...Andre grabbed [Haley's] right arm and said "You don't know who you're fucking with" ...and pushed her...[S]he continued to question Andre and he started coming

towards her and she backed up into the door...Andre twice grabbed the hood of her sweatshirt with his left hand, twisted it so that it was choking her and [he] brought her down to the floor...[S]he felt pain around her neck because her hoodie was zipped up and it started choking her when Andre twisted it...[Sheila] had to pull [Andre] off [Haley] both times. [Andre stated to Sheila] that he had only had sex with Haley 3 times and hung out with her 5 times.

Exhibit 7-15, 16.

Before trial, based only upon Haley's statement, a Municipal Protection Order entered against the Appellant on January 17, 2006. The court found "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." [Exhibit 15-11]. At the request of the victim, the order was modified, on January 30, 2006, to eliminate the no-contact provision regarding her. [Exhibit 15-12]. Although both Orders contain a check-off provision to prohibit possession of a firearm or other weapon, neither order was checked off to prevent the Appellant from possessing a firearm or other weapon. [Exhibit 15-11, 12]. The Agency consulted with the Colorado Bureau of Investigations Insta-check unit which reviewed the Aurora case under its regulations. [Exhibit 11]. The Insta-check agent-in-charge determined the Appellant was ineligible to possess a firearm due to his Aurora conviction. [Kitchen testimony].

A pre-disqualification meeting was conducted November 15, 2005. The Appellant attended with legal counsel. The Agency was represented by Director Lovingier, Division Chiefs Foos and Smith, Majors Kielar and Deeds, and Mr. Richard Rosenthal from the Office of Independent Monitor. Following the meeting, the Agency issued its notice of disqualification on July 31, 2006. This appeal followed.

III. ANALYSIS

A. Introduction

The key to this case is whether the 1996 Lautenberg Amendment, 18 U.S.C.S. § 922(g)(9) (1996), to the Federal Gun Control Act of 1968 (FGCA), 18 U.S.C.S. § 921 (1986) *et seq.* applies to the Appellant. Both sides agree the Act would prohibit the Appellant from possessing a firearm if the elements of the Act were met. They also agree the only basis for the Agency disqualification of the Appellant was because the Agency found he was prohibited from possessing a firearm under the Act. The Agency argues each element of the Act applies against the Appellant. The Appellant replies with the following extended syllogism: Lautenberg is unconstitutionally vague; if Lautenberg is constitutional, it does not apply to him; if Lautenberg does not apply to him, he is entitled to possess a firearm; and since he is entitled to possess a firearm, his disqualification under CSR 14-42 was improper.

B. Jurisdiction

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. Turner v.

Rossmiller, 532 P.2d 751 (Colo. App. 1975), 1975 Colo. App. LEXIS 969, (add'l citations omitted). I find the subject of disqualification is properly before me, and it appears there is no issue regarding personal jurisdiction.

C. The Lautenberg Amendment

Before 1996, an exemption in the FGCA, 18 U.S.C. 925(a)(1), allowed military and law enforcement personnel to possess firearms for official duties even while subject to a restraining order prohibiting firearm possession for personal use. The Lautenberg Amendment (Lautenberg), 18 U.S.C.S. § 922(g)(9) to the FGCA, removed the military and law-enforcement exemption by prohibiting any individual convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. Ward v. Tomsick, 30 P.3d 824 (Colo. Ct. App. 2001). The term "misdemeanor crime of domestic violence" is defined, in pertinent part, as a federal, state, or tribal offense involving the use or attempted use of physical force by a person who has cohabited with the victim, or by a person similarly situated to a spouse. 18 U.S.C.S. § 921(a)(33)(A)(ii).

D. Whether Lautenberg is unconstitutionally vague.

The judicial branch of government retains exclusive jurisdiction over the constitutionality of statutes. Celebrity Custom Builders v. Industrial Claim Appeals Office, 916 P.2d 539, 541 (Colo. Ct. App. 1995), *citing* Arapahoe Roofing & Sheet Metal, Inc. v. Denver, 831 P.2d 451 (Colo. 1992). Therefore, as a hearing officer within an agency of the executive branch, I have no authority to rule on this question.

E. Whether the Lautenberg Amendment applies to the Appellant

The Appellant's remaining challenges to the Agency's application of Lautenberg to the Appellant are as follows: (1) the Appellant's municipal ordinance conviction is not a "federal, state, or tribal offense" as required under Lautenberg; (2) in entering its "Municipal Protection Order," the Aurora court never entered a finding that the Appellant's assault and battery conviction was a "crime of domestic violence" as required by Lautenberg; (3) neither the January 17 "Municipal Protection Order," nor the January 30 order vacating the earlier no contact provision, placed a restriction on the Appellant's possession of a firearm, as claimed by the Agency, and therefore there was no basis for the CBI to have concluded the Appellant should be prohibited from carrying a firearm; (4) The Appellant and victim in the Aurora case were not "similarly situated" to spouses, as required under Lautenberg; (5) the Aurora Court failed to conduct a hearing, as required by Lautenberg, before issuing its Municipal Protection Order. I address each contention in order.

1. Whether Appellant's Aurora Municipal conviction is a "federal, state, or tribal offense" under Lautenberg.

The Appellant claims the Appellant's assault and battery convictions under the Aurora Municipal Code are not "a federal, state, or tribal offense" as required under Lautenberg. In support of his contention, the Appellant cites People v. Bovard, 99 P.3d

585 (Colo. 2004), presumably where the Court stated “[w]e have acknowledged that the violation of a municipal ordinance does not come within the definition of section 18-1-104 [which defines and classifies “offenses” into state felonies, misdemeanors and petty offenses]. I find Bovard inapplicable for several reasons. First, the Bovard Court only referenced these classifications in *dicta*. Second, the Court did not address whether municipal violations may fall under the purview of Lautenberg. Third, the Bovard court’s *dicta* referenced an 1888 Colorado case which held municipal ordinance violations are civil actions, not criminal. City of Greeley v. Hamman, 12 Colo. 94, 20 P. 1 (1888). The law has obviously changed since that time.

In addition to the foregoing, the Colorado Court of Appeals determined a Denver Police Officer convicted of municipal ordinance assault was properly disqualified under Lautenberg. Ward v. Tomsick, 30 P.3d 824, 826-827 (Colo. Ct. App. 2001). The facts in Ward are remarkably similar to the present case. In 1994, Ward, a Denver police officer, was convicted under the Edgewater Municipal Code for domestic assault against his wife. Then, in 1999, the Bureau of Alcohol, Tobacco, and Firearms issued an opinion stating that, because of this conviction, Ward was prohibited from possessing a firearm. The Denver police department then disqualified him from employment. Ward sued, alleging, as the Appellant here, that the Commission’s decision was arbitrary, capricious, and without jurisdiction because his assault conviction did not constitute a “misdemeanor crime of domestic violence” under Lautenberg. Ward v. Tomsick, 30 P.3d 824, 825 (Colo. Ct. App. 2001). The court found

[i]t was appropriate to look at the charging documents as a whole to determine the precise crime to which the defendant had pled guilty. Those documents clearly indicated that the defendant had been charged with and convicted of an offense containing an element of physical force, which was sufficient as a predicate offense under the Act [Lautenberg].

Id.

In examining the charging documents, the Ward court found the summons and complaint charged Ward with a violation of Assault, Domestic Violence. Incident reports from the Edgewater Police Department alleged Ward “pushed his pregnant wife into a wall, causing cuts and bruises to her hand and foot and causing her to fall on her stomach.” *Id.*, at 826-827. Similarly, in the present case, the responding officers completed a “Domestic Violence Case Summary,” a “Domestic Violence victim Survey,” and the court entered a conviction of assault and battery after the jury found him guilty of those two counts. Despite the Appellant’s contention, the evidence established the Appellant and the victim had been boyfriend and girlfriend. The victim found out the Appellant was seeing another woman, called her up and, at the invitation of the other woman, went to the other woman’s house where the Appellant was staying. During the ensuing argument between the victim and the Appellant, the Appellant twice grabbed the victim and choked her by twisting her sweatshirt into her neck while he pushed her head against the wall. The current girlfriend had to pull him off the victim twice. [Exhibit 15]. These facts closely resemble the facts as established in Ward. Consequently, the Colorado Bureau of Investigation’s (CBI) found and recommended to the Denver Sheriff’s Department, that the underlying facts establish a Lautenberg prohibition against the Appellant. Based upon the similarity between the facts of the present case to those in Ward, I find the Appellant was convicted of an offense containing an element

of physical force, which was sufficient as a predicate offense under Lautenberg.¹

2. Whether the Appellant's Aurora Municipal conviction constitutes "domestic violence" under Lautenberg?

The Appellant's argument here is twofold: first, the Aurora court never entered a finding of domestic violence in the Appellant's conviction; and second, the definition for "domestic violence" is less restrictive in the Aurora ordinances than in Lautenberg, so that the Appellant did not commit an offense involving domestic violence as defined under Lautenberg when the facts of the Aurora case are properly analyzed.

a. The Aurora court's failure to enter a finding of domestic violence. This issue was directly addressed in a recent 10th Circuit case. The court stated:

The issue raised in this appeal is whether the domestic relationship component of § 922(g)(9) need be an element of the predicate misdemeanor offense. Although this is an issue of first impression in our circuit, the nine circuits that have addressed this question have agreed, albeit for varying reasons, that it need not. We ... join our sister circuits, and affirm.

United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006). Thus, it was unnecessary for the Aurora court to have entered a finding of domestic violence, as advocated by the Appellant, in order for the CBI to find the facts in the Aurora case met the domestic violence component of Lautenberg.

b. Whether the definition of "domestic violence" under the Aurora Municipal Code is less restrictive than under Lautenberg.

Since it is unnecessary for the Aurora court to enter a finding of domestic violence in order to establish domestic violence under 18 U.S.C. 922 (g) (9),² then it is irrelevant whether the relative definitions of "domestic violence" are more or less restrictive. Moreover, even assuming the Aurora definition is less restrictive, CBI Agent-in-charge Kitchen credibly testified, and reasonably concluded there was (1) a use of force (2) against a certain category of victim, in this case the Appellant's former girlfriend, thus the Appellant and victim were "similarly situated to spouses." These were the only elements required for Kitchen to have reasonably concluded the Appellant was convicted of a "misdemeanor crime of domestic violence." Therefore, Kitchen's conclusion that the Aurora conviction established the Appellant had been convicted of a domestic violence crime was proper.

¹ Without explaining how a municipal violation qualifies as a "misdemeanor crime of domestic violence," as defined by the Lautenberg, the Ward court seems to have assumed it does.

² "misdemeanor crime of domestic violence" requires the domestic relationship element to be charged and proven as an element of a § 922(g)(9) [Lautenberg] violation, not as an element of the underlying misdemeanor. United States v. Heckenliable, 446 F.3d 1048, 1051 (10th Cir. 2006)

c. Since the Aurora court did not prohibit the Appellant from possessing a firearm in the underlying case, whether the CBI improperly recommended such prohibition under Lautenberg.

The Aurora Municipal court did not place a restriction on the Appellant's purchase or possession of a firearm. [Exhibit 6, 6-2]. The Appellant argues since the Aurora court did not place a prohibition on the Appellant's possession of a firearm, then the CBI had no basis to determine the Appellant was ineligible to possess a firearm. [Kitchen cross-examination].

It was established earlier, that the Application of Lautenberg to the Appellant is not dependent upon the underlying Aurora court's Municipal Protection Order. Lautenberg requires the predicate offense, in this case the Aurora conviction, to have only two elements: the use or attempted use of physical force or the threatened use of a deadly weapon, and that the offense was committed by a qualified individual. 18 U.S.C. §921(a) (33), United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999). Kitchen properly found the documents underlying the Appellant's Aurora case proved the Appellant used force on the victim. The next issue is whether the Appellant and victim were qualified individuals under Lautenberg.

3. Whether the victim and Appellant were "similarly situated" to spouses.

Kitchen concluded the victim and Appellant were "similarly situated" to spouses," as defined at 18 U.S.C. 921 (a) (33) (A), based solely upon on the Aurora Court's Municipal Protection Order. [Kitchen cross-exam]. The Appellant argues Lautenberg requires a current live-in relationship in order to qualify as "similarly situated to a spouse." [Kitchen cross-exam]. I disagree. Under Lautenberg, "once a domestic relationship has begun, violence in the context of that relationship is domestic regardless of whether the parties terminated their relationship before or after the violence occurred." Woods v. City and County of Denver, 122 P.3d 1050 (Colo. App. 2005), 2005 Colo. App. LEXIS 1008. Thus, Lautenberg clearly encompasses both past and present live-in relationships. 18 U.S.C. §922 (g) (8), 921 (a) (32). The Aurora court found the Appellant "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." [Exhibit 6-1, 6-2]. The Aurora Municipal Protection Order contains sufficient findings, as described above, 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).


4. Whether the issuance of the Aurora Court's Municipal Protection Order complied with Lautenberg. The Appellant claims the Aurora court failed to provide a hearing, as required by Lautenberg, before issuing its Municipal Protection Order. The Lautenberg prohibition against firearm possession applies to a person who is subject to a court order issued after a hearing at which the person had an opportunity to participate, 18 U.S.C. 922 (g) (8). The Appellant was present for the issuance of the protective order. He was advised by the court as to the provisions it contained. He asked the court questions about the order. The court found sufficient cause for issuing its order. [Exhibit G]. I find these elements meet the Lautenberg requirements under 18 U.S.C. 922 (g) (8). In addition, even if I found the Aurora court's hearing was non-complying, it is not the exclusive means by which the

Appellant may be prohibited from firearm possession under Lautenberg. The Appellant is also prohibited from firearm possession for a "conviction in any court of a misdemeanor crime of domestic violence." 18 U.S.C. 922 (g) (9). It has already been established that the Appellant's Aurora conviction falls under this provision.

IV. CONCLUSION AND ORDER

I find the Agency's disqualification of the Appellant under Lautenberg was sustained by a preponderance of the evidence. None of the Appellant's claims over which I have jurisdiction have overcome the Agency's findings. For these reasons, the Agency's disqualification of the Appellant on July 31, 2006 is SUSTAINED.

DONE this 7th day of December, 2006.


Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board to review this decision, in accordance with the requirements of CSR § 19-60 *et. seq.*, within fifteen calendar days after the date of mailing of the Hearing Officer's Decision, as indicated in the certificate of mailing, below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.

CERTIFICATE OF MAILING

I certify I have forwarded a correct copy of the foregoing **DECISION**, by depositing it in the U.S. mail, postage prepaid, this 5th day of December, 2006, addressed to:

Reid Elkus, Esq.
Elkus & Sisson, P.C.
1444 Blake Street
Denver, CO 80202

Mr. Andre Ray
1548 S. Salida Court
Aurora, CO 80017

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION**, by depositing same in interoffice mail this 5th day of December, 2006, addressed to:

Joseph A. DiGregorio, Assistant City Attorney
City Attorney's Office
Litigation Section
201 West Colfax Avenue Dept. 1108
Denver, CO 80202



Linda Zimm