THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WALTER SETTLES	)	
Employee	)	OEA Matter No. 1601-0014-08
	)	
	)	
	)	Date of Issuance: August 22, 2008
D.C. DEPARTMENT OF CORRECTIONS,	)	
	)	
Agency	)	ROHULAMIN QUANDER, Esq.
	)	Senior Administrative Judge
	)	

Walter Settles, Employee *Pro-Se*
Matthew J. Franks, and Fred Staten, Jr., Agency Representatives

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 8, 2007, Walter Settles ("the Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the decision of the D.C. Department of Corrections ("the Agency"), effective on November 9, 2007, to terminate him from his position as a Correctional Officer, DS-8, Step 9. Agency's investigation sustained that Employee had been convicted of a crime of domestic violence, and was thus unable to carry a firearm as prohibited by the Lautenberg Act (the "Act"), codified at Title 18, United States Code, § 922(g)(9). Further, because of the firearm proscription, his prior conviction rendered Employee incompetent to continue serving as a Correctional Officer, a position he has filled in an exemplary manner since 1986.[1]

The matter was assigned to this administrative judge (the "AJ") on November 28, 2007. I convened a Prehearing conference on January 22, 2008, and a subsequent

[1] During the course of the evidentiary hearing, Fred Staten, Jr., Agency's representative, referred to Employee as "exemplary," noting that he was one of Agency's more professional and diligent employees, blessed with an excellent work history, despite the circumstances of this case, which resulted in Agency's decision to terminate the Employee.

evidentiary hearing on April 8, 2008. Agency was initially represented by Fred Staten, Jr. ("Staten"). However, Staten recently retired, and the matter was reassigned to Mitchell J. Franks ("Franks"), who currently serves as the Agency's representative. At the direction of the AJ, both the Employee and the Agency filed Proposed Findings of Fact, Conclusions of Law, and Final Orders. Due to Staten's retirement shortly after the evidentiary hearing was concluded, and upon a motion for an extension of time, but over the objection of the Employee, the AJ granted Agency additional time within which to prepare and file Agency's proposed final order. In Agency's motion, Franks pleaded that he needed to familiarize himself with the case, before he could prepare and file Agency's proposed final order. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

There are several issues to be decided in this matter, essentially as follows:

1. Whether the relationship between Felecia McCain ("McCain"), the complainant in the domestic violence allegation, and Employee met the criteria for establishment of an "intimate partner" or domestic partner relationship, as the former term is contemplated by the Lautenberg Act, under Title 18, United States Code, § 922 (g) (9);
2. Whether the crime to which Employee pled guilty was one of domestic violence, as defined, for the purposes of Title 18, United States Code, Section (g) (9).

3. Whether the nature and specifications of Employee's job duties require him to be proficient with and handle a weapon and ammunition.
4. Whether Agency's adverse action of terminating the Employee from his position on the basis of incompetence, was a reasonable action, done in accordance with applicable law, rule or regulation.

STATEMENT OF THE CHARGES

On April 2, 2007, William Smith, Warden, D.C. Department of Corrections, issued a letter of Advanced Written Notice of Proposed Termination. The charge against Employee was "Incompetence." The supportive Specification Statement enumerated the following:

> During a National Crime Information Center (NCIC) background criminal history check conducted by DOC's Office of Internal Affairs to determine your suitability for firearms training, possible promotion or as part of a sporadic check, it was discovered that on September 9, 1994 you were found guilty and subsequently convicted of "Battery" against Felicia McCain, your former girlfriend, which is a misdemeanor crime of domestic violence. According to documents certified by the Custodian of Records at the District Court of Maryland, you were sentenced to a probation term of one (1) year to end September 9, 1995.
>
> Title 18 United States Code U.S.C.) ∫ 922(g) makes it illegal for certain groups of people to carry a firearm. Section (g)(1) makes it illegal for anyone who has been convicted of a felony to possess any firearm or ammunition. Section (g)(9) makes it illegal for anyone who has been convicted of a misdemeanor crime of domestic violence to possess any firearm or ammunition. Misdemeanor crimes of domestic violence are generally defined as any offense, whether or not explicitly described in a statute as a crime of domestic violence, which has, as its factual basis, the use or attempted use of physical force or the threatened use of a deadly weapon committed by the victim's current or former domestic partner, parent, or guardian. The term "convicted" is generally defined in the status as excluding anyone whose conviction has been expunged or been set aside, or has received a pardon. These provision apply to all convictions under Title 18 U.S.C. ∫∫ 922 (g)(1) and (9). The provisions also apply to persons convicted at any time prior to or after passage of the September 30, 1996 law. Finally, there is no exemption for law enforcement officers and agents. *Agency Exhibit #4*

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Agency's Case

Testimony of Felicia McCain: Felicia McCain (the "witness") testified that she met Employee in 1994 at the Classics nightclub in Maryland, and that they dated for two to three months, although she did not consider themselves as necessarily being "a couple." This relationship included several dates, particularly to the movies, and included sex on two occasions. The first occasion was consensual, but the second was forced, during which time Employee held the witness against her will. She noted that during an argument, Employee shoved her around, and in essence held her hostage, so that she could not leave his apartment. She decided then that she no longer wished to have a relationship with the Employee, but Employee stalked her, including jumping out of the bushes at her parent's house, where the witness lived, assaulting her, and taking her purse. As a result of that incident, she pressed formal charges against the Employee. *Transcript ("Tr.") Pp. 34-35*

The record reflects that on July 14, 1994, McCain filed criminal charges against Employee with the Prince George's County Police, alleging the theft of her purse and its contents, valued at less than $300.00, and a battery against her person. According to the Police Report:

> On 07/14/94, at 0300 hours, the above defendant approached the victim in front of her residence at 1202 Hill Rd. in Landover, Md. The defendant is the ex-boyfriend of the victim. The defendant pushed the victim and took her purse. Inside the purse was $40 US currency, pager, cosmetics, miscellaneous items. The defendant took the purse and left the scene on foot. This investigator contacted the defendant and picked him up at his residence on 07/15/94 at 0946 hours. The defendant was transported to Dist III Station, where he was charged with battery and theft under $300. The defendant was released on personal recognizance.

Agency Exhibit #1[2]

On cross examination by Employee, *pro se,* the witness denied that during the time that she and Employee came to initially know each other, she was experiencing any female problems which prohibited her ability to have sex. She described in detail the 3:00 a.m. attack in front of her home, and Employee's running off on foot, and her subsequently filing formal charges with the police, who arrested the Employee on the following day, July 15th. She described this attack as the second assault, the first being when he allegedly detained her in his apartment, and forced her to have sex against her will. Although he allegedly struck her with a closed fist at least once, and possibly twice, during the incident of her being involuntarily held in his apartment, she did not report the first incident, because of fear, and threats that he delivered against her and potentially

[2] Agency moved Exhibit #1, a Prince George's County Arrest Report, into the record. Employee objected on the basis that the statement in the document that referred to the Employee's as the witness's "ex-boyfriend" was not true. The AJ advised the Employee that the moving of a document into the record did not necessarily mean that all of the contents of the document were adopted by the court as true and accurate. The document was accepted by the AJ, and assigned as Agency's Exhibit #1.

against her parents. *Tr. Pp. 40–47; 52-53.*

During her testimony narrative, the witness said that she did not use the term "boyfriend" or "ex-boyfriend" when discussing the matter with the investigating police officer, and never considered Employee to be her boyfriend. She conceded that, based upon how she described the relationship that she had had with the Employee, which had then only been concluded a short time before the July 14th incident, the officer may have assumed that a "boyfriend" or "ex-boyfriend" relationship existed. Later, when directly asked by this AJ whether, in retrospect, and long removed from the date of the incident, she considered the Employee to have ever been her boyfriend, she replied, "No!" Further, the witness voluntarily stated during Agency's direct examination that, although she and Employee had a relationship, they were not a couple. *Tr. Pp. 34, 47-48*

The witness testified that, although she never visited Employee's residence located in Virginia, she helped the Employee move into his apartment in Laurel, Maryland. Further, she cleaned up after Employee had cooked for both of them, probably cleaned the bathroom, and was quite certain that she has showered in his bathroom. She also spent more than one night at the apartment, including spending as much as two consecutive nights there. *Tr. Pp. 54-57*

Testimony of Devon Brown, Director, D.C. Department of Corrections: Devon Brown (the "witness") has 34 years of law enforcement and correctional institution experience. He has served in several positions of prison or correctional institution related leadership, and at the time of the Employee's termination, was the Director of the Agency, a position which he still held at the time of the evidentiary hearing. *Tr. Pp. 136-138*

By Notice of Memorandum dated February 8, 2006, Wanda Patten, Chief, Office of Internal Affairs for Agency, notified the witness that on July 15, 1994, Settles was charged with Misdemeanor Theft and Battery against McCain. *Agency Exhibit #3* Patten's notification referred to McCain as Employee's former girlfriend. The Memorandum provided certain details and had several attachments, which detailed that the matter was adjudicated in Prince George's County, Maryland District Court, and that on September 9, 1994, Employee was found guilty of battery, which under the Act and relevant definitions, was a misdemeanor crime of domestic violence. The nature of the offense rendered Employee incompetent to carry out a major component of his job-related duties, i.e., to be proficient with a firearm, a critical necessity in a prison facility *Agency Exhibit #6, Pp. 1-6; Tr. P. 139-143*

On March 3, 2006, the witness issued a letter to the Employee, informing him that during a National Crime Information Center (NCIC) background criminal history check conducted by the Office of Internal Affairs (OIA), it was revealed that Employee had a conviction for misdemeanor domestic violence. The letter also informed Employee of the provisions of Title 18, U.S.C., §§ 922(g) (1) and (g) (9), and apprised Employee that, pursuant to the District Personnel Manual regulations in Chapter 4, he would have fifteen (15) calendar days to provide OIA with court certified documents that explained any

discrepancies, omissions, misinformation or mitigating circumstances that may exist and which are unknown to the OIA. *Agency Exhibit #7; Tr. P. 150*

On April 2, 2007, Agency issued to Employee an Advance Notice of Proposal to Remove letter which proposed to terminate his employment for the adverse action cause of "Incompetence." *Agency Exhibit #4* The proposal to remove matter was assigned to Steve Fezuk ("Fezuk"), Hearing Officer, who evaluated the evidence presented for his consideration. *Tr. Pp. 144-146* Employee filed a timely response and met with Fezuk, as a component of his investigation into the Employee's work eligibility status. On October 25, 2007, Fezuk issued his Hearing Officer's Report, which report contained the following comment and recommendation:

> Officer Settles met with me regarding this action. He explained to me that he was issued a "citation" on this offense, therefore, was not convicted of a misdemeanor crime of domestic violence offense. The information provided to me in this case, does not mention a "citation" and it appears that he was convicted of a misdemeanor. If this is indeed the case, I recommend removal from his position as a Correctional Officer.

Agency Exhibit # 5

Upon receipt of Fezuk's recommendation, the witness hand wrote on Fezuk's submission, "Approve of Hearing Officer's Recommendation to terminate following confirmation of conviction." The witness then signed the Memorandum that Fezuk had presented to him for consideration. *Agency Exhibit # 5* On November 5, 2007, the witness, in his official capacity as the Agency Director and the deciding official, issued a Final Agency Action Letter, notifying Employee that he would be terminated, effective November 9, 2007. *Agency Ex. # 6* The five page letter was comprehensive, and focused upon several considerations that led to the ultimate decision, as follows:

a) Employee's alleged prior relationship with McCain, who was characterized as a "former girlfriend;"
b) The 1996-adopted federal law, Title 18, U.S.C. § 922 (g)(9), that established the misdemeanor crime of domestic violence, and its retroactive effect;
c) The scope and definition of the law, to assert that "domestic violence" also included persons who have previously cohabited, which would include a former girlfriend;
d) The essential nature of Employee's job as a correctional officer mandated that he must maintain firearm proficiency, but the law forbade him to possess or use a firearm and ammunition, the effect of which rendered him incompetent (incapable) to perform one or more of the major functions of his position; and
e) Consideration was given to the *Douglas* Factors, with a specific determination that Factors # 1, #2, #5, #6, and # 10 each had some bearing on this case. *Tr. Pp. 146-150*

Employee's case

Testimony of Walter Settles, Employee: Employee met McCain in July 1994 at a social gathering. Although he and McCain went to at least one movie, they never went out to dinner, as she claimed, in part due to his midnight work schedule, which curtailed most social activity. He did see McCain at least twice during this period. From the outset, she displayed affection towards him, which quickly became an obsession. He did not return her affection or express any romantic interest in her, first, because of her obsessivness, and second, because he was seeing someone else during this time period. He did move, but not from Virginia to Laurel, Maryland, as McCain testified. Rather he relocated from Beltsville, Maryland to Laurel, Maryland. As well, Alfreda Williams ("Williams"), a co-worker on the same shift with the witness, and not McCain, is the individual who helped him move. *Tr. Pp. 70-71; 74-75*

One morning, just after Employee had gotten off from work, McCain unexpectedly showed up, knocking on Employee's door. When Employee opened his door, and McCain discovered that Williams was inside, McCain became angry and frustrated, and even more so when Employee refused to return her telephone calls. Approximately two to three weeks later, Employee was arrested, charged with one count of theft under $300.00, and one count of battery. Employee denied both charges during the evidentiary hearing, noting that he was working at the 3:00 a.m. time that the crimes allegedly occurred. When preparing his defense in 1994, Employee assembled his time and attendance records, to substantiate his alibi. Had the matter gone to trial, he believes that he most probably would have won the case, based upon his ability to prove that he was elsewhere at the time of the alleged crime.[3] *Tr. Pp. 72-73; 83*

Employee realized that this matter was going to take quite a bit of time to resolve, including more than one court appearance. As an alternate solution to making several court appearances, which he wanted to avoid, Employee considered and then accepted Prince George's County Maryland Judge [Vincent] Fermia's ("Judge Femia") suggestion, that if Employee agreed to plead to one count of battery, the court would drop the theft charge. In retrospect, Employee regrets his decision, because his decision to plead guilty was very harmful, causing him to now have a criminal record for something that he denies having done. *Tr. Pp. 73-75*

In addition to the above testimony, Employee denied that: a) McCain ever spent the night at his apartment; b) McCain ever entered his apartment, being stymied at the doorway on that single occasion when she unexpectedly showed up, and observed Williams seated inside; c) he had either consensual or forced sexual relations with her, adding that she had female problems during the time of their brief acquaintance; and d) the acquaintanceship did not last for the two to three months, as McCain testified, asserting instead that the acquaintanceship lasted for only about three weeks, during which period he saw her one or two times, talked to her on the telephone about three times, but decided to terminate the acquaintance, because she was obsessed with him, including calling him at work, which calls he did not return. *Tr. 75-78*

[3] Employee did not present any documents during the evidentiary hearing to substantiate his defense claim of alibi.

Parsing Agency Exhibit #1, the Prince George's County Arrest Report, into several components, the witness denied: a) approaching McCain at 3:00 a.m. on July 14, 1994, or any other day, in front of her residence; b) ever having been the "boyfriend" or "ex-boyfriend" of McCain; and c) assaulting, battering, or pushing McCain, and taking her purse *Tr. Pp. 78-79*

The Employee has a combined long history of law enforcement and military experience, both of which have included the necessity of periodic law enforcement and military training. Both career fields likewise require refresher training in the use of firearms. The Employee set forth in detail the nature of the part-time and as needed work that he continues to provide on a contract basis. He serves as both a military policeman and as a ground surveillance operator for the Maryland National Guard. These are two different positions. He also serves as an events police officer for the Baltimore City Police Department. Although these jobs are part time/occasional, each include firearms training. Sometimes the work may be for a period of up to three consecutive weeks. *Tr. 92-93*

In May 2005, and on behalf of the state of Maryland, the federal government's Office of Personnel Management (the "OPM") conducted a background check on the Employee. The purpose of the investigation was to determine whether the he could be approved to carry a firearm. The OPM-conducted investigation included a review of the nature of the Employee's criminal record, as the Employee's 1994 plea and conviction were disclosed by the Employee at the outset of the investigation. The background check investigation process included official record checking at the [Prince George's County] court house, talking to the state's attorney, and a meeting with the presiding judge [Femia]. Passing the investigation is critically important, because the applicant is seeking to be employed in a position of trust, is going to deal with the public, and everything must be listed, even if it was expunged or pardoned. At the conclusion of the investigation, the Employee was approved by OPM, given a security clearance, and subsequently certified to carry a weapon.

Although OPM did not issue to the Employee a written Report of Investigation or a federally-issued clearance document, when Employee was granted the clearance, he was told that his clearance was noted, and had been entered into the relevant database. He was issued a Clearance Verification by the Maryland National Guard, which document was only issued as a direct result of the Employee having been OPM approved. He was assigned to carry a nine millimeter gun and other type weapons, when on military and/or police duty. Roughly parallel to this time, Agency was initiating its separate, but less comprehensive, investigation to determine Employee's fire arms bearing eligibility. *See Employee's Prehearing Exhibit # 6, P. 5, dated 7 September 2006; Tr. Pp. 93-108*

While the September 7, 2006-issued clearance document did not specifically recite an approval to carry a firearm, Employee pointed out that subsequent to his having been given the OPM clearance for a job that mandated carrying a firearm, he was directed to, and did attend, a series of training sessions, pursuant to a military police memorandum

issued by the Maryland Army National Guard. The training included two weapons training activities. The first training, Individual Weapons Qualification, was conducted on October 19-21, 2007. The second training, Crew Served Weapons Qualification, was conducted on March 14-16, 2008. In addition, the witness was scheduled to attend Annual Training, to be held between June 14-27, 2008. This two week event includes firearms and weapons training. The most recent training sessions were conducted in New Jersey, Kentucky, and Pennsylvania. *See Employee's Prehearing Exhibit #5, dated 27 July 2007; Tr. Pp. 104*

Employee testified that although he was provided a copy of Fezuk's recommendation, he was never provided a copy of Fezuk's report of investigation, despite a statement enumerated in the second paragraph of his letter of termination, dated November 5, 2007, which recited that a copy of the written report was enclosed. *See Agency Ex. # 6*

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Findings of Fact

The following Findings of Fact and Conclusions of Law are based upon the testimonial and documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

1. Beginning from May 1986, Employee was hired by the D.C. Department of Corrections as a Correctional Officer. Until he was terminated, effective November 9, 2007, Employee had an excellent employment history, as reflected by the Employee's annual work evaluations.
2. The job position required that he be certified to carry a firearm when necessary, and maintain fire arm proficiency, which dictated periodic firearm recertification training.
3. Employee was assigned to the midnight shift, and at the time of his termination was assigned Tuesdays and Wednesdays as his "weekend." Consequently, his time for developing and maintaining a social life was limited.
4. Employee met McCain in a social setting and developed a brief acquaintanceship with her for approximately three to four weeks in the period of June/July 1994. During that time they went out on one or two additional social occasions, but were not boyfriend and girlfriend, had no domestic partner or other romantic relationship.
5. The above-noted finding # 4 is buttressed by my further finding that Employee's testimony is highly credible as to the true nature of his brief relationship with McCain. In her sworn testimony, McCain stated twice that she and Employee were never boyfriend and girlfriend, and that they were not a couple.
6. Employee was not interested in cultivating a relationship with McCain, and elected not to return her telephone calls. Subsequently, she called him at work on a number of occasions, which Employee considered to be harassing.
7. It remains disputed between Employee and McCain whether they ever engaged in

sexual relations. McCain asserts that sex occurred twice, once consensual and one time forced, and that both encounters occurred in the Employee's apartment in Laurel, Maryland. Employee, on the other hand, denies that he ever has sex with McCain, testifying that McCain told him that she was experiencing female problems, noting further that he was seeing someone else at the time that she briefly appeared on the scene.

8. McCain appeared once at Employee's front door, unannounced. She never came beyond the door well, and was highly angered and upset when she observed another woman, a co-worker of Employee, sitting in the apartment.
9. On July 14, 1994, McCain filed a report with the Prince George's County Police Department, alleging that Employee had attacked her at 3:00 a.m. in front of her home, jumping out of the bushes, snatching her purse and pushing her. The county police arrested Employee on the following day, charging him with theft under $300.00 and battery.
10. The investigating police officer referred to the Employee as "the ex-boyfriend of the victim." Said characterization was both gratuitous and erroneous, as credibly testified to by both Employee and McCain. Although Employee's credibility could be questionable, considering that his career status was at risk, the sworn testimony of McCain, who had every opportunity to harm Employee during the evidentiary hearing, credibly testified that she and Employee were not in a boyfriend-girlfriend relationship and were not a couple.
11. Although Employee testified that he was innocent of both charges, and had a work alibi to prove that he was elsewhere at the time of the attack, on September 9, 1994, he elected to plead guilty to the battery charge, with the understanding that the theft charge would be dismissed. Further, Employee did not wish to prolong the matter, which from all indications, was going to require several follow-up court appearances, including an estranged period of the continued presence of McCain, whom he no longer wished to be around. As a result of the plea, he was placed on one year of probation, and the matter appeared to be closed.
12. In retrospect, Employee's decision to plead guilty, in order to avoid several follow-up court appearances, was a bad personal and professional decision, an exercise of poor judgment. It was inconsistent with Employee's presumed knowledge of the law, the effects that a plea of guilty would eventually have upon his long term career objectives, and a failure to measure up to the higher standard of behavior that a law enforcement officer is expected to exhibit and abide by.
13. Employee timely notified his supervisors at the Agency of the charges and subsequently of how he disposed of the matter. Said information was entered into his personnel file and became a part of his permanent record. He assumed that the matter was closed.
14. The U.S. Congress adopted the Lautenberg Act (the "Act"), effective on September 30, 1996, codified at Title 18. U.S.C., § 922(g)(9). The Act made it illegal for anyone who has been convicted of a misdemeanor crime of domestic violence to possess any firearm or ammunition. The Act was retroactive, and made no exemption for law enforcement personnel who had been convicted of this offense, but who likewise carried a firearm or ammunition in furtherance of

their job-related duties.

15. The Definitions section of the Act used the term, "intimate partner" in lieu of the more common term, "domestic partner," and defined "intimate partner," "… with respect to a person, the spouse of the person, an individual who is the parent of a child of the person, and an individual who cohabitates or had cohabited with the person."
16. The Act is not applicable to the present fact situation, as Employee has proven that no domestic partner or intimate partner relationship ever existed between Employee and McCain.
17. In May 2005, Employee initiated, through the OPM, obtaining a security clearance, as a mandatory component of serving as a part time employee of the Maryland National Guard. Employee wished to be hired by the state as a military police officer and as a grounds surveillance officer. These are two different positions. The nature of the jobs required that the Employee be certified to carry a firearm, which likewise included sustained periods of weapons training and recertification.
18. At the outset of the clearance process, Employee listed his background, including the 1994 conviction. An investigator was assigned, and a comprehensive background check was conducted, which included examining the Prince George's County records on the conviction, interviewing staff in the state's attorney office, and consulting with Judge Femia, who presided over the 1994 plea.[4]
19. After the comprehensive background check and investigation were completed, OPM approved Employee, and the security clearance was issued, as noted in the National Guard's Clearance Verification letter to Employee, dated 7 September 2006.
20. Although no copy of the OPM report of investigation was presented at the evidentiary hearing, in light of the mandate and limitations imposed by the Act and its possession of firearms prohibition in intimate partner/domestic partner situations, OPM determined that the relationship between Employee and McCain was never one of domestic or intimate partners, and Employee was granted the requested security clearance.
21. In addition to being certified to carry a firearm for the Maryland National Guard, Employee serves as a contract police officer for the city of Baltimore, Maryland, and when he serves, he is also required to carry a firearm.
22. All of the three above-noted positions require Employee to maintain weapons proficiency. As such, he continues to take periodic firearms and weapons training, generally conducted outside of the state of Maryland, including recent training in Kentucky and New Jersey.
23. Despite the existence of the Act since 1996, and its proscription forbidding persons convicted of domestic misdemeanors from carry firearms, Agency appears not to have undertaken any concerted plan of action to assess and determine the firearm-carrying-status and eligibility of its correctional officers until 2005.
24. On August 19, 2005, S. Elwood York, Jr., then Agency Interim Director, issued a department-wide memorandum, titled, "Authorization to Carry Firearms" serving

[4] It is not known whether Judge Femia was actually consulted in this matter.

copies on the staff, plus a copy of the 1996 law and a domestic violence questionnaire. This appears to be the first time that Agency initiated a consistent Agency-wife effort to determine the firearm-carrying-eligibility status of its correctional officers.

25. At about this same time period, the Agency's Office of Internal Affairs initiated a background criminal history check on all of its corrections officers, and learned anew of Employee's 1994 conviction.
26. By express mail letter dated March 3, 2006, Devon Brown, Agency Director, notified Employee of the results of the investigation, including that he had a misdemeanor domestic violence conviction, the effect of which made it illegal for Employee to possess any firearm or ammunition.
27. The letter stated that a copy of the Authorization to Carry Firearms Memo was enclosed. The express mail letter was sent to employee's apartment house address of record, signed for by a "J. Hawkins," a person who is unknown to Employee, who was away from his residence on military furlough training. Employee never received the letter, and filed no response to the Agency. Thirteen months passed.
28. On April 2, 2007, Agency issued a twenty (20) day advance notice of proposal to remove the Employee from his position. The letter reiterated and expanded upon the contents of the March 3, 2006, letter. Employee filed a timely response. The matter was then assigned to Mary Ann Rodgers, Hearing Officer, and then reassigned to Steven C. Fezuk ("Fezuk"), another Hearing Officer.
29. Fezuk met with Employee, referenced that Employee admitted that he was "cited" for the misdemeanor domestic violence offense, although it also appears that Employee was actually convicted of same. Fezuk issued a statement, dated October 25, 2007, which recommended that Employee be removed from his position as a Correctional Officer on the basis of incompetence, which he defined as, "inability to possess/use a firearm, while performing official duties as a Correctional Officer."
30. On November 5, 2007, Brown issued an official Notification of the Final Decision regarding the proposal to remove. Brown adopted Fezuk's recommendation as the Agency's official position, including the determination that Employee had been convicted of a misdemeanor office of domestic violence. Although Brown's letter stated that a copy of Fezuk's written report was enclosed, no copy of said report has ever been provided to Employee.
31. Further, no copy of Fezuk's report was provided to this AJ – not as an attachment to Agency's Answer, not as an attachment to Agency's Prehearing Statement, and not as an evidentiary hearing exhibit. Given the potential cruciality of this report, which should reveal just how much effort was expended to determine the true nature of the relationship between Employee and McCain, I find that there either is no report to support Fezuk's recommendation, or in the alternative, that any report prepared incidental to Fezuk's investigation does not sufficiently address the issue of intimate partner/domestic partner relationship in a manner that is legally supportive of the recommendation that Employee should be terminated for domestic violence.
32. Any credibility concerns, evaluations, and determinations that Fezuk might have made as a component of his investigation and report is not withstanding, and not a

part of this current record, which is based solely upon the credibility of the witnesses who testified in this evidentiary hearing and the legal sufficiency of the documents submitted by the parties.

Discussion and Analysis

This case has a fairly long history, starting with the July 15, 1994, arrest of the Employee, based upon misdemeanor charges of theft under $300.00 and battery. When the Prince George's County policeman prepared his arrest record, he referred to the Employee as the "ex-boyfriend" of McCain, the complainant. Although there was no evidence that Employee was indeed an ex-boyfriend, the gratuitous use of that term in 1994, would eventually be the cause of much anguish and legal wrangling, as a result of the retroactive application of the 1996 Act. Employee appeared in court on September 9, 1994, and after a series of negotiations, that included Employee appearing before Judge Femia, Employee elected to plead guilty to the battery charge and was placed on one year of probation. The theft charge was then dismissed.

In retrospect, this negotiated outcome and Employee's decision to plead guilty was a mistake and poor judgment on Employee's part, considering his testimony that he had a solid alibi defense, and probably would have been found "not guilty," had the case played out to an adjudicated conclusion. Not wanting to be plagued with having to keep a number of anticipated court appearances, in the process of trying to prove his innocence, he erred in electing to shorten the process, ultimately causing himself a sustained period of professional harm and personal anguish. Why allegedly innocent people elect to plead guilty is a recognized legal phenomenon that is beyond the scope of this Initial Decision.

Employee, who has served as a Correctional Officer with the D.C. Department of Corrections since 1986, and had an exemplary employment record, advised his supervisors and the Agency of the charge, and likewise of the eventual outcome. According to his testimony, both the charge and the outcome were entered into his permanent personnel file in 1994, but, since nothing else occurred for several years, it was believed that the matter, although duly recorded, was officially closed.

On September 30, 1996, the U.S. Congress adopted the Lautenberg Act, codified at Title 18, United States Code, § 922 (g) (9), making it illegal for anyone who has been convicted of a misdemeanor crime of domestic violence to possess any firearm or ammunition. This provision is retroactive and applies to persons who commit a prohibited act at any time prior to or after the passage of the law. There is no exemption for law enforcement officers and agents who carry firearms in furtherance of their job-related duties.

Title 18, United States Code, § 921 (a) Definitions, Subsections (32), (33) (A) (i) & (ii) and (B) (ii) provides respectively, the following:

> (32): The term "intimate partner" means, with respect to a person, the spouse of the person, an individual who is the parent of a child of

the person, and an individual who cohabitates or has cohabitated with the person.[5]

(33) (A): Except as provided in subparagraph (c), the term "misdemeanor crime of domestic violence" means an offense that:

(i) is a misdemeanor under Federal or State 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 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.

(B) (ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense from which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Based upon the record before me, it appears that the Agency initiated no immediate post-Lautenberg Act plan of action, to determine the compliance and statutory eligibility of its correctional staff to carry firearms in the discharge of their job-related duties. However, on August 19, 2005, Elwood York, Jr., then Agency's Interim Director, issued an "Authorization to Carry Firearms" memorandum, which articulated the disability provisions of Title 18, U.S.C., § 921 and § 922 (g) (9). Although there is more than one reference to this memorandum in the record, no copy of the memorandum was presented to the AJ for inspection, or made a formal exhibit of record during the evidentiary hearing. It is from this date that Agency took a new look at its staff, to determine which staff had criminal records, and for what offenses.

Agency, after a review of Employee's personnel file, determined anew that he had been convicted of a misdemeanor crime of domestic violence, which under the Act likewise made him ineligible to carry a firearm in discharge of his job-related duties. Wanda Patten, Chief, Investigative Services, Department of Corrections, one of the

[5] The Definitions section of the act used the term, "intimate partner" in lieu of the more common term, "domestic partner", although the intent and context as used herein appear to be the same.

operations maintained by Agency, wrote a memorandum dated February 8, 2006, to Brown, Director, officially alerting Brown to Employee's endangered job status. In turn, by an express mail letter dated March 3, 2007, Brown attempted to notify Employee of Agency's findings, and to accord Employee the opportunity to reply, or take some steps to have the record expunged or to obtain a pardon.

Although the letter was sent to Employee's address of record, 420 16th Street, S.E., Washington, D.C. 20003, with delivery verified via the Track and Confirm option, the delivery confirmation reflected that the document was received by "J. Hawkins" who is totally unknown to Employee, who was away on military furlough. The letter, therefore, was not received, and likewise no response was tendered by Employee. Thirteen months passed, with no visible follow-up action. Then, on April 2, 2007, William Smith, Agency's Warden, issued an advanced notice of proposal to remove letter, which was the official notification of what action Agency proposed to take. Agency's letter was predicated solely upon a reliance of the accuracy of Employee's alleged violation of the Act, specifically his having been convicted of the misdemeanor crime of domestic violence. The letter did not reflect that Agency took any action to inquire or investigate beyond the mere conviction, to determine if there were any extenuating circumstances.

Employee was notified of his right to present a response and any supportive documents to the designated Agency-based hearing officer, and presented same to Fezuk. The result of the alleged investigation, dated October 25, 2007, was scant at best, being but a small reference by Fezuk that he had met with the Employee, that Employee had been convicted of a misdemeanor domestic violence offense, and that he should be terminated on the basis of incompetence, which he defined as, "inability to possess/use a firearm, while performing official duties as a Correctional Officer."

On November 5, 2007, Brown, adopting Fezuk's termination recommendation, issued an official Notification of the Final Decision regarding the proposal to remove, effective November 9, 2007. Although Brown's letter stated that a copy of Fezuk's written report was enclosed, no copy of said report was enclosed, and has, to date, never been provided to Employee. Further, no copy of Fezuk's report was ever provided to this AJ. I determine that there either is no report to support Fezuk's recommendation, or in the alternative, that any report prepared incidental to Fezuk's investigation does not sufficiently address the issue of whether there ever was an intimate partner/domestic partner relationship in a manner that is legally supportive of the recommendation that Employee should be terminated for domestic violence.

Although Agency was apparently unaware of Employee's efforts to expand his career options, and was in the early stages of taking action that ultimately resulted in Employee's termination as "incompetent," in May 2005, Employee initiated obtaining a security clearance through the federal OPM. Employee sought to become qualified and approved to serve as a part time employee of the Maryland National Guard. Employee wished to serve as a military policeman, and, as the opportunity presented itself, to additionally serve as a grounds surveillance officer. Because the homeland defense nature

of the jobs, a security clearance was required for each position. Both positions required that the Employee be certified to carry a firearm and complete periodic weapon-handling proficiency training and recertification classes.

At the outset of the clearance process, Employee listed his background, including the 1994 conviction. An investigator was assigned, and a comprehensive background check was then conducted, which included examining the Prince George's County records on the conviction, interviewing staff in the state's attorney office, and, according to Employee's understanding, a consultation with Judge Femia, who presided over the plea. It is not known if Judge Femia could recall the Employee's case or the specifics of the matter.

A main focus of OPM's investigation was to determine whether, in light of Employee's conviction for a 1994 battery, he was the "ex-boyfriend" of McCain, and likewise a presumed "intimate partner" or "domestic partner" under the Act, and ineligible to carry a firearm in his employment. OPM concluded in the negative, the essence of which determined that such a relationship never existed between Employee and McCain. Although Employee was not provided a copy of OPM's investigative report, which may be the standard operation procedure for a person whose clearance is granted, that the security clearance for a job that required carrying a fire arm, likewise reflects that the investigation concluded that there was no intimate partner/domestic partner relationship between Employee and McCain.

The investigation vindicated Employee, despite Employee having made a poor choice in judgment and in his relationship with McCain, including entering a plea of guilty to an offense that he claims to have a solid alibi defense for. Further, he surely never anticipated that the 1996-enacted Lautenberg Act, proscribing domestic violence and weapons handling capability, would be made retroactive, and become the huge obstacle that it was to his continued employment as a Correctional Officer for the Agency.

Conclusions of Law

Based upon the foregoing findings of fact, discussions, and determinations, I conclude as follows:

1. Agency has not met its burden of proof by a preponderance of the evidence presented, in determining that Employee should be terminated from his position as a Correctional Officer, based upon the charge of "Incompetence," which was defined by Fezuk in his recommendation for termination, as, "inability to possess/use a firearm, while performing official duties as a Correctional Officer."
2. Agency's action of terminating the Employee was not reasonable and not based upon an accurate finding that Employee and McCain were in an intimate partner or domestic partner relationship;
3. Prior to electing to terminate Employee, there is no evidence that Agency conducted an investigation into the true nature of the relationship between

Employee and McCain. Other than a brief reference that an investigation was conducted, which apparently relied heavily upon an inaccurate pre-Lautenberg Act gratuitous comment in the Arrest Report, no copy of any investigative report has been presented for consideration.

4. The Lautenberg Act, adopted by the U.S. Congress to proscribe certain behaviors in intimate partner/domestic partner relationships, first requires that the relationship be established, before the provisions of the Act become applicable. Said relationship has not been established.
5. The record establishes that the brief acquaintanceship period between Employee and McCain that spanned June/July 1994, was not a boyfriend/girlfriend relationship, nor were they "a couple," with a contemplation that a relationship might be forthcoming if they continued to see one another.
6. The federal OPM investigated Employee for approval of his security clearance application for positions that required Employee to carry a firearm, handle ammunition, and be enrolled in a sustained training in fire arms, ammunition, and weapons training. OPM delved into the matter in depth, including a federal investigator's evaluating the 1994 offense. OPM concluded that Employee was eligible to be given the clearance and likewise the authority to handle firearms, which could only have been granted if there was a likewise determination that there was no Lautenberg Act-controlled domestic violence misdemeanor.

ORDER

The foregoing having been stated, it is,

ORDERED that Agency's termination of Employee, effective November 9, 2007, is REVERSED; and, it is

FURTHER ORDERED that Agency is directed to reinstate Employee forthwith, with all back pay; leave, retirement, and health benefits; and eligibility for promotions; and, it is

FURTHER ORDERED that Agency is directed to file, within 30 days, documentation that it has complied with the directives set forth in this Initial Decision.

FOR THE OFFICE: / s /

Rohulamin Quander, Esq.
Senior Administrative Judge