STATE OF NEW JERSEY

In the Matter of Franklin Hernandez
City of Perth Amboy

CSC DKT. NO. 2018-1058
OAL DKT. NO. CSR 15611-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 29, 2018 BW

The appeal of Franklin Hernandez, Police Officer, City of Perth Amboy, removal effective January 29, 2016, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on January 18, 2018. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 27, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Franklin Hernandez.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF FRANKLIN HERNANDEZ, CITY OF PERTH AMBOY.

OAL DKT. NO. CSR 15611-17

Charles J. Uliano, Esq., for appellant Franklin Hernandez (Chamlin, Rosen, Uliano and Witherington, attorneys)

Michael S. Williams, Esq., for respondent City of Perth Amboy (Cruser, Mitchell, Novitz, Sanchez, Gaston and Zimet, LLP, attorneys)

Record Closed: January 8, 2018 Decided: January 18, 2018

BEFORE **JEFF S. MASIN**, ALJ t/a:

On August 7, 2017, the City of Perth Amboy issued a Preliminary Notice of Disciplinary Action (PNDA) against Police Officer Franklin Hernandez, seeking to remove him from employment because he had violated N.J.A.C. 4A:2-2.3(a) (3), inability to perform duties; (5) Conviction of a crime; (6) Conduct unbecoming a public employee; and (12) Other sufficient cause. After a departmental hearing, Hernandez was removed by the appointing authority, effective January 29, 2016, as detailed in a Final Notice of Disciplinary Action (FNDA) issued on October 6, 2017. On October 17, 2017, Hernandez filed a simultaneous appeal with the Civil Service Commission and the Office of Administrative Law, and the contested case was assigned to this judge. A prehearing conference was held with counsel on November 8, 2017. The parties agreed

that the resolution of the contested case necessitated a legal analysis concerning the nature of a violation of the Uniform Code of Military Justice (UCMJ) to which Officer Hernandez pled guilty in 2014. As such, they agreed to file legal argument prior to a hearing scheduled for January 23, 2018. The City then moved for summary decision. N.J.A.C. 1:1-12-5. Hernandez, while not specifically moving for summary decision, contends that a proper understanding of the provision at issue demonstrated that Officer Hernandez's removal was improper and that he should be restored to duty.

The PNDA's Specification of Officer Hernandez's alleged offenses against the Administrative Code identifies that he pled guilty to a "crime consummated by a battery" while a member of the military and that this offense had been against a fellow soldier with whom Hernandez had a "romantic relationship." Additionally, the Middlesex County Prosecutor's Office had advised the City that it considered Hernandez's conviction to constitute a domestic violence offense and that, as such, he was prohibited by statute from possessing firearms, including his service weapon, and was ordered to turn in his personal firearm. The Specification concluded that as a result of this prohibition, Hernandez was incapable of performing his duties as a police officer and that his conduct was unbecoming a public employee. Finally, it charged that he had failed to inform the Police Department of the status of pending charges of serious crime while on military leave under the Uniform Code of Military Justice, in violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and (7), neglect of duty.

Hernandez's Conviction

According to a Stipulation of Fact offered in evidence by Perth Amboy, entered in the military court in the matter of United States of America v. Hernandez, Franklin, Sergeant (SGT), United States Army Headquarters Support Company, on June 29, 2016, and specifically consented to by Sergeant Hernandez, at that time, Hernandez was assigned to Shaw Air Force Base, South Carolina. His primary Military Occupational Specialty was "Military Police." He had enlisted in the New Jersey Army National Guard in January 2008, after having been honorably discharged following seven years of service as a United States Marine. While on active duty in 2014 and

assigned to Camp As Sayliyah, Qatar (CAS), he became involved in what the Stipulation of Facts identifies as a "romantic relationship" with a specialist, here identified by her initials as SPC T. The relationship began on or about September 11, 2014. Specialist T.'s roommate provided a sworn statement that she was aware of the "romantic relationship, noting that Hernandez and SPC T. "act(ed) like a real couple, publicly holding hands even though it was against the rules." This refers to the fact that as a non-commissioned officer, Sergeant Hernandez was prohibited from any fraternization with a junior enlisted soldier. The Stipulation noted that on November 14, 2014, First Sergeant Stuart counseled Hernandez for what Stuart described as a "blatant act of fraternization" between these two. Stuart learned of this relationship on or about that date after he and Sergeant Hernandez's company commander observed the two holding hands. Stuart ordered Hernandez to terminate the relationship "immediately" and to undergo corrective training. Hernandez acknowledged the orders. However, according to the Stipulation, despite the order, Hernandez and SPC T. "continued to engage in a romantic relationship until on or after 16 December 2014."

The Stipulation then describes events that occurred on December 24, 2014. Sergeant. Hernandez and SPC T. had by that date ended their romantic relationship. Each arrived separately at the Top-Off Club on base. They greeted each other, but then engaged in

> a verbal dispute regarding whether SPC T. was seeing other persons. Sergeant Hernandez turned around and grasped with his hand the area on SPC T.'s body where her neck and shoulder met. Sergeant Hernandez did not have SPC. T.'s permission to touch her in that manner. In a sworn statement to Military Police, SPC T. stated that SGT Hernandez forcefully grabbed her by the back of her neck and tried to take her out of the Top-Off club. She stated that before he grabbed her, she had agreed to talk to SGT Hernandez outside of the club so as not to create a scene. She stated that she asked SGT Hernandez to let her tell her friends where she was going and to let her get her purse . . . SGT told her "no," to get her purse only, and to leave with him now. It was at this moment that she stated SGT Hernandez grabbed her neck and tried to take her out of the club. . . T. . . . told Hernandez he was hurting her and to let go of her. . . . He did not let go of her, and it was not until she asked him

> three times to remove his hand and two other Soldiers came to intervene that he finally removed his hand from her neck. . . . Sergeant Hernandez did not have permission to touch SPC. T. in the manner described. . . Hernandez did not believe that she was about to inflict bodily harm upon him. Therefore, he was not acting in self-defense when he touched her. Sergeant Hernandez's touching of SPC T. constituted bodily harm because he offensively touched SPC T. without her consent and without legal justification.

The Specification notes that by definition, Hernandez had committed an assault and battery. In an Offer to Plead Guilty, Hernandez agreed to plead guilty to Specification 5 of Charge III.[1] a violation of Article 128 of the UCMJ, which is also codified at 10 U.S.C. 928.

> Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

After being advised of Sergeant Hernandez's conviction, Perth Amboy notified the Middlesex County Prosecutor's Office of the conviction.

N.J.S.A. 2C:39-7 b. (2) provides

> A person having been convicted in this State or elsewhere of a disorderly persons offense involving domestic violence, whether or not armed with or having in his possession a weapon enumerated in subsection r. of N.J.S. 2C:39-1, who purchases, owns, possesses or controls a firearm is guilty of a crime of the third degree.

On November 30, 2016, the Prosecutor's Office advised the City that it should have Hernandez surrender his firearms because he was a "person not to have weapons." On August 7, 2017, the City filed the PNDA that is the subject of this appeal.

[1] The Offer to Plead Guilty notes that the text of the Specification to which Hernandez pleaded was amended from "grabbing her neck with his hands" to "grasping her neck and shoulder with his hand." He also pled guilty to a charge regarding having alcohol in his quarters and to failing to obey a lawful general order, to wit: engaging in a prohibited relationship with a junior enlisted soldier. Neither of these violations of the UCMJ is relevant to the motion for summary decision.

It should be noted here that the offense to which Sergeant Hernandez pled, 10 U.S.C. 928, does not include any language regarding "domestic violence." Indeed, the parties agree that the UCMJ does not include any crimes that are entitled "domestic violence." Yet, for the prohibitions of N.J.S.A. 2C:39-7 b. (2) to apply there must be evidence that the person who is to be subjected to this criminal sanction for the possession of a firearm has a pre-existing conviction for a disorderly persons offense that "involv[ed] domestic violence."

N.J.S.A. 2C:25-19 a. defines "domestic violence" as

> the occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor:
>
> . . . .
>
> (2) Assault N.J.S. 2C:12-1

Thus, the elements of this definition include the occurrence of an act falling within the list of offenses, including assault, and that the act be perpetrated against a "person protected under this act."

The crux of the current dispute is whether Hernandez's plea to the violation of 10 U.S.C. 228 constituted a plea to a "disorderly person's offense involving domestic violence." Perth Amboy agrees with the Prosecutor's Office that it does, and that this fact bars Hernandez from possessing a weapon. As such, he is unable to fulfill the requirements of his job as a police officer and his removal is warranted under that provision of the Administrative Code. Officer Hernandez does not dispute that he pled guilty to an assault. However, he disputes the notion that his plea invokes the prohibition, as he contends that he did not plead guilty to an "offense involving domestic violence." Further, even if the offense might serve in some situations as the predicate for the invocation of the prohibition, the nature of his relationship with the victim of the assault simply does not come within the confines of those relationships defined as "domestic" and thus capable of including "domestic violence." Thus, summary decision must be denied to the City, and he should be restored to his position.

In support of his claim, Officer Hernandez points to the fact that the Army did not "require a guilty plea to an allegation of 'domestic violence.'" As such, there is no predicate offense upon which to base the prohibition, as that only applies where there exists a conviction for "an offense involving domestic violence." Perth Amboy responds that the predicate offense need not include the element of "domestic violence." Further, the facts of the situation acknowledged by Hernandez in the Stipulation of Facts as the grounding for his guilty plea to the assault charge make it clear that what he engaged in was indeed "domestic violence."

Summary Decision

The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986) (Anderson).

In Judson, , at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be

something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, at 477 U.S. 251-52, 106 S.Ct 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

The Predicate Offense

For the prohibition to apply, Hernandez's plea to the assault charge must serve as the predicate offense. He is correct that the words of the federal provision to which he pled do not include any reference to the assault as occurring in the context of a domestic relationship of any sort. It is necessary only that the "assault" simply be perpetrated on "another person." However, Perth Amboy points to the United States Supreme Court decision in United States v. Hayes, 555 U.S. 415 (2009). There, the Court reviewed a conviction under the federal Gun Control Act of 1968, 18 U.S.C. 921 et seq., which was amended to include a prohibition on possession of a firearm by one "convicted of a misdemeanor crime of domestic violence." Hayes had been convicted in

West Virginia of battery in 1994. The statute under which he was convicted did not require as an element of the offense the existence of a domestic relationship involving the perpetrator and the victim. When he was prosecuted for being in possession of a firearm despite having this conviction, the District Court held that this absence did not bar prosecution for a violation of the Gun Control Act. The Court of Appeals reversed, and the Supreme Court then took up the issue. The Court, Ginsburg, J., explained the issue as: "must the statute describing the predicate offense include, as a discrete element, the existence of a domestic relationship between offender and victim?"

The majority held that

> In line with the large majority of the Courts of Appeals, we conclude that § 921(a)(33)(A) does not require a predicate-offense statute of that specificity. Instead, in a § 922(g)(9) prosecution, it suffices for the Government to charge and prove a prior conviction that was, in fact, for 'an offense . . . committed by' the defendant against a spouse or other domestic victim.

Thus, the Supreme Court, considering a federal statute penalizing firearm possession that is very similar to N.J.S.A. 2C:39-7 b.(2), concluded that it was not essential to the prosecution that the prior statute under which Hayes had been prosecuted specify that the assault involved persons whose "relationship" come within the definition "domestic" such that the assault was an act of "domestic violence." It was the facts regarding the nature of the relationship that governed whether the prosecution could proceed, not the language of the West Virginia statute. Hernandez tries to evade the result of this decision by noting that this case, unlike Hayes, is not a criminal prosecution for possession of a firearm and that the alleged domestic relationship has not been proven beyond a reasonable doubt. But these arguments fail. Here, the predicate federal offense did not refer to domestic relationships or domestic violence, but Hayes makes clear that that is not a bar to the use of the conviction for assault in determining whether the State's own firearms prohibition applies to Hernandez. As for the need to prove the relationship beyond a reasonable doubt, in this civil matter, the issue is whether the preponderance of the evidence supports the ban on Hernandez's possession of a firearm. The facts of the relationship to be examined to determine if the required "domestic violence" was involved in the assault are to be drawn from a Stipulation of

Facts agreed to by Hernandez as the basis for his court martial. Whether these then prove the existence of the necessary "domestic" relationship must be determined by reference to relevant definitions. The parties point to differing frames of reference for this task.

Officer Hernandez's frame of reference for understanding this question is drawn from federal statutes. Presumably, this is because his plea was to a federal offense, one defined by the United States Code and the UCMJ.

18 U.S.C. 921(a)(33) provides

> (A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—
>
> > (i) is a misdemeanor under Federal, State, or Tribal [tribal] law; and
> > (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

He also cites as another definition relevant to this discussion that is found in 18 U.S.C. 921(a)(32), which defines an "intimate partner" as

> with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

According to Hernandez, none of these relationships involve the limited relationship that Hernandez had with SPC T. prior to the date of the offense to which he pled guilty, an

offense committed, as the Stipulation of Facts notes, after the "romantic relationship" had already terminated. There was no marriage, they were not a divorced couple and the "relationship" did not even reach the level of "cohabitation." Konzelman v. Konzelman, 307 N.J. Super. 150, 157 (App. Div. 1998). Thus, contrary to the position taken by the Prosecutor's Office and the City, he was not convicted of an offense involving "domestic violence" and the prohibition of N.J.S.A. 2C:39-7 b.(2) does not apply. He is not precluded from possessing his duty weapon and can therefore function as a police officer.

In response, Perth Amboy looks to New Jersey law to understand what constitutes a domestic relationship that can result in a victim of violence coming within the definition of a "victim of domestic violence." N.J.S.A. 2C:25-19(d) provides

> d. "Victim of domestic violence" means a person protected under this act and shall include any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present household member or was at any time a household member. "Victim of domestic violence" also includes any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant. "Victim of domestic violence" also includes any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship.

This definition is more expansive than either the definition at 18 U.S.C. 921(a)(33) of "misdemeanor crime of domestic violence," or that of "intimate partner" at 18 U.S.C. 921(a)(32). On their face, those two definitions do not purport to include within their coverage a person who "has had a dating relationship" with the person who has committed an act that, were the "victim" a spouse, one with whom the perpetrator had a child, or one with whom the perpetrator had cohabitated, would constitute such an act of domestic violence. What definition then guides the understanding of the coverage of the New Jersey prohibition when the conviction that is the alleged source for the bar was a federal, and not a state conviction?

Within the limits of the Second Amendment, the issue of who may or may not possess a weapon is a matter over which the states do have some ability to legislate. District of Columbia v. Heller, 554 U.S. 570 (2008). And it is certainly within the authority of the state to define those relationships for which it finds it necessary to provide some additional measure of protection for the participants. The occurrence of incidents of domestic violence and the tragic consequences that can occur need not be documented here. To the extent that New Jersey has an interest in preventing individuals from possessing firearms where such persons have committed violent offenses against individuals with whom they have had a relationship that the State has determined requires such enhanced protection, it is within the State's authority to define for itself those who should benefit from such protection. Thus, while the United States Code and the UMCJ have defined for federal and military, purposes those who are deemed to be "victims of domestic violence" more narrowly than has New Jersey, the State has seen fit to include within its definition of "victims of domestic violence" "any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship." And in this context at least, it is the State's definition that is the proper one to apply in determining whether its citizens should be prevented from possession of firearms.

In United States v. LaVictor, 848 F.3d 428, 458 (6th Cir.), cert. denied, 137 S.Ct. 2231, 198 L.Ed. 2nd 671 (2017), the Sixth Circuit considered a case involving, among other issues, whether the defendant was a "habitual offender" who had committed a "domestic assault." 18 U.S.C. 117. This provision defined such an assault as

> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or . . .
>
> > (b) Domestic assault defined. In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or

> guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

The court considered the scope of coverage, where, as in the case before it, the perpetrator and the victim where not married and had never been married.

> Although we have not defined what constitutes an "intimate partner," a similar domestic assault statute states that a "spouse or intimate partner" includes "a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship." 18 U.S.C. § 2266(7)(A)(i)(II); see United States v. St. John, 716 F.3d 491, 493 (8th Cir. 2013) (applying the definition to §117). Reading the plain language of the statute, we see no reason to limit the definition, as LaVictor encourages, to cohabitating partners. Rather, we look to the general nature of their relationship to determine, as the Eighth Circuit has done, whether C.B. and LaVictor constitute intimate partners.

New Jersey has obviously also understood that the nature of domestic relationships can go beyond the more traditional marriage and even cohabitation. As the two Circuit Courts understood, and as has become ever more apparent, domestic relationships may involve other sorts of arrangements and interactions. In the Federal enactments, 18 U.S.C. 117 and 18 U.S.C. 2266(7)(A)(i)(II)(a definitional section, part of 18 U.S.C. 2261, a statute that address "interstate domestic violence), these include relationships in which victim and perpetrator were, or still are, "intimate partner(s)." New Jersey has chosen to include as a covered relationship "a dating relationship." But how are we to understand what constitutes such a "dating relationship?" While it uses this term, N.J.S.A. 2C:25-19 does not define it. While it might be doubted that one date is enough to form such a "relationship", how often must the dating occur, over what period of time, and what degree of "connection" must the "dating" involve before it becomes what the statute speaks of?

It would appear that a reasonable way to determine if such a "dating relationship" exists is to look to the definitions and factors identified in the federal statutes and cases discussed above. Thus, an "intimate partner" includes a "social relationship of a

romantic or intimate nature between the perpetrator and the victim. Cohabitation, and sexual connection, are not necessary elements of such a relationship. The length of time, the type of relationship, the indicia of romantic connection, the frequency of interaction, the holding out to the public of a romantic, socially intimate, more than merely "friendly" association, these all are factors that can be utilized to assess if the required "dating relationship" exists. LaVictor, at 458; St. John, at 493.

In this case, the evidence as to the nature of the relationship between then Sergeant Hernandez and SPC T. is drawn from the Stipulation of Facts which the Government and Hernandez, voluntarily and expressly entered into on June 29, 2016. As Hernandez by his "express consent" agreed to these facts, they are accepted herein as the **FINDINGS OF FACTS** concerning the connections between these two soldiers at Camp As Sayliyah, Qatar.

1. As of that date, both Hernandez and T. were members of the New Jersey Army National Guard.
2.They began a romantic relationship on or about September 11, 2014.
3. Specialist Pimental and SPC Restrepo each confirmed that they were aware that the two were dating.
4. Specialist Pimental described the two as "acting like a real couple, publicly holding hands even though it was against the rules, showing public affection, and going everywhere together."
5. SPC T. told Pimental that she was "happy she was in a relationship with Sergeant Hernandez.
6. First Sergeant (1SG) Stuart and Hernandez's company commander both observed the two holding hands on November 14, 2014, as they entered the MWR building, and saw that Hernandez dropped SPC T.'s hand when Hernandez saw Stuart.
7. Stuart counseled Hernandez about the "blatant act of fraternization" on November 14. He ordered that the romantic relationship be terminated "immediately."
8. Hernandez acknowledged this order.

9. Despite receiving and acknowledging this order to terminate the relationship, Hernandez continued "to engage in a romantic relationship until on or about 16 December 2014."

10. The Stipulation notes that while the two soldiers were in different companies, "they were in the same battalion, and soldiers within the battalion would frequently interact with each other regardless of their company of assignment." The base had a small geographic footprint.

11. Multiple soldiers at CAS knew Sergeant Hernandez and SPC T. were in a relationship, had seen them holding hands and being likewise affectionate to each other, and had seen or heard them arguing.

12. Although the romantic relationship had ended by December 24, 2014, the dispute that occurred at the Top-Off Club that evening was in regard to the issue of whether SPC T. was seeing other persons.

While the nature of the relationship between Hernandez and SPC T. was certainly not of the length or to the degree of combining living arrangements that were present in the relationships examined in LaVictor and St. John, it must be remembered that the New Jersey statute sweeps broadly to include relationships that involve dating, but do not necessarily go so far as to include sexual activity, cohabitation and other such entanglements. It must be understood that the Legislature felt it necessary in view of the events of the day to enlarge the types of interpersonal connections that fall within the definition of "domestic," such that violence perpetrated by one or conceivably both parties to the relationship to the other party would come within the scope of "domestic violence." Given this, by his own admission, Officer Hernandez had a romantic relationship with SPC T. that lasted from on or about September 11, 2014 through December 16, 2014, a period of three months. During that time they were physically affectionate in public settings, held hands, and at least SPC T. openly expressed her happiness at being in a relationship that Hernandez acknowledged was "romantic." It is unknown to what degree the two may have been "intimate" as that term may imply sexual relations. However, it is acknowledged that they were a couple, and this was well known. The nature of the romantic connection was apparently such that despite being counseled by his superior officer and indeed ordered by him to end the romantic

relationship, Hernandez, who agreed that he received the order, ignored it and the romantic relationship continued even after that order was issued on November 14, until mid-December. And while the exact details of the discussion/argument that occurred on the evening of December 24, 2014, outside the Top-Off Club are not detailed in the Stipulation, it does relate that the "verbal dispute" was about "whether SPC T. was seeing other persons." This topic surely is understood to be related to the fact that the two were, until shortly before the incident, a romantically attached couple. The nature of this incident implies jealousy on Hernandez's part, certainly a frequent enough element in domestic violence.

Based upon the above findings, I **FIND** that the Officer Hernandez "had a dating relationship" with SPC T. Given this, I **CONCLUDE** that the "assault consummated with a battery" that he committed upon her on December 24, 2014, and for which he was guilty of a violation of 10 U.S.C. 928, UCMJ Article 128, was "a disorderly persons offense involving domestic violence" as meant in N.J.S.A. 2C:39-7 b. (2). As a "person" so convicted, Officer Hernandez is barred from possessing a firearm. Given this, he is unable to perform the essential duties of a police officer.

Conduct Unbecoming

In addition to charging that Hernandez was unable to perform the duties of a police officer due to his inability to possess a weapon, Perth Amboy also charged that his conduct was unbecoming a public employee. The unbecoming conduct was the commission of the "assault consummated by a battery" upon SPC T. As a police officer, Hernandez is held to a higher standard of conduct than even the typical public employee. Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Conduct that is unbecoming for a public employee is that conduct that offends publicly accepted standards of decency, Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). It is the sort of conduct that can undermine public respect for public employees, and in the case of law enforcement personnel, the public's respect for law and for those that society employs to enforce its most important standards of conduct. Here, Officer Hernandez, while serving in the

military as a military police officer, assaulted a woman without any legal justification. Such conduct is reprehensible in any citizen, but given that the perpetrator of this assault was a sworn civilian police officer and was also serving in a similar law enforcement capacity within the military, his misconduct is all the more troubling. That it occurred outside of his police duties for Perth Amboy is of no consequence. Based upon the facts of the case, and with these standards in mind, I **CONCLUDE** that Hernandez's conduct was unbecoming a public employee.

Conviction of Crime

Perth Amboy also charges that Hernandez was "convicted of a crime" and is thus in violation of N.J.A.C. 4A:2-2.3(a)(5), conviction of a crime. Under the UCMJ, a conviction in 2014 for assault consummated by battery, a violation of 10 U.S.C. 928, was subject to a maximum sentence that could include a bad conduct discharge, forfeiture of all pay and allowances and confinement for no more than six months. Manual for Courts-Martial United States (2012 Edition) Part IV Punitive Articles 54. Art. 128 e.(2). Under New Jersey law, this offense would not generally be considered a crime, but instead a disorderly person's offense. N.J.S.A. 2C:1-4. classifies offenses against the criminal laws of New Jersey.

> **a.** An offense defined by this code or by any other statute of this State, for which a sentence of imprisonment in excess of 6 months is authorized, constitutes a crime within the meaning of the Constitution of this State. Crimes are designated in this code as being of the first, second, third or fourth degree.
> **b.** An offense is a disorderly persons offense if it is so designated in this code or in a statute other than this code. . .Disorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State. . . Conviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime.
> **c.** . . . Insofar as any provision outside the code declares an offense to be a misdemeanor when such offense specifically provides a maximum penalty of 6 months' imprisonment or less, whether or not in combination with a fine, such provision shall constitute a disorderly persons offense.

Several cases have held that for the purposes of the prohibition enacted by the Lautenberg Amendment a simple misdemeanor assault conviction qualifies as a "misdemeanor crime of domestic violence." United States v. Smith, 171 F.3d 617, 620-21 (8th Cir. 1999). Thus, by definition the offense Hernandez was convicted of under federal law is considered a "misdemeanor crime." In State v. Wahl, 365 N.J.Super. 356, 374 (App. Div. 2004), the case dealt with the authority of a New Jersey court to order the return of weapons seized under the Prevention of Domestic Violence Act, N.J. Stat. Ann. §§ 2C:25-17 to -35. The Appellate Division concluded that the term "misdemeanor crime of domestic violence" as defined in 18 U.S.C. 921(a)(33)(A) and 27 C.F.R. 478.11 "must be construed . . . to include offenses that New Jersey law classifies as disorderly person's offenses." Thus, for the purposes of understanding the reach of gun possession prohibitions, a conviction in New Jersey for a "simple" assault, or an "assault with battery," while traditionally defined as a disorderly person offense, is, when perpetrated upon a person defined in New Jersey law as a "victim of domestic violence," also a "misdemeanor crime."

This connection of "misdemeanor" with "crime" might raise some doubt as to whether the conviction for assault consummated by a battery should be regarded as a "crime", at least in respect to N.J.A.C. 4A:2-2.3(a)(5). However, as N.J.S.A. 2C:1-4 states, a "crime" within this State means an offense for which confinement may exceed six months, and the maximum confinement authorized for the federal offense here involved is not so great as to meet this definition of a "crime." A simple assault committed in New Jersey, punishable by no more than six months incarceration, is not a "crime." Given this, I **CONCLUDE** that while Hernandez is barred from possessing a firearm and cannot serve as a police officer, and while his conduct was unbecoming that expected of a public employee, he was not convicted of "crime" and that charge must fail.

Conclusion and Order

Based upon the facts of this case and the applicable statute, I **FIND** that there are no disputes of material fact that require a hearing and **CONCLUDE** that the

contested case can be resolved by summary decision pursuant to N.J.A.C. 1:1-12(5). Based upon the evidence and the applicable law, I **CONCLUDE** that Perth Amboy is entitled to summary decision in its favor.

I **FIND** that Officer Hernandez pled guilty to assault consummated by a battery, in violation of 10 U.S.C. 928, Section 928 of the UCMJ. I **FIND** that the assault was committed upon a person with whom the appellant had a "dating relationship." I **CONCLUDE** that under the terms of N.J.S.A. 2C:39-7 b. (2) it would be illegal for Hernandez to possess a firearm. As such, I **CONCLUDE** that he cannot fulfill the duties of a sworn police officer. Additionally, I **CONCLUDE** that his conduct was unbecoming a public employee. However I **CONCLUDE** that he was not convicted of a "crime." Therefore, I **CONCLUDE** that the City of Perth Amboy has proven by a preponderance of the credible evidence that Hernandez violated N.J.A.C.4A:2-2.3(a)(3), inability to perform duties, and (a)(6) conduct unbecoming a public employee. I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(5), conviction of a crime, is **DISMISSED**. As for the charge of N.J.A.C. 4A:2-2.3(a)(6) and (7), involving Hernandez's alleged failure to inform the Police Department of status of the military charges, no evidence as to this alleged failure has been presented as a part of the proofs associated with the motion for summary decision, which does not seek summary decision as to that charge. Given the dispositive outcome of the motion in favor of Perth Amboy, and the resulting termination of Hernandez, no findings are made as to that charge.

It is **HEREBY ORDERED** that Franklin Hernandez be removed from his position as a police officer for the City of Perth Amboy.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 18, 2018
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 1-18-18

Date Mailed to Parties: 1-18-18

mph

APPENDIX

LIST OF EXHIBITS:

For appellant:

None

For respondent:

R-1 Certification of Michael S. Williams, Esq., dated December 14, 2017, with attached Exhibits A, B, C. and D., as described therein