

On June 30, 2003, Petitioner applied for a license to carry a firearm pursuant to Section 6109 of the Pennsylvania Uniform Firearms Act of 1995 (Firearms Act), 18 Pa. C.S. §6109. An examination of Petitioner’s criminal history through the Pennsylvania Instant Check System (PICS) revealed a simple assault conviction that was deemed to disqualify Petitioner from obtaining a license. On July 14, 2003, Petitioner filed a PICS challenge with the Pennsylvania State Police (PSP) and the denial was confirmed by letter dated July 17, 2003. Specifically, the letter informed Petitioner, in relevant part, that:

...the basis for your denial can be found under Federal Law, 18 U.S.C. §922 **which states that**, it shall be unlawful for any person to sell or otherwise dispose of any firearm to any person who has been convicted in any court of a misdemeanor crime of domestic violence....

Your 1990 conviction for Simple Assault is prohibiting as it was determined to be a state misdemeanor offense involving domestic violence.

Original Record (O.R.), Section A at 2 (emphasis in original). Section 922(g)(9) of the Federal Gun Control Act provides that:

(g) It shall be unlawful for any person –

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

To ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §922(g)(9). Section 921(a)(33)(A) of the Federal Gun Control Act defines the term “misdemeanor crime of domestic violence” to be an offense that:

(i) is a misdemeanor under Federal, State or 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.

18 U.S.C. §921(a)(33)(A). Petitioner appealed this decision to the Office of Attorney General pursuant to 18 Pa. C.S. §6111.1(e) and a hearing was held before the AALJ on December 17, 2003.

At the hearing, Petitioner's criminal record was entered into evidence, which revealed that on December 10, 1989, Petitioner was arrested for simple assault/domestic violence. Petitioner's criminal record contains a "Final Disposition Report" which indicates that he was charged with "2701 simple assault (domestic violence)." O.R., Section I at 5. Petitioner pled guilty to "simple assault" on April 9, 1990. O.R., Section H at 1. The police report for the December 10, 1989 charge was produced by John Schneider, a witness employed by the PSP in the firearms division as the supervisor in the PICS legal section. Schneider testified that he received the police report from the Pittsburgh Police Department. The police report stated that Petitioner "meet [sic] us at the door and stated that he had called the medics because he hit the victim, his live in girlfriend, knocking her to the floor, and that she was unconscious." O.R., Section I at 1. The police report also lists the same address for the Petitioner and the victim. *Id.* The "Offense/Incident" section of the police report lists "Simple Assault 2701", which is a reference to the crime of simple assault which is set forth in 18 Pa.C.S. §2701,

and “Domestic Viol. 2711”, which is a reference to probable cause arrests in domestic violence cases which is set forth in 18 Pa. C.S. §2711. O.R., Section I at 1.

Petitioner’s attorney objected to the police report on the basis that it was inadmissible hearsay evidence. However, the AALJ overruled this objection because the police report “is a certified record from the Pittsburgh Police Department.” Supplemental Reproduced Record (S.R.R.) at 23). Later in the hearing, Petitioner’s attorney renewed his hearsay objection on the basis that the police report contains internal hearsay. In overruling the objection, the AALJ stated that:

I think that the record was prepared contemporaneous with the incident. I’m going to overrule the objection with the understanding that it is not – it isn’t dispositive of all the issues involving this particular case and I think the totality of the circumstances are going to have to be reviewed to determine whether or not the relationship that existed between [Petitioner] and [the victim] rises to the level of a relationship that would be considered a domestic relationship for the purpose of the domestic violence prohibition under the statute.

In fact, the address doesn’t prove one way or another at this point, in my opinion, but it was properly recorded contemporaneous with the incident. So, I’m going to overrule the objection....

(S.R.R. at 32-33).

Petitioner testified that he did not live with the victim, who was an employee of his, and he produced pay stubs to show that he and the victim did not live together. (Petitioner’s Exhibit #1 and #2 in the Certified Record). Petitioner submitted this evidence for the purpose of showing that his relationship with the victim was not of any type listed in 18 U.S.C. § 921(a)(33)(A). However,

Petitioner did admit that he was involved in a sexual relationship with the victim and that he had dated the victim for a few months after she had started working for him.

By order dated September 16, 2004, the AALJ denied Petitioner's request for relief. In his decision, the AALJ reasoned that, because Petitioner was having a sexual relationship with the victim, he assaulted a "family or household member" and therefore committed a crime of domestic violence because 18 Pa. C.S. §2711(a), which deals with probable cause arrests in domestic violence cases, uses the definition of "family or household member" in the Protection From Abuse Act and because "current or former sexual or intimate partners" is included in that definition. Specifically, the AALJ stated that:

Because of the nature of the statutes applicable to firearms eligibility, it is necessary to review each set of facts and apply the respective state and federal statutes *in pari materia* in order to arrive at the complete relationship between the jurisdictions.

In this matter one must consider the federal disqualifier, the 18 U.S.C. §921(a)(33) suggestion of a crime of domestic violence which follows a simple assault conviction [under] 18 Pa. C.S.A. §2701 and 18 Pa. C.S.A. §2711. While the enumerated classifications found in 921(a)(33) are illustrative of the federal classification there[,] it is clear that the Commonwealth statutes have considered the issue of domestic violence referring the inquiry to 23 Pa. C.S.A. § 6102 for an extensive discussion of what... a "family member or household member" is considered. In section 23 Pa. C.S.A. §6102 a family or household member is defined as

"spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current

or former sexual or intimate partners or persons who share biological parenthood....”

The record of the hearing, specifically, page 14 suggests that the [Petitioner] was having sexual relations with the victim for at least a period of a few months and that [Petitioner] had been dating the victim for a few months. The application of this statute to this matter supports [the PSP’s] conclusion that the [Petitioner] did in fact perpetrate a crime of domestic violence on the victim.

S.R.R. at 75-76 (emphasis added and footnotes omitted). Thus, because the AALJ determined that, under Pennsylvania law, Petitioner committed a crime of domestic violence, he concluded that Petitioner was prohibited from obtaining a license to carry a firearm. Petitioner appealed to this Court.

In an opinion filed June 24, 2005, this Court reversed the decision of the Office of Attorney General and determined that the police report was inadmissible stating that:

the State Police failed to prove that Petitioner was convicted of a “misdemeanor crime of domestic violence” as that term is defined in Section 921(33)(A) of the Federal Gun Control Act. As such, the State Police has failed to show that Petitioner is barred from obtaining a license to carry a firearm by Section 922(g)(9) of the Federal Gun Control Act.

D’Alessandro, 878 A.2d at 142. The PSP appealed to the Supreme Court.

The Supreme Court reversed this court’s determination that the police report was inadmissible and remanded the case to this court for further proceedings. Specifically, this court is to determine whether the AALJ was correct in applying Pennsylvania law, rather than federal law, in determining what is

required to prove the type of domestic relationship which supports the denial of a gun permit. However, as instructed by the Supreme Court, we must first determine “whether any distinct challenge to that determination has been properly presented, and what the consequences of such a challenge would be.” D’Alessandro, 594 Pa. at 518; 937 A.2d at 415. The Supreme Court further states that it offers “no view on the reviewability, or merits of any remaining issue.”¹ Id.

In Petitioner’s petition for review before our court, Petitioner states that he:

1. ...[W]as refused the right to purchase a firearm based upon a finding by the [PSP] that this denial was appropriate under 18 U.S.C. section 921 and 922, which prohibits inter alia the delivery of a firearm to a person who has been convicted of a misdemeanor of domestic violence.

3. The denial of the petitioner’s right to purchase firearms was based upon a finding that 18 U.S.C. section 921(a) (33) applied to the Petitioner, in that he was a person who has been convicted of a misdemeanor of domestic violence.

4. 18 U.S.C. section 921(a)(33) provides that a misdemeanor of domestic violence must have all of the following elements: (1) it be a misdemeanor under state or federal law, (2) it have an element of force or threatened use of a firearm, (3) and it must be committed by the defendant upon a person falling into one of seven enumerated classifications.

5. The enumerated classifications under section 921(a)(33) are: current spouse, former spouse, parent,

¹ Our review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed and whether constitutional rights were violated. Pennsylvania State Police v. Viall, 774 A.2d 1288 (Pa. Cmwlth. 2001).

guardian, person with whom the defendant has a child, a person who is cohabiting or has cohabitated with the defendant, or “a person similarly situated to a spouse, parent, or guardian of a victim.” In other words, if the victim is a spouse, parent, guardian, fellow parent, or a person that is or has cohabited with the victim, then the defendant falls under the 921(a)(33) definition.

6. A criminal defendant also falls under the 921(a)(33) definition if he is similarly situated to a spouse, parent, or guardian of a victim: that is to say, if he is the spouse, parent, guardian, cohabitant, or fellow parent with the victim’s spouse, parent, or guardian.

8. Petitioner testified that he was never the spouse, fellow parent, cohabitant, guardian, or parent of Deborah Spencer (N.T. 9-10). The evidence showed that Petitioner was not a person similarly situated to a spouse, parent, or guardian of a Deborah Spencer.

10. ...Mr. Schneider testified that the record of conviction contained “no indication of there being a domestic violence component to this charge.”

11. With respect to the dispositive issue of whether or not Deborah Spencer and Petitioner had cohabitated, the Commonwealth’s only evidence was the December 10, 1989 police report which recorded Ms. Spencer’s address as 91 Pius Street, the same as Petitioner’s address.

12. The police report was itself inadmissible hearsay, and further it contained internal inadmissible hearsay. Petitioner objected to the police report as hearsay. The Administrative Law Judge overruled this objection and admitted it as a business record. Petitioner objected again on the grounds that the report did not qualify as a business record, but even if it did it contained inadmissible hearsay. The [ALJ] again overruled the Petitioner’s objection and admitted the report. This ruling was erroneous and should be reversed by this court, and the case remanded for a new hearing.

13. At the hearing, the Commonwealth argued that even if the Petitioner and Ms. Spencer were not cohabitants, the 1989 simple assault should still count as a misdemeanor of domestic violence under 18 U.S.C. section 921. There is no law which supports that argument.

14. In its post-hearing submission (Exhibit D hereto), the Commonwealth argued that Petitioner and Ms. Spencer were also “similarly situated as spouses” under Federal Law, that Petitioner and Ms. Spencer were sexual or intimate partners, and that Petitioner’s assault of Ms. Spencer [was] a “domestic violence case” as defined by 18 Pa. C.S.A., section 2711(a). Even if true (which Petitioner contests), none of these circumstances would disqualify the Petitioner from purchasing a firearm.

15. Accordingly, the petitioner is qualified to purchase a firearm and the decision of the Administrative Law Judge and the determination of the [PSP] should be reversed.

16. Furthermore, the determination of the [ALJ] was based upon inadmissible hearsay, without which there was no evidence to support the Commonwealth’s contention that the petitioner had co-habited with Ms. Spencer. If this Court does not reverse the decision of the [ALJ] and the determination of the [PSP], then this Court should remand the case for a new hearing with directions to exclude the inadmissible hearsay of the police report.

17. The evidence at the hearing established that the determination of the [PSP] to affirm the denial of Petitioner’s right to purchase a firearm was erroneous and unlawful.

18. The decision of the [ALJ] to deny the Petitioner’s request for relief from that determination was erroneous and should be reversed by this court.

Petition for Review at 1-7. Petitioner requests in pertinent part as follows:

[T]hat this Court reverse the order of the Pennsylvania Office of Attorney General and the determination of the Pennsylvania State Police that the therefore (sic) he is not prohibited from owning or possessing firearms. In the alternative the Petitioner requests that this Court order a new hearing at which the inadmissible hearsay of the police report be excluded.

Petition for Review at 8. Petitioner does mention the federal law in his petition for review. However, Petitioner does not state anywhere in his petition for review that Pennsylvania state law was used in error and/or that federal law should have been applied instead of Pennsylvania law.

Further, Petitioner set forth two issues for review in his initial brief before our court. They are presented as follows:

1. Does the Federal Gun Control Act prohibit firearms purchase by a person who has been convicted of simple assault, if that simple assault does not meet the definition of “misdemeanor of domestic violence” contained in 18 USC 921 and 922?

...

2. At an administrative hearing convened to determine if a petitioner has been convicted of a misdemeanor of domestic violence, can the administrative agency law judge’s decision be based entirely on inadmissible hearsay?

Petitioner’s brief at 2. Similarly, neither issue presented inquires as to whether the AALJ committed an error of law in applying Pennsylvania law rather than federal law. Instead, Petitioner asks our court to review the evidence presented and determine whether it was sufficient and/or admissible in determining that his conviction for simple assault amounted to a misdemeanor crime of domestic violence. The first time the issue of applying Pennsylvania law rather than federal law arises is in the body of Petitioner’s brief before our court.

Pa. R.A.P. 1501(a) provides for appeals from administrative agencies to an appellate court. Pa. R.A.P. 1511 further provides that a petitioner must file a petition for review with the appellate court and Pa. R.A.P. 1513(d) provides in pertinent part that:

(d) Content of appellate jurisdiction petition for review. An appellate jurisdiction petition for review shall contain: ... (5) a general statement of the objections to the order or other determination; and (6) a short statement of the relief sought. A copy of the order or other determination to be reviewed shall be attached to the petition for review as an exhibit. The statement of objections will be deemed to include every subsidiary question fairly comprised therein. No notice to plead or verification is necessary.

This court has held that “where a Claimant fails to include an issue in his petition for review, but addresses the issue in his brief, this court has declined to consider the issue, since it was not raised in the stated objections in the petition for review, nor ‘fairly comprised therein’ in accordance with Pa. R.A.P. 1513(a).” Tyler v. Unemployment Compensation Board of Review, 591 A.2d 1164, 1168 (Pa. Cmwlth. 1991). Petitioner has, therefore, failed to raise the issue of whether the AALJ improperly relied on Pennsylvania rather than federal law in his petition for review before this Court. As Petitioner has failed to present a distinct challenge as to whether the AALJ erred in applying Pennsylvania law rather than federal law, such issue has been waived and will not be considered before our court.²

² Since the issue of a distinct challenge has been waived, it is unnecessary to consider what the consequences of such a challenge would be.

Accordingly, we conclude that the issue before us on remand has been waived and, based upon the determination of the Supreme Court of Pennsylvania, the decision of the Office of Attorney General is affirmed.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald D'Alessandro,	:	
Petitioner	:	
	:	
v.	:	No. 2195 C.D. 2004
	:	
Pennsylvania State Police,	:	
Respondent	:	

ORDER

AND NOW, this 11th day of August, 2008, the decision of the Office of Attorney General dated September 16, 2004, in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge