

DECISION

IN THE MATTER OF THE APPEAL OF:

██████████, Appellant,

vs.

DEPARTMENT OF SAFETY, POLICE CRIME LAB,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, ██████████, appeals her dismissal from employment with the Denver Police Department's Crime Laboratory Bureau (Agency), on October 3, 2011, for alleged violations of specified Career Service Rules pertaining to shoplifting off-duty. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on April 10, 2012. The Agency was represented by Franklin A. Nachman, Assistant City Attorney. ██████████ was represented by Eric B. White, Esq. Agency exhibits 1-7, 9-11, and Appellant's exhibit A were admitted by stipulation, and Agency exhibit 8.2011-04-12_t1806_passallpointsofsale2.edi, and 8.2011-04-12_t1806_exit.edi, were admitted at hearing. Testifying for the Agency were: Greg LaBerge, Haden Jonsgaard, Kevin Deaton, Marcus McElroy, and Mitch Morrissey. The Appellant testified on her own behalf. The hearing was closed and the case file sealed pursuant to Colorado Revised Statutes § 24-72-308 (2012). A sequestration order was entered at the commencement of hearing. For the following reasons, the Agency's decision to dismiss ██████████ from employment is **AFFIRMED**.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: §§ 16-60 E., K., L., P., or Z.; and
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss her conformed to the purposes of discipline under CSR § 16-20.

III. FINDINGS

██████████ was hired on July 1, 2008, as a Forensic Scientist II (FS II), specializing in forensic biology and DNA analysis in the Denver Police Department's Crime Laboratory Bureau. FS IIs analyze DNA in approximately 1800 cases per year, of which about ten percent become evidence at trial.

The primary duties of an FS II in DNA analysis are to analyze and to testify in court regarding physical evidence in criminal matters. That testimony is pivotal in identifying or excluding an individual as the perpetrator.

A second FS II always conducts a peer review, in order to confirm the interpretation and conclusions of the first report. The second FS II also conducts an administrative review of the first report, in order to confirm whether it was completed pursuant to agency standards.

Forensic Scientists are held to the highest standards of honesty and integrity, because they have unfettered access to stored evidence, and because their testimony is crucial to identification of criminals. [LaBerge, Morrissey testimony]. Consequently, the credibility of forensic scientists at trial is of paramount importance. [LaBerge testimony; Morrissey testimony; Exhibit 10-3].

██████████ work product was very good. Prior to the incident for which she was terminated, the Appellant had not been the subject of any similar disciplinary actions. [LaBerge testimony].

On April 12, 2011, Appellant entered the Glendale Target store with her three year-old son. She placed \$658.52 of merchandise in her cart and on the bottom rack. During the shopping trip, ██████████ son, who had not felt well, spit up a small amount of juice on his shirt and blanket. ██████████ walked past all cash registers at the south end of the store, walked the length of the store behind the registers, and exited the doors at the north end, pushing the cart and carrying her son. [Appellant testimony; Exhibit 8].

Kevin Deaton, Target Senior Asset Protection Specialist, his supervisor, Jeff Binder, and Haden Jonsgaard, a security trainee, observed ██████████, via video monitors, leave without paying. Deaton stopped ██████████ outside the store and brought her to the security office. [Deaton, Appellant testimony].

The merchandise in ██████████ cart was scanned and totaled \$658.52. Deaton interviewed ██████████ while Jonsgaard observed, Deaton typed his own report, and also typed a report for Jonsgaard to review and sign.

Deaton called the Glendale Police. The responding officer issued a summons to ██████████ for theft and child abuse. ██████████ entered a diversion program and withdrew her not guilty plea. At the end of her diversion, the criminal charges were dismissed and her record on the matter was expunged.

Three days after the Target incident, the Agency's Internal Affairs Bureau notified Gregory LaBerge, Director of the Denver Police Department Crime Lab, about the incident and charges against ██████. LaBerge placed ██████ on investigatory leave, and consulted with Denver District Attorney Mitch Morrissey about how the charges might affect ██████ ability to testify in criminal cases, as she was involved in over 600 cases at the time. [LaBerge testimony].

██████ attended a pre-disciplinary meeting convened by the Agency on May 24, 2011. LaBerge delayed making a decision regarding discipline until ██████ criminal case was decided. [LaBerge testimony]. A second pre-disciplinary meeting was held Sept. 19, 2011. ██████ presented the District Attorney's motion to dismiss the criminal charges against her. [Exhibit 2]. The Agency served ██████ with its notice of dismissal on October 3, 2011. This appeal followed timely the next day.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR § 19-10 A.1.a., as the direct appeal of a dismissal. I am required to conduct a de novo review of the alleged rule violations, meaning to consider the evidence as though the Agency had not yet decided if ██████ violated any Career Service Rules. See Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

In a disciplinary case, the Agency retains the burden of persuasion to establish, by a preponderance of the evidence, that the cited employee violated specified Career Service Rules by her conduct alleged in the notice of discipline.

C. Alleged Career Service Rule Violations

1. CSR 16-60 P. Conviction of or being charged with a crime.

This rule is violated if (1) the Agency establishes that ██████ engaged in the conduct which formed the factual basis for the underlying theft crime, and (2) that her conduct affected her ability to perform her position. In re Mitchell, CSA 05-05, 6 (6/27/05). ██████ disputed that she intended to commit a crime when she left Target without paying, and also disputed that the incident affected her ability to testify credibly in criminal cases.

This case turns on ██████ claim that, even though she left a Target store on 4/12/11 without paying for the items in her cart, she had no intent to steal. If her justifications were credible, and she had no intent to steal, then the Agency's various allegations regarding that incident fail. If ██████ reasons for leaving without paying were not credible, then the Agency's claims are justified. With respect to credibility, the following factors were compelling in order of descending significance.

a. Admission. ██████ admitted she left Target, with a cart full of merchandise, without paying for any of it, the result of which she was charged with theft and child abuse. These facts, taken alone, justify finding a breach of the first part of CSR 16-60 P., conduct which forms a fact basis for the crime of theft. What remains is whether ██████ explanations overcome that presumption.

b. Furlough day. ██████ claimed that, because April 12, 2011, a Tuesday, was a furlough day, she shopped for an unusually large number of items compared with a normal shopping trip. She made her furlough claim twice. [██████ testimony; ██████ Amended Pre-hearing Statement]. The date of April 12, 2011 was not a furlough day for Denver employees; Tuesday has never been a furlough day for Denver employees; nor was any evidence provided that it was any other kind of furlough day. That ██████ made the furlough day claim twice, many months apart, makes it unlikely that she simply made a mistake.

c. Buried items. ██████ claimed that, in her rush to take her ill son to the car, she could not simply leave her shopping cart in the store, because personal items she brought into the store - a blanket for her son, one of his toys, and her purse - were buried "very deep down at the bottom of my cart." [Exhibit 5 CD pre-discip. meeting]. There are significant issues with this explanation. First, ██████ acknowledged her purse was in the fold-out section of the shopping cart and just underneath a small stuffed animal, [see Exhibit 9-12]. Her purse was, therefore, not "buried" as she claimed. [Contrast ██████ statement in Exhibit 5 CD with ██████ cross exam, Exhibits 9-12, 9-16;]. Since her purse was readily accessible, then, even assuming her son was ill, she could have easily retrieved her purse without having then to maneuver a heavy cart while carrying her child. Moreover, the cart was apparently less than half full of merchandise, further belying ██████ claim that her personal items were inaccessibly buried. [see photo at Exhibit 9-16].

d. Extra trip. ██████ told Deaton "four or five times" there were two options once she left Target with unpaid merchandise, both of which depended on her son's allegedly evolving condition: (1) if he continued to deteriorate, then she would retrieve her personal items from the cart, return the cart and merchandise to the store, then return to her car, leaving the full cart in the store; or, (2) if her son improved after changing his shirt, then she would return to the store with the cart and continue shopping. [██████ testimony]. Both options required ██████ to make an additional round trip to the store with a cart that was heavy and unwieldy, according to her testimony. Both options would also require more time and effort than retrieving her personal items while in the store, and leaving the cart, even if she returned to finish shopping.

e. Frantic. If, as ██████ claimed, she was sufficiently frantic about her son's well-being¹ that she failed to realize she appeared to be shoplifting, it seems unlikely that, simultaneously, she held out hope her son might improve to the point where she could finish her shopping trip with him, or that she continued hoping she could

¹ ██████ claimed her son had a history of histrionics and projectile vomiting, both of which were on her mind as she left the store.

purchase a Star Wars item for her daughter. [REDACTED] testimony].

Together, these factors raise considerable questions about [REDACTED] credibility. [REDACTED] explanations for leaving Target without paying for merchandise failed to overcome the presumptive intent, based on her admission, to deprive Target permanently of that merchandise, the fact basis for the crime of theft. C.R.S. 18-4-401.

f. Whether [REDACTED] theft significantly impaired her ability to perform her duties. Court testimony is one of the most important duties of an FS II. For each of the criminal cases in which [REDACTED] performed DNA tests, her arrest and the charges arising from the Target incident, had to be disclosed, by law, to defense counsel. [Morrissey testimony; Colo. R. Crim. P. 16]. [REDACTED] claimed her exoneration and the expungement of her criminal record would repair her credibility as a witness in felony DNA cases. As is evident from the Colorado Supreme Court's discussion in the Segovia case, discussed more fully below, the fact of a conviction, or lack thereof, is irrelevant to an inquiry into credibility in the context of what is termed a "prior bad act" under the rules of evidence. Only the facts underlying the incident in question are considered. [CRE 608(b); CSR 16-60 P]. It is not difficult to envisage a criminal defense attorney asking [REDACTED] a single question: "On April 12, 2011, did you leave the Target store in Glendale, Colorado without paying for \$658.52 worth of merchandise?" then encouraging the jury to determine [REDACTED] was not credible. The Agency, as [REDACTED] acknowledged, is not required to take such a risk.² [REDACTED] cross-exam]. [REDACTED] violated CSR 16-60 P. where she left a store without paying for merchandise, her justifications for doing so were not persuasive, and the impact of that event negatively affected an essential work duty of providing credible testimony.

2. CSR 16-60 E. Any act of dishonesty.

A violation of this rule occurs when an employee makes any knowing misrepresentation within the employment context. In re Mounjim, CSA 87-07, 6 (CSB 1/8/09). [REDACTED] statement to IAB during its investigation of the Target incident was an event within the employment context. What remains is whether [REDACTED] was honest with IAB about her intent when she left Target with a cart full of merchandise.

As is commonly the case, circumstantial evidence determines intent. The circumstances described above show, by a preponderance of the evidence, that the reasons [REDACTED] proffered for taking merchandise without paying were not credible. Consequently, [REDACTED] statement to IAB- that she intended to pay for merchandise she took from Target on April 12, 2011- was a knowing misrepresentation

² The Denver District Attorney's Office had four (4) out of its then-current eight DNA reports which [REDACTED] had issued to be reissued by other FS IIs, in order for their testimony to replace that of [REDACTED]. The Adams County District Attorney's Office requested one of [REDACTED] reports also be reissued because they did not want to use her testimony. Pueblo County requested the re-issuance of a report for the same reason. In two other cases, the Denver District Attorney's Office used the testimony of the FS II who reviewed [REDACTED] reports, instead of having [REDACTED] testify. Those eight (8) instances document the Agency's concern, in conjunction with the D.A.'s office, that [REDACTED] testimony would either not be credible or would be challenged in current and future criminal trials. [Exhibit 2-4].

within the employment context, in violation of CSR 16-60 E.

3. CSR 16-60 K. Failing to meet established standards of performance.

An employee's failure to meet established standards of performance is proven by evidence of a prior established standard, clear communication of that standard to the employee, and the employee's failure to meet that standard. In re Mounjim, CSA 87-07, 8 (7/10/08), *rev'd on other grounds*, In re Mounjim, CSA 87-07 (CSB 1/8/09).

The Agency cited the following standard from [REDACTED] work review (Performance Enhancement Program Report, or PEPR):

The employee will prepare and interpret scientific data collected from physical evidence for criminal court presentation in the areas of forensic biology and DNA analysis.

The Agency acknowledged [REDACTED] abilities and her performance of DNA testing requirements were competent. The Agency also acknowledged her court presentations had always been competent. The issue was that, despite her competence, her testimony could be challenged for non-duty related reasons. Where, as in the present case, an employee performs competently the duties cited by the Agency, there is no violation of this rule.

4. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies, or rules.

An agency establishes an employee's violation of this rule by showing it provided notice to the employee of a clear, reasonable, and uniformly enforced rule, regulation, or policy, and the employee failed to follow it. In re Mounjim, CSA 87-07, 6 (CSB 1/08/09).

The Agency asserted that [REDACTED] was aware of, but failed to comply with the following Agency policy:

In the performance of all duties [Career Service Employees] shall be honest, diligent, faithful, competent and obedient: exercise due care and strict economy in the use of city property and refrain from any act detrimental to the best interests of the City.

[Denver Police Department *Operations Manual*, Section 1.02(2)].

[REDACTED] acknowledged honesty is a requirement of paramount importance to an FS II's duties. Her dishonesty was proven for reasons cited above. For those reasons, the Agency proved this violation.

5. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

This rule requires a showing of actual harm to the Agency's mission, or to the City's reputation or integrity. The Agency did not allege any harm to the City by [REDACTED] actions. The following discussion applies to the alternate element of actual harm to the Agency's mission.

CSR 16-60 Z. is not a prospective rule. It does not allow an agency to discipline an employee even for actions which are likely to cause harm, only for those actions which already caused harm to the agency's mission. In re Jones, CSA 88-09 (CSB 9/29/10) (*affirming In re Jones*, CSA 88-09 (5/11/10)).

As amply established above, providing credible testimony in criminal trials involving DNA testing is a critical duty for an FS II and a critical service of the Agency to its customers.³ For reasons stated previously, [REDACTED] ability to provide credible testimony was significantly impaired by her actions leading to her arrest and criminal charges on April 12, 2011. The Agency was obligated to employ significant resources to avoid damage to its past work product, and to avoid future challenges to its work product. Based upon the testimony of Agency witnesses Morrissey and LaBerge, and as supported by case law cited below, there was little question that the Agency's contortions to avoid [REDACTED] having to testify were justified. Nonetheless, since harm was avoided, at least up to the moment of [REDACTED] dismissal, this rule is inapplicable.

V. DEGREE OF DISCIPLINE

The primary purpose of discipline under the Career Service Rules is to correct inappropriate behavior if possible. Appointing authorities must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

³ Those customers include such wide-ranging entities as: the office of the District Attorney; the people of Denver; and, as in the instance of [REDACTED] testimony in a San Diego criminal trial, similar agencies and populations elsewhere.

A. Severity of Proven Violations.⁴

██████ caused a significant, negative impact to the Agency's mission. The Agency's loss of trust in her would undermine any future work she would perform in the Agency.

The impact of ██████ claims, if granted, would have a substantial impact beyond this case. If a Career Service employee could find exoneration under CSR 16-60 E., and 16-60 P., simply by asserting she intended to return to pay for merchandise she took without paying, commonsense limits would no longer apply. What if ██████ son deteriorated further when in the car? Should ██████ be able to load the merchandise in her car and return in a few hours to pay? The next day?

The crime lab reviewed all of ██████ work in current and cold cases. LaBerge noted, without rebuttal, that since ██████ was involved in over 600 cases, the negative fallout from ██████ Target incident may continue well into the future with challenges to current and even prior cases. [LaBerge testimony]. Most importantly, the Agency and the District Attorney are not obligated to risk losing a murder or rape case based on the hope that a jury would not hear about ██████ Target incident, or would not find it significant.

B. Past Record.

The seriousness of the consequences in retaining ██████ outweighed her positive work history.

C. Penalty Most Likely to Achieve Compliance with the Rules.

Since ██████ continued to deny wrongdoing throughout the case, the Agency was unable to determine if a lesser sanction could have achieved compliance with the Career Service Rules. Moreover, even if ██████ had accepted responsibility, the damage to the Agency's mission was of a magnitude that outweighed the benefit of

⁴ The Agency would likely not have met its burden to prove the violations alleged in this case if the outcome depended on the testimony of Deaton and Jonsgaard, both of whom had significant credibility issues. Deaton testified under oath three times that Jonsgaard typed his own statement, [Exhibit 9-9], and that he (Deaton) did not provide any substantive input for Jonsgaard's written statement. [Deaton testimony; Deaton cross-exam; Deaton re-direct exam]. Jonsgaard, however, was certain that Deaton typed the written statement and presented it to him (Jonsgaard) to review and sign. [Jonsgaard testimony]. Even more damning to Deaton's credibility on this point: a comparison of the written statements attributed to Deaton and Jonsgaard reveal virtually identical language, even down to the misplacement of punctuation, with only the viewpoint changed as appropriate to Deaton or Jonsgaard. As to Jonsgaard, he testified, under oath, that Deaton drafted his (Jonsgaard's) report and he (Jonsgaard) merely signed it; however, during the IAB investigation, Jonsgaard previously told Lt. Wilson that he drafted his own statement. Wilson specifically noted that in Jonsgaard's statement about the matter. "Mr. Jonsgaard confirmed that he wrote his own statement of the theft and did not simply sign a document given to him by Mr. Deaton." [Pre-hearing tab 15 p.4 top]. Wilson's notation infers the Agency had some reservation about who drafted Jonsgaard's statement. Despite the apparent credibility issues of two of its witnesses, ██████ was hoist by her own petard, and not by the testimony of the Agency's Rosencrantz and Guildenstern, i.e. the case turned on the credibility the testimony of ██████ herself, and not that of Deaton and Jonsgaard.

her return to service.


████████ stated she would still be competent to testify in those felony cases in which she tested DNA samples, because her credibility could not be significantly impeached, and because there is always the backup of an administrative and technical review of each DNA test, which confirms the reliability of the original test. Both statements were refuted by Morrissey and by LaBerge. Morrissey, as noted above, pointed out that if █████████ returned to her duties, defense attorneys would be entitled to test her credibility by inquiring into the facts underlying the Target incident. [People v. Segovia, 196 P.3d 1126, 1132 (Colo. 2008)].

The Agency and the Denver District Attorney's office have already been obligated to undertake significant defensive and anticipatory actions in an attempt to minimize the risk of challenges to DNA cases in which █████████ was involved. [See Exhibit 15; Morrissey testimony]. The prosecutors in those cases should not be obligated to risk their cases based on the uncertainties of how a jury might weigh █████████ credibility.

VI. ORDER

The Agency's dismissal of Appellant's employment on October 3, 2011 is AFFIRMED.

DONE May 31, 2012.



Bruce A. Plotkin
Career Service Hearing Officer

