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

Appeal No. 57-11

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. <u>INTRODUCTION</u>

The Appellant, paper and personal perso

II. <u>ISSUES</u>

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

The primary duties of an FS II in DNA analysis are to analyze and to testity 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; Morrisey testimony; Exhibit 10-3].

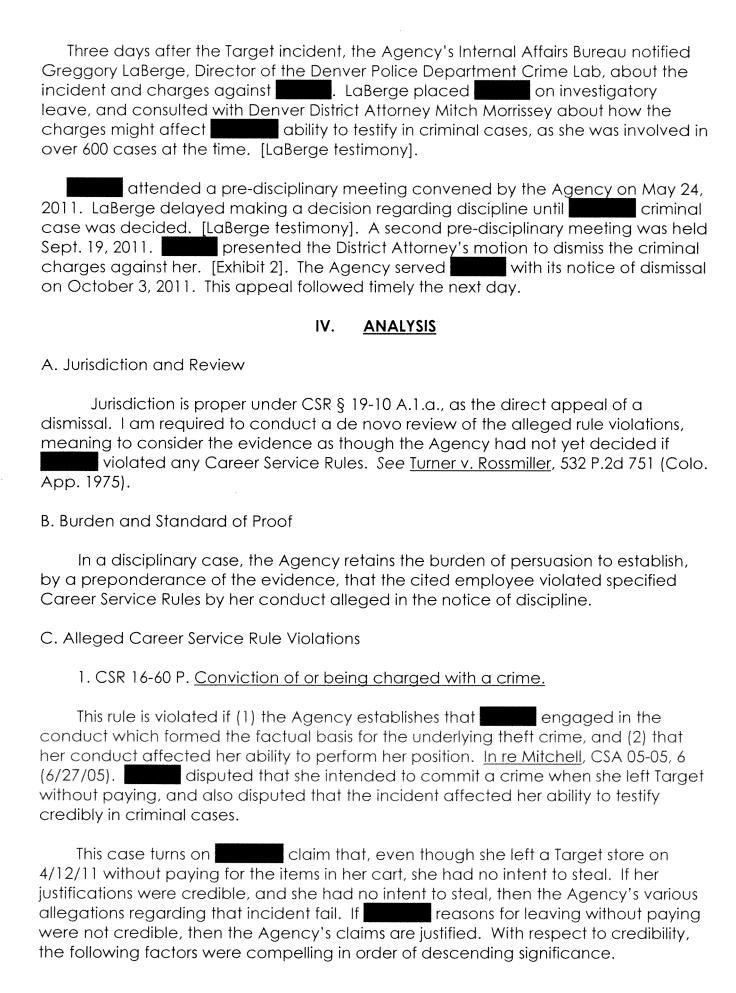
work product was very good. Prior to the incident for which she was terminated, the Appellant had not been the subject of any similar disciplinary actions. [LaBerge testimony].

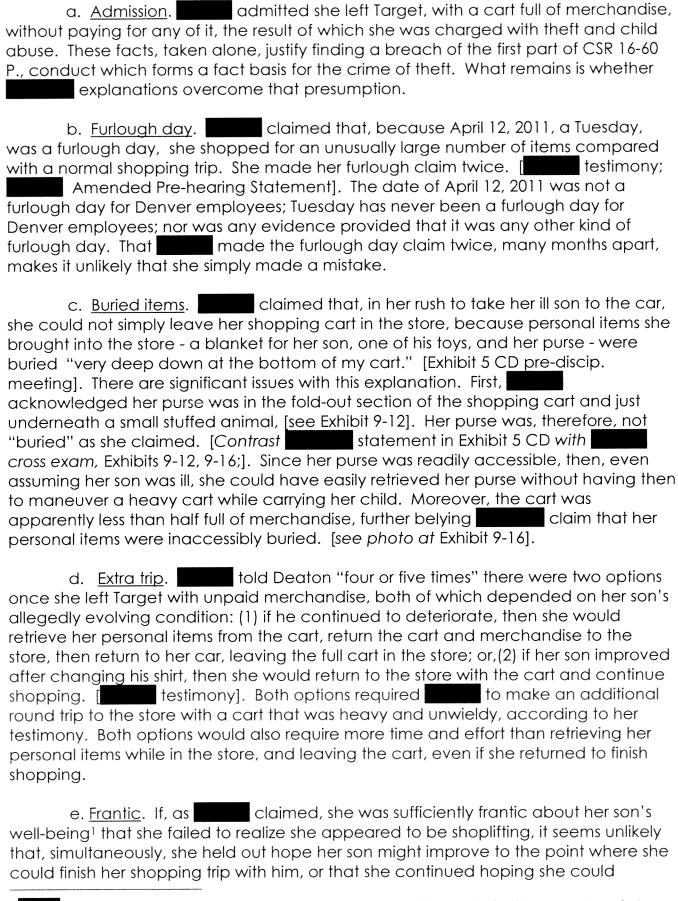
On April 12, 2011, Appellant entered the Glendale Target store with her three year-old son. She placed \$658.52 of merchandise in her cart and on the bottom rack. During the shopping trip, son, who had not felt well, spit up a small amount of juice on his shirt and blanket. walked past all cash registers 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].

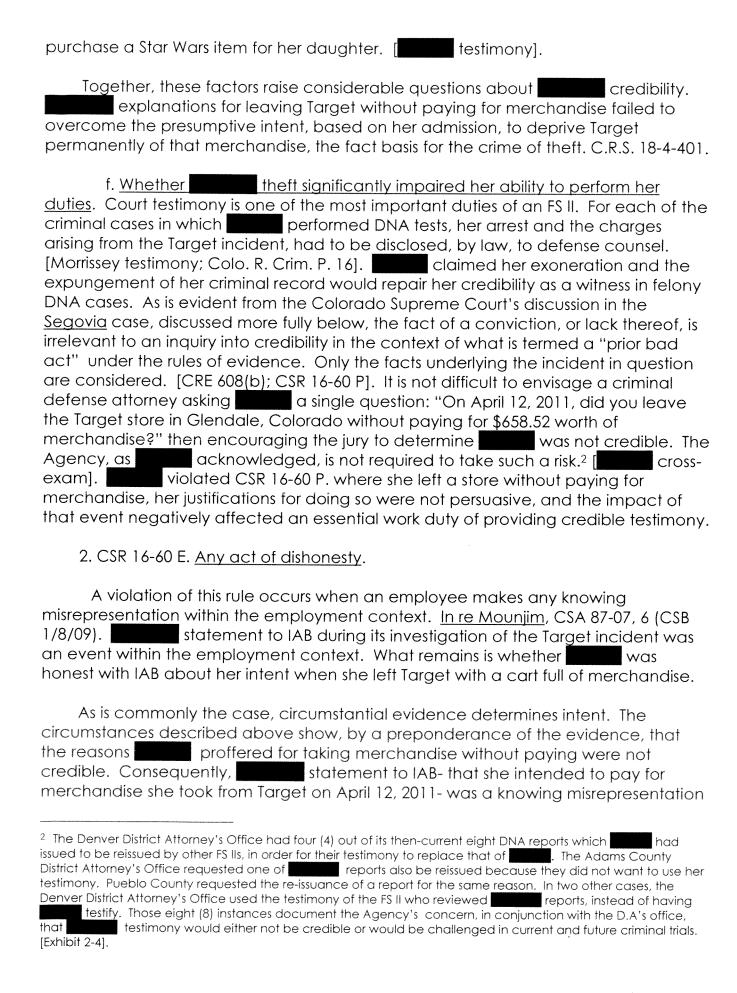
The merchandise in _____ cart was scanned and totaled \$658.52. Deaton interviewed ____ while Jonsgaard observed, Deaton typed his own report, and also typed a report for Jonsgaard to review and sign.

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.





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



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. <u>In re Mounjim</u>, CSA 87-07, 8 (7/10/08), rev'd on other grounds, <u>In re Mounjim</u>, CSA 87-07 (CSB 1/8/09).

The Agency cited the following standard from 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 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. <u>Failure to observe written departmental or agency regulations</u>, 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. <u>In re Mounjim</u>, CSA 87-07, 6 (CSB 1/08/09).

The Agency asserted that 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)].

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. <u>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.</u>

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 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. <u>In re Jones</u>, CSA 88-09 (CSB 9/29/10) (affirming <u>In re Jones</u>, 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, 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 having to testify were justified. Nonetheless, since harm was avoided, at least up to the moment of dismissal, this rule is inapplicable.

V. <u>DEGREE OF DISCIPLINE</u>

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 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 was hoist by her own petard, and not by the testimony of the Agency's Rosencrantz of two of its witnesses, 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