STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| VENIS CHARLOT,<br><br>Petitioner,<br><br>vs.<br><br>COUNTY OF MIAMI-DADE AVIATION DEPARTMENT,<br><br>Respondent. | ) | Case No. 10-9727 |

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by live presentation on September 13 and 14, 2011, in Miami, Florida, and on October 28, 2011, by video teleconference with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mayra Lizette Gonzalez-Kadzinski, Esquire
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For Respondent: Eric Alberto Rodriguez, Esquire
Office of Dade County Attorney
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## STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed an unlawful employment act by discriminating against Petitioner on the basis of national origin in violation of the Florida Civil Rights Act of 1992, as amended.[1/]

## PRELIMINARY STATEMENT

Venis Charlot filed an employment discrimination complaint against the County of Miami-Dade (County) Aviation Department (Department) on the basis of national origin (Haitian) and retaliation (for filing a previous discrimination complaint with the Equal Employment Opportunity Commission (EEOC)) with the Florida Commission on Human Relations (FCHR). Initially, the FCHR determined that reasonable cause existed to believe that an unlawful employment practice had occurred and issued a "Determination: Cause" and a "Notice of Determination: Cause" on June 3, 2010. Mr. Charlot filed a timely Petition for Relief for an unlawful employment practice. On October 18, 2010, FCHR referred this matter to the Division of Administrative Hearings. Subsequently, on November 8, 2010, FCHR issued a Rescission of Dismissal, rescinding the "Determination: Cause" and "Notice of Determination: Cause" and issuing a determination of "NO CAUSE."

At hearing, Mr. Charlot testified on his own behalf, presented the testimony of four witnesses, and entered 17 exhibits (Petitioner's Exhibits numbered 2 through 9, 11 through

17, 22, 23A, and 25) into evidence. The County presented the testimony of six witnesses and entered 18 exhibits (Respondent's Exhibits numbered 1, 1A, and 2 through 17) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of six volumes, was filed on January 13, 2012. The County requested additional time to file post-hearing submissions, to which Mr. Charlot did not object. Subsequently, Mr. Charlot requested additional time to file post-hearing submissions, to which the County did not object. The parties timely filed their post-hearing submissions, which were considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. Mr. Charlot is a Black male of Haitian descent.

2. Mr. Charlot was employed by the County in the Department for almost 16 years before he was terminated in December 2008.

3. The Department operates Miami International Airport (Airport).

4. At the time of his termination and all times material hereto, Mr. Charlot's classification was an Airport Automotive Equipment Operator II, operating heavy machinery in maintenance work at the Airport.

5. At all times material hereto, the majority of the Department's employees were Hispanic, including the supervisors.

Mr. Charlot's Dismissal before the Aviation Director

6. By letter dated December 12, 2008, the Aviation Director, José Abreu, dismissed Mr. Charlot from employment with the Department and the County, effective the close of business on December 4, 2008, upholding the "recommendation by management" for dismissal. Mr. Abreu indicated, among other things, that, in upholding the recommendation, he considered the Disciplinary Action Report (DAR) and Mr. Charlot's work history. Furthermore, Mr. Abreu indicated, among other things, that his decision on termination was based in part upon Mr. Charlot's violations of the County's Personnel Rules, Chapter VIII, Section 7, Paragraphs (I), (R), and (BB), related to Mr. Charlot's arrest on grand theft charges; and that the basis for his (Mr. Abreu's) final decision was based upon Mr. Charlot's disregard for County Personnel Rules. Additionally, Mr. Abreu indicated that, because Mr. Charlot failed to attend the meeting at which Mr. Charlot would have been able to appeal management's recommendation, he (Mr. Abreu) had no additional factors to consider in making his decision.

7. Consequently, Mr. Charlot was dismissed from employment with the Department and the County, effective close of business on December 4, 2008.

8. The DAR dated September 25, 2008, was considered by Mr. Abreu. The DAR notified Mr. Charlot that he was charged with violating the County's Personnel Rules, Chapter VIII, Section 7, Paragraphs (I), (R), and (BB), which provides: (I) that the employee has been guilty of conduct unbecoming an employee of the County whether on or off duty, provided allegations shall be specific and shall describe the conduct which is the basis of the charge; (R) that the employee has misappropriated County funds, appropriated County property for personal use, or illegally disposed of County property; and (BB) that the employee has violated any of the provisions of the Act or the Rules.

9. The DAR dated September 25, 2008, set forth revised facts. Those revised facts state that, on September 24, 2008, Mr. Charlot was re-arrested, arraigned, and formally charged with a third degree felony for theft of County property based upon an incident occurring on August 5, 2008; and that, also, as a result of the formal charge, the County automatically placed Mr. Charlot on suspension without pay.

10. Additionally, the revised facts recite facts stated in a DAR dated August 6, 2008, issued as a result of the incident occurring on August 5, 2008, which cited the same violations of the County's Personnel Rules. In essence, the DAR facts state that, on August 5, 2008, Mr. Charlot was on an overtime assignment, from 11:00 p.m. through 7:00 a.m., repairing asphalt;

that his duty was to operate the scrubber/sweeper, sweeping around the site prior to the asphalt being placed; that, at approximately 3:00 a.m., Mr. Charlot advised Kendall Davis that he would return and left the worksite; that, shortly thereafter and according to an Airfield Security Incident Report, a law enforcement officer observed Mr. Charlot on Airport property, not at the worksite, with two bags of copper wire, weighing approximately 140 pounds; that Mr. Charlot left the worksite and was found committing a crime against the County by stealing County material; that Mr. Charlot was in an area in which he was not authorized and found in a vehicle no longer in service and not able to be driven; and that the DAR was warranted because of Mr. Charlot's actions of taking County material, leaving the worksite and not performing his assigned duties while on County time.

11. Further, the facts in the DAR dated September 25, 2008, stated that Mr. Charlot was arrested on May 11, 2006, for petty theft, but had failed to advise the Aviation Director or anyone in the chain of command about the arrest. Also, the facts stated that his failure to so advise of the arrest was a violation of Department's Rules which placed an obligation on County employees to notify their Department Director or his/her designee of an arrest, whether on or off duty, within a reasonable amount of time, not to exceed three calendar days, of the arrest. A copy

of the Department's policy regarding arrests was included with the DAR. Additionally, a copy of the disposition of the charge was included with the DAR, which showed that Mr. Charlot was not prosecuted.

12. The DAR dated September 25, 2008, concluded that the DAR was warranted based on Mr. Charlot's actions of taking County material, being formally charged with a third degree felony, leaving the worksite, not performing his assigned task while on duty, and failing to report a prior arrest to the Department.

13. Mr. Charlot's responded to the DAR dated August 6, 2008, and his response was also included with the DAR dated September 25, 2008. The response stated, among other things, that the State Attorney's Office had decided that the evidence was insufficient to charge Mr. Charlot with committing a crime and took no action on the charge; that Mr. Charlot was on his lunch break, with his identification, and it was not uncommon for employees to take a lunch break away from the worksite; and that Mr. Charlot advised Mr. Davis that he (Mr. Charlot) was taking his lunch break and would return. Also, the response included affidavits from several employees stating that it was normal for employees to take lunch breaks away from the worksite and attesting to Mr. Charlot's performance as an employee and to his character.

Mr. Charlot's Appeal of the Termination through Arbitration

14. Having been terminated from his employment by Mr. Abreu, Mr. Charlot appealed the termination through arbitration. On September 29, 2009, the appeal was heard by a Hearing Examiner of the American Arbitration Association. The Hearing Examiner issued a written recommendation on November 22, 2009. The Hearing Examiner's recommendation was to sustain Mr. Charlot's dismissal.

Mr. Charlot's Dismissal before the County Manager

15. After arbitration, the Hearing Examiner's recommendation was considered by the County Manager.

16. By letter dated December 3, 2009, the County Manager sustained and confirmed Mr. Charlot's dismissal from employment with the County.

The Incident on August 6, 2008

17. Mr. Charlot was arrested and charged with burglary on August 6, 2008. He obtained counsel. The State Attorney's Office decided to nolle prose, and the charge against Mr. Charlot was dismissed. He returned to work.

18. However, subsequently, in September 2008, Mr. Charlot was re-arrested and arraigned on a third degree felony count of grand theft regarding the incident on August 6, 2008. On September 24, 2008, the State Attorney's Office filed an

information charging Mr. Charlot with the third degree felony count of grand theft.

19. The evidence is insufficient to demonstrate that the County played a part in or influenced the action by the State Attorney's Office to re-arrest Mr. Charlot, arraign him on a different crime, and file an information against him on the different crime.

20. By letter dated September 25, 2008, Mr. Abreu advised Mr. Charlot, among other things, that he was suspended indefinitely in accordance with the "Code of Miami-Dade County, Section 2-42, Paragraph (22), which provides: 'For the automatic suspension of any person from the County service immediately upon being indicted by any grand jury or upon having an information filed against him by any prosecuting official, such suspension to continue until any such indictment or information shall have been disposed of by a trial and conviction or acquittal of the accused or by any dismissal or quashing or reversal of the same.'" The letter further advised Mr. Charlot that, if the charges were reduced or dropped, it was his (Mr. Charlot's) responsibility to immediately advise Human Resources; and that, even if the charges were reduced or dropped, the Department may still pursue any administrative action deemed necessary.

21. The evidence demonstrates that Mr. Charlot's immediate suspension was in accordance with the County's Code.

22. Mr. Charlot was unable to afford the continuation of representation by counsel. He entered into a plea agreement, and the charge was nolle prossed.[2/]

Prior Disciplinary Action Against Mr. Charlot

23. In October 2004, Mr. Charlot was suspended for three days for an incident that occurred on July 2, 2004. He served the three-day suspension from October 13 through 15, 2004. Mr. Charlot received a DAR in July 2004 for the incident, which stated, among other things, that his minor child was with him on a sweeper during his work hours. Also, the DAR indicated previous disciplinary action taken against Mr. Charlot in November 2003 and December 2002, resulting in a five-day suspension and a three-day suspension, respectively; and indicated that the County would not tolerate continuous violation of its rules.

24. The evidence is insufficient to demonstrate that the County's disciplinary action, regarding the incident on July 2, 2004, was unreasonable or discriminatory.

25. In November 2003, Mr. Charlot received a five-day suspension for an incident that occurred on October 11, 2003. He served the five-day suspension from November 18 through 22, 2003. Mr. Charlot received a DAR on October 14, 2003, which stated, among other things, that he failed to report to work during his scheduled work shift hours and failed to notify his supervisor

that he would not be reporting to work. Also, the DAR indicated previous disciplinary action taken against Mr. Charlot for leaving work prior to the scheduled end of his shift, without swiping out of his shift, resulting in a three-day suspension.

26. The evidence is insufficient to demonstrate that the County's disciplinary action, regarding the incident on October 11, 2003, was unreasonable or discriminatory.

27. In December 2002, Mr. Charlot received a three-day suspension for an incident that occurred on November 26, 2002. He served the three-day suspension from January 15 through 17, 2003. Mr. Charlot received a DAR on December 2, 2002, which stated, among other things, that he left the worksite in his personal vehicle during his regularly scheduled shift hours, without swiping out and without notifying his supervisor. In a memorandum dated December 30, 2002, the Assistant Aviation Director, among other things, advised Mr. Charlot of the suspension and further advised Mr. Charlot that, should he need to leave the worksite to respond to personal matters, he was required to swipe out and to ensure that his supervisor was notified.

28. As to the incident on November 26, 2002, at hearing Mr. Charlot testified that school personnel at the school that his child was attending contacted him regarding his child experiencing a diabetic episode; and that he immediately departed

the worksite for the school to give his child an insulin injection. His testimony is credible. Further, no evidence was presented to indicate that the County failed to consider his explanation at the time of the disciplinary action.

29. The evidence is insufficient to demonstrate that the County's disciplinary action, regarding the incident on November 26, 2002, was unreasonable or discriminatory.

30. In July 1998, Mr. Charlot received a written reprimand for various incidents occurring in May 1998. He received a DAR on May 26, 1998, regarding the incidents. The written reprimand indicated, among other things, that Mr. Charlot engaged in insubordinate behavior and took an unauthorized break. Additionally, the written reprimand advised him that further such incidents would result in progressive disciplinary action up to and including termination.

31. The evidence is insufficient to demonstrate that the County's disciplinary action, regarding the incidents in May 1998, was unreasonable or discriminatory.

Alleged Employees Similarly-Situated to Mr. Charlot

32. Mr. Charlot asserts that there are other Department employees who are similarly-situated to him and who are Hispanic.

33. The other employees are Robert Chacon, Rodolfo deArmas, and Ricardo Mendez. No dispute exists that all of the other employees are Hispanic.

(a) Robert Chacon

34. Robert Chacon was employed with the Department for approximately 20 years. Since 2008, he has been an Airport Maintenance Mechanic.

35. The evidence demonstrates, among other things, that, in 2009, Mr. Chacon was suspended due to an incident not associated with the Department and which occurred outside of the workplace; that in 2001, he was issued a DAR, which he grieved, but lost; that he was a supervisor, but was demoted and is no longer a supervisor; and that he has been suspended four times. The evidence fails to demonstrate the details of or the circumstances of the suspensions, the DAR, or the demotion.

36. Furthermore, the evidence demonstrates that Mr. Chacon has not been charged with stealing from the Department.

(b) Rodolfo deArmas

37. Rodolfo deArmas has been employed with the Department since 1984. He has been an Equipment Operator II for more than 15 years.

38. The evidence demonstrates that, in 1991, Mr. deArmas was charged with a criminal offense which was not associated with the Department and for which he was not convicted; and that he has been subject to two disciplinary actions. The evidence fails to demonstrate the details of or the circumstances of the criminal offense or the disciplinary actions.

(c) Ricardo Mendez

39. Regarding Ricardo Mendez, the evidence demonstrates that the Department charged Mr. Mendez with violating the County's Personnel Rules and that one of the Rules was the same one Mr. Charlot was charged with violating, i.e., Personnel Rules, Chapter VIII, Section 7, Paragraph (R); and that Mr. Mendez was dismissed and terminated in 2001 for the violation. Among the alleged facts associated with Mr. Mendez's violation of Personnel Rules, Chapter VIII, Section 7, Paragraph (R) were that Mr. Mendez submitted more hours of work than he had actually worked and was paid for more hours than he had actually worked.

40. Furthermore, the evidence demonstrates Mr. Mendez appealed his termination through arbitration, as did Mr. Charlot. However, the evidence demonstrates that, unlike in Mr. Charlot's situation, a hearing examiner found facts favorable to Mr. Mendez and recommended reinstatement of Mr. Mendez. The County reinstated Mr. Mendez.

## CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to sections 760.11 and 120.569, Florida Statutes (2011), and subsection 120.57(1), Florida Statutes (2011).

42. The standard of proof is preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2011).

43. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2011).

44. Section 760.10, Florida Statutes (2009), provides in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

45. In the instant case, Mr. Charlot must rely upon circumstantial evidence to prove discriminatory intent by the County. For such cases, a three-step burden and order of presentation of proof have been established for unlawful employment practices. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Aramburu v. The Boeing Co., 112 F.3d 1398, 1403 (10th

Cir. 1997); Combs v. Plantation Patterns, 106 F.3d 1519, 1527-1528 (11th Cir. 1997).

46. The initial burden is upon Mr. Charlot to establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802; Aramburu, 112 F.3d at 1403; Combs, 106 F.3d at 1527-1528. Mr. Charlot establishes a prima facie case of discrimination by showing four factors: (1) that he belongs to a protected group; (2) that he was subjected to an adverse employment action; (3) that his employer treated similarly situated employees outside the protected group differently or more favorably; and (4) that he was qualified to do the job. McDonnell Douglas, supra; Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Aramburu, supra; Combs, supra. See Kendrick v. Penske Transp. Servs., 220 F.3d 1220 (10th Cir. 2000) (similarly situated employees need not be outside the protected group).

47. Further, as to similarly situated employees, Mr. Charlot must show that he and the other employees (the comparator employees) are "similarly situated in all relevant respects." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). In making such a determination, consideration must be given to "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Id.

48. The comparator employees "must be similarly situated in all material respects, not in all respects." McGuinness v. Lincoln Hall, 263 F.3d 49, 53 (2d Cir. 2001); Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997). "In other words, . . . those employees must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination." McGuinness, 263 F.3d at 54. Similarly situated "only requires similar misconduct from the similarly situated comparator." Anderson v. WBMG-42, 253 F.3d 561, 565 (11th Cir. 2001). The employees need not have the disciplines administered by the same supervisor to be similarly situated. Id. An employee who is discharged subsequent to the complaining employee can be examined as to whether they are similarly situated. McGuinness, 263 F.3d at 53.

49. Once Mr. Charlot establishes a prima facie case, a presumption of unlawful discrimination is created. McDonnell Douglas, supra; Aramburu, supra; Combs, 106 F.3d at 1528. The burden shifts then to the County to show a legitimate, nondiscriminatory reason for its action. McDonnell Douglas, supra; Aramburu, supra; Combs, supra.

50. If the County carries its burden, Mr. Charlot must then prove, by a preponderance of the evidence, that the reason offered by the County is not its true reason, but only a pretext

for discrimination. McDonnell Douglas, 411 U.S. at 804; Aramburu, supra; Combs, supra.

51. However, at all times, the ultimate burden of persuasion that the County intentionally discriminated against him remains with Mr. Charlot. Texas Dep't of Comty. Affairs v. Burdine, 450 U.S. 248 (1981).

52. Applying the prima facie standards, the evidence demonstrates that Mr. Charlot satisfied the first two prongs of the test. Mr. Charlot demonstrated that he belongs to a protected class (national origin--Haitian) and that he was subjected to an adverse employment action (termination of employment).

53. However, the evidence fails to demonstrate that Mr. Charlot satisfied the third prong of the test. He failed to demonstrate that other employees, whether inside or outside the protected group, were similarly situated; or that the County treated similarly situated employees, whether inside or outside the protected group, differently or more favorably. Anderson, 253 F.3d at 565; McGuinness, 263 F.3d at 54; Kendrick, supra; Holifield, 115 F.3d at 1562; Shumway, 118 F.3d at 64.

54. Assuming Mr. Charlot had established a prima facie case, the County has demonstrated a legitimate, nondiscriminatory reason for its employment action of terminating him. The County demonstrated that he had a DAR dated September 25, 2008, for

violating the County's Personnel Rules; and that he had prior disciplinary action for violating the County's Personnel Rules.

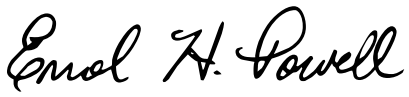
55. Further, Mr. Charlot failed to demonstrate that the County's reason for terminating him was not the true reason, but a pretext for discrimination.

56. Additionally, Mr. Charlot appealed his termination through arbitration; an independent hearing examiner recommended Mr. Charlot's termination; and the County followed the recommendation and terminated him.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the discrimination complaint of Venis Charlot.

DONE AND ENTERED this 26th day of April, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of April, 2012.

ENDNOTES

[1/] The issue of retaliation was withdrawn.

[2/] No party argued in the instant case that the Mr. Charlot was convicted. The details of the plea agreement are contained in the Discussion/Analysis of the Hearing Examiner's written recommendation, which was admitted into evidence, without objection. The Hearing Examiner stated that the plea agreement was 50 hours of community service.

COPIES FURNISHED:

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## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.