

DECISION AFFIRMING DISMISSAL FROM EMPLOYMENT

WALTER MADRIL, Appellant,

v.

COMMUNITY PLANNING AND DEVELOPMENT, OFFICE OF THE MANAGER,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Walter Madril, appeals his dismissal from employment as an Associate City Inspector with the Community Planning and Development Department (Agency), for alleged violations of specified Career Service rules. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on May 27¹ and August 5, 2016. The Agency was represented by Jessica Allen, Assistant City Attorney. Appellant represented himself. Agency exhibits 1–2, 5, 9, 13, and 16 were admitted. The following witnesses testified for the Agency: Sergeant Melvin Berghahn, Mr. Jose Viveros, and Director Janice Cornell. Appellant testified on his own behalf, and presented witnesses Mr. Michael Madden, Mr. Phillip Ortega, and Ms. Eva Madril.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 E, P, or Y as it relates to Central City Municipal Code § 10-5-50;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss him conformed to the purposes of discipline under CSR 16-20; and
- C. whether the Agency's dismissal of Appellant from employment was motivated by unlawful discrimination or harassment on the bases of his race, color, or age.

III. FINDINGS

Madril, was hired by the Agency in 1997 and was promoted to associate city inspector in 2012. In addition to performing inspections under Denver's zoning laws, employees in that position issue citations, orders or summonses. Duties of the position also require inspectors to enter private homes, and to testify in court. For those reasons, honesty and integrity are of paramount importance for all inspectors. [Viveros testimony; Madden testimony].

On April 19, 2015, Madril and his mother were at Johnny Z's casino in Central City, Colorado. Madril's mother was on a losing streak and wanted Madril to take her to another casino. As she waited at the casino entrance, the casino security video showed Madril approaching a change kiosk where a woman had inserted a \$100 bill and momentarily stepped away. Just as the woman stepped away, the machine

¹ On May 27, Appellant moved to continue the hearing to allow him to prepare his case. The Agency did not object, and hearing was continued to August 5, 2016.

rejected the bill and re-exposed it. [Exhibit 9 “114 & 116 Bank” camera @ 22:08:08]. Six seconds later, Madril - looking in the direction of the kiosk – walked to it and, without stopping, took the \$100 bill, [Id @ 22:08:19], and placed it in an inside jacket pocket while glancing over his shoulder back toward the kiosk. [Id @ 22:08:21]. He looked back twice as he left the casino with his mother 13 seconds after taking the money. The second time he turned to look back, he twisted fully around to look behind him. [Exhibit 9 “Front Door” camera @ 22:08:23, 22:08:29]. Madril took his mother to another casino.

The woman who inserted the \$100 bill returned to the kiosk 2-3 seconds after she stepped away and discovered her money missing. A few minutes later, security came to talk with her at the kiosk. They reported the missing money to police who reviewed the casino’s security recording of the incident. While that investigation was ongoing, Madril returned to Johnny Z’s alone, 21 minutes after he left. He turned in the \$100. The police officer who had viewed the security video of the incident, approached Madril about the incident. The officer wrote in his contemporaneous report “Madril stated that his sister whom was not present during my contact with him advised him of the money and he subsequently took it without thinking.” [Exhibit 5-4]. Having reviewed the security video, and after hearing Madril’s explanation, the officer issued him a summons and complaint to appear in court on a charge of theft. One of the officer’s principal duties is to write citations that identify people and the relationships between them. In his eight years of writing reports he made grammatical errors, but never received a complaint about inaccurate identification of parties or witnesses in over 1,000 citations. [Berghahn testimony and cross-exam]. He was certain Madril identified the woman with him in the casino as his sister, not his mother. [Id].

The next day, Madril reported the incident to his immediate supervisor, Chief City Inspector Jose Viveros. Viveros recalled Madril explaining he happened on the \$100 bill at the kiosk, had no way of identifying to whom it belonged, removed it, and “immediately” took it to the cashier. [Viveros testimony]. Two days later, Viveros wrote an email memorializing the meeting to his supervisor, Director Janice Cornell. [Exhibit 13].

Cornell met with Madril about the incident. Madril told Cornell his sister was walking with him in the casino when she spotted the \$100 bill, and she gestured to him to take it. The security video shows Madril passed by the kiosk alone when he took the money. According to Madril’s later explanation, his mother, not his sister, was waiting at the entrance. The video shows his mother played no role in taking the money.

On June 8, 2015, Madril attended his court proceeding with his attorney, and accepted a six-month deferred prosecution which he completed successfully. Madril was not required to enter any plea.

The Agency convened a contemplation of discipline meeting on August 7, 2015. Madril attended with his attorney who stated the woman accompanying Madril was his mother, not his sister, that Madril’s mother wanted to go to another casino, and that Madril had to drive and assist her due to her advanced age before he returned to Johnny Z’s. Madril’s attorney did not deny or clarify the version of the incident which Madril provided to Viveros. Madril’s attorney denied Madril ever told anyone his sister pointed out the \$100 bill, or that she gestured for Madril to take it. Madril did not correct any statement by his attorney during the pre-disciplinary meeting or any time thereafter.

Following the contemplation of discipline meeting, the Agency placed Madril on administrative leave on August 25, 2015. After conducting additional investigation, the Agency issued a revised contemplation letter and convened a new contemplation of discipline meeting on October 7, 2015. Madril attended with his attorney. Madril said he told Viveros that his mother, not his sister, was with him at Johnny Z’s. Madril denied that he had said his sister was with him at Johnny Z’s to the police officer, to Viveros, or to Cornell. He also denied telling the police officer or Cornell his sister was the first to notice the \$100 bill and gestured to him to take it. Madril did not offer what he did tell Cornell or the police officer.

The Agency served Madril with its notice of dismissal on October 20, 2015, effective at the end of that day. This appeal followed timely on November 4, 2015.

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, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, to prove Madril violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate his employment complied with Career Service Rule 16-20. Appellant bears the burden of persuasion on his discrimination and harassment claims on the bases of race, color, and age. The standard by which the moving party must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations²

1. **CSR 16-60 E. Any act of dishonesty**

1. **Altering or falsifying official records or examinations**
2. ...
3. **Lying to supervisors...**

CSR 16-60 E requires the Agency to prove an employee made knowing misrepresentations or omissions in an employment context. In re Mounjim, 87-07A (CSB 1/8/09). Credibility is critical in determining whether dishonesty was proven. In re Clayton, 111-09, 4 (4/16/10). Based on the bullet items, below, the proof for and against this rule violation is the same as CSR 16-60 P, below, and proves Madril lied to police, to his immediate supervisor and to the Director about a matter during the course of an investigation against him, namely the identity of the woman he accompanied at Johnny Z's Casino. He also lied both in writing and verbally about the circumstances under which he found a \$100 bill, and lied about when he turned it in. By doing so, he falsified two official records – his report to the police officer and his written and oral reports of the incident to his supervisors - all in violation of this rule.

2. **CSR 16-60 P. Conviction of or being charged with a crime. Prior to imposing discipline under this subsection, the department or agency shall follow the guidelines contained in subsection 16-61.**

The first part of this rule is a simple, fact-based determination. Madril argued at hearing that he was not convicted on any crime and did not enter any plea. The rule is not limited to a conviction or entering a plea of guilty or no contest to a charge. It includes being charged with a crime. Madril took a \$100 bill that did not belong to him and left the casino with it, looking back over his shoulder immediately after taking it and twice again before exiting the casino. Madril did not deny these basic facts. They are all that is required for the officer to have charged Madril with theft. [See theft ordinance, below, under CSR 16-60 Y]. Madril did not deny he was charged with theft under Central City's criminal ordinances. This element of the rule is established.

This rule also requires the Agency to determine, by a preponderance of the evidence, whether Madril engaged in conduct which establishes a theft charge. While the elements required to establish a violation of this portion of CSR 16-60 P. and under CSR 16-60 E. are different, the factual proof for both is the same and comes down to Madril's intent at the time he took the \$100 bill, i.e., whether he intended to keep it. Madril argued he never intended to keep the money and always intended to turn it in as a

² Since this appeal was filed, the Career Service Rules have been revised. Because the previous version of the rules was in effect when discipline was assessed, that version applies here.

good deed. He argued that turning in the money was proof of his intent. [Madril testimony]. It bears repeating that the issue is whether, at the time he left Johnny Z's casino, Madril intended to keep the money, irrespective of any later intent. In that regard, the following evidence was persuasive.

- The owner of the \$100 turned away for less than 3 seconds when Madril took the money. In his written statement, Madril acknowledged having seen a woman at the change kiosk, but claimed she left the kiosk and was at another machine when he passed by the kiosk and a \$100 bill appeared. [Exhibit I]. In order to know the woman who was at the kiosk went to another machine, Madril likely saw the \$100 bill reappear as the woman turned away, since security video confirmed the bill reappeared as soon as the woman turned away, not, as claimed by Madril, when he passed by the kiosk. Consequently, Madril likely knew the rejected \$100 bill belonged to the woman who just left.
- Madril immediately placed the \$100 bill in an inside coat pocket, indicating an intent to conceal the money instead of turning it in.
- Madril looked behind him 3 times while and after taking the money, noticeably twisting around as he exited the casino. He did not indicate any reason to keep looking back after taking the money other than to check if anyone was watching him.
- Contrary to his earlier claims, Madril did not immediately take the money to the cashier, but left the Casino. At hearing, Madril vigorously extolled the importance tending to his ailing, elderly mother over returning the money immediately. However, it came out during hearing that his mother, rather than ailing, was on a losing streak at Johnny Z's and simply wanted her son to take her to another casino.
- Madril was dishonest to three people about his mother's identity: the police officer, his immediate supervisor and his Agency manager, in claiming the woman with him was his sister, not his mother, and that this "sister" instigated taking the \$100. It is more probable than not that a police officer trained to take accurate statements of identity, Madril's immediate supervisor, who Madril liked, and the Agency Manager, all recalled accurately that Madril said he was at Johnny Z's with his sister. Madril did not rebut the credibility of any of those three. This dishonesty is not directly related to Madril's intent to keep the \$100 under CSR 16-60 P., but diminishes the credibility of his allegedly virtuous motive for not returning it immediately.
- Madril left his mother at another casino while he returned with the money, further indicating his mother was not so ailing as to need his attention. Thus, Madril's claimed urgency to tend to his mother, and his outrage at hearing over placing the importance of his mother's health first, rings hollow.
- Madril returned 21 minutes after he left Johnny Z's and turned in the \$100 bill. This fact is susceptible to interpretation two ways: that he kept the money for 21 minutes could indicate his intention, at the time he took it, to keep it. The same fact could also indicate the short time Madril was gone indicated his intent to return it. For all the reasons stated immediately above, it is more likely than not that Madril intended to keep the money at the time he took it and left Johnny Z's.

3. CSR 16-60 Y. Conduct which violates the Rules, the city Charter, the Denver revised Municipal Code, Executive orders, or any other applicable legal authority.

Central City Municipal Code sec. 10-5-50: Theft; defrauding a public establishment...

(a) A person commits the criminal violation of theft when that person knowingly obtains or exercises control over anything having a value less than five hundred dollars (\$500.00) of another without authorization or by threat or deception and:

- (1) Intends to deprive the other person permanently of the use or benefit of the thing of value;**
- (2) Knowingly... conceals... the thing of value in such manner as to deprive the other person permanently of its use or benefit;**
- (3) Uses, conceals ... the thing of value intending that such... concealment...will deprive the other person permanently of its use or benefit;**

The same determinations that established violations of 16-60 E, and 16-60 P, above, also apply here to establish a violation of this rule via Central City's petty theft/defrauding a public establishment ordinance. Madril knowingly obtained a \$100 bill without authorization and more likely than not intended to deprive the owner permanently of it at the time he took it; knowingly concealed it in such manner as to deprive the owner of it; and concealed it, intending to deprive the owner of it, all in violation of that ordinance. Consequently, he violated CSR 16-60 Y.

V. APPELLANT'S CLAIMS

Madril claimed his dismissal was motivated by unlawful discrimination and harassment against his race, color and age. Race, color and age discrimination claims are established by showing (1) membership in a protected class, (2) an adverse employment action, and (3) evidence that the first two elements are connected. In re Lombard-Hunt, 75-07, 7 (3/3/08). Madril is a 45-year old Hispanic, and the Agency terminated his employment. Those facts establish the first two elements of his race, color and age discrimination and harassment claims.

A. Race and Color discrimination.

Madril's nexus evidence was that two supervisors, neither of whom was a current supervisor at the time of the incident, and neither of whom was the decision-maker here, swore at him at some unknown time, place and circumstances. Asked what his supervisor cussed about, Madril answered it was over how he performed his duties

Michael Madden, a retired inspector and colleague of Madril, testified for Madril that management at times seemed harder on Madril than other inspectors, but did not know why. He did not feel he was discriminated against, and knew nothing about color discrimination in the Agency. Those supervisors rated Madril's work as meeting expectations. [Madril cross-exam].

Madril's immediate supervisor, Viveros, is Hispanic. He testified Madril never complained previously about discrimination. He maintained a friendly relationship with Madril both before and after this discipline. He also stated Madril was not treated any differently than any other inspector. [Viveros testimony]. Madril did not dispute that testimony.

B. Age discrimination.

Madril did not provide facts to support his age discrimination claim.

During his examination, Michael Madden stated he was an older inspector who did not feel the Agency discriminated against him based on his age and did not observe it against anyone else.

He said management was hard on Madril because they believed he was underperforming and not due to his age. [Madden testimony].

Madril's supervisors, Viveros and Cornell are both over 40 years old. [Viveros testimony; Cornell testimony]. Madril made no connection between his dismissal and his age. Neither supervisor heard Madril complain about age-based discrimination before this appeal. This claim remained unproven.

C. Race and Color and Age Harassment.

Madril's evidence of harassment was his testimony that he "felt harassed... because of my race." [Madril testimony]. He also stated a supervisor who retired two years ago, cussed at him, telling him not to get out of his vehicle. He did not recall why. The other, former supervisor responded "humph" to Madril's "good morning." [Madril testimony]. Finally, Madril said that supervisor cussed at everyone. "She was an equal-opportunity cusser." [Madril cross-exam]. Madril's claims that former supervisors cursed at him were not more compelling than his acknowledgment that both were "equal opportunity" cursers, or that the reason they were upset with him was for safety-related reasons.

When Madril asked his witness Madden if he witnessed a hostile work environment against him (Madril), Madden answered, as above, that sometimes management seemed to put more pressure on Madril than other inspectors. He added he recalled management questioning Madril's ability. Asked if he believed management's treatment of him (Madril) was based on his race or age Madden answered "no, I didn't feel like you were treated differently because of your race...or age." [Madden testimony] and stated "I don't know that" in response to a question of whether management discriminated against Appellant based on his color. [Madden testimony]. He had the same answer for whether management picked on Madril. Finally, Madden said he thought the unequal treatment against Madril was based on personality differences, and that, from management's perspective, they believed Madril was underperforming. [Madden testimony]. Madden testified he is an older inspector but never felt management discriminated against him or harassed him.

Madril testified after Madden that he did not disagree with any of Madden's testimony. For the reason stated above, Madril failed to establish any of his claims of discrimination or harassment.

D. Madril's other claims.

Madril claimed the police officer made mistakes in his report. The officer admitted to a mistake in the spelling of the victim's name. He wrote "Montano" instead of "Monano." The officer also acknowledged the victim may have stepped away by more than four feet when Madril took the money. Those mistakes are both insignificant and irrelevant to whether Madril took and kept money that was not his then lied about it.

Finally, even if Madril had established his discrimination and harassment claims, and established mistakes made in his summons and complaint, the Agency was justified in terminating his employment for his theft and deceit.

VI. DEGREE OF DISCIPLINE

The purpose of discipline under the Career Service Rules is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense(s), the employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-20. The measure of these considerations is whether the penalty assessed is within the range of penalties that could be imposed by a reasonable and prudent administrator, or is clearly excessive. In re Ford, 48-14A, 8 (CSB 9/17/15).

A. Seriousness of the proven offenses

Although Madril made a poor decision in Johnny Z's Casino, taking the money, alone, may not have ended his employment. According to Cornell, it was not the poor decision to grab an exposed \$100, but Madril's subsequent dishonesty, that made it impossible for the Agency to retain him. Inspectors must be honest, as they go into private homes and testify at trials. Madril's dishonesty may well have subjected him to cross-examination in trials in which he was a witness, diminished his credibility, and therefore brought into question the violation he wrote on behalf of the Agency. At least as grievously, Madril's implication that his "sister" urged him to take the \$100 could have implicated his elderly and frail mother in a criminal conspiracy.

The Career Service Rules require that discipline be progressive, when possible. CSR 16-20; see *also In re Ford*, 48-14A, 8-9 (CSB 9/17/15). However, any penalty, including dismissal, may be warranted by the particular circumstances of the case. CSR 16-50. Madril's dishonesty was antithetical to his position, and justified the Agency's decision.

B. Prior Record

No evidence of prior discipline was presented at hearing or in the Notice of Dismissal.

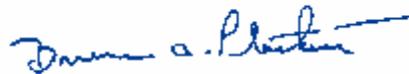
C. Likelihood of Reform

Because Madril denied any wrongdoing, and even declared his actions to be virtuous, it remains unknown whether he would be capable of lasting reform.

VII. ORDER

The Agency's decision to dismiss Appellant Walter Madril from employment on October 20, 2015, is AFFIRMED.

DONE September 16, 2016.



Bruce A. Plotkin
Career Service Hearing Officer