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<tr><td>Appeal from:
District Court, Denver County, Colorado
District Court Judge: The Hon. David H. Goldberg
District Court Case Number: 2016CV31292</td></tr>
<tr><td>Appellant:
JAMES MEDINA

v.

Appellees:
CIVIL SERVICE COMMISSION of the CITY AND COUNTY OF DENVER; CITY AND COUNTY OF DENVER, a Colorado Municipal Corporation; and DENVER POLICE DEPARTMENT</td></tr>
<tr><td>Attorneys for Appellant James Medina:
Elkus & Sisson, P.C.
Donald C. Sisson, #35825
Lucas Lorenz, #35739
501 S. Cherry Street, Suite 920
Denver, CO 80246
dsisson@elkusandsisson.com
llorenz@elkusandsisson.com</td><td>⮙ FOR COURT USE ⮙
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2016CA2205</td></tr>
<tr><td colspan="2">OPENING BRIEF</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

It contains 6,190 words (principal brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

ELKUS & SISSON, P.C.

/s/Lucas Lorenz
Donald C. Sisson, #35825
Lucas Lorenz, #35739
Attorneys for Appellant

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STATEMENT OF THE CASE

Appellant James Medina ("Medina") was employed as a Denver Police Officer until his employment was terminated on March 4, 2015, by Deputy Director of Safety Jess Vigil ("Vigil"). Medina commenced a C.R.C.P. 106(a)(4) action regarding the termination after he exhausted his administrative remedies.

A. The events of July 10, 2014.

On July 10, 2014, Officer James Medina responded to a Code 10 (officer calling for help) at a Burger King located at 3200 North Downing Street, Denver, Colorado. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and

ORDER, p. 2 at ¶ 1.) Officer Ramone Young had called in the Code 10 because two individuals were interfering with his and the paramedics' efforts to aid a sick man. (*Id.*) Medina and Officer Cheryl Smith independently responded to Officer Young's call. (*Id.*) Unfortunately, Seryina Trujillo (hereinafter "Trujillo") and her boyfriend were interfering with paramedics and were "agitated, argumentative and unduly interested in and inquisitive about what was happening…." (*Id.* at ¶ 2.) Trujillo's boyfriend was visibly intoxicated and racially insulting, so Officer Young decided to transport him to detox. (*Id.* at ¶ 3.) Trujillo then escalated the situation by grabbing at her boyfriend's arm to pull him away from the Officers and spitting in Officer Smith's face. (*Id.* at ¶ 3.) Spitting in an Officer's face constitutes a level of resistance called "active aggression" and is a criminal act, *i.e.*, assault on a peace officer. Trujillo was convicted of a crime as it concerns this case.

Officer Smith handcuffed Trujillo and Medina took Trujillo to Medina's patrol car. Trujillo put her feet on the door of the patrol car and actively refused multiple orders by Medina who had to swat her feet away to close the door. (R. Disc 3, 6-23-15 MEDINA-HG, p. 181 lines 11-24.) Trujillo then kicked Medina in the face, which was her second assault on an officer that day. (*Id.*; R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 2 at ¶ 3.) In response

to Trujillo's assault, Medina struck Trujillo one time in the face, which was sufficient force to stop her active aggression, and then closed the door to his patrol car. (R. Disc 3, 6-23-15 MEDINA-HG, p. 181 lines 11-24.) Medina immediately called over the EMTs to evaluate any injury to Trujillo and it was determined that Trujillo had no injury. (*Id.* at p. 183 lines 4-16.) Next, Medina notified Sgt. Hausner, who responded to the scene and attempted a video interview of Trujillo. (*Id.* at p. 184 lines 7-15, p. 190 lines 1-21.) Medina orally reported his use of force to Sgt. Hausner on scene and later filled out a use of force report detailing the single punch to Trujillo. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 2 at ¶ 4.) Medina's use of force at the scene was found to be "appropriate and reasonable," and not in violation of "any departmental rule, regulation or policy." (R. Disc 2, 15-06-08B Exhibit 1 – Bates Nos. DENVER 000001-206.IAB File IC 2014-0076, p. 4.) Medina then transported Trujillo to the District 2 station for processing.

When Medina and Trujillo arrived at District 2, and on the way there, Trujillo had calmed down and was being compliant with Medina's requests. (R. Disc 3, 6-23-15 MEDINA-HG, pp. 195-97 lines 4-18.) Medina brought Trujillo into the District 2 sally port and took her out of the car. Medina un-cuffed Trujillo prior to getting her into Holding Cell #8 so she could take off her belt and shoes as

required by policy. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 2 at ¶ 6.) When Medina and Trujillo arrived at the holding cell, the only other officer present in the station was Officer Richmond, who was working at the desk on light duty, *i.e.*, on injured reserve. (R. Disc 3, 6-23-15 MEDINA-HG, p. 193 lines 20-23, p. 202 lines 3-13, p. 258 lines 10-14.) Trujillo refused multiple verbal commands by Medina to remove her shoes and belt. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 2 at ¶ 7(a); R. Disc 3, 6-23-15 MEDINA-HG, pp. 200-01 lines 20-13.) Medina asked Trujillo to come into Holding Cell #8 and sit down. Medina asked her repeatedly to take off her belt and shoes and she continued to refuse. Video from the holding cell clearly supports the fact that Trujillo was verbally non-compliant. (R. Disc 2, 15-06-08C Exhibit 2 – District Two Holding Cell -- 74335-13.) At 6:05 and 6:21 in the video, Trujillo displayed active aggression towards Medina by grabbing and pushing him. At 6:24 in the video, Trujillo has an open mouth and teeth on Medina's shirt and Medina can be heard stating multiple time "don't bite," to which Trujillo can be heard replying, "or what." At 6:57 in the video, Trujillo knocked Medina's glasses off and scratched him. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 2 at ¶ 7(d).) Photographs show that

Trujillo broke Medina's skin and drew blood. (R. Disc 2, 15-06-08B Exhibit 1 – Bates Nos. DENVER 000001-206.IAB File IC 2014-0076, pp. 199-201.)

In response to Trujillo's assault on Medina, and in an attempt to restrain her from further assaults, he placed a knee on her upper chest/shoulder area. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 3 at ¶ 7(e); R. Disc 3, 6-23-15 MEDINA-HG, p. 204 lines 18-20, pp. 207-08 lines 22-2.) Only after restraining Trujillo was Medina finally able to remove her belt and shoes. At 7:40, Trujillo appeared to slide off the bench in the holding cell. The video of the incident does not show Trujillo's face in any useful detail (*id.* at pp. 43-44 lines 23-2), however, Medina was looking directly at her and confirms that she never lost consciousness and was in fact smiling at him. (*Id.* at p. 209 lines 8-14.) A few seconds later, Trujillo sat back on the bench and by 8:32 in the video she started singing. (*Id.* at pp. 44-45 lines 19-18.) There is no evidence that Trujillo ever lost consciousness. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 3 at ¶ 7(h) and (j); R. Disc 3, 6-23-15 MEDINA-HG, pp. 208-09 lines 15-1, p. 236 lines 20-23.) Moreover, there is no objective evidence of injury to Trujillo, and she did not report any injury. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 3 at ¶ 7(h) and (j); R. Disc 3, 6-22-15 MEDINA-HG, p. 95 lines 9-12, p. 97 lines 3-10, p. 124 lines 17-19, p. 125 lines

12-14; R. Disc 3, 6-23-15 MEDINA-HG, p. 34 lines 3-13, pp. 210-11 lines 24-5, pp. 212-13 lines 14-5.) After leaving the cell, Medina returned to retrieve his handcuffs. (*Id.* at p. 212 lines 6-13.) On July 15, 2014, Medina filed a follow-up report regarding the events in the holding cell. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 3 at ¶ 10; R. Disc 2, 15-06-08B Exhibit 1 – Bates Nos. DENVER 000001-206.IAB File IC 2014-0076, pp. 114-15.)

B. Procedural history and Order presented for review.

The Denver Police Department Internal Affairs Bureau ("IAB") began an investigation of the July 10, 2014, holding cell incident on July 17, 2014. (R. Disc 2, 15-06-08B Exhibit 1 – Bates Nos. DENVER 000001-206.IAB File IC 2014-0076, p. 33.) The disciplinary process that followed is not directly relevant to the issues in this appeal, but is described in detail in the record. (*See* R. CF, pp. 73-76.) On March 4, 2015, Vigil imposed disciplinary penalties on Medina:

- Termination of employment for violation of RR-306, "Inappropriate Force;"[1]

[1] Both the Denver Police Department Conduct Review Office and the Chief of Police recommended that the penalty for violation of RR-306 be termination held in abeyance for two years contingent on no further Conduct Category D, or higher, violations. (R. Disc. 2, 15-06-08B Exhibit 1 – Bates Nos. DENVER 000001-206.IAB File IC 2014-0076, pp. 125-27, 144-45, 157.)

- 30-day suspension for violation of RR-102.1, "Duty to Obey Departmental Rules," as it pertains to OMS 105.02; and
- 30-day suspension for violation of RR-105, "Conduct Prejudicial."

(*See* R. Disc 1, 15-03-06 Notice of Appeal Redact_Medina 15-03, p. 19.)

Medina timely instituted an administrative appeal of the discipline imposed against him, and that appeal was heard by Hearing Officer Terry Tomsick. (*See* R. Disc 1, 15-03-06 Notice of Appeal Redact_Medina 15-03, pp. 1-20; R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, pp. 1, 12.) The Hearing Officer affirmed the 30-day suspensions imposed for the alleged violations of RR-102.1 and RR-105. (*Id.* at p. 12.) Though the Hearing Officer held that Medina had violated RR-306, the Hearing Officer reinstated the original penalty for that violation that had been recommended to Vigil, *i.e.*, termination held in abeyance for two years. (*Id.*) The Agency appealed that decision (R. Disc 1, 15-08-13 Notice of Appeal FINAL, pp. 1-6), and Medina cross-appealed (R. Disc 1, 15-08-25 PET Notice of Cross-Appeal, pp. 1-5). The Civil Service Commission (the "Commission") reversed the penalty ordered by the Hearing Officer for the alleged violation of RR-306, and reinstated the penalty of termination. (R. Disc 1, 16-03-15 Medina Decision CSC – FINAL, pp. 14-15.) As to the alleged violations of RR-102.1 and RR-105, the Commission did not make specific determinations and

considered those alleged violations moot. (*Id.*) Medina appealed the Commission's ruling to the District Court for the City and County of Denver pursuant to C.R.C.P. 106(a)(4). (R. CF, pp. 3-6.) The Honorable David H. Goldberg affirmed the Commission's ruling. (*Id.* at pp. 158-73.) Medina appeals the portions of Judge Goldberg's Order concerning the alleged violations of departmental rules governing "Inappropriate Force" and "Duty to Obey Departmental Rules."

SUMMARY OF THE ARGUMENT

This appeal concerns the alleged violations of RR-306, "Inappropriate Force," and RR-102.1, "Duty to Obey Departmental Rules."[2] The alleged violation of RR-306 is based on the unfounded allegation that Medina had other options available to him instead of going "hands-on" with Trujillo in the holding cell. The only other option articulated by the Commission was enlisting the assistance of another officer. This allegation, however, is contrary to the record. The only other officer at the station was on injured reserve and, therefore, could not assist in the holding cell. Medina could not have merely left Trujillo in the holding cell with her belt and shoes, and without putting her in restraints.

[2] The text of these rules can be found at R. Disc 3, 15-06-15B Exhibit 10 – DPD Discipline Handbook, pp. 94 and 101.

Departmental rules clearly and unequivocally required that Medina remove her belt and shoes, and place her in restraints, while in the holding cell. The Commission's decision with respect to RR-306 is not only unsupported by any evidence in the record, the decision is directly contradicted by the evidence in the record. The Commission abused its discretion when it terminated Medina's employment for alleged violation of RR-306.

The question of whether Medina violated RR-102.1 comes down to a simple inquiry: did Trujillo have any obvious injuries while in the holding cell? The evidence in the record is unequivocal that Trujillo did not receive or report any injury. There is also no evidence that she actually lost consciousness while in the holding cell. The only person in a position to see Trujillo's face at the time she went to the floor of the holding cell was Medina, because the video from the holding cell does not clearly show her face. Medina's unrebutted testimony was that she did not lose consciousness, and she actually smirked at him. There was simply no "obvious injury" to Trujillo, based on a plain interpretation of that term. The Commission's decision to uphold the violation of RR-102.1 is, therefore, an abuse of discretion that should be reversed.

ARGUMENT

I. Whether the District Court erred when it affirmed the Civil Service Commission's finding of a violation of Denver Police Department Rule 306 "Inappropriate Force" despite no evidence in the record to support such a conclusion.

A. Standard of Review

"Appellate review of a district court's decision in a proceeding under C.R.C.P. 106(a)(4) is de novo. An appellate court sits in the same position as the district court when reviewing an agency's decision." *Thomas v. Colo. Dep't of Corr.*, 117 P.3d 7, 8-9 (Colo. App. 2004) (citation omitted). "C.R.C.P. 106(a)(4) proceedings are limited to review of whether the decision of the governmental body was an abuse of discretion or was made without jurisdiction, based on the evidence in the record before that body." *Verrier v. Colo. Dep't of Corr.*, 77 P.3d 875, 879 (Colo. App. 2003).

Review pursuant to C.R.C.P. 106(a)(4) entails determination of whether an erroneous legal standard was applied by the governmental body below, and whether there is no competent evidence to support the governmental body's decision. *City of Colorado Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995). "For purposes of judicial review of administrative decisions, competent evidence is the same as substantial evidence." *Colorado Municipal League v. Mountain States*

Tel. & Tel. Co., 759 P.2d 40, 44 (Colo. 1988); *see also City of Colorado Springs*, 897 P.2d at 756.

> Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," ….and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Colorado Municipal League, 759 P.2d at 44 (*quoting NLRB v. Columbian Enameling & Stamping Co., Inc.*, 306 U.S. 292, 300 (1939)).

B. Preservation on Appeal

This issue was preserved in the Civil Service Commission appeal (R. Disc 1, 15-12-15 Cross-Appeal Opening Brief and Answer Brief, pp. 20-23; R. Disc 1, 16-02-01 Cross-Appeal Reply Brief, pp. 5-6), and in the District Court (R. CF, pp. 77-79, 145-47). The Civil Service Commission ruled on this issue at R. Disc 1, 16-03-15 Medina Decision CSC – FINAL, pp. 5-6. The District Court ruled on this issue at R. CF, pp. 162-63.

C. Discussion

The crux of the Commission's ruling on this alleged violation was that Medina "had options other than force available to him (such as enlisting the assistance of another officer)...." (R. Disc 1, 16-03-15 Medina Decision CSC – FINAL, p. 5.) The Hearing Officer and Vigil also made this allegation, however,

there is no actual evidence in the record to support such a conclusion. The District Court held that "[t]he Commission was clear that Appellant's use of physical force was unnecessary and disproportionate to the situation." (R. CF, p. 163.) Referring back to the Commission's ruling, however, it is apparent that the Commission relied on the allegation that the other option allegedly available to Medina was "enlisting the assistance of another officer…." (R. Disc 1, 16-03-15 Medina Decision CSC – FINAL, p. 5.) The Commission did not articulate any other allegedly-available options. (*See id.*) The assertion, stated by the Commission and repeated by the District Court, that Medina could have enlisted the assistance of another officer, is not supported by the record.

The record is clear that there was no one available at the station to assist Medina. The only other officer present in the station was Officer Richmond, who was working at the desk on light duty, *i.e.*, on injured reserve. (R. Disc 3, 6-23-15 MEDINA-HG, p. 193 lines 20-23, p. 202 lines 3-13, p. 258 lines 10-14.) Because he was on light duty, Officer Richmond could not go into the holding cell to assist Medina. (R. Disc 3, 6-22-15 MEDINA-HG, p. 247 at lines 7-12.) Even assuming Medina called in Officer Richmond for "backup," the record is bereft of any indication of how this would have changed the outcome. The argument put forth by the Agency below is purely speculative because there is no evidence in the

record that calling in Officer Richmond (who could not have assisted anyway because he was on light duty at the desk) would have changed Trujillo's refusal to remove her belt and shoes.

Also, per policy, Trujillo was the responsibility of Medina alone. (R. Disc 3, 15-06-15M Exhibit 21, p. 1 (Denver Police Department Operations Manual ("OMS") 113.02(1)(a)) ("The officer placing an arrested person in a holding room or holding cell is responsible for the person unless relieved by another officer.").) Calling for assistance was in fact not a reasonable option at all under the circumstances Medina faced.

Likewise, the other options allegedly available to Medina were not actually possible. While neither the Commission nor the District Court went into details about all of the options allegedly available, according to the Hearing Officer and Vigil, Medina could have retreated or simply observed Trujillo via video without first obtaining her belt and shoes. Again, this conclusion is contradicted by the reality of the situation. The Operations Manual is clear in requiring what officers must do when putting a prisoner in a holding cell, and the officers are not given any discretion to simply withdraw or take an action other than what is required by the policy:

> Before a prisoner is placed in a holding room/cell, the arresting officer will search the prisoner and the room/cell for weapons and contraband.

> Any item that might be used to cause harm or injury, or damage to the room/cell, **shall** be removed, **without** exception.

(R. Disc 3, 15-06-15M Exhibit 21, p. 2 (OMS 113.02(1)(f)) (bold emphasis added, underline in original); *see also* R. Disc 3, 6-23-15 MEDINA-HG, p. 284 lines 6-23.) This includes belts and shoes. (R. Disc 2, 15-06008B Exhibit 1 – Bates Nos. DENVER 000001-206.IAB File IC 2014-0076, p. 162 at ¶ 1(A).) "To enhance the safety of officers and prisoners and to reduce property damage and the possibility of escape, *all* prisoners *will* be restrained while detained in holding rooms/cells." (R. Disc 3, 15-06-15M Exhibit 21, p. 2 (OMS 113.02(1)(h)) (emphasis added).) These policies apply equally to patrol district holding cells. (R. Disc 3, 15-06-15M Exhibit 21, p. 4 (OMS 113.02(4)(a)).) No lengthy discussion should be needed to explain the unequivocal meaning of words like "shall," "will," and "without exception." *See* C.R.S. § 2-4-401(13.7). The mandatory nature of the term "shall" in this context is reinforced by the fact that the Operations Manual immediately thereafter uses the phrase, "without exception."

Medina was unequivocally required to remove Trujillo's belt and shoes, and he acted accordingly. Withdrawing without doing so would have been a violation of the policies cited above. Merely monitoring Trujillo via video would have violated the above policies, and would not have actually prevented Trujillo from injuring herself. Watching her via a video camera would not prevent her from

hurting herself, it would only allow Medina to see it happen. One of the express purposes of the above policies is to "enhance the safety of…prisoners…." (R. Disc 3, 15-06-15M Exhibit 21, p. 2 (OMS 113.02(1)(h)).) The conclusion of the Commission is clearly erroneous because it is unsupported by the record and contrary to unequivocal policy requiring Medina to proceed exactly as he did.

The Agency's arguments to the District Court on this alleged rule violation were based entirely on speculation, and have no support in the record. The central theme of the Agency's argument was that Medina could have done things differently. The alternatives put forth by the Agency, however, are contrary to the record and the rules Medina was required to follow.

First, the Agency contended that Medina "could have called for assistance prior to escorting Trujillo to the station and placing her in the cell." (R. CF, p. 126.) The premise of this argument is that Medina "should have anticipated, or at least contemplated, that Trujillo would continue to demonstrate resistance – including the refusal to remove her belt and shoes." (*Id.*) This groundless speculation is contrary to the record. On the way to District 2, Trujillo had calmed down and was being compliant with Medina's requests. (R. Disc 3, 6-23-15 MEDINA-HG, pp. 195-97 lines 4-18.) The record shows that in fact it would have been reasonable for Medina to assume that Trujillo had calmed down because that

was how she was behaving on the way to the station. There is no evidence in the record to support the purported alternative of calling for assistance prior to arriving at the station, and that is because the record contradicts this purported alternative.

Second, the Agency argued that "there is no indication Trujillo intended to hurt herself." (R. CF, p. 126.) The fundamental problem with this argument is again that the Agency failed to cite to any evidence in the record to support the argument. Even if there was evidence to support this argument, it would not matter because the rules Medina was required to follow (discussed above) were not contingent on some indicia of intent. These rules do not say that an officer can disregard them if "there is no indication [the prisoner] intended to hurt herself." To the contrary, these rules used terms like "will," "shall," and "without exception." The Agency's argument simply ignored the mandatory nature of these rules.

Third, the Agency argued that Officer Medina "did not need to go 'hands on' with Trujillo in the first place." (R. CF, p. 127.) Yet again, the Agency's argument was contrary to the record. As discussed previously, Medina was required to remove Trujillo's belt and shoes. He asked her repeatedly to remove her belt and shoes and she continued to refuse. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 2 at ¶ 7(a); R. Disc 3, 6-23-15

MEDINA-HG, pp. 200-01 lines 20-13.) Trujillo's refusal to cooperate was not only verbal. She also displayed active aggression towards Medina by grabbing and pushing him. (R. Disc 2, 15-06-08C Exhibit 2 – District Two Holding Cell -- 74335-13, at 6:05, 6:21.) She bit and scratched Medina, and knocked his glasses off his face. (*Id.* at 6:24, 6:57; R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 2 at ¶ 7(d).) Thus, it was Trujillo that went "hands on" in the first place, contrary to the Agency's argument. There is simply no support in the record for the speculative arguments put forth by the Agency, and the Agency failed to show that the decision of the Commission is anything other than clearly erroneous.

The Commission did not rule that Medina's use of force in the holding cell was in and of itself inappropriate. Rather, the Commission focused on the alleged availability of other options because the evidence showed that the actual use of force in the holding cell was appropriate. Officer Richard Stensgaard, with more than 30 years of law enforcement experience, was called to testify in the hearing below as a witness against Medina. Officer Stensgaard taught arrest and control tactics for 14 years at the Denver Police Academy. (R. Disc 3, 6-22-15 MEDINA-HG, p. 131 lines 19-23.) Having reviewed the video of the holding cell incident, Officer Stensgaard testified that Medina's use of force in the holding cell was

reasonable and appropriate. (*Id.* at pp. 147-48 lines 25-12.) Officer Stensgaard provided a cogent explanation of the circumstances surrounding the incident:

> Well, when the -- when the altercation began, it was obvious that the -- that Officer Medina just wanted to control the situation and control the individual as best he could.
>
> Controlling one on one, one individual like that is nearly impossible and incredibly difficult when they're fighting in a combative resistive manner.
>
> But what I -- what I say was Officer Medina try -- best as he could on his own, trying to control the individual to get her under control at that point.
>
> So -- and there's nothing, in my opinion, that showed that that would be anything but an objectively reasonable use of force entered and based on that situation.

(R. Disc 3, 6-22-15 MEDINA-HG, p. 152 lines 1-16.) Written statements about the use of force were collected as part of the IAB investigation. Officer Glenn Mahr and Division Chief Marc Scherschel both stated in their written statements that the force used by Medina was reasonable and appropriate. (R. Disc 2, 15-06-08B Exhibit 1 – Bates Nos. DENVER 000001-206.IAB File IC 2014-0076, pp. 170-73.) With the evidence showing that Medina's use of force was reasonable and appropriate, the Commission was forced to resort to speculation about other alternatives allegedly available to Medina. As discussed above, however, those other options are not borne out by the record.

The District Court's ruling on the use of force issue suffers from the same defects in the Commission's decision. Because there is no evidence to support the alleged violation of RR-306, the Commission's decision was an abuse of discretion and should be reversed.

II. Whether the District Court erred when it affirmed the Civil Service Commission's finding of a violation of Denver Police Department Rule 102.1 "Duty to Obey Departmental Rules" despite no evidence in the record to support violations of two Denver Police Department regulations on which the alleged violation of Rule 102.1 was predicated.

A. Standard of Review

"Appellate review of a district court's decision in a proceeding under C.R.C.P. 106(a)(4) is de novo. An appellate court sits in the same position as the district court when reviewing an agency's decision." *Thomas*, 117 P.3d at 8-9 (citation omitted). "C.R.C.P. 106(a)(4) proceedings are limited to review of whether the decision of the governmental body was an abuse of discretion or was made without jurisdiction, based on the evidence in the record before that body." *Verrier*, 77 P.3d at 879.

Review pursuant to C.R.C.P. 106(a)(4) entails determination of whether an erroneous legal standard was applied by the governmental body below, and whether there is no competent evidence to support the governmental body's decision. *City of Colorado Springs*, 897 P.2d at 756. "For purposes of judicial

review of administrative decisions, competent evidence is the same as substantial evidence." *Colorado Municipal League*, 759 P.2d at 44; *see also City of Colorado Springs*, 897 P.2d at 756.

> Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," ….and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Colorado Municipal League, 759 P.2d at 44 (*quoting Columbian Enameling & Stamping Co., Inc.*, 306 U.S. at 300).

B. Preservation on Appeal

This issue was preserved in the Civil Service Commission appeal (R. Disc 1, 15-12-15 Cross-Appeal Opening Brief and Answer Brief, pp. 23-25; R. Disc 1, 16-02-01 Cross-Appeal Reply Brief, pp. 6-7), and in the District Court (R. CF, p. 79-81, 148-49). The Civil Service Commission ruled on this issue at R. Disc 1, 16-03-15 Medina Decision CSC – FINAL, pp. 5-6. The District Court ruled on this issue at R. CF, pp. 163-64.

C. Discussion

There are two purported violations that form the basis for the charge under RR-102.1: duty to report use of force (OMS 105.02(1)), and duty to request medical attention (OMS 105.02(2)). The pertinent portions of the "duty to report"

provision require reports when: "An officer encounters an individual with obvious injuries" (R. Disc 3, 15-06-15L Exhibit 20, p. 1 (OMS 105.02(1)(a)(5))), or "An officer applies…Carotid compression technique" (*id.* (OMS 105.02(1)(a)(6)(b))). The "duty to request medical attention" provision is triggered when "an officer encounters an individual with obvious injuries…." (*Id.* at p. 3 (OMS 105.02(2)(a)).) The Commission held that Medina violated RR-102.1 because "regardless of whether Ms. Trujillo actually lost consciousness, her physical response resulting from the application of Officer Medina's knee to her body required Officer Medina to seek medical attention for her – something he did not do." (R. Disc 1, 16-03-15 Medina Decision CSC – FINAL, pp. 5-6 (footnote omitted).) The District Court did not provide additional analysis on this point, but affirmed the analysis of the Commission. (R. CF, pp. 163-64.) The Commission's ruling on this issue is an abuse of discretion and should be reversed because it is contrary to the plain language of the "duty to report" and "duty to request medical attention" rules and it is contrary to the record.

There are essentially two applicable inquiries here: (1) whether the "carotid compression technique"[3] was applied; and (2) whether the individual has "obvious

[3] The carotid compression technique involves applying compression to the neck. (*See* R. Disc 1, Exhibit E, pp. 1-3.)

injuries." (*See* R. Disc 3, 15-06-15L Exhibit 20, pp. 1, 3.) The Commission did not find that Medina applied the carotid compression technique. (R. Disc 1, 16-03-15 Medina Decision CSC – FINAL, p. 5 at n. 7 ("It is unclear where on Ms. Trujillo's body Officer Medina applied pressure with his knee.").) Indeed, Vigil admitted that the carotid compression technique was not used. (R. Disc 3, 6-22-15 MEDINA-HG, p. 207 lines 23-24; R. Disc 3, 6-23-15 MEDINA-HG, p. 47 lines 8-9.) The Agency admitted that "[Medina] is correct in that application of the carotid compression technique was not the basis of the Hearing Officer's finding and is not at issue here." (R. CF, p. 128.) The only remaining question is whether Trujillo had "obvious injuries."

The District Court acknowledged that there is no definition of "obvious injury" in "the relevant rules or policy." (R. CF, p. 164.) The District Court went on to state: "it was not an abuse of discretion for the Commission to find that Ms. Trujillo's physical response was an obvious injury triggering the duty to report." (*Id.*) While an agency's interpretation of its own rules may be entitled to some deference, that deference has limits. *See Waste Mgmt. of Colo., Inc. v. City of Commerce City*, 250 P.3d 722, 725 (Colo. App. 2010). An agency's interpretation is not entitled to deference when that interpretation is plainly erroneous. *Khelik v. City & Cnty. of Denver*, No. 15CA0283, 2016 Colo. App. LEXIS 464, at *9 (Colo.

App. Apr. 7, 2016). The Court of Appeals is "not bound by the agency's construction because [the Court of Appeals'] review of the law is de novo." *Id.* Based on the evidence in the record, and the plain language of the applicable rules and policies, the interpretation of "obvious injury" employed by the Commission is plainly erroneous.

There is no evidence that Trujillo had "obvious injuries" as a result of Medina going "hand on" with her. It is undisputed that Trujillo did not receive or report any injury from the holding cell incident. There is no evidence that she lost consciousness, other than Vigil's speculative assumption. Medina was in a position to see Trujillo's face and he confirms that she did not lose consciousness. (R. Disc 3, 6-23-15 MEDINA-HG, p. 44 lines 12-18.) By contrast, Vigil could not see Trujillo's face when she was on the floor of the holding cell. (*Id.* at pp. 43-44 lines 23-2.) Medina could see Trujillo's face at the time of the incident, but her face is not visible on the video. (*Id.* at pp. 43-44 lines 23-18.) The Agency did not appear to contest Medina's unrebutted testimony that Trujillo was smiling at him, but rather argued only that her smiling at him is inconsistent with her faking a loss of consciousness. (*See* R. CF, p. 128.) Whether she was intentionally faking a loss of consciousness or not, her smiling at him further proves that she did not in fact

lose consciousness.[4] "Obvious injury" is not defined in the applicable policy, and there is nothing in the policy stating that loss of consciousness constitutes an obvious injury. (*Id.* at p. 37 lines 14-21.) Further, faking a loss of consciousness would not be considered an "obvious injury." (*Id.* at pp. 42-43 lines 24-2.)

The Commission attempts to sidestep the lack of evidence of "obvious injury" by stating that "her physical response resulting from the application of Officer Medina's knee to her body required Officer Medina to seek medical attention for her…." (R. Disc 1, 16-03-15 Medina Decision CSC – FINAL, pp. 5-6 (footnote omitted).) The problem with this approach is the applicable rules are not triggered by a subject's "physical response," but instead the rules set a much higher bar. Not only must there be an injury to the subject, it must also be "obvious." (R. Disc 3, 15-06-15L Exhibit 20, p. 1 (OMS 105.02(1)(a)(5)), p. 3 (OMS 105.02(2)(a)).) The record is devoid of any injury to Trujillo, much less an injury that was "obvious." There is no objective evidence of injury to Trujillo, and she did not report any injury. (R. Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 3 at ¶ 7(h) and (j); R. Disc 3, 6-22-15 MEDINA-

[4] Notably, before Medina used any force in the holding cell, Trujillo threatened that video would be on YouTube and the Internet (R. Disc 2, 15-06-08C Exhibit 2 – District Two Holding Cell -- 74335-13 at 4:40-4:49) and threatened that her lawyer was on the phone (*id.* at 5:50-5:55).

HG, p. 95 lines 9-12, p. 97 lines 3-10, p. 124 lines 17-19, p. 125 lines 12-14; R. Disc 3, 6-23-15 MEDINA-HG, p. 34 lines 3-13, pp. 210-11 lines 24-5, pp. 212-13 lines 14-5.) The Commission's ruling on RR-102.1 is unsupported by the record, contrary to the applicable Denver Police Department rules, and inconsistent with the plain meaning of "obvious injury."

"Obvious" is defined as "easy to see or understand; evident." Webster's New Compact Desk Dictionary and Style Guide 334 (Michael Agnes et al. eds., 2013). "Injury" is defined as "harm or damage" or, secondarily, "an injurious act." *Id.* at 251. In the context of this appeal and the rules at issue, the term "obvious injury" is used in reference to the condition of a person encountered by an officer and, therefore, the secondary definition of "obvious injury" ("an injurious act") does not apply. (*See* R. Disc 3, 15-06-15L Exhibit 20, p. 1 (OMS 105.02(1)(a)(5)) and p. 3 (OMS 105.02(2)(a)).) Taking the definitions of "obvious" and "injury" together, then, gives the following definition of "obvious injury:" harm or damage that is evident, or easy to see or understand. According to this plain interpretation of the term, Trujillo did not have obvious injuries. As discussed above, there is no evidence in the record that she suffered any injuries. Because she had no injuries, it is impossible for her to have had any injuries that were obvious. The Commission's interpretation of "obvious injury" is plainly erroneous.

Undersigned counsel has been unable to locate any Colorado appellate opinion or statute defining "obvious injury." At least one other Court, however, has applied the term in the context of a case involving the actions of a police officer. In the context of a Constitutional claim of deliberate indifference to the need for medical care, "obvious injury" was characterized to include "bumps, bruises, cuts, bleeding…." *Aguilar v. Rangel*, No. 4:13-CV-855-A, 2013 U.S. Dist. LEXIS 170732, at *7 (N.D. Tex. Dec. 4, 2013). The claim at issue in *Aguilar* involved a different standard than is applicable to this appeal, but the *Aguilar* court's ruling is instructive. The alleged conduct by the officer in *Aguilar* was distinctly different than the conduct of Medina:

> …Rangel grabbed plaintiff by the neck and slammed her to the ground. The impact left plaintiff 'stunned and disoriented.'
>
> Plaintiff did not attempt to resist defendants before she was slammed to the ground; afterwards, she was physically unable to do anything. Rangel repeatedly punched plaintiff in the head while she lay on the ground, then handcuffed her. Even after plaintiff was handcuffed and immobilized, Rangel continued to punch her in the head.

Id. at *3 (citation omitted). The *Aguilar* court dismissed the claim for deliberate indifference to need for medical care under F.R.C.P. 12(b)(6). In this case, Medina used much less force than that employed by the subject officer in *Aguilar*. Like the plaintiff in *Aguilar*, Trujillo did not have any "bumps, bruises, cuts, [or] bleeding" that could constitute "obvious injuries."

The Commission's analysis of the alleged violation of RR-102.1 is contrary to the evidence in the record, the plain language of the applicable rules, and is contrary to a reasonable interpretation of the term "obvious injury." In light of all of the above, the Commission's decision with respect to RR-102.1 was an abuse of discretion and should be reversed.

CONCLUSION

For the reasons stated above, the Court of Appeals should reverse the rulings of the Commission and the District Court regarding the alleged violations of RR-306, "Inappropriate Force," and RR-102.1, "Duty to Obey Departmental Rules."

Respectfully submitted June 8, 2017.

ELKUS & SISSON, P.C.

/s/Lucas Lorenz
Donald C. Sisson, #35825
Lucas Lorenz, #35739
Elkus & Sisson, P.C.
501 S. Cherry Street, Suite 920
Denver, CO 80246
Telephone: (303) 567-7981
dsisson@elkusandsisson.com
llorenz@elkusandsisson.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on June 8, 2017, I filed this **OPENING BRIEF** with the Court of Appeals via Colorado Courts E-Filing, and served a copy on the following via Colorado Courts E-Filing:

Kristen A. Merrick
John-Paul Sauer
Denver City Attorney's Office
Litigation Section
201 West Colfax Ave., Dept. No. 1108
Denver, CO 80202-5332
Attorneys for Appellees City and County of Denver and Denver Police Department

Robert A. Wolf
1200 Federal Blvd., 4th Floor
Denver, CO 80204
Attorney for Appellee Civil Service Commission of the City and County of Denver

/s/Lucas Lorenz
Lucas Lorenz