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COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Appeal from the District Court, City and County of Denver
The Honorable David H. Goldberg
Case Number: 2016CV31292

**Plaintiff- Appellant:**

**JAMES MEDINA,**

**v.**

**Defendants- Appellees:**

**CIVIL SERVICE COMMISSION of the CITY AND COUNTY OF DENVER; CITY AND COUNTY OF DENVER, a Colorado municipal corporation; and DENVER POLICE DEPARTMENT.**

▲ **COURT USE ONLY** ▲

Case No.: 2016CA2205

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# ANSWER BRIEF

## 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, undersigned counsel certifies that:

1. The brief complies with C.A.R. 28(g). It contains 5251 words.
2. The brief complies with C.A.R. 28(a). For the appellee, it contains a table of contents with page references, a table of authorities-cases, statutes, and other authorities, a statement of the issues presented for review, a concise statement identifying the nature of the case, relevant facts and procedural history, a summary of the arguments, the arguments, a short conclusion stating the precise relief sought, and any request for attorney fees.
3. 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.

*s/Kristen A. Merrick*
Kristen A. Merrick, #41031

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## I. INTRODUCTION

This case involves a Denver Police Officer who aggressively instigated a physical altercation with a prisoner in a holding cell to obtain her shoes and belt when there were non-violent alternatives, in violation of Denver Police Department regulation RR-306 *Inappropriate Force*. The Officer also failed to seek medical attention and failed to report the use of force in violation of RR-102.1 *Duty to Obey Departmental Rules and Mayoral Executive Orders* as it pertains to OMS 105.02 *Use of Force Procedures*. The Deputy Director of Safety, the decision maker, issued an order March 4, 2015 terminating Plaintiff for violating RR-306, and suspending Plaintiff for thirty days for each of the other two violations.

## II. ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly affirmed the Civil Service Commission's finding that Medina violated Denver Police Department Rule 306 "Inappropriate Force"?

2. Whether the District Court properly affirmed the Civil Service Commission's finding that Medina violated Denver Police Department Rule 102.1 "Duty to Obey Departmental Rules"?

## III. STATEMENT OF THE CASE

### A. Facts

The facts in this case are largely undisputed. On July 10, 2014, Plaintiff and Officer Cheryl Smith responded to a call for assistance from Officer Ramone Young who was at the Burger King at 3200 N. Downing Street. (Hearing Officer's Finding, Conclusions, and Order ("HO Order"), CSC000331 ¶ 1.) Officer Young was having difficulty with two people that were interfering with his treatment of an intoxicated individual. *Id.*

Upon arrival, Officer Cheryl Smith and Plaintiff began assisting Officer Young with the intoxicated man. *Id.* at ¶ 2. Seryina Trujillo and her boyfriend Daniel Adams began interfering, and Officer Young determined Mr. Adams needed to be transported to detox. *Id.* at ¶ 3. This upset Ms. Trujillo who grabbed Mr. Adams and spat on Officer Smith, hitting her below the eye. *Id.* Plaintiff arrested Ms. Trujillo for assault on a police officer and attempted to place her in the patrol car. *Id.* As he was placing her in the car, Ms. Trujillo kicked Plaintiff in the face and he responded by punching her in the face. *Id.* Later, Plaintiff filed a Use of Force report, per policy, regarding this strike to the face. *Id.*; (Use of Force Report, CSC000714-715.)

Plaintiff transported Ms. Trujillo to the District 2 Station and charged her with two counts of assault on a police officer and resisting arrest. (HO Order, CSC000331

¶ 5.) Plaintiff escorted Ms. Trujillo by himself to a holding cell. *Id.* at ¶ 6. The incident in the holding cell was recorded by a cell camera with audio which was transcribed. (Video 4:17-9:40 CSC00920; Transcript of Video.)[1]

Denver Police Department ("DPD") policy requires that when a prisoner is placed in a holding cell, his/her belt and shoes must be removed and confiscated for the prisoner's safety. (DPD District/Bureau Directive § 1(f) (2004), CSC001066). Plaintiff ordered Ms. Trujillo to provide her belt and shoes and she refused. (HO Order, CSC000331 ¶ 7.) Then, in violation of DPD policy, Plaintiff lunged at Ms. Trujillo and engaged in a physical altercation with her. *Id.* at ¶ 26. The Hearing Officer noted "Although the facts were essentially undisputed, Plaintiff's counsel spent a great deal of time attempting to show that Officer Medina had not violated the Use of Force Policy. But, the real issue was Plaintiff's deployment of force in the first place." *Id.* During the scuffle, Ms. Trujillo asks "What are you going to do if I refuse to give you my belt and shoes?" *Id.* at ¶ 7. Plaintiff responds "[I am] going to get them one way or another." *Id.*

The video depicts Plaintiff lunging at Ms. Trujillo and pinning her to the bench. (Video 4:17-8:14, CSC000920.) He wrestles with her from one side of the bench to

[1] The transcript of the video, was admitted as Exhibit 23 at hearing (CSC 001918 lines 2-4) with no objection but it was initially omitted from the record certified to the District Court. It is included in the record before this Court, but the pages are not bates labeled with a CSC stamp.

the other and she places her feet on the wall as he tries to pin her down. *Id.* Ms. Trujillo kicks at Plaintiff and knocks his glasses off. *Id.* As he comes forward, he tries again to pin her, this time getting his knee across her neck pinning her to the bench with her other arm outstretched under her head. *Id.* As he attempts to remove her belt, the video depicts her outstretched arm go limp. *Id.* Ms. Trujillo lifelessly slides off the bench and Plaintiff stands up and removes Ms. Trujillo's shoes. *Id.* Plaintiff leaves the cell and Ms. Trujillo comes to and pulls herself back up on the bench. *Id.* Plaintiff returned and unnecessarily verbally engaged Ms. Trujillo telling her that he was going to add another charge and antagonized her by stating "I know what I did. I know what I did" and "Don't cry now" and "You can tell that to God." *Id.* at 8:58-9:40; *see also* Exhibit ("Ex.") A, Transcript of Video, p. 7:13-25.

The Denver Police Department Use of Force Policy provides "[A]n officer shall use only that degree of force necessary and reasonable under the circumstances." (CSC000305.) The Policy also requires that when officers use force, they file a Use of Force report which includes the details of the use of force situation. *Id.* There is no doubt that Medina knew this reporting requirement, as he completed a use of force report for the events earlier that day at Burger King. (Use of Force Report, CSC000714-715; Commission's Decision and Final Order ("Commission Order"), CSC000455 fn3.) The Policy also requires an officer to contact a supervisor

and notify him/her of any injuries or alleged injuries as the result of a use of force situation and to contact an ambulance anytime the Carotid compression technique is used. (CSC000900.)

After the struggle in the holding Cell, Plaintiff did not report the struggle, nor did he request medical assistance for a prisoner that went limp during the struggle. "Probably none of this would have come to light except that Officer Smith informed Detective Phil Coleman that 'something might have happened' in the holding cell between Ms. Trujillo and Officer Medina." (HO Order, CSC000332 ¶ 8.) After receiving notice of the incident from Detective Coleman, Sergeant Mike Cody forwarded the complaint to Internal Affairs for investigation. (Transcript Vol. I 110:6-12, CSC001227.) Sgt. Cody testified that after viewing the video of the incident, he was concerned there may have been some policy violations. (Transcript Vo. I 106:14-107:6, CSC001223.)

Internal Affairs investigated this matter and it was forwarded to the Conduct Review Office ("CRO") which, on January 22, 2015, sustained violations for RR-306 Inappropriate Force, RR 102.1 as it pertains to OMS 105.02 (1) Duty to Report Use of Force and (2) Duty to Request Medical Attention, and RR-105 Conduct Prejudicial. (HO Order, CSC000333 ¶ 13.) The CRO recommended a penalty of termination held in abeyance for two years for the violation of RR-306. *Id.* at ¶ 17.

The CRO recommended the presumptive thirty-day suspensions for the other two violations. *Id.* After the Chief's Hearing on February 23, 2015, Commander Michael Battista on behalf of DPD Chief Robert C. White issued the Chief's Written Command recommending the same discipline as recommended in the CRO Report. *Id*. On March 4, 2014, the ultimate decision maker Deputy Director of Safety Jess Vigil issued the Departmental Order of Discipline affirming the recommended penalties for the violations of OMS-102.1 and RR-105, but imposing the presumptive penalty of termination for the violation of RR-306 Use of Force. *Id*. at ¶ 23. The Deputy Director was not willing to hold the termination in abeyance. *Id*.

**B. <u>Procedural Status</u>**

The Hearing Officer sustained all the rule violations determined by the Department of Safety. (HO Order CSC000334-335.) However, the Hearing Officer determined Plaintiff was denied due process and modified the discipline from termination to termination held in abeyance for two years conditioned on no further Conduct Category D or higher violations, as recommended by the CRO. *Id.* at CSC000333-334, 341. In justifying her finding that due process was denied Plaintiff, the Hearing Officer determined that the Department of Safety did not provide notice to Plaintiff that termination was a possible penalty, that the Charter and the

Operations Manual conflict, and that the CRO's recommendation to the ultimate decision maker sets a ceiling for discipline. *Id.* at CSC000335-340.

The Civil Service Commission ("Commission") upheld the Hearing Officer's findings of Medina's violation of RR-306 *Inappropriate Force* and RR-102.1 *Duty to Obey Departmental Rules*. (Commission Order CSC000458-460.) However, the Commission found the Hearing Officer erred in finding that due process violations necessitated her reducing the imposed penalty of discharge. *Id.* at CSC000460, 467-468. The Commission therefore reinstated the penalty of discharge initially imposed for Medina's violation of RR-306. *Id.* The Commission noted the Hearing Officer failed to make any findings or conclusions regarding RR-105 *Conduct Prejudicial*, but determined the issue was moot in light of the reinstated penalty of termination for RR-306. *Id.* at 459 n. 8.

The Denver District Court affirmed the Commission's decision. (Denver District Court "DDC" Decision, p. 16.) With respect to RR-306 (inappropriate force), the Court noted that the Commission's decision did not rest upon whether another officer was available to assist Medina. *Id.* at p. 6. Rather, "[t]he Commission was clear that Appellant's use of physical force was unnecessary and disproportionate in the situation." *Id.* With respect to RR-102.1 (duty to obey departmental rules), the Court agreed with Appellant that what constitutes an obvious injury is not defined by

relevant rules or policy. *Id.* at p. 7. The Court determined, therefore, that "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.* The Denver District Court also determined the Commission did not abuse its discretion when it 1) ruled that Medina's due process rights were not violated; 2) rejected Appellant's argument regarding inconsistency of discipline; and 3) failed to address Medina's policy arguments. *Id.* at pp. 8-15.

Having failed to obtain relief from the Commission and the Denver District Court, Medina now seeks relief from the Colorado Court of Appeals. However, Medina does not appeal the Denver District Court's rejection of his due process, inconsistent discipline, or policy determination arguments. Medina only appeals the Denver District Court's determination that the Commission did not abuse its discretion in finding Medina violated Denver Police Department Rules and Regulations 306 (inappropriate force) and 102.1 (failure to obey departmental rules) as it pertains to Operations Manual Sections 105.02(1) (duty to report use of force) and 105.02(2) (duty to request medical attention).

## IV. SUMMARY OF THE ARGUMENT

This case involves a Denver Police Officer who responded to a scene at a Burger King where he encountered a woman who kicked him, spit on his colleague,

and screamed at the officers. Medina handcuffed the woman, placed her in his vehicle, and transported her to a holding cell at the District 2 police station. Despite her recalcitrant behavior at the scene, Medina did not request assistance from another officer. After escorting her to a holding cell, Medina instructed the prisoner to remove her belt and shoes, and she refused. Medina aggressively instigated a physical altercation when he lunged at the prisoner and wrestled her to obtain her shoes and belt when there were non-violent alternatives, in violation of RR-306 *Inappropriate Force*.

After pinning his knee against the prisoner's neck, the prisoner appeared to lose consciousness as she went limp and slid off the bench onto the concrete floor. The Officer failed to seek medical attention and failed to report the use of force in violation of Denver Police Department Rule and Regulation 102.1 *Duty to Obey Departmental Rules and Mayoral Executive Orders* as it pertains to Operations Manual Section ("OMS") 105.02 *Use of Force Procedures*. Specifically, OMS 105.02(2) requires officers to seek medical attention any time there is an injury or an alleged injury as a result of force used by department personnel or an officer encounters an individual with obvious injuries. OMS 105.02(1) requires an officer to complete a Use of Force Report when "a person is injured or dies while in custody," or "an officer encounters an individual with obvious injuries."

The Deputy Director of Safety issued an order March 4, 2015 terminating Plaintiff for violating RR-306, and suspending Plaintiff for thirty days for each of the other two violations, and the Denver Civil Service Commission agreed.

## V. ARGUMENT

### A. Standard of Review

Review of a lower judicial body's decision pursuant to C.R.C.P. 106(a)(4) is strictly limited to a determination of whether the quasi-judicial body or officer, here the Civil Service Commission, exceeded its jurisdiction or abused its discretion, based on the evidence presented. *City of Colorado Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995). This Court may reverse the decision of the Commission only if there is "no competent evidence" to support the decision. *Id.* The phrase "no competent evidence" means the decision of the lower judicial body "is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* (citing *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308-09 (Colo. 1986); *Sellon v. City of Manitou Springs*, 745 P.2d 229, 235 (Colo. 1987)).

An "arbitrary and capricious" exercise of discretion by an administrative agency can arise in three ways: (1) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider; (2)

by failing to give honest and candid consideration of the evidence before it; or (3) by exercising its discretion in such a manner that reasonable people fairly and honestly considering the same evidence would reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001) (citing *Van De Vegt v. Bd. of Comm'rs of Larimer Cty.*, 55 P.2d 703, 705 n. 15 (Colo. 1936)).

Administrative proceedings "are accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990) (quoting *Hadley v. Moffat Cty. Sch. Dist. RE-1*, 681 P.2d 938, 944 (Colo. 1984)); *U-Tote-M of Colorado, Inc. v. City of Greenwood Vill.*, 563 P.2d 373, 376 (Colo. App. 1977).

### B. Competent Evidence Supports Plaintiff's Rule Violations for RR-306 (Inappropriate Force) and RR-102.1 (Duty to Obey Departmental Rules)

#### 1. RR-306 Inappropriate Force

The Hearing Officer found Plaintiff's use of force was inappropriate because he had other options available to him, he did not need to go "hands on" with Ms. Trujillo, and he unnecessarily escalated the situation in the holding cell. (HO Order, CSC000335 ¶ 25.) Specifically, the Hearing Officer found Plaintiff could have left the cell, called for assistance, and observed Trujillo via video while waiting for backup to arrive. *Id.* The Commission upheld the Department of Safety's rule

violation based on the Hearing Officer's findings. (Commission Order, CSC000457.) The Commission held that Medina "had options other than force available to him (such as enlisting the assistance of another officer), that is, he did not need to go 'hands on' with Ms. Trujillo when he did in the manner in which he did." (Commission Order, CSC000458.)

Both the Hearing Officer and the Commission agreed that the scenario Medina created was entirely avoidable; Plaintiff's own failure to employ sound tactics placed him there. Immediately upon her arrest, Trujillo refused to obey Plaintiff's orders, forcefully kicked him in the face, and spit on Officer Smith's face, all of which culminated in Plaintiff striking Trujillo in the face. Plaintiff knew he was dealing with a difficult, combative, and physically aggressive suspect. He should have anticipated, or at least contemplated, that Trujillo would continue to demonstrate resistance – including the refusal to remove her belt and shoes. Medina places a great deal of emphasis on the fact that Trujillo had calmed down during transport to District 2. As a result, Medina argues, he had absolutely no idea that a woman who had, minutes earlier, kicked him in the face, would become aggressive and obstinate again.[2] The fact that Trujillo briefly calmed down during transport to the District 2

[2] Medina's argument is undercut by the fact that he told Internal Affairs on August 8, 2014 that he believed Trujillo was "high on something" and that she has "mental issues" which suggests he found her unstable and unpredictable. (Ex. 6 6:39-6:51 CSC000924.)

police station was no indication that she would be docile and cooperative going forward. In fact, in Officer Glenn Mahr's[3] statement, which was included in the IAB file he states:

> …I do believe that this situation could have been possibly prevented or mitigated by the use of sound tactics. The first thing I noticed was that, according to the video, this suspect was arrested for spitting on an officer. That is assaultive behavior and demonstrates a willingness not to comply or to be hostile with police. That fact alone would make it appropriate to have at least two officers dealing with this suspect, including following the transporting officer to the station and being present when she is placed in the holding cell. Whenever an officer encounters an assaultive or resistive party they should have adequate cover, and that includes after the initial arrest.

(Exhibit 1-173 CSC00085.)[4] Plaintiff could have and should have called for assistance before escorting Trujillo to the station and placing her in the cell.

Plaintiff contends he had no one to assist him because Officer Richmond, the only other officer present at the District 2 station, was on light duty. Medina erroneously contends that was the only solution offered by the Hearing Officer and Commission. However, neither the Hearing Officer nor the Commission found that

[3] Officer Glenn Mahr served on the tactics review board and, based on his experience and knowledge, was asked to review the video in this case and provide his opinion. (Exhibit 1-172 to Exhibit 1-173 CSC00085-86.)

[4] Plaintiff also relies on the statements of Officer Glenn Mahr and Division Chief Marc Scherschel in his Opening Brief, p. 18.

Medina should have had Officer Richmond assist him. Rather they note there were other "options" (plural) including getting assistance from another officer. While Medina and Richmond may have been the only officers in the station at that moment, they were not the only two assigned to District 2 during that shift. In fact, Medina had just been with several other District 2 officers at the Burger King scene including Officers Smith, Young, Henderson, and Sgt. Hausner. (Exhibit 1-3 to 1-5 CSC000716-718; Exhibit 1-11 to 1-14 CSC000724-727.) In fact, Officer Henderson, following the incident, "responded to the District Two Station to copy the photos and the video to CDs…." (Exhibit 1-14 CSC000727.) Certainly, Medina could have called one of those officers, or another officer, over the radio and watched Trujillo in her cell on video while he waited for assistance. Officer Glenn Mahr agreed with this approach, stating:

> The other issue I noted was that the suspect is verbally challenging the officer and demonstrating a clear willingness not to comply from the very beginning of the video. This would indicate that the suspect is not likely to suddenly comply, but more than likely escalate the situation. The option I would recommend would be to leave the suspect handcuffed in the cell and go get an additional officer(s) to assist. The suspect can be monitored on video during that time. When adequate officers are present, enter the cell and attempt to take the property from the suspect, while still handcuffed, that way more control can be maintained.

(Exhibit 1-173 CSC00086.)

Plaintiff further argues monitoring Trujillo on video was not a viable option because he could not have prevented her from hurting herself. This argument is meritless. First, there is no evidence that Trujillo was depressed or suicidal, nor is there any evidence that Trujillo intended to hurt herself. To the contrary, in response to Medina's statement that he needs to confiscate her belt and shoes so she doesn't hang herself, she responds "why would I have reason to hang myself?" (Video, CSC000920 5:20-5:40; *see also* Transcript of Video, p. 4:2-20.) Plaintiff was asked in his second internal affairs interview if he had any reason to believe Trujillo was a suicide risk, and he conceded he did not. (Ex. 6 5:58-6:15 CSC000924.) In addition, her resistance in the video demonstrates she was strongly motivated by self-preservation. Further, it is not as though Trujillo had a loaded gun in the cell and could harm herself in a split second. Causing any injury to herself with her shoes or belt would have taken time, certainly enough time for Plaintiff to enter her cell and intervene. In fact, had she removed her shoes and belt, Medina could have simply entered the cell and collected them, thereby resolving the issue. Alternatively, Medina could have awaited assistance while standing directly outside Trujillo's cell watching her through the window.

Plaintiff also incorrectly contends that the Hearing Officer and Vigil's conclusion that Medina had other options such as retreating or observing Trujillo via

video is “contradicted by the reality of the situation” and that those options “were not actually possible.” Plaintiff does not support this argument with evidence that there was no video feed, or the video feed was down that day, or officers were somehow prevented from getting to the District 2 station. Rather, Medina contends the “reality of the situation” was simply that he was required to obtain Trujillo’s belt and shoes, apparently at all costs.

Likewise, Plaintiff claims seeking assistance while monitoring Ms. Trujillo would have violated OMS 113.02 (1)(f), which requires removal of belts and shoes from inmates before placing them in a holding cell. Thus, per Plaintiff, he was forced to choose between using inappropriate force and violating OMS 113.02. Plaintiff’s “Catch 22” excuse misses the mark. Nothing prevented Plaintiff from obtaining backup to assist with that process.

Finally, Plaintiff argues that other officers found his use of force was reasonable and appropriate, but Plaintiff misrepresents what these officers actually said in the written statements they submitted to IAB. For instance, Officer Glenn Mahr states that once engaged in a physical altercation with Trujillo, the force used was reasonable, but noted “I do believe that this situation could have possibly been prevented or mitigated by the use of sound tactics.” (Exhibit 1-173 CSC000886.) This response recognizes not only alternatives available to Medina but also that in

achieving the ends of removing her belt and shoes, he is required to follow the use of force policy. Likewise, Division Chief Marc Scherschel stated "I would have some concern with the decision to approach a verbally combative subject without some additional assistance in the area." (Exhibit 1-171 CSC000884.) Neither officer stated that because Medina was required to get Trujillo's shoes and belt, he could disregard sound police tactics and use any means of force.

Plaintiff ignores the crux of the matter, which is that he did not need to go "hands on" with Trujillo in the first place. (HO Order, CSC000335, at ¶ 25.) Trujillo was already in custody, which "drastically changed the need for any use of force." *Id*. Certainly, the force used, applying pressure to Trujillo's neck or chest was "disproportionate and inappropriate." (Commission Order, CSC000458 at fn 7.) The Commission did not abuse its discretion in relying on the Hearing Officer's factual findings and holding Plaintiff violated RR-306.

2. RR-102.1 Duty to Obey Departmental Rules

Plaintiff failed to comply with Departmental Rule 102.1 which requires officers to obey departmental rules, in this case Operations Manual sections 105.02(1) and 105.02(2). OMS 105.02(1) requires an officer to complete a Use of Force Report when, *inter alia*, "an officer encounters an individual with obvious injuries. (CSC001062). OMS 105.02(2) requires an officer to request medical

attention "any time there is an injury or an alleged injury as a result of force used by department personnel or an officer encounters an individual with obvious injuries...." (CSC001064) Plaintiff incorrectly contends Trujillo had no "obvious injury" and therefore he had no duty to either report his use of force against Trujillo in the holding cell or request medical attention for her. Plaintiff urges this Court to find that the Commission misconstrued the phrase "obvious injury."

Plaintiff woefully understates the amount of deference afforded an agency's interpretation of its own rules, particularly in the law enforcement context. In fact, a case Plaintiff cites in his Opening Brief sets forth the following standard:

> In a C.R.C.P. 106 action, a reviewing court will give "deference to the interpretation provided by the officer or agency charged with the administration of the code or statute unless that interpretation is inconsistent with the legislative intent manifested in the text of the statute or code." *Waste Mgmt. of Colo.*, 250 P.3d at 725. In that regard, "[t]he agency's interpretation of the rule should be given great weight unless plainly erroneous or inconsistent with the rule." *Bryant v. Career Serv. Auth.*, 765 P.2d 1037, 1038 (Colo.App.1988). Similarly, we may give deference to the agency's reasonable interpretation involving matters within the agency's area of expertise. *Sheep Mountain All. v. Bd. of Cty. Comm'rs*, 271 P.3d 597, 601 (Colo.App.2011). In the law enforcement context, "police department regulations are entitled to considerable deference because of the State's substantial interest in creating and maintaining an efficient police organization." *Puzick v. City of Colorado Springs*, 680 P.2d 1283, 1286 (Colo.App.1983) (citing *Kelley v. Johnson*, 425 U.S. 238, 247, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976)).

*Khelik v. City & Cty. of Denver*, No. 15CA0283, 2016 WL 1385323, *3 (Colo. Ct. App. April 7, 2016) (upholding the Career Service Board's interpretation of a Denver Sheriff Department rule).

Disregarding completely the Civil Service Commission's interpretation of its own rule, Plaintiff instead purports to rely on a Northern District of Texas case, *Aguilar v. Rangel*, No. 4:13–CV–855–A, 2013 WL 6283965, *3 (N.D. Tex. Dec. 4, 2013) for a definition of "obvious injury." However, Plaintiff's analysis is flawed. As an initial matter, Plaintiff concedes the claim at issue in *Aguilar* involved a different standard than is applicable to this appeal. Indeed, the Court in *Aguilar* considered whether a constitutional claim by a pretrial detainee could withstand a motion to dismiss. *Aguilar*, 2013 WL 6283965 at *2. More importantly, Plaintiff claims that the Court in Aguilar defined "obvious injury" as "bumps, bruises, cuts, [or] bleeding" which is not true. In fact, the Court in *Aguilar* stated "there are no facts alleging that plaintiff received any bumps, bruises, cuts, bleeding, or anything else that would constitute an 'obvious injury,' or that should have alerted defendants of the need for plaintiff to immediately receive medical care." *Id.* at *3. Plaintiff conveniently omitted the entire "or anything else…" clause from his recitation of the case. The extremely restrictive definition of "obvious injury" Plaintiff promotes, and which is not supported by *Aguilar* or any other case, eliminates a host of potentially

serious obvious injuries such as excessive vomiting, dizziness, slurred speech, foaming at the mouth, convulsions, a dislocated joint, a sprain or broken bone, paralysis, fainting, or losing consciousness, just to name just a few. To suggest Plaintiff would have to request medical attention for a man with a cut on his arm that is bleeding but not for a man who cannot feel or move his legs is an absurd result.

In promoting this absurd result, Plaintiff loses sight of the purpose of OMS 105.02(2) which is to ensure that officers, who did not attend medical school and are not medical doctors, seek medical help for those with obvious injuries. That purpose is not served if officers choose not to seek medical help because they do not want to believe a prisoner suffered injury and they do not want to report the force that led to the injury as required by OMS 105.02(1).

Plaintiff's argument, that he did not encounter an individual with "obvious injuries" and Trujillo's "physical response" itself was not sufficient, falls flat. The Hearing Officer found Trujillo "clearly went limp," slumped to the floor, and appeared to lose consciousness. (HO Order, CSC003332 ¶ 7.) These facts add up to an "obvious injury" and triggered Plaintiff's duty to request medical attention. Plaintiff claims Trujillo was "faking," and that "faking a loss of consciousness would not be considered an obvious injury." However, the Hearing Officer did not find Trujillo was faking, and Plaintiff's own testimony undercuts this claim.

Plaintiff claimed that, unseen by the video, Trujillo was "smiling" or "smirking" at him after she slid to the ground.[5] Someone attempting to "fake" loss of consciousness is unlikely to clue in the subject of her deceit by smiling or smirking at him, actions that indicate consciousness. Further, even if Plaintiff legitimately suspected Trujillo of faking, his own biased interpretation of the situation is insufficient to excuse him from requesting medical attention. If every officer could circumvent this procedural rule by claiming victims were "crying wolf," numerous individuals would be denied medical treatment and the police department would be subject to a flood of lawsuits. Moreover, Plaintiff's own shocked reaction to Ms. Trujillo slumping to the floor, as seen on the video, indicates concern –not a response likely elicited by someone "faking" an injury. There was more than competent evidence that Ms. Trujillo suffered an obvious injury requiring Plaintiff to seek medical attention. However, even if Trujillo was faking, the Hearing Officer noted that "[i]t is immaterial whether she lost consciousness because her slumpage was

[5] Notably, Medina did not even mention Trujillo sliding off the bench in his follow-up report prepared July 15, 2014, five days after the incident. (Ex. 1-112 to 1-115 CSC000825-828; HO Order CSC 000332 ¶ 10.) He spoke about it in his first interview with Internal Affairs on July 21, 2014, and told the investigator Trujillo was not unconscious. (Ex. 5 2:50-3:28 CSC000923.) When the investigator asked how Medina knew that, he said she was only out for a couple seconds. *Id.* He did not mention any smile or smirk. *Id.* The first time he reported the alleged smirk was in his second Internal Affairs interview on August 8, 2014, nearly a month after the incident. (Ex. 6, 4:40-5:10 CSC000924.)

sufficient to alert Petitioner that a medical issue loomed." (HO Order, CSC000335 ¶ 25.)

Plaintiff likewise had a duty to report his use of force in the holding cell because Ms. Trujillo suffered "obvious injuries" as a result. As set forth above, the Hearing Officer and Commission found that Ms. Trujillo's slumping to the floor limp and appearing to lose consciousness, in direct and immediate response to Plaintiff's placing his knee on her chest or neck, demonstrated an "obvious injury." This finding was supported by competent evidence and the Commission did not abuse its discretion in upholding the Hearing Officer's decision that Plaintiff violated RR-102.1 as it pertains to OMS 105.02(1) and 105.02(2).

## VI. CONCLUSION

The Deputy Director of Safety's decision was not clearly erroneous, as it finds sufficient supporting competent evidence in the record. Therefore, this Court should find the Commission did not abuse its discretion in affirming the Hearing Officer's decision that Medina violated Denver Police Department Rules and Regulations 306 *Inappropriate Force* and 102.1 *Duty to Obey Departmental Regulations* as it pertains to OMS 105.02(1) (duty to report use of force) and 105.02(2) (duty to obtain medical assistance).

Respectfully submitted this 13th day of July, 2017.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of July 2017, a true and correct copy of the foregoing **ANSWER BRIEF** was filed and served via ICCES to the following:

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