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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from: District Court, Denver County, Colorado District Court Judge: The Hon. David H. Goldberg District Court Case Number: 2016CV31292	
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	**FOR COURT USE**
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REPLY 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, the undersigned certifies that:

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

It contains 2,464 words (reply brief does not exceed 5,700 words).

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.

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The fundamental defect in the decisions under appeal, as well as the Agency's arguments in support of those decisions, is their reliance on the reiteration effect: "repetition of an assertion increases the confidence in its truth and…the increase in confidence is independent of the actual truth or falsity of the assertion." Ralph Hertwig et al., *The Reiteration Effect in Hindsight Bias*, 104 Psychological Review 194, 194 (1997), *available at* http://library.mpib-berlin.mpg.de/ft/rh/rh_reiteration_1997.pdf. Conclusory statements about "other options" allegedly available to Medina are repeated, yet there is no factual evidence in the record to support such statements. Repetition does not beget proof.

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.

The core of the Agency's argument is that there were options available to Medina other than entering the cell and retrieving Trujillo's belt and shoes. That entire argument, however, is undercut by policy Medina was required to follow. To use the Agency's own characterization of the policy, "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." (Answer Br. at 3 (emphasis added).) This unequivocal policy negates

many of the alleged options argued by the Agency. For example, the Agency argues that Medina could have merely watched Trujillo on video. To do so without first removing and confiscating her Trujillo's belt and shoes, however, would have been a violation of the very policy described by the Agency as quoted above. The Agency's argument that Trujillo was not depressed or suicidal is a red herring; the policy is unequivocal and does not state that belts and shoes must be removed and confiscated only if the individual is depressed or expresses suicidal ideations. Another example of an alleged option that is negated by the policy discussed above is the contention that Medina could have waited outside the window of the cell and watched through the window. Not only does this alleged option put Medina in the position of violating the policy requiring that he remove and confiscate Trujillo's belt and shoes, it is also pure speculation. How long would Medina have had to stand at the window watching Trujillo? Did he have other duties to attend to besides standing watch over a single inmate? The Agency fails to point to any such supporting facts in the record, and without establishing such facts the argument is speculative and unavailing.

The alleged option that the Agency, and the decisions below, focus on most is that Medina could have called for the assistance of another officer. Regardless of the number of times this alleged option may be repeated, however, the record

reveals that it was not actually an option. The Agency asserts that "Nothing prevented [Medina] from obtaining backup to assist with that process" (Answer Br. at 16), yet the Agency fails to point to actual evidence in the record establishing that there was any officer available to assist Medina. Once again, the Agency relies solely on speculation. Speculation is insufficient to support the Commission's decision. That decision must be supported by facts in the record. *See City of Colorado Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995). The Agency attempts to support its conclusory statement by reference to the statement of Officer Glenn Mahr, but this attempt does not withstand careful scrutiny. Officer Mahr's statement was made after reviewing only the "holding cell video." (R. Disc 2, 15-06-08B Exhibit 1 – Bates Nos. DENVER 000001-206.IAB File IC 2014-0076, p. 172.) In his statement Officer Mahr addresses tactics, not whether there actually were any officers available to assist Medina. (*Id.* at pp. 172-73.) Whether something is tactically sound in general does not mean it was feasible in a given circumstance. To this point, it is important to note that the Agency does not contest that Officer Richmond, the only other officer in the station at the time, was on injured reserve and could not go into the holding cell to assist. (*See* R. Disc 3, 6-22-15 MEDINA-HG, p. 247 at lines 7-12.) This crucial fact eviscerates the Agency's argument.

Unable to establish that there was any officer present at the station to assist, the Agency speculates further that officers present at the initial Burger King scene could have assisted. There is no evidence in the record, however, that those officers were available to report to the station when Medina brought in Trujillo. It is entirely possible that those officers were occupied with other duties, including handling other incidents. The Agency's reliance on Officer Henderson's report actually contradicts the Agency's argument. Officer Henderson's report bears the time "1950," *i.e.*, 7:50 p.m. (R. Disc 2, 15-06-08B Exhibit 1 – Bates Nos. DENVER 000001-206.IAB File IC 2014-0076, p. 13.) The video of the holding cell incident shows Medina brought Trujillo to the holding cell at approximately 18:24, *i.e.*, 6:24 p.m. (R. Disc 2, 15-06-08C Exhibit 2 – District Two Holding Cell -- 74335-13.) If Officer Henderson's report establishes anything, it is merely that he may have been at the station almost 90 minutes after Medina brought Trujillo to the holding cell. Rather than support the Agency's argument, this emphasizes the lack of factual support for that argument.

It is undisputed that after being assaultive at the initial Burger King scene, Trujillo was calm and compliant on the way to the station. The Agency argues that Medina could have called for assistance on the way to the station based on the mere possibility that Trujillo might become resistant again. Again, the Agency is

engaging in pure speculation. There is no evidence that other officers were available at that time to assist. It is entirely possible that the other officers at the initial scene were occupied with other calls, potentially more serious than a single suspect who was already in custody on the way to the station and who might (this would be pure speculation at the time) put up resistance. In addition to speculating, the Agency is looking at this with the benefit of 20/20 hindsight. On the way to the station, Medina could not know that Trujillo would become resistant to giving up her belt and shoes. On the way to the station it was at least as likely, if not more so, that Trujillo's temper had cooled down after the initial incident and she would continue to be compliant.

Attempting to avoid the fact that the record does not support the alleged "other options," the Agency contends that "the [District] Court noted that the Commission's decision did not rest upon whether another officer was available to assist Medina." (Answer Br. at 7.) The Commission did, however, rely solely on the alleged other options with respect to the "Inappropriate Force" charge:

> We agree with the DDOS and the Hearing Officer that Officer Medina's use of force on Ms. Trujillo was inappropriate *where, given the circumstances, Officer 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. As the Hearing Officer found, it was Officer Medina who escalated the situation in the holding cell, turning it into a physical altercation.

(R. Disc 1, 16-03-15 Medina Decision CSC – FINAL, p. 5 (emphasis added).) The Agency has failed to put forth any alleged "options" that are supported by the record, and all of the alleged options argued by the Agency are either contradicted by the record or based on pure speculation.

The allegation that there were other options available to Medina, standing alone, is little more than a conclusory statement. The number of times that statement is repeated—whether it is by Officer Mahr, the Hearing Officer, the Commission, the District Court, or the Agency—does not change that there is no factual support for it in the record. Reaching such a conclusion under the facts of this case is an abuse of discretion, and the "Inappropriate Force" charge 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.

One of the central questions for this issue is the meaning of "obvious injuries." That term is not defined by the policies or rules in the record. (*See* R. CF, p. 164.) "When a statute does not define its terms but the words used are terms of common usage, we may refer to dictionary definitions to determine the plain and ordinary meanings of those words." *People v. Daniels*, 240 P.3d 409,

411 (Colo. App. 2009). This principle applies equally to administrative regulations. *Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 360 P.3d 186, 192 (Colo. App. 2015). In his Opening Brief, Medina provided a definition of "obvious injury" based on the dictionary definitions of "obvious" and "injury." (Opening Br. at 25.) The Agency does not appear to directly contest that definition in its Answer Brief. The Agency does, however, provide examples of alleged obvious injuries that indicate an unreasonably broad interpretation of "obvious injury." For example, the Agency argues that "dizziness" is an obvious injury. (Answer Br. at 20.) Unless it is manifested in some outward physical symptoms such as stumbling, however, a person's feeling of dizziness would not be obvious to an observer. After all, an observer (such as Medina in this case) can only rely on perception and cannot get inside the subject's head.

Medina was present in the holding cell and in a better position to perceive the events than someone viewing the low-resolution video after-the-fact. Based on his first-hand perception, Medina has stated that Trujillo did not actually lose consciousness. (R. Disc 3, 6-23-15 MEDINA-HG, p. 204 lines 18-20, p. 209 lines 8-14.) The Agency, relying solely on the low-resolution video, disputes Medina's account. Notably, however, there was no charge of dishonesty levied against Medina, and the Hearing Officer did not find that Trujillo lost consciousness. (R.

Disc 1, 15-07-30 Medina FINDINGS CONCLUSIONS and ORDER, p. 3 at ¶ 7(h) and (j).) Close review of the video also contradicts the Agency's version of events. Trujillo's feigned loss of consciousness is consistent with her knowledge that the area was under video surveillance and her threat of legal action. Before her feigned loss of consciousness, she can be heard to state: "this is publicized on YouTube and all Internet access." (R. Disc 2, 15-06-08C Exhibit 2 – District Two Holding Cell -- 74335-13 at 4:31.) Trujillo then made a thinly-veiled threat of legal action: "don't you know my lawyer's already on the phone waiting for me to bond out?" (*Id.* at 5:51.) Immediately prior to the feigned loss of consciousness she can be heard to say "okay," and she then stops resisting. (*Id.* at 7:19.) While on the floor she smiled at Medina (R. Disc 3, 6-23-15 MEDINA-HG, p. 209 lines 8-14), consistent with her earlier threat, as if to taunt him with her performance for "YouTube and all Internet access." Less than a minute after saying "okay," Trujillo has gotten up on her own, is sitting upright on the bench, and adjusts her hair. (R. Disc 2, 15-06-08C Exhibit 2 – District Two Holding Cell -- 74335-13 at 7:57.) She even starts singing nearly 30 seconds after that. (*Id.* at 8:31.) All of this evidence supports the conclusion that Trujillo did not actually lose consciousness. The Agency essentially argues that "obvious injuries" should

include "obviously feigned injuries," yet that is inconsistent with the plain meaning of "obvious injuries" and would lead to absurd results.

While there are some instances in which an agency's interpretation of its own regulation calls for deference, this is not such a case. First and foremost, "an interpretation that is inconsistent with the plain language of the regulation is not [entitled to deference]." *Rags Over the Ark. River, Inc.*, 360 P.3d at 192. Interpreting "obvious injuries" to include a feigned injury, *i.e.*, something that is not an injury at all, is inconsistent with the plain meaning of "obvious injuries." Second, the rules at issue regarding "obvious injuries" are not the Commission's regulations, yet the Agency argues that this Court should defer to the Commission's interpretation. What is at issue are Denver Police Department rules. (*See* R. Disc 3, 15-06-15L Exhibit 20, pp. 1, 3.) The Commission is not a law enforcement agency, but rather a human resources agency:

> There shall be a Civil Service Commission, whose duties, powers and responsibilities shall include: establishing, fostering and maintaining a merit personnel system providing for the selection and appointment by the Manager of Safety to the Classified Service of the Denver Fire and Police Departments those determined to be the best qualified applicants and the promotion within the Classified Service of the best qualified members; establishing and administering a disciplinary and disqualification review process for members of the Classified Service; and other duties, powers and responsibilities as necessary to effectuate the intent of this Charter section.

Denver City Charter § 9.3.1. "Where a statute is reasonably susceptible of more than one interpretation, and the agency has employed *its expertise* to select a particular interpretation, we must defer to the agency's interpretation." *Colo. State Bd. of Accountancy v. Paroske*, 39 P.3d 1283, 1286 (Colo. App. 2001) (emphasis added). Law enforcement is not within the Commission's areas of expertise. Nor is it within the expertise of the disciplinary decision-maker below, Deputy Director of Safety Jess Vigil. (R. Disc 3, 6-22-15 MEDINA-HG, p. 225 line 11 – p. 26 line 12.) Because the rules at issue are not within the expertise of the Commission, and the Commission's interpretation is unreasonable, this Court should not defer to that interpretation.

Because Trujillo did not have "obvious injuries," and in fact there is no evidence in the record that she suffered any injury at all, Medina was not required to report or request medical attention after the holding cell incident,[1] and the alleged violation of Rule 102.1 should be reversed.

[1] The Agency's allegation that suggestion that Medina did not "want" to believe Trujillo or make a report, *i.e.*, that there was some intent behind this (*see* Answer Br. at 20), has no evidentiary support in the record.

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 August 3, 2017.

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CERTIFICATE OF SERVICE

I certify that on August 3, 2017, I filed this **REPLY BRIEF** with the Court of Appeals via Colorado Courts E-Filing, and served a copy on the following via Colorado Courts E-Filing:

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