

**DECISION AFFIRMING TWO-DAY SUSPENSION**

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**MICHAEL ESPINOZA**, Appellant,

v.

**PUBLIC WORKS, RIGHT OF WAY ENFORCEMENT**,  
and the City and County of Denver, a municipal corporation, Agency.

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**I. INTRODUCTION**

This is an appeal of Appellant's two-day suspension for alleged violations of specified Career Service Rules (CSRs). A hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on March 3, 2017. The Agency was represented by John Sauer, Assistant City Attorney, while the Appellant represented himself. Agency exhibits 1-5 were admitted. Appellant's exhibits A - E were admitted. Dominic Vaiana testified for the Agency. The Appellant testified on her own behalf.

**II. ISSUES**

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules (CSRs): 16-29 G.1.; 16-29 I; or 16-29 T;
- B. if the Appellant violated any of the aforementioned CSRs, whether the Agency's decision to suspend him for two days conformed to the purposes of discipline under CSR 16-41.

**III. FINDINGS**

This case arises from an angry encounter between a vehicle boot investigator and a citizen in Denver's City Park. The Appellant, Frank Espinoza, has worked for the Agency since 1995 and, specifically, as a vehicle boot investigator, or VBI, since February 16, 2001. The duties of that position include locating, identifying, and attaching immobilization devices to vehicles identified in the Agency's data base as having multiple unpaid parking citations. VBIs and other ticket-writing agents are trained that, when confronted with an especially difficult or unruly citizen, they must call their supervisor to assist. If - but only if - a citizen's confrontation rises to the level of a threat of immediate harm, Agents are instructed to call the Denver Police Department (DPD). \*

On November 7, 2016, Espinoza was on duty and driving his Agency boot vehicle through City Park when a citizen, AL, approached to ask he was allowed to park in a nearby space. Espinoza told AL it was not an authorized space but he would allow the vehicle to remain there, as it was a free day at the Denver Zoo, and parking was difficult throughout the area.

For reasons that were unclear, the encounter turned bitter. Espinoza initially left in his vehicle, but returned almost immediately to re-engage with AL who then recorded that portion of his encounter with Espinoza on his cellular phone's camera. [Exh. E]. The encounter makes evident Espinoza's multiple violations, below, and is, therefore, reproduced here in its entirety.

[AL] Hey, what's your name, you can't be screaming like that. You can't be yelling at people, sir.

[Espinoza] What? Can't hear you. What?

[AL] What's your name. What's your name?

[Espinoza] Can't hear you.

[AL] What's your supervisor's name?

[Espinoza at the same time] Your voice is so low, I'm not sure what you're tellin' me. What? Speak up sir. Speak up sir. I can't understand you, man.

[AL at same time] What's your supervisor's name? Can you get your supervisor out here? Get your supervisor out.

[Espinoza] You know, I was gonna allow you to park there, but you have such a loud mouth [while making a "talking" motion with his hand]...

[AL] What did I say?

Espinoza [talking over AL] You don't listen...

[AL] What did I say?

[Espinoza] I was explaining to you that I'm gonna go ahead and allow you to park there today.

[AL] OK, and what did I say that was bad - that you didn't like?

[Espinoza] (interrupting) But what happened was that you started to be argumentative and you started talking to me in a manner that I didn't feel was acceptable.

[AL] How... what did I say?

[Espinoza] And I responded to you, then you responded 'what did you say?' I raised my voice, and I do that - that's the proper thing to do if somebody isn't hearing properly, and evidently, I either have to raise my voice or I just move on because there's no comprehension on your part.

[AL] No...

[Espinoza] So evidently that's what was happening; there's no comprehension on your part...

[AL, talking at the same time]<sup>1</sup> No, you said that the handicap bus is there sometimes.

[Espinoza at the same time] So you don't understand what was [inaudible]... you asked me... OK, you're doing it again, brother. See, you're [pointing finger at AL] doing it again.

[AL, at the same time] and then I said... I said... look... sir..

[Espinoza, at the same time] You're doing it again; [repeating] you're doing it again. You know what...

[AL, at the same time] You're not even telling the truth. You're crazy. Get your supervisor out, get your fucking supervisor here right now.

[Espinoza, at the same time, while pointing again] Now you're cursing? Look, look...

[AL, at the same time] Yes, I am. Get your supervisor out here right now; [Repeating] Get your supervisor out here right now. What's your name? You're gonna get fired. You wanna get fired?

[Espinoza laughs].

[AL] You're gonna get fired, dude. Get your supervisor out here right now.

[Espinoza, reaching for his radio and speaking into it] Two Three for dispatch [then to AL] I'm gonna get the police here and you're going to jail.

[AL at the same time] I told you, we have a handicapped gentlemen right here, and then you started yelling at me, like a crazy person.

[Espinoza at the same time, speaking into the radio] [unintelligible]... an argumentative person that... getting threatening now

[AL at the same time] Get a supervisor out here right now.

[Espinoza at the same time, speaking into the radio] He's getting threatening now. I'm out here by City Park by the Zoo between the museum ..., can you hear this guy?

[AL at the same time] I didn't say anything threatening. I got it all on video, dude. You don't even work for this parking lot, this is private property, get out of here.

[Espinoza] Can you hear this guy?

[AL]. Get the supervisor out here, dude. Get the supervisor out here.

[Espinoza] Okay, City Park I'm along the avenue between the museum and the zoo.

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<sup>1</sup> During the following portion of the exchange, both speakers spoke louder and louder, attempting to talk over the other.

[AL] Get the supervisor out here.

[AL moves from driver's side of Espinoza's vehicle to the front to record Espinoza's license plate. Espinoza's vehicle lurches toward AL].

[AL] What are you doin' dude? That's assault, brother. That's assault. That's assault, dude. That's assault. Are you serious?

[Female citizen, off camera] That's so bad.

[AL returns to driver side of Espinoza's vehicle, still recording]

[Espinoza, talking into radio] I'm attempting to, but he's in front of the vehicle. Now he's claiming I'm trying to assault him.<sup>2</sup>

[AL, at the same time] Are you joking? I have it all on camera. You just ran into me.

[Espinoza, at the same time] Are you out of your mind? [repeating] Are you out of your mind?

[AL, at the same time] You just got fired, bud, that sucks for you. Why are you doing all this? You think you're a big guy? You want to lose your job over all this. That's crazy.

[Espinoza, at the same time] ... about six foot, about a hundred and....

[End of AL's recording]

[Exh. E].

The Agency dispatcher contacted the Denver Police Department (DPD). An officer was dispatched on a Code 10 (lights and sirens on report of imminent physical harm) [Vaiana testimony; Espinoza testimony]. Based on Espinoza's over-air description, the officer handcuffed AL, calmly asked questions, and patiently answered AL's questions. Espinoza affirmed AL threatened him, but when questioned directly on the subject by the officer, specified AL threatened to have him fired, and did not threaten him physically.

The day after the incident, AL filed a complaint against Espinoza. [Vaiana testimony]. Following its investigation of the incident, the Agency conducted a pre-disciplinary meeting. Espinoza attended *pro se* and gave statements about the incident. The Agency then served Espinoza with a two-day suspension, from December 7, 2016 through December 8, 2016. This appeal followed timely on December 21, 2016.

#### IV. ANALYSIS

##### A. Jurisdiction and Review

Jurisdiction is proper under CSR § 19-10 A.1.b., as a direct appeal of a suspension. 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).

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<sup>2</sup> Both returned to speaking over each other here.

B. Burden and Standard of Proof

The Agency retained the burden of persuasion, throughout hearing, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove the degree of discipline complied with CSR 16-41. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

**1. CSR 16-29 G. 1. Failing to meet established standards of performance including either qualitative or quantitative standards.**

**Performance Enhancement Program (PEP) Plan**

**- Compliance/Interpersonal**

**VBI behavior in the workplace and in the public contributes to an atmosphere where diverse thoughts and opinions are respected, and professionalism is obvious. Standard is no founded complaints from citizens, peers, or other city employees.**

Under this performance standard, Vehicle Boot Investigators are required to demonstrate tolerance and maintain respect for thoughts and opinions of others. The measure of that performance is to have no founded complaint against them. The Agency determined Espinoza failed to maintain this standard because he:

Left the scene of a confrontation only to return to re-engage in the confrontation;

Shouted at and antagonized AL by feigning an inability to hear or understand him;

Spoke in a demeaning manner;

Failed to provide AL with reasonable and repeated requests for information such as his name, and to call for a supervisor;

Approved AL to park in an invalid parking space, then removed this illegitimate approval because AL had "such a loud mouth;"

Lurched his City vehicle toward AL when AL moved to the front of the vehicle to photograph the license plate.

[Exh. 2; Vaiana testimony].

Espinoza defended his actions and decried the Agency's lack of training. It was unclear how the initial neutral encounter between Espinoza and AL turned confrontational, and it does not matter to the issues in this case. Agents are trained and required to de-escalate even when confronting unjustified citizen hostility. Even if AL was unreasonable and argumentative, Espinoza's mocking, unresponsive, and hostile responses were intolerable. To that end, I make the following conclusions.

(1) Returning to the confrontation. Espinoza claimed he returned only because, as he was driving away, the license plate recognition system in his vehicle notified him of a bootable car as he passed. [Espinoza testimony]. He provided no evidence of the "hit" on the bootable vehicle. Even if his stated purpose to return was true, Espinoza was entirely unjustified in re-engaging in argument with AL. Moreover, the Exhibit E recording plainly shows Espinoza

returned directly to AL, making it unlikely he returned to boot a vehicle. This lack of professionalism justified AL's complaint was in violation of Espinoza's PEP, and 16-29 G.1.

(2) Pretending not to hear. Espinoza admitted, as plainly shown in Exhibit E, that he pretended not to hear AL who had approached Espinoza's City vehicle to ask for his name. In response, Espinoza repeatedly yelled back, in mocking fashion, "What? What? I can't hear you!" even though his window was down, and AL's camera-phone clearly recorded the exchange. Espinoza's mocking response had the evident effect of escalating AL's frustration and anger, and showed a lack of courtesy and professionalism as required by this PEP standard, and justified the complaint against him in violation of 16-29 G.1.

(3). Lack of training. Espinoza claimed he was on his own to determine how best to handle the confrontation because training is "sporadic" and outdated. [Exh. 3 @ 17:40]. Vaiana countered training is ongoing, current, and that he has engaged in one-on-one training with Espinoza, although he could not specify when and what training Espinoza has taken. [Vaiana testimony]. Espinoza recognized his obligation "to provide a good rapport with the public," [Exh. 3 @ 41:03], thus his claim that he was insufficiently trained lacks credibility.

(4) Demeaning manner. It was apparent during much of the recorded interaction, that Espinoza acted in demeaning fashion toward AL. For example, using his hand to indicate "yapping," condescendingly telling AL "you don't listen," repeatedly telling AL he did not understand ("lack of comprehension on your part"), and laughing at AL's evident mounting anger that Espinoza caused. These actions violated the above-stated PEP requirements and therefore justified AL's complaint in breach of CSR 16-29 G.1.

Espinoza's response, that he was responding appropriately to an increasingly irate AL is without merit. AL's questions were reasonable, and his tone was restrained, even after Espinoza began his mocking and unprofessional responses. Although AL's tone and accusations became as hyperbolic as those of Espinoza, AL's responses did not justify Espinoza's demeaning actions. Espinoza is an experienced, trained representative of his agency and the City whose duties require him to remain calm and to de-escalate hostility. That Espinoza was the cause of AL's irritation makes his demeaning actions all the more egregious, and justified AL's complaint, a violation of this PEP standard and CSR 16-29 G.1.

(5) Failure to provide information. AL demanded that Espinoza call his supervisor 13 times during the recording, at least four of which were made before the encounter turned overtly hostile. He also demanded Espinoza's name at least three times. Espinoza responded to those continuing demands by laughing then calling for police. He claimed he provided the requested information off-camera, but AL's continued demand for a supervisor belie his claimed compliance, and Espinoza provided no phone records or testimony to confirm his claim. Vaiana testified credibly that agents are required to call a supervisor when requested. [Vaiana testimony]. Calling for DPD is a last resort only if a citizen makes a threat of physical harm. Espinoza acknowledged he could have called for a supervisor. [Espinoza cross-exam]. Vaiana's testimony presented an established standard of performance expected of agents under CSR 16-29 G.1. Espinoza's failure to contact a supervisor violated that standard in violation of this rule and justified AL's complaint.

(6) Removing approval to park. Agents are not authorized to permit parking in a prohibited space. [Vaiana testimony]. Espinoza's authorization, even if initially well-intentioned, was a violation of this established standard. More concerning than allowing or withdrawing such "permission" was Espinoza's stated reason: AL's "loud mouth," an evident breach of the requirement to be respectful and maintain a professional attitude under this PEP standard. This was a violation of CSR 16-29 G. 1., and AL's complaint was justified.

(7) Lurching vehicle. Espinoza acknowledged his vehicle “lurched” toward AL who was standing in front of the vehicle. [Espinoza cross-exam]. Espinoza’s explanations for the occurrence were inconsistent. He claimed AL jumped in front of his vehicle; [Exh. 3]; claimed his foot may have slipped on the accelerator; [Id.] claimed the vehicle merely rolled forward when he took his foot off the brake [Id.]; and claimed AL was on a curb and therefore out of range of harm. [Id.]. I agree with Vaiana that, whether the action was intentional or an accident, and whether AL was in imminent danger of being struck were irrelevant, as agents must maintain control of their vehicles at all times. [Vaiana testimony].

Moreover, the circumstances make it more likely than not that Espinoza’s action was intentional. AL had just “threatened” Espinoza’s job, and had just moved to the front of the vehicle to record the license plate of Espinoza’s vehicle when Espinoza lurched the vehicle forward. AL’s complaint justified the Agency’s finding a violation under CSR 16-29 G.1.

### **Compliance/Safety**

**VBI maintain[s] vigilant awareness of surroundings. Agents attempt to deescalate conflicts with the public. Agents comply with all Agency, Department, and City safety policies, procedures, and protocols.**

Assuming Espinoza allowed his vehicle to lurch forward as an accident, he did so in the absence of an awareness of his surroundings, including AL standing directly in front of the vehicle, in violation of this PEP standard.

The entire exchange above, indicates Espinoza took no action to de-escalate the rapidly deteriorating encounter with a AL, in violation of this PEP standard.

### **Operations/Procedures**

**In all situations, Agents have an individual responsibility to uphold ethical standards of the Agency, Department, Manager of Safety, and the City.**

While it may seem Espinoza’s actions were unethical, the Agency’s notice of discipline failed to identify what ethical standards were violated. Vaiana stated Espinoza was unethical in providing inconsistent statements which undermined the credibility of the Agency and the City. [Vaiana testimony]. This testimony also failed to provide an ethical standard breached by Espinoza. No violation is established under this provision.

### **STARS Values**

**Service, Teamwork, Accountability and Ethics, Respect, Safety.**

These standards of conduct are aspirational. They provide insufficient notice to an employee what conduct is prohibited. As such they are unenforceable. [In re Roybal, CSA 60-11, 8-9 (3/13/12); see also In re Black, CSA 03-14, 5 (6/9/14)].

## **2. CSR 16-29 I. Failure to maintain satisfactory working relationships with... individuals the employee interacts with as part of his or her job.**

A breach of this rule is established by conduct causing a significant degradation of a working relationship. [See in re Novitch, CSB 29-15A, n.11 (9/15/16). Espinoza escalated the hostility of the encounter by his demeaning, and otherwise outrageous behavior toward AL. For reasons stated above, his defense of his actions was unjustified. AL made a valid complaint about Espinoza’s conduct, proving his failure to maintain a satisfactory working relationship with a member of the public, in violation of this rule.

**3. CSR 16-20 T. Conduct which is or could foreseeably:**

- 1. Be prejudicial to the good order and effectiveness of the department or Agency.**
- 2. Bring disrepute on or compromises the integrity of the City; or**
- 3. Be unbecoming of a City employee.**

Violations under this rule include conduct which could foreseeably cause harm, as well as actual harm. CSR 16-29 T. *In re Marez*, CSA 58-16 (127/17). As noted previously, the Agency expects its Vehicle Boot Inspectors to behave with decorum and civility toward the public. Espinoza's conduct was contrary to those requirements and thereby negatively affected the good order and effectiveness of the Agency. The evidence was unclear how the encounter brought or may have brought disrepute on or compromised the integrity of the City. While perhaps overbroad, "conduct unbecoming" of a City employee, at a minimum, includes rude, deprecating conduct as displayed by Espinoza.

Particularly concerning was Espinoza's call to his dispatcher in which he claimed he was being threatened, and resulted in a DPD Code 10 response with the innocent AL being detained, even if for a short time. Espinoza claimed he had no responsibility for the dispatch as Code 10, but he knew or should have known that result would ensue, and his unwarranted accusation could have resulted in wrongful criminal charges being brought against AL. Espinoza's suggestion, during his predisciplinary meeting, that Code 10 responses should be changed due to the danger created by DPD "coming in hot," was impudent, given that he caused the response. His conduct was a contrary to the good order and effectiveness of the Agency and was unbecoming a City employee who, as with all City employees, are bound to serve the public. This violation is established.

## **V. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-41 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-41.

### **A. Severity of the proven offenses**

The confrontational, demeaning, and threatening conduct by Espinoza toward a AL which could have resulted in wrongful criminal charges, was outrageous. At nearly every turn Espinoza had ample opportunity to de-escalate the tension, call for assistance, or leave. Instead he returned to re-engage in a hostile encounter, refused to summon assistance from his supervisor, and called in a false threat of physical harm. His equating AL's threat about his career with physical threat was unconvincing.

### **B. Prior Record**

Espinoza's last recorded discipline was 2004, too old to be considered as an aggravating factor here.

### **C. Likelihood of Reform**

Espinoza was persistent, throughout the appeal, in denying wrongdoing. Given the severity of his offenses, and his insistence that he acted properly at all times, it is unknown whether Espinoza will voluntarily amend his improper conduct, particularly as he made it clear he trusts his experience and instincts more than his training. [Espinoza testimony; Exh. 3 @ 20:17-21:21].

Considering the outrageousness of Espinoza's conduct, a more severe penalty could have been imposed. His two-day suspension easily qualifies as within the range of alternatives available to a reasonable administrator. [In re Economakos, CSB 28-13, 2-3 (3/27/14)].

**VI. ORDER**

The two-day suspension assessed by the Agency against Espinoza on December 6, 2016, is AFFIRMED.

DONE April 14, 2017.



Bruce A. Plotkin  
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements that follow CSR § 19-60, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at [www.denvergov.org/csa](http://www.denvergov.org/csa).

**All petitions for review must be filed with the:**

Career Service Board  
c/o OHR Executive Director's Office  
201 W. Colfax Avenue, Dept. 412, 4<sup>th</sup> Floor  
Denver, CO 80202  
FAX: 720-913-5720  
EMAIL: [CareerServiceBoardAppeals@denvergov.org](mailto:CareerServiceBoardAppeals@denvergov.org)

AND

Career Service Hearing Office  
201 W. Colfax, 1<sup>st</sup> Floor  
Denver, CO 80202  
FAX: 720-913-5995  
EMAIL: [CSAHearings@denvergov.org](mailto:CSAHearings@denvergov.org).

AND

Opposing parties or their representatives, if any.