

# Item #4a - Hearing Officer's Supplemental Report

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## BEFORE THE CITY OF OAKLAND PUBLIC ETHICS COMMISSION

In the Matter of:

THOMAS ESPINOSA, et al.,  
Respondent.

Case No. 16-14

### **SUPPLEMENTAL REPORT TO THE PUBLIC ETHICS COMMISSION**

#### **SUPPLEMENTAL REPORT**

The purpose of this Supplemental Report is to address questions related to the participation and mental status of Thomas Espinosa (“Respondent”) during—and prior to—the April 27, 2021 hearing of this matter by Hearing Officer Jodie Smith.

#### **Pre-Hearing Information from Respondent**

On April 26, 2021, at 2:44 pm, I received an email from Whitney Barazoto, Executive Director of the City of Oakland Public Ethics Commission (PEC) communicating, in relevant part, the following:

Last week, and in the weeks leading up to the hearing tomorrow, I have been in contact with Mr. Paul Reyes, who has stated that he is Thomas Espinosa’s brother-in-law and that he is trying to help us interact with Mr. Espinosa. Mr. Reyes has indicated that he will attempt to help Mr. Espinosa access the hearing tomorrow. I last spoke with Mr. Reyes on Friday, April 23, and we were in contact by phone and email. Mr. Reyes is cc’d on this email here.

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1  
2 My staff emailed the hearing brief and attachments to Mr. Reyes at the same time  
3 the documents were emailed to you on Thursday, April 22. My staff also mailed a  
4 copy of the full packet to Mr. Reyes and Mr. Espinosa at his residence in Raisin  
5 City.

6 At 10:36 a.m. this morning, I received a phone call from Thomas Espinosa who  
7 stated that he received that packet in the mail on Saturday but does not know what  
8 his is supposed to do with it. He stated that he has no memory and that he has  
9 doctors letters indicating that he cannot remember events and cannot testify in court.  
10 I asked him if he could send me copies of those letters. At 10:49 a.m., I received the  
11 first of the attached three letters via email that Mr. Espinosa said were sent from his  
12 mobile phone to my email address. He called me immediately after to confirm that I  
13 received the letters.

14 I sent him an email response that confirmed that I had received the letters, and, in  
15 that same email, I provided a phone number that he can call to access the hearing  
16 tomorrow at 9 a.m. in case he has any trouble accessing it via the Zoom link. He  
17 responded back from that email address ([5597791055@mms.att.net](mailto:5597791055@mms.att.net)) to say "Thank  
18 you." I have included that email address here on this email to you as well.

19 I am also aware that PEC Enforcement Chief Kellie Johnson (cc'd here as well) met  
20 with Mr. Reyes and Mr. Espinosa last Monday, April 19, 2021, via Zoom video to  
21 discuss possible settlement.

22 Attachments 1 & 2 are two of the three doctor's letters referenced by Director Barazoto. The  
23 third file was a duplicate of the letter in Attachment 1. This is all of the information I received  
24 regarding Respondent's mental state prior to the April 27, 2021 hearing.

### 25 **The Hearing**

26 I was prepared to hear issues concerning Respondent's memory at the hearing. However, as  
noted in my original Findings of Fact and Conclusions ("Initial Report"), Respondent did not  
appear at the hearing.<sup>1</sup>

Though Respondent did not attend the hearing, Paul Reyes participated by Zoom. He  
identified himself as Respondent's brother-in-law. I asked him multiple questions to determine if he  
was present as Respondent's representative or if Respondent had asked him to be there. The

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<sup>1</sup> Initial Report, 1:25 to 3:1.

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1 relevant portion of the transcript shows that, in response to my questions, Reyes was not  
2 participating in the hearing as the Respondent's representative and that the Respondent did not ask  
3 Reyes to attend the hearing on Respondent's behalf:

4 *Hearing Officer Jodie Smith:* For Respondent, I see Mr. Paul Reyes, and if you  
5 could introduce who you are please and introduce if you are connected to the  
6 respondent Mr. Thomas Espinosa.

7 *Paul Reyes:* Yes Mam, my name's Paul Reyes and Thomas Espinosa is my brother-  
8 in-law.

9 *JS:* Is he present with you?

10 *PR:* No Mam. And that's why I wanted to . . . [unintelligible]

11 *JS:* Sure, and we'll get to those issues as we go here. So he's not with you. Are you  
12 alone participating in this or is there someone with you?

13 *PR:* No, it's just me Mam.

14 *JS:* Thank you, thank you.

15 *PR:* You're welcome.

16 *JS:* And so correct you are the brother in law of Thomas Espinosa?

17 *PR:* Yes Mam.

18 *JS:* Are you here as his advocate or his representative? Or are you here in some  
19 other capacity?

20 *PR:* Some other capacity. Mam. I'm just here just to help him out. Can I say  
21 something, or should I wait?

22 *JS:* Right now, I'd just like to understand if he has sent a representative to this  
23 hearing. If he sent you here to speak on his behalf, not as, not for his testimony or  
24 his memory but just to represent him in the proceeding or . . why you have joined us  
25 this morning... in connection. . . ?

26 *PR:* I just wanted to let you know Mam. I tried very hard to get him here but like I  
told Mrs. . . Mrs. Johnson at our last previous, that I'm not a doctor but his health  
has deteriorated. It's very hard to get him . . especially to communicate with him.  
It's just I tried to but it's just very hard Mam. And that's all I you know I just wanted  
to let you know that.

*JS:* Okay. Thank you.

*PR:* You're welcome.

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1        *JS:* I just wanted to clarify a little. Is . . . Did he ask you to come here as his  
2        representative?

3        *PR:* No Mam. I'm I'm just here for support you know. Just. Unfortunately there's  
4        nobody to help him. So like I told Mrs. . . . I told Whitney and I believe Mrs.  
5        Johnson that, the reason, because my mother in law, she's ADA, and she asked me  
6        to help him.

7        *JS:* Okay. Thank you for that clarification.

8        *PR:* Your welcome Mam. But I'm not no, I'm not his legal or I'm not an attorney,  
9        I'm just a I'm just a family member. That's all.

10       *JS:* Well sometimes family members do help as a representative. A non-attorney  
11       representative.

12       [CROSS TALK]

13       *PR:* I'm sorry I didn't mean to interrupt you

14       *JS:* No that's fine. But what I hear from you is that he has not asked you here as his  
15       representative, it was your mother in law who asked you to help in the situation.

16       *PR:* Yes Mam.

17       *JS:* So you're here really on your own behalf and on perhaps because of your  
18       mother in law's request, but not at Mr. Espinosa's request.

19       *PR:* No Mam.

20       *JS:* Okay. Thank you for that clarification.

21       *PR:* You're welcome.<sup>2</sup>

22       The PEC Mediation & Complaint Procedures specify the protocol to follow if a respondent  
23       does not attend a hearing, either personally or through a representative. "If the respondent fails to  
24       appear at a properly noticed hearing, Commission staff may proceed with presenting the  
25       Commission's case or may request to submit a written summary in lieu of a verbal presentation.  
26       The hearing officer may proceed with issuing findings and recommendations based solely on the  
27       information received from Commission staff."<sup>3</sup> Respondent's failure to attend the hearing or send a

<sup>2</sup> Espinosa Administrative Hearing, at 0:03:08 to 0:06:30.

<sup>3</sup> PEC Mediation & Complaint Procedures §VII.F.8.

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1 representative precluded me from hearing or considering any information Respondent might have  
2 provided at the hearing. Had he attended personally or sent a representative, he could have  
3 presented information, raised questions about process, or requested consideration of his situation. In  
4 his absence, I could not hear requests or arguments as to his memory or decide related questions.

### 5 **Legal Authorities**

6 Had Respondent or his representative raised any issue at the hearing related to his memory,  
7 I would have analyzed the facts and issues based on the relevant legal authorities in the California  
8 Probate Code, Evidence Code, and Code of Civil Procedure.<sup>4</sup> The California Penal Code and  
9 related criminal law authorities are inapplicable to an administrative law proceeding such as this,  
10 which is a civil matter conducted under the Government Code, Code of Civil Procedure, and related  
11 civil codes.<sup>5</sup>

12 Any analysis of issues related to the impact of a respondent's memory in a legal proceeding  
13 must distinguish between legal capacity to participate in a proceeding and the legal competence of  
14 witness testimony. First, as to capacity to participate in a legal proceeding, Probate Code section  
15 810 creates a "rebuttable presumption affecting the burden of proof that all persons have the  
16 capacity to make decisions and to be responsible for their acts or decisions."<sup>6</sup> It provides further  
17 that "a person who has a mental or physical disorder may still be capable of contracting, conveying,  
18 marrying, making medical decisions, executing wills or trusts, and performing other actions."<sup>7</sup> Any  
19 judicial determination that a person is totally without understanding, or is of unsound mind, or  
20 suffers from one or more mental deficits so substantial that, under the circumstances, the person  
21 should be deemed to lack the legal capacity to perform a specific act, should be based on evidence  
22 of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's

23 \_\_\_\_\_  
24 <sup>4</sup> Additionally, the Judicial Council of California has a helpful publication with a section related to legal capacity and  
25 competency issues regarding elders involved in legal proceedings that the Commission may wish to reference.  
26 Mosqueda, Laura and the Judicial Council of California, "Elder Abuse Pocket Reference A Medical/Legal Reference  
for California Judicial Officers," (2012) at pp. 19-21, <https://www.courts.ca.gov/documents/ElderAbusePDoc.pdf>.

<sup>5</sup> Cal. Gov. Code §§11370-11529; 11455(.20(c)); 11513 (c).

<sup>6</sup> Probate Code §810.

<sup>7</sup> *Id.*

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1 mental or physical disorder. That is, the test is functional, not simply whether a person has a  
2 diagnosis of a particular condition.<sup>8</sup>

3         The functional test requires both evidence of deficit in a specific mental function(s) and  
4 evidence of a correlation between the deficit(s) and the decision or act for which capacity is  
5 questioned.<sup>9</sup> A mental deficit in information processing may be based on a deficit in short- and  
6 long-term memory, including immediate recall.<sup>10</sup> Any mental deficit must significantly impair a  
7 person's ability to understand and appreciate the consequences of their actions.<sup>11</sup> Courts may  
8 consider the frequency, severity and duration of impairment periods.<sup>12</sup> The mere diagnosis of a  
9 mental/physical disorder is not sufficient to support a determination that a person lacks capacity.<sup>13</sup>

10         The determination of a person's mental capacity is fact specific, and the level of required  
11 mental capacity changes depending on the issue at hand.<sup>14</sup> That is, courts measure mental capacity  
12 on a sliding scale.<sup>15</sup> Marital capacity requires the least amount of capacity, followed by  
13 testamentary capacity, and on the high end of the scale is the mental capacity required to enter  
14 contracts.<sup>16</sup> The mental capacity required to end a marriage is similar to the mental capacity  
15 required to enter marriage, which is a low threshold that may include a person under a  
16 conservatorship who is generally without contract.<sup>17</sup>

17         Second, regarding the competence of witness testimony, the California Evidence Code  
18 creates a presumption that "every person, irrespective of age, is qualified to be a witness and no  
19 person is disqualified to testify to any matter" unless otherwise excepted pursuant to a specific  
20 statute.<sup>18</sup> A witness is disqualified if they are "incapable of expressing himself or herself concerning  
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22 <sup>8</sup> Probate Code §810.

23 <sup>9</sup> Probate Code §811.

24 <sup>10</sup> *Ibid.*

25 <sup>11</sup> *Id.*

26 <sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *In re Marriage of Greenway*, 217 Cal.App.4th 628, 639 (2013).

<sup>15</sup> *In re Marriage of Greenway*, 217 Cal.App.4th 628, 639 (2013).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Evid. Code §700.

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1 the matter so as to be understood, either directly or through interpretation by one who can  
2 understand him.”<sup>19</sup> Additionally, “the testimony of a witness concerning a particular matter is  
3 inadmissible unless he has personal knowledge of the matter.”<sup>20</sup> “Personal knowledge” under  
4 Section 702 means “a present recollection of an impression derived from the exercise of the  
5 witness’ own senses.”<sup>21</sup> Because a witness must have personal knowledge of the facts to which they  
6 testify, the witness must have the capacity to perceive and to recollect those facts. Witness  
7 testimony may be excluded for lack of personal knowledge if no fact finder could reasonably find  
8 that they have such knowledge.<sup>22</sup>

### 9 **Legal Analysis**

10 Had Respondent raised issues concerning his mental state at the hearing, my analysis would  
11 have been two-pronged. I would have first heard evidence of a deficit in Respondent’s mental  
12 function and evidence of a correlation between that deficit and Respondent’s functional ability to  
13 participate in the hearing under Probate Code sections 810 through 812. I would have considered  
14 evidence of Respondent’s level of alertness, information processing (including memory), thought  
15 processing, and ability to regulate mood and affect, per Probate Code section 811.

16 The information I received before the hearing did not suggest to me that Respondent lacked  
17 capacity to participate in the hearing. The limited evidence I had (Attachments 1 & 2) speaks only  
18 to Respondent’s memory and testimony as to past events—“not capable of testifying in court due to  
19 memory impairment” and “has significant memory impairment and dementia and is therefore  
20 unable to testify in court”—not to any deficit in his mental function in the present tense. Under  
21 Probate Code section 811, memory issues are considered distinctly from other mental functions  
22 such as orientation to persons and places, ability to communicate verbally, ability to understand  
23 quantities, ability to use abstract reasoning, presence of hallucinations, a state of panic, etc. Had  
24

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25 <sup>19</sup> Evid. Code §701.

26 <sup>20</sup> Evid. Code §702.

<sup>21</sup> 2 Wigmore, Evidence §657 at 762 (3d ed. 1940). Cf. Evid. Code §170, defining “perceive;” and see, Law Revision Comments to Evid. Code §702.

<sup>22</sup> Evid. Code §403 and Law Revision Comments thereto.

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1 significant additional evidence not been submitted to supplement the two doctors' letters I received  
2 before the hearing, I anticipate that I would have likely determined that Respondent had the mental  
3 function to participate in this civil legal proceeding.

4       If I had determined that Respondent had the capacity to participate in the proceeding, I  
5 would have proceeded to decide a second question: was Respondent able to give competent  
6 testimony under Evidence Code sections 701 and 702 regarding the fact questions at issue? Had  
7 significant additional evidence not been submitted to supplement the two doctors' letters in  
8 Attachments 1 & 2, I anticipate I would have likely found Respondent's testimony incompetent on  
9 the historical questions of fact that were at issue because of his doctors' statements in the letters. If  
10 this had been the result, Respondent—either directly or through a representative or attorney—could  
11 still have participated in the proceeding by calling other witnesses to testify on his behalf, cross-  
12 examining witnesses called by the Enforcement Division of the PEC, presenting documentary or  
13 circumstantial evidence, making arguments in his defense, critiquing arguments made by opposing  
14 counsel, requesting procedural changes to the proceedings, and otherwise participating in the  
15 proceeding in all respects except testifying as a fact witness to past events he did not recall.

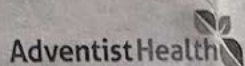
16       I reiterate that I did not at the hearing—and have not since—decide Respondent's capacity  
17 to participate in this civil proceeding or the competency of his testimony as to past events.  
18 Respondent's failure to appear at the administrative hearing resulted in the questions never being  
19 raised, full evidence never being considered, and no decisions being made. Respondent's  
20 opportunity to raise such issues was at the hearing. Because he did not, I made findings and  
21 conclusions based on the evidence submitted by the Enforcement Division of the PEC in  
22 accordance with the PEC Mediation & Complaint Procedures.

23 Dated: August 11, 2021

24  
25  
26 By:   
Hearing Officer Jodie Smith



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April 14 2021

THOMAS ESPINOSA  
[REDACTED]

Dear THOMAS ESPINOSA,

To Whom it May Concern:

THOMAS ESPINOSA is a patient under my care. He has significant memory impairment and dementia and is therefore unable to testify in court.

Please feel free to call with any questions.


Sincerely,

*H. Laimer D.O.*

Hannah Laimer  
Medical Office Caruthers  
2440 W Tahoe Ave  
Caruthers, CA 93609

AHMO-Caruthers East  
2357 W. Tahoe Ave/PO Box 130  
Caruthers, CA 93609  
Ph: (559)864-6200 Fax: (559)864-84-03

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 Sutter Health  
Sutter East Bay  
Medical Foundation  
We Plus You


ALBANY FAMILY MEDICINE  
500 San Pablo Ave.  
Albany CA 94706  
Phone: 510-204-8130  
Fax: 510-524-0861

Tuesday, January 29, 2019

To Whom It May Concern:

I am the primary care doctor for Thomas Espinosa [REDACTED] 1954. He has had a recent downturn in his health and is not capable of testifying in court due to memory impairment.

Sincerely,

  
Nina Birnbaum, MD