IN THE MATTER OF ARBITRATION BETWEEN

City of Woodbury, Woodbury, MN	**) BMS Case No. 09-PA-0952**
	)
	) Issue: Disciplinary Suspension
"City" or "Employer"	**)**
	) Hearing Site: Woodbury, MN
	)
Woodbury Police Officers Association	**) Hearing Date: April 30, 2010**
	)
	) Briefing Date: June 29, 2010
"Union"	**)**
	) Award Date: August 16, 2010
	)
	) Mario F. Bognanno, Labor Arbitrator

JURISDICTION

Pursuant to article 7 of the parties' 2005-2008 Collective Bargaining Agreement (CBA), the above-captioned matter was heard on April 30, 2010 in Woodbury, Minnesota. (Joint Exhibit 1) Appearing through their designated representatives, the parties waived the CBA's article 7.05(B) language requiring an arbitration decision within 30 days of the close of the record. They also stipulated that the issues in dispute were properly before the Arbitrator for a final and binding determination. Last, at the Union's behest, the Grievant is referred to by his initials, J.M.G.

Each party was given a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination; exhibits were introduced into the record; and post-hearing briefs were filed on about June 29, 2010. Thereafter, the matter was taken under advisement.

APPEARANCES

For the Union:

Anthony D. Spector	Attorney-at-Law
J.M.G.	Grievant
Lieutenant Matthew D. Nelson	State of MN Highway Patrol

For the Employer:

Susan K. Hansen	Attorney-at-Law
Jody Vogl-Eilertson	Director, Administration Services
Todd Johnson	Deputy Public Safety Director
Christine Merritt	Registered Nurse (who testified *via* interactive TV)
William F. Hering	Public Safety Director or Chief of Police (Retired: 03-31-07)
Clinton P. Gridley	City Administrator

I. BACKGROUND

The City of Woodbury ("City" or "Employer") and the Woodbury Police Officers Association ("Union") are parties to a CBA effective December 25, 2005 through December 20, 2008. (Joint Exhibit 1) Said Agreement covers police department personnel in the job classifications of Investigator, Patrol Officer and School Liaison/Juvenile Officer. (Joint Exhibit 1)

J.M.G, the Grievant, was hired as a Patrol Officer in January 1996 and, prior to August 2, 2006, he had an unblemished work record. In addition to performing his routine patrol duties, the Grievant was qualified as a Field Training Officer; he was a member of the City's SWAT Team; and he was a Paramedic

and Firearms Instructor. As this list of special qualifications may imply, J.M.G. has attended a wide range of police-related training courses over the past decade, including annual firearm training exercises dating back to 1996, which featured the safe handling of pistols. The latter exercises addressed subjects such as firearms cleaning and maintenance, insuring that pistol chamber and magazine are empty and performing “dry” and “live” fire exercises. The Grievant attended at least one “how to” course that expressly focused on the use of Glock Pistols. (Employer Tabs 4(E) and 7) Special note is made of J.M.G.’s answer to the test question:

> In the event of an on-duty *accidental* discharge, the officer is required to notify the on-duty supervisor:
>
> a. Immediately
> b. After clearing the call
> c. Prior to the end of the shift
> d. Only if an injury results

(Employer Tab 4(E)) The Grievant correctly circled the letter “a” in answering this question, which was a part of a battery of test questions asked of students who attended a 1996 class on the “Use of Force/Use of Deadly Force.” Indeed, the Grievant has conducted firearms safety classes, as a Firearms Instructor. Lastly, given the breadth of J.M.G.’s police expertise and solid record as a patrol officer, it is not surprising that the Grievant was well-regarded by his managers and co-workers. (Employer Exhibit 5 and Testimony of William F. Hering)

On August 2, 2006, the Grievant accidentally discharged his department-issued Glock handgun, triggering a series of events that resulted in a January 4, 2007 decision by the Employer to suspend him without pay for 15 days, on a “last

chance" basis. (Joint Exhibit 2) On January 18, 2007, the Union filed a Step 1 grievance challenging the suspension and "last chance" notice. In addition, the grievance challenged the City's August 8, 2006 decision to assign administrative duties to J.M.G. and to deny him overtime and off-duty work assignments. (Joint Exhibit 3) The Employer subsequently denied the grievance and, thereafter, the parties alternated appeals and denials of the grievance through Step 3—the pre-arbitration step—of the grievance procedure. (Joint Exhibits 4, 5, 6, 7 & 8) On March 9, 2007, the Union advanced the grievance to Step 4—arbitration. (Joint Exhibit 9) On September 4, 2009, the undersigned received a letter from the City's representative, requesting dates on which to arbitrate the grievance. (Joint Exhibit 10)

At the hearing, the City requested that the Arbitrator dismiss the instant grievance, citing the doctrine of *laches*. The parties' post-hearing briefs argue both the question of *laches* (i.e., whether the grievance is non-arbitrable because of undue delay) and whether the City's disciplinary actions in this matter were for "just cause." Accordingly, the Arbitrator's phrasing of the issues is presented below.

II. STATEMENT OF THE ISSUES

Did the Union implicitly waive its right to arbitrate J.M.G.'s grievance based on time-delay considerations? If not, were J.M.G.'s 15-day suspension, "last chance" notice and duty assignment changes for just cause? If not, what is an appropriate remedy?

III. RELEVANT CBA PROVISIONS & ADMINISTRATIVE BULLETINS

A. CBA PROVISIONS

ARTICLE 10 DISCIPLINE

10.01 The EMPLOYER will discipline employees for just cause only.

ARTICLE 11 CONSTITUTIONAL PROTECTION

11.01 Employees shall have the rights granted to all citizens by the United States and Minnesota State Constitution.

(Joint Exhibit 1)

B. POLICE DEPARTMENT MANUAL

PP-101 USE OF FORCE

* * *

1. Whenever an officer fires a weapon either in the performance of police duty or accidentally, the officer shall verbally notify the on-duty supervisor **immediately. I**f a supervisory officer is not on duty at the time, one will be called at home.

* * *

AO-403 NOTIFICATION OF ON-DUTY SUPERVISOR

* * *

Any employee or dispatcher receiving or becoming aware of any of the following must notify the shift supervisor immediately after it is practical:

* * *

7. Discharge of firearms by a police officer (except at the range for practice)

AO-201 RULES AND REGULATIONS

* * *

Unacceptable Performance

Officers shall maintain sufficient competency to perform their duties and assume the responsibilities of their positions. Officers shall perform their duties in a manner that will tend to establish and maintain the highest standards of efficiency in carrying out the functions and objectives of the Department. Unacceptable performance may be demonstrated by an officer's lack of knowledge regarding laws or their application; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the officer's rank or position; the failure

to take appropriate action on the occasion of a crime…or…other conditions deserving police attention; …

AO-218 CONDUCT UNBECOMING

* * *

Policy:
Law enforcement effectiveness depends upon community respect and confidence. Conduct which detracts from this respect and confidence is detrimental to the public interest and should be prohibited. The policy of this department is to investigate circumstances suggesting an officer has engaged in unbecoming conduct and impose disciplinary action when appropriate.

* * *

Principle Four

Police officers shall not, whether on or off duty, exhibit any conduct which discredits themselves or their department or otherwise impairs their ability or that of other officers or the department to provide law enforcement services to the community.

* * *

Principle Five

Police officers shall treat all members of the public courteously and with respect.

Rationale
Police officers are the most visible form of location [sic] government. Therefore, police officers must make a positive impression when interacting with the public and each other.

Rules

5.1 Police officers shall exercise reasonable courtesy in their dealings with the public, fellow officers, supervisors and subordinates.

* * *

(Employer Tab 5)

IV. ARBITRABILITY ISSUE

A. BACKGROUND AND THE PARTIES' POSITIONS

The Employer argues that the doctrine of *laches* requires that the

grievance be dismissed because the Union engaged in an unreasonably protracted delay between the date of its appeal to Step 4 and the date the grievance was actually submitted to arbitration. Article 7.04 of the CBA spells out the parties' 4-step grievance procedure. Steps 1 through 3 specify time limits during which an unresolved grievance must be appealed to the next higher level. It is uncontroverted that the instant grievance was timely advanced from Step 1 to Step 2, from Step 2 to Step 3 and from Step 3 to Step 4. The Union advanced the grievance to Step 4 (arbitration) on March 9, 2007. (Joint Exhibit 9) Step 4, as quoted below, does not expressly reference time limits:

> Step 4. A grievance unresolved in Step 3 and appealed to Step 4 by the UNION shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971, as amended. The selection of an arbitrator shall be made in accordance with the 'Rules Governing the Arbitration of Grievances', as established by the Bureau of Mediation Services.

(Joint Exhibit 1) Regardless, the Employer urges, the grievance was not actually submitted to arbitration until September 4, 2009, a time lapse of 18-months for which the Union was solely responsible. Said delay, the Employer maintains, is contrary to the goal of expeditiously resolving grievances. Further, it is prejudicial to the City's case because William F. Hering, the then Chief of Police, retired in 2007, diminishing his ability and that of the City's other witnesses to recall, in detail, the events of August 2, 2006.

While acknowledging the above-referenced delay, the Union maintains that it was unavoidable and that the City knew all along that the Union planned to arbitrate the matter. As the facts set forth below will show, the Grievant was the subject of a criminal prosecution that was resolved by an "Agreement to Suspend

Prosecution" for a period of one year from February 28, 2008 to February 28, 2009. Consequently, the Union argues, arbitration was continued until the period of suspended prosecution had lapsed for the simple reason that the Grievant did not want to testify in arbitration and have said testimony be used against him in a court of law in the event that, for whatever reason, the criminal prosecution might have resurfaced during the interim. In February 2009, the Union maintains that it contacted the Employer, advising that the criminal case against the Grievant had been dismissed and further advising that it would secure a list of arbitrators, which it did in April 2009, thus, initiating the arbitration process.

B. DISCUSSION AND DETERMINATION

The Union moved the grievance to the arbitration step of the grievance procedure on March 9, 2007, but it was not until September 4, 2009, that the undersigned was notified that he had been selected to arbitrate the case. Almost to the day, one and one-half years lapsed between these two events. Nevertheless, for the doctrine of *laches* to control, the Employer must show that this lapse of time was due to neglect on the Union part and that its inaction, in effect, constituted a waiver of its right to arbitrate. For several reasons, the Employer did not meet this burden. First, as quoted above, Step 4 of the grievance procedure does not reference a contractual time limitation. Therefore, to conclude that the Union forfeited its otherwise contractually-stated right to process a grievance requires a level of proof that the Employer was simply unable to provide.

Second, the Union was neither procrastinating nor being unreasonable in

its strategy to delay arbitration until the criminal charges that had been brought against the Grievant–for the same underlying facts that resulted in the discipline issued by the City–were ultimately dropped. If anything, this cause for delay was both reasonable and prudent. In a related vein, the undisputed testimony is that after learning in February 2009 that criminal charges against the Grievant had been dropped, the Union advised the City of same and shortly thereafter, in April 2009, proceeded to acquire a list of arbitrators.

Third, the Employer argued that one of its key witnesses (i.e., the former Police Chief) had retired in March 2007. Thus, to have put the grievance on hold for such a long time was prejudicial to its case. The Police Chief's long-ago departure from City employment served only to dim his recollection of facts and the same is true, the Employer argued, for the City's other key witnesses. This argument is well taken but, in fact, the witnesses in question did not have any trouble remembering the facts of the case, most of which are extensively documented.

Finally, the Employer's arbitrability, timeliness or *laches* argument is deficient because its initiation was untimely. The City raised the *laches* claim at the arbitration hearing and never before during the several months that it took for the grievance to be heard. Since the Employer waited until the very last minute to assert *laches*, the undersigned has still further cause to dismiss it altogether.

V. <u>DISCIPLINARY ISSUES</u>

A. BACKGROUND AND FACTS

On August 6, 2006, the Grievant was issued a "last chance" notice and

suspended for 15 days by the City of Woodbury for accidently discharging his duty pistol on August 2, 2006. (Joint Exhibit 2) The City also removed J.M.G. from routine patrol duties, pending the completion of its investigation into the matter. (Joint Exhibit 3) The alleged charges and related policy violations the Employer leveled against the Grievant are as follows:

(1) The Grievant failed to "clear" his weapon before practicing holster draws and dry firing, a safety measure he was trained to perform and that he had trained other police officers to perform. This failure constituted "unacceptable performance" under administrative order A0-201, which requires, in part, compliance with established safety standards. (Employer Tab 5 and Testimony Todd Johnson and William F. Hering)

(2) The Grievant failed to immediately notify his shift supervisor of the accidental discharge of his firearm. This failure violated administrative order A0-403, requiring that any City employee who knows that a police officer discharged a firearm (except on the firing range) *immediately* notify his or her supervisor. This failure also violated police personnel policy PP-101 that requires a police officer to verbally notify his or her supervisor, whether on-duty or off-duty, *immediately* after the intentional or accidental firing of a weapon. (Employer Tab 5 and Testimony Todd Johnson and William F. Hering)

(3) The Grievant failed to inquire as to the welfare of a member of the public who may have been killed or injured by the accidental discharge of his duty pistol. This failure violated administrative order A0-201, noted above, and it constitutes behavior unbecoming a police officer, a violation of administrative order A0-218,

because his actions brought discredit to himself, his department and damaged public confidence in the department. (Employer Tab 5 and Testimony Todd Johnson and William F. Hering)

The facts in this case are substantially undisputed. The summary of facts that follows is based on material witness testimony and documents in Employer Tabs 2, 3, 4 and 6. Among other things, the latter include the St. Cloud Police Department's Offense/Incident/Arrest Report, investigatory work products and, for example, a transcript of the Grievant's interview and of the St. Cloud Country Inn and Suites' 911 call; and the Woodbury Police Department's internal investigation reports, which includes the Grievant's Garrity/Tennessen warning and related statement and a set of interior photographs taken of the Country Inn and Suites' rooms #206 and #208.

First, along with five other City of Woodbury employees, during the week of July 31 to August 4, 2006, the Grievant was attending an instructor-level statewide P.O.S.T. firearms training course in St. Cloud, MN. Said course, *inter alia,* covered firearms safety. (Employer Tab 4(D)). The Grievant was staying at the St. Cloud Country Inn and Suites, room #206. Subsequent to the August 2nd incident in question, he changed hotels. (Employer Exhibit 4)

After firearms class on August 2nd, the Grievant found a live 40 caliber round on the practice range; he picked it up and put it in his pocket. Ultimately, he returned to his hotel room, emptied his pockets and disrobed, planning to take a shower. Before showering, he spotted the loose round, inserted it into an empty magazine and inserted the magazine into his weapon, which he had previously

cleared. Next, he showered, dressed, went to dinner. Around 9:30 p.m., he returned to his room, planning to practice holster draws and dry fire exercises, as directed by the P.O.S.T. instructor. After briefly watching T.V., the Grievant put on his gun belt and began practicing holster draws. The Grievant next decided to practice a few dry fire trigger pulls. His target was a corner lamp sconce hung on the wall that separated rooms #206 and #208. He drew his gun the first time, pulled its trigger and re-holstered the gun.

However, the second time he pulled the trigger, the now chambered 40 caliber round that he had previously placed in the magazine was fired. The bullet struck the brass sconce, traveled through the common wall separating rooms #206 and #208 and, after ricocheting off room #208's exterior wall, it ended up in Christine Merritt's open suitcase. Ms. Merritt was room #208's sole occupant. J.M.G. had forgotten that he had placed the discharged round into the gun's magazine. In any event, on cross-examination, the Grievant admitted that prior to performing these drills he mistakenly failed to clear his weapon.

Second, the gun's unexpected blast "stunned" J.M.G. Nevertheless, he proceeded to pop out the magazine, inspecting it and the gun's emptied chamber, reinserted the magazine into the gun and then he re-holstered the gun. After the gunshot, the Grievant listened for screaming, door slamming or footsteps running down the hall by any occupant of room #208. He heard nothing. Next, he inspected the bullet hole in the lamp; put his finger in the wall's bullet hole; reasoned that the wall's construction prevented the bullet from passing through the wall; and proceeded to consider his options. He gave

considerable thought regarding who he should call. He did not want to “freak out” the front desk, he was not sure who to call from among fellow officers who were attending the shooting school, and it did not occur to him to call either the Woodbury or St. Cloud Police Department. None the less, on cross-examination, the Grievant admitted that his failure to call his on-duty supervisor was a mistake; and, in retrospect, he alternatively might well have called the St. Cloud Police Department (i.e., 911), his fellow Woodbury Police Department officers, even the instructors of his firearms course and/or the hotel’s front desk.

Third, the accidental firing occurred at about 10:45 p.m. At that time, Ms. Merritt was standing about 10 feet from the point the record passed through the wall separating rooms #206 and #208. The gun shot frightened Ms. Merritt, who promptly crouched down in the entry to room #208’s bathroom, to “stay out of the line of fire.” After a few moments had passed, she began to make note of the bullet hole in the adjacent wall, the ricocheting mark it made on the exterior wall and the flakes of paint and plaster on the floor. Next, feeling unsafe and hearing nothing in room #208, she dressed, looked out the door’s peephole and walked quickly to the hotel lobby’s front desk, where she told Amber Moske what had just happened. Fearing that someone might have been shot in room #206, the two women returned to room #208 where Ms. Moske viewed the bullet hole for herself. They returned to the lobby and called Heath Lunde, the hotel’s resident manager, who dressed and joined the ladies in the lobby, at which time they reported what had transpired. At 10:53 p.m., Mr. Lunde directed Ms. Moske to call 911. At 11:05 p.m., the St. Cloud Police knocked on the door of room #206.

This timeline suggests that slightly more than 20 minutes had elapsed between the time the bullet was fired and the time the St. Cloud police arrived on the scene, guns drawn, knocked on the room #206's door, ordered J.M.G. out of the room and handcuffed him.

At the hearing, Ms. Merritt testified that she was hurt, angry and upset by the incident, noting that to this day when she hears a loud noise, she becomes upset. In particular, Ms. Merritt was angry because J.M.G., a police officer, failed to behave responsibly after the accidental discharge of his pistol. She observed that he chose not to tell anybody about firing a 40 caliber bullet in a hotel room and that he showed no regard for her welfare. After all, a wife and mother of two young children, she could have been shot, bleeding or killed, and yet, Ms. Merritt testified, J.M.G. did not check on the consequences of his reckless actions, while, by comparison, she was concerned about his. Again, even though the Grievant did not believe the accidently fired bullet passed through the adjacent wall, on cross-examination, he acknowledged that, in retrospect, he should have checked on the welfare of the room #208's occupant, if any.

Finally, at the time of the incident in question, William F. Hering was Woodbury's Chief of Police. The record evidence establishes that on August 3, 2006, Ms. Merritt's husband called Mr. Hering, demanding that the Grievant be relieved of duty immediately and eventually fired. It also shows that the incident was picked up by mass media. On August 4, 2006, the online editions of the *St. Cloud Times* and the *Pioneer Press* ran similar stories of the incident. On August 5, 2006, the *Pioneer Press*' website carried a second story entitled, "Off-duty

gunshot lands cop in trouble." After reading the first *Pioneer Press* story a citizen emailed the Woodbury City Council, questioning whether "…this clown is qualified to be a police officer." (Employer Exhibit Tab 4(F)) At the behest of the City Clerk, Mr. Hering answered the citizen's email. (Employer Exhibit 5) Slightly more than a year later, on September 21, 2007, a different citizen wrote a letter to Mr. Hering, requesting information about the final disposition of this matter. (Employer Exhibit 6)

On September 19, 2006, the City Attorney of St. Cloud filed a criminal complaint, charging the Grievant with the unlawful discharge of a firearm and for reckless handling of a firearm. (Employer Tab 5) At the conclusion of St. Cloud's criminal investigation, the Employer commenced its internal investigation, which was completed on December 5, 2006. (Employer Tab 1) Mr. Hering testified that subsequent to J.M.G.'s accidental discharge, he was removed from "street duty" and relieved of Firearms Instructor duties. In this respect, he observed that this administrative action was taken to hedge against the potential liability that could arise if the officer in question had to use his weapon while on-duty. According to Mr. Hering, the Grievant was returned to his routine set of duties in March, 2007.

B. THE EMPLOYER'S POSITION

Initially, the Employer challenges the Union's assertion that the unexpected gun blast left the Grievant shocked, stunned and, ultimately, rendered him incapable of responding to the accidental discharge. If incapacitated, the Employer argues, J.M.G. would not have removed the gun's magazine, examined it along with the pistol's emptied chamber; reinserted it into

Glock and then holstered same. Moreover, he would not have inspected the wall sconce; put his finger in the adjacent wall's bullet hole; and concluded that the bullet did not pass through the wall, given the angle of its entry and because the wall was constructed with metal studs at least 7 inches thick, 5/8th inch thick sheetrock on both sides and 14 gauge steel inside. These physical movements and rational calculations, the Employer argues, belie the Union's story that the Grievant was in a catatonic state, albeit temporarily, that was brought on by the gun's blast and that prevented any further action on his part.

Further, the Employer disputes the Union's disparate treatment allegation. The firearms of two other City of Woodbury police officers were accidentally discharged in recent years, the Employer concedes, and neither officer was suspended. In both cases, however, the Employer points to undisputed evidence that the officers in question followed department policy and immediately reported the accidents to their on-duty supervisors. In addition, the Employer continues, the record is devoid of evidence bearing on the other key aspects of this case, namely, that the two incidents involved failure to perform safety checks and the total disregard of possible second-party injuries.

Still further, the Employer rebuts the Union's claim that the City's police officers are inadequately trained in regard to accidental discharges. The Employer argues as follows: first, the Grievant assumed Firearms Instructor duties in March, 2006, he has been a SWAT Team member since 2001 and he has trained police officers on a range of subjects, including firearms safety; second, on a regular and repeating basis, the Grievant has attended advanced

and instructor-level firearms training for about one decade, receiving training in the safe handling of handguns and so forth; third, at the St. Cloud school, the instructor reviewed safety rules with the Grievant and other attendees and he reminded them to make sure their weapons were unloaded before performing their evening holster draw and dry-fire exercises; and, finally, whether a round is accidentally fired or not, the rules are the same, beginning with the rule to immediately notify one's on-duty supervisor.

Next, the Employer argues the Grievant (1) knew that he was to clear/safety check his pistol before performing the mock exercises in his hotel room and he knew that he was responsible for following the trajectory of his discharged bullet into room #208—work standards on which he has been trained and on which he has trained others and that failure to meet these standards are unacceptable AO-201 violations; (2) had knowledge of police personnel policy PP-101 and administrative order AO-403, requiring notification of on-duty supervision immediately upon the discharge of one's weapon; and (3) knew that off-duty conduct that undermines public confidence and discredits oneself and/or the department is an administrative order AO-218 violation.

Finally, the Employer cites legal precedent establishing that police officers are "granted special powers" and are identified as persons "the public can trust," tenets that subject police officers to a higher standard of conduct than that applicable to most other professions. Thus, given the serious nature of the Grievant's infractions, the Employer urges that it was judicious in the level of discipline it meted out; and, indeed, that the Grievant's employment may well

have been terminated had he not amassed a good work record over a period of approximately ten years. For all of the above reasons, the Employer requests that the grievance be denied.

C. THE UNION'S POSITION

For several reasons, the Union argues that the Employer's disciplinary actions in this cases lacked just cause. First, the Union maintains, the unintentional discharge of a weapon in and of itself is not a violation of City policy. In this regard, the Union observes that although the discharge of the Grievant's weapon due to his failure to clear it conflicts with the firearms handling and safety training he has received, the department's internal affairs investigation report, nevertheless, does not cite a related policy violation. *(*Employer Tab 2, pages 2 - 4*)* Indeed, the Union urges, because said report does not conclude that the accidental discharge/safety training *nexus* was a policy violation, the City overreached—contravening an internal affairs finding—when it charged J.M.G. with having violated AO-201 in its January 4, 2007, letter of discipline. (Joint Exhibit 2)

Second, the Union maintains that J.M.G.'s failure to notify his on-duty supervisor after the weapon's discharge was not a policy PP-101 or AO-403 violation because there was only an 8 to 13 minutes lapse between the time of the discharge and the time the St. Cloud Police Department arrived, placing the Grievant in custody. Once this happened, the Grievant was unable call anyone.

. Third, the Union characterizes J.M.G.'s failure to check on the welfare of the guest in room #208 as unfortunate, but mitigated. Union witness Lieutenant

Matthew Nelson, MN Highway Patrol, like the Grievant, was stunned for several minutes by the blast of a bullet, accidentally discharged. However, he, unlike the Grievant who was alone in the hotel room, was brought back to reality by co-workers. Further, the Grievant was not being discourteous or disrespectful to the room #208 guest by not checking on her welfare, as the City alleges, because he was stunned, suffering from the physical and psychological trauma caused by the accidental blast–a topic on which the Woodbury Police Department provides no specialized training.

Fourth, the Union maintains disparate treatment. Most recently, in November, 2008, a Woodbury police officer lost his footing and his AR-15 accidentally discharged. Critically, the Union argues, neither Messrs. Johnson nor Clinton P. Grigley, City Administrator, could recall the details of this incident and, in particular, whether discipline was applied in this case. Thus, given their vaulted position in matters involving personnel discipline, the Union concludes that said officer was not disciplined, whereas, the Grievant received a 15-day suspension.

Finally, the Union urges that the J.M.G.'s suspension was not reasonably related to the seriousness of his alleged offenses and to his record of stellar service with the Police Department. The Grievant, the Union points out, was a "go-to guy," with multiple specializations. Thus, the Union concludes, the Employer's disciplinary action in this case may have been motivated by the "embarrassing" attention it received in the media, although the news sources never identified the Grievant by name. For all of these reasons, the Union

requests that the grievance be sustained.

C. DISCUSSION AND DETERMINATIONS

Except for varying estimates of the amount of time that elapsed between the accidental discharge of J.M.G.'s weapon and the arrival of the St. Cloud Police Department, the facts of this matter are not substantially in dispute. Particularly, at the time of the incident in question, the Grievant was a well-regarded, highly-trained police officer, with many specialized skills, who had amassed an excellent police record during his ten years of service with the Woodbury Police Department,

Nevertheless, the City argues that J.M.G.'s August 2, 2006, conduct was a "big deal," constituting unacceptable performance, which AO-201 defines, in part, as

> … failure to conform to work standards established for the officer's rank or position; the failure to take appropriate action on the occasion of a crime …or….other condition deserving police attention.

(Employer Tab 5) The record shows that the Grievant committed a series of missteps: first, he failed to clear or safety check his Glock pistol before practicing holster draw and dry-fire exercises in hotel room #206 on the night in question; second, he failed to call his on-duty supervisor, or any other second party, after he accidentally fired a round that passed through the wall separating room #206 and room #208; and third, he failed to fully investigate the errant bullet's trajectory to find if it entered room #208 and by inquiring whether room #208 was occupied and, if so, whether its occupant had been hit.

Ultimately, the undersigned concludes that the Grievant's first and third

missteps violated A.O. 201 and the third misstep also violated A.O. 218, as the Grievant's conduct was a discredit to himself and to the department. The media accounts of this incident and the telephone and two emailed communications from citizens certainly cannot be construed as complimentary or gratifying.

Further, with respect to first misstep, the Union correctly pointed out that the City's internal affairs investigatory report did not specifically cite an A.O. 201 violation relative to the fact that the Grievant had been trained and had trained others in the performance of safety checks before using a weapon and yet, on the night in question, the Grievant failed to perform a safety check. This point, however, is academic. Cited or not, failure to know the safety status of one's weapon is a serious matter; and, in addition, the Grievant acknowledged that he should have safety checked his weapon before he began the holster draw and dry fire exercises.. Further, if this had been the Grievant's only misstep, in all likelihood, his discipline, if any, would have been minimal because his failure to perform the safety check was clearly inadvertent but, as previously alluded, there were more missteps. In addition to failing to conduct a room #208 investigation, the Grievant also failed to timely notify his on-duty supervisor of the accidental discharge—a clear violation of rules PP-101 and AO-403.

With respect to testimony about Woodbury Police Department precedent having to do with the accidental discharge of a weapon, the evidence suggests that, in each instance, (1) failure to perform safety checks was not an issue, and (2) the police officers involved had notified supervision of the discharges. Moreover, Mr. Nelson testified on cross-examination, that he too had informed

his supervisor of his accidental discharge. For these reasons, the facts of said precedent are clearly distinguished from the facts of the instant case. Thus, the undersigned concludes that the Union did not prove disparate treatment.

Moreover, the Union-advanced “shocked and stunned” defense of the Grievant’s failure to immediately contact his on-duty supervisor (and to check out room #208) is found to be unpersuasive. Unlike Mr. Nelson, who remained seated in his chair—frozen—after his pistol was accidently discharged, the Grievant, as he testified, listened for disturbance from room #208, inspected and holstered his pistol, inspected the adjacent wall’s damage and logically reasoned why he believed the bullet did not pass through the wall and into room #208. These uncontested facts, plus the fact that the Grievant was very well accustomed to hearing the blast that a 40 caliber round makes, smelling its smoke, and thinking of himself as a “go-to guy,” which he was, makes it very difficult for the undersigned to find that he did not have the required level of composure to call the on-duty supervisor at the Woodbury Police Department, if not immediately, surely before the St. Cloud police arrived 8, 13 or about 20 minutes later, the latter estimate being the most credible. In theory, it may be argued that the Grievant chose not to call his on-duty supervisor or anyone else for that matter, because he was trying to figure out how he could explain the damage done to room #208, while protecting his reputation. Regardless, the undersigned ultimately concludes that the Employer convincingly proved that the grievant also violated policies PO-101 and AO-403.

In the final analysis, it is concluded, that there is convincing evidence in

this case to sustain the 15-day suspension that was issued to J.M.G. Moreover, it is concluded that the City acted appropriately when it placed the Grievant on administrative-only duties until March, 2007. However, the undersigned cannot agree with the City's determination that the totality of circumstances in this case forms a just cause basis for also placing the Grievant on a "last chance" notice. His exemplary pre-August 2, 2006 service record and his length of service deserve more weight. Thus, whether a subsequent misstep on the Grievant's part should result in his discharge ought to be based on the facts and circumstance of the misstep rather than automatically determined by application of the "last chance" notification.

VI. AWARDS

The grievance is denied in part and sustained in part. The City had just cause to suspend the Grievant for 15-days and for placing him on administrative details until March, 2007. However, to have also placed the Grievant on a "last chance" notice lacked just cause and, therefore, said notice is ordered null and void.

Issued and ordered from Tucson, AZ, on the 16th day of August, 2010

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Mario F. Bognanno, Labor Arbitrator