

BEFORE THE ARBITRATOR

LAW ENFORCEMENT LABOR SERVICES, INC
(LOCAL #2, POLICE OFFICERS)

And

BMS NO. 16 PA-0351

CITY OF ROSEMOUNT

APPEARANCES:

Attorney Scott Higbee, on behalf of Law Enforcement Labor Services, Inc. (Local #2, Police Officers).

Attorney Robert Alsop, on behalf of the City of Rosemount.

Law Enforcement Labor Services, Inc. (Local #2, Police Officers) and the City of Rosemount (hereinafter referred to as the LELS and the City, respectively) are parties to a collective bargaining agreement providing for final and binding arbitration. The undersigned was selected from a panel provided by Minnesota's Bureau of Mediation Services pursuant to said agreement to hear and decide the above-referenced dispute. Hearing was held on March 18, 2016 in Rosemount, Minnesota, where the parties were afforded full opportunity to present oral argument, evidence, and testimony. The hearing was not transcribed. The parties filed post-hearing briefs which were exchanged on April 7, 2016, marking the close of the record.

Based upon consideration of the record and arguments in their entirety, the undersigned issues the following Award.

ISSUES:

The parties stipulated to the following issues:

- 1) Whether the City had just cause to discharge Chad Rosa?
- 2) If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS AND RESPONSIBILITIES

3.3 Any term and condition of employment not specifically established or modified by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to modify, establish or eliminate.

ARTICLE 8 – DISCIPLINE AND DISCHARGE

8.3 Discharge

8.31 Discharge shall be for just cause only.

...

ARTICLE 9 – JOB SAFETY

It shall be the policy of the EMPLOYER that the safety of employees, the protection of work areas, the adequate training in necessary safety practices and the prevention of accidents are a continuing and integral part of its every day responsibility. It shall also be the responsibility of all employees to cooperate in programs to promote safety to themselves and the public and to comply with rules promulgated to ensure safety. This employee responsibility shall include the proper use of vehicles, equipment and all safety devices in accordance with recognized safety procedures. ...

PERTINENT WORK RULES

SAFETY RULES

1. Treat every weapon as if it were loaded.
2. Keep your finger straight and off the trigger until you intend to fire.
3. Never point your weapon at anything you are not willing to shoot.
4. Be sure of your target and beyond.

PERTINENT DEPARTMENT POLICIES

Chapter 200 STANDARDS OF CONDUCT

III. REGULATIONS

Breach of Policy

No member shall act or fail to act in such a fashion that constitutes a breach of any policy outlined in this or other sections of the manual.

Conduct Unbecoming a Department Member

...
The policy of this Department is to investigate circumstances suggesting a member has engaged in unbecoming conduct, and impose disciplinary action when appropriate.

...
Department members shall act honestly, impartially, and in a manner that seeks to import trust and confidence in that member and in the Department.

...
▪ Department members truthfully, completely and impartially report, testify and present evidence, including exculpatory evidence, in all matter of an official nature.

Truthfulness

...
Department members will not make false statement or intentionally misrepresent facts under any circumstances. ...

Chapter 210 USE OF FORCE

IV. PROCEDURES

▪ Police officers shall adhere to the following restrictions when their weapon is exhibited:
1. Except for maintenance, training, or in the performance of potentially threatening duties, police officers shall not draw or exhibit their firearm unless circumstances create reasonable cause to believe that it may be necessary to use the weapon in conformance with this policy.

PERTINENT PERSONNEL POLICIES

Cause: Any disciplinary action shall be for a reasonable or just cause and may include, but will not be limited to the following:

(1) Conduct or performance which fails to satisfy the duties, responsibilities, quantity, quality or safety rules of the job.

(2) Restriction, interference or harassment of others in the performance of their job, which is adversely distracting or disrupting the well-being of others.

...

Process:

The City embraces the philosophy of progressive discipline where appropriate but maintains that any incident of misconduct or violation of this policy may result in discharge, depending upon the circumstances. ...

City of Rosemount's Policy on Harassment/Inappropriate or Offensive Behavior

...[C]onduct, whether deliberate or careless, which creates an intimidating or offensive environment interfering with an employee's work.

FACTS

Chad Rosa, the grievant, was a patrol officer with the City's police department, starting in 1997. In 2001 he took a position as a State Trooper with the State of Minnesota; however, he returned to the City's police department in 2003 as a patrol officer. He had never been disciplined during the time he worked for the City.

He has received extensive training in firearm use and safety over his tenure with the City and the State Patrol.

Rosa testified that in July 2015 as he was speaking to Detective Winters, the City's officer responsible for "Glock instruction," Rosa asked Winters if he could have new magazines for his gun. Winters told him to hold off because he could obtain them more cheaply. On July 24, 2015 (all dates hereafter are for 2015) Winters showed Rosa how to "drop test the mags" for his gun in a room in the police station. While working on Rosa's firearm, Winters noticed yellow marks on the gun. He demonstrated to Rosa that the marks turned the laser site for his gun on and off.

The next day Officer Kevin Tapper was sitting in the northeast corner of the squad room working at a computer terminal. Tapper has been on the force since March 2015. Officer Jason Waage was sitting in the southwest corner of the room at another computer terminal. Waage has been on the force for about eight years.

The lights were off in the squad room. The west wall of the room has blinds which were closed but let in some light from outside. The door into the room is in the southeast corner. There is a hallway to the door of the room; the door was open and the hall lights were on. There is a wall that extends into the squad room a few feet from the door. (At the hearing the arbitrator viewed the squad room under similar lighting conditions.)

At about noon that day, according to Rosa, he wanted to demonstrate the laser feature of his firearm to whoever was in the squad room at that time. He heard voices and/or the TV playing in the room. His gun was loaded; while still in the hallway he took his gun out of his holster and turned the laser sight on. He pointed his gun into the room. Rosa testified he did not know Tapper would be in the corner of the room. He noticed the laser light was on Tapper's leg and he immediately swept the laser light to the left off of Tapper and onto the wall, then immediately re-holstered the gun. He testified that the laser was on Tapper five to seven seconds. He did not initially see Waage because of the wall that extended into the room by the door. Rosa recalled that he told Tapper it "was not a big deal." He testified that by that he meant the laser on the wall was not a big deal. Rosa was in the room for a couple of minutes and told Waage he did not see anything because Waage had his back to the incident. He does not recall what instigated that declaration. They then all left the squad room.

Tapper testified that just before Rosa entered the room he stood up from his chair and turned around. Rosa was about four to five feet from Tapper. Tapper immediately noticed the laser on his legs, genital area, and lower abdomen. He estimated the laser was on him up to fifteen to twenty seconds. He asked Rosa what he was doing, which caught Waage's attention; Waage then stepped into a position to be able to see the laser on Tapper. Rosa re-holstered his gun and then sat at his desk. Tapper testified that he and Waage asked him what happened. Tapper testified Rosa said "You did not see anything. Prove it." Rosa gave no explanation to them of why he pointed his gun at Tapper. Tapper testified that there had been no animosity between them beforehand.

Waage had socialized with Rosa the night before at "Leprechaun Days." At around noon Waage testified that he was sitting at his workstation. He does not recall what caught his attention, but he turned and saw the laser on Tapper's chest and abdomen as Tapper stood by his workstation. Tapper had a shocked look on his face with his "eyes wide." Waage walked toward Tapper and then noticed Rosa holding his weapon at Tapper. He does not recall Rosa saying anything at that point. Waage testified that he then asked Rosa "What are you doing?" Rosa then walked to his workstation in the room and said "You didn't see nothing." No other explanation was given by Rosa. Waage testified there was no animosity between them before that incident.

A couple of days later Waage and his wife had dinner with Tapper. Sometime before

dinner Waage had texted Rosa that he should meet them at the restaurant. When Waage and Tapper were at their table they noticed Rosa was sitting at the bar. Waage and Rosa then had a text exchange while Waage and Tapper were having dinner. After dinner Waage and Tapper joined Rosa at the bar and they had a couple of drinks. The three of them then met up at another bar. Rosa did not explain the gun pointing event to Waage or Tapper that evening, nor did they ask him about it.

Waage and Tapper were hoping that Rosa would explain what happened, or apologize. However, because that did not occur, Tapper decided to report what occurred to Sergeant Coughlin on August 3rd. Coughlin then interviewed Waage about the incident. Both Tapper and Waage described what happened to Coughlin and indicated that they were both very concerned about what had occurred. Their testimony generally reiterated their descriptions to Coughlin of what occurred.

Coughlin then reported the matter to Police Chief Scott; it was decided Rosa would immediately be placed on administrative leave. Coughlin directed Rosa to go to Scott's office. At that meeting Rosa was presented with a list of allegations and told he was being placed on administrative leave and to turn over his firearm and ammunition, as well as other equipment. Rosa was then escorted out of the station.

On August 10th Coughlin met with Rosa and the LELS's attorney, Scott Higbee, where he was given a copy of his Tennessen Warning. A Tennessen warning is given when a governmental entity is attempting to collect private/confidential information from an individual. Coughlin also advised that he would not read Rosa the Garrity warning since he did not feel the need to compel a statement. A Garrity warning can be used when there may be criminal charges. The subject of the warning is granted immunity but is required to answer questions during the interview.

At the August 10th meeting Rosa decided to provide management with the following written statement instead of verbally answering their questions:

A week or two prior, I had been talking with our Glock armor about getting additional magazines. He suggested I wait, because he could get them through Glock at a cheaper price. Then the day before, Friday I believe, the armor spoke to me in the squad room and had a Glock catalog. We talked and he asked if I needed to (sic.) magazines or if the (sic.) just needed to be rebuilt he examined my magazines and my Glock. He asked what the yellow marks were on the Glock and at the same time he discovered it was the on/off switch for the laser

sight. I forgot that I even had the laser sight. He then field stripped my Glock and then explained to me how to drop test my magazines to determine if my magazines could be rebuilt.

The next morning was a good morning. As I was walking into the squad room it was dark and I heard them talking and I thought I would demonstrate the laser to my colleagues. I turned the laser on and I didn't realize Officer Tapper was there, when I realized it was on Officer Tapper's leg, I immediately corrected and moved it to the left and then put it away. I did not intend to hurt, threaten anyone. My intent was to demonstrate the laser and bond with coworkers.

I don't recall hearing them say anything. In fact, I was waiting to hear them say they wanted to see it or try it.

The day and the rest of the week went on as usual. A few days later – on Tuesday night – the three of us Waage, Tapper and I had beers together at the bar.

In 17 years of service, this is my only internal investigation.

Rosa testified that the statement was submitted under advice of counsel and that he had drafted it as his talking points in case he had been given the Garrity warning.

On August 21st Sergeant Coughlin issued his "Findings of Fact and Conclusions in Rosemount IA15-01," which states in pertinent part:

Officer Rosa's conduct was either deliberate or careless and created an intimidating environment for Officer Waage and Officer Tapper. They have both expressed concerns that their work is disrupted due to safety concerns. Officer Tapper does not feel safe being at the range with Officer Rosa and Officer Waage feels he has to maintain a state of vigilance when working with Officer Rosa.

Officer Rosa clearly violated [firearms] safety rules.

Officer Rosa's conduct fails to satisfy the safety rules, caused significant stress and disruption to Officer Waage and Officer Tapper, and they clearly found his conduct offensive.

Officer Rosa's action was in violation of his contract with the City of Rosemount and created a situation which impacted the safety of his coworkers. His failure to explain his conduct to his co-workers has created an on-going safety concern for them. Officer Rosa personally signed this contract as a Union Representative.

Chief Scott reviewed the matter and decided there was enough evidence to demonstrate Rosa egregiously and improperly used his weapon and failed to be truthful as to what happened.

He felt Rosa engaged in very "serious misconduct." Scott noted that because of the incident there was now a lack of trust in Rosa by his fellow officers. Scott recommended that the City Council vote to discharge Rosa. On September 3rd Scott issued Rosa a Notice for Recommendation for Discharge.

On September 1st Police Chief Scott issued his Disposition of Complaint of Employee Misconduct, finding in part:

Policy Violation:

- Rosemount City Policy Section 41, paragraph 1 – conduct or performance which fails to satisfy the duties, responsibilities, quantity, quality or safety rules of the job.
- Rosemount City Policy Section 41, paragraph 3 – Restriction, interference or harassment of others in the performance of their job, which is adversely distracting or disrupting the well-being of others.
- Rosemount City Policy Section 41, paragraph 10 – Use of offensive conduct or language towards the public or municipal officers or employees.
- Rosemount Police department Policy Manual Chapter 210 Use of Force, IV Procedures – Police officers shall adhere to the following restrictions when their weapon is exhibited.
- Labor Agreement between the City of Rosemount and Law enforcement Labor Services, Inc., (Local #2, Police Officers) – Article 9 – JOB SAFETY.

Allegation #2 – Officer Rosa failed to be truthful while providing a written statement regarding the course of events that happened on July 25, 2015.

...

Scott further testified that the police sergeants advised him that they were concerned if Rosa was returned to duty; therefore, Scott directed Rosa to submit to a fitness-for-duty evaluation that was conducted by Psychologist Michael Keller, PhD, on August 28th. In a report of that same date Keller concluded Rosa was psychologically fit for duty. Keller reiterated his written conclusions through testimony at the hearing.

In a September 3rd memo to Rosa, City Administrator Dwight Johnson recommended that Rosa be discharged. On September 18th Rosa participated in a Loudermill hearing with Johnson, Assistant City Administrator Foster and Police Chief Scott regarding the July 25th incident. At that hearing Johnson advised Rosa that he could resign if he so chose. In a September 21st memo to Rosa, Johnson stated that he intended to recommend to the City Council at the October 6th Council meeting that Rosa be discharged. In a September 30th memo to the City Council from Scott and Johnson it was recommended that Rosa be discharged. On October 6th the City

Council met. Rosa did not appear, and the City Council voted to discharge Rosa.

On October 7th the LELS filed a grievance over Rosa's discharge, and in an October 12th answer Scott denied the grievance.

POSITION OF THE CITY

Pursuant to the labor agreement, the City bears the burden of establishing that it had cause to support its decision to terminate the employment of Rosa. Where a collective bargaining agreement between a City and union does not specifically define what acts constitute "cause" for discharge of a municipal employee, the Minnesota Supreme Court has found that the question was appropriately left to the arbitrator. In this case, the arbitrator should look to the provisions of the City's personnel policy since the labor agreement does not include a definition of what constitutes just cause for purposes of imposing discipline. Pursuant to Article 3.3 of the labor agreement, "[a]ny term and condition of employment not specifically established or modified by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to modify, establish or eliminate." The City's personnel policy provides examples of just cause for imposing discipline to a City employee, which includes but is not limited to: (1) conduct or performance which fails to satisfy the duties, responsibilities, quantity, quality or safety rules of the job; and (2) restriction, interference or harassment of others in the performance of their job, which is adversely distracting or disrupting the wellbeing of others."

The City demonstrated sufficient proof of egregious acts of misconduct committed by Rosa to establish just cause for the imposition of discipline in this matter. Moreover, based on the serious nature of the alleged misconduct as well as Rosa's gross misrepresentation of the incident during the internal investigation, termination of his employment is reasonable discipline in order to maintain the integrity and efficiency of the Rosemount Police Department.

Two of the cornerstones of any well-operated police department are to ensure both the safety of all of its officers as well as the integrity of the Department based on the conduct of its officers. Police officers are generally held to a higher standard of conduct compared to other public employees due to the special powers that they are granted by statute as well as their solemn oath and responsibility to protect and preserve the lives and property of the public. Strict

adherence to Department policies and procedures is imperative to maintain the public's trust in a Department's police officers as well as to retain the overall integrity of the Department. Egregious violations of essential Department policies by an officer justify his or her removal from the Department. In this case, Rosa's conduct on July 25th and his subsequent misrepresentation during the internal investigation of the incident severely compromised two of the most basic tenets of law enforcement for the Rosemount Police Department: safety and trust. Rosa's blatant violations of established policies of the Police Department as well as the safety provisions of the labor agreement justify the termination of his employment by the City and the grievance challenging the City's decision in this proceeding should be denied by the Arbitrator.

Rosa's testimony surrounding the firearm safety violation committed by Rosa in the squad room on July 25th conflicts with that of Tapper and Waage. The consistent testimony of both Tapper and Waage that Rosa had the firearm aimed at Tapper for 15 to 20 seconds is significantly different than Rosa's testimony that the laser merely grazed Tapper's leg.

Rosa's recollection of the incident occurring on July 25th consists of his written statement to Coughlin on August 10th and his testimony during the arbitration hearing on March 14th. Based on this evidence, Rosa's version of the incident is both inconsistent and incomplete. He admitted hearing voices coming from the squad room but did not know Tapper was in the room. He stated that he intended to demonstrate the laser to other officers but never followed through with his stated intention once he got into the squad room. He initially did not recall any conversation with Tapper or Waage after the incident but later testified at the arbitration hearing that he made two statements related to the incident. Rosa could not recall the context in which these statements were made and incredibly he had no recollection of any statements or questions made by Tapper or Waage. Rosa's evasive and inconsistent recollection of the incident is also tainted by the fact that he has a significant stake in the outcome of the arbitrator's decision. Overall, Rosa's recollection of the incident is not credible or substantiated by any other witnesses or evidence.

Conversely, evidence that Rosa aimed his loaded service weapon at a fellow officer for 15 to 20 seconds is substantiated by two officers that have no stake in the outcome of the arbitration. More importantly, there is no evidence that either Tapper or Waage had any prior problems with Rosa or any explanation why they would provide an untruthful account of the incident to the investigating officer. Tapper had only been employed as an officer with the City

for approximately four months and both Waage and Rosa acknowledged that they were friends and socialized together prior to the incident. The information provided by Tapper and Waage during Coughlin's investigation and their testimony at the arbitration hearing are consistent and complete. Both officers are adamant that the laser from Rosa's gun went back and forth across Tapper's torso and pelvic area for between 15 and 20 seconds. Moreover, contrary to Rosa's contention, the testimony of Tapper and Waage cannot merely be discounted as their "perception" of the facts or purportedly be reconciled with Rosa's testimony in any manner. Waage's contention that he turned, saw the laser, stood up and walked around the corner to see Rosa still pointing his gun at Tapper clearly substantiates both officers' testimony concerning the duration of the incident and completely undermines Rosa's contention that the laser merely passed over Tapper's leg. Interestingly, Rosa testified that Waage never left his chair and would not have seen the laser from where he was sitting in the Southwest corner of the squad room. The more credible and unbiased testimony of Tapper and Waage clearly establishes that Rosa aimed his loaded service weapon at a fellow officer for an extended period of time and it was not limited to a single swipe of the laser across Tapper's leg.

Every Rosemount officer that testified at the arbitration hearing, including Rosa, acknowledged the Department's well-established policy related to the use of force and firearm safety. The Department's Use of Force policy expressly prohibits any officer from drawing or even exhibiting his or her firearm except for purposes of maintenance, training or in the performance of potentially threatening duties. All the officers that testified at the arbitration hearing also acknowledged that a firearm should never be pointed at another individual except if the officer has the intention of using the firearm. In addition, Rosa's contractual responsibility to properly use police equipment in accordance with recognized safety procedures is specifically identified in the labor agreement which Rosa helped negotiate and ultimately executed on behalf of LELS. Rosa was admittedly aware of the foregoing policies and contractual obligations as well as the seriousness of the transgression if violated by an officer of the Department.

His apparent attempt to characterize the incident as a demonstration or training under the Department policy is preposterous. Rosa's purported justification to aim a loaded firearm into a dark squad room on July 25th defies common sense and represents an insult to the officers that were the subject of his misconduct. According to Rosa's own description of the incident at the arbitration hearing, he admits pointing a loaded gun into a dark room in which he had heard

voices and knew someone was present. Such conduct clearly does not constitute acceptable use of a firearm under the City's policy or the express contract provisions of the labor agreement.

The more objective and compelling evidence provided by the City in this case establishes that Rosa pointed a loaded firearm at Tapper for between 15 and 20 seconds on July 25th. The conduct constitutes clear and convincing evidence of an egregious and inexplicable violation of the Department's policy related to Use of Force by Rosa and Article 9 of the labor agreement related to Job Safety.

Rosa unnecessarily put officers (including himself) at significant risk of injury or possible death. Tapper and Waage were put in the unthinkable situation of possibly responding with deadly force towards a fellow officer inside the typically safe confines of the squad room. In fact, either officer could have appropriately reacted to the situation by shooting Rosa based on his threatening conduct. Rosa's misconduct has forever shattered the sanctity of the Department's secured offices and the trust of his fellow officers and superiors.

Rosa's misconduct is compounded by the untruthful evidence that he provided during the internal investigation of the incident as contained in the written statement that he gave to Coughlin on August 10th. During the internal investigation, Rosa was not compelled by the City to provide either a verbal or written statement. However, once Rosa decided to submit a written statement to Coughlin, his statement is expected to comply with the well-established Department policy concerning an officer's code of conduct related to truthfulness. In particular, the policy requires that the statement provided by Rosa be both truthful and complete. Based on the totality of evidence gathered during the course of the investigation, Chief Scott concluded that the written statement provided by Rosa on August 10th contained untruthful and incomplete statements concerning the incident on July 25th.

The Arbitrator cannot ignore the diametrically different versions of the firearm incident provided by Tapper and Waage compared to Rosa's written statement. The two versions cannot be reconciled by simply characterizing them as different perceptions of the same incident. Instead, the officers' contradictory versions of the incident can only mean that one of the versions is fabricated or untrue. Based on the factors related to credibility previously outlined herein, the City reasonably and appropriately concluded that Rosa's recollection of the incident was incomplete and untruthful. Aside from being completely inconsistent with the testimony of Tapper and Waage, his recollection of the incident did not make logical sense nor was it

substantiated by any other evidence.

Moreover, his failure to recall any discussion subsequent to the incident is also not credible. In addition, his characterization of a dark room is not supported by independent observations of the squad room by Coughlin, Chief Scott or even the arbitrator under similar conditions. Finally, his subsequent recollection during the arbitration hearing of the statements that he made following the incident is incomplete and make no sense. During the arbitration hearing, he suddenly recalled making two statements following the incident but surprisingly cannot remember any statements being made back to him or even the context in which his statements were made to Tapper and Waage.

The significant discrepancies in the evidence cannot be ignored and the overwhelming objective evidence suggests that Rosa was not truthful in the written statement provided to Coughlin. Rosa's untruthfulness undermines the trustworthiness that a police officer must maintain with his fellow officers, his superiors and also the public. The City's decision to terminate Rosa's employment is reasonable in light of the seriousness of his misconduct and the impact his presence would have had on the entire Department if had been allowed to remain a police officer with the Department.

LELS will minimize the significance of Rosa's written statement as well as the fairness of the internal investigation based on the City's decision to not provide Rosa with a Garrity warning and/or compel him to provide a statement. The anticipated argument from LELS is that the absence of the Garrity warning effectively precluded the City from gathering all the evidence relevant to the investigation since Rosa was apparently reluctant to provide information for fear of criminal repercussions. This argument has no merit in this case for a number of reasons. The decision of a public employer not to provide a Garrity warning for an officer subject to an internal investigation does not render the investigation unfair. There is no applicable law that creates an affirmative duty to provide a Garrity warning to an officer being investigated if a statement from the officer is not being compelled by the employer. Nor is there any obligation on the part of the City to compel a statement under any circumstance. In this case, however, Rosa voluntarily provided the City with the written statement with the intention that the City would consider the statement in its investigation of the incident. Consequently, the City obtained information from all witnesses to the incident occurring on July 25th which would typically form the foundation of a fair investigation. Coughlin also interviewed other officers within the

Department and the City ordered a fitness-for-duty examination of Rosa for purposes of understanding the reason for Rosa's serious and inexplicable actions. Clearly, the absence of the Garrity warning did not undermine the fairness of the investigation since Rosa voluntarily provided information to be considered in the City's investigation and he also had multiple opportunities prior to his termination on October 6th to either change or supplement his written statement.

Overall, Rosa's acts of misconduct were clearly established by a thorough and fair investigation of the incident by the City in which Rosa was provided the opportunity to address and/or explain the allegations on multiple occasions and instead limited the information he provided in the investigation to the untruthful written statement that he provided to Coughlin.

As outlined herein, the decision by the City to terminate his employment was both reasonable and necessary in light of the circumstances surrounding the firearm incident on July 25th as well as his subsequent misconduct in connection with the internal investigation of the incident by the City.

Ensuring the safety of the City's police officers as well as maintaining the integrity of the Police Department are two attributes of an efficient and effectively operated law enforcement agency that cannot be over emphasized enough for the Arbitrator. In this case, Chief Scott provided the arbitrator with a number of reasonable justifications for terminating Rosa's employment for his misconduct in this matter, with the egregiousness of the conduct being the most convincing justification of them all. Scott cannot minimize or ignore the chilling accounts of the firearm incident involving Tapper and Waage. According to Scott, aiming a loaded firearm at a fellow officer for an extended period of time is not conduct that can be explained, justified, or tolerated under any circumstances by the Police Department. Aside from the undeniable risk of injury that Tapper faced as a result of the misconduct, Rosa cannot erase or eradicate the long term impact his misconduct will have on Tapper and Waage as well as possibly the entire Department if a less severe discipline is imposed for the misconduct.

Contrary to Rosa's anticipated contention, the City's decision to terminate his employment is not based on a single act of misconduct or lapse in judgment. Rosa voluntarily submitted a written description of the incident to Coughlin as part of the internal investigation of the incident. The statement was prepared by Rosa after he had multiple days to gather his thoughts and consciously decide how to describe the incident to the investigating officer. The

untruthful account of the incident provided to the City by Rosa in the written statement constitutes additional acts of misconduct committed by Rosa, and when considered in conjunction with the firearm misconduct on July 25th, reasonably supports the City decision to terminate Rosa's employment on October 6th.

Rosa's gross mischaracterization of the facts surrounding the incident on July 25th clearly evidences Rosa's attempt to minimize the significance of his wrongful acts as well as the resulting discipline. Instead, his untruthful statement compounded the severity of his overall misconduct and further accentuated the mistrust of his superior officers.

How will any officer or member of the public be able to trust an officer that has been disciplined for pointing a loaded gun at a fellow officer and subsequently lying about the incident during the internal investigation of the incident? Rosa's effectiveness as a contributing member of the Department will be greatly diminished if not outright eliminated. If Rosa returned to the department, he will be subject to impeachment for any report he writes due to his unfortunate decision to lie in the written statement that he provided to Coughlin in connection with his internal investigation. Based on the foregoing, the City's decision to terminate Rosa was both justified and reasonable.

The evidence clearly establishes that Rosa violated well-established, reasonable and job-related policies of the Police Department. Since firearm safety and officer integrity represent two of the cornerstones of an effective law enforcement agency, termination of an officer's employment for an egregious violation of either of these tenets should not be unexpected nor deemed unreasonable. Moreover, since the allegations of misconduct were fully and fairly investigated by the City, Rosa should be precluded from claiming any violation of his due process rights. Finally, the reasonableness of the discipline imposed on Rosa is substantiated by the objective explanations for the termination as articulated by Chief Scott and outlined herein. Any discipline short of Rosa's removal from the Department will significantly undermine the effectiveness of the Department and completely ignore the very real concerns of Tapper and Waage. Based on the foregoing, the City respectfully requests that the termination of Rosa be sustained and that the grievance submitted by LELS on behalf of Rosa be denied. The City cites arbitral in support of its position.

POSITION OF LELS

Discharge has been reasonably characterized as the industrial equivalent of capital punishment. Not only does it entail the immediate loss of income, it also robs an employee of acquired seniority and other contractual benefits. Moreover, a discharge is a strike against the employee's reputation, particularly within the industry in which he or she has chosen to serve. There is no overstating the impact of a discharge on an employee. The City is thus rightly charged with a weighty burden in proving that it had just cause to terminate the employment of Rosa who in all likelihood will be unable find future employment as a law enforcement officer if the discharge is upheld

A seven-element test for just cause is commonly employed in determining whether just cause exists for the discharge of an employee. The seven elements are: 1. Did the employer give the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct? 2. Was the employer's rule reasonably related to business efficiency and the performance the employer might reasonably expect from an employee? 3. Did the employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? 4. Was the employer's investigation conducted fairly and objectively? 5. At the investigation, did the decision-maker obtain substantial evidence or proof that the employee was guilty as charged? 6. Has the employer applied the rules, orders, and penalties evenhandedly and without discrimination to its employees? 7. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?

With regard to the instant case, LELS contends that the factors that most squarely work against the City decision to discharge Rosa are the fairness investigation and the severity of the penalty. The City's failure to compel a statement from Rosa is difficult to understand. Its decision to treat the informal "talking points" he provided as a sworn statement is also unfair. If the City had seriously wanted to consider Rosa's version of events, it should have compelled a statement under Garrity and taken that opportunity to follow up on any perceived discrepancies. The City's failure to take the conclusions of Dr. Keller into account in determining the level of discipline is also difficult to understand. If the City had concluded that discharge was the only appropriate discipline, why did it bother to send Rosa for the evaluation? Under the circumstances it appears that the City proceeded with the evaluation in anticipation that Rosa would fail which would

have supported its discharge decision. The City should not be permitted to attempt to rely upon a fitness-for-duty analysis as a substitute for establishing just cause for discharge.

By failing to compel a statement from Rosa, the City essentially waived the ability to clarify any perceived inconsistencies in his account. Rosa did provide the City with his prepared talking points once it was announced that the City would not be compelling him to speak. The talking points were not intended to be a complete explanation of the events in question. If that is what the City wanted, then it should have compelled a statement. However, despite having failed to compel a statement, the City chose to interpret the talking points as a detailed sworn statement which it concluded contained serious inconsistencies. In fact, the City concluded that Rosa was untruthful in that submission. A claim that a law enforcement officer has been untruthful is a serious matter. It is unfair to make that conclusion on the basis of an unsworn statement which was submitted only because the City chose not to compel a statement. Further, a comparison of that submission with the record establishes that it is largely consistent with the versions of both Tapper and Waage.

The first paragraph describes an interaction between Rosa and the City's Glock armor in which the armor pointed out the laser sight on Rosa's firearm. Rosa states that he had forgotten about the laser sight. Coughlin apparently confirmed this interaction. In the second paragraph, Rosa explained that his motivation on the date in question was to demonstrate the laser. He states that as he approached the squad room it was dark and he did not notice Tapper. The City appears to dispute how dark the room actually was or whether Rosa could have failed to observe Tapper as he approached the room. However, both Tapper and Waage stated that the lights in the squad room were off and that it was at least somewhat dark in the room. LELS contends that it is far more believable that Rosa may not have immediately observed Tapper, who was dressed in his dark uniform, as he approached the darkened room than the necessary alternative which is that he saw Tapper and deliberately put the laser on him.

The next factor which the City points to concerns how long the laser was on Tapper. All present agree that the entire incident was brief. Rosa's informal statement did not estimate how long the laser was on Tapper but states that when he realized the laser was on Tapper he immediately corrected and moved it to the left. Tapper estimates that from the time he noticed the laser until Rosa had holstered it was "fifteen to twenty seconds". At hearing Tapper

broadened that estimate to from zero to twenty seconds. Waage's estimate was a little less than Tapper's, eventually indicating it was "probably at least more than 10 seconds". All witnesses had their own perspective, but given that they all provided relatively similar estimates of a matter of seconds, it is unfair to conclude that any of them are not being truthful.

The final inconsistency which the City points to concerns what, if anything, was said in the immediate aftermath of the incident. Again, both Tapper and Waage indicate that any efforts to discuss the matter with Rosa were relatively brief. As Tapper put it: "maybe a minute or so approximately" and Waage stated that it was "(n)ot very long. Um, it's not like we were grilling him on it all day or something like that, but maybe only a couple, couple of minutes maybe". From their statements it is clear that Tapper and Waage were upset about the incident, but they were not as clear about what was said in the aftermath. Their view that Rosa was downplaying what had happened and suggesting that it was no big deal is consistent with Rosa's view that the matter passed quickly. There is no dispute over the accuracy of the final three paragraphs, which are only one sentence long. All agree that the rest of the day and work week proceeded as usual. The incident was not addressed again by anyone until August 3rd. Rosa, Tapper and Waage did meet up for beers a couple of days after the incident.

While there was some effort to portray that as merely a chance meeting, it is undisputed that Waage texted Rosa encouraging him to meet at the Fireside. There was also some effort to suggest that Rosa was attempting to avoid Tapper and Waage even at the Fireside. The reality was that Rosa was present before they arrived and stayed after Waage texted that they were coming there. Rosa ate his meal, which he had already ordered, at the bar where he was chatting up the female bartender. Rosa and Waage exchanged a good-natured series of text messages during the evening before Tapper and Waage joined him at the bar. If Rosa had been attempting to avoid any contact with the others, one would have expected him to leave when informed they were coming to the restaurant or at least not linger there after finishing his meal. After having a beer at the bar, the trio agreed to go to the America Legion together for another beer. Again, these are hardly the actions of someone trying to avoid the others. Finally, it is accurate that the current matter is the only internal affairs investigation Rosa has been subjected to.

The incident of July 25th was a serious lapse of judgment by Rosa; LELS understands that disciplinary action is justified because of it. However, there is no basis to conclude that he has

been untruthful in discussing the matter, particularly where the City chose to not order an interview under Garrity. Under the circumstances, it is unfair for the City to rely upon the unsworn statement of Rosa as establishing that he has been dishonest with regard to the situation. Rosa contends that his actions were a misguided attempt to show off the laser sight and putting the laser on Tapper was inadvertent.

The City's investigation was completed by August 21st when Coughlin submitted his report. No further interviews were scheduled and no additional facts were discovered thereafter. Instead, the City directed that Rosa report to Dr. Michael Keller for a fitness-for-duty evaluation. It is notable that the City did not mention the evaluation in its opening statement and it was LELS who called Dr. Keller to testify. LELS entered both his curriculum vitae and report as exhibits. There can be no dispute over Dr. Keller's qualifications to have performed the evaluation. Again it was the City who selected him. Dr. Keller stated that he had been charged with completing the "Fitness-For-Duty Evaluation (FFDE) in order to determine whether (Rosa) is able to safely, effectively, and professionally perform his duties and essential job functions". His detailed report describes the tests which he performed on Rosa. Dr. Keller emphasized that he was not charged with determining the appropriate discipline which should be imposed. Dr. Keller concluded that Rosa's evaluation results indicate that he has the ability and capacity to perform the essential functions of his job as a police officer in a safe, effective, and professional manner, and that he is able to work as a Police Officer without any limitations or restrictions at this time." Dr. Keller also concluded that the incident of July 25th was "most likely the consequence of a momentary lapse in judgment, which was serious in nature" but also that "this type of mistake should not be expected to be repeated." Despite obtaining these conclusions from the expert it had retained, the City proceeded to discharge Rosa.

During the hearing, no clear explanation was offered by the City as to why the evaluation was performed if the City had concluded that discharge would be the result. The most logical explanation seems to be that the City expected Rosa would not be found fit for duty which in turn would have made his removal from office much easier. An employer should not be permitted to use a fitness-for-duty evaluation as a substitute for demonstrating just cause for discipline. Implicit in an employer's decision to order an employee to undergo a fitness-for-duty evaluation prior to determining what discipline to impose is a determination that if the employee is found fit for duty, a lesser discipline will be imposed. After completing its investigation, but

before settling upon what discipline to impose the City directed the evaluation.

After receiving assurances from Dr. Keller that Rosa was fit for duty, the City moved to discharge anyway. There is no indication that the City considered Dr. Keller's conclusions. Rather, it appears that the City had already decided to discharge Rosa and was banking on Dr. Keller reaching conclusions in support of that action. Rosa's years of service to the City were not taken into account in determining the appropriate discipline. In addition to the assurances of Dr. Keller that Rosa is fit for duty; the City should have considered the lack of any previous discipline issued against Rosa as another point in his favor. As noted above, the failure to conduct a Garrity interview of Rosa is further evidence that the City had predetermined what discipline it would impose and was simply going through the motions of an investigation.

In his investigative report, Coughlin made a limited effort to establish that the City had ongoing concerns about Rosa and his relationships with fellow officers. This was largely based upon hearsay which was attributed to witnesses who the City did not call to testify. One specific issue the report referenced was a claim that Rosa was very upset over his reassignment from a particular squad. Rosa testified that he was frustrated over the reassignment because he felt it failed to recognize his seniority, but denied any resulting animosity towards fellow officers. Tapper was not involved in the squad reassignment and so there is no basis to believe that Rosa targeted him due to it.

Another concern with Coughlin's report is its hearsay suggestion that Sgt. Risvold had noted problems between Rosa and Tapper and Waage. Risvold did not testify and so the basis for this perception was not able to be challenged. However, in his initial interview when asked about his relationship with Rosa, Tapper stated, "I felt like we've always got along. I, I don't think we have any issues with each other."

Similarly, at hearing Waage testified that he had no real problems with Rosa. Thus, it appears that neither Tapper nor Waage was aware of any significant issues with Rosa. Conspicuously absent from Coughlin's report is any indication that the City took formal action against Rosa for these perceived problems with fellow officers. It is unfair to allow the City to rely upon such undocumented concerns to cast Rosa as a troubled officer who demands serious discipline.

The fact is that there is no evidence that prior to July 25th Rosa was a disciplinary

problem for the City. His good employment record should have been considered in determining the appropriate level of discipline. The record shows that the City did not give Rosa the benefit of his prior years of good performance.

LELS and Rosa acknowledge that the incident of July 25th was a serious mistake for which disciplinary action is warranted. The incident has damaged the trust fellow officers have in Rosa. Rosa testified that he understands that it will be incumbent upon him to reestablish relationships and rebuild trust with fellow officers and is prepared to do so. The arbitrator can assess for himself Rosa's level of commitment in that regard. It should be noted that discharge is not the necessarily the appropriate discipline for mishandling of a firearm.

A stated concern for the City is whether fellow officers would be comfortable working with Rosa. Whenever an employee is discharged for conduct against fellow employees there may be some level of discomfort concerning his or her return. That cannot be the dispositive factor in assessing whether just cause for discharge. It appears that fellow officers are generally unaware of the results of Rosa's fitness-for-duty evaluation. Dr. Keller's conclusions in that evaluation are the best measure on whether Rosa's return would create a safety concern for others.

Discharge is not the necessary response for Rosa's act. Rosa regrets his conduct and is willing to do whatever is necessary to restore his trust with fellow officers. He can continue to provide the City with valuable service. LELS requests that the arbitrator uphold the grievance and direct Rosa's reinstatement. LELS cites arbitral authority in support of its position.

DISCUSSION

The most significant issue in dispute focuses on what happened and what was said when Rosa entered the squad room on Jul 25th, pointing his firearm into the room. In summary, Rosa contends he wanted to show his fellow patrol officers how the laser worked on his gun. He heard voices in the room and as he was about to enter the room he pointed his loaded gun into the room with the laser on. Rosa maintains that his laser was unintentionally pointed at Tapper's leg, and he quickly swept the laser light off of Tapper's leg (though it remained on Tapper's leg for five to seven seconds) onto the wall. He then immediately re-holstered the gun. He told Tapper it was "no big deal," referring to the laser light on the wall. A couple of minutes later he told Waage that Waage did not see anything, though he does not recall what precipitated that statement.

Shortly thereafter they all left the squad room.

Tapper testified that he happened to stand up from his corner workstation and turned around. Rosa was four to five feet away with the laser light from his gun moving over Tapper's legs, genital area, and abdomen for up to fifteen to twenty seconds. He asked Rosa what he was doing, which caught Waage's attention; Waage then stepped into a position to be able to see the laser on Tapper. Rosa re-holstered his gun and then sat at his desk. Tapper testified that he and Waage asked him what happened. Tapper testified Rosa said "You did not see anything. Prove it." Waage testified that he was sitting at his workstation. He does not recall what caught his attention, but he turned and saw the laser on Tapper's chest and abdomen as Tapper stood by his workstation. Tapper had a shocked look on his face with his "eyes wide." Waage walked toward Tapper and then noticed Rosa holding his weapon at Tapper. He does not recall Rosa saying anything at that point. Waage testified that he then asked Rosa "What are you doing?" Rosa then walked to his workstation in the room and said "You didn't see nothing." No other explanation was given by Rosa to Tapper or Waage. There was no animosity between the three of the officers.

I find it difficult to accept Rosa's description of what was said and what occurred during the incident. Tapper and Waage had no reason to testify untruthfully about what had happened. During cross-examination Rosa indicated he did not remember any other statements made by himself or Tapper and Waage and that it must be differences in perception between the three of them. Such an explanation is implausible.

Rosa contends he said it "was no big deal" referring to when the laser light was pointing at the wall. That is nonsensical, after having just pointed the light on Tapper. Even assuming it was on Tapper for five to seven seconds, as Rosa argues, that is actually a significant period of time to point a loaded weapon at a co-worker who posed no threat of bodily harm. For Rosa to testify that he then told Waage that Waage did not see anything is also not credited. Rosa could not explain why he told Waage that.

It is additionally somewhat baffling that if, as Rosa claims, he simply wished to demonstrate the laser light on his gun, then never attempted to tell Tapper or Waage that was what was why he was pointing his loaded weapon into the room.

While there were no lights on in the squad room, some light passed through the closed blinds and from the hallway through the open door. Moreover, if anything, a slightly darker

room would cause the laser light to stand out more.

Tapper's and Waage's explanations are clear and compelling and more persuasive than Rosa's. I find that Rosa had his laser pointed at Tapper's legs, genital area, and abdomen for up to fifteen to twenty seconds.

After the July 25th incident, Tapper waited about a week for Rosa to give him some explanation, but when none was forthcoming he advised Sgt. Coughlin what happened. Tapper justifiably considered it serious enough to report what happened.

Rosa's misconduct on July 25th was very serious. To enter the squad room when he heard what were likely his co-workers voices with his weapon drawn and pointed into a fairly dark room is extremely perilous. Pointing his gun at Tapper for up to fifteen to twenty seconds unnecessarily placed Tapper, and potentially himself, in significant danger. To cast the laser light across Tapper's leg, genital area, and abdomen for that length of time cannot reasonably be considered accidental. That Rosa, Tapper, and Waage may have socialized after the incident does not detract from this finding.

Rosa's conduct clearly violated the City's safety rules and procedures, which he was well aware of and trained in, including:

Safety Rule: Never point your weapon at anything you are not willing to shoot.

Chapter 210 USE OF FORCE: Except for maintenance, training, or in the performance of potentially threatening duties, police officers shall not draw or exhibit their firearm unless circumstances create reasonable cause to believe that it may be necessary to use the weapon in conformance with this policy.

Rosa also violated Article 9, Job Safety, of the labor agreement, which directs employees to comply with safety rules and to use equipment properly.

With respect to the ensuing investigation, Coughlin immediately questioned Waage about what happened, and he then reported it to Chief Scott that same day. On August 10th Coughlin met with Rosa; Attorney Higbee was present. Rosa was given his Tennessen warning and advised that he would not read Rosa the Garrity warning. Rosa chose to only give Coughlin his written "talking points" that he would have used had Coughlin read the Garrity warning. He chose not to provide any other statement. Nothing prevented Rosa from more fully explaining what happened. With nothing more forthcoming, it was appropriate for the City to rely on the statements of Waage and Tapper and Rosa's written statement to reach its conclusions.

Chief Scott also concluded that Rosa was not truthful in the written statement he

submitted at the August 10th meeting. As noted above, Rosa's description of the July 25th incident was found to not be credible. Specifically, with respect to Rosa's written statement, Rosa stated: "when I realized it was on Officer Tapper's leg, I immediately corrected and moved it to the left and then put it away." However, Rosa guided the laser over Tapper's leg, genital area, and abdomen. In addition, in Rosa's written statement he asserts: "I don't recall hearing them say anything. In fact, I was waiting to hear them say they wanted to see it or try it." The evidence persuasively demonstrates that Tapper asked Rosa what happened to which Rosa responded: "You did not see anything. Prove it." Rosa's written statement is not truthful in those two key respects and supports Coughlin's conclusion of untruthfulness.

LELS contends that the City apparently was hoping to use the Fitness for Duty evaluation to further support its decision to discharge Rosa. However, Scott credibly testified that the police sergeants advised him that they were concerned if Rosa would be returned to duty, and he therefore ordered the evaluation. The evaluation can reasonably be seen then as an additional tool in a comprehensive investigation of the incident.

Finally, it cannot be understated that a police officer must have the confidence and the trust of his or her fellow officers to fully carry out their duty in a safe and effective manner. Here, the fellow officers' diminished trust and confidence in Rosa would be expected as a result of Rosa's very serious and dangerous misconduct on July 25th.

LELS and Rosa acknowledge that he engaged in a significant mistake. But given Rosa's length of service and no prior discipline, they contend discharge is too severe. Just cause generally requires the consideration of the employee's length of service and disciplinary record and the application of progressive discipline. However, arbitral authority also reflects that if the misconduct is serious enough, discharge without progressive discipline is warranted. As has been stated: "In cases of extremely serious offenses, arbitrators are more than willing to recognize the need for enforcing penalties that meet the seriousness of the offense." Elkouri and Elkouri, How Arbitration Works, (5th ed. 1997), p. 916.

Rosa's misconduct on July 25th and untruthful written statement were significant and serious. In this case, discharge is warranted. The City therefore had just cause to discharge Chad Rosa.

In light of the foregoing, it is my

AWARD

- 1) The City had just cause to discharge Chad Rosa.
- 2) The grievance is denied.

Dated in Madison, Wisconsin, on April 23, 2016, by

Andrew M. Roberts