

1. Call to Order

Chair Puglisi called the meeting to order at approximately 9:00 am.

2. Public Comment

There were no comments from the audience or Committee Members.

3. Committee introductions and meeting overview and/or update - For discussion only.

Chair Puglisi opened the meeting with Committee introductions.

4. Adoption of the Agenda – Action Item

Chair Puglisi requested a motion to adopt the agenda.

MOTION: Moved to adopt the agenda.

BY: Member Thompson

SECOND: Member Russell

VOTE: The vote was unanimous in favor of the motion.

5. Discussion and possible action related to Grievance James Buckley #6431, Department of Corrections – Action Item

Officer Buckley was represented by Teletha Zupan, Esq., of the Law Offices of Daniel Marks. The agency-employer, the Nevada Department of Corrections (“NDOC”), was represented by NDOC Personnel Officer II Megan Bottom (“Ms. Bottom”). Grievant, Associate Warden Jeremy Bean (“AW Bean”), Lieutenant Dean Ontiveros (“Lieutenant Ontiveros”), Correctional Officer Lionel Henderson (“Officer Henderson”) and Lieutenant Jeremy Branham (“Lieutenant Branham”) were sworn in and testified at the hearing. There were no objections to the exhibits submitted by the parties.

STATEMENT OF THE CASE

Grievant has been a correctional officer with NDOC for 5 years and 8 months, and his grievance was the result of a written reprimand issued for an incident that took place on February 2, 2019.

Grievant had never been disciplined for any incidents prior to February 2, 2019. On that date Grievant was on duty with Officer Henderson in Unit 9 at High Desert State Prison (“HDSP”) at Indian Springs, NV.

Grievant was training Officer Henderson and had shown him how to open the breeze doors in Unit 9 and how to operate the cell bright lights. Grievant noticed the single shot 40-millimeter (“mm”) weapon which

fired rubber rounds and tried to check to see if the weapon was on safety, loaded or unloaded, and the weapon's condition.

Grievant placed his finger inside the 40 mm weapon's trigger guard and accidentally fired the 40 mm weapon.

Grievant argued that issuing a written reprimand for the incident was too harsh, and that the written reprimand had to be overturned as a matter of law because the discipline imposed was solely based on Administrative Regulation ("AR") 339.07.2.

On May 2, 2019, Grievant noted, the Nevada Supreme Court held in a published opinion (*NDOC v. Ludwig*, 440 P. 3d 43 (2019)) that any employee discipline that was imposed pursuant to AR 339 was invalid and of no legal effect because it had not been approved by the State of Nevada Personnel Commission.

Additionally, Grievant argued that NDOC had violated the Peace Officers' Bill of Rights, codified in NRS Chapter 289, because NDOC failed to provide Officer Buckley a hearing before it imposed discipline. It was also argued that the evidence would show NDOC had failed to train Officer Buckley on the single shot, 40 mm weapon prior to the incident occurring

Grievant also argued that NDOC failed to use progressive discipline, and/or its Operations Procedure ("OP") 405.08, which became effective two days prior to this incident, as that OP imposed discipline or required Grievant to attend further training.

Grievant noted that the evidence would show that Grievant received the discipline and had to complete further training. Grievant further argued that the Nevada Court of Appeals ruled in *NDOC v. Kassebaum*, 2017 WL 881950, at *3 (Nev. App. Feb. 28, 2017) that the EMC had the authority to alter and adjust discipline, which included reducing written reprimands to oral warnings.

Grievant requested that the written reprimand be overturned by the EMC in accordance with *NDOC v. Ludwig* and/or NDOC's OP 405.08, or, in the alternative, for the written reprimand to be reduced to an oral warning pursuant to Nevada Administrative Code 284.638(2).

NDOC argued that Grievant never denied accidentally discharging a weapon, and that there was no other discipline imposed besides the written reprimand, and that given the nature of the incident a written reprimand was appropriate.

NDOC noted that Grievant alleged that he had not been trained on the 40 mm weapon, and that NDOC agreed Grievant was in fact not trained on the 40 mm weapon, which added to the question of why the weapon

was discharged to begin with, and that this fact supported the need for a written reprimand.

NDOC argued that Grievant had received training which covered safety and trigger control, and also training and instruction which would have informed Grievant that if he felt that he was not properly trained on a weapon he was to immediately inform his supervisor if the weapon was needed to his daily duties.

According to NDOC, in law enforcement there was no such thing as an accidental discharge of any weapon, there were only negligent discharges, which warranted a written reprimand, and so NDOC requested that the grievance be denied.

Grievant testified that prior to this incident he had never received discipline from NDOC. On February 2, 2019, Grievant was assigned to Unit 9 at HDSP and was assisting or helping train a new officer, Officer Henderson, and Grievant asked Officer Henderson to open up the breezeway door and to turn on the cell bright lights.

Officer Henderson told Grievant he did not know how to perform these actions, and so Grievant asked if Officer Henderson wanted his assistance. Grievant further testified that he went up to the control panel to show Officer Henderson how to work it

Grievant stated in substance that NDOC's policy, when an officer assumed an armed post, was to inspect the equipment to check if the weapons were on safe, to see if the weapons were loaded or unloaded, and to check the conditions of the weapons.

In looking at Employer's Exhibit C, Firearms Orientation, Grievant reviewed page two of the exhibit, and also examined Slide 11 and 12, which were slides dealing with the general safety of NDOC's weapons, and which covered NDOC's weapon's safety policy.

The policy, which was in effect on February 2, 2019, indicated that to perform a weapons check the first actions to be performed by an officer was to determine the weapon's condition, whether the weapon was loaded and whether the weapon's safety was on.

Grievant also testified about Slide 17 of Employer's Exhibit C, which again concerned general safety, and which stated that an officer would never have the safety in the fire position for any reason unless an officer was going to shoot the weapon, and that Slide 17 was consistent with NDOC's safety policy in effect on February 2, 2019.

Grievant testified in substance that after he finished training Officer Henderson, he looked over to the 40 mm weapon, and then visually inspected the weapon.

Grievant further testified that, as Officer Henderson was new, he did not believe Office Henderson would inspect the 40 mm weapon.

Grievant indicated that he looked to see if the 40 mm weapon was loaded and thought that the weapon was not loaded; Grievant also stated that he had not been trained on the weapon. Grievant testified that he took the 40 mm weapon off its rack, visually inspected it, looked at the lever that opened the weapon, but he believed that the lever was the safety due to his lack of training with the 40 mm weapon. Grievant indicated that at that time, with the safety cocked to the rear, he thought that the weapon was on safe, and to test the safety Grievant tried squeezing the trigger and deployed a round into the ceiling of the control bubble.

Grievant testified in substance that there were two parts to the training on the 40 mm weapon, a practical component involving instruction and a slide show, and another component where the officers shot the 40 mm weapon. Grievant stated that he qualified on the 40 mm weapon in October 2018, after he had shot the multi-round 40 mm weapon. Grievant explained that when he went to shoot the multi-round 40 mm weapon, he was not required to load the weapon, and that it was handed to him already loaded.

Grievant also testified in substance that no one at that time explained how to load the 40 mm weapon, and no one explained to him how to turn the safety on or off, and that he was essentially told to just shoot the weapon. Grievant testified that when the incident he was reprimanded for occurred he did not know how to locate the safety on the 40 mm weapon, nor how to load or unload the weapon.

Grievant explained that after he deployed the rubber round, he called shift command to notify them. Grievant was told by shift command to go downstairs and submit a report on the incident, which was included in Grievant's Exhibit Packet as Exhibit 1. In viewing Slide 10 of NDOC's Exhibit C, which concerned NDOC's policy on accidental weapon's discharge, Grievant noted that NDOC said it was its policy that there was no such thing as an accidental discharge, and that the only way a weapon discharged was by pulling the trigger, which was an intentional act, and that even before that a round needed to be chambered and the manual safety needed to be disengaged. The slide further indicated in substance that officers who negligently discharged his or her weapon would be subject to disciplinary action.

Grievant argued that under this NDOC policy, which became effective after February 2, 2019, a discharge was considered to be negligent because before a weapon could be fired a round needed to be chambered and the manual safety had to be disengaged.

Grievant testified that on February 2, 2019, he never chambered a round in the 40 mm weapon, and that he had not disengaged the safety. Grievant further testified that since he had completed training, he was

now aware of how the safety should be set on the 40 mm weapon, and that the safety was on the trigger well, next to the trigger. Grievant also explained how to load the 40 mm weapon by using the slide lever.

Grievant examined his Exhibit 2, which was the written reprimand NDOC issued to him as a result of the February 2, 2019 incident. Grievant testified that the reprimand was dated February 20, 2019, although it was signed February 28, 2019, and that he received the reprimand on April 16, 2019.

Grievant also added that he never received a notice of investigation prior to that date, nor did he receive a hearing prior to the reprimand being issued, nor had he received any review by a firearm's discharge committee.

Grievant indicated that the written reprimand was based on AR 339.07.2. Grievant also testified that he received an on the job training form at the same time he received his written reprimand, which was included in Grievant's Exhibit Packet as Exhibit 3.

Grievant testified that he did not sign this form when it was provided to him because he did not feel comfortable with the 40 mm weapon, and also in light of Section E of his written reprimand, which stated in substance that if an incident happened again he would receive progressive discipline and would possibly be discharged, and so Grievant was apprehensive because he knew that he needed further training on the single shot 40 mm weapon.

Grievant testified that he completed his training on the single shot 40 mm weapon approximately a week prior to November 7, 2019, and that he had received other training that occurred on or about May 2, 2019, prior to signing the on the job training form.

Grievant stated in substance that he went back to the range and was walked through by the range master the loading and unloading of the 40 mm weapon, the engaging and releasing of the safety, as well as prequalifying. Grievant explained that when he went to the range for the first time (October 2018) he basically just shot the multi-round 40 mm weapon, and that the weapon had been loaded for him. Grievant indicated in substance that when he received the subsequent training at the range, he was walked through how to turn the safety on and off and how to load and unload the 40 mm weapon.

Grievant noted that he was asking that the written reprimand be reduced to a letter of instruction, as he was concerned that the written reprimand would be on his record for his entire career (according to his supervisor and fellow correctional officers).

Grievant testified that he range qualified twice a year, and had range qualified about 10 or 11 times in his NDOC career. Grievant testified

that each time he was range qualified NDOC went over the rules of the range, which included safety and other training. In looking at NDOC's Exhibit G, which included the NDOC Weapons and Range Safety Rules signed by Grievant in 2017.

Grievant also testified that page 11 of Exhibit G, which concerned the 2017 Inservice Training, indicated that the officer's finger should remain off the trigger until the officer was ready to shoot the weapon, and that the officer shooting the weapon should always verify his or her target and what was behind the target.

Grievant testified that he put his finger in the finger well of the 40 mm weapon and on its trigger, and that he did not verify what was behind his target, and that nowhere in his range safety training did it say to put his finger in the finger well if he did not know whether or not the weapon was loaded. Grievant testified on February 2, 2019 he put his finger in the 40 mm weapon's finger well, but that he thought the 40 mm weapon was unloaded.

Grievant noted in Exhibit G, the first document, the Firearms Orientation Written Examination, Question 38, indicated that every weapon should be treated as if it were loaded, which Grievant acknowledged that he did not do on February 2, 2019.

Grievant stated that he received range training on the 40 mm weapon in mid or late October 2018, and that was the first time he had been on the range with a 40 mm weapon. Grievant testified that when on the range in October 2018 he had no idea where the safety was on the 40 mm weapon, and did not ask about the safety, and that he did not know where the safety was on February 2, 2019.

Grievant stated in substance that after he received his written reprimand, he never contacted HR to ask about the policy concerning written reprimands, and that he was not aware until recently that he could make a written request to have the written reprimand removed from his file after 12 months if he had no other incidents. Grievant also acknowledged that the incident might not follow him for the rest of his career, and that there was no formal investigation of the February 2, 2019 incident.

In looking at NDOC Exhibit C, Slide 17, Grievant noted that pursuant to NDOC's safety policy cited in Slide 17 a safety violation was a "big deal." Grievant reiterated that when he discharged the 40 mm weapon he did not believe that it was loaded, that he thought the weapon was on safe, and that if the safety had been on it would not have discharged, and that pursuant to NDOC policy the safety was required to be on, and that it was not. Grievant also stated in substance that in October 2018 he had not fired the single shot 40 mm weapon until the actual accidental discharge on February 2, 2019, and then again in May 2019, although Grievant had fired the multi shot 40 mm weapon in October 2018.

Grievant also noted that even if he did not have a repeat incident in the next 12 months the warden could still refuse to remove the written reprimand which Grievant received.

Grievant also explained that it was his habit, upon coming into a control post that has a weapon, to inspect the weapon, in addition to checking all of the other equipment in the post, and that February 2, 2019 was the first time Grievant has encountered the single shot 40 mm weapon in any control post. Grievant also stated that in the trigger well of the 40 mm single shot weapon, that if one slid the safety to the left it would show a red line, meaning the safety was live (off), and if that one slide the safety in the opposite direction it was all black, and that the safety was located on the bottom, towards the handle of the 40 mm single shot weapon, and was not within the trigger well itself.

AW Bean testified that he had been employed at HDSP since April 2001, and had been an associate warden since 2017, and that he had held several positions with NDOC prior to his promotion to assistant warden.

AW Bean stated that he was familiar with the events of February 2, 2019. In looking at NDOC's Exhibit C, Slide 10, AW Bean testified that it was understanding that a person would have to go through all of the functions set out in Slide 10 in order to have a negligent discharge, and that this was NDOC's policy, but that he would assume no one would handle a weapon unless the person knew how to use it.

In looking at NDOC Exhibit H (NDOC HDSP OP 405, titled "Use of Force"), AW Bean testified that OP 405 became effective January 30, 2019, and that this policy would have applied in the event of a weapon discharge.

In looking at page 12 of 13 of OP 405, AW Bean testified that a firearm discharge review would be for a firearm discharge and a use of force, so that if there was a use of force against another person NDOC would review that use of force. It was pointed out by Employee's counsel that the plain language of the Use of Force Policy did not only apply to incidents where force was used on another person, and that the policy provided for counseling in the event that force was accidentally or negligently used against another person, who was then injured.

AW Bean did not know whether the firearm discharge committee was convened for Grievant as a result of his discharge of the 40 mm weapon, as he was not in charge of reviewing the use of force by correctional officers.

AW Bean testified in substance that normally the firearms review committee would speak to the officer who was the subject of the review and then create an after actions report and note in the incident report's file that a review was completed; however, if the incident was significant enough where it could warrant an investigation the officer would not be

spoken to until it was determined whether or not the investigation was going to occur in order to the preserve peace officer rights.

AW Bean noted that the incident involving Grievant did not go to an investigation.

AW Bean noted in substance that after a committee use of force/firearms review ultimately the committee would look to see if NDOC had a policy in place that was insufficient and that could be amended to prevent the incident from reoccurring, to see if there was there a history between the officer and the offender that could have contributed to the incident, to determine if the use of force was justified and to determine if the use of force was excessive and if training protocols need to be changed in order to best prevent the incident from occurring again.

AW Bean noted that ultimately it would be decided by the firearms review/use of force committee as to the appropriateness of the weapons discharge and if disciplinary action or further training would be required. In this case, AW Bean stated that Grievant was given a written reprimand and had to complete further training.

Grievant's counsel argued that under Section 5 of OP 405.08, the language stated that an officer was to receive either further training or discipline, and not both.

AW Bean acknowledged this fact and stated that he was not going to discipline an officer and then not train him on what had occurred. AW Bean further testified that it was uncommon to have negligent discharges at HDSP, and that the 40 mm weapon was brought in to replace the Remington shotgun about one or two days prior to February 2, 2019.

AW Bean further testified that all officers had been trained on the use of the 40 mm weapon prior to it replacing the Remington shotgun, and that NDOC had specifically held off on installing the 40 mm weapon until training on that weapon had been completed.

AW Bean also testified that range qualification (which AW Bean had for Grievant) involved more than just shooting a weapon.

AW Bean indicated that the range master would discuss the nomenclature of the particular weapon, explain the weapon to the officers being trained, teach the officers the proper use of the weapon, and only then take to officers being trained to the firing line. If the correctional officer did not understand any part of that process or any part of the weapon, it was the officer's responsibility to inform the range master that he or she did not feel comfortable with the weapon.

AW Bean stated in substance that to his knowledge Grievant did not tell the range master he did not feel comfortable with the 40 mm weapon,

although he further stated he was not on the range when Grievant was trained.

In looking at the Written Reprimand issued to Grievant, AW Bean stated that he was aware that the reprimand was based on AR 339, and that he did not see any NAC cited on the written reprimand.

AW Bean testified that he denied Grievant's request to reduce the written reprimand, although at that time he was not aware that AR 339 had been invalidated. AW Bean stated that he had reviewed Officer Buckley's grievance where he stated he had not been trained on the weapon's system in question and went through his personnel file and found his training documentation (qualification for the 40 mm multi shot weapon) dated prior to February 2, 2019, which led to his decision to uphold the reprimand.

AW Bean was asked whether in light of the fact that AR 339 had been invalidated whether it was fair to reduce Grievant's written reprimand to an oral warning, to which AW Bean stated that he did not believe the reprimand should be reduced to an oral warning because of the significance of the discharge, which AW Bean stated "could have been a lot worse," and to impress upon NDOC employees that if the employee was unfamiliar with a weapon the employee should not touch it, and if the employee did touch the weapon there was the chance that someone could be significantly injured or killed.

AW Bean stated that based on OP 405.08, regarding use of force, that it would not be proper for Grievant to just go on without receiving training, as he did not believe the OP exclusively provided for either discipline or training. AW Bean also stated that the decision on the adjudication was for discipline, and that the training was given to prevent a repeat incident and was not a resolution of the February 2, 2019 incident.

AW Bean added that anytime NDOC had an employee who received an adjudication against them the employee was given on the job training to prevent a reoccurrence of the incident. AW Bean was asked about the bottom of page one of Grievant's reprimand and noted that it said progressive disciplinary action up to an including termination may be taken for any future violations which are of the same or similar.

AW Bean stated that over the years with NDOC he had range qualified about 40 times, and that no one ever handed him a loaded weapon with the safety off and told him to shoot the weapon, and that he had been trained to use the safety, load and fire the weapon prior to being on the range. AW Bean further stated that if he found out a range master in his chain of command was just handing weapons to correctional officers and then allowing them to shoot the weapon, he would take disciplinary action against the range master, as the practice was an unsafe one.

AW Bean explained that the only the difference between the single shot and multi-shot 40 mm weapon was that the multi-shot had six or seven tubes, and one had to wind it counterclockwise for it to rotate through spring loaded, and that the trigger function, safety controls and loading techniques were the same. Thus, if a person were to put their finger in the trigger well of a multi-shot 40 mm weapon vs the single shot it would feel the same and look the same as the single shot 40 mm weapon, according to AW Bean.

AW Bean also stated in substance that if the safety was taken off of the multi-shot 40 mm weapon the two weapons would also look the same, as the safety was a push button right on the back of the trigger housing that showed red on one side to the left if in fire mode and showed black on the right if it was not.

AW Bean further testified that correctional officers were never trained to pull the trigger of any weapon unless they intended to shoot the weapon. AW Bean also testified that NDOC training protocols called for the correctional officers never to put their finger in the trigger housing unless the officer intended to shoot the weapon. AW Bean indicated in substance that officers were trained to have their finger remain on the side of the weapon system extended out pending the need to engage.

AW Bean explained that when correctional officers assumed their posts, they were to check the weapons at the post. First, the officer would open the 40 mm weapon to check to see if it was loaded, and then check the safety of weapon's system to be sure it was on safe, then close the weapon, put the weapon either back on the rack or the officer would sling it around his or her body and carry it with them.

According to AW Bean, at no time in this process would an officer put his or her finger in the trigger well, and the officer would not pull the trigger.

In looking at OP 405, with respect to the firearm discharge review, AW Bean stated in substance that it was his understanding that the firearms committee was intended to convene only when there was a use of force by an officer against another person, and in Grievant's case his incident was never investigated as a use of force situation, it was simply a negligent discharge.

AW Bean stated that there were 13 lieutenants, 18 sergeants 46 senior correctional officers and, in February 2019, 402 correctional officers at HDSP. AW further testified that NDOC did not just have the single shot 40 mm weapon, and that it employed the multi-shot 40 mm, and that the multi-shots 40 mm weapons were put onto protection posts, where the officers observe yards where there were multiple inmates congregating at any given time, and so to avoid officers having to physically carry multiple rounds the multi-shot 40 mm weapon was placed in protection

posts. In the housing units, where there were not as many inmates, the singles shot 40 mm weapon was placed.

AW Bean reiterated that the documentation he had showed Grievant's range qualification, but there was no designation as to what this consisted of, and did not show whether the complete process, as far as weapons orientation, had been performed.

Lieutenant Ontiveros testified that he had worked for NDOC for 15 years and was the Quad supervisor. Lieutenant Ontiveros stated that he had been trained on both the single and multi-shot 40 mm weapon and was also trained on the mini 14 weapon. Lieutenant Ontiveros stated that there was no difference in the safety mechanism between the multi-shot 40 mm weapon and the single shot 40 mm, and Lieutenant Ontiveros explained there was a difference in the safety mechanism between the mini 14 and the 40 mm weapons.

Lieutenant Ontiveros had heard about the February 2, 2019 incident, but was not present when it occurred. Lieutenant Ontiveros also testified that he was not part of a conversation between AW Bean and Grievant concerning Grievant's lack of training on the 40 mm weapon.

Lieutenant Ontiveros estimated that he had qualified at the range approximately 30 times in his career and had never had anyone just hand him a weapon at the range without any training on how to load the weapon and release the safety of the weapon.

Lieutenant Ontiveros said that the people on the range had to go through the training protocol, which included classroom training with both 40 mm weapons in order to demonstrate the differences between the single shot and multi-shot 40 mm weapon, and that on the range only the single shot 40 mm weapon was used. Lieutenant Ontiveros also stated that he thought a written reprimand was appropriate for an officer who negligently discharged a weapon.

Lieutenant Ontiveros was asked if he was aware that AR 339 had been invalidated, and that any discipline based on AR 339 was invalid, and he stated that he had heard that. In looking at Employee's Exhibit 2, Lieutenant Ontiveros acknowledged that Grievant's discipline was imposed based on AR 339. Lieutenant Ontiveros also testified that in order to turn the safety of the mini 14 weapons off an officer had to put his or her finger in the weapon's trigger well.

Officer Henderson testified that he had been employed by NDOC for a little over a year, and on February 2, 2019, he was assigned to a control bubble at HDSP. Officer Henderson stated in substance that he was learning about the different functions of the control bubble at that time and was being assisted by Grievant in performing certain functions. Officer Henderson explained that he was about 10 feet from the 40 mm

weapon when it was discharged, and that his back was to the weapon when it discharged.

Officer Henderson also testified in substance that he would never put his finger in the trigger well of a weapon without verifying whether the safety was on or off. Officer Henderson further stated that it was pretty common for the 40 mm weapon to be in a loaded state. Officer Henderson testified that he could not remember if he had checked the night of the incident to see if the 40 mm weapon was loaded, and he could not recall if the safety had been on. Officer Henderson stated that when he came on shift, he normally checked the weapons.

Lieutenant Brenham testified that he had been with NDOC for over 18 years and was currently a lieutenant in charge of the training division and stated in substance that he was probably the most knowledgeable person concerning the 40 mm weapons.

Lieutenant Brenham testified that he designed the training curriculum for the 40 mm weapon, and that he provided training courses for the 40 mm weapon. Lieutenant Brenham stated that there was a qualification component that was separate from the classroom component for the 40 mm weapon training.

Lieutenant Brenham also testified that the classroom portion of instruction was in a classroom setting where nomenclature was discussed, along with the capabilities of the weapon, the capabilities of the rounds, a review of NDOC policy, and then officers were provided with rounds to qualify with.

Lieutenant Brenham also stated in substance that the classroom training typically included the use of an actual 40 mm weapon for the class to load and unload and handle, and to demonstrate how to turn the weapon's safety on and off, and that was also part of the normal process for qualifying on the range. Lieutenant Brenham testified that he was not present on the range when Grievant was qualified.

In looking at NDOC's Exhibit C, concerning the date of training, Lieutenant Brenham stated that the date was changed (revised on April 25, 2019) because NDOC was removing the 870 Platform (the shotgun) from the academy, so that training on that weapon was removed, and that was the only part of the training that had been changed since February 2, 2019. Lieutenant Brenham also testified that the safety mechanism looked the same on the single shot 40 mm weapon, the multi-shot 40 mm weapon, and the shotgun.

Lieutenant Brenham stated that he did not believe that a range master would just hand a weapon to a correctional officer and tell that officer to fire the weapon without the officer having knowledge on how to load the weapon, how to disengage the safety, as that is contrary to what his firearms instructors and range masters are taught.

Lieutenant Brenham further stated that there was no such thing as an accidental discharge, and that an appropriate punishment for a negligent discharge was at least a letter of reprimand, and that such discipline was appropriate in this case.

Lieutenant Brenham also agreed with NDOC's policy that there can be no negligent discharges because an officer first had to load a weapon, take the safety off and then pull the trigger, and that in most situations the 40 mm weapon would be loaded with the safety on when they were in "post condition."

Lieutenant Brenham further stated that NDOC's weapons policy required a weapon's safety to be on at all times, and that was in HDSP OP, and that it was policy for an officer reporting to a station to inspect the weapons there to make sure they were in good condition, loaded with the safety on, and that when each shift started an officer was required to perform a weapons check to see if a weapon was loaded and functioning properly and that there would be no reason to take the weapon off safe when performing this function.

Lieutenant Brenham added there was nothing in NDOC policy telling an officer to pull the trigger during a weapons inspection. Lieutenant Brenham also stated in substance that he was not aware of any negligent discharges due to a weapon's safety malfunction.

The EMC deliberated on Officer Buckley's grievance.

Chair Puglisi noted that the Notice of Investigation was only specific to suspensions, demotions and dismissals, and not written reprimands.

Chair Puglisi noted that Grievant was asking the discipline be reduced to an oral warning, and noted that in comparing the discipline imposed on Officer Buckley in this case to what Department of Public Safety ("DPS") would impose for a negligent discharge for a first offense a DPS employee would receive an oral warning or written reprimand, but that this was always contingent on the severity of the incident.

The problem for Chair Puglisi was that the written reprimand did not cite the causes for disciplinary action from the NAC, so that he was leaning towards granting the grievance because he felt that Grievant had taken responsibility for as much as saying that the incident should not have happened.

Chair Puglisi also stated that he thought the EMC had been presented with a lot of technicalities, and he thought that reducing the written reprimand to an oral warning as requested by Grievant would be a fair resolution, as there would be a consequence for Grievant's negligence.

Member Russell expressed concern about the grievance, and how much training and practice NDOC officers received, and noted that the officers

had access to weapons in confined areas near dense populations of people.

Member Russell also expressed concern that the training materials the EMC received were for weapons that were commonly accessible, and that the EMC was not presented training material on the 40 mm weapon. However, in looking at OP 405, page 7 of 13, Member Russell noted in substance that some of the written procedure appeared conflicting, as it stated that the single shot 40 mm weapon was not to be stored in a loaded state.

Member Russell also stated that it was her observation today that the automatic process of checking a weapon was taking a higher priority than where an officer's finger was placed and indexed when the officer handled the weapon, and that this concerned her.

Co-Chair Beigel was concerned with the fact that Grievant tested the safety of the 40 mm weapon by pulling the trigger, and that it was one of the first things taught in gun safety not to put a finger on a weapon's trigger unless you planned on shooting the weapon

However, Co-Chair Beigel stated in substance she agreed with Chair Puglisi where AR 339, if it was invalid, and NDOC did not cite to the NAC, then she did not see how the written reprimand was valid and would support the reduction to an oral warning. Co-Chair Beigel also noted that the incident was a serious one, and that if a person did not know how to handle a weapon they should ask and find out how before handling the weapon

Member Russell stated in substance that she agreed with both Chair Puglisi and Co-Chair Beigel, and that being able to index without touching the trigger unless one was ready to shoot the weapon at what one was aiming at should be paramount, but from what she had heard today that was not the case.

Member Russell added that she understood officers were nervous, but when you had a negligent discharge like this the result could be substantial bodily harm to another person.

Member Thompson stated in substance that the situation was unfortunate and should not have happened, and that Grievant had taken responsibility for his actions, but Grievant had not technically violated anything, as NDOC had cited to an invalid AR in its written reprimand

Member Keith stated in substance that she agreed with what the other EMC members had stated, and that it was troubling that NDOC, on the written reprimand, cited to only one AR, which was invalid.

Member Keith stated that a "huge offense" had occurred, and that an oral warning was not truly acceptable. Member Keith further noted that she

had no formal training with weapons and still knew that a person did not put his or her finger on a weapon's trigger until ready to shoot.

Member Keith also in substance questioned whether, if a person could see the safety and knew it was off when red showed, whether the weapon even had to be touched to realize if the weapon's safety was on or off.

Member Keith closed by stating that she was concerned that if no NAC was listed in Grievant's written reprimand then the EMC's hands were tied.

Member Whitten motioned to grant Grievance # 6431 and to remove the written reprimand and change it to a letter of instruction; Member Whitten's motion was seconded by Member Russell.

Chair Puglisi noted that there was a conflict and wanted to clarify it. Chair Puglisi noted in the closing statement Grievant was asking that the written reprimand be reduced to an oral warning, and this was confirmed by Grievant's counsel.

Chair Puglisi stated that he felt troubled by Member Whitten's motion, as it appeared to him that most of the EMC wanted to reduce the reprimand to an oral warning, and that he felt that a letter of instruction was too mild to address the February 2, 2019 incident.

Chair Puglisi noted the difference between the warning and the written reprimand was that the oral warning did not go to the jacket maintained by the State of Nevada, Division of Human Resource Management, or Central Records.

Chair Puglisi noted that if the EMC was not faced with the technicality of an invalid AR being the basis for Grievant's written reprimand then the written reprimand was warranted.

Co-Chair Beigel questioned whether an oral warning had more strength than a letter of instruction.

Chair Puglisi reiterated that Grievant asked for an oral warning in closing, and that was the direction in which the EMC went, and now there was a motion to reduce the written reprimand to an LOI ("letter of instruction"), which he felt was not appropriate; Chair Puglisi noted that a letter of instruction was not even discipline.

Co-Chair Beigel stated that at least with an LOI there was written documentation. Chair Puglisi noted that he was not sure how all agencies handled oral warnings, but with his agency an oral warning was simply called a warning and always documented in writing.

Member Russell asked if it was the EMC's consensus to change the motion's terminology from letter of instruction to documented oral warning.

Member Keith noted in substance in her experience an LOI was a coaching tool and could lead to discipline "down the road" if the same event kept occurring, but in reality LOI had nothing to do with discipline when issued, and a documented oral warning was something more than this. In this case Member Keith stated that a step in the progressive discipline was needed if the EMC was not going to sustain the written reprimand, and so she would agree with the documented oral warning.

Co-Chair Beigel asked if AR 339 was invalid what was the EMC disciplining on vs saying here is the letter of instruction for doing something wrong, and do not do it again, and that was a reason to proceed with an LOI, and not a documented oral warning, as there was no valid citation to appropriate disciplinary authority in the written reprimand.

Member Whitten agreed, noting that there was no additional legal authority other than AR 339 to support Grievant's written reprimand, so her motion seemed to be the cleanest, most proficient way to handle the matter.

Chair Puglisi stated he understood this, but that Grievant had represented he was willing to have the reprimand reduce to something that held him more accountable.

Member Russell stated in substance that she was receiving the sense that the only purpose for the EMC was to hold Grievant accountable, but in her eyes part of the EMC's duties were to hold the agency accountable. The EMC voted on Member Whitten's motion, which carried by a 4-2 margin, with Member Keith and Chair Puglisi voting against it.

FINDINGS OF FACT

Based upon the testimony of the witnesses, the arguments made by the parties, the briefs, evidence, and documents on file in this matter, the EMC makes the following findings of fact. All findings made are based upon a preponderance of the evidence.

1. Grievant was a non-exempt State of Nevada employee.
2. Grievant worked as a correctional officer at HDSP during the relevant time period.
3. Grievant was on duty at HDSP on February 2, 2019, in the Unit 9 control bubble.
4. Grievant on February 2, 2019, was helping train Officer Henderson, and had showed him how to open the breeze doors and operate the cell bright lights.
5. The control bubble area in which Grievant and Officer Henderson were working had a 40 mm weapon that shot rubber rounds.
6. During this training process of Officer Henderson Grievant performed a check of a 40 mm weapon in the Unit 9 control bubble.
7. Grievant was unaware of where the 40 mm weapons' safety was located.
8. Grievant did not know whether or not the 40 mm weapon was loaded.

9. Grievant placed his finger inside the 40 mm's trigger guard and unintentionally fired the 40 mm, deploying a round in the Unit 9 control bubble.
10. NDOC issued a written reprimand to Grievant as a result of the February 2, 2019 incident.
11. Grievant received the written reprimand on April 16, 2019.
12. The written reprimand cited to AR 339.07.2, "Discharge of Firearm due to Negligence."
13. NDOC only cited to AR 339.07.2 in the written reprimand as the basis for the discipline it imposed on Grievant.
14. Grievant was also given a form for on the job training concerning the 40 mm weapon at the same time he was given the written reprimand. However, Grievant did not complete his training on the 40 mm weapon until late October/early November 2019.
15. The training given to Grievant was not part of the discipline imposed by NDOC for the February 2, 2019 incident.

CONCLUSIONS OF LAW

1. For this grievance, it was Grievant's burden to establish by a preponderance of the evidence that NDOC acted arbitrarily and capriciously in issuing him a written reprimand for negligently firing the 40 mm weapon on February 2, 2019.
2. A grievance is any act, omission or occurrence which an employee who has attained permanent status feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee. NRS 284.384(6).
3. Officer Buckley's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
4. NDOC only cited to AR 339 in the written reprimand which it issued to Grievant for negligently discharging the 40 mm weapon on February 2, 2019.
5. In *NDOC v. Ludwig*, 440 P. 3d 43 (2019) ("*Ludwig*") the Nevada Supreme Court held that any employee discipline that was imposed pursuant to AR 339 was invalid, and of no legal effect, because AR 339 had not been approved by the State of Nevada Personnel Commission.
6. As NDOC only cited to AR 339 in its written reprimand issued to Grievant, and as the Nevada Supreme Court in *Ludwig* held that that AR 339 was invalid and had no legal effect, the written reprimand issued to Grievant for the February 2, 2019 incident was invalid.

DECISION

Based upon the evidence in the record, and the foregoing Findings of Fact and Conclusions of Law, and good cause appearing therefor, Grievance No. 6431 is hereby GRANTED; the written reprimand issued to Grievant will be removed and changed to a letter of instruction.

MOTION: Moved to grant Grievance # 6431 and to remove the written reprimand and change it to a letter of instruction.
BY: Member Whitten
SECOND: Member Russell

VOTE: The vote was a 4-2 in favor of the motion, with Member Keith and Chair Puglisi voting nay.
in favor of the motion.

6. Discussion and possible action related to Grievance #6626 Gaylene Fukagawa, and Grievance #6661 Ashley Randolph, Department of Corrections – Action Item

Chair Puglisi took the agenda items out of order and opened the Committee for discussion.

The Committee discussed the issues and discussed the similarities based on prior decisions.

The Chair requested the agenda item #7, grievance #6626 and agenda item #8, grievance #6661 be removed and rescheduled pending information and a memo regarding the key box location from NDOC.

7. Discussion and possible action related to Grievance #6574 Marc Sydiongco, Department of Corrections – Action Item

Chair Puglisi opened the Committee for discussion.

Chair Puglisi stated this grievance was in regard to a recruitment dispute and the last response was the recruitment process was suspended.

Chair Puglisi stated the grievance mentioned harassment and discrimination felt there had been no injustice.

Chair Puglisi stated the recruitment had been suspended and an investigation started, therefore the grievance was moot pending the outcome.

Member Russell asked if the Committee could request a status check to see when the investigation is concluded.

Mr. Whitney stated that was something the Committee could do, as they had requested status checks in the past.

Member Beigel stated she believed that grievance was actually filed with EEO while this grievance was just at DHRM in the grievance process.

Member Beigel stated this may be sitting at NDOC human resources.

Chair Puglisi stated the grievance was being investigated by HR and until the investigation was complete, the grievance was upheld, and the promotion was currently suspended pending the outcome of the investigation.

Chair Puglisi stated if the grievance was being upheld by the agency, there was no relief the EMC could offer.

Member Keith stated she agreed, and it seemed the grievance may have been handled in house.

Chair Puglisi stated with the recruitment on hold pending the investigation, there was no injustice and they grievant could file a new grievance, with a new event date once the outcome of the investigation is released.

Member Keith motioned to move grievance #6574 to hearing.

Member Whitten seconded the motion.

Chair Puglisi asked if there was any discussion, there was none.

MOTION: Motioned to move grievance #6574 to hearing.
BY: Member Keith
SECOND: Member Whitten
VOTE: The vote was unanimous in favor of the motion.

8. Discussion and possible action related to Grievance #6689 La Toya Walker, Department of Corrections – Action Item

Chair Puglisi opened the Committee for discussion.

Chair Puglisi stated this grievance was a recruitment dispute but the grievant was claiming race and sex discrimination.

Chair Puglisi stated that was not within the EMC's jurisdiction and had no authority to grant relief as the agency followed the recruitment process.

Chair Puglisi stated the grievance should be denied based on prior decisions and with language in the decision that relief could be provided by Federal law.

Chair Puglisi stated the grievant was interviewed and there was no dispute until the grievant was not selected.

Member Whitten stated she was inclined to encourage the grievant to pursue other avenues for relief.

Chair Puglisi stated it was not the place of the EMC to encourage grievants, but at best to advise and this grievance was out of the Committee's jurisdiction.

Chair Puglisi motioned to deny hearing for grievance #6689 based on lack of jurisdiction and per NAC 284.696, relief may be provided by Federal law.

Member Russell seconded the motion.

Chair Puglisi asked if there was any discussion, there was none.

MOTION: Motioned to deny hearing for grievance #6689 based on lack of jurisdiction and per NAC 284.696, relief may be provided by Federal law.

BY: Chair Puglisi

SECOND: Member Russell

VOTE: The vote was unanimous in favor of the motion.

9. Public Comment

There were no comments in the North or in the South.

10. Adjournment

Chair Puglisi adjourned the meeting at approximately 12:43 pm.