Denver Police Officer Brian Mudloff (Petitioner) provided assistance to his fellow officers who had stopped a stolen vehicle. Occupants of the stolen vehicle ran. One of those running individuals entered a nearby car occupied by a man and a woman and their small child. Officer Mudloff and his partner approached that vehicle. Officer Mudloff un-holstered his service weapon. As he attempted to turn on the mounted light of his weapon, his finger slipped to the trigger causing him to discharge his weapon. The bullet from his gun went through the vehicle’s windshield and then shattered a side window. The shattered glass caused minor injuries to the driver of the vehicle.
The Deputy Director of Safety (DDOS) believed, based on the facts presented, that this was an accidental discharge which violated Departmental Rule RR-402 (Careless Handling of Firearms). Employing the Department’s Disciplinary Matrix, the DDOS determined this misconduct to constitute a Matrix Category E violation and issued a mitigated penalty of 18 suspended days.

Officer Mudloff appealed that decision. Officer Mudloff stipulated at hearing that he accidentally discharged his weapon, and that the accidentally discharged round traveled through the vehicle’s windshield, through the front passenger seat and into the right rear passenger door causing a side window to shatter. Officer Mudloff further stipulated that the driver of the car suffered minor injuries from flying glass.

The Hearing Officer upheld the 18-day suspension. Officer Mudloff has filed a timely appeal of that decision to this body. The Commission AFFIRMS the Hearing Officer’s decision.

Petitioner’s appeal is based upon the disclosure, at hearing, of a memorandum (referred to by the Hearing Officer as the “Rosenthal Memo,” referring to the City’s first Independent Monitor, Richard Rosenthal) considered by Commander Michael Batista which assisted him in coming to a recommendation concerning discipline.\(^1\) As a result of this discovery of the memo,\

\(^1\) The memorandum allegedly contained a short-cut type formula to help determine into which Category of the Matrix RR-402 violations should be classified. (We say “allegedly” because the memo itself was never produced at hearing and the contents of the memo were gleaned solely from the recollections of Commander Battista.) In the Matrix, RR-402 violations can be classified anywhere from Category C violations to Category F violations. According to Commander Battista, if an accidental discharge occurred and no one could have been injured, there was a Category C violation. If there was an accidental discharge and someone could have been injured but was not,
Petitioner argues that the failure to disclose the existence of the memo at any time before the hearing violated terms of the Handbook accompanying the Department’s Disciplinary Matrix, amounted to an erroneous interpretation of the Handbook, and constituted a violation of our Rule 12, specifically Section 7(D)(3)(A)(2)(v), which requires disclosure, prior to hearing, of the methodology and rationale used to determine the penalty imposed. All of Petitioner’s arguments are unavailing.

It is important to note that this recommendation of discipline, made by Commander Battista on behalf of Denver Police Chief Robert White, was not binding on the ultimate decision maker. Neither Commander Battista, nor Chief White made the final disciplinary decision. Per the Denver City Charter, the final say on police discipline rests with the Office of Executive Director of Safety. (Denver City Charter, Sections 2.6.1, 2.6.2, 9.4.14)

The Hearing Officer found as a matter of fact that there was no evidence the DDOS “knew [of] or used the Rosenthal Memo in determining the quantum of discipline or the Matrix level.” (Hearing Officer Decision p.5, par. 5) We concur. Consequently, any failure to disclose the existence of the Memo is not demonstrated by Officer Mudloff to have had any impact on the decision-making process employed by the actual decision-maker in this case.

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2 We are not holding that the DDOS was under any obligation to disclose its existence.
Per the Hearing Officer’s decision (Id.) the DDOS, in making the determination that Officer Mudloff’s misconduct amounted to a Matrix Category E violation, considered the totality of the circumstances and the fact that Officer Mudloff’s actions placed several individuals at great risk of serious bodily injury or death. The Hearing Officer found that these considerations were sufficient to support the DDOS’s determination that a mitigated Category E penalty of 18 suspended days was appropriate and, therefore, not clearly erroneous. We agree.³

In any event, we conclude that Officer Mudloff suffered no actual prejudice by the DDOS’s failure to produce or disclose the existence of the Rosenthal memo because much of the “guidance” offered by the memo is, in fact, contained in the Disciplinary Handbook. DDOS, in his brief, points us to pages 14 and 15 of Appendix D to the Handbook which states in part:

A sustained violation of Rule & Regulation 402 (Careless Handling of Firearms) can result in a categorization ranging from a minimum of a Conduct Category C up to a Conduct Category F violation. Care must be taken to follow the Conduct Category definitions and the principles set forth in Handbook Section 15.0 to determine the appropriate Conduct Category.

Attempts to fit a violation into a Conduct Category so as to reach or avoid a particular penalty or discipline level must be avoided. In cases where a sustained violation of this section involves “a demonstrable serious risk to officer or public safety,” the act should be considered to be a Conduct Category D violation. A determination as to whether the violation involves a “demonstrable serious risk to officer or public safety” may be based on many factors including, but not limited to, the proximity of others to the discharged round.

³ Officer Mudloff, in his brief, argues that the harm in this matter was a better fit in Matrix Category D, which refers to “a demonstrable serious risk to officer or public safety.” But we agree with the DDOS that Category E was the better fit, because the incident went beyond the “risk” of harm. There was, instead, actual physical harm to a member of the public caused by Officer Mudloff’s careless discharge of his weapon. In addition, the fact that Petitioner’s interpretation of the Matrix categories may render Category D a better fit does not render the DDOS’ application of Category E clearly erroneous, especially in light of the deference afforded the DDOS in making disciplinary determinations.
In a case where any person (including the involved officer) is actually injured as the result of the careless handling of a firearm, such violation should be placed in Conduct Category E as “an act that results in an actual serious and adverse impact on officer or public safety.”

In a case where a person (other than the officer) suffers death or serious bodily injury, such violation should be placed in Conduct Category F if such a consequence is a foreseeable result of the commission of the prohibited act.

The fact that a person other than the officer suffers death or serious bodily injury, as the foreseeable result of an officer’s careless handling of a firearm, does not automatically mean that the officer will be terminated for the aforementioned violation. As described in Section 19.0 of this Handbook, the reviewer must take into account all of the circumstances of the case to determine whether the mitigated penalty or the presumptive penalty should be imposed. In addition, as indicated in Section 25.0 of this Handbook, special circumstances involving extraordinary mitigation could justify a penalty less than that indicated in the matrix for a Conduct Category F violation.

The terms of the handbook are consistent with the recollected terms of the Memo. There is no dispute in this record that the Disciplinary Handbook was, at all times relevant, available to Officer Mudloff and, in fact, Officer Mudloff testified at hearing that he had read through the Handbook (Tr. Vol 1 107:3-9). Officer Mudloff establishes no grounds for overturning the Hearing Officer’s decision.

Accordingly, the Hearing Officer’s decision is AFFIRMED.

Filed the 17th day of February, 2016.

For the Civil Service Commission,

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By: Earl E. Peterson, Executive Director
CERTIFICATE OF SERVICE

I hereby certify that this 17th day of February, 2016, I have electronically served the foregoing DECISION AND FINAL ORDER, in Case No. 15 CSC 11A, In the matter of Brian Mudloff (P06149) v. Jess Vigil, by arranging that a true and correct copy of the same be sent by email to the following attorneys of record at the email addresses listed:

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By: Jeannette Madrid