

DATE: November 21, 2022

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FROM: AYESHA HARDAWAY, INTERIM MONITOR

RE: INDEPENDENT MONITORING TEAM'S ASSESSMENT OF CDP's  
INVESTIGATION AND ADJUDICATION OF CLEVELAND POLICE  
OFFICER BAILEY GANNON'S SHOOTING INJURY TO CLEVELAND  
POLICE OFFICER JENNIFER KILNAPP

## **I. Introduction & Identification of Issues**

This memorandum describes the Monitoring Team's analysis and conclusions regarding the processes used by the Cleveland Division of Police ("the Division" or "CDP") in its review of an officer-involved shooting that took place on July 20, 2020. That shooting ultimately resulted in the wounding of Cleveland Police Officer Jennifer Kilnapp. The Division first reported the incident to the Monitoring Team as a shooting that resulted in no one being hit or injured by the shots fired by an on-duty, probationary police officer. The improper categorization of the shooting resulted in it being scheduled to be reviewed by the Monitoring Team only as part of our regular assessment of Force Investigation Team (FIT) investigations along with a host of other uses of deadly force cases.

It took nearly two years for the Monitoring Team to become aware that the Division had improperly reported this incident. On July 13, 2022, a local media story brought the incident to the Monitoring Team's attention. It was reported that Officer Kilnapp filed a civil lawsuit alleging that she was injured on July 20, 2020 in the line of duty as a result of being shot by her partner, Probationary Officer Bailey Gannon. It was only upon further inquiry that the Monitoring Team learned the Division received a ballistics report on April 24, 2021 which established that Officer Kilnapp was, in fact, shot by Officer Gannon rather than the subject originally charged with the attempted murder of Officers Kilnapp and Gannon. CDP has represented to the Monitoring Team that the Homicide Division provided timely notice to the County Prosecutor, which ultimately

resulted in the defendant pleading guilty to a lesser offense of attempted assault. We found no documentation, however, that any of the aforementioned important information was *formally* shared with the Force Review Board (FRB) prior to its consideration of the case on June 3, 2021. That FRB hearing took place more than a month after the ballistics report was received by the Homicide Division. The aforementioned information was only shared with the Monitoring Team after we made our inquiries in July 2022.

As a result of this new information, the Monitor determined that an in-depth assessment of the Division's investigation and administrative review of this incident was warranted as it raised significant concerns regarding CDP's compliance with the Consent Decree. Prior to the completion of our assessment, however, the Superintendent of CDP's Internal Affairs Division completed his own review and analysis of the Internal Affairs investigation underlying this incident. It is our understanding that Superintendent Viland was asked by the Chief to conduct his own review as a result of the announcement of Officer Kilnapp's lawsuit and the Monitoring Team's expressed concerns regarding the Division's handling of the incident. Superintendent Viland ultimately prepared a 13-page memorandum, dated September 19, 2022.

In his memorandum, Superintendent Viland made eight thoughtful recommendations which were included in the content of his memorandum. Superintendent Viland also made the following specific findings:

1. The Internal Investigation was based on less than complete information.

Superintendent Viland correctly pointed out that the administrative findings made by Internal Affairs were made without first being informed of the results of a ballistics test, which ultimately established that Officer Kilnapp was shot by probationary Officer Gannon. Superintendent Viland recommended that, in the future: "The Division, and specifically the IA Unit, be more assiduous in ensuring the thoroughness and full completion of all aspects of investigations. Additionally, Unit members are to be updated/advised of all appropriate methodologies and documentation required for legitimate time extensions in investigations."

2. Superintendent Viland concluded that the original "in policy" finding initially recommended by Internal Affairs was "spurious."

Superintendent Viland reported that: "with full information from the ballistics report and re-assessment of the original case facts [] this intentional discharge, application of use of force, does not meet policy requirements and therefore should not have been determined to be 'Within Policy.'"

3. Superintendent Viland also identified that the Division failed to adequately address Officer Gannon's admitted "accidental discharge." Viland's report stated that: "accidental firearms discharges that occur during any use of force investigation should consistently be referred for disciplinary action."
4. Superintendent Viland noted that the Force Review Board found that Officer Gannon's "decision making and tactics negatively impacted the need to use force, [] were not consistent with the core principles of the Division, [and] [] were not consistent with Division training."
5. With respect to the Investigative files, Superintendent Viland found that "attachments, reports, evidence and other items were placed into the case file without sufficient explanation or documentation."

The Monitoring Team believes that Superintendent Viland conducted a competent and well-reasoned evaluation of the incident and its handling by the Division. We agree with his findings and recommendations. We also applaud the City for assigning Superintendent Viland to conduct such a systemic evaluation of this incident with a view of avoiding future mistakes which could not only negatively impact the City's compliance with the Consent Decree, but also negatively impact the City's long-term ability to provide internal critical incident oversight and accountability.

However, we have identified a number of areas of concern, that were unaddressed in Superintendent Viland's memorandum and which, we believe, require further inquiry and consideration by the City.

1. The FRB was reportedly made aware of the ballistics reports and its findings at the time of the hearing and yet still reached the "spurious" finding that the shooting was "in policy."

Superintendent Viland reported that: "[Internal Affairs] Sgt. Bennett reports that at the time of the meeting, the ballistics report was known and discussed as well as the plea and disposition of the criminal case; and that these issues were discussed by the Board."

However, there was not any documentation relating to the IA investigation or the FRB review process that mentions the existence of the ballistics report or includes any acknowledgement that Officer Gannon had, in fact, shot Officer Kilnapp. It is essential to understand why, if this information was known, it was not included in the Investigator's PowerPoint presentation to the FRB or reflected in the FRB's responses on the checklist. Further, if this information was known at the time of the FRB, it appears clear that the FRB incorrectly reached its finding. The Division must provide a detailed explanation for how this happened and what action will the Division take to ensure no similar failures by the FRB occur in the future.

2. Even though Officer Gannon was on probation at the time of the incident, that fact appeared to have no impact on the investigation or administrative review of the case.

The Monitoring Team has previously highlighted the Division's history being unable to speedily adjudicate cases involving probationary employees.<sup>1</sup> In this current case, the shooting officer had been on-the-job for less than three months and was still on probationary status. The existence of Body Worn Camera video footage allowed the Division to be fully aware that Officer Gannon panicked when faced with an armed suspect. It also revealed that Officer Gannon acted outside of his training and police policy in a manner that put his partner at risk. Despite these glaring issues, the department failed to act and allowed Officer Gannon to successfully complete his probationary period. He received a rating of "exceed[ing] expectations" and his performance evaluation referred to the shooting as a "minor setback."

3. Officer Gannon resigned his commission as a police officer on March 10, 2022, but was ultimately reinstated by the Division on May 31, 2022 (DN22-168).<sup>2</sup> Officer Gannon was subsequently assigned to District 3, effective June 11, 2022 (DN22-190), eight business days after his reinstatement.

Officer Gannon was rehired even after the FRB found that "his decision making and tactics negatively impacted the need to use force, [] were not consistent with the core principles of the Division, [and] [] were not consistent with Division training." This leaves open questions as to what, if any, criteria were used to allow Officer Gannon to return to the job and why would he be allowed to return to patrol without first, at a minimum, receiving reinstruction pursuant to the recommendations of the FRB.<sup>3</sup>

4. As noted by Superintendent Viland, "there are many aspects of and divided responsibilities in a large scale and complicated critical use of force investigation."<sup>4</sup> In order to better understand

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<sup>1</sup> The Monitoring Team provided technical assistance to the Division on this issue in a memo dated, July 9, 2021.

<sup>2</sup> The Monitoring Team has not seen a copy of Officer Gannon's resignation letter and is currently unaware of his reason for resigning from the CDP. Nor is the Monitoring Team currently aware of why he requested reinstatement.

<sup>3</sup> According to Superintendent Viland, as of the time of the writing of his memo, Officer Gannon's "reinstruction is [currently] being scheduled regardless of P.O. Kilnapp's availability." (Viland memo, 9/19/22, fn. 19).

<sup>4</sup> "There are criminal investigations for both member officers and involved subjects that are the primary responsibility of the Homicide Unit (which includes the crime scene processing and evidence collection activities of the Crime Scene / Records Unit); there are both disciplinary action proceedings and reviews of use of force through the Force Review Board that are the responsibility of the Compliance Unit; there are training and tactics reviews and requirements that are completed by members of the Academy and Ordnance Units; and there are officer wellness issues that are the responsibility of the Employee Assistance Unit. This is all in addition to the administrative monitoring and investigative tasks that are within the purview of the Internal Affairs Unit. All of these various components exist within separate chains of command and authority in the organization." (Viland memo, 9/19/22, p. 2).

how well or poorly the involved units and personnel coordinated their activities there are certain key questions that remain unanswered at this time. To include:

- a. Who knew what and when? Specifically, when did Homicide Division advise Internal Affairs of the existence of the ballistics report and why was the report not uploaded to IA Pro in a timely fashion?
- b. Precisely how did the FRB become aware of the existence of the ballistics report?
- c. Why was the ballistics report not included in the IA-FRB PowerPoint if its existence was known at the time of the FRB?
- d. Why would the administrators of the FRB process decline to include that information into the FRB's responses to the checklist?
- e. Why was the investigation not returned to Internal Affairs to consider the new information available as a result of the ballistics report?
- f. Why did the FRB fail to identify any deficiencies in the Internal Affairs investigations and findings?

## II. Timeline of Events

The following chart provides a timeline of significant events related to the incident and the employment history of Officer Gannon.

August 19, 2019	Gannon Hire Date
May 5, 2020	Gannon appointed as police officer
July 20, 2020	Date of Incident (Gannon still on probation)
July 21, 2020	Suspect charged with Attempted Murder
August 8, 2020	Last Homicide log entry in copy of Homicide report uploaded to IA Pro.
August 28, 2020	Firearms inspection report produced.
September 9, 2020	Prosecutor no-filing decision - Gannon
October 24, 2020	Performance evaluation refers to shooting as "a minor setback"
November 5, 2020	Gannon probation completion date.
November 29, 2020	In policy recommendation by IA Acting Lt Sheehan. <u>Identified one shot by Gannon as an accidental discharge.</u> Identified that Gannon "accidentally released the magazine" of his firearm, while fleeing. Accepted Homicide finding that Kilnapp was shot by suspect, not Gannon. <i>Comments on, but ignores discrepancy between Gannon statement that subject shot first and video/audio that indicates Gannon shot first while retreating.</i>
December 10, 2020	Verbal counseling provided to PO Gannon for WCS violation. (FIT report, Section 26)
December 14, 2020	Policy & Training Assessment by IA Sgt. Bennett; identified tactical deficiencies, but recommended use of deadly force to be "in policy." (FIT report, Section 26)

December 19, 2020	“In policy” finding by Acting IA Superintendent (Lt. Neidbalson) Found neither PO Gannon or Kilnapp at fault for Kilnapp’s injury. Concluded that Gannon and Kilnapp were the victims of an ambush by the suspect and Gannon and the suspect “exchanged gunfire.”
December 19, 2020	In policy finding by Chief Williams (per Blue Team)
February 22, 2021	Pre-disciplinary hearing - Kilnapp
March 22, 2021	Written Reprimand Issued to PO Kilnapp for WCS violation.
April 23, 2021	Ballistics report finding one of two bullets that injured PO Kilnapp was fired by PO Gannon. (Apparently only one of the two bullets was recovered).
April 24, 2021	Homicide log indicates Ballistic report received.
	<i>No indication of who in command staff was informed of the results of the ballistics report.</i>
May 26, 2021	Defendant pleads guilty to attempted assault on a police officer. Originally charged with attempted murder.
June 3, 2021	Force Review Board meeting. FRB notes that retraining for both officers was recommended in original review. Administratively disapproved: “The decision making and tactics employed do not appear to be consistent with division core principles and training.” “Board approved the actions during the use of force” with one dissenting vote. FRB acknowledged WCS and portable radio violations by both officers. Board Chair was D/C Drummond. <sup>5</sup> *FRB Power Point presentation makes no mention of Accidental discharge admitted by Gannon; FRB Power Point presentation makes no mention of fact that Kilnapp may have been shot by her partner.
June 14, 2021	Homicide Captain Pillow assigned as Acting IA Superintendent
June 30, 2021	Defendant sentenced to 7 years in prison.
March 10, 2022	Gannon resigns from Division.
May 31, 2022	Gannon re-instated as a police officer.
June 11, 2022	Gannon assigned to District 3 as a patrol officer
August 16, 2022	<i>Ballistics report uploaded to IA Pro Case Number CPD 2020-0061</i>
September 19, 2022	<i>Memo entitled: “Review and Analysis of Internal Affairs Investigation” by IA Superintendent Viland.</i>
October 12, 2022	<i>Review and Analysis memo received by Monitoring Team.</i>

<sup>5</sup> The Board specifically found that Officer Gannon’s use of force was “necessary to achieve a lawful objective, proportional to the level of the subject’s resistance and objectively reasonable” (FRB checklist, Q. 4). The Board also specifically found that Officer Gannon “compl[ie]d with CDP’s general procedures involving force” (FRB checklist, Q. 5). The Board also found that the original investigation’s conclusions were supported by a preponderance of the evidence (FRB checklist, Q. 13). Even though the FRB had reason to believe that the Ballistics Report was still outstanding, it found that there was no “additional relevant evidence that may [have] assist[ed] in resolving inconsistencies or improve the reliability or credibility of the investigation” (FRB checklist, Q. 14).



### **III. Internal Affairs & FRB Findings**

The Monitoring Team agrees with Superintendent Viland that the recommendations made by Internal Affairs were inherently unreasonable as to whether Officer Gannon committed any police violations. First, they simply ignored the stated fact that Officer Gannon admitted his second shot was an accidental discharge. Further, when considered in the face of the known fact that Officer Gannon shot his partner while retreating past her in a panicked attempt to escape, these findings were not supported by the evidence or basic police training and policy.

Unfortunately, as acknowledged by Superintendent Viland, the FRB simply accepted the findings recommended by Internal Affairs, without robust inquiry. This indicates that the Board failed to perform its essential function “to serve as a quality control mechanism to determine if UOF investigations are thorough and complete” ...and to “ensure the UOF investigations are of the highest quality.”<sup>6</sup>

### **IV. Monitoring Team Assessment**

Consistent with the findings made by Superintended Viland, and based on the information provided by the City thus far, the Monitoring Team makes the following findings.

- Officer Gannon was on probation at the time of the incident but no action was taken on his probationary status, even though the WCS footage and his initial statements showed an officer who panicked and accidentally discharged his firearm while fleeing from an armed subject.
- The Internal Affairs interview of Officer Gannon was untimely. He was interviewed seven days after the incident, as opposed to within 48-72 hours as required by the FIT Manual (section VI.B.2.c)). Further, the IA interview of this critical incident was deficient, with the officer’s narrative and question and answers lasting less than 13 minutes.
- IA adjudicated the case prior to obtaining the ballistics report. The adjudication was based on the incorrect assumption that Kilnapp was shot by the subject, even though the evidence was not conclusive. IA relied on findings made by Homicide Detectives that the evidence pointed to the suspect as the shooter. Although Officer Gannon initially reported to other officers that he was worried that he had shot his partner,<sup>7</sup> he later insisted that there was “no way” that one of his bullets hit his partner.<sup>8</sup>

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<sup>6</sup> CDP 2019 Force Review Board (FRB) Training, paragraph III.A.1.a

<sup>7</sup> Officer Gannon’s WCS footage captured him making the following statements, while at the hospital, shortly after he arrived in the rescue ambulance that transported Officer Kilnapp to the hospital from the scene: “I don’t know which bullet she was hit by; whether it was us shooting at him or him shooting at us; cause at one point I turned and ducked out...”

“Yeah, I don’t know which fire she...like if that guy hit her or if like... because I was shooting at the guy and I don’t know if I shot her when I turned and ran or what you know...”

<sup>8</sup> During his July 27, 2020 interview with Internal Affairs, Officer Gannon was confronted with his prior statement that he was worried he may have shot his partner: “That was more because it just happened and she got shot and I was like feeling really bad because, .... it’s like instant guilt that someone you’re working with just got hurt and that you just don’t want to be the one that did it; I think that was more like, adrenaline was pumping; when I sit back and

- Officer Gannon's statement that he did not shoot his partner was accepted by Internal Affairs, even though some key statements he made to Homicide Division investigators during a July 30, 2020 interview were not consistent with his WCS footage:
  - Officer Gannon claimed that the suspect started shooting immediately after Officer Gannon pushed open a bathroom door and saw the suspect pointing a gun at him. This statement was not consistent with Officer Gannon's WCS audio in which gunshots could only be heard after Gannon had already fled from the door of the bathroom where the suspect was located.<sup>9</sup>
  - Officer Gannon claimed he reached around the corner and fired one shot into the bathroom, although the WCS showed him firing only after he fled from the bathroom door.
- The ballistics report, establishing that Kilnapp was shot by Officer Gannon was obtained by Homicide on April 24, 2021. This occurred five weeks before the FRB session that evaluated whether or not the shooting was in or out of policy. The findings of the ballistics report were not formally presented to the FRB, although Superintendent Viland advises that the FRB members were, in fact, aware of the existence of the report and its findings. The IA presentation also failed to disclose that Officer Gannon admitted that one of his shots was an accidental discharge. As a result, the FRB concluded that the shooting was "in policy," meaning that Officer Gannon was justified in using deadly force, although tactical issues and concerns were identified and both officers' tactics were found to be out-of-policy.<sup>10</sup>
- The findings from Internal Affairs in IA Pro clearly disclosed the fact that Officer Gannon accidentally discharged one round. As a result, either the FRB members did not adequately prepare for the hearing by failing to read the IA findings and recommendations, or they failed to identify the accidental discharge as an issue. As indicated by Superintendent Viland, this resulted in "spurious" findings by the FRB.
- There is no information in the documents provided to the Monitoring Team to show who within the CDP, other than the assigned Homicide Detectives, were made aware of the ballistics findings or when.

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look at it, I was like thinking there's no way any of mine would have hit her because of the way he was standing, the way I was standing, when he started shooting at me; I think that was kind of an excited utterance because of the fact that she got hurt."

<sup>9</sup> Officer Gannon pushed open the bathroom door 1 minute, 50 seconds after turning on his WCS. Shots could be heard being fired 3 seconds after that point, well after Officer Gannon can be seen fleeing down the stairs of the building.

<sup>10</sup> Among the tactical issues identified was the officers' failure to turn on their radios, a failure to call for back-up on an armed suspect call; unsafe building search tactics; and a failure to identify themselves as police officers while searching for the suspect. No discipline was imposed on the officers as a result of these from the tactical errors, although Officer Kilnapp did receive a one-day suspension for failing to activate her WCS until after the shooting occurred.



## V. Conclusion

The investigation and administrative review of this case implicate the following areas of the Consent Decree and lead us to reach the following conclusions:

- The CDP did not ensure that the incident was accurately or properly reported, documented or reviewed. (See, Consent Decree paragraph 47, which requires that “[a]s soon as practical following a use of force, CDP will ensure that the incident is accurately and properly reported, documented, and investigated. A fundamental goal of the revised use of force policy will be to account for, review, and investigate every reportable use of force and reduce any improper uses of force.”);
- The CDP failed to appropriately analyze the officer’s use of force (See, Consent Decree paragraph 48, which requires that “CDP will track and analyze officers’ uses of force to hold officers accountable for unreasonable uses of force...”);
- The Force Investigation Team failed to fully investigate the incident and failed to exhibit the type of investigative skills necessary to ensure that an out-of-policy use of deadly force was identified. (See, Consent Decree paragraph 111, which requires in pertinent part: “The FIT will be designed to ensure that these incidents are investigated fully and fairly by individuals with appropriate expertise, independence, and investigative skills to ensure that uses of force that are contrary to law or policy are identified; that training, tactical, and equipment deficiencies related to the use of force are identified; and that investigations are of sufficient quality”);
- The Force Review Board failed in its mission to serve as a quality control mechanism and failed to properly appraise this use of deadly force from a tactics, training, policy and agency improvement perspective. (See, Consent Decree paragraph 124, which requires in pertinent part: “CDP will develop and implement a Force Review Board (“FRB”) to serve as a quality control mechanism for uses of force and force investigations, and to appraise use of force incidents from a tactics, training, policy, and agency improvement perspective”);
- The Force Review Board’s findings were not supported by a preponderance of the evidence; additional investigation was not requested, even though required and failed to raise concerns regarding clear policy violations. (See, Consent Decree paragraph 127, which requires in pertinent part that: “In conducting these reviews, the Force Review Board will:
  - a. ensure that it is objective and complete and that the findings are supported by a preponderance of the evidence...
  - d. order additional investigation when it appears that there is additional relevant evidence that may assist in resolving inconsistencies or improve the reliability or credibility of the force investigation;
  - e. determine whether the incident raises concerns regarding policy, training, equipment, supervision, medical response by officers on the scene, communication, or tactics, and refer such incidents to the appropriate unit within CDP to ensure they are resolved”);

- The Force Review Board failed to adequately address the quality of the underlying investigation and whether the recommendations were supported by a preponderance of the evidence. Deficiencies in the investigation were neither identified or documented. (See, Consent Decree paragraph 128, which requires that: “The FRB will assess the quality of the investigations it reviews, including whether investigations are objective and comprehensive and recommendations are supported by a preponderance of the evidence. The FRB will identify and document any deficiencies that indicate a need for corrective action”);
- The FIT investigation in this case was not fully, fairly or efficiently conducted; the findings were not supported by the facts and the involved officer was not held accountable by the disciplinary system. (See Consent Decree paragraph 176, which requires that: “The City and CDP will ensure that all allegations of officer misconduct, whether internally discovered or alleged by a civilian, are fully, fairly, and efficiently investigated; that all investigative findings are supported by a preponderance of the evidence and documented in writing; and that all officers who commit misconduct are held accountable pursuant to a disciplinary system that is fair, consistent, and provides due process”).

The Monitoring Team believes that Superintendent Viland conducted a professional and objective review and evaluation of the investigation and administrative review of this case. Nevertheless, as noted above, questions remain and further review and consideration of the case is necessary. We look forward to seeing how the Division intends to act on Superintendent Viland’s recommendations and to respond to the points raised in this memorandum.