

INDEPENDENT REPORT

An Evaluation of The Boulder Police Department's

Internal Review of March 1, 2019

Interaction Between Mr. Zayd Atkinson

and Boulder Police Department Officers

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Background and Scope

On March 25, 2019, the City of Boulder engaged me as Special Counsel to conduct a thorough and independent review of the Boulder Police Department's ("BPD") internal investigation of an interaction on March 1, 2019 between Naropa University student Mr. Zayd Atkinson and BPD patrol officer John Smyly (and, subsequently, other responding officers) ("the Incident"). I have practiced law for over 28 years, 14 of those years as a federal prosecutor and over two of them as the United States Attorney for the District of Colorado. In those roles, I reviewed police conduct and misconduct, worked on civil rights issues involved in policing, and became familiar with Colorado and national best practices concerning police internal affairs management and investigations. To assist me with this special-counsel project, I engaged Michael Rankin and Robert Evans, both former FBI Special Agents and Assistant Special-Agents-in-Charge. Both are also lawyers. Between them they have 54 years of experience with the FBI in 13 different states and Washington D.C. They have worked the full range of criminal investigations including civil rights, public corruption, and officer-involved shootings. In addition, Mr. Rankin was the Director of the Colorado Bureau of Investigation from August 2015 to September 2017.

The City of Boulder tasked us with investigating BPD's internal review of the Incident. Specifically, we were asked to answer the following four questions:

1. Was BPD's internal review conducted in a competent, independent, and professional manner?
2. Is there any indication that the investigation was subjected to any outside influence or the product of any bias?

3. Was the resulting disciplinary recommendation, if any, appropriate based on the evidence?
4. Do we have any recommendations or observations regarding BPD's Professional Standards review processes?

To answer these questions, we reviewed all of the materials collected and prepared by BPD's Professional Standards Unit ("PSU"). The PSU's role within BPD is to review complaints from any source about BPD members' conduct (in other words, the PSU is what is colloquially known as "internal affairs" or "IA"). The PSU materials consisted of over 3.5 hours of audio-recorded interviews of nine BPD officers and two civilians; over three hours of audio and video recorded by BPD body-worn cameras ("BWC"), a surveillance camera, cameras filming the March 18th Boulder Community Forum regarding the Incident, and a citizen cellphone camera; and approximately 160 pages of interview summaries, incident reports, photographs, diagrams, charts, a timeline, an investigation summary, an incident summary, a complaint report, dispatch logs, emails, complaint forms, and other documents and communications.

We also completed all the additional investigation we believed necessary to offer reliable and independent judgments concerning the PSU's review of the Incident. Specifically, we

- conducted six interviews of BPD members (the PSU Sergeant and BPD command staff),
- conducted an extensive interview of Mr. Atkinson,
- conducted three interviews of civilian members of the Professional Standards Review Panel ("PSRP"),
- conducted one interview of a BPD member of the PSRP,

- conducted interviews of three Naropa University students residing at the Naropa University dormitory where the Incident occurred,
- conducted interviews of two employees at businesses adjacent to the Naropa University dormitory,
- reviewed all of the General Orders governing BPD members' conduct and the PSU process,
- reviewed the Collective Bargaining Agreement governing BPD conduct,
- inspected the site where the Incident occurred and the surrounding area,
- conducted relevant legal research, and
- examined dozens of pages of additional BPD crime data.

To understand our four conclusions based on that review, it is essential first to understand the undisputed facts of the Incident and the details of the PSU process and investigation that immediately followed.

The Incident

The Incident evolved over the course of approximately 32 minutes and included four distinct phases:

1. Officer Smyly's observation of Mr. Atkinson before he contacted him,
2. Officer Smyly's initial contact with Mr. Atkinson,
3. their interaction as they walked around the outside of the building where the Incident occurred, and
4. the standoff between Mr. Atkinson and BPD officers at the back of that building.

1.Observation Pre-contact

At approximately 8:20 a.m. on Friday March 1, 2019, Zayd Atkinson sat on the back, partially enclosed patio of the Naropa University dormitory located at 2333 Arapahoe Avenue in Boulder. He is a 26-year-old African American man completing his first year of study at Naropa University. The dormitory where he sat has three signs that state "Private Property" posted on the exterior walls, one by each of the three doors to the building, including the back door by which Mr. Atkinson sat. The building's address is spelled out in large letters and numbers above the front entrance. There is no sign on or around the building identifying it as a Naropa University dormitory. Mr. Atkinson lived in that building, and he was on the back patio taking a short break before finishing his three-hour work-study job picking up trash around the dormitory and two other Naropa properties. He had with him the white, five-gallon plastic bucket and approximately three-foot-long metal trash grabber he used for his job. While seated there he manipulated his cell phone, listened to music through ear buds, and ate a snack.

As Mr. Atkinson sat there, BPD patrol officer John Smyly was on routine patrol driving his police cruiser northbound on Folsom Street. After crossing Arapahoe Avenue, he looked across two small parking lots to his left and saw Mr. Atkinson sitting on the patio. Mr. Atkinson was approximately 287 feet away. Officer Smyly was aware of a number of recent crimes committed in that general area, including attempted bike theft and trespassing. He turned left after passing the parking lots, drove back around, parked approximately 80 feet northeast of the patio, and sat in his cruiser for about a minute watching Mr. Atkinson. This pre-contact phase lasted approximately two minutes.

2. Initial Contact

Officer Smyly then got out of his car and walked toward Mr. Atkinson. As he approached, Officer Smyly saw the "Private Property" sign by the dormitory's back door. As Officer Smyly walked toward the patio, Mr. Atkinson (whose back was to Officer Smyly) ended his break, stood up, and began walking southbound along the west side of the dormitory, picking up trash as he went.

Officer Smyly notified dispatch that he was about to make a pedestrian contact and turned on his BWC. He followed Mr. Atkinson around the side of the building. After Mr. Atkinson turned left at Arapahoe Avenue and stood on the sidewalk in front of the dormitory, Officer Smyly got his attention and asked him to stop. Mr. Atkinson turned, took out his ear buds, and asked what was going on. Officer Smyly explained that he had seen Mr. Atkinson sitting on the back patio marked as private property and was checking to see if he was allowed to be there. Mr. Atkinson explained that he lived there and was working there picking up trash. Officer Smyly asked him for the building address. Mr. Atkinson responded by stating the address as he turned to his right and gestured toward the printed address above the front door of the building. Officer Smyly then asked what unit Mr. Atkinson lived in.

Up to this point, Mr. Atkinson had been polite but surprised by Officer Smyly's presence. Officer Smyly too had been polite. But with the question about which specific unit he lived in, Mr. Atkinson paused, looked around, and began to become exasperated. He told Officer Smyly he did not think he had to tell him which unit he lived in. Officer Smyly told Mr. Atkinson he just needed to verify that Mr. Atkinson belonged on the property. Mr. Atkinson responded, "What do you need from me?" Officer Smyly responded, "If you have an ID with your address

on it, that would be great." He also explained that he was just doing his job, checking on the situation "because we've had some stuff going on in this area" and would be on his way once he confirmed Mr. Atkinson was allowed on the property. It is worth noting the 2333 Arapahoe Avenue property looks like a small, modern apartment building, and when he contacted Mr. Atkinson, Officer Smyly did not know it is a Naropa University dormitory.

In response, Mr. Atkinson handed Officer Smyly his student identification card. That identification card, the same size as a driver's license or credit card, displayed Mr. Atkinson's name and photo. It stated that he is a student at Naropa University. It listed the main Naropa University address (2310 Arapahoe Avenue). It did not list the address of the dormitory and did not state Mr. Atkinson's date of birth. It had a bar code on the back that allowed electronic access to the dormitory entrances. Officer Smyly looked at the student identification card and then asked Mr. Atkinson if he had any identification with his address on it. Mr. Atkinson told Officer Smyly "no" and reached out to take his student identification card back. Officer Smyly pulled his own hand back and did not return the identification card. Mr. Atkinson then offered to prove he lived there by "beeping into the building" with the card's bar code. Officer Smyly did not respond to this offer.

Mr. Atkinson then put the bucket and trash grabber down in front of Officer Smyly, moved a few feet farther away, and sat down on the low concrete wall between the sidewalk and the front of the dormitory. Officer Smyly asked him for his date of birth. Mr. Atkinson asked, "Why?" Officer Smyly explained again that he just needed to verify who Mr. Atkinson was and confirm he was allowed to be on that private property. Mr. Atkinson asked, "Are you kidding?" and stood up, picked up the bucket and trash grabber, and started walking away.

It was now approximately 8:32 a.m. This initial contact lasted a total of approximately 2.5 minutes. Until Mr. Atkinson became frustrated at the end, the contact was cordial. No racial language was used, neither party accused the other of using racial language or having any racial animus, but there definitely was miscommunication. Officer Smyly believed he had made it clear he was investigating a potential trespass and wanted evidence that Mr. Atkinson lived in the building. Mr. Atkinson concluded Officer Smyly was being disrespectful and dishonest about the reason for the contact because Officer Smyly would not stop asking for information, even after Mr. Atkinson had provided an ID and explained he lived there. Mr. Atkinson felt Officer Smyly was hiding something and the real reason for the contact must have been that “he looked like a black homeless man.”

As explained below, neither the PSU investigation nor our review revealed a preponderance of evidence that this contact was based on Mr. Atkinson’s race. The circumstances did suggest to Mr. Atkinson that the contact was based on his race, and he was justified in his confusion and frustration that the contact continued long after he had explained his residency and work and provided his student identification card. What the evidence shows, though, is that Officer Smyly continued the contact because (1) he misunderstood the law about what information a citizen must provide, and (2) he erred in believing he had reasonable suspicion that a trespass was occurring.

We focus on this point because these were Officer Smyly’s pivotal mistakes. Had Officer Smyly understood the law, the contact would have ended without trauma. An officer needs no level of suspicion to engage in consensual contact with a citizen. In such a consensual contact, the citizen may walk away at any point. To stop the citizen from walking away, the officer must have reasonable suspicion that the citizen committed a crime. Reasonable suspicion means a

specific and reasonable belief based on the facts and inferences from all circumstances at hand. It is more than a “hunch,” but it is less than probable cause. If an officer has reasonable suspicion, the citizen is required by Colorado law to give his/her name, address, an ID if he/she has it, and an explanation of his/her actions. Even if the officer has reasonable suspicion, the officer cannot require a person to provide a date of birth.

Officer Smyly concluded he had a reasonable suspicion that Mr. Atkinson was trespassing. He based that conclusion primarily on the facts that Mr. Atkinson had no ID with his address on it and that he turned and looked toward the address on the front of the dormitory when he told Officer Smyly his address was 2333 Arapahoe Avenue. Officer Smyly believed Mr. Atkinson was reading the address off the building and believed if he lived there he would know the address and not have to read it. Officer Smyly’s BWC, however, shows that Mr. Atkinson did not read the address. Rather, he gestured toward it demonstratively, maybe in frustration. Even if he did read it, there were many other facts that the law on reasonable suspicion required Officer Smyly to consider before concluding he had reasonable suspicion (*e.g.*, why would a trespasser be picking up trash where he is trespassing and offer to use his ID to gain access to the property he is trespassing on?). Officer Smyly failed to consider those circumstances.

Officer Smyly’s additional error was his misunderstanding about what his reasonable suspicion allowed him to do. He continued to ask Mr. Atkinson for his date of birth at various times throughout the contact. Even if he had reasonable suspicion, he was not entitled to that information. His pursuit of Mr. Atkinson’s date of birth led Officer Smyly to his next mistaken conclusion: that Mr. Atkinson was committing the crime of obstructing a police officer by refusing to give him his date of birth. Though he was mistaken, the evidence is clear that Officer Smyly genuinely believed he had reasonable suspicion and genuinely believed he was authorized

to require Mr. Atkinson to provide his date of birth. These were the motives that the evidence shows prolonged the Incident and caused Mr. Atkinson's anger and frustration.

3. Walk around the Building

At 8:32 a.m., Mr. Atkinson walked away from Officer Smyly to the east along the front of the dormitory and started picking up trash again. Officer Smyly told him to "please have a seat." Mr. Atkinson said he would not. Officer Smyly then called BPD dispatch for a routine cover officer to assist him because Mr. Atkinson was not complying with his order to stop and sit down. For the next three minutes, the two men circled the perimeter of the dormitory and ended up back where Mr. Atkinson was originally seated on the back patio. Several significant things occurred while they walked, Mr. Atkinson in front and picking up trash with the grabber and Officer Smyly behind and to the side:

- Officer Smyly repeatedly told Mr. Atkinson to stop, sit down, and put down the trash grabber because it could be used as a weapon.
- Officer Smyly told Mr. Atkinson he was being detained for investigation of trespass.
- Officer Smyly told Mr. Atkinson that by refusing to stop and sit down he was committing the "jailable offense" of obstructing a police officer.
- Officer Smyly drew his Conducted Electrical Weapon ("CEW") (commonly known as a taser) and held it pointed straight down at the ground, in the front of his body at ribcage level. He had his CEW out for approximately two minutes. He never pointed it at Mr. Atkinson.

- Officer Smyly told Mr. Atkinson he was "probably going to get tased" because the trash grabber could be used as a weapon.
- Officer Smyly called dispatch again and reported that Mr. Atkinson was failing to comply, had a blunt object in his hand, and would not put it down.
- Officer Smyly's tone and volume were measured and calm, but his voice began to reveal his recognition that he was not in control of the situation.
- Mr. Atkinson repeatedly refused to stop, repeatedly refused to sit down, and repeatedly refused to put the trash grabber down.
- Mr. Atkinson stated more and more loudly, and with increasingly demeaning vulgarity, that he had done nothing wrong, that he was entitled to be on the property, that he worked there, that he lived there, that he paid his taxes, and that Officer Smyly had no right to stop him or be on the property.
- When he saw Officer Smyly unholster the CEW, Mr. Atkinson said, "Are you going to tase me? What, you're going to tase me? You're not going to tase me."
- Mr. Atkinson used the trash grabber to pick up trash. He also gestured with it and waved it in the air as he tried to explain to Officer Smyly it was only for picking up trash and was not a weapon. He did not approach or threaten Officer Smyly with the trash grabber.

4. The Standoff

When the two men got to the back of the building, Mr. Atkinson stood on the patio facing out, and Officer Smyly stood about ten feet off the patio facing Mr. Atkinson and the back of the

dormitory. They stayed in those positions until the Incident ended 16 minutes later. Once on the patio, Mr. Atkinson saw that Officer Smyly had holstered his CEW and drawn his handgun. Officer Smyly held his handgun in his right hand in front of his body at ribcage level with the muzzle pointed straight down at the ground. He had it unholstered and held in that position for the next seven minutes.

Fewer than three minutes after the two men reached the back patio, other law enforcement officers began to arrive at the scene in response to Officer Smyly's calls to dispatch. Over the course of the next 10 minutes, a total of nine other officers arrived (eight from BPD and one from the University of Colorado Police Department ("CUPD")). They did not all arrive at the same time, and not all stayed until the Incident's conclusion. But for most of the 13-minute period from the first cover officer's arrival until the scene was cleared, there were eight officers including Officer Smyly on scene and visible to Mr. Atkinson, surrounding him on three sides as he stood on the patio with the dormitory behind him.

This number of officers responded for several reasons:

- Officer Smyly first told dispatch that the citizen he was contacting was not complying;
- several minutes later he told dispatch that the citizen was still not complying and had a blunt object in his hand; and
- during the second call to dispatch, officers listening on the radio could hear agitated yelling in the background.

What none of those responding officers knew until they got there was Mr. Atkinson's race. Race was never mentioned by Officer Smyly in his dispatch calls nor at any other time.

Hence, there is no evidence that any of the officers responded because of Mr. Atkinson's race or that the large number of officers was the result of his race.

As noted, Officer Smyly had his CEW out for approximately two minutes and then his handgun out for approximately seven minutes. Of all the other officers present at any point, one had an orange less-than-lethal bean bag shotgun slung over his shoulder and held behind his body pointing at the ground for approximately 12 minutes, one had his handgun unholstered for less than one minute, and one had his CEW unholstered for approximately two minutes. No other weapons of any type were unholstered. No officer pointed any weapon of any type at Mr. Atkinson at any time during the incident. Mr. Atkinson and a Naropa University student filming the standoff on his cellphone from inside the dormitory both stated that multiple officers were pointing their guns at Mr. Atkinson. All of the video evidence, including that student's, demonstrate this was false.

Soon after they arrived, two of the cover officers also tried to convince Mr. Atkinson to put down the trash grabber. They and Officer Smyly repeatedly asked Mr. Atkinson to calm down and to sit down. Officer Smyly also offered to holster his handgun if Mr. Atkinson would put down the trash grabber. At 8:42 a.m., Mr. Atkinson did so, and Officer Smyly holstered his handgun. Just before, one of the cover officers had entered the dormitory through the back door and confirmed with two residents that Mr. Atkinson lived there. At about that time, Officer Smyly again asked Mr. Atkinson for his date of birth. Mr. Atkinson did not provide it. The officer who had gone in the dormitory came back out and told the on-scene sergeant he had confirmed Mr. Atkinson lived there.

At about that time, a Naropa University employee arrived. He too confirmed Mr. Atkinson lived in the dormitory. He also attempted to calm Mr. Atkinson, telling him "you have

probably been profiled" and they could take steps to address this concern later if he would just calm down. At about this time, the on-scene sergeant conferred with Officer Smyly. The latter explained his reasons for contacting Mr. Atkinson and the entire sequence of events. With Mr. Atkinson's residency on the property confirmed, the sergeant directed Officer Smyly to return Mr. Atkinson's student identification card and clear the scene. Officer Smyly then muted the audio on his BWC for approximately one minute to confer further with the sergeant as directed by BPD General Order 240-2(c)(3). Officer Smyly then returned the student identification card to Mr. Atkinson, and all the officers left the scene at approximately 8:52 a.m.

During the 16-minute standoff, multiple officers politely and calmly asked Mr. Atkinson to drop the trash grabber and sit down so they could talk. However, none of the officers explained why they wanted him to sit down. That lack of explanation solidified Mr. Atkinson's perception that he was not being treated honestly and fairly, which increased his agitation and heightened his berating of the officers.¹ The miscommunication and misunderstanding that had started 20 minutes earlier had escalated to this level. It was resolved without any injury or actual use of force because Mr. Atkinson did not get physically aggressive, because the officers exercised professionalism, calm, and restraint, and because the Naropa University employee interceded. At no point in the entire Incident did anyone use racial language, slurs, or innuendo (other than the Naropa University employee mentioning "profiling").

¹ Mr. Atkinson was aware he was being filmed by multiple cameras, and he gestured and narrated specifically for the camera being used by the fellow student filming from inside the dormitory. As that video and the BWCs demonstrate, Mr. Atkinson referred to the officers as "murderers," called them dumbasses, asked them "what are you going to do?", demanded that they get off "his property," told them they were wasting resources, and told them to "go solve some real crimes."

The PSU's Investigation, Report, and Review of the Incident

To put the PSU's processes and their application to the Incident into context, we set forth principles nationally recognized as best practices for internal-affairs work. We then summarize the BPD PSU's processes, and we conclude this section with an examination of how the PSU and BPD applied them in their investigation, reporting, and review of the Incident.

1. National Standards

National best practices require that internal police investigations be thorough, fair, and impartial. The national standards/best practices described in this report are set forth in the United States Department of Justice Office of Community Oriented Policing Services study entitled *Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice*. This study reflects collaboration on internal affairs best practices by 12 major-city policing agencies across the United States, representatives from other large and small policing agencies, consultants, and specialized topic experts. Those standards advise a fundamental test to determine thoroughness, fairness, and impartiality: does the investigation of the officer's conduct reveal and impartially present all the relevant facts the police chief needs to determine if the officer violated policy and to make a fair disciplinary decision if he did? To pass that test, the investigation must give a police chief sufficient information so that he/she does not have to resort to assumption, bias, or speculation. Fundamentally, the investigation must not overlook any relevant facts and must be objective. It must not slant for or against the officer, the victim, any particular interest, or any particular outcome.

How an investigation meets this high standard depends on the unique circumstances of each incident investigated. There is no checklist, no algorithm, that can apply this test; it is inevitably an incident-specific standard requiring human care and sound judgment. There are, though, recognized investigative steps that internal investigators must either take -- or be well justified in not taking -- for an investigation to be thorough, fair, and impartial:

1. Immediately review the complaint and known facts; confer with leadership to determine the rules potentially violated.
2. Review those rules.
3. Prepare a "complaint form" containing those rules and a description of the conduct alleged to violate them.
4. Create and follow a strategically sequenced investigation plan addressing all allegations.
5. Flexibly adapt during the course of the investigation if the facts indicate additional possible violations should be investigated.
6. Review all relevant videos including BWC and security camera videos.
7. Review all relevant written reports, statements, and records.
8. Examine and photograph the incident location.
9. Review all relevant physical evidence and photographs.
10. Collect and review follow-up materials (*e.g.*, crime data from the incident area, the officer's complaint history, and dispatch logs).
11. Create diagrams, charts, and summaries that digest or display relevant information.
12. Create interview-topic outlines.
13. Conduct and record thorough, unbiased interviews that do not rely on leading questions.
14. Create an incident timeline.

15. Prepare an incident summary.

16. Prepare a complete package of all relevant materials from the investigation.

Again, the best practice is to apply these steps flexibly and practically under the specific circumstances at issue so that fact-gathering is comprehensive and the review of those facts is dispassionate.

2. PSU's Processes

BPD's commitment to the above goals, and its processes to ensure they are met, are set forth in BPD General Order 120, entitled "Professional Standards Investigations." That General Order is comprised of 16 sections that set detailed timeliness, completeness, and fairness requirements for PSU investigations and reports. BPD General Order 120 is concise and comprehensive. It addresses the rights and responsibilities of all affected parties, the necessary investigation and reporting requirements, the order and deadlines of completion, and the due process for adjudication of discipline decisions. It is consistent with the City of Boulder and Boulder Police Officers Association 2018-2019 Collective Bargaining Agreement. It aligns with national best practices. It sets forth the following basic process: receipt and referral of complaints for review, classification of complaints based on the seriousness of the alleged police misconduct, consultation between PSU and command staff to make the appropriate classification and choose the appropriate rules allegedly violated, due process and timing for interviews and report completion, reviews and recommendations for discipline from command staff and the PSRP, administrative hearing, and final discipline decision by the police chief.

3. Application of General Order 120 to the Incident

As set forth below, the PSU investigation and reporting of the Incident -- and BPD's review and decision-making based on the PSU's work -- complied with the requirements of General Order 120 and met or exceeded national internal-affairs standards for thoroughness, timeliness, fairness, and impartiality.

a. The Investigation

The PSU Sergeant conducted the investigation and prepared its report. He has been a BPD member for 28 years. During that time he has gained significant investigative experience and received extensive investigative training as a detective, a patrol officer, a sergeant, a federal drug task force member, and (for the last four-plus years) in his assignment to the PSU.² In his current role, the PSU Sergeant regularly attends national internal-affairs training conferences and has conducted numerous PSU investigations (over the last several years, the PSU has conducted an average of approximately three investigations per year; prior to that and the advent of the current BWC system, PSU investigations were three to four times more frequent).

The Incident occurred on Friday morning March 1, 2019. The first complaint about the Incident came to Police Chief Greg Testa on Sunday, March 3rd at 7:20 p.m. in the form of an email to him from Mr. Atkinson's mother. In sum, that email stated that BPD officers had accosted her son as a "gang" brandishing weapons without explanation. It described the Incident as police brutality and harassment, and she respectfully requested that Chief Testa address the situation to "ensure that students and young people, particularly those of color, are safe" in

² The PSU consists of only one BPD member at a time. That person serves a term of five years, reports directly to the police chief, operates with the authority of the chief's office, is selected based on investigative and supervisory skill and experience, and receives valued promotional opportunities if he/she performs well in the PSU role. All of these components align with national best practices.

Boulder. Her email indicated she based her complaint at least in part on the civilian video filmed from inside the dormitory and later posted to Facebook. She attached a link to her email.

Four hours after she sent that email complaint, another citizen filled out and submitted a BPD online complaint form about the Incident. That complaint also attached a link to the Facebook video, described the Incident as involving "eight guns drawn on a black man picking up trash" and stated a BPD officer made the "profiling" comment actually made by the Naropa University employee. This complainant asked, "Why are the Boulder police profiling?" Over the course of the next several days, many more complaints came to BPD in the form of calls and emails based on viewings of the Facebook video. Complaints came from all over the United States and from several other countries.

Chief Testa responded to Mr. Atkinson's mother at 8:30 a.m. on Monday, March 4th. At the same time he referred the matter to the PSU Sergeant for "Administrative Review" per General Order 120-6. Administrative Review is the review performed by the PSU immediately after receiving a complaint from any source. The goal of that review is to determine whether the complaint merits PSU investigation per the General Orders as a "Class I Investigation." To help make that determination, the PSU Sergeant reviewed the Facebook video, the BPD BWC videos, and the available incident reports that same day. Per General Order 120, he also met that day with Chief Testa and a Deputy Chief to determine whether this matter should be a Class I Investigation and, if so, which potential rule violations the PSU would investigate. Like the PSU Sergeant, the Chief and Deputy Chief had already reviewed the videos and available reports about the Incident.

In that meeting, all agreed the Incident merited a Class I Investigation by PSU. They also agreed the investigation should focus on alleged violations of BPD Rules 5 and 8. Rule 5

prohibits BPD members from taking “any police action which they ... reasonably should know is not in accordance with the law.” Rule 8 requires BPD members to “use reasonable judgment and refrain from conduct which reflects unfavorably on the department,” which includes causing “embarrassment to the department, or ... compromis[ing] its reputation ... or ... impair[ing] its credibility.” During their consultation the PSU Sergeant, Chief Testa, and the Deputy Chief also discussed the possibility of other violations, including violation of General Order 200's prohibition on BPD officers using race in making law enforcement decisions. After discussion, they decided to include that racial prohibition in the PSU review materials and to investigate that issue, but not to list it as a violation in the PSU Complaint Form.

They decided not to allege a violation of the prohibition on using race in making law enforcement decisions for several reasons. First, they had no evidence that would support such a charge other than the fact of Mr. Atkinson's race itself. Second, if the PSU investigation did reveal such evidence, it would be considered in determining whether Officer Smyly violated Rules 5 or 8. Third, if the investigation developed evidence of race-based decisionmaking, the Complaint could be modified to include such a charge. Fourth, a PSU investigation of the broadest potential violations (Rules 5 and 8) would more likely inoculate the investigation from risk that a narrow focus on piecemeal violations would miss the bigger picture of Officer Smyly's conduct. These collaborative decisions were reasonable, did not seek to conceal potential officer misconduct, and complied with General Order 120-1(A), 4, and 5.

The next day, March 5th, the PSU Sergeant completed the Complaint Form opening this PSU Class I Investigation. He sent interview notices to all the on-scene BPD members except the subject of the investigation (*i.e.*, Officer Smyly). He gathered and began to review additional materials. Over the next 10 calendar days, the PSU Sergeant formed an investigative plan, wrote

a summary of the incident, created a log of investigative steps, created interview outlines, drafted a detailed incident timeline based on the BWC and dispatch data, and interviewed all eight non-subject BPD members and the Naropa University employee. Between March 16th and 28th, the PSU Sergeant obtained a written statement from the one CUPD officer who had been on scene, communicated with Mr. Atkinson and his mother, attempted to locate and interview the student who took the Facebook video, obtained crime data and analysis for the area, had the Incident site measured for key distances, obtained and reviewed Officer Smyly's history of prior citizen contacts, obtained and reviewed surveillance camera video, had scene diagrams created, examined the Incident site and took photographs, interviewed Officer Smyly, interviewed Mr. Atkinson, and assembled miscellaneous other materials. The PSU Sergeant completed this work on March 28th, 24 calendar days after he had started and 25 days after the complaint was first received. He completed PSU's work five days before the deadline set by General Order 120, which itself is six times tighter than the national standard for completing an internal-affairs investigation. He then submitted PSU's report package to the first of the four reviewers General Order 120 designates to make discipline recommendations and the final discipline decision.

b. The PSU Report

National standards require an internal-affairs report to

- comprehensively and impartially include all relevant information;
- be rigorously precise in summarizing interviews and constructing timelines;
- be devoid of opinions, conclusions, and outcome-oriented statements;
- be organized logically and in an easy-to-follow format;

- use clear, direct, concise sentence and paragraph structure, with technical terms explained simply; and
- maintain neutral tone, content, and structure.

General Order 120-7 itself is consistent with all of these standards.

The PSU Sergeant's speed in completing the PSU investigation did not sacrifice thoroughness or fealty to these standards. Specifically, he created the following complete PSU report package for decisionmakers to review:

- Class I Complaint Report and attachments (12 pages) (prepared in compliance with General Order 120-6);
- Case Summary (three pages);
- Incident Timeline (two pages);
- Supporting Documents (130 pages, including relevant BPD Rules and General Orders, scene sketch, photos, BPD on-duty data for March 1, 2019, witness list, officer incident reports, and the other material set forth above);
- Audio Files (12 files: recorded interviews of nine officers and two citizens, one citizen voicemail message) (all interviews conducted and recorded per General Orders 120-3(F) and 120-7(H), (I)(2)); and
- Video Files (11 files: eight BWC videos, one surveillance camera video, one Facebook video, and one video clip of Mr. Atkinson's Boulder Community Forum statement).

A representative example of the thoroughness of the PSU Sergeant's investigative work reflected in the PSU report package is his review of Officer Smyly's "Stop Data." Starting in September 2017, BPD required its members to collect and record certain data about all officer-

initiated vehicle and pedestrian stops, per General Order 109. That data includes, among other things, date, time, location, duration, identity, age, race, whether a BWC was used, reason for stop, and result. The PSU Sergeant collected and reviewed all of Officer Smyly's Stop Data since that General Order's inception to determine if his citizen contacts revealed any patterns of racial profiling. The PSU Sergeant hand-searched each of Officer Smyly's stops and looked for any disparities based on the race of the individual contacted. He found none. In our review of PSU's work, we did the same and confirmed there were no apparent racial disparities reflected in Officer Smyly's number of stops, duration of stops, types of stops, reasons for stops, results of stops, use of BWC during stops, or searches of people he stopped.

Another important example of the PSU's work reflects its impartiality. The complaints that triggered the PSU investigation invoked racial profiling and cited in support the "profiling" comment and the "guns pointed" allegation. Within 20 minutes any objective viewer of the BWC videos would see it was not an officer but instead a Naropa University employee arriving at the end of the standoff who made the "profiling" comment. Additionally, an objective viewer would observe officers did not have their weapons pointed at Mr. Atkinson.

An objective viewer also would see in the first few minutes of Officer Smyly's BWC video that there is strong evidence he violated Rules 5 and 8 by misjudging reasonable suspicion and pursuing date of birth information he had no right to obtain. Thus, at the outset of the PSU investigation it would have been easy to focus entirely on the latter clear violations and rationalize the curtailment of any further investigation of race. But it would not have been thorough and impartial, so the PSU Sergeant continued to investigate that issue, both by combing through Officer Smyly's Stop Data and by probing the race issue with Officer Smyly in his interview and in the interviews of the six officers who were present the longest and who

were most involved in the standoff. In police departments with sub-standard internal affairs performance, this is exactly the kind of impartial work on parallel issues that is often overlooked. It was not here.

In sum, the PSU Sergeant's work complied with national standards. He completed his investigation and report on schedule, he followed the letter of General Order 120, he neither overlooked relevant evidence nor wasted time on irrelevant evidence, he prepared thoroughly before interviewing witnesses, he interviewed them in strategic order, he recorded his interviews, his interviews were fair and thorough, he did not try to produce particular answers via leading questions, he objectively judged witness credibility, he did not jump to conclusions, he did not favor any party or interest, and he wrote accurate summaries of those interviews and the dispatch and BWC evidence. He also ensured administrative due process for Officer Smyly per General Order 120-3(D), (E). The investigation was as comprehensive as reasonably necessary, consistent with General Order 120 and national standards.

As a result, he presented in his work a fair, thorough, and impartial picture so reviewers could reach sound, reliable decisions. When we interviewed the PSU Sergeant, he convincingly affirmed that he never received any pressure, influence, or bias from any source to reach a particular outcome. He emphasized it was his job to collect any and all relevant information for decisionmakers. In our thorough review of PSU's work and extensive interviews with the PSU Sergeant, PSRP panelists, and other BPD members, we saw no evidence of bias or outside influence.

c. The Review

The PSU report package was delivered to Officer Smyly's sergeant, his commander, a deputy chief, and Chief Testa within the timeframe required by General Order 120. Each supervisor was able to complete a timely recommendation for disposition as required by that General Order because each found the PSU report package to include all relevant and unbiased information, objectively and accurately presented, necessary to determine by a preponderance of the evidence whether Officer Smyly violated Rules 5 and 8 -- and necessary to determine whether Officer Smyly had improperly considered race in his decisionmaking. Chief Testa found the PSU report package met that standard and therefore allowed him to reach a fair and impartial recommendation for final disposition, applying the proper standard of review and evaluating the evidence against the relevant charges. The sergeant, commander, deputy chief, and chief benefitted from the PSU report package's compliance with national standards for thoroughness, completeness, integrity, impartiality, and clarity of organization and expression. Thus, the supervisory disposition review was completed per General Order 120-8 and 10 requirements.

The PSU also complied with General Order 120-9. That General Order governs the function of the PSRP. The PSRP is comprised of 12 members who serve two-year, renewable terms. Six of the panelists are non-law enforcement community members selected by the City Manager through a rigorous process. The other six are BPD representatives selected by the chief with input from the police and municipal employee unions. All panelists receive special training. After supervisory review of a PSU report package, each PSRP panelist separately reviews that package. The PSRP then meets, discusses whether the investigation and materials are sufficiently thorough, discusses the evidence and alleged violations, has an opportunity to question BDP representatives about the investigation, and issues its comments as to whether the PSU's

investigation was fair, complete, and accurately reported. It also issues its recommendations on the disposition of the alleged violations.

In this case, the PSRP unanimously agreed and recommended that Chief Testa sustain violations of Rules 5 and 8. In other words, panelists found by a preponderance of the evidence that Officer Smyly violated those Rules. In their written comments and in separate interviews we conducted with three of the community-member panelists and one of the BPD panelists, the PSRP expressed their complete satisfaction with the thoroughness, accuracy, integrity, and impartiality of the PSU report package and their own deliberative process. The PSRP spent approximately 2.5 hours discussing this case. That included a probing discussion about the thoroughness of the PSU report package, and the panel concluded it lacked nothing. Panelists found it helpful that the PSU Sergeant had mined Officer Smyly's Stop Data for evidence of racial bias. In that vein, the panel discussed whether there was sufficient evidence to find that racial profiling had occurred and concluded that there was not. As further evidence that the PSRP process itself was conducted fairly and impartially, we note that one of the six BPD panelists recused herself from the case to avoid even an appearance of partiality because she had worked with Officer Smyly.

Second PSU Investigation

We are aware that a second Class I PSU investigation was initiated on April 2, 2019, regarding Officer Smyly. That investigation was based on a citizen complaint emailed on March 23, 2019, to the Boulder City Council. The email was from a black citizen who alleged that more than two years prior Officer Smyly had an extended consensual contact with him regarding a potential car theft. The complainant felt that he had been racially profiled. There was no use of force, no detention, and no arrest. While we believe it would have been consistent with best

practices to fully investigate this complaint and then brief BPD supervisors and PSRP panelists, the circumstances prevented BPD from doing so. Specifically, the complaint was unsubstantiated, there were complainant credibility issues, there was no BWC video available, and by the beginning of April 2019 Officer Smyly's attorney was engaged in settlement negotiations with the City and he was unavailable for interview. Therefore, the investigation of that 2017 incident could not be substantiated and fairly included for consideration in the Atkinson report package.

We believe the decision not to include unsubstantiated information from more than two years prior in the Atkinson PSU package demonstrated sound judgment on the part of BPD.

Our Conclusions

1. The PSU Investigation was Conducted in a Competent, Independent, and Professional Manner. The BPD's PSU process meets national standards, and that process was faithfully applied in this case. The PSU investigation resulted in a complete, thorough, impartial report package that reviewers, PSRP panelists, and decisionmakers could rely on to make fair, sound decisions and recommendations. The PSU system and the people who executed its mandates operated successfully even under time pressure and community scrutiny. The PSU Sergeant and the command staff gave careful investigative attention to both the racial-profiling allegation and the reasonable-suspicion errors. Tunnel vision is a common affliction in internal investigations, especially when it conveniently allows police departments to avoid severe allegations like racism. Here, the PSU Sergeant and command staff did not succumb to it.

2. There is No Indication that the Investigation was Subjected to Any Outside Influence or the Product of Any Bias. We found no evidence that bias or outside influence tainted this investigation. It was clear from our interviews and from listening to the audio recordings of his interviews that the PSU Sergeant conducted himself throughout the investigation as an impartial factgatherer. He did not omit or avoid investigative steps or facts. He did not ask leading questions or otherwise direct witnesses to a desired response or outcome. He did not favor a particular result or party. He treated witnesses and complainants kindly, fairly, and respectfully. It was also clear the culture of the BPD would make it very difficult to drive a PSU investigation to a desired outcome or otherwise influence it even if someone tried. The PSU Sergeant, other BPD members, and PSRP panelists all appear to feel respected and comfortable sharing their opinions without fear of retribution. We also found no evidence, direct or indirect, that bias in favor of “one of their own” infected the PSU’s work here. Again, the only “outside influence” was the community’s express desire to have the investigation completed quickly.

3. The Resulting Disciplinary Recommendations were Appropriate Based on the Evidence. Chief Testa did not make a final discipline decision in this case because the parties negotiated a settlement. However, the discipline *recommendations* presented by Officer Smyly’s sergeant, commander, and deputy chief were reasonable, appropriate, honest, and grounded in the evidence presented in the PSU report package.

4. The Special Counsel's Recommendations and Observations Regarding BPD's PSU Review Process. We offer several observations regarding the PSU process based on our experience and what we learned during our review. The first is simple: if it ain’t broke,

don't fix it. The process and its application in this particular case strongly indicate that internal affairs at BPD ain't broke. We also know from our experience that reliable, impartial internal-affairs processes can be hard to come by. They are precious, and they are very hard to repair once broken. We offer these observations so that the City does not take action that inadvertently and irretrievably breaks a system that did not need fixing.

Second, and with that observation in mind, we strongly suggest BPD formalize an official staff employee position to support the PSU Sergeant. The staff person should be trained and specialized in the PSU processes, forms, and administrative functions, and should do other duties secondarily, rather than vice versa. Though the PSU only investigates about three Class I cases a year, those cases will be handled under much less stress, and the risk of error due to time pressure and workload will be reduced, if trained support staff is ready when needed. Similarly, BPD currently has a PSU Sergeant who is exceptional at his job. He will be very difficult to replace when his five-year term ends. His replacement must be selected carefully. We raise this in case his high level of performance has lulled leadership into thinking that level of performance is easy to come by. It is not. If a replacement is not carefully selected, trained, mentored, and supported, many of the exceptional qualities we saw in the PSU review of the Incident may be lost.

In addition to training for future PSU members, we also recommend BPD examine its training program for all officers to ensure it satisfies or exceeds the training requirements maintained by Colorado's Peace Officer Standards Training Board. Specifically, we encourage BPD to refresh or enhance training related to sound judgment and legal standards for consensual contacts, reasonable suspicion, and detentions. BPD should also add professional implicit-bias training to its regular annual curriculum.

Though we did not find officer conduct in this case that was driven by bias, it is critical for all law enforcement agencies to conduct sustained training that enables their officers to execute their duties in a fair, fact-based, and impartial manner.

Our third observation is that the PSRP functions very effectively. As noted, 50% of the PSRP panelists are non-law enforcement community members. The recommendations of that panel are clearly of great value to the police chief. The panel's recommendations just as clearly would not be as insightful if the composition were either 100% community members or 100% BPD members. Both need each other. It was notable to us how much value each constituency sees added by the other. It was also notable to us that the community members are fully empowered to express their views, do so freely and strongly, and give no appearance of being coopted by law enforcement. This too is a precious thing.

Fourth, we note that BPD does not use the default national standard for police officer discipline decisions imposed after an internal investigation. Specifically, the general Department of Justice standards recommend police agencies impose discipline (from admonition letters to termination of employment) based on a "matrix." In essence, a matrix system assigns a number for each type of police misconduct and a number for an officer's prior misconduct history, and the resulting combination of those numbers directs a police chief to the specific discipline to be imposed. BPD does not use a matrix system. It uses a "progressive discipline system," which relies on exacting case-by-case decision-making, not robotic calculations. There is much debate about the pros and cons of both systems. A progressive discipline system tends to fit best in a department of BPD's size

(or smaller) with experienced and collaborative upper management like BPD's, and we conclude it is appropriate for BPD based on our review of this case.

Finally, we address the question often foremost in the community's mind after an experience like Mr. Atkinson endured that March 1st morning: can we ever really trust the police to police themselves? It is our opinion based on our experience and extensive review here that we can, and that we should in this case. But decisions we can trust do not come automatically, and they cannot be guaranteed simply by imposing more machinery and more oversight. Reliable internal-affairs decisions, and trust, come when a police department has experienced leaders who foster a culture of integrity, excellent internal-affairs staff, community-member input like that from the PSRP, and a firm but flexible process for accountability like BPD General Order 120.