

**REPORT OF INVESTIGATION**  
**CONTINUATION OF IA 2011-09-297**

On October 18, 2011, after an investigation conducted by Captain Nikki Dofflemyer, Internal Affairs for the Department of Public Protection, a Notice of Intent to Dismiss was issued and served on Captain Richard Gardner of the Division of Beach Safety.

On October 24, 2011, Jonathan D. Kaney III, Esquire, representing Captain Gardner, authored a thirteen (13) page letter in response to the Notice of Intent to Dismiss, which provided additional information and made several allegations of fact which had not been fully developed in the initial investigation. In order to provide for fairness to all parties and assure a complete investigation of the allegations against Captain Gardner, the Director of Public Protection requested that the County Attorney's Office continue the investigation and Larry Smith, Deputy County Attorney was assigned to conduct additional interviews and gather evidence in order to determine whether or not the allegations of the Notice of Intent to Dismiss or Mr. Kaney's response of October 24, 2011, were supported by the facts. This Report is the result of those interviews and the gathering of that evidence.

I have attached both the Notice of Intent to Dismiss and the thirteen (13) page letter from Mr. Kaney to this Report in order that the matters discussed in this report can be understood in context.

**Factual Summary and Potential Violations**

Captain Richard Gardner was served with a Notice of Intent to Dismiss ("NOI") for violation of Sec. 86-453 and Section 86-45 (Code of Conduct), Volusia County Merit Rules and Regulations and Section 11.01.05, Division of Beach Safety Policies and Procedures. These allegations were based upon his actions connected with two(2) romantic, sexual affairs with subordinate law enforcement officers employed by Volusia County Beach Safety, Officer Cara Gittner and Officer Paige Winters. Captain Gardner and Officers Gittner and Winters admit that the affairs took place.

Captain Gardner apparently takes the position that his actions were not violations of any policies or rules of Volusia County and that his dismissal is not based upon just cause.

### **Collateral Matters Raised in Response to NOI**

Mr. Kaney's letter in response to the NOI raises two matters which are collateral to the question of whether Captain Gardner should be disciplined.

The first is the accusation that Director Michael Coffin "manufactured" evidence in order to find Captain Gardner in violation of Volusia County rules and policies. What is alleged is criminal conduct apparently associated with Director Coffin's recollection of a conversation with Captain Gardner when Captain Gardner was being considered for the position of Deputy Chief of Volusia County Beach Safety Division. Director Coffin stated that he asked Captain Gardner "whether there was anything in your background which could cause embarrassment to the Division and you said, 'No.' Clearly these statements were misleading and untrue." [page 3 of 4, NOI].

Because this last statement was referred to as being a false statement by Captain Gardner and was raised as being "manufactured" evidence in Mr. Kaney's response, I questioned Deputy Chief Scott Petersohn [who was apparently asked questions similar to those asked of Captain Gardner in an interview with Director Coffin] and Director Mike Coffin. Because I presently represent Director Kevin Sweat in a civil action, I requested that John Whiteman, Esquire question Director Sweat on this subject. I understand that Director Coffin, because of the allegation of criminal misconduct, self-reported this to State Attorney's Office for whatever action it deemed appropriate. However, after my questioning, and that of John Whiteman, I found that there was no consensus in the memories of those involved in this interview on what Director Coffin asked of Captain Gardner. For example, Deputy Chief Petersohn did not remember the questions asked but took the questions to be asking about the Drury case. Director Sweat did not remember the question being asked by Director Coffin and could not recall the exact questions. But, later when asked if Director Coffin could have asked

something like [what is alleged to have been asked], Director Sweat answered, "He may have." It is my judgment that, without that consensus, an allegation that Captain Gardner gave a false statement in response to Director Coffin's questions cannot be sustained. I consider the criminal allegations to be a collateral matter for the Office of the State Attorney.

Part of Mr. Kaney's response on behalf of Captain Gardner was devoted to "Anonymous" letters received by the Director of Public Protection and which played a part in instituting this internal affairs investigation. Much of Mr. Kaney's attention was directed at identifying the author of the envelopes which contained the "Anonymous" letters. To that end, Mr. Kaney attached handwriting samples from Officer Thomas McGibney and a report from Mr. Don Quinn, who identified himself as a "Forensic Document Examiner". Mr. Quinn offered the opinion that Officer McGibney authored the handwritten envelopes.

Because this raised an issue which Captain Gardner believed was important, I questioned Officer Thomas McGibney, under oath, and he unequivocally denied either authoring the envelopes or having any knowledge of who authored the envelopes or who sent the "anonymous" letters. Subsequently, an attorney representing Mr. McGibney has advised me that another handwriting expert has offered the opinion that the handwriting on the envelopes in question is not Officer McGibney's.

I consider the issue of who authored the letters as collateral to the questions of whether Captain Gardner violated rules, regulations or policies of Volusia County. The real question is whether the allegations contained in the letters were accurate. In any event, even if this was relevant to my inquiry, there is no way to resolve this issue in light of the contradictory opinions of experts and no direct evidence of who authored the letters or the envelopes.

## **Factual Basis for the NOI**

### **Affair with Officer Paige Winters**

There is no question but that Captain Richard Gardner, while serving as the head of investigations for Volusia County Beach Safety and also while serving with some regularity as Acting Deputy Chief for that Division, carried on a romantic, sexual affair with Officer Paige Winters, a female officer who was on probation because of only recently becoming a law enforcement officer. Captain Gardner, through his attorney apparently takes the position that this extra-marital affair did not violate any County policy and was simply two consenting adults engaging in an off-duty romantic relationship. Mr. Kaney gives support to this argument by stating that Beach Safety does not have an anti-fraternization policy and there is nothing wrong with this kind of relationship “so long as one does not directly report to the other. . .” [page 6 of Kaney Letter, 10/24/2011].

The evidence adduced by me is that this romantic relationship lasted, according to Officer Winters, about one month during August and September, 2011. During that time, Captain Gardner did serve as Acting Deputy Chief when Officer Winters was also working. When Captain Gardner was Acting Deputy Chief, he was the highest ranking officer on duty with Volusia County Beach Safety. According to Officer Winters, she and Captain Gardner spoke about keeping their relationship quiet “because he was married and because he is sometimes an acting deputy chief.” [page 44, Statement of Elizabeth Paige Winters]. She realized that others in Beach Safety probably knew they were a “couple” by the way they acted in social settings.

Because Captain Gardner declined to give a sworn statement asserting violations of the Police Officer Bill of Rights, I do not know his position on Officer’s Winters testimony.

### Affair with Officer Cara Gittner

According to Officer Cara Gittner, she and Captain Gardner were involved in a romantic, sexual affair between February 2009 and August 2011. While she described this relationship as off and on, I was unable to determine what dates they were "off" and those when they were "on."

While Mr. Kaney's letter states that Captain Gardner was not Officer Gittner's "direct supervisor," that appears to be inaccurate. The sworn testimony of Officer Kyle McDaniel, who states that he is a friend of Captain Gardner and who served as Captain Gardner's assistant for some time while he was employed by Beach Safety; the testimony of Officer Andrew Ethridge, another friend of Captain Gardner who also served in investigations with Beach Safety; the testimony of Captain Tammie Marris; and work schedules and records of Beach Safety reflect that Officer Gittner worked with and under the direction of Captain Gardner on numerous occasions between 2009 and 2011 and that Officer Gittner performed numerous tasks for investigations, over which Captain Gardner supervised, and also spent a great deal of time on details and investigations where Captain Gardner was in charge during their two year affair.

First, in Captain Gardner's sworn statement to Captain Nikki Dofflemyer [taken October 6, 2011], Captain Gardner was asked the following questions and gave the following answers:

Dofflemyer:	Do you directly supervise her [Gittner]?
Gardner:	No
Dofflemyer:	Have you ever been her direct supervisor?
Gardner:	No ah..no

[Statement of Richard Gardner, page 9 of 30].

Even though Captain Marris was Officer Gittner's direct supervisor for most of this two year period, she testified that Officer Gittner worked under Captain Gardner "quite often"; she "was with him all the time. Any time something came up that had anything to do with investigations in our zone she got the information and assisted him with things." This occurred a couple of times a week, according to Captain Marris. And Officer Gittner was requested by Captain Gardner to work in

investigations during the time of their affair. This occurred often enough that Captain Marris included Officer Gittner's work in investigations in her evaluation.

Officer Kyle McDaniel, now a Deputy Sheriff in Volusia County, considers himself to be a close friend of Captain Gardner [Statement of Kyle McDaniel, page 11-12]. At the time of his statement to me, he had recently returned from a cruise with Captain Gardner and other mutual friends, including Andrew Ethridge. Officer McDaniel worked with Captain Gardner in investigations for approximately one year during 2010 and 2011. He has also known Officer Cara Gittner for maybe five years. He knew that Captain Gardner and Officer Gittner were in a relationship and he didn't agree with it. Captain Gardner and Officer Gittner worked out together every day. In Officer McDaniel's words, Officer Gittner "followed him [Gardner] around like a puppy dog." If he and Gardner were on a call, Gittner showed up. He assumed they were texting all day because Gardner's phone would go off "a hundred times a day." [Statement of Kyle McDaniel, page 36-37]. McDaniel did not like what Officer Gittner was doing to Captain Gardner and his wife, and he spoke directly to Captain Gardner about stopping Gittner from coming around. McDaniel also spoke to Gittner about coming around on investigations. He also described Gittner as showing up on investigations with Gardner "maybe once or twice a week, if that." Officer McDaniel also remembered Gittner and Gardner working outside details at the Ocean Deck together and records of Beach Safety support that.

Officer McDaniel also testified that it was well-known among Beach Safety officers that there was a romantic relationship between Gardner and Gittner. He recalled telling Officer Gittner "you need to stop messing around with Captain Gardner." [Statement of Kyle McDaniel, page 45]. When asked generally if he wanted to tell us anything, Officer McDaniel, stated:

" I think that Captain Gardner and Officer Gittner's behavior was inappropriate and that everyone in the department saw it and nothing was done about it, I don't agree with that. I think

something should have been done with, you know, the situation and handled and it wasn't. And I think it just spiraled out of control since then." [Statement of Kyle McDaniel, page 61-62].

Officer Andrew Ethridge, a law enforcement officer with Volusia County Beach Safety, describes Captain Gardner as "a personal friend and a coworker." [Statement of Andrew Ethridge, page 6]. Ethridge has worked for Beach Safety since 1996 and has known Captain Gardner "maybe a year longer than I've worked here." [Statement at page 6]. He was also on the recent cruise with Captain Gardner. He also worked with Captain Gardner on details and investigations. He was trying to get into investigations and worked in investigations as much as possible. Like others, he knew that Gardner served as Acting Deputy Chief in addition to acting as the head of investigations with Beach Safety. When Gardner served as Acting Deputy Chief, he was the commanding officer and everyone on duty would ultimately answered to him. [Statement, page 10-11].

Officer Ethridge also noticed that "every time he [Gardner] would go out on a call, she [Gittner] would be the first backup. Every time there was a report to be done, they were shoulder to shoulder." [Statement, page 25]. Gittner was very vocal about trying to get the investigation spot. That was a position that Officer Ethridge was also vying for. [Statement, page 26]. When Captain Gardner would be working a detail at Ocean Deck, Officer Gittner would "be there for hours by herself, you know what I mean, hanging out." [Statement, page 34]. But, this was frustrating to Officer Ethridge trying to vie for a position against this person who was obviously very close to the investigator. [Statement, page 34]. He noticed that Gittner was "always on calls with him [Gardner]". When Ethridge spoke to Officer Gittner about ending the relationship, after the affair had become public, her response was, "Well, I'm trying to be an investigator." Ethridge asked her if she was going about it the right way. [Statement, page 36]. He also recalled that Gittner would speak about working with Gardner on cases. [Statement, page 38]. And, according to Ethridge, even

though she did not qualify because of her lack of time with Beach Safety, she applied for the investigator's position when there was an opening. [Statement, page 42].

Ethridge clearly observed Officer Gittner and Captain Gardner working on investigations together. [Statement, page 44]. This is also supported by schedules and reports that are part of the records of Volusia County Beach Safety.

It seems clear, from the testimony and evidence adduced in this investigation, that Officer Gittner worked under the authority of Captain Richard Gardner throughout the time of their two year affair; that others in the Beach Safety Division were aware of the relationship; and that this affected how other officers, and even those close to Captain Gardner, viewed his impartiality in dealing with Officer Gittner.

The records of the Beach Safety Division make clear that Captain Gardner recommended Officer Gittner for a commendation for investigative work which she had performed while working under Gardner's authority. [See: Email dated November 25, 2009, from Captain Richard Gardner to various officers including Director Sweat]. Officer Gittner confirmed that the two of them had worked together on duty and on off-duty details, but she could not say how many. [Statement, page 43, 48] .

During the time period when Captain Gardner and Officer Gittner were involved in their affair, and during the weekend of August 6-7, 2011, when Captain Gardner was serving as Acting Deputy Chief, he was called by Officer Gittner to her home at 1:00 a.m. She described herself as "upset and crying." [Statement of Cara Gittner, page 70]. According to Officer Gittner, Captain Gardner knew that she was upset and that she had been in and out of EAP for depression. She and Captain Gardner had been arguing for hours that evening. [Statement, page 70-71]. She and Captain Gardner were "both mad." [Statement, page 74]. She wanted to quit her job and wanted for him to take her service weapon and her personal weapon. Baker Act was mentioned between them. This



incident was never reported by Captain Gardner and he returned the guns to Officer Gittner the next morning. But, Captain Gardner told her that he might be in trouble for not reporting that he came and took her guns.

Captain Gardner made a similar statement to Officer Andrew Ethridge when he said that “what they were going to hang him on, was the fact that he didn’t report that she turned in her guns and badge to him.” [Statement of Andrew Ethridge, page 47]. When asked about this incident, Deputy Chief Scott Petersohn stated that whether Officer Gittner was in control of her normal faculties or was simply talking about resigning, this should have been documented and it should not have happened this way. It should have been documented and passed on to Director Sweat. [Statement of Scott Petersohn, page 36-37]. This is another reason that the administration needs to know about the relationships between officers of Beach Safety. [Statement, page 36-37].

There is also conflicting evidence between Officer Gittner and Captain Gardner about whether he “hacked” into her Facebook account in order to obtain personal information about her. She testified that he did and he denied that.

#### **Gardner’s Statement to Director Sweat**

Although we received various versions of a conversation between Director Sweat and Captain Gardner where Sweat asked Gardner about his relationship with Officer Gittner, the only reliable evidence received is Director Sweat’s account. In the Beach Safety chain of command, Captain Gardner reports directly to Director Kevin Sweat. [Statement of Kevin Sweat, page 22-23]. Various charts and graphs showing the structure of Beach Safety confirm this to be true.

Somewhere between six and twelve months prior to giving his statement on December 13, 2011, Director Sweat asked Captain Gardner to come to his office and asked him “if he was in an inappropriate relationship or romantic relationship with Cara Gittner.” Captain Gardner told Director Sweat that he was not and that they were just friends. [Statement of Kevin Sweat, page 24].

Officer Cara Gittner testified in her sworn statement that she and Captain Gardner had been involved in a romantic, sexual relationship for months before a similar conversation that she remembers having with Director Sweat, about the same time, and that they renewed their romantic relationship after this conversation. In fact, Mr. Kaney states that “the relationship subsequently resumed [after this conversation], but Director Sweat did not thereafter ask again.” Mr. Kaney’s position apparently is that Director Sweat would have to ask Captain Gardner over and over again until he came to a date when Officer Gittner and Captain Gardner were engaged in their romantic relationship in order to get a “yes” answer.

When asked why he asked Captain Gardner about the relationship, Director Sweat testified that he had seen them together on a continual basis, every single day and considering what had gone on the last three years, “I thought it would be appropriate for me to ask him. . .” He continued, “I think at the time it was very important for me to understand what was going on in the department as far as relationships, no matter what, for the fact of making sure the working relationship was not compromised by a social relationship.” [Statement, page 25].

As Director Sweat explained, he had a standard rule that he did not allow employees who are dating to work in the same zone. If Captain Gardner had told him that he was in a relationship with Officer Gittner, he would “absolutely” have taken action and made his superiors aware that there was a relationship occurring. [Statement, page 26].

As to Director Sweat’s expectations of Captain Gardner when he asked the question about a relationship with Officer Gittner, he stated:

“I would like to think anybody should be forthright, should volunteer the information if they’re especially in a supervisor level of that magnitude.” [Statement, page 27].

Further, Director Sweat expected that his Captain in charge of investigations, should have disclosed the “rekindled” relationship when he was interviewed for the Deputy Chief position. On this subject, he stated:

“... I think at a deputy chief’s position you’ve got to lay everything on the table at that point to me and to make sure that – I’m putting him in a position of almost the highest position in the department, and unfortunately, whether we like it or not, any relationships at that level would inappropriate.” [Statement, page 36].

In fact, Director Sweat testified specifically that if the relationship was rekindled, he expected Captain Gardner to tell him or Director Coffin. [Statement, page 36].

At no time did Captain Gardner ever come to Director Sweat and tell him about his relationship with Officer Gittner.

In fact, according to Officer Gittner, she and Captain Gardner made a “mutual decision” not to tell anyone at Beach Safety about their relationship. [Statement of Cara Gittner, page 66-67]. They had conversations about keeping their relationship secret “all the time.” [Statement, page 66].

#### **Practice at Beach Safety - Officer Dating and Working Together**

As explained by Director Kevin Sweat, he had a standard rule that he did not allow employees who are dating to work in the same zone. [Statement of Kevin Sweat, page 26]. In fact, he recited a couple [Captain Mindy Greene and Officer Thomas McGibney] who advised Director Sweat of their relationship and Officer McGibney was moved to another zone. [Statement, page 39]. It was at this time that Officer Gittner volunteered to be moved to the Daytona zone [where Captain Gardner was most often located].

This was confirmed by Deputy Chief Scott Petersohn, who has been employed by the Beach Safety Division since 1975, and testified that if a captain disclosed that he was having a romantic relationship with a subordinate, they would be separated. [Statement of Scott Petersohn, page 33]. He cited the Greene/McGibney relationship as well two supervisors [Captain Driscoll and Captain Liz Johnson] who are never allowed to work together. [Statement, page 33]. According to Deputy

Chief Petersohn, this practice and rule has been in effect "as long as—as far back as I can remember. Way before I got into this position they were practicing it." [Statement, page 33;34].


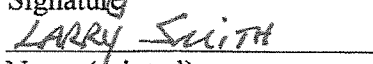
Even though we did not have an opportunity to question Captain Gardner about his knowledge of this rule and practice, it is reasonable to assume that he knew of this rule when he had the conversation with Director Sweat and when he and Officer Gittner decided to keep their relationship a secret.

After Captain Gardner and his attorneys left the scheduled and noticed interview, and after they had reviewed over a four hour period all sworn statements taken by me and all documentary evidence which had been discovered in my continued investigation, I wrote a letter to Captain Gardner, with copies to his attorneys. This letter, dated December 20, 2011, offered Captain Gardner one last opportunity to submit any additional factual matters which he desired for the appointing authority to consider so long as those additional matters were submitted to me at the office of the County Attorney no later than Thursday, December 22, 2011, at 9:00 a.m. No additional matters were received from Captain Gardner.

**Concluding Statement:**

Unless otherwise directed, this investigation is considered closed, and has previously been submitted for review and action as deemed appropriate. The original attachments of interviews and other documents pertaining to this investigation remain on file with the Internal Affairs Unit.

I, the undersigned, do hereby swear, under penalty of perjury, that, to the best of my personal knowledge, information, and belief, I have not knowingly or willfully deprived, or allowed another to deprive, the subject of the investigation of any of the rights contained in ss. 112.532 and 112.533, Florida Statutes.

  
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Signature  
  
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Name (printed)