

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF POLICE COMPLAINTS**

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	09-0533
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER, Fifth District
<b>Allegation 1:</b>	Harassment
<b>Complaint Examiner:</b>	Paula Xinis
<b>Merits Determination Date:</b>	March 18, 2011

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC), formerly the Office of Citizen Complaint Review (OCCR), has the authority to adjudicate citizen complaints against members of the Metropolitan Police Department (MPD) that allege abuse or misuse of police powers by such members, as provided by that section. This complaint was timely filed in the proper form as required by § 5-1107, and the complaint has been referred to this Complaint Examiner to determine the merits of the complaint as provided by § 5-1111(e).

**I. SUMMARY OF COMPLAINT ALLEGATIONS**

COMPLAINANT alleges that SUBJECT OFFICER harassed him when the Officer unlawfully arrested him for “disorderly conduct-loud and boisterous” on February 23, 2009. COMPLAINANT further alleges that the SUBJECT OFFICER arrest was baseless as it was solely the product of COMPLAINANT’s protestations following the Officer’s request for COMPLAINANT to leave the area in front of a Giant Food Store in Northwest D.C.<sup>1</sup>

**II. EVIDENTIARY HEARING**

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC’s Report of Investigation, the Complaint Examiner determined that the Report of

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<sup>1</sup> COMPLAINANT also alleged in his initial complaint alternative bases for his harassment claim, including an allegation that the SUBJECT OFFICER unlawfully arrested COMPLAINANT for assault on a police officer and felony threats. COMPLAINANT then filed a subsequent complaint on May 17, 2010, alleging that on February 3, 2010, SUBJECT OFFICER retaliated against him for filing the initial complaint by falsely arresting COMPLAINANT on an additional charge of unlawful entry. Pursuant to D.C. Code § 5-1108(1), on January 6, 2011, a member of the Police Complaints Board dismissed these allegations, concurring in the determination made by OPC’s executive director. Accordingly, only the February 23, 2009 harassment allegation requires resolution.

Investigation presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs., title 6A, § 2116.3.

### III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation and the objections submitted by SUBJECT OFFICER on February 3, 2011, the Complaint Examiner finds the undisputed material facts regarding this complaint to be:

1. On August 29, 2009, at 2:30 p.m., COMPLAINANT was seated on a crate eating a donut outside the Giant Food Store located at 1414 8<sup>th</sup> Street, Northwest, D.C. About eight to ten other individuals were also congregated near the store entrance and in the same general location as COMPLAINANT.
2. SUBJECT OFFICER was working at the Giant Food store and was in uniform as required when M.P.D. officers work private duty in addition to their official shifts.
3. Because the group was congregating near the store, SUBJECT OFFICER told the group of individuals that included COMPLAINANT to "move on." All the individuals except COMPLAINANT left the area.
4. At the same time, COMPLAINANT was on the phone talking to his girlfriend who was informing COMPLAINANT that she was at the hospital.
5. COMPLAINANT was attempting to learn from his girlfriend the specific hospital when SUBJECT OFFICER specifically directed COMPLAINANT to leave the area.
6. COMPLAINANT protested. One store patron and SUBJECT OFFICER claim that COMPLAINANT became verbally abusive.<sup>2</sup>
7. COMPLAINANT was then arrested for "Disorderly Conduct - Loud and Boisterous" in violation of D.C. Code § 22-1307.

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<sup>2</sup> SUBJECT OFFICER claims, in his OPC witness statement, that COMPLAINANT'S initial response to the Officer's demand to move on was to shout "You're not gonna tell me what to do. This is America. I grew up around here." The SUBJECT OFFICER further claims in his initial Arrest/Prosecution Report that COMPLAINANT also yelled "fuck you, motherfucker. I ain't going nowhere and you can't make me do shit. I am a grown ass man." While no other witness reports hearing these precise words, and while COMPLAINANT does not admit to using such language prior to his arrest, these statements are by far the most offensive and verbally abusive comments attributed to COMPLAINANT. For purposes of this decision, specifically as to whether COMPLAINANT'S conduct would have justified SUBJECT OFFICER'S decision to arrest him for disorderly conduct- loud and boisterous, this examiner will accept as true that COMPLAINANT responded as SUBJECT OFFICER reports.

#### IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a), “The Office [of Police Complaints] shall have the authority to receive and to ... adjudicate a citizen complaint against a member or members of the MPD ... that alleges abuse or misuse of police powers by such member or members, including: (1) harassment; (2) use of unnecessary or excessive force; (3) use of language or conduct that is insulting, demeaning, or humiliating; (4) discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business; or (5) retaliation against a person for filing a complaint pursuant to [the Act].”

Harassment, as defined by OPC regulations, includes “[w]ords, conduct, gestures or other actions directed at a person that are purposefully, knowingly, or recklessly in violation of the law or internal guidelines of the MPD ... so as to (1) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (2) deny or impede the person in the exercise or enjoyment of any right, privilege, power or immunity. *See* MPD General Order § 120.25. In determining whether conduct constitutes harassment, [OPC] will look to the totality of the circumstances surrounding the alleged incident, including, where appropriate, whether the officer adhered to applicable orders, policies, procedures, practices, and training of the MPD ... the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating.” D.C. Mun. Regs., title 6A, § 2199.1. *See also* MPD General Order § 120.25(II)(B)(defining harassment).

It is well settled that a single citizen’s verbally abusive language directed at an officer in circumstances near identical to this case does not provide probable cause to arrest the citizen for disorderly conduct. In *Shepherd v. District of Columbia*, 929 A.2d 417 (D.C. Ct. App. 2007), the D.C. Court of Appeals passing on the identical charges that SUBJECT OFFICER leveled against COMPLAINANT, held that verbal assaults directed at a police officer standing alone cannot support a “disorderly conduct – loud and boisterous” offense. *Id.* at 419. Rather, the words uttered must be capable of occasioning a “breach of the peace,” in that they “are capable of inciting violent conduct in others.” *Id.* The “bare possibility” that words may provoke violence in others is not enough. The offensive words instead “must create a likelihood or probability of such a reaction.” *Id.*

And this reaction must be from the general citizenry, not solely a police officer. Mere offensive language, uttered briefly and directed only at a police officer, cannot support a disorderly charge. This is so because “a police officer is expected to have a greater tolerance for verbal assaults” and is “especially trained to resist provocation” by “verbal abuse that might provoke or offend the ordinary citizen.” *Id.* (quoting *In re. W.H.L.*, 743 A.2d 1226, 1228 (D.C. App. 2000)).

Consequently, prior OPC Complaint Examiners have sustained harassment allegations where citizen Complainants were arrested for disorderly conduct based solely on directing loud

verbally abusive remarks at the Officers. *See* OPC Case No. 06-0364, 2008 DC POLICE LEXIS 10 (D.C. Office of Police Complaints Oct. 31, 2008) (sustaining harassment allegation against officer who arrested complainant for disorderly conduct where there was no accompanying “breach of the peace” and complainant’s language was directed at the officer); OPC Case No. 02-0336, 2004 DC POLICE LEXIS 7 (D.C. Office of Police Complaints Jul. 6, 2004) (same).

Here, the SUBJECT OFFICER first encountered COMPLAINANT while COMPLAINANT was sitting on a crate outside the Giant eating a donut. About eight to ten other individuals were also congregated in the same general area. The SUBJECT OFFICER requested that the group generally “move on.” While the other individuals heeded the SUBJECT OFFICER’s request, COMPLAINANT did not, and instead, leveled loud and perhaps offensive remarks at the officer. No evidence exists that COMPLAINANT’S verbal barbs were directed at anyone but the SUBJECT OFFICER. Nor does anyone claim that COMPLAINANT’S words did or could provoke a hostile reaction by the general citizenry. This is especially so given the apparent brevity of the verbal exchange prior to the SUBJECT OFFICER placing COMPLAINANT under arrest, and that the encounter took place in broad daylight. *Cf. In Re. T.L.*, 996 A.2d. 805 (noting time, place and manner restrictions on free speech rights that may permit an officer to circumscribe citizen speech when its excessively loud and provocative during non daylight hours).

Indeed, while one witness favorable to the SUBJECT OFFICER noted that a crowd formed during the encounter, the crowd congregated only as a result of the SUBJECT OFFICER’S arresting COMPLAINANT without legal basis. No credible evidence exists that COMPLAINANT’S verbal protestations, which formed the basis of his arrest in the first place, could have been attributed to the crowd that gathered *after* his arrest.

Further, even assuming the crowd was gathering in response to the commotion caused by COMPLAINANT’S verbal exchange with the SUBJECT OFFICER, no evidence exists that COMPLAINANT’S words had any potential of inciting violence or upheaval. COMPLAINANT’S words were directed only at the officer, and were simply challenging whether he had to comply with the SUBJECT OFFICER’S directive to “move on.”

The most substantive of the SUBJECT OFFICER’S objections challenge whether he could have known at the time of the arrest that the COMPLAINANT’S verbal protestations directed at the Officer could not have supported a valid arrest for disorderly conduct – loud and boisterous. This objection is without merit.

All of the above-cited authority was published *prior to* the February 23, 2009, encounter of SUBJECT OFFICER and COMPLAINANT. Accordingly, contrary to SUBJECT OFFICER’S objections claiming that he had no way of knowing COMPLAINANT’S verbal aspersions could not form the basis of a valid arrest, SUBJECT OFFICER would be hard pressed to ignore the well-established precedent instructing otherwise.

Nor was there any other obvious basis for COMPLAINANT'S arrest. Indeed, SUBJECT OFFICER did not arrest him for any other offenses stemming from his initial encounter with COMPLAINANT. Rather, the undisputed facts – that COMPLAINANT verbally protested the Officer's directive to "move on" – were the sole conduct that gave rise to COMPLAINANT'S arrest.

An illegal arrest, that is one without probable cause, is indeed a substantial restriction of an individual's freedom. It is, by definition, an act that "impede[s] the person in the exercise or enjoyment of any right, privilege, power or immunity." MPD General Order § 120.25. Because SUBJECT OFFICER arrested COMPLAINANT illegally for COMPLAINANT'S mere protestations, the arrest alone constitutes harassment in violation of MPD General Order § 120.25.

**V. SUMMARY OF MERITS DETERMINATION**

[SUBJECT OFFICER'S NAME]

<b>Allegation 1:</b>	Sustained
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Submitted on March 18, 2011.

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[COMPLAINT EXAMINER'S NAME]  
Complaint Examiner