GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF POLICE COMPLAINTS

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint Nos.:	08-416 and 08-418
Complainants:	COMPLAINANT #1 and COMPLAINANT #2
Subject Officer, Badge No., District:	SUBJECT OFFICER, District of Columbia Housing Authority's Office of Public Safety
Allegation 1:	Use of Excessive or Unnecessary Force (COMPLAINANT #1)
Allegation 2:	Harassment (COMPLAINANT #1)
Allegation 3:	Harassment (COMPLAINANT #2)
Complaint Examiner:	Adav Noti
Merits Determination Date:	June 8, 2012

Pursuant to D.C. Official Code § 5-1107, 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 District of Columbia Housing Authority's Office of Public Safety 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 #1 and COMPLAINANT #2 allege that SUBJECT OFFICER of the District of Columbia Housing Authority's Office of Public Safety (DCHA OPS) engaged in misconduct while arresting COMPLAINANTS #1 AND #2 on June 12, 2008, at approximately 9:30 a.m. in the 200 block of V Street, N.W. COMPLAINANT #1 alleges that SUBJECT OFFICER harassed him by unlawfully arresting him for assault on a police officer (APO) and unlawful entry, and that the officer used excessive or unnecessary force in making this arrest. COMPLAINANT #2 alleges that SUBJECT OFFICER harassed him by verbally threatening him and by unlawfully arresting him for APO and disorderly conduct.[1]

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because the Complaint Examiner determined that the material in OPC's Report of Investigation (ROI) and the

[1] OPC's Report of Investigation indicates that additional allegations were dismissed at an earlier stage of this case. Such allegations are not before the Complaint Examiner and are not addressed in this decision.

associated file present no genuine issues of material fact in dispute that require a hearing. *See* D.C. Mun. Regs., tit. 6A § 2116.3.

III. FINDINGS OF FACT

Based on a review of the ROI, including all exhibits thereto, and the objections submitted by SUBJECT OFFICER on April 2, 2012, the Complaint Examiner makes the following findings of material fact.

1. On June 12, 2008, at approximately 9:00 a.m., SUBJECT OFFICER of DCHA OPS was on duty at the Kelly Miller Apartments housing complex in the 200 block of V Street, N.W.

2. At the same date and time, COMPLAINANT #1 was with WITNESS #1 and WITNESS #2 in the courtyard of WITNESS #1'S apartment building at 251 V Street, N.W. WITNESS #1 lived in the Kelly Miller Apartments; COMPLAINANT #1 did not.

3. Prior to the day in question, a DCHA maintenance supervisor had told SUBJECT OFFICER that COMPLAINANT #1 had illegally broken into a vacant Kelly Miller unit in which COMPLAINANT #1'S mother had once lived. SUBJECT OFFICER was familiar with COMPLAINANT #1 from having arrested him several times previously, and the officer believed the supervisor's statement that COMPLAINANT #1 had broken into the vacant apartment.

4. Upon seeing COMPLAINANT #1 in the courtyard, SUBJECT OFFICER called for COMPLAINANT #1 to come over to SUBJECT OFFICER'S patrol car, which was in an alley between the 200 blocks of V and W Streets. COMPLAINANT #1 complied.

5. When he summoned COMPLAINANT #1 to the car, SUBJECT OFFICER intended to issue him a notice barring him from the housing complex. The officer did not intend, at that time, to arrest COMPLAINANT #1 for breaking into the vacant apartment, but he hoped COMPLAINANT #1 would make incriminating statements that could subsequently be used to obtain an arrest warrant charging him with unlawful entry for the break-in.

6. In the process of filling out the barring notice, SUBJECT OFFICER asked COMPLAINANT #1 to spell his name. COMPLAINANT #1 declined to provide that spelling; instead, seeking to end the encounter, he turned around and began walking away.

7. SUBJECT OFFICER either physically grabbed COMPLAINANT #1 to prevent him from leaving, or the officer verbally told COMPLAINANT #1 that he was not free to leave. As a result, COMPLAINANT #1 stopped walking away.

8. COMPLAINANT #1 turned around (or was turned around by SUBJECT OFFICER'S grip) and faced SUBJECT OFFICER. With his hands clenched into fists at his sides, COMPLAINANT #1 exclaimed, "Motherfucker, what?"

9. Without saying anything, SUBJECT OFFICER immediately punched COMPLAINANT #1 at least once in the left side of his face, knocking him to the ground.

10. SUBJECT OFFICER handcuffed COMPLAINANT #1, who was lying semi-conscious in the alley, had abrasions near his left eye, and was bleeding from the front and back of his head.

11. COMPLAINANT #2, who was familiar with both COMPLAINANT #1 and SUBJECT OFFICER, had been in the alley and had seen the encounter near SUBJECT OFFICER'S car and the subsequent punch. As SUBJECT OFFICER was handcuffing COMPLAINANT #1, COMPLAINANT #2 and at least one other person who had witnessed the encounter approached and began yelling at SUBJECT OFFICER.

12. COMPLAINANT #2 approached to within approximately four feet of SUBJECT OFFICER and continued yelling, primarily to criticize SUBJECT OFFICER'S treatment of COMPLAINANT #1. COMPLAINANT #2'S yelling included obscenities, but he did not threaten SUBJECT OFFICER.

13. SUBJECT OFFICER ultimately responded to COMPLAINANT #2's yelling by saying "you're next," or "you're gonna be next," or similar words to the same effect.

14. COMPLAINANT #2 understood "you're next" to mean that SUBJECT OFFICER would physically attack COMPLAINANT #2 as SUBJECT OFFICER'S had attacked COMPLAINANT #1. SUBJECT OFFICER, however, actually meant that COMPLAINANT #2 would be the next person arrested after COMPLAINANT #1.

15. SUBJECT OFFICER called for assistance on his radio, and MPD officers arrived on the scene in response. By the time they arrived, a crowd of onlookers had formed, and some of the people in that crowd were expressing their displeasure with SUBJECT OFFICER for injuring COMPLAINANT #1, who was still lying in the alley.

16. Once MPD was on the scene, SUBJECT OFFICER attempted to arrest COMPLAINANT #2. COMPLAINANT #2 resisted arrest by grabbing SUBJECT OFFICER'S hand and arm. COMPLAINANT #2 insisted that he would agree to be arrested by the MPD officers, but not by SUBJECT OFFICER. An MPD officer then intervened, and COMPLAINANT #2 was arrested without further incident.

17. After COMPLAINANT #1 and COMPLAINANT #2 were in custody, SUBJECT OFFICER radioed a dispatcher for criminal complaint numbers. He requested and was given one set of numbers "for unlawful entry and APO, and the other one for disorderly

conduct." SUBJECT OFFICER arrested COMPLAINANT #1 and COMPLAINANT #2, respectively, on these charges, plus an additional charge of APO against COMPLAINANT #2. The United States Attorney's Office no-papered all charges against both complainants the next day.

18. COMPLAINANT #1 was taken by ambulance directly to Howard University Hospital, where he was released without treatment because he was uncooperative with the medical staff. Three days later, he returned to the hospital complaining of chest pain and a headache, and a CT scan performed on June 16, 2008, found that he had a fracture of his left orbital bone.

19. COMPLAINANT #1 and COMPLAINANT #2 filed the instant complaints on June 24, 2008. OPC issued its ROI on September 6, 2011, and this case was referred to the Complaint Examiner for adjudication on May 22, 2012.

IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a) and (j), OPC "shall have the authority to receive and to . . . adjudicate a citizen complaint against a member [of DCHA OPS]. . . that alleges abuse or misuse of police powers by such member or members, including: (1) Harassment; [or] (2) Use of unnecessary or excessive force." For the reasons set forth below, the instant complaints are hereby adjudicated and sustained.

A. SUBJECT OFFICER Used Excessive and Unnecessary Force Against COMPLAINANT #1

OPC's regulations define excessive or unnecessary force as

> [u]nreasonable use of power, violence, or pressure under the particular circumstances. Factors to be considered when determining the 'reasonableness' of a use of force include the following: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officer [sic] or others; (3) whether the subject was actively resisting arrest or attempting to evade arrest by flight; (4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; (5) whether the officer adhered to the general orders, policies, procedures, practices and training of the . . . law enforcement agency; and (6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish the objective.

D.C. Mun. Regs., tit. 6A § 2199.1. DCHA OPS's general orders define excessive force as that which "exceeds the minimum application of force necessary to bring a situation or a person under control and accomplish a lawful purpose." DCHA OPS General Order 501.3.4; *see also*

id. at 501.2.3 ("Members shall use only the minimum amount of force necessary to bring a situation or a person under control and accomplish a lawful purpose, while protecting his/her life or the lives of others."). Lawful purposes include to "protect [the officer] or another person from physical harm," and to "[r]estrain or subdue a resistant individual." *Id*. at 501.5.3. The general orders establish a hierarchy of force, beginning with "mere officer presence," then proceeding to "voice commands," "gentle controls, such as a hand on the elbow," and "restraining holds or pressure point techniques," before ultimately advancing to the use of weapons. *See id*. at 501.5.1. An officer may not "employ a more forceful measure, unless it is judged that a lower level of force would not be adequate, or such a level of force is attempted and actually found to be inadequate." *Id*.; *see also id*. at 501.5.4 (permitting use of physical force without weapons to "subdue[ ]" a subject, but providing that "[n]o more force than is necessary may be used").

Applying the relevant factors,[2] it is beyond doubt that SUBJECT OFFICER'S use of force against COMPLAINANT #1 was unreasonable, excessive, and unnecessary. First, there is no evidence that COMPLAINANT #1 posed a threat — much less an "immediate threat" — to SUBJECT OFFICER'S safety. The officer's entire testimony supporting this aspect of his claim is that COMPLAINANT #1 had his "fists balled up at his sides," and that he said "'Motherfucker, what?' in an aggressive manner." Based on these two facts alone, SUBJECT OFFICER allegedly "felt threatened" to such an extent that he deemed violent self-defense a necessity. Such a claim is difficult to credit on its face, as COMPLAINANT #1 did not raise a fist to the officer, or prepare to swing at the officer, or adopt a fighting stance, or say anything that might have indicated that violence was forthcoming; indeed, by SUBJECT OFFICER'S own account, COMPLAINANT #1'S hands never left his sides. It strains credibility to believe that SUBJECT OFFICER thought his safety was under an "immediate threat" from a civilian who did nothing more than say an obscenity with his lowered hands clenched.[3] In any event, it is not necessary to speculate as to SUBJECT OFFICER'S thought process, because he clarified in his own testimony that the "threat" he allegedly felt was that he "did not know if [COMPLAINANT #1] was going to strike [him]." SUBJECT OFFICER'S PD-163 similarly states that he "was unsure of [COMPLAINANT #1'S] next action." In other words, SUBJECT OFFICER did not believe that COMPLAINANT #1 was *about* to hit him, and he did not even think that COMPLAINANT #1 was *likely* to hit him; SUBJECT OFFICER merely thought that such an

[2] The first regulatory factor — the "severity of the crime" — is not probative here because although the underlying crime (i.e., misdemeanor unlawful entry into a vacant apartment) was minor, officers may "use reasonable force to effect an arrest, provided that the means employed are not 'in excess of those which the actor reasonably believes to be necessary.'" *See District of Columbia v. Chinn*, 839 A.2d 701, 705-06 (D.C. 2003) (quoting *Holder v. District of Columbia*, 700 A.2d 738, 741 (D.C. 1997)).

[3] SUBJECT OFFICER testified that he knew from his prior interactions with COMPLAINANT #1 that the latter's usual demeanor was "aggressive," but there is no indication in the officer's testimony (or elsewhere in the record) that COMPLAINANT #1 had ever acted violently towards SUBJECT OFFICER in any of their earlier encounters. It also bears mention that COMPLAINANT #1 was fifty-two years old, he weighed only 140 pounds despite standing five-foot-nine, and contemporaneous photographs make clear that he was in poor physical condition. While none of this means that COMPLAINANT #1 could not have posed a threat to SUBJECT OFFICER'S safety, it does cast some doubt on the officer's testimony that he felt immediately threatened by nothing more than COMPLAINANT #1'S clenched hands.

altercation was *possible*. Even under the most favorable reading of the evidence, therefore, the officer's actions were based on his attenuated speculation about COMPLAINANT #1'S intent, not an "immediate threat to the [officer's] safety."

Second, COMPLAINANT #1 was not attempting to evade arrest when SUBJECT OFFICER punched him. To the contrary, COMPLAINANT #1 had already stopped walking away, in direct compliance with the officer's physical and/or verbal indication that COMPLAINANT #1 was not free to leave. There is no evidence to suggest — and SUBJECT OFFICER does not claim — that COMPLAINANT #1 was fleeing or about to flee when SUBJECT OFFICER'S conduct turned violent. Thus, even taking into account that SUBJECT OFFICER needed to make a "split-second decision" about how to handle the situation, the evidence indicates that his decision to punch COMPLAINANT #1 in the face could not reasonably have been based on a risk of fight.

Finally, the last two factors ask whether SUBJECT OFFICER'S punch went beyond the minimum level of force necessary to achieve SUBJECT OFFICER'S objective. SUBJECT OFFICER'S putative goal in punching COMPLAINANT #1 was either to stop him from fleeing or to prevent him from assaulting the officer. If SUBJECT OFFICER was attempting to stop COMPLAINANT #1 from leaving the scene, the punch was excessive because, by SUBJECT OFFICER'S own testimony, COMPLAINANT #1 had already complied with his verbal order to stop. While SUBJECT OFFICER might have reasonably applied *some* force to prevent COMPLAINANT #1 from beginning to leave again — indeed, DCHA OPS General Order 501.5.1 specifically lists "gentle controls, such as a hand on the elbow" as preferable to more serious restraints — it is inconceivable that a debilitating punch to the face was the minimum amount of force necessary to achieve that objective.[4] And if SUBJECT OFFICER'S objective was to prevent COMPLAINANT #1 from assaulting him — even assuming (counterfactually) that the officer had determined that such an assault was imminent — there were any number of ways that the officer might have prevented that assault without harming COMPLAINANT #1. But SUBJECT OFFICER declined to attempt a verbal command, a "gentle control," or even simply handcuffing COMPLAINANT #1, instead preemptively and violently striking him. Because he did not attempt any lower levels of force, and his testimony presents no explanation of how such lesser techniques would have been inadequate, SUBJECT OFFICER'S actions violated DCHA OPS General Order 501.

In sum, SUBJECT OFFICER could not reasonably have believed that punching COMPLAINANT #1 in the face hard enough to break his orbital bone was the minimum amount of force necessary to defend himself, to stop COMPLAINANT #1 from fleeing, or to accomplish

[4] This assumes for the sake of argument that SUBJECT OFFICER had a legitimate basis for preventing COMPLAINANT #1 from leaving the scene; in reality, the officer had no such basis. *See infra* Part IV.B & n.5 (finding detention and arrest of COMPLAINANT #1 unlawful). Thus, because DCHA OPS's general orders provide that force may be used to further only a "lawful purpose," SUBJECT OFFICER violated the general orders not just by using more force than was necessary, but also by using force at all.

any other lawful objective. COMPLAINANT #1'S complaint for excessive force is accordingly sustained pursuant to D.C. Mun. Regs., tit. 6A § 2199.1.

B. SUBJECT OFFICER Harassed COMPLAINANT #1 by Unlawfully Arresting Him

OPC's regulations define harassment as

> [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 . . . law enforcement agency, 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. 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 . . . law enforcement agency, the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating.

D.C. Mun. Regs., tit. 6A § 2199.1. DCHA OPS General Order 402.1.4(c) provides that officers "shall not threaten, fight with, intimidate, abuse, or coerce . . . members of the public, or provoke such actions by them."

SUBJECT OFFICER'S arrest of COMPLAINANT #1 for APO and unlawful entry was contrary to law. As explained above, SUBJECT OFFICER could not reasonably have believed even that COMPLAINANT #1 posed an imminent threat merely by clenching his hands at his sides, much less that COMPLAINANT #1 had actually assaulted or resisted the officer so as to give rise to an arrest for APO. *See* D.C. Official Code § 22-405(b) (defining APO as "[w]hoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with a law enforcement officer . . . engaged in the performance of his or her official duties"); *In re C.L.D.*, 739 A.2d 353, 356-58 (D.C. 1999) (holding that yelling obscenities at officer and walking away after being told to stop does not constitute APO). And there is no other evidence in the record of this case that could have supported that charge. Thus, given the complete dearth of facts making out the elements of the offense, arresting COMPLAINANT #1 for APO was so patently unlawful that the only reasonable inference the Complaint Examiner can draw is that SUBJECT OFFICER made the arrest while "purposefully, knowingly, or recklessly" disregarding the statute he was putatively enforcing.

In light of the foregoing, COMPLAINANT #1'S complaint for harassment would be sustained even if SUBJECT OFFICER'S arrest of COMPLAINANT #1 for unlawful entry had been legal. But that arrest was also unlawful, because D.C. Official Code § 23-581(a)(1)

provides that an officer may make a warrantless arrest for unlawful entry only if the crime was committed in the officer's presence or the suspect "unless immediately arrested, may not be apprehended, may cause injury to others, or may tamper with . . . evidence." SUBJECT OFFICER asserts that he had probable cause to arrest COMPLAINANT #1 on the scene based on what the DCHA employee had told him about COMPLAINANT #1 breaking in to the vacant apartment (Respondent's Obj. at 1), but the Court of Appeals has squarely rejected this argument and held that meeting the Fourth Amendment's requirement for *probable cause* does not satisfy the District's statutory requirement for *warrantless arrests*.[5] *See Enders v. District of Columbia*, 4 A.3d 457, 460-67 & n.9 (D.C. 2010). Accordingly, an officer who makes a warrantless arrest that is not within the exceptions of Section 23-581 is, *inter alia*, subject to suit for false arrest. *See id*.; *see also Creecy v. District of Columbia*, Civ. No. 10-841, slip op. at 10-12 (D.D.C. Mar. 31, 2011) (citing *Enders*).

None of the exceptions in Section 23-581 can avail the officer in this case. There was no risk of COMPLAINANT #1 tampering with evidence, nor (as discussed above) was there any reasonable inference that he would injure others. And any claim that SUBJECT OFFICER believed COMPLAINANT #1 would evade apprehension if he was not arrested on June 12 is belied by the officer's own testimony that he initially planned to obtain a warrant and arrest COMPLAINANT #1 for unlawful entry at a later time. Because SUBJECT OFFICER believed that he would be able to locate and arrest COMPLAINANT #1 after a warrant was issued, SUBJECT OFFICER cannot also plausibly claim COMPLAINANT #1 was a sufficient flight risk to justify a warrantless arrest. Thus, by arresting COMPLAINANT #1 for unlawful entry without a warrant, SUBJECT OFFICER deprived COMPLAINANT #1 of his liberty with — at a minimum — reckless disregard for the basic legal requirements attendant upon making such an arrest. COMPLAINANT #1'S complaint for harassment is accordingly sustained.

C. SUBJECT OFFICER Harassed COMPLAINANT #2 by Unlawfully Arresting Him

As with COMPLAINANT #1, SUBJECT OFFICER lacked any legal basis for either of the two charges on which he arrested COMPLAINANT #2. First, SUBJECT OFFICER arrested COMPLAINANT #2 for APO on the grounds that COMPLAINANT #2 interfered with SUBJECT OFFICER'S arrest of COMPLAINANT #1 by yelling obscenities and refusing to leave the scene. The law, however, is well-settled that the type of conduct in which COMPLAINANT #2 engaged does not constitute APO. *See Howard v. United States*, 966 A.2d 854, 856-57 (D.C. 2009) (summarizing case law as limiting reach of APO statute only to

[5] In addition to arguing that he had probable cause to effect an arrest, SUBJECT OFFICER also raises an alternative argument that his encounter with COMPLAINANT #1 constituted a *Terry* stop until the physical altercation began, at which point, "having arrested COMPLAINANT #1 for APO, there was no reason to withhold the evidence of an unlawful entry charge from the prosecutor's office." (Respondent's Obj. at 2.) But the pre-altercation encounter could not have been a lawful *Terry* stop, as the officer had no reasonable suspicion that COMPLAINANT #1 was engaging in criminal activity at that time. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968); *see also* ROI at 17 n.5 (citing uncontroverted evidence that COMPLAINANT #1 was lawfully on premises of Kelly Miller Apartments on the day in question).

defendants who "actively or physically oppose or interfere with the officers"); *In re C.L.D.*, 739 A.2d at 356-58 (holding that yelling obscenities at officer and walking away after being told to stop is not APO); *In re E.D.P.*, 573 A.2d 1307, 1309 (D.C. 1990) (limiting APO statute to reach only conduct that "physically oppos[es]" officer).

COMPLAINANT #2 testified that he was yelling at SUBJECT OFFICER from a distance of between two and four feet away, while SUBJECT OFFICER testified that COMPLAINANT #2 came so close to him that SUBJECT OFFICER had to push COMPLAINANT #2 away to have enough room to handcuff COMPLAINANT #1.[6] SUBJECT OFFICER'S account is not supported by the evidence, as neither COMPLAINANT #2 nor the two witnesses who saw him yelling at SUBJECT OFFICER testified that the officer pushed COMPLAINANT #2. Because these witnesses were all notably forthcoming in their statements about their negative opinions of SUBJECT OFFICER'S use of force, it is unlikely that they would have failed to mention that SUBJECT OFFICER had — in addition to punching COMPLAINANT #1 — also pushed COMPLAINANT #2. Indeed, as noted *supra* Part III ¶ 16, the evidence is clear that SUBJECT OFFICER and COMPLAINANT #2 *did* engage in a physical struggle when the officer tried to arrest COMPLAINANT #2 several minutes later, and the eyewitnesses' statements discuss that struggle in detail to support their allegations regarding the officer's use of force.[7] Thus, the absence of any eyewitness testimony supporting SUBJECT OFFICER'S claim that he had to push COMPLAINANT #2 away from where he was trying to arrest COMPLAINANT #1 leads to the conclusion that COMPLAINANT #2 probably did not, in fact, get so close that he physically interfered with the arrest.

Witnesses also provided inconsistent testimony as to the substance of what COMPLAINANT #2 yelled at SUBJECT OFFICER. WITNESS #2 and WITNESS #1 (as well as COMPLAINANT #2 himself) stated that COMPLAINANT #2 was criticizing SUBJECT OFFICER for hitting COMPLAINANT #1, exclaiming, for example, "He didn't do anything!" and "Why are you hitting him like that?" On the other hand, SUBJECT OFFICER testified that COMPLAINANT #2 threatened him by yelling "I'm going to fuck you up," and a DCHA employee who was on the scene stated that COMPLAINANT #2 threatened to "knock [SUBJECT OFFICER] out." The contemporaneous documentation supports COMPLAINANT #2'S version of events. Specifically, SUBJECT OFFICER'S PD-163 and PD-251 make no mention of any threat from COMPLAINANT #2; instead, SUBJECT OFFICER'S reports state that that COMPLAINANT #2 interfered with the arrest of COMPLAINANT #1 by refusing to move away, and by yelling loudly enough to attract an angry crowd, not by threatening SUBJECT OFFICER directly. The absence of a particular fact from a PD-163 would not normally indicate that the fact did not occur, but here the primary — if not sole — purpose of the

[6] WITNESS #1 took a picture that shows SUBJECT OFFICER standing over COMPLAINANT #1, who is lying prone in the alley, with COMPLAINANT #2 standing roughly four feet away from them. This snapshot, of course, does not indicate whether COMPLAINANT #2 at some point came closer to the other men.

[7] Oddly, the only witness who stated that COMPLAINANT #2 did *not* resist arrest was SUBJECT OFFICER. Every other civilian and officer who saw the arrest — including COMPLAINANT #2 himself — stated that COMPLAINANT #2 resisted being handcuffed.

officer's paperwork was to explain how COMPLAINANT #2 interfered with the arrest of COMPLAINANT #1. It is therefore difficult to believe that SUBJECT OFFICER would have failed to mention the critical fact that COMPLAINANT #2 was not just yelling loudly (as the PD-163 and PD-251 state), but that he specifically made verbal threats against the officer's personal safety while the officer was making the arrest. The significance of this omission is compounded by the fact that, although SUBJECT OFFICER ultimately arrested COMPLAINANT #2 for APO and disorderly conduct, the officer did not charge COMPLAINANT #2 with making a threat to do bodily harm. *See* D.C. Official Code § 22-407. Given that the charges on which SUBJECT OFFICER did arrest COMPLAINANT #2 were factually tenuous (as discussed in depth below), it seems most likely that SUBJECT OFFICER would have arrested COMPLAINANT #2 on a much stronger charge of threats if COMPLAINANT #2 had actually made such a threat. Thus, in light of the absence of any charge based on — or even any contemporaneous documentation of — COMPLAINANT #2'S threatening SUBJECT OFFICER, a preponderance of the evidence suggests that COMPLAINANT #2 did not threaten to "fuck up" or "knock out" SUBJECT OFFICER.

In his filings with OPC, SUBJECT OFFICER notes that the APO statute prohibits "imped[ing]" or "interfer[ing]" with an officer, and he correctly argues that, as a practical matter, having a civilian scream at an officer from four feet away might very well impede or interfere with that officer's ability to make an arrest. (*See* Respondent's Obj. at 3-4.) But SUBJECT OFFICER then asserts, without any citation, that COMPLAINANT #2's conduct constituted "a classic example of the behavior proscribed by the APO [statute]." (*Id*. at 4.) The Court of Appeals recently found otherwise in a situation almost identical to the instant complaint. In *Jones v. United States*, 16 A.3d 966 (D.C. 2011), the defendant was a passer-by who saw an officer using what the defendant believed to be excessive force against an arrestee. As the officer was preparing the arrestee for transport, the defendant approached to within five feet of the officer, yelled obscenities at him, and refused the officer's command to back away. *Id*. at 968. On appeal from the defendant's conviction for APO, the Court of Appeals noted the consistent line of cases cited above requiring "active confrontation or obstruction" to sustain a conviction under the APO statute, and so the court held that simply being near an officer and yelling obscenities presents "a legally invalid theory" of APO. *See id*. at 970-71. Although *Jones* post-dates the incident in question, its discussion relies on and illustrates the state of the law as it stood in 2008: The APO statute is violated only by active, physical obstruction of an officer. Accordingly, SUBJECT OFFICER could not reasonably have believed that COMPLAINANT #2 committed APO by yelling.[8]

[8] COMPLAINANT #2 almost certainly *did* commit APO by resisting SUBJECT OFFICER'S attempt to handcuff him, but SUBJECT OFFICER did not charge COMPLAINANT #2 with APO for that resistance. In fact, when the officer requested criminal complaint numbers for the incident, he did not mention charging COMPLAINANT #2 with APO at all. *See supra* Part III ¶ 17 & n.7. Although officers do not always identify every arrest charge in a request for numbers — and so no strong inference can be drawn from that omission — there are two noteworthy aspects of the radio communication in this case: (1) SUBJECT OFFICER did identify both of COMPLAINANT #1'S arrest charges to the dispatcher; and (2) if the officer were going to mention only one of COMPLAINANT #2'S charges, it would almost certainly have been the more serious APO charge. *Id*. Thus, the

For similar reasons, SUBJECT OFFICER had no basis to arrest COMPLAINANT #2 for disorderly conduct. At least three times since 2000, the Court of Appeals has held that the disorderly conduct statute does not prohibit a civilian from yelling protests and obscenities at police officers. *See Martinez v. District of Columbia*, 987 A.2d 1199, 1201-02 (D.C. 2010) (finding that defendant did not commit disorderly conduct by yelling obscenities at officers, even when crowd formed, because defendant directed obscenities to officers rather than to crowd); *Shepherd v. District of Columbia*, 929 A.2d 417 (D.C. 2007) (same); *In re W.H.L.*, 743 A.2d 1226, 1228-29 (D.C. 2000) (same). Judging from his arrest paperwork, SUBJECT OFFICER apparently sought to justify COMPLAINANT #2'S arrest on the grounds that a crowd of displeased civilians had formed, and therefore that COMPLAINANT #2'S yelling posed an imminent risk of breaching the peace by inciting the crowd to engage in violence against the officer. But the law is clear that the disorderly conduct statute is violated in such situations only if the person who is yelling directs his speech *to the crowd*, such that they will likely or probably be incited to violence. *Martinez*, 897 A.2d at 1202 (citing *Shepherd*). If the speaker directs his language (even foul language) to the officers, that speech standing alone is not disorderly conduct.[9] Thus, because there is no evidence in this case that COMPLAINANT #2 yelled at anyone except SUBJECT OFFICER, COMPLAINANT #2 did not do anything to warrant being arrested for disorderly conduct.[10]

To be sure, it is distressingly common for police officers in the District of Columbia to find themselves confronted by a large group of unhappy civilians, as SUBJECT OFFICER notes. (*See* Respondent's Obj. at 3 ("DCHA officers work in single-officer cruisers and thus are called upon to single-handedly defuse threatening situations . . . .").) Alone and in that type of intense situation, an officer could sometimes be excused for erring on the side of self-protection. On the other hand, the situation arises with enough frequency that officers have ample opportunity to learn to conduct themselves within the bounds of the law, even under such difficult conditions; indeed, they are expected to do so. *See* DCHA OPS General Order 402.1.4(a) ("[Officers] shall

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fact that the only numbers SUBJECT OFFICER requested in relation to COMPLAINANT #2 were for disorderly conduct tends to suggest that the officer's decision to charge him with APO was made after the fact.

[9] The transcript of SUBJECT OFFICER'S radio call indicates that an unknown person can be heard yelling "fuck yourself" in the background while the officer makes the call. It is unclear whether that person was COMPLAINANT #2 or one of the other bystanders, but, for the reasons stated above, this is ultimately immaterial.

[10] Neither this finding nor the finding above that SUBJECT OFFICER recklessly disregarded the requirements for an APO violation should be understood as suggesting that he committed misconduct merely by failing to account for the intricacies and subtleties of judicial glosses on criminal statutes. To the contrary, if the only reason that COMPLAINANT #2'S actions did not give rise to criminal liability had been an obscure judicial interpretation of a statute, the officer's reasonable understanding of the statutory text would almost certainly have absolved him of wrongdoing. But SUBJECT OFFICER'S arrest of COMPLAINANT #2 contravened a long, uniform line of case law from the Court of Appeals — holdings that are neither obscure nor subtle: Yelling at a police officer, without more, does not make the speaker a criminal. Knowing that civilians have a right to loudly express their displeasure to authority figures is so basic to the principles of the American legal system — and so fundamental to the job that patrol officers such as SUBJECT OFFICER do every day — that SUBJECT OFFICER could have arrested COMPLAINANT #2 only by intentionally or recklessly disregarding COMPLAINANT #2'S right to engage in lawful speech.

approach people calmly and in a business-like manner, and remain so despite provocation."); *In re W.H.L.*, 743 A.2d at 1228 ("'[B]ecause the police are especially trained to resist provocation, we expect them to remain peaceful in the face of verbal abuse that might provoke or offend the ordinary citizen.'") (quoting *In re M.W.G.*, 427 A.2d 440, 442 (D.C. 1981)). SUBJECT OFFICER failed to maintain that minimum standard when he arrested COMPLAINANT #2, for under no reasonable understanding of the law of disorderly conduct were COMPLAINANT #2'S actions criminal.

Furthermore, SUBJECT OFFICER did not actually effect this illegal arrest until numerous MPD officers had arrived as backup, at which point the threatening situation had been defused. If he had not already done so, it was incumbent upon SUBJECT OFFICER to reassess at that time whether COMPLAINANT #2 had committed an arrestable offense. As explained above, the answer was no. By nonetheless arresting COMPLAINANT #2 on untenable charges, SUBJECT OFFICER acted — at best — with reckless disregard for the legality of that arrest, with the result that COMPLAINANT #2 was unjustly incarcerated until his case was no-papered. At worst, SUBJECT OFFICER attempted to use the charges against COMPLAINANT #2 to silence or negate COMPLAINANT #2 as an eyewitness to the officer's illegal use of force on COMPLAINANT #1. Under either scenario, SUBJECT OFFICER unlawfully arrested COMPLAINANT #2 for disorderly conduct, and COMPLAINANT #2's complaint alleging harassment by unlawful arrest is accordingly sustained under Section 2199.1.

D. SUBJECT OFFICER Harassed COMPLAINANT #2 by Threatening Him with Unlawful Arrest

OPC found that SUBJECT OFFICER harassed COMPLAINANT #2 by saying "you're next" or "you're going to be next," which COMPLAINANT #2 understood to be a threat of physical harm. While COMPLAINANT #2'S interpretation was reasonable under the circumstances (i.e., after seeing SUBJECT OFFICER injure COMPLAINANT #1 without cause), it was not the message that SUBJECT OFFICER was trying to convey. Instead, SUBJECT OFFICER testified that "you're next" meant that COMPLAINANT #2 would be the next person arrested after COMPLAINANT #1. SUBJECT OFFICER'S testimony in this respect is credible, as he provided a specific and detailed recollection of also telling both COMPLAINANT #2 and the other onlooker, "If you're here when my backup gets here, both of y'all are going" (i.e., to jail). That is, by all accounts, exactly what happened next: COMPLAINANT #2 was still on the scene when backup arrived, and he was arrested. Accordingly, there is no significant reason to question SUBJECT OFFICER'S testimony that he intended "you're next" to mean "you will be arrested next," and the evidence therefore does not support an inference that the officer said "you're next" as a threat against COMPLAINANT #2's person. Rather, it was a truthful declaration of the officer's intention to arrest COMPLAINANT #2.

Nonetheless, the Complaint Examiner finds that SUBJECT OFFICER threatened COMPLAINANT #2 by saying that he would arrest him after COMPLAINANT #2 had done nothing except legally (albeit loudly and at close distance) protest SUBJECT OFFICER'S illegal

treatment of COMPLAINANT #1. Because COMPLAINANT #2'S actions had not given SUBJECT OFFICER grounds for arrest, the plain meaning of SUBJECT OFFICER'S statement was that he intended to unlawfully deprive COMPLAINANT #2 of his liberty — and that is a "threat" under any reasonable understanding of the term. SUBJECT OFFICER therefore violated the prohibition on threats in DCHA OPS General Order 402.1.4(c), and COMPLAINANT #2'S complaint of harassment is accordingly sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER, District of Columbia Housing Authority Police Department:

Allegation 1:	Sustained
Allegation 2:	Sustained
Allegation 3:	Sustained

Submitted on June 8, 2012.

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ADAV NOTI
Complaint Examiner