

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	11-0097
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Insulting, Demeaning, or Humiliating Language or Conduct
Complaint Examiner:	Adav Noti
Merits Determination Date:	September 25, 2012

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 used inappropriate language towards her during a traffic stop on November 16, 2010. Specifically, COMPLAINANT alleges that SUBJECT OFFICER pulled her over for speeding and asked her sarcastic questions in an excessively loud tone.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on August 21, 2012. The Complaint Examiner heard the testimony of COMPLAINANT and SUBJECT OFFICER. No exhibits were entered into substantive evidence during the hearing.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, including the exhibits thereto, the objections submitted by SUBJECT OFFICER on May 30, 2012, OPC's response to those objections, and the evidentiary hearing conducted on August 21, 2012, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On November 16, 2010, at approximately 10:30 a.m., COMPLAINANT was driving southbound in the right lane of Rock Creek Parkway NW. SUBJECT OFFICER was driving a marked patrol car in the left lane of that two-lane road.
2. In the vicinity of the Kennedy Center, COMPLAINANT passed SUBJECT OFFICER. He then pulled into the right lane behind her and initiated a traffic stop.
3. Once their cars were stopped, SUBJECT OFFICER approached the front passenger window of COMPLAINANT'S car on foot. She rolled down the front passenger window.
4. SUBJECT OFFICER said to COMPLAINANT, "What are you supposed to do when you see a police car driving 25 miles an hour?"
5. COMPLAINANT responded, "Go 25?"
6. SUBJECT OFFICER repeated, "What are you supposed to do when you see a police car driving 25 miles an hour?"
7. SUBJECT OFFICER continued, "What are you supposed to do when you see a car with the word 'Police' written on the side?"
8. After this verbal exchange, SUBJECT OFFICER issued COMPLAINANT a notice of infraction for speeding.
9. At the end of the encounter, COMPLAINANT asked SUBJECT OFFICER for his name and badge number. He told her that this information was written on the notice of infraction (which it was).
10. COMPLAINANT was upset by her interaction with SUBJECT OFFICER. Later on November 16, she downloaded the complaint form from OPC's website and filled it out. At some point on the same day, she also Googled the officer's name.
11. COMPLAINANT timely faxed her complaint form to OPC on November 22, 2010.

IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a), OPC "shall have the authority to receive and . . . 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 . . . use of language or conduct that is insulting, demeaning, or humiliating."

According to MPD General Order 201.26, Part I, Section C, "[a]ll members of the department shall be courteous and orderly in their dealings with the public. They shall perform

their duties quietly, remaining calm regardless of provocation to do otherwise. . . . Members shall refrain from harsh, violent, coarse, profane, sarcastic, or insolent language.”

This case presents two issues. The first is whether COMPLAINANT has demonstrated by a preponderance of the evidence that SUBJECT OFFICER asked her the two questions she alleges he asked. For the reasons discussed below, I find that COMPLAINANT has met her burden to demonstrate that he did. The second issue is whether SUBJECT OFFICER’S questions violated General Order 201.26. Although the violation in this case borders on *de minimis*, I conclude that SUBJECT OFFICER did improperly use “sarcastic or insolent language” towards COMPLAINANT.

A. Factual Analysis

In essence, COMPLAINANT’S material testimony was that SUBJECT OFFICER asked her two “rhetorical” questions: (1) “What are you supposed to do when you see a police car driving 25 miles an hour?”; and (2) “What are you supposed to do when you see a car with the word ‘Police’ written on the side?” In his own testimony, SUBJECT OFFICER did not directly dispute COMPLAINANT’S account, testifying instead that he conducts 30-50 traffic stops per month and does not recall stopping COMPLAINANT in particular. SUBJECT OFFICER did, however, testify as to his general procedures when conducting such stops, including the standard questions he poses to motorists, and he denied that either of the two questions at issue here are part of that standard repertoire. Thus, the only factual dispute to be resolved here is whether COMPLAINANT’S testimony was sufficiently credible to establish by a preponderance of the evidence that SUBJECT OFFICER did ask the two questions, his general denial notwithstanding.

I find that COMPLAINANT has easily met her burden. COMPLAINANT’S testimony regarding what SUBJECT OFFICER said to her (and her response to him) was entirely credible. In particular, COMPLAINANT’S emotional reaction when asked to recount the day in question could not have been more genuine: The deep unease she felt during her encounter with SUBJECT OFFICER was palpable when she revisited that encounter in her testimony — an emotional response that thoroughly demonstrated the clarity of her memory regarding the events. Other aspects of her testimony confirmed that clarity as well. For example, when asked whether she had reviewed her written complaint and statement to OPC in preparation for the hearing, she responded firmly and convincingly that she had indeed reviewed the documents but had not needed them to refresh her recollection. (Tr. 49.) Furthermore, even apart from her demeanor, the substance of COMPLAINANT’S testimony bore numerous hallmarks of veracity, including the uniqueness of the rhetorical questions she attributed to SUBJECT OFFICER — questions phrased so distinctively that it seems exceedingly unlikely she would have concocted them. Finally, there was no bias impeachment of COMPLAINANT: It is undisputed that she did not know SUBJECT OFFICER prior to the day in question and, having successfully contested the notice of infraction he issued her for speeding (on the grounds that her car’s transmission had malfunctioned), she had no motivation to impugn SUBJECT OFFICER in her testimony. For all these reasons — the most important being COMPLAINANT’S demeanor while testifying — I

have no doubt that she clearly remembered the traffic stop and testified honestly about it in all material respects.¹

SUBJECT OFFICER raises three unconvincing arguments for not crediting COMPLAINANT'S testimony. First, SUBJECT OFFICER points to an OPC investigator's report of an interview with COMPLAINANT. (ROI Exh. 3.) According to that report, COMPLAINANT initially admitted that she gave a "smart ass" response to SUBJECT OFFICER, but she later told the investigator that she did not want to include that phrase in her written statement. This sequence, which COMPLAINANT does not dispute (Tr. 50-51), provides no reason to doubt her hearing testimony. It is entirely understandable that COMPLAINANT did not want the word "ass" to appear in her statement to OPC, even assuming she used it during her oral conversation with the investigator. In any event, COMPLAINANT credibly testified before me that, when SUBJECT OFFICER asked her what to do upon seeing a police car driving 25 miles per hour, she responded, "Go 25?" (Tr. 27.) Her recollection and free admission of that arguably "smart-ass" response casts no doubt on her veracity; to the contrary, by giving testimony that did not present herself in the best possible light, COMPLAINANT enhanced her credibility.

Second, SUBJECT OFFICER argues that COMPLAINANT'S testimony should not be credited because of the delay between when the incident occurred and the filing of her OPC complaint. Specifically, although COMPLAINANT completed a complaint form on the evening of the day of the incident, November 16, she did not fax it to OPC until November 22. SUBJECT OFFICER, however, provides no explanation of why that delay would cast any doubt on COMPLAINANT'S testimony, instead asserting generally that her timing "doesn't make sense." (See Tr. 117-18.) I disagree. November 22, 2010, was only four work days after November 16, and COMPLAINANT explained that she simply did not have a chance to fax the complaint from her office in the days immediately after the incident. There is no reason — and SUBJECT OFFICER provides none — to doubt her testimony in that respect.

Third, SUBJECT OFFICER argues that COMPLAINANT'S testimony should not be credited because, although she admitted conducting a Google search of SUBJECT OFFICER'S name before filing her complaint, she denied that the results of that search affected her decision to submit the complaint to OPC. (Tr. 118.) It appears to be undisputed that something negative — the content of which is unknown to the Complaint Examiner and is not in evidence here — comes up when SUBJECT OFFICER'S name is Googled. (See Tr. 120.) SUBJECT OFFICER

¹ I do not, however, credit COMPLAINANT'S statements that SUBJECT OFFICER'S tone of voice was excessively loud when he spoke to her. I believe that COMPLAINANT *perceived* SUBJECT OFFICER to be speaking loudly; her testimony in that respect was entirely credible, like the rest of her testimony. But, having observed the demeanor of both COMPLAINANT and SUBJECT OFFICER — and recognizing that the conversation in question occurred on a four-lane highway, with SUBJECT OFFICER outside the car and COMPLAINANT inside it — I believe there was probably a subjective discrepancy between COMPLAINANT'S perception of SUBJECT OFFICER'S volume and the volume itself. I therefore cannot find by a preponderance of the evidence that SUBJECT OFFICER addressed COMPLAINANT in an excessively loud tone.

asserts, therefore, that COMPLAINANT must not be telling the truth when she says that her Google search had no effect on her decision to file her OPC complaint. But this argument simply assumes that finding negative information about an officer would necessarily sway a potential complainant's decision to file a complaint. I see no reason to adopt that assumption. A citizen's decision to commence a formal legal process alleging misconduct by a police officer is a complicated one involving many considerations. Finding negative information on the internet might cause a potential complainant to be more likely to file a complaint, such as if the information included allegations of similar misconduct. Or the search results could make her less likely to file the complaint, such as if the information caused her to feel sorry for the officer. Or the information could be unrelated to the events in question and simply have no effect on the complainant's decision. Because any of these reactions is entirely plausible, I decline the SUBJECT OFFICER'S suggestion to find COMPLAINANT incredible because she testified that her complaint was not influenced by the results of her Google search.

In sum, COMPLAINANT'S credible testimony establishes by a preponderance of the evidence that SUBJECT OFFICER asked her two questions: "What are you supposed to do when you see a police car driving 25 miles an hour?" and "What are you supposed to do when you see a car with the word 'Police' written on the side?"

B. Legal Analysis

The legal question presented here is whether SUBJECT OFFICER'S questions to COMPLAINANT violated MPD General Order 201.26.C.3, which requires officers, *inter alia*, to "refrain from harsh, violent, coarse, profane, sarcastic, or insolent language." Specifically, COMPLAINANT argues that SUBJECT OFFICER'S statements were "sarcastic."² (Tr. 109.)

SUBJECT OFFICER'S first question — "What are you supposed to do when you see a police car driving 25 miles an hour?" — was not sarcastic. While it was undoubtedly a rhetorical question, in that it suggested its own answer rather than genuinely requesting one from COMPLAINANT, not all rhetorical questions are sarcastic. To rise to the level of sarcasm, the question would have to convey some non-trivial amount of mockery or contempt. *See* OXFORD ENGLISH DICTIONARY (defining "sarcastic" as "bitterly cutting or caustic"). I cannot find by a preponderance of the evidence that SUBJECT OFFICER'S first rhetorical question mocked COMPLAINANT. While I do not doubt her testimony that she *believed* the question was intended to denigrate her, police officers ask countless routine questions substantively indistinguishable from this one, none of which could reasonably be understood as sarcastic. For example, the officer who finds a felon carrying a handgun and asks, "Are you supposed to be carrying a gun with your record?" or the officer who makes a drug arrest and asks, "Are you supposed to be smoking marijuana?" — these are no different from the officer who gets passed by a speeder and asks "What are you supposed to do when you see a police car driving [at the

² COMPLAINANT argues that SUBJECT OFFICER also violated the General Order's requirement to be "courteous to the public." Because, as discussed below, I find that SUBJECT OFFICER violated the more specific prohibition on sarcasm, there is no need to address COMPLAINANT'S general allegation of discourteousness.

speed limit]?” Although these questions are not models of courtesy, they are each intended to demonstrate the obviousness of the arrestee’s law-breaking — and perhaps to thereby induce incriminating statements — not to mock the arrestee. (*See* Tr. 78:6-15 (testimony of subject officer) (“Have I asked people, you know, ‘did you see the police car,’ sure. Yes. Some people would say, ‘no, because I was talking on my phone while I was speeding’ or ‘I just – I’ve had a couple drinks’ . . .”).) Accordingly, I cannot find that SUBJECT OFFICER was being sarcastic within the meaning of the General Order when he asked COMPLAINANT what she was supposed to do upon seeing a police car driving 25 miles per hour.³

SUBJECT OFFICER’S second question — “What are you supposed to do when you see a car with the word ‘Police’ written on the side?” — is a different matter. By referring to “a car with the word ‘Police’ written on the side,” rather than to a “police car,” SUBJECT OFFICER went beyond a mere rhetorical question to active sarcasm. An analogy is again instructive: If SUBJECT OFFICER had asked “What do you do when you see a yellow vehicle with the words ‘School Bus’ written on the side?” there would be no doubt that he was mocking COMPLAINANT for her putative failure to recognize the well-marked vehicle. The actual question SUBJECT OFFICER asked is no different; he was unmistakably conveying his belief — through an ironic rhetorical question — that COMPLAINANT was stupid or oblivious or both for passing his clearly marked patrol car (*i.e.*, the one “with the word ‘Police’ written on the side”). Such sarcastic language is proscribed by General Order 201.26.C.3.

This conclusion is strongly confirmed by SUBJECT OFFICER’S own testimony. As noted previously, SUBJECT OFFICER testified to having no memory of the specific incident involving COMPLAINANT, but he did explain his usual course of questioning upon making a traffic stop. The Complaint Examiner then asked him if the first rhetorical question COMPLAINANT alleged he made was a question he might ask during a routine stop, and he responded, “That’s not one of my . . . regular one[s]. But is it possible that I would have asked that . . .” (Tr. 76:9-19.) The Complaint Examiner next asked about the second question:

Q: What about the question, “when you see a car with ‘Police’ written across the side what are you supposed to do,” would that be one of the . . . standard questions you would ask?

A: No. No. I think that that may be COMPLAINANT’S recollection of a rhetorical question in some sense. But *no, that’s — I see where there’s a line and where things can cross in and out of that* and I see that.

(Tr. 77:18-78:5 (emphasis added).) This testimony forecloses SUBJECT OFFICER’S argument that any discourteousness in his second question was merely a subjective perception of

³ Nor does the fact that the officer stated his first question twice indicate any sarcasm or lack of courtesy. Although COMPLAINANT testified that she responded the first time, suggesting that SUBJECT OFFICER’S repetition of the question was essentially to badger her, there is no evidence that SUBJECT OFFICER actually heard her response.

COMPLAINANT. By recognizing that the second question would “cross” a “line” if asked, SUBJECT OFFICER inherently acknowledged that, if he *did* make the statement, he went beyond the objective boundary of propriety in doing so. Thus, because COMPLAINANT has demonstrated by a preponderance of the evidence that SUBJECT OFFICER made this statement, I find that it crossed the line from legitimate questioning to inappropriate sarcasm.

* * *

The misconduct in this case barely rises above the *de minimis* level. (*See* Tr. 111:8-10 (complainant’s counsel) (“Nobody is saying that this is the end of the world or that somebody’s life was ruined.”).) The particular happenstance of this garrulous officer pulling over a much more reserved citizen was an unfortunate coincidence for all involved. Nonetheless, SUBJECT OFFICER did violate the plain text of General Order 201.26.C.3 when he used sarcastic language towards COMPLAINANT. The complaint must therefore be sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1:	Sustained
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Submitted on September 25, 2012.

Adav Noti
Complaint Examiner