GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF POLICE COMPLAINTS

DECISION BY FINAL REVIEW PANEL

Complaint No.:	16-0429
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER 1
Allegation 1:	Harassment
Final Review Panel Members:	Jennifer Fischer, Peter Tague, Richard Ugelow
Decision Date:	October 18, 2017

Pursuant to D.C. Official Code § 5-1112(g)(2) and D.C. Mun. Regs., Title 6A, § 2121.1, the Chief of Police of the Metropolitan Police Department (MPD) has returned the Merits Determination issued in this matter for review by a Final Review Panel. This appeal was referred to the Final Review Panel for disposition on September 26, 2017.

This Final Review Panel was convened by the Office of Police Complaints (OPC), to review the Complaint Examiner's Decision finding that MPD SUBJECT OFFICER harassed the COMPLAINANT. The Final Review Panel issues this decision in accordance with D.C. Official Code § 5-1112(g)(2) and D.C. Mun. Regs., Title 6A, § 2121.3.

I. SUMMARY OF COMPLAINT EXAMINER DECISION

On May 1, 2017, the Complaint Examiner reviewing this complaint issued Findings of Fact and a Merits Determination sustaining OPC's determination that SUBJECT OFFICER 2 and SUBJECT OFFICER 1 harassed the COMPLAINANT when they handcuffed him on September 21, 2016. The Complaint Examiner also sustained OPC's determination that SUBJECT OFFICER 2 harassed COMPLAINANT by conducting a search of his person.

The sole issue before the Final Review Panel is the Complaint Examiner's Merits Determination sustaining the allegation of harassment against SUBJECT OFFICER 1.

II. STANDARD OF REVIEW

Under District of Columbia law, a Final Review Panel is charged with reviewing the record regarding a complaint, and without taking any additional evidence, issuing a written decision, with supporting reasons, regarding the correctness of the merits determination issued for the complaint to the extent that the Police Chief has concluded that it erroneously sustained one or more allegations. D.C. Official Code § 5-1112(g)(2); D.C. Mun. Regs., Title 6A,

§ 2121.3. The Final Review Panel "shall uphold the merits determination as to any allegation of the complaint that the determination was sustained, unless the panel concludes that the determination regarding the allegation clearly misapprehends the record before the original complaint examiner and is not supported by substantial, reliable, and probative evidence in that record." D.C. Official Code § 5-1112(g)(2); D.C. Mun. Regs., Title 6A, § 2121.4.

III. ANALYSIS AND DISCUSSION

The Final Review Panel (Panel) reviewed the March 2, 2017, OPC Report of Investigation (ROI) and attached exhibits, the March 19, 2017, Objections to the ROI submitted by Monica Crichlow, union representative, the March 30, 2017, response to the Objections from OPC, the May 1, 2017 Findings of Fact and Merits Determination of the Complaint Examiner, and the September 20, 2017, letter from Chief of Police, Peter Newsham. In particular, Chief Newsham objected to the Complaint Examiner's finding against SUBJECT OFFICER 1 because the case law cited by the Complaint Examiner were state court decisions for jurisdictions other than the District of Columbia and because "COMPLAINANT's statement clearly indicates that the decision to handcuff him was made by SUBJECT OFFICER 2 and not SUBJECT OFFICER 1, SUBJECT OFFICER 1 only assisted in handcuffing after COMPLAINANT began to resist.....SUBJECT OFFICER 1 did not make the decision to handcuff COMPLAINANT and only assisted SUBJECT OFFICER 2." The Review Panel has considered Chief Newsham's objections and upholds the Complaint Examiner's determination of harassment as toward SUBJECT OFFICER 1.

The Complaint Examiner determined that SUBJECT OFFICER 2, while off duty, but in full uniform, confronted Complainant on September 21, 2016, at approximately 3:15 p.m. At the time, Complainant was sitting on a wall with two acquaintances near the entrance to the parking lot at AN APARTMENT BUILDING IN SE, WASHINGTON, DC. SUBJECT OFFICER 2 was working as a security officer at APARTMENT BUILDING IN SE, WASHINGTON, DC. SUBJECT OFFICER 1 arrived on the scene in response to a request from SUBJECT OFFICER 2 for backup support.

SUBJECT OFFICER 1 and SUBJECT OFFICER 2 approached Complainant and SUBJECT OFFICER 2 asked Complainant whether he was barred from the property. Complainant said he was not. In response, SUBJECT OFFICER 2 requested that Complainant produce some identification. Complainant refused to produce the identification and told SUBJECT OFFICER 2 to call a supervisor. SUBJECT OFFICER 1 and SUBJECT OFFICER 2 handcuffed Complainant with SUBJECT OFFICER 1 stating that they handcuffed Complainant because he might try to run away. In concluding that SUBJECT OFFICER 1 and SUBJECT OFFICER 2's handcuffing of Complainant constituted harassment, the Complaint Examiner reviewed the record and determined that Complainant had not been engaged in any violent behavior or crimes, was not armed and did not attempt to flee, that SUBJECT OFFICER 2 and SUBJECT OFFICER 1 expressed no fear of harm from Complainant, and that there was no danger of Complainant running away. As such, the Complaint Examiner concluded that both

SUBJECT OFFICER 1 and SUBJECT OFFICER 2 harassed Complainant when they handcuffed Complainant.

Turning from the Complaint Examiner's Findings of Fact to his application of the law, this panel's independent review of the record finds ample support for the Complaint Examiner's conclusion. Here, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 were justified in approaching and stopping Complainant to learn whether he was trespassing on the private property at AN APARTMENT BUILDING IN SE, WASHINGTON, DC. If the Complainant was barred from that property, he was subject to arrest. It was, therefore, proper for the two officers to ask the Complainant to identify himself, so that SUBJECT OFFICER 2 could then determine whether there existed an order barring the Complainant. *See In re M.E.B.*, 638 A.2d 1123, 1126 (D.C. 1993) (a suspect may be detained temporarily "until a preliminary investigation either generates probable cause or results in [that person's] release"). *See generally Terry v. Ohio*, 392 U.S. 1 (1968).

When the Complainant refused to provide his name, the Panel appreciates that the officers may have thought they were approaching an impasse. But their resolution—handcuffing the Complainant to end his verbal resistance— was unlawful and a violation of MPD policy and thus rose to the level of harassment as concluded by Complaint Examiner.

Handcuffing a person is typically understood as escalating a detention authorized by *Terry* into an arrest. *See Al-Mahdi v. United States*, 867 A.2d 1011, 1023 (D.C. 2005) (handcuffing is "recognized 'as a hallmark of a formal arrest'") (quoting from *United States v. Newton*, 369 F.3d 659, 676 (2d Cir.), *cert. denied*, 543 U.S. 947 (2004). To justify an arrest, the police must have probable cause to believe the person is committing or has committed a crime. In this case, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 lacked probable cause to justify an arrest.

Nonetheless, in limited settings, handcuffing is permitted as part of a detention. Those settings, however, are very different from the encounter between Complainant and SUBJECT OFFICER 1 and SUBJECT OFFICER 2. A case cited by the Subject Officer in her "Objections to Report of Investigation from the Office of Police Complaints," as well as the cases mentioned by the complaint examiner, illustrate the difference.

In *United States v. Vargas*, 369 F.3d 98 (2d Cir. 2004), the case cited by the Subject Officer, the Court of Appeals noted that "although '[u]nder ordinary circumstances, drawing weapons and using handcuffs are not part of a *Terry* stop[,] intrusive and aggressive police conduct' is not an arrest 'when it is a reasonable response to legitimate safety concerns on the part of the investigating officers."[1] *Id.* at 102 (quoting from *United States v. Miles*, 247 F.3d

[1] In her Objections, the Subject Officer quotes from a more general list of factors mentioned by the Court of Appeals in assessing whether the encounter was too intrusive: the "amount of force used by the police, the need for such force, and the extent to which an individual's freedom of

1009, 1012 (9th Cir. 2001)[2]). In *Vargas*, it was proper to handcuff a suspect whom a reliable informant had identified as a robber who was then carrying a firearm, and who fled from the police as they approached to inquire.

In *Reynolds v. State*, 592 So.2d 1082 (Fla. 1992), a case cited by Complaint Examiner, the appellate court provided a long list of cases holding that it was permissible to handcuff a suspect during a *Terry* detention. But those cases, like the facts of *Reynolds* itself, all involved settings where the police were justified in believing that the suspect posed a danger to them or a third party. In *Reynolds*, for example, after stopping a car, the police handcuffed the driver. A trusted informant had told them that the car's passenger was resupplying street dealers with crack cocaine. The informant had also seen drugs in the car. An officer testified that in a similar encounter he had been injured. The appellate court accepted the officers' view that the driver or passenger might be armed or act "irrationally" when stopped. *Id.* at 1086.

The law in the District of Columbia is the same. In *In re M.E.B.*, 638 A.2d 1123, 1126 (D.C. 1993), the police responded to an emergency call reporting a murder. The police handcuffed a man leaning against a wall in the room where the deceased's body lay. The appellate court held that that restraint did not convert a legitimate detention into an arrest. The police were justified in fearing that he was the killer, and thus posed a danger to them.

The case law indicates that Subject Officers were not justified in handcuffing the Complainant and the Panel agrees with the Complaint Examiner's assessment of the encounter. In their interviews, neither SUBJECT OFFICER 1 or SUBJECT OFFICER 2 defended handcuffing the Complainant by claiming he was armed, was suspected of committing a violent crime, or posed any danger of fleeing. In his interview, the Complainant recalls that SUBJECT OFFICER 1 told him she thought he "might try to run." ROI, Exh. 3 at 21:12. But in her interview SUBJECT OFFICER 1 does not offer that explanation, or any other, except that the Complainant was "somewhat irate" about being stopped and she clarified that to the extent he resisted being handcuffed, it was verbal and not physical. Exh. 9 at 10:00. Moreover, the encounter occurred at the top of a flight of steps with the only escape blocked by the Subject Officers. Exh. 19. The Complainant had nowhere to retreat. *Id.* To escape, he would have had to knock over both officers and he shows no indication in the video of doing so. *Id.*

Chief Newsham's argument that SUBJECT OFFICER 1 merely assisted in handcuffing Complainant because she could not be expected to stand idly by while Complainant resisted

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movement was restrained, and in particular, such factors as the number of agents involved, whether the target of the stop was suspected of being armed, the duration of the stop, and the physical treatment of the suspect, including whether or not handcuffs were used." 369 F.3d. at 101 (quoting from *United States v. Perea*, 986 F.2d 633, 645 (2d Cir. 1993) (citations omitted).

[2] *Miles*, too, approved of handcuffing a suspect, but only because he was suspected of having fired shots at a nearby residence.

SUBJECT OFFICER 2's attempt to handcuff him is mistaken and overlooks the statements by both SUBJECT OFFICER 1 and SUBJECT OFFICER 2. The audio recordings of OPC's interviews with SUBJECT OFFICER 1 and SUBJECT OFFICER 2 are to the effect that SUBJECT OFFICER 1 actively and willingly participated in the handcuffing of Complainant.

At no time during SUBJECT OFFICER 1's interview does she state that her participation in handcuffing Complainant was mere assistance or was because Complainant was resisting SUBJECT OFFICER 2's attempts to handcuff him. Rather, she states that both she and SUBJECT OFFICER 2 handcuffed Complainant. Exh. 9 at 3:00 ("We decided to place him in handcuffs. We placed him in handcuffs."), 6:32 (When asked who placed the Complainant in handcuffs, SUBJECT OFFICER 1 answered, "myself and the other officer"), 7:30 ("[The other officer] assisted me in handcuffing [Complainant].") When asked why she decided to put Complainant in handcuffs, SUBJECT OFFICER 1 said it was because Complainant was irate , but this was expressed verbally and not physically. Exh. 9 at 10:00.

Likewise, SUBJECT OFFICER 2 indicated in his statements to OPC that he and SUBJECT OFFICER 1 jointly initiated the handcuffing of Complainant and it was only when SUBJECT OFFICER 1 was unable to handcuff Complainant because Complainant was moving his arm that SUBJECT OFFICER 2 took over the handcuffing. Exh. 7 at 10:36, 11:40 ("The female officer tried. Complainant wouldn't comply. She had one arm. [She was] struggling with [the Complainant] to handcuff him." SUBJECT OFFICER 2 took over the handcuffing at that point.).

Given the Subject Officers testimony as to their joint efforts to handcuff Complainant, if it was wrong for SUBJECT OFFICER 2 to try to handcuff the Complainant under the law, it was no less wrong for SUBJECT OFFICER 1 to participate.

For these reasons, the Complaint Examiner's conclusion that SUBJECT OFFICER 1 harassed Complainant when she handcuffed him is supported by substantial, reliable, and probative evidence and did not clearly misapprehend the record. Thus, the Final Review Panel finds that the Complaint Examiner correctly concluded that SUBJECT OFFICER 1 actively participated in the handcuffing of COMPLAINANT.

IV. SUMMARY OF FINAL REVIEW PANEL DECISION

SUBJECT OFFICER 1

Final Review Panel Determination issued on October 18, 2017.

Merits Determination Conclusion Regarding Allegation 1: Harassment-Handcuffing	Upheld

Submitted on October 18, 2017.

Jennifer A. Fischer
Complaint Examiner

Peter Tague
Complaint Examiner

Richard S. Ugelow
Complaint Examiner