

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	22-0198
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2
Allegation 1:	Harassment Length of Stop
Allegation 2:	Harassment – Pat Down
Allegation 3:	Harassment - Handcuffing
Allegation 4:	Harassment – Search of Car
Complaint Examiner:	Richard S. Ugelow
Merits Determination Date:	July 1, 2022

Pursuant to D.C. Official Code § 5-1107(b-1), the Office of Police Complaints (OPC) has the sole 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 § 5-1107(a). This complaint was timely filed in the proper form as required by § 5-110. 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

On January 18, 2022, at approximately 3:35 p.m., COMPLAINANT was driving on STREET IN SE, WASHINGTON, DC, when he was stopped for a traffic infraction by MPD Officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2. The officers were in a marked MPD cruiser and had been following COMPLAINANT for several minutes. COMPLAINANT's license and registration were in order. He was asked to exit the vehicle, which he did. COMPLAINANT then declined SUBJECT OFFICER #1's request to conduct a search of his person and the car. The officers then called for a canine unit to search the car. While the officers were waiting for the canine unit, SUBJECT OFFICER #1 claimed to notice a bulge in COMPLAINANT's jacket and, over his objection, both officers patted him down in the area of his right jacket pocket. No weapon was found. It took approximately 20 minutes for the canine unit to arrive and walk around the car. According to SUBJECT OFFICER #1 and SUBJECT OFFICER #2 the canine search indicated that a weapon was in the car, and a search of the car followed. At approximately this time, COMPLAINANT was handcuffed. The search did not reveal a weapon or any contraband. COMPLAINANT was released from the handcuffs. He was

given a verbal warning and allowed to go on his way. The entire incident took approximately 40 minutes.

COMPLAINANT filed a timely complaint with OPC raising several issues, some of which were dismissed by OPC.¹ The issues for the Complaint Examiner to decide are whether the officers harassed COMPLAINANT by unlawfully prolonging the traffic stop, patting him down, placing him in handcuffs, and searching his car.

II. EVIDENTIARY HEARING

The Complaint Examiner determined that the Report of Investigation (ROI) presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3. This determination was based on a review of OPC's Report of Investigation, the objections submitted by the DC Police Union (Union) on behalf of SUBJECT OFFICER #1 and SUBJECT OFFICER #2, OPC's response to the objections, and the Complaint Examiner's review of the Body Worn Camera (BWC) footage for SUBJECT OFFICER #1, SUBJECT OFFICER #2, and WITNESS OFFICER #1 (K9 officer).

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by the Union on behalf of SUBJECT OFFICER #1 and SUBJECT OFFICER #2, OPC's response to the objections, and the Complaint Examiner's review of the BWC footage for SUBJECT OFFICER #1, SUBJECT OFFICER #2, and WITNESS OFFICER #1, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On January 18, 2022, at approximately 3:35 p.m. COMPLAINANT was driving his personal vehicle on A STREET IN SE, WASHINGTON, DC when he was stopped by uniformed MPD Officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 for rolling through stop signs and illegally tinted windows.
2. COMPLAINANT's vehicle was a "show" car with, among others, decorative hubcaps and markings, and tinted windows.

¹ COMPLAINANT further alleged that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed him by unlawfully stopping him. COMPLAINANT also alleged that SUBJECT OFFICER #2 used unnecessary or excessive force against him by pulling him out of his car. COMPLAINANT also alleged that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 discriminated against him based on his race, where he was driving during the incident, and the appearance of his car. Pursuant to D.C. Code § 5- 1108(1), on May 15, 2022, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's executive director. *See Exhibit 2.*

3. The officers were in a marked MPD cruiser and had been following COMPLAINANT for several minutes, somewhere between 90 seconds and seven minutes.
4. According to the officers, COMPLAINANT was driving in a manner that indicated he was attempting to lose them.
5. Before he was stopped, the officers (presumably SUBJECT OFFICER #2 in the passenger seat) determined that the vehicle was not stolen.
6. COMPLAINANT was told that he had not fully stopped at several stop signs. He was also told that the car's tinted windows were too dark and unlawful.
7. COMPLAINANT denied that he had not stopped at the stop signs and that he was driving in a manner calculated to lose them. He told (and showed) the officers that he had received a ticket in Maryland for illegal tinted windows.
8. OPC determined that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 had "the lawful authority to stop [COMPLAINANT] to address the stop sign and window tint violations." See **Exhibit 2**.
9. COMPLAINANT provided the officers with his registration and driver's license.
10. COMPLAINANT exited the vehicle when asked to do so. SUBJECT OFFICER #1 BWC at 6:30.
11. COMPLAINANT was asked if he would consent to a pat down, which he refused. Indeed, he specifically said "Don't pat me down." SUBJECT OFFICER #1, BWC at 3:30.
12. The officers learned from their computer search that COMPLAINANT had been arrested for armed carjacking at some unknown time in the past.
13. COMPLAINANT was told that a canine unit would be called to search the car for weapons.
14. COMPLAINANT indicated that he was generally aware of the role of the canine units but did not give permission for a search. See ROI at 5.
15. Although the day was sunny, it appeared to be cold. Several officers were seen in the BWC footage to be wearing face coverings and COMPLAINANT was wearing a black puffy winter jacket.
16. After approximately nine minutes of standing in the cold, COMPLAINANT was again asked if he had a gun. He responded that he did not. Nevertheless, the officers patted the

- front of COMPLAINANT's coat because they claimed to have seen a bulge. SUBJECT OFFICER #1 BWC at 15:40
17. COMPLAINANT told the officers that he did not give them permission to search him. The officers stated it was a pat down, not a search. SUBJECT OFFICER #1 BWC at 15:40.
 18. For approximately 25 minutes COMPLAINANT stood away from his car and was talking on his cell phone awaiting the arrival of the canine unit.
 19. At all times COMPLAINANT was watched by one or more MPD officers, as additional officers arrived on the scene.
 20. The BWC shows at least six officers present.
 21. The canine unit arrived approximately 30 minutes after COMPLAINANT was stopped. SUBJECT OFFICER #1 BWC at 30.
 22. The handler led the dog twice around the car and indicated to SUBJECT OFFICER #1 and SUBJECT OFFICER #2 that there was a positive response.
 23. COMPLAINANT was handcuffed by the officers, and the car was searched. SUBJECT OFFICER #1 BWC at 31-32.
 24. Nothing was found in the car and the handcuffs promptly were removed from COMPLAINANT. SUBJECT OFFICER #1 BWC at 36:24.
 25. COMPLAINANT was given a verbal warning, handed a piece of paper (not a ticket) by SUBJECT OFFICER #2 and allowed to leave. The piece of paper said, "warrantless search." ROI at 4.
 26. Neither SUBJECT OFFICER #1 nor SUBJECT OFFICER #2 had a ticket book, and the ticket writer was inoperable. In other words, neither officer had the means of issuing a citation to COMPLAINANT. ROI at 8.
 27. At no time did any officer measure the amount of tint on the windows of COMPLAINANT's car.

IV. DISCUSSION

Pursuant to D.C. Code § 5-1107(a), (b-1), OPC has the sole authority 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; (5) retaliation against a person for filing a complaint pursuant to [the Act]; or (6) failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public.”

The ROI determined that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed COMPLAINANT in four different ways: (1) unlawfully prolonging the traffic stop, (2) patting him down, (3) placing him in handcuffs, and (4) searching his car. The officers, through the Union representative, argue that they acted appropriately at all times.

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 as “words, 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: (a) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (b) deny or impede the person in the exercise or enjoyment of any right, privilege, power, or immunity.”

The regulations governing OPC 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 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. 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. tit. 6A, § 2199.1.

1. Prolonged Traffic Stop.

The extended length of the traffic stop, approximately 40 minutes, was due to the officers’ determination to call the canine unit. Absent that determination, the traffic stop would certainly have been routine, and COMPLAINANT would have been on his way in short order. Thus, the question for the Complaint Examiner is whether the subject officers were justified in requesting a canine search of the car.

The officers’ justification for the stop was their assertion that COMPLAINANT drove evasively when he was followed, “answered questions evasively, and was excessively nervous.” Union objections at p.5. The Union correctly notes that the OPC did not consider these assertions in reaching its decision. The Complaint Examiner’s review of the BWC footage does not support a finding that COMPLAINANT answered questions evasively or acted excessively nervous. COMPLAINANT at all times seemed to be cooperative and responsive to the officers.

He acted in a manner that appears to be reasonable and calm under the circumstances. And, if he was shaking (which the BWC does not reveal) it could easily be attributed to the cold weather.

The Complaint Examiner will assume, without deciding, for purposes of this decision that COMPLAINANT drove evasively before the stop. It does not follow, however, that driving evasively by itself leads to a credible suspicion that COMPLAINANT was in possession of a weapon. Likewise, the fact that gunshots may have been heard in the area does not link COMPLAINANT to gun possession. Neither does a past arrest for alleged armed carjacking provide the necessary grounds to suspect gun possession.

Rodriquez v. the United States, 575 U.S. 348 (2015) is on point. There, the Supreme Court held that: the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission" – to address the traffic violation that warranted the stop. Id. at 354. Here, as in Rodriquez, there was no independent justification to go beyond a traffic stop. The mission in the case of COMPLAINANT was to address an alleged traffic violation and illegal tinted windows. There was no other reason for the officers to stop COMPLAINANT. Once those limited issues were addressed, COMPLAINANT should have been free to go.

The Complaint Examiner is aware of the “gun problem” in the District of Columbia and applauds MPD’s efforts to get illegal weapons off the streets. That said, such efforts must comport with the U.S. Constitution and MPD Orders and guidelines. Here, the officers’ actions went beyond what is permitted by the law and regulations.

The totality of the circumstances confirm that the officers harassed COMPLAINANT within the meaning of MPD General Order 120.25 by prolonging his detention when a canine unit was requested.

2. Improper Pat Down.

COMPLAINANT told the subject officers at least twice that he would not consent to a search. That is not in dispute. Although SUBJECT OFFICER #1 stated that he was conducting a protective pat down and not a search, the pat down (or search) must meet constitutional standards.

SUBJECT OFFICER #1 and SUBJECT OFFICER #2 patted COMPLAINANT’s jacket because the officers claimed to observe “a significant-size bulge on COMPLAINANT’s right side that he kept tapping and holding.” ROI at 14. The Union claims that the “BWC footage clearly shows an abnormal bulge in COMPLAINANT’s right front pocket, that COMPLAINANT appears to be trying to conceal.” Union Objections at 6. The Union correctly notes that pat down was restricted to the suspected area of COMPLAINANT’s jacket.

General Order 304.10, II, C, 1 requires that there be “reasonable suspicion that the individual is carrying a concealed weapon or dangerous instrument and that a pat down is necessary to self-protect or protect others.”

In reviewing the BWC footage, the Complaint Examiner paid particular attention to COMPLAINANT’s jacket and looked for a bulge. An “abnormal” bulge was not observed. In fact, no bulge on any part of the jacket was observed. It would have been particularly difficult, in the opinion of the Complaint Examiner, to see a bulge in COMPLAINANT’s jacket because it was puffy. Importantly, the right pocket did not appear to the Complaint Examiner to look differently than the left pocket.

There are, however, additional reasons why the pat down was unjustified. COMPLAINANT denied on more than once that he possessed a gun. His denials did not, to this Complaint Examiner, seem suspect. More importantly, however, COMPLAINANT was out of his car and standing alone for approximately nine minutes before the subject officers determined that a pat down was appropriate. During that time, he was watched by one or more officers. At no time did he make any moves that looked threatening. Indeed, he was always holding a cell phone in his hand and often talking on it. None of the officers observing him indicated that he posed a threat or possessed a weapon because none sought to pat him down. Finally, shortly after COMPLAINANT exited his vehicle, SUBJECT OFFICER #1 visually looked inside the car and did not see a weapon or contraband. All the objective indicators were that COMPLAINANT did not possess a weapon or pose a threat to the officers or others.

In sum, there was no reason to believe that COMPLAINANT possessed a weapon or otherwise posed a threat to the subject officers. The totality of the circumstances confirm that the officers harassed COMPLAINANT within the meaning of MPD General Order 120.25 by patting him down without justification or reasonable suspicion.

3. Inappropriate Handcuffing.

COMPLAINANT was handcuffed once the canine unit indicated a positive response. SUBJECT OFFICER #1 BWC at 31. At the time, almost 30 minutes into the encounter, COMPLAINANT was standing in the area of the stop, cell phone in hand, not acting in a threatening manner, and under the observation of one or more MPD officers. SUBJECT OFFICER #1 told OPC that COMPLAINANT was placed in handcuffs as a preventive measure to ensure that he would not try to leave the scene while the car was searched. According to SUBJECT OFFICER #1 some individuals run once the dog makes a positive identification, although it is rare. Exhibit 8 at p. 2.

As discussed in the ROI at p. 16, use of handcuffs is appropriate for officers’ safety or to prevent a suspect from fleeing. Like the Union (objections at p. 7), the Complaint Examiner is acutely concerned about the safety of police officers and the need to avoid physical conflict with suspects. These concerns must be balanced against the case law and applicable MPD General Order 304.10 (use the least coercive means necessary to conduct a stop). Exhibit 27.

Here, COMPLAINANT was standing uncuffed for some 30 minutes and had not acted in a threatening or other untoward manner. And, of course, he was under the constant observation of one or more police officers. If COMPLAINANT was going to react adversely to the search he almost certainly would have done so long before the canine search. After all, he had been advised early in the stop that the canine unit was being called to search the car. SUBJECT OFFICER #1 BWC at 6:30. Stated differently, COMPLAINANT had some 24 minutes to run or act before the canine search. The BWC footage shows COMPLAINANT being cavalier about the search², saying in effect “go ahead call the canine unit.” SUBJECT OFFICER #1 BWC at 6:30.

Thus, the totality of the evidence and the circumstances are to the effect that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed COMPLAINANT within the meaning of MPD General Order 120.25 by directing WITNESS OFFICER #2 and WITNESS OFFICER #3 to place him in handcuffs.

4. Search of the Car.

The search of COMPLAINANT’s car was based solely on the positive response of the canine unit walk around of the car. For the reasons discussed earlier, there was no cause to call the canine unit. It follows, therefore, that the search of the car was also improper because the officers lacked probable cause or COMPLAINANT’s consent.

Under the totality of the evidence and the circumstances extant here are to the effect that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed COMPLAINANT within the meaning of MPD General Order 120.25 by conducting a search of his car.

SUBJECT OFFICER #1

Allegation 1: Harassment Length of Stop	Sustained
Allegation 2: Harassment – Pat Down	Sustained
Allegation 3: Harassment – Handcuffing	Sustained
Allegation 4: Harassment – Search of Car	Sustained

² This is not to suggest that COMPLAINANT approved or authorized the search, which he clearly did not. Rather, COMPLAINANT seemed to accept the reality of the circumstances that the officers were going to do what they wanted, and he couldn’t do anything about it.

SUBJECT OFFICER #2

Allegation 1: Harassment Length of Stop	Sustained
Allegation 2: Harassment – Pat Down	Sustained
Allegation 3: Harassment - Handcuffing	Sustained
Allegation 4: Harassment – Search of Car	Sustained

Submitted on July 1, 2020.

Richard S. Ugelow
Complaint Examiner