

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.	14-0290
Complainant:	COMPLAINANT
Subject Officers, Badge No., District:	SUBJECT OFFICER
Allegation 1	Harassment
Allegation 2	Language or conduct
Complaint Examiner:	Sara Kropf
Merits Determination Date:	January 23, 2016

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 in 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

In a complaint timely filed with OPC on June 27, 2014, COMPLAINANT alleged that on June 5, 2014, SUBJECT OFFICER harassed him when he searched his car without consent and that SUBJECT OFFICER used language that was insulting, demeaning or humiliating when SUBJECT OFFICER asked COMPLAINANT if he was a drug user and asked him to display his arms to look for evidence of drug use.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on December 2, 2015. The Complaint Examiner heard the testimony of COMPLAINANT, WITNESS #1, WITNESS #2, WITNESS OFFICER #1, WITNESS OFFICER #2, WITNESS OFFICER #3 and SUBJECT OFFICER. The Complaint Examiner also reviewed OPC's Report of Investigation and the exhibits found in the OPC file. The parties filed post-hearing briefs, and the Complaint Examiner considered those briefs as well as the transcript of the hearing in reaching this decision.

III. FINDINGS OF FACT

Based on the evidence described above, the Complaint Examiner finds the material facts regarding the complaint to be:

1. On June 5, 2014, SUBJECT OFFICER pulled over a car on A STREET IN N.E. WASHINGTON, D.C. for failure to signal a turn.

2. This area of Washington, DC, is understood by SUBJECT OFFICER to be a high-crime area.
3. COMPLAINANT was driving the car, WITNESS #1 was in the front passenger seat and WITNESS #2 was in the back passenger seat.
4. All three passengers were cooperative during the traffic stop and did not threaten SUBJECT OFFICER at any time.
5. After obtaining COMPLAINANT'S license, SUBJECT OFFICER returned to his car to write a citation.
6. As he was writing the citation, SUBJECT OFFICER did not have a clear view of what was happening in COMPLAINANT'S car and he was distracted by writing the citation.
7. COMPLAINANT, WITNESS #1 and WITNESS #2 did not engage in any furtive movements in the car while SUBJECT OFFICER was writing the citation, or any movements that could reasonably be interpreted as movements to conceal a weapon or other contraband.
8. At no point did SUBJECT OFFICER have a specific reason to feel threatened by COMPLAINANT, WITNESS #1 and WITNESS #2, other than the general concerns raised by a traffic stop at night.
9. After writing the citation, SUBJECT OFFICER returned to the car and asked for COMPLAINANT'S consent to search the car.
10. COMPLAINANT refused to give his consent to search the car.
11. There is no evidence that SUBJECT OFFICER had a search warrant to search COMPLAINANT'S car.
12. SUBJECT OFFICER did not see any contraband or weapons in the car in plain view before he searched the car. He did see at least one beer can in the car. He was also aware that WITNESS #1 had a closed pocket knife in his pocket, because WITNESS #1 told him it was there. The knife was located and seized without incident during a pat down of WITNESS #1 outside of the car.
13. SUBJECT OFFICER searched the car, including the front passenger seat area, the glove compartment and the center console.
14. During this search, SUBJECT OFFICER found no evidence of a crime or any weapons.
15. Before the search of the car, SUBJECT OFFICER asked all three passengers to exit the car.
16. While COMPLAINANT was outside of the car, SUBJECT OFFICER asked him if he used drugs. SUBJECT OFFICER also asked COMPLAINANT to turn over his arms so

that SUBJECT OFFICER could see whether there was any evidence on his arms to show that he used drugs. COMPLAINANT denied that he used drugs and complied with the request to show his arms.

17. SUBJECT OFFICER did not have any evidence that COMPLAINANT was under the influence of drugs during the traffic stop, nor was COMPLAINANT under the influence of drugs during the traffic stop.
18. There was no law enforcement purpose to asking COMPLAINANT if he was under the influence of drugs or requesting that he display his arms to the subject officer.
19. None of the three passengers was arrested.

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 or residence of business; or (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.” MPD General Order 201.26 (effective April 5, 2011), Park IV, states: In accordance with D.C. Official Code § 2-1401, et seq. (District of Columbia Human Rights Act), members shall not discriminate, either in the enforcement of the law, or in the provision of police service, on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity and expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intra-family offense, and place of residence or business.”

Harassment – Search of the Car

COMPLAINANT alleges that SUBJECT OFFICER harassed him by searching the car without his consent or any other valid justification.

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.

There are several ways in which a police officer may validly search a car. The officer may have a search warrant or the valid consent of the driver. The officer may search a car incident to arrest. *Arizona v. Gant*, 556 U.S. 332, 343 (2009). A warrantless search is also permitted if the officer has probable cause to believe there is evidence or contraband in the car, *Speight v. United States*, 671 A.2d 442, 445 (D.C. 1996), or has a “reasonable articulable belief” that a person in the car is potentially dangerous, *Michigan v. Long*, 463 U.S. 1032 (1983). MPD General Order 304.15 provides that MPD officers “shall be able to articulate specific facts and circumstances that support reasonable suspicion or probable cause.” MPD General Order 304.10 explains that “reasonable suspicion” is “more than a hunch or mere speculation on the part of the officer but less than the probable cause necessary to arrest” a suspect.

It is undisputed that SUBJECT OFFICER did not have a search warrant for COMPLAINANT’S car. SUBJECT OFFICER testified that he thought COMPLAINANT likely did not give him consent for a search. COMPLAINANT and the other passengers testified that COMPLAINANT did not give consent for the search.

SUBJECT OFFICER contends that he had a reasonable articulable belief to search the car because he saw movement in the car while he was writing the citation in his cruiser. The Complaint Examiner declines to credit this testimony for two primary reasons.

First, SUBJECT OFFICER’S written statement differs from his testimony during the hearing. In his written statement, SUBJECT OFFICER stated only that he “observed movement in the vehicle. I do not specifically recall who was moving or how.” Exhibit 7. During the hearing several months later, however, he recalled that the person who moved was either WITNESS #1 or WITNESS #2 and that the movement was specific (“he turned his head around, I guess, to look back.”). Tr. 142:11-15. It is not credible that SUBJECT OFFICER’S memory improved in the intervening months.

Second, SUBJECT OFFICER conceded that he was sitting in his cruiser, writing a citation, at the time he supposedly saw these movements. He therefore neither had a clear view of what was happening in COMPLAINANT’S car nor was he completely focused on what was happening in COMPLAINANT’S car.

The Complaint Examiner finds credible the consistent testimony of COMPLAINANT, WITNESS #1 and WITNESS #2 that none of them engaged in any movements that would suggest concealment of weapons or contraband.

SUBJECT OFFICER also suggested during the hearing that he had a reasonable articulable belief that someone in the car was dangerous because WITNESS #1 had a closed pocket knife in his pocket. However, this fact standing alone does not reach the objective standard of a reasonable articulable belief because WITNESS #1 voluntarily consented to the search (which was conducted outside of the car), immediately warned the officer that that he had the small pocketknife in his pocket and made no movement to use to knife in any threatening manner. These facts contradict the testimony by SUBJECT OFFICER that he thought someone in the car might be dangerous because of the existence of the pocketknife.

Because there was no legal justification the search of COMPLAINANT'S car, SUBJECT OFFICER engaged in conduct that was "recklessly in violation of the law or internal guidelines of the MPD." D.C. Mun. Regs. tit. 6A, § 2199.1. This allegation is sustained.

Language or Conduct – Drug-Related Inquiries

COMPLAINANT also alleges that SUBJECT OFFICER engaged in improper language or conduct when he (1) asked COMPLAINANT whether he used drugs, and (2) asked COMPLAINANT to show the subject officer his arms to determine whether there was any evidence that he did use drugs.

MPD General Order 201.26 (effective Nov. 10, 1976), Part I, Section C. Nos. 1-3 states in pertinent part:

All 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 be courteous, civil, and respectful to . . . other persons whether on, or off duty. They shall be quiet, orderly, and attentive and shall exercise patience and discretion in the performance of their duties Members shall refrain from harsh, violent, coarse, profane, sarcastic, or insolent language.

MPD General Order 201.26 states that officers should refrain from "us[ing] terms or resorting to name-calling which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person."

COMPLAINANT recalled that SUBJECT OFFICER then asked him to show his arms to the officer to check to see if he used drugs. SUBJECT OFFICER agreed that he "probably" asked to see COMPLAINANT'S arms. Tr. 137:4. The Complaint Examiner concludes that SUBJECT OFFICER asked COMPLAINANT to show the officer his arms to look for evidence of drug use. COMPLAINANT denied that SUBJECT OFFICER called him a "drug addict." Tr. 37:10-12.

SUBJECT OFFICER testified that when he first approached the car during the traffic stop, he noticed that COMPLAINANT'S hands looked "bloated or kind of like puffy" and that from his "experience as a proactive police officer, I've learned that puffy hands, or swollen hands, or large hands like that it's known as, puffy hands syndrome. And you get that from heroin users who've been using heroin." Tr. 124:3-4, 124:7-11.

Although the Complaint Examiner credits SUBJECT OFFICER'S testimony that he did not intend to insult COMPLAINANT by asking him these questions, proof of a violation of MPD 201.26 does not require wrongful intent by the officer. The Complaint Examiner does not conclude that SUBJECT OFFICER engaged in "name-calling" by asking COMPLAINANT these questions. The Complaint Examiner also does not find that these questions constitute "harsh, violent, coarse, profane, sarcastic, or insolent language" under MPD General Order 201.26.

The only possible way this question and request could be a language and conduct violation would be to conclude that SUBJECT OFFICER was not “courteous, civil [or] respectful” towards COMPLAINANT, under MPD General Order 201.26.

The Complaint Examiner notes that there was no legitimate law enforcement reason for these questions. As an initial matter, there was no indication to SUBJECT OFFICER that COMPLAINANT was under the influence of drugs during the traffic stop and there is no scientific support in the record for the “puffy hands syndrome” articulated by SUBJECT OFFICER. Plus, the request appeared to be made after COMPLAINANT refused to consent to the search, giving rise the possibility that SUBJECT OFFICER was upset at the lack of consent. The Complaint Examiner is concerned that this request was made when it was not necessary to conduct the traffic stop for a simple moving violation.

This is a close call. The language of MPD General Order 201.26, taken as a whole, appears to be aimed more at regulating the demeanor and conduct of officers during interactions with the public than at regulating the content of the questions they ask during an investigation. This is not to say that questions asked by an officer during an investigation cannot give rise to a language and conduct violation if they are, on their face, disrespectful, uncivil or discourteous. Here, however, there is no evidence that SUBJECT OFFICER used a hostile or disrespectful tone when he asked COMPLAINANT to show him his arms, and the questions he asked do not, on their face, implicate MPD General Order 201.26. As a result, the Complaint Examiner concludes that the requests—while inappropriate and unnecessary—do not violate any of the applicable regulations. This allegation is unfounded.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1: Harassment	Sustained
Allegation 2: Language or conduct	Unfounded

Submitted on January 23, 2016.

Sara Kropf
Complaint Examiner