

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	08-0394
Complainant:	COMPLAINANT
Subject Officer, District:	SUBJECT OFFICER, Sixth District
Allegation 1:	Harassment
Allegation 2:	Unnecessary or Excessive Force
Complaint Examiner:	Turna R. Lewis
Merits Determination Date:	November 19, 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 filed a complaint with the Office of Police Complaints on June 9, 2008. COMPLAINANT alleges that on June 1, 2008, SUBJECT OFFICER harassed him when he was questioned in front of his residence and arrested for assault on a police officer. COMPLAINANT also alleged that SUBJECT OFFICER pointed his service weapon at him, using unnecessary or excessive force towards him.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on August 16, August 17, and September 7, 2012. The Complaint Examiner heard the testimony of COMPLAINANT, SUBJECT OFFICER, and Witnesses WITNESS #1, WITNESS OFFICER, and WITNESS LIEUTENANT. The following exhibits were introduced into the record.

Exhibits

Exhibit 1: OPC Formal Complaint, COMPLAINANT, received June 10, 2008.

Exhibit 2: OPC Dismissal, August 26, 2010.

- Exhibit 3: OPC Interview of COMPLAINANT, July 3, 2008.
- Exhibit 4: OPC Statement of WITNESS #2, August 1, 2008.
- Exhibit 5: OPC Statement WITNESS #3, July 29, 2008.
- Exhibit 6: OPC Statement of WITNESS #1, August 12, 2008.
- Exhibit 7: OPC Memorandum of Interview, WITNESS #4, July 28, 2008.
- Exhibit 8: OPC Memorandum of Interview, WITNESS #5, July 28, 2008.
- Exhibit 9: OPC Memorandum of Interview, WITNESS #6, July 28, 2008.
- Exhibit 10: OPC Statement of SUBJECT OFFICER, Sixth District, October 22, 2008.
- Exhibit 11: OPC Statement of WITNESS OFFICER #1, Sixth District, October 23, 2008.
- Exhibit 12: OPC Statement of WITNESS SERGEANT, Sixth District, October 30, 2008.
- Exhibit 13: OPC Memorandum of Investigative Activity. MPD Radio Run record of compact disc for OPC # 08-0394.
- Exhibit 14: MPD Event Chronology, event number; 120080293919.
- Exhibit 15: D.C. Superior Court, 2008 CDC 012355, Docket entries, file date June 2, 2008, and transcript of hearing and Judge Susan Winfield's findings, dated August 4, 2008.
- Exhibit 16: Final Report Regarding the Use of Force (Tactical Takedown, Hand Control Techniques) Involving WITNESS OFFICER and SUBJECT OFFICER of the Sixth District (IS Number 08-002833).
- Exhibit 17: Letter of declination of criminal prosecution from U.S. Attorney's Office, dated September 15, 2008.
- Exhibit 18: MPD Special Order 01-01, "Office of Citizen Complaint Review and the Citizen Complaint Review Board" (effective January 5, 2001).
- Exhibit 19: MPD General Order 120.21, "Disciplinary Procedures and Processes" (effective April 13, 2006).
- Exhibit 20: D.C. Official Code § 22-1321 "Disorderly Conduct" (2010).
- Exhibit 21: MPD General Order 901.07 "Use of Force" (effective October 7, 2002).

Exhibit 22: Policy and Procedures: "Application of the Use of Force Continuum for the MPD" (November 2000).

Exhibit 23: MPD General Order 201.26 "Duties, Responsibilities and Conduct of Members of the Department" (effective November 10, 1976).

III. FINDINGS OF FACT

Based on the evidence contained in the OPC's Report of Investigation and testimony presented at the hearing, the Complaint Examiner finds the material facts regarding this complaint to be:

1. COMPLAINANT filed a complaint with OPC on June 9, 2008, alleging that on June 1, 2008, SUBJECT OFFICER used excessive force when he pointed a gun in the COMPLAINANT'S face and harassed him by arresting him without cause.
2. The incidents occurred in front of COMPLAINANT'S residence, located at ADDRESS, where COMPLAINANT resided with his grandparents when he was not attending college.
3. At the time of the incident, COMPLAINANT was a student at Hampton University.
4. On the evening of the incident in question COMPLAINANT attended a birthday cookout for WITNESS #7'S stepfather in Fort Washington, Maryland.
5. After attending the birthday cookout, COMPLAINANT returned to his grandparents' home with six friends, WITNESS #8, WITNESS #1, WITNESS #7, WITNESS #9, and twins WITNESS #2 and WITNESS #3.
6. COMPLAINANT and his friends were riding in two cars: COMPLAINANT, WITNESS #9, WITNESS #2, and WITNESS #3 were riding in WITNESS #2'S car; and WITNESS #7, WITNESS #8 and WITNESS #1 were riding in WITNESS #8'S car. WITNESS #8'S car was parked in front of the driveway, blocking the driveway. WITNESS #2'S car was parked on the street.
7. Upon arriving at COMPLAINANT'S home, COMPLAINANT and his friends remained in and near their cars.
8. WITNESS #4, a neighbor, who resided next door to COMPLAINANT'S residence, made a "911" call complaining of a group of about six men and noise. WITNESS #4 described the men as "smoking crack and hanging out here and loitering out here for the last 4 or 5 hours." An MPD dispatcher indicated that MPD would dispatch a car.
9. MPD records of the "911" call made by WITNESS #4 do not indicate the time of his "911" call.

10. At approximately 1:01 a.m., SUBJECT OFFICER and WITNESS OFFICER responded to a MPD radio run call requesting MPD officers to report to ADDRESS. Records of the MPD radio indicate the dispatcher described the basis for MPD assistance as "...group of men, drug complaint, loud noise complaint, no lookout."
11. Upon arriving at the scene, SUBJECT OFFICER and WITNESS OFFICER notified the dispatcher and requested additional MPD assistance.
12. MPD radio run records for June 1, 2008 indicate an officer stating "turn the f--- around," an unidentified individual stating "shoot me then. See there you go." The officer responds "Don't you f-----g move" The MPD radio run record indicates that a rustling noise is heard.
13. SUBJECT OFFICER and WITNESS OFFICER exited the MPD squad car and approached COMPLAINANT and his friends, directing them to place their hands on the car. COMPLAINANT ignored the directive, exiting the car to walk towards his grandparents' house.
14. As SUBJECT OFFICER and WITNESS OFFICER approached the cars, WITNESS #7 began to walk away from the car blocking the driveway toward the second car parked on the street. WITNESS #7 threw an item under the car. Both officers heard the sound of the item as it hit the ground, thinking it was a weapon.
15. WITNESS OFFICER approached WITNESS #7 who threw the item. SUBJECT OFFICER unholstered his service weapon and placed it in the tuck position.
16. SUBJECT OFFICER unholstered his service weapon, placing it in a tuck position, after hearing the object drop.
17. WITNESS OFFICER recovered the item WITNESS #7 had thrown to the ground, discovering it was a pill bottle. WITNESS #7 was arrested and charged with possession with intention to distribute (PWID) amphetamines. WITNESS #9 was also arrested and charged with PWID amphetamines.
18. COMPLAINANT ignored SUBJECT OFFICER'S directives to place his hands on the car, and began to use profane language in a loud voice towards SUBJECT OFFICER.
19. Both COMPLAINANT and SUBJECT OFFICER engaged in an exchange of profane language. COMPLAINANT'S voice was loud enough for neighbors to hear and observe his behavior. COMPLAINANT'S grandparents came out to the yard and asked COMPLAINANT to stop using profanity to no avail.
20. SUBJECT OFFICER requested that COMPLAINANT place his hands behind his back to be handcuffed. COMPLAINANT refused and began to use aggressive hand gestures towards SUBJECT OFFICER, striking him on his shoulder. SUBJECT OFFICER used a tactical takedown of COMPLAINANT and WITNESS OFFICER then assisted SUBJECT OFFICER in placing handcuffs on COMPLAINANT.

21. COMPLAINANT was charged with assault on a police officer and a hearing was held in D.C. Superior Court before Judge Susan Winfield on August 4, 2008.
22. SUBJECT OFFICER was officially reprimanded by MPD for using profanity during the incident with COMPLAINANT.
23. Judge Winfield dismissed the charges, finding that the Government failed to meet its burden of proof that COMPLAINANT assaulted a police officer, noting that the MPD did not provide any evidence of the "911" call and dispatch of a squad car.
24. On August 15, 2008, OPC referred COMPLAINANT'S complaint to the U.S. Attorney for the District of Columbia (USAO) for possible criminal prosecution of SUBJECT OFFICER and WITNESS OFFICER based on COMPLAINANT'S allegations of unnecessary or excessive force.
25. On September 17, 2008, OPC received a letter from the USAO notifying OPC that the USAO would not criminally prosecute SUBJECT OFFICER.
26. WITNESS LIEUTENANT conducted an investigation of the use of force (tactical takedown, hand control techniques) and issued written findings, "Final Report Regarding the Use of Force (Tactical Takedown, Hand Control Techniques Involving WITNESS OFFICER AND SUBJECT OFFICER)" (IS Number 08-00283), (hereinafter referred to as "Final Report Regarding the Use of Force"), dated September 23, 2008, to the Assistant Chief for the Internal Affairs Bureau. The report was signed by the Captain, Sixth District, and the Assistant Chief, Internal Affairs, on October 6, 2008.
27. WITNESS LIEUTENANT concluded, in the "Final Report Regarding the Use of Force," that SUBJECT OFFICER acted reasonably and within MPD guidelines when he used a tactical take-down to gain control of COMPLAINANT, who was actively resisting a lawful attempt to arrest him.
28. WITNESS LIEUTENANT concluded that the use of force tactical take-down by SUBJECT OFFICER should be classified as "Justified-Within Departmental Policy"; that the use of force and control techniques by WITNESS OFFICER should be classified as "Justified-within Departmental Policy;" and that the allegation that SUBJECT OFFICER and WITNESS OFFICER used excessive force on COMPLAINANT should be classified as "Insufficient Facts."

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 of residence or business; or (5) retaliation against a person for filing a complaint pursuant to [the Act].”

Harassment

COMPLAINANT alleges that SUBJECT OFFICER harassed him when he was arrested for disorderly conduct as he was walking towards his grandparent’s residence. COMPLAINANT was later tried in D.C. Superior Court for assault on a police officer (Tr. at 51, 71; Exhibit 15). As discussed below, the Complaint Examiner finds that SUBJECT OFFICER’S actions in stopping and arresting COMPLAINANT did not violate D.C. Code § 5-1107(a), MPD Special Order 01-01 and MPD General Order 201.26.

Harassment, as defined by MPD Special Order 01-01, Part III, Section G, includes “acts that are intended to bother, annoy, or otherwise interfere with a citizen’s ability to go about lawful business normally, in the absence of a specific law enforcement purpose.”

The applicable District of Columbia 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 looks 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.

COMPLAINANT was returning to his grandparent’s home after attending a barbecue on the afternoon of June 1, 2008. Sometime that evening he arrived at his grandparent’s home with six friends, WITNESS #8, WITNESS #1, WITNESS #7, WITNESS #9, WITNESS #3, and WITNESS #2 (Exhibit 3). His claim that he was harassed by SUBJECT OFFICER is not supported by the evidence. A neighbor, WITNESS #4, told OPC that he made a “911” call to MPD to report disorderly conduct. WITNESS #4’S disorderly complaint, described six men who were “smoking crack and stuff,” making “loud noise,” and “hanging out” near his residence (Exhibit 7). In response to WITNESS #4’S “911” call, MPD dispatched a squad car to the scene. SUBJECT OFFICER and WITNESS OFFICER arrived on the ADDRESS OF SCENE, between 1:01 a.m. and 1:06 a.m. (Exhibit 13; Tr. at 187). Shortly after SUBJECT OFFICER and Officer Brown arrived, they requested backup assistance.

WITNESS #4’S “911” call provided a legitimate lawful basis for SUBJECT OFFICER to stop and question COMPLAINANT and his friends as the call alleged illegal drug use and loud behavior which was occurring late in the evening and disturbed neighbors’ right to peace and

quiet. In response to WITNESS #4'S "911" call the MPD dispatcher sent a squad car to his address. SUBJECT OFFICER and WITNESS OFFICER responded to the "911" call that described a "disorderly conduct, disorderly drug complaint" and a "loud group" (Exhibit 7). Under these circumstances, SUBJECT OFFICER had reasonable suspicion to believe that COMPLAINANT and his friends were the group of males referenced in the "911" call and it was reasonable for SUBJECT OFFICER to question COMPLAINANT and his friends about possible illegal drug use.

COMPLAINANT argues that SUBJECT OFFICER harassed him by arresting him without probable cause. SUBJECT OFFICER states he arrested COMPLAINANT for disorderly conduct because "...he [COMPLAINANT] was disorderly because of his extremely loud tone at that time of day, which was between 1 a.m. and 2 a.m. He was causing a disturbance to the community (Exhibit 10). SUBJECT OFFICER states that when he and WITNESS OFFICER arrived, they observed a group of males, in or near a car, music playing." Both SUBJECT OFFICER and WITNESS OFFICER testified that as they approached the car they observed an individual (later identified WITNESS #7) walking quickly away from them towards WITNESS #8'S car, which was parked in the driveway. WITNESS OFFICER and SUBJECT OFFICER testified they observed the individual drop an object which made a metallic sound that they thought might have been a weapon (Tr. at 189, 311). Based on the evidence recovered at the scene, WITNESS #7 and WITNESS #9 were arrested and charged with possession with intention to distribute (PWID) amphetamines.

SUBJECT OFFICER testified that as WITNESS OFFICER pursued WITNESS #7, he directed COMPLAINANT and his friends to calm down as they were yelling and using profanities (Tr. at 189-190). SUBJECT OFFICER testified that COMPLAINANT'S friends complied with his directives to keep quiet but COMPLAINANT got louder (Tr. at 190). SUBJECT OFFICER observed COMPLAINANT walking toward his grandparents' house and directed him to stop and return to the car. COMPLAINANT refused (Tr. at 190-191). WITNESS OFFICER testified that he assisted SUBJECT OFFICER in arresting COMPLAINANT by assisting SUBJECT OFFICER in handcuffing COMPLAINANT who continued to resist (Tr. at 338).

Whether harassment has occurred is based on the totality of the circumstances. MPD regulations require MPD sworn officers to familiarize themselves with the "...statutes, laws, and regulations in force in the District of Columbia..." and states that "...failure to do so, or to take action respecting violations of those statutes, laws, and regulations coming to their attention or about which they have knowledge shall be deemed neglect of duty (D.C. Mun. Regs, tit. 6A, § 2199.1).

Based upon the totality of the circumstances, I find that SUBJECT OFFICER'S arrest of COMPLAINANT did not constitute harassment because the questioning and arrest of COMPLAINANT was supported by a legitimate law enforcement purpose and COMPLAINANT'S conduct met the legal requirements to establish disorderly conduct. To violate the disorderly conduct statute, a person must be engaging in one of the five proscribed activities enumerated in the statute. The District of Columbia law, in effect at the time of this incident, defined disorderly conduct as: Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) acts in

such a manner as to annoy, disturb, interfere with obstruct, or be offensive to others; (2) congregates with other on a public street and refuses to move on when ordered by the police; (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons; (4) interferes with any person in any place by jostling against such person or unnecessarily crowding such person or by placing a hand in the proximity of such person's pocketbook or handbag; or (5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees, shall be fined not more than \$150 or imprisoned (D.C. Code § 22-1321).

The incident occurred sometime after 1:00 a.m. COMPLAINANT'S and his friends' behavior initiated the "911" call and demonstrated disorderly conduct—they were loud and playing music late in the evening. When SUBJECT OFFICER and WITNESS OFFICER arrived, COMPLAINANT'S behavior escalated--he was observed yelling and screaming, using profane language in a loud voice to "annoy, disturb, interfere with, obstruct, or be offensive to others...or, shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons..." (D.C. Code § 22-1321). Although the evidence of record does not indicate how many people heard COMPLAINANT'S profane tirade, the record does indicate his grandparents came out of their home to calm him. The record also reflects at least two of COMPLAINANT'S neighbors told OPC they were awakened by COMPLAINANT'S conduct (Exhibit 7 and Exhibit 8), heard COMPLAINANT and provided statements to OPC (Exhibits 7 and 8) detailing COMPLAINANT'S behavior and loudness which disturbed their sleep. COMPLAINANT'S grandparents heard him and left their house to calm him, without avail. By the preponderance of the evidence, I find that COMPLAINANT'S conduct met the definition of breach of peace and violated the disorderly conduct statute. Accordingly, I find that SUBJECT OFFICER'S actions in questioning and arresting COMPLAINANT complied with MPD policy and procedure, and did not constitute harassment.

Unnecessary or Excessive Force

COMPLAINANT alleges that SUBJECT OFFICER used unnecessary or excessive force towards him when SUBJECT OFFICER removed his gun from his holster and pointed it in COMPLAINANT'S face without cause. COMPLAINANT argues that although he engaged in profanity he did not physically assault SUBJECT OFFICER or resist arrest. COMPLAINANT also testified that he was stomped and kicked in the face, neck, and shoulder (Tr. at 114-122). COMPLAINANT stated he suffered injuries as a result of the kicking and stomping, but refused medical treatment on the evening of the incident, but refused medical treatment because of the costs. The evidence of record does not contain any objective evidence of injury. WITNESS #1'S testimony that SUBJECT OFFICER pointed his gun at COMPLAINANT was contradictory and therefore, not persuasive (Tr. at 27, 43, 47-49, 51-53).

SUBJECT OFFICER testified that he unholstered his gun because he was afraid for his partner's safety. He states that he maintained his gun in the "tuck position," pointing down to the ground. SUBJECT OFFICER testified that he holstered his service weapon after WITNESS OFFICER apprehended WITNESS #7 and placed him in handcuffs. (Tr. at 190-192). SUBJECT OFFICER denied pointing his gun at COMPLAINANT or any of his friends.

SUBJECT OFFICER stated that the reason for placing handcuffs on COMPLAINANT and his friends was for officer safety and to determine if narcotics or weapons were present (Tr. at 200). SUBJECT OFFICER testified that narcotics were recovered and some of the narcotics that were recovered tested positive for amphetamines (Tr. at 201).

The evidence reviewed in this matter does not support a finding that SUBJECT OFFICER'S actions violated MPD regulations and policy. MPD policy on use of force mandates that "...officers of the MPD shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others" (Exhibit 21). MPD General Order 201.26, Part I, Section C (7), states, in pertinent part, that "Members [of MPD] shall not use unnecessary force in making arrests or in dealing with prisoners or any other person. Prisoners and suspects shall be treated in a fair and humane manner; they shall not be humiliated, ridiculed, taunted, or embarrassed. Members shall not strike or use any form of physical force on a prisoner or other person except when necessary to prevent escape or in self defense or to prevent violence to another person..." (Exhibit 23).

MPD Policy "Application of the Use of Force Continuum" provides guidance on the proper application of force and provides a model for use of force (Exhibit 22). The policy states that "members are not required to start at the lowest level of the use-of-force model, they must select the appropriate level of force required to control the situation. The goal of any confrontation is control." The policy provides a reasonable test, noting that relevant factors include:

- 1) Careful attention to the facts and circumstances of a particular case;
- 2) Severity of the crime at issue;
- 3) Whether the suspect poses an immediate threat to the safety of the officers or others;
- 4) Whether the suspect is actively resisting arrest or attempting to evade arrest by flight;
- 5) Reasonableness includes an allowance for time available to make decisions inasmuch as "officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving..."
- 6) Reasonableness is judged from the perspective of a reasonable officer on the scene without the "20/20 vision of hindsight..."
- 7) Not every push or shove, even if it may later seem unnecessary in the peace of judge's chambers violates the Fourth Amendment; and

- 8) Evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.

(MPD Policy on Application of the Use of Force Continuum, quoting from *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.ED. 2d 443 (1989)).

The MPD conducted an investigation of SUBJECT OFFICER’S use of force and concluded that SUBJECT OFFICER acted in compliance with MPD Policy on Application of the Use of Force Continuum and MPD General Order 901.07 “Use of Force” (Exhibit 16). Specifically, WITNESS LIEUTENANT, the investigator, concluded that the use of force “tactical take-down” by SUBJECT OFFICER and WITNESS OFFICER was justified by the facts and classified as within departmental policy. Regarding the allegation that SUBJECT OFFICER and WITNESS OFFICER used excessive force, WITNESS LIEUTENANT found insufficient facts. The MPD is charged with establishing policy and procedures prescribing appropriate police conduct. Whether an officer has used excessive and/or unnecessary force requires a complex analysis—reviewing the facts specific to the incident, applying a reasonableness standard, and acknowledging that these situations require split-second decisions, which involve life-threatening consequences. Here, SUBJECT OFFICER responded to a disorderly drug complaint in which the caller stated that COMPLAINANT and his friends were using drugs, were loud, and had been loitering outside for hours. Under these circumstances, SUBJECT OFFICER could not have any idea of the level of potential harm or threat until he arrived at the scene. His actions were reasonable considering the body language and behavior of WITNESS #7, the dropped object that sounded like a weapon, and COMPLAINANT’S refusal to comply with a police directive. The findings contained in the Final Report Regarding the Use of Force (Tactical Takedown, Hand Control Techniques) are reasoned and comprehensive. Viewing the evidence of record and considering the Final Report, I find that SUBJECT OFFICER’S actions complied with MPD General Order 901.07 and the MPD Policy on Application of the Use of Force Continuum.

Based upon the preponderance of the evidence of record I find that the allegations of harassment and use of excessive or unnecessary force are without merit.

SUMMARY OF MERITS DETERMINATION

Allegation 1: Harassment	Exonerated
Allegation 2: Use of Excessive Force	Exonerated

Submitted on November 19, 2012

Turna R. Lewis
Complaint Examiner