

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	09-0454
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER
<b>Allegation 1:</b>	Harassment
<b>Complaint Examiner:</b>	Ali Beydoun
<b>Merits Determination Date:</b>	August 7, 2013

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 on August 4, 2009, SUBJECT OFFICER, First District, harassed him by threatening him and unlawfully arresting him during a traffic stop.<sup>1</sup> COMPLAINANT alleges that SUBJECT OFFICER unlawfully arrested him for disorderly conduct, failure to obey, assault on a police officer (APO), and felony threats. COMPLAINANT denies that he committed any of the offenses for which he was arrested and charged. COMPLAINANT timely filed a complaint with the Office of Police Complaints (OPC) on August 5, 2009.

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<sup>1</sup> The complainant also alleged that SUBJECT OFFICER harassed him by coming to the scene of the traffic stop to target him specifically. COMPLAINANT also alleged that the SUBJECT OFFICER used language or engaged in conduct that was insulting, demeaning or humiliating. Furthermore, COMPLAINANT alleged that SUBJECT OFFICER had retaliated against him because he had previously filed an OPC complaint against SUBJECT OFFICER. Finally, COMPLAINANT alleged that WITNESS OFFICER harassed his friend, WITNESS #1, during a traffic stop by stopping him without a lawful purpose. Pursuant to D.C. Code § 5-1108(1), on May 28, 2013, a member of the Police Complaints Board (PCB) dismissed these allegations, concurring in the determination made by OPC's executive director.

## II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on June 17, 2013, and OPC's response to the objections, the Complaint Examiner determined that the Report of Investigation presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

## III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on June 17, 2013, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On August 4, 2009, COMPLAINANT was riding in the front passenger of a taxicab driven by his friend, WITNESS #1, when they were pulled over by WITNESS OFFICER.
2. WITNESS OFFICER approached on the driver side and asked WITNESS #1, "How many drinks have you had?" WITNESS #1 told the officer that he had not been drinking. WITNESS OFFICER then asked WITNESS #1 to produce his driver's license, vehicle registration, and insurance card. WITNESS #1 complied with WITNESS OFFICER'S request and provided her with the materials.
3. COMPLAINANT then noticed that another police cruiser had arrived. He watched SUBJECT OFFICER get out of his police cruiser and stand by it.
4. COMPLAINANT was familiar with SUBJECT OFFICER because they were once friends, but are no longer on good terms and have had several negative interactions since the relationship soured.
5. After WITNESS OFFICER stepped away to check WITNESS #1'S information, SUBJECT OFFICER approached the passenger side window of the taxi, ordered the complainant out of the car and instructed him to leave the scene by walking home.
6. COMPLAINANT complied with the command and got out of the taxicab and told SUBJECT OFFICER that he was going to call for a cab and not walk home.
7. After being unable to get a cab ride home, COMPLAINANT tried calling a friend to arrange for that person to pick him up and take him home.
8. While COMPLAINANT was waiting for his ride, a tow truck and a taxicab licensing authority inspector arrived and inspected WITNESS #1'S taxicab. The taxi inspector and the tow truck left without citing WITNESS #1.

9. After the inspector and tow truck left the scene, the complainant began walking back to WITNESS #1'S taxicab. As the complainant started to walk back to the taxicab SUBJECT OFFICER approached and arrested him, put him in the police cruiser and transported him to the police station.
10. COMPLAINANT later found out that he had been charged with: 1) APO; 2) disorderly conduct – loud and boisterous; 3) failure to obey; and 4) felony threats.
11. In May 2010, a judge of the District of Columbia Superior Court presided over a hearing on the charges and granted COMPLAINANT an acquittal with a finding that the government had not proven its cases against COMPLAINANT beyond a reasonable doubt.

#### 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.” Such allegations may include, among other things, harassment.

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.

The single issue presented for consideration is whether SUBJECT OFFICER purposefully, knowingly, or recklessly harassed COMPLAINANT in violation of D.C. Code § 5-1107(a) and MPD General Order 120.25 that would have occurred by unlawfully arresting him for disorderly conduct, failure to obey, assault on a police officer and felony threats. As discussed below, the Complaint Examiner concludes that SUBJECT

OFFICER violated D.C. Code § 5-1107(a) and MPD General Order 120.25 because he unlawfully arrested COMPLAINANT on unsupportable charges.

For SUBJECT OFFICER to have lawfully arrested COMPLAINANT for disorderly conduct – loud and boisterous, his actions would have needed to violate the applicable District disorderly conduct statute in effect at the time of the incident - D.C. Code § 22-1307. That statute, provided in pertinent part:

“It shall not be lawful for person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in any or around any public building or enclosure, or any park or reservation, or at the entrance of any private building or enclosure, and engage in loud and boisterous talking or other disorderly conduct . . .”

Under D.C. law, in order to support a disorderly conduct arrest under § 22-1307 for loud and boisterous talking, D.C. courts have held that there must be: 1) congregation and assembly and 2) demonstrated loud and boisterous conduct by those congregated and assembled. *See Kinoy v. District of Columbia*, 400 F.2d 761, 765 (D.C. Cir. 1968); *Hunter v. District of Columbia*, 47 App. D.C. 406 (D.C. Cir 1918). In this case, for SUBJECT OFFICER’S arrest of COMPLAINANT to be lawful, it needs to be shown that based on the conduct of COMPLAINANT, he incited a congregation and assembly that demonstrated loud and boisterous conduct.

As support for COMPLAINANT’S disorderly conduct arrest, SUBJECT OFFICER asserts that it was the result of “cursing, screaming and yelling while using profane language” in the presence of others. SUBJECT OFFICER claimed that due to COMPLAINANT’S “loud and boisterous behavior,” some people assembled and looked toward the scene from a nearby vehicle inspection station.

As a primary determination, the Complaint Examiner finds that based on the statements provided to OPC and made available to the Complaint Examiner, it does not appear that COMPLAINANT was congregating or assembling with others at the time of the incident. Although there are several accounts of COMPLAINANT appearing irate and upset, it appears to the Complaint Examiner that COMPLAINANT was acting alone and not in concert with others. The statements of the witnesses, some of which are discussed below, do not mention any crowds gathering at the scene, but instead only drew the curiosity of distant bystanders. Even if there were people watching during the incident, it cannot be determined that the crowd was specifically congregating because of COMPLAINANT’S conduct. There is no evidence that they were incited to violence. Moreover, there is no evidence that COMPLAINANT issued any commands or instructions to people who might have observed the incident, further indicating that COMPLAINANT’S words to SUBJECT OFFICER did not incite violence or even create a substantial risk of inciting violence.

WITNESS OFFICER supports SUBJECT OFFICER's account of COMPLAINANT'S behavior, describing it as "shouting," "screaming" and "yelling" during the traffic stop. She also stated that COMPLAINANT repeatedly "walked back and forth" on the sidewalk and that SUBJECT OFFICER asked COMPLAINANT to calm down and to leave the scene. She further observed that "people were looking from the post office and the inspection station nearby due to COMPLAINANT'S loud commotion," but added that "no one was gathering near the scene" in response to COMPLAINANT'S conduct.

WITNESS #2, the city taxi inspector, described COMPLAINANT as being "loud and irate" at some point during the stop. WITNESS #2 stated that there may have been "one or two people" who were passing by and stopped to see what was happening, but "they did not stay long." He also recalled seeing some individuals outside the nearby post office, the fire station, and DMV inspection station, but he was not sure if they were watching the incident.

Based on the statements of these witnesses, it appears to the Complaint Examiner that COMPLAINANT was acting alone and was not in concert with any other person during the events leading to his arrest. It does not appear that he was congregating or assembling with others during the incident with SUBJECT OFFICER. There is no evidence that COMPLAINANT intended to provoke anyone watching or that any onlookers were incited by his actions.

Neither could the basis of SUBJECT OFFICER'S arrest of COMPLAINANT for disorderly conduct have been based on his alleged "cursing, screaming and yelling while using profane language" because the language allegedly used by COMPLAINANT was not so "grossly offensive" that it constituted a nuisance.

For years, the D.C. courts have found that the test for breach of the peace based on "nuisance" without threat of violence does not pass muster. *See Shepherd v. District of Columbia*, 929 A.2d 417, 419 (2007) (Court found that "[o]ur decisions thus teach that the bare possibility that words directed to a police officer may provoke violence by others does not suffice to show disorderly conduct; rather the words must create a likelihood or probability of such reaction. Moreover, the focus ordinarily must be on the likelihood of a violent reaction by persons other than a police officer to whom the words were directed, because "[a] police officer is expected to have a greater tolerance for verbal assaults" and is "especially trained to resist provocation" by "verbal abuse that might provoke or offend the ordinary citizen." (quoting *In re W.H.L.*, 743 A.2d 1226 (D.C. 2000)(internal citations omitted)).

Consequently, the Complaint Examiner cannot find a sufficient basis for SUBJECT OFFICER to charge COMPLAINANT with disorderly conduct.

With regard to the charge of failure to obey, the Complaint Examiner cannot find a proper basis for the arrest. The District of Columbia's Municipal Regulations regarding obedience to traffic regulations, D.C. Mun. Regs. tit. 18, § 2000.2 (2013), provides, in pertinent part:

No person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians and to the operators of vehicles.

In *Maryland v. Wilson*, 519 U.S. 408 (1997), a police officer may order passengers to get out of a lawfully stopped vehicle pending completion of the stop. In *Wilson*, the U.S. Supreme Court determined that the public interest in officer safety during traffic stops outweighed the passenger's right to personal security free from police intrusion. *Id.* at 412-15. However, given the circumstances of the interaction between SUBJECT OFFICER and COMPLAINANT, the validity of SUBJECT OFFICER'S order to leave is questionable. SUBJECT OFFICER, COMPLAINANT, and other witnesses, discuss a charged personal history between the subject officer and the complainant that existed prior to this incident and appears to serve as a basis for the order to COMPLAINANT that he exit the car and leave the scene. This instruction could possibly have been motivated by SUBJECT OFFICER'S personal animus against COMPLAINANT rather than legitimate safety concerns. At the time the instruction to leave was given to COMPLAINANT, the driver of the taxi had not been found to have violated any laws and COMPLAINANT was not interfering with the interaction between WITNESS OFFICER and WITNESS #1. Nor could it be reasonably shown that COMPLAINANT was arrested because he posed a threat to anyone or that he was interfering with the traffic stop and investigation of WITNESS #1. At the time of his arrest, COMPLAINANT was standing at a distance from the interaction between the taxi driver and police officer and was not a threat to himself or anyone else. Based on this set of circumstances, the legality of SUBJECT OFFICER'S charging COMPLAINANT with failure to obey is highly questionable.

Regarding SUBJECT OFFICER'S allegation that COMPLAINANT spat on him, and that such conduct was the basis for the arrest and charge of APO, the Complaint Examiner determines that the lack of evidence and credibility of SUBJECT OFFICER'S account regarding the alleged assault cannot support the charge or the arrest. Not a single identified and interviewed witness saw COMPLAINANT spit on SUBJECT OFFICER or threaten his family, property, career or declare an intent to commit personal physical harm on anyone.<sup>2</sup> Therefore, the APO charge as well as felony threats, cannot be supported.

In closing, the Complaint Examiner finds it necessary to comment on the District's regulations, as well as MPD policy, on standards of conduct that caution against District employees, including police officers, using the power of their position in an inappropriate manner. For example, D.C. Mun. Regs. tit. 6B, § 1803.1 (a)(4) and (6) (2013), which pertain to District employee standards of conduct, states that "[a]n employee shall avoid action, whether

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<sup>2</sup> Although SUBJECT OFFICER claimed that WITNESS #3 saw COMPLAINANT spit on SUBJECT OFFICER, the Complaint Examiner does not credit Mr. Shah's alleged account of the incident because no other witness identified him or placed him on the scene, and he did not cooperate with OPC's investigation or otherwise provide an account of the incident.

or not specifically prohibited by this chapter, which might result in or create the appearance of the following ... [l]osing complete independence or impartiality ... [or] [a]ffecting adversely the confidence of the public in the integrity of government." According to MPD General Order 201.26 (effective Nov. 10, 1976), police officers "must observe, uphold, and enforce all laws without bias or prejudice and without regard to individual or individuals involved."

To avoid the appearance of impropriety or conflict of interest, a police officer should take numerous steps to avoid interacting with an individual whom he is personally acquainted with or for whom he harbors negative resentments toward. In this particular case, SUBJECT OFFICER could have called an MPD official or another officer for assistance once he realized COMPLAINANT was at the scene and needed to be approached. With the arrival of other officers, SUBJECT OFFICER could have refrained from interfering or excused himself from the scene and completely avoided interacting with COMPLAINANT.

The Complaint Examiner finds SUBJECT OFFICER'S decision to arrest COMPLAINANT suspect and inappropriate. The fact that SUBJECT OFFICER knew he had a negative personal history with COMPLAINANT and was acquitted of all of the charges against him further supports his claim of harassment.

Based on the reasons discussed above, the Complaint Examiner concludes that SUBJECT OFFICER purposefully, knowingly, or recklessly harassed COMPLAINANT in violation of D.C. Code § 5-1107(a) and MPD General Order 120.25 by unlawfully arresting him for disorderly conduct, failure to obey, assault on a police officer, and felony threats. The complaint must therefore be sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER, First District

Allegation 1:	Sustained
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Submitted on August 7, 2013.

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Ali Beydoun  
Complaint Examiner