

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF POLICE COMPLAINTS

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	10-0003
Complainant:	COMPLAINANT
Subject Officer, Badge No., District:	SUBJECT OFFICER, Fourth District
Allegation 1:	Harassment
Complaint Examiner:	Arthur D. Sidney
Merits Determination Date:	November 25, 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 20, 2009, Metropolitan Police Department (MPD) SUBJECT OFFICER harassed him by unlawfully arresting him for disorderly conduct following a verbal altercation he had with a security officer, WITNESS #1, at a local Safeway grocery store. COMPLAINANT and WITNESS #1 exchanged words while COMPLAINANT was in the store's checkout line. Shortly after the altercation, WITNESS #1 called MPD.¹ SUBJECT OFFICER arrived, along with two MPD officers, WITNESS OFFICER #1 and

¹ COMPLAINANT also alleged that on August 20, 2009, SUBJECT OFFICER and two additional subject officers, WITNESS OFFICER #1 and WITNESS OFFICER #2, used unnecessary or excessive force against him by pushing his back against a railing. COMPLAINANT further alleged that the three subject officers harassed him by searching him and allowing a grocery store security guard to search his bag. COMPLAINANT further alleged that he was harassed by SUBJECT OFFICER when the officer intentionally sped up and stopped his police car, causing the complainant to get "tossed around." COMPLAINANT alleged that SUBJECT OFFICER used language or engaged in conduct towards him that was insulting, demeaning, or humiliating when the officer laughed at him in a "sinister like manner" and stated, "Don't you know we are the police and we can do whatever we want to you." The last allegation made by COMPLAINANT was that one of the three subject officers, or a fourth subject officer, WITNESS OFFICER #3, used language or engaged in conduct toward him that was insulting, demeaning, or humiliating towards him by telling him to "[s]hut up." Pursuant to D.C. Code § 5-1108(1), on August 12, 2013, a member of the Police Complaints Board dismissed these allegations, concurring in the determination made by OPC's executive director. Accordingly, WITNESS OFFICERS are considered witness officers for purposes of this merits determination.

WITNESS OFFICER #2. The officers approached COMPLAINANT and asked him for his identification. COMPLAINANT complied with the officers' request and then questioned the MPD officers about the reason for the stop. COMPLAINANT was subsequently handcuffed and placed in the backseat of a police car. While COMPLAINANT was in the backseat of the car, SUBJECT OFFICER approached, opened the car door, and took COMPLAINANT out of the car. SUBJECT OFFICER informed COMPLAINANT that the security officer would not press charges. COMPLAINANT replied, "Press charges for what?" SUBJECT OFFICER did not respond but placed him back in the police car and allegedly told COMPLAINANT, "I'm locking you up anyway!" COMPLAINANT was transported to the Fourth District police station for processing. According to COMPLAINANT, MPD officers never told him why he was being placed under arrest.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based upon a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER 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 upon a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on October 4, 2013, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. COMPLAINANT initiated this matter by filing a complaint with OPC on October 5, 2009.
2. On August 20, 2009, at approximately 10:30 p.m., COMPLAINANT was standing in the checkout line at the Safeway grocery store located at 3830 Georgia Avenue, N.W. After COMPLAINANT paid for his purchases and was proceeding to leave the building, WITNESS #1 said, "You forgot your EBT card!"²
3. COMPLAINANT walked over to WITNESS #1 and asked him for his name. WITNESS #1 refused to provide his name to COMPLAINANT, pulled out his cellular phone and dialed "911."

² Electronic Benefit Transfer ("EBT") is an electronic system that allows governments to provide financial and material benefits via a plastic debit card. Common benefits provided via EBT are typically sorted into two general categories: food and cash benefits. Food benefits are federally authorized benefits that can be used only to purchase food and non-alcoholic beverages.

4. Once COMPLAINANT was outside the store, he saw two marked MPD police cars. WITNESS OFFICER #1, WITNESS OFFICER #2, and SUBJECT OFFICER approached and surrounded COMPLAINANT. COMPLAINANT was asked to produce his identification, which he provided. COMPLAINANT questioned the MPD officers regarding what was occurring but received no responses. Complainant used curse words and ethnic slurs toward SUBJECT OFFICER, as observed by WITNESS OFFICER #1, WITNESS OFFICER #2, and WITNESS OFFICER #3. SUBJECT OFFICER asked COMPLAINANT to stop cursing and lower his voice, but COMPLAINANT did not comply.
5. COMPLAINANT was handcuffed with his hands behind his back and was escorted to a police car and placed in the back seat. SUBJECT OFFICER removed COMPLAINANT from the police car and informed him that WITNESS #1 would not be pursuing charges against COMPLAINANT. COMPLAINANT replied to SUBJECT OFFICER with more curse words and yelling.
6. SUBJECT OFFICER did not respond and placed COMPLAINANT back in the police car and informed COMPLAINANT that he was locking COMPLAINANT up. COMPLAINANT was then taken to the police station for processing and was later informed that he was charged with Disorderly Conduct – Loud and Boisterous.
7. The charge was later dismissed when the government decided not to prosecute COMPLAINANT.

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...”

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.

COMPLAINANT alleged that SUBJECT OFFICER subjected him to harassment by unlawfully arresting him for disorderly conduct. The relevant District of Columbia disorderly conduct statute in effect at the time of the incident provided in pertinent part:

It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing It shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent words, or engage in any disorderly conduct in any . . . public building. D.C. Code § 22-1307.

In order to support a disorderly conduct arrest under D.C. Code § 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). The congregating and assembling must be done by at least three persons and those persons must engage in the prohibited behavior. See id. at 409. Additionally, to sustain a conviction under the statute, there must be a threatened “breach of peace.” See Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969) (finding that statute which became D.C. Code § 22-1307 could pass constitutional muster only if statute was construed “to require an additional element that the language be spoken in circumstances which threaten a breach of the peace.”). In Williams, the U.S. Court of Appeals for the D.C. Circuit determined that language could threaten a breach of the peace if it “creates a substantial risk of provoking violence” or is “under ‘contemporary community standards,’ grossly offensive to amount to a nuisance. Id. at 646; In re T.L., 996 A.2d 805 (D.C. 2010); Martinez v. District of Columbia, 987 A.2d 1199 (D.C. 2010)

SUBJECT OFFICER claimed that he arrested COMPLAINANT for disorderly conduct because COMPLAINANT’S actions caused a crowd to gather, COMPLAINANT spoke in a loud voice, and because COMPLAINANT used profane and obscene language and racial slurs despite SUBJECT OFFICER’S insistence that COMPLAINANT lower his voice. WITNESS #1 acknowledged that COMPLAINANT was placed into the MPD car and then was released. SUBJECT OFFICER then placed COMPLAINANT under arrest after COMPLAINANT made a racial or insulting statement.

Complaint Examiner finds that SUBJECT OFFICER harassed COMPLAINANT because he unlawfully arrested COMPLAINANT for disorderly conduct and thus violated D.C. Code § 5-1107 and MPD General Order 120.25. The government's decision not to prosecute COMPLAINANT is also instructive that Complainant's words and actions did not create a breach of the peace or otherwise disorderly conduct as envisioned by D.C. Code § 22-1307 and, thus, COMPLAINANT was unlawfully arrested.

Pursuant to D.C. Code § 5-1107 and MPD General Order 120.25, harassment occurs if COMPLAINANT is purposefully, knowingly, or recklessly subjected to conduct in violation of the law, here the Fourth Amendment's prohibition on unlawful searches and seizures, that results in COMPLAINANT'S arrest or impedes the COMPLAINANT'S enjoyment of any right, privilege, power, or immunity. As demonstrated below, COMPLAINANT was unlawfully arrested because COMPLAINANT'S actions did not amount to a breach of peace pursuant to D.C. Code § 22-1307.

Whether COMPLAINANT was inebriated, talking loudly, or using racial epithets or profanity, these actions did not result in a breach of the peace. Even if a crowd gathered during the time that COMPLAINANT was talking loudly, this would not amount to a breach of the peace because although there was a crowd, no one was incited to violence. No one in the crowd was actively involved in the interaction between the MPD officers and COMPLAINANT. In Shepherd v. D.C., the court held that "our decisions . . . 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." Shepherd v. D.C., 929 A.2d 417, 419 (D.C. 2007). The crowd gathered merely because of the police activity and there is no indication that the crowd, with the exception of COMPLAINANT, did anything more than observe the activity. The members of the crowd were neither incited to violence nor did COMPLAINANT'S words create a likelihood or probability of provoking violence.

The language used by COMPLAINANT also was not so grossly offensive that it amounted to a nuisance. Complaint Examiner finds that COMPLAINANT may have used repugnant language, but there was no breach of the public peace. MPD officers are trained to deal with rude individuals and are supposed to resist provocation and remain calm in the midst of abusive language. See In re W.H.L., 743 A.2d 1226,1228 (D.C. 2000); see also OPC Case No. 09-0012, 2010 DC POLICE LEXIS 6 (D.C. Office of Police Complaints Sept. 21, 2010).

An unlawful arrest, that is one without probable cause, is indeed a substantial restriction of an individual's freedom. It is, by definition, an act that "impede[s] the person in the exercise or enjoyment of any right, privilege, power or immunity" within the plain meaning of MPD's own general order. See, e.g. MPD General Order § 120.25, Part III, Section B, No. 2. Because SUBJECT OFFICER arrested COMPLAINANT unlawfully for COMPLAINANT'S loud, racist, and profane speech, the arrest alone constitutes harassment in violation of MPD General Order § 120.25.

Accordingly, Complaint Examiner finds that SUBJECT OFFICER harassed COMPLAINANT by unlawfully arresting him for disorderly conduct in violation of D.C. Code § 5-1107(a) and MPD General Order § 120.25.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER, Fourth District

Allegation 1: Harassment	Sustained
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Submitted on November 25, 2013.

ARTHUR D. SIDNEY
Complaint Examiner