

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.</b>	10-0257
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer, Badge No., District:</b>	SUBJECT OFFICER, Third District
<b>Allegation 1:</b>	Harassment
<b>Complaint Examiner:</b>	Precious Murchison
<b>Merits Determination Date:</b>	January 3, 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 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 April 7, 2010, COMPLAINANT alleged that on March 26, 2010, SUBJECT OFFICER harassed him by unlawfully arresting him for disorderly conduct -- loud and boisterous.<sup>1</sup>

**II. EVIDENTIARY HEARING**

An evidentiary hearing was conducted regarding this complaint on December 14, 2012. The Complaint Examiner heard the testimony of COMPLAINANT, WITNESS, WITNESS OFFICER #1, WITNESS OFFICER #2, and SUBJECT OFFICER. The following exhibits were introduced at the hearing, without objection:<sup>2</sup>

Exhibit A: Drawing of the scene

Exhibit B: Collateral/Bond Receipt

Exhibit C: Superior Court Docket, 2010 CMD 006066

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<sup>1</sup> COMPLAINANT also alleged that on March 2, 2010, SUBJECT OFFICER discriminated against him based on COMPLAINANT'S race, African American. COMPLAINANT'S girlfriend, WITNESS, filed a separate complaint on March 29, 2010, alleging that SUBJECT OFFICER used unnecessary or excessive force against her and harassed her during the same incident. Both COMPLAINANT and WITNESS alleged that SUBJECT OFFICER used language and engaged in conduct towards them that was insulting, demeaning, or humiliating during their interaction. On July 16, 2012, a member of the Police Complaints Board (PCB) dismissed all of these allegations as part of a consolidated dismissal report, concurring with the determination made by OPC's executive director.

<sup>2</sup> WITNESS was a complainant in the dismissal referenced *supra*, N.1. Because her complaint was dismissed in its entirety on July 16, 2012, WITNESS is herein referred to as a WITNESS.

### III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by the SUBJECT OFFICER on August 3, 2012, and an evidentiary hearing conducted on December 14, 2012, the Complaint Examiner finds the material facts regarding the complaint to be:

1. SUBJECT OFFICER has been employed with MPD for more than five years. In March 2010, he was driving a marked police car in the U Street, N.W. area, an area to which the SUBJECT OFFICER was regularly assigned.
2. On the evening of March 26, 2010, SUBJECT OFFICER was canvassing in the 1300 block of U Street, N.W. when he received a "radio run" dispatch broadcasting the description of a suspect that was wearing a North Face jacket and had just committed an armed robbery in the area.<sup>3</sup>
3. Soon after receiving the "radio run," and less than 30 minutes after the armed robbery occurred, SUBJECT OFFICER entered a dead-end alley near the 1300 block of U Street, N.W., where he saw COMPLAINANT walking towards him. COMPLAINANT'S then-girlfriend, WITNESS, was also in the alley near several parked cars.
4. WITNESS' car was facing a wall at the dead-end of the alley and two other cars were parked behind WITNESS' car, blocking it in the alley and preventing WITNESS from driving out of the alley.
5. As WITNESS stood near her car, COMPLAINANT approached SUBJECT OFFICER to request help getting WITNESS' car out of the alley.
6. SUBJECT OFFICER noticed that COMPLAINANT matched the description of the robbery suspect and, in particular, COMPLAINANT was wearing a North Face jacket.
7. SUBJECT OFFICER exited his police cruiser, asked COMPLAINANT how long WITNESS' car had been parked in the alley and directed COMPLAINANT to provide his identification.
8. COMPLAINANT explained that WITNESS' car had been parked in the alley about two or three hours and COMPLAINANT provided his identification to SUBJECT OFFICER. COMPLAINANT was cooperative during this interaction.
9. COMPLAINANT asked SUBJECT OFFICER why he needed his identification, but SUBJECT OFFICER did not answer the question initially. Instead, SUBJECT OFFICER decided to call for back-up police assistance before discussing the reason for the stop.
10. SUBJECT OFFICER told WITNESS to sit in her car and she complied. COMPLAINANT stood near WITNESS' car.

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<sup>3</sup> A "radio run" is a radio communication between dispatch and police officers.

11. SUBJECT OFFICER contacted a police dispatcher and advised that he had stopped a person matching the description of the armed robbery suspect, and SUBJECT OFFICER requested assistance on the scene.
12. While COMPLAINANT waited for SUBJECT OFFICER to return his identification, he became upset because he believed he was being mistreated and inappropriately detained.
13. Less than 10 minutes after SUBJECT OFFICER contacted the dispatcher, WITNESS OFFICER #1 arrived in the alley. When WITNESS OFFICER #1 arrived, SUBJECT OFFICER attempted to explain to COMPLAINANT and WITNESS why COMPLAINANT was being detained, but COMPLAINANT would not listen to SUBJECT OFFICER. He immediately complained to WITNESS OFFICER #1, yelling that SUBJECT OFFICER was a racist and had no right to stop him. He accused SUBJECT OFFICER of racial profiling and directed insults and profanity at SUBJECT OFFICER. COMPLAINANT was loud and upset.
14. WITNESS OFFICER #1 told COMPLAINANT that he was stopped because there had been a robbery in the area. As WITNESS OFFICER #1 continued to explain the reason for the stop, COMPLAINANT made sarcastic comments and continued to complain loudly and to direct profanity and insults at SUBJECT OFFICER.
15. After speaking with WITNESS OFFICER #1, COMPLAINANT understood that he was being detained because he matched the description of a robbery suspect. He told WITNESS to call his sister, who is an attorney.
16. COMPLAINANT began dictating his sister's telephone number to WITNESS, who then exited her car.
17. SUBJECT OFFICER directed WITNESS to get back inside her car and WITNESS complied.
18. Thereafter, WITNESS exited her car again and asked COMPLAINANT to repeat his sister's number.
19. Again, SUBJECT OFFICER directed WITNESS to get back in her car, this time waving handcuffs in the air.
20. WITNESS returned to the car, sat inside and called COMPLAINANT'S sister.
21. Meanwhile, WITNESS OFFICER #3 and WITNESS OFFICER #2 arrived on the scene with the armed robbery victim to conduct a "show-up" procedure.<sup>4</sup>

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<sup>4</sup> A "show-up" is an identification procedure during which a suspect is detained and presented to a witness of a crime so that the witness may either affirmatively identify the suspect as the perpetrator of the crime, or fail to identify the suspect as the perpetrator. A "show-up" is usually conducted shortly after a crime has occurred.

22. Around the same time, COMPLAINANT'S sister arrived in the alley and WITNESS exited her car again. This time, SUBJECT OFFICER advised WITNESS that she was under arrest.
23. In an attempt to avoid arrest, WITNESS returned to her car, sat inside and tried to close her car door as SUBJECT OFFICER approached.
24. SUBJECT OFFICER pulled WITNESS out of her car and handcuffed and arrested her. During this time, WITNESS was crying and screaming for COMPLAINANT and his sister to help her.
25. As WITNESS was being arrested, COMPLAINANT became angry and continued to speak loudly. He asked WITNESS OFFICER #1 to help WITNESS and yelled at SUBJECT OFFICER to get off of her. He cursed at and insulted SUBJECT OFFICER. He threatened to sue SUBJECT OFFICER and to file a complaint against him that would cost SUBJECT OFFICER his job. However, COMPLAINANT never threatened to do bodily harm to SUBJECT OFFICER, nor did COMPLAINANT move aggressively towards any officers.
26. COMPLAINANT refused to calm down or to lower his voice when ordered to do so by both SUBJECT OFFICER and WITNESS OFFICER #1. Although the officers repeatedly told COMPLAINANT to calm down and to lower his voice, they never warned him that he would be arrested if he continued to yell and use profanity.
27. As COMPLAINANT continued to speak in a loud and profane manner, SUBJECT OFFICER directed WITNESS OFFICER #1 to arrest COMPLAINANT, and WITNESS OFFICER #1 placed him in handcuffs. COMPLAINANT did not resist, but he remained loud and continued to direct profanity and insults at SUBJECT OFFICER.
28. At this point in the evening, it was dark outside. There were approximately five officers on the scene and at least three police cars in or near the alley.
29. A small crowd of at least five and as many as 10 bystanders were gathered in the alley and were watching as COMPLAINANT was handcuffed. At least one person in the crowd was taking pictures and asking questions about what was going on, but no one in the crowd communicated with COMPLAINANT or attempted to interfere with the police activity. Neither SUBJECT OFFICER nor COMPLAINANT focused on the crowd. In fact, COMPLAINANT never directed any language towards the onlookers; nor did COMPLAINANT address his sister, who was in the alley. COMPLAINANT'S language was directed at SUBJECT OFFICER and aimed at protesting the legality of WITNESS' arrest.
30. WITNESS OFFICER #3 conducted the "show-up" procedure, during which the armed robbery victim advised that COMPLAINANT was not the person who committed the robbery. Thereafter, COMPLAINANT asked if he was free to leave but SUBJECT

OFFICER told him that he was not free to go and that, instead, he was under arrest for disorderly conduct -- loud and boisterous.

31. Neither WITNESS nor COMPLAINANT were prosecuted in connection with their arrests.

32. Before arresting COMPLAINANT on March 26, 2010, SUBJECT OFFICER had made numerous arrests for disorderly conduct -- loud and boisterous. SUBJECT OFFICER understood that, in order to make such arrests, there must be a threatened breach of the peace.

#### **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.”

#### **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 or 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.

#### **Analysis**

COMPLAINANT alleges that SUBJECT OFFICER harassed him by unlawfully arresting him for disorderly conduct -- loud and boisterous. Specifically, COMPLAINANT claims that SUBJECT OFFICER lacked probable cause for the arrest. In order to lawfully arrest a person for disorderly conduct -- loud and boisterous, there must exist probable cause to believe that the person has (1) congregated and assembled and (2) engaged in loud and boisterous conduct. *See Kinoy v. District of Columbia*, 400 F.2d 761, 769-770 (D.C. Cir. 1968) (explaining the essential elements of the disorderly conduct offense). The “congregation and assembly” element of the disorderly conduct statute requires “the presence of three or more persons acting in concert for an unlawful purpose.” *Kinoy*, 440 F.2d at 770. Additionally, the “loud and boisterous” element of the statute requires a threatened “breach of the peace.” *See Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir. 199) (finding that statute which is now 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.”). A breach of the peace is threatened when one uses language that is “likely to produce violence on the part of others.” *See W.H.L.*, 743 A.2d 1226, 1228 (D.C. 2000). The disorderly conduct statute applies to breaches of the *public* peace, not breaches of the officer’s peace. As the D.C. Court of Appeals explained in *In re W.H.L.*:

Police officers are trained to deal with unruly and uncooperative members of the public. A police officer is expected to have a greater tolerance for verbal assaults, . . . and because the police are especially trained to resist provocation, we expect them to remain peaceful in the face of verbal abuse that might provoke or offend the ordinary citizen.

*In re W.H.L.*, 743 A.2d at 1228 (quoting *In re M.W.G.*, 427 A.2d 440, 442 (D.C. 1981)).

Here, the verbal abuse, profanity and insults that COMPLAINANT directed at SUBJECT OFFICER were not an appropriate response to the temporary detention and “show-up” procedure. Still, as explained below, there was no probable cause to arrest COMPLAINANT because he did not congregate or assemble with others, and he did not engage in loud and boisterous conduct that threatened a breach of the peace.

COMPLAINANT did not congregate or assemble. Although WITNESS, COMPLAINANT’S sister and a small crowd were in the alley, there is no evidence that three or more persons acted with a common and unlawful purpose. *See Kinoy*, 440 F.2d at 770. COMPLAINANT never assembled with two other persons. He did not even physically intervene or interfere when SUBJECT OFFICER arrested his girlfriend, despite WITNESS’ cries for help. Instead, he asked WITNESS OFFICER #1 to help WITNESS. Additionally, COMPLAINANT’S angry protestations about WITNESS’ arrest were aimed at SUBJECT OFFICER. COMPLAINANT never addressed his angry words to the bystanders and he did not assemble with them. Indeed, in response to cross-examination at the hearing, SUBJECT OFFICER admitted that COMPLAINANT was not congregating with others. Yet, SUBJECT OFFICER testified that he had probable cause to arrest COMPLAINANT for disorderly conduct because COMPLAINANT was loud, he was using profanity, he refused to obey the officers’ repeated commands to calm down and SUBJECT OFFICER believed that COMPLAINANT’S

conduct caused more than three people to congregate in the alley. SUBJECT OFFICER is wrong. SUBJECT OFFICER did not focus his attention on the crowd and there is no evidence that COMPLAINANT’S words or actions attracted the crowd. The crowd may have gathered in response to seeing numerous police officers and cars in the alley, seeing SUBJECT OFFICER pull WITNESS from her car, hearing WITNESS’ cries for help, or seeing WITNESS or COMPLAINANT handcuffed. In any event, COMPLAINANT was not acting in concert with anyone else. For these reasons, SUBJECT OFFICER lacked probable cause to believe that COMPLAINANT congregated or assembled with others for an unlawful purpose.

Moreover, COMPLAINANT’S loud and profane language, directed solely at SUBJECT OFFICER, did not threaten a breach of the peace because it was not likely to produce violence on the part of others. *See Shepherd v. District of Columbia*, 929, A.2d 417, 419 (D.C. 2007) (indicating that, in considering whether a breach of the peace has been threatened, courts ordinarily focus on “the likelihood of violent reaction by persons other than a police officer to whom the words were directed . . .”). There is no evidence that any bystander complained about COMPLAINANT’S words or actions. COMPLAINANT did not attempt to incite some reaction from the crowd against the police, and there was no reaction by the crowd, other than standing around, taking pictures and asking what was going on. For these reasons, SUBJECT OFFICER lacked probable cause to believe that COMPLAINANT’S loud and boisterous conduct threatened a breach of the peace.

COMPLAINANT has established by a preponderance of the evidence that SUBJECT OFFICER harassed him by knowingly or recklessly arresting him without probable cause.

**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER

<b>Allegation 1: Harassment</b>	<b>Sustained</b>
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Submitted on January 3, 2013

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Precious Murchison  
Complaint Examiner