

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	10-0397
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, First District
Allegation 1:	Harassment
Complaint Examiner:	Arthur D. Sidney
Merits Determination Date:	July 23, 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 (OPC) on June 30, 2010. COMPLAINANT alleged that on May 29, 2010, SUBJECT OFFICER harassed him when he unlawfully arrested him for disorderly conduct.¹

Specifically, COMPLAINANT alleged that on May 29, 2010, he was out with friends at the Zanzibar nightclub at 700 Water Street, S.W. At the end of the night, there was a dispute between COMPLAINANT and bar staff over the group's bar bill. COMPLAINANT explained that he intended to settle the issue regarding the group's unpaid bill but first needed to walk his friend, WITNESS #1, to her car. When COMPLAINANT tried to leave, he was approached by security staff at the front door and informed that he could not leave the club until the bill was

¹ COMPLAINANT also alleged that a second officer, WITNESS OFFICER, participated in the disorderly conduct arrest by interacting with COMPLAINANT during the arrest. WITNESS OFFICER is listed as the arresting officer on the arrest report. However, during the course of its investigation, OPC determined that SUBJECT OFFICER was training and otherwise directing WITNESS OFFICER at the time of the event. Accordingly, OPC has designated WITNESS OFFICER as a witness for the harassment – unlawful arrest allegation. COMPLAINANT further alleged that WITNESS OFFICER harassed him by threatening COMPLAINANT at the time of his arrest. Pursuant to D.C. Code § 5-1108 (1), on December 12, 2011, a member of the Police Complaints Board dismissed this allegation, concurring with the determination made by OPC's executive director. Therefore, only the harassment allegation stemming from SUBJECT OFFICER'S arrest of COMPLAINANT is before this Complaint Examiner.

paid in full. COMPLAINANT told the security staff that he had “paid his portion.” When he tried to walk around the security staff, they blocked his way and “pushed” him back onto the property. Feeling as though the security staff had assaulted him and acted outside of their authority, COMPLAINANT called 911. WITNESS #2, head of security at Zanzibar on the involved evening, was present and observed the interaction between COMPLAINANT and the security staff.

SUBJECT OFFICER and WITNESS OFFICER arrived. COMPLAINANT informed the MPD officers that he had been assaulted by the Zanzibar security staff. SUBJECT OFFICER spoke with the security staff and allegedly informed COMPLAINANT that he had to pay the bill. COMPLAINANT contacted a friend who provided her credit card number over the phone and helped to settle the bill.

When the bill was settled, COMPLAINANT informed SUBJECT OFFICER that he still wanted to press assault charges. After allegedly asking SUBJECT OFFICER several times to send a supervisor to the scene, SUBJECT OFFICER allegedly told COMPLAINANT that if he did not go home, he would be arrested for disorderly conduct. When COMPLAINANT asked for a supervisor again, SUBJECT OFFICER arrested COMPLAINANT for disorderly conduct – loud and boisterous.

II. EVIDENTIARY HEARING

On June 22, 2012, an evidentiary hearing was conducted regarding this complaint. The Complaint Examiner heard the testimony of COMPLAINANT, SUBJECT OFFICER, WITNESS OFFICER, WITNESS #1, and WITNESS #2.

III. FINDINGS OF FACT

Based upon a review of OPC’s Report of Investigation, the objections submitted by SUBJECT OFFICER on January 11, 2012, OPC’s memorandum to correct, clarify, or respond to assertions contained in the January 11, 2012, objections submitted by SUBJECT OFFICER, pre-hearing briefs filed by COMPLAINANT and SUBJECT OFFICER on May 2, 2012, the reply brief filed by COMPLAINANT on May 8, 2012, and an evidentiary hearing conducted on June 22, 2012, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On May 29, 2010, COMPLAINANT was at Zanzibar nightclub at 700 Water Street, S.W. where he had been drinking with a group of friends. There was a dispute between COMPLAINANT and bar staff regarding the bar bill. COMPLAINANT paid a portion of the bill and proceeded to attempt to leave the night club to walk his friend, WITNESS #1, to her car.
2. When COMPLAINANT tried to leave, he was approached by security staff at the door and informed that he could not leave until his bill was paid in its entirety. When

COMPLAINANT tried to walk around the security staff, he was blocked and was not permitted to leave the property. WITNESS #2 was the head of security at the nightclub on the involved evening and observed her security staffs' interactions with COMPLAINANT. COMPLAINANT telephoned 911 on his cellular phone because he believed he was assaulted.

3. SUBJECT OFFICER and WITNESS Officer arrived. COMPLAINANT informed the MPD officers that he had been assaulted by the Zanzibar security staff. SUBJECT OFFICER and WITNESS Officer talked to the security staff and bar staff, including WITNESS #2, at Zanzibar and later informed COMPLAINANT that he had to pay the bar bill in its entirety or be locked up.
4. COMPLAINANT telephoned a friend who provided credit card information over the phone to pay the bar bill in its entirety.
5. After the bar bill was paid in full, COMPLAINANT asked SUBJECT OFFICER about the assault and informed SUBJECT OFFICER that he wanted to press assault charges. In response, SUBJECT OFFICER told COMPLAINANT to "just go home." COMPLAINANT then asked SUBJECT OFFICER to contact a supervising police official to come to the scene. SUBJECT OFFICER responded "just go home." COMPLAINANT asked several more times that a MPD supervising official be brought to the scene. SUBJECT OFFICER told COMPLAINANT that if he did not go home, he would be arrested for disorderly conduct. When COMPLAINANT asked for a supervising official again, SUBJECT OFFICER arrested COMPLAINANT for disorderly conduct.

IV. DISCUSSION

COMPLAINANT alleges that he was harassed by SUBJECT OFFICER when he was arrested for disorderly conduct – loud and boisterous. Complaint Examiner finds that when SUBJECT OFFICER arrested COMPLAINANT, he violated the law because there was no assembly that became loud and boisterous as a result of COMPLAINANT'S actions. COMPLAINANT was loud, obnoxious, and intoxicated; however, his actions did not support an arrest for disorderly conduct because his behavior only incited the police not the crowd around him. As discussed further below, Complaint Examiner determines that COMPLAINANT'S arrest for disorderly conduct constituted harassment in violation of D.C. Code § 5-1107(a) and MPD General Order 120.25.

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; (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 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.

According to MPD General Order 201.26, Part I, Section C, “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 refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name calling which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person.”

COMPLAINANT alleges that he was unlawfully arrested for disorderly conduct by SUBJECT OFFICER. COMPLAINANT also alleges that he was pushed and prevented from leaving the Zanzibar nightclub premises and that he called 911 to report the matter but SUBJECT OFFICER and WITNESS OFFICER failed to file a police report regarding this incident. Subsequently, COMPLAINANT requested that a supervising official be called to the scene. SUBJECT OFFICER responded that COMPLAINANT should go home. COMPLAINANT made the request for a supervising officer several times and SUBJECT OFFICER responded that he should go home or if he did not, he would be arrested for disorderly conduct. COMPLAINANT requested one final time that a supervisor come to the scene when SUBJECT OFFICER arrested him.

Complaint Examiner finds that when the MPD officers refused to arrest any Zanzibar staff in response to the alleged assault against COMPLAINANT that he grew increasingly agitated with the MPD officers. Complaint Examiner finds WITNESS #2'S testimony that there was no large crowd to witness the interchange between COMPLAINANT and SUBJECT OFFICER to be credible. *See* Hearing Transcript at pp. 190-193, lines 22 –14. The bystanders that were in the vicinity of the interaction between COMPLAINANT and SUBJECT OFFICER may have been watching the incident but were not incited to violence. Hearing Transcript at p. 227, lines 18-21 (SUBJECT OFFICER testimony). Complaint Examiner finds that it is likely that COMPLAINANT was intoxicated, highly agitated, irate, and may even have been disrespectful by talking in a loud voice, using swear words, and behaving in a noisome and bothersome manner. Complaint Examiner finds that COMPLAINANT'S unruliness was directed at the MPD Officers.

There was no evidence presented that the crowd was unruly, that COMPLAINANT'S actions created an unsafe and threatening environment for the MPD officers or the crowd itself, or that a considerable number of persons were annoyed or disturbed by COMPLAINANT. Indeed, the hearing testimony indicates that COMPLAINANT was arrested for being loud and boisterous to the MPD officers. *See* Hearing Transcript at p. 105, lines 11-22 and p. 106, lines 1-2 (WITNESS Officer's Testimony)(WITNESS Officer testifies that COMPLAINANT'S loud talking to her was the reason why he was arrested).

SUBJECT OFFICER testified that COMPLAINANT made a threatening gesture toward her yet WITNESS OFFICER never made a similar statement at the hearing. COMPLAINANT was arrested for disorderly conduct - loud and boisterous, therefore the Complaint Examiner does not find this statement credible. Hearing Transcript p. 232, lines 11-16 (SUBJECT OFFICER'S testimony).

Complaint Examiner finds probative the statement of SUBJECT OFFICER that had COMPLAINANT attempted to drive away from Zanzibar that he would have arrested him. Hearing Transcript at pp 240-247. COMPLAINANT and SUBJECT OFFICER were involved in a series of verbal altercations and it is likely that SUBJECT OFFICER was aggravated by COMPLAINANT. Indeed, SUBJECT OFFICER spurred COMPLAINANT'S verbal altercation. Rather than respond to COMPLAINANT'S request to dispatch a supervising MPD officer, SUBJECT OFFICER informs COMPLAINANT that he is free to go and after several requests, he ultimately arrests him. SUBJECT OFFICER did not act courteously in dealing with COMPLAINANT; instead, SUBJECT OFFICER evasively answered COMPLAINANT by telling him to go home and thereby exacerbated the verbal altercation.

D.C. Code § 22-1307, the District disorderly conduct statute in effect at the time of the incident, 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 penalty of not more than \$250 or imprisonment for not more than 90 days, or both....

According to the arrest documents, and their statements to OPC and in the hearing, both SUBJECT OFFICER and WITNESS OFFICER assert that COMPLAINANT was arrested for disorderly conduct – loud and boisterous. 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). Additionally, in order to sustain a conviction under the statute, there must be a threatened “breach of the peace.” *See Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir. 1969) (finding that statute which later became § 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 substantial risk of provoking violence” or is “under ‘contemporary community standards,’ so grossly offensive to members of the public who actually overhear it as to amount to a nuisance.” *Id.* at 646.²

In a 2003 decision issued by the predecessor to OPC, the Office of Citizen Complaint review (OCCR), the complaint examiner found that absent evidence that COMPLAINANT “acted in such a way to disturb or be offensive to others, since it was uncontroverted that the incident involved only [the complainant in 02-0041] and the four police officers,” the facts did not satisfy the elements of disorderly conduct. *See* OPC Case No. 02-0041 2003 DC Police LEXIS 20 (D.C. Office of Police Complaints July 9, 2003). The complaint examiner relied upon *In re W.H.L.*, 743 A.2d 1226, 1228 (D.C. 2000) (youth who stood behind police officers, yelling obscenities and refusing an order to “move on” had not engaged in disorderly conduct because the words were directed at the police, not others, and no crowd had gathered, whereby a breach of the peace might occur). Similar to *In re W.H.L.*, COMPLAINANT was also directing his language toward the MPD police officers, questioning their actions, and requesting a supervisor to review the MPD officers’ conduct. In the absence of evidence of annoyance to others or words or actions that are capable of inciting violent conduct in others, yelling and the use of obscenities toward MPD officers do not constitute a disorderly conduct. *See* OPC Case No. 02-0336 2004 DC Police LEXIS 7 (D.C. Office of Police Complaints July 4, 2004); *see also* OPC Complaint No. 09-0533 2011 DC Police LEXIS 2 (D.C. Office of Police Complaints Mar. 18, 2011) (“Rather, the words uttered must be capable of occasioning a ‘breach of the peace’ in that they ‘are capable of inciting violent conduct in others.’ The ‘bare possibility’ that words may provide violence in others is not enough. The offensive words instead must ‘create a likelihood

² Later D.C. court decisions have rejected this alternative “nuisance” test. *See In re T.L.*, 996 A.2d 805 (D.C. 2010); *Martinez v. District of Columbia*, 987 A.2d 1199 (D.C. 2010).

or probability of such a reaction.’ And this reaction must be from the general citizenry, not solely a police officer. Mere offensive language, uttered briefly and directed only at a police officer cannot support a disorderly charge.”).

Complaint Examiner finds that COMPLAINANT was exercising his freedom of speech in questioning the actions of SUBJECT OFFICER regarding his request to file a report and his request to speak with a supervising officer. According to the testimony of SUBJECT OFFICER and WITNESS OFFICER, it was not until the repeated requests by COMPLAINANT for a supervising officer and his failure to leave the scene, when prompted by SUBJECT OFFICER, that he was placed under arrest. The Complaint Examiner finds that SUBJECT OFFICER arrested COMPLAINANT on the basis of his protestations and unruly conduct directed toward the police alone. MPD officers are required to be courteous and orderly in their dealing with the public and must avoid giving the impression that they are evading the performance of their duty. *See* MPD General Order 201.26. SUBJECT OFFICER failed to perform his duties in a courteous manner and failed to respond to COMPLAINANT’S request to dispatch a supervising official. Complaint Examiner finds that the crowd was not incited to violence and COMPLAINANT’S unruly behavior was directed solely at the MPD officials. Thus, COMPLAINANT’S arrest for disorderly conduct was unlawful and SUBJECT OFFICER’S arrest of COMPLAINANT constituted harassment. D.C. Code § 5-1107(a); MPD General Order 120.25.

As discussed above, the evidence demonstrates that SUBJECT OFFICER arrested COMPLAINANT for disorderly conduct because his presence was making the MPD officers uncomfortable and/or angry and thus SUBJECT OFFICER did not have a legitimate law enforcement purpose in arresting COMPLAINANT and his actions constituted harassment in violation of D.C. Code § 5-1107(a) and MPD General Order 120.25.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER, First District

Allegation 1: Harassment	Sustained
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Submitted on July 23, 2012.

ARTHUR D. SIDNEY
Complaint Examiner