

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	11-0130
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, Fifth District
Allegation 1:	Harassment
Complaint Examiner:	Kimberly Berry
Merits Determination Date:	March 2, 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 filed a complaint with the Office of Police Complaints on December 16, 2010. The complaint was later signed by COMPLAINANT on January 7, 2011. COMPLAINANT alleges that Fifth District MPD Officer, SUBJECT OFFICER, harassed him when the officer stopped him at a bus stop.¹

COMPLAINANT alleged that while he was waiting at a bus stop at the intersection of 18th and Hamlin Streets N.E., SUBJECT OFFICER, accompanied by WITNESS OFFICER, asked COMPLAINANT to provide identification. When COMPLAINANT asked why he had to provide an I.D., SUBJECT OFFICER told COMPLAINANT that if he did not, he would be handcuffed. COMPLAINANT did not provide I.D. and was handcuffed and detained while SUBJECT OFFICER retrieved and checked COMPLAINANT'S I.D. After clearing his information and releasing him from handcuffs, SUBJECT OFFICER told COMPLAINANT that he had been stopped because COMPLAINANT turned his back to the officers when they first observed him from their police cruiser. COMPLAINANT deems SUBJECT OFFICER'S actions to have been unnecessary and harassing.

¹ COMPLAINANT also alleged that SUBJECT OFFICER discriminated against him based on his race. On December 30, 2012, pursuant to D.C. Code § 5-1108(1), a member of the Police Complaints Board, concurring with the determination made by the OPC Executive Director, dismissed the allegation of discrimination.

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 January 29, 2013, and OPC's response to the objections, the Complaint Examiner has 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 January 29, 2013, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. COMPLAINANT filed a complaint for harassment against SUBJECT OFFICER with the Office of Police Complaints on December 16, 2010. The complaint was signed on January 7, 2011.
2. On or about December 6, 2010, at approximately 5:15 p.m. while on routine patrol in a marked MPD cruiser with WITNESS OFFICER, SUBJECT OFFICER observed COMPLAINANT standing near a bus stop at the corner of 18th and Hamlin Streets, N.E.
3. COMPLAINANT observed the officers in their MPD vehicle.
4. SUBJECT OFFICER circled the block, got out of his vehicle and made contact with COMPLAINANT.
5. COMPLAINANT refused SUBJECT OFFICER'S request to engage in conversation or produce identification.
6. COMPLAINANT had consumed alcohol the day of the incident.
7. COMPLAINANT appeared irate and boisterously expressed his dissatisfaction with being stopped by the officers.
8. SUBJECT OFFICER placed COMPLAINANT in handcuffs while SUBJECT OFFICER physically retrieved COMPLAINANT'S identification, frisked him, and ran COMPLAINANT'S name for outstanding warrants.
9. After determining COMPLAINANT had no existing warrants, SUBJECT OFFICER released COMPLAINANT.
10. The stop and detention lasted 10 to 15 minutes.

11. SUBJECT OFFICER completed an Incident Report (CCN 10-176205) in which he stated that COMPLAINANT “turned his body toward the side of building and took a stance as if he was [sic] going to urinate on the building in plain view of the public.”
12. In his OPC statement SUBJECT OFFICER alleges that while in his police cruiser, he witnessed COMPLAINANT “move his hands toward his crotch area in a suspicious manner” and that he pulled up to COMPLAINANT to make a stop.

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; (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.

Internal Procedural Regulations

MPD General Order 304.10 establishes the procedures for police-citizen contacts, stops and frisks. Contact is defined as conduct that places an officer in face-to-face communication with a citizen in which the citizen is free not to respond and to leave. An officer may initiate a contact with a person in any place in which the officer has a right to be. Where a citizen refuses or ceases to cooperate during a contact, the citizen must be permitted to go on his way and the refusal to cooperate cannot be used as the basis to escalate the encounter into a stop.

If an officer reasonably suspects that a person has committed, is committing, or is about to commit a crime, the officer may stop and detain the person for the purpose of determining whether probable cause exists to arrest. An officer conducting a stop must cite the particular factors supporting the determination of reasonable suspicion for the stop and the record shall contain all factors relied on for the stop. During the stop the detained person is not compelled to answer questions or produce identification.

An officer may frisk a person who he reasonably suspects is carrying a concealed weapon or dangerous instrument and if the frisk is necessary to protect himself. The officer conducting a frisk must cite the specific factors which supported the determination that there was reasonable suspicion to conduct the frisk. The record of the frisk must contain all factors relied upon.

Terry v. Ohio

Terry v. Ohio, 392 U.S. 1 (1968) held that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops and frisks a suspect without probable cause to arrest, if (1) the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and (2) has a reasonable belief that the person may be armed and dangerous. In that case, a police officer testified to specific factors he observed which led him to believe the suspects in question were “casing” a business establishment in what appeared to be an attempt to rob it. A search of the suspects revealed that they were carrying concealed weapons. The U.S. Supreme Court found that the officer’s seizure of the suspects and subsequent search to be reasonable in light of the fact that the suspects’ appearing to prepare to rob a store would lead a reasonable person to believe they possessed weapons.

Analysis

SUBJECT OFFICER’S two sworn statements are contradictory as to whether his intent was initially to make contact with COMPLAINANT or to make a stop. In his Incident-Based Event Report, SUBJECT OFFICER states that he attempted to make contact with COMPLAINANT. In his sworn OPC statement, he states that he pulled up to COMPLAINANT with the intent to make a stop. If his intent was to simply make contact with COMPLAINANT, SUBJECT OFFICER’S “contact” with COMPLAINANT did not comply with the MPD General Order. According to SUBJECT OFFICER’S statement in his Incident-Based Event Report,

when SUBJECT OFFICER attempted to make contact with COMPLAINANT, COMPLAINANT became loud and tried to walk away. SUBJECT OFFICER then stopped him and placed him in handcuffs. COMPLAINANT'S account, as stated in his complaint and OPC statement, is not contradictory. He states that SUBJECT OFFICER asked for his identification and that when he refused, SUBJECT OFFICER threatened to handcuff him and in fact did handcuff him after COMPLAINANT got irritated and again refused to comply with SUBJECT OFFICER'S request. Upon COMPLAINANT'S attempt to walk away from the officers and his refusal to provide identification, SUBJECT OFFICER was allowed to continue observing COMPLAINANT but was required to let him walk away from the officers. Instead of letting COMPLAINANT leave, the "contact" was escalated to a stop.

Whether the interaction between COMPLAINANT and SUBJECT OFFICER began as a contact as stated in the Incident Report and escalated into a stop or initiated as a stop as stated in SUBJECT OFFICER'S OPC statement, the stop did not comply with the MPD General Order. According to his Incident Report, SUBJECT OFFICER observed COMPLAINANT turn toward the side of a building and take a stance as if he were going to urinate. This observation, however, is contradicted by WITNESS OFFICER'S, SUBJECT OFFICER'S and COMPLAINANT'S accounts in their OPC statements. WITNESS OFFICER states that COMPLAINANT turned away in a suspicious manner and discarded something onto the ground. SUBJECT OFFICER stated that COMPLAINANT, upon observing the marked scout car, immediately turned away from him and moved his hands toward his crotch area in a suspicious manner. COMPLAINANT stated that he saw the officers in their squad car before they circled the block and pull up to him. Neither of the officer's accounts in their OPC statements reference COMPLAINANT appearing to prepare himself to urinate, and it is more likely than not that COMPLAINANT would not urinate having seen the officers. Therefore, this Complaint Examiner finds that the "urination" was written in the Incident Report merely to provide justification for SUBJECT OFFICER'S unwarranted stop of COMPLAINANT. Moreover, SUBJECT OFFICER'S and WITNESS OFFICER'S characterization of COMPLAINANT'S behavior as "suspicious" does not rise to the specificity required for reasonable suspicion to make a stop.

SUBJECT OFFICER did not provide a reasonable basis for frisking COMPLAINANT. Neither in the Incident Report nor in either OPC statement did the officers give information that would provide a basis for reasonable suspicion that COMPLAINANT was carrying a weapon. The officers stated that COMPLAINANT was "irate" and "aggressive" because he had been stopped and that he was intoxicated and smelled of alcohol. This description of COMPLAINANT'S demeanor does not give rise to the specific factors required to justify a reasonable suspicion that COMPLAINANT possessed a concealed weapon. Moreover, had the officers allowed COMPLAINANT to walk away and had they honored COMPLAINANT'S refusal to provide identification-- as is required by the General Order-- there would have been no possibility of injury to the officers and no reason for a frisk.

The facts of this complaint are distinguished from *Terry v. Ohio* because SUBJECT OFFICER did not have a reasonable suspicion that COMPLAINANT was engaged in a criminal act and SUBJECT OFFICER has not articulated any other facts that would lead to a reasonable belief that COMPLAINANT was armed. Thus, there was no reasonable justification warranting SUBJECT OFFICER'S intrusion upon COMPLAINANT.

In his Objections to Report of Investigation, SUBJECT OFFICER argues that the Memorandum of Interview should not be relied upon because it is an unsworn document that he asserts as being factually incorrect. Although the Memorandum of Interview is a reliable source of information, this Complaint Examiner did not consider the statements contained in the Memorandum in determining that the stop and frisk violated MPD guidelines.

Conclusion

SUBJECT OFFICER'S actions violated MPD's internal guidelines when he subjected COMPLAINANT to detention and search thus denying and impeding him in the exercise or enjoyment of his rights and privileges. A police officer's restraining a person's freedom to walk away and searching him is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment. *Terry*, 392 U.S. at 17. SUBJECT OFFICER'S actions would cause a reasonable person to be humiliated. Therefore, this Complaint Examiner finds that SUBJECT OFFICER harassed COMPLAINANT when he detained and frisked him.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER, Fifth District

Allegation 1: Harassment	Sustained

Submitted on March 2, 2013.

Kimberly D. Berry
Complaint Examiner