

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.	11-0136
Complainant:	COMPLAINANT
Subject Officer, Badge No., District:	SUBJECT OFFICER, Second District
Allegation 1:	Use of Excessive or Unnecessary Force
Allegation 2:	Insulting, Demeaning, or Humiliating Language or Conduct
Complaint Examiner:	Precious Murchison
Merits Determination Date:	July 17, 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 December 20, 2010, COMPLAINANT alleged that on December 19, 2010, SUBJECT OFFICER used unnecessary or excessive force against him by “grab[bing]” him and “push[ing]” him down a stairwell as he was leaving a bar. The COMPLAINANT also alleged that SUBJECT OFFICER used language or engaged in conduct toward him that was insulting, demeaning, or humiliating.

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 10, 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 10, 2013, and OPC’s response to the objections, the Complaint Examiner finds the material facts regarding the complaint to be:

1. On the evening of Saturday, December 18, 2010, through the early morning of Sunday, December 19, 2010, SUBJECT OFFICER and WITNESS OFFICER were working

overtime at the Third Edition bar (“Third Edition” or “bar”) located at 1218 Wisconsin Avenue, N.W., in the Georgetown area of the Second District.¹ This was not the first time that SUBJECT OFFICER and WITNESS OFFICER worked together at Third Edition.

2. When they worked together at Third Edition, SUBJECT OFFICER and WITNESS OFFICER sometimes walked around the second floor of the bar for approximately 10 to 15 minutes at a time. On Saturday evenings, the second floor of the bar usually was crowded and on Sundays at approximately 1:45 a.m., SUBJECT OFFICER and WITNESS OFFICER ordinarily remained inside of the bar to provide extra security there. During the evening of December 18, 2010, SUBJECT OFFICER and WITNESS OFFICER roamed around the second floor at different times, which was routine.
3. At approximately 1:45 a.m. on December 19, 2010, COMPLAINANT and his wife, WITNESS #1, were leaving the second floor of Third Edition. As they made their way through the crowd on the second floor, a person bumped into COMPLAINANT, causing COMPLAINANT to stumble and bump into SUBJECT OFFICER, who was standing near a wall on the second floor of the bar.
4. After COMPLAINANT bumped into SUBJECT OFFICER, SUBJECT OFFICER told COMPLAINANT, “watch where the fuck you’re going.” COMPLAINANT apologized to SUBJECT OFFICER, explaining that someone in the crowd bumped into COMPLAINANT. In response, SUBJECT OFFICER repeated his profane statement. COMPLAINANT replied, “just because you have a badge doesn’t give you the right to be a dick.” Then, SUBJECT OFFICER grabbed COMPLAINANT and pushed him down the stairs until COMPLAINANT reached a stairwell landing. COMPLAINANT stood on the landing and against a wall as he held his hands up in the air and told SUBJECT OFFICER that he had not done anything wrong. SUBJECT OFFICER replied that COMPLAINANT had called him “a dick” and then COMPLAINANT said words to the effect, “I said that because you’re being a dick.” Then, SUBJECT OFFICER pushed COMPLAINANT down the rest of the stairs as COMPLAINANT held onto SUBJECT OFFICER to avoid falling to the ground.
5. After COMPLAINANT reached the bottom of the stairs, he exited the bar, but later returned and asked SUBJECT OFFICER to provide his badge number. SUBJECT OFFICER stated, “yeah[,] you can have my badge number. I’ll put it on your arrest papers.” COMPLAINANT asked SUBJECT OFFICER what he would be arrested for, and SUBJECT OFFICER said, “for trying to throw an officer down the stairs.” COMPLAINANT disagreed, stating that he merely was holding onto SUBJECT OFFICER as he tried to throw COMPLAINANT down the stairs. After this verbal exchange, SUBJECT OFFICER provided COMPLAINANT with his badge number and directed COMPLAINANT to leave the bar, which he did.

¹ Third Edition bar closed in January 2013.

6. COMPLAINANT was not injured and SUBJECT OFFICER did not arrest COMPLAINANT.
7. On December 20, 2010, the day after the incident, COMPLAINANT filed a complaint with OPC. On January 4, 2011, OPC interviewed COMPLAINANT, who provided a signed statement on the same date. COMPLAINANT'S January 4, 2011, statement is consistent in all material respects to the complaint that he filed on December 20, 2010.
8. COMPLAINANT'S wife, WITNESS #1, witnessed part of COMPLAINANT'S encounter with SUBJECT OFFICER and her description of the incident differs in non-material ways from COMPLAINANT'S description.² In any event, WITNESS #1 did not see the initial interaction between COMPLAINANT and SUBJECT OFFICER because she walked ahead of her husband as they left the second floor of the bar. WITNESS #1 exited the door on the second floor, entered the stairwell and descended some of the stairs before noticing that COMPLAINANT was not behind her in the stairwell. When she turned around and ascended the stairs, she saw COMPLAINANT and SUBJECT OFFICER exit the door at the top of the stairwell. She heard SUBJECT OFFICER accuse COMPLAINANT of calling him "a dick" and then heard COMPLAINANT state that just because SUBJECT OFFICER has a badge does not mean he gets to be "a dick." WITNESS #1 saw COMPLAINANT standing with his hands raised in the air while he stood on a stairwell landing. WITNESS #1 stated that SUBJECT OFFICER "forcefully guided" COMPLAINANT down some of the stairs and then "began pushing" COMPLAINANT down other stairs to the bottom of the stairwell as COMPLAINANT held onto SUBJECT OFFICER.³ Later, she heard COMPLAINANT ask SUBJECT OFFICER for his badge number, heard SUBJECT OFFICER say that he would write his badge number on COMPLAINANT'S arrest paperwork and heard SUBJECT OFFICER state that COMPLAINANT could be arrested "for trying to throw an officer down a flight of stairs." Also, WITNESS #1 heard COMPLAINANT state that he was holding onto SUBJECT OFFICER as he tried to throw COMPLAINANT down the stairwell.

² On January 10, 2011, more than a year after the incident, OPC interviewed and obtained a written statement from WITNESS #1. In her statement, WITNESS #1 described what she saw and heard at Third Edition on the morning of December 19, 2010. In particular, she stated that COMPLAINANT "walked down the first set of steps" in the stairwell. Additionally, WITNESS #1 referred to three separate stairwell landings, stating that at one point, she, SUBJECT OFFICER, COMPLAINANT and two bouncers were standing together on the second landing and that at another point, SUBJECT OFFICER grabbed COMPLAINANT and "forcefully guided [him] down the steps to the third landing" before pushing COMPLAINANT down the last flight of steps. Also, WITNESS #1 did not state that SUBJECT OFFICER pushed COMPLAINANT out of the bar; instead, WITNESS #1 stated that COMPLAINANT "exited the bar." On May 16, 2013, more than three years after the incident, OPC interviewed WITNESS #1 again. This time, WITNESS #1 referred to two stairwell landings only.

³ The Examiner need not resolve the apparent discrepancy about whether SUBJECT OFFICER pushed COMPLAINANT once or twice in the stairwell. Although COMPLAINANT and WITNESS #1 describe this part of the incident differently, they agree that SUBJECT OFFICER pushed COMPLAINANT down the final set of stairs leading to the bottom of the stairwell. Accordingly, the Examiner finds that SUBJECT OFFICER pushed COMPLAINANT at least once; he pushed COMPLAINANT down the final set of stairs leading to the bottom of the stairwell as COMPLAINANT held onto SUBJECT OFFICER.

9. WITNESS OFFICER was not present on the second floor or in the stairwell when COMPLAINANT encountered SUBJECT OFFICER, and WITNESS OFFICER did not see or hear what happened between COMPLAINANT and SUBJECT OFFICER inside of the bar.
10. WITNESS #2 was a General Manger of Third Edition at the time of the incident and WITNESS #3 was a bouncer there. Neither WITNESS #2 nor WITNESS #3 witnessed the incident involving COMPLAINANT and SUBJECT OFFICER.
11. WITNESS #2 provided a copy of the "Third Edition Training Summary" dated December 18, 2010 ("Summary"). The Summary includes staff notes related to incidents or events at the bar on that date, but none of the notes refer to the incident involving COMPLAINANT and SUBJECT OFFICER. Specifically, the Summary refers to a fight between two men on the dance floor; a male guest who was asked to leave after he continued to block the female guest entrance; three intoxicated persons in line who were denied entry into Third Edition; and an employee that "was involved in 4 incidents asking patrons to leave [the] property." The Summary does not reference or describe COMPLAINANT'S encounter with SUBJECT OFFICER inside of the bar.

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."

Excessive or Unnecessary Force

MPD General Order 901.07, Part II, states, "The policy of the Metropolitan Police Department is to preserve human life when using lawful authority to use force. Therefore, officers of the Metropolitan Police Department shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others."

The regulations governing OPC define excessive or unnecessary force as "[u]nreasonable use of power, violence, or pressure under the particular circumstances. Factors to be considered when determining the 'reasonableness' of a use of force include the following: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officer or others; (3) whether the subject was actively resisting arrest or attempting to evade arrest by

flight; (4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; (5) whether the officer adhered to the general orders, policies, procedures, practices and training of the MPD ... and (6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish the objective.” D.C. Mun. Regs. tit. 6A, § 2199.1.

The MPD document entitled, “Application of the Use of Force Continuum for the Metropolitan Police Department” provides guidance to MPD officers on the appropriate use of force. This document states that “[t]he policy of the Metropolitan Police Department is that an officer shall use only that force that is reasonably necessary to effectively bring an incident under control, while protecting the lives of the officers and others.”

In his August 26, 2011 written statement to OPC, SUBJECT OFFICER denied all allegations in the complaint, including the use of any force against COMPLAINANT. Specifically SUBJECT OFFICER denied having “any contact with [COMPLAINANT] on the second floor of Third Edition, or inside of Third Edition at all.” SUBJECT OFFICER claimed that he encountered COMPLAINANT outside of the bar, near the sidewalk after several bouncers escorted COMPLAINANT out of the bar, and that COMPLAINANT became upset with him “because [SUBJECT OFFICER] did not take his side, and assist him in getting back into the bar.” SUBJECT OFFICER even denied innocent details, stating that he was “never positioned on the second floor of Third Edition” and that “[t]he only time” that he goes up to the second floor is “around closing time, [or] approximately 10 minutes before 3:00 a.m.” SUBJECT OFFICER’S statement is not credible and is belied by the statements of COMPLAINANT, WITNESS #1 and WITNESS OFFICER.

First, WITNESS OFFICER stated that he and SUBJECT OFFICER normally remained inside of Third Edition on Sundays at approximately 1:45 a.m. to provide extra security in the crowded bar, which is consistent with COMPLAINANT’S allegation that he first encountered SUBJECT OFFICER inside of the bar at that time as he made his way through the crowd. The Examiner concludes that SUBJECT OFFICER was inside of the bar on the second floor at approximately 1:45 a.m. on December 19, 2010, and had an opportunity to use force against COMPLAINANT at that time.

Second, WITNESS #1’S description of the incident contradicts SUBJECT OFFICER’S account and supports COMPLAINANT’S allegations. WITNESS #1 stated that, while they were inside of the bar, she heard SUBJECT OFFICER accuse COMPLAINANT of calling him “a dick” and then heard COMPLAINANT state that just because SUBJECT OFFICER has a badge does not mean he gets to be “a dick.” WITNESS #1 saw COMPLAINANT’S hands raised in the air while he stood on a stairwell landing inside of the bar. She stated that SUBJECT OFFICER “forcefully guided” COMPLAINANT down some of the stairs and then “began pushing” COMPLAINANT down other stairs to the bottom of the stairwell as COMPLAINANT held onto SUBJECT OFFICER. The Examiner concludes that SUBJECT OFFICER had a motive to use force against COMPLAINANT after he bumped into SUBJECT OFFICER and referred to him as “a dick.”

Moreover, COMPLAINANT’S very actions lend credence to his allegations and cast

doubt on SUBJECT OFFICER'S explanation of the event. COMPLAINANT admitted that he bumped into SUBJECT OFFICER and referred to him as "a dick." COMPLAINANT stated that SUBJECT OFFICER pushed him down the steps and COMPLAINANT never alleged that the bouncers used force against him or threw him out of the bar. While talking with SUBJECT OFFICER on the scene, COMPLAINANT complained that SUBJECT OFFICER tried to throw him down the stairs inside of the bar. The very next day, COMPLAINANT followed up by filing a complaint with OPC alleging excessive or unnecessary force and inappropriate language or conduct. There is no evidence to suggest that COMPLAINANT fabricated his account of the incident and there is no credible reason for COMPLAINANT to admit that he accidentally bumped into SUBJECT OFFICER inside of the crowded bar or that he referred to SUBJECT OFFICER as "a dick," if he had not done so. Accordingly, the Examiner concludes that SUBJECT OFFICER used force against COMPLAINANT when he pushed him down the steps inside of the bar.

At the time of the incident, COMPLAINANT was not suspected of committing any crime and did not pose an immediate threat to the safety of SUBJECT OFFICER or others. COMPLAINANT was not behaving aggressively or violently and he apologized immediately after bumping into SUBJECT OFFICER, and explained that he did so accidentally. Also, COMPLAINANT was not actively resisting arrest or attempting to evade arrest by flight. Indeed, COMPLAINANT returned to the bar after SUBJECT OFFICER grabbed and pushed him to the bottom of the stairwell so that he could get SUBJECT OFFICER'S badge number. Here, SUBJECT OFFICER was not forced to make a split second decision about the level of force to use against COMPLAINANT. In fact, it was unnecessary for SUBJECT OFFICER to use any force under the circumstances. Accordingly, SUBJECT OFFICER violated MPD General Order 901.07, Part II and the Application of the Use of Force Continuum for the Metropolitan Police Department when he grabbed and pushed COMPLAINANT down the stairs inside of Third Edition.

Language or Conduct

MPD General Order 201.26 (effective Nov. 10, 1976), Part I, Section C. Nos. 1-3 states in pertinent part:

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 be courteous, civil, and respectful to . . . other persons whether on, or off duty. They shall be quiet, orderly, and attentive and shall exercise patience and discretion in the performance of their duties Members shall refrain from harsh, violent, coarse, profane, sarcastic, or insolent language.

The Examiner finds that COMPLAINANT'S allegations have the "ring of truth" and the totality of the credible evidence in this complaint convinces the Examiner that SUBJECT OFFICER responded with profanity and sarcasm after COMPLAINANT bumped into him inside of the bar. SUBJECT OFFICER twice told COMPLAINANT to "watch where the fuck you're going." Indeed, it was SUBJECT OFFICER'S use of this profane and insolent language that caused COMPLAINANT to go from apologizing to SUBJECT OFFICER, to accusing him of

acting like “a dick.” Furthermore, COMPLAINANT’S reference to SUBJECT OFFICER as “a dick” angered SUBJECT OFFICER, who responded by grabbing and pushing COMPLAINANT and later telling COMPLAINANT that he could be arrested “for trying to throw an officer down the stairs” and that SUBJECT OFFICER would put his badge number on COMPLAINANT’S arrest papers. SUBJECT OFFICER’S conduct was prohibited by MPD General Order 201.26.

Significantly, SUBJECT OFFICER and WITNESS OFFICER provided conflicting statements concerning SUBJECT OFFICER’S presence on the second floor of the bar generally and, in particular, on the night of the incident. WITNESS OFFICER stated that SUBJECT OFFICER “positions himself on the second floor occasionally” and that both officers “walk through the second floor on occasion, [for] roughly 10 [to] 15 minutes at a time based on the amount of people at the [bar].” Further, WITNESS OFFICER stated that “[o]n this particular night, both [SUBJECT OFFICER] and [WITNESS OFFICER] roamed around throughout the club, including the second floor at different times throughout the night[,] which is a regular occurrence.” In contrast, SUBJECT OFFICER stated that he was “never positioned on the second floor of Third Edition” and “[t]he only time that [he] go[es] up to the second floor is around closing time, approximately 10 minutes before 3:00 a.m. . . .” The Examiner credits the statement of WITNESS OFFICER, who unlike SUBJECT OFFICER has no interest in the outcome of this complaint, and concludes that the reason SUBJECT OFFICER denied being on the second floor of the bar on the night of the incident is because he engaged in conduct in violation of MPD General Orders 201.26 and 901.07 while there, namely, the use of inappropriate language or conduct after COMPLAINANT bumped into SUBJECT OFFICER and the use of excessive or unnecessary force that followed COMPLAINANT’S derogatory reference to SUBJECT OFFICER.

Having credited COMPLAINANT’S account of the incident, the Examiner finds that COMPLAINANT has established by a preponderance of the evidence that SUBJECT OFFICER used excessive or unnecessary force, engaged in conduct that was not courteous, civil or respectful and used language that was harsh, coarse, profane, sarcastic or insolent.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Excessive or Unnecessary Force	Sustained
Allegation 2: Language or Conduct	Sustained

Submitted on July 17, 2013

Precious Murchison
Complaint Examiner