

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.	11-0548
Complainant:	COMPLAINANT
Subject Officers, Badge No., District:	SUBJECT OFFICER #1, Second District SUBJECT OFFICER #2, Second District
Allegation 1:	Use of Excessive or Unnecessary Force
Allegation 2:	Harassment
Allegation 3:	Language or Conduct
Allegation 4:	Retaliation
Complaint Examiner:	Sara Kropf
Merits Determination Date:	March 31, 2014

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 September 26, 2011, COMPLAINANT alleged that on September 22, 2011, SUBJECT OFFICER #1 harassed an individual by the name of WITNESS #1 by unlawfully stopping and searching him. The complainant also alleged SUBJECT OFFICER #1 used excessive and unnecessary force against WITNESS #1. COMPLAINANT further alleged that SUBJECT OFFICER #1 retaliated against and harassed COMPLAINANT by issuing COMPLAINANT a parking ticket when COMPLAINANT challenged SUBJECT OFFICER #1 about his treatment of WITNESS #1. Finally, COMPLAINANT alleged that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 used insulting, demeaning or humiliating language towards COMPLAINANT, including laughing at COMPLAINANT.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on February 10, 2014. The Complaint Examiner heard the testimony of COMPLAINANT (by telephone), SUBJECT OFFICER #1, WITNESS #2, WITNESS OFFICER #1 and WITNESS OFFICER #2. SUBJECT OFFICER #2 was on medical leave and unable to attend the hearing. She agreed, through counsel, to accepting the findings of the hearing against her in her absence. The Complaint Examiner excused her absence for good cause and did not consider her absence in the weighing of evidence D.C. Mun. Regs. tit. 6A, § 2118.6.

The following exhibits to the OPC Report of Investigation (ROI) were introduced at the hearing and admitted into evidence.

By Complainant:

Exhibit 11: Photograph Taken at Bank

Exhibit 10: Parking Ticket and Hearing Record

Exhibit 1: SUBJECT OFFICER #1's Statement to OPC

Exhibit 5: Transcript of 911 Call by Complainant

III. FINDINGS OF FACT

Based on a review of OPC's ROI, the objections submitted by SUBJECT OFFICER #1 on November 25, 2013, OPC's response to the objections and the post-hearing briefs submitted by the parties, the Complaint Examiner finds the material facts regarding the complaint to be:

1. On September 22, 2011, COMPLAINANT was driving his car, a red Hyundai Tiburon, east on U Street, N.W. A marked police cruiser, driven by SUBJECT OFFICER #1 was driving west on U Street, N.W. and then pulled through the eastbound traffic lanes and into the parking lane of U Street, N.W., where it came to a stop.
2. SUBJECT OFFICER #1 got out of his cruiser and confronted an individual, WITNESS #1, who was sitting on the steps of a bank facing U Street, N.W. SUBJECT OFFICER #1 believed he saw WITNESS #1 rolling some sort of cigarette.
3. After getting out of his car, SUBJECT OFFICER #1 confronted WITNESS #1. SUBJECT OFFICER #1 grabbed WITNESS #1's arm when SUBJECT OFFICER #1 believed that WITNESS #1 was reaching towards the waistband of his clothing. He searched WITNESS #1 and found only a hand-rolled tobacco cigarette. WITNESS #1 was permitted to leave the area and not questioned further.
4. COMPLAINANT stopped his car at least partially in the lane of traffic on U Street, N.W. to avoid hitting SUBJECT OFFICER #1's car when SUBJECT OFFICER #1 pulled through the eastbound lane of U Street, N.W. COMPLAINANT did not park his car entirely in the parking lane at that point. At least part of COMPLAINANT's car was in the right travel lane of eastbound U Street, N.W. because COMPLAINANT had been forced to make a quick stop when SUBJECT OFFICER #1's car unexpectedly crossed into the eastbound lane of U Street, N.W.
5. COMPLAINANT was in his car, with the windows up and the sunroof open, during his viewing of the interaction between SUBJECT OFFICER #1 and WITNESS #1.
6. COMPLAINANT, from his car, called 911 for the first time to report what he believed to be SUBJECT OFFICER #1's harassment of WITNESS #1. SUBJECT OFFICER #2 arrived on the scene to assist SUBJECT OFFICER #1. COMPLAINANT questioned

SUBJECT OFFICER #2 and SUBJECT OFFICER #1 about SUBJECT OFFICER #1's treatment of WITNESS #1 during the stop and search of WITNESS #1.

7. COMPLAINANT called 911 at least two more times during the incident to request that a supervisor come to the scene so he could report the actions of SUBJECT OFFICER #1.
8. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 repeatedly asked COMPLAINANT to move his car from the lane of travel on U Street, N.W. COMPLAINANT refused to move his car several times, though he did eventually move his car. He then took a picture of his car, after moving it, showing it in the parking lane of eastbound U Street, N.W.
9. SUBJECT OFFICER #1 issued COMPLAINANT a ticket for parking abreast. This ticket was dismissed by DMV Adjudication Services.
10. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 talked with COMPLAINANT for several minutes. COMPLAINANT was belligerent and argumentative during this discussion.
11. WITNESS #2, a security guard at the bank, witnessed portions of this event. He witnessed COMPLAINANT "yelling" and being "loud and obnoxious." WITNESS #2 testified that SUBJECT OFFICER #1 "handled it pretty well considering that [COMPLAINANT] . . . didn't want to listen."
12. Exhibit 11 shows COMPLAINANT's car after he had moved it from the lane of traffic on U Street, N.W., in compliance with SUBJECT OFFICER #1's requests.
13. Eventually, a supervisor, WITNESS OFFICER #2 arrived at the scene, in response to COMPLAINANT's calls to 911. He spoke to WITNESS #1 who stated that he did not wish to make any complaint against SUBJECT OFFICER #1.
14. WITNESS OFFICER #2 also spoke with COMPLAINANT about what had happened and provided him with information about how to file a civilian complaint against a police officer.

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.”

COMPLAINANT alleges that SUBJECT OFFICER #1 used excessive or unnecessary force against WITNESS #1 during SUBJECT OFFICER #1’s stop and search. According to COMPLAINANT, SUBJECT OFFICER #1 “grabbed WITNESS #1’s arm . . . And he jerked him back and forth.” SUBJECT OFFICER #1 denies using excessive or unnecessary force, explaining that he appropriately grabbed WITNESS #1’s arm when WITNESS #1 moved his hand towards his waistband and possibly towards a weapon.

WITNESS #1 was not located and did not testify during the evidentiary hearing or provide a statement to OPC. WITNESS #1 did not tell any of the officers on the scene that SUBJECT OFFICER #1 had assaulted him, nor did WITNESS #1 file a complaint with the OPC. The Complaint Examiner concludes that COMPLAINANT’s testimony is not credible that he was able to view the interaction between SUBJECT OFFICER #1 and WITNESS #1 closely enough to support a claim of excessive or unnecessary force. The Complaint Examiner does not find SUBJECT OFFICER #1’s testimony that he grabbed WITNESS #1’s arm to prevent him from grabbing a weapon or disposing of evidence to be credible. However, in light of the fact that (1) COMPLAINANT’s testimony was not credible, (2) WITNESS #1 did not testify and (3) only minimal force was used, the Complaint Examiner concludes that the force used by SUBJECT OFFICER #1 during this stop and search was not unnecessary or excessive. The claim for excessive or unnecessary force is unfounded.

Harassment

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.

Harassment of WITNESS #1 by SUBJECT OFFICER #1

COMPLAINANT alleges that SUBJECT OFFICER #1 harassed WITNESS #1 by stopping and frisking WITNESS #1 because SUBJECT OFFICER #1 did not “reasonably suspect[]” WITNESS #1 “has committed, is committing, or is about to commit any crime,” as required by General Order 304.10 to conduct a “stop” of WITNESS #1.

SUBJECT OFFICER #1 testified that he saw WITNESS #1 rolling a cigarette and concluded that it must be something “drug-related.” This was his justification for initiating a contact with WITNESS #1. According to SUBJECT OFFICER #1, WITNESS #1 then “ma[de] a gesture as if he’s going to take it away but then he brings it down to this waist area where his pockets are.” SUBJECT OFFICER #1 became concerned that WITNESS #1 had a weapon because the “waistband area” is where someone could “retrieve an item, a dangerous item of some sort or discard evidence.” This was why, according to SUBJECT OFFICER #1, he grabbed WITNESS #1’s arm and then conducted a pat down for weapons. SUBJECT OFFICER #1 admitted that the cigarette that WITNESS #1 was rolling was tobacco, not marijuana. However, SUBJECT OFFICER #1 denied that he ever felt “unsafe” during the encounter with WITNESS #1.

SUBJECT OFFICER #1 testified that WITNESS #1 gave his consent to have SUBJECT OFFICER #1’s search WITNESS #1’s bag, and SUBJECT OFFICER #1 did so, using a flashlight.

SUBJECT OFFICER #1 conducted a stop of WITNESS #1 and not simply a police contact. Certainly, WITNESS #1 did not feel free to leave with SUBJECT OFFICER #1 standing over him and grabbing his arm.

As to whether SUBJECT OFFICER #1 was justified in stopping WITNESS #1, SUBJECT OFFICER #1 testified that he stopped WITNESS #1 because he thought WITNESS #1 was rolling a marijuana cigarette. SUBJECT OFFICER #1’s testimony is credible on this point, particularly since he testified that he found a hand-rolled (tobacco) cigarette on WITNESS #1 during the search. COMPLAINANT was only able to view the interaction between SUBJECT OFFICER #1 and WITNESS #1 from COMPLAINANT’s car with the windows up (and the sunroof open). He was therefore not close enough to hear and see exactly what happened between SUBJECT OFFICER #1 and WITNESS #1, nor did he view what happened between SUBJECT OFFICER #1 and WITNESS #1 before

COMPLAINANT arrived at the scene. The Complaint Examiner concludes that COMPLAINANT's testimony that he was able to view the interaction between SUBJECT OFFICER #1 and WITNESS #1 closely enough to support a claim of harassment is not credible. The Complaint Examiner finds the claim related to the stop of WITNESS #1 to be unfounded.

As to whether it was harassment for SUBJECT OFFICER #1 to have grabbed WITNESS #1's arm to search WITNESS #1's person during the stop, there is not sufficient evidence for the Complaint Examiner to make a conclusion because WITNESS #1 did not testify. As stated above, the Complaint Examiner does not find SUBJECT OFFICER #1's testimony as to his explanation for grabbing WITNESS #1's arm to be credible. However, without WITNESS #1's testimony on this point, the Complaint Examiner cannot draw a conclusion on it.

As to whether SUBJECT OFFICER #1 harassed WITNESS #1 by searching his bag without consent, the Complaint Examiner finds in SUBJECT OFFICER #1's favor. SUBJECT OFFICER #1's testimony was credible that WITNESS #1 gave him consent. It was therefore not harassment for SUBJECT OFFICER #1 to have searched WITNESS #1's bag. The Complaint Examiner finds this claim to be unfounded.

Harassment of COMPLAINANT by SUBJECT OFFICER #1

COMPLAINANT alleges that SUBJECT OFFICER #1 harassed COMPLAINANT by issuing him a parking ticket for parking abreast.

According to Title 18 of the District of Columbia Municipal Regulations (Vehicles and Traffic)§ 2405.3(c)(7): "No person shall park a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading of passengers or freight in any of the following places: . . . On the roadway side of any vehicle stopped or parked at the edge or curb of a street."

There was a material dispute of fact as to where COMPLAINANT's car was parked when the ticket was issued. If the car was in the travel lane, then the ticket was properly issued under § 2405.3(c)(7). If it was not in the travel lane but rather in the parking lane, then the ticket was improperly issued.

COMPLAINANT testified that he parked the car in the parking lane only as shown by Exhibit 11. He admitted that he later moved his car closer to the curb after SUBJECT OFFICER #2 told him to move his car. The Complaint Examiner does not find COMPLAINANT's testimony on this point to be credible.

SUBJECT OFFICER #1 testified that COMPLAINANT's car was "in the main lane of traffic" and that COMPLAINANT "couldn't have been against the curb because there were other cars there." According to SUBJECT OFFICER #1, he wrote the ticket and then COMPLAINANT moved his car. The Complaint Examiner finds SUBJECT OFFICER #1's testimony on this point to be credible.

WITNESS #2's testimony supports SUBJECT OFFICER #1. WITNESS #2 testified

that COMPLAINANT “had his car parked like almost in the middle of the street” and was “being real obnoxious and loud and yelling and talking about how he’s not going to move his car if [SUBJECT OFFICER #1] doesn’t give his I.D. back.” He also testified that COMPLAINANT did not “want to move his car out of the street” and that the car was “impeding traffic” on a busy street. The Complaint Examiner finds WITNESS #2’s testimony to be credible.

The balance of the evidence supports SUBJECT OFFICER #1’s version of events, particularly the testimony of WITNESS #2, who has no stake in the outcome here and is credible for that reason. COMPLAINANT also testified that he needed to pull over quickly to avoid an accident with SUBJECT OFFICER #1, which makes it highly unlikely that he could have parked as neatly as Exhibit 11 depicts.

The ticket was properly issued under the parking regulation and the Examiner finds, by a preponderance of the evidence, that SUBJECT OFFICER #1 did not harass COMPLAINANT by issuing the ticket for parking abreast. This allegation is unfounded.

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.

There was conflicting evidence as to the tone of SUBJECT OFFICER #1 and SUBJECT OFFICER #2 in their interaction with COMPLAINANT during this incident. COMPLAINANT testified that SUBJECT OFFICER #1 was “rude” and used some profanity when talking with COMPLAINANT, including a statement that “I don’t see any bars. I don’t see any “F” stripes. And he used the F-U-C-K-I-N-G word.” SUBJECT OFFICER #1, according to COMPLAINANT, “kind of chuckled and laughed at me a little bit.”

Notably, COMPLAINANT did not mention any use of profanity by SUBJECT OFFICER #1 in his September 26th complaint to OPC.

SUBJECT OFFICER #1 contradicted COMPLAINANT’s testimony. He testified that he did not yell at COMPLAINANT, though he admitted that he may have “raise[d] my voice to a level where you can hear me and be assertive and know that like I’m not here playing around.” SUBJECT OFFICER #1 denied making any comments about stars and stripes and denied that he was disrespectful. He did admit that he may have “cracked a smile or smirked” with SUBJECT OFFICER #2 in front of COMPLAINANT.

WITNESS #2's testimony supports SUBJECT OFFICER #1. WITNESS #2 testified that COMPLAINANT was "yelling" and being "loud and obnoxious." WITNESS #2 testified that SUBJECT OFFICER #1 "handled it pretty well considering that [COMPLAINANT] . . . didn't want to listen." The Examiner credits WITNESS #2's testimony on this point. Notably, COMPLAINANT did not deny that he was yelling at SUBJECT OFFICER #1 or that COMPLAINANT initially refused to move his car when ordered to do so by SUBJECT OFFICER #1.

The Complaint Examiner finds COMPLAINANT's testimony credible that SUBJECT OFFICER #1 may have been disrespectful at moments towards COMPLAINANT during this interaction, but concludes that SUBJECT OFFICER #1's conduct does not rise to the level of a violation of MPD General Order 201.26 and concludes that this allegation is unfounded. It appears that SUBJECT OFFICER #1, on balance, "exercise[d] patience and discretion" during this event.

As for SUBJECT OFFICER #2, there was very little testimony about her language and conduct. COMPLAINANT did testify that her tone changed from "curiosity" to being "sarcastic" when she "found that [COMPLAINANT] was trying to investigate SUBJECT OFFICER #1's behavior." According to COMPLAINANT, SUBJECT OFFICER #2 also "kind of chuckled and laughed at me a little bit." COMPLAINANT's testimony is credible on this point. However, there was no testimony that SUBJECT OFFICER #2 used any profanity during the encounter. The Complaint Examiner finds that SUBJECT OFFICER #2's conduct does not rise to the level of a violation of MPD General Order 201.26. As such, the allegation of language or conduct against SUBJECT OFFICER #2 is unfounded.

Retaliation

The regulations governing OPC define retaliation as "[a]ction that discriminates against a person for making or attempting to make a complaint pursuant to the [OPC Statute], including action taken against a person because he or she has opposed any practice made unlawful by this [Statute] or because he or she has made a complaint or expressed an intention to file a complaint, testified, assisted, or participated in any manner in an investigation, mediation, conciliation, complaint examination or other proceeding under this [Statute]." D.C. Mun. Regs. tit. 6A, § 2199.1. MPD General Order 120.25 defines retaliation in a similar fashion.

COMPLAINANT alleges that SUBJECT OFFICER #1 retaliated against him by issuing a parking ticket because COMPLAINANT threatened to file a complaint against SUBJECT OFFICER #1 for his treatment of WITNESS #1. SUBJECT OFFICER #1 responds that the ticket was properly issued under the D.C. parking regulations.

For a retaliation claim, it is first the complainant's burden to show a prima facie case¹ of retaliatory conduct by an officer. If such a prima facie case is made, then the burden shifts to the

¹ In this type of case, it is first the burden of the complainant to offer some credible evidence that there was a violation. The evidence offered at this point need not be conclusive, however. If there is sufficient credible evidence, then the complainant has satisfied his burden of showing a "prima facie case." It is then the burden of the subject officer to offer evidence to rebut—or contradict—the prima facie case presented by the complainant.

subject officer to offer a legitimate reason for issuing the ticket. The complainant must then show that the reason was merely pretextual.

The evidence supports COMPLAINANT's contention that the ticket was issued because COMPLAINANT was threatening to lodge a complaint against SUBJECT OFFICER #1 and because COMPLAINANT was vociferous in his complaints to SUBJECT OFFICER #1 during the incident. In fact, SUBJECT OFFICER #1 described COMPLAINANT as "badgering the 911 center, talking to me, yelling at me, critiquing everything I did on the scene." There is no dispute that SUBJECT OFFICER #1 was, perhaps rightfully, frustrated with COMPLAINANT's behavior during the incident. SUBJECT OFFICER #1 admitted that he was frustrated with COMPLAINANT.

SUBJECT OFFICER #1 did offer a legitimate reason for issuing the ticket. As explained above, the Complaint Examiner concludes that COMPLAINANT's car was partially blocking a lane of traffic on U Street, N.W.

Nonetheless, the Complaint Examiner concludes that SUBJECT OFFICER #1's reason for giving the ticket was a pretext for retaliation. The evidence supports COMPLAINANT's position that he initially pulled over to avoid hitting SUBJECT OFFICER #1's cruiser as it came into the eastbound lanes of U Street, N.W. where COMPLAINANT was traveling. COMPLAINANT was justified in pulling over to the side of the street, even if it meant briefly double parking his car or partially blocking the travel lane briefly.

The Complaint Examiner concludes that SUBJECT OFFICER #1 issued the ticket to COMPLAINANT not because COMPLAINANT's car was blocking traffic but because COMPLAINANT loudly and repeatedly challenged SUBJECT OFFICER #1's treatment of WITNESS #1. SUBJECT OFFICER #1 admitted that he was frustrated during the altercation and that he waited to issue the ticket until after COMPLAINANT had complained several times—both directly to SUBJECT OFFICER #1 and to the 911 call center. In fact, he testified that "He wouldn't move [the car], belligerent, so I wrote him a ticket," suggesting that he wrote the ticket because of COMPLAINANT's "belligerent" attitude, rather than because of the location of the car. Such retaliation is precisely why Regulation title 6A, § 2199.1 and MPD General Order 120.25 exist. This allegation is sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Excessive or Unnecessary Force	Unfounded
Allegation 2: Harassment	Unfounded (as to stop of WITNESS #1 and search of WITNESS #1's bag) Insufficient facts (as to search of WITNESS #1's person)

	Unfounded (as to harassment of COMPLAINANT)
Allegation 3: Language or Conduct	Unfounded
Allegation 4: Retaliation	Sustained

SUBJECT OFFICER #2

Allegation 1: Language or Conduct	Unfounded
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Submitted on March 31, 2014

Sara Kropf
Complaint Examiner