

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	12-0507 and 13-0023
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Harassment
Allegation 2:	Retaliation
Complaint Examiner:	Adav Noti
Merits Determination Date:	August 5, 2015

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC) 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

In complaint 12-0507, COMPLAINANT alleges that SUBJECT OFFICER harassed him by barring him from a local grocery store in S.E. DC and by threatening to arrest him. In complaint 13-0023, COMPLAINANT alleges that SUBJECT OFFICER harassed him and retaliated against him by arresting him for unlawful entry into the same local grocery store.¹

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding these complaints on June 30, 2015. The Complaint Examiner heard the testimony of COMPLAINANT, SUBJECT OFFICER, and WITNESS #1. The following exhibits were introduced at the hearing:

Exhibit 1: OPC complaint number 12-0507 (Aug. 13, 2012)

¹ In complaint 12-0507, COMPLAINANT also alleged that the SUBJECT OFFICER committed a language or conduct violation by commenting on COMPLAINANT'S appearance. This allegation was dismissed on March 24, 2015, by a member of the Police Complaints Board, concurring with the determination made by OPC's executive director.

Exhibit 2: OPC complaint number 13-0023 (Oct. 19, 2012)

Exhibit 3: Barring notice (Aug. 10, 2012)

Exhibit 4: OPC Witness Statement of WITNESS #2 (Mar. 10, 2015)

Exhibit 5: MPD Circular 12-01 (Jan. 3, 2012)

Exhibit 6: Trial Transcript, DC Superior Court, Civil Case

Exhibit 7: Letter from OPC to SUBJECT OFFICER (Sept. 14, 2012)

Exhibit 8: OPC Witness Statement of WITNESS #2 (Oct. 1, 2012)

Exhibit 9: OPC Witness Statement of WITNESS #1 (Oct. 1, 2012)

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on May 6, 2015, OPC's response to the objections, and an evidentiary hearing conducted on June 30, 2015, the Complaint Examiner finds the material facts regarding this complaint to be:

1. At all times relevant to this matter, SUBJECT OFFICER worked off-duty as security at a local grocery store, and COMPLAINANT earned money as a "courtesy driver" outside the same store. As a courtesy driver, COMPLAINANT offered to drive customers from the local grocery store to their homes or elsewhere in exchange for gratuities.
2. The management of the local grocery store generally did not object to the activity of courtesy drivers, including COMPLAINANT, as long as they solicited customers outside the store rather than inside it. Officers who worked security at the store, including SUBJECT OFFICER, did not regularly patrol or otherwise monitor the conduct of the courtesy drivers outside the store.
3. One morning in June or July 2012, COMPLAINANT offered a ride to a customer who was leaving the local grocery store. The customer expressed some hesitation about accepting this offer. COMPLAINANT then asked SUBJECT OFFICER to vouch for him to the customer. SUBJECT OFFICER declined to do so. Complainant perceived this an attempt by SUBJECT OFFICER to interfere with his livelihood, and as a result he and SUBJECT OFFICER exchanged heated words.
4. Later that same day in June or July 2012, SUBJECT OFFICER asked the manager of the local grocery store to bar COMPLAINANT from the store. The manager agreed. SUBJECT OFFICER prepared a barring notice, and the manager signed it as a

representative of the property owner. SUBJECT OFFICER did not present or show this notice to COMPLAINANT after the manager signed it.

5. Between the date of the foregoing incident and August 10, 2012, COMPLAINANT and SUBJECT OFFICER continued to interact at the local grocery store. On several of these occasions, upon seeing COMPLAINANT inside the store, SUBJECT OFFICER orally informed COMPLAINANT that he was barred from the local grocery store and risked arrest by being inside.
6. On August 10, 2012, SUBJECT OFFICER encountered COMPLAINANT inside the store and informed him that he was not allowed to be there. COMPLAINANT stepped outside and called 911. Several MPD officers arrived in response and attempted to mediate the situation between COMPLAINANT and SUBJECT OFFICER.
7. SUBJECT OFFICER attempted to locate the June or July barring notice in the local grocery store's management office but was unable to do so. Thus, on the advice of one of the other officers who had responded to the 911 call, SUBJECT OFFICER filled out a new barring notice. The store manager was on vacation, and no representative of the local grocery store signed this notice. Rather, SUBJECT OFFICER signed the new barring notice adjacent to — but not on — the line labeled "Authorized Agent or Owner."
8. The MPD officers presented the new barring notice to COMPLAINANT. He refused to sign it, so one of the officers signed it as a witness.
9. On August 13, 2012, COMPLAINANT filed a complaint with OPC against SUBJECT OFFICER. This complaint (number 12-0507) alleged that SUBJECT OFFICER had harassed COMPLAINANT by issuing him the barring notice on August 10, 2012.
10. Between August 10 and September 26, 2012, COMPLAINANT continued his work as a courtesy driver at the local grocery store. SUBJECT OFFICER did not object to COMPLAINANT'S solicitations outside the store, but on multiple occasions during this time period SUBJECT OFFICER warned COMPLAINANT upon encountering him in the store that he was barred from entering and told him to leave.
11. On September 14, 2012, OPC sent SUBJECT OFFICER a letter notifying her of complaint 12-0507. SUBJECT OFFICER received this notification.
12. On September 26, 2012, SUBJECT OFFICER was inside the local grocery store, at one end of the store, when she saw COMPLAINANT walking out of the front doors at the other end of the store. She called for MPD assistance and crossed the length of the store to follow COMPLAINANT, eventually catching up with him outside. When the on-duty MPD officers arrived, she arrested COMPLAINANT for unlawful entry, *i.e.*, for entering the local grocery store in violation of the August 10, 2012, barring notice.

IV. DISCUSSION

A. Harassment

Pursuant to D.C. 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.

Complainant alleges that SUBJECT OFFICER harassed him in three ways. First, he alleges that SUBJECT OFFICER harassed him by issuing him an invalid barring notice on August 10, 2012. Second, COMPLAINANT alleges that SUBJECT OFFICER harassed him on multiple occasions between August 10 and September 26, 2012, by telling him to leave the local grocery store and threatening to arrest him if he did not. Third, COMPLAINANT alleges that SUBJECT OFFICER harassed him by arresting him on September 26, 2012. For the reasons set forth below, the Complaint Examiner sustains these allegations in all three respects.

The D.C. Code defines the misdemeanor offense of “unlawful entry” as “enter[ing], or attempt[ing] to enter, any private dwelling, building, or other property . . . against the will of the

lawful occupant or of the person lawfully in charge thereof.” D.C. Code § 22-3302(a)(1); *see Bean v. United States*, 709 A. 2d 85, 86 (D.C. 1998); *Kelly v. United States*, 348 A.2d 884, 887 (D.C. 1975). Because the elements of this offense require that the entry be “against the will . . . of the person lawfully in charge” of the property, an MPD officer may not bar an individual from private property without the authorization of the property owner or the owner’s agent. *See Kelly*, 348 A.2d at 887 (noting that “police lack authority to bar persons” from non-public property and finding that defendant was lawfully barred where “evidence [was] absent that the police officer requested or even suggested” that the property owner bar her). Accordingly, MPD’s internal policies specifically provide that officers “**shall not** . . . [c]reate, draft or self-issue barring notices” for private property. *See* Metropolitan Police Department, Circular 12-01 (Jan. 3, 2012) (emphasis in original), available at <http://mpdc.dc.gov/page/written-directives-circulars>.

Although the parties heatedly dispute the events of June and July 2012, it is undisputed that on August 10, 2012, SUBJECT OFFICER created and presented COMPLAINANT with a notice that purported to bar him from the local grocery store. It is also undisputed that SUBJECT OFFICER wrote this notice herself, and that she did so without the authorization of the local grocery store’s manager (who was on vacation)² or any other representative of the property owner.

By drafting and self-issuing the barring notice, SUBJECT OFFICER did precisely what MPD Circular 12-01 prohibits. Her actions on August 10, 2012, were therefore “in violation of . . . internal guidelines of the MPD.” D.C. Mun. Regs. tit. 6A, § 2199.1. And because the barring notice subjected COMPLAINANT to “infringement” of his ability to enter the grocery store without fear of arrest and “den[ied] or impede[d]” him in the same manner, these actions constituted harassment within the meaning of section 2199.1.

SUBJECT OFFICER does not dispute that she created the barring notice herself without authorization from a representative of the local grocery store. (*See* Tr. 104.) Rather, she argues that she did not “purposefully, knowingly, or recklessly” violate MPD policy, *see* D.C. Mun. Regs. tit. 6A, § 2199.1, because she believed that she was merely “reissuing” the barring notice that she had previously issued (with the local grocery store manager’s approval) in June or July. (*See* Tr. at 184-85.)

While I credit SUBJECT OFFICER’S testimony that the store manager had signed a prior barring notice, that notice does not exculpate her. In fact, SUBJECT OFFICER’S testimony belies her claim that she believed she had authority to “reissue” the barring notice. SUBJECT OFFICER testified that she intentionally signed her name next to — but not on — the signature line labeled “Authorized Agent or Owner.” (Tr. 104.) She did this to indicate that she

² The store manager gave three statements to OPC investigators in this matter, but these statements are inconsistent with each other in many significant respects. Because neither party called the manager as a witness at the evidentiary hearing to clarify the inconsistencies, the Complaint Examiner accords his statements to OPC no weight here.

was, in her words, “not saying there I’m the authorizing agent or the owner, because I’m neither one.” (*Id.*) Stated differently, SUBJECT OFFICER *knew* when she issued the second notice that she was not authorized to sign it as a representative of the property owner, and she therefore intentionally left the authorizing signature line blank. Given this contemporaneous awareness of her lack of authority, I find by a preponderance of the evidence that SUBJECT OFFICER acted with knowing disregard for the MPD policy that prohibits officers from creating or issuing barring notices without the authorization of the property owner.³

Furthermore, contrary to SUBJECT OFFICER’S argument that she believed she was “reissuing” the earlier barring notice, the August 10 barring notice did not merely restate the terms of the notice from June or July. The prior notice would have run for five years from its date of issuance, but the second barring notice ran through August 10, 2017. Thus, the August 10 barring notice prohibited COMPLAINANT from entering the store for a period of time in 2017 that was not covered by the first notice. Without authorization from a representative of the property owner, SUBJECT OFFICER could not have reasonably believed that she had the authority to bar COMPLAINANT for that additional time.

Given that SUBJECT OFFICER’S issuance of the August 10 barring notice constituted harassment of COMPLAINANT IN violation of MPD guidelines, it necessarily follows that her subsequent actions — which involved orally threatening COMPLAINANT about, and ultimately arresting him because of, the barring notice — were similarly impermissible. In other words, because SUBJECT OFFICER committed misconduct by purporting to bar COMPLAINANT from private property without the authorization of the property owner, she also harassed him by threatening and arresting him based on the invalid, self-issued barring notice. For these reasons, the allegations of harassment are sustained.⁴

B. 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,

³ By way of analogy, consider an officer who arrests a suspect for violating a Superior Court stay-away order, only to find out that the court has misplaced that order. If the officer were then to take it upon herself to “reissue” the judicial stay-away order, signing her own name adjacent to the judge’s blank signature line, it would be indisputable that the officer was acting outside the boundaries of her authority.

⁴ SUBJECT OFFICER argues that her good-faith belief in the validity of the August 10 barring notice is supported by the fact that COMPLAINANT was brought to trial for violating that notice. Even assuming for the sake of argument that it is possible to draw an inference about the facts of a particular case from the mere fact that the case was brought, SUBJECT OFFICER fails to note that COMPLAINANT was acquitted at trial specifically due to the lack of any evidence that a representative of local grocery store had authorized SUBJECT OFFICER to bar COMPLAINANT on August 10, 2012. Complaint Examiner observes the same lack of evidence here.

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.

The general framework for evaluating retaliation complaints is the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973):

Under the *McDonnell Douglas* framework, a [complainant claiming retaliation] must first make a prima facie showing of retaliation by a preponderance of the evidence, which gives rise to a presumption that the [action] was unlawful. At that point, the [party alleged to have committed retaliation] may rebut this presumption by articulating a legitimate reason for the . . . action. If the [party] offers such an explanation, the presumption of illegality drops out of the case, and the [complainant] has the ultimate burden of proving retaliation by a preponderance of the evidence.

Bryant v. District of Columbia, 102 A.3d 264, 267-68 (D.C. 2014) (internal citations omitted).

It is undisputed that: (1) SUBJECT OFFICER threatened to arrest COMPLAINANT numerous times in July and August 2012 for being inside the local grocery store but did not arrest him any of these times; (2) OPC mailed notification of COMPLAINANT’S first OPC complaint to SUBJECT OFFICER on or about September 14, 2012; and (3) SUBJECT OFFICER arrested COMPLAINANT for being inside the local grocery store on September 26, 2012. The timing of these events makes out a prima facie case that SUBJECT OFFICER arrested COMPLAINANT in retaliation for his OPC complaint. *See Cones v. Shalala*, 199 F. 3d 512, 521 (D.C. Cir. 2000) (holding that “close temporal proximity” between protected activity and allegedly retaliatory act “is sufficient to establish a causal connection”); *see also Singletary v. District of Columbia*, 351 F. 3d 519, 525 (D.C. Cir. 2003) (citing *Cones*).

Regarding whether SUBJECT OFFICER can “articulat[e] a legitimate reason” for her actions, she explained her decision to arrest COMPLAINANT on September 26, 2012, as follows:

Q: Help me to understand why it is you had seen him inside the store and just let him leave on several occasions before September 26th, but on September 26th, when he was outside the store, you called the police for backup to arrest him?

A: Well, on September 26th, I observed him in the store exiting the store. So, that's violation of your order right there. Prior to this, as an officer, we have certain areas of discretion, and I'm saying certain areas of discretion whereas to say, as an example, if I'm giving you a traffic ticket, I have the discretion whether I'm going to give you a fine or I'll give you a warning.

I chose, in my official capacity, to try to avoid arresting COMPLAINANT. I gave him the discretion of COMPLAINANT, “You know you're barred. Leave the store.” So, it was my discretion as an officer in my official capacity to say that I am going to have discretion and give him warning. At some point, when you just downright disregarding the fact that you are barred, he had acknowledged that he was barred. He said it several times. He knew he was barred. I told him verbally. He refused to sign. You keep failing to adhere to the Barring Notice, so at this point, something had to be done. He was arrested.

(Tr. 122-23; *see also id.* at 129 (Q: “Is there any particular reason that you arrested that day, having not arrested him the other times? Any specific reason?” A: “Outside of violating the bar notice? No, sir.”). Thus, SUBJECT OFFICER’S explanation of why she arrested COMPLAINANT was that “something had to be done” “at some point.” This does not articulate any reason why she arrested him on September 26, rather than during any of their encounters before she was notified of the OPC complaint against her.

But even assuming that COMPLAINANT’S violation of the (invalid) August 2012 barring notice constitutes a potentially legitimate reason for SUBJECT OFFICER’S actions on September 26, the Complaint Examiner finds that COMPLAINANT has proven retaliation by a preponderance of the evidence. SUBJECT OFFICER testified that she encountered COMPLAINANT inside the store multiple times in July and August 2012 after barring him, and each of these times she gave him a verbal warning to leave, which he did. On September 26, however, SUBJECT OFFICER crossed the entire store, eventually locating COMPLAINANT outside the building, to arrest him. Such active pursuit differs sharply from how SUBJECT OFFICER treated COMPLAINANT before she was notified of the OPC complaint. SUBJECT OFFICER also testified that, in six years working at the local grocery store, the only courtesy drivers she ever arrested were a driver who committed an assault in the parking lot, and COMPLAINANT. In other words, the only driver she ever arrested for a non-violent offense was the driver who had filed an OPC complaint against her — and despite believing that she was authorized to arrest him every time she encountered him over a span of several months, she chose not to do so until just days after she was informed about the complaint. Finally, in stark contrast to her having not arrested COMPLAINANT on any of the occasions when she actually encountered him inside the building after barring him, the only thing she saw COMPLAINANT do on the day she arrested him was *leave* the store. She did not see him solicit a customer or engage in any other activity that might have made his presence on that day more worthy of arrest than all the prior days when she exercised her discretion not to arrest him. The most reasonable inference to be drawn from this entire body of evidence is that there was a causal connection between OPC’s complaint notification letter of September 14 and SUBJECT OFFICER’S actions on September 26.

In sum, based on the timing and overall circumstances of COMPLAINANT’S arrest — and the absence of any cogent, non-retaliatory explanation from SUBJECT OFFICER for such

timing and circumstances — the Complaint Examiner finds by a preponderance of the evidence that SUBJECT OFFICER arrested COMPLAINANT in retaliation for the OPC complaint he filed against her.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER.

Allegation 1 (Harassment):	Sustained
Allegation 2 (Retaliation):	Sustained

Submitted on August 5, 2015.

Adav Noti
Complaint Examiner