GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF POLICE COMPLAINTS

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	13-0255
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2 SUBJECT OFFICER #3 SUBJECT OFFICER #4 SUBJECT OFFICER #5
Allegation 1:	Harassment by unlawfully detaining the complainant. (SUBJECT OFFICER #1 and SUBJECT OFFICER #2, SUBJECT OFFICER #3, SUBJECT OFFICER #4 and SUBJECT OFFICER #5).
Allegation 2:	Harassment by unlawfully entering the home. (SUBJECT OFFICER #1 and SUBJECT OFFICER #2, SUBJECT OFFICER #3 and SUBJECT OFFICER #4).
Allegation 3:	Harassment by unlawfully handcuffing the complainant. (SUBJECT OFFICER #3).
Allegation 4:	Harassment by unlawful frisking of complainant. (SUBJECT OFFICER #2).
Allegation 5:	Harassment by unlawfully searching the home. (SUBJECT OFFICER #1 and SUBJECT OFFICER #3 and SUBJECT OFFICER #4).
Allegation 6:	Harassment by unwarranted verbal threat. (SUBJECT OFFICER #1).
Complaint Examiner:	Meaghan H. Davant
Merits Determination Date:	May 13, 2016

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

COMPLAINANT filed a complaint with the OPC on May 7, 2013, alleging that SUBJECT OFFICER #1, SUBJECT OFFICER #3 and SUBJECT OFFICER #2, SUBJECT OFFICER #4 and SUBJECT OFFICER #5, all from the POLICE DISTRICT ("the subject officers"), harassed him through various forms of conduct.

COMPLAINANT alleged as follows: first, that SUBJECT OFFICER #1 and SUBJECT OFFICER #2, SUBJECT OFFICER #3 and SUBJECT OFFICER #4 harassed him when they unlawfully entered his godmother's home, IN NORTHEAST, D.C. Second, that SUBJECT OFFICER #1 and SUBJECT OFFICER #4 harassed him by conducting a warrantless search of his godmother's home. Third, that SUBJECT OFFICER #3 harassed him by unlawfully placing him in handcuffs. Fourth, that SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, SUBJECT OFFICER #4 and SUBJECT OFFICER #5 harassed him by unlawfully detaining him. Fifth, that SUBJECT OFFICER #2 harassed him by unlawfully frisking him. And sixth, that SUBJECT OFFICER #1 harassed him by threatening to call Child Protective Services unless COMPLAINANT or the other occupants of the home surrendered illegal drugs.[1]

Specifically, COMPLAINANT alleged that, on April 10, 2013, at approximately 9:30 a.m., he was visiting his godmother at her home IN NORTHEAST, D.C., when he heard a knock at the front door. COMPLAINANT opened the door and was immediately detained by SUBJECT OFFICER #1 and SUBJECT OFFICER #3 and SUBJECT OFFICER #5. SUBJECT OFFICER #3 placed COMPLAINANT in handcuffs and removed him from the apartment, placing him out into the hallway of the apartment building. COMPLAINANT'S two godbrothers, WITNESS #3 and WITNESS #1, were also placed in the hallway, although neither was handcuffed.

SUBJECT OFFICER #1 and SUBJECT OFFICER #3 then unlawfully entered WITNESS #2'S apartment, while SUBJECT OFFICER #5 remained outside in the hallway with COMPLAINANT and WITNESS #3 and WITNESS #1. Once inside, SUBJECT OFFICER #1 repeatedly asked the occupants of the apartment to identify the location of suspected illegal

[1] COMPLAINANT also alleged that SUBJECT OFFICER #1 threated to "pull out [her] gun and shoot [COMPLAINANT];" that SUBJECT OFFICER #3 subjected COMPLAINANT to a strip search; and that officer SUBJECT OFFICER #2 used unnecessary force against COMPLAINANT by pushing him, threatened further force, and used language or engaged in conduct that was insulting, demeaning or humiliating by directing racial slurs and profanity at the COMPLAINANT. Pursuant to D.C. Code § 5-1108(1), on March 8, 2016, a member of the Police Complaints Board dismissed these allegations, concurring with a determination by the OPC's executive director. The COMPLAINANT also alleged that an unidentified officer harassed him by searching his book bag without consent. The OPC was unable to identify this officer and therefore this allegation will not be discussed in this report.

drugs. Receiving no response from the occupants, SUBJECT OFFICER #1 and SUBJECT OFFICER #3 began to search the apartment, without a warrant or consent.

Shortly thereafter, SUBJECT OFFICER #2 and SUBJECT OFFICER #4 arrived on the scene and entered WITNESS #2'S apartment. SUBJECT OFFICER #4 began assisting SUBJECT OFFICER #1 and SUBJECT OFFICER #3 in their search of the apartment. SUBJECT OFFICER #2 joined SUBJECT OFFICER #5 in the hallway and conducted a frisk, or pat down, of COMPLAINANT.

During the continued search of the apartment, SUBJECT OFFICER #1 discovered two infants inside the apartment, whereupon she threatened to call Child Protective Services (CPS) unless the occupants of the apartment turned over any illegal drugs in their possession.

At the conclusion of the search, SUBJECT OFFICER #1 told COMPLAINANT not to come around the apartment anymore and claimed there was a "stay-away order," against him for that purpose. An officer removed the handcuffs and COMPLAINANT left the apartment building.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of the OPC's Report of Investigation, the objections submitted by the subject officers on April 1, 2016, and the 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 the OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER #1 and SUBJECT OFFICER #2, SUBJECT OFFICER #3, SUBJECT OFFICER #4 and SUBJECT OFFICER #5 on April 1, 2016, and the OPC's response to those objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On April 10, 2013 at approximately 9:30 a.m., SUBJECT OFFICER #1 and SUBJECT OFFICER #3[2] and SUBJECT OFFICER #5 were on duty, conducting routine work, when they observed COMPLAINANT standing out in front of an apartment building located IN NORTHEAST, D.C.

2. At approximately the time the officers saw COMPLAINANT, he ran inside the apartment building.

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[2] Since the date of the incident, SUBJECT OFFICER #3 has received the new title and rank of [POLICE RANK]. His MPD badge number at the time of the incident was [BADGE NUMBER].

3. SUBJECT OFFICER #1 and SUBJECT OFFICER #3 and SUBJECT OFFICER #5 followed COMPLAINANT into the apartment building. SUBJECT OFFICER #3 observed COMPLAINANT enter an apartment on the first floor.

4. From past interactions with COMPLAINANT, SUBJECT OFFICER #1 knew that the apartment in question, AN APARTMENT IN NORTHEAST, D.C., was the home of COMPLAINANT'S godmother, WITNESS #2 ("the apartment").

5. SUBJECT OFFICER #1 knocked on the front door of the apartment. COMPLAINANT responded to the knock and, upon opening the door, was immediately detained by SUBJECT OFFICER #1 and SUBJECT OFFICER #3 and SUBJECT OFFICER #5.

6. SUBJECT OFFICER #3 immediately placed COMPLAINANT in handcuffs and moved him out into the hallway of the apartment building. COMPLAINANT's godbrothers, WITNESS #1 and WITNESS #3, were also taken into the hallway outside of the apartment by the Officers, but were not handcuffed. SUBJECT OFFICER #5 thereafter remained in the hallway with COMPLAINANT and his godbrothers.

7. SUBJECT OFFICER #1 and SUBJECT OFFICER #3 then entered WITNESS #2'S home and SUBJECT OFFICER #1 repeatedly asked the occupants of the apartment for the locations of any illegal drugs. Receiving no response, SUBJECT OFFICER #1 and SUBJECT OFFICER #3 conducted a search of the apartment.

8. Shortly thereafter SUBJECT OFFICER #2 and SUBJECT OFFICER #4 arrived on the scene and entered the apartment.

9. SUBJECT OFFICER #1 and SUBJECT OFFICER #4 then continued to search of the apartment, while SUBJECT OFFICER #2 and SUBJECT OFFICER #3 went back out into the hallway to join SUBJECT OFFICER #5 and assist with the detention of COMPLAINANT and his godbrothers.

10. SUBJECT OFFICER #2 thereafter conducted a frisk, or pat down, of COMPLAINANT, but did not find any weapons or illegal drugs.

11. While continuing to search the apartment, SUBJECT OFFICER #1 discovered two small infants and their mother, WITNESS #4, in a room that was "filthy," and which SUBJECT OFFICER #1 believed to be an unfit environment for children.

12. SUBJECT OFFICER #1 told the infants' mother that she was going to call Child Protective services ("CPS") to remove the children. WITNESS #2 perceived SUBJECT OFFICER #1'S promise to call CPS as a threat that would be carried out if WITNESS #2 could not point out the location of illegal drugs.

13. Neither SUBJECT OFFICER #1 nor SUBJECT OFFICER #3 produced a warrant to search WITNESS #2'S home, nor did they make any reference to a warrant at the time of the incident.

14. WITNESS #2 did not grant consent to any MPD personnel, to include SUBJECT OFFICER #1 and the subject officers, to enter her apartment or to search her apartment.

IV. DISCUSSION

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 alleged abuse or misuse of police powers by such member or members, including: (1) harassment.

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 the 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, [the 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.

SUBJECT OFFICER #1 and SUBJECT OFFICER #2, SUBJECT OFFICER #3 and SUBJECT OFFICER #4'S Unlawful Entry into WITNESS #2'S Apartment and SUBJECT OFFICER #1 and SUBJECT OFFICER #3 and SUBJECT OFFICER #4'S Unlawful Search of WITNESS #2'S Apartment.

The Fourth Amendment prohibits law enforcement from conducting "unreasonable searches and seizures." *U.S. v. Williams*, 878 F. Supp. 2d 190, 196-197 (D.D.C. 2012). "[A]n unconsented police entry into a residential unit, be it a house or an apartment . . . constitutes a search" subject to the requirements of the Fourth Amendment. *In re K.H.*, 14 A.3d 1087, 1090 (D.C. 2011).

COMPLAINANT had a Legitimate Expectation of Privacy at his Godmother's Apartment.

In this case, the apartment was leased not to COMPLAINANT himself, but to his godmother, WITNESS #2. However, the Supreme Court has recognized that, while a home owner's legitimate expectation of privacy would not extend to just "anyone legitimately on the premises," it would extend to a guest or visitor who can "establish their independent privacy right in the form of 'a meaningful connection to [the homeowner's] apartment.'" *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). *See also Morton v. United States*, 734 A.2d 178, 182 (D.C. 1999) (Where defendant was "a frequent visitor" in the home in question and home owner considered him to be "like family" defendant shared the home owner's reasonable expectation of privacy under the Fourth Amendment.) Here, where COMPLAINANT was the leaseholder's godson and, by admission of SUBJECT OFFICER #1 herself, was known to frequent the apartment, COMPLAINANT had a legitimate expectation of privacy.

While the sphere of COMPLAINANT'S expectation of privacy most likely did *not* extend to the grounds surrounding the apartment building, where COMPLAINANT was originally seen by the subject officers, or even the apartment building as a whole, it is well-settled law that "[i]n defining the area in which an apartment dweller may have a reasonable expectation of privacy, case law generally draws the line at the threshold of the apartment rather than the front door of the apartment building." *See id.* at 182. *See also United States v. Dorsey*, 192 U.S. App. D.C. 313, 319 (1978); *Moore v. United States*, 149 U.S. App. D.C. 150, 152 (1976). Here, according to SUBJECT OFFICER #3 and SUBJECT OFFICER #5 who were the first to arrive at the apartment door, COMPLAINANT was inside his godmother's apartment prior to opening the front door. SUBJECT OFFICER #1 similarly states that "COMPLAINANT was standing in the open doorway of unit [APARTMENT NUMBER] when I came in." Thereby, COMPLAINANT had a reasonable expectation of privacy against the subject officer's entry into, and search of, the apartment.

The Subject Officers Lacked Consent for Their Warrantless Entry and Search.

"Consent is an exception to both the warrant and probable cause requirements of the Fourth Amendment." *Jackson v. United States*, 404 A.2d 911, 920 (D.C. 1979). Thereby, if consent is "voluntarily given," it will "validate a search and seizure of property effectuated without a warrant and without probable cause." *Id. citing Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). However, "in order to justify a third-party consent, the government must prove by a preponderance of the evidence that 'permission to search was obtained from a third-party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" *United States v. Matlock*, 415 U.S. 164, 171 (1974) (emphasis added).

SUBJECT OFFICER #3, SUBJECT OFFICER #2 and SUBJECT OFFICER #4 claimed that consent to enter the apartment was given prior to their entering the apartment. Specifically, each states that an unidentified female voice, either from the other side of the closed apartment

door, or from the back of the apartment once the door was opened, told them to, "come in," or "come to the back." Neither SUBJECT OFFICER #1 nor SUBJECT OFFICER #5 disputed that the officers entered the apartment without the consent of WITNESS #2. In contrast, WITNESS #2 stated that she "did not grant consent to any MPD personnel, to include SUBJECT OFFICER #1, and all members of the MPD POLICE DISTRICT Warrant Squad, to enter [her] apartment and to search [her] apartment." WITNESS #1 also stated that "[a]t no point did I ever hear my mom, WITNESS #2, give permission to any officers to enter or search the apartment."

Thereby, even if SUBJECT OFFICER #3, SUBJECT OFFICER #2 and SUBJECT OFFICER #4'S statements are found credible, none of the officers ever states that they knew or believed that it was WITNESS #2, the homeowner, that gave her consent to enter the home. Nor do they state that they knew, or believed, that the voice belonged to a third party with the "common authority" to consent to their entry and search of the premises.

The Subject Officers Lacked Probable Cause for Their Warrantless Entry and Search.

"Ordinarily, the Fourth Amendment requires the police to obtain a warrant supported by probable cause before they lawfully may enter a home without proper consent to search for a suspect or make an arrest." *In re K.H.*, 14 A.3d 1087, 1090 (D.C. 2011). Here, neither SUBJECT OFFICER #1, nor any of the subject officers, produced—or otherwise contend—that they had a warrant to enter or search the apartment.

When a person's home or person is subjected to a search without a warrant, the burden shifts to the government to justify the warrantless search. *United States v. Brown*, 334 F.3d 1161, 1182 (D.C. Cir. 2003) ("The government bears the burden of proof, and under *Terry*, the government must present evidence that the police officer was able to articulate the specific facts that caused him to view [the defendant] as a likely suspect....") *citing Terry v. Ohio, 392 U.S. 1 (1968)*; *see also United States v. Jones*, 374 F.Supp.2d 143, 147 (D.D.C. 2005). "The existence of exigent circumstances…may justify such an intrusion without an arrest or search warrant." *In re K.H.,* 14 A.3d at 1090. However, "the presence of circumstantial exigencies does not relax the requirement of probable cause."

While "the Supreme Court has not attempted a comprehensive definition of the exigent circumstances exception to the warrant requirement," District of Columbia courts have followed the approach laid out in the en banc opinion of the United States Court of Appeals for the District of Columbia Circuit in *Dorman v. United States*, 140 U.S. App. D.C. 313 (1970), later summarized in *United States v. Lindsay*, 165 U.S. App. D.C. 105, 110 (1974). *Dorman* sets forth seven factors to be considered in determining whether exigent circumstances exist for a search, including: (1) That a grave offense is involved, particularly a crime of violence; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) a strong reason to believe that the suspect is in the dwelling; (5) the likelihood of escape if not swiftly apprehended; (6) a peaceful entry as opposed to a "breaking;" and (7) the time of entry (night or day).

Of these factors, the subject officers' statements could support only two possible theories of "exigent circumstances," namely, that COMPLAINANT may have been engaged in the sale of illegal drugs, and that the COMPLAINANT may have been armed.[3] Specifically, in her interview with the OPC, SUBJECT OFFICER #1 stated that she had "known the COMPLAINANT …for several years," and that she knew him "to be a drug dealer and to carry firearms." SUBJECT OFFICER #1 further specified that she knew "[COMPLAINANT] to deal drugs in front of [WITNESS #2's RESIDENCE]….crack cocaine and marijuana."

First, whether or not the sale of illegal drugs, including marijuana and cocaine, is a "grave offense" justifying exigent circumstances, probable cause exists only where "the facts and circumstances within the officers' knowledge of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense *has been or is being committed*." *Id.* (emphasis added) (citing *Perkins v. United States*, 936 A.2d 303, 306 (D.C. 2007) (internal citations omitted)). Probable cause is measured by the totality of the circumstances and "must be supported by more than mere suspicion." *Id.* (quoting *Blackmon v. U.S.*, 835 A.2d 1070, 1075 (D.C. 2003).

Here, the only evidence to support a claim that COMPLAINANT was involved in the illegal sale of drugs *at the time in question*, or that he was armed at the time, was that he ran inside the apartment building at approximately the same time the subject officers arrived on the scene (they could not know whether COMPLAINANT actually saw them or if seeing them caused him to run); that, according to SUBJECT OFFICER #1, COMPLAINANT "grab[bed] his right side waistband area" as he ran away; and, as stated in the MPD PD 251 Incidence-Based Event Report, that there was a smell of "freshly burnt marijuana [that] was illuminating in the air in the hallway."

Even if considered collectively, this evidence falls far short of proving either exigent circumstances or probable cause, particularly for the entry and search of WITNESS #2'S apartment. This is especially true where SUBJECT OFFICER #1 and the remaining subject officers consistently state that COMPLAINANT answered the apartment door almost immediately after they arrived, that COMPLAINANT was immediately detained and brought out into the hallway, and where he was then frisked and found not to possess either illegal drugs or weapons. Once COMPLAINANT was detained in the hallway, there was no probable cause to enter and search WITNESS #2'S home.

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[3] SUBJECT OFFICER #1 contends that the purpose of the search was to "make sure there was no one hiding in the apartment, for [WITNESS #2'S] safety." This statement is not credible given that COMPLAINANT had already been detained at the front door at the time that she and the subject officers entered the apartment. SUBJECT OFFICER #1 also contends that the scope of the search was limited to "looking in places that people could hide." However, SUBJECT OFFICER #2 stated that the purpose of the search was to "search the apartment for the presumed drugs [and] weapon." SUBJECT OFFICER #2'S statement is more credible given SUBJECT OFFICER #1'S previous statements that COMPLAINANT was a known dealer of illegal drugs, and the statements made by WITNESS #2, WITNESS #4 and WITNESS #1 that the officers made demands that the occupants of the apartment tell them where the "drugs" were located.

Therefore, SUBJECT OFFICER #1 and SUBJECT OFFICER #2, SUBJECT OFFICER #3 and SUBJECT OFFICER #4 harassed COMPLAINANT by their unlawful entry into WITNESS #2'S home. Further, SUBJECT OFFICER #1 and SUBJECT OFFICER #3 and SUBJECT OFFICER #4 harassed COMPLAINANT by their unlawful search of WITNESS #2'S home. Both actions were taken despite COMPLAINANT'S legitimate expectation of privacy, without consent or a warrant, and without reasonable suspicion of criminal conduct or immediate access to weapons, in violation of § 5-1107(a) and MPD General Orders 120.25 and 304.10.

The Subject Officers Lacked Reasonable and Articulable Suspicion of Criminal Activity to Support Complainant's Detention, Handcuffing and Frisking.

"Consistent with the Fourth Amendment, the police may briefly detain an individual for investigative purposes, even if they lack probable cause to arrest, so long as the officers have a reasonable and articulable suspicion that the individual has committed or is about to commit a crime." *Terry*, 392 U.S. 1, 22 (1968). "*Terry* thus carves out a narrow exception to the Fourth Amendment's probable cause requirement." *Womack v. United States*, 673 A.2d 603, 608 (D.C. 1996). "To come within the purview of the *Terry* exception, police action must be justified at its inception, and must also be reasonably related in scope to the circumstances which initially justified the detention." *Id. citing Terry,* 392 U.S. at 19-20. "Thus, when officers subject a detained suspect to a greater restraint on his liberty than is permissible in a legitimate *Terry* seizure, articulable suspicion is not sufficient, and the Constitution requires a showing of probable cause." *See, Womack,* 673 A.2d at 608 *citing In re M.E.B.,* 638 A.2d 1123, 1126 (D.C. 1993).

Further, pursuant to MPD Order 304.10, Police-Citizen Contacts, Stops, and Frisks (effective Jul. 1 1973), officers must have "reasonable suspicion" to conduct a stop, or a pat down for weapons. "Reasonable suspicion" is further defined therein as "more than a hunch or mere speculation…a combination of specific facts and circumstances which justify a reasonable officer to believe that the person stopped had committed, was committing, or was about to commit a criminal act." The Order further requires that "Every officer conducting a stop must be prepared to cite the particular factors which supported the determination that 'reasonable suspicion' was present" and that the "record of the stop…*shall contain all factors relied on*." (emphasis added).

Here, any "reasonable suspicion" that the subject officers may have had that COMPLAINANT was involved in the illegal sale of drugs or was armed *at the time* was SUBJECT OFFICER #1'S statement that COMPLAINANT was "known" to engage in the sale of illegal drugs and to carry weapons, that he ran inside the apartment building at approximately the same time the officers arrived on the scene "grab[bing] his right side waistband area" as he ran away; and, once the officers entered the building, a general smell of marijuana in the hallway. These factors, even taken in combination, do not warrant a finding of "reasonable suspicion." Moreover, the *only* factors actually cited in the PD 251 Incident-Based Event Report

(the "Report") to support "reasonable suspicion" are that the COMPLAINANT was "suspected to be engaging in drug activity," was "in the hallway" of the apartment building IN NORTHEAST, D.C.; and that "the smell of freshly burnt marijuana was illuminating the air in the hallway." The Report cites no basis for any contention that COMPLAINANT was prohibited from being in front of, or in the hallways of, his godmother's apartment building, nor that the marijuana smell could be connected to him personally. Thereby, the officers' "suspicion" that COMPLAINANT was engaging in drug activity is inadequate under the clear letter of the law.

With respect to SUBJECT OFFICER #3 placing COMPLAINANT in handcuffs during the detention,[4] we objectively consider whether a "reasonably prudent officer would have been justified in using handcuffs to neutralize potential threats to his or her safety or to inhibit any attempt by the suspect to escape." *Womack*, 673 A.2d at 609. Courts have repeatedly found the use of handcuffs justified where suspects have attempted to resist police, made furtive gestures, ignored police commands, attempted to flee, or otherwise frustrated police inquiry. *See id.*

In this case, there is no evidence that COMPLAINANT attempted to resist police, ignored police commands, attempted to flee following his first contact with the police officers, or otherwise frustrated policy inquiry. Rather, COMPLAINANT opened the door when the police officers knocked and allowed himself to be led out into the hallway. At no point did any of the subject officers reasonably state that they feared for their personal safety.[5] As such, SUBJECT OFFICER #3'S use of handcuffs was unwarranted.

Lastly, with respect to SUBJECT OFFICER #2'S frisking of COMPLAINANT, under *Terry*, absent a warrant, police officers may conduct a frisk or pat down of an individual for weapons or contraband only where there is a "reasonable, articulable suspicion" that they are armed and dangerous. 392 U.S. at 37. The factors that may warrant a pat down include "The time of day, flight, the high crime nature of the location, furtive hand movements, an informant's tip, a person's reaction to questioning, a report of criminal activity, and the viewing of an object or bulge indicating a weapon." *Anderson v. United States*, 658 A.2d 1036,1038 (D.C. 1995); *see also Germany v. United States*, 984 A.2d 1217, 1222 (D.C. 2009).

MPD General Order 304.10 defines reasonable suspicion to support a frisk as "more than a vague hunch…under the circumstances, a reasonably prudent law enforcement officer would be warranted in believing his/her safety or that of other persons is in danger because the individual may be carrying a weapon or dangerous instrument."

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[4] We find it credible, based on the statements of COMPLAINANT and WITNESS #1, WITNESS #2 and WITNESS #3 that COMPLAINANT was placed in handcuffs by SUBJECT OFFICER #3, despite the fact that SUBJECT OFFICER #3 did not admit to this particular fact.

[5] While, in their subsequent statements to the OPC, two of the officers claimed to have observed COMPLAINANT reach for "an unidentified object in his waistband," and SUBJECT OFFICER #1 recalled advising SUBJECT OFFICER #3 to "be careful" in his pursuit of COMPLAINANT, none of these factors were included in the Report, as expressly required under MPD Order 304.10.

The subject officers, in their statements to the OPC, which were taken approximately two years after the incident, noted that the frisk was conducted to ensure the general "safety and security of the officers," that the apartment building was a "drug spot," that COMPLAINANT was "known to carry a weapon" and that COMPLAINANT reached for an "unidentified object in his waistband." However, in direct contrast, the officers' Report, completed on the same date as the incident in question, makes *no specific reference* to any factors supporting a reasonable suspicion that COMPLAINANT was armed. In fact, the Report makes no reference to the COMPLAINANT fleeing from the officers, any reports of criminal activity in the area, the high crime nature of the location, any visible evidence of a concealed weapon or any other factors identified by the General Order or case law to support a finding of reasonable suspicion for the frisk. Where the only possible factors to support reasonable suspicion came nearly two years *after the fact* and none were included, as required, in the initial Report, SUBJECT OFFICER #2'S frisk of COMPLAINANT was unwarranted and unlawful.

For all of these reasons, SUBJECT OFFICER #1 and SUBJECT OFFICER #2, SUBJECT OFFICER #3 and SUBJECT OFFICER #4 and SUBJECT OFFICER #5 harassed COMPLAINANT by their unlawful detention of COMPLAINANT, SUBJECT OFFICER #3 harassed COMPLAINANT by his unlawful handcuffing of COMPLAINANT, and SUBJECT OFFICER #2 harassed COMPLAINANT by his unlawful frisk of COMPLAINANT, without consent or a warrant, and without reasonable suspicion of criminal conduct or immediate access to weapons, in violation of § 5-1107(a) and MPD General Orders 120.25 and 304.10.

SUBJECT OFFICER #1's Threat to Contact Child Protective Services (CPS)

Finally, while SUBJECT OFFICER #1 denied that the purpose of the search of WITNESS #2'S apartment was to locate illegal drugs, SUBJECT OFFICER #2 stated that the purpose of the search was to "search the apartment for the presumed drugs [and] weapon." *See FN 3 supra.* Further, statements made by WITNESS #2, WITNESS #4 and WITNESS #1 all support COMPLAINANT'S account that the subject officers that searched WITNESS #2'S home were looking for illegal drugs and that SUBJECT OFFICER #1, in particular, repeatedly asked the apartment's occupants to tell her where the drugs or "the dope" were located within the apartment. The similarity of the witnesses' accounts, combined with SUBJECT OFFICER #2'S statement as to the purpose of the search, make credible the finding that SUBJECT OFFICER #1 was searching for illegal drugs in the apartment and made numerous verbal requests for the occupants to identify their location.

SUBJECT OFFICER #1 did state that, while inside WITNESS #2'S apartment, she came across a room with "two small infants," living in "filthy conditions" with "roaches everywhere and crack bags on the floor," and that there was not "any food for the kids" when she opened the refrigerator. On these grounds, SUBJECT OFFICER #1 admitted telling the infants' mother, WITNESS #4, that she was "going to call CPS" to remove the children because "three children had recently died and that had prompted new police directives for being more aware of the welfare of kids." In fact, MPD General Order 309.06 (citing D.C. Code § 4-1321.02) *requires*

that a law enforcement officer "who knows or has reasonable cause to suspect that a child known to him or her in his or her professional or official capacity has been or is in immediate danger of being mentally or physically abused or neglected…shall immediately report or have a report made of such…to either the [MPD]…or the Child and Family Services Agency" ("CFSA").[6]

However, SUBJECT OFFICER #1, by her own admission, never filed such a report, nor does the Incident-Based Event Report make any mention of a need to file such a report. In her statement to the OPC two years after the incident, SUBJECT OFFICER #1 said that she delegated the task of contacting CFSA to SUBJECT OFFICER #3, but that he "later told [her] he forgot." SUBJECT OFFICER #3 confirmed that SUBJECT OFFICER #1 asked him to contact CPS, but that before he made the call an "unidentified adult female arrived and removed the infant from the apartment," and, thus, he believed that "the removal of the child negated the need to call CPS."

The temporary removal of the children by a third party, even if it was the children's father, does not negate the subject officers' duty to comply with General Order 309.06. Particularly where SUBJECT OFFICER #1 noted the "filthy" environment to which the children were being subjected, her suspicions that their caretakers may have been taking illegal drugs, and the lack of food in the apartment, and where she made explicit reference to "new police directives for being more aware of the welfare of the kids," her failure to take any action, or to ensure that such action was taken by an officer under her command, constitutes a clear dereliction of duty.

SUBJECT OFFICER #1'S failure to follow through with her obligation to call CPS, coupled with WITNESS #4'S statement that she perceived SUBJECT OFFICER #1'S statement regarding her plans to call CPS as a threat that would be carried out if WITNESS #2 could not point out the location of illegal drugs, and the statements of multiple witnesses that SUBJECT OFFICER #1 repeatedly asked the occupants to identify the location of illegal drugs, are credible evidence that SUBJECT OFFICER #1'S statements constituted a conditional threat.

Thereby, SUBJECT OFFICER #1 harassed COMPLAINANT by making an unwarranted threat to call CPS and have the infants removed if the occupants did not identify the location of illegal drugs in the apartment, in violation of § 5-1107(a) and MPD General Orders 120.25, 304.10 and 309.06.

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[6] D.C. Code § 4-1321.02 (a) previously provided that reports to be made to the Child Protective Services Division of the Department of Human Services (CPS) or the MPD. In 2007, the law was amended with the CFSA assuming CPS's previous role. *See Hargrove v. District of Columbia*, 5 A.3d 632, 633 n.1 (D.C. 2010) (discussing legislative history).

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegations: Harassment by conduct, including unlawful detention, entering and search; and by unwarranted verbal threat.	Sustained.

SUBJECT OFFICER #2

Allegations: Harassment by conduct, including unlawful detention, entering and frisking.	Sustained.

SUBJECT OFFICER #3

Allegations: Harassment by conduct, including unlawful detention, entering, search and handcuffing.	Sustained.

SUBJECT OFFICER #4

Allegations: Harassment by conduct, including unlawful detention, entering and search.	Sustained.

SUBJECT OFFICER #5

Allegations: Harassment by conduct, including unlawful detention.	Sustained.

Submitted on May 13, 2016.

Meaghan H. Davant
Complaint Examiner