

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	13-0308
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Harassment.
Complaint Examiner:	Peter W. Tague
Merits Determination Date:	December 2, 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

COMPLAINANT, filed a complaint with the OPC on June 17, 2013. He alleged that on that day the subject officer, SUBJECT OFFICER, harassed him when he unlawfully stopped and frisked him.

Driven by his wife, WITNESS #1, COMPLAINANT said he arrived by car in AN ALLEY IN NORTHWEST D.C., on June 17, 2013. Acting on behalf of a client, his purpose was to visit AN OFFICE RELATED TO HIS WORK, located across the alley from where WITNESS #1 parked the car. As he walked to that office, COMPLAINANT alleges that he saw two police officers standing near the front of their car. When he returned to the car a few minutes later, those officers, who turned out to be SUBJECT OFFICER and his partner, WITNESS OFFICER #1 were still in the same area. He alleges that the two officers saw him walk to and from the housing office. Immediately after sitting in the front passenger seat, COMPLAINANT says he bent forward to put a notebook in the shoulder bag he had been carrying, and that he had placed on the floorboard. At that point, SUBJECT OFFICER obtained COMPLAINANT'S attention by knocking several times on the passenger window.

For the purpose of judging SUBJECT OFFICER'S conduct, his and COMPLAINANT'S descriptions of what followed are closely congruent, even as they differ in detail. COMPLAINANT alleges that SUBJECT OFFICER ordered him to get out of the car so that SUBJECT OFFICER could search it. SUBJECT OFFICER agrees that he "stepped

[COMPLAINANT] out” of the car, and thus detained him. Both agree that SUBJECT OFFICER then touched COMPLAINANT, although they disagree over its extent.¹ While they disagree over whether WITNESS #1 gave permission to search the car, that disagreement is not part of this allegation by COMPLAINANT of being harassed by SUBJECT OFFICER. The way in which SUBJECT OFFICER conducted that search is also not part of this complaint.

A police officer must justify detaining and frisking an individual. If COMPLAINANT is correct in claiming that SUBJECT OFFICER saw him come and go from the housing office, then SUBJECT OFFICER had no basis to intervene, either to detain or to frisk COMPLAINANT.

SUBJECT OFFICER denies seeing COMPLAINANT walk to and from the housing office. Instead, he alleges that he first saw COMPLAINANT as he and his partner had climbed to the top of steps leading from a building the two had been searching for evidence connected to gun shots the night before. From that position, a few feet from the front of WITNESS #1’s car, SUBJECT OFFICER claims to have seen COMPLAINANT look at him, “his facial expression like a deer caught in headlights.” (SUBJECT OFFICER testimony, Transcript of Hearing at 104) COMPLAINANT then bent forward, “making a movement with his hands ... like he was trying to conceal something.” *Id.*

An evidentiary hearing was conducted to resolve the dispute over when SUBJECT OFFICER first saw COMPLAINANT. In the end, it was not possible to decide which person was correct. That inability, however, does not prevent evaluating whether SUBJECT OFFICER harassed COMPLAINANT by what he concedes he did in detaining and in frisking COMPLAINANT.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on November 2, 2015. The Complaint Examiner heard the testimony of COMPLAINANT and of SUBJECT OFFICER. The thirteen exhibits attached to the OPC’s Report of Investigation, dated July 20, 2015, were admitted into evidence, as numbered.

In addition, COMPLAINANT submitted Exhibit 15, the Declaration of WITNESS #1.

Subject Officer submitted Exhibit 14, a photograph of THE LOCATION OF THE INCIDENT. On that exhibit, COMPLAINANT marked the location of the car, and SUBJECT OFFICER marked his location when he first saw the car.

¹ See note 3 below.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on August 19, 2015, and an evidentiary hearing conducted on November 2, 2015, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On June 17, 2013, the date of his encounter with SUBJECT OFFICER, COMPLAINANT was 59 years of age. He is six feet, eight inches tall.
2. His wife, WITNESS #1, drove him to the location of the encounter, in AN ALLEY IN NORTHWEST, D.C. She parked the car legally.
3. COMPLAINANT'S purpose was to visit the office of HIS PLACE OF WORK on behalf of a client. From the car he crossed the alley to and from that office.
4. Upon his return to the car, COMPLAINANT sat in the front passenger seat. He then bent forward.
5. Very shortly thereafter, SUBJECT OFFICER moved to the passenger door, and obtained COMPLAINANT'S attention.²
6. SUBJECT OFFICER ordered COMPLAINANT to get out of the automobile.
7. Once COMPLAINANT was out of the car, SUBJECT OFFICER touched him to learn whether he had drugs or weapons on his person.³
8. SUBJECT OFFICER searched various parts of the car, including the glove compartment and under the passenger seat.
9. SUBJECT OFFICER found nothing linking COMPLAINANT to a crime.

IV. DISCUSSION

² COMPLAINANT says that SUBJECT OFFICER rapped aggressively on the window. (COMPLAINANT testimony, Transcript at 37 ("bam, bam, bam, bam, bam"). SUBJECT OFFICER said he "knocked on the window or ... opened the [passenger] door handle." (SUBJECT OFFICER testimony, Transcript at 139) If SUBJECT OFFICER opened the door, that act would itself constitute a "stop," as defined below.

³ COMPLAINANT described the touching as an aggressive slap around his waist. SUBJECT OFFICER said he touched COMPLAINANT more extensively. "I ran my hands around his front and the back of his neck [and] down his legs and feet" (SUBJECT OFFICER testimony, Transcript at 142)

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 ... of the MPD ... that alleges abuse or misuse of police powers by such member” Those allegations may include, among other things, conduct that constitutes harassment. *See* Exhibit 11.

Harassment is also defined in OPC’s regulations 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 (1) subject the person to arrest, detention, search, [or] seizure In determining whether conduct constitutes harassment, the Office 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 ..., its severity, and whether it is physically threatening or humiliating. D.C. Mun. Regs. Tit. 6A, § 2199.1 (2015). *See* Exhibit 12.

Encounters between police officers and citizens are characterized in four ways: contacts, stops, frisks and arrests. *See* MPD General Order 304.10, Police-Citizen Contacts, Stops and Frisks (7/1/1973) (hereafter MPD GO 304.10) (Exhibit 13).

The fourth is not relevant to this complaint.

That General Order’s descriptions of the first three, and of the justifications for each, are correct.

A “contact” involves an officer’s effort to learn information from a person. That person is not required to provide information, and is free to leave. *Id.* Part IA, at 1.

A “stop” involves “the temporary detention of a person for the purpose of determining whether probable cause exists to arrest that person.” *Id.* Part IB, at 3. A “stop” must be justified. To be justified, the officer must reasonably suspect that the person “has committed, is committing, or is about to commit any crime” *Id.* For the origin of this test, see *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (a police officer “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot”).

A “frisk” involves “a limited protective search for concealed weapons or dangerous instruments.” *Id.* Part IC, at 7. It too must be justified. The officer must “reasonably suspect[] that the person [stopped] is carrying a concealed weapon or dangerous instrument and that a frisk is necessary to protect himself ... or others.” *Id.* *Terry* was also the origin of this test. *See Terry*, 391 U.S. at 27 (“reasonably to conclude ... that the person[] with whom [the police officer] is dealing may be armed and presently dangerous”).

SUBJECT OFFICER seeks to justify his conduct in two ways. First, ignoring SUBJECT OFFICER'S assessment of his acts, his LAWYER argued that SUBJECT OFFICER had not "stopped" COMPLAINANT.⁴ Instead, SUBJECT OFFICER had initiated a "contact." If that characterization were accepted, COMPLAINANT'S exit from the car would not create a constitutional issue, for it could be said that COMPLAINANT voluntarily cooperated with SUBJECT OFFICER'S direction.

SUBJECT OFFICER'S LAWYER is correct that the ways the officer and the citizen interpret their encounter do not control the analysis. *See Whren v. United States*, 517 U.S. 806 (1996) ("subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis"). Instead, the police officer's behavior must be judged objectively. Viewed objectively, however, SUBJECT OFFICER'S behavior constituted a "stop" (or detention), not a "contact."

COMPLAINANT testified that SUBJECT OFFICER had his hand on his firearm as he stood next to the passenger door. (COMPLAINANT testimony, Transcript at 38, 42, 85) He did not feel free to go. *Id.* at 42. He was ordered from the car by SUBJECT OFFICER, *see* Exhibit 3 (COMPLAINANT statement), and then ordered to move to the rear of the car so that SUBJECT OFFICER could search the car's interior (COMPLAINANT testimony, Transcript at 86). COMPLAINANT'S assessment of the encounter is credible: he was "stopped."

As explained above, a police officer must justify a stop. The General Order lists various factors of use in assessing whether the stop was warranted.⁵ In judging whether SUBJECT OFFICER'S suspicion was justified, several of those factors are irrelevant, several indicate that his suspicion was baseless, and none provide a reasonable justification. *See also Anderson v. United States*, 658 A.2d 1036, 1038 (D.C. 1995) (listing considerations).

SUBJECT OFFICER offers two reasons to justify his stop. Neither is credible.

⁴ *See* Written Objections to Report of Investigation and Request for Hearing OPC Complaint No. 13-0308 (August 19, 2015).

⁵ With respect to the person's behavior, does he "generally fit the description of a person wanted for a known offense," is he "fleeing ... [or] hiding" "from an actual or possible crime," or does he "respond to inquiries with evasive, suspicious, or incriminating replies ...?" Also relevant are the area of the stop ("The person may be in the areas of a known offense soon after its commission ..."), and the time of day ("during which criminal activity of the kind suspected usually occurs"). As well, the "officer may have experience in investigating a particular kind of criminal activity and recognize a person's conduct as consistent with a pattern ... generally followed in particular criminal offenses." The officer may also rely on information from witnesses or informants, or from "law enforcement sources." *See* MPD GO 304.10 at 3 and 4.

The first is SUBJECT OFFICER'S evaluation of COMPLAINANT'S supposed reaction upon seeing him: COMPLAINANT'S "facial expression was like a deer in a headlight." (SUBJECT OFFICER testimony, Transcript at 104) But SUBJECT OFFICER conceded that he could not see all of the passenger's face (*id.* at 112), did not know whether the man was "black, Hispanic or whatever" (*id.*), and that this "eye contact" lasted "[l]ess than five/six seconds" (*id.* at 137).

The second reason involved what COMPLAINANT did next. Both agree that he bent forward. They disagree over the meaning of that act. COMPLAINANT said he was putting a notebook in the bag he had carried, and had put on the passenger's floor. SUBJECT OFFICER thought COMPLAINANT was attempting to hide something. His act was accordingly "furtive,"⁶ a code word for behavior that might justify a detention.

SUBJECT OFFICER'S interpretation of COMPLAINANT'S movement is inextricably linked to his evaluation of the latter's facial expression. With that first reason discredited, this second reason loses all force.

When, after repeatedly indicating that the only reason he stopped COMPLAINANT was the "furtive" movement, SUBJECT OFFICER added, for the first time during questioning by this Complaint Examiner, that also of concern to him were the "fact[s] that area [sic] was a shooting [the crime he and WITNESS OFFICER #1 were investigating] and then the area's known for where gangs hang out ..., [and] [s]ome robberies and stuff in that area" (SUBJECT OFFICER testimony, Transcript at 141) SUBJECT OFFICER made no effort to tie COMPLAINANT to the second or third of those points.

Nor did he have any reason to tie COMPLAINANT to the crime (the gunshots) he and WITNESS OFFICER #1 had been sent to THE LOCATION OF THE INCIDENT in search of evidence. SUBJECT OFFICER professes to know nothing about the suspect who had fired the gunshots or who had acted as a lookout. *See* SUBJECT OFFICER testimony, Transcript at 119. This denial is questionable. The two officers had been told to search the building and its rooftop for the lookout. *Id.* at 100-101. How would they have known whom to approach without knowing the suspect's ethnicity? Moreover, COMPLAINANT claims that SUBJECT OFFICER told him that the suspect was "a Spanish guy." (COMPLAINANT testimony, Transcript at 70) As well, WITNESS OFFICER #1 left SUBJECT OFFICER to talk with "two Latino males," because, one infers, they were more likely to know something of the suspect. *See* Statement by WITNESS OFFICER #1, Exhibit 5. Last, the MPD's announcement of the crime indicated that the suspect was a "juvenile hispanic [sic] male, 5'9 [inches]." *See* Exhibit 10. As a very tall,

⁶ *See* Exhibit 3 (SUBJECT OFFICER statement); SUBJECT OFFICER testimony, transcript at 116, 128; Exhibit 8 (MPD Form PD 251, completed by SUBJECT OFFICER, who justified the "stop & frisk" by COMPLAINANTS' "fertive [sic] movement with his hand as that if he was stuffing something under his seat").

African-American man, there was no reason to believe that COMPLAINANT was connected to the crime being investigated, let alone to any crime.

In the context, SUBJECT OFFICER'S interpretation of COMPLAINANT'S conduct was not reasonable. SUBJECT OFFICER'S stop of COMPLAINANT was therefore not justified.

SUBJECT OFFICER also "frisked" COMPLAINANT. SUBJECT OFFICER seems to believe that a frisk is automatically justified if a stop is. In his statement, he said: "I conducted a terry [sic] stop, Terry v. Ohio, which was a pat down of his outer garments to make sure he did not have any weapons or drugs on his person." Exhibit 4 (SUBJECT OFFICER statement).

Instead, a frisk must itself be justified, a justification that, as explained above, is separate from the justification for the stop.⁷ Drawing again from the test's inception, a frisk is justified if, based on "specific and articulable facts ... taken together with rational inferences from those facts," the officer believes "he is dealing with an armed and dangerous individual." *Terry*, 391 U.S. at 21, 27. The test is not high, because no one wants police officers exposed to unnecessary danger from people they believe may be committing a crime.

Nonetheless, frisking COMPLAINANT was not justified. Frisking him for drugs is never authorized. The concern must be that the person is "armed and dangerous." On that test, frisking him for weapons in the context of this encounter was also not justified. SUBJECT OFFICER, neither in his statement or testimony, indicated that he feared that COMPLAINANT had a weapon that was accessible, and that COMPLAINANT was the sort of person who posed a danger to him.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER violated D.C. Code § 5-1107(a) and MPD General Order 120.25 (Harassment) when he stopped and frisked COMPLAINANT.

Allegation 1: Harassment	Sustained
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Submitted on December 2, 2015.

Peter W. Tague

⁷ Return to SUBJECT OFFICER'S LAWYER effort to recast SUBJECT OFFICER'S behavior as an "approach" rather than as a "stop." Even if his conclusion were accepted, it would not itself justify the frisk of COMPLAINANT. In touching (frisking) COMPLAINANT, about which there is no doubt, SUBJECT OFFICER expanded the intrusion. It follows that a frisk could constitute harassment even if the stop was justified.

Complaint Examiner