

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	13-0331
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Harassment
Allegation 2:	Discriminatory Treatment
Complaint Examiner:	Laurie S. Kohn
Merits Determination Date:	October 20, 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

The complainant, COMPLAINANT, filed a complaint with OPC on June 28, 2013 that alleged that on May 29, 2013, SUBJECT OFFICER, harassed her when SUBJECT OFFICER unlawfully subjected her to a warrantless arrest for domestic threats to do bodily harm. Additionally, she alleged that SUBJECT OFFICER discriminated against her on the basis of nationality when the officer demanded that she identify her national origin.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on June 28, 2015, and OPC's response to the objections, the Complaint Examiner determined that the Report of Investigation presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on June 28, 2015, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On May 29, 2013, COMPLAINANT was walking at the intersection of TWO STREETS in N.W. at which point her ex-husband, WITNESS #1 pulled up in a car. WITNESS #1'S girlfriend WITNESS #2 and WITNESS #2'S child were also in the car.
2. WITNESS #1 exited the car. COMPLAINANT, referring to WITNESS #2, asked: "Is she your daughter?" WITNESS #2 and her child left the interaction and entered WITNESS #1'S nearby home.
3. WITNESS #1 then slapped COMPLAINANT on her face. The two parties exchanged heated words. WITNESS #3, a neighbor, was able to see WITNESS #1 strike COMPLAINANT but was not able to hear any words that were being exchanged.
4. COMPLAINANT has a Jamaican accent. WITNESS #1 believed it was unlikely his girlfriend could understand what COMPLAINANT was saying given her accent and emotional state.
5. COMPLAINANT stated that she would call the police but instead went to WITNESS #1 mother's home, which is next door to WITNESS #1'S home. She spoke with WITNESS #1'S mother, WITNESS #4, and recounted what had occurred.
6. Several calls to 911 were placed from WITNESS #1'S home. When WITNESS #2 called 911, she asked for the police to come and stated that it was not an emergency. When the 911 operator picked up the phone, she inquired about how the operator was doing. WITNESS #2 then reported that COMPLAINANT was talking loudly and making threats in front of her neighbors.
7. SUBJECT OFFICER and WITNESS OFFICER #1 responded to the radio runs and arrived on the scene shortly after the incident. WITNESS OFFICER #1 spoke with complainant.
8. SUBJECT OFFICER first spoke with WITNESS #1 and WITNESS #2. WITNESS #2 reported that COMPLAINANT approached her in front of her home aggressively and said "Bitch, I'll smack you." SUBJECT OFFICER included this statement in the arrest report.
9. SUBJECT OFFICER approached COMPLAINANT in front of WITNESS #4'S home and inquired about her country of origin at least once but possibly multiple times.

COMPLAINANT replied that she is a U.S. citizen who was born in Jamaica. SUBJECT OFFICER did not ask COMPLAINANT any other questions at this time.

10. SUBJECT OFFICER put COMPLAINANT in handcuffs and placed her under arrest.
11. After hearing from COMPLAINANT and WITNESS #3 that WITNESS #1 slapped COMPLAINANT, the officers then placed WITNESS #1 under arrest as well.

IV. DISCUSSION

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.

Ordinarily, officers are precluded from making arrests without warrants unless they witness the criminal conduct. There are several exceptions which provide circumstances in

which an officer may make a warrantless arrest without having witnessed the conduct. Those circumstances are set forth in D.C. Code § 23-581 (2015) and in D.C. Code § 16-1031 (2015). In fact, D.C. Code § 16-1031 mandates that the officer make the arrest without a warrant if the appropriate circumstances are present.

D.C. Code § 16-1031 sets forth that an officer must make an arrest if she “has probable cause to believe that a person... (2) committed an intrafamily offense that caused or was intended to cause reasonable fear of imminent serious physical injury or death.” D.C. Code § 16-1031 (a)(2). Further, D.C. law defines an intrafamily offense as “interpersonal, intimate partner, or intrafamily violence.” D.C. Code § 16-1001(8). In relevant part, the statute also defines interpersonal violence as a criminal offense that is committed upon a person who “is or was ... in a romantic, dating, or sexual relationship with another person who is or was married to ... the offender.” D.C. Code § 16-1001(6)(B). The statute defines “intimate partner violence” as a criminal offense that is threatened or perpetrated against a person “with whom the offender is or was married.” D.C. Code § 16-1001(7)(A).

In this case, it is undisputed that SUBJECT OFFICER effectuated the arrest of the COMPLAINANT without a warrant. After speaking with WITNESS #1 and WITNESS #2, SUBJECT OFFICER placed COMPLAINANT under arrest. It is also undisputed that SUBJECT OFFICER failed to question COMPLAINANT about the allegations prior to placing her under arrest. Based on the accounts of WITNESS #1, the 911 call from WITNESS #2, the statement of WITNESS OFFICER #1, and the police report, SUBJECT OFFICER arrested COMPLAINANT based on allegations that she uttered threats to do bodily harm. The evidence does not elucidate whether the witnesses felt the threatening words were directed and WITNESS #1 or WITNESS #2. However, the arrest report clearly illustrates that SUBJECT OFFICER based her determination to arrest on allegations of a threat against WITNESS #2.

Either way, both relationships between COMPLAINANT and WITNESS #1, and between COMPLAINANT and WITNESS #2 are sufficient to render this allegation the basis of an intrafamily offense under D.C. law. COMPLAINANT’S relationship with WITNESS #1 makes the allegation one of intimate partner violence under 16-1001(7)(A); and her relationship with WITNESS #1’S new girlfriend, WITNESS #2, renders that allegation one of interpersonal violence under D.C. Code § 16-1001(6)(B). Therefore, the allegations were sufficient to allow SUBJECT OFFICER to consider arresting under 16-1031, without a warrant. However, were the criminal act allegations themselves sufficient to allow SUBJECT OFFICER to effectuate the arrest without a warrant?

Based on the evidence, it does not appear that SUBJECT OFFICER had probable cause to believe that COMPLAINANT has committed an offense “that caused or was intended to cause reasonable fear of imminent serious physical injury or death.” D.C. Code § 16-1031 (a)(2). Without probable cause to believe that COMPLAINANT had committed such an act, SUBJECT OFFICER had no authority to make the arrest. Since SUBJECT OFFICER did not provide a statement, the best evidence of what she believed to be the facts at the scene appear in the Arrest Report for COMPLAINANT’S arrest. SUBJECT OFFICER, who identified herself as the

arresting officer, wrote that WITNESS #2 advised the officers that COMPLAINANT approached her and stated “Bitch, I’ll smack you.” Based on this allegation, SUBJECT OFFICER classified this incident as a threat to do bodily harm. Although these words in and of themselves might be classified as threats under D.C. Code 22-407 and its construing case law, based on the evidence presented they do not rise to the level of a threat that “caused or was intended to cause reasonable fear of imminent serious bodily injury or death.”

There is no evidence that COMPLAINANT intended these words to cause serious bodily injury or death. The words themselves, based on SUBJECT OFFICER’S own police report are not words that would be uttered if causing fear of imminent serious bodily harm was the speaker’s intent. Threatening to smack someone does not convey an intent to cause major injury or death. As for WITNESS #2’s subjective experience of fear, her call to 911 illustrates that prior to the arrival of the officers, WITNESS #2 herself was quite calm. On the 911 recording she pauses at the beginning and asks how the officer is. She later says that the call is not about an emergency. Someone in fear of serious bodily harm or death would most likely present differently when speaking about the incident and seeking help. Based on the words themselves as reported by SUBJECT OFFICER and upon the circumstantial evidence that illustrates WITNESS #2 herself was not particularly concerned about the words that had been uttered, SUBJECT OFFICER’S assessment of having probable cause to arrest for an intrafamily offense involving a threat is not reasonable.

Nor does it appear that SUBJECT OFFICER took the procedural steps necessary to determine that she had probable cause to believe that this intrafamily offense occurred, as required to make a warrantless arrest under D.C. Code § 16-1031 (a)(2). Metropolitan Police General Order 304.11 sets forth the steps required to determine probable cause. “Members shall assess the facts, circumstances, and reliable information to determine the existence of a crime and by whom it was committed.” Gen. Order 304.11 (D). The guidelines further specify that officers are directed to interview all parties and witnesses in determining probable cause. Gen. Order 304.11 (C)(8). In the instant case, SUBJECT OFFICER appears to have spoken only to WITNESS #2 and WITNESS #1 prior to making the arrest of COMPLAINANT. Based on COMPLAINANT’S very consistent allegations in her complaint and in her interview, SUBJECT OFFICER spoke first with WITNESS #2 and WITNESS #1, then she approached COMPLAINANT and immediately inquired about her national origin. After that inquiry, she handcuffed COMPLAINANT. Although WITNESS #4’S statement suggests some words were exchanged between COMPLAINANT and SUBJECT OFFICER prior to the questions about national origin, her account corroborates that the officer did not ask COMPLAINANT about the underlying threats allegations. WITNESS #4 reported that the male and female officer came to talk to her and to COMPLAINANT and then arrested COMPLAINANT. WITNESS #4 states she asked why the officer was arresting COMPLAINANT. Had SUBJECT OFFICER questioned COMPLAINANT about the threats allegations, WITNESS #4 would have suspected what COMPLAINANT was being arrested for.

In conclusion, the evidence shows that SUBJECT OFFICER subjected COMPLAINANT to harassment when she arrested her on May 29, 2013 because she did not follow applicable procedures, guidelines, and statutory mandates in effectuating a warrantless arrest under these circumstances.

Discrimination

COMPLAINANT, who is a U.S. citizen born in Jamaica and who speaks with a Jamaican accent, also alleges that SUBJECT OFFICER discriminated against her on the basis of national origin when he twice asked her about her national origin.

MPD General Order 201.26 provides that, “[i]n accordance with D. C. Official Code § 2-1401, et seq. (District of Columbia Human Rights Act), members shall not discriminate, either in the enforcement of the law, or in the provision of police service, on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity and expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intra-family offense and place of residence or business.”

The regulations governing OPC define discriminatory treatment as “[c]onduct by a member of the MPD ... that results in the disparate treatment of persons because of their race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, place of residence or business or any other ground of discrimination prohibited under the statutory and the common law of the District of Columbia.” D.C. Mun. Regs. tit. 6A, § 2199.1.

In this case, SUBJECT OFFICER discriminated against COMPLAINANT through conduct that resulted in disparate treatment of COMPLAINANT on the basis of her national origin. Though there is no evidence that SUBJECT OFFICER’S arrest of COMPLAINANT was related in any way to her questions about COMPLAINANT’S national origin, the questions themselves, which had no lawful purpose, created an environment in which COMPLAINANT felt singled out and challenged solely on the basis of her national origin.

All witnesses present during the interaction between SUBJECT OFFICER corroborate that she questioned COMPLAINANT in some way about her national origin until she received a response. COMPLAINANT’S consistent statements in her complaint and in her interview allege that SUBJECT OFFICER asked her two times where she was born. She alleged in both accounts that these were the first two questions SUBJECT OFFICER asked her. WITNESS #3, a neighbor who was nearby at the time of the arrest, stated that she heard SUBJECT OFFICER ask COMPLAINANT if she had papers to be in this country. She stated this question was asked just prior to COMPLAINANT being put in handcuffs. Further, WITNESS #4, who was with COMPLAINANT at the time of her arrest, stated that just prior to the arrest, SUBJECT OFFICER asked COMPLAINANT what country she was from. Although each witness remembered the question being posed in a slightly different way, the consistency of their recollection about SUBJECT OFFICER inquiring about her national origin and/or immigration status is striking.

WITNESS OFFICER #1, who also responded to the scene, suggested that SUBJECT OFFICER could have inquired about complainant’s place of birth because it is a required field

on a PD Form 256 Quick Booking Form. Because SUBJECT OFFICER failed to provide a statement in this investigation, her explanation is unavailable. However, WITNESS OFFICER #1'S theory cannot hold in this instance to explain a lawful reason for the inquiry. Based on the investigation, no PD Form 256 was completed for this arrest. Further evidence that SUBJECT OFFICER did not inquire about COMPLAINANT'S place of birth for a lawful purpose appears on the PD Form 163 that SUBJECT OFFICER completed for COMPLAINANT'S arrest. On that form, she failed to fill in the section entitled "place of birth." Had the information been relevant to her for administrative reasons, it follows that she would have completed the section soliciting it.

Accordingly, the undisputed evidence shows that SUBJECT OFFICER violated MPD guidelines and municipal regulations when she inquired into COMPLAINANT'S national origin just prior to arresting her. As such, COMPLAINANT'S allegation of discrimination against SUBJECT OFFICER is sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1: Harassment	Sustained
Allegation 2: Discrimination	Sustained

Submitted on October 20, 2015.

Laurie S. Kohn
Complaint Examiner