

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	14-0058 and 14-0064
Complainant:	COMPLAINANT # 1 and COMPLAINANT # 2
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, Badge No. 3590, Second District
Allegation 1:	Harassment
Allegation 2:	Use of Excessive or Unnecessary Force
Complaint Examiner:	Kahlill Palmer
Merits Determination Date:	January 15, 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

In a complaint timely filed with OPC on December 2, 2013, COMPLAINANT # 1 alleged that on October 24, 2013, SUBJECT OFFICER harassed COMPLAINANT # 1 by unlawfully arresting him for Assault on a Police Officer (APO). In a complaint timely filed with OPC on December 5, 2013, Complainant COMPLAINANT # 2 alleged that on October 24, 2013, SUBJECT OFFICER used excessive force when SUBJECT OFFICER hit COMPLAINANT # 2 without being physically provoked.¹ OPC consolidated the two complaints.

¹ COMPLAINANT # 2 also alleged SUBJECT OFFICER harassed him by unlawfully arresting him for APO and that SUBJECT OFFICER used insulting, demeaning or insulting language when SUBJECT OFFICER told COMPLAINANT # 2 to “shut up” twice. Pursuant to D.C. Code § 5-1108 (1) on April 19, 2015, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC’s executive director.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on December 16, 2015. The Complaint Examiner heard the testimony of COMPLAINANT # 1,² COMPLAINANT # 2,³ WITNESS #1, WITNESS # 2 and SUBJECT OFFICER. The following exhibits were introduced at the hearing:

- Complainant Exhibit 1: ROI, Exhibit 20
- Subject Officer Exhibit 1: ROI, Exhibit 13
- Subject Officer Exhibit 2: ROI, Exhibit 14
- Subject Officer Exhibit 3: ROI, Exhibit 15
- Subject Officer Exhibit 4: ROI, Exhibit 16
- Subject Officer Exhibit 5: ROI, Exhibit 19
- Subject Officer Exhibit 6: CCTV Videos

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on June 1, 2015, OPC's response to the objections, one color CCTC video located at the corner of A MAIN STREET IN NORTHWEST WASHINGTON, D.C., one black and white CCTV video located at ANOTHER MAIN STREET IN NORTHWEST WASHINGTON, D.C., two interrogation videos of COMPLAINANTS referenced by SUBJECT OFFICER in his objection and an evidentiary hearing conducted on December 16, 2015, the Complaint Examiner finds the material facts regarding this complaint to be:

1. COMPLAINANT # 1 and COMPLAINANT # 2 testified that in the late evening hours of October 23, 2013, they went out to dinner and shared a pitcher of beer. COMPLAINANT # 2 testified that his cousin was present at dinner; however, he did not drink or share the pitcher of beer with COMPLAINANT # 2 and COMPLAINANT # 1.
2. COMPLAINANT # 1 testified that he and COMPLAINANT # 2 went to A BAR to watch the World Series. COMPLAINANT # 1 testified that he had a total of four beers during the course of the evening: two beers at dinner and two beers at A BAR.

² COMPLAINANT #1 testified via telephone from OVERSEAS.

³ COMPLAINANT #2 testified via telephone from ANOTHER STATE.

- COMPLAINANT # 1 indicated that he limited his alcohol intake because he was driving back home to HIS HOME STATE the following day.
3. COMPLAINANT # 2 testified that he had at least 8 to 9 drinks: “4 or 5 beers and then later [was] liquor.” COMPLAINANT # 2 acknowledged in his statement and during his testimony that he was intoxicated.
 4. On October 24, 2013, shortly after midnight, COMPLAINANT # 1 and COMPLAINANT # 2 decided to leave A BAR. COMPLAINANT # 1 went to the restroom and COMPLAINANT # 2 went to exit the bar to hail a taxicab. As COMPLAINANT # 2 was leaving, he got into a verbal altercation with two other patrons. COMPLAINANT # 1 testified that to an outsider it may have looked as if it could become imminently physical. As COMPLAINANT # 1 was leaving, he noticed COMPLAINANT # 2 at the exit engaged in an argument and tried to diffuse the altercation.
 5. SUBJECT OFFICER was on duty working the midnight shift. He was sitting in a parking lot on A MAIN STREET IN NORTHWEST, WASHINGTON, D.C. across from the BAR.
 6. SUBJECT OFFICER was waved over by WITNESS #1 a patron of the BAR.
 7. SUBJECT OFFICER turned on his police lights and drove his police vehicle across the street.
 8. Upon noticing the lights, COMPLAINANTS and the two other patrons separated and went in opposite directions on A MAIN STREET IN NORTHWEST, WASHINGTON D.C.
 9. SUBJECT OFFICER testified that he exited his vehicle and spoke to WITNESS # 3, the hostess at the BAR. According to SUBJECT OFFICER, WITNESS # 3 indicated that “the man in gray hat is the problem.” As a result, SUBJECT OFFICER called out to the COMPLAINANTS. COMPLAINANT # 2 testified that he believed SUBJECT OFFICER to be one of the patrons with whom he had been arguing and yelled back an obscenity. COMPLAINANT # 1 realized that the call to stop was not coming from the patrons, but a police officer. COMPLAINANT # 1 informed COMPLAINANT # 2 and suggested that he stop.
 10. According to the color CCTV video, at about the middle of the block, SUBJECT OFFICER walked past COMPLAINANT # 1 and spoke to COMPLAINANT # 2. COMPLAINANT # 1 testified that during SUBJECT OFFICER and COMPLAINANT # 2’s conversation, COMPLAINANT # 1 perceived COMPLAINANT # 2 as growing agitated and approached SUBJECT OFFICER to ask SUBJECT OFFICER if he could

10. speak with COMPLAINANT # 2. SUBJECT OFFICER rejected COMPLAINANT # 1's request and warned COMPLAINANT # 1 not to interfere.
11. According to SUBJECT OFFICER, he continued questioning COMPLAINANT # 2 and alleges that COMPLAINANT # 2 grew increasingly agitated and punched him in the face. As a defensive response, SUBJECT OFFICER then pushed COMPLAINANT # 2 away. SUBJECT OFFICER's account is contradicted by THE COMPLAINANTS.
 12. According to COMPLAINANT # 2, SUBJECT OFFICER ordered COMPLAINANT # 2 to "shut up" and after COMPLAINANT # 2 indicated three times that he would not be quiet, but wanted to explain himself, SUBJECT OFFICER struck COMPLAINANT # 2 without physical provocation. COMPLAINANT # 1 did not witness the circumstances leading up to the hit by SUBJECT OFFICER, but says that after hearing a noise that sounded like a punch, he immediately looked back and saw COMPLAINANT # 2 moving as if he had been hit in the face and SUBJECT OFFICER's "follow-through." COMPLAINANTS' account is contradicted by SUBJECT OFFICER.
 13. The Complaint Examiner reviewed both CCTV videos and neither CCTV video was clear enough to determine who initiated physical contact: either COMPLAINANT # 2 or SUBJECT OFFICER.
 14. The color CCTV video reflects that, following the initiating incident, COMPLAINANT #2 then moved away from SUBJECT OFFICER and stumbled into the street and was followed by both SUBJECT OFFICER and COMPLAINANT # 1. Two bystanders, who appeared to be unrelated to the incident, also ran into the street after COMPLAINANTS and SUBJECT OFFICER. It appeared to the Complaint Examiner that one of the people blocked traffic to avoid anyone being hit by oncoming traffic.
 15. After moving around a parked vehicle, the other bystander, COMPLAINANT # 2 and COMPLAINANT # 1 began moving back to the sidewalk and SUBJECT OFFICER appeared to direct the person that had stopped traffic to return to the sidewalk. SUBJECT OFFICER also returned to the sidewalk.
 16. COMPLAINANT # 1 testified and alleged that he advised SUBJECT OFFICER that he was not okay with what happened and was going to begin recording the incident on his mobile phone. SUBJECT OFFICER contradicts COMPLAINANT # 1's testimony testifying that he did not know that he was being recorded until the conclusion of the incident when his sergeant advised him.
 17. SUBJECT OFFICER ordered COMPLAINANT # 2 to turn around and hit COMPLAINANT # 2 in the face.

18. COMPLAINANT # 2 was advised numerous times to stop resisting, but continued to resist arrest. Ultimately, backup officers arrived and subdued COMPLAINANT # 2 and arrested him for APO.
19. The color CCTV video and the video taken by COMPLAINANT # 1 indicate that the entire incident lasted roughly three and a half minutes from the time SUBJECT OFFICER is seen approaching COMPLAINANT # 1 until the police backup arrives and COMPLAINANT # 2 is subdued and arrested.
20. COMPLAINANT # 1 notified a police officer that he had taken a video of a portion of the incident.
21. COMPLAINANT # 1 was also arrested for APO.
22. COMPLAINANT # 2 and COMPLAINANT # 1 were taken to AN MPD police station and placed in interrogation rooms.
23. According to COMPLAINANT # 2's interrogation video, COMPLAINANT # 2 answered some preliminary questions, but, ultimately, did not answer any substantive questions about the events leading to his arrest. COMPLAINANT # 2 did acknowledge to the interrogating officer that he was intoxicated.
24. According to COMPLAINANT # 1's interrogation video, COMPLAINANT # 1 answered some preliminary questions and consented to further questioning.

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 alleges abuse or misuse of police powers by such member or members, including: (1) harassment; and (2) use of unnecessary or excessive force."

A. 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 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 # 1 alleged that SUBJECT OFFICER harassed him by unlawfully arresting him for assault on a police officer.

Whether SUBJECT OFFICER lawfully arrested COMPLAINANT # 1 for Assault on a Police Officer

D.C. Code § 22-405, the code provision governing arrest for assault of a police officer, provides that “Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties, shall be guilty of a misdemeanor.”

SUBJECT OFFICER alleged that COMPLAINANT # 1 interfered with SUBJECT OFFICER’s official duties, while questioning and attempting to arrest COMPLAINANT # 2. As a result, SUBJECT OFFICER arrested COMPLAINANT # 1 for assault on a police officer. COMPLAINANTS and SUBJECT OFFICER have very different and inconsistent accounts of the events that transpired the morning of October 24, 2013.

After reviewing the CCTV videos,⁴ the Complaint Examiner concluded that neither COMPLAINANT # 1’s account nor SUBJECT OFFICER’s account can be entirely accurate or relied upon due to inconsistencies, which will be discussed below.

Color CCTV video

The video begins at 12:05am. However, SUBJECT OFFICER, COMPLAINANT # 1 nor COMPLAINANT # 2 are seen on the video until 12:25am.

⁴ It should be noted that the Complaint Examiner reviewed both the color and the black and white CCTV video; however, as it relates to the black and white video, much of it was indiscernible. For most of the video none of the parties can be identified due the video being in black and white, the flashing lights from SUBJECT OFFICER’s police vehicle, the lights from passing cars and businesses, the distance from the subjects and the grainy nature of the video. The information that could be gleaned from the black and white video was duplicative of the information in the color CCTV video (e.g., people entering the street and stopping traffic, when flashing police vehicles arrived on the scene).

- At approximately, 12:25:06am, a gentleman wearing light colored pants (maybe khakis or jeans) and a black top, COMPLAINANT # 1, and another gentleman wearing light colored pants and a gray top, COMPLAINANT # 2, entered the frame and are seen walking down the sidewalk.
- At approximately 12:25:10am, COMPLAINANT # 1 stopped and COMPLAINANT # 2 continued walking down the sidewalk.
- At approximately, 12:25:14am, a uniformed officer, SUBJECT OFFICER, can be seen walking into the frame and past COMPLAINANT # 1. COMPLAINANT # 2 can be seen coming back toward SUBJECT OFFICER. SUBJECT OFFICER continued walking toward COMPLAINANT # 2 and COMPLAINANT # 2 appeared to be facing SUBJECT OFFICER and initially walking toward SUBJECT OFFICER, but then later backing away from SUBJECT OFFICER while facing him. COMPLAINANT # 1 remained where he initially stopped. COMPLAINANT # 2 and SUBJECT OFFICER eventually stopped roughly three doorways away from COMPLAINANT # 1. Because COMPLAINANT # 2 and SUBJECT OFFICER were in front of a doorway, it was difficult to clearly identify their movements.
- At approximately 12:25:46am, COMPLAINANT # 2 can be seen jumping back, while SUBJECT OFFICER appears to be in the same place. Although, again, given the distance of SUBJECT OFFICER and COMPLAINANT # 2 from the camera and the vantage point, it is not clear. At the same time, COMPLAINANT # 1 can be seen walking toward SUBJECT OFFICER and COMPLAINANT # 2. It appears as if COMPLAINANT # 2 and SUBJECT OFFICER began to struggle or grab each other and move toward the street. Again, the picture was grainy and not clear.
- At approximately 12:25:51am, COMPLAINANT # 2 and SUBJECT OFFICER left the sidewalk and entered the street – the parking lane. A few seconds later, COMPLAINANT # 1 appeared to have approached SUBJECT OFFICER and started talking to him. At the same time, COMPLAINANT # 2 appeared to be continuing to stumble further into the street.
- At approximately 12:25:54am, COMPLAINANT # 1 entered the parking lane of the street and COMPLAINANT # 2 began walking back toward SUBJECT OFFICER and COMPLAINANT # 1. For a second, it appeared that SUBJECT OFFICER, COMPLAINANT # 2 and COMPLAINANT # 1 were very close and appeared as if they could be struggling or fighting. Also at 12:25:54am, two bystanders entered the video and entered the parking lane of the street after SUBJECT OFFICER, COMPLAINANT # 1 and COMPLAINANT # 2.

- At approximately 12:26:00am, SUBJECT OFFICER, COMPLAINANTS and the two bystanders left the parking lane of the street and entered the right active traffic lane.
- While in the street, it was impossible to determine whether COMPLAINANT # 1 had interposed his body in between COMPLAINANT # 2 and SUBJECT OFFICER.
- At approximately 12:26:13am, it appeared that one of the bystanders walked into the active right lane of oncoming traffic and blocked it to ensure that no one was hit by the oncoming traffic.
- At approximately 12:26:23am, it appeared that SUBJECT OFFICER was directing everyone out of the street, including the bystander who stopped traffic, and back on the sidewalk.
- At approximately 12:26:30am, it appeared that the two bystanders walked away from SUBJECT OFFICER and COMPLAINANTS and back towards A BAR. For the remainder of the CCTV video, SUBJECT OFFICER, COMPLAINANT # 2 and COMPLAINANT # 1 cannot be clearly identified or seen because the view was partially obstructed by a parked car and the shadows were not discernable from people or walls.
- At approximately, 12:28:30am, another uniformed officer was seen running on foot in the direction of SUBJECT OFFICER, which is when backup arrived.

Whether the CCTV video revealed reasonable cause for arrest

At the evidentiary hearing, SUBJECT OFFICER testified that COMPLAINANT # 1 was warned numerous times (at least three) that his continued interference would result in COMPLAINANT # 1's arrest. SUBJECT OFFICER claimed to have made his final warning as COMPLAINANT # 2 and SUBJECT OFFICER entered the street.

If SUBJECT OFFICER's statement that COMPLAINANT # 1 received his final warning while he was still on the sidewalk and before he entered the street is taken as true, then the CCTV video reveals that COMPLAINANT # 1 remained close to SUBJECT OFFICER after COMPLAINANT # 2 entered the street. In fact, SUBJECT OFFICER's statement to OPC provided,

COMPLAINANT # 1 was a continual distraction as I tried to arrest COMPLAINANT # 2. COMPLAINANT # 1's actions put everyone's life in danger, to include bystanders, as COMPLAINANT # 2 ran into the street. COMPLAINANT # 1 stopped grabbing at me, but he continued to remain in close proximity as I tried to pursue COMPLAINANT # 2, who was running to and fro from me.

Given how close COMPLAINANT # 1 was, the Complaint Examiner finds that it could and did interfere with SUBJECT OFFICER performing his duties. However, the Complaint Examiner must consider whether COMPLAINANT # 1 had justifiable and excusable cause.

Whether COMPLAINANT # 1 acted with justifiable and excusable cause

According to SUBJECT OFFICER's January 20, 2015 statement to OPC, he indicated that COMPLAINANT # 1 came forward when COMPLAINANT # 2 "began to slowly back pedal. As he back pedaled, it looked like he was moving in the street." COMPLAINANT # 1 did not remember that the incident spilled into the street and, as a result, certainly did not provide an explanation as to why he entered the street after COMPLAINANT # 2. Nevertheless, it seems plausible that COMPLAINANT # 1 was afraid for his friend's safety (i.e., a friend attempting to prevent an intoxicated friend from entering the street to avoid the possibility of being struck by oncoming traffic). In fact, that is consistent with SUBJECT OFFICER's statement to OPC, although SUBJECT OFFICER attributed COMPLAINANT # 1's motive to be preventing COMPLAINANT # 2's arrest. SUBJECT OFFICER provided, "it appeared that COMPLAINANT # 1 was afraid for his friend and did not want his friend to get arrested. COMPLAINANT # 1 probably thought he was trying to help his friend, but he was committing APO . . . by interfering with my police actions."

COMPLAINANT # 1's presumed concern for COMPLAINANT # 2's safety is underscored by the fact that two bystanders entered the street after COMPLAINANT # 2, SUBJECT OFFICER and COMPLAINANT # 1. One of those bystanders stopped traffic and the other appeared to be attempting to help get COMPLAINANT # 2 and COMPLAINANT # 1 back on the sidewalk. SUBJECT OFFICER seems to acknowledge the presence of bystanders when he testified, "And I finally managed to get everybody on the sidewalk, because there were like a few of us in the street, and finally got everybody back on the sidewalk."

The two bystanders had justifiable and excusable cause for interfering – that is good Samaritans interfering to ensure the safety and welfare of their fellow man and more particularly keeping him and, ultimately, COMPLAINANT # 1 and SUBJECT OFFICER from entering inadvertently into active and oncoming traffic. COMPLAINANT # 1's compulsion to assist COMPLAINANT # 2 was perhaps greater than the two bystanders because he knew COMPLAINANT # 2, that COMPLAINANT # 2 was intoxicated and appeared to be entering traffic. The Complaint Examiner finds that COMPLAINANT # 1 similarly had justifiable and excusable cause and therefore should not have been arrested for APO based on COMPLAINANT # 1 entering the street after COMPLAINANT # 2.

Because the CCTV video can only provide limited assistance in determining the events of October 24, 2013, the Complaint Examiner must consider both versions of events and examine the remainder of the record to determine whether COMPLAINANT # 1 interfered before or after he entered the street. In doing so, the Complaint Examiner found numerous inconsistencies in both COMPLAINANT # 1's and SUBJECT OFFICER's account.

Uncovered inconsistencies in COMPLAINANT # 1's account

COMPLAINANT # 1 testified that after SUBJECT OFFICER initially walked past him and began approaching COMPLAINANT # 2, COMPLAINANT # 1 was looking back towards the bar between a couple of seconds or a couple of minutes. However, the color CCTV video indicated that COMPLAINANT # 1 could have been distracted no longer than roughly 30 seconds.⁵ He further testified that after hearing a smack, COMPLAINANT # 1 observed SUBJECT OFFICER's follow through and concluded that SUBJECT OFFICER struck COMPLAINANT # 2. According to COMPLAINANT # 1, it was then that he "walked over to [COMPLAINANT # 2] and the officer . . . [and] told the officer that I was not okay with what had just happened and that I was going to start filming everything." It is possible that COMPLAINANT # 1 conveyed his disapproval to SUBJECT OFFICER; however, it is not possible that COMPLAINANT # 1 immediately began recording the incident as he indicated, particularly given that the CCTV showed COMPLAINANT # 2, COMPLAINANT # 1, SUBJECT OFFICER and two bystanders enter the street and that all of COMPLAINANT # 1's video was taken on the sidewalk up until COMPLAINANT # 2 was arrested.

COMPLAINANT # 1 denied that he interfered and stated, "I never touched the officer or got in between him and [COMPLAINANT # 2]." As indicated above, the CCTV video was inconclusive as to whether COMPLAINANT # 1 interposed himself between SUBJECT OFFICER and COMPLAINANT # 2. However, COMPLAINANT # 1 did testify that he was never close enough to touch SUBJECT OFFICER. Similarly, COMPLAINANT # 2 testified, "I don't think COMPLAINANT # 1 was ever within arm's reach of SUBJECT OFFICER." It should be noted that neither COMPLAINANT # 1 nor COMPLAINANT # 2's accounts reflect that they, including SUBJECT OFFICER, ever left the sidewalk and entered the street. However, as indicated above, the CCTV video showed that COMPLAINANT # 1 left the sidewalk when COMPLAINANT # 2 stumbled into the street and was within arm's reach of SUBJECT OFFICER and COMPLAINANT # 2. The video showed COMPLAINANT # 1 in close proximity to and certainly within arm's reach of SUBJECT OFFICER while they were in the street. As such, the Complaint Examiner cannot credit either COMPLAINANT # 1 or COMPLAINANT # 2's statement that COMPLAINANT # 1 was not close enough to touch SUBJECT OFFICER.

⁵ The color CCTV video shows COMPLAINANTS walking into the frame on the sidewalk. At approximately 12:25:14, SUBJECT OFFICER can be seen walking in the picture pass COMPLAINANT # 1 and approaching COMPLAINANT # 2. The video reflects that COMPLAINANT # 1 (roughly three doorways from SUBJECT OFFICER and COMPLAINANT # 2) did not start walking toward SUBJECT OFFICER and COMPLAINANT # 2 until 12:25:46am, or 32 seconds.

Uncovered inconsistencies in SUBJECT OFFICER's account

SUBJECT OFFICER clarified at the hearing that COMPLAINANT # 1 was interposing his body “first on the sidewalk and then in the street and after that it finally stopped.” SUBJECT OFFICER said that COMPLAINANT # 1 had been told at least three times. As indicated above, the CCTV video showed that COMPLAINANT # 1 was roughly three doorways away from SUBJECT OFFICER from the time that SUBJECT OFFICER approached COMPLAINANT # 2 until COMPLAINANT # 1 noticed COMPLAINANT # 2 and SUBJECT OFFICER struggle and move towards the street. COMPLAINANT # 1 was not close enough to SUBJECT OFFICER to interpose himself or receive the first warning until 12:25:51am. Assuming that SUBJECT OFFICER was being imprecise when referring to the parking lane of the street and called it the sidewalk,⁶ SUBJECT OFFICER and COMPLAINANTS had all entered active traffic lanes as of 12:26:00am. That means SUBJECT OFFICER had nine seconds to issue three warnings, which seems highly unlikely. The Complaint Examiner does not credit SUBJECT OFFICER's statement regarding COMPLAINANT # 1 initially interposing himself on the sidewalk or SUBJECT OFFICER issuing three warnings to COMPLAINANT # 1 before he entered the street.

SUBJECT OFFICER testified that “[COMPLAINANT # 2] started to run away into the street and I tried to get him out of the street. Actually, prior to that his friend interposed his body between me and him, between me and COMPLAINANT # 2, and I tried to warn him that . . . you are interfering with police business and . . . you need to go.” SUBJECT OFFICER claimed to have said it on the sidewalk before they went into the street. As indicated above, COMPLAINANT # 1 certainly could not have interposed his body in between SUBJECT OFFICER and COMPLAINANT # 2 because the CCTV video indicated that as COMPLAINANT # 1 was talking to SUBJECT OFFICER, COMPLAINANT # 2 appeared to be stumbling further into the street. That aside, the CCTV video indicated that roughly three seconds after COMPLAINANT # 1 approached SUBJECT OFFICER; COMPLAINANT # 1 entered the street after COMPLAINANT # 2. Three seconds seems hardly enough time for SUBJECT OFFICER to issue one warning; although, it is possible. Again, assuming SUBJECT OFFICER testified imprecisely, as stated above, issuing three warnings in nine seconds seems highly unlikely. Furthermore, if we assume that SUBJECT OFFICER used imprecise language, then the CCTV video further indicated that the two bystanders were certainly in close proximity to COMPLAINANTS and SUBJECT OFFICER. The video did not resolve whether COMPLAINANT # 1 interposed himself between SUBJECT OFFICER and COMPLAINANT # 2 in the street. Given the number of people surrounding SUBJECT OFFICER, the parked car and the oncoming traffic, it would seem difficult, if not impossible, to be certain who, in fact, was in between SUBJECT OFFICER and COMPLAINANT # 2. In any event, SUBJECT

⁶ It seems unlikely that SUBJECT OFFICER conflated a sidewalk and a parking lane given that he differentiated the two when he testified describing where he parked his car prior to speaking to the BAR hostess: “I parked the car right there with the wheels up on the curb. It was still safe, it was still passable on the sidewalk and I wasn't blocking a main thoroughfare. It was a parking space essentially.”

OFFICER then testified, “[COMPLAINANT # 1] . . . stayed close but then he eventually backed off and I tried to confront COMPLAINANT # 2 again and advise him that he is under arrest.” This seems to indicate that COMPLAINANT # 1 heeded SUBJECT OFFICER’s warning.

Later, SUBJECT OFFICER testified that “then it moved on to the street, moved from the sidewalk into the street and his friend started interposing his body in between me and him again. And that continued for at least a minute and I kept telling him you’re going to be under arrest . . . because you’re interfering, and I warned him about that at least two to three times. And I finally managed to get everybody on the sidewalk, because there were like a few of us in the street, and finally got everybody back on the sidewalk.” This portion of the testimony appears to be redundant because the CCTV video did not reflect that COMPLAINANT # 1 was on the sidewalk, entered the street, returned to the sidewalk and then re-entered the street. Assuming that SUBJECT OFFICER was being imprecise when referring to the parking lane of the street and called it the sidewalk, the CCTV video still indicated that all parties had moved from the parking lane into the right active traffic lane at 12:26:00am or roughly ten seconds after SUBJECT OFFICER’s first warning could have been issued. Additionally, all parties were out of the street – both active traffic and parking lanes at 12:26:30am. Given that SUBJECT OFFICER appeared to be occupied with COMPLAINANT # 2, two bystanders and oncoming traffic, SUBJECT OFFICER’s account that COMPLAINANT # 1 interfered, was warned not to infer, was subsequently compliant (i.e., stayed close but then eventually backed off) and then later became non-compliant again and was warned again all in a matter of 30 seconds strains credibility.

In the Arrest Report, it provided,

COMPLAINANT # 1 attempted to stop SUBJECT OFFICER from talking to COMPLAINANT # 2 by getting in between SUBJECT OFFICER and COMPLAINANT # 2 and physically pushing SUBJECT OFFICER away. COMPLAINANT # 1 continued to try and physically stop SUBJECT OFFICER from coming in contact with COMPLAINANT # 2.

In SUBJECT OFFICER’s statement to OPC, after stating that COMPLAINANT # 2 “back peddled away . . . like he was moving in the street,” SUBJECT OFFICER wrote,

At this point, COMPLAINANT # 1 tried to step in between me and COMPLAINANT # 2. COMPLAINANT # 1 put his arm out in front of me, as if to grab my arm and push me away from stopping COMPLAINANT # 2 who was now moving toward the street. As I tried to pursue COMPLAINANT # 2, COMPLAINANT # 1 kept interposing his own body between me and his friend. At one point, COMPLAINANT # 1 put his hand on top of my hand to keep me away from his friend.

Both the Arrest Report and SUBJECT OFFICER’s statement to OPC reflect SUBJECT OFFICER’s claim that COMPLAINANT # 1 interposed himself between COMPLAINANT # 2 and SUBJECT OFFICER. However, the Arrest Report describes COMPLAINANT # 1 as

“physically pushing SUBJECT OFFICER away;” while the OPC statement stops short of “pushing,” indicating instead that “COMPLAINANT # 1 put his arm out in front of me, **as if** to grab my arm and push me away (emphasis added).” It should be noted that in SUBJECT OFFICER ’s statement to OPC, it also provided that, “at one point, COMPLAINANT # 1 put his hand on top of my hand to keep me away from his friend.” In SUBJECT OFFICER ’s Letter of Protest, he argued that OPC was engaged in semantics – that “what you may consider a physical push, whether your entire body is pushed or someone grabs your arm and pushes it away is a mere matter of semantics. A push is a push.” It is unclear if SUBJECT OFFICER was referring to COMPLAINANT # 1 holding his arm out “as if” to push SUBJECT OFFICER away or to COMPLAINANT # 1 putting his hand on top of SUBJECT OFFICER ’s hand to keep him away from COMPLAINANT # 2 because SUBJECT OFFICER only referenced paragraphs in the ROI and not specific language. In either case, the Complaint Examiner disagrees. Words matter. One cannot reasonably interpret “as if” to mean that it, in fact, happened. One also cannot reasonably interpret someone placing his hand on another’s as pushing. It may amount to blocking and it would certainly amount to interference; however, it would not amount to pushing.

In the narrative of the Case Summary Report, it provided,

[COMPLAINANT # 1] attempted to stopped (sic) [SUBJECT OFFICER] from talking to [COMPLAINANT # 2] and [COMPLAINANT # 1] placed his hand on [SUBJECT OFFICER’s] shoulder to push [SUBJECT OFFICER] away from [COMPLAINANT # 2].”

The Case Summary Report indicates that this happened during SUBJECT OFFICER’s initial questioning of COMPLAINANT # 2 and before COMPLAINANT # 2 allegedly punched SUBJECT OFFICER. As established in the CCTV video, COMPLAINANT # 1 did not approach SUBJECT OFFICER until COMPLAINANT # 2 began stumbling toward the street. Furthermore, at no point in the beginning of the CCTV video, does it appear that COMPLAINANT # 1 placed his hand on SUBJECT OFFICER’s shoulder. Moreover, in no other police reports, statements or testimony did SUBJECT OFFICER claim that COMPLAINANT # 1 placed his hand on SUBJECT OFFICER’s shoulder.

The Case Summary Report narrative continues to discuss how COMPLAINANT # 2 allegedly punched SUBJECT OFFICER in the face and then how COMPLAINANT # 2 assumed a fighting stance. The narrative then provides, “[COMPLAINANT # 1] continued to get in the middle of [COMPLAINANT # 2] and [SUBJECT OFFICER], pushing [SUBJECT OFFICER] away from [COMPLAINANT # 2].” It implies that COMPLAINANT # 1 never heeded SUBJECT OFFICER’s warnings. In the MPD Use of Force Incident Report, SUBJECT OFFICER provides, “[COMPLAINANT # 2’s] male companion persistently interfered and disregarded all my warnings to back down.” These statements are certainly contradicted by SUBJECT OFFICER ’s own testimony that “we finally got everybody back on the sidewalk and the rest is what you saw on the video,” coupled with SUBJECT OFFICER ’s testimony that COMPLAINANT # 1 was not interfering during the period when he was recording the incident.

Furthermore, the video taken by COMPLAINANT # 1 reflects that he maintained an appropriate distance from SUBJECT OFFICER and COMPLAINANT # 2.

Finally, in SUBJECT OFFICER's 4-page statement to OPC, he did not mention COMPLAINANT # 1 until after COMPLAINANT # 2 "back pedaled away . . . like he was moving in the street." SUBJECT OFFICER wrote,

At this point, a second male, whom OPC has identified to me as the second complainant, COMPLAINANT # 1, tried to step in between me and COMPLAINANT # 2. COMPLAINANT # 1 put his arm out in front of me, as if to grab my arm and push me away from stopping COMPLAINANT # 2 who was now moving toward the street. As I tried to pursue COMPLAINANT # 2, COMPLAINANT # 1 kept interposing his own body between me and his friend. At one point, COMPLAINANT # 1 put his hand on top of my hand to keep me away from his friend.

It appeared that COMPLAINANT # 1 was afraid for his friend and did not want his friend to get arrested. COMPLAINANT # 1 probably thought he was trying to help his friend and did not want his friend to get arrested. COMPLAINANT # 1 probably thought he was trying to help his friend, but he was committing APO, by statute, by interfering with my police actions.

I advised COMPLAINANT # 1 that he could be arrested for interfering with police business. I told him that he did not have to be involved in this and said that this was not about him. I told him he could get in trouble.

It should be noted that SUBJECT OFFICER testified that he provided warnings to COMPLAINANT # 1 – that "he could be arrested for interfering with police business." This raises the question whether COMPLAINANT # 1 continued to interfere after receiving the warnings.

Again, as provided above, SUBJECT OFFICER testified that COMPLAINANT # 1 did not interfere after everyone returned to the sidewalk and COMPLAINANT # 1 began recording the remainder of the incident. However, the remainder of SUBJECT OFFICER's statement was critical of COMPLAINANT # 1. It provided,

During this time, I could hear COMPLAINANT # 1 nearby, but I could not see him because I was trying to keep a visual on COMPLAINANT # 2, who was the main combative threat. Even though, COMPLAINANT # 1 was no longer trying to physically interfere at this point, the fact that COMPLAINANT # 1 initially displayed a willingness to be a physical threat, made me also have to monitor his whereabouts during this time, which was a distraction.

The Complaint Examiner finds that based on all the foregoing inconsistencies in SUBJECT OFFICER's various statements, reports and testimony, the Complaint Examiner does

not credit SUBJECT OFFICER 's claim that COMPLAINANT # 1 continued to interfere after being warned, and instead credits COMPLAINANT # 1's claim that he stayed 10-15 feet away after being warned by SUBJECT OFFICER . The D.C. Court of Appeals ruled to violate the APO statute, "the conduct must go beyond speech and mere passive resistance or avoidance, and cross the line into active confrontation, obstruction or other action directed against an officer's performance in the line of duty." *See Cheek v. United States*, 103 A.3d 1019, 1021 (D.C. 2014) citing *In re C.L.D.*, 739 A.2d 353, 356-57 (D.C. 1999). In this instance, COMPLAINANT # 1's behavior does not go beyond speech and cross the line into active confrontation or obstruction. While the CCTV video does not prove whether COMPLAINANT # 1 interposed himself between COMPLAINANT # 2 and SUBJECT OFFICER while in the street, as discussed above, if he did interpose himself, the Complaint Examiner concludes that he had justifiable and excusable cause.

As such, the Complaint Examiner is disturbed that after everyone had returned to the sidewalk and COMPLAINANT # 1 began recording, SUBJECT OFFICER can be heard saying to COMPLAINANT # 1, "you're interfering, you're going to go too." This statement seems to confirm and support COMPLAINANT # 1's claim that as soon as he informed SUBJECT OFFICER that he was going to record the incident, SUBJECT OFFICER decided that COMPLAINANT # 1 would be arrested for APO and told him so.

Other Evidence

It should be noted that MPD General Order 701.03, Part V, Section B, Nos. 3 and 4, which deals with how officers should handle assault on a police officer, provides that the police officers on the scene were responsible for "immediately canvass[ing] the area to locate all witnesses to the assault" and "have each witness complete a PD Form 119 (Complainant/Witness Statement) regarding the events surrounding the assault."

There were no witness statements obtained concerning COMPLAINANT # 1 allegedly interfering with SUBJECT OFFICER doing his job. However, it should be noted that a witness statement was obtained from WITNESS # 3 concerning COMPLAINANT # 2 allegedly hitting SUBJECT OFFICER. It also bears mentioning that WITNESS # 3's unsigned statement to OPC contradicted SUBJECT OFFICER's claim that COMPLAINANT # 1 interfered. It provides that "at no point did COMPLAINANT # 1 ever physically interfere with the officers on the scene. I just recall him talking a lot and interfering verbally." The Complaint Examiner notes that WITNESS # 3 was not located and did not testify during the evidentiary hearing. Nevertheless, the Complaint Examiner cannot reconcile that no witness statements were obtained to support the charge of APO against COMPLAINANT # 1, even though a witness statement was obtained to support the APO charge against COMPLAINANT # 2. The absence of any witness statements to support the APO charge, and particularly a witness statement from WITNESS # 3, further suggests to the Complaint Examiner that the APO charge against COMPLAINANT # 1 was baseless and intended to harass him.

While not dispositive, it bears mentioning that all charges, including the assault on a police officer charge, against COMPLAINANT # 1 were dropped.⁷

The Complaint Examiner sustains COMPLAINANT # 1's allegation of harassment.

B. UNNECESSARY OR EXCESSIVE FORCE

MPD General Order 901.07, Part II, states, "The policy of the Metropolitan Police Department is to preserve human life when using lawful authority to use force. Therefore, officers of the Metropolitan Police Department shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others."

The regulations governing OPC define excessive or unnecessary force as "[u]nreasonable use of power, violence, or pressure under the particular circumstances. Factors to be considered when determining the 'reasonableness' of a use of force include the following: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officer or others; (3) whether the subject was actively resisting arrest or attempting to evade arrest by flight; (4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; (5) whether the officer adhered to the general orders, policies, procedures, practices and training of the MPD ... and (6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish the objective." D.C. Mun. Regs. tit. 6A, § 2199.1.

COMPLAINANT # 2 alleged that SUBJECT OFFICER used excessive or unnecessary force by hitting COMPLAINANT # 2 multiple times in the face. It should be noted that COMPLAINANT # 2 alleged in his OPC complaint that SUBJECT OFFICER hit him in the face three times. However, in the video taken by COMPLAINANT # 1, COMPLAINANT # 1 can be heard saying to SUBJECT OFFICER that SUBJECT OFFICER hit COMPLAINANT # 2 twice in the face. SUBJECT OFFICER testified to striking COMPLAINANT # 2 twice, but disputes that the first strike was to COMPLAINANT # 2's face. SUBJECT OFFICER testified that the second strike was the strike recorded on COMPLAINANT # 1's video. As such, the Complaint Examiner finds that SUBJECT OFFICER struck COMPLAINANT # 2 twice, not three times, and will discuss both strikes, which are at issue.

⁷ COMPLAINANT # 1 testified uncontroverted that a month after his arraignment, he returned to Washington, D.C. to appear for the first pretrial hearing and the prosecution could not contact SUBJECT OFFICER. According to COMPLAINANT # 1, the prosecution requested another week to contact SUBJECT OFFICER and still could not reach him. As a result, the prosecution dropped all charges against COMPLAINANT # 1.

Whether SUBJECT OFFICER used unnecessary force against COMPLAINANT # 2 regarding the first strike

According to COMPLAINANT # 2's testimony, after SUBJECT OFFICER told him to shut up and COMPLAINANT # 2 refused that order three times, SUBJECT OFFICER hit him in the face. COMPLAINANT # 1 testified that he was not looking at COMPLAINANT # 2 nor SUBJECT OFFICER when COMPLAINANT # 2 was first hit. As established above and based on the CCTV video, COMPLAINANT # 1 could have been distracted for no longer than 30 seconds. Nevertheless, COMPLAINANT # 1 testified to hearing a smack and looking towards SUBJECT OFFICER and COMPLAINANT # 2. COMPLAINANT # 1 said he saw COMPLAINANT # 2's face moving like it had just been hit and observing SUBJECT OFFICER's "follow through." COMPLAINANT # 1 testified that SUBJECT OFFICER hit COMPLAINANT # 2 without any physical provocation as SUBJECT OFFICER alleges (i.e., punching SUBJECT OFFICER in the face). Although, COMPLAINANT # 1 testified that he was looking back towards the bar, he opined that if COMPLAINANT # 2 had hit SUBJECT OFFICER, he would've heard it. If true, then SUBJECT OFFICER would be guilty of using excessive force because COMPLAINANT # 2 would not have posed an immediate threat to the safety of SUBJECT OFFICER.

According to SUBJECT OFFICER's testimony, as SUBJECT OFFICER was questioning COMPLAINANT # 2 and asked for COMPLAINANT # 2's identification, COMPLAINANT # 2 grew agitated and threw a straight punch to the left side of SUBJECT OFFICER's face, which grazed it. SUBJECT OFFICER "responded by pushing him back, that was the first strike," which he testified landed on COMPLAINANT # 2's chest. If SUBJECT OFFICER's version is to be believed, then SUBJECT OFFICER would not be guilty of using excessive force in the case of the first strike because COMPLAINANT # 2 would have threatened the safety of SUBJECT OFFICER when he hit him.

Like with the previous allegation, COMPLAINANTS and SUBJECT OFFICER have very different accounts of the events that transpired that evening. Unlike with the previous allegation, the record evidence, specifically the CCTV video, was not clear enough to discern whether COMPLAINANT # 2 struck SUBJECT OFFICER in the face as SUBJECT OFFICER claims or whether SUBJECT OFFICER struck COMPLAINANT # 2 as COMPLAINANTS claim. As noted above at 12:25:46am, COMPLAINANT # 2 appeared to move back while SUBJECT OFFICER remained still. COMPLAINANT # 2's movement could have been COMPLAINANT # 2 moving backward after being punched by SUBJECT OFFICER or COMPLAINANT # 2 could have been moving backward after SUBJECT OFFICER pushed him away. Essentially, the Complaint Examiner must assess the credibility of the witnesses and the record evidence that does exist.

As a preliminary matter, COMPLAINANT # 2's accurate recollection of the events that evening are questionable given the volume of alcohol he testified to consuming, the statements and actions of COMPLAINANT # 2 shown in the video taken by COMPLAINANT # 1 and the statements and actions of COMPLAINANT # 2 shown in his interrogation video at the police

station. Furthermore, as discussed above, COMPLAINANT # 2 had no recollection of the incident spilling into the street. COMPLAINANT # 1 testified that he was not looking at either COMPLAINANT # 2 or SUBJECT OFFICER to observe who threw the first punch. COMPLAINANT # 1 speculated that he would've heard if COMPLAINANT # 2 had hit SUBJECT OFFICER first; however, SUBJECT OFFICER testified that COMPLAINANT # 2's punch grazed his face. It is not reasonable to believe that COMPLAINANT # 1 could have heard a punch graze SUBJECT OFFICER's face given his distance from SUBJECT OFFICER and COMPLAINANT # 2. Given the noise on the street (such as vehicle and pedestrian traffic and the music and/or noise of the patrons at surrounding businesses, like THE BAR) and the distance between him and SUBJECT OFFICER and COMPLAINANT # 2, it is similarly not reasonable to believe that COMPLAINANT # 1 would have heard any potential sounds that either COMPLAINANT # 2 could have made when throwing the punch. And as a practical matter, the Complaint Examiner cannot rely on COMPLAINANT # 1's hearing to determine whether COMPLAINANT # 2 hit SUBJECT OFFICER first or vice versa. It bears repeating that COMPLAINANT # 1 did not recall the incident spilling into the street at all, which calls into question the reliability of COMPLAINANT # 1's memory. In fact, COMPLAINANT # 1 testified that it was a blur and, as a result, his testimony cannot be relied upon to determine whether SUBJECT OFFICER used excessive force.

WITNESS # 3, the hostess at the A BAR, provided a written statement signed and dated on October 24, 2013 that corroborated SUBJECT OFFICER's account. This statement is distinguished from the statement WITNESS # 3 provided to OPC, which was not signed. This statement was taken the morning of the incident by police officers. It provides, "Larger male struck officer in face. Incident stubbled (sic) into street . . . larger . . . male struck officer several more times then backup arrived." The "larger male" was later identified as COMPLAINANT # 2. WITNESS # 3's contemporaneous statement seems to support SUBJECT OFFICER's account that COMPLAINANT # 2 hit SUBJECT OFFICER first. However, WITNESS # 3's statement is not complete. It does not indicate that SUBJECT OFFICER ever pushed COMPLAINANT # 2 away after the first punch or that SUBJECT OFFICER ever hit COMPLAINANT # 2, which COMPLAINANT # 1's video illustrates and SUBJECT OFFICER admits. Similarly, WITNESS # 3's statement indicates that after the incident stumbled into the street that COMPLAINANT # 2 struck SUBJECT OFFICER several more times. However, in SUBJECT OFFICER's statement to OPC he indicated, "at some point, COMPLAINANT # 2 took a few more swings in my direction. He was also using some straight kicks toward me, but neither the swings nor the kicks landed." The record evidence reflects that WITNESS # 3 would've been at least half a block away from SUBJECT OFFICER and COMPLAINANT # 2. So, WITNESS # 3 may have seen COMPLAINANT # 2 move as if trying to hit SUBJECT OFFICER, but she couldn't be certain that the hits landed. Furthermore, in WITNESS # 3's unsigned statement to OPC, she indicated that her "attention was mostly focused on dispersing the crowd in front of the bar" and "because of this, I did not see and hear every part of this incident." While WITNESS # 3's statement is unsigned and cannot be relied upon, it stands to reason that WITNESS # 3 similarly did not observe the entire incident. SUBJECT OFFICER testified that "as [WITNESS # 3] was telling me" that "the man in the gray hat is the problem,"

she went inside. The obvious question is when did WITNESS # 3 return outside and at what point during the incident. Furthermore, the CCTV video reflects that SUBJECT OFFICER appeared to be standing in front of COMPLAINANT # 2 and would seemingly be obstructing WITNESS # 3's view. SUBJECT OFFICER testified that his back was against the wall and COMPLAINANT # 2 was very close to the wall. COMPLAINANT # 1 was also on the street, along with citizens walking by. Given that WITNESS # 3's contemporaneous statement does not appear to be complete in describing the incident, her distance from the incident (which would call into question whether she would have had a clear and undistracted view to see who threw the first punch), that she did not edit and sign her OPC statement, and could not be located to testify for the evidentiary hearing, the Complaint Examiner cannot rely on it.

The Complaint Examiner indicated in the previous allegation that he did not credit SUBJECT OFFICER's claim regarding COMPLAINANT # 1 interfering given the many inconsistencies in SUBJECT OFFICER's statements, reports and testimony. As such, the Complaint Examiner is not inclined to credit SUBJECT OFFICER's version of events regarding his claim that COMPLAINANT # 2 struck him in the face first. Given that COMPLAINANT # 1 alleged that after he told SUBJECT OFFICER that he was going to record the incident, SUBJECT OFFICER indicated that he was going to arrest COMPLAINANT # 1 for interfering and the Complaint Examiner credited COMPLAINANT # 1's account, it stands to reason that SUBJECT OFFICER would be doing so in an attempt to cover up his improper conduct.

Whether SUBJECT OFFICER used unnecessary force against COMPLAINANT # 2 regarding the second strike

Even though the Complaint Examiner has been unable to determine who physically initiated contact in this incident, the Complaint Examiner has been able to determine the amount of time between the first strike and the second strike. Given the time that transpired between when both parties allege the first hit to have occurred (based on the testimony of the parties and the CCTV video, it seems to indicate approximately 12:25:46am) and the second hit, which both parties acknowledge occurred once everyone was out of the street and shortly after everyone was back on the sidewalk (the CCTV reflects that everyone was back on the sidewalk on or about 12:26:23am) and assuming that COMPLAINANT # 1's video picks up at 12:26:23am, the second hit occurred nine seconds into COMPLAINANT # 1's video, or 12:26:32am – 45 seconds after the first hit.

COMPLAINANT # 1's video

- The video begins facing toward the ground. As COMPLAINANT # 1 adjusts the video, SUBJECT OFFICER's legs are in view and it appears that SUBJECT OFFICER takes a few steps away and that COMPLAINANT # 1 steps back. He appears to be approximately 10-15 feet away from SUBJECT OFFICER and

COMPLAINANT # 2. At the same time, SUBJECT OFFICER says, “You’re interfering. You’re going to go too.”

- Once COMPLAINANT # 1 has adjusted the video, SUBJECT OFFICER and COMPLAINANT # 2 can be seen. SUBJECT OFFICER has his hands up and to be in a fighting stance. COMPLAINANT # 2 is facing SUBJECT OFFICER with his hands hanging by his side. COMPLAINANT # 2’s hands are open – not clinched or balled.
- SUBJECT OFFICER tells COMPLAINANT # 2 to turn around.
- COMPLAINANT # 1 calls out to COMPLAINANT # 2, saying “[COMPLAINANT #2], I’m . . .” COMPLAINANT # 2 turns his head and faces COMPLAINANT # 1, who is holding the camera. At the same time, SUBJECT OFFICER hits COMPLAINANT # 2 with an open hand smack and says, “told ya – turn around.”
- COMPLAINANT # 2 briefly balls his fist and quickly releases it and says, “That was great. Hey, that’s called losing your job.” SUBJECT OFFICER continues to tell COMPLAINANT # 2 to turn around.
- COMPLAINANT # 2 walks toward SUBJECT OFFICER, leans in and invites SUBJECT OFFICER to hit him again in the face. COMPLAINANT # 2’s hands are not balled or clinched. SUBJECT OFFICER tells COMPLAINANT # 2 to stop resisting.
- After not being hit again in the face by SUBJECT OFFICER, COMPLAINANT # 2 stands upright again and faces the video, at which point SUBJECT OFFICER pushes COMPLAINANT # 2 with both hands on COMPLAINANT # 2’s left shoulder and back. COMPLAINANT # 1 can be heard saying to SUBJECT OFFICER, “He’s not resisting. You just hit him in the face twice.”
- COMPLAINANT # 2 walks away. As SUBJECT OFFICER moves closer to COMPLAINANT # 2, SUBJECT OFFICER continues to tell him to stop resisting and to get on the ground.
- COMPLAINANT # 2 looks into the video and says, “Hey, this is the man (incoherent).” SUBJECT OFFICER continues to repeatedly tell COMPLAINANT # 2 to get on the ground. SUBJECT OFFICER tells COMPLAINANT # 2, “Get on the ground or I’m going to force you.”
- COMPLAINANT # 2 appears perplexed and drops both arms to his side and takes a deep breath as he takes his hat off and scratches his head. COMPLAINANT # 2 then puts the hat back on his head.

- SUBJECT OFFICER continues to repeatedly tell COMPLAINANT # 2 to get on the ground.
- COMPLAINANT # 1 says to COMPLAINANT # 2, “Let’s just leave. Can we leave?” SUBJECT OFFICER looks toward COMPLAINANT # 1 and tells him, “You cannot leave.”
- SUBJECT OFFICER then says to COMPLAINANT # 2, “This is the third time. You’ve hit me three times.” Immediately, COMPLAINANT # 1 says loudly, “He didn’t hit you once. You hit him twice.” SUBJECT OFFICER then says to COMPLAINANT # 2, “You hit me first.” COMPLAINANT # 1 responds, “No, he did not.”
- SUBJECT OFFICER then moves closer to COMPLAINANT # 2 and continues repeating, “Get on the ground.” SUBJECT OFFICER grabs COMPLAINANT # 2’s arm and appears to try to arrest him, but COMPLAINANT # 2 resists and pushes back against SUBJECT OFFICER.
- COMPLAINANT # 2 and SUBJECT OFFICER struggle and then COMPLAINANT # 2 tries to kick SUBJECT OFFICER. SUBJECT OFFICER continues to repeatedly tell COMPLAINANT # 2 to get on the ground and to stop resisting. COMPLAINANT # 2 continues to resist.
- COMPLAINANT # 2 balls his fists and appears aggressive. SUBJECT OFFICER pushes COMPLAINANT # 2 and continues to try to arrest him. COMPLAINANT # 2 continues to resist.
- Ultimately, two additional backup officers arrive and, as COMPLAINANT # 2 continues to struggle and resist, they take him down to the ground and arrest him.

Uncovered Inconsistencies in SUBJECT OFFICER’s account

As established above, SUBJECT OFFICER testified that COMPLAINANT # 2 hit him once prior to leaving the sidewalk and he replied by pushing COMPLAINANT # 2 away. The incident then spilled into the street and SUBJECT OFFICER testified that COMPLAINANT # 2 attempted to hit him while on the street. After successfully moving the incident back onto the sidewalk, SUBJECT OFFICER testified that COMPLAINANT # 1’s video captures the remainder of the incident. The video reflects that shortly after everyone returned to the sidewalk, that SUBJECT OFFICER hit COMPLAINANT # 2, which SUBJECT OFFICER testified was the second strike to COMPLAINANT # 2. SUBJECT OFFICER testified that immediately before the video began; while in the street COMPLAINANT # 2 hit him. He testified that COMPLAINANT # 2 did not hit him solidly, that the hits landed on “the shoulder, the body.” However, SUBJECT OFFICER’s statement is inconsistent with his prior statement to OPC when he stated that after COMPLAINANT # 2 was in the street,

I gave multiple standard commands to COMPLAINANT # 2 to stop and get on the ground, which he resisted and said, 'I'm not.' I tried to keep COMPLAINANT # 2 within close proximity as he was not adhering to my commands. At some point, COMPLAINANT # 2 took a few more swings in my direction. He was also using some straight kicks toward me, but neither the swings nor the kicks landed.

SUBJECT OFFICER's preceding statement was provided before SUBJECT OFFICER said that he "delivered a straight open palm to his left shoulder, but the strike missed and I accidentally hit COMPLAINANT # 2 on the left side of his face." Additionally, during COMPLAINANT # 1's video, SUBJECT OFFICER ordered COMPLAINANT # 2 to the ground and to stop resisting. COMPLAINANT # 1 can be heard telling SUBJECT OFFICER, "He's not resisting. You hit him in the face twice." A few moments later, SUBJECT OFFICER continues to instruct COMPLAINANT # 2 to get on the ground and states, "you've hit me three times." As established above, prior to what SUBJECT OFFICER calls the second strike, SUBJECT OFFICER only mentioned being hit once by COMPLAINANT # 2 in his police report and in his statement to the Office of Police Complaints. As such, the Complaint Examiner does not credit SUBJECT OFFICER's statements given the inconsistencies in SUBJECT OFFICER's account.

SUBJECT OFFICER testified regarding the second strike that he intended to hit COMPLAINANT # 2's shoulder and knock COMPLAINANT # 2 off balance to then place COMPLAINANT # 2 under arrest; however, he missed COMPLAINANT # 2's shoulder, accidentally hitting COMPLAINANT # 2 in the face. SUBJECT OFFICER's explanation is specious on its face given that the hit appears deliberate. It is further compounded by the fact that after hitting COMPLAINANT # 2 in the face, SUBJECT OFFICER responds, "told ya."

As a result of the foregoing, the Complaint Examiner does not credit SUBJECT OFFICER's explanation and account. Nevertheless, it is clear that SUBJECT OFFICER was attempting to place COMPLAINANT # 2 under arrest even at the beginning of COMPLAINANT # 1's video (i.e., SUBJECT OFFICER telling COMPLAINANT # 2 to turn around) and that COMPLAINANT # 2 was not complying. As such, SUBJECT OFFICER was permitted some level of force. The Complaint Examiner must determine what the appropriate level was.

Whether SUBJECT OFFICER's strikes to COMPLAINANT # 2 were necessary and reasonable

According to the Final Investigative Report Regarding the Use of Force, A LIEUTENANT determined, "given that the officer was the victim of a violent physical attack, it would have been entirely reasonable for SUBJECT OFFICER to escalate his use of force utilizing less lethal weapons to include chemicals (Oc Spray), and impact weapons (ASP)." As established above, the Complaint Examiner does not credit SUBJECT OFFICER's account that he was the victim of a violent physical attack. It bears mentioning that it does not appear in THE LIEUTENANT's report that he reviewed the CCTV (the only physical evidence reviewed appear

to be COMPLAINANT # 1's video), which the Complaint Examiner found was not consistent with SUBJECT OFFICER's version of events.

MPD General Order 901.07, Section 1 provides, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation." As indicated above, the Complaint Examiner did not credit that COMPLAINANT # 2 initiated physical contact. The Complaint Examiner does credit SUBJECT OFFICER's testimony that COMPLAINANT # 2 appeared agitated given that COMPLAINANT # 1 seemed to corroborate that claim. The Complaint Examiner believes that it is unlikely that COMPLAINANT # 2 would have been responsive to verbal persuasion and, as such, a reasonable officer would have utilized hand controls, like grabs, holds or joint locks.

Other Issues

SUBJECT OFFICER's counsel attempted to have as a factor justifying the use of force, allegations made by WITNESS # 1 and WITNESS # 2 that COMPLAINANT # 2 groped WITNESS # 1 in THE BAR.⁸ The Complaint Examiner, however, limited WITNESS # 1 and WITNESS # 2 testimonies to their observations of SUBJECT OFFICER and COMPLAINANT # 2 because the proffered testimony was not relevant. SUBJECT OFFICER's counsel objected prior to and throughout the hearing to the limitation of the testimony. SUBJECT OFFICER's counsel proffered that these witness be allowed to testify as to the allegations, which WITNESS # 1 and WITNESS # 2 contend instigated the verbal altercation in front of the A BAR. SUBJECT OFFICER's counsel further contended that their testimony would illustrate "the perceived level of threat posed by COMPLAINANT # 2 and the reasonableness of SUBJECT OFFICER's response to the threat including the level of SUBJECT OFFICER's use of force."

MPD General Order 901.07 provides that "officers . . . shall use the minimum amount of force that the objectively reasonable officer would use *in light of the circumstances* (emphasis added) to effectively bring an incident or person under control." MPD General Order 901.08, Part II, Section B, further explains that, "the decision to use force of any level should be based on the danger posed by the subject, rather than the nature or category of the incident. That decision must be based on the circumstances that a reasonable member believes exist."

As such, the proffered testimony of WITNESS # 1 and WITNESS # 2 are irrelevant because SUBJECT OFFICER did not testify to seeing any physical contact between COMPLAINANT # 2 and WITNESS # 1 or anyone else. SUBJECT OFFICER testified that as

⁸ It bears mentioning that according to SUBJECT OFFICER's statement to OPC, WITNESS # 1 did not file a formal complaint against COMPLAINANT # 2. SUBJECT OFFICER's statement provides, "the assaulted female did not want to file any reports." Furthermore, COMPLAINANT # 2 testified that he denies "one hundred percent" that he groped WITNESS # 1. According to COMPLAINANT # 2's testimony, the verbal altercation arose from COMPLAINANT # 2 bumping another patron or the patron bumping him.

he was sitting across the street from THE BAR, “I saw several people waving me over.” When SUBJECT OFFICER drove across the street, he testified that he spoke to WITNESS # 3 – not WITNESS # 1 or WITNESS # 2 – before approaching COMPLAINANT # 2. SUBJECT OFFICER’s statement to OPC provides, “Before I could get more information from the hostess, she and the others ran (sic) went back inside the bar.” As such, SUBJECT OFFICER had no prior knowledge of the altercation with the two other patrons or what may have initiated it. Moreover, in SUBJECT OFFICER’s statement to OPC, he stated, “following the incident . . . I also went back to the bar and spoke with the hostess and two females.” SUBJECT OFFICER did not learn that WITNESS # 1 alleged that COMPLAINANT # 2 groped her until after COMPLAINANT # 2 had already been arrested. As such, SUBJECT OFFICER cannot use the circumstances that he learned about after he used force on COMPLAINANT # 2 to justify it.

Similarly, SUBJECT OFFICER’s counsel also wished to introduce the testimony of seven other police officers. None of the officers were present at the time of the events that gave rise to the complaint allegation of unnecessary or excessive force and, as such, their proffered testimony would also be irrelevant.

Accordingly, the Complaint Examiner sustains COMPLAINANT # 2’s allegation that SUBJECT OFFICER used excessive or unnecessary force.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1: Harassment	Sustained
Allegation 2: Use of Excessive or Unnecessary Force	Sustained

Submitted on January 15, 2016.

Kahlill Palmer
Complaint Examiner