

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	14-0078
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation	Harassment
Complaint Examiner:	Richard S. Ugelow
Merits Determination Date:	July 28, 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 alleged that on December 18, 2013 he was unlawfully stopped, searched, and harassed by SUBJECT OFFICER.¹ COMPLAINANT alleged that he was having a conversation with friends at a corner in Northeast, DC, when SUBJECT OFFICER approached him and asked what he had in his pockets. COMPLAINANT voluntarily emptied his pockets and produced, among other items, three packs of Newport cigarettes that had a Virginia tax stamp. COMPLAINANT claimed that SUBJECT OFFICER took the three packs of cigarettes and refused to return them. In addition, COMPLAINANT alleged that when he approached SUBJECT OFFICER to again ask for return of the cigarettes, SUBJECT OFFICER said words to the effect: “don’t walk up on me like that again or I’ll knock you out. Don’t be fool[ed] by this uniform...” Immediately after his encounter with SUBJECT OFFICER, COMPLAINANT filed a complaint with OPC.

¹ COMPLAINANT’s allegation that SUBJECT OFFICER harassed him by unlawfully stopping him and inquiring about cigarettes he had in his possession were dismissed on May 28, 2015. Pursuant to D.C. Code 5-1108(1), the Police Complaints Board dismissed these two allegations, concurring in the determination made by OPC’s executive director.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint. Based on a review of OPC's Report of Investigation,² 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 Complaint Examiner finds the material facts regarding this complaint to be:

1. COMPLAINANT filed a complaint with the Office of Police Complaints against SUBJECT OFFICER on December 18, 2013.
2. At about 10:50 a.m. on December 18, 2013, COMPLAINANT was standing near the intersection of 8th and H Streets, NE talking to acquaintances.
3. At the time, COMPLAINANT stated that he was waiting for the bus.
4. COMPLAINANT was approached by SUBJECT OFFICER, who asked him to empty his pockets.
5. COMPLAINANT produced, among other items, three packs of Newport cigarettes.
6. SUBJECT OFFICER observed that the cigarettes had a state of Virginia tax stamp.
7. COMPLAINANT was requested by SUBJECT OFFICER to produce a receipt for the cigarettes, but he did not have one.
8. COMPLAINANT was not arrested.
9. SUBJECT OFFICER took the three packs of cigarettes.
10. COMPLAINANT asked SUBJECT OFFICER to return the cigarettes.
11. SUBJECT OFFICER responded to COMPLAINANT's request for return of his cigarettes by telling him something along the line of "I am going to hurt your pockets."
12. When COMPLAINANT followed SUBJECT OFFICER to again ask for return of his cigarettes, SUBJECT OFFICER said words to the effect: "don't walk up on me like that again or I'll knock you out. Don't be fool[ed] by this uniform...."
13. WITNESS OFFICER #1 witnessed the incident.

² SUBJECT OFFICER did not submit objections to the Report of Investigation, even though he was given an opportunity to do so.

14. WITNESS OFFICER #1 recalls COMPLAINANT being “loud and boisterous” and accusing SUBJECT OFFICER of taking his cigarettes and not returning them.
15. WITNESS OFFICER #1 did not hear WITNESS OFFICER’S dialogue with COMPLAINANT and did not see SUBJECT OFFICER with any cigarettes in his possession.
16. WITNESS OFFICER #1 recalls that COMPLAINANT was “very loud and animated” when he claimed that SUBJECT OFFICER took his cigarettes.
17. WITNESS OFFICER #2 was a Police Cadet on December 18, 2013. WITNESS OFFICER #1 was her training officer.
18. WITNESS OFFICER #2 witnessed the December 18, 2013 encounter, but all she saw and heard was COMPLAINANT complaining that his cigarettes had been taken.
19. Approximately one hour after the incident, COMPLAINANT filed a complaint against SUBJECT OFFICER with OPC.
20. Sometime in July 2013, SUBJECT OFFICER had an encounter regarding cigarettes with COMPLAINANT at the same location.
21. During the July 2013 encounter, SUBJECT OFFICER was present when COMPLAINANT was arrested for selling six packs of Virginia-tax stamped cigarettes without a license.
22. The District of Columbia Regulatory Affairs (DCRA) was contacted and took control of the cigarettes that were taken from COMPLAINANT in July 2013.
23. SUBJECT OFFICER told OPC that during the December 2013 incident he contacted DCRA to take control of the cigarettes, and that they did so.
24. WITNESS OFFICER #1 does not recall representatives of the District of Columbia Government responding to the incident.
25. There is no documentary or corroborating evidence, and therefore no reason to believe in December 2013, that the three packs of cigarettes were given to the DCRA or any agency of the District of Columbia.
26. There is no record on the First District Property Book for December 18, 2013 reflecting that Newport cigarettes were seized.
27. SUBJECT OFFICER did not record the seizure of COMPLAINANT’s cigarettes on the First District Property Book.
28. SUBJECT OFFICER did not return the three packs of Newport cigarettes to COMPLAINANT.

IV. DISCUSSION

Pursuant to D.C. Official 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.

In July 2013, COMPLAINANT had been stopped in the Northeast corridor of DC by MPD officers, including SUBJECT OFFICER, for selling six packs of cigarettes that did not have District of Columbia tax stamps. Those cigarettes were confiscated and put in the custody of the DCRA. On December 18, 2013, when SUBJECT OFFICER saw COMPLAINANT at an intersection in Northeast, DC, he had reason to suspect that COMPLAINANT was again involved in the sale of cigarettes without a license. Thus, as OPC determined, SUBJECT OFFICER’s December encounter with COMPLAINANT was lawful. In response to SUBJECT OFFICER’s request, COMPLAINANT voluntarily emptied his pockets and produced three packs of Newport cigarettes with Virginia tax stamps. COMPLAINANT’s complaint (beyond the lawfulness of the stop) is that he was harassed by SUBJECT OFFICER verbally and by not returning the three packs of seized cigarettes.

The December 18, 2013 incident was witnessed by at least four people in addition to COMPLAINANT and SUBJECT OFFICER. While WITNESS OFFICER #1 and WITNESS OFFICER #2 were on site, neither saw what happened to the cigarettes nor did they hear the

words exchanged between COMPLAINANT and SUBJECT OFFICER. Two witnesses identified by COMPLAINANT, WITNESS #1 and WITNESS #2, were unavailable for interviews. Thus, what happened between COMPLAINANT and SUBJECT OFFICER on December 18, 2013 must be pieced together from the statements of the principals and the limited extrinsic evidence.

COMPLAINANT's version of the events is more credible for a number of reasons. First, almost immediately after his encounter with SUBJECT OFFICER, COMPLAINANT filed a complaint with OPC. The event had just taken place and everything was fresh in his mind. Further, the mere fact that he filed the complaint is some evidence of how strongly he believed that his rights had been violated by SUBJECT OFFICER. In essence, COMPLAINANT was upset about the stop, the language used by SUBJECT OFFICER and the failure to return his cigarettes.

Second, SUBJECT OFFICER did not file a response to OPC's June 4, 2015 Report of Investigation (ROI) that he had harassed COMPLAINANT. While there may not be a requirement that an officer respond to an adverse ROI determination, a failure to challenge the ROI determination suggests that it was correct.

Third, the preponderance of the evidence supports COMPLAINANT's version of the events. Of particular importance is that SUBJECT OFFICER admitted having possession of the cigarettes when he told the OPC investigator that a call had been placed to DCRA to take possession of them and that they had done so. However, WITNESS OFFICER #1 does not recall any DC Government official (particularly officials from the Office of Tax Revenue) responding to the scene. Thus, SUBJECT OFFICER's memory on this point must be discounted. Finally, SUBJECT OFFICER did not record the cigarettes on the First District Property Book. These events lead to the conclusion that COMPLAINANT's cigarettes were not returned to him by SUBJECT OFFICER.

Likewise, it is more likely than not that SUBJECT OFFICER used hostile and threatening language when COMPLAINANT pursued him in an effort to have the cigarettes returned. It is easy to visualize COMPLAINANT behavior being irritating and provoking to SUBJECT OFFICER but that would not excuse the use of threatening language, like "I'll knock you out" or otherwise harassing language by SUBJECT OFFICER.

SUBJECT OFFICER misused his police powers by threatening COMPLAINANT with bodily harm and confiscating his personal property. These actions fall squarely within actions prohibited by D.C. Code § 5-1107(a) and General Order 120.25, quoted above, defining prohibited harassment.

For these reasons, the Complaint Examiner concludes that SUBJECT OFFICER violated D.C. Code § 5-1107(a) and General Order 120.25 when he threatened to "knock out" COMPLAINANT and did not return the three packs of Newport cigarettes.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation: Harassment	Sustained
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Submitted on July 28, 2015.

Richard S. Ugelow
Complaint Examiner