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

# FINDINGS OF FACT AND MERITS DETERMINATION

| | |
|---|---|
| **Complaint No.:** | 14-0185 |
| **Complainant:** | COMPLAINANT |
| **Subject Officer(s), Badge No., District:** | SUBJECT OFFICER #1<br>SUBJECT OFFICER #2 |
| **Allegation 1:** | Harassment (SUBJECT OFFICER #1 and SUBJECT OFFICER #2) |
| **Allegation 2:** | Harassment (SUBJECT OFFICER #1) |
| **Complaint Examiner:** | Adav Noti |
| **Merits Determination Date:** | March 25, 2016 |

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC) has the authority to adjudicate citizen complaints against members of the Metropolitan Police Department (MPD) that allege abuse or misuse of police powers by such members, as provided by that section. This complaint was timely filed in the proper form as required by § 5-1107, and the complaint has been referred to this Complaint Examiner to determine the merits of the complaint as provided by § 5-1111(e).

## I. SUMMARY OF COMPLAINT ALLEGATIONS

COMPLAINANT alleges that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed him on March 19, 2014, by unlawfully patting him down during a traffic stop. The Complainant also alleges that SUBJECT OFFICER #1 harassed him during the same traffic stop by unlawfully searching the car that he was driving.[1]

## II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on February 12, 2016. The Complaint Examiner heard the testimony of the Complainant and both Subject Officers. The following exhibits were introduced at the hearing:

---

[1] The Report of Investigation states that the Complainant also alleged that (1) SUBJECT OFFICER #1 harassed him by unlawfully stopping his car and by touching her holstered gun; (2) SUBJECT OFFICER #1 spoke to him in a derogatory manner and "snapped" at him; (3) SUBJECT OFFICER #1 failed to provide her name and badge number on request; and (4) SUBJECT OFFICER #2 harassed him by searching his pockets and unlawfully issuing him five traffic citations. A member of the Police Complaints Board dismissed these allegations on September 1, 2015, concurring with the determination of OPC's Executive Director. ROI at 1 n.1 & Ex. 2.

Exhibit 1: Memorandum from MPD OFFICIAL to Internal Affairs Bureau, MPD (May 27, 2014)

Exhibits 2, 3, 4: Photographs of Complainant's car

Exhibit 5: Printout of online astronomical data for March 19, 2014

Exhibit 6: OPC Statement of SUBJECT OFFICER #1 (Aug. 28, 2014)

Exhibit 7: OPC Statement of SUBJECT OFFICER #2 (July 31, 2014)

## III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on October 15 and December 23, 2015, respectively, OPC's responses to the objections, and an evidentiary hearing conducted on February 12, 2016, the Complaint Examiner finds the material facts regarding this complaint to be:

1. At approximately 7:00 p.m. on March 19, 2014, the Complainant was driving his father's car to a restaurant located in the vicinity of the 3200 block of M Street NW. The car was a two-door Acura Integra that had tinted windows and a Florida license plate on the rear.

2. As the Complainant drove westbound on M Street, the Subject Officers were driving in a patrol car eastbound on the same street. The Subject Officers noticed that the Complainant's car had no front license plate and what they believed might be unlawfully tinted windows. The Subject Officers decided to pull the Complainant over.

3. The Subject Officers initiated the traffic stop in the 3200 block of M Street NW. The Complainant pulled over promptly, and the Subject Officers stopped their car approximately one car length behind the Complainant's.

4. The Subject Officers exited their cruiser and walked up to the Complainant's car. SUBJECT OFFICER #1 approached the Complainant's window, which he rolled down, and SUBJECT OFFICER #2 approached the passenger-side window.

5. SUBJECT OFFICER #1 asked the Complainant to produce his driver's license, proof of insurance, and the car's registration. The Complainant provided his driver's license, but he could not produce proof of insurance, and the registration he located in the car was expired. He explained to SUBJECT OFFICER #1 that the car was his father's and offered to get his father on the phone to verify that the Complainant was driving the car with permission. SUBJECT OFFICER #1 agreed. The Complainant placed multiple calls to his father while SUBJECT OFFICER #1 waited at the car window, but the Complainant's father did not answer the calls.

6. Interspersed with their discussion about the car's registration, SUBJECT OFFICER #1 and the Complainant engaged in a contentious conversation: SUBJECT OFFICER #1 suggested (incorrectly) that there was marijuana and alcohol in the car, and the Complainant suggested that the Subject Officers had pulled him over because he was an African-American male driving in Georgetown. The conversation became sufficiently antagonistic that SUBJECT OFFICER #1 — believing that the Complainant might later file some form of complaint against her — took a series of photographs of the scene with her personal cell phone to document the reasons that the Subject Officers had decided to pull over the Complainant.

7. The Subject Officers returned to their car to write notices of infractions for the Complainant's window tints, absence of front license plate, failure to provide proof of insurance, and driving with an obstructed view (for having a GPS on his windshield).

8. While the Subject Officers were writing the notices, the Complainant called his stepfather (a different person than the owner of the car, who was the Complainant's father). The Complainant described to his stepfather his interaction with SUBJECT OFFICER #1. The Complainant's stepfather suggested that the Complainant should give the phone to SUBJECT OFFICER #1 so that the Complainant's stepfather could speak with her.

9. With his stepfather on the phone, the Complainant opened his car door with his left hand, placed his left foot on the ground outside the car, and twisted around so that his right hand, holding his phone, was also out of the car. As he did this, the Complainant yelled out to the Subject Officers that his stepfather was on the phone and wished to speak with SUBJECT OFFICER #1.

10. The Subject Officers saw the Complainant place his left leg and right hand out of the car but, due to the loud traffic conditions on M Street, they could not hear what he was saying. Not able to immediately determine what the object was in Complainant's right hand, they got out of their cruiser and ordered the Complainant back into his car. The Complainant complied, returning his left leg and right hand to the inside of his car.

11. The Subject Officers walked up to the driver's side of Complainant's car and ordered him to get out and put his hands on the roof. The Complainant complied, getting out of the car with his phone still in his hand. SUBJECT OFFICER #1 took hold of the Complainant's hands and placed them on the roof of the car. Complainant let go of his cell phone, which then sat on the roof. The Subject Officers saw this and recognized the object as a phone.

12. SUBJECT OFFICER #1 began to pat down the Complainant. After a few seconds, SUBJECT OFFICER #1 stopped the pat down, and SUBJECT OFFICER #2 took over.

13. As SUBJECT OFFICER #2 patted down the Complainant, SUBJECT OFFICER #1 searched the car by entering it and shining her flashlight on the floorboards in front of, behind, and under the driver's and passenger seats.

14. The Subject Officers found no contraband or weapons in their searches of the Complainant and the car. After searching, the Subject Officers allowed the Complainant to get back into the car.

15. The Subject Officers returned to their cruiser to finish writing the notices of infractions, which they then issued to the Complainant without further incident.

16. The notice of infraction that the Subject Officers issued to the Complainant for his alleged window-tint violation was rescinded by an MPD supervisor because neither officer had followed MPD procedure that requires an officer to mechanically test a car's window tints before issuing such a ticket. The notice of infraction regarding the Complainant's alleged license plate violation was also invalid because Florida — where the car was registered — does not require front license plates.

## 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 . . . ." 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."

Similarly, 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.

The Complainant alleges that the Subject Officers harassed him by unlawfully searching his person and his car. For the reasons that follow, the Complaint Examiner finds that the

searches were unlawful, but that they were not "purposefully, knowingly, or recklessly" unlawful within the meaning of OPC's statute and regulations.

The legal standard for warrantless searches such as those at issue here is well established:

> The validity under the Fourth Amendment of [searching a driver and his car] during a lawful traffic stop depends on whether the officer had a reasonable articulable suspicion based on objective facts and circumstances that [the driver] was armed or had access to a weapon in the car and was dangerous.

*United States v. Glover*, 851 A. 2d 473, 477 (D.C. 2004) (citing *Michigan v. Long*, 463 U.S. 1032 (1983); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Terry v. Ohio*, 392 U.S. 1 (1968)); *see Jackson v. United States*, 56 A.3d 1206, 1209 (D.C. 2012). Because "the standard for determining reasonableness in the Fourth Amendment context is an objective one," *United States v. Askew*, 529 F.3d 1119, 1142 (D.C. Cir. 2008) (en banc) (citing *Whren v. United States*, 517 U.S. 806 (1996)), the question is not whether the Subject Officers suspected that the Complainant was armed and dangerous, but "whether a reasonable officer in the circumstances would have harbored such a suspicion." *Johnson v. United States*, 33 A.3d 361, 368 (D.C. 2011).

The Subject Officers testified that they suspected the Complainant was armed and dangerous because (1) he started to get out of his car during the traffic stop without being told to do so, and (2) when he started to exit the car, he was holding in his hand an object that the officers could not initially identify. Undoubtedly, pointing an unidentified object in the direction of an officer could give rise to a reasonable suspicion of danger, and the Subject Officers credibly testified that they held that suspicion upon first seeing the Complainant stick his right hand out of the car. But the problem with using this object as a basis for the search is that the Subject Officers' concerns were almost immediately dispelled: Both officers realized within seconds that the object was merely a phone. It is unclear whether they realized this as they walked up to the Complainant's car to remove him or when the Complainant put his hands on the roof and let go of his phone, but certainly by the time SUBJECT OFFICER #2 began patting down the Complainant and SUBJECT OFFICER #1 began searching his car, both officers knew that the object that had initially caused them concern was not dangerous. (Tr. 160, 193.)

Indeed, when asked why she still suspected that the Complainant posed a danger after realizing that the object was a phone, SUBJECT OFFICER #1 testified: "Because he exited the vehicle, and it still alerted me he could still have a weapon on his person or inside of his vehicle." (Tr. 164.) In other words, once the object was identified as harmless, the only remaining fact or circumstance on which the officers' suspicion was based — or could have been based — was that the Complainant had started to get out of his car.

For a suspicion to be reasonable, the facts that give rise to it must bear some logical connection to the suspicion itself. *See United States v. Spinner*, 475 F.3d 356, 359 (D.C. Cir.

2007) (finding no reasonable suspicion of danger where individual's actions generated suspicion that he had hidden something in car but gave no indication that he was armed). Neither the parties nor the Complaint Examiner has identified any case law from the District of Columbia addressing whether exiting a car during a traffic stop bears a logical connection to being armed, but the Complainant does cite two on-point decisions from other jurisdictions. In *United States v. McCraney*, 674 F. 3d 614, 620 (6th Cir. 2012), the Sixth Circuit affirmed a district court's suppression of evidence located during a search that had been based on an individual's attempts to exit a car during a traffic stop to get the officer's attention. The court held that where the individual did not "attempt to flee" and engaged in no "otherwise suspicious behavior," getting out of his car did not give rise to reasonable suspicion that he was armed. And in *United States v. Austin*, 269 F. Supp. 2d 629, 634 (E.D. Pa. 2003), the district court analyzed facts that were also highly similar to those in the instant case:

> [The defendant] attempted to exit the vehicle and reached beneath his seat. . . . [The officer] . . . grabbed the defendant's hand and saw that [the defendant] had reached for a cell phone. . . . Therefore, [the officer] was justified in reaching into the car and grabbing the defendant's arm to dispel his suspicions that [the defendant] had reached for a weapon. However, when [the officer] realized that [the defendant] had reached for a cell phone, not a weapon, there was no reason to believe that he was dealing with an armed or dangerous individual. The officer[']s actions thereafter were understandably based on the continued rush of adrenalin, but there was no basis for reasonable suspicion that the defendant had a weapon on his person or in his vehicle. Defendant was also understandably nervous . . . , but he was not violent.

*Id*. (citing *Florida v. Royer*, 460 U.S. 491 (1983)); *see also* Tr. 197 (SUBJECT OFFICER #2 testifying that he did not follow MPD window-tint testing procedures because his "adrenalin was high").

The Complaint Examiner finds the reasoning of *McCraney* and *Austin* persuasive. There are innumerable perfectly legitimate reasons that an individual might exit a car during a traffic stop — including, both here and in *McCraney*, to simply talk to the officer. It is unreasonable to suspect that anyone who gets out of a car is, on the basis of that fact alone, armed and dangerous. And there is nothing remotely suspicious about an individual bringing his cell phone with him when he gets out of his car. While either or both of these facts might be combined with *additional* facts to give rise to reasonable suspicion of danger, standing alone they bear no logical connection to possession of a weapon.

The Subject Officers rely on *Johnson v. United States*, 33 A.3d 361 (D.C. 2011), and *Commonwealth v. Douglas*, 35 N.E.3d 349 (Mass. 2015), but these cases upheld findings of reasonable suspicion where defendants engaged in a slew of suspicious conduct, of which getting out of a car was only incidental or incremental. In *Johnson*, the defendant (a) was reluctant to stop his car when pulled over, (b) appeared "hyper-nervous," (c) twice attempted to exit the car

"despite orders to remain inside,"[2] (d) had no driver's license, (e) invented a facially implausible story about needing to buy diapers, and (f) was driving a car listed in a police database as potentially stolen. 33 A.3d at 368-69; *see also id.* at 373 (Oberly, J., dissenting) (identifying nine "factors" that *Johnson* majority describes as collectively providing reasonable suspicion). And in *Douglas*, the officers had seen the defendant (a) attending a party that was tied to "acts of violence," (b) getting into a car with other attendees of that party, (c) exiting the car once the officers pulled it over, and (d) getting back into the car *and putting it in drive*, only to be stopped by another person who put her foot on the brake. 35 N.E.3d at 356. In neither of these cases — nor in any others that the Complaint Examiner has reviewed — did the court conclude, or even suggest, that the mere act of getting out of a car during a traffic stop can lead to reasonable suspicion that an individual is armed and dangerous.

In sum, getting out of a car does not reasonably give rise to suspicion that a person is armed. The Complainant did not engage in any other suspicious activity: He did not resist being pulled over, he attempted to provide the documentation that the Subject Officers requested, he complied immediately with their commands to get back into his car and then to exit it, and he engaged in no threatening, furtive, or otherwise unusual conduct whatsoever.[3] The Subject Officers' search of Complainant's person and car were therefore unlawful under the Fourth Amendment, as interpreted by *Terry* and *Long.*

Officers must sometimes make close calls in very short time periods, and some of those decisions are later determined — after calm legal reflection and research — to have been in error. But conducting a search that is subsequently found to be illegal does not necessarily mean that an officer committed harassment within the meaning of OPC's statute and regulations. Rather, to constitute misconduct the Subject Officers' searches must have been at least "*recklessly* in violation of the law." D.C. Mun. Regs. tit. 6A, § 2199.1 (emphasis added).

The Complaint Examiner cannot conclude by a preponderance of the evidence that the Subject Officers acted with reckless disregard for the law when they searched the Complainant and his car. In OPC matters in which allegations of harassment have been sustained, it is generally because the officers have violated well-established or self-evident principles. *See, e.g.*, OPC Case No. 15-0280 (finding harassment where officer violated plain text of D.C. Human Rights Act); OPC Case No. 14-0290 (finding harassment where officer searched car based solely on seeing unspecified "movement in the vehicle"); OPC Case Nos. 08-416, 08-418 (finding harassment where subject officer arrested complainant for yelling at him, despite repeated D.C. Court of Appeals decisions holding that yelling at officers is not illegal). Officers are charged with knowledge of the legal standards under which they operate (including *Terry* and *Long*), and

---

[2] SUBJECT OFFICER #1 and SUBJECT OFFICER #2 did not order the Complainant to remain in his car until after he had attempted to exit it.

[3] In their post-hearing brief, the Subject Officers argue for the first time that the Complainant's placing his foot outside his car was a "furtive" action giving rise to suspicion. That belated assertion is contrary to their own testimony, which included each officer physically reenacting the Complainant's actions. (Tr. 106, 177.)

the D.C. Court of Appeals need not have ruled on the exact facts presented in a complaint to establish their recklessness. But to sustain an allegation of harassment, there must be some factual or legal basis from which the Complaint Examiner can at least infer recklessness on the part of the Officers. Here, although there is persuasive authority establishing the illegality of the Subject Officers' searches, the Complaint Examiner is not aware of any District of Columbia statute, court decision, or policy that the officers can be deemed to have recklessly disregarded. The searches were illegal, but they were less than reckless in their illegality. Thus, the Complainant's allegations of harassment cannot be sustained under the standard that governs this proceeding.[4]

## V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

| | |
|---|---|
| **Allegation 1 (Harassment — Search of Complainant):** | Exonerated |
| **Allegation 2 (Harassment — Search of Vehicle):** | Exonerated |

SUBJECT OFFICER #2

| | |
|---|---|
| **Allegation 1 (Harassment — Search of Complainant):** | Exonerated |

Submitted on March 25, 2016.

Adav Noti
Complaint Examiner

[4] The result of this case should not be construed as an endorsement of the Subject Officers' actions towards the Complainant, particularly SUBJECT OFFICER #1'S accusations that the Complainant had engaged in a variety of criminal acts (including drug possession and drunk driving) that she had no legitimate reason to believe he had committed. Suffice it to say that the suspicions Complainant voiced during his traffic stop (*see supra* Part III ¶ 6) as to why the officers targeted him with these accusations — as well as with multiple invalid tickets — are not devoid of evidentiary support, and if such actions had been submitted to the Complaint Examiner (*see supra* n.1), allegations of misconduct might well have been sustained.