

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	16-0148 & 16-0149
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2
Allegation 1:	Harassment (SUBJECT OFFICER #1)
Allegation 2:	Retaliation (SUBJECT OFFICER #1)
Allegation 3:	Language or Conduct (SUBJECT OFFICER #2)
Complaint Examiner:	Arthur D. Sidney
Merits Determination Date:	August 29, 2016

Pursuant to D.C. Official Code § 5-1107(b-1), the Office of Police Complaints (OPC) has the sole 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 § 5-1107(a). 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, COMPLAINANT, filed two complaints with OPC on February 29, 2016. Complainant alleged that on February 26 and 27, 2016, Subject Officer, SUBJECT OFFICER #1, harassed him when SUBJECT OFFICER #1 unlawfully issued two Notices of Infraction (NOI) to him for window tint violations on both dates, and another NOI for excessive idling on February 26.

Complainant also alleged that on February 26, 2016, SUBJECT OFFICER #1 unlawfully retaliated against him by issuing the February 26 NOI immediately after Complainant requested MPD officers' names and badge numbers.

Complainant further alleged that on February 26, 2016, SUBJECT OFFICER #2, used language or engaged in conduct that was insulting, demeaning, or humiliating when he sarcastically asked Complainant and/or Witness WITNESS "you blind?"¹

¹ Complainant also alleged that on February 26, 2016, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 failed to provide their names and badge numbers when requested to do so. Complainant further alleged that on February 26, 2016, SUBJECT OFFICER #1 used language or engaged in conduct that was insulting, demeaning, or humiliating when he directed a racial slur toward Complainant and when he called him and/or witness WITNESS a "drug

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based upon a review of OPC's Report of Investigation, 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. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 did not submit objections to the Report of Investigation.

III. FINDINGS OF FACT

Based upon a review of OPC's Report of Investigation, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On February 26, 2016, around 6:30pm, Complainant along with his friend, WITNESS (Witness #1) approached SUBJECT OFFICER #1 and SUBJECT OFFICER #2, who were sitting in a marked MPD vehicle. Complainant and Witness #1 approached the MPD vehicle because the officers directed their spotlight on them.
2. As Complainant and Witness #1, walked to the MPD vehicle, they began to record their interaction with the MPD officers with a mobile phone. While recording, Complainant and Witness #1 requested that the MPD officers provide their names and badge numbers.
3. In response, SUBJECT OFFICER #1 began to write a NOI and told Complainant that he could find his name and badge number on the citation that he was preparing for Complainant's vehicle. SUBJECT OFFICER #2 motioned to his MPD badge on his chest and later said, "It's right here, you blind?"
4. SUBJECT OFFICER #1 issued a NOI for illegal window tint and placed it on Complainant's vehicle window. SUBJECT OFFICER #1 also issued a second NOI to Complainant for excessive idling. Complainant's vehicle is registered in Maryland.
5. On the following evening, February 27, 2016, around 10:30 p.m., at the same location, SUBJECT OFFICER #1 issued the Complainant's vehicle another NOI for illegal window tint. Complainant and SUBJECT OFFICER #1 did not have an interaction when this NOI was issued.

IV. DISCUSSION

dealer." On June 23, 2016, pursuant to D.C. Code § 5-1108(1), a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's executive director. Thus, these particular allegations are not the subject of this determination.

Pursuant to D.C. Code § 5-1107(a), (b-1), OPC has the sole authority 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.”

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.

1. Window Tint NOI

Complainant alleged that on February 26 and 27, 2016, SUBJECT OFFICER #1 unlawfully issued to him two NOIs for window tint violations. Complainant further alleged that the NOIs were issued without SUBJECT OFFICER #1 conducting a test or inspection.

D.C. Code § 50.2207.2(a)(1) which governs tinted window provides that no motor vehicle, other than a mini-van “may be operated or parked...[in] the District of Columbia with: (A) a front windshield or front windows that allow less than 70% light transmittance; or (B) a rear windshield or rear side windows that allows less than 50% light transmittance.”

The Code further provides that a person that is found to be in violation can be issued a \$50.00 citation. D.C. Code § 50.2207.2(c) Any motor vehicle found to be in violation is required

to be inspected at an official District Inspection Station within five days. D.C. Code § 50.2207.2(d)(1).

MPD Special Order 95.14, Motor Vehicle Tinted Window Amendment Act of 1994 provides that a tint meter will be used by MPD to measure window illumination. MPD Special Order 95.14 provides “Operators shall not be cited for a violation of the act unless a window illumination check has been performed using a tint meter...(5) Operators whose vehicles are registered outside the District of Colombia and are in compliance with their state’s window tinting law shall not be cited for failure to comply with the District of Colombia’s tinted window law. The state of Maryland allows no less than 35% light transmittance in all windows.” MPD Special Order 95.14.

SUBJECT OFFICER #1 stated that on February 27, 2016, he made the determination to issue Complainant an NOI for tinted windows based upon a visual inspection made from the inside of his MPD cruiser. According to both Complainant and SUBJECT OFFICER #1, SUBJECT OFFICER #1 did not inspect the vehicle or use a tint meter. The NOI does not list the window tint or illumination percentage to document that Complainant’s vehicle was in violation of any state’s window tint law.

SUBJECT OFFICER #1 issued an additional NOI for window tint violation on February 27, 2016 as he incorrectly believed that he only had to wait 24-hours before issuing another citation for the same offense. During the second NOI, SUBJECT OFFICER #1 admitted that he did not administer a window illumination test. Moreover, SUBJECT OFFICER #1 did not provide Complainant with the opportunity to fix the tint concern, take the vehicle to inspection station, or make a determination as to whether the degree of illumination was permissible under Maryland law. Thus, SUBJECT OFFICER #1 unlawfully issued Complainant the two NOIs for window tint violations on February 26 and 27, 2017 and therefore harassed Complainant in violation of D.C. Code § 5-1107(a) and MPD General Order 120.25.

2. Excessive Idling NOI

Complainant also alleged that SUBJECT OFFICER #1 unlawfully issued a NOI on February 26, 2016, for excessive idling. Complainant indicated that his vehicle was not running. Witness #1 could not recall whether Complainant’s vehicle was running at the time the infraction was issued.

Section 2418.3 of Title 18 of the DCMR states, “No person operating or having control over the engine of a gasoline or diesel powered motor vehicle...shall allow the engine to idle for more than three (3) minutes while the motor vehicle is parked, stopped, or standing, including for the purpose of operating air conditioning equipment in those vehicles, on public or private space except as follows: (a) To operate private passenger vehicles [any non-commercial vehicle]....”

According to SUBJECT OFFICER #1, he determined that Complainant's vehicle was running after he approached to issue the NOI for window tint violation and then issued the NOI for excessive idling. Subject Officer believed that if a car ran for fifteen minutes it would constitute excessive idling. SUBJECT OFFICER #1 did not know the rules governing MPD's classification of idling and was unable to provide any conditions as outlined in the DC Code or Regulations that would classify a vehicle as idling.

Complainant's vehicle was registered in Maryland and he alleged that his vehicle was not running at the time that SUBJECT OFFICER #1 issued the citation. Even if Complainant's vehicle was running, personal vehicles are exempt from the anti-idling laws. Thus, SUBJECT OFFICER #1 harassed Complainant when he issued Complainant the unlawful NOI for excessive idling on February 26, 2016, in violation of D.C. Code § 5-1107(a) and MPD General Order 120.25.

B. RETALIATION

The regulations governing OPC define retaliation as “[a]ction that discriminates against a person for making or attempting to make a complaint pursuant to the [OPC Statute], including action taken against a person because he or she has opposed any practice made unlawful by this [Statute] or because he or she has made a complaint or expressed an intention to file a complaint, testified, assisted, or participated in any manner in an investigation, mediation, conciliation, complaint examination or other proceeding under this [Statute].” D.C. Mun. Regs. tit. 6A, § 2199.1. MPD General Order 120.25 defines retaliation in a similar fashion.

Complainant alleged that SUBJECT OFFICER #1 retaliated against him by issuing Complainant multiple NOIs in response to Complainant and Witness #1's request for the MPD officers' names and badge numbers. Complainant requested the information so that he could file a complaint against the MPD officers. SUBJECT OFFICER #1's response was to issue several NOIs to Complainant regarding his vehicle.

To prevail upon a retaliation claim analyzed under the Title VII framework,² Complainant must show: (1) that he engaged or participated in a protected activity, (2) that he was subject to an adverse action by Subject Officer, and (3) that a causal connection exists between the protected activity and the adverse action.

A person is protected from retaliation if he or she opposes a form of police misconduct under the OPC enabling statute, i.e., harassment, unnecessary or excessive force, language or conduct, discrimination, retaliation, or failure to identify. See D.C. Code § 5-1107(a). To constitute “opposition” under this framework, the words or actions of Complainant must reasonably be interpreted by Subject Officer as opposition to a form of OPC misconduct. See Alexander v. Gerhardt Enters., Inc., 40 F.3d 187, 295 (7th Cir. 1994).

² See 42 U.S.C. § 2000e et seq.

Complainant alleged that he and Witness #1 approached and requested SUBJECT OFFICER #1 and SUBJECT OFFICER #2's names and badge numbers because they believed that the officers were shining the MPD vehicle's spotlight on them to harass them. Moreover, Complainant wanted to file a complaint regarding the MPD officers' actions and conduct. Additionally, Complainant and Witness #1 engaged in their right to request this information from the MPD officers which is a protected activity that inures to all citizens within the District of Columbia.

The second element of retaliation is showing there was an adverse action by Subject Officer against Complainant, which was met because Subject Officer issued to Complainant several NOIs. The third element requires Complainant to show that the adverse action was taken because Complainant engaged in the protected activity. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981). Although no single factor is determinative, Complainant must show that the adverse action took place after the protected activity, that there was a close temporal proximity between the protected activity and the adverse action, and that Subject Officer had knowledge of the protected activity. See Mitchell v. Baldrige, 759 F.2d 80,86 (D.C. Cir. 1985). Next, after Complainant makes a prima facie showing of retaliation, Subject Officer bears the burden of producing a legitimate, non-retaliatory reason for the adverse action. Lastly, the burden is on Complainant to show that the asserted legitimate reasons were pretextual. See St. Mary's Honor Ctr. V. Hicks, 508 U.S. 502, 507-08 (1993).

Complainant requested the name and badge numbers of the MPD officers because he felt that he was harassed by SUBJECT OFFICER #1 and SUBJECT OFFICER #2 shining the spotlight on them and wanted to file a complaint. According to the mobile telephone video, in response to Complainant and Witness #1's request for the MPD officers' names and badge numbers, SUBJECT OFFICER #1 says "hold up, hold up," pulls out a note pad and states, "you'll have my badge number when I finish with [this NOI]." In response to additional requests for his information, SUBJECT OFFICER #1 states his name and badge number and declares, "you're about to have it written down when I give this car a parking ticket." Complainant was issued the NOIs because he requested the name and badge numbers of the MPD officers.

The threshold for retaliation has been met. Subject Officer issued the NOI immediately after the protected activity (i.e., requesting the MPD officers' names and badge numbers to file a complaint). The mobile telephone video indicates that Subject Officer stated that he was answering Complainant's request for his information with the NOI that he about to issue. Subject Officer admitted that he did not decide to give the NOIs until Complainant and Witness #1 requested badge numbers and names of the MPD officers. By his own admission, Subject Officer stated in his interview with OPC that when he is given a hard time, he feels the need to justify his presence. Thus, Subject Officer issued the NOIs in response to Complainant's request for the names and badges of SUBJECT OFFICER #1 and SUBJECT OFFICER #2. Thus, SUBJECT OFFICER #1 retaliated against Complainant when he made these requests when SUBJECT OFFICER #1 issued the NOIs in violation of Title 6A DCMR, D.C. Code § 5-1107(a) and MPD General Order 120.25

C. LANGUAGE OR CONDUCT

According to MPD General Order 201.26, Part V, Section C, “All members of the department shall be courteous and orderly in their dealings with the public. They shall perform their duties quietly, remaining calm regardless of provocation to do otherwise. . . . Members shall refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name calling which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person.”

Complainant alleged that SUBJECT OFFICER #2 used language or engaged in conduct that was insulting, demeaning, or humiliating when he sarcastically asked Complainant and/or Witness #1, “you blind?” after requests for SUBJECT OFFICER #1 and SUBJECT OFFICER #2’s name and badge number. SUBJECT OFFICER #2 denied making this statement, but the mobile telephone video footage shows that SUBJECT OFFICER #2 responded to the requests by stating, “It’s right here, you blind?” while pointing to his MPD badge. MPD General Order 201.26 instructs MPD Officers to “be courteous,” remain “calm regardless of provocation,” and refrain from “harsh, violent, coarse, profane, sarcastic or insolent language. Members shall not use terms [. . .], which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person.” The comment made by SUBJECT OFFICER #2 was sarcastic, derogatory, insolent, and demeaning. Therefore, SUBJECT OFFICER #2 engaged in conduct or used language toward Complainant and Witness #1 that was insulting, demeaning, or humiliating, in violation of D.C. Code § 5-1107(a) and MPD General Order 201.26.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment	Sustained
Allegation 2: Retaliation	Sustained

SUBJECT OFFICER #2

Allegation 1: Language or Conduct	Sustained
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Submitted on August 29, 2016.

ARTHUR D. SIDNEY
Complaint Examiner