

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	16-0344
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER 1 SUBJECT OFFICER 2 SUBJECT OFFICER 3 SUBJECT OFFICER 4 SUBJECT OFFICER 5 SUBJECT OFFICER 6
Allegation 1 as to SUBJECT OFFICER 1 and SUBJECT OFFICER 2:	Harassment (Arrest)
Allegation 2 as to SUBJECT OFFICERS 1, 2, 3, 4, 5, and 6	Harassment (Search)
Complaint Examiner:	Jennifer A. Fischer, Esq.
Merits Determination Date:	October 16, 2017

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

I. SUMMARY OF COMPLAINT ALLEGATIONS

The complainant filed a complaint with the Office of Police Complaints (OPC) on August 3, 2016. Complainant alleged that on July 21, 2016, the subject officers, Metropolitan Police Department (MPD) SUBJECT OFFICER 1 and SUBJECT OFFICER 2 harassed him by unlawfully arresting him for reckless driving. After discovering video of a search of his vehicle following his arrest, COMPLAINANT further alleged that SUBJECT OFFICER 1 and SUBJECT OFFICER 2, as well as SUBJECT OFFICER 3, SUBJECT OFFICER 4, SUBJECT OFFICER 5, and SUBJECT OFFICER 6 harassed him when they unlawfully searched his car.¹

¹ In addition, COMPLAINANT alleged that on May 30, 2016, SUBJECT OFFICER 1 harassed him by unlawfully stopping him and issuing him a traffic citation. COMPLAINANT further alleged that on July 21, 2016, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 harassed him by unlawfully stopping him. COMPLAINANT also alleged

Specifically, Complainant stated that on July 21, 2016, at approximately 8:00 p.m., IN THE 900 BLOCK OF A STREET IN NW, WASHINGTON DC, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 stopped him and arrested him for reckless driving. At some point during the incident, SUBJECT OFFICERS 3, 4, 5, and 6 responded to the scene to assist. WITNESS OFFICER 1 and WITNESS OFFICER 2 also arrived to transport the complainant to the MPD DISTRICT STATION for processing. Although Complainant did not know it at the time, body-worn camera (BWC) footage revealed certain Subject Officers searching his car without his consent after he had been placed in the transport vehicle.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted on September 15, 2017 focusing on two genuine issues of material fact in dispute:

- a. Was Complainant driving recklessly and was his arrest warranted under the circumstances? Subject Officers for whom the issue applied were SUBJECT OFFICER 1 and SUBJECT OFFICER 2.
- b. What was SUBJECT OFFICER 1's involvement in the search of Complainant's car. The only Subject Officer for whom the issue applied was SUBJECT OFFICER 1.

The remaining allegations as related to other Subject Officers did not involve any genuine issues of material fact in dispute based on a review of the OPC's Report of Investigation, the objections submitted by Subject Officers on June 19, 2017, OPC's response to the objections, and BWC footage as recorded by WITNESS OFFICER 3, WITNESS OFFICER 1, and WITNESS OFFICER 2, and, therefore, did not warrant an evidentiary hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

The Complaint Examiner heard the testimony of SUBJECT OFFICERS 1, 2, 3, 4, 5, and 6; and WITNESS OFFICERS 1 and 2. Complainant did not appear at the hearing.

No exhibits were introduced at the hearing. The Report of Investigation and attached exhibits were admitted during the pre-hearing conference and no objections to those exhibits were raised by the parties.

At the outset of the evidentiary hearing, counsel for the Subject Officers objected to the hearing on the grounds that the Complainant did not appear. The Complaint Examiner noted that under D.C. Code § 6-2118.7 the OPC Executive Director may dismiss a complaint with concurrence of the Board if Complainant does not appear, but it does not require dismissal. With

that on July 21, 2016, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 used unnecessary or excessive force against him when they removed their guns from their holsters. Finally, COMPLAINANT alleged that on July 21, 2016, SUBJECT OFFICER 2 harassed him by unlawfully issuing him five traffic citations and mishandling his money. Pursuant to D.C. Code § 5-1108(1), on June 8, 2017, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's executive director.

the understanding that the OPC Executive Director was not dismissing the complaint, the Complaint Examiner proceeded with the hearing and issuing this decision.

Counsel for the Subject Officer also objected in his closing to the harassment allegation for the search being added to the complaint after the deadline for filing a complaint had passed. D.C. Code § 5-1107(d) states that a complaint is timely if it is received by OPC within 90 days from the date of incident that is the subject of the Complaint. The Code does not prohibit amending the complaint at a later date, however, as was done here. Moreover, D.C. Code § 6-2107 provides the Executive Director with the authority to extend the deadline for good cause. In this instance, Complainant was unaware that Subject Officers had searched his car until after the OPC investigator viewed the BWC footage. Thus, Complainant amended his complaint at the earliest moment when the alleged violation was brought to his attention. Thus, the Executive Director would have been well within his right to extend the deadline if it were necessary in this case. For these reasons, the Complaint Examiner proceeded with the hearing and issuing this decision.

Because Complainant did not appear at the evidentiary hearing and was not available for cross-examination, the Complaint Examiner has not relied upon his complaint statement or witness interview for evidence except to the extent that they are corroborated by other reliable evidence.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation including exhibits, the objections submitted by Subject Officers on June 19, 2017, OPC's response to the objections submitted on July 14, 2017, and BWC footage of the incident as recorded by WITNESS OFFICER 3, WITNESS OFFICER 1, and WITNESS OFFICER 2, and an evidentiary hearing conducted on September 15, 2017, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On July 21, 2016, at approximately 8:00 p.m., SUBJECT OFFICER 1 and SUBJECT OFFICER 2, driving northbound in the 5500 BLOCK OF AN AVE. IN. N.W., WASHINGTON DC, saw Complainant pass them driving southbound exceeding the speed limit.
2. SUBJECT OFFICER 1 and SUBJECT OFFICER 2 made a U-turn and proceeded southbound on AN AVE IN N.W., WASHINGTON DC, weaving in and out of traffic, also exceeding the speed limit in an attempt to reach Complainant.
3. SUBJECT OFFICER and SUBJECT OFFICER 2 observed Complainant changing lanes without signaling.
4. SUBJECT OFFICER 1 and SUBJECT OFFICER 2 observed Complainant run a red light while continuing southbound on AN AVE IN N.W., WASHINGTON DC, at A STREET IN N.W., WASHINGTON DC.
5. Complainant turned left one block past A STREET IN N.W., WASHINGTON DC and immediately pulled over to the right, in front of THE 900 BLOCK ON A STREET IN NW, WASHINGTON DC, parked, and got out of his car to walk toward the store across the street.

6. SUBJECT OFFICER 2 engaged their emergency lights and siren shortly after seeing Complainant run the red light and seconds before pulling in behind Complainant's car parked on THE 900 BLOCK ON A STREET IN NW, WASHINGTON DC.
7. At the moment Subject Officers pulled up behind Complainant, he was already out of his car and walking toward the store. Subject Officers exited their car and ordered Complainant to return to his car.
8. Complainant turned toward the Subject Officers while continuing to walk away from them and refused to return to his car.
9. Because of Complainant's refusal, Subject Officers approached Complainant and put Complainant in handcuffs.
10. Shortly after Subject Officers placed Complainant in handcuffs, SUBJECT OFFICER 3, SUBJECT OFFICER 4, SUBJECT OFFICER 5, and SUBJECT OFFICER 6, and WITNESS OFFICER 3, arrived to assist, and WITNESS OFFICER 1 and WITNESS OFFICER 2 arrived to transport Complainant.
11. Complainant asked repeatedly why he was being arrested and objected to his arrest. When SUBJECT OFFICER 1 asked Complainant if there was anything in the car they needed to know about he said no. At no time did any Officer ask Complainant to search his vehicle and at no time did Complainant provide consent to search his vehicle.
12. WITNESS OFFICER 1 and WITNESS OFFICER 2 then placed Complainant in the transport vehicle and drove him away.
13. After Complainant's departure, SUBJECT OFFICERS 1, 2, 3, 4, 5, and 6 searched Complainant's vehicle while it was parked in front of THE 900 BLOCK ON A STREET IN NW, WASHINGTON DC. Following the search, the Subject Officers left Complainant's vehicle where Complainant had parked it and did not tow it.

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. . . ."

A. Harassment

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 and in the regulations governing OPC 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."

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.

B. Allegation of Harassment against SUBJECT OFFICER 1 and SUBJECT OFFICER 2 for the arrest of Complainant

The Complainant alleged that SUBJECT OFFICER 1 and SUBJECT OFFICER 2 harassed him by unlawfully arresting him for reckless driving. For the arrest of Complainant to amount to harassment, it must have been purposeful, knowing, or reckless in violation of the law or internal guidelines of the MPD.

Complainant alleges that he was not speeding or changing lanes without signaling, and that he did not run a red light prior to SUBJECT OFFICER 1 and SUBJECT OFFICER 2 pulling up behind his car and arresting him. He alleges, rather, that SUBJECT OFFICER 1 had an unknown problem with him and had been harassing him ever since she had previously pulled him over on May 30, 2016. Thus, he contends that her pulling him over was not for reckless driving, but to harass him.

In BWC footage recorded by SUBJECT OFFICER 1 of the May 30, 2016, incident, she can be heard talking with Complainant through his car window. SUBJECT OFFICER 1 BWC footage at 0:23 (May 30, 2016). After taking his documents, she walked back to her cruiser and said to another officer, “Yo! Yeah this dude, he’s a piece of shit. Just make sure he doesn’t do anything crazy.” *Id.* at 1:42. The other officer responded with, “Oh yeah?” *Id.* at 1:44. Her statement and the other officer’s question suggests that the other officer didn’t know why she was speaking about Complainant in such a derogatory way. It left the impression that SUBJECT OFFICER 1 may, in fact, have known Complainant. During her interview and in the evidentiary hearing, SUBJECT OFFICER 1 explained that her statement about Complainant was so aggressive because she was frustrated in the heat of the moment because he was acting in such a strange way. Tr. 64:03-66:06. She explained that initially during the stop Complainant was being uncooperative and refused to roll down his window, and when he finally did, he only rolled it down part way. Exh. 7 at 2:06; 3:37, 4:13; Tr. 64:03-66:06. She claimed that he then initially refused to answer her questions and provide her with documents and did so only after several minutes. Exh. 7 at 2:10, 3:50; Tr. 64:03-66:06. She also claimed during her interview that he was driving completely erratically, at a very fast speed, blowing through stop signs and stop lights, and they could have arrested him for reckless driving, but they didn’t because he eventually became cooperative. Exh. 7 at 3:17.

SUBJECT OFFICER 1’s testimony, however, is completely discredited by the BWC footage of the encounter. Visibly seen in the BWC footage, which captures the entire encounter, Complainant rolled down his driver’s side window about $\frac{3}{4}$ of the way as soon as SUBJECT OFFICER 1 came close to his door. SUBJECT OFFICER 1 BWC footage at 0:21. He did not refuse to roll down his driver’s side window or his passenger window when asked. At no time did Complainant refuse to provide SUBJECT OFFICER 1 with his documents, and in fact provided them when asked. *Id.* at 0:43, 1:28. And although Complainant objected to the stop arguing that he didn’t run a red light, he never acted in any uncooperative manner toward SUBJECT OFFICER 1: he doesn’t raise his voice and can be seen reclining in the driver’s seat

during the interaction. *Id.* entire video. Moreover, contrary to SUBJECT OFFICER 1's claim that Complainant could have been arrested for reckless driving because of his excessive speed and blowing through stop signs and stop lights, in the video, the only reason she states for the stop is that he "almost went through a red light." SUBJECT OFFICER 1 BWC footage at 0:33

As troubling for SUBJECT OFFICER 1's credibility is her response to Complainant after he told her that he was videotaping their interaction when she returned to his vehicle after running a check on Complainant's information. *Id.* at 4:24. She told him that she too was videotaping the interaction and then she returned to her car to prepare a ticket for running a red light using her partner's ticket book. *Id.* at 4:24, 9:22. Notably, in her interview with OPC, she claims that it was her partner that issued the ticket, which is not correct. Exh. 7 at 2:20; SUBJECT OFFICER 1 BWC footage at 9:22. The ticket is seemingly retributive in that when SUBJECT OFFICER 1 initially approached Complainant she stated to him only that he "almost" ran a red light. *Id.* at 0:33. In other words, he didn't run a red light. Her behavior and exaggeration of Complainant's behavior suggests that SUBJECT OFFICER 1 issued a ticket for running a red light to Complainant when he didn't, in fact, run a red light.² She either did it because of annoyance with Complainant for not being submissive enough, because he was videotaping her, or because she had some other issue with Complainant. While this incident is not part of the decision here, it is indicative of the level of credibility with which SUBJECT OFFICER 1's testimony as to her interaction with Complainant on July 21, 2016, is to be considered – especially given the similarity in the descriptions of the reasons for the stop. Moreover, it suggests the possibility of the truth of Complainant's allegations.

It is not only SUBJECT OFFICER 1's testimony as to the May 30, 2016, incident that calls into question her credibility, however. SUBJECT OFFICER 1 testified both during her interview with the OPC investigator and during the evidentiary hearing that Complainant ran multiple stop signs (as she did in relation to the May 30, 2016 incident). Exh. 7 at 7:50; Tr.68:17-21. There are no stop signs on the section of AVE IN N.W., WASHINGTON, DC, travelled during the July 21, 2016, incident, however, (nor anywhere on AVE IN N.W., WASHINGTON DC for that matter). SUBJECT OFFICER 1 claims that she patrols this road almost daily so it is difficult to understand how she could mistake that Complainant ran stop signs. Tr. 69:8-10. It is even more incredulous when, according to both her and SUBJECT OFFICER 2, she wrote the arrest report, which says that Complainant ran only one red light and they didn't issue any ticket for running a stop sign. Exh. 9 at 10:45; Exh. 23; Tr. 67:10-15. Rather, as the arrest report and the tickets issued indicate and as SUBJECT OFFICER 2 testified, Complainant ran only one stop light at INTERSECTION IN N.W., WASHINGTON DC – no stop signs. Exh. 23; Exh. 24; Ex. 9 at 2:18.

Moreover, SUBJECT OFFICER 1's testimony that Complainant started charging toward them and acting aggressively is not credible and mirrors her exaggeration of Complainant's

² Complaint Examiner notes that the subject of harassment based on the May 30, 2016 incident is not at issue here as OPC already dismissed it based on lack of credibility by both SUBJECT OFFICER 1 and Complainant. Exh. 2 at 3. Complaint Examiner reviewed this incident solely to determine whether there might be any basis to Complainant's allegation that SUBJECT OFFICER 1 had a prior issue with Complainant. Complaint Examiner's conclusion as to the validity of the ticket is not meant to be any kind of determination in relation to Complainant's complaint on that issue, but relates only to a determination as to Complainant and SUBJECT OFFICER 1's credibility as it relates to the July 21, 2016 incident.

conduct during the May 30, 2016, incident. Exh. 7 at 8:48, 11:58; Tr. 71:22, 73:2-5, 73:11-19. In fact, she even states that his behavior was the same during both encounters, when in fact the encounters were quite different, which makes her description of events completely unreliable. Exh. 7 at 11:57. SUBJECT OFFICER 2, whose testimony is more credible, as will be discussed below, testified that Complainant walked away from them while facing them and speaking to them. Exh. 9 at 7:55; Tr. 47:2-48:9. He never alleges that Complainant was acting aggressively, but stated only that they decided to handcuff and arrest him because he was being noncompliant with their requests to return to his car and because of the reckless driving charge. Exh. 9 at 2:45, 5:21; Tr.48:11-49:19. SUBJECT OFFICER 2's statements are consistent with Complainant's statement during his interview with OPC that he was walking away from Subject Officers. Exh. 3 at 21:27.

SUBJECT OFFICER 1's testimony also lacks credibility in her testimony regarding a crowd that gathered when they were arresting Complainant. In her interview she states that "his whole entire family starts coming out; I guess they live in the location" and that because they outnumbered the officers on the scene – they numbered approximately five or six - they immediately placed Complainant in the transport vehicle and removed him from the scene for Officer safety. Exh. 7 at 9:49, 12:41. During the hearing, however, she said that she didn't know why she said that the crowd was made up of relatives. Tr.75:6-76:9. The BWC footage which starts while Complainant is in handcuffs next to his car and prior to being put in the transport vehicle doesn't show any people appearing on the south side of THE 900 BLOCK OF A STREET IN NW, WASHINGTON DC where Complainant and the officers are standing. WITNESS OFFICER 3 BWC footage at 0:40 (July 21, 2016); WITNESS OFFICER 2 BWC footage at 1:06, 1:39, 2:19 (July 21, 2016). The only observers appear later when Complainant is being led into the transport – a teenager with a bike can be seen crossing the street east of the officers, and a boy of approximately 10 years appeared on the north side of the street, also with a bike, opposite from where Complainant's car is parked and Subject Officers are speaking with Complainant. WITNESS OFFICER 3 BWC footage at 0:43; WITNESS OFFICER 2 BWC footage at 0:56. The only time one of the observers is seen speaking to the officers is when WITNESS OFFICER 3 engages the teenager in a discussion of how he needs to hug the curb when cops pass by with their sirens on. WITNESS OFFICER 3 BWC footage at 1:15. While the transport vehicle was still on the scene, two more young men appear on the north side of the street, but they say nothing to the officers. WITNESS OFFICER 3 BWC footage at 2:03; WITNESS OFFICER 2 BWC footage at 5:12. As WITNESS OFFICER 2 drives away with Complainant two additional women can be seen further east on the northside facing the officers, but it is not clear if they are watching the event or simply walking. WITNESS OFFICER 2 BWC footage at 5:38. At no time do any of these observers say anything to the Officers other than as noted. Here again, SUBJECT OFFICER 1 has grossly exaggerated her description of events and it renders her not credible.

Finally, SUBJECT OFFICER 1 failed to turn on her BWC. She claimed during her interview with OPC that she didn't recall whether she recorded the incident or not, but that if she didn't it would be because "you have to make sure that you have enough feasible time to activate your body camera" and "safety is the utmost importance before activating your body camera." Exh. 7 at 15:35. So if she didn't, it was for safety reasons because of how quickly Complainant jumped out of his car and not knowing whether he had a weapon or not. Exh. 7 at 16:27. During

the hearing, however, when pressed about why she didn't turn the BWC on earlier – when they were trying to catch up to Complainant in the car or at the very least, once they turned on the emergency lights and siren - she claimed that she did attempt to turn it on. Tr. 77:10-78:18. She alleged, however, that the camera requires two quick taps to the button and that she must not have activated it properly. *Id.* She stated that in the heat of the moment she didn't look down to verify that it was on by the green light that would appear. *Id.* While SUBJECT OFFICER 1's last claim sounds plausible – especially since these were the early days of wearing BWCs - given her earlier claim of not remembering if she turned it on, but assuming she didn't because of safety reasons, it seems less so. Moreover, given the amount of what seems to be exaggeration in her testimony surrounding both the May 30 and July 21 events, it raises the question of whether she chose not to turn it on so that she could share her own version of events without video to contradict her.

The lack of credibility and gross exaggeration of SUBJECT OFFICER 1's testimony would be sufficient to lend corroboration to Complainant's story regarding harassment by SUBJECT OFFICER 1 and sustain Complainant's allegation, but for the fact that SUBJECT OFFICER 1 was not the only officer involved in Complainant's arrest. SUBJECT OFFICER 2's testimony is more credible, although his testimony is also subject to inconsistencies, and there is no allegation that he had any prior knowledge of Complainant or reason to subject Complainant to harassment.

SUBJECT OFFICER 2's testimony as to his observation of Complainant's driving is consistent throughout the arrest report, his interview with OPC, and his testimony at the evidentiary hearing. SUBJECT OFFICER 2 consistently states that while he was travelling northbound on the 5500 BLOCK OF AN AVE. IN N.W., WASHINGTON, DC, that he observed Complainant driving southbound at an excessive rate of speed. Exh. 9 at 1:50; Tr. 35:1-7; Exh. 23. He also consistently states that following his turning around and attempting to reach Complainant that he observed Complainant change lanes without signaling and passing a red light at A STREET IN N.W., WASHINGTON DC before turning left on the right hand side OF THE 900 BLOCK ON A STREET IN NW, WASHINGTON, DC. Exh. 9 at 2:05; Tr. 35:7-20; Exh. 23.

In addition, SUBJECT OFFICER 2's description as to Complainant's behavior once Subject Officers pulled up behind Complainant is consistent with Complainant's description of events. Both SUBJECT OFFICER 2 and Complainant testify that the emergency lights and siren of the police car were activated only seconds before Complainant pulled over and that Complainant had exited his car before Subject Officers parked behind Complainant. Exh. 9 at 2:23, 3:27; Tr. 35:18-36:4; Exh. 3 at 9:22. They both testify that at the time Subject Officers ordered Complainant to return to his car and they walked toward him that Complainant was walking backward, away from the Officers with his face toward them. Exh. 9 at 7:55; Tr. 47:2-48:7; Exh. 3 at 21:27. SUBJECT OFFICER 2 does not state that Complainant acted aggressively, but only that he did not comply with their order and they thus placed him in handcuffs and ultimately decided to arrest him for reckless driving. Exh. 9 at 2:45, 5:21; Tr. 47:18-48:18. Although most of this interaction is not visible on BWC footage because of SUBJECT OFFICER 1's failure to turn on her BWC, SUBJECT OFFICER 2's description of Complainant's demeanor as being irate and objecting to his being stopped is consistent with BWC footage recorded by

officers who arrived on scene after Complainant was handcuffed. Exh. 9 at 3:52. The BWC footage shows Complainant protesting vehemently his stop and arrest, but not acting aggressively. WITNESS OFFICER 3 BWC footage at 0:31; WITNESS OFFICER 2 BWC footage at 1:16. Moreover, although the arrest report records Complainant acting aggressively, it was prepared by SUBJECT OFFICER 1 and, as already noted above, her testimony as to the interaction lacks credibility. Exh. 23.

Certain elements of SUBJECT OFFICER 2's testimony raise concerns, however. His estimate that Complainant was driving approximately 55-65 miles an hour – double the speed limit - despite having to weave in and out of the moderate traffic seen in WITNESS OFFICER 3's and WITNESS OFFICER 2's BWC footage, which was presumably travelling at the posted speed limit of 30 miles per hour, is difficult to believe. Exh. 23; Exh. 9 at 6:36; Tr. 42:1-10; WITNESS OFFICER 3 BWC footage at 0:48; WITNESS OFFICER 2 BWC footage at 0:20, 6:58. It seems more than coincidental that SUBJECT OFFICER 2's estimate in the arrest report of 60 mph is exactly thirty miles per hour over the speed limit on AVE IN N.W., WASHINGTON DC (which is 30 mph), a requirement for aggravated reckless driving. DC Code § 50-2201.04 (b-1)(1).

More disconcerting, however, is SUBJECT OFFICER 2's testimony that he was driving at over 70 miles per hour, weaving in and out of moderate traffic for at least four blocks, without turning on his emergency lights and siren. Tr.42:5-7, 42:2-3, 44:1-45:12. He claimed during the hearing that they did not turn on the lights and siren earlier because people pulling over would create a safety issue. Tr. 44:9-18. Weaving in and out of traffic at 70 miles per hour, however, without giving a warning to cars and pedestrians sounds like a much bigger safety concern. It is hard to comprehend how if Complainant's driving behavior was so unsafe for those on the road to warrant a reckless driving arrest how SUBJECT OFFICER 2's even faster driving in the same manner is not considered reckless driving. Moreover, his driving at such a speed under the conditions he describes of moderate traffic, and the presence of pedestrians and bicyclists violates D.C. Code 18-2002.2 and 2002.3. This section provides that the driver of an authorized emergency vehicle (which includes police vehicles under D.C. Code 18-9901) may "exceed the prima facie speed limit so long as it does not endanger life or property, and that such an exemption shall apply "only when the driver of the vehicle while in motion sounds an audible signal by bell, siren or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped as specified in section 712 of this title."

The judge in the hearing on Complainant's five Notices of Infractions ("NOI"s) issued in relation to this incident dismissed the NOIs for passing the red light and unreasonable speed, even after hearing from SUBJECT OFFICER 2, due to a failure to establish the violations by clear and convincing testimony. Exh. 26. The judge did not, however, provide any detail as to how the prosecutor failed to establish its case. *Id.* Subject Officer's attorney argued during the evidentiary hearing here that it was due to a failure to provide BWC footage, but the failure to provide BWC footage is specifically mentioned only in a later hearing related to the remaining NOIs for not signaling lane changes; it is not raised in the hearing at which the judge dismissed the infraction for unreasonable speed and for passing the red light. Exh. 26; Exh. 32. Without knowing the exact details of why the judge chose to dismiss the unreasonable speed ticket it is impossible to know whether his decision is specifically relevant to determining whether

Complainant was driving recklessly and the resulting arrest was merited. It is suggestive, however, that this Complaint Examiner's doubts about Complainant driving at such an excessive speed are well-founded.

In addition to questions and concerns surrounding SUBJECT OFFICER 2's testimony about Complainant's speed and his own driving, SUBJECT OFFICER 2 too has non-credible testimony as to complainant's family and friends gathering and yelling about police harassment and getting Complainant hyped. Exh. 9 at 7:50; Tr. 50:7-51:10. He claims, as did SUBJECT OFFICER 1 that this was the reason for quickly patting Complainant down and moving him to the transport vehicle. Exh. 9 at 5:39, 7:17. The BWC footage, however, shows no indication of friends gathering and no yelling about police harassment or any yelling at all. At most, as described earlier, four different people appeared at different times and from different directions and observed the scene, but none said anything to the officers except the one boy that spoke with WITNESS OFFICER 3 after WITNESS OFFICER 3 initiated a conversation. And there is no indication that these are friends or relatives of Complainant. SUBJECT OFFICER 2 claimed during the hearing that he didn't know why he said they were relatives except that he later learned Complainant lived nearby so perhaps he assumed it. Tr. 50:11-51:10. Nonetheless, his testimony as to the crowd is an exaggeration of the situation and suggests that perhaps it was fabricated to justify the arrest of Complainant.

Here Complainant was arrested for reckless driving based on his allegedly driving at an excessive speed, changing lanes without signaling, and running a stop light. The requirements for a reckless driving charge are vague. "A person shall be guilty of reckless driving if the person drives a vehicle upon a highway carelessly and heedlessly in willful or wanton disregard for the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger a person or property." DC Code § 50-2201.04 (b). If Complainant was actually driving recklessly, the Subject Officers are required to arrest Complainant as a matter of course under MPD policy. MPD General Order, Traffic Enforcement, 303.1 Part I.B.1.a.

With the available facts, however, it can't be concluded whether Complainant's arrest was genuinely for reckless driving or whether it was harassment. The lack of credibility of SUBJECT OFFICER 1 raises a significant question as to the reason for Complainant's arrest. Although SUBJECT OFFICER 2 is much more credible, his own doubtful estimate as to Complainant's speed, his exaggeration about the crowd that appeared when they stopped Complainant, and his statement that Complainant's arrest was partially due to his lack of compliance with their order to return to his car, also puts a question on the Officers' reason for Complainant's arrest.

These doubts, however, are insufficient to sustain Complainant's allegation of harassment. On the other hand, the doubts make it also impossible to exonerate the Subject Officers, which finding requires a preponderance of the evidence showing that the alleged conduct did occur but that it did not violate the policies, procedures, practices, orders or training of the MPD or the covered law enforcement agency. As discussed, the evidence here is insufficient to determine what exactly occurred. In any case, there are certainly violations by the police of law and policy, although they are not at issue here.

Similarly the doubts make it impossible to find the allegations unfounded. A finding of unfounded requires concluding that there are no facts to support that the incident complained of actually occurred. Here again, it is difficult to determine what did occur and thus whether the arrest was legitimately for reckless driving or to harass Complainant.

For these reasons, the Complaint Examiner finds that there are insufficient facts to decide whether the allegation of harassment for the arrest of Complainant occurred. *See* D.C. Code 6-2120.2(c) (a determination of “Insufficient facts,” is merited when there are insufficient facts to decide whether the alleged misconduct occurred).

C. Allegation of Harassment Against Subject Officers for the Search of Complainant’s car

Complainant alleges that Subject Officers unlawfully searched his car. Based on the definition of harassment, to establish harassment by the Subject Officers for searching the vehicle, there must have been 1) a search of the vehicle directed at Complainant or another by Subject Officers; 2) that was purposeful, knowing, or reckless; 3) in violation of the law or internal guidelines of the MPD.

1. SUBJECT OFFICERS 2, 3, 4, 5, and 6 searched Complainant’s car

SUBJECT OFFICERS 2, 3, 4, 5 and 6 can all be seen at various points in the BWC footage putting their full upper bodies into every entry of Complainant’s car.

In the BWC footage recorded by WITNESS OFFICER 3 at 1:45, SUBJECT OFFICER 3 is leaning through the back door on the driver’s side, and SUBJECT OFFICER 2 is leaning through the front door on the driver’s side, an unidentifiable officer is leaning into the front door on the passenger’s side with SUBJECT OFFICER 5 standing behind the officer. Another unidentifiable officer appears to be talking to the dispatcher. SUBJECT OFFICER 1, SUBJECT OFFICER 6, and SUBJECT OFFICER 4 are not otherwise visible, however, so the two unidentifiable officers could possibly be any of those three.

In BWC footage recorded by WITNESS OFFICER 2, at minute 3:52, SUBJECT OFFICER 2 is seen leaning through the front door on the driver’s side, SUBJECT OFFICER 3 is leaning through the back door on the driver’s side, and SUBJECT OFFICER 5 can be seen standing toward the back of the passenger side of the vehicle. WITNESS OFFICER 2 then walks around to the driver’s side of the transport vehicle and when he returns his BWC captures SUBJECT OFFICER 3 leaning through the front door of Complainant’s car on the driver’s side, SUBJECT OFFICER 4 is leaning through the back door on the driver’s side, and SUBJECT OFFICER 5 is leaning into the Complainant’s trunk. WITNESS OFFICER 2 BWC footage at 4:58.

In BWC footage recorded by WITNESS OFFICER 1, at minute 0:01, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 are seen standing next to the hood of Complainant’s car

while SUBJECT OFFICER 3 leans through the front door on the driver's side, SUBJECT OFFICER 4 leans into the back door on the driver's side, SUBJECT OFFICER 5 is leaning into leaning into Complainant's trunk, and SUBJECT OFFICER 6 leans through the front door on the passenger side.

2. SUBJECT OFFICER 1 searched Complainant's car

Although there is no BWC footage in which SUBJECT OFFICER 1 can be identified as searching Complainant's car, the footage shows at least one unidentified officer searching Complainant's car and the entire search of Complainant's car is not captured on film. There is no doubt, however, that SUBJECT OFFICER 1 participated in the search of Complainant's car. In the BWC footage, SUBJECT OFFICER 1 can be seen trying to open the front door of Complainant's car on the driver's side, but it is locked. WITNESS OFFICER 3 BWC footage at 0:44. SUBJECT OFFICER 5 points to Complainant's keys on the hood of the car and then SUBJECT OFFICER 3 asked her if she wanted to move Complainant's car. *Id.* at 0:45. SUBJECT OFFICER 1 responds, "No, I wanna look if I can see . . ." *Id.* at 0:49.

In her interview with OPC SUBJECT OFFICER 1 did not recall if she searched Complainant's car or not, but in her testimony during the evidentiary hearing she claimed that she did not. Exh. 7 at 13:27, Tr. 83:8-10. As already discussed above, SUBJECT OFFICER 1's testimony lacks credibility, but her changed story calls this specific memory into question. Moreover, as one of the two initiating officers on the scene with no Sergeant present, she would have been a primary officer on the scene, indicating that even if she didn't conduct the search herself that she would have been part of any decision to search the car. That SUBJECT OFFICER 1 was the first officer to try to enter Complainant's car without his consent and then specifically stated that she wanted to look for something in his car leaves no question that she participated in the search of Complainant's car.

3. The searches violated the law and internal guidelines of the MPD

All of the officers claim that they do not remember conducting a search of Complainant's car. To the extent they may have looked into his car, they provide a number of possible excuses: according to SUBJECT OFFICER 1, one justification for looking into Complainant's car would be to do a protective sweep for weapons due to Complainant's allegedly aggressive behavior prior to his arrest providing reasonable suspicion he had a weapon in his possession or in the car. Exh. 7 at 18:20. SUBJECT OFFICER 2 said in his interview with OPC that he did not search Complainant's vehicle or witness other officers search the vehicle, but that they may have visually looked inside the vehicle to make sure there was no valuable property that they were leaving unattended; if there was valuable property in plain view, he said that they would not have been able to leave the vehicle parked on the street. Exh. 9 at 12:18. Otherwise, SUBJECT OFFICER 2 did not believe that there would be any basis to search a vehicle incident to a traffic stop. *Id.* at 12:47. SUBJECT OFFICER 3 who did not think he had searched Complainant's vehicle said that if it happened, officers might search a vehicle incident to arrest if they were to find contraband on the detainee such as a gun or drugs. Exh. 11 at 5:35. SUBJECT OFFICER 4 understood there was footage of her searching Complainant's vehicle, but did not recall why she did so. Exh. 13 at 4:34. She said, however, that it might have been done incident to arrest for

further evidence, but that she didn't know why a vehicle would be searched in the case of a reckless driving arrest. *Id.* at 6:50. SUBJECT OFFICER 5 who also did not remember searching Complainant's car suggested that if the car was being left on the street that officers might conduct an inventory search to ensure valuable items weren't left visible inside a car. Exh. 15 at 5:03, 6:23. SUBJECT OFFICE 6 also did not remember searching Complainant's car, but said it might happen if they were trying to locate a driver's license or if they saw something in plain view like an open container of alcohol, drugs, or a weapon. Exh. 17 at 3:23, 4:02.

b) Consent or Search Warrant

The search here was in violation of the law and internal guidelines of the MPD. In the absence of consent, a search warrant is typically required to search persons and property under the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347 (1967). Here, there is no contention that there was consent or a search warrant.

ii) Probable Cause

There are exceptions to requiring consent or a search warrant for an automobile search, “[i]f a car is readily mobile and probable cause exists to believe it contains contraband.” *U.S. v. Scott*, 987 A.2d 1180, 1191 (D.C. 2010) quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) citing *California v. Carney*, 471 U.S. 386, 393, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). Here, there is no question about the mobility of the vehicle so the question is whether there was probable cause to conduct a search. “Probable cause to search a particular place exists ‘where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found’ there.” *Id.* quoting *Omelas v. United States*, 517 U.S. 690, 696 (1996).

Here, the Subject Officers do not articulate any probable cause to conduct a search of the vehicle. In fact, many of them admit that no such probable cause to search a vehicle exists for an arrest of reckless driving. SUBJECT OFFICER 1 contends that she would have had “reasonable suspicion” to search the vehicle due to Complainant's aggressive and disrespectful behavior suggesting that he might have had a gun in the car. Even if SUBJECT OFFICER 1 had credibility to suggest that she had reasonable suspicion that Complainant had a gun in a car, reasonable suspicion is not sufficient to conduct a search. She needed probable cause, which she did not have, especially as the alleged reason for Complainant's arrest was reckless driving, not carrying an unauthorized weapon. Her language as to conducting a protective sweep suggests, however, that she may have been contending that she had an exigent circumstance to search the car for a gun.

iii) Exigent Circumstances

Another exception to the Fourth Amendment warrant requirement is for exigent circumstances “when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 563 U.S. 452, 460 (2011) (internal quotation marks and alteration omitted). Exigent circumstances can include, for example, hot pursuit, imminent destruction of evidence,

and protection of the police or the public. *Hawkins v. United States*, 113 A.3d 216, 220 (D.C. 2015) (citing *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970)).

In this vein, MPD policy provides that “if a full custody arrest is made of a subject in a motor vehicle and the officer does not have probable cause to believe that the vehicle contains fruits, instrumentalities, contraband, or evidence of the crime for which he has been arrested, only those areas, which are in the immediate control of the defendant (the area from which the arrested person might gain possession of weapons or destructible evidence) at the time of his arrest may be searched incident to that arrest. The search must be conducted in the presence of the defendant.” MPD General Order, Series 602, Part I.A.1.a.(1). See also Part I.A.1.a.(2) and (3). The policy goes on to provide examples of a search with no probable cause in the case of a full custody traffic arrest: “an officer arrests a driver of a vehicle for driving after revocation. Before he is transported to a district station, those areas of the vehicle within the immediate control of the defendant at the time of his arrest should be searched. However, areas beyond his immediate control should not be searched because there is no probable cause to believe that the vehicle contains fruits, instrumentalities, contraband, or evidence of the offense of driving after revocation.” MPD General Order, Series 602, Part I.A.1.a.(1).

The only Subject Officer to speculate about an exigent circumstance is SUBJECT OFFICER 1 when she claims that she could have done a protective sweep for a gun, again, due to Complainant’s aggressive and disrespectful behavior. Her contention has no merit, however, when at the time the Subject Officers conducted the search, Complainant was already in the transport vehicle and heading to the precinct for booking. Thus, he would not have been able to use anything located in the car and no one was in danger, and there was no imminent threat of evidence being destroyed. Moreover, MPD policy provides that such a search is limited only to the areas of the vehicle within the immediate control of the defendant, not the entire car and trunk, which was done here. And finally, the search must have been done in the presence of Complainant, whereas it was done after Complainant’s departure here. Thus, the searches were not justified by exigent circumstances and were a violation of MPD policy.

iv) Inventory Search

The predominant justification among the Subject Officers for the search here is that it was an inventory search. However, an inventory search is only allowed under MPD internal guidelines when the vehicle has been brought to a police facility. MPD General Order, Series 602, Part I(B)(4) (“If a vehicle is not placed on police department property or near a police facility, it is not a traffic impoundment and shall not be inventoried or searched in any way”). Here, where the Subject Officers left Complainant’s car parked where he had left it, the most that the officers could have done pursuant to police policy was to look through the windows of the vehicle, including by means of a flashlight, as this would be considered “plain and open view.” MPD General Order, Series 602, Part I.A..4.

Inventories are not allowed when a person is arrested in an automobile and that vehicle is left parked on the street where the arrestee parked it. MPD General Order, Series 602, Part I.B.3 (“[W]hen a person is arrested in an automobile which he owns or has been authorized to use and the vehicle cannot be [classified in a manner not applicable here], that vehicle shall be classified

as prisoner's property. . . . If a vehicle classified as prisoner's property is disposed of so that it is not taken to a police facility, it shall not be inventoried in any way.""). Instead, the proper procedure when leaving an arrestee's car on the street is, if large amounts of personal property are in plain view in the automobile, to impound the vehicle. MPD General Order, Series 602, Part I.B.4.c. Only once the vehicle is at the police facility, the arresting officer "shall remove from the passenger compartment of the vehicle any personal property which can easily be seen from outside the vehicle and which reasonably has a value in excess of \$25. After removing such property, the officer shall make sure that the windows are rolled up and the doors and trunk are locked. . . . No other inventory or search of the vehicle shall be made at this time." MPD General Order, Series 602, Part I.B.4.d.

Here, the officers did not just look in Complainant's windows, however, to see what was in plain view; rather, they unlocked and opened every car door and put the top half of their bodies in and through every possible door of the car including the trunk. The search was significantly more than looking at what was visible in plain view. Moreover, even if the Subject Officers had properly impounded Complainant's vehicle for safety reasons, their search of the car significantly exceeded what would have been allowed under MPD policy. Thus, the Subject Officers did not conduct a lawful inventory.

c) The unlawful searches were knowingly committed

Having determined that the searches of Complainant's car by Subject Officers was a violation of the law and internal guidelines of the MPD, the remaining question is whether the unlawful searches were knowing, purposeful, or reckless. While an officer may not understand every traffic regulation, an officer's investigative function is integral to his activities as an officer and it is incomprehensible that the officers did not know on what basis they could conduct a search of the vehicle. This is of particular concern since an unlawful search could result in the suppression of discovered evidence and hurt or destroy an otherwise valid case. That the officers understood that their searches were unlawful is highlighted by their inconsistent testimony on the subject of the bases for their searches indicating their attempts to justify their searches after the fact. Thus, the evidence demonstrates by a preponderance of the evidence that the unlawful searches were knowing.

Because Subject Officers knowingly searched Complainant's vehicle in violation of the law and internal guidelines of the MPD, the allegation of harassment on the basis of an unlawful search against the Subject Officers is sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER 1

Allegation 1	Harassment (Arrest)	Insufficient Facts
Allegation 2	Harassment (Search)	Sustained

SUBJECT OFFICER 2

Allegation 1	Harassment (Arrest)	Insufficient Facts
Allegation 2	Harassment (Search)	Sustained

SUBJECT OFFICER 3

Allegation 2	Harassment (Search)	Sustained
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SUBJECT OFFICER 4

Allegation 2	Harassment (Search)	Sustained
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SUBJECT OFFICER 5

Allegation 2	Harassment (Search)	Sustained
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SUBJECT OFFICER 6

Allegation 2	Harassment (Search)	Sustained
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Submitted on October 16, 2017.

Jennifer A. Fischer, Esq.
Complaint Examiner