

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	16-0355
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Harassment
Complaint Examiner:	Jennifer A. Fischer, Esq.
Merits Determination Date:	April 1, 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 alleges that on August 7, 2016, Metropolitan Police Department (“MPD”) SUBJECT OFFICER harassed the COMPLAINANT when the SUBJECT OFFICER unlawfully stopped, frisked, and searched the COMPLAINANT because of having marijuana within the legal limit in plain sight.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this Complaint because, based on a review of OPC’s Report of Investigation (ROI), the Complaint Examiner determined that the ROI presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

The Complaint Examiner notes that subject officer did not respond to the OPC’s ROI. OPC sent an initial notification to Subject Officer on December 28, 2016. Because Subject Officer was on medical leave at that time, OPC issued him a new notification on February 6, 2017, when he returned to active duty, extending the deadline to respond to the ROI to February 21, 2017. OPC again extended his deadline to respond to March 3, 2017, based on a request from Subject Officer’s Union Representative. Neither Subject Officer nor his Union Representative nor an attorney representing Subject Officer raised objections to the ROI and thus, appropriately, no objections by Subject Officer were considered in reaching this Determination.

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 OPC on August 8, 2016.
2. On August 7, 2016, at approximately 5:32 p.m., Complainant was leaning on the hood of a car with a clear jar containing marijuana sitting behind him. No other persons are in the vicinity of Complainant.
3. Subject Officer and WITNESS OFFICER 1 approached Complainant and Subject Officer told Complainant to stand up and put his hands on the car, which Complainant complied with.
4. Subject Officer conducted a thorough pat down of Complainant, including putting his thumbs into Complainant's front pockets, pulling open his back pockets and peering inside, and scrunching Complainant's jeans in his hands along the outside edge the entire length of the jeans. During the pat down, Subject officer removed a cigar wrapper from Complainant's jeans and placed it on the hood of the car.
5. During the pat down, Complainant asked Subject Officer why he was being searched, to which Subject Officer stated "You got all of this weed right here in plain view. Alright? So I'm makin' sure you don't have anything else."
6. Subject Officer asked Complainant if he had any weapons, to which Complainant responded, "I got a knife," and tells Subject Officer where it was located. Subject Officer removed the small pocket knife and placed it on the roof of the car.
7. Subject Officer asked Complainant what he was doing with all the weed, to which Complainant responded that he was "smokin' it" and that he was going down to OPC the next day.
8. Upon hearing that Complainant intended to go to OPC, Subject Officer added, "Because also when I rode by, I seen you countin' a large amount of money."
9. Once Subject Officer completed his pat down, he thoroughly examined the cigar wrapper by opening it up fully and turning it over. He also examined the jar of marijuana.
10. Subject Officer then tried to open the doors of the car that Complainant had been leaning on, but the doors were locked. Complainant had previously told Subject Officer that the car did not belong to him and that he did not know whose car it was.

11. Subject Officer asked WITNESS OFFICER 2, "I can't really take this, can I?" WITNESS OFFICER 2 told him, "It's not over two ounces." Subject Officer then returned the jar to the roof of the car."
12. Subject Officer did not report this stop on his Daily Patrol Activity report, nor did he file a PD251-252, Incident Based Event Report, or a PD 76, Stop or Contact Report.

IV. DISCUSSION

Complainant alleges that he was harassed by Subject Officer when Subject Officer unlawfully stopped, frisked, and searched Complainant for having marijuana within the legal limit in plain sight. Complaint Examiner finds that Subject Officer's conduct violated the law and the internal guidelines of the MPD because Subject Officer's conduct constituted a stop and frisk with no reasonable suspicion and a search without probable cause. Moreover, Complaint Examiner finds Subject Officer's later inconsistent and uncorroborated testimony that he stopped Complainant because he and WITNESS OFFICER 1 witnessed Complainant make a hand-to-hand transaction is not credible and, combined with his failure to file proper documentation related to the stop, frisk, and search, indicates that his actions toward Complainant were purposeful, or at least knowing. Thus, as discussed further below, Complaint Examiner determines that Subject Officer's stop, frisk, and search of Complainant constituted harassment in violation of D.C. Code § 5-1107(a), MPD General Order 120.25, Part III, Section B, No. 2, and D.C. Mun. Regs. tit. 6A, § 2199.1.

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 (effective Feb. 19, 2009), 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 (2002).

Thus, to establish harassment, there must have been 1) conduct directed at Complainant by Subject Officer; 2) that was purposeful, knowing, or reckless; 3) in violation of the law or internal guidelines of the MPD; any 4) so as to subject Complainant to search, mistreatment, or other infringement of his personal or property rights or to deny or impede Complainant in the exercise or enjoyment of any right.

Here, there is no dispute as to element one. Subject Officer approached Complainant, told him to turn and place his hands on the car, and subjected Complainant to a pat down.

As to elements three and four, the evidence demonstrates that Subject Officer’s contact with Complainant rose to the level of a stop requiring reasonable suspicion when Subject Officer pat down Complainant. According to MPD General Order 304.10, Police-Citizen Contacts, Stops, and Frisks (eff. August 30, 2013), “[p]ersons ‘contacted’ may not be detained in any manner against their will, nor frisked.” Part III.A.5.a. A frisk is defined as “a limited protective search for concealed weapons or dangerous instruments. Usually, it occurs during a ‘stop’ and consists of a pat down of the individual’s clothing to determine the presence of weapons and other dangerous objects.” *Id.* at Part II.2. Here, Subject Officer conducted a pat down of Complainant’s clothes and so Subject Officer’s actions constituted a stop of Complainant rather than merely a contact.

An officer may only stop a person if s/he “reasonably suspects that a person has committed, is committing, or is about to commit any crime . . . for the purpose of determining whether or not probable cause to arrest exists.” *Id.* at Part III.B.1. A frisk, on the other hand, requires reasonable suspicion that “the person is carrying a concealed weapon or dangerous instrument and that a frisk is necessary to protect himself/herself or others.” *Id.* at Part III.C.1.

Reasonable suspicion “is more than a hunch or mere speculation on the part of the officer, but less than [] probable cause.” *Id.* at Part III.B.2. and C.2. The officer may consider a variety of factors when determining reasonable suspicion including appearance, actions, demeanor during a contact, area of the stop, time of day, police training and experience, and information from witnesses, informants, and other law enforcement sources. *Id.* In the case of a stop, “the officer shall, in every case, give the person an explanation of the purpose of the stop.” *Id.* at Part III.B.4.b. The officer is also required to maintain a record of stops and frisks on a PD

Form 251 if the stop is forcible and a PD Form 76 if the stop is nonforcible. *Id.* at Part III.D.1. The report must contain the factors relied on to determine reasonable suspicion. *Id.* at Part III.B.3.

Here, Subject Officer told Complainant early in the stop that his reason for searching Complainant was because he saw Complainant with marijuana in plain view and that he was making sure Complainant didn't have anything else. Body-Worn Camera Footage recorded by Subject Officer (BWCF), at 0:50. He did not provide any basis for his reasonable suspicion as to why he thought Complainant might have anything else. *Id.* Only after Complainant said he was going to complain to OPC did Subject Officer add that his additional justification was because he had allegedly seen Complainant counting a lot of money when he drove by. *Id.* at 1:10.

Neither viewing the marijuana when it was within the legal limit, nor when combined with allegedly seeing Complainant with a lot of cash¹ constitute reasonable suspicion sufficient to stop and frisk Complainant. Thus, the stop and frisk resulted in the mistreatment of Complainant and an infringement of his personal rights. First, the two factors, whether alone or in combination do not provide reasonable suspicion to conduct a stop. MPD SO-15-07, Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014 (Initiative 71), Eff. Feb. 26, 2015 provides that possession of marijuana, without evidence of quantity in excess of two ounces, either on its own or in proximity to any amount of cash or currency does not "constitute reasonable articulable suspicion of a crime." Part III.D.1. Second, neither of the factors articulated by Subject Officer during the stop suggest that he had a reasonable suspicion that Complainant was carrying a concealed weapon or dangerous instrument and that a frisk was necessary to protect himself or others. Nor did Subject Officer provide any such reasonable suspicion regarding weapons or dangerousness of Complainant during his interview with OPC. He even specifically stated during his interview that he did not notice anything about Complainant's appearance that suggested he had weapons, but he simply wanted to make sure Complainant did not have weapons before he stopped him. Ex. 4 at 13:00.

Moreover, Subject Officer's very thorough pat down rose to the level of a search and, as he did not even have reasonable suspicion, let alone the requisite probable cause for a search, his conduct was illegal. During the pat down, Subject Officer inserted his thumbs into Complainant's front pockets, opened his back pockets and looked inside, pulled out a cigar wrapper from Complainant's pockets, and thoroughly looked through the cigar wrapper. These actions exceeded a pat down and constituted a search requiring probable cause. BWCF at 0:50, 0:57, 1:38, 1:52, and 2:00. According to MPD General Order 304.10, during a frisk, the officer shall not reach inside the person's clothing or pockets unless the officer feels something that may reasonably

¹ Complaint Examiner considers here Subject Officer's claim that he stopped and frisked Complainant because he saw Complainant counting a lot of money. The Complaint Examiner finds this claim dubious, however, given that Subject Officer only raised it once Complainant said he was going to complain about Subject Officer's conduct and Subject Officer found no cash despite a thorough search of Complainant. A determination of credibility of this statement, however, is unnecessary here, as even if it were true, it did not provide reasonable suspicion for Subject Officer to stop and frisk Complainant.

constitute a weapon or dangerous instrument. Part III.C.4.(c)(3). MPD General Order 304.10 also provides that “[t]he authority to frisk shall not be used to conduct full searches designed to produce evidence or other incriminating material. Full searches of persons conducted without adequate probable cause to arrest are illegal and are specifically prohibited by this order.” *Id.* at III.C.4.b.

During Subject Officer’s interview with OPC, he claimed that the probable cause for the search stemmed from him and WITNESS OFFICER 1 witnessing Complainant engage in a hand-to-hand transaction. Ex. 4 at 3:47. If Subject Officer had witnessed such a transaction, it would have been sufficient for probable cause to search. This Complaint Examiner does not find Subject Officer’s statements regarding the hand-to-hand transaction credible, however. Subject Officer did not mention witnessing such a transaction at any time before, during or immediately after the search as required by MPD General Order 304.10 Part III.B.4.b., nor did he mention it in response to Complainant’s question as to the basis for the search. In addition, given the seriousness of the alleged observation, one would have expected Subject Officer to report it on the PD Forms 251 or 76 as required by MPD General Order 304.10 Part III.D.1, even if he ultimately chose not to arrest Complainant. Thus, Subject Officer’s failure to mention this very important basis to stop and search Complainant until after Complainant filed a Complaint and Subject Officer was interviewed creates significant doubt as to its veracity.

Subject Officer’s credibility is also in doubt by stating during his interview with OPC that WITNESS OFFICER 1 was his partner that day and also witnessed the alleged transaction, which could have corroborated his statements. Ex. 4 at 4:12. WITNESS OFFICER 1 stated in his interview, however, that he was not partnered with Subject Officer that day and that he did not observe the Complainant engaged in any activity, but only assisted Subject Officer for safety based on Subject Officer’s statements about what Subject Officer had witnessed. Ex. 6 at 1:52. That the two officers were not partnered is corroborated by Subject Officer’s Daily Patrol Activity Report for August 7, 2016, which shows the vehicle assigned only to Subject Officer. Ex. 10 at 2. Subject Officer’s incorrect assertion that WITNESS OFFICER 1 was his partner that day and also observed the transaction further casts doubt on Subject Officer’s credibility in stating that he witnessed Complainant conduct a hand-to-hand transaction.

Finally, Subject Officer’s credibility is further damaged by his false statements during the interview that he did not try to enter the vehicle on which Complainant sat. Ex. 4 at 6:16. Observable in the body-worn camera footage and videos taken by bystanders, Subject Officer tries to open both the front passenger and driver side doors and when he cannot, he looks inside the vehicle. BWCF at 2:20, Ex. 13 at 1:20, Ex. 14 at 0:48. Thus, Subject Officer’s statements during his interview regarding witnessing Complainant engage in a hand-to-hand transaction are not credible.

Because Subject Officer did not have reasonable suspicion to conduct a stop and frisk of Complainant or probable cause for a search, Subject Officer’s actions subjected Complainant to a search, mistreatment, and an infringement of Complainant’s personal rights in violation of the law and MPD internal regulations as required by elements three and four.

Whether such unlawful actions rose to the level of harassment, however, depends on element two: whether Subject Officer's unlawful conduct was purposeful, knowing or reckless. Here, the evidence shows Subject Officer's conduct was likely purposeful, but at a minimum, knowing and, therefore, constituted harassment. Most prominently, Subject Officer changed his articulable basis for the stop and frisk and search during his interview with OPC from what he told Complainant during the search. One might expect an Officer to forget what happened during a stop and frisk during the two months between when the actions occurred and when OPC interviewed Subject Officer; this is likely one significant reason for reporting the basis on PD Forms 271 or 76. That Subject Officer failed to file those forms and then claimed to remember more egregious conduct by Complainant than what he stated at the time of the stop, changing it from not meeting even the reasonable suspicion standard to meeting the probable cause standard, suggests an intent to cover up what he knew was unlawful behavior. That Subject Officer did not file the required reports even after Complainant warned Subject Officer that he was going to complain further suggests that Subject Officer knew he did not have even reasonable suspicion for his stop and search. Finally, that Subject Officer added factors during the stop once Complainant told him that he was going to complain indicates that his unlawful stop and search of Complainant was not only knowing, but purposeful.

Thus, because Subject Officer purposefully or knowingly stopped, frisked, and searched Complainant in violation of the law and MPD regulations, the allegation of harassment is sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1:	Sustained
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Submitted on April 1, 2017.

Jennifer A. Fischer, Esq.
Complaint Examiner