

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	17-0107 & 17-0108
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER 1 SUBJECT OFFICER 2 SUBJECT OFFICER 3
Allegation 1:	Harassment: Search, SUBJECT OFFICER 1 and SUBJECT OFFICER 2, and SUBJECT OFFICER 3
Allegation 2:	Harassment: Mishandling of Car on November 19, 2016, SUBJECT OFFICER 1 and SUBJECT OFFICER 3
Allegation 3:	Harassment: Mishandling of Car on November 25, 2016, SUBJECT OFFICER 2 and SUBJECT OFFICER 3
Complaint Examiner:	Laurie S. Kohn
Merits Determination Date:	August 28, 2017

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

The complainant filed two complaints with the Office of Police Complaints (OPC) on December 15, 2016. The two complaints related to two traffic stops conducted in the Sixth District. In the first complaint, Complainant alleged that SUBJECT OFFICER 1, SUBJECT OFFICER 2, and SUBJECT OFFICER 3, harassed him by unlawfully conducting a search of his car on November 19, 2016. In addition, he alleged that SUBJECT OFFICER 1 and SUBJECT OFFICER 3 harassed him by mishandling his car. In the second complaint, Complainant alleged that SUBJECT OFFICER 2 harassed him by mishandling his car on November 25, 2016.¹

¹ COMPLAINANT also alleged in his first complaint that on November 19, 2016, SUBJECT OFFICER 2 harassed him by unlawfully stopping him and SUBJECT OFFICER 3 harassed him when he intimidated the complainant by removing a weapon from his police belt, threatening to break his window if he did not exit his car, and unlawfully arresting him for no permit. COMPLAINANT also alleged in his second complaint that on November 25, 2016, SUBJECT OFFICER 2 harassed him when she unlawfully stopped him, threatened to use force to remove him from

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER 1, SUBJECT OFFICER 2, and SUBJECT OFFICER 3 on July 18, 2017, and OPC's response to the objections, the Complaint Examiner determined that the Report of Investigation presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER 1, SUBJECT OFFICER 2, and SUBJECT OFFICER 3 on July 18, 2017, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On November 19, 2016 at approximately 6:50 PM, SUBJECT OFFICER 2 spotted a car on the road without tags and conducted a traffic stop near A ROAD IN S.E, WASHINGTON, DC. The car was driven by Complainant. WITNESS 1 sat in the passenger seat and recorded much of the interaction on her cellphone.
2. SUBJECT OFFICER 2 used her lights to direct Complainant to pull over. SUBJECT OFFICER 2's only reason for pulling over Complainant was his missing tags.
3. SUBJECT OFFICER 2 asked Complainant for his license and registration. In response, Complainant presented a packet of papers that included a fee schedule among other documents. The packet did not include a registration or license. Complainant refused to exit his car. He asked for a supervisor.
4. SUBJECT OFFICER 1 arrived on the scene.
5. SUBJECT OFFICER 3 arrived on the scene and approached the vehicle. SUBJECT OFFICER 3 again ordered the Complainant out of his vehicle. When Complainant refused to exit, SUBJECT OFFICER 3 pulled the door handle to open the door. Discovering that it was locked, SUBJECT OFFICER 3, having identified himself as the supervisor, said he would be forced to break a window if the Complainant did not exit the vehicle. While saying this, he removed an item from his police belt.

his car if he did not exit on his own, and unlawfully arrest him for no permit. Pursuant to D.C. Code § 5-1108(1), on May 20, 2017, a member of the Police Complaints Board dismissed these allegations, concurring with a determination made by OPC's executive director.

6. Complainant exited the vehicle with his hands raised. Complainant initially refused to answer whether he has a valid driver's license. SUBJECT OFFICER 3 placed Complainant under arrest and handcuffed him.
7. SUBJECT OFFICER 1 shined his light into the front door on the passenger side. Complainant said the officers did not have his permission to search his vehicle. Complainant stated that he does not have a driver's license.
8. WITNESS OFFICER 1 and WITNESS OFFICER 2 arrived on the scene and joined the SUBJECT OFFICER 3 at the rear of the vehicle where Complainant was handcuffed.
9. Complainant stated that he hoped the officers tow his vehicle. When asked if that meant he would like his vehicle to be towed, Complainant replied that he did not ask them to tow his vehicle.
10. SUBJECT OFFICER 3 and WITNESS OFFICER 1 patted down Complainant and removed his wallet from his pocket. SUBJECT OFFICER 1 looked through the wallet and retrieved Complainant's I.D. from his wallet.
11. SUBJECT OFFICER 2 leaned inside the vehicle on the driver's side and looked through the documents that Complainant produced.
12. SUBJECT OFFICER 1 determined, after a database search, that Complainant had surrendered his driver's license but had a valid I.D. Dispatch informed SUBJECT OFFICER 2 that the VIN of Complainant's car returned no results.
13. WITNESS 1 asked if she could have her purse back from the car. WITNESS OFFICER 2 informed her that she cannot retrieve it yet as the car temporarily belonged to MPD.
14. SUBJECT OFFICER 1 obtained a property bag and kneeled on the driver's seat of the car. He removed two blue cups from the cup holders. SUBJECT OFFICER 1 looked on floor of passenger side. He then shone his police flash light into the back seat. Finally, he opened and looked inside the armrest.
15. WITNESS OFFICER 2 looked through WITNESS 1's purse, which was sitting on the front passenger seat. She then returned the purse to WITNESS 1.
16. SUBJECT OFFICER 1 carried the one of the blue cups to SUBJECT OFFICER 2 and WITNESS OFFICER 1 and asked them to smell the contents. They both indicated that they did not smell alcohol. He later took the other blue cup to SUBJECT OFFICER 2 who also indicated she did not smell alcohol.
17. SUBJECT OFFICER 1 stated that he looked only in the parts of the car that Complainant would have had access to.

18. SUBJECT OFFICER 2 stated to WITNESS OFFICER 1 that she is going to leave Complainant's car in the neighborhood rather than have it towed. She explained that if she had it towed someone would have to stay with the vehicle.
19. SUBJECT OFFICER 3 directed SUBJECT OFFICER 1 to park Complainant's car, explaining that he could ticket it and ask for a tow but that the tow truck would not come immediately. SUBJECT OFFICER 1 parked Complainant's vehicle in a legal parking spot. He placed the keys in the property bag.
20. Complainant was transported by police cruiser.
21. SUBJECT OFFICER 2 pulled Complainant over again on November 25, 2016 at approximately 3:32 p.m. when he was driving in the BLOCK OF A ROAD IN SE, WASHINGTON, DC. When Complainant refused to exit his vehicle, SUBJECT OFFICER 2 called for back up.
22. SUBJECT OFFICER 3 arrived on the scene and Complainant exited his vehicle. Officer SUBJECT OFFICER 2 placed Complainant under arrest for driving without a license after Complainant stated that he did not have a driver's license.
23. Once Complainant was in handcuffs, SUBJECT OFFICER 1, who had arrived on the scene, searched Complainant.
24. SUBJECT OFFICER 2 opened Complainant's front door on the driver's side. Complainant stated that he was not giving permission to search his private property. SUBJECT OFFICER 2 stated that she was not conducting a search.
25. SUBJECT OFFICER 1 escorted Complainant to SUBJECT OFFICER 2's cruiser. Complainant was not asked for permission to park his vehicle.
26. SUBJECT OFFICER 2 entered Complainant's vehicle and parked it next to the curb.
27. Complainant was transported by police cruiser.

IV. DISCUSSION

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.”

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.

A. Harassment: Search on November 19, 2016.

The general rule is that warrantless searches are not permissible under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967). However, officers may search a car incident to arrest under limited circumstances. An unlawful search, under MPD General Order 120.25, Part III, Section B, Subsection 2 constitutes harassment. The Supreme Court recently set forth the parameters of such a search. In *Arizona v. Gant*, the Supreme Court held that police may search an automobile incident to arrest only when it is reasonable to believe that evidence of the offense might be found in the vehicle or when an arrestee could have access to his car. *Arizona v. Gant*, 555 U.S. 2 (2009).

The circumstances involved in *Gant* were strikingly similar to this case. *Gant* was arrested for driving without a license, as was Complainant. After police had handcuffed *Gant* and placed him in the police car, they searched his car. *Id.* at 3. Similarly, after Complainant had been arrested and handcuffed outside of his vehicle on November 19, 2016, SUBJECT OFFICER 1 leaned into Complainant’s car, removed two cups, searched the floor of the passenger seat, and shone his flashlight into the back seat, and opened and looked through the contents of the armrest.

In *Gant*, the Supreme Court held that the search was unreasonable because 1) *Gant* was arrested for driving with a suspended license, “an offense for which police could not expect to

find evidence in the passenger compartment of Gant's car;" and 2) because police could not have reasonably believed that Gant could have accessed his car.

In this case as well, the search was unreasonable. Complainant indicated that he did not have a valid driver's license and that the car was not registered. The officers had found Complainant's I.D. card in his wallet and knew his identity. The car's VIN number was obtained and run prior to the search. Complainant had provided paperwork that conveyed to the officers that he was affiliated with the sovereign citizen movement, which is consistent with his failure to have a driver's license and registration. Therefore, the officers had no reasonable expectation that a search would reveal any evidence related to the crime for which Complainant was arrested, driving without a license. And since he was handcuffed behind the vehicle, the police could not have reasonably believed that Complainant could have accessed his car.

The officers provided various justifications for the search that was conducted, though none of the officers recalled having searched the car. SUBJECT OFFICER 1 stated that he didn't remember if he was the one who searched the car, but he knew the car was searched. He also didn't recall which areas were searched. But he stated that it was common to search a car incident to an arrest to see if the subject had hidden or disposed of any other element of criminal activity. SUBJECT OFFICER 2 did not recall anyone searching the car and declared she did not search the car. However, she did assert that if a search was conducted, the only reason to do so would have been to search for a driver's ID or a license. Although SUBJECT OFFICER 3 did not recall searching the car, he believed a search was conducted. SUBJECT OFFICER 3 stated that had a search been conducted, the justification would have been that Complainant identified himself as affiliated with a "domestic terrorist organization." He stated that the police would be justified in conducting a "pat down" of the vehicle as they would of an arrestee, looking for weapons. He also noted that they could search the car for ownership and registration under the circumstances.

None of these explanations justifies the search that was conducted. Since Complainant was arrested merely for driving without a permit and because he was handcuffed during the search, SUBJECT OFFICER 3's concern about Complainant's affiliation with a "domestic terrorist organization" is inapposite. In their objections, the officers claimed that the search was necessary to determine if the car had been stolen. (Obj. to ROI at 5). However, this justification is unpersuasive since the VIN number on the car was run and came back clean *prior* to the search. SUBJECT OFFICER 1's and SUBJECT OFFICER 3's justifications for when a search can be undertaken reveal a lack of understanding regarding the permissible parameters of vehicle searches incident to arrest.² Although Supreme Court precedent has not been entirely clear over the years and there are many nuances to the law of constitutional searches, the *Gant* case

² WITNESS OFFICER 2's testimony revealed she was also quite unclear of the parameters of her authority to search a vehicle. She stated incident to an arrest for driving without a license, officers often conduct a search of the wingspan of the driver, looking for weapons. She was unsure if the arrestee was required to be in the car during the arrest.

resolved the issues related to the search conducted in Complainant's case in an unambiguous way. And the case was decided seven years prior to the arrest of Complainant. Therefore, not only was this search unreasonable harassment, it reveals a strong need for training and education of officers to understand this critical issue.

SUBJECT OFFICER 1 searched Complainant's car on November 19, 2016 without consent or circumstances to justify such a warrantless search. Body-worn camera footage of SUBJECT OFFICER 2 illustrates that she merely looked through paperwork that Complainant provided for her. Therefore, allegations against her for conducting a search are not founded. SUBJECT OFFICER 3, as the supervisor on the scene, approved the search and therefore is implicated in this act of harassment.

B. Harassment: Mishandling by Parking Complainant's Car without Consent November 19, 2016.

General Order 303.3, Tow and Crane Operation and Enforcement addresses the question of whether the handling of Complainant's car on November 19, 2016 and again on November 25, 2016 was harassment. The General Order provides guidance in several different clauses that are on point. When an officer makes a traffic stop involving an unregistered vehicle, General Order 303.3 § (C)(4)(b)(1) specifies that the officer can impound that vehicle as a traffic impoundment:

Members will not impound a vehicle as a Traffic Impoundment except in the following situations:

- (1) Unregistered vehicles, which include automobiles, mopeds, motorcycles, and all-terrain vehicles (ATVs).
- (2) Vehicles deemed unsafe to be operated in the District of Columbia.
MPD Gen. Order 303.3 §(C)(4)(b)(1&2)(2006).

Later, it specifies that: "For cases outlined in IV.C.4.b.(1)...above, the member shall request a tow from UCC." MPD Gen. Order 303.3 §(C)(4)(d)(2006). And finally, Section c dictates that "DWI, DUI, No Permit, and other traffic arrests are not to be handled as Traffic Impoundments, but are categorized as Police Impoundment (Prisoner Property)." (emphasis in original). MPD Gen. Order 303.3 §(C)(4)(c)(2006).

On the other hand, when an arrest is made and the vehicle is not needed as evidence, Section 5 dictates that the car is considered Prisoner Property and, "with the operator's permission, the vehicle . . . may be left on legally parked on the streets or turned over to a licensed operator." If those options are not available to the officer and when the operator makes

such a request, then Section 5 specifies that the vehicle can be handled as a police impoundment and towed. The facts of this case render the application of General Order 303.3 confusing at best.

Complainant's car was unregistered and he was arrested for driving without a license, an offense for which his car was not needed as evidence. Therefore, the officers could have handled the car as a traffic impoundment or as a police impoundment, prisoner property. Because the officers were dealing with an unregistered car, one could read the General Order to mandate towing. However, because the car was not needed as evidence and because the arrest of Complainant involved only no permit, one could also read the General Order to require treatment of the car only as prisoner property.

If the officers had tried to follow the procedures for dealing with the car as prisoner property, they would have likely been in a catch-22. Although Complainant was never directly asked for permission to move his vehicle, his demeanor and statements at the scene strongly conveyed that he would have objected. Since the car was unregistered, the officers could not have turned the car over to a licensed operator. Therefore, the officers were left with a final option, to tow the vehicle to a police facility by an MPD-controlled crane. However, to do so, the General Order requires that the operator of the vehicle request towing. In fact, Complainant denied permission to tow the vehicle. When discussing towing, Complainant said clearly that he was not asking the officers to tow his car.

The body-worn camera footage illustrates that the officers were unsure of the procedures applicable to their handling of Complainant's car on both dates in question. On November 19, 2016, officers discussed what to do with the vehicle, ultimately deciding to move the car to a legal parking spot on their own without asking permission from Complainant. SUBJECT OFFICER 2 told WITNESS OFFICER 1 that she did not plan to have the car towed, but she would leave it in the neighborhood. WITNESS OFFICER 1 pointed out that if she had the car towed, the Complainant would have to go to Blue Plains Impoundment Lot to prove ownership. SUBJECT OFFICER 1 pointed out that if they requested towing, someone would have to stay with the car until it was towed. SUBJECT OFFICER 3 told SUBJECT OFFICER 1 to park the vehicle on the side of the road. SUBJECT OFFICER 1 asked if DPW (Department of Public Works) would take the car if it were unregistered. In response, SUBJECT OFFICER 3 explained that they could ticket the car and request a tow, but that the tow truck would not come immediately. None of this discussion related to the proper protocol for handling the car under General Order 303.03. Ultimately, without asking permission to do so and at SUBJECT OFFICER 3s direction, SUBJECT OFFICER 1 parked the car on November 19, 2016. On November 25, 2016, without any discussion between the officers and without asking permission, SUBJECT OFFICER 2 entered and parked Complainant's vehicle.

Interviews with the subject officers further revealed their unfamiliarity with protocol. SUBJECT OFFICER 1, who didn't remember if the car was registered, recalled parking Complainant's car on November 19, 2016. He stated that he did not ask permission to park the car, although he did not recall any objection to him parking it. When asked about the proper protocol, SUBJECT OFFICER 1 admitted he didn't really know the wording but that upon

arrest, officers generally park cars close to where the stop takes place and then place the keys in a property bag. As for SUBJECT OFFICER 2, she stated that she did not recall any objection to her parking Complainant's car on November 25th. She explained that she believed the General Order required towing, but could not answer why she did not call for towing in this case. SUBJECT OFFICER 3 asserted that he would not have asked permission to park the car. He explained that the General Order mandates towing of unregistered vehicles but that what is practiced and what is done diverge. In a perfect world, he asserted, they would have towed the car, but that the tow lots were overflowing. These statements reveal that SUBJECT OFFICER 1 was unfamiliar with the protocol for handling a vehicle; that SUBJECT OFFICER 2 was somewhat familiar with the protocol but could not explain why she may have deviated from it; and that SUBJECT OFFICER 3 was familiar with the General Order's mandates, but was comfortable issuing orders that conflict with MPD protocol.

The subject officers' lack of familiarity with MPD protocol and SUBJECT OFFICER 3's willingness to breach protocol simply because protocol and practice diverge are regrettable. Again, subject officers should have a greater comfort level with MPD protocol and endeavor to follow it. However, the officers' handling of Complainant's car on November 19 and 25, 2016 does not amount to harassment.

Under OPC regulations, OPC is directed as follows: "In determining whether conduct constitutes harassment, the Office 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 or the covered law enforcement agency, the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating." D.C. Mun. Regs. Tit. 6A s 2199.1 (2002). First, the dictates of General Order 303.03 conflict under these circumstances and gave the officers little clear guidance. Second, looking at the totality of the circumstances, the handling of Complainant's car placed only a negligible burden on Complainant, given the alternative of towing the car. Their treatment of the car lacked severity and failed to involve threatening or humiliating conduct. In fact, the officers' decision to park the car in the neighborhood placed less of a burden on Complainant than had they had the car towed without his permission. After his release from confinement, Complainant was able to retrieve his car from the street, rather than from an impoundment lot. Further, although Complainant did not give permission to have his car handled in any way, he did clearly state that he was not asking for his car to be towed.

The allegations regarding harassment for the handling of Complainant's car on both dates in question are unfounded.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER 1

Allegation 1: Harassment: Search	Sustained
Allegation 2: Harassment: Mishandling of Car on November 19, 2016	Unfounded

SUBJECT OFFICER 2

Allegation 1: Harassment: Search	Unfounded
Allegation 3: Harassment: Mishandling of Car on November 25, 2016	Unfounded

SUBJECT OFFICER 3

Allegation 1: Harassment Search	Sustained
Allegation 2: Harassment: Mishandling of Car on November 19, 2016	Unfounded
Allegation 3: Harassment: Mishandling of Car on November 25, 2016	Unfounded

Submitted on August 28, 2017.

Laurie S. Kohn
Complaint Examiner