

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	17-0246
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Harassment (Threat)
Allegation 2:	Harassment (Stop)
Allegation 3:	Harassment (Frisk and Search)
Complaint Examiner:	Adav Noti
Merits Determination Date:	December 20, 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

Complainant alleges that Subject Officer harassed the Complainant on February 13 and March 1, 2017, by threatening to stop, search, and arrest him if the Subject Officer ever saw the Complainant in the area again. The Complainant also alleges that the Subject Officer harassed the Complainant on March 1, 2017, by unlawfully stopping and frisking him, and by unlawfully searching him.¹

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on November 20, 2017. The Complainant did not appear for the hearing, and the Complaint Examiner did not find good cause for the Complainant's failure to appear. *See* D.C. Mun. Regs. tit. 6A, § 2120.7.

¹ The complaint further alleged that the Subject Officer harassed the Complainant on February 13, 2017, by unlawfully stopping, handcuffing, and frisking him. Pursuant to D.C. Code § 5-1108(1), a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's Executive Director. (ROI Ex. 2.)

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by the Subject Officer on September 13, 2017, OPC's response to the objections, and an evidentiary hearing conducted on November 20, 2017, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On February 13, 2017, the Subject Officer saw the Complainant on MAIN STREET #1, NW at or near the corner of MAIN STREET #1, NW and MAIN STREET #2, NW.
2. Approximately one week earlier, the Subject Officer had arrested the Complainant in the 1000 block of MAIN STREET #2, NW, which runs between MAIN STREET #1, NW and A MAAIN STREET #3, NW. The Subject Officer believed that, as part of the pending criminal case arising from that arrest, the Complainant was subject to a stay-away order from the 1000 block of MAIN STREET #2, NW.
3. The Subject Officer stopped the Complainant on February 13 for violating the stay-away order that the Subject Officer believed to be in effect.
4. SUBJECT OFFICER made a phone call to confirm the stay-away order. During that call, he learned that a D.C. Superior Court Judge had incorrectly ordered the Complainant to stay away from the 100 block of MAIN STREET #2, NW instead of the 1000 block of MAIN STREET #2, NW.
5. Upon learning of the error, the Subject Officer released the Complainant, while saying to him:
 - a. "Don't come up here again man, because I'm going to stop you every time I see you . . . I'm gonna press you out."
 - b. "If you come up here again, I'm going to find something to lock you up for. Because I could just say I saw — don't try me."
 - c. "That's part of the game. . . . If [I] keep seeing you, then you're going to go for something."
6. On March 1, 2017, the Subject Officer again saw the Complainant on Main Street #1, NW at or near the corner of MAIN STREET #2, NW. The Subject Officer stopped the Complainant one block away, at the corner of MAIN STREET #1, NW, and MAIN STREET #4, NW, saying "What did I tell you about coming over here? . . . I told you every time you come up here you're gonna get stopped."
7. The Subject Officer placed the Complainant's hands on a fence and briefly lifted up the back of his jacket. The Subject Officer and the Complainant then exchanged words for about 30 seconds, with the Complainant protesting that he lived in the area.

8. The Subject Officer asked the Complainant for permission to search him. The Complainant consented. The Subject Officer searched the Complainant but found no contraband.
9. The Subject Officer called another officer to ask if the Subject Officer had probable cause to arrest the Complainant for violating what was supposed to have been a stay-away order from the 1000 block of MAIN STREET #2, NW but had actually been entered as the 100 block of MAIN STREET #2, NW. The Subject Officer said that he “wasn’t sure if that would pass the PC muster.”
10. The other officer told the Subject Officer that order was enforceable only as entered. The Subject Officer then completed the call, told the Complainant that he was “lucky that they screwed [the order] up,” and released him.
11. During the March 1 stop, the Subject Officer said to the Complainant:
 - a. “I’m going to stop you every time.”
 - b. “If you come up here, then you’re going to get stopped.”
 - c. “If I’m out here, you’re gonna get stopped.”
 - d. “If I see you up here, then I’m going to stop you period.”
 - e. “[I will] make it uncomfortable for you to come up here.”
 - f. “You’re going to get pressed out.”
12. At least four of these statements came after the Subject Officer had been informed that the stay-away order was enforceable only as entered.
13. All of the foregoing events, except for the statements made to the Subject Officer during his telephone calls, were recorded by the Subject Officer’s body-worn camera.

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.

For the following reasons, the Complaint Examiner (1) sustains the allegation that the Subject Officer harassed the Complainant on February 13 and March 1 by repeatedly threatening to stop, search, and arrest him on sight, regardless of cause; (2) exonerates the Subject Officer on the allegation that he unlawfully stopped and frisked the Complainant on March 1; and (3) finds insufficient facts to conclude that the Subject Officer harassed the Complainant by searching him on March 1.

A. Threats

On both February 13 and March 1, the Subject Officer repeatedly threatened to stop, search, and arrest the Complainant on sight, regardless of cause. Specifically, the Subject Officer said:

- “Don’t come up here again man, because I’m going to stop you every time I see you . . . I’m gonna press you out.”
- “If you come up here again, I’m going to find something to lock you up for. Because I could just say I saw — don’t try me.”
- “That’s part of the game. . . . If [I] keep seeing you, then you’re going to go for something.”
- “I’m going to stop you every time.”

- “If you come up here, then you’re going to get stopped.”
- “If I’m out here, you’re gonna get stopped.”
- “If I see you up here, then I’m going to stop you period.”
- “[I will] make it uncomfortable for you to come up here.”
- “You’re going to get pressed out.”

Any one of these statements would be sufficient to sustain an allegation of harassment: They are threats to “deny or impede” the Complainant’s right to lawfully be present in a particular neighborhood. In fact, the unlawful nature of the threats is heightened by the Complainant’s repeated protestations during the March 1 encounter that he lived in the area — protestations that put the Subject Officer on notice that his threats to arrest the Complaint for merely being present would significantly impede the Complainant’s rights.

The Subject Officer argues that his threats were not unlawful because he genuinely believed when he made them that the Complainant was in violation of the stay-away order, such that the Complainant was indeed subject to stop, search, and arrest for being in the area. (*See* Obj. of Subj. Officer at 4.) This argument fails for the simple reason that the Subject Officer made at least four of the threats *after* learning on March 1 that he did not have probable cause to arrest the Complainant for violating the erroneously entered stay-away. Thus, even assuming for the sake of argument that the Subject Officer’s threats referred only to arresting the Complainant for stay-away violations,² several of those statements constituted threats to use the Subject Officer’s police authority against the Complainant without any legal basis.

The Complainant’s allegation that the Subject Officer harassment the Complainant by repeatedly threatening to stop, search, and arrest him without cause is sustained.

B. Stop

The Complainant alleges that the Subject Officer harassed him by stopping him on March 1, given that the Subject Officer had already learned on February 13 that the stay-away order had been entered for the wrong block. The Complaint Examiner concludes that the Subject Officer did not “purposefully, knowingly, or recklessly” violate any law or regulation by stopping the Complainant on that date.

² In reality, the Subject Officer’s argument in this respect is not consistent with the plain meaning of several of his threats, such as his threat to “find something” for which to arrest the Complainant. If the Subject Officer’s threats were solely in reference to the putative stay-away violation, he would not have needed to “find something” for which to arrest the Complainant.

To find that the Subject Officer committed misconduct as alleged in this allegation, the Complaint Examiner would need to conclude by a preponderance of the evidence that the Subject Officer knew that (or recklessly disregarded whether) he lacked legal authority to stop the Complainant on March 1. The preponderance of the evidence does not warrant such a finding. Specifically, the content of the Subject Officer's phone call on March 1 is largely inconsistent with the argument that the Subject Officer had "knowledge" that the order was "invalid and not enforceable." (ROI at 5.) To the contrary, that evidence, as recorded by the Subject Officer's body-worn camera, tends to demonstrate that the Subject Officer genuinely believed at the time he stopped the Complainant that the Subject Officer likely had the lawful authority to arrest the Complainant for violating a stay-away from the 1000 block of MAIN STREET #2, NW. This is so for several reasons.

First, the Subject Officer called another officer during the stop to confirm that an arrest "would pass the PC muster." This is strong evidence that he did not know that he lacked authority to make the stop, as the plain words of the question show that the Subject Officer thought that he might — or might not — have such authority. Indeed, it is hard to understand why the Subject Officer would call an officer to ask this question if he knew all along that the stop was unlawful. To use a more blatant example, an officer who planted drugs on an arrestee would not usually call another officer (with his body-worn camera rolling, no less) to ask, "Do I have probable cause to arrest someone for the drugs I planted on him?" Yet this is essentially what the Complaint Examiner would have to conclude that the Subject Officer did here: intentionally make an illegal stop and then get on the phone to explicitly confirm the illegality of that stop. The Complaint Examiner does not find this to be the most likely interpretation of events.

Second, the Subject Officer made the phone call expeditiously, very shortly after stopping and securing the Complainant. This, too, tends to show that the Subject Officer was uncertain as to the enforceability of the stay-away order in the 1000 block of MAIN STREET #2, NW (which it had been intended to cover) and was genuinely interested in resolving that uncertainty. The Complaint Examiner finds it unlikely that an officer who was intentionally and actively engaged in unlawful conduct would reach out so quickly to seek input regarding his actions.

Third, the argument that the Subject Officer knew or should have known from his February 13 call "that the [stay-away] order contained an error that listed a nonexistent address, *and was thus invalid and not enforceable*" appears to conflate the events of February 13 and March 1. On February 13, the Subject Officer did clearly learn that the stay-away order erroneously listed an incorrect address, one that was relatively far away from the area where the Subject Officer stopped the Complainant.³ But it was not until the call of March 1 that the Subject Officer asked and was told that the clerical error rendered the stay-away order *unenforceable* in the 1000 block.

³ The ROI's description of the 100 block of MAIN STREET #2, NW as "nonexistent" appears to be in error.

There are many ways that an erroneous address could end up associated with a stay-away order, and not all of them would make the order unenforceable. For example: The prosecutor might give the Court the wrong address; the prosecutor might give the Court and the defendant the correct address while the Court enters the wrong address on its docket; the Judge might orally state the correct address but sign an order with the incorrect address; and so on. In some of these situations, a stay-away order that shows up in one system with an incorrect address might well be enforceable against the defendant nonetheless. Because a clerical error does not necessarily render a court order unenforceable, the Complaint Examiner cannot infer from the events of February 13 that the Subject Officer must have already known that the order was unenforceable when he stopped the Complainant on March 1.

Finally, upon being told that that the order did not provide probable cause to arrest the Complainant, the Subject Officer called the Complainant “lucky” and released him. These actions — and the promptness with which the Subject Officer conducted them — show the Subject Officer complying expeditiously with his Fourth Amendment obligations despite his obvious disappointment at not having legal authority to arrest the Complainant that day.

In short, the preponderance of the evidence tends to demonstrate that the Subject Officer had reasonable, articulable suspicion that the Complainant had committed contempt of court on March 1. This gave the Subject Officer a lawful basis to stop the Complainant while checking on the status of the stay-away. Because the Subject Officer acted with due care in determining the enforceability of the erroneous stay-away order and did not intentionally, knowingly, or recklessly violate any law or regulation in doing so, the Subject Officer is exonerated on the allegation that he harassed the Complainant by stopping him on March 1.

C. Frisk and Search

The record provides insufficient facts from which the Complaint Examiner can determine by a preponderance of the evidence whether the Subject Officer unlawfully frisked or searched the Complainant on March 1.

MPD General Order 304.10 permits officers to frisk lawfully-stopped citizens for weapons under certain circumstances; it does not permit officers to conduct a frisk for drugs or other evidence.

The body-worn camera footage shows the Subject Officer briefly lifting the back of the Complainant’s jacket while in the process of stopping him. Although there is no reliable evidence in the record regarding why the Subject Officer did this,⁴ it appears to be consistent with the scope and procedure of a permissible frisk. *See* MPD General Order 304.10.III.C.4.c.2

⁴ During his interview with OPC, the Subject Officer acknowledged having searched the Complainant for drugs. The body-worn camera video confirms that the Subject Officer did conduct such a search, but only after obtaining the Complainant’s consent.

(“The officer shall begin the frisk at the area of the person’s body or clothing most likely to contain a concealed weapon or dangerous instrument and shall limit the frisk to a patdown. Outer clothing, such as overcoats and jackets, may be opened to allow a pat-down directly on shirts and trousers . . .”).

The body-worn camera video then shows the left side of the Complainant’s jacket moving in a manner possibly consistent with the Subject Officer searching it, but the Subject Officer’s hands cannot be seen in the video at the key moment in which the search might have occurred. Thus, the Complainant Examiner cannot determine whether the Subject Officer conducted a search of the Complainant’s left jacket pocket in violation of General Order 304.10.

Because the exhibits to the ROI were inconclusive on these points, the Complaint Examiner determined that an evidentiary hearing was necessary to resolve the factual disputes. The Complainant failed to appear or present evidence at the evidentiary hearing. Accordingly, there are insufficient facts from which the Complaint Examiner can determine by a preponderance of the evidence whether the Subject Officer unlawfully frisked or searched the Complainant on March 1.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER:

Allegation 1 (Harassment — Threats):	Sustained
Allegation 2 (Harassment — Stop):	Exonerated
Allegation 3 (Harassment — Frisk and Search)	Insufficient Facts

Submitted on December 20, 2017.

ADAV NOTI
Complaint Examiner