

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	17-0578
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer, Badge No., District:</b>	SUBJECT OFFICER
<b>Allegation 1:</b>	Harassment
<b>Allegation 2:</b>	Failure to Identify
<b>Complaint Examiner:</b>	Richard S. Ugelow
<b>Merits Determination Date:</b>	March 12, 2018

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 was sitting alone on a picnic table in A PARK IN NE, WASHINGTON, DC. He was wearing shorts, a tee shirt and had a backpack (book bag) strapped to his shoulders. There were 8-10 other individuals, including young children, sitting on other tables and benches in the enclosed playground area. SUBJECT OFFICER and two other MPD officers were on patrol in an MPD Cruiser. SUBJECT OFFICER exited the cruiser, which was parked about 20-30 yards away from the playground and walked to where COMPLAINANT was sitting. SUBJECT OFFICER believed that he saw an "L" shaped object in the backpack, which could have been a weapon. COMPLAINANT told SUBJECT OFFICER that he did not want to answer his questions. SUBJECT OFFICER then stated that he was going to pat down COMPLAINANT's backpack or book bag, which he did. COMPLAINANT objected and attempted to stop him by twisting his body. SUBJECT OFFICER pointed to his right breast pocket, when COMPLAINANT asked for his name, but there was no name plate. SUBJECT OFFICER quickly gave COMPLAINANT his name and badge number as he walked away. COMPLAINANT orally repeated SUBJECT OFFICER's badge number.

**II. EVIDENTIARY HEARING**

No evidentiary hearing was conducted regarding this complaint. Based on a review of OPC's Report of Investigation and attached exhibits, the Complaint Examiner's review of the Body Worn Camera footage (BWC), the objections submitted on behalf of SUBJECT OFFICER on January 2, 2017 by the DC Police Union, 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, with exhibits, and the Complaint Examiner's review of the Body Worn Camera recordings (BWC), the objections submitted on behalf of SUBJECT OFFICER on January 2, 2017 by the DC Police Union, and OPC's response to the objections, the Complaint finds the material facts regarding this complaint to be:

1. The Complainant filed a timely complaint with OPC on July 17, 2017, regarding an encounter with SUBJECT OFFICER that occurred on July 3, 2017.
2. On July 3, 2017, at approximately 7: 15 pm, COMPLAINANT was sitting on a picnic table located in the playground area of A PARKIN IN NE, WASHINGTON, DC.
3. Approximately 8-10 other people, including young children, were standing or sitting on benches and tables in the enclosed playground area.
4. COMPLAINANT was sitting on a table alone but facing other occupied tables and benches.
5. At the time of the incident, COMPLAINANT was wearing shorts, a red tee shirt and a backpack.
6. THE PARK IN NE, WASHINGTON, DC, contains a recreation center and, according to MPD SUBJECT OFFICER, is in an unsafe area.
7. On July 3, SUBJECT OFFICER was assigned to the Crime Suppression Unit.
8. SUBJECT OFFICER was on patrol in a marked MPD cruiser on a "10-4" plus patrol along with MPD WITNESS OFFICER 1 and WITNESS OFFICER 2. SUBJECT OFFICER was riding in the backseat. The Cruiser was driven by WITNESS OFFICER 2.
9. SUBJECT OFFICER was instructed by the Sixth District Commander to patrol THE PARK IN NE, WASHINGTON, DC, in order to prevent violent crimes.
10. SUBJECT OFFICER and WITNESS OFFICER 2 told OPC that guns, drugs, and ammunition routinely had been recovered at THE PARK IN NE, WASHINGTON, DC.

The Officers also told OPC that guns had been recovered from book bags, especially over the summer when it is difficult to conceal a weapon in clothing.

11. WITNESS OFFICER 1 was on a 30-day training detail with SUBJECT OFFICER and WITNESS OFFICER 2.
12. WITNESS OFFICER 1 told OPC that they were looking for anyone who “may have had a gun.”
13. Each of the Officers was wearing and activated their BWC when they left the cruiser.
14. The MPD Cruiser was approximately 30 yards from the playground area, where COMPLAINANT was sitting on a table.
15. The BWC videos show a low fence, trees, trash cans, and other individuals located between the Cruiser and COMPLAINANT, all of which would have partially obscured SUBJECT OFFICER’s ability to identify a bulge or an “L” shaped object in COMPLAINANT’s backpack.
16. According to SUBJECT OFFICER, COMPLAINANT drew his attention because he (COMPLAINANT) “did not take his eyes off the police car” as it drove by. SUBJECT OFFICER stated that COMPLAINANT “had his head on a swivel.”
17. WITNESS OFFICER 2 told OPC that COMPLAINANT was looking at the approaching officers, like “he was trying to hide something.”
18. SUBJECT OFFICER told OPC that he saw a bulge in the shape of an “L” in the backpack, which would be consistent with the shape of hand gun.
19. SUBJECT OFFICER approached COMPLAINANT and tried to engage in small talk with him. COMPLAINANT did not seem interested in engaging in conversation. When asked what he was doing and whether he had played basketball, COMPLAINANT responded that he his was “chilling” and that he had not played basketball.
20. COMPLAINANT was wearing his backpack. The outline of an “L” shape object is not visible from the BWC videos and the video taken by a bystander (Exhibit 12).
21. COMPLAINANT, in response to SUBJECT OFFICER’s request, said that he could not examine the back pack and that there was nothing in it.
22. COMPLAINANT also asked SUBJECT OFFICER if he had a “call on [him]”
23. COMPLAINANT rejected SUBJECT OFFICER’s request to look into COMPLAINANT’s backpack.

24. SUBJECT OFFICER then told COMPLAINANT that he was going to pat down the backpack, which was lying flat on COMPLAINANT's back.
25. SUBJECT OFFICER was standing to COMPLAINANT's left and not behind him, when he told COMPLAINANT that he was going to conduct the "pat down."
26. When SUBJECT OFFICER placed his hand on the backpack, COMPLAINANT resisted by turning his body away. COMPLAINANT again told SUBJECT OFFICER that he could not search the bag.
27. After patting down the backpack, SUBJECT OFFICER and the other officers left the scene.
28. At no time during his encounter with the MPD officers did COMPLAINANT make a furtive movement. Indeed, the BWC videos show him to be calm and cooperative.
29. COMPLAINANT asked SUBJECT OFFICER for his name and badge number.
30. The BWC videos show that SUBJECT OFFICER not wearing a name plate.
31. SUBJECT OFFICER orally, but quickly stated his name and badge number. SUBJECT OFFICER repeated his badge number twice, and COMPLAINANT repeated it outloud.

#### IV. DISCUSSION<sup>1</sup>

Pursuant to D.C. Code § 5-1107(a), (b-1), OPC has the sole authority to adjudicate "a citizen complaint against a member or members of the MPD . . . that alleges abuse or misuse of police powers by such member or members, including "(1) harassment; (2) use of unnecessary or excessive force; (3) use of language or conduct that is insulting, demeaning, or humiliating; (4) discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business; (5) retaliation against a person for filing a complaint pursuant to [the Act]; or (6) failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public."

##### A. Harassment.

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 as "words, conduct, gestures, or other actions directed at a person that are purposefully, knowingly,

---

<sup>1</sup> In his objections, SUBJECT OFFICER requests mediation of this dispute. Only the Executive Director of OPC has authority to recommend mediation, See D.C. Code §5-1110(d).

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.

Around 7:15 p.m. on July 3, 2017, SUBJECT OFFICER and two other officers, WITNESS OFFICER 2 and WITNESS OFFICER 1, assigned to the Crime Suppression Team (CST) were on patrol in a marked MPD cruiser in the area of A PARK IN NE, WASHINGTON, DC. THE PARK IN NE, WASHINGTON, DC, is located in a high crime area, with guns, drugs, and ammunition routinely recovered at THE PARK IN NE, WASHINGTON, DC. The officers told OPC that it was not uncommon for handguns to be found in backpacks during warm weather because guns could not be readily concealed in warm-weather clothing. According to WITNESS OFFICER 1, they were particularly looking for “anyone who had a gun.”

From their patrol car, the officers observed COMPLAINANT sitting by himself on a picnic table in the playground area of THE PARK IN NE, WASHINGTON, DC. COMPLAINANT was wearing shorts, a tee shirt, white socks, sandals, and had a back pack flat on his back, with one backpack strap over each shoulder. Approximately 8-10 other individuals, including adults and young children, were also in the picnic area. COMPLAINANT caught the attention of SUBJECT OFFICER because he did not take his eyes off the MPD cruiser as it was driving by on A STREET IN NE, WASHINGTON, DC. SUBJECT OFFICER told OPC that COMPLAINANT “had his head on a swivel.” WITNESS OFFICER 2 told OPC that COMPLAINANT “looked like he was doing something he should not be doing.” The officers exited the cruiser, and each activated their BWC. The MPD cruiser was approximately 20-30 yards from the PLAYGROUND IN NE, WASHINGTON, DC, playground area, where COMPLAINANT was sitting. The officers’ vision of COMPLAINANT was partially obscured by a low fence, trees, plants, garbage cans, and the presence of other people.

In particular, COMPLAINANT’s backpack attracted SUBJECT OFFICER’s attention, because he claimed to see a bulge in the shape of “L” which would be consistent with the shape of a hand gun. SUBJECT OFFICER also told OPC that COMPLAINANT took off his backpack and placed it on the ground when he saw him approaching. SUBJECT OFFICER stated that COMPLAINANT put the backpack on by the time he got to where he was sitting. Neither

WITNESS OFFICER 2 nor WITNESS OFFICER 1 told OPC that COMPLAINANT placed the backpack on the ground. A review of the BWC footage is to the effect that it would not have been possible for COMPLAINANT to remove his backpack and put it back on in the time that it took SUBJECT OFFICER to walk from the cruiser to the playground area. Because SUBJECT OFFICER did not have a clear line of sight, it is highly unlikely that SUBJECT OFFICER could have seen the rear of the backpack with the alleged "L" shape bulge until he was standing next to COMPLAINANT.

COMPLAINANT refused to engage in small talk with SUBJECT OFFICER but did tell him that there was nothing in his backpack. SUBJECT OFFICER approached COMPLAINANT from the left side, walked behind the bench, and with his left hand patted down the backpack over COMPLAINANT's objections. COMPLAINANT turned his body and thus the backpack to deny SUBJECT OFFICER access to the backpack, but SUBJECT OFFICER was able to feel enough of the backpack apparently to satisfy himself that it did not contain a weapon.

At all times during the encounter, COMPLAINANT was cooperative (except for expressing his displeasure about being searched), made no furtive moves, and posed no threat to the officers or the public.

The next day, SUBJECT OFFICER completed Form PD 251. The narrative states in part: "a STOP&FRISK on the listed subject. The frisk yielded negative results." The PD 251 does not describe the circumstances leading to the stop and frisk. In particular, MPD General Order 304.10 requires where, as here, a frisk was conducted the PD 251 contain "all pertinent details of the incident, including all factors relied upon in determining that the stop or frisk was justified." The PD 251 completed by SUBJECT OFFICER was woefully incomplete in that it provides absolutely no contemporaneous rationale for the stop and frisk of COMPLAINANT.<sup>2</sup>

Here, there is no dispute that SUBJECT OFFICER stopped and frisked COMPLAINANT. The question then is whether the stop and frisk were consistent with the applicable MPD regulations and legal standards.

The Union's objections filed on behalf of SUBJECT OFFICER assert that "he had reasonable, articulable suspicion to stop, detain and examine COMPLAINANT's backpack." Objections, p. 1. The Union further states that OPC has the burden of showing that SUBJECT OFFICER "knowingly, purposefully, and recklessly mishandled COMPLAINANT's backpack." Id.

MPD General Order 304.10 defines frisk as: "A limited protective search for concealed weapons or dangerous instruments. Usually, it occurs during a "stop" [defined in 304.10 II. 3]

---

<sup>2</sup> The Complaint Examiner does not fault SUBJECT OFFICER for completing PD 251 on July 4, one day after the incident. The problem is that the PD251 does not provide any substantive, contemporaneous rationale to support the stop and frisk.

and consists of a pat down of the individual's clothing to determine the presence of weapons and other dangerous items." 304.10 II. 2.

General Order 304.10 further provides "[a]n officer may frisk a person...whom he/she has stopped if he/she reasonably suspects that the person is carrying a concealed weapon or dangerous instrument and that a risk is necessary to protect himself/herself or others."

SUBJECT OFFICER's justification for the stop and frisk is that COMPLAINANT was sitting in "a high crime area, dropped his backpack, looked suspiciously at the scout car, and had his head on a swivel." Objections, p 3. SUBJECT OFFICER argues that based on his training and experience, these factors enabled him to "draw inferences and make deductions" to justify a stop and frisk. As SUBJECT OFFICER correctly states "A reasonable and prudent complaint examiner must consider the totality of the circumstances through the eyes of a reasonable and cautious officer on the scene, guided by his experience and training." Objections, p. 2. (internal quotes and citations omitted).

A careful review of the objective facts and the totality of the circumstances does not support SUBJECT OFFICER. It is undisputed for purposes of this decision that COMPLAINANT was in a known high crime area, one where drugs and guns have been found, and was wearing a backpack. Those factors standing alone are not sufficient to support a lawful frisk. To decide otherwise means that every individual in a high crime area and wearing a backpack would be subject to being stopped and frisked. There must be more. The "more" here, according to SUBJECT OFFICER, is that COMPLAINANT removed his backpack, put it on the ground, put it back on his body, was watching the police car, had his "head on a swivel", and was not watching the other children in the playground area.

SUBJECT OFFICER's statement that COMPLAINANT put his backpack on the ground when he saw the police and then put it back on is suspect. It was not corroborated by WITNESS OFFICER 2 and WITNESS OFFICER 1. The statements they gave to OPC do not indicate that the backpack was on the ground at any time. More importantly, a review of the BWC footage is to the effect that it would have been nearly impossible for COMPLAINANT to remove the backpack, pick it up, and return it to his shoulders in the short time – probably less than 60 seconds – from the time he was first noticed by SUBJECT OFFICER. The videos viewed by the Complaint Examiner show COMPLAINANT sitting calmly, without any nervousness, and not trying to conceal his backpack. The videos show also that SUBJECT OFFICER did not have a clear view of the backpack because of the distance (20-30 yards), low fence, trees and other objects obscuring his line of sight, and that COMPLAINANT was facing SUBJECT OFFICER as he approached. All of these factors call into serious question whether SUBJECT OFFICER or any of the officers could have seen a "L" shape in the backpack or that COMPLAINANT was in anyway acting suspiciously. WITNESS OFFICER 2's statement that COMPLAINANT "looked like he was doing something he should not be doing" is contradicted by COMPLAINANT's demeanor as shown on the videos. In any event, that statement is highly subjective and speculative.

COMPLAINANT told OPC that he was looking at the street because he had heard a siren at approximately the same time SUBJECT OFFICER's cruiser appeared on the scene. It does not seem unusual for individuals to look at the movements of police cars, especially in high crime areas. The fact that SUBJECT OFFICER perceived that COMPLAINANT was staring at the police car is, under the circumstances of this interaction, insufficient either standing alone or in conjunction with the other reasons articulated by SUBJECT OFFICER to support a frisk. It is unclear what SUBJECT OFFICER meant when he stated that COMPLAINANT had his head on a "swivel." In the audio of his OPC interview, SUBJECT OFFICER referred to the actions of a defensive back on a football team. It seems that SUBJECT OFFICER is referring to COMPLAINANT being aware of his surroundings and following the police cruiser. But, those are not unusual or inappropriate actions that would give a reasonable and cautious officer cause to conduct a frisk.

The Complaint Examiner understands and appreciates that SUBJECT OFFICER wanted to be proactive and ensure the safety of District of Columbia residents and particularly those individuals who use THE PARK IN NE, WASHINGTON, DC. It is legally insufficient to conduct a frisk where, as here, SUBJECT OFFICER merely had a hunch or suspicion that COMPLAINANT had a weapon in his back pack. General Order 304.10 requires more than a "vague hunch." COMPLAINANT did not make any furtive hand movements and was not the target of an investigation (there was no "call" on COMPLAINANT). He was sitting on a park bench wearing a backpack, seemingly minding his own business. What appears to have triggered SUBJECT OFFICER's interest in COMPLAINANT was his presence in a high crime area and that he was wearing a back pack. Although there were items in it, the back pack was largely not visible from the police cruiser but only became visible when SUBJECT OFFICER stood immediately to the left of COMPLAINANT. Even then, the back pack did not show a bulge in the shape of an "L" or the distinctive shape of a gun. Nevertheless, SUBJECT OFFICER patted down the bottom of the backpack.

Terry v. Ohio, 392 U.S. 1 (1968), the seminal case on stop and frisks, does not support the lawfulness of SUBJECT OFFICER actions.

As the Terry court observed: "Even a limited search of the outer clothing for weapons constitutes a severe though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. 392 U.S. at 25.

But, the Court said, a police officer is authorized to frisk for weapons:

for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must



be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. 392 U.S. at 27. (internal citations omitted)

As the Terry court observed

[Where] a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where, in the course of investigating this behavior, he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. 392 U.S. at 30.

SUBJECT OFFICER did not have reasonable suspicion to frisk COMPLAINANT. The Complaint Examiner is not “second guessing” SUBJECT OFFICER. Being a police officer is a difficult, challenging, and potentially dangerous profession. But here, for the reasons discussed earlier, there were insufficient objective reasons to frisk COMPLAINANT and the totality of the circumstances do not support a lawful frisk. COMPLAINANT posed no apparent danger to anyone – himself, the police officers, or those in the playground area. Beyond the fact that COMPLAINANT was in a high crime area and wearing a backpack, there were not objective reasons to believe that he was armed and/or dangerous. In particular, COMPLAINANT’s demeanor, merely sitting on a park bench, being in the area of other adults and children, making no furtive movements or gestures, and generally cooperative (other than not wanting to engage in conversation and twisting his body to resist the frisk), objectively did not give SUBJECT OFFICER cause to fear for his safety or the safety of others.

MPD General Order 120.25 does not require a finding of intent, as suggested by SUBJECT OFFICER in his objections. Rather, the Complaint Examiner must determine, in part, if SUBJECT OFFICER acted “purposefully, knowingly, or recklessly in violation of the law, or internal guidelines of the MPD....” Here, the totality of the circumstances are to the effect that SUBJECT OFFICER violated MPD General Orders and applicable law when he frisked COMPLAINANT’s backpack on July 3, 2017.

The allegation of harassment is sustained

#### **B. Failure to Identify**

MPD General Order 201.26 requires MPD officers to “give their first and last name and badge numbers in a respectful and polite manner” when requested to do so by a member of the public. MPD officers are also required to identify themselves by displaying their badge or

identification folder before taking police action, “except when impractical, unfeasible, or where their identity is obvious.”

COMPLAINANT asked SUBJECT OFFICER for his name and badge number immediately after the pat down. The BWC footage clearly shows SUBJECT OFFICER not wearing his name plate. That said, SUBJECT OFFICER directed COMPLAINANT to the shirt area where his name plate would typically be worn. He seemed surprised that it was not there. Nevertheless, SUBJECT OFFICER quickly gave provided his name and badge number to COMPLAINANT, repeating the badge number twice. It would have been difficult at best for COMPLAINANT to understand and retain SUBJECT OFFICER’s name as it was said very rapidly. However, COMPLAINANT repeated SUBJECT OFFICER’s badge number. While SUBJECT OFFICER could and should have ensured that COMPLAINANT understood his name, the Complaint Examiner finds that he technically complied with General Order 201.26, especially since COMPLAINANT heard, understood, and repeated the badge number. SUBJECT OFFICER did not hide his identify. General Order 201.26 states that officers should “identify themselves by displaying their badge or identification folder.” SUBJECT OFFICER was wearing his badge and provided his badge number.

The allegation of Failure to Identify is unfounded.

**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER

<b>Allegation 1: Harassment</b>	Sustained
<b>Allegation 2: Failure to Identify</b>	Unfounded

Submitted on March 12, 2018.

---

Richard S. Ugelow  
Complaint Examiner