

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	17-0673
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER
<b>Allegation 1:</b>	Harassment (Search of Complainant)
<b>Allegation 2:</b>	Harassment (Search of Vehicle)
<b>Allegation 3:</b>	Harassment (Arrest)
<b>Complaint Examiner:</b>	Adav Noti
<b>Merits Determination Date:</b>	September 14, 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**

Complainant alleges that Subject Officer harassed the Complainant on June 9, 2017, by searching him, searching his car, and arresting him.<sup>1</sup>

**II. EVIDENTIARY HEARING**

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation, 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.

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<sup>1</sup> The Complainant also alleged that another officer harassed the Complainant by searching him and his car, and that the Subject Officer and the other officer harassed the Complainant by stopping him and discriminated against him on the basis of race. 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, including exhibits, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On June 9, 2017, the Subject Officer saw the Complainant on a sidewalk with a glass jar containing marijuana sticking out of the Complainant's rear pants pocket.
2. The Subject Officer asked to see the jar, and the Complainant showed it to him. The Subject Officer informed the Complainant that the amount of marijuana in the jar was legally permissible and asked the Complainant if he was carrying other drugs. The Complainant said no.
3. The Subject Officer asked the Complainant for permission to search him. The Complainant did not say anything in response, but the Subject Officer searched him anyway.
4. The Subject Officer asked the Complainant if he was the owner of a car parked on the street a few feet from where they were standing. The Complainant falsely stated that the car was not his.
5. The Subject Officer opened the driver's door of the car and quickly closed it. He then opened the rear driver's side door, leaned in, and rummaged through a backpack that was sitting in the back seat of the car. In the backpack, he found a gun, illegal drugs, and other contraband.
6. Officers on the scene checked the registration of the car, which came back registered to the Complainant. The Subject Officer arrested Complainant on a number of charges relating to the items in the backpack.
7. At various points during the course of the foregoing events, the Subject Officer:
  - a. Covered his body-worn camera;
  - b. With his camera covered, whispered to another officer on the scene, apparently about the search of the Complainant's car;
  - c. Turned off his body-worn camera for approximately five minutes during what appears to have been a conversation with another officer about the Complainant's arrest;
  - d. Alluded repeatedly to the fact that he would speak more freely with other officers "after Hollywood" — i.e., after his body-worn camera stopped recording; and

- e. Allowed another officer to physically cover his (the Subject Officer's) body camera to whisper something to him about the Subject Officer's conduct on the scene.
8. On August 18, 2017, a D.C. Superior Court Judge ruled that the Subject Officer's searches of the Complainant and of his car violated the Fourth Amendment. The court therefore suppressed the evidence seized in those searches, and the government dismissed the criminal charges against the Complainant.

#### **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 court of law has already determined, in a contested proceeding in which the Subject Officer testified, that the Subject Officer's searches of the Complainant and of his car violated the Complainant's Fourth Amendment rights. *United States v. COMPLAINANT*, No.

REDACTED, at 91 (D.C. Sup. Ct. REDACTED DATE) (ROI Ex. 13). The Complainant's arrest was premised entirely on these unlawful searches. Accordingly, it is *res judicata* that the Subject Officer's conduct in searching the Complainant, searching his car, and arresting him was "in violation of the law," and the Complaint Examiner will not second-guess the court as urged by the Subject Officer.<sup>2</sup> Thus, the only remaining inquiry here is whether such violations were committed "purposefully, knowingly, or recklessly."

The Complaint Examiner concludes that the Subject Officer's violations of the Complainant's rights were, at a minimum, reckless. First, the warrantless search of the Complainant was contrary to most basic premise of a consent search, i.e., that the person being searched has given consent. The Subject Officer did ask the Complainant for permission to search him, but the Complainant said nothing in response, and yet the Subject Officer searched him anyway.<sup>3</sup> It has been axiomatic for generations that a police officer cannot perform a warrantless consent search of a citizen unless the citizen gives "unequivocal and specific" consent. *See Judd v. United States*, 190 F. 2d 649 (D.C. Cir. 1951) (citing *Karwicky v. United States*, 55 F.2d 225 (4th Cir. 1932)). The Complaint Examiner concludes that this proposition is so basic and well-established that the Subject Officer's violation cannot have been anything less than reckless.

As to the Subject Officer's unlawful search of the car and subsequent arrest of the Complainant, the Subject Officer's actions demonstrate substantial consciousness of wrongdoing. The repeated covering up of his body-worn camera, his complete deactivation of the camera for several minutes, his intentional whispering to avoid having his statements recorded, and his multiple references to not wanting to talk about the search while the camera was running all tend to demonstrate that the Subject Officer knew or suspected that the searches he conducted were potentially unlawful. An officer who believed that his conduct was permissible would have little reason to conceal his statements about that conduct, much less to do so at least five times during the course of a single arrest. *Cf. Smith v. United States*, 899 A.2d 119 (D.C. 2006) (describing "attempts to hide or destroy evidence" as "evincing consciousness of guilt"); OPC Case No. 17-0246, at 6-7 (Dec. 20, 2017) (finding no recklessness where officer openly sought official guidance on lawfulness of *Terry* stop and promptly released complainant

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<sup>2</sup> When a District of Columbia court of competent jurisdiction issues a ruling on the legality of specific conduct, it seems doubtful that a complaint examiner can, under the statutes governing OPC complaints, reach a different result on the legality of the exact same conduct. Indeed, if the court here had found the Subject Officer's actions to be lawful, it would be problematic for the Complaint Examiner to nonetheless sustain an allegation of misconduct on the grounds that the same actions were "contrary to law." Such a finding would require a determination that District of Columbia case law is not binding on complaint examiners, which would make little sense in matters where the primary question is whether an officer violated a complainant's constitutional rights as those rights have been interpreted by the applicable courts.

<sup>3</sup> A faint sound — like "nah" or "ah" — can be heard on the Subject Officer's body-worn camera video right after the Subject Officer asks the Complainant for permission to search him. The Complaint Examiner cannot determine from that recording whether the Complainant was the source of this sound, but even if he was, it was not an affirmative response to the Subject Officer's request for permission to search.

upon receiving negative response). That the Subject Officer engaged in such repeated attempts to prevent recording of his discussions on the scene — discussions about conduct that has already been adjudicated to have been unlawful — leads the Complaint Examiner to conclude by a preponderance of the evidence that the Subject Officer was sufficiently aware that his actions were problematic that the violations were committed knowingly or recklessly.

For the foregoing reasons, the Complaint Examiner sustains the allegations that the Subject Officer harassed COMPLAINANT by searching him, searching his car, and arresting him in reckless violation of law.

**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER:

<b>Allegation 1: Harassment (Search of Complainant)</b>	Sustained
<b>Allegation 2: Harassment (Search of Vehicle)</b>	Sustained
<b>Allegation 3: Harassment (Arrest)</b>	Sustained

Submitted on September 14, 2018.

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Complaint Examiner