

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	17-0750
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER 1 SUBJECT OFFICER 2
Allegation 1:	Retaliation
Complaint Examiner:	Meaghan H. Davant
Merits Determination Date:	July 27, 2018

Pursuant to D.C. Official Code § 5-1107(b-1), the Office of Police Complaints (OPC) has the sole authority to adjudicate 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 a complaint with the OPC on September 21, 2017. COMPLAINANT alleged that, on August 10, 2017, the subject officers, Metropolitan Police Department (MPD) SUBJECT OFFICER 1, and SUBJECT OFFICER 2 retaliated against him by issuing a ticket for a tinted windows violation only after the complainant requested the subject officers' names and badge numbers.¹

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.

¹ COMPLAINANT also alleged that SUBJECT OFFICER 1 and SUBJECT OFFICER 2, as well as a third officer, WITNESS OFFICER, harassed him by stopping him for a traffic violation. Complainant also alleged that officer SUBJECT OFFICER 1 further harassed him by frisking him and searching both his person and his vehicle. Finally, COMPLAINANT alleged that SUBJECT OFFICER 1 discriminated against him on the basis of race when he suggested that complainant might feel more comfortable speaking with WITNESS OFFICER, the only African American officer on the scene. Pursuant to D.C. Code § 5-1108(1), on May 16, 2018, a member of the Police Complaints Board dismissed these allegations, concurring with the decision made by the OPC's Executive Director.

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. On August 10, 2017 at approximately 10:00 p.m., COMPLAINANT was exiting his vehicle, parked near AN INTERSECTION IN NE, WASHINGTON, DC, when the subject officers approached him for a traffic violation. Specifically, the officers stated that the tint applied to COMPLAINANT's car windows was too dark, in violation of D.C. law.
2. SUBJECT OFFICER 1 then questioned COMPLAINANT as to whether he was in possession of any weapons or narcotics, frisked complainant and—following verbal permission by COMPLAINANT—searched his car. No weapons or narcotics were found.
3. SUBJECT OFFICER 1 stated that the complainant was not going to receive a ticket in relation to the traffic stop.
4. The complainant expressed doubts about the legitimacy of the traffic stop and the subject officers' actions and stated that he "deserve[d] an apology" for the officers' conduct and for wasting his time.
5. SUBJECT OFFICER 1 responded that COMPLAINANT's "apology would be us not writing you a fifty-dollar ticket," for the tinted windows.
6. COMPLAINANT responded, "Cool. I still need all three of you officers' names. Is that cool?" To which SUBJECT OFFICER 2 responded, "I think we should probably write a ticket then."
7. COMPLAINANT challenged this, asking "Why 'cause I'm getting your name?"
8. SUBJECT OFFICER 2 responded, "no because we're supposed to write a ticket" and then "because we don't want you to say that we are making stuff up."
9. WITNESS OFFICER responded that the NOI was being issued, "[j]ust to say this is why we stopped you."
10. SUBJECT OFFICER 1 added, "It's just a warning, you don't have to pay. Just in case you decide to go file a complaint."
11. COMPLAINANT asked twice more for the officers' names and badge numbers and requested they all provide their information, while the officers continued to debate among themselves the reason for the stop and timing of the ticket's issuance.

12. Video of the interactions between complainant and the subject officers were recorded by the officers' body worn cameras.
13. The subject officers ultimately issued complainant a warning ticket, or "NOI" for the window tint.

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."

The regulations governing OPC define retaliation as "[a]ction that discriminates against a person for making or attempting to make a complaint pursuant to the [OPC Statute], including action taken against a person because he or she has opposed any practice made unlawful by this [Statute] or because he or she has made a complaint or expressed an intention to file a complaint, testified, assisted, or participated in any manner in an investigation, mediation, conciliation, complaint examination or other proceeding under this [Statute]." D.C. Mun. Regs. tit. 6A, § 2199.1. MPD General Order 120.25 defines retaliation in a similar fashion.

COMPLAINANT alleged that the subject officers retaliated against him by issuing the NOI for the window tint only after, and in response to, complainant's request for the MPD officers' names and badge numbers. Complainant requested the information so that he could file a complaint against the MPD officers.

To prevail upon a claim of retaliation under a Title VII framework (*see* 42 U.S.C. §2000e *et seq.*) complainant must show that he or she: (1) engaged or participated in a protected activity, (2) was subject to an adverse action by the subject officer, and (3) there was a causal connection between the protected activity and the adverse action.

First, a person is protected from retaliation if he or she expresses vocal or physical opposition to a police action that he or she reasonably believes constitutes misconduct under the OPC enabling statute, here, retaliation under D.C. Code § 5-1107(a). *See Alexander v. Gerhardt Enters., Inc.*, 40 F.3d 187, 295 (7th Cir. 1994) *citing Holland v. Jefferson Nat. Life Ins. Co.*, 883 F.2d 1307, 1314 (7th Cir.1989); *Jennings v. Tinley Park Community Consolidated School Dist.*

No. 146, 796 F.2d 962, 967 (7th Cir.1986), cert. denied, 481 U.S. 1017, 107 S. Ct. 1895, 95 L.Ed.2d 502 (1987).

In this case, COMPLAINANT first expressed opposition to the legitimacy of the traffic stop by stating that he “deserve[d] an apology” for the officers’ conduct and for wasting his time. Then, when COMPLAINANT asked for the officers’ name and badge numbers, neither SUBJECT OFFICER 1 nor SUBJECT OFFICER 2 readily provided that information. SUBJECT OFFICER 2 immediately responded to COMPLAINANT’s request by stating, “I think we should probably write a ticket *then*” (emphasis added). COMPLAINANT reasonably believed that the ticket, or NOI, was being issued as a form of retaliation, in violation of D.C. law. Evidence of this belief came in COMPLAINANT’s immediate response, “Why ‘cause I’m getting your name?”

WITNESS OFFICER responded that the NOI was being issued, “[j]ust to say this is why we stopped you.” SUBJECT OFFICER 2 stated that the NOI was issued, “[b]ecause we don’t want you to say that we are making stuff up.” SUBJECT OFFICER 1 then added, “Just in case you decide to go file a complaint.” COMPLAINANT asked twice more for the officers’ names and badge numbers and requested they all provide their information, while the officers continued to debate among themselves the reason for the stop and timing of the ticket issuance.

Second, the “warning ticket” or NOI issued to COMPLAINANT for the window tint constitutes “adverse action” by the subject officer, whether or not he incurred a fine. The retaliation provision of D.C. Code § 5-1107(a) protects a complainant against any conduct by a subject officer that has a “materially adverse” effect on the complainant. *See Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006). SUBJECT OFFICER 1 first told COMPLAINANT that he would not receive a ticket for his window tint. SUBJECT OFFICER 2 then abruptly reversed course and threatened to issue the ticket after COMPLAINANT asked for their names and badge numbers. Thereby, the ticket was clearly intended as punishment for COMPLAINANT’s intention to file a police complaint. SUBJECT OFFICER 1 acknowledged the officers’ understanding that COMPLAINANT asked for their information for that exact purpose by stating, “[j]ust in case you decide to go file a complaint.” Further, the NOI constitutes a material adverse action where it prolonged COMPLAINANT’s detention unnecessarily, requiring him to wait several more minutes while SUBJECT OFFICER 2 tested the window tint—which he had not bothered to do prior to COMPLAINANT’s request for information—and complete the NOI.

The third element requires complainant to show that there was a causal relationship between the protected activity in which the complainant engaged and the adverse outcome. *See Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Although no single factor is determinative, complainant must show that the adverse action took place after the protected activity, that there was a close temporal proximity between the protected activity and the adverse action, and that the subject officers had knowledge of the protected activity. *See Mitchell v. Baldrige*, 759 F.2d 80,86 (D.C. Cir. 1985). Upon a *prima facie* showing of retaliation, the subject officer(s) bear the burden of producing a legitimate, non-retaliatory reason for the

adverse action. Conversely, the complainant bears the burden of proving that the officers' asserted legitimate reasons were merely pretextual. *See St. Mary's Honor Ctr. v. Hicks*, 508 U.S. 502, 507-08 (1993).

The right to request MPD officers' names and badge numbers is a protected activity that inures to all people within the District of Columbia. D.C. Code § 5-1107(a). All MPD officers are required to have knowledge of this law. COMPLAINANT requested the name and badge numbers of the subject officers because he felt that he had been harassed by the traffic stop and subsequent search of his person and car, and because he believed that the officers ultimately issued the NOI a form of retaliation against him for asking for this information and/or planning to file a police complaint. COMPLAINANT's allegation is supported by the timing of events which places the issuing of the NOI in "close temporal proximity" to COMPLAINANT's assertion of his rights. Specifically, SUBJECT OFFICER 1 first told COMPLAINANT that no ticket would be issued for the tint but then SUBJECT OFFICER 2 *immediately* decided to issue the ticket after COMPLAINANT asked for his name and badge number, stating "I think we should probably write a ticket then." COMPLAINANT expressed surprise at this sudden change when he replied, "Why 'cause I'm getting your name?"

None of the subject officers have produced convincing evidence that there was a legitimate, non-retaliatory reason for issuing the NOI. SUBJECT OFFICER 2 first stated that he suddenly changed his mind and issued the NOI "because we're supposed to write a ticket." However, MPD officers are permitted to give verbal warnings for traffic violations. Moreover, none of the officers documented the stop by completing a PD 251 stop and frisk incident report, which is strictly required by General Order 304.10, and could have documented the observed traffic violations without imposing any adverse action against the complainant. SUBJECT OFFICER 2 also claimed that he issued the NOI to prevent COMPLAINANT from bringing false claims against the subject officers, "[b]ecause we don't want you to say that we are making stuff up." Similarly, WITNESS OFFICER responded that the NOI was being issued, "[j]ust to say this is why we stopped you." SUBJECT OFFICER 1 added, "Just in case you decide to go file a complaint." These claims are easily invalidated where all three officers collected body worn camera footage that documented the entire interaction, thereby rendering a formal ticket unnecessary. The officers thereby fail to cite any reasonable explanation for why a formal ticket would be required for COMPLAINANT to file a police complaint. For all of these reasons, COMPLAINANT has presented credible evidence that the NOI was issued as a form of retaliation against him for requesting the subject officers' names and badge numbers, while the subject officers have failed to adequately establish any legitimate, non-retaliatory reason for its issuance.

Based on the totality of the circumstances, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 retaliated against complainant when they issued an NOI immediately following, and in response to, his request for the officers' names and badge numbers, thereby violating § 5-1107(a) and MPD General Order 201.26.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER 1

Allegation 1: Retaliation	Sustained.
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SUBJECT OFFICER 2

Allegation 1: Retaliation	Sustained.
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Submitted on July 27, 2018.

Meaghan Hannan Davant
Complaint Examiner