

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	18-0380
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Use of Excessive or Unnecessary Force
Allegation 2:	Insulting, Demeaning, or Humiliating Language or Conduct
Complaint Examiner:	Adav Noti
Merits Determination Date:	August 12, 2019

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 on March 29, 2019, SUBJECT OFFICER used unnecessary or excessive force when he punched the Complainant in the face. The Complainant also alleges that the Subject Officer used insulting, demeaning, or humiliating language during the same incident.¹

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 the Subject Officer on June 12, 2019, 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.

¹ The Complainant further alleged the Subject Officer used unnecessary or excessive force on his brother's girlfriend, harassed her, and discriminated against both of them on the basis of race. Pursuant to D.C. Code § 5-1108(1), a member of the Police Complaints Board dismissed these allegations on May 19, 2019, concurring with the determination of OPC's Executive Director. *See* ROI Ex. 2.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation and exhibits (including body-worn camera videos), the objections submitted by the Subject Officer on June 12, 2019, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. Beginning on March 28 and continuing into the early morning hours of March 29, 2019, the Complainant, his brother, and his brother's girlfriend, WITNESS, were patrons at A BAR IN NW, WASHINGTON, DC.
2. The Complainant's brother passed out at the bar, and the police and paramedics were called. A number of EMTs and MPD officers, including the Subject Officer, arrived on the scene in response.
3. When the officers and EMTs arrived, the Complainant's brother was incoherent, barely conscious, and unable to stand. The Complainant and WITNESS were highly intoxicated but could speak and walk.
4. After about ten minutes of talking to the bar employees and EMTs, the Subject Officer asked for the Complainant's brother's identification. WITNESS verbally challenged the Subject Officer regarding this request, claiming that as a result of her college studies she was knowledgeable about criminal law and health law. In doing so, WITNESS was verbally argumentative but not aggressive—she did not yell at the officer or threaten him. The Subject Officer responded by asking WITNESS in a flat, unaggressive tone why she was being “confrontational.”
5. About one minute later, while the Subject Officer was trying to obtain the Complainant's brother's information, the Complainant told the Subject Officer that the group was not causing any “trouble.” SUBJECT OFFICER calmly and correctly responded that no one had accused the group of causing trouble.
6. WITNESS began lecturing the Subject Officer again about her knowledge of public health and criminology; the Subject Officer declined her efforts to engage on those topics.
7. The Complainant calmly asserted that the group was being “peaceful.” The Subject Officer, apparently referring to WITNESS's verbal criticisms, said, “You guys *aren't* being peaceful.”

8. Approximately five minutes later, the EMTs were treating the Complainant's brother. The Subject Officer, who had not said anything during the intervening time, broke his silence by turning to his sergeant and saying, "[T]his is going to be a UFIR."²
9. For approximately the next ten minutes, the Subject Officer's main actions were to prevent WITNESS from interfering with the EMTs' treatment of the Complainant's brother. WITNESS remained highly intoxicated and verbally confrontational: She accused the Subject Officer (falsely) of using excessive force on her after he gently steered her away from the EMTs, threatened that she "kn[e]w people" of importance, and repeatedly invoked her "criminology major" to question the Subject Officer's actions. The Subject Officer did not respond to WITNESS's provocations, instead asking her if she would be going in the ambulance with the Complainant's brother.
10. When the EMTs began wheeling the gurney with the Complainant's brother towards the bar's exit to take him to an ambulance, the Complainant became agitated, asking loudly and repeatedly why the EMTs were "touching" his brother. The Subject Officer positioned himself between the Complainant and the EMTs.
11. The Complainant's agitation grew; he yelled loudly and attempted to get past the Subject Officer. The Subject Officer put his hand on the Complainant's chest to keep him away and said "get out of my face." The Complainant then began yelling obscenities at the Subject Officer, and the Subject Officer again said "get out of my face."
12. WITNESS moved the Complainant away from the Subject Officer. The Complainant ignored her, pointed at the Subject Officer, and said "you're funny."
13. The Complainant, still pointing, walked towards the Subject Officer. The Complainant stopped about two feet away from the Subject Officer and lowered his pointing hand.
14. As soon as the Complainant lowered his hand, the Subject Officer punched the Complainant in the face. The Subject Officer then punched the Complainant two more times, yelling repeatedly, "Do not step on me!"
15. The Subject Officer took the Complainant to the ground and, with the assistance of another officer, placed him in handcuffs.
16. Approximately 20 minutes later, the Subject Officer stated that he would not arrest the Complainant, agreeing with his sergeant's assertion that the Complainant had been "a drunken asshole" but stating that "the punishment has already been rendered."

² "UFIR" stands for "Use of Force Incident Report"—the form MPD officers fill out after incidents involving the use of force.

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.”

For the reasons that follow, the Complaint Examiner (a) sustains the allegation that the Subject Officer used unnecessary or excessive force against the Complainant, and (b) finds unfounded the allegation that the Subject Officer used insulting, demeaning, or humiliating language.

A. Use of Unnecessary or Excessive Force

MPD General Order 901.07, Part II, states, “The policy of the Metropolitan Police Department is to preserve human life when using lawful authority to use force. Therefore, officers of the Metropolitan Police Department shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others.”

The regulations governing OPC define excessive or unnecessary force as “[u]nreasonable use of power, violence, or pressure under the particular circumstances. Factors to be considered when determining the ‘reasonableness’ of a use of force include the following: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officer or others; (3) whether the subject was actively resisting arrest or attempting to evade arrest by flight; (4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; (5) whether the officer adhered to the general orders, policies, procedures, practices and training of the MPD . . . and (6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish the objective.” D.C. Mun. Regs. tit. 6A, § 2199.1.

The Complainant and WITNESS were highly intoxicated, and their conduct was, by any objective standard, extremely irritating. For twenty minutes, they collectively hectorated the Subject Officer, who was attempting to ensure that the Complainant’s brother received necessary medical attention. The Complainant and WITNESS were indeed, as the Subject Officer’s sergeant stated, “drunken [jerks].”

But none of this required the Subject Officer to punch the Complainant in the face. The Complainant's physical actions were largely directed at getting close to his brother; he never touched or threatened to touch the Subject Officer. The Complainant's only act that was even arguably physically aggressive was to point at the Subject Officer and yell "you're funny." When the Complainant did this, he was close enough to the Subject Officer that, in theory, it could have developed into an assaultive situation. Thus, if the Subject Officer had reacted to the Complainant's pointing and yelling by perceiving it as a physical threat to be neutralized in an appropriate manner, limited use of force to achieve that goal might not have been excessive. But this is not what happened. Instead, the Complainant pointed and yelled at the Subject Officer, and then lowered his hand. It was *after* the Complainant lowered his hand that the Subject Officer engaged in physical violence.

In any event, even assuming the sequence of events could have led an objective officer to perceive the Complainant as noncompliant, punching the Complainant in the face was not "the minimum amount of force necessary." The Complainant had engaged in no criminal conduct and was, *at most*, an "active resister" on MPD's threat scale. *See* MPD General Order 901.07.IV.E.1.a ("Active resister – the subject is uncooperative and will not comply with the member's requests or comments. The subject exhibits physical and mechanical defiance, including evasive movements to defeat the member's attempt at control, including but not limited to, bracing, tensing, pushing, or verbally signaling an intention not to be taken into or retained in custody, provided that the intent to resist has been clearly manifested."). For that level of resistance, the generally appropriate level of force would be "[c]ompliance techniques . . . e.g., control holds. . . [or] solo or team takedowns that may induce pain or cause discomfort to the subject who is actively resisting until control is achieved." *See id.* at IV.E.1.b & Attachment B. The Subject Officer did eventually control and take down the Complainant, but not until after using the more serious force of a blow to the head. Under MPD's use-of-force framework, even construing the Complainant's actions in the light most favorable to the Subject Officer, the force used was disproportionate to the Complainant's drunken yelling and pointing.

In his objections, the Subject Officer relies on MPD's conclusion that his use of force was not ideal but was within departmental guidelines. *See* ROI Ex. 14 at 7-8. That finding is indeed persuasive authority as to the proper interpretation of MPD's use-of-force guidelines, and the Complaint Examiner has considered it carefully.³ But MPD's conclusion is far from an exoneration of the Subject Officer. The key factual finding in MPD's report is that the Subject Officer "struck [the Complainant] several times with straight strikes, pushing him back." *Id.* This phrasing suggests that the Subject Officer essentially pushed the Complainant away, which omits the key fact that the Subject Officer struck the Complainant several times *in the head*. And even with this somewhat glossed-over description, MPD's report still concluded that the Subject Officer "appear[ed] to be on edge and predisposed to taking physical action against" the Complainant, and that he should practice less serious uses of force.

³ As OPC correctly notes in its response to the Subject Officer's objections, MPD's conclusion cannot be *binding* authority on a complaint examiner, as that would defeat the DC Council's statutory purpose in establishing independent civilian review of the use of force by MPD officers.

MPD's conclusion regarding the Subject Officer's "predispos[ition]" may relate to the Subject Officer's statement, shortly after arriving on the scene, that he would be filling out a UFIR that night. At the time he said this, neither the Complainant nor WITNESS nor anyone else on the scene had come anywhere near provoking any use of force, so is not clear why the Subject Officer was already contemplating violence at that point. Whatever the reason, the Subject Officer's prescient prediction that force would be used casts significant doubt on his claim that he later did so merely in reaction to the Complainant's aggressiveness.

The other revealing statement the Subject Officer made on the scene was his after-the-fact assertion that the Complainant did not need to be arrested because "the punishment ha[d] already been rendered." The Subject Officer's sergeant immediately and appropriately challenged the Subject Officer on this point, noting that officers may not use force as "punishment." Upon being challenged, the Subject Officer attempted to walk back his statement, but it nonetheless confirms the Subject Officer's state of mind: he viewed the Complainant as having received his comeuppance for obnoxious behavior.

Ultimately, what happened in this matter is not complicated. After twenty minutes of the Complainant's and WITNESS's drunken antics, the Subject Officer briefly lost his patience, with the Complainant's pointing and yelling being the last straw. As the description of the facts in this Merits Determination may suggest, it is possible to sympathize with the Subject Officer's momentary loss of control. But his lashing out resulted in a civilian being subjected to unnecessary blows to the head at the hands of a police officer, which, like all unnecessary force, is impermissible. Accordingly, the Complaint Examiner sustains the allegation that the Subject Officer used unnecessary or excessive force.

B. Demeaning Language or Conduct

According to MPD General Order 201.26, Part V, Section C, "All members of the department shall be courteous and orderly in their dealings with the public. They shall perform their duties quietly, remaining calm regardless of provocation to do otherwise. . . . Members shall refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name calling which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person."

The Complainant alleges that the Subject Officer's conduct and language were demeaning and included the use of profanity directed at the Complainant and his brother's girlfriend. Specifically, the Complainant alleged in his OPC interview that the Subject Officer said "'f'in shut up' and 'don't say f'in words,' things like that." ROI Ex. 4.

The body-worn camera video does not corroborate these allegations. First, as to the use of profanity, review of the video footage shows that the Subject Officer simply did not use profanity in the way the Complainant alleged, either to the Complainant or to WITNESS.

Second, regarding the Subject Officer's verbal conduct more generally, the Subject Officer did not verbally humiliate or demean the Complainant. In fact, in response to the

Complainant's statement that he was not attempting to cause trouble, the Subject Officer *reassured* the Complainant that no one had accused him otherwise. The Subject Officer did later assert that the group was not being "peaceful," but this passing statement (which appears to have been a reference to WITNESS's argumentativeness) cannot reasonably be construed as rising to the level of humiliation. And the Subject Officer's loud commands to "get out of my face" in response to the Complainant's repeated attempts to get past him were blunt but not unwarranted instructions.

Accordingly, the Complaint Examiner concludes that the allegations that the Subject Officer committed misconduct through the use of demeaning language or conduct are unfounded.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER:

Allegation 1: Unnecessary or Excessive Force	Sustained
Allegation 2: Demeaning Language or Conduct	Unfounded

Submitted on August 12, 2019.

ADAV NOTI
Complaint Examiner