

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	18-0523
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Harassment (Expulsion from Public Area)
Allegation 2:	Harassment (Arrest)
Allegation 3:	Retaliation
Complaint Examiner:	Adav Noti
Merits Determination Date:	April 29, 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 Subject Officer harassed the Complainant on May 29, 2018, by ordering him to leave a public park, and harassed and retaliated against the Complainant on May 30, 2018, by arresting him.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 In addition, the Complainant alleged that on May 15, 2018, another officer harassed him and his acquaintances by unlawfully ordering them to leave a public park. Moreover, the Complainant alleged that on May 29 and May 30, 2018, the Subject Officer discriminated against him based on his race. Finally, the Complainant alleged that on May 30, 2018, the Subject Officer and three other officers harassed him by unlawfully searching his car. On January 26, 2019, 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 May 29, 2018, the Subject Officer saw the Complainant in a public park in the BLOCK OF A ROAD IN NE, WASHINGTON, DC.
2. The Complainant and the Subject Officer engaged in an approximately four-minute verbal exchange regarding the Subject Officer's suspicions that the Complainant was engaged in unlawful activity.
3. During that exchange, the Subject Officer:
 - a. Three times told the Complainant "Go ahead," while pointing and gesturing with his hand to the outside of the park;
 - b. Said "I'm going to advise you to get outta here or leave me alone," while continuing to engage the Complainant verbally;
 - c. Told the Complainant, "Stop getting in my face," when the Complainant could not reasonably be construed as getting in the Subject Officer's face;
 - d. Threatened to call "other units" if the Complainant did not "cooperate"; and
 - e. Twice said that the Complainant was "Fail[ing] to move on."
4. After the Subject Officer told him he was "fail[ing] to move on," the Complainant left the park.
5. The next day, May 30, the Subject Officer was called to a business in the BLOCK OF A ROAD IN NE, WASHINGTON, DC, where the Complainant was inside.
6. The Subject Officer said to the Complainant that the Complainant was aware he had been issued a notice barring him from the business. After several minutes of debating whether the Complainant had previously been provided with a copy of the barring notice, the Subject Officer threatened to arrest the Complainant for unlawful entry.
7. The Complainant said that he had obtained an order that the Subject Officer was to stay away from the Complainant. On the request of another officer, the Complainant walked to his car to obtain documentation of that order.
8. While the Complainant was at his car, the Subject Officer said to the other officer, "You know what? It's best to just bring him in. We should just bring him in. . . . I should. It would take care of problems right now. I think that's the best way."

9. The Complainant walked back to the Subject Officer, and as he was showing the Subject Officer an OPC complaint that the Complainant had filed against the Subject Officer, the Subject Officer arrested Complainant for unlawful entry.
10. On August 16, 2018, the Complainant pleaded guilty to the unlawful entry charge for which the Subject Officer had arrested him on May 30, 2018. During his plea hearing, the Complainant testified under oath before a D.C. Superior Court judge that he knew when he entered the business in question that he had been issued a notice barring him from that business.

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.

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.

A. Harassment (Expulsion from Public Area)

The Complainant alleges that on May 29, 2018, the Subject Officer told him to leave a park in the BLOCK OF ROAD IN NE, WASHINGTON, DC, even though the Complainant was engaged in no illegal activity and was lawfully permitted to be present in the park. The Subject Officer argues that he did not tell the Complainant to leave the park.

The Subject Officer’s body-worn camera (“BWC”) video confirms the Complainant’s allegations. First, the Subject Officer repeatedly told the Complainant “Go ahead,” while making a hand gesture that unambiguously indicated that to “go ahead” meant to physically move. Second, the Subject Officer said “I’m going to advise you to get outta here or leave me alone,” while continuing to engage the Complainant in a manner that left the Complainant no option to “leave [him] alone.” Third, the Subject Officer told the Complainant to “stop getting in my face” when the Complainant was actually quite far away from the Subject Officer, thereby suggesting that the Complainant needed to move farther away. Fourth, the Subject Officer threatened to call “other units” if the Complainant did not “cooperate”; but because the Complainant was not engaged in any uncooperative behavior, “cooperation” clearly referred to the Subject Officer’s previous commands to move. Finally, and most unequivocally, the Subject Officer twice said that the Complainant was “Fail[ing] to move on.”

While some of these statements might be ambiguous if viewed in isolation, cumulatively they amply establish by a preponderance of the evidence that the Subject Officer deprived the Complainant of his right to be present in that public area. In particular, the Subject Officer’s statement that the Complainant was “fail[ing] to move on” — which can lead to criminal arrest and charges — could reasonably be construed only as an order to leave. The Subject Officer presents no argument or evidence that he believed such an order was lawful or that he believed he had any basis to expel the Complainant from the park. Accordingly, the Complaint Examiner sustains the allegation that the Subject Officer harassed the Complainant by ordering him to leave the public area.

B. Harassment (Arrest)

The Complainant alleges that on May 30, 2018, the Subject Officer harassed him by arresting him for unlawful entry in a business in the BLOCK OF ROAD IN NE, WASHINGTON, DC. Specifically, the Complainant alleges that he had never been lawfully issued a barring notice relating to the business and that the Subject Officer knew the Complainant had never been lawfully issued such a notice.

The Complainant's allegations fail because when he later pleaded guilty to the crime of unlawful arrest for which the Subject Officer had arrested him, the Complainant testified under oath that he knew when he entered the business in question that he had been issued a notice barring him from that location.²

The Complaint Examiner therefore finds the Subject Officer exonerated as to this allegation of harassment.

C. Retaliation

The Complainant, who initially contacted OPC on May 29, 2018, alleges that the Subject Officer retaliated against him for that contact by arresting him on May 30, 2018. The Subject Officer in his oral testimony and written objections denies that the arrest was retaliatory, stating he had decided to arrest the Complainant before the Complainant showed the Subject Officer the OPC complaint paperwork.

The facts on the record are insufficient to reach a determination on this allegation by a preponderance of the evidence.

The sequence of events demonstrated by the Subject Officer's BWC video is essentially as follows: (1) the Subject Officer threatened to arrest the Complainant; (2) the Complainant said he had a "stay-away" order against the Subject Officer; (3) the Subject Officer told another officer that he intended to arrest the Complainant; (4) the Complainant started to show the Subject Officer his OPC complaint paperwork; and (5) the Subject Officer arrested the Complainant.

It is possible that the Complainant's "stay away" assertion — which ultimately turned out to be a reference to an OPC complaint — triggered the Subject Officer's initial decision to make the arrest, and that the Complainant's provision of the complaint paperwork was the final factor in that decision. But the fact that the Subject Officer threatened to arrest the Complainant before any complaint had been mentioned, and told another officer about his plan to effectuate the arrest before the complaint was produced, suggests that the Complainant's ultimate demonstration of the OPC paperwork could just as well have been immaterial to the arrest decision. And because the Complainant's reference to a "stay-away" order was ambiguous (and inaccurate), the Complaint Examiner cannot conclude by a preponderance of the evidence that it even constituted "a complaint pursuant to the [OPC Statute]" necessary to establish retaliation under section 2199.1, much less that the Subject Officer retaliated against the Complainant in relation to that order.

² See Hearing Tr., *United States v. COMPLAINANT*, REDACTED CMD REDACTED (D.C. Super. Ct. REDACTED DATE).

For the foregoing reasons, the Complaint Examiner finds insufficient facts regarding the allegation that the Subject Officer retaliated against the Complainant.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER:

Allegation 1: Harassment (Expulsion from Public Area)	Sustained
Allegation 2: Harassment (Arrest)	Exonerated
Allegation 3: Retaliation	Insufficient Facts

Submitted on April 29, 2019.

ADAV NOTI
Complaint Examiner