

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	18-0601
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER #1 SUBJECT OFFICER #2
<b>Allegation 1:</b>	Use of Excessive or Unnecessary Force – SUBJECT OFFICER #2
<b>Allegation 2:</b>	Harassment (move along order) - Officers SUBJECT OFFICER #2 and SUBJECT OFFICER #1
<b>Allegation 3:</b>	Humiliating Language or Conduct (use of profanity) – SUBJECT OFFICER #2
<b>Allegation 4</b>	Harassment (arrest) – SUBJECT OFFICER #1
<b>Complaint Examiner:</b>	Richard S. Ugelow
<b>Merits Determination Date:</b>	August 15, 2019

Pursuant to D.C. 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**

At approximately 1:00 a.m. on July 4, 2018, SUBJECT OFFICER #1, SUBJECT OFFICER #2, and WITNESS OFFICER were on patrol in the area of AN INTERSECTION IN NW, WASHINGTON, DC. They observed, from their marked MPD police cruiser, individuals setting off illegal fireworks. The Officers exited their vehicle to engage the individuals using the fireworks.

The complainant was in the area, but not one of the individuals setting off fireworks. COMPLAINANT took videos of the scene with his smart phone. On multiple occasions, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 instructed COMPLAINANT to stay away from them. He was instructed to stay away and not block the sidewalk. At one point, COMPLAINANT was inches from SUBJECT OFFICER #2's face, who then shoved him.

During the encounter, COMPLAINANT uttered profanity and SUBJECT OFFICER #2 responded in kind. COMPLAINANT was arrested for blocking the sidewalk.<sup>1</sup>

## **II. EVIDENTIARY HEARING**

No evidentiary hearing was conducted regarding this complaint because, based on the Complaint Examiner's review of the Body Worn Camera (BWC) footage taken by SUBJECT OFFICER #1, SUBJECT OFFICER #2 and WITNESS OFFICER, a review of OPC's Report of Investigation (ROI), the objections submitted on behalf of SUBJECT OFFICER #1 and SUBJECT OFFICER #2 by the FOP on July 8, 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.

## **III. FINDINGS OF FACT**

The Complaint Examiner finds, based on a review of the BWC footage taken by SUBJECT OFFICER #1, SUBJECT OFFICER #2 and WITNESS OFFICER, OPC's Report of Investigation, the objections submitted on behalf of SUBJECT OFFICER #1 and SUBJECT OFFICER #2 by the FOP on July 8, 2019, and OPC's response to the objections, the material facts regarding this complaint to be:

1. At approximately 1:00 a.m. on July 4, 2018, SUBJECT OFFICER #1, SUBJECT OFFICER #2 and WITNESS OFFICER were on patrol in a marked MPD Cruiser the area of AN INTERSECTION IN NW, WASHINGTON, DC, when they observed individuals setting off the fireworks.
2. It is unlawful for individuals to set off fireworks in the District of Columbia.
3. SUBJECT OFFICER #1, SUBJECT OFFICER #2 and WITNESS OFFICER were in full uniform.
4. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 engaged the individuals setting off the fireworks.
5. COMPLAINANT, who was not setting off fireworks, used his cell phone to video record SUBJECT OFFICER #1 and SUBJECT OFFICER #2.

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<sup>1</sup> COMPLAINANT also alleged that SUBJECT OFFICER #1 used unnecessary or excessive force when he pushed him into an iron fence during the arrest. COMPLAINANT further alleged that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 did not provide their names and badge numbers upon the complainant's request. Pursuant to D.C. Code § 5-1107 on June 11, 2019, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's executive director. *See* Exhibit 2.

6. The BWC shows COMPLAINANT continually approaching the officers, but not interfering with their duties.
7. COMPLAINANT was standing on a sidewalk that appeared to be fairly wide and unoccupied.
8. COMPLAINANT' fiancée WITNESS was present at the scene.
9. COMPLAINANT told SUBJECT OFFICER #2 "We are fucking recording you;" SUBJECT OFFICER #2 responded, "record whatever the fuck you want."
10. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 instructed COMPLAINANT not to approach them and that he would be arrested if he did.
11. SUBJECT OFFICER #2 told him not to block the sidewalk.
12. SUBJECT OFFICER #2 and COMPLAINANT were face-to-face in close proximity, when SUBJECT OFFICER #2 pushed COMPLAINANT as if to keep him away.
13. At COMPLAINANT' request, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 provided their badge numbers.
14. At one point, COMPLAINANT called SUBJECT OFFICER #2 a "hoe ass nigger." SUBJECT OFFICER #2 replied that "I am a hoe ass nigger, but you are going to jail."
15. SUBJECT OFFICER #1 arrested COMPLAINANT for blocking passage and resisting arrest. Exhibit 15.

#### **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."

OPC determined that SUBJECT OFFICER #1 and/or SUBJECT OFFICER #2 harassed, used inappropriate language, excessive force, and improperly arrested COMPLAINANT. The backdrop for this complaint is just after midnight on July 4. As the FOP observes, "[t]he July 4th

holiday is always eventful in Washington, D.C., and illegal fireworks are a major concern for law enforcement.” FOP objections, p.4. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 sought to stop the discharge of illegal fireworks at the intersection of AN INTERSECTION IN NW, WASHINGTON, DC. COMPLAINANT and his fiancée, WITNESS, were in the vicinity, but not using fireworks. COMPLAINANT took a video recording of the scene with his cell phone.

COMPLAINANT’ right to take a video of the scene is not in dispute. What he does not have a right to do is to interfere with police officers in the performance of their lawful duties. A review of the BWC footage does not reveal that COMPLAINANT interfered with the officers’ ability to perform their duties.

The BWC footage shows COMPLAINANT approaching the officers from behind, getting uncomfortably close to them, and using profanity. While there is no way to determine COMPLAINANT’s intent, his actions suggest that he was trying to “get under the skin” of the police officers and to provoke them into a confrontation. If that was his objective, he had a measure of success. It does not appear to this Complaint Examiner that COMPLAINANT was simply trying to be a good citizen and ensure that the police were doing their jobs and not harassing innocent people.

The FOP argues that “COMPLAINANT, often along with his wife [sic], WITNESS, approaches officers, interferes with their scenes, badgers them, uses profanity and racist and homophobic epithets to insult them, and he posts videos of himself doing this online. COMPLAINANT’s harassment has become such a concern that DC Superior Court has issued a stay-away order prohibiting him from engaging in “assaultive, threatening, abusive, harassing, or stalking behavior toward law enforcement officers.” FOP objections, p. 3 and Attachment 1.

The Complaint Examiner, with the assistance of OPC, determined that the stay away order referred to by the FOP was issued on March 21, 2019 as part of case REDACTED CASE NUMBER, a matter unrelated to the complaint 18-0601. It is entered on the docket in that case as a “pretrial stay away order” and it appears to be standard practice in such cases. Importantly, at no time during their encounter is there evidence that either SUBJECT OFFICER #1 or SUBJECT OFFICER #2 recognized COMPLAINANT or WITNESS, and certainly not as individuals who have interfered with the police in the performance of their duties.

After COMPLAINANT said words to the effect “We are fucking recording you,” SUBJECT OFFICER #2 responded, “record whatever the fuck you want.” On more than one occasion, SUBJECT OFFICER #1 and/or SUBJECT OFFICER #2 instructed COMPLAINANT to back off and not get too close to them. In fact, SUBJECT OFFICER #2 shoved him away. They also directed him not to block the sidewalk or he would be arrested. At one point, COMPLAINANT called SUBJECT OFFICER #2 a “hoe ass nigger.” SUBJECT OFFICER #2 replied in kind “I am a hoe ass nigger, but you are going to jail.”

The entire interaction lasted about 3-5 minutes and resulted in the arrest of COMPLAINANT by SUBJECT OFFICER #1. At the time, COMPLAINANT was not given a reason for the arrest, but the paperwork shows that it was for blocking passage and resisting arrest. Exhibit 15.

### **1. Use of Excessive Force (SUBJECT OFFICER #2).**

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.

COMPLAINANT refused several directives to not approach the officers. Nevertheless, he was face-to-face with SUBJECT OFFICER #2, at which time SUBJECT OFFICER #2 shoved him away. COMPLAINANT’s action in approaching SUBJECT OFFICER #2 was certainly provocative. His action, however, did not physically threaten either SUBJECT OFFICER #2 or SUBJECT OFFICER #1; he did not block the sidewalk; and he did not interfere with the performance of police functions. Even though he may have been provoked, SUBJECT OFFICER #2 was not physically threatened and his ability to perform his police duties was not compromised. The Complaint Examiner finds that there was no cause for SUBJECT OFFICER #2 to shove COMPLAINANT.

The totality of the circumstances warrant sustaining the allegation of use of unnecessary or excessive force lodged against SUBJECT OFFICER #2.

### **2. Harassment and Language**

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. Move Along Order (SUBJECT OFFICER #1 and SUBJECT OFFICER #2).

The FOP argues that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 ordered COMPLAINANT to move along “because of his reputation for interfering and obstructing police business.” FOP objections, p. 10. There is nothing in the record that indicates that either SUBJECT OFFICER #1 or SUBJECT OFFICER #2 knew of COMPLAINANT’s reputation **at the time of the incident**, i.e. July 4, 2018. Moreover, there is no evidence to suggest that either officer had ever encountered COMPLAINANT prior to this incident. The FOP’s objection is not well taken.

It is likely, as discussed earlier, that COMPLAINANT was intentionally being a “pain” to the officers. The officers’ repeatedly admonished COMPLAINANT to not block the sidewalk, stand back, and not approach them. The BWC footage does not show COMPLAINANT approaching the officers except to ask for their names and badge numbers. While COMPLAINANT may have “pushed the envelope” he did not cross the line by interfering with police activity or blocking the sidewalk. This incident took place on a wide sidewalk, with few people on it. There was ample room for people to walk around each other. The BWC footage shows that COMPLAINANT was not blocking the sidewalk or obstructing the officers in the performance of their duties.

For these reasons, the Complaint Examiner finds that the totality of the circumstances warrant sustaining a finding of harassment against SUBJECT OFFICER #1 and SUBJECT OFFICER #2 for ordering him to move along.

B. Humiliating Language or Conduct (use of profanity) (SUBJECT OFFICER #2).

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.” OPC definition is “Language or conduct that is intended to or has the effect of causing a reasonable person to experience distress, anxiety, or apprehension.” See D.C. Mun. Regs. tit. 6A, § 2199.1

It is understandable under the circumstances that SUBJECT OFFICER #2 responded to COMPLAINANT’s physical and verbal taunts in a like manner. Here, SUBJECT OFFICER #2 merely repeated the words spoken to him by COMPLAINANT. SUBJECT OFFICER #2 did not initiate the use of obscene or profane language or engage in name calling, and he was not disrespectful to COMPLAINANT. In the context and circumstances of this case, SUBJECT OFFICER #2 did not use language that meets the definition of harassment under the OPC definition of the MPD General Order.

C. Arrest (SUBJECT OFFICER #1).

COMPLAINANT was arrested for blocking passage.<sup>2</sup> Exhibit 15. Despite repeated requests, COMPLAINANT was not advised of the reason for his arrest at the time it took place. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 encountered COMPLAINANT on a wide sidewalk with virtually nobody else on it. It is important to remember that this event literally took place in the middle of the night when most people were not out and about.

Blocking passage is defined in D.C. Code § 22-13079(A) as follows:

It is unlawful for a person, alone or in concert with others to crowd, obstruct, or incommode...the use of any street, avenue, alley, road, highway or sidewalk...and to continue or resume the crowding, obstructing, or incommoding.” Exhibit 24.

MPD Circular 17-01 specifies that the Blocking Passage charge applies when the violator, here COMPLAINANT, “**continues to block** vehicular **or** pedestrian traffic on a city street, sidewalk, or entrance to a building.” Exhibit 26, p. 1 (emphasis added).

The Complaint Examiner’s review of the BWC footage shows that COMPLAINANT did not block the sidewalk. Accordingly, there was no justification for his arrest. Under the totality of the circumstances, the arrest of COMPLAINANT by SUBJECT OFFICER #1 was not improper. Thus, COMPLAINANT’s arrest constitutes harassment within the meaning of MPD General Order 120.25, Part III, Section B, No. 2.

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<sup>2</sup> Exhibit 15 shows that COMPLAINANT was charged with resisting arrest. That claim is not the subject of this decision.

**V. SUMMARY OF MERITS DETERMINATION**

**SUBJECT OFFICER #1**

Allegation 2: Harassment (move along order)	Sustained
Allegation 4: Harassment (arrest)	Sustained

**SUBJECT OFFICER #2**

Allegation 1: Use of Excessive or Unnecessary Force	Sustained
Allegation 2: Harassment (move along order)	Sustained
Allegation 3: Humiliating Language or Conduct (use of profanity)	Exonerated

Submitted on August 15, 2019.

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Richard S. Ugelow  
Complaint Examiner