

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	18-0678
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2 SUBJECT OFFICER #3 SUBJECT OFFICER #4
Allegation 1:	Harassment (handcuffing) – SUBJECT OFFICER #1, SUBJECT OFFICER #3, and SUBJECT OFFICER #4
Allegation 2:	Harassment (unlawful search) – SUBJECT OFFICER #1, SUBJECT OFFICER #2, and SUBJECT OFFICER #3
Allegation 3:	Humiliating Language or Conduct – SUBJECT OFFICER #1
Complaint Examiner:	Richard S. Ugelow
Merits Determination Date:	September 3, 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

On July 26, 2018, the vehicle driven by the complainant was stopped by SUBJECT OFFICER #1 because a passenger in the rear seat was not wearing a seat belt. SUBJECT OFFICER #1 smelled marijuana in the vehicle. As requested by SUBJECT OFFICER #1, COMPLAINANT exited the vehicle. A cigarillo butt, which SUBJECT OFFICER #1 suspected contained marijuana, was found on the driver's side. After a short discussion, COMPLAINANT and the two passengers were handcuffed, and the car searched. Contraband was not found in the vehicle. Thereafter, the handcuffs were removed, and COMPLAINANT and his passengers were free to go. Neither COMPLAINANT nor his passengers were charged or cited with an offense.¹

¹ The complainant also alleged that SUBJECT OFFICER #1 harassed he complainant and his passengers by frisking them during a traffic stop for a seatbelt violation. Additionally, COMPLAINANT alleged that SUBJECT OFFICER #1 harassed them by detaining them unnecessarily during the traffic stop. Pursuant to D.C. Code § 5-1108, on July

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint. This Complaint Examiner determined that the Report of Investigation (ROI) presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3. This determination was based on a review of the Body Worn Camera (BWC) footage for SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, and SUBJECT OFFICER #4, the ROI, the objections submitted by the FOP on behalf of SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, and SUBJECT OFFICER #4 on August 6, 2019, and OPC's response to the objections.

III. FINDINGS OF FACT

Based on a review of the BWC footage for SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, and SUBJECT OFFICER #4, the ROI, the objections submitted by the FOP on behalf of SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, and SUBJECT OFFICER #3 on August 6, 2019, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On the afternoon of July 26, 2018, COMPLAINANT was driving a rental car east bound on A STREET IN SW, WASHINGTON, DC.
2. There were two passengers in the car: WITNESS #1, sitting in the front passenger seat, and WITNESS #2, sitting on the passenger side in the rear.
3. WITNESS #2 was not wearing a seat belt.
4. SUBJECT OFFICER #1 and SUBJECT OFFICER #3 were on routine patrol in an unmarked MPD cruiser. SUBJECT OFFICER #1 was driving. Both officers were in full uniforms.
5. SUBJECT OFFICER #1 stopped the vehicle driven by COMPLAINANT in the unit block of THE STREET IN SW, WASHINGTON, DC, because he noticed the passenger in the rear, WITNESS #2, not wearing a seatbelt.
6. Both Officers exited the cruiser. SUBJECT OFFICER #1 approached the driver's side window, while SUBJECT OFFICER #3 stood on the passenger side of the vehicle.

7. WITNESS OFFICER #1 appeared on the scene shortly after the stop occurred. The BWC footage shows WITNESS OFFICER #1 standing by the driver's side door.
8. The record does not indicate why or what caused WITNESS OFFICER #1 to be present.
9. SUBJECT OFFICER #1 was the contact officer for the stop, which means that he was in charge and the other officers were to assist.
10. SUBJECT OFFICER #1 asked COMPLAINANT for identification, which he readily provided.
11. SUBJECT OFFICER #1 smelled what he believed to be a marijuana in the vehicle.
12. WITNESS #1 and WITNESS #2 were asked for identification, which they did not have on their person. They had been playing basketball and were dressed in workout clothing. WITNESS #1 orally provided his name and contact information to SUBJECT OFFICER #1 and WITNESS #2 orally provided his information to SUBJECT OFFICER #3.
13. SUBJECT OFFICER #1 returned to the cruiser to run the names of the individuals in the car through the MPD computer system. While he was at the cruiser, WITNESS OFFICER #1 stood at the driver-side door and SUBJECT OFFICER #3 at the passenger-side door.
14. Because he smelled marijuana, SUBJECT OFFICER #1 called for backup assistance, saying words to the effect of "I want to be sure that the driver is not under the influence."
15. SUBJECT OFFICER #4 and SUBJECT OFFICER #2 responded, as did WITNESS OFFICER #2 and WITNESS OFFICER #3.
16. SUBJECT OFFICER #1 returned to COMPLAINANT's vehicle, asked him to turn off the engine and to exit. COMPLAINANT complied with these requests.
17. SUBJECT OFFICER #1 told COMPLAINANT that he was going to pat him down for weapons, which he did without incident. Before patting him down, SUBJECT OFFICER #1 poked his fingers on COMPLAINANT's chest.
18. After COMPLAINANT exited the vehicle, SUBJECT OFFICER #1 retrieved a cigarillo butt from the driver's side door. The cigarillo was visible and did not involve a search. SUBJECT OFFICER #1 suspected that the cigarillo contained marijuana.
19. SUBJECT OFFICER #1 walked COMPLAINANT to the MPD cruiser so that he could have a private conversation.

20. When SUBJECT OFFICER #1 asked COMPLAINANT when he last smoked marijuana, COMPLAINANT replied that he did not want to talk without a lawyer. SUBJECT OFFICER #1 responded that he did not need a lawyer.
21. When COMPLAINANT tried to leave, SUBJECT OFFICER #1 told him “you are not going anywhere.”
22. SUBJECT OFFICER #1 using his thumb and index fingers pushed COMPLAINANT on to the hood of the police cruiser and placed him in handcuffs.
23. SUBJECT OFFICER #1 then instructed the other officers on the scene to direct WITNESS #1 and WITNESS #2 to exit the car and to place them in handcuffs.
24. SUBJECT OFFICER #3 placed handcuffs on WITNESS #1 and SUBJECT OFFICER #4 placed handcuffs on WITNESS #2.
25. SUBJECT OFFICER #1 then directed that the vehicle be searched. SUBJECT OFFICER #1, SUBJECT OFFICER #3 and SUBJECT OFFICER #2 searched the vehicle.
26. No MPD officer requested permission from COMPLAINANT or the passengers to conduct the search.
27. The vehicle search did not discover any contraband.
28. The cigarillo contained less than two ounces of marijuana, which is the legal limit in the District of Columbia.
29. COMPLAINANT did not smell of marijuana and there was no evidence that he was driving under the influence, prior to or during the stop.
30. There is no evidence that anyone in the vehicle consumed marijuana while it was in motion or, for that matter, at any time.
31. Once the search was completed, handcuffs were removed from COMPLAINANT and his passengers and the cigarillo butt was returned.
32. COMPLAINANT was not cited or charged with any offense.
33. As requested, SUBJECT OFFICER #1 provided COMPLAINANT with his name and the number of the incident report.
34. The entire incident took approximately 18 minutes.

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 complainant was the subject of a vehicular stop by SUBJECT OFFICER #1 because a passenger in the rear seat, WITNESS #2, was not wearing a seatbelt. SUBJECT OFFICER #1 was driving an unmarked MPD cruiser. His partner was SUBJECT OFFICER #3. Both officers exited the MPD cruiser. SUBJECT OFFICER #1 approached the driver's side and SUBJECT OFFICER #3 went to the passenger side. The BWC footage shows WITNESS OFFICER #1 standing on the driver's side of the vehicle, too.

WITNESS #1 was sitting in the front passenger seat and was wearing a seat belt, as was COMPLAINANT. As requested, COMPLAINANT provided his identification and registration to SUBJECT OFFICER #1. When COMPLAINANT rolled down the car window, SUBJECT OFFICER #1 smelled, what he believed to be, marijuana.

SUBJECT OFFICER #1 also obtained identifying information for WITNESS #1 and WITNESS #2. This information was processed through the relevant MPD database using a computer located in the MPD cruiser. While he was processing the names, SUBJECT OFFICER #1 requested backup assistance. He did this because he suspected the use of marijuana and he wanted to determine if COMPLAINANT was “under the influence.” However, the BWC footage does not indicate that COMPLAINANT was tested in any way to determine if he was “under the influence.” On the contrary, the BWC footage shows COMPLAINANT to be very much in control. Several other MPD officers responded, including SUBJECT OFFICER #2 and SUBJECT OFFICER #4.

When he returned to the vehicle, SUBJECT OFFICER #1 requested COMPLAINANT to exit, so that they could talk privately. COMPLAINANT gave permission for a “pat down.” At this time, a cigarillo butt was retrieved from or near the driver's side door. SUBJECT OFFICER #1 clearly suspected the butt, described as “a half rolled, small jay,” to contain marijuana. That said, it was also clear that the amount of marijuana, if any, was less than two ounces and legal in the District of Columbia. SUBJECT OFFICER #1 walked COMPLAINANT to the MPD cruiser and directed that he lean against the front hood of the car. When COMPLAINANT protested that the hood was too hot, SUBJECT OFFICER #1 moved him. At various times, SUBJECT OFFICER #1 used his fingers to direct COMPLAINANT's arm and appeared to jab him in the chest. SUBJECT OFFICER #1 placed COMPLAINANT in handcuffs. SUBJECT OFFICER #1

then instructed the other officers to “step out” the passengers and to place them in handcuffs. SUBJECT OFFICER #3 and SUBJECT OFFICER #4 handcuffed the passengers. SUBJECT OFFICER #1 directed the vehicle be searched. SUBJECT OFFICER #1, SUBJECT OFFICER #3 and SUBJECT OFFICER #2 conducted the search, which did not find any contraband.

During the encounter, SUBJECT OFFICER #1 asked COMPLAINANT when he last smoked marijuana. COMPLAINANT stated that he would not speak without a lawyer. SUBJECT OFFICER #1 responded that COMPLAINANT was being detained, not arrested, and did not need a lawyer. Despite asking several times what crime he had committed, he did not receive an answer. In fact, neither COMPLAINANT nor his passengers had committed a crime. They also appeared, to this Complaint Examiner, entirely cooperative and not to pose a threat to the officers or the public. SUBJECT OFFICER #1 accused COMPLAINANT of being “hyped up” and acting nervously. COMPLAINANT responded, “I have done everything you asked,” which to this Complaint Examiner seems to be a correct statement. At no time does the BWC footage show COMPLAINANT or the passengers to be a threat to run or otherwise interfering with the Officers in the performance of their duties. Moreover, there were at least six police officers on the scene: SUBJECT OFFICER #1, SUBJECT OFFICER #3, SUBJECT OFFICER #2, SUBJECT OFFICER #4, WITNESS OFFICER #1, WITNESS OFFICER #3, and WITNESS OFFICER #2. In other words, there were more than two officers for each person in the car. Not one of the officers, other than SUBJECT OFFICER #1, suggested that COMPLAINANT or his passengers posed a threat or acted in a threatening manner.

A. Harassment

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.

1. Handcuffing – SUBJECT OFFICER #1, SUBJECT OFFICER #3, and SUBJECT OFFICER #4

SUBJECT OFFICER #1's reason for handcuffing COMPLAINANT is essentially that he was "hyped up," and that he was concerned that he would fight or run. COMPLAINANT admitted that his heart was beating rapidly because of the traffic stop, but otherwise acted normally. The BWC footage and testimony of the other officers demonstrate that COMPLAINANT and the two passengers were totally compliant and did not pose a physical threat to the officers or showed any inclination to flee. The Complaint Examiner observed that SUBJECT OFFICER #1's attitude to COMPLAINANT seemed to become more hostile when he asked for a lawyer. Importantly, neither COMPLAINANT nor the passengers were in any position to cause trouble as they were surrounded by seven armed police officers. Under these circumstances the handcuffing of COMPLAINANT by SUBJECT OFFICER #1 constitutes an act of harassment.

For the same reasons, WITNESS #1 and WITNESS #2 were victims of harassment when they were handcuffed. The question remains whether SUBJECT OFFICER #3 and SUBJECT OFFICER #4 are also responsible for the harassment. SUBJECT OFFICER #1 was the contact officer and in charge of the scene. The other officers were present to assist. Neither SUBJECT OFFICER #3 nor SUBJECT OFFICER #4 were privy to the discussions between SUBJECT OFFICER #1 and COMPLAINANT, as those conversations took place out of their hearing range. And there is no evidence that they became aware of the nature of that conversation before handcuffing the passengers. Moreover, there were not any "red flags" or other warning that reasonably would have alerted them that SUBJECT OFFICER #1's directive to handcuff the passengers was improper. Because there were seven officers present and nobody was acting in a threatening way, it seems that at least one of the officers would have questioned the necessity to use handcuffs. That said, the Complaint Examiner has no reason to believe that any of the officers (other than SUBJECT OFFICER #1) violated an MPD General Order or MPD protocol.

The Complaint Examiner concludes that SUBJECT OFFICER #1 is responsible for handcuffing of WITNESS #1 and WITNESS #2. For sure, WITNESS #1 and WITNESS #2 were harassed within the meaning of General Order 125, but the Complaint Examiner finds that SUBJECT OFFICER #1 caused the harassment and not the acts of SUBJECT OFFICER #3 and SUBJECT OFFICER #4.

2. Search – SUBJECT OFFICER #1, SUBJECT OFFICER #3, and SUBJECT OFFICER #2

After handcuffing COMPLAINANT, SUBJECT OFFICER #1 directed that the car be searched for "lighters, rolling papers and additional marijuana." SUBJECT OFFICER #1, SUBJECT OFFICER #3, and SUBJECT OFFICER #2 conducted the search, which did not discover any contraband. No police officer asked either COMPLAINANT or the passengers for permission to conduct the search, and none was given.

For purposes of the search, It is important to remember that COMPLAINANT was told that he was being detained and not under arrest.

MPD GO 602, dated May 26, 1972 is the controlling authority in assessing the validity SUBJECT OFFICER #1's directive to search the vehicle. This GO covers searches connected with an arrest (not applicable here) and not connected with an arrest. See GO 602, Part I, A. 1. The touchstone, of course, is probable cause. The first words of Part I. A. 2. of the GO covering Searches not connected with an arrest state: "If an officer has probable cause to believe...."

The question then is did SUBJECT OFFICER #1 have probable cause? Part III. D of SO-15-07 provides the answer. That provision provides as follows:

D. Reasonable articulable suspicion.

1. None of the following shall, individually or in combination with each other, constitute reasonable articulable suspicion of a crime.
 - a. The odor of marijuana.
 - b. The possession of, or the suspicion of marijuana without evidence of quantity in excess of two ounces.
 - c. The possession of multiple containers of marijuana without evidence of quantity in excess of two ounces; or
 - d. The possession of marijuana without evidence of quantity in excess of two ounces in proximity to any amount of cash or currency.
2. However, Part III.D.1. **shall not** request or apply when a member is investigating whether a person is operating or in physical control of a vehicle or watercraft while intoxicated, under the influence of, or impaired by alcohol or a drug. (emphasis in original).

Here, SUBJECT OFFICER #1 had no reason to believe either that COMPLAINANT was driving under the influence or that he possessed two ounces or more of marijuana. Indeed, SUBJECT OFFICER #1 acknowledged to OPC that he did not believe COMPLAINANT was under the influence. See Exhibit 12. Similarly, there is no credible evidence to suggest that COMPLAINANT or the passengers possessed two ounces or more of marijuana. The only evidence SUBJECT OFFICER #1 had was the alleged smell of marijuana in the car, not on COMPLAINANT, and the cigarillo butt. This evidence was totally insufficient to support a vehicle search. Therefore, the Complaint Examiner finds that SUBJECT OFFICER #1's

instructions to search and participation in the search of the vehicle constituted harassment within the meaning of General Order 120.25.

Next, it must be determined whether SUBJECT OFFICER #3 and SUBJECT OFFICER #2 violated General Order 120.25 by participating in the search. As observed earlier, SUBJECT OFFICER #1 was the sole decision maker. He spoke to COMPLAINANT privately and did not share the substance of the discussion with others. Rather, SUBJECT OFFICER #3 and SUBJECT OFFICER #2 relied on SUBJECT OFFICER #1's judgment that his actions were lawful and appropriate. They lacked information or cause to question SUBJECT OFFICER #1's judgment and decisions. The violation of General Order 120.25 is attributable solely to SUBJECT OFFICER #1 and not SUBJECT OFFICER #3 and SUBJECT OFFICER #2.

B. 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."

As described earlier, SUBJECT OFFICER #1 pushed and poked COMPLAINANT with his fingers. While the pushing and poking seemed to this Complaint Examiner not to be overly aggressive, the question remains whether any touching was necessary. COMPLAINANT was compliant and calm, although he acknowledged that his heart was pounding. The BWC footage demonstrates that he followed all of SUBJECT OFFICER #1's requests. There was no cause to push or poke COMPLAINANT for any purpose.

COMPLAINANT, as was his right, questioned some of SUBJECT OFFICER #1's demands and wanted a lawyer before answering questions. It appears to this Complaint Examiner that SUBJECT OFFICER #1 penalized COMPLAINANT for requesting a lawyer. His tone changed, and he became verbally more aggressive and hostile toward COMPLAINANT after the request. In fact, SUBJECT OFFICER #1's actions and language caused COMPLAINANT to suggest that he was being racially profiled.

The preponderance of the evidence and the totality of the circumstances support a finding that SUBJECT OFFICER #1's violated MPD General Order 201.26 when he poked and pushed COMPLAINANT and spoke to him in a demeaning fashion.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment (handcuffing)	Sustained
Allegation 2: Harassment (vehicle search)	Sustained
Allegation 3: Humiliating Language or Conduct – SUBJECT OFFICER #1	Sustained

SUBJECT OFFICER #3

Allegation 1: Harassment (handcuffing)	Exonerated
Allegation 2: Harassment (vehicle search)	Exonerated

SUBJECT OFFICER #2

Allegation 2: Harassment (vehicle search)	Exonerated
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SUBJECT OFFICER #4

Allegation 1: Harassment (handcuffing)	Exonerated
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Submitted on September 3, 2019.

Richard S. Ugelow
Complaint Examiner