

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	19-0137
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER
<b>Allegation 1:</b>	Harassment: Stop and Ticket
<b>Allegation 2:</b>	Harassment: Handcuffing
<b>Allegation 3:</b>	Harassment: Car Search
<b>Allegation 4:</b>	Discrimination
<b>Complaint Examiner:</b>	Jennifer A. Fischer, Esq.
<b>Merits Determination Date:</b>	December 9, 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**

The complainant, COMPLAINANT (“Complainant”), filed a complaint with the Office of Police Complaints (OPC) on November 30, 2018. COMPLAINANT alleged that on November 3, 2018, Metropolitan Police Department (MPD) SUBJECT OFFICER, harassed her by unlawfully stopping and ticketing her for parking in an alley, placing her in handcuffs, and unlawfully searching her car. Complainant further alleged that SUBJECT OFFICER discriminated against her based on her national origin.<sup>1</sup>

Specifically, Complainant explained that on November 3, 2018, between 10:30 p.m. and 11:30 p.m., near A STRET IN NW, WASHINGTON, DC, she was in her car on a one-way street waiting to pick up FOOD while working as an FOOD DELIVERY DRIVER. She was blocking

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<sup>1</sup> Additionally, COMPLAINANT alleged that SUBJECT OFFICER used unnecessary or excessive force against her by forcibly placing her in handcuffs. Pursuant to D.C. Code §5-1108(1) on September 9, 2019, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC’s executive director.

the vehicles in the alley to her right, but there were other vehicles in front, to the left, and behind her so she was not able to move. Once the driver in front of her left, she managed to park in their space. She exited and locked her car. She started walking to the passenger side. At that time, Subject Officer stepped into her path and yelled for her driving documents. She showed him her phone. She explained that she was going to pick up some FOOD FOR DELIVERY. She then continued walking. Although Subject Officer was yelling, Complainant thought she had explained herself. At that time, he grabbed her, placed her in handcuffs, and told her not to run. While she was still in handcuffs, he entered her car without her permission. He went through her items until he found her license in her wallet. He then issued her a ticket for parking in the alley. Although Complainant speaks some English, her primary language is Spanish, and she would have preferred to communicate with SUBJECT OFFICER through an interpreter, but he never offered to provide one.

## **II. EVIDENTIARY HEARING**

No evidentiary hearing was conducted regarding this Complaint because, based on a review of OPC's Report of Investigation (ROI), the Body Worn Camera Footage recorded by Subject Officer on November 3, 2018, the objections submitted by Subject Officer on October 9, 2019, and OPC's response to the objections dated October 21, 2019, the Complaint Examiner determined that the ROI 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**

Based on a review of OPC's Report of Investigation, the Body Worn Camera Footage recorded by Subject Officer on November 3, 2018, the objections submitted by Subject Officer on October 9, 2019, and OPC's response to the objections dated October 21, 2019, the Complaint Examiner finds the material facts regarding this complaint to be:

1. Complainant filed a complaint with OPC on November 30, 2018.
2. On November 3, 2018 at approximately 11:15 p.m., near A STREET IN NW, WASHINGTON, DC, Complainant temporarily stopped her vehicle so that it blocked an alley in which Subject Officer sat in a line of cars waiting to exit. Subject Officer was off-duty and in his personal vehicle, although he was in uniform.
3. When able to do so, Complainant moved her vehicle into a legal parking spot some feet away from the alley entrance and in front of A RESTAURANT IN NW, WASHINGTON, DC.
4. When traffic moved such that Subject Officer could exit the alley in his vehicle, he pulled out onto A STREET IN NW WASHINGTON DC and stopped his vehicle next to Complainant's.

5. Complainant exited her vehicle and moved toward THE RESTAURANT IN NW, WASHINGTON, DC where she was picking up a delivery order for WORK.
6. Subject Officer commanded Complainant to stop. She attempted to explain to Subject Officer that she was picking up a FOOD delivery by showing him the order on her phone.
7. When Complainant continued toward THE RESTAURANT IN NW, WASHINGTON, DC, he grabbed her and handcuffed her.
8. Subject Officer asked Complainant for her identification and vehicle registration, but Complainant told him that they were in her vehicle.
9. Subject Officer did not ask for consent to enter her vehicle to search for the documents, but instructed her to unlock the car, which she did with the key fob in her pocket.
10. Subject Officer entered Complainant's vehicle and searched among Complainant's belongings for her driver's license, which he found in the center console, and vehicle rental form, which he found in the glove compartment.
11. After retrieving Complainant's identification and rental vehicle form, he wrote out a ticket, which he acknowledged he does not normally do, and left it on her windshield.
12. After writing out the ticket, Subject Officer released Complainant from the handcuffs and allowed her to leave.
13. Complainant speaks some English, but not very well. Nonetheless, Subject Officer did not ask Complainant whether she could speak English very well or offer her interpretation services.

#### **IV. DISCUSSION**

Complainant alleged that Subject Officer harassed her when he stopped her, put her in handcuffs, and issued her a ticket. She also alleged that he harassed her when he unlawfully searched her car. Finally, she alleged that he discriminated against her by not providing her with interpretation services during the stop.

Pursuant to D.C. Official Code § 5-1107(a), and (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; . . . [and] (4) Discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, physical disability, matriculation, political affiliation, source of income, or place of residence or business.”

As discussed below, Subject Officer's behavior here constituted harassment and discrimination. First, he violated policy by stopping and ticketing Complainant for a traffic violation that he couldn't even have been sure she committed while he was off-duty. His violation became even more egregious when this alleged traffic violation led him to handcuff her, search her car, and disregard her clear weakness in speaking and comprehending English for a violation of which he could have simply left a ticket on her car windshield.

#### **A. Harassment**

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 and in the regulations governing OPC 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."

"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.

##### **i. Stop and Ticket**

Here, it is undisputed that Subject Officer stopped Complainant, handcuffed her, and issued her a ticket for blocking the alley, a parking violation. Exh. 1, Exh. 4 at 10:25, Exh. 6 at 6:25. It is also undisputed that Subject Officer was off-duty at the time he issued the ticket and was driving his personal vehicle. Exh. 6 at 3:03, 3:10, 11:58. He did not call for any assistance of a marked unit, and did not submit any paperwork regarding the stop. Exh. 6 at 12:20, Exh. 12.

*Subject Officer violated MPD policy when he stopped and ticketed Complainant for a parking violation when he was off-duty, driving his personal vehicle, and was not responding to a grave, immediate threat.*

However, off-duty members may only take traffic enforcement action if a) they are driving a marked take-home vehicle or when operating a Department vehicle equipped with emergency lights and b) the violation is so grave that it poses an immediate threat to the members or others. General Order 303.1 I.A.2.a. Moreover, in such instances, "the officer shall request the assistance of a marked unit as soon as possible." *Id.*

Because Subject Officer was off-duty and in his personal vehicle, his stopping and issuing a ticket to Complainant was in violation of MPD policy. Moreover, even if he had been in a sanctioned vehicle, he would still be in violation of MPD policy unless the violation was so

grave that it posed an immediate threat to Subject Officer or others. Here, there was no danger posing an immediate threat to anyone.

Subject Officer claims that when he stopped Complainant, she was blocking an alley on A STREET IN NW, WASHINGTON, DC, from which he and other cars were trying to exit. Exh. 6 at 1:57, 2:47, 4:10. He even drew a diagram of where he claimed she was parked. *Id.* at 3:45, Exh. 11. Assuming that Subject Officer's claim is true, stopping and blocking an alley is hardly a violation so grave that it poses an immediate threat. Given that Subject Officer claims he was waiting for seven to ten minutes, he also could have called for a marked unit if the situation was dangerous. Exh. 6 at 2:47. Regardless, Subject Officer claims that he only exited his vehicle when he heard a couple of people yelling, "Move bitch." *Id.* 6 at 1:49. According to Subject Officer, after he had left his vehicle, he then saw another man about to exit his truck, Subject Officer told him that he "got it". *Id.* at 1:50. This, according to his representative's Objections is the grave immediate threat that justified Subject Officer's stop.

Even assuming that all of Subject Officer's claims are true, these facts hardly constitute a grave immediate threat justifying a stop and ticket of Complainant. If Subject Officer truly was concerned about violence on the part of the man exiting his truck – and Subject Officer does not indicate why he thought this man would become violent – the solution was to tell the man to remain in his truck and to call for a marked unit. If Complainant was, in fact, blocking the alley for seven to ten minutes it would be incredibly annoying, but not a grave immediate threat.

Therefore, Subject Officer's stopping and ticketing complainant was in violation of General Order 303.1: he was off-duty and not in a marked vehicle or other Department vehicle equipped with emergency lights, and his actions were not in response to a grave immediate threat from Complainant.

Subject Officer's actions were more egregious, however, than simply disregarding a policy that he is not to conduct traffic enforcement when he's off-duty and in his personal vehicle because his interview responses regarding the stop are not credible.

*BWC Footage Contradicts Subject Officer's Description of Events and Corroborates Complainant's*

Subject Officer claims he was waiting in a line of cars trying to exit an alley onto A STREET IN NW, WASHINGTON, DC for seven to ten minutes and that when he exited his vehicle, it was still in the backed-up traffic in the alley. Exh. 6 at 1:30, 2:45, 3:55. He claims that when he approached Complainant's vehicle, she was still blocking the alley, he knocked on her window and asked her to move. *Id.* at 2:02, 3:55, 4:13, 4:37. He claims that she ignored him and kept talking on her phone until she hopped out of the car, still blocking the alley, and tried to run into THE RESTAURANT IN NW, WASHINGTON, DC. *Id.* at 2:05, 4:45, 5:28. It was then that he stopped her, asked for her driver's license and registration, and repeated that she needed to move her car. *Id.* at 2:20. When asked again by the interviewer, Subject Officer said that

Complainant didn't move her car at any point, thus leaving the alley blocked. *Id.* at 5:00. He didn't observe anything else and had no other reason to stop her. *Id.* at 4:27.

The BWC footage, however, shows Complainant legally parked, not blocking the alley, and Subject Officer's black SUV parked alongside it, blocking the street. BWC footage of SUBJECT OFFICER, Nov. 3, 2018 [SUBJECT OFFICER BWC] at 0:01. No vehicle is seen blocking the alley. *Id.* The BWC footage, therefore, contradicts Subject Officer's version of events. Although Subject Officer claims toward the end of his interview that he had a valet move his vehicle out of the alley, that too is suspect since he told the interviewer that Complainant never moved her car into a legal parking space during their interaction and it would still have been blocking the alley. Exh. 6 at 5:00, and 15:30.

The BWC footage, on the other hand, corroborates Complainant's version of events that from her position blocking the alley, she pulled into a legal parking space in front of A RESTAURANT IN NW, WASHINGTON, DC as soon as she was able. Exh. 1, Exh. 4 at 8:00. Subject Officer admits he did not exit his vehicle for at least seven to ten minutes and that he did not see it was Complainant blocking the alley until after he exited his vehicle. Exh. 6 at 13:54. At some point, Subject Officer did see her and Complainant does not deny she was blocking the alley for some period of time. She claims it was because traffic was blocking her in on her left. Exh 4 at 8:00. It is not possible to corroborate that claim. The point, however, is that given that Subject Officer didn't see what was happening in that time, he could not have known what her actual violation was or contradict her claim. Moreover, the fact that she was legally parked, belies whatever allegation Subject Officer may have had as regards a grave, immediate threat for stopping her since at that point, the threat was over.

Subject Officer's Representative in his Objections contends that Complainant moved her vehicle after Subject Officer approached her. His objection, however, ignores Subject Officer's claim that Complainant never moved her vehicle during the interaction and that she ran from it while it was still blocking the alley. In fact, the representative later says as justification for the stop and handcuffs that "He only wanted COMPLAINANT to move her car, which would have been a quick and easy and minimally intrusive solution." This last statement corresponds with Subject Officer's interview responses, but if all he wanted was for Complainant to move her car and she did so, then there was no longer any justification for the stop and handcuffs. So either Subject Officer's statements are not credible in relation to her not moving her car, or they are not credible as the alleged basis for the stop and handcuff.

Thus, given that Subject Officer's claims regarding the stop and ticketing are not credible and relevant portions of Complainant's claim are corroborated by BWC footage, Subject Officer's violation of General Order 303.1 rose at a minimum to the level of reckless, if not intentional, and constituted harassment of Complainant.

## **ii. Handcuffing**

Handcuffing Complainant during the stop compounded her harassment by Subject Officer.

General Order 304.10 provides that “[An] Officer shall use the least coercive means necessary to effect a stop. The least coercive means, depending on the circumstances, may be a verbal request, an order, or the use of physical force.” Handcuffing in the course of an investigatory stop is permissible “where it [is] reasonably necessary to protect the officers’ safety or to thwart a suspect’s attempt to flee.” *Womack v. United States* 673 A.2d 603 (D.C. 1996) citing in *Re M.E.B.*, 638 A.2d 1123, 1128; *Reynolds v. State*, 592 So.2d 1082, 1084 (Fla. 1992).

As already mentioned, Subject Officer claimed that he approached Complainant’s vehicle while she was illegally parked and blocking the alley. Exh. 6 at 1:57, 2:47, 4:10, 4:13. He claims that she never moved her vehicle. *Id.* at 5:00. The BWC footage contradicts this claim, however, as it shows Complainant’s car legally parked and not blocking the alley with Subject Officer’s vehicle stopped alongside hers. SUBJECT OFFICER BWC at 0:01. Subject Officer then claimed that after he knocked on her window, she hopped out of her car and tried to run into A RESTAURANT IN NW, WASHINGTON, DC. Exh. 6 at 2:05, 4:37, 5:28. He alleges that he stopped her before she entered the door and asked for her driver’s license and registration, but that she kept pulling on the door. *Id.* at 5:43, 5:50. He claimed at this point that he then put Complainant in handcuffs. *Id.* at 2:35, 5:53, 14:10. When asked by the OPC interviewer why he needed her driver’s license and registration, he claimed that it was because she was running out of her vehicle. *Id.* at 15:54. He said that she could have had a gun or been in a stolen vehicle. *Id.* at 16:02.

Throughout his interview, however, Subject Officer never articulated anything additional suggesting that he had reasonable suspicion that Complainant might have a gun, nor that she was in a stolen vehicle. *Id.* at 4:27. Rather, his statements indicate he believed she was going into THE RESTAURANT IN NW, WASHINGTON, DC, and that he suspected she was a delivery person picking up FOOD. *Id.* at 5:20, 5:28. In Subject Officer’s BWC footage, when Complainant complains about the handcuffs, Subject Officer repeats eleven times in three minutes variations of “you ran” or “don’t try to run” followed several times by “when they ask you for your driver’s license and registration” and “you tried to run into the store.” SUBJECT OFFICER BWC at 2:30, 2:50, 2:56, 3:10, 4:09, 4:12, 4:17, 4:43, 4:53, 5:05, 5:17. Throughout the BWC footage Subject Officer expresses no concerns about his safety and seems to know that she wasn’t “fleeing” but simply going into the store. *Id.* Both the BWC footage and Subject Officer’s responses to the OPC interviewer’s questions suggest his only reason for handcuffing complainant is that she didn’t respond as he would have liked when he asked for her driver’s license and registration.

Even assuming Subject Officer was accurately conveying the situation to the OPC interviewer, he then claimed in his interview that he removed one of her handcuffs so that she could re-enter her car to get her license and registration. Exh. 6 at 14:45. Subject Officer explained in his interview that he removed the one handcuff because he was no longer afraid of

her having a gun or fleeing once he spoke to her. Exh. 6 at 16:15. If that is the case, then it is still a problem that he left one handcuff on her. It's even more of a problem if he then put the handcuffs back on her as his Representative claims in the objections to explain why the BWC footage shows Complainant still in handcuffs while Subject Officer holds her driver's license and rental agreement. SUBJECT OFFICER BWC at 0:01.

Even if the stop and ticket had truly been justified, the circumstances suggest less coercive measures Subject Officer could have taken than handcuffing Complainant. That he chose handcuffing is made all the more egregious by the fact that he didn't need to stop her in the first place. He could have just put a ticket on her windshield, which is what he ultimately did. SUBJECT OFFICER BWC at 4:30.

No doubt being stuck in backed-up traffic in an alley is very frustrating. It is harassment though, when Subject Officer, using his authority, translates that frustration into stopping and handcuffing a driver when the traffic violation has passed and the Subject Officer has no other reason to believe another violation is occurring. It is a knowing violation of Complainant's rights and her allegation of harassment for handcuffing is sustained.

### **iii. Car Search**

Both Complainant and Subject Officer agree on a number of facts related to the retrieval of Complainant's driver's license and rental car agreement from Complainant's car: 1) both were located in the Complainant's vehicle until sometime after she was handcuffed; 2) Subject Officer is the one who retrieved the rental car agreement from the glove compartment of Complainant's car; and 3) the driver's license was found in the center console of Complainant's vehicle. Exh. 1, Exh. 4 at 11:40 and 29:38; Exh. 6 at 6:43, 7:05, 7:15, 7:50, 14:30. Where their stories relating to the search differ, however, is in who retrieved Complainant's driver's license from the car and whether Complainant consented to Subject Officer entering her car to search for it and the rental agreement.

*Subject Officer entered and searched Complainant's vehicle.*

Subject Officer claims that he did not enter Complainant's car and search for her driver's license among her belongings as contended by Complainant. Exh. 6 at 6:43, 7:40, 8:19. Rather, he alleges that after handcuffing her, he took off one of the handcuffs so Complainant could enter her car and obtain her license. *Id.* at 7:05, 14:45. He claims that he did not put the handcuff back on after she obtained her license. *Id.* at 14:35. Yet, the BWC footage shows the Subject Officer writing a ticket with Complainant's identification in hand while Complainant stands with both hands still handcuffed. SUBJECT OFFICER BWC at 0:01. Thus, Subject Officer's story of releasing Complainant from one handcuff to retrieve the identification is not credible.

Subject Officer's representative in his objections to OPC's ROI, however, claims that the Subject Officer put the handcuff back on Complainant after she retrieved the license. This claim,



however, is contradicted by Subject Officer's own statement in his interview that he didn't put the handcuff back on Complainant. Exh. 6 at 14:35. Besides the contradiction, the explanation is nonsensical. While Subject Officer's explanation that after talking to Complainant he decided to remove one of the handcuffs to allow her to enter the car is reasonable, he would then have no reason or need to put the handcuff back on Complainant after she returned with her driver's license.

The only logical conclusion is that Complainant's allegation that Subject Officer entered her car to search for her driver's license, while she remained handcuffed is credible and the most likely explanation. Thus, it is concluded that Subject Officer entered and searched Complainant's car when he sought her driver's license. As he admitted, he also entered her car to retrieve the rental car agreement from her glove compartment.

*Subject Officer had no search warrant, probable cause, or valid consent to search Complainant's vehicle*

The search of Complainant's car here was in violation of the law and internal guidelines of the MPD. Normally, a search warrant is required to search property under the Fourth Amendment, although there are exceptions if an officer has probable cause to believe that contraband or evidence of a crime will be found. *See Katz v. United States*, 389 U.S. 347 (1967); *U.S. v. Scott*, 987 A.2d 1180 (D.C. 2010). Moreover, a search may be conducted if an individual voluntarily consents to it. For consent to be valid, however, it must be "unequivocal and specific." *See U.S. v. Manuel*, 992 F.2d 272, 275 (10<sup>th</sup> Cir. 1993).

Here, Subject Officer did not contend that he intended to arrest Complainant or had any probable cause to do so. Nor did he claim that he had any probable cause to believe contraband or evidence of a crime were in her car. Rather, he claimed he had consent to enter Complainant's vehicle to retrieve the rental agreement from her glove compartment. "She told me to get it. I asked her where her stuff was and she told me where it was." Exh. 6 at 7:54. Earlier in the interview, however, he claimed that "I got the rental agreement out of her glove compartment because she didn't know where the registration was." *Id.* at 7:15. Subject Officer's contradictory statements regarding Complainant's knowledge of the location of the rental agreement and why she instructed him to retrieve it leave his claim of consent not credible. At the very least, it demonstrates that any consent was not "unequivocal and specific."

Moreover, even if Subject Officer had consent to search for the rental agreement, he did not claim to have consent to enter the vehicle to search for Complainant's driver's license because he claimed Complainant retrieved it. As discussed above, however, Subject Officer's explanation that he released one of the handcuffs so Complainant could obtain her driver's license from the vehicle is not credible.

On the other hand, the evidence supports Complainant's allegation that Subject Officer told her to unlock her car and she managed it by digging her keys out of her pocket while

handcuffed and using the key fob: a) the BWC footage shows both of Complainant's hands handcuffed while Subject Officer held her identification and wrote her a ticket, b) both Subject Officer and Complainant agreed that the Subject Officer came into possession of her driver's license and rental car agreement after she was handcuffed, and c) it is improbable that Complainant would be able to retrieve her driver's license from the car but not her rental car agreement, especially in light of Subject Officer's contradictory statements as to why that occurred. Exh. 1 and Exh. 4 at 11:40, and 29:38. Unlocking a car door when an officer has handcuffed her is far from the type of consent required to comply with the Fourth Amendment.

Subject Officer's unlawful search of Complainant's vehicle to obtain her driver's license and rental car agreement is all the more egregious because he didn't even need them to write the parking ticket he ultimately gave her. For these reasons, the search of Complainant's vehicle here constituted harassment.

## **B. Discrimination**

In the processing of complaints against MPD, discriminatory treatment is defined as "conduct by an MPD member that results in the disparate treatment of persons because of their race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, physical handicap, matriculation, political affiliation, source of income, place of residence or business or any other basis of discrimination prohibited under the statutory and the common law of the District of Columbia. (6A DCMR 2199). MPD General Order 120.25 (effective October 27, 2017), Part III.5.

Discrimination is prohibited in both enforcement of the law and in the provision of police services. MPD General Order 201.26 (effective April 5, 2011).

Here, Complainant contends that she speaks some English, but her primary language is Spanish and she would have preferred to communicate with Subject Officer through an interpreter. Subject Officer never offered an interpreter, however.

MPD policy requires MPD members to "provide free language access services to all limited and non-English proficient (LEP/NEP) persons in a timely and effective manner. . . . barring exigent circumstances." General Order 304.18 (effective October 6, 2015), Part II.

- "Members who encounter a person who is LEP/NEP shall take all necessary and appropriate steps, consistent with their obligations, to establish and maintain timely and effective communication with the LEP/NEP person including but not limited to: 1. Asking all customers if they need assistance in a language other than English and automatically calling the language line when they encounter a LEP/NEP constituent." *Id* at Part IV. A.
- "In every circumstance where LEP/NEP persons and MPD members need to communicate, members shall: 1. Provide appropriate language services; 2. Provide services in a timely manner (i.e., in a manner that does not result in delays for the

LEP/NEP persons that would be significantly greater than those for English proficient persons); and 3. Provide language access services in a manner that ensures full and accurate communication between the member and the LEP/NEP individual.” *Id.* at Part IV. B.

The policy also lays out what to do with LEP/NEP persons in exigent circumstances:

- “In any situation involving exigent circumstances, members may communicate by any means possible with the individual or take immediate police action as the exigent circumstances require.” *Id.* at Part IV. H.
- “In circumstances where a suspect who speaks English very well would be subject to a stop for questioning, a suspect who is LEP/NEP may also be stopped. If, following the stop, the member wishes to question the suspect, and it becomes apparent that the suspect is LEP/NEP, the member shall obtain an MPD certified interviewer, telephonic interpreter, or other qualified interpreter without delay.” *Id.* at Part IV. K.

The policy then lays out the procedure for determining when an encountered person is LEP/NEP and how to offer interpretation services: “When members suspect . . . that persons that they encounter are LEP/NEP, they shall use the following protocol to determine whether or not the persons are actually LEP/NEP:

a. Ask: ‘Do you speak English very well?’

- (1) If the person answers ‘Yes,’ proceed with communicating with the person in English. . . .

[T]here are many individuals who report speaking English either ‘well,’ ‘not well,’ or ‘not at all.’ These individuals – who report speaking English less than ‘very well’ – must be regarded as LEP/NEP and eligible to receive language access services.

If an LEP/NEP person appears able to communicate in English, MPD members must keep in mind the fact that LEP/NEP persons may be competent in certain types of communication (e.g., speaking or understanding), but still be LEP/NEP for other purposes (e.g., reading or writing). Similarly, members must also keep in mind the fact that LEP/NEP designations are context-specific, that is, an individual may possess sufficient English language skills to function in one setting, but these skills may be insufficient in other situations.

- (2) If the person answers ‘No,’ or indicates or appears not to understand what the member is saying, or states ‘I speak it a little,’ or ‘I speak it okay,’ the member shall assume that the person is LEP/NEP and provide appropriate language access services.

- b. If the LEP/NEP person can speak or understand some English, the member shall state: "I can request an interpreter in your language immediately and can get an interpreter here in person or over the phone. Would you like me to get an interpreter?" *Id.* at Part V.A.1.

At no time during the interaction with Complainant did Subject Officer ask Complainant whether she spoke English very well. Nor did he ask her if she would like an interpreter. Exh. 6 at 10:00. In his interview with OPC, Subject Officer claimed that "she was speaking English pretty good so I didn't think she needed one." *Id.* at 10:43. When asked how he determines whether an individual needs services, he answered, "if they can't speak any English then we get an interpreter. If I can't understand her then we get an interpreter." *Id.* at 10:55. Although Subject Officer stated that he understood the impetus to offer the services was on him, rather than on the Complainant to request the services, he still noted that "She didn't ask for one." *Id.* at 10:40.

As noted above, the standard for offering the services of an interpreter is not whether the subject can't speak English or whether the Officer can't understand the subject, nor is the standard "pretty well." The General Order regarding how to evaluate whether to offer services is whether the subject speaks English "very well." The Order also clarifies that the evaluation of the subject's English speaking and comprehension abilities may vary based on context and the type of communication.

Here, Subject Officer's determination that Complainant spoke English "pretty well" rather than "very well" suggests that he should have known to offer her interpretation services. Moreover, watching the BWC footage indicates that while Complainant did have some English ability in both comprehension and speaking, it was limited. For example, her responses to Subject Officer's statements suggest only a limited understanding of what she was being stopped for and only a limited ability to respond to the Officer.

Subject Officer: "I don't write tickets. I'm writing a ticket because you obviously need one. And you tried to run."

Complainant: "I no run. I no running." SUBJECT OFFICER BWC at 2:30:

Subject Officer: "Your driver's license and registration is not there. You do not need to get out of the car to run to the other side of the car to get it when it's in the center console."

Complainant: "Yes sir because I parked and I parked." SUBJECT OFFICER BWC at 2:50.

Subject Officer: "You tried to run into the store."

Complainant: "I parked and I parked." SUBJECT OFFICER BWC at 2:56.

This is hardly a conversation with someone who speaks English “very well.”

The question then is whether Subject Officer’s failure to properly assess Complainant’s ability to speak English and offer her interpretation services constitutes discrimination. Discrimination is evaluated on whether the Subject Officer’s conduct resulted in disparate treatment in either the enforcement of the law or in the provision of police services based on one of the enumerated classes listed above. Here, it is unequivocal that Subject Officer’s failure to offer services resulted in Complainant not being given the opportunity for interpretation services available to her.

Whether offering her interpretation services would have altered the outcome of the interaction is unknown. Although Subject Officer’s decision to stop Complainant was not based on her language ability, it is possible it influenced how she understood and responded to Subject Officer. Given the lack of severity of the situation, it should have been part of his calculation when deciding to handcuff her. More significantly, however, is that Subject Officer needed specific and unequivocal consent to search her car. It doesn’t appear that Subject Officer had the required consent simply because it doesn’t sound like he ever asked for it. Regardless, any consent he may have obtained would be suspect in light of the Subject Officer’s lack of properly following the MPD General Order on evaluating a subject’s English ability and then offering interpretation services. The discrimination based on not providing proper language services thus arose out of her national origin.

Subject Officer claims he couldn’t have discriminated because his fiancé is Dominican. Exh. 6 at 13:19. That fact is irrelevant, however. Here, Subject Officer disregarded Complainant’s weakness in speaking and understanding English. This failure meant that he not only discriminated by not providing her with language services, but in possibly treating her more harshly and inappropriately because of her difficulty in comprehending his requests, which he did nothing to alleviate.

For these reasons, the allegation of discrimination against Subject Officer is sustained.

## V. SUMMARY OF MERITS DETERMINATION

### SUBJECT OFFICER

<b>Allegation 1: Harassment: Stop and Ticket</b>	Sustained
<b>Allegation 2: Harassment: Handcuffing</b>	Sustained
<b>Allegation 3: Harassment: Car Search</b>	Sustained
<b>Allegation 4: Discrimination</b>	Sustained

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Submitted on December 9, 2019.

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Complaint Examiner