

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	19-0402
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER
<b>Allegation 1:</b>	Harassment (stop)
<b>Allegation 2:</b>	Harassment (search)
<b>Allegation 3:</b>	Harassment (move along order)
<b>Complaint Examiner:</b>	Jennifer A. Fischer, Esq.
<b>Merits Determination Date:</b>	June 12, 2020

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 April 10, 2019. Complainant alleged that on April 6, 2019, the subject officer, Metropolitan Police Department (MPD) SUBJECT OFFICER (Subject Officer), harassed him by unlawfully stopping and searching him. COMPLAINANT further alleged that SUBJECT OFFICER harassed him when he ordered him to move along.<sup>1</sup>

Specifically, Complainant stated that on April 6, 2019, he was standing on a public easement on the A STREET IN WASHINGTON DC side A MD DISTRICT POLICE STATION recording vehicular traffic as well as officers going in and out of the station. Subject Officer and WITNESS OFFICER #1 approached him. Subject Officer asked Complainant his name, removed the camera from his hands, and placed his hands behind his back. Complainant

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<sup>1</sup> Complainant further alleged that along with SUBJECT OFFICER, and WITNESS OFFICER #1 also stopped complainant unlawfully. OPC learned, however, that WITNESS OFFICER #1 separated from MPD on April 30, 2019. As OPC does not have jurisdiction over members who have separated from MPD, the allegation against WITNESS OFFICER #1 will not be adjudicated, and has been closed administratively.

further alleged that Subject Officer searched his back right pocket, pulled out his wallet, removed his identification from his wallet and copied down his personal information after he informed Subject Officer that he did not allow any searches or seizures of his possessions. Subject Officer then ordered Complainant to leave the area.

## **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 (BWC) footage recorded by Subject Officer, WITNESS OFFICER #2, WITNESS OFFICER #1, WITNESS OFFICER #3, and WITNESS OFFICER #4 on April 6, 2019, video footage recorded by Complainant on April 6, 2019, the objections submitted by Subject Officer on March 27, 2020, and OPC's response to the objections dated April 21, 2020, 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 (BWC) footage recorded by Subject Officer, WITNESS OFFICER #2, WITNESS OFFICER #1, WITNESS OFFICER #3, and WITNESS OFFICER #4 on April 6, 2019, video footage recorded by Complainant on April 6, 2019, the objections submitted by Subject Officer on March 27, 2020, and OPC's response to the objections dated April 21, 2020, the Complaint Examiner finds the material facts regarding this complaint to be:

1. Complainant filed a complaint with OPC on April 10, 2019.
2. On April 6, 2019, at approximately 3:45 p.m., Complainant walked down a staircase leading from A STREET WASHINGTON, DC to a parking lot on the north side of the MPD DISTRICT police station. From the base of that staircase, Complainant began videotaping vehicles entering and exiting the parking area in the rear of the station. The entry to the rear portion of the station had an open gate and on the wall on the opposite side of the driveway leading through the gated area was a sign that read Do Not Enter. Police Vehicles Only. Beyond the gate was a parking garage and gas pumps. While Complainant videotaped from this position at the base of the stairs, several officers stopped in their cars and asked him what he was doing. He didn't answer and they drove on.
3. Complainant then moved across the driveway to a raised median located directly in front of the Do Not Enter sign. On the other side of the raised median was a driveway leading to the garage door entry for prisoner transport vehicles (the "sally-port"). From the vantage of the median, Complainant continued to videotape what he could see of the area beyond the gate. He did not go past the Do Not Enter sign or through the open gate.

4. WITNESS OFFICER #3 and WITNESS OFFICER #5 approached Complainant, asking if there was anything they could help him with. WITNESS OFFICER #3 told him that he was on D.C. public property and if there was nothing he could help him with, he wanted him to leave since he took his pictures. Complainant claimed he was lawfully on public property and could videotape. WITNESS OFFICER #3 said that no one was objecting to his videotaping on public property, but he could do it from the sidewalk outside the station property. Complainant insisted he was on public property. The Officers continued to ask him questions about why he was videotaping and his name when WITNESS OFFICER #2, one of the SUPERVISORS on duty, approached.
5. WITNESS OFFICER #5 informed WITNESS OFFICER #2 that Complainant had been recording police cars and personnel from the steps, then walked over to the median. When WITNESS OFFICER #2 approached Complainant, she initially asked him to move to where she was standing on the sidewalk next to the station on the other side of the driveway to the “van port way.”
6. After Complainant asked for names and badge numbers, but didn’t move, WITNESS OFFICER #2 told him that he couldn’t stand on the median because “if a car comes through here and you are standing right there, blocking the view then you are going to be obstructing. I do not think you are here for that. I think you may be here for something else.” When Complainant asked her to clarify what she meant by “blocking the view” she said, “no. If the cars are driving by.”
7. Complainant clarified that he did not intend to block vehicles and stated that he was “reporting anything I can see from a public area, anything lawful. Beyond that.” He gestured into the parking area beyond the gate and the Do Not Enter sign. Complainant questioned whether he could enter that area and both WITNESS OFFICER #3 and WITNESS OFFICER #2 clarified that he could not.
8. WITNESS OFFICER #2 made numerous attempts to determine Complainant’s objective and multiple offers to assist Complainant with whatever he was working on, including for him to come into the station and speak to officers and to do a ride along. His response was always that he just wanted to record what he could lawfully see from a public area. During their conversation, WITNESS OFFICER #2 joined Complainant on the median.
9. At one point WITNESS OFFICER #2 said, “why don’t we come over here,” gesturing to the sidewalk along the police station on the other side of the sally-port driveway. When he didn’t move, she continued asking him if she could help him with anything.
10. WITNESS OFFICER #2 and WITNESS OFFICER #5 discussed if he might be an individual who was known to harass police. WITNESS OFFICER #2 then pivoted from that conversation and returned to Complainant asking him, again, if he’d like to do a ride along.

11. WITNESS OFFICER #2 then stated to WITNESS OFFICER #5 while standing near Complainant so he could hear, "Okay, just go head and let him sit over there and do whatever he is going to do and we are going to deal with this differently. . . . It is a public space. He can stand wherever he wants on a public space."
12. She then stated directly to Complainant, "Sir, please do not go in the back okay. You can do whatever you like to do, but do not go in the back." Turning to WITNESS OFFICER #5 she continued, "So yeah, he can stand right there on the public space if he likes. We can just come on and let him stand wherever he wants to stand. Apparently, he is harassing the police." WITNESS OFFICER #2 then returned into the police station.
13. A few minutes later, WITNESS OFFICER #2 returned to speak with Complainant. She stood on the sidewalk next to the station on the other side of the driveway from the median where Complainant was still standing. Her main concern was Complainant continuing to videotape the vehicles entering and exiting the area beyond the Do Not Enter sign and she made the following statements:
  - "I am not sure why you are here harassing the police officers."
  - "Sir that is their private cars and things back there. So you cannot be going there with them, okay. So please sir, I am asking you nicely."
  - "You appear to be [a vigilante that goes around messing with police]. . . .Please do not videotape the officers going back and forth sir. Sir, I am asking you for the final time."
  - "If you want to come over here, come over here."
  - "Sir, if you want to, you may come over here. If you want to understand why we do this, I can [inaudible]."
  - WITNESS OFFICER #2 then calls Subject Officer and tells him to look out his window as they have Complainant on video footage now, videotaping.
  - "You keep videotaping a secured area."
  - "Sir. Please stop videotaping. . . . I know you want to videotape, but you cannot videotape the officers' personal vehicles and things of that nature that are coming in and out back there."
  - "So we are not going to let you film back there. I have asked you several times."
  - "You cannot film the officers' cars. That is their private life and you need to not do that." WITNESS OFFICER #1 BWC 7:03.

14. In response to WITNESS OFFICER #2's statements, Complainant continued to insist that he was just trying to videotape what he could see from a public space and that he was not trying to harass officers or create a lawsuit, rather, he insisted, they were harassing him. He refused to answer any questions about his intent or to identify himself.
15. WITNESS OFFICER #2 left, but WITNESS OFFICER #1 and WITNESS OFFICER #5 remained. They spoke to each other on the sidewalk where WITNESS OFFICER #2 had been watching Complainant.
16. A minute or so later, an MPD transport van pulled up to the van port. WITNESS OFFICER #1 walked over to the median, stating, "Hey excuse me, they are bringing a van port in, just move off this area okay."
17. Complainant responded, "I am not obstructing the wagon."
18. WITNESS OFFICER #1 then stood in between Complainant and the van, slightly pushing Complainant back, and extended his arms blocking Complainant's view. As WITNESS OFFICER #1 made these actions he stated, "move back please."
19. Complainant stated, "Sir, do not touch me. You are in my personal space. I am on the sidewalk and the van is not. Sir that was unacceptable."
20. WITNESS OFFICER #1 remained there until after the van had entered and the garage door closed. He then returned to the sidewalk in front of the station.
21. WITNESS OFFICER #5 then walked over to Complainant and took a photograph of him with his phone and left.
22. Approximately five minutes after WITNESS OFFICER #2 left and less than a minute after WITNESS OFFICER #1 and WITNESS OFFICER #5 left Complainant alone on the median, Complainant crossed the driveway and strolled across the sidewalk in front of the station, continuing to videotape. He then crossed the parking lot and walked up the hill to beyond the short brick wall surrounding the police station. He proceeded to walk along the brick wall until he was at the top of the stairs leading down to the parking lot.
23. About two minutes later, Subject Officer exited the station. He approached WITNESS OFFICER #1 who pointed to the top of the stairs above the parking lot, beyond the fence surrounding the police station and said, "He is up there now. He was videotaping."
24. Subject officer responded, "I know he was videotaping. Where was he, down here?"
25. WITNESS OFFICER #1 answered, "He was right there on that little island in the front near where it says do not enter police."

26. Subject Officer crossed the parking lot and walked up the stairs to Complainant. As he approached, he stated, "What are you doing? Give me the camera. . . . Do you have ID on you?"
27. As Subject Officer asked these questions, he pulled Complainant's arms behind his back, took his camera and gave it to WITNESS OFFICER #1 who placed it on the ground.
28. Complainant refused to answer any questions and said he refused any searches or seizures of his possessions. While he made these statements, Subject Officer patted Complainant's back pockets, reached into his right back pocket and pulled out his wallet.
29. Once the wallet was removed, Subject Officer released Complainant's hands. He then looked in Complainant's wallet and pulled out Complainant's identification, which he handed to WITNESS OFFICER #1 to record.
30. After pulling Complainant's wallet out, he told Complainant that he was being detained "for your unlawful presence on government property when you were asked to leave the first time and you did not leave. You are being identified because we are going to apply for an application for an arrest warrant, for your arrest for unlawful entry onto D.C. Government property. That is what you are being detained for. The warrant will either be approved or denied, but that is what we are doing. If you come back on the property again and wander back there near the gas pumps or by the van port, you will be arrested."
31. Complainant then told him that he had not been in any restricted area or on any non-public property.
32. Subject Officer responded, "if you wish to visit the police department, you can go to the front, go through the front door. But you have no business in the back or back there where the vehicles and gas pumps are."
33. Complainant again reiterated, "At no point was I in that area. They told me not to go beyond the fence and I did not go beyond the fence."
34. Complainant obtained Subject Officer's name and badge number and Subject Officer pointed out where his camera was. Subject Officer then walked down the stairs to the parking lot with WITNESS OFFICER #1.
35. Once they were at the bottom of the stairs, Subject Officer asked WITNESS OFFICER #1, "Did he go back there at all?"
36. WITNESS OFFICER #1 responded, "I am not sure but he was right where this island is. At one point when the transport wagon came in, I went and did like this and he was like, do not touch me. But I do not know, and then he was in the parking lot getting everyone's license plates. So technically, he is [inaudible] a hazard maybe."

37. Subject Officer stated, “Well no he cannot do what he is doing. . . . I do not have a problem with him videotaping. I do have a problem with him coming down here and interfering when REDACTED asked him to leave and his refusing to leave when asked to do so.”
38. WITNESS OFFICER #1 responded, “Yeah. He was back here getting everyone’s license plates and all that.”
39. Subject Officer then asked WITNESS OFFICER #1 to turn off his BWC.
40. A few minutes later, Complainant approached the front entrance of the station with his video camera. WITNESS OFFICER #2, Subject Officer, and WITNESS OFFICER #1 stopped him before entering.
41. WITNESS OFFICER #2 obtained an OPC complaint form for him from inside the station. After Complainant stated he did not want to leave a complaint with WITNESS OFFICER #2, Subject Officer asked him if he had any other business with MPD.
42. When Complainant responded that he did not, Subject Officer said to him, “Okay, then you are free to go. I am now going to ask you to leave the property. If you fail to leave the property, you will be placed under arrest immediately for unlawful entry.” WITNESS OFFICER #2 then read the unlawful entry statute to Complainant.
43. Complainant then left the station property.

#### **IV. DISCUSSION**

Complainant raises three allegations of harassment against Subject Officer in his Complaint: 1) when Subject Officer stopped and detained Complainant; 2) when Subject Officer searched Complainant by pulling his wallet from his pocket; and 3) when Subject Officer ordered him to move along from a public space. As discussed below, all three allegations raised by Complainant against Subject Officer are sustained.

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.

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.

#### **A. Subject Officer Harassed Complainant When He Stopped Him**

On April 6, 2019, Complainant was videotaping police and private vehicles entering and exiting the restricted area of the parking lot behind the station from two unrestricted locations in the parking lot, one of which was a narrow, raised median just outside the restricted area. Complainant video 0002;<sup>2</sup> BWC footage of WITNESS OFFICER #4, April 6, 2019 (“WITNESS OFFICER #4 BWC”) at 0:00; BWC footage of WITNESS OFFICER #3, April 6, 2019 (“WITNESS OFFICER #3 BWC”) at 2:59; BWC footage of WITNESS OFFICER #2, April 6, 2019 at 3:48 pm (“WITNESS OFFICER #2 1 BWC”) at 2:34, 6:25. From that location, he was videotaping what he could see of the restricted area. *Id.* Multiple officers initiated contact with Complainant and asked him to identify himself and questions about why he was videotaping, and offered to assist him. Complainant video 0002; WITNESS OFFICER #4 BWC 0:00, WITNESS OFFICER #3 BWC 0:31; WITNESS OFFICER #2 1 BWC 2:34. Complainant refused to answer their questions or identify himself and declined their offers of help. *Id.*

In his interactions with WITNESS OFFICER #2, a SUPERVISOR at the station at the time of Complainant’s videotaping, she explicitly told him that he could videotape from the median, which was public property, but she asked him to stop videotaping into the restricted area and the officers’ private vehicles. WITNESS OFFICER #2 1 BWC 1 7:59, 8:31; BWC footage of WITNESS OFFICER #1, April 6, 2019 (“WITNESS OFFICER #1 BWC”) at 2:48, 5:46, 6:54, 7:03. Although Complainant never physically entered the restricted area of the parking lot, he continued videotaping it under the observation of WITNESS OFFICER #5 and WITNESS OFFICER #1 who continued to engage with Complainant. WITNESS OFFICER #1 BWC 8:33-12:39.

Approximately, five minutes after WITNESS OFFICER #2 left and less than a minute after WITNESS OFFICER #5 and WITNESS OFFICER #1 stopped engaging with Complainant, he moved off the median and after a pass of the sidewalk in front of the station building, re-crossed the parking lot and walked up the hill to beyond the brick wall surrounding the station. WITNESS OFFICER #1 BWC 13:15-15:13.

At the time Subject Officer stopped Complainant, Complainant had left the police station property. Complainant video 0004; BWC footage of SUBJECT OFFICER, April 6, 2019 at 4:12 p.m. (“SUBJECT OFFICER 1 BWC”) at 2:05; WITNESS OFFICER #1 BWC 17:26. Subject

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<sup>2</sup> The Complainant provided all of his videos of the incident to OPC at the time of his interview. These videos were labeled 0002, 0004, and 0005.



Officer almost immediately started asking for Complainant's ID, taking away his camera, pulling his arms behind his back, and reaching into Complainant's pocket to retrieve his identification. SUBJECT OFFICER 1 BWC 2:34; WITNESS OFFICER #1 BWC 17:54.

Only after pulling Complainant's wallet from his right back pocket, did Subject Officer tell Complainant that he was being detained and his identification retrieved to apply for an application for an arrest warrant. SUBJECT OFFICER 1 BWC 3:10, 4:34; WITNESS OFFICER #1 BWC 18:34, 19:58.

Complainant alleges that the stop and detention was harassment.

Subject Officer claims that his stop of Complainant was based on probable cause for arrest for violation of laws on blocking passage, failure to obey, and unlawful entry. Exh. 4 at 2:10, 9:12, 19:15; SUBJECT OFFICER Objections, 8. He claims that his probable cause was based on his understanding from two conversations with WITNESS OFFICER #2 and a later conversation with WITNESS OFFICER #1 that Complainant had entered a signed, restricted area of the parking lot, behind the police station, and that later, when he was standing on a median just in front of the restricted area, that he'd been told to leave and did not. Exh. 4 at 1:17, 1:38, 1:54, 11:25, 12:45, 23:53, 25:54. SUBJECT OFFICER Objections, 7. Subject Officer argues alternatively, that even if he did not have probable cause, he still had reasonable suspicion sufficient to make the stop. Exh. 4 at 2:35; SUBJECT OFFICER Objections, 9.

Complainant never entered a restricted area, however, nor, was he ever ordered to leave the median. Nonetheless, Subject Officer argues in his objection to the ROI that these facts are irrelevant. Rather, he correctly contends that probable cause and reasonable suspicion are to be based on "the reasonably trustworthy facts and circumstances the officer knew of at the time to warrant a man of reasonable caution to believe an offense has been or is being committed," even if his understanding was based on an reasonable mistake. *See Watson v. United States*, 43 A.3d 276, 282 (citing *Perkins v. United States*, 936 A.2d 303, 306 (D.C. 2007)); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). Complainant does not contend that officers lied or misled him about the events. Thus, the question is whether he made a reasonable mistake as to what had taken place and, if so, whether these facts would have provided sufficient basis justifying the stop.

1. *Subject Officer did not have probable cause or reasonable suspicion for the stop based on Complainant entering a restricted area.*

In his interview with OPC, Subject Officer claimed that WITNESS OFFICER #2 called him after her initial encounter with Complainant and told him that an individual was walking around the parking lot, the back and side of the station, and videotaping. Exh. 4 at 1:17.

Subject Officer then stated in his interview with OPC that WITNESS OFFICER #2 called him a second time to report that Complainant was standing on the median by the sally port. Exh. 4 at 1:38. Thus, in his recollection of the second call, he correctly understood from WITNESS

OFFICER #2 Complainant's location, which, as WITNESS OFFICER #2 had told Complainant was a public space.

Nonetheless, Subject Officer claims that he wanted to see what was happening for himself so he went down to the parking lot where he claimed that WITNESS OFFICER #1 told him that Complainant was standing on the sally port. Exh. 4 at 1:54, 11:26, 26:00. He also stated that he was told that Complainant had been asked to move, and that Complainant refused to move. Exh. 4 at 1:54.

Subject Officer does not contend that WITNESS OFFICER #2 lied about Complainant's whereabouts in speaking to him, although it's possible he misunderstood her. BWC footage of his conversation with WITNESS OFFICER #1, however, does not support Subject Officer's misunderstanding as to Complainant having gone into the restricted area of the police station parking lot. Rather, it suggests a lack of understanding and desire for clarity.

- BWC footage shows that Subject Officer asked WITNESS OFFICER #2, as soon as he walked out of the police station, where Complainant had been videotaping. SUBJECT OFFICER 1 BWC 2:07; WITNESS OFFICER #1 BWC 17:33. His question indicates that at the time he exited the police station, he wasn't certain where Complainant had been walking.
- WITNESS OFFICER #1 told Subject Officer that Complainant had been on the median and that he had been videotaping, but not that Complainant had been asked to leave. SUBJECT OFFICER 1 BWC 2:10; WITNESS OFFICER #1 BWC 17:35. This response means that at the time Subject Officer approached Complainant, he only knew for certain that Complainant had been on the median.

Even if Subject Officer had previously misunderstood about Complainant's whereabouts, WITNESS OFFICER #1's response should have put him on notice of his possible misunderstanding.

Thus, Subject Officer's alleged belief that he had probable cause or reasonable suspicion to stop Complainant based on him being in a restricted area doesn't appear to have a reasonable basis.<sup>3</sup> As such, his alleged belief that Complainant had been walking in restricted areas does not provide probable cause or reasonable suspicion to justify the stop.

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<sup>3</sup> From a credibility perspective, it is troubling that Subject Officer twice asked officers to turn off their BWC prior to continuing their conversation about Complainant:

- The first time was immediately after Subject Officer's stop of Complainant. WITNESS OFFICER #1 is explaining what Complainant had been doing when Subject Officer interrupts him and asks, "You off camera?" WITNESS OFFICER #1 responds, "No, I am still on. You want me to go off?" And Subject Officer says "Yeah go ahead." WITNESS OFFICER #1 BWC 22:04.

2. *Subject Officer did not have probable cause or reasonable suspicion for the stop based on Complainant being asked to leave the median.*

Subject Officer's conversation with Complainant indicated that he believed Complainant had been asked to leave the median next to the sally port and did not leave when asked. When he explained to Complainant why he was being detained, he stated "You are being detained for your unlawful presence on government property when you were asked to leave the first time and you did not leave." SUBJECT OFFICER 1 BWC 4:34; WITNESS OFFICER #1 BWC 19:58.

Even if Complainant had reasonably believed that Complainant had been asked to leave, Subject Officer should have a) known Complainant was on public property and had the right to stand there as long as he wasn't interfering with station operations, and b) even if he hadn't had such a right, that Complainant had already complied with the request.

- a. WITNESS OFFICER #2 did not tell Complainant he had to leave the median. Rather she told him he had to stop videotaping the restricted area.

As already discussed, WITNESS OFFICER #2, one of the SUPERVISORS on duty, did not ask Complainant to leave the median, although she tried to convince him to move to the other side of the sally-port. WITNESS OFFICER #3 BWC 2:44; WITNESS OFFICER #2 1 BWC 3:09, 6:12, 7:59, 8:31; WITNESS OFFICER #1 BWC 3:27, 3:40. Ultimately though, she told him he was on public space and could remain on the median. WITNESS OFFICER #2 1 BWC 7:59, 8:31. She was, however, insistent that he stop videotaping officers in their private vehicles coming from and going into the restricted area. WITNESS OFFICER #1 BWC 2:48, 3:09, 3:23, 5:46, 6:54, 7:03.

Subject Officer does not contend that WITNESS OFFICER #2 lied to him or mis-conveyed her conversations with Complainant to him regarding telling him to leave. Since BWC footage shows Subject Officer did not learn this information from WITNESS OFFICER #1, presumably Subject Officer contends that he reasonably misunderstood the information WITNESS OFFICER #2 conveyed to him.

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- The second time was after the second encounter with Complainant at the front door. WITNESS OFFICER #2 was in the middle of explaining what she'd done to report Complainant to intel. Subject Officer asked, "are you still on camera? I am going off." WITNESS OFFICER #2 3 BWC 5:54.

Subject Officer's desire to not have his conversations with other officers regarding Complainant recorded suggests that he has something to hide. While his requests are not considered here as evidence as to whether his alleged reasons for stopping Complainant were reasonably believed, despite the evidence showing they were incorrect beliefs, such secrecy impacts his credibility.

- b. Even if Subject Officer reasonably misunderstood that WITNESS OFFICER #2 or another officer asked Complainant to leave the median, Subject Officer should have known that Complainant remaining on the median was lawful.

Subject Officer claims Complainant's refusal to move from the median when asked violated several laws: blocking passage, failure to obey, and unlawful entry. Exh. 4 at 2:10, 19:15. Complainant's actions did not violate any of these laws, however. Thus, even if he reasonably misunderstood that WITNESS OFFICER #2 had asked Complainant to move, he should have known it wasn't a lawful request.

- i. Blocking passage, D.C. Code § 22-1307

The "blocking passage" law, as Subject Officer referred to D.C. Code § 22-1307, makes it unlawful to "crowd, obstruct, or incommode: (A) the use of any street, avenue, alley, road, highway, or sidewalk; (B) the entrance of any public or private building or enclosure; (C) the use of or passage through any public building or public conveyance; or (D) the passage through or within any park or reservation." D.C. Code § 22-1307(a)(1).

Here, Complainant stood on a small, elevated median that divided the entrance to the sally port and the gated driveway that went to the rear of the station. Subject Officer claims that he could have been hit there by a car coming out of the sally-port or from the back of the station. Exh. 4 at 25:10. Unless a vehicle would be driving up on the elevated median, however, Complainant was not in a position to be hit by a car nor was he blocking any passageway as his position on the median allowed traffic to pass on either side.

Subject Officer's arguments seem to suggest that the law was violated merely by the possibility that Complainant could have blocked passage had Complainant stepped down from the median or simply because he was distracted. Exh. 4 at 25:00. The possibility of committing a violation is not unlawful, however, only actual crowding, obstructing, or incommoding passage is. If Subject Officer's theory were true, then anyone in Washington, D.C. standing on a sidewalk, looking at their cell phone could be issued a ticket at any time since it would always be possible for someone to step off and "obstruct" or "incommode" traffic. Thus, neither Complainant's actual behavior or allegedly believed behavior violated D.C. Code § 22-1307 and he did not have probable cause or reasonable suspicion to stop Complainant on this basis.

Subject Officer during his interview with OPC mentions twice that WITNESS OFFICER #1 stood in front of Complainant with his arms outstretched to block Complainant from the incoming prisoner transport van as an example of how Complainant was blocking the sally-way. Exh. 4 at 11:41, 19:45, 26:15. Watching the BWC video, however, Complainant made no action to suggest that he was about to interfere or block the incoming van. WITNESS OFFICER #1 BWC 11:17. All he was doing was videotaping. *Id.* Even if WITNESS OFFICER #1's action was warranted, however, Subject Officer didn't know about it before he stopped Complainant, he

learned about it only after the stop when WITNESS OFFICER #1 informed him of it. WITNESS OFFICER #1 BWC 21:42. He suggests that perhaps he learned about it earlier from someone else, Exh. 4 at 26:15, except when it happened the only other person present was WITNESS OFFICER #5 and Subject Officer does not claim he spoke to WITNESS OFFICER #5. Since probable cause is based on what Subject Officer knew at the time he stopped Complainant, it is not relevant to that decision.

ii. “Failure to Obey” 18 DCMR § 2000.2

The “failure to obey” law, as Subject Officer referred to 18 DCMR § 2000.2, provides that “[n]o person shall fail or refuse to comply with any lawful order or direction of any police officer . . . invested by law with authority to direct, control, or regulate traffic.” (emphasis added). The title of the regulation, “Obedience to Traffic Regulations.” combined with the authorized duties of the officers whose orders must be obeyed indicates that the regulation applies only to “lawful orders” as to the direction, control or regulation of traffic.

The situation here is that of a parking lot of a police station with minimal incoming or exiting vehicles observed during the period covered by the BWC footage. It seems a stretch to suggest that an order for Complainant to move off a raised median in the middle of the parking lot was related to directing, controlling or regulating traffic. Moreover, as already discussed, Complainant was on public property and not blocking any traffic, thus it is questionable whether an order to move from it would even be lawful. Thus, Complainant did not violate the “failure to obey” regulation.

iii. “Unlawful Entry” D.C. Code §22-3302

Complainant could only be guilty of unlawful entry if, without lawful authority, he a) had entered or attempted to enter the police station or its parking lot or b) refused to leave “on the demand of the person lawfully in charge thereof.” *See* D.C. Code §22-3302(b) (emphasis added). *See also* D.C. Code § 22-3312.05 for the definition of public property.

Since Complainant did not enter the marked restricted area and the evidence does not support a reasonable belief by Subject Officer that he had, the grounds for unlawful entry could not be based on that fact. Instead, it would have to be based on Complainant, without lawful authority, refusing to leave the median when asked by WITNESS OFFICER #2.

First, the evidence shows WITNESS OFFICER #2 did not ask Complainant to leave the median. Rather, as already discussed, it shows that she asked him to stop videotaping in the restricted area.

Second, assuming arguendo that Subject Officer made a reasonable mistake in believing that WITNESS OFFICER #2 made such a request, it still wouldn’t have been a lawful request. WITNESS OFFICER #2 said herself that it was public property and Complainant had a right to be there. WITNESS OFFICER #2 1 BWC 1 at 7:59. The U.S. Attorney’s office confirmed that

fact when it declined to approve the application for Complainant's request stating the case was too weak because "public space," "never crossed threshold," "never went into garage," "never went to back door area." Exh. 9. In other words, as long as he stayed in the public areas that were not marked as restricted, there was no probable cause for a violation of unlawful entry.

Third, during his interview with OPC, Subject Officer raised a number of safety concerns relating to Complainant's presence immediately next to a driveway in which emergency vehicles were entering and exiting that may have had merit. Exh. 4 at 7:16. Assuming *arguendo* this was his basis for believing an order to move from a public space had been lawful, by the time Subject Officer approached Complainant, Complainant had left the median and the police station property altogether. SUBJECT OFFICER 1 BWC 2:05. Thus, based on Subject Officer's own viewing of the situation, Complainant complied and Subject Officer had no probable cause for an unlawful entry violation.

3. *Subject Officer's real reason for stopping Complainant appears to be a belief that Complainant's video recording the restricted areas of the station without explaining his reason or identifying himself was suspicious*

Subject Officer made numerous statements during his interview regarding his belief that the officers had a right to know why Complainant was videotaping where he was and that his refusal to respond made his presence at the station unlawful. These suggest that his real reason for stopping Complainant were related to his videotaping and refusal to explain why.

- He stated four times during his interview with OPC that videotaping wasn't a problem, but his concern was with why Complainant was doing it. Exh. 4 at 5:04, 6:00, 25:48, 25:00.
- He specified that he was concerned about Complainant videotaping tag numbers of vehicles coming in and out, and recording information about how the operations of the facility worked, including key podiums, vital structures and points of the station. Exh 4 at 5:15.
- He said that Complainant "was not restricted from recording that stuff, but the police department and the government have an interest in knowing." He added this was especially true in light of the stuff happening around the country and the attacks against police officers and stuff of that sort. Exh. 4 at 5:25.

Moreover, Subject Officer's almost immediate attempt to obtain Complainant's identification from his wallet without any other questions or explanation suggests that the real purpose of his stopping Complainant was wanting to identify Complainant due to the aforementioned security concerns.

- As Subject Officer approached Complainant, he almost immediately took Complainant's camera from him and pulled his arms behind his back asking as he

did so, “Do you have ID? Do you have ID on you?” SUBJECT OFFICER 1 BWC 2:38; WITNESS OFFICER #1 BWC 18:02.

- Subject Officer then patted Complainant’s back pockets, reached into his right back pocket and pulled out his wallet. SUBJECT OFFICER 1 BWC 3:10; WITNESS OFFICER #1 BWC 18:34.
- As soon as the wallet was removed, Subject Officer released Complainant’s hands. SUBJECT OFFICER 1 BWC 3:17; WITNESS OFFICER #1 BWC 18:41. Only after he completed that task did Subject Officer explain the reason for the stop and needing his identification. SUBJECT OFFICER 1 BWC 4:34; WITNESS OFFICER #1 BWC 19:58.

*4. Subject Officer’s stop of Complainant due to videotaping and a desire to obtain his identification, and using force to effect the detention constituted harassment*

Concerns about security are relevant and would provide reasonable suspicion for a stop to question Complainant and ask for his identification. The problem with Subject Officer stopping Complainant, however, was that several other officers had already initiated contact with Complainant three times while he was on the median. Complainant’s refusal to answer their questions and to identify himself justified only continued surveillance, not a fourth stop by Subject Officer after he’d already left the property.

Complainant’s videotaping of the police station, including the vehicles and their tag numbers as long as he was in a place he had a right to be, does not, by itself, constitute suspicious conduct providing reasonable suspicion or probable cause for stop or arrest. Exh. 4 at 5:52, General Order 304.19, Video Recording, Photographing, and Audio Recording of Metropolitan Police Department Members by the Public (eff. July 19, 2012), II.A.1. The General Order regarding videotaping of public spaces provides, however, that General Order 802.06 provides guidance on when behavior while video recording might elevate it to suspicious conduct. GO 304.19, II.A.2.

Under General Order 802.06, suspicious activity includes “person(s) taking photographs or video footage with no apparent aesthetic value (e.g., from various camera angles; and of security equipment, security personnel, traffic lights, building entrances).” General Order (G.O.) 802.06, Suspicious Activity Reporting Program (eff. Aug. 19, 2011), III.A.7.e. It also includes “Person(s) attempting to enter secured or sensitive premises or an area without authorization. *Id.* at III.A.7.i.

Thus, Complainant’s behavior videotaping a restricted area and standing in an unusual location to do so created reasonable suspicion to justify stopping and questioning Complainant and asking him to identify himself. However, WITNESS OFFICER #2 and officers prior to

WITNESS OFFICER #2 already initiated contact and questioned Complainant three times prior to Subject Officer detaining him:

1) when WITNESS OFFICER #5, WITNESS OFFICER #4 and WITNESS OFFICER #3 questioned him about why he was standing on the median and video recording, Complainant video 0002;

2) when WITNESS OFFICER #2 engaged in a dialogue with him and concluded he could remain on the median, WITNESS OFFICER #2 1 BWC 7:59; and

3) when WITNESS OFFICER #2 repeatedly asked Complainant to stop video recording the restricted area and officers' private vehicles. WITNESS OFFICER #1 BWC 3:09.

Complainant had every right to refuse to answer the officers' questions whether it was a contact or a stop and the refusal to do so could not be used as a reason for Subject Officer to escalate the previous contacts to a stop absent other evidence of criminal conduct. General Order (G.O.) 304.10, Police-Citizen Contacts, Stops, and Frisks (Eff. Aug. 30, 2013), III.A.5.f., III.B.4.c.(2). Rather, Complainant's refusal to identify himself and answer their questions here allowed only for keeping Complainant within visual sight. G.O. 304.10, III.A.5.f. But it did not allow Subject Officer to stop Complainant a fourth time and demand that he identify himself, especially after he had left the police station property and was no longer engaging in suspicious conduct.

Making Subject Officer's stop of Complainant worse was using force to detain him by taking away his camera and pulling his arms behind his back. Even if Subject Officer had sufficient reasonable suspicion to stop Complainant, he had no basis for using force to do it. "Officers 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." G.O. 304.10, III.B.5. The level of force used is that reasonably necessary to carry out the officer's authority. G.O. 304.10, III.B.6.a.

Here, Subject Officer alleged during his interview with OPC that he took away Complainant's camera and pulled his arms behind his back because "he wanted to make sure the complainant did not have anything in his hand where he could have hit him or inadvertently hit somebody." Exh. 4 at 4:23. Except that Complainant had been interacting with the police at close range during the bulk of his visit and, other than videotaping the officers, had never threatened anyone or even spoken in a loud voice. Nor did Complainant act in any way suggestive that he might use his video camera to hit Subject Officer or any other officer. Rather, Complainant seemed more concerned about the safety of his camera. Thus, Subject Officer had no reasonable basis to believe Complainant might hit him with it.

Moreover, as already discussed, the BWC footage shows that Subject Officer's primary, if not sole, purpose in taking Complainant's videocamera and pulling his arms behind his back was to retrieve Complainant's identification from his back pocket. *See supra.14*. Thus, the force



Subject Officer used was not necessary to effect the stop of Complainant who never tried to move or resist being stopped by Subject Officer or any other officer.

Subject Officer is a HIGH RANKING OFFICER and not only is expected to know the law he is enforcing and MPD policy, but to set an example for the officers who report to him. Subject Officer stopped and detained Complainant using physical force after Complainant had already been questioned numerous times by other officers and had left the station property. Alleging that the stop was based on laws Subject Officer should know were not applicable can only be construed as Subject Officer intentionally violating Complainant's rights under the law and MPD policy. Thus, Subject Officer's stop of Complainant constituted harassment, made worse by his use of physical force to effect the detention. The allegation of harassment due to the stop is sustained.

#### **B. Subject Officer Harassed Complainant When He Searched Him by Pulling His Wallet Out of His Pocket**

As already discussed, Subject Officer reached into Complainant's rear right back pocket, withdrew Complainant's wallet, reached into Complainant's wallet and withdrew his identification card. This behavior constituted a search as alleged by Complainant. Because Subject Officer did not have lawful justification for such a search, and he should have known better, it constituted harassment.

Subject Officer has a disconcerting misconception that pulling Complainant's identification out of his pocket does not constitute a search. Reaching into a subject's pocket to retrieve identification is a fourth amendment search. *Sibron v. New York*, 392 U.S. 40, 65 (1968). As such a search warrant or an exception is required. *See Katz v. United States*, 389 U.S. 347 (1967); *U.S. v. Scott*, 987 A.2d 1180 (D.C. 2010). Such exceptions include probable cause to believe that contraband or evidence of a crime will be found, consent, and search incident to arrest. *Katz*, 389 U.S. 347.

When Subject Officer reached into Complainant's pocket, he did not have a search warrant, he did not have probable cause to believe Complainant had contraband or evidence of a crime on his person, and Complainant explicitly refused to allow a search. SUBJECT OFFICER 1 BWC 3:10; WITNESS OFFICER #1 BWC 18:34.

Subject Officer indicated in his interview with OPC, however, that he didn't believe he needed any justification because his actions did not constitute a search. When asked by the OPC investigator if he searched Complainant, Subject Officer said, "I did not conduct a pat down or search COMPLAINANT." Exh. 4 at 10:00. He then explained, twice, how his actions did not constitute a search:

- “I saw [Complainant] had a wallet, I know there’s usually an I.D. in a wallet. . . . As soon as I obtained his I.D, I returned it. I didn’t search his wallet, I didn’t search his backpack.” *Id.* at 8:42.
- “I saw he had an ID, a wallet. I know there’s ID in wallet, I removed his wallet, pulled the ID out, folded it back up, and I handed it back to him. I did not look in his, I don’t even know if he had money or what else he had in his wallet. Right there in the front was his ID and that’s what I pulled out. Kind of like when you do a pat down, . . . you identify drugs, you pull them out . . .” *Id.* at 10:19.
- He specified that he removed Complainant’s wallet from his right rear pocket. *Id.* at 10:40.

Subject Officer seemed to have been operating under the mistaken belief that government interest is sufficient to “require” a subject to provide ID. When asked during his interview if Complainant was required to provide identification, he stated that “under Terry, subjects are required, if the government has an interest, the subject is required to provide ID,” but clarified that it did not have to be an identification card. Exh. 4 at 9:36. Subject Officer is incorrect. Simple government interest does not result in requiring a subject to identify him or herself. *See* G.O. 304.10, III.B.4.c.(2). And it definitely does not create an exception to the Fourth Amendment search requirements.

Subject Officer’s attorney tried to patch over Subject Officer’s gross error of law in his objections. First, he egregiously suggests that Subject Officer did not say the actions were not a search. SUBJECT OFFICER Objections, 9. Except he did. Second, he justifies the search by stating that Subject Officer was planning to arrest Complainant when he first approached him based on probable cause, and it was, thus, a search incident to arrest. *Id.*

The problem with Subject Officer’s argument, however, is that search incident to arrest must take place after an arrest, not before. *Sibron*, 392 U.S. at 63. Here, Subject Officer had not arrested Complainant at the time he searched Complainant’s rear pockets. Rather, he searched Complainant, then clarified he was detaining Complainant, and then told him he was going to file an application for an arrest warrant. SUBJECT OFFICER 1 BWC 4:34; WITNESS OFFICER #1 BWC 18:34. Moreover, Subject Officer never even claims during his interview with OPC that he approached Complainant intending to arrest him. He says only that he could have arrested him and that if he hadn’t had ID on him, he probably would have been arrested. Exh. 4 at 26:33. Rather, his intent from the outset seemed to have been, just as he explained to Complainant, to obtain his identification so he could apply for an arrest warrant. Exh. 4 at 27:30. Thus, even if Subject Officer had probable cause to arrest Complainant, which he did not, he did not actually arrest Complainant and thus did not meet the exception for search incident to arrest.

Here, Subject Officer searched Complainant’s pockets in violation of the law and MPD policy. MPD General Order 201.26 requires that sworn members “familiarize themselves with

the laws and regulations they are required to enforce.” Part V. B. 1. Thus, Subject Officer was on clear notice of the requirements relating to the production of identification in this instance and the need for unequivocal consent before reaching into Complainant’s pockets for it.

It is hard to believe that Subject Officer, a HIGH RANKING OFFICER, did not know that reaching into a subject’s pocket, even if just for a wallet he is sure contains identification, constitutes a search. His statements, however, create a situation in which he either did know and intentionally violated the law and MPD policy, or, he was genuinely ignorant of the laws and policy around a basic part of policing and his act was reckless. Either way, his act and subsequent justifications are especially disturbing given his role in leading other officers.<sup>4</sup>

Because Subject Officer searched Complainant’s pockets for his identification intentionally, knowingly or recklessly in violation of the law and MPD policy the allegation of harassment is sustained.

**C. Subject Officer Harassed Complainant When He Ordered Him to Move Along from the MPD DISTRICT Police Station**

In Subject Officer’s second encounter with Complainant only a few minutes later, Subject Officer refused to allow Complainant to enter the station by the front door. BWC footage of SUBJECT OFFICER, April 6, 2019 at 4:18 p.m. (“SUBJECT OFFICER 2 BWC”) at 2:00. As soon as WITNESS OFFICER #2 provided him with an OPC complaint form and he said that he had no further business with MPD, Subject officer told him, “Okay, then you are free to go. I am now going to ask you to leave the property. If you fail to leave the property, you will be placed under arrest immediately for unlawful entry.” BWC footage of WITNESS OFFICER #2, April 6, 2019 at 4:10 p.m. (“WITNESS OFFICER #2 3 BWC”) at 3:22, 3:39, 3:59; SUBJECT OFFICER 2 BWC 3:56, 4:05, 4:25.

What’s especially troubling about this order is that it came after Subject Officer had just told Complainant while he was detaining him, “if you wish to visit the police department, you can go to the front, go through the front door.” SUBJECT OFFICER 1 BWC 4:50; WITNESS OFFICER #2 BWC 20:13.

Despite this clear contradiction of what he had just told Complainant, in Subject Officer’s objections to the ROI, he claims that his order to leave was based on the belief that Complainant engaged in earlier criminal conduct while on government property and in the presence of several officers. SUBJECT OFFICER Objections, 10. He claims that D.C. Code § 22-307 permits MPD officers to issue such orders. *Id.*

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<sup>4</sup> Although not relevant to this decision, it is equally disturbing how Subject Officer compared his pulling Complainant’s wallet out to doing a pat down and pulling out drugs. His statement suggests a disturbing ignorance of law and MPD policy as to pat downs and searches.

There are two problems with this argument. First, as already discussed, Complainant never violated D.C. Code § 22-307, the “blocking passage” law. *See infra.* at 12. Second, even if Complainant had violated that law, it would only allow an order to stop blocking passage. Even if Complainant had been blocking passage in the parking lot, he was doing no such thing when he was trying to enter the police station door. In fact, he’d been following Subject Officer’s instructions.

While Subject Officer claimed at the time of Complainant attempting to enter the police station that his move along order was based on unlawful entry, he doesn’t explain the basis for his refusing entry to Complainant who had a lawful basis to be there – which was to obtain a complaint form. Presumably, Subject Officer understood unlawful entry wasn’t actually a valid basis for his threatening to arrest Complainant if he didn’t leave since he changed his basis for the order in his objections to being a violation of D.C. Code § 22-307.

Thus, Subject Officer provides no valid legal basis for ordering Complainant to leave police station property when he tried to enter the station through the front door to obtain a complaint form. His order to Complainant to leave the property on penalty of arrest infringed on Complainant’s rights in violation of the law. As already explained, a Captain must not only know the law, but provide an example to those who report to him. As such his misconduct appeared to be intended to harass Complainant who had annoyed him with his obstinance. Complainant’s allegation of harassment based on the move along order is thus sustained.

**V. SUMMARY OF MERITS DETERMINATION**

**SUBJECT OFFICER**

<b>Allegation 1: Harassment (stop)</b>	Sustained
<b>Allegation 2: Harassment (search)</b>	Sustained
<b>Allegation 3: Harassment (move along order)</b>	Sustained

Submitted on June 12, 2020.

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Complaint Examiner