

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	20-0105
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2
Allegation 1:	Harassment- Stop (SUBJECTS OFFICERS #1 and #2)
Allegation 2:	Harassment- Search (SUBJECT OFFICER #1)
Complaint Examiner:	Richard S. Ugelow
Merits Determination Date:	May 7, 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

At approximately 1:00 a.m. on November 9, 2019, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 stopped their marked MPD police cruiser alongside COMPLAINANT's truck that was legally parked in front of AN ADDRESS IN SE, WASHINGTON, DC.. When the officers approached the driver's side of the truck, COMPLAINANT immediately and voluntarily placed both of his hands out of the window and said words to the effect "I have a gun." COMPLAINANT was told to exit his vehicle, which he did, and was handcuffed. COMPLAINANT advised the officers that the gun was registered and that he had a concealed carry permit. SUBJECT OFFICER #1 then removed COMPLAINANT's wallet from his pants' pocket and found the gun registration and concealed carry documentation. COMPLAINANT complains that he was improperly stopped and searched by the officers.¹

¹ COMPLAINANT also alleged that subject officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 discriminated against him based on his race, African American. Pursuant to D.C. Code Section 5-1108(1), on March 26, 2020, a member of the Police Complaints Board dismissed these allegations concurring with the determination made by OPC's executive director. See Exhibit 2.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint. The Complaint Examiner determined that no genuine issues of material facts are in dispute that required a hearing based on a review of the Body Worn Camera (BWC) footage for SUBJECT OFFICER #1 and SUBJECT OFFICER #2, the OPC's Report of Investigation (ROI), the objections submitted by the Fraternal Order of Police (FOP) on behalf of SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on April 20, 2020, and OPC's response to the objections. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

III. FINDINGS OF FACT

Based on a review of the BWC footage for footage for SUBJECT OFFICER #1 and SUBJECT OFFICER #2, the OPC's Report of Investigation (ROI), the objections submitted by the Fraternal Order of Police (FOP) on behalf of SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on April 20, 2020, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. COMPLAINANT, the complainant, was in the driver seat of a legally parked car, with the motor running, at AN ADDRESS IN SE, WASHINGTON, DC, on November 19, 2019, at approximately 1:00 a.m.
2. MPD Officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 were on routine patrol in a marked MPD cruiser. Both officers were in full uniform. SUBJECT OFFICER #1 was driving.
3. The MPD cruiser was traveling in the opposite direction of the orientation of COMPLAINANT's car. That is to say, they may have been able to see COMPLAINANT sitting in his vehicle since they were driving toward him.
4. SUBJECT OFFICER #1 pulled the police cruiser next to COMPLAINANT's white pick-up truck.
5. Both officers exited the cruiser and approached the driver's side of the truck.²
6. SUBJECT OFFICER #1 used his flashlight to illuminate the inside of the truck.

² SUBJECT OFFICER #2 told OPC that he went to the passenger side. However, he had not reviewed the BWC before his December 12, 2019 OPC interview. The ROI at p. 4 incorrectly relied on SUBJECT OFFICER #2's statement to the effect that he approached the passenger side. In any event, this is a minor discrepancy that does not affect this decision.

7. COMPLAINANT immediately and voluntarily placed his hands outside the driver's side window so that they were fully visible and loudly said words to the effect "I have a gun."
8. The subject officers ordered COMPLAINANT to unlock the doors and to exit.
9. COMPLAINANT was reluctant to lower his hands because they would not be visible to the officers.
10. The subject officers helped COMPLAINANT to exit the vehicle and immediately placed him in handcuffs.
11. COMPLAINANT advised the subject officers that he had a concealed carry permit and that the gun was registered.
12. He also told the subject officers that the gun was in the front seat, where it was retrieved by SUBJECT OFFICER #2.
13. COMPLAINANT advised the subject officers that the DC carry permit was located in his pants' pocket.
14. SUBJECT OFFICER #1 retrieved COMPLAINANT's wallet from his person and located the permit.
15. COMPLAINANT was not asked for and did not give consent to this search.
16. After reviewing COMPLAINANT's paperwork, the handcuffs were removed and COMPLAINANT was free to go.
17. At all times immediately prior to and during his encounter with the SUBJECT OFFICER #1 and SUBJECT OFFICER #2, COMPLAINANT was acting in a lawful, non-suspicious and non-belligerent manner.
18. The officers had no cause or reason to stop COMPLAINANT, as the term "stop" is defined in MPD General Order 304.10.

IV. DISCUSSION

Pursuant to D.C. Code § 5-1107(a), (b-1), OPC has the sole authority to adjudicate "a citizen complaint against a member or members of the MPD . . . that alleges abuse or misuse of police powers by such member or members, including "(1) harassment...."

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 as "words, conduct, gestures, or other actions directed at a person that are purposefully, knowingly,

or recklessly in violation of the law, or internal guidelines of the MPD, so as to: (a) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (b) deny or impede the person in the exercise or enjoyment of any right, privilege, power, or immunity.”

The regulations governing OPC define harassment as “[w]ords, conduct, gestures or other actions directed at a person that are purposefully, knowingly, or recklessly in violation of the law or internal guidelines of the MPD ... so as to (1) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (2) deny or impede the person in the exercise or enjoyment of any right, privilege, power or immunity. In determining whether conduct constitutes harassment, OPC will look to the totality of the circumstances surrounding the alleged incident, including, where appropriate, whether the officer adhered to applicable orders, policies, procedures, practices, and training of the MPD ... the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating.” D.C. Mun. Regs. tit. 6A, § 2199.1.

SUBJECT OFFICER #1 and SUBJECT OFFICER #2 told COMPLAINANT that they pulled over to see if he was okay as he was in a high crime area. COMPLAINANT told the officers that he was an investigator for A BRANCH OF THE ARMED SERVICES and that he had a weapon. COMPLAINANT’s statement to OPC and the BWC footage show that he was familiar with the law and requirements for carrying a concealed weapon. For this reason, he immediately notified the officers that he was armed and made his hands visible to them. Indeed, this occurred before the officers could say anything to him, such as why they had approached him. Stated differently, COMPLAINANT took the initiative to speak to the officers before they had an opportunity to speak to him. This initial encounter took place extremely quickly, perhaps one minute or less.

1. Contact or Stop

The question to be decided is whether SUBJECT OFFICER #1 and SUBJECT OFFICER #2 engaged in a lawful contact or an unlawful stop. The starting point for this analysis is MPD General Order 304.10, which states in pertinent part:

Field Contacts

1. Field contacts may be initiated at any time by an officer. No evidence of any crime is needed to initiate a field contact, and the encounter may be terminated at any time by either party.
2. Since a field contact involves solely the voluntary cooperativeness of an individual who is free not to respond and to leave, the standard for a field contact does not

require probable cause, reasonable suspicion, or any other specific indication of criminal activity.

3. While an officer may initiate a field contact for any legitimate, police-related purpose, field contacts shall not be conducted in a hostile or aggressive manner, or as a means of harassing any individual or attempting to coerce an individual to leave an area merely because he or she is “hanging around” or loitering...
5. b. Officers must constantly keep in mind that the distinction between a field contact and a stop depends on whether under the particular circumstances an individual could reasonably perceive that he or she is not free to leave the officer’s presence.

The BWC footage shows that once the police cruiser was pulled alongside COMPLAINANT’s truck, he was not free to leave. Cars were parked in front and back of him and the cruiser’s location would have blocked him from leaving the parking space. But, importantly, COMPLAINANT clearly perceived that he was not free to leave the scene as he immediately placed his hands so that they were visible at all times to the officers. In other words, he thought he was being stopped. Further, the officers were driving toward COMPLAINANT on A STREET IN SE, WASHINGTON, DC, so they were obviously able to observe him. What they witnessed, as the officers acknowledge in their statements to OPC, was COMPLAINANT sitting in his truck, with the motor running, in a legal parking spot, minding his own business and not acting in a suspicious manner. If the officers’ intent was truly to see if he was okay, all they had to do was pull up alongside of his truck, roll down the cruiser window and talk to him. Instead, they boxed his truck so it could not leave the parking spot, both officers exited the cruiser, approached the truck, and pointed a flashlight inside. Under the totality of the circumstances present here, the Complaint Examiner finds that the encounter SUBJECT OFFICER #1 and SUBJECT OFFICER #2 had with COMPLAINANT was a stop and not a field contact and therefore their actions constituted harassment in violation of D.C. Code § 5-1107 and MPD General Order 120.25.

2. The Search.

SUBJECT OFFICER #1 retrieved the gun registration documentation from COMPLAINANT’s wallet that was in his pants’ pocket. COMPLAINANT did not consent to this search. While he did tell the officers that the permits were in his pants’ pocket, that is not remotely sufficient to give permission to a search. Moreover, there is no evidence that either officer explicitly asked COMPLAINANT for consent and there is no evidence that he granted it. Further, there is no claim by SUBJECT OFFICER #1 that there was an alternative justification for the search.

The law is clear. In the absence of probable cause, not present here, 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 *Jud v. United States*, 190 f.2d 649, 651 (D.C. Cir. 1951); *U.S. v. Manuel*, 992 F.2d 272, 275 (10th Cir. 1993). Here, the evidence is unequivocal: COMPLAINANT neither implicitly nor explicitly consented to a search of his person.

Police officers may stop a vehicle and its occupants without a warrant when they have probable cause to believe a traffic violation has occurred. *Watson v. United States*, 43 A.3d 276, 282 (D.C. 2012) (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)). Police officers may also briefly detain a person without a warrant in a Terry stop if they have a “reasonable, articulable suspicion that ‘criminal activity may be afoot.’” *United States v. Edmonds*, 240 F.3d 55, 59 (D.C. Cir. 2001) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (U.S. 1968)). Here, however, the subject officer had no basis to believe that COMPLAINANT had committed a traffic offense or otherwise was acting in a suspicious manner. Thus, there was no justification to engage in a search in the absence of “unequivocal and specific” consent.

The totality of the circumstances demonstrate that SUBJECT OFFICER #1 harassed COMPLAINANT in violation of D.C. Code § 5-1107 and MPD General Order 120.25. by searching his person without consent.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment – Stop	Sustained
Allegation 2: Harassment – Search	Sustained

SUBJECT OFFICER #2

Allegation 1: Harassment – Stop	Sustained
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Submitted on May 7, 2020

Richard S. Ugelow
Complaint Examiner