

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	20-0638
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER
<b>Allegation:</b>	Unnecessary/Excessive Force
<b>Complaint Examiner:</b>	Jennifer A. Fischer, Esq.
<b>Merits Determination Date:</b>	September 13, 2021

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 July 7, 2020. Complainant alleged that on May 30, 2020, the subject officer, Metropolitan Police Department (MPD) SUBJECT OFFICER, used unnecessary or excessive force against protestors when spraying them with OC spray.

Specifically, COMPLAINANT stated that on May 30, 2020, while he was participating in the protests near A STREET IN NW, WASHINGTON, DC, he witnessed SUBJECT OFFICER spray a black male protestor in the face with OC spray as the man walked by the SUBJECT OFFICER and other officers in a police line. COMPLAINANT added that he witnessed the subject officer spray other protestors as well, and he never heard the SUBJECT OFFICER give any warnings or commands to the protestors, before spraying them.

**II. EVIDENTIARY HEARING**

No evidentiary hearing was conducted regarding this Complaint because, based on a review of OPC's Report of Investigation (ROI), Cellphone video recorded by Complainant on May 30, 2020, the Body Worn Camera Footage recorded by WITNESS OFFICER #1, WITNESS OFFICER #2, WITNESS OFFICER #3, WITNESS OFFICER #4, and WITNESS OFFICER #5 on May 30, 2020, the objections submitted by Subject Officer on July 29, 2021,

and OPC's response to the objections dated August 6, 2021, 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 (ROI), the Body Worn Camera Footage recorded by WITNESS OFFICER #1, WITNESS OFFICER #2, WITNESS OFFICER #3, WITNESS OFFICER #4, and WITNESS OFFICER #5 on May 30, 2020, the objections submitted by Subject Officer on July 29, 2021, and OPC's response to the objections dated August 6, 2021, the Complaint Examiner finds the material facts regarding this complaint to be:

1. Complainant filed a complaint on July 7, 2020.
2. On May 30, 2020, a number of large scale, unplanned First Amendment demonstrations took place in the District of Columbia following the death of George Floyd in Minneapolis. One such protest developed at the intersection of A STREET IN NW, WASHINGTON, DC from approximately 10:18 pm.
3. In advance of the protestors arriving at the intersection, officers formed a police line on the east side of the crosswalk on A STREET IN NW, WASHINGTON, DC on the east side of the intersection with THE STREET IN NW, WASHINGTON, DC. Subject Officer stepped out of the police line and into the crosswalk, holding a large canister in his right hand and stated to the officers in the police line, "Stand behind the crosswalk. Anyone that comes into a neutral zone you can spray them. Pepper spray is for the neutral zone only." Subject Officer motioned back and forth with his right arm."
4. While Subject Officer was speaking, protestors approached the police line from the west, heading east on A STREET IN NW, WASHINGTON DC and passing PARK on their south side, crossing the intersection with THE STREET IN NW, WASHINGTON, DC until they stopped en masse before the crosswalk, directly across it from the police line. Although several protestors entered the crosswalk, the mass of protestors did not. The protestors were chanting, but did not attempt to breach the police line or behave in a threatening, aggressive, or assaultive manner toward the officers.
5. Subject Officer walked back into the police line and gave no warnings or commands to the protestors regarding the crosswalk, neither prohibiting them to step into it nor stating that they would be sprayed if they stepped into it.
6. Two young men on a motorbike rode into the middle of the crosswalk from the south side of THE STREET IN NW, WASHINGTON, DC and slowly drove north along the length of the police line, but did not turn toward the police or indicate an intention to try to breach the police line. When the motorbike was a little over half of the way along the police line, Subject Officer stepped out of the police line and deployed his OC spray

directly into the faces of the two men on the motorbike from a distance that appeared to be less than 3 feet away. Subject Officer did not give the men a warning. No other officer sprayed the men on the motorbike with OC spray nor did any give the men a warning to leave the crosswalk.

7. After spraying the men on the motorbike, Subject Officer continued walking along the police line from the north toward the south, facing the protestors with his right arm out holding his can of OC spray pointed toward the line of protestors. He did not give a verbal warning to the protestors as he walked. He then returned to the police line a little more than halfway along the police line, but toward the south end.
8. Several other people also entered the crosswalk at the same time as the men on the motorbike and some entered shortly after: a white female wearing black sweatpants and sportsbra who walked into the crosswalk and walked along the line of protestors who appeared to be one of the leaders of the protest, a bicyclist who also rode within the crosswalk and along the police line, a group of two males who walked along the police line recording with their cellphones, and a group of three men, one with a dog on a leash (Complainant), who also walked along the police line recording the police line with their cell phones. None of these protestors were sprayed with OC spray nor were they told to get out of the crosswalk.
9. Approximately a minute and a half after spraying the men on the motorbike, a black male wearing all black with long dreadlocks then walked in the crosswalk along the police line from north to south with his face in the direction he was walking and with his right arm held straight out and slightly up. He did not turn toward the officers while walking. As he passed Subject Officer, Subject Officer sprayed him in the face with OC spray from a distance of less than three feet.
10. At approximately 10:25 pm the officers deployed flashbang and disbursed the crowd.
11. Prior to the deployment of flashbang, the only other officer seen to discharge his OC spray at protestors was Sgt Mendez who yelled “get back” and sprayed from the police line at the crowd on the other side of the crosswalk. No one was in the crosswalk and from that distance it did not appear to have hit anyone as no one turned away, although one man later asked him what he did to get sprayed and another young woman yelled at WITNESS OFFICER #5 that “your fellow officer just sprayed us for nothing and we were not doing anything. How do you all justify things like that?”
12. The only other warnings heard to be given besides that from WITNESS OFFICER #5 was from WITNESS OFFICER #3 who held his OC cannister up and told the protestors on the other side of the crosswalk to “back up” shortly after the men on the motorbike had passed and again shortly after Subject Officer sprayed the man with dreadlocks.

#### **IV. DISCUSSION**

Pursuant to D.C. Official Code § 5-1107(a), “The Office [of Police Complaints] shall have the authority to receive a citizen complaint against a member or members of the MPD . . . that alleges abuse or misuse of police power by such member or members.” Such allegations may include, among other things, the use of unnecessary or excessive force. Pursuant to Section 5-1107 (b-1), “The Office shall have the sole authority to dismiss, conciliate, mediate, adjudicate, or refer for further action to MPD . . . a citizen complaint received.”

Complainant alleged that Subject Officer used unnecessary or excessive force when he sprayed OC spray at a protestor without warning. Complaint Examiner sustains this allegation.

“The policy of the Metropolitan Police Department (MPD) is to value and preserve the sanctity of human life at all times, especially when lawfully exercising the use of force. Therefore, MPD members shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others. When using force, members shall continuously reassess the perceived threat in order to select the reasonable use of force response, or one that is proportional to the threat faced by him, her or others.” MPD General Order 901.07 (effective November 3, 2017), Part II.

D.C. Mun. Regs. Tit. 6A, § 2199.1 defines Excessive or Unnecessary Use of Force for the purposes of OPC as “Unreasonable use of power, violence, or pressure under the particular circumstances. Factors to be considered when determining the “reasonableness” of a use of force include the following: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officer or others; (3) whether the subject was actively and physically resisting arrest or attempting to evade arrest by flight; (4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; (5) whether the officer adhered to the general orders, policies, procedures, practices and training of the MPD or DCHAPD, including adherence to the Use of Force Framework; and (6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish the objective. MPD’s Use of Force Framework requires a similar analysis. MPD General Order 901.07 IV.E.

The Use of Force framework articulated in MPD General Order 901.07 provides that “To ensure the force response is objectively reasonable and proportionate to the perceived threat, members shall: a. Continuously assess the threat and develop strategies, consider their authority and Department policies, identify options and contingencies, take action and review, and gather information. This approach requires members to: (1) Consider the seriousness of the crime, the level of threat or resistance presented by the suspect, the imminence of danger, the suspect’s mental capacity, his or her access to weapons, agency policies, and available options (e.g., calling upon members with specialized training for assistance). (2) Modify their level of force in

relation to the amount of resistance offered by a suspect. As the subject offers less resistance, the member shall lower the amount or type of force used.” MPD General Order 901.07 IV.E

The use of Oleoresin Capsicum (OC) spray is specifically addressed in the use of force framework and in a policy specifically addressing the use of OC spray, MPD General Order 901.04, as a “compliance technique.” Within the Use of Force framework as laid out in MPD General Order 901.07, Compliance techniques are only to be used with an “Active Resister,” which is defined as a subject “who is uncooperative and will not comply with the member’s requests or comments. The subject exhibits physical and mechanical defiance, including evasive movements to defeat the member’s attempt at control, including but not limited to, bracing, tensing, pushing, or verbally signaling an intention not to be taken into or retained in custody, provided that the intent to resist has been clearly manifested.” In the context of crowd control, MPD General Order 901.04 provides that “Officers are prohibited from using OC spray to disburse crowds or others unless those crowds or others are committing acts of disobedience that endanger public safety and security.”

MPD General Order 901.04 also provides the proper procedure to be followed when OC Spray is to be used: “(a) Issue a warning that OC Spray is going to be used against the subject . . . (b) Ensure that, prior to discharging the OC Spray, the member permits a reasonable period of time to allow compliance with the warning, when feasible . . . (d) Not use the dispenser at any distance less than 3 feet from the subject unless absolutely necessary. Effective range is approximately 12 feet.”

MPD Standard Operating Procedure 16.01 also specifies how First Amendment Assemblies and Mass Demonstrations are to be held. The policy emphasizes the importance of communication and warnings. “Communication is an essential tool in crowd management. It ensures unity of action among members, and that police officials and crowd leaders understand one another. Communication must be constant, clear, and immediate, and on many occasions, can serve to diffuse threatening situations.” When issuing warnings, the SOP provides that they “shall be of such amplification and repetition that they are reasonably calculated to be heard by the entire assemblage . . . At least one warning shall be issued and, absent exigent circumstances, a total of three warnings shall be issued . . . Participants shall be allowed a reasonable amount of time to disperse. . . The entire warning process shall be documented by means of an audio-visual recording, if available.”

SOP 16.01 also addresses the use of OC spray in the case of Civil Disturbance Unit (CDU) Use of Force. First, it requires compliance with MPD General Order 901.04 in the use of personal OC spray dispensers. Moreover, for MK-9 and MK-46 Canisters, they “should, generally, be deployed “only upon the approval of an incident commander to repel a substantial effort to breach a police line or to prevent significant physical injury of police personnel or others” or “to arrest actively resisting subjects, or if subjects are endangering public safety or security.”

Here, Subject Officer did not provide either the men on the motorbike or the man with dreadlocks a warning to leave the crosswalk prior to spraying them with OC spray. Exh. 7 at 0:08; **WITNESS OFFICER #1 BWC 3:03, 4:19; WITNESS OFFICER #2 BWC 3:05, 4:18; WITNESS OFFICER #3 BWC 3:56, 5:17; WITNESS OFFICER #5 BWC 1:50, 3:03.** Nor was there at any time a general warning given to the crowd, in any way loud enough for the crowd to hear, that they would be subject to OC spray if they entered the crosswalk. Exh. 7; WITNESS OFFICER #1 BWC; WITNESS OFFICER #2 BWC; WITNESS OFFICER #3 BWC; WITNESS OFFICER #5 BWC. Moreover, multiple other people entered the crosswalk and walked along the police line and were not sprayed, which, at the very least would create confusion as to whether entering the crosswalk and walking along the police line was allowed. Exh. 7; WITNESS OFFICER #1 BWC; WITNESS OFFICER #2 BWC; WITNESS OFFICER #3 BWC; WITNESS OFFICER #5 BWC. Neither the men on the motorbike nor the man with dreadlocks were given an opportunity to comply with an order to stay out of the crosswalk or to leave the crosswalk. Exh. 7 at 0:08; **WITNESS OFFICER #1 BWC at 3:03, 4:19; WITNESS OFFICER #2 BWC 3:05, 4:18; WITNESS OFFICER #3 BWC 3:56, 5:17; WITNESS OFFICER #5 BWC 1:50, 3:03.** These men were also not actively resisting being put under arrest nor were they doing anything to indicate they were trying to breach a police line, injure officers or others, or endangering public safety or security. Exh. 7 at 0:08; **WITNESS OFFICER #1 BWC at 3:03, 4:19; WITNESS OFFICER #2 BWC 3:05, 4:18; WITNESS OFFICER #3 BWC 3:56, 5:17; WITNESS OFFICER #5 BWC 1:50, 3:03.** As with numerous other protestors who entered the crosswalk and walked the length of the police line, but did not attempt to cross the police line or move toward the officers in an aggressive manner, they gave no indication of doing anything other than peacefully participating in a mass demonstration. Exh. 7 at 0:08; **WITNESS OFFICER #1 BWC at 3:03, 4:19; WITNESS OFFICER #2 BWC 3:05, 4:18; WITNESS OFFICER #3 BWC 3:56, 5:17; WITNESS OFFICER #5 BWC 1:50, 3:03.** Thus, spraying them with OC spray was a violation of MPD General Orders 901.04, 901.07, and Standard Operating Procedure 16.01.

Subject Officer admitted to knowing the proper standard for deploying OC spray when he stated during his interview with the OPC investigator that “when the OC is deployed by myself, it was because a person was engaged in, attempting to cross the police line or engaging in assaultive or combative behavior towards the officer or failure to listen to the officers’ commands to stop.” Exh. 4.1 at 4:50. Similarly, when asked to clarify what an individual has to do to be sprayed with OC spray when standing close by, he said, “actively failing the verbal command of the officer and crossing the police line, or attempting to cross the police line, moving in a direction of the officers in an aggressive manner, which the officer would believe that could lead to an assault or other injury or damage.” Exh. 4.2 at 0:48. He indicated during his interview that his understanding was that protestors could have been sprayed by simply walking into the crosswalk because “they would have been given verbal warnings and told not to cross

that area.” Exh. 4.2 at 2:28. Thus, Subject Officer failing to give such warnings prior to deploying his OC spray indicates that he did so knowingly in violation of police policy.

In Subject Officer’s Objections, he contends that MPD’s Internal Affairs Division (IAD) and Use of Force Review Board (UFRP) already reviewed the incident and found Subject Officer’s actions to be appropriate. He does not state how he is intending that this report be used in relation to this investigation except perhaps to say that OPC’s investigator got it wrong. Regardless, IAD’s and UFRB’s investigation have no bearing on OPCs duty under D.C. Official Code § 5-1107(a) and (b-1) to receive, review and adjudicate citizen complaints of unnecessary or excessive force against members of the MPD.

Moreover, to the extent that this Complaint Examiner might take the report of IAD and UFRP’s investigation and conclusions into consideration, it would only be relevant to the extent that it covers the conduct alleged here. Nowhere in the report does it mention the instances of use of OC spray alleged in the Complaint here, however. Moreover, most of the BWC footage reviewed in the report that pertains to the police line at A STREET IN NW, WASHINGTON, DC starts after the alleged instances being reviewed here, which took place between 10:18 pm and 10:24 pm, and seemed to have been reviewed solely in relation to the decision to use aerial bursts and sting balls: WITNESS OFFICER #6 BWC footage starts at 22:25, WITNESS OFFICER #7’s BWC footage starts at 22:24, WITNESS OFFICER #8’s BWC footage starts at 22:24, WITNESS OFFICER #9’s BWC footage starts at 22:35, and WITNESS OFFICER #10’s BWC footage starts at 22:27. The only two videos that were reviewed from THE STREET IN NW, WASHINGTON, DC that began during the relevant time frame were videos from WITNESS OFFICER #11 (22:21) and WITNESS OFFICER #12 (22:23) and the discussion of those videos only related to the authorization and ultimate use of aerial bursts and sting balls. None of the discussion of these videos mention Subject Officer or the use of OC spray.

In fact, the only place the report references SUBJECT OFFICER’s use of force states that he “had uses of force at multiple locations . . . in response to the rioters throwing projectiles at the officers, setting fires to vehicles and structures, and destroying and looting property.” Exh 9 at 86. Notably, that conclusion is contrary to what is viewable in Complainant’s recording and the BWC footage reviewed as part of this decision, which show Subject Officer using OC spray on peaceful protestors with no warning. This is not surprising given that the report itself notes problems with a lack of reporting of uses of force the night of the protests. Exh 9 at 88.

Thus, Subject Officer’s use of force in spraying OC spray at the two men on the motorbike and the man with dreadlocks was neither reasonable nor necessary and it thus constituted an excessive and unnecessary use of force as defined under D.C. Mun. Regs. Titl. 6A § 2199.1 and MPD General Order 901.07. The allegation of Unnecessary and Excessive force is sustained.

**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER

<b>Allegation 1: Unnecessary/Excessive Force</b>	Sustained
--	-----------

Submitted on September 13, 2021.

---

Jennifer A. Fischer, Esq.  
Complaint Examiner