

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	21-0233
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2
Allegation 1:	Harassment
Complaint Examiner:	Richard S. Ugelow
Merits Determination Date:	November 17, 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

On January 20, 2021, at approximately 6 p.m., the complainant, COMPLAINANT, was walking his dog on the sidewalk of the STREET BLOCK IN SE, WASHINGTON, DC. On the night in question, SUBJECT OFFICER #1¹ and SUBJECT OFFICER #2 were in an unmarked cruiser and were assigned to the REDACTED UNIT. They approached COMPLAINANT because they claimed to see a bulge in his jacket pocket which they thought could be a gun. COMPLAINANT denied having a gun and refused a request to be searched. Nevertheless, the subject officers patted down the outside of his coat. A gun or other weapon was not found. COMPLAINANT alleges that he was harassed by SUBJECT OFFICER #1 and SUBJECT OFFICER #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, SUBJECT OFFICER #2, WITNESS OFFICER #1, WITNESS OFFICER #2, WITNESS

¹ At the time of the incident, SUBJECT OFFICER #1 was SUBJECT OFFICER #1. He was promoted to REDACTED RANK after January 20, 2021.

OFFICER #3, and WITNESS OFFICER #4; OPC's Report of Investigation (ROI) and the exhibits thereto (including bystander videos); the objections submitted by the D.C. Police Union on behalf of SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on October 18, 2021; 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 SUBJECT OFFICER #1, SUBJECT OFFICER #2, WITNESS OFFICER #1, WITNESS OFFICER #2, WITNESS OFFICER #3, and WITNESS OFFICER #4; the ROI and accompanying exhibits; the objections submitted by the D.C. Police Union on behalf of SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on October 18, 2021, and accompanying exhibits; and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. At approximately 6 p.m., after sunset, on January 20, 2021, the complainant, COMPLAINANT, was walking his dog on the STREET BLOCK OF SE, WASHINGTON, DC.
2. The incident took place well past sunset so it was dark, but the street was somewhat illuminated by streetlights.
3. SUBJECT OFFICER #2 was driving, and SUBJECT OFFICER #1 was in the front passenger seat of an unmarked MPD cruiser. Two other MPD officers were in the rear seat. There was a second unmarked MPD cruiser with four MPD officers following the SUBJECT OFFICER #1 and SUBJECT OFFICER #2 cruiser.
4. All eight MPD officers were in full uniform.
5. COMPLAINANT was dressed in casual wear -- slacks, slip-on shoes, shirt, and unzipped jacket.
6. COMPLAINANT's dog was on a leash. The dog was small and well-behaved.
7. COMPLAINANT was walking alone on a quiet residential street.
8. SUBJECT OFFICER #1 told OPC that he noticed a bulge in COMPLAINANT's jacket and that his jacket pocket was "swinging which made him believe it could possibly be a firearm." Exhibit 8 at 7:48.
9. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 exited the cruiser and approached COMPLAINANT.
10. The six other officers exited their respective vehicles and some or all were visible to COMPLAINANT.

11. The officers told COMPLAINANT that they wanted to search him because they saw a bulge in his jacket pocket.
12. COMPLAINANT said there was not a bulge in his jacket pocket.
13. The BWC footage confirms that there was no bulge in COMPLAINANT's jacket pocket.
14. In response to a question by one of the subject officers, COMPLAINANT said that he did not have a gun on him.
15. COMPLAINANT denied a request from the subject officers that he consent to a pat down. Nevertheless, both subject officers proceeded to touch his clothing to see if he had a gun, which he did not.
16. COMPLAINANT was asked by SUBJECT OFFICER #2 "Why you look like you about to take off running on me?" SUBJECT OFFICER #2 BWC at 2:10.
17. COMPLAINANT raised his hands and responded, "No. I'm wondering why y'all talking to me, first of all." Id.
18. The subject officers asked COMPLAINANT why he was "freaking out." SUBJECT OFFICER #1 BWC at 2:15.
19. COMPLAINANT told the subject officers "Because I'm wondering why, why a unmarked car of police, first of all." SUBJECT OFFICER #1 BWC at 2:30. Shortly thereafter, COMPLAINANT "Because it's fifteen police out here." SUBJECT OFFICER #1 BWC at 3:13.
20. In response to COMPLAINANT's request, both officers provided their names and badge numbers.
21. COMPLAINANT filed a timely complaint with OPC.

IV. DISCUSSION

Pursuant to D.C. Code § 5-1107(a), (b-1), OPC has the sole authority to adjudicate "a citizen complaint against a member or members of the MPD . . . that alleges abuse or misuse of police powers by such member or members, including "(1) harassment; (2) use of unnecessary or excessive force; (3) use of language or conduct that is insulting, demeaning, or humiliating; (4) discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business; (5) retaliation against a person for filing a complaint pursuant to [the Act]; or (6) failure to wear or

display required identification or to identify oneself by name and badge number when requested to do so by a member of the public.”

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.

At approximately, 6 p.m. on the evening of January 20, 2021, eight MPD officers were on patrol in two unmarked MPD cruisers in the area of the STREET BLOCK IN SE, WASHINGTON, DC. SUBJECT OFFICER #1 and were in the front seat of one vehicle, two other MPD officers were in the rear seat of the vehicle, and four additional officers were in a second unmarked cruiser. Each of the officers was wearing an MPD uniform. They were all members of the REDACTED UNIT.

The BWC footage reviewed by the Complaint Examiner shows COMPLAINANT walking his dog on the STREET BLOCK OF SE, WASHINGTON, DC. He was dressed in slacks, slip-on shoes, shirt, and an unzipped jacket. He was walking alone and minding his own business. There is no evidence or suggestion from the BWC that COMPLAINANT was acting in a suspicious manner. The street was dark except for some glow from streetlights.

Apparently, SUBJECT OFFICER #1 and SUBJECT OFFICER #2, from their cruiser, claimed to see a bulge in COMPLAINANT’s jacket which, to them, indicated he might have been carrying a gun. The subject officers exited their vehicle and approached COMPLAINANT. They asked whether he was carrying a gun, which he denied.

The subject officers claimed as a justification for the encounter that there was a bulge indicating a gun in COMPLAINANT’s jacket pocket. The BWC footage simply does not support that claim. As the objections submitted by the Union state “The stop was conducted at night with limited visibility.” Objections at 4. The Union’s observation shows that it was highly

unlikely that the subject officers would have been able to see a bulge in the shape of a gun or weapon in COMPLAINANT's jacket pocket from their cruiser.

COMPLAINANT told the officers that he did not have a gun and continued to walk. The officers asked him "why are you freaking out?" The Complaint Examiner's examination of the BWC footage shows that COMPLAINANT (understandably) was upset from the stop but not otherwise expressing any untoward or threatening conduct. COMPLAINANT certainly did not appear to be "running away" as SUBJECT OFFICER #2 accused him of doing. Objectively, COMPLAINANT could not run because of his footwear and the small dog, not to mention the presence of six other MPD officers. But SUBJECT OFFICER #2's statement shows that COMPLAINANT had been stopped and that this was not a mere contact. Clearly, SUBJECT OFFICER #2 was telling COMPLAINANT in so many words that he was not free to go.

Most importantly for purposes of the Complaint Examiner's analysis is that the officers patted down COMPLAINANT without his consent. The question is, therefore, was the pat down justified and lawful.

In support of their position, the Union's objections note that the STREET BLOCK IN SE, WASHINGTON, DC, is "plagued with violence." The Union also asserts that "SUBJECT OFFICER #2 and SUBJECT OFFICER #1 are highly trained in identifying characteristic of an armed gunman. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 employed that training and took their time to visibly examine COMPLAINANT and his pockets during the field interview and still believed it appeared he was carrying a firearm." Objections, p. 5.

MPD General Order 304.10 defines frisk as: "A limited protective search for concealed weapons or dangerous instruments. Usually, it occurs during a "stop" [defined in 304.10 II. 3] and consists of a pat down of the individual's clothing to determine the presence of weapons and other dangerous items." 304.10 II. 2.

General Order 304.10 further provides "[a]n officer may frisk a person...whom he/she has stopped if he/she reasonably suspects that the person is carrying a concealed weapon or dangerous instrument and that a risk is necessary to protect himself/herself or others."

For purposes of this decision, the Complaint Examiner will accept the claim that the STREET BLOCK IN SE, WASHINGTON, DC, is in a high crime area, one where drugs and guns have been found and assaults have taken place.² Those factors standing alone are not sufficient to support a lawful frisk. To decide otherwise means that every individual walking a dog and minding their own business in a high crime area would be subject to being stopped and frisked. There must be more. The "more" here, according to the subject officers is the asserted bulge in COMPLAINANT's jacket and his conduct while they talked to him. In particular, the

² To be clear, the Complaint Examiner does not find that the STREET BLOCK IN SE, WASHINGTON, DC, is a high crime area. The Complaint Examiner merely accepts the Union's assertion for purposes of this decision.

officers claim that “THE COMPLAINANT was blading his body, which is consistent with an armed individual trying to conceal a firearm and increasing the pace of his stride when he observed the officers’ presence.” Objections, p. 5.

The Complaint Examiner’s review of the BWC did not reveal COMPLAINANT blading his body in a suspicious manner or increasing his pace. But assuming he did, there simply was no reason to believe under the circumstances present here that COMPLAINANT had a weapon on his person, as there is no visible bulge. It is, moreover, highly suspect that the officers saw a bulge from their cruiser particularly in dim lighting. Until confronted by the subject officers, COMPLAINANT was only walking his dog and not acting differently than any other citizen similarly situated. In sum, COMPLAINANT’s appearance and demeanor were not unusual or of such a nature that would give reasonable and cautious police officers justification to conduct a frisk.

Terry v. Ohio, 392 U.S. 1 (1968), the seminal case on stop and frisks, does not support the lawfulness of the subject officers’ actions.

As the Terry court observed: “Even a limited search of the outer clothing for weapons constitutes a severe though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. 392 U.S. at 25.

But, the Court said, a police officer is authorized to frisk for weapons:

for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. 392 U.S. at 27. (internal citations omitted)

As the Terry court observed

[Where] a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where, in the course of investigating this behavior, he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing

of such persons in an attempt to discover weapons which might be used to assault him.
392 U.S. at 30.

The subject officers did not have reasonable suspicion to frisk COMPLAINANT. Being a police officer is a difficult, challenging, and potentially dangerous profession. But here, for the reasons discussed earlier, there were insufficient objective reasons to frisk COMPLAINANT and the totality of the circumstances do not support a lawful frisk. He posed no apparent danger to anyone – himself, the police officers, or those in the area. Beyond the fact that COMPLAINANT was in a high crime area and walking his dog at night, there were no objective reasons to believe that he was armed and/or dangerous. In particular, COMPLAINANT’s demeanor, walking alone on street, walking his dog, minding his own business, making no furtive movements or gestures, objectively did not give SUBJECT OFFICER #1 or SUBJECT OFFICER #2 cause to fear for their safety or the safety of others.

The Complaint Examiner must determine, in part, if SUBJECT OFFICER #1 and/or SUBJECT OFFICER #2 acted “purposefully, knowingly, or recklessly in violation of the law, or internal guidelines of the MPD...” Here, the totality of the circumstances are that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 violated MPD General Orders and applicable law when they frisked COMPLAINANT on January 20, 2021.

The allegation of harassment is sustained

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment	Sustained
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SUBJECT OFFICER #2

Allegation 1: Harassment	Sustained
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Submitted on November 17, 2021

Richard S. Ugelow

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