

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	22-0008
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Harassment
Complaint Examiner:	Rebecca Goldfrank
Merits Determination Date:	January 23, 2023

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, filed a complaint with the Office of Police Complaints (OPC) on October 6, 2021. COMPLAINANT alleged that on September 27, 2021, subject officer, Metropolitan Police Department (MPD) SUBJECT OFFICER, harassed him when the officer unlawfully searched his car and unlawfully arrested him.¹

Specifically, COMPLAINANT stated that on September 27, 2021, at approximately 10:00 p.m., he was driving on A ROAD IN NE, WASHINGTON, DC, when he noticed an MPD vehicle rapidly approach him from behind and initiate a traffic stop. SUBJECT OFFICER approached the complainant and told him that he was being stopped for running a red light. The complainant denied running a red light and believed that he was stopped for being a Black male driving a SEDAN with tinted windows in a high crime area. SUBJECT OFFICER requested COMPLAINANT's driver's license, registration, and insurance information. The complainant provided the documents and the subject officer returned to his police vehicle.

¹ COMPLAINANT also alleged that SUBJECT OFFICER harassed him when he unlawfully stopped his vehicle and issued him an unlawful ticket. The complainant further alleged that SUBJECT OFFICER used language or engaged in conduct toward him that was insulting, demeaning, or humiliating. Lastly, the complainant alleged that SUBJECT OFFICER discriminated against him based on his race, African American. Pursuant to D.C. Code § 5-1108 (1), on November 11, 2022, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's executive director. *See* Dismissal submitted by OPC and concurred with by OPC Board Member Earl Fowlkes on November 11, 2022.

When SUBJECT OFFICER returned to the complainant, he ordered him to step out of his vehicle and to stand on the sidewalk near the trunk of his vehicle with WITNESS OFFICER. SUBJECT OFFICER proceeded to search COMPLAINANT's vehicle without asking for consent. After the search, COMPLAINANT was placed in handcuffs and was arrested for driving under the influence (DUI) and possession of a firearm. COMPLAINANT denied drinking or being intoxicated. COMPLAINANT alleged that SUBJECT OFFICER never explained to him the reason he suspected that he was intoxicated, nor did the subject officer perform any field sobriety tests on the scene. The complainant believed that SUBJECT OFFICER searched his vehicle and arrested him unlawfully.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on December 12, 2022, and OPC's response to the objections, the Complaint Examiner determined that the Report of Investigation 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 objections submitted by SUBJECT OFFICER on December 12, 2022, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On September 27, 2021, SUBJECT OFFICER conducted a traffic stop involving COMPLAINANT on A STREET IN NE, WASHINGTON, DC. SUBJECT OFFICER's body-worn camera footage begins at 10:07 pm.
2. SUBJECT OFFICER informed COMPLAINANT that he had stopped him because he ran a red light at AN INTERSECTION IN NE, WASHINGTON, DC. COMPLAINANT expressed that he thought he had been stopped for driving 38 miles per hour in a 35 mile per hour Zone. COMPLAINANT's voice appeared to be slightly slurred.
3. COMPLAINANT readily provided SUBJECT OFFICER with his license and registration upon request. SUBJECT OFFICER searched COMPLAINANT's information in the police database.
4. SUBJECT OFFICER returned to COMPLAINANT's car and asked him to step out of his vehicle. The officer patted him down as he exited and asked if he would encounter anything sharp as he did so.
5. SUBJECT OFFICER directed COMPLAINANT to stand on the sidewalk and asked him if he will find anything in the vehicle that is not supposed to be there. SUBJECT OFFICER began searching the passenger compartment of COMPLAINANT's vehicle.
6. WITNESS OFFICER arrived on the scene to assist SUBJECT OFFICER; his body-worn camera footage begins five minutes after SUBJECT OFFICER's at 10:12 pm.

SUBJECT OFFICER remained with COMPLAINT standing on the sidewalk for several minutes while SUBJECT OFFICER searched COMPLAINT's vehicle. When asked by both officers, COMPLAINT denied being intoxicated. SUBJECT OFFICER stated several times that COMPLAINT reeked of alcohol. COMPLAINT stated that SUBJECT OFFICER did not have consent to search his vehicle.

7. SUBJECT OFFICER searched the trunk of COMPLAINT's vehicle and located a gun by the spare tire. Shortly thereafter, SUBJECT OFFICER placed COMPLAINT under arrest. SUBJECT OFFICER also called for the gun recovery unit to respond to the scene. COMPLAINT stated, "I didn't give ya'll permission to search my car." In response, SUBJECT OFFICER said, "Sir, you threw that out the window by driving drunk."
8. SUBJECT OFFICER is trained to administer Field Sobriety Tests. SUBJECT OFFICER did not administer a Standardized Field Sobriety Test or perform any other tests on COMPLAINT to establish whether he was intoxicated.
9. COMPLAINT was not prosecuted for this offense.

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 both the regulations governing OPC and 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."

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's Search of COMPLAINT's Vehicle

SUBJECT OFFICER unlawfully searched COMPLAINANT's vehicle. This violation of the law subjected COMPLAINANT to search, arrest, and detention and constitutes harassment under both the relevant regulations and MPD General Order.²

A warrantless search is 'per se unreasonable' under the Fourth Amendment unless it meets an exception. *Basnueva v. United States*, 874A.2d 363, 369 (D.C. 2005). A search incident to a lawful arrest is a valid exception to this rule. *Punch v. United States*, 377 A.2d 1353, 1357 (D.C. 1977) (citing *Chimel v. California*, 395 U.S. 752, (1969)). In *Arizona v. Gant*, the Supreme Court redefined the law governing searches of a vehicle incident to arrest restricting searches to those situations in which "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." 556 U.S. 332, 332, 343 (2009). *Gant* also established that a search is legal when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 343. In D.C., "officers must have reasonable, articulable suspicion to conduct a vehicle search under the second prong of *Gant*." *United States v. Taylor*, 49 A.3d 818, 824 (D.C. 2012). The court in *Taylor* clarified that to determine whether the "reasonable suspicion standard has been met, a court must consider the totality of the circumstances, as "viewed through the lens of a reasonable police officer, guided by his training and experience.'" *Id.* (internal citations omitted).

The court in *U.S. v. Taylor* elaborated, "[i]t was, of course, *possible* that evidence of drinking – such as empty or partially full containers of alcohol – would be found in the vehicle, just as it is possible that such evidence may be found in any vehicle driven by an intoxicated individual. But the question under the second prong of *Gant* is whether it is reasonable to believe that such evidence might be found in this specific vehicle. The suspicion must be particularized." *Id.* at 826 (emphasis added). In this matter, while SUBJECT OFFICER may well have been justified to believe COMPLAINANT was driving under the influence, he had no indication that there were bottles of alcohol, firearms or other contraband inside the vehicle justifying his search of the passenger section of the vehicle let alone the trunk of his car. "...[T]here was nothing in particular – no tell-tale sign – to suggest that [COMPLAINANT] had been drinking in his

² The decision in this matter is a question of law. The bodyworn camera footage of SUBJECT OFFICER and WITNESS OFFICER as well as the information provided in their and COMPLAINANT's interviews provide ample evidence to support the factual findings and to draw conclusions of law in this matter. COMPLAINANT's credibility or lack thereof did not impact this decision.

vehicle.” *Id.* Even if this search were incident to arrest, there had to have been particularized suspicion that there was evidence in the car of the offense of driving under the influence at the time of the search.³

Absent consent or a warrant, SUBJECT OFFICER was required to have particularized suspicion to search COMPLAINANT’s vehicle and therefore the search was not proper. SUBJECT OFFICER told OPC in his interview on April 4, 2022, “when it comes to DUIs, now, we are searching for the source of the DUI....so at that point of the DUI the vehicle is open for search for....anything like that and to find the source of the odor that’s inside the vehicle.” *See SUBJECT OFFICER’s* interview by OPC at 7:49 – 8:13. SUBJECT OFFICER’s statement misunderstands the law. Here, lacking particularized suspicion, SUBJECT OFFICER’s improper search was in violation of the law and constitutes harassment as defined by the MPD General Order. *See* General Order 120.25, Part III, Section B, No. 2

SUBJECT OFFICER’s Arrest of COMPLAINANT

When SUBJECT OFFICER arrested COMPLAINANT for driving under the influence and possession of a firearm he failed to follow MPD policy. Specifically, he violated MPD General Order 502.2 *Handling Cases Involving Persons Suspected of “Driving While Intoxicated” and/or “Driving While Under the Influence” (DUI and/or DWI)* (June 2015). This General Order makes clear in the background section on the first page:

“Members who encounter drivers who display symptoms of impairment by alcohol, drugs (illegal, prescription, or over the counter), inhalants, other chemicals or a combination of them must be prepared to conduct or have conducted the proper tests to determine if there is probable cause for an arrest and additional chemical testing.” (emphasis added).

Specifically, General Order 502.2 requires that, “[a]fter the member establishes reasonable suspicion of the driver’s impairment, the member shall: a. If trained, administer the SFSTs to the driver; or b. Request through the Office of Unified Communications (OUC) the assistance of an SFST trained member at his/her location.” *See* General Order 502.2, Section V.A.4: Procedures, DUI/DWI – Traffic Stops or Crashes.

SUBJECT OFFICER identified that COMPLAINANT displayed symptoms of being under the influence of alcohol specifically that he had slurred speech, glossy eyes and smelled of alcohol even when outside the vehicle. At that point, SUBJECT OFFICER was required under the General Order to conduct or have conducted the proper tests to determine probable cause for an arrest. *See Id.* Although SUBJECT OFFICER was trained to administer a Standardized Field Sobriety Test (SFST), he did not do so because he was initially without a backup officer on the scene⁴.

³ SUBJECT OFFICER’s objections also cite to *Taylor* suggesting a duty to search the car however these statements confuse the holding of the case and the standard articulated therein.

⁴ SUBJECT OFFICER explained in his interview with OPC that he did not conduct the test without backup present out of concern for COMPLAINANT, that he could have fallen into the street or harmed himself. The incident report states “[d]ue to Defendant COMPLAINANT history of assault, and the strong odor of alcohol emitting from Defendant COMPLAINANT, Field sobriety was not conducted on scene.” (Error in original.) Whatever the justification for not initially conducting a SFST, the tests should have been conducted once another officer was on the scene.

However, within just a few minutes of having COMPLAINANT step out of his car, WITNESS OFFICER was on the scene. (See WITNESS OFFICER's bodyworn camera footage at approximately minute two, confirming that he was present on the scene prior to SUBJECT OFFICER initiating the search of COMPLAINANT's car). Shortly thereafter, multiple other officers had also arrived. SUBJECT OFFICER could have administered the required test but declined to do so. Alternatively, he could have asked the Office of Unified Communications to send another officer trained to administer a sobriety test. SUBJECT OFFICER also stated that he felt he had enough information that COMPLAINANT was intoxicated without conducting the required tests. The general order however does not allow for officer discretion and having been trained in administering SFSTs and with another officer on the scene within minutes, he should have administered those tests to COMPLAINANT. By failing to administer such a test or arrange for someone else to do so, he violated the MPD General Order 502.2. This violation of MPD policy constitutes harassment.

In conclusion, SUBJECT OFFICER harassed COMPLAINANT when he unlawfully searched his vehicle and when he arrested COMPLAINANT without following MPD protocol.⁵ Whether SUBJECT OFFICER did not comply with the law and policy purposefully, knowingly, or recklessly is unclear however the lack of compliance is apparent. Further, in contemplation of the totality of the circumstances, there were no extenuating circumstances to justify lack of compliance. Although trained to administer SFSTs, SUBJECT OFFICER did not do so and his recollection of the General Order on this was unclear. Additionally, his understanding of the law around searches was also murky. As an officer of the law, basic understanding of and compliance with the governing laws, policies and orders is required. Failure to comply with the laws, policies and orders constitutes harassment.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1: Harassment	Sustained
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Submitted on January 23, 2023.

⁵ That COMPLAINANT was not prosecuted for the offense is not dispositive of the outcome here. As SUBJECT OFFICER's objections point out through the WTOP news article, there may be many reasons that prosecutors decline to pursue a case such as insufficient evidence or an unconstitutional basis. Significantly, the WTOP article also points out that it is important for accountability and training purposes that those reasons be known to improve training for MPD officers.