

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	22-0335
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER
<b>Allegation 1</b>	Harassment (pat down)
<b>Allegation 2</b>	Harassment (improper touching of genitals).
<b>Complaint Examiner:</b>	Richard S. Ugelow
<b>Merits Determination Date:</b>	October 20, 2022

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 March 28, 2022, the complainant, COMPLAINANT, was patted down over his objections by SUBJECT OFFICER. At the time, SUBJECT OFFICER was with a group of individuals some of whom were smoking marijuana in the parking lot of AN ADRESS IN SE, WASHINGTON, DC. SUBJECT OFFICER told the group that they could not smoke in public. He then asked COMPLAINANT if he had a gun. COMPLAINANT said that he did not. SUBJECT OFFICER asked COMPLAINANT if he would consent to a search. COMPLAINANT emphatically and repeatedly refused permission, but SUBJECT OFFICER proceeded to pat him down. In the course of the pat down, COMPLAINANT claimed that SUBJECT OFFICER improperly touched his genitals.<sup>1</sup>

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<sup>1</sup> COMPLAINANT also alleged that SUBJECT OFFICER harassed him by unlawfully stopping him for smoking marijuana in public. COMPLAINANT further alleged that WITNESS OFFICER #1 used unnecessary or excessive force against him while assisting SUBJECT OFFICER with the pat down. COMPLAINANT also alleged that SUBJECT OFFICER failed to provide his name and badge number upon request. COMPLAINANT also alleged that WITNESS OFFICER #2 and WITNESS OFFICER #3 retaliated against him for filing a complaint. Pursuant to D.C. Code § 5-1108(1), on August 22, 2022, 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, WITNESS OFFICER #1, WITNESS OFFICER #4 and WITNESS OFFICER #5; OPC's Report of Investigation (ROI); the objections submitted by the D.C. Police Union on behalf of SUBJECT OFFICER on September 13, 2022; and OPC's response to the objections. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

## **III. FINDINGS OF FACT**

Based on the Complaint Examiner's review of the BWC footage for SUBJECT OFFICER, WITNESS OFFICER #1, WITNESS OFFICER #4 and WITNESS OFFICER #5; OPC's Report of Investigation (ROI); the objections submitted by the D.C. Police Union on behalf of SUBJECT OFFICER on September 13, 2022; and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On March 28, 2002, the complainant, COMPLAINANT, was standing along with several other individuals in the parking lot on the grounds of AN ADDRESS IN SE, WASHINGTON, DC, around 4:30 pm. Some of the individuals were smoking marijuana.
2. The property manager of THE PROPERTY IN SE, WASHINGTON, DC authorized the MPD to patrol the property including the parking lot. Exhibit 2, p. 4.
3. The OPC acknowledged that the "parking lot was a common location for public consumption of marijuana and alcohol, illegal drug sale, and dice games." Id.
4. SUBJECT OFFICER and WITNESS OFFICER #1 were on routine patrol in a marked MPD cruiser and were in full uniform.
5. SUBJECT OFFICER told the group that smoking marijuana in public was prohibited.
6. SUBJECT OFFICER then asked COMPLAINANT if he had a gun or weapon. COMPLAINANT denied having a gun or weapon.
7. SUBJECT OFFICER asked COMPLAINANT if he could search him. COMPLAINANT said "Nah." Don't check." When SUBJECT OFFICER said "Okay. I'm gonna check" COMPLAINANT pulled away saying "No" and "Don't touch me." SUBJECT OFFICER, BWC.

8. SUBJECT OFFICER grabbed COMPLAINANT's arm and proceeded to pat COMPLAINANT down, touching among other areas his waistband, pants pockets, and his groin area.
9. COMPLAINANT became agitated when he was touched and said "I said, Don't touch me. Get the fuck off me." Id.
10. Other officers on the scene sought to deescalate the confrontation between COMPLAINANT and SUBJECT OFFICER.
11. COMPLAINANT wearing a puffy winter parka that extended well below his waist. Both of his hands were in the jacket pockets when he was approached by SUBJECT OFFICER.
12. SUBJECT OFFICER did not find a gun or weapon on COMPLAINANT.
13. 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.

Here, the facts are not in dispute. SUBJECT OFFICER (and other MPD officers) was on crime suppression patrol on March 28, 2002, in the area of AND ADDRESS IN SE, WASHINGTON, DC. The area is known by the MPD for the public consumption of marijuana and alcohol, illegal drug sale, and dice games. The officers were legally on the property and, because they smelled marijuana, they had reasonable grounds to approach a group of individuals, including COMPLAINANT. SUBJECT OFFICER explained that it was illegal to smoke marijuana in public. The BWC footage shows COMPLAINANT with his hands in his jacket pocket when approached by SUBJECT OFFICER. COMPLAINANT was wearing a dark puffy winter coat that extended below his waist.

SUBJECT OFFICER asked COMPLAINANT if had a gun or anything (presumably a weapon). COMPLAINANT said no. SUBJECT OFFICER asked permission to search him, to which COMPLAINANT repeatedly said no or words to that effect. SUBJECT OFFICER said that he was going to search him anyway and proceeded to conduct a pat down. COMPLAINANT resisted, and a little scuffle took place that was quickly defused by WITNESS OFFICER #1. The pat down itself took about 20 seconds and the entire encounter with COMPLAINANT took approximately four minutes. See Union Objections, p. 6 and SUBJECT OFFICER BWC.

The overarching question before the Complaint Examiner is whether the pat down was lawful and complied with MPD General Orders.

Lawful pat downs or frisks can only occur in limited circumstances. General Order 304.10, “[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 frisk is necessary to protect himself/herself or others.” See General Order 304.10. The General Order defines reasonable suspicion to support a frisk as “more than a vague hunch. . . . under the circumstances, a reasonably prudent law enforcement officer would be warranted in believing his/her safety or that of other persons is in danger because the individual may be carrying a weapon or dangerous instrument.” Reasonableness depends upon the time of day, flight, the high crime nature of the location, furtive hand movements, an informant’s tip, a person’s reaction to questioning, a report of criminal activity or gunshots, and the viewing of an object or bulge indicating a weapon.” Anderson v. U.S., 658 A.2d 1036, 1038 (D.C. 1995).

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

SUBJECT OFFICER told OPC that he “observed a large, straight-edged, object protruding from COMPLAINANT’s waistband.” See Police Union objections, p. 5. The objections further claim that SUBJECT OFFICER is “highly trained in the area of identifying the characteristics of weapons and an armed gunman. Of all the group members present, SUBJECT OFFICER solely believed COMPLAINANT had a weapon based upon his observations, as is evident by the fact no other individual on scene was patted down. Id.

The Complaint Examiner carefully reviewed the BWC of four MPD officers (SUBJECT OFFICER, WITNESS OFFICER #1, WITNESS OFFICER #5, and WITNESS OFFICER #4), showing the pat down from different angles. The Complaint Examiner did not see any evidence of a “large, straight-edged object protruding from COMPLAINANT’s waistband.” COMPLAINANT was wearing a dark, puffy winter coat that extended below his waist. He had one hand in his left pocket and the other in the right pocket, seemingly to keep warm. There was nothing visible to this Complaint Examiner that would suggest COMPLAINANT posed a threat of any nature and specifically that he had a weapon or object that could be used as a weapon on his person. Moreover, there were at least four MPD officers on the scene and in close proximity

to COMPLAINANT who could have assisted if COMPLAINANT posed a threat. Importantly, not one of these officers appeared to be threatened by COMPLAINANT or concerned that he or any of the other individuals in the area had a gun or other weapon.

The Complaint Examiner concludes that SUBJECT OFFICER did not have reasonable suspicion to pat down or frisk COMPLAINANT. Being a police officer is a difficult, challenging, and potentially dangerous profession. Here, the totality of the circumstances do not support a lawful frisk. COMPLAINANT 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 with a group of individuals, some of whom were smoking marijuana, there were no objective reasons to believe that COMPLAINANT was armed and/or dangerous. In particular, there was no visible reason to believe that COMPLAINANT had a gun (which he denied). Moreover, he made no furtive movements or gestures that threatened the safety of SUBJECT OFFICER, the other MPD officers or anyone else in the area.

Under the totality of the circumstances, the Complaint Examiner determines that SUBJECT OFFICER acted “purposefully, knowingly, or recklessly in violation of the law, or internal guidelines of the MPD...” and therefore, violated MPD General Orders and applicable law when he patted down COMPLAINANT on March 28, 2022.

The remaining question is whether SUBJECT OFFICER harassed COMPLAINANT by touching his genitals during the pat down. As noted earlier, the pat down was quick – perhaps 20 seconds. The pat down performed by SUBJECT OFFICER appears to be similar in form and level of aggressiveness to other pat downs/frisks the Complaint Examiner has seen on BWC footage in other cases. Moreover, OPC does not claim that a pat down or frisk of the groin area, in of itself, constitutes harassment. Indeed, WITNESS OFFICER #1 told OPC that it was “absolutely” proper to conduct such a pat down, at least in the circumstances of this case.

Here, the pat down included a touching of the inside of each of COMPLAINANT’s legs. Thus, SUBJECT OFFICER’s hand was briefly in the area of COMPLAINANT’s groin. However, the BWC does not show SUBJECT OFFICER’s hand touching COMPLAINANT’s groin. For this reason, The Complaint Examiner is unable to conclude based on a review of the BWC and witness statements that SUBJECT OFFICER harassed COMPLAINANT by touching his genitals.

**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER

<b>Allegation 1: Harassment (pat down)</b>	Sustained
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<b>Allegation 2: Harassment (improper touching of genitals)</b>	Insufficient Facts
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Submitted on October 20, 2022

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Richard S. Ugelow  
Complaint Examiner