

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.	10-0535
Complainant:	COMPLAINANT
Subject Officer, Badge No., District:	SUBJECT OFFICER, Fifth District
Allegation 1:	Harassment
Complaint Examiner:	C. Allen Foster
Merits Determination Date:	January 16, 2013

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC), formerly the Office of Citizen Complaint Review (OCCR), has the 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 in that section. 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

In a complaint timely filed with OPC on September 7, 2010, COMPLAINANT alleged that on August 19, 2010, SUBJECT OFFICER harassed him by unlawfully conducting a Terry patdown and searching him without cause or consent.¹

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on January 10, 2013. The Complaint Examiner heard the testimony of COMPLAINANT, WITNESS OFFICER #1 and SUBJECT OFFICER. The following exhibits were introduced at the hearing, without objection:

Book of Exhibits, including Complaint, Dismissal (see footnote 1), Witness Statement of COMPLAINANT, Witness Statement of SUBJECT OFFICER, Memorandum of Interview of

¹ COMPLAINANT also alleged that SUBJECT OFFICER and another Officer (also the subject of COMPLAINANT'S original Complaint) harassed him by stopping him without a legitimate law enforcement purpose and, in conjunction with that stop, failed to provide identification as required by law. Following an OPC investigation, it was determined that the SUBJECT OFFICERS had reasonable cause to stop COMPLAINANT because he was not wearing a seatbelt while operating a motor vehicle and that they sufficiently identified themselves by, at least, providing their names (COMPLAINANT conceded that he did not request their badge numbers). As a result, these two charges were dismissed on December 28, 2011 by the Police Complaints Board pursuant to D.C. Code § 5-1108(1).

In addition, at the hearing, COMPLAINANT contended that the SUBJECT OFFICER harassed him by searching his vehicle without his consent and the SUBJECT OFFICER did not contend that he had COMPLAINANT'S consent. That issue is not before the instant Examiner because it was not previously presented by the COMPLAINANT but the SUBJECT OFFICER did not object to the evidence on the issue. In order to avoid any doubt concerning the resolution of the issue, the Examiner includes a discussion and resolution of it.

SUBJECT OFFICER, Witness Statement of WITNESS OFFICER #1, Memorandum of Investigative Activity, Daily Vehicle Inspection and Activity Reports, Roll Call Sheets, General Order PER-120.25, D.C. Code, Title 6A, Chapter 21 and General Order 304.10.

Book of Exhibits provided by OPC, including Report of Investigation, OPC's letters to COMPLAINANT and SUBJECT OFFICERS, Contact Information and Objections by SUBJECT OFFICER.

Exhibit FOP-1: PD Form 76 of WITNESS OFFICER #1 re COMPLAINANT

Exhibit FOP-2: Daily Vehicle Inspection Check List

Exhibit FOP-3: PD Form 76 of SUBJECT OFFICER re COMPLAINANT

Exhibit Complaint Examiner - 1: Drawing of scene at 17th and M Streets, N.E., Washington, D.C. made by COMPLAINANT at the hearing

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by the SUBJECT OFFICER on March 1, 2012, an evidentiary hearing conducted on January 10, 2013 and the testimony and exhibits introduced at that hearing, the Complaint Examiner finds the material facts regarding the Complaint to be:²

1. SUBJECT OFFICER has been employed with MPD for more than ten years. WITNESS OFFICER #1 has been employed with MPD for over seven years. Both Officers have been assigned to the 5th District Vice Squad for more than five years. As such, they have received drug-related training, including PCP handling and identification. Both Officers have numerous cases in which they have made stops, searches and, sometimes, arrests involving PCP based upon their detection of the odor of PCP.
2. PCP is a very common illegal drug in Washington, D.C. It has a strong and very distinct odor, not unlike starter fluid. It can be smelled from some distance while it is being ingested and can also be smelled in the closer vicinity of persons who have been in contact with it. PCP is frequently ingested by dipping a cigarette (a "dipper") into liquid PCP. Users of PCP frequently smoke dippers while driving. As a result, it is relatively easy for a suspect to dispose of a dipper when he sees police officers before they can stop and search him. The two officers involved in this case credibly testified that they have stopped hundreds of PCP suspects who have sought to conceal the drug by throwing the

² The material facts are those found by the Complaint Examiner after a careful consideration of all of the evidence and the demeanor of the witnesses, and include the Complaint Examiner's resolution of disputed facts. In some of the cases of disputed facts, the Complaint Examiner gives his reasons for his resolution of the dispute. The absence of such reasoning does not indicate that the Complaint Examiner did not recognize and resolve the dispute based upon appropriate considerations, rather than that the Complaint Examiner did not believe that a detailed description of the basis of his decision would add significantly to the decision.

dipper away, eating the dipper or associated drug paraphernalia or by inserting the dipper and paraphernalia in their body cavities.

3. On August 19, 2010, SUBJECT OFFICER was driving an unmarked police car on 17th Street, N.E., an area to which the SUBJECT OFFICER was regularly assigned. In his unmarked car, SUBJECT OFFICER was working as a vice squad officer with WITNESS OFFICERS #1 and #2. All the officers were wearing dark blue bulletproof vests with "Police" marked on them.³ The unmarked police car was stopped at a traffic light on 17th Street, N.E. as COMPLAINANT was exiting a service station onto 17th Street. COMPLAINANT turned right onto 17th Street (opposite to the direction that the unmarked police car was travelling). As a result, COMPLAINANT and his vehicle passed the unmarked police car going in the opposite direction within 30 feet,⁴ more likely within 10 feet.
4. The temperature on August 19, 2010 at 6:30 p.m. was approximately 87 degrees Fahrenheit. The windows in the unmarked police car were down and the air conditioning was on to relieve some of the heat generated because of the open windows.⁵
5. COMPLAINANT was exiting the service station without his seat belt being secured.⁶ When he saw the Officers in the unmarked police car, he secured his seatbelt.

³ The Complaint Examiner does not accept the testimony of the COMPLAINANT that he could see that the three officers were also wearing dark blue jump suits. COMPLAINANT'S own testimony puts him and his vehicle at least 30 feet from the unmarked police car, and at an angle which would have made it almost impossible to see what the officers were wearing under and below their bulletproof vests. Such improbable testimony colors COMPLAINANT'S other testimony.

⁴ COMPLAINANT testified that he was in the far right lane of 17th Street after he turned right and that the police officers were in the far lane of their opposite direction of travel. The Complaint Examiner believes that it is more likely that the unmarked car was in the lane closest to COMPLAINANT because, upon becoming aware of COMPLAINANT'S vehicle (as described herein), SUBJECT OFFICER was immediately able to make a U-turn into the service station from which COMPLAINANT was exiting. Furthermore, if the unmarked police car was in the far lane, because (according to COMPLAINANT) traffic was heavy, it would have been unlikely that COMPLAINANT could have even seen the officers in the unmarked car (they would have been obscured by intervening vehicles). In any event, even accepting COMPLAINANT'S testimony, no more than 30 feet separated the vehicles because there are only two usable lanes in each direction of 17th Street at that point.

⁵ The Complaint Examiner accepts the testimony of the two Officers that the windows were down. They testified credibly that it was their uniform practice to drive their beat while on duty with the windows down so that they could "hear, smell, see and touch" their surroundings and that it was Police SOP for the drug squad to do so. COMPLAINANT'S testimony to the contrary is less credible because, under his own testimony, prior to being stopped, he was never within 30 feet of the unmarked car and, therefore, had less opportunity to observe.

⁶ COMPLAINANT'S witness statement makes it clear that he was operating a motor vehicle, albeit on private property, without a secure seatbelt. Whether he actually entered the roadway of 17th Street (which, of course, extends to the full extent of the right of way, including portions of the driveways into the service station) is irrelevant. The statutory violation is based upon operating a motor vehicle without a secured seat belt, regardless of the property on which the vehicle is located. See D.C. Code §50-1802 (2011) ("the driver and all passengers in a motor vehicle shall wear a properly adjusted safety belt while the driver is in control of the vehicle.")

6. WITNESS OFFICER #1 saw COMPLAINANT operating a motor vehicle without a seatbelt.
7. As COMPLAINANT turned right onto 17th Street and passed the unmarked police car, WITNESS OFFICER #1 smelled the faint odor of PCP coming from the vicinity of COMPLAINANT'S vehicle.
8. WITNESS OFFICER #1 alerted SUBJECT OFFICER and WITNESS OFFICER #2 to his observation of the seat belt violation and the fact that he had smelled PCP from the vicinity of COMPLAINANT'S vehicle. SUBJECT OFFICER immediately made a U-turn through the driveway of the service station and followed COMPLAINANT'S vehicle.
9. SUBJECT OFFICER drove five to six blocks on 17th Street before following COMPLAINANT'S vehicle as it turned left onto Benning Rd. After that turn, SUBJECT OFFICER traveled a further five to six blocks on Benning Road, approaching directly behind COMPLAINANT'S vehicle closely enough⁷ for SUBJECT OFFICER to identify COMPLAINANT'S vehicle as the source of the smell of PCP.
10. SUBJECT OFFICER and the other Officers ordered COMPLAINANT to stop his vehicle using a "bubble light" on the dash of the unmarked police vehicle and the vehicle siren.⁸
11. SUBJECT OFFICER exited the unmarked vehicle and approached the driver's door of COMPLAINANT'S vehicle. WITNESS OFFICER #2 approached the passenger door (COMPLAINANT'S vehicle was a two-door Bronco SUV). Apparently, WITNESS OFFICER #2 ordered COMPLAINANT'S two passengers to get out of the vehicle with their hands up.⁹ WITNESS OFFICER #1 remained at the rear of COMPLAINANT'S vehicle and dealt with COMPLAINANT'S two passengers when they exited the vehicle.
12. SUBJECT OFFICER testified that, as he approached the driver's side door, he smelled the odor of PCP.

⁷ The Complaint Examiner accepts the Officers' testimony on this point, in contrast to the COMPLAINANT'S testimony that the unmarked police vehicle was never directly (i.e., without intervening vehicles) behind him until he was stopped. It is highly unlikely that trained police officers, skilled in following and catching up with suspicious vehicles, would have travelled in a different lane over 10 - 12 blocks and only "swerved" into COMPLAINANT'S lane just as they were stopping COMPLAINANT.

⁸ COMPLAINANT testified that the Officers used a "bullhorn" or other voice magnifying device to order him to stop. The Officers testified that their vehicle did not have any voice magnifying device and the vehicle inspection report completed on the day in question does not indicate any such capability. As a result, the Complaint Examiner accepts the Officers' testimony.

⁹ There was no direct testimony as to who gave that order but it was either WITNESS OFFICER #2 or SUBJECT OFFICER because WITNESS OFFICER #1 testified without contradiction that he never left the area at the rear of COMPLAINANT'S vehicle.

13. COMPLAINANT was on his cell phone, having called 911 as soon as the Officers instituted the stop. He testified that he wanted a recording of the incident because, as a result of “over 20 prior incidents since he moved back from Texas,”¹⁰ he thought that he was going to be harassed.
14. SUBJECT OFFICER testified that, as he approached COMPLAINANT, COMPLAINANT appeared extremely nervous and agitated. SUBJECT OFFICER asked COMPLAINANT why he was nervous and agitated. At the hearing, COMPLAINANT denied being nervous and agitated but, in his witness statement, conceded that he told SUBJECT OFFICER, “You would be nervous too.” As a result, the Complaint Examiner finds that the SUBJECT OFFICER’S testimony is credible.
15. SUBJECT OFFICER instructed COMPLAINANT to hang up the telephone and to get out of the vehicle. COMPLAINANT did so.¹¹
16. SUBJECT OFFICER opened the door to COMPLAINANT’S vehicle and COMPLAINANT exited the vehicle. At this point, SUBJECT OFFICER smelled the odor of PCP coming from COMPLAINANT. SUBJECT OFFICER placed handcuffs on COMPLAINANT, telling him that it was “for his and COMPLAINANT’S safety.”¹²
17. SUBJECT OFFICER then conducted a Terry frisk of COMPLAINANT and, in the process, searched COMPLAINANT’S pockets and removed his wallet.¹³ COMPLAINANT contended that the frisk was a search and that he did not consent to it or to the search of his pockets.
18. SUBJECT OFFICER asked COMPLAINANT for permission to search his vehicle. There was disputed testimony concerning when and under what circumstances COMPLAINANT consented. Those facts are irrelevant, however, because SUBJECT OFFICER conceded that he and WITNESS OFFICER #2 began the search of the vehicle before consent was given.
19. SUBJECT OFFICER and WITNESS OFFICER #2 found no contraband in COMPLAINANT’S vehicle. SUBJECT OFFICER uncuffed COMPLAINANT and he was released without being charged for anything, including any seatbelt violation.

¹⁰ COMPLAINANT moved from Texas to the District in 2009; thus, his testimony was that in, at most, 20 months, he had been harassed by the police over 20 times; in other words, at least once a month. He believed that it was because of the “flashy” 22 inch rims on his vehicle. The Complaint Officer finds this testimony highly unlikely and does not credit it.

¹¹ COMPLAINANT testified that SUBJECT OFFICER took his cell phone from him and tossed it on the dash. The transcription of the recording of the call does not indicate any such violent action and, instead, is more consistent with COMPLAINANT obeying SUBJECT OFFICER.

¹² COMPLAINANT concedes that he was told such.

¹³ COMPLAINANT made much of the fact that he was wearing a tank top and blue jean shorts and, therefore, any weapon would have been obvious. The propriety of the patdown, however, does not depend upon its being for a weapon. Reasonable suspicion to believe a drug violation can justify a patdown for drugs or paraphernalia.

IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a), “The Office [of Police Complaints] shall have the authority to receive and 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 or residence of business; or (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

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 or 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.

Analysis

COMPLAINANT alleges that SUBJECT OFFICER harassed him by frisking him, searching his person and searching his vehicle without consent or a warrant. Specifically, COMPLAINANT claims that SUBJECT OFFICER lacked the necessary suspicion or cause to take these actions. In order to subject someone to a Terry frisk, the officer must have reasonable suspicion of danger whereas, in order to search a person or vehicle, the officer must have probable cause to believe a violation of the law has occurred. Because of the unusual facts of this case, the Complaint Examiner finds that the two standards merge. In particular, the officers began with the observation of the seat belt violation which gave them probable cause to stop the

vehicle and cite the driver and his passengers. Subsequently, WITNESS OFFICER #1 and the SUBJECT OFFICER credibly testified that they smelled the odor of PCP and identified the COMPLAINANT'S vehicle as the source. Furthermore, as the SUBJECT OFFICER approached and dealt with the COMPLAINANT, he again smelled the odor of PCP. Thus, the Officers had probable cause to stop COMPLAINANT'S vehicle and to search it and COMPLAINANT. Thus, the Terry frisk was merely a subsidiary part of a lawful search. Even if that were not the case, however, the fact that the SUBJECT OFFICER smelled PCP emanating from COMPLAINANT, combined with the knowledge and experience that users of PCP frequently exhibit violent behavior, independently establishes reasonable suspicion of danger sufficient to support the frisk. That the officers failed to find PCP or drug paraphernalia on COMPLAINANT'S person or in his vehicle is of no moment. COMPLAINANT had ample opportunity to dispose of any incriminating evidence prior to his being stopped.

Conclusion

COMPLAINANT has failed to establish by a preponderance of the evidence that SUBJECT OFFICER harassed him by knowingly or recklessly frisking and searching him and his vehicle without probable cause.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1: Harassment	Exonerated
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Submitted on January 16, 2013

C. Allen Foster
Complaint Examiner