

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	23-0586
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Harassment (stop)
Allegation 2:	Harassment (pat down/frisk)
Complaint Examiner:	Jennifer A. Fischer, Esq.
Merits Determination Date:	February 19, 2024

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 June 12, 2023. Complainant alleged that on June 10, 2023, Metropolitan Police Department (MPD) SUBJECT OFFICER (Subject Officer), harassed his friend, FRIEND, by stopping him and frisking his bag.¹

Specifically, Complainant stated that on June 10, 2023, at approximately 9:06 p.m., he was standing on a porch at AN ADDRESS IN SE, WASHINGTON, DC, with a group of friends when Subject Officer approached FRIEND and started touching his bag. Specifically, Subject Officer “grappled” the bag. Prior to that, FRIEND was not doing anything besides standing and talking with Complainant and a few other people. Subject Officer did not say anything or ask for consent before he touched FRIENDS’s bag. Afterward, Complainant asked Subject Officer, “Why did you touch the bag?” and, “What did [FRIEND] do for the search?” Subject Officer said the bag looked like a firearm.

¹ Complainant also alleged that Subject Officer used language or engaged in conduct that was insulting, demeaning, or humiliating when he spoke in a nonchalant and dehumanizing tone. Pursuant to D.C. Code § 5-1108(1), on December 15, 2023, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC’s executive director.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation, Body Worn Camera Footage recorded by Subject Officer, and WITNESS OFFICER #1 and WITNESS OFFICER #2 on June 10, 2023, objections submitted by Subject Officer on January 24, 2024 (Subject Officer's Objections), and OPC's Response to the Objections dated January 29, 2024, 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, Body Worn Camera Footage recorded by Subject Officer, and WITNESS OFFICER #1 and WITNESS OFFICER #2 on June 10, 2023, objections submitted by Subject Officer on January 24, 2024 (Subject Officer's Objections), and OPC's Response to the Objections dated January 29, 2024, the Complaint Examiner finds the material facts regarding this complaint to be:

1. Complainant filed a complaint with OPC on June 12, 2023.
2. On June 10, 2023, at approximately 8:41 p.m., Subject Officer and WITNESS OFFICER #1 and WITNESS OFFICER #2 walked along the sidewalk in front of a housing development at AT AN ADDRESS IN SE, WASHINGTON, DC on routine patrol. They were particularly attentive to there having been a shooting a half mile away the previous night. However, at the time of their patrol, they were not investigating any crime that had taken place.
3. The officers approached FRIEND from behind, as he was standing at the bottom of stairs leading up to the building speaking with Complainant and several others, including three children standing on the stairs. From behind, FRIEND could be seen to be carrying some sort of bag with the strap running from his right shoulder, to the bag on the front of his left hip, but the bag itself was not visible as the officers approached.
4. As the officers approached, FRIEND glanced behind him at them and turned back to speak to the others on the steps. Here again, the bag was still not visible from behind.
5. As the officers came closer and passed around FRIEND, FRIEND turned toward the officers and faced Subject Officer directly. Only at this point was FRIEND's bag visible to the officers. The bag rested flat on the front of FRIEND's left hip. It was square in shape and somewhat narrow, appearing to be at most a couple inches in width.
6. Subject Officer pointed at FRIEND's bag and asked if he could pat the bag and FRIEND, again responded, "no."

7. Subject Officer then reached over and pushed down twice on the bottom center of FRIEND's bag with his right hand.
8. FRIEND said no and asked Subject Officer what he was doing. Those around FRIEND, including Complainant, also objected. Subject Officer told them that he could provide report numbers for touching FRIEND's stuff. FRIEND said he did not want a report number.
9. Complainant then asked why he patted FRIEND's bag and whether he also stopped women with purses. Subject Officer said that the bag looked like a gun from the side, but that it was not a search, but only a pat of the bag.
10. As Subject Officer walked away, he said "there was definitely something in there. . . . You could clearly see the indentation that there was something in there." WITNESS OFFICER #2 follows this by saying, "We didn't do nothing. We literally engaged in a conversation."
11. WITNESS OFFICER #1 claimed during this conversation that FRIEND agreed to being patted and also agreed that the bag looked "heavier" and stated that officers are familiar with the type of bag used by FRIEND being used to carry guns.

IV. DISCUSSION

Harassment

Pursuant to D.C. Official 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 (effective Feb. 19, 2009), 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 (2002).

Thus, to establish harassment, there must have been 1) conduct directed at Complainant by Subject Officer; 2) that was purposeful, knowing, or reckless; 3) in violation of the law or internal guidelines of the MPD; and 4) so as to subject Complainant to search, mistreatment, or other infringement of his personal or property rights or to deny or impede Complainant in the exercise or enjoyment of any right.

1. The Conduct directed at Complainant

Element one – conduct directed at Complainant – is established here. Subject Officer approached FRIEND and pressed his hand against the bottom of FRIENDS’s bag even after FRIEND told him that he could not pat his bag.

2. The Stop of FRIEND constituted Harassment

a. Subject Officer’s Interaction with FRIEND Constituted a Stop.

As to element four, the question is whether the Subject’s conduct toward Complainant was a “field contact” or a “stop.” A stop is a brief seizure of a person for investigative purposes, even if the government lacks probable cause to arrest. *Terry v. Ohio*, 391 U.S. 1 (1968). Courts have ruled that police officers must have reasonable suspicion that criminal activity is afoot prior to initiating a stop. *Id.* A stop is differentiated from a field contact, which consists of a consensual encounter between a community member and a police officer. Nevertheless, an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that s/he was not free to leave. *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984).

MPD General Order 304.10, Field Contacts, Stops, and Protective Pat Downs, differentiates between field contacts and clarifies that a “field contact involves solely the voluntary cooperativeness of an individual who is free not to respond and leave” and would not, thus rise to the level of harassment. MPD General Order 304.10, Field Contacts, Stops, and Protective Pat downs (eff. July 9, 2019), Part II.A. 2. In conducting a field contact, “members shall not detain an individual in any manner against their will, nor conduct a protective pat down.

Members may not require the individual to answer questions or respond in any way to the member if they choose not to do so. . . . The distinction between a field contact and a stop depends on whether, under the particular circumstances, an individual could reasonably perceive that he or she is not free to leave the member's presence." MPD General Order 304.10, Part II.A. 5.

Here, Subject Officer patted FRIEND's bag, allegedly because he thought it looked like it contained a gun. Because field contacts do not involve pat downs, Subject Officer's interaction with FRIEND was a stop.

b. Subject Officer's Stop Was Not Lawful

For a stop to be lawful, the member must have "reasonable suspicion that an individual has committed, is committing, or is about to commit any crime." MPD General Order 304.10 Part II.B.1. According to MPD General Order 304.10, "reasonable suspicion necessitates a minimal level of objective justification for making the stop. . . . it is more than a hunch or mere speculation, but less than probable cause to arrest. Members shall consider the totality of the circumstances and base reasonable suspicion on their training and experience," including: 1) the stopped individual's characteristics; 2) the stopped individual's actions; 3) demeanor of the stopped individual during a field contact; 4) police training and experience; 5) information obtained from witnesses or information; and 6) information obtained from law enforcement sources.

Here, Subject Officer claimed in the report he filed of the incident that he was patrolling the area on foot due to a shooting taking place about a half mile away the night before as well as other sounds of gunshots in the area from the past week. Exh. 8. One could surmise that he was thus on the look-out for guns, although he was not investigating any immediate active shooting situation and had no reason to suspect FRIEND of having a gun based on description or location. Rather, Subject Officer claimed in the report that FRIEND looked at officers, looked at his bag, then bladed his body. Exh. 8. When Subject Officer made contact with FRIEND, he claimed that he witnessed an L shape consistent with his experience as an officer that it might contain a firearm. Exh. 8. Based on these characteristics, he did a protective pat down of the bag. Exh. 8.

The BWC footage of the incident does not support Subject Officer's claims. It is true that FRIEND looked behind him at the officers with his head and part of his body – as one does when glancing behind - but he then turned back to his companions and continued interacting with them. **SUBJECT OFFICER BWC 1:44**. He did not move his body from its original stance or look at his bag or move it. **Id. at 1:40-1:50**. Moreover, when the officers approached, FRIEND turned directly toward them – not away from them – with his bag sitting flat against his front left hip, in plain sight. **Id. at 1:50**. Nothing about his behavior suggested an attempt to hide anything from the officers or to avoid the officers. The entire bag is not visible on the BWC footage. In the video captured by Complainant, however, a seeming bulge at the bottom of the bag is visible, but it is not "L-shaped." Exh. 13 at 00:00 and 00:41. Nor is there anything else specific to

suggest it is a gun rather than something else or just the shape of the bag. Thus, based solely on this information, Subject Officer did not have reasonable suspicion to stop FRIEND.

Thus, without reasonable suspicion for the stop, the stop of Complainant was unlawful.

c. The Unlawful Stop was Recklessly in Violation of the Law and Policy.

The determination of whether the unlawful stop constituted harassment depends on element two: whether Subject Officer's unlawful stop of FRIEND was purposeful, knowing or reckless. Subject Officer has acknowledged that he was patrolling due to a recent shooting in the area. Exh. 8. He was thus seemingly on high alert looking for guns. As Subject Officer walked away from FRIEND, he noted that there was "definitely something in there." SUBJECT OFFICER **BWC 5:05**. His colleague, WITNESS OFFICER #1 agreed that the bag looked "heavy" and that this type of bag was often used to hold a gun. **WITNESS OFFICER #1 BWC 5:50**. While all of that may be true, it is not sufficient reasonable suspicion for stopping someone. As for Subject Officer's claim in his report that there was an upside-down L shaped bulge, as already discussed, no such bulge is visible in the evidence and his claim is not credible. Subject Officer needed something more to move his interaction from a contact to a stop. Subject Officer knew he did not have permission to pat FRIEND's bag, SUBJECT OFFICER **BWC 2:02**, and he should have known that FRIEND holding a bag, even if one that looks like the type often used to hold a gun, is not sufficient reasonable suspicion for a stop. His unlawful stop of FRIEND was thus reckless and constituted harassment in violation of DC Code § 5-1107. Thus, the harassment allegation for the stop is sustained.

3. The Pat of the Bag Constituted Harassment

a. Lawfulness of the Pat of the Bag

The facts do not support conducting a protective pat down of Complainant, even if it is limited to patting his bag. According to *Terry v. Ohio*, 392 U.S. 1 (1968), officers may pat down an individual for weapons or frisk him for contraband if there is a reasonable, articulable suspicion that the person stopped is armed and dangerous. The standard for a pat down as articulated in MPD General Order 304.10 is whether "a reasonably prudent law enforcement officer would be warranted in believing his or her safety or that of other individuals is in danger because the individual may be carrying a weapon or dangerous instrument." The factors to be considered are similar to those for a stop, but the descriptions are expanded to account for factors that increase the suspicion of a concealed weapon and dangerousness such as a bulge in a stopped individuals clothing, movements that suggest either the hiding or movement toward a weapon, the time of day or location that might increase the risk of an attack, and prior knowledge of the stopped individuals having weapons. MPD General Order 304.10.

What is notable here is that the reasonable suspicion articulated by Subject Officer here is not that a pat down was necessary to self-protect or protect others. At no time does he suggest or

behave as if he believes that his safety or that of other individuals is in danger. That there is no safety concern is visible in the BWC footage when Subject Officer approaches a calm FRIEND and asks to pat his bag. **SUBJECT OFFICER BWC 1:45 – 2:02.** As already discussed, Subject Officer's claim that FRIEND was trying to hide his bag, Exh. 8, is belied by the fact that as the officers approached, FRIEND turned to face them directly. **SUBJECT OFFICER BWC 1:50.** He does not pull his bag away from their view or touch it at all until after Subject Officer pats it. **Id. at 2:12.** Tellingly, during Subject Officer's interview with OPC, he says that when he patted the bag, he couldn't tell if it was a gun or not, so he stopped trying to pat it. Exh. 5 at 2:25. Had Subject Officer genuinely believed he had reasonable suspicion and a concern as to safety, then it's hard to imagine him not doing a more thorough pat of the bag to alleviate his safety concerns.

Notably, Subject Officer's representative provides an altered image of FRIEND with his bag attempting to demonstrate how a slight bulge in the side of the bag might be from the "sloped" grip of a handgun. Subject Officer's Objections. The problem with this image is that this very slight bulge in the side of the bag in the photo provided in Subject Officer's Objections is only visible in this very blurry image, but is not visible in the clear image of the video. Exh. 13 at 00:41. Moreover, the captured image is well after Subject Officer had already patted FRIEND's bag. **Id.** That Subject Officer's representative did not take a still shot from when Subject Officer is standing directly in front of FRIEND, **Id. at 00:00**, is telling as to its reliability. This alleged bulge is not visible at any time during the interaction when the bag is seen much more clearly and FRIEND is standing still. **Exh. 13 at 00:00, 00:41; SUBJECT OFFICER BWC 1:48-2:02.** Moreover, if the altered image Subject Officer's representative provided accurately represents how the gun may have been positioned in the bag, the alleged bulge is not at the location of the butt of the gun, the part that would have caused the bulge, but further down the side of the bag. Subject Officer's Objections. Were the grip of the gun to cause the bulge, it would have either pushed out the entire side of the bag from where the butt pushed against the side due to stiffness of the fabric or the bulge would have been only at the site of the butt of the gun. This altered photo thus does not demonstrate the likelihood of the presence of a gun, but rather disproves it.

The conclusion is that Subject Officer's only basis for patting FRIEND's bag was it was a bag of a style with which officers are familiar as sometimes being used to hold a gun, and a possible bulge along the bottom, Exh. 13 at 00:00, 00:41, **SUBJECT OFFICER BWC 1:48** indicating that it might contain something or that the bag is simply a square bag and it puffs out at the bottom. Subject Officer's claim that FRIEND tried to blade his body upon seeing the officers is contradicted by the BWC footage. **SUBJECT OFFICER BWC 1:30 – 2:00;** Exh. 13 at 00:00. Not only that, but at no time did Subject Officer suggest that he was patting FRIEND's bag out of a concern for safety, which is required for a pat down. **SUBJECT OFFICER BWC;** Exh. 5; Exh. 13. Thus, Subject Officer did not have sufficient reasonable suspicion to pat FRIENDS's bag and the pat was unlawful.

b. The Unlawful Pat was Recklessly in Violation of the Law and Policy.

As with the Stop, Subject Officer should have known that he did not have reasonable suspicion to pat FRIEND's bag. In fact, that he asked first suggested that he did know that he did not have reasonable suspicion. Thus, Subject Officer's pat of FRIEND's bag was recklessly in violation of the law and policy and constituted harassment in violation of DC Code § 5-1107. Thus, the harassment allegation for the frisk of the bag is sustained.

SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1 (Harassment - stop):	Sustained
Allegation 2 (Harassment - pat down/frisk):	Sustained

Submitted on February 19, 2024.

Jennifer A. Fischer, Esq.
Complaint Examiner