

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	18-0632
Complainant:	COMPLAINANT
Subject Officers, Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2 SUBJECT OFFICER #3
Allegation:	Harassment
Complaint Examiner:	Richard S. Ugelow
Merits Determination Date:	March 13, 2020

Pursuant to D.C. 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 June 29, 2018, the complainant was stopped by SUBJECT OFFICER #1 and WITNESS OFFICER #1 for driving with an inoperative center taillight.¹ COMPLAINANT complained that his vehicle was searched without his consent and SUBJECT OFFICER #2 and SUBJECT OFFICER #3 harassed him when they mishandled money that was taken from his pocket during the arrest.²

¹ In addition, COMPLAINANT alleged that WITNESS OFFICER #1 harassed him when he stopped his vehicle. Pursuant to D.C. Code § 5-1108(1), on January 4, 2020, a member of the Police Complaints Board dismissed these allegations, concurring with the determination by OPC's executive director. *See* Exhibit 2.

² At the time of his arrest, COMPLAINANT identified himself as REDACTED NAME. A number of false identifications and credit cards were found in his vehicle. Because there was confusion about his identify, COMPLAINANT was booked as "John Doe." While not relevant to this decision, the Complaint Examiner notes that these matters raise a question of COMPLAINANT's truthfulness.

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 WITNESS OFFICER #1, SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, WITNESS OFFICER #2 and WITNESS OFFICER #3, the OPC's Report of Investigation (ROI), the objections submitted by the Fraternal Order of Police (FOP) on behalf of SUBJECT OFFICER #1, SUBJECT OFFICER #2. And SUBJECT OFFICER #3 on January 22, 2020, 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 WITNESS OFFICER #1, SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, WITNESS OFFICER #2 and WITNESS OFFICER #3, the OPC's Report of Investigation, the objections submitted by the FOP on behalf of SUBJECT OFFICER #1, SUBJECT OFFICER #2 and SUBJECT OFFICER #3, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. At approximately 11:45 p.m. on June 29, 2018, the complainant, was driving along ON A BLOCK IN SE, WASHINGTON, DC..
2. SUBJECT OFFICER #1 and WITNESS OFFICER #1, members of A SPECIALIZED MPD UNIT were on routine patrol, when they stopped COMPLAINANT's vehicle because it had a nonfunctioning center brake light and lacked a front license plate.
3. WITNESS OFFICER #1 was the contact officer, i.e. in charge, and had the initial interaction with COMPLAINANT on the driver's side of the vehicle. SUBJECT OFFICER #1 approached the vehicle on the passenger side.
4. COMPLAINANT exited his vehicle and, as requested, placed his hands on it and was patted down.
5. COMPLAINANT asserts that WITNESS OFFICER #1 asked to search the car, but he said no. Exhibit 3, p. 2.
6. According to the FOP, COMPLAINANT said "yup" when asked for permission to conduct the search. FOP objections, p. 3.
7. The ROI found that no officer asked for consent to search the car, but that COMPLAINANT "shook his head no" when told the vehicle would be searched. ROI, pp. 6-7.

8. The Complaint Examiner reviewed the BWC footage carefully for evidence of a request made to COMPLAINANT to search the vehicle and did not hear any such request. Neither did the Complaint Examiner hear COMPLAINANT say no or see him shake his head in a manner that would indicate no.
9. Regardless of whether WITNESS OFFICER #1 obtained voluntary consent from COMPLAINANT, he authorized WITNESS OFFICER #1 to search the vehicle. Exhibit 8 at 6:33.
10. SUBJECT OFFICER #1 conducted the initial search, and, among other items, located a gun. Id.
11. COMPLAINANT was then placed under arrest and subsequently searched by SUBJECT OFFICER #2.
12. SUBJECT OFFICER #2 removed a “wad” of cash from COMPLAINANT’s pants pocket, which he (COMPLAINANT) estimated to be around \$1250. The money was placed in a clear plastic property bag, which ultimately was handed to SUBJECT OFFICER #3. COMPLAINANT asked the Officers to count the money in front of him. They indicated it was unnecessary because everything was recorded by the BWCs. *See* BWC of WITNESS OFFICER #3, 4:58-5:40.
13. When COMPLAINANT’s personal property was retrieved at AN MPD DISTRICT STATION, there was \$355.40 in the property bag.

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.

1. SUBJECT OFFICER #1

The ROI concluded that: “[W]hen WITNESS OFFICER #1 told COMPLAINANT they would be searching his vehicle, COMPLAINANT shook his head no. At the time, WITNESS OFFICER #1 was on the other side of the vehicle, but looking in in the direction of WITNESS OFFICER #1 and the complainant, OPC finds that SUBJECT OFFICER #1, if he heard WITNESS OFFICER #1 mention the search, reasonably would have been able to see COMPLAINANT shake his head no. Furthermore, even if he did not see COMPLAINANT shake his head, and only heard WITNESS OFFICER #1 make the statement, he would not have heard COMPLAINANT consent to a search because there was no verbal or expressed consent given.” ROI, p. 7. The Complaint Examiner disagrees with these conclusions based on a review of the BWC footage and the statements of the relevant officers.

The Complaint Examiner found no evidence that SUBJECT OFFICER #1 overheard the conversation between WITNESS OFFICER #1 and COMPLAINANT or saw him shake his head to indicate no to a search. SUBJECT OFFICER #1 relied on WITNESS #1’s authorization to search the vehicle. And, there is no allegation that SUBJECT OFFICER #1 searched the car without WITNESS OFFICER #1’s authorization. Absent clear facts to the contrary, not present here, SUBJECT OFFICER #1 reasonably could rely on WITNESS OFFICER #1’s authorization, as the contact officer, to proceed with the search.³

For purposes of this decision, the Complaint Examiner assumes (without deciding) that COMPLAINANT did not give WITNESS OFFICER #1 consent for the search.⁴ That said, the

³ COMPLAINANT is heard to say on various BWCs words to the effect: “You have my permission.” *See, e.g.*, BWC of SUBJECT OFFICER #2 at 5:02. This and similar statements were made after the search was conducted and, therefore, are not probative of COMPLAINANT’s consent to search the vehicle when he was talking to WITNESS OFFICER #1. Nevertheless, the statements suggest that COMPLAINANT was inclined to allow a search and it is entirely possible that he voluntarily consented to the search of his vehicle.

⁴ The ROI relies on a hearsay statement from COMPLAINANT’s defense counsel that the U.S. Attorney’s Office declined to prosecute because the search was unlawful. ROI at p. 7. The Complaint Examiner does not give any weight to this statement. Moreover, it is not relevant to this decision.

critical issue is whether SUBJECT OFFICER #1 had reason to question WITNESS OFFICER #1's authorization to proceed with the search. Based on the totality of the circumstances, the Complaint Examiner finds that SUBJECT OFFICER #1 did not have cause to question WITNESS OFFICER #1's authorization to conduct the search.⁵

Therefore, it follows that SUBJECT OFFICER #1 was not responsible for an unlawful arrest.

For these reasons, the Complaint Examiner concludes that SUBJECT OFFICER #1 did not harass COMPLAINANT in violation of D.C. Code § 5-1107 and MPD General Order 120.25.

2. SUBJECT OFFICER #2 and SUBJECT OFFICER #3

SUBJECT OFFICER #2 searched COMPLAINANT and retrieved a "wad" of money, estimated by COMPLAINANT to be \$1250. COMPLAINANT asked that the money be counted. He also asked if he could keep the money until he was taken to AN MPD DISTRICT STATION, where it would be inventoried. Both of these requests were denied. COMPLAINANT was told that everything was being recorded and there was no need to count the money at this time. The Complaint Examiner was unable to tell from the BWC footage the denomination of the currency or the amount. The BWC shows the money being placed into a clear plastic property bag, which SUBJECT OFFICER #2 handed to SUBJECT OFFICER #3. When WITNESS retrieved COMPLAINANT's property from the MPD DISTRICT STATION, she was given \$355.40 and his other personal property.⁶

The Complaint Examiner's charge is not to determine whether COMPLAINANT in fact had \$1250 on his person at the time of arrest. Rather, the charge is to determine whether SUBJECT OFFICER #2 and SUBJECT OFFICER #3 harassed COMPLAINANT by not counting the money as he requested.

There is no MPD General Order that specifically requires that MPD officers to count currency under the circumstances presented here. MPD General Order 601.1 requires that the property be properly recorded, processed and safeguarded. Clearly, COMPLAINANT was concerned about the currency because he wanted it counted in front of him or, at least, to keep it on his person until he arrived at the MPD DISTRICT STATION. Here, the Officers cavalierly dismissed COMPLAINANT's request by telling him that everything was being recorded. In fact, the BWC footage does not reveal the amount of money that was taken from COMPLAINANT. The Officers' actions deprived COMPLAINANT of his property and did not comply with MPD General Order 601.1 to safeguard property.

⁵ Again, this does not mean that the search was lawful under Fourth Amendment standards. Rather, this determination means only that SUBJECT OFFICER #1 did not violate MPD General Order 120.25 under a preponderance of the evidence standard.

⁶ WITNESS was authorized by COMPLAINANT to retrieve his personal property.

Separately, MPD General Order 302.13 requires that the BWC be activated during initial inventorying of seized money. According to Exhibit 28, SUBJECT OFFICER #2 and SUBJECT OFFICER #3 brought COMPLAINANT's personal property to the MPD DISTRICT STATION. Therefore, they were responsible for activating a BWC to record the inventory of the funds. This was not done.

The totality of the circumstances demonstrates that SUBJECT OFFICER #2 and SUBJECT OFFICER #3 harassed COMPLAINANT in violation of D.C. Code § 5-1107 and MPD General Order 120.25. by not safeguarding his personal property or activating a BWC to record the inventory of an undetermined amount of U.S. currency.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation: Harassment	Exonerated
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SUBJECT OFFICER #2

Allegation: Harassment	Sustained
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SUBJECT OFFICER #3

Allegation: Harassment	Sustained
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Submitted on March 13, 2020

Richard S. Ugelow
Complaint Examiner