

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	19-0229
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation 1:	Unnecessary/Excessive Force
Complaint Examiner:	Jennifer A. Fischer, Esq.
Merits Determination Date:	April 14, 2020

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 January 17, 2019. Complainant alleged that on November 16, 2018, the subject officer, Metropolitan Police Department (MPD) SUBJECT OFFICER (Subject Officer), used unnecessary or excessive force against WITNESS when he drew his service weapon and pointed it in WITNESS's direction.¹

Specifically, Complainant stated that on November 16, 2018, SUBJECT OFFICER initiated a traffic stop on the U-Haul moving van that WITNESS was driving and Complainant was a passenger. Complainant alleged that upon approaching the van, SUBJECT OFFICER drew his service weapon and pointed it at WITNESS.

¹ COMPLAINANT also alleged that SUBJECT OFFICER harassed him when he unlawfully stopped him, detained him for an unreasonable length of time, arrested him for possession of an open container of alcohol, and threw away his food. COMPLAINANT also alleged that WITNESS OFFICER #1 used unnecessary or excessive force against him when WITNESS OFFICER #1 pointed his service weapon at the complainant. 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 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 (ROI), the Body Worn Camera Footage recorded by SUBJECT OFFICER, WITNESS OFFICER #2, and WITNESS OFFICER #1 on November 16, 2018, the objections submitted by Subject Officer on January 28, 2020, and OPC's response to the objections dated March 17, 2020, the Complaint Examiner determined that the ROI presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

Subject Officer objected to the unnecessary or excessive force allegation in relation to the pointing of the gun at or in the direction of WITNESS because he contends that 1) Complainant was not the victim of the allegation, and 2) the gun pointing at or in the direction of WITNESS was not part of Complainant's complaint, rather, he was coached to mention the drawing of guns and his mentioning of it was "merely describing what happened." He contends that Complainant's only "complaint" was that he was arrested unlawfully and detained too long. He argues that this allegation regarding pointing his gun at WITNESS cannot then be included as part of his complaint to be decided here.

As regards Subject Officer's first objection, "any individual having personal knowledge of alleged officer misconduct may file a complaint with the Office on behalf of a victim." D.C. Code § 5-1107(c). Thus, COMPLAINANT has standing to file a complaint in regards Subject Officer's treatment of WITNESS.

Moreover, Subject Officer's objection to the gun allegation being outside of what Complainant was complaining about and therefore outside of OPC's jurisdiction is incorrect. First, restricting the Complaint here in the way suggested by Subject Officer is contrary to the purposes of providing "easy access" to a process of review of citizen complaints involving the police. *See* D.C. Code 5-1101(3). Citizens may complain when they believe that they or others have been mistreated, but they can't be expected to know the ins and outs of what exactly constitutes a violation. For that reason, the definition of a "complaint" required to begin the process of investigating a complaint requires only "an allegation of misconduct . . . during an incident occurring within the District of Columbia." D.C. Mun. Regs. Tit. 6A , §2199.1. Here, Complainant filed such a complaint regarding his arrest, which launched an investigation of the event. During Complainant's interview, he was given an opportunity to elaborate on the details of the event that was the subject of his complaint. During that interview, he brought up or referenced multiple times that guns were drawn. For example, he explained that, while he did have an open beer, he "didn't even get a chance to swallow it before [the officers] pulled their guns out on me. I was not treated fairly." Exh. 3 at 3:30. "[They drew guns] at my man that was driving and on my side." *Id.* at 5:07. Thus, the allegation of excessive or unnecessary force relating to a gun drawn on WITNESS was appropriately investigated and brought here.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation (ROI), the Body Worn Camera Footage recorded by SUBJECT OFFICER, WITNESS OFFICER #2, and WITNESS OFFICER #1 on November 16, 2018, the objections submitted by Subject Officer on January 28, 2020, and OPC's response to the objections dated March 17, 2020, the Complaint Examiner finds the material facts regarding this complaint to be:

1. Complainant filed a complaint with MPD on January 17, 2019.
2. At approximately 7:36 pm on November 16, 2018, SUBJECT OFFICER and WITNESS OFFICER #2 were riding in the same vehicle and notified of a License Plate Reader hit on a stolen vehicle. They were given both the LPR photo of the license plate and the stolen plate to which the LPR matched the photo. They then ran the plate in the WALES database to confirm its stolen plates. Based on this information, they tracked down the vehicle and then used their radio to coordinate with other units.
3. Once two other units joined them, they activated their emergency equipment to signal the allegedly stolen U-Haul van to pull over. One of the joining units then pulled ahead of the van and it came to a stop. Subject Officer's vehicle was positioned behind the van, while the other unit was to the right of the van and its driver's door blocked from Subject Officer's view. Similarly, the driver of the unit to the right of the van did not have a view of the driver's side of Subject Officer's vehicle.
4. Upon stopping, Subject Officer, who had been driving, asked WITNESS OFFICER #2 for the microphone as he opened his door, but did not wait for it. Instead, he exited and as he walked toward the van's driver's door, he pulled out his gun with his right hand and pointed it, tilted downward, toward the van's driver's door. As he walked, he yelled for the driver to turn the engine off.
5. Subject Officer opened the driver's door with his left hand while still pointing his gun with his right hand toward the driver, WITNESS, with a downward tilt until the door was partly open at which time he began lowering his gun to his side. When his gun was holstered, he assisted WITNESS out of the van.
6. At the same time that Subject Officer emerged from his vehicle, WITNESS exited their vehicle and approached the passenger side of the van. She did not have her gun drawn.
7. WITNESS OFFICER #1 then exited from the driver's side of the police vehicle that had pulled up next to the van on the passenger side. He approached the passenger door and he did not have his gun drawn. WITNESS OFFICER #1 used his right hand to open the passenger door of the van and put his left hand on Complainant's shoulder as he assisted him out of the van.

8. As soon as WITNESS OFFICER #2 saw WITNESS OFFICER #1 moving toward the passenger side of the van, she moved to the driver's side of the van to assist Subject Officer.
9. Neither Complainant nor WITNESS resisted the officers' requests in exiting the van, during the search of their persons, the search of the vehicle, and transport after arrest.
10. At no time did Subject Officer discuss the drawing of his gun with WITNESS OFFICER #1. Subject officer also did not file a 901-g(RIF).

IV. DISCUSSION

Complainant alleged that Subject Officer used unnecessary or excessive force when he drew his service weapon and pointed it in WITNESS's direction. Complaint Examiner sustains this allegation.

Pursuant to D.C. Official Code § 5-1107(a), and (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: (2) unnecessary or excessive use of force."

D.C. Mun. Regs. Tit. 6A, § 2199.1 defines Excessive or Unnecessary Use of Force for the purposes of OPC as "Unreasonable use of power, violence, or pressure under the particular circumstances. Factors to be considered when determining the "reasonableness" of a use of force include the following: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officer or others; (3) whether the subject was actively and physically resisting arrest or attempting to evade arrest by flight; (4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; (5) whether the officer adhered to the general orders, policies, procedures, practices and training of the MPD or DCHAPD, including adherence to the Use of Force Framework; and (6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish the objective. MPD's Use of Force Framework requires a similar analysis. MPD General Order 901.07 IV.E.

"The policy of the Metropolitan Police Department (MPD) is to value and preserve the sanctity of human life at all times, especially when lawfully exercising the use of force. Therefore, MPD members shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others. When using force, members shall continuously reassess the perceived threat in order to select the reasonable use of force response, or one that is proportional to the threat faced by him, her or others." MPD General Order 901.07 (effective November 3, 2017), Part II.

A member is prohibited from “draw[ing] and point[ing] a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that the situation may escalate to the point where lethal force would be permitted.” MPD General Order 901.01 (effective June 12, 2008), Part IV. A. (emphasis added); MPD General Order 901.07, IV. K. 4. Lethal force is allowed in “defense of life” and “fleeing felon” situations. MPD General Order 901.07, IV. G.1. A “defense of life” situation is defined as “(1) when it is necessary and objectively reasonable; **and** (2) to defend themselves from an actual or threatened attack that is imminent and could result in death or serious bodily injury; **and** (3) when all other options have been exhausted or do not reasonably lend themselves to the circumstances.” *Id.*

Here, WITNESS was not fleeing so Subject Officer was only allowed to draw and point his firearm in the direction of WITNESS if he had a *reasonable and objective perception* of a *substantial risk* that the subject posed an *immediate threat of attack* that could result in death or serious bodily injury to the member or another person. Moreover, the Subject Officer must first have exhausted all other options or the situation must not have reasonably lent itself to other options.

As an initial matter, Complaint Examiner finds that Complainant pointed his gun in the direction of WITNESS. Subject Officer’s BWC footage shows him driving a marked police vehicle and pulling up behind a U-Haul Rental Van. SUBJECT OFFICER BWC footage dated Nov. 16, 2018 (SUBJECT OFFICER BWC) at 2:49; WITNESS OFFICER #2 BWC footage dated Nov. 16, 2018 (WITNESS OFFICER #2 BWC) at 2:46. Within seconds of stopping the van, Subject Officer asked Officer WITNESS OFFICER #2 for the microphone as he opened his car door and stepped out of his vehicle. SUBJECT OFFICER BWC at 3:00. Without a pause, Subject Officer pulled his revolver from its holster and pointed it in the direction of the driver’s door of the van at a slight downward slant. *Id.* Subject Officer continued walking toward the van door with his gun raised and pointed, at a downward slant, toward the door. *Id.*; WITNESS OFFICER #2 BWC at 3:07. As he opened the door, he momentarily had the gun pointed, at a downward slant, toward the driver, WITNESS, but as he opened the door further, he lowered the gun to his side. SUBJECT OFFICER BWC at 3:07; WITNESS OFFICER #2 BWC at 3:15.

The prohibition on pointing a gun distinguishes between pointing “at” and “in the direction of” the subject. Here, the gun pointed at the driver door at a downward angle, which WITNESS was sitting behind. Subject Officer continued to point his gun toward WITNESS at a downward tilt while he began opening the door. While the gun was at a downward tilt and, most of the time, a car door was between the gun and WITNESS, it is difficult to come up with another description of where the gun was pointed at other than “in the direction of” WITNESS. “Toward,” which means the same thing, is the only other word that comes to mind. If the gun were required to be pointed any more directly to qualify as “in the direction of” then there would be no need for the distinction between “at” and “in the direction of.” If a downward tilt or the barrier of a car door is not to be considered “in the direction of” a subject as Subject Officer seems to suggest then the policy should be written to make that clear.

Second, the evidence does not support Subject Officer having a reasonable and objective perception of a substantial risk that WITNESS posed an immediate threat of attack that could have resulted in death or serious bodily injury to the member or another person. It is reasonable to imagine that a report of a stolen vehicle creates a greater danger than, for example, a routine traffic stop, especially when it is a van that the officer cannot see inside from behind. However, Subject Officer had no information suggesting that the driver or passengers were armed or otherwise dangerous. Neither the LPR data, his mobile data terminal, nor the MPD DISTRICT radio communications indicated the stolen van had been procured by carjacking or other violent means to suggest that a reasonable and objective perception of the requisite substantial risk of attack. Exh 11; Exh. 12; SUBJECT OFFICER BWC at 2:00; WITNESS OFFICER #2 BWC at 2:00. The van did not attempt to flee when the officers' indicated that it was to pull over nor did the driver or passenger take any actions at the outset of the encounter to suggest dangerousness. SUBJECT OFFICER BWC at 2:30; WITNESS OFFICER #2 BWC at 2:30. Once pulled over, driver and passenger complied with all of the officers' orders and did not resist. SUBJECT OFFICER BWC at 3:09; WITNESS OFFICER #2 BWC at 3:15; WITNESS OFFICER #1 BWC footage dated Nov. 16, 2018 (WITNESS OFFICER #1 BWC) at 1:22. Nothing about the incident, besides a belief of the van being stolen, suggested a "substantial risk" of an immediate threat of attack that could result in death or serious bodily injury.

Notably, Subject Officer was alone in his decision to pull his weapon and point it in the direction of either the driver or the passenger of the van. The BWC footage shows both WITNESS OFFICER #2 and WITNESS OFFICER #1 approaching the passenger side of the vehicle at roughly the same time that Subject Officer approached the driver's side of the vehicle. WITNESS OFFICER #2 BWC at 3:07; WITNESS OFFICER #1 BWC at 1:25. Neither had their weapons drawn and pointing in the direction of the van. WITNESS OFFICER #2 BWC at 3:05; WITNESS OFFICER #1 BWC at 1:25. Nor could WITNESS OFFICER #1 see that Subject Officer had drawn his. SUBJECT OFFICER #1 BWC at 1:25. Subject Officer's lone decision indicates that knowledge that the vehicle was stolen was not, by itself, a substantial enough risk to justify drawing a weapon and pointing it in the direction of the subject.

In Subject Officer's objections he raises alleged testimony from an alleged training expert at the MPD Police Academy. Assuming arguendo that the testimony is accurate, the expert claims that pulling over a stolen vehicle is a "high risk traffic stop." Stating it is a high risk situation, however, is not the same as saying that "there is a reasonable perception of a substantial risk that the situation may escalate to the point where lethal force would be permitted." That there are no other indications of such a substantial risk, here, is indicated by neither of the other officers on the scene drawing their weapons and pointing them at or in the direction of the van's driver or passenger.

Finally, even if such a danger existed, Subject Officer did not exhaust all other options prior to pointing his gun in WITNESS's direction nor does the evidence support that no other options were feasible under the circumstances. Here, Subject Officer exercised no other options

prior to drawing his weapon and pointing it in the direction of WITNESS. SUBJECT OFFICER BWC at 3:05.

Subject Officer's "expert" stated in his objections that the usual procedure in this situation would have been for Subject Officer to have remained protected behind his engine block while calling over his microphone to the driver and passenger to step out of the vehicle one at a time. Subject Officer here did not do that. *Id.* The expert seems to suggest, although he does not say it outright, that a possible reason Subject Officer did not call out was because WITNESS OFFICER #1 pulled his vehicle next to the van rather than remaining behind it. The expert said, however, that Subject Officer could have "slowed down and ordered the other unit to back up," which Subject Officer did not do. *See Id.*

Finally, it is noted that Subject Officer objected to his difficulty in viewing BWC footage prior to his interview. He complained that it made it difficult to answer the OPC investigator's questions appropriately and prejudiced him in this proceeding. As this decision doesn't rely on Subject Officer's answers to (or refusals to answer) the investigator that are inconsistent with what is visible in the BWC footage, this objection is irrelevant. Complaint Examiner notes, however, that had Subject Officer notified WITNESS OFFICER #1 and filed the PD Form 901-g(RIF) as required, he would have been able to refer to it for his reasoning. *See* MPD Special Order 06.06 (effective April 7, 2006) B.1.; General Order 901.07, IV.K.4.b. He neither notified his WITNESS OFFICER #1 nor filed the report, however, which was also a violation of policy, although not one under review here.

In response to questions regarding his not filing a 901-g(RIF), Subject Officer stated in his interview that WITNESS OFFICER #1 was aware of his actions because he witnessed them. *See* Exh. 5 at 8:08, 9:05. The BWC footage shows, however, that WITNESS OFFICER #1 could not see Subject Officer drawing his gun. SUBJECT OFFICER BWC at 3:05; WITNESS OFFICER #1 BWC at 1:25. Moreover, Subject Officer didn't discuss with WITNESS OFFICER #1 about drawing and pointing his gun in the direction of WITNESS during the incident as recorded in the BWC footage. SUBJECT OFFICER BWC; WITNESS OFFICER #1 BWC. Regardless, Subject Officer claimed to know the policy relating to pointing his gun in the direction of a subject. Exh. 5 at 7:15, 8:00. Nonetheless, he did not follow it. While it would be ideal if Subject Officer had accessed his BWC footage prior to his interview, the method for his ability to do so is not in the control of the Office of Police Complaints. Rather that seems more in the purview of MPD and Subject Officer's union representative, who, by now, should be well familiar with the process.

Subject Officer, here, is found to have violated the MPD General Order 901.01 Part IV. A. and MPD General Order 901.07, Part IV.K.4. and G.2, which prohibit the pointing of his gun at or in the direction of a subject absent requisite threat. As such, Subject Officer's pointing of his gun in the direction of WITNESS constituted unnecessary and excessive force as defined under D.C. Mun. Regs. Tit. 6A, § 2199.1 and MPD General Order 901.07. The allegation of Unnecessary and Excessive force is, thus, sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1: Unnecessary/Excessive Force	Sustained
--	-----------

Submitted on April 14, 2020.

Jennifer A. Fischer, Esq.
Complaint Examiner