

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

FINDINGS OF FACT AND MERITS DETERMINATION

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| Complaint No.: | 23-0260 |
| Complainant: | COMPLAINANT |
| Subject Officer(s), Badge No., District: | SUBJECT OFFICER #1 SUBJECT OFFICER #2 |
| Allegation 1: | Harassment – Stop – Pedestrian (SUBJECT OFFICER #2) |
| Allegation 2: | Harassment - Entry w/o search (SUBJECT OFFICER #1) |
| Complaint Examiner: | Peter Tague |
| Merits Determination Date: | March 6, 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

SUBJECT OFFICER #2 violated D.C. Code § 5-1107 and MPD General Order 120.25 (Harassment) when he unlawfully detained SUBJECT.

SUBJECT OFFICER #1 violated the same provisions when he unlawfully entered the complainant’s home.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC’s Report of Investigation, the objections submitted by SUBJECT OFFICERS on February 1, 2024, and OPC’s response to the objections on February 4, 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, the objections submitted by SUBJECT OFFICERS on February 1, 2024, and OPC's response to the objections on February 4, 2024, the Complaint Examiner finds the material facts regarding this complaint to be:

1. First discussed is the behavior of SUBJECT OFFICER #2, then that of SUBJECT OFFICER #1.
2. Two patrol cars drive on the streets of Southeast Washington, DC, on January 16, 2023. Turning onto A BLOCK IN SE, WASHINGTON, DC, the cars stop when one or more of the nine subject or witness officers involved in this incident espy eight young men standing together at the top of the first of three sets of stairs leading from the street's sidewalk to the building, some thirty feet away, where COMPLAINANT (Complainant), lived.
3. While a passenger in one of the patrol cars, SUBJECT OFFICER #2 had turned on the video of his body-worn camera but not its sound. There is thus no record of what he, or one of the other officers, might have said to explain what drew their attention to the young men.
4. One of the young men, SUBJECT, the complainant's nephew, stands on the grass next to the walkway leading to the building. From the angle that SUBJECT OFFICER #2 takes in briskly mounting the stairs, SUBJECT is slightly behind the others. He wears a sweatshirt with a hood and a ski mask (a balaclava). One young man carries a basketball in one hand, keys in the other. (COMPLAINANT said the young men were her sons, nephews, and their cousins, and all were returning to her apartment after playing basketball at a nearby court.) As the officers approach the young men, the latter turn and walk slowly up the next set of three stairs, toward the building. The encounter occurs as the young men reach the final set of three steps, leading to the landing outside the building.
5. SUBJECT OFFICER #2 first approaches an unidentified young man. He asks, "What's that in your pocket? Is that, is that weed right there?" The male responds, "No," and, as described by SUBJECT OFFICER #2, removes "keys and stuff."
6. SUBJECT OFFICER #2 then shifts to SUBJECT who has stopped near the last three steps leading to the building's entrance. As with the first male, he says, "Hey, you got a bunch of weed in your pocket there? This little kangaroo pouch?" Withdrawing his hands from the pouch, SUBJECT raises his arms and answers "No, sir." Not done with SUBJECT, SUBJECT OFFICER #2 says, "Could you come over here real quick and just talk to me?" Several other officers have now surrounded SUBJECT. His way to the building's landing is impeded. SUBJECT OFFICER #2 asks SUBJECT if he has guns. SUBJECT again answers, "No, sir." Not satisfied, SUBJECT OFFICER #2 presses the point: "Do you mind if I check? You can say no, but I just want to check. Real quick, send you on your way if there's no guns. That's cool?" SUBJECT: "I don't have any guns on me." SUBJECT OFFICER #2: "Can I check real quick? You can say no." SUBJECT: "Yes, sir."

7. SUBJECT consents to the pat-down. SUBJECT OFFICER #2 touches SUBJECT's hoodie's waistband, pouch, and pockets, and then between SUBJECT's legs. Finding nothing, SUBJECT OFFICER #2 adds, "Why are you shaking so much? I'm just curious. Just because you're talking with me?" SUBJECT gestures to the other officers surrounding him. SUBJECT OFFICER #2 dismisses SUBJECT with "You're good to go man, but I appreciate you talking to me."
8. In his interview with OPC, SUBJECT OFFICER #2 initially disavowed detaining SUBJECT. "I'm not even sure it's a stop," he said, adding that "I don't, I don't think it's a stop." Report of Investigation, Exhibit 8 (Interview with OPC Investigator (September 6, 2023)).
9. SUBJECT OFFICER #2 nonetheless listed the encounter as a stop in the police report he wrote. ROI, Exhibit 12. In his interview he explained that "the dispatch system" was responsible for that characterization: that "system automatically categoriz[es] some incidents as such even when they were just a contact." ROI, Exhibit 8 (SUBJECT OFFICER #2 interview).
10. In an ostensible attempt to defend his behavior if it were later determined that he had detained SUBJECT, SUBJECT OFFICER #2 offered a more sinister description and interpretation of SUBJECT's behavior during his interview with OPC. While conceding that "everyone [the young men] were kind of standing around ... he [SUBJECT] had his hands inside a kangaroo pouch of a hoodie." *Id.* So? SUBJECT OFFICER #2:
11. "It seemed like he [SUBJECT] was kind of pushing it out a little and down, but concealed the waistband. ... I get the sense that people [here SUBJECT] keep up on you, like turn around a little bit, and lay away from me, and stay behind other people. So, I just went to talk to them [sic] and see if, uh, we could talk." *Id.*
12. From that description, what prompted SUBJECT OFFICER #2 to approach SUBJECT? "All the characteristics building up to an armed gunman." *Id.*
13. In opposing the ROI's finding of reasonable cause to believe SUBJECT OFFICER #2 harassed SUBJECT, the DC Police Union offered this expansive interpretation of what SUBJECT OFFICER #2 had said in his interview with OPC:
14. "SUBJECT OFFICER #2 observed SUBJECT move himself to the back of the group, creating a buffer between himself and law enforcement personnel. SUBJECT OFFICER #2 also noticed SUBJECT use both his hands to push down or inflate his waistband, which SUBJECT OFFICER #2 believed was done in an attempt to conceal a firearm. Further, SUBJECT began to blade his body, enabling him to flee or enter a shooting stance in an expeditious manner." DC Police Union, *Objections to Report of Investigation for OPC Complaint Number 23-0260* (February 1, 2024).
15. Footage from SUBJECT OFFICER #2's body worn camera belies his and the Police Union's description of SUBJECT's behavior.
16. SUBJECT does not appear to "move ... to the back of the group," as the Police Union contends. He stood still as the officers approached, as did the other young men. When several of them turned to walk to the building's front door, SUBJECT turned, too, and, with them, walked slowly toward the door.

17. SUBJECT wore a hoodie with a “kangaroo” pouch. He did have his hands in that pouch. He does not appear to push his hands down. Nor did he turn his body in any way that could be considered “blading.” He did turn, but with the purpose of joining the other young men as they walked along the walkway to the building, and thus to his aunt’s (COMPLAINANT’s) home in the building.
18. Turning to SUBJECT OFFICER #1, he was one of the nine officers who took part in the encounter with the eight young men. He was not involved with SUBJECT.
19. Instead, COMPLAINANT accuses him of harassment because he intruded into her apartment without permission.
20. COMPLAINANT provides what she recalls about the incident. See ROI, Exhibit 1, Section 4. She says:
21. “My sons and nephews were harassed by a few officers from Sixth District. They entered my home without a warrant or permission. ... I hear voices and tussles by my [front] door. I ... go downstairs and my youngest son came towards me to tell me the police is in our home. ... [T]hey were indeed in my living room with a flashlight. The officer asked did they live here and I said yes they do. I asked why were they in here? They never answered me and said ok and was leaving. ...” Email from COMPLAINANT to MPD (January 27, 2023), included in ROI, Exhibit 1.
22. In her interview with OPC, COMPLAINANT made the same points, expressed differently. She said: “[T]he Asian guy ... with the flashlight ... was in my living room ... He said ‘Do they live here?’ ... And I said, ‘Yes, they live here.’” SUBJECT OFFICER #1 then said, “Okay, have a good day,” and left. ROI, Exhibit 4 (Interview with COMPLAINANT).
23. Continuing, COMPLAINANT fulsomely praised her sons, nephews, and their friends. She wrote painfully about the incident. *Id.*
24. But footage from the body-worn cameras does not substantiate her claim that one or more officers entered her home.
25. The young man holding the basketball and key must have opened the entrance door to the building. Shortly after that outer door was opened, SUBJECT OFFICER #1 walked into the foyer. The door to the complainant’s apartment was immediately on the right. Footage from SUBJECT OFFICER #1’s body-worn camera shows that that door was slightly ajar, with entry blocked by one of the young men (wearing a blue jacket), his back to SUBJECT OFFICER #1. Footage from his body-worn camera and that of two other officers does not support the claim that he entered COMPLAINANT’s apartment. While SUBJECT OFFICER #1 does shine his flashlight into the apartment, he does not cross the threshold.

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.

COMPLAINANT accuses SUBJECT OFFICER #2 of harassing her nephew SUBJECT and SUBJECT OFFICER #1 of harassing her for the latter’s entry into her home without permission. First discussed is the accusation against SUBJECT OFFICER #2; then, that against SUBJECT OFFICER #1.

A. SUBJECT OFFICER #2

SUBJECT OFFICER #2’s involvement presents three issues. First, how should his encounter with SUBJECT be characterized? Was it a detention that triggers constitutional protection or was it an encounter of the sort (a “field contact”) that society encourages between police officers and the public?

Second, if SUBJECT OFFICER #2 detained SUBJECT, did he have a basis to do so?

Third, if the basis was insufficient, did SUBJECT OFFICER #2 act recklessly?

A fourth possible issue involves the pat-down. There is no constitutional issue here for SUBJECT consented to that intrusion.

But SUBJECT's consent to the frisk does not eliminate the question over the propriety of approaching him. The initial question, to repeat, is whether SUBJECT OFFICER #2 detained SUBJECT. If so, the detention must be justified. The fact that their involvement was very brief, lasting less than a minute, is irrelevant.

1. Field-contact or detention

The line between a detention that requires constitutional justification and a "field contact" that requires none is sometimes faint.

The District of Columbia Court of Appeals provides guidance to distinguish one from the other.

In *Golden v. United States*, 248 A.3d 925 (DC Ct App 2021), that court asked whether the conduct of the police:

“communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter. This test ‘presupposes an *innocent* person.’ The question is ‘not what the defendant himself ... thought, but what a reasonable [individual], innocent of any crime, would have thought had [they] been in the defendant's shoes.’ Our precedent instructs us to ‘take an ‘earthy’ and realistic approach’ to this inquiry.”

Id. at 934 (internal citations omitted).

In *Dozier v. United States*, 220 A.3d 933 (DC Ct App 2019), that court recognized:

“when a ‘visibly armed police officer in full uniform and tactical vest emerges without warning from a police cruiser to interrupt a person going about his private business,’ the encounter is not ‘between equals.’ In addition, we noted that where ‘questioning is at least implicitly accusatory (if not explicitly so), a reasonable person's reaction is not only to show respect for the officer's authority, but also to feel vulnerable and apprehensive.’ ‘In such an atmosphere ... a reasonable person who can tell from the inquiries that the officer suspects him of something, and who cannot know whether the officer thinks there is sufficient reason to detain him, may well doubt that the officer would allow him to avoid or terminate the encounter and just walk away.’”

Id. at 941-42 (internal citations omitted).

The aspects of this encounter, when combined, warrant finding it was a detention.

Consider the context. The eight young men—all related—had left the street, to gather on the walkway to the Complainant’s home that they intended to enter. They would not have known why three police patrol cars stopped near them, with nine officers approaching briskly and surrounding them. The officers were armed and wore clothes designating their status as police. Intimidating, this encounter fits *Dozier*’s description of a detention.

SUBJECT OFFICER #2 moved quickly along the sidewalk and up the short hill to reach the walkway. He singled out one of the young men to determine whether he possessed marijuana. Satisfied that he did not, SUBJECT OFFICER #2 turned to SUBJECT and asked whether he had marijuana. While what SUBJECT OFFICER #2 said was not intimidating, the context was. Like the other man, SUBJECT immediately submitted, raising his arms, and denying that he had marijuana. His monosyllabic response suggested uneasiness.

With his suspicion over marijuana quelled, SUBJECT OFFICER #2 switched to a much more serious topic, whether SUBJECT had a gun. With a firearm now the subject, a reasonable person in SUBJECT’s position would not think he could refuse to cooperate. The position of other officers, surrounding SUBJECT, would add to a reasonable person’s apprehension. And then, despite the words he used, SUBJECT OFFICER #2 might have evinced an attitude consistent with his efforts to justify his conduct.

At odds with characterizing the encounter with SUBJECT as a stop in his incident report, SUBJECT OFFICER #2 in his interview with OPC first said he thought he had not detained SUBJECT. But then in attempting to defend his actions, he switched his position. He said he thought SUBJECT acted as if he possessed a firearm. SUBJECT had “all the characteristics building up to an armed gunman.” ROI, Exhibit 8 (SUBJECT OFFICER #2 Interview)

We do not know what SUBJECT OFFICER #2 would have done if SUBJECT had refused to cooperate and instead had continued to walk toward the building’s entrance. But SUBJECT OFFICER #2’s shift in defending his actions in the interview with OPC suggests that he was concerned that the encounter would be regarded as a detention rather than a field contact.

And SUBJECT OFFICER #2 should have been concerned: it was a detention.

2. The detention must be justified.

A detention is justified if the officer reasonably suspects that the individual stopped is committing a crime. See *Terry v. Ohio*, 391 U.S. 1 (1968).

As noted in the finding of facts, SUBJECT OFFICER #2 described SUBJECT’s behavior to defend the detention to learn whether SUBJECT had a firearm.

Footage from SUBJECT OFFICER #2’s body worn camera belies that description. The detention was not reasonable. SUBJECT did not choose where he stood to screen himself behind

the other young men. He did not turn his body to ready himself to fire at SUBJECT OFFICER #2 or the other officers. He did have his hands in the pouch of his hoodie. Not known is the temperature at the time of the encounter day; but the date was January 16. And SUBJECT is not seen moving his hands in the way SUBJECT OFFICER #2 describes.

3. Does it follow that SUBJECT OFFICER #2 violated D.C. Code § 5-1107 and MPD General Order 120.25 (Harassment)?

The detention constitutes harassment if SUBJECT OFFICER #2 acted recklessly. Recklessness requires recognizing the risk of acting (here, unconstitutionally) and choosing to ignore that risk.

Given MPD policy and its officers' training, any MPD officer will be held to recognize when an encounter becomes a detention. See MPD, General Order 304.10, "Field Contacts, Stops, and Protective Pat Downs" [https://go.mpdonline.com/GO/GO_304_10.pdf].

That General Order stresses that field contacts depend solely on the voluntary cooperation of the individual who "is free not to respond and leave." *Id.* Part II(A)(2). The Order also notes that the difference between a permitted field contact and a detention that demands justification turns on whether the person could reasonably believe that he or she is not free to leave. *Id.* Part II(A)(5)(b).

That General Order, then, informs officers of the law and thus of when they act recklessly in ignoring the risk that the encounter with a person constitutes a detention rather than a field contact.

4. Conclusion

Although a close question, SUBJECT OFFICER #2 detained SUBJECT. Because that detention was unjustified, SUBJECT OFFICER #2 harassed SUBJECT.

B. SUBJECT OFFICER #1

COMPLAINANT provides what she recalls about the incident. See ROI, Exhibit 1, Section 4. She says:

"My sons and nephews were harassed by a few officers from Sixth District. They entered my home without a warrant or permission. ... I hear voices and tussles by my [front] door. I ... go downstairs and my youngest son came towards me to tell me the police is in our home. ... [T]hey were indeed in my living room with a flashlight. The officer asked did they live here and I said yes they do. I asked why were they in here? They never answered me and said ok and was leaving...."

Continuing, COMPLAINANT fulsomely praised her sons, nephews, and their friends. She wrote painfully about the incident. *Id.*

In her statement to OPC, COMPLAINANT narrowed the intruder to the “Asian guy.” See ROI, Exhibit 4 (Complainant Interview)

But footage from SUBJECT OFFICER #1’s body-worn camera and the footage from the witness officers’ cameras does not substantiate her claim that one or more officers entered her home.

The young man holding the basketball and key must have opened the entrance door to the apartment building. Shortly after that outer door was opened, SUBJECT OFFICER #1 walked into the foyer. The door to the complainant’s apartment was immediately on the right. Footage from SUBJECT OFFICER #1’s body-worn camera shows that that door was slightly ajar, with entry blocked by one of the young men (wearing a blue jacket), his back to SUBJECT OFFICER #1. The complainant accuses SUBJECT OFFICER #1 of entering her apartment. Footage from his camera and that of two other officers does not support that claim. While he does shine his flashlight into the apartment, he does not cross the threshold.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #2

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| Allegation 1: Harassment: Stop - Pedestrian | Sustained |
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SUBJECT OFFICER #1

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| Allegation 1: Harassment - Entry w/o search | Unfounded |
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Submitted on March 6, 2024.

Peter Tague

Complaint Examiner