

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	09-0169
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER, First District
<b>Allegation 1:</b>	Harassment
<b>Allegation 2:</b>	Discriminatory Treatment
<b>Complaint Examiner:</b>	Arthur D. Sidney
<b>Merits Determination Date:</b>	August 27, 2012

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 by 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**

COMPLAINANT filed a complaint with the Office of Police Complaints (“OPC”) on June 22, 2009. COMPLAINANT alleged that on June 18, 2009, SUBJECT OFFICER, First District harassed him when SUBJECT OFFICER stopped and searched COMPLAINANT and his belongings and threatened to arrest him for disorderly conduct. COMPLAINANT also alleged that SUBJECT OFFICER discriminated against him based upon his race.<sup>1</sup>

**II. EVIDENTIARY HEARING**

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC’s Report of Investigation, 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.

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<sup>1</sup> COMPLAINANT also alleged that SUBJECT OFFICER used language or engaged in conduct that was insulting, demeaning, or humiliating when he asked COMPLAINANT if he had been drinking or using drugs and if he was in possession of drug paraphernalia. On May 15, 2012, a member of the Police Complaints Board (PCB) dismissed these allegations.

### **III. FINDINGS OF FACT**

Based upon a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on June 27, 2012, and OPC's response to SUBJECT OFFICER'S objections submitted on July 23, 2012, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On June 18, 2009, at approximately 5:00 p.m., COMPLAINANT was walking on his way home from work. As COMPLAINANT walked through a park located at 6<sup>th</sup> Street, N.W. and Massachusetts Avenue, N.W., he saw an acquaintance, WITNESS, sitting on a bench in the park. COMPLAINANT stopped to talk with WITNESS. Both COMPLAINANT and WITNESS are African Americans.
2. After a short while, an MPD police cruiser parked on 6<sup>th</sup> Street, N.W. SUBJECT OFFICER and WITNESS OFFICER exited the vehicle and approached the two men.
3. The area was associated with illegal drug use and public alcohol consumption. The neighborhood surrounding the park is less than 50% African American.
4. SUBJECT OFFICER asked COMPLAINANT and WITNESS whether they were using any drugs or alcohol. COMPLAINANT responded that they were not using drugs or alcohol. Subsequently, SUBJECT OFFICER ordered COMPLAINANT to raise his hands and then proceeded to pat down COMPLAINANT. During the pat down, SUBJECT OFFICER pulled a ball point pen out of COMPLAINANT'S pockets. WITNESS was also searched.
5. COMPLAINANT inquired of SUBJECT OFFICER why the two individuals were being detained. There was no answer to this question. COMPLAINANT then asked whether race was a factor in SUBJECT OFFICER'S decision to detain the two individuals. SUBJECT OFFICER did not respond to the question but threatened to lock up COMPLAINANT for disorderly conduct if he would not be quiet.
6. SUBJECT OFFICER continued to search COMPLAINANT and removed COMPLAINANT'S wallet. SUBJECT OFFICER removed COMPLAINANT'S driver's license and gave it to WITNESS OFFICER. WITNESS'S identifying information was also taken. Subsequently, WITNESS OFFICER went to the police cruiser to run the names through the police databases to determine whether there were any outstanding warrants, aliases, and other identifying information and to determine whether COMPLAINANT and WITNESS were involved in the criminal justice system.
7. SUBJECT OFFICER searched COMPLAINANT'S laptop bag while WITNESS OFFICER was at the police cruiser.

8. WITNESS OFFICER returned COMPLAINANT'S license to SUBJECT OFFICER who in turn gave the license to COMPLAINANT. SUBJECT OFFICER and WITNESS OFFICER went further into the park and searched another African American male. COMPLAINANT continued to walk on his way home.
9. According to MPD police records, within a two hour time period, six males were stopped and had their identification run through the MPD police database system: five African American males and one male of an unknown race.

#### **IV. DISCUSSION**

COMPLAINANT alleges that SUBJECT OFFICER harassed him when SUBJECT OFFICER stopped and searched COMPLAINANT and his belongings in a park without a specific law enforcement purpose and threatened to arrest him for disorderly conduct. COMPLAINANT also alleged that SUBJECT OFFICER discriminated against him based upon his race as an African American. As discussed further below, Complaint Examiner determines that 1) SUBJECT OFFICER'S stop, pat down, and search of COMPLAINANT was not lawful because SUBJECT OFFICER purposefully, knowingly, or recklessly harassed COMPLAINANT and subjected him to mistreatment that violated D.C. Code § 5-1107(a) and MPD General Order 120.25 when he threatened to arrest COMPLAINANT for disorderly conduct, and 2) SUBJECT OFFICER discriminated against COMPLAINANT because of his race, African American, in violation of D.C. Code § 5-1107(a) and MPD General Order 201.26.

##### **1. Harassment**

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 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 alleges that he was harassed when SUBJECT OFFICER stopped and searched him and his belongings in the park after he had stopped to talk to a friend in the park. COMPLAINANT was on his way home from work when SUBJECT OFFICER asked COMPLAINANT and WITNESS whether they were using drugs or alcohol. COMPLAINANT’S body and his laptop bag were searched by SUBJECT OFFICER.

MPD General Order 304.10 governs police-citizen contacts, stops, and frisks. The order defines a stop as the temporary detention of a person for the purpose of determining whether probable cause exists to arrest the person. The General Order authorizes an officer to stop a citizen only if the officer “reasonably suspects that a person has committed, is committing, or is about to commit” a crime. The General Order further permits an officer to conduct a protective pat down frisk of a suspect’s outer clothing only where the officer “reasonably suspects that the person is carrying a concealed weapon or dangerous instrument and that a frisk is necessary to protect himself/herself or others.” MPD General Order 304.10 is consistent with longstanding Fourth Amendment law. See Terry v. Ohio, 392 U.S. 1, 27 (1968).

SUBJECT OFFICER neither told COMPLAINANT the reason that he was stopped nor did SUBJECT OFFICER have reasonable suspicion to stop and search COMPLAINANT. COMPLAINANT and WITNESS were not drinking or using illegal drugs and answered accordingly when questioned by SUBJECT OFFICER. There was no alcohol or drugs in the vicinity of COMPLAINANT and WITNESS.

Even if COMPLAINANT was standing in an area that had received complaints about drug and alcohol use, COMPLAINANT’S mere presence in the park was not enough to justify a stop by the police. It is well settled that a person’s presence in a high crime area by itself does not meet the Fourth Amendment requirement that a stop is authorized because there is particularized suspicion that the person has committed, is committing, or is about to commit a crime. Jones v. U.S., 374 F. Supp. 2d 143, 151 (D.D.C. 2005).

The search of COMPLAINANT and his belongings was also not lawful. D.C. law is well-settled that a lawful stop does not automatically permit the police to conduct a search. Prince v. U.S., 825 F.2d 928, 931 (D.C. 2003). MPD officers must point to facts which can reasonably be inferred that the individual is armed and dangerous. Id.

COMPLAINANT and WITNESS were not using drugs and alcohol and there were no containers or drug paraphernalia on the ground or in the vicinity of COMPLAINANT and WITNESS. COMPLAINANT was not observed participating in a crime or engaged in any suspicious movements, actions, or behaviors. Further, there was no lawful basis for SUBJECT OFFICER to search COMPLAINANT'S laptop bag or his pockets. U.S. v. Holmes, 2007 WL 3071629 at 3 (D.C. Cir. 2007) (“police seizure of items that are neither weapons nor apparent contraband during a *Terry* pat down exceeds that doctrine’s limited exception to the Fourth Amendment’s prohibition on warrantless searches and seizures.”); MPD General Order 304.10 (prohibiting officers from removing keys, change, envelopes, and other papers detected during a frisk because such objects did not likely constitute or be used as weapons or instrumentalities of a crime). There was no evidence that COMPLAINANT was armed and dangerous.

Complaint Examiner further finds that SUBJECT OFFICER threatened to arrest COMPLAINANT if he did not stop asking questions during the stop, pat down, and subsequent searches. The credibility of SUBJECT OFFICER is tarnished because neither he nor WITNESS OFFICER completed a PD 251 to document the stop and frisk of COMPLAINANT as required by General Order 304.10.

Complaint Examiner determines that SUBJECT OFFICER purposefully, knowingly, or recklessly harassed COMPLAINANT in violation of D.C. Code § 5-1107(a) and MPD General Order 201.26 when he stopped, searched, and threatened to arrest COMPLAINANT for disorderly conduct if he continued to talk and ask questions.

## **2. Discrimination**

The District of Columbia Human Rights Act provides in pertinent part:

It shall be an unlawful discriminatory practice for a District government agency . . . to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual’s actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.

MPD General Order 201.26, Part I, Section A provides that, “[i]n accordance with the District of Columbia Human Rights Law, members shall not discriminate, either in the enforcement of the law, or in the provision of police service, on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, or place of residence or business....”

The regulations governing OPC define discriminatory treatment as “[c]onduct by a member of the MPD ... that results in the disparate treatment of persons because of their race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, place of residence or business or any other ground of discrimination prohibited under the statutory and the common law of the District of Columbia.” D.C. Mun. Regs., tit. 6A, § 2199.1.

In making a determination whether disparate treatment exists based upon circumstantial evidence of discrimination, OPC relies upon McDonnell Douglas framework applied in Title VII employment discrimination cases. To establish a *prima facie* case of unlawful discrimination, a complainant must demonstrate: 1) the complainant is a member of a protected class; 2) the complainant applied for a requested service or benefit for which he was eligible; 3) the complainant was denied the benefit or service; and 4) the adverse action or decision was made under circumstances which give rise to the inference that it was based upon unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 U.S.792, 802 (1973).

COMPLAINANT alleges that SUBJECT OFFICER subjected him to discrimination on the basis of his race, African American, when he was stopped, and his person and personal belongings searched. SUBJECT OFFICER inquired whether COMPLAINANT was drinking or used illegal drugs and COMPLAINANT answered that he was not. There were no drugs or drinking or drug paraphernalia in the vicinity. SUBJECT OFFICER then searched COMPLAINANT’S laptop bag and a search through the various MPD databases was conducted to determine whether COMPLAINANT or WITNESS had any involvement with the criminal justice system. COMPLAINANT inquired of SUBJECT OFFICER whether race was a factor in COMPLAINANT and WITNESS’S detention. Subsequent to the involved searches, SUBJECT OFFICER approached and searched another African American male. According to MPD police records, within a two-hour time period, six males were stopped and had identification run through the MPD databases: five African American males and one male of an unknown race. The neighborhood surrounding the park is comprised of less than 50% African American.

MPD may have received complaints regarding public intoxication and illegal drug use in the park but there was no complaint that these activities were engaged in by any particular ethnic group. Nevertheless, the individuals that SUBJECT OFFICER stopped, questioned, and inquired in the criminal justice database regarding their criminal activity were African Americans. SUBJECT OFFICER did not provide a reasonable explanation regarding why he questioned African Americans in a majority non-minority neighborhood. Non-African Americans were in the park; but, SUBJECT OFFICER did not stop, inquire, search, or run their names through the

police databases. If SUBJECT OFFICER were truly concerned about investigating complaints regarding public intoxication and illegal drug use in the park, all individuals in the park would have been investigated because the complaint about the illegal activities in the park was not limited to any race. Thus, the Complaint Examiner concludes that SUBJECT OFFICER discriminated against COMPLAINANT on the basis of race, African American, when he singled out COMPLAINANT when he detained, searched COMPLAINANT and his belongings, and ran his name in the criminal justice databases in violation of D.C. Code § 5-1107(a) and MPD General Order 201.26.

**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER, First District

<b>Allegation 1: Harassment</b>	Sustained
<b>Allegation 2: Discrimination</b>	Sustained

Submitted on August 27, 2012.

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ARTHUR D. SIDNEY  
Complaint Examiner