

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	10-0272
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, Seventh District
Allegation 1:	Harassment
Complaint Examiner:	Colleen F. Shanahan
Merits Determination Date:	June 5, 2013

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 OPC on April 14, 2010. COMPLAINANT alleged that on March 23, 2010,¹ SUBJECT OFFICER, Seventh District, harassed him by unlawfully stopping and arresting him for disorderly conduct.²

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation,³ the Complaint Examiner determined that the Report of

¹ OPC's investigation determined that the incident occurred on March 24, 2010 rather than March 23, 2010, as alleged by the complainant.

² COMPLAINANT also alleged that SUBJECT OFFICER used unnecessary or excessive force against him during the encounter and used language or engaged in conduct towards him that was insulting, demeaning, or humiliating. On April 4, 2013, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's executive director. Thus, only the allegation of harassment is the subject of this determination.

³ SUBJECT OFFICER submitted no objections in this matter.

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 Complaint Examiner finds the material facts regarding this complaint to be:

1. On March 24, 2010, while doing routine patrol in his marked MPD vehicle, SUBJECT OFFICER observed two men inside an apartment building at ADDRESS.
2. SUBJECT OFFICER "decided to stop and make contact" with the two men because he knew the area to be a "hot spot for open air drug markets and violent crimes."
3. SUBJECT OFFICER entered the building, asked COMPLAINANT and another individual, WITNESS, for their identification, and informed them that they were loitering.
4. SUBJECT OFFICER observed that COMPLAINANT'S identification did not match the address of the building, and so SUBJECT OFFICER verified the men's information through the Washington Area Law Enforcement System (WALES).
5. SUBJECT OFFICER and COMPLAINANT engaged in a conversation about the District's loitering law. During this conversation, COMPLAINANT informed SUBJECT OFFICER that he lived in the building. During this conversation, COMPLAINANT became agitated and both SUBJECT OFFICER and COMPLAINANT spoke "sarcastically" to each other. SUBJECT OFFICER did not take COMPLAINANT seriously, though he asked COMPLAINANT "to settle down." The discussion lasted several minutes, before WITNESS interrupted and told COMPLAINANT to stop arguing with SUBJECT OFFICER.
6. COMPLAINANT then went to his nearby apartment, to print out District law on loitering.
7. SUBJECT OFFICER perceived COMPLAINANT'S movement as "suspicious" because SUBJECT OFFICER still held COMPLAINANT'S identification. Before COMPLAINANT could get inside the door, SUBJECT OFFICER stopped and detained him in handcuffs.
8. Once in handcuffs, COMPLAINANT was "loud and boisterous" and ignored SUBJECT OFFICER'S "commands to settle down." As a result, SUBJECT OFFICER placed COMPLAINANT under arrest for disorderly conduct.

IV. DISCUSSION

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.”

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 alleged that SUBJECT OFFICER harassed him by unlawfully stopping him and arresting him for disorderly conduct.

SUBJECT OFFICER’S Stop or Contact of COMPLAINANT

MPD General Order 304.10 states that a “stop” occurs whenever an officer uses his or her authority to “compel a person to halt, remain in a certain place, or perform some act.” “If a person is under the reasonable impression that he or she is not free to leave the officer’s presence, a ‘stop’ has occurred.” To properly make a stop, an officer must “reasonably suspect that a person has committed, is committing, or is about to commit [a] crime.”

In addition, MPD General Order 304.10 states that a contact may be conducted when an officer “reasonably believes that some investigatory inquiry into a situation is warranted.” A contact involves the voluntary cooperation of the citizen and the citizen is “free not to respond, and to leave.” The general order specifically states “[c]ontacts shall not be initiated merely because a person is ‘hanging around,’ ‘loitering,’ or ‘standing on the corner,’ unless overall circumstances are such as would reasonably arouse the curiosity, concern, or suspicion of the officer.”

SUBJECT OFFICER stated that he decided to “stop and make contact” with COMPLAINANT and the other individual because he knew the area to be a “hot spot for open air drug markets and violent crimes.” Regardless of whether SUBJECT OFFICER’S conduct was a stop, a contact or a combination of the two, it was unlawful and thus constituted harassment of COMPLAINANT.

If SUBJECT OFFICER entering the building and asking COMPLAINANT for his identification is analyzed as a stop, it was unlawful under District law. MPD General Order 304.10 explicitly states that a stop requires the officer to “reasonably suspect that a person has committed, is committing, or is about to commit [a] crime.” There is no evidence that SUBJECT OFFICER had such a suspicion. The only evidence is that SUBJECT OFFICER saw two men in a crime “hot spot.” This is not a lawful basis for a stop, as the D.C. Court of Appeals has specifically held that a neighborhood’s status as a high crime area does not provide reasonable suspicion that an individual in that area is engaging in criminal conduct. *See Henson v. United States*, 55 A.3d 895, 867-68 (D.C. 2012) (“[a]n individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime”). *See also Duhart v. United States*, 589 A.2d 895 (D.C. 1991); *Curtis v. United States*, 349 A.2d 469, 472 (D.C. 1975).

If SUBJECT OFFICER entering the building and asking COMPLAINANT for his identification is analyzed as a contact, it is also unlawful under District law. MPD General Order 304.10 explicitly prohibits contacts “merely because a person is ‘hanging around,’ ‘loitering,’ or ‘standing on the corner,’ unless overall circumstances are such as would reasonably arouse the curiosity, concern, or suspicion of the officer.” The undisputed evidence in the record that SUBJECT OFFICER’S decision to approach COMPLAINANT and the other individual was based on seeing two men standing inside an apartment building in a neighborhood known to be a crime “hot spot.” Thus, the conduct of COMPLAINANT that led SUBJECT OFFICER to initiate the contact was solely standing in the hallway of the apartment building, which is expressly prohibited by MPD General Order 304.10. And the only other circumstance that led SUBJECT OFFICER to initiate contact with COMPLAINANT was the nature of the neighborhood. This basis is plainly contrary to MPD General Order 304.10’s requirement that the officer reasonably believes that some investigatory inquiry into a situation is warranted, and inconsistent with the decisions of the D.C. Court of Appeals.

Finally, SUBJECT OFFICER asserted to the Office of Police Complaints that he “stopped” COMPLAINANT when he attempted to enter the apartment after SUBJECT OFFICER took his identification. Regardless of SUBJECT OFFICER’S characterization of events, the record is undisputed that COMPLAINANT attempted to enter the apartment *after* SUBJECT OFFICER took COMPLAINANT’S identification. Thus, COMPLAINANT’S movement towards the apartment does not factor into the reasonable suspicion analysis for SUBJECT OFFICER’S initial conduct. Even, however, if SUBJECT OFFICER’S conduct is analyzed as a contact that then changed into a stop, his conduct was unlawful. First, the initial contact to ask for identification was contrary to MPD General Order 304.10, as discussed above.

Second, MPD General Order 304.10 expressly states “[w]here citizens refuse, or cease to cooperate during a ‘contact,’ they must be permitted to go on their way, and the refusal to cooperate (or silence) cannot, itself, be used as the basis to escalate the encounter into a ‘stop’” (emphasis in original). Thus, SUBJECT OFFICER could not properly use COMPLAINANT’S entering his apartment as a basis to convert the encounter into a legal stop.

Therefore, the undisputed evidence of the events of March 24, 2010 shows that SUBJECT OFFICER’S conduct was unlawful and inconsistent with MPD internal guidelines, whether analyzed as a stop, a contact, or a combination thereof.

Harassment, as defined in MPD General Order 120.25 and in D.C. Mun. Regs. tit. 6A, §2199.1, includes “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...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.” Because SUBJECT OFFICER’S conduct was, at a minimum, recklessly unlawful and contrary to MPD’s internal guidelines and because COMPLAINANT was detained and ultimately arrested as a result of the conduct, COMPLAINANT was subject to harassment by SUBJECT OFFICER and COMPLAINANT’S complaint is sustained.

SUBJECT OFFICER’S Arrest of COMPLAINANT

SUBJECT OFFICER also placed COMPLAINANT under arrest. The evidence is undisputed that the arrest was for disorderly conduct because COMPLAINANT was “loud and boisterous.”

The District disorderly conduct statute states “[i]t shall not be lawful for any person...to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance to any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct. D.C. Code §22-1307. An arrest for disorderly conduct due to loud and boisterous talking requires congregation and assembly by at least three people. *See Odum v. District of Columbia*, 565 A.2d 302, 304 (D.C. 1989); *Kinoy v. District of Columbia*, 400 F.2d 761, 765 (D.C. Cir. 1968). Such an arrest also requires demonstrated loud and boisterous conduct by the three or more people assembled. *Id.* Finally, a conviction for disorderly conduct requires a threatened breach of the peace, which may include language that “creates a substantial risk of provoking violence” *Williams v. District of Columbia*, 419 F.2d 638, 646 (D.C. Cir. 1969).

There is no evidence that the encounter that is the subject of COMPLAINANT’S complaint satisfies these legal requirements. First, the undisputed evidence is that COMPLAINANT and the other individual were conversing in the hallway of their own apartment building. This is insufficient to satisfy the “congregation and assembly” requirement. Second, there is no evidence is that the “loud and boisterous” talking was more than COMPLAINANT complaining about SUBJECT OFFICER’S conduct. As a result, neither the

collective conduct requirement nor the breach of peace requirement is satisfied. Finally, there is no additional evidence in the record of any probable cause by SUBJECT OFFICER to arrest COMPLAINANT, for disorderly conduct or otherwise.

Thus, SUBJECT OFFICER'S arrest of COMPLAINANT was unlawful and contrary to MPD's internal guidelines. As a result, the undisputed evidence shows that SUBJECT OFFICER purposefully, knowingly, or recklessly harassed COMPLAINANT by arresting him for disorderly conduct without a lawful basis and COMPLAINANT'S complaint is sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER, Metropolitan Police Department

Allegation 1:	Sustained
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Submitted on June 5, 2013.

Colleen F. Shanahan
Complaint Examiner