

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	10-0119
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER, Third District
<b>Allegation 1:</b>	Harassment
<b>Complaint Examiner:</b>	Ali Beydoun
<b>Merits Determination Date:</b>	October 15, 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 alleges that on November 8, 2009, SUBJECT OFFICER, Metropolitan Police Department (MPD), Third District, harassed her when the officer arrested her for disorderly conduct.<sup>1</sup>

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<sup>1</sup> COMPLAINANT'S husband, WITNESS #1, filed a separate complaint on December 23, 2009, alleging that SUBJECT OFFICER harassed him by unlawfully stopping him, ticketing him, and arresting him. The Complainant and her husband alleged in each of their complaints that SUBJECT OFFICER harassed them by mishandling their property, and used unnecessary and excessive force against them. Pursuant to D.C. Code § 5-1108(1), on March 31, 2012, a member of the Police Complaints Board dismissed all of these allegations, concurring with the determination made by OPC's executive director. Therefore, only the harassment allegation stemming from SUBJECT OFFICER'S disorderly conduct arrest of COMPLAINANT is at issue before the Complaint Examiner and in this Merits Determination.

## **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., title 6A, § 2116.3.*

## **III. FINDINGS OF FACT**

Based on a review of OPC's Report of Investigation, including the exhibits thereto and the complaint form, the objections submitted by SUBJECT OFFICER on August 24, 2012, and the Memorandum to the Complaint Examiner dated September 10, 2012, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On November 8, 2009, at approximately 2:45 a.m., COMPLAINANT and her husband, WITNESS #1, were driving down V Street, N.W., when they encountered a van pulling out of a driveway onto V Street, N.W.
2. COMPLAINANT identified the van as a "police van." According to COMPLAINANT, WITNESS #1 "honked his horn to alert the driver that we were near him ... as he was pulling out of the driveway."
3. The police van followed the COMPLAINANT and WITNESS #1 as they continued driving down V Street, N.W. when it activated its lights and pulled COMPLAINANT AND WITNESS #1'S car over on Florida Avenue, N.W.
4. SUBJECT OFFICER approached the driver's side of the couple's vehicle and asked WITNESS #1, who was driving, for his driver's license and registration. Shortly thereafter, SUBJECT OFFICER informed WITNESS #1 that he was being placed under arrest for expired tags.
5. SUBJECT OFFICER arrested WITNESS #1 and escorted him into the transport wagon where he awaited transport to the Third District for processing.
6. SUBJECT OFFICER told COMPLAINANT she would be arrested if she drove her vehicle from the scene and informed her that the car would have to be towed.
7. The car was moved to a legal parking spot across the street from where it was

stopped. SUBJECT OFFICER obtained possession of COMPLAINANT and WITNESS #1'S car keys.

8. COMPLAINANT began to retrieve her belongings from inside the cabin of the vehicle, which included "expensive photography equipment and a laptop."
9. While COMPLAINANT was in the process of retrieving her belongings from the trunk of the car, SUBJECT OFFICER locked COMPLAINANT'S car using the car's remote control device. COMPLAINANT told SUBJECT OFFICER that she was "just retrieving [her] belongings," and asked SUBJECT OFFICER to "unlock [her] car."
10. SUBJECT OFFICER refused to unlock the car.
11. As a result, COMPLAINANT became upset, irate, and using disrespectful language towards SUBJECT OFFICER said, "Open the car[,] you fucking asshole."
12. After a command to "back up and be quiet," which was not heeded, SUBJECT OFFICER then made the decision to arrest COMPLAINANT for disorderly conduct - loud and boisterous.
13. SUBJECT OFFICER proceeded to put COMPLAINANT in handcuffs, and notified her that she was under arrest for disorderly conduct. He directed COMPLAINANT into the police vehicle and transported COMPLAINANT to the Third District for processing.
14. COMPLAINANT timely filed her complaint form with OPC on December 23, 2009.

#### **IV. DISCUSSION**

Pursuant to D.C. Official Code § 5-1107(a), OPC "shall have the authority to receive and to dismiss conciliate, mediate or adjudicate a citizen complaint against a member or members of the MPD. . . that alleges abuse or misuse of police powers by such a 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:

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 or the covered law enforcement agency, 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, the Office 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 or the covered law enforcement agency, the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating.

D.C. Mun. Regs. tit. 6A, § 2199.1 (2002).

For SUBJECT OFFICER to have lawfully arrested COMPLAINANT for disorderly conduct – loud and boisterous, her actions would have needed to violated the applicable District disorderly conduct statute in effect at the time of the incident - D.C. Code § 22-1307. That statute, provided in pertinent part:

“It shall not be lawful for person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in any or around any public building or enclosure, or any park or reservation, or at the entrance of any private building or enclosure, and engage in loud and boisterous talking or other disorderly conduct . . .”

Under D.C. law, in order to support a disorderly conduct arrest under § 22-1307 for loud and boisterous talking, the D.C. courts have held that there must be: 1) congregation and assembly and 2) demonstrated loud and boisterous conduct by those congregated and assembled. *See Kinoy v. District of Columbia*, 400 F.2d 761, 765 (D.C. Cir. 1968); *Hunter v. District of Columbia*, 47 App. D.C. 406 (D.C. Cir. 1918). In this case, for SUBJECT OFFICER’S arrest of COMPLAINANT to be lawful, it needs to be shown that based on the conduct of COMPLAINANT, she incited a congregation and assembly that demonstrated loud and boisterous conduct.

This case presents a single issue for determination. That is, whether SUBJECT OFFICER purposefully, knowingly, or recklessly harassed COMPLAINANT in violation of D.C. Code § 5-1107(a) and MPD General Order 120.25 that would have occurred by unlawfully arresting her for disorderly conduct. As discussed below, the Complaint Examiner concludes that SUBJECT OFFICER violated D.C. Code § 5-1107(a) and MPD General Order 120.25 because he unlawfully arrested COMPLAINANT on an unsupportable charge of disorderly conduct – loud and boisterous.

As a primary determination, the Complaint Examiner finds that when SUBJECT OFFICER arrested COMPLAINANT, he violated D.C. law because there were no sufficient grounds to support a charge of disorderly conduct. Other than SUBJECT OFFICER'S statements, no other statement corroborates the allegation that a crowd was incited as a result of COMPLAINANT'S conduct. Moreover, even if a crowd was present, there is insufficient evidence to substantiate SUBJECT OFFICER'S claim that any such congregation became loud and boisterous or instigated to disrupt the peace as a result of COMPLAINANT'S actions. While COMPLAINANT'S conduct toward SUBJECT OFFICER was loud, rude, and unbecoming, her actions did not support an arrest for disorderly conduct because her behavior only incited SUBJECT OFFICER and not a crowd around her.

The Complaint Examiner also finds that based on the statements provided to OPC and made available to the Complaint Examiner, it does not appear that COMPLAINANT was congregating or assembling with others at the time of her arrest. Although there are varying accounts of the number of observers on the scene, it seems to the Complaint Examiner as though COMPLAINANT was acting alone and not in concert with others. WITNESS OFFICERS' assertions that COMPLAINANT was "upset" and "irate" are credible. However, there is little indication that COMPLAINANT'S conduct threatened a breach of the peace.

The Complaint Examiner also finds that SUBJECT OFFICER'S allegation that there were approximately three or more people outside and that a neighborhood resident came to him and complained about COMPLAINANT'S behavior are not corroborated with other accounts of the arrest. In their statements, the WITNESS OFFICERS did not recall a crowd gathering nor did they recall a neighborhood resident complaining about the incident. Even if there were several people outside during the incident, as maintained solely by SUBJECT OFFICER, it cannot be determined that the crowd was specifically congregating because of COMPLAINANT'S conduct. There is no evidence that they were incited to violence. Moreover, there is no evidence that any commands or instructions were ever issued to people who might have observed the incident, further indicating that COMPLAINANT'S words to SUBJECT OFFICER did not incite violence or even create a substantial risk of inciting violence.

The Complaint Examiner takes notice of SUBJECT OFFICER'S "nuisance" argument raised in his objections; however, this objection must be overruled. For years, the D.C. Courts have found that the test for breach of the peace based on "nuisance" without threat of violence does not pass muster. *See Shepherd v. District of Columbia*, 929 A.2d 417, 419 (2007) (Court found that "[o]ur decisions thus teach that the bare possibility that words directed to a police officer may provoke violence by others does not suffice to show disorderly conduct; rather the words must create a likelihood or probability of such reaction. Moreover, the focus ordinarily must be on the likelihood of a violent reaction by persons other than a police officer to whom the words were directed, because "[a] police officer is expected to have a greater tolerance for verbal assaults" and is "especially trained to resist provocation" by "verbal abuse that might provoke or offend the ordinary citizen." (quoting *In re W.H.L.*, 743 A.2d 1226 (D.C. 2000) (internal citations omitted)).

Because COMPLAINANT'S actions did not amount to an actual or imminent breach of the peace, the Complaint Examiner concludes that SUBJECT OFFICER purposefully, knowingly, or recklessly harassed COMPLAINANT in violation of D.C. Code § 5-1107(a) and MPD General Order 120.25 by unlawfully arresting her for disorderly conduct – loud and boisterous. The complaint must therefore be sustained.

## **V. SUMMARY OF MERITS DETERMINATION**

### **SUBJECT OFFICER**

<b>Allegation 1:</b>	Sustained
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Submitted on October 15, 2012.

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Ali Beydoun  
Complaint Examiner