

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	10-0379
<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>	Linda Reese Davidson
<b>Merits Determination Date:</b>	May 27, 2012

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC), formerly known as 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 May 29, 2010, SUBJECT OFFICER, Third District, harassed him when SUBJECT OFFICER unlawfully arrested him for disorderly conduct.<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 and the attached exhibits, the Complaint Examiner determined that the Report of Investigation presented no genuine issues of

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<sup>1</sup> In his complaint, COMPLAINANT also alleged that SUBJECT OFFICER harassed him by telling him, "You have to leave the block or you're subject to arrest. Don't come on U Street no more." Additionally, COMPLAINANT alleged that SUBJECT OFFICER harassed him by unlawfully arresting him for vending without a license and by mishandling his property. COMPLAINANT further alleged that SUBJECT OFFICER used unnecessary or excessive force against him during the arrest by kneeling him in the upper left thigh. COMPLAINANT also alleged that SUBJECT OFFICER used language or engaged in conduct towards him that was insulting, demeaning, or humiliating. Finally, COMPLAINANT alleged that SUBJECT OFFICER arrested him in retaliation for previously filing an OPC complaint against SUBJECT OFFICER. Pursuant to D.C. Code § 5-1108(1), on December 16, 2011, a member of the Police Complaints Board dismissed these allegations, concurring in the determination made by OPC's executive director. Accordingly, only the harassment allegation stemming from the disorderly conduct arrest requires resolution.

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 and the objections submitted by SUBJECT OFFICER on February 7, 2012, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On May 29, 2010, COMPLAINANT was in the 1300 block of U Street, N.W. waiting for his friend and talking with an individual identified only as WITNESS 1.
2. COMPLAINANT was planning a trip and he and WITNESS 1 were looking at a motel brochure.
3. COMPLAINANT had in his possession a large bag which contained individual smaller bags of toiletries; in addition the bag contained oils, books, incense and compact discs.
4. SUBJECT OFFICER approached COMPLAINANT and inquired as to whether he was vending without a license.
5. SUBJECT OFFICER directed COMPLAINANT to leave the area; he told COMPLAINANT not to sell merchandise without a license.
6. COMPLAINANT denied that he was vending and he did not produce a vending license.
7. COMPLAINANT walked to the corner of 13th & U Streets, N.W.; he called MPD and requested that a supervisor come to the scene.
8. COMPLAINANT directed SUBJECT OFFICER to remain on the scene until the MPD supervisor arrived. While waiting for the MPD supervisor, COMPLAINANT made insulting comments to SUBJECT OFFICER.<sup>2</sup>
10. COMPLAINANT was arrested and charged with disorderly conduct and vending without a license. He was taken to the Third District police station.

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<sup>2</sup> According to the OPC statement given by WITNESS OFFICER, Third District, the complainant was making insulting remarks to SUBJECT OFFICER. Only two are mentioned within this footnote: "You're just pissed off because you're an immigrant," and "Oh, so you're a Puerto Rican nigger."

11. COMPLAINANT was released from the police station on citation.
12. The District of Columbia Office of the Attorney General declined to prosecute both charges on the condition that COMPLAINANT obtain a vending permit.

#### **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." Such allegations may include, among other things, harassment.

##### Harassment

Harassment, as defined by MPD General Order 120.25, Part III, Section B, Subsection 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., title 6A, § 2199.1.

COMPLAINANT alleged that on May 29, 2010, SUBJECT OFFICER, Third District, harassed him by arresting him for disorderly conduct. According to COMPLAINANT, he was in the 1300 block of U Street, N.W. COMPLAINANT had in his possession a large bag which consisted of individual smaller bags of toiletries; in addition, he had oils, books, incense and compact discs. He was waiting for his friend, WITNESS 2. COMPLAINANT was to give all of the items to WITNESS 2. WITNESS

2 in turn, was to sell the items at a nursing home. While waiting for WITNESS 2, COMPLAINANT became engaged in a conversation with an individual identified by first name only, WITNESS 1. The complainant and WITNESS 1 were discussing the complainant's upcoming trip and looking through a Motel 6 brochure. SUBJECT OFFICER approached the two men and inquired as to whether COMPLAINANT was vending without a license. According to COMPLAINANT, the SUBJECT OFFICER accused him of selling books to WITNESS 1, directed him to leave the block and warned him not to return. SUBJECT OFFICER did not recall the incident. However, the arrest report cites that SUBJECT OFFICER approached COMPLAINANT after he observed him sell incense. COMPLAINANT admits to selling the incense but asserts SUBJECT OFFICER did not observe the transaction.

COMPLAINANT and WITNESS 1 began to walk east on U Street N.W. but COMPLAINANT refused to leave the block; COMPLAINANT stopped in front of Rite Aid, at the corner of 13th & U Streets, N.W. and called MPD. He requested that a supervisor come to the scene. The dispatcher informed COMPLAINANT that a supervisor would be sent to the location. SUBJECT OFFICER walked by COMPLAINANT; COMPLAINANT informed SUBJECT OFFICER that a MPD supervisor was on the way; he directed SUBJECT OFFICER not to leave the scene until the supervisor arrived. COMPLAINANT made insulting remarks to SUBJECT OFFICER and as individuals walked by, some stopped to watch the interaction. COMPLAINANT asserts that SUBJECT OFFICER said he was "irritated with [COMPLAINANT]", and that he had "been patient" with [COMPLAINANT]. SUBJECT OFFICER placed COMPLAINANT under arrest for disorderly conduct and vending without a license. A transport wagon arrived and COMPLAINANT was taken to the Third District police station. SUBJECT OFFICER indicated he did not remember the incident. However, COMPLAINANT and SUBJECT OFFICER had a previous similar encounter. COMPLAINANT filed an OPC complaint against SUBJECT OFFICER on July 13, 2009. The complaint was dismissed on September 17, 2009. COMPLAINANT did not have a vending license in September 2009, and did not have one in May 2010.

There are no witnesses for COMPLAINANT. COMPLAINANT'S attorney spoke to WITNESS 1, but he was not helpful. The police report indicates that SUBJECT OFFICER approached COMPLAINANT after he observed him selling incense. There are three witness police officers, all arrived at the scene after the altercation between COMPLAINANT and SUBJECT OFFICER. The witness officer statements, either individually or combined, do not support a disorderly conduct arrest, which is the basis for a harassment allegation. COMPLAINANT was charged with violating D.C. Code § 22-1307, the District disorderly conduct statute, which in part reads, "It shall not be lawful for person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley...or in any or around any public building or enclosure...or any

entrance of any private building or enclosure...and engage in loud boisterous talking or other disorderly conduct...under penalty of not more than \$250.00 or imprisonment for not more than 90 days, or both..." In order to support a disorderly conduct arrest under § 22-1307 for loud and boisterous talking, 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). Additionally, in order to sustain a conviction under the statute, there must be a threatened "breach of the peace." *See Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir. 1969) (finding that statute which later became § 22-1307 could pass constitutional muster only if the statute was construed "to require an additional element that the language be spoken in circumstances which threaten a breach of peace.")<sup>3</sup> In *Williams*, the U.S. Court of Appeals for the D.C. Circuit determined that language could threaten a breach of the peace if it "creates substantial risk of provoking violence" or is "under 'contemporary community standards', so grossly offensive to members of the public who actually overhear it as to amount to a nuisance."

After SUBJECT OFFICER directed COMPLAINANT to leave the area, COMPLAINANT walked to the corner of 13<sup>th</sup> & U Streets, N.W. He stood in front of the Rite Aid and called for a MPD supervisor to come to the scene. He was talking loudly and made offensive comments about SUBJECT OFFICER. COMPLAINANT denies cursing at SUBJECT OFFICER. COMPLAINANT directed SUBJECT OFFICER to remain at the scene until the MPD supervisor arrived. COMPLAINANT was characterized as being agitated. COMPLAINANT was being arrested by an officer with whom he had a previous negative encounter. It is plausible to believe that COMPLAINANT hurled insults at SUBJECT OFFICER. But insulting a police officer without more, may be rude and annoying but does not rise to a breach of the public peace, an element necessary to sustain an arrest for disorderly conduct. People near the scene may have stopped to see the arrest but there was no crowd that "congregated and assembled" or threatened the "breach of the peace." WITNESS OFFICER 1, Third District, indicated that one unidentified man approached and inquired as to what was happening. WITNESS OFFICER 1 stepped between the man and SUBJECT OFFICER, then directed the man to step back. The unidentified man indicated COMPLAINANT was his friend then complied with the officer's directive and stepped away. There is no evidence in the record that COMPLAINANT'S comments incited violence or created a substantial risk of inciting violence, or that his words were so offensive that they amounted to a public nuisance.

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<sup>3</sup> Later D.C. Court decisions have rejected this alternative "nuisance" test. *See In re T.L.*, 996 A. 2d 805 (2010).

Since SUBJECT OFFICER did not have a sufficient basis to arrest COMPLAINANT for disorderly conduct, the SUBJECT OFFICER'S actions resulted in harassment. COMPLAINANT was subjected to arrest, detention, search and seizure, and dispossession of personal property. COMPLAINANT was harassed by SUBJECT OFFICER.

**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER, Third District

<b>Allegation 1: Harassment</b>	Sustained
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Submitted on May 27, 2012.

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Linda Reese Davidson  
Complaint Examiner