

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	09-0109
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, Sixth District SUBJECT OFFICER #2, Sixth District SUBJECT OFFICER #3, Sixth District
Allegation 1:	Harassment (as against SUBJECT OFFICERS #1, #2, and #3)
Allegation 2:	Unnecessary or Excessive Force (as against SUBJECT OFFICER #1)
Allegation 3:	Insulting, Demeaning or Humiliating Language or Conduct (as against SUBJECT OFFICERS #1, #2, and #3)
Allegation 4:	Failure to Provide Identification (as against SUBJECT OFFICERS #1, #2, and #3)
Complaint Examiner:	Stephen D. Kong
Merits Determination Date:	July 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 the Complaint Examiner to determine the merits of the complaint as provided by § 5-1111(e).

I. SUMMARY OF COMPLAINT ALLEGATIONS

COMPLAINANT alleges that he was driving on the night of November 22, 2008, and after being stopped for failing to have his headlights on: (a) SUBJECT OFFICER #1 harassed him when he ordered him out of the car, handcuffed him and then removed his wallet from his vest, that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 collectively harassed him by later mishandling his wallet, and that SUBJECT OFFICER #3 separately harassed COMPLAINANT by threatening to physically harm him; (b) SUBJECT OFFICER #1 used unnecessary or excessive force against him when the officer grabbed the COMPLAINANT, pushed him and slammed him against his car after COMPLAINANT questioned why he was being handcuffed; (c) SUBJECT OFFICERS #1, #2 and #3 each used language or engaged in

conduct toward him that was insulting, demeaning, or humiliating during the incident; and (d) All three SUBJECT OFFICERS failed to provide identification when requested by COMPLAINANT.

II. EVIDENTIARY HEARING

The Complaint Examiner reviewed the following documents: (a) OPC's Report of Investigation ("ROI"), dated May 8, 2012, and the attached exhibits; (b) OPC's letters to COMPLAINANT and SUBJECT OFFICERS, dated May 10, 2012; (c) Objections submitted by SUBJECT OFFICERS on May 30, 2012; and (d) Memorandum submitted by OPC to correct, clarify or respond to the objections of SUBJECT OFFICERS, dated June 22, 2012.

No evidentiary hearing was conducted regarding this complaint because, based on a review of the information in the record, the Complaint Examiner determined that there were 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 the documents referenced in Section II, infra, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On November 22, 2008, at approximately 9:30 p.m., COMPLAINANT was driving his car (a red sport utility vehicle or jeep) on 17th Street, S.E. He turned onto Minnesota Avenue, S.E. and saw two marked police cruisers parked ahead of him.
2. SUBJECT OFFICER #1 and SUBJECT OFFICER #3 were assigned to one of these police vehicles (Cruiser Number 624), and SUBJECT OFFICER #2 and WITNESS OFFICER #1 were assigned to the other (Cruiser Number 626). All four officers were in the process of conducting a traffic stop of another vehicle when they noticed COMPLAINANT driving his vehicle towards them without his headlights on.
3. One of the officers signaled to COMPLAINANT to pull over and COMPLAINANT did so. WITNESS OFFICER #1 remained with the initial vehicle that had been stopped while the others approached COMPLAINANT's vehicle. SUBJECT OFFICER #1 walked over to the driver's side of the vehicle and informed COMPLAINANT that he did not have his headlights on. COMPLAINANT at this point was "irate" and shouting, to the effect, that he was being "harassed." WITNESS OFFICER #1, with the initial stop completed, now joined the others standing next to COMPLAINANT'S car but never had any direct interaction with COMPLAINANT during the incident.
4. SUBJECT OFFICER #1 then ordered COMPLAINANT, in a loud and unequivocal manner, to get out of the vehicle. After COMPLAINANT exited his car, SUBJECT

OFFICER #1 “grabbed” him, “pushed” COMPLAINANT’S face forward with both hands and “slammed” COMPLAINANT up against the back of the vehicle. SUBJECT OFFICER #1 handcuffed COMPLAINANT and held him against the car with his hand. When COMPLAINANT began to verbally protest, SUBJECT OFFICER #1 “got within inches of [his] face, in a confrontational manner” and told him to “Shut up!”

5. SUBJECT OFFICER #1 next reached into COMPLAINANT’S vest and pulled out his wallet. Neither SUBJECT OFFICER #1 nor any of the other officers at the scene conducted a pat down or frisk of COMPLAINANT.
6. While these events were transpiring, a friend of COMPLAINANT’S brother, WITNESS #1, was walking home on Minnesota Avenue, S.E. He observed, among other things, COMPLAINANT being surrounded by “two or three” officers but he did not stop to see every detail of the encounter.
7. SUBJECT OFFICER #1 handed the wallet over to SUBJECT OFFICER #2. As SUBJECT OFFICER #2 walked back to his cruiser to verify COMPLAINANT’S records through a database search, SUBJECT OFFICER #3 approached COMPLAINANT. COMPLAINANT asked the officer to explain why he was being handcuffed. SUBJECT OFFICER #3 did not answer the question, but instead “got in [his] face” and yelled at COMPLAINANT to “Shut up before I bust your head open!”
8. At around 9:48 p.m., after confirming the validity of COMPLAINANT’S license and registration, SUBJECT OFFICER #2 returned to COMPLAINANT’S vehicle, accompanied by SUBJECT OFFICER #1 who was now holding the wallet. SUBJECT OFFICER #1 placed the wallet on the roof of COMPLAINANT’S car. SUBJECT OFFICER #2 then picked up the wallet, looked through it, and made several “sarcastic” remarks about COMPLAINANT’S name. COMPLAINANT told SUBJECT OFFICER #2 that he was not happy about the comments, but SUBJECT OFFICER #2 looked right at him and laughed.
9. SUBJECT OFFICER #1 proceeded to remove COMPLAINANT’S handcuffs and shout in his face, “Get away from here!” COMPLAINANT, believing that he had been mistreated, asked the three SUBJECT OFFICERS for their names and badge numbers. The officers refused to provide the information and walked away towards their vehicles.
10. As COMPLAINANT got back into his car, he realized that he did not have his wallet. He exited his vehicle and waved at the SUBJECT OFFICERS, who saw him trying to get their attention but they instead drove off. COMPLAINANT, though, noted that one of the police cruisers was marked as number 624, the other number 626.
11. By coincidence, COMPLAINANT saw another marked MPD cruiser in the immediate vicinity and was able to flag down WITNESS OFFICER #2. COMPLAINANT recounted the incident to WITNESS OFFICER #2 and emphasized that SUBJECT

OFFICERS had not returned his wallet. At 10:02 p.m., WITNESS OFFICER #2 opened a radio communication asking whether any units in the Sixth District area had initiated a traffic stop in the 1800 block of Minnesota Avenue because a motorist had just advised him that his identification had been taken but not given back to him. The dispatcher, provided with cruiser numbers 624 and 626 (the two vehicles being driven by the SUBJECT OFFICERS) by WITNESS OFFICER #2, immediately radioed for those cruisers to acknowledge, but did not receive a response. Then, at the direction of the dispatcher, WITNESS OFFICER #2 used the MPD talk around channel ("TAC"), but there was again no response from any of the officers.

12. Moments later, however, WITNESS OFFICER #3, a sergeant, called out over the TAC asking if SUBJECT OFFICER #1 was there. SUBJECT OFFICER #1 immediately responded "Yeh, go 'head searg," and then a conversation unrelated to this incident ensued.
13. WITNESS OFFICER #2 advised COMPLAINANT to go to the "Pennsylvania Avenue" police station where the officers worked. COMPLAINANT drove to the Sixth District substation, located at 2701 Pennsylvania Avenue, S.E., and spoke to an officer at the front desk about the encounter with SUBJECT OFFICERS. The officer informed COMPLAINANT that if he wanted to speak with SUBJECT OFFICERS and/or the duty sergeant, they would all be back at the station at midnight.
14. When COMPLAINANT returned to the station around midnight, he began recounting the incident to WITNESS OFFICER #3, who also happened to be the desk sergeant. COMPLAINANT then saw SUBJECT OFFICER #1 and SUBJECT OFFICER #3, both in plain clothes, leaving the building. He pointed out the officers to WITNESS OFFICER #3, but WITNESS OFFICER #3 ignored him and instead questioned whether COMPLAINANT even owned a wallet. COMPLAINANT requested that WITNESS OFFICER #3 provide him with names of the officers who had just left, but WITNESS OFFICER #3 refused. Feeling that he was not receiving proper assistance, COMPLAINANT walked out of the station.
15. On November 24, 2008, COMPLAINANT came back to the station and spoke to a different officer at the desk. The officer identified SUBJECT OFFICERS from the cruiser numbers, but did not tell COMPLAINANT their names. She told COMPLAINANT that SUBJECT OFFICERS would not be in the station until 3 p.m.
16. COMPLAINANT came back at 3 p.m. and spoke to the same officer. She looked into the break room and apparently asked if anyone had possession of someone's wallet. She returned and according to this officer, SUBJECT OFFICERS claimed that they had placed the wallet on the rooftop of his vehicle and left it there. COMPLAINANT never recovered his wallet and subsequently filed a formal complaint with the OPC against SUBJECT OFFICERS.

17. WITNESS OFFICER #1, who was partnering with SUBJECT OFFICER #2 on November 22, 2008 and present at the scene of the incident, and WITNESS OFFICER #3, the desk sergeant who COMPLAINANT alleged was unresponsive to his inquiries, are not subjects of the complaint.

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; (2) Use of unnecessary or excessive force; (3) Use of language or conduct that is insulting, demeaning, or humiliating; . . . [or] (6) Failure . . . to identify oneself by name and badge number when requested to do so by a member of the public.”

Harassment

Controlling Law

Harassment, as defined by MPD Special Order 01-01, Part III, Section G, includes “acts that are intended to bother, annoy, or otherwise interfere with a citizen’s ability to go about lawful business normally, in the absence of a specific law enforcement purpose.”

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.

Additionally, MPD General Order 120.21, “Disciplinary Procedures and Processes,” prohibits MPD officers from engaging in “conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee’s or agency’s ability to perform effectively, or violations of . . . any law, municipal ordinance, or regulation of the District of Columbia.”

Application of Law to Facts

COMPLAINANT alleges that SUBJECT OFFICER #1 harassed him by ordering him out of his vehicle, handcuffing him and removing his wallet from his vest pocket. In a separate allegation, COMPLAINANT claims that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 later harassed him by mishandling his wallet. COMPLAINANT also alleges that SUBJECT OFFICER #3 threatened to physically harm him during the incident.

As a threshold matter, the evidence in the record is clear that all of the SUBJECT OFFICERS were, at the very least, present at the scene of the incident. First, although SUBJECT OFFICER #1 claimed in his statement that he did not recall ever stopping COMPLAINANT, he did admit that SUBJECT OFFICER #3 had told him before the interview that COMPLAINANT had been put in handcuffs and that COMPLAINANT had apparently lost something. There would be no logical explanation for SUBJECT OFFICER #3 to remind SUBJECT OFFICER #1 of these facts unless both individuals had encountered COMPLAINANT on the night in question. Second, SUBJECT OFFICER #3 states that he was present at the stop of COMPLAINANT on November 22, 2008 and notes that although he does not remember if he was partnered with anyone, if he had been it would have been with SUBJECT OFFICER #1. This qualified admission, combined with information in the Sixth District PSS Book for November 22, 2008 showing that SUBJECT OFFICERS #1 and #3 were both assigned to TAC, provides further support that SUBJECT OFFICERS #1 and #3 were partnering and encountered COMPLAINANT together that night. Third, the MPD Mobile Data Terminal ("MDT") activity report for November 22, 2008 indicates that at 9:48 p.m., the user ID for SUBJECT OFFICER #2 checked a District of Columbia driver's license number in the National Crime Information Center ("NCIS") database, corroborating COMPLAINANT'S account of who had stopped him. Fourth, although disagreeing with COMPLAINANT'S version of the events and claiming that he did not recall which officers were on the scene with him, SUBJECT OFFICER #2 in his statement acknowledged that he was involved in the stop of COMPLAINANT and stated (albeit, incorrectly) that SUBJECT OFFICER #3 had run COMPLAINANT'S identification through the computer at the scene. Fifth, WITNESS #1 was walking home on the night of November 22, 2008 when he observed COMPLAINANT being surrounded by "two or three" MPD officers. While true that other portions of his account were conflicting, his statement overall also supports COMPLAINANT'S claim that more than one officer was involved in the incident. Sixth, after being shown an array containing official photographs of SUBJECT OFFICERS, COMPLAINANT immediately identified each of the SUBJECT OFFICERS and outlined in detail each officer's involvement. COMPLAINANT'S unequivocal identification, consistent with his prior physical description of the officers and their actions contained in his complaint form and statements to OPC, is additional proof that each of the SUBJECT OFFICERS was present when COMPLAINANT was stopped on the night of November 22, 2008.¹

¹ SUBJECT OFFICERS contest the validity of the photo array on the grounds that it did not contain nine photos, as is standard in District of Columbia criminal cases, and is thus inherently defective. Their argument is without merit. No such requirement exists for OPC proceedings, and any claim of undue suggestiveness will be evaluated on a case-by-case basis. Here, prior to his viewing of the array, COMPLAINANT was not given an

With their identities not in question, the next issue to address is the roles, if any, of the SUBJECT OFFICERS in the alleged harassment of COMPLAINANT. Before going further, this Complaint Examiner notes that he agrees with the position advanced by SUBJECT OFFICERS that any harassment committed by one or more of SUBJECT OFFICERS should not be imputed to all of the others as a matter of law simply because they were present at the scene. Under the circumstances, painting these allegations with such a broad brush is unwarranted. Instead the focus will lie on whether a specific allegation has been made against a specific individual and then whether the evidence supports a finding that the specific individual committed a specific prohibited act.²

COMPLAINANT'S first claim of harassment is that that he was improperly ordered out of his vehicle by SUBJECT OFFICER #1. COMPLAINANT does not challenge the validity of the stop, but essentially contends that there was no legal justification for the officer's demand. As discussed above, SUBJECT OFFICER #1 does not affirmatively rebut COMPLAINANT'S factual contentions, but conveniently states that he doesn't remember anything about the incident. SUBJECT OFFICER #1 instead relies on the accounts, and better memories, of the other officers who recall that the "irate" COMPLAINANT was not directed but was instead "asked" to exit his car and he did so voluntarily. And on the law, claims SUBJECT OFFICER #1, merely "[a]sking an irate driver to step out of a vehicle, during a traffic stop, at night, is not harassment."

On this point, COMPLAINANT has been consistent throughout the investigative process. He states in his complaint form that an officer—later identified as SUBJECT OFFICER #1—told him to "get out of the car." In his first written statement to the OPC, he recalled vividly that SUBJECT OFFICER #1 shouted at him in a loud and rude tone to "GET OUT" of his car. There is no ambiguity in his account—getting out of his vehicle was not optional, and was an order not a request.

The credibility of COMPLAINANT must be weighted against that of the officers, and in that contest, COMPLAINANT prevails. That SUBJECT OFFICER #1 has absolutely no memory of the incident is suspect, especially given the unusual facts of the case and juxtaposed against the curiously more detailed recollections of his fellow officers. Also, the statements of SUBJECT OFFICERS #2 and #3 that COMPLAINANT was simply "asked to step out of the vehicle" and that "he got out on his own or was asked to step out," respectively, are simply not

opportunity to review his original complaint form or statement, and COMPLAINANT had no knowledge of what information he would have to provide while examining the photos. There is also no evidence that the investigator prompted COMPLAINANT to identify any or all of the officers or to say that the officers committed certain acts. Based on these facts, the Complaint Examiner finds that OPC's photo array procedure was entirely proper.

² According to OPC, COMPLAINANT alleged that all three SUBJECT OFFICERS collectively harassed COMPLAINANT by ordering him out of the car, handcuffing him and taking the wallet from his vest. As will be clear from the subsequent discussion, this Complaint Examiner finds that OPC erroneously characterized the nature of COMPLAINANT'S allegations. The record reflects that COMPLAINANT'S allegations with respect to these three specific actions are focused solely on SUBJECT OFFICER #1.

believable in the context of being stopped and surrounded by four police officers. Impliedly conceding that ordering COMPLAINANT out of his vehicle, even if “irate,” would have no legal foundation, SUBJECT OFFICER #1 tries to create a nuanced justification based on COMPLAINANT somehow having a choice whether or not to exit the car that is not supported by the credible evidence. Because there is sufficient evidence that SUBJECT OFFICER #1 ordered COMPLAINANT out of his vehicle without adequate legal justification, this Complaint Examiner concludes that SUBJECT OFFICER #1 harassed COMPLAINANT.

COMPLAINANT’S second claim of harassment is that SUBJECT OFFICER #1 handcuffed him for no valid reason after he exited the car. As noted above, SUBJECT OFFICER #1 does not recall the incident, much less handcuffing COMPLAINANT. However, COMPLAINANT specifically identified SUBJECT OFFICER #1 as the person who handcuffed him, and SUBJECT OFFICERS #2 and #3 concede that COMPLAINANT was placed in handcuffs by one of the officers. Such evidence leaves little doubt that SUBJECT OFFICER #1 handcuffed COMPLAINANT that night.

This finding leads to the next question as to whether SUBJECT OFFICER #1’s action was justified under the circumstances. In his interview with OPC, SUBJECT OFFICER #1 acknowledged that it was not routine to take someone out of his vehicle and handcuff him. He stated that this is done where he has reasonable suspicion that the person is carrying a gun or where the person immediately steps out of the vehicle and comes toward him. SUBJECT OFFICER #2, acting as a proxy for SUBJECT OFFICER #1 and his lack of recollection, then states that “[t]he driver was then placed in handcuffs for officer safety.”

Even assuming, *arguendo*, that COMPLAINANT was “irate” when the officers stopped him, such behavior, without more, is insufficient to justify handcuffing COMPLAINANT. What is dispositive here is that no one corroborates SUBJECT OFFICER #2’S cursory claim that they were in fear for their safety. In addition, there is no evidence that COMPLAINANT was carrying a weapon or aggressively advanced on any of the officers when he exited the car. Furthermore, the fact that none of the officers conducted a pat down or frisk of COMPLAINANT during the incident tends to undermine SUBJECT OFFICER #1’S defense that COMPLAINANT was dangerous and he handcuffed him to diffuse a potential physical threat.³ Under the totality of the circumstances, the record overwhelmingly demonstrates that SUBJECT OFFICER #1 harassed COMPLAINANT by handcuffing him without legal justification.

³ SUBJECT OFFICER #1 claims that he and the other officers were never asked by OPC whether or not they had conducted a pat down or frisk of COMPLAINANT and therefore, to conclude that procedure was never conducted would be wrong. This argument must be rejected. OPC reasonably assumed that the officers laid bare their knowledge of the incident during the interviews. None of the SUBJECT OFFICERS has attempted to supplement their statements on this particular issue. If they do possess information to the contrary, they have had every opportunity to disclose it and should not now be permitted to strategically hold back information in hopes of relying on it at a hearing.

COMPLAINANT'S third claim of harassment—reaching into his vest pocket and removing his wallet—is also directed towards SUBJECT OFFICER #1. Pursuant to MPD General Order 304.10 I.C.4.c.3, an officer may not reach inside an individual's pocket during a frisk unless there is something present that feels like a weapon. MPD General Order 304.10 I.C.4.b states that “[f]ull searches of persons conducted without adequate probable cause to arrest are illegal and are specifically prohibited by this order.” Based on COMPLAINANT'S complaint form and statements along with the statements of the officers, this Complaint Examiner concludes that there was no probable cause for SUBJECT OFFICER #1 to grab COMPLAINANT'S wallet from his vest pocket. Such conduct on the part of SUBJECT OFFICER #1, lacking a legitimate law enforcement purpose, constitutes harassment.

COMPLAINANT'S fourth claim of harassment is that both SUBJECT OFFICER #1 and SUBJECT OFFICER #2 mishandled his wallet. SUBJECT OFFICER #1, according to COMPLAINANT, placed the wallet on the roof of his car. Then, SUBJECT OFFICER #2 picked up the wallet, looked inside and began to mock COMPLAINANT'S name. COMPLAINANT states that he last saw his wallet in the possession of SUBJECT OFFICER #2. When the stop was completed and he was about to leave, COMPLAINANT realized that the officers had not returned his wallet. He subsequently tried to wave down the officers, but they ignored him and drove off. COMPLAINANT recalls that a few minutes later, he was able to flag down WITNESS OFFICER #2, who called over the radio requesting that the officers operating cruisers 624 and 626 to respond but none did.

The account of WITNESS OFFICER #2 and the transcript of the relevant radio run communications supports COMPLAINANT'S version of events. WITNESS OFFICER #2 states that on the night of the incident, he was “flagged down on Minnesota Ave. SE, by a black male citizen” who “mention[ed] something about his wallet and the police.” He also confirms that he radioed the dispatcher and requested assistance from a Sixth District unit, the unit of all three SUBJECT OFFICERS and WITNESS OFFICER #1. The transcript of the radio run communications reflects that at 10:02 p.m., WITNESS OFFICER #2 placed a call over the radio asking if any units in the Sixth District area had conducted a traffic stop in the 1800 block of Minnesota Avenue (the approximate location of the incident) within the past five minutes. WITNESS OFFICER #2 explained that “[a] citizen just advised that his ID was taken, but wasn't given back to him” and provided cruiser numbers 624 and 626. The dispatcher directed the MPD officers using cruisers 624 (later identified as SUBJECT OFFICERS #1 and #3) and 626 (later identified as SUBJECT OFFICER #2 and WITNESS OFFICER #1) to acknowledge that they heard the call, but none of the officers responded. An unidentified person then told WITNESS OFFICER to switch to TAC.

SUBJECT OFFICERS #1 and #2 categorically deny taking COMPLAINANT'S wallet, with SUBJECT OFFICER #2 further emphasizing that COMPLAINANT was told and saw where his wallet had been placed. However, SUBJECT OFFICER #2'S statement is not inconsistent with COMPLAINANT'S account that his wallet had been left on the roof of the car,

and does nothing to rebut COMPLAINANT'S claim that the wallet was no longer there when he was ready to drive off.

The defense of SUBJECT OFFICERS #1 and #2 also omits reference to additional relevant evidence in the record. For example, the statement of WITNESS OFFICER #1 actually lends credibility to COMPLAINANT'S account while tending to discredit the denials of the SUBJECT OFFICERS. WITNESS OFFICER #1 recalls that the only time he saw the wallet was when it was sitting on the roof of COMPLAINANT'S vehicle, and that he did not see that wallet on the roof after COMPLAINANT was permitted to leave the scene. Moreover, despite SUBJECT OFFICER #2'S claims to the contrary, the MDT printout shows that SUBJECT OFFICER #2 ran COMPLAINANT'S identification through an NCIS query, and therefore demonstrates that SUBJECT OFFICER #2 did at least have possession of the wallet at some point in time during the incident. In addition, and maybe most telling, the TAC communications indicate that SUBJECT OFFICER #1 responded to a radio message from WITNESS OFFICER #3, while failing to respond to WITNESS OFFICER #2'S inquiry related to COMPLAINANT'S missing wallet made seconds earlier. By not acknowledging the radio call, SUBJECT OFFICER #1 failed to comply with MPD General Order 302.5 I.E.1.a ("Upon receipt of a radio message from the dispatcher directing a unit to proceed to a given point or take specific action, the officer(s) in the unit so assigned shall . . . [i]mmediately acknowledge the assignment over the radio."). SUBJECT OFFICER #1'S conscious decision to remain silent on the radio in violation of MPD rules when confronted with the issue of the missing wallet is evidence of a person who is being less than candid about his actions that night. This complaint examiner, after a review of the record, finds the COMPLAINANT'S claim that SUBJECT OFFICERS #1 and #2 both possessed, and eventually mishandled his wallet, to be credible.

In the alternative, SUBJECT OFFICERS #1 and #2 back away from an emphasis on the facts and take the legal position that "mishandling personal property is not harassment." This Complaint Examiner will not adopt a per se rule, as urged by the officers, that the actions of SUBJECT OFFICERS #1 and #2 are "inefficient or improper procedures" that lie within the jurisdiction of the MPD, not OPC. The problem with the actions of SUBJECT OFFICERS #1 and #2, and what crossed the line between a mere misplacement of property and harassment, is twofold. As noted by the officers in their objections, while it is sometimes reasonable for officers to place the an item in open and plain view to help prevent complaints of abuse and theft, here the officers should have simply handed the wallet back to COMPLAINANT when his license and registration check was completed and his handcuffs were removed. Here, putting the wallet on the roof of the car can be reasonably interpreted as a symbolic gesture by SUBJECT OFFICERS #1 and #2 to assert and abuse their authority over COMPLAINANT, which is the essence of harassment. Also, by SUBJECT OFFICER #2'S own account, SUBJECT OFFICERS #1 and #2 left COMPLAINANT'S wallet on the roof of the vehicle for him to retrieve and simply walked away. If that is true, the failure of the officers to secure this item and ensure that it was in COMPLAINANT'S possession before driving off is a degree of negligence and a callous lack of respect for a citizen of the District that amounts to harassment.

COMPLAINANT'S fifth, and final, claim of harassment is against SUBJECT OFFICER #3, who he claims threatened to harm him. SUBJECT OFFICER #3 denies the charge. The question is a simple one: Did SUBJECT OFFICER #3 make the threat or not? If he did, the allegation of harassment will be sustained.

COMPLAINANT alleges in his complaint form that one of the officers told him "I will bust your head open." In his more detailed statement to the OPC, he recounts that an officer (later identified as SUBJECT OFFICER #3) shouted at him, "Shut up before I bust your head open!" when COMPLAINANT questioned why he was being handcuffed. COMPLAINANT'S claim has been consistent and is credible.

SUBJECT OFFICER #3 relies on isolated statements of SUBJECT OFFICER #2 and WITNESS OFFICER #1 to support his position that he did not threaten COMPLAINANT. But a careful examination of their words and their entire written statements reflects more ambiguity than SUBJECT OFFICER #3 lets on. SUBJECT OFFICER #2 states that he "did not hear any other officer tell the driver to 'shut up' or make threats to use force." But SUBJECT OFFICER #2 also acknowledges that he doesn't recall whether he or another officer "put the driver in handcuffs" and whether "the driver told us where his ID was or whether we searched for it." It thus becomes difficult to fully credit SUBJECT OFFICER #2'S statement about the threat, when he doesn't remember key events that occurred moments before the threat was allegedly made.

WITNESS OFFICER #1 is much less definitive on this issue than SUBJECT OFFICER #2, stating "I also do not remember hearing any threats to use force or cause bodily harm to the driver." The "I don't remember" assertion of WITNESS OFFICER #1 (as opposed to saying it did not happen at all) is not the powerful corroboration that SUBJECT OFFICER #3 claims it is and wishes it would be.

Given the less than forceful support of SUBJECT OFFICER #3'S denial provided by his fellow officers, and the credible statements of COMPLAINANT, this Complaint Examiner concluded that SUBJECT OFFICER #3 made a verbal threat to harm COMPLAINANT and by doing so, committed harassment.

In sum, SUBJECT OFFICER #1'S conduct in ordering COMPLAINANT out of his vehicle, handcuffing him and removing his wallet, in the absence of a valid legal justification, constitutes harassment in violation of D.C. Official Code § 5-1107(a), D.C. Mun. Regs., tit. 6A, § 2199.1, MPD Special Order 01-01, and MPD General Order 120.21.⁴

By dispossessing COMPLAINANT of his wallet without a valid legal basis, and with an apparent intent to remind COMPLAINANT of who was in charge of the situation, SUBJECT

⁴ By logical extension, since COMPLAINANT did not specifically allege that SUBJECT OFFICERS #2 and #3 ordered him out of the car, handcuffed him and reached into his vest and removed his wallet, these specific allegations of harassment against the two officers are unfounded.

OFFICERS #1 and #2 committed harassment in violation of D.C. Official Code § 5-1107(a), D.C. Mun. Regs., tit. 6A, § 2199.1, MPD Special Order 01-01, and MPD General Order 120.21.

Also, there exists reliable, credible and sufficient evidence to support a determination that SUBJECT OFFICER #3 threatened to harm COMPLAINANT during the incident. Accordingly, this Complaint Examiner finds that SUBJECT OFFICER #3 harassed COMPLAINANT in violation of D.C. Official Code § 5-1107(a), D.C. Mun. Regs., tit. 6A, § 2199.1, MPD Special Order 01-01, and MPD General Order 120.21.

Unnecessary or Excessive Force

Controlling Law

MPD General Order 901.07, Part II states: “[T]he policy of the Metropolitan Police Department is to preserve human life when using lawful authority to use force. Therefore, officers of the Metropolitan Police Department shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others.”

The MPD employs the “Use of Force Continuum.” General Order 901.07, Part V, Section B, No. 1. The related guidance document entitled “Application of the Use of Force Continuum for the Metropolitan Police Department” states, in relevant part, that “When the use of force becomes necessary, members must comply with the use-of-force model, which ranges from cooperative controls [e.g., verbal persuasion] to lethal force. The officer’s response to a subject’s action must be based on the totality of circumstances, which an officer reasonably believes to exist at the time of the confrontation.”

“Excessive or Unnecessary force” is also defined in the OPC regulations as a “[u]nreasonable use of power, violence or pressure under the particular circumstances. Factors to be considered when determining the ‘reasonableness’ of a use of force include the following: 1) the severity of the crime at issue; 2) whether the suspect posed an immediate threat to the safety of officer or others; 3) whether the subject was actively resisting arrest or attempting to evade arrest by flight; 4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; 5) whether the officer adhered to the general orders, policies, procedures, practices and training of the MPD . . . and 6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish this objective.” D.C. Mun. Regs., tit. 6A, § 2199.1.

Application of Law to Facts

COMPLAINANT alleges that SUBJECT OFFICER #1 “grabbed” him as he was exiting his vehicle, and “pushed” his face forward with both hands and “slammed” his body against the car. As discussed below, the evidentiary record sufficiently demonstrates that SUBJECT OFFICER #1 did in fact, commit these acts, and that such conduct under the circumstances

constitutes unnecessary or excessive force prohibited by the controlling MPD General Order and OPC regulations.

The statement of WITNESS #1, in the view of COMPLAINANT, bolsters his allegations of improper conduct on the part of SUBJECT OFFICER #1. WITNESS #1 initially told the OPC investigator that he saw one of the officers “slam” COMPLAINANT against his car. But in his formal statement, WITNESS #1 says that COMPLAINANT was “slammed” to the ground. This discrepancy, as also recognized by the OPC investigator, undermines the reliability of WITNESS #1’S observation on this material point. In short, WITNESS #1 adds little to COMPLAINANT’S unnecessary or excessive force claim.

However, the real strength of COMPLAINANT’S claim is his consistent description of the force itself. He has been unwavering throughout the investigative process in his account that SUBJECT OFFICER #1 “grabbed” him, “pushed” and then “slammed” him into the back of his car before handcuffing him.

The record is devoid of anything to persuasively demonstrate that SUBJECT OFFICER #1’S use of force was appropriate. No proof has been offered to show that COMPLAINANT was carrying a weapon. There is no evidence that COMPLAINANT came towards the officers when he was ordered out of the car. In fact, SUBJECT OFFICERS #2 and #3 concede that COMPLAINANT complied with their instructions during the incident. Other than SUBJECT OFFICER #2’S unsubstantiated assertion that they were in fear for their safety because of COMPLAINANT’S “irate” behavior, a claim with no details and thus carrying little weight, no facts have come to light to show that COMPLAINANT posed an immediate physical threat warranting a swift and substantial response. Although hindsight is always 20-20, it is clear in this case that SUBJECT OFFICER #1’S quick yet considerable use of force on COMPLAINANT was unprovoked and unjustified.

In addition, it is worth noting that COMPLAINANT had no motive to falsely accuse SUBJECT OFFICER #1 of misconduct. COMPLAINANT had no history of prior contact with SUBJECT OFFICER #1 or any of the other officers at the scene, and he was not ticketed or arrested as a result of the encounter. Thus, it makes little sense that COMPLAINANT would retaliate against him by blatantly lying and initiating a formal process where he himself would be subjected to intense scrutiny. Moreover, when COMPLAINANT submitted his complaint form, he could not identify SUBJECT OFFICER #1 by name. So, it seems highly improbable that COMPLAINANT would concoct such an elaborate story, with the attendant legal risks of a false allegation, to damage the reputation of someone he did not know by name and with no assurances that the officer would ultimately be identified.

Although SUBJECT OFFICER #1 cannot recall the incident, he challenges COMPLAINANT’S allegation of excessive or unnecessary force on several grounds. SUBJECT OFFICER #1, noting that WITNESS OFFICER #1 stated that “I did not use or see any other officer use force on the driver,” argues that this testimonial evidence directly refutes COMPLAINANT’S account and therefore warrants dismissal of the allegation.

His argument, however, is unavailing. WITNESS OFFICER #1, to put it bluntly, is not a reliable witness. He fails to recall a number of basic facts that could support COMPLAINANT'S claims (e.g., whether SUBJECT OFFICERS #1 and #2 were present at the scene, whether COMPLAINANT was ordered out of the car, whether COMPLAINANT was handcuffed, how the wallet got on roof of the vehicle, whether he was asked for his name and badge number, whether any of the officers told COMPLAINANT to "shut up," whether he heard any threats to use force or harm COMPLAINANT), but at the same time, he somehow remembers those details (e.g., that COMPLAINANT was "irate" and that he did not see force used) that SUBJECT OFFICERS rely on for their defense. There is no basis to reject COMPLAINANT'S allegations outright based solely on the statement of a witness with such a "selective" memory.

SUBJECT OFFICER #1 also levels a direct attack on COMPLAINANT'S credibility. According to SUBJECT OFFICER #1, COMPLAINANT did not include an excessive or unnecessary force allegation in his first formal statement to the OPC on January 28, 2009, and it was not until December 30, 2011, three years after the incident had occurred, that COMPLAINANT submitted a supplemental statement containing the allegation that he had been assaulted. Given COMPLAINANT'S unexplained and lengthy delay in informing OPC of such a serious allegation, contends SUBJECT OFFICER #1, SUBJECT OFFICER #1'S conduct could not have been as serious as COMPLAINANT now claims, or didn't occur at all.

SUBJECT OFFICER #1'S argument is based on a blatant misreading of the record and must be rejected. COMPLAINANT first informed OPC that he was the victim of excessive or unnecessary force in his complaint form filed on January 5, 2009 alleging, *inter alia*, that the officers were "assaulting" him "verbally and physically." Three weeks later, on January 28, 2009, an OPC investigator interviewed COMPLAINANT and he signed a formal written statement describing the incident. While true that his written statement does not include an allegation of excessive or unnecessary force, the investigator's internal "Memorandum of Interview," a document memorializing the meeting, notes that COMPLAINANT told her that an officer (later identified as SUBJECT OFFICER #1) "walked up to him and pushed him with his hands and said 'shut up' . . . [and] slammed him against the back of his jeep . . ." The fact that allegations of unnecessary or excessive force were actually made during the interview, but were omitted in the written statement, is further evidenced by the OPC's March 27, 2009 referral of the matter to the U.S. Attorney's Office for the District of Columbia ("USAO") for possible criminal prosecution, which presumably was based on COMPLAINANT'S complaint form and interview.⁵ In late October 2011, as the case began to move forward, a different OPC investigator contacted COMPLAINANT to confirm if he had made a force allegation because it was not in his written statement. He told her that he would need to review his statement, but reiterated that SUBJECT OFFICER #1 did assault him. The omission of his original allegation

⁵ On April 21, 2009, the USAO informed the OPC by letter that it was declining any criminal prosecution arising from the incident. The decision by the USAO has no bearing on the present evaluation of the merits of COMPLAINANT'S allegations.

precipitated submission of his supplemental statement on December 30, 2011. This chronology, based on exhibits to the ROI, makes it clear that COMPLAINANT has alleged that SUBJECT OFFICER #1 used excessive or unnecessary force against him from the very start of the investigation. Rather than a “smoking gun” as essentially characterized by SUBJECT OFFICER #1, the omission appears to have been an inadvertent error by the original investigator, and nothing more.

Referencing COMPLAINANT’S multiple visits to the Sixth District station to retrieve his wallet, SUBJECT OFFICER #1 contends that COMPLAINANT’S failure to mention the alleged use of force to any of the officers on duty, and instead focusing his attention on his missing property, is proof that while he may have lost his wallet, he was not assaulted. However, there is a simple explanation for COMPLAINANT’S single-minded emphasis on recovering his wallet that can be reasonably inferred from the record. It is likely that SUBJECT OFFICER #1’S actions, while improper, did not cause immediate physical harm to COMPLAINANT. As a result, COMPLAINANT’S priority was not reporting SUBJECT OFFICER #1’S use of force against him, but instead determining the whereabouts of his wallet and safeguarding its contents. This Complaint Examiner disagrees with SUBJECT OFFICER #1’S position that COMPLAINANT’S efforts to track down his wallet served as an admission that he was not the victim of excessive or unnecessary force, but instead believes that it was a course of action that any reasonable person would have considered and pursued under the circumstances.

After a careful weighing of the evidence in the record, this Complaint Examiner concludes that SUBJECT OFFICER #1 used excessive or unnecessary force against COMPLAINANT in violation of D.C. Official Code § 5-1107(a), D.C. Mun. Regs., tit. 6A, § 2199.1, and MPD General Order 901.07 when he “grabbed” COMPLAINANT, “pushed” him and “slammed” COMPLAINANT into his vehicle.

Language or Conduct

Controlling Law

According to MPD General Order 201.26, Part I, Section C, Nos. 1 and 3, “All members of the department shall be courteous and orderly in their dealings with the public. They shall perform their duties quietly, remaining calm regardless of provocation to do otherwise Members shall refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name calling which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person.”

Application of Law to Facts

COMPLAINANT’S claim involves all three of the SUBJECT OFFICERS. COMPLAINANT emphatically alleges that each of the officers was “rude” during the traffic stop and that SUBJECT OFFICER #1, in particular, treated him like an “animal.” According to

COMPLAINANT, after pulling over and rolling down his window, SUBJECT OFFICER #1 shouted "GET OUT!" in a "loud and rude" tone. SUBJECT OFFICER #1 then allegedly continued to engage in "unprofessional" conduct, including telling him to "Shut up!" at one point, up until the conclusion of the stop when he approached COMPLAINANT, removed the handcuffs, and "shouted" in COMPLAINANT'S face to "GET AWAY FROM HERE!" In addition, COMPLAINANT alleges that SUBJECT OFFICER #3 shouted at him to "Shut up before I bust your head open!" COMPLAINANT further alleges that SUBJECT OFFICER #2 made several sarcastic remarks about COMPLAINANT'S name, one being "Oh, your name is Frankie." When COMPLAINANT tried to correct the officer by telling him that "My name is Frank," SUBJECT OFFICER #2 laughed at him.

SUBJECT OFFICER #1 concedes that COMPLAINANT'S allegations, if taken as true, would constitute a violation of the applicable language and conduct MPD General Order. But because he does not remember the stop at all, he must again rely on the recollections of his fellow officers to rebut COMPLAINANT'S allegations concerning his conduct. As explained earlier (see *infra* at p. 14), WITNESS OFFICER #1'S statement is replete with examples of "I don't remember" with respect to the most basic of facts and thus, should be considered to be unreliable. SUBJECT OFFICER #2 claims that "I did not hear any other officer tell the driver to 'shut up' or make threats to use force." This seemingly confident and unequivocal position, however, becomes less so when examined in the context of his entire written statement that is also filled with gaping holes in his recollection (e.g., doesn't recall the names of the officers at the scene, who handcuffed COMPLAINANT, or who put the wallet on the roof of the car) and statements that are factually incorrect, inconsistent, or lack credibility (e.g., that SUBJECT OFFICER #3 checked COMPLAINANT'S license and registration in the database, that he never had possession of the wallet, that COMPLAINANT was asked or volunteered himself to step out of the car). SUBJECT OFFICER #3 also provides little support for SUBJECT OFFICER #1'S defense. SUBJECT OFFICER #3 asserts that he "did not hear any other officer tell him to 'shut up.'" But he does acknowledge that he does not remember what prompted COMPLAINANT to get out of the vehicle, he "did not see the driver be placed in handcuffs" and he believes "that another officer gave him a verbal warning and sent him on his way," a strong indication that SUBJECT OFFICER #3 was not in a position during the relevant moments of the incident to hear SUBJECT OFFICER #1 or discern specifically what was said when SUBJECT OFFICER #1 interacted with COMPLAINANT. In light of COMPLAINANT'S specific and credible allegations against SUBJECT OFFICER #1, and the lack of credible evidence controverting these allegations, this Complaint Examiner finds that SUBJECT OFFICER #1 used language and conduct towards COMPLAINANT during the traffic stop that was insulting, humiliating or demeaning in violation of D.C. Official Code § 5-1107(a) and MPD General Order 201.26.

SUBJECT OFFICER #2 denies calling COMPLAINANT "Frankie" or any other names. WITNESS OFFICER #1 states that "he do[es] not recall any other officer laughing at or telling the driver to 'shut up' or refer to the driver as 'Frankie.'" However, that WITNESS OFFICER #1 may not "recall" hearing SUBJECT OFFICER #2 make the remarks in question does not foreclose the possibility or even likelihood that he did hear the remarks at the time or that the

remarks were actually made. Also, SUBJECT OFFICER #3 says that he does not remember personally addressing COMPLAINANT by the name “Frankie,” but makes no mention of what SUBJECT OFFICER #2 said or did not say. Given the lack of corroborative evidence for SUBJECT OFFICER #2’S categorical denial, COMPLAINANT’S consistent and credible account is thus legally sufficient to support a determination that SUBJECT OFFICER #2 used language and conduct towards COMPLAINANT during the traffic stop that was insulting, humiliating or demeaning in violation of D.C. Official Code § 5-1107(a) and MPD General Order 201.26.

COMPLAINANT’S allegation against SUBJECT OFFICER #3 is the same, factually, as his harassment claim. This Complaint Examiner has already determined that SUBJECT OFFICER #3 told COMPLAINANT to “Shut up before I bust your head open.” See *infra* at p. 11. Such a threat amounts to harassment, and also constitutes police misconduct in violation of D.C. Official Code § 5-1107(a) and MPD General Order 201.26.

Failure to Identify

Controlling Law

MPD General Order 201.26, Part I, Section C, No. 2 states: “Members shall be courteous, civil and respectful to their superiors, associates, and other persons whether on or off duty. They shall be quiet, orderly and attentive and shall exercise patience and discretion in the performance of their duties. When requested to do so, they shall give their names and badge numbers in a respectful, polite manner.”

Application of Law to Facts

COMPLAINANT alleges that he asked the three SUBJECT OFFICERS for their names and badge numbers as soon as he was taken out of the handcuffs, but that each of the SUBJECT OFFICERS refused his request and walked away from him.

SUBJECT OFFICER #1 does not recall the stop of COMPLAINANT, much less any request made during the incident. SUBJECT OFFICERS #1 and #2 cannot remember whether or not COMPLAINANT requested that they provide their name and badge number, but both emphasize that if COMPLAINANT had asked, they would have supplied the information.

This Complaint Examiner credits COMPLAINANT’S assertion that each of the SUBJECT OFFICERS failed to provide their name and badge number upon request. According to COMPLAINANT, when he was unable to obtain the names and badge numbers of the SUBJECT OFFICERS at the scene, he obtained the police vehicle numbers from the cars that the officers were driving so that he would have some way of identifying them. These numbers (and no names or badge numbers) were included on COMPLAINANT’S complaint form. It would be highly unlikely that COMPLAINANT would have recorded the cruiser numbers if he had been provided the SUBJECT OFFICERS’ names and badge numbers.

SUBJECT OFFICERS claim that “their names and badge numbers were displayed” and that they “would have no reason to deny their names and badge numbers to the complainant if asked.” However, display of one’s name and badge number does not release an MPD officer from his or her obligation to provide that same information if requested. Moreover, given their misconduct during the stop, SUBJECT OFFICERS had every reason to make it as difficult as possible for COMPLAINANT to identify them and thus discourage him from filing a complaint.

Based on the record evidence, this Complaint Examiner finds that SUBJECT OFFICER #1, SUBJECT OFFICER #2 and SUBJECT OFFICER #3 failed to identify themselves by name and badge number upon COMPLAINANT’S request, in violation of D.C. Official Code § 5-1107(a) and MPD General Order 201.26.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment	Sustained
Allegation 2: Unnecessary or Excessive Use of Force	Sustained
Allegation 3: Insulting, Demeaning or Humiliating Language or Conduct	Sustained
Allegation 4: Failure to Identify	Sustained

SUBJECT OFFICER #2

Allegation 1: Harassment	Sustained (as to allegation that he mishandled COMPLAINANT’S wallet) Unfounded (as to allegation that he ordered COMPLAINANT out his vehicle, handcuffed him and removed his wallet without legal justification)
Allegation 3: Insulting, Demeaning or Humiliating Language or Conduct	Sustained
Allegation 4: Failure to Identify	Sustained

SUBJECT OFFICER #3

Allegation 1: Harassment	Sustained (as to allegation that he threatened to physically harm COMPLAINANT) Unfounded (as to allegation that he ordered COMPLAINANT out his vehicle, handcuffed him and removed his wallet without legal justification)
Allegation 3: Insulting, Demeaning or Humiliating Language or Conduct	Sustained
Allegation 4: Failure to Identify	Sustained

Submitted on July 27, 2012.

Stephen D. Kong
Complaint Examiner