

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	01-0411
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, Fifth District SUBJECT OFFICER #2, First District
Allegation 1:	Harassment
Allegation 2:	Use of Excessive or Unnecessary Force
Complaint Examiner:	Amy E. Wind
Merits Determination Date:	October 7, 2005

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC) 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 § 5-1107,¹ 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 alleged that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed him when they entered his house at approximately 5:30 a.m. on August 3, 2001, allegedly without permission or legal justification, to arrest him. He also alleged that these officers used excessive or unnecessary force in carrying out the arrest.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint on September 7, 2005. The Complaint Examiner heard the testimony of COMPLAINANT, WITNESS #1, WITNESS #2, WITNESS #3, SUBJECT OFFICER #1, SUBJECT OFFICER #2, WITNESS OFFICER #1, and WITNESS OFFICER #2. In addition to the evidence already contained in the Report of Investigation, the following exhibits were introduced and accepted at the hearing:

Investigation Exhibit 30: Memorandum of Investigative Activity (June 21, 2005)

¹ The complaint was filed by COMPLAINANT on August 6, 2001. The Office of Police Complaints (then known as Office of Citizen Complaint Review) forwarded the matter to the U.S. Attorney's Office (USAO) for the District of Columbia on August 16, 2001 for possible criminal prosecution. The USAO advised OPC on November 5, 2001 that it had initiated a criminal investigation into this matter. On June 3, 2004, however, the USAO notified the MPD that it had declined to prosecute the complaint. On June 23, 2004, MPD also declined to take further action and referred the matter back to OPC. OPC resumed its investigation, incorporating evidence gathered in the USAO investigation, and completed its Report of Investigation on March 25, 2005. See Report of Investigation, p. 2.

- Investigation Exhibit 31: Arrestee Datasheet for COMPLAINANT
- Investigation Exhibit 32: Memorandum of Investigative Activity (June 28, 2005)
- Investigation Exhibit 33: Recruit Training Program – Confronting Family Violence (revised October 2000)
- Investigation Exhibit 34: MPD Crime Scene Examination Section/Evidence Report – photos attached (August 3, 2001)
- Investigation Exhibit 35: Approximate Floor Plan of 1947 Capitol Avenue, NE (not to scale)

FINDINGS OF FACT

Based on a review of OCCR's Report of Investigation, all comments and objections submitted by the complainant and SUBJECT OFFICER #1 and SUBJECT OFFICER #2 through their representatives, and all evidence presented at the evidentiary hearing conducted on September 7, 2005, the Complaint Examiner finds the material facts regarding this complaint to be as follows:

1. In the early morning hours of August 3, 2001, WITNESS #1 (son of COMPLAINANT) had an extended argument with his then-girlfriend, WITNESS #3, at the COMPLAINANT'S home located at LOCATION #1, NE. Ex. 9; Tr. 115, 188-195.² WITNESS #3, who did not live at that address, was upset and refused to leave the house. Tr. 116-118, 197. At around 5:00 a.m., WITNESS #1 pushed WITNESS #3 down the stairs, forcibly ejected her from the house, and locked the front door. Tr. 118, 196.
2. WITNESS #3 sat on a bench on the WITNESS #1's front porch and called 911, reporting that she and her boyfriend "were fighting, and he pushed me and kicked me down the steps and threw me out of the house." Ex. 25; Tr. 120, 197. She did this apparently to provoke WITNESS #1 and to respond to his having ejected her from the house. Tr. 118, 223. WITNESS #3 was not injured other than having a sore back, although she was upset and crying. Tr. 197.
3. About five minutes after WITNESS #3 called 911, COMPLAINANT returned home from an early morning bicycle ride. Tr. 198. He spoke briefly with WITNESS #3, who told him about the argument with his son and that she had called the police. Tr. 198, 218. Promising to speak with his son, complainant entered the house, closing the door behind him. Tr. 56-57, 199, 238.

² References to exhibits contained in the Report of Investigation and accepted at the hearing shall be cited as "Ex. ___;" citations to the transcript of the evidentiary hearing held on September 7, 2005 shall be "Tr. ___."

4. A few minutes later, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 arrived at the house and found WITNESS #3 sitting on the front porch. Ex. 17; Tr. 199-200. SUBJECT OFFICER #1 asked WITNESS #3 if she was the person who had called 911 about an assault by her boyfriend, who her boyfriend was, and whether he was in the house. Ex. 13, 14; Tr. 199-200. WITNESS #3 stated that her boyfriend was “WITNESS #1,” and that he was inside the house. Ex. 13; Tr. 200. Neither officer asked WITNESS #3 for details about the assault or her boyfriend, or whether she was injured or needed medical assistance. Tr. 201-02. The officers’ conversation with WITNESS #3 lasted about one or two minutes. Tr. 201, 335. SUBJECT OFFICER #1 had previous dealings with complainant, and, unaware that he had a son of the same name, assumed complainant was WITNESS #3’s boyfriend. Ex. 14; Tr. 322.
5. Without knocking or otherwise announcing the presence of police officers, SUBJECT OFFICER #1 opened the COMPLAINANT’s front door and entered the house, along with SUBJECT OFFICER #2. Ex. 14; Tr. 123. A third officer, WITNESS OFFICER #2, who had arrived shortly after the other officers (Tr. 405) followed them and stood just behind them in the doorway. Tr. 330.³
6. Having heard from his son that police had come into the house, complainant immediately approached the officers from the kitchen where he had been making a sandwich. Tr. 58. The officers were standing inside the front door in a small entryway leading to the living room. Tr. 60-61, 128. Complainant demanded to know why the officers were in his house and angrily told them to leave. Ex. 13; Tr. 129, 177, 323. Almost simultaneously, SUBJECT OFFICER #1 asked complainant to step outside. Tr. 323, 378-9. As complainant moved toward the officers in the small entryway between the living room and front door, SUBJECT OFFICER #1 grabbed complainant’s wrist to escort him out of the house. Ex. 16; Tr. 66, 130, 379. Complainant resisted and what several witnesses described as a “tussle” ensued between SUBJECT OFFICER #1 and complainant. Tr. 131-34, 149, 325.
7. Complainant and SUBJECT OFFICER #1 exchanged blows and struggled together, eventually falling to the floor in the living room. Tr. 132-33, 165-67. SUBJECT OFFICER #2, who had been standing just behind SUBJECT OFFICER #1, radioed a “1033” (officer in need of assistance) alarm and attempted to assist SUBJECT OFFICER #1 subdue complainant by striking him in the head and body with his hand. Ex. 16; Tr. 227. SUBJECT OFFICER #1 was commanding complainant to stop resisting arrest (Tr. 324); at the same time, complainant was fighting, “tussling,” and screaming “stop, get off

³ SUBJECT OFFICER #1 and SUBJECT OFFICER #2 testified at the hearing that the front door was open, and that SUBJECT OFFICER #1 had a conversation with complainant through the screen door prior to entering the house. Tr. 323-24, 353, 378. This was contradicted by their own prior statements (see Exhibits 13-14, 16-17), as well as the testimony of complainant, his son and WITNESS #3, who all asserted that the officers simply entered the house without announcing themselves. Tr. 61-62.

me,” “you’re wrong!” and “get out of my house!” (Tr. 170, 210, 235). As complainant struggled to get up from the floor, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 continued to strike him with their hands and SUBJECT OFFICER #2 hit him several times in the arm and leg with his ASP baton. Ex. 16; Tr. 149, 208, 235. Because complainant was struggling, the officers handcuffed him with his hands in front of instead of behind his body. Tr. 325. WITNESS OFFICER #2 entered the house and kept complainant’s son and daughter (who had awakened and come down the stairs due the noise of the struggle) from becoming involved in the “tussle.” Tr. 408. The entire incident, from when the officers entered the house to when they took complainant outside, lasted no more than 20 minutes. Ex. 25; Tr. 201, 209.

8. Complainant was arrested for assaulting a police officer, and driven by SUBJECT OFFICER #1 to D.C. General Hospital for treatment of the bruises and abrasions he received during the incident. Ex. 5; Tr. 341. WITNESS #3, who had remained on the porch and observed the incident, was interviewed by other officers, who determined that her complaint was against WITNESS #1. Tr. 210. WITNESS #1 was arrested for simple assault that morning. Ex. 7.
9. Charges against both COMPLAINANT and WITNESS #1 ultimately were dropped for lack of prosecution. Exs. 7, 10.

III. 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 excessive or **unnecessary** force; (3) use of language or conduct that is insulting, demeaning, or humiliating; (4) discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business; or (5) retaliation against a person for filing a complaint pursuant to [the Act].” The Police Complaints Board (formerly the Citizen Complaint Review Board), is OPC’s governing body, and has promulgated regulations regarding OPC (then called “OCCR”) on August 30, 2002. *See* 49 D.C. Reg. 8347. This Merits Determination does not rely on the definitions of “harassment” or “excessive or **unnecessary** force” contained in the regulations because the underlying conduct alleged in the complaint occurred before the regulations took effect on August 30, 2002.

In this matter, COMPLAINANT alleges that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 (a) harassed him on August 3, 2001, when they entered his house without permission or a warrant, and (b) used excessive or **unnecessary** force in the physical struggle that resulted when they entered the house and asked complainant to speak with them outside.

A. Harassment

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.” Ex. 26, p. 3. Complainant’s complaint (see Exs. 1, 3, 4) alleges that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed him by entering his house during the early morning hours of August 3, 2001 without a warrant and without permission from any owner or resident.

The Fourth Amendment of the U.S. Constitution prohibits police officers from entering a private residence without permission or a warrant unless emergency or other exigent circumstances are present. As the Supreme Court noted in *Payton v. New York*, 445 U.S. 573, 590 (1980): “In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” See also, *Kirk v. Louisiana*, 536 U.S. 635, 636 (2002) (*per curiam*) (reaffirming *Payton*). In the District of Columbia, in particular, it is clear that in the absence of a warrant, police are not entitled to enter a person’s house unless (1) they have probable cause to believe a crime is being or has been committed, and (2) there are exigent circumstances justifying the lack of a warrant. *In re Sealed Case 96-3167*, 153 F.3d 759 (D.C. Cir. 1998).

SUBJECT OFFICER #1 and SUBJECT OFFICER #2 have provided at various times a number of different explanations of how they entered the COMPLAINANT’s house and why they believed it was proper to enter without a warrant. SUBJECT OFFICER #1 initially stated that he went in the house with the intention of arresting complainant, whom he believed to be the “WITNESS #1” identified by WITNESS #3, and that he opened the door without knocking. Ex. 14. SUBJECT OFFICER #2 initially confirmed that SUBJECT OFFICER #1 opened the front door and walked in. Ex. 16. SUBJECT OFFICER #2 later asserted that SUBJECT OFFICER #1 had asked WITNESS #3 (who did not live at the COMPLAINANT’s house) for permission to enter the premises, and that she had said she was “temporarily staying” there (Exs. 16, 17). Both officers asserted at various points that complainant opened the door for them (Exs. 16, 17) or that the inner door was open and they spoke with complainant through the screened portion of a screen door before entering the house through the screen door (Tr. 323-324, 379). Both also asserted that they had the right to enter the house without a warrant or permission because the D.C. Domestic Violence Act required them to do that. Ex. 16; Tr. 349-50.

Testimony of COMPLAINANT, WITNESS #1 and WITNESS #3, as well as the statements made by the officers when first interviewed, confirmed that SUBJECT OFFICER #1 opened the closed front door, without knocking or announcing police presence, and entered the premises. See Tr. 57, 123, 200, 205-206. Although SUBJECT OFFICER #2 initially stated that WITNESS #3 told SUBJECT OFFICER #1 she was “temporarily staying” in the house and that he had asked her permission to enter, this was never mentioned by SUBJECT OFFICER #1 himself (see Exs. 13-15, Tr. 322), WITNESS #3 denied that anyone asked her permission to enter (Tr. 207), and SUBJECT OFFICER #2 later testified that did not recall this having

happened although he believed she lived there because she was on the premises at that time of morning. Tr. 207, 377, 378.

As is reflected in the Findings of Fact, the Claims Examiner finds that the weight of the evidence, based on testimony of the witnesses at the hearing and the varying accounts of the officers, established that: (a) the front door to the COMPLAINANT'S residence was initially closed, and (b) the officers opened the door and entered the house without seeking permission from WITNESS #3 or anyone else. The issue then is whether the officers properly entered the premises, and if not, whether that entry without permission or warrant constituted harassment.

1. Propriety of Entering the House Without A Warrant

The Fourth Amendment of the United States Constitution prohibits police officers from entering a private residence without permission or a warrant in the absence of an emergency or other exigent circumstances. *Kirk v. Louisiana*, 536 U.S. 635, 636 (2002) (*per curiam*); *Payton v. New York*, 445 U.S. 573, 590 (1980). Entry into someone's home without a warrant, even for the purposes of searching the premises or arresting a suspect, is not permissible unless (1) the police officers have probable cause to believe a crime is being or has been committed, and (2) there are exigent circumstances justifying the lack of a warrant. *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *In re Sealed Case 96-3167*, 153 F.3d 759 (D.C. Cir. 1998).

SUBJECT OFFICER #1 and SUBJECT OFFICER #2, as well as their supervisor at the time of the incident, WITNESS OFFICER #1, asserted that the District of Columbia Domestic Violence Act of 1990's "mandatory arrest" policy permitted the warrantless entry into the COMPLAINANT's home because the officers were required to arrest "WITNESS #1." Ex. 17; Tr. 244-45, 311. The officers asserted that, under the District of Columbia Prevention of Domestic Violence Amendment Act of 1990 and the MPD General Order implementing that statute (see Ex. 27), they were required to arrest WITNESS #1, so they were entitled to enter a dwelling without a warrant to do just that. Ex. 17; Tr. 311. WITNESS OFFICER #1 insisted that had they not gone in to make the arrest, the officers likely would have faced MPD internal discipline. Tr. 250-51.

While it is doubtful that such a statutory proposition could pass constitutional muster (see, e.g., *Payton v. New York*, 445 U.S. 573, 590 (1980) (finding a state statute permitting warrantless arrests in routine felony cases to violate the Fourth Amendment)), this conclusion is not in any event supported by the facts in this case. MPD General Order 304.11 specifies that the domestic violence statute "requires a police officer to arrest a person if the officer has probable cause to believe that a person committed an intrafamily offense that: (1) Resulted in physical injury, including physical pain or illness, regardless of whether or not the intrafamily-related offense was committed in the presence of the officer; OR (2) caused or was intended to cause reasonable fear to the victim of imminent serious physical injury or death." Ex. 27, p. 3; see Tr. 245-46. As noted above, because of their lack of substantive preliminary investigation, the officers could not reasonably have concluded that an intrafamily offense occurred that resulted in an injury to WITNESS #3, or caused her fear or death or serious injury. The officers

testified that they did not observe any signs of injury to WITNESS #3, nor was there any indication that she suffered from fear of “serious physical injury or death.” See Tr. 203, 322. Under the plain language of MPD General Order 304.11, it is clear that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 were under no duty to arrest “WITNESS #1,” and there was no extraordinary need to enter the COMPLAINANT’s home in violation of the constitutional prohibition against warrantless entry into private dwellings.

Moreover, there is no provision in the domestic violence statute, or in the MPD General Order 304.11 implementing it (Ex. 27), that authorizes warrantless entry into private dwellings simply to arrest a domestic violence suspect. To the contrary, General Order 304.11 requires officers to make a detailed preliminary investigation (including personally interviewing the complainant/victim if he or she is available at the scene) specifically to determine whether probable cause exists for believing a crime has occurred. Ex. 27, p. 2. Only if the officers “determine that probable cause exists that the defendant has committed an intrafamily offense ... and the defendant is present or can be located, the member must make an arrest ...” Ex. 27, pp. 3, 6. Thus, under both the Fourth Amendment and the D.C. domestic violence statute, a lawful police entry into the Bracey house required a probable cause determination by the officers.

a. Probable Cause

SUBJECT OFFICER #1 and SUBJECT OFFICER #2, and WITNESS OFFICER #1, conceded that before an officer can enter someone’s home, there needs to be more than a mere allegation or suspicion that a crime had been committed. Tr. 262, 393. Thus, the mere fact that WITNESS #3 had reported to 911 and later to the officers that her boyfriend had hit her, and that she appeared upset when officers arrived, was insufficient to establish probable cause. Tr. 276-277. MPD General Order 304.11 provides explicit guidance regarding the kinds of factors that should be considered in making a determination as to whether an intrafamily offense has been committed. These factors include visible injuries, pain from non-visible injuries, need for medical treatment, evidence that furniture is in disarray, witnesses to the violence, presence of weapons, torn clothing, threats made in the officers’ presence, demeanor of the victim, suspect and witnesses, existence of a restraining order, and a prior history of violence, especially intra-family. Ex. 27, pp. 8-9. Further, MPD materials used in the domestic violence trainings attended by SUBJECT OFFICER #1 and SUBJECT OFFICER #2 (see Tr. 311-12, 376) specify that officers are required “to conduct a detailed preliminary investigation to include: victim/witness interviews, evidence collection [and] ... field reports.” Ex. 33, pp. 26-27.

It is undisputed that officers did not conduct the extensive “preliminary investigation” required by MPD General Order 304.11 for a determination of probable cause. See Ex. 27, pp. 5-6. Upon arrival at the scene SUBJECT OFFICER #1 spoke to WITNESS #3 for perhaps one or two minutes (Tr. 201, 335), and his questions were limited to whether she had called 911 about being hit, the name of her boyfriend, and whether her boyfriend was inside the house. Ex. 13; Tr. 219, 321. Neither officer asked WITNESS #3 about the details of the alleged assault or her boyfriend, or whether she needed medical assistance or shelter, or whether she felt herself in physical danger. Tr. 203, 211.

SUBJECT OFFICER #1 and SUBJECT OFFICER #2 asserted that SUBJECT OFFICER #1's brief questioning of WITNESS #3 constituted their preliminary investigation, and it established probable cause to believe that a crime had been committed by complainant. Tr. 335, 382; see also WITNESS OFFICER #1's concurrence, Tr. 297-98. The officers asserted that they found probable cause in the facts that (a) when they arrived at the COMPLAINANT'S house, WITNESS #3 confirmed that she had called 911 to say her boyfriend had hit her and thrown her down the stairs, (b) she appeared angry and had been crying, and (c) her clothes looked disheveled and her hair might have been pulled. Ex. 14; Tr. 321-322, 377, 382. SUBJECT OFFICER #1 also testified that he knew of complainant from a previous encounter that involved another individual with a weapon, and believed him to be violent. Tr. 322.

These contentions, however, were controverted by WITNESS #3 herself. She testified that she was uninjured and her clothes were not torn or "messed up." Tr. 202, 218. She further testified that when officers arrived she was "crying a little bit, but not like physically hurt crying ...," and that she was calm enough to speak coherently to the officers. Tr. 200, 201.

MPD describes probable cause as "a set of facts and circumstances, or reliable information that would lead a reasonable, prudent, and cautious officer to believe that a crime had been committed and a certain person committed it." Ex. 33, p. 26. It does not follow that a "prudent and cautious officer" would conclude, solely based on an upset girlfriend's unsubstantiated allegation of domestic violence, that probable cause existed to make an arrest. The officers' failure to conduct even a rudimentary preliminary investigation hampered their ability to determine probable cause. In the absence of details of the alleged assault, the officers had before them only allegations of a person who acted upset, against a person who had previously been in the presence of someone who possessed a weapon. It must be concluded that based on this scant information, no "reasonable, prudent, and cautious officer" would have concluded that there was probable cause to believe that an intra-family offense had occurred.

b. Exigent Circumstances

Even assuming that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 had probable cause to believe that an intra-family offense had just occurred, this did not in itself justify warrantless entry into a private home. There must also be exigent circumstances justifying an exception to the warrant requirement. *In re Sealed Case 96-3167*, 153 F.3d at 765. The general test for exigent circumstances is whether "the police had an 'urgent need' or 'an immediate major crisis in the performance of duty afford[ing] neither time nor opportunity to apply to a magistrate.'" *United States v. (James) Johnson*, 802 F.2d 1459, 1461 (D.C. Cir. 1986). Examples of exigent circumstances include the need to protect or preserve life or avoid serious injury, the risk of danger to police or other persons inside or outside the dwelling, and prevention of destruction of evidence. *In re Sealed Case 96-3167*, 153 F.3d at 766.

SUBJECT OFFICER #1 and SUBJECT OFFICER #2, and WITNESS OFFICER #1, offered several theories of "exigent circumstances" that allegedly permitted them to enter the COMPLAINANT's residence without a warrant or consent from a resident. First, they asserted

that once they had probable cause to believe that a crime had occurred, they were required to perform a “protective sweep” to ensure that the suspect was not a danger to the victim, the officers, or any others in the house. Tr. 322. Second, they needed entry to the house to secure the alleged crime scene and prevent destruction of evidence. Tr. 256. And finally, WITNESS OFFICER #1 asserted the need to arrest the suspect as a way to ensure the safety of the victim, since they did not have a legal means of requiring WITNESS #3 to leave the porch if she had insisted on remaining there. Tr. 251.

At the outset, it cannot be said that the officers were engaging in a mere “protective sweep” incident to an arrest, since they were in fact entering the dwelling to make the actual arrest. Protective sweeps are “quick and limited searches of premises to protect the safety of officers or others incident to an arrest.” *Maryland v. Buie*, 494 U.S. 325, 327 (1990). The officers cannot justify a warrantless arrest on the ground that once the arrest is made, they would be entitled to conduct a protective sweep.

Moreover, the notion that there was an “urgent need” or “immediate crisis” requiring the officers to immediately enter the COMPLAINANT’S home in order to preserve evidence or secure a crime scene is purely speculative. In the absence of any genuine preliminary investigation, there is no evidence that evidence or a crime was in danger of being compromised. Finally, WITNESS #3 was located outside the house and away from her alleged batterer. SUBJECT OFFICER #2 conceded that WITNESS #3 was not under any immediate threat of harm when they came upon her on the porch, there was no suggestion of involvement of a weapon, and the officers had no indication that she felt that she or anyone else was in danger. Tr. 393.

Because the officers entered the premises before knocking or otherwise requesting entry, and because they had not conducted a detailed preliminary investigation, there was no indication that the crime scene was about to be compromised or evidence lost. Had the officers conducted a genuine preliminary investigation, and requested entry into the house instead of simply entering, the issue of arresting complainant likely would have been swiftly resolved. In the absence of any evidence of an urgent need to protect the victim, officers or others, or to preserve evidence, it must be concluded that there were no exigent circumstances justifying a warrantless entry into the Bracey home.

2. Did Improper Entry Constitute Harassment

Having concluded that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 lacked probable cause for arresting complainant without a warrant, and that there were no exigent circumstances justifying warrantless entry into the COMPLAINANT’S house, the final issue is whether their conduct constituted harassment. Harassment includes “acts that are intended to bother, annoy, or otherwise interfere with a citizen’s ability to go about lawful business normally.” These acts must have been carried out “in the absence of a specific law enforcement purpose.” Ex. 26, p. 3.

More than just the ability to “go about lawful business normally,” a citizen’s right to be free from unjustified police intrusion into his private residence is a substantive right guaranteed by the Bill of Rights of the Constitution. Entry by SUBJECT OFFICER #1 and SUBJECT OFFICER #2 into complainant’s home, without permission or a warrant, clearly interfered with complainant’s ability to go about the lawful business of living unmolested in his own home.

a. Intent

To constitute harassment, the officers’ actions must have been “intended” to interfere with complainant’s right to be free from unwarranted police intrusion in his home. In this context, the term “intend” may have several meanings, including “[t]o have in mind a fixed purpose to reach a desired objective; to have as one’s purpose;” or “[t]o contemplate that the usual consequences of one’s act will probably or necessarily follow from the act, whether or not those consequences are desired for their own sake.” BLACK’S LAW DICTIONARY 813 (7th ed. 1999).

Under either definition, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 must have intended to interfere with complainant’s lawful enjoyment of his home. The Fourth Amendment’s proscription of warrantless government entry is a fundamental constitutional right, not some esoteric bit of law of which citizens, not to mention police officers, might be unaware. At the time of this incident, it had been well-established for over 20 years that the Fourth Amendment of the U.S. Constitution prohibited police officers from entering a private residence without permission or a warrant unless emergency or other exigent circumstances were present. See *Payton v. New York*, 445 U.S. 573, 590 (1980) (“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”).

In the complete absence of any indicia of urgency, the officers cavalierly ignored not only the basic tenants of the Fourth Amendment, but also the MPD’s own rules on conducting detailed preliminary investigations to determine probable cause in domestic violence situations. At a minimum, they must have understood that a Fourth Amendment violation was the inevitable consequence of their action. The officers’ failure to ask the complaining witness/victim about her allegations, or whether she needed medical attention or felt in danger, and their proceeding to enter a private dwelling without legal justification, indicates an intent to violate the constitutionally-protected sanctity of complainant’s home.

b. Absence of specific law enforcement purpose

As is discussed above, warrantless entry into complainant’s house served no law enforcement purpose. Other than the facts that the premises were located in a violent neighborhood, and SUBJECT OFFICER #1 knew that complainant had had past contact with people who possessed weapons, there were no indicia of undue risk that might be entailed by knocking and seeking permission to enter, or to speak with complainant outside his house, or

seeking an arrest warrant. No specific law enforcement purpose was served by preemptively entering the Bracey premises without legal justification.

In sum, it must be concluded that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 lacked probable cause to initiate an arrest of complainant, and there were no exigent circumstances involved in the situation that permitted a warrantless entry into complainant's home. The officers' failure to conduct even a minimal preliminary investigation, contrary to the plain requirements of MPD General order 304.11, evinces an intent violate complainant's right to security in his own home. As the officers' conduct furthered any specific law enforcement purpose, they must be found to have harassed complainant when they entered his home without a warrant or consent.⁴

B. Excessive or Unnecessary Use of Force

Complainant alleges that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 used excessive or unnecessary force when they arrested him on August 3, 2001. It is fundamental MPD policy that a police officer shall use only that force that is reasonably necessary to effectively bring an incident under control, while protecting the lives of the officers and others. MPD General Order 901.7, Part II (see Ex. 28, p. 1). MPD officers are permitted to use physical force only when (a) defending themselves or others from an actual or perceived attack, (b) effecting the arrest or preventing the escape of a suspect, and (c) overcoming resistance.

The MPD utilizes a "Use of Force Continuum" in which escalating levels of force may be applied by officers in response to resistant or dangerous individuals. The levels include: (a) verbal persuasion, (b) hand control procedures, such as a firm grip, escort or pain/pressure compliance holds, (c) protective weapons including OC Spray or impact weapons such as a tactical baton, and (d) deadly force. MPD General Order 901.7, Part IV, Section A, No. 1 (Ex. 28, p.2). Officers are not required to start at the lowest level of the use-of-force model, but they must select the appropriate level of force required to control the situation. MPD Application of Use of Force Continuum guidelines (see Ex. 29, p. 4).

MPD relies upon its Application of Use of Force Continuum guidelines (Ex. 29) to provide guidance to its officers on the appropriate use of force. These guidelines employ a color coded use-of-force model in which blue represents "day-to-day, non-threatening types of policing activities, mostly involving compliant subjects. For situations coded "blue," appropriate responses include cooperative controls; searching, handcuffing; and verbal and non-verbal communications and demands. Situations coded "green" usually involve additional behavior in which the subject displays a low level of noncompliant resistance, such as is seen with a passive resister. When confronted with this kind of subject, the officer uses low-level physical tactics

⁴ A third officer, WITNESS OFFICER #2, was present at the scene, but he apparently stood behind SUBJECT OFFICER #1 and SUBJECT OFFICER #2, had no direct involvement in the entry, and did not strike complainant as part of the arrest. Tr. 407-409. In any event, WITNESS OFFICER #2 was not charged with any misconduct.

such as strong verbal persuasion, soft empty hand control, and firm grip and escorting. Ex. 29, pp. 5-6. The “yellow” code signals a need for increased officer alertness due to a recognized danger because the subject is demonstrating active resistance. In that case, the officer perceives the situation escalating and becoming volatile, and appropriate responses include control holds, joint locks and OC spray. Ex. 29, p. 6. Code “orange” entails an assessment of imminent bodily harm to the officer or others, and there is a more directed focus on officer safety and defense. Appropriate responses at the “orange” level of the continuum include use of chemical agents, baton strikes, striking and blocking techniques, takedowns, “mountain bike ghost ride and power slide,” and K-9. Ex. 29, p. 7. Finally, the “red” category denotes the highest level of threat, such as imminent serious bodily injury or death of the officer or others. At the “red” level, appropriate responses include survival skills and use of lethal force. Ex. 29, p. 7.

In this case, witnesses presented widely divergent accounts of (a) who initiated the physical altercation between complainant and SUBJECT OFFICER #1 and SUBJECT OFFICER #2, (b) complainant’s conduct during the altercation and (c) the level of force used by the officers. As is reflected in the Findings of Fact listed above, and based on the statements and testimony at the hearing, the Complaint Examiner determined that (a) upon entry of the officers in his house, the complainant approached the officers in a hostile manner, demanding that they leave (Ex. 13; Tr. 324, 379); (b) the officers simultaneously asked that complainant accompany them out of the house (Tr. 329, 379); (c) when complainant moved toward the officers standing in the entryway near the front door, SUBJECT OFFICER #1 grabbed complainant on the arm or wrist (Ex. 16; Tr. 379,); (d) complainant responded to SUBJECT OFFICER #1’s grip by hitting or grabbing him, which caused both SUBJECT OFFICER #1 and SUBJECT OFFICER #2 to begin striking complainant with their fists and attempting to push him onto the ground in the living room (Tr. 329, 379-80); (e) complainant struggled with SUBJECT OFFICER #1 and yelled at him to “stop” at the same time SUBJECT OFFICER #1 was yelling at him to “stop resisting (Tr. 235, 324); SUBJECT OFFICER #1 and SUBJECT OFFICER #2 struck complainant with their fists and attempted to handcuff him incident to an arrest for assaulting a police officer (Tr. 227, 325); (f) complainant continued to struggle (Tr. 209, 408), causing SUBJECT OFFICER #2 to radio in a “1033” (officer in need of assistance) call in which he indicated that complainant “keeps hitting us” (Ex. 25); and SUBJECT OFFICER #2 hit complainant several times on his leg and arm with his ASP baton (Tr. 409).

It appears that SUBJECT OFFICER #1 initiated this incident by grabbing complainant’s arm or wrist, and that complainant escalated it by striking the officer and attempting to grab him around the waist. Complainant’s assertion that the officers struck him in a completely unprovoked manner, and that he offered no resistance whatsoever, was not credible.

Complainant alleges that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 used excessive or unnecessary force in that altercation. Use of excessive or unnecessary force, as defined by MPD Special Order 01-01, Part III, Section N includes “the use of force that is improper in the context of the incident giving rise to the use of force.” Evidence of either unlawful motives or good intentions is not determinative; rather, appropriateness of use of force

is measured according to whether it was objectively reasonable in light of the facts and circumstances confronting the officers. *Graham v. Connor*, 490 U.S. 386 (1989). Accordingly, the conduct of SUBJECT OFFICER #1 and SUBJECT OFFICER #2, as summarized above, are analyzed in context of the standards set forth in the MPD's Continuum of Force color-coded model.

1. SUBJECT OFFICER #1

SUBJECT OFFICER #1 initiated the use of force by grabbing the complainant's arm or wrist in an attempt to escort him out the front door. This occurred a few steps inside the front door as complainant approached the officers, demanding in a hostile tone that the officers leave. While complainant may well have had legitimate grounds for his anger at the officers' uninvited entry into the house, his conduct fell squarely into the situation described by Application of the Continuum of Force's "green" category. In that situation, the individual does not offer physical resistance but is not immediately responding to the officer's request and appears argumentative, leading to a perception of "an increase in risks within the confrontational environment." Ex. 29, p. 6. Notably, one of the responses deemed to be appropriate for this level is "firm grip and escorting." Therefore, it must be concluded that SUBJECT OFFICER #1 did not use excessive or unnecessary force when he gripped complainant to attempt to escort him out the door.

SUBJECT OFFICER #1 used considerably more force in responding to complainant's striking him and grabbing him around the waist. SUBJECT OFFICER #1 testified that he hit complainant repeatedly with his fists, and in doing so he injured his hand to the extent that he thought it might be broken. Ex. 24; Tr. 340. Witnesses testified that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 were "beating" on complainant (Tr. 67, 133-34, 208), and his injuries were severe enough to warrant medical attention. Exs. 5, 31.

However, the record established that complainant also struck SUBJECT OFFICER #1 and SUBJECT OFFICER #2, as is evidenced by testimony that he was "squirming, fighting, tussling" with the officers. Tr. 209. This is confirmed by the transcript of the contemporaneous dispatch tape in which SUBJECT OFFICER #2 is heard to exclaim, "he keeps hitting us!" Ex. 25.⁵

This evidence places the situation at the "orange" level of MPD's Application of the Use of Force Continuum. That level entails an actual or attempted assault on the officer, and where there is an assessment of imminent bodily harm to the officer or others. Ex. 29, p. 7. This level contemplates that the individual is actively and aggressively resisting the officer. Significantly, appropriate responses are acknowledged to possibly result in non-lethal injuries to the subject, and under the MPD's guidelines, a code "orange" situation justifies the use of "striking and

⁵ The actual tape was played during the hearing, and it did in fact reinforce the impression of a credible utterance made in the midst of a violent incident.

blocking techniques,” as well as takedowns. Ex. 29, p. 7. These were precisely the techniques utilized by SUBJECT OFFICER #1.

There was no credible evidence that SUBJECT OFFICER #1’s response lasted unduly long. Several witnesses noted that the entire altercation “happened so fast” and was over in a matter of minutes. Tr. 143, 204. In light of the “orange” level situation, SUBJECT OFFICER #1’s behavior must be found to have been objectively reasonable in light of the facts and circumstances confronting the officers. Therefore, it must be concluded that SUBJECT OFFICER #1 did not exercise excessive or unnecessary force in subduing and arresting complainant.

2. SUBJECT OFFICER #2

As with SUBJECT OFFICER #1, SUBJECT OFFICER #2’S physical confrontation with complainant arose in the context of a level “orange” situation, where complainant was acting aggressively and there was a distinct possibility of imminent bodily harm to another officer. SUBJECT OFFICER #2 testified that he attempted to assist SUBJECT OFFICER #1 by striking complainant first with his fists, and then by hitting him on the leg and arm with an ASP baton. Tr. 379. MPD’s Application of the Use of Force Continuum specifically authorizes use of striking and blocking techniques and “baton strikes” (Ex. 29, p. 7). As in the case of SUBJECT OFFICER #1, SUBJECT OFFICER #2’ behavior was objectively reasonable in light of the facts and circumstances confronting the officers. Therefore, it must be concluded that SUBJECT OFFICER #2 did not exercise excessive or unnecessary force.

IV. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment	Sustained
Allegation 2: Excessive or unnecessary Force	Exonerated

SUBJECT OFFICER #2

Allegation 1: Harassment	Sustained
Allegation 2: Excessive or unnecessary Force	Exonerated

Submitted on October 7, 2005.

Amy E. Wind
Complaint Examiner