

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	02-0507
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, Third District SUBJECT OFFICER #2, Third District
Allegation:	Use of Excessive or Unnecessary Force
Complaint Examiner:	Irene N. Pantelis
Merits Determination Date:	December 2, 2005

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC), formerly the Office of Citizen Complaint Review (OCCR), has the authority to adjudicate citizen complaints against members of the Metropolitan Police Department (MPD) that allege abuse or misuse of police powers by such members, as provided by that section. This complaint was timely filed in the proper form as required by § 5-1107, and the complaint has been referred to this Complaint Examiner to determine the merits of the complaint as provided by § 5-1111(e).

I. SUMMARY OF COMPLAINT ALLEGATIONS

COMPLAINANT alleges that MPD SUBJECT OFFICER #2 and SUBJECT OFFICER #1 used unnecessary or excessive force against him. COMPLAINANT, then a fifteen-year-old boy, claims that on September 18, 2002, SUBJECT OFFICER #2 punched him in the face three or four times, initiating a fight that spilled onto the sidewalk in front of the boy's home and resulted in his injury and arrest. COMPLAINANT further maintains that SUBJECT OFFICER #1 assisted SUBJECT OFFICER #2 in removing his police equipment and holding it while SUBJECT OFFICER #2 beat him.

II. EVIDENCE IN THE RECORD

No evidentiary hearing was conducted regarding this complaint, because the Complaint Examiner resolved all disputes of material facts on the basis of the OPC's Report of Investigation.¹

¹ It is noted that the Subject Officers did not submit any objections regarding this complaint.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On the night of September 18, 2002, SUBJECT OFFICER #2 and SUBJECT OFFICER #1 were on detail, sitting in their police car with the windows rolled down, when they saw and heard COMPLAINANT and WITNESS #1, two fifteen-year-old boys, engage in a loud altercation inside the porch of a house across the street from them, at 2029 First Street, N.W.
2. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 approached the house, flashed a light onto the teenagers, and told them to lower their voices. Complainant and WITNESS #1 responded with smart remarks, told the officers that they lived there, and continued their loud argument. SUBJECT OFFICER #2 went to the steps in front of the porch and told them that they should take their argument inside the house. SUBJECT OFFICER #2 also explained that their conduct was disorderly. Complainant and WITNESS #1 continued to argue loudly and yell profanity at SUBJECT OFFICER #2, insinuating that he take off his badge and gun so that they could beat him up.
3. During this exchange, Complainant spat once or twice in the direction of SUBJECT OFFICER #2. SUBJECT OFFICER #2 asked him if he was spitting on him, and Complainant said that he was not, but that if he was, he apologized for it. SUBJECT OFFICER #2 then grabbed Complainant off the porch and onto the steps of the house, where he patted him down. Complainant then returned to the porch.
4. After returning to the porch, Complainant and WITNESS #1 continued to be loud and verbally disrespectful to SUBJECT OFFICER #2, yelling profanity and telling him that he should take off his badge and gun so that they could fight. Citizens witnessing the incident saw SUBJECT OFFICER #2 exchange words with the teenagers and saw him remove his police equipment, handing it to SUBJECT OFFICER #1. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 deny that SUBJECT OFFICER #2 removed his equipment.
5. Complainant came out of the porch and stood right in front of SUBJECT OFFICER #2. The citizens witnessing the incident saw that Complainant's arms were hanging, near his body. SUBJECT OFFICER #2 believed that Complainant was showing him his fists and that Complainant shoved him on the shoulder. SUBJECT OFFICER #2 advised Complainant that he was going to be placed under arrest for threatening bodily harm. A physical struggle between them ensued. SUBJECT OFFICER #2 punched Complainant three or four times in the face. Complainant's arms flew in the air and he tried to punch SUBJECT OFFICER #2 back, but was unsuccessful. SUBJECT OFFICER #2 bear hugged Complainant, but Complainant resisted. SUBJECT OFFICER #2 and Complainant then wrestled in the yard, landing on a

gate, against which Complainant shoved SUBJECT OFFICER #2 several times. They continued to struggle and ended up against a car parked on the sidewalk, where SUBJECT OFFICER #2 held Complainant with his arm by the neck.

6. SUBJECT OFFICER #2 was then able to place one handcuff on Complainant and, with the assistance of SUBJECT OFFICER #1 or another officer who had arrived at the scene, place the second handcuff on Complainant. Before assisting SUBJECT OFFICER #2 with the second handcuff, SUBJECT OFFICER #1 did not attempt to intervene in the arrest.
7. Family members came out of the house and told Complainant to go inside the house. Complainant obeyed, but then got back out through the back door. Both SUBJECT OFFICER #2 and Complainant were still agitated after the fight. SUBJECT OFFICER #2 tried to grab Complainant again, but Complainant's aunt intervened and asked that a different officer take Complainant under custody.
8. Additional officers who had arrived at the scene placed Complainant in a police car, and drove him to the First District Youth Division to be processed for assault on a police officer and threatening bodily harm. Complainant's charges were later dismissed without prosecution.
9. Complainant was then taken to the D.C. General Hospital. He was treated for a superficial cut to the right side of his forehead. He did not sustain any other injuries to his face, torso, or extremities. He also did not complain of any headache, nausea, dizziness, or blurred vision. SUBJECT OFFICER #2 did not sustain any injuries other than a few minor scratches on his back from the metal on the gate.
10. WITNESS OFFICER #1, who was patrolling the neighborhood in his mountain bike, arrived at the scene during the initial exchange between SUBJECT OFFICER #2 and Complainant and engaged in crowd control during the incident, as there were numerous citizens who came out of their houses and seemed upset by it.

IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a), “[t]he 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:...(2) use of unnecessary or excessive force....”

General Order 901.7 sets forth the MPD's policies regarding the use of force and incorporates the constitutional standards applicable to such use. See Graham v. O'Connor, 490 U.S. 386, 396 (1989). In general, the MPD's policy “is that an officer shall use only that force that is reasonably necessary to effectively bring an incident under control, while protecting the lives of the officer and others.” MPD General Order 901.7, Part II. The use of non-deadly force is permissible only to protect the officers or others from physical harm, to

restrain or subdue a resistant individual, or to bring an unlawful situation safely and effectively under control. Id. at Part IV(C)(1). The decision to use force must be based on the danger posed by a subject confronted by the police and is based on the circumstances that the officer reasonably believes to exist. Id. at Part II. Officers are responsible for “weighing all other reasonable means of apprehension or defense before resorting to the use of force.” Id.

If force is necessary, officers must adhere to a continuum, employing escalating levels of force in response to resistant or dangerous individuals. MPD General Order 901.7, Part IV(A)(1). The levels include: (a) verbal persuasion, (b) hand control procedures, such as firm grip, escort or pain/pressure compliance holds, (c) protective weapons, including OC Spray or impact weapons such as tactical baton; and (d) deadly force. Id. While officers are not required to start at the lowest level, they are required to select “the appropriate level of force required by the circumstances.” Id. at Part II.

Officers are also required to intervene if they see other officers using excessive force, as long as they have a reasonable opportunity to do so. See e.g. Priester v. Riviera Beach, 208 F.3d 919, 924 (11th Cir. 2000); Mick v. Brewer, 76 F.3d 1127, 1136 (10th Cir. 1996); Koon v. Powell, 34 F.3d 1416, n.25 (9th Cir. 1994), aff’d and rev’d on other grounds, 518 U.S. 81 (1996); Thomson v. Boggs, 33 F.3d 847, 857 (7th Cir. 1994); O’Neil v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988); Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986); Webb v. Hiykel, 713 F.2d 405, 408 (8th Cir. 1983); Bruner v. Dunaway, 684 F.2d 422, 425-26 (6th Cir. 1982); Putnam v. Gerloff, 639 F.2d 415, 423 (8th Cir. 1981); Byrd v. Brishke, 466 F.2d 6, 10-11 (7th Cir. 1972); see also Gregory v. District of Columbia, 957 F. Supp. 299 (D.D.C. 1997).

In this case, SUBJECT OFFICER #2 used unnecessary force while bringing what he perceived to be an unlawful disorderly situation under control. Initially, SUBJECT OFFICER #2 acted appropriately by talking to Complainant for an extended period of time, asking him to lower his voice and take his loud argument with WITNESS #1 inside the house. He also correctly explained to the teenagers that their conduct was disorderly. When Complainant responded with smart remarks, profanity, threats, and spitting, SUBJECT OFFICER #2 appropriately grabbed Complainant and patted him down to show him that he needed to stop his boisterous behavior.

It was after SUBJECT OFFICER #2 released the Complainant from the brief grip, and Complainant insisted on verbally abusing SUBJECT OFFICER #2, challenging him to “remove his gun and badge” so that they could fight, that the reasonableness of SUBJECT OFFICER #2’s response becomes questionable. Whether it was because SUBJECT OFFICER #2 removed his police equipment, or for some other unknown reason, Complainant at this point stepped down from the porch of his house and stood toe-to-toe right in front of SUBJECT OFFICER #2. Assuming that SUBJECT OFFICER #2 could legitimately arrest Complainant for threatening bodily harm under the circumstances, as he stated to the teenager, it was unnecessary for SUBJECT OFFICER #2 to punch Complainant three or four times in the face. Throwing the first punches was unnecessary even if Complainant shoved him on the shoulder and showed him his fists. Instead of punching

Complainant, the reasonable response from SUBJECT OFFICER #2 would have been to step back, attempt to calm Complainant verbally, apply a firm grip, or escort Complainant to avoid a fight. By punching Complainant first, SUBJECT OFFICER #2 effectively started the fight that ensued, or at least significantly escalated the intensity of the struggle unnecessarily. Once the fight had started, SUBJECT OFFICER #2 appears to have used a reasonable degree of force to protect himself and bring Complainant, who was boisterous and resistant, under arrest.

Although SUBJECT OFFICER #2 may have had valid reasons for wanting to bring a situation that he perceived as unlawful safely and effectively under control, he had no valid reason for punching the teenager first. It was that act that amounts to an unnecessary use of force. The fact that Complainant only suffered a minor cut to his forehead and that SUBJECT OFFICER #2 had minor scratches on his back may show that the force was not brutal, but it was nonetheless unnecessary under the circumstances.

SUBJECT OFFICER #1, who is SUBJECT OFFICER #2's supervisor and was at the scene, did not have an opportunity to intervene and prevent the unnecessary use of force. SUBJECT OFFICER #2's initial verbal exchange with the Complainant did not indicate that they were about to engage in a fight. When SUBJECT OFFICER #2 removed his police equipment, SUBJECT OFFICER #1 perhaps should have told SUBJECT OFFICER #2 to adhere to police protocol, but she could not have known for sure that SUBJECT OFFICER #2 was in fact going to fight with Complainant and that he would be the one to throw the first punches. SUBJECT OFFICER #1 could have reasonably believed that SUBJECT OFFICER #2, who had acted reasonably and with measure up to that point, was being unorthodox, but intended to handle Complainant according to the escalation of force policy, as necessary. Once Complainant stepped down from the porch and stood toe-to-toe with SUBJECT OFFICER #2, the fight ensued quickly, giving her no meaningful chance to intervene, until the end, when she appears to have assisted SUBJECT OFFICER #2 in placing a handcuff on Complainant.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation:	Exonerated
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SUBJECT OFFICER #2

Allegation:	Sustained
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Submitted on December 2, 2005.

Irene N. Pantelis
Complaint Examiner