

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	05-0262
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER #1 SUBJECT OFFICER #2
<b>Allegation 1:</b>	Harassment
<b>Allegation 2:</b>	Insulting, Demeaning, or Humiliating Language or Conduct
<b>Complaint Examiner:</b>	Richard Jerome
<b>Merits Determination Date:</b>	February 9, 2006

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**

The complainant, COMPLAINANT, filed a complaint with the Office of Police Complaints (OPC) on April 29, 2005. COMPLAINANT alleged that on April 23, 2005, the subject officers, Metropolitan Police Department (MPD) SUBJECT OFFICER #2, Fifth District, and SUBJECT OFFICER #1, Fifth District, harassed him and used language or engaged in conduct toward him that was insulting, demeaning, or humiliating.

Specifically, COMPLAINANT alleged that on April 23, 2005, at approximately 7:00 p.m., two plainclothes police officers, one male and one female (later identified as SUBJECT OFFICER #2 and SUBJECT OFFICER #1), came to the front entrance of the Lazarus House apartment building located at 2523 14<sup>th</sup> Street, N.W. COMPLAINANT, a resident of Lazarus House, and the building manager on duty that evening, was outside the building locking a gate when the officers arrived, and he approached the officers. The officers wanted to enter the building, but COMPLAINANT believed he was not authorized to let the officers enter unless they had a warrant. Accordingly, COMPLAINANT asked the officers their names and whether they had a warrant. COMPLAINANT alleges that the officers told him that they did not need a warrant and that they could enter any building in D.C. they wanted to, except the White House. When COMPLAINANT again asked the officers for their names and badge numbers, they allegedly told him, "Move out of the way, you stupid motherfucker, before we lock you up."

As COMPLAINANT unlocked and opened the front door to let himself in, the officers entered the building right behind him, even though COMPLAINANT states that he did intend to let the officers come in. They then went past him into the building. COMPLAINANT followed the officers through the lobby and again told them that they needed a warrant to enter the building. At this point SUBJECT OFFICER #1 allegedly turned around, pointed her finger in COMPLAINANT'S face, and said, "You better back off unless you want to go to jail." COMPLAINANT then walked to the manager's booth and attempted to call his supervisor. According to COMPLAINANT, the officers returned to the lobby about ten minutes later and SUBJECT OFFICER #1 asked to see the tenant list. COMPLAINANT informed SUBJECT OFFICER #1 that he was not authorized to give out that information. SUBJECT OFFICER #1 wrote down her name and telephone number as well as SUBJECT OFFICER #2's name and number. Both officers then left the building.<sup>1</sup>

## **II. EVIDENTIARY HEARING**

An evidentiary hearing was conducted regarding this complaint on December 23, 2005. The Complaint Examiner heard the testimony of COMPLAINANT, SUBJECT OFFICER #2, SUBJECT OFFICER #1, and WITNESS #1, a resident at Lazarus House. A videotape of the Lazarus security cameras was introduced as an exhibit at the hearing, and several photographs of frames from the videotape were used as demonstrative aids during the hearing, but not introduced as exhibits.

## **III. FINDINGS OF FACT**

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on October 14, 2005, and an evidentiary hearing conducted on December 23, 2005, the Complaint Examiner finds the material facts regarding this complaint to be:

1. Lazarus House is an apartment building located at 2523 14<sup>th</sup> Street, N.W., Washington, D.C. It houses individuals who participate in the Samaritan Inn's transitional living program for persons who were formerly homeless and addicted to substance abuse. Lazarus House is a private apartment building and is not open to the public.
2. COMPLAINANT is a resident of Lazarus House and is its building manager.

---

<sup>1</sup> Pursuant to D.C. Official Code § 5-1108(1), on September 15, 2005, a member of the Police Complaints Board dismissed the complainant's allegations of insulting, demeaning or humiliating language against SUBJECT OFFICER #2, concurring in the determination made by OPC's executive director. Accordingly, the language allegations are only at issue against SUBJECT OFFICER #1 in this Determination.

3. On April 23, 2005, SUBJECT OFFICER #1 was investigating a robbery that occurred at the National Wholesale Liquidators, 514 Rhode Island Avenue, N.E. The police department identified a suspect in the robbery and had a copy of the suspect's driver's license. The address on the license was 2524 14th St., N.W., Apartment GR3.
4. On April 23, 2005, at approximately 7:00 pm, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 approached Lazarus House to obtain a description of the apartment building and the suspect's apartment to be used to apply for a search warrant.
5. On April 23, 2005, at approximately 7:00 pm., COMPLAINANT was outside Lazarus House locking a gate and saw SUBJECT OFFICER #2 and SUBJECT OFFICER #1 approach the front door of Lazarus House. The officers were in plainclothes. The front door of Lazarus House was locked.
6. COMPLAINANT approached the officers and asked if he could help them. The officers stated that they had been called to the building for police business and wanted to enter the building. COMPLAINANT asked the officers if they had a warrant to enter the building. The officers did not have a warrant and told COMPLAINANT that they did not need a warrant to enter the building.
7. COMPLAINANT did not at first let the officers into the building. While the officers asked COMPLAINANT to open the door for them, COMPLAINANT told the officers that he did not think he was allowed to let them in unless they had a warrant. The officers told COMPLAINANT that he would be arrested if he did not let them into the building.
8. Lazarus House has security cameras that record video surveillance. One is outside Lazarus House and overlooks the front entrance, and a second camera overlooks the lobby area of the building. The recording of the video cameras show the officers at the front entrance of the building at approximately 7:06 p.m. and conversing with COMPLAINANT until approximately 7:13 p.m.
9. After the discussion between the officers and COMPLAINANT, COMPLAINANT turned and opened the door to go into Lazarus House. While the door was open, SUBJECT OFFICER #2 then followed COMPLAINANT and entered the building, and then SUBJECT OFFICER #1 entered the building.
10. Upon entering the building, SUBJECT OFFICER #2 and SUBJECT OFFICER #1 walked past COMPLAINANT into the lobby and towards the stairs. COMPLAINANT followed them and continued to ask whether the officers had a warrant to enter the building.

11. SUBJECT OFFICER #1 turned around towards COMPLAINANT, put up her hand, shook her finger at COMPLAINANT, and, using profanity, told him that he had to step back and let the officers do their job or he would be arrested.
12. The officers went up to the third floor and found the suite in which Apartment GR3 was located. This apartment is in a suite behind a locked, entryway door. The officers were able to see the door of Apartment GR3 through the window part of the entryway door to the suite. When the officers were outside the door to the suite, WITNESS #1, one of the residents who lives in another apartment in the suite, Apartment GR2, heard the officers trying to open the suite door and came out of his apartment to the other side of the suite door. After a verbal exchange between WITNESS #1 and the officers, the officers went back down to the lobby of the building.
13. When the officers came down to the lobby, COMPLAINANT was in the manager's booth in the front of the lobby. SUBJECT OFFICER #1 came up to the booth while SUBJECT OFFICER #2 went out of the door of the building. While there is some dispute over the content of the discussion between SUBJECT OFFICER #1 and COMPLAINANT, SUBJECT OFFICER #1 gave COMPLAINANT her cell phone number and the cell phone number of SUBJECT OFFICER #2. SUBJECT OFFICER #1 then left the building.

#### **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; (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]."

##### **A. Harassment Allegation**

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., title 6A, § 2199.1

OPC concluded that there was reasonable cause to believe that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed the complainant in violation of MPD Special Order 01-01, based on COMPLAINANT’s description of the incident and the videotape of the security camera. COMPLAINANT alleged that when he encountered the officers outside the front door of Lazarus House, the officers forced their way into the building without his permission by threatening, pressuring, and intimidating him. COMPLAINANT asked the officers if they had a search warrant to enter the building. He alleges that the officers told him they did not need a warrant to get into the building, that SUBJECT OFFICER #2 told him they could get into any building in Washington other than the White House, and that SUBJECT OFFICER #1 said “I will lock your ass up if you do not allow us to do our job” by letting them into the building. He also alleges that they called him a “stupid motherfucker.”

After the officers threatened COMPLAINANT that he would be arrested if he did not let them into the building, COMPLAINANT turned toward the door and opened it to go in. Both officers allegedly rushed past COMPLAINANT and into the building as he let himself in. Once inside, COMPLAINANT followed the officers into the lobby and continued to tell them they needed a warrant. SUBJECT OFFICER #1 turned around, put up her hand toward COMPLAINANT, pointed her finger at him and told him to back off if he did not want to go to jail. After the officers came back downstairs, COMPLAINANT states that SUBJECT OFFICER #1 approached the manager’s booth and asked COMPLAINANT for a tenants list, which COMPLAINANT did not give to her. COMPLAINANT does say that SUBJECT OFFICER #1 provided him with her cell phone number and with SUBJECT OFFICER #2’s cell phone number. COMPLAINANT also noted that WITNESS #1, a Lazarus House resident, came downstairs after the officers had left and reported to him that the officers had attempted to unlock the door to the suite where WITNESS #1’s apartment is located. WITNESS #1 complained to COMPLAINANT that the officers had acted rudely toward him also.

SUBJECT OFFICER #1 and SUBJECT OFFICER #2 agree with COMPLAINANT’s description of the incident in some respects and disagree with other aspects. Both officers state that they tried to get in to the building, but the door was locked. COMPLAINANT approached them and asked if he could be of any help. They asked COMPLAINANT to let them in to the building, but he told them that he thought they needed a warrant. Both SUBJECT OFFICER #1 and SUBJECT OFFICER #2 agree that they told COMPLAINANT that they did not need a warrant to get into the building. SUBJECT OFFICER #1 admitted that she attempted to gain access to the building using the ruse that she was responding to a call from a tenant. Both officers also admit to telling COMPLAINANT that they would arrest him if he did not let them in the building. However, the officers deny that either one of them called COMPLAINANT a

“stupid motherfucker.” SUBJECT OFFICER #1 stated she might have used the words “hell” or “shit” but not in any derogatory way. SUBJECT OFFICER #1 also agreed that when they were in the building and COMPLAINANT was behind her, she turned around and put up her hand and shook her finger at him, and told him to back off and let her do her job, or he would be arrested.

The officers claim that they had a legitimate law enforcement purpose to enter the building to obtain a description of the apartment door for a warrant application. They distinguish between an officer’s legal authority to enter the common areas of an apartment building and a tenant’s apartment. As stated by SUBJECT OFFICER #2 at the complaint hearing, “[w]e have a right to go into any public building to check for occupancy permits or check for business license or anything else. That isn’t why we were [going] into that one, of course, but we have a right to.” [Transcript, p. 63.]

The officers also claim that they had a basis for threatening to arrest COMPLAINANT under the District’s Assault on a Police Officer statute, D.C. Code Section 22-505(a)(1995 repl.), 22-405 (2001). Section 22-405(a) states:

Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia, . . . while engaged in or on account of the performance of his or her official duties, shall be fined not more than \$5,000 or imprisoned not more than 5 years, or both.

The officers acknowledge that COMPLAINANT was not required to unlock the door for the officers, and he could have walked away. Respondents’ Brief, at 2. However, they allege that in continuing to question the officers’ right to enter the building without a warrant, COMPLAINANT was impeding their investigation and, therefore, could have been arrested.

Under the OPC regulations and MPD’s regulations, a finding of harassment in this case is warranted if the officers intentionally interfered with COMPLAINANT’s “ability to go about his lawful business” and threatened COMPLAINANT with arrest, without a legal basis for those actions. The Complaint Examiner concludes that the officers’ actions did result in COMPLAINANT feeling threatened and intimidated, and did pressure him to open the door, even though he did not want to let the officers in the building. The question then becomes whether the officers’ were legally justified in taking their actions.

As a general rule, the Fourth Amendment requires a police officer to have a warrant for a search of a building, subject to specific exceptions such as exigent circumstances. See, e.g., Katz v. United States, 389 U.S. 347 (1967). While the officers had a legitimate purpose in entering the building—to obtain the description of the suspect’s apartment for a warrant application—that does not answer the question of whether they had the right to enter a locked building such as Lazarus House, particularly against the wishes of the building manager, who was also a tenant in the building. There is a split in the circuit court opinions as to whether officers are authorized to

enter the common hallways of an apartment building. Compare United States v. Nohara, 3 F.3d 1239, 1241-42 (9<sup>th</sup> Cir. 1993) (entry authorized into apartment hallway); United States v. Concepcion, 942 F.2d 1170, 1171-72 (7<sup>th</sup> Cir. 1991) (entry into apartment common areas lawful); United States v. Barrios-Moriera, 872 F.2d 12, 14-15 (2d Cir. 1989) (apartment hallway), overruled on other grounds by Horton v. Cal., 496 U.S. 128 (2000); with United States v. Carriger, 541 F. 2d 545 (6<sup>th</sup> Cir. 1976)(entry not authorized into locked common areas); United States v. Heath, 259 F.3d 522 (6<sup>th</sup> Cir. 2001)(same). Each of these cases turned on whether the tenant in the apartment building has a reasonable expectation of privacy in the common areas of the apartment building.

The officers cite Penny v. United States, 694 A.2d 872 (D.C. 1997) in arguing that they were authorized to enter Lazarus House. There, the court ruled that a tenant of a residential apartment building could not challenge the officers' warrantless entry and search and seizure of contraband in the building's common areas, because he did not have a reasonable expectation of privacy in those areas. As noted in Complainant's brief, however, the building in Penny was not a locked building, and the ruling addressed the right of a tenant who did not have the authority to exclude others from the common areas of the building. See Rakas v. Illinois, 439 U.S. 128, 144 n12 (right to exclude others is one of the main rights of property). In this case, the common areas of the building were not open to the general public, and COMPLAINANT, as the building manager, was standing in the stead of the owner and had the authority and was in the position to deny persons entry to the building. These circumstances are more akin to those of United States v. Booth, 455 A.2d 1351 (D.C. App. 1983). There, the court found that police are not entitled to enter the hallway of a rooming house where nothing about the premises suggested that strangers are free to enter. The court found that the "precautions to maintain privacy" (such as the locked door) and the "authority to exclude" weighed in favor of a reasonable expectation of privacy. In that case, it was exigent circumstances which allowed the officers to enter, a situation which is not present here. In addition, the fact that MPD officers do not need a warrant to conduct an administrative inspection or search of a building does not exempt officers from warrant requirements for searches that are not made for such administrative purposes. See Whren v. United States, 517 U.S. 806 (1996); Alexander v. City and County of San Francisco, 29 F. 3d 1355 (9<sup>th</sup> Cir. 1004).

Even if the officers' entry into Lazarus House was not prohibited by the Fourth Amendment, both officers agree that COMPLAINANT was not required to unlock the door to Lazarus House and let them in. COMPLAINANT was performing his duty as the building manager in asking the officers whether they had a warrant to enter the building. The Complaint Examiner finds that COMPLAINANT'S actions in questioning the officers did not constitute impeding the officers' investigation in violation of the Assault on a Police Officer statute. The D.C. Court of Appeals has held that "to constitute an offense under D.C. Code 22-505, a person's conduct must go beyond speech and mere passive resistance or avoidance, and cross the line into active confrontation, obstruction or other action directed against an officer's performance in the line of duty." In re C.L.D., 739 A.2d 353 (1999). In this case, the court noted the common dictionary definitions of the terms "impede" (to "make timid or fearful;

inspire or affect with fear; frighten ...to compel to action or inaction”) and “interfere” (“to come into collision; to be in opposition; to run at cross purposes; clash ... to enter into or take part in a the concerns of others; intermeddle; interpose; intervene”). *Id.* at 356. Given the language of the statute and the concerns of the First Amendment, the court found that “speech, alone, may not form the basis of an offense under Section 22-505.” *Id.* Here, COMPLAINANT did not resist, oppose, impede or interfere with the officers in the meaning of the Assault on a Police Officer statute. Therefore, neither COMPLAINANT’s refusal to open the door for the officers, nor his questions to them (while they may have annoyed the officers), justified the officers’ threats to arrest COMPLAINANT. It was these threats of arrest that intimidated COMPLAINANT and caused him to open the door. The Complaint Examiner finds that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed COMPLAINANT and sustains the allegation of harassment.

### **B. Language Allegation**

Language or conduct that is insulting, humiliating, or demeaning, as defined by MPD Special Order 01-01, Part III, Section H “includes, but is not limited to acts, words, phrases, slang, slurs, epithets, ‘street’ talk or other language which would be likely to demean the person to whom it is directed or to offend a citizen overhearing the language; demeaning language includes language of such kind that its use by a member tends to create disrespect for law enforcement whether or not it is directed at a specific individual.”

MPD General Order 201.26, Part I, Section C provides that “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.”

COMPLAINANT alleges that outside the building, after he asked for the officers’ names and badge number, the officers did not provide that information, but instead told him to “move out the way you stupid motherfucker before we lock you up.” COMPLAINANT stated in his OPC interview that SUBJECT OFFICER #2 “continued to call me a ‘stupid motherfucker’ and tell me to move out of the way.” At the complaint hearing, COMPLAINANT stated that SUBJECT OFFICER #1 told him: “I will lock your ass up if you do not allow us to do our job” by letting them into the building. He also alleges that when he followed the officers through the lobby and continued to tell them they needed a warrant, SUBJECT OFFICER #1 turned to him, pointed her finger in his face, and told him to back off if he did not want to be arrested. These actions would clearly constitute improper language and conduct if proved. The Office of Police Complaints has already determined that there was insufficient evidence to conclude that SUBJECT OFFICER #2 used insulting, demeaning, or humiliating language toward COMPLAINANT in violation of MPD General Order 201.26. Therefore, only the language and conduct of SUBJECT OFFICER #1 is at issue.

SUBJECT OFFICER #1 states that she did not call COMPLAINANT a “stupid motherfucker” or any curse words. Hearing Transcript, at 120. At the complaint hearing, SUBJECT OFFICER #2 also stated that neither he nor SUBJECT OFFICER #1 used any



profanity or curse words toward COMPLAINANT. Hearing Transcript, at 76. SUBJECT OFFICER #2 stated that “[a]nd on the outside of the building, I think I did most of the talking. There was no disrespectful language or anything.” Id. While both officers stated that they did tell COMPLAINANT that he could be arrested if he did not let them into the building, neither admitted that SUBJECT OFFICER #1 stated “I will lock your ass up if you do not allow us to do our job.”

Once inside the building, there is no question that SUBJECT OFFICER #1 pointed her finger at and pushed her hand toward COMPLAINANT, to stop him from following her through the lobby. These gestures are clearly depicted in the video surveillance tape. SUBJECT OFFICER #1 justifies her actions, in part, based on safety, because officers do not want persons approaching them from behind. Hearing Transcript at 87. This is a legitimate reason for turning and telling COMPLAINANT to stop. However, SUBJECT OFFICER #1 also states that she “may have used the word hell or shit,” and that inside the building “I know I told him, get the hell away, back down. But hell and shit are my two famous words.” Id. at 97. “My hands came up and to make sure I understood the seriousness of it, I told him, back down, get the hell out of the way, let us do our jobs.” Id. at 99. The statement of WITNESS #1 provides some additional support for Complainant’s allegations. WITNESS #1 stated that when he heard someone at the door of the suite, he came to the door and asked SUBJECT OFFICER #1 if he could help her. According to WITNESS #1, SUBJECT OFFICER #1 “said very rudely – I don’t remember if she said get the F out of my face or get the hell away from the door and let me do my job. She said that.” Hearing Transcript at 53. “I don’t know if she use F or hell, but it was – it was verbal. She was like – like, get back. Get the fuck back, let me do my job. Get away from the door. That was it.” Id. at 54.

While there is some dispute about the exact language that was used in this incident, and which officer used which language, based on the statements of the officers, the Complainant and the witness, as well as an assessment of credibility of the statements, the Complaint Examiner concludes that SUBJECT OFFICER #1 used language toward COMPLAINANT that was insulting, demeaning, or humiliating, in violation of MPD General Order 201.26.

## V. SUMMARY OF MERITS DETERMINATION

### SUBJECT OFFICER #1

<b>Allegation 1: Harassment</b>	Sustained
<b>Allegation 2: Language</b>	Sustained

### SUBJECT OFFICER #2

<b>Allegation 1: Harassment</b>	Sustained
---------------------------------	-----------

Complaint No. 05-0262  
Page 10 of 10

Submitted on February 9, 2006.

---

RICHARD JEROME  
Complaint Examiner