

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	03-0410
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer Badge No., District:</b>	SUBJECT OFFICER, DCHAPD
<b>Allegation 1:</b>	Harassment
<b>Complaint Examiner:</b>	Amy E. Wind
<b>Merits Determination Date:</b>	March 2, 2006

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), including officers of the D.C. Housing Authority Police Department, 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 alleged that SUBJECT OFFICER harassed him by stopping him during an identification check in the parking lot of a public housing property, and frisking him when he objected to SUBJECT OFFICER allegedly demeaning and hostile tone towards him and the other individuals who had been stopped. Ex. 2.<sup>1</sup>

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<sup>1</sup>The complaint filed by COMPLAINANT on May 30, 2003, described the general nature of the incident at issue as involving excessive force, assault, and demeaning language and conduct. Ex. 2, p. 1. In the narrative of his complaint, he also alleged that SUBJECT OFFICER had engaged in harassment. Ex. 2, p. 4. On March 5, 2004, OPC referred the complaint to the United States Attorney's Office for the District of Columbia for possible criminal prosecution because it contained allegations of excessive use of force. Ex. 1, p. 2. On April 8, 2004, the U.S. Justice Department notified OPC that the Justice Department had declined prosecution. Thereafter, on December 22, 2005, Marc Schindler, a member of the Police Complaints Board (PCB,) concurred with a determination of the OPC Executive Director and dismissed COMPLAINANT's allegations regarding language and excessive force. Ex. 1, p. 1. However, OPC also determined at that time that COMPLAINANT's allegations regarding harassment might have merit and continued processing those allegations. Ex. 1, p. 2.

## II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because the Complaint Examiner determined on February 15, 2006, that the Revised Report of Investigation presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs., title 6A, § 2116.3. This Merits Determination is based upon review of the Revised Report of Investigation,<sup>2</sup> the attached exhibits, SUBJECT OFFICER's comments and objections, and the relevant statutory, regulatory and case authorities.

## III. FINDINGS OF FACT

The Complaint Examiner finds the material facts in this complaint to be as follows:

1. Greenleaf Gardens is public housing apartment complex located near the 200 block of K Street, S.W. that falls within the policing authority of the District of Columbia Housing Authority. Ex. 6. In 2003, the parking lot behind that apartment complex was known to Housing Authority police officers as a high crime area with "notorious" drug activity. Ex. 4. In May 2003, residents had been requesting increased police activity in that area for some time, spurred by a recent hospitalization of an infant who had found and ingested illegal drugs on the premises. Ex. 6.
2. On the evening of May 27, 2003, a "Tactical Sweep Team" comprised of 6-7 members of the D.C. Housing Authority Police Department ("DCHAPD") conducted an Operational Plan to identify individuals who might be trafficking in narcotics in the parking lot and alley behind the Greenleaf Gardens apartments. Exs. 2, 4, 6. The sweep was planned and led by DCHAPD, who instructed his officers to "stop anyone in the parking lot and ID them." Ex. 4. According to SUBJECT OFFICER, the purpose of the operation was to identify individuals present in the parking lot to see if they had a legitimate reason to be there and to check if there were any outstanding arrest warrants for those individuals. Ex. 4.
3. Sometime between 6:30-7:40 p.m. on May 27, 2003, members of the DCHAPD Tactical Sweep Team simultaneously entered the alley and parking lot area behind Greenleaf Gardens, approaching all individuals present and asking them show personal identification. Exs. 2-6. Approximately 6 individuals were present, including COMPLAINANT who had just entered the alley adjacent to the parking lot. Exs. 2-3. The individuals initially dispersed, but were intercepted by the officers and asked for identification. Exs. 4, 6. The officers did not draw their guns, and the individuals complied by providing their names and identification. Exs. 2, 5, 6.

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<sup>2</sup> On January 26, 2006, OPC revised its Report of Investigation by substituting District of Columbia Housing Authority Police Department (DCHAPD) General Order 301, which pertains to procedures to be followed by sworn DCHAPD officers in conducting preliminary investigations, for DCHAPD General Order 202, a directive applicable to DCHAPD Special Police Officers. As SUBJECT OFFICER has full powers as a DCHAPD officer, this Merits Determination cites only to DCHAPD General Order 301.

4. As SUBJECT OFFICER arrived at the scene, he observed COMPLAINANT walking away at a “brisk pace,” and ordered him to stop. Ex. 4. COMPLAINANT perceived SUBJECT OFFICER’s communications toward him and the other individuals, which included yelling and using profanity, as unnecessarily “hostile” and “demeaning.” Exs. 2, 3. He challenged SUBJECT OFFICER, asking why he was addressing them in such a “demeaning” and “disrespectful” manner (Exs. 2-4).

5. SUBJECT OFFICER then ordered all the individuals to place their hands on the fence and assume the “frisk position.” Ex. 2. COMPLAINANT again objected that this was “uncalled for” in the situation and that the action was “harassment.” Exs. 2, 3.

6. SUBJECT OFFICER put his hands on COMPLAINANT’s upper body to force him into a frisk position, and COMPLAINANT raised his fists to object. Exs. 3-4. SUBJECT OFFICER and COMPLAINANT briefly “tussled.” Exs. 3, 4. Other officers restrained COMPLAINANT, however, and no further contact between SUBJECT OFFICER and COMPLAINANT took place. Ex. 2, p. 2. COMPLAINANT was not injured. Ex. 3.

7. A small crowd of about 30 onlookers had gathered, and COMPLAINANT was arrested for disorderly conduct and taken to the First District police station office. Exs. 3, 5. He was released upon paying a fine. Ex. 3.

#### 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 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.

In this matter, COMPLAINANT alleged that DCHAPD SUBJECT OFFICER harassed him on May 27, 2003 when SUBJECT OFFICER used unnecessarily hostile and “demeaning” language toward him while carrying out an identification check, and then forced him to assume the “frisk position” when COMPLAINANT objected to SUBJECT OFFICER’s language.<sup>3</sup>

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<sup>3</sup> As noted above, COMPLAINANT also alleged that SUBJECT OFFICER engaged in offensive language and unnecessary force, but the Police Complaints Board dismissed those claims on December 22, 2005.

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.” Harassment is further defined by the OPC regulations as:

Words, conduct, gestures or other actions directed at a person that are purposefully, knowingly or recklessly in violation of the law or internal guidelines of the MPD or the covered law enforcement agency, 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, the Office 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 or the covered law enforcement agency, the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating.

D.C. Mun. Regs. tit. 6A, section 2199.1 (August 30, 2002).

#### **A. SUBJECT OFFICER’S Stop of COMPLAINANT**

The Fourth Amendment to the United States Constitution protects citizens from unreasonable police searches, seizures and detention. To justify a police intrusion upon the right of a citizen “to proceed on his or her way,” a police officer must be able to point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. State of Ohio*, 392 U.S. 1, 21 (1968).

The United States Supreme Court has made clear that not every interaction between police and citizens implicates the Fourth Amendment, and that police officers may initiate different types of encounters with members of the public based on varying levels of justification. Police officers are permitted to briefly stop an individual to ask him or her questions, even if they do not suspect the individual of criminal activity, “as long as the police do not convey a message that compliance with their requests is required.” *Florida v. Bostick*, 501 U.S. 429, 434 (1991). If it is clear that compliance is not mandatory, police are free to briefly intercept individuals and ask to see their identification. *INS v. Delgado*, 466 U.S. 210, 216 (1984).

The DCHAPD General Order covering preliminary investigations specifically authorizes its officers to initiate “contacts” (defined as a “face-to-face communication[s] between a police officer and an individual citizen under circumstances in which the citizen is free to leave at any time and is free not to respond to questions” -- DCHAPD General Order 301.3.1.) with citizens whenever the officer believes they are warranted. DCHAPD General Order 301.5.1. The provision specifically notes that since contacts rely on voluntary cooperation of the citizen, the officers need not rely on any specific indication of criminal activity.” DCHAPD General Order 301.5.2.

The operation at issue in this complaint apparently was conceived as one involving “contacts,” with officers approaching individuals located in the area, asking for identification, and individuals complying with the requests. Exs. 4, 6. WITNESS OFFICER #1, a member of the Tactical Sweep Team that participated in the operation, stated that SUBJECT OFFICER gave the officers orders to conduct “contacts.” Ex. 6. SUBJECT OFFICER noted in his January 20, 2006 “Objections to Findings and Conclusions” of the Report of Investigation (“SUBJECT OFFICER Objections”) that he had planned and conducted “scores” of such operations, presumably based on his knowledge and experience as a former Metropolitan Police Officer with 30 years of experience and training with regard to police-initiated “Terry stops” that such contacts were permissible. Thus, even in the absence of any indication that criminal activity was taking place (or going to take place) at the time of the sweep, SUBJECT OFFICER’s planning and participation in the sweep of the alley and parking lot would have been proper as long as it relied on voluntary cooperation by the persons stopped. See DCHAPD General Order 301.3.1.<sup>4</sup>

However, the operation became a “stop” rather than a “contact” with citizens once SUBJECT OFFICER ordered COMPLAINANT to stop and other the individuals previously contacted to assume the frisk position, because those individuals were prevented from continuing on their way. A person has been detained or “stopped” if he is “not free to leave, or to ignore the police and go about his business.” *Gomez v. United States*, 597 A.2d 884, 888 (D.C. 1991).

It is well-established that if a police officer wishes to stop (detain) a citizen for investigation into the possibility that the citizen has been involved in criminal activity, consistent with the Fourth Amendment, the officer must be acting on “a reasonable, articulable suspicion that criminal activity is afoot.” *Illinois v. Wardlow*, 528 U.S. 119, 123-4 (2000). In order for an investigatory stop to be supported by reasonable suspicion there must be some minimal level of objective justification for the stop. *In re A.F.*, 875 A.2d 633 (D.C. 2004).

While “reasonable suspicion” can be based on many things, it cannot be “inchoate and unparticularized suspicion” – rather, there must be specific reasonable inferences which a police officer can draw from the facts in light of his or her experience. *State of Ohio v. Terry*, 392 U.S. 1, 27 (1968). One factor that may be considered in determining whether reasonable suspicion of criminal activity existed is “unprovoked flight upon noticing the police.” *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Another is if it took place late at night in an area known to the police for illicit narcotics activity. *Gomez v. United States*, 597 A.2d 884, 889 (D.C. 1991). Other examples of factors that can be considered include the citizen’s personal appearance; actions indicating flight from a crime scene; suspicious demeanor; presence in an area of a known offense soon after it was committed or in an area known for the kind of activity on which the

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<sup>4</sup> DCHAPD regulations provide that “[c]ontacts may not be initiated merely because a person is “hanging around” or “loitering” unless the overall circumstances are such as would reasonably arouse the curiosity, concern or suspicion of the officer” DCHAPD General Order 301.5.3. In this case, however, the Operational Plan addressed a specific concern raised around illegal drug activity in the parking lot (see Exs. 4, 6), so the circumstances appear to justify the initiation of contacts.

suspicion is based; time of day; the officers' experience with a particular type of crime; information from witnesses, informants or other officers; or specific information known to the officer tying an individual to a specific crime. DCHAPD General Order 301.6.5.

SUBJECT OFFICER conceded that his actions toward COMPLAINANT constituted a stop rather than a citizen contact (SUBJECT OFFICER Objections, p. 3), but asserted that they were based on articulable suspicions about COMPLAINANT. SUBJECT OFFICER stated that the factors that formed the basis of his suspicion were: his knowledge of the area as one of illegal drug activity; the knowledge of other officers as to the drug activity in the area; his observation of COMPLAINANT's apparent "flight," *i.e.*, walking away "briskly" when officers arrived;<sup>5</sup> the time of day (dusk); COMPLAINANT's demeanor as he was approached by SUBJECT OFFICER, *i.e.*, challenging him; and SUBJECT OFFICER's 30 years of experience dealing with individuals involved in illegal drug activity. SUBJECT OFFICER Objections, p. 4.

This explanation essentially amounts to the facts that COMPLAINANT was present in an area known to officers as an area of narcotics activity, and that he continued walking when police arrived. Individuals cannot be deemed suspect simply because they are present in a drug-infested neighborhood where crime is rampant. *Gomez v. United States*, 597 A.2d 884, 890, n.14 (D.C. 1991). Further, there was no suggestion that COMPLAINANT made any furtive gestures indicative of hiding narcotics, weapons or other illegal items, or anything else related to drug activity. The fact that it was early evening or dusk does not create an articulable suspicion, in that there was no indication that it was unusual for someone to be walking in that area at that time of day. To the extent that SUBJECT OFFICER suggested that the early evening hour add to his suspicions, it must be noted that safety concerns cannot be included in the determination of whether an officer had a reasonable articulable suspicion of criminal activity (*i.e.*, if the officer lacked articulable suspicion to detain a citizen, the stop could not be justified on the notion that it would have been dangerous to stop the citizen without restricting his or her liberty.) *Gomez v. United States*, 597 A.2d 884, 891 (D.C. 1991).

DCHAPD General Order 301 states that if an officer wishes to temporarily detain a person the officer believes may have been engaged in criminal activity, such a "stop" (defined as "the temporary detention of a citizen by a police officer for the purpose of determining whether probable cause exists to arrest that person" – DCHAPD General Order 301.3.2) must be because the officer "reasonably suspects that a citizen has committed, is committing, or is about to commit a crime." DCHAPD General Order 301.6.2. SUBJECT OFFICER's contention that he believed COMPLAINANT had committed, was committing or was about to commit a crime

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<sup>5</sup> COMPLAINANT's account of how he initially encountered police differed markedly in that COMPLAINANT stated that he was stopped by two officers other than SUBJECT OFFICER, and he in fact had handed over his identification before interacting with SUBJECT OFFICER. Exs. 2, 3. However, SUBJECT OFFICER's account was corroborated by the statement of WITNESS OFFICER #1 that the individuals in the parking lot started to disperse upon arrival of the police. Ex. 6.

because he was present in the alley known for drug activity and continued walking in the presence of police is unsupportable.

Therefore, it must be concluded that SUBJECT OFFICER lacked justification (“reasonable suspicion”) when he ordered COMPLAINANT to stop, thereby improperly detaining him in violation of both the Fourth Amendment to the United States Constitution and the applicable provisions of the DCHAPD General Order 301. Given SUBJECT OFFICER’s many years of experience with the constitutional requirements involved in stopping citizens, such detention must be found to have been either knowing or in reckless disregard of those requirements. As SUBJECT OFFICER’s actions subjected COMPLAINANT to improper detention, SUBJECT OFFICER must be found to have harassed COMPLAINANT.

### **B. SUBJECT OFFICER’s Language Toward COMPLAINANT and Others**

DCHAPD General Order 301.5.3 states that “an officer may not initiate or conduct a contact in a hostile or aggressive manner.” It further provides that “[o]fficers should take special care to act in as a restrained and courteous manner as possible during a stop.” DCHAPD General Order 301.5.5.

COMPLAINANT’s complaint (see Ex. 2) stated that SUBJECT OFFICER engaged in unnecessary hostile and demeaning language, which was “harassment.” However, in a statement made only 3 days after the incident, COMPLAINANT was unable to describe the language he found inappropriate. Ex. 3. A witness stated that although she heard a police officer state that he was “going to kick COMPLAINANT’s ass,” she did not believe the officer was SUBJECT OFFICER. Ex. 7.

Thus, while SUBJECT OFFICER did not address the nature of his language during the events in question in either the statement he gave to OPC or his Objections to OPC’s Findings and Conclusions (see Ex. 4 and SUBJECT OFFICER Objections), it was not established that SUBJECT OFFICER violated the requirement of DCHAPD General Order 301 that contacts and stops be carried out in a non-hostile and courteous manner. Additionally, even if SUBJECT OFFICER had violated those provisions, there was no evidence that such behavior subjected COMPLAINANT to “arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights... or den[jied] or impede[d him] in the exercise or enjoyment of any right, privilege, power or immunity.” D.C. Mun. Regs. tit.6A, section 2199.1 Therefore, any inappropriate language by SUBJECT OFFICER cannot be found to have constituted harassment.

### **C. SUBJECT OFFICER’s Order to Assume the “Frisk Position”**

Once police officers have effected a valid stop, they may conduct a protective search if they have reasonable grounds to believe that the suspect is armed and poses a danger to himself or others. *State of Ohio v. Terry*, 392 U.S. 1, 30 (1968). “Even assuming the validity of an investigatory stop, the police are not at liberty to conduct a protective search every time they

make an investigative stop.” *Upshur v. United States*, 716 A.2d 981, 983 (D.C. 1998). To justify a protective search, “the police officer must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.” *Sibron v. New York*, 392 U.S. 40, 64 (1968).

Consistent with these cases, DCHAPD General Order 301.9.1 provides that “[a]n officer may frisk a citizen at any time during a stop if the officer reasonably suspects that the citizen is carrying a concealed weapon or dangerous instrument, and a frisk is necessary to protect the officer or others.” DCHAPD General Order 301.9.2 lists examples of factors that might be considered, such as bulging clothing or furtive movements that might suggest the presence of a weapon; knowledge that an individual has a prior arrests or a reputation for weapons offenses; the location is known for criminal activity or is extremely isolated; the time of day such that an attack would be difficult to defend against; the officer has reason to suspect that the individual is about to commit a violent or serious offense; the officer is outnumbered by the number of suspects; or an individual’s companion is found to have a weapon.

SUBJECT OFFICER asserted that he initiated the frisk because he had concerns about his personal safety. SUBJECT OFFICER Objections, p. 3. He stated that he had reasonable suspicions for his safety due to his knowledge of the area as a location known for criminal activity; his knowledge that individuals involved in illegal drug transactions are often armed, particularly with guns; his suspicion that COMPLAINANT was involved or about to be involved in drug activity; and his belief he was in jeopardy due to the number of other individuals who had been stopped by other officers and the number of onlookers who were gathering. SUBJECT OFFICER Objections, p. 3.

SUBJECT OFFICER’s explanation did not establish that he reasonably suspected that COMPLAINANT was carrying a concealed weapon or dangerous instrument as required by the courts and DCHAPD General Order 301.9.1. He relied solely on the fact that the events took place in a known area of drug activity, and that he was aware that individuals involved in drug transactions often used weapons. SUBJECT OFFICER did not identify anything specific to COMPLAINANT, such as bulging clothing or furtive gestures, that might suggest he had a weapon.

Moreover, SUBJECT OFFICER did not point to any credible evidence that he believed the frisk was “necessary to protect the officer or others.” DCHAPD General Order 301.9.1. Six individuals were stopped at the scene by six or seven officers. Exs. 4, 6. It was dusk, not night, when these events occurred, and WITNESS OFFICER #1 stated that when he looked over where SUBJECT OFFICER was interacting with COMPLAINANT, he did not perceive any particular threat. Ex. 6.

SUBJECT OFFICER did not articulate any legitimate factors leading him to reasonably suspect that COMPLAINANT had a concealed weapon. Therefore, he conducted an improper frisk in violation of DCHAPD General Order 301.9.1. Again, given SUBJECT OFFICER’s long years of police experience, this violation must be found to have been either knowing or reckless.



Since the violation resulted in an improper detention and search of COMPLAINANT's person, SUBJECT OFFICER must be found to have harassed COMPLAINANT when he subjected him to a frisk.

**V. SUMMARY OF MERITS DETERMINATION**

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

Submitted on March 2, 2006.

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Amy E. Wind  
Complaint Examiner