

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	04 0055
Complainant:	COMPLAINANT
Subject Officer Badge No., District:	SUBJECT OFFICER, Fifth District
Allegation 1:	Harassment
Allegation 2:	Insulting, Demeaning, or Humiliating Language or Conduct
Allegation 3:	Use of Excessive or Unnecessary Force
Allegation 4:	Discrimination
Complaint Examiner:	Linda Reese Davidson
Merits Determination Date:	August 22, 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 alleged that on October 30, 2003, SUBJECT OFFICER, harassed him, discriminated against him because of his race, used language or engaged in conduct toward him that was insulting, demeaning, or humiliating and used unnecessary or excessive force against him. The complainant alleged that he was standing in the vicinity of the 600 block of Newton Street, N.W., near the intersection of Georgia Avenue, when the subject officer approached him with weapon in hand. The complainant alleges that the subject officer hit him in the head with his gun, and punched him in the face and body. The complainant alleged that several other police officers arrived at the scene and began to beat him. The complainant alleged that as the officers beat him, they referred to him as a “nigger” and “bitch”. The complainant was arrested, transported to the Fourth District and charged with Disorderly Conduct. After approximately an hour and a half, he paid \$25.00 and was released without further prosecution.

II. EVIDENTIARY HEARING

After reviewing the file, the Complaint Examiner determined that an evidentiary hearing was required. Pursuant to D.C.M.R., Title 6A, Section 2117.1, a preliminary hearing conference is required before holding an evidentiary hearing. A preliminary hearing conference was scheduled for July 20, 2006 at 3:00 p.m. All parties were given timely notice of the preliminary hearing. The Complaint Examiner and the subject officer were present. However, the complainant failed to appear. Therefore, no evidentiary hearing has been held. Jerry Roscoe, ADR/JAMS, Program Manager, attempted to contact the complainant in an effort to ascertain whether he intended to proceed with the matter. To date, Mr. Roscoe has been unable to make contact with the complainant. On August 4, 2006, Jerry Roscoe indicated that a determination should be issued. Because the complainant has not indicated to anyone at either ADR/JAMS or OPC, the Complaint Examiner will not treat the matter as though the complainant has requested the complaint be withdrawn. The Complaint Examiner has reviewed the case and has determined that there are material issues in dispute, as well as a nexus of occurrences that require elucidation. Any decision rendered as plenary would be deficient. Therefore, the complainant, if he so desires, can request a re- hearing, in part or whole, if such request is submitted within a reasonable period of time [to be determined by the Office of Police Complaints [OPC]].

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation and the objections submitted by subject officer, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On November 12, 2003, the COMPLAINANT, was on his cell phone in the vicinity of the 600 block of Newton Street, N.W. It was approximately 3:00 a.m.
2. The complainant alleged that suddenly, the subject officer, later identified as SUBJECT OFFICER, jumped out of a vehicle, with gun drawn, approached him and struck COMPLAINANT in the head with his gun.
3. The complainant stated that the subject officer accused him [the complainant] of telling him to "Suck his dick."
4. The complainant stated that six to seven officers arrived at the scene and began to punch him and while the officers punched him they called him a "nigger" and "bitch."
5. The complainant fought back during the altercation. He defended himself from physical harm.
6. The complainant was arrested, transported to the Fourth District and charged with Disorderly Conduct.

7. After an hour and a half, the complainant paid \$25.00 and was released without further prosecution.
8. The subject officer alleged that while driving eastbound in the 600 block of Newton Street, N.W., he observed the complainant on the opposite side of the street; the complainant was on his cell phone and his free hand was concealed underneath his outer jacket.
9. The subject officer alleged that the complainant yelled, "Suck my dick, you bitch motherfucker." The subject officer pointed to the MPD emblem on his jacket and asked, "Who are you talking to? I'm the police."
10. The subject officer alleged that the complainant responded, "You heard me the first time, suck my dick."
11. SUBJECT OFFICER pulled over, exited his vehicle and approached the complainant. SUBJECT OFFICER held his weapon down by his side because he thought that the complainant might have been armed.
12. SUBJECT OFFICER stated that as he approached the complainant, he repeatedly ordered COMPLAINANT to remove his hand from under his jacket, but that the complainant refused the order.
13. The subject officer called for back up then attempted to pat down the complainant's waist.
14. The subject officer alleged that the complainant 'smacked' his hand away and then punched the subject officer in the chest.
15. The subject officer responded by punching the complainant in the face with a closed fist.
16. The subject officer and the complainant exchanged punches in the physical altercation.
17. WITNESS OFFICER #1, Third District, did not recall whether he arrived at the scene as a result of SUBJECT OFFICER' radio call, or whether he just happen to be driving by the vicinity.
18. WITNESS OFFICER #1 stated that, when he arrived at the scene, he observed SUBJECT OFFICER and COMPLAINANT engaged in a struggle.
19. WITNESS OFFICER #1 assisted SUBJECT OFFICER in subduing and handcuffing COMPLAINANT.
20. The complainant was arrested, taken to the Fourth District and charged with Disorderly Conduct.

21. The complainant remained in custody for approximately ninety minutes. After paying \$25.00, he was released without further prosecution.
22. WITNESS OFFICER #1 stated that several other officers arrived at the scene after COMPLAINANT had been handcuffed.
23. Other than WITNESS OFFICER #1, none of the other backup officers have been identified.
24. The complainant stated that he was injured during the altercation. He asserted that he sustained a knot on his head, a swollen cheek, bruises on his ribs, legs and arms, and, a pinch on his hand caused by the clasp of a gun hammer. He stated that his wrists were bruised due to the handcuffs having been placed on him too tightly.
25. He asserted that, he went the Washington Hospital Center but was refused treatment because he did not have insurance.

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 harassment, the use of unnecessary or excessive force, discrimination, and language or conduct that is insulting, demeaning, or humiliating.

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

Notwithstanding the fact that a hearing was not held, there is little question as to whether the subject officer harassed the complainant. The subject officer’s conduct interfered with the complainant’s ability to go about lawful actions. The subject officer’s actions were purposefully directed at COMPLAINANT and subjected the complainant to arrest, detention and

mistreatment. The subject officer stated that while driving in the 600 block of Newton Street, N.W., he observed the complainant standing on the street and that the complainant appeared to be talking on a cell phone. The subject officer stated that one of the complainant's hands was being used to hold the cell phone and that his other hand was concealed underneath his outer jacket. In the OPC Report of Investigation, the subject officer alleged that the area was under special surveillance because of witness intimidation in a then, pending criminal case. Finally, the subject officer stated that he was familiar with the area but he did not recognize the complainant. SUBJECT OFFICER continued to scrutinize the complainant as he continued driving. The subject officer stated that COMPLAINANT yelled, "Suck my dick you bitch motherfucker." According to the subject officer, he asked the complainant, "Who are you talking to? I'm the police." The subject officer alleged that, the respondent replied, "You heard me the first time. Suck my dick." It was at this time that the subject officer pulled over and got out of his car. He held his gun in his hand because he thought COMPLAINANT might be armed. As he approached the complainant, he repeatedly ordered COMPLAINANT to remove his hand from underneath his jacket. The complainant refused the order.

The subject officer called for assistance. While waiting for backup, the officer attempted to pat down the complainant. The complainant allegedly 'smacked' the subject officer's hand away and then punched SUBJECT OFFICER in the chest. According to SUBJECT OFFICER, a struggle ensued and punches were exchanged. The complainant alleged that six or seven police officers arrived at the scene and began beating him. The complainant admits that he had to defend himself in the exchange.

It should be noted that, WITNESS OFFICER #1, Third District, is the only other officer identified [in the OPC Report of Investigation] as having been involved in the incident. WITNESS OFFICER #1 stated that when he arrived at the scene, the complainant and subject officer were engaged in a struggle. He and SUBJECT OFFICER subdued the complainant. The complainant was arrested, transported to the fourth district and charged with Disorderly Conduct. After ninety minutes, the complainant paid \$25.00 and was released without further prosecution.

Did SUBJECT OFFICER stop COMPLAINANT because he had reason to believe that the complainant had committed a crime or was about to commit a crime? See *Terry v. Ohio*, 392 U.S. 1 (1968) or did he stop COMPLAINANT as a response to the complainant's alleged act of yelling profanity at him? The facts as described in SUBJECT OFFICER'S ¹narrative do not support a Terry stop. The subject officer did not have a reasonable, articulable suspicion to stop the complainant and thus, there is no need to provide a lengthy analysis of the practicable application of the standard. The subject officer indicated that from fifteen (15) feet away, he observed the complainant holding and talking on a cell phone. He observed the complainant's other hand underneath his jacket. COMPLAINANT may have had his hand under his jacket for any number of reasons unrelated to having a gun. See *Duhart v. United States*, 589 A.2d 895

¹ An OPC Investigator interviewed SUBJECT OFFICER, and in his statement, he provided a characterization of the circumstances surrounding the incident with COMPLAINANT.

(D.C. 1991). It was 3:00 a.m. and the complainant was in an area that was under surveillance because of reported criminal activity. However, a police officer cannot rely upon a “high crime area” to justify stops. See *Jackson v. United States*, 805 A.2d 979 (D.C. 2002). Nor can he use as a basis for a stop, the fact that the complainant shouted a profane remark at him while no was around. See *In re C.L.D.*, 739 A 2d 353 (D.C. 1999), (using profanity toward a police officer while refusing to comply with officer’s request did not constitute a criminal offense...) See also, *In re M.W.G.*, 427 A 2d 440 (D.C. 1981) (cursing at police officer did not constitute the offense of using profane language in public, proscribed by D.C. Official Code, Section 22-1307, because the words were not spoken under circumstances which threatened a breach of the peace).

The subject officer made an improper contact with the complainant. The improper contact led to the physical altercation, the arrest and the charge filed against him. SUBJECT OFFICER violated MPD Special Order 304.10 and the Fourth Amendment to the U.S. Constitution.

In determining whether conduct constitutes harassment, the Office will look at the totality of the circumstances surrounding the alleged incident...whether the officer adhered to applicable orders, policies, procedures, practices and training of the MPD...D.C.M.R., Title 6A, Section 2199.1. It was 3:00 a.m. when SUBJECT OFFICER observed the respondent standing in the 600 block of Newton Street N.W. talking on his cell phone. He observed that the complainant’s free hand remained underneath his outer jacket. The area was targeted by MPD and known as a haven for criminal activity. Despite all of the above listed factors [none of which would justify a Terry stop], the subject officer continued to visually observe the complainant. However, it was only when the complainant yelled a profane remark at him [no one else was around to hear it] that, SUBJECT OFFICER pulled over, exited the vehicle and approached COMPLAINANT.

SUBJECT OFFICER violated MPD General Order 304.10 and the Fourth Amendment to the U.S. Constitution. He lacked a legitimate law enforcement purpose.

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.”

The complainant stated that when the subject officer initially approached him, SUBJECT OFFICER had his gun drawn and pointed in his face. Angered by the previously mentioned profane remark, the subject officer charged at the complainant and punched him in the face. The complainant asked the subject officer what was wrong, and SUBJECT OFFICER allegedly

replied, "Shut up". It is not inconceivable that COMPLAINANT may not have exercised civility. He may have used the words "shut up" instead of "be quiet". But there are insufficient facts to support the allegation. The complainant stated that other back up police officers arrived at the scene and as they beat him, they referred to him as "nigger" and "bitch". The backup officers are unidentified and therefore this allegation cannot be charged against only the subject officer.

Use of unnecessary or excessive 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."

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

The complainant alleged that he was beaten by six or seven unidentified police officers. He alleged that he sustained a knot on his head, a swollen cheek, bruises on his ribs, legs, arms, a pinch on his hand caused by the clasp of a gun hammer, and bruises on his wrists due to the handcuffs having been placed on him too tightly. The complainant alleged that he went to The Washington Hospital Center but was refused treatment because he did not have health insurance. The complainant recalls being beaten and spoken to in a derogatory manner by six or seven police officers. However, WITNESS OFFICER #1 is the only other officer identified and he asserted that the other back up officers arrived at the scene after the complainant was already subdued and handcuffed. The Complaint Examiner has determined that a hearing is required on the excessive force allegation. There are material issues in dispute as well as a nexus of occurrences that require elucidation. The subject officer's initial contact with the complainant was determined to be improper and connects too closely to the Unnecessary or Excessive Force allegation. An attempt has been made to contact the complainant, but to no avail. A final decision on the Unusual/Excessive Force allegation should not be made due to an inability to contact the complainant. Any permanent decision rendered as plenary would be deficient. The complainant, if he so desires, and if done so in a timely manner [to be determined by OPC] should be given the opportunity to be heard on this part of the complaint. No decision can be made due to Insufficient Facts.

Discrimination, as defined by MPD Special Order 01-01, Part III, Section D includes "failure to provide proper police service, either in the enforcement of the law or in the provision of police service, on the basis of race, color, religion, national origin, sex, age, marital status,

personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, or place of residence or business.”

MPD General Order 201.26, Part I, Section A provides that “In accordance with the District of Columbia Human Rights Law, members shall not discriminate, either in the enforcement of the law, or in the provision of police service, on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, or place of residence or business....”

The regulations governing OPC define discriminatory treatment as “[c]onduct by a member of the MPD ... that results in the disparate treatment of persons because of their race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, place of residence or business or any other ground of discrimination prohibited under the statutory and the common law of the District of Columbia.” D.C. Mun. Regs., title 6A, § 2199.1

The complainant alleged that the six or seven backup police officers arrived at the scene and began hitting and punching him and during the assault, they called him a “nigger” and a “bitch”. However, the officers that were alleged to have beaten him and hurled insults at him are unidentified. It is cited in the OPC Report of Investigation, that the complainant did not specify the basis for his discrimination allegation. Therefore, there is insufficient evidence in the record to uphold the allegation.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1:	Sustained
Allegation 2:	Insufficient Facts
Allegation 3:	Insufficient Facts
Allegation 4:	Unfounded

Submitted on August 22, 2006.

Linda Reese Davidson
Complaint Examiner