

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF CITIZEN COMPLAINT REVIEW**

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	02-0031
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, First District
Allegation 1:	Use of Excessive or Unnecessary Force
Allegation 2:	Insulting, Demeaning, or Humiliating Language or Conduct
Complaint Examiner:	Roy L. Pearson, Jr.
Merits Determination Date:	December 30, 2004

Pursuant to D.C. Code § 5-1107(a), 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 was referred to this Complaint Examiner to determine the merits of the complaint as provided by D.C. Code § 5-1111(e).

I. SUMMARY OF COMPLAINT ALLEGATIONS

COMPLAINANT alleges that SUBJECT OFFICER (1) used unnecessary or excessive force against him and (2) engaged in language or conduct that was insulting, demeaning, or humiliating to him. In the complaint he filed with OCCR, COMPLAINANT claims that on the evening of October 31, 2001, SUBJECT OFFICER repeatedly told him to shut up and called him a bitch. He further alleges that the officer punched him repeatedly and used unnecessary force.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted on December 21, 2004, in an effort to resolve conflicts between the statements made by potential witnesses in this case to various OCCR, MPD, and USAO investigators in 2001, 2002, and 2004, and to assess credibility. The Complaint Examiner heard live testimony from COMPLAINANT, SUBJECT OFFICER, and WITNESS OFFICER #1. WITNESS #1 was subpoenaed at the request of the examiner, but did not appear. Without objection from the parties, the record was closed without hearing live testimony from WITNESS #1. Without objection from the parties, all exhibits attached to the original Record of Investigation, and to the Supplemental Report of Investigation, were introduced into evidence at the outset of the hearing. Those exhibits consisted of the following documents:

- Exhibit 1: OCCR Formal Complaint, COMPLAINANT, dated November 5, 2001
- Exhibit 2: Memorandum of Interview (MOI), COMPLAINANT, November 5, 2001
- Exhibit 3: Transcript of MPD's interview of WITNESS #1, December 14, 2001
- Exhibit 4: MPD MOI, WITNESS #2, January 9, 2002
- Exhibit 5: MPD MOI, WITNESS #3, January 9, 2002
- Exhibit 6: MPD MOI, WITNESS #4, January 9, 2002
- Exhibit 7: MOI, SUBJECT OFFICER, April 20, 2004
- Exhibit 8: MOI, WITNESS OFFICER #1, May 14, 2004
- Exhibit 9: COMPLAINANT's Medical Records, Greater Southeast Community Hospital, October 31, 2001
- Exhibit 10: Photographs of COMPLAINANT's injuries taken by OCCR, November 5, 2001
- Exhibit 11: Photographs of incident location taken by MPD, January 9, 2002
- Exhibit 12: COMPLAINANT's sketch of the incident location, November 5, 2001
- Exhibit 13: SUBJECT OFFICER's sketch of the incident location, April 20, 2004
- Exhibit 14: MPD Computer Aided Dispatching System (CADS) Printout, October 31, 2001
- Exhibit 15: PD 251, Incident Based Report, COMPLAINANT's charge of simple assault-domestic violence, and SUBJECT OFFICER's use of force.
- Exhibit 16: PD 163, Arrest/Prosecution Report, charge of simple assault
- Exhibit 17: PD 313, Arrestee's Injury/Illness Report
- Exhibit 18: SUBJECT OFFICER's MPD Time and Attendance Pay Period Detail
- Exhibit 19: USAO Declination letter
- Exhibit 20: MPD General Order 901.7
- Exhibit 21: Application of the Use of Force Continuum for the Metropolitan Police Department, Maurice T. Turner, Jr., Institute of Police Science, November 2000
- Exhibit 22: MPD General Order 201.26, Part I
- Exhibit A: Complaint Examiner Pearson's Request for Additional Investigation
- Exhibit B: MPD Investigative File Cover Memorandum
- Exhibit C: MPD Report of Investigation (dated 10/01/02)
- Exhibit D: OCCR Investigator Megan Rowan's Memorandum of Investigative Activity (prepared 10/14/04)
- Exhibit E: Transcript of MPD Interview with WITNESS #2
- Exhibit F: Transcript of MPD Interview with WITNESS #3
- Exhibit G: Transcript of MPD Interview with WITNESS #4
- Exhibit H: OCCR Memorandum of Investigative Activity (prepared 5/05/04)

Additionally, counsel for COMPLAINANT prepared the following exhibit, which both counsel found to be useful in their examination of witnesses and in their closing arguments:

Complainant's Exhibit AA: Layout of LOCATION #1, N.E.

COMPLAINANT's counsel conceded that at the time of the incident in question the dining room table shown on Complainant's Exhibit AA was perpendicular to the fireplace in the dining room, and not horizontal.

III. FINDINGS OF FACT

Based on a review of OCCR's *Report of Investigation* (including exhibits attached thereto), the objections submitted by SUBJECT OFFICER on September 28, 2004, the *Supplemental Report of Investigation* (including exhibits attached thereto), and the evidence and arguments presented at the hearing conducted on December 21, 2004, the Complaint Examiner finds the material facts regarding this complaint to be as follows:

1. On October 31, 2001, COMPLAINANT began to drink after leaving his job at the COMPANY #1. COMPLAINANT admits that he had one beer and one-half of a half pint of liquor before arriving home at LOCATION #1, N.E.

2. After arriving home, COMPLAINANT became involved in an argument with his live-in girlfriend, WITNESS #1, whose three boys, then aged 10, 12, and 15, lived with them.

3. At 7:56 p.m., WITNESS #1 called 911 to request that the police come to her address. She complained that her boyfriend, COMPLAINANT, was drunk, "fighting on me" and was trying to throw her out of the house. In response to a specific inquiry from the dispatcher, WITNESS #1 also stated that COMPLAINANT had hit her.

4. At approximately 8 p.m. on October 31, 2001, SUBJECT OFFICER¹ received a radio run for LOCATION #1, N.E., involving an alleged domestic assault. SUBJECT OFFICER, a sixteen-year veteran of the MPD, was working overtime and was on mountain bike patrol. He rode over to the subject address alone, and arrived at approximately 8:20 p.m. Spurred by his concern that the complainant might be in danger, SUBJECT OFFICER knocked on the front door to obtain entry without waiting for back-up.

5. COMPLAINANT opened the front door and security gate for SUBJECT OFFICER. SUBJECT OFFICER asked him to sit in the living room, adjacent to the front door, to discuss the complaint of domestic violence that SUBJECT OFFICER was responding to. COMPLAINANT replied that he would instead sit in the dining room, which adjoined the living room. COMPLAINANT then proceeded to go to that room, to sit down at the dining room table, and to resume drinking from a half pint bottle of Seagram's Gin.

¹ On October 31, 2001, SUBJECT OFFICER was an officer with the Fifth District. In 2002, SUBJECT OFFICER was promoted to sergeant. In the heading and conclusion of this report the subject officer is identified by his current rank, badge number and duty station. In the narrative sections of this report the subject officer is identified by his rank at the time of the incident and is therefore referred to as SUBJECT OFFICER.

6. By then, WITNESS #1 had walked down from the second floor to meet SUBJECT OFFICER in the hallway near the entrance to the dining room where COMPLAINANT was sitting. SUBJECT OFFICER did not observe any injuries to WITNESS #1, nor was the residence in disarray. SUBJECT OFFICER asked WITNESS #1 what had happened, while positioning himself so that he was at the entrance to the dining room, where he could see COMPLAINANT. WITNESS #1's view of COMPLAINANT was blocked by a wall, and COMPLAINANT's view of WITNESS #1 was blocked by the same wall. The front door that SUBJECT OFFICER had entered was approximately 10-12 feet behind WITNESS #1 in the hallway where SUBJECT OFFICER and WITNESS #1 were standing. COMPLAINANT was approximately six feet from SUBJECT OFFICER while seated at the far end of his dining room table. The dining room table had six chairs around it.

7. WITNESS #1 responded that she and COMPLAINANT had been arguing and fighting and that COMPLAINANT had shoved and pushed her. She told the officer that she wanted COMPLAINANT "to leave out to take a walk or something." SUBJECT OFFICER then walked over to COMPLAINANT and asked him his name, social security number, and date of birth. COMPLAINANT continued drinking liquor and did not respond to the officer, except to repeatedly say, "Either I can leave, or she can leave," or "I want her out."

8. SUBJECT OFFICER gave up his attempt to question COMPLAINANT and walked back to WITNESS #1 and asked her the questions he had attempted to pose to COMPLAINANT. Because he continued to stand in close proximity to COMPLAINANT, SUBJECT OFFICER's questioning of WITNESS #1 was occasionally interrupted by COMPLAINANT's declarations: "Either I can leave, or she can leave" and "I want her out." SUBJECT OFFICER began instructing COMPLAINANT to "shut up." COMPLAINANT responded: "This is my house. I say what I want to say in my house." SUBJECT OFFICER then walked over to COMPLAINANT and asked him what his problem was. COMPLAINANT responded that there was no problem. SUBJECT OFFICER repeated his instruction that COMPLAINANT shut up and COMPLAINANT repeated his statement: "This is my house. I say what I want to say in my house."

9. Apparently frustrated because COMPLAINANT would not stop speaking, and had not been responsive to his questions, SUBJECT OFFICER called COMPLAINANT a "bitch." COMPLAINANT responded, "Oh it's like that now." WITNESS #1's fifteen-year-old son, WITNESS #2, heard SUBJECT OFFICER say: "You want to get all big and bad in your own house, and act like a asshole in your own house. I can act like an asshole too. Touch me. Touch me, bitch, touch me."

10. At that point about fifteen minutes had passed since SUBJECT OFFICER first arrived. Three of WITNESS #1's children -- WITNESS #2, twelve-year-old WITNESS #3, and ten-year-old WITNESS #4 -- were on the stairwell across from the entrance to the dining room.

11. While SUBJECT OFFICER was escalating his challenges to COMPLAINANT, WITNESS #1 became chilly from the open front door and turned from where she was standing at

the entrance to the dining room to walk away and close the front door. As WITNESS #1 was walking down the hallway to the front door (with her view of the dining room blocked by a wall), SUBJECT OFFICER lunged at COMPLAINANT and punched him on the upper right side of his face, between his temple and right eye. The force of the blow caused COMPLAINANT to fall from his chair (breaking the back of it) and against the wall near the fire place in the dining room. SUBJECT OFFICER straddled COMPLAINANT, grabbed him with one hand, and used his other fist to punch COMPLAINANT in the area of his face. COMPLAINANT was frightened by the ferocity and suddenness of the attack and did not punch back or put up any active resistance.

12. Within seconds, WITNESS #1 had returned from the front door and arrived at the entrance to the dining room. She called out to SUBJECT OFFICER to "please stop" as he punched COMPLAINANT five or six times. SUBJECT OFFICER made no response to her.

13. After a short time, SUBJECT OFFICER placed his knee on COMPLAINANT to hold him in place and called for back up from other police officers. WITNESS OFFICER #1 arrived, initially, and then four more officers. When WITNESS OFFICER #1 arrived, he and SUBJECT OFFICER handcuffed COMPLAINANT while he was on the ground and told him he was charged with assaulting WITNESS #1. COMPLAINANT had not previously been told he was under arrest.

14. After COMPLAINANT was taken from the house, SUBJECT OFFICER asked WITNESS #1 and her son, WITNESS #3, "What did you see?" His purpose in doing so was to determine whether they had witnessed his unprovoked initial punch to COMPLAINANT's face.

15. COMPLAINANT was taken to the Fifth District. In response to his complaints about his injuries, he was subsequently taken that same night to D.C. General Hospital for treatment.

16. COMPLAINANT's injuries included a bruised and bloody lip, abrasions on his right bicep, a swollen right eye, and a sore back and neck. SUBJECT OFFICER was not injured. On the arrest form (PD-251) SUBJECT OFFICER completed for COMPLAINANT, SUBJECT OFFICER estimated COMPLAINANT's weight to be 210 pounds, and his height to be 5'11". SUBJECT OFFICER is 5'9" and weighs approximately 200 pounds.

17. On November 1, 2001, COMPLAINANT was brought from lock-up to appear before a judge at D.C. Superior Court. He was told he had been charged with simple assault. WITNESS #1 and SUBJECT OFFICER did not appear to pursue the assault charge and it was dropped as a result.

18. At no point did SUBJECT OFFICER press charges against COMPLAINANT for resisting arrest or for an assault on SUBJECT OFFICER.

19. On November 1 or 2, 2001, COMPLAINANT obtained a one page Citizen Complaint Report. He completed the report on November 2, 2001. On the one line asking him to describe the nature of his complaint he wrote: "Officer beat me for no reason."

20. On Monday, November 5, 2001, COMPLAINANT appeared at OCCR to complete a Citizen Complaint Form and to be interviewed by OCCR investigators.

IV. DISCUSSION

"The Office [of Citizen Complaint Review has] 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;² [and] (3) Use of language or conduct that is insulting, demeaning, or humiliating ..." D.C. Code § 5-1107(a).

The Complaint Examiner's analysis of whether the facts in this case sustain the allegation that SUBJECT OFFICER's conduct on October 31, 2001 violated D.C. Code §§ 5-1107(a)(2) & (3) follows.

A. Allegation #1: Use of Unnecessary Or Excessive Force

COMPLAINANT's first allegation is that SUBJECT OFFICER used unnecessary or excessive force against him on October 31, 2001.

The Metropolitan Police Department has drafted a policy regarding the use of force, and it uses a continuum to determine whether any non-deadly force that is used by an officer was reasonably calculated to de-escalate an incident and bring it under control.

MPD General Order 901.7, Part II³ states in relevant part, as follows:

[T]he policy of the Department 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."

² The Citizen Complaint Review Board, which is OCCR's governing body, promulgated regulations regarding OCCR on August 30, 2002. See 49 D.C. Reg. 8347. This Merits Determination does not rely on the definition of "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.

³ The Metropolitan Police Department replaced General Order 901.7 (Use of Force) with General Order 901.07 on October 7, 2002. This Merits Determination does not rely on General Order 901.07 because the alleged prohibited conduct occurred prior to October 7, 2002.

The “decision to use force of any level ought to be based on the danger posed by a subject confronted by the police rather than on the nature or category of the offense.⁴ That decision must be based on the circumstances that the officer reasonably believes to exist.”

. . . When force is necessary, officers will comply with the Use of Force Continuum, which ranges from verbal persuasion to deadly force. Officers are not required to start at the lowest level of the Use of Force Continuum. Officers should select the appropriate level of force required by the circumstances.

* * *

A. Levels of Force

1. The Department recognizes and employs a Use of Force Continuum. 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 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.

* * *

C. Authorized Use of Non-deadly Force

1. Where deadly force is not authorized, officers shall use only that level of force on the Department’s Use of Force Continuum that is reasonably necessary to de-escalate the incident and bring it under control. Officers shall use non-deadly force techniques and

⁴ Thus, the fact that allegations of domestic violence can often result in an officer being placed in a dangerous situation, does not relieve the officer from his professional obligation to respond to the set of facts before him, rather than to assumptions.

issued equipment for resolution of incidents as follows:

- a. To protect themselves or another from physical harm;
- b. To restrain or subdue a resistant individual; and
- c. To bring an unlawful situation safely and effectively under control.

“Application of the Use of Force Continuum for the Metropolitan Police Department” provides further written guidance to MPD officers on the appropriate use of force. This guidance states that “the use of physical force by members of the Metropolitan Police Department is limited to the following: 1. Defending yourself or others from an actual or perceived attack; 2. Effecting the arrest or preventing the escape of a suspect; and 3. Overcoming resistance.”

The amount of force used by SUBJECT OFFICER on October 31, 2001, was not authorized by any of these guidelines. The Complaint Examiner, specifically, does not find credible SUBJECT OFFICER’s recorded statement (Exhibit 7) and testimony to the effect that COMPLAINANT approached him with clenched fists. SUBJECT OFFICER was not attempting to defend himself when he struck COMPLAINANT. SUBJECT OFFICER was not attempting to arrest COMPLAINANT, or to prevent COMPLAINANT’s escape from arrest, when he struck COMPLAINANT. And he was not attempting to overcome COMPLAINANT’s physical resistance to arrest. Although COMPLAINANT was voluble and clearly under the influence of alcohol, SUBJECT OFFICER did not testify (or provide any other statement in which he claimed) that on October 31, 2001 he concluded COMPLAINANT was acting unlawfully while sitting in his chair. There was no objective basis for SUBJECT OFFICER to reasonably conclude that the seated COMPLAINANT posed any danger to the officer or to the residents of LOCATION #1, N.E.

If SUBJECT OFFICER believed he had probable cause to arrest COMPLAINANT for an assault on WITNESS #1, and feared arresting him before police back-up arrived, he clearly could have walked away from COMPLAINANT at any point and called for back up.⁵ He, instead, initiated a course of action that demonstrates he had no physical fear of COMPLAINANT. The emotions that impelled him were anger and frustration, and not fear or apprehension. He first got in COMPLAINANT’s face, and invited COMPLAINANT to attack him so that he would be justified in hitting COMPLAINANT. And when he could not bait COMPLAINANT into swinging at him, he took advantage of WITNESS #1’s momentary absence to vent his

⁵ MPD General Order 201.26, Part I, Section D(7) states, in relevant part, that “Members shall not use unnecessary force in making arrests or in dealing with prisoners or any other person.”

frustrations by striking COMPLAINANT. SUBJECT OFFICER's conduct was not reasonably necessary to de-escalate an incident and bring it under control. It, instead, escalated the incident and traumatized its witnesses and victim.

A clear preponderance of all of the record evidence, including:

- the location, nature, number and severity of COMPLAINANT's injuries;
- where SUBJECT OFFICER claimed he was standing in the hallway in relation to where credible evidence established COMPLAINANT landed in the dining room (on the other side of a table) after being punched by SUBJECT OFFICER;
- COMPLAINANT's demeanor while testifying;
- the immediacy with which COMPLAINANT lodged his complaint of unnecessary force and followed it up with an appearance at the OCCR;
- SUBJECT OFFICER's failure to formally charge COMPLAINANT with resisting arrest or with assaulting him;
- SUBJECT OFFICER's demeanor as he testified, the contradictions in his testimony (e.g., testifying at one point that COMPLAINANT was ranting and belligerent on October 31, 2001, and at another point that COMPLAINANT was not ranting on October 31, 2001) and the non-credible differences between his testimony (e.g, repeatedly claiming that COMPLAINANT "resented" SUBJECT OFFICER being in his home) and his written statements (no reference to COMPLAINANT basically resenting SUBJECT OFFICER just being in his home);
- the contradictions between SUBJECT OFFICER's written and recorded statements (in Exhibit 7 he claimed the reason he struck COMPLAINANT was because he felt threatened as COMPLAINANT approached him while "out of control"; in Exhibit 15 he claimed he used force "in an attempt to place [COMPLAINANT] under arrest"); and
- SUBJECT OFFICER's subsequent inquiry of WITNESS #1 and one her sons, in an effort to determine whether they witnessed his 'stealth punch,'

establishes that SUBJECT OFFICER used unnecessary and excessive force on COMPLAINANT on October 31, 2001.

B. Allegation #2: Use of Insulting, Demeaning Or Humiliating Language or Conduct

COMPLAINANT's second allegation is that SUBJECT OFFICER used language or engaged in conduct that was insulting, demeaning, or humiliating. The Complaint Examiner has found, by a preponderance of the evidence, that SUBJECT OFFICER: (1) repeatedly told COMPLAINANT to "shut up;" (2) called COMPLAINANT a "bitch"; and (3) attempted to bait COMPLAINANT and to demean him. SUBJECT OFFICER admits he may have told COMPLAINANT to "shut up." Every person who was present, with the exception of SUBJECT OFFICER, testified that SUBJECT OFFICER, at a minimum, used the insulting and demeaning term "bitch" to characterize COMPLAINANT in front of his girlfriend and her impressionable children.

There is no legal justification for this language and conduct. MPD General Order 201.26, Part I, Section C(2) 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."

Section C(3) of the same General Order states, in relevant part, that "Members shall refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name calling which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person."

If the loudness of COMPLAINANT's comments was impeding SUBJECT OFFICER's ability to conduct an investigation he could have warned COMPLAINANT of that fact and warned him that he was subject to arrest for that reason if he continued. Repeatedly telling COMPLAINANT to "shut up," and using coarse and profane language in an effort to either cow COMPLAINANT into being quiet, or to bait him into providing a pretext for a beating, obviously violates the prohibition against insulting, demeaning or humiliating language or conduct.

A clear preponderance of all of the record evidence -- including COMPLAINANT's compelling (and substantially corroborated) live testimony about SUBJECT OFFICER's statements and conduct toward him, and SUBJECT OFFICER's often non-credible live testimony and his April 20, 2004 Memorandum of Interview in which he, at best, equivocally denies COMPLAINANT's charges -- compels the conclusion that SUBJECT OFFICER used language and engaged in conduct that was insulting, demeaning, or humiliating on October 31, 2001.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER, First District

Allegation 1:	Sustained
Allegation 2:	Sustained

Submitted on December 30, 2004.

Roy L. Pearson, Jr.
Complaint Examiner