

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	02-0041
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, 3rd District
Allegation 1:	Harassment
Allegation 2:	Insulting, Demeaning, or Humiliating Language or Conduct
Allegation 3:	Use of Unnecessary or Excessive Force
Complaint Examiner:	Amy E. Wind
Merits Determination Date:	July 9, 2003

Pursuant to D.C. Official 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 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

In a complaint filed with the Office of Citizen Complaint Review (OCCR) on November 8, 2001, COMPLAINANT alleged that Metropolitan Police Department (MPD) SUBJECT OFFICER, harassed him, used language and engaged in conduct toward him that were insulting, demeaning or humiliating and subjected him to unnecessary or excessive force. COMPLAINANT alleged that on November 8, 2001, SUBJECT OFFICER: (a) stopped and arrested him for disorderly conduct without adequate justification, (b) yelled and used abusive language and profanities in addressing him, and (c) pointed his firearm directly in complainant's face, pulled him out of his car and pushed him onto the sidewalk. Report of Investigation (ROI), Exhibit 1.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OCCR's Report of Investigation, the Complaint Examiner determined that the 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.

III. FINDINGS OF FACT

Based on a review of OCCR's Report of Investigation, as well as the objections submitted by SUBJECT OFFICER on June 4, 2003, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On November 8, 2001, at approximately 2:00 a.m., COMPLAINANT was in his car traveling south on LOCATION #1, N.W.. After stopping at a red light at the intersection of LOCATION #2, N.W., he turned left in a way that his tires skidded and loudly screeched. This attracted the attention of two police officers riding on patrol in the area, Officers SUBJECT OFFICER and WITNESS OFFICER #1. They activated their lights and siren and followed COMPLAINANT.
2. COMPLAINANT slowed down but initially did not pull over, and he made several more turns and drove a number of blocks before stopping.
3. As COMPLAINANT stopped his car, the officers pulled up directly behind him. SUBJECT OFFICER, who was driving, opened the driver's side of the police car and crouched behind it, removing his gun from its holster and pointing it toward COMPLAINANT's car. SUBJECT OFFICER demanded that COMPLAINANT put his hands outside the car through the window, and then both officers approached, ordering COMPLAINANT to get out of the car. When COMPLAINANT did not immediately respond, SUBJECT OFFICER pointed his gun at COMPLAINANT's face and pulled him from the car. SUBJECT OFFICER'S orders were urgent and laced with obscenity, and COMPLAINANT responded in kind.
4. SUBJECT OFFICER handcuffed COMPLAINANT, put away his weapon, made COMPLAINANT sit on the sidewalk near the car. COMPLAINANT repeatedly and loudly asked what he had done wrong, and SUBJECT OFFICER responded with obscenities such as, "Shut the fuck up!"
5. SUBJECT OFFICER and COMPLAINANT were engaged in a loud, heated and profane exchange when WITNESS OFFICER #2 and WITNESS OFFICER #3, who had been patrolling nearby, arrived at the scene to render assistance. COMPLAINANT was screaming at SUBJECT OFFICER, and yelled to the other officers, "He pointed a fucking gun at me. He's fucking crazy." He also yelled at SUBJECT OFFICER, "Shoot me!" SUBJECT OFFICER told WITNESS OFFICER #2 that he had seen COMPLAINANT go through a stop sign or red light, and intended to issue COMPLAINANT a Notice of Infraction (ticket).
6. WITNESS OFFICER #2 lifted COMPLAINANT to his feet, and escorted him about 10 feet down the sidewalk. SUBJECT OFFICER continued to tell COMPLAINANT to "shut up" or be taken to jail, but COMPLAINANT continued to loudly demand, "What did I do wrong?" When COMPLAINANT said, "I can talk. I know my rights,"

SUBJECT OFFICER indicated that he was arresting COMPLAINANT for disorderly conduct. WITNESS OFFICER #2 transported COMPLAINANT to the 3rd District station, where he received a Notice of Infraction for “Unreasonable Speed”, and was charged with disorderly conduct.

7. This incident occurred late on a cold night, and there were no pedestrians and few cars passing in the vicinity. The nearest apartment building was set back from the sidewalk and street, and only a few individuals were observed by the officers looking out their windows at the scene.

IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a), “The Office [of Citizen Complaint Review] 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; [and] (3) use of language or conduct that is insulting, demeaning, or humiliating ...” Each of COMPLAINANT’s allegations are addressed below.

A. Allegation #1: Harassment

MPD General Order 201.26, Part I, Section A (1) provides that “[i]t is the duty and responsibility of each member of the police force to preserve the peace, protect life and property, prevent crime, apprehend criminals, recover lost and stolen property, and *enforce all laws and ordinances of the District of Columbia and the United States in a fair and impartial manner.* Exhibit 16, at 1 (emphasis added). Thus, in dealing with the citizenry of the District of Columbia, MPD officers are charged with enforcing the law fairly and impartially and cannot arrest citizens, for example, based on personal feelings rather than an objective belief that the individual has committed the violation charged.

SUBJECT OFFICER did not enforce the law in a fair and impartial manner when he placed COMPLAINANT under arrest for disorderly conduct. It was clear from the statements of all witnesses to the incident that SUBJECT OFFICER and COMPLAINANT were engaged in a prolonged, heated and profane exchange involving COMPLAINANT’s demands to know why he had been stopped, and SUBJECT OFFICER’s insistence that COMPLAINANT be quiet. Another officer at the scene, WITNESS OFFICER #2, stated that SUBJECT OFFICER initially said that that he intended to issue COMPLAINANT a Notice of Infraction for running a stop sign or red light, but that he changed his mind and arrested him for disorderly conduct when COMPLAINANT refused to be quiet and insisted that he could talk because “I know my rights.” Exhibit 7. There is no evidence that the trigger for SUBJECT OFFICER’s decision to arrest COMPLAINANT was increased or continued disorderly conduct by COMPLAINANT (indeed, COMPLAINANT was standing on the sidewalk in handcuffs); rather, it appears that SUBJECT OFFICER did so because COMPLAINANT

had refused to comply with his order to be quiet and referred to his “rights.” Basing an arrest for disorderly conduct on a perception that a citizen had orally challenged a police officer’s authority, rather than on a judgment that COMPLAINANT was actually engaged in disorderly conduct, violates SUBJECT OFFICER’s obligation to enforce the laws fairly and impartially.

Additionally, MPD officers are prohibited from harassing citizens. 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.” See also, MPD General Order 1202.5 Part I, Section A (4) (Exhibits 14, 15).¹ COMPLAINANT contends that SUBJECT OFFICER harassed him by stopping him and charging him with disorderly conduct without justification. Exhibit 1.

With regard to the stop, COMPLAINANT admitted that he had “skidded his tires,” and not initially pulled over although he had noticed the police car behind him with lights and siren in use. This was sufficiently suspicious that it cannot be said that SUBJECT OFFICER did not have a law enforcement purpose in carrying out an investigatory stop of COMPLAINANT.

However, there is no evidence that SUBJECT OFFICER’s decision to arrest COMPLAINANT for disorderly conduct served any similar “specific law enforcement purpose.” D.C. Code § 22-1321 states:

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; (2) congregates with others on a public street and refuses to move on when ordered by the police; [or] (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons . . . shall be fined not more than \$250 or imprisoned not more than 90 days or both.

See Exhibit 17.

The evidence gathered by the investigator established that COMPLAINANT used profanity and spoke loudly, but there is no indication that his conduct met the requirements for a violation of the disorderly conduct statute. First, there is no evidence that he acted in such a way as to disturb or be offensive to others, since it was uncontroverted that the incident involved only

¹ 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 “harassment” contained in the regulations because the underlying conduct alleged in the complaint occurred before the regulations took effect on August 30, 2002.

COMPLAINANT and the four police officers. Second, although the incident occurred late at night and COMPLAINANT did engage in loud and obscenity-laden discussion, it occurred on a sidewalk which was set back from the nearest building (see Exhibit 10), it was cold out and most windows presumably would be closed, there were no pedestrians and few cars passing in the vicinity, and the police officers observed at most only a few individuals looking out their windows at the scene. Thus, it cannot be found that SUBJECT OFFICER at the time legitimately contemplated that COMPLAINANT was annoying or disturbing “any considerable number of persons,” as required by D.C. Code § 22-1321(3). Although an officer need not wait until an actual breach of the peace occurs before making an arrest for disorderly conduct (see Chemalali v. District of Columbia, 655 A.2d 1226, 1228 (D.C. 1995)), there is no evidence that the conduct occurred under “circumstances such that a breach of the peace may be occasioned thereby.”

In the absence of evidence of annoyance to others, the mere acts of yelling or using profane language toward police officers, or repeatedly demanding to know the purpose of being stopped, do not constitute disorderly conduct. See In re W.H.L., 743 A.2d 1226, 1228 (D.C. 2000) (youth who stood behind police officers, yelling obscenities and refusing an order to “move on” had not engaged in disorderly conduct, since the words were directed at the police, not others, and no crowd had gathered whereby a breach of the peace might occur); Langevine v. District of Columbia, 106 F.3d 1018, 1022 (D.C. Cir. 1997) (repeated requests to know what is going on and refusal to sit in car as directed by police, did not constitute disorderly conduct).

As noted above, the evidence shows that SUBJECT OFFICER and the complainant were engaged in a heated argument, and SUBJECT OFFICER decided to arrest COMPLAINANT not because he was disturbing others but because he was insisting loudly on his right to know why he was stopped. The arrest served no legitimate purpose in enforcing the laws of the District of Columbia or to protect anyone in any way. Rather, the arrest interfered with COMPLAINANT’s ability to go about his lawful business. SUBJECT OFFICER properly stopped COMPLAINANT for suspicious driving. However, by arresting him for and charging him with disorderly conduct under the circumstances described above, SUBJECT OFFICER harassed the complainant and treated him unfairly, in violation of MPD General Order 1202.5, Part I, Section A (1) and (4), MPD Special Order 01-01, Part III, Section G and MPD General Order 201.26, Part I, Section A (1).

B. Allegation #2: Use of Language That Was Insulting, Demeaning or Humiliating

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.” 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.”

COMPLAINANT’s allegation that SUBJECT OFFICER used abusive and profane language toward him was supported by the evidence gathered in the investigation. SUBJECT OFFICER became engaged in a profane interchange with COMPLAINANT and directed language at him that would likely offend most citizens. Although in his both his statement to investigators and his comments on the ROI, SUBJECT OFFICER specifically denied using obscene language in any way in the incident, 2 of the 3 fellow officers on the scene confirmed his use of profanity. This corroborating evidence confirms COMPLAINANT’s allegation that SUBJECT OFFICER made statements such as “Get your fucking hands outside the window,” “Let me see you hands mother fucker” and “shut the fuck up,” among others.

There is no question that COMPLAINANT also hurled profanities at SUBJECT OFFICER, but this does not excuse SUBJECT OFFICER’s use of such language in return. The courts have recognized that police officers are trained to deal with unruly and uncooperative members of the public, including those addressing them with abusive language. In re W.H.L., 743 A.2d at 1228. “A police officer is expected to have a greater tolerance for verbal assaults, ... and because the police are especially trained to resist provocation, we expect them to remain peaceful in the face of verbal abuse that might provoke or offend the ordinary citizen.” In re M.W.G., 427 A.2d 440, 442 (D.C. 1981) (citation omitted). Indeed, MPD General Order 201.26, Part I, Section C (3) is quite clear in prohibiting the use of profane language by officers: “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.” Exhibit 16.

SUBJECT OFFICER failed to remain calm while speaking with COMPLAINANT, who was in handcuffs and sitting on the curb, and directed profane and abusive language toward him. Therefore, it is found that SUBJECT OFFICER used language and engaged in conduct toward COMPLAINANT that were insulting, demeaning or humiliating, in violation of MPD General Order 201.26, Part I, Section C (1) and (3).

C. Allegation #3: Unnecessary or Excessive Use of Force

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.”² COMPLAINANT alleges that SUBJECT OFFICER engaged in excessive

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

and unnecessary force when he (a) pulled him out his car and pushed him to the ground, and (b) pointed his gun in COMPLAINANT's face.

MPD General Order 901.7, Part II states, "[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." The "decision to use force of any level ought to be based on the danger posed by a subject confronted by the police ... That decision must be based on the circumstances that the officer reasonably believes to exist."

Officers are not required to start at the lowest level of the Use of Force Continuum, but instead "should select the appropriate level of force required by the circumstances." MPD General Order 901.7, Part II. The levels of force, which may be applied by officers *in response to resistant or dangerous individuals* [emphasis added], 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." MPD General Order 901.7, Part IV, Section A (1). See Exhibit 18.

When an officer perceives that a subject poses an immediate danger of death or serious physical injury to the officer or another person, the officer must use immediate counter measures to stop the threat. Under an internal MPD publication that provides guidance on the appropriate use of force by MPD officers, an officer is authorized and directed to "maintain the highest level of risk assessment and be prepared to use survival skills and lethal force" in situations involving "the highest level of a threat, that of imminent serious bodily injury or death to the officer or others. "Application of the Use of Force Continuum for the Metropolitan Police Department," November 2000 (Exhibit 19, at 7). Under the policy, appropriate responses in this situation include:

1. Unholstering/drawing of firearm **AND** pointing it at, or in the direction of another person (*emphasis in original*);
2. The discharge of the officer's firearm; and
3. Impact weapons to vital area.

Exhibit 19, at 8.

There is no dispute that SUBJECT OFFICER grabbed COMPLAINANT and pulled him out of his car, and that he pushed or "set" him on the sidewalk after handcuffing him. Further, SUBJECT OFFICER admitted that immediately after stopping COMPLAINANT's car, he unholstered his firearm and pointed it at COMPLAINANT's car. Exhibit 8. While SUBJECT OFFICER denied that he ever pointed his gun at COMPLAINANT's face, he also stated that he could not recall when he returned it to its

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.

holster and his partner, WITNESS OFFICER #1, stated that he did not put his firearm away until COMPLAINANT was out of the car. See Exhibit 5. Most importantly, however, WITNESS OFFICER #2 said that when he arrived on the scene, he heard COMPLAINANT say, "He pointed a fucking gun at me. He's fucking crazy" and "Shoot me!" Exhibit 7. The weight of the evidence mandates the conclusion that SUBJECT OFFICER pointed a gun at both at COMPLAINANT's car, and then in COMPLAINANT's face.

The MPD regulations cited above clearly provide that: "[u]nholstering/drawing of firearm **AND** pointing it at, or in the direction of another person," which entails an exercise of potentially lethal force, is authorized when an officer perceives that a subject poses an immediate danger of death or serious physical injury to the officer or another person. See Exhibit 19 at 8. The regulations specify that a subject's action is life-threatening when it reasonably appears necessary for the officer to protect himself/herself or others from an immediate threat of death or serious bodily injury, or to apprehend a fleeing felon when the officer has reasonably exhausted every means of effecting the arrest or preventing the escape and there exists reasonable belief that the suspect fleeing poses an immediate threat of death or serious bodily harm to the officer or others; or when

1. There is probable cause to believe the crime committed or attempted was a felony which involved an actual or threatened attack which could result in death or serious bodily harm; and
2. There is probable cause to believe the person fleeing committed or attempted to commit the crime; and
3. Failure to immediately apprehend the person places the officer, another law enforcement officer or the public in immediate danger of death or serious bodily harm; and
4. The lives of innocent individuals will not be endangered if lethal force is used.

"Application of the Use of Force Continuum for the Metropolitan Police Department," November 2000 (Exhibit 19, at 8).

None of these considerations is present here. Officers SUBJECT OFFICER and WITNESS OFFICER #1 followed and stopped COMPLAINANT because he screeched his tires and possibly ran a red light. There was no indication that the individual who turned out to be COMPLAINANT was a "resistant or dangerous individual," or that he in any way posed an immediate danger of death or serious physical injury to the officers or any other persons. At the time of the incident, COMPLAINANT had possibly committed a traffic offense, not a felony, and had stopped his car after driving at a slow rate of speed for several blocks.

The reasonableness of the particular use of force must be judged from the perspective of a reasonable officer on the scene. Graham v. Connor, 490 U.S. 386, 395 (1989). Given the late hour, and COMPLAINANT's initial failure to stop, it was reasonable to unholster the firearm and point it at the car until COMPLAINANT put his hands out the window as directed. However, in the absence of any evidence that COMPLAINANT posed any imminent danger to the officers, it cannot be concluded that SUBJECT OFFICER's conduct in pointing his gun in COMPLAINANT's face, a use of potentially lethal force, was "objectively reasonable in light of all the facts and circumstances." Graham v. Connor, 490 U.S. at 394.

SUBJECT OFFICER's use of hand control procedures (see MPD General Order 901.7, Part IV, Section A (1)) to remove COMPLAINANT from the car and place him on the sidewalk was reasonable in the circumstance. Similarly, his drawing of his gun and pointing it at COMPLAINANT's car before COMPLAINANT had shown that he possessed no weapons, was also an appropriate use of force. However, by pointing his firearm directly in COMPLAINANT's face under the circumstances described above was an inappropriate use of force with a potentially lethal degree of risk, and in doing so SUBJECT OFFICER misused his police powers. The finding that it was not reasonably necessary for SUBJECT OFFICER to resort to this use of force warrants the conclusion that he used unnecessary or excessive force against the complainant, in violation of MPD General Order 901.7.

IV. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1:	Sustained in part (arrest for disorderly conduct); exonerated in part (traffic stop)
Allegation 2:	Sustained
Allegation 3:	Sustained in part (pointing firearm in face); exonerated in part (pulling from car and pushing to ground, pointing firearm at car)

Submitted on July 9, 2003.

Amy E. Wind
Complaint Examiner