

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	02-0042
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 Excessive or Unnecessary Force
Complaint Examiner:	Christopher Davies
Merits Determination Date:	September 30, 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 on November 9, 2001, COMPLAINANT alleges that on October 31, 2001, SUBJECT OFFICER of the MPD: (1) harassed COMPLAINANT by calling COMPLAINANT over to an unmarked police vehicle without cause and by initiating a baseless stop, (2) addressed COMPLAINANT and some of his coworkers with insulting, demeaning, and humiliating language while engaged in a stop and frisk of COMPLAINANT, and (3) used excessive and unnecessary force by pointing a gun at COMPLAINANT and by placing COMPLAINANT in a “choke hold.”

II. EVIDENTIARY HEARING

The Complaint Examiner conducted an evidentiary hearing regarding COMPLAINANT’s Complaint on August 20, 2003. COMPLAINANT, WITNESS #1, WITNESS #2, and WITNESS #3 (collectively the “School employees”) testified on behalf of COMPLAINANT; SUBJECT OFFICER, WITNESS OFFICER #1, and WITNESS OFFICER #2 testified on behalf of Respondent.

Neither Complainant nor Respondent introduced any exhibits other than those attached to OCCR's Report of Investigation ("ROI"). During the hearing, however, the witnesses referred to a large schematic of the scene of the alleged incident as an explanatory aid.

III. FINDINGS OF FACT

Based on a review of OCCR's ROI and the rest of the evidentiary record, the Complaint Examiner finds by a preponderance of the evidence the material facts regarding this complaint to be:

1. On October 31, 2001, the sun set at 5:09 p.m.; civil twilight was over at 5:36 p.m.; and the moon was full.
2. At approximately 7:30 p.m. on October 31, 2003, COMPLAINANT and WITNESS #1 – who are custodial employees at ELEMENTARY SCHOOL (the "School"), which is at LOCATION #1, S.E. – left the School parking lot, turned left, and began walking south on STREET #1, S.E.
3. As COMPLAINANT and WITNESS #1 walked south, a silver Ford Taurus heading south on STREET #1, S.E., approached them from behind. As the car was nearly even with COMPLAINANT and WITNESS #1, the car's driver asked twice that COMPLAINANT and WITNESS #1 come over to the car. The window through which the driver made the request was tinted and only partially down.
4. COMPLAINANT responded twice that he did not know the driver of the car and then ran toward the School's parking lot. WITNESS #1 paused and then continued to walk south on STREET #1, S.E.
5. The occupants of the car turned on the cabin light; WITNESS #1 was only then able to see the occupants of the car. At that point, he recognized that they were Metropolitan Police Officers ("MPOs").
6. COMPLAINANT ran back down the driveway, through the parking lot, past WITNESS #2 (who was smoking a cigarette in the parking lot), and into the door that led to the School's incinerator (the "Incinerator Door").
7. The police car made a U-turn on STREET #1, S.E., and headed back toward the entrance of the parking lot. The car descended the parking lot ramp into the lot behind the building.
8. WITNESS #1 turned around and followed the car back toward the parking lot.
9. After the car arrived in the lot, COMPLAINANT, WITNESS OFFICER #1, and WITNESS OFFICER #2 got out of the vehicle. One of the officers may have had his gun

- drawn when he opened his car door. That same officer ordered WITNESS #2 to remain where he was.
10. SUBJECT OFFICER left the police car on throughout the incident, with its headlights on and pointed in the direction of the area where the stop occurred.
 11. WITNESS OFFICER #2 left the car and began to survey the parking lot and vicinity to determine whether COMPLAINANT had dropped any contraband when he fled down the driveway and into the parking lot. He concurrently protected the perimeter, in case WITNESS #1 returned and posed a threat to the MPOs.
 12. COMPLAINANT opened the door through which he had entered the School. SUBJECT OFFICER was standing immediately outside the door and apprehended him.
 13. SUBJECT OFFICER directed COMPLAINANT to stand with his legs spread and hands against the wall. COMPLAINANT was generally not cooperative but did stand against the wall as instructed.
 14. WITNESS #2 asked WITNESS OFFICER #2 whether he could return to the School. WITNESS OFFICER #2 told WITNESS #2 that he could. WITNESS #2 left the scene. WITNESS OFFICER #2 then searched for contraband in the area around where the police car was parked.
 15. Around that time, WITNESS #1 arrived in the parking lot.
 16. SUBJECT OFFICER instructed COMPLAINANT to kneel on the ground and then forced him to his knees.
 17. While COMPLAINANT knelt, SUBJECT OFFICER stood over him, handcuffed him, and got his personal information.
 18. After confirming that COMPLAINANT had no outstanding warrants, SUBJECT OFFICER informed COMPLAINANT that he was free to go.
 19. SUBJECT OFFICER is approximately 5'11" and weighs approximately 240 pounds. COMPLAINANT is somewhat shorter and substantially lighter.

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"

Allegation #1: Harassment

Harassment, as defined by MPD Special Order 01-01, Pt. III, § 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.”¹

COMPLAINANT has alleged that SUBJECT OFFICER harassed him by calling him and WITNESS #1 over to the police car while they were walking on STREET #1, S.E. Both COMPLAINANT and WITNESS #1 testified that the driver of the car – whom all agree was SUBJECT OFFICER – asked them to “come to the car.” According to WITNESS #1 and COMPLAINANT, that request was made twice. Both times, COMPLAINANT refused and responded that he did not know the occupants of the car. The occupants of the car did not identify themselves as MPOs, and COMPLAINANT fled toward the School driveway after the second exchange.

SUBJECT OFFICER’s request does not reach the level of harassment. MPOs on patrol must be free to ask for directions or otherwise engage in regular interaction with city residents. While the MPOs involved in this incident recalled neither calling COMPLAINANT over to the car nor having had any reason to call him over, neither COMPLAINANT nor WITNESS #1 could point to conduct by SUBJECT OFFICER or any of the other MPOs that was “intended to bother, annoy, or otherwise interfere” with their ability to go about their business. To the contrary, the car’s tinted windows and COMPLAINANT’s own fears regarding crime in the neighborhood made COMPLAINANT wary of SUBJECT OFFICER and therefore reluctant to comply with his request. As such, there is simply no evidence suggesting that SUBJECT OFFICER or any of the other officers intended to harass COMPLAINANT when SUBJECT OFFICER asked him to approach the car.

COMPLAINANT also presented a second and potentially broader theory of harassment: whether the stop itself was warranted.

According to WITNESS OFFICER #1 and to the Incident Report he completed at the time, the officers pursued and stopped COMPLAINANT because he was “holding his waistband in the same manner that a person holds a weapon.” SUBJECT OFFICER confirmed that reason during his testimony during the OCCR hearing. WITNESS OFFICER #2 does not remember why the stop was initiated, other than that COMPLAINANT ran from them; he remembers, however, being worried that COMPLAINANT might have a gun. Flight from the police alone may be a legitimate basis for conducting a stop, depending on the context in which the individual flees. *See Illinois v. Wardlow*, 528 U.S. 119, ___, 120 S.Ct. 673, 676-77 (2000). It seems likely that the officers believed – whether correctly or not – that COMPLAINANT knew they were

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.

MPOs when he fled. That belief, coupled with WITNESS OFFICER #1's contemporaneous recordation of the reason for the stop in the Incident Report, the neighborhood in which the stop occurred, and COMPLAINANT's flight together support the reasonableness of the stop. The stop itself was therefore not harassment.

Allegation #2: Use of Insulting, Humiliating, or Demeaning Language

Language or conduct that is insulting, humiliating, or demeaning, as defined by MPD Special Order 01-01, Pt. III, § 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, Pt. I, § C further provides that "All members of the department shall be courteous and orderly in their dealings with the public. They shall perform their duties quietly, remaining calm regardless of provocation to do otherwise."

COMPLAINANT alleges that SUBJECT OFFICER used expletives in two contexts: (1) he told WITNESS #2 and WITNESS #3 to "get the fuck back in the building," and (2) he said to COMPLAINANT "why the fuck [did] you run, motherfucker? I told you not to run, motherfucker" during the stop in the School parking lot.

WITNESS #1's testimony to the OCCR supported COMPLAINANT's allegation that SUBJECT OFFICER used profanity when he spoke to WITNESS #2 and WITNESS #3. WITNESS #2 and WITNESS #3, however, have no recollection of SUBJECT OFFICER's using expletives. SUBJECT OFFICER does not remember whether he used any expletives when he addressed them. As I explain in greater detail below, I found WITNESS #1 to be the most credible witness in this proceeding. In this instance, however, I nevertheless conclude that his recollection is insufficient to prove COMPLAINANT's allegation. While SUBJECT OFFICER neither admits nor denies that he used the language, WITNESS #2 and WITNESS #3 – the subjects of the alleged epithets – recall neither the language nor being offended by SUBJECT OFFICER's conduct. I assign significant weight in these circumstances to the recollections of those to whom the profanity was allegedly addressed and therefore conclude that COMPLAINANT has not established by a preponderance of the evidence that SUBJECT OFFICER addressed WITNESS #2 and WITNESS #3 with improper language.

The evidence regarding whether SUBJECT OFFICER addressed COMPLAINANT with profanity while conducting the stop is more complicated. COMPLAINANT's statements to government investigators and his testimony at the OCCR hearing have been consistent. SUBJECT OFFICER does not remember whether he uttered any expletives during the stop, though he generally claims not to have interacted with COMPLAINANT in any event. WITNESS OFFICER #2 does not remember the use of expletives but said to the United States Attorney's Office for the District of Columbia ("USAO") during his June 19, 2002 interview that

either SUBJECT OFFICER or WITNESS OFFICER #1 asked COMPLAINANT why he had run.² WITNESS OFFICER #2's statement to the USAO therefore confirms COMPLAINANT's recollection that he had been asked that question. The open issue is whether the question was laced with expletives. WITNESS #2 (who was present when SUBJECT OFFICER initially apprehended COMPLAINANT) does not remember whether SUBJECT OFFICER used expletives when addressing COMPLAINANT. WITNESS #2, however, claimed during the OCCR hearing that he could remember nothing other than that one of the officers was pointing a gun at him.³ WITNESS #1, whose statements and demeanor were credible, generally supported COMPLAINANT's allegations.

Based on the totality of the circumstances and on the weight of the evidence, I find COMPLAINANT credible on this point and therefore conclude that SUBJECT OFFICER used profane language in violation of MPD Special Order 01-01, Pt. III, § H. Even though I concur with SUBJECT OFFICER's argument at the hearing and in his post-hearing brief that, even assuming he used some inappropriate language, it was "de minimis," my role is not to assess the materiality of an officer's violation. That may presumably be taken into account by the MPD itself when it imposes whatever disciplinary or remedial measures are called for by my findings.

Allegation #3: Unnecessary or Excessive Force

Use of unnecessary or excessive force, as defined by MPD Special Order 01-01, Pt. III, § N includes "the use of force that is improper in the context of the incident giving rise to the use of force."⁴

COMPLAINANT alleges that SUBJECT OFFICER used unnecessary or excessive force in two separate respects: (1) SUBJECT OFFICER had his gun drawn and pointed at COMPLAINANT when COMPLAINANT emerged from the School into the parking lot, and (2) SUBJECT OFFICER placed COMPLAINANT in a "choke hold" during the stop.

Much of the testimony regarding the use of force allegations is in conflict. In general, the MPOs tell one story (with one significant exception explained below), and the School employees

² As set forth in greater detail below, I give significant weight to what WITNESS OFFICER #2 said to the USAO on June 19, 2002.

³ That statement is contrary to his earlier interview with the OCCR investigator, when he did not mention that a gun was pointed at him and remembered having witnessed COMPLAINANT's being subject to a "choke hold." Because WITNESS #2's testimony and prior statement are in significant tension and because he did not appear to have a very good recollection of the events in any case, I have largely discredited what he said over the course of the investigation and hearing.

⁴ 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.

tell another. Resolving the merits of COMPLAINANT's complaint therefore depends largely on assessing the credibility of the witnesses.

In evaluating the witnesses' credibility, I considered their demeanor and apparent candor during their testimony before me, their earlier statements to government investigators, the consistency of their statements with other witnesses' recollections, and my understanding of the context surrounding the events in question. Based on my consideration of the totality of the circumstances and for the reasons explained below, I conclude that the first allegation (drawn gun) was not proved by a preponderance of the evidence but that the second (use of excessive physical force in the stop) was proved in part.

Officers' Route to the Parking Lot. Nothing in this case rests specifically on how the MPOs arrived in the parking lot, but the issue is relevant to my findings regarding the stop itself. I will therefore review the record evidence.

WITNESS #1 testified that, after COMPLAINANT fled toward the School, the car turned on its interior light (thereby illuminating the inside of the car and making clear that its occupants were MPOs) and made a slow U-turn, after which it went down the driveway to the parking lot behind the School. WITNESS #2 corroborates that story, to the extent that he remembers smoking a cigarette next to his truck in the parking lot when (1) COMPLAINANT ran by and entered the School; (2) the police car drove into the parking lot and turned to face the School, such that the driver-side door was closest to the door through which COMPLAINANT had entered the School; and (3) the officer in the front passenger seat got out of the car, pointed a gun at WITNESS #2, and instructed him to raise his hands in the air.⁵

SUBJECT OFFICER and WITNESS OFFICER #1 have consistently agreed that WITNESS OFFICER #1 and WITNESS OFFICER #2 got out of the car while it was still on STREET #1, S.E., and before it had turned around or backed up. According to SUBJECT OFFICER and WITNESS OFFICER #1, WITNESS OFFICER #1 and WITNESS OFFICER #2 chased COMPLAINANT by foot into the parking lot, where WITNESS OFFICER #1 remembers that WITNESS OFFICER #2 first reached COMPLAINANT and began conducting the stop.

⁵ Because WITNESS #2 filed no complaint about a gun's being pointed at him during this incident, I do not address whether WITNESS #2's recollection is supported by a preponderance of the evidence and whether that recollection – if true – would have been an unnecessary or excessive use of force. WITNESS #2's recollection, however, is relevant to the MPOs' state of mind and therefore to whether SUBJECT OFFICER had his gun drawn when he apprehended COMPLAINANT. It is also relevant to considering which officer stopped COMPLAINANT. If WITNESS #2's testimony in the OCCR hearing was accurate, then not only was SUBJECT OFFICER the one closest to the area where the stop occurred (because the driver's side of the car was closest to the Incinerator door), but the second closest officer (WITNESS OFFICER #1) was occupied pointing a gun at WITNESS #2. As I noted earlier, I have given little weight to WITNESS #2's testimony in reaching my conclusions, because of his inconsistent statements and spotty memory.

COMPLAINANT does not purport to know how the officers got from STREET #1, S.E., to the parking lot. WITNESS OFFICER #2's June 19, 2002 statement to the USAO does not explain whether he entered the parking lot on foot or in the car. He nevertheless placed both SUBJECT OFFICER and WITNESS OFFICER #1 in the area around the stop, which implies that – regardless whether WITNESS OFFICER #1 and WITNESS OFFICER #2 ran or rode into the parking lot and the order in which they arrived – SUBJECT OFFICER could not have been far behind (as SUBJECT OFFICER claimed during his testimony at the OCCR hearing).

SUBJECT OFFICER testified during the OCCR hearing that, after WITNESS OFFICER #1 and WITNESS OFFICER #2 got out of the car, he spoke with WITNESS #1, backed the car up past the driveway, and turned left into the parking lot while WITNESS #1 followed the car on foot down the driveway – all the while keeping his eyes on WITNESS #1. When he arrived in the parking lot, SUBJECT OFFICER remembers that he left the car on with the headlights pointed toward the scene of the stop.⁶

Identity of Officer who Stopped COMPLAINANT. WITNESS #1 has consistently stated that SUBJECT OFFICER stopped COMPLAINANT. According to WITNESS #1, he arrived in the area around where the stop took place just before SUBJECT OFFICER allegedly forced COMPLAINANT to his knees. WITNESS #1 therefore saw SUBJECT OFFICER with COMPLAINANT when COMPLAINANT was standing against the School's wall with his hands against the wall. During his March 13, 2003 interview with the USAO, WITNESS #1 identified SUBJECT OFFICER from a photo array as the officer whom he had seen conduct the stop.⁷

SUBJECT OFFICER himself claims to have been involved only tangentially in the stop, and in any event, to have remained some distance from where COMPLAINANT was subdued. WITNESS OFFICER #1 has confirmed SUBJECT OFFICER's recollection. He has testified and given statements to the effect that WITNESS OFFICER #2 initiated the stop and that he participated in it. In his statement to the USAO, WITNESS OFFICER #2 stated that either

⁶ All witnesses agreed on the location of the car during the stop. With the car parked in that spot, the officer closest to the Incinerator door was SUBJECT OFFICER. Assuming that the officers were all in the car and drove into the parking lot, WITNESS OFFICER #1 and WITNESS OFFICER #2 would have had to walk around the car and past SUBJECT OFFICER to get to the Incinerator door and conduct the stop.

It is of some relevance that WITNESS #2, who claimed at the OCCR hearing only to have witnessed the initial interaction between COMPLAINANT and the officers, places the car in the same place as all the other witnesses. WITNESS #2 had not addressed that issue in any prior statements to investigators. Indeed, none of the government investigators had asked any of the witnesses about the location of the police car on the scene. Given that no one had previously considered the location of the car during the stop of any importance, it seems unlikely that WITNESS #2's recollection was the result of suggestion by any other witness. Assuming that WITNESS #2 saw the car arrive on the scene but left while COMPLAINANT was still standing against the wall, SUBJECT OFFICER must have been on the scene in time to have participated in the stop.

⁷ WITNESS #1 was unable to identify WITNESS OFFICER #1 or WITNESS OFFICER #2 from similar photo arrays.

SUBJECT OFFICER or WITNESS OFFICER #1 conducted the stop and “had hands on” COMPLAINANT but that he did not participate in the stop.⁸ At the OCCR hearing, WITNESS OFFICER #2’s testimony contradicted his earlier statement to the USAO and instead corroborated WITNESS OFFICER #1’s recitation of the events. I discuss WITNESS OFFICER #2’s statement and testimony in greater detail below.

COMPLAINANT’s statements have been somewhat inconsistent – on November 9, 2001, COMPLAINANT informed the OCCR that, though he could identify one of the three MPOs by sight, he could not identify which officer put him in a choke hold. On March 11, 2002, COMPLAINANT claimed that he “could recognize [the officer] who subdued him.” The same day, he identified SUBJECT OFFICER from a photo array and stated, “the guy looks like this one only without glasses.” Because the report of his review of the photo array does not set forth the “guy” to whom COMPLAINANT was referring (i.e., whether it was an officer whom he recognized or the officer who subdued him), it is unclear whether he was then claiming that SUBJECT OFFICER conducted the stop.⁹ At the OCCR hearing, COMPLAINANT identified SUBJECT OFFICER as the officer who conducted the stop.

WITNESS #1 was the most credible witness during the OCCR hearing. While he is a workplace friend and colleague of COMPLAINANT’s, they are not close friends, and he has no stake in the outcome of this case. Unlike WITNESS OFFICER #1, whose friend and long-time partner might face disciplinary action depending on the outcome of this matter, WITNESS #1 has no reason to be anything but truthful. Furthermore, WITNESS #1’s testimony in this matter has never overreached; he has been critical of COMPLAINANT’s conduct when appropriate (e.g., explaining that COMPLAINANT was belligerent during the stop) and has not sought to speculate about any event that he did not personally witness.

During the OCCR hearing, WITNESS OFFICER #1’s demeanor was not credible. Furthermore, WITNESS OFFICER #2’s late conversion to WITNESS OFFICER #1’s version of the story not only did not buttress but instead further undermined the credibility of WITNESS OFFICER #1’s testimony, by raising the implication that the officers’ statements were orchestrated.¹⁰ According to the transcript of WITNESS OFFICER #2’s USAO interview, the Assistant U.S. Attorney refreshed WITNESS OFFICER #2’s memory of the events by showing

⁸ According to the transcript of the USAO interview, WITNESS OFFICER #2 may have asked COMPLAINANT why he had run. While the statement and the question that elicited it are both ambiguous, the transcript suggests that, at some point, he might have been close enough to COMPLAINANT to ask him a question. He was not there very long, however, given that he was the officer closest to STREET #1, S.E. (according to both WITNESS #1 and COMPLAINANT) when WITNESS #1 came back down the driveway.

⁹ COMPLAINANT was unable to identify WITNESS OFFICER #1 or WITNESS OFFICER #2 from similar photo arrays.

¹⁰ Unlike WITNESS OFFICER #1, WITNESS OFFICER #2 has had only a passing relationship with SUBJECT OFFICER. His distance from SUBJECT OFFICER adds credibility to his initial statement.

him photographs of the scene. WITNESS OFFICER #2 stated that he remembered the incident that evening and was able to speak credibly regarding his recollection of the stop. Although there were a number of details he was not able to remember, WITNESS OFFICER #2 was clear that he did not conduct the stop and that he was largely on the periphery searching for contraband by flashlight. In general, WITNESS OFFICER #2's initial statement did not support SUBJECT OFFICER and WITNESS OFFICER #1's version of events. He instead explained to the USAO that he was not in the immediate vicinity of the stop and therefore did not witness most of the events there. He placed either SUBJECT OFFICER or WITNESS OFFICER #1 at the stop. Before the hearing took place, it therefore seemed that WITNESS OFFICER #2's statement was largely consistent – and in no material way inconsistent – with WITNESS #1's statement.

At the OCCR hearing, however, WITNESS OFFICER #2 abandoned his earlier statement to the USAO and instead recited the version of events previously given by WITNESS OFFICER #1. Not only did WITNESS OFFICER #2's physical demeanor during testimony convey discomfort with his testimony, but his explanation for his new recollections was itself not credible. WITNESS OFFICER #2 claimed that the discrepancies between his earlier statements and his testimony at the hearing were attributable to how his memories of that night were “starting to come back to [him] piece by piece.” That seems unlikely. His recollections have not merely filled out with the passage of time; they have taken on new shapes entirely. And each change in his story – down to details – has become consistent with WITNESS OFFICER #1's version of events. I therefore discredit WITNESS OFFICER #2's testimony at the OCCR hearing, to the extent that it is inconsistent with his earlier statement.

Based on WITNESS #1's statement and on WITNESS OFFICER #2's initial statement to the USAO, I conclude – even without taking into regard COMPLAINANT's own testimony – that SUBJECT OFFICER was more likely than not the officer who conducted the stop.

Use of a Weapon During the Stop. COMPLAINANT alleges that when he opened the door from the School to the parking lot, SUBJECT OFFICER was pointing a gun at him. SUBJECT OFFICER claims he did not draw a gun during the incident. No one else present that evening claims to have seen SUBJECT OFFICER with his gun drawn. As is clear from this decision, I found that much of SUBJECT OFFICER's testimony was not credible. By the same token, my impression is that COMPLAINANT is apt to exaggerate. Their competing recollections therefore leave me in equipoise. Three pieces of testimony support the idea that the officers drew their weapons: (1) WITNESS #2 testified that one of the other officers drew a gun on him; (2) all the officers testified that they initiated the stop because they believed COMPLAINANT was carrying a gun; and (3) WITNESS OFFICER #2 testified that he slowed in going around a corner because he was concerned that he might get shot by COMPLAINANT. On the first point, WITNESS #2 did not mention having had a gun pointed at him in his earlier statements to government investigators, though he did state that at least some of the officers had their guns drawn. Furthermore, his testimony at the OCCR hearing was punctuated by his failure to recollect ever having given a statement to the OCCR investigator (which he had on January

13, 2003). As noted above, I therefore assign little weight to WITNESS #2's statements and testimony. The latter two points support an inference that the officers might have drawn their weapons. But that inference is fairly weak – particularly given the officers' own denials (including during WITNESS OFFICER #2's initial statement to the USAO) and WITNESS #1's failure to see an unholstered gun. In any case, the inference only goes to the likelihood that some of the officers unholstered their weapons; it does not resolve whether SUBJECT OFFICER in particular did so.

Based on the evidence presented, I have no adequate factual basis to determine whether SUBJECT OFFICER in fact drew his gun and pointed it at COMPLAINANT. I therefore need not address whether use of a gun in the circumstances would have been warranted.

Use of Physical Force to Get COMPLAINANT to the Ground. COMPLAINANT claims that SUBJECT OFFICER: (1) stood behind him while he was facing the wall of the School with his hands against the wall, (2) put his arm around COMPLAINANT's neck (with SUBJECT OFFICER's elbow facing forward), (3) applied pressure to the front and sides of COMPLAINANT's neck, and (4) forced him to the ground. COMPLAINANT claims to have been short of breath immediately after the incident as a consequence of SUBJECT OFFICER's hold. He subsequently sought medical treatment for strained neck muscles and consequently missed a number of days of work.¹¹

WITNESS #1's testimony and prior statements largely support COMPLAINANT's story but are less extreme. According to WITNESS #1 (in particular to his physical demonstration at the OCCR hearing), SUBJECT OFFICER reached around COMPLAINANT's neck and threw COMPLAINANT to his knees. WITNESS #1, however, did not testify that SUBJECT OFFICER applied any sustained pressure to COMPLAINANT's neck. A short while after the stop, WITNESS #1 saw that COMPLAINANT's neck was red from having been held.

SUBJECT OFFICER denies being present in the immediate vicinity of the stop, and WITNESS OFFICER #1 claims that he and WITNESS OFFICER #2 patted COMPLAINANT down but did not otherwise have much physical contact with him. WITNESS OFFICER #2 (like WITNESS #1) told the USAO that COMPLAINANT was not cooperative and that either SUBJECT OFFICER or WITNESS OFFICER #1 had "hands on him" because he "struggled a bit." In his testimony at the OCCR hearing, WITNESS OFFICER #2 did not repeat that statement and instead affirmed WITNESS OFFICER #1's version of events, according to which WITNESS OFFICER #1 and WITNESS OFFICER #2 conducted the stop while SUBJECT OFFICER entered the parking lot and then watched. WITNESS OFFICER #2 testified during

¹¹ SUBJECT OFFICER correctly noted at the hearing that COMPLAINANT's having sought medical treatment, as well as the supporting medical records, prove nothing regarding what happened on October 31, 2001. Because no examination objectively identified an injury caused by the October 31 stop, the medical records and associated diagnoses reflect no more than the treating physicians' reactions to COMPLAINANT's subjective recitation of his own symptoms and therefore add nothing to the record.

the hearing that COMPLAINANT showed “a little bit of resistance” but was restrained with minimal physical force.

For the reasons explained above, I give credence to WITNESS #1’s statements and his testimony at the OCCR hearing; I similarly credit WITNESS OFFICER #2’s statement to the USAO. In light of that, I find that COMPLAINANT has shown by a preponderance of the evidence that SUBJECT OFFICER grasped him around the neck and threw him to his knees with that hold.

COMPLAINANT alleges that the hold used on him by SUBJECT OFFICER was a “choke hold” or “carotid artery hold.” MPD Special Order 93-25 defines a choke hold as:

any weaponless technique which is applied in an effort to control or disable a person by applying pressure or force to the carotid artery or the jugular vein on the sides of the neck with the intent or purpose of controlling a person’s movement or rendering a person unconscious by constricting the flow of blood to and from the brain.

Read closely, MPD Special Order 93-25 is not a model of clarity – for example, it is not obvious whether the clause “by constricting the flow of blood to and from the brain” modifies one or both of the preceding activities (i.e., “controlling a person’s movement” and “rendering a person unconscious”). For purposes of this case, however, it is sufficient to note that the Order requires that the “technique [be] . . . applied in *an effort* to control or disable a person *by* applying pressure or force to the carotid artery or jugular vein.” (Emphasis added.) The officer’s “effort” therefore needs to be directed at applying “pressure or force to the carotid artery or jugular vein” for purposes of subduing the subject of the hold.

Based in particular on WITNESS #1’s testimony and physical demonstration, I conclude that the hold employed by SUBJECT OFFICER was not intended to “control or disable [COMPLAINANT] by applying pressure or force to the carotid artery or jugular vein.” Rather, SUBJECT OFFICER appears to have – for lack of a better description – more or less picked up COMPLAINANT (who is significantly smaller than SUBJECT OFFICER) by his neck and thrown him to his knees. As such, I do not believe that SUBJECT OFFICER employed a “choke hold” or “carotid artery hold.”

According to the MPD’s manual *Application of the Use of Force Continuum for the Metropolitan Police Department* (Nov. 2000) [hereinafter “*Use of Force Guide*”], “The policy of the [MPD] 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.” In this instance, COMPLAINANT had been stopped, had complied with the instruction to stand facing the School’s wall with his hands against the wall, had been patted down for weapons, and did not pose a threat to SUBJECT OFFICER or the other officers. SUBJECT OFFICER nevertheless used physical force to throw him to the ground.

Both WITNESS #1 and WITNESS OFFICER #2 agree that COMPLAINANT was not compliant. His noncompliance, however, appears to have been minimal at any time during the stop and reduced to verbal noncooperation by the time SUBJECT OFFICER grasped him around the neck and threw him to the ground.

The MPD employs a “force continuum” that allows MPOs to “select the appropriate level of force required by the circumstances.” MPD General Order 901.7, Pt. II. The appropriate level of force is intended to be “proportional to the actions and level of resistance of [the] subject,” *id.* at Pt. III, and is intended to ensure that “the officer is always superior to the subject’s degree of compliance/noncompliance in terms of controlled and balanced force utilization.” *Use of Force Guide* Pt. III, § 2.

The MPD’s “use-of-force model” correlates perceived levels of threat to corresponding permissible levels of force by categorizing them into “tiers.” Each tier is designated by a color intended to encapsulate the appropriate level of “action and alertness.” In order of increasing risk, the colors of the tiers are: blue, green, yellow, orange, and red. *Id.* at Pt. IV. An MPO is expected to “select the appropriate level of force required to control the situation” and to escalate or de-escalate his or her response as the “subject’s resistance or threat level” increases or decreases. *Id.* at Pt. I.

After COMPLAINANT had been stopped and frisked and was standing with his hands against the wall, he engaged in “noncompliant resistance” but was otherwise under SUBJECT OFFICER’s control. As such, COMPLAINANT’s behavior was within the “Green” category of the MPD’s “use-of-force model.” An officer responding to a “green situation” is authorized to engage in:

1. Strong verbal persuasion;
2. Soft empty hand control; and
3. Firm grip and escorting.

Id. at Pt. IV, § 2. Based on WITNESS #1’s demonstration, my review of the record in this case, and my review of the “use-of-force model,” SUBJECT OFFICER’s reaction to COMPLAINANT’s conduct would best be characterized as a “takedown,” which is in the Orange tier (i.e., two tiers above the conduct by COMPLAINANT that precipitated SUBJECT OFFICER’s reaction). Thus, contrary to MPD General Order 901.7.C., SUBJECT OFFICER not only did not limit his use of non-deadly force to that “necessary to de-escalate the incident and bring it under control,” he instead used a degree of force wholly out of proportion to the situation and likely to both injure COMPLAINANT and increase the danger of the stop. I therefore conclude that SUBJECT OFFICER’s conduct violated MPD General Order 901.7.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1: Harassment	Exonerated
Allegation 2: Language or Conduct that is Insulting, Demeaning, or Humiliating	Exonerated in part (inappropriate language directed at WITNESS #2 and WITNESS #3); sustained in part (inappropriate language directed at COMPLAINANT)
Allegation 3: Use of Unnecessary or Excessive Force	Insufficient facts in part (pointing gun at COMPLAINANT); exonerated in part (use of choke hold); sustained in part (excessive use of non-deadly physical force)

Submitted on September 30, 2003.

Christopher Davies
Complaint Examiner