

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	02-0128
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, 3rd District
Allegation 1:	Use of Excessive or Unnecessary Force
Complaint Examiner:	Shana L. Malinowski
Merits Determination Date:	November 17, 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 OCCR on January 18, 2002, COMPLAINANT alleged that during a traffic stop, a subject officer, SUBJECT OFFICER #2 used unnecessary or excessive force against her and also used language and engaged in conduct toward her that were insulting, demeaning or humiliating. COMPLAINANT also alleged that a second subject officer, later identified as SUBJECT OFFICER #1, used unnecessary or excessive force against her. COMPLAINANT further alleged that a third subject officer, later identified as SUBJECT OFFICER #3, used language toward her that was insulting, demeaning or humiliating after she was transported to the 3rd District police station.

Specifically, on January 7, 2002, SUBJECT OFFICER #2 arrested COMPLAINANT for operating an unregistered auto and for failure to comply. COMPLAINANT claimed that during the incident, SUBJECT OFFICER #2 closed the door of a car on her leg, pushed her face into concrete and made offensive statements, including, "Back the fuck up." COMPLAINANT also claimed that SUBJECT OFFICER #1 pushed her on her throat and that SUBJECT OFFICER #3 told her, "Fuck it, you're going to court." On August 19, 2003, a member of the Citizen Complaint Review Board (CCRB) dismissed all of the allegations in the complaint against

SUBJECT OFFICER #2 and SUBJECT OFFICER #3, concurring with the determination made by OCCR's executive director.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 and the Exhibits appended thereto, and upon the objections submitted by SUBJECT OFFICER #1 on September 23, 2003, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On January 15, 2002 at approximately 8:00 a.m., SUBJECT OFFICER #2 saw a Ford station wagon on the 400 block of P Street, N.W., which he later determined was being driven by COMPLAINANT. The car had a homemade paper tag in the rear window. ROI at 4-5 & Ex 8 (SUBJECT OFFICER #2 MOI) at 1.
2. SUBJECT OFFICER #2 signaled for COMPLAINANT to stop, and COMPLAINANT pulled into the parking lot at ELEMENTARY SCHOOL. ROI at 5 & Ex. 8 (SUBJECT OFFICER #2 MOI) at 1. COMPLAINANT worked at the elementary school as a cafeteria assistant. *Id.* at 3 & Ex. 3 (COMPLAINANT MOI) at 1.
3. SUBJECT OFFICER #2 asked COMPLAINANT for her driver's license and vehicle registration. ROI at 5 & Ex. 3 (COMPLAINANT MOI) at 1. COMPLAINANT gave SUBJECT OFFICER #2 her driver's license and informed him that she did not have the registration with her. ROI Ex. 3 (COMPLAINANT MOI) at 1.
4. SUBJECT OFFICER #2 requested a check of the tag number on the paper tag and was told that the number was registered to a 2002 Honda, not the Ford station wagon. ROI at 5. Based on this information, SUBJECT OFFICER #2 asked COMPLAINANT whether the car she was driving had been stolen. *Id.* COMPLAINANT became "huffy [and] puffy," and SUBJECT OFFICER #2 proceeded to read the Vehicle Identification Number (VIN) at the front windshield of the car. *Id.* & Ex. 8 (SUBJECT OFFICER #2 MOI) at 1.
5. While SUBJECT OFFICER #2 was reading the VIN number, COMPLAINANT began to open the door of the car. ROI at 5. SUBJECT OFFICER #2 asked COMPLAINANT to stay in the car and returned to reading the VIN number. *Id.*

¹ Individual CCRB members are assigned to rotating two-week dismissal schedules.

6. COMPLAINANT again began to open the car door, and SUBJECT OFFICER #2 grabbed her by the arm. ROI at 5.² A struggle ensued between COMPLAINANT and SUBJECT OFFICER #2, where SUBJECT OFFICER #2 “threw [COMPLAINANT] against the fence” because of her attempt to resist arrest, and then she “hit the ground” on her back. ROI Ex. 8 (SUBJECT OFFICER #2 MOI) at 2. The altercation concluded with SUBJECT OFFICER #2 placing COMPLAINANT in handcuffs. ROI at 3 & Ex. 3 (COMPLAINANT MOI) at 2.
7. By this time, three other officers had arrived on the scene: WITNESS OFFICER #1, WITNESS OFFICER #2, and SUBJECT OFFICER #1.
8. Also by this time, some employees from the elementary school came out of the building to witness the incident.
9. Even after COMPLAINANT was placed in handcuffs, she remained in an agitated state, and was cursing at the officers. See ROI Ex. 3 (COMPLAINANT MOI) at 2.
10. WITNESS #1, the school’s cafeteria manager, was informed by one of the teachers that COMPLAINANT was being placed under arrest. WITNESS #1 went to the school parking lot and observed SUBJECT OFFICER #2 pulling COMPLAINANT by the arm. ROI, Ex. 5 (WITNESS #1 MOI) at 1. WITNESS #1 also observed that COMPLAINANT was in handcuffs and that COMPLAINANT “was crying and yelling at the officers that they had hit her and what they were doing to her wasn’t right.” Id. WITNESS #1 was told to “back up” by one of the officers. Id. at 2. WITNESS #1 further observed that COMPLAINANT “was becoming increasingly agitated, which . . . made the officer more agitated . . .” Id. at 1.
11. WITNESS #2, a custodial employee at the elementary school, observed a portion of the incident and noted that while COMPLAINANT was in handcuffs, she was crying, agitated, and yelling at the officers. ROI, Ex. 7 (WITNESS #2 MOI) at 1. WITNESS #2 was told to by the officers to stay back. Id.
12. WITNESS #3, the witness interviewed by Sergeant Devine at the 3rd District, observed COMPLAINANT using profanities. ROI, Ex. 12.
13. WITNESS OFFICER #2 observed COMPLAINANT using profane language (“Fuck SUBJECT OFFICER #2” and “He [SUBJECT OFFICER #2]’s a fat bitch) while COMPLAINANT was in handcuffs. ROI, Ex. 10 (WITNESS OFFICER #2 MOI) at 1. WITNESS OFFICER #1 also observed COMPLAINANT refer to SUBJECT OFFICER #2 as a “fat bitch” while in handcuffs. ROI, Ex. 9 (WITNESS OFFICER #1 MOI) at 1.

² SUBJECT OFFICER #2’s version of the events was corroborated by WITNESS #3, a witness who was dropping his grandson off at the elementary school at the time of the incident. WITNESS #3 was interviewed by Sergeant John E. Devine, 3rd District, in an investigation of a PD Form 99 complaint against SUBJECT OFFICER #2 alleging excessive force and brutality. ROI, Ex. 12 (Investigative Report with Recommendations CS-02-014) at 4.

- SUBJECT OFFICER #1 also observed COMPLAINANT “cursing out SUBJECT OFFICER #2” and telling him, “You bitch mother fuckers. I work here.” ROI, Ex. 11 (SUBJECT OFFICER #1 MOI) at 1.
14. COMPLAINANT remained agitated and continued cursing even after arriving at the station. ROI, Ex. 12 at 3.
 15. There were approximately 20-40 people on the scene, including elementary school children from the school, and the scene was a “melee.” ROI, Ex. 10 (WITNESS OFFICER #2 MOI) at 2.
 16. While COMPLAINANT was in handcuffs and being held by SUBJECT OFFICER #2, COMPLAINANT moved towards SUBJECT OFFICER #1 in a manner that made SUBJECT OFFICER #1 “feel threatened.” ROI, Ex. 11 (SUBJECT OFFICER #1 MOI) at 1.
 17. At the time, SUBJECT OFFICER #1 was standing in front of COMPLAINANT with his left side towards her, so that she was visible to him only by his peripheral vision. Sept. 23, 2003 Letter from SUBJECT OFFICER #1 to OCCR Director Eure (hereinafter “Sept. 23 SUBJECT OFFICER #1 Letter”).
 18. To stop COMPLAINANT, SUBJECT OFFICER #1 put his hand up and made contact with COMPLAINANT’s throat, using “enough force to push her back,” ROI, Ex. 11 (SUBJECT OFFICER #1 MOI) at 1, “in an effort to maintain his reactionary gap, and to avoid an assault.” Sept. 23 SUBJECT OFFICER #1 Letter.
 19. COMPLAINANT described the push as “slight.” ROI, Ex. 3 (COMPLAINANT MOI) at 2.
 20. From the perspective of SUBJECT OFFICER #1, it was unclear whether COMPLAINANT “had escaped SUBJECT OFFICER #2’s grip, and was in full stride.” Sept. 23 SUBJECT OFFICER #1 Letter at 1. SUBJECT OFFICER #1 “pushed high because she was a large person and in order to avoid her breasts, and inadvertently pushed her back by the throat once.” Id.
 21. COMPLAINANT is approximately 5’10” and weighed approximately 200 lbs. ROI, Ex. 11 (SUBJECT OFFICER #1 MOI) at 1.
 22. Pursuant to standard OCCR policy, because the complaint alleged the use of unnecessary or excessive force, OCCR referred the matter on May 20, 2002 to the United States Attorney for the District of Columbia for possible criminal prosecution. On May 28, 2002, the U.S. Attorney notified OCCR that it had declined any criminal prosecution arising from the incident. ROI, Ex. 13.

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; (3) use of language or conduct that is insulting, demeaning, or humiliating; (4) discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business; or (5) retaliation against a person for filing a complaint pursuant to [the Act].”

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.”³ MPD General Order 901.7, Part II states, “the 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.” ROI, Ex. 14.

MPD General Order 901.7, Part IV, Section A, No. 1 states: “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.” Id.

“Application of the Use of Force Continuum for the Metropolitan Police Department,” which provides additional written guidance on the appropriate use of force by MPD officers, correlates levels of action and alertness to five colors – blue, green, yellow, orange and red. ROI, Ex. 15.

OCCR determined that SUBJECT OFFICER #1 conduct of pushing COMPLAINANT was best characterized as a striking or blocking technique, corresponding to the color orange. ROI at 9. The policy states, “At this level of the model, there is an assessment of imminent bodily harm to the officer or others. There is an actual or attempted assault on the officer at this level. The officer may direct energy and tactics toward self-defense.” ROI, Ex. 15. Other responses falling within the orange category are the use of chemical agents, baton strikes and takedowns, or actions that “may result in non-lethal injuries to the subject.” Id.

³ 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.

The Complaint Examiner does not believe that SUBJECT OFFICER #1's "push" of COMPLAINANT resulted in a striking or blocking technique corresponding with the color orange. Pursuant to the credible facts before the Complaint Examiner, SUBJECT OFFICER #1 was not engaging in self-defense tactics that could result in non-lethal injury to COMPLAINANT. Rather, SUBJECT OFFICER #1's actions were more akin to the color yellow, as COMPLAINANT's move towards SUBJECT OFFICER #1, while yelling and agitated, appears to the Complaint Examiner to be "active resistance," albeit while in handcuffs, and "not allowing the officer to exercise control," requiring SUBJECT OFFICER #1 to employ physical control tactics to maintain control of the situation.

At the yellow level, "[t]he subject is uncooperative and will not comply with the officer's requests or commands by actively resisting so as not allowing the officer to exert control" and "[t]he officer perceives the situation escalating and [that] the level of noncompliance has increased and becomes volatile. The officer uses compliance techniques and physical control tactics. The actions of the officer may induce pain or cause discomfort to the subject until control is achieved, but will not generally cause an injury." Id. Responses at the yellow level include control holds, joint locks, and OC spray. Id.

First, the "slight" push used by SUBJECT OFFICER #1 is more closely analogized to control holds and joint locks exercised in the yellow level than the baton strikes and takedowns employed by officers exercising options at the orange level. While a push could be considered a blocking or striking technique, the Complaint Examiner believes that there is a wide array of conduct that could be considered a "block" or "strike," ranging from harsh and severe to minimal and protective. Considering the severity of the other options of force appropriately available at the orange level, a slight push, while it may be a strike or a block, is not, in the opinion of the Complaint Examiner, the type of strike or block contemplated at the orange level.

Second, "[t]he 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. That decision must be based on the circumstances that the officer reasonably believes to exist." MPD General Order 901.7, Part II, ROI Ex. 14. The Complaint Examiner finds that SUBJECT OFFICER #1's placing of his hand on COMPLAINANT's body to stop her from moving towards him in a way that made him feel threatened – and, in the process, inadvertently pushing slightly against her throat – was reasonable based on the circumstances at the time. COMPLAINANT had already demonstrated noncompliance, hostility and physical resistance. Within moments before the incident, COMPLAINANT had been placed under arrest for, *inter alia*, failure to comply. Witnesses present reported that COMPLAINANT, described as a large woman, was agitated, yelling, cursing, and moving about. There was a crowd of individuals, including employees and students of the elementary school, and the scene was described as a "melee." ROI, Ex. 15 (WITNESS OFFICER #2 MOI) at 2. In light of these circumstances, the Complaint Examiner believes that SUBJECT OFFICER #1's intended conduct – to stop

COMPLAINANT from moving forward by placing his hand on the upper part of her chest – was reasonable. The unintended conduct, touching her throat, was simply unintended conduct.⁴

The Complaint Examiner also disagrees with OCCR’s conclusion that SUBJECT OFFICER #1 knew that COMPLAINANT was not dangerous because she was in handcuffs and standing next to SUBJECT OFFICER #2. ROI at 8. A suspect, particularly one that is unruly and had to be arrested moments before with a takedown, can still be dangerous while in handcuffs, particularly if it reasonably appears to the officer that the agitated suspect has broken away from the individual holding the handcuffs. OCCR also asserts that “pushing COMPLAINANT’s neck did not bring the situation under control, but rather, put the complainant at greater risk of bodily injury. Instead of pushing COMPLAINANT, SUBJECT OFFICER #1 could have simply stepped backwards, away from COMPLAINANT’s movement.” Id. The Complaint Examiner disagrees. Had SUBJECT OFFICER #1 stepped away from COMPLAINANT while she was in motion and appeared to not be held by another officer, control of the circumstances would have been lessened and the officers present would have had to exercise more force to regain it.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1, 3rd District

Allegation 1:	Exonerated
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Submitted on November 17, 2003.

Shana L. Malinowski
Complaint Examiner

⁴ While COMPLAINANT told OCCR that SUBJECT OFFICER #1 pushed her at the neck twice, the Complaint Examiner chooses to credit SUBJECT OFFICER #1’s statement over COMPLAINANT’s as no other witness saw SUBJECT OFFICER #1 hit COMPLAINANT more than once and because the record reflects that COMPLAINANT’s version of other events was contradicted by witnesses, see ROI, Ex. 12 at 4 (report on PD Form 99 where witness stated that SUBJECT OFFICER #2 did not close car door on COMPLAINANT’s leg), and as COMPLAINANT had falsely informed an officer that she had never been arrested before. See id. at 4.