

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

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| <b>Complaint No.:</b>                               | 03-0457  |
| <b>Complainant:</b>                                 | COMPLAINANT  |
| <b>Subject Officer(s),<br/>Badge No., District:</b> | SUBJECT OFFICER, Second District                         |
| <b>Allegation 1:</b>                                | Harassment   |
| <b>Allegation 2:</b>                                | Insulting, Demeaning, or Humiliating Language or Conduct |
| <b>Complaint Examiner:</b>                          | Turna R. Lewis   |
| <b>Merits Determination Date:</b>                   | April 22, 2005   |

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC), formerly the Office of Citizen Complaint Review (OCCR), has the authority to adjudicate citizen complaints against members of the Metropolitan Police Department (MPD) that allege abuse or misuse of police powers by such members, as provided by that section. This complaint was timely filed in the proper form as required by § 5-1107, and the complaint has been referred to this Complaint Examiner to determine the merits of the complaint as provided by § 5-1111(e).

**I. SUMMARY OF COMPLAINT ALLEGATIONS**

In a complaint filed with the Office of Police Complaints (OPC), formerly the Office of Citizen Complaint Review (OCCR), on July 3, 2003, COMPLAINANT alleged that a Metropolitan Police Department (MPD) officer, SUBJECT OFFICER, harassed him and used language and engaged in conduct toward him that was insulting, demeaning, or humiliating.

**II. EVIDENTIARY HEARING**

An evidentiary hearing was conducted regarding this complaint on February 28, 2005. The Complaint Examiner heard the testimony of COMPLAINANT, SUBJECT OFFICER, WITNESS #1, WITNESS #2, WITNESS #3, WITNESS #4, WITNESS OFFICER #1, WITNESS OFFICER #2, and WITNESS OFFICER #3. The following exhibit, numbered consecutively to the exhibits in the Report of Investigation, was introduced as part and accepted at the hearing:<sup>1</sup> The Report of Investigation was entered into the record and its exhibits are incorporated by reference.

Exhibit 19: Disorderly Conduct Handbook

**III. FINDINGS OF FACT**

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on December 23, 2004, an evidentiary hearing conducted on February 28,

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<sup>1</sup> One exhibit was entered at the hearing, COMPLAINANT's Exhibit 19. The Report of Investigation was entered into the record and contains Exhibits 1 through 18 that were referenced at the hearing.

2004, and the parties' closing briefs, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On the evening of June 27, 2003, WITNESS #1 and WITNESS #2, along with two other friends and COMPLAINANT, gathered at COMPLAINANT's apartment between 8:30 and 9:00 p.m. Later they went dancing at the LOCATION #1 in Virginia, had drinks, and then decided to go to Georgetown, arriving at RESTAURANT & BAR, N.W., located in Georgetown at approximately 1:45 a.m.

2. COMPLAINANT, WITNESS #1, and WITNESS #2, joined the line to enter RESTAURANT & BAR. WITNESS #1 was closest to the door, WITNESS #2 was directly behind her, followed by COMPLAINANT. COMPLAINANT made a comment to a friend standing behind him about SUBJECT OFFICER holding and drinking out of a "keg cup."

3. SUBJECT OFFICER responded to COMPLAINANT's comment with the question, "What the fuck did you say to me?" When COMPLAINANT did not respond, SUBJECT OFFICER approached COMPLAINANT, physically restraining him from behind, saying, "hey, you fucking punk," and then "you are a fucking punk and you're under arrest." During the time that COMPLAINANT was in custody, SUBJECT OFFICER continued to converse with COMPLAINANT using profanity.

4. WITNESS OFFICER #1, the Power Shift Sergeant, was patrolling the area and came upon the scene when he observed SUBJECT OFFICER holding COMPLAINANT. WITNESS OFFICER #1 did not observe the initial incident between SUBJECT OFFICER and COMPLAINANT, but instructed SUBJECT OFFICER to arrest COMPLAINANT based upon SUBJECT OFFICER's physical contact with COMPLAINANT, COMPLAINANT's loud and boisterous behavior, and SUBJECT OFFICER's description of the events in a conversation away from COMPLAINANT. SUBJECT OFFICER then placed handcuffs on COMPLAINANT.

5. WITNESS OFFICER #2 and WITNESS OFFICER #3 were in the block of RESTAURANT & BAR. WITNESS OFFICER #2 was approximately twenty feet away from the location of the incident; and WITNESS OFFICER #3 was one hundred feet away. At the time of the incident between COMPLAINANT and SUBJECT OFFICER neither WITNESS OFFICER #2 nor WITNESS OFFICER #3 were engaged in conversation with SUBJECT OFFICER.

6. WITNESS #3 and WITNESS #4 did not have first hand knowledge of the entire incident between COMPLAINANT and SUBJECT OFFICER.

7. SUBJECT OFFICER led COMPLAINANT through the crowd and around the corner to his squad car. COMPLAINANT's friends, including WITNESS #1 and WITNESS #2 followed COMPLAINANT, where SUBJECT OFFICER directed WITNESS #1 to get on her knees and remove COMPLAINANT's shoelaces from his shoes, and WITNESS #2 to get on her knees and remove COMPLAINANT's belt. SUBJECT OFFICER removed COMPLAINANT's wallet and money, retrieving \$25.00, informing COMPLAINANT that it was for bail.

8. SUBJECT OFFICER transported COMPLAINANT to the Second District station, where he completed paperwork, including an Arrest/Prosecution Report. SUBJECT OFFICER paid a \$25.00 bail with the money retrieved from COMPLAINANT. While at the station, COMPLAINANT was photographed and fingerprinted. COMPLAINANT was not advised of his rights or told that by paying the \$25.00 fine that he was admitting guilt to disorderly conduct. COMPLAINANT was released at approximately 4:30 a.m.

9. COMPLAINANT filed a complaint with the Office of Citizen Complaint Review on July 3, 2003, alleging that SUBJECT OFFICER illegally arrested and detained him, and that he was wrongfully fined.

10. SUBJECT OFFICER asked WITNESS #3, WITNESS #4, WITNESS OFFICER #2, and WITNESS OFFICER #3, but not WITNESS OFFICER #1, to provide witness statements. They complied with his request, each providing a witness statement, a PD 119. WITNESS OFFICER #2 and WITNESS OFFICER #3 provided witness statements to SUBJECT OFFICER, dated September 25, 2003. WITNESS #3 provided a statement to SUBJECT OFFICER, dated September 17, 2005. WITNESS #4 refused to cooperate with the investigation, failing to provide a statement to the Investigator, but provided a witness statement to SUBJECT OFFICER, dated October 1, 2003.

#### **IV. DISCUSSION**

Pursuant to D.C. Official Code § 5-1107(a), “The Office [of Police Complaints] shall have authority 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].”

In the instant matter, COMPLAINANT alleges that SUBJECT OFFICER harassed him when he arrested him for disorderly conduct. Harassment, as defined by MPD Special Order 01-01, 1 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, or in the absence of a specific law enforcement purpose.” The regulations governing OPC further define harassment as “[w]ords, conduct, gestures or other actions directed at a person that are purposefully, knowingly, or recklessly in violation of the law or internal guidelines of the MPD ... so as to (1) subject the person to arrest, detention, search seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (2) deny or impede the person in the exercise or enjoyment of any right, privilege, power or immunity. In determining whether conduct constitutes harassment, [OPC] will look to the totality of the circumstances surrounding the alleged incident, including, where appropriate, whether the officer adhered to applicable orders,

policies, procedures, practices, and training of the MPD ... the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating.” D.C. Mun. Regs. Title 6A § 2199.1.

**A. Allegation #1: Harassment**

To constitute harassment under the OPC Regulations, an officer’s violation of the law or MPD guidelines must have subjected the recipient of the conduct to “arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights...[or] den[ied] or impede[d] the person in the exercise of enjoyment of any right, privilege, power or immunity.” D.C. Mun. Regs., Title 6A, § 2199.1 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.”

COMPLAINANT testified that SUBJECT OFFICER harassed him and wrongfully arrested him for commenting to his friend that SUBJECT OFFICER was drinking out of a keg cup. Specifically, COMPLAINANT testified that after making the comment to his friend, who stood directly in line behind him, that SUBJECT OFFICER said, “What the fuck did you say to me?” When COMPLAINANT did not respond, SUBJECT OFFICER approached COMPLAINANT, physically restraining him from behind, saying, “hey you, fucking punk,” and then “you are a fucking punk and you’re under arrest.” During the time that COMPLAINANT was in custody, SUBJECT OFFICER continued to converse with COMPLAINANT using profanity. COMPLAINANT’s allegations were corroborated by WITNESS #1 and WITNESS #2, who were directly in front of him in line to enter RESTAURANT & BAR.

WITNESS OFFICER #1, the Power Shift Sergeant on duty on the night of the incident, had no motivation for fabrication, as did WITNESS OFFICER #2 and WITNESS OFFICER #3, who had been on the force for four years and were junior to SUBJECT OFFICER. (Tr. at pp. 184, 223). SUBJECT OFFICER, apparently in anticipation of this proceeding or some other investigation, began to collect statements from witnesses he felt would be favorable to him. It is telling that he did not ask WITNESS OFFICER #1 for a statement. The Arrest/Prosecution Report, is also very revealing and relevant to a determination of whether SUBJECT OFFICER harassed COMPLAINANT. SUBJECT OFFICER completed the Arrest/Prosecution report on June 28, 2003, when he transported COMPLAINANT to the Second District. SUBJECT OFFICER’s statement of facts asserted that COMPLAINANT’s conduct in “enticing the crowd” consisted of raising his voice and stating, “This is so messed up.” On the Arrest/Prosecution Report, in the space “defendant’s version/remarks,” SUBJECT OFFICER wrote, “I am really sorry.” (Exhibit 11, ROI). Nothing in the Arrest/Prosecution Report describes conduct and/or behavior that would constitute a breach of the peace/disorderly conduct as defined by MPD orders, OPC regulations, or case law.

SUBJECT OFFICER testified that before WITNESS OFFICER #1 arrived, he had not decided whether to let COMPLAINANT go without arresting him. (Tr. at pp. 256-257). His testimony was contradicted by WITNESS OFFICER #1 who testified that SUBJECT OFFICER “pretty much wanted to send him on his way, cut him loose...” (Tr. at p. 78). WITNESS

OFFICER #1 testified that because he observed SUBJECT OFFICER physically restrain COMPLAINANT he directed SUBJECT OFFICER to arrest him in accordance with MPD General Orders. (Tr. at pp. 77-79). There is no dispute that SUBJECT OFFICER engaged in an actual touching/physical restraint of COMPLAINANT, as described by COMPLAINANT, and observed by WITNESS #2, WITNESS OFFICER #1, and WITNESS OFFICER #3. (Tr. at pp. 49, 74, and 231).

In deciding whether conduct constitutes harassment, OPC will look to the totality of the circumstances involved in the incident, including whether the officer adhered to applicable MPD orders, policies, procedures, practices and training; the frequency of the alleged conduct; severity of the alleged conduct; and whether the conduct was physically threatening or humiliating. D.C. Mun. Regs., Title 6A, § 2199.1.

It is more probable than not, that based on the evidence of record, that SUBJECT OFFICER would not have arrested COMPLAINANT, but for WITNESS OFFICER #1's directive to do so. It is clear that SUBJECT OFFICER's actions in physically restraining COMPLAINANT were not justified based on the MPD orders, policies, procedures, and practices. There was no credible testimony that COMPLAINANT's words or conduct "incited the crowd" or caused a breach of the peace. Indeed, WITNESS OFFICER #1 testified that COMPLAINANT would have been within his first amendment rights to protest his arrest if the facts were as he asserted. The Disorderly Conduct Handbook provides that all disorderly conduct offenses have one element in common:

Unless the facts clearly show that the defendant intended to breach the peace, or that the offending conduct was committed under circumstances such that a breach of the peace might be occasioned, there can be no violation of the disorderly conduct laws.

#### 1.2.2 Disorderly Conduct Statutes (D.C. Code 22-1107 to 22-1121). (Exhibit 19).

The Disorderly Conduct Handbook provides a description of behavior that establishes a breach of the peace, to include:

When acts or threats of violence cause consternation and alarm and thus disturb the tranquility of the citizens or of a community, threatening their security and invading the protection, which the law affords to every citizen....

This legal requirement means that a police must show that the defendant's conduct was illegal, and not merely offensive or in bad taste.

For example, there is clearly a breach of the peace when people are fighting in the street, but a verbal argument may or may not occur under circumstances such that a breach of the peace may be occasioned....

1.2.2.1 (Exhibit 19).

None of the police officers who were identified by SUBJECT OFFICER corroborated SUBJECT OFFICER's assertion that COMPLAINANT was thrown out of RESTAURANT & BAR for intoxication or that he was summoned by the doorman to assist him in handling COMPLAINANT. Further, there was no objective evidence that COMPLAINANT was intoxicated. SUBJECT OFFICER's other witnesses, WITNESS #3 and WITNESS #4, are employees of RESTAURANT & BAR and were not present for the entire incident. Further, their testimony and statements provided to the Investigator were contradictory and inconsistent, evidencing bias. I do not credit the testimony of WITNESS #4, who refused to provide a statement to the Investigator, but gave a statement to SUBJECT OFFICER, in which he asserted that he refused entry to two White males, presumably COMPLAINANT and his friend. I find more credible the testimony of COMPLAINANT, WITNESS #1, and WITNESS #2, who testified that COMPLAINANT did not make it to the door before the incident with SUBJECT OFFICER began. Further, the testimony of WITNESS #4 was contradicted by SUBJECT OFFICER, who testified that he was ten feet away, while WITNESS #4 testified that SUBJECT OFFICER was ten to twenty yards away. None of the police officers observed a doorman summon SUBJECT OFFICER for assistance, even though according to SUBJECT OFFICER, they were close by.

There was no credible evidence that COMPLAINANT acted illegally, or that he incited the crowd. COMPLAINANT and his friends were in a commercial area, populated by bars and restaurants. The evidence of record shows that if there was any loud and boisterous conduct, it was a response to SUBJECT OFFICER's harassment and arrest of COMPLAINANT. SUBJECT OFFICER, noted in the Arrest/Prosecution Report that COMPLAINANT's "disorderly conduct" consisted of repeating in a raised voice, "This is messed up." Under the statutes, COMPLAINANT's behavior did not constitute disorderly conduct and did not warrant arrest. Based upon the evidence of record, I conclude that SUBJECT OFFICER's actions in physically restraining and arresting COMPLAINANT were physically threatening and humiliating, occurring in front of his friends and in a public place. Based on the foregoing, I find that SUBJECT OFFICER's conduct constituted harassment.

**B. Allegation #2: Use Of Language That Is Insulting, Demeaning, or Humiliating**

MPD General Order 201.26, Part I, Section C. No. 1 and 3 states, "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...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." ROI, Exhibit 18. 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.”

The evidence of record gathered during the investigation and presented at the hearing supports COMPLAINANT’s allegation that SUBJECT OFFICER used insulting and demeaning language. COMPLAINANT alleged that SUBJECT OFFICER responded to his “keg cup” comment with the comments: “What the fuck did you say to me?” “You’re a fucking punk,” and “Do you think you’re fucking funny.” WITNESS #2, who was standing in front of him when the incident occurred corroborated COMPLAINANT’s allegation. WITNESS #2 provided a written statement to the Investigator that supported COMPLAINANT’s description of the incident. WITNESS #2 provided a statement on August 15, 2003, approximately five weeks after the incident. (Exhibit 4, ROI). Her testimony at the hearing was credible and consistent with her statement given to the Investigator.

SUBJECT OFFICER’s witnesses provided inconsistent and contradictory statements. In his statement to the Investigator, WITNESS #3 stated that he was standing just outside of the door of RESTAURANT & BAR and observed SUBJECT OFFICER with an intoxicated white male who was making comments towards him. WITNESS #3 was unsure whether the intoxicated man was COMPLAINANT or his friend and admitted in his testimony that he may have been referring to COMPLAINANT’s friend. WITNESS #3 stated that he never saw WITNESS #4 request assistance from SUBJECT OFFICER concerning COMPLAINANT’s behavior. (Exhibit 12, ROI). It is not clear that WITNESS #3 observed the incident between SUBJECT OFFICER and COMPLAINANT from beginning to end. At the hearing, WITNESS #3 was evasive and combative, refusing to answer questions. His testimony contradicted the statement he provided to the Investigator. He admitted that at the hearing that he came to the door of RESTAURANT & BAR and did not know if he came before or after the incident between SUBJECT OFFICER and COMPLAINANT. WITNESS #3 objected to being a part of the investigation and hearing and repeatedly made statements about protecting RESTAURANT & BAR from liability. (Tr. at p. 143). He appeared more concerned about potential liability of RESTAURANT & BAR than providing information relevant to a determination of the truthfulness of the allegations. WITNESS #3 corroborated COMPLAINANT’s assertion that SUBJECT OFFICER would have been drinking out of a red or blue keg cup as testified to by COMPLAINANT, when he testified that RESTAURANT & BAR uses red and blue, never white cups, referred to as “keg cups.” (Tr. at p. 147).

WITNESS #4 was also not credible. He refused to cooperate with the OPC investigation and never provided a statement despite numerous attempts by the Investigator to contact him. (p. 11, ROI). He failed to provide any reasonable rationale for his refusal to provide a statement to the Investigator. (Tr. at pp. 176-177). However, he did provide a witness statement, form PD 119, at SUBJECT OFFICER’s request on October 1, 2003. (Exhibit 15, ROI). In that statement, WITNESS #4 stated that he refused entry to two white males who became belligerent and rude and that he summoned SUBJECT OFFICER for assistance. WITNESS #4 contradicted SUBJECT OFFICER’s assertion that he was about eight or ten feet away from the door, describing SUBJECT OFFICER as being twenty to twenty-five yards away. (Tr. at pp. 172-173). He further stated that he left the scene after requesting SUBJECT OFFICER’s assistance.

None of the police officers was able to corroborate SUBJECT OFFICER's description of the incident. Neither WITNESS OFFICER #2 nor WITNESS OFFICER #3 was close enough to SUBJECT OFFICER to hear the initial incident between him and COMPLAINANT. (Tr. at pp. 186-186, 226.) WITNESS OFFICER #2 admitted that he had no firsthand knowledge of the incident, and that he did not observe the doorman (WITNESS #4) request assistance from SUBJECT OFFICER. (Tr. at pp. 185-186). WITNESS OFFICER #3 admitted under cross-examination that he was too far away to hear any conversation, but based his assessment of the situation on "body language." (Tr. at 220-230). WITNESS OFFICER #3 further admitted under cross-examination that he did not see COMPLAINANT touch SUBJECT OFFICER, but did observe SUBJECT OFFICER put his hands on COMPLAINANT's chest. (Tr. at p. 231).

COMPLAINANT testified credibly at the hearing. COMPLAINANT filed his complaint on July 3, 2003, five days after the incident. (Exhibit 2, ROI). His complaint, statement provided to the Investigator, and testimony at the hearing were consistent and credible. COMPLAINANT's witnesses, WITNESS #1 and WITNESS #2 both provided letters of support to OPC, dated respectively June 30, 2003, and July 20, 2003. WITNESS #1 and WITNESS #2 provided statements to the Investigator corroborating COMPLAINANT's allegations that were consistent with both their earlier letters of support and their testimony at the hearing. (Exhibits 4 and 5, ROI). Contrasted with SUBJECT OFFICER's witnesses (WITNESS OFFICER #2, WITNESS OFFICER #3, WITNESS #3, and WITNESS #4) whose statements and testimony were inconsistent and contradictory, COMPLAINANT's witnesses were more credible. Their testimony, along with WITNESS OFFICER #1, shows by a preponderance of the evidence that it is more probable than not that SUBJECT OFFICER used language and engaged in conduct that was insulting, demeaning, or humiliating on June 28, 2003.

## V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER, Second District

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|--------------------------|-----------|
| <b>Allegation No. 1:</b> | Sustained |
| <b>Allegation No. 2:</b> | Sustained |

Submitted on April 22, 2005

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Turna R. Lewis  
Complaint Examiner