

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	04-0099
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, Fifth District SUBJECT OFFICER #2, Fifth District SUBJECT OFFICER #3, Fifth District
Allegation 1:	Insulting, Demeaning, or Humiliating Language or Conduct
Allegation 2:	Use of Excessive or Unnecessary Force
Allegation 3:	Harassment
Complaint Examiner:	Maia Caplan
Merits Determination Date:	May 5, 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 has been referred for a determination on the merits pursuant to § 5-1111(e).

I. SUMMARY OF COMPLAINT ALLEGATIONS

COMPLAINANT alleges that SUBJECT OFFICER #1, SUBJECT OFFICER #2 and SUBJECT OFFICER #3 (collectively “the officers”) (1) engaged in conduct that was insulting, demeaning, or humiliating to him and (2) used unnecessary or excessive force against him. He also alleges that (3) SUBJECT OFFICER #1 harassed him.¹ According to COMPLAINANT, he phoned 911 on November 7, 2003, to report his escape from carjacker/kidnappers. Instead of assisting him, the above responding officers ridiculed him, referred to him as a “drug addict” and “liar,” and slammed him against the trunk of the squad car. SUBJECT OFFICER #1 also phoned COMPLAINANT’s employer, resulting in his termination.

¹ At hearing COMPLAINANT asserted for the first time allegations of discriminatory treatment on the basis of disability. COMPLAINANT testified that he has a glass eye. However, D.C. Mun. Regs., title 6A, § 2120.2 states in relevant part: "In the merits determination, the complaint examiner shall make . . . decisions about each allegation in the complaint." As the discrimination allegation did not appear in the complaint, it would be improper to entertain it here.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted on March 17, 2005. The Complaint Examiner heard testimony from complainant COMPLAINANT, SUBJECT OFFICER #1, SUBJECT OFFICER #2, and SUBJECT OFFICER #3. She also heard testimony from WITNESS #1, WITNESS #2, and WITNESS #3, all witnesses for the Complainant.

The following exhibits were introduced at the hearing:

- Complainant Exhibit 1: Complainant's March 3, 2004 Letter to BEF Corporation for outstanding wages following termination
- Complainant Exhibit 2: Random Drug Testing Records for Complainant
- Complainant Exhibit 3: Affidavit of WITNESS #4.

At the close of the evidentiary hearing, the Complaint Examiner granted the officers' unopposed request to file a brief in lieu of closing statements. The parties filed their briefs on April 6, 2005.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation (ROI)², an evidentiary hearing conducted on March 17, 2005, and the parties' briefs, the Complaint Examiner finds the material facts to be:

1. In November 2003, COMPLAINANT was employed with BEF Corporation (BEF). He used his corporate credit card to rent a car for transportation to and from BEF client sites in South Carolina and Virginia.
2. On November 7, 2003, COMPLAINANT phoned 911 to report that he had been carjacked and kidnapped in the District of Columbia.
3. SUBJECT OFFICER #1, SUBJECT OFFICER #2, and subsequently SUBJECT OFFICER #3, responded to COMPLAINANT's location near the 7-11 at the intersection of 8th Street and Maryland Avenue, N.E.
4. The officers each spoke with COMPLAINANT. He stated that he had been bound and shuttled between car and apartment for approximately three days, having just escaped.
5. COMPLAINANT was unable to describe his escape route, his captors, or their apartment.

² The OPC properly drew adverse factual inferences against the officers owing to their failure to cooperate with its investigators. Because this was remedied by the time of hearing—the officers consulted with expert counsel and participated in a full day of testimony—those inferences are no longer warranted.

6. COMPLAINANT's clothing was not soiled. The officers observed COMPLAINANT and saw no visible markings on his body.
7. COMPLAINANT did not know the whereabouts or model of his rental car, and could not identify the car rental agency. He specified that it was charged to his BEF corporate credit card.
8. The officers concluded that COMPLAINANT had been using drugs, and that his report lacked credibility. They did not file a carjacking or kidnapping report. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 focused on retrieving the missing vehicle.
9. SUBJECT OFFICER #1 phoned BEF, traced the identity of the rental agency and thereafter the make and year of the missing car. He also spoke with COMPLAINANT's sister-in-law, WITNESS #1, to request that she pick COMPLAINANT up.
10. At some point during the exchanges, COMPLAINANT phoned 911 a second time to seek additional assistance and complain about the officers. MPD 911 transcripts record SUBJECT OFFICER #3 informing the dispatcher that COMPLAINANT was a "liar" and recommending against further assistance.
11. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 located the missing vehicle that night in the same vicinity. The car appeared to have been in an accident. They also recovered valuable computer and camera equipment from within the car belonging to COMPLAINANT and/or BEF.
12. The officers did not seek to notify COMPLAINANT of the recovery.
13. COMPLAINANT was terminated from BEF shortly after the incident.

IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a), "[t]he Office [of Police Complaints] 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]."

A. Allegation One: Insulting, Humiliating or Demeaning Conduct and/or Language

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.”

MPD General Order 201.26, Part I, Section C provides that “[a]ll 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.”

According to COMPLAINANT, the officers insulted and demeaned him by referring to him as a drug addict and liar, laughing at him, and generally treating him with undue disbelief during the interview process. The officers deny the allegation, testifying that while they disbelieved COMPLAINANT and refused to file an incident report on the alleged carjacking and hijacking, they treated him with requisite courtesy during their interaction. They also assert some benevolence in that they did not pursue COMPLAINANT for filing a false claim and wasting MPD’s limited resources.

COMPLAINANT’s claim has some corroboration in MPD records relating to the second 911 call. In one transcript, SUBJECT OFFICER #3 refers to COMPLAINANT as a liar and discourages additional police officers from assisting. Both Special Order 01-01 and General Order 201.26 require officers to conduct themselves respectfully even if they decline to pursue a claim. Use of the term liar is disrespectful and demeaning. But the transcript is of a conversation between SUBJECT OFFICER #3 and other MPD personnel—not with complainant. While one might suspect comparable language in an exchange with COMPLAINANT, such suspicion is too attenuated to draw a conclusive inference.

Further support might be garnered from the officers’ testimony, given certain inconsistencies and belated explanations that suggest possible coordination. By way of example, the officers provided synchronized testimony that COMPLAINANT smelled like a crack user, but this is not mentioned in the ROI. When confronted with contradictory statements in the ROI, SUBJECT OFFICER #3 had to correct his testimony as to whether or not COMPLAINANT had told him on November 7 that he was a recovering crack addict who relapsed—an improbable assertion given the circumstances.

But COMPLAINANT’s own testimony about the incident must be discounted owing to formidable inconsistencies and contradictions, and the burden of proof is his. In one instance, COMPLAINANT claimed that his captors were motivated by pecuniary gain, forcing him to seek ATM withdrawals. It is undisputed, however, that his rental was recovered with valuable and portable property inside, including computer and camera equipment. This seems unlikely if the motive was theft. COMPLAINANT’s testimony about cell phone calls with his estranged wife and sister-in-law during the period of his alleged captivity also hint at fabrication. The claim that he sought money over the phone from his ex-wife only on behalf of captors who

coerced him seems implausible, as does attribution to his alleged captors of a call to his sister-in-law about an outstanding check. According to her testimony, COMPLAINANT's interests went beyond the check to his phone messages. There is also conflicting testimony in the record as to when COMPLAINANT ceased using crack—early in his testimony he claimed to have stopped approximately a decade before, however subsequent testimony, including by others, revealed that his use continued at least sporadically into the years immediately preceding this incident. These and like difficulties with the testimony are coupled with the overarching credibility questions that confronted the officers too on November 7. Among others: why was COMPLAINANT able to explain so little about the kidnappers, the apartment, the location of ATM(s) attempted, and his escape route; why were there no visible marks from his binding, and if they were concealed, why didn't he reveal them; and why were his clothes not soiled?

Because there is insufficient corroboration of COMPLAINANT's claims, and his own testimony is inadequate to overcome the officers' articulation of conduct permissible under Special Order 01-01 and General Order 201.26, the Complaint Examiner concludes that with respect to SUBJECT OFFICER #1 and SUBJECT OFFICER #3, there are insufficient facts to sustain the allegation of demeaning and insulting language and/or conduct. With respect to SUBJECT OFFICER #2, COMPLAINANT testified at hearing that SUBJECT OFFICER #2 said nothing demeaning or humiliating to him. The only conduct he is alleged to have engaged in falls under allegation two. Therefore, SUBJECT OFFICER #2 is exonerated as to allegation one.

B. Allegation Two: Excessive or Unnecessary 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.”

The regulations governing OPC define excessive or unnecessary force as “[u]nreasonable use of power, violence, or pressure under the particular circumstances. Factors to be considered when determining the ‘reasonableness’ of a use of force include the following: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officer or others; (3) whether the subject was actively resisting arrest or attempting to evade arrest by flight; (4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; (5) whether the officer adhered to the general orders, policies, procedures, practices and training of the MPD; and (6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish the objective.” D.C. Mun. Regs., title 6A, § 2199.1.

COMPLAINANT alleges that SUBJECT OFFICER #3 grabbed him by the collar and pulled him, and that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 then grabbed him and slammed him against the squad car. While disturbing because such actions would be unjustified given the circumstances, COMPLAINANT's uncorroborated allegations are denied by each of the officers. 7-11 employees who COMPLAINANT believed witnessed the alleged use of force

informed OPC that they had no recollection of any incident. (OPC also determined that COMPLAINANT may not have been visible to them.) There were no medical records to corroborate the application of any physical force.

Given the uncorroborated nature of the allegations, the credibility concerns, and the officers' denials, the Complaint Examiner finds insufficient facts to sustain the allegation of excessive or unnecessary use of force.

C. Allegation Three: Harassment

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."

The regulations governing OPC 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.

COMPLAINANT contends that SUBJECT OFFICER #1 harassed him principally by phoning BEF on November 7, and perhaps thereafter, and relaying information about his carjacking and kidnapping claims in the absence of a legitimate law enforcement purpose. COMPLAINANT also contends that SUBJECT OFFICER #1 conveyed his belief that COMPLAINANT was on drugs, and that he was consequently terminated from BEF's employment.

SUBJECT OFFICER #1 does not deny that he phoned BEF. He testified that he phoned in order to trace the identity of the car rental agency and ultimately the make and year of the car, because COMPLAINANT was unable to provide these essential details and SUBJECT OFFICER #1 had no other method of learning them. Since the car had been rented on BEF's credit card, he knew that BEF would be able to provide them. According to SUBJECT OFFICER #1, during the conversation, BEF communicated concern over COMPLAINANT's failure to report to a job site in Newport News and some apparent activity on his credit card. SUBJECT OFFICER #1 did not deny that he conveyed to BEF disbelief of the carjacking/kidnapping allegation, and possibly that COMPLAINANT appeared to be using drugs, while informing them that the investigation was ongoing.

While these facts and allegations are troubling, on the record before this Complaint Examiner (which includes post-hearing briefs intended to address this topic), it cannot be said that SUBJECT OFFICER #1 lacked a legitimate law enforcement purpose in contacting BEF to trace the missing car. With respect to relaying his disbelief of COMPLAINANT's allegations, and concern about drug use, it is not evident from the record to what extent he did this, and further, that doing so exceeded the bounds of permissible and natural conversation in light of BEF's concerns about its missing employee and possibly damage to its business resulting from his unheeded business obligations.

Therefore, this Complaint Examiner finds insufficient evidence to sustain the allegation of harassment. It cannot be conclusively determined on the record before her that SUBJECT OFFICER #1 phoned BEF, or others, in order to bother, annoy, or otherwise interfere with COMPLAINANT's ability to go about lawful business normally.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1:

Allegation 1: Insulting and Demeaning Language and/or Conduct	Insufficient Facts
Allegation 2: Excessive Use of Force	Insufficient Facts
Allegation 3: Harassment	Insufficient Facts

SUBJECT OFFICER #2:

Allegation 1: Insulting and Demeaning Language and/or Conduct	Exonerated
Allegation 2: Excessive Use of Force	Insufficient Facts

SUBJECT OFFICER #3:

Allegation 1: Insulting and Demeaning Language and/or Conduct	Insufficient Facts
Allegation 2: Excessive	Insufficient Facts

Use of Force	
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Submitted on May 5, 2005.

Maia Caplan
Complaint Examiner