

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	04-0029 and 04-0030
<b>Complainant:</b>	COMPLAINANT #1 & COMPLAINANT #2
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER #1, 3rd District SUBJECT OFFICER #2, 3rd District
<b>Allegation 1:</b>	Harassment
<b>Allegation 2:</b>	Insulting, Demeaning, or Humiliating Language or Conduct
<b>Allegation 3:</b>	Use of Excessive or Unnecessary Force
<b>Allegation 4:</b>	Discriminatory Treatment
<b>Complaint Examiner:</b>	Stacy L. Brustin
<b>Merits Determination Date:</b>	February 7, 2007

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**

The complainants, COMPLAINANT #1 and COMPLAINANT #2, allege that on October 8, 2003 at approximately 8:00 p.m., they witnessed SUBJECT OFFICER #1 and SUBJECT OFFICER #2 engage in harassment; use of language or conduct that is insulting, demeaning, or humiliating; use of unnecessary or excessive force; and discriminatory treatment toward WITNESS #1 and another individual identified throughout the case as WITNESS #2.

The complainants allege that SUBJECT OFFICER #1 grabbed WITNESS #1, used profanity toward him, slammed him against a police car, and made several derogatory comments about WITNESS #1. They further allege that when the other man present, WITNESS #2, did not respond to SUBJECT OFFICER #2's requests to approach her, appearing not to understand her commands, SUBJECT OFFICER #2 charged WITNESS #2 and pushed him against the wall of LOCATION #1. SUBJECT OFFICER #2 then proceeded to search his backpack.

In addition, the complainants allege that the Officers subjected the complainants to insulting, demeaning, or humiliating language and conduct. COMPLAINANT #1 and

COMPLAINANT #2 allege that both Officers SUBJECT OFFICER #2 and SUBJECT OFFICER #1 became upset with COMPLAINANT #1 when she attempted to explain what had transpired before the officers arrived on the scene. The complainants allege that the subject officers yelled at them, spoke rudely, repeatedly asked bystanders to move back or leave the scene, and accused bystanders of interfering with a police investigation.

## **II. EVIDENTIARY HEARING**

An evidentiary hearing was conducted regarding this complaint on January 8, 2007. The Complaint Examiner heard the testimony of COMPLAINANT #1, COMPLAINANT #2, WITNESS #3, WITNESS #4, SUBJECT OFFICER #2, SUBJECT OFFICER #1, WITNESS OFFICER #1, WITNESS OFFICER #2, and WITNESS OFFICER #3. The following exhibits were introduced at the hearing:

- Complainant Exhibit 22: Photos of Scene
- Complainant Exhibit 3: OPC Complaint Filed By COMPLAINANT #2
- Complainant Exhibit 2: OPC Complaint Filed By COMPLAINANT #1
- Subject Officer Exhibit 23: Letter of Declination from U.S. Attorney's Office
- Subject Officer Exhibit 15: Vehicle Inspection Report

## **III. FINDINGS OF FACT**

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on October 5, 2006, the response to objections filed by OPC on October 16, 2006, the testimony elicited during an evidentiary hearing conducted on January 8, 2007, and the exhibits entered in evidence, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On October 8, 2003, near LOCATION #1 an unidentified Caucasian male and a female companion were walking a dog on Mount Pleasant street. Some type of interaction took place between the couple and a Hispanic male, WITNESS #1. The Caucasian male started yelling at WITNESS #1. Both men were located on the sidewalk. The female tried to get her companion to calm down. The Caucasian male proceeded to hit WITNESS #1 in the face and kick him. WITNESS #1 did not react or fight back.
2. Two bystanders, COMPLAINANT #1 and COMPLAINANT #2 witnessed this exchange. COMPLAINANT #2 had been walking north on the east side of Mount Pleasant Street and COMPLAINANT #1 had been walking south on the west side of Mount Pleasant Street.

3. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 were in their patrol car driving along Mt. Pleasant Street. They noticed a commotion and pulled over near LOCATION #1. The Caucasian male reported to the officers that WITNESS #1 had “messed with his woman” and indicated that WITNESS #1 had touched the woman’s buttocks. At this point the Caucasian couple left the scene. A group of bystanders had stopped and were observing the situation.
4. Neither SUBJECT OFFICER #2 nor SUBJECT OFFICER #1 asked the Caucasian couple to remain on the scene to question them about what had transpired.
5. SUBJECT OFFICER #1 immediately turned his attention to WITNESS #1. He did not question WITNESS #1 as to what had happened or issue any verbal commands.
6. SUBJECT OFFICER #1 proceeded to grab WITNESS #1 and slammed him down against the rear of the patrol car. WITNESS #1 made a groaning sound as his body was slammed against the car. He was facing downward, with his stomach on the car. SUBJECT OFFICER #1 then positioned WITNESS #1’s arms behind his back.
7. SUBJECT OFFICER #1 made several loud and derogatory comments to WITNESS #1 including referring to him as a drunk Latino and making threats to the effect that he was going to kick the shit out of WITNESS #1. He stated that drunk Latinos are the problem with the neighborhood, referring to Mount Pleasant.
8. While SUBJECT OFFICER #1 was moving WITNESS #1 to the patrol car, SUBJECT OFFICER #2 turned her attention to another Latino man who was present and standing a few feet away from WITNESS #1. This man was later identified as WITNESS #2. WITNESS #2 was standing still, passively. SUBJECT OFFICER #2 ordered him in a loud voice, in English, to come over to her. She said this several times. She did not make any gestures to indicate what she wanted WITNESS #2 to do. WITNESS #2 did not verbally respond.
9. WITNESS #2 put his hands up and began backing up toward the wall at LOCATION #1. SUBJECT OFFICER #2 rapidly and forcefully approached WITNESS #2 and pushed him against the wall of LOCATION #1. They tussled along the wall and then SUBJECT OFFICER #2 gained control and held WITNESS #2 against the wall. WITNESS #2 was facing the wall with SUBJECT OFFICER #2 standing behind him.
10. SUBJECT OFFICER #1 had heard SUBJECT OFFICER #2 giving verbal commands to WITNESS #2 and he came over to assist her.
11. A backpack belonging to WITNESS #2 was lying a few feet away from where he was standing. SUBJECT OFFICER #2 asked WITNESS #2 what was in his backpack and he responded “tools.” SUBJECT OFFICER #2 proceeded to use a flashlight and search through his backpack.

12. SUBJECT OFFICER #2 found no weapons in the backpack and WITNESS #2 was eventually allowed to leave the scene. The officers never questioned him in English or Spanish as to what had transpired before the officers arrived on the scene.
13. A crowd had gathered at the scene. COMPLAINANT #1 was near LOCATION #1 when SUBJECT OFFICER #2 and SUBJECT OFFICER #1 arrived. COMPLAINANT #2 witnessed the events originally from the west side of Mount Pleasant Street and she then crossed the street and observed the incident from the east side of the street. Other bystanders had gathered on the sidewalk. Members of the crowd were shouting out to the officers and indicating their disapproval of the officers' actions.
14. COMPLAINANT #1 shouted out that WITNESS #1 had been hit and kicked by the Caucasian man. SUBJECT OFFICER #1 shouted back that he wished she had told him this information earlier. SUBJECT OFFICER #1 told COMPLAINANT #1 to stop talking. He and SUBJECT OFFICER #2 insisted that she had not been present when the altercation took place and therefore she did not know what she was talking about.
15. The officers repeatedly asked the crowd to move back.
16. At one point, SUBJECT OFFICER #1 yelled at COMPLAINANT #1 and COMPLAINANT #2, telling them to shut up and move at least 20 feet away.
17. SUBJECT OFFICER #2 told the crowd not to interfere and called a supervisor, WITNESS OFFICER #4, to the scene.
18. WITNESS OFFICER #4 arrived and was unable to calm the situation. She called her supervisor, WITNESS OFFICER #1, who arrived on the scene and provided COMPLAINANT #1 and COMPLAINANT #2 with information concerning how to file a complaint with the Office of Police Complaints.
19. Neither SUBJECT OFFICER #1 nor SUBJECT OFFICER #2 called for a Spanish interpreter to assist in communicating with WITNESS #1 and WITNESS #2.
20. The subject officers did not interview COMPLAINANT #1, COMPLAINANT #2 or any other witnesses to determine what happened in the incident between WITNESS #1 and the unidentified Caucasian male.
21. Neither SUBJECT OFFICER #1 nor SUBJECT OFFICER #2 filed a Stop and Frisk report (PD 251 or PD 76).

#### **IV. DISCUSSION**

Pursuant to D.C. Official Code § 5-1107(a), "The 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; and (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.

### **A. 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

The complaint alleges that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed WITNESS #1 and WITNESS #2 by detaining, frisking, and searching them in a manner which violated the law and MPD internal policies. WITNESS #1 and WITNESS #2 were not involved in a contact as defined by MPD General Order 304-10, Police Citizen Contacts, Stops and Frisks. Instead, Officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 conducted a stop (Part I.B. of General Order 301-10) of both men.

#### 1) SUBJECT OFFICER #1

SUBJECT OFFICER #1 reasonably suspected that WITNESS #1 had committed a crime based on the report made to SUBJECT OFFICER #1 by the Caucasian male. Therefore, SUBJECT OFFICER #1 had a basis to stop and detain WITNESS #1 for the purpose of determining whether or not probable cause existed to arrest. However, SUBJECT OFFICER #1 did not comply with the requirement of General Order 301-10 regarding conduct during a stop. The order requires that “Officers shall act with as much restraint and courtesy as possible.” In addition, the order requires that the officer “use the least coercive means necessary to effect a stop.” The officer is only permitted to use “such force as is reasonably necessary” to carry out the authority to stop and detain an individual.

SUBJECT OFFICER #1 acknowledges that he did not ask WITNESS #1 any questions or issue any verbal commands. He made no effort to determine what had happened between WITNESS #1 and the Caucasian male. He did not call for a Spanish speaking officer to assist him in obtaining information nor did he explain to WITNESS #1 why he was being detained – as required by General Order 304-10. SUBJECT OFFICER #1, in his testimony, did not suggest that WITNESS #1 was resisting or defying SUBJECT OFFICER #1. COMPLAINANT #1, credibly testified that she did not observe WITNESS #1 resist SUBJECT OFFICER #1.

Nevertheless, based on the brief information he received from the Caucasian male, SUBJECT OFFICER #1, by his own admission, grabbed WITNESS #1. COMPLAINANT #1 credibly testified that she then observed SUBJECT OFFICER #1 slam WITNESS #1 against the police cruiser at least three times. These actions violated the requirements outlined in General Order 304-10 concerning conduct during a stop.

The reliability and credibility of SUBJECT OFFICER #1's testimony concerning the stop and detention of WITNESS #1 is also discredited by the fact that the Officers failed to make records of the stop (P.D. Forms 251 or 76.) Both officers failed to complete a PD Form 251 or 76 as required by General Order 304-10 whenever an officer carries out a forcible stop, frisk, and search.

2) SUBJECT OFFICER #2

While the report by the Caucasian male justified a stop of WITNESS #1, there was no such justification for the stop of WITNESS #2. There was no testimony or evidence presented suggesting that either SUBJECT OFFICER #1 or SUBJECT OFFICER #2 had information that WITNESS #2 had been involved in the alleged harassment or assault of the woman accompanying the Caucasian male. In addition, in her written complaint and during the hearing COMPLAINANT #1 credibly testified that WITNESS #2 was passively standing and watching the interaction between SUBJECT OFFICER #1 and WITNESS #1. At this point, the only action properly authorized under General Order 304-10 would have been a contact. The officers could have reasonably believed that “some investigatory inquiry into the situation” was warranted. [304-10 Part I A.] However, WITNESS #2 should have been free not to respond or to leave. In order to carry out a contact and investigate the alleged assault, the subject officers would have needed to call for an interpreter which they did not do.

Instead, SUBJECT OFFICER #2 conducted a stop. She loudly ordered WITNESS #2 to “come over here.” As COMPLAINANT #1 credibly testified and indicated in her written complaint, SUBJECT OFFICER #2 issued this verbal command several times. SUBJECT OFFICER #2 testified that she wanted to find out from WITNESS #2 what had occurred and determine whether what the Caucasian man had said was true. As SUBJECT OFFICER #2 acknowledged, WITNESS #2 “was just a witness.” However, the tone of voice she used and the constant repeating of the verbal command suggested that WITNESS #2 did not have a choice about whether to approach SUBJECT OFFICER #2. SUBJECT OFFICER #2 expected him to comply with her verbal command. As SUBJECT OFFICER #2 testified, WITNESS #2 did not

respond to SUBJECT OFFICER #2's verbal commands to approach her. Both COMPLAINANT #2 and COMPLAINANT #1 indicated in their written complaints that WITNESS #2 did not move. COMPLAINANT #1 testified that WITNESS #2's hands were free.

SUBJECT OFFICER #2 testified that WITNESS #2 then began slowly backing away. COMPLAINANT #2 corroborated SUBJECT OFFICER #2's testimony that WITNESS #2 was slowly backing away but she also credibly testified (and stated in her complaint) that WITNESS #2 had his hands up while he was backing away. SUBJECT OFFICER #2 testified that WITNESS #2 had his hand in his pocket and would not remove it when requested to do so. She testified that she began to become suspicious that he might have a weapon in his pocket. This version was simply not credible in light of the clear, contrary eyewitness reports given by COMPLAINANT #2 in her complaint, written approximately one month after the incident, and in COMPLAINANT #2's and COMPLAINANT #1's testimony as to the positioning of WITNESS #1's hands. Therefore, pursuant to General Order 304-10, SUBJECT OFFICER #2 had no basis for conducting a stop and resorting to physical force. When WITNESS #2 would not comply with SUBJECT OFFICER #2's verbal commands, SUBJECT OFFICER #2 quickly resorted to physical force, pushing WITNESS #2 against the wall of LOCATION #1 and tussling with him until she had him faced against the wall with his hands up and on the wall. SUBJECT OFFICER #1 came to SUBJECT OFFICER #2's side and assisted her in getting WITNESS #2 against the wall.

Even if a stop had been justified based on SUBJECT OFFICER #2's suspicions that WITNESS #2 possessed a weapon, once WITNESS #2 was against the wall, the situation was fully under SUBJECT OFFICER #2's control. SUBJECT OFFICER #2 testified that she had established that WITNESS #2 did not have any weapons on his person. She testified that she pulled out a wad of money from WITNESS #2's pocket. SUBJECT OFFICER #1's testimony was vague as to whether WITNESS #2 pulled money out of his pocket. He appeared to want to corroborate SUBJECT OFFICER #2's version but did not provide convincing testimony on this point. Neither COMPLAINANT #1 nor COMPLAINANT #2 observed SUBJECT OFFICER #1 remove anything from WITNESS #2's pocket. In any event, at this point WITNESS #2 posed no threat to SUBJECT OFFICER #2. WITNESS #2's backpack was lying several feet away from his person.

General Order 304.10 clearly states that "[i]f the person is carrying an item immediately separable from his/her person, such as a purse, shopping bag, or briefcase, it shall be taken from him. (a) The officer shall not search inside the object, however, but shall place it at a safe distance out of the person's reach for the duration of the detention.

(b) "If during the detention something occurs which makes the officer reasonably suspect the possibility of harm should he/she return an unsearched item without first inspecting it, he/she may briefly inspect the contents in order to determine if the item contains a weapon or other dangerous objects."

The detention itself was inappropriate. In addition, there was nothing that had happened during the detention which gave SUBJECT OFFICER #2 reasonable suspicion that there was a possibility of harm if she returned the backpack without searching it. SUBJECT OFFICER #2 should have called for a Spanish speaking officer or a translator so that she could obtain consent to search WITNESS #2's backpack if she felt that a search was necessary.

SUBJECT OFFICER #2 testified that there was a gentleman on the scene who offered to translate. Neither COMPLAINANT #1 nor COMPLAINANT #2 testified that another man was serving as a translator. SUBJECT OFFICER #1 testified that he did not recall having any translator called to the scene. SUBJECT OFFICER #2's testimony becomes somewhat vague at this point. She said she thought the translator asked WITNESS #2 if she could search his backpack but she didn't know because she didn't speak Spanish. SUBJECT OFFICER #1 did not corroborate SUBJECT OFFICER #2's testimony that a civilian witness served as an interpreter and obtained consent from WITNESS #2 to search his backpack.

SUBJECT OFFICER #2 acknowledged during the hearing that she herself asked WITNESS #2 if she could search his backpack and he did not respond. COMPLAINANT #2 similarly testified that SUBJECT OFFICER #2 asked WITNESS #2 what was in his backpack. COMPLAINANT #1 testified that he responded "my tools". COMPLAINANT #1, who understands Spanish, testified that she did not hear WITNESS #2 give consent to search the backpack. SUBJECT OFFICER #2 proceeded to shine a flashlight in the backpack and search it. She did not find any weapons.

The reliability and credibility of SUBJECT OFFICER #2's testimony concerning the stop and detention of WITNESS #2 is further discredited by the fact that the Officers failed to make records of the stop (P.D. Forms 251 or 76.) Both officers failed to complete a PD Form 251 or 76 as required by General Order 304-10 whenever an officer carries out a forcible stop, frisk, and search.

### **B. Language or Conduct**

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 "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."



1) SUBJECT OFFICER #1

The evidence reviewed in this matter supports the conclusion that SUBJECT OFFICER #1 used language and conduct toward WITNESS #1 that was insulting, humiliating, or demeaning. COMPLAINANT #1 credibly testified that when SUBJECT OFFICER #1 arrived on the scene and saw WITNESS #1, SUBJECT OFFICER #1 immediately stated, in a loud voice, "I know this drunk."

COMPLAINANT #1 testified that SUBJECT OFFICER #1 slammed WITNESS #1 onto the patrol car and said in a very loud voice that he was going to beat the shit out of WITNESS #1. This account given by COMPLAINANT #1 at the hearing is consistent with the detailed description she gave of the incident in her OPC complaint submitted just fifteen days after the incident took place. In her complaint, COMPLAINANT #1 states that SUBJECT OFFICER #1 threatened to "kick the shit" out of WITNESS #1's insides. COMPLAINANT #2, in her complaint, corroborates that SUBJECT OFFICER #1 had WITNESS #1 against the police car and was screaming at WITNESS #1 "Don't screw with me! I'm not joking around" in a very hostile manner.

COMPLAINANT #2 testified that when she heard a loud, male voice shouting she turned her head and saw SUBJECT OFFICER #1 with WITNESS #1 pressed against the patrol car. COMPLAINANT #2 testified that she saw WITNESS #1 against the car with SUBJECT OFFICER #1 behind him shouting. COMPLAINANT #2's complaint corroborates her testimony. In her complaint, she stated that she observed SUBJECT OFFICER #1 screaming at WITNESS #1 whose "head was resting on the back of the squad car. SUBJECT OFFICER #1 shouted, 'Don't screw with me. I'm not joking around' in an extremely hostile manner." (Exhibit 3) In and of itself, this latter comment would not constitute hostile or insulting language. However, coupled with the earlier threats to beat WITNESS #1, these comments further support the conclusion that SUBJECT OFFICER #1 used language or conduct toward WITNESS #1 that was insulting, humiliating, or demeaning.

The testimony elicited at the hearing as well as the exhibits entered in evidence support the conclusion that SUBJECT OFFICER #1 also used language or conduct toward COMPLAINANT #1 and COMPLAINANT #2 that was insulting, humiliating, or demeaning. COMPLAINANT #2 testified that she and others were making comments to the officers such as "I don't think that's necessary force" and "stop it," and at one point SUBJECT OFFICER #1 turned around and told them to shut up. COMPLAINANT #2 stated that when COMPLAINANT #1 made a comment that she is glad that her ANC Commissioner is present, SUBJECT OFFICER #1 turned and told her to shut up. This was consistent with the allegations COMPLAINANT #2 reported in her OPC complaint filed approximately one month after the incident (Exhibit #3). In her complaint she stated that "SUBJECT OFFICER #1 turned at us and screamed 'I told you to shut up! Get out of here. You need to move at least 20 feet away.'

COMPLAINANT #1 similarly testified that SUBJECT OFFICER #1 told her to shut up. However, in her detailed OPC complaint, filed just fifteen days after the incident, COMPLAINANT #1 states that SUBJECT OFFICER #1 told her to stop talking and to be quiet. She does not use the words “shut up.” The version described in the OPC complaint is more reliable. However, in her complaint, COMPLAINANT #1 reiterates that SUBJECT OFFICER #1 was yelling at her and he repeatedly told COMPLAINANT #1 that she had not been present during the entire incident and did not know what she was talking about. Regardless of whether SUBJECT OFFICER #1 used the term “shut up” or “you just be quiet” or “just stop talking,” in both their testimony during the hearing and in their OPC statements COMPLAINANT #2 and COMPLAINANT #1 credibly conveyed that SUBJECT OFFICER #1 was using a loud, hostile, and disrespectful tone of voice toward them.

From all accounts it is clear that a sizable crowd had gathered. Both the officers and the complainants testified that bystanders were shouting things to the police officers while the officers were interacting with WITNESS #1 and WITNESS #2. It is certainly understandable that Officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 would want the crowd to keep a distance and not interfere with the officers’ ability to investigate the situation. However, if the officers sensed that the situation was escalating or they did not have appropriate control over the crowd, they should have called for back up or for a superior. This is what SUBJECT OFFICER #2 did. She called WITNESS OFFICER #4 to the scene. SUBJECT OFFICER #1 should have maintained calm, regardless of whether there was any provocation from the crowd. This is exactly what MPD General Order 201.26, Part I, Section C requires. In fact, raising his voice and using a hostile and aggressive tone with bystanders only fueled the tension of the situation.

## 2) SUBJECT OFFICER #2

The evidence does not support the allegation that SUBJECT OFFICER #2 engaged in language or conduct that was insulting or demeaning to WITNESS #1 or WITNESS #2. SUBJECT OFFICER #2 raised her voice and issued loud verbal commands to WITNESS #2, but there is no suggestion in COMPLAINANT #1’s or COMPLAINANT #2’s written complaints or testimony during the hearing that SUBJECT OFFICER #2 used profanity or made derogatory comments toward WITNESS #1 or WITNESS #2. In addition, the testimony and exhibits do not support the allegation that SUBJECT OFFICER #2 engaged in language or conduct that was insulting or demeaning to COMPLAINANT #1 or COMPLAINANT #2. COMPLAINANT #2 testified that SUBJECT OFFICER #2 told them to “stay out of this, you’re interfering” and at some point called WITNESS OFFICER #4 to the scene. COMPLAINANT #2 herself acknowledged during her testimony at the hearing that that she did not think SUBJECT OFFICER #2’s tone of voice was inappropriate. SUBJECT OFFICER #2 raised her voice to let bystanders know that she had called WITNESS OFFICER #4 but COMPLAINANT #2 did not define the tone as inappropriate. This does not constitute insulting or demeaning language.

### **C. Unnecessary or Excessive 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. See also *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989).

#### 1) SUBJECT OFFICER #1

COMPLAINANT #1 and COMPLAINANT #2, allege that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 used unnecessary or excessive force against WITNESS #1 and WITNESS #2. COMPLAINANT #1 credibly testified that upon receiving the report that WITNESS #1 had done something to the woman with the dog, SUBJECT OFFICER #1 swiftly approached WITNESS #1, grabbed him, took WITNESS #1 to the back of the squad car and slammed him down on the car, stomach first, several times. She described in detail the groaning sound that WITNESS #1 made as his body slammed against the car. This description is similar to the detailed account that COMPLAINANT #1 gave to OPC in her complaint. She described how SUBJECT OFFICER #1 shoved WITNESS #1 onto the patrol car. She further observed that, from her vantage point, WITNESS #1 did not resist detention by SUBJECT OFFICER #1. She explained that she was positioned between the place where SUBJECT OFFICER #1 grabbed WITNESS #1 and the police car. She also testified that she had a view of the rear of the patrol car.

SUBJECT OFFICER #1 acknowledged during direct examination that he “grabbed” WITNESS #1 and brought him over to the scout car, though he could not recall whether he said anything to WITNESS #1 prior to grabbing him. On cross examination, SUBJECT OFFICER #1 was asked whether he issued any verbal commands to WITNESS #1 before grabbing him. SUBJECT OFFICER #1 stated that he thought that WITNESS #1 was too intoxicated to “handle” verbal commands and SUBJECT OFFICER #1 then unequivocally testified that he did not issue verbal commands before resorting to physical force.

SUBJECT OFFICER #1 stated that WITNESS #1 was so intoxicated that SUBJECT OFFICER #1 had to practically lift WITNESS #1 off of his feet in order to move him. During

this portion of the testimony, SUBJECT OFFICER #1 did not suggest that WITNESS #1 was acting in an aggressive manner or resisting detention. WITNESS #1 did not pose a threat to the safety of SUBJECT OFFICER #1 or other bystanders. On the contrary, SUBJECT OFFICER #1 painted a picture of WITNESS #1 as barely able to move under his own powers. SUBJECT OFFICER #2 testified that WITNESS #1 began to holler and was very intoxicated. She described him as agitated. However, her testimony differs significantly from that of COMPLAINANT #1, COMPLAINANT #2, and SUBJECT OFFICER #1. SUBJECT OFFICER #2 also acknowledged that she turned her attention to the second man, WITNESS #2 and did not witness the entire interaction between SUBJECT OFFICER #1 and WITNESS #1. However, SUBJECT OFFICER #2 testified that she saw SUBJECT OFFICER #1 with his hands on WITNESS #1 and that WITNESS #1 had his hands behind his back and his stomach on the cruiser.

SUBJECT OFFICER #1 testified that he did not slam WITNESS #1 against the patrol car. Instead, he stated that he asked WITNESS #1 to place his hands on the vehicle and WITNESS #1 slammed his hands against the patrol car, causing a loud noise. SUBJECT OFFICER #1 attempted to use the Daily Vehicle Inspection Checklist report, Exhibit # 15 to prove that he did not slam WITNESS #1 onto the police car. The Vehicle Inspection Report indicates that there was no damage to the hood or trunk of the patrol car. He argued that if a man SUBJECT OFFICER #1's size were to slam someone onto a car, there would have been a dent on the car. This is not necessarily the case. COMPLAINANT #1 testified that SUBJECT OFFICER #1 pushed WITNESS #1 stomach first onto the car. It is fair to assume that WITNESS #1's palms and stomach would have hit the car, both softer parts of the body. This type of action would not necessarily leave a dent.

SUBJECT OFFICER #1's version of events is not credible. He acknowledged grabbing WITNESS #1 and bringing him over to the police car. He admits that he did not issue any verbal commands. SUBJECT OFFICER #2 saw SUBJECT OFFICER #1 with his hands on WITNESS #1 and WITNESS #1 had his hands behind his back and his stomach on the cruiser. COMPLAINANT #1 and COMPLAINANT #2 credibly testified that SUBJECT OFFICER #1 was yelling at WITNESS #1, using a hostile and aggressive tone. COMPLAINANT #1's detailed complaint, submitted fifteen days after the event, describes in vivid and graphic detail the force used by SUBJECT OFFICER #1 against WITNESS #1. The question remains, therefore, whether such force was justified.

MPD General Order 901.07 requires that police officers "modify their level of force in relation to the amount of resistance offered by a subject. As the subject offers less resistance, the member shall lower the amount or type of force used." [Section V.B.3] The Order further states that [o]nly the minimum level of force needed to obtain control that the objectively reasonable officer would use in light of the circumstances shall be used." The order instructs that officers, should, if possible, "defuse the situation through advice, warning and verbal persuasion." [Section V.B.] If a suspect or detained individual does not respond then the officer is permitted to use the next level of force on the continuum. Pursuant to the Application of the Use of Force

Continuum for the Metropolitan Police Department (November 2000), the use of physical force by MPD officers is limited to: 1) defending oneself or others from actual or perceived attack; 2) effecting an arrest or preventing the escape of a suspect; and 3) overcoming resistance. None of these circumstances existed with respect to WITNESS #1.

Through his own testimony, SUBJECT OFFICER #1 made it clear that WITNESS #1 was not offering resistance to SUBJECT OFFICER #1. This description of WITNESS #1 as passive is corroborated by COMPLAINANT #1's complaint and testimony. There is no evidence to suggest that WITNESS #1 was a threat to SUBJECT OFFICER #1 or to others nor is there evidence to demonstrate that WITNESS #1 was attempting to flee the scene. SUBJECT OFFICER #1 had not even attempted to speak with WITNESS #1 to find out what had happened, so there was no basis yet for effecting an arrest, and ultimately no arrest was made. SUBJECT OFFICER #1, who is six feet, nine inches tall, had control over WITNESS #1 from the outset. There was no need to use force. SUBJECT OFFICER #1 did not make any effort to defuse the situation using verbal commands or verbal persuasion. Therefore, the force used by SUBJECT OFFICER #1 was unnecessary and excessive.

During his testimony, WITNESS OFFICER #1 shed additional light on the procedures to be used when trying to investigate an alleged crime such as assault. WITNESS OFFICER #1 testified that the officers should do interviews and check both parties for injuries. He also stated that if there are no obvious injuries then the officers should speak with the parties directly (though separately) and look for other signs such as torn clothing. He further explained that the officers should speak to any witnesses who may have observed the assault.

According to WITNESS OFFICER #1, if one or more of the parties is intoxicated, the officers should still make an attempt to interview the parties. When questioned on this point by Counsel for the Subject Officers, WITNESS OFFICER #1 remained firm in his view that even if a suspect was severely intoxicated to the point that he could barely stand, the officer should make an attempt to interview the suspect. If the subject was not responding to verbal commands, then WITNESS OFFICER #1 explained that the officer could get a translator if needed. He emphasized that if the officer could not get information from the subjects due to intoxication or nonresponsiveness then the officers would need to rely on other witnesses. SUBJECT OFFICER #1 did not follow the procedures described by WITNESS OFFICER #1. Instead, the evidence suggests that SUBJECT OFFICER #1 immediately assumed that the allegation made by the Caucasian man against WITNESS #1 was true and SUBJECT OFFICER #1 took matters into his own hands.

## 2) SUBJECT OFFICER #2

There was no testimony or evidence presented suggesting that either SUBJECT OFFICER #1 or SUBJECT OFFICER #2 had information that WITNESS #2 had been involved in the alleged harassment or assault of the woman accompanying the Caucasian male. In her written complaint and during the hearing COMPLAINANT #1 credibly testified that WITNESS #2 was passively standing off to the side and watching the interaction between

SUBJECT OFFICER #1 and WITNESS #1. SUBJECT OFFICER #2 loudly ordered WITNESS #2 to “come over here.” COMPLAINANT #1 credibly testified and indicated in her written complaint that SUBJECT OFFICER #2 issued this verbal command several times in a loud voice and in English. As discussed in Section I. above, SUBJECT OFFICER #2 had no legal basis for effectuating a stop.

The conditions for using force, pursuant to MPD policy regarding the Continuum of Force, did not exist. SUBJECT OFFICER #2 was not 1) defending herself or others from actual or perceived attack; 2) effecting an arrest or preventing the escape of a suspect; or 3) overcoming resistance of a suspect. WITNESS #2 was not a suspect in any alleged crime. SUBJECT OFFICER #2 testified that she wanted to find out from WITNESS #2 what had occurred and determine whether what the Caucasian man had said was true. As SUBJECT OFFICER #2 acknowledged, WITNESS #2 “was just a witness.” Therefore she was not effecting an arrest.

Nevertheless, SUBJECT OFFICER #2 expected WITNESS #2 to comply with her verbal command. As SUBJECT OFFICER #2 testified, WITNESS #2 did not respond to SUBJECT OFFICER #2’s verbal commands to approach her. Both COMPLAINANT #2 and COMPLAINANT #1 indicated in their written complaints that WITNESS #2 initially did not move. COMPLAINANT #1 testified that WITNESS #2’s hands were free.

SUBJECT OFFICER #2 testified that WITNESS #2 then began slowly backing away. COMPLAINANT #2 corroborated SUBJECT OFFICER #2’s testimony that WITNESS #2 was slowly backing away but she also credibly testified (and stated in her complaint) that WITNESS #2 had his hands up while he was backing away. SUBJECT OFFICER #2 testified that WITNESS #2 had his hand in his pocket and would not remove it when requested to do so. She testified that she began to become suspicious that he might have a weapon in his pocket. This version was simply not credible in light of the clear, contrary eyewitness reports given by COMPLAINANT #2 in her complaint, written approximately one month after the incident, and in testimony by COMPLAINANT #2 and COMPLAINANT #1 as to the positioning of WITNESS #1’s hands.

When WITNESS #2 would not comply with SUBJECT OFFICER #2’s verbal commands, SUBJECT OFFICER #2 quickly resorted to physical force, charging WITNESS #2, pushing him against the wall of LOCATION #1 and tussling with him until she had him faced against the wall with his hands up and on the wall. SUBJECT OFFICER #1 came to SUBJECT OFFICER #2’s side and assisted her in getting WITNESS #2 against the wall.

SUBJECT OFFICER #2’s actions constitute excessive or unnecessary force. OPC Regulations define excessive or unnecessary force as “[u]nreasonable use of power, violence, or pressure under the particular circumstances. This conclusion is supported when one considers the factors outlined in the OPC regulations to be considered when determining the ‘reasonableness’ of the use of force including: (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.

In applying the factors it becomes clear that the force SUBJECT OFFICER #2 used was excessive. First of all, there is no indication from anyone’s testimony or complaint that WITNESS #2 actually committed any crime. He was passively observing the interaction between the Subject Officers and WITNESS #1 from the periphery as a witness and there was no evidence that WITNESS #2 acted in a violent or threatening manner toward SUBJECT OFFICER #2. At the point that SUBJECT OFFICER #2 began aggressively and loudly demanding that WITNESS #2 approach her, WITNESS #2 began to slowly back up with his hands up. There was no basis for effecting an arrest and, in fact, no arrest was made. SUBJECT OFFICER #2 did not have justification to use force against WITNESS #2. Instead, SUBJECT OFFICER #2 should have interviewed WITNESS #2 when she first saw him. She could have used gestures and maintained a calm demeanor to indicate to WITNESS #2 that she did not intend to harm WITNESS #2, she simply wanted to interview him. This would most likely have required obtaining a Spanish interpreter. As WITNESS OFFICER #1 noted, even if WITNESS #2 was intoxicated, SUBJECT OFFICER #2 should have made an effort to interview him and obtain information pertaining to the exchange between WITNESS #1, the Caucasian male, and the woman with the dog.

#### **D. Discriminatory Treatment**

Discrimination, as defined by MPD Special Order 01-01, Part III, Section D includes “failure to provide proper police service, either in the enforcement of the law or in the provision of police service, on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, or place of residence or business.”

MPD General Order 201.26, Part I, Section A provides that “[i]n accordance with the District of Columbia Human Rights Law, members shall not discriminate, either in the enforcement of the law, or in the provision of police service, on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, or place of residence or business....”

The regulations governing OPC define discriminatory treatment as “[c]onduct by a member of the MPD ... that results in the disparate treatment of persons because of their race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, place of residence or business or any other ground of discrimination prohibited under the statutory and the common law of the District of Columbia.” D.C. Mun. Regs., title 6A, § 2199.1

The testimony elicited during the hearing as well as the documentary evidence support the conclusion that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 failed to provide proper police service on the basis of race or national origin and, as a result, engaged in discriminatory treatment of WITNESS #1 and WITNESS #2. Specifically, when SUBJECT OFFICER #1 had WITNESS #1 pressed against the patrol car he made racially derogatory remarks to WITNESS #1. COMPLAINANT #1 credibly testified that SUBJECT OFFICER #1 said “You drunk Latinos, you’re the problem in this neighborhood.” In her OPC complaint, COMPLAINANT #1 similarly describes how SUBJECT OFFICER #1 stated that “drunk Latinos are the problem with this neighborhood.” These comments, while offensive and violative of other General Orders (as discussed above), do not, in and of themselves, prove that SUBJECT OFFICER #1 engaged in discriminatory treatment on the basis of race. However, language which reflects a discriminatory attitude coupled with inappropriate action which takes place simultaneously or in close proximate time to the expression of discriminatory animus can provide evidence of discrimination. *See e.g. Hollins v. Federal National Mortgage Association*, 760 A.2d 563, 574-75 (D.C. 2000). SUBJECT OFFICER #1’s comments, particularly when coupled with nearly simultaneous use of unnecessary and excessive force (discussed in detail in Section III. above), provide powerful evidence that the speed and force with which SUBJECT OFFICER #1 resorted to excessive physical force against WITNESS #1 was based, at least in part, on the fact that WITNESS #1 was Latino. It is also possible that part of SUBJECT OFFICER #1’s animus was based on the fact that WITNESS #1 was intoxicated. However, SUBJECT OFFICER #1 did not simply refer to WITNESS #1 as a drunk. He specifically and repeatedly used the racially derogatory term “drunk Latinos.”

In addition, SUBJECT OFFICER #1 and SUBJECT OFFICER #2’s failure to request a Spanish speaking police officer or a Spanish translator prevented the subject officers from providing the type of police service necessary to determine whether a crime was committed and to decide how to enforce the law. The subject officers detained and handcuffed both WITNESS #1 and WITNESS #2, used force in the detentions, frisked both men, and searched WITNESS #2’s backpack without seeking an interpreter to enable the officers to communicate with either man. SUBJECT OFFICER #2 testified that someone in the crowd came forward and acted as an interpreter but no one else corroborated this statement. WITNESS OFFICER #1 testified that even if a suspect appears intoxicated, an officer should attempt to question the suspect using an interpreter if necessary.

Further, MPD General Order 901.07 requires that when any level of force is used, the police officer shall visually and verbally check whether the subject is in need of medical care. There is no indication that the Officers verbally communicated with WITNESS #1 or WITNESS #2 about the need for medical treatment or any other matter. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 did not determine whether WITNESS #1 had sustained any non-visible injuries during the encounter with the Caucasian male or when he was slammed on the police car. The officers acknowledged that they could not communicate in Spanish and they did not call a translator to the scene to make this determination. SUBJECT OFFICER #1 agreed that



the way to determine whether someone sustained nonvisible injuries was to ask the person yet when questioned during the hearing it was clear that neither officer asked WITNESS #1 or WITNESS #2 whether they had sustained any injuries and there was no translator available to ask these questions.

WITNESS OFFICER #3 testified that to his knowledge he was the only Spanish speaking officer on the Redeployment Roll Call List for the evening of October 8, 2003. He was on duty and he had no recollection of being called to provide translation services for SUBJECT OFFICER #1 or SUBJECT OFFICER #2 that night. An off duty officer, WITNESS OFFICER #2, approached SUBJECT OFFICER #2 and SUBJECT OFFICER #1 at some point after WITNESS #1 and WITNESS #2 had been detained. WITNESS OFFICER #2 testified that he inquired whether the officers needed his assistance and they told him that everything was all right. WITNESS OFFICER #2 confirmed that he did not provide any translation services and, in fact, does not speak Spanish.

The failure to seek assistance with translation led to disparate treatment of WITNESS #1 and WITNESS #2 on the basis of national origin. The officers did not avail themselves of translation services nor did they seek redeployment of a Spanish speaking officer. Therefore, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 could not provide the police services required to investigate the alleged crime, determine whether detentions were warranted, obtain consent to search and establish whether any of the parties sustained injuries.

There was brief testimony during the hearing concerning the subject officers' allegedly discriminatory behavior on other occasions. Specifically, COMPLAINANT #1 testified to having witnessed an incident involving SUBJECT OFFICER #1 and WITNESS #4 testified to an alleged incident regarding SUBJECT OFFICER #2. Neither COMPLAINANT #1 nor WITNESS #4 filed a complaint at or near the time of these alleged incidents. COMPLAINANT #1 acknowledges that she did not observe the entire previous incident concerning SUBJECT OFFICER #1. WITNESS #4's testimony was vague as to her recognition of SUBJECT OFFICER #2 and she acknowledges that she failed to mention this situation to the Sergeant or Lieutenant present on the scene. Testimony concerning these incidents more than three years later, without any corroborating written documentation or other witnesses, is not sufficiently reliable and therefore this information is not being used to support the finding of discriminatory conduct in this case.

**V. SUMMARY OF MERITS DETERMINATION**

<b>Allegation 1: Harassment</b>	Sustained as to SUBJECT OFFICER #1 Sustained as to SUBJECT OFFICER #2
<b>Allegation 2: Language or Conduct</b>	Sustained as to SUBJECT OFFICER #1's Treatment of Suspect and Complainants Unfounded as to SUBJECT OFFICER #2's Treatment of Suspect & Complainants
<b>Allegation 3: Unnecessary or Excessive Force</b>	Sustained as to SUBJECT OFFICER #1 Sustained as to SUBJECT OFFICER #2
<b>Allegation 4: Discriminatory Treatment</b>	Sustained as to SUBJECT OFFICER #1 Sustained as to SUBJECT OFFICER #2

Submitted on February 7, 2007.

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Stacy L. Brustin  
Complaint Examiner