

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No:</b>	04-0170 and 04-0171
<b>Complainants:</b>	COMPLAINANT #1 and COMPLAINANT #2
<b>Subject Officer, Badge No., District:</b>	SUBJECT OFFICER, First District
<b>Allegation 1:</b>	Insulting, Demeaning, or Humiliating Language or Conduct
<b>Allegation 2:</b>	Use of Excessive or Unnecessary Force
<b>Complaint Examiner:</b>	Eleanor Nace
<b>Merits Determination Date:</b>	March 2, 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. These complaints were timely filed in the proper form as required by § 5-1107, and the complaints have been referred to the Complaint Examiner to determine the merits of the complaints as provided by § 5-1111(e).

**I. SUMMARY OF COMPLAINT ALLEGATIONS**

The complainants, COMPLAINANT #1 and COMPLAINANT #2, each filed a complaint with the Office of Police Complaints (OPC), formerly the Office of Citizen Complaint Review (OCCR), on March 10, 2004. In their complaints, which have been consolidated here, COMPLAINANT #2 and COMPLAINANT #1 alleged that on March 1, 2004, the subject officer, Metropolitan Police Department (MPD) SUBJECT OFFICER, First District, used unnecessary or excessive force against them, and used language and engaged in conduct toward them that was insulting, demeaning, or humiliating.

The complaints were submitted in a timely manner and in the proper form.

**II. EVIDENTIARY HEARING**

No evidentiary hearing was conducted regarding these complaints because, based on a review of OPC's Report of Investigation, and the objections filed by the officer, the Complaint Examiner determined that the Report of Investigation presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs., title 6A, § 2116.3. To the extent that any material facts were in dispute, the Complaint Examiner credited the complainants'

credibility because of internal inconsistencies in the subject officer's written and signed report (Exhibit 11 attached to ROI).

### **III. FINDINGS OF FACT**

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on December 18, 2006, and the Memorandum submitted by Thomas E. Sharp on December 19, 2006, in response to objections filed on behalf of SUBJECT OFFICER, the Complaint Examiner finds the material facts regarding these complaints to be:

1. COMPLAINANT #1 and COMPLAINANT #2 were in the LOCATION #1, N.W., in the early morning hours of March 1, 2004.
2. SUBJECT OFFICER was also in the LOCATION #1, N.W. at the same time, off duty and in civilian clothes, carrying his MPD weapon.
3. At some point, COMPLAINANT #2 was in a dispute with another patron ("WITNESS #1").
4. This matter was resolved with the assistance of another, unknown off duty MPD police officer who identified himself, showed his badge, and defused the situation.
5. As the complainants and their party were leaving the Nightclub at around 3 a.m., the individual with whom COMPLAINANT #2 had had his previous encounter – WITNESS #1 - approached COMPLAINANT #2 and the two exchanged words.
6. SUBJECT OFFICER left the bar and walked toward COMPLAINANT #2 and WITNESS #1.
7. COMPLAINANT #1 walked toward COMPLAINANT #2 to leave the club with him.
8. SUBJECT OFFICER stood next to WITNESS #1. He did not identify himself as a police officer. He did not show his badge. He did not say anything.
9. SUBJECT OFFICER pulled out his service weapon.
10. SUBJECT OFFICER told the complainants to "Back the fuck up."
11. The complainants were escorted out of the Nightclub.

### **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) use of unnecessary or excessive force and (2) use of language or conduct that is insulting, demeaning, or humiliating.

***Unnecessary or Excessive Force***

MPD General Order 901.07, Part II (effective Oct. 7, 2002) states:

The policy of the Metropolitan Police Department is to preserve human life when using lawful authority to use force. Therefore, officers of the Metropolitan Police Department shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others.

MPD General Order 901.07, Part V, Section B, No. 1 states:

The Department recognizes and employs the Use of Force Continuum. Members in response to resistant or dangerous individuals may apply escalating options of force (see Use of Force Continuum Chart attached). The options include: a. Cooperative Controls, such as verbal persuasion; b. Contact Controls, such as hand control procedures, firm grip, escort and control holds; c. Compliance Techniques, such as Oleoresin Capsicum (OC) Spray (non-deadly); d. Defensive Tactics, such as less-than-lethal weapons, including impact weapons, such as a baton, or ASP, and including less-than lethal projectiles used by the Emergency Response Team and during times of civil disobedience (e.g. 12 gauge shotgun, 27 mm gas guns, and rubber bullets), and canines; e. deadly Force (including deadly applications of less-than-lethal weapons).

***See Exhibit 13, Report of Investigation.***

The “Application of the Use of Force Continuum for the Metropolitan Police Department,” which provides additional written guidance on the appropriate use of force by MPD officers, correlates levels of action and alertness to five colors – blue, green, yellow, orange and red. **Exhibit 14, Report of Investigation.** The document states, “The color red alerts the officer to the highest level of a threat, that of imminent serious bodily injury or death to the officer or others. The officer must maintain the highest level of risk assessment and be prepared to use survival skills and lethal force.” *Id.* at 7. The document also states: The potentially lethal degree of risk is the most infrequent, and yet most critical for officer safety and survival. A subject’s action is life-threatening when it reasonably appears necessary for the officer to protect himself/herself or others from an immediate threat of death or serious bodily injury, or apprehend a fleeing felon when the officer has reasonably exhausted every means of effecting the arrest or preventing the escape and

there exists reasonable belief that the suspect fleeing poses an immediate threat of death or serious bodily harm to the officer or others; or

1. There is probable cause to believe the crime committed or attempted was a felony which involved an actual or threatened attack which could result in death or serious bodily harm; and
2. There is probable cause to believe the person fleeing committed or attempted to commit the crime; and
3. Failure to immediately apprehend the person places the officer, another law enforcement officer or the public in immediate danger of death or serious bodily harm; and
4. The lives of innocent individuals will not be endangered if lethal force is used.

When the officer perceives that the subject of such force poses an immediate danger of death or serious physical injury to the officer or another person, immediate counter measures must be used to stop the threat. Appropriate responses within this level include:

1. Unholstering/drawing of firearm **AND** pointing it at, or in the direction of another person (*emphasis in original*);
2. The discharge of the officer's firearm; and
3. Impact weapons to vital area.

*Id.* at 7-8.<sup>1</sup>

The Fourth Amendment prohibits officers from using unreasonable force during a seizure. In assessing whether the amount of force used by police officer was reasonable, courts pay “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers and others, and whether he is actively resisting arrest or evading flight.” *Graham v.*

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<sup>1</sup> On April 7, 2006, Special Orders (SO) 06-05 and 06-06 went into effect. SO 06-05 exempts, by omission, the completion of a Use of Force Incident Report in instances where an officer draws and points a firearm at, or in the direction of a person. See **Exhibit 15, Report of Investigation**. SO 06-06 states that “[t]he Metropolitan Police Department considers the pointing of a firearm at, or in the direction of, another person to be a reportable incident” and that “[m]embers shall complete [a Reportable Incident Form] immediately upon the drawing and pointing of a firearm at, or in the direction of, another person when no other force was used.” See **Exhibit 16, Report of Investigation**. It is unclear whether, with the creation of the two SOs, MPD intended to exclude the drawing and pointing of a weapon from its definition of force. Regardless of whether the SOs indicate a change in MPD force policies, because the SOs went into effect on April 7, 2006, two years after the incident with the complainants occurred, they were not considered by OPC in making its reasonable cause determination, nor by the Complaint Examiner.

*Connor*, 490 U.S. 386, 396 (1989). The standard for reasonableness is an objective one; that is, “whether the officer’s actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Id.* at 397

In pulling his weapon on unarmed citizens engaged in a verbal dispute in a crowded nightclub, as a first step and before identifying himself, the Hearing Examiner finds that SUBJECT OFFICER did not use the minimum amount of force that an objective officer might use. Nor did he endeavor to use alternative means such as verbal persuasion, as suggested by MPD General Order 901.07. The Hearing Officer finds that SUBJECT OFFICER used unjustifiable force against the complainants. SUBJECT OFFICER’s conduct was not objectively reasonable in light of the facts and circumstances confronting him. In response to a verbal altercation between the complainants and SUBJECT OFFICER’s acquaintance, WITNESS #1, SUBJECT OFFICER failed to identify himself as an MPD officer and use other cooperative controls, such as verbal requests and commands, to prevent the situation from escalating. Instead, SUBJECT OFFICER recklessly escalated the situation by drawing his weapon in a crowd of club goers.

At the time of the incident, there was no evidence that COMPLAINANT #1, COMPLAINANT #2, or anyone in their group was armed. In fact, COMPLAINANT #2 informed OPC that he was searched for weapons before entering the nightclub. It is evident, from the reports of witnesses and officers at the scene, that the complainants and at least a few members of their group were large individuals. Perhaps SUBJECT OFFICER felt threatened by the complainants’ size. However, the test for reasonableness is not a subjective one, but is rather judged “from the perspective of a reasonable officer on the scene.” *Graham*, 490 U.S. 386, 296. The fact that a subject is larger than an officer, without COMPLAINANT #1, does not justify the off-duty officer’s unholstering of his weapon and displaying it in a crowd of citizens at 3 a.m. in a club.

The following facts are undisputed: SUBJECT OFFICER drew his weapon in the LOCATION #1, N.W. at approximately 3 a.m. on March 1, 2004. He did so in response to a verbal altercation between his friend WITNESS #1 and COMPLAINANT #2. The exact location of and behavior of COMPLAINANT #1 are disputed. SUBJECT OFFICER denies cocking his weapon, discharging a bullet, and pointing the weapon at complainants. But given the undisputed facts, the Hearing Examiner finds that the officer used unnecessary and excessive force.

One of the factors that may be considered in determining whether a use of force was reasonable is the extent to which the officer “attempted to use only the minimum level of force necessary to accomplish the objective.” *See* D.C. Mun.Reg. title 6A sec. 2199.1 (2002 ). Here, SUBJECT OFFICER inserted himself gratuitously into a verbal dispute. There was no evidence that COMPLAINANT #1, COMPLAINANT #2, or anyone in their group was armed. In fact, COMPLAINANT #2 informed OPC that he was searched for weapons before entering the nightclub.

The situation might have been defused promptly had SUBJECT OFFICER immediately identified himself as a police officer and used verbal persuasion to calm down his friend and the complainants. These tactics, it should be noted, were the ones used by a smaller-statured plainclothes officer who successfully defused an earlier altercation involving the same individuals. Instead, SUBJECT OFFICER approached the complainants, failed to identify himself as a police officer, and drew his weapon on unarmed individuals in a crowded nightclub. SUBJECT OFFICER utterly failed to attempt to handle the situation by any less aggressive or forceful means. His actions were out of proportion to the incident.

Whether the weapon was raised and pointed directly at the complainants, or pointed at the floor in the direction of the complainants, the reality is that the complainants had a gun drawn on them and it was in the officer's hand and the officer was facing them. Only then did SUBJECT OFFICER identify himself as a police officer, and tell the complainants to "Back the fuck up," and leave the nightclub.

SUBJECT OFFICER' justifications for his behavior do not ring true, because of the inconsistencies in his written statement. Therefore I quote a key portion of that statement:

I thought COMPLAINANT #1 was going to strike WITNESS #1. My intention was to defuse the situation. COMPLAINANT #1 pushed me against the wall before I could identify myself as a Police officer. COMPLAINANT #1 and another guy from the entourage began to walk toward me at which time I drew my MPD service weapon because I felt an impending threat from two very large and muscular individuals. My weapon was pointed at the ground and I was holding the weapon with my right hand. I never had the service weapon pointed in the direction of anyone it was pointed at the ground. However I had my non weapon left hand pointed at COMPLAINANT #1 and the other guy that approached me. . . . I told COMPLAINANT #1 and the other guy to Back the Fuck up. COMPLAINANT #1 and the other guy complied. I identified myself as a police officer . . . .

According to this Statement, COMPLAINANT #1 pushed SUBJECT OFFICER against the wall, and that's why he didn't identify himself as a police officer. This explanation is repeated later in the statement. However, SUBJECT OFFICER describes COMPLAINANT #1 and the other individual walking toward him after he was allegedly pushed, and their walking toward him was the justification for his pulling his weapon. SUBJECT OFFICER's statement that COMPLAINANT #1 pushed him does not seem credible. To the extent that it is material, the Hearing Examiner credits the witnesses, and especially COMPLAINANT #2, who reported that the weapon was pointed at them.

### ***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.”

By his own admission, SUBJECT OFFICER pulled out his handgun, pointed his finger at the complainants, and told them, “Back the fuck up.” At the time the verbal altercation between COMPLAINANT #1 and WITNESS #1 occurred, SUBJECT OFFICER did not immediately identify himself as a police officer. Although SUBJECT OFFICER alleged that he was trying to “defuse the situation,” he did not make any attempts to calm down his friend or the complainants, but unholstered his weapon and used profane and abusive language toward COMPLAINANT #1 and COMPLAINANT #2.

SUBJECT OFFICER also failed to be calm, courteous and orderly. Instead, he was aggressive, rude, and disorderly, as well as profane.

It is hard to imagine clearer violations of Special Order 01-01 Part III, Sec. H, and MPD General Order 201.26.

**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER

<b>Allegation 1:</b>	Sustained
<b>Allegation 2:</b>	Sustained

Submitted on March 2, 2007.

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ELEANOR NACE  
Complaint Examiner