

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	05-0343
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, Fourth District SUBJECT OFFICER #2, Fourth District
Allegation 1:	Harassment
Complaint Examiner:	Arthur D. Sidney
Merits Determination Date:	June 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. 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 COMPLAINANT, alleged that on May 26, 2005, he and his employee, WITNESS #1, were driving along Hawaii Avenue, N.E., when SUBJECT OFFICER #1 and SUBJECT OFFICER #2, along with WITNESS OFFICER #1 and WITNESS OFFICER #2, stopped COMPLAINANT's car. WITNESS #1 was in the driver's seat, while COMPLAINANT sat in the front passenger seat. The four officers were traveling in a black, unmarked police car at the time of the stop. One of the officers saw a cup of beer in COMPLAINANT's car, and informed him that he would be arrested.

COMPLAINANT was arrested for possession of an open container of alcohol (POCA) and searched by the officers. He alleged the officers removed \$500 in cash and a check in the amount of \$1,200 from his person. The \$1,200 check was returned to COMPLAINANT upon his release; however, he only received \$27.04 in cash from the property clerk. COMPLAINANT alleges that the officers did not have a legitimate basis for stopping his car. COMPLAINANT also alleges that the officers failed to secure properly his money during the arrest, which resulted in the theft or loss of his money.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation ("ROI"), and the objections filed by SUBJECT OFFICER #2 on April 12, 2007, the response to objections filed by OPC on April 20, 2007, the Complaint Examiner determined that the ROI presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs., title 6A, § 2116.3.

III. FINDINGS OF FACT

Based on a review of OPC's ROI, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On June 13, 2005, COMPLAINANT filed this complaint with OPC.
2. COMPLAINANT alleged that on May 26, 2005, SUBJECT OFFICER #1 and SUBJECT OFFICER #2, harassed him.
3. COMPLAINANT alleged that on May 26, 2005, at approximately 6:35 p.m., he and his employee, WITNESS #1, were driving along Hawaii Avenue, N.E. While driving along Hawaii Avenue, N.E., WITNESS #1 and COMPLAINANT passed an unmarked police car driving on the opposite side of the street. The unmarked police car contained four MPD officers, later identified as SUBJECT OFFICER #1, SUBJECT OFFICER #2, WITNESS OFFICER #1 and Officer WITNESS OFFICER #2.
4. Shortly thereafter, the patrol car had turned around, and was behind COMPLAINANT's car. The officers stopped WITNESS #1 and COMPLAINANT as COMPLAINANT's car approached a stop sign. According to the *Gerstein* affidavit and the arrest reports for COMPLAINANT and WITNESS #1, completed and signed by SUBJECT OFFICER #2, the car had an "inoperable tail light" and was stopped for the infraction.
5. During the stop, one of the MPD officers saw that COMPLAINANT had an open container of alcohol. Also during the stop, the MPD officers discovered that WITNESS #1 did not have a driver's license.
6. COMPLAINANT and WITNESS #1 were told to get out of the car. COMPLAINANT was arrested for POCA; WITNESS #1 was arrested for driving without a license. Both COMPLAINANT and WITNESS #1 were handcuffed and searched incident to arrest. The search incident to the arrest of WITNESS #1 revealed that he had two white rock-like substances that later field-tested positive for cocaine. WITNESS #1 was charged with Possession of Cocaine, but was not charged for his failure to possess a driver's license.

7. COMPLAINANT indicated to WITNESS OFFICER #2 that he had received three hundred dollars (\$300) in cash and a check in the amount of \$1200 for work completed earlier that day. WITNESS OFFICER #2 removed the cash and the check from COMPLAINANT and placed it on the hood of the unmarked police car.
8. A gust of wind blew some of the money, as well as the check that was sitting on the hood of the unmarked police car, into a nearby storm drain. MPD officers retrieved the check and some of the cash from the storm drain.
9. COMPLAINANT and WITNESS #1 were transported to Fourth District.
10. Later that day, while COMPLAINANT was waiting in a cell to be released, WITNESS OFFICER #2 gave COMPLAINANT a property receipt. According to COMPLAINANT, the receipt indicated that he had only \$27.04 to retrieve from the property clerk. COMPLAINANT was able to obtain his \$1,200 check upon his release, but never fully recovered all of his cash.
11. On September 12, 2005, an OPC investigator contacted a representative of Affiliated Computer Systems (ACS). ACS is the ticket processing contractor for the D.C. Department of Motor Vehicles. The contractor informed OPC that no Notices of Infraction were issued by SUBJECT OFFICER #1, SUBJECT OFFICER #2, WITNESS OFFICER #2 or WITNESS OFFICER #1, on May 26, 2005. The contractor also indicated that WITNESS #1 did not receive any Notices of Infraction (NOI) on May 26, 2005.
12. According to weather records obtained from WeatherUnderground.com, sunset on May 26, 2005, was at 8:23 p.m. There were scattered clouds to mostly cloudy conditions, with visibility at 10 miles and a high temperature of 80 degrees. It was not extremely overcast or raining.

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; (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].”

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.

OPC concluded that there was reasonable cause to believe that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed COMPLAINANT in violation of MPD Special Order 01-01, because the subject officers stopped COMPLAINANT in the absence of a specific law enforcement purpose. COMPLAINANT alleged that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 stopped him in the absence of a specific law enforcement purpose. According to COMPLAINANT, he and his employee, WITNESS #1, were driving when they were stopped by the two subject officers and two additional members of the MPD.

Both COMPLAINANT and WITNESS #1 denied that WITNESS #1 was speeding when they were stopped. The subject officers, on the other hand, stated that they initiated a traffic stop because the officers observed WITNESS #1 violate D.C. traffic laws. SUBJECT OFFICER #1 stated that COMPLAINANT’s car was stopped because it was traveling at a “high rate of speed in a residential area.” SUBJECT OFFICER #2 could not recall the specific traffic offense that WITNESS #1 committed, nor could he remember whether he observed the traffic offense. However, the *Gerstein* affidavit signed by SUBJECT OFFICER #2 and the arrest reports completed by him indicate that COMPLAINANT’s “vehicle was being operated with an inoperable tail light.” WITNESS OFFICER #1 and WITNESS OFFICER #2 also could not recall the specific traffic offense that WITNESS #1 committed.

COMPLAINANT’s assertion that WITNESS #1 was not speeding is credible. There is no evidence to support SUBJECT OFFICER #1’s contention that WITNESS #1 was speeding at the time he was stopped. According to the ACS contractor, on the day of the incident, no NOIs were issued by any of the officers involved. None of the four officers recalled the reason for the stop in their OPC interviews, and SUBJECT OFFICER #2 stated in the *Gerstein* affidavit and the arrest reports that WITNESS #1’s car was stopped for an inoperable tail light.

SUBJECT OFFICER #2’s contention in the *Gerstein* affidavit and arrest reports that WITNESS #1’s car was stopped for an inoperable tail light is not supported by the record. The

officers were traveling in the opposite direction from COMPLAINANT's car just prior to the stop. According to WITNESS #1, a black, unmarked police car passed COMPLAINANT and WITNESS #1 "in the opposite direction" on Hawaii Avenue, NE. WITNESS #1 and COMPLAINANT were stopped while they were in front of a stop sign. SUBJECT OFFICER #1 stated that the car was traveling "in the opposite direction" at the time that he observed it speeding. Furthermore, WITNESS OFFICER #1 stated that when the officers passed COMPLAINANT's vehicle they noticed a traffic violation, and after passing the vehicle, the officers "turned around and activated [their] emergency lights and the vehicle pulled over." Because the officers made a U-turn, it appears that they made the decision to stop COMPLAINANT's car as they were driving toward WITNESS #1 and COMPLAINANT, and not after the two had already passed. It would have been difficult for the officers to have seen that WITNESS #1's left tail light was inoperable at the time they were driving towards COMPLAINANT's car.

It is possible that the officers noticed the inoperable tail light after they passed COMPLAINANT and WITNESS #1. However, the likelihood of this occurring is improbable, because it would mean that the officers passed COMPLAINANT's car on the opposite side of the avenue, and then, looked behind them while driving in the opposite direction and noticed the inoperable tail light. At the time COMPLAINANT's car was stopped, approximately 6:35 p.m. on a late day in the month of May, there would not have been a reason for COMPLAINANT's car to have its lights activated because the stop occurred during daylight hours on a clear day.

SUBJECT OFFICER #2 clearly indicated in the *Gerstein* affidavit and arrest reports that COMPLAINANT's car tail light was inoperable. In his objections to the ROI, SUBJECT OFFICER #2 indicated that he was referring to the "left break light on the rear of the car which illuminates when the breaking system of the vehicle is engage." However, the officers would not have noticed an inoperable brake light until COMPLAINANT's car approached the stop sign. According to COMPLAINANT, WITNESS #1, and SUBJECT OFFICER #2, the officers made a U-turn and followed COMPLAINANT's car *before* it came to the stop sign at Hawaii Avenue. In his objections to the ROI, SUBJECT OFFICER #2 stated that "[COMPLAINANT and WITNESS #1] were first observed traveling at a high rate of speed which is what prompted the officer's to perform a u-turn to follow the vehicle. Not being equipped with a LIDAR to detect vehicle speed, the officers decided to initiate the traffic stop once the equipment violation was observed." In his objections, SUBJECT OFFICER #2 also indicated that the officers could have lawfully stopped the car for its unreasonable speed without using a LIDAR detector, but the officer never indicated why the stop was not made upon observing the vehicle traveling at a high rate of speed. Based on this evidence, it is clear that the subject officers made their decision to stop COMPLAINANT prior to observing any equipment violations.

COMPLAINANT's and WITNESS #1's assertions that they were not speeding at the time of the stop, coupled with the officers' failure to agree on the reason for the traffic stop and the officers' failure to issue any NOIs on the date of the incident, support an inference that a traffic offense did not occur. For the above reasons, the Complaint Examiner finds that

SUBJECT OFFICER #1 and SUBJECT OFFICER #2 purposefully, knowingly, or recklessly harassed COMPLAINANT, in violation of MPD Special Order 01-01, when they stopped COMPLAINANT without a legitimate law enforcement purpose.

COMPLAINANT also alleged that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed him in violation of MPD Special Order 01-01 when they failed to properly secure his property during the traffic stop. It appears that COMPLAINANT received \$300 in cash and a \$1,200 check for electrical work done earlier that day. According to COMPLAINANT all of his cash was not returned to him. However, OPC does not determine that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 deprived COMPLAINANT of his property without a legitimate law enforcement purpose.

From COMPLAINANT's own account, the person most likely to have misplaced COMPLAINANT's money was WITNESS OFFICER #2. According to COMPLAINANT, WITNESS OFFICER #2 was the officer who "took the money out of [his] back pocket and set it on the hood of his car." WITNESS OFFICER #2 was also the officer who COMPLAINANT argued with while he was in his cell, and who COMPLAINANT told that he "would have his job." WITNESS OFFICER #2, not SUBJECT OFFICER #1 and SUBJECT OFFICER #2, is the officer which had immediate control of COMPLAINANT's possessions at the time of the arrest. However, WITNESS OFFICER #2 is no longer a police officer with MPD.

The officers did make an attempt to secure the money after it fell down the storm drain. According to COMPLAINANT, "one of the officers went down into the hole and got [his] check and some of the cash back." In his OPC interview, SUBJECT OFFICER #1 stated that SUBJECT OFFICER #2, accompanied by WITNESS OFFICER #1 and WITNESS OFFICER #2, "walked over to the sewer and lift[ed] the manhole cover." According to SUBJECT OFFICER #1, WITNESS OFFICER #1 "held the legs of SUBJECT OFFICER #2 and WITNESS OFFICER #2 while they went into the sewer to retrieve the money." SUBJECT OFFICER #2 also stated that he went into the storm drain to retrieve COMPLAINANT's money. Finally, WITNESS #1 informed OPC that "two officers . . . went inside the sewer to get [COMPLAINANT's] money." In interviews with OPC, the two subject officers could not recall the amount of money COMPLAINANT placed on the vehicle or the amount of money that they recovered from the street and the storm drain.

The officers should have exercised better judgment in securing COMPLAINANT's money during his arrest. However, because COMPLAINANT's property was not in the immediate control of the subject officers at the time of the arrest, the Complaint Examiner concludes that the two subject officers did not fail to properly secure COMPLAINANT's money. In addition, the Complaint Examiner does not find that the two subject officers' failure to retrieve all of the money out of the storm drain rises to the level of police misconduct. Therefore, the Complaint Examiner finds that there is no reasonable cause to believe that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 purposefully, knowingly, or recklessly

harassed the COMPLAINANT, in violation of MPD Special Order 01-01, when they allegedly mishandled his property and allowed it to fall down a storm drain.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment	Sustained, in part (concerning the stop of COMPLAINANT's car) Exonerated, in part (concerning the loss of COMPLAINANT's cash)
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SUBJECT OFFICER #2

Allegation 1: Harassment	Sustained, in part (concerning the stop of COMPLAINANT's car) Exonerated, in part (concerning the loss of COMPLAINANT's cash)
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Submitted on June 2, 2007.

ARTHUR D. SIDNEY
Complaint Examiner