

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF POLICE COMPLAINTS

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	06-0052
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, Third District
Allegation 1:	Harassment
Allegation 2:	Insulting, Demeaning, or Humiliating Language or Conduct
Allegation 3:	Discriminatory Treatment
Complaint Examiner:	Kevin D. Judd
Merits Determination Date:	March 11, 2008

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

I. SUMMARY OF COMPLAINT ALLEGATIONS

In a complaint timely filed with the Office of Police Complaints (OPC) on December 5, 2005, the COMPLAINANT ("Complainant"), alleged that on October 20, 2005, and October 21, 2005, Metropolitan Police Department (MPD) SUBJECT OFFICER, used language or engaged in conduct toward him and his friend, WITNESS, that was insulting, demeaning or humiliating. The complainant also alleged that SUBJECT OFFICER harassed and discriminated against WITNESS based on his place of residence.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this complaint, because there were genuine issues of material facts in dispute that required a hearing.

FINDINGS OF FACT

Based on the hearing conducted on December 7, 2007, and a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER, and the post-hearing briefs submitted by

both parties, the Complaint Examiner finds the material facts regarding this complaint to be:

1. The complainant is a 73-year-old owner of a hair salon in the District of Columbia and an MPD reserve officer.

2. The complainant's friend, WITNESS, is a former employee of the complainant and was homeless at the time of the incident.

3. On October 20, 2005, SUBJECT OFFICER was on duty and was patrolling the vicinity of Dupont Circle.

4. SUBJECT OFFICER was approach by a male subject, who stated that a person who appears to be homeless has a laptop in the area of 19th and Q, and you may want to check it out.

5. SUBJECT OFFICER approached WITNESS and questioned him regarding the laptop and secured the laptop and transported it to the 3rd District police station.

6. The complainant observed SUBJECT OFFICER questioning WITNESS about the laptop from his store. The complainant approached the two men and identified himself as a MPD reserve officer and explained to SUBJECT OFFICER that WITNESS is the rightful owner of the laptop and that he had witnessed the purchase receipt shortly after WITNESS had purchased the laptop. However, SUBJECT OFFICER transported the laptop to the station, because he was not satisfied that the laptop belong to WITNESS.

7. On October 21, 2005, the complainant went to the 3rd District police station to speak with SUBJECT OFFICER and to retrieve the laptop. The complainant brought documentation showing that WITNESS is the owner of the laptop. SUBJECT OFFICER refused to surrender the laptop to the complainant. The complainant requested to see SUBJECT OFFICER'S superior officer. WITNESS OFFICER #1 presented herself and she listened to both men and explained to the complainant that the laptop cannot be released to anyone, except to the owner of the laptop. The complainant was then told by WITNESS OFFICER #1 that he must leave the station after he started yelling at her.

III. 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

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.

In accordance with MPD Special Order 01-01, in order to establish harassment, the complainant has the burden to prove that SUBJECT OFFICER intentionally bothered, annoyed, or otherwise interfered with WITNESS'S ability to go about his lawful business normally, in the absence of a specific law enforcement purpose. In this case, the complainant failed to meet the standard of proof under MPD Special Order 01-01 to prove that SUBJECT OFFICER intended to harass the complainant when he secured WITNESS'S laptop on October 20, 2005. Although, the complainant alleges that SUBJECT OFFICER harassed WITNESS, by seizing the laptop without a legitimate reason, the evidence shows that SUBJECT OFFICER'S behavior was supported by a law enforcement purpose, i.e. determining whether the circumstances indicated whether a crime had been committed.

In this instance, SUBJECT OFFICER was told by a male subject that a person who appears to be homeless is playing with a laptop in the area of 19th and Q, and you may want to check it out. After being informed of this information, by this male subject, SUBJECT OFFICER investigated a potential theft by approaching WITNESS and inquiring as to his ownership of the laptop. After WITNESS was unable to produce the receipt or the credit card that he used to purchase the laptop, and listening to the complainant that WITNESS was the owner of the laptop, SUBJECT OFFICER decided to secure the laptop and conduct further investigation to determine if the laptop was stolen and to determine the ownership of the laptop. After questioning WITNESS, SUBJECT OFFICER drove by the location where WITNESS indicated he purchased the laptop. However, SUBJECT OFFICER did not find a computer store at the location of 18th and T Street, NW. SUBJECT OFFICER then called Dell, the manufacturer of the computer, in order to determine the ownership of the laptop and he then learned that the computer was not registered to WITNESS.

SUBJECT OFFICER'S actions show that he was conducting a specific law enforcement purpose, specifically investigating a possible crime for the purpose of determining whether the laptop was stolen or not. The requisite element that SUBJECT OFFICER intended to agitate WITNESS or interfere with WITNESS'S lawful right to enjoy his laptop without a law enforcement purpose is not present. Therefore, a finding of harassment cannot be found in this instance.

Based on the testimony of the witnesses at the hearing and the facts contained in the OPC Report of Investigation regarding SUBJECT OFFICER'S securing WITNESS'S laptop, SUBJECT OFFICER will be exonerated from the allegation that he purposely, knowingly, or recklessly harassed the complainant in violation of MPD Special Order 01-01.

Insulting, Demeaning, or Humiliating 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, slangs, 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 clam regardless of provocation to do otherwise."

In this instance, there is not sufficient evidence proving that SUBJECT OFFICER used language that was insulting, demeaning and humiliating towards the complainant and WITNESS on October 20, 2005, and October 21, 2005, in violation of MPD Special Order 201.26.

Both the complainant and WITNESS testified that SUBJECT OFFICER'S actions and words were intimidating and rude. They also testified that SUBJECT OFFICER told the complainant to shut up or he would be arrested. However, SUBJECT OFFICER testified otherwise, indicating that he was professional at all times and did not threaten to arrest anyone. In regard to this allegation, there is clearly a dispute of material facts, which must be resolved by assessing the credibility of the witnesses and their demeanor on the stand.

In regard to the complainant's testimony, he repeatedly contradicted himself and was very elusive in answering questions during cross examination, which tarnished his credibility as a witness. In addition, the complainant's credibility as a witness was severely diminished when he contradicted his own testimony that SUBJECT OFFICER used profanity and curse words towards him. After repeatedly asking the complainant the exact curse words that were used by SUBJECT OFFICER, the complainant eventually stated that the statements were: "I don't want to hear anything from you. I don't want to hear anything about the computer. I don't want to hear about {sic} anything." Tr. at 67

WITNESS'S testimony was equally unbelievable. Although WITNESS made a few statements that were not accurate during his testimony, the most glaring example is when he falsely testified that he was interviewed by two OPC investigators in a barbershop and that he received multiple e-mails from them regarding this matter. However, this interview could not have happened because OPC was unable to locate WITNESS for the purpose of interviewing him.

On the other hand, SUBJECT OFFICER'S testimony was credible. He was not elusive while answering questions, nor did he give contradictory testimony. A negative inference was not drawn with respect to SUBJECT OFFICER'S credibility as a witness as a result of his refusal to sign his statement drafted by the Investigator. The Investigator testified that SUBJECT OFFICER did not sign the statement because SUBJECT OFFICER did not want to be inconsistent with any previous statements prepared by him in this matter. The Investigator also testified that he did not suggest or provide SUBJECT OFFICER an opportunity to review his prior statements in order for SUBJECT OFFICER to feel comfortable in signing the statement that was drafted by the Investigator.

Based on the testimony of the witnesses and the facts contained in the OPC Report of Investigation, the complaint examiner has determined that the allegation that SUBJECT OFFICER mocked, intimidated, and verbally abused the complainant and WITNESS, and the allegations that he verbally and by conduct insulted, demeaned and humiliated the complainant and WITNESS in violation of MPD Special 201.26, are unfounded.

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 or 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, sec. 2199.1.

In this matter, the evidence suggests that SUBJECT OFFICER discriminated against WITNESS based on his place of residence (in this case, WITNESS homeless status) when he initiated the investigation concerning WITNESS'S laptop. Under existing case law, in order to establish a prima facie case of unlawful discrimination, the complainant must show: (1) the complainant is a member of a protected class; (2) the complainant applied for or requested a service or benefit for which he or she was eligible; (3) the complainant was denied the benefit or service; and (4) the adverse action or decision was made under circumstances which give rise to the inference that it was based on unlawful discrimination. See *Texas Dept. Of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); see also *McDonnell Douglas Corp. V. Green*, 411 U.S. 792, 802 (1973).

In this instance, a prima facie case was made. (1) WITNESS was homeless at the time of the incident; (2) he was entitled to equitable enforcement of the law; (3) SUBJECT OFFICER failed to enforce the law equally to WITNESS; and (4) SUBJECT OFFICER'S treatment of WITNESS, because he was homeless gives rise to an inference that his conduct was based on unlawful discrimination. Here, a discriminatory attitude was established when SUBJECT OFFICER responded to a male subject statement that a homeless person is playing with a laptop. SUBJECT OFFICER'S response to the male subject's tip coupled with SUBJECT OFFICER'S investigation on WITNESS 'S laptop established direct evidence of unlawful discrimination.

Once a prima facie case of discrimination has been established, "the burden shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegal factor into consideration." *Feemster v. BSA Ltd. P'ship*, 471 F.Supp.2d 87, 101 (D.D.C. 2007). Although, it appears that SUBJECT OFFICER had a law enforcement reason for taking WITNESS'S laptop and investigating whether a crime occurred, if it was not for WITNESS being homeless, SUBJECT OFFICER would not have initiated the investigation. In this instance, once the burden of proof shifted to SUBJECT OFFICER, he failed to produce any evidence that he would have taken the same action against a non-homeless citizen.

Based on the testimony of the witnesses and the facts contained in the OPC Report of Investigation regarding SUBJECT OFFICER'S investigation of WITNESS'S laptop, where SUBJECT OFFICER initiated a potential theft investigation based on WITNESS'S homelessness, the allegation of discriminatory conduct by SUBJECT OFFICER in violation of MPD General Order 201.26 will be sustained.

IV. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1:	Exonerated
Allegation 2:	Unfounded
Allegation 3:	Sustained

Submitted on March 11, 2008.

/s/ Kevin D. Judd_____

Kevin D. Judd, Complaint Examiner