GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF POLICE COMPLAINTS

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	06-0121
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, Sixth District
Allegation 1:	Harassment
Allegation 2:	Insulting, Demeaning, or Humiliating Language or Conduct
Allegation 3:	Insulting, Demeaning, or Humiliating Language or Conduct
Allegation 4:	Insulting, Demeaning, or Humiliating Language or Conduct
Complaint Examiner:	Jeffrey S. Gutman
Merits Determination Date:	July 23, 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. 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 as provided by § 5-1111(e).

I. SUMMARY OF COMPLAINT ALLEGATIONS

The Complaint, filed on February 21, 2006, and contemporaneous witness statement allege that, on February 15, 2006, at approximately 9:40 p.m., COMPLAINANT and a friend, WITNESS #1, walked to the apartment building located at LOCATION #1., S.E., Washington, D.C. At that time, COMPLAINANT resided with his sister, WITNESS #2, in an apartment in that building. As COMPLAINANT approached the front door of the apartment building, he saw a police car and heard an officer call his name.

As COMPLAINANT entered the building, he asked WITNESS #1 to get WITNESS #2 to witness the expected encounter. The witness statement says that WITNESS OFFICER #1, who has subsequently left the MPD, entered the apartment building and asked for COMPLAINANT's identification. COMPLAINANT alleges that he was told to turn to face a wall, to raise his hands and to place them on the wall. He alleges that he asked why he was stopped and that WITNESS OFFICER #1 said that he could do what he wanted because he was a police officer. Subsequently, WITNESS #2 asked why her brother was stopped. After she was instructed to return to her apartment, WITNESS OFFICER #1 allegedly removed his handcuffs

and threatened to arrest her if she did not return to her apartment. WITNESS #2 was asked whether COMPLAINANT's name was on the lease. She responded that it was.

This February, 2006 encounter followed WITNESS OFFICER #1's and SUBJECT OFFICER's arrest of COMPLAINANT in January 2006 on drugs and weapons charges. During that incident, COMPLAINANT's cell phone was confiscated. After a brief conversation about the cell phone, the statement alleges that SUBJECT OFFICER asked him if he had drugs. COMPLAINANT alleges that he consented to a search, but was not searched. After WITNESS OFFICER #1 wrote down information from the identification, COMPLAINANT's ID was returned and he was told that he could go.

The Complaint and witness statement, summarized above, appear to have confused SUBJECT OFFICER, the Subject Officer here, and WITNESS OFFICER #1, whose conduct is not at issue in this case. The Findings of Fact, set forth below, attempt to resolve this confusion.

The subsequent OPC investigation examined an allegation that SUBJECT OFFICER engaged in police misconduct by saying "I can do what I want; I'm the police," or words to that effect. OPC found no credible corroborating evidence of that statement and requested that I not sustain his allegation. At the pre-hearing conference, the parties agreed with OPC's conclusion and that this allegation did not warrant attention at the hearing. Because this allegation was, as a technical matter, referred to me for adjudication, I address it below in a manner consistent with the parties' agreement at the pre-hearing conference.

The following allegations are addressed in this decision:

Allegation 1: SUBJECT OFFICER harassed COMPLAINANT by stopping him without a law enforcement purpose.

Allegation 2: SUBJECT OFFICER engaged in conduct that was insulting, demeaning or humiliating by failing to respond to COMPLAINANT's requests for a reason why he was contacted or stopped.

Allegation 3: SUBJECT OFFICER used language or engaged in conduct that was insulting, demeaning or humiliating by removing or appearing to be removing his handcuffs while telling WITNESS #2, in effect, to return to her apartment or be subject to arrest following her inquiry as to why he contacted or stopped COMPLAINANT.

Allegation 4: SUBJECT OFFICER used language or engaged in conduct that was insulting, demeaning or humiliating when he said, "I can do what I want; I'm the police."

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this Complaint on June 20, 2007. The Complaint Examiner heard the testimony of COMPLAINANT by telephone, WITNESS OFFICER #2, WITNESS OFFICER #3, WITNESS #1, WITNESS #2, WITNESS OFFICER #4 and SUBJECT OFFICER. WITNESS OFFICER #1 and WITNESS #3 were subpoenaed, but did not appear at the hearing. The following exhibits were introduced at the hearing and entered into evidence:

Joint Exhibits 1-27, which comprised the OPC's administrative record

Joint Exhibit 28, Stipulations

Joint Exhibit 29, Declaration of OPC INVESTIGATOR

Subject Officer Exhibit 1, General Order 702-3 "Vice Search Warrants"

III. FINDINGS OF FACT

Based on a review of the exhibits listed above, OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on March 19, 2007, and the evidentiary hearing conducted on June 20, 2007, the Complaint Examiner finds the material facts regarding this Complaint to be as follows:

1. SUBJECT OFFICER has been an officer with the District of Columbia Metropolitan Police Department (MPD) for more than seven years.

2. For most of his tenure, SUBJECT OFFICER has been assigned to the Sixth District. At the time relevant here, SUBJECT OFFICER was a member of a tactical unit.

3. WITNESS OFFICER #2 informed SUBJECT OFFICER of citizen complaints about drug and prostitution activity in and around the area of 19th and R Streets, S.E., Washington, D.C.

4. WITNESS OFFICER #2 directed SUBJECT OFFICER to increase his patrols of that area.

5. On January 10, 2006, while on routine patrol in their police vehicle, WITNESS OFFICER #1 and SUBJECT OFFICER saw a male individual, later identified as COMPLAINANT, walking down the street. The officers believed that COMPLAINANT might be carrying a gun.

6. SUBJECT OFFICER exited his vehicle, identified himself as a police officer and commanded COMPLAINANT to get on the ground. COMPLAINANT did not comply.

7. WITNESS OFFICER #1 and SUBJECT OFFICER took COMPLAINANT down tactically and found a gun and a vial of what was later identified as PCP on his person. COMPLAINANT was then arrested.

8. On or about January 11, 2006, COMPLAINANT was arraigned in D.C. Superior Court on weapons and drug charges and released on his own recognizance.

9. These charges were dismissed on or about January 30, 2006. COMPLAINANT was indicted in federal court on firearms and drug charges on February 16, 2006. COMPLAINANT subsequently entered a guilty plea and is currently incarcerated.

10. Shortly after COMPLAINANT's arrest, WITNESS OFFICER #2 told SUBJECT OFFICER that he had spoken to individuals at the U.S. Attorney's Office and directed him to take steps necessary to secure a search warrant of COMPLAINANT's residence.

11. Because of some conflicting information on file, SUBJECT OFFICER was directed to determine and verify COMPLAINANT's current residence.

12. In the evening of February 15, 2006, WITNESS OFFICER #1 and SUBJECT OFFICER were returning to the station in their vehicle when SUBJECT OFFICER observed COMPLAINANT approaching LOCATION #1., S.E.

13. The Metropolitan Police Department regarded that neighborhood, and LOCATION #1., S.E. in particular, as a high crime area.

14. COMPLAINANT and his friend, WITNESS #1, were returning from WITNESS #1's house to look at COMPLAINANT's DVD collection. COMPLAINANT noticed a police car following him.

15. As COMPLAINANT was opening the front lobby door of the apartment building located at LOCATION #1., S.E., SUBJECT OFFICER called "COMPLAINANT" and shined a light in his direction.

16. COMPLAINANT then used his key to enter the apartment building at LOCATION #1., S.E. After COMPLAINANT entered the building, SUBJECT OFFICER was close behind and asked COMPLAINANT to open the door. COMPLAINANT complied with that request.

17. COMPLAINANT requested that WITNESS #1 alert his sister, WITNESS #2, that he was likely to have an encounter with police officers.

18. COMPLAINANT had been living with WITNESS #2 in apartment B-1, which is located close to and downstairs from the main entrance to the apartment building.

19. SUBJECT OFFICER asked COMPLAINANT where he lived and asked, "May I see your ID?" He also asked whether the ID was in COMPLAINANT's pocket.

20. COMPLAINANT responded by saying "fuck you" at least twice.

21. SUBJECT OFFICER did not inform COMPLAINANT of his right to refuse to answer his questions.

22. SUBJECT OFFICER did not inform COMPLAINANT of his right to leave.

23. SUBJECT OFFICER again asked COMPLAINANT for his identification.

24. COMPLAINANT told SUBJECT OFFICER that he had identification in his right pocket.

25. COMPLAINANT then produced an identification card to SUBJECT OFFICER.

26. COMPLAINANT asked SUBJECT OFFICER why he had been stopped.

27. SUBJECT OFFICER heard the question, but did not respond.

28. At this point, SUBJECT OFFICER recorded the address on the identification card in his notebook.

29. About two or three minutes after COMPLAINANT's request of WITNESS #1 that he contact WITNESS #2, WITNESS #1 and WITNESS #2 emerged from WITNESS #2's apartment.

30. WITNESS #2 asked the officers repeatedly why they had stopped COMPLAINANT.

31. WITNESS OFFICER #1 asked WITNESS #2 repeatedly to return to her apartment. When WITNESS #2 did not comply, WITNESS OFFICER #1 stated that he would arrest her if she did not return to her apartment.

32. Officers WITNESS OFFICER #1 or SUBJECT OFFICER asked WITNESS #2 if COMPLAINANT was on her lease. She said that he was.

33. SUBJECT OFFICER did not remove his handcuffs in a manner that would convey to WITNESS #2 that he intended to arrest her.

34. After recording information in his notebook, SUBJECT OFFICER asked COMPLAINANT whether he resided at the address indicated on the identification card. COMPLAINANT did not specifically answer that question. SUBJECT OFFICER then recorded the word "refused" in his notebook.

35. Thereafter, WITNESS OFFICER #1 and SUBJECT OFFICER left the apartment building.

36. The encounter with COMPLAINANT took approximately five minutes.

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]."

The preliminary question, briefed in connection with Allegation 2, but with relevance to the remaining allegations, is what standard of conduct applies to the police. What defines "abuse and misuse of police powers" and the subsidiary examples of them? There are two potential sources of governing standards of conduct: the OPC statute and implementing regulations, and MPD orders, both general and special. Unless it is clear that one source incorporates the other by reference (and does so consistently) or that certain standards supersede others in cases of differences or conflicts among them, officers may be left uncertain as to which they are expected to comply. It is therefore necessary to examine these sources of conduct with some care.

D.C. Code § 5-1107(a) provides the OPC with jurisdiction to entertain complaints that allege "abuse or misuse of police powers," including six enumerated categories of misconduct. Two of these categories are at issue in this case: harassment and use of language or conduct that is insulting, demeaning, or humiliating. D.C. Code § 5-1107(a)(1), (3); *see also* D.C. Mun. Regs. tit. 6A, § 2104.1(a), (c). The governing statute does not, however, define these terms or more specifically identify the types of conduct contemplated as rising to the level of an "abuse or misuse of police powers."

The OPC implementing regulations, however, quite specifically define "harassment":

> Words, 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.

D.C. Mun. Regs. tit. 6A, § 2199. That definition expressly incorporates the internal guidelines of the MPD, which are, presumably, the Orders.[1] The definition further authorizes the OPC to examine the totality of the circumstances, including whether the Officer adhered to applicable "orders, policies, procedures, practices and training" of the MPD.

MPD Special Order 01-01, written prior to the OPC regulation, employs different and somewhat less formal language to define harassment: "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 OPC regulation and Special Order seem largely consistent. However, in perhaps two ways, the OPC regulation sweeps more broadly. It includes "reckless" conduct. And, it does not include the "specific law enforcement purpose" exception, unless that is incorporated by its reference to MPD guidelines.[2] These potential differences, however, have no bearing to the outcome of this case.

In contrast to "harassment," none of the terms employed in § 2104(c), prohibiting insulting, demeaning or humiliating language or conduct, are defined in the OPC regulations. *See* D.C. Mun. Regs. tit. 6A, § 2199. D.C. Mun. Regs. tit. 6A, § 2116.4 potentially offers some guidance, although in a rather indirect way. That regulation permits complaint examiners to consider the definitions in the regulations "as well as any MPD regulation, policy, procedure or order that prescribes standards of conduct for officers." *See also* D.C. Mun. Regs. tit. 6A, § 2120.2(d) (the complaint examiner shall find an officer "exonerated" where the alleged conduct did occur, but did not "violate the policies, procedures, practices, order or training of the MPD"). These regulations, then, do not directly impose a standard of conduct on officers. Instead, they permit (but do not require) complaint examiners to consider applicable MPD orders. In the guise of defining the contours of complaint examiner discretion, the regulations seemingly backdoor a standard of conduct through reference to police orders.

One such order is relevant here. MPD General Order 201-26, Parts C(1)-(2) imposes affirmative duties on officers. Part C(1) requires officers to be "courteous and orderly in their dealings with the public." Officers must also "fulfill proper requests for information or assistance," Part C(1), and be "courteous, civil and respectful" to persons while they are on or off

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[1] The Chief of Police is authorized to issue "orders, rules and regulations of the Mayor or the Council which pertain to the work of the Metropolitan Police Department, and shall issue those instructions, and promulgate those orders, rules, and regulations, not inconsistent with law or with the overall D.C. Government policy, as he or she may deem proper in the exercise of his or her functions as chief executive of the department." D.C. Mun. Regs. tit. 6A, § 800.3.

[2] The existence of Special Order 01-01, written prior to the OPC regulations, appears in some sense to try to anticipate what the future OPC regulations might prescribe in terms of standards of conduct. Now that the OPC regulations are effective, the continued existence and possible applicability of Special Order 01-01 seem problematic. To the extent that the standards therein are consistent with the OPC regulations, they serve little purpose. To the extent they conflict to some degree, Subject Officers can claim legitimate confusion about which one to follow.

duty. Part C(2). *See also* Part F(1) (officers shall "be habitually courteous"). At the same time, the Order prohibits officers from "giving the impression that they are evading the performance of their duty." Part C(1).[3]

A subsequent MPD Special Order, Number 01-01, however, takes a significantly different approach. The Special Order was issued to inform MPD members of the establishment of the OPC. It explains that the OPC has authority to adjudicate allegations of the use of language or conduct that is insulting, demeaning or humiliating. Section III(H) of the Special Order specifically defines such language or conduct as:

> Includ[ing], but 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.

This Special Order predated the OPC regulations and is to remain in effect "until incorporated into the appropriate General Order." My research has revealed no subsequent General Order. In this context, then, the General Order imposes a general and undefined affirmative duty of courteousness while the Special Order (and OPC statute and regulations) are prohibitory in nature. Conceivably, there are situations in which an officer's conduct falls short of generally recognized conceptions of courtesy, but do not rise to the level of insult or humiliation. This raises the question of which standards of conduct apply in such cases.

One answer is to apply the most exacting standard. If the officer meets that standard, then he or she necessarily meets the alternative, more lenient, one. The potential difficulty with that answer lies in whether officers have meaningful notice of such a rule. There is no reason to believe that they do. Both the General Order and Special Order co-exist without an indication as to which is the governing standard.

SUBJECT OFFICER's answer is that the MPD orders cannot be given the force and effect of law because they were not promulgated pursuant to the D.C. Administrative Procedure Act's ("DCAPA") rulemaking requirements. D.C. Code § 2-501 *et seq.* The potential ramifications of accepting such an argument should give one pause. Taken to its apparent logical conclusion, the argument suggests that MPD orders and guidelines cannot be used to establish

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[3] D.C. Mun. Regs. tit. 6A, § 202.1(d) also requires officers to be "courteous and considerate under all circumstances." As explained below, SUBJECT OFFICER essentially argues that the prohibitory "language and conduct" rule in the OPC regulations trump the rather loose and mandatory duty of courteousness in the MPD order. To the extent that the argument is premised on the notion that regulations reign supreme over MPD orders, it fails in light of § 202.1(d).

baseline standards of conduct against which to evaluate officers in OPC cases no matter how the OPC regulations are phrased.[4]

D.C. Code § 2-505(a) requires the Mayor and independent agencies to publish rules for notice and comment. Independent agencies are those for which the Mayor and City Council are *not* authorized by a law other than the DCAPA to establish administrative procedures. D.C. Code § 2-502(5). It appears that the Council is elsewhere empowered to issue "needful" rules and regulations governing the MPD. D.C. Code § 5-127.01. Thus, as a threshold matter, there is some real question as to whether the MPD is subject to the DCAPA's rulemaking requirements in the first place.

The D.C. Court of Appeals has provided no direct guidance on this issue. It has, however, addressed whether violation of an MPD order alone supports a finding of gross negligence required to impose liability on the District in cases involving police chases. *Duggan v. District of Columbia*, 783 A.2d 653 (D.C. 2001), *aff'd in part, rev'd in part en banc on other grounds*, 884 A.2d 661 (D.C. 2005); s*ee District of Columbia v. Henderson*, 710 A.2d 874 (D.C. 1998); *District of Columbia v. Banks*, 646 A.2d 772 (D.C. 1994); *Abney v. District of Columbia*, 580 A.2d 1036 (D.C. 1989). The Court of Appeals has described the relevant MPD order as an "internal operating manual," *Abney*, 580 A.2d at 1041, and has declined to hold that violation of an order is alone *per se* gross negligence. It is not at all certain, however, that the court arrived at that conclusion because it regarded MPD orders as invalid for failure to comply with notice and comment rulemaking requirements.

To the contrary, in the most recent such case, the D.C. Court of Appeals held that violation of the MPD order on police chases can be a factor in the jury's consideration of gross negligence. *Duggan*, 783 A.2d at 659. Presumably, if the court regarded the order as procedurally invalid, it would have ruled that the order could not be considered at all. Moreover, these police chase cases were decided in the context of determining the circumstances under which the District waived its immunity from damages. The court expressly noted that the MPD order did not purport to implicate the immunity issue, *id.*, or apply to the extent that it conflicted with a regulation. *Henderson*, 710 A.2d at 877. At bottom, the court did not rule that the MPD order was invalid, but that it could not establish the sole criterion for the applicable duty of care when it did not expressly modify governmental immunity and did conflict with a governing regulation. For reasons not fully explained, the D.C. Court of Appeals seems to view MPD Orders as a viable source of standards of conduct, but ones potentially superseded by superior laws or regulations.

Ultimately, the contention that the MPD Orders were not issued pursuant to the DCAPA misses the point. The OPC regulations were. 49 D.C. Reg. 8347 (Aug. 30, 2002). The OPC regulations effectively, although not always artfully, incorporate those Orders by reference. That

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[4] The argument might also suggest that MPD officers cannot be subject to internal discipline outside the OPC process for violating an MPD order.

notice and comment rulemaking effectively cures, in the OPC context, any alleged DCAPA deficiency with respect to an MPD Order. *Cf. Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

SUBJECT OFFICER further argues that particular MPD orders should not apply to the extent that they are "inconsistent with law or the overall D.C. Government policy." D.C. Mun. Regs. tit. 6A, § 800.3. This is true, but this argument offers no interpretive guidance when the OPC regulations, which are claimed to supersede the MPD orders, incorporate these orders expressly or implicitly. Thus, while I cannot entirely disregard the MPD orders on the grounds asserted by SUBJECT OFFICER, there remain potential interpretive difficulties when the OPC regulations set forth a standard of conduct but also incorporate arguably different standards found in the MPD orders.

I next turn to apply these standards to the conduct at issue in this case.

ALLEGATION 1

General Order 304-10, Part I(A) explains the circumstances under which a police officer may initiate a "contact" with a civilian:

> Conduct by an officer which places the sworn member in face-to-face communication with an individual citizen under circumstances in which the citizen is free not to respond, and to leave, is considered a "contact." Contacts may be initiated by a [sic] officer when he/she reasonably believes that some investigatory inquiry into a situation is warranted. Since a contact involves solely the voluntary cooperativeness of a citizen who is free not to respond and to leave, the standard for a police-citizen contact does not require "probable cause," "reasonable suspicion," or any other specific indication of criminal activity.

A "stop," in contrast, is defined as

> the temporary detention of a person for the purpose of determining whether probable cause exists to arrest that person. . . . If a person is under a reasonable impression that he/she is not free to leave the officer's presence, a "stop" has occurred.

General Order 304-10, Part I(B). In effect, the parties disagree on whether the encounter with COMPLAINANT was a "contact" or a "stop." As explained below, I view the matter somewhat differently and conclude that a legitimate contact escalated into a stop as the encounter unfolded.

SUBJECT OFFICER testified that he initiated the encounter with COMPLAINANT in order to ascertain his current residence for purposes of securing a search warrant. Tr. 274:9-22,

275:1-16.[5] Particularly where, as here, there was apparently some conflict in the record as to COMPLAINANT's residence, Tr. 259:4-19, 298:22 – 299:1-7, 302:8-9, obtaining further information is certainly legitimate given the exacting standards required to obtain a warrant and the need to protect innocent individuals from a wrongful search. *See* General Order 702-3 (search warrant affidavit must contain a full description of the premises to be searched; one test for judging reliability of the information is corroboration); Tr. 200:12-15 (WITNESS OFFICER #4). WITNESS OFFICER #2 testified without contradiction that he tasked SUBJECT OFFICER with this assignment. Tr. 84:6-10, 90:5-8.[6]

COMPLAINANT has suggested that SUBJECT OFFICER had no legitimate grounds for the encounter because the police already had sufficient evidence of his address to get a search warrant and that the asserted need for three independent sources of information was pretextual. COMPLAINANT is quite right that there seems to be no law or policy requiring three such sources. However, that does not mean that further checking was not appropriate. Exhibit 21 notes an address of LOCATION #1., S.E., but does not indicate the apartment in which he lived. Even the identification produced by COMPLAINANT did not apparently list an apartment number. Exhibit 12. The building has multiple apartments. SUBJECT OFFICER may have had a list of lessees, but the one we have in the record does not include COMPLAINANT. Exhibit 16. There is, then, even in our limited record, a lack of precision about COMPLAINANT' specific residence.[7]

This interest in obtaining COMPLAINANT's residence information is supported by the fact that the officers also asked WITNESS #2 whether he was listed on the lease. Tr. 71:8-10; 285:12-14. The questions of WITNESS #2 appear to have followed COMPLAINANT's refusal to provide additional, specific information. Tr. 288:2. If the encounter were purely pretextual,

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[5] There was considerable testimony and evidence about whether the officers also initiated the encounter with COMPLAINANT at the general direction of the apartment building owner and manager who sought to promote lawful conduct in and around the building. I do not need to decide whether this rationale, alone, would have justified the encounter. SUBJECT OFFICER, supported by, credibly testified that the search warrant rationale was the principal purpose for the encounter. Whether there are, or are not, other secondary justifications is not relevant.

[6] COMPLAINANT argues that it is suspicious that neither WITNESS OFFICER #2 nor SUBJECT OFFICER can recall the name of the Assistant U.S. Attorney who suggested getting a search warrant. Given the passage of time and the number of meetings WITNESS OFFICER #2 and SUBJECT OFFICER must have had with AUSAs on similar matters since then, this lack of recall is understandable. Somewhat more troubling, though, is AUSA #1's statement that he did not know SUBJECT OFFICER was attempting to get a search warrant. Exhibit 20. Yet, as that Exhibit suggests, perhaps another AUSA was involved in the matter. At bottom, SUBJECT OFFICER testified credibly that WITNESS OFFICER #2 directed him to get a search warrant and WITNESS OFFICER #2 corroborated this.

[7] COMPLAINANT contends that SUBJECT OFFICER could have used other means to confirm COMPLAINANT's residence, such as talking to WITNESS #3 or WITNESS OFFICER #3. To be sure, it would be wise to seek third-party verification of residence. But, asking the party in question is hardly an illegitimate investigatory method.

there would have been no reason to engage WITNESS #2 in this substantive conversation. I am not, therefore, persuaded that the initial contact was intended to harass COMPLAINANT.

Rather, SUBJECT OFFICER testified that he was on the way back to the station for "check off" when he happened to see COMPLAINANT approaching the building. Tr. 271:1-4, 272:3-5. He seemed to recognize COMPLAINANT from their encounter of January 10, 2006, when COMPLAINANT was both carrying a gun and, admittedly, uncooperative, necessitating a tactical takedown. Consequently, calling COMPLAINANT's name and later asking whether he lived at LOCATION #1., S.E. for purposes of a future search warrant was a legitimate "investigatory inquiry." COMPLAINANT, moreover, testified that SUBJECT OFFICER used the required "optional" verbal requests reflective of a contact. Tr. 66:15-16 ("He said, may I see your ID.") Initially, then, the encounter was a contact.

SUBJECT OFFICER testified that, after he asked COMPLAINANT for his identification, COMPLAINANT clearly said, "Fuck you." Tr. 278:21-22; 306:15-17. SUBJECT OFFICER stated that he "kind of brushed it off" and asked twice more before COMPLAINANT produced his identification. Tr. 279:2-4. SUBJECT OFFICER denied that this language would suggest that COMPLAINANT did not want to cooperate. Tr. 306:21-22, 307:1. Instead, he regarded use of that language as part of COMPLAINANT's "nature," because he used that kind of language on January 10, 2006. *Id.;* Tr. 308:17-19. Testifying that this use of obscenities did not signal a refusal to cooperate, SUBJECT OFFICER also stated that use of this sort of language against police officers is common among people in that neighborhood. Tr. 309:4-17.

SUBJECT OFFICER was not in a position to evaluate COMPLAINANT's "nature" given that SUBJECT OFFICER believed that COMPLAINANT was under the influence of PCP during their only previous encounter. Tr. 256:18-21. Nor does the common use of obscenities in the neighborhood justify ignoring COMPLAINANT's use of them. In whatever neighborhood, it is difficult to imagine a response that more clearly signals a refusal to answer SUBJECT OFFICER's questions.

Once he understood that COMPLAINANT did not intend to cooperate, SUBJECT OFFICER should have informed him of his right to refuse to answer his questions. General Order 304-10 Part I 2(a). He should also have been told of his right to leave and be permitted to do so. *Id*., 2(b). SUBJECT OFFICER admittedly did not do this, Tr. 306:6-14; *see also* Tr. 44:18-21, 45:8-10, and instead asked him about his residence repeatedly. Tr. 273:18 ("I asked him several questions."). Tr. 276:14-16. Under such circumstances, a reasonable person would have felt compelled to respond and not free to leave.[8] After several requests, COMPLAINANT finally produced his identification, but refused to cooperate further. Tr. 288:2; *see also* Tr. 69:22

[8] WITNESS OFFICER #4's view, in essence, is that people who had been or are involved in criminal activity are never "reasonable persons" for this purpose. Tr. 223:20 – 224:1-12. As a result, the rules and protections pertaining to "stops" would never apply to these individuals. Fortunately, the General Orders do not subscribe to the view that the distinction between contacts and stops is one thing for people perceived to be law-abiding in safe neighborhoods and quite another for those regarded as suspicious in rougher neighborhoods.

(COMPLAINANT did not provide a specific apartment number); Exhibit 2 (COMPLAINANT's statement: I was fed up and said, "There is my sister, ask her."). SUBJECT OFFICER testified that he wrote the word "refused" in his notebook, Exhibit 12, because COMPLAINANT would not furnish any additional information about his residence. Tr. 287:22, 288:1-2.[9]

When COMPLAINANT initially refused to answer SUBJECT OFFICER's questions, there was no longer a basis for a contact. Thereafter, COMPLAINANT was impeded in his right to go about his business. There was conflicting testimony about the length of this encounter. Having carefully studied the evidence and testimony, with the objective of discerning precisely what occurred, I conclude that the incident is very unlikely to have taken much more than five minutes. Thus, while COMPLAINANT's detention was not as lengthy as some of the witnesses had suggested, it was of a non-trivial duration.

Given the reasoning above, it is not necessary to decide two issues about which there was considerable dispute: whether COMPLAINANT was told to face the wall with his hands on it and whether there was a pat down. However, because these issues may be relevant to the future disposition of this matter, they are worthy of brief discussion.

There is conflicting evidence about whether SUBJECT OFFICER instructed COMPLAINANT to face a wall with his hands up. According to SUBJECT OFFICER, COMPLAINANT was against the wall facing him. Tr. 279:16-17. He denied directing COMPLAINANT to put his hands against the wall. Tr. 294:6-9. COMPLAINANT testified that SUBJECT OFFICER ordered him to put his hands on the wall and that he complied with that request. Tr. 39:17-19. COMPLAINANT said that they were alone at that time. Tr. 40:9. WITNESS #1 testified that COMPLAINANT was facing the wall with his hands on the wall for the duration of the encounter. Tr. 148:4-8. WITNESS #1's testimony that he heard an officer tell COMPLAINANT to turn to the wall and put his hands up, Tr. 156:4-8, conflicts with COMPLAINANT's testimony that he was alone with SUBJECT OFFICER at that point.[10]

Yet, even if WITNESS #1 did not hear the command, he is the only independent and credible witness who testified that he saw COMPLAINANT in that position. Being asked to face a wall with one's hands up, particularly after a pat down, would unquestionably leave a reasonable person the impression that they are not free to leave. *See* Tr. 245:10-15 (WITNESS OFFICER #4). There was no legitimate reason for such a command; because SUBJECT OFFICER had no reasonable basis for arresting COMPLAINANT, he had no basis for stopping

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[9] The key inquiry here is whether a reasonable person would believe he was *free* to leave (and could do so unmolested by the police), not whether he or she actually would do so. Here, COMPLAINANT was in an enclosed environment, in the building lobby, and wanted to go to his apartment. As a practical matter, if COMPLAINANT were timely told that he was free to leave, he might have stayed to witness the exchange between the officers and his sister. That, however, would have been his choice, not one forced upon him by the officers.

[10] WITNESS #2's testimony that the officers had "pinned" COMPLAINANT against the wall is not corroborated. Tr. 163:11.

him. In sum, COMPLAINANT's testimony was credible, consistent with his prior statements and corroborated. There is substantial evidence that SUBJECT OFFICER ordered COMPLAINANT to face the wall with his hands on the wall. At the same time, COMPLAINANT spread his legs voluntarily, Tr. 46:21-22, and, for the reasons explained above, I believe the encounter was significantly shorter in duration than COMPLAINANT and WITNESS #1 believed it to be.

There is conflicting evidence on whether there was a pat down or frisk before COMPLAINANT produced his identification. Tr. 68:4-6 (COMPLAINANT testifying that there was no pat down); Tr. 155:14-16 (WITNESS #1 testifying there was a pat down); Tr. 279:8-9, 291:10-12 (SUBJECT OFFICER testifying that he did pat COMPLAINANT's outer garments down). WITNESS OFFICER #4 testified that there is a recognized difference between a "pat down" and a "frisk." Tr. 227:3-20. The "pat down" involves a cursory, outer garment search around the waistband. The "frisk" involves a more intrusive, full body outer garment search.

The distinction between the two makes intuitive sense. The difficulty is that it is not clearly reflected in General Order 304-10, Part I(C). Indeed, the definition of frisk says it consists of a "pat down." *See also id*. Part I(C)(4)(c)(2) (the officer shall "limit the frisk to a pat down"). The terms are used somewhat interchangeably. I am persuaded that some sort of frisk or pat down did occur here and equally persuaded that there was a legitimate basis for it.

Given SUBJECT OFFICER's knowledge that COMPLAINANT previously had carried a gun, it would have been appropriate to have conducted a protective pat down or "frisk" of COMPLAINANT. Here, there was reasonable suspicion that COMPLAINANT was carrying a weapon given his prior conduct and location. *Id.* Part I(C)(2). I do not believe that this pat down alone turned the contact into a stop. General Order 304-10 Part I(C) says only that a frisk "usually" occurs during a stop; it does not prohibit a pat down in contacts. *See also* Tr. 203:19-21 (WITNESS OFFICER #4).

SUBJECT OFFICER did not prepare a PD 251 or a PD 76. Tr. 313-15. The rationale offered is troubling. Both SUBJECT OFFICER and WITNESS OFFICER #4 testified that officers use their notebooks rather than MPD forms because they believe the forms can be made public. Tr. 208:1-9, 209:9-21, 313:20-21; *but see* General Order 304-10 Part I(D)(3) (PD 76 is not available to the public). If this is the case, the rules regarding completion of the forms or their public availability should be modified, not ignored. COMPLAINANT suggests that the failure to complete the forms calls for an adverse inference: that the Officer did not complete the form because he did not want to face the choice between lying and admitting misconduct. Here, though, there is no need to engage in such inferences. Substantial direct evidence supports the conclusion that COMPLAINANT was the victim of harassment.

ALLEGATION 2

In my May 17, 2007 Prehearing Memorandum, I stated that the parties had agreed that, as to this allegation, there were no material disputed facts: COMPLAINANT requested SUBJECT

OFFICER to explain the reason for their encounter during the evening in question; SUBJECT OFFICER heard that request and SUBJECT OFFICER did not answer it. Here, COMPLAINANT does not challenge SUBJECT OFFICER's express use of language. Rather, he alleges, in essence, that SUBJECT OFFICER's failure to respond amounted to prohibited conduct.

As suggested above, I view this allegation as being one that tests the applicable standard of conduct. It is difficult to conceive of a circumstance in which the failure to answer a question alone constitutes conduct that is "insulting, demeaning or humiliating." To the extent that I can inform an understanding of these terms by reference to MPD orders, Special Order 01-01 speaks exclusively to language, not conduct. MPD General Order 201.26, Part I, Section C provides that "[a]ll members of the department shall be courteous and orderly in their dealings with the public."

Section 2104(c) is prohibitory in nature; General Order 201.26 imposes an affirmative duty of courteousness. Given the differences in the nature and language of these rules, I believe that it is possible for an officer to be discourteous, but not be insulting. Failing to answer a reasonable question may well be one of those situations.

Which standard of conduct applies in this context is of great importance. The stakes are high; if such misconduct is found, the Chief of Police is to take "appropriate action." D.C. Mun. Regs. tit. 6A, § 2120.4. As a result, fundamental principles of Due Process command that officers have clear notice of what types of misconduct could result in sanction. The answer is not to ignore the MPD Orders on the grounds advanced by SUBJECT OFFICER. It seems appropriate, instead, to borrow a rule of statutory interpretation from the criminal law – the Rule of Lenity. *See Cullen v. United States*, 886 A.2d 870, 874 (D.C. 2005) ("It is well-established that criminal statutes should be strictly construed and that ambiguities should be resolved in favor of the defendant (*i.e.*, the Rule of Lenity)."). When faced with two different standards of conduct, the most permissive standard of conduct should apply. Here, that is the "insulting, demeaning or humiliating" standard, and I find that SUBJECT OFFICER's failure to respond to COMPLAINANT's inquiries does not meet that standard.

SUBJECT OFFICER argues with some justification that telling someone that the officer intends to seek a search warrant can harm law enforcement efforts. This information might prompt someone to move or discard contraband that they might have in their residence. At the same time, that legitimate law enforcement purpose does not necessarily justify saying nothing. SUBJECT OFFICER might have said, "I am just checking your identification, sir." This is not a very illuminating answer, but it is somewhat more responsive and forthcoming than saying nothing at all. Although SUBJECT OFFICER might have said something responsive, his failure to do so does not rise to the level of a use or abuse of police power.

ALLEGATION 3

COMPLAINANT alleged that SUBJECT OFFICER removed his handcuffs and, through language and conduct, threatened to arrest WITNESS #2 if she did not return to her apartment. Based upon my review of the record, I conclude that COMPLAINANT likely confused SUBJECT OFFICER and WITNESS OFFICER #1. The Complaint Form completed by COMPLAINANT, for example, identifies WITNESS OFFICER #1 [sic] as shorter and with red hair and SUBJECT OFFICER as taller with black hair. It is the reverse. COMPLAINANT recognized his confusion at the hearing: "I had the names mixed up. I thought the short guy – the short officer was WITNESS OFFICER #1." Tr. 46:2-3.

COMPLAINANT offered no oral testimony regarding SUBJECT OFFICER brandishing his handcuffs, threatening WITNESS #2 with arrest or telling his sister to return to her apartment. WITNESS #1 testified that the younger officer "pulled out his handcuffs and had them up in the air and came past me and like made her go back into the apartment." Tr. 147:12-14. WITNESS #1's testimony is quite clear that he knew SUBJECT OFFICER to be the older, shorter officer with reddish hair, while the other officer, now known to be WITNESS OFFICER #1, was younger. Tr. 144-146. Moreover, WITNESS #1 specifically testified that he did not see SUBJECT OFFICER raise his handcuffs, Tr. 150:8, and that WITNESS OFFICER #1, rather than SUBJECT OFFICER, told WITNESS #2 to return to her apartment and brandished the handcuffs. Tr. 156:16 – 157:8.

WITNESS #2 did not specifically identify SUBJECT OFFICER as the officer who ordered her to her apartment, threatened to arrest her or removed his handcuffs. Indeed, WITNESS #2 testified that one of officers involved in the incident was black, Tr. 163:4, and that SUBJECT OFFICER was the white officer. Tr. 164:2, 170:21. All of the other evidence in this case clearly shows that two white officers, WITNESS OFFICER #1 and SUBJECT OFFICER, were involved in this encounter.[11] As a result, WITNESS #2's identification of SUBJECT OFFICER as the white officer must be discounted substantially.

Moreover, even if WITNESS #2 properly and consistently identified SUBJECT OFFICER, she testified only that the white officer "probably" said that he would arrest her, but that she "didn't pay it too much attention." Tr. 171:21-22. Similarly, she testified that the white officer "probably" removed his handcuffs, but that she did not recall it. Tr. 172:3-5. SUBJECT OFFICER's recollection, although concededly imperfect, was that WITNESS OFFICER #1 had directed WITNESS #2 to her apartment and threatened arrest, Tr. 282:7-17, and that he (SUBJECT OFFICER) did not pull his handcuffs out. Tr. 283:16-17.

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[11] WITNESS #2's witness statement, Exhibit 6, refers to two white police officers. When referring to her interaction with the officers, she frequently uses the word "they," without specifically identifying a particular officer. At the conclusion of her statement, she says that the taller officer, presumably WITNESS OFFICER #1, was "mainly" yelling at her, but that she did not see him remove his handcuffs. Although it is possible to infer that SUBJECT OFFICER was also (but not mainly) yelling at her, there are clear inconsistencies between her OPC statement and her testimony at the hearing. It is also inconsistent with WITNESS #1's testimony which is considerably more credible and deserving of substantially more weight.

There is, in sum, no substantial and credible evidence that SUBJECT OFFICER removed his handcuffs in such a manner that conveyed the threat of arrest of WITNESS #2 or that SUBJECT OFFICER otherwise threatened her with arrest.

ALLEGATION 4

OPC did not find any corroborating evidence that SUBJECT OFFICER engaged in police misconduct by saying "I can do what I want; I'm the police," or words to that effect. As stated above, at the pre-hearing conference, the parties agreed that this allegation did not warrant further review by the complaint examiner. Based on my independent review of the record, I conclude that the preponderance of the evidence does not show that SUBJECT OFFICER engaged in police misconduct in this respect.

SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1:	Sustained
Allegation 2:	Exonerated
Allegation 3:	Unfounded
Allegation 4:	Unfounded

Submitted on July 23, 2007.

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Jeffrey S. Gutman
Complaint Examiner