

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	06-0206
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, First District
Allegation 1:	Harassment
Allegation 2:	Insulting, Demeaning, or Humiliating Language or Conduct
Allegation 3:	Use of Excessive or Unnecessary Force
Complaint Examiner:	Eleanor Nace
Merits Determination Date:	December 30, 2009

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, COMPLAINANT, filed a complaint with the Office of Police Complaints (OPC) on May 1, 2006. COMPLAINANT alleged that on April 22, 2006, the subject officer, Metropolitan Police Department (MPD) Officer SUBJECT OFFICER, First District, used language or engaged in conduct toward her that was insulting, demeaning, or humiliating, used unnecessary or excessive force against her and some fellow demonstrators, and harassed her and some fellow demonstrators.

Specifically, COMPLAINANT alleged that while she was walking with a group of people during a demonstration protesting the practices of the International Monetary Fund (IMF) and the World Bank, SUBJECT OFFICER followed behind her and other demonstrators for more than an hour. According to COMPLAINANT, during this time, SUBJECT OFFICER rode his motorcycle into her leg, as well as the legs of other demonstrators. COMPLAINANT asked SUBJECT OFFICER to stop striking people with his motorcycle, and when he continued, COMPLAINANT told him that he was “nuts.” SUBJECT OFFICER allegedly replied, “I have nuts I am sure you would like.” SUBJECT OFFICER then allegedly blew kisses at COMPLAINANT and referred to her as “baby.” COMPLAINANT further alleged that she

personally observed SUBJECT OFFICER shove the side mirror of his motorcycle into the back of a fellow demonstrator. A copy of the complaint, which was submitted timely and in the proper form, was attached as **Exhibit 1** to the Report of Investigation.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation and other materials, 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.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER dated September 14, 2009, a Memorandum to the Complaint Examiner dated November 9, 2009, from Nicole Porter, Special Assistant, Office of Police Complaints, in response to COMPLAINANT'S Objections, and a thorough study of the twenty-six (26) Exhibits attached to the OPC's Report of Investigation, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On April 22, 2006, there was a demonstration in Washington, D.C., against practices of the International Monetary Fund (IMF) and the World Bank.
2. COMPLAINANT ("Complainant") participated in this demonstration.
3. SUBJECT OFFICER ("Subject Officer" or "SUBJECT OFFICER") was assigned to monitor the demonstration as part of the Civil Disturbance Unit.
4. Complainant provided a signed statement after being interviewed by OPC.
5. SUBJECT OFFICER was interviewed by OPC and refused to sign his statement attesting to its truth and accuracy.
6. SUBJECT OFFICER followed Complainant and other demonstrators for more than an hour.
7. SUBJECT OFFICER rode his motorcycle into Complainant's leg as well as the legs of other demonstrators.
8. Complainant asked SUBJECT OFFICER to stop striking people with his motorcycle.
9. When Complainant told the Subject Officer he was "nuts" to continue striking people with his motorcycle, he said to her, "I have nuts I am sure you would like," and blew kisses at Complainant to whom he referred as "baby."

10. Complainant observed Subject Officer shove the side mirror of his motorcycle into the back of a fellow demonstrator.
11. SUBJECT OFFICER drove his motorcycle in an erratic manner that caused the demonstrators who were near him to be fearful.
12. Neither Complainant nor the other demonstrators that she observed behaved in a manner that justified any such behavior on the part of a law enforcement officer.
13. Complaint was filed timely and in proper form.

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].”

Allegation 1: 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

COMPLAINANT alleged that SUBJECT OFFICER harassed her and other demonstrators while following them for more than one hour. COMPLAINANT further alleged that the subject officer attempted to intimidate her and her friends by driving “erratically” around the demonstrators as they marched from hotel to hotel. COMPLAINANT told OPC that the

subject officer's driving, which consisted of him starting and abruptly stopping his vehicle near the demonstrators, made her concerned for her safety and the safety of the other demonstrators. Two witnesses, WITNESS #1 and WITNESS #2, both stated that they observed the subject officer drive his scooter in an unsafe manner as he followed the demonstrators.

The subject officer acknowledged that he, along with other members of his unit, followed the demonstrators as they walked to various locations in Northwest Washington, DC. He explained, however, that his unit was directed to ride parallel on both sides of the demonstrators to keep them to a one lane maximum. SUBJECT OFFICER further explained that his unit tried to keep the gap between the demonstrators and the scooters as close as possible so that the protesters would stay within one traffic lane. SUBJECT OFFICER denied that he drove his scooter in an erratic manner. He told OPC that he had many starts and stops, but that his stops were controlled.

OPC interviewed other officers who were assigned to follow the demonstrators and although most of the officers acknowledged that they had very little contact with SUBJECT OFFICER during the demonstration, they all stated that they never observed SUBJECT OFFICER drive in an erratic manner or hit any of the demonstrators with his scooter. Additionally, WITNESS OFFICER #1, who did not recall observing SUBJECT OFFICER starting and stopping his scooter, acknowledged that he had frequent starts and stops because the demonstrators frequently stopped or stepped in front of his scooter.

As an initial matter, the Complaint Examiner finds that SUBJECT OFFICER had a legitimate law enforcement purpose when he and his fellow police officers followed the demonstrators during the anti-IMF and World Bank protest. As previously noted, SUBJECT OFFICER was a member of the CDU and was present during the demonstration because his unit was assigned to monitor the demonstration. SUBJECT OFFICER told OPC that his unit was directed to ride in parallel formation on both sides of the demonstrators so that the demonstrators marched in one lane of traffic. Several other officers confirmed that they were assigned to follow the demonstrators as they marched through the District.

Although the subject officer was lawfully present riding alongside the protesters, the Complaint Examiner concludes that the subject officer harassed the complainant, as well as fellow demonstrators, when he caused them to fear for their safety because of his "erratic" driving. The subject officer's denials are rejected: he is not a credible witness. He refused to provide OPC with a signed statement as required by OPC and his statements are contradicted by the complainant and two witnesses, WITNESS #1 and WITNESS #2. A witness, WITNESS #2, described the manner in which SUBJECT OFFICER was driving as "frightening." Judging from the accounts of the incident provided by the complainant, WITNESS #1, and WITNESS #2, SUBJECT OFFICER acted in a manner that denied them the opportunity to exercise their First Amendment rights without feeling physically threatened. SUBJECT OFFICER purposefully, knowingly, or recklessly harassed the complainant and some fellow demonstrators without a legitimate law enforcement purpose, in violation of MPD Special Order 01-01.

Allegation 2: 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.”

COMPLAINANT alleged that while she was participating in a First Amendment demonstration in the District of Columbia, the subject officer struck her with the wheel of his motorcycle and when she told the subject officer that he was “nuts,” he replied, “I have nuts I’m sure you would like,” and blew kisses at her. The complainant’s account was largely corroborated by two eye-witnesses, WITNESS #1 and WITNESS #2. WITNESS #1 told OPC that when he was marching next to COMPLAINANT he heard her tell SUBJECT OFFICER that he was “nuts.” WITNESS #1 also told OPC that he heard SUBJECT OFFICER tell COMPLAINANT that he had “some nuts I am sure you would like.” According to WITNESS #1, he was upset by the subject officer’s comment to COMPLAINANT and he called SUBJECT OFFICER a “sexist pig” and told the subject officer that he was “pretty fucked up.” WITNESS #1 did not observe the subject officer blow kisses at COMPLAINANT. WITNESS #2 told OPC that she observed SUBJECT OFFICER “licking his lips and making kissing motions” toward COMPLAINANT. Although WITNESS #2 acknowledged that she could not recall the exact wording of SUBJECT OFFICER’S comment to COMPLAINANT, WITNESS #2 recalled that the subject officer’s words had sexual overtones.

SUBJECT OFFICER stated that during the last stop of the demonstration, which may have been a hotel or apartment building, he had a friendly conversation with several demonstrators. SUBJECT OFFICER denied, however, that he made kissing motions toward any of the demonstrators or that he had a conversation with any of them in which he stated, “I have nuts I’m sure you would like.” SUBJECT OFFICER told OPC that such a statement was out of character for him and he would never make such a statement to a citizen. SUBJECT OFFICER reviewed photographs that COMPLAINANT provided to OPC. The subject officer acknowledged that the officer in the photograph was him, but he denied that the photographs showed him blowing kisses.

The Report of Investigation reveals that OPC interviewed 11 officers who were assigned to the same unit as the subject officer at the time of the incident. While a majority of the officers OPC interviewed stated that they did not recall seeing SUBJECT OFFICER during the demonstration, or acknowledged only that they saw him periodically throughout the

demonstration, all of the officers told OPC that they did not observe SUBJECT OFFICER interacting with any of the demonstrators. Of the 11 officers interviewed, only one officer, WITNESS OFFICER #1, recalled observing SUBJECT OFFICER for a significant period of time during the demonstration. WITNESS OFFICER #1 told OPC that he never observed SUBJECT OFFICER blowing kisses at any of the demonstrators or hearing the subject officer tell a demonstrator, "I have nuts I'm sure you would like." WITNESS OFFICER #1 told OPC that he has never heard SUBJECT OFFICER makes such a statement to a citizen and that the allegation sounded "ridiculous." Additionally, WITNESS OFFICER #2, who told OPC that he observed SUBJECT OFFICER during the demonstration approximately five times, stated that he never heard SUBJECT OFFICER make any derogatory comments to any of the demonstrators. The sergeant told OPC that if he had heard the subject officer make such a comment, he would have "immediately intervened and taken some action." WITNESS OFFICER #3, who told OPC that he could not say with certainty that he encountered SUBJECT OFFICER during the demonstration, told OPC that SUBJECT OFFICER was "respectful to citizens" and that such alleged conduct "was not part of [SUBJECT OFFICER] character."

The Complaint Examiner finds COMPLAINANT to be credible for several reasons. The complainant's account was substantially corroborated by two witnesses, WITNESS #1 and WITNESS #2. These eye witnesses were credible because they marched alongside COMPLAINANT during the entire demonstration and their versions of events were consistent with the complainant's account. Additionally, COMPLAINANT's account, as well as WITNESS #1's and WITNESS #2's versions, appear to be corroborated to some extent by the photographs she provided to OPC. Most importantly, however, SUBJECT OFFICER'S credibility is diminished by his refusal to sign his written statement. In refusing to provide OPC with a signed, written statement, subject OFFICER refused to certify that his account was true and correct to the best of his knowledge and recollection. A reasonable inference is that SUBJECT OFFICER did not provide a signed, written statement because he was not truthful and did not furnish correct information during his interview.¹ Therefore, where SUBJECT OFFICER'S version differs from those of the complainant and two witnesses, the Complaint Examiner credits the evidence presented by complainant and two witnesses, rather than the subject officer. SUBJECT OFFICERS' credibility is substantially compromised by his refusal to sign his statement. The Complaint Examiner also notes that unlike the complainant and supporting witnesses, the subject officer also had a powerful incentive to dissemble.

The evidence provided by COMPLAINANT, as well as WITNESS #2 and WITNESS #1, supports the conclusion that SUBJECT OFFICER used language and engaged in conduct toward

¹ Complaint examiners have drawn adverse inferences from an officer's refusal to sign his statement. *See, e.g.,* OPC Case No. 05-0274, slip op. at 4, n.1 (D.C. Office of Police Complaints June 17, 2007) (in assessing credibility of witnesses, OPC Complaint Examiner drew adverse inference from police officer's refusal to sign his OPC statement); OPC Case No. 03-0313, 2006 DC POLICE LEXIS 5 (D.C. Office of Police Complaints May 5, 2006)(same); OPC Case No. 05-0110, 2005 DC POLICE LEXIS 9 (D.C. Office of Police Complaints Nov. 4, 2005) (same).

COMPLAINANT that had sexual overtones. He used language or engaged in conduct toward COMPLAINANT that was insulting, demeaning, or humiliating, in violation of MPD General Order 201.26.

Allegation 3: Unnecessary or Excessive Force

Use of unnecessary or excessive force, as defined by MPD Special Order 01-01, Part III, Section N includes “the use of force that is improper in the context of the incident giving rise to the use of force.”

The regulations governing OPC define excessive or unnecessary force as “[u]nreasonable use of power, violence, or pressure under the particular circumstances. Factors to be considered when determining the ‘reasonableness’ of a use of force include the following: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officer or others; (3) whether the subject was actively resisting arrest or attempting to evade arrest by flight; (4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; (5) whether the officer adhered to the general orders, policies, procedures, practices and training of the MPD ... and (6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish the objective.” D.C. Mun. Regs., title 6A, § 2199.1

MPD General Order 901.07 (effective Oct. 7, 2002), 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).” See **Exhibit 23**, attached to ROI.

MPD General Order 805.01 (effective May 17, 2004) states, however, that the Use of Force Continuum provided in MPD General Order 901.7 does not apply for crowd control incidents such as mass demonstrations. See **Exhibit 24** of the ROI. Generally, members of the Civil Disturbance Unit (CDU), a unit organized for the purpose of providing trained personnel to deliver service in connection with large scale events, civil disorder or other emergencies, are specifically assigned to control mass demonstrations. The CDU responds to any demonstrations, protests or other mass assemblies and provides police services to those who wish to exercise their rights of freedom of speech and assembly. For mass demonstrations that occur routinely within the District, such as First Amendment rallies or marches, MPD is guided by the CDU Use of Force Continuum. The CDU Use of Force Continuum, which is described on pages 18 and 19 of MPD’s Standard Operating Procedures for Mass Demonstrations, Response to Civil Disturbances, and Prisoner Processing, see **Exhibit 25** of the ROI, includes the following options:

1. Constructive Force: Uniformed police presence. The presence may be in platoon formation. There is no physical contact between police and demonstrators.

2. Physical Force: Force involving hands-on touching, but with no deployment of tools or weapons. This may include line and wedge formations (with or without protective riot shield) that move a crowd. Arrests also fall into this category.

The Standard Operating Procedures for Mass Demonstrations, Response to Civil Disturbances, and Prisoner Processing also provides the Civil Disturbance Use of Force Protocols, which explains to CDU members the type of force that should be employed for different situations that may occur during a First Amendment demonstration. The handbook provides the following:

a) Permitted Marches (orderly crowd)

Police presence is appropriate in this category. Crowd activities should be monitored. The police presence may be in platoon formation. There should be no physical contact between police and demonstrators.

b) Peaceful Civil Disobedience

Unlawful, non-violent, peaceful actions by protesters: Monitor crowd activities. Depending on the fluid scenario and degree of disruption, use of force and/or mass arrests can be considered. The decision to deploy force shall be determined by the platoon commander. The decision to make mass arrests shall only be commenced in consultation with the Field Commander or his/her designee.

c) Non-Peaceful Civil Disobedience

Non-peaceful, violent actions by protesters: Monitor crowd and engage persons involved in violent and/or criminal activities as appropriate. Employ the CDU Use of Force Continuum and/or conduct mass arrests. Platoon commanders shall immediately contact the Field Commander or his/her designee.

The handbook further states on page 20 that “[i]n managing a crowd, the policy of this department is to use the least stringent level of force necessary to accomplish the objective.” See **Exhibit 25** of the ROI.

COMPLAINANT alleged that the subject officer hit her and her fellow demonstrators with his motorcycle. According to COMPLAINANT, SUBJECT OFFICER was “driving his motorcycle erratically” by starting and stopping his motorcycle behind the demonstrators. The complainant explained that the subject officer would drive his motorcycle forward several feet and then abruptly stop. The complainant told OPC that she observed SUBJECT OFFICER drive his motorcycle into the legs of several demonstrators as he followed them through the streets of the District of Columbia. Concerned for her safety, as well as that of the other demonstrators, COMPLAINANT asked SUBJECT OFFICER, who was riding his motorcycle on her right side, to stop hitting people with his motorcycle. COMPLAINANT told OPC that SUBJECT

OFFICER looked directly at her, but he did not respond to her request and continued to hit the legs of the demonstrators with his motorcycle. Then, according to COMPLAINANT, SUBJECT OFFICER struck her right leg with his motorcycle tire. COMPLAINANT told OPC that during this time she also observed SUBJECT OFFICER hit the small of WITNESS #1's back with the left side mirror of his motorcycle.

COMPLAINANT's account was corroborated by WITNESS #1. WITNESS #1 told OPC that he observed SUBJECT OFFICER driving his "motorcycle erratically up and down the street" as the subject officer followed the demonstrators and that he personally observed SUBJECT OFFICER run into the legs of several demonstrators. WITNESS #1 also told OPC that while SUBJECT OFFICER was riding next to him, the subject officer swung his handlebars at WITNESS #1 in an attempt to shove WITNESS #1. WITNESS #1 explained that the left side mirror on the subject officer's motorcycle struck him in the elbow, which caused a small bruise. WITNESS #1 responded to the blow by telling SUBJECT OFFICER something like, "Dude you just hit me with your motorcycle! What the fuck is wrong with you?" Although WITNESS #1 acknowledged that he did not personally observe SUBJECT OFFICER strike COMPLAINANT with the wheels of his motorcycle, he told OPC that during the demonstration he heard COMPLAINANT complain that SUBJECT OFFICER struck her with his motorcycle.

Similarly, WITNESS #2 told OPC that SUBJECT OFFICER followed the demonstrators and repeatedly revved the engine of his motorcycle as he rode extremely close to the demonstrators. WITNESS #2 told OPC that she believed that SUBJECT OFFICER was attempting to scare them by driving in such a manner. WITNESS #2 told OPC that she personally observed SUBJECT OFFICER "ram" his motorcycle into the legs of several protesters, at which point she told SUBJECT OFFICER, "It appears that you enjoy ramming people!" According to WITNESS #2, SUBJECT OFFICER replied, "I'm just trying to protect you ma'am." Although WITNESS #2 acknowledged that she never observed SUBJECT OFFICER hit COMPLAINANT with his motorcycle, she stated that she observed the subject officer strike WITNESS #1's legs with his motorcycle.

The subject officer denied the complainant's allegations of force. The subject officer acknowledged that his unit continuously followed the demonstrators during their march through downtown Washington, DC. SUBJECT OFFICER denied, however, that he drove his scooter in an erratic manner. The subject officer explained that he had controlled starts and stops while riding his motorcycle alongside the demonstrators. The subject officer also denied that he had any physical contact with any of the demonstrators or hit any of the demonstrators with his scooter. SUBJECT OFFICER explained that it would have been impossible for him to hit someone with his scooter without falling to the ground. The subject officer explained that if he had attempted to hit a demonstrator with the handlebars of his scooter, he would have had to "dump," or drop the bike, which would cause him to fall to the ground.

The Report of Investigation shows that OPC interviewed other officers who were assigned to follow the demonstrators and although most of the witness officers acknowledged

that they had very little contact with SUBJECT OFFICER during the demonstration, they all stated that they never observed SUBJECT OFFICER drive in an erratic manner or hit any of the demonstrators with his motorcycle. Although WITNESS OFFICER #1 did not recall observing SUBJECT OFFICER starting and stopping his scooter, the officer acknowledged that he had frequent starts and stops because the demonstrators frequently stopped or stepped in front of his scooter. Additionally, WITNESS OFFICER #4, who did not specifically recall observing SUBJECT OFFICER during the demonstration, told OPC that he considered SUBJECT OFFICER to be a “skilled motorcycle rider.”

COMPLAINANT’s account is credible. The complainant’s account was corroborated, in part, by WITNESS #2 and WITNESS #1. Although the witnesses did not personally observe SUBJECT OFFICER strike COMPLAINANT with his motorcycle, they told OPC that they observed SUBJECT OFFICER driving in an erratic manner and riding into the legs of other demonstrators. In addition, WITNESS #2 and WITNESS #1 both stated that the subject officer struck WITNESS #1 with the motorcycle, albeit in different places. According to WITNESS #2, WITNESS #1 was struck in the leg. WITNESS #1 stated that he was struck in the elbow. Furthermore, as previously discussed, SUBJECT OFFICER’S credibility was greatly diminished because he refused to sign his written statement. For these reasons, the Complaint Examiner finds that SUBJECT OFFICER was driving his scooter in an erratic manner and that he struck the demonstrators with his scooter. Such conduct was in direct violation of MPD’s general orders. SUBJECT OFFICER used unnecessary or excessive use of force against COMPLAINANT and her fellow demonstrators, in violation of MPD General Order 805.01.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1:	Sustained
Allegation 2:	Sustained
Allegation 3:	Sustained

Submitted on December 17, 2009.

Eleanor Nace
Complaint Examiner