

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	06-0239
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER, Fourth District
<b>Allegation 1:</b>	Harassment
<b>Complaint Examiner:</b>	Jeffrey S. Gutman
<b>Merits Determination Date:</b>	April 21, 2008

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC), 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 Complainant was a referee at a basketball game that took place in the gym at Lafayette Elementary School on May 26, 2006. The Subject Officer was a player in that game. Near the end of the game, SUBJECT OFFICER believed that COMPLAINANT should have called a foul committed against him by an opposing player. After throwing the ball and, later, a chair, SUBJECT OFFICER was ejected from the game because he received two technical fouls. He was directed to leave the gym. After the game ended, SUBJECT OFFICER returned and tried to discuss the matter with COMPLAINANT and the other referee, WITNESS #1. COMPLAINANT alleges that she told him that she did not want to discuss the game and that SUBJECT OFFICER said something to the effect of “we’ll see you outside in five minutes.”

COMPLAINANT alleges that, after she drove out of the school parking lot, SUBJECT OFFICER followed very closely behind her in his police cruiser going eastbound on Northampton Street. At or near the intersection of Northampton and Utah St., COMPLAINANT called 911. She alleges that, while driving slowly southbound on Utah (which becomes 27<sup>th</sup> St.); SUBJECT OFFICER continued to follow very closely behind her. COMPLAINANT alleges that she pulled over north of the intersection of 27<sup>th</sup> St. and Military Road and that SUBJECT OFFICER stopped his car beside hers. She states that SUBJECT OFFICER remained there for longer than a light cycle and then left. COMPLAINANT contends that, by driving very closely behind her car, failing to take opportunities to drive around her slowing vehicle and, ultimately, stopping beside her car, SUBJECT OFFICER harassed her without a legitimate law enforcement purpose.

The parties agreed that the following allegation should be the subject of this decision:

Allegation 1: SUBJECT OFFICER harassed COMPLAINANT by knowingly and intentionally following her from the Lafayette Elementary School parking lot in his police car and later stopping beside her parked vehicle.

## **II. EVIDENTIARY HEARING**

An evidentiary hearing was conducted regarding this Complaint on March 19, 2008. The Complaint Examiner heard the testimony of WITNESS #2, WITNESS #1, COMPLAINANT, WITNESS #3, WITNESS #4, WITNESS #5, WITNESS #6 and SUBJECT OFFICER.

The following exhibits were entered into evidence:

Joint Exhibits 1-24, which comprised OPC's administrative record

Joint Exhibit 25, Transcript of a hearing in *COMPLAINANT v. SUBJECT OFFICER*, CIVIL ACTION NUMBER

Joint Exhibit 26, Transcript of a hearing in *COMPLAINANT v. SUBJECT OFFICER*, CIVIL ACTION NUMBER

Joint Exhibit 27, aerial photo of 5701 Broad Branch Road, N.W.

Joint Exhibit 28, map of neighborhood around Lafayette Elementary School

Joint Exhibit 29, map of neighborhood east of Lafayette Elementary School

## **III. FINDINGS OF FACT**

Prior to the hearing, the Complaint Examiner made 23 findings of fact based on the written record and shared those draft findings with the parties. The parties stipulated to those facts and they are included among the findings that follow. Based on a review of the exhibits listed above, OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER on October 4, 2007, and the evidentiary hearing conducted on March 19, 2008, 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 over seventeen years.
2. During the period of time relevant here, SUBJECT OFFICER was assigned to the Fourth District. He resided at SUBJECT OFFICER ADDRESS.

3. SUBJECT OFFICER was assigned a police cruiser which he was authorized to drive while off-duty.
4. SUBJECT OFFICER was a member of a men's basketball team which was scheduled to play a basketball game on May 26, 2006 in the gym of Lafayette Elementary School. Lafayette Elementary School is located at 5701 Broad Branch Rd., N.W., Washington, D.C.
5. SUBJECT OFFICER arrived at the gym after the basketball game started. He parked his police cruiser on the south side of Northampton Street, outside the parking lot at Lafayette Elementary School.
6. As of May 26, 2006, COMPLAINANT had served as a basketball referee for several years. She was assigned to officiate the game at Lafayette Elementary School in which SUBJECT OFFICER'S team was to play.
7. On May 26, 2006, COMPLAINANT arrived at Lafayette Elementary School in her car. She parked her car in the school parking lot.
8. Prior to the game, SUBJECT OFFICER did not know the make, model or year of COMPLAINANT'S car.
9. COMPLAINANT was the lead referee for the game in which SUBJECT OFFICER'S team played. WITNESS #1 was the other referee for that game.
10. The basketball game in which SUBJECT OFFICER'S team played began at about 8:30 p.m.
11. During the second half of the game, COMPLAINANT called a technical foul on SUBJECT OFFICER. SUBJECT OFFICER disagreed with the call and expressed his disagreement with it. SUBJECT OFFICER believed that he was fouled, but the referees did not call a foul.
12. SUBJECT OFFICER subsequently threw a chair. WITNESS #1 called a second technical foul on SUBJECT OFFICER and ejected him from the game. SUBJECT OFFICER did not agree with that determination and remained at his team's bench.
13. SUBJECT OFFICER was asked to leave the gym. He left the bench and remained standing in the door of the gym. SUBJECT OFFICER was told to leave the gym entirely and he did so.
14. Following the game, SUBJECT OFFICER returned to the gym, collected his belongings and went to the scorer's table. He asked to speak to the referees and questioned the calls that were made. He engaged in a discussion there with COMPLAINANT and others.

COMPLAINANT expressed an unwillingness to debate the calls that were made in the game.

15. SUBJECT OFFICER said something to the effect of "I'll see you outside in about five minutes" to COMPLAINANT. WITNESS #1 told him that such comments were not necessary.
16. After this discussion, SUBJECT OFFICER left the gym. COMPLAINANT and WITNESS #1 left the gym together a few minutes later.
17. COMPLAINANT went to her car in the parking lot. The parking lot has a single exit located on the north side of Northampton St. The lot was not lighted.
18. SUBJECT OFFICER went to his police car, sat in the front seat facing in the street, and changed his clothes.
19. SUBJECT OFFICER did not see COMPLAINANT leave the gym or enter her car in the parking lot.
20. COMPLAINANT made a left turn out of the parking lot onto Northampton Street, N.W., traveling east. SUBJECT OFFICER drove behind COMPLAINANT but did not know that COMPLAINANT was driving in front of him.
21. Thereafter, COMPLAINANT and SUBJECT OFFICER traveled east on Northampton, COMPLAINANT driving ahead of SUBJECT OFFICER. Both COMPLAINANT and SUBJECT OFFICER turned south on Utah St., N.W.
22. COMPLAINANT observed SUBJECT OFFICER'S police cruiser behind her as she was driving. COMPLAINANT called a 911 operator, WITNESS #7, from her cellular telephone. The call lasted approximately six minutes and forty-five seconds.
23. During the telephone call, COMPLAINANT slowed her car, but hesitated to park her car at WITNESS #7'S request.
24. COMPLAINANT ultimately pulled her car over to the side of the road somewhat north of the intersection of 27<sup>th</sup> St., and Military Rd., N.W. She continued her conversation with WITNESS #7.
25. SUBJECT OFFICER stopped his car in the adjoining lane while the light at the corner of 27<sup>th</sup> and Military was green. There were no cars in front of SUBJECT OFFICER.
26. SUBJECT OFFICER stopped his car somewhat forward of COMPLAINANT'S car.
27. SUBJECT OFFICER looked in the car and noticed that the driver was COMPLAINANT.

28. The cycle of the light at the corner facing 27<sup>th</sup> St. is green for 21 seconds, yellow for 3 seconds and red for 36 seconds.
29. When the light next turned green, SUBJECT OFFICER left, turning eastbound on Military Road.
30. Approximately one minute passed between the times SUBJECT OFFICER stopped his car beside COMPLAINANT'S and when he left the scene.
31. Later that evening, COMPLAINANT contacted the Second District police station to file a complaint against SUBJECT OFFICER. She was advised to go to the Fourth District station to do so.
32. On or about June 2, 2006, COMPLAINANT filed a complaint against SUBJECT OFFICER in D.C. Superior Court. The case was docketed CIVIL ACTION NUMBER.
33. On June 19, 2006, JUDGE #1 held a hearing in which COMPLAINANT and SUBJECT OFFICER testified under oath.
34. JUDGE #1 ordered that, until the matter was heard again, SUBJECT OFFICER not assault or threaten or harass or physically abuse COMPLAINANT in any manner and that he stay at least one hundred feet away from her person, home and workplace.
35. On June 30, 2006, JUDGE #2 conducted a hearing in the civil case. With the consent of SUBJECT OFFICER, who was represented by legal counsel, JUDGE #2 issued an order granting COMPLAINANT'S motion for a preliminary injunction. He ordered that "Defendant shall not assault, threaten, harass, or physically abuse Plaintiff in any manner. Defendant shall stay at least 100 feet away from the Plaintiff's person, home, and workplace. Defendant shall not contact Plaintiff in any manner. . . "

#### **IV. DISCUSSION**

##### Legal Framework

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]."

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. One of these categories, harassment, is at issue in this case. D.C. Code § 5-1107(a)(1); *see also* D.C. Mun. Regs. tit. 6A, § 2104.1(a). The governing statute does not, however, define harassment 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.<sup>1</sup> 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.”

### Allegation 1

The circumstances surrounding this case are most unfortunate. What should have been an enjoyable basketball game turned into a controversy lasting nearly two years that has shadowed the lives of both the Complainant and the Subject Officer. COMPLAINANT, an experienced basketball referee, left the hobby which she clearly enjoyed and felt so unsettled by her encounter with SUBJECT OFFICER that she missed work and bought a new car. SUBJECT OFFICER, an experienced police officer, has been subject to scrutiny by the league, two Superior Court judges, the Office of Police Complaints and this Complaint Examiner.

There is no question that COMPLAINANT felt that she was harassed during her drive east on Northampton St. and south on Utah St. She took significant steps to express the deep and genuine feelings of fear, worry and agitation she experienced: calling 911, making contact with the Second District police station, filing the complaint at issue here and filing a case in the D.C. Superior Court. This incident seems, sadly, to have profoundly affected her life. At the same

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<sup>1</sup> 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.

time, however, the regulations define harassment in terms of the actions taken by the Subject Officer, not the feelings or reactions of the Complainant.

COMPLAINANT'S core theory is that SUBJECT OFFICER was upset because he was ejected from the game and was not provided an explanation for the referees' decisions during a post-game discussion. She alleges that he consequently threatened her by saying "we'll see when you get outside in five minutes." Tr. 120:7. COMPLAINANT contends that SUBJECT OFFICER then made good on that threat by following her car very closely as she drove out of the parking lot and by stopping just behind her car for longer than necessary near the intersection of 27<sup>th</sup> St. and Military Road. COMPLAINANT'S contentions require me to determine whether SUBJECT OFFICER *knew* that he was following COMPLAINANT and acted with the intention of harassing the target of his displeasure about the basketball game.

There is essentially no dispute about what happened at the game officiated by COMPLAINANT and WITNESS #1. SUBJECT OFFICER believed that COMPLAINANT missed calling a foul on him by an opposing player. After he threw a ball, COMPLAINANT gave him a technical foul which he felt was undeserved. SUBJECT OFFICER then threw a chair and was ejected from the game. Rather than leaving promptly, he lingered at the bench and, later, at the door of the gym. He only left after the referees threatened to end the game early with a forfeit against SUBJECT OFFICER'S team. SUBJECT OFFICER returned after the game and attempted to discuss the disputed calls with the referees who were unwilling to discuss them.

There is a conflict over whether SUBJECT OFFICER threatened COMPLAINANT by saying "we'll see you outside in five minutes," or words to that effect. COMPLAINANT and WITNESS #1 testified that SUBJECT OFFICER made this statement. Tr. 36:9, 19-21; 41:15, 16; 64:8-9 (WITNESS #1); Tr. 86: 9-10, 87: 3-4; 120: 1-7 (COMPLAINANT). SUBJECT OFFICER denied it, Tr. 217:2-16, and other witnesses, who were generally in the vicinity of the conversation, testified that they did not hear it or any other threatening statement by SUBJECT OFFICER. Tr. 171:15-18, 175: 4-12 (WITNESS #3); Tr. 186: 13-22 (WITNESS #4); Tr. 195:2; 199: 15-21 (WITNESS #5); Tr. 207: 21-22, 208: 1-2, 210: 19-21 (WITNESS #6). Another witness does not recall. Tr. 28: 12-13, 29: 17-19 (WITNESS #2).

I conclude that it is more likely than not that SUBJECT OFFICER did make such a comment. WITNESS #1 credibly testified that, after hearing it, he told SUBJECT OFFICER that such statements were not necessary. Tr. 36:8-16; 41:15-19; *see also* Tr. 89:10-12. There would have been no need for WITNESS #1, an impartial and credible witness, to caution SUBJECT OFFICER in this way had he not heard the statement. No witness denied that WITNESS #1 responded in this way. Moreover, WITNESS #1 testified without contradiction that he told his supervisor about SUBJECT OFFICER'S comment that evening. Tr. 63:3-16.

To be sure, several witnesses testified that they did not hear SUBJECT OFFICER make any sort of threat to COMPLAINANT. However, each testified that they were either some distance away from the conversation, Tr. 179:17-19 (WITNESS #4), or may not have been listening carefully or did not hear it entirely. Tr. 174:8-9 (WITNESS #3); Tr. 194:18-21; 197:6-8

(WITNESS #5); 208:3-12; 209:22 – 210:1-11 (WITNESS #6). As a result, WITNESS #1'S testimony that he heard the statement and reacted to it is considerably more compelling than that of the other witnesses who testified that they did not hear it in the first instance.

SUBJECT OFFICER'S statement, however, cannot itself constitute harassment. SUBJECT OFFICER was off-duty and did not exercise police authority when making the statement. D.C. Mun. Regs. tit. 6A, §§ 2104.1, 2199.1 (definition of complaint). For the reasons explained below, in the context of this case, the question presented is whether the statement alone is sufficient to make it more likely than not that SUBJECT OFFICER harassed COMPLAINANT by intentionally following her in his car. Put differently, there are two plausible alternative narratives: 1) SUBJECT OFFICER'S veiled threat was an idle one; he did not see COMPLAINANT leave and only happened to follow her since he was headed home in the same direction or 2) SUBJECT OFFICER carried out his threat by observing COMPLAINANT leaving and intentionally following her closely as she left the parking lot. I conclude that SUBJECT OFFICER'S statement does not make scenario 2 more likely.

In this regard, four undisputed facts are important: SUBJECT OFFICER left the gym before COMPLAINANT. Tr. 42:22 (WITNESS #1). SUBJECT OFFICER parked his car on the south side of Northampton Street rather than in the parking lot. Tr. 61:13-14 (WITNESS #1); Tr. 218:3-4 (SUBJECT OFFICER). SUBJECT OFFICER did not know the make, model or year of COMPLAINANT'S car or know that she had driven to the gym. Tr. 236: 17-20. SUBJECT OFFICER drove his police car in the direction of his destination – his home. Tr. 229:19 – 232:1.

Consequently, it is undisputed that SUBJECT OFFICER did not follow COMPLAINANT out of the gym. They were not simultaneously in the parking lot. We cannot infer SUBJECT OFFICER saw her by traveling thereafter in a direction away from his home with no purpose other than to follow her. As a result, with respect to the drive from the school to 27<sup>th</sup> and Military Road, COMPLAINANT has the burden of establishing that it was more likely than not that SUBJECT OFFICER *knew* that he was following her. Given these undisputed facts, this burden is formidable.

One possible theory is that SUBJECT OFFICER saw COMPLAINANT leave the gym and enter her car. There is no evidence to support such a theory. At the time COMPLAINANT left the gym, SUBJECT OFFICER was getting in his car or sitting in his car. Tr. 38: 4-5; 48:15; 68:13-15; 18-20 (WITNESS #1). COMPLAINANT testified that the gym parking lot was unlighted. Tr. 90:20-22. Moreover, SUBJECT OFFICER testified, without contradiction, that he was in his car, facing the street – the opposite direction of the gym – to change his clothes for about ten minutes. Tr. 219: 16-22, 220:1-2. During part of that time, COMPLAINANT was still in the gym. The map of the school suggests a very short distance from the gym to the small parking lot. Exhibit 27. As a result, there was little time and opportunity for such an observation. I am mindful that SUBJECT OFFICER has considerable training and experience as an officer in observing people, but there is no evidence that he saw COMPLAINANT leave the gym or get into her car and he denies doing so. Tr. 223:9-21.

Another theory is that SUBJECT OFFICER saw COMPLAINANT for the first time while she was in her car leaving the parking lot and, then, followed her. The notion would be that SUBJECT OFFICER waited for her to leave so that he could follow her. Tr. 237:21-22, 238:1-2 (SUBJECT OFFICER denies waiting after closing his door). The threshold difficulty with this theory is that it assumes that SUBJECT OFFICER knew in the first instance that COMPLAINANT had in fact parked her car in the parking lot and intended to drive it to leave. There is no evidence to support this assumption.

There is some evidence, however, that SUBJECT OFFICER turned his car around on Northampton Street. Doing so might indicate some intention to follow COMPLAINANT. However, turning his car around would reflect this intention only if the U-turn occurred *after* he saw COMPLAINANT in her car and *after* he saw which direction COMPLAINANT was going out of the parking lot. With the respect to the U-turn itself, the record is a muddle. SUBJECT OFFICER denies turning his car around, Tr. 235:6-8, stating that his car was parked facing eastbound, the direction he wished to go. Tr. 218:6, 20-22. However, COMPLAINANT, Tr. 96:1, and WITNESS #5, Tr. 201:8, indicated that his car was parked facing west, meaning that SUBJECT OFFICER must have turned the car around to go east. WITNESS #1 suggested that his car was initially facing west and that SUBJECT OFFICER turned it around to drive east. Tr. 38:8-11, but he also testified the opposite. Tr. 48:5-7.

The testimony of WITNESS #1, the third party who observed these events most closely, is also contradictory on when the turn occurred. Initially, he testified that, at the moment he left the gym with COMPLAINANT, SUBJECT OFFICER'S car was turning around. Tr. 48:18-20; *see also* Tr. 47:22, 48:1-2 (WITNESS #1 saying that he and COMPLAINANT watched SUBJECT OFFICER turn his car around).<sup>2</sup> Later, he testified that SUBJECT OFFICER'S car was stationary for three to four minutes and started moving as COMPLAINANT pulled out of the parking lot. Tr. 49: 7-9, 15-20; 50: 21-22; 51: 15-16. He also testified that SUBJECT OFFICER turned around after she pulled out of the parking lot. Tr. 51: 9-11; 59: 11-19. COMPLAINANT testified that the police car was turning around before she left the parking lot. Tr. 125:4-14; 126: 14-18, 21-22; 127:1-2. On balance, if SUBJECT OFFICER did turn his car around, the preponderance of the evidence is that he started doing so before he would have known which direction COMPLAINANT intended to travel. The fact, then, that SUBJECT OFFICER turned his car around does not suggest that he did so with an intention to follow COMPLAINANT. It is more likely that, if he turned, he did so because he needed to in order to go home.<sup>3</sup>

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<sup>2</sup> This suggests that SUBJECT OFFICER turned his car around before he could have known which way COMPLAINANT would go.

<sup>3</sup> Whatever occurred, there is some significance in WITNESS #1's testimony, as he saw SUBJECT OFFICER follow COMPLAINANT leave the parking lot, that he didn't "give it any other thought" even though he was concerned about her. Tr. 37: 13-15, 18-21; 65: 8-11. This suggests that SUBJECT OFFICER did not obviously lie in wait for COMPLAINANT.

In sum, there is insufficient direct evidence to conclude that it was more likely than not that SUBJECT OFFICER observed COMPLAINANT'S car leave the parking lot, that he knew she was the driver and that he intended to follow her. All that remains is an inference that, because SUBJECT OFFICER was upset at her, and expressed it, he must have seen COMPLAINANT leave and, then, intended to follow her car. The evidentiary gap is too wide here to be filled by such an inference.

COMPLAINANT asserts that, during the drive east on Northampton and south on Utah, as she was generally slowing down, Tr. 101:13-20, 103:3, SUBJECT OFFICER followed closely behind her and failed to pass her. Tr. 97:13-14, 101:13-20; 136: 21-22, 137:1-3. SUBJECT OFFICER testified that he traveled more than a car length behind the car in front of him. Tr. 226:20-22, 227:1-2; 240:17-19. COMPLAINANT suggests that it can be inferred from SUBJECT OFFICER'S close following of the vehicle ahead of him that he must have known it was COMPLAINANT; there would have been no reason for him to do so otherwise. Again, COMPLAINANT seeks to employ an inference to substitute for evidence.

COMPLAINANT testified that SUBJECT OFFICER followed behind her very closely; he denies it. There is no evidence that one is more likely than the other. COMPLAINANT essentially argues that SUBJECT OFFICER'S motive tips the scale. Motive, however, makes it no more likely that SUBJECT OFFICER had knowledge he was pursuing COMPLAINANT. Given the absence of evidence that SUBJECT OFFICER knew who he was following, there is an equally likely innocent explanation. At night, when cars have their headlights on, cars appear to be closer than they actually are. Tr. 97: 9-10 (COMPLAINANT testifies that the car lights behind her were a little brighter than normal); Tr. 101: 6-8 (car lights annoyingly bright). This is particularly likely when a car is slowing down; drivers naturally keep a greater distance at higher speeds and follow more closely when the driver in front is moving slowly. Tr. 102:1-2 (COMPLAINANT testifies that car behind her slowed as she slowed down).

In addition, Northampton is a narrow street, with little if any room to pass. Tr. 241:1-10. Utah is a wider street, but SUBJECT OFFICER testified without contradiction that he could have passed only if he drove on other side of the street. Tr: 241:15-22. While it is possible that his failure to pass reflects SUBJECT OFFICER'S intent to follow, it is as likely that a police officer would hesitate to drive in a lane reserved for oncoming traffic unless there were an emergency. The fact, then, that SUBJECT OFFICER did not pass COMPLAINANT does not mean that he was intentionally following someone he knew to be her.

There is, finally, little force to COMPLAINANT'S alternative argument that it does not matter whether SUBJECT OFFICER knew he was following COMPLAINANT; he was following someone recklessly. As explained, there is insufficient evidence to support the notion of recklessness. Even if there were, the recklessness theory makes no sense in this context. The argument would be that the angry SUBJECT OFFICER vented his anger by closely following the first car he could, unaware that it was COMPLAINANT, but turning out to be her. Assuming one can harass another recklessly, COMPLAINANT'S central argument in this case is that SUBJECT OFFICER acted in a vengeful manner against *her*. This theory of harassment requires

intentionality and knowledge of his intended victim. One cannot, in this context, seek to take revenge against an unknown person.<sup>4</sup>

Therefore, I conclude that the Complainant has not demonstrated by a preponderance of the evidence that the Subject Officer harassed her while she was driving.

I view the situation differently with respect to the stop. COMPLAINANT testified that she stopped her car some distance north of the intersection of Military Road and 27<sup>th</sup> St. Tr. 107:9-14; 147: 5-8. Where precisely SUBJECT OFFICER stopped is unclear. COMPLAINANT testified that he stopped in the adjacent lane with his front bumper at the rear part of her car. Tr. 108:16-20. The 911 transcript shows her saying that “he’s sitting right there on the side of me.” Exhibit 21 at 2. SUBJECT OFFICER’S OPC statement also says that the front of his car was parallel to the middle part of COMPLAINANT’S car. Exhibit 9 at 2. At the hearing, he clearly testified that the front of his car was beyond the front of COMPLAINANT’S car. Tr. 245:10-22, 246:1-8.

SUBJECT OFFICER claims that he remained stopped beside COMPLAINANT’S car at a red light for no longer than necessary, until the light at the intersection turned green. *See* Tr. 247:1-3. Contemporaneous evidence demonstrates otherwise. The 911 transmission, Exhibit 21 at 2, shows that COMPLAINANT stopped near the corner of 27<sup>th</sup> and Military Rd., at Counter 18 and that she said SUBJECT OFFICER stopped shortly thereafter, at Counter 20. COMPLAINANT states:

Ma’am, he stopped right beside me. The light’s green for him to pass me. I’m on the side and he’s sitting there on the side of me.

Exhibit 21 at 2; *see also* Tr. 108: 1-3; 148: 1-3. A short time later, just before Counter 32, COMPLAINANT stated that “the light is turning green” and that, just a moment later, he left. *Id.* at 3. OPC determined that about one minute passed between Counters 20 and Counter 32 on the transmission. *Id.* at 5.<sup>5</sup> This is consistent with OPC’s undisputed calculation that the light at that intersection is on a 60 second cycle: green for 21 seconds, yellow for 3 seconds and red for 36 seconds. Exhibit 23. Had SUBJECT OFFICER arrived when the light was red, he would have needed to stop for no more than 36 seconds.

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<sup>4</sup> I am mindful that JUDGE #1 entered a temporary restraining order. Exhibit 25. Somewhat in passing, JUDGE #1 stated “And, when you got into that parking lot and you saw this lady in this parking lot, you should have gone in another direction.” Exhibit 25 at 36:5-7. With due respect to JUDGE #1, there was no testimony at the hearing to support this comment. The legal context with respect to temporary stay away orders may be more forgiving as well. In any event, our hearing and preceding OPC investigation yielded a much more complete record on which to make findings.

<sup>5</sup> SUBJECT OFFICER’S attorney performed an unscientific timing of this duration and concluded that it was one minute, twenty-four seconds. Tr. 148: 17-19.

SUBJECT OFFICER argues in his post-hearing brief that this one minute duration may not have actually started when COMPLAINANT stopped, but as she approached the intersection. The implication is that the cars were stopped for, perhaps, forty seconds during what may well have been the red portion of the light cycle. The 911 transcript does not support that argument. The transcript reveals that the operator was trying to convince COMPLAINANT to pull over; she was hesitant to do so. Prior to Counter 18, she saw the intersection of Military and Utah (actually, 27<sup>th</sup> Street) and told the operator that she intended to stop there. At Counter 18, she announced “Okay I’m right here on Military and Utah.” At Counter 20, she states that “He’s over here on the side of me.” This contemporaneous record of events shows that COMPLAINANT had stopped at Counter 20, when the one minute period began.

SUBJECT OFFICER’S testimony is inconsistent with respect to whether he learned during this one minute period that COMPLAINANT was the driver of the stopped car. At the hearing, SUBJECT OFFICER claimed not to recall whether he looked at or noticed the driver next to him at all. Tr. 234:13-16, 235:1-4; 268: 9-22, 269:1-6. SUBJECT OFFICER’S statement, signed under penalty of perjury, on August 25, 2006, just three months after the event, states:

As we approached Military Road, COMPLAINANT had her left blinker on. The traffic light at Military and Utah was red and COMPLAINANT put her hazard lights on and pulled to the right. I stopped my car so that the front of my car was at the middle part of her car. I did this because I thought she still may be taking a left turn.

Exhibit 9 at 2. In addition, in his statement of objections to the OPC, which SUBJECT OFFICER reviewed, Tr. 258:11-18, his representative offered a different rationale. The statement asserted that SUBJECT OFFICER stopped in order to determine whether the driver needed assistance and, then, realized that it was COMPLAINANT. Objections at 3. The statement further explained that, when he saw her raise her cell phone, he left. At the hearing, however, SUBJECT OFFICER testified that there was nothing suspicious about COMPLAINANT’S car. Tr. 234:20-22; 239:11-18. Nor did he recall seeing COMPLAINANT on her cell phone. Tr. 239:19-22, 240: 1-8.

The contemporaneous 911 call and inconsistencies in SUBJECT OFFICER’S statements lead me to conclude that it was more likely than not that SUBJECT OFFICER did come to realize at the stop that COMPLAINANT was the driver of the car and that he stopped near her longer than necessary. SUBJECT OFFICER’S hearing testimony that he passed COMPLAINANT’S car and stopped closer to the intersection crosswalk means that he would have had an opportunity to look through the driver’s side window to see her. SUBJECT OFFICER’S testimony that he does not recall doing so is not credible because it is entirely inconsistent with his prior statements in which he acknowledged looking and noticing that the driver was COMPLAINANT. The duration of the relevant portion of the 911 transmission and the uncontroverted evidence about the duration of the light cycle support the conclusion that SUBJECT OFFICER stopped beside COMPLAINANT when the light was green.

The question, then, is whether this constitutes harassment. Because COMPLAINANT had parked and was speaking to the 911 operator, she did not at that point intend to leave the parking spot. As a result, SUBJECT OFFICER'S presence did not impede her ability to leave. SUBJECT OFFICER might have been justified in stopping beside COMPLAINANT had he noticed flashing hazard lights to determine whether she was having any difficulty. However, at the hearing, SUBJECT OFFICER testified that he did not see any flashing hazard lights or anything suspicious about the car. As a result, he offered no law enforcement purpose for stopping his car at the green light.

I am left to conclude that it is more likely than not that he did notice that the driver was COMPLAINANT and stopped briefly to annoy or bother her. In so doing, I conclude that the stop at the green light was no more than 21 seconds. Continuing to wait while the light was red had a lawful purpose. The duration of SUBJECT OFFICER'S stop was, therefore, considerably shorter than the several minutes or several light cycles initially stated by COMPLAINANT. Nonetheless, SUBJECT OFFICER'S conduct at the stop constituted harassment.

#### **SUMMARY OF MERITS DETERMINATION**

##### **SUBJECT OFFICER**

<b>Allegation 1:</b>	Sustained in part; exonerated in part
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Submitted on April 21, 2008.

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Jeffrey S. Gutman  
Complaint Examiner