

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	06-0366
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER #1 SUBJECT OFFICER #2
<b>Allegation:</b>	Harassment
<b>Complaint Examiner:</b>	Richard Jerome
<b>Merits Determination Date:</b>	May 28, 2008

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

**I. SUMMARY OF COMPLAINT ALLEGATIONS**

The COMPLAINANT filed a complaint with the Office of Police Complaints (OPC) on August 30, 2006. COMPLAINANT alleged that on August 12, 2006, Metropolitan Police Department (MPD) SUBJECT OFFICER #2, Fourth District, and SUBJECT OFFICER #1, Fourth District, harassed him when they stopped and arrested him as he was walking home.

COMPLAINANT alleges that at approximately 11:00 pm, he parked his car approximately one block away from his apartment and began walking home. He realized he left something in the car and returned to get it. As he was walking home, he put a piece of paper – a church bulletin – into a cloth bag he was carrying. At that point, a car stopped in front of him and two individuals exited the car. These individuals were the subject officers. COMPLAINANT alleges that SUBJECT OFFICER #2 began questioning him and looked inside COMPLAINANT's bag, and then frisked him. He alleges that the officers asked if he could be searched, to which he responded that he would prefer not to be, but that they searched him anyway. He was handcuffed and arrested for an expired license. COMPLAINANT alleges that the officers were disrespectful during the stop and search and that they harassed him by improperly stopping, searching and arresting him.

## **II. EVIDENTIARY HEARING**

An evidentiary hearing was conducted on February 27, 2008, regarding this complaint because, based on a review of OPC's Report of Investigation, the Complaint Examiner determined that there were genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs., title 6A, § 2116.3.

At the evidentiary hearing, the Complaint Examiner heard the testimony of COMPLAINANT, SUBJECT OFFICER #2, and SUBJECT OFFICER #1. There were no separate exhibits introduced, although COMPLAINANT did display the bag that he states he was carrying on August 12, 2006.

## **III. FINDINGS OF FACT**

Based on a review of OPC's Report of Investigation, and the evidentiary hearing conducted on February 27, 2008, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On Saturday, August 12, 2006, at approximately 11:00 pm, COMPLAINANT parked his car, a VEHICLE #1, on the 800 block of Hemlock Street, NW. He exited the car to start walking towards his home on ADDRESS #1. He then walked back to his car to get something from his car.
2. After retrieving something from his car, COMPLAINANT began walking west on Hemlock Street towards ADDRESS #1.
3. On August 12, 2006, SUBJECT OFFICER #2, SUBJECT OFFICER #1 and WITNESS OFFICER #1 were in an unmarked police car, a OFFICER VEHICLE #1, in the area of Ninth Street and Hemlock Street. The officers were assigned to the Fourth District's Vice Unit, which at that time was called the Focused Mission Unit.
4. SUBJECT OFFICER #1 was driving the car, SUBJECT OFFICER #2 was in the front passenger seat, and WITNESS OFFICER #1 was in the back seat of the car. WITNESS OFFICER #1 was not feeling very well that evening.
5. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 were patrolling the neighborhood and were conducting an operation based on reports of a brothel in the area.
6. At approximately 11:00, the officers were in their vehicle on Hemlock Street facing east. COMPLAINANT walked past the car as he walked west on Hemlock and crossed the street from the south side of the street to the north side of the street.

7. As COMPLAINANT walked past the officers' vehicle, he stuffed the piece of paper (a church bulletin) into a bag he was carrying. This bag was a shoulder-strap nylon cloth bag that he was carrying on his right side.
8. As COMPLAINANT continued east, the officers made a U turn in the intersection of 8<sup>th</sup> and Hemlock and drove west on Hemlock, and stopped in the intersection of 9<sup>th</sup> and Hemlock, in the crosswalk in front of COMPLAINANT.
9. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 then exited their vehicle and approached COMPLAINANT, while WITNESS OFFICER #1 stayed in the unmarked police car.
10. SUBJECT OFFICER #2 told COMPLAINANT that he saw him stuff something into his bag. COMPLAINANT states that he said something to the effect of "Is there a law against putting something in my bag?" Tr. 24. SUBJECT OFFICER #2 also states that COMPLAINANT asked "Is that against the law?" Tr. 89.
11. SUBJECT OFFICER #2 then looked inside COMPLAINANT's bag with his flashlight. SUBJECT OFFICER #2 did not find any contraband in COMPLAINANT's bag. SUBJECT OFFICER #2 also conducted a frisk of COMPLAINANT, patting down the outer layer of his clothing.
12. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 asked COMPLAINANT a number of questions at this time. There is a dispute regarding whether the questions were routine or whether they were, in COMPLAINANT's words, "derogatory and disrespectful." Ex. 1, Ex. 2.
13. There is a significant dispute regarding when the officers obtained COMPLAINANT's driver's license. The officers maintain that they asked COMPLAINANT for identification, and COMPLAINANT voluntarily provided his driver's license. COMPLAINANT states that the officers asked him if they could search him and he replied that he preferred not to be searched. COMPLAINANT alleges that the officers told COMPLAINANT to "get on the car" and the officers then searched him, removing his rings and his belongings from his pockets, including his driver's license. He also claims that SUBJECT OFFICER #1 asked him if he had any tattoos, and the officer pulled his shorts down several inches to his hip and pulled his shirt up to look for a tattoo. Tr. 65; Ex. 2. COMPLAINANT states that the officers did not ask him for his license, and that he did not provide it to them voluntarily. Tr. 84
14. SUBJECT OFFICER #1 and COMPLAINANT agree that COMPLAINANT indicated to the officers that he wanted to leave. Tr. 165, 168; Ex. 2.
15. There is no dispute that the officers did search COMPLAINANT, whether before or after obtaining his license, and that the officers determined that COMPLAINANT's driver's

license was expired. Both COMPLAINANT and SUBJECT OFFICER #1 agree that COMPLAINANT stated that he did not want to be searched. Tr. 27 (COMPLAINANT), 164-165 (SUBJECT OFFICER #1).

16. SUBJECT OFFICER #2 then radioed into dispatch for a check of the WALES and NCIC system, and to confirm that COMPLAINANT's license was expired. The dispatcher responded that COMPLAINANT had no criminal status but that his driver's license was expired. Ex. 14.
17. COMPLAINANT was handcuffed and placed under arrest for "no permit" – driving a vehicle without a valid license. Ex. 13.
18. It is not certain how long COMPLAINANT's driver's license had been expired on the date of the arrest. The officers did not ask COMPLAINANT why his license had expired, nor did they determine for how long the license had been expired. Tr. 188.
19. The officers and COMPLAINANT waited until a police transport van arrived, and then COMPLAINANT was taken to the Fourth District police station. COMPLAINANT posted bond on August 13, and was released and given an arraignment date of August 14, 2006. Ex. 4.
20. On August 14, 2006, the charge against COMPLAINANT was dismissed for *nolle prosequi*, and COMPLAINANT also renewed his license on August 14, 2006.

#### IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a), "The Office [of Police Complaints] shall have the authority to receive and to ... adjudicate a citizen complaint against a member or members of the MPD ... that alleges abuse or misuse of police powers by such member or members, including: (1) harassment; (2) use of unnecessary or excessive force; (3) use of language or conduct that is insulting, demeaning, or humiliating; (4) discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business; or (5) retaliation against a person for filing a complaint pursuant to [the Act]."

Harassment, as defined by MPD Special Order 01-01, Part III, Section G, includes "acts that are intended to bother, annoy, or otherwise interfere with a citizen's ability to go about lawful business normally, in the absence of a specific law enforcement purpose."

The regulations governing OPC define harassment as "[w]ords, conduct, gestures or other actions directed at a person that are purposefully, knowingly, or recklessly in violation of the law or internal guidelines of the MPD ... so as to (1) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or

property rights; or (2) deny or impede the person in the exercise or enjoyment of any right, privilege, power or immunity. In determining whether conduct constitutes harassment, [OPC] will look to the totality of the circumstances surrounding the alleged incident, including, where appropriate, whether the officer adhered to applicable orders, policies, procedures, practices, and training of the MPD ... the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating.” D.C. Mun. Regs., title 6A, § 2199.1.

COMPLAINANT alleges that the two officers harassed him by improperly stopping, questioning and searching him, and by improperly arresting him on a “No Permit” charge. COMPLAINANT states that when the officers approached him and started asking him questions, he did not feel free to leave, Tr. 25, and that the officers questioned him in a derogatory and disrespectful way. Ex. 1. He also alleges that the officer conducted a search without his permission, and that it was through this search that they retrieved his driver’s license. He states that the officers did not ask him for his identification and that he did not voluntarily give them his driver’s license. It was only after the search that they determined that his license had expired.

SUBJECT OFFICER #2 states that when COMPLAINANT passed the officer’s car, he saw COMPLAINANT stuffed something into his bag, Tr. 89.<sup>1</sup> SUBJECT OFFICER #2 also states that COMPLAINANT “bladed his body” away from the police car. Tr. 96-97. This was the basis for their initial approach of COMPLAINANT. SUBJECT OFFICER #2 states that he did look into COMPLAINANT’s bag and conducted a pat-down frisk, but that he did not conduct a search until after COMPLAINANT provided his driver’s license, and the officers determined that it was expired, and that they therefore had a basis for an arrest and a search incident to arrest. SUBJECT OFFICER #1 similarly states that COMPLAINANT was not searched and arrested until after he provided his driver’s license and it was determined to be expired.

The officer’s actions did interfere with COMPLAINANT “ability to go about lawful business normally,” and did subject him “to arrest, detention, search, seizure.” A determination of harassment, however, will depend on whether the officers did so “in the absence of a specific law enforcement purpose” or “purposefully, knowingly, or recklessly in violation of the law or internal guidelines of the MPD.”

#### A. Initial Encounter

The first issue in this complaint is whether the officers actions in approaching COMPLAINANT and asking him questions was a consensual “contact,” in which the person is free to go, or whether it was a “stop,” in which case the person is not free to go. MPD General Order 304.10 governs police-citizen contacts, stops and frisks. A “stop” is defined as the

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<sup>1</sup> In SUBJECT OFFICER #2’s statement to OPC, Ex. 7, SUBJECT OFFICER states that he saw COMPLAINANT “make a stuffing motion with his arm into his pants,” but in the Arrest Report, Ex. 13, SUBJECT OFFICER #2 states COMPLAINANT “made a stuffing motion with his right hand into his backpack.”

temporary detention of a person for determining whether probable cause exists to arrest the person. Under General Order 304.10, for a stop, an officer needs to have reasonable suspicion that the person stopped “has committed, is committing, or is about to commit any crime.” See *Terry v. Ohio*, 392 U.S. 1 (1968). A “contact” is defined by the MPD Order as a “face-to-face communications with an individual citizen under circumstances in which the citizen is free not to respond, and to leave ....” According to the Order:

Persons “contacted” may not be detained in any manner against their will, nor frisked. ... If during a “contact” citizens would ask whether they must respond, or give the impression of feeling compelled to respond, the officer shall immediately inform them of their right to refuse as well as their right to leave.

At the hearing, the two officers took different positions regarding whether the initial approach was a stop or a contact. At the complaint hearing, SUBJECT OFFICER #2 stated that he considered the approach to be a stop. He stated that he believed that he had reasonable suspicion for the stop and for a frisk based on COMPLAINANT’s stuffing motion, the area they were in, the time of night, and that COMPLAINANT “bladed himself away” from the officers. Tr. 96-97.<sup>2</sup> SUBJECT OFFICER #1, however, stated that the initial encounter was a contact and that COMPLAINANT was free to leave before they determined that his license expired and before SUBJECT OFFICER #2 asked COMPLAINANT to place his hands behind his back. Tr. 180-182. He also stated that “I didn’t reasonably believe that we should have conducted a stop. Or if we did a stop. But at that point of what we did was a contact.” Tr. 186.

Based on the statements of the officers and COMPLAINANT in both the exhibits and at the hearing, it is my determination that the officers conducted a stop of COMPLAINANT. COMPLAINANT states that he did not believe he could leave, and felt that he was being “picked on.” Tr. 61. He also states that he told the officers his belief that they should not be stopping and questioning him. Tr. 25. SUBJECT OFFICER #1 also states that COMPLAINANT was agitated and “exaggerated,” Tr. 162, 165, that COMPLAINANT stated that he did not think the officers had the right to stop and talk to him, Tr. 163, and that he did not want to be searched. Tr. 165. COMPLAINANT and SUBJECT OFFICER #1 agree that he told the officers that he wanted to be left alone, but they continued the encounter. Also, SUBJECT OFFICER #2’s actions of looking into COMPLAINANT’s bag and also conducting a pat-down frisk suggest that the stop should be characterized as a stop and not merely a police-citizen contact, as a person frisked would not have the reasonable belief that he was free to go.

For the officers to meet the requirements of law and MPD orders, and to have had a “law enforcement purpose” to make the stop of COMPLAINANT, they would have had to have reasonable suspicion that COMPLAINANT “committed, is committing, or is about to commit

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<sup>2</sup> SUBJECT OFFICER #2 in his OPC interview characterized the encounter differently: “We got out of the car to initiate a contact with him to determine what he had stuffed into his pants. ... He provided a driver’s license that had expired. At this point, the contact became a stop.” Ex. 7.

any crime.” The actions of COMPLAINANT prior to the stop was his: (i) parking his car; (ii) walking east on Hemlock St., returning to his car and retrieving something from his car, and continuing back east on Hemlock; and then (iii) putting a piece of paper into his bag. These actions are not sufficient to provide the officers with reasonable suspicion for a stop and a frisk. SUBJECT OFFICER #2 identifies three other criteria that he contends provided him with reasonable suspicion: that COMPLAINANT “bladed his body” away from the officer’s car, that the location of the encounter was a high crime area, and that the encounter occurred at night. Tr. 96-97; Ex. 7. SUBJECT OFFICER #1, in his OPC statement, also states that “he had the ‘drug boy’ stare, meaning he watched us and observed our actions as we drove by.” Ex. 9. In the Arrest/Prosecution Report, Ex. 13, the only action noted was that “D-1 [COMPLAINANT] observed Police and made a stuffing motion with his right hand into his back pocket.”<sup>3</sup> Based on the evidence from the Report of Investigation and the Complaint Hearing, the officers did not have reasonable suspicion to make a stop of COMPLAINANT.

The only undisputed facts are the time of night, the location and the fact that COMPLAINANT placed a piece of paper into his bag. All parties agree that COMPLAINANT walked past the officers’ car, but he states that he did not see that they were police officers. His continuing to walk past them and placing the piece of paper in his bag cannot be considered “blading his body” or having a “drug boy stare” sufficient to meet the test of reasonable suspicion. Nor did the officers reach the requirement of reasonable suspicion due to the fact that the officers were in the area to investigate prosecution and that it was 11:00 pm. See *Duhart v. United States*, 589 A.2d 895, 898-901 (D.C. 1991) (finding no reasonable suspicion where the officer observed the individual place an object in his pocket after seeing a police officer in a high drug trafficking area); *In re A.S.*, 827 A.2d 46, 47048 (D.C. 2003)(a “furtive gesture” and a “stuffing motion” in a high crime area are not sufficient for a *Terry* stop). See also, OPC Case No. 04-0055, 2006 DC Police Lexis 10 (August 22, 2006) (speaking on a cell phone at 3:00 am in a high crime neighborhood does not justify a *Terry* stop); OPC Case No. 04-0132, 2006 DC Police Lexis 7 (June 24, 2006) (no reasonable suspicion for stop where complainant “was walking in a high crime area at 1:00 am, and quickened his pace when he saw the subject officer driving a police cruiser down the street.”); OPC Case No. 03-0410, DC Police Lexis 4 (March 2, 2006) (the fact that complainant was “present in [an] alley known for drug activity and continued walking in the presence of police” was not sufficient for reasonable suspicion for a stop). For this reason, the Complaint Examiner finds that the complainant was harassed.<sup>4</sup>

## B. Search

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<sup>3</sup> MPD General Order 304.10 Part I.B.3 states that “The record of the stop (P.D. Form 251 or P.D. Form 76) shall contain all factors relied upon ...”

<sup>4</sup> In addition, even if the stop were considered to be a consensual “contact,” the officers would not have had a basis for conducting a frisk of the complainant, and the complaint of harassment would be sustained.

Complainant also alleges that the officers searched him after asking for permission for a search and after he told them he did not want to be searched. He alleges that he did not provide the officers with his license, and that the officers searched him before obtaining his license and before determining that his license was expired. If these allegations are correct and the officers conducted the search solely on the basis of their initial stop, they would not have had probable cause for the search. This would constitute harassment. However, the officers claim that they obtained the complainant's driver's license and determined that it had expired before they conducted the search. They assert the search was incident to arrest, and that their actions (including any search for tattoos) are consistent with law and MPD policy. There is insufficient evidence to determine when the officers obtained the complainant's license, and whether they obtained the license voluntarily from COMPLAINANT after they requested it, or whether they obtained it by conducted the search.

### C. Arrest

Under MPD General Oder 303.1, if an officer stops a motor vehicle for a minor traffic violation and motorist's driver's license was recently expired, the officer may issue a notice of infraction (NOI), or citation, for 'No Permit', but "shall not summarily arrest the operator of the vehicle if it appears that the operator has through oversight allowed the permit to expire." Ex.17. The General Order also states that officers shall "make a summary arrest for 'No Permit' or 'No D.C. Permit' where ... the permit has been expired for more than 90 days." Drivers whose permits are expired for less than 90 days are subject to civil fines (e.g., may be ticketed), but are not subject to certain criminal penalties.

In this case, while COMPLAINANT's driver's license was expired on August 12, 2006, it had not expired for more than 90 days. His date of birth is DATE OF BIRTH, less than 90 days before August 12, 2006. In addition, the OPC investigation obtained information from the DMV that COMPLAINANT's permit likely expired on June 20, 2006, which was only 52 days before the date of this incident, August 12, 2006. COMPLAINANT was therefore not subject to arrest. The officers did not make any attempt to determine when COMPLAINANT's license had expired, nor did they attempt to determine whether his license had expired through inadvertent oversight. The officers therefore did not have a basis for the arrest, and a "specific law enforcement purpose" for "interfer[ing] with [COMPLAINANT's] ability to go about lawful business normally." Because the officers did not adhere to applicable orders, policies, and procedures in making the arrest, the Complaint Examiner finds that this is an additional basis for sustaining Complainant's complaint of harassment.

### SUMMARY OF MERITS DETERMINATION

#### SUBJECT OFFICER #2

<b>Allegation 1: Harassment</b>	Sustained
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SUBJECT OFFICER #1

<b>Allegation 1: Harassment</b>	Sustained
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Submitted on May 28, 2008.

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Richard Jerome  
Complaint Examiner