

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	06-0393
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, Sixth District
Allegation 1:	Harassment
Allegation 2:	Humiliating Language or Conduct
Allegation 3:	Use of Excessive or Unnecessary Force
Complaint Examiner:	Arthur D. Sidney
Merits Determination Date:	April 5, 2011

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

COMPLAINANT (Complainant), filed a complaint with the Office of Police Complaints (OPC) on September 14, 2006. COMPLAINANT, who is deceased, alleged that on August 17, 2006, Metropolitan Police Department (MPD) SUBJECT OFFICER, Sixth District (Subject Officer), harassed him by unlawfully arresting him for felony threats. Complainant also alleged that Subject Officer used unnecessary or excessive force against him when Subject Officer “grabbed” COMPLAINANT by his neck, “twisted” his arm, and “pushed” him to the ground during the arrest. Complainant further alleged that Subject Officer used language or engaged in conduct toward him that was insulting, demeaning, or humiliating.¹

¹ COMPLAINANT died on July 25, 2007, as a result of a motorcycle accident. OPC’s governing statute and regulations do not prohibit the agency from investigating a complaint even though the complainant is deceased.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation ("ROI"), the objections submitted by Subject Officer, and OPC's memorandum in response to those objections, 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 on November 19, 2010, and OPC's memorandum in response to those objections submitted on January 5, 2011, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On August 17, 2006, at approximately 9:30pm, Complainant was standing outside near the LOCATION, N.E. He was retrieving property from his friend, WITNESS #1 (Witness #1), who along with WITNESS #2(Witness #2), was arrested. There was a crowd of approximately 70 people on the scene.
2. Complainant was on the scene to collect the property of Witness #1 before he was arrested.
3. Subject Officer responded to the scene and recognized Complainant. Previously, on May 4, 2006, Subject Officer and his partner MPD WITNESS OFFICER #1(MPD Witness Officer), arrested Complainant for armed robbery. These charges were subsequently dismissed.
4. After a verbal exchange occurred between Complainant and Subject Officer, Subject Officer returned to the patrol car to put on black gloves. Subject Officer returned to the area where Complainant was standing and grabbed his neck from behind, twisted his arm behind his back, and pushed the Complainant to the ground.
5. Complainant was handcuffed and arrested for felony threats. This charge was subsequently dismissed.
6. WITNESS #3, Complainant's girlfriend (Witness #3); WITNESS #4, Complainant's friend (Witness #4); WITNESS #5, Complainant's friend (Witness #5); WITNESS #6, Complainant's sister (Witness #6); WITNESS #7, Complainant's friend (Witness #7); WITNESS #8, Complainant's friend (Witness #8); WITNESS #9, Complainant's friend (Witness #9); WITNESS #10, Complainant's friend (Witness #10); and WITNESS #11, Complainant's friend (Witness #11) observed Complainant's arrest.

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].”

A. Harassment

Complainant alleged that Subject Officer harassed him when he arrested him because Subject Officer had no legitimate law enforcement purpose in arresting Complainant. As discussed further below, the Complainant Examiner finds that Subject Officer did harass Complainant in violation of D.C. Code § 5-1107(a), D.C. Mun. Regs. Title 6A, § 2199.1, and MPD Special Order 01-01 and MPD General Order 120.21.

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.

The evidence reviewed in this matter supports the finding that Subject Officer harassed Complainant by arresting him without a legitimate law enforcement purpose. According to the ROI, Subject Officer stated that Complainant looked at him and said, “Fuck you too Essay,” while advancing in a threatening posture and pointed his finger at Subject Officer as he approached Complainant. See ROI at 8. Subject Officer made the decision to arrest Complainant for felony threats because of the profane language directed toward Subject Officer. Id.

The plain language of D.C.’s felony threats prohibition, D.C. Official Code § 22-1810, requires that there must be a threat to do bodily harm to another. Specifically, D.C. Official Code

§ 22-1810 provides, “whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than \$5,000 or imprisoned not more than 20 years, or both.” D.C. Official Code § 22-1810. Under D.C. Code § 22-1810, the crime of threatening to injure a person is complete as soon as the threat is communicated to a third party, regardless of whether the intended victim ever knew of the plot; thus, where the defendant hired an undercover police officer to kill the intended victim, the crime was complete, even if the defendant did not expect the victim to discover the plot and the defendant did not communicate a threat to the intended victim. *Beard v. United States*, 535 A.2d 1373 (1988).

Subject Officer is the only witness that heard the threats. No other record evidence supports that Complainant “threatened” anyone. Despite several preliminary hearings, Complainant did not go to trial on the felony threats charge. See ROI Exhibits 18, 19, and 20. Complainant was approximately 10 feet away from Subject Officer when the verbal exchange occurred and Complainant walked closer to Subject Officer during the verbal exchange. ROI Exhibit 18. According to Subject Officer, Complainant said “Fuck you.” ROI at 8, Exhibit 14. A few months prior, Subject Officer arrested Complainant for another charge, armed robbery, and Complainant was ultimately not prosecuted for that charge. In this case, Subject Officer determined to arrest Complainant solely because he used profane language. ROI at 8. However, there is no prohibition against using profane language alone.

Subject Officer’s account to OPC was different from his account to D.C. Superior Court during a preliminary hearing in connection with the felony threats charge. At that hearing, Subject Officer testified that in addition to using profane language, Complainant stated to Subject Officer, “I’m gonna get your ass.” ROI at 14; ROI Exhibit 18. Subject Officer testified at that hearing that because he arrested Complainant previously, he felt threatened by this latter statement, and believed that Complainant was talking to him. Id.

The witness accounts of the scene corroborate that Complainant had an interchange with the police. Indeed, there are accounts that Complainant did use profane language directed at either Subject Officer or the MPD officers generally. However, there is little indication that Complainant made threats to harm Subject Officer or any other MPD officer on the scene at the time.

Given the fact that there was a crowd of approximately seventy people and it was likely chaotic, Complainant was never brought to trial on any of his prior arrests associated with this case, and Complainant did not incite the crowd with his statements, it would not have been reasonable for Subject Officer to have felt threatened. The Complaint Examiner finds that Subject Officer was not threatened, he had no legitimate law enforcement purpose in arresting Complainant. Therefore, the Complaint Examiner finds Subject Officer’s arrest of Complainant, in the absence of a legitimate law enforcement purpose, constituted harassment in violation of D.C. Code § 5-1107(a), D.C. Mun. Regs. Title 6A, § 2199.1, and MPD Special Order 01-01 and MPD General Order 120.21.

B. Language or Conduct

Complainant alleged that Subject Officer used language or engaged in conduct toward him that was insulting, demeaning, or humiliating. As discussed further below, Complainant Examiner does not find that Subject Officer engaged in language or conduct that was insulting, demeaning, or humiliating and thus did not violate D.C. Code in violation of D.C. Code § 5-1107(a) and MPD General Order 201.26.

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.”

The witnesses agree that Complainant was knocked to the ground by Subject Officer; however, only Complainant and Witness #11 state that Subject Officer used profane language. There were 12 witnesses that were interviewed by OPC in this matter. All but two, the MPD officers, were friends to Complainant. Yet, only one civilian witness stated that Subject Officer used profane language. This discrepancy may have resulted from when the other witnesses arrived on the scene or where they were located in relation to Complainant and Subject Officer. The Complaint Examiner finds that there is not enough evidence to support this allegation. Therefore, the Complaint Examiner finds that Subject Officer did not violate D.C. Code § 5-1107(a) and MPD General Order 201.26.

C. Unnecessary or Excessive Force

Complainant alleged that Subject Officer used unnecessary or excessive force against him when Subject Officer “grabbed” COMPLAINANT by his neck, “twisted” his arm, and “pushed” him to the ground during the arrest. As discussed below, the Complaint Examiner finds that Subject Officer used excessive and unnecessary force in arresting Complainant in violation of D.C. Code § 5-1107(a), D.C. Mun. Regs., title 6A, § 2199.1, and MPD Special Order 01-01.

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

Only the Subject Officer and MPD Witness Officer indicated that Complainant resisted arrest. ROI 9-10. All eleven of Complainant’s witnesses, and the Complaint himself, indicated that he was forcibly grabbed about the neck and pushed to the ground. Moreover, MPD Witness Officer indicated that Complainant and Subject Officer fell to the ground during the arrest. ROI at 10. Thus, the Complainant Examiner finds that force was applied. The Complaint Examiner finds that the force applied was excessive because there was no legitimate law enforcement purpose for arresting Complainant. There was no reasonable basis to grab the Complainant and push him to the ground. There was a crowd and no one was in immediate danger. Although Complainant was not visibly hurt from the arrest, any force applied would have been excessive because there was no basis for his arrest. Thus, the Complaint Examiner finds that excessive and unnecessary force was used in violation of D.C. Code § 5-1107(a), D.C. Mun. Regs., title 6A, § 2199.1, and MPD Special Order 01-01.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER, Sixth District

Allegation 1: Harassment	Sustained
Allegation 2: Humiliating Language or Conduct	Unfounded
Allegation 3: Use of Excessive or Unnecessary Force	Sustained

Submitted on _____, 2011.

ARTHUR D. SIDNEY
Complaint Examiner