

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	09-0012
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, NSID SUBJECT OFFICER #2, NSID
Allegation 1:	Harassment
Complaint Examiner:	Laurie S. Kohn
Merits Determination Date:	September 21, 2010

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 on October 10, 2008. COMPLAINANT alleged that on September 14, 2008, two subject officers, Metropolitan Police Department SUBJECT OFFICER #1, Narcotics and Special Investigations Division, and SUBJECT OFFICER #2, Narcotics and Special Investigations Division, harassed him when they unlawfully detained him and improperly arrested him for disorderly conduct.

Specifically, COMPLAINANT alleged that on September 14, 2008, at approximately 9:45 p.m., he was walking toward his home when a marked MPD cruiser pulled up to him. COMPLAINANT continued walking toward his home and was walking up his front steps when he heard the word “stop.” COMPLAINANT turned around and saw SUBJECT OFFICER #1 and SUBJECT OFFICER #2, whom he recognized from the MPD cruiser. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 allegedly grabbed COMPLAINANT by the arms, pushed him into the fence in front of his house, and placed his hands behind his back. COMPLAINANT was angry and frustrated. The officers handcuffed COMPLAINANT behind his back, and brought him to the fender of their vehicle. SUBJECT OFFICER #1 asked COMPLAINANT for his name, but COMPLAINANT refused to provide it. COMPLAINANT saw his neighbor knocking on the COMPLAINANT’S front door. COMPLAINANT’S mother and father, WITNESS #1 and WITNESS #2, answered the door and immediately came outside to see what was happening. WITNESS #2 asked SUBJECT OFFICER #1 what they were doing in his yard, but SUBJECT OFFICER #1 did not say why they had stopped COMPLAINANT. The officers searched

COMPLAINANT while COMPLAINANT'S father called the Seventh District police station and requested an official. The officers arrested COMPLAINANT for disorderly conduct and transported him to the Seventh District police station for processing. COMPLAINANT was released the following day when the Office of the Attorney General (OAG) declined to pursue the charge.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation and the officer's Objections to the Report of Investigation, the Complaint Examiner determined that there were 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 and the Objections submitted on behalf of SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on July 30, 2010, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On September 14, 2008 at approximately 9:45 p.m., SUBJECT OFFICER'S #1 and #2 approached COMPLAINANT and attempted to make contact with him.
2. SUBJECT OFFICER'S #1 and #2 observed that COMPLAINANT behaved in a way that was consistent with someone who was carrying a gun. They observed he held his hand close to his waistband.
3. The officers called out to COMPLAINANT, requesting that he stop to speak with them. COMPLAINANT did not stop.
4. Based on COMPLAINANT'S refusal to respond and his behavior, the officers decided to stop COMPLAINANT.
5. The officers stopped COMPLAINANT in the front yard of a home at the corner of Waclark and Brothers Place, SE. They patted him down and ascertained that he was not carrying a weapon.
6. COMPLAINANT was angry and frustrated that he was being stopped, demanding that the officers could not come into his yard and asking for the reason for the stop. He used profanity. At some point, the officers took COMPLAINANT out of his yard and held him against their police cruiser.
7. COMPLAINANT'S neighbor, knocked on the door of the FAMILY home. WITNESS #2 and WITNESS #1, COMPLAINANT'S parents, came out of the home. A discussion ensued between the officers and COMPLAINANT'S parents about why

COMPLAINANT was being locked up. WITNESS #1 AND WITNESS #2 were given no clear answer about why COMPLAINANT was being apprehended. WITNESS #2 raised his voice during his interactions with the officers.

8. WITNESS #2 went into the house to call 311 and request that a supervisor come to the scene.
9. COMPLAINANT continued to refuse to provide the officers with his name. At some point, the officers put COMPLAINANT in handcuffs.
10. WITNESS OFFICER arrived on the scene and heard COMPLAINANT and WITNESS #2 yelling. He spoke with WITNESS #2 and informed him that his son was being arrested for disorderly conduct.
11. COMPLAINANT was transported to the Seventh District where he was processed.
12. The D.C. Office of Attorney General declined to prosecute COMPLAINANT.

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.

At issue in this case is whether SUBJECT OFFICER'S #1 and #2 harassed COMPLAINANT in stopping him and in arresting him on September 14, 2008. This opinion will analyze each issue in turn. First, did the officers harass COMPLAINANT in effectuating his stop? When the officers first saw COMPLAINANT, they noticed that he acted in a way that would suggest he was holding a weapon in his waistband. SUBJECT OFFICER #2 stated that COMPLAINANT held his hand near his waistband. SUBJECT OFFICER #1 stated that COMPLAINANT "bladed his body away and grabbed his waistband." Such behavior seemed consistent with an armed individual who was trying to hide his weapon. When the officers initially tried to make contact with COMPLAINANT, he did not respond. Based on COMPLAINANT's behavior, the officers determined they had the basis to stop COMPLAINANT.

Under MPD General Order 304.10, the officers acted consistently with police procedures in initiating a contact with COMPLAINANT and in eventually stopping him. MPD officers may initiate a contact when they reasonably believe that some investigatory inquiry is required. Based on COMPLAINANT'S behavior, it was reasonable to believe that he possessed a weapon.

An officer may escalate to a making a stop if he or reasonably suspects that a person has committed a crime and may detain that person for the purpose of determining probable cause. MPD General Order 304-10. Reasonable suspicion may derive from the suspect's demeanor during the contact. Id. Based on the facts in this case, the officers again acted consistently with police procedures when they stopped COMPLAINANT. His behavior combined with his refusal to respond to the officers' attempt to make contact provide sufficient basis for reasonable suspicion that COMPLAINANT had committed a crime. The officers then proceeded according to proper police procedures in patting COMPLAINANT down in order to determine if probable cause existed to make an arrest. After determining that COMPLAINANT was not carrying a weapon, however, the officers prolonged the detention.

Did the officers harass COMPLAINANT when the prolonged the detention and apprehended him for disorderly conduct? At this point, the officers' behavior deviated from proper procedures. Their prolonged detention of COMPLAINANT and his ultimate arrest were inconsistent with their authority and amounted to harassment under MPD Special Order 01-01, D.C. Municipal Regulations, title 6A, § 2199.1.

Under MPD General Order 304-10, a stop is merely a temporary detention for the purpose of determining probable cause. "Officers should detain a person only for the length of time (not to exceed 10 minutes) necessary to obtain or verify the person's identification; to obtain an account of the person's presence or conduct; or otherwise determine if the person should be arrested." MPD General Order 304-10. Having stopped COMPLAINANT on suspicion that he carried a concealed weapon, which both officers stated was their reason for initiating the contact, the officers should have resolved their probable cause inquiry after patting him down and finding no weapons. Both officers reported that they quickly determined that COMPLAINANT was not in possession of a weapon, though their accounts differed slightly as to how that determination was reached. SUBJECT OFFICER #2 stated that soon after stopping

COMPLAINANT, the officers conducted a protective pat down search of COMPLAINANT and concluded that COMPLAINANT did not have an illegal firearm. SUBJECT OFFICER #1 did not recall whether the officers conducted the protective pat down or whether COMPLAINANT demonstrated on his own that he did not possess a firearm. Significantly, however, he corroborated SUBJECT OFFICER #2's account that soon after the stop they reached a definitive conclusion that COMPLAINANT was not armed.

Instead of terminating the stop at this point, they continued to detain him and to restrain him against their police car. While SUBJECT OFFICER #1 cited COMPLAINANT'S refusal to provide them with identification, MPD General Order 304-10 explicitly states that a detained person during a stop has the right to refuse to produce identification. COMPLAINANT'S demeanor was angry, he raised his voice, and he refused to produce identification. While COMPLAINANT'S behavior was uncooperative, it did not give the officers license to detain him after they had patted him down.

Nor did COMPLAINANT'S behavior provide SUBJECT OFFICER #1 and SUBJECT OFFICER #2 with probable cause to arrest him for disorderly conduct. Under D.C. Code Ann. § 22-1307, which criminalizes public disturbances in the District of Columbia:

It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble on any street, avenue, alley, road, or highway...or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct. . ." D.C. Code Ann. § 22-1307 (2010).

Under D.C. law, the crime of disorderly conduct for engaging in loud and boisterous talking, for which COMPLAINANT was arrested, requires two elements: 1) that the defendant did congregate and assemble; 2) that he did engage in loud and boisterous talking or other disorderly conduct. *Kinoy v. D.C.*, 400 F.2d 761, 765 (D.C. 1968). Case law has made clear that the mere act of assembly cannot be illegal. To be actionable, the purpose of the assembly must be unlawful in some way or the assembly must be combined with the commission of forbidden acts. *Hunter v. U.S.*, 47 App. D.C. 40 (D.C. 1918). Further, the loud and boisterous conduct, though it does not have to involve the risk of a substantial risk of violence, must involve conduct that threatens a breach of the peace. *Adams v. U.S.* 256 A.2d 563, 565 (D.C. 1969).

There is no doubt that COMPLAINANT'S behavior was unpleasant that evening. COMPLAINANT admitted he was angry and frustrated. He admitted that he "showed anger and frustration by cussing at the officers." Both officers stated that COMPLAINANT raised his voice and used profanity in expressing himself. WITNESS OFFICER stated that when he arrived on the scene, COMPLAINANT was yelling. COMPLAINANT yelled, however, to protest his arrest; he yelled because he was angry that he was being subject to an unlawful prolonged detention. There is no indication that he yelled to incite a crowd; or even in concert with a crowd. Moreover, the facts do not suggest that his conduct threatened a breach of the peace. After the officers had determined that COMPLAINANT did not carry a weapon, according to all the evidence, including the officer statements, COMPLAINANT merely yelled

and cursed but did not take part in any threatening behavior.¹ COMPLAINANT was merely exercising his freedom of speech in questioning the action the police had taken against him.

Moreover, even if COMPLAINANT had been unlawfully loud and boisterous, only one element of the crime of disorderly conduct could have been established. Though a small assembly of people may have gathered during this incident and COMPLAINANT did yell and curse, there was no connection between the assembly and the loud behavior. SUBJECT OFFICER #2 stated that a small crowd formed during the stop, including COMPLAINANT'S parents. His statement did not assert that the crowd had any type of threatening demeanor, or that COMPLAINANT encouraged the crowd. SUBJECT OFFICER #1 claimed a crowd of 12-15 people had formed by the time of the arrest. He asserted that this posed a threat to the officers' safety, but he failed to offer any facts suggesting that the crowd acted in any kind of threatening manner or that COMPLAINANT encouraged the crowd. In *Shepherd v. D.C.*, the court held that "our decisions . . . teach that the bare possibility that words directed to a police officer may provoke violence by others does not suffice to show disorderly conduct; rather the words must create a likelihood or probability of such reaction." *Shepherd v. D.C.*, 929 A.2d 417, 419 (D.C. 2007). The crowd gathered merely because of the police activity and there is no indication that the crowd, with the exception of COMPLAINANT and his parents, did anything more than observe the activity. Here, any assembly that gathered was entirely disconnected both from the allegedly unlawful activity – that of being loud and boisterous – and from COMPLAINANT.

In addition, SUBJECT OFFICER #1'S explanation that he felt an arrest was necessary to exercise his authority over COMPLAINANT to elicit better behavior from him in future police interactions suggests even SUBJECT OFFICER #1 did not truly conclude probable cause existed at the time to arrest COMPLAINANT. He seems to have been offended and disrespected by COMPLAINANT and eager merely to exert his authority over him.

Because the officers could not reasonably have found probable cause to arrest COMPLAINANT for disorderly conduct, the officers' arrest of COMPLAINANT amounts to unlawful harassment under MPD Special Order 01-01, D.C. Municipal Regulations, title 6A, §

¹ In their Objections to the Report of Investigation, the officers claim that COMPLAINANT'S loud behavior was threatening to the officers, even though neither officer mentioned such facts in their statements. They claim in their Objections that the arrest report offers evidence that the officers felt threatened by COMPLAINANT'S behavior. However, the arrest report suggests that COMPLAINANT may have acted in a threatening fashion at a much earlier moment in this encounter. In the arrest report, SUBJECT OFFICER #1 wrote when the officers stopped COMPLAINANT in front of his parents' home, "D-1 immediately took a combative stance toward SUBJECT OFFICER #2 at which time D-1 started yelling. . ." At that point, the officers had yet to investigate COMPLAINANT for weapons. They had not frisked him. After the frisk, they placed COMPLAINANT against the police cruiser and spoke with COMPLAINANT'S parents. COMPLAINANT could not have maintained his combative stance during the frisk or when he was up against the cruiser. All evidence illustrates that COMPLAINANT'S subsequent protest remained verbal.

2199.1 by acting purposefully, knowingly, or recklessly in violation of the law or internal guidelines in subjecting a person to arrest and detention.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1, NSID
SUBJECT OFFICER #2, NSID

Allegation 1: Harassment	Sustained
---------------------------------	-----------

Submitted on September 21, 2010.

Laurie S. Kohn
Complaint Examiner