

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	09-0434
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER, Second District
<b>Allegation 1:</b>	Harassment
<b>Allegation 2:</b>	Insulting, Demeaning, or Humiliating Language or Conduct
<b>Allegation 3:</b>	Discriminatory Treatment
<b>Complaint Examiner:</b>	Sundeep Hora
<b>Merits Determination Date:</b>	January 14, 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 August 5, 2009. Complainant alleged that on July 26, 2009, the subject officer, Metropolitan Police Department (MPD) Officer SUBJECT OFFICER, Second District, harassed him by unlawfully arresting him for disorderly conduct, used language or engaged in conduct towards him during the arrest that was insulting, demeaning, or humiliating, and discriminated against him on the basis of his sexual orientation.

Specifically, Complainant alleged that on July 26, 2009, shortly after midnight, he and two of his friends were walking along the south side of the 1700 block of U Street, N.W. Police officers were on the north side of the street conducting a traffic checkpoint. As they walked by the officers, Complainant said out loud in a “sing-song” voice, “I hate the police, I hate the police.” After hearing COMPLAINANT’s remark, the Subject Officer ran across the street yelling, “Who do you think you are? Who do you think you are talking to?” After a short exchange of words, SUBJECT OFFICER handcuffed Complainant and escorted him to a police car. During this time, Complainant repeatedly asked why he was being detained and if he was being arrested. SUBJECT OFFICER allegedly responded, “Just shut up faggot.” Complainant,

who is gay, was offended by the comment. SUBJECT OFFICER arrested Complainant and charged him with disorderly conduct.

Complainant alleges that his arrest was unlawful and that he had not been disorderly. Complainant also alleges that SUBJECT OFFICER used insulting language and discriminated against him based on his sexual orientation when he told him to “shut up” and called him a “faggot” during the course of his arrest.

## **II. EVIDENTIARY HEARING**

An evidentiary hearing was conducted regarding this complaint on November 15, 2010. The Complaint Examiner heard the testimony of WITNESS #1, WITNESS #2, COMPLAINANT, WITNESS OFFICER #1, WITNESS OFFICER #2, WITNESS #3, WITNESS #4, WITNESS OFFICER #3, WITNESS OFFICER #4, WITNESS OFFICER #5, TECHNICIAN #1, and SUBJECT OFFICER. All of the exhibits introduced at the hearing and attached as part of the OPC Report of Investigation were made part of the record for the hearing.

## **III. FINDINGS OF FACT**

Based on a review of: (1) OPC’s Report of Investigation; (2) the objections submitted by SUBJECT OFFICER dated July 15, 2010; (3) OPC’s response to those objections; (4) the exhibits introduced and the testimony elicited during the evidentiary hearing conducted on November 15, 2010; and (5) the parties’ post-hearing briefs, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On July 26, 2009, SUBJECT OFFICER was working at a safety compliance checkpoint at the 1700 block of U St., N.W. Tr. 187, 338.
2. On July 26, 2009, shortly after midnight, Complainant and his friends, WITNESS #1 and WITNESS #2, were walking eastbound on the south side of U Street, between 17<sup>th</sup> and 18<sup>th</sup> Streets. Tr. 13, 72, 129, 346.
3. While passing the police checkpoint, Complainant declared two to three times, “I hate the police” in a “sing-song” voice. Tr. 18, 72, 106, 385.<sup>1</sup>
4. WITNESS #1 and WITNESS #2 were in front of Complainant at the time that he made this statement. Tr. 18.

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<sup>1</sup> SUBJECT OFFICER testified that he heard Complainant shout “I hate the fucking police.” Tr. 341, 385; *See* ROI at 7, 18, however, this Complaint Examiner does not find that Complainant used the F-word and that even if he did, it is not a material fact relevant to the determination of whether his arrest was lawful.

5. Subject Officer approached the corner of 17<sup>th</sup> and U Streets while Complainant and his friends continued to walk across 17<sup>th</sup> Street toward the southeast corner of the intersection. Tr. 32, 73, 340.
6. Subject Officer yelled something to the effect of, “Who do you think you’re talking to. You can’t talk to me like that.” Tr. 23, 107, 224, 319-320. WITNESS #3 was in his apartment watching television with the windows open. WITNESS #3s’ apartment building was on the southeast corner of 17<sup>th</sup> Street. Subject Officer’s statements directed to Complainant were loud enough that WITNESS #3 heard him from his second floor apartment.<sup>2</sup> Tr. 222-225.
7. Complainant and Subject Officer engaged in a discussion, which consisted of Subject Officer admonishing Complainant for speaking about the police in such a manner and Complainant responding that he had a right to state his opinion in a public place. Tr. 25. At some point, Complainant asked if was being arrested. *Id.*
8. Subject Officer grabbed Complainant by his waist belt and said, “I asked you to move on. You refused. You’re under arrest.” Tr. 347. However, WITNESS OFFICER #5, who was approaching SUBJECT OFFICER at this time, did not recall SUBJECT OFFICER giving Complainant a reason for his arrest at the time that WITNESS OFFICER #5 took Complainant away. Tr. 312-313. He assumed that SUBJECT OFFICER arrested Complainant for disorderly conduct because he did not see any type of physical altercation. Tr. 311-312.
9. SUBJECT OFFICER moved Complainant to a metal utility box at the southeastern corner of 17<sup>th</sup> and U streets and pressed Complainant’s chest against it and placed him handcuffs. Tr. 25, 75, 109, 112, 226, 229.
10. Complainant did not resist arrest at any point. Tr. 38, 77, 113, 232, 296, 328.
11. Subject Officer escorted Complainant across the street to a police car that transported him to the Second District. Tr. 118, 226. 253, 351.
12. WITNESS OFFICER #1 and WITNESS OFFICER #4 did not hear or see any of the events surrounding the arrest until after SUBJECT OFFICER was in the process of effectuating the arrest.<sup>3</sup> Tr. 185,188, 274. The other officers, except for WITNESS

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<sup>2</sup> Other officers participating in the checkpoint were closer to Complainant in comparison to the Subject Officer, however, they either did not hear Complainant state, “I hate the police” or chose to ignore it. Tr. 198, 233, 267, 273-274, 278, 302-303.

<sup>3</sup> WITNESS OFFICER #1 heard “some yelling” at the corner of 17<sup>th</sup> and U Streets, but could not determine who was yelling, and when he approached the corner, SUBJECT OFFICER was “effectuating an arrest.” Tr. 188.

OFFICER #5, did not observe SUBJECT OFFICER approach or arrest Complainant. Tr. 209, 214, 244-245, 264, 267.

13. WITNESS #1 testified that he did not recall any people gathering during the incident but that he remembered two women who walked by during the arrest and recommended that he video record the arrest, and kept walking. Tr. 33-34. WITNESS #2 testified that he might have passed a few pedestrians while walking east on U Street before the arrest, but that he did not see any civilians gathered when the arrest was occurring. Tr. 79-80. Complainant testified that no civilian onlookers were present during or before the arrest. Tr. 114. WITNESS #3 testified that “I think there were some pedestrians starting to gather, but if anything the scene unfolded quick enough that it wasn’t too long of a time for a crowd to gather and disperse.” Tr. 230. WITNESS OFFICER #4 testified that there was a crowd of about five to seven people on the southeast corner standing around and talking, but that she was not concerned about the crowd in any way. Tr. 276. WITNESS OFFICER #1 noticed a line of people standing outside a club on the south side of U Street, east of the intersection, looking over at the incident. Tr. 202-203. WITNESS OFFICER #5 testified that he was “sure there were countless people out” on either the southwest or southeast corner of 17<sup>th</sup> and U Streets. Tr. 332.
14. Complainant had been drinking the night of the incident but was not inebriated. Tr. 167-168. During their interaction with Complainant, WITNESS OFFICER #1 and SUBJECT OFFICER determined that Complainant had been drinking, due to the odor of alcohol as well as the presence of flushed skin and bloodshot eyes. Tr. 190, 345. Complainant was not arrested for public intoxication or any offense related to alcohol use. Tr. 201.

#### **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**

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 SUBJECT OFFICER harassed him by unlawfully arresting him for disorderly conduct. The evidence reviewed in this matter supports the finding that SUBJECT OFFICER did not have probable cause to arrest Complainant for disorderly conduct and that Subject Officer harassed Complainant by subjecting him to an unlawful arrest.

Disorderly conduct is defined, in relevant part, under D.C. Code § 22-1321 as the following:

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; (2) congregates with others on a public street and refuses to move on when ordered by police; (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons . . . shall be fined not more than \$250 or imprisoned not more than 90 days, or both.

D.C. Code § 22-1321.

According to SUBJECT OFFICER, as the incident was unfolding, he saw three to four people on the same side of the street crossing and several people standing on the corner of 17<sup>th</sup> and U streets on the east side. Tr. 348. SUBJECT OFFICER also testified he heard someone in the crowd say, “I can’t believe this.” *Id.* None of the witnesses who were present could corroborate SUBJECT OFFICER’s account about Complainant’s behavior or conduct that justified his arrest. WITNESS #1 could not recall if a crowd of people had gathered and stated that during the incident two women passed by without stopping. Tr. 33-34. Moreover, according WITNESS #3, it was SUBJECT OFFICER’s behavior and loud voice, not Complainant’s, that caused him to look out of his window to see what was occurring on the street below. Out of the five officers present at the scene, only two officers, WITNESS OFFICER #1 and WITNESS OFFICER #4, stated that the complainant’s actions may have caught the attention of other individuals who happened to be present at the scene. WITNESS OFFICER #1 testified that, as he ran to the incident location, he noticed “a line of people” standing outside of a club in the area.

Tr. 202. WITNESS OFFICER #4 stated that there was a “crowd of [five to seven] people on the corner.” Tr. 275. However, according to the officers, the crowd either stood around or simply looked over at the incident. Tr. 202-203, 275-276.

Even if we credit SUBJECT OFFICER’s assertion that Complainant was creating a “safety issue” (Tr. 349) his account of Complainant’s conduct does not rise to the level of disorderly conduct because there is no evidence that Complainant’s words or actions were likely to lead to a breach of the peace and/or likely to produce violence by others. *Shepherd v. District of Columbia*, 929 A.2d 417 (D.C. 2007).

In *Shepherd*, the D.C. Court of Appeals found that defendant’s actions in yelling and swearing at a Metro officer were insufficient to support a disorderly conduct conviction where there was no evidence that the defendant intended to incite the small crowd to engage in violent conduct and there was no evidence of a hostile reaction by the crowd. *See also In re W.H.L.*, 743 A.2d 1226 (D.C. 2000) (overturning a conviction for disorderly conduct where there was no evidence that a juvenile defendant swearing at officers in front of a crowd was likely to breach the peace by inciting violence). There is no evidence in the record to show that Complainant’s words incited any of the civilian onlookers to take immediate hostile action.<sup>4</sup> Tr. 63, 80, 114, 203. WITNESS #1 and WITNESS #2 recall Complainant saying “I hate the police” louder than a normal speaking tone, but not as loud as a shout. Tr. 18, 72. Even if his voice rose to the level of shout, SUBJECT OFFICER is the only person (other than Complainant’s friends) who heard him. The only shouting that WITNESS OFFICER #5 or WITNESS #3 heard was from SUBJECT OFFICER.

The evidence reviewed in this matter supports the finding that SUBJECT OFFICER harassed Complainant by unlawfully arresting him for disorderly conduct. There is no credible evidence in the record to substantiate that Complainant was acting disorderly prior to his arrest. Although Complainant’s comments to SUBJECT OFFICER were insensitive and disrespectful, his conduct did not rise to the level of disorderly conduct. Because the Complainant’s actions did not amount to an actual or imminent breach of the peace, this Complaint Examiner concludes that SUBJECT OFFICER purposefully, knowingly, or recklessly harassed the complainant, in violation of D.C. Code § 5-1107(a) and MPD General Order 120.25, by unlawfully arresting him for disorderly conduct.

#### B. Language or Conduct

Language or conduct that is insulting, humiliating, or demeaning, as defined by MPD Special Order 01-01, Part III, Section H “includes, but is not limited to acts, words, phrases, slang, slurs, epithets, ‘street’ talk or other language which would be likely to demean the person to whom it is directed or to offend a citizen overhearing the language; demeaning language

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<sup>4</sup> In fact, Complainant asked his friends to “move on” because he did not want to “inconvenience them.” Tr. 115.

includes language of such kind that its use by a member tends to create disrespect for law enforcement whether or not it is directed at a specific individual.”

MPD General Order 201.26, Part I, Section C provides that “All members of the department shall be courteous and orderly in their dealings with the public. They shall perform their duties quietly, remaining calm regardless of provocation to do otherwise.”

Complainant alleges that SUBJECT OFFICER used language or engaged in conduct towards him during the arrest that was insulting, demeaning, or humiliating. The evidence reviewed in this matter supports the finding that SUBJECT OFFICER used language and conduct toward Complainant that was insulting, humiliating or demeaning and that he failed to “remain calm regardless of provocation to do otherwise.”

In SUBJECT OFFICER’s January 7, 2010 statement to the investigator (5 months after the incident took place), he acknowledged that he may have told Complainant to “be quiet” or “shut up” when he was shouting “I hate the police.” ROI at 17. He also acknowledged that he may have said, “Who do you think you are talking to?” and “Who do you think you are?” *Id.* At the hearing, however, SUBJECT OFFICER testified unequivocally that he never said “shut up” or called Complainant a “faggot” while he was escorting him across the street to a police car. Tr. 351-352.

Out of all of the officers who participated in the safety checkpoint that night, SUBJECT OFFICER was the only one who thought it necessary to run over to Complainant and confront him after hearing him sing, “I hate the police.” He also effectuated an arrest without probable cause. The evidence shows that SUBJECT OFFICER was extremely irate<sup>5</sup> with Complainant and more likely than not, told him to “shut up” in violation of MPD Special Order 01-01MPD General Order 201.26.

SUBJECT OFFICER’s statements of “Who do you think you are?” and “Who do you think you are talking to?” constitutes “language which would be likely [] demean the person to whom it is directed.” SUBJECT OFFICER’s statements are reminiscent of what a parent would say to their child. But in the context of a police officer and a citizen on a public street, SUBJECT OFFICER’s statements were demeaning and insulting to the Complainant.

Only Complainant and SUBJECT OFFICER were in a position to hear SUBJECT OFFICER allegedly use the word “faggot.” WITNESS OFFICER #5, who was walking behind the two when the alleged slur was used, did not hear it. Tr. 299. Complainant also admits that SUBJECT OFFICER did not witness him engage in any conduct that would reveal that he was gay, nor did anyone expressly state that Complainant or his companions were gay, had come from a “gay” party, or were going to a gay bar, (even if we assume that such “facts” were

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<sup>5</sup> WITNESS OFFICER #5, in his statement to IAD, corroborates that SUBJECT OFFICER lost his patience with Complainant. Tr. 322.

dispositive of one's sexual orientation or the perception of one's sexual orientation). Tr. 120, 335. Complainant could only "assume that [he] was perceived by SUBJECT OFFICER [as] a homosexual." Tr. 122. SUBJECT OFFICER has been a patrol officer for 22 years and has likely dealt with citizens from all walks of life. While the record is replete with evidence that he acted inappropriately, there is insufficient evidence that he called Complainant a "faggot."

The totality of the evidence reviewed in this matter supports the finding that SUBJECT OFFICER used language and conduct toward Complainant that was insulting, humiliating or demeaning and that he failed to "exercise patience and discretion in the performance of [his] duties."

### C. Discrimination

Discrimination, as defined by MPD Special Order 01-01, Part III, Section D includes "failure to provide proper police service, either in the enforcement of the law or in the provision of police service, on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, or place of residence or business."

MPD General Order 201.26, Part I, Section A, provides that "[i]n accordance with the District of Columbia Human Rights Law, members shall not discriminate, either in the enforcement of the law, or in the provision of police service, on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, or place of residence or business...."

The regulations governing OPC define discriminatory treatment as "[c]onduct by a member of the MPD ... that results in the disparate treatment of persons because of their race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, place of residence or business or any other ground of discrimination prohibited under the statutory and the common law of the District of Columbia." D.C. Mun. Regs., title 6A, § 2199.1.

Because Complainant believed that SUBJECT OFFICER had no basis to make the arrest, and because he believed that SUBJECT OFFICER called him a "faggot," Complainant alleged that SUBJECT OFFICER discriminated against him based on his sexual orientation. The evidence reviewed in this matter supports the finding that SUBJECT OFFICER did not engage in discriminatory conduct based upon Complainant's sexual orientation.

As discussed above, there is no evidence that SUBJECT OFFICER even knew that Complainant was gay. In fact, SUBJECT OFFICER testified that he learned of Complainant's sexual orientation later on that night after he had effectuated the arrest and after he allegedly called him a "faggot." Tr. 352. Even if we assume that the Subject Officer called Complainant a



“faggot,” this “fact” would not be conclusive evidence that SUBJECT OFFICER’s actions, while certainly inappropriate, amounted to discrimination.

In sum, this Complainant Examiner finds that this charge is unfounded.

**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER, Second District

<b>Allegation 1:</b>	Sustained
<b>Allegation 2:</b>	Sustained
<b>Allegation 3:</b>	Unfounded

Submitted on January 18, 2011

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Sundeep Hora  
Complaint Examiner