

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF CITIZEN COMPLAINT REVIEW**

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint Nos.:	02-0318 and 02-0319
Complainants:	COMPLAINANT #1 AND COMPLAINANT #2
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, 4th District SUBJECT OFFICER #2, 4th District
Allegation 1:	Harassment
Allegation 2:	Use of Excessive or Unnecessary Force
Complaint Examiner:	Cynthia B. Schultz
Merits Determination Date:	August 21, 2003

Pursuant to D.C. Official Code § 5-1107(a), 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. These complaints were timely filed in the proper form as required by § 5-1107, and the complaints have been referred to this Complaint Examiner to determine the merits of the complaints as provided by § 5-1111(e).

I. SUMMARY OF COMPLAINT ALLEGATIONS

COMPLAINANT #1 and COMPLAINANT #2 filed two separate, yet related complaints alleging harassment and the use of excessive force against SUBJECT OFFICER #1 and SUBJECT OFFICER #2, respectively. These two complaints, 02-0318 and 02-0319, have been consolidated in this matter.

In the first complaint filed with the Office of Citizen Complaint Review (OCCR) on May 31, 2002, COMPLAINANT #2 alleged that SUBJECT OFFICER #2 used unnecessary or excessive force against him and subjected him to harassment during an altercation outside COMPLAINANT #2's house on May 29, 2002. In the second complaint filed with OCCR on May 31, 2002, COMPLAINANT #1 alleged that SUBJECT OFFICER #1 used unnecessary or excessive force against him and subjected him to harassment during the same altercation.

Specifically, COMPLAINANTS stated that they were standing in a fenced-in yard in front of COMPLAINANT #2's house at LOCATION #1, N.W., when the two subject officers approached them and told the men to be quiet and go inside the house. COMPLAINANT #2 stated that he told the officers that they did not have to go inside because it was only 10:00 p.m.

COMPLAINANT #2 and COMPLAINANT #1 are of Vietnamese origin. One of the Officers escalated the encounter by telling the Complainants to go back to their country. After COMPLAINANT #2 and SUBJECT OFFICER #2 argued for several minutes, SUBJECT OFFICER #2 struck COMPLAINANT #2 on the side of his neck. SUBJECT OFFICER #1 then struck COMPLAINANT #1. As COMPLAINANT #1 fell, his face hit a steel fence post, resulting in an injury to his left eye. SUBJECT OFFICER #1 arrested COMPLAINANT #1 for disorderly conduct. Neither SUBJECT OFFICER #1 nor SUBJECT OFFICER #2 arrested COMPLAINANT #2 or any of the other bystanders.

COMPLAINANT #1 and COMPLAINANT #2's complaints were timely filed in a proper manner. Neither SUBJECT OFFICER #2 nor SUBJECT OFFICER #1 filed objections to the Report of Investigation.

Pursuant to standard OCCR policy, because the complaint alleged the use of excessive or unnecessary force, OCCR referred the matter to the U.S. Attorney for possible criminal prosecution of the two subject officers. The U.S. Attorney's Office declined criminal prosecution. Exh. 21

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding these complaints because, based on a review of OCCR's Report of Investigation, 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 OCCR's Report of Investigation and attached exhibits, the Complaint Examiner finds the material facts regarding this complaint to be:

1. COMPLAINANT #2 and COMPLAINANT #1 were outside in front of COMPLAINANT #2's home, at LOCATION #1, N.W., on the evening of May 29, 2002. Exhs. 4 and 6.
2. COMPLAINANT #1 is Vietnamese and COMPLAINANT #2 is of Vietnamese descent. Exh. 6.
3. On May 29, at 9:24 p.m., a caller from LOCATION #2, N.W. (a house up the street from LOCATION #1, N.W.), placed a call to the MPD, reporting that men were "drinking and selling drugs on her property."
4. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 were dispatched to respond to the call. Exh. 16.

5. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 did not respond to the location of the call and investigate the allegations raised by the radio caller at LOCATION #2, N.W.
6. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 noticed a group of individuals standing around a car in front of LOCATION #1, N.W., and immediately instructed them to be quiet and disband without assessing the situation. Exhs. 16 and 19.
7. Some of the individuals left and COMPLAINANT #2 and COMPLAINANT #1 went inside the front yard in front of COMPLAINANT #2's home. Exh. 3.
8. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 approached COMPLAINANT #2 and COMPLAINANT #1, but remained on the other side of the fenced yard. Exh. 3.
9. SUBJECT OFFICER #2 stated to COMPLAINANT #2, "Don't make noise." Exh. 4.
10. The more that SUBJECT OFFICER #2 and SUBJECT OFFICER #1 engaged the Complainants by telling them to go inside their home, the more the situation escalated.
11. COMPLAINANT #2 replied that he was not making any noise and told SUBJECT OFFICER #2 that he lived at that address. Exh. 4.
12. SUBJECT OFFICER #2 stated to the Complainants to "go home, go upstairs." Exh. 4.
13. SUBJECT OFFICER #2 told the Complainants to go back to their country. Exh. 4.
14. COMPLAINANT #2 and COMPLAINANT #1 became angry and the conversation escalated. Exhs. 4, 16 and 19.
15. At or around the same time, SUBJECT OFFICER #1 continued to make the same type of comments to COMPLAINANT #1.
16. COMPLAINANT #1 apparently became more agitated and vocalized his anger with the use of profane language. Exh. 19. COMPLAINANT #1 speaks very little English.
17. SUBJECT OFFICER #2 and SUBJECT OFFICER #1 never identified or articulated to either of the Complainants a reason why they should disband, be quiet, go inside their house, or go back to their country.
18. Suddenly, without warrant, cause, or provocation, SUBJECT OFFICER #2 reached over the fence and struck COMPLAINANT #2 on the left side of his neck. Exh. 4, 5, 6, 7, 8, 11, and 19.
19. COMPLAINANT #2 fell to the ground.

20. SUBJECT OFFICER #2 entered into the fenced yard with his “stick” or “blackjack” and directed it toward COMPLAINANT #2. Exhs. 5, 7, and 11.
21. COMPLAINANT #2’s Mother interceded and stood in front of her son, at which time SUBJECT OFFICER #2 retreated and left the yard. Exh. 11.
22. An OCCR Investigator photographed a visible mark on the left side of COMPLAINANT #2’s neck and small scratches on his left elbow the day after the incident. Exh. 8. COMPLAINANT #2 suffered minor injuries as a result of being struck by SUBJECT OFFICER #2. Exh. 8.
23. COMPLAINANT#1 and WITNESS #1, COMPLAINANT #2’s Mother, saw SUBJECT OFFICER #2 hit COMPLAINANT #2 on the left side of the neck from the other side of the fence her out kitchen window, which had a direct view of the scene. Exh. 11.
24. WITNESS #1 stated that SUBJECT OFFICER #2 had taken his “stick” out and was holding it in his hand. Exh. 11.
25. At or around the same time that SUBJECT OFFICER #2 struck COMPLAINANT #2, SUBJECT OFFICER #1, without warrant, cause, or provocation, reached over the fence and struck COMPLAINANT #1, who fell against a fence and injured his left eye. Exhs. 1, 6, 8, and 9.
26. After SUBJECT OFFICER #1 realized that COMPLAINANT #1 was injured and bleeding, he entered into the fenced yard and placed COMPLAINANT #1 under arrest for disorderly conduct. Exhs. 6, 7, and 17.
27. WITNESS #1 heard COMPLAINANT #1 ask SUBJECT OFFICER #1 why he had been struck and he was told to be quiet by stating “shhh.” Exh. 11.
28. A neighbor who was interviewed by OCCR identified one of the Officers as grabbing a Complainant’s shirt and throwing him to the ground. Exh. 13.
29. SUBJECT OFFICER #2 stated that he saw SUBJECT OFFICER #1 reach for COMPLAINANT #1, who was standing inside the fenced yard. Exh. 19.
30. SUBJECT OFFICER #1 stated that he grabbed COMPLAINANT #1’s right shoulder and COMPLAINANT #1 pulled away and slipped and fell on wet grass. Exh. 16.
31. The local climatological data from the national Oceanic and Atmospheric Administration indicated that mist on May 29, 2002, was present between the hours of 4:00 a.m. and 7:00 a.m. Exh. 20.
32. SUBJECT OFFICER #1 handcuffed and arrested COMPLAINANT #1 because he was “wild and acting crazy.” Exh. 16.

33. SUBJECT OFFICER #1 also acknowledged that there were other individuals who were “yelling and carrying on.” Exh. 16.
34. SUBJECT OFFICER #1 did not understand what COMPLAINANT #1 was saying, because he was speaking another language. Exh. 16.
35. COMPLAINANT #1 did not resist arrest. Exh. 16.
36. COMPLAINANT #1 suffered an injury to his left eye as a result of being struck by SUBJECT OFFICER #1. Exh. 8.
37. COMPLAINANT #1 was treated for his injuries at the scene and at Washington Hospital Center. Exhs. 6 and 9.
38. Another caller, WITNESS #2, brother to COMPLAINANT #2, placed a call to 911 stating that the police had beaten his brother and arrested him and indicated that he wanted to file a complaint.

IV. DISCUSSION

Pursuant to D.C. Official Code § 5-1107(a), “The Office [of Citizen Complaint Review] 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.”¹

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

¹ The Citizen Complaint Review Board, which is OCCR’s governing body, promulgated regulations regarding OCCR on August 30, 2002. See 49 D.C. Reg. 8347. This Merits Determination does not rely on the definition of “harassment” contained in the regulations because the underlying conduct alleged in the complaint occurred before the regulations took effect on August 30, 2002.

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.”

On May 29, 2002, between 9:30 p.m. and 10:00 p.m. COMPLAINANT #1 and COMPLAINANT #2 appeared to have been visiting with friends in front of COMPLAINANT #2's home. Around that same time, SUBJECT OFFICER #2 and SUBJECT OFFICER #1 received a dispatched call to LOCATION #2, N.W., to investigate a group of men drinking and dealing drugs at that property site. That investigation apparently never took place.

Instead, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 noticed several individuals standing outside the home of COMPLAINANT #2 on the street around a friend's car. Without assessing the purpose of the gathering or finding the use of alcohol or drugs or any other unlawful activity, SUBJECT OFFICER #2 and SUBJECT OFFICER #1 approached the individuals and instructed them to be quiet and go home. Apparently, these several individuals took offense to their commands and some of them responded in a different language. One responded, COMPLAINANT #2, said that he was not making noise and that he lived at that address. The exchange between SUBJECT OFFICER #2, SUBJECT OFFICER #1, COMPLAINANT #2, and COMPLAINANT #1 escalated when SUBJECT OFFICER #2 made a derogatory, insulting, and demeaning statement by stating that they should go back to their country.

SUBJECT OFFICER #2 and SUBJECT OFFICER #1 did not identify any reason or cause or unlawful behavior to require these individuals to disband and return home. Neither of the Officers articulated any basis for a finding of disorderly conduct to either COMPLAINANT #2 or COMPLAINANT #1. SUBJECT OFFICER #2 and SUBJECT OFFICER #1's statements to go home, be quiet, return to your country were acts that constitute harassment and can be interpreted under these facts to bother, annoy, and interfere with COMPLAINANT #2 and COMPLAINANT #1's ability to go about lawful business normally, in the absence of a specific law enforcement purpose.

SUBJECT OFFICER #1 statements appeared to also have provoked an escalation in the exchange between him and COMPLAINANT #1, most of which SUBJECT OFFICER #1 was not able to understand, because COMPLAINANT #1 shouted comments in another language, presumably Vietnamese. From the exchange of words as stated by SUBJECT OFFICER #1, it is clear that COMPLAINANT #1 perceived SUBJECT OFFICER #1's instructions as annoying and demeaning.

More importantly, however, is SUBJECT OFFICER #1's act of striking COMPLAINANT #1 that resulted in him falling against a fence and then placing him under arrest for disorderly conduct after noticing that he had suffered an injury and was bleeding.

SUBJECT OFFICER #1 stated that he placed COMPLAINANT #1 under arrest because he was the only person acting wild and crazy, although SUBJECT OFFICER #1 does not describe the behavior in any greater detail. In the same interview of SUBJECT OFFICER #1, however, he acknowledged that others were “yelling and carrying on.” In fact, even COMPLAINANT #2 was reported to have been angry and shouting. None of the other individuals were arrested.

SUBJECT OFFICER #2 and SUBJECT OFFICER #1 stated that the dispatched call was for disorderly conduct. Several individuals standing outside of one friend’s home does not rise to the occasion of disorderly conduct. See DC Code § 22-1321. Nor does responding to insulting remarks made by police officers. *Id.* Moreover, neither SUBJECT OFFICER #2 nor SUBJECT OFFICER #1 identified a situation of disorderly conduct when they were patrolling the area around LOCATION #1, N.W., in their Memoranda of Interviews (“MOIs”). SUBJECT OFFICER #1 also did not identify any disorderly conduct in his Arrest/Prosecution Report.

In sum, SUBJECT OFFICER #1’s unfair treatment and arrest of COMPLAINANT #1 under the evidence and facts set forth above constitutes harassment in violation of MPD Special Order 01-01, Part III, Section G and MPD General Order 201.26, Part I, Section A, No. 1.

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.”² MPD General Order 901.7, Part II states, “[t]he policy of the Department is that an officer shall use only that force that is reasonably necessary to effectively bring an incident under control, while protecting the lives of the officers and others.” According to the model found in the “Application of the Use of Force Continuum for the Metropolitan Police Department,” which provides additional written guidance on the appropriate use of force, the appropriate responses for the orange level, which include baton strikes, striking and blocking techniques, and takedowns. Should only be engaged where “there is an assessment of imminent bodily harm to the officer or others. There is an actual or attempted assault on the officer at this level. The officer may direct energy and tactics toward self-defense.”

The facts reveal that, without provocation, good cause, threat of imminent bodily harm to himself or others, or an attempted assault, SUBJECT OFFICER #2 reached over a fence, where COMPLAINANT #2 was standing on his own property, and struck COMPLAINANT #2 with such a blow that he fell to the ground and sustained minor injuries. Clearly, COMPLAINANT #2, on the other side of a fence, standing on his own property without any weapon, did not present any imminent danger to either police officer or others. WITNESS #1, COMPLAINANT #2’s Mother, as well as others, stated that she saw SUBJECT OFFICER #2 strike her son. Indeed, SUBJECT OFFICER #2 does not deny having struck COMPLAINANT #2 in his own

² The Citizen Complaint Review Board, which is OCCR’s governing body, promulgated regulations regarding OCCR on August 30, 2002. See 49 D.C. Reg. 8347. This Merits Determination does not rely on the definition of “excessive or unnecessary force” contained in the regulations because the underlying conduct alleged in the complaint occurred before the regulations took effect on August 30, 2002.

admission. None of the evidence indicates that COMPLAINANT #2 engaged in any disorderly conduct. Accordingly, it is clear that SUBJECT OFFICER #2 struck COMPLAINANT #2 and that he used unnecessary and excessive force under the circumstances and evidence as presented.

The evidence also clearly indicates that without provocation, good cause, threat of imminent bodily harm to himself or others, or an attempted assault against him, SUBJECT OFFICER #1 reached over the fence and struck COMPLAINANT #1 with such a blow that he fell to the ground and sustained an eye injury in the fall. Clearly, COMPLAINANT #1, on the other side of a fence, standing on his friend's property without any weapon, did not present any imminent danger to either police officer or others. Although SUBJECT OFFICER #1 states that COMPLAINANT #1 slipped and fell on his own accord, he admits that he grabbed COMPLAINANT #1 right shoulder. A neighbor also reported that he saw an officer grab one of the individuals and throw him to the floor. Moreover, the NOAA data obtained by the OCCR revealed that there was no dew or mist present at the time of the incident that would result in COMPLAINANT #1 slipping on wet grass. None of the evidence indicates that COMPLAINANT #1 engaged in disorderly conduct. Accordingly, it is clear that SUBJECT OFFICER #1 struck COMPLAINANT #1 and that he used unnecessary and excessive force under the circumstances and evidence as presented.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #2

Allegation 1:	Sustained
Allegation 2:	Sustained

SUBJECT OFFICER #1

Allegation 1:	Sustained
Allegation 2:	Sustained

Submitted on August 21, 2003.

Cynthia B. Schultz
Complaint Examiner