

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	02-0336
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1, 6th District SUBJECT OFFICER #2, 3rd District SUBJECT OFFICER #3, 3rd District SUBJECT OFFICER #4, 3rd District
Allegation 1:	Harassment
Allegation 2:	Insulting, Demeaning, or Humiliating Language or Conduct
Allegation 3:	Use of Excessive or Unnecessary Force
Complaint Examiner:	Leslie T. Annexstein
Merits Determination Date:	July 6, 2004

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. 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

In a complaint filed with the Office of Citizen Complaint Review (OCCR) on June 17, 2002, COMPLAINANT alleged that three Metropolitan Police Department (MPD) officers, SUBJECT OFFICER #1, SUBJECT OFFICER #2, and SUBJECT OFFICER #4, subjected him to unnecessary or excessive force when he was arrested on June 3, 2002, for disorderly conduct. Report of Investigation (ROI), Exhibit 1. On his complaint form, COMPLAINANT identified SUBJECT OFFICER #2 as being with SUBJECT OFFICER #4 when the force was used. However, OCCR's investigation revealed that it was SUBJECT OFFICER #3 who was present with SUBJECT OFFICER #4 when force was used against COMPLAINANT, and not SUBJECT OFFICER #2. Therefore, it is SUBJECT OFFICER #3, along with SUBJECT OFFICER #4 and SUBJECT OFFICER #1, who is subject to the allegation of the use of excessive or unnecessary force, not SUBJECT OFFICER #2.

Additionally, OCCR's investigation indicates that SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, and SUBJECT OFFICER #4 allegedly harassed COMPLAINANT and used language toward him that was insulting, demeaning, or humiliating.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint 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, as well as the objections submitted by SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, and SUBJECT OFFICER #4 and on June 1, 2004, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On June 3, 2002, SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, and SUBJECT OFFICER #4 were arresting two persons on narcotics-related charges near 14th and Chapin Streets, N.W. WITNESS OFFICER, an MPD officer who was working at the Metropolitan Police Boys and Girls Club #10 at 2500 14th Street, N.W., was called outside of the building by a citizen who was complaining about the actions of the arresting officers and was speaking with witnesses who were voicing their concerns about the narcotics arrest.
2. COMPLAINANT was riding his bicycle in the area on 14th Street, N.W. He noticed police officers chasing, and then arresting, a young black male toward the alley behind the Metropolitan Police Boys and Girls Club #10.
3. COMPLAINANT began yelling at the officers about the arrest. Some of COMPLAINANT's comments to the officers may have included obscenities such as this "shit ain't right."
4. COMPLAINANT was told by SUBJECT OFFICER #4, SUBJECT OFFICER #1 and SUBJECT OFFICER #3 to leave the scene of the arrest. SUBJECT OFFICER #4 may have included obscenities in his order to COMPLAINANT to leave the scene, such as, "Get the fuck out of here!"
5. COMPLAINANT rode away on his bicycle, but he stopped at the shopping mall and began yelling at the officers again. COMPLAINANT's shouts included statements such as "I know my rights."
6. At least two of the officers chased after COMPLAINANT and approached him in front of a store in the shopping center, Q Nail Design. COMPLAINANT was informed that he was going to be arrested. COMPLAINANT walked towards the officers. He was thrown against the window of the nail shop, handcuffed, and then thrown on the ground on his back.

7. WITNESS OFFICER crossed the street to get a view of what was happening with COMPLAINANT. WITNESS #1 observed SUBJECT OFFICER #4 on top of COMPLAINANT with his knee on his chest and heard him tell COMPLAINANT, who was continuing to yell, to “shut the fuck up.” By this time, in addition to WITNESS OFFICER, there were approximately three other MPD officers on the scene. Eventually, one of the officers told SUBJECT OFFICER #4 to get off the complainant. WITNESS OFFICER assisted COMPLAINANT to his feet.
8. COMPLAINANT was arrested and charged with disorderly conduct. COMPLAINANT’S property was given to WITNESS, a neighborhood friend, who had been inside the Q Nail Design shop getting a pedicure at the time of the incident.
9. COMPLAINANT was transported to the 3rd District police station and charged with disorderly conduct. MPD Form PD 163 (Arrest/Prosecution Report) was completed by SUBJECT OFFICER #1, SUBJECT OFFICER #1 is identified as the arresting officer, with SUBJECT OFFICER #3 and SUBJECT OFFICER #2 identified as the assisting officers. COMPLAINANT was released after providing \$25 collateral.
10. This incident occurred shortly after 6:00 p.m. COMPLAINANT’S comments and actions toward the police did not cause a crowd to form. Each of the four officers provided a different account during the investigation about which officers told COMPLAINANT to be quiet and to leave the area and about which officers actually arrested COMPLAINANT.

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; [and] (3) use of language or conduct that is insulting, demeaning, or humiliating....” Each of COMPLAINANT’S allegations is addressed below.

A. Allegation #1: Harassment

MPD officers are prohibited from harassing citizens. 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 COMPLAINANT alleges that the four officers harassed him by charging him with disorderly conduct without justification.

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

The evidence gathered during the investigation by OCCR does not demonstrate that the decision to arrest COMPLAINANT for disorderly conduct met the requirements of the disorderly conduct statute. D.C. Official Code § 22-1321 states:

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 the police; [or] (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. ROI, Exhibit 16.

While COMPLAINANT may have used profanity and spoken loudly, there is no evidence that the decision to arrest COMPLAINANT for disorderly conduct met the requirements for a violation of the disorderly conduct statute. First, based on the investigation conducted, there is no evidence that he acted in such a way as to disturb or be offensive to others since the incident involved only him and the four police officers. Indeed, based on the account of WITNESS OFFICER, there was at least one other citizen who was complaining about the manner in which the four officers had conducted the narcotics arrest about which COMPLAINANT was also complaining. Second, none of the officers or other witnesses claimed that COMPLAINANT's comments and actions toward the police caused a crowd to form. In fact, if any crowd was formed at all, this occurred because citizens in addition to COMPLAINANT were concerned about the manner in which the officers had conducted an arrest; WITNESS OFFICER's statements during the investigation bear this out. Thus, it was the officers' own actions, not COMPLAINANT's, which would have led to the formation of a crowd. Third, it was shortly after 6:00 p.m., not "during the nighttime" and there is no evidence provided by the officers that a considerable number of persons were annoyed or disturbed by COMPLAINANT.²

A recent decision issued by an OCCR complaint examiner discussed a similar situation in another case. OCCR Complaint No. 02-0041, Findings of Fact and Merits Determination (July 9, 2003). The complaint examiner found that absent evidence that the complainant "acted in such a way to disturb or be offensive to others, since it was uncontroverted that the incident involved only [the complainant in 02-0041] and the four police officers," the facts did not satisfy the elements of disorderly conduct. 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.

² Although WITNESS OFFICER indicated during the investigation that he believed that the disorderly conduct charge was correct, his statements do not provide information demonstrating how the requirements for a disorderly conduct arrest were met.

complaint examiner relied on *In re W.H.L.*, 743 A.2d 1226, 1228 (D.C. 2000) (youth who stood behind police officers, yelling obscenities and refusing an order to “move on” had not engaged in disorderly conduct since the words were directed at the police, not others, and no crowd had gathered, whereby a breach of the peace might occur) in reaching her decision. ROI, Exhibit 17. Indeed, the facts here are strikingly similar to *In re W.H.L.* COMPLAINANT was also directing his language toward four police officers, questioning their actions, and initially refused to move on when ordered to do so. In the absence of evidence of annoyance to others, the acts of yelling, or even using obscenities toward police officers, do not constitute disorderly conduct.

As described above, the evidence demonstrates that COMPLAINANT was exercising his right to free speech and was arrested for doing so. The arrest served no legitimate purpose in enforcing the laws of the District of Columbia or protecting any of its citizens. COMPLAINANT was lawfully present at a public place and was exercising his right to question the police about actions they were taking. While each officer gave a different account of which officers told COMPLAINANT to leave and “shut up,” as well as different accounts of exactly which officers placed COMPLAINANT under arrest, all four officers participated in some manner in COMPLAINANT’s arrest. By arresting and charging COMPLAINANT with disorderly conduct because his presence was making the officers uncomfortable and/or angry, SUBJECT OFFICER #1, SUBJECT OFFICER #2, SUBJECT OFFICER #3, and SUBJECT OFFICER #4 harassed COMPLAINANT in violation of MPD Special Order 01-01.³

B. Allegation #2: Use of Language That Is Insulting, Demeaning or Humiliating

MPD General Order 201.26, Part I, Section C, No. 1 and 3 states, “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... Members shall refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name calling which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person.” ROI, Exhibit 18. 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

³ Additionally, MPD General Order No. 201.26, Part I, Section C, No.1 states, in relevant part, “All members of the department shall be courteous and orderly in their dealings with the public. They shall perform their duties quietly, remaining clam regardless of provocation to do otherwise.” Clearly, the officers did not perform their duties calmly or with courtesy and orderliness when challenged by COMPLAINANT; rather, the officers created further disturbance in the community through their actions to silence COMPLAINANT. While this violation is dealt with in the context of the allegation regarding use of insulting, demeaning or humiliating language, it is equally applicable to the allegation of harassment.

by a member tends to create disrespect for law enforcement whether or not it is directed at a specific individual.”

COMPLAINANT’s allegation that SUBJECT OFFICER #4 used profane language toward him was supported by evidence gathered during the investigation. COMPLAINANT said that SUBJECT OFFICER #4 told him to “get the fuck out of here” before arresting him. WITNESS OFFICER reported that when he walked up to where SUBJECT OFFICER #4 and COMPLAINANT were on the ground, he heard SUBJECT OFFICER #4 tell COMPLAINANT, “shut the fuck up.” Although the four officers involved in the incident do not acknowledge that anyone other than COMPLAINANT used profanity, the fact that WITNESS OFFICER heard profanity used by SUBJECT OFFICER #4 is corroborating evidence of COMPLAINANT’s allegation that SUBJECT OFFICER #4 directed obscenities at him. MPD General Order 201.26, Part I, Section C(3) is quite clear that officers are prohibited from using profane language. SUBJECT OFFICER #4 violated MPD General Order 201.26 by telling the complainant to “shut the fuck up,” which is insulting, demeaning or humiliating language.

Additionally, while they differ on the details of the incident, it is apparent that SUBJECT OFFICER #1, SUBJECT OFFICER #3, and SUBJECT OFFICER #4 engaged in heated dialogue with COMPLAINANT in response to his yelling. The officers allowed COMPLAINANT’s comments to provoke them into telling him to shut up, telling him to leave, and eventually chasing him down and arresting him. Based on their own statements, none of the three officers were “courteous and orderly in their dealings” with COMPLAINANT. The officers also failed to “perform their duties quietly, remaining calm regardless of provocation to do otherwise.” By failing to deal with COMPLAINANT in a courteous and orderly manner, SUBJECT OFFICER #1, SUBJECT OFFICER #3, and SUBJECT OFFICER #4 all engaged in conduct toward the complainant that was insulting, demeaning or humiliating, in violation of MPD General Order 201.26. There are insufficient facts to determine whether SUBJECT OFFICER #2 violated MPD General Order 201.26.

C. Allegation #3: Unnecessary or Excessive Use of Force

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.”⁴ COMPLAINANT alleges that SUBJECT OFFICER #2 and SUBJECT OFFICER #4 engaged in excessive and unnecessary force when he was thrown against the window of the Q Nail Design and then thrown onto his back on the ground. COMPLAINANT further alleges that SUBJECT OFFICER #4 “pounded” his knee into COMPLAINANT’s chest.

⁴ 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.

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 officer and others.” The “decision to use force of any level ought to be based on the danger posed by a subject confronted by the police ... That decision must be based on the circumstances that the officer reasonably believes to exist.”⁵ “Application of the Use of Force Continuum for the Metropolitan Police Department” provides further written guidance to MPD officers on the appropriate use of force. This guidance states that “the use of physical force by members of the Metropolitan Police Department is limited to the following: 1. Defending yourself or others from an actual or perceived attack; 2. Effecting the arrest or preventing the escape of a suspect; and 3. Overcoming resistance.”⁶ Additionally, MPD General Order No. 201.26 (D)(7) provides that “[m]embers shall not use unnecessary force in making arrests....”

The accounts provided by the four officers during the investigation of this complaint are at odds with one another with respect to the specific details of the arrest. However, information gathered from other witnesses provides corroborating evidence of COMPLAINANT’s claim that excessive and unnecessary force was used in his arrest. First, WITNESS reported that she heard a bang against the window of Q Nail Design while she was getting a pedicure. When she exited the store, she saw COMPLAINANT being pushed against the glass of the store by MPD officers and then observed him being thrown to the ground. Second, WITNESS OFFICER saw COMPLAINANT’s body go to the ground and when he crossed the street to get a better view, he saw that SUBJECT OFFICER #4 was on top of COMPLAINANT with his knee on his chest. WITNESS OFFICER believed it was “totally unnecessary” for SUBJECT OFFICER #4 to put his knee on COMPLAINANT’s chest and stated that he believed that SUBJECT OFFICER #1 and SUBJECT OFFICER #4 were rough on COMPLAINANT.

WITNESS OFFICER’s account is similar to the one provided by COMPLAINANT, with the exception that COMPLAINANT identified the two that arrested him as SUBJECT OFFICER #2 and SUBJECT OFFICER #4. The conflicting versions recounted by the four officers lack credibility, particularly when contrasted with the accounts given by WITNESS OFFICER, COMPLAINANT, and WITNESS. The stories of the four officers are not even in agreement as to who was on the scene when force was used, let alone whether COMPLAINANT had resisted arrest such that force was required. Indeed, SUBJECT OFFICER #4 kept his knee on COMPLAINANT’s chest after COMPLAINANT was on the ground and handcuffed,

⁵ The Metropolitan Police Department replaced General Order 901.7 (Use of Force) with General Order 901.07 on October 7, 2002. This Merits Determination does not rely on General Order 901.07 because the alleged prohibited conduct occurred prior to October 7, 2002.

⁶ Additionally, MPD General Order No. 201.26 Part I, Section D, No. 7 provides that “[m]embers shall not use unnecessary force in making arrests....”

removing his knee only when requested to do so by another officer. Further, no witnesses corroborated the officers' accounts that COMPLAINANT resisted arrest.

Thus, the amount of force used against COMPLAINANT was not reasonably necessary to effect his arrest since he did not resist arrest, and was already on the ground. Accordingly, SUBJECT OFFICER #4 used unnecessary or excessive force against COMPLAINANT, in violation of MPD General Order 901.7. Additionally, based on SUBJECT OFFICER #3's acknowledgement that he and SUBJECT OFFICER #1 grabbed COMPLAINANT's legs and flipped him to the ground, coupled with the statement in SUBJECT OFFICER #1's PD 163 report identifying himself as the arresting officer, SUBJECT OFFICER #3 and SUBJECT OFFICER #1 also used unnecessary or excessive force against COMPLAINANT in violation of MPD General Order 901.7.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1:	Sustained
Allegation 2:	Sustained
Allegation 3:	Sustained

SUBJECT OFFICER #2

Allegation 1:	Sustained
Allegation 2:	Insufficient facts

SUBJECT OFFICER #3

Allegation 1:	Sustained
Allegation 2:	Sustained
Allegation 3:	Sustained

SUBJECT OFFICER #4

Allegation 1:	Sustained
Allegation 2:	Sustained
Allegation 3:	Sustained

Complaint No. 02-0336
Page 9 of 9

Submitted on July 6, 2004.

Leslie T. Annexstein
Complaint Examiner