

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	17-0619
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER 1 SUBJECT OFFICER 2 SUBJECT OFFICER 3 SUBJECT OFFICER 4
<b>Allegation 1 as to SUBJECT OFFICER 4:</b>	Harassment (Threat of arrest)
<b>Allegation 2 as to SUBJECT OFFICER 2 and SUBJECT OFFICER 3</b>	Harassment (Prolonged traffic stop)
<b>Allegation 3 as to SUBJECT OFFICER 3 and SUBJECT OFFICER 1</b>	Harassment (Unlawful car search)
<b>Complaint Examiner:</b>	Jennifer A. Fischer, Esq.
<b>Merits Determination Date:</b>	April 4, 2018

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 (OPC) on August 1, 2017. COMPLAINANT alleged that on July 29, 2017, Metropolitan Police Department Officer SUBJECT OFFICER 4 harassed him by threatening to arrest him and have his driver's license revoked if he did not complete the Standardized Field Sobriety Test (SFST). COMPLAINANT also alleged that SUBJECT OFFICER 2, and SUBJECT OFFICER 3, harassed him by subjecting him to a prolonged traffic stop. Finally, COMPLAINANT alleged

that SUBJECT OFFICER 3 and SUBJECT OFFICER 1, harassed him by unlawfully searching his car.<sup>1</sup>

Specifically, COMPLAINANT stated that on July 29, 2017, at approximately 4:00 p.m., at AN INTERSECTION IN SW, WASHINGTON, DC, he was sitting in his VEHICLE when SUBJECT OFFICER, SUBJECT OFFICER 2, SUBJECT OFFICER 3, and SUBJECT OFFICER 4 stopped him in reference to a parking violation. SUBJECT OFFICER 4 and SUBJECT OFFICER 2 pulled him out of his car and frisked him. SUBJECT OFFICER 2 and SUBJECT OFFICER 3 asked him multiple times if he had any weapons. COMPLAINANT said no. SUBJECT OFFICER 2 and SUBJECT OFFICER 3 asked him for consent to search his car. COMPLAINANT said no. At that time, the officers began questioning him about his use of narcotics. SUBJECT OFFICER 2 and SUBJECT OFFICER 4 asked him to submit to a “drug test.” Although COMPLAINANT repeatedly communicated that he did not want to take the test because he was not under the influence, SUBJECT OFFICER 4 threatened that they would arrest him and take his driver’s license away if he refused. Because of these threats and the officers’ overall behavior, which made the complainant nervous, he took the tests. At some point, a canine unit arrived and SUBJECT OFFICER 3 and SUBJECT OFFICER 1 conducted a search of the complainant’s car, even though he had explicitly stated that he did not consent to any searches. COMPLAINANT estimated the stop lasted an hour, which he felt was unnecessarily prolonged. He was not arrested or issued any tickets.

## II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC’s Report of Investigation, Body Worn Camera Footage recorded on July 29, 2017, by Subject Officers, WITNESS OFFICER 1, and WITNESS OFFICER 2, the objections submitted by the Subject Officers on February 9, 2018, and OPC’s response to the 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. Tit. 6A, § 2116.3.

Subject Officers objected to the harassment allegation in relation to the search of the vehicle being improperly before the Complaint Examiner because it was not included in COMPLAINANT’s initial complaint that he filed online, it was not “reduced to writing and signed by the complainant,” nor did it contain a salutation as to the truth and veracity of the statement as required by § 5-1107(f) and OCRB Regulations 2106.1. Such a proposed reading of § 5-1107(f) and OCRB Regulations 2106.1 is far narrower than the general level of specificity included in the definition of complaint as found at OCRB Regulations 2199.1, which requires

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<sup>1</sup> In addition, COMPLAINANT alleged that SUBJECT OFFICER 1, SUBJECT OFFICER 2, SUBJECT OFFICER 3 and SUBJECT OFFICER 4 harassed him by unlawfully stopping him. COMPLAINANT further alleged that SUBJECT OFFICER 1 and SUBJECT OFFICER 2 harassed him by touching their holstered weapons. COMPLAINANT also alleged that SUBJECT OFFICER 1 and SUBJECT OFFICER 2 used unnecessary or excessive force against him when they grabbed his arm and pulled him from his car. COMPLAINANT also alleged that SUBJECT OFFICER 1, SUBJECT OFFICER 2 and SUBJECT OFFICER 3 harassed him by frisking him. Finally, COMPLAINANT alleged that SUBJECT OFFICER 2 and SUBJECT OFFICER 4 used unnecessary or excessive force against him by using various hand controls on him throughout the stop. Pursuant to D.C. Code § 5-1108(1), on December 29, 2017, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC’s executive director. *See* Exh 2.

only “an allegation of misconduct . . . during an incident occurring within the District of Columbia.” Moreover, such a narrow reading is contrary to the purposes of providing “easy access” to a process of review of citizen complaints involving the police, *See* D.C. Code 5-1101(3). Here, complainant alleged misconduct, and specifically harassment, by the officers during a traffic stop, thus it is sufficient to include any misconduct that may have occurred during that stop, even if the complainant did not provide greater specificity as to the entire scope of that misconduct in the complaint form. To require greater specificity would significantly limit access to the process of review. Moreover, even if Subject Officers’ reading were valid, the initial complaint here included the statement, “They then threatened me to take me to jail if I didn’t take the drug test and everything else after that was just straight abuse.” Exh. 1 (emphasis added). Thus, Complainant’s complaint contained an allegation of harassment for all activity by the police during the incident complained of following their threats regarding the taking of the drug test, which would include the search of his car. Thus, the allegation of harassment for the search of the vehicle is properly included in this Determination.

### III. FINDINGS OF FACT

Based on a review of OPC’s Report of Investigation including exhibits, the objections submitted by Subject Officers on June 19, 2017, OPC’s response to the objections submitted on July 14, 2017, and BWC footage of the incident as recorded by Subject Officers, WITNESS OFFICER 1, and WITNESS OFFICER 2, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On July 21, 2017, at approximately 4:00 p.m., Subject Officers arrived at A STREET IN SW, WASHINGTON, DC, in an unmarked vehicle and stopped next to and slightly behind complainant’s vehicle.
2. Complainant’s vehicle was parked on the street in a no parking area.
3. SUBJECT OFFICER 3 and SUBJECT OFFICER 4 approached several men standing on the sidewalk near Complainant’s vehicle who they had observed prior to their approach smoking marijuana in public.
4. SUBJECT OFFICER 1 and SUBJECT OFFICER 2 approached Complainant sitting in the driver’s seat of his car with his door open. SUBJECT OFFICER 1 told him, “Boy, you’re parked in a messed up area. You got your license on you man?”
5. Complainant responded that he did, but asked if he could just move the car.
6. SUBJECT OFFICER 1 continued to ask for Complainant’s ID and Complainant kept asking if he could just move the car. Complainant also asked why the officers were asking for his ID and SUBJECT OFFICER 1 told him that it was for a traffic stop because of the illegal parking. This conversation continued for roughly twenty seconds when SUBJECT OFFICER 1 then asked Complainant to step out of the car.
7. Complainant then reached between his legs at the front of the seat and SUBJECT OFFICER 1 and SUBJECT OFFICER 2 reached and grabbed Complainant’s arm moving him out of the car.
8. Complainant appeared calm, but continued to ask why he couldn’t just move the car. SUBJECT OFFICER 2 said “just calm down man.” SUBJECT OFFICER 2 then asked if Complainant had any weapons to which Complainant answered, “no.” SUBJECT OFFICER 2 then asked if he could check if Complainant had any weapons, and Complainant again answered no.

9. SUBJECT OFFICER 2 said he saw a bulge and did a pat down of Complainant. He claimed that he could have arrested Complainant because he claimed that SUBJECT OFFICER 1 asked him to get out of the car three times. SUBJECT OFFICER 2's statement was incorrect as SUBJECT OFFICER 1 only asked complainant once to get out of the car.
10. Complainant then asked why they grabbed him out of the car and SUBJECT OFFICER 1 said "because you're not cooperating with us. It raises suspicions and then when I asked you to step out of the car you reached down for the front and that's a known." Complainant explained that he was reaching for his ID and SUBJECT OFFICER 1 responded, "that time was over with. Then it was step out of the car and then you reach down." Complainant then asked why he was asked to get out of the car.
11. SUBJECT OFFICER 1 moved Complainant to the hood of the Subject Officers' car and SUBJECT OFFICER 2 and Complainant proceeded to have what appeared to be a relaxed conversation regarding the reason for the stop.
  - During that conversation SUBJECT OFFICER 2 asked "What's the problem man?" to which Complainant responded, "nah. I'm cool."
  - SUBJECT OFFICER 2 said "Okay. You seem like an alright dude. It seems like it was a misunderstanding." Complainant agreed and then SUBJECT OFFICER 2 asked if the car belonged to Complainant, which it did.
  - SUBJECT OFFICER 2 then explained in detail the reason for the stop. He pointed out the yellow mark on the curb and explained that the car needed to be parked a certain distance from the driveway. He explained that they could have just asked Complainant to move, but they could do a traffic stop based on their discretion. Complainant acknowledged the explanation and said he understood.
  - SUBJECT OFFICER 2 continued the casual conversation with Complainant and eventually asked if he could retrieve Complainant's identification from the car. Complainant consented and SUBJECT OFFICER 2 retrieved the ID and gave it to SUBJECT OFFICER 1.
  - SUBJECT OFFICER 2 then asked Complainant, "nothing illegal in the car? Nothing at all? No weed, nothing?" After Complainant said no, SUBJECT OFFICER 2 stated, "not so much lately, but in the past, we've had violent activity in this area. So that's why I'm asking. I don't know you obviously; I'm just doing my due diligence. See what I'm saying."
  - During the entire conversation, which lasted approximately four minutes, Complainant looked at SUBJECT OFFICER 2 while he was talking with him. The only time Complainant looked away during the conversation was when SUBJECT OFFICER 1 opened and shut the Subject Officers' car door or when SUBJECT OFFICER 2 pointed to the yellow lines.
12. After the conversation, SUBJECT OFFICER 2 walked over to the car and peered in, without entering. While SUBJECT OFFICER 2 looked in the car, Complainant remained leaning against the Subject Officers' car and looked around at SUBJECT OFFICER 1 and the guys who had been stopped on the sidewalk.
13. Approximately six minutes into the stop, SUBJECT OFFICER 3 joined SUBJECT OFFICER 2 and Complainant.

- SUBJECT OFFICER 3 asked Complainant, “you got a gun in the car?” Complainant said no to which SUBJECT OFFICER 3 asked, “you sure?” and Complainant responded again in the negative.
  - SUBJECT OFFICER 3 then asked, can we check your car for guns?” Complainant stated, “I do not consent to any searches.”
  - SUBJECT OFFICER 3 then referenced a previous shooting incident, indicating that Complainant had been involved in the incident.
14. Approximately thirty seconds after Complainant refused a search of his car for guns and SUBJECT OFFICER 3 referenced the previous shooting incident, SUBJECT OFFICER 3 began to ask Complainant about being under the influence.
- SUBJECT OFFICER 3 first asked Complainant “you been smoking?” Complainant stated that he doesn’t smoke because he’s a college student.
  - After it is again established that Complainant lives at the location, SUBJECT OFFICER 2 lectures Complainant “you’re a college student and you’re hanging out with guys that shoot guns out the window at cops in a car chase? . . . I mean, you see the problem with that? If you’re a guy that doesn’t do anything wrong, then you’re going to get wrapped up in something hanging out with people like that.”
  - SUBJECT OFFICER 3 then asked Complainant if he was high and if he smoked that day. Complainant denied both questions.
  - Subsequently, Complainant asked SUBJECT OFFICER 2 and SUBJECT OFFICER 3 why he had to be a dope smoker. SUBJECT OFFICER 2 responded that Complainant was having a weird demeanor, but that maybe it is was because he’s nervous. Complainant agreed that he was nervous.
  - During the conversation, Complainant looked between SUBJECT OFFICER 2, SUBJECT OFFICER 3 and the ground.
15. SUBJECT OFFICER 3 asked SUBJECT OFFICER 2 if he wanted to do a Standardized Field Sobriety Test (SFST) on Complainant.
- SUBJECT OFFICER 2 then asked Complainant, “you haven’t had anything to drink, nothing to smoke, nothing like that?”
  - Complainant responded, “no.”
  - SUBJECT OFFICER 2 looked at SUBJECT OFFICER 3 and said, “I could.”
16. SUBJECT OFFICER 2 then attempted to conduct an SFST on Complainant. Complainant repeatedly asked why he was being asked to do an SFST and when told that he was doing “weird movements” he responded that he didn’t think an SFST was necessary.
17. SUBJECT OFFICER 3 then did a second pat down of Complainant.
18. After the pat down, SUBJECT OFFICER 3 left the conversation with Complainant to talk to SUBJECT OFFICER 1. SUBJECT OFFICER 3 asked SUBJECT OFFICER 1 if he thought that Complainant was drunk or high. SUBJECT OFFICER 1 did not answer this question, but responded that Complainant had priors.
19. Complainant meanwhile agreed to take the first of the SFST batteries, which was a pen test after SUBJECT OFFICER 4 repeatedly told him that if he took the test, he could leave.
20. Complainant started the test, but repeatedly stated that it was embarrassing to be taking the test and that he thought it was abuse because he didn’t do anything.

21. SUBJECT OFFICER 4 told Complainant that he was losing patience with Complainant and Complainant then completed the eye test.
22. SUBJECT OFFICER 2 tried to move Complainant to the next test, but Complainant questioned the need for more tests since he passed the first. Complainant continued to claim that his treatment was discrimination and abuse. SUBJECT OFFICER 2 explained to Complainant that he was doing the tests because the Subject Officers thought Complainant was under the influence because “you’re flopping around, you’re looking everywhere.” Complainant explained that the Officers were making him uncomfortable. In the Body Worn Camera Footage Complainant appeared steady. He could not be seen to be “flopping around” or looking everywhere.
23. Numerous times Complainant said he was not going to take the test.
24. Eighteen minutes into the encounter, SUBJECT OFFICER 3 radioed requesting a canine unit, preferably one that searched for guns, but said he would take a drug dog if that was all that was available.
25. SUBJECT OFFICER 2 and SUBJECT OFFICER 4 continued trying to convince Complainant to take the remaining two parts of the SFST. SUBJECT OFFICER 4 told Complainant that they gave him too much leeway giving him the option to take the test and that if he didn’t take it, that they couldn’t let him take his vehicle and that if he refused to take the test he would lose his license. Complainant continued to refuse to take the remaining two tests.
26. After 34 minutes, SUBJECT OFFICER 2 told Complainant that since he wouldn’t finish the tests, they couldn’t let him drive his car.
27. After 35 minutes, SUBJECT OFFICER 2 asked SUBJECT OFFICER 3 if the gun sniffing dog is coming and if they should let Complainant walk away.
  - SUBJECT OFFICER 2: “should we just let him walk off?”
  - SUBJECT OFFICER 3: “No. Let him take the test.”
  - SUBJECT OFFICER 2: “He’s saying he doesn’t want to.”
  - SUBJECT OFFICER 3: “Keep asking him and if he refuses, we’ll place him under arrest.”
  - SUBJECT OFFICER 2: “We can’t do that.”
  - SUBJECT OFFICER 3: “If they refuse?”
  - SUBJECT OFFICER 2: “That’s only if they refuse intox. . . . I say just let him walk off if that’s what he wants to do.”
  - SUBJECT OFFICER 3: “Ollie is probably five minutes off. So, if you could hold him for five minutes?”
28. SUBJECT OFFICER 2 then stood some distance from Complainant and SUBJECT OFFICER 4 while SUBJECT OFFICER 4 continued to tell Complainant that he wouldn’t be able to leave until he agreed to take the test.
29. Two minutes after the conversation between SUBJECT OFFICER 2 and SUBJECT OFFICER 3, SUBJECT OFFICER 4 said that Complainant had agreed to take the test.
30. SUBJECT OFFICER 2 and SUBJECT OFFICER 4 walked with Complainant to a covered walkway to conduct the remaining tests away from the bystanders. Initially Complainant continued to state that he was not going to take the tests, although eventually he complied.
31. While Complainant and SUBJECT OFFICER 2 and SUBJECT OFFICER 4 were in the covered walkway, the gun sniffing dog arrived with its handler and the dog was walked

around Complainant's car. The handler claimed the dog hit by the driver's door of the car.

32. Based on the hit, SUBJECT OFFICER 3 said that they were going to search Complainant's car. SUBJECT OFFICER 3 and SUBJECT OFFICER 1 then searched Complainant's car.
33. During the search, Complainant and SUBJECT OFFICER 2 and SUBJECT OFFICER 4 finished the SFST. SUBJECT OFFICER 2 claimed that Complainant had not passed the test, but he couldn't be sure if it was because Complainant was under the influence or deliberately being difficult.
34. After finishing the SFST, Complainant and SUBJECT OFFICER 2 and SUBJECT OFFICER 4 walked toward Complainant's car while the search was in progress. SUBJECT OFFICER 2 and SUBJECT OFFICER 4 prevented Complainant from approaching the car.
35. Subject Officers told Complainant that he did not pass the SFST so he could not drive his car. SUBJECT OFFICER 3 found a female bystander who went to her house and obtained her license so she could park Complainant's car. Complainant agreed to let the female park his car.
36. SUBJECT OFFICER 1 filed the incident report related to the stop and frisk. The public narrative stated only that subjects "were stopped and frisked for officer safety in reference to possible driving under the influence. Nothing was found and [subjects] were released without incident." The incident report did not mention conducting an SFST, the reasonable suspicion leading to the SFST, the dog sniff, or the search of the vehicle.

#### **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. . . ."

##### **A. Harassment**

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 and in the regulations governing OPC as "words, 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: (a) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (b) 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. tit. 6A, § 2199.1.

**B. SUBJECT OFFICER 2 And SUBJECT OFFICER 3's Prolongation of the Stop of Complainant for the SFST Following Complainant's Repeated Refusals Was Unlawful And a Violation of MPD Policy**

Complainant alleges that SUBJECT OFFICER 2 and SUBJECT OFFICER 3 harassed him by unlawfully prolonging his traffic stop. Here, there is no question that SUBJECT OFFICER 2 and SUBJECT OFFICER 3 initiated a traffic stop of Complainant and prolonged it beyond a simple parking violation. Whether the prolongation of the stop constituted harassment depends on whether it was a) purposefully, knowingly, recklessly in violation of the law, or internal guidelines of the MPD and b) subjected Complainant to an unlawful detention, mistreatment, or other infringement of a personal right or denied or impeded Complainant in the exercise of or enjoyment of any right, privilege, power, or immunity.

A police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015) citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). "An officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at 1615 (citations omitted). "Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to [the traffic] stop. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.*

MPD General Order OPS 304.10, Police-Citizen Contacts Stops and Frisks, III.B.4.a.(2) and (3) provides that "[o]fficers shall detain a person only for the length of time necessary (in most cases not to exceed twenty(20) minutes) 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. . . . caution dictates moving quickly so as to avoid the stop becoming more like an arrest." It further provides that "when a stop exceeds twenty (20) minutes, members must articulate in the PD Form 76 or PD Form 251 the justification for the length of the stop." *Id.* at III.B.4.a.(1). *See also Id.* at III.B.3. "At some point during the stop, the officer shall, in every case, give the person an explanation of the purpose of the stop. The explanation need not be lengthy. . . . The record of the stop (PD Form 251 or PD Form 76) shall briefly note the fact that the officer gave the person an explanation for the stop, and the nature of that explanation."

There is no dispute that Subject Officers observed Complainant parked in a no parking zone and their initial stop of Complainant was lawful. It is unclear based on the BWC footage when the initial traffic stop of Complainant was complete, although within ten minutes the footage shows SUBJECT OFFICER 2 obtaining Complainant's identification, providing it to SUBJECT OFFICER 1 to check it on the computer in the police cruiser, and SUBJECT OFFICER 1 telling SUBJECT OFFICER 3 that Complainant has priors. Thus, the BWC footage of the Subject Officers suggests that the initial traffic stop could have been completed, at most, in a little more than ten minutes had the Subject Officers decided to issue a parking ticket to



Complainant. The stop of Complainant, however, lasted over an hour due first, to SUBJECT OFFICER 2, SUBJECT OFFICER 3 and SUBJECT OFFICER 4 attempting to give Complainant a Standard Field Sobriety Test (“SFST”) despite his repeated refusals, and second to the search of Complainant’s car based on a dog sniff that took place while SUBJECT OFFICER 2 and SUBJECT OFFICER 4 were giving Complainant the SFST.

**1. SUBJECT OFFICER 2 and SUBJECT OFFICER 3’s Reasonable Suspicion to Subject Complainant to an SFST Is Questionable.**

SUBJECT OFFICER 3 and SUBJECT OFFICER 2 made the decision to request Complainant to take an SFST. The question then is whether they had reasonable suspicion for such a request. They do not appear to have from the BWC footage.

After SUBJECT OFFICER 3 and SUBJECT OFFICER 2 asked Complainant to conduct an SFST, Complainant asked on numerous occasions why the officers thought he was high and why he was being asked to do an SFST. The Subject Officers explanation was limited primarily to statements regarding his nervous or weird demeanor without further articulation. But the BWC footage of Complainant’s demeanor or behavior does not reflect Subject Officers’ comments.

- At minute 7:40 of SUBJECT OFFICER 2’s BWC footage:  
Complainant: “Why I gotta be a dope smoker?”  
SUBJECT OFFICER 2: “You’re just having a weird demeanor right now, that’s all.”  
Complainant: “Oh. For real?”  
SUBJECT OFFICER 2: “Maybe you’re just nervous or something.”  
Complainant: “You just got me uncomfortable. That’s it.”  
SUBJECT OFFICER 2: “okay.”
- At minute 9:30 of SUBJECT OFFICER 2’s BWC footage:  
Complainant: “Do I look like I’m under the influence?”  
SUBJECT OFFICER 2: “Do you see how you’re doing all sorts of weird movements and looking all around and stuff?”

In all of the BWC footage showing these interactions, however, Complainant’s movements do not appear weird; he is just leaning against the car where SUBJECT OFFICER 1 put him. Mostly he looks directly at the Officers talking to him, but he occasionally looks at the guys who are watching him from the sidewalk.

- At minute 9:54 of SUBJECT OFFICER 2’s BWC footage:  
Complainant: “Why am I doing all this though? Can I ask you that?”  
SUBJECT OFFICER 2: “Yeah. Sure. That’s no problem. It’s because you’re acting in a way that suggests you might be under the influence of either alcohol or drugs.”  
Complainant: “Nah this is embarrassing.”  
SUBJECT OFFICER 2: “and you were sitting behind the wheel of the car.”

- At minute 13:45 of SUBJECT OFFICER 2's BWC footage, five minutes after SUBJECT OFFICER 2 attempts to start the SFST with Complainant:  
SUBJECT OFFICER 4: "you can't even stand up straight and you're asking us to fix our training."  
Complainant: "y'all are just making me uncomfortable to be honest with you."

In the BWC footage, however, Complainant appears to be standing up straight and he has not appeared at any time to be swaying or shifting so SUBJECT OFFICER 4'S observation is not visible to the Complaint Examiner.

- At minute 22:15 of SUBJECT OFFICER 2's BWC footage:  
SUBJECT OFFICER 4: "you barely have your balance,"

Here again, the footage does not reflect Complainant having any problem with his balance. He shifts occasionally from foot to foot, but he's never swayed or tripped or done anything to suggest he's having trouble balancing. While it is possible that the officer is seeing something not visible in the BWC footage, it is notable that none of the other officers are making the same comments about Complainant's balance.

When asked in their interviews why they thought Complainant might be under the influence, SUBJECT OFFICER 1, SUBJECT OFFICER 2 and SUBJECT OFFICER 3 described Complainant's behavior as nervous, Exh. 5 at 5:00; Exh. 7 at 6:45, 28:40; Exh. 11 at 2:33. This conclusion is consistent with Complainant's statements throughout the interaction that he was feeling nervous and embarrassed at being singled out by the officers and watched by numerous bystanders. It is also consistent with SUBJECT OFFICER 2's comments about the possible reason for Complainant's demeanor when responding to Complainant's requests as to why he had to do an SFST. Yet nervousness alone is not sufficient to provide reasonable suspicion to conduct an SFST. Prior to conducting the SFST, the officers provided no other articulable basis to establish reasonable suspicion that Complainant was under the influence. Moreover, SUBJECT OFFICER 1 did not even mention the SFST or any factors establishing reasonable suspicion to conduct it in the incident report as required by MPD General Order OPS 304.10.

Thus, based on Subject Officers comments in the BWC footage, Complainant's demeanor visible in the BWC footage, and the incident report, SUBJECT OFFICER 3 and SUBJECT OFFICER 2 did not appear to have reasonable suspicion for the SFST.

Subject Officers contend in their objections, however, a much longer list of items that allegedly provided the officers with reasonable suspicion. It is disconcerting that none of these items were mentioned to Complainant when he asked why they thought he was under the influence and why he needed to do the SFST, nor included in the incident report. These failures in following policy raise questions about the credibility of Subject Officers' contention that they believed they had reasonable suspicion that Complainant might be under the influence.

The most significant of the reasons raised by Subject Officers in their objections to the ROI is that they smelled the odor of marijuana in and around COMPLAINANT's vehicle. This statement is not supported by the BWC footage. None of the Subject Officers comment at any

time about the smell of marijuana coming from Complainant's vehicle or even near the vehicle. Only SUBJECT OFFICER 1 stated in his interview with OPC that he smelled marijuana coming from Complainant's car. Exh. 5 at 1:20. His statement is not credible though since it is not corroborated by any other Subject Officer or the BWC footage. SUBJECT OFFICER 2 and SUBJECT OFFICER 3 only said they smelled marijuana when they approached the site, Exh. 7 at 4:44, Exh. 11 at 2:00, Exh. 13 at 3:14, which would be consistent with the fact that they said that they saw men on the sidewalk near Complainant's car smoking marijuana, but that the individuals got rid of it before the Subject Officers arrived. But smelling marijuana coming from the sidewalk where others are smoking marijuana does not provide reasonable suspicion that Complainant, who was not on the sidewalk, was high, especially when Complainant was not alleged to be one of the people witnessed as smoking marijuana.

The Subject Officers in their objections point out footage of the incident taken by bystanders in which an unseen person says that the cops "pulled up and seen us smoking" as support justifying the SFST on Complainant. Yet, the Subject Officers ignore that a person states in the same footage that the Complainant's car does not smell like marijuana and that "[Complainant] wasn't smoking. They pulled up and seen us smoking. Not him." Exh. at 1:19. If anything, the video serves to corroborate the lack of credibility of the Subject Officers' contention that they smelled marijuana coming from Complainant's car.

While Complainant's presence near the people on the sidewalk might contribute to reasonable suspicion, it is disconcerting that at no time when Complainant asked why the Subject Officers thought he was high or under the influence did Subject Officers mention it. One would expect this to be more significant. Instead, it comes off as an after-the-fact justification.

Subject Officers also contend in their objections that Complainant stumbled as he exited the car and this is stated by SUBJECT OFFICER 1 and SUBJECT OFFICER 2 during their interviews with OPC. Exh 5 at 5:57, Exh. 7 at 9:41. Such a stumble is not visible in any of the BWC footage, however. Moreover, neither the stumble nor any problem with balance is mentioned by SUBJECT OFFICER 2 during the interaction, which calls its credibility into question.

Subject Officers in their objections, and most notably, SUBJECT OFFICER 2 raises during his interview with OPC, that Complainant's car was parked in a no parking zone despite the fact that there was a parking lot nearby with a multitude of open spaces suggesting impaired judgment. Exh. 7 at 15:50. This might, when combined with Complainant's allegedly nervous behavior and the men standing on the sidewalk near Complainant's car possibly smoking marijuana contribute toward reasonable suspicion, but, here again, SUBJECT OFFICER 2 never raised this factor in response to Complainant's questions as to the basis for the SFST. Moreover, given the Subject Officers' seeming assumption that Complainant was interacting with the men near the car on the sidewalk and that he lived across the street, his pulling over in that spot makes more sense than pulling into an empty, private parking lot.

Finally, in their objections to the ROI, Subject Officers claim that SUBJECT OFFICER 1 had to explain to Complainant three times at the beginning of the encounter, the reason for the police contact. Subject Officers' interpretation of this event in their objections is overblown,

however. Complainant's questions indicate that he understands he is parked illegally, but that he doesn't understand why they won't let him move the car rather than being asked for his identification. Here again, none of the Subject Officers raise this issue as a basis in response to any of Complainant's questions about why they think he is under the influence, SUBJECT OFFICER 1 does not articulate it in the incident report, and none of the Subject Officers even raise it in their interviews with OPC.

All of the other factors of reasonable suspicion pointed out in the objections to the ROI are either encompassed in the discussion about Complainant's "weird" or "nervous" behavior above or are observations of Complainant's behavior after attempting to give Complainant the SFST. These latter observations are not relevant to the question of whether the Subject Officers had reasonable suspicion to give the SFST in the first place.

Rather than concern about Complainant being under the influence, the BWC footage indicates that Subject Officers' true concern seemed to be, not that Complainant was under the influence, but with whether Complainant had guns in his car. The idea for an SFST was proposed, not by SUBJECT OFFICER 2, the SFST expert (Exh. 7 at 33:38) and the officer that had the longest interaction with Complainant. Rather, SUBJECT OFFICER 3 proposed it within approximately two minutes of interacting with Complainant. His request came only after the Subject Officers discovered Complainant's alleged involvement in a police shooting a year prior, and Complainant denied having a gun and refused a search of his car. SUBJECT OFFICER 2's tepid response of "I could" to SUBJECT OFFICER 3's question about whether he wanted to do an SFST is hardly what one would expect if he had a reasonable suspicion that Complainant was under the influence. In fact, until Complainant asks, "why I got to be a dope smoker," SUBJECT OFFICER 2 never made any statements indicating that Complainant's behavior suggested he was under the influence. Even then, his statement was simply that Complainant had weird behavior. SUBJECT OFFICER 2's follow up comment that the weird behavior may be because Complainant is nervous suggests that SUBJECT OFFICER 2 didn't actually believe Complainant was under the influence.

Moreover, if the crime Subject Officers were investigating here was whether Complainant was under the influence, it is odd that SUBJECT OFFICER 3 requested a gun sniffing dog rather than a drug sniffing dog. It is also odd that they did not arrest Complainant when he allegedly did not pass the SFST. SUBJECT OFFICER 2 explained during his interview with OPC that he did not know whether Complainant was deliberately being cavalier during the test or actually physically unable to pass. Exh. 7 at 20:40, 35:18. But he also explained that since the Subject Officers are a Crime Suppression Team primarily tasked with violent crimes and more serious felony offenses, it didn't make sense to devote their limited resources to an arrest in this situation when it could be resolved through other means – in this case by a bystander female parking the car in a legal location and Complainant "basically" agreeing not to drive. Exh. 7 at 21:35, 36:15. If properly resolving a DUI situation didn't make sense for these officers, then one wonders why the Subject Officers bothered with the SFST at all.

The decision to release someone if the officers have probable cause to arrest for driving under the influence is troubling from a safety perspective because Complainant could have driven as soon as the Subject Officers were out of sight. Moreover, contrary to Subject Officers'

contention in the objections that the Subject Officers had discretion to choose to give a warning over an arrest, MPD General Order PCA-502.02 V.7. provides that “if the member ... has established probable cause that the operator is impaired . . . he/she shall ... arrest the driver. And, under V.6, if probable cause is not established, the driver shall be released. Subject Officers’ argument that “[p]olice officers are given broad discretion on when to make an arrest in misdemeanor crime scenarios” is overstated. They cite to MPD General Order 201.26 V.D.2.f. because this provides for warnings for “minor violations of the law.” Driving under the influence is hardly a minor violation of the law from a public safety perspective. Nonetheless, even if the Subject Officers had such discretion and it was warranted in this case, SUBJECT OFFICER 2’s explanation that they didn’t want to devote limited resources to further dealing with an allegedly inebriated driver buttresses the concern that the Subject Officers’ concern in detaining Complainant was not that he was under the influence, but was to search for guns, which is evidently more in line with these officers’ focus.

Subject Officers are correct in their objections to the ROI that it is irrelevant if the SFST was a pretext for something else as long as there is reasonable suspicion for the SFST. *See Whren v. United States*, 517 U.S. 806, 812-13 (1996). Subject Officers actions and statements as to their reasonable suspicion in the BWC footage, the lack of visible evidence of Complainant’s “weird” demeanor or lack of balance, the failure to articulate reasonable suspicion in the incident report, and the indications in the BWC footage that Subject Officers’ real motive was to search for guns in Complainant’s car lead to a conclusion that SUBJECT OFFICER 3 and SUBJECT OFFICER 2 did not have reasonable suspicion that Complainant was under the influence at the time they decided to give him the SFST.

It is possible, however, that evidence of Complainant’s possibly inebriated demeanor was visible in-person, but not captured on the video footage. It is also possible that despite not articulating the factors constituting reasonable suspicion to Complainant or in the incident report, that SUBJECT OFFICER 2 and SUBJECT OFFICER 3 had them in their minds when concluding to do the SFST, although their after-the-fact articulation suggests a lack of credibility.

Nonetheless, it is not necessary to resolve with certainty whether SUBJECT OFFICER 2 and SUBJECT OFFICER 3 had reasonable suspicion at the time of asking Complainant to conduct an SFST. Even if they did, a point came at which the prolongation of the detention of Complainant to continue pressing him to take the SFST, despite his refusals, became unreasonable and unlawful.

**2. Even If SUBJECT OFFICER 3 And SUBJECT OFFICER 2 Had Reasonable Suspicion To Conduct An SFST, Complainant Refused And They Had No Legal Basis To Continue To Prolong Complainant’s Stop Without Probable Cause For Arrest**

Even if SUBJECT OFFICER 3 and SUBJECT OFFICER 2 had reasonable suspicion, Complainant repeatedly refused to take the SFST and the length of time they continued to detain him following his refusals was unreasonable and unlawful. While the Subject Officers might have been able to use Complainant’s refusal as one factor toward establishing probable cause for

an arrest (if they had other factors as well), continuing to detain Complainant after he refused to take the test without arresting him became an unlawful prolongation of the traffic stop.

MPD General Order PCA 502.02 at the Note following V.A.4. specifies that drivers may refuse to take the SFST. It does not, however, indicate the protocol officers are to follow in light of such a refusal. However, MPD General Order OPS 304.10 at III.B.4.a.(3) provides that “[t]he length of the stop must be reasonable and will be evaluated on the particular facts, but caution dictates moving quickly so as to avoid the stop becoming more like an arrest.” The question then is at what point does continuing to attempt to give an SFST to a driver that is refusing to take it become unreasonable.

Here, the point of unreasonableness was definitively reached when SUBJECT OFFICER 2 suggested to SUBJECT OFFICER 3 over thirty-five minutes into the stop and twenty minutes after they first began trying to give the SFST to Complainant that they allow Complainant to walk away. When SUBJECT OFFICER 3 asked him to continue to prolong the detention of Complainant for another five minutes to wait for the gun sniffing dog to arrive the basis for the stop was no longer the SFST, but to wait for a gun sniffing dog. At that point reasonable suspicion for the dog sniff was required to continue to detain Complainant.

Despite Subject Officers’ argument in their objections that Complainant never refused to take the SFST, but instead continually asked questions about them, suggesting that he could be convinced, Complainant refused to take the SFST on multiple occasions:

- At minute 9:54 of SUBJECT OFFICER 2’s BWC:
  - Complainant asks why he has to take the test and in response to SUBJECT OFFICER 2’s explanation he responds, “Nah. This is embarrassing.”
  - SUBJECT OFFICER 4 tells him, if you just do it, you’ll get it over with and you can go and Complainant responds, “but I have rights.”
  - SUBJECT OFFICER 4: responds “and he has the right to give you this test to make sure you’re safe to drive and you don’t kill nobody. . . . so take the test and you can go about your business if you pass and that’s it.”

After SUBJECT OFFICER 4’s statement, Complainant agrees to take the eye test, but stops because he says he is embarrassed. He resumes the eye test when SUBJECT OFFICER 4 tells him that he’s losing patience with him and passes it. When SUBJECT OFFICER 2 and SUBJECT OFFICER 4 try to get him to take the subsequent portions of the tests, he questions again why he’s having to take more tests since he just passed the eye portion of the test.

- At minute 15:03 of SUBJECT OFFICER 2’s BWC footage:
  - SUBJECT OFFICER 3: “Are you refusing the test? Just say yes or no.”
  - Complainant responds that the test is abuse, “I’m not doing all this walking back and forth.”
  - SUBJECT OFFICER 4: “You want to take the test or you want to get locked up?”

Complainant continues indicating to SUBJECT OFFICER 2 and SUBJECT OFFICER 4 that he does not want to take the test and asking why he can’t just leave for another twenty minutes.

- At minute 16:55 of SUBJECT OFFICER 2's BWC footage he asks, "why can't I just leave?"
- At minute 23:00 of SUBJECT OFFICER 2's BWC footage he asks, "can I just leave?";
- At minute 30:21 of SUBJECT OFFICER 2's BWC footage he says, "I'm not going to take the test. . . . I'm not trying to take it."
- At minute 30:50 of SUBJECT OFFICER 2's BWC footage he asks multiple times, "Can't I just walk man?"
- Again at minute 35:10 of SUBJECT OFFICER 2's BWC footage he asks, "why can't I just walk away?"

After SUBJECT OFFICER 3 asks SUBJECT OFFICER 2 to continue detaining Complainant for another five minutes while they wait for the gun sniffing dog, SUBJECT OFFICER 2 complies by allowing SUBJECT OFFICER 4 to continue pushing Complainant to take the SFST. At this moment, the reason for continuing to detain Complainant became not the SFST, but to wait for a drug sniffing dog. That Complainant minutes later agreed to take the test, only to again change his mind and refuse minutes after that, does not change this fact.

The Supreme Court in *Rodriguez v. United States*, 135 S. Ct. at 1616 held that a traffic stop may not be prolonged for a dog sniff absent reasonable suspicion justifying the dog sniff. Thus, at the moment the stated reason for the stop of Complainant became the dog sniff, if not earlier, SUBJECT OFFICER 2 and SUBJECT OFFICER 3's continued detention of Complainant was dependent on having reasonable suspicion to conduct the dog sniff, which they did not have, as is discussed below. Thus, the prolongation of the stop of Complainant following SUBJECT OFFICER 3's request to wait until the canine unit arrived was unlawful.

**C. SUBJECT OFFICER 2 and SUBJECT OFFICER 3 Did Not Have Reasonable Suspicion to Detain Complainant for the Dog Sniff and SUBJECT OFFICER 3 and SUBJECT OFFICER 1's Search of Complainant's Car Was Unlawful.**

SUBJECT OFFICER 3 and SUBJECT OFFICER 1 conducted a search of Complainant's vehicle predicated on probable cause established by a dog sniff hit on Complainant's passenger door indicating the presence of a gun. The dog sniff took place over an hour after the stop of Complainant. As already discussed, a traffic stop may not be prolonged to conduct a dog sniff unless there is reasonable suspicion to conduct the sniff. See *Rodriguez v. United States*, 135 S. Ct. at 1616. Because the traffic stop here was prolonged to conduct a dog sniff, the question is whether there was reasonable suspicion for that dog sniff. If not, the dog sniff, the prolongation of the stop of Complainant, and the subsequent search were unlawful.

Subject Officers contend in their objections to the ROI that they had sufficient reasonable suspicion to conduct a dog sniff even in the absence of the SFST. They cite for their proposition *Michigan v. Long*, 463 U.S. 1032. *Michigan v. Long* is inapposite, however. In *Michigan v. Long* the Court held that the protective search allowed by *Terry v. Ohio*, 392 U.S. 1, could extend to "the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden . . . if the police officer possesses a reasonable belief based on 'specific and

articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." The reason to allow such a limited sweep of the passenger compartment of the automobile is for the "protection of police and others" when police have a reasonable belief that the suspect poses a danger. Such allowances recognize that "roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect." In other words, the goal of a *Terry* protective sweep of the passenger compartment of a vehicle belonging to a suspect is for protection of police and others who may be nearby; it is not to search for evidence of a crime.

To this extent, Subject Officers might have had reasonable suspicion to conduct a protective sweep of Complainant's vehicle based on the forward movement he made when asked to exit the vehicle and their subsequent knowledge of Complainant's possible involvement in a shooting of police the previous year. Whether Subject Officers had such reasonable suspicion is not determined here, however, because Subject Officers did not conduct a protective sweep of the passenger compartment of Complainant's vehicle. Complainant's use of the dog sniff was not to protect the officers and bystanders from a possibly dangerous suspect. If it had been SUBJECT OFFICER 3 would not have waited to call for the canine unit until almost ten minutes after they learned about Complainant's possible participation in the shooting the previous year and seventeen minutes after the stop began. Moreover, the dog sniff didn't occur until after Complainant had been stopped for over an hour. Thus, the dog sniff did nothing to make the Subject Officers or bystanders safer and was not done out of any fear of danger of the presence of weapons in the area surrounding Complainant.

Subject Officers contend during their objections, however, that because the dog sniff was the same or less of an intrusion than a *Terry* sweep of the car, the prolongation of the stop to conduct the dog sniff was thus subject to the same reasonable suspicion that would provide the basis for a *Terry* sweep. The argument is false, however, because the dog sniff here was not the same or less of an intrusion because it prolonged the stop well past the few seconds or minutes a *Terry* sweep would take to conduct at the moment that the danger and reasonable suspicion justifying the stop was evident.

Unlike the *Terry* sweep, the long delay in requesting the dog sniff and then in the conducting of the dog sniff suggest that the dog sniff of Complainant's vehicle was not aimed at officer or bystander protection, but was "a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing." *Rodriguez*, 135 S. Ct. at 1615. Specifically, the Subject Officers wanted to search for a gun in Complainant's car. While Subject Officers might have had reasonable suspicion of Complainant's dangerousness, they did not have reasonable suspicion that Complainant was involved in any crime involving a gun that would justify the dog sniff of his car. At most, based on the alleged reason for their initial stop, they had concerns that Complainant had been smoking marijuana in public, but they requested a gun sniffing dog, not a drug sniffing dog.

Thus, because the search by SUBJECT OFFICER 3 and SUBJECT OFFICER 1 was predicated on a dog sniff, which was obtained only by unlawfully detaining Complainant, the search too was unlawful.



**D. SUBJECT OFFICER 2 and SUBJECT OFFICER 3's prolonged detention of Complainant Constituted Harassment**

The prolonged detention of Complainant by SUBJECT OFFICER 2 and SUBJECT OFFICER 3 beyond the time needed to complete the traffic stop warranted by his illegal parking was unlawful: 1) the SFST predicated the prolongation of the traffic stop was not based on reasonable suspicion; 2) even if the request for the SFST was based on reasonable suspicion, Complainant refused the test and once SUBJECT OFFICER 3 and SUBJECT OFFICER 2 made the decision to continue pressing Complainant to take the test solely to wait for a dog sniff, it became unlawful; and 3) they had no independent reasonable suspicion to detain Complainant for the purposes of the dog sniff. The question then becomes whether SUBJECT OFFICER 2 and SUBJECT OFFICER 3's actions were purposefully, knowingly, or recklessly in violation of the law, or internal guidelines of the MPD.

SUBJECT OFFICER 2 knew that the reasonableness of continuing to prolong the stop of Complainant after his continued refusal to take the SFST had ended when he suggested to SUBJECT OFFICER 3 that they let Complainant leave. At the moment when SUBJECT OFFICER 3 asked SUBJECT OFFICER 2 to continue until the canine unit arrived they both knew that the stop was no longer for an SFST, but for a dog sniff. That Complainant eventually consented to the SFST does not change that fact since Complainant likely agreed due to SUBJECT OFFICER 4 threats and his desire to bring the stop to an end.

SUBJECT OFFICER 2 and SUBJECT OFFICER 3 also knew that they did not have reasonable suspicion to detain Complainant to conduct a dog sniff because if they had, they could have stopped arguing with Complainant to conduct the SFST.

Thus, SUBJECT OFFICER 2 and SUBJECT OFFICER 3's unlawful prolongation of the stop of Complainant, subjecting Complainant to mistreatment and a deprivation of his rights, was not only knowing, but purposeful and thus constituted harassment. The allegation of harassment against SUBJECT OFFICER 2 and SUBJECT OFFICER 3 for harassment on the basis of the prolongation of the traffic stop is thus sustained.

**E. SUBJECT OFFICER 3 and SUBJECT OFFICER 1's Search of Complainant's Car Constituted Harassment**

SUBJECT OFFICER 3 as described in the previous section knew that he did not have reasonable suspicion to prolong the detention of Complainant for the SFST or for the dog sniff. His request to continue pressing Complainant on the SFST simply to wait for the dog sniff suggests that his unlawful action was not only knowing, but purposeful. His actions resulted in the unlawful search of Complainant's car. Thus, the allegation of harassment against SUBJECT OFFICER 3 for the search of Complainant's vehicle is sustained.

Subject Officers contend that because SUBJECT OFFICER 1 was not involved in the SFST with Complainant nor in the decision to request a canine that his participation in the search of Complainant's car was based solely on information provided by other Officers and the

positive canine hit. Although Subject Officers do not articulate it, they are presumably thus arguing that he did not have the requisite intent, knowledge, or recklessness for his participation in the search to constitute harassment. It may be true that SUBJECT OFFICER 1 was unaware of whether reasonable suspicion existed to conduct the SFST of Complainant. SUBJECT OFFICER 1's BWC footage at minutes 35:48 and 37:11 shows, however, SUBJECT OFFICER 1 standing not more than four feet from SUBJECT OFFICER 2 and SUBJECT OFFICER 3's conversation regarding waiting for the canine unit to arrive. Some of that conversation is picked up by SUBJECT OFFICER 1's BWC and it is most likely that SUBJECT OFFICER 1 was aware of their decision to prolong Complainant's detention further to wait for the canine unit. SUBJECT OFFICER 1 testified during his interview with OPC that he knew that officers are not permitted to prolong traffic stops to wait for a canine unit. Exh. 5 at 11:00. Thus, SUBJECT OFFICER 1's unlawful search of Complainant's car was knowing and constituted harassment. The allegation of harassment against SUBJECT OFFICER 1 for the search of Complainant's vehicle is sustained.

#### **F. SUBJECT OFFICER 4's Threat Of Arrest And Revocation Of Complainant's License Constituted Harassment**

The Complainant alleged that SUBJECT OFFICER 4 harassed him by threatening to arrest him and take his car and license if he refused to take the SFST. For the threat toward Complainant to amount to harassment, it must have been purposeful, knowing, or reckless in violation of the law or internal guidelines of the MPD and resulted in the infringement of personal or property rights; or deny or impede the person in the exercise or enjoyment of any right, privilege, power, or immunity.

SUBJECT OFFICER 4 made incorrect statements to Complainant as to the consequences of his refusal to take the SFST on several occasions:

- At minute 20:18 of SUBJECT OFFICER 2's BWC footage, SUBJECT OFFICER 4 states, "we actually gave you too much leeway giving you the option to take this test. . . . If you don't take the test, we can't allow you to take the vehicle."
- At minute 27:50 of SUBJECT OFFICER 2's BWC footage, SUBJECT OFFICER 4 says, "what [the bystanders are] telling you is right. You refuse to take the test and that's your license right there."
- At minute 31:00 of SUBJECT OFFICER 2's BWC footage, SUBJECT OFFICER 4 tells Complainant, "you're going to keep saying no. We're going to get tired of waiting. You're going to say no. And we're going to say is that your final answer. You're going to say yes. We're going to take your license. . . . We've been more than patient and make sure why this is happening. . . . If you lose your license, how are you going to get to school?"
  - Complainant perceives SUBJECT OFFICER 4's statement as a threat because he says, "now you're threatening me?"

- At minute 35:23 of SUBJECT OFFICER 4 BWC footage, SUBJECT OFFICER 4 speaks privately with Complainant and tells him that the only way he is going to be able to leave is if he takes the SFST.

That Complainant felt threatened to take the SFST by SUBJECT OFFICER 4 is reflected not only by his comment at minute 31 of SUBJECT OFFICER 2's BWC footage, but also on his complaint in which he says, "they then threatened me to take me to jail if I didn't take the drug test." Similarly, during his interview with OPC he stated that he did not want to take the test because he was not under the influence and felt fine, but that they threatened to arrest him and take his car and license if he did not. Thus, SUBJECT OFFICER 4's incorrect statements of law to Complainant were perceived by him as threats and led a) to his decision ultimately to take the SFST and b) to the continued unlawful prolongation of Complainant's stop.

During his interview with OPC, SUBJECT OFFICER 4 initially indicated a belief that a license could be revoked if a driver refused to take the SFST and refused to give a blood sample, but he did not know what would happen if a driver refused to take only the SFST. Exh. 13 at 11:45. Thus, SUBJECT OFFICER 4 does not appear to have intended or known that his statements were incorrect. However, SUBJECT OFFICER 4 is required to "familiarize [himself] with the laws and regulations [he] is required to enforce." MPD General Order PER-201.26, Duties, Responsibilities and Conduct of Members of the Department, eff. April 5, 2011, V. B.1.

The law pertaining to the repercussions of a test refusal apply only to blood and urine tests. Moreover, Department policy clearly states that a driver may refuse an SFST. MPD General Order PCA 502.02 at the Note following V.A.4. If SUBJECT OFFICER 4 was not familiar with the laws and policies relating to SFSTs, then he should have refrained from making statements regarding those repercussions. Notably, the one expert regarding the SFST, SUBJECT OFFICER 2 never made threats such as those made by SUBJECT OFFICER 4 and, as SUBJECT OFFICER 2 was the expert, SUBJECT OFFICER 4 should have followed his lead. Instead, he chose to make threats to Complainant beyond anything SUBJECT OFFICER 2 stated. While SUBJECT OFFICER 4's unlawful conduct may not have been intentional or knowing, it was reckless. As such SUBJECT OFFICER 4's statements constituted harassment and the allegation of harassment against him is sustained.

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**V. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER 1

<b>Allegation 3</b>	Harassment (Search)	Sustained
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SUBJECT OFFICER 2

<b>Allegation 2</b>	Harassment (Prolonged Traffic Stop)	Sustained
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SUBJECT OFFICER 3

<b>Allegation 2</b>	Harassment (Prolonged Traffic Stop)	Sustained
<b>Allegation 3</b>	Harassment (Search)	Sustained

SUBJECT OFFICER 4

<b>Allegation 1</b>	Harassment (Threat of Arrest)	Sustained
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Submitted on April 4, 2018.

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Jennifer A. Fischer, Esq.  
Complaint Examiner