



## **OMBUDSMAN'S REPORT**

### **Complaint Investigation & Findings**

*OMB07/0054 - November 26, 2007*

#### ***THE SITUATION***

Shortly before the bars closed on a winter morning in 2007, the Complainant and his companions exited a bar. One of the Complainant's companions, Witness #7, hit another person in the face. The bouncers who worked at the bar detained Witness #7 and contacted the police. While the police were on the ground trying to bring Witness #7 under control, the Complainant tried to go toward the area where the struggle was taking place. The bouncers stopped the Complainant and pushed him back into the crowd. A short time later, Officer #3, who had seen the Complainant trying to get through to the officers and Witness #7, talked to the Complainant and told him that if he had to deal with him again, he was going to jail. The Complainant made derogatory comments to the officers. A young woman reported to Officer #4 that the Complainant had a gun. Officer #4 frisked the Complainant and found no weapon. Officer #3 then placed the Complainant under arrest and charged him with public intoxication.

#### ***THE COMPLAINT***

The Complainant filed a complaint by electronic mail on April 19, 2007. In his complaint, he alleged that Officer #3 arrested him without probable cause. The Complainant also alleged that Officer #3 incorrectly reported that he made derogatory statements to the officers before he was arrested. The Complainant maintained that he made the statements after he arrived at the jail. These allegations, if proven true, would be a violation of the Boise Police Department's Policy § 11.03.16B False Reporting and § 11.03.02 Performance of Duty.

## ***THE COMPLAINT INVESTIGATION***

The investigation into the complaint included interviews of the Complainant and Witness #2, Witness #3, Witness #4, and Witness #7, the persons who were with the Complainant at the time the incident occurred. Interviews were also conducted with Witness #1, the man who was hit in the face, and with Witness #5 and Witness #6, who worked as bouncers at the bar where the incident occurred. In addition to civilian witnesses, interviews were also conducted with Officer #1, Officer #2, Officer #3, Officer #4, and Supervisor #1, all of whom were involved in the incident in some manner. The investigation included the review of the following documents: the dispatch record; the police report; the digital audio recordings made by the officers during the incident; and three digital photographs taken by Witness #3 on his camera phone.

## ***WHAT THE COMPLAINT INVESTIGATION FOUND***

Based on the preponderance of the evidence obtained and reviewed in the course of this investigation, I issued the following findings of fact.

1. In the early hours of a winter morning in 2007, the Complainant and his friends left a bar in downtown Boise.
2. Witness #7, one of the persons with the Complainant, hit another person in the face.
3. The bouncers, who had followed the Complainant and his friends out of the bar, took physical control of Witness #7 and signaled to the nearby police officers for assistance.

4. While Witness #7 was engaged in a physical struggle with the officers, the Complainant attempted to approach the area where the struggle was taking place.
5. The bouncers blocked the Complainant's approach and pushed the Complainant back into the crowd.
6. Officer #3, who was patrolling the perimeter, advised the Complainant that if he had to deal with him again that night, he would be going to jail.
7. A female bystander reported to Officer #4 that the Complainant had a gun. Officer #4 frisked the Complainant and found no gun. Supervisor #1 kept watch on the Complainant while he was being detained.
8. The Complainant made comments at the scene of the incident to Supervisor #1 regarding San Diego and regarding Supervisor #1's wife.
9. The Complainant's eyes were red and he smelled like alcohol.
10. After the Witness #7 was placed under arrest, Officer #3 returned to where the Complainant had been detained and placed him under arrest for public intoxication.

## ***OMBUDSMAN'S ANALYSIS***

### **I. Probable Cause to Arrest the Complainant.**

The Complainant claims that Officer #3 did not have probable cause to arrest him. Arresting someone without probable cause, or other lawful justification, would be a violation of BPD Policy § 11.03.02, which states:

*11.03.02 Performance of Duty*

*An employee shall perform his/her duties in a manner which will maintain the highest standards of efficiency in carrying out the Department's functions and objectives. Satisfactory performance and competence is demonstrated by:*

- *Adequate knowledge of the application of laws required to be enforced*
- *Willingness and ability to perform assigned tasks properly*
- *Conformance to the work standards established for the employee's rank, grade, or position*
- *Taking appropriate and timely action when a crime, disorder, or other situation requiring police action occurs.*

Arresting a person without probable cause, or other lawful justification, would demonstrate an inadequate knowledge of the law.

The first question is, "What is probable cause?" In the context of an arrest, probable cause means that an officer has information that would lead a person of ordinary care and prudence to believe that a person has committed a crime. For an officer to have probable cause, he does not need to have proof beyond a reasonable doubt. In other words, an officer does not need to have enough evidence to convict the person of a crime in order to arrest that person. Probable cause is a common sense standard. There must be a reasonable probability that the person to be arrested has committed a crime.

Officer #3 charged Complainant #2 with public intoxication, which is a misdemeanor. A police officer may arrest someone for a public offense committed in the officer's presence.<sup>1</sup> The ordinance prohibiting public intoxication is defined in Boise City Code 6-01-06, which states:

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<sup>1</sup> See Idaho Code § 19-603(1).

*Any person, who is in public and intoxicated at a level that presents a danger to that person or others or creates a disturbance of the peace, shall be guilty of a misdemeanor.*

In order to have probable cause to arrest the Complainant for public intoxication, the offense needed to have occurred in Officer #3's presence, and Officer #3 needed to have objective reasons to believe that the Complainant was: 1) in public; 2) intoxicated; and 3) creating a disturbance.

Because there is no question that the Complainant was in public, the next question is whether Officer #3 observed facts that would make an ordinary person think that the Complainant was intoxicated. Officer #3 stated in his report that the Complainant smelled of alcohol and that his eyes were bloodshot and glassy. The Complainant, by his own admission, stated that someone had knocked over a bottle of beer that had spilled on him. In addition, Witness #3 stated that the Complainant's eyes were always red as a result of wearing contacts. While smelling of alcohol and having red eyes may be insufficient evidence to convict a person of being intoxicated, a person of ordinary care and prudence would believe that the person was intoxicated.

The next question is whether Officer #3 had probable cause to believe that the Complainant was creating a disturbance. Officer #3 stated in his police report and in his interview that the Complainant created a disturbance by trying to charge Officer #1 and Officer #2 while they were attempting to make a lawful arrest. The Complainant admitted in his interview that he tried to get closer to Witness #7. Witness #5 and Witness #6, the bouncers who worked at the bar, both stated that the Complainant tried to get to the officers. The Complainant's actions in trying to get to the place where the officers were struggling with Witness #7 provided Officer #3 with sufficient probable cause to believe that the Complainant was disturbing the peace.

It should be noted that Officer #3 also stated that the Complainant created a disturbance by yelling obscenities and derogatory statements at the officers. While yelling, by itself, can be a disturbance of the peace, if the yelling is done in a quiet neighborhood, it is questionable whether yelling in a crowd of noisy, downtown bar patrons, many of whom are also yelling, is truly a disturbance of the peace. This is especially true where the Complainant's voice cannot be heard on the audio recordings.

Of even greater importance is the fact that using obscenities, and making derogatory statements about police officers, cannot, by itself, be considered a disturbance of the peace. The First Amendment protects commentary directed at public officials, however mean-spirited or unpleasant. If the comments become threats or an incitement to violence, the situation changes; but simple negative statements regarding the police should not be considered to be the basis for disturbing the peace.

In summary, even though the Complainant's statements to Supervisor #1 and other officers were not a basis for charging the Complainant with disturbing the peace, the Complainant did engage in actions that appeared to be an attempt to prevent the officers who were struggling with Witness #7 from effecting a lawful arrest. This action, combined with the odor of alcohol and the Complainant's red eyes, provided probable cause for Officer #3 to place the Complainant under arrest for public intoxication, a misdemeanor that was committed in his presence.

## **II. False Reporting.**

The second issue raised by the Complainant is an allegation that Officer #3 falsely reported that the Complainant made derogatory statements to the police at the scene of the incident. The Complainant claims that he made the statements, but did not make them until he reached the jail. BPD Policy § 11.03.16B addresses the issue of making false reports in Department records or reports; it states:

### *11.03.16B False Reporting*

*No employee shall knowingly enter or cause to be entered any inaccurate, false, or improper information or misrepresent the facts in the Department records or reports. The violation of this policy may result in discipline up to and including termination.*

The question presented is whether Officer #3 knowingly entered inaccurate facts in the police report.

Officer #3 reported that the Complainant made a number of derogatory statements including calling Supervisor #1 a “hillbilly, redneck cop.” The Complainant also made baseless and inflammatory comments indicating that Supervisor #1’s spouse was being unfaithful to him. The Complainant admitted to having made these comments in order to “get under [the officer’s] skin.” In his supplement to Officer #3’s report, Supervisor #1 also reported that the Complainant made the same comments. While the Complainant claims to have made these comments at the jail, Supervisor #1 did not assist in transporting the Complainant to the jail, nor did he go to the jail.

One of the problematic issues in the case is that the Complainant’s comments are not on Officer #3’s audio recordings. Of even greater concern, the comments did not initially appear to be on Supervisor #1’s audio recordings either. Listening closely to Supervisor #1’s audio recording, even given the low tones in which the Complainant speaks, it is possible to discern the Complainant’s voice amidst the background noise and the voices of the crowd. While most of the Complainant’s words are indiscernible, the words, “San Diego” and “wife” can be heard. This suggests that the Complainant made the alleged statements at the scene. The officers’ statements, together with the two words on the audio recording, show by a preponderance of the evidence that Officer #3 made no false representation of fact in his police report.

## ***OMBUDSMAN'S FINDINGS***

### Officer #1

|                  |                     |                   |
|------------------|---------------------|-------------------|
| P.M. § 11.03.02  | Performance of Duty | <b>Exonerated</b> |
| P.M. § 11.03.16B | False Reporting     | <b>Exonerated</b> |



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