BOARD OF FIRE AND POLICE COMMISSIONERS
OF THE CITY OF MILWAUKEE

In the Matter of the Appeal of Richard A. Schoen
Personnel Order 2012-60

Hearing Dates:	November 28, 2012 December 3, 2012 December 11, 2012
Hearing Location:	200 East Wells Street, Room 301A, City Hall Milwaukee, Wisconsin
Commissioners:	Richard C. Cox Paoi X. Lor Michael M. O'Hear
Hearing Examiner:	John J. Carter
Appearances:	Adam B. Stephens, Assistant City Attorney For the Milwaukee Police Department
	Attorney Jonathan Cermele For Appellant Richard A. Schoen

PROCEDURAL HISTORY

The Chief of Police, Edward A. Flynn, charged Police Officer Richard A. Schoen in Personnel Order 2012-60 dated May 1, 2012, with the following violation of Milwaukee Police Department Rules and Procedures:

1. Core Value 6.00 – Restraint, referencing Guiding Principle 6.01: Excessive Use of Force.

Schoen, the Appellant in this matter, filed an appeal with Milwaukee Fire and Police Commission from the order of the Chief of Police and a hearing was held.

SUMMARY OF HEARING PROCEEDINGS

The hearing was conducted on November 28, 2012, and December 3, 2012. The hearing was recorded by a stenographic reporter. Testimony was taken from the following witnesses:

For the Chief of Police:	Jeanine Tracy Police Officer Bobby Lindsey, Milwaukee Police Department Sergeant Rupert Reilly, Milwaukee Police Department Sergeant Lisa Gagliano, Milwaukee Police Department Chief Edward Flynn, Milwaukee Police Department Lieutenant Johnny Sgrignuoli, Milwaukee Police Department
For the Appellant:	Robert C. Willis Randall L. Revling Police Officer Richard A. Schoen, Milwaukee Police Department

Based upon the evidence received at the hearing, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On September 22, 2011, at about 9:00 p.m., the Appellant, Officer Richard A. Schoen, and his partner, Officer Nicholas Federer, conducted a traffic stop of a vehicle driven by Jeanine Tracy. According to Schoen, the stop was based on a sudden lane change that was made by Tracy without the proper use of a signal.

2. A video camera inside the squad car captured much, though not all, of the subsequent interactions between Schoen, Federer, and Tracy. We have viewed the entire twenty-minute video from the time of the initial stop through the later events giving rise to the present charge against Schoen. Our findings are largely based on the video, although we have also taken into account the testimony and documentary evidence submitted by both parties. We have also given due regard to the testimony of Schoen's expert witness Robert C. Willis regarding the potential limitations of video evidence, but, even taking those limitations into account, we believe the video evidence in this case to be clear and compelling as to most of the matters of concern in this appeal.

3. After a brief interaction between Tracy and Federer, Tracy was asked to exit her vehicle. She was in short order handcuffed and placed in the back of the squad car, allegedly for disorderly conduct. Tracy remained handcuffed for the remainder of the events depicted in the video.

4. By the time Tracy was placed in the squad car, which is when we can first make out the audio portion of the recording, it seems that both Tracy and Federer were in an agitated state and using angry tones of voice. Schoen seems to have interacted less with Tracy at the traffic stop and to have focused more on Tracy's daughter, who was also present at

the stop but not placed under arrest. To the extent that Schoen did interact with Tracy at the stop, he appears to have used a calmer tone of voice than his partner. Randall L. Revling, another expert witness who testified on behalf of Schoen, observed that Schoen's calmer, more professional approach at the traffic stop seemed for a time to help in calming Tracy down.

5. Tracy demanded that she be searched by a female officer, rather than by Schoen or Federer. This request was accommodated. When a female officer arrived on the scene, Tracy exited the squad car for the search. The immediately ensuing events were not visible on the video, but there seems no dispute that Schoen used a measure of force on Tracy in connection with the search. Schoen has not been charged with that use of force, and we express no opinion as to whether it was justified. What is clear is that Tracy was very upset about the use of force when she was returned to the back of the squad car and expressed her displeasure loudly and at length and with considerable profanity.

6. Tracy was then transported to the District Seven police station. During the trip, she spat numerous times on the partition dividing the front and back of the car. At the hearing, Schoen's counsel characterized this behavior as spitting "at" the officers in the front seat, although it is hard to have a sense from the video as to whether the spitting was indeed directed specifically at the officers. We note, too, that Tracy had requested to spit out of the car while at the traffic stop.

7. At one point during the car trip, the radio was turned on and music played at a high volume, in order either to drown out Tracy's complaints or to try to calm her down (the record contains contradictory indications on this point). Whatever the motivation, Tracy did indeed grow quieter after the music was turned up, and even later asked to have it put back on when it was turned off.

8. Upon arrival at District Seven, the squad car was parked in the garage, and Federer went to obtain a spit hood for Tracy. Schoen and Tracy remained in the car. Tracy then began to stomp in the backseat. At the hearing, she testified that she was scared of being left alone with Schoen. In any event, Schoen responded to the stomping by yelling, "Knock it off." Tracy also began to complain that her leg hurt. Schoen then exited the front seat, opened the back door on the passenger side, and yelled at Tracy to "get out." When she did not immediately do so, he reached into the back seat and grabbed the front of her shirt near her abdomen.

9. Tracy then pulled away from Schoen, shifting her body toward the driver's side of the car. Based on our review of the video, as well as the entire series of interactions between Tracy and the officers, we believe that this pulling away by Tracy was a fear response, and most definitely not a preparation for an attack on Schoen. As her upper body moved away from Schoen, her legs also necessarily shifted. At the hearing, it was suggested that Schoen perceived a kick from Tracy's direction, but given that Tracy was handcuffed, off balance, and confined to a narrow backseat, we do not believe that Schoen could have been genuinely concerned about a kick attack. Indeed, in his account to the Chief of what happened in the backseat, Schoen did not even mention a kick (Exhibit 5).

10. Off balance as she was, and screaming in fear or pain, Tracy's upper body rocked back toward the passenger side at the same time that Schoen's body moved further into the car in response to her initial pullback. Schoen testified that he looked up just then to see Tracy's open mouth only a few inches away and headed in his direction. He testified to a fear that she would either spit at him or bite him. However, the video shows that Tracy's mouth was wide open in a screaming position; it is hard to imagine how she could spit effectively in this position. It is somewhat more plausible that he feared a bite, but we note again that Tracy was handcuffed, off balance, and contained within a narrow space, which would have made a bite difficult to pull off.

11. Whatever his perceptions of a threat, Schoen chose to respond with a handful of quick punches or "focused strikes" to Tracy's head. These were delivered with his right hand, while his left hand continued to clutch Tracy's shirt. We note that Schoen's "strong" hand is his left hand. He then grabbed Tracy's hair and pulled her out of the car.

12. What happened outside the car is captured on video from the District Seven garage. Tracy was thrown to the ground, with Schoen on top of her. He delivered a knee strike in this position. He pulled her back by the handcuffs a short distance across the floor and then into a standing position. Schoen and another officer then escorted her outside the view of the video camera.

13. A subsequent medical examination revealed no visible physical injuries to Tracy from the attack.

CONCLUSIONS OF LAW

14. In a disciplinary appeal, our hearings are divided into two phases. In the first phase, we determine whether a Department rule has been violated. If we find a rule violation, then we conduct a "Phase II" hearing to determine what discipline to impose.

PHASE I

15. In the first phase, our decision is governed by the first five "just cause" standards set forth in Wis. Stat. §62.50(17)(b) and in Section 12 of the Fire and Police Commission's Trial Procedures. The Department bears the burden of proof as to each of these standards.

16. The first just cause standard is "Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct." There can be no dispute that excessive force is one of the most serious forms of misconduct of which an officer may be guilty. This is a betrayal of public trust of the first order, and we have no difficulty concluding that officers are reasonably aware of the probability of discipline up to and including discharge for striking a handcuffed subject in the sorts of circumstances present here.

17. The second just cause standard is "Whether the rule or order that the subordinate allegedly violated is reasonable." The rule at issue reads, "Police members shall exercise restraint in the use of force and act in proportion to the seriousness of the offense and legitimate law enforcement objectives to be achieved." We do not see any possible objection to the reasonableness of this rule, which embodies one of the most important principles that must govern police conduct if the police are to maintain and deserve the public's trust.

18. The third just cause standard is "Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order." In this case, the video largely speaks for itself, and it may be that little more by way of investigation is necessary than to view the video. However, the testimony of Lieutenant Sgrignuoli, as well as the many documents introduced into evidence in this appeal that were collected or generated in the investigation of this matter, demonstrate that appropriate and thorough investigation procedures were followed, including giving Schoen ample opportunity to present his side of the story. We conclude that the third just cause standard is satisfied.

19. The fourth just cause standard is "Whether the effort described [in the third standard] was fair and objective." For the reasons set forth in Paragraph 18 above, we believe that the Chief has also satisfied this standard. No evidence to the contrary was presented at the hearing.

20. The fifth just cause standard is "Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate." There is no question that Schoen used force against Tracy. The specific acts of force that have been charged are the punches or strikes to the face, the pulling of Tracy from the car by her hair, and the knee strike while she was on the ground. There is no dispute that Schoen committed the charged acts. The only question is whether these acts were consistent with the requirements of "restraint" and "proportional[ity] to the seriousness of the offense and the legitimate law enforcement objective to be achieved."

21. Simply put, it is hard to see any legitimate law enforcement objective being pursued in Schoen's actions at District Seven, much less being pursued in a proportional way. Schoen testified to concern regarding Tracy's well-being in light of her complaint about her leg. This is belied, however, by his rough tone of voice, his failure to make any attempt to ask her what was wrong with her leg, and his evident determination to extract her immediately and forcibly from the car without regard to what effect this might have on Tracy physically or emotionally. This was not the conduct of an officer motivated by a genuine care for Tracy's well-being—it should have been obvious to him that he was acting in a manner that might be far more damaging to Tracy than whatever was bothering her leg. Rather, we cannot conclude but that Schoen lost his temper. This seems clearly revealed to us by his tone of voice, by the abrupt decision to forcefully extract Tracy from the car, by the rapid escalation of the violence against her, and by the entire sequence of interactions with Tracy beginning at the traffic stop, which were doubtlessly very frustrating to the officers.

22. At the hearing, Schoen's counsel, with the aid of a distinguished expert witness, broke down the events in the backseat of the car in painstaking detail, in an effort to establish appropriate motivations for each of Schoen's actions taken in isolation. There is some value to this approach, but it is also important not to miss the forest for the trees. All of Schoen's actions were part and parcel of a loss of temper and due restraint. He was angry at her and was going to pull her from the car whatever force it took and without regard to any other considerations. We do not, in any event, believe that at any time she posed a serious threat to him or that he genuinely felt in danger. Tracy was handcuffed and securely contained in a squad car in the garage of a police station. Even after Schoen introduced his body into the backseat area, there was little that Tracy could do to harm him, and he demonstrated his ability to withdraw his body from the car very quickly indeed once he grabbed Tracy's hair.

23. At the hearing, the Chief's experts in law enforcement defense and arrest tactics testified convincingly that, even if Schoen was concerned about Tracy's leg problem, there were a variety of things that Schoen could have and should have done differently. For instance, Schoen could have attempted to engage Tracy in dialogue using the "professional communications" techniques that are taught to all members of the Department. While Schoen's expert suggested that this would have been futile based on Tracy's earlier behavior and highly agitated state, we believe that the partial success that Schoen had in engaging with Tracy at the traffic stop demonstrates the contrary. We note, moreover, that Tracy had plainly calmed down while the music played during her transportation to District Seven. There was no basis, in our view, for Schoen to reject further professional communications without first giving them a try. We also agree with the Chief's experts that Schoen should have waited for assistance before attempting to forcefully extract Tracy while he was in an emotionally agitated state. Waiting for his partner to return or seeking assistance from another officer would have given Schoen an opportunity to cool off and would have ensured an ability to control or remove Tracy from either the passenger's or the driver's side of the car, depending on which side presented the best position for safe and effective engagement.

24. At the hearing, Schoen presented evidence that Tracy had run-ins with the law both before and after the events of September 22, 2011. We do not see the relevance of these matters. Tracy is not on trial in this appeal, and the credibility of her testimony is not crucial to our decision in light of the video evidence. What matters are Schoen's actions, perceptions, and intentions on the night in question, and Tracy's legal issues—especially those occurring after that night—do not seem to us to illuminate matters much.

25. We note, too, that Schoen's own credibility has been severely compromised. In his statement to the Chief before discipline was imposed (Exhibit 5), Schoen conceded that he was "in full agreement with both [of the Chief's expert witnesses] that other tactics or strategies could, and should have been employed." However, at the Commission's hearing on this matter, Schoen maintained that his actions were justified and disavowed his earlier statement to the Chief as something he wrote merely for strategic reasons. By

doing so, he puts into doubt all of his statements about this incident—how can we know now which are genuine and which are merely expedient?

26. For these reasons, we conclude that the fifth just cause standard is satisfied.

PHASE II

27. Having found a rule violation and that the first five just cause standards are satisfied by a preponderance of the evidence, we turn to Phase II and the question of discipline. As stated in Wis. Stat. §62.50(17)(a), and echoed in Section 14 of our Trial Procedures, "If the board or panel determines that the charges are sustained, the board shall at once determine whether the good of the service requires that the accused be permanently discharged or be suspended without pay for a period not exceeding 60 days or reduced in rank." In making this "good of the service" decision, we take into account the sixth and seventh just cause standards. We need not, however, impose a burden of proof on the Department. In both the statute (Wis. Stat. §62.50(17)(a)) and our rules (Trial Procedures §12(b)), the preponderance standard is associated only with the decision about whether the "charges" are sustained. The statute and the rules are silent with respect to a burden of proof for a disciplinary (i.e., Phase II) decision. We do not believe this difference to be merely a product of careless drafting. A Phase I decision is, by its nature, primarily a determination of historical fact: did the charged officer actually do what the Department accuses him of doing? By contrast, a Phase II decision necessarily requires an exercise of judgment; there is no objectively "correct" discipline in the same way that there are objectively right and wrong determinations of historical fact. A Chief exercises discretion in determining what discipline best serves the "good of the service." In making this decision, the Chief, who is much closer than we are to the day-to-day operations and needs of the Department, brings uniquely valuable perspectives to bear. For this reason, we believe it appropriate for us to show a measure of deference to the Chief's disciplinary decisions, at least where it seems that the Chief is acting reasonably and proceeding in a fair and nondiscriminatory fashion. This is not to say that our Phase II role is merely to serve as a "rubber stamp," but it is to acknowledge that the Chief's position and expertise are often entitled to some respect when the question is what the good of the service requires.

28. The sixth just cause standard is "Whether the chief is applying the rule or order fairly and without discrimination against the subordinate." The Chief based his decision on an extensive investigation of Schoen's conduct, and further testified as to the various legitimate considerations relating to offense severity that governed his decision. No evidence was presented suggesting that the Chief was motivated by personal animus against Schoen or otherwise took into account improper considerations.

29. Bearing on both the sixth and seventh standards, the Chief was presented with four "comparables," that is, earlier cases that have similarities with this one. All four involved excessive force. In fact, we understand these to be the only four excessive force cases for which the current Chief has imposed discipline. The discipline in these cases ranged from a one-day suspension to a 60-day suspension. The 60-day suspension, imposed on

an Officer Woller in 2008, was considerably more severe than the discipline imposed in the other three cases. At the hearing in this matter, the Chief identified as a distinguishing feature of the Woller case that the victim had been handcuffed and in control when he was attacked. This, of course, is also an important aspect of the present case. Thus, it seems to us that the Woller matter is the closest of the four comparables and provides support as precedent for the level of discipline imposed on Schoen. Indeed, the Chief initially discharged Woller, as he did Schoen, but then later reduced the discipline to a 60-day suspension. At bottom, we see no troubling inconsistencies between the treatment of Schoen and the treatment of other officers who used excessive force.

30. We conclude, for the foregoing reasons, that the sixth just cause standard is satisfied, and we would reach this conclusion regardless of whether the Department bore a burden of proof.

31. The seventh just cause standard is "Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department." We believe that the violations in this case were very serious indeed. As a general matter, there may be no more serious form of officer misconduct than excessive force, which potentially jeopardizes life and limb. Even when no serious physical injury is sustained as a result of an officer assault, a victim may nonetheless suffer severe emotional trauma. Moreover, we agree with the Chief in his testimony that excessive force has an important negative effect on the reputation of the entire Department.

32. To be sure, as Schoen's counsel observed at the hearing, there are some respects in which the seriousness could be even worse. For instance, we were presented with no evidence that Tracy suffered a serious physical injury. Additionally, when one views the entire twenty-minute video, one appreciates that the amount of time when Schoen was out of control was very brief—really, only a matter of seconds. Additionally, we see no affirmative desire on Schoen's part to cause injury—angry and uncaring, yes, but not deliberately sadistic. Still, the fact that this misconduct might have been worse does not mean that it is insufficiently serious to warrant discharge.

33. On the other hand, Schoen does have a positive record of service to the Department. He joined the Department on April 28, 2003. In nine years of service, he has not been the subject of even one prior allegation of excessive force, much less a sustained finding. His one prior discipline was a reprimand in 2007 for a dissimilar incident that even the Chief concedes has no real bearing on the present matter. Moreover, in reviewing Schoen's performance evaluations, we are struck by the frequent positive comments by supervisors over the years about his respectfulness to citizens, his "calm demeanor at chaotic scenes," his use of "tactical communication skills to defuse tense situations," his "excellent communication skills which he employs to manage disturbances and agitated subjects," his self-discipline, his "even temperament during tense situations," his "ability to handle citizens in a manner in which he can calm them," his "good temperament when

interacting with prisoners," and his courteousness. (Exhibit 20) Such comments provide some reassurance that Schoen's behavior on September 22, 2011, was atypical for him.

34. Based on Schoen's record of service to the Department, as well as his record of more than a decade of honorable service in the United States military, two of the undersigned (Commissioners Lor and O'Hear) were initially of the view that a 60-day suspension without pay would be a more appropriate discipline than discharge. In reaching this initial decision, we did not take into account the considerations identified in Section 14 of our Trial Procedures. We note that Section 14 was not provided to us in its entirety prior to our deliberations. (*See* Exhibit 3) Nor were the statutes provided to us at all. We also note that neither counsel otherwise drew our attention to Section 14 or highlighted what we now see as the key language in Section 14. In particular, we were not provided with the "good of the service" language, and the Phase II question was not presented to us in those terms. Now, with the benefit of time, reflection, and a more complete understanding of the relevant legal standards, Commissioners Lor and O'Hear join Commissioner Cox in agreeing with the Chief's recommendation that Schoen be discharged permanently from the Department.

35. The real challenge posed by this case is deciding how to balance a very serious violation against a positive record of service. In his testimony at the Phase II hearing, the Chief was very clear that he regarded the violation as so serious as to outweigh the acknowledged positive aspects of Schoen's record. Having now fully reviewed Sections 12 and 14 and Wis. Stat. §62.50(17), and for the reasons identified in Paragraph 27 above, we now believe that the Chief's decision about how to balance the competing factors so as best to achieve the "good of the service" ought to be shown some deference in this case.

36. Section 14 illuminates our analysis of the seventh just cause standard in a variety of ways. First, Section 14 makes clear that the seriousness of the offense and the prior record of service must be balanced with an eye to determining what is required by the good of the service; our job is not to select the discipline that seems to us the most just or reasonable in some more open-ended way. Second, the conspicuous absence of a burden of proof in Section 14, coupled with a careful review of the language that does appear in Sections 12 and 14, persuades us that we may defer to the Chief's choice of discipline when the Chief has acted in a fair, nondiscriminatory fashion and when the Chief's decision meets a minimal standard of substantive reasonableness based on the seriousness of the offense and prior record of service. Finally, by directing that evidence "may . . . be received" in the Phase II hearing on "the member's character, work record, and the impact of the misconduct on the complainant, department, and community," Section 14 implicitly indicates that these factors are appropriately taken into account in assessing the seriousness of a violation, the record of service, and what is required for the good of the Department.

37. We note some particular concerns with respect to Schoen's character. First, as indicated in Paragraph 25 above, Schoen's inconsistencies have seriously comprised his credibility. Second, in the Phase II hearing, even after we determined that he had violated the

excessive force rule, Schoen failed to accept responsibility for the violation in a clear, unequivocal way. Although he indicated that he "learned" from the experience and would like to apologize to Tracy, he still maintained that, in his view, he had acted properly in responding to Tracy's actions in the back of the squad car.

38. In light of the seriousness of the violation, the concerns regarding Schoen's character, and our view that the Chief has made a fair, nondiscriminatory, and reasonable decision to discharge, we conclude that the good of the service requires that Schoen be permanently discharged.

DECISION

The charge against the Appellant, Richard A. Schoen, is sustained and he is permanently discharged from the Milwaukee Police Department.

Dated at Milwaukee, Wisconsin.

BY THE COMMISSION:

Richard C. Cox — 12/12, 2012

Paoi X. Lor — 12/12, 2012

Michael M. O'Hear — 12/11, 2012