

**CITY OF SEATTLE
PUBLIC SAFETY CIVIL SERVICE COMMISSION**

In the matter of the appeal of

TERRY DUNN,

Appellant

v.

SEATTLE POLICE DEPARTMENT,

Respondent

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

PSCSC No. 05- 007

This matter was heard pursuant to a Notice of Appeal filed by Officer Terry Dunn appealing a ten day suspension issued by the Seattle Police Department (Department). A full evidentiary hearing was held on October 25 and 26, 2005 before Commissioners Bown, Johnson, and Nark, with Commissioner Nark acting as Presiding Officer.

Sgt. O'Neill, a Police Officers Guild official, assisted Officer Dunn. Mark McCarty, Police Department Legal Advisor, represented the Department. After considering the evidence in this case, including the testimony, documentary evidence, and arguments of the parties and their representatives, the Commission by majority vote of those present enters the following Findings of Fact, Conclusions of Law, and Order.

I. INTRODUCTION

1. Officer Dunn is a Patrol Officer for the Seattle Police Department.

2. On October 8, 2004, Officer Dunn was working in the Pioneer Square district of downtown Seattle. An incident occurred in which Officer Dunn used force to restrain an individual. The individual filed a complaint. (Exhibit 2, p.9).

3. The Department Office of Professional Accountability – Investigation Section investigated the complaint. (Exhibit 2).

4. On May 12, 2005 Chief of Police Kerlikowske notified Officer Dunn that he had decided to accept a sustained finding of misconduct for Conduct Unbecoming an Officer and for Unnecessary Use of Force. Chief Kerlikowske modified the proposed discipline from a thirty day suspension without pay to a ten day suspension without pay. (Exhibit 5).

5. Officer Dunn received the May 12 notice on May 16, 2005 and filed a timely appeal with the Commission on May 23, 2005.

II. FINDINGS OF FACT

A. Undisputed Facts

1. On October 8, 2004, Officer Dunn was participating in a “Buy Bust Operation”, one of three such operations taking place that day in downtown Seattle.

2. In a “Buy Bust” operation, undercover officers buy illegal drugs from dealers, often on the street. Other officers are nearby, ready to move in when the undercover officer buying the drugs signals that the drug deal has been consummated. Other officers are also in the vicinity ready to assist if needed.

3. Some of those other officers may be in uniform, others in plainclothes. Plainclothes in this context means they are in civilian-type clothing, but they may also be wearing something identifying them as police officers.

4. Officer Dunn was working in plainclothes that day. He was wearing a “hidden agenda” jacket. A hidden agenda jacket may look like an ordinary civilian jacket (in this case denim), but the jacket has hidden flaps that the officer can flip down that identify him or her as a police officer.

5. Officer Dunn was a passenger in an unmarked vehicle leased by the Department, a pickup truck driven by Sgt. Larry Brotherton. The truck had no lights, decals or other markings indicating it was being used as a police vehicle.

6. At approximately 1:00 p.m. that day, Sgt. Brotherton was driving the truck southbound on Second Avenue and was making a right turn westbound onto Yesler. Sgt. Brotherton drove the pickup truck into the pedestrian crosswalk, or came very close to doing so, as pedestrians were crossing in the crosswalk with the right of way.

7. At the same time, Gary Roberts was walking eastbound up Yesler toward Second Avenue on his way back to his workplace in the Smith Tower, located on the northeast corner of Second Ave. and Yesler.

8. Mr. Roberts walked around the rear of the truck, and as he did so he hit the rear quarter-panel of the vehicle with his open hand. The resulting noise was loud enough to be heard by a witness standing approximately fifty feet away. The events of the next few minutes are disputed and form the core of the facts upon which this Commission must base its decision.

B. Summary of Evidence Regarding Disputed Facts

1. Officer Dunn’s Testimony

Sergeant Brotherton responded to the loud noise by telling Officer Dunn to “go get that guy and see what his problem is”, while he checked to see if their vehicle was damaged. Officer

Dunn followed Mr. Roberts across Second Avenue. Officer Dunn was wearing a baseball cap with a Department insignia on it.

He yelled at Mr. Roberts, identifying himself as a police officer and displayed his badge to Mr. Roberts as he crossed Second Avenue behind Mr. Roberts. As Mr. Roberts turned, Officer Dunn believed he saw him. Officer Dunn also showed his badge and identified himself again as a police officer as he caught up with Mr. Roberts at the entrance to the Smith Tower. Mr. Roberts was looking right at him and Officer Dunn was sure Mr. Roberts saw the badge and knew he was a police officer at that point.

Mr. Roberts did not stop but continued to enter the Smith Tower. Officer Dunn grabbed Mr. Roberts by the sleeve. Mr. Roberts resisted by pushing back against Officer Dunn. Officer Dunn did not want Mr. Roberts to enter the Smith Tower, because he did not know what risks he might face inside. He therefore pinned Mr. Roberts against the wall in the entryway between the outer and inner doors. Two individuals came from inside the Smith Tower lobby and wanted to know what was going on. Officer Dunn told them he was a police officer, showed them his badge and told them to “back off, this is police business”, or words to that effect. He held Mr. Roberts against the wall until Mr. Roberts calmed down. He asked Mr. Roberts for his identification. He released Mr. Roberts, who provided his identification. Officer Dunn memorized Mr. Roberts name and date of birth, information that would be useful if the Department needed to locate Mr. Roberts later in a follow up if the vehicle sustained damage. He then went back to the truck where Sgt. Brotherton informed him there was probably no damage to the truck . Officer Dunn and Sergeant Brotherton discussed the need to file a written report to document the encounter, which Officer Dunn completed on that same day. (Exhibit 1, Tab A).

2. Gary Roberts' Testimony

Mr. Roberts believed that the pickup truck came dangerously close to hitting two pedestrians who were crossing in the crosswalk in front of him. He also believed the truck was in danger of hitting him. As he walked behind the vehicle, he hit it with his open hand. As he continued crossing Second Avenue toward the entrance to the Smith Tower, he did not hear anyone identify themselves as a police officer and did not see anyone display a badge while he was outside the Smith Tower. As he opened the Smith Tower outer doors, someone grabbed him on the arm and slammed him against the wall in the entryway. At that point, he had no idea the individual was a police officer. Officer Dunn said “you hit my car” or words to that effect. Mr. Roberts offered no resistance. Officer Dunn threw him against the wall several times, striking his head against the hard stone wall. Despite his repeated requests, Officer Dunn did not identify himself. Officer Dunn demanded his identification but would not provide his own. Officer Dunn finally released him and left. Mr. Roberts was very shaken by the incident. He later went to the hospital to receive medical attention for his injuries, which included an egg-sized lump on his head.

3. Luke Byrd's Testimony

Luke Byrd, an investigator for a public defender agency, testified that he was on the sidewalk on the south side of Yesler at least fifty (50) feet from the intersection when he saw the pickup truck cut off two pedestrians in the crosswalk. One of the pedestrians circled behind the vehicle and hit it hard with his flat hand, creating a loud bang. The pedestrian, visibly upset and talking to himself, continued walking behind the vehicle and across Second Avenue toward the Smith Tower. A passenger got out of the pickup truck and pursued the pedestrian toward the Smith Tower entrance.

Mr. Byrd was concerned about the possibility of an assault occurring between the two individuals and brought the situation to the attention of a bicycle officer standing nearby. The bicycle officer seemed unconcerned about the incident. Mr. Byrd saw the passenger push the pedestrian against the wall in the entryway and pin him there with his forearm. He told the bicycle officer what he saw. Mr. Byrd did not see the passenger strike the pedestrian at any time during the incident. During the heated discussion between the passenger and the pedestrian, Mr. Byrd did see the passenger show the pedestrian a badge. Mr. Byrd and the bicycle officer waited outside. The officer inside emerged from the building and then crossed Second Avenue to return to the truck.

4. Jason Yockman's Testimony

Jason Yockman was a security officer working at the Smith Tower at the time of this incident. He testified that he was at his work station in the lobby inside the building when Mr. Roberts entered the outer doors. A second man had grabbed Mr. Roberts as he entered the outer doors and shoved him against the stone wall in the entryway between the outer and inner doors. He was about fifteen feet from the two individuals. The second man was yelling at Mr. Roberts. He quickly went to the entryway to determine what was going on. The man said he was a police officer and showed him a badge. Mr. Yockman saw the officer push Mr. Roberts against the wall and hold him there. He did not see Mr. Roberts resist, nor did he see the officer strike Mr. Roberts.

5. Kumar Natarajan's Testimony

Kumar Natarajan was an elevator operator at the Smith Tower at the time of the incident. He testified he saw a man spin Mr. Roberts around and push him against the wall. He also did not see Mr. Roberts resist nor did he see the officer strike Mr. Roberts.

6. Officer James Kim Testimony

Seattle Police Officer James Kim testified as an expert witness for Officer Dunn. Officer Kim, who is assigned to the advanced training unit of the Department, teaches use of force and suspect control techniques to Seattle Police Officers. He also testifies in Municipal Court cases as an expert witness on police use of force. Officer James Kim testified that police officers are taught in training to try to stop a suspect before he enters a building or other enclosed area if at all possible. He testified that the reason for such training is officer safety, because the officer does not know what risks he may face inside the building. Also, if an encounter turns violent, the officer is much safer out in the open where other officers or members of the public can see what is going on and render assistance if necessary.

He also testified that the Seattle Police Department teaches its officers to get close to a suspect and when necessary to pin him against the wall, which allows the officer to control the suspect and prevent him from striking the officer, pulling a weapon on the officer, or fleeing.

C. Other Evidence

Video security cameras located at the Smith Tower recorded part of the events that occurred that afternoon. The film footage showed that the encounter between Officer Dunn and Mr. Roberts lasted approximately 90 seconds. The Commission reviewed both the video (Exhibit 1) and still pictures created from the video. (Exhibit 3). The attending physician at Swedish Medical Center where Mr. Roberts went later in the afternoon also noted in the medical records that Mr. Roberts had an abrasion on the back of his head. (Exhibit 2, Tab C).

III. COMMISSION FINDINGS ON CONTESTED QUESTIONS OF FACT

1. Mr. Roberts struck the unmarked leased police vehicle with sufficient force that Mr. Byrd, a witness standing approximately fifty feet away, heard a loud bang.

2. Sgt. Brotherton (Officer Dunn's supervisor and the driver of the vehicle), believed that Mr. Roberts may have damaged the vehicle. He directed Officer Dunn to stop Mr. Roberts while he, Sgt. Brotherton, inspected the vehicle for possible damage.

3. The video shows that Officer Dunn was wearing a baseball cap, although no insignia is visible. It also shows that Officer Dunn was displaying his badge to Mr. Roberts as he approached the entrance to the Smith Tower.

4. The video also shows that Mr. Roberts was looking in Officer Dunn's direction before Mr. Roberts opened the building door.

5. Mr. Roberts did not stop. He proceeded to open the outer door to the building.

6. Given Mr. Roberts' agitated state, his size, and that he had not stopped as Officer Dunn commanded him to, Officer Dunn grabbed Mr. Roberts by either the sleeve or the arm and pinned him against the wall in the entryway.

7. As part of their training, Seattle Police officers are taught techniques to control suspects. Those techniques include pinning a suspect against a wall if necessary in order to avoid entering a building or other enclosed area while apprehending the suspect.

8. Because the witnesses disagreed as to whether Mr. Roberts resisted Officer Dunn, we make no finding on that issue, nor do we think one is necessary to our decision.

9. After Officer Dunn pinned Mr. Roberts against the wall, he identified himself as a police officer to Mr. Yockman and Mr. Natarajan. He immediately released him after Mr. Roberts calmed down and agreed to show Officer Dunn his identification. Once Officer Dunn had looked at Mr. Roberts' identification, he left the building.

IV. CONCLUSIONS OF LAW

1. The Public Safety Civil Service Commission has jurisdiction over this matter pursuant to Article XVI, Section 3 of the Seattle City Charter and Seattle Municipal Code (“SMC”) 4.08.190 E.

2. The Department bears the burden of proof in a discipline case such as this.

3. The Commission has the authority to affirm, reverse, or modify the decision of the employing department pursuant to SMC 4.08.100.

4. The charges are that Officer Dunn committed Conduct Unbecoming an Officer and used excessive force in the incident involving Mr. Roberts in violation of SPD Manual Section 1.145 “Use of Force”.

5. SPD Manual Section 1.145 “Use of Force” provides:

Officers may, in the course of their official duties, use only the amount of force necessary and reasonable to effect the lawful purpose intended. When determining the necessity for force and the amount of force required, officers shall consider known circumstances, including, but not limited to, the level of threat or resistance presented by the subject, the danger to the community, and the seriousness of the crime.

6. The crime here was possible property damage to the pickup truck leased to the Department. It was reasonable for Sergeant Brotherton to conclude that whatever Mr. Roberts did to cause the loud bang may have also caused some damage to the vehicle. It was reasonable for Sgt. Brotherton to direct Officer Dunn to stop Mr. Roberts in case there was property damage to the truck. It was reasonable for Officer Dunn, having been given such a direction from his superior officer, to follow Mr. Roberts toward the Smith Tower.

7. Officer Dunn's pursuit of Mr. Roberts was therefore for a lawful purpose. Officer Dunn was investigating whether Mr. Roberts had damaged the vehicle and therefore committed a crime.

8. Officer Dunn properly identified himself verbally as a police officer and displayed his badge to Mr. Roberts before he used any force in the situation.

9. When Mr. Roberts failed to stop and instead proceeded to enter the Smith Tower, it was reasonable and consistent with Department training for Officer Dunn to attempt to prevent Mr. Roberts from entering the Smith Tower, and to use reasonable force if necessary to prevent that from occurring.

10. It was reasonable for Officer Dunn to physically prevent Mr. Roberts from entering the building, using a suspect control technique taught to him by Department training. Officer Dunn pinned, but did not slam, Mr. Roberts against the wall between the outer and inner doorways to the building.

11. There is no other evidence corroborating Mr. Roberts testimony that Officer Dunn repeatedly slammed him against the wall. No other witness testified they saw Officer Dunn repeatedly slam Mr. Roberts against the wall or strike him. The medical records are at best ambiguous on what injuries Mr. Roberts sustained, but there is no evidence in those records that supports Mr. Roberts' claim that he suffered an "egg-sized lump" as a result of the incident.

12. In resolving the differing testimony (particularly between Officer Dunn and Mr. Roberts) regarding the events that day, the Commission is required to make credibility determinations. In evaluating Officer Dunn's credibility, the Commission finds it significant that his initial report filed on the day of the incident, when he did not know the contents of or even

the existence of the videotape, is consistent in most important respects with the events recorded on that videotape.

13. The level of force Officer Dunn utilized to prevent Mr. Roberts from entering the building was reasonable under all the circumstances and consistent with Department training on the use of force.

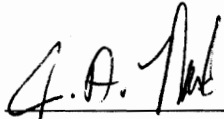
14. The Department has failed to meet its burden of proof that Officer Dunn engaged in conduct unbecoming an officer or that he utilized excessive force in violation of Department Policy Section 1.145.

V. ORDER

IT IS HEREBY ORDERED that the ten day suspension of Officer Dunn is reversed.

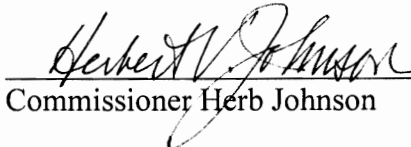
Signed at Seattle, Washington this 30th day of November, 2005.

**PUBLIC SAFETY CIVIL SERVICE COMMISSION
OF THE CITY OF SEATTLE**



Commissioner Joel Nark, Chair

11-28-05
Date



Commissioner Herb Johnson

11/22/05
Date

DISSENT by Commissioner David C. Bown

I dissent from the decision reached by a majority of the Commission in this matter. I do so based upon the longstanding policy of the Seattle Police Department limiting the force used by officers in the lawful performance of their duties to only that amount necessary and reasonable to effect the lawful purpose for which intended. I am guided by the plain language of Department Policy 1.145 quoted in the majority opinion, but in my opinion misapplied by that majority.

Evidence presented during the hearing in this matter included a video taken from a security camera mounted on the building central to the incident in question, the Smith Tower. That video shows the Appellant, Officer Dunn, in speedy pursuit of the Complaining Party, Mr. Roberts, across Second Avenue, with both reaching the outer doors of the building almost simultaneously. Close examination of that video shows Officer Dunn with his hand on Mr. Roberts' arm as they each enter the building in close sequence.

Evidence presented at hearing reflects that within a few scant seconds, Officer Dunn forcibly pinned Mr. Roberts against the building vestibule wall, violently enough to cause a bruise and an abrasion on Complaining Party Roberts' head, a fact supported by documents from the health care provider from whom Mr. Roberts sought treatment shortly after. The suddenness and the intensity of this attack so alarmed witnesses that two (2) of them attempted to intervene on behalf of Mr. Roberts, whom they assumed was being assaulted by a civilian. An additional witness attempted without success to enlist the intervention of another police officer, nearby, into what all three witnesses uniformly described as unnecessarily assaultive behavior on the part of Officer Dunn. (Mr. Yockman, Mr. Byrd, and Mr. Natarajan)

No testimony was presented at hearing to support Officer Dunn's contention that Mr. Roberts resisted. Officer Dunn was in plainclothes, not in uniform. It is not surprising that Mr. Roberts, having just struck the pickup truck, might assume that Officer Dunn was simply an angry citizen who might do him harm. Under those circumstances, I do not believe it to be reasonable for Officer Dunn to have assumed that Mr. Roberts knew that he was a police officer as they entered the building. Further, I am not convinced that Department policy permits the level of force utilized here simply to prevent Mr. Roberts from entering the public lobby of an office building. Mr. Roberts was entering the Smith Tower, not a known crack house, or even a

private residence. I do not find it reasonable that a veteran police officer such as Officer Dunn would conclude that the level of risk of injury to himself would justify the level of force utilized to prevent Mr. Roberts from entering the building.

In short, the use of force to accomplish Officer Dunn's purpose appears to have been predetermined, instantaneous upon entry into the building, leaving no time for any reasonable assessment of the level of any threat posed by Mr. Roberts, any danger to the community posed by Mr. Roberts, or the seriousness of any offense he may have committed. In fact, the only offense alleged against Mr. Roberts was striking the side of an unmarked truck occupied by two plainclothes officers with his bare open hand, hardly an offense justifying the overwhelming force Officer Dunn employed against Mr. Roberts.

I find that actions taken by Officer Dunn to be inconsistent with the policy of the Department, and constitute an excessive use of force in violation of that policy.

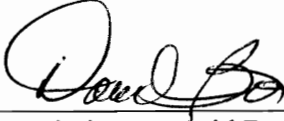
Additionally, consideration must be given to the direct aftermath of the incident in question. Citizens nearby observed the actions taken by Officer Dunn against Mr. Roberts. Testimony given by those citizens reflected extremely negative views of those actions, and, in their stated opinion, the absence of any necessity for the use of such force. Reference was made in the testimony of two (2) of those witnesses to the reluctance on the part of Officer Dunn to identify himself, and his abrupt walking away from the scene without offering any explanation whatsoever for his actions. Thus, these citizens were left with the lasting impression of the violent interrogation of an unresisting fellow citizen by a police officer, occurring without any explanation or justification.

Further, no evidence was presented showing that any emergency demand for police services required the presence of Officer Dunn somewhere else. Officer Dunn, therefore, had

more than ample time to provide an explanation of the necessity for his actions and a justification for his behavior. Yet, he failed or refused to do so, and thus, did nothing to ameliorate the negative impact of this incident, or to protect the image of the Department.

I do not believe that this behavior by Appellant Officer Dunn is consistent with Department policy, and I believe that the charge of conduct unbecoming of an officer is sustained.

The Chief of Police, in considering appropriate disciplinary action in this matter, proposed placing Appellant on suspension without pay for ten (10) days. I believe that to be excessive in light of the record as a whole, including Appellant's length of service and overall employment record. I would find a period of suspension not to exceed three (3) days appropriate under all the circumstances of this case.



Commissioner David Bown Date 11/22/05