

**Decision and Award in the matter of Arbitration between:**

**State of Ohio, Department of Public Safety-Ohio Investigative Unit**

**And**

**The Fraternal Order of Police/Ohio Labor Council, Inc.  
Unit 2**

**Case # 15-03-20130318-05-02**

**Grievant: Thomas Dalton**

E. William Lewis, Arbitrator

Hearing date: August 22, 2013

Date Briefs received: September 28, 2013

Date decision issued: November 4, 2013

Representing the Employer:

Ms. Aimee Szczerbacki, OCB Advocate  
Office of Collective Bargaining  
100 East Broad Street, 14<sup>th</sup> floor  
Columbus, Ohio 43215  
43215

Representing the Union:

Mr. Paul Cox, Chief Counsel  
FOP/OLC, Inc  
222 East Town Street  
Columbus, Ohio

By mutual agreement, the Hearing was scheduled for 10:00am on August 22, 2013. The Hearing was held at the Office of Collective Bargaining.

In attendance for the Employer:

Ms. Aimee Szczerbacki	Advocate,
OCB	

Mr. Victor Dandridge	OCB
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Mr. Larry Hester	witness
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Sgt. Darrell G. Harris	Ohio State
Highway Patrol	

(witness)

Lt. Cassandra L. Kocab	OSHP
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S/Lt. Charles J. Linek	OSHP
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Lt. R. E. Raines	OSHP
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Lt. Col. George Williams	OSHP(witness)
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Mr. Eric Wolf	Agent
in Charge/OIU	

(witness)

In attendance for the Union:

Mr.	Paul	Cox
Advocate, Chief Counsel		

Mr.	Tony	Dalton
Grievant(witness)		

Ms. Renee Engelbach	Paralegal
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Ms. Brenda Goheen  
Representative

Staff

Mr. Byron Gunther

FOP/OLC

Ms. Beth McNutt

(witness)

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Mr. Steve Stocker  
Agent(witness)

Enforcement

The parties were asked to submit exhibits into the record. The following were stipulated to by the parties and submitted as Joint Exhibits:

Joint Exhibit #1  
Agreement

Collective Bargaining

(2012-2015)

between the State of

Ohio/Fraternal

Order of Police/OLC

Joint Exhibit #2  
Dalton

Grievance Trail-Thomas

Joint Exhibit #3  
of

Discipline Trail-Notification

Administrative

Leave, Pre-disciplinary

Conference

Notice, Pre-D Meeting

Officer's Report,

Statement of Charges,

Removal Letter.

Joint Exhibit #4  
Safety Work

Ohio Department of Public

Rules-Performance of Duty-Conduct

Unbecoming an

Officer, H.1. And

Compliance to

Orders, W. 2.

Joint Exhibit #5  
Policy

Ohio Investigative Unit

INV. 200.31

Powers and Duties of

Enforcement

Agents

The following were submitted as Management Exhibits:

Management Exhibit #1  
2012-

Administrative Investigation #

0151(AI)-Agent

Thomas Dalton

Management Exhibit #2

Probationary Agent Orientation

Program Week of

7/19-23, 2010

Management Exhibit #3

ODPS-Investigative Unit Daily

Activity Report,

Thomas Dalton July 19

Thru Aug. 6, 2010

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Management Exhibit #4  
Management

ODPS-Policy & Procedure

Read and Sign

Record-Dalton Thomas

Management Exhibit #5  
Policy #

Ohio Investigative Unit(OIU)

200.39-Response to

Domestic Violence

Offenses -

1/19/2005

The following were submitted as Union Exhibits:

Union Exhibit #1  
incident

Hand drawing of altercation

March 6, 2012

**ISSUE:**

The parties jointly stipulated to the issue, which reads as follows:

Was the Grievant removed from his position at the Department of Public Safety, Ohio Investigative Unit, for just cause? If not, what shall the remedy be?

**BACKGROUND:**

The State of Ohio, Department of Public Safety, Ohio Investigative Unit, hereinafter known as the Employer/DPS, provides law enforcement and investigative services in accordance with Title XLIII (43) of the ORC and for food stamp violations. The Fraternal Order of Police, Ohio Labor Council, hereinafter known as the Union/FOP represents the Enforcement Agents of the OIU.

On March 6, 2012, at approximately 4:15pm, an altercation occurred between Enforcement Agent Dalton and a Mr. Deaton. At the time of the incident, Agent Dalton had approximately eighteen months service with the OIU. Agent Dalton was off duty at the time. He was driving with his children to his girlfriend's residence to celebrate his birthday(ME-1). While traveling to his girlfriend's residence he noticed that he was being followed by Mr. Deaton. Mr. Deaton was his girlfriend's(Ms. McNutt) ex-husband(ME-1). Per the Grievant's testimony and submitted evidence, when he turned onto Ms. McNutt's Boulevard, in Miami Township, her ex-

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husband followed. Ms. McNutt had a restraining order against her ex-husband at the time. By cell phone, the Grievant notified Ms. McNutt to call the Miami Township Police. When he arrived at her residence, he pulled into her driveway, and Deaton stopped also. Deaton's vehicle was partially blocking the driveway(ME-1).

The children were sent into the house. Deaton exited his car and started up the driveway. The Grievant, also out of his vehicle, drew his backup weapon, and ordered Deaton to the ground, stating he was a police officer

two or three times. Deaton failed to respond and retreated towards his car. Threatening words were exchanged, but they were not conclusively identified by evidence or testimony(ME-1). The Grievant holstered his weapon, and attempted to get into position to read Deaton's license plate, per his testimony and submitted evidence(ME-1 & UE-1).

They wound up face to face, and an altercation occurred. Deaton struck the Grievant in the head with his fist, causing him to stumble backwards. Agent Dalton fired his weapon, striking Deaton in the abdomen. Numerous police units began arriving within one-half an hour, and Deaton was transported to the local hospital. He was successfully treated and he recovered(ME-1).

Agent Dalton was placed on administrative duties on March 7<sup>th</sup>. However, he was deployed by the US Coast Guard shortly thereafter, and he returned to duty on December 10, 2012(ME-1).

An Administrative Investigation was initiated on December 20, 2012, by the Ohio State Highway Patrol(JE-3A). "It was found that you engaged in behavior that brought discredit to the Department when you became involved in a physical altercation, while in an off-duty status. You acted outside of the scope of your official duties when you drew a firearm and ordered a citizen to the ground instead of waiting for the appropriate jurisdictional agency to respond to the scene". These actions on your part violated Ohio Department of Public Safety Work Rules #501.02(H)(1) Conduct Unbecoming an Officer, and 501.02(W)(2) Compliance to Orders. Thus, Agent Dalton was terminated on March 14, 2013(JE-3E).

Enforcement Agent Dalton filed a grievance on March 16, 2013. He claimed that the DPS violated Article 19-Grievance Procedure, Sections

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19.01 and 19.05 of the CBA. His statement on the grievance claimed the removal violated the contract, because it was not for just cause and it was not progressive discipline. He requested to be made whole with reinstatement to his position, and removal of all content regarding this discipline from his file, all lost back pay, seniority and benefits to be restored(JE-2A).

A Step 2 Hearing was held on April 2, 2013, and a response denying the grievance was issued on April 10, 2013. The Union appealed the grievance

to Arbitration(JE-2B). By mutual agreement between the parties, the Arbitration Hearing was scheduled for August 22, 2013. At the Hearing the parties stipulated to there being no procedural issues, and that the grievance was properly before the arbitrator.

## **RELEVANT CONTRACT LANGUAGE:**

### **ARTICLE 19 - DISCIPLINARY PROCEDURE**

#### **19.01 Standard**

No bargaining member shall be reduced in pay or position, suspended or removed except for just cause.

#### **19.05 Progressive Discipline**

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:

1. Verbal Reprimand(with appropriate notation in employee's file);
2. Written Reprimand;
3. One or more fines in an amount of one (1) to five days pay for any form of discipline. The first time fine for an employee shall not exceed three (3) days;
4. Suspension;
5. Leave reduction of one or more day(s);
6. Working suspension;
7. Demotion;
8. Termination.

However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.

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The Employer, at its discretion, is also free impose less severe discipline in situations which so warrant.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

## **MANAGEMENT POSITION:**

On March 6, 2012, Enforcement Agent Thomas Dalton, and eighteen month

employee, in an off-duty status, acted outside the scope of his authority. He identified himself as a law enforcement officer and drew his backup weapon in an attempt to detain a private citizen. The action was at a private residence. The incident between the Grievant and the citizen, Mr. Deaton, turned physical. It ended when the Grievant shot Mr. Deaton in the abdomen.

Evidence and testimony will show that the Grievant, on March 6, 2012, drove to the home of his girlfriend(Ms. McNutt). On his way he passed the ex-husband(Deaton), and both men ended up at Dalton's girlfriend's residence. After arriving at the residence, the Grievant exited his vehicle, drew his weapon, and identified himself as a police officer. He ordered Deaton to the ground in an attempt to detain him, based on a protection order, he believed to be in effect. When Deaton attempted to leave, the Grievant re-holstered his weapon, and moved in front of Deaton's Vehicle, per Management. The two men engaged in a verbal altercation that turned physical. Ultimately, the Grievant drew his weapon again, and shot Deaton in the abdomen.

An Enforcement Agent of the OIU has specific authority act as a peace officer when enforcing Ohio Liquor control laws and any laws governing the use of food stamps in Ohio. Enforcement Agents are sworn peace officers, however, their enforcement authority is limited to those times when they are performing duties as an Enforcement Agent, argues the DPS.

The Grievant was not performing the duties of an Enforcement Agent at Ms. McNutt's residence. He identified himself as a police officer and attempted

to detain Deaton, without authority, and without waiting for the appropriate jurisdictional agency to arrive. The Grievant's decision to act outside the scope of his authority contributed to the escalation of this incident, per the State.

The Employer acknowledges the strained personal history of the three persons involved in this incident. Nor do they deny that the Grievant was not convicted of any crime. However, per the Employer, the Grievant's decision and actions during the incident depleted the trust in him to handle a deadly weapon. His actions violated agency work rules, and caused the Employer to lose all faith in his judgment regarding scope of authority, and



thus, his ability to do his job.

The Employer can no longer be confident in the Grievant. They cannot justify exposing the State of Ohio to liabilities posed by an Enforcement Agent willing to act outside the scope of his authority. His actions even resulted in the use of deadly force. Therefore, the Employer respectfully requests that the arbitrator deny the grievance in its entirety.

#### **UNION POSITION:**

Deaton was a dangerous person and a threat to Enforcement Agent Dalton, per the FOP. Deaton followed Enforcement Agent Dalton to his ex-wife's home when Dalton's kids were in his car. By doing so, Deaton was violating a protection order. Deaton had threatened Enforcement Agent Dalton on Facebook. He left his car and came up the driveway. This was a domestic violence situation in which the Grievant could not have walked away, per the Union.

The Employer claimed charges outlined in Jt.-3E, did occur, per the FOP. First, the physical altercation was not caused by the Grievant. The only physical altercation was when the Grievant was punched by Deaton. Secondly, the Grievant identified himself as a police officer because of the training provided by OIU. The perpetrator needed to know that the Grievant was serious. And, thirdly, he was not outside his authority since he was forced into the situation by Deaton, who followed them to her residence and Deaton came up the driveway.

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What should have he done? He couldn't just walk away, per the Union. The Employer has no evidence that he could have backed away. Enforcement Agent Dalton was put in a position in which he had no alternative.

The Grievant was attacked several times by Deaton. The shooting was in self defense and he did the same as any other citizen would do, claims the Union. The shooting was reasonable and justifiable, and not part of the charge.

There are no work rules about domestic violence. Compliance to Orders and Conduct Unbecoming are "bootstrap" general rules, per the FOP. In

domestic violence situations its not about an off-duty weapon. As a public employee, the Grievant needs to be a good officer.

The Union requests the arbitrator to sustain the grievance in its entirety, and reinstate the Grievant.

## **DISCUSSION AND OPINION:**

It is highly unusual, to hear a case in which the discipline was issued one year after the occurrence of the incident which gave rise to the discipline. However, the Grievant was deployed within days of the precipitating event. Unfortunately, the AI interviews were not conducted until the return of the Grievant from deployment. Fortunately, most of the activities in this case are not substantively in dispute.

On March 6, 2012, between 4:00p and 4:30p, the Grievant, accompanied by his children, was traveling to his girlfriend's home to celebrate his birthday. He was followed to her residence by her ex-husband. The Grievant pulled his vehicle into McNutt's driveway, and the ex-husband(Deaton) parked his car in the street partially blocking the drive(ME-1,pg. 60). Both exited their vehicles, and the Grievant sent his children into the home.

Deaton started up the driveway, and argumentative words were exchanged. At which time, the Grievant, claiming to be a police officer, pulled his weapon and ordered Deaton to get on the ground. Deaton refused and retreated down the driveway, per evidence and testimony. The Grievant

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holstered his weapon, and moved sideways and somewhat down the drive. Per his testimony and evidence, he did so to get Deaton's license number(UE-1). Deaton had stopped retreating and they met again at close proximity(ME-1). Altercation words were again exchanged and the Grievant was struck in the head by Deaton, causing the Grievant to stumble and fall back(ME-1). Deaton was shot by the Grievant. The shooting is not part of the charges. Deaton recovered and no charges were brought against the Grievant.

Although Deaton was interviewed his recollection of the events are not substantiated by submitted evidence and witness testimony, in the arbitrator's opinion(ME-1).

This was clearly a domestic violence situation.. There was a triangulated relationship among the three principles. Mr. Deaton had made serious Facebook threats towards the Grievant the same day of the incident(ME-1, pg 27). Deaton was the obvious perpetrator in this situation. Whatever his vigilantly reason for being their, he was violating a restraining order, and was clearly in the wrong(ME-1, pgs. 2, 17 ++ & ME-1 tab C).

Management's witnesses testimony identified opportunities in this situation that Enforcement Agent Dalton could have, or in their opinion, should have, defused the situation. First, he could have exited his vehicle and gone in the house and waited for jurisdictional authority. And, secondly, he could have let Deaton leave when he started down the driveway. Evidence shows that jurisdictional authority first arrived at 5:01p, approximately one-half hour after the incident(ME-1, pg. 10). Furthermore, according to Mr. Hester, an eye witness at the scene who was interviewed immediately after the incident, Deaton was not leaving, and again approached EA Dalton(ME-1, pg.17). According to eye witness Hester's Hearing testimony, the time between the two altercations was a matter of seconds not even minutes.

The Grievant was trained on OIU Policy and Procedures and jurisdictional authority(ME-2 thru 5, & Jt.-5). Evidence shows that OIU Enforcement Agents have restricted authority to enforce liquor control violations and food stamp violations, while in the performance of their duties. This incident did not fall within the scope of his duties. However, when an apparently enraged ex-husband comes at you, what should be your response?  
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If he had not drawn his weapon initially, what would Deaton, a large man, have done to him(ME-1)? When Deaton had the opportunity to leave, even knowing that Dalton was armed, he still pummeled him. Furthermore, there were children nearby, with no visible evidence of local law enforcement in the area. A reasonable person, feeling threatened and armed may have reacted similarly.

The charged physical altercation that allegedly brought discredit to the Department was certainly not initiated by the Grievant, in the arbitrator's opinion. According to witness testimony and submitted evidence, Deaton, by his specific and overall actions that day was the perpetrator. The evidence and testimony does not support the allegation that Deaton had actually chosen to leave the scene(ME-1.,pg.17). The grievant did not enter

the situation spoiling for a fight. On the contrary, he was at the scene with his children to celebrate his birthday. Hopefully, this will have been his worst birthday experience.

Although the shooting was not part of the specific charges, the court's decision to not pursue charges against the Grievant in a shooting, further convinces the arbitrator that Deaton was definitely the aggressor. Additionally, Deaton had a restraining order against him, which exemplifies a potentially violent person.

This off duty conduct of Dalton's reaction to a violent aggressive person, does not in the arbitrator's opinion: (1) harm the employer's reputation, (2) does not harm the ability of the grievant to perform his assigned duties or to appear at work, and (3) other employees knowing the circumstances should not refuse to work with EA Dalton<sup>1</sup>.

The arbitrator is not convinced that this unfortunate domestic violence situation precipitated by Deaton is egregious enough to rise to the level of removal. Public employees, especially our law enforcement personnel are expected to conduct themselves in a responsible manner. However, they can't live in a bubble, and are exposed to crazy behavior in our society, as we all are. In this unfortunate situation I can find no substantive evidence

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that the Grievant's actions were unreasonable, and thus, not in violation of the charged rules.

## **AWARD:**

The grievance is sustained. The Grievant is to be returned to his former position. He is to be made whole for lost wages and benefits. The arbitrator will retain jurisdiction for sixty days in case of an implementation issue.

This concludes the Arbitration decision.

Respectfully submitted this 4<sup>th</sup> day of November 2013.

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<sup>1</sup> Elkouri & Elkouri, 6<sup>th</sup> Ed. Pg. 1312-W. E. Caldwell Co.

E. William Lewis  
Arbitrator