IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
	)	
	)	
v.	)	INDICTMENT NO. 13SC117954
	)	Judge Jerry W. Baxter
	)	
BEVERLY HALL, et al.	)	
	)	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS THE BILL OF INDICTMENT

On May 16th, 2013, Defendant Dr. Lucious Brown filed a "Motion to Dismiss the Bill of Indictment" ("Motion To Dismiss"). Subsequently, all Defendants joined in the Motion To Dismiss. The State first filed on June 6th, 2013 a "Brief in Opposition to Pleadings Challenging the Indictment." The State also filed on June 17, 2013 a "Consolidated Brief In Opposition To Motion To Dismiss The Indictment on Fifth Amendment Grounds." Defendant Christopher Waller filed on June 14, 2013 a "Prehearing Memorandum" supporting the Motion To Dismiss. The Court conducted on June 17-18, 2013 a hearing on the Motion To Dismiss. Collectively, the pleadings and hearing are the Record on this matter.

FACTS

On August 6, 2010, the Governor of Georgia issued an Executive Order appointing special investigators to probe any "possible test tampering and any related issues in Atlanta Public Schools..., in which capacity they shall have all investigatory powers granted to [the Governor] or the Office of Student Achievement by Georgia law..." On August 10, 2010, Defendant Dr. Beverly L. Hall, Superintendent of Atlanta Public Schools (APS), sent a notice to all APS employees, including the Defendants, regarding a "Duty to Cooperate with Investigations." The notice stated in part that "...all employees are advised and directed to cooperate with any and all investigations conducted by or on behalf of APS...,[and] "[a]ny employee who fails or refuses to fully cooperate with an investigation may be subject to formal disciplinary action, including termination."

On August 27, 2010 Dr. Hall sent an updated notice to all employees of APS, including the Defendants, stating in part;

> *All employees are advised and directed to cooperate with the special investigations appointed by the Governor or risk being found insubordinate. Any employee who fails or refuses to fully cooperate with the special investigators may be subject to formal disciplinary action, including termination.*

The above language was highlighted in the notice by bold underlining. The notice invited any person who had any questions to contact APS General Counsel, Veleter Mazyck.

On October 20, 2010, APS General Counsel sent an email to all faculty and staff, including the Defendants, of fifty-four schools whose results on the Criterion-Referenced Competency Tests had a statistically improbable amount of answers that had been changed from wrong to right. The email stated that while APS employees were required to fully cooperate with the investigations, "no part of the investigative process is intended to or should infringe on your rights under federal, state or local laws, including the United States and Georgia Constitutions, including but not limited to the right to representation." According to testimony at the hearing regarding the Motion To Dismiss, APS General Counsel, at the time of the investigation, stated that it was never the policy of APS to terminate any teacher who decided to invoke his or her Fifth Amendment right against self-incrimination.

After the Governor issued a new executive order on October 13, 2010 appointing the Georgia Bureau of Investigations to assist in the matter, Dr. Hall transmitted another notice to all APS employees, including the Defendants, reminding them that they "have the right to legal representation... during interviews." Again, she invited all with questions to contact APS General Counsel. When Defendant Dr. Brown chose to exercise his Sixth Amendment right to counsel during the investigation, an APS Assistant General Counsel sent an email directly to the investigators instructing them that although employees must

cooperate with the investigation, "if an employee, on the advice of counsel, chooses to exercise his or her Fifth or Sixth Amendment rights under the United States and State of Georgia constitutions, we cannot punish or penalize that employee." He went on to say "the Garity [sic] Rule... does not apply in this situation because the employer is not involved in the investigation."[1]

Having considered the legal and factual arguments in the Motion To Dismiss and other referenced pleadings, the Record, as well as the applicable principles of law, the Court hereby finds as follows:

ANALYSIS - *Garrity*

In *Garrity v. New Jersey*. 385 U.S. 493, 87 S.Ct. 616, 17 L. Ed. 2nd 562 (1967), the United States Supreme Court held that a New Jersey statute which required public officials (police officers) to choose between making statements to investigators or being fired was coercive, violated the defendants' Fifth Amendment privilege against self-incrimination and, as applied by the State of New Jersey, the defendants' Fourteenth Amendment rights. "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibit use in subsequent criminal proceedings of statements obtained under threat of removal from office, and it extends to all whether they are

[1] Recently, the United States Supreme Court in *Salinas v. Texas 570* U.S.___, No. 12-246, (June 17, 2013) stated, "[t]he privilege against self-incrimination 'is an exception to the general principle that the Government has the right to everyone's testimony,' [citing] *Garner v. United States*, 424 U.S. 648, 658, n. 11, 96 S.Ct. 1178, 47 L. Ed. 2nd 370 (1976). (slip op. at 9).

policeman or other members of our body politic." *Id.* at 500. [2] "The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.'" *Id.* at 496.

In 2007, the Georgia Supreme Court held in *State v. Aiken*, 282 Ga. 132 (2007), that trial courts, in deciding an issue involving alleged "Garrity" coercion, should decide using the totality-of-the-circumstances test stated by the *Garrity* court. "Instead, because the Supreme Court in *Garrity* employed the totality-of-the-circumstances test for evaluating whether the defendant's statement was coerced, and because this State's courts have vast experience applying this test, we hereby adopt that test for determining whether the statements that a public employee makes during an investigation into his activities are voluntary." *Id* at 135.

The *Aiken* court enumerated several factors a trial court should consider in applying the totality-of-the-circumstances test. *Id.* at 135-36. The court also stated that, "[i]f no express threat [of job loss] is present [at the time of the interview], the court may examine whether the defendant subjectively believed that he could lose his job for failing to cooperate and whether, if so, that belief was reasonable given the State action involved." *Id.* The court further stated, "[i]n determining whether the defendant's belief was objectively reasonable, the court may examine

[2] The Court rejects the State's claim that *Garrity* only applies to "incriminating" statements, as plainly the U.S. Supreme Court did not so hold.

[knowledge of the defendant]." *Id.* Additionally, the trial court "is free to consider any other factor that it determines is relevant to the determination of voluntariness." *Id.* at 136.

In the case at bar, APS's Assistant General Counsel circulated a document to APS employees, including the Defendants, that specifically stated that *Garrity* did not apply. APS General Counsel testified that she informed her staff, APS employees and attorneys who inquired about the possibility of termination for invoking the Fifth Amendment, that APS employees would not lose their jobs for asserting their Fifth Amendment privilege. Further, the Defendants were told by the investigators that they were free to leave the interview at any time or have a lawyer present.

Under the totality-of-the-circumstances test, the Court FINDS that at the time of each Defendant's interview(s) there were no expressed threats to the Defendant that she or he would lose their jobs unless they provided statements to investigators' questions. However, whether or not any Defendant subjectively believed that he or she would be fired were he or she to refuse to answer the investigators' questions, rather than assert their Fifth Amendment privilege, and whether such a subjective belief was objectively reasonable, remains an open question, as the Court must examine the circumstances surrounding the statements

given on an individual defendant by defendant basis. *Aiken* at 135-36.[3] As the Defendants have moved to dismiss the indictment based on alleged *Garrity* violations and not to suppress their statements, for the reasons given below, dismissal of the indictment is not an appropriate remedy should the Court find any individual *Garrity* violations.

ANALYSIS- *Kastigar*

Dr. Brown claims that "[w]here the prosecution has compelled a person to speak, this compelled statement cannot be used by the prosecutors *in any way, directly or indirectly*, to inflict criminal penalties upon the speaker," citing *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2nd 212 (1972) (emphasis added). Mr. Waller claims in his memorandum that "[t]he compelled statements [in violation of *Garrity*] are to be treated as if they were the product of a grant of immunity." The Court does not find the law to support the Defendants' claims.

The United States Supreme Court in *Kastigar* decided whether or not the statutory scheme found in Title 18, United States Code, §§6000-6002 passed constitutional muster in light of the court's holding in *Counselman v. Hitchcock*, 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892). *Kastigar* specifically

[3] The Record remains open on this issue should any Defendant seek to move to suppress his or her statement as not being voluntary. Any such motions to suppress must be filed within fourteen (14) days of the filing of this order. The Court will thereafter schedule a hearing date to receive additional evidence to supplement the Record.

addressed a Federal statutory use immunity regime. These statutes were not involved in this case. At the heart of the U.S Government's ability to compel a recalcitrant witness to testify is its ability under §§6000-6002 to obtain a court order striping him of his Fifth Amendment privilege and directing the witness to testify or face contempt of court. It is the subsequent "compelled testimony" that cannot be used "directly or indirectly" against the witness, except for prosecution for perjury, false statements, etc. *Id.*

In the case at bar there was no judicially ordered compelled testimony of any Defendant. There certainly was no compelled testimony under 18 U.S.C §§6000-6002. The Defendants' efforts to substitute the remedies of *Kastigar* violations for alleged *Garrity* violations are without legal support.[4] Quite simply, *Kastigar* and its progeny, e.g. *United States v. North*, 910 F. 2nd 843 (D.C. Cir. 1990) are inapplicable to this case.

In finding that the remedies for *Kastigar* violations (requiring the prosecution to prove that no compelled immunized statements of a defendant were used directly or indirectly against him in his prosecution) are not applicable for alleged *Garrity* violations, the Court relies on the legal principles set forth in *Rose v. Mitchell*, 443 U.S. 545, 577, n.4 (1979); *United States v. Blue,* 384 U.S. 251, 255

[4] The Court rejects *dicta* in *United States v. Slough,* 677 F. Supp. 2nd 112, 115 (D.D.C. 2009) ("The Fifth Amendment automatically confers use and derivative use immunity on statements compelled under *Garrity*..."). Neither *Garrity*, nor the United States or Georgia constitutions hold to this effect. The Court finds no law binding on this Court holds to this effect.

(1966); *Costello v. United States*, 350 U.S. 359 (1956) and *Newell v. State*, 237 Ga 488 (1976) ("There is no merit to the defendant's argument that the indictment should fail because it was based on illegally obtained evidence. *See United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L. Ed. 2nd 561 (1973)").

Based on the law and facts before the Court, it is hereby **ORDERED** that the Motion To Dismiss The Bill Of Indictment be **DENIED**, with directions that the Court will certify this issue for immediate appeal.

SO ORDERED, this 17 day of June, 2013.

JERRY W. BAXTER, JUDGE
SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT