#1433

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO DEPARTMENT OF CORRECTIONS

AND

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/

AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 27-32(99-02-18) 0178-03
Bart Brown, Grievant

Advocate(s) for the UNION:

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INTRODUCTION

A hearing on the above referenced matter was held on February 11, 2000 and February 15, 2000, in Caldwell, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu of closing arguments. The hearing was closed on March 9, 2000. The Arbitrator's decision, by mutual agreement of the parties, is to be issued no later than May 4, 2000.

ISSUE

The parties stipulated to the following definition of the issue:

Was the Grievant removed for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

The issue in dispute in this matter involves the termination of Bart Brown, a Correction Officer, employed at the Noble Correctional Institution. Mr. Brown was terminated from his position for violation of Rule 24, "*Interfering with or failure to cooperate in an official investigation or inquiry.*" A Rule 24 violation calls for a range of discipline from a written reprimand to a removal.

On November 2, 1999, the Grievant refused to answer questions at an internal Use of Force Committee Inquiry. The Grievant was a five-year employee. His place of work (post) at the Noble Correctional Institution (hereinafter referred to as "Noble") was the Control Room in the Segregation Unit. The Control Room is like a spoke of a wheel that operates the cell doors in three living unit corridors of cells that branch off from the Control Room. From the Control Room the Grievant was primarily responsible for operating a large control panel that disengages the cell locks of each cell as well as the locks that are on doors of a sally port system bridging the living units and the Control Room.

On June 8, 1998, an incident occurred involving the use of force of Inmate Sammy White. The use of force occurred when Correction Officer's Rogan and McKee attempted to move Inmate White to an adjacent cell in the Segregation Unit. Ohio Administrative Rule 5120-9-02, Use of Force Report and Investigation requires any DRC employees who struggle with or use physical restraint or control on an inmate to file a use of force report prior to the conclusion of the work shift. The rule also requires any employee who witnesses a use of force by another employee to file a use of force report.

Both Officers Rogan and McKee filed a use of force report. The Grievant stated that he was not a witness to the use of force and did not file a report.

A three person Use of Force Committee was convened to investigate the June 18, 1998 incident involving Inmate White. The committee interviewed Inmate White, Officers Rogan and Mckee, but did not interview Officer Brown. On July 6, 1998, the committee determined that the use of force by Officers Rogan and McKee was justified, according to Ohio Administrative Code 5120-9-01 (See JX 3, 9). On July 10, 1998, another incident occurred involving another inmate, Inmate Todd. The Grievant was placed on administrative leave on July 23, 1998, pending an investigation of the Grievant's involvement in the incident involving Inmate Todd.

The Grievant was a suspect in the Todd case and answered all of the questions asked of him by another Use of Force Committee that convened on August 13, 1998 to investigate the Inmate Todd incident. A Union Steward during the Todd use of force inquiry represented the Grievant. He never sought a Garrity warning nor was one offered to him during his testimony on August 13, 1998. On October 26, 1998, the Grievant was issued a written warning for his involvement in the incident.

In mid to late August of 1998, shortly after he provided testimony in the Inmate Todd matter, FBI Agents and State Highway Patrol Officers made separate visits to the Grievant's home. The two law enforcement agencies informed Mr. Brown that he was under investigation for his role in the Inmate White and the Inmate Todd use of force incidents. Both law enforcement agencies attempted to get the Grievant to sign a wavier in exchange for his cooperation in their investigations. The exact nature of the waiver was never made clear by the Grievant. However, during his testimony in the arbitration

hearing he used the word immunity to characterize his understanding of the waiver. They did not read him his Miranda rights, and he did not sign the waivers. Shortly after these two visits, the Grievant hired a criminal attorney. His attorney advised him not to answer any additional questions because the information could be used against him criminally.

The FBI and the State Highway Patrol were actively conducting investigations during this period and each of these law enforcement agencies made a second visit to the Grievant's home. No less than 13 FBI agents were involved in investigating alleged civil rights violations at Noble. The Nobel prison population has always been roughly a 50-50 mix of white and minorities inmates (See Warden Haskin's testimony). The Warden testified that Noble had been under scrutiny by the Department of Corrections due to the nature of its rural based location and its largely Caucasian workforce. In addition, numerous Correction Officers were placed on administrative leave during this period as a result of ongoing investigations. During the summer and fall of 1998, the institution was a "powder keg" of rumors and innuendo (See testimony of Witnesses Dennis and Haskins).

A second Use of Force Committee was convened to once again look into the Inmate White June 18, 1998 incident during the period of the FBI and Highway Patrol mass investigative efforts. It was convened at the request of Warden Haskins following a conversation he had had with the FBI, who were actively investigating the Inmate Todd use of force incident. The FBI did not offer Warden Haskins any specific information, however, they suggested that there may be additional evidence regarding the use of force used against Inmate White in June.

The second Use of Force Committee was intentionally comprised of experienced

Department employees outside of Nobel, in order to remove any perception of a bias stemming from the findings of the first Use of Force Committee. It began its investigation in September of 1998 and interviewed several inmates and employees. After these interviews were conducted, it concluded that the Grievant was not involved in the use of force against Inmate White (See testimony of Arbogast). However, the Committee still wanted to interview the Grievant as well as Officers Rogan and McKee, who were suspects.

On November 2, 1998, the Use of Force Committee called the Grievant to Noble for an interview. The Grievant had been on administrative leave since July 23, 1998. During that time he had been part of the Inmate Todd investigation and had received a written warning on October 26, 1998. He was not told why he was being asked to go to Noble, but he testified that he thought it was to arrange his return to work, following the October 26th resolution of his involvement in the Todd use of force matter. Instead, he was asked to testify in front of the second Use of Force Committee, which was reinvestigating the Inmate White incident.

The Grievant refused to testify and handed the Use of Force Committee the name of his attorney. The Committee asked if he wanted them to contact his attorney and he said "yes." However, he did not have a signed release relieving the Union from its obligation to represent him. Union Steward Mummy was representing Mr. Brown during this investigative inquiry. Mr. Mummy consulted with the Grievant and never asked the Use of Force Committee to offer the Grievant a Garrity warning. The Use of Force Committee Chair, John Arbogast, told the Grievant he was risking discipline by refusing to testify. Mr. Arbogast is a 17 year veteran with the Department of Corrections and has

been involved in law enforcement since 1963 in various capacities. Mr. Arbogast testified he has had *"quite a bit of experience"* as a member of Use of Force committees. Mr. Brown continued to refuse to answer the Committee's questions and did not ask for a Garrity warning. Mr. Arbogast told the Grievant *"to get a hold of him if he wanted to talk to the Committee today."* The Grievant returned to his home. Officers Rogan and Mckee, who retained the same criminal attorney as the Grievant then testified before the Use of Force Committee following the Grievant's appearance. They did not ask for or were offered Garrity warnings.

Union President, Joe Dennis, who had just returned to Noble from a transport assignment, was informed of the Grievant's refusal to testify. He immediately called the Grievant's home and spoke with him. Mr. Dennis talked the Grievant into testifying in front of the Use of Force Committee. He then went to Warden Haskins in the early afternoon and told him that Officer Brown has agreed to provide testimony to the Committee. Warden Haskins attempted to get in contact with Mr. Arbogast, but he and the remainder of the Use of Force Committee had left Noble and were headed back to Columbus. The time of Mr. Dennis's conversation with the Warden Haskins was about 2:00 p.m., according to their testimony.

The Warden contacted Mr. Arbogast the following day, but was told that the Committee had obtained all the information that it needed to conclude the investigation. Mr. Arbogast also testified that during these type of investigations there is always concern that witnesses might share information and compromise the investigation. Mr. Arbogast also stated during the hearing that he would have given the Grievant a Garrity waiver, had he asked for it.

The Grievant was terminated for his refusal to cooperate and subsequently filed a grievance.

EMPLOYER'S POSITION

The Employer argues that the Grievant had no right to invoke a Fifth Amendment privilege against self-incrimination to protect Officers Rogan and McKee. There was no evidence to indicate he was involved in the violation of any work rules or criminal wrong doing, argues the Employer. The Employer asserts that the Grievant refused to cooperate with an important internal investigation, and this conduct cannot be tolerated. It is the nature of the corrections business that force must be periodically used to control inmate behavior. The reporting and investigation procedures that are used to report and investigate use of force are critical for the Department to maintain a safe, humane, and appropriately secure environment, contends the Employer.

The Employer asserts that the Grievant had no good reason for his failure to respond to the questions of the Use of Force Committee. Mr. Brown was aware he could be terminated for his refusal to testify and still refused to cooperate, argues the Employer. The Use of Force Committee made a reasonable effort to encourage the Grievant to testify, but he still failed to answer the Committee's questions.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union makes several arguments in defense of the Grievant's actions. The most salient of these is the fact that the Grievant had a right to assert his Fifth

Amendment privilege against self-incrimination. The Union argues that the Use of Force Committee failed to provide Mr. Brown with a Garrity wavier in spite of the fact that they were not opposed to providing him with this waiver, if he had asked. The Union contends that the exchange between the Grievant and Committee member, Arborgast, a former policeman, prove that the Grievant was asking for Garrity protection. However, the Use of Force Committee failed to respond to the Grievant's concerns.

The Union points out that the Use of Force Committee failed to inform the Grievant that he was not a suspect, but was merely a witness. In contrast, the Grievant, after being visited twice by the FBI and the State Highway Patrol, and being called into a hearing of the Use of Force Committee without warning, had good reason to believe he was a suspect, asserts the Union. When the Use of Force Committee refused to offer the Grievant a Garrity warning, his only choice was to remain silent, contends the Union.

The Union also argues that Article 24.02 of the Agreement was violated when the Employer waited approximately eighty (80) days to hold a pre-disciplinary hearing. His refusal to testify occurred on November 2, 1998, and his pre-disciplinary hearing was January 21, 1999. The Union argues that the Department was using Mr. Brown as an example and that Noble was unfairly being held to a higher standard because of all the attending publicity surrounding the investigations of the FBI and State Highway Patrol. The Union also contends that the punishment did not fit the crime.

Finally, the Union points out that Use of Force Committee member, John Arbogast, stated that the Grievant could have shared what he knew by the end of the day. Yet, when attempted to accept the offer, through Warden Haskin's intervention, it was denied. The Union contends this was an unsolicited offer that was communicated to Mr.

Brown and was binding upon the Department.

Based upon the above, the Union requests that the grievance be sustained.

DISCUSSION

The weight of the evidence and testimony in this case supports the arguments of the Union. I find that the Department, through the conduct of the Use of Force Committee, failed to take into consideration the extraordinary circumstances in play at the time that served to mitigate the Grievant's actions. The Use of Force Committee acted unreasonably when it did not offer the Grievant a Garrity warning and when it reneged on its promise to allow the Grievant to testify on the same day.

The primary reason for the convening of a second Use of Force Committee in the Inmate White incident was at the suggestion of the FBI, the top criminal law enforcement agency in the country (See testimony of Warden Haskins). It is reasonable to conclude that the employees of Noble linked the unusual step of convening a second Use of Force Committee in the Inmate White incident with the FBI's investigation.

The Grievant had good reason to believe that he was a suspect in a criminal investigation. The Grievant's experience prior to his summons to testify was marked by several traumatic events. He was put on administrative leave on July 23rd for his involvement in the Inmate Todd investigation (also being investigated by the FBI). He then willingly testified in front of a Use of Force Committee, but this investigation did not result in any closure for him until October 26, 1998. After his testimony in the Todd matter, he was visited in his home twice by FBI agents and investigators of the State Highway Patrol. They told him that he was a suspect in a criminal investigation. He

stated that because of fear he hired a criminal defense attorney after the first visit. His attorney advised him not to answer any more questions because of the investigations. Paralleling the Grievant's experiences was an unprecedented and massive investigation by two law enforcement agencies, resulting in several Corrections Officers being placed on administrative leave.

The second Use of Force Committee was comprised of experienced individuals who had civil and criminal investigative backgrounds. The weight of the evidence and testimony establishes that the Use of Force Committee could not have been unaware of the fact that the Grievant feared self-incrimination. His conduct in handing the Committee his attorney's card immediately should have been an obvious clue to any reasonable person. Paranoia among the workforce at Noble was widespread in the fall of 1998 (See testimony of Mr. Dennis and Warden Haskins).

Mr. Brown expressed his fears to the Use of Force Committee not as straightforwardly as he could have, but to a sufficient degree that they may have lessened his concerns by simply conveying to him that he was not a suspect, but rather a witness. Of course, there was no guarantee that these words alone would have been sufficient to solicit the Grievant's cooperation, yet it is difficult to understand why this was not done. Committee member, John Arbogast, asked the Grievant whether he wanted them to contact his criminal defense attorney. He stated "yes", but the Committee, rather than picking up on this obvious expression of the Grievant's fear of self-incrimination, simply dropped the idea and kept on insisting that he answer their questions. I do not believe the Committee had any responsibility to contact an employee's attorney, but it treated the Grievant in an arbitrary manner by denying the reality of what was being conveyed to

them by the Grievant.

It is absolutely vital that employees provide testimony to Use of Force inquiries. I agree with the Department's need to investigate any and all incidents of force in order to fulfill its mission. However, there are circumstances when the gathering of information requires a measure of reasonableness on the part of the Employer in invoking this process. I find that the Use of Force Committee "valued form over substance" and lost an opportunity to gain the testimony of the Grievant.

If collecting information on use of force is vital to maintaining a humane environment for inmates, why is there a problem with an employer offering a Garrity waiver to a witness, who is not a suspect and who readily conveys a fear of criminal prosecution? In this case, two of the three Committee members testified that they would have granted Mr. Brown a Garrity warning, if he would have simply asked for it. They had the power to prevent him from placing himself in the impossible position of losing his job or providing what he thought would be potentially self-incriminating testimony.

It is unreasonable to expect the average employee to understand the legal complexities of self-incrimination under Garrity. Former Warden Haskins testified that he had a very limited understanding of Garrity. In this situation, the failure of the Grievant to utter the word "Garrity", should not have been the difference between his being retained or terminated as an employee.

I am also troubled by the fact that the Committee told the Grievant that he could still get back to them "that day" if he changed his mind about testifying, yet when he did change his mind in the early afternoon, he was barred from answering questions. This offer, as the Union argues, gave the Grievant the opportunity to reconsider his actions

based upon the informed advice of the Union President. Unions are supposed to provide this type of advice to their members, and Mr. Dennis did his job well. It was unreasonable for the Department to discharge Mr. Brown after the Committee made a good faith offer to him and he accepted it. The Union steward in this matter, Mr. Mummy, could have advised the Grievant regarding Garrity if he had known about this principle of law. However, Mr. Mummy did not testify at the hearing, and there is no way to determine his level of knowledge regarding Garrity.

According to the testimony of the Employer's witnesses, providing a Garrity warning has been a common practice of the Department. It appears that this practice has become an integral part of the Employer's routine of investigation that the parties are well aware of and commonly experience. Employer witness, Coval, testified that in her experience, OCSEA representatives frequently request a Garrity waiver in Use of Force hearings, and it is often granted. This ruling does not add or subtract from the Agreement. However, it does take into consideration that the Employer and the Union have utilized Garrity warnings to assist in Use of Force investigations. The instant matter represented a situation in which it should have been used.

The Use of Force Committee may not have had facts to suggest that the Grievant would be subject to discipline; however, the Grievant had no way of knowing what the Committee was investigating. All he knew was that the FBI and the State Highway Patrol came to his home twice and threatened him with criminal prosecution. In the supercharged atmosphere of paranoia that was present at Noble, it is quite plausible that the Grievant believed the second Use of Force Committee (in the Inmate White incident) may have been investigating criminal wrongdoing as well as departmental rule violations.

There is no evidence to suggest that the Grievant's refusal to answer the questions of the Use of Force Committee was intended to protect anyone but himself. On November 2, 1998, Mr. Brown was placed in a situation by the Employer to surrender his constitutional privilege against self-incrimination in exchange for his cooperation in a Use of Force hearing. The Committee's failure to provide the Grievant with a Garrity warning in this situation as well as its actions in disallowing the Grievant to testify later in the day resulted in his unjust termination.

AWARD

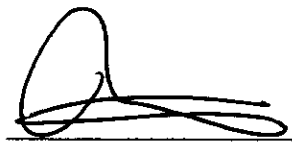
The grievance is sustained.

1. The Grievant shall be returned to work within thirty calendar days. Any and all references to the Grievant's termination shall be removed from his personnel file. The Grievant shall be made whole for all of his back wages, roll-call pay (minus any W-2 income, or unemployed received during the period of his absence), benefits and seniority from the date of his termination. The Grievant's restoration of back pay and benefits shall occur no later than the second full pay period following the date of his return to work.

2. It became apparent from the testimony and evidence presented by both parties that there exists a great deal of confusion concerning when and how a Garrity warning is offered during a Use of Force inquiry. Therefore, it is recommended that the parties meet, within sixty (60) calendar days from the date of this Award, for purposes of having the Department clarify its policy on this matter.

The Arbitrator shall maintain jurisdiction over this Award for a period of sixty days in order to assist the parties in its implementation.

Respectfully submitted to the parties this 4th day of May, 2000.



Robert G. Stein, Arbitrator