SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

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In the Matter of the Application of Index No.

THEODORE SMITH,

Petitioner, **AFFIRMATION**

For a judgment pursuant to
Article 75 of the C.P.L.R.

- against -

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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STATE OF NEW YORK)
)SS.:
COUNTY OF ROCKLAND)

WILLIAM A. GERARD, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms the following to be true under the penalties of perjury and alleges:

1. I am the attorney for the petitioner and this affirmation is made in support of the annexed application, made by Petition and order to show cause, seeking to vacate and overturn a certain Decision of the Hearing Officer, dated December 4, 2007, pursuant to C.P.L.R. § 7511, and Education Law § 3020-a (4) (Decision annexed hereto as Ex. "1").

2. This affirmation is made partly upon personal knowledge, gained from prior participation in the underlying proceedings, and partly upon information

and belief, based upon my investigation of the matter, a review of relevant documents, and legal research conducted.

FACTS

3. The history of this matter is described in the annexed petition, and mention of the facts in this affirmation is limited to the facts necessary to the issues addressed.

10. Petitioner is a physical education teacher employed by the respondent, who was charged in 27 specifications with various incidents of misconduct, insubordination, incompetence and dereliction concerning his employment at the Museum School in District 9 during the 2004-2005 school year (Ex. "1" p. 3-11).

11. Hearings were held before an Arbitrator between January 11, 2007 and May 10, 2007, resulting in a decision finding petitioner culpable of most of the Specifications, and this proceeding is brought to vacate that Decision.

CORRUPTION FRAUD AND MISCONDUCT

14. An arbitrator's award may be vacated for corruption, fraud, or misconduct of the arbitrator or a third party, if it is shown that the petitioner's rights were prejudiced thereby. C.P.L.R. § 7511 (b) (1) (i); 23 Carmody Wait 2d, 141:194.

15. This is so because the integrity of the process, as opposed to simply the correctness of the decision, must be zealously safeguarded. 23 Carmody Wait 2d, 141:194.

16. Upon information and belief, the conduct of petitioner's counsel in this matter, combined with the collusion of the Arbitrator and the DOE attorneys, constitutes the sort of irregularity that undermines the validity of the award.

Petitioner's Attorney

17. This record confirms that petitioner had a written contingency fee agreement with his attorney to represent him in the Federal Court action against the DOE, as well as in the related Arbitration proceeding (Ex. "4"). Clearly, those two proceedings were inextricably intertwined, since the results of the arbitration could have a dispositive effect on the Federal case.

18. Upon information and belief, as the arbitration proceeding neared its conclusion and petitioner expressed dissatisfaction with the performance of his attorney and left a message for Brickman on April 24, 2007 that he was going to sue his firm for legal malpractice and ruin him, his attorney had a clear obligation to withdraw from representing petitioner in both cases.

19. Upon information and belief, instead of moving to withdraw, the attorney demanded that Petitioner sign a written contract stating that he had a choice to terminate or continue the representation (Ex. "6"), and which also acknowledged his obligation to pay attorneys fees, which were over $54,000.00 (Ex. "7").

20. Upon information and belief, when Petitioner refused to sign the document, his attorneys repeatedly demanded that Smith sign it, or they would not appear on the final hearing date of May 10, 2007 (Ex. "8," "10").

21. Upon information and belief, this conduct constitutes abandonment of a client in the midst of a contested hearing, which is flagrantly unethical under the attendant circumstances.

22. Upon information and belief, it would have been a simple enough matter to withdraw at the time based upon Smith's prior expression of an intention to sue his attorneys, but instead, he chose to engage in ex-parte conversations with the Arbitrator to disclose the alleged content of a prior attorney/client conversation in which he claims that petitioner made an emotional outburst against the Arbitrator, which he did not consider credible at the time.

23. Upon information and belief, engaging in ex-parte conversations with an Arbitrator, with or without the client's approval are improper. Here, not only did Kearney have such communication without petitioner's knowledge or consent, he disclosed the content of a confidential communication after he had been threatened with suit and was embroiled in an ongoing fee dispute.

24. Worse yet, after disclosing matters that he had reason to know could defeat petitioner's prospects of recovery in the Federal case, and result in Smith being fired and prosecuted, upon information and belief, he conspired with the Arbitrator and the DOE attorneys to falsify the grounds for the Arbitrator's planned recusal on May 10, 2007.

25. Upon information and belief, had the matter unfolded as planned, and had the agreed script been followed, the case would have been transferred to

another Arbitrator who had not heard any of the conflicting evidence, and petitioner would never have known what his own attorney had done to destroy his due process rights.

26. The written e-mails confirm that even after disclosing Petitioner's alleged threats on May 8, 2007, his attorney continued to demand that Smith sign the attorney's fee document, apparently in hopes that he could still be compensated for his treachery (Ex. "8," "12").

27. Upon information and belief, during the proceedings held over the phone on May 10, 2007, there was an off the record conference between the attorneys and the Arbitrator which excluded Smith. The conference occurred when the DOE attorneys departed from the agreed script and insisted that Smith's threats be placed on the record so they could use it for their own purposes (Ex. "2," trans. 5/10/07 p. 1056-1067).

28. Upon information and belief, petitioner was improperly excluded from this conference, in which he had an absolute right to participate. Off-the-record means that the conference is not transcribed, but it does not mean that the client can be excluded from the call while his attorney, the DOE lawyers and the Arbitrator plot to deprive him of his due process rights without his knowledge or consent.

29. Finally, Upon information and belief, Kearney provided false and misleading information to the Arbitrator concerning Smith's alleged threats, thereby prejudicing his due process rights.

DOE Attorneys

30. Upon information and belief, the DOE attorneys had improper ex-parte discussions with the Arbitrator concerning the plan to fabricate the hearing record concerning the Arbitrator's recusal.

31. Upon information and belief, the DOE attorneys involved have admitted that they initially agreed with Smith's attorney to go along with the planned falsification on the official hearing record concerning the Arbitrator's pretextual recusal.

32. Upon information and belief, their decision to betray the agreement without warning in the middle of the hearing was motivated by self-interest, instead of any ethical concerns, and the DOE attorneys reported Smith's alleged death threats to SCI the very next day, and also sought to have him evaluated and dismissed under Sec. 2568 of the Education Law as a danger to others.

33. Upon information and belief, the DOE was attempting to exploit the existing conflict between Smith and his attorney in a way that would resolve both the disciplinary matter and the Federal case in their favor. In the process, they have engaged in unethical and dishonest tactics, resulting in prejudice to petitioner.

The Arbitrator

34. Upon information and belief, after engaging in improper ex-parte discussions with the attorneys on May 8, 2007, a telephone conference was had

on May 10, 2007, where the Arbitrator followed an agreed script, and recused himself on a pretext. During this conference, the attorneys and the Arbitrator went off the record to have additional ex-parte discussions, and when they returned to the record, the Arbitrator confessed that his real reason for recusal (Ex. "2," trans. 5/10/07 p. 1056-1067).

35. Upon information and belief, the Arbitrator's willingness to engage in these ex-parte discussions, and to welcome the disclosure of confidential information from a conflicted attorney, led him to agree to falsify the record of the Arbitration proceeding by placing a fictitious ruling on the record. No greater misconduct exists for an Arbitrator, considering that it is his duty as a Judge to insure that the proceedings are honest, fair and just.

PARTIALITY OF THE ARBITRATOR

36. Although he did not hear any of the testimony, the second Arbitrator based his findings almost exclusively on evaluations of credibility, while utterly ignoring evidence in the record that petitioner was targeted for dismissal in advance by DOE officials.

37. He rejected the testimony of petitioner and his witnesses as not credible (Ex. "1" p. 48-50), and accepted virtually all of the DOE testimony, without seeing or hearing a single witness testify.

38. The following is a series of examples illustrating the Arbitrator's reliance upon credibility evaluations for his guilty findings:

Specification 2--

> "I can think of no reason why the Principal would claim students were playing in the yard without supervision if it were not true." (Ex. "1" p. 52);

Specification 3--

> I credit her (Principal Uehling's) observations (Ex. "1" p. 54);

Specification 4-a,b,d,e--

> Once again, I credit the observations made by the Principal. (Ex. "1" p. 54;

and,

> I accept as true her claim ... . (Ex. "1" p. 55);

Specification 5--

> Here, I credit the memo from Uehling ... . (Ex. "1" p. 55);

Specification 7-a, b. c--

> This is so because I credit Principal Uehling's testimony ... . (Ex. "1" p. 57);

Specification 8-a--

> I credit Kantha's testimony in this matter. (Ex. "1" p. 58);

Specification 9--

> I credit her (Uehling's) testimony. (Ex. "1" p. 59);

and,

> I have no reason to doubt that Uehling accurately recorded what she observed that day. (Ex. "1" p. 59-60);

Specification 10--

I credit all the assertions in Uehling's testimony and observation report. (Ex. "1" p. 59-60);

Specification 11--

Thus, he (Smith) asserted, it was Killen not he, who refused to attend the meeting. This assertion lacks the ring of truth. (Ex. "1" p. 61),

Specification 16--

Principal Uehling testified credibly ... .

(Ex. "1" p. 63),

and,

Based upon the Principal's credible testimony, it is clear Specification 16 has been proven.

(Ex. "1" p. 64),

Specification 19--

Therefore, I credit the Principal's assertion with regard to the plans.

(Ex. "1" p. 66),

Specification 20--

I find it difficult to believe that four assistants would conspire against him in this matter. (Ex. "1" p. 67);

Specification 23--

I base my conclusion on Principal Uehling's credible testimony ... .

(Ex. "1" p. 69);

and,

I fully credit Uehling's account.

(Ex. "1" p. 70),

Specification 24--

> Once again, I credit Uehling's testimony ... .
> (Ex. "1" p. 70),

and,

> I credit Uehling's conclusions in their entirety.
> (Ex. "1" p. 70),

39. Upon information and belief, the process employed by the Arbitrator was illustrates an unacceptable bias, since it is universally understood that the trier of fact is in the best position to make valid credibility evaluations based on the ability to see and hear the witnesses. People v Bleakley, 69 N.Y.2d 490 (1987), 515 N.Y.S.2d 761

40. As stated in People v Taveras, 155 A.D.2d 131 (1sr Dept, 1990), 553 N.Y.S.2d 305,

> This court has repeatedly held that the trier of fact is in the best position to evaluate credibility, since it observes the witnesses, in the crucible of the courtroom (see, for example, People v Wright, 71 A.D.2d 585, 586 [1st Dept 1979]; People v Stroman, 83 A.D.2d 370, 372 [1st Dept 1981]; People v Cesar, 111 A.D.2d 707, 710 [1st Dept 1985]; People v Rivera, 121 A.D.2d 166, 171 [1st Dept 1986]). I find particularly applicable to the instant case, these words that this court wrote in People v Wright (supra, at 586) "Credibility is determined by the trier of facts who has the advantage of observing the witnesses and necessarily is in a superior

> position with respect to that aspect than an appellate court which reviews but the printed record (see People v Cohen, 223 NY 406, 422-423; Fisch, New York Evidence, § 446)."

41. Upon information and belief, aside from employing a biased procedure to decide the case, the Arbitrator disregarded clear evidence showing that the DOE had targeted petitioner for discipline, while at the same time proclaiming throughout his Decision that he could conceive of no reason why the charges might not be true.

42. Upon information and belief, Hearing Ex. "R-6," is an e-mail that had mistakenly been sent to Smith at the time when he began experiencing retaliation by his DOE superiors as a result of his complaints (see complaints, Ex. "3" H. Ex. R-31, R-32). In this e-mail, Fay Pallen, corresponds with another DOE employee concerning how they could get rid of Smith the following semester if one more bad job evaluation could be arranged.

43. The Arbitrator fails to make any mention whatsoever of this e-mail in his Decision, and he discounts the testimony of petitioner's witness, Kurniaputra, who testified that the Principal consistently pumped him for information about possible wrongdoing by petitioner (Ex. "1" p. 40). In addition, the Decision makes no mention of the testimony of DOE employee and prosecution witness, Victor Ramsey, who admitted that the Principal Uehling expressed the opinion that she wanted petitioner out of her school (Ex. "2" Tr. 2/22/07 p. 297-298).

44. Although there was testimony at the hearing that petitioner was assigned to teach oversized classes in direct violation of the union contract (Ex. "14") (Ex. "2" Tr. 2/28/07 p. 323; Tr. 2/8/07 p. 1043, 1050-1053, 1168, 1170), no mention is made in the Decision of this clear contract violation.

45. Despite explaining in the Decision that petitioner was not-guilty of Specification 12 (Ex. "1" p. 62), he was convicted on Specification 12 (Ex. "1" p. 72, 77), which involves an accusation that petitioner did not have approval to tell the students that the gym would be closed on reagents week.

46. The Arbitrator also found petitioner guilty of Specification 19-e (Ex. "1" p. 67), which is an accusation that petitioner refused to enroll in peer intervention (Ex. "1" p. 8) however, that Specification was withdrawn in a pre-hearing conference as noted by the first Arbitrator (Ex. "2" Tr. 2/8/07 p. 1151 L. 16-18).

47. Concerning Specification 2-c, the Arbitrator based his decision of guilt on his finding that petitioner acknowledged the validity of the charge (Ex. "1" p. 53, however, he relied for this conclusion on the testimony of Uehling, and not any admission in the record by petitioner.

48. Despite finding petitioner of Specification 22 for refusing to attend a medical exam, the record confirms that the DOE did not claim at the hearing that such conduct constitutes insubordination (Ex. "2" Trans. p 1183-1185).

49. Petitioner was found guilty of Specification 27 for missing 16 meetings (Ex. "1" p. 71), however, there is no evidence in the record that he missed any specific meeting.

50. A list of the subject meetings was admitted for the dates only (Hearing Ex. D-25) (Ex. "2" Trans. 2/8/07 p. 1033), but the Payroll Secretary who was called to prove the allegations, failed to provide any proof that petitioner had missed any of those meetings (Ex. "2" Trans. 2/15/07 p. 140-141).

51. Almost without exception, the only charges of which petitioner was acquitted (Specifications 1, 4-c, 6, 7-d, 8-b, 13, 17 and 21-b), were those concerning which no evidence was introduced.

ARBITRATOR'S POWER IMPERFECTLY EXECUTED

52. Upon information and belief, an arbitrator's award should be vacated if the Arbitrator exceeded his power or so imperfectly executed it that a final and definite award was not made (23 Carmody Wait 2d 141:197).

53. Here, as described above, petitioner was convicted of the charges based almost exclusively on credibility evaluations of witnesses, although he had no opportunity to see or hear their testimony.

54. He was also convicted of charges that were withdrawn, or which were wholly unsupported by any evidence as described above.

55. It is further submitted that the Arbitrator, in essence, re-wrote the union contract in a way that violates public police, by disregarding the clear

evidence that petitioner's assignment to teach oversized classes was improper in the first place.

56. Although there was testimony at the hearing that petitioner was assigned to teach oversized classes in direct violation of the union contract (Ex. "14") (Ex. "2" Tr. 2/28/07 p. 323; Tr. 2/8/07 p. 1043, 1050-1053, 1168, 1170), no mention is made in the Decision of this clear contract violation.

57. These examples illustrate that the Arbitrator so imperfectly exceeded and exercised his power, in some instances by finding guilt where none was alleged or proven, in others by employing a corrupt and ineffective process, and in still others by disregarding the implications of a clear contract violation in violation of public policy (23 Carmody Wait 2d 141:197).

FAILURE TO FOLLOW PROCEDURES

58. Upon information and belief, after the first Arbitrator recused himself, the matter was assigned to Arbitrator, Jack Tillem, Esq., who rejected petitioner's application for a de-novo hearing (Ex. "15"; Ex. "2" Tr. 10/1/07).

59. Although the Arbitrator was informed of the prior circumstances involving the fraud and collusion of petitioner's prior attorney, the Arbitrator and DOE attorneys at this conference, he rejected petitioner's application and decided to proceed to decide the case by simply reviewing the written record, later claiming in his Decision that the prior fiasco was irrelevant (Ex. "1" p. 42).

60. Although he claims in his Decision that he offered petitioner an opportunity to call additional witnesses to supplement the record (Ex. "1" p. 42), he only offered one additional hearing date to do so (Ex. "2" Tr. 10/1/07 p. 2051 L. 5-11), which was unacceptable under the circumstances.

61. Upon information and belief, allowing a new arbitrator to decide the case based on the record violates petitioner's due process rights to a fair hearing, in view of petitioner's continuing objection and refusal to participate (Ex. "15"); Matter of Syquia v Board of Education of the Harpsville Central School District et al., 149 Misc.2d 463 (Sup Ct, Albany Co., 1991), 568 N.Y.S.2d 263; Matter of Conley v Ambach, 61 N.Y.2d 685 (1984), 472 N.Y.S.2d 598; In Re Jeffrey Soloman v Lancaster, 19 A.D.3d 334 (1st Dept, 2005), 798 N.Y.S.2d 43; ; Matter of Meyer v Board of Education of the Charlotte Valley Central School District et al., 182 A.D.2d 873 (3rd Dept, 1992), 581 N.Y.S.2d 920.

62. As explained in Matter of Syquia v Board of Education of the Harpsville Central School District et al., Supra,

> Once due process is lost it can never be regained. Not "all the King's horses and all the King's men" can put it together again. Nor can judicial review of a lengthy and intensive transcript substitute for what due process is intended and designed to do -- to guarantee a fair and impartial hearing and a fair and impartial determination of the issues. Only fair and impartial triers of the facts can do this.

WHEREFORE, it is respectfully requested that a judgment be entered herein, vacating and setting aside the Decision of the Arbitrator, and awarding petitioner the costs and disbursements of this proceeding, together with such other relief as to the Court may seem just and proper.

Dated: Palisades, N.Y.
December 20, 2007

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William A. Gerard