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

IA Part 16

PRESENT: ALICE SCHLESINGER Justice

PART 16

Theodore Smith

- v -

NYC Dept. of Ed.

INDEX NO. 117051/07

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ proceeding is determined in accordance with the accompanying memorandum decision.

E-1st

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 13 2008

NEW YORK COUNTY CLERK'S OFFICE

RECEIVED

MAY 02 2008

IAS MOTION SUPPORT OFFICE

Dated: APR 30 2008

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

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In the Matter of the Application of

THEODORE SMITH,

Petitioner,

Index No. 117051/07

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules,

Motion Seq. No. 001

-against -

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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SCHLESINGER, J:

Theodore Smith, petitioner, is a tenured New York City physical education teacher. He is challenging the findings and punishment determined by Arbitrator Howard Edelman in a decision dated December 4, 2007. That decision culminated a disciplinary proceeding commenced against Mr. Smith one year earlier, on December 6, 2006. There were 27 specifications alleged against him, involving incidents of misconduct, insubordination, incompetence and dereliction concerning his work at the Museum School in District 9 during the 2004-2005 school year.

The Arbitrator deciding the case, found Mr. Smith guilty of most of the specifications, viz 2,3,4-a,b,d and e, 5,7-a,b and c, 8-a, 9,10,11,12,15,16,18,19,20,21-a, and 22 through 27. He was found not guilty of specifications 1,4-c,6,7-d,8-b,13,17 and 21-b. Specification 14 was dismissed. The penalty imposed was a one-year suspension without pay.

Mr. Smith is challenging the decision and penalty pursuant to Section 7511 of the CPLR and Section 3020-a(4) of the Education Law. It is his contention that virtually every

aspect of the disciplinary process, including the role of his first counsel who represented him at all of the hearing sessions from January 11, 2007 to the conclusion of testimony on April 23, 2007, the actions of the first Arbitrator who heard the testimony and then recused himself on May 10, 2007, and finally and most importantly the performance of the second Arbitrator who decided the controversy based solely on the transcript of the proceedings before the first Arbitrator, thereby violating his due process right to a fair and impartial hearing.

The respondent Department of Education disputes these claims. Their counsel argues that Arbitrator Edelman's decision was based on the record, that he acted properly in finding Mr. Smith guilty, and that in reaching that decision noted that Mr. Smith's first counsel had ably and competently represented him throughout the hearing.

These are very unusual and disturbing circumstances, circumstances that did not become public and relevant until petitioner and his former lawyer, David Kearney, became involved in a nasty fee dispute. This dispute, which occurred after the conclusion of testimony and involved a federal action as well as this disciplinary proceeding, resulted in Kearney's leaving the case at the same time that Jack Tillem, the first Arbitrator, recused himself.

The circumstances of the recusal revolved around an alleged death threat to Arbitrator Tillem by Mr. Smith, which Kearney communicated both to his adversary in the disciplinary proceeding and to Tillem as well. These individuals then decided, without telling Smith, that Tillem would recuse himself, but give as the reason a letter Mr. Smith had written to Tillem questioning the Arbitrator's impartiality. However, when Mr. Smith (who vigorously denies any threat to Tillem) rejoined this conference call on May 10, 2007,

upon the insistence of respondent's counsel, Tillem revealed that the real reason for the recusal was the alleged threat and his resulting fear.[1]

The second Arbitrator became privy to all this information during the ensuing hearing dates when new counsel repeatedly asked for a hearing *de novo*. These requests were denied although the Arbitrator offered William Gerard, petitioner's new counsel, a one day opportunity to supplement the record.

Counsel for petitioner argues that virtually all of the guilty findings made by Edelman involved credibility determinations. I believe this is borne out by the record. Repeatedly, the Arbitrator states that he "credits" or "accepts" the testimony of the witnesses testifying against Mr. Smith, such as Principal Uehling and the school's witness, Shantl Kantha, one of Smith's assistants, in sustaining the various specifications while finding petitioner and his witnesses lacking in credibility.

For example, the decision includes the following statements by the Arbitrator:

> "I credit her [Principal Uehling's] observations" (p. 54);
>
> "I accept as true her claim" (p. 55);
>
> "This is so because I credit Principal Uehling's testimony" (p. 57);
>
> "I credit Kantha's testimony in this matter" (p. 58);
>
> "I credit all the assertions in Uehling's testimony and observation report," on page 61, regarding an assertion made by Smith;

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[1]These alleged threats were the subject of a separate investigation.

> "This assertion lacks the ring of truth," on page 63;
>
> "Principal Uehling testified credibly" and on numerous other occasions, culminating in the statement "I credit Uehling's conclusions in their entirety" on page 70.

It should be noted that Arbitrator Edelman saw none of these witnesses present their testimony. All of his findings were made exclusively from the record. It should also be noted that these specifications were all vigorously denied by Mr. Smith, and to a large extent the determinations made by the Arbitrator were based on what was believable or not.

As mentioned earlier, this petition was brought pursuant to CPLR Article 75 and Education Law §3020. CPLR §7511 sets out stringent criteria for when a court may vacate an arbitrator's award. There has to be a finding that the rights of the party were prejudiced by (I) corruption, fraud or misconduct in procuring the award; (ii) partiality of an arbitrator appointed as neutral; (iii) or a circumstance where the arbitrator so exceeded his power or so imperfectly executed it that a final and definite award was not made.

However, the Education Law mandates arbitration of disciplinary matters such as this. Therefore, the court's role is broadened considerably to include the factors of substantive and procedural due process. As Judge Breitel said in *Mount St. Mary's Hospital v. Catherwood*, 26 NY2d 493, 500 (1970), when first considering the distinction between voluntary and compulsory arbitration.

> The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration are fundamentally different if only because one may, under our system, consent to almost any restriction upon or deprivation of right, but similar

> restrictions or deprivations, if compelled by government, must accord with procedural and substantive due process.

In other words, the relevancy of due process in the literal sense can only be eliminated in voluntary arbitration. Id at 505.

Therefore, the question presented is whether the decision here based on an arbitrator's exclusive reading of the record, without seeing or hearing any witness and thereby evaluating their credibility in such a limited fashion, comports with the dictates of due process. I find that it does not. In *Conley v. Ambach*, 61 NY2d 685 (1984) the Court of Appeals approved of the replacement of a chairman of a §3020-a hearing panel due to an undisclosed conflict of interest, but modified the Appellate Division's order that the matter should proceed to be decided on the basis of the record. In that connection the Court said (at p. 688):

> Additionally, inasmuch as portions of the evidence at the hearings consisted of conflicting testimony of live witnesses, the credibility and persuasive force of which testimony might not be susceptible to adequate evaluation on the basis of a reading of the transcript only, it was an abuse of discretion, in view of the key role played by the chairman of the hearing panel as its only impartial member to order the determination of the reconstituted panel to be based only "upon the record already established".

Conley directly applies here. As noted above, Arbitrator Edelman was the sole arbitrator and he based his decision on a reading of the transcript only, despite conflicting testimony of live witnesses at the hearing. The credibility of witnesses could not be adequately evaluated, nor could conflicts in testimony be appropriated resolved, based on

the transcript alone.

It is fundamental to the fact finding process to be present when testimony is given, testimony which constitutes the evidence upon which the determination will be made. In *Solomon v. Lancaster, as Commissioner of Buildings of the City of New York*, (19 AD3d 334 1st Dept, 2005) petitioner was denied on application for a master electrician's license. The hearing, wherein testimony was given as to the applicant's fitness for the license, lacked a quorum of Board members. The denial of the license was challenged and the Appellate Division, First Department upheld the challenge and remanded for a new hearing. The Court said (at p. 335):

> We find that the hearing of live testimony was fundamental to the Board's investigation of petitioner's fitness, and was a transaction of business requiring a quorum.

Here, where the stakes are so much higher for the petitioner, his fundamental rights in this regard must be respected. The respondent argues that the Arbitrator deciding this matter made every attempt to be fair and made detailed analytical findings. However, that is essentially beside the point. When an individual is denied fundamental due process, an argument that substantial evidence supports the decision is irrelevant. In *Syquia v. Board of Education of Harpursville Cent. School District*, 80 NY2d 531 (1992), the courts hearing the challenge to an arbitration decision all believed the determination had to be annulled because one of the panel members had been paid an amount greater than he was statutorily entitled to receive, even though there was not an explicit finding that this violation itself caused petitioner any harm.

Therefore, neither the fact that many days had been spent hearing testimony by the first Arbitrator, nor the fact that the second Arbitrator Edelman conscientiously reviewed the record, is ultimately determinative. Once the recusal occurred, here under quite extraordinary circumstances involving threats, it was incumbent upon the new fact finder, one who was aware of these controversial and extraordinary circumstances, to grant Smith a hearing *de novo*. The fact that he did not, and proceeded to base virtually all of his findings on considerations of credibility without seeing and hearing the witness, was to deny Smith a fair hearing.

Therefore, the determination cannot stand. It must be vacated and the matter remanded for a new hearing before a different arbitrator.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted, the December 4, 2007 decision by Arbitrator Edelman is vacated, and the matter is remanded for a new hearing in accordance with the terms of this decision.

Dated: April 30, 2008

APR 30 2008

J.S.C.
ALICE SCHLESINGER

CLERK

FILED

MAY 13 2008

NEW YORK
COUNTY CLERK'S OFFICE

courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: December 21, 2007

William A. Gerard