In the Matter of the Application of

THEODORE SMITH,

Petitioner,

For a Judgment Pursuant to Article 75 of the C.P.L.R.

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

-- x

VERIFIED ANSWER

Index No. 117051/07

FILED
MAY 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

Respondent, by its attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, answers the petition as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "1" of the petition except admits that petitioner is employed by the New York City Department of Education.

2. Denies the allegations set forth in paragraph "2" of the petition and respectfully refers the Court to Article 52A of the Education Law for the full and accurate text and powers of the New York City Department of Education ("DOE").

3. Admits the allegations set forth in paragraph "3" of the petition.

4. Admits the allegations set forth in paragraph "4" of the petition.

5. Denies the allegations set forth in paragraph "5" of the petition except admits that petitioner received tenure in 1999.

6. Denies the allegations set forth in paragraph "6" of the petition except admits that petitioner purports to proceed as set forth in that paragraph and affirmatively states

Exhibit A Exhibit B Exhibit C Exhibit D

that the standard of review governing this proceeding is governed by Article 75 of the Civil Practice Law and Rules.

7. Admits the allegations set forth in paragraph "7" of the petition.

8. Denies the allegations set forth in paragraph "8" of the petition except admits that petitioner was served with Charges and Specifications and respectfully refers the Court to such Charges and Specifications, annexed as Exhibit "A" to respondent's answer, for the full and accurate text and content thereof.

9. Denies the allegations set forth in paragraph "9" of the petition except admits that petitioner was found guilty of Specifications 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, 22, 23, 24, 25, 26 and 27 and found not guilty of Specifications 1, 4-c, 6, 7-d, 8-b, 13, 14, 17 and 21-b.

10. Admits the allegations set forth in paragraph "10" of the petition.

11. Denies the allegations set forth in paragraph "11" of the petition, except admits that the first Arbitrator, Jack Tillem, Esq., who presided over all of the hearing sessions from January 11, 2007 to the conclusion of testimony on April 23, 2007, recused himself on May 10, 2007 and that the new Arbitrator rendered a decision on the complete record and respectfully refers the Court to the transcript of the May 10, 2007 hearing date, annexed as Exhibit "B" to respondent's answer, for the full and accurate text and content thereof.

12. Denies the allegations set forth in paragraph "12" of the petition, except admits that this case was reassigned to Arbitrator Howard C. Edelman, Esq., who rendered a decision in this matter on the record and respectfully refers the Court to the decision of Arbitrator Edelman, annexed to respondent's answer as Exhibit "D", for the full and accurate text and content thereof.

Exhibit A Exhibit B

13. Denies the allegations set forth in paragraph "13" of the petition.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "14" of the petition except admits that at times during the proceedings petitioner was represented by counsel.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "15" of the petition.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "16" of the petition.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "17" of the petition.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "18" of the petition.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "19" of the petition.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "20" of the petition.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "21" of the petition.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "22" of the petition.

23. Denies the allegations set forth in paragraph "23" of the petition except admits that petitioner wrote a letter to the Arbitrator dated May 3, 2007 and respectfully refers the Court to petitioner's Exhibit "11" for the full and accurate text and content thereof.

Exhibit A

Exhibit B

24. Denies the allegations set forth in paragraph "24" of the petition except admits that petitioner's attorney, David Kearney, called DOE and that DOE sent an e-mail to the Office of the Special Commissioner of Investigation for The New York City School District ("SCI").

25. Denies the allegations set forth in paragraph "25" of the petition except admits that Theresa Europe, the Deputy Counsel to the Chancellor, upon consent of petitioner's attorney, Mr. Kearney, had a conversation with the Arbitrator.

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "26" of the petition.

27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "27" of the petition.

28. Denies the allegations set forth in paragraph "28 of the petition.

29. Denies the allegations set forth in paragraph "29" of the petition and further denies knowledge or information sufficient to form a belief as to what petitioner's attorney did.

30. Denies the allegations set forth in paragraph "30" of the petition except admits that on May 10, 2007 a telephone conference with Arbitrator Tillem was held, that petitioner, Mr. Kearney, Ms. Europe, and DOE attorney, Susan Jalowski were present, that during that phone conversation Arbitrator Tillem recused himself and respectfully refers the Court to the May 10, 2007 transcript, pages 1057, 1059 and p. 1061, annexed to respondent's answer as Exhibit "B" for the full and accurate text and content thereof.

31. Denies the allegations set forth in paragraph "31" of the petition except admits that during the May 10, 2007 conference there was an off the record conversation and

respectfully refers the Court to the May 10, 2007 transcript, pages 1062, 1063 and 1065, annexed to respondent's answer as Exhibit "B" for the full and accurate text and content thereof.

32. Denies the allegations set forth in paragraph "32" of the petition except admits that DOE reported petitioner's threats to SCI, that DOE attempted to have petitioner medically evaluated under Section 2568 of the Education Law and that on January 8, 2008 DOE preferred new disciplinary Charges and Specifications against petitioner.

33. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "33" of the petition.

34. Denies the allegations set forth in paragraph "34" of the petition except admits that after the recusal of Arbitrator Tillem, Arbitrator Edelman was appointed.

35. Denies the allegations set forth in paragraph "35" of the petition.

36. Denies the allegations set forth in paragraph "36" of the petition and respectfully refers the Court to the decision of Arbitrator Edelman, annexed as Exhibit "D" to the respondent's answer for the full and accurate text and content thereof.

37. Denies the allegations set forth in paragraph "37" of the petition and respectfully refers the Court to the decision of Arbitrator Edelman, annexed as Exhibit "D" to the respondent's answer for the full and accurate text and content thereof.

38. Denies the allegations set forth in paragraph "38" of the petition and respectfully refers the Court to ~~the~~ Exhibits "3" H and Ex. R-6 annexed as petitioner's Exhibit "3" for the full and accurate text and content thereof.

Exhibit A Exhibit B

39. Denies the allegations set forth in the second numbered paragraph "33" of the petition and respectfully refers the Court to the decision of Arbitrator Edelman, annexed as Exhibit "D" to the respondent's answer for the full and accurate text and content thereof.[1]

40. Denies the allegations set forth in the second numbered paragraph "34" of the petition and respectfully refers the Court to the decision of Arbitrator Edelman, annexed as Exhibit "D" to the respondent's answer for the full and accurate text and content thereof.

41. Denies the allegations set forth in the second numbered paragraph "35" of the petition and respectfully refers the Court to the decision of Arbitrator Edelman, annexed as Exhibit "D" to the respondent's answer for the full and accurate text and content thereof.

42. Denies the allegations set forth in the second numbered paragraph "36" of the petition and respectfully refers the Court to the decision of Arbitrator Edelman, annexed as Exhibit "D" to the respondent's answer for the full and accurate text and content thereof.

43. Denies the allegations set forth in the second numbered paragraph "37" of the petition and respectfully refers the Court to the decision of Arbitrator Edelman, annexed as Exhibit "D" to the respondent's answer for the full and accurate text and content thereof.

44. Denies the allegations set forth in the second numbered paragraph "38" of the petition.

45. Denies the allegations set forth in paragraph "39" of the petition.

46. Denies the allegations set forth in paragraph "40" of the petition and respectfully refers the Court to the decision of Arbitrator Edelman, annexed as Exhibit "D" to the respondent's answer for the full and accurate text and content thereof.

47. Denies the allegations set forth in paragraph "41" of the petition.

---

[1] After paragraph "38" of the petition, petitioner mistakenly numbered the next paragraph "33" and continued with duplicate paragraph numbers through "38" after that.

48. Denies the allegations set forth in paragraph "43" of the petition.[2]

49. Denies the allegations set forth in paragraph "44" of the petition.

OR A STATEMENT OF MATERIAL AND RELEVANT FACTS, RESPONDENT ALLEGES

50. Petitioner was appointed as a physical education teacher in 1995 and became tenured on February 3, 1999.

51. On or about December 6, 2005, DOE, in accordance with Education Law § 3020 served petitioner with disciplinary Charges and Specifications. A copy of the Charges and Specifications is annexed hereto as Exhibit "A."

52. In bringing these Charges and Specifications, DOE asserted that petitioner's improper conduct was just cause for termination. (Id.)

53. The charges and specifications related to plaintiff's alleged insubordination, incompetence, conduct unbecoming a teacher, excessive absences and neglect of duty from November 17, 2004 until the end of the 2004-2005 school year. (Id.)

54. In accordance with Education Law § 3020-a, Jack D. Tillem was designated as an Arbitrator to hear the matter. Thereafter, 18 days of hearing took place. At the hearing, plaintiff was represented by counsel and was afforded a full and fair opportunity to conduct direct and cross-examination of witnesses and present documentary evidence.

55. After the conclusion of the hearings and the record closed, closing arguments were scheduled for May 10, 2007. However, on that day, Arbitrator Tillem recused himself. See a copy of the May 10, 2007 transcript annexed hereto as Exhibit "B."

56. In recusing himself, Arbitrator Tillem said:

---

[2] The petition does not contain a paragraph "42."

Exhibit A Exhibit B

> And as a result of the statements made in that letter in which the [petitioner] claimed that I am "tilted" against him and that I can not, I guess the letter makes clear, render a fair and objective decision...Therefore, I am going to recuse myself so that he has the opportunity to have another arbitrator restore his confidence in the process
>
> ....
>
> It—it turns out that that is only partly the reason and the chances are quite candidly that if I had just gotten the letter I wouldn't recuse myself because there is no real basis. There—there's no merit or substance to it. However, it has been made known to me as a result of counsel for the [petitioner's] ethical compliance he has informed me that Mr. Smith has made death threats against me. And that is the main—that is the real and primary reason that I am recusing myself, coupled with this letter and his statements which Mr. Kearney, thank you, has informed me of and had to inform me of as an ethical requirement of his profession. Mr. Smith has threatened to kill me, blow my f...--beat my f ing head in and other expressions and I don't think that at this point I wish to continue as the arbitrator in light of his threats....

Id., pp. 1057-1065.

57. The circumstances surrounding the recusal of Arbitrator Tillem were investigated by Office of the Special Commissioner of Investigation for The New York City School District ("SCI"). A copy of the SCI report of the results of its investigation is annexed hereto as Exhibit "C."

58. SCI interviewed petitioner, his previous attorney, David Kearney, Arbitrator Tillem, Theresa Europe, Deputy Counsel to the Chancellor and Susan Jalowski, the DOE attorney in the arbitration. Id., p. 2.

59. In its report, SCI concluded that:

> "[Petitioner] threatened the life of the arbitrator presiding over a disciplinary proceeding against him. His Attorney's accounts of Smith's threats are entirely credible; Smith's denials are the complete opposite. Smith's conduct is consistent with his pattern of distrust and suspicion of others as exhibited in his written communications and his testimony at SCI. Smith understandably caused the arbitrator to fear for his life, and nearly sabotaged the disciplinary proceeding against him. His allegations against the DOE and his supervisors are without merit, and are similarly prompted by Smith's rigid preoccupation with the motives of his accusers, and a likely desire to undermine the disciplinary proceeding against him...."

Id., p. 12

60. As a result of this recusal, the disciplinary case was reassigned to another Arbitrator, Howard Edelman, Esq. See p. 43 of the Decision of Arbitrator Edelman which is annexed hereto as Exhibit "D."

61. The entire record was supplied to Arbitrator Edelman and he scheduled closing arguments for June 15, 2007. Id., p. 43.

62. Petitioner appeared pro se and, as a result, Arbitrator Edelman granted petitioner's request to obtain new counsel. Id.

63. Petitioner obtained new counsel, Mr. William Gerard, and in a conference call with the Arbitrator conducted July 19, 2007, Mr. Gerard was granted a continuation of the conference call until August 10, 2007. Id.

64. At that conference call, Mr. Gerard requested, among other things, that there be a de novo hearing on this matter because Arbitrator Edelman had not heard any live witnesses and because petitioner was dissatisfied with the representation of his prior attorney, Mr. Kearney. Id., pp. 43, 44.

65. Arbitrator Edelman rejected this request and, despite the hearing being closed, gave Mr. Gerard the right to recall petitioner or other witnesses to offer testimony and to introduce any documentary evidence which had not been produced previously. Id., p. 44.

66. Though a hearing had been scheduled for August 22, 2007, Arbitrator Edelman granted Mr. Gerard's request for an adjournment and a final hearing date was scheduled for September 20, 2007. Id.

67. However, neither Mr. Gerard nor petitioner appeared on September 20, 2007. Thus, Arbitrator Edelman noted:

> THE HEARING OFFICER: ...I do note that Mr. Gerard initially asked that the hearings be held de novo - that due process require [sic] that the hearings be held de novo. I should comment that hearings were held before prior Hearing Officer and substantial record was made. Witnesses were examined and cross examined by both Mr. Jalowski - Ms. Jalowski and Mr. Smith's then counsel. I did not grant Mr. Gerard's motion to have a hearing de novo, but I did, as I indicated, stated that he could present any evidence that he wished to have me consider before I rendered a decision.
>
> That brings us up to last night. Last night, at approximately four forty-five p.m., I received an e-mail from Mr. Gerard, which essentially - I need not read it into the record, but essentially it indicated that Mr. Smith, quote, has declined to participate because due process requires an entirely new fact-finding proceeding and a review of the prior record is insufficient under the circumstances, close quote. And Mr. Gerard has various citations which he claims supports that position. Ms. Jalowski submitted a document a few minutes later opposing Mr. Gerard's request.
>
> I then sent an e-mail to both Mr. Gerard and Ms. Jalowski directing them to appear this morning with the first order of business being argument on Mr. Gerard's motion or contention, if you will, that a hearing de novo should be held or that one could

Exhibit A Exhibit B

> not proceed if the hearing de novo was not - was not held. I set the time for the commencement of that hearing at eleven a.m. and it is now approximately eleven fifteen.
>
> What all that means is that we are going to wait until eleven - and oh, also, I just called Mr. Gerard's office to ascertain whether he was going to appear or not going to appear and I got a recording which indicated that his voice box mail was full, so therefore I could not communicate with him. I'm going to wait until approximately eleven thirty and then I'll have some other comments as to how this matter will proceed if Mr. Gerard or Mr. Smith do not appear.
>
> Okay. Stacey, you got a break until eleven thirty. All right?
> (Off-the-record discussion)
>
> THE HEARING OFFICER: Okay. It is now eleven thirty a.m. and neither Mr. Gerard, nor Mr. Smith has appeared, and Ms. Jalowski is now here.
>
> As I indicated in my e-mail of yesterday evening, the purpose of this proceeding was to allow both Ms. Jalowski and Mr. Gerard to make any oral arguments in support of Mr. - in support or opposition to Mr. Gerard's claim that the matter should not go forward or that he may not appear and that presumably the proceedings should be stayed, although that was not expressly stated in his memo.
>
> Accordingly, what I'm going to do - I have Mr. Gerard's letter; I have Ms. Jalowski's letter. I'm going to take from Ms. Jalowski any other documentation that she wishes to give me at this time. I won't take any oral arguments. And I will render a - a *termination[3] in this matter in a very brief period of time. Thereafter, if, depending on my determination, I may set another date for hearing as is necessary. (1700-1708).

Id., pp. 44-46.

---

[3] The transcript reads "termination." I stated "determination," however.

68. Another hearing date was scheduled for October 1, 2007. Petitioner and Mr. Gerard were present that day and once again Mr. Gerard asked for a hearing de novo. Id., p. 46.

69. This request was rejected by Arbitrator Edelman. However, he once again offered Mr. Gerard the opportunity to recall petitioner or any other witnesses and submit documentary evidence not previously introduced. Mr. Gerard declined the offer. Id., pp. 46, 47.

70. Mr. Gerard also declined the opportunity afforded him by Arbitrator Edelman to make closing arguments. Id., p. 47.

71. In a detailed seventy seven (77) page opinion and award dated December 4, 2007, Arbitrator Edelman found petitioner guilty of virtually all of the Specifications. A copy of this decision is annexed hereto as Exhibit "D." Specifically, Arbitrator Edelman found petitioner guilty of Specifications 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, 22, 23, 24, 25, 26 and 27. Id., pp., 72, 77.

72. In connection with Specification 2, i.e., the improper conduct on November 23, 2004, Arbitrator Edelman determined that:

> First, on November 23, 2004, Principal Uehling observed Respondent's class. Her findings were committed to writing that same day. I can think of no reason why the Principal would claim students were playing in the yard without supervision if it were not true. Nor would she claim no instruction was taking place if, indeed, it was taking place. Further, I note, Respondent acknowledged this allegation was valid, since when he met with Uehling later that day, he confirmed he would make sure students would only be in supervised areas.
>
> As for the allegation Smith did not address the problem of students being unprepared for class, I find his response to be unconvincing. While Respondent claims he lined up unprepared students outside his office, this does not constitute

Exhibit A Exhibit B

> addressing this matter with them, I find. For that to have occurred, Respondent needed to speak with them as a group and explain to them the consequences of their being unprepared. There is no record evidence he did so. Instead, he called their parents to advise them their child was unprepared for gym class. While it is some attempt at remediating the problem, it does not constitute dealing with the students themselves.
>
> Further, I find it inappropriate that Respondent Smith called the students' parents during class time. Clearly, this is an inappropriate use of the instructional day. Also, Smith acknowledged his misfeasance for he agreed to make phone calls after school and to use instructional time for its intended purpose. Thus, Smith, himself, acknowledged his shortcomings in this regard.

(Id., pp. 52-54).

73. With respect to Specification 3, i.e., the improper conduct of December 1, 2004, Arbitrator Edelman determined that:

> According to Uehling's memorandum of December 1, 2004, Respondent sent two students to get her because the students in Smith's class were not following his directions. Upon her arrival, Uehling found that students were not on their floor spots and many were running around. I credit her observations.
>
> Additionally, I credit the Principal's claim Respondent had no established way of taking attendance. Uehling found that even she could not take attendance in his classes since he had no real system for doing so. In fact, students were continually moving around and were not on their floor spots. As such there simply was no way to accurately record who was present.

(Id., p. 54.)

74. In connection with Specification 4, sub specifications a, c, d, e, and f, i.e., the improper conduct of December 2, 2004, Arbitrator Edelman concluded:

Exhibit A Exhibit B

> I credit the observation made by the Principal that when she arrived at Respondent's class, she found students engaged in free play rather than being instructed in the soccer unit. I also credit Uehling's statements that Smith did not know his students' names. Moreover, I credit her assertion that no instruction was taking place. Also, I accept as true her claim she detected no evidence Smith had established any classroom rules.

(Id., pp. 54, 55).

75. In connection with Specification 5, the improper conduct of December 9, 2004, Arbitrator Edelman concluded:

> Here I credit the memo from Uehling to Smith, dated December 9, 2005, in which she summarized what had occurred in one of his physical education classes. Uehling found Respondent was not instructing students when she arrived. Rather, she observed, he was sitting in a chair. This was clearly inappropriate as Smith is paid to teach, not to baby-sit. Moreover, if Respondent was sitting down due to a flare-up of his medical condition, he should have notified someone in the main office he was not feeling well so that some relief and instruction could be provided.
>
> I also credit Uehling's assertion that Respondent failed to provide a lesson plan for her as alleged in sub-specification (c). Further, when she asked him why the students were engaged in free play rather than receiving instruction, he retorted that if the Principal wanted it, he would tell the students they would never again have free play. I find such a response to be thoroughly inappropriate and unprofessional.

(Id., pp. 55, 56).

76. In connection with sub specifications (a), (b) and (c) of Specification 7, i.e., the improper conduct of December 23, 2004, Arbitrator Edelman concluded:

> This is so because I credit Principal Uehling's testimony that on December 23, 2004, Respondent

brought his students to the auditorium without permission, failed to supervise the students and did not provide instruction.

> Beyond Uehling's credible testimony, Respondent was inconsistent when questioned as to whether or not he had taken his students to the auditorium. On direct examination Smith acknowledged he had taken his students to the auditorium because they were unruly (394). Yet, later in his testimony, when [sic] was asked if, at any time, he took any of his students to the auditorium without permission from the administration, he replied, "Not that I recall (448.)" Respondent's wavering testimony confirms my determination that Uehling's version is accurate.
>
> I also note that when questioned as to what instruction he gave on December 23, 2004, he replied, "I think I gave them a short essay to write - a short, like note or something (394)." Not only is this answer vague, it also belies Respondent's claim he provided instruction that day. I find it difficult to believe that asking students to write a short essay, while sitting in an auditorium rather than receiving instruction in the gym, constitutes instruction in Physical Education.

(Id., p. 56, 57).

77. In connection with sub specification of Specification 8, i.e., the improper conduct between December 23, 2004 and January 10, 2005, Arbitrator Edelman determined:

> Although Smith insisted he gave lesson plans to all his assistants, his testimony is contradicted by one of them, Shanti Kantha, who declared he gave her only two or three plans, "And that was it. Then I didn't receive any other lesson plans from him (155)." Kantha's claim in buttressed by the fact she sent an e-mail to Uehling on January 10, 2005, in which she advised the Principal that, "I haven't received a lesson plan yet (Dept. Ex. 12)." I credit Kantha's testimony in this matter.

(Id., p: 58).

78. With regard to Specification 9, i.e., the improper conduct of January 5, 2005, Arbitrator Edelman concluded:

> Principal Uehling testified that on January 5, 2005, she observed that Respondent dismissed his class, "Much too early (91)." I credit her testimony.
>
> Moreover, on January 11, 2005, the Principal met with Respondent and his Union representative, at which time she criticized him for dismissing his class sixteen minutes early. In response, I observe, Smith insisted he had dismissed his class only five minutes early. This statement is clear evidence that he dismissed his class before he should have done so (Dept. Ex. 13), even if he and the Principal differed as to how early he let them go.
>
> Sub-specification (b) has also been proven. Uehling testified she observed "disorder" in Smith's class during student dismissal (91). Further, at a January 11, 2005 meeting, she discussed this with Smith, and told him, "Your failure to demonstrate routine, safe dismissal procedure is unsatisfactory (Dept. Ex. 13.)" I have no reason to doubt that Uehling accurately recorded what she observed that day.

(Id., pp. 59, 60).

79. With respect to Specification 10, i.e., the improper conduct of January 6, 2005, Arbitrator Edelman concluded:

> At the hearing Principal Uehling credibly testified that on January 6, 2005, Respondent performed an unsatisfactory lesson (95-97). She based her conclusions on several factors. First, she noted, he did not have a lesson plan with him when she requested it. According to Uehling, Respondent disappeared into a bathroom and produced his "lesson plan" a few minutes later (Resp. Ex. 22). My examination of that plan leads to the obvious conclusion that Respondent hurriedly scribbled some notes on a piece of paper and then gave them to Uehling. However, his "plan" contains none of

the elements one would expect in a lesson plan, such as an aim, objectives, assessment measures and material to be used.

> Moreover, on that day Principal Uehling also determined there was minimal instruction taking place (Dept. Ex. 14). She found, too, there was little evidence of planning. Also, she discerned, Smith did not make proper use of his assistant, who he told to sit in the bleachers even though she was attempting to help him keep order (97). I credit all the assertions in Uehling's testimony and observation report.

(Id., p. 60).

80. With respect to Specification 11, i.e., petitioner's failure to attend a meeting on January 6, 2005, Arbitrator Edelman concluded:

> In like manner, I find Respondent did not attend a meeting on January 6, 2005, as directed by Principal Uehling. At the hearing, the Principal related that one of Smith's assistants, Ms. Killen, wrote her a memo regarding safety issues in the gym (Dept. Ex. 15). As a result, Uehling told Killen and Smith that all three of them should meet to resolve any problems that existed.
>
> On the meeting day, when Killen had not yet arrived, Respondent told the Principal he would look for her. According to Smith, he found Killen, who told him she could not come to the meeting because she was busy (333). Thus, he asserted, it was Killen, not he, who refused to attend the meeting. This assertion lacks the ring of truth. The meeting in question was the result of Killen's memo to Uehling in which she expressed serious safety concerns. Why, then, would she not want to appear? There can be no sound explanation for her refusal.
>
> Additionally, when Uehling asked Killen about the matter, she told the Principal that Smith did not request her to come to the meeting. It is clear to me Respondent's version of this incident does not add

up and that his actions were designed to ensure the meeting would [sic] take place.

(Id., pp. 61, 62).

81. With respect to Specification 12, i.e., the improper conduct of January 17, 2005, Arbitrator Edelman concluded:

> I also find Respondent told his students the gym would be closed during Regents week, without obtaining prior approval from the administration, as alleged in Specification 12. However, I find, this breach does not constitute actionable misconduct since there is no evidence he deliberately misrepresented what he believed to be true; i.e. that the gym would in fact be closed during that period.

(Id., p. 62).

82. With respect to Specification 15, i.e., leaving early from his workshop on January 31, 2005 without prior permission, Arbitrator Edelman concluded:

> The record clearly demonstrates that Respondent left the workshop before it had concluded. This is evidenced by the fact that in an e-mail from Smith to Ramsey, Smith apologized for leaving early (Resp. Ex. 8) However, Respondent did comply with his principal's request that he meet with Ramsey. Ramsey confirmed this fact in his testimony (234). That conversation notwithstanding, I determine, Respondent is guilty of Specification 15.

(Id., p. 63).

83. With regard to Specification 16, i.e., the improper conduct of February 1, 2005, Arbitrator Edelman concluded:

> First, Principal Uehling credibly testified that as a result of an e-mail she received from Smith she went to see him at the gym. However, she observed, the gym was locked. Thereafter, Uehling went to the auditorium where she found students running around and banging on the piano (Dept. Ex

Exhibit A Exhibit B

19). So chaotic was the situation, she related, one of Respondent's assistants was hit by a flying dodge ball (117). The Principal reported she directed Smith to take his students back to the gym, a directive he refused to obey (117; Dept. Ex. 19).

> Respondent's behavior in this situation was inappropriate. It reflected a lack of understanding of his responsibilities and a cavalier attitude towards his obligations.
>
> In addition, according to Uehling, Smith also did not have a lesson plan; nor did he instruct his class that day. She averred Respondent told her his lesson plan was that students would sit quietly and read in the auditorium (Dept. Ex. 19). Such a statement clearly demonstrates Respondent does not comprehend what constitutes a valid and subject-appropriate lesson plan.

(Id., pp. 63, 64)

84. In connection with Specification 18, i.e., the improper conduct of March 3, 2005, Arbitrator Edelman concluded:

> There is no question Respondent left school at the beginning of the day on March 3, 2007, as alleged in Specification 18. It is also uncontroverted that he did not leave a lesson plan; nor did he obtain a substitute. Respondent explained that his early departure was caused by his health problems. In spite of his assertion, I determine, he is guilty of both sub-specifications. It is certainly possible Smith left early on March 3, 2005 because he was having an episode of atrial fibrillation. However, given his health problems, Respondent should have always had an emergency lesson plan with him. In that way, if he encountered problems his substitute could do something more babysit his class. Further, in a world where cell phones proliferate, he certainly could have called a substitute before leaving. His failure to leave plans or get a substitute clearly demonstrates his guilt of Specification 18.

(Id., p. 65).

85. With regard to sub specifications (a), (b), (c) and (e) of Specification 19, i.e., the improper conduct of March 9, 2005, the Arbitrator concluded:

> I base my determination on a letter to Respondent from Uehling, dated March 18, 2005, in which the Principal criticized him for his failure to provide her with his Physical Education lesson plans each Monday (Dept. Ex. 22). According to Uehling, Smith refused to comply with this requirement because he was grieving the issue. Uehling's recall of this matter is clear and consistent and stands in sharp contrast to that of Maria Aragonez whose testimony was unclear and vague. Therefore, I credit the Principal's assertion with regard to the plans.
>
> Further, while Respondent excused his failure to provide plans because he was grieving the matter, this is not a valid excuse. It is well established that if an employee believes he is being aggrieved by a certain requirement, he must still fulfill that requirement until such time as his grievance is heard and upheld. Instead of following the "work now, grieve later," rule, Respondent decided to take matters into his own hands by refusing to comply with the Principal's legitimate directive.
>
> I also credit Uehling's statement that Respondent submitted inadequate lesson plans. This had been a recurring criticism for a long period of time. My own examination of some of Respondent's purported plans, specifically those of January 6, 2005 and March 2, 2005, convinces me there is merit to the Principal's criticism.
>
> Respondent further claimed his assistants were lying when they told Uehling they had received only two lesson plans from him. However, I find it difficult to believe that four assistants would conspire against him in his manner.
>
> .....
>
> Respondent's guilt with regard to sub-specification e is uncontroverted. When Uehling suggested he

enroll in the Department's Peer Intervention Program, Smith refused to do so. His excuse for not enrolling was that Uehling was writing letters critical of his performance and he was fearful she would twist what he was saying to make him look bad. This excuse is sheer nonsense. The Peer intervention Program is designed to help teachers who are having difficulty. The fact Respondent was receiving criticism from the Principal is the exact reason he should have enrolled immediately. Additionally, Respondent's contention he was afraid to enroll because Uehling would twist what he said also lacks a valid basis. Respondent's speculation as to what the Principal might do is just that, speculation and nothing more. He had no way of knowing that she would do anything negative if he enrolled in the program.

Moreover, there is no evidence that Smith even investigated the program before rejecting the suggestion he participate. At the very least, Smith should have enrolled. Then, he could have evaluated whether or not it had value for him. Had he done so, perhaps some of his misfortune could have been avoided.

(Id., pp. 65-68).

86. With regard to Specification 20, i.e., improper absences from scheduled meetings between February 2005 and March 2005, Arbitrator Edelman determined:

There is no question Respondent absented himself from school on February 9, 2005, February 10, 2005 and March 9, 2005. Smith would have me believe the reason he was out on those days was because of his medical condition. However, I note, that on each of these three days he was absent Respondent was scheduled to meet with Victor Ramsey. I believe Smith used his health as an excuse for not meeting with Ramsey.

(Id., p. 68).

87. In connection with sub specification (a) of Specification 21, i.e., petitioner's improper comments, Arbitrator Edelman concluded:

Exhibit A Exhibit B

In like manner, I find Respondent guilty of Specification 21, sub-specification (a). I do so because not only did Ramsey testify that Smith told him to, "Get off my back," Respondent acknowledged he made that remark.

(Id., p. 68).

88. With regard to Specification 22, i.e., petitioner's refusal on May 24, 2005 to attend his scheduled appointment for medical evaluation, Arbitrator Edelman concluded:

> The record on this is clear. Respondent was directed to undergo a medical examination on April 28, 2005. However, because the schools were closed the examination was rescheduled for May 24, 2005. Respondent refused to appear on that date, claiming his due process rights were being violated. This he had no right to do. If he truly believed his rights were being violated, he should have consulted an attorney or his Union for advice. He did not do either of those two things. Rather he chose to commit an act of insubordination. As such, his culpability here has been demonstrated to my satisfaction.

(Id., p. 69).

89. With respect to Specification 23, i.e., petitioner's misconduct of June 22, 2005, Arbitrator Edelman concluded:

> I further determine Respondent is guilty of Specification 23, in its entirety. I base my conclusion on Principal Uehling's credible testimony that on June 22, 2005, she received a call from teacher Vinnie Murray that students in Respondent's class were, "Going wild (1030)." Uehling related how she proceeded to the gym where she found Respondent sitting down, eating and drinking and the gym in disarray. Further, she discovered, Respondent was using floor mats from another school in the building without permission. Also, she reported, when she questioned Respondent about this he became belligerent, turned his back on her and walked away (1031-1032). Later, Uehling memorialized the incident in a

Exhibit A Exhibit B

memorandum, dated June 28, 2005 (Dept. Ex. 24).
I fully credit Uehling's account.

(Id., pp. 69, 70)

90. With respect to Specification 24, i.e., petitioner's improper conduct on June 28, 2005, Arbitrator Edelman concluded:

> Once, again, I credit Uehling's testimony that although Respondent told her his records were in his office desk, when she and substitute teacher Susan Schron went to retrieve Smith's record books from his office, they discovered the records were not there. In fact, she observed, the entire office was empty (1038).
>
> In addition, when Uehling met with Respondent on June 22, 2005, she asked him to provide grades for his students. When she examined them, the Principal determined Respondent did not have an established grading procedure. For example, she found unexplained grades, such as students who where excessively absent receiving grades of A and B. I credit Uehling's conclusions in their entirety.

(Id., p.70).

91. With regard to Specification 25, i.e., petitioner's excessive absences during the 2004-2005 school year, Arbitrator Edelman determined:

> Respondent was also excessively absent, I determine. The record shows that from November 18, 2004 to May 10, 2005, Smith was absent on nineteen separate occasions. (Dept. Ex. 27). Even if some of those absences may have been due to health-related problems, I believe that so many absences in a six month period constitute excessive absenteeism. A teacher must be available to teach. Even legitimate absences may he excessive, especially where, as here, they are intermittent and frequent, as opposed to a single absence of long duration.

(Id., p. 71).

92. With regard to Specification 26, i.e., petitioner's excessive lateness's or early departures from school during the 2004-2005 school year, Arbitrator Edelman determined:

> During the same period of time Respondent either arrived or departed early on fourteen separate occasions. This, too, is excessive, I am convinced.

(Id.).

93. With respect to Specification 27, i.e., petitioner's absences from meetings and professional development conferences during the 2004-2005 school year, Arbitrator Edelman concluded:

> According to the Department, Smith was absent for scheduled meetings on sixteen occasions between November 18, 2004 and April 18, 2005. It is interesting to note these meetings involved parent conferences, disciplinary meetings and staff development meetings. I am struck by the fact that this pattern of absences is virtually identical to that which Respondent displayed when he was scheduled to meet with Victor Ramsey, as alleged in Specification 20. Clearly, in all those instances Respondent engaged in a pattern of behavior designed to thwart the purpose of those meetings.

(Id., pp. 71, 72).

94. In determining the appropriate penalty, Arbitrator Edelman concluded:

> Based on the positive observations, positive comments and the testimony of several witnesses, I am convinced that Respondent Smith is fit to teach. However, he should not be under no illusion his performance can continue in the same vein as it did during 2004-2005. Smith must understand the immediacy of his need to improve his pedagogical skills, especially those of planning, writing satisfactory lesson plans and class control. He must also dramatically improve his attendance and follow the directives of his supervisor. He should know that his failure to do so may well lead to his termination.

Nonetheless, and based on the foregoing, I conclude that the appropriate penalty in the instant matter is a one year suspension without pay. Any penalty more severe than this would be punitive rather than corrective. Further, this penalty is appropriate and proportional; for the misconduct that respondent has demonstrated.

(Id., pp. 75, 76)

95. This petition was instituted on or about December 24, 2007.

AS AND FOR A FIRST DEFENSE RESPONDENT RESPECTFULLY ALLEGES:

96. The petition fails to state a cause of action upon which relief may be granted.

AS AND FOR A SECOND DEFENSE RESPONDENT RESPECTFULLY ALLEGES:

97. Pursuant to CPLR § 7511, an arbitrator's award may be vacated only if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award, or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

98. The petitioner has not, and cannot present any of the bases enumerated in CPLR § 7511 to vacate the Arbitrator's Award.

AS AND FOR A THIRD DEFENSE RESPONDENT RESPECTFULLY ALLEGES:

Exhibit A Exhibit B

99. The decision of Arbitrator Edelman was based on a careful review of the testimony, on considerations of credibility of the witnesses and the evidence submitted.

AS AND FOR A FOURTH DEFENSE RESPONDENT RESPECTFULLY ALLEGES:

100. The decision of Arbitrator Edelman was not procured by fraud, misconduct or corruption, bias or impartiality, nor did Arbitrator Edelman exceed his powers.

AS AND FOR A FIFTH DEFENSE RESPONDENT RESPECTFULLY ALLEGES:

101. In order to establish bias, petitioner has to show prejudice as a result of the partiality of the arbitrator arising from some financial or familial relationship.

102. Petitioner has failed to meet this burden and has failed to establish any bias on the part of the arbitrator.

AS AND FOR A SIXTH DEFENSE RESPONDENT RESPECTFULLY ALLEGES:

103. When because of threats made by petitioner Arbitrator Tillem recused himself after the record was closed, the new Arbitrator, Howard Edelman, could decide this matter on the record and petitioner is not entitled to a de novo hearing.

104. This is especially so in this matter where despite the hearing being closed, Arbitrator Edelman gave petitioner's attorney, Mr. Gerard, the right to recall petitioner or other witnesses to offer testimony and to introduce any documentary evidence which had not been produced previously and petitioner as well as his attorney declined the opportunities afforded him by Arbitrator Edelman.

AS AND FOR A SEVENTH DEFENSE RESPONDENT RESPECTFULLY ALLEGES:

Exhibit A Exhibit B

105. It is the province of the arbitrator to assess credibility and petitioner's disagreement with the result reached by the arbitrator is not a ground to vacate an arbitration award.

WHEREFORE, respondent respectfully requests judgment dismissing the petition together with such other relief as the Court deems just and proper.

Dated: New York, New York
January 24, 2008

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Respondent
100 Church Street, Room 2-117
New York, NY 10007
(212) 788-0897

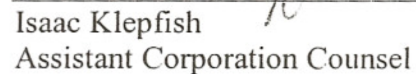
By: 
Isaac Klepfish
Assistant Corporation Counsel

Exhibit A Exhibit B

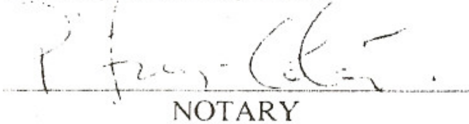
VERIFICATION

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

SUSAN JALOWSKI, being duly sworn, says that she has been duly designated as [illegible], and as such that she is an officer of The City of New York in the within action. That the foregoing Defendants' Responses and Objections to Plaintiff's First Set of Interrogatories are true to her knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true. Deponent further says that the reason why this verification is not made by The City of New York is that it is a corporation; that the grounds of her belief as to all matters not therein stated upon her knowledge are as follows: Information obtained from the books and records of the New York City Department of Education and other departments of the city government and from statements made to her by certain officers or agents of The City of New York.

SUSAN JALOWSKI

Sworn to before me this
24th day of January 2008.



NOTARY

PATRIA FRIAS-COLON
Notary Public, State of New York
No. 02F[illegible]
Qualified in Kings County
Commission Expires 10-23-2009

Exhibit A Exhibit B