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THE STATE EDUCATION DEPARTMENT
THE UNIVERSITY OF THE STATE OF NEW YORK



In the Matter of
THE NEW YORK CITY DEPARTMENT OF EDUCATION

v

THEODORE SMITH

Section 3020-a Education Law Proceeding (File#)

DATE: May 10, 2007

TIME: 10:03 a.m. to 10:50 a.m.

LOCATION: New York City Department of Education
Office of Legal Services
49-51 Chambers Street, 6th Floor
New York, New York

BEFORE: JACK D. TILLEM, ESQ.
Hearing Officer
20 West Marie Street
Hicksville, New York 11801

1 Theodore Smith - 5-10-2007
 2 FOR THE DEPARTMENT:
 3 SUSAN JALOWSKI, ESQ., Of counsel
 4 THERESA EUROPE, Deputy Counsel
 5 MICHAEL BEST, ESQ., General Counsel
 6 New York City Department of Education
 7 Office of Legal Services
 8 49-51 Chambers Street, 6th Floor
 9 New York, New York

10 FOR THE RESPONDENT:
 11 DAVID KEARNEY, ESQ.
 12 317 Madison Ave, 21st Floor
 13 New York, New York 10017

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1 Theodore Smith - 5-10-2007
 2 THE HEARING OFFICER: Go on
 3 the record, please. We're on. I'm just going
 4 to note appearances for this telephone
 5 conference call. I'm Jack Tillem, the hearing
 6 officer.

7 For the Department?
 8 MS. EUROPE: Terry Europe,
 9 Deputy Counsel to the Chancellor.

10 THE HEARING OFFICER: For the
 11 Respondent?

12 MR. KEARNEY: David Kearney.

13 THE HEARING OFFICER: And I
 14 understand the Respondent is on the call also.

15 MR. SMITH: Yes, Ted Smith.

16 Yes.

17 THE HEARING OFFICER: All
 18 right. The -- the reason for this call, we
 19 originally had this scheduled for a hearing at
 20 which I understand the parties were going to
 21 make their closing arguments. However,
 22 approximately a week or so ago I received a
 23 letter from the Respondent, Ms. Smith, and I --
 24 I just want to be clear that both sides now

1 Theodore Smith - 5-10-2007
 2 have a copy of that letter. I believe the
 3 letter was cc'd to Mr. Kearney. And has a copy
 4 been given to the Department?

5 MR. KEARNEY: It has,
 6 pursuant to your directive Mr. Tillem.

7 THE HEARING OFFICER: Yes.
 8 And as a result of the statements made in that
 9 letter in which the Respondent claimed that I
 10 am quote, tilted, close quote against him and
 11 that I can not, I guess the letter makes clear,
 12 render a fair and objective decision.

13 And apparently some of this
 14 belief on his part stems from a conversation,
 15 which I presume he was eavesdropping on, held
 16 in camera with the attorney for the Department
 17 and the Respondent in which we were attempting
 18 to settle it. And I made a suggestion for a --
 19 a suspension and or a fine and the Respondent
 20 apparently picked this up and somehow concluded
 21 therefore --. Yes, I'm sorry -- is Susan
 22 Jalowski --?

23 MS. JALOWSKI: Yes, I'm here
 24 now. Sorry there was a transportation problem.

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1 Theodore Smith - 5-10-2007
 2 THE HEARING OFFICER: Oh,
 3 okay. And he concluded from the snippets of
 4 conversation he heard that therefore I am
 5 prejudiced. And I have prejudged the case and
 6 therefore I can not render a fair conclusion or
 7 decision for him, however grievously wrong he
 8 is about that and however he misunderstood.
 9 Clearly the purpose and the content of that
 10 conversation in which we were all trying to
 11 settle this matter -- he -- he appears to be
 12 impossible to persuade that I could render a
 13 fair decision. Therefore I am going to recuse
 14 myself so that he has the opportunity to have
 15 another arbitrator restore his confidence in
 16 the process. And that is my statement at this
 17 time. I'm sorry about it. We spent a lot of
 18 time on this case but I -- I don't see any
 19 other alternative.

20 MR. SMITH: This is Ted
 21 Smith. May I make a statement?

22 MR. KEARNEY: Ted, you're
 23 represented by counsel. I'd advise you not to
 24 make any statement.

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1 Theodore Smith - 5-10-2007
 2 MR. SMITH: Well I do, it's
 3 my right. It's my right to be able to speak.
 4 And I'm going to speak.
 5 MR. KEARNEY: Well then
 6 you're going to have to discharge me as your
 7 counsel, Mr. Smith.
 8 MR. SMITH: I'm -- I'm not
 9 going to discharge you as my counsel and I'm
 10 not pro se. And Mr. Tillem obviously by
 11 recusing yourself you acknowledge you did not
 12 take an impartial approach to my case. In
 13 addition I want a brand new hearing because a
 14 lot of my evidence did not go into the record
 15 since you propose that I accept a three- to
 16 six-month suspension. This before you heard my
 17 testimony or that of my witnesses. In fact on
 18 February 28, 2007, the first day of my direct
 19 testimony Mr. Kearney limited my testimony
 20 based on your initial bias and he did not put
 21 in important evidence.
 22 MR. KEARNEY: Mr. Smith I'm
 23 going to advise you again to stop speaking.
 24 THE HEARING OFFICER: Thank

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1 Theodore Smith - 5-10-2007
 2 colleague, Ms. Jalowski, and I would
 3 respectfully submit that we have an agreement.
 4 And we have arranged to have Mr. Tillem make a
 5 very clear and definitive statement as to his
 6 reasons for recusal and I think that has
 7 already been done. And I think that -- if
 8 you'd like to talk to me off the record we can
 9 do that.
 10 MS. EUROPE: We can do that,
 11 sure. But I -- I want to go back on the record
 12 as well.
 13 THE HEARING OFFICER: Well,
 14 in all fairness to the process I -- I'm
 15 inclined to agree with Ms. Europe but I would
 16 allow you guys to talk off the record for a
 17 while and then we'll see what we're going to do
 18 then.
 19 MS. EUROPE: Okay. Does --
 20 does everyone want to hold? And do you want
 21 to --?
 22 MR. KEARNEY: Yes, can I just
 23 call you direct?
 24 THE HEARING OFFICER: I'll be

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1 Theodore Smith - 5-10-2007
 2 you for sharing your thoughts Mr. Smith.
 3 MR. SMITH: Thank you Mr.
 4 Tillem.
 5 THE HEARING OFFICER: Is
 6 there anything else anyone wishes to say as
 7 to --?
 8 MS. EUROPE: Yes I do. Can
 9 you just hold on one second please?
 10 (Off-the-record discussion)
 11 MS. EUROPE: Mr. Tillem I was
 12 under the impression that you were recusing
 13 yourself for reasons other than just that
 14 letter. And I would like a clear record made
 15 of that.
 16 THE HEARING OFFICER: There
 17 are other factors involved in this. I -- I'm
 18 not sure at this stage that we need -- get into
 19 them. They probably will unfold soon.
 20 MS. EUROPE: I think it has
 21 to be clear why you are actually recusing
 22 yourself on this matter.
 23 MR. KEARNEY: Ms. Europe --
 24 Ms. Europe I had a discussion with your

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1 Theodore Smith - 5-10-2007
 2 glad to hold.
 3 MS. EUROPE: Okay.
 4 MR. KEARNEY: Can I call your
 5 direct line?
 6 MS. EUROPE: Sure.
 7 MR. KEARNEY: All right,
 8 thanks.
 9 (Off the record)
 10 MR. KEARNEY: There --
 11 there's been an off -- off the record
 12 discussion that was prompted by me, I requested
 13 it in light of my client's gratuitous comments
 14 for the record. And some decisions have been
 15 made. And Mr. Tillem is -- is going to, in
 16 light of Mr. Smith's behavior he's going to
 17 have to amend what he said on the record
 18 previously. Is that -- is that what -- what
 19 happened? Does everyone agree on that?
 20 THE HEARING OFFICER: Well
 21 I'm going to make a statement. I'm going to
 22 continue to explain why I'm recusing myself.
 23 MR. KEARNEY: All right.
 24 THE HEARING OFFICER: It --

3 (Pages 1060 to 1063)

1 Theodore Smith - 5-10-2007
 2 it turns out that that is only partly the
 3 reason and the chances are quite candidly that
 4 if I had just gotten the letter I wouldn't
 5 recuse myself because there's no real basis.
 6 There -- there's no meritory substance to it.
 7 However, it has been made
 8 known to me as a result of counsel for the
 9 Respondent's ethical compliance he has informed
 10 me that Mr. Smith has made death threats
 11 against me. And that is the main -- that is
 12 the real and primary reason that I am recusing
 13 myself, coupled with his letter and his
 14 statements, which Mr. Kearney, thank you, has
 15 informed me of and had to inform me of as an
 16 ethical requirement of his profession.
 17 Mr. Smith has threatened to
 18 kill me, blow my fuck -- beat my fucking head
 19 in and other expressions and I don't really
 20 think that at this point I wish to continue as
 21 the arbitrator in light of his threats.
 22 So that is the main reason.
 23 And I trust that something will come of this
 24 because I do think that he represents a danger.

1 Theodore Smith - 5-10-2007
 2 And that is my statement.
 3 MS. EUROPE: Okay. Well we'll
 4 have to have the case reassigned and possibly
 5 further charges will be coming against Mr.
 6 Smith based on his behavior.
 7 MR. KEARNEY: To the extent
 8 that counsel has made an ethical disclosure to
 9 the court -- to the hearing officer ex parte, I
 10 don't think there's any basis for an
 11 adversarial proceeding based on that.
 12 MS. EUROPE: I would also
 13 suggest, Mr. Tillem, that you file a police
 14 report.
 15 THE HEARING OFFICER: Well
 16 no. I think it's incumbent upon Mr. Kearney to
 17 file the police report since the statement was
 18 made to Mr. Kearney and it was transmitted to
 19 me. But I do feel threatened and I will take
 20 that under advisement.
 21 MR. KEARNEY: Also taken
 22 under advisement.
 23 THE HEARING OFFICER: Okay.
 24 MS. EUROPE: Okay. Thank you

1 Theodore Smith - 5-10-2007
 2 Mr. Tillem.
 3 THE HEARING OFFICER: Thank
 4 you.
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1 Theodore Smith - 5-10-2007
 2 STATE OF NEW YORK
 3 I, Dana Jock, do hereby certify that the
 4 foregoing was reported by me, in the cause, at
 5 the time and place, and in the presence of
 6 counsel, as stated in the caption hereto, at
 7 Page 1055 hereof; that the foregoing
 8 typewritten transcription, consisting of pages
 9 number 1055 through 1066, inclusive, was
 10 prepared under my supervision and is a true
 11 record of all proceedings had at the hearing.
 12 IN WITNESS WHEREOF, I have
 13 hereunto subscribed my name, this the 17th day
 14 of May, 2007.
 15
 16 _____
 17 Dana Jock, Reporter
 18
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1 Theodore Smith - 5-10-2007

2 E R R A T A S H E E T

3 Case: Theodore Smith, File #

4 Date: May 10, 2007

5 CORRECTIONS:

6 Page_ _line_

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