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

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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.

Index No. _____

PETITION TO VACATE ARBITRATION AWARD

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The Petition of, THEODORE SMITH, respectfully shows:

PARTIES

1. Petitioner is a 47 year-old Physical Education teacher, employed by the New York City Department of Education. Petitioner resides at 2 Sutton Place South, Apt. 10G, New York, N. Y. 10022.

2. Respondent, NEW YORK CITY DEPARTMENT OF EDUCATION, was and is an administrative department of the City of New York, which is a municipal corporation and political subdivision of the State of New York.

3. Petitioner holds a state certification in physical education, a School Administrator's Supervisor's License, and a New York City license as an assistant Principal and Principal.

4. Petitioner became employed as a Physical Education teacher in 1995, at the Beacon High School in New York, N.Y., and has been continuously employed by respondent since that time at various school locations in the City of New York.

5. Petitioner received tenure in 1999, and has an unblemished record, having never before received unsatisfactory ratings or observations prior to his assignment at the Museum School in September, 2004.

PRELIMINARY ALLEGATIONS

6. This proceeding is brought pursuant to C.P.L.R. § 7511, and Education Law § 3020-a (4), to vacate and overturn a certain Decision of the Hearing Officer, dated December 4, 2007, and served upon respondent on December 12, 2007 (Decision annexed hereto as Ex. "1").

7. That Decision was issued in a disciplinary proceeding commenced against petitioner under Education Law § 3020-a entitled In the Matter of the Arbitration Between NEW YORK CITY DEPARTMENT OF EDUCATION v THEODORE SMITH (SED File # 5432).

8. In that disciplinary proceeding, petitioner was charged with 27 Specifications alleging various incidents of misconduct, excessive absence, conduct unbecoming his position, insubordination, neglect of duties, and incompetence during the 2004-2005 school year. (Ex. "1" p. 2-11).

9. As a result of hearings held in the matter, the Arbitrator 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. Petitioner was found not guilty of

Specifications 1, 4-c, 6, 7-d, 8-b, 13, 17 and 21-b, and Specification 14 was dismissed (Ex. "1" p. 72, 77).

10. Based upon the findings of guilt, the Arbitrator determined that the petitioner be suspended without pay for one year (Ex. "1" p. 72, 77).

11. The Decision of the Arbitrator was made without hearing any of the witnesses testify, because 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 under unusual circumstances (Ex. "2" Tr. 5/10/07 p 1057-1065) (see below, Corruption, Fraud and Misconduct).

12. As a result, the case was re-assigned, over petitioner's continuing objection, to Arbitrator, Howard C. Edelman, Esq., who found petitioner guilty based solely upon reading the hearing transcript and reviewing the Exhibits (Hearing Exhibits annexed hereto as Ex. "3").

13. Petitioner alleges that such Decision should be vacated pursuant to C.P.L.R. § 7511 (b) (1), because petitioner was deprived of due process, and his rights were prejudiced by:

i. Corruption, fraud, or misconduct in procuring the award;

ii. Partiality of the Arbitrator;

iii. Imperfect execution by the Arbitrator of his power, such that a final and definite award on the subject matter submitted was not made;

iv. The failure to follow the proper procedures despite petitioner's continuing objections to the defects.

CORRUPTION FRAUD AND MISCONDUCT

14. Petitioner was represented in the disciplinary proceeding by a law firm, and as the hearing progressed, a dispute developed between petitioner and his assigned attorney, David Kearney, Esq., over the handling of the case, and over payment of attorney's fees.

15. Petitioner had a contingency fee agreement with this law firm, which also represented him in a pending case between these parties in Federal Court (Ex. "4"), and as the disciplinary hearing dragged on, the attorney pressed petitioner to settle the disciplinary case by accepting an unfavorable rating and a six month suspension without pay (Ex. "5").

16. As the hearing progressed, friction grew between petitioner and his attorney, because petitioner felt that Mr. Kearney was not willing to call witnesses and introduce the evidence necessary to defend against the charges.

17. While petitioner grew increasingly critical of his attorney and their relationship deteriorated, the attorney attempted to force petitioner into agreeing to pay legal fees of over $54,000.00.

18. On or about April 24, 2007, with only the final arguments remaining in the arbitration proceeding (scheduled for May 10, 2007), petitioner called Kearney's boss, Neil Brickman, Esq., at his home to complain, leaving a message for Brickman that he was going to expose his firm and sue him for legal malpractice.

19. Instead of moving to withdraw as attorney from both the Federal case and the disciplinary proceeding due to the conflict of interest, Smith's attorney

demanded that he sign a one-page agreement (Ex. "6"), which acknowledged his obligation to pay attorneys fees, which were over $54,000.00 (Ex. "7").

20. Between April 27, 2007 and May 3gu, 2007, Kearney repeatedly called and left messages for petitioner demanding that he sign the agreement, and threatening not to appear for final arguments in the disciplinary hearing on May 10, 2007, unless he did so (Ex. "8").

21. Petitioner refused to sign the agreement, e-mailing Kearney on May 2, 2007 that "our entire relationship is on a 100% contingency basis." (Ex. "9").

22. Kearney responded by e-mail on May 3, 2007, stating,

> **IF YOU DO NOT RETURN THE SIGNED FORM BY 5:00 P.M. TODAY, WEDNESDAY MAY 3, 2007, WE WILL NOT APPEAR AT THE HEARING.**
>
> (Ex. "10").

23. Also on May 3, 2007, petitioner wrote a letter to the Arbitrator at his office address complaining that the Arbitrator was tilted against him (Ex. "11").

24. Upon information and belief, when petitioner failed to sign the proffered fee agreement, Kearney called the DOE attorney handling the arbitration, Susan Jalowski, Esq., on May 7, 2007, and reported that petitioner had made statements against the arbitrator that concerned him. Upon information and belief, the DOE later e-mailed this information to the Office of the Special Commissioner of Investigation (SCI).

25. Upon information and belief, another DOE attorney, Theresa Europe, Esq., called the Arbitrator, ex-parte, on May 8, 2007, and advised him of Kearney's statements about petitioner.

26. Upon information and belief, Tillem then called Kearney, ex-parte, on May 8, 2007, and told Tillem that petitioner had threatened to bash his head in and kill him back on April 12, 2007, during a heated phone call between them.

27. Upon information and belief, according to the Arbitrator's contemporaneous notes, Kearney also told the Arbitrator that he did not think the threats were credible. Kearney has previously submitted an affirmation to the Federal Court stating, "

> I did not report the threats to anyone, as I did not believe that Smith's threats were entirely credible at that time. I believed that he temporarily took leave of his senses because of things he had overheard and the stress of the case. "

28. Upon information and belief, as a result of this disclosure, the Arbitrator, the DOE attorneys and petitioner's attorney agreed, without petitioner's knowledge, to hold the May 10 proceedings by phone, so they would not have to face petitioner, and they all agreed that the Arbitrator would recuse himself during that conference on the pretext that Smith had previously written him a letter questioning his impartiality (see Ex. "11"). Upon information and belief, both Kearney and the DOE attorneys later confirmed these conversations and this agreement in sworn testimony to SCI.

29. Even after making these surreptitious arrangements, petitioner's attorney continued, in writing, to demand that petitioner execute the form agreeing to pay the attorney's fees (Ex. "12"), and when that failed, he advised him by e-mails that there would be a phone conference on May 10, 2007, where the Arbitrator would recuse himself, and a new arbitrator would be assigned to decide the case based on the record (Ex. "13").

30. On May 10, 2007, a telephone conference was had with all parties and the Arbitrator followed the agreed script, and recused himself based on Smith's previous letter (Ex. "2," Tr. 5/10/07 p. 1057, L. 17- p. 1059, L. 19). The Arbitrator and petitioner's attorney both followed the plan, however, the DOE attorneys unexpectedly insisted that the real reason for recusal be put on the record (Ex. "2," Tr. 5/10/07 p. 1061, L. 5- 22).

31. Petitioner's attorney then asked to go off the record, and the attorneys and the Arbitrator left petitioner holding on the conference line for over a half an hour while they conferred on other phone lines about what to do (Ex. "2," Tr. 5/10/07 p. 1062-1063). When they returned to the record, the Arbitrator confessed that the stated grounds for his recusal were fictitious, and the real reason was that "as an ethical requirement of his profession" Smith's attorney had told him that Smith had made death threats against him, resulting in his unwillingness to continue as an arbitrator (Ex. "2," Tr. 5/10/07 p. 1063, L. 20-1065, L. 2).

32. Upon information and belief, the following day the DOE attorneys reported Smith's alleged threats to the Office of the Special Commissioner of Investigation, and also sought unsuccessfully to have him mentally evaluated and

dismissed under Sec. 2568 of the Education Law as a danger to others. Thereafter, the DOE notified petitioner that new disciplinary charges will be filed against him for threatening the Arbitrator.

33. Petitioner denies that he ever made the threats attributed to him by Kearney against the Arbitrator, and upon information and belief, Tillem's contemporaneous notes (later provided to SCI by Tillem), confirm that Kearney advised Tillem of petitioner's denials.

34. After Tillem's recusal, a new Arbitrator was appointed to decide the disciplinary case based upon the record only, despite petitioner's objections to that procedure (see below, Failure to Follow Procedure).

PARTIALITY OF THE ARBITRATOR

35. Petitioner's rights in the matter were prejudiced by the partiality of the first Arbitrator, who engaged in ex-parte discussions with both attorneys without the knowledge or consent of petitioner, resulting in his recusal for no legitimate reason.

36. Petitioner's rights in the matter were also prejudiced by the partiality of the second Arbitrator, Howard C. Edelman, Esq., who based his Decision almost exclusively on evaluations of credibility, while utterly ignoring evidence in the record that petitioner was targeted for dismissal in advance by DOE officials because of his complaints about conditions that violated the union contract concerning oversized classes (Ex. "3" H. Ex. R-31, R-32).

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, basing his decision on evaluations of credibility, without seeing or hearing a single witness testify.

38. One of petitioner's hearing exhibits is a copy of an e-mail that had mistakenly been sent to petitioner at the time when he began experiencing retaliation by his DOE superiors as a result of his complaints (Ex. "3" H. Ex. R-6). In this e-mail DOE employee, Fay Pallen, corresponds with principal Uehling concerning how they could get rid of petitioner the following year if one more poor job evaluation could be arranged.

33. 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).

34. 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.

35. The Arbitrator found petitioner guilty of 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 (Ex. "1" p. 6) however, in his discussion of Specification 12 in his Decision, he found petitioner not-guilty, explaining that this was not misconduct (Ex. "1" p. 62).

36. The Arbitrator 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).

37. The only charges petitioner was found not-guilty of, were those for which no evidence was introduced.

38. By disregarding significant evidence introduced by petitioner, and adopting 100% of the respondent's evidence, while ignoring evidence of contract violations, and convicting petitioner of charges that were withdrawn or not sustained, the Arbitrator has exhibited an unacceptable degree of bias resulting in prejudice to petitioner.

ARBITRATOR'S POWER IMPERFECTLY EXECUTED

39. In carrying out his duties, the Arbitrator exceeded his power and so imperfectly executed it that a final and definite award was not made.

40. As described above, the Arbitrator found petitioner guilty of specifications which were withdrawn (Specification 19-e), or on which he was acquitted during the hearing (Specification 12).

41. He also disregarded virtually all of petitioner's evidence and witnesses, making credibility determinations without seeing or hearing any of the testimony.

43. The Arbitrator essentially re-wrote the parties' contract in violation of public policy, giving it an irrational construction by failing to give consideration to the class size requirements contained therein (Ex. "14").

FAILURE TO FOLLOW PROCEDURES

44. By rejecting petitioner's request for a de-novo hearing and deciding the case based on only the printed record over continuing objection, the Arbitrator violated petitioner's due process rights to a fair hearing, resulting in prejudice to petitioner.

WHEREFORE, petitioner respectfully requests that pursuant to the provisions of the statute in such cases made and provided, 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.

William A. Gerard
Attorney for Petitioner
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Palisades, New York 10964
(845) 365-3121

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

THEODORE SMITH, being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

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THEODORE SMITH

Sworn to before me this

_____ day of December, 2007

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NOTARY PUBLIC