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November 23, 2007

Francesca Pena
High School Superintendent
4360 Broadway, Room 521
New York, New York 100033

Re: NYC DOE v Theodore Smith

Dear Ms. Pena:

I write as Mr. Smith's attorney to respond to the findings of the Office of the Special Commissioner of Investigations (hereinafter "SCI").

First, in order to evaluate the findings contained in the report you provided me on November 9, 2007, it is necessary to listen to the audiotapes of the interviews with Mr. Smith and the other witnesses questioned. For example, the report concludes on page 12 that Smith's denials are not credible, however, I was present during Smith's taped interview, and he was never asked what was said in the conversation in which the threats were allegedly made. Like it's other conclusions, the fallacy of the report's finding that Smith's denials are not credible, can only be fully appreciated in the context of the evidence considered.

I will attempt to address the report's findings in this letter however, in fairness, It is hereby requested that the audiotapes of the witness interviews be provided to me, so that I can properly reference the actual record in my response.

SUMMARY OF RESPONSE

First, the SCI report is inaccurate and incomplete, and its conclusions concerning Mr. Smith are incorrect. The report is rife with internal contradictions, and the way the information was obtained and presented is fundamentally unprofessional and dishonest.

Second, even if one accepts the conclusions of the report for the sake of this argument only, the words attributed to Mr. Smith do not make out any criminal offense in the circumstances described, nor do they provide any basis for termination or discipline.

Finally, the report does confirm that Smith's lawyer, the arbitrator and the DOE attorneys engaged in dishonest and unethical conduct, thereby compromising Mr. Smith's due process rights in the disciplinary proceeding.

THE REPORT'S DEFICIENCIES

Interview Conducted Under False Pretenses

The report confirms that Mr. Smith submitted a written complaint to SCI on May 22nd, 2007, making allegations of DOE misconduct, and claiming to be the victim of retaliation (P. 9-10). In response, he was invited by SCI to be interviewed concerning his complaint.

On July 16, 2007, at about 11:00 a.m., Mr. Smith and I appeared at the SCI offices for what had previously been described to me by Gerald Conroy as an interview concerning Smith's complaint.

The report confirms that to the contrary, the interview was actually scheduled to investigate the previous complaint made by Theresa Europe against Smith on May 11, 2007 (P. 1-2). At no time before the interview did anyone from SCI advise Smith that a complaint had been made against him, or that he was the target of the investigation.

In addition to misrepresenting the purpose of the interview, nobody advised us that SCI had already reported Smith's alleged threat to the NYC police (P. 8, fn. 22), or that all of the other witnesses (Europe, Tillem, Kearney and Jalowski) had already been interviewed under oath (P. 2).

Prior to the interview, Smith and I were provided with a room and instructed to search through Smith's records and locate documents relevant to Smith's complaint. After doing so, two SCI officials conducted the taped interview, however, they seemed curiously uninterested in Smith's complaints and the documents he offered. The interview record will show that whenever Smith or I

tried to explain his complaints or to provide supporting documents, our attempts were brushed aside, and the questioners returned to mining for evidence against Smith in other matters. One such document we tendered that failed to arouse the curiosity of SCI investigators, was an e-mail that had mistakenly been sent to Smith at the time when he began experiencing on-the-job retaliation from his DOE superiors as a result of his complaints. In this e-mail, a DOE employee, Fay Pallen, corresponds with another DOE employee about how they could fire Smith if one more bad evaluation could be arranged (see below, Failure To Investigate Facts).

Having practiced criminal law for over twenty years, it became apparent to me that SCI officials were not interested in Smith's allegations against the DOE, and instead, they were searching doggedly for evidence of wrongdoing by Smith. Mindful of their focus, I kept waiting for the investigators to ask Smith about the alleged threats that his attorney falsely reported to the Arbitrator, however in almost four hours of questioning, they never specifically asked him about that alleged conversation. Such failure is particularly striking, considering the report's conclusion that smith's denials concerning that alleged incident are not credible.

The record will show that the SCI investigators were particularly interested in whether Smith had somehow broken the law by tape recording certain conversations that had occurred over the last several years. In this regard, they questioned him incessantly about any recordings of conversations involving his attorneys or DOE officials. What SCI fails to address in the report is that under New York law it is perfectly legal for a person to tape his own phone calls.

The report confirms the undue attention paid to this issue, by repeated reference to the claim that Smith admitted making "surreptitious recordings" of conversations with Kearney, Tillem and Europe (P. 9, 11) however, this is a mischaracterization of the facts. What Smith did was tape record the arbitration proceedings that were conducted over the phone on May 10, 2007, which he had an absolute legal right to do. Not unexpectedly, the official transcript of that day's proceeding omits certain discussions (although found by SCI to be irrelevant [p.9]), therefore Smith's recording is the only accurate record of what actually happened in those proceedings.

The SCI report further confirms the inordinate attention paid to the issue of taping phone calls, as well as the SCI's misconception of the facts and ignorance of the

law in this area. The report incorrectly states that Smith arranged to have a friend telephone two school officials claiming to be a DOE employee in order to see what sort of a reference would be provided (P. 11), however, a review of the taped interview will refute this claim. What Smith actually said was that without his advance knowledge, and while he was not present, a friend called school officials and requested such a reference, only later providing Smith with the resulting tape recording.

At this point in the four hour long interview it was apparent that Smith had been invited there under false pretenses, and the SCI investigators were exploring some sort of charges concerning these tape recordings. Since there was no further purpose to be served by continuing the discussion when SCI had no interest in investigating Smith's claim (the purpose for which we were there), I advised Smith to leave (p. 11).

The report makes much of the fact that although Mr. Kearney refused to supply documents to SCI, claiming attorney client privilege (p. 2, fn. 2, p.4, fn. 8), a copy of his Federal affirmation was supplied to SCI by me (p. 3, fn. 4). Strangely, the report is vague concerning what, if anything, was testified to under oath by Kearney during his taped interview with SCI investigators, and it relies almost exclusively on the information in the Kearney affirmation for it's findings concerning Smith's threats.

While it is apparent that these findings are based upon SCI's complete acceptance of the statements in Kearney's affirmation, that document was actually provided to SCI to show that Kearney had made sworn allegations to the Federal Court concerning this matter that were demonstrably false (see below, Failure To Investigate Facts). When presented with these arguments at the interview, the investigators showed no interest in this document or in the explanations, yet they later relied most heavily upon this false affirmation to support their erroneous conclusions.

Internal Contradictions Within The Report

There are internal inconsistencies within the report that illustrate the shallowness and inadequacy of the SCI investigation, and which undermine the report's conclusions.

Concerning what was reported by Kearney to Europe on May 8th, 2007, about Smith's alleged threats, they both testified specifically that Kearney had not mentioned the Arbitrator, and had only reported that Smith was "making statements that concern me." (p. 5-6). Without noting the contradiction, the report also contains a copy of Europe's contemporaneous e-mail, which states that Kearney called and told her that Smith was making "statements against the Arbitrator (p. 2).

Although the SCI report states conclusively that Smith threatened the life of the Arbitrator (p.1, 12), the report notably fails to specify exactly when Smith made the alleged threats. As shown by the Arbitrator's contemporaneous notes of the conversation, Kearney told the Arbitrator on May 8, 2007, that the threat occurred during a phone call between he and Smith on April 12, 2007 (p.6). Remarkably, in the Kearney affirmation relied so heavily upon by SCI, he swore to the Federal Court that the threats occurred during a phone conversation on March 23, 2007 (p. 4).

It is troubling that a report recommending Smith's termination and prosecution for making death threats, cannot specify when these threats were made, and fails to note that the only person relied on for this information, Smith's attorney, has supplied two different dates.

It is submitted that the actual date of the alleged threats is important, since it would allow one to determine how much time passed before Kearney made his revelations to the Arbitrator on May 8, 2007. The issue is relevant to determining whether Smith's alleged remarks were perceived at the time as serious, which will be addressed below (see Impact Of The First Amendment).

In addition, during his interview, Smith was prepared to show SCI that Kearney is referring to a phone conversation that occurred on March 8, 2007 (see below, Failure To Investigate Facts), however, as previously noted, the record will show that the investigators chose not to inquire about the specifics of the conversation.

Concerning communications between Smith and his attorney, Kearney, the SCI report found it noteworthy that when confronted in writing by Kearney with the issue of his prior threats, Smith did not respond (p. 4). However, the Arbitrator's contemporaneous notes of his conversation with Kearney on May 8, 2007 show that Kearney specifically told him that,

Smith sent him an E-Mail denying he ever said any of those things.

SCI's apparent disregard of these internal contradictions and inconsistencies discloses an inexcusable lack of attention to the very details that are critical to the integrity of its findings. The report's conclusions are necessarily dependent on the truthfulness and accuracy of the statements of Kearney and Europe, yet SCI failed to notice or resolve these inconsistencies within its own report.

Failure to Investigate Facts

The SCI report is replete with obvious inconsistencies and inaccuracies, demonstrating a lack of investigational integrity that undermines the report's conclusions. The record shows that there was much valuable and reliable information that they either failed to pursue, or disregarded.

For instance, Mrs. Smith attended the SCI interview with Ted Smith on July 16, 2007, but SCI refused to interview her or even allow her in the interview room. This failure is inexplicable, considering that according to Kearney's affirmation, she was a party to the conversation during which the threats were allegedly made. As a result, the report's findings about Smith's threats appear to be based solely on Kearney's affirmation, since SCI did not interview Smith or his mother about that conversation, and the report does not quote anything said by Kearney on this subject during his SCI interview.

As previously mentioned, Kearney's affirmation is demonstrably false, and it was supplied to SCI in the futile hope that a proper inquiry would confirm this. If SCI had been at all inclined to investigate the affirmation's allegations, they would have learned that this document does not provide viable support for their conclusions.

One of the stated grounds for Kearney's motion to be relieved as Smith's attorney in the Federal case against DOE is the claim that Smith violated the retainer agreement by failing to pay for the attorney's services. Although there was a written retainer agreement between Smith and Kearney's firm, it was a contingent fee agreement, awarding the attorney a percentage of the amount recovered in the Federal case, and it did not call for any payments to the lawyers. Kearney's demand for attorney's fees was instead based on the claim that Smith had orally

agreed to pay an hourly rate for his representation in the disciplinary proceeding, however, smith denies this, and an attorney is not permitted to enter such an arrangement with a client unless the agreement is in writing (see 22 NYCRR 1215.1).

Concerning when the alleged threats were actually made, Kearney's affirmation places them on March 23, 2007, during a conversation concerning the production of a character witness and Smith's failure to obtain certain medical records that were required in connection with proposed medical testimony. In actuality, that conversation occurred on March 8, 2007, because that is the day that the subject medical records were needed for the scheduled testimony of Smith's Doctors, and that is also the day that the character witness testified.

The transcript of the disciplinary hearing of March 8, 2007 confirms this, and quite remarkably, Kearney elicited testimony that day from the character witness that he had never heard Smith say the F-word in the twenty years he had known him.

Considering that an attorney is ethically bound not to elicit sworn testimony that he knows to be false, incorrect or deliberately misleading, it defies reason to believe that several hours earlier on that same morning, Smith had engaged in a conversation with Kearney laced with the threats and profanities described in Kearney's affirmation. Under the circumstances, the conclusion is inescapable that Kearney is either lying about Smith's threats, or he is an unethical attorney who presented knowingly false testimony on March 8, 2007. In either case, the testimony provided by him in this matter must be viewed as inherently unreliable.

Kearney continued representing Smith, and his affirmation indicates that as the proceedings neared an end in the latter part of April, 2007, Smith "refused to pay us anything for our time and efforts, and disclaimed any obligation to pay us for vindication of " [his] rights." "

Kearney's complaints about this fee dispute were ignored by SCI, however, there is ample evidence that this dispute was the likely motivation for Kearney's revelations to the Arbitrator about Smith's alleged threats of two months earlier.

At the end of April, 2007, with only the final arguments remaining in the arbitration proceeding, Smith was unhappy with his attorneys, and on April 24, 2007, he called Kearney's boss, Neil Brickman, at his home to complain. As

indicated in the SCI report, when he was told that Brickman was not home, he told Brickman's wife that he was going to expose Brickman's firm and sue him for legal malpractice. While the SCI report interprets this as further evidence of Smith's loss of control (p. 5), they should consider the probability that Smith's complaints against Kearney have merit.

This is a significant event, since such an accusation by a client creates a conflict of interest, which requires that the attorney withdraw from the representation. The attorney's obligation to withdraw arises because an adversarial relationship has developed, and the atmosphere of trust and confidence, which must exist between attorney and client, has been destroyed.

Instead of moving to withdraw as Smith's attorney in both the Federal case and the disciplinary proceeding, the e-mail correspondence in which SCI was uninterested, shows that on or about April 27, 2007, Kearney demanded that Smith sign a one page agreement which recited that Smith had the option of continuing the representation or discharging the attorney at that point. Naturally, these were things that did not need to be recorded in any agreement, since these options are always available under the law concerning any attorney/client relationship. The real purpose of the proposed agreement is only apparent from a careful reading, which discloses that it contains the following language buried deep within the legal mumbo-jumbo,

> I acknowledge and agree that I have paid
> no legal fees thus far in connection with this
> matter, despite my agreement to do so.

By this time, Smith's bill had reached over $54,000.00, and between April 27, 2007 and May 8, 2007, Kearney repeatedly called and e-mailed Smith demanding that he sign the agreement, threatening not to appear for final arguments on May 10, 2007, unless he did so. Smith refused to sign the agreement, e-mailing Kearney on May 2, 2007 that "our entire relationship is on a 100% contingency basis."

Kearney e-mailed him back 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.**
> (Emphasis in original document).

To reiterate, at this point, there was a raging conflict between Smith and his attorney, who was trying to get him to pay over $50,000.00, when there was no legally required written agreement to justify such a fee. Smith had refused to pay, and had threatened to expose the attorneys' conduct, and sue for legal malpractice, and contrary to his legal and ethical duties, Kearney had refused to appear at the final hearing date.

It was at this juncture that Kearney called Jalowski on May 7, 2007, complaining that Smith should be required to pass through the metal detector at the hearing location because he was making some sort of disturbing statements. As previously mentioned, Kearney claims in his sworn affirmation that he only reported that Smith had made comments that concerned him, but Europe's e-mail is contradictory, indicating that Kearney reported that Smith had "made statements against the arbitrator."

It is submitted that this claim by Kearney was merely a pretext to sabotage the proceedings, since his story that Smith was not being required to pass through security is patently untrue. Contrary to the sworn statements of Kearney, Smith does not have any ID supplied by DOE, and he has always been required to pass through security like everyone else. This could easily have been confirmed if SCI had bothered to interview the security workers or review the security videotapes which may exist.

Concerning his other stated reasons for ultimately disclosing Smith's alleged threats to the Arbitrator, Kearney told the SCI that he became concerned by subsequent events, including the disturbing fact that Smith had sent a letter to the Arbitrator at his home address. The Arbitrator also cites this as a cause of his fear of Smith, and his concern that he could be shot by a sniper hiding in the woods behind his home.

These claims were accepted without question by SCI (p.5), however, even the most cursory inspection of the Arbitration minutes (some of which the SCI claims were provided [p.2]), discloses that the Arbitrator uses his home address as a business address, and that is the only address provided to the parties to

communicate with him. In addition, the letter itself is unremarkable, and can be described as courteous and professional.

Under the circumstances, Smith's letter cannot fairly be portrayed as some sort of dangerous event, which somehow justified Kearney's conclusion that Smith actions had escalated to become threatening. The unquestioning reliance of SCI on the selective statements of Kearney and the Arbitrator is evidence of an incompetent investigation resulting in necessarily flawed conclusions.

Upon failing to obtain any relief from Jalowski, Kearney spoke with the Arbitrator on May 8, 2007, and advised him that Smith had previously threatened to kill him. As a result of this disclosure, the Arbitrator, the DOE attorneys and Kearney all agreed to hold the May 10 proceedings by phone, so they would not have to face Mr. Smith, 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 (p.6-7).

The SCI report explains that Kearney was acting upon his ethical obligation to prevent the potential harm posed by Smith's threats without also harming his client (p. 8, fn. 23), however, if that were really his intention, he could easily have made a request to hold the final arguments over the phone (as was ultimately done). Instead, he chose a course that involved disclosing the alleged contents of a two-month-old confidential discussion between attorney and client that could possibly lead to the client's prosecution and discharge, lying to the client both orally and in writing, participating in the premeditated creation of false statements and legal rulings by the Arbitrator, creating a false record of the disciplinary hearing, and destroying any prospect of due process in those proceedings.

The record shows that even after making these unethical, surreptitious arrangements, Smith's attorney continued, in writing, to demand that Smith execute the form agreeing to pay the attorney's fees, and when that failed, he finally advised him by e-mails that his appearance at the arbitration hearing on May 10, 2007 was unnecessary, and the proceedings would instead be conducted by phone.

The SCI report states that prior to the conference call on May 10, 2007, Kearney had not told Smith of the Arbitrator's planned recusal (p. 7) however, Smith has copies of e-mails from Kearney sent on May 8, 2007, in which Kearney not only falsely advised Smith that the Arbitrator recused himself because of Smith's

letter, but also told Smith that a new Arbitrator would be assigned to decide his case upon the existing record. These e-mails were available to the SCI investigators during Smith's testimony concerning these matters, but they were uninterested.

The information is significant, because it confirms that the attorneys and the Arbitrator had already conferred on May 8, 2007 and agreed that his disciplinary case would be decided on the existing record by another Arbitrator (without an opportunity to see or hear the witnesses). Most disturbingly, this highly irregular procedure was to be accomplished without Smith ever knowing that his own attorney had sandbagged the proceedings with false allegations, intended to be concealed forever, which he had no opportunity to contest.

Kearney's affirmation states that his revelations to the Arbitrator about Smith's death threats took place on May 9, 2007, however, the Arbitrator's notes and Kearney's e-mails to Smith confirm that this took place on May 8, 2007.

Finally, concerning Smith accusation of retaliation by DOE officials due to his job-related complaints, SCI was offered a copy of 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 those complaints. 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.

Although the SCI report devotes some attention to discounting Smith's complaints (p. 9-11), it fails to make any mention whatsoever of this e-mail. This lack of attention to such a "smoking gun" e-mail, suggests the superficiality of the SCI investigation into Smith's complaints.

Quite clearly, if SCI had conducted a competent investigation and discovered the real facts, their conclusions might be quite different. For instance, the reliance upon false, inaccurate and conflicted statements of Kearney, which pervade and corrupt the SCI report, might be replaced with references to reliable information and documents that support a different set of findings.

Unprofessional Conduct Of SCI

As already mentioned, it was my understanding from speaking with SCI's Gerald Conroy on July 9, 2007, that Smith would be interviewed on July 16, 2007, concerning his complaint to SCI. Neither Smith nor I were told in advance that he was a target of the investigation, or that all of the other witnesses in the matter had already been questioned under oath. In fact, in a grand jury investigation, it is standard operating procedure to obtain the testimony of the all of the incriminating witnesses, before obtaining the testimony of the target.

It is extremely unusual to misrepresent the purpose of such an interview, and it is customary for prosecutors and investigators to advise a target's attorney of such matters in advance, in order to avoid claims of unethical trickery and deceit, which might impact upon the admissibility of any statements obtained, or otherwise impugn the integrity of the investigation.

Surprisingly, SCI officials also failed to disclose that they had already reported Smith's alleged conduct to the Police even before conducting an investigation. This is troubling, because one would ordinarily expect that any such complaint to the police would await a determination of whether there was evidence to warrant such a referral. Here, the act of reporting the matter by SCI to the police unfortunately suggests that the investigation's results were a foregone conclusion, reached before the investigation began.

Although the report confirms that I currently represent Smith in the arbitration proceeding, and that I filed a Notice of Appearance for Smith in the Federal Court action against the DOE on September 14, 2007, (P. 9, fn 24), the report misidentifies me as Robert Gerard (p. 9).

This seemingly innocuous error suggests the rather disturbing conclusion that SCI has also been investigating me, since this is my father's name, and SCI would otherwise have no such knowledge. It is only through their apparent ineptitude that the extent of SCI's dishonesty and unprofessional conduct is revealed in the report.

NO BASIS FOR PROSECUTION, TERMINATION OR DISCIPLINE

Utter Absence Of Legal Analysis

Although the SCI report confidently concludes that Smith threatened the life of the Arbitrator, and should therefore be fired and considered for prosecution (p. 1, 12), there is a complete absence of legal analysis to support this conclusion or these recommendations.

First, notably missing is any discussion of the total absence of any evidence to corroborate Kearney's much belated report to the Arbitrator. Nor is there any consideration given to his motives in the matter, his prior participation in the admitted scheme to falsify the record in Smith's legal proceeding without his knowledge, or his sworn statements that are contradicted by the contemporaneous record.

Remarkably, the SCI report does not identify any crime or offense that might apply to Smith's alleged conduct, nor does it address how the evidence might satisfy the necessary elements of any such offense.

Although it is perfectly legal in New York to tape record one's own phone calls, the SCI report devotes considerable attention to the issue, without engaging in any legal analysis whatsoever.

Finally, while the report recommends Smith's termination from employment, it does not identify any statute or contractual provision that would provide any basis for the recommendation.

Impact Of The First Amendment

Assuming for the sake of argument only that Kearney's account of Smith's threats against the Arbitrator is true, the question remains whether such conduct constitutes a crime or offense of any kind under New York law.

The statute that might apply is Harassment in the 2nd degree under section 240.26 of the Penal Law, which prohibits communicating threats of physical contact, when made with the intent to harass, annoy, or alarm the victim. That charge is not considered a criminal offense, and instead, is a violation, punishable by a fine and a maximum of 15 days in jail. To determine whether the

statute applies, the agreed facts must be evaluated to see whether they satisfy the necessary elements of the offense.

Here, it is claimed that on March 8, 2007, Smith became angry during a confidential telephone conversation with his own attorney, and in a fit of rage, he expressed a desire to kill the Arbitrator and bash his head in. After the argument, the parties made up and all was forgotten after Smith promised to behave. Kearney has stated unequivocally that at the time, he did not believe that Smith's comments were serious, and he stated in his affirmation that "Smith temporarily took leave of his senses because of things he had overheard and the stress of the case."

There is not the slightest indication that Smith intended his crude outburst to his own attorney to be conveyed to the Arbitrator, and Kearney certainly did not believe that Smith wanted him to do so. Consistent with his belief that Smith was simply venting, Kearney did not report Smith to the police, and he made no mention of Smith's remarks until he disclosed them to the Arbitrator two months later, after being accused of malpractice by Smith. These facts do not support a charge of harassment in the 2nd degree for a variety of reasons.

First, There was clearly no intent on Smith's part to harass, annoy or alarm the Arbitrator by this alleged outburst. He was engaged in a confidential communication with his own attorney about pending legal matters, and he certainly did not expect or intend that his comments would be conveyed by Kearney to others.

More importantly, under the 1st Amendment to the U.S. Constitution, there are only two categories of speech that can be prohibited: words that provoke immediate disorder (fighting words), and "true threats," evincing a serious and immediate intention to do bodily harm. All other expressions, even if offensive, abusive, or unwelcome, are protected, and cannot be criminalized.

The most important factor to be considered in determining whether the alleged words constitute "true threats" or just a crude outburst, is the reaction of the recipient. Here, Smith's alleged comments were not perceived by Kearney as threats when made. At the time, they were understood to be the result of an isolated emotional outburst, and it was not until two months later, that Kearney reported Smith's comments to the Arbitrator, after he misperceived the significance of certain events.

Under these circumstances, Smith could not be charged with, or convicted of 2nd degree Harassment, or any other crime or violation, since it is clear that his alleged remarks were not "true threats" and were never intended to be conveyed to the Arbitrator as such.

The 1st Amendment likewise applies to the issue of Smith's termination, and it is submitted that he cannot be terminated or disciplined for the unethical disclosure of private comments made in confidence to his own attorney during an emotional outburst, which were never intended to be publicly revealed.

UNETHICAL CONDUCT BY ATTORNEYS AND ARBITRATOR

In stark contrast to the inaccuracy of the findings concerning Smith's alleged behavior, the report accurately recites facts that confirm the deliberate misconduct and unethical behavior of Smith's attorney, the DOE attorneys and the Arbitrator. Although confirming these facts, the report reaches no conclusions and makes no recommendations concerning this issue, despite Smith's complaint to SCI concerning this undisputed misconduct, and the resulting deprivation of Smith's due process rights to a fair, accurate and impartial hearing.

Kearney

This record confirms that although Smith had a written contingency fee agreement with his attorney to represent him in the Federal Court action against the DOE, that same attorney also represented him in the related Arbitration proceeding. Clearly, those two proceedings were inextricably intertwined, since the results of the arbitration could have a dispositive effect on the Federal case.

Contrary to common sense, the attorney claims that there was a separate oral fee agreement for the arbitration case, wherein Smith agreed to pay an unspecified hourly charge for that representation. Smith denies any such oral agreement, and indicates that he understood the existing written agreement to also cover the arbitration proceeding.

The law requires that such a fee agreement be in writing, containing a description of the scope of the services to be provided, an explanation of the amount to be charged, the terms of payment, and a notice to the client that he may arbitrate any fee dispute (22 NYCRR 1215.1). The lack of such a legally required written

agreement can only mean one of two things: either Smith is telling the truth, or Kearney violated the law by trying to collect over $50,000.00 from Smith without a written agreement containing the required terms.

As the arbitration proceeding neared its conclusion and Smith 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, his attorney had a clear obligation to withdraw from representing Smith in both cases, and had he done so, none of this controversy would have occurred. Instead of moving to withdraw, the attorney demanded that Smith sign a written contract stating that he had a choice to terminate or continue the representation (as is always the case). Secreted in that document was also a sentence acknowledging an obligation to pay an attorney's fee of over $50,000.00, which is inconsistent with the only written agreement between Smith and his attorney.

Smith refused to sign the document, and therefore, between April 27, 2007 and May 8, 2007, Kearney and Brickman repeatedly demanded, orally and in writing, that Smith sign the document, or they would not appear on the final hearing date of May 10, 2007. This conduct constitutes abandonment of a client in the midst of a contested hearing, which is flagrantly unethical under the attendant circumstances.

Unable to get Smith to sign on the dotted line for $50,000.00, Kearney then decided to make a fuss with the DOE attorneys about security, claiming that Smith was not being searched when entering the hearing location, because he had DOE identification. In fact, Smith does not have DOE identification, and he was always passed through the metal detector like everyone else who entered the building.

Kearney's claims about security were a lie, as were his other claims that Smith's behavior was escalating out of control, such that he was a threat to others. The grounds he cites for this belief are absurd (writing a letter to the Arbitrator at his business address, threatening his attorney with a lawsuit, calling his attorney unethical, planning to expose the matter in the press, dreams of mass murder, comparing of Smith with Norman Bates), and do not provide justification for Kearney's actions at that time.

Although 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, Kearney instead dropped a bombshell in the arbitration proceeding, by engaging in ex-parte conversations with the Arbitrator and disclosing the alleged content of an attorney/client conversation of two months earlier in which he claims that Smith made an emotional outburst against the Arbitrator which he did not consider credible at the time.

It is a basic rule that ex-parte conversations with an Arbitrator, with or without the client's approval are improper. Here, not only did Kearney have such communication without Smith'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.

Worse yet, after disclosing matters that he had reason to know could defeat his prospects of recovery in the Federal case, and result in Smith being fired and prosecuted, he conspired with the Arbitrator and the DOE attorneys to falsify the grounds for the Arbitrator's planned recusal on May 10, 2007. 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 Smith would never have known what Kearney had done to destroy his due process rights.

The written e-mails in Smith's possession confirm that even after disclosing Smith's alleged threats on May 8, 2007, Kearney continued to demand that Smith sign the attorney's fee document, apparently in hopes that he could sucker Smith into paying him even after his treachery.

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 to fire Smith and defeat his Federal action. This was clearly DOE's purpose, since they stated this at the conference, and the next day they scheduled Smith for a mental exam and sent the matter to SCI for prosecution.

Smith 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.

Finally, Kearney provided false and misleading information to the Arbitrator concerning Smith's alleged threats, and has apparently provided false information under oath to the Federal Court and SCI concerning the matter.

DOE Attorneys

First, The SCI report confirms that the DOE attorneys had numerous improper ex-parte discussions with the Arbitrator.

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. Their decision to betray the agreement without warning in the middle of the hearing was motivated by self-interest, instead of any ethical concerns. According to Kearney's affirmation, Europe's reason for demanding that a record be made of the real cause for the Arbitrator's recusal, was because "we want to terminate him." Consistent with this expression, 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.

Clearly, the DOE was and is attempting to exploit the existing conflict between Smith and his attorney in a way that will resolve both the disciplinary matter and the Federal case in their favor. In the process, they have engaged in unethical and dishonest tactics that have revealed character deficiencies, which render them unfit to practice law.

The Arbitrator

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. The record shows that the Arbitrator and Kearney both followed the plan, however, the DOE attorneys unexpectedly insisted that the real reason be put on the record.

At this point, the attorneys and the Arbitrator left Smith holding on the phone for over a half an hour while they conferred on other lines about what to do. When they returned to the record, the Arbitrator confessed that his real reason for

recusal, 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.

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 sworn duty as a Judge to insure that the proceedings are honest, fair and just. An Arbitrator who shows the slightest inclination to engage in such conduct should be fired as an Arbitrator, and disbarred as an attorney.

CONCLUSION

It is abundantly clear that the SCI report is yet another self-serving document prepared by the DOE, and for the DOE, in order to assist them in their ongoing litigation with Smith. SCI reported Smith to the Police even before conducting the investigation, and the only purpose served by this report is to manufacture a basis to discharge Smith and resolve the pending cases.

Its conclusions about Smith are unsupported by the credible evidence, and its recommendations are utterly baseless and totally devoid of legal support. Under the circumstances, it should be disregarded and a decision should be reached that no further action is warranted.

Thank you for your courtesy and assistance.

Very truly yours,

William A. Gerard,

PLEASE REPLY TO THE FOLLOWING ADDRESS:
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