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

In the Matter of
NEW YORK CITY DEPARTMENT OF EDUCATION
v.
THEODORE SMITH
Section 3020-a Education Law Proceeding (File #5,432)

DATE: August 10, 2007
TIME: 9:30 a.m. to 10:03 a.m.
LOCATION: NYC Department of Education
Office of Legal Services
49-51 Chambers Street
New York, New York 10004
BEFORE: HOWARD EDELMAN, ESQ.
Hearing Officer
119 Andover Road
Rockville Centre, New York 11570

1 Theodore Smith - 8-10-2007
 2 APPEARANCES:
 3 FOR THE COMPLAINANT:
 4 SUSAN JALOWSKI, ESQ., of Counsel
 MICHAEL BEST, ESQ.
 5 NYC Department of Education
 Office of Legal Services
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 8 FOR THE RESPONDENT:
 9 WILLIAM GERARD, ESQ., of Counsel
 71 Woods Road
 10 Palisades, New York 10964
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1 Theodore Smith - 8-10-2007
 2 THE HEARING OFFICER: On the
 3 record. This is an additional conference call
 4 in the matter of the New York City Department
 5 of Education versus Theodore Smith. We have
 6 present on the line Ms. Jalowski representing
 7 the Department. Mr. Gerard representing Mr.
 8 Smith, and Mr. Smith. And I'm Howard Edelman,
 9 the hearing officer in this matter.
 10 We had set up this call
 11 really to see if there are any procedural
 12 issues we need addressed prior to the scheduled
 13 closing arguments, which I believe, are set for
 14 August 22nd. Mr. Gerard, is there anything on
 15 your end?
 16 MR. GERARD: Well, yes, first
 17 of all I'm -- I -- I appreciate receiving a
 18 copy of the record. I have that and I also
 19 received a copy of the school district's
 20 exhibits.
 21 THE HEARING OFFICER: Good.
 22 MR. GERARD: And I've had a
 23 chance to, you know, review that material
 24 somewhat. I'm a little handicapped because the

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 2 prior counsel for Mr. Smith will not give up
 3 Smith's exhibits.
 4 MS. JALOWSKI: I --
 5 THE HEARING OFFICER: Let --
 6 let him finish. Go ahead, Mr. Gerard.
 7 MR. GERARD: Yeah. Or, you
 8 know, really the -- an unknown portion of the
 9 file involving, you know, notes, e-mails,
 10 conversations, things like that.
 11 So, what -- what he did was
 12 turn over a sort of selected portions of the
 13 file to Smith after he culled out whatever he
 14 didn't want him to see. And Smith has
 15 requested, in writing, the remainder of the
 16 materials and -- and the attorney has responded
 17 in writing that you've gotten all I'm going to
 18 give you. So --
 19 THE HEARING OFFICER: If I
 20 may ask. Has he responded, you've gotten all
 21 I'm going to give you, or has he responded,
 22 you've gotten all that I have?
 23 MR. GERARD: You've gotten
 24 all that I'm going to give you.

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 2 THE HEARING OFFICER: Okay.
 3 MR. GERARD: That's what he
 4 said. I have it in an e-mail.
 5 THE HEARING OFFICER: Okay.
 6 MR. GERARD: So, I may have
 7 to, you know bring some sort of a disciplinary
 8 proceeding against him to get him to -- to
 9 disgorge the rest of the file. I -- I feel a
 10 little at a disadvantage not having, you know,
 11 I don't know what -- what he's not giving up
 12 actually, but he's clearly not giving up
 13 something.
 14 So, that's one problem I have
 15 in -- in continuing with the hearing.
 16 MS. JALOWSKI: Be -- before
 17 you go on to your next problem, I just want to
 18 talk, you know, in response to what you're
 19 saying in regard to that.
 20 MR. GERARD: And this is who?
 21 MS. JALOWSKI: I mean if
 22 Mr. -- what?
 23 MR. GERARD: Who is speaking?
 24 MS. JALOWSKI: Susan

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 2 Jalowski.
 3 MR. GERARD: I didn't hear
 4 that.
 5 THE HEARING OFFICER: Ms.
 6 Jalowski, representing the Department.
 7 MR. GERARD: Ms. Lasky.
 8 MS. JALOWSKI: Jalowski.
 9 MR. GERARD: Oh, oh Jalowski,
 10 sorry. Okay.
 11 THE HEARING OFFICER: Go
 12 ahead, Ms. Jalowski.
 13 MS. JALOWSKI: Is Mr. Smith
 14 representing that he does not have -- that he
 15 did not keep copies of all the materials he
 16 gave to Mr. Carney?
 17 MR. GERARD: You know --.
 18 MS. JALOWSKI: That's my one
 19 question. My one question is: Does Mr. Smith
 20 have copies of everything he gave to Mr.
 21 Carney?
 22 MR. SMITH: No, I don't have
 23 all of that. No.
 24 MS. JALOWSKI: You didn't --

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 2 THE HEARING OFFICER: -- from
 3 prior Counsel.
 4 MR. GERARD: No, he doesn't
 5 and now she's asking specifically what he's
 6 talking about.
 7 MS. JALOWSKI: I was, well,
 8 first of all I thought, I really find that hard
 9 to believe that Mr. Smith did not keep -- that
 10 he just handed materials over to his attorney
 11 without keeping copies for himself. And --.
 12 MR. GERARD: Well, let's --
 13 let's decide the whole case on what you find
 14 hard to believe.
 15 THE HEARING OFFICER: All
 16 right. All right. Let's -- let's take the
 17 tone down a bit everybody. Let me just decide
 18 what has to be decided.
 19 MS. JALOWSKI: And --.
 20 THE HEARING OFFICER: Go
 21 ahead Ms. Jalowski, anything else?
 22 MS. JALOWSKI: In terms of
 23 whatever happened during that year, those
 24 materials you do have. You do have Mr. Smith's

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 2 you didn't keep copies of all the e-mails that
 3 you gave him, because what other materials --
 4 what are you representing that you gave Mr.
 5 Carney, that you gave him, not any materials
 6 that he might have done as his own work
 7 product, but what are you representing in
 8 materials.
 9 MR. GERARD: Well --.
 10 MS. JALOWSKI: That you gave
 11 Mr. Carney that you don't have?
 12 MR. GERARD: Well, I'm going
 13 to jump in at this point and direct him not to
 14 respond to what he gave his prior counsel.
 15 There may be things there
 16 that, you know, you're not entitled to know.
 17 THE HEARING OFFICER: Well,
 18 let me just say this. Ms. Jalowski's not
 19 asking the contents of what he gave, she's
 20 simply asking whether he has copies of
 21 everything either he gave or presumably
 22 received --
 23 MR. GERARD: And he, what
 24 he's answered --.

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 2 file and you do have -- have the e-mails,
 3 things I've given you that was part of the
 4 record was the e-mails that went back and forth
 5 that were necessary to deal with what happened
 6 during the year that he's being charged with.
 7 MR. GERARD: Well --.
 8 MS. JALOWSKI: So, I -- I
 9 really don't feel that you're -- that you're
 10 going to be compromised in -- in -- in
 11 representing him because first of all the
 12 bottom line is you have the record and the
 13 record is what the closing argument is going to
 14 be based on.
 15 MR. GERARD: Well --.
 16 MS. JALOWSKI: We're not --
 17 you know, unless you want to make a motion to
 18 reopen the case and then let Mr. Edelman decide
 19 that. But right now, you're not compromised in
 20 any way because -- because your arguments going
 21 to be based on the -- on the record. What you
 22 have.
 23 MR. GERARD: No, I don't have
 24 it. That's my problem.

3 (Pages 1424 to 1427)

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 2 MS. JALOWSKI: You have the
 3 record. I gave you the record.
 4 THE HEARING OFFICER: All
 5 right. Easy. Easy. Easy. Easy.
 6 MR. GERARD: You gave me your
 7 exhibits.
 8 THE HEARING OFFICER: I've
 9 heard --.
 10 MS. JALOWSKI: I gave you his
 11 exhibit and my exhibits and I also gave you all
 12 the materials that were provided by me, by Ms.
 13 Uehling, that didn't even have to -- that
 14 didn't even go into evidence.
 15 THE HEARING OFFICER: All
 16 right. Let's -- let's hear the other problems,
 17 and Mr. Gerard I'll make a --
 18 MR. GERARD: All right.
 19 THE HEARING OFFICER: --
 20 basically an omnibus ruling on all of it and
 21 then we'll go forward.
 22 MR. GERARD: All right. The
 23 other -- the other problem is that, after doing
 24 a little bit of research, it's -- it's sort of

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 2 confirmed a -- a reluctance that I had
 3 concerning the procedure.
 4 I had initially mentioned, I
 5 think to Ms. Jalowski in our first conversation
 6 that I -- I was incredulous about the procedure
 7 of having a new hearing officer simply review
 8 the written record and render a decision in a
 9 case involving, you know, disputed testimony of
 10 witnesses.
 11 You know, issues of
 12 credibility and reliability are things that are
 13 hard to decide based upon just reading the
 14 printed word on a -- on a page. You know,
 15 for -- I do a lot of appellate work and the --
 16 the findings of a fact finder, you know when
 17 you're dealing with them on appeal are -- are
 18 difficult to overcome because specifically that
 19 fact finder had the benefit of seeing the
 20 demeanor of the witnesses and the way they
 21 testified and the way they spoke and their body
 22 language and all that sort of thing. And, so,
 23 when you try to challenge conclusions on
 24 appeal, the appellate court will -- will often

1 Theodore Smith - 8-10-2007
 2 say that the fact finder was in the best
 3 position to judge these issues, and they're not
 4 going to second guess it, not having the
 5 benefit of -- of that first-hand experience
 6 of -- of seeing the witness testify.
 7 So, I kind of feel in this
 8 situation any arbitrator or hearing officer, no
 9 matter how well intentioned, is not going to be
 10 in a position to reach a decision based upon
 11 actually judging the credibility of the -- the
 12 participants. And, so, I, you know, the
 13 initial queasiness that I had in my stomach
 14 about the proposed process sort of jumping in
 15 at the end and -- and having a new party review
 16 is sort of confirmed by my research --.
 17 MS. JALOWSKI: Mr. Gerard,
 18 are you making a motion to have the whole
 19 hearing redone?
 20 MR. GERARD: Yeah, I think --
 21 I think that's pretty much what -- what -- what
 22 I have to do in this case.
 23 I -- I regret it because
 24 it's, you know, so much water has gone under

1 Theodore Smith - 8-10-2007
 2 the -- under the bridge here. But --.
 3 THE HEARING OFFICER: Let me
 4 ask Ms. -- let me ask a question before I hear
 5 from Ms. Jalowski.
 6 I -- I understand your
 7 argument about, you know, observa -- observing
 8 a witness's demeanor and the like. But I'm
 9 asking a slightly different question. And that
 10 is, having had a chance to look at the record,
 11 do you believe that a new trial would simply,
 12 for want of a better term, rehash the old
 13 record with the additional factor that I'd be
 14 able to observe witnesses, observe their
 15 demeanor and so on, or -- or, do you think that
 16 a new trial would give you the opportunity to
 17 call witnesses who should have been heard but
 18 were not heard during the first trial?
 19 MR. GERARD: Well, that's an
 20 issue also because, you know, according to Mr.
 21 Smith he was having problems with his prior
 22 counsel for quite some time during the hearing.
 23 They were at odds over
 24 what -- what issues to address, what witnesses

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 2 to call, what records to produce. And this is
 3 the tension that apparently erupted eventually
 4 near the conclusion of the hearing. It erupted
 5 into disputes directly between Smith and his
 6 counsel. And then his counsel did, you know,
 7 what we all apparently are aware of.
 8 MS. JALOWSKI: Mr. Edelman,
 9 no -- does not, for the record he does not know
 10 what -- why -- what happened in regard, he just
 11 knows that Mr. Tillem recused himself. He does
 12 not know the facts underlying that because I
 13 didn't, you know, I -- I think that in the
 14 interest of justice, that it was not necessary
 15 for him to know the -- the reason for the
 16 recusal. So he does not have --
 17 THE HEARING OFFICER: And I
 18 don't --
 19 MS. JALOWSKI: -- that he
 20 does not have --
 21 THE HEARING OFFICER: -- I
 22 don't need it.
 23 MS. JALOWSKI: -- that he
 24 does not have the record for that.

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 2 problem.
 3 THE HEARING OFFICER: Go
 4 ahead, Mr. Gerard.
 5 MR. GERARD: Yeah, without --
 6 without getting into the specifics, I -- I
 7 suppose the best way to characterize it is that
 8 there was this sort of horrendous conflict of
 9 interest which erupted during the proceeding
 10 between Smith and his counsel. And it -- it
 11 -- it -- Smith claims and, you know, there's
 12 some substance to it that his representation
 13 may have been sort of clouded throughout the
 14 process of the hearing by this -- by this
 15 situation with his attorney.
 16 THE HEARING OFFICER: I would
 17 like to know more specifically, you say that
 18 there were other witnesses that Mr. Smith felt
 19 should be called and presumably that prior
 20 counsel refused to call or something like that.
 21 I would like to know with
 22 some specificity, who you're talking about,
 23 what witnesses and to what end.
 24 In other words, I'm not sure

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 2 THE HEARING OFFICER: I'm not
 3 interested in that. I'm sorry. I'm not
 4 interested in that and I don't need to hear
 5 that.
 6 MR. GERARD: Well --
 7 THE HEARING OFFICER: I would
 8 like you --
 9 MR. GERARD: -- you know,
 10 THE HEARING OFFICER: -- Mr.
 11 Gerard, finish up and then I want Ms. Jalowski
 12 to respond. Go ahead.
 13 MR. GERARD: All right. Well
 14 without getting into the specifics, there was
 15 sort of a horrendous, shall we call it,
 16 breakdown --.
 17 THE HEARING OFFICER: I have
 18 to put you on hold for one second. I have my
 19 son calling on the other line for me.
 20 MR. GERARD: Okay. Sure.
 21 (Off the record)
 22 THE HEARING OFFICER: Hold on
 23 one second. Okay. Sorry I apologize.
 24 MR. GERARD: Okay, no

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 2 I'm going to reopen the hearing totally or
 3 reopen to just to allow other witnesses. But I
 4 want to know, you know, who we're talking about
 5 so I have some idea as to what the scope of
 6 this is.
 7 MR. GERARD: Well, I mean
 8 perhaps Mr. Smith could best answer that. I
 9 mean I haven't even obtained the full file from
 10 prior -- prior counsel. And, I'm not familiar
 11 with each and every dispute that they had. I
 12 know for instance -- well, I don't know. Mr.
 13 Smith, are there -- are there witnesses that
 14 you specifically asked him or wanted him to
 15 call that he declined to call?
 16 MR. SMITH: Yeah. There was
 17 a few.
 18 THE HEARING OFFICER: Let --
 19 let me say this with all due respect to Mr.
 20 Smith, I'm not necessarily going to permit Mr.
 21 Smith to call a witness who I believe can --
 22 cannot add anything to this -- to this hearing.
 23 I am going to give and I want
 24 to hear from Ms. Jalowski first but I may well

5 (Pages 1432 to 1435)

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 2 give Mr. Gerard an opportunity to make a
 3 showing that individuals should be called who
 4 were not called. But simply because anybody --
 5 it doesn't matter whether it's the Respondent,
 6 or whether it's the Department or whether it's
 7 counsel for the Respondent or counsel for the
 8 Department, simply wishes to call a witness
 9 that I'm going to permit the witness to be
 10 called, if in my view the witness can offer
 11 nothing more to the record to assist me in
 12 rendering a just decision.
 13 But I -- I -- I just want to
 14 put everybody, all three of you frankly on
 15 notice to that regard -- in that regard. Ms.
 16 Jalowski, let me hear from you and then I want
 17 to make some rulings.
 18 MS. JALOWSKI: Well, as I
 19 said, the record is very clear on this case.
 20 And in respect -- I think that even on papers
 21 you're going to be able to assess the
 22 credibility. This is an incompetence case. A
 23 lot of it is based, you know, most of it is
 24 backed up by letters to the file, by

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 2 observations and so forth.
 3 I don't think it would be
 4 necessary to -- to just have everybody testify
 5 again to -- to basically say the same thing. I
 6 do want to note, that even on -- on Mr. Smith's
 7 case that he was actually allowed to testify
 8 twice because he didn't feel he got everything
 9 out that he wanted to. And, over my objection,
 10 he was allowed to do this. So, he really had
 11 more than ample opportunity. Mr. Smith
 12 subpoenaed a lot of people. I actually
 13 assisted in making sure that people who worked
 14 for the Department actually came to testify.
 15 I actually allowed people to
 16 testify by phone as a courtesy to make sure
 17 that there was a complete record in this case.
 18 I do know that there were
 19 some people that were subpoenaed that did not
 20 come in and I -- I don't recall offhand but I
 21 think one of them was Joel Kline and if
 22 that's -- maybe that is the one person he wants
 23 to call. I don't see what Mr. Kline would have
 24 to add to this case being that he doesn't even

1 Theodore Smith - 8-10-2007
 2 know who Mr. Smith is. After a showing of who
 3 they still -- who Mr. Smith wants to still
 4 testify, I probably -- if it's somebody who
 5 would actually have to add to what happened
 6 during that year, I probably wouldn't even
 7 oppose that happening to make sure that Mr.
 8 Smith does get a full and fair hearing.
 9 But right as of now he hasn't
 10 even stated who he still wants to testify. So,
 11 at that point I, you know, strenuously object
 12 to reopening this -- this hearing to have the
 13 same people testify again. But again,
 14 depending on who he states, I probably I might
 15 not oppose reopening the case to have certain
 16 witnesses once we are told who those witnesses
 17 may be.
 18 MR. SMITH: Am I allowed to
 19 say something or not?
 20 THE HEARING OFFICER: It's up
 21 to Mr. Gerard, Mr. Smith.
 22 MR. GERARD: Yeah, Mr. Smith
 23 is more familiar with the history than I. I
 24 mean it's my understanding there was not only

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 2 witnesses there were documents that he wanted
 3 the attorney to introduce which -- which
 4 weren't done.
 5 And, also, that even in his
 6 repeat testimony, his attorney refused to go
 7 into certain areas or bring out certain things.
 8 So, it's not just additional witnesses, it's --
 9 it's exhibits and it's also additional
 10 testimony from Smith.
 11 MS. JALOWSKI: You know what,
 12 I will not, if you want Mr. Smith -- if you
 13 want to ask him certain questions that he feels
 14 did not get on the record, I would not object
 15 to -- to that happening.
 16 THE HEARING OFFICER: All
 17 right. Mr. Smith, you wanted an opportunity to
 18 say something. Mr. Gerard, you have no
 19 objection?
 20 MR. GERARD: No. No problem.
 21 Just go ahead.
 22 MR. SMITH: I think Mr.
 23 Gerard has to point out some -- some issues
 24 here that there's been collusion in the record

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 2 between my attorney and the former, previous
 3 arbitrator, that this -- that this shouldn't
 4 have to go forward any longer.
 5 MS. JALOWSKI: You know, I'm
 6 going to object to Mr. Smith stating certain
 7 things that -- that he believed happened.
 8 THE HEARING OFFICER: Well,
 9 it's an assertion he can make. Obviously, any
 10 assertions are subject to proof of course.
 11 MR. GERARD: Well, there, you
 12 know, I mean we didn't want to get into it.
 13 THE HEARING OFFICER: No we
 14 don't want to get into it.
 15 MR. GERARD: No, there was --
 16 there was collusion between not only the
 17 arbitrator, but the city attorney and Mr.
 18 Smith's prior attorney.
 19 MS. JALOWSKI: Mr. Gerard,
 20 I -- I think that -- that saying --
 21 MR. GERARD: Don't interrupt
 22 me.
 23 MS. JALOWSKI: -- that it's
 24 collusion is -- is really something that I

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 2 letter to the arbitrator questioning his
 3 impartiality.
 4 But that was -- and that was
 5 what was used by the arbitrator to recuse
 6 himself. But at that same session, it
 7 developed that that wasn't the real reason.
 8 That in fact the attorney --
 9 MS. JALOWSKI: Do you want to
 10 get into that Mr. Gerard, why, what the reason
 11 was? I was trying to --
 12 THE HEARING OFFICER: I don't
 13 want, I really don't want to hear it.
 14 MS. JALOWSKI: -- keep that
 15 away from Mr. Edelman. If you want to bring
 16 that up then fine, you can bring that up.
 17 MR. GERARD: Yeah, I -- I
 18 have to bring it up.
 19 The -- what happened was
 20 there was ex parte communication between
 21 Smith's lawyer and the arbitrator. And then
 22 there was ex parte communication between the
 23 arbitrator and the city. And then they set up
 24 a conference -- a telephone conference at which

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 2 think, first of all, how are you saying that
 3 that happened when you weren't there. And what
 4 Mr. Smith is basically talking about is that
 5 me, the arbitrator and Mr. Kearney had
 6 conversations, as you well know Mr. Edelman,
 7 sometimes the arbitrator acts as a facilitator
 8 in trying to settle the matter. And that is
 9 what Mr. Smith is referring to --
 10 MR. GERARD: No, it's not.
 11 MS. JALOWSKI: -- that we had
 12 conversations --
 13 MR. GERARD: No it's not.
 14 MS. JALOWSKI: -- about --.
 15 MR. GERARD: No it's not.
 16 THE HEARING OFFICER: One at
 17 a time, I can't the court reporter can't take
 18 you talking at the same time.
 19 Mr. Gerard?
 20 MR. GERARD: All right. No
 21 it's not -- it's not a question of -- of -- of
 22 settlement talks. It's a question of -- Mr.
 23 Smith wrote a letter. He overheard some
 24 conversations involving settlement. He wrote a

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 2 they went through a script where the arbitrator
 3 purported to recuse himself because of Smith's
 4 letter when in fact everyone knew that it was a
 5 different reason.
 6 MS. JALOWSKI: You know, Mr.
 7 Gerard, if you're going to bring this up then I
 8 will give Mr. Edelman a copy of the record of
 9 what happened on that day because it is all in
 10 the record.
 11 THE HEARING OFFICER: All
 12 right. All right. Look let me interrupt --
 13 let me interrupt. Everybody quiet now.
 14 It's -- it's my turn. First I still am not
 15 interested in why Mr. Tillem recused himself,
 16 for whatever reasons he had, he had.
 17 It clearly does not relate
 18 unless somebody can prove otherwise and so far
 19 nobody has and I don't think anybody can, that
 20 it clearly does not relate to the record
 21 regarding the charges brought against Mr. Smith
 22 and whether the Department has or has not
 23 proven its case.
 24 That's number one, so I'm not

7 (Pages 1440 to 1443)

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 2 interested in the reasons why Mr. Tillem
 3 recused himself. That's number one.
 4 Number two, I am not inclined
 5 to reopen the record entirely. I'm not -- I do
 6 not see the basis for a de nova hearing again.
 7 I understand the issues of credibility and, you
 8 know, observing demeanor. Frankly I have with
 9 all due respect to everybody, I have certain
 10 dubious views about witnesses' demeanor and how
 11 that relates to credibility. I've seen nervous
 12 witnesses tell the truth. I've seen composed
 13 witnesses lie through their teeth, quite
 14 honestly.
 15 So, I'm not really worried
 16 about assessing credibility simply based on the
 17 record. However, I am willing to afford Mr.
 18 Gerard and Mr. Smith the following:
 19 Number one, the right of Mr.
 20 Smith to testify, not to repeat what he said
 21 quite obviously, but the right of Mr. Smith to
 22 testify to other issues that he believes are
 23 relevant to this proceeding. And make no
 24 mistake, that does not preclude Ms. Jalowski

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 2 from objecting to some of his testimony and
 3 I'll make a ruling, as a particular question is
 4 asked and as a particular question is answered.
 5 With respect to -- all right so, that's number
 6 one.
 7 With respect to document, the
 8 same ruling with respect to documents that were
 9 not introduced. If Mr. Gerard wants to
 10 introduce a document that was not introduced
 11 during the prior hearing, the same standards of
 12 relevance and competence and materiality and --
 13 and the like, apply and I may or may not, you
 14 know, accept such documents into the record.
 15 We will do it on a case -- on a case-by-case --
 16 case-by-case basis, sorry. With respect to
 17 additional witnesses, the -- the same rule
 18 apply. That is to say Mr. Ger -- I'll be
 19 giving Mr. Gerard the opportunity to have
 20 additional witnesses testify and again subject
 21 to the competence and materiality and relevance
 22 of their testimony. And, if Ms. Jalowski feels
 23 a particular witness is unable to offer
 24 anything relevant, she will object presumably

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 2 and I'll make the appropriate ruling. So, what
 3 that -- just to summarize all of this, all that
 4 means is yes, we are reopening the record.
 5 Or I'm permitting Mr. Gerard
 6 to reopen the record. He may ultimately choose
 7 not to I guess, but I don't think he will from
 8 what he said.
 9 But we are reopening the
 10 record, but we are reopening the record for
 11 limited purposes, essentially to provide me
 12 with additional information that is testimonial
 13 or documentary that is relevant to this
 14 proceeding.
 15 Two other points I want to
 16 make. Next, with respect to Mr. Gerard and Mr.
 17 Smith's conflict, if you will, with the prior
 18 attorney, as I think I said last time, it's
 19 obviously not before me whether Mr. Gerard
 20 wants to bring a proceeding to compel Mr.
 21 Kearney to produce certain documents or he
 22 wants to bring a proceeding before the
 23 grievance committee, that's obviously --
 24 obviously up to him.

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 2 And I have absolutely no role
 3 in that whatsoever. This does not -- and as
 4 you'll see in a moment, I'm going to give Mr.
 5 Gerard some more time to get more documents
 6 either from Mr. Kearney or elsewhere, but I'm
 7 not going to, you know, basically put this
 8 matter in abeyance pending any action that Mr.
 9 Gerard may bring against Mr. Kearney. Because
 10 as well all know that could take months and
 11 years and I'm not going to delay the
 12 proceedings.
 13 Finally, with respect to
 14 scheduling we have a date of August 22nd, I
 15 think we have it at nine a.m., is that correct?
 16 MS. JALOWSKI: No, I don't
 17 think we made it nine a.m.
 18 THE HEARING OFFICER: All
 19 right. Well we'll pick up, we'll pick the
 20 time, that's no problem. We have a hearing set
 21 for August 22nd.
 22 We're going to go forward
 23 with that hearing and I'm going to give Mr. --
 24 and Mr. Gerard the opportunity at that hearing

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1 Theodore Smith - 8-10-2007
 2 to present Mr. Smith because obviously he has
 3 time to speak to Mr. Smith. He may not have
 4 time to speak to other witnesses.
 5 But we will go forward with
 6 that hearing and Mr. Gerard will obviously have
 7 the ability to present Mr. Smith and Mr. Smith
 8 can offer additional testimony, if he wishes.
 9 As well as additional documents if he deems
 10 them relevant. I will afford Mr. Gerard an
 11 additional date and I may suggest one or two
 12 before we get off the phone today, roughly
 13 thirty days thereafter, so as to permit him to
 14 contact other witnesses, to see if they are
 15 able or will or maybe subject to subpoena to
 16 offer relevant testimony.
 17 As we all know getting a hold
 18 of school representatives, whether it's
 19 teachers or administrators and the like during
 20 the month of August is -- is very difficult and
 21 it would be unfair to require Mr. Gerard to
 22 present such witnesses at our August 22nd
 23 hearing.
 24 Currently I have either and I

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1 Theodore Smith - 8-10-2007
 2 MR. GERARD: I'm looking at
 3 August.
 4 THE HEARING OFFICER: I'm
 5 sorry go ahead.
 6 MR. GERARD: I'm looking at
 7 August 22nd. We initially had this actually
 8 set --
 9 THE HEARING OFFICER: For a
 10 hearing.
 11 MR. GERARD: -- for closing
 12 arguments at nine a.m.
 13 THE HEARING OFFICER: That's
 14 correct sir, right.
 15 MR. GERARD: I see it in my
 16 book. I -- I -- I have a little problem being
 17 ready to actually, you know, go all day that
 18 day with a hearing.
 19 THE HEARING OFFICER: I'm not
 20 going to make you go all day. I'm only going
 21 to require you to put forward, (coughing)
 22 excuse me, I'm only going to require you to put
 23 forward Mr. Smith for areas that you believe
 24 and he believes presumably were not adequately

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1 Theodore Smith - 8-10-2007
 2 won't know for a day or two -- either September
 3 20th or 24th open. Can you folks look at your
 4 calendar for those days, please?
 5 MS. JALOWSKI: I'm -- I
 6 actually am at home. I don't have my calendar
 7 with me.
 8 THE HEARING OFFICER: Okay.
 9 Mr. Gerard, do you know?
 10 MR. GERARD: All right. Well
 11 yeah September, let me just see, 22nd I think
 12 is a Saturday.
 13 THE HEARING OFFICER: Yeah I
 14 said 20 or 24, sir.
 15 MR. GERARD: Oh, okay 20 or
 16 24th, yeah those dates are good.
 17 THE HEARING OFFICER: All
 18 right. I'm sorry, go ahead.
 19 MR. GERARD: My only, I
 20 look -- I look at the 2nd and --.
 21 THE HEARING OFFICER: The
 22 22nd is a Saturday you just said.
 23 MR. GERARD: Oh.
 24 MS. JALOWSKI: That's August.

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1 Theodore Smith - 8-10-2007
 2 or covered -- or covered at all, when he
 3 testified in the prior proceeding. That's the
 4 limited purpose for which we're going to have
 5 the hearing on the 22nd.
 6 MR. GERARD: All right, well
 7 the problem is that I'm going away on vacation
 8 for a week or ten days on the 24th.
 9 THE HEARING OFFICER: Good.
 10 Have a good time. I hope you have a great
 11 time.
 12 MR. GERARD: I know, well the
 13 problem is I'm sort of quite jammed-up as we
 14 approach there. I'm in the process of trying
 15 to finish up an appeal on a murder case, which
 16 has to go in before I leave.
 17 And I have basically courts
 18 all day long on the 20th and 21st and I -- I'm
 19 trying, you know I'm staying up till three
 20 o'clock in the morning just about every night
 21 trying to get this out of the way before I go
 22 and I'm just concerned that I'm not going to
 23 have adequate time to prepare.
 24 It's about twelve days and

9 (Pages 1448 to 1451)

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1 Theodore Smith - 8-10-2007
 2 I'm shooting to submit that appeal right around
 3 then. And I'm -- I'm basically disabled on the
 4 20th and the 21st. I have about six court
 5 appearances a day on each of those days. So
 6 my, you know, I mean originally I had this at
 7 nine o'clock for closing arguments. But, if
 8 it's a matter of, you know, going through, you
 9 know, and fully preparing with Smith and
 10 figuring out exactly what we want to put in and
 11 not put in and then doing it. I'm -- I'm --
 12 I'm a little bit I prefer to do all of that in
 13 September. It's a lot -- it's a lot easier.
 14 MS. JALOWSKI: This case has
 15 already been delayed, so badly. You are Mr.
 16 Smith's fourth attorney. This case was
 17 supposed to like start almost a year ago. The
 18 hearing was supposed to start and it didn't
 19 start until like January.
 20 MR. GERARD: I -- I -- I
 21 understand, you know --.
 22 MS. JALOWSKI: And this is
 23 like now getting, it's -- it's -- it's --.
 24 THE HEARING OFFICER: All

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1 Theodore Smith - 8-10-2007
 2 if you don't get all the other witnesses on the
 3 20th, then we would have the 24th, then I'm
 4 okay if we take both days.
 5 THE HEARING OFFICER: All
 6 right. Let me just say this. I just have to
 7 double check with my secretary and get back to
 8 you. Please hold the 20th and the 24th open.
 9 I will get back to you sometime today or at the
 10 latest on Monday. I will grant Mr. Gerard
 11 the --.
 12 MR. GERARD: I'm here.
 13 THE HEARING OFFICER: I don't
 14 know what that was.
 15 MR. GERARD: I don't know.
 16 THE HEARING OFFICER: I'll
 17 grant Mr. Gerard's request for, hello? Court
 18 reporter are you there?
 19 THE REPORTER: Yes, I am.
 20 THE HEARING OFFICER: Okay.
 21 Everybody there?
 22 MR. GERARD: Uh-huh.
 23 THE HEARING OFFICER: Mr.
 24 Gerard, you there?

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1 Theodore Smith - 8-10-2007
 2 right. Let me -- let me give you a ruling.
 3 All right. I understand the
 4 idea that Ms. Jalowski just proposed or not
 5 proposed but propounded in terms of the delay.
 6 But the truth is if we afford Mr. Gerard the
 7 opportunity to go forward on the 20th or 24th
 8 of September anyway then this does not, you
 9 know this does not mean that there will be
 10 further delay. In other words, if we don't
 11 have the 22nd of August but we do all our work
 12 on the 20th of -- say the 20th of September.
 13 MS. JALOWSKI: Well, I --
 14 I --.
 15 THE HEARING OFFICER: Then
 16 let me just finish. Then -- then there really
 17 is no delay on the assumption that we finish on
 18 the 20th or the 24th, whatever it is. Ms.
 19 Jalowski, what did you want to say?
 20 MS. JALOWSKI: That's fine.
 21 I was going to say, if -- if Mr. Gerard wants
 22 to take both days you offered, the 20th and the
 23 24th, and the 20th and then the 20th can be for
 24 Mr. Smith's testimony and other witnesses. And

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1 Theodore Smith - 8-10-2007
 2 MR. GERARD: I'm here.
 3 THE HEARING OFFICER: Ms.
 4 Jalowski you there?
 5 MR. GERARD: Oops, she may
 6 have dropped.
 7 THE HEARING OFFICER: Yeah,
 8 she did. That beep usually means that. All
 9 right. Let's keep, court reporter, just keep
 10 the record going because all it is -- is to
 11 tell her what the -- what's going on. We will,
 12 I'm sure she'll call back in too. I will grant
 13 Mr. Gerard's request for an adjournment of
 14 August 22nd.
 15 MS. JALOWSKI: Hi. I was out
 16 for a little --.
 17 THE HEARING OFFICER: Yeah.
 18 You're back okay fine. Let me repeat that.
 19 I'm granting Mr. Gerard's
 20 adjournment for -- Mr. Gerard's request for an
 21 adjournment of August 22nd. Keep open the 20th
 22 and the 24th. I'll call -- I'll have my
 23 secretary get in touch with all of you via
 24 e-mail either today or Monday as to which or

10 (Pages 1452 to 1455)

1 Theodore Smith - 8-10-2007
 2 both days we're going to be using.
 3 Mr. Gerard, this is -- this
 4 is the last shot Mr. Gerard, as you can
 5 understand. Be fully prepared on that day or
 6 those dates to present anything new that you
 7 wish to present subject to my earlier comments
 8 about the questions of relevance materiality
 9 and the like.
 10 MR. GERARD: I understand.
 11 THE HEARING OFFICER: Thank
 12 you.
 13 MS. JALOWSKI: What -- what I
 14 would ask though, is prior to the 20th if I be
 15 given a -- a list of the witnesses that they
 16 plan to call. So, that if I have any
 17 objections, maybe we could, you know, have a --
 18 have a -- a you know telephone conversation
 19 about what, you know, that if I have any
 20 objections. And also the same thing as to any
 21 documents. That I also be provided with them
 22 prior to the 20th, so that we could maybe deal
 23 with any issues I would have towards the
 24 documents also prior to the 20th. So, we don't

1 Theodore Smith - 8-10-2007
 2 have to waste time on that day with dealing
 3 with any motions of -- of my objections.
 4 THE HEARING OFFICER: I think
 5 that's fair Mr. Gerard and I will require just
 6 the two of you agree upon a date that you'll
 7 provide that information, Mr. Gerard. What's
 8 convenient for you sir?
 9 MR. GERARD: All right.
 10 Let's say --.
 11 MS. JALOWSKI: When are you
 12 back from vacation?
 13 MR. GERARD: Yeah, I'll be
 14 back the beginning of September, so maybe the
 15 14th of September?
 16 MS. JALOWSKI: That's --
 17 that's fine.
 18 MR. GERARD: Okay.
 19 THE HEARING OFFICER: Okay.
 20 And --.
 21 MS. JALOWSKI: Or whatever
 22 that Friday is. I think the 14th might be a
 23 weekend but whatever the Friday is.
 24 THE HEARING OFFICER: Okay.

1 Theodore Smith - 8-10-2007
 2 Whatever that Friday is. I think Friday is the
 3 14th actually.
 4 MS. JALOWSKI: Okay.
 5 THE HEARING OFFICER: And if
 6 need be, we'll arrange a conference call for
 7 say the 17th, including me in terms of making
 8 any rulings regarding questions of documents or
 9 witnesses to be produced.
 10 MR. GERARD: Okay. Great.
 11 MS. JALOWSKI: Okay.
 12 THE HEARING OFFICER: Okay.
 13 I thank you all.
 14 MS. JALOWSKI: All right.
 15 MR. GERARD: Thank you.
 16 MS. JALOWSKI: Thank you, bye
 17 bye.
 18 THE HEARING OFFICER: Bye,
 19 bye.
 20
 21
 22
 23
 24

1 Theodore Smith - 8-10-2007
 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 1419 hereof; that the foregoing
 8 typewritten transcription, consisting of pages
 9 number 1419 through 1458, 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 24th day
 14 of August, 2007.
 15
 16 _____
 17 Dana Jock, Reporter
 18
 19
 20
 21
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 24

1 Theodore Smith - 8-10-2007
 2 E R R A T A S H E E T
 3 Case: Theodore Smith, File #5,432
 3 Date: August 10, 2007
 3 CORRECTIONS:
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<p style="text-align: center;">A</p> <p>abeyance 1447:8 ability 1448:7 able 1431:14 1436:21 1448:15 absolutely 1447:2 accept 1445:14 action 1447:8 acts 1441:7 add 1435:22 1437:24 1438:5 additional 1421:3 1431:13 1439:8,9 1445:17,20 1446:12 1448:8,9,11 address 1431:24 addressed 1421:12 adequate 1451:23 adequately 1450:24 adjournment 1455:13,20 1455:21 administrators 1448:19 afford 1444:17 1448:10 1453:6 ago 1452:17 agree 1457:6 ahead 1422:6 1424:12 1426:21 1433:12 1434:4 1439:21 1449:18 1450:5 allow 1435:3 allowed 1437:7,10,15 1438:18 ample 1437:11 Andover 1419:15 answer 1435:8 answered 1425:24 1445:4 anybody 1436:4 1443:19 anyway 1453:8 apologize 1433:23 apparently 1432:3,7 appeal 1429:17,24 1451:15 1452:2 appearances 1420:2 1452:5 appellate 1429:15,24</p>	<p>apply 1445:13,18 appreciate 1421:17 approach 1451:14 appropriate 1446:2 arbitrator 1430:8 1440:3 1440:17 1441:5,7 1442:2 1442:5,21,23 1443:2 areas 1439:7 1450:23 argument 1427:13 1431:7 arguments 1421:13 1427:20 1450:12 1452:7 arrange 1458:6 asked 1435:14 1445:4 asking 1425:19,20 1426:5 1431:9 assertion 1440:9 assertions 1440:10 assess 1436:21 assessing 1444:16 assist 1436:11 assisted 1437:13 assumption 1453:17 attorney 1422:16 1426:10 1434:15 1439:3,6 1440:2 1440:17,18 1442:8 1446:18 1452:16 August 1419:9 1421:14 1447:14,21 1448:20,22 1449:24 1450:3,7 1453:11 1455:14,21 1459:14 1460:3 aware 1432:7 a.m 1419:10,10 1447:15,17 1450:12</p> <hr/> <p style="text-align: center;">B</p> <p>back 1427:4 1454:7,9 1455:12,18 1457:12,14 backed 1436:24 badly 1452:15 based 1427:14,21 1429:13 1430:10 1436:23 1444:16 basically 1428:20 1437:5 1441:4 1447:7 1451:17</p>	<p>1452:3 basis 1444:6 1445:16 beep 1455:8 beginning 1457:14 believe 1421:13 1426:9,14 1431:11 1435:21 1450:23 believed 1440:7 believes 1444:22 1450:24 benefit 1429:19 1430:5 best 1420:4 1430:2 1434:7 1435:8 better 1431:12 bit 1426:17 1428:24 1452:12 body 1429:21 book 1450:16 bottom 1427:12 breakdown 1433:16 bridge 1431:2 bring 1423:7 1439:7 1442:15,16,18 1443:7 1446:20,22 1447:9 brought 1443:21 bye 1458:16,17,18,19</p> <hr/> <p style="text-align: center;">C</p> <p>calendar 1449:4,6 call 1421:3,10 1431:17 1432:2 1433:15 1434:20 1435:15,15,21 1436:8 1437:23 1455:12,22 1456:16 1458:6 called 1434:19 1436:3,4,10 calling 1433:19 caption 1459:6 Carney 1424:16,21 1425:5 1425:11 case 1426:13 1427:18 1429:9 1430:22 1436:19 1436:22 1437:7,17,24 1438:15 1443:23 1445:15 1451:15 1452:14,16 1460:2 case-by-case 1445:15,16</p>
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