October 4, 2007

Hon. Joel I. Klein
Chancellor
New York City Public Schools
Department of Education
52 Chambers Street, Room 314
New York, NY 10007

Re: Theodore Smith
SCI Case No. 2007-2034

Dear Chancellor Klein:

An investigation conducted by this office has substantiated that during the course of a New York City Department of Education ("DOE") disciplinary proceeding against teacher Theodore Smith, he threatened the life of Jack Tillem, the arbitrator presiding at the hearing.[1] Smith told his attorney, David Kearney, "I'm going to kick your fucking head in and kill that fucking arbitrator, Jack Tillem, you hear me?" Smith added that he was going to "break [Tillem] in half," and "bust his head in." Kearney advised Tillem of Smith's threats. In response, Tillem recused himself from further consideration of the case. The arbitrator initially declined to state the true reason for his recusal on the hearing record, and claimed that it was based on Smith's accusation that Tillem was biased in favor of the DOE's prosecution. However, in response to a DOE attorney's demand, Tillem subsequently changed his position and stated for the record that Smith's threats prompted his recusal. Neither Tillem nor Kearney reported Smith's threats to the police.

This matter was reported to the office of the Special Commissioner of Investigation for the New York City School District ("SCI") by Theresa Europe, Deputy Counsel to the Chancellor, on May 11, 2007. Europe reported by e-mail that:

[1] Smith was reassigned as a result of the disciplinary proceeding and remains so. The proceeding is still pending, and is described herein.

> We have a very weird situation. We have a teacher by the name of Ted Smith who is up on disciplinary charges for incompetence and insubordination. The case is assigned to Susan Jalowski and closing arguments were due to be heard today. We received a call from his attorney who advised me that his client has made statements against the arbitrator "that is concerning" him. I asked him what Smith was saying and he wouldn't tell me and asked if he can have an ex parte conversation with the arbitrator to advise him. I agreed and told him that I would follow up with the arbitrator. The arbitrator advised me that, according to the defense attorney, his client stated, among other things that he was going to "bash his fucking head in" and "kill him". He also threatened to kill his attorney on several occasions.

Later that month, Smith reported by letter to SCI that the DOE disciplinary proceeding against him was based on "lies, fraud, forgery and falsification." Accompanied by an attorney, Smith appeared at SCI at the conclusion of this investigation to be interviewed concerning his complaint, and Europe's reports concerning the threats to Tillem. However, at his attorney's direction, Smith left the SCI office before the conclusion of the interview. We have determined that Smith's complaint is without merit.

SCI investigators interviewed the following persons under oath: Europe, Tillem, Kearney, Susan Jalowski, the DOE Office of Legal Services ("OLS") attorney assigned to prosecute the disciplinary proceeding, and Smith, who appeared with a new attorney. We examined numerous documents pertaining to the disciplinary hearing obtained from the DOE OLS, including some transcripts of the hearing. Smith also provided documents to SCI, including some which Kearney declined to produce.[2]

The disciplinary proceeding

In December 2005, Smith was charged in the DOE disciplinary proceeding (N.Y. Educ. Law § 3020-a) with 27 specifications of misconduct pertaining to his assignment as a physical education teacher at the New York City Museum School in Manhattan during the 2004-2005 school year. Thirteen of the specifications were based on observations of Smith's class on separate dates by Museum School Principal Lindsey Uehling. At various times, Uehling observed that Smith: failed to instruct the class, failed to control the class, did not have a lesson plan, did not take attendance, allowed free play by the students for an entire period, refused to take his students to the gym, or to meet with the principal, as she directed. Two of the specifications concerned the DOE Regional Fitness and Physical Education Director, Victor Ramsey, to whom Smith stated, "Get off my back," and "leave me alone." Smith also failed to appear at three scheduled meetings with Ramsey. Two of the specifications concerned Smith's absence on 19 days of the school year, and 14 days on which he arrived late or departed early from school. Another charged Smith with failing to appear at scheduled meetings, parent-teacher conferences

[2] Kearney claimed that the attorney-client privilege precluded him from producing the documents.

or professional development sessions on 16 occasions. The DOE specifications alleged, among other things, that Smith's actions constituted insubordination, incompetence and/or inefficient service, excessive absence from duty and/or excessive lateness, and neglect of duty.

Smith was initially represented in the 3020-a proceeding by attorneys assigned to him through the United Federation of Teachers ("UFT"). While the matter was pending, he retained the Law Offices of Neal Brickman, P.C., to file suit against the DOE, Uehling, Ramsey and two other DOE employees, in the United States District Court for the Southern District of New York (the "Southern District case").[3] The suit generally alleged that the DOE's efforts to terminate Smith's employment were the result of retaliation and disability discrimination. The Brickman firm assigned Kearney to handle the suit. In December 2006, Smith fired his UFT attorney and hired another private lawyer to represent him in the 3020-a matter, but dismissed him the following month. In January 2007, on the evening before the first day of testimony in the 3020-a hearing, Smith retained the Brickman firm and Kearney to represent him in that proceeding.

Tillem took testimony in the 3020-a proceeding on scheduled dates from January though May 2007. On February 22nd, as the DOE's case against Smith neared conclusion, Tillem conferred with Kearney and Jalowski, the assigned DOE attorney, while Smith was absent from the hearing room. Tillem urged the attorneys to settle the case, and proposed a three to six month suspension of Smith to dispose of the matter. As Smith later recounted in his letter to SCI, and in a May 3rd letter he wrote to Tillem (described below), Smith overheard Tillem and the attorneys from outside the hearing room. Smith considered Tillem's proposed settlement and suspension as evidence that the arbitrator was "tilted" against him. According to a copy of a sealed affirmation filed by Kearney in the Southern District case (the "Kearney Affirmation") which Smith provided to SCI, after Kearney left the February 22nd settlement conference to meet with his client:

> Smith's behavior toward me began to change drastically at that very moment. Smith accused me of not advocating for him, of withholding documents from him, of violating my fiduciary duty to him for speaking to the Union, opposing counsel, to the hearing officer outside his presence and, of all people, to his mother. He was suspicious of any discussion held outside of his presence.[4]

---

[3] Theodore Smith v. New York City Dept. of Education, et al., 06 CV 4613 (NRB) (S.D.N.Y.). The lawsuit remains stayed pending the disposition of the 3020-a proceeding.

[4] Kearney Aff. ¶¶ 39, 43. The Kearney Affirmation was filed under seal on May 23, 2007 in support of a motion for leave for Kearney and the Brickman firm to withdraw from the Southern District case; Kearney provided a copy of the affirmation to Smith at that time. Kearney's motion to withdraw was granted by the court on July 5, 2007. Kearney declined to produce his affirmation to SCI, citing attorney-client privilege. Smith, however, voluntarily furnished a copy of the Kearney Affirmation to SCI in the presence of his new attorney when they appeared at SCI for Smith's testimony on July 16, 2007.

Kearney reported in his affirmation that in subsequent discussions, Smith cursed him, and continued to accuse the arbitrator of bias. Kearney stated that on March 23rd, he telephoned Smith to discuss contacting witnesses and obtaining medical records for upcoming hearing dates. Smith "launched into a tirade," and "exploded, saying "fuck you – go fuck your mother." Kearney then ended the call.[5] He reported that:

> Sometime thereafter, Smith's mother, Lilian, called me. She had apparently been listening on the other line and began to tell me that there was no way she could get records on such short notice and that the arbitrator "had it out for Teddy;" and that the ruling was "unfair" and proved that the arbitrator was biased. I told her that I had advised both of them of his ruling and that they had assured me they would obtain the records. Smith then grabbed the telephone and said "I've got a problem with you and I've got a problem with that fucking arbitrator, all right? I don't care who you are, never talk to me. You hear that? So fuck you, mother fucker! I am going to kick your fucking head in and kill that fucking arbitrator Jack Tillem, you hear me?" Smith then began to speak in a tone that I can best describe as seething, saying that, "Tillem is already crooked" and that Smith was going to "break him in half" and then "bust his head in." Thereafter, Smith dropped the receiver and I could hear a thumping sound as though he were punching or kicking something. He continued screaming "fuck you, mother fucker!!" over and over again. His voice rose as he approached and fell as he retreated, as though he were pacing or walking around the room in a circle.[6]
>
> Lilian Smith then continued the conversation with me, stating that she had "never seen Teddy like this." Smith screamed at her to "get off the fucking phone, you fucking cunt" and repeatedly addressed her as "you fucking cunt," just as he continued to scream the words "fuck you, mother fucker," presumably, to me. I heard a loud crashing noise and then the line went dead.[7]

Kearney advised his supervisor of Smith's remarks, and he directed Kearney to withdraw from both of Smith's cases. However, Smith's mother persuaded Kearney to remain. Kearney reported in his affirmation that he "did not believe Smith's threats were entirely credible at that time." In subsequent discussions with Kearney, Smith denied having made threats to anyone. Smith's denial prompted Kearney to send him a written account of his threats on April 12, 2007, in which he challenged Smith to refute it. Smith did not respond.[8]

Kearney reported that Smith continued in his erratic behavior concerning the 3020-a matter. Smith demanded that he be recalled for a second direct examination, and

---

[5] Kearney Aff. ¶ 49.
[6] Kearney Aff. ¶ 50.
[7] Kearney Aff. ¶ 51.
[8] Kearney Aff. ¶¶ 60 – 62. Kearney declined to provide a copy of this communication to SCI, citing attorney-client privilege.

that Kearney subpoena, among others, Mayor Michael Bloomberg, and submit evidence including letters by Smith which, Kearney believed, would be harmful to his defense.[9]

The 3020-a arbitration was scheduled to conclude after hearings on April 18th, 24th, and 27th. Kearney noted that on April 16th, as widely reported in the media, a student at Virginia Polytechnic Institute and State University shot and killed 33 people on the campus, including himself. Two days later, Kearney and Smith appeared at the DOE Chambers Street office for the continued hearing. According to Kearney, as with their previous visits, he was required by the security guard to enter through a metal detector, while Smith was allowed to bypass the device. Kearney asked the guard about this disparity, and was informed that because Smith had DOE identification, he was not required to go through the detector.[10] Kearney stated that in the succeeding days, Smith "began to rage about the arbitrator's bias against him," and that when Tillem denied his request for further hearing dates beyond May 10th, Smith "lost all control."[11] On April 24th, Smith telephoned Neal Brickman's home, and spoke with his wife. Smith accused her of lying when she reported that Brickman was not at home, and "threatened to destroy Brickman."[12] On May 3rd, without notifying his attorney, Smith sent a letter to Tillem at his home address. It accused the arbitrator of bias, and of being "tilted" against Smith.[13] On May 4th, Smith sent several e-mails to Kearney, accusing his firm of "being unethical and directly harming him."[14] On May 7th, Kearney received a "disturbing phone call" from Smith, in which he said "that a 'very high level' person in the media was going to expose everything." Kearney was led to believe by Smith's description that he was referring to Barbara Walters.[15]

Against this backdrop, Kearney directed the security guards at his office building not to admit Smith to his office.[16] Kearney and Jalowski consistently testified at SCI that he telephoned her and requested that Smith be required to pass through the metal detector at the continued 3020-a hearing on May 10th. Kearney told Jalowski that Smith was "making statements that concern me," but did not specify what he had heard from his client. Jalowski told Kearney that his request could not be accommodated because Smith had DOE identification. She referred the matter to her supervisor, Europe, who telephoned Kearney the following day. Europe and Kearney consistently testified at SCI that Kearney repeated his concern about Smith to Europe. She asked if Smith was making threats concerning DOE attorneys, and Kearney answered in the negative.

---

[9] Kearney Aff. ¶¶ 63 – 67.
[10] Kearney Aff. ¶¶ 69 – 71.
[11] Kearney Aff. ¶¶ 72, 74.
[12] Kearney Aff. ¶ 75.
[13] Tillem forwarded copies of the letter to Kearney and Jalowski; SCI obtained a copy from the DOE.
[14] Kearney Aff. ¶ 76.
[15] Kearney Aff. ¶ 80.
[16] Kearney Aff. ¶ 80. Kearney also averred, "In retrospect, I also should have taken more seriously the fact that Smith had been accused of physically assaulting a former principal. However, Smith sued for defamation and the case settled." Kearney Aff. ¶ 79, n. 6.

Europe asked the same question with respect to the arbitrator, and Kearney repeated his general complaint, that Smith was "making statements that concern me." Europe advised Kearney to contact the police.

Europe telephoned Tillem and advised him of her conversation with Kearney. The arbitrator subsequently telephoned Kearney, and asked about his security request. Tillem and Kearney consistently testified at SCI that he replied, "There's some information that I need to tell you." Kearney then told Tillem of Smith's threat to harm him, which, he said, he did not regard as credible at the time. Kearney reported that he said, "However, due to Smith's escalating behavior, including calls to my boss's wife and letters to the arbitrator, I felt he posed enough of a potential violent threat that Smith needed, at the very least, to be passed through security."[17] At his appearance at SCI, Tillem produced a typewritten note which he said that he wrote immediately after Kearney's call:

> Tuesday, May 8, 2007
>
> Spoke to David K
>
> Says Smith on phone April 12 stated: I'll kick your fucking head in and kill that fucking arbitrator Jack Tillem. He's crooked and I'm going to bust his head in.
>
> Dave said Smith has threatened to kick hishead [*sic*] in and kill him Numerous times. Dave made a memo and when he confronted Smith with his threats, Smith sent him an E-Mail denying he ever said any of those things.
>
> Dave said he doesn't think the threats are credible. I said it may not be worth the risk if you're wrong. On the other hand, Dave says he thinks he may be psychotic or mentally unbalanced. Compared him to Norman Bates in Psycho.
>
> I called terry [Europe] [telephone number omitted]. Left message.

Tillem telephoned Kearney later the same day and advised him that in the circumstances, he would recuse himself from further consideration of Smith's case. All testimony and evidence had been taken in the matter – closing arguments were scheduled for May 10th. Kearney asked Tillem to note for the hearing record that Smith's May 3rd letter and its accusation of bias as the reason for his recusal, and not to mention Smith's threats. Kearney testified that he told the arbitrator, "The last thing that I want is for there to be a record of my disclosure, which could be used for any number of purposes." Tillem agreed to Kearney's request. The arbitrator told him that the May 10th hearing would be conducted by telephone conference call (assuming that Jalowski consented) thereby

[17] Kearney Aff. ¶ 84.

removing any security concerns. He directed Kearney to send a copy of Smith's May 3rd letter to Jalowski and to inform her of his decision to recuse himself.

Kearney telephoned Jalowski as directed, and sent her Smith's May 3rd letter. He advised her of Tillem's recusal decision and request to conduct the hearing by telephone. They consistently testified that he asked and she agreed not to mention his prior request concerning metal detectors on the record, and not to otherwise object to Tillem's stated reason – Smith's accusation of bias – for his recusal.

As he stated in his May 8th note, Tillem telephoned Europe and advised her of Kearney's report of Smith's threats, and of his decision to recuse himself from the case. Apparently, this discussion occurred before Tillem agreed to Kearney's request to refer to Smith's bias accusation as the reason for his recusal. On May 10th, the conference call took place as scheduled. Kearney had not told Smith of his disclosure to Tillem, or that he would be recusing himself. Jalowski did not initially join the call, and Tillem directed Kearney to telephone her office to inquire about her delay. Kearney then spoke with Europe, who after unsuccessfully attempting to locate Jalowski, joined the conference call in her stead.

Tillem proceeded to state for the record that based on Smith's letter, he concluded that the respondent believed that he had "prejudiced the case and therefore I cannot render a fair conclusion for him, however grievously wrong he is about that and however he misunderstood" the settlement discussion. Tillem continued, "Therefore, I am going to recuse myself so that he has the opportunity to have another arbitrator restore his confidence in the process."[18] Against his attorney's advice, Smith then stated that Tillem was acknowledging that he was not impartial in the case, and demanded "a brand new hearing because a lot of my evidence did not go into the record … ."[19] Europe then told the arbitrator that she "was under the impression that you were recusing yourself for reasons other than just that letter. And I would like a clear record made of that." Tillem acknowledged, "There are other factors involved in this. I – I'm not sure at this stage that we need – get into them. They probably will unfold soon."[20] Kearney objected, citing the agreement that he had with Jalowski. Kearney and Europe then had an off-the-record telephone conference (excluding Smith). When they returned to the hearing conference call, Tillem announced for the record:

> It turns out that that is only partly the reason and the chances are quite candidly that if I had just gotten the letter I wouldn't recuse myself because there's no real basis. There -- there's no meritory [*sic*] substance to it.

---

[18] DOE v. Smith, Educ. Law § 3020-a Proceeding (SED 5432), May 10, 2007 at 1058 – 59. Jalowski joined the conference call during Tillem's statement.
[19] Id. at 1060.
[20] Id. at 1061.

> However, it has been made known to me as a result of counsel for the Respondent's ethical compliance he has informed me that Mr. Smith has made death threats against me. And that is the main -- that is the real and primary reason that I am recusing myself, coupled with his letter and his statements, which Mr. Kearney, thank you, has informed me of and had to inform me of as an ethical requirement of his profession.
>
> Mr. Smith has threatened to kill me, blow my fuck -- beat my fucking head in and other expressions and I don't really think that at this point I wish to continue as the arbitrator in light of his threats.
>
> So that is the main reason. And I trust that something will come of this because I do think that he represents a danger.
>
> And that is my statement.

Europe then suggested to Tillem that he file a police report. Tillem replied, "Well, no. I think it's incumbent upon Mr. Kearney to file the police report since the statement was made to Mr. Kearney and it was transmitted to me. But I do feel threatened and I will take that under advisement." Kearney added that he, too, would consider the matter.[21] When (separately) interviewed at SCI the following month, neither Kearney nor Tillem had reported Smith's threats to the police. Each of them maintained that it was the other's responsibility to do so.[22] Brickman, who appeared at SCI as Kearney's attorney, maintained that Kearney discharged his professional ethical obligations by first trying to arrange for Smith to be screened by a metal detector and, when he was unsuccessful in that effort, advising Tillem of the threats.[23]

On the day following the conference call, at Europe's direction, Jalowski requested that the DOE direct Smith to appear for a medical examination because of the reported threats. After initially resisting, Smith was examined as directed by the DOE, and was determined to be fit for DOE employment.

Although Tillem declined to contact the police, he testified that Smith's threats reported to him by Kearney caused him to fear for his safety, and (as he ultimately declared in the record) were the genuine reason for his recusal. The arbitrator had received Smith's letter at his home; therefore Smith knew Tillem's address. Tillem testified that while recently seated at his kitchen table and viewing the wooded area

---

[21] Id. at 1065.

[22] SCI advised the New York City Police Department of Smith's threats on the day of Europe's referral to SCI.

[23] Brickman maintained that Kearney was not obligated under the attorney's disciplinary rules to contact the police, but only to take such action which, in his subjective judgment, was necessary to prevent the potential harm. *See* Code of Professional Responsibility DR 4-101(C)(3) [N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.19 (2003); NY St Bar Assn Comm on Prof Ethics Op 562 [1984].

behind his home, he recalled media accounts of the murder of Barnett Slepian, the Buffalo area physician who was shot and killed by a sniper in similar circumstances.

Smith appeared at SCI accompanied by attorney Robert Gerard and was interviewed under oath.[24] Smith and his attorney voluntarily produced a number of documents to SCI, including the Kearney Affirmation, which detailed his account of Smith's threats and erratic behavior. In his testimony, Smith denied making threats concerning Tillem or Kearney. According to Smith, Kearney threatened him. Smith stated that during a telephone call in March, Kearney told Smith to obtain certain medical records needed for the 3020-a hearing, and that if he failed to do so, Kearney would choke him. Asked what words Kearney used in making the threat, Smith replied that his lawyer said, "You get the records, or I'm going to 'ch' [phonetic] you." Smith explained that Kearney did not use the word "choke," but stopped short and uttered the sound "ch" or "cho." Smith volunteered, "I have it on tape." He was then asked to produce the recording to SCI, but has not done so.[25] Smith said that he reported Kearney's threat to the New York County District Attorney's Office. An Assistant District Attorney of that office confirmed that Smith and his mother made such a complaint (in addition to alleging forgery on the part of the DOE, and false testimony at Smith's 3020-a hearing) in May. That office declined to take action on Smith's complaint, and referred the matter to SCI.

Smith's complaints regarding the DOE

In his May 22nd letter to SCI, Smith complained that he had been "experiencing egregious lies, fraud, forgery, misstatements on-and-off the legal record, and now falsification of the [May 10th 3020-a] transcript … ." The letter included about two dozen lines of off-the-record colloquy from the May 10th hearing among Tillem, Europe and Kearney. Nothing in their discussion pertains to the substance of the case against Smith – the parties were merely making arrangements for an off-the-record conference call, as is noted in the official transcript. The discussion's omission from the official transcript is precisely because the parties agreed to speak off-the-record and does not constitute a "falsification." Smith was asked at SCI how he was able to repeat the colloquy of the attorneys and the arbitrator with such precision in his May 22nd letter. He testified that he surreptitiously tape-recorded their conversation from his telephone.

Smith's May 22nd letter appeared to characterize Tillem's change of position as to the reason for his recusal as further evidence of his bias. Referring to the official

[24] On July 3, 2007, Smith advised an SCI investigator that Gerard was now his attorney. Gerard also succeeded Kearney as Smith's attorney in the 3020-a proceeding, and on September 14, 2007, Gerard entered a notice of appearance for Smith in the Southern District case.

[25] Smith testified that he made as many as three recordings of conversations he had with Kearney. He was asked to produce the recordings to SCI, but has not done so.

transcript, Smith wrote, "… the arbitrator now explains that my attorney Mr. Kearney had given what I flatly contradict as being falsified information. Mr. Kearney's falsification is clearly evidenced in a number of e-mails in my possession." However, none of the e-mails which Smith produced to SCI reference threats by Smith (or Kearney), except for some self-serving denials written by Smith after the May 10th hearing.

Smith's complaint to SCI also stated that the 3020-a charges against him were retaliatory, and were based on "clear lies, falsified and even forged documents submitted by the DOE … ." Asked to explain this complaint, Smith essentially stated that testimony and evidence presented against him at the 3020-a hearing was untrue. He said that the 27 specifications against him were without merit, and largely concocted by his supervisors, Uehling and Ramsey, in retaliation for Smith's complaints regarding oversized or "illegal" gym classes he was assigned to teach at the Museum School.[26] Asked whether he pursued his complaint regarding the oversized classes with his union, Smith responded that he had filed a "stack of grievances" with the UFT beginning in the spring of 2005. He specified that he filed "two or three" grievances, beginning in 2003. Smith said that "one or two" grievances were decided against him, and that another "one or two" were not heard. Smith blamed the UFT for not acting on some of his grievances within the required deadlines, and said that the union "did not go to bat for me." Asked about the "forged documents," Smith produced a few class rosters from his gym classes which he claimed were inaccurate, because some of the classes were combined, and thus the total enrollment was understated. Smith said that he told Kearney about these documents, but said that he did not recall if his attorney submitted them in evidence or otherwise made this argument in the pending 3020-a hearing.

Smith also repeated his complaint that in discussing a proposed settlement with Kearney and Jalowski, Tillem was "tilted" against him. Smith testified that he overheard the settlement discussions, and Tillem's proposal of a three to six month suspension to dispose of the case. Smith maintained that Tillem's mere suggestion of a suspension as a compromise indicated that he was biased. When asked if Tillem made any statements indicating that he would find against Smith, he replied in the negative.

Finally, Smith complained that he was assessed $1,600 by Tillem for missing a scheduled hearing date. Smith said he could not attend the hearing due to illness. Smith recalled his record of attendance in his May 3rd letter to Tillem, and hoped that the arbitrator would release him from the assessment. Tillem was asked about the matter at his appearance at SCI. He stated that the regular practice is to assess this sum to the party

[26] In December 2006, after the 3020-a specifications were filed against him, Smith complained to SCI that Uehling had forced him to instruct oversized classes. SCI referred his complaint to the DOE Office of Special Investigations ("OSI"). In May 2002, Smith complained to SCI that while he was assigned to Beacon High School, Principal Stephen Stoll gave him a disproportionately large schedule of classes compared to other teachers at the school. This was also referred to OSI.

responsible for missing hearing dates – which are scheduled far in advance – to compensate the arbitrator for his or her lost business opportunity. Tillem said that these assessments are generally paid by the DOE or UFT, as appropriate. However, since Smith had dismissed his UFT counsel and was represented by a private attorney, he was personally responsible for the assessment. Tillem testified that he did not plan to enforce the assessment against Smith.

Because of Smith's revelation that he made surreptitious recordings of conversations with Kearney, Tillem and Europe, during his appearance at SCI, he was asked if he recorded any other individuals regarding any of the matters specified in his complaints. After some prodding, he testified that after he received a "U" rating from Uehling, he arranged for some friends to telephone her and Ramsey on the pretext that they were DOE officials considering hiring Smith for an administrative position. Smith said that one or more friends tape recorded calls as they asked Uehling and Ramsey for their evaluation of Smith. According to Smith, he heard on one recording that Ramsey advised against hiring him, because "he pretends to be sick." Smith was asked about further recordings, at which point his attorney interjected, "Teddy, we're leaving." Smith and his attorney then exited the SCI conference room before investigators could conclude the interview. As he was leaving, Smith acknowledged that he had retained copies of the recordings. Smith agreed to provide them to his attorney so that he could produce them to SCI. His attorney then said "We'll take that under advisement." No recordings have been given to SCI.

Status of the 3020-a proceeding

After Tillem's recusal, the 3020-a proceeding was assigned to arbitrator Howard Edelman, who scheduled a hearing for September 20th for Smith to offer any relevant evidence or testimony to supplement that which had been presented to Tillem. According to Edelman:

> At approximately 4:50 p.m. on September 19, 2007 I received an e-mail from Mr. Gerard stating Respondent would not appear at the hearing because the "underlying hearing was fatally flawed as a result of pervasive corruption, fraud and misconduct of the attorneys and the previous Hearing Officer." He also stated, "Based upon this record, I have advised Mr. Smith not to participate further in the disciplinary proceedings and to proceed instead with the Federal suit to vindicate his rights." Ms. Jalowski objected to that communication and asked that the hearing go forward.[27]

Edelman said that he replied by e-mail at 5:05 p.m. on September 19th and directed that the hearing would proceed as scheduled the following day, but that he would allow Gerard to present oral argument as to why the hearing should be stayed or why a trial *de novo* should be held. Neither Gerard nor Smith appeared as directed on September 20th.

[27] Memorandum of Howard C. Edelman, Esq. to William Gerard, Esq. and Susan Jalowski, Esq. re DOE v. Theodore Smith, (SED 5432), Sept. 20, 2007.

The arbitrator then adjourned the hearing until October 1st, and examined the record of the hearing before Tillem. Edelman determined that there was nothing to warrant staying the proceeding or holding a trial *de novo.* He ordered that on October 1st Smith would be given an opportunity to present any additional evidence, and that if he failed to appear, the DOE would be allowed to make a closing argument, and the record will then be closed.[28] On October 1st, Smith and Gerard appeared at the hearing. The attorney announced that they would not participate any further in the proceedings, and he declined to make a closing argument. The DOE attorney presented a closing argument, and the arbitrator took the case under advisement.

Conclusion and recommendations

Theodore Smith threatened the life of the arbitrator presiding over a disciplinary proceeding against him. His attorney's accounts of Smith's threats are entirely credible; Smith's denials are the complete opposite. Smith's conduct is consistent with his pattern of distrust and suspicion of others as exhibited in his written communications and his testimony at SCI. Smith understandably caused the arbitrator to fear for his life, and nearly sabotaged the disciplinary proceeding against him. His allegations against the DOE and his supervisors are without merit, and are similarly prompted by Smith's rigid preoccupation with the motives of his accusers, and a likely desire to undermine the disciplinary proceeding against him. It is the recommendation of this office that his employment be terminated, that he be placed on the ineligible list, and that this matter be taken into account should he seek employment with the DOE or its affiliates in the future. We are also referring this matter to the District Attorney of New York County for whatever action he deems appropriate.

Should you have any inquiries regarding the above, please contact Deputy Commissioner Gerald P. Conroy, the attorney assigned to the case. He can be reached at (212) 510-1486. Please notify Deputy Commissioner Conroy within thirty days of receipt of this letter of what, if any, action has been taken or is contemplated concerning Theodore Smith. Thank you for your attention to this matter.

Sincerely,

RICHARD J. CONDON
Special Commissioner of Investigation
for the New York City School District

By: _____
Gerald P. Conroy
Deputy Commissioner

RJC:GPC:gm
c: Michael Best, Esq.
Theresa Europe, Esq.

[28] Id.