STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of

BUFFALO TEACHERS FEDERATION, INC.,

Petitioner-Plaintiff,

For an Order and Judgment Pursuant to
CPLR Article 78

-against-

MARYELLEN ELIA as Commissioner of the New York State Education Department, the NEW YORK STATE EDUCATION DEPARTMENT, the STATE OF NEW YORK, DR. KRINER CASH, as the Superintendent of the Buffalo Public Schools, the BOARD OF EDUCATION OF THE BUFFALO PUBLIC SCHOOLS, and the BUFFALO PUBLIC SCHOOLS, also known as the BUFFALO CITY SCHOOL DISTRICT,

Respondents-Defendants.

AFFIDAVIT OF
PHILIP RUMORE

Index No.

Assigned Justice:

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

PHILIP RUMORE, being duly sworn deposes and says:

1. I am the President of the petitioner-plaintiff, Buffalo Teachers Federation, Inc. ("BTF"), have held that position for all relevant times set forth below, and am personally familiar with the facts set forth below.

2. I submit this affidavit in support of the BTF's application to vacate and annul the

decision and order of the Commissioner of Education dated November 8, 2015, a decision and order re-writing the collective bargaining agreement between the BTF and the Buffalo Public Schools.

Background:

3. BTF is a labor union that represents approximately 3,400 teachers and other educational professionals employed by the Board of Education of the Buffalo Public Schools ("District").

4. BTF and the District are parties to a contract, a collective bargaining agreement. That contract is attached to this affidavit as Exhibit "A."

5. BTF and the District are presently in negotiations for a new contract. Our most recent session was held on January 26, 2016.

6. On November 8, 2015, however, by her decision and order, MaryEllen Elia, the Commissioner of the New York State Education Department ("Commissioner") took the unprecedented step of simply re-writing parts of that contract in several respects. *See* Exhibit "A" to the Petition/Complaint.

7. While the Commissioner claimed authority to re-write our contract pursuant to newly enacted New York State Education Law §211-f, it is respectfully submitted, as will be discussed below, that she did not comply with the statute and its implementing regulations; she exceeded her authority; she acted in violation of lawful procedure; she acted arbitrarily and capriciously; and, to the extent that she could be considered to have complied with the statute, the statute is unconstitutional on its face and as applied here.

Demand to re-negotiate existing contract:

8. By letter to BTF dated August 27, 2015, the Superintendent asked in a very broad and

general way to "modify the collective bargaining agreement between the parties" for District schools that had been identified as persistently struggling by the Commissioner. A copy of that request is attached to this affidavit as Exhibit "B." Education Law §211-f, recently enacted as part of a budget bill in April 1, 2015, purports to vest a school superintendent with certain new authority in this regard. To my knowledge, the Superintendent's request was the first of its kind in New York State.

9. On September 1, 2015, I forwarded a memo to the Superintendent requesting certain information. A copy of that memo is attached to this affidavit as Exhibit "C." I sought to know the specific schools where the Superintendent was seeking to have receivership agreements — I intended to appoint teachers from those schools to serve on the negotiating teams for each of those schools. I also wanted to know what the District was actually going to be seeking so that we could timely evaluate the proposals on our side.

10. I further sought information about the "community engagement team" activities and recommendations for each of the schools. Under the new Education Law regulations, each struggling school was to develop a plan of action to improve. The plans were to be developed by administrators, teachers appointed by BTF, and parents after hearings and community engagement. If a plan proposed something that could not be implemented because of a collective bargaining agreement, it would obviously be important for us to consider that. On the other hand, if the plan did not call for the changes that the District was going to be seeking, we would need to know the reason the District wanted that change. The claimed goal for this scheme is supposed to be to improve education for our children, not have a public employer do an "end around" their collective bargaining obligations under the law. As I wrote to the Commissioner at that time "We look forward to working with the District to develop plans that will improve student achievement."

11. In this regard, BTF had been trying to work with the District to create these community engagement teams for weeks. Attached as Exhibit "D" is a copy of a BTF memo to the District dated August 5, 2015, wherein BTF sought information about how the District was forming the CETs. BTF also stated therein who were to be the BTF members on the CETs. BTF has never been provided with this information.

12. Under Article VII of our collective bargaining agreement (Exhibit "A," p.12), BTF had a specific contract right to such information.

13. Furthermore, I am advised by my attorneys but also am aware based on my years of experience in this area that under the Taylor Law a union also has a specific right to such information in negotiations so that it can intelligently negotiate. Not to provide information is bad faith bargaining, an improper practice under the Taylor Law, Civil Service Law §209-a (1)(d).

14. Because this was such an unprecedented situation, it was important for all parties to proceed carefully and appropriately. Despite what the Superintendent said in his letter about the deadline being thirty days to complete negotiations, the applicable emergency regulations at that time specifically provided that negotiations were to *commence* within thirty *school* days (Reilly Affidavit ¶6 and Exhibit "D").

15. There was correspondence between the parties on September 8, 2015, September 9, 2015, and September 25, 2015. Copies of those letters are attached to this affidavit as Exhibits "E," "F," and "G". In the Superintendent's September 25 correspondence, the Superintendent provided its re-writing proposals but did not provide the other requested information. The Superintendent also set a deadline of October 1, 2015, to "accept the proposals or to meet" or he "would move the process forward." Regarding the last remark, the Superintendent was obviously threatening to

submit his proposals to the Commissioner for resolution even at that early date. The new statute provided for such a resolution and the Superintendent appeared anxious to get this to the Commissioner's desk.

16. I was surprised to learn at that time that SED had adopted new emergency regulations on September 21, 2015, and now the requirement was that the parties were to *complete* negotiations within thirty school days of a demand to re-negotiate (Reilly Affidavit ¶7 and Exhibit "E"). SED had changed the rules "mid-stream." I tried to find out if the demand to renegotiate was made before this new rule, as here, whether we were we covered under the old rule, or whether the demand to re-negotiate should be considered to begin as of the date of the new rule, or what were the rules that now applied. To my knowledge, SED offered no guidance in this regard.

17. Thus, on September 28, I again inquired about the prior information we had demanded. I again asked for the community engagement team plans: "We are informed that the school based plans were just due at the District office on or about September 23, 2015." A copy of the September 28, 2015 letter is attached to this affidavit as Exhibit "H." Again, I re-iterated, "We look forward to working with the district to develop a consensus on what will improve student performance." I sent further correspondence to the Superintendent on September 30, 2015, disputing his calculation of the deadline and again requesting the previously demanded information. A copy of that letter is attached to this affidavit as Exhibit "I."

18. The parties thereafter met several times to negotiate, on October 13, 14, 19, and 22. We responded and sought clarification of their September 25 and October 21 proposals. We wrote them for clarifications and questions on October 14 and 22, 2015. Copies of those letters are attached to this affidavit as Exhibits "J" and "K." We made counter proposals on October 19 and

22. On October 23, 2015, we submitted our own proposals. A copy of those proposals is attached to this affidavit as Exhibit "L."

19. On October 14, 2015, BTF was supplied by the District with some but not all of the information it had sought regarding the community engagement teams ("CET"). Attached to this affidavit as Exhibit "M" is a copy of the CET recommendations for four of the five schools that we were provided at that time. Significantly, none of the community engagement teams had recommended any of the collective bargaining agreement changes that the Superintendent sought. None of the various stakeholders, who remain undisclosed to BTF, charged with creating proposals that would help education in these schools had proposed the contract changes that the Superintendent was seeking.

20. On October 27, 2015, one day before the District's submission to the Commissioner, I was again surprised to see that SED had once again changed the time periods through adoption of yet another set of emergency regulations (Reilly Affidavit ¶8 and Exhibit "F"). This time, the bargaining process was supposed to be completed within thirty *calendar* days of the demand to re-negotiate. Depending on how you computed the time with these shifting rules, we still had time or we were *retroactively* late. One would think SED would have proceeded more deliberatively considering that they were adopting regulations which would have the unprecedented affect of altering the pre-existing contract rights of parties.

21. As negotiations were proceeding and we seemed to be making progress, I asked the Superintendent on October 27, 2015, if he would agree to an extension of time to negotiate. A copy of that letter is attached to this affidavit as Exhibit "N." The actual deadline was completely muddled because of the three different rules that SED had in effect in this short two month period,

but the latest emergency regulations did provide that the parties could agree to an extension (Reilly Affidavit, Exhibit "F"). Rather than shove something down our throats, I would have thought that the Superintendent would prefer to have a negotiated resolution.

22. My request was ignored by the Superintendent — he submitted his application for the Commissioner to rule on the matter on October 28, 2015. (Reilly Affidavit, Exhibit "A").

Commissioner's prior involvement:

23. I have been shown video taken by a news crew of a meeting between the Commissioner and the School Board on July 17, 2015, and I now see why the Superintendent was in such a hurry throughout this process to get his proposals to the Commissioner.

24. In the video, just a few weeks before the Superintendent's demand to re-negotiate, the Commissioner discusses the receivership law and tells the District "I think this community should be very impatient, I think we have to move ... This is an important opportunity for the Superintendent to take the reigns of this and to move forward to support schools and if necessary change some of the things that are in place there to bring success to our kids." A copy of that video is attached to this affidavit as Exhibit "O", also accessible at:

http://wivb.com/2015/11/13/buffalo-teachers-federation-says-state-went-too-far-during-meeting/.

In a matter where she could be the impartial decision maker, the Commissioner appeared to encourage the District to proceed and override the collective bargaining agreement. It appears that she already had her mind made up about this.

25. The Commissioner continues in this meeting:

> Commissioner Elia: You're in a position in specific schools to supercede that and sit down and make the changes that need to be made. If the union doesn't want to do that, after good faith bargaining ...

> Board Member Quinn: Well what does good faith bargaining mean?
>
> Deputy Commissioner Ira Schwartz: Statute says that if the issue comes to the commissioner for a resolution, she must make a determination within five business days.
>
> Board Member Quinn: Do not want to compromise for these kids.

(Exhibit "O"). It is especially troubling to me that the answer to a question about good faith bargaining was that SED will be making a prompt decision.

26. And note the following as well, perhaps the most disturbing:

> Board Member (not clear who): so my question is, those things can't be done until we show the good faith effort ... so after that's done, then the decision goes to the commissioner, what type of time frame are we looking at for a decision?
> Commissioner Elia: We only have 17 school districts in the state that have any schools on the list, and your district is one of only a few that have several schools on the list, so *your request would be fast-tracked into my office and I would review it, talk to you, see what had been done, and make a decision. Id.* (Emphasis added).

The Commissioner, who will be in the role of impartial judge/interest arbitrator, appears to be signaling to the District that she will be having *ex parte* communications with them, before making the decision. How can this be proper?

27. This is all the more problematic because the Commissioner recommended to the District Board of Education and pushed for the selection of the particular person who was thereafter selected to become Superintendent of the District. (*See* newspaper articles attached as Exhibit "P").

28. The Commissioner thus apparently formed an opinion of what needed to be done about overriding the contract, met with the Board to discuss it, got her own particular selection picked as Superintendent, perhaps had *ex parte* communications with the Superintendent and/or his

assistants if she did what she said she was going to do, and then ruled on that Superintendent's submittal to overrule the contract.

District's submittal to the Commissioner:

29. The latest emergency regulations mandate that the Superintendent "describe the unresolved issues," and set forth "an explanation of the rationale for the proposed contract language and how adoption of the proposed language would be consistent with collective bargaining principles, such as any applicable factors set forth in Civil Service Law section 209(4)(c)(v)." (Reilly Affidavit, Exhibit "F"). Even a cursory look at the Superintendent's submittal shows that it does none of those things.

30. First, there is no actual explanation in the submittal as to why the Superintendent needs any of the particular contract changes to improve education. Rather, there is essentially just a listing of the contract changes he wants. Again, it is significant that none of the community engagement teams, the administrators, teachers and parents, after public hearings and community input, having been specifically charged with creating proposals that would help education in these schools, had recommended any of the contract changes that the Superintendent sought (*see* Exhibit "M"). If a party's contract is going to be re-written without their consent, you would think there should be a very clear and good reason for it, and that should have to be at least articulated to justify it.

31. Likewise, the Superintendent nowhere explains how adoption of the proposed language would be consistent with collective bargaining principles. The term "collective bargaining principles" is not even used in the submittal.

32. Further, in his submittal, the Superintendent does not even mention all the "unresolved issues," i.e., BTF's proposals (*see* Exhibit "L"), which involve smaller class size, more teacher preparation time, and more teacher input -- things that might actually help students. The Superintendent just sets out a laundry list of changes he seeks. He does not even mention, much less discuss, how his proposals are consistent with collective bargaining principles.

Commissioner's decision generally:

33. The Commissioner essentially adopted all of the Superintendent's proposals, with certain arbitrary tweaks discussed below.

34. The Commissioner ignored the specific requirement that the Superintendent is supposed to explain the rationale for the changes (Exhibit "A" to Petition/Complaint at p. 22). For example, just saying that you want authority to start school earlier is not enough; if a teacher's contract rights are going to be overridden, it would seem elementary that the specific justification for why that is needed should be spelled out.

35. The Commissioner forgave the complete lack of the Superintendent mentioning how his proposals comport with collective bargaining principles:

> While the superintendent receiver's submission does not specifically address how adoption of the proposed language would be consistent with collective bargaining principles listed in Civil Service Law 209(4)(c)(v), I find the factors listed in §209(4)(c)(v)(a) and (c) are not relevant in the instant context and that factors (b) and (d) are addressed by the superintendent receiver's reference to the interests and welfare of public school students in the receivership schools and to the parties' existing CBA, which has been in effect since July 1, 1999" (Exhibit "A" to Petition/Complaint at p. 22).

In other words, despite the specific statutory and regulatory requirements, the Commissioner overrode

a contract just by generally saying "it's for the best"?

36. The Commissioner thereafter again and again recited the mantra "in accordance with collective bargaining principles" as she directs the re-writing of our collective bargaining agreement (*Id.* at pp. 38, 42, 45, 49, 56, 62). How can imposing a collective bargaining agreement by fiat on a union be consistent with collective bargaining? It makes no sense.

37. The Commissioner even refused to determine whether the negotiations of the parties were done in good faith (*Id.* at pp. 17-18), although that is specifically required by statute and regulation. Given the repeated questions about good faith bargaining at the July 17, 2015 meeting of the Commissioner and Board of Education, this again seems very disturbing.

38. My attorneys advise me, and I am aware from my experience, that the Public Employment Relations Board (PERB) determines improper practice charges between an *employer* and union. If an employer bargains in bad faith, PERB can set aside the result and have the parties go back to the bargaining table. Here, though, the *Commissioner* has imposed new contract terms upon the parties. The Commissioner cannot be a party at PERB. PERB does not have jurisdiction over the Commissioner in this context. If PERB were to determine that the Superintendent did not bargain in good faith, it would appear that PERB could not set aside the contract imposed by the Commissioner. BTF thus has no effective means of remedy.

39. The statute and regulations specifically impose a requirement of good faith bargaining during the period of re-negotiations. Like it or not, the Commissioner cannot just slough off the responsibility; the Commissioner is the only entity in this situation with a meaningful way to ensure that the legal requirements are met.

40. The Commissioner also refused to consider the BTF proposals purportedly because the *District* did not raise them (*Id.* at p.16). The statute talks about the Commissioner's authority to determine unresolved issues. How is this not an unresolved issue? The Commissioner's decision makes no sense and is blatantly unfair and one-sided.

Beyond jurisdiction — District-wide changes to transfer system:

41. Four of the ten changes directed by the Commissioner involved the transfer system that governs teachers in the District. (*Id.* at pp. 38-39, 42-43, 45-47). Because the transfer process works on a District-wide basis, however, the Commissioner has necessarily effected changes at non-persistently struggling schools, something she acknowledges in her own decision that she does not have the authority to do.

42. At page 56-57 of her decision, the Commissioner herself states: "While the receiver has the powers and authority specified in Education Law §211-f over schools in receivership status, *the superintendent receiver's proposal as written would permit the receiver to impact staffing decisions at other schools in a school district, thereby exceeding the powers and authority enumerated in the statute*" (emphasis added). Yet the Commissioner inexplicably has directed various changes in the transfer process that will affect the staffing at the other schools.

43. A copy of the District's latest guidelines on transfers are attached as Exhibit "Q". The present District transfer system and transfer lists involve first a District-wide list of people who are entitled to transfers as part of grievance settlements. People on that list (by seniority) get first pick on vacancies at the various schools. There might be 5 to 10 people on this list in this position. Then there is a list for people who are being involuntarily transferred out of a school. These are people

where positions have been eliminated (most commonly) or the principal at the school wants them out of their particular assignment. There might be 50 people on this list. Next, there is the voluntary transfer list. By March 23 of each year, teachers can ask to be on the voluntary transfer list. There are maybe 400 people on this list. Then there is a list of teachers coming back from unpaid leave (maybe 12 to 15 people). Finally, there are people recalled from a statutory Preferred Eligible List (PEL) from layoff. There might be maybe 20 or so persons on this list.

44. In July and August before each school year, the District works downward through the lists, calling teachers and telling them the vacancies that are open to them. The teacher then meets with the principal, has four days to make a decision, and has the right to decline any offered position.

45. Vacancies that open up during the school year are filled off a PEL list or with a temporary placeholder, with the position then going through above transfer process in the summer. There is no transfer list or process during the school year.

46. Empowering the Superintendent to change transfer rights at persistently struggling schools, will *necessarily affect the rights of teachers throughout the system because it is a District-wide system.* If a teacher cannot transfer to another school, or if a teacher is involuntarily transferred to another school, there is a cascading effect on teacher rights throughout the various lists and the various schools. Staffing at all the schools will be affected. This, the Commissioner herself concedes, she is without authority to do.

Other irrational aspects of the Commissioner's decision:

47. The Commissioner's decision allows the Superintendent to extend the school day (Exhibit "A" to Petition/Complaint at p. 59). Under Article 10 of CBA, however, instructional time

is limited for non-elementary teachers to 25 teacher periods a week of no more than 45 minutes and for special subject teachers are limited to 6 periods a day of no more than 240 minutes. Those provisions are unchanged.

48. The Commissioner's decision to change starting and ending times (Exhibit "A" to Petition/Complaint at p. 66) gives no rationale to demonstrate how changing starting and ending times alone (think, for example, of going from a 9 to 5 day instead of an 8 to 4 day), increases student achievement.

49. Because the Superintendent has not proceeded in a deliberative way in this matter, such as perhaps by following the community engagement team recommendations, these contract changes have been made without an apparent appropriate purpose.

50. Regarding the Commissioner's holding relating to filling vacancies in summer school, after school, recreational, part time, she makes a point of including language that if Preferred Eligible List applies, a vacancy has to be filled with someone off the PEL first. This makes no sense. These positions (coaches, summer school, part time) do not have PELs. This illustrates the disconnect of what Commissioner is doing and what actually is going on.

51. The Commissioner makes confused directives involving increased compensation that violate the statute. Regarding the fourth, sixth and tenth directed revisions, the Commissioner orders increased pay for the increased work as follows: "a proportionate increase in compensation based on the hourly rate of pay in accordance with the Contract." (Exhibit "A" to Petition/Complaint at pp. 50, 63 and 72). The joining of "a proportionate increase" and "hourly rate" makes no sense. The CBA, at Article 25, has certain hourly rates of pay for certain duties. The statute, however, requires

a proportionate increase in pay for increased work, which, presumably, would be a portion of 1/200 of their salary, their daily rate of pay, depending on how much of their day is increased. So what is the Commissioner ordering here? *See* Exhibit "A" at p. 49. Further, hourly rates of pay under the CBA only governs where voluntary assignments for teachers are involved, something that the Commissioner does not address when she mixes these concepts up in her decision.

52. There are other unworkable and arbitrary elements to her decision. The Commissioner's decision permits the Superintendent to involuntarily transfer anyone out of a school, at any time, and the affected teacher the person is supposed to go on a transfer list (Exhibit "A" to Petition/Complaint at pp. 57-59). As stated, there is no transfer list at that time of school year. But, typically there are not vacancies at other schools during the school year. So what happens to that teacher? The Commissioner does not say. Clearly, the teacher cannot be fired — that would violate his or her statutory rights.

53. Throughout her decision and order, the Commissioner assumes that collective bargaining is the problem. But that cannot be the case. The idea that the BTF/BPS collective bargaining agreement is the reason for any unsatisfactory student outcomes in Buffalo is directly refuted by the fact that City Honors School at Fosdick Masten Park, one of the District's public schools, is covered by the very same collective bargaining agreement as the five persistently struggling schools at issue, and yet it is regularly ranked as on the best high schools in the State and the Country. Attached to this affidavit as Exhibit "R" is a copy of the home page for the City Honors school, available at:

http://www.cityhonors.org/page/news/title/city-honors-rises-in-us-news-2012-rankings-/

(last visited January 15, 2016).

No alternatives offered or discussed:

54. My attorneys advise me, and I believe, that before the government can override a contract that it must be determined to be reasonable and necessary, and less drastic alternatives to impairing contract rights must be considered. It cannot be said here that these contract impairments are necessary and certainly no alternatives have been discussed prior to resorting to this action.

55. The Commissioner has also made her decisions for schools designated as persistently struggling and struggling schools that were so classified based upon State standardized tests that the December 10, 2015, New York Common Core Task Force Final Report to Governor M. Cuomo (Reilly Affidavit, Exhibit "H") found so unreliable that a moratorium on their use to evaluate teachers and students was recommended by the Task Force and approved by the New York State Board of Regents "until the transition to a new system is complete" (Reilly Affidavit, Exhibit "H", p. 36). I note that Commissioner Elia was a member of the Task force that issued said report and recommendation.

56. There is great poverty in Buffalo. This of course has a direct effect on learning. Things that would really deal with this issue, such as expanded social services for at-risk kids, more extensive family support, better parent and community liaisons, intensive math and literacy interventions, smaller class sizes and so forth — none of this has been discussed with us to avoid trampling on our contract rights.

57. It is noteworthy that the District is asking for the same things in our present negotiations that the Commissioner has granted to them by fiat in this proceeding --- see District's latest proposal dated December 10, 2015, attached as Exhibit "S", in particular, proposals 15, 16, 17, 28, 29, and 31.

58. To the contrary, BTF's proposals for smaller class size, more teacher preparation time, and more teacher input were specifically rejected for consideration by the Commissioner.

59. Where the reasonableness and necessity of a contract impairment cannot be shown, and where other alternatives are not even considered, it is my understanding that such action by the government is not lawful.

60. For this and the other reasons set forth above, and in the accompanying papers, it is respectfully requested the Commissioner's decision be vacated.

PHILIP RUMORE

Sworn to before me this
3rd day of February, 2016.

Notary Public - State of New York

TIMOTHY CONNICK
Notary Public, State of New York
Qualified in Erie County
No. 02CO4777589
Commission Expires October 1, 2018

123685