

FILED
ACTIONS & PROCEEDINGS

DEC 11 2008

ERIE COUNTY
CLERK'S OFFICE

At a Special Term of the Supreme
Court held in and for the County
Of Erie, State of New York on the
11th day of December, 2008

PAID
CHECK _____ CASH _____

STATE OF NEW YORK
SUPREME COURT :: ERIE COUNTY

DEC 11 2008

In the Matter of:

BUFFALO TEACHERS FEDERATION, INC.,
Petitioner

ERIE COUNTY
CLERK'S OFFICE

Vs.

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF BUFFALO
Respondent

ORDER TO SHOW CAUSE

Index No. 2006-010476

Justice Assigned: NeMoyer

**The purpose of this hearing is to punish the accused for a contempt of Court, and
that such punishment may consist of a fine of imprisonment, or both, according to
law.**

**WARNING:
YOUR FAILURE TO APPEAR
IN COURT MAY RESULT IN
YOUR IMMEDIATE ARREST
AND IMPRISONMENT FOR
CONTEMPT OF COURT.**

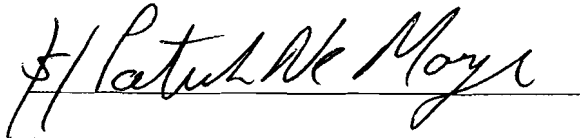
Upon the annexed affidavit of Philip Rumore, sworn to on the 11th day of December, 2008, and the exhibits attached thereto; and the affidavit of Robert W. Klingensmith, Jr., Esq., and the attachments thereto; and after due deliberation, it is hereby

ORDERED that Respondents Show Cause before this Court at a Special Term thereof, Part 37, 10th floor, at the Buffalo City Court Courthouse Buffalo, New York on the 13 day of January, 2009, at 9:45 o'clock in the fore noon of that day or as soon thereafter as counsel can be heard, why a Judgment pursuant to New York Judiciary Law section 753 *et seq.* for contempt of court should not be made and entered against Respondent and their respective officers, agents, trustees, members, representatives, employees and all persons acting on their behalf or in concert and participation with them for a violation of the Order and Judgment of this Court granted by the Hon. Patrick NeMoyer on January 12, 2007, as modified by the Judgment of the Appellate Division, Fourth Department, April 28th, 2008; and as made final by the Judgment of the Court of Appeals denying leave to appeal entered on October 23, 2008, certified copies of all of which were served upon Respondent, together with the BTF's November 13, 2008 demand for compliance with same; and it is further

ORDERED that service of this Order to Show Cause and a copy of the affidavits of Philip Rumore and Robert W. Klingensmith, Jr., Esq. and the exhibits attached thereto shall be made upon Respondent by personally serving or delivering and leaving these papers with a person of suitable age at the offices of Damon & Morey, attorneys at law,

attorneys for Respondent, on or before December 17, 2008. Service of this Order to Show Cause pursuant to this paragraph will be deemed good and sufficient service; and it is further

ORDERED that the Respondents shall serve their Answer and Supporting Affidavits, if any, upon Petitioner's Counsel at least five days prior to the return date of this application.



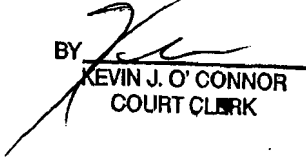
Hon. Patrick NeMoyer, J.S.C.

ENTER

GRANTED

DEC 11 2008

BY



KEVIN J. O'CONNOR
COURT CLERK

STATE OF NEW YORK
SUPREME COURT :: ERIE COUNTY

In the Matter of:

BUFFALO TEACHERS FEDERATION, INC.,
Petitioner

Vs.

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF BUFFALO
Respondent

AFFIDAVIT

Index No. 2006-010476

Justice Assigned: NeMoyer

State of New York)
County of Erie) ss:
City of Buffalo)

PHILIP RUMORE, being duly sworn, deposes and says:

1. I am the President of the Buffalo Teachers Federation, Inc., Petitioner herein and I am fully familiar with the facts of this case.
 2. On March 30, 2006, arbitrator Dana Eischen issued Part I of his award in an arbitration between the parties hereto; and on October 21, 2006 Arbitrator Eischen issued Part II of his award in that arbitration. Copies of same are attached as Exhibit A and B, respectively.
 3. On January 12, 2007, the Hon. Patrick NeMoyer granted an Order and Judgment confirming the said arbitration award. A copy of the Order and a copy of the Judgment are annexed hereto as Exhibit C and Exhibit D. Certified copies were served on Respondent.
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4. The said arbitration award directed the Respondent to restore four contractually required health care options that Respondent had discontinued, and to rehire and make whole certain teachers the Respondent had laid off.
5. The Respondent appealed Justice NeMoyer's Order and Judgment to the Appellate Division, Fourth Department.
6. The Appellate Division affirmed that part of Justice NeMoyer's Order and Judgment that required Respondent to restore the said four health care options provided by the collective bargaining agreement between the parties; and vacated that part which required the rehiring and making whole of the said teachers. A copy of the Fourth Department's judgment is attached as Exhibit E. A certified copy of same was served on Respondents.
7. Both parties applied to the Court of Appeals for leave to appeal that part of the Appellate Division's judgment which adversely affected that party.
8. On or about October 23, 2008, the Court of Appeals denied both applications for leave to appeal. A copy of the Court of Appeals judgment is attached as Exhibit F. A certified copy of same was served on Respondents.
 - a. Since no further appeal is possible, the Court of Appeals' denial of permission to appeal rendered final Justice NeMoyer's Order and Judgment as modified by the Judgment of the Appellate Division.
9. A demand that Respondents comply with the Order and Judgment of Hon. Patrick NeMoyer as modified by the Judgment of the Appellate Division, Fourth Department was made on Respondents on November 13, 2008. A copy of that demand for compliance is attached as Exhibit G.

9. Respondents have replied to Petitioner's demand refusing to comply with said Order and Judgment of Hon. Patrick NeMoyer, JSC, and alleging that compliance is impossible. A copy of Respondents' reply is attached hereto as Exhibit H.
10. The Order and Judgment of this court is in full force and effect and Respondents' failure to obey the final order of this court is willful.

WHEREFORE Petitioner makes this motion for an order pursuant to New York Judiciary Law section 753 *et seq.* as follows:

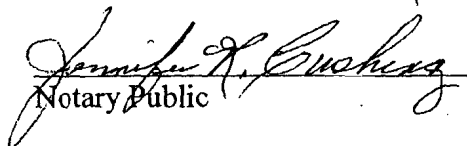
1. finding Respondents in contempt of the Order and Judgment of Justice NeMoyer as modified by the judgment of the Appellate Division, for its failure to obey same and restore the four health care options as directed by this Court; and
2. ordering Respondents to pay fines and sanctions for their contempt; and that such fine include payment from the date of the Eischen arbitration award
3. ordering such other and further relief as the Court may deem just and proper.

Dated: December 11, 2008
Buffalo, New York



Philip Rumore

Sworn to before me this 11th day
Of December 2008



Notary Public

JENNIFER R. CUSHING
Notary Public, State of New York
Qualified in Erie County
My Commission Expires October 19, 2010

STATE OF NEW YORK
SUPREME COURT :: ERIE COUNTY

In the Matter of:

BUFFALO TEACHERS FEDERATION, INC.,
Petitioner

Vs.

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF BUFFALO
Respondent

AFFIDAVIT

Index No. 2006-010476

Justice Assigned: NeMoyer

State of New York)
County of Erie) ss:
City of Buffalo)

ROBERT W. KLINGENSMITH, JR., being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the state of New York; and I appear in this matter of counsel to James R. Sandner, Esq., NYSUT General Counsel, attorney for the Buffalo Teachers Federation, Inc., ("BTF" hereinafter) moveant herein.
2. I make this affidavit in support of the BTF's motion seeking a judgment of contempt against respondent Board of Education of the City of Buffalo ("Board" hereinafter).
3. The Board has, through its attorney, responded to the BTF's demand that the Board comply with the order of the court to restore the four health care options provided teachers under the CBA. See Exhibit F to Rumore affidavit. With respect to that part of

the Board's response which offers to replicate the plans it has been ordered to restore in a "self-insured" format:

A. On information and belief, the source of which is Susan Klug, NYSUT

Insurance Analyst:

i. "Self-insured" means that the self-insurer (in this instance, the employer Board) has the ultimate responsibility to pay the health care claims, not an insurance company (i.e. whether or not the employer administers the plan or engages a third party administrator, the employer is the "pocketbook" from which claims are paid).

ii. A self-insurer which uses the network of an insurance company (like Independent Health) in effect "rents" the use of that insurance company's network.

a. This is generally the same network that the insurance company uses (although some variation in providers is also possible, depending on the insurance company's contracts with the providers constituting the network)

iii. The use of a "self-insurer" has many consequences:

a. Changing from health coverage through a health insurance company to a self-insured format must be negotiated under the Taylor Law. An employer cannot unilaterally switch from an indemnity insurance company to a self-insured format.

1. When the BTF agreed to go from Blue Cross indemnity insurance to “The Plan”, a self-insured program which used the Blue Cross network and was administered by Blue Cross, it was as result of negotiations with the District. The BTF did not agree to a self-insurance program for the HMO’s.

b. Health insurance companies are subject to the jurisdiction of a New York State agency, to wit, the NY State Insurance Department. However, self insurers generally are not subject to the jurisdiction of the NYS Insurance Department.

1. This is because self-insurers (employers like the school district) are not insurance companies

2. Insurance companies must implement mandated benefits as directed by the NYS Insurance Department. Self-insurers do not have to obey those directives.

aa. For example, insurance companies must implement the NYS insurance department’s directive commonly known as Timothy’s Law, which requires them to provide mental health benefits on parity with physical health benefits, for

biologically based mental illness and emotional disability.

bb. Attached as Exhibit 1 is a listing illustrating the kinds of Insurance Department directives that mandate benefits to be provided by insurance companies.

c. While self-insurers may agree contractually to follow the directives of the NYS Insurance Department, that is a matter of contract. The instant matter has been in court for years because the District refuses to obey its written contractual promise.

d. It is respectfully submitted that an insurance company would not refuse to obey the directive of the New York State Insurance Department.

e. When indemnification is by an insurance company, a denial of coverage is ultimately appealable to the NYS Department of Insurance. That agency has as a core mandate the protection of the insured person. When indemnification is by a self-insurer, a denial of coverage is ultimately appealable not to the NYS Department of Insurance (for the self-insurer is not an insurance company) but only to the self-insurer (the same entity which denied the coverage in the first place). While contractual agreements setting up joint employer-employee appellate committees, procedures, etc., are

possible, these must be detailed and must be agreed (i.e. negotiated). They do not spring into being spontaneously.

B. Thus the District's offer to provide coverage through a self-insured format is but an extension of its initial tactic to avoid its obligation under law to negotiate contract changes, to breach its already negotiated CBA and deprive the teachers of their contractually provided health care options, and for the District to "replicate" what it has stolen by its breach.

1. As the award of Arbitrator Eischen found, and as this explanation demonstrates, the District's present "offer" does not satisfy what the BTF CBA provided teachers.

2. Likewise it does not satisfy the requirement that the Board obey this court's order to restore the four health care options as per the CBA.

4. With respect to that part of the Board's response which includes the Board's statement that the plans which it is required to offer under the CBA and by court order are no longer available:

A. On information and belief, the source of which is Richard Furlong, Esq., attorney for the BCSA (the District's administrators and supervisors); and Susan Klug, NYSUT Insurance Analyst:

i. According to Mr. Furlong, the coverage options required under the BTF CBA are identical to the coverage required under the BCSA CBA. See

Exhibit 2 (BCSA CBA provision). That coverage was in place prior to the District's unilateral breach of the BTF CBA in 2005, and it continues unabated today.

ii. According to Ms. Klug, for a health insurance company to discontinue a plan it offers, it must apply to and receive permission (under appropriate conditions) from the Department of Insurance.

iii. If – as the letters from the Board's attorney indicate – the Board can “rent” the networks from the insurance companies, this must necessarily mean that those networks still exist and are available to the insurance companies.

iv. There is no explanation whether or why – if indeed it is so – the insurance companies decline to sell the district the same coverage it had sold the district before. Since that same coverage continues to be sold to the district today under the BCSA CBA, it appears disingenuous for the District to say it is no longer available.

5. Regardless of any part of the Board's response to the BTF's demand for compliance with this court's order and judgment, the Board is not excused from obeying this court's order and judgment.

6. As it stands today, the District intentionally has not done what the court ordered it to do in its order and judgment of January 12, 2007. Until the District complies with this court's order, it should be sanctioned. That sanction should include, but not necessarily be limited to, the District being fined in the amount it has saved and continues to save by that disobedience, with that amount being distributed among those teachers whose right of choice was taken away (thereby creating that savings) by the District's wrongful breach of its contractual commitment.

WHEREFORE Petitioner makes this motion for an order pursuant to New York Judiciary Law section 753 *et seq.* as follows:

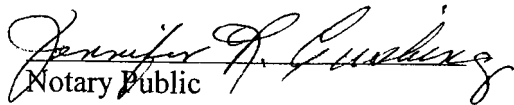
1. finding Respondents in contempt of the Order and Judgment of Justice NeMoyer as modified by the judgment of the Appellate Division, for its failure to obey same and restore the four health care options as directed by this Court; and
2. ordering Respondents to pay fines and sanctions for their contempt; and that such fine include payment from the date of the Eischen arbitration award ; and that the District be ordered to negotiate the misappropriated value of the quid-pro-quo that the BTF would have obtained in return for agreeing to a significant cost saving change, from the date of this court's initial order; and
3. ordering such other and further relief as the Court may deem just and proper.

Buffalo, New York



Robert W. Klingensmith, Jr.

Sworn to before me this 11th day
Of December, 2008.


Notary Public

JENNIFER R. CUSHING
Notary Public, State of New York
Qualified in Erie County
My Commission Expires October 19, 2010