SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of Index #:

SALVATORE DAVI,

Petitioner,

For a judgment pursuant to Article 75 of the CPLR

VERIFIED PETITION PURSUANT TO CPLR § 7511 TO VACATE ARBITRATION AWARD

-against-

THE NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE and SAMUEL D. ROBERTS, in his official capacity as Commissioner of THE NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE,

Respondents.

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Petitioner, Salvatore Davi ("Mr. Davi"), by his undersigned counsel, JOSHPE LAW GROUP LLP and CENTER FOR INDIVIDUAL RIGHTS, respectfully alleges:

Preliminary Statement

1. This is a special proceeding commenced pursuant to Civil Practice Law and Rules ("CPLR") § 7511.

2. Petitioner seeks an Order:

(1) Vacating the entirety of the Award of Ronald M. Peretti, Arbitrator ("Arbitrator Peretti"), dated April 28, 2016 (**EXHIBIT 1** – Arbitrator Peretti's Opinion & Award) and delivered to Mr. Davi on May 3, 2016, on the grounds that (a) the Award was violative of a strong public policy, and/or (b) Arbitrator Peretti exceeded his power, and/or (c) the Award was totally irrational [CPLR § 7511(b)(1)(iii)]; *see also, e.g.,* Albany County Sheriff's Local 775 of Council 82, etc. on behalf of Hughes v. County of Albany, 63 N.Y.2d 654, 656 (1984)]; and

(2) Upon vacating the Award, ordering a rehearing of all issues before a different arbitrator [CPLR § 7511(d)]; and

(3) Granting any other relief that the Court deems just and proper.

Form, Jurisdiction, Venue & Statute of Limitations

3. This special proceeding is properly commenced by Notice of Petition to bring before this Court this application arising out of the arbitration between the parties, which is not the subject of any pending action. [CPLR §§ 403, 7502(a)]. No prior application for the relief requested in this special proceeding has been made in this or any other court.

4. This Court has jurisdiction over this special proceeding pursuant to CPLR §§ 7502 & 7511.

5. Venue is proper in Nassau County because there is no court and county specified in the relevant arbitration agreement and at least one party resides in Nassau County, to wit: Petitioner. [CPLR § 7502(a)(i)].

6. The Opinion & Award (**EXHIBIT 1**) was delivered to Mr. Davi on May 3, 2016. Therefore, this Petition is timely brought within 90 days of that date. [CPLR § 7511(a)].

Parties

7. Petitioner, Salvatore Davi ("Mr. Davi"), is a natural person and an attorney admitted to practice in New York. He resides at 154 Commonwealth St., Franklin Square, New York.

8. Respondent, the New York State Office of Temporary and Disability Assistance ("OTDA"), is the State agency "responsible for supervising programs that provide assistance and support to eligible families and individuals."[1] OTDA is

[1] *See*: https://otda.ny.gov/about/

headquartered at 40 North Pearl Street, Albany, New York.

9. Respondent, Samuel D. Roberts ("Commissioner Roberts"), named in his official capacity, is the Commissioner of OTDA (Commissioner Roberts and OTDA collectively referred to as "Respondents").

Facts

Mr. Davi's Background

10. Mr. Davi is a New York State classified civil service employee of OTDA. He is a member of the Public Employees Federation ("PEF") Professional, Scientific and Technical Services Unit. The New York Civil Service Law (the "Civ. Serv. Law") and a collective bargaining agreement ("CBA") between PEF and the State of New York known as the "2011-2015 Agreement between PEF and the State of New York" govern Mr. Davi's employment. (**EXHIBIT 2 –** Excerpt of CBA: Table of Contents & Article 33 – Discipline**).**

11. OTDA hired Mr. Davi in January 2010 as a Hearing Officer/Administrative Law Judge, Grade 25 ["Hearing Officer"] to work in OTDA's Office of Fair Hearings in Brooklyn, New York.

12. Prior to coming to OTDA, he worked a number of jobs in the legal field, including with the Kings County District Attorney as a Special Prosecutor, and with the U.S. Department of Justice.

13. Mr. Davi holds a Bachelor's and Masters degree from St. John's University, a Juris Doctor degree from CUNY Law School, and an LLM from the Cardozo School of Law at Yeshiva University.

14. Until the events detailed hereinafter, Mr. Davi had never been the subject of any professional discipline.

15. In his capacity as a Hearing Officer, Mr. Davi heard appeals from initial denials of eligibility for various public assistance programs, including *inter alia*, food stamp benefits, child care, and Medicaid. He did not make any final decisions, but rather, recommendations subject to modification and final determination by a Supervising Hearing Officer.

16. As a Hearing Officer, Mr. Davi was "energetic, responsible, [had] great work habits and . . . was a great asset to the office." Indeed, "[n]ot one of his current or former supervisors detected any bias in his recommendations citing a 95% affirmation rate [rulings in favor of applicants for welfare benefits]." Moreover, he had never been disciplined by OTDA. (**EXHIBIT 1** at 12). In fact, supervisors praised Mr. Davi for his "unbiased approach to his job." (**EXHIBIT 1** at 14).

Mr. Davi's Politically-Oriented Facebook Posts

17. On or about October 28, 2015, Mr. Davi's friend, Ian Spiridigliozzi ("Spiridigliozzi"), republished an article from *Daily Kos* (an online political publication which analyzes events from a "liberal perspective"[2]) on his Facebook page. The *Daily Kos* article, which lauded the purported success of certain social welfare programs, was entitled "Anti-poverty programs like Food Stamps are working. Let's expand them not make more cuts."

18. On or about October 28, 2015, Mr. Davi, while off-duty, responded to Spiridigliozzi's *Daily Kos* Facebook republication by making several political comments

[2] http://www.dailykos.com/

on Spiridigliozzi's private Facebook page during the course of a discussion about the *Daily Kos* article. The discussion occurred exclusively on Spiridigliozzi's private Facebook page and therefore could be viewed only by individuals who were either Spiridigliozzi's or Mr. Davi's Facebook "friends." One of those individuals was Mr. Davi's former law school classmate, Erin Lloyd ("Lloyd"), who immediately launched a hostile *ad hominem* attack against Mr. Davi for his political comments. Mr. Davi's posts were as follows:

> This article and the underlying study use the wrong metric. These programs should be judged by how many people or families they get back on their feet and off government assistance, not how well these programs enable their recipients to be poor and collect government assistance for the rest of their lies [sic]. (Mr. Davi's initial comment).
>
> It is not the government's job to subsidize laziness and failure. I agree that there should most certainly be a safety net, but it should be of limited duration and designed to get people back to self-sufficiency. But I have zero sympathy for anyone who refuses to work and/or get the education or training to earn a livable wage. This country has turned welfare into a generational career path! (Comment made by Mr. Davi in response to Lloyd).
>
> If you are going to be that nasty then fuck you, too. Your 'morals' suck because they have created an underclass dependent on government handouts that translate into generational poverty, while at the same time taxing productive members of our society to the breaking point. (Comment made by Mr. Davi in response to Lloyd, who wrote to Mr. Davi, *inter alia*: "I remember your bullshit from law school, so I've got no patience for you" and "I wish you only financial disaster and hunger").
>
> (**EXHIBIT 3 -** Private Facebook Discussion about *Daily Kos* article).

19. Mr. Davi's political comments did not in any way relate to any specific case presently or previously before him in his capacity as a Hearing Officer and were not made in a public forum. Moreover, none of these private political comments for which Mr. Davi was eventually disciplined for posting made specific reference to any law or

regulation he was tasked with adjudicating, but rather discussed the underlying policy considerations of social services programs.

20. At that time of the exchange on Spiridigliozzi's Facebook page, Lloyd did not know that Mr. Davi was a Hearing Officer.

21. An acquaintance of Lloyd, who also saw the private discussion, subsequently informed Lloyd that Mr. Davi was a Hearing Officer for OTDA. Lloyd then "googled" Mr. Davi and confirmed her friend's information.

22. Having learned that Mr. Davi was a Hearing Officer, Lloyd made an anonymous complaint to OTDA concerning Mr. Davi's expressions of political opinion. Lloyd's complaint formed the basis of the investigation that would lead to disciplinary charges against Mr. Davi. (**EXHIBIT 1** at 10).

23. Lloyd also communicated her complaint to the Legal Aid Society, which assists individuals seeking benefits in the OTDA hearing process. (**EXHIBIT 1** at 10). Despite Legal Aid's possession of the Facebook communications, Respondents have never identified any evidence that even one applicant who had come before Mr. Davi during his tenure as a Hearing Officer ever sought to reconsider, argue, overturn or review any of Mr. Davi's recommendations, or the rulings of a Supervising Hearing Officer based on those recommendations, as a result of this information.

The Disciplinary Process & The Arbitration

24. As a consequence of Lloyd's anonymous complaint, OTDA delivered to Mr. Davi a Notice of Suspension (the "NOS") dated November 13, 2015 and suspended him without pay on that date. (**EXHIBIT 4 - NOS**). This suspension would continue

until December 31, 2015, at which time OTDA delivered a Notice of Discipline (the "NOD") dated December 29, 2015 to Mr. Davi. (**EXHIBIT 5 – NOD**).

25. On January 11, 2016, OTDA conceded that the suspension of Mr. Davi without pay prior to January 1, 2016 violated the CBA. Accordingly, OTDA retroactively restored him to the payroll for the entire period of November 13, 2015 to December 31, 2015. However, the agency simply resumed the suspension without pay effective January 1, 2016. Although the suspension was technically "temporary," it had no specifically defined end date and was for all intents and purposes indefinite. Arbitrator Peretti would ultimately convert this indefinite suspension to a six-month suspension without pay running from January 1, 2016 to June 30, 2016. (**EXHIBIT 1** at 14; **EXHIBIT 6** – June 1, 2016 Letter from Donna Faresta, OTDA Director of Human Resources, to Mr. Davi).

26. Pursuant to CBA § 33.4(a)(1), a temporary suspension without pay is permissible only "when a determination is made that there is probable cause that such employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with operations." (**EXHIBIT 2**). Such determinations are reviewable in arbitration. *Id.* § 33.4(c)(1).

27. The NOD listed seven charges of misconduct that purportedly constituted "just cause" for the proposed discipline of termination. All of the charges related directly to Mr. Davi's off-duty Facebook comments. (**EXHIBIT 5**).

28. Notably, Commissioner Roberts did not sign the NOD, nor did any of the specific designees that he had appointed to address employment disciplinary matters.

Instead, Samuel Spitzberg, Director of OTDA's Office of Administrative Hearings ("Director Spitzberg"), signed the NOD.

29. Pursuant to the CBA § 33.5, "[w]here the appointing authority or the authority's designee seeks to impose discipline, notice of such discipline shall be made in writing and served upon the employee."

30. Under the CBA, the appointing authority is Commissioner Roberts. Pursuant to an ODTA document entitled "Official Designations," Commissioner Roberts selected only four designees authorized "to consider and decide proceedings relating to employment, including discipline and termination of employees . . . ." (**EXHIBIT 7** – OTDA Official Designations dated June 26, 2015 at 3, § V). Those four designees, designated by Commissioner Roberts pursuant to Social Services Law § 34 and Public Officers Law § 9, were Sharon Devine (Executive Deputy Commissioner), Wilma Brown-Phillips (Deputy Commissioner), Eric Schwenzfeier (Assistant Deputy Commissioner), and Donna Faresta (Director of Human Resources). *Id*. Director Spitzberg, who issued and signed the NOD, was not one of the designees with authority to issue an NOD.

31. PEF filed timely grievances and demands for arbitration on behalf of Mr. Davi on November 19, 2015 and January 4, 2016, contesting the NOS and the NOD, respectively.

32. In accordance with the CBA, Arbitrator Peretti of the American Arbitration Association was selected as the arbitrator.

33. The arbitration took place at the American Arbitration Association offices in Manhattan on February 18 and 19, 2016.

34. The parties agreed on the following issues to be determined by Arbitrator Peretti:

> 1. Is there just cause to discipline Salvatore P. Davi for the charges contained in the Notice of Discipline dated December 29, 2015?
>
> 2. If there is just cause, is the proposed penalty of termination appropriate? If not, what is the appropriate penalty, if any?
>
> 3. Did OTDA have probable cause to suspend Mr. Davi on November 13, 2015?
>
> (**EXHIBIT 1** at 10).

35. PEF, on behalf of Mr. Davi, asserted that the charges should be dismissed and the suspension without pay overturned for several reasons relevant to this Petition:

> (i) Mr. Davi "was engaged in political speech which is clearly protected by the First Amendment, OTDA's internal policies, the Hatch Act and Civil Service Law." (**EXHIBIT 1** at 11).
>
> (ii) Mr. Davi's "continued employment would not 'severely interfere with operations.' " (**EXHIBIT 1** at 11).
>
> (iii) Additionally, not memorialized in the Award, on the first day of arbitration, Mr. Davi argued that the NOD was void *ab initio* because it had not been signed or sent by Commissioner Roberts or one of his designees as required by the CBA. Arbitrator Peretti rejected this proposed defense.

36. On the first day of the arbitration, Arbitrator Peretti ruled that he had no jurisdiction over the issue of whether the proposed discipline violated Mr. Davi's First Amendment rights. Indeed, it should be noted that the issue of whether OTDA violated Mr. Davi's free expression rights under the First Amendment or his rights under N.Y. Const., art. I, § 8 is not contested in this Petition and Mr. Davi specifically reserves the right to raise that issue and any associated claims at a later date in a different proceeding, in state or federal court. Rather, the issue in this proceeding is whether the strong public policy expressed in the Civ. Serv. Law protects civil service employees such as Mr. Davi

from discipline for expressing political opinions, and therefore whether the Award was violative of a strong public policy.

37. Following the two-day arbitration hearing, Arbitrator Peretti issued his Opinion and Award dated April 28, 2016. The Award dismissed three of the charges of misconduct and sustained four others. (**EXHIBIT 1** at 12-13).

38. Arbitrator Peretti also concluded that OTDA had just cause to impose discipline against Mr. Davi. Although Arbitrator Peretti concluded that termination was too severe a sanction (**EXHIBIT 1** at 14), he found that OTDA had just cause to suspend Mr. Davi for six months without pay, a suspension that would ultimately run from January 1, 2016 to June 30, 2016. (**EXHIBIT 1** at 14).

39. Despite this affirmation of the suspension without pay, Arbitrator Peretti did not make any specific finding that OTDA had probable cause that Mr. Davi's continued presence on the job would constitute a danger or severely interfere with operations." (**EXHIBIT 1).**

40. Arbitrator Peretti also ruled that at the end of the suspension:

> OTDA shall offer [Mr. Davi] a position in the New York City metropolitan area. The position must be at the same pay grade as his current position and [Mr. Davi] shall not be required to serve a probationary period. The position offered will be at the discretion of the employer and need not include the duties of a hearing officer. (**EXHIBIT 1** at 14).

41. After his six-month suspension was concluded, OTDA transferred Mr. Davi to another civil service position, Senior Attorney, Grade 25, effective July 1, 2016. At present, Mr. Davi remains in that position. (**EXHIBIT 6**).

42. Additionally, as a result of Arbitrator Peretti's decision to uphold the suspension without pay, Mr. Davi sustained lost pay/wages and benefits in an amount no less than $50,000.

FIRST CLAIM FOR RELIEF – C.P.L.R. § 7511(b)(1)(iii)
The Award Was Violative of a Strong Public Policy

43. Petitioner, Mr. Davi, incorporates each of the allegations contained in paragraphs 1 through 42 of the Petition as if fully set forth herein.

44. One of the grounds for vacating an arbitrator's award under C.P.L.R. § 7511(b)(1)(iii) arises when the award "is violative of a strong public policy." Albany County Sheriff's Local 775, 63 N.Y.2d at 656; *see also* County of Putnam v. Putnam County Sheriff's Employees Ass'n, Inc., 90 A.D.3d 922 (2d Dept. 2011); Phillips v. Manhattan and Bronx Surface Transit Operating Authority, 132 A.D.3d 149, 153 (1st Dept. 2015).

45. Case law is clear that where an arbitration award violates strong public policy, the award must be vacated. *See e.g.*, Matter of City of Oswego v. Oswego City Firefighters Ass'n, 21 N.Y.3d 880, 882 (2013) (vacating arbitration award requiring municipality to provide a retirement benefit to firefighters that was no longer authorized by law in violation of strong public policy); Phillip*s*, 132 A.D.3d at 155 (vacating arbitration award requiring reinstatement of employee who had engaged in sexual harassment because it "conflicts with a well-defined and dominant public policy"); Matter of City Univ. of New York. v. Professional Staff Congress, 41 A.D.3d 138 (1st Dept. 2007) (vacating arbitration award that precluded CUNY from having its affirmative action officer review personnel files in response to discrimination complaints because of

"strong public policy requiring employers to investigate discrimination complaints by their employees and take necessary corrective action.").

46. In the case at bar, Arbitrator Peretti's Award upholding and imposing the discipline of suspension without pay violated a strong public policy in New York, that being the protection of political speech for civil service employees such as Mr. Davi. Civ. Serv. Law § 107(1) provides in pertinent part:

> No recommendation or question under the authority of this chapter shall relate to the political opinions or affiliations of any person whatever; and no . . . removal from an office or employment within the scope of this chapter or the rules established thereunder, shall be in any manner affected or influenced by such opinions or affiliations.

47. In enacting Civ. Serv. Law § 107(1), the Legislature expressed a very strong public policy, which is that no civil service employee in New York (including Mr. Davi) shall be subject to adverse employment action based on his or her political opinions.

48. Indeed, when it comes to expressions of political opinion, the protections afforded to civil service employees under Civ. Serv. Law § 107(1) go beyond those available under other authority, such as the First Amendment, that might require a court to "balance" the interests of the State and the free speech rights of an employee. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). This is not to say that any such First Amendment balancing test would not favor Mr. Davi. However, that issue need not be reached in this proceeding because Civ. Serv. Law § 107(1) permits no balancing of interests when political opinion of civil servants is involved.

49. The application of Civ. Serv. Law § 107(1) to Mr. Davi's situation is clear. Mr. Davi's Facebook posts at issue in this case were expressions of "political

opinion." Therefore, the Award violates the strong public policy expressed in Civ. Serv. Law § 107(1) and must be vacated.

SECOND CLAIM FOR RELIEF – C.P.L.R. § 7511(b)(1)(iii)
Arbitrator Peretti Exceeded His Power

50. Petitioner, Mr. Davi, incorporates each of the allegations contained in paragraphs 1 through 49 of the Petition as if fully set forth herein.

51. One of the grounds for vacating an arbitrator's award under C.P.L.R. § 7511(b)(1)(iii) arises when the award "exceeds a specifically enumerated limitation." Albany County Sheriff's Local 775, 63 N.Y.2d at 656.

52. The Award states, in pertinent part:

> OTDA shall offer [Mr. Davi] a position in the New York City metropolitan area. The position must be at the same pay grade as his current position and [Mr. Davi] shall not be required to serve a probationary period. The position offered will be at the discretion of the employer and need not include the duties of a hearing officer. (**EXHIBIT 1** at 14).

53. Under the plain language of the Award, Arbitrator Peretti granted OTDA full discretion to transfer Mr. Davi to a different civil service position. OTDA in turn transferred Mr. Davi from the position of Hearing Officer to the position of Senior Attorney. (**EXHIBIT 6**).

54. However, "[e]very transfer *shall require the consent, in writing, of the transferee* and of the appointing authority having jurisdiction over the position to which transfer is sought, and the approval of the Civil Service Department." [4 NYCRR 5.1(a)(3) – emphasis added].

55. As required by the relevant regulation, any transfer of Mr. Davi out of the Hearing Officer position to another position within OTDA would not and could not be at the sole discretion of OTDA because Mr. Davi's written consent would be required. [4

NYCRR 5.1(a)(3)].

56. Moreover, Civ. Serv. Law § 61(1) provides, *inter alia*, that: "Appointments and promotions shall be made from the eligible list most nearly appropriate for the position to be filled." In addition, Civ. Serv. Law § 65 provides, *inter alia*, that provisional appointments are authorized only where "there is no appropriate eligible list available for filling a vacancy in the competitive class." *See also* Burke v. Sugarman, 35 N.Y.2d 39, 42 (1974)(citing Civ. Serv. Law § 61 and holding that appointments to a civil service position made from outside the relevant eligibility list "support a contention that the appointments . . . were contrary to law."); Ensley v. New York City Dep't of Personnel, 170 A.D.2d 298, 299 (1st Dept. 1991) (holding that hiring of individuals not on the eligibility list for a particular title "clearly violates Civil Service Law § 61 and § 65 . . . .").

57. Mr. Davi was never on any eligible list for the position of Senior Attorney at OTDA prior to being transferred on July 1, 2016.

58. Arbitrator Peretti did not have the power to grant OTDA the discretion to transfer Mr. Davi to a position other than Hearing Officer, because OTDA itself does not have that discretion in the absence of Mr. Davi's written consent and without Mr. Davi being on an appropriate eligibility list. Therefore, the Award must be vacated.

THIRD CLAIM FOR RELIEF – C.P.L.R. § 7511(b)(1)(iii)
The Award Was Totally Irrational Insofar as it Upheld the Temporary Suspension Without Pay

59. Petitioner, Mr. Davi, incorporates each of the allegations contained in paragraphs 1 through 58 of the Petition as if fully set forth herein.

60. One of the grounds for vacating an arbitrator's award under C.P.L.R. § 7511(b)(1)(iii) arises when the award "is totally irrational." Albany County Sheriff's Local 775, 63 N.Y.2d at 656.

61. In the case at bar, OTDA delivered to Mr. Davi the NOS dated November 13, 2015 and suspended him without pay on that date. (**EXHIBIT 4**). This suspension would continue until December 29, 2015, at which time OTDA delivered the NOD bearing that same date. (**EXHIBIT 5**).

62. On January 11, 2016, OTDA conceded that the suspension of Mr. Davi without pay prior to December 29, 2015 violated the CBA. Accordingly, OTDA retroactively restored him to the payroll for the entire period of November 13, 2015 to December 29, 2015. However, the agency simply resumed the suspension without pay effective December 31, 2015 and running to June 30, 2016 (**EXHIBIT 6**), a suspension that would ultimately be upheld by Arbitrator Peretti (**EXHIBIT 1** at 14).

63. Pursuant to CBA § 33.4(a)(1**),** a temporary suspension without pay is permissible only "when a determination is made that there is probable cause that such employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with operations." (**EXHIBIT 2).** Such determinations are reviewable in arbitration. *Id.* § 33.4(c)(1).

64. Arbitrator Peretti sustained the temporary suspension without pay because:

> The agency was faced with allowing a hearing officer to make decisions regarding state provided benefits while his public statements portrayed a clear animus towards the appellants. They were faced with the fact that the Legal Aid Society was armed with information that would severely discredit the premise of impartiality of the grievant and by extension, that of the agency. (**EXHIBIT 1** at 13.

Even if that were a plausible interpretation of Mr. Davi's political opinions - again, he

wrote only of general policy matters, not about any individual applicant for aid - the conclusion that the agency was justified in temporarily suspending Mr. Davi without pay is irrational under the CBA that created the arbitrator's authority. (**EXHIBIT 2**).

65. There are two obvious flaws with any conclusion that OTDA had the requisite probable cause for temporarily suspending petitioner without pay.

66. First, when parties to a contract use a common term like "probable cause," it is presumed that they intend to incorporate the generally understood meaning of that term. 17A C.J.S. Contracts § 406 (2016). "Probable cause" requires trustworthy and credible information. *See, e.g.,* Draper v. United States, 358 U.S. 307, 313 (1959). The agency had no evidence, much less trustworthy and credible evidence, that any applicant would view Mr. Davi as less than impartial *in any disqualifying sense* because of his public statements. *See* Republican Party v. White, 536 U.S. 765, 777 (2002) ("A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law."). Justice Ginsburg's recent comments about Presidential candidate Donald Trump may or may not have been prudent, but they surely did not constitute probable cause of severe interference with the operations of the Supreme Court. The fact that applicants could complain about Mr. Davi, or unsuccessfully seek his recusal, even if there had been evidence to suggest that they would, is simply not a "severe" interference with the operations of OTDA.

67. Second, CBA § 33.4 offers OTDA a choice between a temporary reassignment or a suspension without pay. (**EXHIBIT 2**). Arbitrator Peretti offered no

reason at all why OTDA could not have temporarily reassigned Mr. Davi. (Not all Hearing Officers hear cases.) In fact, Arbitrator Peretti's conclusion was that OTDA *had* to rehire Mr. Davi at the same grade and pay level, which undermines any contention that OTDA had probable cause to believe that Mr. Davi's mere presence anywhere in OTDA would somehow compromise its operations. (**EXHIBIT** 1 at 14). At a minimum, to qualify as rational, an arbitration award must at least clear the low bar of internal coherence. This Award did not.

68. As the Award was totally irrational with respect to the temporary suspension of Mr. Davi, the Award must be vacated.

FOURTH CLAIM FOR RELIEF – C.P.L.R. § 7511(b)(1)(iii)
The Award Was Totally Irrational Insofar as it Ignored the Defective NOD

69. Petitioner, Mr. Davi, incorporates each of the allegations contained in paragraphs 1 through 68 of the Petition as if fully set forth herein.

70. One of the grounds for vacating an arbitrator's award under C.P.L.R. § 7511(b)(1)(iii) arises when the award "is totally irrational." Albany County Sheriff's Local 775, 63 N.Y.2d at 656.

71. Notably, Commissioner Roberts did not sign the NOD, nor did any of his specific designees that he had appointed to address employment disciplinary matters. Instead, Director Spitzberg signed the NOD.

72. Pursuant to the CBA § 33.5, "[w]here the appointing authority or the authority's designee seeks to impose discipline, notice of such discipline shall be made in writing and served upon the employee." (**EXHIBIT 2**).

73. Under the CBA, the appointing authority is Commissioner Roberts. Pursuant to an ODTA document entitled "Official Designations," Commissioner Roberts

selected only four designees authorized "to consider and decide proceedings relating to employment, including discipline and termination of employees . . . ." (**EXHIBIT 7**). Director Spitzberg, who issued and signed the NOD, was not one of the designees with authority to issue an NOD.

74. On the first day of arbitration, Mr. Davi argued that the NOD was void *ab initio* because it had not been signed or sent by Commissioner Roberts or one of his designees. Arbitrator Peretti rejected this proposed defense.

75. In Bosco v. County of Oneida, 106 Misc. 2d 872 (Sup. Ct. Oneida County 1980), the Article 78 petitioner, a former senior veteran's services officer, had been improperly terminated by the county executive while the administrative head of the petitioner's department was on sick leave. The petitioner was entitled to reinstatement, back pay, and benefits "[s]ince the power to remove an appointee is an incident of the power to appoint him, the power to summarily dismiss does not lie with anyone other than the appointing officer." *Id*. at 874. The county executive had no authority to terminate the petitioner because the temporary replacement for the petitioner's department head was the official with the authority to appoint or remove the petitioner. *Id*. at 873-874.

76. Similarly, in the case at bar, Director Spitzberg had no authority to seek Mr. Davi's termination, as set forth in the NOD. Pursuant to the CBA, that authority lay exclusively with Commissioner Roberts or his four designees.

77. Arbitrator Peretti's determination on this point was totally irrational in a very straightforward way. He offered no reasons at all as to why the NOD was valid without the required signatures of Commissioner Roberts or appropriate designee. Since

Arbitrator Peretti provided no rationale for why the plain meaning of the CBA and OTDA's designations did not render the NOD invalid, the Award should be vacated

Prayer for Relief

WHEREFORE, Petitioner requests that this Court issue an Order:

(1) Vacating the entirety of Arbitrator Peretti's Award, on the grounds that (a) the Award was violative of a strong public policy, and/or (b) Arbitrator Peretti exceeded his power, and/or (c) the Award was totally irrational; and

(2) Upon vacating the Award, ordering a rehearing before a different arbitrator as to all issues; and

(3) Granting any other relief that the Court deems just and proper.

DATED: July 28, 2016

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Attorneys for Petitioner Salvatore Davi

VERIFICATION

STATE OF NEW YORK)
ss:
COUNTY OF NASSAU)

SALVATORE DAVI, the Petitioner in this special proceeding captioned *Salvatore Davi v. New York State Office of Temporary and Disability Assistance et al.*, being duly sworn, deposes and says that he has read the foregoing Verified Petition and knows the contents thereof, and that the contents are true and accurate to the best of his own knowledge, information, and belief.

Salvatore Davi

Sworn to before me this
28th day of July, 2016

Notary Public

MITCHELL S. FRIEDMAN
Notary Public, State of New York
No. 41-4526490
Qualified in Queens County
Commission Expires March 30, 19__

NASSAU
1/31/19