

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Nicholas Cilento, State Board of Examiners,
New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, October 28, 2021

For the Respondent-Appellant, Edward A. Cridge, Esq.

For the Petitioner-Respondent, State Board of Examiners, Michal Czarnecki,
Deputy Attorney General (Matthew J. Platkin, Acting Attorney General of
New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Nicholas Cilento's appeal of the State Board of Examiners' (Board) Order of October 28, 2021, suspending his Teacher of the Handicapped certificate (certificate) for two years. The Board found that the appellant engaged in unbecoming conduct when he possessed and used alcohol on school premises while on duty on May 20 and May 21, 2019 (May incidents). The appellant previously had tenure charges filed against him related to the May incidents and the Arbitrator, assigned to the case pursuant to *N.J.S.A. 18A6-16*, found that the appellant engaged in unbecoming conduct and suspended him for a period of three months. Thereafter, the Board issued an Order to Show Cause upon the appellant requiring him to show cause as to why his certificate should not be revoked.

On appeal the appellant does not argue that the May incidents did not occur, but instead contends that the Order of Suspension is barred by the principles of *res judicata* and

collateral estoppel. *Res judicata*, or claim preclusion, is a doctrine that declares that once a matter has been fully litigated and resolved, it cannot be re-litigated. Here, the appellant asserts, the Arbitrator assigned to the tenure proceedings was statutorily empowered to act in a judicial capacity under the auspices of the Department of Education in issuing the award, just as the Board is empowered to preside over Order to Show Cause proceedings. Therefore, the principles of *res judicata* bar the Board from relitigating whether the appellant can be removed from his position for conduct unbecoming based upon allegations set forth in the underlying tenure case and final award. The appellant also maintains that the Board cannot issue a suspension that is inconsistent with the Arbitrator's final penalty determination. The appellant notes that the application of these principles would not foreclose the Board from issuing an Order to Show cause when tenured cases are settled, but the principles apply in this case because the Arbitrator determined as a matter of fact and law that the appellant should not be removed from his tenured position. Finally, the appellant argues that the Board's penalty determination is inconsistent with the factors outlined in *In re Fulcomer*, 93 N.J. Super 404 (App. Div. 1967). As a result, the appellant maintains that the Commissioner should reject the Board's decision.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C. 6A:4-4.1(a)*.

Upon a comprehensive review of the record, the Commissioner finds that the record adequately supports the Board's determination that the appellant engaged in unbecoming conduct, and that a two-year suspension of his certificate was the appropriate penalty. It is undisputed that the appellant possessed and used alcohol on school premises during the May incidents. Therefore, the Board's determination regarding the characterization of appellant's behavior as unbecoming conduct is amply supported by the record and consistent with applicable law.

Despite the appellant's contentions to the contrary, the Board is not constrained by the Arbitrator's penalty determination in the tenure proceeding under the principles of *res judicata* and collateral estoppel. For *res judicata* to become applicable, the party asserting the bar must demonstrate: 1) a final judgment by a court or tribunal of competent jurisdiction, 2) the same identity of issues, 3) the same parties, and 4) the same cause of action and thing sued for. *City of Hackensack v. Winner*, 162 N.J. Super. 1, 28 (App. Div. 1978), modified, 82 N.J. 1 (1980). A party attempting to invoke collateral estoppel must establish similar criteria. "Collateral estoppel is the branch of *res judicata* which bans relitigating an issue of fact or law that has been actually determined on the merits in a prior proceeding. *Res judicata* applies when either party attempts to relitigate the same cause of action. Collateral estoppel applies when either party attempts to relitigate facts necessary to a prior judgment." *T.W. v. A.W.*, 224 N.J. Super. 675, 682 (citations omitted).

First and foremost, the party against whom the doctrines of both *res judicata* and collateral estoppel are to be invoked must have been a party to the other proceeding. It is undisputed that the Board was not a party to the arbitration proceedings and had no role

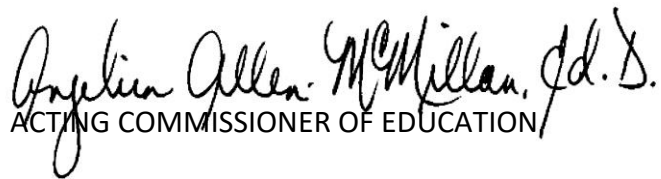
whatsoever in the determination of the final award. Nor are the Board, whose statutory power is derived from *N.J.S.A.* 18A:6-38, and the panel of Arbitrators, whose statutory power is derived from *N.J.S.A.* 18A:6-17.1, deemed to be one in the same as the appellant attempts to suggest.

The principle of *res judicata* is also inapplicable because the two actions addressed herein were separate proceedings undertaken for different purposes. The proceeding held before the Arbitrator was limited to a determination as to whether the tenure charges proven against the appellant warranted his dismissal or the reduction of his salary. *N.J.S.A.* 18A:6-16. The Order to Show Cause proceeding before the State Board of Examiners was a separate and distinct action to determine whether the appellant's certificate should be revoked pursuant to *N.J.S.A.* 18A:6-38. Practically speaking, when a tenured employee is dismissed from a tenured position through the arbitration process, the employee is not precluded from seeking employment that requires a certificate in another school district. However, when the Board issues an order suspending or revoking a certificate, the certificate holder is precluded from utilizing the certificate. Thus, a final arbitrator award dismissing an employee from a tenured position does not equate to an order issued by the Board suspending or revoking a certificate under the principles of *res judicata*.¹ Therefore, the Board was not precluded from conducting the Order

¹ Notably, there are cases in which the tenured employee was dismissed from employment by an arbitrator but did not have their certificates revoked by the Board. See, *In the Matter of the Certificates of Kimberley Peschi*, Dkt. No. 1920-192 (State Board of Examiners Decision, June 25, 2021); *In the Matter of the Certificates of Bruce Bassetti*, Dkt. No. 2021-103 (State Board of Examiners Decision, September 17, 2021).

to Show Cause proceedings and from issuing an Order suspending the appellant's certificate for two years.²

Finally, for the reasons outlined in the October 21, 2022 Order, the Board's penalty determination is consistent with the factors outlined in *In re Fulcomer*, 93 N.J. Super 404 (App. Div. 1967). Accordingly, the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.


ANGELINA ALLEN McMILLAN, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2022
Date of Mailing: June 23, 2022

² The Commissioner finds that the Board properly invoked collateral estoppel with respect to the facts related to the unbecoming conduct found during the arbitration proceeding. The appellant was a party to the action, the baseline facts are the same and the appellant had a full and fair opportunity to litigate the issue.