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August 9, 2024

Via Electronic Filing

Heather Joy Baker, Clerk
Supreme Court of New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 970
Trenton, New Jersey 08625

Re: In the Matter of Nicholas Cilento, State Board of Examiners
Docket No.: 089658

Civil Action: On Petition for Certification to the Supreme Court of
New Jersey from the Judgment of the Superior Court, Appellate
Division, Docket No.: A-3586-21

Sat Below: Hon. Francis J. Vernoia, P.J.A.D.
Hon. Katie A. Gummer, J.A.D.

Letter Brief and Appendix of Respondent, Commissioner of
Education, in Opposition to Cilento's Petition for Certification.

Dear Ms. Baker:

Please accept this letter brief pursuant to Rule 2:6-2(b) on behalf of
Respondent, the New Jersey Commissioner of Education, in opposition to



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Petitioner Nicholas Cilento’s petition for certification in this matter. The Commissioner relies primarily on his brief and appendix filed in the Appellate Division, four copies of which accompany this letter.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

Petitioner, Nicholas Cilento was a tenured special education teacher who was employed by the Woodbridge Township School District Board of Education. (Pa1).² On September 27, 2019, Woodbridge filed tenure charges against him, alleging “conduct unbecoming a teaching staff member and/or other

¹ Because they are closely related, the factual and procedural histories are combined for efficiency and the court’s convenience.

² “Pa” refers to Petitioner’s appendix in support of certification and “Pb” refers to Petitioner’s brief. “Aa” refers to Petitioner’s appendix before the Appellate Division.

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just cause, including insubordination, all of which warrant dismissal, pursuant to N.J.S.A. 18A:28-5 and 18A:6-10” and a “pattern or course of unbecoming conduct over [a] protracted period of time.” (Pa2-3). Cilento did not dispute the underlying factual basis for the charges: that on two consecutive days, he brought alcohol to school and consumed it while working. (Pa3).

After Woodbridge certified tenure charges, an arbitrator presided over a hearing in the summer of 2020 during which Cilento testified. Ibid. On December 5, 2020, the arbitrator issued an arbitration award and decision, noting that Cilento did not dispute the factual basis for the charges and finding that his actions constituted conduct unbecoming a teacher, but not insubordination. Ibid. Further, although he consumed alcohol on two consecutive days while working at school, the arbitrator concluded that Cilento had not engaged in a “pattern or course of unbecoming conduct over a protracted period of time.” Ibid. The arbitrator therefore held that dismissal was unwarranted, and instead ordered a three-month unpaid suspension and reinstatement on a last chance basis. Ibid. Neither Cilento nor Woodbridge appealed the arbitrator’s finding or sanction. (Pa3-4). As such, the arbitrator’s award was final as between the parties. (Pa4 (citing Policeman's Benevolent Ass'n, Local 292 v. Borough of N. Haledon, 158 N.J. 392, 398-99 (1999))).

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On February 26, 2021, the Board of Examiners issued Cilento an order to show cause (“OTSC”) why all his certificates and credentials should not be revoked based on his admission that he brought alcohol to school on two days and consuming during working hours. Ibid.; (Aa44-45). In response, Cilento argued that the arbitrator’s tenure decision barred the Board from taking further action to suspend or revoke his teaching certificate based on the identical conduct. (Pa4). He claimed that the legal principles of res judicata and collateral estoppel barred the Board’s actions on the OTSC, and since the arbitration award ordered that he maintain his teaching position, the Board of Examiners could not thereafter remove him from that position via a suspension or revocation. Ibid.

Because Cilento did not dispute the conduct in his answer, the Board conducted a hearing to determine the appropriate penalty, at which Cilento testified and presented arguments. Ibid. The Board considered the undisputed facts and determined that Cilento engaged in “unbecoming conduct” that provided just cause to take action against his certificates pursuant to N.J.A.C. 6A:9B-4.4 and it suspended his teaching certificate for two years. Ibid. It rejected Cilento’s argument that the tenure arbitration award constrained its authority because that matter was distinct from the Board’s proceeding. (Pa5).

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It reasoned that if an arbitrator's tenure decision barred the Board of Examiners from taking action, the Board would be prevented from exercising its statutory responsibilities in suspension/revocation proceedings and it would usurp the Board's expertise and authority in these matters. Ibid. The Board issued an order of suspension on November 3, 2021. Ibid. Six days later, Woodbridge informed Cilento of his immediate termination with the District as a result of the suspension. Ibid.

On June 23, 2022, the Commissioner issued a final decision adopting the decision of the Board of Examiners. Ibid. She found that the record adequately supported the Board's determination that Cilento engaged in unbecoming conduct. Ibid. She rejected Cilento's argument that the legal principles of res judicata and collateral estoppel precluded the Board from suspending his certificate, and determined that a two-year suspension of his certificate was the appropriate penalty. Ibid.

Cilento appealed the Commissioner's decision to the Appellate Division, arguing that she should not have adopted the Board's decision as the Board was precluded from pursuing its suspension/revocation proceeding due to the preclusive effect of res judicata and collateral estoppel. (Pa6). He also contended that the decision violated his due process rights. Ibid.

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On June 26, 2024, the Appellate Division affirmed the Commissioner’s decision in its entirety. In the Matter of the Certificates of Nicholas Cilento, A-3586-21 (June 26, 2024) (slip op. at 7-8)³; (Pa6-8). The panel noted that Cilento posed the identical question that the appellant asked in Morison v. Willingboro Board of Education, 478 N.J. Super. 229, 234 (App. Div. 2024): whether or not “a tenure arbitrator's determination of discipline through the procedures set forth in N.J.S.A. 18A:6-17.1 prevent[ed] the State Board of Examiners and Commissioner from imposing a more severe sanction of suspending or revoking the licensee's certificate to teach within this State, under the procedures set forth in N.J.S.A. 18A:6-38 to -39.” (Pa2). In Morison, the court held that a tenure arbitration award does not preclude or prevent the Board of Examiners from imposing a suspension or revocation. Ibid.

In Morison, the court analyzed “the respective frameworks of the two statutory schemes in question: (1) the issuance and revocation of certificates to teach; and (2) the discipline of tenured educators.” (Pa6) (quoting Morison, 278 N.J. Super at 236). The court found that the two statutory schemes are distinct, serve different purposes, and operate independently of each another. Morison,

³ The Appellate Division’s decision is included in Cilento’s appendix to petition for certification at Pa1-8.

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278 N.J. Super at 236. Further, since the Board of Examiners was neither a party to the tenure arbitration nor in privity with any party, there was no identity of parties and the doctrines of collateral estoppel and res judicata did not bind the Board of Examiners. (Pa6). The court also rejected Morison’s argument that the Board of Examiner’s suspension or revocation of a teaching certificate violated a tenured teacher’s due process rights when an arbitrator had declined to dismiss the teacher. (Pa6-Pa7).

The Appellate Division found “no basis to deviate from our holdings in Morison.” (Pa7). Perceiving nothing arbitrary, capricious or unreasonable about the Commissioner’s decision, the court affirmed. Ibid. This petition for certification followed. (Pa9-10).

ARGUMENT

**CERTIFICATION IS NOT WARRANTED
BECAUSE THE APPELLATE DIVISION
APPLIED THE CORRECT LEGAL STANDARDS
AND THE MATTER DOES NOT MERIT
FURTHER REVIEW.**

This Court's intervention is not required because the petition does not present an unsettled question of general public importance, conflict with other appellate or Supreme Court decisions, or otherwise implicate the interest of justice. R. 2:12-4. The Appellate Division's finding that the arbitrator's ruling on the tenure matter does not constrain the Board's independent authority to take action when a certificate holder engages in conduct unbecoming is essentially an application of settled principles to the facts of this case. See Fox v. Woodbridge Twp. Bd. of Educ., 98 N.J. 513, 515-16 (1985) (O'Hern, J., concurring); In re Route 280 Contract, 89 N.J. 1, 1-2 (1982).

In his petition for certification, Cilento merely reiterates the same four arguments that he presented below and which the Appellate Division correctly rejected in accordance with established law. First, Cilento asks the same questions as the respondent in Morison: does a tenure arbitration award bind the Board of Examiners in its own suspension and revocation proceeding when the Board was not a party to the tenure arbitration proceeding? (Pb10-12); see

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also Morison v. Willingboro Board of Education, 478 N.J. Super. 229, 234 (App. Div. 2024) (whether a tenure arbitration award bound the Board of Examiners and precluded it from its own revocation/suspension proceedings where the Board had not been a party to the tenure arbitration). And, as the court explained in Morison, the Board of Examiners should not be so precluded because tenure proceedings and suspension/revocation proceedings are fundamentally different. Ibid.

Under the Tenured Employees Hearing Law (“TEHL”), N.J.S.A. 18A:6-10 to -18.1, tenure proceedings affect the terms of a teacher’s employment by a school district through dismissals or reductions in compensation. The TEHL was revised with the enactment of the Teacher Effectiveness and Accountability for the Children of New Jersey Act (“TEACH NJ Act”), N.J.S.A. 18A:6-117 to -129, which required the Commissioner to refer tenure charges that are deemed statutorily sufficient to an arbitrator to oversee the tenure proceedings. N.J.S.A. 18A:6-16. According to N.J.S.A. 18A:6-17.1(a), arbitrators are not employees of the Department of Education. N.J.S.A. 18A:6-17.1.

The TEACH NJ Act further provides that “[t]he arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review

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and enforcement as provided pursuant to N.J.S.A. 2A:24-7 through N.J.S.A. 2A:24-10,” thereby subjecting the arbitration award to the provisions of the Arbitration Act. N.J.S.A. 18A:6-17.1. The Arbitration Act permits the parties to an arbitration award to seek review of the arbitration award in the Superior Court of New Jersey; they cannot seek review of arbitration awards with the Commissioner of Education or the State Board. N.J.S.A. 2A:24-7. As such, arbitration awards are not final agency decisions, as defined at N.J.A.C. 1:1-2.1.

In contrast, the Board’s revocation and suspension proceedings address a teacher’s qualification to hold teaching certificates, or fitness to be an educator. N.J.S.A. 18A:6-38; N.J.A.C. 6A:9B-3.2(b); N.J.A.C. 6A:9B-4.4 to -4.7. N.J.A.C. 6A:9B-4.5 and -4.6 address the procedure for the initiation of a revocation or suspension proceeding, which starts with the issuance of an order to show cause. If there is no dispute as to material fact, the Board would decide whether a suspension or revocation of a teacher’s certificates is warranted. N.J.A.C. 6A:9B-4.6 to -4.7. The Board’s decision may be appealed to the Commissioner, whose decision would be considered a final agency decision under the Administrative Procedure Act. N.J.S.A. 18A:6-38.4. The Commissioner’s decision can be appealed directly to the Appellate Division of the Superior Court. Ibid.; N.J.A.C. 6A:4-1.3(b); R. 2:2-3(a)(2). The Appellate

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Division clearly explained the distinctions between tenure arbitrations and revocation proceedings in its well-reasoned opinion. (Pa4).

The Board does not dispute that the arbitrator's decision was final and binding — but it was final and binding as to the Woodbridge Township Board of Education and Cilento, not the Board. N.J.S.A. 18A:6-17.1(e). Because the Board was not a party to the tenure arbitration, it could not review the evidence presented, cross-examine witnesses, or seek judicial review of the arbitration award. Its interests were not represented. The Board could not interfere once the decision was rendered, nor did it have any right to do so during the proceeding itself, which related to Cilento's employment with the District, and had nothing to do with his teaching certificates. Furthermore, the Board could not have obtained judicial review of the Arbitration Award through the Arbitration Act, N.J.S.A. 2A:24-7 to -10, because it was not a party to those proceedings. Thus, it would be wrong to preclude the Board from proceeding with its statutory obligation to ensure the fitness of teaching staff members through its issuance of the order to show cause. The arbitration award was not “final and binding” as to the Board.

Second, Cilento claims he was deprived of due process because “the Appellate Division countenanced arbitrary and irrational government action.”

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(Pb13-14). Cilento claims that the Commissioner's decision was "disparate agency action upon one factual record" which violated his due process rights. (Pb14). This argument is fundamentally flawed because, as noted above, the arbitrator's decision does not represent an agency action. The protections of due process are amply provided in the Board's regulations and were afforded to Cilento here. The OTSC provided notice to him that action was being taken with regard to his certificates, the bases for taking such action, and an opportunity to show cause why all certificates and credentials he holds as of the final adjudication of this matter should not be revoked. (Pa4). Cilento "filed a written response," in which he made various arguments against the OTSC. Ibid. He then had "an opportunity to be heard": the Board held a hearing where Cilento testified and his counsel presented arguments. Ibid.; N.J.A.C. 6A:9B-4.4. Cilento had the opportunity to present mitigating evidence and character witnesses. The Board of Examiners complied with the procedure for revocation or suspension under N.J.A.C. 6A:9B-4.6.

Cilento appealed the Board's decision to the Commissioner, and then to the Appellate Division. N.J.S.A. 18A:6-38.4; R. 2:2-3(a)(2). Thus, by availing himself of the Board's procedures to contest suspension or revocation, Cilento has been afforded a full and fair opportunity to be heard. R.D., 207 N.J. at 119.

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Thus, as the Appellate Division properly held, there was “nothing arbitrary, capricious, or unreasonable about the Commissioner’s decision.” (Pa7-8).

Third, Cilento argues that the Department of Education should be required to abide by the doctrines of comity or agency privity in this case, which would require the State Board of Examiners to honor and uphold the arbitration opinion and award, which, Cilento contends, was also issued by the Department of Education. (Pb11-12; Pb14-19). Here, again, Cilento is mistaken because arbitrators are not employees of the Department. N.J.S.A. 18A:6-17.1. Further, his arguments falsely equate the tenure arbitration award with a “final agency decision” comparable to an order of suspension or order of revocation from the Board of Examiners. (Pb11-12). That reasoning is contrary to the laws that govern how Board proceedings and tenure arbitrations proceed. See N.J.A.C. 1:1-2.1 (defining final agency decision); N.J.S.A. 2A:24-7 (discussing the arbitration process). By extension of this logic, because there were no conflicting final agency decisions, the doctrines of comity or agency privity do not apply. (Pb14-19).

Cilento’s final argument is that the doctrines of collateral estoppel and res judicata should bind the Board of Examiners to the arbitration decision, and preclude the Board from its own suspension/revocation proceeding. (Pb19-22).

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However, the Appellate Division correctly declined to apply the legal principles of collateral estoppel and res judicata to preclude the Board of Examiners from its suspension/revocation proceeding. (Pb19-22; Pa6-7). The court correctly stated that since the Board of Examiners was neither a party to the arbitration proceeding, nor in privity with a party to the arbitration proceeding, collateral estoppel and res judicata should not be applied here. Ibid. Collateral estoppel, or issue preclusion, is a legal doctrine that bars the relitigation of an issue that has already been addressed in a prior matter. First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007). In assessing whether either doctrine applies, our Supreme Court has explained that courts should consider five factors:

(1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

[First Union, 190 N.J. at 352 (citation and internal quotations omitted).]

Cilento does not satisfy the First Union test. To begin, the issues to be decided in the two proceedings are not identical, and thus Cilento cannot show

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that the issue was actually litigated in the prior proceeding, thereby failing to satisfy the first two First Union factors. The tenure matter before the arbitrator was limited to a determination as to whether the tenure charges proven against Cilento warranted his dismissal from employment or the reduction of his salary, while the matter before the Board was a separate and distinct action to determine whether his teaching certificate should be suspended or revoked pursuant to N.J.S.A. 18A:6-38.

As to the third and fourth First Union factors, the arbitrator issued a final judgment only as to whether Cilento's conduct should be locally disciplined by his employer; but there has been no final judgment by any court or tribunal regarding his teaching certificates. N.J.S.A. 18A:6-38; N.J.A.C. 6A:9B-3.2; N.J.A.C. 6A:9B-4.4.

As for the fifth First Union factor, the parties involved in the tenure charges were Cilento and Woodbridge, while the parties in the administrative proceedings are Cilento and the Board. In urging the application of collateral estoppel, Cilento incorrectly conflates the Board and Woodbridge. (Pb19-20). He claims that "the Arbitrator and the Examiners/Commissioner have a coextensive adjudicatory position, function, and obligation within the DOE: ensuring the fitness of persons who teach in New Jersey's public schools." Ibid.

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This is false; as discussed above, arbitrators are not employees of the Department of Education and their decisions are not final agency decisions. N.J.S.A. 18A:6-17.1; N.J.A.C. 1:1-2.1.

Collateral estoppel has no application here because the Board was not a party to the arbitration proceedings and had no role whatsoever in the determination of the final award. (Pa3-4). The Board and Woodbridge are distinct entities, with different authorizing legislation, regulations, roles, and responsibilities. The Board has the power to issue, suspend, or revoke teaching certificates, while Woodbridge does not. See N.J.A.C. 6A:9B-4.4 (grounds for action against teaching certificates); N.J.A.C. 6A:9B-3.2 (powers of the Board); see also N.J.A.C. 6A:9B-4.4 to -4.7 (procedure for suspension/revocation proceedings). School district boards of education do not have the same powers and responsibilities. They have powers enumerated at N.J.S.A. 18A:11-1, none of which are directed toward the issuance, maintenance, revocation, or suspension of teaching certificates. Ibid. Because the Board and Woodbridge are statutorily distinct creations with very different powers and responsibilities, Cilento cannot satisfy the fifth factor. The Appellate Division correctly concluded that collateral estoppel should not be applied to the Board. (Pa6-8).

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A fair reading of the Appellate Division’s decision shows that it thoroughly considered the record, including the arbitration award and the Commissioner’s decision, and all of Cilento’s arguments before rejecting them. That Cilento disagrees with its decision does not constitute a sufficient basis for certification. Rather than raising issues of “general public importance” or “special reasons,” his arguments and the relief he seeks impacts only his own. See Mahony v. Danis, 95 N.J. 50, 52 (1983) (finding supervision by this Court is not invited where a case does not transcend the immediate interests of the litigants). The outcome here is consistent with well-settled law and, thus, his petition should be denied.

CONCLUSION

For these reasons, the petition for certification should be denied.

Respectfully submitted,

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