FILED, Clerk of the Supreme Court, 17 Jun 2025, **089658**

	:	SUPREME COURT OF NEW JERSEY
	:	DOCKET NO.: 089658
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	:	CIVIL ACTION
	:	
IN THE MATTER OF THE CERTIFICATES OF NICHOLAS CILENTO, STATE BOARD OF EXAMINERS, NEW JERSEY DEPARTMENT OF EDUCATION.	:	ON APPEAL FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY — APPELLATE DIVISION
	:	
	:	SAT BELOW
	:	
	:	HON. FRANCIS J. VERNOIA, P.J.A.D.
	:	HON. KATIE A. GUMMER, J.A.D.
	:	
	:	DOCKET NO.: A-3586-21

RESPONDENT COMMISSIONER OF EDUCATION'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPEAL
(Date Submitted: May 2, 2025)

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PRELIMINARY STATEMENT

Since 1967, when the Legislature enacted both the statewide teacher certification law (TCL), N.J.S.A. 18A:6-34 to -39, and the Tenure Employees Hearing Law (TEHL), N.J.S.A. 18A:6-10 to -18.1, those laws (as amended) have worked harmoniously to ensure that New Jersey's public school teachers, educators, and administrators are held to the highest standards both throughout the State and within local districts. For over half a century, the State Board of Examiners has held educators accountable on a statewide level, and school district boards have focused instead on ensuring at the local level that educators are held accountable by their employers for misconduct or poor performance.

That division of responsibility has been well-settled for a reason. Boards of education apply their own local interests in tenure matters, and the arbitrators who adjudicate them bring their own expertise and tools to bear in the labor context to determine how an issue should be resolved. The Board of Examiners, on the other hand, is concerned with a larger question: whether the educator is entitled to participate in the public school educational experience at all — and if not, for how long. Local employment considerations are not its focus, and it is not concerned with the employment relationship between a district and its educators. Its legislative mandate is to act as steward for the statewide certification process.

It is therefore unsurprising that the Legislature has never once sought to displace the settled understanding that the adjudication of one proceeding should prohibit the other. Even in 2012, when the Legislature codified a comprehensive revision to the TEHL through the Teacher Effectiveness and Accountability for the Children of New Jersey Act (TEACH NJ Act), L. 2012, c. 26, it still chose not to include any such prohibition. And no court has ever held that the Board is bound by tenure outcomes when it determines whether misconduct or poor performance merits revocation of an educator's certificates. With good reason: the Legislature made clear that it was entrusting decisions about who should be certified to educate students in our state to the Board, a body with expertise on the standards that govern teacher certification, rather than to local labor arbitrators charged with making tenure decisions based on individual district policies and other local considerations.

Nearly sixty years later, and over a decade after the enactment of the TEACH NJ Act, petitioner Nicholas Cilento, amicus New Jersey Education Association (NJEA), and amicus New Jersey Principals and Supervisors Association (PSA), now seek a sea change in the law. They urge this Court to undo decades of settled practice under long-defined and well-refined laws, and supplant the Board's expertise and discretion with the decisions of local labor arbitrators. That argument is flatly inconsistent with the text, structure, history,

and legislative intent of the relevant statutes, which make clear that local tenure arbitration awards do not bar the Board of Examiners from carrying out its legislative mandate to take action against the statewide certificates of teachers whose conduct or performance demonstrates that they are unfit to remain in the classroom. Rather, the Legislature explicitly granted the Board that exclusive role through the plain language of the TCL. It specifically created a process whereby teachers may be subject to disciplinary proceedings initiated by the Board for misconduct or poor performance; and neither the TCL nor the TEHL afford arbitrators the authority to interfere with that process.

The Appellate Division's decision correctly rejected Cilento's claims that tenure arbitration awards are final agency decisions under the law, and that res judicata, collateral estoppel, and similar doctrines bar the Board's action. The Board, and the Commissioner when reviewing its decision on appeal, carried out their duties according to a statutory framework that has been closely scrutinized by the Legislature over decades, and did so in a way that benefits the public, as the Legislature intended. And they did so fully cognizant of the record in this matter and the significant risks that would be posed to New Jersey's students by overlooking a teacher's possession and consumption of alcohol on school grounds. This Court should affirm the Commissioner's and Appellate Division's decisions recognizing that the Board acted well within its legal authority.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

The Commissioner adopts and incorporates by reference the factual and procedural history of Cilento's tenure arbitration, Board proceedings, and appeal, as set forth in his briefs in opposition Cilento's appeal and petition for certification. (Rb2-6; Rpb2-7).[2]

A. New Jersey's Statewide Teacher Certification Law.

Since 1967, the Board has played a critical role in assuring the fitness of educators and teachers who have access to schools. L. 1967, c. 271. Under N.J.S.A. 18A:26-2, "teaching staff member[s]" shall not be "employed in the public schools by any board of education unless" they are "the holder[s] of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of. . . pupils in such public schools . . . ." When the Legislature enacted the TCL and imposed the teacher certification

[1] The factual and procedural histories of this matter are combined for efficiency and the Court's convenience.

[2] "Pa" refers to petitioner's appendix in support of certification; "Pb" refers to petitioner's brief in support of certification; "Prb" refers to petitioner's reply brief in support of certification; "Aa" refers to petitioner's appendix before the Appellate Division; "Ab" refers to petitioner's brief before the Appellate Division; "NJEAb" refers to amicus NJEA's brief; "NJEAa" refers to NJEA's appendix; "PSAb" refers to amicus PSA's brief; "PSAa" refers to PSA's appendix; "Rb" refers to respondent's brief before the Appellate Division; and "Rpb" refers to respondent's brief in opposition to Cilento's petition for certification.

requirement, it also tasked the Board of Examiners with the sole and exclusive authority to administer and supervise the entire process for the issuance, suspension, and revocation of teacher certificates. N.J.S.A. 18A:6-38; Morison v. Willingboro Bd. of Educ., 478 N.J. Super. 229, 236 (App. Div.), certif. denied, 258 N.J. 163 (2024); see also N.J.S.A. 18A:26-1 to -37 (governing teacher qualifications and requirements for certification).[3]

A robust set of regulations governs licensure of educators and delineates the organization, powers, duties, and proceedings before the State Board of Examiners. N.J.A.C. 6A:9B-1.1; Morison, 478 N.J. Super. at 236-38; see generally N.J.A.C. 6A:9B-1.1 to -15.2 (Chapter 9B). Relevant here, N.J.A.C. 6A:9B-3.2(a)(2) authorizes the revocation or suspension of certificates pursuant to N.J.A.C. 6A:9B-4.4. In turn, N.J.A.C. 6A:9B-4.4 to -4.7 govern proceedings to suspend or revoke teaching certificates; and N.J.A.C. 6A:9B-4.4(a) provides the grounds for the revocation or suspension of certificates: "[t]he Board of Examiners may revoke or suspend the certificate(s) of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher, or other just cause." Morison, 478 N.J. Super. at 237.

[3] As noted in Morison, 478 N.J. Super. at 236 n. 2, although the TCL covers various types of educators and school personnel, N.J.S.A. 18A:6-38, for ease of reference and to avoid redundancy the Commissioner will generally refer to "teachers" throughout, given the specific subject matter of Cilento's appeal.

Revocation or suspension proceedings are initiated with the issuance of an order to show cause (OTSC), which may be triggered by any of the ten events delineated in N.J.A.C. 6A:9B-4.5(a) — e.g., the Commissioner reports a tenure outcome that resulted in a loss of tenure, dismissal, resignation, or retirement (subsection (a)(1)); or the Board is informed that a teacher was criminally charged or convicted (subsection (a)(3)). N.J.A.C. 6A:9B-4.5(a); Morison, 478 N.J. Super. at 237.[4] Or, the Board may issue an OTSC on its own if it determines there are other grounds for suspension or revocation. N.J.A.C. 6A:9B-4.5(b); Morison, 478 N.J. Super. at 237.

The process begins with a public vote by the Board to initiate an OTSC against the teacher. N.J.A.C. 6A:9B-4.6(a); Morison, 478 N.J. Super. at 237. If the teacher files an answer disputing material facts alleged in the OTSC, the Board may then transmit the matter to the Office of Administrative Law (OAL) for a hearing as a contested case in accordance with the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -31, and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. N.J.A.C. 6A:9B-4.6(b) and (d); Morison, 478 N.J. Super. at 237-38. When a teacher files an answer but does not dispute the material facts, the Board conducts a hearing

[4] Districts also have independent reporting obligations to the Board, including when tenured teachers are accused of misconduct or criminal offenses; and they must cooperate with the Board in its investigation. N.J.A.C. 6A:9B-4.3.

after the submission of additional brief and affidavits. N.J.A.C. 6A:9B-4.6(e) and (f); Morison, 478 N.J. Super. at 238. If, upon further review, the Board determines that there are material facts in dispute, it sends the matter to the OAL as a contested case. N.J.A.C. 6A:9B-4.6(g).

At contested proceedings, teachers are permitted to appear, present evidence, hear from witnesses, cross-examine witnesses, and make closing arguments. N.J.A.C. 1:1-14.7. Teachers may also, and often do, argue before the ALJ — and, eventually, the Board and the Commissioner — that the discipline received during tenure proceedings should prevent, or mitigate, the penalty before the Board. See, e.g., (Aa52; PSAa99). Following the close of evidence and argument, the administrative law judge (ALJ) makes findings of fact and conclusions of law in an initial decision, N.J.A.C. 1:1-18.1; or the matter may at times be disposed of by motion for summary decision, N.J.A.C. 1:1-12.5, which may also result in an initial decision. Morison, 478 N.J. Super. at 238. Either way, the ALJ must decide whether, by a preponderance of the credible evidence, the Board as the prosecuting party has proven that the teacher committed one of the acts enumerated in N.J.A.C. 6A:9B-4.4(a) and, if so, the ALJ must recommend an appropriate penalty. See In re Polk, 90 N.J. 550, 561, 569 (1982) (applying preponderance standard for administrative cases).

Once an initial decision is issued, a party may file exceptions, disagreeing with the ALJ's findings of fact and conclusions of law. N.J.A.C. 1:1-18.4. But regardless of whether exceptions are filed, the matter is returned to the Board for a decision as to whether a suspension or revocation is warranted — applying a de novo review of the ALJ's decision on whether the conduct amounts to a violation and whether a penalty should be imposed, utilizing the "preponderance of the evidence" standard. N.J.A.C. 6A:9B-4.6(h) and -4.7; Morison, 478 N.J. Super. at 238; Polk, 90 N.J. at 560.

After the Board decides whether to suspend or revoke a teacher's certificates, the teacher may choose to accept the Board's decision and turn in her or his certificates, N.J.A.C. 6A:9B-4.7, or a party may appeal the determination to the Commissioner according to the procedure set forth at N.J.A.C. 6A:4-1.1 to -4.4. N.J.A.C. 6A:9B-4.18; N.J.A.C. 6A:4-1.3(b) and -2.1(a). When reviewing the Board's decision, the Commissioner applies a standard similar to that applied by the Appellate Division and this Court. See N.J.A.C. 6A:4-4.1(a) (Commissioner "shall not disturb the decision unless the appellant has demonstrated the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law"); Morison, 478 N.J. Super. at 238 (quoting N.J.A.C. 6A:4-4.1(a)).

The Commissioner's decision "shall be a final agency action" under the APA. N.J.S.A. 18A:6-38.4; N.J.A.C. 6A:4-1.3(a) and -4.3(a). Thus, it may be appealed directly to the Appellate Division. N.J.S.A. 18A:6-9.1(a) and -38.4; N.J.A.C. 6A:4-1.3(a) and -4.3(a); R. 2:2-3(a)(2).

B. The Tenure Employees Hearing Law and the TEACH NJ Act.

Originally, under the TEHL, the Commissioner would conduct a hearing involving local school districts' discipline of teachers if she or he "determined that a tenure charge was 'sufficient to warrant dismissal or reduction in salary of the person charged[.]'" Sanjuan v. Sch. Dist. of W. N.Y., Hudson Cnty., 256 N.J. 369, 379 (2024) (quoting L. 1967, c. 271). But in 1998, the law was amended to require that tenure cases be heard by an ALJ if the Commissioner thought the charges were sufficient. Ibid. (citing L. 1998, c. 42, § 2).

That process underwent another significant change in 2012, with the adoption of the TEACH NJ Act. L. 2012, c. 26. Among other things, the Legislature sought to correct the "unduly protracted and inefficient" "sequence of proceedings" involving the use of ALJs for tenure hearings and the issuance of FADs by the Commissioner or State Board. Morison, 478 N.J. Super. at 240. Under the new, streamlined process, as this Court explained, "'the agency review process no longer exists,' and instead, contested cases must be submitted to arbitration." Sanjuan, 256 N.J. at 379 (quoting Pugliese v. State-Operated

Sch. Dist. of Newark, 440 N.J. Super. 501, 510 (App. Div. 2015)) (emphasis added). So for the last decade-plus, the Commissioner has referred tenure charges deemed statutorily sufficient to an arbitrator. N.J.S.A. 18A:6-16.

N.J.S.A. 18A:6-10 states that no tenured teacher "shall be dismissed or reduced in compensation . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause[.]" See also Sanjuan, 256 N.J. at 379 (quoting N.J.S.A. 18A:6-10). The process begins with sworn charges, which must be filed with the local board of education; and after the teacher is noticed and has the opportunity to respond, the local board then determines by majority vote whether probable cause exists "to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary." N.J.S.A. 18A:6-11 and -13; Sanjuan, 256 N.J. at 379. If probable cause is found, then the local board must forward the charges "to the [C]ommissioner for a hearing pursuant to N.J.S.A. 18A:6-16, together with a certificate of such determination." N.J.S.A. 18A:6-11; Sanjuan, 256 N.J. at 380.

After the certified tenure charges are filed with the Commissioner, the teacher may file a written response to the charges, and within ten days the Commissioner must determine whether the charges are "sufficient to warrant dismissal or reduction in salary of the person charged[.]" N.J.S.A. 18A:6-16; Sanjuan, 256 N.J. at 380. If the Commissioner finds they are not sufficient, then

the matter shall be dismissed; but if the Commissioner finds they are sufficient to warrant dismissal or reduction in salary, then she or he shall "refer the case to an arbitrator pursuant to [N.J.S.A. 18A:6-17.1] . . . ." N.J.S.A. 18A:6-16. To increase efficiency, the TEACH NJ Act placed strict timelines on the arbitration process. N.J.S.A. 18A:6-17.1(b) and (f); Morison, 478 N.J. Super. at 240.

The local board of education that certifies the tenure charges — not the Commissioner, the Department, or the Board of Examiners — "shall be a party" for the hearing. N.J.S.A. 18A:6-17. The Commissioner and State Board of Education are only tasked with adopting the regulations governing arbitrations. Ibid. As such, additional procedures for tenure hearings under the TEHL have been adopted at N.J.A.C. 6A:3-5.1 to -5.7; but neither the Commissioner nor the State Board of Education issue any FAD. Sanjuan, 256 N.J. at 381.

At the arbitration, the parties — that is, the local board and the teacher — must present their evidence and witnesses, and the arbitrator conducts a hearing in accordance with the American Arbitration Association (AAA) labor arbitration rules. Morison, 478 N.J. Super. at 240; N.J.S.A. 18A:6-17.1(b) and (c). The arbitrator must then issue a written decision within forty-five days of the start of the hearing. N.J.S.A. 18A:6-17.1(d). The TEHL provides that "[t]he arbitrator's determination shall be final and binding and may not be appealable to the [C]ommissioner or the State Board of Education." N.J.S.A. 18A:6-

17.1(e). Instead, "[t]he determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.A 2A:24-7 through N.J.S.A 2A:24-10." N.J.S.A. 18A:6-17.1(e); Sanjuan, 256 N.J. at 381.

In turn, the Arbitration Act, N.J.S.A. 2A:24-1 to -11, states that a party to an arbitration "may. . . commence a summary action in the court . . . for the confirmation of the award or for its vacation, modification or correction." N.J.S.A. 2A:24-7. Thus, only the trial court may vacate an arbitration award, and it may only do so for certain reasons — e.g., where a party alleges the award was obtained through undue means under subsection (a), or where the arbitrator far exceeded her or his powers under subsection (d). See N.J.S.A. 2A:24-8(a) to (d) (setting forth the bases for vacatur of an award); Sanjuan, 256 N.J. at 381 (same). Trial court decisions on application to confirm, modify, or vacate an arbitration award are appealable pursuant to Rule 2:2-3(a)(1). Appellate courts review the trial court's decision de novo. Sanjuan, 256 N.J. at 381.

ARGUMENT

Across their briefs, Cilento's and amici's various arguments can be distilled into two categories — one involving a strained reading of the TCL and TEHL, and another relying on preclusion doctrines and fairness principles. With respect to the former, they claim that the TCL and TEHL processes are coextensive and so arbitration awards are FADs that cannot be interfered with

by the Commissioner. (Pb6-7, Pb10-12, Pb23-24; NJEAb5-7, NJEAb12-16; PSAb10-15). With respect to the latter, Cilento argues that different outcomes in those separate proceedings would lead to unfair results based on the application of res judicata, collateral estoppel, due process and fundamental fairness, and other equitable principles. (Pb13-22). Their arguments are based on a fundamental misunderstanding of the law. This Court should affirm.[5]

POINT I

THE APPELLATE DIVISION AND THE COMMISSIONER CORRECTLY HELD THAT A TENURE ARBITRATION AWARD IN A LOCAL SCHOOL DISTRICT CANNOT INTERFERE WITH STATEWIDE TEACHER CERTIFICATE REVIEW PROCEEDINGS.

The Board has a clear mandate: to ensure the safety and security of students and the quality of New Jersey's public education system by holding teachers accountable through a comprehensive statewide certification program. Local employment disputes are not within the Board's province; and likewise, statewide certification issues are not within the purview of a tenure arbitrator. The Commissioner's performance of an administrative screening function in tenure proceedings is irrelevant — the Commissioner plays no role in the outcome of those matters, and arbitration awards are therefore not agency

[5] As to the reasonableness of the two-year suspension of Cilento's certificate, the Commissioner relies on his brief before the Appellate Division. (Rb18-19).

decisions. By supplanting the Board's expertise and authority with that of an arbitrator, not only would Cilento and amici render a significant portion of the TCL and the Board's authority meaningless, but they would be doing so against the will of the Legislature and the public policy of this State.

A court's review of an agency's determination is limited. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018). The Commissioner's decision "is entitled to affirmance so long as the determination is not arbitrary, capricious, or unreasonable, which includes examination into whether the decision lacks sufficient support in the record or involves an erroneous interpretation of law." Melnyk v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist., 241 N.J. 31, 40 (2020). In assessing those criteria, courts "must be mindful of, and deferential to, the agency's expertise and superior knowledge of a particular field." Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)) (internal quotations omitted). Where special expertise is required to interpret and administer laws under the agency head's purview, an even stronger presumption of reasonableness exists. Van Dalen v. Wash. Twp., 120 N.J. 234, 244-45 (1990) (citing Newark v. Nat. Res. Council, 82 N.J. 530, 539 (1980)); Acoli v. State Parole Bd., 224 N.J. 213, 229 (2016).

A. The Legislature Did Not Intend for Tenure Proceedings to Interfere With Statewide Teacher Certificate Actions.

Contrary to Cilento's suggestion, (Prb4), the law on this issue is well-settled. As the Commissioner explained, the Board (whose authority is derived from N.J.S.A. 18A:6-38 and the TCL), and tenure arbitrators (whose authority is derived from N.J.S.A. 18A:6-17.1 and the TEHL), are not one and the same, nor are their enabling legislative mandates coterminous. (Aa54). The Commissioner and the Appellate Division correctly determined that the Board may take action against a teacher's certificates, regardless of the outcome of any factually related tenure proceeding. Nothing in the text, structure, or legislative intent of the TCL or TEHL remotely suggests that tenure outcomes should dictate teacher certificate determinations, and common practices that have been in place for decades bear that out.

When construing the meaning of a statute, courts must look to its plain language because that is the "best indicator of [the Legislature's] intent." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citation and internal quotations omitted); see also N.J.S.A. 1:1-1 (the words in a statute should be given their "generally accepted meaning, according to the approved usage"). And where, as here, "two or more statutory schemes are analyzed, they 'should be read in pari materia and construed together as a unitary and harmonious whole.'" Liberty Ins. Corp. v. Techdan, LLC, 253 N.J. 87, 103-04 (2023) (quoting State

v. Nance, 228 N.J. 378, 395 (2017)). Indeed, "[t]he Legislature is presumed to be familiar with its own enactments, with judicial declarations relating to them, and to have passed or preserved cognate laws with the intention that they be construed to serve a useful and consistent purpose." Id. at 104 (quoting State v. Federanko, 26 N.J. 119, 129 (1958)). Applying those principles of statutory construction, nothing in the plain language of the TCL or the TEHL states (or implies) that the Legislature intended for arbitration awards to interfere with the Board's statutory mandate to take action against a teacher's certificates.

For starters, the Commissioner and Appellate Division were right to conclude that the Board retains exclusive authority over the teacher certification, suspension, and revocation process. (Pa2); Morison, 478 N.J. Super. at 235, 245-46. The plain text of the statutes supports their conclusion. To ensure that the certificate requirement under N.J.S.A. 18A:26-2 is properly administered, the Legislature expressly granted the Board the sole authority to issue, suspend, and revoke teaching certificates when it enacted N.J.S.A. 18A:6-38. And under N.J.A.C. 6A:9B-4.4, the Board may "[r]evoke or suspend the certificates of any certificate holder. . . ." Tenure arbitrators, and the awards they issue, never enter the equation. See generally N.J.S.A. 18A:6-10, -16, -17.1, and -38. Cilento's and NJEA's insistence that the processes are "intertwined" is therefore not grounded in the law. (Pb10-12; NJEAb12-15). NJEA does get one thing right:

the TCL and TEHL work in tandem to hold teachers accountable locally and statewide. (NJEAb5-6). But when statutes "function in tandem," (NJEAb6), that does not mean that one scheme replaces the other.

In the nearly sixty years since the adoption of L. 1967, c. 271 — which enacted both the TCL and TEHL — the Legislature never sought to bind the Board to tenure outcomes. And when it updated the tenure system in 1998, L. 1998, c. 42, and again through the TEACH NJ Act in 2012, L. 2012, c. 26, the Legislature never expressly or impliedly modified longstanding practice by declaring that arbitration awards effectively supplant Board outcomes or estop the Board from carrying out its mandate. The Legislature could have easily included language in the TCL or TEHL expressly stating that arbitration awards prohibit the Board from acting against a teacher's certificates. See Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 596 (2013) (courts "cannot insert language that the Legislature could have included . . . but did not"); Diprospero, 183 N.J. at 493 ("[o]rdinarily, we are enjoined from presuming that the Legislature intended a result different from the wording of the statute or from adding a qualification that has been omitted from the statute"). But despite the sweeping changes to the State's tenure laws in the TEACH NJ Act, not a single change was made to the TCL. L. 2012, c. 26; N.J.S.A. 18A:6-34 to -39. And the Board's regulations under Chapter 9B, which have been in place for

decades, were also never once addressed by the Legislature. See Morison, 478 N.J. Super. at 239 (noting the "procedures for the revocation or suspension of an educator's certificate essentially have been in place for decades[,]" with the exception of the changes noted in N.J.A.C. 6A:4-1.1 and L. 2008, c. 36).

The Morison court, and by extension the appellate panel in this matter, reasonably and correctly relied on strong statutory indicia that tenure proceedings and teacher certificate proceedings as designed by the Legislature "are distinct and dissimilar." Morison, 478 N.J. Super. at 246. As one example, there is a marked difference between local employment disputes under tenure laws (which sometimes involve a demotion or reduction in compensation), and statewide teacher certificate proceedings (which only involve suspension or revocation of certificates). Ibid.; compare N.J.S.A. 18A:6-38 and N.J.A.C. 6A:9B (both governing statewide teaching certificates) with N.J.S.A. 18A:6-10, -16, and N.J.A.C. 6A:3-5.1 (both governing local school district discipline of teachers via dismissal or reduction in compensation).

In other words, the Board's view is more global than local, because its decisions must be made in the context of removing a teacher from all classrooms in the State. See Morison, 478 N.J. Super. at 246 ("[a]lthough the subject matters in both proceedings involve . . . unbecoming conduct, the stakes are different. The tenure case encompasse[s] only . . . employment status in [a]

school district, whereas the certificate proceedings concern [the] ability to teach at any public school in the [S]tate"). As PSA concedes, the Board is not tasked with concern over "local employment matters"; its legislative mandate is less directed towards the interpretation or application of local district policies, and more towards "safeguard[ing] the profession of public education[.]" (PSAb15).

The actual practices and procedures governing Board and tenure matters are also strong indicia that the Board has a statutory mandate to independently take action against a teacher's certificates. Morison, 478 N.J. Super. at 246. Contested Board proceedings initiated by OTSC are sent to the OAL, and are litigated according to the APA and its cognate regulations. Id. at 237-38. Tenure proceedings, on the other hand, take place before an arbitrator under AAA rules. Id. at 240. And it is no small matter that the standards and processes for appellate review differ greatly, as the court noted in Morison, id. at 246. In certificate cases, an ALJ's decision is reviewed by the Board, which is the transmitting and adjudicating agency; and appellate review is conducted by the Commissioner and then the Appellate Division according to the "arbitrary and capricious" standard. Id. at 238, 246. In contrast, arbitrators decide tenure matters, and their awards can only be vacated by the Superior Court of New Jersey according to the standards set forth in the Arbitration Act. Id. at 241. Appellate review is conducted de novo. It makes little sense to suggest that an

arbitrator's award, subject to one unique structure and standard of appellate review, can suddenly stand in the place of a public Board subjected to an entirely different structure and standard.

Contrary to NJEA's suggestion, the Board's OTSC process in no way undermines the finality of arbitration awards. (NJEAb6). The Board can, indeed, issue an OTSC regardless of the existence of a tenure matter. One is not contingent on the other, and the referral of a tenure matter to the Board is only one of a larger set of instances where an OTSC may be issued in the Board's discretion. N.J.A.C. 6A:9B-4.5. Arbitrators are free to, and regularly do, independently issue awards and impose penalties with respect to teachers' salary or employment status — in fact, as the Commissioner pointed out, sometimes those outcomes are harsher than the ones imposed by the Board. (Aa54).[6]

The timelines of the respective proceedings bear mention as well. Recall that when the Legislature enacted the TEACH NJ Act, it placed tenure

[6] NJEA's argument that the Board should never have reviewed Cilento's matter to begin with is also simply incorrect. (NJEAb8, NJEAb17-18). N.J.A.C. 6A:9B-4.5(a) is discretionary — it is a non-exhaustive list of events that "may" trigger an OTSC. N.J.A.C. 6A:9B-4.5(b) further clarifies the Board's general authority to take action against a teacher's certificates, as authorized by the TCL. There is nothing in the TCL limiting the Board's authority to issue certificates to the specific circumstances set forth in subsection (a). N.J.S.A. 18A:6-34 to -39. As PSA wholly concedes, (PSAb4, PSAb8, PSAb11-17), the Board has wide discretion under the TCL, and its decision to issue an OTSC — even one triggered by a tenure matter — is permissive.

proceedings on a far speedier track than Board proceedings, with the express intention of streamlining tenure matters, which had been "unduly protracted and inefficient[.]" Morison, 478 N.J. Super. at 240; see also N.J.S.A. 18A:6-16 and -17.1(b). The expedited timelines set forth in the TEHL, however, do not exist in the TCL or Chapter 9B. Thus, accepting Cilento's argument that arbitration awards bar the Board from acting against a teacher's certificates would guarantee that any tenure matter that precedes Board OTSCs automatically forecloses the Board from carrying out its legislative mandate. That cannot be what the Legislature intended — Cilento's and NJEA's arguments seek to upend settled practice and generate untenable results. See Sun Life Assur. Co. of Can. v. Wells Fargo Bank, N.A., 238 N.J. 157, 174 n. 3 (2019) (cautioning that courts should strive to avoid statutory interpretations that would lead to absurd results).

The composition of the Board is another particularly telling indicator of the Board's independent mandate. By statute, the Board must consist of:

> [t]he [C]ommissioner ex officio and one assistant commissioner of education, two presidents of State colleges, one county superintendent, one superintendent of schools of a Type I district, one superintendent of a Type II district, one high school principal, one elementary school principal, one school business administrator, one librarian employed by the State or by one of its political subdivisions and four teaching staff members other than a superintendent, principal, school business administrator or librarian, all of whom shall be appointed by the [C]ommissioner with the approval of the State [B]oard [of Education].

[N.J.S.A. 18A:6-34.]

The diversity of the Board evinces a clear legislative mandate that the issuance, suspension, or revocation of a teacher's certificates be subject to serious consideration by public school educators and officials across a range of backgrounds, training, and professional experience. In other words, when the Board decides to take action (or not) against a teacher's certificate, it is not done lightly — the Legislature plainly expected that every decision voted upon is laden with educational perspectives and expertise to give teachers their just due.

Arbitrators, on the other side of the ledger, are not educators or public school officials. All arbitrators on the panel maintained by the Commissioner "shall serve on the [AAA] panel of labor arbitrators and shall be members of the National Academy of Arbitrators." N.J.S.A. 18A:6-17.1(a) (emphasis added). And they "shall have knowledge and experience in the school employment sector." Ibid. (emphasis added). Arbitrators are designated by the NJEA, PSA, American Federation of Teachers (AFT), and New Jersey School Boards Association (SBA). Ibid. They are not employees of the Department. N.J.S.A. 18A:6-17.1. Certainly, the Legislature never intended for arbitrators to stand in the shoes of a publicly-voting Board comprised of public school officials and educators, and State college presidents, who are tasked with a specific mandate.

The structure of the statute reinforces this conclusion in other ways, too. Under N.J.S.A. 18A:6-38.5, if a local board of education determines in a tenure proceeding that a teacher failed to report an allegation of child abuse, or discovers the teacher was convicted for such a failure to report under N.J.S.A. 9:6-8.14, the local board must submit a report to the Board outlining its findings; and the Board must review the matter to determine if revocation or suspension proceedings should be initiated. And in other instances, after a district provides information to the Department regarding misconduct by a superintendent, assistant superintendent, or business administrator, the Commissioner in her or his discretion may recommend to the Board that it take action against that individual's certificates. N.J.S.A. 18A:6-38.1. Similarly, under Chapter 9B, districts must report to the Board when, among other reasons, "[t]enured teaching staff members who are accused of criminal offenses or unbecoming conduct resign, retire, are suspended, or are placed on administrative leave from their positions[.]" N.J.A.C. 6A:9B-4.3(a)(1); see also N.J.A.C. 6A:9B-4.5(a)(1) and (a)(2) (allowing Board to issue OTSC when tenure matters are reported to the Board by the Commissioner or the district). Indeed, districts "shall cooperate with the Board of Examiners, as requested, to assist the Board of Examiners in executing its functions." N.J.A.C. 6A:9B-4.3(b).

The Legislature and the State Board of Education, through their respective statutory and regulatory enactments, plainly understood there to be a difference between tenure matters and certificate proceedings — otherwise, it would make little sense to implement such reporting requirements only for certificate proceedings to be stopped in their tracks immediately upon reporting. NJEA attempts to tip the scales in the other direction by arguing that another referral regulation, N.J.A.C. 6A:3-5.6, shows that the State Board of Education intended for the Board of Examiners to only take action and issue an OTSC when a teacher has been terminated from employment — not when the individual was suspended. (NJEAb8-11). NJEA is wrong for two reasons. First, there is nothing in the plain language of the text, or its long regulatory history, stating that the Board should not act on referrals unless a teacher is terminated.

And second, the administrative cases NJEA points to actually explain why its interpretation of N.J.A.C. 6A:3-5.6 is mistaken. In In re Frank Cardonick, 1990 S.L.D. 842 (Comm'r of Educ. Apr. 7, 1982), aff'd, 1990 S.L.D. 846, 850-51 (State Bd. of Educ. Aug. 4, 1982), the State Board of Education recognized that tenure matters and certificate proceedings are not one and the same and, therefore, teachers should be made aware that a settlement (or arbitration award) in tenure matters will not foreclose the Board of Examiners from taking separate action. (NJEAa15-16); see also (NJEAa3 (In re John Ahern, EDE 2842-86, SB

23-87, final decision, at *3 (State Bd. of Educ. Aug. 5, 1987))) (explaining that a decision by the Board of Examiners to revoke or suspend "is a significant one" and "requires that the Board make an independent determination as to whether the individual should be precluded from employment in other districts, whether permanently or temporarily, based on all the evidence relating to this question"). Almost twenty years after it decided Cardonick, the State Board of Education reiterated the "distinct" purposes between tenure and certificate proceedings, and cautioned that "one of the implications" of a settlement in a tenure matter "is referral to the Board of Examiners and, consequently, the potential for that board to initiate proceedings to revoke or suspend [a teacher's] certification." (NJEAa8-9 (In re Lenore Allen, EDU 897-00, SB 38-00, final decision, at *4-5 (State Bd. of Educ. Nov. 1, 2000))).

None of those cases ever state that the Board of Examiners is prohibited from taking action after a tenure matter is concluded, or that a certificate matter must reach the same result as the tenure matter. If anything, the State Board of Education announced through Cardonick, Ahern, and Allen that it is entirely likely that the Board of Examiners can and will take its own independent action against a teacher's certificate, regardless of the outcome in the tenure matter. The cases cited by PSA, (PSAb9, PSAb13-14), stand for the same exact proposition. In fact, PSA's interpretation of the law and those cases, and its

argument that the Board of Examiners has wide discretion to carry out its legislative mandate, actually supports the Commissioner's argument here that the Board must conduct its own independent review.[7]

Cilento and amici may respond to all of the foregoing analysis by arguing that the Commissioner is missing the forest for the trees — i.e., that he is focusing too narrowly on the text of the TCL and TEHL, without considering whether it is unfair to perform an "end run" around the TEACH NJ Act and arbitrators' "final" decisions. See, e.g., (PSAb3; NJEAb7; Pb24). Not so. For one thing, the Legislature is presumed to be thoroughly conversant with its own legislation, Brewer v. Porch, 53 N.J. 167, 174 (1969); and as such, it knew when enacting L. 1967, c. 271 and the TEACH NJ Act that both the TEHL and TCL would work on parallel tracks to ensure that arbitrators and the Board would carry out their respective legislative mandates.[8] For another, adopting Cilento

[7] PSA never reconciles its own conflicting arguments. On one hand, it argues that the TCL and TEHL should be interpreted and "harmonized" as constraining the Board of Examiners from issuing an OTSC when an arbitration award has already been issued, suspending a teacher from employment. (PSAb2-3; PSAb18-19). On the other, it repeatedly argues that the Board of Examiners "should" exercise its own discretion and not take a second bite at the apple. (PSAb4, PSAb8, PSAb11-17). Both cannot be true: either the Legislature wrote the laws in a way to constrain the Board from taking action, or it wrote them in a way to afford the Board discretion when carrying out its policy mandate.

[8] Again, not a single change was made to the TCL when the Legislature updated the tenure system through the TEACH NJ Act.

and amici's interpretation of the TCL and TEHL would thwart the Legislature's intent to ensure accountability and a safe, high-quality learning environment for students and staff across the State.

It cannot reasonably be disputed that, through the enactment of the TCL, the Legislature sought to create a statewide system of accountability for teachers; and through the TEHL, the Legislature sought to ensure that districts maintain local control over their employment decisions. But what, then, of teachers who are suspended or removed from employment in their local tenure proceedings, and then decide to obtain employment in another district? Under Cilento's and amici's theory, with the Board prohibited from taking action against those teachers' certificates, would mean that there is no opportunity for the Board to act on its mandate to ensure accountability or otherwise protect schools and students from individuals who may not be fit to supervise children.[9] That decision would be left to the individual needs, considerations, and vetting processes of districts, which is not what the Legislature intended.

Another recent example of legislative action helps to paint the picture. In the wake of a public call for accountability in law enforcement, the Legislature

[9] Laws disqualifying employment in public schools if an individual has certain criminal convictions, N.J.S.A. 18A:6-7.1 to -7.5, or the "Pass the Trash" laws, N.J.S.A. 18A:6-7.6 to -7.13, are too narrow in scope and do not address conduct unbecoming or other charges for misconduct or poor performance which fall in the Board's purview.

enacted the Police Licensure Act, N.J.S.A. 52:17B-66 to -71h. L. 2022, c. 65. The Act requires all law enforcement officers to be properly licensed, N.J.S.A. 52:17B-67.1, and authorizes the Police Training Commission to, among other things, establish licensing standards and "take appropriate action against any law enforcement officer who acts outside the bounds of professionalism or engages in illegal or improper conduct." N.J.S.A. 52:17B-66. By Cilento's and amici's logic, that type of statewide accountability is unnecessary because local employment outcomes forbid it.

Similar examples are legion. If a Deputy Attorney General is disciplined for conduct unbecoming and the employment matter is arbitrated pursuant to a collective negotiations agreement, should the Office of Attorney Ethics be foreclosed from taking action against the attorney's license pursuant to Rule 1:20-1 to -23? See, e.g., In re Logan, 70 N.J. 222, 227 (1976) ("[t]he purpose of a disciplinary sanction, whether it be a reprimand, suspension, or a disbarment, is not punishment, but maintenance of the integrity and purity of the bar, elimination of unfit persons from the practice of law, and vindication of public confidence in the bar and the administration of justice").

The answer must be no. The entire purpose of these systems, and the many other professions that require statewide licensure, is to avoid situations where bad or unfit actors jump from one employer to another, one municipality

to another, or one school district to another, to find employment without being held accountable. Holding that labor arbitration awards stand in the way of the State's many licensing bodies and their ability to take action against professional licenses would have significant consequences. The Board has the exclusive authority to supervise the statewide teacher certification process and, where appropriate, suspend or revoke certificates. This Court should be wary of allowing a process whereby independent arbitrators would supplant the Board's authority or interfere with its expertise and statewide mandate.

B. Arbitration Awards Are Not Final Agency Decisions.

Despite the Legislature's unambiguous pronouncements, Cilento repeatedly suggests that arbitration awards are FADs. (Pb10-12, Pb18-19; Prb6-7). And for their part, PSA claims that arbitration awards are "final and binding agency determination[s]" issued by the Commissioner, while NJEA contends that the Commissioner plays a "dual role" in some dispositive way in both tenure and Board proceedings. (PSAb17; NJEAb13). None of their arguments stand up to the law's plain language.

As discussed earlier, and contrary to PSA's assertion, (PSAb11 n. 2), the TEHL states "[t]he arbitrator's determination shall be final and binding and may not be appealable to the [C]ommissioner or the State Board of Education." N.J.S.A. 18A:6-17.1(e). Instead, arbitration awards are "subject to judicial

review and enforcement as provided" in the Arbitration Act. N.J.S.A. 18A:6-17.1(e); Sanjuan, 256 N.J. at 381. Superior Court decisions adjudicating challenges to such awards are subject to de novo review on appeal pursuant to Rule 2:2-3(a)(1). Sanjuan, 256 N.J. at 381. Additional procedures for tenure hearings under the TEHL have been adopted at N.J.A.C. 6A:3-5.1 to -5.7; but neither the Commissioner nor the State Board of Education issue an FAD. See Sanjuan, 256 N.J. at 381 ("the TEACHNJ amendments to the TEHL changed the entity that makes the final determination in a case"); Morison, 478 N.J. Super. at 241-42, 246 (explaining the Commissioner performs a "screening function" in tenure matters, and "simply assesses" "whether charges appear to be sufficient on their face to be tried before an arbitrator and are of potential severity to warrant removal, a pay reduction, or other employer sanctions"; and further noting that the Commissioner "has no say in the degree of discipline the arbitrator chooses to mete out if the charges are proven in that forum") (citing Sanjuan, 256 N.J. at 379).

This is a far cry from meeting the actual definition of an FAD. And nothing in the APA advances Cilento's or amici's arguments — not any of the definitions in N.J.S.A. 52:14B-2 and -3.2, and not the APA's definition of a contested case or its description of the agency head's review and issuance of a final decision after a matter is heard in the OAL under N.J.S.A. 52:14B-10. See

also N.J.A.C. 1:1-2.1 (defining "[f]inal decision" in relevant part as "a decision by an agency head that adopts, rejects or modifies an initial decision by an administrative law judge, . . . or a decision by an agency head after a hearing conducted in accordance with these rules"). Their arguments have other implications, too: if arbitration awards are FADs, then the Appellate Division would have exclusive jurisdiction to review them pursuant to Rule 2:2-3(a)(2). But if that were the case, then that would mean the Legislature intended to abrogate the rule when it enacted N.J.S.A. 18A:6-17.1(e) (which subjects arbitration awards to review under the Arbitration Act), but there is no indication in the statute's plain language that that is the case.

Amici's contention that the Commissioner serves a dual, dispositive role in tenure matters and Board proceedings is untenable. (NJEAb13; PSAb17). Amici fail to explain how the Commissioner's ex officio status on a diverse, publicly-voting board, and his administrative role in tenure matters, is conclusive of anything. And neither Cilento nor amici provide any legal support for their contention that the Commissioner's screening role in tenure matters somehow converts arbitration awards into FADs. But if there is any doubt or ambiguity about whether arbitration awards are FADs, the TEACH NJ Act's legislative history removes it. See Senate Budget & Appropriations Comm. Statement to Senate Comm. Substitute for S. 1455 3 (June 18, 2012) (explaining

"the final determination on the case will no longer be made by the Commissioner of Education," and that the Commissioner is only tasked with "determin[ing] whether or not there is a contested case"); Assembly Budget Comm. Statement to Senate Comm. Substitute for S. 1455 3 (June 21, 2012) (same); Assembly Educ. Comm. Statement to A. 3060 2 (June 14, 2012) (same); see also Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 583 (2018) ("[w]here the statutory language is ambiguous, we may consider extrinsic materials such as legislative history, committee reports, and other relevant sources").

Although Cilento and amici do not dispute that Board outcomes follow traditional notions of a what final agency action looks like, the process is illustrative of what is, and is not, an FAD. See Counterstatement of Facts, Point A. Thus, to call an arbitration award an FAD would not be at all consistent with well-established precedents and practices. Rather, tenure arbitrations operate on an independent, local track (not according to the APA); are decided by an arbitrator (not the Commissioner); are subject to appellate review under Arbitration Act standards (not the "arbitrary and capricious" standard); and do not square with any of the definitions in the APA.

Moreover, as this Court explained, although the TEHL "limited the contested cases that may be submitted to arbitration by the Commissioner to those charges" which are "sufficient to warrant dismissal or reduction in salary

. . . [,] it did not set forth the penalties that could be imposed by an arbitrator . . . ." Sanjuan, 256 N.J. at 380. Indeed, "[a]rbitrators have the same discretion to impose penalties under the post-TEACHNJ version of the TEHL as did the hearing officer under the pre-amendment version of the statute." Id. at 381. In other words, arbitrators are empowered to operate independently, issue their own decisions, and have at their disposal a wider range of penalties than the Board (e.g., demotion or loss of income, in addition to suspension or removal), while the Board is limited only to suspension or revocation. Cilento conceded as much before the Appellate Division, (Ab15, Ab17), but he fails to carry the implications of that concession to their logical, black letter law conclusion: arbitrators are not administrative law judges or agency heads, do not adhere to the APA, and do not issue FADs.

For these reasons, the Commissioner's determination must be affirmed.

POINT II

THE COMMISSIONER'S DECISION DOES NOT RUN AFOUL OF PRECLUSION DOCTRINES, DUE PROCESS, OR OTHER EQUITABLE PRINCIPLES.

Cilento raises several arguments invoking res judicata (or "claim preclusion"), collateral estoppel (or "issue preclusion"), due process, and other fairness principles. And without pointing to any supporting law, NJEA suggests that because the underlying facts were the same, an arbitrator's findings "should

be determinative for both processes . . . ." (NJEAb6). All of their arguments are premised on the same fundamental flaw that undermines their interpretation of the TCL and TEHL: they simply fail to appreciate the significant substantive and procedural differences that distinguish Board proceedings from tenure arbitrations. Beyond that, it cannot be reasonably disputed that Cilento received due process in the proceedings before the Board. This Court should affirm the Commissioner's and Appellate Division's rejection of the same arguments.

A. Neither Res Judicata nor Collateral Estoppel Apply.

Res judicata prohibits relitigation of the same cause of action once it is finally determined on the merits. Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 606 (2015). Its rationale lies in the recognition that "fairness to the defendant and sound judicial administration requires a definite end to litigation." Velasquez v. Franz, 123 N.J. 498, 505 (1991) (citing Restatement (Second) of Judgments § 19 cmt. a (Am. Law Inst. 1982)). Collateral estoppel is "that branch of . . . res judicata which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." In re Liquidation of Integrity Ins. Co., 214 N.J. 51, 66 (2013) (quoting N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 114 (2011)).

Collateral estoppel bars relitigation of issues that were actually litigated,

while res judicata applies to all claims arising from the same set of facts that could have been brought. Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 422 (1991). Both doctrines "serve the important policy goals of 'finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness[.]'" First Union Nat'l Bank v. Penn Salem Marina, Inc. (First Union), 190 N.J. 342, 352 (2007) (quoting Hackensack v. Winner, 82 N.J. 1, 32-33 (1980)).

In Morison, 478 N.J. Super. at 245, the Appellate Division boiled the salient elements of each doctrine to their essence, and cogently explained that neither doctrine "prevent[s] the Board of Examiners from pursuing regulatory action against Morison because of the earlier arbitration proceeding." It pointed in particular to the fact that the Board was not a party to the arbitration, and would not have been able to intervene or participate in the arbitration. Ibid. The reverse is also true, it explained: the school board was "not a party to the certificate proceedings being pursued by the Board . . . , nor is there any rule or authority allowing its participation." Ibid. Therefore, "[b]ecause there is no identity of parties, the doctrines of collateral estoppel and res judicata do not bind the Board of Examiners. The Board of Examiners, a state regulatory body, is neither the same entity, nor in privity with, the Willingboro Board of

Education, an agency of local government." Ibid. (citations omitted).

Those threshold observations, and the court's analysis of the distinctions between the TCL and TEHL, id. at 246, should end the inquiry. But even applying the factors of each respective doctrine, Cilento's arguments still fail.

1. Res Judicata Did Not Prohibit the Board From Taking Action Against Cilento's Certificate.

Res judicata, for its part, "'requires substantially similar or identical causes of action and issues, parties, and relief sought,' as well as a final judgment." Wadeer, 220 N.J. at 606 (quoting Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989)). To determine whether res judicata applies, courts must look at the following factors:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same.
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> [Id. at 606-07 (quoting Culver, 115 N.J. at 461-62).]

Here, the matters were far from identical; the Board proceedings were not a mere "repetition" of the tenure matter. Id. at 606. The tenure matter and the Board proceedings each retained unique characteristics. For instance, beyond his conduct unbecoming charge, Cilento was also charged in the local tenure

matter with violating (and was found to have violated) district policies and a municipal ordinance, along with unbecoming conduct over a protracted period of time. (Aa3-8, Aa18, Aa23, Aa26). On the other hand, the Board suspended Cilento's certificates only for "engag[ing] in unbecoming conduct." (Aa48). And most critically, the demands for relief differed too — the tenure matter involved a suspension from employment, while the Board proceedings addressed whether Cilento's teaching certificate should be suspended.

Therefore, Cilento's invocation of res judicata is mistaken, and his reliance on this Court's decisions in Hackensack, 82 N.J. at 32-33, and Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, 531-32 (1978), and generalized notions of "comity" and "privity" in the res judicata context are also misplaced. (Pb18; Ab24-25). To be sure, in both cases the Court cautioned against the potential for "collision" between two administrative tribunals. Hackensack, 82 N.J. at 33; Hinfey, 77 N.J. at 532. But Cilento overlooks two critical aspects of those matters which distinguish them from this case. First, and most critically, the Court was specifically addressing the collision between two administrative agencies under the executive branch — the Civil Service Commission and the Public Employment Relations Commission in Hackensack, 82 N.J. at 32-33, and the Division on Civil Rights and the Department of Education in Hinfey, 77 N.J. at 517. The Court invoked res judicata and comity,

and other preclusion principles, in order to preserve "intergovernmental compatibility and harmony" and a "strong and centralized executive." Hackensack, 82 N.J. at 32-33; see also Hinfey, 77 N.J. at 517. The issue in those cases had nothing to do with any "collision" between independent arbitrators and their awards in local disciplinary matters on the one hand, and licensing authorities and their certificate review processes on the other.

That leads to the second distinguishing factor: there was also far more overlap between the issues and subject matter in Hackensack and Hinfey than there are here, making preclusion a logical way to ensure efficiency. In Hackensack, 82 N.J. at 33-34, the "basic dispute involved primarily civil service law" and both matters were focused on whether or not firefighters were entitled to a promotion. And in Hinfey, 77 N.J. at 517-20, the Division on Civil Rights received complaints alleging sex discrimination, and issued an order transferring jurisdiction over certain claims to the Commissioner of Education. Both cases involved two administrative agencies and the question of how to harmonize their overlapping, concurrent jurisdiction over the same issues. They did not involve independent arbitrators on the one hand, and an agency head on the other; and they did not involve divergent stakes and policy objectives the way this matter does (see Point I above).

Although Cilento points to inapposite cases outside of this State for guidance, other jurisdictions have rejected the same or similar arguments that he raises in more analogous contexts. For example, in Hayes v. State Teacher Certification Board, 359 Ill. App. 3d 1153, 1161 (Ill. App. Ct. 2005), an appeals court in Illinois rejected the argument that the state's Teacher Certification Board (TCB) was bound by a decision in an employment dismissal hearing. In that matter, the appellant sexually assaulted a fourteen-year-old student, leading to the birth of a child. Id. at 1156-57. He eventually prevailed in his employment dismissal hearing in 1992 and was reinstated to his position. Ibid. Seven years later, the TCB initiated suspension proceedings against Hayes for the same conduct (albeit with additional evidence), and Hayes argued that the action was barred by res judicata and collateral estoppel. Id. at 1159-60.

The appeals court rejected Hayes's arguments and suspended his teaching certificates for five years. Ibid. The court reasoned that the hearing officer in his employment dismissal matter "had no statutory authority to hear and recommend that Hayes'[s] certificates be suspended under" the state's teacher certification laws. Id. at 1161. The court also concluded "that the parties in both proceedings are not identical nor are they parties in privity," and that under a collateral estoppel analysis, the State Superintendent (who prosecutes teacher certificate actions) could not have "had a full and fair opportunity in the

employment-dismissal action to litigate whether Hayes had engaged in sexual contact resulting in paternity." Ibid. Like the court in Morison, the appeals court went on to compare the two statutory frameworks governing employment dismissal and teacher certification, id. at 1161-62, and concluded that interpreting them "as requiring both certificate-suspension and employment-dismissal proceedings to be brought or heard together and before the same hearing officer would result in granting authority and creating restrictions not suggested by the language of the statute and would be at odds with the overall structure of the [School] Code." Id. at 1163.

The Commonwealth Court in Pennsylvania reached a similar conclusion, holding that res judicata and collateral estoppel did not bar the Pennsylvania Department of Education's Professional Standards and Practices Commission from ruling on an individual's teaching certificates based on a dismissal action by the local school board. Gow v. Dep't of Educ., Pro. Standards & Pracs. Comm'n, 763 A.2d 528, 532-33 (Pa. Commw. Ct. 2000). Gow was charged with cruelty and intemperance by his school district, but the employment charges were not sustained and he was reinstated as Principal. Id. at 530-31. A complaint was then filed with the Department of Education, and the Department issued charges under Pennsylvania's Teacher Certification Law. Id. at 531. A hearing officer sustained one charge of intemperance and recommended

suspension of his certificates; and after exceptions were filed, the Commission found an additional act of cruelty and revoked Gow's certificates. Ibid.

The court rejected Gow's argument that res judicata and collateral estoppel applied. It explained that the certificate action was not precluded because the "thing sued for" in Gow's dismissal action with the local board was his employment with the district, whereas in the present matter it was his certification as an educator and administrator. Id. at 532. And it further concluded that the issues in the two cases were not identical because the actions were triggered by two different bodies of law, and there was no privity between the district and the Commission. Id. at 533.

2. The Board Was Not Collaterally Estopped From Taking Action Against Cilento's Certificate.

Cilento's collateral estoppel arguments fare no better. In assessing whether collateral estoppel applies, this Court has explained that courts should consider the following 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.
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> [First Union, 190 N.J. at 352 (citation and internal quotations omitted).]

To begin with, the issues litigated in the tenure matter and Board proceedings are not the same, and therefore the first two First Union factors are not met. As the Commissioner explained, the tenure matter before the arbitrator was "limited to a determination as to whether the tenure charges proven against [Cilento] warranted his dismissal or the reduction of his salary[,] N.J.S.A. 18A:6-16[,]" while the matter before the Board "was a separate and distinct action to determine whether [his] certificate should be revoked pursuant to N.J.S.A. 18A:6-38." (Aa54; see also Aa16; Aa44-45). The issue of penalty raised before the arbitrator only pertained to Cilento's employment or compensation status with Woodbridge; it did not touch on his certificate, as an arbitrator cannot make any such determinations. N.J.S.A. 18A:6-38; cf. Lefelt, Miragliotta, & Prunty, New Jersey Practice — Administrative Law and Practice, Vol. 37 at 346 (2d ed. 2000) ("[w]here an agency by statute has exclusive power to adjudicate an issue, that issue could not have been addressed by the trial court"; and further explaining that courts should consider whether issue preclusion would "jeopardize any discrete, identifiable item of public policy").

Cilento's and NJEA's argument that both matters involved allegations of conduct unbecoming and therefore should not be decided twice does not tell the whole story, and also misses the point. (Prb9-10; NJEAb7). To begin with, there were differences in the charges to be adjudicated — the arbitrator was

tasked with interpreting and applying local district policies and a municipal ordinance. More importantly, it is irrelevant that the Board and arbitrators both adjudicate "conduct unbecoming" charges. That is a common charge in this State, across a range of contexts; but each matter must take into account the unique demands of that profession. See, e.g., Karins v. Atl. City, 152 N.J. 532, 716-17 (1998) (describing conduct unbecoming in civil service discipline of a firefighter); Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 13-14 (2017) (describing conduct unbecoming in tenure matter); In re Ambroise, 258 N.J. 180, 203 (2024) (describing heightened standards of conduct for law enforcement officers in conduct unbecoming context); In re Herrmann, 192 N.J. 19, 36-37 (2007) (same for employees of Division of Youth and Family Services). So too, here. While arbitrators and the Board both adjudicate conduct unbecoming charges, they must bring their own expertise and policy mandates to bear.

Next, as to the third and fourth First Union factors, 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 of Examiners. And the arbitrator only issued a final award as to whether Cilento should be locally disciplined by his employer; there was no final judgment by a court or tribunal of competent jurisdiction regarding Cilento's teaching certificate until the Board issued its decision. Cilento argues

that the arbitrator's decision is the only permissible final decision, (Pb19-21), but as noted throughout, the arbitrator cannot issue a final judgment with respect to Cilento's certificate — only the Board has such authority. See Point I above. And the penalties at the arbitrator's disposal are more diverse, ranging from a demotion or reduction in salary to a suspension or removal from employment. See, e.g., Sanjuan, 256 N.J. at 380-81; N.J.S.A. 18A:6-10. The Board, on the other hand, may only suspend or revoke a teacher's certificates.

As for the fifth First Union factor, the Board was not "a party to or in privity with a party" to the tenure proceedings. First Union, 190 N.J. at 352. The Board was not a party to the arbitration proceedings and had no role in the determination of the final award. As noted above, the local board of education that certifies the tenure charges — not the Commissioner, the Department, or the Board of Examiners — "shall be a party" to the hearing before the arbitrator. N.J.S.A. 18A:6-17. The parties involved in the tenure charges were Cilento and the Woodbridge Board of Education; while the parties in the proceedings below were Cilento and the Board of Examiners. For that reason, the Commissioner rightly pointed out that the legal authority underpinning the Board's obligations differs from the panel of arbitrators chosen under the TEACH NJ Act. (Aa53-54). That rationale makes sense — under N.J.S.A. 18A:6-17.1(a), arbitrators hearing tenure matters are designated by the NJEA, AFT, SBA, and PSA; they

are not employees of the Department. N.J.S.A. 18A:6-17.1.

Moreover, the Board's interests were in no way represented or protected in the underlying tenure proceedings. As this Court has stated, it is "essential that the party to be bound by the former adjudication have fair notice and be fairly represented in the prior proceeding . . . ." Sacharow v. Sacharow, 177 N.J. 62, 77 (2003) (quoting Parks v. Colonial Penn Ins. Co., 98 N.J. 42 (1984)). No such privity existed here. The Board's interests could not have been represented in the tenure proceedings because, regardless of whether conduct unbecoming would be found, Cilento's certificate status was not in question. And since 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. Nor could the Board obtain judicial review of the Arbitration Award through the Arbitration Act, N.J.S.A. 2A:24-7 to -10. Thus, even if an arbitration award is confirmed, 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 an OTSC.

Another case Cilento relies on — People v. Sims, 32 Cal. 3d 468 (1982) — is inapposite. (Pb16-17). In that matter, a criminal prosecution for welfare fraud was collaterally estopped because an administrative proceeding filed by the California Department of Social Services (DSS) for the same fraudulent act

was dismissed. Id. at 474, 479-80. But that case carries little weight because precedent in this State has reached a different conclusion. See, e.g., State v. Hanemann, 180 N.J. Super. 544 (App. Div. 1981) (prosecution of driving while intoxicated in municipal court was not barred by res judicata or collateral estoppel after defendant prevailed in administrative proceedings before the Motor Vehicle Commission).

And interestingly, the Court in Sims first relied on a reading of the governing statute to explain why the County's position was mistaken to begin with — the controlling law required that restitution be sought (i.e., via the administrative DSS proceedings) before the criminal prosecution could even take place. Sims, 32 Cal. 3d at 475-76. In other words, California's lawmakers purposefully built a preclusive effect into the statute — one that does not exist in the TCL and TEHL. In fact, the opposite is true in New Jersey — there are actually laws on the books requiring that tenure charges or outcomes be referred to the Board for its own review. And it should be noted, as with Hinfey and Hackensack, that the court in Sims addressed whether preclusion may be applied against two different government agencies; the case has little to do with the question of whether an independent arbitrator's award on a local employment matter may bar a state agency from taking action against a teacher's certificates.

In sum and substance, 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. School district boards of education do not have the same powers and responsibilities, and none of them are directed toward the issuance, maintenance, revocation, or suspension of teaching certificates. See generally N.J.S.A. 18A:11-1. Therefore, the Board and Woodbridge are different in focus and in scope, and the Board's interests were in no way represented or protected in the underlying proceedings.

B. Cilento Received Due Process.

Cilento seems to suggest he was deprived of due process, and relatedly, that "New Jersey's doctrine of fundamental fairness prohibits such arbitrary government action." (Pb13-14). Neither argument is sustainable. Cilento was afforded more than adequate due process throughout the OTSC proceedings, and there is nothing unfair about the Board carrying out its legislative mandate.

Procedural due process generally includes notice and an opportunity to be heard. Doe v. Poritz, 142 N.J. 1, 106 (1995). However, "due process is flexible and calls for such procedural protections as the situation demands." R.D., 207 N.J. at 119 (citation and internal quotations omitted). Substantive due process involves "the most egregious governmental abuses against liberty or property rights, abuses that shock the conscience or otherwise offend . . . judicial notions

of fairness . . . [and are] offensive to human dignity." Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 366 (1996). Along those same lines, "[t]he doctrine of fundamental fairness 'serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily.'" State v. Saavedra, 222 N.J. 39, 67 (2015) (emphasis omitted) (quoting Doe, 142 N.J. at 108). Courts view the doctrine as part of due process. Ibid. It "is applied 'sparingly' and only where the 'interests involved are especially compelling'; if a [party] would be subject 'to oppression, harassment, or egregious deprivation,' it is to be applied." Ibid. (quoting Doe, 142 N.J. at 108).

Regardless of whether Cilento is arguing that he has been deprived of substantive or procedural due process — and that much is unclear — neither doctrine has been violated here. Due process protections are amply provided in the Board's regulations, and were afforded to Cilento. The OTSC provided notice to Cilento that action was being taken with regard to his certificate, which set forth the bases for taking such action, and outlined his opportunity to "show cause why all certificates and credentials he holds as of the final adjudication of this matter should not be revoked." (Aa44-45). Cilento subsequently filed an answer responding to the allegations set forth in the OTSC. (Aa47). Thereafter, he was given the opportunity to be heard not only in written submissions to the

Board, but also in a hearing before the Board. Ibid. Beyond that, he availed himself of the opportunity to appeal that decision to the Commissioner, the Appellate Division, and then this Court. (Aa48). Simply stated, there was no deprivation of Cilento's procedural rights, or substantive ones for that matter.

Notably here, nothing prohibited Cilento from relying on the record created before the arbitrator, and the penalty imposed in the tenure matter, to argue that the Board should not take action or impose a more severe penalty. Parties can, and do, argue that tenure arbitration awards should mitigate the Board's penalty. See, e.g., (Aa52; PSAa99). In turn, ALJs, the Board, and the Commissioner can, and do, consider those arguments when determining an appropriate penalty. Parties may also argue on appeal to the Commissioner and the Appellate Division that the Board did not give due regard to the arbitration award, just like Cilento did here. As the Commissioner pointed out, sometimes the Board may apply its own expertise and discretion to hold that those mitigating facts should result in an equal or less harsh penalty. (Aa54). Other times, the Board may decide that public policy dictates a more severe penalty. Cilento's case illustrates the point: the Board considered the entire record before the arbitrator, including Cilento's medical history and performance record, and determined that as a special education teacher, consuming alcohol on school grounds while on the job warranted a more severe sanction than the three-month

suspension of employment imposed by the arbitrator. As noted, the Board has more global concerns than districts and, when necessary, must take action to ensure that misconduct is not repeated in other districts by the same actors. One thing is for sure, however: Cilento had, and all teachers have, the opportunity to seek mitigation based on the record and the penalty imposed by the arbitrator.

The Appellate Division has aptly noted that when a party is afforded a mechanism for challenging an administrative decision, the State has provided adequate due process and that party cannot raise a claim for violation of due process — regardless of whether or not that party avails itself of the administrative remedy. Hosp. Ctr. at Orange v. Guhl, 331 N.J. Super. 322, 340-41 (App. Div. 2000). And as noted in Morison, 478 N.J. Super. at 248, "[t]he separate regulatory action of the Board of Examiners with respect to appellant's continued ability to serve as a teacher within this [S]tate does not amount to 'an egregious governmental abuse' nor does it 'shock the conscience.' Nor does it offend 'judicial notions of fairness' or 'human dignity.'" (quoting Doe, 142 N.J. at 108). That is because the Board lawfully "carr[ied] out its responsibility to protect schoolchildren from improper teacher conduct, and thereby promote their own ability to receive a public education under our laws." Ibid.

CONCLUSION

For these reasons, the Commissioner's decision should be affirmed.

Respectfully submitted,

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Date: May 2, 2025