STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Bernard J. McCrink	:	
	:	
v.	:	**A.A. No. 2011 - 184**
	:	
Department of Labor and Training:		
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 10th day of May, 2013.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc **DISTRICT COURT**
SIXTH DIVISION

Bernard J. McCrink	:	
	:	
v.	:	**A.A. No. 2011 – 184**
	:	
Department of Labor and Training,	:	
Board of Review	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. For the most part, this Court considers decisions rendered by the Board of Review of the Department of Labor and Training permitting or denying a claimant unemployment benefits on the general question of whether the decision under review was supported by the evidence of record. But in this case Mr. Bernard J. McCrink asks us to consider a question that is presented much less frequently — whether the Board of Review erred when it denied his motion to reopen a decision, rendered three years before, which had declared him ineligible to receive unemployment benefits.

This matter has been referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. After a review of the record in this case, I find that the decision of the Board of Review denying Mr.

McCrink's Motion to Reopen was neither arbitrary nor capricious nor characterized by an abuse of discretion and should therefore be affirmed; I so recommend.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Bernard J. McCrink was employed by the Providence School Department as a teacher for about sixteen years until May of 2006. He filed an application for unemployment benefits on September 28, 2006 but, on October 19, 2006, a designee of the Director of the Department of Labor and Training determined him to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was terminated for proved misconduct.

Mr. McCrink filed an appeal and a hearing was held before Referee William G. Brody on December 14, 2006 and August 20, 2007. On January 2, 2008, Referee Brody held Mr. McCrink to be disqualified from receiving benefits because he was discharged for proved misconduct. In his written Decision, the Referee made Findings of Fact, quoted here in full:

> The claimant had been employed as a mathematics teacher on a high school level for the employer, the Providence School
>
> Department, for approximately 16 years. His last day of work was May 15, 2006. He was discharged from his position by his employer. The evidence indicates that the claimant had received prior warnings and disciplinary actions within recent years. Specifically, the 2004 arbitration concerned, in part, the claimant's failure to meet his contractual responsibility to leave lesson plans should he be forced to miss work because of illness. The arbitrator found that the claimant had not met his obligations. The claimant received a suspension from work and a written warning with respect to such conduct. The evidence presented at the

> Referee hearing establishes that the claimant did not provide for adequate lesson plans when he was sick on May 16 and May 17, 2006.
>
> The evidence presented to the Referee establishes that the claimant did not provide adequate supervision to his class, as evidenced by the many times the computer in his classroom was utilized to access pornographic sites on the web. Even taken in a light most favorable to the claimant, this activity indicates a willful neglect of the claimant's responsibilities with respect to the supervision of his classroom.

Decision of Referee, January 2, 2008, at 1-2. Thus, the Referee found Mr. McCrink had committed two forms of misconduct — (1) he failed to leave lesson plans for a substitute teacher to utilize in case of an unexpected illness and (2) he failed to establish and maintain standards of conduct in his classroom. Based on these findings, the Referee, after quoting from Gen. Laws 1956 § 28-44-18, pronounced the following brief, unspecific conclusion:

> * * *
> The claimant's failure to abide by the rules and regulations of the employer and his failure to establish a suitable standard for conduct in his classroom constitute misconduct within the meaning of Section 28-44-18.

Decision of Referee, January 2, 2008 at 2. Claimant appealed and the matter was considered by the Board of Review — which, on January 31, 2008, issued a decision finding the decision of the Referee to be a proper adjudication of the facts and the law applicable thereto; furthermore, the Referee's decision was adopted as the decision of the Board. Decision of Board of Review, January 31, 2008, at 1.

Finally, Mr. McCrink filed a complaint for judicial review in the Sixth Division District Court on February 21, 2008, which was denominated A.A. No. 08-027. But, on October 8, 2008, Mr. McCrink withdrew his appeal.

Thereafter, on July 11, 2011, Mr. McCrink moved to reopen the Board of Review's decision, based on what he termed "newly discovered evidence" — not evidence in the traditional sense (such as a witness's testimony or physical or documentary evidence), but a decision of the Commissioner of Education dated October 20, 2009 upholding his termination by the Providence School Committee due to his failure to prepare lesson plans for use by a substitute. Of course, at first blush it might seem anomalous that Mr. McCrink would rely on a decision that affirmed his termination. But, in fact, there was logic to his action. The Commissioner had found that a second allegation — failure to maintain classroom decorum (which was one of the two instances of misconduct found by Referee Brody) — had not been proven at the hearing held by her designee.[1] For this reason Mr. McCrink urged that the Referee's finding on this second issue should be set aside.

However, in a decision dated November 23, 2011, a majority of the members of the Board of Review denied the Motion to Reopen on two grounds — first, it was untimely, having been filed some twenty months after the Commissioner rendered her

[1] The Commissioner's designee was Hearing Officer Kathleen Murray. In fact, other allegations were also found unproven by the Commissioner. But they are immaterial to the instant case because they had not been deemed proven by the Referee (and the Board of Review). See Appellant's Memorandum, at 1, n. 1.

decision and second, the Claimant's failure to prepare adequate lesson plans for use by a substitute teacher was sufficient to establish misconduct. Decision of Board of Review, November 23, 2011, at 1. As a result, on December 22, 2011, Mr. McCrink filed a second complaint for judicial review in the Sixth Division District Court.

II. APPLICABLE LAW

This case involves, at least indirectly, the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses misconduct as a circumstance which disqualifies a claimant from receiving benefits; Gen. Laws 1956 § 28-44-18, provides:

> **28-44-18. Discharge for misconduct. —** An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, "misconduct" is defined as deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42 – 44 of this title, this section shall be construed in a manner

> that is fair and reasonable to both the employer and the employed worker.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, "misconduct," in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

> 'Misconduct' * * * is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.

III. STANDARD OF REVIEW

A. The Administrative Procedures Act Standard of Review.

The standard of review applicable to appeals from the Board of Review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which states as follows:

> **42-35-15. Judicial review of contested cases.**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may

> affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4] The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act.

---

[2] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

[3] Cahoone v. Board of Review of the Departmentof Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

[4] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

B. Appellate Review of a Motion to Reopen.

As we acknowledged at the beginning of this opinion, Mr. McCrink's appeal is not brought on the merits of the Board of Review's January 31, 2008 decision; no, at this juncture he is appealing only from the denial of his motion to reopen, which was brought under the authority of Rule 17 of the Board of Review's Rules of Procedure.[5]

And so, it is patently obvious that the question we usually ask when reviewing Board of Review decisions — whether the decision was clearly erroneous in light of the reliable, probative and substantial evidence of record — is of no utility here. And so, we must, before proceeding further, establish the standard by which to evaluate the Board's denial of McCrink's Motion to Reopen.

I am aware of no case from our Supreme Court construing Rule 17 or defining how appeals from rulings on such motions will be considered on appeal. In his memorandum, Appellant McCrink suggests that we may draw guidance from cases construing Rule 60(b)(2) of the Rules of Civil Procedure — pursuant to which a party may request relief from a civil judgment on the basis of newly discovered evidence. In my view, the analogy is indeed apt. Accordingly, I shall use such cases for guidance.

The Rhode Island Supreme Court has stated that Motions to Vacate a Judgment based on Newly Discovered Evidence "* * * are left to the sound discretion of the trial justice and such a ruling will not be disturbed absent an abuse of

[5] Rule 17 provides — "After decision, the Board of Review may reopen any matter for reason of fraud, mistake, collusion or substantial new evidence or when the interests of justice so require." (Emphasis added).

discretion." See Malinou v. Seattle Savings Bank, 970 A.2d 6, 10 (R.I. 2009). Similarly, I believe Rule 17 Motions to Reopen should be viewed as implicating the sound discretion of the Board of Review. And although the Court is not considering a direct appeal — only the denial of a motion to reopen — we are nonetheless required to follow the procedural mandates of the Rhode Island Administrative Procedures Act (APA), Chapter 35 of Title 42 of the General Laws, when hearing the case. And so, recognizing that (1) the Board of Review's consideration of Mr. McCrink's Motion to Reopen involved the exercise of discretion, and (2) that the District Court is required to follow the mandates of § 42-35-15(g) when reviewing Board of Review decisions, I believe we may satisfy both criteria by declaring that the standard for our review in the instant case must be whether the Board's ruling (denying the motion) was arbitrary, capricious, an abuse of discretion, or an unwarranted exercise of discretion pursuant to Gen. Laws 1956 § 42-35-15(g)(6).

IV. ISSUE

The issue before the Court is whether the decision of the Board of Review denying Claimant's Motion to Reopen was arbitrary, capricious, an abuse of discretion, or an unwarranted exercise of discretion.

V. ANALYSIS

Synopsizing the facts and travel presented above, we see that on January 31, 2008, the Board of Review affirmed a January 2, 2008 decision of Referee William Brody in which Mr. McCrink was found to have been discharged from the employ of

the Providence School Department for two elements of misconduct — specifically, (1) failing to maintain lesson plans for use by a substitute teacher and (2) failing to maintain proper classroom decorum. Referee's Decision, at 2. The decision was adopted by the Board of Review as its own on January 31, 2008.

More than three years later, on July 25, 2011, Claimant sought to reopen his adjudication — citing, as "newly discovered evidence," a decision made by the Commissioner of Education in which she found certain of the allegations against Mr. McCrink (specifically, the deportment allegations) to had not been proven. Indeed, the Commissioner found Mr. McCrink guilty of naught but only a single instance of failing to prepare a lesson plan for use by a substitute.

However, in a decision dated November 23, 2011, a majority of the members of the Board of Review denied Mr. McCrink's Motion to Reopen on two grounds — first, it was untimely, having been filed twenty months after the Commissioner rendered her decision and second, the Claimant's failure to leave adequate lesson plans for a substitute teacher was sufficient per se to establish misconduct. Decision of Board of Review, November 23, 2011, at 1.

But Mr. McCrink urges this Court to reverse the Board of Review on the basis of the following argument — first, the Board of Review's 2008 finding of misconduct was grounded on two allegations of misconduct — his failure to prepare lesson plans and his failure to insure proper classroom deportment; second, the Board improperly failed to give estoppel effect to the Commissioner's ruling that the deportment

allegation had not been proven; and third, if the deportment allegation was, in fact, stricken, the remaining lesson plan allegation would be insufficient to prove misconduct, and he would be entitled to benefits.

Thus, our task in this opinion is to determine the validity of this argument. Without question, the first premise is true — the Referee's decision (adopted by the Board of Review) did rest on two findings. The validity vel non of the second element of his argument rests on whether his Rule 17 motion had merit — both as to the procedural prerequisites of such a motion and the sufficiency of the "newly discovered evidence" he proffered with the motion. Finally, we will have to consider whether Mr. McCrink's final assumption — that, as a matter of law, a finding of misconduct could not be based on one further instance of failing to prepare a lesson plan — was legally correct.

A. Did the Board of Review Improperly Refuse to Grant Mr. McCrink's Motion to Reopen Based Upon a Proffer of "Newly Discovered Evidence?"

In order to determine whether the Board of Review's decision constituted an abuse of discretion, we must determine whether the Claimant's proffered "newly discovered evidence" was sufficient to justify reopening. To make such a finding, we must explore the elements of such a motion. As stated above, I believe we may draw guidance from the manner in which Rule 60(b)(2) motions are treated.

The Rhode Island Supreme Court has stated that

> * * * with regard to Rule 60(b)(2), a motion to vacate should not be granted unless "(1) the evidence must be material enough that it probably would change the outcome of the proceedings and (2) 'the evidence was not discoverable at the time of diligence.' " Medeiros [v. Anthem Casualty Insurance Group], the original hearing by the exercise of ordinary 822 A.2d 175] 178 [R.I. 2003] (quoting Forcier v. Forcier, 558 A.2d 212, 213 (R.I. 1989)). Even if both these requirements are met, the motion must be made "within a reasonable time and not more than one year after the judgment." Flynn v. Al-Amir, 811 A.2d 1146, 1150 (R.I. 2002). *"[U]ndue delay may bar relief, even if the motion is made before the one-year period has expired.*" Sansone v. Morton Machine Works, Inc., 957 A.2d 386, 396 (R.I. 2008) (quoting Waldeck v. Domenic Lombardi Realty, Inc., 425 A.2d 81, 83 (R.I. 1981)). (Emphasis added and citation completed).

Malinou v. Seattle Savings Bank, 970 A.2d 6, 10 (R.I. 2009). Thus, in order to grant a motion to vacate based upon newly discovered evidence the court must make findings in three areas — (1) materiality, (2) unavailability, and (3) timeliness. For the reasons I shall now enumerate, I believe the Board of Review did not abuse its discretion in finding that Mr. McCrink failed to meet both the materiality and timeliness requirements. We shall address the procedural requirement, timeliness, first.[6]

---

[6] One procedural issue not argued by the School Committee in its comprehensive memorandum is the requirement of "unavailability." It is the third element of a Rule 60(b)(2) Motion to Vacate based on a proffer of newly discovered evidence and I believe may be interpolated into a Motion to Reopen under Rule 17. The Board of Review did not address it. But, in any event, it would seem at first blush that such a requirement was fully satisfied in this case. After all, the Commissioner's decision was not available to Claimant in January of 2008 — as it was not yet written.

But there is a concomitant rule to unavailability — the material must not only have been unavailable, it must also have been in existence at the time of the first proceeding. See Rivera v. M/T Fossarina, 840 F.2d 152, 156-57 (1st Cir. 1988). The need for this provision is obvious — if it were not thus, there would be no finality to any case litigated, as

1. The Timeliness Requirement.

As a separate and independent basis for denying the motion the Board of Review found the motion was untimely made. The Board's initial ruling (on the merits) was issued on January 31, 2008; the Motion to Reopen was filed on July 25, 2011 — three and a half years later. It was filed more than 20 months after the Commissioner ruled on October 20, 2009, and almost 13 months after the Board of Regents confirmed the decision on July 1, 2010. Assuming Claimant felt he had to wait until the Board of Regents acted, he does not explain this final delay.

Of course, Mr. McCrink demurs that the Board of Review's Rule 17 — unlike Civil Rule 60(b)(2) — does not contain a time limit. Plaintiff's Memorandum, at 3. This is certainly true. It would be wrong to interpolate such a hard and fast limitation into the Rule. But I have no similar hesitation to construe Rule 17 as having a requirement of timeliness. Motions to reopen or vacate cut against the presumptions that rulings are final unless appealed. And so, since the Claimant did not justify (or even explain) the cause of the 13-month delay after the Board of Regents ruled, I must come to the ineluctable conclusion that the Board of Review did not abuse its discretion when it found the instant Motion was not timely filed.

On this independent basis the Board of Review's decision may be affirmed. Nevertheless, in the interest of providing this Court with the most thorough set of

---

evidence became available, successive motions to vacate would filed by the losing party.

recommendations possible, I shall also consider whether Mr. McCrink's motion satisfied the other necessary element — materiality.

2. The Materiality of the Commissioner's Decision.

We now turn to Mr. McCrink's efforts to satisfy the requirement of materiality. As enunciated above in the quotation from Malinou, Mr. McCrink argues that the Commissioner's finding was not only material — in the sense that it would likely change the outcome — but that it was decisive, that it would necessarily change the outcome, because, as a matter of law, the Court must take notice of the Commissioner's decision and, having done so, it must strike the finding he did not maintain classroom decorum and decide that he is eligible to receive benefits; this result was required, he urges, because his disqualification could not be rooted on the single finding of misconduct found by the Commissioner — i.e., his failure to maintain a lesson plan.

And so, in this case, materiality must be supported by the following two elements: (a) that the Commissioner's decision qualified as "newly discovered evidence" and (b) that the Commissioner's decision should have been be given estoppel effect by the Board of Review.

a. The Commissioner's Decision As "Newly Discovered Evidence."

The School Committee flatly rejects the idea that an administrative decision can be deemed "newly discovered evidence." See School Committee's Memorandum, at 9-14. The School Committee urges that the Commissioner is not a testimonial witness

who can testify from personal knowledge but an administrator who made factual findings and legal conclusions regarding the circumstances of Mr. McCrink's termination from the testimony and exhibits contained in the record before her. Id., at 11. As a result, they submit that there is no basis for the Board of Review to revisit Mr. McCrink's claim for benefits "in light of the Commissioner's decision." Id., at 10, quoting Plaintiff's Memorandum, at 7.

Of course, Mr. McCrink never declared that the Commissioner would be called as a witness and, á fortiori, never suggested that she was a percipient witness to the events that led to Mr. McCrink's termination. Instead, it is clear that he was urging the Board of Review to give her decision estoppel effect — if only partially. I see no reason why — in theory — a decision meriting consideration under principles of collateral estoppel may not be brought to the Board of Review's attention through the procedural device of a Motion to Reopen under Rule 17. And so, I believe Mr. McCrink's motion deserves consideration on the merits.

b. Implications of the Invocation of Collateral Estoppel In This Case.

The heart of Mr. McCrink's appeal is his claim that the Board of Review erred when it declined to give preclusive effect to the Commissioner's finding that the School Committee had failed to prove some — but not all — of the charges against him. Plaintiff's Memorandum, at 1. It is certainly true that on October 20, 2009[7] the

[7] This juncture may be as suitable as any at which to note the curious sequence in which the rulings regarding Mr. McCrink's termination were issued. This sequence

Commissioner so ruled. But it is also true that the Commissioner concluded that the single charge that was proven was sufficient to justify his termination. See Commissioner's Decision, at 15.

And so, we may ask, if the Claimant gets his wish and this Court finds the Board of Review should have taken notice of the Commissioner's decision — what will be the effect? May the Court only take notice of the factual finding that the deportment allegation was not proven? Or must the Court, having taken notice of the decision, also give estoppel effect to her conclusion that his behavior merited termination? Is not the Commissioner's decision a double-edged sword which, if received into evidence, will cut the legs out from under his case?

I believe that if the Court accepts as preclusive the Commissioner's findings it would only be logical to receive her conclusion as well. The two are inseparable. In fact, doing so would not be optional. Indeed, it is clear from the teaching in a recent case that our Supreme Court would require the District Court to give estoppel effect to the Commissioner's conclusion.

The Supreme Court instructed us to that effect in Foster-Glocester Regional School Committee v. Board of Review, 854 A.2d 1008 (R.I. 2004), where it found the

---

is significant because the doctrine of collateral estoppel defines the circumstances under which an earlier ruling is given preclusive effect in a later proceeding. In this case the Board of Review ruled in January of 2008 and the Commissioner ruled in October of 2009. In my view bringing a motion to reopen does not reverse that order. Thus, the doctrine would seem entirely inapplicable to the instant case. Nevertheless, I shall proceed to analyze the applicability vel non of the doctrine in order to provide the Court with the fullest possible findings.

prerequisites for the invocation of issue preclusion[8] were met where a school teacher was terminated for misconduct and his termination was upheld by an arbitrator — whose decision was, in turn, confirmed by the Superior Court. Foster-Glocester, 854 A.2d at 1014-17. The Supreme Court held that the District Court should have invoked the doctrine of issue preclusion where: (1) the parties were the same or in privity — where the teacher was a party to the arbitration and represented by counsel furnished by his union, (2) the judgment was final — the arbitration award having been confirmed by the Superior Court, and (3) the issue — i.e., misconduct — was the same in both proceedings. Id. The instant case mirrors the decision in Foster-Glocester — a teacher terminated for misconduct litigates, on parallel tracks, his right

[8] In Foster-Glocester, supra, the Supreme Court concisely explained the various components of the doctrine of res judicata:

> The doctrine of res judicata involves both the concepts of "claim preclusion" and "issue preclusion." 1 Restatement (Second) Judgments 2d ch. 1, Intro. at 1, 2 (1982). Res judicata or claim preclusion "relates to the effect of a final judgment between the parties to an action and those in privity with those parties." E.W. Audet & Sons, Inc. v. Fireman's Fund Insurance Co. of Newark, New Jersey, 635 A.2d 1181, 1186 (R.I. 1994) (citing Providence Teachers' Union, Local 958, American Federation of Teachers, AFL-CIO v. McGovern, 113 R.I. 169, 172, 319 A.2d 358, 361 (1974)). This claim-preclusion doctrine "precludes the relitigation of all the issues that were tried or might have been tried in the original suit." Id. (Emphasis added) The doctrine of collateral estoppel or issue preclusion, however, "makes conclusive in a later action on a different claim the determination of issues that were actually litigated in a prior action." Id. (Emphasis added.) Thus, the issue-preclusion rule may apply even if the claims asserted in the two proceedings are not identical. As discussed above, issue preclusion or collateral estoppel, rather claim preclusion, applies to this case.

Foster-Glocester, 854 A.2d at 1014 n. 2.

to reinstatement and his right to receive unemployment benefits. Thus, we must come to the conclusion that in this case as well the Supreme Court would find that the parties in the two proceedings were the same (i.e., Mr. McCrink and the School Committee) and the issue was the same — whether Mr. McCrink committed misconduct.

Of course, there is one important distinction between the circumstances in Foster-Glocester and those in the instant case — the Commissioner's decision is still not final as of the date of this opinion. On this basis alone the propriety of according estoppel effect to the Commissioner's ruling may be challenged. But, we need not decide this issue. It is enough for us to conclude that even if Mr. McCrink were to be successful in his Rule 17 motion and the Commissioner's decision were to be placed before the Board of Review, the Board would be required to give preclusive effect to the Commissioner's conclusion (of a justifiable termination) as well as her findings (that only one finding of misconduct was proven). And so, its reception would not change the outcome in this case. Accordingly, Mr. McCrink's appeal from the denial of his Motion to Reopen must fail for lack of materiality.

c. The Board of Review's Position — A Demurrer.

But, as we have seen, the Board of Review did not address the merits of Mr. McCrink's proffer; instead, it demurred, and indicated that even if the other allegations were to be stricken, there remained "* * * substantial evidence to establish misconduct" since he "failed to leave adequate lesson plans, despite prior warnings

and past instances of a failure to provide adequate lesson plans." Decision of Board of Review, at 1. Thus, the Board found that even if the classroom behavior issue were to be entirely disregarded, Mr. McCrink would still have been disqualified from receiving benefits on the basis of the lesson-plan allegation alone. In other words, in the estimation of a majority of the Board, striking the classroom behavior issue would not have changed the outcome.

Given the Board of Review's unreserved pronouncement on this point — adamantly stating its position that the lesson-plan finding was sufficient to support a finding of misconduct within the meaning of section 28-44-18 — the ultimate question becomes: Is it true, as Mr. McCrink urges that, as a matter of law, a finding of misconduct cannot be based solely on Mr. McCrink's failure to prepare lesson plans? For if it can be based on this sole finding, the Board cannot be said to have abused its discretion in denying the Motion to Reopen.

In my view, a finding of misconduct could well be based on such an omission by Mr. McCrink. He had been disciplined in the past for the same behavior and was given one last chance to remedy his performance. This, the Commissioner found, he failed to do.

B. In the Interests of Justice.

Claimant McCrink also invokes the clause in Rule 17 which permits reopening "in the interest of justice." This rather amorphous language would seem to give the Board of Review broad authority to reopen whenever it feels the need to do so; on

the other hand, it provides little basis for us to determine error, if the request is denied. Accordingly, I can find no error in the Board of Review's denial of Mr. McCrink's Motion to Reopen on this ground.

VI. CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review denying the plaintiff's Motion to Reopen is not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(4). Nor is it arbitrary or capricious or characterized by an abuse of discretion. Gen. Laws 1956 § 42-35-15(G)(6). Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

May 10, 2013