

IN THE MATTER OF : NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF : STATE BOARD OF EXAMINERS
JENNIFER FILO : ORDER OF REVOCATION
_____ : DOCKET NO: 1415-223

At its meeting of May 21, 2015, the State Board of Examiners (Board) reviewed a tenure matter involving Jennifer Filo. Pursuant to *N.J.S.A.* 18A:6-16, the Arbitrator assigned by the Department of Education to hear the case, dismissed Filo from her tenured employment and referred the matter to the Board. *In the Matter of Arbitration of Jennifer Filo*, Dkt. No. 334-11/14 (Arbitrator's Decision, March 22, 2015). Filo currently holds a Teacher of the Handicapped certificate, issued in September 2006 and a Teacher of Elementary School in Grades K-5 Certificate of Eligibility with Advanced Standing, issued in December 2006.

This case originated when the Morris-Union Jointure Commission (MUJC) had certified tenure charges of unbecoming conduct and other just cause against Filo, alleging a pattern of corporal punishment against students. Specifically, MUJC alleged that, during its extended year program (ESY) in 2014, which ran between June 24 and August 7, Filo: was extremely aggressive with student MH, pulling back her fingers and wrists, causing her to cry; twisted student MC's wrist to one side while simultaneously bending it back severely on several occasions; twisted and bent back the wrist of student MM on several occasions; shoved a table against student CW or BK's stomach, longer and more forcibly than necessary; swatted student MM with an inappropriate hit when he was swinging his arms trying to hit others nearby; used a wooden clipboard to repeatedly hit MM's knuckles and hands, causing them to become red and swollen, when he swung at Filo; withheld breakfast from students MC and MM because they had not finished their morning schedule; bent student HM's fingers back when she refused to get up off the floor; bent back student TH's fingers with more force than necessary to get him to release

Filo's arm after he had grabbed her; held student CW's hands and unnecessarily bent her fingers backwards when CW became aggressive in a bathroom stall and unnecessarily twisted student MC's arm back when he had become agitated and, on another occasion, bent MC's arm back to punish him for throwing his lunch. MUJC also claimed that Filo screamed at students on a daily basis and encouraged students to hit back when another student was being aggressive. According to MUJC, Filo also engaged in inappropriate conduct during the 2013-2014 school year by: yelling at students and mimicking their autistic-like behaviors and, on one occasion, cupping and screaming directly into the ear of student BO, causing him to cry; making derogatory comments to students RH and MH, asking them if they were stupid or idiots; continuing to feed or allowing a teacher assistant to feed student RM on several occasions, to the point where he was in visible distress, crying or vomiting; and frequently knocking vocational task items on the floor and forcing student MH to pick them up, sometimes forcibly prompting him to do so.

In his Decision (which is incorporated herein by reference), the Arbitrator concluded that MUJC had proven most of the tenure allegations against Filo with regard to the ESY. The Arbitrator also concluded that MUJC's witnesses were credible and did not misinterpret Filo's restraint techniques as corporal punishment.

The Arbitrator also determined that MUJC had proven only one tenure charge against Filo regarding the 2013-2014 school year, when he found that she had yelled at students and mimicked their autistic-like behaviors and yelled in student BO's ear. The Arbitrator also rejected Filo's claim that the MUJC's witnesses "altered their testimony to add allegations that they did not personally observe, received information from the Commission or its counsel to bolster their testimony, or as a result of meetings attended by the witnesses significantly deviated from their original accounts."

Having determined that Filo engaged in most of the unbecoming conduct alleged by MUJC, and that the conduct constituted corporal punishment, the Arbitrator concluded that Filo had forfeited the right to continue in a position requiring public trust. The Arbitrator concluded that Filo's conduct warranted her removal from MUJC and was the only appropriate penalty "that will safeguard the students, ensure accountability for proven misconduct, and serve to deter a similar deviation from the requisite standards."

Filo was dismissed from her tenured employment with MUJC as a result of the unbecoming conduct proven in the tenure proceeding. The Arbitrator transmitted the matter to the Board for its review.

Thereafter, on June 26, 2015, the Board issued Filo an Order to Show Cause as to why her certificates should not be revoked. The Order was predicated on the charges of unbecoming conduct that had been proven in the tenure hearing.

The Board sent Filo the Order to Show Cause by regular and certified mail on July 2, 2015. The Order provided that Filo's Answer was due within 30 days. Filo filed her Answer on August 4, 2015.

In that Answer, Filo admitted that the Order to Show Cause accurately summarized the allegations against her but vehemently denied the allegations. (Answer, ¶¶ 3, 4, 6-7). Filo added that the Arbitrator had dismissed a number of the allegations against her that she had filed suit to vacate the Arbitrator's decision. (Answer, ¶ 5). Filo also claimed that several of the witnesses who testified against her were untruthful. (Answer, ¶ 6). She also admitted that her employment with MUJC had been terminated but denied that the allegations were "proven." (Answer, ¶ 8).

Thereafter, the Board placed the matter into abeyance while Filo appealed the tenure decision. After the appeal was dismissed, pursuant to *N.J.A.C. 6A:9B-4.6(e)*, on March 4, 2016, the Board sent Filo a hearing notice by regular and certified mail. The notice explained that

there appeared to be no material facts in dispute. Thus, Filo was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause provided just cause to take action against her certificates as well as arguments with regard to the appropriate sanction in the event that the Board determined to take action against her certificates. It also explained that upon review of the charges against her and the legal arguments tendered in her defense, the Board would determine if Filo's offense warranted action against her certificates. Thereupon, the Board would also determine the appropriate sanction, if any. Filo was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. Filo filed a written response on May 3, 2016. Filo also asked to appear before the Board.

In her Hearing Response, Filo argued that the case should not be based simply on the findings of the arbitrator and that the Board had "an independent and separate responsibility to evaluate the allegations" against her. (Hearing Response, p. 1). Filo argued that the charges against her were incredible and could not withstand reasoned scrutiny. (Hearing Response, p. 1). She added that she had been a successful teacher and had a flawless record during the course of her ten-year career in the district. (Hearing Response, p. 2). Filo stated that it made no sense that she would "suddenly start to viciously abuse her students during the 2014 extended summer session." (Hearing Response, p. 2). Filo argued that the witnesses against her were seeking revenge and that, in preparing the witnesses to testify against her, the MUJC "herded" the witnesses together, questioned them together and allowed them to openly discuss their accounts of what transpired together. (Hearing Response, p. 2). Filo claimed that the MUJC's conduct was systematically flawed and corrupted the witnesses' testimony beyond repair and that therefore a full hearing should be held on the allegations against her. (Hearing Response, p. 2).

In testimony before the Board on June 23, 2016, Filo's attorney noted that the arbitration hearing was flawed and should not control the Board's decision. He argued that Filo was

entitled to a new hearing since the charges against her were incredible and could not withstand reasoned scrutiny. He noted that the witnesses against Filo never reported her mistreatment right away and used the hearing to curry favor with their employer and get revenge on Filo. Filo's attorney also noted that there was a dearth of physical evidence against her including no nurse's records or police reports. He claimed that the employer tainted the witness testimony and that the witnesses contradicted themselves and each other. He also argued that the Board should conduct an independent analysis since there were too many material facts in dispute.

At its meeting on September 23, 2016, the Board voted to transmit the matter to the Office of Administrative Law (OAL) for factual findings related to the mitigation of the penalty. Administrative Law Judge (ALJ) Carol I. Cohen decided the matter on Motion for Summary Decision and the record closed on May 16, 2017. The ALJ issued an Initial Decision on June 23, 2017. *In the Matter of the Certificates of Jennifer Filo*, Dkt. No. EDE 15142-16 (Initial Decision, June 23, 2017).

In the decision, the ALJ noted that "collateral estoppel should be invoked to preclude further evidentiary hearings on the same facts." (Initial Decision, slip op. at 13). ALJ Cohen concluded that equitable estoppel was particularly appropriate in this case because "the same agency is the forum for both the tenure-charge proceeding and the revocation proceeding, and the identical policy consideration underlies both proceedings, that is, ensuring that competent teachers instruct the public-school children of the state of New Jersey." *Ibid.*

In assessing the appropriate penalty, the ALJ determined that "the record here reveals a pattern by Filo of corporal punishment of special-education students." *Id.* at 14. ALJ Cohen also concluded that the facts proven before the arbitrator established that Filo had engaged in unbecoming conduct and that her certificates should be revoked. *Ibid.* Both Filo and the Deputy

Attorney General (DAG) representing the Board filed Exceptions and Reply Exceptions, respectively.

In her Exceptions, Filo argued that it was inappropriate for ALJ Cohen to apply collateral estoppel to her case “so as to give the arbitrator’s award preclusive effect as to the facts.” (Exceptions, p. 1). She also maintained that even if the ALJ agreed with the arbitrator that Filo had engaged in unbecoming conduct, the ALJ should have reviewed and considered the totality of Filo’s career prior to determining that revocation was the appropriate penalty. (Exceptions, p. 1). Filo claimed that this matter was sent back to the OAL because the Board had determined that there were material facts in dispute and that it was therefore “contrary to public policy, for Judge Cohen to have considered herself bound by the arbitrator’s findings in this matter.” (Exceptions, p. 2). She also argued that if collateral estoppel were to apply, it should apply to the Board’s own decision finding material facts in dispute and transferring the case back to the OAL. (Exceptions, p. 2). Filo contended that the arbitrator’s decision should not bind the ALJ because the arbitrator was not bound by the rules of evidence or procedure and the grounds for appeal of an arbitrator’s decision were “so narrow as to be rightfully considered razor-thin.” (Exceptions, pp. 2-3). She continued that the arbitrator’s decision was “not a determination reached by a court that knows that its judgment will be carefully scrutinized by the appellate courts for any legal or factual errors which may have tainted the judgment.” (Exceptions, p. 4). Filo added that the loss of her teaching certificates would be devastating. (Exceptions, p. 5). Finally, Filo agreed with the Board’s statement that whether to impose the sanction of revocation must be determined by the totality of the circumstances and emphasized that one of those circumstances is “a complete picture of her career as a teacher.” (Exceptions, p. 5). Filo stressed that she had always been a successful, competent and diligent teacher and until the “instant scurrilous charges” she had a “flawless record and no prior history of mistreating students over the course of her ten-year

career with the district.” (Exceptions, pp. 5-6). She contended that it made no sense to impose the ultimate sanction of revocation based upon her “supposed conduct during one extended summer session.” (Exceptions, p. 6). Filo therefore asked the Board to reverse the ALJ’s decision granting summary decision and revoking her certificates. (Exceptions, p. 6).

In her Reply Exceptions, the DAG argued that Filo’s arguments were without merit and that the Board should adopt the Initial Decision. (Reply Exceptions, pp. 1-2). The DAG claimed that the Board’s transmission of a case to OAL “does not concede the existence of material facts, nor does it create genuine issues of material fact when none are in dispute.” (Reply Exceptions, p. 2). In addition, the DAG noted that Filo was not entitled to relitigate the facts already found by the arbitrator and therefore since there were no genuine issues of material fact summary decision was appropriate. (Reply Exceptions, pp. 2-3). The DAG challenged Filo’s position that collateral estoppel should not apply, noting that Filo did not argue “that the conditions necessary for its application were unmet.” (Reply Exceptions, p. 3). In fact, according to the DAG, the issue to be precluded, whether Filo engaged in unbecoming conduct, was identical to the issue that the Arbitrator decided in the tenure case, was a final decision on the merits and was essential to the Arbitrator’s decision. (Reply Exceptions, p. 3). The DAG also noted that, although “a court’s review of an arbitration award is limited,” Filo did appeal and obtain review of the Arbitrator’s decision in the Superior Court of New Jersey. (Reply Exceptions, p. 4). According to the DAG, the fact that Filo was unsuccessful in her appeal did not negate the fact that review was available to her, obviating the need for an additional hearing. (Reply Exceptions, pp. 4-5). Moreover, the DAG argued that revocation of Filo’s certificates was warranted based upon the Arbitrator’s finding that she had engaged in unbecoming conduct by her pattern of corporal punishment. (Reply Exceptions, pp. 6-8). Finally, the DAG refuted Filo’s contention that the ALJ’s decision was invalid because the court had not been presented with a complete picture of

her career as a teacher, by noting that Filo “was entitled to present any evidence of mitigation during the tenure matter before the Arbitrator and before the ALJ in response to the Board’s Motion for Summary [sic].” (Reply Exceptions, p. 9). The DAG therefore urged the Board to adopt the Initial Decision and revoke Filo’s certificates.

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of November 1, 2017, the Board reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of the Decision and other submissions, the Board voted to adopt the Initial Decision.

“Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.” *Tenure of Sammons*, 1972 S.L.D. 302, 321. Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 N.J.L. 369, 371 (Sup. Ct. 1943), *aff’d*, 131 N.J.L. 326 (E & A 1944). In this case, ALJ Cohen correctly noted that the facts underlying Filo’s pattern of conduct were established at the tenure hearing and, pursuant to collateral estoppel, govern the Board’s decision-making here. Furthermore, the Board agrees with ALJ Cohen that Filo’s behavior constituted unbecoming conduct which warrants a severe penalty. Consequently, the Board finds that revocation is the appropriate response in this matter and therefore adopts the Initial Decision.

Accordingly, on November 1, 2017, the Board voted to adopt the Initial Decision and ordered to revoke Filo’s certificates. On this 8th day of December 2017, the Board formally adopted its written decision to adopt the Initial Decision, and it is therefore ORDERED that Jennifer Filo’s Teacher of Elementary School in Grades K-5 Certificate of Eligibility with Advanced Standing and her Teacher of the Handicapped certificate are hereby revoked, effective

immediately. It is further ORDERED that Filo return her certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

RRH/MZ/th

Date of Mailing:
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.