CHAPTER 18
ARBITRATION AND COLLATERAL ESTOPPEL

2.18.1 INTRODUCTION

Collateral estoppel acts as a bar to relitigating an issue which has previously been decided, providing that there is an identity of issues and parties, and that the party against whom collateral estoppel is to be applied had a full and fair opportunity to litigate the matter in the earlier proceeding.[1]

Collateral estoppel is applicable to quasi-judicial decisions issued by government agencies,[2] including disciplinary hearings held pursuant to Civil Service Law § 75[3] and arbitration hearings held pursuant to a collective bargaining agreement.[4] In such instances, where a decision has been issued by a hearing officer or arbitrator, the Board is bound by the *factual* findings made in the prior decision.[5]

The Board is not bound by arbitration decisions issued after its decision is issued. The Board is also not required to reopen a decision in order to consider the subsequent arbitration decision.[6]

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[1] *Matter of Ranni,* 58 N.Y.2d 715 (1982); *Matter of Guimarales,* 68 N.Y.2d 989 (1986).

[2] "[T]he doctrines of *res judicata* and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law." *Ryan v. New York Telephone,* 62 N.Y.2d 494, 499 (1984) (citations omitted).

[3] *See, e.g., Matter of Winters*, 109 A.D.3d 1034 (3d Dep't 2013) (involving a school custodian who was charged with misconduct, incompetence, and insubordination based on numerous incidents, including sleeping on duty, unauthorized use of vacation days, verbally abusing his supervisor, and failing to leave the premises after being directed to do so); and *Matter of Hopton*, 136 A.D.3d 1098 (3d Dep't 2016) (involving a corrections officer charged with violating the employer's rules by having an improper personal relationship with an inmate).

[4] *See, e.g*., *Matter of Boretsky*, 121 A.D.3d 1486 (3d Dep't 2014) (involving a subway train operator charged with violating employer policies which resulted in endangering the passengers' safety).

[5] *Matter of Ranni*, 58 N.Y.2d 715 (1982); *Ryan v New York Telephone Co.*, 62 N.Y.2d 494 (1984)

[6] *Matter of Tucek*, 277 A.D.2d 628 (3d Dep't 2000) (Board decision was issued December 1997; claimant's July 1999 application to reopen the decision based on an arbitration award was denied); *see also Matter of Duffy*, 231 A.D.2d 770 (3d Dep't 1996), Appeal Board No. 569036.

However, if the matter is remanded and the arbitration decision is taken into evidence, the arbitrator's findings of fact are binding.[7]

Collateral estoppel still applies even if the claimant has appealed the arbitration decision to the court under NY CPLR Article 78.[8]

2.18.2 REQUISITES TO APPLYING COLLATERAL ESTOPPEL

IDENTITY OF ISSUE

For collateral estoppel to apply, the issue in the unemployment insurance hearing must be the same as what was decided in the earlier proceeding. It has been found that the issues are sufficiently similar in an unemployment insurance hearing and a prior arbitration addressing whether there was just cause to separate a worker from employment under a collective bargaining agreement,[9] disciplinary proceedings alleging actions that constitute misconduct under Civil Service Law § 75,[10] and disciplinary proceedings alleging misconduct under Education Law § 3020-a.[11]

However, collateral estoppel may not apply where the prior litigation involves the same set of facts under a different legal standard. For example, collateral estoppel was not applied where the prior

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[7] *Matter of Brauner*, 162 A.D.3d 838, 840 (3d Dep't 1990) (Collateral estoppel applied where arbitration decision was issued after the conclusion of the original hearing but prior to conclusion of remand hearing and was taken into the record by the ALJ, holding that a "final factual determination had not yet been made by the Board when the arbitration decision was handed down") ; *see also Matter of Edie*, 25 A.D.3d 952 (3d Dep't 1998).

[8] *Matter of Morales*, 70 A.D.3d 1271 (3d Dep't 2010); *Matter of Hopton*, 136 A.D.3d 1098 (3d Dep't 2016; Appeal Board No. 578269.

[9] *Matter of Ranni,* 58 N.Y.2d 715 (1982) ("In the present controversy, the administrative law judge was specifically concerned with determining whether claimant was guilty of misconduct and, hence, disqualified for benefits (see Labor Law, § 593, subd 3). In making this determination, the question of claimant's conduct leading to his termination necessarily had to be considered. Claimant's commission of the underlying acts had been decided in the previous proceeding, and claimant was precluded from relitigating this factual issue.")

[10] Appeal Board No. 576600 ("In the case herein the issue to be decided is whether the claimant's extended absence from work after September 14, 2012 can be excused or whether that absence constitutes misconduct under the law. This was one of the issues in the charges brought against the claimant in the Article 75 disciplinary proceeding and which was litigated in that arbitration hearing.")

[11] Appeal Board No. 572093 ("As the issue before the Board concerns the claimant's separation from employment as a result of the actions which led to the disciplinary proceedings brought against the claimant, there is clearly an identity of issue in this case.")

decision was on the question of whether an employer's decision to discharge the claimant was arbitrary and capricious under ERISA standards.[12] Similarly, collateral estoppel did not apply to a decision of the Appellate Division, Fourth Department that a municipality's decision to discharge an employee for violation of residence requirements was not without a rational basis.[13] Additionally, collateral estoppel does not apply where a different legal issue is being decided in the subsequent matter. For example, a decision on the alternate issues of voluntary quit and misconduct would not have a preclusive effect on a subsequent hearing about felony misconduct as there is no identity of issue.[14]

FULL AND FAIR OPPORTUNITY

Whether the party against whom collateral estoppel is being asserted had a full and fair opportunity to be heard at the prior proceeding "requires consideration of the 'realities of the [prior] litigation', including the context and other circumstances which… may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him."[15] Some factors to be considered are: the nature of the forum, importance of the claim in the prior proceeding, the incentive to litigate, the extent of the litigation, the competence and expertise of counsel, the availability of new evidence, differences in the applicable law, and the foreseeability of future litigation.[16]

A full and fair opportunity to litigate has been found where the claimant is represented by an attorney or other representative and had an opportunity to testify, present witnesses, and cross-examine the employer's witnesses.[17] Notice to the claimant of the allegations has also been held

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[12] *Matter of Tischmann*, 256 A.D.2d 949 (3d Dep't 1998)

[13] *Matter of Bowman*, 124 A.D.3d 1047 (3d Dep't 2015) (the Court held that "the Fourth Department did not hold that the City had established that claimant actually resided and normally slept at a residence outside the City. Rather, that Court concluded that, under the extremely deferential standard that was applicable upon review—whether the City's initial determination was arbitrary and capricious or an abuse of discretion — it could not conclude that there was "*no rational basis*" for that determination") (citation omitted).

[14] *Matter of Gunn*, 172 A.D.3d 1865 (3d Dep't 2019) (prior ALJ decision on voluntary quit and misconduct did not have a preclusive effect on a subsequent felony misconduct determination. Court also noted that first ALJ decision was not final, as the Board rescinded it and remanded for a new hearing and decision, combining the issues in that case with claimant's hearing request on the felony misconduct determination).

[15] *Ryan,* 62 N.Y.2d at 501 (citation omitted).

[16] *Id.* (citations omitted).

[17] *Matter of Mykhaskiv*, 140 A.D.3d 1567 (3d Dep't 2016); *see also Matter of Intini*, 123 A.D.3d 1347 (3d Dep't 2014) (claimant had a non-attorney union representative, and had opportunity to testify, present other evidence, and cross-examine the employer's witnesses); and *Matter of Telemaque*, 148 A.D.3d 1441 (3d Dep't 2017) (claimant had full and fair opportunity to litigate where she was represented by an attorney, was allowed to present evidence, witnesses and testimony and to cross examine the employer's witnesses); *cf.* Appeal Board No. 583440 (no full and fair opportunity found where claimant could not find anyone to represent him in prior matter and had no meaningful opportunity to obtain

to be a factor in determining whether the claimant had a full and fair opportunity to be heard.[18] A claimant's decision not to appear at a disciplinary hearin,[19] disagreement with his representative's hearing strategy,[20] or an inability to personally choose the arbitration forum[21] do not establish a denial of due process.

Practice Tip:

The ALJ should question the parties about whether the claimant was afforded due process at the prior arbitration proceeding and develop the record to determine whether the claimant:

- Received a notice of the hearing;
- Had the right to testify on his or her own behalf;
- Had the right to be represented;
- Had the right to produce documents or witnesses;
- Had the right to cross-examine witnesses;
- Had the right to testify through an interpreter, if needed.

As long as the claimant was provided with those rights, even if he or she did not exercise them, due process has been satisfied.

2.18.3 BOUND BY FACTUAL FINDINGS

When collateral estoppel applies, the ALJ is bound by the facts found in the prior decision, not the ultimate conclusions that were made. While bound by the facts, the Board may make additional, non-contradictory factual findings and form an independent conclusion on the issue through application of the unemployment insurance law.[22]

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counsel; Board also noted differences in applicable evidentiary standards and law as prior matter relied on hearsay testimony without explanation).

[18] Appeal Board No. 591528 (the Board also noted that the claimant was represented by counsel and had the opportunity to testify, present other evidence, and cross-examine opposing witnesses).

[19] *Matter of Agran*, 54 A.D.3d 479 (3d Dep't 2008); *Matter of Dimps,* 274 A.D.2d 625 (3d Dep't 2000)

[20] Appeal Board No. 578269 (on appeal to the Board, the claimant argued that he now disagreed with his attorney's decision as to what evidence should be presented at the § 75 hearing).

[21] Appeal Board No. 562114 (citations omitted).

[22] *Matter of Guimarales,* 68 N.Y.2d 989 (1986) ("The Appeal Board and the ALJ, although bound by the arbitrator's factual findings regarding claimant's conduct… were free to make their independent additional factual findings and form their own independent conclusion as to whether such conduct constituted 'misconduct' for purposes of unemployment insurance"); *see also Matter of Nwaozor*, 82 AD3d 1475 ("[I]t is incumbent upon the Board to make an independent

Not all findings in a prior decision are binding. In determining what factual findings are binding, evidentiary facts must be differentiated from ultimate facts. Ultimate facts are "mixed issue[s] of fact and law . . .agency decisions on such ultimate facts are imbued with policy considerations as well as the expertise of the agency." [23] For example, the "fact" that someone was found to be an independent contractor by a different agency did not preclude the Board from reaching a contrary conclusion Industrial Board of Appeals (IBA) since the term "employment" was not defined identically in their respective governing statutes and was a mixed question of fact and law.[24]

Practice Tip:

When a party offers an arbitrator's decision at the hearing, it must be made part of the record. The ALJ should then take a recess to read the decision. The ALJ should ensure that the decision:

- Relates to the claimant's separation from employment;
- Rests on a basis that coincides with the basis in the initial determination (if it does not, the ALJ may need to go through the steps for expansion of the scope).
- Makes actual findings of fact, as opposed to just sustaining unspecified charges
- Offers findings of fact which support a decision on the misconduct issue (if not, the ALJ may need to make additional but non-contradictory findings)

If the decision does not include a traditional "findings of fact" section but includes the facts throughout the decision, the ALJ may ask both parties to point out what findings they believe the ALJ is bound by.

If the ALJ is not convinced that specific findings of fact are present in the arbitrator's decision, the hearing should proceed as if no arbitration decision had been presented. In the ALJ decision, the ALJ must explain why he or she was not bound by the prior arbitrator's decision.

evaluation as to whether that conduct constitutes 'misconduct' for the purposes of unemployment insurance"); Appeal Board No. 599302.

[23] *Engel v. Calgon Corp.,* 114 A.D.2d 108, 111 (3d Dep't 1986) (The New York State Division of Human Rights dismissed a complaint of age discrimination on the grounds that the petitioner was an independent contractor; the petitioner argued that the Division should have given collateral estoppel to the Appeal Board's finding that he was an employee; the Court rejected the argument, noting that the term "employee" was defined differently by the two agencies and writing that "[e]mployment is an ultimate fact, as opposed to the evidentiary facts upon which the conclusion regarding employment must be based").

[24] *Matter of Bartenders Unlimited, Inc.*, 289 A.D.2d 785 (3d Dep't 2001).

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