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K.S. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS.

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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

JOHN CAPORALE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 06-C-208
	)	
KANSAS BEHAVIORAL SCIENCES REGULATORY BOARD,	)	
	)	
Respondent.	)	

MEMORANDUM DECISION AND ORDER

This matter comes before the Court on John Caporale's Petition for Judicial Review of the Kansas Behavioral Sciences Regulatory Board's ("BSRB") Notice of Final Agency Action denying Petitioner's application, pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Action, K.S.A. § 77-601 *et seq.* After careful consideration the Court finds and concludes as follows:

STATEMENT OF FACTS

1. On or about April 5, 2003 Petitioner filed an "Application for Licensure for the Practice of Psychology," pursuant to K.S.A. § 74-5310 *et seq.* This application was based upon Petitioner's Ph.D. in Psychology from Walden University, an online or distance learning institution.

2. On September 30, 2003 the Kansas BSRB denied Petitioner's application for licensure. Petitioner was awarded an opportunity by BSRB to submit additional

information in support of his application for licensure.

3. On November 3, 2003, Petitioner submitted an enumerated list of supporting information to the BSRB.

4. On November 17, 2003 after consideration of Petitioner's supplemented application, BSRB issued a Notice of Final Agency Action denying Petitioner's application for licensure.

5. On December 18, 2003 Petitioner filed a Petition for Judicial Review from the determination of the Agency that the Petitioner was not eligible for license in Kansas as a psychologist pursuant to the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. § 77-601 *et seq.* Petitioner also alleged that BSRB's actions were unreasonable, arbitrary and capricious.

6. Petitioner ascertained Judicial Review was necessary because BSRB failed to correctly interpret and apply the provisions of K.S.A. § 74-5310 and the applicable regulations at K.A.R. 102-1-12 in making its determination that Petitioner did not meet the Kansas eligibility standards for licensure as a psychologist.

7. On June 1, 2004 the Shawnee County District Court affirmed the Kansas BSRB in its decision to deny Petitioner his licensure as a Ph.D. Psychologist in Kansas. The Court found that BSRB's decision was not unreasonable, arbitrary or capricious and therefore, should be given deference.

8. On July 19, 2004 Petitioner's Notice of Appeal of the Shawnee County District Court ruling was received and filed with the Court of Appeals of Kansas.

9. On April 22, 2005 the Court of Appeals of Kansas found the following. BSRB erred in its interpretation and application of K.A.R. 102-1-12(a)(12)(B)(i) and K.A.R. 102-1-12(a)(18). BSRB was not erroneous in its interpretation and application of K.A.R. 102-1-12(a)(11) and K.A.R. 102-1-12(a)(16). BSRB did not act in an unreasonable, arbitrary and capricious manner. The Court of Appeals affirmed the Memorandum Decision and Order of the Shawnee County District Court and ruled that although the Board erred in its construction and application of two of the requirements, it properly applied two other requirements and "did not err in denying licensure to Caporale."

10. On May 19, 2005 Petitioner filed an "Application for Licensure for the Practice of Psychology," pursuant to K.S.A. § 74-5310 *et seq.* BSRB determined Petitioner was not eligible to take the exam for licensure upon reviewing his first application and invited him to submit additional supporting materials.

11. On September 1, 2005 the Kansas BSRB denied Petitioner's application for licensure. Petitioner was awarded an opportunity by BSRB to submit additional information in support of his application for licensure.

12. On November 14, 2005 Petitioner presented additional materials to the BSRB.

13. On January 25, 2006, after consideration of Petitioner's supplemented application, BSRB issued a Notice of Final Agency Action denying Petitioner's application for licensure.

14. On February 9, 2006 Petitioner timely filed a Petition for Judicial Review from the determination of the Agency that the Petitioner was not eligible for licensure in Kansas as a Ph.D. in psychology pursuant to the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. § 77-601 *et seq.* Petitioner alleges that BSRB's actions were unreasonable, arbitrary and capricious.

15. Petitioner ascertained Judicial Review was necessary because BSRB failed to correctly interpret and apply the provisions of K.S.A. § 74-5310 and the applicable regulations at K.A.R. 102-1-12, and specifically K.A.R. 102-1-12(a)(11); K.A.R. 102-1-12(a)(12)(B)(1); and K.A.R. 102-1-12(a)(16) in making its determination that Petitioner did not meet the Kansas eligibility standards for licensure as a psychologist.

STANDARD OF REVIEW

The Kansas Act for Judicial Review and Civil Enforcement of Agency Action ("KJRA") statutorily defines the standard of review to be used by the Shawnee County District Court in this matter. K.S.A. § 77-601 *et. seq.* See *Fisher v. Kansas Dep't of SRS*, 271 Kan. 167, 175, 21 P.3d 509 (2001). The KJRA is the exclusive remedy for review of agency actions unless the agency is specifically exempted by a statute. K.S.A. § 77-

603(a); K.S.A. § 77-606. BSRB is not specifically exempted. The Kansas Supreme Court recognizes the KJRA as the exclusive means of review of an agency action. See *Schall v. Wichita State University*, 269 Kan. 456, 482, 7 P.3d 1144 (2000). See also *Connelly v. Kansas Highway Patrol*, 271 Kan. 944, 965, 26 P.3d 1246 (2001), *cert. denied* 534 U.S. 1081, 151 L. Ed. 2d 698, 122 S.Ct. 813 (2002). Pursuant to K.S.A. § 77-621(a), BRSB's Final Noticc of Action shall be overturned only if one or more of the following applies:

> (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
> (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
> (3) the agency has not decided an issue requiring resolution;
> (4) the agency has erroneously interpreted or applied the law;
> (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
> (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
> (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
> (8) the agency action is otherwise unreasonable, arbitrary or capricious.

DISCUSSION AND CONCLUSIONS OF LAW

Petitioner is seeking relief for his claims under K.S.A. § 77-621(c)(4) and K.S.A. § 77-621(c)(8). In cases of judicial review of agency actions, pursuant to K.S.A. § 621(a)(1), the Petitioner has the burden of proof in challenging the agency action. A rebuttable presumption of validity attaches to actions of an administrative agency, and the party challenging the agency's action has the burden of proving that said agency's

conduct was arbitrary and capricious. *Connelly*, 271 Kan at 965. Statutory interpretation by an administrative agency responsible for enforcing such statutes is entitled to judicial deference. *In re Appeal of Topeka SMSA Ltd. Partnership*, 260 Kan. 154, 162, 917 P.2d 827 (1996). Deference to an agency's interpretation is especially appropriate if the agency is one of special experience and competence. *Auten v. Kansas Corp. Comm'n*, 27 Kan.App. 2d 252, 254, 3 P.3d 86 (2000). When the agency is one of special experience and competence, its interpretation may be "entitled to a controlling significance in judicial proceedings." *See id.* If the agency's interpretation of the statute has a rational basis, it should generally be upheld on judicial review. *In re Application of Zivanovic*, 261 Kan. 191, 193, 929 P.2d 1377 (1996).

There are two issues before the court in this case. First, the court must determine whether Caporale's Petition for Judicial Review should reverse the BSRB's final decision denying Petitioner licensure, or whether the Petition should be denied on the principles of res judicata or collateral estoppel. Second, the court must determine whether the Kansas BSRB correctly interpreted and applied K.A.R. 102-1-12(a)(11), K.A.R. 102-1-12(a)(12)(B)(1), and K.A.R. 102-1-12(a)(16).

Although the concept of res judicata is broad enough to encompass both claim preclusion and issue preclusion, the modern trend of the courts is to refer to claim preclusion as res judicata and issue preclusion as collateral estoppel. See *Waterview Resolution Corp. v. Allen*, 274 Kan. 1016, 1023, 58 P.3d 1284 (2002). See also 46 Am.

Jur. 2d, Judgments § 516. Thus, in the case before the court, the principles of res judicata and collateral estoppel will be examined and applied separately.

An issue is res judicata when four conditions occur concurrently: (1) identity in the thing sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of persons for or against whom the claim is made. *Waterview* at 1023. See, e.g., *Regency Park v. City of Topeka,* 276 Kan. 465, 478, 981 P.2d 256 (1999); *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 473, 712 P.2d 1199 (1986). Res judicata, is not limited to questions that were actually presented and decided, but to any question that could have been presented and decided. *Neunzig v. Seaman Unified School Dist.*, 239 Kan 654, 661, 722 P.2d 659 (1986). See, e.g., *Hutchinson Nat'l Bank & Trust Co. v. English*, 209 Kan. 127, 130, 495 P.2d 1011.

Respondent notes that in the present matter before the court, because the Petitioner has filed a new application for the same license with the same Board based on the same academic program, and was unwilling to provide any new information from the initial application, this issue is res judicata and should be dismissed. Res judicata bars the same parties "from litigating a second lawsuit on the same claim or any other claim arising from the same transaction or series of transactions that could have been—but was not–raised in the first suit." *Black's Law Dictionary* 1312 (7th ed. 1999). Although Respondent argues that this Petition should be dismissed on the grounds of res judicata, based upon its legal definition, this issue is not res judicata. The current claim before the

court comes from a separate transaction than the first claim that was before the court. The first claim resulted from Respondent's April 5, 2003 denial of Peitioner's *first* application for licensure. This claim is an entirely separate claim resulting from Respondent's January 25, 2006 denial of Petitioner's *second* application for licensure, over 32 months later.

Petitioner argues that because the application for licensure is not adversarial, in that there was no hearing, hearing date, and no lawyers, nor was Petitioner allowed to cross examine witnesses, it is not res judicata. It is noted that res judicata "does not ordinarily apply to the decisions of administrative tribunals." *Hartman v. State Corp. Comm.*, 215 Kan. 758, 765, 529 P.2d 134 (1974). See also *Warburton v. Warkentin*, 185 Kan. 468, 345 P.2d 992 (1959). However, when an administrative agency has acted within a judicial capacity and has resolved disputed issues of fact properly before it that the parties have had adequate opportunity to litigate, courts do not hesitate to apply res judicata to enforce the action of the agency. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107, 111 S. Ct. 2166 (1991). Res judicata is justified "on the sound and obvious principal of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Id.* at 107.

The court allows application of res judicata to administrative agency decisions when the agency is acting in a judicial capacity. *Neunzig* at 659. In this decision, the

Kansas Supreme Court noted:

> When an agency conducts a trial-type hearing, makes findings, and applies the law, the reasons for treating its decision as res judicata are the same as the reasons for applying res judicata to a decision of a court that has used the same procedure. But the formality may be diminished in any degree, and when it is sufficiently diminished, the administrative decision may not be res judicata. The starting point in drawing the line is the observation that res judicata applies when what the agency does resembles what a trial court does. Such a resemblance or lack of it applies to determinations of law as well as to determinations of fact.

See *id.* at 659. The principle of res judicata is applied when a court has resolved an issue, "and should do so when the issue has been decided by an administrative agency, be it state or federal, see *University of Tennessee v. Elliot*, 478 U.S. 788, 798, 106 S. Ct. 3220 (1986), which acts in a judicial capacity." *Id.* at 107, 108. *Astoria* at 108.

In the matter before the court, BSRB did not act in a judicial capacity. Although elements of res judicata are present in that, the parties involved in this action are identical from the initial case, and the relief asked for is identical, the proceeding conducted by the Kansas BSRB was not an adversary one in the judicial sense. After Petitioner filed his second application for licensure with the BSRB, he was again initially denied his application, but invited to present additional materials to the Board in support of his application. While the Petition's presentation was nine single spaced, typed pages long, and included one hundred eighteen pages of exhibits, there was no exchange between the BSRB and Petitioner. In this presentation, BSRB sat and listened to information presented, but there was no discussion, no exchange between the parties. Therefore res

judicata cannot be applied because the cause of action arises from two separate applications for licensure and because the agency proceedings do not resemble what a trial court does when it conducts a judicial hearing.

Although res judicata does not apply to this case, the Court will now examine whether collateral estoppel is applicable. As several Kansas courts have noted, "collateral estoppel (issue preclusion) prevents the relitigation of issues previously litigated and, if res judicata is found to apply, there is no need to consider the application of collateral estoppel." *Neunzig* at 661. See generally 46 Am. Jur. 2d, Judgments §§ 394-620. See also *In re Estate of Reed,* 236 Kan. 514, 519-21, 693 P.2d 1156 (1985); *Writ v. Esrey* 233 Kan. 300, 308, 662 P.2d 1238 (1983).

The requirements for collateral estoppel are (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment, (2) the parties must be the same or in privity, and (3) the issue litigated must have been determined and necessary to support the judgment. *In re City of Wichita*, 277 Kan. 487, 506, 86 P.3d 513 (2004). See also *Waterview* at 1023; *Regency Park* at 478. The doctrine of collateral estoppel is different from the doctrine of res judicata. Instead of preventing a second assertion of the same claim or cause of action as res judicata does, the doctrine of collateral estoppel prevents a second litigation of the same issues between the same parties or their privies even in connection with a different claim or cause of action. *In re City of Wichita* at 506. See

also, *Williams v. Evans*, 220 Kan. 394, Syl. P 1, 552 P. 2d 876 (1976).

In Petitioner's Motion for Judicial Review presently before the court, he again asserts that Respondent erred in denying his second application for licensure based upon their interpretation and application of the following Kansas Agency Regulations: K.A.R. 102-1-12(a)(11), K.A.R. 102-1-12(12)(B)(i) and , K.A.R. 102-1-12(a)(16) in denying Petitioner's second application for licensure. In case number 03-C-1860, the first *Caporale v. Kansas BSRB* case, the court rendered judgment on these issues; the parties are identical, the issues of whether the particular K.A.R. regulations were properly interpreted and applied were litigated, determined, and necessary to support the judgment. Today, the same parties are before the court, asking it to again examine the whether the identical Kansas Agency Regulations were properly interpreted and applied for the a different denial of the same application of licensure. The courts have determined that the purposes of employing the doctrine of collateral estoppel are: (1) to avoid the expense and vexation attending multiple lawsuits, (2) to conserve judicial resources, and (3) to foster reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970 (1979). See also, *Kansas Pub. Emples. Retirement Sys. v. Reimer & Koger Assocs.,* 262 Kan. 635, 669, 941 P.2d 1321 (1997).

In *Kansas Pub. Emples. Retirement Sys. v. Reimer & Koger Assocs.*, the Kansas Supreme Court examined the issue of whether it should abandon the absolute mutuality

requirement in order to apply collateral estoppel. The court found that because mutuality remained the majority rule in the United States, abandonment of that rule would be unfair. The court affirmed their previous stance on this issue that "collateral estoppel, or issue preclusion, required mutuality; i.e., the issue subject to preclusion must have arisen in a prior case in which both of the current parties were adequately represented." *Kansas Pub. Emples.* at 670. See also, *Jones v. Bordman*, 243 Kan. 444, 460, 759 P.2d 953 (1988). See generally, *McDermott v. Kansas Public Serv. Co.*, 238 Kan. 462, 712 P.2d 1199 (1986). In the present case before the court, mutuality does exist in that this is an issue that had arisen previously in which both parties were properly represented by counsel. Therefore it is appropriate to apply collateral estoppel to this particular set of facts.

Petitioner asks the Court in his Petition for Judicial Review to determine whether the Respondent properly interpreted K.A.R. 102-1-12(a)(11), K.A.R. 102-1-12(12)(B)(i) and , K.A.R. 102-1-12(a)(16). Having previously determined this issue in both the Shawnee County District Court (case no. 03-C-1860) and then the Kansas Court of Appeals (case no. 92,743), this court finds Respondent's request to redetermine the issue of these agency regulations to be moot.

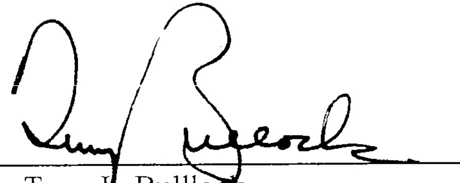
CONCLUSION

Based upon the foregoing reasons, the Court finds that Caporale's Petition for Judicial Review should be denied on the doctrine of collateral estoppel. The final agency action of the Kansas Behavioral Sciences Regulatory Board finding that Petitioner is

ineligible for a Psychologist license in the State of Kansas is affirmed. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court and no further journal entry is required.

IT IS SO ORDERED.

Dated this 19 day of July, 2006.



Hon. Terry L. Bulllock,
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct file-stamped copy of the above and foregoing **Memorandum Decision and Order** was mailed on the 19 day of July, 2006, by United States mail, postage prepaid thereon, to the following:

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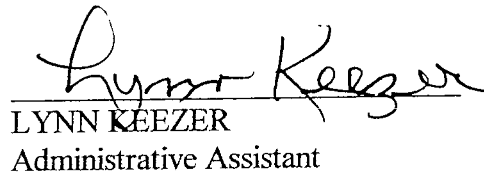

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