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COLLATERAL ESTOPPEL AND THE ADMINISTRATIVE PROCESS

I. INTRODUCTION

During its second regular session, the Eighty-Fourth General Assembly enacted substantial revisions to the Missouri Employment Security Law.¹ One of the newly enacted sections prohibits the estoppel of a party in a proceeding with “[a]ny finding of fact, conclusion of law, judgment or order made” under the Employment Security Law, regardless of the nature of the forum in which the subsequent proceeding arises.² This section was added in response to the recent Missouri Supreme Court decision in *Bresnahan v. May Dep’t Stores Co.*³ which held that if the requirements of *Oates v. Safeco Insurance Co. of America*⁴ were satisfied, the findings of an administrative tribunal could be used to collaterally estop parties to subsequent judicial proceedings.⁵ The

1. H.B. 1485, 84th Gen. Assembly, 2d Sess., 1988 Mo. Legis. Serv. 2 (to be codified at MO. REV. STAT. §§ 288.030-381) (Supp. 1988).

2. The statute provides:

1. Any finding of fact, conclusion of law, judgment or order made by an appeals tribunal, the labor and industrial relations commission or any person with the authority to make findings of fact or law in any proceeding under this chapter shall not be conclusive or binding in any separate or subsequent action not brought under this chapter, and shall not be used as evidence in any subsequent or separate action not brought under this chapter, before an arbitrator, commissioner, commission, administrative law judge, judge or court of this state or of the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.

2. Any finding of fact, conclusion of law, judgment or order made by an arbitrator, commissioner, commission, administrative law judge, judge or any other person or body with authority to make findings of fact or law in any proceeding not brought under this chapter shall not be binding or conclusive on an appeals tribunal or the labor and industrial relations commission in any subsequent or separate proceeding brought under this chapter, regardless of whether the prior action was between the same or related parties or involved the same facts.

MO. REV. STAT. § 288.215 (Supp. 1988).

3. 726 S.W.2d 327 (Mo. 1987) (en banc).

4. 583 S.W.2d 713, 719 (Mo. 1979) (en banc); see *infra* note 21 and accompanying text.

5. *Bresnahan v. May Dep’t Stores Co.*, 726 S.W.2d 327 (Mo. 1987) (en banc). In *Bresnahan*, the plaintiff was discharged from her job at a department store on the ground that she stole from her employer. She applied for unemployment compensation benefits, but her application was denied because the deputy found that she had stolen from her employer and had therefore engaged in aggravated misconduct connected with her work. *Id.* at 327-28. The plaintiff appealed the decision of the deputy and was given a hearing before the Appeals Tribunal of the Division of Employment Security.

legislature apparently believed that the possibility of being collaterally estopped had caused parties to unemployment compensation hearings to turn the hearings into full-blown adversary proceedings, and thus to subvert the goal of expediting decisions in such cases.⁶

Bresnahan was decided in the context of an unemployment compensation proceeding, and the legislature chose to overrule its holding in the narrow context of the Employment Security Law. The *Bresnahan* opinion indicates, however, that the supreme court's intent was to extend the doctrine of collateral estoppel to all administrative adjudications which satisfy the *Oates* test.⁷ Unless the Missouri General Assembly or the Missouri Supreme Court indicates to the contrary, parties to administrative adjudications that do not arise under the state's Employment Security Law should assume that they later may be estopped on issues that were decided in the administrative hearing.

Application of collateral estoppel in this context is not without precedent.⁸ It is not, however, universally accepted and its adoption can generate

Evidence, including live testimony, was presented by both parties at the hearing. The appeals referee affirmed the determination of the deputy, and the Labor and Industrial Relations Commission later affirmed the decision of the Appeals Tribunal. *Id.* at 328-29. Ms. Bresnahan did not seek judicial review of the final decision of the Labor and Industrial Relations Commission and instead filed suit for wrongful discharge against her former employer. She received a jury verdict in her favor on a count of breach of implied contract of employment and was assessed actual damages of \$116,000.00 and punitive damages of \$10,000.00. *Id.* at 329. On appeal, the supreme court held that the trial court should have ruled in favor of the defendant on the affirmative defense of collateral estoppel and that the plaintiff could not relitigate the issue of whether she had been discharged for good cause, *i.e.*, whether she had stolen from her employer. *Id.* Cf. *King v. City of Pagedale*, 573 F. Supp. 309, 313 (E.D. Mo. 1983) ("A state administrative proceeding is not sufficient to support preclusion standing alone, but preclusion does arise if the administrative decision is affirmed on judicial review.").

Bresnahan may have been foreshadowed by *Bank Bldg. & Equip. Corp. v. Director of Revenue*, 687 S.W.2d 168 (Mo. 1985) (en banc). The court in this case refused to give preclusive effect to a decision made by the State Tax Commission, but it did not foreclose the possibility of ever giving collateral estoppel effect to an administrative agency decision:

The Tax Commission plays an important part in the revenue system of the state, but its members are not required to be legally trained. Its review function over deficiencies has now been assigned to the Administrative Hearing Commission, which provides a hearing before a commissioner who must be a member of the bar. It is appropriate to consider the nature of a tribunal in determining the estoppel effect of its rulings.

Id. at 170-71 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment b (1982)).

6. *Bresnahan*, 726 S.W.2d at 332 (Blackmar, J., dissenting); see also RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment d (1982); *id.* § 83 comment h, illustration 13.

7. 726 S.W.2d at 329-30.

8. *E.g.*, *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984); *Salt Creek Freightways v. Wyoming Fair Employment Practices Comm'n*, 598 P.2d 435 (Wyo. 1979); see also RESTATEMENT (SECOND) OF JUDGMENTS § 83 and comments following.

controversy. This controversy stems from the perceived effects of the extension of the doctrine of collateral estoppel, effects upon the rights of individual litigants and upon the administrative process itself.⁹ This Comment will discuss the countervailing policies that are at the heart of the controversy and formulate an understanding of when it is appropriate to collaterally estop a litigant on issues that have previously been decided in an administrative adjudication.

A. *Collateral Estoppel in General*

The Restatement (Second) of Judgments¹⁰ states the general rule of collateral estoppel in the following manner: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."¹¹ Application of this principle serves the basic policy goals of fairness, finality, judicial economy and efficiency, and consistency in adjudicatory decision-making.¹²

But the general rule is subject to certain exceptions. Two are of particular interest in analyzing the arguments for and against administrative collateral estoppel:

A new determination of the issue is warranted by differences in the quality of

9. *E.g.*, *Bresnahan*, 726 S.W.2d at 331-35 (Blackmar, J., dissenting); *see also* Agatstein, *The Doctrine of Collateral Estoppel Should Not Apply to Administrative Hearings*, 7 J. NAT'L ADMIN. L. JUDGES 26, 28-37 (Spring 1987) (estoppel inappropriate because of differences in nature and purpose of administrative adjudications as compared to judicial proceedings); Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 445-46 (1983) ("many courts have lost sight of the foundational elements of collateral estoppel . . . [and] in novel situations combine[] mechanistic reasoning . . . with the extreme flexibility of certain standards" and thus achieve unfair results).

10. Hereinafter referred to in the text as the Restatement.

11. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). The *Restatement* speaks in terms of a rule of *res judicata*, and divides it into the categories of claim preclusion and issue preclusion:

The rule of claim preclusion . . . is that a party ordinarily may not assert a civil claim arising from a transaction with respect to which he has already prosecuted such a claim, whether or not the two claims wholly correspond to each other. The rule of issue preclusion, sometimes referred to as collateral estoppel . . . is that a party ordinarily may not relitigate an issue that he fully and fairly litigated on a previous occasion.

Id. ch. 1. Since the Missouri judiciary had not fully abandoned the traditional terminology of *res judicata* and collateral estoppel, this Comment will refer to issue preclusion as collateral estoppel.

12. *E.g.*, *Shaffer v. Terrydale Management Corp.*, 648 S.W.2d 595, 608 (Mo. Ct. App. 1983); Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 84 (1986).

extensiveness of the procedures followed in the two courts . . . ; or There is a clear and convincing need for a new determination of the issue . . . because the party sought to be precluded, as a result of . . . special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.¹³

B. *Administrative Collateral Estoppel*

In addition to the sections on collateral estoppel in general, a new section of the Restatement specifically deals with the problem of when it is appropriate for a second tribunal to give preclusive effect to an issue first decided in an administrative adjudication. The general rule of the section is that "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court."¹⁴ The language which follows this statement of the rule limits its application to administrative proceedings that are conducted in accord with the "essential elements of adjudication." These elements are notice to parties to be bound; the right to present and rebut evidence and argument; "formulation of issues of law and fact;" finality; and any "other procedural elements as may be necessary," taking into account the nature of the matter to be decided.¹⁵

Besides making an exception for administrative determinations which were not the product of proceedings which "entailed the essential elements of adjudication,"¹⁶ the Restatement specifically excludes determinations where "the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim,"¹⁷ or where to give preclusive effect to the administrative determination would be "incompatible with a legislative policy."¹⁸ The Restatement's introductory note and comments make clear that in this exception, the drafters were concerned that the second tribunal be sensitive to policy considerations which weigh against the application of administrative collateral estoppel in a particular case.¹⁹ A mechanistic application of a test for collateral estoppel can lead to inappropriate results in cases arising solely within the judicial system.²⁰ When the question of collateral estoppel arises in a multi-forum context, there is even greater need for a refined analysis. Such a context gives rise to added considerations involved in analyzing the

13. RESTATEMENT (SECOND) OF JUDGMENTS § 28(3), (5) (1982).

14. *Id.* § 83(1).

15. *Id.* § 83(2).

16. *Id.*

17. *Id.* § 83(3) comment h, illustration 14. The enactment of MO. REV. STAT. § 288.215 (Supp. 1988) has the effect of bringing administrative adjudications by the Division of Employment Security and Labor and Industrial Relations Commission within this exception.

18. RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (1982).

19. *Id.* ch. 6, at 265; *see also* § 83 comment h.

20. *See e.g.*, Perschbacher, *supra* note 9, at 445.

possible effects of administrative collateral estoppel, not only upon the judicial system and the individual litigants, but also upon the interests of the administrative agency and its ability to serve effectively the public interest in carrying out its legislative mandate.

C. *The Missouri Approach*

In *Oates v. Safeco Ins. Co.*²¹ the Missouri Supreme Court adopted a four-part test for Missouri courts to determine whether application of collateral estoppel is appropriate in a given case:

The court in reviewing whether the application of collateral estoppel is appropriate should consider: (1) whether the issue decided in the prior adjudication was *identical* with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; and (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication. Most courts have added a fourth factor to the three enunciated . . . whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.²²

When *Bresnahan* was decided, the court based its holding upon an application of this *Oates* test without reference to the policy considerations unique to the situation. In other words, the court did not appear to recognize the implications of its holding upon the ability of the Division of Employment Security to effectively process claims for unemployment compensation benefits.

The dissenting opinion in *Bresnahan* accuses the majority of applying the *Oates* test "mechanically and uncritically."²³ It further contends that the court erred in failing "to consider the purpose of the administrative proceedings and the nature of the hearing before the appeals tribunal."²⁴ Although this language appears to indicate the dissenting judges' concern about the possible adverse effects upon the ability of the Division of Employment Security to perform its functions, the dissent never addressed that issue. Instead, the thrust of the dissent's argument is aimed entirely at perceived procedural inadequacies in administrative adjudications and concludes that the plaintiff in *Bresnahan* was unfairly deprived of a jury trial.²⁵

Thus, neither the majority nor the dissent addressed what was a, perhaps

21. 583 S.W.2d 713 (Mo. 1979) (en banc).

22. *Oates v. Safeco Ins. Co.*, 583 S.W.2d 713, 719 (Mo. 1979) (en banc); see also *Hudson v. Carr*, 668 S.W.2d 68, 70 (Mo. 1984) (en banc) ("It is at least arguable that the fourth factor of full and fair opportunity to litigate . . . is applicable only where there is absence of mutuality."). But see *Bresnahan v. May Dep't Stores Co.*, 726 S.W.2d 327, 331 (Mo. 1987) (en banc) (Blackmar, J., dissenting) (there is "no doubt that this fourth factor is part of law in Missouri").

23. 726 S.W.2d at 331 (Blackmar, J., dissenting).

24. *Id.*

25. *Id.* at 331-35.

the, crucial issue in the case: how would the application of administrative collateral estoppel affect the ability of the Division of Employment Security to carry out its legislative mandate? Although the question is moot in light of the General Assembly's action to overrule *Bresnahan* in the Employment Security Law context,²⁶ the same issue will have to be addressed when determinations of other administrative agencies are considered for possible preclusive effects in subsequent lawsuits.

1. Full and Fair Opportunity to Litigate

The analysis of the first three prongs of the *Oates* test would be the same whether or not the question of collateral estoppel arises in a multi-forum context. It need not be repeated here. The fourth prong, full and fair opportunity to litigate in the prior suit, incorporates the Restatement exceptions for differences in quality or extensiveness of procedures and inadequacies of opportunity or incentive to fully litigate the issue in the prior suit.²⁷ The drafters of the Restatement refer to these two factors as the "essential" procedural issues:

If the prior opportunity and incentive to litigate the claim or issue in question were substantially the same as would have existed had the matter been adjudicated in the second forum, the procedural prerequisites exist for normal application of the rules of *res judicata*. The comparison of procedures should focus on the practical aspects of the procedures involved and not simply on matters of form. For example, proof-taking in an administrative . . . tribunal may be relatively informal but may nevertheless permit the parties to present substantially the same evidence that might be adduced through the more formal procedures characteristic of courts.²⁸

The supposed lack of adequate procedural protection was the subject of much of the *Bresnahan* dissent and is commonly advanced to support arguments by opponents of administrative collateral estoppel.²⁹ This factor will be discussed in conjunction with the Restatement requirement that administrative collateral estoppel only be applied where the administrative proceeding "entailed the essential elements of adjudication."³⁰ In addition, policy considerations unique to administrative collateral estoppel will be discussed as to when and to what extent might an administrative agency be affected adversely in carrying out its legislative mandate if its adjudicative determinations are given preclusive effect in a court of law.

26. MO. REV. STAT. § 288.215 (Supp. 1988).

27. See *supra* text accompanying note 13.

28. RESTATEMENT (SECOND) OF JUDGMENTS, ch. 6 introductory note, at 265 (1982).

29. *E.g.*, *Bresnahan v. May Dep't Stores Co.*, 726 S.W.2d 327, 331-34 (Mo. 1987) (en banc) (Blackmar, J., dissenting); see also Carlisle, *supra* note 12, at 80-94; see generally Agatstein, *supra* note 8.

30. RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1982).

a. The Essential Elements of Adjudication

Perhaps the most common objection raised to administrative collateral estoppel is that, because administrative procedures do not fully conform to the judicial model, they are inadequate to protect the rights of the parties to be estopped. Since the party to be estopped has not had an opportunity to fully develop the issues, it would not be fair to preclude him or her from doing so in the subsequent proceeding.³¹ Proponents of this view find support for it not only in the differences in procedures between the two forums, but also in the combination of functions commonly found in administrative agencies. This combination carries the potential for biased decision-making.³²

The extent and adequacy of procedural safeguards are defined in the Missouri Administrative Procedure and Review Act.³³ The Act is based upon the Model State Administrative Procedure Act.³⁴ It mandates that minimum procedural safeguards to be followed when an agency adjudication is a contested case.

A contested case within the meaning of the Act is "a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by law to be determined after hearing."³⁵ The definition is specific. There must be a statute, municipal charter, ordinance, or constitutional provision that requires a hearing *before* legal rights, duties, or privileges of specific parties are determined.³⁶ If there is no such requirement of a prior hearing, an agency decision affecting the private rights of a specific party must be tested against the Due Process Clause of the Constitution³⁷ and not against the procedures set forth in the Act.

A contested case is commenced by the filing of a writing, analogous to a civil pleading.³⁸ The Act provides for "[a]nswering, intervening, and amendatory writings" as well as motions.³⁹ If a writing asks for affirmative relief, it must "state what relief is sought or proposed and the reason for granting it"

31. See *supra* note 28 and accompanying text.

32. See, e.g., Carlisle, *supra* note 12, at 87-88.

33. MO. REV. STAT. §§ 536.010-.215 (1986) [hereinafter the Act].

34. MODEL STATE ADMIN. PROC. ACT, 14 U.L.A. 68 (Supp. 1988). Missouri adopted the original Model Act of 1944 and still retains in substance this version of the Act. 14 U.L.A. 363 (1980).

35. MO. REV. STAT. § 536.010(2) (1986).

36. E.g., *State ex rel Leggett v. Jensen*, 318 S.W.2d 353, 356 (Mo. 1958) (en banc); *Walker v. Personnel Advisory Bd.*, 670 S.W.2d 1 (Mo. Ct. App. 1984); *Kopper Kettle Restaurants, Inc. v. City of St. Robert*, 439 S.W.2d 1 (Mo. Ct. App. 1969).

37. U.S. CONST. amend. XIV, § 1; see *Mathews v. Eldridge*, 424 U.S. 319 (1976) (discussion of the due process limitations placed upon informal administrative adjudication); see also K. DAVIS, ADMINISTRATIVE LAW TREATISE, chs. 12-13 (2d ed. 1979) (when due process requires trial-type hearing and discussion of fair informal procedures).

38. MO. REV. STAT. § 536.063(1) (1986).

without simply being "phrased in the language of a statute or a rule."⁴⁰ The agency must "promptly mail a notice of institution of the case to all necessary parties."⁴¹ Notice shall also be mailed "to all persons designated by the moving party and to any other persons to whom the agency may determine that notice should be given."⁴² The notice must include "[a] brief statement of the matter involved in the case unless a copy of the writing accompanies [the] notice."⁴³ The Act also provides that a notice of hearing must be mailed to the moving party, to all other parties to the proceeding, and to all persons to whom notice of institution of the case was mailed.⁴⁴

Discovery in contested cases is limited to depositions and subpoenas duces tecum unless the hearing is before the Administrative Hearing Commission (AHC). If the case is before the AHC, the parties have available to them all the discovery devices which would be available to them in a case tried in circuit court.⁴⁵ The Act directs the agency to issue subpoenas "upon request of any party," but issuance of subpoenas duces tecum is within the Agency's discretion.⁴⁶ Administrative agencies do not possess enforcement powers, however, and must request subpoena enforcement from the circuit court of the county where the hearing is located or where the witness resides or can be located.⁴⁷ The same is true when an agency seeks to punish a party for contempt.⁴⁸

The Act states that "[r]easonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised or decided or relief sought or granted."⁴⁹ A party may present evidence by oral testimony under oath or through introduction of exhibits.⁵⁰ The Act also provides for the introduction of business records, statistical studies and reports, and affidavits.⁵¹

40. *Id.* § 536.063(2).

41. *Id.* § 536.067(1).

42. *Id.*

43. *Id.* § 536.067(2)(c).

44. *Id.* § 536.067(3).

45. *Id.* § 536.073. The Administrative Hearing Commission (authorized by MO. REV. STAT. §§ 621.015-.205 (1986)) is an adjudicative tribunal within the Office of Administration. Its function is to conduct hearings in licensing cases involving certain state agencies, primarily those involved in licensing professionals. The Commission also hears appeals from decisions made by the Director of Revenue. Adjudications by the Commission appear more "judicial" than do other agency adjudications in that the procedures followed are more formal. MO. CODE REGS. tit. 4, § 20-2 (1980). Commissioners are required to be attorneys admitted to practice in Missouri. MO. REV. STAT. § 621.015 (1986). See generally Special Project, *Fair Treatment for the Licensed Professional: The Missouri Administrative Hearing Commission*, 37 MO. L. REV. 410 (1972).

46. MO. REV. STAT. § 536.077 (1986).

47. *Id.*

48. *Id.* § 536.095.

49. *Id.* § 536.063.3.

50. *Id.* § 536.070.1-.070.2.

51. *Id.* § 536.076.00-.070.12.

As to receipt of evidence, it states that:

Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.⁵²

In addition, each party to a contested case is "entitled to present oral argument or written briefs [analogous to proposed findings of fact and conclusions of law] at or after the hearing which shall be heard or read by each official of the agency" who participates in the final decision.⁵³ The Act as well provides for a point in the process where the decision of the agency becomes final.⁵⁴

Although the Act affords procedural protections to parties to administrative adjudications,⁵⁵ including the rights of notice, limited discovery, oral and written argument, compulsory process, presentation of evidence, and the opportunity to cross-examine witnesses and rebut evidence; these procedures are not identical to those available in a judicial hearing. For example, the civil rules of evidence do not apply to administrative adjudications.⁵⁶ Proceedings are usually conducted in a less formal manner than those conducted in a court,⁵⁷ parties are generally limited in their use of pre-hearing discovery,⁵⁸

52. *Id.* § 536.070.2.

53. *Id.* § 536.080.1.

54. *E.g.*, Mo. REV. STAT. § 288.200.2 (Supp. 1988) (decision of agency becomes final ten days after parties notified or notice is mailed).

55. *See supra* text accompanying notes 36-52.

56. The general rule in Missouri is that while the "technical rules of evidence are not controlling in administrative hearings, fundamental rules of evidence apply." *Missouri Church of Scientology v. State Tax Comm'n*, 560 S.W.2d 837, 839 (Mo. 1977), *appeal dismissed*, 439 U.S. 803 (1978). Thus, while admission of hearsay evidence does not in and of itself deprive a party of a fair hearing, *Conners v. Missouri Div. of Family Servs.*, 576 S.W.2d 568 (Mo. Ct. App. 1979), the hearing officer must exclude irrelevant evidence. *Eastern Star Missionary Baptist Church v. Missouri State Div. of Family Servs.*, 632 S.W.2d 503 (Mo. Ct. App. 1982).

Professor Davis notes that the common law rules of evidence were meant for use in jury trials. DAVIS, *supra* note 36, § 16:4, at 234. He suggests that, in the federal system, the Federal Rules of Evidence should only apply to jury trials and that non-jury trials should be tried on "any relevant evidence" as is the case with agency adjudication: "If the purpose of any trial, whether in a court or in an agency, is to find facts accurately and efficiently, then having two systems of evidence, one of which excludes particular evidence that the other admits, is irrational, unless some reason justifies the system." *Id.* § 14:1, at 3. Davis also points out that:

Although administrative agencies may be freed from observance of strict common-law rules of evidence for jury trials, it is erroneous to suppose that agencies do not, as a result, observe some rules of evidence. . . . That strict adherence to standards of relevance and probative value should be observed needs no underscoring.

Id. § 16:4 (quoting *Attorney General's Committee on Administrative Procedure*, at 70-71 (1941 Report)).

57. *Boyd v. Civil Serv. Comm'n*, 657 S.W.2d 83 (Mo. Ct. App. 1983); *see also*

and the administrative hearing officer is not required to be an attorney.⁶⁰ But these differences in procedure do not render hearings conducted in accordance with the Act defective under the Due Process Clause of the Constitution.⁶⁰ Parties are protected from unlawful administrative decisions by provisions for judicial review in the state constitution⁶¹ and implemented either by the Act⁶² or by agency organic acts.⁶³

The "essential elements of adjudication"⁶⁴ presuppose an unbiased and competent decision-maker regardless of the forum in which the adjudication takes place. Although the Act presumes that "unbiased and competent" does not of necessity mean that the decision-maker must be an attorney, some argue that to fulfill these qualities he or she must be.⁶⁵

"Unbiased" simply means that the decision-maker has not prejudged the contested issues in a case. Impartiality is required in administrative adjudications as a matter of due process.⁶⁶ Although biased decision-making is always a legitimate concern when the "legal rights, duties, or privileges of specific parties are [to be] determined,"⁶⁷ it is erroneous to assume that administrative

[A] cluster of largely false assumptions . . . [has] been widely accepted by judges, administrators, and practitioners and . . . [is] in the nature of a basic philosophy. Some samples of the largely false assumptions that in combination have been especially harmful are (1) that the best way to untangle a jumble of disputed facts, confused law, and undetermined policy is to conduct a huge trial, allowing witnesses to argue about policy, permitting anyone to cross-examine any witnesses, and then purporting to decide what to do on the basis of a record of thousands or tens of thousands of pages, [and] (2) that in any "adjudication" a trial-type hearing is necessarily appropriate . . .

Id.

58. *E.g.*, National Advertising Co. v. State Highway Comm'n, 549 S.W.2d 536 (Mo. Ct. App. 1977) (methods of discovery listed in statute are exclusive methods available to parties); MO. REV. STAT. § 536.073.1 (1986). *But see* MO. REV. STAT. § 536.073.2 (1986) and *supra* note 44 and accompanying text.

59. *But see supra* note 44.

60. *King v. City of Pagedale*, 573 F. Supp. 309, 313 (E.D. Mo. 1983) ("[c]ourt has no hesitation in concluding [that Missouri's administrative procedure is] sufficient under the Due Process clause").

61. MO. CONST. art. V, § 18.

62. MO. REV. STAT. § 536.100 (1986).

63. *E.g.*, MO. REV. STAT. § 288.210 (Supp. 1988) (party may seek judicial review "within ten days after a decision of the [industrial] commission becomes final"); MO. REV. STAT. § 288.200.2 (Supp. 1988) ("decision of the [industrial] commission shall become final ten days after the date of notification or mailing thereof to parties."); *see also* Greater Kansas City Baptist & Community Hosp. Ass'n v. Division of Employment Sec., 583 S.W.2d 247 (Mo. Ct. App. 1979) ("Administrative Procedure and Review Act . . . does not apply to agencies . . . which [have] . . . own review procedure").

64. RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1982).

65. *See Bresnahan v. May Dep't Stores Co.*, 726 S.W.2d 327, 333 (Mo. 1987) (en banc) (Blackmar, J., dissenting).

66. *E.g.*, *Withrow v. Larkin*, 421 U.S. 35 (1975).

67. *Id.*, MO. REV. STAT. § 536.010.2 (1986).

adjudication as a whole is tainted by a lack of impartiality. While the combination of functions which characterizes administrative agencies makes biased decision-making more than just a theoretical possibility,⁶⁸ this possibility can be guarded against and an administrative proceedings' validity can be challenged on the ground of bias.⁶⁹

The *Bresnahan* dissent reasoned that the lack of a requirement that administrative hearing officers be attorneys is why administrative collateral estoppel was inappropriately applied.⁷⁰ But it did not explain its basis for concern, and left to speculation why the possession of a law degree is a necessary prerequisite to allowing an administrative determination preclusive effect. Two reasons are possible. Both lead to the conclusion that, unless the hearing officer is an attorney, an administrative adjudication is procedurally invalid and should not produce results to be given any effect, much less a preclusive one.⁷¹

One unstated reason may be that only attorneys are competent to conduct fair hearings in accordance with rules of procedure and evidence. But administrative hearing officers are not constrained by such rules to the same degree as are judges. This lack of constraint undermines the weight of the argument,⁷² and without such constraint to give it credence, the argument is unpersuasive.

The procedures required in administrative adjudications are not complex. Yet if they are followed, they result in fairness to the parties. If parties are not treated fairly because the hearing officers are incapable of following these procedures, the problem is not whether administrative collateral estoppel is appropriate but whether administrative adjudications validly can bind the parties at all.⁷³

A second possible reason why the dissent believes that administrative hearing officers should be attorneys before administrative determinations are given preclusive effect may be that only attorneys are competent fact-finders. But the place of juries as factfinders in legal actions demonstrates the weakness of the argument. Lay jury members make findings on factual issues, and such findings often are given preclusive effect. If hearing officers are incompetent fact-finders, then once again the validity of administrative adjudications is questionable. The problem becomes whether the parties should be bound at all. The collateral estoppel issue need not even be reached.⁷⁴

The concern about non-attorney hearing officers may simply be

68. Perschbacher, *supra* note 9, at 455.

69. See *Withrow*, 421 U.S. at 47 ("[B]iased decision maker constitutionally unacceptable, [but] contention that . . . combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication . . . must overcome a presumption of honesty and integrity in those serving as adjudicators . . .")

70. *Bresnahan*, 726 S.W.2d at 333 (Blackmar, J., dissenting).

71. RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment b (1982).

72. See *supra* notes 37-61 and accompanying text.

73. RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment b (1982).

74. *Id.*

make-weight argument to bolster the criticism that administrative procedures are inadequate in providing the parties an opportunity to fully and fairly litigate the issues.⁷⁶ But implicit in this concern over lack of legal credentials may be judicial hostility toward administrative law in general. The development in the United States of the field of administrative law includes attempts by the legal community to limit the powers of administrative agencies.⁷⁶ Vestiges of this suspicious attitude may remain and may have surfaced in the *Bresnahan* dissent in the form of strong implications that the judicial province has been invaded. Whether or not this is true, there is no persuasive reason why an administrative hearing officer must be an attorney before his or her determinations should be given preclusive effect. The procedural rules followed in an administrative adjudication do not require an attorney's expertise. Attorneys do not have any special competence as fact-finders which lay persons do not also possess.⁷⁷

Before preclusive effect is given to a decision in an administrative hearing the case should be separately analyzed to determine whether a "trial-type hearing" was conducted.⁷⁸ The Act provides for the "essential elements of

75. See *supra* text accompanying notes 29-30.

76. DAVIS, *supra* note 36, § 1:7, at 22-23. In 1936, Justice Stone stated:

Perhaps the most striking change in the common law of this country, certainly in recent times, has been the rise of a system of administrative law . . . Addresses before bar associations twenty years ago, discussing the rise of new administrative agencies, are reminiscent of the distrust of equity displayed by the common law judges . . . So far as the nostalgic yearnings for an era that has passed would encourage us to stay the tide of a needed reform, they are destined to share the fate of the obstacles which Coke and his colleagues sought to place in the way of the extension of the beneficent sway of equity . . . The time has come for a more ready recognition that the procedures worked out by administrative bodies have realized this ideal [the common law ideal of protecting individual right and justice] largely without the coercive intervention of the courts, and that they have set up standards for the appraisal of the specialized experience with which they are concerned which courts could have formulated, if at all, only more tardily and with greater difficulty.

Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 16-18 (1936).

77. See *Prokopf v. Whaley*, 592 S.W.2d 819, 823 (Mo. 1980) (en banc) ("determination of the credibility of witnesses is the function of the administrative tribunal"); *Ceramo Co. v. Goldberg*, 650 S.W.2d 303, 304 (Mo. Ct. App. 1983) (court may not substitute its judgment for that of the administrative agency and must defer to the agency's findings of fact).

78. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966); *Manser v. Missouri Farmers Ass'n*, 652 F. Supp. 267 (W.D. Mo. 1986); see also *State v. Purvis*, 739 S.W.2d 589, 591 (Mo. Ct. App. 1987) ("A judgment on the merits for purposes of determining applicability of the doctrine of collateral estoppel is one rendered after argument and investigation, when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or merely technical point . . ."); *State Farm Fire Ins. Co. v. Emde*, 706 S.W.2d 543, 546 (Mo. Ct. App. 1986) ("the informal and summary nature [of small claims court] procedures does not ensure the opportunity to fully litigate issues that is a prerequisite to the application of

adjudication" in "contested case" administrative hearings.⁷⁹ Additional procedural safeguards come into play when a case comes within the jurisdiction of the Administrative Hearing Commission.⁸⁰ Although procedures for informal adjudication are not mandated by statute, case-by-case analysis could apply when considering whether determinations made in such adjudications should be given preclusive effect.

b. Incentive and Opportunity to Litigate

If the interests at stake in an administrative hearing are relatively minor compared to those at stake in a subsequent legal proceeding, it may be unfair to afford the administrative proceeding a preclusive effect. The party involved in the first proceeding may not have contested the issue as vigorously as she would have had she known the important interest was at risk.⁸¹ Closely related to the lack of vigor is the fact that parties to administrative adjudications are often not represented by attorneys.⁸² Lay persons cannot ordinarily be expected to have an attorney's awareness of the doctrine of collateral estoppel, and hence the lay or unrepresented party may be unfairly disadvantaged by a failure to understand the implications of participating in the first adjudication.⁸³

This problem is most likely to arise where the administrative hearing's purpose is to determine eligibility for subsistence benefits. Such hearings are designed to be conducted expeditiously and are confined to the very narrow issue of benefit eligibility.⁸⁴ Hearings to determine the rights of parties in other contexts, such as professional licensing, are much more likely to be vigorously contested.⁸⁵

collateral estoppel"); RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982); *cf.* LaRose v. Casey, 570 S.W.2d 746, 750 (Mo. Ct. App. 1978) (conviction of ordinance violation could serve as basis of collateral estoppel when party litigated conviction up through judicial system). *But cf.* DAVIS, *supra* note 36, § 21:3, at 55 (Restatement position that an administrative adjudication is not "conclusive under the rules of res judicata" if procedure used does not "resemble court procedure" is "contrary to a good deal of law").

79. *See supra* text accompanying notes 36-52.

80. *See supra* note 44 and accompanying text.

81. *E.g.*, State Farm Fire Ins. Co. v. Emde, 706 S.W.2d 543 (Mo. Ct. App. 1986); RESTATEMENT (SECOND) OF JUDGMENTS § 28(4)(b) comment d (1982); *id.* § 83 comment h, illustration 13.

82. *E.g.*, DAVIS, *supra* note 36, § 21:2, at 49-50; Agatstein, *supra* note 9, at 29; Carlisle, *supra* note 12, at 91.

83. *E.g.*, Agatstein, *supra* note 9, at 33; Carlisle, *supra* note 12, at 91.

84. *Bresnahan v. May Dep't Stores Co.*, 726 S.W.2d 327, 332 (Mo. 1987) (en banc) (Blackmar, J., dissenting); RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment h, illustration 13 (1982).

85. *See supra* note 44. Since a party to a professional licensing hearing presumably has his or her livelihood at stake, the party is likely to be prepared to fully contest whatever issues are necessary to the decision.

But the problems surrounding administrative hearing preclusion are not solely focused upon the element of surprise, even though most precluded parties claim that they were unfairly surprised at the preclusion. The real issue is whether the "the amount in controversy in the first action [was] so small in relation to the amount in controversy in the second action that preclusion would be plainly unfair."⁸⁶

2. Effects Upon the Administrative Process

Aside from the unfairness which may result from preclusion in circumstances where the amount in controversy differs substantially between the two forums, there is a very real possibility of adverse effects upon the administrative agency involved. Two adverse effects are possible when parties are precluded from relitigating issues which were decided in a prior administrative proceeding. Both of them are likely to occur when the amount at stake in the administrative proceeding is relatively small in comparison to the amount at stake in the subsequent litigation.

First, one who is aware of the potential for preclusion may avoid administrative adjudication altogether. A potential plaintiff with a colorable tort claim arising out of the same facts and circumstances which gave rise to a claim before the administrative agency may prefer not to risk being estopped by a low-stakes administrative decision in the high-stakes civil lawsuit.⁸⁷ This would have the effect of undermining legislative and public policy in favor of encouraging access to benefits and remedies available through a particular administrative agency.

Second, if the main purpose of the administrative hearing is to provide an expedited determination of the issue before it, the purpose will not be served if parties to the proceeding try to turn it into a full-blown formal adjudication so as to avoid being precluded on any issues that may form the basis of future litigation. The Restatement states the issue as follows:

The scheme of [legislative] remedies may intend that the proceedings in an administrative tribunal be determinative only for the purposes of the controversy immediately before the agency. For example, the scheme may contemplate that the agency proceedings be as expeditious as possible. One aspect of assuring expeditiousness is to confine the stakes to the matter immediately in controversy. Thus, issue preclusion may be withheld so that the parties will not be induced to dispute the administrative proceeding in

86. RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment j (1982). It is not clear that the plaintiff in *Bresnahan* can be said to have been *unfairly* surprised by being estopped on the issue of whether she stole from her employer. Although the amounts at stake in the two proceedings were substantially dissimilar, if Ms. Bresnahan was truly serious about obtaining unemployment benefits, she would have every incentive to fully contest the issue of whether or not she stole from her employer since it was foreseeable that it would be the decisive issue in the proceeding. *Bresnahan*, 726 S.W.2d at 327.

87. Agatstein, *supra* note 9, at 32.
<http://scholarship.law.missouri.edu/mlr/vol53/iss4/10>

anticipation of its effect in another proceeding.⁸⁸

Once it becomes generally known that administrative adjudications may carry preclusive effects, parties will more vigorously contest the issues in an administrative context which may form the basis for the final decision.⁸⁹ They may hire attorneys to represent them where they previously would not have done so. The parties, through their attorneys, will very likely argue for proceedings which are as formal as possible. They will increase their use of pre-hearing discovery, and increase attempts to exclude evidence which is ordinarily admissible in administrative adjudications. At the same time, the parties will try to introduce as much testimonial and documentary evidence as possible.

But whether the parties are successful in making hearings more "judicial" is beside the point. Even though the administrative hearing officer has a great deal of discretion in deciding how to conduct a hearing, dealing with this type of maneuvering will have the net effect of encumbering what is meant to be an expedited process.

One of the major benefits of administrative adjudication is the expeditious and efficient manner in which hearings are conducted. This benefit may be lost if the judiciary applies collateral estoppel to administrative determinations without taking into account the implications for the decision-making processes of a given agency. The net effect may be that the caseload of the judiciary may be shifted to administrative agencies, an effect which is not a goal of the doctrine of collateral estoppel.⁹⁰

III. CONCLUSION

The doctrine of collateral estoppel may properly be applied to decisions made by an administrative agency acting in an adjudicative capacity. When the defense of collateral estoppel is raised in a proceeding subsequent to an administrative adjudication, the second tribunal should take care to ascertain that the administrative proceeding was conducted in accordance with the "essential elements of adjudication." This analysis should take into account whether the parties to the administrative proceeding had the incentive to fully litigate the issue upon which collateral estoppel is based.

If the administrative proceeding was sufficiently trial-like, the inquiry should shift to an analysis of potential effects upon the administrative agency. There may be compelling policy reasons why the decisions of a particular administrative agency should not be given preclusive effect. If an undue burden will be placed upon the ability of the administrative agency to fulfill its legislative mandate, its decisions should not be given preclusive effect regard-

88. RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment h (1982).

89. Agatstein, *supra* note 9, at 32-33; Carlisle, *supra* note 12 at 93.

90. Carlisle, *supra* note 12, at 93-94.

less of the extent of procedural protections available to parties to proceedings before the agency.

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