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McClanahan v. Remington Freight Lines, Inc.: Making a Mountain Out of a Molehill

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I. Introduction

In 1987, the Indiana Supreme Court confronted head-on the issue of whether administrative agency decisions could be given res judicata or collateral estoppel effect in subsequent proceedings in *McClanahan v. Remington Freight Lines, Inc.*[1] This Article addresses the historical precedents for application of the two doctrines in administrative law, discusses the impact of the supreme court's decision in *McClanahan*, and reviews the issues likely to arise in future, similar instances.

The doctrine of res judicata stems from the basic principle that a matter which has been litigated and determined should not be re-litigated. Litigation must be final.[2] Res judicata itself is also known as claim preclusion. Claim preclusion means that a previous adjudication of an action is a total bar to the same action in a subsequent suit.[3] A derivative of res judicata is collateral estoppel, also known as issue preclusion. Issue preclusion generally does not work to bar a claim *in toto*, though it may as a practical matter have that effect. Rather, issue preclusion functions only to prevent a party from re-litigating a particular factually-

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1. 517 N.E.2d 390 (Ind. 1988).

2. *See* State v. Gurecki, 247 Ind. 218, 214 N.E.2d 392 (1966); Barker v. State, 244 Ind. 267, 191 N.E.2d 9 (1963).

3. Hardesty v. Bolerjack, 441 N.E.2d 243, 245 (Ind. Ct. App. 1982).

oriented issue in a subsequent action, even if the causes of action in the two cases differ.[4]

The basic requirements for res judicata are: (1) a court of competent jurisdiction, (2) a final judgment on the merits, (3) between the same parties or their privies, (4) on all matters essential to that judgment which were or might have been litigated.[5] The basic requirements for collateral estoppel are (1) the same parties, (2) actually litigated the point subsequently at issue, and (3) both would have been bound by the determination had it been adverse to them.[6]

II. Historical Precedent

A. Indiana Law

Perhaps unwittingly, Indiana courts began sanctioning the use of res judicata to give preclusive effect to an agency decision nearly one hundred years ago. In *Bass Foundry & Machine Works v. Board of Commissioners*,[7] a contractor abandoned the county's project to build a courthouse and jail. Bass Foundry, a subcontractor, agreed with the county to complete its iron work on the project at the original contract price, notwithstanding the fact that iron prices had doubled in the interim. In return, the county agreed to pay Bass Foundry all amounts due and owing under the original contract despite a previous court determination which held that the county did not have the authority to agree to pay the full contract price.[8] Bass Foundry then filed its claim with the county commissioners, who subsequently denied payment. No appeal of the commissioners' decision was taken. Instead, an independent action was instituted.

The county alleged the previous resolution of the issue (denial by the county commissioners) was a bar to Bass Foundry's subsequent suit. The Indiana Supreme Court agreed, citing an 1879 statute which deprived circuit courts of jurisdiction in cases involving County Commissioners, except when an appeal was taken from the County Commissioners' decision. Had the case been left to that statutory, jurisdictional point alone, there would have been little to commend it as a case giving res judicata effect to an administrative decision. The supreme court went beyond the statutory basis, however, and noted: "The purpose of filing

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4. *Id.*

5. *See* Coulson v. State, 488 N.E.2d 1154 (Ind. Ct. App. 1986); *In re* Marriage of Moser, 469 N.E.2d 762 (Ind. Ct. App. 1984).

6. *Hardesty*, 441 N.E.2d at 245.

7. 141 Ind. 68, 32 N.E. 1125 (1894).

8. Bass Foundry & Machine Works v. Bd. of Comm'rs, 115 Ind. 234, 17 N.E. 593 (1888).

the claim before the board of commissioners was to recover the claim from the county, and that is the purpose and object of this suit, and the question is *res judicata* . . . ."[9]

The *Bass Foundry* analysis cleaves remarkably close to the analysis given to the issue today. The supreme court noted that the identity of the issues was the same in the court case and the administrative litigation: recovery of sums allegedly due under the second contract. Identity of issues is, of course, a keystone to modern res judicata decisions. The *Bass Foundry* court went further and noted that the identity of the parties was also the same: the county was, as the court termed it, a "real party in interest."[10] The court reasoned that addition of the original defaulting contractor as a party could not defeat this congruity of identities.[11] Again, the *Bass Foundry* court, having little or no difficulty according the Commissioner's determination the same weight it would give to a previous trial court ruling, seized upon the fact that the parties were the same in both adjudications to validate the res judicata defense. Modern res judicata theory tends to demand this as well prior to successful invocation of the defense.[12]

Bass Foundry did not launch a full-scale application of res judicata to administrative decisions. Courts began to struggle with the issue—not in terms of the res judicata doctrine itself, but in terms of whether an administrative decision was attended by the qualities and characteristics which should give rise to res judicata. In short, was the administrative decisional process sufficiently court-like to permit the administrative decisions to become final?

The supreme court itself suggested that the answer was no in *Board of Commissioners, Allen County v. Trautman.*[13] When Helen Trautman thought she had been underpaid as a clerk in the county assessor's office, she filed a claim with the county board of commissioners. The board of commissioners disallowed the claim for the excess pay but did regularly pay the semi-monthly claims on the amounts agreed to be due. Trautman sued for the excess and received judgment in her favor. The Indiana Supreme Court affirmed the judgment, brushing away the county's contention that the commissioners' decision on the claim was res judicata. The court cited a statute authorizing a claimant either to seek judicial review or sue independently but did not distinguish between judicial review of an administrative decision and a collateral attack. Instead, the court simply stated that the commissioners' decision was

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9. *Bass Foundry*, 141 Ind. at 72, 32 N.E. at 1126 (emphasis in original).
10. *Id.*
11. *Id.*
12. *See supra* notes 4-6 and accompanying text.
13. 204 Ind. 362, 184 N.E. 178 (1933).

"administrative or ministerial and not judicial."[14] Presumably, therefore, the commissioners' decision could not be accorded res judicata effect.

In a later, unrelated case, the supreme court provided further explanation for its rationale:

> [W]hen the Legislature defines its policy and prescribes a standard as it has in the act in question, it may leave to the executive boards and officers the determination of facts in order to apply the law. . . . An administrative officer charged with the administration of the laws enacted by the General Assembly necessarily exercises a discretion partaking of the characteristics of the judicial department of the government, but does not have the force and effect of a judgment. Unless an administrative officer or department is permitted to make reasonable rules and regulations, it would be impossible in many instances to apply and enforce the legislative enactments, and the good to be accomplished would be entirely lost.[15]

Apparently, res judicata was occasionally one of the effects which an administrative decision was not accorded.

The court's reluctance to give full-blown effect to decisions stemmed in part, it seems, not from the procedural requisites necessary for res judicata to apply, but rather from the alien grounds—as a matter of decisional framework—upon which agency decisions are made. The reverse image of this principle is found in the time-honored principle of deference to agency expertise. For instance, the Indiana Supreme Court has written:

> Where the legislature has created a fact-finding body of experts in another branch of government, their decision or findings should not be lightly overridden because we, as judges, might reach a contrary opinion on the same evidence. So long as the experts act within the limits of the discretion given them by the statute, their decision is final.[16]

In other words, the same policy motivating deference to agency expertise was actually a disincentive to applying res judicata to an agency decision. The *anima mundi* for an agency was its expertise in a given field; the

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14. *Id.* at 370, 184 N.E. at 181.

15. Financial Aid Corp. v. Wallace, 216 Ind. 114, 119-21, 23 N.E.2d 472, 475 (1939) (The *Financial Aid Corp.* court was reviewing a revised enabling statute of the Department of Financial Institutions in the face of various constitutional challenges. The court upheld the act.).

16. Public Serv. Comm'n v. City of Indianapolis, 235 Ind. 70, 79, 131 N.E.2d 308, 311 (1956).

agency was presumably created by the legislature to provide innovative and problem- or industry-specific answers to novel, complex issues. The principles of deciding issues on the narrowest possible factual and legal basis and adherence to prior decisions—lynchpins of the common law—were not necessarily proper for an administrative agency. Without this decisional framework, courts would not grant the conclusiveness to an administrative adjudication that was routinely granted to trial court adjudications.[17] Whether couched as a distinction between judicial and ministerial functions, as in *Trautman*, or located in the deference of courts to agency determinations, courts remained unsure of the proper "effect" to be given to an agency determination.

This problem, coupled with the issue of which function (either executive or legislative)[18] an agency was exercising, caused a continuing struggle with res judicata questions in the context of the weight to be given previous administrative adjudications. In the 1970's res judicata's usefulness in agency decisions received a new test: could res judicata bind an agency to its own prior decision? A trilogy of zoning cases from 1970 to 1974 presented three milestones in the field: (a) establishing res judicata by name as a doctrine to be dealt with in the administrative context, (b) shifting the focus of the doctrine's applicability to the procedures attendant to the administrative decisional process, and (c) suggesting that, when an agency's decision could be termed judicial in nature, there was no serious impediment to granting that determination res judicata effect.

The first case was *Braughton v. Metropolitan Board of Zoning Appeals*.[19] There, disappointed landowners sought judicial review of a zoning variance grant to adjacent landowners. The landowners argued, *inter alia*, that the zoning board had previously denied a variance petition for the same property and proposed use. Because there had not been a showing of any factual difference between the previous and present

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17. Agencies are not expected to apply fixed or unyielding rules or policies, it was argued, but rather to exercise discretion and ingenuity in working out a satisfactory solution for each new case; and it was concluded that, at least to the extent that the doctrine of stare decisis is founded on the notion that the law is unchanging, the classical doctrine of stare decisis does not square with the theory and practices of the agencies.

F. Cooper, State Administrative Law, 504 (1962).

18. *See Public Service Comm'n*, 235 Ind. 70, 131 N.E.2d 308 (1956). In resolving a standard of review issue, the supreme court pointed out that "rate-making is a legislative, not a judicial function, and even if a statute attempted to lodge such power in a court it would be unconstitutional." *Id.* at 81, 131 N.E.2d at 312.

19. 146 Ind. App. 652, 257 N.E.2d 839, *reh'g denied*, 146 Ind. App. 652, 258 N.E.2d 866 (1970).

variance petitions, the landowners argued, there could be no change in the board's determination of the issue.

Although not validating the res judicata argument entirely,[20] the court of appeals wrote that a zoning board "should not indiscriminately or repeatedly reconsider a determination denying a variance absent a change of conditions or circumstances."[21] The burden to raise the issue and present evidence on it, the court held, fell upon the remonstrators seeking to show that circumstances indeed had not changed.[22]

In *Easley v. Metropolitan Board of Zoning Appeals*,[23] the court of appeals revisited the burden of proof issue created by *Braughton*. The *Easley* court was faced with the issue of how remonstrators could prove a change in circumstances when the reasons for the prior variance denial were not a matter of public record. To remedy this problem, the court imposed upon the zoning boards the requirement that, "in all future cases and in those pending or in which the determination has not become final, it [the board] should specify by factual finding or by a statement of reasons the basis for denial of the variance petitions."[24]

The final case of the trilogy, decided between *Easley* and *Braughton*, was *Board of Zoning Appeals v. Sink*.[25] Unlike *Easley* and *Braughton*, *Sink* did not involve a quasi-res judicata effect as between two agency decisions. Instead, the issue presented in *Sink* was whether a remonstrator could use a previous, unappealed trial court judgment, which reversed a variance grant, to gain reversal of the board's granting of a second, similar petition without following the required procedure for direct judicial review.

Of crucial importance in *Sink* is the court's statement that "[m]ost courts have viewed the granting or denying of variance by Boards of Zoning Appeals as a quasi-judicial determination and have applied the doctrine of *res judicata* to their decisions. This is the law in Indiana."[26]

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20. The court suggested that there were other instances where "the doctrine of res judicata is clearly applicable." *Id.* at 659, 257 N.E.2d at 843; *see also id.* at 658 n.2, 257 N.E.2d at 842 n.2.

21. *Id.* at 658, 257 N.E.2d at 842.

22. *Id.*

23. 161 Ind. App. 501, 317 N.E.2d 185 (1974).

24. *Id.* at 512, 317 N.E.2d at 192. The court went on to state: "Thereafter, remonstrators against subsequent variance petitions may successfully assert a defense in the nature of res judicata by merely establishing the fact of the prior denial unless the petitioner proves that there has been a change in the conditions, circumstances or facts which induced the prior denial." *Id.*

25. 153 Ind. App. 1, 285 N.E.2d 655 (1972).

26. *Id.* at 8, 285 N.E.2d at 659. The court cited *Braughton* for the latter proposition; the court also cited Beaven v. Village of Palatine, 22 Ill. App. 2d 274, 160 N.E.2d 702 (1959); Turf Valley Assocs. v. Zoning Bd. of Howard Co., 262 Md. 632, 278 A.2d 574 (1971); *In re* Clements' Appeal, 2 Ohio App. 2d 201, 207 N.E.2d 573 (1965).

The court held that the remonstrators could not bypass the administrative agency (and judicial review of the agency's actions) and assert res judicata directly before the trial court rendering the first decision. Instead, it was incumbent upon the remonstrators to establish the elements of the quasi-res judicata defense, as outlined in *Braughton*, before the agency in the first instance. Review of the agency's decision on the res judicata issue could then be had by normal routes of judicial review.[27]

Sink, when read in conjunction with its policy statements concerning the salutary effects of res judicata,[28] establishes res judicata as a method of either attacking or defending an agency decision. *Sink* also suggests that so long as the decision is quasi-judicial, res judicata must be dealt with. *Braughton* and *Easley*, focusing on how the board may find changed circumstances and on the precise contours of the change in circumstances (in the context of zoning) which will justify a different result, evidence a shift toward ensuring that re-litigation can be had when procedures are not in place which allow review and understanding of the original decision. Res judicata effect will not be given to an agency decision which cannot be explained or understood. For instance, there must be a statement of reasons for the denial of the variance under *Easley*. By the same token, perhaps, res judicata effect will not be given to an agency decision which has not followed proper procedure for decision-making. In other words, *Braughton* and *Easley* may have foreshadowed a subtle shift toward procedure over deference to the substantive nature (*i.e.*, expertise) of the agency decision.

B. United States Supreme Court History

The seminal case in United States Supreme Court pronouncements is relatively recent. In 1966, the decision in *United States v. Utah Construction & Mining Co.*[29] explicitly validated for the first time granting administrative decisions res judicata effect. In *Utah Construction*, the issue was, in its simplest form, whether the decision of the Advisory Board of Contract Appeals was entitled to res judicata effect in a subsequent suit in the Court of Claims. The Court of Claims ordered

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27. *Sink*, 153 Ind. App. at 8, 285 N.E.2d at 659.

28. The court noted that the bar on re-litigation of disputes formerly decided is a matter of public policy, and is based upon economies of time and fairness to parties. *Id.* at 7, 285 N.E.2d at 658-59. The *Sink* court's statements must be limited to the context of that case: whether res judicata effect for a trial court—not agency—decision could effectively short-circuit the administrative review process. Nonetheless, given the positive statement by the court that res judicata would apply to agency quasi-judicial determinations, there can be little doubt that the same benefits which obtain from res judicata in a court would also, in the *Sink* court's view, apply to an agency decision.

29. 384 U.S. 394 (1966).

that the contractor's delay claims (for contract price adjustment and time extension) be heard in a trial *de novo*, rather than based solely upon the administrative record before the Advisory Board of Contract Appeals.[30]

The Supreme Court's holding was ostensibly based on the Wunderlich Act of 1954, which required that decisions of the agency should be final, absent extreme circumstances.[31] The Supreme Court went beyond this, however, to reach the general res judicata[32] issue as developed by common law. The Court boldly stated:

> Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.[33]

This declaration seems at odds with the authority cited but appears to have been intentionally created for future application to cases where the issue was more directly presented.

Professor Davis suggests that the statement was by no means mere *obiter dictum*. Instead, he writes, "The statement was carefully crafted. Each detail has significance."[34] Review of the primary authority of the *Utah Construction* Court, *Sunshine Anthracite Coal Co. v. Adkins*,[35] bears this premise out. Sunshine Anthracite petitioned the National Bituminous Coal Commission for a determination that its coal was not subject to the Commission's jurisdiction. The petition was denied; Sunshine then unsuccessfully sought judicial review of the commission's decision. Later, the Internal Revenue Service sought to collect taxes based on the fact that Sunshine actually produced bituminous coal. In the Supreme Court's opinion, res judicata effect was given to the court

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30. Utah Constr. & Mining Co. v. United States, 339 F.2d 606, 609-10 (Ct. Cl. 1964).

31. The statute provided that "any such decision shall be final and conclusive unless the same is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence." 384 U.S. at 399 (quoting 41 U.S.C. § 321 (1964)).

32. The precise issue before the Court was one of collateral estoppel: whether the factual findings of the board were conclusive in the subsequent litigation of the alleged breach of contract. *Utah Constr.*, 384 U.S. at 400. For convenience, the discussion herein is of res judicata generally.

33. *Id.* at 421-22.

34. K. Davis, Administrative Law Treatise § 21:2, at 49 (1983).

35. 310 U.S. 381 (1940).

decision which reviewed the Bituminous Coal Commission decision,[36] not the Bituminous Coal Commission decision itself.

The distinction may at first appear to be of little significance. Yet the previous *court* judgment allowed the *Sunshine Anthracite* Court to speak in terms of res judicata with little difficulty. The Court spoke in terms of "a judgment" rendered in "each of these two suits." In the Court's view, this made the key issue "whether or not in the earlier litigation the representative of the United States had [the] authority to represent its interests in a final adjudication of the issue in controversy."[37] Consequently, the Court found unassailable the Coal Commission's authority to decide the matter and then enter the subsequent litigation. With those two conclusions reached, the ultimate conclusion was clear: the court decision, affirming the Bituminous Coal Commission, bound both the commission and the Internal Revenue Service because a judicial decision which binds the United States binds all its agencies.[38]

The decision in *Sunshine Anthracite* is, in this light, much removed from the *Utah Construction* decision. *Utah Construction* involved making final an agency decision in a subsequent court case; *Sunshine Anthracite* was effectively a case of one court judgment being given preclusive effect in a subsequent court case. Professor Davis continues with his evaluation of *Utah Construction*:

> The only part of the statement that is subject to doubt is that "the courts have not hesitated. . . ." It should be interpreted to mean that the Supreme Court did not hesitate in the *Utah Construction* case, for the Supreme Court before that case did a good deal of hesitating.[39]

It is, then, appropriate to take the *Utah Construction* Court's statement in smaller pieces. The pre-requisites to giving res judicata effect to an agency decision are four-fold.[40] First, the agency must be acting in judicial capacity. Legislative actions by the agency, such as rulemaking, do not fall within the limits of the administrative res judicata doctrine. So, too, may decisions which require agency expertise and are perhaps not attended by trial-type procedures.

Second, the agency must be resolving disputed issues of fact. At first blush, the requirement seems to be derivative of the first, because determination of the historical facts (to which the law is then applied) seems at the core of the judicial function. However, the statement may

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36. *Id.* at 403-04.
37. *Id.* at 403.
38. *Id.*
39. K. Davis, *supra* note 34, § 21:2, at 49.
40. United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966).

be less innocuous than it seems. The effect to be given to an agency decision may extend only to the brute, cold, historical facts—the actual events which transpired. Evaluative facts, those shading more toward legal conclusions, along with the legal conclusions, may not be subject to a res judicata effect. The distinction between giving res judicata effect to fact findings but not legal conclusions may separate administrative res judicata from the court-oriented res judicata.[41]

Thirdly, the fact issues must have been "properly before" the administrative agency. Apparently, jurisdictional defects at the agency level, and perhaps even procedural, non-fundamental defects in the agency's decisional process will prevent using the agency decision in subsequent litigation. The *Utah Construction* Court noted that if an agency gratuitously made findings on an issue, even an issue over which it had jurisdiction, "such findings would have no finality whatsoever."[42] Consequently, an agency decision, even if all the remaining prerequisites are met, still may not be entitled to preclusive effect. A search for procedural defects lurking behind the administrative record, as well as the scope of the issues actually litigated, is necessary for a determination of whether an agency decision is actually the final determination of the issue.

Fourth, the parties before the agency must "have had an adequate opportunity to litigate" the disputed issues of fact.[43] Actual utilization of the opportunity need not be afforded. Nevertheless, the issue does not end there. Requisites for procedural due process certainly figure in the calculus, as does the nature of the administrative state, where many dispositions are made without hearing, without the presence of the affected party, and probably without the presence of counsel.

Obviously, superimposing additional prerequisites to use of res judicata for agency decisions is designed to promote some control over subsequent use of administrative decisions while at the same time encouraging "the parties to make a complete disclosure at the administrative level, rather than holding evidence back for subsequent litigation."[44] This background sets the stage for understanding and analyzing the Indiana Supreme Court's decision in *McClanahan v. Remington Freight Lines, Inc.*[45]

III. The *McClanahan* Case[46]

John McClanahan drove a truck for Remington Freight Lines, Inc., an Indiana company. McClanahan, who started work in November 1981,

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41. *See* Restatement (Second) of Judgments § 27 (1982). *See also* K. Davis, *supra* note 34, at 51.

42. *Utah Constr.*, 384 U.S. at 419 n.15.

43. *Id.* at 422.

44. *Id.* at 420.

45. 517 N.E.2d 390 (Ind. 1988).

46. The facts in this section are taken from the Court of Appeals decision, 498

had no contract of employment. McClanahan was travelling from New York to Minnesota, carrying a load that weighed 78,000 pounds. Federal law allowed 80,000 pound loads; Illinois allowed only 75,000 pound loads. Before reaching Illinois, McClanahan called the safety director for Remington, Richard Barbour, and told him that the load was too heavy.

Barbour told McClanahan that the company would pay any fine he incurred and that he probably would not be caught in any event. McClanahan continuously refused to drive through Illinois. McClanahan drove back to Remington's terminal, on orders from Remington. When he returned, McClanahan was fired; Remington's employee manual defined his termination as a "voluntary quit."

McClanahan applied for unemployment benefits. The initial application was refused, without hearing. McClanahan pursued an appeal to the Indiana Employment Security Division's Appellate Section. A hearing was held at which McClanahan and Barbour both testified. The hearing officer reversed the initial determination, holding that McClanahan was not discharged for just cause. He was therefore entitled, the hearing officer held, to unemployment compensation. No appeal was taken to the Indiana Employment Security Division's full board from the hearing officer's order.

Having secured his unemployment compensation benefits, McClanahan then instituted a separate action against Remington and Barbour in the Tippecanoe County Superior Court. He alleged retaliatory and wrongful discharge. Both McClanahan and Remington moved for summary judgment. McClanahan argued that re-litigation of the reasons for his discharge was not permitted: the decision of the hearing officer was collateral estoppel in the court case as to the facts causing his discharge. Remington sought summary judgment on the ultimate merits of the case: McClanahan was an employee at will and could be terminated for any (or no) reason and hence had no cause of action. The trial court granted Remington's motion and denied McClanahan's.

The Second District of the Indiana Court of Appeals reversed the grant of summary judgment in Remington's favor, and affirmed the denial of McClanahan's motion. On the first issue, the court held that "if, as *Frampton v. Central Indiana Gas Co.* clearly holds, an employee cannot be discharged solely for exercising a statutory right, logic and justice compel us to hold that an employee cannot be discharged solely for refusing to breach a statutorily imposed duty."[47]

N.E.2d 1336 (Ind. Ct. App. 1986), and the Indiana Supreme Court's opinion on transfer, 517 N.E.2d 390 (Ind. 1988).

47. 517 N.E.2d at 392 (quoting Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973)).

On the second issue, whether the reasons for McClanahan's discharge were relitigable, the court held that McClanahan had not presented a sufficient evidentiary basis for the imposition of collateral estoppel. The decision of the appeals referee (hearing officer) was not certified and could not be properly considered by the trial judge in determining the summary judgment motion. The appeals court found that the transcript of the proceedings before the hearing officer did not contain the hearing officer's decision and was thus an insufficient basis upon which to base a summary judgment ruling.

However, the court chose to address the general collateral estoppel issue because of its likely recurrence on remand. The court concluded that the decisions of the Indiana Employment Security Division could be given res judicata effect. Acknowledging the procedures for notice, evidentiary record, oaths, and subpoenas in the appeals referee hearing, the court determined that the proceedings were judicial in nature, particularly in view of the appeals referee's authority to affirm, modify or reverse the previous determination.

In a footnote, the court suggested some instances in which the agency decision was not to be accorded collateral estoppel or res judicata effect.[48] Noting that collateral estoppel effect is not proper when convincing reasons are advanced why the agency decision should not be final, the court of appeals suggested a total failure to observe procedural safeguards or a consideration of inadmissible evidence might be such a convincing reason. Nevertheless, the court held that, the appeals referee's decision, upon a proper evidentiary foundation, was entitled to collateral estoppel effect in this case.

The Indiana Supreme Court granted transfer.[49] The court affirmed the lower court's holding that McClanahan had stated a valid cause of action. The court also addressed the collateral estoppel issue because of its likely recurrence. Unlike the court of appeals, the Indiana Supreme Court declined to give the appeals referee's decision collateral estoppel effect. The high court adopted the following analysis for the issue: "1) whether the issues sought to be estopped were within the statutory jurisdiction of the agency; 2) whether the agency was acting in a judicial capacity; 3) whether both parties had a fair opportunity to litigate the issues; [and] 4) whether the decision of the administrative tribunal could be appealed to a judicial tribunal."[50] The application of this analysis of the facts before the court is critical to an informed understanding of *McClanahan's* effect on later cases involving collateral estoppel and administrative decisions.

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48. 498 N.E.2d at 1343 n.8.
49. 517 N.E.2d at 391.
50. *Id.* at 394.

IV. Analysis of *McClanahan*

The first and foremost task in analyzing *McClanahan* is to examine its underlying rationale and determine whether there is any basis in law for the result reached by the supreme court. Besides the two Indiana cases cited in the opinion, *South Bend Federation of Teachers v. National Education Association*[51] and *Cox v. Indiana Subcontractors Association, Inc.*,[52] the primary basis for the court's result was engendered by the federal district court case of *Gear v. City of Des Moines*.[53] In that case, where the factual situation[54] was very similar to that present in *McClanahan*, the trial court set forth four elements which must be fulfilled by a prior administrative decision before its collateral application to a related civil rights claim. The Indiana Supreme Court faithfully reproduced those elements in its own inquiry into McClanahan's case: (1) the matters at issue must be within the agency's statutory jurisdiction; (2) the agency had to function judicially; (3) both parties had to have a fair opportunity to litigate the issues; (4) the administrative decision must be appealable.[55] The *Gear* court found the Iowa Job Service's decision worthy of collateral estoppel effect; the Indiana Supreme Court applied these same four factors to the decision of the Indiana Employment Security Division and found it wanting.

This result is difficult to justify because the Iowa agency's procedures were almost identical to the Indiana agency's, even to the extent that there is no trial *de novo* on disputed issues of fact. This result is also difficult to justify because of the four elements themselves. There is one statement in *Gear*, however, which is particularly illuminating and clearly justifies the decision rendered by the Indiana court: "Additional related factors which must figure in the court's analysis include the deference accorded opinions of a particular administrative entity by the state courts, the intention of that entity and the expectations of the parties regarding judicial retrial of factual questions determined in administrative proceedings."[56] Although not specifically endorsed by the *McClanahan* court,

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51. 180 Ind. App. 299, 389 N.E.2d 23 (Ind. Ct. App. 1979).
52. 441 N.E.2d 222 (Ind. Ct. App. 1982).
53. 514 F. Supp. 1218 (S.D. Iowa 1981).
54. In *Gear*, a female former police officer was denied unemployment compensation upon a factual finding that she had left her employment voluntarily and without good cause. In her later lawsuit for relief under 42 U.S.C. §§ 1983 and 1985 and the fourteenth amendment of the United States Constitution, the defendants attempted to erect the Iowa Department of Job Service's finding as collateral estoppel to further litigation of the facts dispositive of her civil rights action. On the basis of the procedures before the Department, the United States District Court for the Southern District of Iowa, granted summary judgment in favor of the defendants on the matter of collateral estoppel. *Id.*
55. 517 N.E.2d 390, 394 (Ind. 1988).
56. 514 F. Supp. at 1221.

it is very apparent that these considerations weighed more heavily in its decision than the enumerated criteria. Thus, the court could freely state that, despite the obvious *opportunity* for review as required by the fourth factor, it considered instead the fact that it was "altogether likely that Remington *would have* pursued the appeal had it known McClanahan's intent to file a civil action for substantial damages."[57] How else to explain the cavalier treatment of the administrative procedures, procedures which are, by law, required to be informal in order to relieve the burden on trial courts? The *McClanahan* court obviously rendered only lip-service to the factors listed by the *Gear* court and instead determined that the defendants had neither a full nor fair opportunity to litigate the factual issue before the division on the premise that to decide otherwise would be inequitable because they had not taken full and fair *advantage* of the opportunity actually offered them. As critical as that statement may seem, it is not altogether clear that the *McClanahan* court did not reach the correct result in any event, regardless of its failure to acknowledge the *Gear* elements.

One must first re-examine the substance of the elements the *Gear* opinion posited for application of collateral estoppel in the agency-judiciary context. (These four factors are not to be confused with the four integral parts of the essential collateral estoppel inquiry itself.)[58] Primarily, a court is to look at the nature of the proceeding, the due process offered the parties (opportunity to litigate and opportunity for review), and the agency's jurisdiction over the issue in question. The standard for application of these factors is tempered "selectively and with a greater degree of flexibility"[59] than is afforded the traditional application of res judicata of judicial decisions. The problem with this approach on collateral review of agency decisions is that it is directly contrary to the well-established standard of judicial review of agency decisions on direct review.

It is well-settled by both statute and case law that on direct appeal from an administrative decision, a court has only limited review of that decision. However, it is interesting that the criteria governing that review bear a more than coincidental resemblance to the *Gear* factors. By statute, an Indiana court may grant relief from an agency decision only

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57. 517 N.E.2d at 395 (emphasis added).

58. There are four basic elements of res judicata: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the matter now in issue was, or might have been, determined in the former suit; (3) the particular controversy previously adjudicated must have been between the parties to the present suit or their privies; and (4) the judgment in the former suit must have been rendered on the merits. Cox v. Indiana Subcontractors Ass'n, Inc., 441 N.E.2d 222, 225 (Ind. Ct. App. 1982).

59. *Gear*, 514 F. Supp. at 1221.

if its action is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.[60] The common law ingredients, for those agencies not governed by the Administrative Adjudication Act,[61] are the same.[62] Distilled to their essence, the direct review criteria are almost the same as those set forth in *Gear*: Did the agency have jurisdiction? Did the agency afford the aggrieved party due process? Was the decision void for any reason supplied by the law? It is apparent there is very little to distinguish the items a court considers on direct review of an administrative adjudication from those used in *Gear* and *McClanahan* in determining whether to allow its collateral use except the actual application of those factors.

The critical difference between the two applications is that on direct review, courts are inclined to give much greater deference to the decision of the agency[63] than the supreme court did in the *McClanahan* case. In other words, on direct appeal, an agency determination is more likely to be upheld on the very same notions that make it *unlikely* it will be given effect in a collateral matter. Therefore, a party stands a much greater chance of being bound by such a decision if he takes the matter directly for review than if he opts to take his chances in a different proceeding involving the same issues before the agency. The *McClanahan* opinion, if nothing else, gives an aggrieved party another opportunity to relitigate the issues and to succeed on the merits, when the agency decision has been otherwise unfavorable. On collateral matters, the agency decision is less likely to prohibit the trial court from retrying the very same case whereas *de novo* relief is not typically available in judicial review.[64]

This lack of symmetry in the application of the same factors to the same sort of decision but with different results is troublesome. There appear to be three solutions to this problem. One could dispense with

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60. IND. CODE § 4-21.5-5-14(d) (1988).

61. IND. CODE §§ 4-21.5-1-1 to -2-4 (1988).

62. *See, e.g.*, Tilton v. Southwest School Corp., 151 Ind. App. 608, 281 N.E.2d 117 (1972).

63. *See e.g.*, New Trend Beauty School, Inc. v. Indiana State Bd. of Beauty Culturist Examiners, 518 N.E.2d 1101 (Ind. Ct. App. 1988); Drake v. City of Gary, 449 N.E.2d 624 (Ind. Ct. App. 1983).

64. IND. CODE § 4-21.5-5-11 (1988) sets forth the following limitation on the introduction of evidence upon judicial review of an administrative decision: "Judicial review of disputed issues of fact must be confined to the agency record for the agency action supplemented by additional evidence taken under section 12 of this chapter. The court may not try the cause de novo or substitute its judgment for that of the agency.

the *Gear* criteria altogether in matters of collateral attack and consider only the four basic elements of collateral estoppel itself. The *McClanahan* court obviously followed this course. Or one could apply the factors in matters of collateral attack in the same fashion they are treated on direct judicial review. Lastly, one could formulate a different set of criteria than those set forth by the *Gear* and *McClanahan* decisions.

With the first solution, a trial court would simply apply the four basic elements of collateral estoppel[65] but would also determine whether the agency's decision was sufficiently congruent with trial proceedings to grant it the deference due to judicial decisions. This format, for which there is already established precedent in *McClanahan*, has a practical appeal to it. Unless the parties' expectations evince otherwise, it could be presumed that they did not grant sufficient weight to the informal proceedings before the administrative agency to make them be bound by its decisions in a collateral judicial matter that may very well have greater ramifications. For instance, McClanahan's claim for unemployment compensation, garnering as it did only a minimal economic award, could not have presaged to his employer that a larger wrongful discharge suit lurked in the wings. Therefore, as is their wont, the parties probably took the entire proceedings before the Employment Security Division much more lightly, given the informality and routine nature of the proceedings. On the other hand, a matter before the Medical Licensing Board has a greater potential for grave consequences and for greater care and preparation by the parties. A decision by the Licensing Board is more likely to deprive a party of property and liberty rights to which specific due process protections inhere. Therefore, that agency is more likely, as a matter of course, to conduct traditional judicial proceedings although perhaps somewhat more informally as allowed by statute. Under the *McClanahan* rationale, which is dependent upon whether the hearing "differed substantially from a traditional courtroom proceeding,"[66] greater credence would therefore be given a Board decision than the one at issue in McClanahan and collateral estoppel principles more likely effected.

This result may appear to be in derogation of the whole purpose for creating agencies in the first place—to delegate certain judicial responsibilities to governmental entities with expertise in specific areas of the law. *McClanahan* might be read to suggest such a "cavalier" result inasmuch as some agency decisions could fall by the wayside upon collateral attack because their proceedings are not conducted as if in a courtroom, nor were they conceived to be. However, the likelihood of

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65. *See, e.g.*, Hardesty v. Bolerjack, 441 N.E.2d 243, 245 (Ind. Ct. App. 1982).
66. 517 N.E.2d at 394-95.

any great number of decisions reaching the posture present in *McClanahan* seems very remote—there are only two such scenarios in contemporary Indiana case law, *McClanahan* and *Cox*.[67] In addition, it is not unlikely that the expectations of the parties could be better served by a "retrial" on the merits. Otherwise, agency decisions may end up as formalistic as judicial proceedings in order to forestall unexpected collateral attacks, an outcome not contemplated when the delegation of judicial duties was imposed upon agencies. The *McClanahan* opinion may therefore be more in line with current attitudes regarding collateral review of agency decisions than its lack of reliance on *Gear* might imply.

The second alternative would be to apply the already established direct review criteria as pronounced by *Gear* uniformly to both direct attacks on administrative decisions, via judicial review, and collateral attacks. The simplicity in applying this standard is apparent when one contemplates the wealth of case law from which the courts could draw in the context of judicial review. In addition, applying the *Gear* standard would accord to agency decisions the dignity to which they are entitled by reason of their fact-finding function. This posture, of course, would make *McClanahan* and *Cox* incorrectly resolved.

The primary motivation for wielding an agency decision as a weapon in a judicial collateral attack, be it offensively or defensively, is to expedite proceedings. If a fact at issue has been already determined before a trier of fact, *i.e.*, the administrative agency, there seems no reasonable need to retry the matter before yet another trier of fact. And this is the crucial point that the *Cox* and *McClanahan* courts appeared to miss. The only branch of res judicata amenable for use in the administrative context is issue preclusion/collateral estoppel. Estoppel by judgment is out of the question for the very reason that agencies were established—they dispense specialized remedies not available to trial courts. There could be no estoppel between the judgment of a trial court and the decision of an agency. That therefore leaves, by default, collateral estoppel as the res judicata tool used by trial courts when confronted with the resolution of the same or similar issues by an agency.

The *Cox* court evinced no understanding of this tenet when it challenged the agency's expertise to decide contract issues. That expertise is beside the point because that was never the "issue" before the Employment Security Division. Rather, the Division determined that Cox had been terminated for just cause by his employer. When his employer attempted to use the fact of his statutorily lawful termination in Cox's breach of contract action, such fact was apparently to be used simply as one established element among many in the civil litigation. There is

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67. Cox v. Indiana Subcontractors Ass'n, 441 N.E.2d 222 (Ind. Ct. App. 1982).

no intimation from the case's presentation of the facts that Cox's proper termination was *ipso facto* a determination of his contract claim. Rather, the agency's finding of fact might have been used in the Association's defense of *Cox*'s claim—to justify the employer's alleged breach if indeed such breach existed at all. In any event, it is clear the *Cox* case misunderstood the use of the agency's finding and misunderstood the basic concept of collateral attack in the agency-judiciary context.

The court in *Shortridge v. Review Board of Indiana Employment Security Division*,[68] however, was right on target when it held that an agency's *findings of fact* are binding on collateral attack. This principle is what some courts seem to lose sight of when they encourage giving less deference to agency decisions than to judicial decisions. The only application for agency determinations in court cases is in the matter of fact-finding. Fact-finding is not a specialized area reserved for the expertise of trial courts. Indeed, it is the basic function of agencies to render certain specialized remedies. Nevertheless, underlying those remedies are factual determinations. In fact, administrative agencies are typically required to consider three types of facts: *evidentiary facts* which form the foundation for their *basic findings of fact* upon which they determine their *ultimate findings of fact* (remedies).[69] Given the burden that agencies must bear with regard to the factual conclusions they must draw,[70] particularly for purposes of judicial review and despite the informalities inhering in their procedures, there seems no reason why their factual determinations should be given any less credence than a trial court's in the matter of collateral estoppel. A trier-of-fact is a trier-of-fact is a trier-of-fact. There is simply no rational explanation for not honoring that role in the determination of the credibility of witnesses and weighing of evidence for purposes of establishing factual matters on collateral attack. As discussed above, it is expected from the agencies as a matter of law on direct attack by judicial review. And courts give deference to it. As a consequence, there also seems no rational reason why the *Gear* criteria cannot be applied with the force used in judicial review when a court is confronted with an agency decision on collateral attack.

As a third alternative, one could formulate a different set of rules. In light of the conclusions regarding the other two alternatives, that

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68. 498 N.E.2d 82 (Ind. Ct. App. 1986).

69. *See, e.g.*, Perez v. United States Steel Corp., 426 N.E.2d 29, 33 (Ind. 1981) ("[F]indings of basic fact must reveal the Board's analysis of the evidence and its determination therefrom regarding the various specific issues of fact which bear on the particular claim. The 'finding of ultimate fact' is the ultimate factual conclusion regarding the particular claim before the Board.").

70. *Id.*

would hardly seem a useful exercise. The embryo for the notion that administrative res judicata even needed an independent set of rules was formed in Professor Davis' well-recognized treatise on administrative law.[71] Professor Davis' premise was that administrative agencies often work with fluid facts and shifting policies.[72] How an agency's function in this regard differs significantly from that of a trial court is difficult to discern, but evidently Davis was concerned more with the agency-agency decisions rather than agency-judiciary matters. Agencies, being creatures of politics, are often governed by the vagaries of patronage in each administration resulting in new board memberships, and consequently, new agendas. Regardless, a set of rules would be useful, if focused on the proper goal, in order to confront more objectively other situations such as that which arose in *McClanahan*.

A framework for formulating a set of rules in the collateral use of agency decisions in a later lawsuit should adopt portions of the first two solutions discussed above but as a disinct permutation entire unto itself. Actually, the *McClanahan* court contributed to such a set of rules, albeit perhaps unwittingly. The first element is that which sets agencies apart from judicial tribunals in the first instance—the identification of the agency function. (1) Did the agency act in a judicial capacity (as opposed to its legislative capacity)? Once that is determined in the affirmative, the trial court simply applies the remaining three nonjurisdictional elements of collateral estoppel: (2) Did the agency decision involve and bind the same parties or their privies? (3) Was the agency decision final, *i.e.*, unreviewed? (4) Was the issue at hand actually "litigated" and essential to the agency's decision?[73] The rules look familiar; however, the first step—which sets agency decisions apart from trial court judgments—has its own considerations.

Whether the agency acted in a judicial capacity is not an inquiry that goes deep enough. It was not even an inquiry that the *McClanahan* court took at face value. Although McClanahan and his employer took part in a judicial proceeding, it was simply not "judicial" enough. In reaching that conclusion, the supreme court looked at the parties' expectations and the actual occurrence of events before the agency. That approach is not entirely bad because the right result was reached in the *McClanahan* decision. However, the subjective element of the parties' expectations is simply too uncertain to use as an appropriate element of the judicial nature of an agency proceedings.

Rather, the emphasis on the judicial capacity of the agency should center on an objective inquiry as to what actually happened before the

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71. Davis, *supra* note 34, at §§ 18.01, 18.04.
72. *Id.*
73. *McClanahan*, 517 N.E.2d at 394.

agency and on whether those events comport with our notions of a judicial function. Those investigations must take into account the legislatively mandated informality of such proceedings, and the measure of that informality would also have a direct relationship to the parties' expectations. Hence, the elimination of one of *McClanahan*'s questions is the elimination of an ill-defined yardstick. What the trial court should be limited to is a review of the agency record and that record alone.

From the information therein, the court could determine (1) the adversarial nature of the proceedings, *i.e.*, did the parties actually litigate the issues in the case or was the issue so small that it was considered a *fait accompli* upon the presentation of the petitioner's case? Did the hearing examiner assist petitioner in the presentation of his case?; and (2) the due process accorded the parties, *i.e.*, how strictly did the hearing examiner adhere to the rules of evidence? Was cross-examination available? Was testimony under oath?

These two concerns were primary factors in the *McClanahan* decision and correctly so.[74] However, taking out the subjective elements of that opinion and limiting the trial court's assessment of the agency's judicial function to the actual record before it will confine the inquiry to the objective nature of the elements rather than making collateral estoppel decisions subject to the varying strengths of the parties' arguments dependent upon "if only I had known the consequences." Once this objective hurdle is crossed, the trial court then either denies estoppel effect to the decision outright or goes on to consider the remaining collateral estoppel elements. Simplistic by nature, these rules need not be anymore complicated. To do so would merely, and unnecessarily, obfuscate a doctrine which has enjoyed unparalleled success between trial court opinions without such subjective confusion.

V. Application of *McClanahan*

After having engaged in extensive analysis of *McClanahan*[75] and addressing its immediate ramifications *vis a vis* its actual application to cases of the same ilk, one must consider the effects, if any, this case will have on the whole broad spectrum of the matter of the *res judicata* effect to be given to administrative decisions in the judicial arena. Such an investigation entails consideration of other "current" Indiana cases, such as *South Bend Federation of Teachers v. National Education Association*[76] and *Cox v. Indiana Subcontractors Association, Inc.*,[77] as

74. *See id.* at 395.
75. 517 N.E.2d 390 (Ind. 1988).
76. 180 Ind. App. 299, 389 N.E.2d 23 (1979).
77. 441 N.E.2d 222 (Ind. Ct. App. 1982).

well as of the manner in which the issue is presented to a court for review. Primarily, the distinction is whether a trial court is applying the doctrine between two decisions of the same agency or between an agency decision and a trial court proceeding. Indiana case law suggests that distinction makes a difference.

South Bend Federation of Teachers is more akin to the zoning cases discussed previously[78] because it consisted of the application of an agency decision to a later decision of the same agency. In the *South Bend* case, the matter was brought to a head in a judicial challenge to a decision of the Indiana Education Employment Relations Board (IEERB). One teachers' association (NEA) filed a Verified Complaint to enjoin IEERB from exercising jurisdiction over an election petition filed by a rival association (AFT). The basis for the complaint was a decision entered on March 25, 1977. The thrust of the complaint was that IEERB was bound to apply an earlier 1974 board decision in favor of NEA, rather than be allowed to issue a second decision in favor of AFT. In a well-reasoned opinion, presaging *Gear v. City of Des Moines*,[79] Judge Buchanan determined that no facts had intervened between the two IEERB decisions necessitating a change in position from the 1974 ruling, and the parties, as well as IEERB, were bound by the earlier declarations regarding the same factual determination material to both decisions[80]—the interpretation of an election agreement among the two associations and the school corporation.[81]

As with *McClanahan*, the court of appeals was confronted with a factual issue, thereby requiring the application of the collateral estoppel branch of res judicata, but with the twist that the factual determination was binding on the *agency* rather than upon a trial court. The trial court's function here was one more of review rather than of a *de novo* litigation of a distinct cause of action. Despite the ultimate holding in *McClanahan*, there is nothing to intimate that *South Bend Federation of Teachers* is defunct precedent, at least in the agency-agency context.

The second important case addressed by *McClanahan* is *Cox v. Indiana Subcontractors Association, Inc.*[82] The factual issues in the *Cox* case are very similar to those presented in *McClanahan*: Cox filed a claim for unemployment compensation before the Employment Security Division after he was terminated from his positions as director and board secretary for the Indiana Subcontractors Association.[83] The Di-

78. *See supra* notes 19-25 and accompanying text.
79. 514 F. Supp. 1218 (S.D. Iowa 1981).
80. 180 Ind. App. at 318, 389 N.E.2d at 34.
81. *Id.* at 301, 389 N.E.2d at 25.
82. 441 N.E.2d 222 (Ind. Ct. App. 1982).
83. *Id.* at 224.

vision denied him benefits upon its determination that he had been terminated for just cause.[84] Cox then filed a suit against the Association for, among other things, breach of contract. In turn, the Association erected the Division's finding as res judicata on the issue. Like the *McClanahan* court, the *Cox* court examined the newly rendered opinion of *Gear v. City of Des Moines*[85] and, like the *McClanahan* court, held that res judicata was not applicable. The court of appeals held the doctrine inappropriate in this instance because "[it] is simply inapplicable to resolve a case as complex as the present one."[86] *Cox* and *McClanahan* are therefore congruent in result where they both reflect a disinclination to give deference to agency decisions in matters of judicial cognizance. However, the *Cox* result is disturbing because of its lack of rationale.

The most troubling aspect of the *Cox* decision is the utter lack of analysis of the *Gear* decision as it should have been applied to the matter at hand. There is no disputing that *Cox* probably set forth the appropriate standards of review as delineated in *Gear* in a more comprehensive fashion than did *McClanahan*. Unfortunately, such coverage does not explain the total lack of application of the *Gear* elements to the *Cox* facts. Rather, the court made the sweeping generalization that "[t]he Review Board [of the Employment Security Division] is not the proper authority to determine complex legal issues involving contract interpretation and tort issues."[87] Even if that proposition were true,[88] this declaration totally ignores the well-developed meaning of the collateral estoppel prong of res judicata: "when a particular issue is adjudicated and then is put into issue in a subsequent suit on a different cause of action between the same parties or those in privity with them."[89] Instead, the *Cox* court determined that a legal opinion rendered by the Division could not prevent relitigation of the same question in court.

The problem is that collateral estoppel is a fact-based principle rather than a law-based. The Division had made no contractual determination, only a determination of the reasons for Cox's termination, which *fact* would have been an essential element in the Association's defense of the breach of contract claim. In other words, the reliability of the *Cox*

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84. *Id.*

85. 514 F. Supp. 1218 (S.D. Iowa 1981).

86. *Cox*, 441 N.E.2d at 226.

87. *Id.* at 226.

88. *See, e.g.*, Metropolitan Dev. Comm'n v. I. Ching, Inc., 460 N.E.2d 1236, 1237 (Ind. Ct. App. 1984) ("It is . . . well settled that landowners seeking to raise the issue of [confiscation of property without just compensation] must exhaust their administrative remedies by presenting the constitutional issue to the Board of Zoning Appeals before invoking the aid of the courts.").

89. South Bend Fed'n of Teachers v. National Educ. Ass'n, 180 Ind. App. 299, 314, 389 N.E.2d 23, 32 (1979).

decision, as applied to the facts before it, is of questionable value although there is without doubt important ramifications for its use as a source of the law to apply when other significant cases arise dealing with the application of res judicata in the administrative-judicial context.

There also exists one other Indiana decision of a contemporary nature which is noteworthy, if for no other reason than that it sheds some additional light on our courts' willingness to apply the doctrine of res judicata with regard to agency decisions when the opportunity presents itself. In *Shortridge v. Review Board of Indiana Employment Security Division*,[90] collateral estoppel was utilized to require the Employment Security Division to abide by its own findings of fact rendered in 1977 when determining benefits to be awarded to the same claimant in 1984 proceedings.[91] The agency-agency application of res judicata was born of an analysis of *South Bend Federation of Teachers*.[92] However, what is interesting about this opinion is its divergence from the *Cox* case in its definitive reliance upon the collateral estoppel doctrine as applicable to findings of fact, and not just to the determination of singular legal questions as applied to those facts.

If one can say with any authority that there is a "pattern" to the manner in which Indiana courts will consider the doctrine of res judicata in giving estoppel effect to agency decisions, the likelihood of success is greater when the issue arises in the agency-agency relationship, as in *South Bend Federation of Teachers* and *Shortridge*. The philosophy inhering in those two cases is, succinctly, "if there is a reason to settle the issues involved once and for all,"[93] courts will not be loathe to apply estoppel-type principles to "guard parties against vexatious and repetitious litigation of issues which have been determined in a judicial or quasi-judicial proceeding."[94] Both opinions evince little or no patience for an agency's decision to reverse itself in subsequent proceedings where the legal questions and/or facts at issue remain essentially the same and where intervening events have not changed the circumstances upon which the initial findings were based.[95] Such philosophy, however, has not been translated into the agency-judiciary situation, where the courts seem more

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90. 498 N.E.2d 82 (Ind. Ct. App. 1986). *See also supra* notes 68-70 and accompanying text.

91. *Id.* at 91.

92. 180 Ind. App. 299, 389 N.E.2d 23 (1979). *See supra* text accompanying notes 78-81.

93. *South Bend Fed'n of Teachers*, 180 Ind. App. at 317, 389 N.E.2d at 34.

94. 180 Ind. App. at 318, 389 N.E.2d at 35; *see also Shortridge*, 498 N.E.2d at 90.

95. *South Bend Fed'n of Teachers*, 180 Ind. App. at 317, 389 N.E.2d at 34; *Shortridge*, 498 N.E.2d at 90.

reluctant to afford agency decisions the respect sufficient to estop later judicial determinations.

This attitude is best exemplified in *Cox*.[96] The deference ordinarily given by courts to administrative decisions and agency expertise[97] fell by the wayside when the court of appeals declared, "[t]he Review Board lacks the requisite training and experience to determine these matters."[98] That statement calls into question the manner in which an agency makes its factual determinations, especially because there seems to be no dispute but that collateral estoppel/issue preclusion, rather than estoppel by judgment, will be the manner of applying an administrative decision to a judicial cause of action. And the supreme court dealt handily with this very attitude toward such fact-finding expertise in *McClanahan*:

> [N]either Remington nor Barbour had a full and fair opportunity to litigate the issue of whether McClanahan was discharged for refusing to commit an illegal act. . . . [T]he nature of the administrative hearing itself differed substantially from a traditional courtroom proceeding. The referee acted as the primary questioner, and neither party was represented by counsel. Cross-examination was minimal and ineffective. Inasmuch as the rules of evidence do not strictly apply to administrative proceedings, a substantial amount of hearsay potentially inadmissible at trial was introduced without objection.
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> In light of all these circumstances, fairness requires that we not apply collateral estoppel. The relative informality of the particular administrative procedure at issue here does not meet the test used in *Cox*. It is a procedure designed for quick and inexpensive determinations of unemployment benefits.[99]

In essence, the supreme court implies that when an agency decision is brought for estoppel consideration before a court, its proceedings must be as nearly as akin to a judicial atmosphere as possible or its decisions will not merit application in a court of law. By the supreme court's very declaration that an agency's decision is specifically designed for "quick and inexpensive determinations" and by reason of the typically relaxed evidentiary and procedural requirements allowed in administrative

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96. *See supra* text accompanying notes 82-89.

97. *See, e.g.*, Capital Improvement Bd. of Managers v. Public Serv. Comm'n, 176 Ind. App. 240, 259, 375 N.E.2d 616, 630 (1978) ("[A court] in reviewing the decision of an administrative body is not to substitute its own opinions and conclusions for those of the agency, but rather must give deference to the expertise of that agency.").

98. 441 N.E.2d at 226.

99. 517 N.E.2d at 394-95.

proceedings,[100] it is unlikely that administrative decisions will ever become an integral part of the collateral estoppel doctrine in Indiana within the judicial arena, despite the representations to the contrary in *McClanahan v. Remington Freight Lines, Inc.*

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100. IND. CODE § 4-21.5-3-25(b) (1988) provides:
"The administrative law judge shall regulate the course of the proceedings . . . in an informal manner without recourse to the technical, common rules of evidence applicable to civil actions in the courts."
IND. CODE § 4-21.5-3-34 (1988) provides:
"An agency is encouraged to develop informal procedures that are consistent with this article and make unnecessary more elaborate proceedings under this article.