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COMMENT

ADMINISTRATIVE LAW—RES JUDICATA—Application of Res Judicata to Agencies with Parallel Jurisdiction

Umberfield v. School District 11, 522 P.2d 730 (Colo. 1974)

INTRODUCTION

Although the application of res judicata to administrative agency determinations was once questioned,[1] it is now accepted that under appropriate circumstances the doctrine may be used in administrative law. It is, however, well settled that the doctrine may not be indiscriminately applied to administrative determinations.[2] Before concluding that an agency decision is res judicata, courts must consider not only the traditional criteria applied to judicial decisions, *i.e.*, identity of claims, parties, and causes of action,[3] but also the theory, purpose, and intent of the doctrine in light of the specific factual situation before the court.[4] The Colorado Supreme Court in *Umberfield v. School District 11*[5] applied the doctrine of res judicata to the decision of a teacher tenure panel, despite previous statements that "where public interest may be adversely affected" prior administrative determinations should not be binding.[6] The Colorado Civil Rights Commission's (CCRC) jurisdiction over an alleged discriminatory dismissal of a tenured teacher was effectively denied by this decision.

The question of res judicata as it applies to two administrative agencies having parallel jurisdiction has arisen infrequently in case law. Accordingly, there are no well-established guidelines to follow in determining the appropriateness of the doctrine's application. Thus the rationale (or lack thereof) of *Umberfield* is potentially applicable in other situations where administrative agencies have overlapping jurisdiction. Reliance on the court's reasoning may result in further unwarranted, and perhaps even

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[1] K. DAVIS, ADMINISTRATIVE LAW TEXT § 18.03 (3d ed. 1972) [hereinafter cited as DAVIS].

[2] *Id.*

[3] *E.g.*, Liddell v. Smith, 345 F.2d 491 (7th Cir. 1965).

[4] Pearson v. Williams, 202 U.S. 281 (1906); Churchill Tabernacle v. FCC, 160 F.2d 244, 246 (D.C. Cir. 1947). *See generally* note 14 *infra* and accompanying text.

[5] 522 P.2d 730 (Colo. 1974).

[6] B & M Serv., Inc. v. PUC, 163 Colo. 228, 232, 429 P.2d 293, 295 (1967) (PUC decision was not binding and could be changed).

unintended, judicial limitation of agency jurisdiction. This comment will examine the theory and rationale behind the application of res judicata to administrative agency decisions. An analytical framework will be proposed which courts may use as a guide in applying res judicata to decisions made by agencies with potentially overlapping jurisdiction.

I. RES JUDICATA AND ADMINISTRATIVE AGENCIES

A. *The Doctrine of Res Judicata*

Courts unhesitatingly apply res judicata to final judicial decisions. As generally defined, res judicata means claim preclusion[7]—it prevents relitigation of all issues raised in the original suit between two parties, or their privies, as well as all issues that might properly have been raised.

Before the doctrine can be applied, three basic elements must be present: identity of the claims upon which the two proceedings are based; identity of the parties or their privies; and a final determination of the issues.[8] Inherent in these elements are two other elements: that the matter deemed to have been conclusively determined is within the jurisdiction of the body; and that the body making the determination is independent and uninterested. If any of these five elements are lacking, the original decision should not be held determinative of the later cause of action.[9]

B. *Res Judicata and Administrative Agencies*

1. Theory Behind Its Application

Although the trend is toward recognition of the doctrine in administrative law,[10] many courts[11] and most authorities[12] have

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[7] Umberfield v. School Dist. 11, 522 P.2d 730, 732 (Colo. 1974). *See generally* RESTATEMENT OF JUDGMENTS, Introductory Note §§ 41-72 (1942); Vestal, *Extent of Claim Preclusion*, 54 IOWA L. REV. 1 (1968).

[8] *E.g.*, City & County of Denver v. Colorado Seminary, 96 Colo. 109, 41 P.2d 1109 (1934).

[9] *E.g.*, United States v. International Bldg. Co., 345 U.S. 502, 504-05 (1953) (where subsequent action is based on a different claim the original proceeding operates as a bar only for those issues actually heard and determined); Bankers Pocahontas Coal Co. v. Burnet, 287 U.S. 308, 312 (1932) (res judicata requires identity of the parties); Gensinger v. Commissioner, 208 F.2d 576, 579 (9th Cir. 1953) (jurisdiction lacking in the original Tax Court proceeding); Sachs v. Ohio Nat'l Life Ins. Co., 148 F.2d 128, 132 (7th Cir.), *cert. denied*, 326 U.S. 753 (1945) (an order which was not final, issued by an agency which lacked jurisdiction, could not preclude redetermination of the issues).

[10] United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966); Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622, 627 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955) (res judicata applies to agencies when exercising "judicial functions"); French v. Rishell, 40 Cal. 2d 477, 254 P.2d 26 (1953); DAVIS § 18.01. *Compare* McMahan v. Yeilding, 270 Ala. 504, 120 So. 2d 429 (1960) (ministerial actions are not res judicata).

stressed the need for careful consideration of the unique processes of administrative law[13] in applying the doctrine. It has been established that res judicata will be considered a bar to collateral attack of an agency decision only when the agency has been acting in its quasi-judicial capacity.[14] When the determination is based on unchanged law and facts the doctrine has been most strictly applied.[15] The rationale behind limiting the application of res judicata in this manner is that the doctrine is used in administrative law for the same reasons that it is applied to judicial determinations:[16] finality and judicial economy.

Case law[17] suggests that when the issue of res judicata arises in respect to an administrative determination

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[11] United States v. Stone Downer Co., 274 U.S. 225 (1927) (nature of Court of Customs precludes its finding from being res judicata); Pearson v. Williams, 202 U.S. 281 (1906) (initial hearing on alien exclusion too hasty to bar a future hearing on the same question); United States v. Smith, 482 F.2d 1120, 1123 (8th Cir. 1973) (res judicata must be flexibly applied to administrative decisions); Gordon County Broadcasting Co. v. FCC, 446 F.2d 1335 (D.C. Cir. 1971) (NLRB finding that employee was not dismissed for racial reasons did not bar a Title VII action since the NLRB examiner was primarily concerned with union activities); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 126 (6th Cir. 1971) (a Labor Relations Board decision on the issue of racial discrimination did not preclude a subsequent consideration of this issue by the Equal Employment Opportunity Commission); Grose v. Cohen, 406 F.2d 823 (4th Cir. 1969) (when facts in administrative determinations so require, the doctrine of res judicata should not be strictly applied); Lane v. Railroad Retirement Bd., 185 F.2d 819 (6th Cir. 1950) (determination by the National Railroad Adjustment Board concerning an employment relationship was not binding on Railroad Retirement Board since two different statutes were involved); Sekov Corp. v. United States, 139 F.2d 197 (5th Cir. 1943) (prior FTC determination did not bar a district court redetermination of same issue).

[12] *E.g.*, 2 F. COOPER, STATE ADMINISTRATIVE LAW 503 (1965) [hereinafter cited as COOPER]; DAVIS § 18.04.

[13] Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 WIS. L. REV. 1.

[14] United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); Associated Indus., Inc. v. United States Dep't of Labor, 487 F.2d 342, 350 n.10 (2d Cir. 1973); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971); Jet Air Freight v. Jet Air Freight Delivery, Inc., 264 So. 2d 35 (Fla. Ct. App. 1972); Roman Cleanser Co. v. Murphy, 366 Mich. 351, 194 N.W.2d 704 (1972); Standard Auto Parts Co. v. Michigan Employment Security Comm'n, 3 Mich. App. 81, 143 N.W.2d 135 (1966); Morin v. S.H. Valliere Co., 113 N.H. 436, 309 A.2d 153 (1973); Walsh v. Pluess-Staufer, Inc., 67 Misc. 2d 855, 325 N.Y.S.2d 19 (Sup. Ct. 1971). *See* DAVIS §§ 18.02-.03. Res judicata does not apply to decisions made when an administrative agency is acting in its rulemaking capacity.

[15] Stucky v. Weinberger, 488 F.2d 904, 911 (9th Cir. 1973); Painters Dist. Council 58 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969) (all facts pertinent to second action had been fully heard and decided in the initial proceeding); DAVIS § 18.03, at 559.

[16] Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622 (4th Cir. 1955); Old Dutch Milk Farms, Inc. v. Milk Drivers & Dairy Employees Local 584, 281 F. Supp. 971, 974 (E.D.N.Y. 1968); DAVIS § 18.03.

[17] Cases cited note 11 *supra*.

> the decision [whether to apply the doctrine] depends upon a weighing of competing interests in light of all the factors involved in the particular case.[18]

Administrative agencies are given the authority to investigate, adjudicate, and legislate in specified areas based on the premise that they will develop expertise in their fields. The decisionmakers are generally selected for their knowledge within the areas of agency jurisdiction. Their expertise justifies the deference given to administrative agencies by courts, particularly when the agency has been created to protect an individual's rights and to enforce public policy.[19]

2. Three Contexts in Which Res Judicata May Apply

The question of whether to apply res judicata to an agency decision arises in three basic contexts: what weight a court should give to an agency decision in a subsequent proceeding; what effect the original decision has if the same parties seek a rehearing before the same agency; and what effect a prior administrative decision has when a collateral attack is made to another agency based upon the same factual circumstances.

The first of these situations arises when the consequences of an agency decision are bypassed by a collateral attack on the issue in court.[20] Must the agency's decision be accorded the conclusive effect of a similar decision by a court of law? Courts have answered this question affirmatively or negatively depending upon the facts before them.[21] When there has been reliance upon

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[18] COOPER at 508.

[19] *See generally* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971); 1964 U.S. CODE CONG. & AD. NEWS 2401 (purpose of Civil Rights Act of 1964, Title VII).

[20] This situation frequently arises in EEOC Title VII cases. As a result of a recent Supreme Court decision, a finding by the EEOC that a complainant has been dismissed for cause does not preclude a collateral attack in court. The district court is not bound by the factual findings or conclusions reached by the EEOC. In fact, the petitioner is entitled to a trial de novo at the district court level on the issue of the alleged Title VII violation. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[21] United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966) (holding that prior agency determination was final and binding on court based on the facts of the case); Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955) (applying res judicata to a prior Tax Court determination of liability); Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Local 584, 281 F. Supp. 971 (E.D.N.Y. 1968) (denying application of res judicata to administrative determination when it appeared that there were significant facts that remained to be determined); Jet Air Freight v. Jet Air Freight Delivery, Inc., 264 So. 2d 35 (Fla. Ct. App. 1972) (court applied res judicata to a prior agency determination); EPPS Air Serv., Inc. v. Lampkin,

the initial decision, or when the decision has provided the basis for a third party's change in position, the courts appear more ready to find the agency decision conclusive. However, when it is apparent that all the facts were not considered by the agency,[22] or when the agency has exceeded it statutory authority,[23] res judicata will generally not be applied. Rather than allowing a collateral attack, however, courts usually hold that the proper recourse is an appeal of the agency decision.[24]

Different factors must be considered when, as in the second situation, what is sought is a rehearing before the same agency, rather than a collateral attack in court. Rehearings by an agency may be mandated by its organic statute or by the inherent nature of the agency itself.[25] The situation arises most often, however, when there has been a change in facts or law, or when new facts have been discovered.[26] When facts change there is no real question of res judicata, since the previous decision was based on premises which are no longer valid. Similarly, when a statute provides for redetermination of issues previously decided, there is recognition by the legislature that the subject matter of the agency's jurisdiction may require periodic reconsideration. Problems of conclusiveness of a prior decision do arise, however, when the petitioner requests a rehearing based on some inadequacy in the initial proceeding.[27] If an agency's refusal to grant a rehearing

229 Ga. 792, 194 S.E.2d 437 (1972) (court did not accord prior agency decision finality based on different issues raised in the two proceedings); Walsh v. Pluess-Staufer, Inc., 67 Misc. 2d 855, 325 N.Y.S.2d 19 (Sup. Ct. 1971).

[22] *E.g.*, Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Local 584, 281 F. Supp. 971 (E.D.N.Y. 1968).

[23] *E.g.*, Flavell v. Department of Welfare, 144 Colo. 203, 355 P.2d 941 (1960).

[24] *E.g.*, Reconstruction Fin. Corp. v. Lightsey, 185 F.2d 167 (4th Cir. 1950).

[25] An example of this is the ability of the FCC to review radio and television licenses periodically. Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947) (the court refused to prevent agency rehearing on whether to approve a license previously granted).

[26] Jason v. Summerfield, 214 F.2d 273 (D.C. Cir.), *cert. denied*, 348 U.S. 840 (1954) (change in law); NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir.), *cert. denied*, 321 U.S. 795 (1944) (previous agency inaction does not operate as a bar to a new action on new facts even though the same parties were involved); B & M Serv., Inc. v. PUC, 163 Colo. 193, 429 P.2d 293 (1967) (previous grant of license not a bar to refusal to grant license on the same factual situation presented in the first application); Metropolitan Dade County Bd. of Comm'rs v. Rockmatt Corp., 231 So. 2d 41 (Fla. Ct. App. 1970) (court held prior zoning determination res judicata in regard to subsequent attempt at rezoning hearing, barring substantial change in circumstances); Canada v. Peake, Inc., 184 Neb. 52, 165 N.W.2d 587 (1969) (order of railway commission was not res judicata as to subsequent application of same nature since issues presented for new application were not raised at the previous determination).

[27] *E.g.*, Southland Indus., Inc. v. FCC, 99 F.2d 117, 121 (D.C. Cir. 1938) (there should

is appealed, courts analyze the initial hearing in the same way that a trial court decision is reviewed by an appellate court: the court examines the significance of the alleged inadequacy and the effect it may have had on the original decision. Unless the agency decision has denied fundamental fairness, courts will generally defer to an agency's grant or denial of a rehearing.[28] The specific standards of review provided for most agency decisions[29] and the expertise of administrative agencies justifies this deference by the courts.

Cases presenting the question of res judicata have arisen with some regularity in the two contexts described above. The applicability of the doctrine to one of two agency determinations when both agencies have heard and decided the issue based upon their own statutorily-defined objectives has arisen infrequently.[30] It was in this context, however, that the court in *Umberfield* considered and applied res judicata to the teacher tenure panel decision.

Where two agencies have had parallel jurisdiction, the potential conflict in decisionmaking ability has frequently been resolved by statutory interpretation,[31] informal agreements between the agencies themselves,[32] or the court's reliance on procedural or factual variations between the proceedings.[33] If these solutions prove unworkable, the court should carefully examine all pertinent issues in order to reach the desired result and avoid

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be a right to rehearing to enable the commission to correct errors or hear newly discovered evidence).

[28] *E.g.*, United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 535 (1946); ICC v. Parker, 326 U.S. 60, 73 (1945).

[29] *E.g.*, COLO. REV. STAT. ANN. § 24-4-106(7) (1973).

[30] The situations in which this issue may arise are limited. For example, areas of concurrent state and federal jurisdiction include CCRC and EEOC, Social Security and state welfare agencies, ICC and a state public service commission which also grants licenses; concurrent jurisdiction between two federal agencies may arise between the NLRB and EEOC, FTC and FDA, Railroad Retirement Board and National Railroad Adjustment Board; concurrent jurisdiction between two state agencies exists between state unemployment commission and CCRC, and now, the teacher tenure panel and the CCRC.

[31] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971); Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Lane v. Railroad Retirement Bd., 185 F.2d 819 (6th Cir. 1950).

[32] For example, such agreements exist between the FTC and the FDA. *See generally* Groner & Sternstein, *Res Judicata in Federal Administrative Law*, 39 IOWA L. REV. 300 (1954); Kleinfeld & Goding, *Res Judicata and Two Coordinate Federal Agencies*, 95 U. PENN. L. REV. 388 (1947).

[33] *E.g.*, State Licensing Bd. for Healing Arts v. Alabama Bd. of Podiatry, 287 Ala. 132, 249 So. 2d 611 (1971) (record insufficient to determine if the issue between the two boards was really identical).

unwarranted intrusions upon agency jurisdiction. Since the court found no informal agreements or significant procedural variations in *Umberfield*, the failure to analyze fully the application of res judicata to the facts in the case was particularly critical.

II. *Umberfield v. School District 11*

A. *Case Facts and History*

Umberfield, a tenured teacher in School District 11, joined the World Wide Church of God in 1969. He requested leaves of absence in October 1969 and in April 1970 to observe religious holy days. Although the school board denied permission, Umberfield was absent on the holy days.[34] In April 1970 he was charged with breach of contract and neglect of his teaching duties and the school board initiated dismissal proceedings.[35] The teacher tenure panel (the panel) recommended dismissal and the school board acted thereon. In August 1970 Umberfield filed a complaint with the CCRC, alleging that his dismissal was based on his religious practices and thus violated the Colorado Antidiscrimination Act of 1957 (Antidiscrimination Act).[36]

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[34] The record before the CCRC stated that Umberfield had offered to procure and pay for a substitute teacher or to teach summer school without compensation, and that he did provide detailed lesson plans to be used in his absence. Transcript of the Hearing before the Comm'n at 15 (Sept. 24, 1971).

[35] COLO. REV. STAT. ANN. § 22-63-117(1)-(4) (1973) describes the procedure to be followed: The board accepts the recommendation of any member that a teacher be dismissed. The teacher is notified and may request that a panel to review the recommendation be convened. The panel is composed of three lay individuals who are not affiliated with the school district. The board selects one member, the teacher selects a second member, and a third is chosen by the two who have already been selected.

[36] *Id.* § 24-34-306(2). The question of religious discrimination was never considered on its merits by any court of review. However, the CCRC did find as a result of its investigation and hearing that Umberfield's dismissal violated the Antidiscrimination Act, which forbids an employer to discharge any person who is otherwise qualified because of his creed. The commission found that the school district interfered with the free exercise of Umberfield's religion by forcing him to choose between continued employment and observance of the tenets of his faith. *Cf.* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Furthermore, the CCRC found that such an infringement can only be justified by a compelling state interest or business reason. Applying the standards used by the courts in interpreting rights arising under the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e [hereinafter cited as Title VII], and by the CCRC in rights arising under COLO. REV. STAT. ANN. §§ 24-34-301 to -308 (1973), an attempt at reasonable accomodation must be made by the employer if it can be made without undue hardship. Moody v. Albemarle Paper Co., 474 F.2d 134, 140 (4th Cir. 1973); Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (where job criteria are justified by "business necessity" they are permissible); Claybaugh v. Pacific N.W. Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973); *cf.* Pillar of Fire v. Denver Urban Renewal Authority, 509 P.2d 1250 (Colo. 1973).

The CCRC found that the dismissal was in violation of the Antidiscrimination Act.[37] The school district appealed the CCRC's decision, alleging that the CCRC lacked jurisdiction over Umberfield's complaint because of the panel's previous adjudication of the matter. The district court upheld the school district's contention. On appeal the court of appeals reversed the district court's finding that the CCRC lacked jurisdiction, but affirmed the decision on the basis that the CCRC's findings were not supported by the evidence.[38] The Supreme Court of Colorado granted certiorari "[p]rimarily to review the correctness of the Court of Appeals ruling that the doctrine of *res judicata* did not apply."[39]

B. *The Court's Rationale*

The Colorado Supreme Court held that the CCRC lacked jurisdiction because the teacher tenure panel findings were res judicata. They reasoned that since the court's broad scope of review of a tenure panel decision[40] extended to all matters, the

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[37] COLO. REV. STAT. ANN. §§ 24-34-301 to -308 (1973).

[38] "The findings of fact by the commission are conclusive upon the district court if supported by substantial evidence." Colorado Civil Rights Comm'n v. State, 30 Colo. App. 10, 17, 488 P.2d 83, 85 (1971). *E.g.*, Colorado Civil Rights Comm'n v. Refrigerated Foods, Inc., 515 P.2d 1137 (Colo. 1973); Texas Southerland Corp. v. Hogue, 30 Colo. App. 560, 497 P.2d 1275 (1972) (the requirement may be met by indirect evidence). Substantial evidence requires affirmance of an agency determination of fact unless the weight of the record as a whole "clearly precludes" the agency's decision. Inherent in the concept of substantial evidence is a requirement for quantity as well as quality. The quality aspect is satisfied when there is a residuum of legally admissible evidence sufficient to support the agency's findings. Johnson v. Industrial Comm'n, 137 Colo. 591, 597, 328 P.2d 384, 387 (1958); Williams v. New Amsterdam Cas. Co., 136 Colo. 458, 464, 319 P.2d 1078, 1081 (1957). *See also* COOPER at 727.

[39] 522 P.2d at 732.

[40] *Id.* at 733. A panel hearing is subject to review as statutorily provided.

> If [the district court] finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege or immunity . . . then the court shall hold unlawful and set aside the agency action . . . . In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretations to the facts duly found or established.

Id. § 24-4-106(7). The statutory standard which the court applies is "*clearly erroneous* on the whole record, unsupported by *substantial evidence* when the record is considered as a whole . . . ." *Id.* (emphasis added). As defined by the court in United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), "clearly erroneous" is a finding that leaves the reviewing court "with a definite and firm conviction that a mistake has been committed." "Policy, authority and history all thus show that the 'clearly erroneous' rule gives the reviewing court broader powers than the 'substantial evidence' formula." Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 88-89 (1944). *See also* COOPER at 726. Note that the 1969 amendment to

panel itself had authority to consider violations of statutory or constitutional rights.[41] Although the grounds for dismissal which are specified in the Teacher Employment, Dismissal, and Tenure Act of 1967 (Teacher Tenure Act)[42] make no mention of statutory or constitutional rights, the court argued that the scope of review defined the panel's jurisdiction. It was the court's contention that Umberfield actually presented his complaint of discrimination to the panel when he alleged a violation of his constitutional rights, and that the panel rejected it.[43] (The court stated that he could have, but did not, allege violation of the Antidiscrimination Act). The court reasoned that if it failed to accord finality to the panel's decision and allowed the CCRC to hear the question of a discriminatory practice, the court might be "compelled to affirm opposite results of the two administrative bodies."[44]

To support its contention that res judicata may be applied to an administrative determination, the court cited *United States v. Utah Construction & Mining Co.*[45] Although the Supreme Court in that case made the general statement that res judicata may apply to administrative agencies when they have resolved "disputed issues of fact properly before [them] which the parties have had an adequate opportunity to litigate . . ."[46] the facts in the case were much stronger. The parties had contractually agreed that the determinations were to be final.[47] By simplistically adopting the Supreme Court's general statement, the Colorado court failed to consider whether the requisite elements for a finding of res judicata were present in *Umberfield*.

Of the five elements necessary for a proper application of res judicata, only two, the identity of the parties before both the panel and the CCRC, and the finality of the panel's decision, were clear. The identity of claims, the jurisdiction of the panel to de-

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the Colorado Administrative Procedure Act provides for both standards of review. The court has not, as yet, interpreted these two standards together.

[41] COLO. REV. STAT. ANN. § 22-63-116 (1973) provides that a tenured teacher may be dismissed for "physical or mental disability, incompetency, neglect of duty, immorality, conviction of a felony, insubordination, or other good and just cause. . . ."

[42] *Id.*

[43] At the CCRC hearing Umberfield stipulated that he had alleged at the panel hearing that the school board's action was in "[v]iolation of the rights guaranteed all citizens, including the teacher, under the Constitution of the United States and the State of Colorado. . . ." 522 P.2d at 734.

[44] *Id.*

[45] 522 P.2d at 732, *citing* 384 U.S. 394 (1966).

[46] 384 U.S. at 422.

[47] *Id.* at 419.

termine a violation of the Antidiscrimination Act or of the Constitution, and the determination by an independent board were only questionably present.

To support a finding of res judicata, the same claim must provide the basis for both actions.[48]

> In deciding whether the substances of two actions are for *res judicata* purposes the same, various tests have been advanced: Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?[49]

Since these guidelines are directed at judicial rather than administrative determinations, they should be liberally interpreted and applied.[50] In *Umberfield* two distinct rights arising under two different statutes provided the bases for the claims. A finding of discrimination, or lack thereof, by the CCRC would not impair Umberfield's rights before the panel. However, due to the mandate against discrimination, if there were a finding that Umberfield's rights under the Antidiscrimination Act had been violated, this might impair the school board's ability to effectuate a dismissal.

Likewise, although the evidence necessary to both actions arose out of the same transaction, arguably different evidence is relevant to meet the statutory criteria of the Teacher Tenure Act[51] and the Antidiscrimination Act.[52] Thus the requirement that both causes of action arose from the same claim should not have been so quickly dismissed by the court. Even if the court had found that the complaint before the CCRC and the action by the panel were based on the same claim, the question of jurisdiction was not effectively resolved by the court. As a defense for his absences from school Umberfield may have presented the infringement of his free exercise of religion. This did not, however, give the panel direct jurisdiction to make a final determination of the constitutional violation,[53] much less a violation of another state statute.

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[48] *See, e.g.*, United States v. International Bldg. Co., 345 U.S. 502 (1953).

[49] Acree v. Air Line Pilots Assoc., 390 F.2d 199, 201 (5th Cir.), *cert. denied*, 393 U.S. 852 (1968). *See also* RESTATEMENT OF JUDGMENTS §§ 61-67 (1942).

[50] *See generally* DAVIS § 18.03.

[51] COLO. REV. STAT. ANN. § 22-63-116 (1973).

[52] *See* note 116 *infra* for the text of the Act.

[53] RESTATEMENT OF JUDGMENTS § 71 (1942):

> Where a court has incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine

Direct jurisdiction to make final determinations of legal and factual issues may not be conferred by incorporating by reference a general procedural statute.

Not only did the panel lack direct jurisdiction, but the final decision to dismiss Umberfield was not made by an uninterested body, as the doctrine of res judicata requires. The school board makes the final decision to terminate a tenured teacher's employment.[54] Thus the court found that a decision by an interested party was res judicata, thereby preventing a determination of a statutory violation by an independent, statutorily-created agency.

In the CCRC the legislature has created an agency with expertise in discriminatory employment practices. However, the court's rationale effectively weakened the CCRC by limiting its ability to hold a hearing on the alleged discriminatory dismissal. If, as the court suggested, the scope of review[55] expands the jurisdiction of the agency, all agencies would have authority to decide violations of any constitutional or statutory rights.[56] Consequently, there would be no need for the CCRC. Inasmuch as the legislature did create an agency with specific jurisdiction over discriminatory employment practices, it is reasonable that the CCRC, and not other agencies, should be allowed to make final determinations of discrimination.

The court in *Umberfield* ignored not only the expertise of the CCRC and the legislative intent expressed in its creation, but also the absence of several elements required for the application of res judicata. Even if the court had determined that all necessary elements were present for finding the panel decision res judicata,

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> it, the judgment is not conclusive in a subsequent action brought to determine the matter directly.

Similarly, the Colorado Court of Appeals in School District v. Howell, 517 P.2d 422 (Colo. Ct. App. 1973), held that the CCRC could not determine violations of constitutional rights. The scope of the CCRC's jurisdiction was specifically limited to determining violations of its own organic statute. If the court's logic in *Umberfield* were extended, then *Umberfield* would overrule *Howell*. Since the CCRC is also subject to the Administrative Procedure Act's standards of review, it too would have jurisdiction to make determinations of constitutional violations.

[54] COLO. REV. STAT. ANN. § 22-63-117(10) (1973).

[55] *Id.* § 24-4-106(7). The Administrative Procedure Act defines the scope of review for all administrative agency decisions except those exempted by provisions of individual statutes. *Id.* § 24-4-107.

[56] The Administrative Procedure Act is purely a procedural statute and was not intended to be a source of agency jurisdiction. Jurisdiction of an agency is determined solely by the organic statute of that agency.

there are other factors which must be considered before the doctrine can be applied to an administrative decision.

III. AN ANALYTICAL FRAMEWORK FOR DETERMINING THE APPLICABILITY OF RES JUDICATA

Under the case law dealing with the application of res judicata to administrative agencies[57] it is clear that this doctrine is not a simplistic concept, but one in which issues other than the basic definitional elements must be considered. It is a complex doctrine when applied to administrative determinations, and must be applied differently in different contexts. Although courts have generally dealt with one, or at most two, of these issues in any case, each issue is important and should be considered by the court in all instances.

A. *An Overview of the Proposed Analysis*

A functional breakdown of the case law suggests that there are four basic issues which a court must analyze (in addition to the five elements discussed earlier)[58] when considering the application of res judicata to administrative agency decisions: (1) election of remedies; (2) primary jurisdiction; (3) exhaustion of remedies; (4) public policy considerations.[59] Although these issues have usually arisen in contexts where a rehearing before the same agency is sought or a collateral attack of an agency decision is made in court, they are equally relevant to the situation in which two administrative agencies have parallel jurisdiction, as in *Umberfield*. Because any of these issues can constitute sufficient grounds for refusal to apply res judicata to an administrative decision, it is not usually necessary for a court to consider all of them. But if one or more considerations appears to support application of the doctrine, the court should carefully examine each of the remaining issues. For example, even if there has been an election of remedies, there may be important public policy considerations or questions of primary jurisdiction which may preclude use of the doctrine.

The relative weight of each of the four issues will vary with the facts of the particular case. When an agency decision is collat-

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[57] *See* text accompanying notes 10-19 *supra*.

[58] *See* text accompanying notes 7-9 *supra*.

[59] No one case was found which discussed all these issues. *See* the detailed discussion accompanying notes 60-118 *infra*, for cases dealing with each issue.

erally attacked in court, for example, the questions of election and exhaustion of remedies are probably the most important and should be considered first. However, when two agencies have parallel jurisdiction, as in *Umberfield*, and a party attempts to establish that only one of those agencies may hear and decide an issue, the questions of election of remedies, primary jurisdiction, and, sometimes, public policy should be given the greatest weight.

In *Umberfield* the Colorado Supreme Court completely failed to recognize the complex nature of the doctrine. They took a simplistic definition[60] and applied it uncritically to the tenure panel decision. Had the court considered all the relevant factors, the inappropriateness of applying res judicata to the facts of this case would have been apparent.

B. *Elements of the Analytical Framework*

1. Election of Remedies

When a court is faced with a situation where a party has two or more potential avenues of relief available, the issue of election of remedies must be explored.[61] In *Umberfield* there was no real election made since the panel hearing preceded Umberfield's dismissal and the dismissal itself provided the basis for his complaint to the CCRC. The issue, however, was still pertinent, since the court proceeded as if Umberfield's pursuit of his right to a hearing before the panel resulted in a choice of forums. The court held that he was estopped from seeking alternative relief when the panel action resulted in his dismissal by the board.[62]

In Colorado, courts have traditionally been reluctant to impose an election of remedies on a party unless directly inconsistent positions must be taken to avail oneself of both remedies.[63] The principal limitation on the pursuit of concurrent remedies is that a party is entitled to only one satisfaction.[64] In conjunction

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[60] 522 P.2d at 732.

[61] Election of remedies is often used by courts to include election of forums. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Thus, although there was no possibility of duplicate relief being awarded, nor any real election of remedies made in *Umberfield*, the term as used throughout this section incorporates election of forums.

[62] 522 P.2d at 734.

[63] Louis Cook Plumbing & Heating, Inc. v. Frank Briscoe Co., 445 F.2d 1177, 1179 (10th Cir. 1971); Carpenter v. Donohoe, 154 Colo. 78, 82, 388 P.2d 399, 401 (1964); Holscher v. Ferry, 131 Colo. 190, 193, 280 P.2d 655, 657 (1955); Thornburg v. Homestead Minerals Corp., 513 P.2d 219, 220 (Colo. App. 1973).

[64] Marean v. Stanley, 5 Colo. App. 335, 338, 58 P. 395, 396 (1894).

with the contract claims actually made before the tenure panel in *Umberfield*, it would not have been inconsistent to allege a violation of the Antidiscrimination Act.[65] Nor was there any possibility of duplicate relief being sought, since Umberfield did not file a complaint with the CCRC until after the panel had met, the school board had acted, and he had been dismissed.

In *Umberfield* the court was faced with a situation that is directly analogous to cases that have arisen alleging violations of the Civil Rights Act of 1964 (Title VII)[66] and labor agreements or the National Labor Relations Act.[67] Labor arbitration agreements and the National Labor Relations Act provide for arbitration of labor disputes by a board of arbitrators chosen specifically to deal with the complaint. If the complainant also alleges that a discriminatory employment practice has occurred, there is an additional remedy provided by Title VII.

Title VII[68] is the federal counterpart to the Antidiscrimination Act.[69] They are both designed to

> eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices . . . .[70]

Thus, comparison of *Umberfield* with cases arising where resort to arbitration has preceded or accompanied a Title VII action is

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[65] COLO. REV. STAT. ANN. §§ 24-34-301 to -308 (1973).

[66] 42 U.S.C. § 2000e (1970). Although most of the cases arising under Title VII deal with racial discrimination, the language of its provisions also forbids discrimination on the basis of religion. The wording of the Antidiscrimination Act and Title VII in these sections is nearly identical, so the comparison of these cases with *Umberfield* is appropriate. However, the procedure embodied in COLO. REV. STAT. ANN. §§ 24-34-305 to -308 (1973) and that in Title VII differ in how allegations of discrimination are dealt with.

Under the Colorado Act, the CCRC conducts an investigation and hearing and reaches a final determination of the substance of the allegation. Its findings are reviewable by a district court. However, according to the provisions of Title VII, the EEOC conducts an investigation and determines the validity of the complaint. It then attempts by informal means to resolve the problem. If this attempt is unsuccessful, it notifies the complainant of its findings and authorizes him to seek judicial relief. Under the 1972 amendment the EEOC itself may pursue a judicial hearing on the question. Therefore, under Title VII, the court makes the final determination, enforceable by law, as to the existence of any discrimination, whereas in Colorado the CCRC is empowered, based upon its own decision, to grant appropriate relief.

[67] 29 U.S.C. § 158(a)(1) (1970).

[68] 42 U.S.C. § 2000e (1970).

[69] COLO. REV. STAT. ANN. §§ 24-34-301 to -308 (1973).

[70] 1964 U.S. CODE CONG. & AD. NEWS 2401; *see* COLO. REV. STAT. ANN. §§ 24-34-301 to -308 (1973).

appropriate, since both Title VII and the Antidiscrimination Act address similar problems.

The Teacher Tenure Act provides for the convening of a tenure panel at the teacher's request to conduct a hearing concerning any proposed dismissal of a tenured teacher. Its composition and functions are defined by statute.[71] The panel evaluates, in light of the Teacher Tenure Act[72] and the teacher's contract, the validity of the complaint on which the recommendation for dismissal is based. The statute defines the grounds for dismissal and provides the framework in which the panel operates. Similarly, the role of the arbitrator or an arbitration board

> is to carry out the aims of the agreement that [it] has been commissioned to interpret and apply, and [its] role defines the scope of [its] authority.[73]

The rights arising under both Title VII and the Antidiscrimination Act, however, are distinct and separate from the rights guaranteed by an employment contract or the Teacher Tenure Act. The courts have stressed the distinction between the rights arising under a labor arbitration agreement and those arising under Title VII, refusing to apply an election of remedies to Title VII cases.[74] This same distinction between the rights arising under the Teacher Tenure Act and those protected by the Antidiscrimination Act was ignored by the Colorado court in *Umberfield.*

In a recent U.S. Supreme Court decision, *Alexander v. Gardner-Denver*,[75] it was held that the doctrine of election of remedies is inapplicable when there are statutory rights distinctly separate from the employee's contract rights. Prior to *Gardner-Denver*, courts had limited an arbitrator's authority to determining the existence of any contract violations; he had no authority to make a conclusive determination of any other statutory rights that may have been violated.[76] Courts reasoned that the fundamental nature of the rights protected by Title VII[77] militates

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[71] COLO. REV. STAT. ANN. § 22-63-117(5)-(9) (1973).

[72] *Id.* §§ 22-63-101 to -118.

[73] Hutchings v. United States Indus., Inc., 428 F.2d 303, 312 (5th Cir. 1970).

[74] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971).

[75] 415 U.S. 36 (1974).

[76] Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971); Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970).

[77] *See generally* 1964 U.S. CODE CONG. & AD. NEWS 2401.

against use of any body, other than the one specially created, to make a final finding of discriminatory employment practices.[78] The Teacher Tenure Act was designed to prevent arbitrary dismissals of tenured teachers,[79] and similarly most labor agreements are designed to protect both the employer's and employee's rights and interests in the employment relationship, and to prevent unjustified, capricious actions on the part of either party. The Supreme Court found that the fact that a violation of one's civil rights and contract rights arose from the same incident did not erase the distinction between those two rights. In allowing Alexander to pursue both remedies, the Court found the relationship between the forums to be complementary rather than inconsistent.[80] Since the rights protected by the Antidiscrimination Act[81] are identical with those the court found in *Gardner-Denver*[82] to be distinct and separate from the rights guaranteed in the arbitration agreement, the analogy seems compelling.

In failing to follow the lead of the U.S. Supreme Court, the Colorado court constructively imposed an election of remedies on Umberfield by precluding his complaint to the CCRC. By so doing, it failed to give any weight either to its traditional reluctance to impose such a harsh doctrine or to the importance of safeguarding those rights protected by the Antidiscrimination Act.[83]

2. Primary Jurisdiction

In failing to allow the CCRC to investigate claims directly within its competence, the Colorado court ignored a fundamental tenet of administrative law, primary jurisdiction. The court argued that if it recognized the CCRC's jurisdiction over the dismissal, affirmation of two conflicting agency decisions might be required. They justified their holding that the tenure panel decision was res judicata on the issue of religious discrimination on the basis of this potential conflict.[84]

The doctrine of primary jurisdiction provides that when there is concurrent jurisdiction between an administrative agency

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[78] Cases cited note 76 *supra*.
[79] COLO. REV. STAT. ANN. §§ 22-63-111 to -116 (1973).
[80] 415 U.S. 36 (1974).
[81] COLO. REV. STAT. ANN. §§ 24-34-301 to -308 (1973).
[82] 415 U.S. 36 (1974).
[83] COLO. REV. STAT. ANN. §§ 24-34-301 to -308 (1973).
[84] 522 P.2d at 734.

and a court, the court should defer factual determinations to the agency. This deference is based on the supposed expertise of the agency and the need for uniform interpretation of statutory provisions that can only be afforded when one body hears all cases that arise thereunder.[85] It has been suggested that this concept could be applied in modified form to two administrative agencies with concurrent jurisdiction.[86]

Under the doctrine of "primary jurisdiction," even if the issues raised in the first proceeding were arguably within the jurisdiction of that agency but another agency had been created with specific jurisdiction over those issues, it would be the second agency whose jurisdiction would be recognized. If this concept had been accepted by the court there would have been no potential conflict. Because the two agencies involved in *Umberfield* have distinct functions and because only the CCRC has explicit jurisdiction and expertise in discriminatory employment practices, it, and not the tenure panel, should be authorized to make a final determination of any discriminatory acts.

3. Exhaustion of Remedies

The question of exhaustion of remedies, like those of jurisdiction and scope of authority discussed below, involves statutory construction and consideration of legislative intent. The issue which a court must decide is whether all remedies that are provided in the statute have been, or must be, exhausted[87] before an appeal can be taken or a collateral attack made. The rationale behind the application of exhaustion of remedies to an administrative decision is threefold:

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[85] G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379 (Alas. 1974). *See generally* Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

[86] Editorial Note, *Res Judicata and Administrative Jurisdiction—A Proposal for Resolving Conflicts Between Agencies with Overlapping Jurisdiction*, 35 GEO. WASH. L. REV. 1056, 1063 (1967). The note suggests that an interlocutory appeal provision be incorporated into the APA providing for a determination of proper jurisdiction. A court would determine, based on the issue in controversy, which agency would have jurisdiction to hear and decide the controversy. This decision would then be subject to judicial review under APA provisions.

[87] Denver-Laramie-Walden Truck Line, Inc. v. Denver-Ft. Collins Freight Serv., Inc., 156 Colo. 366, 370, 399 P.2d 242, 243 (1965) (failure to follow statutory provisions requiring appeal to agency barred pursuit of judicial relief); Hannum v. Hillyard, 131 Colo. 37, 41, 278 P.2d 1015, 1017 (1955) (failure to take advantage of appeal provided for in statute prevented court action); Florida Welding & Erection Serv., Inc. v. American Mut. Ins. Co., 285 So. 2d 386, 389-90 (Fla. 1973) (where statutory provisions provide for appeal of agency decisions to the agency making the original determination, these must be followed).

> (1) judicial review may be facilitated by allowing the appropriate agency to develop a factual record and apply its expertise, (2) judicial time may be conserved because the agency might grant the relief sought, and (3) administrative autonomy requires that an agency be given opportunity to correct its own errors.[88]

Exhaustion of remedies is used by the courts in two contexts. Courts may require that all administrative remedies within an agency be exhausted prior to granting an appeal of the agency decision.[89] Similarly when an administrative determination is attacked in a different forum, courts may refuse to recognize the validity of the challenge if the initial decision was not judicially appealed.[90] However, courts have held that when fundamental rights protected by a statute are involved, failure to appeal an agency decision will not always bar a collateral attack.[91]

Umberfield failed to take advantage of the appeal provision in the Teacher Tenure Act.[92] The court, by implication, based its determination that the panel decision was res judicata on this

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[88] United States *ex rel.* Marroro v. Warden, 483 F.2d 656, 659 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 653 (1974), *citing* McKart v. United States, 395 U.S. 185, 194-95 (1969).

[89] *E.g.*, James v. Board of Educ., 461 F.2d 566, 570 (2d Cir. 1972) (holding that under New York law, state administrative remedies must always be exhausted before appeals may be taken to federal court, but not always before appeals to state court); Jackson v. Colorado, 294 F. Supp. 1065, 1071 (D. Colo. 1968) (where there was a requirement that all administrative remedies be exhausted prior to asking for an injunction, there was no final record or clear knowledge that the petitioners fell within the agency requirements without exhausting the agency remedies); Moschetti v. Liquor Licensing Authority, 176 Colo. 281, 301, 490 P.2d 299, 301 (1971) (prior to judicial appeal all administrative remedies must be exhausted (dictum)); Denver-Laramie-Walden Truck Lines, Inc. v. Denver-Ft. Collins Freight Serv., Inc., 156 Colo. 366, 370, 399 P.2d 242, 243 (1965); Hannum v. Hillyard, 131 Colo. 37, 41, 278 P.2d 1015, 1017 (1955).

[90] Egner v. Texas City Indep. School Dist., 338 F. Supp. 931, 934 (S.D. Tex. 1972) (where available state judicial and administrative remedies exist, a collateral attack in federal court may not be made).

[91] *See* Russo v. Central School Dist., 469 F.2d 623, 628 n.5 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (court stated that exhaustion of state judicial remedies is not a prerequisite for federal court jurisdiction under the Civil Rights Act of 1871 section 1983, particularly since the teacher was dismissed for exercising first amendment rights); James v. Board of Educ., 461 F.2d 566, 570 (2d Cir. 1972) (administrative remedies, but not appeals to the state court, must be exhausted prior to collateral attack on dismissal); Wishart v. McDonald, 367 F. Supp. 530, 533 (D. Mass. 1973) (teacher's failure to seek judicial review of an administrative decision upholding his dismissal did not bar section 1983 action). Similarly many courts have held that exhaustion of state administrative remedies may not be required when violation of fundamental rights protected by section 1983 is an issue. *E.g.*, McNeese v. Board of Educ., 373 U.S. 668, 671 (1963); Webb v. Lake Mills Community School Dist., 344 F. Supp. 791, 806 (N.D. Iowa 1972).

[92] COLO. REV. STAT. ANN. § 22-63-117(11) (1973).

failure to appeal.[93] Thus they relied on the premise that all judicial appeals must be exhausted before the validitiy of a collateral attack may be recognized. The logic supporting this application of exhaustion of remedies is, however, less compelling when the question presented, as in *Umberfield*, is whether failure to exhaust remedies arising under one statute precludes the assertion of a separate, independent right arising under another statute. Exhaustion of remedies arising under one issue will not necessarily have any effect on the others. In light of the legislative intent expressed in the creation of the CCRC, there are overriding principles which suggest that failure to exhaust remedies in the present case should not operate as a bar to the CCRC's jurisdiction.[94] Moreover, the lack of factual determinations by the panel on the issue of religious discrimination, and the total inadequacy of the record, provided no real basis to support an appeal of the decision.[95] Furthermore, if the agency decision had been appealed, the court might have referred the issue of a discriminatory employment practice to the CCRC under the doctrine of primary jurisdiction. Indeed, such a course might have resulted in a situation identical to the one which the court faced when it granted certiorari: a tenure panel finding justifying the dismissal on the basis of a requirement in the Teacher Tenure Act[96] and a CCRC decision finding that the dismissal violated the Antidiscrimination Act.[97]

4. Public Policy Considerations

Before a court applies res judicata to an administrative decision, it should examine the language and legislative history of the statute creating the agency to determine the legislative intent. In *Umberfield* the court did examine the statutes which created the

[93] 522 P.2d at 734.

[94] Cases cited note 91 *supra*.

[95] In *Umberfield*, the petitioner's brief noted that no record of the panel hearing had been presented to either the CCRC or to the federal district court when the school district appealed the CCRC's decision. A court, when asked to review an agency decision that is insufficiently supported by the record, has two possible courses of action: it can either make an independent determination of the facts, or it can remand the case to the agency for a redetermination and compilation of a complete record on which its decision has been based. The latter course of action is the one recognized by Colorado and many other states. Neverdahl v. Linder, 141 Colo. 186, 347 P.2d 512 (1959). *Accord, e.g.*, Rock Island Metal Foundry, Inc. v. City of Rock Island, 414 Ill. 436, 111 N.E.2d 499 (1953); Moore's Case, 330 Mass. 1, 110 N.E.2d 764 (1953); Reinauer Realty Corp. v. Borough of Paramas, 34 N.J. 406, 169 A.2d 814 (1961); Hooper v. Goldstein, 104 R.I. 132, 241 A.2d 809 (1968).

[96] COLO. REV. STAT. ANN. § 22-63-116 (1973).

[97] *Id.* § 24-34-307(12).

CCRC and the tenure panel,[98] but without the aid of any articulated constructional guides.

a. *Canons of Construction*

The basic canons of construction are often used as an aid in interpreting language used by the legislature so that effect may be given to the expressed and implied intent of that body. In *Umberfield* the court strictly construed the Antidiscrimination Act[99] and liberally interpreted those sections of the Teacher Tenure Act which deal with a teacher tenure panel.[100] This anomalous procedure resulted in a judicial expansion of the panel's jurisdiction beyond both the express and implied intent of the legislature, and a contraction of the CCRC's jurisdiction, which frustrated and prevented action by the CCRC.

Administrative agencies are "creatures of statute" and have only that authority explicitly or implicitly conferred upon them by the legislature in their organic statutes.[101] While the jurisdiction of the agencies has been subject to judicial clarification in several areas where questions have arisen, the directives in the statutes, as construed in light of the legislative intent, should provide the controlling interpretation. Colorado courts have repeatedly asserted that they

> should confine themselves to the construction of a statute as it is written and not attempt to supply omissions or otherwise amend or change the law under the guise of construction.
>
> The fundamental rule of construction is that the court shall ascertain and give effect to the intention of the legislature, as expressed in the statute.[102]

The problem in *Umberfield*, however, is that two statutes must be interpreted in such a way that effect is given to the legislative intent of each of them.

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[98] 520 P.2d at 733, *citing* COLO. REV. STAT. ANN. §§ 80-21-3,-5 (Supp. 1969); COLO. REV. STAT. ANN. § 123-18-17 (Supp. 1967). These sections are currently codified as COLO. REV. STAT. ANN. §§ 24-34-303, -305 (1973); *id.* § 22-63-117.

[99] *Id.* §§ 24-34-301 to -308.

[100] *Id.* § 22-63-117.

[101] Courtney v. Island Creek Coal Co., 474 F.2d 468, 472 (6th Cir. 1973); Civil Serv. Comm'n v. Pitlock, 44 Mich. App. 410, 205 N.W.2d 293 (1973); City of Pittsburgh v. Milk Mktg. Bd., 7 Pa. Comwlth. 180, 299 A.2d 197 (1973); Mountaineer Disposal Serv., Inc. v. Dyer, 197 S.E.2d 111 (W. Va. 1973).

[102] 83 Christner v. Poudre Valley Cooperative Ass'n., 235 F.2d 946, 950 (10th Cir. 1956) (footnotes omitted); United States v. Colorado & N.W.R.R., 157 F. 321, 323 (8th Cir. 1907), *cert. denied*, 209 U.S. 544 (1908); Johnston v. Ctiy Council, 117 Colo. 223, 228, 493 P.2d 651, 654 (1972); St. Luke's Hosp. v. Industrial Comm'n, 142 Colo. 28, 349 P.2d 995 (1960).

b. *Legislative Intent*

1. The Colorado Civil Rights Commission

A careful examination of the functions and authority of the CCRC reveals the broad legislative intent behind the creation of that agency.[103] The Colorado legislature created a statewide agency with expertise in the field of discrimination. This expertise of the CCRC is derived from the lay and professional commissioners who compose the commission. During their 4-year term, they acquire knowledge and skill in the area of discriminatory employment practices.

Due to its experience and the limited area of its jurisdiction, the CCRC has developed uniform standards to test an employer's compliance with the law prohibiting discrimination in employment. These standards are one of the tools used by the CCRC to reach its decisions. The court's decision in *Umberfield* now raises the question of the feasibility of maintaining a uniform statutory application of the Antidiscrimination Act if any agency could make a final determination, subject only to judicial review, that the provisions of that statute have or have not been violated.[104] If this view prevails, the benefit of having a specialized commission whose function it is to interpret and apply the statute would be lost. Although most of the questions presented to courts have arisen in connection with limitations of the CCRC's jurisdiction, these limitations have effectively abrogated much of the legislative intent evident in the Commission's creation.[105] The observation was made in 1969 that

> [u]nder the statutes only the Civil Rights Commission can make the determination of whether an unlawful act of discrimination has occurred and the findings of the commission are binding on the court so long as they are supported by adequate evidence.[106]

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[103] *See generally* text accompanying note 70 *supra*.

[104] *See* text accompanying notes 84-86 *supra*.

[105] State v. Colorado Civil Rights Comm'n, 521 P.2d 908 (Colo. 1974) (the court held that the CCRC lacked jurisdiction over a civil service employee); Colorado Antidiscrimination Comm'n v. Continental Air Lines, 149 Colo. 259, 368 P.2d 970 (1962), *rev'd*, 372 U.S. 714 (1963) (the Colorado Supreme Court held that the CCRC could not regulate hiring practices of an interstate air carrier because this was a matter reserved to the federal government); Colorado Civil Rights Comm'n v. State, 30 Colo. App. 10, 488 P.2d 83 (1971) (CCRC has jurisdiction over constructive discharge); State v. Adolph Coors Corp., 29 Colo. App. 240, 486 P.2d 43 (1971) (the court found a commissioner's complaint insufficient to justify issuance of a subpoena).

[106] Penwell, *Civil Rights in Colorado*, 46 DENVER L.J. 181, 207 (1969).

The continued validity of this observation in light of recent decisions is questionable.

2. The Teacher Tenure Panel

While the panel was created to review recommendations of dismissal and to comply with the principles of a right to a hearing prior to dismissal,[107] it functions only as a fact-finding body and may not dismiss the teacher itself. Dismissal is a function of the board of education.[108]

The panel is an ad hoc body whose members are chosen each time a dismissal action is pending before a board of education. Due to the selection process,[109] it is unlikely that any two panels would be composed of the same members. The panel serves a function analogous to that of an arbitration board whose powers and duties are prescribed by the employment contract, or in the case of the panel, the statute which it is interpreting.[110] This role of interpreting and applying the statute to the facts should define the scope of the board's authority. It has been held in other states that similarly constituted boards, with functions analogous to the Colorado panel, are limited by the specific grants of power which they have been given.[111]

The Colorado statute lists the specific grounds which justify dismissal of a tenured teacher.[112] Instead of confining the panel's scope of inquiry to the statutory standards, the court in *Umberfield* has increased the jurisdiction of the lay panel, including within its purview questions of fundamental statutory and constitutional rights.[113] The mere availability of judicial review which can include consideration of any statutory or constitutional rights[114] does not create jurisdiction in the original agency to consider and determine such questions.

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[107] Case law holds that prior to dismissal a tenured teacher is entitled to notice and a hearing of the charges. *See* School Dist. No. 13 v. Mort, 115 Colo. 571, 176 P.2d 984 (1947); School Dist. No. 1 v. Parker, 82 Colo. 385, 260 P. 521 (1927); School Dist. No. 25 v. Youberg, 77 Colo. 202, 235 P. 351 (1925); School Dist. No. 2 v. Shuck, 49 Colo. 526, 113 P. 311 (1911). *See also* COLO. REV. STAT. ANN. § 22-63-117 (1973).

[108] School Dist. No. 50 v. Witthaus, 30 Colo. App. 41, 490 P.2d 315 (1971).

[109] COLO. REV. STAT. ANN. § 22-63-117(5) (1973).

[110] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Tipler v. E.I. duPont deNemours Co., 443 F.2d 125 (6th Cir. 1971); Hutchings v. United States Indus., Inc., 428 F.2d 303, 312 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969).

[111] *See* Shiffer v. Board of Educ., 45 Mich. App. 190, 206 N.W.2d 250 (1973); Alberts v. Garofalo, 393 Pa. 212, 142 A.2d 280 (1958).

[112] COLO. REV. STAT. ANN. § 22-63-116 (1973).

[113] 522 P.2d at 733.

[114] COLO. REV. STAT. ANN. § 24-4-105(7) (1973) (for text of statute, see note 40 *supra*).

Given the purpose of the hearing before the panel and the fact that Umberfield's dismissal occurred subsequent to it, the allegation of religious discrimination was not strongly asserted before the panel.[115] The dismissal, which the panel found to be justifiable under the Teacher Tenure Act,[116] was a prerequisite to a finding by the CCRC that a discriminatory employment practice in violation of the Antidiscrimination Act[117] had occurred. Until the dismissal, Umberfield's complaint of discrimination had not ripened.

In *Tipler v. E.I. duPont deNemours, Inc.*,[118] a case involving discrimination which was prohibited by both the National Labor Relations Act and Title VII, a claim was filed with both the EEOC and the National Labor Relations Board. Even then it was held that the NLRB hearing did not adequately consider the factors necessary for a Title VII violation.[119] The court said that

> [a]lthough these two acts [Title VII and the Labor Relations Act] are not totally dissimilar, their differences significantly overshadow their similarities. Absent a special consideration, a determination arising solely under one statute should not automatically be binding when a similar question arises under another statute. This is because the purposes, requirements, perspective and configuration of different statutes ordinarily vary.[120]

Drawing the obvious analogy between *Tipler* and *Umberfield*, it is clear that the determination under the Teacher Tenure Act in *Umberfield* should not preclude a determination by the CCRC.

The panel, unlike the CCRC, has no expertise in the area of discriminatory employment practices and should therefore not be accorded the role of making a final determination of any violation of the Antidiscrimination Act which may have occurred.[121]

The Supreme Court has stated that the rights guaranteed by Title VII, which are identical to those protected by Colorado's statute, represent a strong statement of congressional intent that

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[115] *See* note 43 *supra*.

[116] COLO. REV. STAT. ANN. § 22-63-117 (1973).

[117] "It shall be a discriminatory or unfair employment practice: (a) For an employer to . . . discharge . . . any person otherwise qualified because of . . . creed . . . ." *Id.* § 24-34-306.

[118] 433 F.2d 125 (6th Cir. 1971).

[119] *Id.* at 129.

[120] *Id.* at 128. *See also* Lane v. Railroad Retirement Bd., 185 F.2d 819 (6th Cir. 1950); DAVIS § 18.04, at 577. (Professor Davis states that one determination is not necessarily binding when the same question arises under two statutes).

[121] *See* 522 P.2d at 735 (Pringle, J., dissenting).

"each employee [shall] be free from discriminatory practices."[122] The Court has stressed that Congress felt that those rights are so important that they not only provided the remedies available under Title VII proceedings, but also provided that these remedies "supplement, rather than supplant" existing remedies which also forbid discriminatory practices.[123]

CONCLUSION

Although the application of res judicata is appropriate in many administrative law contexts, courts should apply it only after a deliberate determination of its usefulness. It is not an inflexible doctrine; courts should consider not only the essential elements of same party, same claim, and final determination, but also the theory, purpose, and intent behind the doctrine's use. Once it has been determined that the factual situation before the court meets the fundamental criteria for the application of res judicata, the utility of applying the doctrine should be tested against the elements of the analytical framework proposed in this comment. All four issues should be analyzed in light of the facts of the particular case, with any one of them potentially precluding a finding of res judicata.

In *Umberfield* the Colorado Supreme Court applied res judicata in reaction to the potential problem of having to conform two conflicting agency decisions. Failure to approach this issue of first impression without careful analysis seriously limited the CCRC's jurisdiction. It resulted in a denial of the CCRC's right to exercise its expertise whenever the complainant had recourse to a prior agency determination on any issue arising from the same set of facts. In order to provide the CCRC with the authority and jurisdiction which it needs to effectively achieve its purpose, a reconsideration of the question presented in *Umberfield* is imperative.

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[122] Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

[123] *Id.* at 48-49.