

IN THE SUPREME COURT OF IOWA

No. 17-0468

Filed January 19, 2018

GHOST PLAYER, LLC and **CH INVESTORS, LLC,**

Appellees,

vs.

IOWA DEPARTMENT OF ECONOMIC DEVELOPMENT,

Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

An agency appeals from the district court's reversal of its decision to revoke an award of tax credits. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Jeffrey S. Thompson, Solicitor General, and David L.D. Faith II, Assistant Attorney General, for appellant.

Van T. Everett of Whitfield & Eddy, P.L.C., Des Moines, for appellee Ghost Player, LLC.

Richard O. McConville of Coppola, McConville, Coppola, Hockenberg & Scalise, P.C., West Des Moines, for appellee CH Investors, LLC.

APPEL, Justice.

The Iowa Department of Economic Development (IDED)¹ appeals from a district court’s reversal of the agency’s May 26, 2016 decision to revoke tax credits that had been previously awarded by IDED to Ghost Player, LLC (Ghost Player), on February 22, 2012.² The district court had held that the IDED’s 2016 action revoking the tax credits was an invalid collateral attack on the agency’s 2012 action and was barred under the doctrine of claim preclusion.

The IDED appealed. On appeal, the IDED asserts that the district court erred because the elements of claim preclusion as applied to administrative actions have not been met. Even if the elements of claim preclusion were met, the “scheme of remedies” exception should apply to enable it to impose remedies for breach of contract.

For the reasons expressed below, we reverse the decision of the district court and remand the case.

I. Factual and Procedural Background.

A. Introduction. In 2007, the Iowa legislature passed the Film, Television, and Video Project Promotion Program (Film Program). 2007 Iowa Acts ch. 162, §§ 1–13. The legislature repealed the Film Program in 2012. 2012 Iowa Acts ch. 1136, § 38. The purpose of the Film Program was to encourage film, television, and video projects to be produced in Iowa. Iowa Code § 15.392 (2009). The statute establishing the Film

¹The agency is currently known as the Iowa Economic Development Authority. Throughout the litigation, however, the parties have referred to the agency as the Iowa Department of Economic Development. For convenience and to avoid confusion, we refer to the agency in this opinion by the name used by the parties throughout the litigation.

²Appellant CH Investors, LLC, invested in the Ghost Player film and was a third-party beneficiary to an agreement between Ghost Player and IDED. Appellants will be collectively referred to as Ghost Player.

Program required projects seeking to receive tax credits to register with the IDED, and IDED rules required the IDED and the project to enter into a contract containing terms and conditions for the receipt of tax credit benefits. *Id.* § 15.393(1); Iowa Admin. Code r. 261—36.5 (eff. July 15, 2009).

B. Ghost Player and the IDED Agreement and Request for Tax Credits. On January 8, 2009, Ghost Player entered into an agreement with the IDED to produce a documentary project originally entitled Field of Dreams Ghost Players. The agreement provided that upon the completion of the project and after “submittal and approval by IDED of Recipient’s qualified project expenditures (as submitted in Form Z, Schedule of Qualified Expenses), IDED will issue to each Investor a tax credit certificate.” The agreement defined a “qualified expenditure” as “a payment to an Iowa resident or an Iowa-based business for the sale, rental, or furnishing of tangible personal property or for services directly related to the registered project, including, but not limited to [26 enumerated items].” The agreement provided that the total tax credit award would not exceed twenty-five percent of qualified expenditures for the project.

In the event of a default, the agreement provided that IDED would give Ghost Player at least thirty days to cure the default. If the default was uncured, Ghost Player would be required to repay all or a portion of the tax credits. The agreement provided that a material misrepresentation would be an event of default. The agreement defined a material misrepresentation as when

[a]ny representation or warranty made by the Recipient in this Contract or in any statement or certificate furnished by it pursuant to this Contract, or made in its Application, or in connection with any of the above, proves untrue in any

material respect as of the date of the issuance or making thereof.

On October 22, 2009, the IDED requested a status update with respect to the project and an itemization of total expenses and qualified expenditures incurred up until September 18. On December 10, Ghost Player provided a draft of Form Z, a budget summary, and a report on the project. In the budget summary, Ghost Player listed \$625,000 spent on in-kind promotions. The Louisville Slugger Museum & Factory (Louisville Slugger), Ringor, and the Cedar Rapids Kernels (Kernels) were not listed as sponsors of in-kind promotions. In the report on the project, however, Ringor and Louisville Slugger were listed as providing grants to the project.

In May of 2010, Ghost Player submitted its final Form Z to the IDED. The list of expenditures now included in-kind payments of \$25,000 to Ringor, \$25,000 to the Kernels, and \$200,000 to Louisville Slugger. The total listed as being spent on in-kind promotions was \$900,000. Ghost Player provided to IDED what purported to be copies of the “like-exchange of services” agreements between various other parties and Ghost Player, none of which were signed or dated. In total, Ghost Player claimed \$2,034,227.88 in qualified expenditures. The IDED sent the financial information to the Iowa Department of Revenue for a review and audit.

On December 20, the IDED sent Ghost Player a “Notice of Preliminary Tax Credit Determination” for the project. Of the over two million dollars in qualified expenditures claimed, the preliminary total of qualified expenditures allowed was \$246,455.68. The auditor’s report explained that the expenditures for the in-kind contracts would not be allowed. The auditor wrote, “Iowa Code section 15.393(2)(a)(2) requires

‘payments,’ not promises to pay.” Therefore, the auditor categorically concluded in-kind payments were not “qualified expenditures.” Additionally, the auditor’s report found that DreamCatcher Productions, an entity owned and operated by the same people who owned and operated Ghost Player, actually made the payments to vendors. DreamCatcher Productions then charged Ghost Player for the payments at a mark-up that was sometimes substantial. The auditor also found other expenditures that were disallowed.

Ghost Player disputed the IDED’s preliminary tax credit determination. While seeming to concede that unreasonable mark-ups should not be allowed, Ghost Player defended the payments made by Ghost Player to DreamCatcher Productions, insisting several times that DreamCatcher was not a shell company. Ghost Player also argued that the in-kind agreements should be included as qualified expenditures, asserting that Ghost Player received valuable goods and services from the agreements, including sponsorships, advertising, and promotions.

The IDED sent a “Revised Preliminary Tax Credit Determination” to Ghost Player in response. The IDED wrote, “The department stands by its prior determination that ‘in-kind’ contributions and ‘deferred’ payments are not expenditures for purposes of the statute.” The IDED, however, revised its determination of qualified expenditures down to \$239,967.41, subtracting the amount of funds received from the State of Iowa in grants. Ghost Player disputed the determination.

The IDED issued its “Final Tax Credit Determination” on February 22, 2012. The final tax credit determination reiterated the conclusion that in-kind contributions were not payments for the purposes of the statute. The IDED awarded Ghost Player a tax credit of \$59,991.85, or twenty-five percent of the total qualified expenditures.

C. First District Court Action: Breach of Contract Action for Failure to Issue Appropriate Tax Credits. Disappointed with the amount of tax credits granted by IDED, Ghost Player filed a breach of contract action in district court on November 6, 2013, claiming that IDED had breached the contract with Ghost Player by failing to issue tax credits for all qualified expenditures. *Ghost Player, L.L.C. v. State (Ghost Player I)*, 860 N.W.2d 323, 325–26 (Iowa 2015). The State filed a motion to dismiss, arguing that Ghost Player failed to exhaust its administrative remedies by means of a section 17A.19(7) hearing. *Id.* at 326.

The State claimed in *Ghost Player I* that the final tax credit determination was an “other agency action” which required Ghost Player to seek judicial review under the Iowa Administrative Procedures Act. *Id.* at 327. The *Ghost Player I* court discussed applicable caselaw, noting that when

the action or inaction of the agency in question bears a discernible relationship to the statutory mandate of the agency as evidenced by express or implied statutory authorization, a party must first present the claim to the agency for other agency action before the party can proceed to district court.

Id. at 328–29; see *Papadakis v. Iowa State Univ. of Sci. & Tech.*, 574 N.W.2d 258, 260 (Iowa 1997).

As a result, the court held that the final tax credit determination was an “other agency action” and Ghost Player had failed to exhaust its administrative remedies. *Ghost Player I*, 860 N.W.2d at 329. The *Ghost Player I* court explained that the legislature mandated that the IDED verify eligibility for the tax credit and verify the issuance of credit. *Id.* The court further observed that the contract, which declared that “IDED shall have the authority to reasonably assess whether the Recipient has complied with the terms of this Contract,” reinforced the legislative

mandate. *Id.* at 327, 329. Thus, *Ghost Player I* held that the agency's action qualified as an "other agency action" because it was made subject to express statutory authorization. *Id.* at 329.

D. Second District Court Action: Appeal of the Final Tax Credit Determination Awarding Tax Credits as an "Other Agency Action." After the decision in *Ghost Player I*, Ghost Player filed an action in district court seeking to appeal the February 22, 2012 final tax credit determination. In this action brought under Iowa Code chapter 17A, Ghost Player sought discovery both before and after the IDED filed the administrative record with the agency. The district court held a hearing on the discovery issue on January 13, 2016. These proceedings, however, were stayed pending other procedural wrangling described below.

E. State Investigation of Alleged Ghost Player In-Kind Agreements. In December 2015, the attorney general's office, acting as a representative of the IDED, sent letters to Ringor, the Kernels, Louisville Slugger, and the other alleged in-kind partners, asking if they had a like-exchange-of-services agreement with Ghost Player, whether they received the value of the services claimed, and whether they provided the value of the services claimed.

Ringor wrote a letter to the attorney general's office denying entering into an agreement with Ghost Player. Ringor wrote that it was unfamiliar with the two-page document which purported to be the agreement; had never agreed to exchange services with Ghost Player; had no record of providing services to Ghost Player or any affiliated entity; and had, to its knowledge, never received services from Ghost Player or any affiliated entity. Ringor noted that it would not have entered into the kind of contract that Ghost Player claimed existed because, as of the

summer of 2008, Ringor ended its baseball products line and would thus not get any benefit out of advertising with a baseball movie.

Louisville Slugger responded to the inquires of the attorney general's office with an affidavit of the vice president and executive director of its parent company, Anne Jewel. Jewel explained that while she had been contacted by Ghost Player sometime between April and August 2009, the parties did not discuss or agree to a \$200,000 exchange of services. Jewel denied there was a written or unwritten agreement between Louisville Slugger and Ghost Player and denied ever receiving \$200,000 worth of services from Ghost Player or an affiliated entity. Jewell attached an email she sent to Ghost Player in response to an email from it offering to participate in an in-kind promotion, in which she said Louisville Slugger could not "proceed as described."

Louisville Slugger also sent an affidavit of Rick Redman, vice president of communications for its parent company. Redman also denied Louisville Slugger entered into an agreement and received \$200,000 worth of services from Ghost Player or an affiliated entity.

The Kernels responded to the attorney general's investigation by stating that the Kernels were unable to confirm that they had entered into the agreement with Ghost Player. The Kernels were unable to find a written agreement in their records, and no current or former staff recalled the agreement. The Kernels explained that they would not use the term "like-exchange of services agreement," instead using the term "trade agreement." The Kernels also wrote that they would have not valued the services listed as being provided by the Kernels at \$25,000—instead, the approximate value of the services would be \$5000. Finally, the Kernels were unable to find any documentation that they received \$25,000 worth of services.

F. IDED Notices of Default, Ghost Player Response, and Final Agency Decision of IDED Revoking Tax Credits. In light of the results of the attorney general's inquiries, the IDED sent a "Notice of Default of Contract" to Ghost Player on January 12, 2016. The IDED wrote that it had "reason to believe Ghost Player submitted false documents and made false statements in support of its film tax credit claim." The IDED required that Ghost Player provide signed, dated, and complete copies of the in-kind agreements with the alleged in-kind partners to the IDED, along with other documents or explanations. IDED demanded a response by February 19.

IDEED sent to Ghost Player a document entitled "Second Notice of Default of Contract" on January 20. This document declared that Ghost Player submitted inflated and untrue cost information in support of its film tax credit. The document further declared that there was a scheme by Ghost Player, a production company, and unidentified payees to inflate the appearance of the cost of production by \$932,000.

On February 19, attorneys representing Ghost Player responded in writing to the notices of default. The February 19 letter asserted, among other things, that the IDED had made a final determination on the issue of tax credits on February 22, 2012, and lacked the power or jurisdiction to revisit the issue with a new investigation. Without waiving this objection to the default proceedings initiated by IDED, Ghost Player requested "a hearing before an impartial tribunal, including a mechanism to conduct discovery prior to the hearing and to present evidence regarding the challenges to Ghost Player's performance under the contract which [the IDED] has raised its Notices of Default." In addition, and with caveats that it was not waiving its initial objections,

Ghost Player argued on the merits that the agreements with Ringor, the Kernels, and Louisville Slugger actually existed.

The IDED construed Ghost Player's request for a formal adjudication as a request for a contested case under the Iowa Administrative Procedures Act. IDED decided to transfer the matter to the department of inspection and appeals for a contested case hearing.

The IDED filed a motion to stay Ghost Player's Iowa Code chapter 17A appeal pending in the district court, which at that point had yet to issue a ruling on Ghost Player's request to conduct discovery. The district court granted the motion to stay on March 30, 2016.

On April 12, Ghost Player served a motion to dismiss the action before the department of inspections and appeals on the IDED. Ghost Player argued that the matter should be dismissed for lack of subject matter jurisdiction. Ghost Player asserted that the February 22, 2012 determination of tax credits was a "final agency decision" and was entitled to res judicata effect. Ghost Player characterized the IDED's actions as seeking to collaterally attack its own final agency decision by transferring the matter to the department of inspections and appeals.

The IDED responded by sending a letter to Ghost Player stating that because Ghost Player was declining the opportunity to participate in a contested case proceeding by filing the motion to dismiss, the IDED would withdraw its transmission of the file to the department of inspections and appeals and issue a final agency decision based on the evidence in its possession.

On May 26, the director of the IDED issued a "Final Agency Decision." The director of the IDED found that Ghost Player breached its contract with the IDED by providing materially false information in support of its tax credit claim with respect to the in-kind agreements

with Louisville Slugger, Ringor, and the Kernels. The director found that Ghost Player fabricated the unsigned and undated like-exchange agreements, and this could not be an innocent mistake or omission. The director thus revoked all tax credit certificates issued to Ghost Player and instructed the Iowa Department of Revenue not to honor the tax credit certificates. The director further ordered the IDED not to issue further tax credits to Ghost Player.

G. The Third District Court Action: Challenge to Notices of Default and the Final Agency Decision of the IDED Revoking Tax Credits. Ghost Player initiated this action by filing a petition for judicial review of agency action in district court on June 28. Ghost Player sought judicial review of the IDED's actions in issuing the two notices of default and the final agency decision of May 26. Ghost Player argued that these actions were outside of the authority of the agency because an agency may not unilaterally vacate or modify a final agency decision.

In its response, the IDED characterized the issue raised by Ghost Player as whether *res judicata* prohibited it from revoking the tax credits. The IDED asserted that it clearly had the authority to issue notices of default and impose remedies for uncured breaches under the Iowa Code, IDED rules, and the contract. *See* Iowa Code § 15.393(1); Iowa Admin. Code rs. 261—36.3, .4. The IDED asserted that its actions were not prohibited by *res judicata*.

On February 20, 2017, the district court issued its ruling on the petition for judicial review. The court held that the May 26, 2016 final agency decision was a collateral attack on the IDED's initial determination and should be reversed. The court explained that the scope of the review in the other, pending district court action was only whether the initial award should be increased upward and that the

underlying decision to award tax credits in the first place was not being challenged in that action. According to the court, the decision to award tax credits in the first place was thus final and could not be challenged collaterally by the IDED's decision to revoke the tax credits.

The district court also held that the May 26 final agency decision was barred under the doctrine of claim preclusion. According to the court, the issue of whether Ghost Player complied with its contract with IDED in all regards was at play at the time the tax credits were awarded and could have been brought at the same time as the tax credits were awarded. The court reasoned that IDED had a full and fair opportunity to present the issue in its first tax credit decision, and thus the May 26 decision was barred.

IDED appealed the district court's ruling. We retained the appeal.

II. Preclusive Effect of the February 22, 2012 Final Tax Credit Determination.

A. Introduction. The pivotal issue in this appeal is whether the decision of IDED to award tax credits to Ghost Player on February 22, 2012, is entitled to preclusive effect that prohibits IDED from attempting to revoke those tax credits in light of the discovery of fraud.

B. Positions of the Parties. On appeal, the IDED argues that the elements of res judicata have not been met with respect to the agency action reflected in the IDED's February 22, 2012 final tax credit determination. First, IDED asserts it was not a "party" in the original determination of tax credits, but was merely "the decision maker." According to the IDED, the agency action did not involve a court-like proceeding where two parties fight it out before a neutral decision-maker with established procedures designed to resolve contested issues of fact and law. While the February 22, 2012 final tax credit determination

might be characterized as a *final* agency action, the IDED argues the action was not a final *adjudicatory* action as required for claim preclusion. See *Bennett v. MC #619, Inc.*, 586 N.W.2d 512, 517–18 (Iowa 1998).

Second, the IDED also disputes whether its February 22, 2012 final tax credit determination was final for the purposes of preclusion. IDED argues that Ghost Player's chapter 17A challenge to the February 22, 2012 action has not yet been finally determined by the courts, thereby preventing application of *res judicata* in this case. Additionally, if Ghost Player succeeds in its chapter 17A challenge to the February 22, 2012 agency action, the IDED still would be required to determine the value of the in-kind agreements. In order to determine the value of the in-kind agreements, the IDED must conduct a factual determination as to whether the agreements were actual agreements and the value, if any, of any services provided. It is not possible to separate the decision to award tax credits in the abstract from the underlying facts of the decision.

Third, the IDED argues there was not a previous full and fair opportunity to address the fraud issue. While the IDED concedes that it was possible for it to have investigated and uncovered Ghost Player's fraudulent misrepresentations previously, the IDED was not on notice that the authenticity of the alleged agreements was relevant in its February 22, 2012 final tax credit determination.

The IDED argues that a legal determination that in-kind agreements do not qualify for tax credits is very different from a factual determination on the value of any in-kind payments. The IDED characterizes Ghost Player as arguing for a novel and unprecedented discovery rule for claim preclusion. Even if the court is to impose an

inquiry notice requirement, the IDED argues, there was no reason why it should have discovered the misrepresentations because it had made a categorical determination that in-kind expenditures did not qualify for tax credits and therefore had no reason to examine the factual validity of the in-kind agreements.

Fourth, the IDED argues that even if the elements of res judicata are met, the scheme-of-remedies exception applies in this case. See *Pinkerton v. Jeld-Wen, Inc.*, 588 N.W.2d 679, 681 (Iowa 1998). The IDED argues that when an administrative tribunal makes an adjudicative determination of a claim, another tribunal may relitigate the same or a related claim “if the scheme of remedies permits assertion of the second claim notwithstanding adjudication of the first claim.” *Id.* (emphasis omitted) (quoting Restatement (Second) of Judgments § 83(3), at 267 (Am. Law Inst. 1982) [hereinafter Restatement (Second)]).

Citing a trio of Iowa precedents, Ghost Player argues the IDED lacked the legal authority to revoke the tax credits in 2016 because the IDED’s action was an improper collateral attack on its February 22, 2012 final agency action. See *Walker v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 802, 805 (Iowa 1984); *City of Des Moines Police Dep’t v. Iowa Civil Rights Comm’n*, 343 N.W.2d 836, 839 (Iowa 1984); *Toomer v. Iowa Dep’t of Job Serv.*, 340 N.W.2d 594, 598 (Iowa 1983). Ghost Player asserts that the IDED’s original decision to award Ghost Player tax credits was not challenged by IDED in the subsequent Iowa Code chapter 17A action and thus should be considered final.

Additionally, Ghost Player argues that under the doctrine of claim preclusion, a party must try all issues within a claim at the same time, rather than through separate actions. *Bennett*, 586 N.W.2d at 517. Ghost Player reasons that “[a]n adjudication in a prior action between

the same parties on the same claim is final as to all issues that could have been presented to the court for determination.” *Id.* (emphasis omitted). In order to show claim preclusion, Ghost Player asserts, it need only show (1) the first and second actions involved the same parties in privity, (2) there was a final judgment in the first action, and (3) the claim in the second action could have been adjudicated in the first action. *Id.* at 516. If both parties had a “full and fair opportunity” to present issues in the first proceeding, claim preclusion will bar those issues in subsequent proceedings. *Pavone v. Kirke*, 807 N.W.2d 828, 836 (Iowa 2011) (quoting *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002)).

Utilizing these precedents, Ghost Player asserts that the parties were undoubtedly the same, the February 2012 decision was a final agency action, and the issues of whether Ghost Player was eligible for tax credits under the Film Program and the contract, and the amount of tax credits to be awarded were the same in both actions. Further, Ghost Player suggests that the issue of fraudulent misrepresentation of the in-kind agreements could have been raised in the February 2012 action. The IDED had ample time to discover the alleged misrepresentation, and it should not now be permitted to artificially split its claims.

With respect to the fallback position of the IDED that the agency action is subject to the scheme-of-remedies exception to res judicata, Ghost Player contends that the IDED failed to preserve error before the district court and that, as a result, the issue is not properly presented in this appeal.

C. Standard of Review. Iowa Code section 17A.19(10) governs our review of an agency decision that forms the basis of a petition for judicial review. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 255 (Iowa

2012). The district court may properly grant relief if the agency action prejudiced the substantial rights of the petitioner and the agency action fits one of the enumerated criteria included in Iowa Code section 17A.19(10)(a)–(n). *Evercom Sys., Inc. v. Iowa Utils. Bd.*, 805 N.W.2d 758, 762 (Iowa 2011). We will apply the standards of section 17A.19(10) to determine if we reach the same result as the district court. *Burton*, 813 N.W.2d at 255–56.

D. Restatement (Second) of Judgments Section 83. The question of the degree to which the actions of administrative agencies should be entitled to preclusive effect has been a subject of some difficulty. At first, many courts resisted applying concepts of preclusion to administrative actions. As late as 1947, a federal appellate court declared that it was “well settled doctrine that res judicata and equitable estoppel do not ordinarily apply to decisions of administrative tribunals.” *Churchill Tabernacle v. F.C.C.*, 160 F.2d 244, 246 (D.C. Cir. 1947).

Yet, at the same time, Kenneth Culp Davis wrote that principles of res judicata should always apply to administrative actions substantially similar to ordinary judicial proceedings. Kenneth Culp Davis, *Res Judicata in Administrative Law*, 25 Tex. L. Rev. 199, 201 (1947) [hereinafter Davis]. But Davis also noted there was a range of administrative actions that may vary from ordinary judicial proceedings. *Id.* Davis observed “many perplexities of res judicata in administrative law concern nonjudicial or unclassifiable functions.” *Id.* at 199. Davis rejected a bright-line rule or a rule based upon labels, but he did express approval of cases rejecting preclusive effect for actions which were “executive” in nature. *Id.* at 230.

In an effort to clear up some of the confusion, the American Law Institute adopted section 83 in its Restatement (Second) of Judgments.

Many jurisdictions, including Iowa, have generally followed section 83 in considering whether administrative actions are entitled to preclusive effect. *See, e.g., George v. D.W. Zinser Co.*, 762 N.W.2d 865, 868 (Iowa 2009); *Bennett*, 586 N.W.2d at 517; *Drews v. EBI Cos.*, 795 P.2d 531, 536 (Or. 1990); *Lindas v. Cady*, 515 N.W.2d 458, 462 (Wis. 1994).

Under section 83, “an adjudicative determination by an administrative tribunal” is conclusive if the proceeding “entailed the essential elements of adjudication.” Restatement (Second) § 83(2), at 266. The Restatement (Second) provides that “the essential elements of adjudication” include adequate notice, the right of a party “to present evidence and legal argument” in support of the party’s contentions, and “to rebut evidence and argument by opposing parties.” *Id.* Other essential elements of adjudication include “[a] formulation of issues of law and fact in terms of application of rules with respect to specified parties,” a “rule of finality,” and “[s]uch other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question.” *Id.* at 266–67.

A comment to section 83 explains its rationale. According to the comment,

Where an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processing using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments.

Id. § 83 cmt. b, at 268.

Recent cases from other jurisdictions have afforded res judicata effect for administrative proceedings in which trial-type procedures were used. *See, e.g., Ala. Bd. of Nursing v. Williams*, 941 So. 2d 990, 996 (Ala.

Civ. App. 2005) (citing presence of trial-type hearing in determining preclusive effect of administrative decision); *Garrity v. Md. State Bd. of Plumbing*, 110 A.3d 769, 779 (Md. Ct. Spec. App. 2015) (observing administrative tribunal had essential procedural characteristics of a court). On the other hand, courts have declined to afford conclusiveness when the decision-making process lacked trial-type procedural safeguards and were informal in nature. *See, e.g., City of Saint Paul v. State*, 137 P.3d 261, 266 (Alaska 2006) (noting lack of procedural safeguards); *Humphrey v. Robertson*, 709 So. 2d 333, 336 (La. Ct. App. 1998) (citing no opportunity for adverse parties to be heard and fully litigate issues); *Md. State Dep't of Educ. v. Shoop*, 704 A.2d 499, 507 (Md. Ct. Spec. App. 1998) (holding very informal internal proceedings do not reflect action in judicial capacity).

E. Iowa Cases Applying Restatement (Second) Section 83.

Two of our cases highlight the difference between adjudicative agency determinations that are entitled to preclusive effect and more informal agency actions which do not bar later administrative action.

The first case is *Bennett*. In *Bennett*, the plaintiff claimed that his complaint with a municipal human rights commission was not entitled to preclusive effect because the adjudicatory procedure used by the human rights commission did not include all of the essential elements of adjudication identified in the Restatement, among other reasons. 586 N.W.2d at 517–18. The human rights commission had found that the plaintiff suffered from sex discrimination while employed at a restaurant, but held that the plaintiff had not shown that the previous owner of the restaurant was unable to pay the damages awarded and so did not hold that the new owners of the restaurant were liable for the damages. *Id.* at 515. Later, the previous owner of the restaurant declared bankruptcy,

and the plaintiff filed a suit in district court to collect the damages from the new owners. *Id.*

The *Bennett* court disagreed with the plaintiff, finding the commission used procedures “substantially similar to those employed by courts.” *Id.* at 519. The court found the plaintiff had access to discovery which would have allowed him to get all of the financial information from the previous owner that he would have needed to prove his claim. *Id.* at 518. Additionally, although there was no urgency to decide the issue of successor liability before the commission, it was the plaintiff himself who asked the commission to decide the issue of successor liability. *Id.* The plaintiff could have waited until the enforcement action to raise the issue, but since he raised it at the commission, he bore the risk of the commission determining the issue. *Id.* at 518–19. Finally, we considered the evidence in the record before the commission and found there was convincing evidence in the record that the previous owner had the financial ability to pay the judgment, and that the plaintiff did not present evidence to the contrary. *Id.* at 519. We were thus satisfied that all of the elements of adjudicatory procedure established in the Restatement (Second) section 83 were met. *Id.*

The second case is *George*. George filed a complaint with the Iowa Division of Labor Services Occupational Safety and Health Bureau alleging retaliatory discharge for filing a prior complaint. 762 N.W.2d at 867. The division undertook a brief investigation and then dismissed the complaint without a hearing, which the commissioner affirmed, finding that George had been laid off prior to filing the complaint. *Id.* George filed an independent lawsuit in district court alleging the same retaliation claim, which the district court dismissed on the grounds that the

division's action was a final adjudicatory decision of an administrative agency. *Id.*

The *George* court held that the division was not acting in a judicial capacity when it investigated the complaint and then dismissed it. *Id.* at 869. The court explained that the statutory complaint and investigation process “does not bear much resemblance to an adjudication.” *Id.* The court noted that under the statute, the commissioner conducts an investigation “as the commissioner deems appropriate.” *Id.* (quoting Iowa Code § 88.9(3)(b)(2)). The court emphasized that the statute did not allow for the presentation of evidence or weighing legal arguments. *Id.* at 870. Additionally, the court observed that in the specific investigation at issue, the division did not employ a procedure resembling adjudication. *Id.* After receiving the complaint, the court explained, the division contacted the employer and asked for information about the case. *Id.* Nine days after contacting the employer, the division dismissed the complaint. *Id.* This informal nine-day investigation did not afford George a full and fair opportunity to present evidence or respond to his employer's evidence. *Id.*

The *George* court found support for rejecting preclusive effect for an agency's investigative findings in caselaw from other states. *Id.* at 870–71. The court cited *Parson v. Department of Revenue*, 189 P.3d 1032, 1038 (Alaska 2008), in which the Supreme Court of Alaska rejected preclusive effect for an informal investigation by a state commission for human rights resulting in a dismissal of a complaint for racial discrimination. *George*, 762 N.W.2d at 870. The *Parson* court held that the lack of adversarial activity or a decision on the merits by an independent fact finder could not give rise to claim preclusion, even

though the dismissal was a final agency action and was subject to judicial review. 189 P.3d at 1037–38.

F. Application of Claim Preclusion to Administrative Action in This Case. In *Ghost Player I*, we held that the IDED’s award of tax credits to Ghost Player was an “other agency action” under Iowa Code chapter 17A. 860 N.W.2d at 329. In order for claim preclusion to apply, the “other agency action” must be an adjudicatory decision. See *George*, 762 N.W.2d at 868–70; *Bennett*, 586 N.W.2d at 517–18; Restatement (Second) § 83, at 266.

Although we have held that a contested case is “an adjudication,” see *Greenwood Manor v. Iowa Dep’t of Pub. Health*, 641 N.W.2d 823, 833 (Iowa 2002), and is thus ordinarily entitled to preclusive effect, see *Bennett*, 586 N.W.2d at 517–18, our cases have not adopted a bright-line rule that no agency action short of a contested case is ever entitled to preclusive effect, see *George*, 762 N.W.2d at 869. Short of a formal, contested case hearing, there exists a sliding scale of formality and procedure in other agency actions. It is possible to imagine an agency action which is slightly less formal than a contested case proceeding, but which should be regarded as the functional equivalent of a judicial adjudication. We therefore must examine the particular procedures required and actually used by the IDED, as we did in *George*, to determine if its decision to award tax credits should receive preclusive effect. See also *Davis*, 25 Tex. L. Rev. at 230 (rejecting relying upon the label of the action to determine its preclusive effect).

We begin our analysis with the statute which established the Film Program, Iowa Code section 15.391 through 15.393. Notably, the statute does not prescribe procedures for the IDED to follow in awarding tax credits. Instead, the legislature simply directed IDED to “establish and

administer” the Film Program. Iowa Code § 15.393(1). The legislature further directed IDED to “verify[] the eligibility for a tax credit.” *Id.* § 15.393(2)(b)(2). Clearly, Ghost Player does not have a panoply of statutorily protected procedural rights in chapter 15.

We now turn to the administrative rules promulgated by IDED related to the Film Program. In a subsection titled “Approval of tax credit—process,” the administrative rules state that the IDED will “verify[] . . . the eligibility for a tax credit,” without further detail. Iowa Admin. Code r. 261—36.7(3)(a). Like the underlying statute, the administrative rules do not vest applicants for tax credits with the kind of procedural rights ordinarily associated with adjudicative settings.

Next, we consider the contract between IDED and Ghost Player. Under the contract, the IDED’s award of tax credits to Ghost Player was conditioned upon “all qualified project expenditures for a Registered Project [being] submitted to the IDED Iowa Film Office using Form Z, Schedule of Qualified Expenses.” The contract provides that no other form will be accepted and “[n]o additional claims will be accepted once the Schedule of Qualified Expenses has been approved by the Iowa Film Office.” In the “Covenants” section of the contract, Ghost Player agreed to submit any other report to the IDED “that may be reasonably required by IDED to allow IDED to report on the results of the Program.” The contract required that the applicant agree to permit the IDED to inspect its corporate books and financial records and perform an audit. The contract provided that once the IDED approved of the qualified project expenditures, the IDED would issue to Ghost Player a tax credit certificate. The procedural provisions of the contract are notably one-sided, providing the IDED a wide range of investigative tools, but providing applicants with no procedural rights.

In this case, the IDED's actions closely followed the contractual provisions. Once Ghost Player submitted its Form Z to the IDED, the IDED sent a representative to inspect Ghost Player's books and records. This representative performed an audit, and on the basis of the audit, the IDED issued to Ghost Player a "Notice of Preliminary Tax Credit Determination," which included the auditor's report as an attachment. Ghost Player replied to this notice with a letter disputing the results of the audit. In response to this letter, the IDED sent a "Revised Preliminary Tax Credit Determination" to Ghost Player which stood by the prior determinations, but revised down the amount awarded because Ghost Player revealed that some of the funds it received came from the State of Iowa in the form of grants. This letter did not respond to Ghost Player's arguments, but flatly reaffirmed the rationale for the earlier determination. Ghost Player again disputed this determination, but the IDED did not send any kind of response on the merits of Ghost Player's arguments. The IDED simply sent a final tax credit determination.

These agency actions were imbued with informality. Ghost Player did not have a right to, nor was it provided, any kind of hearing where it was allowed to present arguments and the IDED would be required to respond to the arguments. Ghost Player was permitted, at the agency's discretion, to present documents and attempt to persuade the IDED to grant tax credits, but the IDED was not required to make formal findings of law and fact in response to Ghost Player. The lack of procedural rights and trial-type opportunities to present evidence and argument strongly weighs against applying *res judicata* in this case on behalf of either Ghost Player or IDED.

Further, the IDED action granting tax credits was not a proceeding in which two parties contest facts and law before an agency decision-

maker in an adversarial proceeding. Adjudications are ordinarily a three-cornered proposition, with contesting parties jousting before a passive third-party tribunal. Here, the parties were binary. There were no adversaries making arguments and proving their cases before a third party as is generally required for adjudication. The IDED staff were acting more like tax accountants than adjudicators.

Based on our review of the applicable statute, administrative rules, contractual provisions, and the actual conduct and relationship of the parties, we do not find much resemblance to an adjudication. See *George*, 762 N.W.2d at 869; *Bennett*, 586 N.W.2d at 517; Restatement (Second) § 83 cmt. b, at 268. Thus, the IDED's February 22, 2012 final tax credit determination is not entitled to preclusive effect in the present litigation.

Because of our determination that the IDED was not acting as an adjudicator and that, as a result, the February 22, 2012 final tax credit determination is not entitled to preclusive effect, there is no necessity to address whether the IDED's actions were final, whether IDED had a full and fair opportunity to address the fraud issue in the prior administrative proceedings, or whether the scheme-of-remedies exception to res judicata is applicable under the facts and circumstances of this case.

III. Conclusion.

For the above reasons, the district court erred by granting summary judgment to Ghost Player. We reverse the judgment and remand the case to the district court.

REVERSED AND REMANDED.