SURVEY OF INDIANA ADMINISTRATIVE LAW

JOSEPH P. ROMPALA*

Administrative agencies, by nature, perform an array of legislative, executive, and quasi-judicial functions. Because administrative agencies sit at the nexus of the three branches of government, a relatively unique body of law, which preserves the separation of powers while guaranteeing the protection of basic rights, has developed to address the legal questions that arise from the operation of those agencies. For the most part, administrative law principles are well settled in Indiana. The purpose of this Article is to review the application of those administrative law principles by courts to agencies operating in Indiana during the survey period.

I. JUDICIAL REVIEW

The Indiana Supreme Court recognizes the existence of a constitutional right to judicial review of administrative agencies' decisions.[1] For most agencies, Indiana's Administrative Orders and Procedures Act (AOPA) provides that a court may only grant a party relief from an agency action when the action is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.[2]

The Indiana Supreme Court recently held that under this provision, a reviewing court "is limited to consideration of (1) whether there is substantial evidence to support the agency's finding and order and (2) whether the action constitutes an abuse of discretion, is arbitrary, capricious, or in excess of statutory authority."[3]

Although AOPA governs the standard of review for most administrative agencies, it specifically exempts some agencies, such as the Indiana Utility Regulatory Commission (IURC), the Department of Workforce Development, the Department of Revenue, and the Unemployment Insurance Review Board, from its provisions.[4] Nevertheless, the standards of review applied to these exempted agencies are substantially similar to those which govern review of AOPA agencies.

A. Standard of Review—In General

Courts reviewing an agency action are generally deferential to the administrative agency in most respects, particularly when it comes to fact finding,

---

* Associate, Lewis & Kappes, P.C., 2500 One American Square, Indianapolis, Indiana 46282.

1. Ind. Dep't of Highways v. Dixon, 541 N.E.2d 877, 880 (Ind. 1989) (citing State *ex rel.* State Bd. of Tax Comm'rs v. Marion Superior Court, 392 N.E.2d 1161 (Ind. 1979)).

2. IND. CODE § 4-21.5-5-14(d) (2005).

3. Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 844 (Ind. 2009) (citations omitted).

4. IND. CODE § 4-21.5-2-4 (Supp. 2009).

the interpretation of statutes the agency is charged with enforcing, and the interpretation of the agency's own rules.[5] In other respects, however, judicial review is less deferential.[6] This disparity means that in some instances the question of which standard of review applies can become a significant issue as each party tries to convince the reviewing court to apply a standard that favors its position.[7] A recent example in which parties took opposing views of the appropriate standard of review is *Northern Indiana Public Service Co. v. United States Steel Corp.* (*NIPSCO*).[8]

This case arose from a disagreement between Northern Indiana Public Service Company (NIPSCO) and United States Steel.[9] The companies disagreed about the proper interpretation of pricing terms contained within a contract approved by the IURC as part of a 1999 settlement agreement between the parties.[10] After the dispute arose, U. S. Steel filed a complaint with the IURC seeking enforcement based on its interpretation of the contract.[11] U. S. Steel subsequently filed a motion for summary judgment, and following a hearing, the IURC granted U. S. Steel's motion.[12] NIPSCO appealed to the Indiana Court of Appeals, which applied a de novo standard of review and reversed the decision of the IURC.[13] U. S. Steel then sought and was granted transfer to the Indiana Supreme Court.[14]

The supreme court explained that the statute that governs judicial review of IURC decisions sets out a "multiple tiered review."[15] The first level requires that the reviewing court determine "whether there is substantial evidence in light of the whole record to support the Commission's findings of basic fact."[16] The second level of review requires that the order "contain specific findings on all the factual determinations material to its ultimate conclusions."[17] The supreme court further explained that at this second level, the "judicial task" is to review "conclusions of

---

5. Jennifer Wheeler Terry, *Survey of Administrative Law*, 40 IND. L. REV. 676, 677 (2007).

6. Jennifer Wheeler Terry, *Survey of Indiana Administrative Law*, 42 IND. L. REV. 789, 789 (2009).

7. *Id.*

8. 907 N.E.2d 1012, 1016-17 (Ind. 2009). The author wishes to disclose that his law firm, Lewis & Kappes, P.C., represented U. S. Steel throughout the entire course of litigation in this matter. The author was also personally involved in the drafting of the appellate briefs before the court of appeals and supreme court, and entered an appearance on behalf of U. S. Steel before the state's appellate courts.

9. *Id.* at 1014.

10. *Id.* at 1014-15.

11. *Id.* at 1015.

12. *Id.* Both parties, in fact, filed motions for summary judgment before the IURC.

13. *See* N. Ind. Pub. Serv. Co. v. U. S. Steel Corp., 881 N.E.2d 1065, 1069-71, 1080 (Ind. Ct. App. 2008), *superseded*, 907 N.E.2d 1012 (Ind. 2009).

14. *NIPSCO*, 907 N.E.2d at 1014.

15. *Id.* at 1015-16.

16. *Id.* at 1016 (citing Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co., 485 N.E.2d 610, 612 (Ind. 1985)).

17. *Id.* (citing *Citizen Action Coal.*, 485 N.E.2d at 612).

ultimate facts for reasonableness, the deference of which is based on the amount of expertise exercised by the agency."[18] The supreme court then explained that when an order addresses an issue within the "special competence" of an agency, reviewing courts should give greater deference to the agency's determination, while giving less deference to agency orders dealing with matter outside the agency's competence.[19]

Turning to the contract at issue, the supreme court noted that as part of a regulatory settlement, unlike an agreement between private parties, the contract took on "public interest ramifications" upon its approval by the Commission, which retained its "authority and statutory responsibility to supervise and regulate the Contract."[20] This meant that the IURC "deployed its expertise" in interpreting the contract, which effectively became its own order, and was, accordingly, due greater deference as "[a]pproving such contracts and resolving disputes revolving around them is intrinsic to the Commission's regulation of utility rates."[21]

The court ultimately concluded that the Commission's interpretation of the contract was a "question falling well within the Commission's expertise."[22] The supreme court therefore determined that the question presented was a "mixed question of law and fact with a high level of deference"[23] and determined that it was appropriate to examine the IURC's interpretation of the contract at the second tier of review.[24] In applying that standard, the court examined the legal conclusions drawn by the IURC, as well as the basis for those conclusions, before ultimately determining that none of the "Commission's conclusions [ran] afoul of reasonable application of the well-established principles of contract law."[25] The court thus affirmed the Commission's order.[26]

B. Standard of Review—Summary Judgment

In addition to examining the appropriate standard of review applicable to agency decisions, the Indiana Supreme Court in *NIPSCO* also addressed the appropriate standard of review courts should apply in reviewing an agency's summary judgment order.[27] In doing so, the supreme court specifically considered whether it was proper for a court to apply a de novo standard in such a situation.[28]

In addressing that issue, the court explained that an appellate court reviews a

---

18. *Id.* (citing McClain v. Review Bd. of the Ind. Dep't of Workforce Dev., 693 N.E.2d 1314, 1317-18 (Ind. 1998)).

19. *Id.*

20. *Id.* at 1017.

21. *Id.* at 1017-18.

22. *Id.* at 1018.

23. *Id.*

24. *See id.*

25. *See id.* at 1018-20.

26. *Id.* at 1020.

27. *Id.* at 1018.

28. *Id.*

trial court's summary judgment order de novo because the "reviewing court faces the same issues that were before the trial court and analyzes them the same way."[29] The supreme court contrasted this standard with the review of an agency's grant of summary judgment, noting that administrative agencies are "not judicial bodies" but are rather "executive branch institutions which the General Assembly has empowered with delegated duties."[30] Because of this distinction between a trial court and an administrative agency, the court concluded that "adjudication by an agency deserves a higher level of deference than a summary judgment order by a trial court falling squarely within the judicial branch."[31] Thus, the supreme court held that it was proper to apply the "established standard of review for judicial review" of an agency action.[32]

C. Standard of Review—Particular Applications

1. Arbitrary and Capricious.—In *Indiana Pesticide Review Board v. Black Diamond Pest & Termite Control, Inc.*,[33] the Indiana Court of Appeals addressed whether certain decisions of the Indiana Pesticide Review Board were arbitrary and capricious.[34] In this case, Black Diamond, its owners (the Duncans), and an employee (Thomas) were all notified by the Office of the Indiana State Chemist that they had violated various pesticide laws and that each of their licenses would be revoked and suspended indefinitely.[35] The affected individuals sought review of the state chemist's decision, only to have the decision affirmed by an ALJ panel, and then the Indiana Pesticide Review Board (IPRB).[36] On judicial review, after initially affirming the IPRB's decision, the trial court granted certain relief to the petitioners.[37] In doing so, the trial court reasoned that the IPRB had misconstrued several statutes, which rendered the IPRB's decision arbitrary and capricious with respect to revoking of the parties' licenses.[38]

The court of appeals explained that an agency action is arbitrary and capricious if it is "made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency."[39] The court went on to explain that "[s]imply put, an

---

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. 916 N.E.2d 168 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009).

34. *Id.* at 179.

35. *Id.* at 171.

36. *Id.*

37. *Id.*

38. *Id.* at 175-78. As the court of appeals thoughtfully clarified, the trial court determined that the state chemist lacked the authority to find that Thomas violated a particular statute, and therefore, could not find Black Diamond or the Duncans in violation of another statute based on Thomas's acts. *See id.* at 181.

39. *Id.* at 179 (citing Ind. State Bd. of Health Adm'rs v. Werner, 841 N.E.2d 1196, 1206

agency decision is arbitrary and capricious where there is no reasonable basis for the decision."[40] Because the trial court determined that the IPRB acted arbitrarily and capriciously based on a misinterpretation of the relevant statutory provisions, the court of appeals engaged in its own statutory interpretation.[41] In doing so, the court restated the standard of review appropriate for statutory interpretations made by the agency charged with enforcing the statute. That is, the administrative agency's interpretation is "entitled to great weight, unless that interpretation is inconsistent with the statute itself."[42] When faced with "two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency."[43] The court went on to hold that if the agency's interpretation is reasonable, it should end its analysis and accept the agency's interpretation.[44]

In *Black Diamond*, the issue was the reasonableness of the IPRB's interpretation of two former statutes: section 15-3-3.6-14[45] and section 15-3-3.6-16[46] of the Indiana Code.[47] The court concluded that because the provisions fell within the same code chapter, it was a reasonable interpretation that the state chemist had the authority to impose civil penalties (such as revoking a license) for violations of section 16.[48] Because the court determined that the IPRB's interpretation was reasonable, it ceased its statutory analysis and concluded, based on that interpretation and the evidence presented, that the decision was not arbitrary or capricious.[49]

In an interesting twist on the application of the arbitrary and capricious standard, the court of appeals in *Jennings Water, Inc. v. Office of Environmental Adjudication*,[50] struggled with whether a reviewing agency improperly applied an arbitrary and capricious standard.[51] In this case, the Office of Environmental Adjudication (OEA) reviewed an Indiana Department of Environmental Management (IDEM) decision to approve a permit for a "confined feeding

---

(Ind. Ct. App. 2006)).

40. *Id.* (citing *Werner*, 841 N.E.2d at 1207).

41. *Id.* at 180-82.

42. *Id.* at 181 (quoting Ind. Dep't of Envtl. Mgmt. v. Boone County Res. Recovery Sys., Inc., 803 N.E.2d 267, 273 (Ind. Ct. App. 2004)).

43. *Id.* (quoting *Boone County Res. Recovery Sys., Inc.*, 803 N.E.2d at 273).

44. *Id.* (citing *Boone County Res. Recovery Sys., Inc.*, 803 N.E.2d at 273).

45. IND. CODE § 15-3-3.6-14 (2005) (current version at IND. CODE § 15-16-5-65 (2008)) (authorizing the state chemist to impose civil liability for violating the chapter, including aiding and abetting a person in evading the provision of the chapter).

46. *Id.* § 15-3-3.5-16 (current version at IND. CODE § 15-16-5-70 (2008)) (criminalizing acts that impeded, hindered, or prevented the state chemist in the performance of his or her duties).

47. *Black Diamond Pest & Termite Control, Inc.*, 916 N.E.2d at 181-82.

48. *Id.*

49. *Id.* at 182.

50. 909 N.E.2d 1020 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 556 (Ind. 2009).

51. *Id.* at 1023-26.

operation."[52] In doing so, the OEA stated that the "issuance [of the permit] was neither arbitrary nor capricious."[53] This, according to Jennings Water, constituted the imposition of an improper and heightened standard at the administrative level.[54] Although the court of appeals agreed that it would be improper for the reviewing agency to apply an arbitrary and capricious standard, the court concluded, after a full review of the agency's order, that the OEA had not applied such a standard, but rather, the appropriate de novo standard.[55]

2. Unsupported by Substantial Evidence.—Indiana Family and Social Services Administration v. Pickett[56] addressed whether the Family and Social Services Administration's (FSSA) denial of Medicaid benefits to Pickett, an individual diagnosed with a number psychiatric disorders, was based on substantial evidence.[57] The court explained that "'substantial evidence is more than speculation and conjecture' yet less than a preponderance of evidence."[58] The court went on to hold that "[s]ubstantial evidence 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[59]

In reviewing the FSSA's determinations, the court examined whether substantial evidence supported the ALJ's findings.[60] Ultimately, the court concluded that the ALJ did not base its determinations on evidence in the record.[61] To the contrary, the "evidence uniformly supports the conclusion that Pickett's documented conditions substantially impair his ability to perform labor, services, or engage in a useful occupation," which the court considered the central inquiry as to Pickett's eligibility for benefits.[62] Because the "administrative decision did not demonstrate a rational connection between the facts found and the applicable law," the court ultimately concluded that the FSSA's determination was unsupported by the evidence, and affirmed the trial court's decision reversing the FFSA's denial of Pickett's Medicaid benefits.[63]

An interesting side note with respect to the decision in *Pickett* was the court's treatment of the ALJ's use of boilerplate language that she had "carefully reviewed the testimony presented at the hearing, all evidence, Federal/State regulations, and policy transmittals in regard to this matter."[64] The FSSA asserted that this language demonstrated that the ALJ had considered all the evidence, and "that just

---

52. *Id.* at 1021-22.

53. *Id.* at 1025.

54. *Id.* at 1024.

55. *Id.* at 1024-25.

56. 903 N.E.2d 171 (Ind. Ct. App.), *aff'd on reh'g*, 908 N.E.2d 1191 (Ind. Ct. App. 2009).

57. *Id.* at 175.

58. *Id.* at 177 (quoting Ind. Alcoholic Beverage Comm'n v. River Rd. Lounge, Inc., 590 N.E.2d 656, 659 (Ind. Ct. App. 1992)).

59. *Id.* (quoting *River Rd. Lounge*, 590 N.E.2d at 659).

60. *Id.* at 179.

61. *Id.* at 184.

62. *Id.* at 182-84.

63. *Id.* at 183-84.

64. *Id.* at 175.

because certain evidence was not noted does not mean it was not considered."[65] The court rebuffed the assertion that this language "could insulate an administrative decision from any evidentiary challenge," noting that allowing it to do so would "eliminate meaningful review no matter how much, if any, evidence was considered."[66]

3. Statutory Interpretation.—As noted in the discussion of the *Black Diamond* case, courts are generally deferential to an agency's interpretation of a statute the legislature charges it with enforcing.[67] In *Indiana Department of Revenue v. Kitchin Hospitality, LLC*,[68] the Indiana Supreme Court confronted an issue of somewhat competing statutory interpretations by the State Department of Revenue and the Indiana Tax Court—both bodies that possess expertise in the application of Indiana's tax laws.[69]

Kitchin Hospitality involved consideration of whether a law exempting hotels from paying sales tax on "tangible personal property" extended to the hotel's purchase of utilities.[70] The Department of Revenue argued that exemption did not apply because the hotel, not hotel guests, consumed the utilities.[71] The tax court interpreted the exemption to apply to utilities consumed in a hotel's guest rooms, but not in common areas.[72] In a 3-2 decision, the supreme court ultimately sided with the Department of Revenue and concluded that this was an inaccurate interpretation.[73]

The court held that the statutory exemption required the property be used "during occupation of the rooms" and be consumed by the guest.[74] The court explained that it based its decision on a number of factors.[75] First, the tax court's interpretation could lead to exemptions for a wide variety of items that guests did not actually use. Second, other provisions of the statute indicated that the General Assembly intended to exempt only items actually used by hotel guests during their stay.[76] The court also considered later amendments to the statute, which expressly excluded utilities from the exemption, to be evidence of the General Assembly's intention to express its original intent more clearly.[77]

Interestingly, although the majority asserted that this interpretation of the statute was in line with the deference typically given to an administrative agency

---

65. *Id.*
66. *Id.* at 175 n.5
67. *See supra* Part I.C.1.
68. 907 N.E.2d 997 (Ind. 2009).
69. *Id.* at 1001.
70. *Id.* at 998.
71. *Id.* at 1001.
72. *Id.* at 999.
73. *Id.* at 1001-03.
74. *Id.* at 1001-02.
75. *Id.* at 1002.
76. *Id.*
77. *Id.*

charged with enforcing a statute,[78] the dissent disagreed.[79] Justice Dickson instead asserted that the court should defer to the tax court, which the legislature "created 'to consolidate tax-related litigation in one court of expertise.'"[80] This split on the Indiana Supreme Court exposes an intriguing dilemma that can arise when two adjudicative bodies share competence over the same area, and yet interpret the law in that area differently: Specifically, to whose expertise does the court defer?

D. Subject Matter Jurisdiction or Procedural Defect?

1. Exhaustion of Administrative Remedies.—The Indiana Supreme Court has consistently held that in most circumstances if a party is required to exhaust available administrative remedies and fails to do so, a reviewing court is "completely ousted" of subject matter jurisdiction to hear the case.[81] Exceptions to this rule exist, however, and in some cases, questions can arise whether a party has exhausted its administrative remedies or if it is required to do so.

One decision during the survey period that addressed the exhaustion requirement was *LHT Capital, LLC v. Indiana Horse Racing Commission*.[82] Last year's survey Article extensively addressed the original decision in this matter,[83] but LHT sought rehearing of the court of appeals' decision that it had failed to exhaust its administrative remedies before seeking review of the racing commission's imposition of a transfer fee.[84] LHT sought rehearing on a number of theories, including a contention that the court of appeals misapplied an exception to the exhaustion requirement that exists when a party challenges the legality or constitutionality of the statute or regulation at issue.[85]

On rehearing, the court of appeals explained that LHT's position, which amounted to a claim that a party does not need to exhaust its administrative remedies anytime it challenges a statute or regulation as void, was "simply not the case."[86] Instead, the court of appeals explained that Indiana courts had consistently determined that the exception did not always apply.[87] In doing so, the court of appeals cited to a number of cases including *Indiana Department of Environmental Management v. Twin Eagle, LLC*,[88] and *Johnson v. Celebration Fireworks, Inc.*[89] *Celebration Fireworks, Inc.* held that even if a challenge were

---

78. *Id.*

79. *Id.* at 1003 (Dickson, J., dissenting).

80. *Id.* (Dickson, J., dissenting) (quoting State v. Sproles, 672 N.E.2d 1353, 1357 (Ind. 1996)).

81. *See* Austin Lakes Joint Venture v. Avon Utils., Inc., 648 N.E.2d 641, 644 (Ind. 1995).

82. 895 N.E.2d 124 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).

83. *See* Terry, *supra* note 6, at 798-99.

84. *LHT Capital, LLC*, 895 N.E.2d at 125.

85. *Id.* at 126-27.

86. *Id.* at 127.

87. *Id.*

88. 798 N.E.2d 839 (Ind. 2003).

89. 829 N.E.2d 979 (Ind. 2005).

made to the validity of a statute or regulation, exhaustion might still be required in order to resolve the case without "confronting broader legal issues."[90] The court restated a portion of its prior holding that LHT's actions before the racing commission, particularly negotiating and accepting a settlement, accomplished that very end, and prevented the company from litigating the constitutionality of the commission's rule.[91]

In *Jacobsville Developers East, LLC v. Warrick County*,[92] the court of appeals addressed whether a party was required to complete a certiorari action in order to exhaust its administrative remedies. In that case, Jacobsville Developers filed an application in 2007 with the Warrick County Area Planning Commission for approval of a two-lot subdivision.[93] The plat proposed by Jacobsville Developers was rejected because the county's subdivision control ordinance required that developers designate a portion of the land, which the plat designated a setback, as a right-of-way.[94] The developer then filed a certiorari action with the local circuit court, based in part on the assertion that the denial of the proposed plat constituted an unconstitutional taking without just compensation.[95] Before that action concluded, however, the parties agreed to dismiss the matter.[96]

Shortly after agreeing to dismiss the pending certiorari action, the developer filed a second application for approval of a plat, this time including a dedicated right-of-way.[97] After the area planning commission approved the second application, Jacobsville Developers filed an inverse condemnation action alleging that the local ordinance constituted an unconstitutional taking.[98] The trial court dismissed the complaint for lack of subject matter jurisdiction because Jacobsville Developers had failed to exhaust its administrative remedies.[99] On appeal, Jacobsville Developers argued that the trial court erred because it had exhausted the available remedies within the agency and was therefore not required to complete the certiorari process before filing its inverse condemnation action.[100]

Quoting from the U.S. Supreme Court decision in *Williamson County Regional Planning Commission v. Hamilton Bank*,[101] the Indiana Court of Appeals noted that the exhaustion requirement refers to *both* the administrative and judicial procedures available to an aggrieved party and that by dismissing the certiorari action, Jacobsville Developers had failed to exhaust its administrative

---

90. *LHT Capital, LLC*, 895 N.E.2d at 127-28 (quoting *Celebration Fireworks Inc.*, 829 N.E.2d at 982).

91. *Id.* at 128-29.

92. 905 N.E.2d 1034 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009).

93. *Id.* at 1037.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1038.

101. 473 U.S. 172 (1985).

remedies.[102] The court also considered whether the developer's failure to exhaust its administrative remedies fit within the futility exception to the exhaustion requirement. Specifically, the court of appeals considered whether the certiorari process could have provided Jacobsville Developers with the type of relief it sought in that proceeding.[103]

Relying on the applicable Indiana statutory law and Seventh Circuit case law, the court of appeals noted that certiorari courts lack the authority to provide compensatory relief, but instead, can only "pass on the legality of the area plan commission's action by affirming, modifying, or reversing the action."[104] The court thus concluded that if the developer sought compensation in its certiorari action, then its voluntary dismissal of that action would not result in a failure to exhaust its administrative remedies.[105] But the court determined that in the certiorari action the developer's claim was one for excessive exaction, in which it sought to avoid a land-use decision that conditioned approval of a development on the dedication of the property to a public use.[106] As such, the developer was not seeking compensation but rather exactly the sort of relief that the certiorari process could provide, and the court of appeals concluded that the process would not have been futile.[107]

2. Compliance with Statutory Procedures.—AOPA and other administrative statutes contain provisions that require a party seeking judicial review of an agency action to comply with certain procedures.[108] During the survey period, several cases addressed whether a party's failure to comply with those procedures prevented judicial review of an agency action.

In *Reedus v. Indiana Department of Workforce Development*,[109] the court of appeals considered whether a trial court properly dismissed a case based on the petitioner's failure to timely file the complete certified agency record as required by Indiana section 4-21.5-5-13.[110] In addressing that question, the court of appeals first reviewed the historical treatment of such failures in Indiana's Courts of Appeals. In doing so, the court of appeals took note of what it considered a dramatic change in the common law away from considering such defects to deprive a court of subject matter jurisdiction, to a view that such defects were merely procedural in nature.[111]

---

102. *Jacobsville Developers*, 905 N.E.2d at 1041 (quoting *Williamson County*, 473 U.S. at 193).

103. *Id.* at 1039.

104. *Id.*

105. *Id.*

106. *Id.* at 1039-40 (quoting City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999)).

107. *Id.* at 1040.

108. *See, e.g.*, IND. CODE §§ 4-21.5-5-3 (standing), -4 (exhaustion of remedies), -5 (timing).

109. 900 N.E.2d 481 (Ind. Ct. App. 2009).

110. *See id.* at 482-83. Instead, the petitioner filed uncertified copies of four relevant documents to the petition for review. *Id.* at 483.

111. *See id.* at 485-87. The significance of this shift is important. If a trial court were to lack

The court of appeals then acknowledged what it called "somewhat divergent views" on how to treat a petitioner's failure to file statutorily designated materials.[112] After reviewing several cases, the court turned to the language of Indiana Code section 4-21.4-5-13 which requires the timely filing of the "agency's orders, the documents upon which the agency relied in issuing the orders, and 'any other material described in this article as the agency record for the type of agency action at issue.'"[113] The court focused on this last phrase, "the agency record for the type of agency action at issue" and held that it revealed that the General Assembly understood that "not everything [statutorily defined as the agency record] would necessarily exist or be relevant to the disputed action."[114] In addition, the court noted that section 4-21.5-5-13(b) provides only that the failure to file timely the agency record "is cause for dismissal."[115] The court of appeals concluded that the use of this permissive, rather than mandatory, language was evidence that the General Assembly "inten[ded] to allow the trial court some leeway in deciding whether to dismiss an appeal."[116] The court also noted that a "hyper-formalistic" filing requirement could create due process concerns and leave the door open for agencies to be "intentionally slow and uncooperative in producing a complete record, in hopes of securing a dismissal."[117]

The court of appeals concluded that it would be wasteful to require the filing of irrelevant materials, but it ultimately upheld the trial court's dismissal of the petition because Reedus only asserted that the administrative agency's action was "unsupported by substantial evidence."[118] Because the ALJ relied on the transcript of the proceedings in reaching his decision, the court of appeals concluded that the filing of transcript was "explicitly required" by AOPA, and therefore failure to make that filing rendered the petition inadequate.[119]

In another case, *Evans v. State*,[120] the court of appeals addressed whether the failure to serve the "ultimate authority issuing the order" with the petition for review, as required by Indiana Code section 4-21.5-5-8 deprived the reviewing court of subject matter jurisdiction.[121] In that case, Evans, after the Indiana Family and Social Services Administration denied her Medicaid coverage, sought judicial

---

subject matter jurisdiction because of a defect in the process of filing for review, it could not properly review the matter. On the other hand, if the defect is "procedural," a court would still be vested with the authority to act, as the opposing party could waive a challenge to the defect.

112. *Id.* at 485-86.

113. *Id.* at 487 (quoting IND. CODE § 4-21.5-5.13(a)(1-3) (2005)).

114. *Id.*

115. *Id.* (quoting IND. CODE § 4-21.5-5-13(b)).

116. *Id.*

117. *Id.* at 487-88.

118. *Id.* at 488.

119. *Id.*

120. 908 N.E.2d 1254 (Ind. Ct. App. 2009), *reh'g denied*, No. 21A01-0903-CV-152, 2009 Ind. App. LEXIS 1639 (Ind. Ct. App. Sept. 15, 2009).

121. *See id.* at 1256-57.

review.[122] Although Evans served the attorney general, she failed to serve the head of the FSSA and instead served the governor.[123]

Citing Indiana Supreme Court decisions *K.S. v. State*[124] and *Packard v. Shoopman*,[125] the court of appeals concluded that the improper service "should be viewed as a procedural defect, not jurisdictional."[126] The court of appeals then concluded that the defective service was "not fatal" because the method of service had been reasonably calculated to notify the FSSA of the suit, and because the FSSA had actual notice of the suit, evidenced by the attorney general's office entering an appearance on behalf of the FSSA.[127] Accordingly, the court of appeals reversed the dismissal.[128]

In an interesting counterpoint to the decisions in *Reedus* and *Evans*, the court of appeals in *Benton County Remonstrators v. Board of Zoning Appeals*[129] considered whether a petition for review from a decision of the local Board of Zoning Appeals (BZA) was procedurally sufficient.[130] The court first looked at the question of whether the petition, verified by an attorney, was properly verified under Indiana Code section 36-7-4-1003(a).[131] The court of appeals noted that the Indiana Supreme Court had previously concluded that Indiana Trial Rule 11(B) sets the standard necessary for verification of petitions for review of administrative agencies like a BZA.[132] The court then determined that because an attorney could form the requisite belief as to the truth of the representations, as required by Rule 11(B), the attorney's verification was sufficient.[133]

On the other hand, however, the court of appeals determined that the petitioners' failure to serve notice on all affected landowners, as required by statute, justified dismissal of the petition with respect to those landowners.[134] In doing so, the court relied on statements in the Indiana Supreme Court's decision in *Bagnall v. Town of Beverly Shores*,[135] which noted that strict compliance with the statute authorizing review of BZA decisions was necessary to vest jurisdiction in a trial court.[136]

---

122. *Id.* at 1256.

123. *Id.* at 1257.

124. 849 N.E.2d 538 (Ind. 2006) (describing subject matter jurisdiction generally).

125. 852 N.E.2d 927, 931-32 (Ind. 2006) (holding "the timeliness of filing does not affect the subject matter jurisdiction of the Tax Court").

126. *Evans*, 908 N.E.2d at 1257.

127. *Id.* at 1257-59.

128. *Id.* at 1259.

129. 905 N.E.2d 1090 (Ind. Ct. App. 2009).

130. *See id.* at 1093.

131. *Id.* at 1094-95.

132. *Id.* at 1095.

133. *Id.*

134. *Id.* at 1098-99.

135. 726 N.E.2d 782, 786 (Ind. 2000).

136. *Benton County Remonstrators*, 905 N.E.2d at 1098-99 (citing *Bagnall*, 726 N.E.2d at 785).

Although *Reedus*, *Evans*, and *Benton County* all suggest that courts may exercise some lenience with regard to compliance with filing requirements in seeking judicial review, that lenience should not be considered absolute. For example, in *Marchand v. Review Board of the Indiana Department of Workforce Development*,[137] the court of appeals dismissed an appeal because the appellant did not file her notice of appeal until roughly three months after the Department issued its final order.[138]

E. Supplementing the Agency Record

Generally, parties cannot supplement the agency record during judicial review.[139] The decision in *Edward Rose of Indiana, LLC, v. Metropolitan Board of Zoning Appeals*,[140] provided valuable insight into some of the circumstances under which the record may, and may not, be supplemented.

In that case, the court of appeals reviewed the decision of a trial court in a certiorari petition seeking relief from a BZA decision denying Edward Rose a variance to display a large sign on the premises of its apartment complex.[141] During the certiorari proceeding, the trial court, although expressing misgivings about doing so, allowed Edward Rose to provide significant supplemental evidence on the three statutory criteria necessary to obtain a variance.[142] Based on this evidence, the trial court reversed the BZA on two of the three statutory criteria but upheld the BZA's determination as to the last criteria.[143]

Before addressing Edward Rose's argument, the court of appeals chose to "comment on" the trial court's decision to receive additional evidence.[144] The court noted that under the applicable statute, the certiorari proceeding was limited to a determination of the legality of the BZA's decision but that the trial court could take additional testimony if it determined it was necessary to do so in order to pass on that issue; however, "'the review may not be by trial de novo.'"[145]

The court of appeals held that the "trial court's instincts [were] correct" in expressing its misgivings over admitting the evidence, and explained that doing so did not comport with the historical function of the certiorari process, which was to provide a means of relief when an "inferior tribunal either exceeded its jurisdiction or proceeded illegally and there was no other method for reviewing

---

137. 905 N.E.2d 435 (Ind. Ct. App. 2009).

138. *Id.* at 438-39.

139. *See, e.g.*, IND. CODE § 4-21.5-5-12 (2005).

140. 907 N.E.2d 598 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 553 (Ind. 2009).

141. *Id.* at 600.

142. *See id.* at 601-03 (stating that the court received the testimony of a land use developer, three Edward Rose employees, and additional documentary evidence); *see also id.* at 603 (quoting from transcript of the proceedings before the trial court in which judge asked that by receiving supplemental evidence, "[A]ren't we opening ourselves up potentially for problems?").

143. *Id.* at 601.

144. *Id.* at 602.

145. *Id.* (quoting IND. CODE § 36-7-4-1009 (2007)).

such proceedings."[146] The court then indicated that it is hard to conclude that a trial court acted according to Indiana Code section 36-7-4-1009 when it considered evidence the parties did not even present to the BZA.[147] Rather, the court remarked that consideration of such evidence could be "more accurately described as conducting a trial de novo."[148] Because the trial court based its determinations on the new evidence, the court of appeals concluded that the supplementation of the record was "inconsistent with certiorari review under Indiana Code section 36-7-4-1009."

The court then provided a "non-exhaustive list of instances where the trial court may properly consider supplemental evidence, while at the same time avoiding a trial de novo."[149] This list included: an incomplete record because the aggrieved party was denied an opportunity to be heard or evidence was excluded; when "good and sufficient" cause was shown as to why the evidence was not offered before the BZA; when the record does not contain all the evidence presented; when the record of the hearing is insufficient to determine the merits of the appeal; when new evidence is discovered after the hearing; and when the evidence is "probative of whether the BZA members violated the Indiana Open Door Law."[150]

F. Availability of Judicial Review

Most state agencies are subject to judicial review, but not all. In *Hayes v. Trustees of Indiana University*,[151] the court of appeals considered whether a former employee of Indiana University had access to judicial review following her termination during a "reduction in force."[152] In addressing the question, the court looked to the Indiana Supreme Court's decision in *Blanck v. Indiana Department of Corrections*.[153] As the court of appeals explained, Blanck had sought judicial review of a disciplinary action taken against him by the Department of Corrections.[154] Although the supreme court in *Blanck* held that AOPA provided the exclusive means of review for actions like those taken by the Department of Corrections, it nevertheless determined that because the General Assembly had deliberately excluded review of such actions under the provisions of AOPA, the clear intent was to "'deny to inmates charged with or found guilty of misconduct the procedure specified in the AOPA, including judicial review.'"[155]

The court found the situation in *Blanck* analogous to that before it because in

---

146. *Id.* at 603.
147. *Id.*
148. *Id.* at 603-04.
149. *Id.*
150. *Id.*
151. 902 N.E.2d 303 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).
152. *Id.* at 306, 314-15.
153. 829 N.E.2d 505 (Ind. 2005).
154. *Hayes*, 902 N.E.2d at 314.
155. *Id.* at 314-15 (quoting *Blanck*, 829 N.E.2d at 510).

both instances, the General Assembly had excluded the relevant authority, or particular agency action, from the provisions of AOPA.[156] Thus, the court determined that the General Assembly's intent was to exclude the actions of Indiana University from judicial review.[157]

II. AGENCY ACTIONS

This section of this Article examines cases that fall outside of "traditional" issues of judicial review and instead relate to issues such as agency authority and the conduct of proceedings before an administrative agency.

A. Scope of Agency Action

As statutory bodies, administrative agencies are generally limited only to those powers explicitly granted to them by statute. In some instances, then, questions can arise whether an agency has the authority to take a particular action. Such was the case in *Ghosh v. Indiana State Ethics Commission*.[158] That case involved a former employee of IDEM who the agency terminated for violating the state's ethics code.[159] After his dismissal, Ghosh appealed the decision to the State Employee Appeals Commission where the ALJ found that the agency should reinstate him.[160] The Commission, however, declined to follow the ALJ's recommendation and affirmed the termination of Ghosh's employment.[161] Ghosh sought judicial review of that decision with the court of appeals, but the court of appeals dismissed the matter when he failed to timely file the agency record.[162]

While Ghosh was appealing his dismissal, the State Ethics Commission learned of his actions and initiated its own investigation, which led it to find that he had violated the State Ethics Code and ordered him to reimburse the State as a sanction.[163] Ghosh then sought judicial review of the Ethics Commission's determination, seeking reinstatement of his employment.[164] The trial court, however, determined that Ghosh was collaterally estopped from seeking

---

156. *Id.* at 315. The specific exemption from AOPA for state educational institutions is located in Indiana Code section 4-21.5-2-4(a)(3). The exemption for agency actions "related to an offender within the jurisdiction of the department of correction," which was at issue in *Blanck*, is located in section 4-21.5-2-5(6).

157. *Hayes*, 902 N.E.2d at 315.

158. 911 N.E.2d 137 (Ind. Ct. App.), *trans. granted, opinion vacated*, 919 N.E.2d 556 (Ind. 2009). The Indiana Supreme Court granted transfer in this case on October 29, 2009. The court held oral arguments on December 17, 2009, but it has not rendered a decision as of March 3, 2010. The Indiana Law Blog, http://indianalawblog.com/archives/2009/12/ind_decisions_u_132.html (Dec. 7, 2009, 5:30 EST).

159. *Ghosh*, 911 N.E.2d at 139.

160. *Id.* at 139-40.

161. *Id.* at 140.

162. *Id.*

163. *Id.*

164. *Id.*

reinstatement because that matter had already been litigated before IDEM and the Appeals Commission.[165] The question before the court of appeals thus became whether "IDEM had authority to dismiss Ghosh for a violation of the Ethics Code and, if so, whether the Appeals Commission had authority to review such a dismissal."[166]

The court of appeals then engaged in statutory interpretation of several sections of the State Personal Act to determine whether IDEM and the Appeals Commission had the authority they respectively exercised in discharging Ghosh and in reviewing that decision.[167] In reviewing Indiana Code section 34-15-2-34, which grants an "appointing authority" the power to dismiss a "regular employee" for cause, the court determined that there was no dispute that IDEM and Ghosh fit those respective definitions.[168] The court also determined that although the State Personal Act did specifically define "for cause," there was "authority for the proposition that dismissals for cause nevertheless encompass a broad range of dismissals, including those that are accurately described as ethical violations."[169] This broad definition of "for cause" was sufficient for the court to conclude that the General Assembly had not intended to prohibit an "appointing authority" like IDEM from discharging an employee for a violation of the ethics code.[170] The court then concluded that given the statutory procedure established to review dismissal for violations of the ethics code, it "goes without saying that the legislature plainly intended to give the Appeals Commission jurisdiction over administrative appeals from such dismissals."[171] Based on its conclusion that both agencies had the authority to take the actions they did, the court of appeals ultimately held that the trial court properly concluded that Ghosh was collaterally estopped from litigating his dismissal during review of the Ethics Commission proceeding.[172]

B. Due Process

Administrative agencies exercise not only legislative and executive powers, but in many instances, the law also vests them with quasi-judicial powers. As such, many of the rights available to litigants in a traditional judicial setting are also available to persons involved in administrative proceedings. Among these rights is due process, which Indiana's courts have held requires at least notice and an opportunity to be heard.[173] In at least two instances during the survey period,

---

165. *Id.* at 141.

166. *Id.*

167. *Id.* at 142-44.

168. *Id.* at 142 (citing IND. CODE §§ 4-15-2-2.1, -3.7 (2005)).

169. *Id.* at 144 (citations omitted).

170. *Id.*

171. *Id.*

172. *Id.* at 145.

173. *See, e.g.*, Art Hill, Inc. v. Bd. of Ind. Dep't of Workforce Dev., 898 N.E.2d 363, 367 (Ind. Ct. App. 2008).

Indiana courts addressed whether a party to an administrative proceeding had received sufficient notice to satisfy due process requirements.[174]

In *Art Hill*, the court of appeals addressed whether an employer was denied due process during an unemployment compensation hearing.[175] In that matter, Art Hill, Inc., discharged an employee who was initially denied unemployment benefits after determining the discharge was for just cause.[176] The employee appealed, and the presiding ALJ sent notice of the hearing to both the employee and Art Hill.[177] Both subsequently notified the ALJ of a telephone number where they could reach them at the time of the hearing.[178] At the time of the hearing, however, the ALJ attempted several times to contact Art Hill at the number provided, but was unsuccessful.[179] The ALJ thus entered findings of fact and conclusions of law to the effect that Art Hill had failed to present evidence sufficient to meet its statutory burden that the employee was discharged for just cause.[180] Art Hill appealed to the full review board, which approved the ALJ's decision.[181]

On judicial review to the court of appeals, the court compared the situation to those in which a party had notice of a hearing but failed to appear without explanation or justification.[182] The court found that there was "no justification for treating the right to be present at an unemployment hearing any differently than the right to be present in any other context."[183] After noting that Art Hill had received notice, by providing the ALJ with a number where he could be reached, but took no steps to make other arrangements when the extension could not be used, the court determined that it could not be said that Art Hill "was denied a reasonable opportunity for a fair hearing."[184] As such, the court affirmed the decision to grant unemployment benefits.[185]

In another case, *Forni v. Review Board of the Indiana Department of Workforce Development*,[186] the court of appeals reached the opposite conclusion. In that case, Forni was discharged, and after she was granted unemployment benefits, her former employer appealed.[187] Although notice of a telephonic hearing was sent to Forni, she was traveling out of the state and did not receive the notice

---

174. *See* Forni v. Review Bd. of the Ind. Dep't of Workforce Dev., 900 N.E.2d 71, 72-73 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 988 (Ind. 2009); *Art Hill, Inc.*, 898 N.E.2d at 367-68.

175. *Art Hill, Inc.*, 898 N.E.2d at 365-66.

176. *Id.* at 365.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 365-66.

181. *Id.* at 366.

182. *Id.* at 367-68.

183. *Id.* at 368.

184. *Id.* (citation omitted).

185. *Id.*

186. 900 N.E.2d 71 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 988 (Ind. 2009).

187. *Id.* at 71-72.

until she returned, after the hearing.[188] Forni notified the Review Board of this fact and provided her travel itinerary as evidence that she was out of the state, but the Review Board nevertheless affirmed the ALJ's determination that her employer discharged her for cause.[189]

Relying on a prior decision, the Review Board argued that actual notice of the hearing was not required; however the court of appeals distinguished that case, noting that it decided the case on due process grounds.[190] Instead, the court of appeals turned to more recent precedent, which had found that the statutory grant of a "reasonable opportunity for a fair hearing" required actual notice.[191] The court of appeals thus reversed and ordered a new hearing.[192]

III. OPEN DOOR LAW

Indiana's Open Door Law provides that "official action[s]" are to be conducted at an open meeting[193] the purpose of which is to ensure the agency actions are conducted "openly so that the general public may be fully informed."[194] Several cases during the survey period dealt with issues that can arise from the need to conduct such public meetings.

In *Lake County Trust Co. v. Advisory Plan Commission*,[195] the Indiana Supreme Court confronted the issue of whether a governmental entity could be sanctioned under the Indiana Alternative Dispute Resolution (ADR) Rules.[196] In that case, the Advisory Plan Commission denied a developer plat approval for a subdivision in Lake County.[197] The developers sought judicial review, and the trial court offered mediation.[198] The result of the mediation was a written settlement agreement that contained a revised plat and, critically, contained language that the Plan Commission "shall at its next regular meeting . . . approve this agreement and its engineering."[199] Unfortunately, at the next meeting, the Plan Commission did not vote to approve the agreement, but rather deferred the vote for thirty days.[200]

---

188. *Id.* at 72.

189. *Id.*

190. *Id.* at 73 (citing Osborn v. Review Bd. of the Ind. Employment Sec. Div., 398 N.E.2d 495 (Ind. App. 1978)).

191. *Id.* (quoting Scott v. Review Bd. of Ind. Dep't of Workforce Dev., 725 N.E.2d 993, 996 (Ind. Ct. App. 2000)).

192. *Id.*

193. IND. CODE § 5-14-1.5-1 (2005).

194. City of Gary v. McCrady, 851 N.E.2d 359, 365 (Ind. Ct. App. 2006) (citing Gary/Chicago Airport Auth. v. Maclin, 772 N.E.2d 463, 468 (Ind. Ct. App. 2002); IND. CODE § 5-14-1.5-1 (2005)).

195. 904 N.E.2d 1274 (Ind. 2009).

196. *See id.* at 1275.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

At that point, the developers sought to enforce the agreement, and the Plan Commission voted to reject it.[201]

The trial court ordered the settlement be enforced and ordered the Plan Commission to approve the plat, which the Commission did.[202] The trial court, however, also found that the Plan Commission acted in bad faith by failing to approve the agreement initially after it had granted its attorneys full settlement authority during an open meeting.[203] The court determined that a governmental entity such as the Plan Commission was not subject to sanctions under the ADR rules, but nevertheless ordered the Plan Commission to reimburse the developer the cost of mediation.[204]

The Indiana Supreme Court first addressed the issue of whether governmental entities could be subject to sanction under the ADR rules.[205] The court noted that its prior decision holding that a court could not impose treble damages on a governmental entity also recognized a court's inherent authority to impose sanctions on governmental entities because "'[w]hen the State enters the court as a litigant, it places itself on the same basis as any other litigant; subjecting itself to the inherent authority of the court to control actions before it.'"[206] Noting that the ADR rules make no exceptions for governmental entities, the court concluded that the ADR rules were "more analogous to the exercise of inherent judicial authority than to the imposition of punitive damage awards" from which governments are immune.[207] Thus, the court held that governmental entities could be sanctioned under the ADR rules.[208]

But the court did not conclude that the Plan Commission had acted in bad faith during the mediation.[209] Reviewing the relevant statutes, the court determined that because a plan commission's act is not final until approved at a meeting of the commission, the "statutory scheme operates to preclude the delegation of plan commission authority for final approval of subdivision plats."[210] Thus, because the settlement was not final, and could not be final until approved at a meeting "subject to the Open Door Law," the court concluded that the failure to promptly approve the subdivision did not constitute bad faith.[211]

CONCLUSION

Although the basic foundations of administrative law are well settled, as this

---

201. *Id.* at 1275-76.
202. *Id.* at 1276.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 1277 (quoting Noble County v. Rogers, 745 N.E.2d 194, 199 (Ind. 2001)).
207. *Id.* at 1278.
208. *See id.*
209. *Id.* at 1280.
210. *Id.* at 1279.
211. *Id.*

Article shows, the diverse nature of the matters handled by this state's administrative agencies frequently produce unique and challenging questions of law for Indiana's courts. Indeed, this Article reviewed only a small fraction of the number of reported administrative law cases from Indiana's appellate courts. Many cases go unreported and more never reach the courts. Thus, even for creatures of statute, the tradition of the common law continually operates to put flesh on the bones as new issues arise, new approaches are taken, and new challenges are confronted.