SURVEY OF INDIANA ADMINISTRATIVE LAW

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INTRODUCTION

The scope, diversity, and sheer volume of work performed by Indiana's administrative agencies is unquestionably massive. Established by statute, agencies occupy a unique position in the legal field performing tasks assigned to the executive and legislative branches of government while also acting as quasi-judicial entities. As the reach and volume of work performed by administrative agencies has grown, so too has the body of law governing those agencies.

While the basic principles governing agency law are generally well settled, like any area of law there are always new ideas, new approaches, and new issues to be addressed. Accordingly, many disputes arise between litigants as to whether an agency decision is properly before a court for review, and if it is, the type of review the court can conduct. The purpose of this Article, then, is to review some of the opinions issued by the State's appellate courts while sitting in review of agency actions and to highlight how courts have addressed similar questions—sometimes in like fashion, and sometimes in conflict with each other.

I. STANDARD OF REVIEW

A. Deference to Agency Actions

For the most part, the decisions of administrative agencies are subject to judicial review by Indiana's courts.[1] Nevertheless, many aspects of judicial review are controlled either by statute or common law requirements. This includes restrictions on who may seek review, what a court may review, and whether an agency action is subject to review.[2]

Although AOPA does not govern judicial review for all of Indiana's administrative agencies, the statute largely embodies the basic legal principles that govern the standard of review courts apply in reviewing all administrative decisions. Under AOPA, a court may grant a party relief only when an agency action is:

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1. The Indiana Supreme Court has acknowledged the existence of a constitutional right to judicial review of agency decisions. 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)). While the Indiana Administrative Orders and Procedures Act (AOPA) is not applicable to all state agencies, even among those agencies which are regulated under AOPA, some agency decisions are not necessarily subject to review. IND. CODE § 4-21.5-2-5 (2011).

2. *See generally* IND. CODE §§ 4-21.5-5-1 to -16 (2011) (setting out statutory requirements concerning what persons may seek review, parties which have standing, the scope of review courts may employ, and enumerating the other requirements and procedures necessary to obtain judicial review of agency actions).

> (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.[3]

These enumerated reasons for overturning agency actions set forth the standard of review courts are to apply in reviewing agency decisions and are well established.[4] However, in reviewing agency actions under the individual bases for relief, portions of an agency's decision are subject to greater or lesser deference from courts. Accordingly, cases often arise that question the amount of deference that a court should apply.

One such case is *Harris v. United Water Services, Inc.*[5] There, the Indiana Court of Appeals addressed the appropriate standard to be applied to the decision of the Worker's Compensation Board to dismiss a claim brought by Harris seeking worker's compensation and "occupational disease" claims.[6]

Harris brought the claims after developing several serious health issues he asserted arose from his employment with United Water Services ("United Water"), a company that processes waste water.[7] United Water moved to dismiss Harris's claim on the grounds that "all of Harris'[s] medical conditions stemmed solely" from a single incident in 2005 when he had been splashed in the face with waste water, and that, as the statute of limitations had run, the Worker's Compensation Board lacked subject matter jurisdiction to hear the matter.[8] Harris disagreed, contending that his ailments arose from a broader pattern of exposure to waste water due, in part, to United Water's failure to provide appropriate equipment.[9] The Worker's Compensation Board ultimately sided with United Water, finding that Harris had admitted that his injury occurred in 2005, and that the statute of limitations ran in December 2007—roughly half a year before Harris filed his claim.[10]

Harris and United Water disagreed over the appropriate standard of review to be applied to the Worker's Compensation Board's decision to dismiss the case. Harris argued in favor of a de novo standard, consistent with that applied by appellate courts reviewing trial courts' rulings on motions to dismiss under Trial Rule 12(B)(1) based on a paper record.[11] United Water, on the other hand, argued that a more deferential standard of review applied to decisions of the Worker's

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3. *Id.* § 4-21.5-5-14(d).

4. *See, e.g.*, Dept of Fin. Inst. of Ind. v. Beneficial Fin. Co. of Madison, 426 N.E.2d 711, 713 (Ind. Ct. App. 1981).

5. 946 N.E.2d 35 (Ind. Ct. App. 2011).

6. *Id*. at 38-40.

7. *Id*. at 36-37.

8. *Id*. at 37.

9. *Id*.

10. *Id*.

11. *Id.* at 38.

Compensation Board.[12]

The Indiana Court of Appeals noted that neither party cited a case involving a ruling by an administrative agency on a motion to dismiss, and further noted that its own "independent research revealed that we have not consistently applied a single standard of review in this context."[13] The court therefore turned to the decision of the Indiana Supreme Court in *Northern Indiana Public Service Co. v . United States Steel Corp.*[14] In that case, the Indiana Supreme Court explained that while appellate courts would review a trial court's order on summary judgment under a de novo standard because it "faces the same issues that were before the trial court and analyzes them the same way," it would not do so when reviewing an agency decision because "review of an agency order does not involve the same analysis on appeal."[15] Rather, as executive branch institutions that are "empowered with delegated duties," the decision of an administrative agency "deserves a higher level of deference than a summary judgment order by a trial court falling squarely within the judicial branch."[16]

Analogizing the situation before it to that in *NIPSCO*, the court of appeals concluded that although the Worker's Compensation Board had ruled on a paper record, it was still appropriate to afford the Board's decision greater deference than it would a similar decision by a trial court.[17] Interestingly, although the court of appeals applied a more deferential standard of review, it still found that the Worker's Compensation Board had erred in dismissing the case because it erroneously concluded that Harris had admitted in a deposition that his injuries stemmed from a single incident of exposure in 2005.[18] After reviewing the record, the court of appeals determined the Board's conclusion was "not supported by the evidence" due to the numerous statements Harris made concerning his frequent exposure to waste water.[19] The *Harris* court thus reversed and remanded the case.[20]

While the Indiana Court of Appeals in *Harris* concluded that a deferential standard of review was appropriate, the court reached the opposite conclusion in *Office of Trustee of Wayne Township v. Brooks*.[21] In that case, the Township Trustee appealed a decision imposing a preliminary injunction requiring the Trustee to continue providing poor relief assistance to Brooks.[22] The Trustee argued that the trial court erred in issuing the injunction because it applied the wrong standard when reviewing the Trustee's decision to terminate assistance to

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12. *Id*. at 38-39.
13. *Id*. at 39.
14. 907 N.E.2d 1012 (Ind. 2009).
15. *Id*. at 1018.
16. *Id*.
17. *Harris*, 946 N.E.2d at 39-40.
18. *Id.* at 44.
19. *Id*. at 43-44.
20. *Id*. at 44.
21. 940 N.E.2d 334 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 206 (Ind. 2011).
22. *Id*. at 335.

Brooks. Specifically, the Trustee argued that the trial court should have reviewed the decision solely for an abuse of discretion rather than de novo.[23]

The court of appeals, however, pointed to its decision in *State ex rel. Van Buskirk v. Wayne Township, Marion County*,[24] holding that under the applicable statute, trial courts review decisions concerning poor relief as an "original cause" where "the factual findings of the board are not given the weight or accorded the presumption of validity which is usually given administrative factual findings."[25] The court also referred to a line of similar decisions by the Indiana Supreme Court and concluded that the trial court acted properly in "try[ing] the case for itself and render[ing] a final judgment."[26] In doing so, the court of appeals rejected a portion of its prior decision in *Parrish v. Pike Township Trustee's Office*,[27] which applied the more deferential standard of review generally applicable to administrative agencies, to the extent that *Parrish* would sanction applying a standard different than that established by the Indiana General Assembly.[28]

B. Statutory Interpretation

In the course of their duties, administrative agencies are often called upon to interpret statutes as they apply those statutes to various disputes before them. This section compares how courts during the survey period treated several instances where challenges were made to an agency's interpretation of a statute.

One such case is *Indiana Association of Beverage Retailers, Inc. v. Indiana Alcohol and Tobacco Commission*.[29] In that case, the Indiana Court of Appeals was asked to resolve whether the Indiana Alcohol and Tobacco Commission (IATC), the agency charged with regulating the sale of alcohol within the State, was issuing a larger number of beer and liquor permits than is allowed under statute.[30] Specifically, the Indiana Association of Beverage Retailers (IABR) claimed that IATC was issuing permits in excess of those allowed by Indiana Code sections 7.1-3-22-4 and 7.1-3-22-5.[31] The dispute arose because, under Indiana law, IATC may issue to "dealers" a number of different types of permits for the off-premises sale of alcohol, particularly a "beer dealers permit" to a drug store, grocery store, or "package liquor store" and a "liquor dealers permit" to a drug store or "package liquor store."[32] Indiana Code sections 7.1-3-22-4 and 7.1-

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23. *Id*. at 336.

24. 418 N.E.2d 234 (Ind. Ct. App. 1981).

25. *Brooks*, 940 N.E.2d at 335 (quoting *Van Buskirk*, 418 N.E.2d at 239-40).

26. *Id*. at 337 (quoting Pastrick v. Geneva Twp. of Jennings Cnty., 474 N.E.2d 1018, 1021 (Ind. Ct. App. 1985).

27. 742 N.E.2d 515 (Ind. Ct. App. 2001).

28. *Brooks*, 940 N.E.2d at 337 n.3.

29. 945 N.E.2d 187 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 645 (Ind. 2011).

30. *Id*. at 190-93.

31. *Id*. at 192-93.

32. *Id*. at 191 (citing IND. CODE §§ 7.1-3-5, -10 (2011)).

3-22-5 set quotas for the number of beer dealer, liquor dealer, and package liquor store dealer permits.[33]

IABR sought a declaratory judgment and preliminary injunction against IATC, arguing that the manner in which IATC issued permits was contrary to statute.[34] IATC argued that it had issued permits based on a "longstanding interpretation" of title 7.1 so that "beer dealer permits" were counted against the beer dealer quotas in Indiana Code section 7.1-3-22-4; "liquor dealer permits" were counted only against the liquor dealer quotas, but not the beer dealer quotas; and "package liquor permits" were counted only against the quotas established in Indiana Code section 7.1-3-22-5.[35] Based on interpretation of the relevant code sections, and the evidence presented, the trial court denied the motion for preliminary injunction, and IABR appealed.[36]

On appeal, the Indiana Court of Appeals noted that the an agency's interpretation of a statute it is tasked with enforcing is entitled to "great weight."[37] The court further noted that "[d]eference to an agency's interpretation of a statute becomes a consideration when a statute is ambiguous and susceptible of more than one reasonable interpretation."[38] The court then explained that when

> a court is 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. If a court determines that an agency's interpretation is reasonable, it should terminate its analysis and not address the reasonableness of the other party's proposed interpretation.[39]

After reviewing title 7.1, article 3, the court of appeals concluded that the article was "ambiguous regarding the number of permits [IATC] may issue to dealers."[40] Specifically, the court found that the relevant statutes were silent as to how the types of permits issued by the IATC were to be counted against the quotas.[41] The court then concluded that it could not say that IATC's "interpretation was unreasonable" as in reading the statutes as a whole, "the legislature's intent may be construed as limiting the number of permittees rather than the number of total permits issued."[42] Finding that IATC's interpretation was reasonable, the court concluded that "we cannot say that the manner in which it issues dealer's permits violates Title 7.1," and therefore affirmed the denial of

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33. *See id.*
34. *Id*. at 192.
35. *Id*. at 193-94.
36. *See id.* at 194-96.
37. *Id*. at 198.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id.* at 198-99.
42. *Id*. at 199.

the preliminary injunction.[43]

In *R.M. v. Second Injury Fund*,[44] the court of appeals reached the conclusion that the administrative agency erred in its interpretation of a statute it was charged with enforcing.[45] In 1999, R.M. was injured in a workplace accident in which his arms were pulled into a conveyor belt.[46] Under the terms of an agreement with his employer, the employer agreed to continue to pay R.M. his statutory worker's compensation benefits and did so first through its worker's compensation insurer and then itself until both the insurer and the employer became insolvent.[47] R.M. then sought entry into the Second Injury Fund, which is meant, in part, to "provide monetary benefits to employees who are permanently and totally disabled and have received the maximum compensation they are entitled to under the Worker's Compensation Act."[48]

Although the Worker's Compensation Board concluded that R.M. was entitled to receive benefits through the Second Injury Fund, it also concluded that those benefits would not start to be paid until the "501st week after the date of [R.M.'s] workplace injury."[49] R.M. sought judicial review, claiming that he had exhausted his benefits under the Worker's Compensation Act within 264 weeks of his accident "because at that time, both Employer and Employer's worker's compensation insurance provider had gone out of business."[50] Effectively, the court of appeals was asked to decide whether Indiana Code section 22-3-3-13 was ambiguous as to when an injured employee could begin receiving benefits through the Second Injury Fund.

The court of appeals concluded that the statute was ambiguous, and that because R.M. had effectively exhausted his available worker's compensation benefits (that is, as his employer and employer's insurer could no longer make payments), he was entitled to begin receiving payments from the Second Injury Fund effective the 265th week after his accident.[51] The court reached this conclusion reasoning that "[a]ny other interpretation would result in the unjust and absurd result" of allowing R.M. to go without benefits he was unquestionably entitled to for a period of 236 weeks.[52]

Interestingly, in reaching this conclusion, the court did not expressly apply the same standard of review as the court of appeals did in *Indiana Association of Beverage Retailers*. Rather, the court cited a more general standard that did not

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43. *Id.* at 200. The court of appeals did, however, note that it would not apply the doctrine of "legislative acquiescence" to IATC's interpretation, on the grounds that there had been "no previous *judicial* interpretation of [s]ection 4 by our appellate courts." *Id*. at 200 n.7.

44. 943 N.E.2d 811 (Ind. Ct. App. 2011).

45. *Id.* at 816.

46. *Id*. at 813.

47. *Id*.

48. *Id*. at 813-14.

49. *Id*. at 814.

50. *Id*. at 815.

51. *Id.* at 816.

52. *Id*.

consider deference to the administrative agency's interpretation of the statute it is charged with enforcing.[53] The court did, however, note earlier that in reviewing decisions of the Worker's Compensation Board, the "interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself."[54] In light of the overall purpose of the Worker's Compensation Act, the conclusion that took into account that a statutory interpretation would lead to an "unjust and absurd result" fits within the general rubric of the amount of deference owed to administrative agency's interpretation of a statute it enforces.

Both *Indiana Association of Beverage Retailers* and *R.M*. addressed the amount of deference owed to an agency's interpretation of a statute it is charged with enforcing. A portion of the court of appeals decision in *United States Steel Corp. v. Northern Indiana Public Service Co.*[55] addresses a threshold question, whether the statute is one the agency is charged with enforcing.

Specifically, the court examined the level of deference owed to the Indiana Utility Regulatory Commission's (IURC) conclusion that U. S. Steel was acting as a "public utility" within the meaning of Indiana Code sections 8-1-2-1 and 8-1-2-87.5.[56] As the court noted "at the outset," an issue arose between the parties over "the level of deference owed to the [IURC's] conclusions that U. S. Steel has acted as a public utility."[57] U. S. Steel and ArcelorMittal argued that the statutes limited the "scope of the [IURC's] jurisdiction" and therefore were subject to de novo review, while NIPSCO argued that the IURC's ruling was entitled to greater deference because the IURC possesses the "jurisdiction to determine an entity is a public utility" and was acting within that jurisdiction in rendering its decision.[58]

The court of appeals ultimately disagreed with NIPSCO's position. The court agreed that it is "well-settled" that the IURC has the "authority to make a preliminary determination of an entity's status as a public utility and to compel parties to appear before it for the purpose of making such a determination."[59] The court, however, compared the situation to a trial court's determination that it has subject matter jurisdiction over a case, which the court noted "does not clothe it with the authority to decide the merits of a case where subject matter is

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53. *Id*.

54. *Id*. at 815 (quoting E. Alliance Ins. Grp. v. Howell, 929 N.E.2d 922, 926 (Ind. Ct. App. 2010) (internal citations omitted)).

55. 951 N.E.2d 542 (Ind. Ct. App. 2011), *reh'g denied*, *trans. denied*, 963 N.E.2d 1119 (Ind. 2012). The author discloses that his law firm, Lewis & Kappes, P.C., represented U. S. Steel and ArcelorMittal Indiana Harbor, Inc., in the matter throughout the course of proceedings, and that he was personally involved in drafting the appellate briefs before the Indiana Court of Appeals and Indiana Supreme Court and appeared before both in the matter.

56. *Id.* at 551-52.

57. *Id.* at 551.

58. *Id*.

59. *Id*.

lacking."[60] Likewise, the court reasoned, the IURC's "authority to make a threshold determination of an entity's public utility status does not give the [IURC] jurisdiction to regulate that entity if it does not qualify, *ab initio*, as a public utility."[61]

Accordingly, the court concluded that the "statutory definitions of 'public utility' set forth in the Public Service Commission Act are not statutes the [IURC] is charged with enforcing," but rather establish the boundaries of the IURC's regulatory jurisdiction.[62] This led the court to apply a de novo standard in reviewing the IURC's conclusions regarding U. S. Steel's status as a public utility.[63]

C. Evidence and the Adequacy of Agency Findings

A common issue arising in judicial review of agency decisions is whether the agency's decision is supported by substantial evidence. During the survey period, a number of judicial decisions examined situations where an agency's decision was unsupported by the evidence, or whether the findings made by the agency were sufficiently adequate to render a conclusion on that point.

One example is *T.W. v. Review Board of the Indiana Department of Workforce Development*.[64] In that case, T.W. appealed a decision of the Department of Workforce Development, ordering him to repay unemployment benefits and assessing a penalty against him.[65] The basis of the Department's decision was that during the time he was collecting unemployment, T.W. had represented that he was not working, despite the fact that, in March 2010, he became a member of a construction staffing company, known as PLS, and was working as a sales manager for the company "fifty to sixty hours a week."[66] Despite the hours he worked, T.W. did not receive any income.[67] The Department concluded that T.W. failed to disclose his self-employment, a material fact as required by Indiana Code section 22-4-13-1, and thus he was not eligible for benefits.

The specific statutory provision at issue in *T.W.* provides, in relevant part, that if a person knowingly "fails to disclose amounts earned" while receiving unemployment or "fails to disclose or has falsified any fact" that would "disqualify the individual for benefits," the individual forfeits their benefits.[68] The question for the court became for the court whether "T.W. failed to disclose

60. *Id*.
61. *Id*. at 551-52.
62. *Id.* at 552.
63. *Id*.
64. 952 N.E.2d 312 (Ind. Ct. App. 2011).
65. *Id*. at 313-14.
66. *Id*.
67. *Id*. at 314.
68. IND. CODE § 22-4-13-1.1(a) (2011).

or falsified any fact that would disqualify him from receiving benefits."[69] In addressing this question, the court considered relevant Indiana decisions which had concluded that while a person has a "duty to disclose the self-employment earnings so that the Division could determine if it affected" the claimed benefits, "not all self-employment renders a claimant ineligible for benefits."[70]

Because it was undisputed that T.W. was not receiving income from his employment, the court concluded that his failure to report his relationship with PLS did not automatically disqualify him from receiving benefits.[71] Further, the court examined the claim by the Department that T.W. was ineligible because he was unable to work due to "working significant hours for PLS."[72] The court of appeals disagreed.[73] In doing so, it noted testimony by T.W. that despite working for PLS he continued to look for other employment, "remained available to accept other employment", and had reached an agreement with PLS that would allow him to accept other job offers.[74]

Despite the arguments offered by the Department, the court concluded that "no statutory or evidentiary basis" existed to support the finding that "T.W.'s failure to disclose his relationship with PLS would disqualify him from receiving benefits" as the "mere failure to disclose the relationship is insufficient to support the denial of benefits."[75]

In *R.D. v. Review Board of the Indiana Department of Workforce Development*,[76] a split panel of the Indiana Court of Appeals considered the Department's decision concerning payment for retraining benefits. In that case, R.D. lost his job as a machinist and sought to obtain a degree in graphic arts.[77] To assist in paying for the retraining at the Art Institute of Indianapolis, he applied for funding under the Trade Act of 1974, but the Department denied his request.[78] In part, this decision was based on the Department's conclusion that the Art Institute's program was "substantially similar" to a program offered by Ivy Tech which, cost approximately $40,000 less than the Art Institute's program.[79]

During his administrative hearing, R.D. provided undisputed testimony establishing the disparity between the two programs. Specifically, R.D. provided evidence that upon graduation from the Art Institute, he would be trained in both print and web design and could expect to earn a starting salary similar to the

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69. *T.W.*, 952 N.E.2d at 315.

70. *Id*. at 315-16.

71. *Id*. at 316-17.

72. *Id.* at 317.

73. *Id.*

74. *Id*.

75. *Id*.

76. 941 N.E.2d 1063 (Ind. Ct. App. 2010), *reh'g denied*, 2011 Ind. App. LEXIS 287 (Feb. 14, 2011).

77. *Id*. at 1064.

78. *Id*.

79. *Id*.

salary he earned while working as a machinist, roughly $25 per hour.[80] In contrast, evidence was presented that the Ivy Tech program would take longer to complete,[81] would train him only in print or web design, and would qualify him for a wage of only about $9.00 per hour, about thirty-six percent of what he was previously earning.[82] R.D. provided further evidence that while the Art Institute provided placement services for its graduates and published a seventy-eight percent placement rate, Ivy Tech offered no placement assistance.

In reviewing the Department's decision, the court noted that its review of the Department's "findings is subject to a 'substantial evidence' standard of review" in which "we neither reweigh the evidence nor assess witness credibility, and we consider only the evidence most favorable" to the Department's ruling.[83] After examining the relevant statutory and administrative provisions that control decisions under the Trade Act, the court stated that, in the instant case, the Department "made its determination based on the comparative costs of the programs at issue."[84] The court concluded that this required the Department to have first found that the two programs were "'substantially similar in quality, content and results' before it could approve programming based solely on cost."[85]

In considering whether the Department erred in finding that the programs were "substantially similar," the court reviewed the comparative cost of the programs, their length, the training provided, the expected salary following graduation, and the expectation of job placement of each program.[86] Following this examination of the record, the court concluded that even reviewing only the evidence most favorable to the Department, there was "no substantial evidence in the record" that would support a finding of "substantial similarity."[87]

The court of appeals reached a similar conclusion in *Koewler v. Review Board of the Indiana Department of Workforce Development*.[88] In that case, Koewler was fired after eating two hotdogs the day after his employer's Fourth of July picnic.[89] According to the employer, Koewler stole the hotdogs after a manager directed that they be saved for reuse at a later event.[90] When Koewler

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80. *Id*. at 1065.

81. *Id*. Exactly how much longer the program would take was an issue of some debate. The Art Institute program runs a standard eighteen months, while the Ivy Tech program runs two years. However, because the Ivy Tech program does not allow persons to train in both print and web design programs at the same time, it could, arguably, take as long as four years to obtain the same level of training. *Id*. at 1065, 1068.

82. *Id*. at 1065.

83. *Id.* at 1066 (quoting Quakenbush v. Review Bd. of Ind. Dep't of Workforce Dev., 891 N.E.2d 1051, 1054 (Ind. Ct. App. 2008)).

84. *Id*. at 1068.

85. *Id*. (citation omitted).

86. *Id.* at 1068-69.

87. *Id*. at 1068.

88. 951 N.E.2d 272 (Ind. Ct. App. 2011).

89. *Id*. at 274.

90. *Id*.

applied for unemployment benefits, the Department denied his claim, concluding that he had been fired for "just cause" by breaching a "duty in connection with work which is reasonably owed an employer by an employee."[91] Specifically, the Department concluded that by taking the hotdogs, Koewler had been fired for theft.[92]

In reviewing the record, however, the court concluded that the testimony offered during the administrative hearing did not provide support for this conclusion.[93] In doing so, the court emphasized that to commit theft a party must act "knowingly or intentionally" in exerting "unauthorized control over property of another person."[94] As the court pointed out, based on the testimony of the manager, there was no evidence to suggest that Koewler was aware that the food was to be saved for a later picnic, only that it was to be cleaned up and stored.[95] Accordingly, he was unaware that the hotdogs were, in fact, "off-limits."[96]

The court of appeals emphasized that in addition to the lack of support, no "finding of fact was made as to whether Koewler knew his reaching into the refrigerator and consuming two hotdogs was unauthorized."[97] On those grounds, the court concluded that the "determination of ultimate fact that Koewler was terminated for just cause as a hotdog thief is not reasonable," and therefore, in the absence of evidentiary support, the Department's denial of Koewler's unemployment claim was contrary to law.[98]

The above cases illustrate situations when a record existed to allow a court to conduct judicial review of an administrative decision. In *Westville Correctional Facility v. Finney*,[99] the court of appeals was confronted by absence of a record. Finney was employed as an instructor at Westville, but was terminated after attempting to bring his cell phone into the facility on two separate occasions.[100] Finney appealed Westville's termination to the Indiana State Employee's Appeal Commission, which found that Westville had causation to Finney's employment.[101] Finney ultimately sought judicial review of the decision, and the trial court, after noting the absence of an adequate agency record, concluded that "the agency action was unsupported by substantial evidence."[102]

The court of appeals determined that the trial court had not erred in reaching

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91. *Id*. at 275-76.
92. *Id*. at 276.
93. *Id.*
94. *Id*. (quoting IND. CODE § 35-43-4-2 (2011)).
95. *Id.* at 276-77.
96. *Id*. at 277.
97. *Id*.
98. *Id*.
99. 953 N.E.2d 1116 (Ind. Ct. App. 2011).
100. *Id*. at 1117.
101. *Id*. at 1118.
102. *Id*.

this conclusion.[103] Rather, the court noted that it was "clear from the record before us that the agency's action was without evidentiary foundation, let alone *substantial* evidence as required by Indiana Code section 4-21.5.14(d)(5)."[104] The court of appeals explained that judicial review of the agency decision was "made difficult, if not virtually impossible, by the woeful deficiencies of the tape recordings of the testimony of various witnesses so that the attempts to transcribe the proceedings from those tapes were unavailing."[105] As the court detailed, the transcripts prepared from the recordings were replete with references to testimony being "inaudible" and portions of tapes being either blank or filled with static.[106]

The court of appeals described this as "an intolerable failure to preserve evidence" and refused to allow a new hearing or obtain a certified statement of evidence, as Westville had contended that the "transcript provided 'substantial evidence' to support" the agency's decision.[107] The court affirmed the decision of the trial court that the agency record, as presented for judicial review, could not provide support for the evidentiary findings of the agency.[108]

In *Pack v. Indiana Family and Social Services Administration*,[109] the court of appeals addressed the close connections among the sufficiency of the evidence, agency findings, and judicial review and helped to underscore the importance of an agency's compliance with proper procedure to enable judicial review. The court in *Pack* was confronted with an arguably sufficient record, but an agency determination that lacked adequate findings to enable review. The facts are relatively straightforward. Pack sought Medicaid benefits based on various physical and psychiatric ailments.[110] The Family and Social Services Administration (FSSA) initially denied her claim, finding that her ailments did not "substantially impair her ability to perform labor services, or to engage in a useful occupation."[111] This decision was affirmed by an FSSA Administrative Law Judge (ALJ), and finally the agency.[112] Following an unsuccessful attempt at judicial review before the trial court, Pack appealed to the court of appeals.[113]

In addressing the matter, the court of appeals started with a discussion of the "purposes, functions, and proper form of findings of fact and conclusions of law in an administrative context." The court explained it sometimes finds itself confronted with "orders that are defective because the agency's decision lacks support in the record, that do not adequately articulate a basis for the agency's decision, that recite the contents of evidence . . . without making proper findings

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103. *Id*.
104. *Id*. at 1118-19.
105. *Id*. at 1119.
106. *Id.*
107. *Id*.
108. *Id*.
109. 935 N.E.2d 1218 (Ind. Ct. App. 2010).
110. *Id*. at 1220.
111. *Id*. at 1220-21.
112. *Id*. at 1221.
113. *Id*.

of basic fact, or that simply fail to adequately or rationally apply law to found facts."[114] The court explained that the failure to produce a proper order implicates serious due process concerns and undermines judicial review of "whether or not the agency's ultimate decision is correct."[115]

As the Indiana Court of Appeals noted, under AOPA an administrative order must include "findings of basic facts, specify the reasons for the decision, and identify the evidence and applicable statutes, regulations, rules and policies that support the decision."[116] The court went on, stating that a "finding of fact must indicate, not what someone said is true, but *what is determined to be true*, for that is the trier of fact's duty."[117] The court explained that these "basic findings in turn must form the basis for the agency's order" such that "an agency's decision must demonstrate a logical connection among the findings of basic fact, the law applied, and the inferences made therefrom in arriving at an ultimate finding."[118] The court cautioned that when an agency's order fails to conform to these basic criteria, it is "defective and must be reversed."[119]

Pack argued that the agency erred by "failing to give proper consideration to the evidence provided" and that the decision was not supported by substantial evidence. The court of appeals found error "on slightly different grounds, namely that the ALJ's decision [was] defective for failing to consider the totality of the evidence, and [was] defective as well in its presentation and engagement with the findings of basic fact when applying the law to reach a finding of ultimate fact."[120]

In examining the FSSA's conclusions, the court took particular issue with the ALJ's "engagement with Pack's psychiatric conditions."[121] Although the court concluded that the ALJ's findings that Pack was diagnosed with a panic disorder and suffered (or did not suffer) various problems related to that diagnosis, it also found that the ALJ did not apply the statutory factors concerning functional limitation to Pack's diagnosis, "let alone the other [psychological] diagnosis in the record."[122] Put more succinctly, the court found that the FSSA's order simply "note[d] the panic disorder diagnosis but applie[d] the law only to Pack's physical complaints."[123] This left the Indiana Court of Appeals "without confidence that [the ALJ] weighed Pack's psychiatric evidence or applied the law to that evidence in reaching a decision."[124] As such, the court held the decision was reversible as

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114. *Id*. at 1221-22.

115. *Id*. at 1222.

116. *Id.*

117. *Id*. at 1223 (quoting Moore v. Ind. Family & Soc. Servs. Admin., 682 N.E.2d 545, 547 (Ind. Ct. App. 1997) (emphasis added)).

118. *Id*.

119. *Id*. at 1224.

120. *Id*. at 1226.

121. *Id.* at 1226-27.

122. *Id*.

123. *Id*. at 1227.

124. *Id*.

it was made "without observance of procedure required by law" and remanded the matter to the FSSA "not because the ALJ's decision is unsupported by substantial evidence, but because the ALJ's decision is sufficiently defective in its findings of fact to make this matter largely unreviewable by this court on the question of substantial evidence."[125]

D. Arbitrary and Capricious

One basis for reversing the decision of an administrative agency is that the agency's decision is arbitrary and capricious. The decision of the Indiana Supreme Court in *Indiana High School Athletic Association, Inc. v. Watson*[126] illustrates just how high meeting that bar can be. In that case, the Indiana Supreme Court was confronted with assessing whether the Indiana High School Athletic Association's (IHSAA) decision that a student-athlete had transferred schools for "primarily athletic reasons" was subject to reversal.[127]

The court began its analysis by noting that "Indiana courts have reviewed the IHSAA's regulation of student-athletes in a manner analogous to the review of administrative agencies;" they "do not review IHSAA decisions *de novo* and do not substitute their judgment for the association's."[128] Rather, courts are to apply "an arbitrary and capricious standard [when] review[ing] IHSAA decisions."[129] Under that standard, a decision is "arbitrary and capricious 'only where it is willful and unreasonable without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion.'"[130] The court went on to state that if the "IHSAA's findings of fact are supported by substantial evidence, we will not find them to be arbitrary and capricious."[131] The court explained that "[e]vidence meets this standard when it is more than a scintilla; that is, reasonable minds might accept it as adequate to support the conclusion."[132]

The Indiana Supreme Court then concluded that the record, read in the light most favorable to the IHSAA, indicated that its conclusions were supported by substantial evidence.[133] In reaching this conclusion, the court noted that the trial court erred in "repeatedly favoring" the testimony of certain witnesses while "pointing out that the IHSAA's version of events heavily relied on hearsay."[134] The court rejected this as a basis for reversing the IHSAA's determination as the decision to lend greater credibility to a particular statement was within the

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125. *Id*. at 1227-28.
126. 938 N.E.2d 672 (Ind. 2010).
127. *Id*. at 673.
128. *Id*. at 680.
129. *Id*.
130. *Id*. (citing IHSAA v. Carlberg, 694 N.E.2d 222, 232 (Ind. 1997)).
131. *Id.*
132. *Id.* at 680-81.
133. *Id*. at 681.
134. *Id*.

discretion of the IHSAA.[135] Ultimately, the Indiana Supreme Court found that the trial court had, in effect, reweighed the evidence rather than applying an arbitrary and capricious standard.[136] Although the court did not determine that review of conflicting evidence was erroneous, it cautioned that "[w]hile courts must consider whether contradictory evidence completely invalidates evidence supporting" the agency's determinations, courts "must not find the existence of contradictory evidence allowing for a reasonable debate to constitute a lack of substantial evidence."[137] Accordingly, the court noted that simply because facts "could lead a reasonable person to disagree with [the] conclusions," it "does not make them arbitrary or capricious."[138]

II. OBTAINING JUDICIAL REVIEW

A. Exhaustion of Administrative Remedies

Just as a number of statutory and common law requirements govern the standard and scope of judicial review, numerous requirements exist that restrict access to judicial review of administrative agencies. A number of cases during the survey period addressed whether a party had properly complied with, or was required to comply with, these requirements in order to obtain judicial review.

One issue that frequently arises is whether a party seeking judicial review has exhausted their administrative remedies. Frequently, as in the case of *Outboard Boating Club of Evansville v. Indiana State Department of Health*,[139] the question presented for the court sitting in review is whether a party was required to fulfill that requirement at all. In that case, the Outboard Boating Club and another private club (collectively, "Clubs") filed a declaratory judgment action seeking a determination that the Indiana State Department of Health (ISDH) did not possess jurisdiction to regulate their facilities as "campgrounds."[140] ISDH filed a motion to dismiss for lack of subject matter jurisdiction based, in part, on the grounds that the Clubs failed to exhaust their administrative remedies.[141] The trial court granted the motion, and the Clubs appealed, arguing that they were not required to exhaust their administrative remedies.[142]

The Indiana Court of Appeals began its analysis by noting that as a general proposition, when a party has to exhaust administrative remedies prior to seeking judicial review, the court does not have subject matter jurisdiction until the

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135. *Id*.

136. *Id.* at 682.

137. *Id*.

138. *Id*.

139. 952 N.E.2d 340 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 1834 (Oct. 19, 2011), *trans. denied*, 963 N.E.2d 1123 (Ind. 2012).

140. *Id*. at 342.

141. *Id*.

142. *Id*. at 342-43.

agency issues a final order.[143] The court acknowledged that there are exceptions to this general rule, including "where an action is brought upon the theory that the agency lacks the jurisdiction to act in a particular area" because such "issues turns on statutory construction, [and] whether an agency possesses jurisdiction over a matter is a question of law for the courts."[144]

In addressing the specific question before it, the court of appeals, however, found that the statute the Clubs were challenging did not fall within this category of cases that are exempt from compliance with the exhaustion requirement.[145] Instead, "there [was] no abstract question of law presented regarding the ISDH's general authority to regulate Indiana campgrounds."[146] Rather, the issue raised by the Clubs was whether the "their facilities are outside the ISDH's regulatory jurisdiction because they do not fall within the regulatory definition of campgrounds."[147] This, the court reasoned, was "precisely the type of fact sensitive issue [that prior decisions] concluded should be resolved in the first instance by administrative agencies."[148]

The court also addressed the Clubs' contention that they were not required to exhaust their administrative remedies as retroactive application of the regulatory scheme would be unconstitutional.[149] The court rejected this argument because determining whether the campgrounds operated by the Clubs pre-dated the regulatory scheme was a factual issue, as was whether changes had occurred to the campgrounds after the promulgation of the regulations that would be subject to regulation.[150] Further, the court noted that while a challenge to the constitutionality of a statute or regulation may be grounds to avoid the exhaustion requirement, "exhaustion of administrative remedies may still be required because administrative action may resolve the case on other grounds without confronting broader legal issues."[151] The ISDH could dispose of "the matter without confronting broader legal issues" by simply determining that the Clubs facilities did not meet the regulatory definition of campground.[152] Therefore, the Indiana Court of Appeals determined that the Clubs were required to exhaust their administrative remedies, and because they did not do so, the trial court properly dismissed the case for lack of subject matter jurisdiction.[153]

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143. *Id*. at 343.

144. *Id.* at 344.

145. *Id*. at 345.

146. *Id*.

147. *Id*. at 346.

148. *Id*. at 345.

149. *Id.* at 346.

150. *Id*.

151. *Id.* (quoting Ind. Dep't of Envtl. Mgmt. v. Twin Eagle LLC, 798 N.E.2d 839, 844 (Ind. 2003)).

152. *Id*. at 347.

153. *Id*.

B. Timely Filing

Another requirement to obtain judicial review under the AOPA is the timely filing of a verified petition for such review. In *St. Joseph Hospital v. Cain*,[154] the court of appeals addressed whether a timely filed, but unverified, petition satisfied these statutory requirements. In that case, Cain was terminated from his position with St. Joseph Hospital.[155] Following his dismissal, he filed a claim with the Ft. Wayne Metropolitan Human Rights Commission (HRC), alleging the hospital had discriminated against him on the basis of race.[156] The HRC ultimately approved a determination in favor of Cain and awarded him damages.[157]

The hospital filed a timely, but unverified, petition for judicial review with the trial court.[158] Just under a month later, however, the hospital filed an amended, and verified, petition.[159] The trial court then granted HRC's motion to dismiss the petition for lack of subject matter jurisdiction based on the hospital's failure to file a timely, verified petition for review.[160]

Interestingly, unlike *Outboard Boat Club*, the court in *Cain* did not treat the failure to comply with the statutory requirement as an issue of subject matter jurisdiction. Rather, the court of appeals began its analysis by considering whether the alleged filing of an unverified petition was an issue of subject matter jurisdiction or merely a procedural error.[161] Although the court acknowledged that prior decisions had treated the filing of an unverified petition as a jurisdictional issue, it concluded that the hospital's error did not implicate the trial court's subject matter jurisdiction.[162] Rather, quoting *Packard v. Shoopman*,[163] the court concluded that the timely filing of the petition did not "affect the subject matter jurisdiction of the [t]ax [court]," but was "a procedural rather than jurisdictional error" as it "relates to neither the merits of the controversy nor the competence of the court to resolve it."[164] The court of appeals reasoned that because the "trial court had jurisdiction over the general class of actions at issue here[,] petitions for judicial review of agency actions," it had subject matter jurisdiction over the petition for review.[165]

Concluding that the timely filing of a verified petition was a procedural issue, the court of appeals then examined whether "an unverified petition for judicial

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154. 937 N.E.2d 903 (Ind. Ct. App. 2010), *reh'g denied*, 2011 Ind. App. LEXIS 23 (Jan. 14, 2011).

155. *Id*. at 904.

156. *Id*.

157. *Id*.

158. *Id*.

159. *Id.*

160. *Id*. at 904-05.

161. *Id*. at 905-06.

162. *Id*.

163. 852 N.E.2d 927 (Ind. 2006).

164. *Cain*, 937 N.E.2d at 906 (quoting *Packard*, 852 N.E.2d at 931-32).

165. *Id.*

review may be amended and whether the amendment relates back to the date of the filing of the original petition."[166] In addressing this question, the court readily acknowledged that "AOPA clearly requires that a petition for judicial review 'must be verified.'"[167] The court noted, though, that Trial Rule 15 allows for the amendment of pleadings with relation back to the date of the original pleading.[168] The court then stated that the interplay between court rules and AOPA was such that the "General Assembly [did not intend] to preclude a court promulgated rule from providing time in addition to that afforded by AOPA."[169] The Indiana Court of Appeals thus concluded that Trial Rule 15 did not "actually conflict with the verification requirement" in AOPA, and that the statutory requirement was not intended to "preclude a court promulgated rule from allowing a petition to be amended and to relate back to the date of the filing of the original petition."[170] Thus, the court concluded that the trial court did have subject matter jurisdiction and should have considered the hospital's motion to amend the pleading on the merits.[171]

III. DOES JUDICIAL REVIEW EXIST?—ABSENCE OF CLEAR STATUTORY MANDATE

Although most decisions by administrative agencies are subject to some form of judicial review, several cases during the survey period considered whether a party had access to judicial review at all because there was no clear statutory provision authorizing such review.

For example, in *Save Our School: Elmhurst High School v. Fort Wayne Community Schools*,[172] the Indiana Court of Appeals considered whether an association was entitled to judicial review of a decision by the Fort Wayne Community Schools (FWCS) to close a public high school. Specifically, Save Our School argued that it was entitled to judicial review on the basis that FWCS issued an administrative decision when it closed the high school.[173] The court of appeals rejected this contention, finding that FWCS is "not an 'agency' whose decisions fall under AOPA" as it is a political subdivision.[174]

Instead, the court of appeals compared the situation to cases in which the Indiana Supreme Court and the Indiana Court of Appeals had previously determined that the General Assembly's exclusion of an entity or an entity's particular actions from AOPA's scope indicated a legislative intent to exclude the

166. *Id*. at 907.

167. *Id*. at 908 (quoting IND. CODE § 4-21.5-5-7 (2011)).

168. *Id*.

169. *Id*. at 909 (quoting Wayne Cnty. Prop. Tax Assessment Bd. of Appeals v. United Ancient Order of Druids – Grove No. 29, 847 N.E.2d 924, 928 (Ind. 2006)).

170. *Id*.

171. *Id*.

172. 951 N.E.2d 244 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011).

173. *Id*. at 249.

174. *Id.* at 250 (citing IND. CODE §§ 4-21.5-1-3, -12 (2011)).

agency's action from judicial review.[175] Relying on this reasoning, the court rejected Save Our School's "contention that there is any 'common law' right to review the actions of a school corporation such as FWCS" because the school district was both excluded from AOPA and any other statutory provision existed "that would allow its suit to proceed against FWCS."[176] It is interesting to note that the court of appeals did not categorically deny a suit based on a "common law" right to judicial review from proceeding, noting only that "Indiana courts generally do not recognize a non-statutory, 'common law' right to judicial review of governmental decision-making."[177]

In fact, the court of appeals in *Board of Commissioners of Allen County v. Northeastern Indiana Building Trades Council*[178] specifically found that "the lack of a statutory provision for judicial review is not dispositive."[179] In that case, the Indiana Court of Appeals considered whether a trial court had subject matter jurisdiction to review a common wage determination made by county commissioners pursuant to Indiana Code sections 5-16-7 to -6.[180] There, in contrast to the decision in *Save Our School*, the court noted that the Indiana Supreme Court has

> stated, in regard to administrative action by local government for which the legislature has not provided a right of judicial review, Indiana courts will still "review the proceedings to determine whether procedural requirements have been followed and if there is any substantial evidence to support the finding an order of such a board."[181]

The court also noted that a "consistent line of cases" had reviewed decisions of wage committees using basic principles of administrative law.[182]

The court of appeals further determined that judicial review was not prohibited simply because the statute calls a common wage determination by county commissioners "final."[183] As the court recognized, "in the context of administrative law, 'final' administrative action is a prerequisite, not an

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175. *Id*. (citing Blanck v. Ind. Dep't of Corr., 829 N.E.2d 505 (Ind. 2005) (finding that prisoner had no independent right of judicial review for prison disciplinary actions); Hayes v. Trs. of Ind. Univ., 902 N.E.2d 303 (Ind. Ct. App. 2009) (holding that an employee had no common law right to judicial review of Indiana University's termination of her employment)).

176. *Id*.

177. *Id*.

178. 954 N.E.2d 937 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011). The author wishes to disclose that his law firm, Lewis & Kappes, P.C., filed an amicus brief on behalf of the Indiana Building Contractors Alliance in support of the NIBTC, and that he personally participated in the preparation of that brief.

179. *Id.* at 943.

180. *Id.* at 939.

181. *Id*. (quoting Mann v. Terre Haute, 163 N.E.2d 577, 579-80 (Ind. 1960)).

182. *Id*. at 943-44 (collecting cases).

183. *Id*. at 944.

impediment, to judicial review."[184] The court thus concluded that the language applied to prevent reconsideration of a common wage determination made by county commissioners by the common wage committee and was not meant to "unambiguously foreclose judicial review of the completed administrative process."[185]

Like the decisions in *Save Our School* and *Northeastern Indiana Building Trades Council*, the Indiana Supreme Court addressed the appropriateness of judicial review of an agency action in the absence of a specific statutory authorization in *In re A.B.*[186]

In that case, the Indiana Supreme Court was confronted with whether a decision by the Department of Child Services (DCS) to refuse payment for certain child placement decisions by juvenile courts is subject to appellate judicial review. The case involved the placement of A.B. in an out-of-state facility.[187] In the placement proceeding, the probation department recommended the out-of-state facility in Arizona, but the DCS proposed several in-state facilities.[188] Ultimately, the trial court modified the placement, sending A.B. to the out-of-state facility against the recommendation of the DCS, which refused to pay for the placement. Accordingly, the trial court found several statutes concerning the placement of children to be unconstitutional, including Indiana Code section 31-40-1-2(f), which governs the DCS' responsibility to pay for placement of children in out-of-state facilities.[189]

The Indiana Supreme Court found each of the statutes to be constitutional, but then considered whether Indiana Code section 31-40-1-2(f) immunizes DCS decisions refusing to pay for child placement in out-of-state facilities from all judicial review.[190] The court agreed that the statutory provision effectively precluded expedited review under Appellate Rule 14.1 and that "a disapproving decision by the DCS Director cannot be overruled by the juvenile court at which it is directed."[191] The court refused, however, to conclude that the provision "is immune from any judicial review whatsoever."[192]

After determining that DCS decisions made under Indiana Code section 31-40-1-2(f) were subject to some form of review, the court asked how, in the absence of a specific statutory provision to guide such review, "should we

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184. *Id*.

185. *Id*.

186. 949 N.E.2d 1204, 1215 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 994 (Nov. 1, 2011).

187. *Id*. at 1208.

188. *Id*. at 1208-11.

189. *Id*. at 1210-11, 1220. The statute provides that "[t]he department is not responsible for payment of any costs or expenses for housing or services provided to or for the benefit of a child placed by a juvenile court in a home or facility located outside Indiana, if the placement is not recommended or approved the director of the department or the director's designee." IND. CODE § 31-40-1-2(f) (2011).

190. *A.B.*, 949 N.E.2d at 1215.

191. *Id*.

192. *Id*.

proceed to assure that our review of the DCS Director's decision here is guided by principled and clear standards?"[193] In answering that question, the court ultimately settled upon the standards set forth in AOPA which it noted not only apply to determinations made by the DCS, but also "creates minimum procedural rights and imposes minimum procedural duties" in general administrative proceedings.[194] The court did not consider it "necessary" to hold that decisions made under section 31-40-1-2(f) were subject to AOPA provided that the standards established in Indiana Code section 4-21.5-5-14 were applied in appellate review of such decisions.[195]

In concluding that judicial review of DCS decisions was appropriate, the court, however, limited the scope of review solely to whether the DCS's refusal to pay for out-of-state placement was arbitrary and capricious.[196] In doing so, the court noted long standing decisions holding that judicial review of administrative actions, "even if there is no statute authorizing an appeal" for arbitrary and capricious decisions, is appropriate, and that adequate due process required the opportunity for judicial review of an agency decision.[197] As the court further stated, "the law is well settled 'that all discretionary acts of public officials, which directly and substantially affect the lives and property of the public are subject to judicial review where the action of such official is . . . arbitrary or capricious' . . . ."[198] The Indiana Supreme Court thus placed decisions by the DCS concerning the out-of-state placement of children into a highly restricted form of judicial review, but it nevertheless recognized that such review was necessary to protect the rights and interests of children from otherwise unjustified decisions.

IV. DUE PROCESS CONCERNS IN ADMINISTRATIVE PROCEEDINGS

As the decision in *A.B.* makes clear, due process requires access to judicial review of administrative decisions.[199] To the extent that the decisions of administrative agencies affect the rights of those appearing before them, the agency must also provide due process to those parties. This requires, at a minimum, notice and an opportunity to be heard. As more and more administrative decisions are resolved without in-person hearings, a common question arises as to whether and when a party is denied due process during a telephonic hearing. This was an issue frequently addressed by the State's

193. *Id*.

194. *Id.* at 1215-17.

195. *Id*. at 1217.

196. *See id*. at 1220 ("If DCS wants to disapprove and thereby not pay for out-of-state placement pursuant to statute, such decision is subject to appellate review, but only upon an arbitrary and capricious showing" and "[a]ny party may take an appeal to the [Indiana] Court of Appeals, which will review the decision under the arbitrary and capricious standard as discussed above.").

197. *Id*. at 1217-18.

198. *Id*. at 1218 (quoting State *ex rel.* Smitherman v. Davis, 151 N.E.2d 495, 498 (Ind. 1958)).

199. *See id.* at 1220.

appellate courts in the survey period and resolved in somewhat divergent ways by different panels.

In *S.S. v. Review Board of the Indiana Department of Workforce Development*,[200] the Indiana Court of Appeals considered whether an applicant for unemployment benefits was denied due process because she was not given a reasonable opportunity to participate in a telephonic hearing. After an initial determination that she was terminated for just cause and was therefore ineligible for unemployment benefits, S.S. appealed the decision.[201] Following the Department's procedures, the ALJ sent notice of the appeal hearing and directed S.S. to provide "ONE" telephone number at which she could be reached.[202] The notice also provided that it was her responsibility to ensure her availability during the time of her hearing, which included making sure she was aware of the difference in time zones between Indianapolis and her location during the scheduled hearing.[203]

Although S.S. provided a telephone number, the ALJ was unable to reach her during the scheduled hearing time and subsequently dismissed her appeal.[204] Later on in the day of her hearing, S.S. faxed a letter to the ALJ explaining that she did not answer the phone because of having "mixed up" the Eastern and Central time zones and that she was attending a food stamp hearing in a federal building at the time of her unemployment hearing.[205] S.S. also filed a request for reinstatement of her appeal, which was denied, and she subsequently sought judicial review.[206]

The court of appeals concluded that S.S. was not denied due process with respect to her initial appeal to the ALJ because she had been provided notice of the hearing and was given an opportunity to participate.[207] The court compared the case to *Wolf Lake Pub, Inc. v. Review Board of the Indiana Department of Workforce Development*,[208] in which a party had "received actual notice of a telephone hearing but was unable to participate due to its representatives' poor cell phone reception which could have been anticipated and prevented."[209] Similarly, the court concluded S.S. received notice and could have taken steps to reschedule the hearing or make other arrangements, but failed to do so.[210]

Of perhaps greater interest is how the court addressed S.S.'s claim that the Department erred by denying her request to reinstate her appeal. As the court

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200. 941 N.E.2d 550 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 493 (Mar. 24, 2011).

201. *Id*. at 552-53.

202. *Id.* at 553.

203. *Id*.

204. *Id*.

205. *Id*.

206. *Id*.

207. *Id*. at 555.

208. 930 N.E.2d 1138 (Ind. Ct. App. 2010).

209. *S.S.*, 941 N.E.2d at 555.

210. *Id*.

noted, the regulations governing the appeal process expired in January 2009 and have not been readopted, nor have new rules been promulgated.[211] The court recognized that this presented serious concerns as "[l]ack of such promulgation may deprive parties of notice of their procedural rights in [Department] proceedings, particularly because the [Department] is not subject" to AOPA.[212]

Nevertheless, the court did not consider this an impediment to judicial review as it considered the "dispositive issue on which our decision rests is whether S.S. showed good cause to support her reinstatement."[213] This, the court reasoned, was an issue of the Department's "application of a standard inherent in any administrative process to the extent an agency inherently needs some good reason for setting aside its previous action."[214] The court then noted that the "finding that S.S. did not show good cause for reinstatement of her appeal is a finding of ultimate fact, which this court reviews only for reasonableness, not de novo."[215] Stating that S.S. did not "point to any circumstance outside her control" that caused her to miss the appeal, the court concluded that the Department "reasonably found she failed to show good cause for reinstating her appeal."[216]

In *Lush v. Review Board of the Indiana Department of Workforce Development*,[217] the Indiana Court of Appeals reached the opposite conclusion. Like S.S., Lush was terminated from his employment and denied unemployment benefits after an initial determination was made that he was released for good cause.[218] Lush also appealed to an ALJ and received a notice advising him of the date and time of the hearing, also requiring him to provide a telephone number at which he could be reached.[219] Lush did so, but at the time of the hearing, the ALJ was unable to reach Lush, noting on the docket that the first telephone number was "invalid" and the second "to a union hall where no one named [Lush] was located."[220] The ALJ dismissed the case, and Lush sought reinstatement, informing the ALJ that he was at the union hall at the time of the hearing, but that the "hall said you never called."[221] The request for reinstatement was denied, and the decision was ultimately affirmed by the full Board.[222]

Unlike the court in *S.S.*, the court in *Lush* treated the issue under an abuse of discretion standard, noting that "conclusions as to ultimate facts involve the inference or deduction based on the findings of basic fact" and are "typically

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211. *Id*. at 556.

212. *Id*. at 557.

213. *Id*.

214. *Id*.

215. *Id.*

216. *Id*. at 558.

217. 944 N.E.2d 492 (Ind. Ct. App. 2011), *reh'g denied*, 211 Ind. App. LEXIS 603 (Apr. 8, 2011), *trans. denied*, 962 N.E.2d 645 (Ind. 2011).

218. *Id*. at 493.

219. *Id*.

220. *Id*. at 494.

221. *Id*.

222. *Id.* at 494-95.

reviewed to ensure that the Board's inference is 'reasonable' or 'reasonable in light of [the Board's] findings.'"[223] Thus, the court declined to address the issue as one of "due process" and instead focused on whether the Department's decision to refuse to reinstate the appeal was reasonable in light of the "equitable considerations underlying the Act and its humanitarian purposes."[224] In so doing, the court of appeals concluded from the facts that the ALJ abused its discretion when it dismissed the appeal and that the decision to uphold the dismissal was "greatly out of proportion to the minimal costs of rescheduling a second telephonic hearing between Lush and the ALJ."[225] Therefore, with a final note that the purpose of the unemployment statutes is not "to be a vehicle by which the Board may find procedural grounds to deny coverage," the court reversed and remanded to reach a decision on the merits.[226]

V. CONFIDENTIALITY CONCERNS

During the survey period an interesting debate arose in the Indiana Court of Appeals concerning the use of litigants' names in appellate opinions reviewing decisions of the Department of Workforce Development. The debate arises, in part, because the Department of Workforce Development is to keep information concerning unemployment benefits confidential pursuant to Indiana Code section 24-4-19-6.[227] Indiana Administrative Rule 9(G)(1)(b)(xviii) further requires that "[a]ll records of the Department of Workforce Development as declared confidential" by Indiana Code section 22-4-19-6 are to be excluded from public access.[228]

In *Moore v. Review Board of the Indiana Department of Workforce Development*[229] the Indiana Court of Appeals addressed a motion filed by the Department to publish the names of parties in cases involving the Department.[230] This request was made because it had become allegedly "difficult to administer the high volume of cases in the appellate process where the names of the individuals and employing units are not disclosed."[231] In addressing that motion, the court noted that although Administrative Rule 9(G)(1)(b)(xviii) had been amended effective as of January 1, 2010, a number of decisions had been issued using the full names of the litigants, and apparently no consistent practice had emerged.[232] The court further stated that there was likely to be some

223. *Id.* at 495 (quoting in part McClain v. Ind. Dep't of Workforce Dev., 693 N.E.2d 1314, 1317-18 (Ind. 1998)).

224. *Id.* at 496.

225. *Id*.

226. *Id*.

227. IND. CODE § 22-4-19-6 (2011).

228. IND. ADMIN. R. (9)(G)(1)(b)(xviii).

229. 951 N.E.2d 301 (Ind. Ct. App. 2011).

230. *Id.* at 302-03.

231. *Id*. at 304.

232. *Id*. at 305.

administrative burden in tracking cases in which only initials are used.[233] Ultimately, the court concluded that while Indiana Code section 22-4-19-6 kept the records of the Department confidential, Administrative Rule 9(G)(4)(d) and Indiana Code section 22-4-19-6(b) (which provides an exception to the general rule of confidentiality based on a court order) combined to make it appropriate to "use the full names of parties in routine appeals from the Review Board" presumably to ease the administrative burden.[234]

The contrary view was expressed in *S.S. LLC v. Review Board of the Indiana Department of Workforce Development*.[235] There, in a concurring opinion, Judge Crone took issue with the analysis laid out in *Moore*, noting that Administrative Rule 9(G)(1)(b)(xviii) not only applies to the court, but that it was added in response to a specific request by the court to treat filings in cases involving the Department confidentially, and that the Indiana Supreme Court's Records Management Committee had recently declined to amend the rule to allow the use of parties' names.[236] The concurrence also disputed whether the administrative burden imposed by using initials was truly substantial, whether an "opinion" was the same as an "order" under section 22-4-19-6(b), and whether using names "in unemployment cases is 'essential to the resolution of litigation or appropriate to further the establishment of precedent or the development of the law'" as provided for in Administrative Rule 9(G)(4)(d).[237] The concurring opinion also questioned whether it was appropriate for "a single panel of this [c]ourt [to issue] a ruling on a motion in a single case that will affect the privacy rights of unemployment litigants in future cases."[238]

As the reader is likely aware, there does not appear to be overwhelming consensus as to the use of names or initials in appellate decisions involving judicial review of decisions by the Department of Workforce Development. Given the privacy issues at stake, as well as the issues of judicial compliance with the Administrative Rules and statutes, how this matter is ultimately resolved will be of some interest.

CONCLUSION

As the Indiana Court of Appeals noted in *Pack*, "thousands of administrative orders issue each year from our state agencies."[239] Of that number, this Article represents only a selection of those reviewed by courts. The selection offers some insight into the diversity of the issues handled not only by those courts, but

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233. *Id*. (noting that a search of the court's docket revealed "over 100 cases" with the Review Board as a litigant and "thirty-four cases" which used the same initials assigned to the case).

234. *Id*. at 305-06.

235. 953 N.E.2d 597, 604 (Ind. Ct. App. 2011).

236. *Id*. at 604-07 (Crone, J., concurring).

237. *Id*. at 607.

238. *Id*.

239. Pack v. Ind. Family & Soc. Servs. Admin., 935 N.E.2d 1218, 1221-22 (Ind. Ct. App. 2010).

also by the administrative agencies themselves. While general principles of administrative law may be largely well established, Hoosier judges and attorneys cannot sit on their laurels. The sheer volume and complexity of the issues addressed by the State's administrative agencies has always demanded new and innovative approaches and will always continue to do so.