

Indiana Law Review

Volume 53

2021

Number 4

SURVEY

SURVEY OF INDIANA ADMINISTRATIVE LAW

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INTRODUCTION

This survey article provides an updated glimpse into the sweeping world of administrative law. The cases discussed below, combined with Hoosiers' recent and ongoing experience with the novel coronavirus, demonstrate just how much influence administrative law has on the lives of most individuals. Although the legislature passes general, thoroughly considered statutes and policies, when it comes to the on-the-ground government action—in the form of environmental regulation of specific parcels, the adjudication of unemployment benefits, or the determination of whether an individual's professional license can be suspended—it will be executive agencies that wield power. Therein is their benefit and their cost: highly technical decisions can be made and implemented quickly, but at the potential cost of steady deliberation by democratically accountable bodies. Thus, just as Hoosiers turn to the executive branch to implement and enforce stay-at-home orders to battle the spread of a virus, others (perhaps most notably, Justice Slaughter) simultaneously question the shift in power to the same executive branch. The following survey review of these cases highlights both these pros and cons of an administrative state that has never held more power, but has also rarely faced such probing questions going to its fundamental validity.

I. STANDARD OF REVIEW

A. Justice Slaughter's Clarion Call

Indiana Supreme Court Justice Geoffrey G. Slaughter continued to question basic tenets of Indiana's administrative law jurisprudence during the survey period: how much deference should the courts afford agency decisions, and how

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robust should judicial review of those decisions be? In the last survey issue,¹ the authors highlighted *Moriarity v. Indiana Department of Natural Resources*, in which the supreme court recited the familiar standard of review for an agency's interpretation of statute, pursuant to the courts' interpretation of the Administrative Orders and Procedures Act² ("AOPA"):

With AOPA in mind, we note that our review of agency action is intentionally limited, as we recognize an agency has expertise in its field and the public relies on its authority to govern in that area . . . We do not try the facts de novo but rather defer to the agency's findings if they are supported by substantial evidence . . . On the other hand, an agency's conclusions of law are ordinarily reviewed de novo . . . While we are not bound by the [agency's] conclusions of law, . . . an 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 . . . In fact, if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation . . . Like many cases involving judicial review of agency action, the outcome here turns on this standard of review.³

Moriarity stands as a reaffirmation of judicial deference to an agency's interpretation of a statute it is entrusted to enforce. *Moriarity* was announced seemingly to avoid any confusion with the court's opinion in a 2018 case, *NIPSCO Industrial Group v. NIPSCO*,⁴ in which the court adopted the following standard of review for reviewing questions of law arising from appeals of agency action:

We review questions of law de novo . . . and accord the administrative tribunal below no deference. To do otherwise would abdicate our duty to say what the law is . . . Such plenary review is constitutionally preserved for the judiciary . . . and considers whether the disputed decision, ruling or order is contrary to law.⁵

In *Moriarity*, the majority of the court at once made a point to defer to the Department of Natural Resources' ("DNR") interpretation of the word "stream" as used in the Dam Safety Act,⁶ and distinguished *Moriarity*'s scope of review

1. Alexander Carlisle & Manuel "Manny" Herceg, *Survey of Indiana Administrative Law*, 52 IND. L. REV. 589, 595-602 (2019).

2. IND. CODE § 4-21.5-5.

3. Compare *Moriarity v. Ind. Dep't of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019) (internal citations and quotations omitted), with *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

4. *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234 (Ind. 2018).

5. *Id.* at 241 (internal quotations and citations omitted).

6. IND. CODE § 14-27-7.5; *Moriarity*, 113 N.E.3d at 621.

from that of *NIPSCO Industrial Group*.⁷ Both the scrutiny of *NIPSCO Industrial Group* and the deference of *Moriarity* apply in full force, only in different contexts.

Justice Slaughter dissented from the majority opinion in *Moriarity*, entering “resolute”⁸ arguments explaining why he would have given no deference to DNR’s interpretation of the word “stream.”⁹ Justice Slaughter explained that undue deference to an executive agency’s statutory interpretation poses a threat to the structural balance of state government that is mandated by the Indiana Constitution’s separation of powers clauses.¹⁰ Moreover, an agency’s erroneous interpretation of statute—as Justice Slaughter characterized DNR’s interpretation in *Moriarity*—leads to arbitrary and capricious exercise of administrative power.¹¹

This survey period, Justice Slaughter remained consistent. He entered a concurring opinion denying transfer in another case arising from DNR, *DNR v. Prosser*.¹² The issue on appeal in *Prosser* was whether DNR’s denial of a lakefront property owner’s application to build a concrete seawall on Lake Manitou was supported by substantial evidence under AOPA.¹³ AOPA states that courts may grant relief to a person appealing agency action only if the person was “prejudiced by agency action that 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.¹⁴

7. *Moriarity*, 113 N.E.3d at 619 (“applying [*Moriarity*’s] standard of review comports with precedent and our prior decision in *NIPSCO Industrial Group* . . . in *NIPSCO*, we applied a specific, controlling portion of the same standard we recite today. Both in *NIPSCO* and here, we note that we ordinarily review legal questions addressed by an agency de novo . . . In *NIPSCO*, that was our primary focus . . . We did not continue our discussion of the standard of review to address an agency’s interpretation of the relevant statute because there was no need; we found the agency’s interpretation contrary to the statute itself and, thus, necessarily unreasonable.” (internal citations omitted)).

8. *Id.* at 619 (quoting the majority’s characterization of the dissenting opinion).

9. *Id.* at 624-27 (Slaughter, J., dissenting).

10. See Carlisle & Herceg, *supra* note 1, at 598-99 (citing *Moriarity v. Ind. Dep’t Nat. Res.*, 113 N.E.3d 614 (Ind. 2019)); see also IND. CONST. art. 3, § 1.

11. See Carlisle & Herceg, *supra* note 1, at 601-02 (citing *Moriarity v. Ind. Dep’t Nat. Res.*, 113 N.E.3d 614 (Ind. 2019)).

12. *Ind. Dep’t of Nat. Res. v. Prosser*, 139 N.E.3d 702 (Ind. 2020) (denying trans.) (Slaughter, J., concurring).

13. *Ind. Dep’t of Nat. Res. v. Prosser*, 132 N.E.3d 397 (Ind. Ct. App. 2019), *trans. denied*, 139 N.E.3d 702 (Ind. 2020).

14. IND. CODE §§ 4-21.5-5-14, 15.

Prosser turned on a single factual question: whether a dredging operation that occurred decades before the application on the shore of petitioner's property resulted in an increase to "the total length of the shoreline around Lake Manitou."¹⁵ If so, then the petitioner was entitled to build a concrete seawall on his shoreline; if not, he was not entitled to do so.¹⁶ After a contested hearing, the administrative law judge ("ALJ") determined that the shoreline had not been lengthened by the dredging operation and denied the permit. The Natural Resources Commission¹⁷ adopted the ALJ's determination, and the petitioner appealed for judicial review of the final order.

The trial court granted the petition, finding that the ALJ improperly discounted testimony submitted by the petitioner.¹⁸ The trial court noted that ALJ had determined that the testimony of two of petitioner's witnesses was unreliable for being based on recollections from decades prior, and that it was based on faulty assumptions regarding the dredging's effect on the length of the shoreline.¹⁹ The court found that the ALJ improperly discounted this evidence because it was competent and uncontroverted.²⁰ The court of appeals reversed the trial court after it held that there was substantial evidence in the administrative record to support the agency's finding that the shoreline had not been lengthened by the dredging.²¹ Under AOPA standards, the trial court was not permitted to "second-guess" the ALJ's factual determinations, and it was the ALJ's providence to determine the credibility and weight of the evidence.²² A petition to transfer was denied by a unanimous supreme court.²³

In his concurring opinion denying petitioner's transfer request, Justice Slaughter expressed dissatisfaction with the courts' interpretation of AOPA's standard of review. He opined that AOPA's "unsupported by substantial evidence" standard creates an uphill battle for petitioners seeking judicial review of adverse agency decisions because "what qualifies as 'substantial' evidence is not substantial at all—requiring nothing more than a mere 'scintilla' of evidence."²⁴ Under the court's interpretation of AOPA's evidentiary review standards, where there is sufficient evidence in the agency record, the petitioner

15. *Prosser*, 132 N.E.3d at 401 (Ind. Ct. App. 2019), *trans. denied*, 139 N.E.3d 702 (Ind. 2020).

16. *Id.*

17. The Natural Resources Commission is the ultimate authority of the DNR for purposes of AOPA. IND. CODE § 14-10-2-3.

18. *Prosser*, 132 N.E.3d at 400.

19. *Id.*

20. *Id.* The trial court cited *Haynes v. Brown* for the proposition that the "trial court may not refuse to consider and weigh competent, uncontradicted evidence." 88 N.E.2d 795 (Ind. Ct. App. 1949) (emphasis added).

21. *Prosser*, 132 N.E.3d at 397.

22. *Id.* at 402.

23. Ind. Dep't of Nat. Res. v. *Prosser*, 139 N.E.3d 702 (Ind. 2020) (denying *trans.*).

24. *Id.* (Slaughter, J., concurring) (citing Ind. High Sch. Athletic Ass'n, Inc. v. Watson, 938 N.E.2d 672, 680-81 (Ind. 2010)).

essentially is not entitled to meaningful judicial review of the agency's decision.²⁵ Justice Slaughter noted that AOPA deference causes him "deep concern,"²⁶ a concern which animated him to issue a call to action:

I write separately to note my deep concerns with prevailing administrative law as codified in AOPA and interpreted by our courts. Under the current system, a government agency both finds the facts and interprets the statutes that supply the rules of decision, and the courts' only role (as we have interpreted AOPA) is to defer to all aspects of the agency's decision-making. Neither judge nor jury finds facts. And no court gives a fresh, plenary interpretation to the agency's determination of law or to its application of law to the facts.

In a future case, where the issues are raised and the arguments developed, I am open to entertaining legal challenges to this system for adjudicating the legal disputes that our legislature assigns agencies to resolve in the first instance, subject only to a highly circumscribed right of judicial review as set forth in AOPA.²⁷

Future survey issues will tell whether practitioners have taken up Justice Slaughter's invitation.

B. Standard of Review Applied

Generally, on judicial review, courts defer to "administrative agency's findings of fact, if supported by substantial evidence, but review questions of law de novo."²⁸ Where statutory interpretation is involved, the courts must "determine and give effect to the intent of the legislature."²⁹ Where the statutory text is "clear and unambiguous," the courts apply the "plain, ordinary, and usual meanings" of the text; where ambiguous, the courts "seek to ascertain and give effect to the intent of the legislature."³⁰ The court further stated "[a]n 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."³¹

A case arising from the Indiana Department of Insurance ("IDOI") concerns an example of unreasonable agency statutory interpretation.³² In *IDOI v. Schumaker*, a licensed insurance producer found himself in financial woes upon the confluence of unfortunate circumstances.³³ As a result, the insurance producer

25. *Id.*

26. *Id.*

27. *Id.* at 702-03.

28. *Comm'r of Ind. Dep't of Ins. v. Schumaker*, 118 N.E.3d 11, 20 (Ind. Ct. App. 2018).

29. *Id.*

30. *Id.*

31. *Moriarity v. Ind. Dep't of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019).

32. *Schumaker*, 118 N.E.3d 11 (Ind. Ct. App. 2018).

33. *Id.* at 13.

stole “\$8,300 from his homeowners association” (“HOA”), for which he served as treasurer. He eventually repaid the money, “along with two years of [outstanding] dues . . . and one year of future dues,” and “disclosed his actions to the [HOA].”³⁴ Upon learning of the misconduct, and of the decision by the Federal Industry Regulatory Authority to revoke his license to sell securities, the Commissioner of IDOI issued an Administrative Order Notice of Nonrenewal of License (“Nonrenewal Order”).³⁵ The insurance producer requested a hearing before an ALJ on the Nonrenewal Order.³⁶ In the ALJ’s order on the hearing, the ALJ found, among other things, that “no evidence was presented that [the insurance producer] has ever committed any conduct that is fraudulent, coercive, dishonest, incompetent, untrustworthy, or financially irresponsible *in the conduct of his insurance business or any other business venture*.”³⁷ The ALJ also found the money taken from the HOA was an isolated incident not indicative of the insurance producer’s character.³⁸ The ALJ thus recommended the Commissioner’s Nonrenewal Order be reversed and that the insurance producer be placed on a period of probation.³⁹

The IDOI Commissioner reversed the ALJ’s order and recommendation.⁴⁰ The Commissioner found that the insurance producer violated, among other things, subsection (8) of Indiana Code section 27-1-15.6-12(b) (the “Penalty Statute”)⁴¹ and “ordered that [the] insurance producer[’s] license not be renewed.”⁴² Subsection (8) of the Penalty Statute states that the Commissioner “may... refuse to issue or renew an insurance producer license...for...[u]sing fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in Indiana or elsewhere.”⁴³

On judicial review, the trial court reversed the final decision of the IDOI not to renew the insurance producer’s license, finding the Commissioner’s interpretation of the Penalty Statute to the isolated at issue “implausible.”⁴⁴ IDOI held in its final order:

The term “in the conduct of business in Indiana or elsewhere,” when used in [Subsection (8) of the Penalty Statute], should not be read in conjunction with the terms “fraudulent, coercive, or dishonest practices.” [The Penalty Statute] provides the Commissioner the authority to take

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 14 (emphasis added).

38. *Id.*

39. *Id.*

40. *Id.*

41. IND. CODE § 27-1-15.6 contains the regulatory mandates the IDOI, through the Commissioner, must implement concerning the licensing of insurance producers.

42. *Schumaker*, 118 N.E.3d at 14.

43. IND. CODE § 27-1-15.6-12(b)(8).

44. *Schumaker*, 118 N.E.3d at 18.

administrative action when a producer uses fraudulent, coercive, or dishonest practices in any event, whether in the conduct of business in Indiana or not.⁴⁵

In other words, IDOI argued that although it was not disputed that the insurance producer did not engage in misdeeds in the conduct of business, the Penalty Statute allowed the IDOI to not renew his license if he committed a single instance of “fraudulent, coercive, or dishonest practices” because this clause of the Penalty Statute is not modified by the “in the conduct of business” clause. The trial court found the IDOI’s interpretation unreasonable because it would apply the Penalty Statute to “isolated, non-business acts of dishonesty, such as cheating at cards or golf, and . . . would render [the Penalty Statute] completely meaningless.”⁴⁶ Therefore, IDOI’s interpretation was unreasonable and entitled to no deference.

The court of appeals affirmed the trial court. The court reviewed the agency’s statutory interpretation *de novo*,⁴⁷ citing the standard of review from a 2013 case: “Deference to an agency’s interpretation of a statute becomes a consideration when a statute is ambiguous and susceptible to more than one reasonable interpretation, and an agency’s incorrect interpretation of a statute is entitled to no weight.”⁴⁸ The court of appeals held that the Penalty Statute was inapplicable to the insurance producer’s case because the phrase “in the conduct of business” “modifie[s] each of the causes listed in subsection (8).”⁴⁹ Neither the ALJ nor the Commissioner made any factual finding that the conduct at issue took place “in the conduct of business,” or that the insurance producer’s singular act constituted “practices.”⁵⁰ Therefore, the agency’s interpretation was unreasonable and its order was not based on substantial evidence. The Commissioner’s Nonrenewal Order was vacated.⁵¹

45. *Id.* at 17.

46. *Id.* at 19.

47. The complete standard of review for an agency’s interpretation of statute used in *Schumaker* was as follows:

We review an issue of statutory interpretation *de novo*. If the statutory language is clear and unambiguous, we require only that the words and phrases it contains are given their plain, ordinary, and usual meanings to determine and implement the legislature’s intent. If a statute is ambiguous, we seek to ascertain and give effect to the intent of the legislature. In doing so, we read the act as a whole and endeavor to give effect to all of the provisions. Deference to an agency’s interpretation of a statute becomes a consideration when a statute is ambiguous and susceptible to more than one reasonable interpretation, and an agency’s incorrect interpretation of a statute is entitled to no weight.

Schumaker, 118 N.E.3d at 20 (citations omitted).

48. *Id.* at 20 (Ind. Ct. App. 2018) (citing *Ind. Horse Racing Comm’n v. Martin*, 990 N.E.2d 498, 503 (Ind. Ct. App. 2013)).

49. *Id.* at 22.

50. *Id.*

51. *Id.*

In *Webb Ford, Inc. v. Indiana Department of Financial Institutions*, the court of appeals agreed with the petitioner car dealership that the Indiana Department of Financial Institutions (“DFI”) acted arbitrarily and capriciously after it initiated enforcement proceedings against the dealership for alleged violations of the Indiana Uniform Consumer Credit Code (“IUCCC”).⁵² *Webb Ford* concerns the interpretation of two provisions of the IUCCC: the requirement that sellers disclose finance charges to credit consumers, Indiana Code section 24-4.5-2-301, and the requirement that allows sellers to impose certain charges on credit customers “in addition to” finance charges, Indiana Code section 24-4.5-2-202.⁵³

The car dealership in *Webb Ford* charged a \$25 convenience fee to its credit customers for electronic titling with the Bureau of Motor Vehicles (“BMV”) through a third party vendor.⁵⁴ The convenience fee was in addition to a \$15 flat fee paid to the BMV.⁵⁵ The dealership required all credit customers to use the electronic service.⁵⁶ However, the dealership did not require its cash customers to use the electronic service, but rather gave them the option to process the title work directly with the BMV.⁵⁷

During a routine inspection of the dealership’s records, DFI noted a violation on a single transaction where the dealership did not properly disclose the \$25 convenience fee on a retail installment contract.⁵⁸ DFI took the position that the dealership should have disclosed this fee in the “Finance Charge” box because the fee was mandatory only for credit customers and thus a condition of the extension of credit.⁵⁹ After identifying this one incident, DFI expanded its inquiry into the dealership’s consumer credit practices. DFI issued a Notice of Charges, Order to Cease and Desist, and Make Restitution (“Restitution Order”).⁶⁰

In the Restitution Order, DFI did not charge the dealership with violating the IUCCC disclosure statute (IND. CODE § 24-4.5-2-301); rather, DFI charged the dealership with violating the IUCCC additional charges statute (IND. CODE § 24-4.5-2-202).⁶¹ DFI claimed that because the dealership did not treat the \$25 convenience fee as part of the finance charge, it therefore attempted to treat the fee as an additional charge.⁶² According to DFI, this particular type of “additional charge” was not permitted by the additional charges statute, hence the violation.⁶³ After a hearing before an ALJ, the ALJ issued an order in favor of DFI, stating therein, “As [the \$25 convenience fee] was not disclosed as a finance charge, then

52. *Webb Ford, Inc. v. Ind. Dep’t of Fin. Insts.*, 133 N.E.3d 136 (Ind. Ct. App. 2019).

53. *Id.* at 137.

54. *Id.* at 138.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 138-39.

60. *Id.* at 141.

61. *Id.*

62. *Id.*

63. *Id.*

it must be an additional charge.”⁶⁴ The agency’s ultimate authority adopted the ALJ’s order.

On judicial review, the dealership argued that DFI acted arbitrarily and capriciously in treating the finance charge as an additional charge.⁶⁵ The dealership argued that just because finance charge may have been disclosed improperly, it remains a finance charge—it does not simply transform into an “additional charge.” The dealership asserted the agency misconstrued statutory definitions in order to take enforcement action against the dealership, and that such misconstruction is arbitrary and capricious where all the parties agree that the charge was a “finance charge,” albeit improperly disclosed.⁶⁶ DFI’s only argument in response was to point out that this is how the agency has handled such violations for forty years; the agency offered no authority or explanation for why it took enforcement action under the additional charges statute rather than the disclosure statute.⁶⁷

The court of appeals agreed with the car dealership that DFI’s enforcement action was arbitrary and capricious. The court cited the *Moriarity* standard of review: “While we are not bound by the agency’s conclusions of law, an 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.”⁶⁸ Further, the court recited, where the agency’s interpretation is reasonable, the court must stop its analysis and need not consider any other interpretation.⁶⁹

Even under this deferential standard, the court of appeals did not accept the agency’s statutory interpretation.⁷⁰ The court noted that the statutory definition of finance charge “does not include charges as a result of additional charges . . . ,” Indiana Code section 24-4.5-2-109, and that under the IUCCC additional charges are in addition to finance charges, Indiana Code section 24-4.5-2-202(1).⁷¹ “Therefore, a finance charge—again, which everyone agrees is at issue here—can’t also be an additional charge.”⁷² The court of appeals held that DFI had acted arbitrarily and capriciously as a result of its unauthorized statutory interpretation and remanded the matter to DFI to pursue enforcement action for failure to properly disclose a finance charge.⁷³

64. *Id.* at 142.

65. *Id.* at 143.

66. *Id.* at 143.

67. *Id.* at 143-44.

68. *Id.* (citing *Moriarity v. Ind. Dep’t of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019)) (internal quotation marks and citations omitted).

69. *Id.* at 144.

70. As such, *Webb Ford* may be the exception that proves the unofficial rule acknowledged by the *Moriarity* majority: “Like many cases involving judicial review of agency action, the outcome . . . turns on this standard of review.” *Moriarity*, 113 N.E.3d at 619 (Ind. 2019).

71. *Webb Ford, Inc.*, 133 N.E.3d at 144.

72. *Id.*

73. *Id.*

In a case arising from the Indiana Grain Buyers and Warehouse Licensing Agency (“IGBWL”), the court of appeals sided 2-1 with the agency’s interpretation of statute.⁷⁴ Under the Indiana Grain Buyers and Warehouse Licensing and Bonding Law, Indiana Code section 26-3-7 (“Grain Licensing Law”), farmers, called “producers,” are permitted to deliver grain to warehouses for storage with the intent to sell the grain under deferred pricing arrangements.⁷⁵ In a deferred pricing arrangement, the producer delivers the grain, the warehouse accepts title to it, and then the price for the grain is determined and paid at a later date.⁷⁶

The dispute in *Sears v. IGBWL* arose after a warehouse failed financially on April 8, 2016.⁷⁷ Upon a financial failure of a warehouse, the Grain Licensing Law calls for IGBWL to take possession of the failed warehouse and initiate a claims process for the purpose of settling outstanding accounts.⁷⁸ A “claimant” as defined by the Grain Licensing Law “means a person that is unable to secure satisfaction within the twelve (12) months following delivery of the financial obligations due from a licensee under this chapter for grain that has been delivered to the licensee for sale or for storage under a bailment.”⁷⁹ Based on its interpretation of this statute, the agency determined that allowed claims included those for grain deposited on or after April 8, 2015, and denied claims for grain deposited before April 8, 2015.⁸⁰

The producer in *Sears* had delivered grain to the failed warehouse for at least seven years before the warehouse failed, from 2009 through 2016.⁸¹ The agency’s decision meant that the producer was a claimant as to the 13,295 bushels of corn and the 6,232 bushels of soybeans he had delivered after April 8, 2015, but he was not a claimant as to the 83,146 bushels of corn and 17,293 bushels of soybeans delivered prior to April 8, 2015.⁸² The producer sought a hearing before an ALJ. During the hearing, the parties focused on the meaning of the phrase “delivery of financial obligations” as used in the Grain Licensing Law.⁸³ The agency argued that the phrase was synonymous with “delivery of grain” “because the delivery of grain creates a lien . . . which is a ‘financial obligation’ to either [the producer] or the IGBWL.”⁸⁴ Hence the twelve-month time bar precludes claims for *grain delivered* prior to twelve months before failure.⁸⁵ The producer,

74. *Sears v. Ind. Grain Buyers & Warehouse Licensing Agency*, 117 N.E.3d 588 (Ind. Ct. App. 2018).

75. *Id.* at 591.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 592 (quoting IND. CODE § 26-3-7-2(5)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 593.

84. *Id.*

85. *Id.*

on the other hand argued that “delivery of financial obligations” meant the point in time when the depositor *asks to be paid*.⁸⁶ “If the depositor is not paid on demand, a financial obligation to the depositor arises.”⁸⁷ Under the producer’s interpretation, the twelve month period “excluded those depositors who were satisfied/paid within one year after delivering the financial obligations to the licensee, which occurred by requesting return of grain or requesting payment.”⁸⁸

The ALJ adopted the agency’s interpretation because it found that when grain is delivered, a lien attached in favor of the claimants.⁸⁹ Delivery is a legally significant event and therefore equates to “delivery of financial obligations.”⁹⁰ Therefore, the producer was a claimant only as to the grain delivered in the twelve months before the failure of the warehouse because the period is triggered by delivery of the grain.⁹¹ The agency’s final authority adopted the interpretation of the ALJ.⁹² The producer appealed the decision, arguing it was “arbitrary, capricious, and [an] abuse of discretion, and otherwise not in accordance with law.”⁹³ The trial court affirmed the agency.⁹⁴

On appeal, the court of appeals afforded no deference to the agency’s interpretation of the statute, citing *NIPSCO Industrial Group* for the proposition that “[w]hen reviewing an agency’s interpretation of a statute, our standard of review is de novo, and we accord the administrative tribunal no deference.”⁹⁵ The court held that the purpose of statutory interpretation is “to ascertain and give effect to” the intent of the legislature.⁹⁶ “The best evidence of legislative intent is the statutory language itself,” examining the statute as a whole, and the courts will give statutory text its plain and ordinary meaning.⁹⁷ Policy goals are considered in that the court will consider that the General Assembly intended for the statute to be applied consistent with those goals. In addition, the court noted

86. *Id.*

87. *Id.*

88. *Id.* (internal quotes omitted).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 594. In the final order, the agency observed that the General Assembly had amended the Grain Licensing Law since the ALJ’s order to extend the period of allowable claims to those deliveries to a warehouse beginning October 8, 2014, and ending April 8, 2015. IGBWLA therefore allowed the producer’s claims as to all grain delivered to the failed warehouse after October 8, 2014.

93. *Id.*

94. *Id.*

95. *Id.* at 595 (citing *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234, 241 (Ind. 2018)). *But see* subsequent decision of Indiana Supreme Court in *Moriarity v. Ind. Dep’t Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019) (“an 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.”) (internal quotes omitted).

96. *Sears*, 117 N.E.3d at 595.

97. *Id.*

that agency action is arbitrary and capricious “only where there is no reasonable basis for the action.”⁹⁸

The court affirmed the agency’s final order. The court considered the text of the Grain Licensing Law, in light of interim legislative amendments thereto extending the claims period from twelve months before failure to all deliveries from October 8, 2014, to conclude that the “clear implication of [the law] is that the [statute] as written allowed a claim only for grain that was delivered on or after April 8, 2015 – one year before the failure – and the legislature wanted to extend that one-year limitation [to claims from October 8, 2014].”⁹⁹ Therefore, the agency was correct in allowing the producer’s claims for grain delivered from October 8, 2014, through the time of failure, and disallowing claims for grain delivered before October 8, 2014.¹⁰⁰ The court also surveyed the text of other sections of the Grain Licensing Law to conclude that IGBWLA’s final decision was consistent with the broader legislative intent.¹⁰¹

Judge Margret Robb dissented from the majority’s opinion. Relying on *NIPSCO Industrial Group*’s standard of review (“an agency’s interpretation of a statute is entitled to no deference”), Judge Robb opined that the majority’s interpretation of “claimant” was too narrow in that it excluded producers the General assembly intended to compensate. Judge Robb would have held that a financial obligation arose once the producer requested payment, not on delivery,¹⁰² and that the statutory definition of “claimant,” when read in the context of the Grain Licensing Law, means that “once a producer became a claimant, [the producer] remained a claimant until satisfied, regardless of the date of failure.”¹⁰³ This result follows from Judge Robb’s interpretation of the text of Grain Licensing Law, as well as its legislative purpose “to aid farmers—not to exclude them.”¹⁰⁴ Since the record was silent as to when or if the producer had requested payment, Judge Robb would have remanded the case to the agency for further factual development.¹⁰⁵

II. ACCESS TO JUDICIAL REVIEW

A. Final Agency Action

Practitioners should be aware that not only do administrative agencies receive substantial deference when challenged in a court. As creatures of statute, a person’s ability to challenge administrative action is likewise circumscribed by statute and anything but the strictest compliance with the procedures laid out in those statutes will result in an invalid challenge. Indeed, in some circumstances

98. *Id.*

99. *Id.* at 596.

100. *Id.*

101. *Id.* at 597.

102. *Id.* at 601 (Robb, J., dissenting).

103. *Id.* at 600 (Robb, J., dissenting).

104. *Id.* (Robb, J., dissenting).

105. *Id.* at 601 (Robb, J., dissenting).

the relevant statute might be drafted in such a way that a person has no ability to challenge executive action whatsoever.

In *Town of Darmstadt v. CWK Investments-Hillsdale, LLC*, CWK Investments was attempting to obtain a loan to fund the construction of four apartment buildings.¹⁰⁶ CWK Investments filed an improvement loan permit application with the Town of Darmstadt, but the Evansville Area Plan Commission Site Review Committee denied the application.¹⁰⁷ The company appealed that denial to the Evansville-Vanderburgh County Board of Zoning Appeals. The Zoning Board held a hearing, and at the end of the hearing voted to reverse the commission's denial and to approve the company's application.¹⁰⁸

That vote took place on June 15, 2017.¹⁰⁹ Within thirty days, on July 11, the Town petitioned a trial court for review of the Zoning Board's decision.¹¹⁰ The Town did not remember, however, to file the Zoning Board's record within thirty days of that, and did not ask for an extension of time to do so.¹¹¹ So on August 21, the company filed a motion to dismiss that petition. In the meantime, however, the Zoning Board finally issued its written determination regarding CWK Investment's case on August 17.¹¹² The Zoning Board put into writing its rationale for reversing the earlier denial.¹¹³

The Town presumably realized that the failure to file the Zoning Board record within the applicable thirty days was a mistake impossible to overcome, based on established caselaw requiring petitioners to comply strictly with statutory filing deadlines.¹¹⁴ So while filing the record and moving for an extension of time to do so in the case it had already opened, the Town also filed a second petition for judicial review based on the August 17 date where the Zoning Board issued its written decision.¹¹⁵ CWK Investments also sought to dismiss that second petition on the grounds that it came too late after the June 15 oral vote.¹¹⁶ The trial court granted both motions to dismiss, and the Town appealed.

On appeal, the Town acknowledged that it needed to petition within thirty days "after the date of the zoning *decision* that is the subject of the petition for judicial review."¹¹⁷ But that raised the question of when the "decision" happened. The Town argued that those 30 days should have started only after the Zoning

106. 114 N.E.3d 11, 12 (Ind. Ct. App. 2018).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. See discussion *infra* notes 154-74 and accompanying text regarding Timely Filing of Administrative Record (Part II.D).

115. *Darmstadt*, 114 N.E.3d at 12.

116. *Id.*

117. IND. CODE § 36-7-4-1605 (emphasis added).

Board issued its written decision on August 17.¹¹⁸ CWK Investments countered that as soon as the Zoning Board took its vote, it had made a decision, starting the thirty-day clock.

The panel turned to the language of the statute, Indiana Code section 36-7-4-919(e), which provides that boards of zoning appeals “shall make a decision on any matter that it is required to hear under the 900 series¹¹⁹ . . . at the conclusion of the hearing on that matter.” The court found that the plain import of this provision was that the board would make “a decision”—not necessarily a *written* decision—and “a board of zoning appeals is required to make its decision on a matter at the conclusion of the hearing.”¹²⁰

The Town pointed to Indiana Code section 36-7-4-915, which requires the zoning board to “make written findings of fact.” But the court declined to enforce what Indiana Code section 36-7-4-919(e) “d[id] not say,”¹²¹ and since section 919(a) echoed the word “decisions” from section 1605, the court declined to reinterpret the phrase “findings of fact” in section 915 to mean “decision.” Thus, “here, the BZA’s decision was made at the meeting on June 15, 2017, although the BZA did not memorialize its decision with its findings of fact until two months after the hearing.”¹²² The majority noted the difficulties in requiring a petition challenging the zoning board’s decision before there is any documentation regarding what the Zoning Board decided; but the majority found that the legislature had planned for such an eventuality when it built in an automatic extension of time to filing the zoning record, should it not be available in a timely fashion.¹²³

Judge Crone dissented; he emphasized Indiana Code section 36-7-4-1016(a), which says “a ‘zoning decision’ is a board’s ‘final’ decision”—by logic, the board’s voiced decision is not “final” because statutes require the board to follow up with written findings.¹²⁴ Judge Crone also stressed practical issues with the majority’s holding: “In many cases, a petitioner won’t be able to set forth specific facts to demonstrate that he or she has been prejudiced by the board’s decision until after the board has issued its findings of fact.”¹²⁵ Judge Crone noted that even members of the Zoning Board simply assumed that the written findings started the time to appeal, with one member saying, “[c]learly, the time for appeal wouldn’t start until findings were made,” and the legal counsel for the Board saying, “the written findings constitute the final decision. That’s right.”¹²⁶

118. *Darmstadt*, 114 N.E.3d at 13.

119. The 900 series statutes govern the operation and procedures of boards of zoning appeals. IND. CODE § 36-7-4-900 *et seq.*

120. *Darmstadt*, 114 N.E.3d at 14.

121. *See* *ESPN, Inc. v. Univ. of Notre Dame Police Dep’t*, 62 N.E.3d 1192, 1195-96 (Ind. 2016).

122. *Darmstadt*, 114 N.E.3d at 15.

123. *Id.* at 16.

124. *Id.* at 18 (Crone, J., dissenting).

125. *Id.* at 19 (Crone, J., dissenting).

126. *Id.* at 19-20 (Crone, J., dissenting).

Of course, according to the majority's decision, that is not right. As shown by the Zoning Board's assumption that the written findings start the clock to petition, the decision in *Darmstadt* runs counter to ordinary litigation intuition; as such, the case is a reminder that agency law is a creation of statute, and those statutes will be enforced to the letter, even when frustrating practitioners' expectations.

B. Statutory Right to Judicial Review

Darmstadt shows that a person seeking to challenge executive action must strictly comply with the applicable statutes governing such a challenge. But there also times where such statutes are drafted so narrowly as to foreclose any challenge to certain actions.

In *City of Lawrence v. Dullaghan*, the court of appeals reminded practitioners that the ability to challenge a governmental decision depends on the existence of a statute enabling such a challenge.¹²⁷ In *Dullaghan*, a firefighter named Dullaghan disputed the City of Lawrence's calculation of his employment start date. Dullaghan joined the fire department with a class, and they were assigned a June 16, 2002, date of employment.¹²⁸ Dullaghan initially failed a vision exam that was required by the Indiana Public Employee Retirement Fund.¹²⁹ He eventually passed the exam, but in the shuffle, he was assigned a start date two days later on June 18.¹³⁰

The two-day difference had adverse effect on Dullaghan. Seniority among firefighters depends on a firefighter's start date, followed by test scores.¹³¹ Dullaghan's test scores would have entitled him to the highest seniority among his recruiting class, but because of the two-day discrepancy, he was instead ranked as the least senior.¹³² That lower status in turn impacted his priority in terms of vacation and shift assignments, as well as promotions.¹³³ It did not affect, however, his pay or benefits.¹³⁴

Dullaghan was understandably upset by this and took it up through the chain of command.¹³⁵ But the Department refused to correct it. So he took the issue to court. The Department sought to dismiss the petition, and the trial court's denial of that motion led to an interlocutory appeal.

Indiana Code section 36-8-3.5-18(a) governed Dullaghan's claim. That statute says someone in Dullaghan's position would be aggrieved if he were suspended, demoted, or dismissed. Dullaghan could not argue that he had been suspended or dismissed; so the question came down to whether the two-day

127. 116 N.E.3d 1101, 1102 (Ind. Ct. App. 2018).

128. *Id.*

129. *Id.*

130. *Id.* at 1102-03.

131. *Id.* at 1103.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1104.

discrepancy constituted a “demotion.”

The statute does not define these terms, so the court of appeals turned to widely-used dictionaries.¹³⁶ The dictionaries revealed the definitions of “to reduce to a lower grade or rank,” “to reduce to a lower grade, rank, class, or position,” “[t]o reduce in grade, rank, or status,” and “[r]educe to a lower rank or class.”¹³⁷ The court found that Dullaghan did not meet any of the dictionary definitions. Despite the negative effects of the two-day discrepancy, the effect “did not reduce Dullaghan in rank or position. Dullaghan is and remains a private first-class firefighter.”¹³⁸ Accordingly, the court reversed and remanded with instructions to dismiss.

The result is a stark one in that Dullaghan has no judicial recourse to challenge what very well could be a simple mistake by the government, one that has some tangible effects on Dullaghan. But the case is an important reminder that challenges to governmental action must be brought through specific statutory authorization.

C. Remote Interaction with Agency

In *Bailey v. Review Board of Indiana Department of Workforce Development*,¹³⁹ the court considered an issue that will likely affect all practitioners at some point in their future careers, particularly in light of stay-home orders and government office closures issued in Spring 2020 as a result of the coronavirus pandemic: remote access to administrative agencies. And just as one’s ability to challenge an administrative decision is limited or foreclosed by statutes, it can also be limited by the discretion of the administrative agency itself.

Bailey involved a straightforward claim for unemployment benefits. After Ms. Bailey left her job at a law firm, she applied for and received unemployment benefits.¹⁴⁰ The law firm filed an appeal of that decision with the Indiana Department of Workforce Development.¹⁴¹ The Department mailed Bailey a “Notice of TELEPHONE Hearing” (“Notice”), which listed the time of the hearing (10:00 a.m.), gave a contact number, and asked for her contact number.¹⁴² The Notice also provided detailed call-in information. On the day of the hearing, the law firm called in, but Ms. Bailey did not. The ALJ attempted to contact Ms. Bailey by phone, but the ALJ could not get in touch with Ms. Bailey.¹⁴³ The ALJ’s calls went to Ms. Bailey’s voicemail.¹⁴⁴ After conceding that Ms. Bailey would not be reached by phone, the hearing started at 10:24 a.m. without her. Ms. Bailey called in just two minutes after the start of the hearing; however, she was

136. *Id.* at 1106.

137. *Id.* (citations omitted).

138. *Id.* at 1107.

139. 132 N.E.3d 386, 387 (Ind. Ct. App. 2019).

140. *Id.* at 387.

141. *Id.*

142. *Id.* at 387-88.

143. *Id.* at 388.

144. *Id.*

not allowed to participate.¹⁴⁵ In her absence, the ALJ ruled against her.¹⁴⁶

Bailey's argument on appeal was simple, namely that the ALJ denied her due process when she was not permitted to join the call. But the court of appeals noted the Review Board's "wide latitude in conducting its hearings."¹⁴⁷ Such executive departments must comport with due process, which requires only an "opportunity to be heard at a meaningful time and in a meaningful manner."¹⁴⁸ The court accepted that Bailey had "a reasonable explanation about why she missed the calls."¹⁴⁹ She noted that the day of the call had bad weather, and her cell phone had poor reception.¹⁵⁰ But the court found that the onus was on her to make sure her cell phone could be reached at the time of the hearing. The court declared that "Bailey was given notice of the hearing, and based on the explicit language of the hearing instructions associated with the Notice, Bailey knew that any telephonic difficulties could result in the ALJ deciding the case without her attendance, but she chose to appear telephonically."¹⁵¹ Thus, she had the "opportunity" to be heard—she just failed to take advantage. Although not a significant development in the law, *Bailey* should serve as a warning against a situation that practitioners could easily find themselves in while practicing via remote access.

D. Timely Filing of Administrative Record

When it comes to filing the administrative record, timeliness can make or break a petition for judicial review. It is black letter law that AOPA "does not excuse untimely filing or allow *nunc pro tunc* extensions."¹⁵² If a petitioner requires an extension to file the agency record, it must file a request for extension within AOPA's thirty-day period after petitioning for review,¹⁵³ or before the expiration of any judicially-granted extension.¹⁵⁴ In the supreme court's bright-line formulation, "a petitioner for review cannot receive consideration of its petition where the statutorily-defined agency record has not been filed."¹⁵⁵

In fact, it is reversible error for a trial court to enter an order allowing a petitioner to file the agency record outside of the statutory time period.¹⁵⁶ In an

145. *Id.*

146. *Id.* at 389.

147. *Id.* (citing *Art Hill, Inc. v. Review Bd. of the Ind. Dep't. of Workforce Dev.*, 898 N.E.2d 363, 367 (Ind. Ct. App. 2008) (quotation omitted)).

148. *Id.*

149. *Id.* at 390.

150. *Id.*

151. *Id.* at 391.

152. *Ind. Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d 367, 370 (Ind. 2010) (emphasis in original).

153. IND. CODE § 36-7-4-1613(a).

154. *Meyer*, 927 N.E.2d at 371 (Ind. 2010).

155. *Teaching Our Posterity Success, Inc. v. Ind. Dep't of Educ.*, 20 N.E.3d 149, 155 (Ind. 2014).

156. *Carmel Bd. of Zoning Appeals v. Bidgood*, 120 N.E.3d 1045 (Ind. Ct. App. 2019).

appeal arising from the decision of the Carmel Board of Zoning Appeals (the “Board”) to grant a special use zoning permit,¹⁵⁷ the petitioner did not file the agency record with the trial court within thirty days of filing the petition for review.¹⁵⁸ Nor did the petitioner move the court for an extension of time to file the record within that period.¹⁵⁹ Rather, within the thirty-day filing period, the court entered an order setting a hearing on the petition for a date outside the thirty-day filing period.¹⁶⁰ Two days before the hearing, the Board noted in a filing that the petitioners did not timely file the record.¹⁶¹ The petitioners responded to the Board’s filing two days later; the response included a request for extension of time to file the record, citing facts that the court considered good cause for extension.¹⁶² The trial court granted the extension, well after the expiration of the initial thirty-day period.¹⁶³

After the trial court denied the Board’s motion for reconsideration of the order granting an extension, the court certified the order for interlocutory appeal.¹⁶⁴ The Board argued on appeal that the petitioners lost the right to pursue judicial review after failing to comply with the thirty-day filing period of Indiana Code section 36-7-4-1613(a), and that the trial court’s order was therefore erroneous.¹⁶⁵ The petitioners raised an equitable argument. They retorted that the trial court had the inherent authority to manage its docket and filing deadlines, notwithstanding the filing period contained in the Series 1600 statutes.¹⁶⁶

The court of appeals rejected the petitioner’s appeal for equitable relief and strictly applied the plain language of Indiana Code section 36-7-4-1613(a) (thirty-day filing period).¹⁶⁷ The court acknowledged that the trial court has the authority to set its own deadlines under the certiorari process, an alternative to the Series 1600 procedures.¹⁶⁸ However, the certiorari process had been repealed years before this appeal arose and the court issued its order granting an extension.¹⁶⁹ Therefore, the “trial court signed an order that is meaningless, as it is directed to the requirements of a now-repealed statutory process.”¹⁷⁰ In addition, the court of

157. *Id.* at 1049 (Review of decisions of boards of zoning appeals (“BZA”) are governed by the 1600 Series statutes, IND. CODE § 36-7-4-1600 *et seq.* The judicial review provisions of the 1600 Series are identical in all material respects to those of AOPA, and therefore caselaw interpreting AOPA applies fully to judicial review of BZA decisions).

158. *Id.* at 1046.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 1047.

165. *Id.* at 1049.

166. *Id.* at 1050.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

appeals found the trial court's order problematic for the additional fact that it was not issued in response to a motion for extension of time, as the only motion for extension came after the statutory time period to seek an extension.¹⁷¹ Trial courts, in addition to those petitioning for judicial review of agency action, must heed the statutes establishing filing deadlines for judicial review of agency decisions.¹⁷²

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES & ADMINISTRATIVE BYPASS

Given the difficulty of complying with strict statutes limiting or dictating the contours of challenges to administrative decisions, it should not be surprising that litigants seek to bypass such procedures in favor of standard trial court litigation. While it is not impossible to bypass agency review, courts are wary of allowing the applicable exceptions to swallow the rule.

In *Graham v. Town of Brownsburg*,¹⁷³ Sabrina Graham and Kurt Disser sought to challenge the legality of the Town of Brownsburg's water rate ordinance. Brownsburg operated a water utility, of which Graham and Disser were customers even though they lived outside of Brownsburg's town limits.¹⁷⁴ Until 2002, Brownsburg's water utility operated under the jurisdiction of the Indiana Utility Regulatory Commission, and therefore needed to seek the Commission's approval for any rate increases.¹⁷⁵ However, the town opted out of the Commission's jurisdiction under Indiana Code section 8-1.5-3-9.1, so that the town council set rates.

In 2010, Brownsburg adopted an ordinance adding a new charge to fund fire protection services.¹⁷⁶ In 2018, Brownsburg expanded that new charge to individuals living outside Town limits, like Graham and Disser.¹⁷⁷ Graham and Disser did not want to pay this new charge. They attended the public hearings related to the new charge, and voiced their disagreement; they did not, however, file any type of administrative appeal.¹⁷⁸ Instead, they went straight to their local trial court and sought a declaration that the 2018 ordinance—which extended the new charge to individuals living outside of Brownsburg's limits—was void and invalid.¹⁷⁹ And in an amended complaint, Graham and Disser added claims that the ordinance violated Indiana's Constitution Article 1 Section 23 protection of equal privileges and immunities; that the fee was in effect a tax assessed against only some persons; to the extent that any statute permitted the charge, the statute was unconstitutional; and that the 2010 ordinance was not legally adopted.¹⁸⁰

171. *Id.* at 1051.

172. *Id.* at 1050.

173. *Graham v. Town of Brownsburg*, 124 N.E.3d 1241, 1242 (Ind. Ct. App. 2019).

174. *Id.* at 1242-44.

175. *Id.* at 1243.

176. *Id.*

177. *Id.*

178. *Id.* at 1245.

179. *Id.*

180. *Id.*

Brownsburg did not answer the amended complaint,¹⁸¹ which could have entitled Graham and Disser to a default judgment in their favor.¹⁸² Brownsburg also failed to timely respond to requests for admission served by Graham and Disser,¹⁸³ which typically means those requests are admitted.¹⁸⁴ Brownsburg, however, moved to have its deemed-admitted admissions withdrawn under Indiana Trial Rule 36, and then moved for summary judgment on the basis that Graham and Disser had failed to exhaust their administrative remedies.¹⁸⁵ The trial court granted both of these motions from Brownsburg, awarding summary judgment to Brownsburg.¹⁸⁶ Graham and Disser appealed the court's decision.

The court of appeals recited the well-known rule that a party with an available administrative remedy must pursue it before being allowed access to any court.¹⁸⁷ This rule applies even where no statute and no agency specifically instructs the party to follow any particular route of agency appeals.¹⁸⁸

The panel pointed to Indiana Code section 8-1.5.3-8.2, in which subsection (b) provides:

(b) Owners of property connected or to be connected to and served by the works authorized under this chapter may file a written petition objecting to the rates and charges of the utility so long as:

- (1) the petition contains the names and addresses of the petitioners;
- (2) the petitioners attended the public hearing provided under section 8.1 of this chapter;
- (3) the written petition is filed with the municipal legislative body within five (5) days after the ordinance establishing the rates and charges is adopted under section 8.1 of this chapter;
- (4) the written petition states specifically the ground or grounds of objection; and
- (5) a petition has not been filed with the commission under section 8.3 of this chapter or under IC 36-9-23-26.1 appealing the same rates and charges of the utility.¹⁸⁹

Thus, to have any chance to seek any redress of Brownsburg's water rate increase, Graham and Disser needed to attend the correct hearing, and then file a written petition describing their objections within five days of the ordinance being adopted. As the panel held, "[b]ecause it is undisputed that Graham/Disser

181. *Id.*

182. Ind. T.R. 55(A).

183. *Id.*

184. Ind. T.R. 36(A).

185. *Id.* at 1245-46.

186. *Id.* at 1246.

187. *Id.* (citing *Turner v. City of Evansville*, 740 N.E.2d 860, 861 (Ind. 2001)).

188. *Id.* at 1246-47 (citing *Austin Lakes Joint Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644 (Ind. 1995)).

189. IND. CODE § 8-1.5.3-8.2(b).

failed to file such a petition, this matter was not properly before the trial court.”¹⁹⁰ Because they failed to file a written petition, Graham and Disser’s litigation efforts—including their short-lived victories of having the requests for admissions they served deemed admitted, and nearly obtaining a default judgment against Brownsburg—were for naught. The panel mentioned four possible exceptions to the exhaustion requirement.¹⁹¹ Where a plaintiff can show that exhaustion of all remedies would be futile,¹⁹² where the agency action would be outside of its statutory authority,¹⁹³ where going through the entire administrative procedure would result in irreparable injury,¹⁹⁴ or where other equitable considerations preclude exhaustion.¹⁹⁵

Graham and Disser had a colorable futility argument because they had brought a constitutional challenge in their complaint, and the town could not declare a statute unconstitutional.¹⁹⁶ The panel agreed with a portion of that premise, but noted that the town *could* afford relief in these circumstances by withdrawing the ordinance, or modifying it.¹⁹⁷ True, it could not completely invalidate the statute over which Graham and Disser complained; but if the town withdrew the ordinance, that would completely moot Graham and Disser’s dispute without reaching the larger constitutional issue.¹⁹⁸

It is sometimes said that decisions are made by those who show up. But in the case of water rate increases by municipalities, it requires more than just showing up. Such decisions can only be challenged by those who show up—and have filed a written petition that states specifically the grounds of objection within five days.¹⁹⁹

In *Commissioner of IDEM v. Eagle Enclave Development, LLC*, the court of appeals confirmed how much power executive agencies have to enforce their orders against those they regulate—and again confirmed that disputes with agencies must play out fully at the agency level before seeking judicial intervention.²⁰⁰ In *Eagle Enclave*, a developer, Eagle Enclave, developed a property, which required it to seek and procure a permit to remove vegetation and soil from the Indiana Department of Environmental Management (“IDEM”), as well as a storm water permit.²⁰¹ IDEM issued a Notice of Violation to Eagle

190. *Id.* at 1247.

191. *Id.*

192. *Id.* (citing *Scheub v. Van Kalker Family Ltd. P’ship*, 991 N.E.2d 952, 958 (Ind. Ct. App. 2013)).

193. *Id.* (citing *IDEM v. Twin Eagle, LLC*, 798 N.E.2d 839, 844 (Ind. 2003)).

194. *Id.* (citing *S. Bend Fed’n of Teachers v. Nat’l Educ. Ass’n—S. Bend*, 180 Ind. App. 299, 311, 389 N.E.2d 23, 31 (Ind. Ct. App. 1979)).

195. *Id.* (citing *Barnette v. U.S. Architects, LLP*, 15 N.E.3d 1, 10 (Ind. Ct. App. 2014)).

196. *Id.* at 1247–48.

197. *Id.* at 1248.

198. *Id.*

199. IND. CODE § 8-1.5-3-8.2.

200. 120 N.E.3d 212, 213 (Ind. Ct. App. 2019).

201. *Id.*

Enclave after an investigation uncovered that there were thick sediment deposits being left in a third-party's pond.²⁰² The parties entered into an Agreed Order under which Eagle Enclave would submit a plan that would include what actions Eagle Enclave would take "to remove any sediment attributable to the activities at the Site from the off-site pond."²⁰³ The Agreed Order also gave IDEM incredibly broad authority:

In the event IDEM determines that any plan submitted by [Eagle] is deficient or otherwise unacceptable, [Eagle] shall revise and resubmit the plan to IDEM in accordance with IDEM's notice. After three (3) submissions of any plan by [Eagle], IDEM may modify and approve any plan and [Eagle] must implement the plan, as modified by IDEM.²⁰⁴

The Agreed Order also required Eagle Enclave to waive its right to seek any review of the Agreed Order—administrative or judicial.²⁰⁵

Eagle Enclave later commissioned two studies to determine the amount of sediment that its operations placed in the pond.²⁰⁶ The studies—if accurate—revealed only an "inconsequential" amount of sediment in the pond.²⁰⁷ Eagle Enclave wrote to IDEM and asked it to modify the Agreed Order's requirement that it dredge the entire pond,²⁰⁸ which would presumably be inefficient if the only result would be removing an "inconsequential" amount of sediment. Eagle Enclave even offered to donate property that could act as a buffer to the sediments in an effort to convince IDEM to modify the Agreed Order.²⁰⁹ IDEM did not accept the offer. Instead, it responded that *any* amount of sediment would qualify as a violation.²¹⁰ Accordingly, IDEM declined to modify the requirement that Eagle Enclave dredge the pond.²¹¹

Eagle Enclave appealed the Agreed Order to the Office of Environmental Adjudication ("OEA"), but OEA ruled against it.²¹² OEA found that IDEM's letter rejecting Eagle Enclave's proposed deal was not a reviewable action.²¹³ And OEA found that even if the waiver provision were reviewable, Eagle Enclave would have needed to seek review within the applicable time following the Agreed Order.²¹⁴ Since Eagle Enclave did not seek review within that time, it

202. *Id.*

203. *Id.* at 214.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

could not seek review thereafter.²¹⁵

Following further negotiations between IDEM and Eagle Enclave, IDEM filed a petition for civil enforcement of the Agreed Order.²¹⁶ IDEM sought to enforce the provision that would involve Eagle Enclave dredging the pond.²¹⁷ Eagle Enclave responded with counterclaims regarding the issues it had lost previously, namely, that the waiver provision in the Agreed Order was void; that the denial of Eagle Enclave's request to modify the Agreed Order was a reviewable decision; and that IDEM does not have jurisdiction over the pond in any event because the pond was privately owned.²¹⁸ IDEM sought to dismiss all of these counterclaims pursuant to Indiana Trial Rule 12(B)(6).²¹⁹ The trial court denied that motion, but certified the question for an interlocutory appeal, which the court of appeals accepted.

As to the first counterclaim on the validity of the waiver provision, Eagle Enclave conceded on appeal that it had not sought judicial review after OEA had rendered a ruling on the waiver provision. Eagle Enclave abandoned that claim on appeal for its own failure to seek judicial review of the adverse order.²²⁰

Even though Eagle Enclave attempted to distinguish its second counterclaim—regarding whether IDEM's denial of the offer to modify the Agreed Order constituted a reviewable action—the court of appeals did not accept the argument. Eagle Enclave attempted to argue that its second counterclaim should be granted review because “OEA did not reach the merits of its claim.”²²¹ Rather, OEA decided that it did not have the power to decide. However, the court of appeals found that OEA's decision was nevertheless a “final order” subject to the thirty-day timeline in AOPA.²²² “There is no dispute that Eagle did not timely file a petition for judicial review of that order. Accordingly, Eagle waived its right to seek judicial review of the OEA's order.”²²³

Eagle Enclave came closest to savings its third counterclaim, namely whether IDEM had jurisdiction over the pond to begin with.²²⁴ Eagle Enclave likened its situation to that in *IDEM v. Twin Eagle, LLC*.²²⁵ In that case, a developer filed a declaratory judgment seeking to preclude IDEM from enforcing a state law against its project, based on the argument that the statute IDEM relied on did not cover the subject matter it was attempting to regulate.²²⁶ The statute on which IDEM relied defined the word “waters,” and Twin Eagle's case argued that

215. *Id.*

216. *Id.* at 215.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 216.

221. *Id.* at 217.

222. *Id.*; see IND. CODE § 4-21.5-5-5.

223. *Eagle Enclave*, 120 N.E.3d at 217.

224. *Id.* at 217-18.

225. 798 N.E.2d 839 (Ind. 2003).

226. *Id.* at 842.

private ponds did not fall under that definition.²²⁷ Ultimately, the Indiana Supreme Court accepted the argument that developer's claim could be litigated in a trial court without the requirement that it be taken through the administrative process first.²²⁸

The *Eagle Enclave* court distinguished *Twin Eagle*. The court of appeals explained that this administrative bypass "only applies where the question of the agency's jurisdiction presents a pure question of law."²²⁹ In contrast, "where the question of an agency's jurisdiction turns on a question of fact, resort to the administrative process is still a condition precedent to judicial review."²³⁰ The court likened *Eagle Enclave* to the circumstances of *Outboard Boating Club of Evansville, Inc., v. Ind. State Department of Health*.²³¹ There, the plaintiff attempted to invalidate regulatory actions taken by the Indiana State Department of Health ("ISDH"), on the grounds that the ISDH's jurisdiction extended only to campgrounds, not boat clubs.²³² The court of appeals in that case, however, held that the boat club owners' case did not turn on a pure question of law; instead, it turned on the factual question of whether the precise site at issue was in fact a "campground."²³³ That question was "the type of fact sensitive issue" where trial courts need the expertise and factual development offered by agencies.²³⁴

In *Eagle Enclave*, the court of appeals accepted that IDEM's jurisdiction extended to "waters," as defined in Indiana Code section 13-11-2-265(a), but did not extend to "private ponds," as confirmed in Indiana Code section 13-11-2-265(b)(2).²³⁵ However, the court held that it was factually disputed whether the body of water in question was truly a "private pond," or whether it was connected to other bodies of water, such that it constituted "waters" under IDEM's jurisdiction.²³⁶ *Eagle Enclave* never sought such factual development before OEA.²³⁷ Accordingly, "[b]ecause *Eagle* did not raise the factual issue of IDEM's jurisdiction to the administrative agency first, *Eagle* has not preserved for the trial court's review *Eagle*'s claim that IDEM lacks jurisdiction over the . . . pond."²³⁸ If a party aggrieved by agency action does not preserve its rights before both the adjudicative body of the agency and the trial court—as *Eagle Enclave*'s decision to not present all issues before OEA, and then to not appeal OEA's decision within the applicable time—the party cannot thereafter revive its claims, even if

227. *Id.* at 846.

228. *Id.*

229. *Eagle Enclave*, 120 N.E.3d at 218.

230. *Id.*

231. 952 N.E.2d 340 (Ind. Ct. App. 2011).

232. *Id.* at 342.

233. *Id.* at 346.

234. *Id.* at 345.

235. *Eagle Enclave*, 120 N.E.3d at 219.

236. *Id.*

237. *Id.*

238. *Id.*

potentially meritorious.

IV. SCOPE OF AGENCY POWER

A. Statutory Authority to Act

Administrative agencies are creatures of statute; therefore, they may exercise only that authority the General Assembly has delegated them by statute.²³⁹ Any act of an agency in excess of its power is *ultra vires* and void.²⁴⁰ In a case arising from action of the Indiana Utility Regulatory Commission²⁴¹ (“IURC”) approving the schedule of rates, rules, and regulations for providing power to an electric utility’s customers, the question of how much power an administrative agency has been delegated by statute came to the fore.²⁴²

The IURC is the agency tasked with ensuring that Indiana public utilities provide constant, reliable, and efficient service to their customers.²⁴³ Part of the legislature’s charge to the IURC is the requirement that the Commission periodically review and set each utilities’ rates for service.²⁴⁴ This ratemaking function requires the IURC to comprehensively examine every aspect of the utility’s operations and the economic conditions in which the utility operates; this examination results in the IURC setting a tariff for service.²⁴⁵ The tariff the IURC approved for the Indianapolis Power & Light Company (“IPL”), included a release of liability: “[IPL] shall not be liable for damages resulting to the Customer, or to third persons, from the use of electricity, interruption of service or supply, or the presence of the [IPL]’s property on the Customer’s premises, unless due to willful default or neglect on the part of [IPL].”²⁴⁶

IPL invoked the release after being sued by non-customer motorists who alleged that IPL’s failure to properly maintain traffic signals during a storm-induced power outage caused a collision in which the motorists were severely injured.²⁴⁷ The motorists sued under various theories of negligence, gross negligence, and reckless misconduct.²⁴⁸ IPL moved for judgment on the pleadings pursuant to Trial R. 12(C), arguing that the trial court lacked subject matter jurisdiction over the claims as a result of the IURC orders approving the IPL tariff.²⁴⁹ In the alternative, IPL argued an absence of a common law duty in

239. *Tyus v. Indpls. Power and Light Co.*, 134 N.E.3d 389 (Ind. Ct. App. 2019), *trans. denied*, 18A-CT-00828.

240. *Id.*

241. The Indiana Utility Regulatory Commission is one of a handful of administrative entities not subject to AOPA. IND. CODE § 4-21.5-2-4.

242. *Tyus*, 134 N.E.3d at 389.

243. *Id.* at 405.

244. *Id.*

245. *Id.*

246. *Id.* at 397 (italics in original).

247. *Id.* at 395-96.

248. *Id.* at 396.

249. *Id.* at 397.

negligence to the non-customer motorists as a result of the IURC's approval of the release clause.²⁵⁰

The trial court granted IPL's motion for judgment on the pleadings as to the negligence claims, but not as to the gross negligence or reckless conduct claims.²⁵¹ The trial court cited *Prior v. GTE North*²⁵² for the proposition that "the Indiana legislature, through the IURC, had the power to restrict the [motorists'] common law right to bring an ordinary negligence action against IPL as a rational means of keeping IPL's costs to a minimum so that IPL is able to operate without charging its customers an unreasonable rate."²⁵³

On interlocutory appeal, the motorists argued that regardless of how the IURC would have interpreted the release language, "any approval by the IURC of language purporting to relieve IPL of liability for common law tort injuries to a noncustomer, when that injury occurs during IPL's interruption in the supply of electricity, would exceed the power granted to the IURC by the Indiana General Assembly."²⁵⁴ The court of appeals cited precedent holding that the legislature may delegate rule-making authority to an agency only if the delegation is accompanied by sufficient standards to guide the agency in the exercise of its statutory authority.²⁵⁵ The court of appeals held that although the General Assembly had delegated to the IURC the power to "formulate rules necessary or appropriate to carry out the provisions"²⁵⁶ of the statutory delegation, there was no evidence that the General Assembly "gave, or intended to give, the IURC power to shield IPL from liability for injuries caused by IPL's negligence to noncustomers."²⁵⁷ Citing the Indiana Tort Claims Act, the court of appeals noted that the General Assembly knows well how to grant tort immunity, and that it could have shielded IPL from tort liability directly by statute.²⁵⁸ However, the General Assembly did not do so, and it did not delegate this legislative authority to the IURC.²⁵⁹ Therefore, the court of appeals reversed the trial court's order granting IPL judgment on the pleadings. The court further held that IPL's tariff was "unlawful and unreasonable to the extent" it granted IPL "immunity from liability for personal injury or property damage caused to noncustomers, by IPL's

250. *Id.*

251. *Id.* at 398.

252. *Prior v. GTE North*, 681 N.E.2d 768 (Ind. Ct. App. 1997). The court of appeals distinguished *Prior*, another negligence case against a utility, on the basis that the plaintiff in *Prior* was a customer of the utility. "That difference is significant because, by the IURC's own administrative rules, the rate schedules, rules, and regulations cover the relationship between the customer and the public utility." *Id.* at 408. (citing 170 I.A.C. 4-1-29).

253. *Id.* at 397.

254. *Id.* at 399.

255. *Id.* at 398.

256. IND. CODE § 8-1-1-3(g).

257. *Tyus*, 134 N.E.3d at 406.

258. *Id.* at 407.

259. *Id.*

own negligence, in connection with IPL's interruption of service."²⁶⁰ The court also found "[s]uch grant of immunity was beyond the IURC's delegated authority and, therefore, that part of the Release Clause is *ultra vires* and void."²⁶¹

B. Consistency of Agency Action

Since administrative bodies are statutory creations, they must be able to point to a particular grant of statutory authority before acting. In general, this would even include taking the action of changing its mind regarding a decision previously issued, unless the administrative agency convinces a court that the change involved a "mistake of law" as opposed to a mere change in opinion.

In *Essroc Cement Corp. v. Clark County Board of Zoning Appeals*,²⁶² a cement company sought regulatory approval from IDEM to be allowed to burn liquid waste derived fuels ("LWDF").²⁶³ To obtain that approval, Essroc needed written approval from its local Planning Commission to create the LWDF.²⁶⁴ Essroc sent a letter to the Clark County Plan Commission, and the executive director wrote back in January 2015, informing Essroc that its operations could continue in that area as it was presently zoned.²⁶⁵ As IDEM held meetings on its portion of regulatory approval, local interest groups began to protest. A group of concerned citizens came to the next Plan Commission meeting, and voiced their protest that "[t]he Essroc plant is located in close proximity to homes, churches, schools, and daycare centers, and its permit application documents reveal that it already emits vast quantities of toxic pollution into the neighboring community."²⁶⁶

Those concerned citizens filed a petition with the Clark County Board of Zoning Appeals to appeal the January 2015 letter, but the Board noted that more than thirty days had passed since the approval.²⁶⁷ However, the Zoning Board subsequently wrote to Essroc to reverse its previous position; the Zoning Board stated that it had discovered new facts, and that Essroc's plan to burn LWDR could not take place as the area was presently zoned.²⁶⁸ Although Essroc filed an appeal to the Zoning Board, and then petitioned the trial court, it could not undo the Zoning Board's new finding; so, it appealed.²⁶⁹

The appeal largely was determined by the court's deferential standard of review. "The trial court is not permitted to conduct a trial de novo, and instead neither that court nor this one may reweigh the evidence or reassess the credibility

260. *Id.* at 408.

261. *Id.*

262. 122 N.E.3d 881, 884 (Ind. Ct. App. 2019).

263. *Id.* at 885.

264. *Id.*

265. *Id.* at 886-87.

266. *Id.* at 887.

267. *Id.*

268. *Id.* at 888.

269. *Id.* at 888-89.

of witnesses.”²⁷⁰ The court of appeals noted that it could grant relief from a Zoning Board decision only if the decision was (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.²⁷¹ Under this deferential standard, the court of appeals affirmed many technical determinations by the Zoning Board, including that the subsequent determination was a correct zoning decision.²⁷²

Essroc brought other challenges as well. For instance, it argued that the Zoning Board erred by revoking its prior determination. Essroc cited old Indiana Supreme Court precedent holding that “power to undo an act once done will not be implied from the mere grant of power, in the exercise of a sound discretion, to do the act.”²⁷³ Similarly, “administrative bodies may not usually rescind their final determination absent some statutory provision granting that authority.”²⁷⁴ However, the limitation is not absolute. There is an exception for mistakes of law: “When an administrative entity recognizes its own error of law, it may correct that error.”²⁷⁵

Thus, if the Board rescinded its January 2015 zoning decision based on a change of judgment, then it exceeded its authority. If instead the Board attempted to correct a mistake of law, then it acted appropriately. Although the court of appeals entertained the argument, after a lengthy analysis the panel determined that the changed zoning determination was correcting a mistake of law, not merely changing its judgment. “Plan Commission staff revoked the first letter to Essroc based on an actual error of law.”²⁷⁶

Essroc’s final argument regarded equitable estoppel. It noted that it had spent in excess of \$1.2 million on its new facilities, relying upon the January 2015 letter that said it was allowed to do so.²⁷⁷ In a footnote, the court of appeals indicated the difficulty of arguing equitable estoppel against a governmental entity.²⁷⁸ But ultimately the court of appeals did not address the issue because Essroc had not presented it to the Zoning Board; thus, neither the trial court nor the court of appeals could entertain the argument.²⁷⁹

270. *Id.* at 890-91.

271. *Id.* at 891 (citing IND. CODE § 36-7-4-1614(d)).

272. *Id.* at 891-95.

273. *Id.* at 896 (quoting *Cress v. State*, 198 Ind. 323, 333-34, 152 N.E. 822, 826 (1926)).

274. *Id.* (quoting *State ex rel. ANR Pipeline Co. v. Indiana Dep’t of State Revenue*, 672 N.E.2d 91, 94 (Ind. T.C. 1996)).

275. *Id.* (quoting *State ex rel. ANR Pipeline Co. v. Indiana Dep’t of State Revenue*, 672 N.E.2d 91, 94 (Ind. T.C. 1996)).

276. *Id.* at 897.

277. *Id.* at 899.

278. *Id.* at 900 n.4.

279. *Id.* at 900; *see also* IND. CODE § 4-1.5-5-10.

V. ACCESS TO PUBLIC RECORDS

So far, this survey has discussed the need for practitioners challenging administrative decisions to adhere strictly to the statutory framework enabling such challenges. But sometimes it is the executive branch's failure to strictly comply with the applicable statutes that ends in the challenger's victory.

In *Scales v. Warrick County Sheriff's Department*,²⁸⁰ the court of appeals recognized and enforced a father's ability to review police records related to his daughter's disappearance under Indiana's Access to Public Records Act. The case arose from tragic circumstances. The daughter lived with her parents at the time she went missing in August 2014.²⁸¹ She had a strained relationship with her ex-husband, whom she divorced over financial reasons and because of his alleged drinking problem.²⁸² When she went missing, the father suspected foul play—he learned of a text message from the daughter to her ex-husband not long before she went missing in which she wrote “you would probably kill me and hide my body.”²⁸³ The ex-husband had also recently vandalized her car and called her a bad mother.²⁸⁴ The ex-husband had connections, though; his father worked with the police department, and he himself helped run its jails.²⁸⁵

The Warrick County Police did investigate the ex-husband.²⁸⁶ He admitted that he and the decedent had argued over her current boyfriend.²⁸⁷ As the police reviewed the daughter's phone, they found text messages from the ex-husband, who was attempting to meet with her that night, advances that she rebuffed.²⁸⁸ Those very same messages had been deleted from the ex-husband's phone.²⁸⁹ A month after her disappearance, law enforcement found the daughter's body. Her vehicle was in a lake and she was in it, in the backseat.²⁹⁰ The keys were not in the ignition; they were somehow in her pocket.²⁹¹ Regardless, less than twenty-four hours later, the local coroner declared the death an accident.²⁹² The police department closed its investigation shortly thereafter.²⁹³ In fact, the police department never characterized their investigation as a “criminal investigation.”²⁹⁴ Rather, the police conducted interviews with witnesses and gathered evidence

280. 122 N.E.3d 866, 867 (Ind. Ct. App. 2019).

281. *Id.*

282. *Id.*

283. *Id.* at 868.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

under the characterization of a “missing person’s investigation.”²⁹⁵ And the state never filed charges.²⁹⁶

The father of the deceased daughter filed an Access to Public Records Act (“APRA”) petition, seeking access to the videos, documents, and witness interviews obtained during the investigation.²⁹⁷ The sheriff of the police department responded with an affidavit, explaining that he considered the records confidential.²⁹⁸ The sheriff said that he “respectfully decline[d] to produce such records voluntarily because I believe to do so violates my responsibility as Sheriff.”²⁹⁹ Scales responded that the police never conducted a “criminal investigation,” so the police could not withhold the documents from his review.³⁰⁰ The trial court sided with the police, so Scales appealed.

When the legislature enacted APRA, it did so to guarantee Hoosiers “full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.”³⁰¹ To fulfill that guarantee, the legislature instructed courts to “liberally construe[] it to implement this policy and place the burden of proof for the nondisclosure of a public record on the agency that would deny access to the record and not on the person seeking to inspect and copy the record.”³⁰² Among the “public agencies” subject to this mandate are police departments.³⁰³ The General Assembly exempted some records from APRA’s disclosure scheme. Among the documents exempted from public disclosure, “at the discretion of a public agency,” are “[i]nvestigatory records of law enforcement agencies or private university police departments.”³⁰⁴ In order to take advantage of the investigatory records exemption, the agency needs to prove that the exemption exists and must state the contents of the withheld with specificity rather than a conclusory affidavit.³⁰⁵

In Scales’ appeal, the court of appeals turned to the definition of “investigatory record” contained in Indiana Code section 5-14-3-2(i): Investigatory records are “information compiled in the course of the investigation of a crime.”³⁰⁶ According to the police department, there was no crime. As the court of appeals explained, “In this instance, there was no criminal investigation, and the Department conceded to this fact numerous times. The record shows that

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 869.

299. *Id.*

300. *Id.* at 870.

301. IND. CODE § 5-14-3-1.

302. § 5-14-3-1.

303. IND. CODE § 5-14-3-2(q)(6) (defining a public agency as “[a]ny law enforcement agency, which means ... the police or sheriff’s department of a political subdivision”).

304. IND. CODE § 5-14-3-4.

305. *Scales*, 122 N.E.3d at 871 (citing *Lane-El v. Spears*, 13 N.E.3d 859, 868 (Ind. Ct. App. 2014)).

306. *Id.*

at all times, law enforcement from the FBI, the Indiana State Police, and the Boonville Police Department referred to and classified [the] case as a missing person's investigation."³⁰⁷ And the panel pointed to the coroner's declaration of an accident just twenty-four hours after the discovery of the vehicle, finding that the declaration "reinforces the fact that there was no criminal investigation."³⁰⁸ Therefore, the agency failed to meet its burden to demonstrate that the records qualified under APRA's investigatory records exception.

The court considered other cases where law enforcement agencies successfully blocked public access to documents.³⁰⁹ It found that in these other cases, there was at least a potential criminal investigation. In contrast, here the coroner declared the daughter's death an accident within twenty-four hours of finding her in the backseat of a vehicle in a lake.³¹⁰ "In other words, unlike these three cases where there may have been or there was a criminal investigation, Kelley's case was decisively not a criminal investigation."³¹¹ The court ordered judgment to be entered in Scales' favor and the records produced.

CONCLUSION

Everyone has experience with administrative agencies, whether seeking unemployment benefits or facing higher utility payments. This survey article focuses on a handful of decisions of the many issued by the appellate courts, but most administrative decisions do not end up in a judicial challenge, much less an appellate one. Regardless, these developments in case law guide how those decisions are made, and they have a real-world effect on the lives of the thousands of persons and companies appearing before administrative bodies in Indiana.

307. *Id.*

308. *Id.*

309. *Id.*; see *Heltzel v. Thomas*, 516 N.E.2d 103 (Ind. Ct. App. 1987); *Althaus v. Evansville Courier Co.*, 615 N.E.2d 441 (Ind. Ct. App. 1993); and *Lane-El v. Spears*, 13 N.E.3d 859 (Ind. Ct. App. 2014).

310. *Id.*

311. *Id.* at 872.