

SURVEY OF INDIANA ADMINISTRATIVE LAW

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INTRODUCTION

Lawyers may be tempted to think of the “law” as composed solely of judicial decisions and legislative enactments, but the legal system also incorporates the work of administrative agencies. These bodies—operating in legislative, executive, and quasi-judicial capacities—can become one of the most significant points of contact Hoosiers have with the “law.” From decisions determining unemployment compensation,¹ to establishing riparian rights,² to allowing municipalities to treat waste,³ a review of cases published during the Survey Period reveals the surprising array of matters affecting our lives that administrative agencies address on a routine basis.

While Hoosiers may be subject to the power of the “regulatory state,” just as they are subject to legislative enactments and judicial decisions, the exercise of the state’s regulatory power still largely remains subject to review and consideration by Indiana’s judicial branch. Because of the unique nature of administrative agencies, the judiciary has developed a body of law to address the legal questions that arise during administrative review. This Survey Article provides an overview of decisions by Indiana’s courts as they review the actions of Indiana administrative agencies.

I. JUDICIAL REVIEW

Most Indiana administrative agency decisions are open to judicial review.⁴ This review, however, is limited by statutory and common law requirements governing aspects of the process such as who may seek review,⁵ what a court may

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1. *See, e.g.*, Chrysler Grp., LLC v. Review Bd. of Ind. Dep’t of Workforce Dev., 960 N.E.2d 118 (Ind. 2012).

2. Kranz v. Meyers Subdivision Prop. Owners Ass’n, Inc., 969 N.E.2d 1068 (Ind. Ct. App.), *clarified on reh’g*, 973 N.E.2d 615 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 324 (Ind. 2012).

3. City of Gary v. Ind. Dep’t of Env’tl. Mgmt., 967 N.E.2d 1053 (Ind. Ct. App. 2012).

4. Ind. Dep’t of Highways v. Dixon, 541 N.E.2d 877, 880 (Ind. 1989) (acknowledging “a constitutional right to judicial review of administrative [agency] actions” (citing *State ex rel. State Bd. of Tax Comm’rs v. Marion Super. Ct.*, 392 N.E.2d 1161 (Ind. 1979))). In many cases, the Indiana Administrative Orders and Procedures Act (“AOPA”) sets out the method and means by which such review is had. Even so, some agencies, such as the Indiana Utility Regulatory Commission and the Department of Workforce Development, are expressly exempted from the AOPA, although judicial review is still available from decisions of those agencies. IND. CODE § 4-21.5-2-4 (2013). Only certain types of agency actions, such as an “action related to an offender within the jurisdiction of the department of correction,” are expressly exempt from the AOPA and judicial review. *Id.* § 4-21.5-2-5(6).

5. *See, e.g.*, IND. CODE § 4-21.5-5-3 (2013).

review,⁶ when such review is available,⁷ and under what standard courts are to conduct the review.⁸ This section examines how courts, during the Survey Period, addressed the judicial review of agency actions.

II. STANDARD OF REVIEW

In general, judicial review of agency actions is limited and deferential. Because administrative agencies are executive bodies empowered by the legislature, acting on behalf of the executive and/or legislative branches, this deference derives, in significant part, from the doctrine of the separation of powers. While it does not apply to all agencies, Indiana's Administrative Orders and Procedures Act ("AOPA") sets out the basic, principled, limitations placed on judicial review of administrative decisions by declaring that a court may only overturn a decision by an administrative agency when the decision 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.⁹

Courts tend to apply similar standards even when reviewing decisions of agencies not covered by the AOPA.

The degree of deference a court owes to an administrative decision, however, may vary according to the type of agency action and question under review. As the nature and level of owed deference is variable, the manner in which courts apply deference in specific circumstances is worthy of consideration.

A. *Review of Statutory and Administrative Rule Interpretation*

The Indiana Supreme Court's decision in *Chrysler Group, LLC v. Review Board of the Indiana Department of Workforce Development*¹⁰ examines the appropriate level of deference owed to an agency when it interprets a statute that it is charged with enforcing, even if the agency does not explicitly offer an interpretation of the statute.¹¹

Chrysler involved a claim for unemployment benefits by a number of employees of Chrysler who participated in a voluntary buyout program offered by the company during the midst of the "Great Recession."¹² The buyout, known as the "Enhanced Voluntary Termination of Employment Program" ("EVTEP"), offered substantial benefits to workers who voluntarily chose to terminate their

6. See, e.g., *id.* § 4-21.5-5-2.

7. See, e.g., *id.* § 4-21.5-5-5.

8. See, e.g., *id.* § 4-21.5-5-14.

9. See, e.g., *id.* § 4-21.5-5-14(d).

10. 960 N.E.2d 118 (Ind. 2012).

11. *Id.* at 124, 127.

12. *Id.* at 121-23.

employment.¹³ These benefits were offered to all employees, including active employees and those who had been laid off by Chrysler.¹⁴ The Department of Workforce Development initially terminated unemployment benefits to employees who had been laid off prior to accepting EVTEP benefits and denied unemployment benefits to those who terminated their employment in exchange for the EVTEP benefits.¹⁵ This decision was appealed within the agency, until a final ruling determined that all employees, those who had been laid off, and those who had accepted EVTEP benefits while still working, were entitled to unemployment compensation.¹⁶

As the supreme court explained, under Indiana's unemployment benefits regime, ordinarily a person is "disqualified from [receiving unemployment] benefits if he voluntarily terminates his employment without good cause."¹⁷ At the time the Department was reviewing the case of the EVTEP employees, a special exception to this rule provided that persons who left their employment voluntarily could still receive unemployment benefits under certain conditions.¹⁸ Specifically, at the time, a person who was otherwise eligible to receive benefits would not be denied them if she "accepts an offer of payment or other compensation offered by an employer to avert or lessen the effect of a layoff or plant closure."¹⁹ The Department of Workforce Development relied on this statutory provision to determine that the Chrysler employees who accepted EVTEP, thereby voluntarily terminating their employment without good cause, remained eligible for unemployment compensation.²⁰ The court's review of the case thus hinged, initially, on whether the Department correctly interpreted Indiana Code section 22-4-14-1(c) ("Section 1(c)").²¹

In beginning its analysis, the court noted questions of statutory interpretation are usually reviewed *de novo*, but when the case involves the interpretation of a statute an agency is to enforce, the court will "defer to the agency's reasonable interpretation of such a statute even over an equally reasonable interpretation by another party."²² The Indiana Supreme Court concentrated on Chrysler's argument that for Section 1(c) to apply, the employer must make an explicit announcement concerning specific layoffs or plant closures.²³ On this point, the court rejected Chrysler's interpretation of prior case law involving a similar statute, and while agreeing that for Section 1(c) to apply an employer must intend

13. *Id.* at 121-22.

14. *Id.* at 121.

15. *Id.* at 122.

16. *Id.*

17. *Id.* at 123 (citing *Ind. State Univ. v. LaFief*, 888 N.E.2d 184, 186 (Ind. 2008)).

18. IND. CODE § 22-4-14-1(c) (2013).

19. *Chrysler Grp.*, 960 N.E.2d at 123 (quoting IND. CODE § 24-4-14-1(c) (2013)).

20. *Id.* at 123-24.

21. *Id.* at 124.

22. *Id.*

23. *Id.* at 125.

“to avert or lessen the effect of a lay-off or plant closure[,]”²⁴ the court concluded that the employer’s motivation could be inferred from something “less than [an] explicit expression[.]”²⁵ of that intent.²⁶ The court went on to note that Chrysler’s interpretation “would undermine the[] humanitarian purpose[]” of the Unemployment Compensation Act by “allowing a disingenuous employer to side-step its responsibilities . . . by simply choosing its words carefully to avoid an explicit declaration of intent.”²⁷

Although the court conceded that the Department had “not provide[d] an express interpretation” of Section 1(c), the court noted that it would “presume that the agency is familiar with the statutes under which it operates”²⁸ even if as it would “not assume that the Board interpreted the section incorrectly.”²⁹ In other words, the court effectively concluded that given a reasonable interpretation of the statute that conformed with the agency’s decision, deference to that decision would not require reversal even in the absence of a specific interpretation offered by the agency.³⁰

In *City of Gary v. Indiana Department of Environmental Management*,³¹ the Indiana Court of Appeals likewise afforded a high degree of deference to an agency’s interpretation of a controlling administrative regulation when it addressed a challenge by the City of Gary to the Department of Environmental Management’s (“IDEM”) issuance of a permit for the construction of a wastewater treatment plant to the nearby City of Hobart.³² In reviewing IDEM’s actions, the court examined the appropriateness of IDEM’s interpretation of its own “antidegradation” regulations, requiring that IDEM conclude the discharge of treated wastewater into a waterway will not result in the degradation of the waterway.³³

The court began its analysis by stating “[w]hen we interpret administrative regulations, our court applies the same rules of construction that apply to statutes.”³⁴ The court went on to note that deference to an agency’s interpretation of a statute or rule only “becomes a consideration when a statute is ambiguous and susceptible of more than one reasonable interpretation.”³⁵ The court elaborated that, once the agency’s interpretation is found to be reasonable, the

24. *Id.* at 124.

25. *Id.* at 126.

26. *Id.* at 124-26.

27. *Id.* at 126.

28. *Id.* at 127 (quoting *Trelleborg YSH, Inc. v. Bd. of Ind. Dep’t of Workforce Dev.*, 798 N.E.2d 484, 487 (Ind. Ct. App. 2003)).

29. *Id.*

30. *Id.*

31. 967 N.E.2d 1053 (Ind. Ct. App. 2012).

32. *Id.* at 1054, 1063.

33. *Id.* at 1057.

34. *Id.*

35. *Id.* (quoting *Dev. Servs. Alts, Inc. v. Ind. Families & Soc. Servs. Admin.*, 915 N.E.2d 169, 181 (Ind. Ct. App. 2009)).

court “**should terminate its analysis and not address the reasonableness of the other party’s proposed interpretation**” out of deference to the expertise of the agency.³⁶

Thus, the court of appeals determined the “threshold issue in this case is whether IDEM reasonably interpreted the antidegradation requirement” in the Indiana Administrative Code.³⁷ Specifically, the court examined IDEM’s interpretation of 327 Indiana Administrative Code section 5-2-11.7(a)(2) (“Subdivision 11.7(a)(2)”), which, before its repeal in 2012, was divided into subsections (A), (B), and (C).³⁸ The City of Gary argued that IDEM erred in granting a permit to Hobart when it concluded that the requirements of Subdivision 11.7(a)(2) could be met by applying only subsections (A) and (B), and not (C).³⁹ The court disagreed, siding with IDEM’s interpretation that subsection “(C) is simply one of two ways to meet the regulation’s requirements.”⁴⁰

In reaching this conclusion, the court of appeals noted that IDEM’s “interpretation is consistent with the plain language of the regulation[,]” which connects subsections (A) and (B) with the conjunctive “and” but does not join subsection (C) to the others.⁴¹ Further, the court noted the phrasing of subsection (C) which provided that “the requirements of this subdivision will be considered to have been met . . . implies that the requirements of the subdivision may be satisfied by other means.”⁴² In addition, given that subsection (C) did not apply to a portion of Hobart’s wastewater permit, the court of appeals concluded IDEM reasonably determined “it could satisfy Subdivision 11.7(a)(2) by meeting the requirements of clauses (A) and (B)” and, thus, the court concluded its analysis without addressing the reasonableness of other offered interpretations.⁴³

B. Deference on Other Questions of Law

Chrysler and *City of Gary* are two cases that illustrate the degree of deference courts will show certain administrative agency decisions. However, not all legal decisions by an agency in interpreting a statute or rule are entitled to the same level of deference.

In *Brenon v. First Advantage Corp.*,⁴⁴ the court of appeals reviewed the decision of the Worker’s Compensation Board to dismiss the application of Mr. Dale Brenon for benefits on the grounds that he accepted another claim arising

36. *Id.*

37. *Id.*

38. *Id.*; see also 327 IND. ADMIN. CODE 5-2-11.7(a)(2) (repealed 2012).

39. *City of Gary*, 967 N.E.2d at 1058-59.

40. *Id.* at 1058.

41. *Id.*

42. *Id.* (internal quotation marks omitted).

43. *Id.* at 1059.

44. 973 N.E.2d 1116 (Ind. Ct. App. 2012).

out of the same injury in Wisconsin.⁴⁵ The court of appeals noted that when “the matter for our review is primarily a legal question, [the court does] not grant the same degree of deference to the Board’s decision as we would if the issue were of fact, because law is the province of the judiciary.”⁴⁶

The court thus began with a detailed analysis of a Kentucky case, *Industrial Track Builders of America v. Lemaster*,⁴⁷ which the Board relied on as the basis of its conclusion that Brenon was estopped from pursuing his claim in Indiana after voluntarily accepting a settlement in Wisconsin.⁴⁸ In reviewing *Lemaster*, the court “conclude[d] that it stands for more than the proposition relied upon by the Board.”⁴⁹ More specifically, the court found that the *Lemaster* decision did not, in fact, support the Board’s conclusion that only “a unilateral, voluntary payment by” Mr. Brenon’s employer, made without his knowledge, would allow him to pursue worker’s compensation benefits in another state.⁵⁰ Rather, the Indiana Court of Appeals found that the holding in *Lemaster* required the Board to determine whether “[t]he statutes and judicial opinions of the state of the first award . . . expressly disallow a later award in a different state.”⁵¹

Finding “no judicial opinions or statutes in Wisconsin (or Indiana for that matter) that prohibit claims in multiple states[,]” the court of appeals focused on the language of the settlement agreement that concluded the Wisconsin worker’s compensation proceeding—specifically the language that “expressly reserved” Mr. Brenon’s claims in Indiana.⁵² Faced with that reservation of right, and the fact that Mr. Brenon’s case was never adjudicated in Wisconsin, the court of appeals concluded that the Board erred as a matter of law, reversing and remanding the case to the Board.⁵³

C. Treatment of Questions of Fact

In addition to making legal determinations, administrative agencies are often called upon to make factual findings. The following cases illustrate how courts review factual decisions by agencies.

In *Moorhead Electric Co. v. Payne*,⁵⁴ the court examined an employer’s challenge to a decision of the Worker’s Compensation Board to award benefits to an employee for a non-workplace injury that arose from a prior injury sustained while working.⁵⁵

45. *Id.* at 1117-18.

46. *Id.* at 1120.

47. 429 S.W.2d 403 (Ky. Ct. App. 1968).

48. *Brenon*, 973 N.E.2d at 1119-20.

49. *Id.* at 1120.

50. *Id.* at 1121.

51. *Id.*

52. *Id.* at 1121-22.

53. *Id.* at 1122.

54. 962 N.E.2d 657 (Ind. Ct. App. 2011).

55. *Id.* at 658.

In 2008, Jerry Payne, while working for Moorehead, injured his shoulder, an injury which qualified him to receive worker's compensation benefits.⁵⁶ The injury and two subsequent surgeries ultimately left Payne in a shoulder brace.⁵⁷ Shortly after his second surgery, Payne attended a wedding reception during which he fell and re-injured his shoulder, leading to a third surgery that required medical attention until mid-December 2009.⁵⁸ While Moorehead paid worker's compensation benefits through September 2009, as that "was the date Payne [would have] reach[ed] maximum medical improvement" following his second surgery, it refused to pay benefits for the third surgery or additional compensation.⁵⁹ Payne subsequently sought, and was awarded, benefits to cover the third surgery, as well as the three month period from September, 2009 through December, 2009, on the grounds that his "fall was in part caused by the circumstances of his recovery from the work injury."⁶⁰

Under Indiana law, following a workplace injury, an employer may be required to provide compensation for a subsequent injury "if it is of such nature and occurs under such circumstances that it can be considered as the proximate and natural result of the original injury."⁶¹ Moorehead contended that the Board erred in granting Payne extended benefits because the intervening act of an individual contributed to Payne's fall at the wedding reception.⁶² The court of appeals treated the question of whether the fall was "the proximate and natural result of the original injury" or the result of an intervening cause as "a question of fact for the Board."⁶³

The court then stated that even if "a rather slender thread of evidence" supports the Board's decision, we must affirm because the Board "has the power to determine the ultimate facts in the case."⁶⁴ This led the court to review the "evidence supporting the Board's finding that Payne's ability to walk was impaired by the right shoulder brace."⁶⁵ Although the evidence was relatively scant, consisting primarily of evidence that the bulk of the brace impaired Payne's ability to see his feet or the object over which he stumbled,⁶⁶ the court nevertheless concluded that this was sufficient to support the Board's decision,

56. *Id.*

57. *Id.*

58. *Id.* at 658-59. Payne's fall at the wedding reception occurred when "an individual carrying a rod with a large bag" forced his way between Payne and his wife, and another couple. *Id.* at 658. This caused Payne to step to his side, where he stumbled on a grate around a tree, which he could not see because of the shoulder brace. *Id.* at 658-59.

59. *Id.* at 659.

60. *Id.* at 659-60.

61. *Id.* at 660 (quoting *Ind. State Police v. Wiessing*, 836 N.E.2d 1038, 1046 (Ind. Ct. App. 2005)).

62. *Id.* at 661.

63. *Id.*

64. *Id.* (quoting *Wiessing*, 836 N.E.2d at 1046).

65. *Id.* at 662.

66. *Id.*

“and under [its] deferential standard of review of the determinations of administrative agencies” affirmed the Board’s award of compensation to Payne.⁶⁷

Another court of appeals case, *Lacher v. Review Board of the Indiana Department of Workforce Development*,⁶⁸ also turned on a question of whether the administrative agency had sufficient factual basis to support its ruling.⁶⁹

Lacher involved review of the decision of the Department of Workforce Development to deny unemployment benefits to workers who were prevented from working by a labor dispute.⁷⁰ The case had its genesis in 2009 when Bemis Company, Inc. began negotiations with the local union over a new collective bargaining agreement (“CBA”) to replace one that was set to expire.⁷¹ During the negotiations, the original CBA was temporarily extended, and, before it expired, Bemis and the local union representative reached a tentative agreement.⁷² That agreement, however, contained certain terms relating to the employment of temporary workers that the majority of union members found objectionable, and an outside negotiator for the union informed Bemis that unless the objectionable terms were removed, the union would strike.⁷³ In response, Bemis indicated its willingness to continue negotiations, but its representative indicated that the company could not remove the temporary worker provisions.⁷⁴ Subsequently, Bemis began shutting down its operations and the union went on strike, although a number of members crossed the picket line and continued to work.⁷⁵ The parties finally reached agreement on a new CBA, and the employees returned to work.⁷⁶ The employees, however, sought unemployment benefits for the time that they were on strike, a claim that was ultimately denied by the Department on the grounds that the individuals were unemployed “as the result of an impasse reached during a labor dispute.”⁷⁷

The question for the court was, then, whether there was sufficient evidence to support the Department’s conclusion that a bargaining impasse existed.⁷⁸ Although the record was clear that negotiations continued while the workers were on strike, the court nevertheless concluded that “[t]he record before us does support the conclusion that an impasse had been reached on the issue of the temporary employee clause.”⁷⁹ This led the court to “conclude that the evidence supports the findings of fact and the findings, in turn, support the conclusions”

67. *Id.* at 663.

68. 954 N.E.2d 1098 (Ind. Ct. App. 2011), *trans. denied*, 969 N.E.2d 606 (Ind. 2012).

69. *Id.* at 1101.

70. *Id.* at 1103.

71. *Id.* at 1101.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1101-02.

76. *Id.* at 1102.

77. *Id.* at 1102-03.

78. *Id.* at 1104.

79. *Id.* at 1105.

so that the “standard of review compel[led]” the court of appeals to affirm the Department’s decision.⁸⁰

D. Reviewing Ultimate Questions

Distinct from, but closely connected with, review of agency fact finding and pure legal determinations, is judicial review of agency findings of “ultimate facts,” or those which “involve an inference or deduction based on the findings of basic fact.”⁸¹ Put another way, ultimate facts are “typically mixed questions of fact and law.”⁸²

The Indiana Supreme Court addressed the review of an agency’s finding of ultimate fact in *Chrysler* where it, after determining that the Department of Workforce Development had properly interpreted Section 1(c),⁸³ turned to the agency’s application of the statute to facts of the case, or “a review of its conclusions as to an ultimate fact.”⁸⁴ In doing so, the supreme court focused on the legal “question presented by Section [1(c):] whether Chrysler *intended* for the EVTEP to avert or lessen the effect of a lay-off or plant closure—not necessarily whether the EVTEP *did* so.”⁸⁵ In this, the court was somewhat critical of the Department’s focus on whether the EVTEP actually averted or lessened the impact of Chrysler’s layoffs.⁸⁶

Despite the apparent criticism of the Department, the Indiana Supreme Court nevertheless concluded that the Department’s “decision indicates that it found” Chrysler did intend for the EVTEP program to avert or lessen the effect of a lay-off or plant closure.⁸⁷ In doing so, the court reviewed the “unchallenged findings” and concluded that “[f]rom these basic facts alone, it would be reasonable for the [Department] to conclude that Chrysler intended that the EVTEP help avert or lessen the effect of a lay-off.”⁸⁸ The Indiana Supreme Court, however, also examined other evidence in the record, including Chrysler’s notice to its employees concerning the EVTEP program and statements made to the federal government in order to secure financing, indicating that the company

80. *Id.*

81. *Recker v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 958 N.E.2d 1136, 1139 (Ind. 2011) (quoting *McClain v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 693 N.E.2d 1314, 1317 (Ind. 1998)).

82. *Chrysler Group, LLC v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 960 N.E.2d 118, 122 (Ind. 2012).

83. *Id.* at 127.

84. *Id.*

85. *Id.*

86. *Id.* “Here, the [Department] appears to have concluded that the EVTEP ultimately *did* avert or lessen the effects of a lay-off.” *Id.* Although the court noted that “[w]hile [there is] nothing unreasonable or illogical about these conclusions,” it was also quick to point out that this was not the proper focus under Section 1(c). *Id.*

87. *Id.*

88. *Id.* at 127-28.

was planning to take dramatic steps to reduce costs, including employment related costs; and the company was willing to file bankruptcy resulting in the immediate shut down of its facilities and the immediate termination of nearly its entire workforce to avoid government financing.⁸⁹ Against the evidentiary record the court noted that “Chrysler’s own words” clearly indicated that the EVTEP was part of a plan to avoid lay-offs and plant closures, and that, therefore, the Department had not erred in reaching that ultimate conclusion.⁹⁰

II. ACCESSING JUDICIAL REVIEW

Before a court can review an administrative decision, a party seeking judicial review must often take certain procedural steps to secure his or her right to that review.⁹¹ This section focuses on cases decided during the Survey Period that examine whether litigants have met the pre-conditions to obtain judicial review by a court.

A. Exhaustion of Administrative Remedies

Although there are exceptions, as a general rule, before a party can obtain judicial review of an agency action, she must first exhaust her available administrative remedies. That is, she must avail herself of every opportunity to challenge the agency’s determination within the agency itself. The following cases address several issues related to the exhaustion requirement that can arise for a reviewing court.

In some instances, however, whether an administrative remedy exists is not in question. Rather, the court is confronted with the question of whether it, or an administrative agency, should hear a litigant’s challenge in the first instance. The court of appeals’s decision in *In re Sensient Flavors LLC* is one such case.⁹²

In that case, the Indiana Occupational Safety and Health Administration (“IOSHA”) sought an “anticipatory search warrant” to inspect Sensient’s facilities in order to evaluate working conditions at the facility, specifically the possible exposure of Sensient employees to chemicals causing respiratory conditions.⁹³ After the trial court granted IOSHA’s request, a substantial amount of legal wrangling between IOSHA and Sensient followed, with an amended search warrant eventually being issued and executed.⁹⁴ Sensient pursued an appeal challenging the issuance of the amended search warrant.⁹⁵

IOSHA, however, responded by arguing that, with the search having been completed, any remedy available to Sensient would be suppression of the evidence in an administrative proceeding seeking to impose penalties on

89. *See id.* at 128.

90. *Id.* at 129.

91. *See, e.g.*, IND. CODE §§ 4-21.5-5-2, -6 to -8 (2013).

92. 969 N.E.2d 1053 (Ind. Ct. App. 2012).

93. *Id.* at 1055-56.

94. *Id.* at 1055-57.

95. *Id.* at 1057.

Sensient.⁹⁶ IOSHA's position was that an administrative proceeding first had to address any challenge to the evidence; thus, the court of appeals had to dismiss the proceeding because Sensient failed to exhaust its administrative remedies by challenging the evidence before the agency.⁹⁷

The court agreed with IOSHA and, in doing so, examined the rationale for requiring exhaustion of administrative remedies.⁹⁸ In particular, the court reviewed a similar case from the Seventh Circuit, which held that a corporation could not seek to quash an administrative search warrant without first having gone through the process of contesting a federal OSHA citation.⁹⁹ As the Indiana Court of Appeals noted, the Seventh Circuit determined that allowing a challenge to the warrant in the court system, prior to any agency enforcement proceeding, would effectively undermine the administrative process.¹⁰⁰ Among the litany of reasons exhaustion is considered a pre-requisite for review, the Seventh Circuit considered it to be particularly important that requiring a challenge to the search warrant or evidence in the administrative agency would aid courts by possibly nullifying constitutional questions related to the search warrant.¹⁰¹

Considered against the decision in *Kohler*, as well as similar holdings concerning the importance and rationale of requiring exhaustion of available administrative remedies,¹⁰² the court noted that "Sensient has administrative remedies still available to it[.]" namely, the right to challenge any citation that arose from the evidence collected during the search.¹⁰³ Thus, the court concluded, despite the constitutional nature of Sensient's challenge to the search warrant, the company's access to administrative remedies that could resolve the case on grounds short of that challenge required exhaustion of those remedies, and required dismissal of the case.¹⁰⁴

B. Considering the Finality of an Agency Action

Sensient addresses one of the procedural hurdles a party seeking judicial review must overcome, but exhaustion of administrative remedies is by no means the only such hurdle. Closely related is the question of whether the agency's action is final. That is, assuming that a party has availed himself of the administrative process, a court must also ask whether the agency's action is sufficiently definitive to qualify for judicial review.

That was the question faced by the court in *Stewart v. Richmond Community*

96. *Id.* at 1058.

97. *Id.*

98. *Id.* at 1058-60.

99. *Id.* (discussing *In re Establishment Inspection of Kohler Co.*, 935 F.2d 810 (7th Cir. 1991)).

100. *Id.* at 1058-59.

101. *Id.*

102. *Id.* at 1059-60.

103. *Id.* at 1060.

104. *Id.* at 1060-61.

Schools.¹⁰⁵ In this case, Janet Stewart, a teacher with the Richmond Community School Corporation, challenged a decision by the Worker's Compensation Board finding her to have a permanent partial impairment.¹⁰⁶ The case arose out of an accident in which Stewart's leg was broken while teaching a physical education class.¹⁰⁷ Following her recovery from that injury, she subsequently suffered another injury, which she contended was related to the previous injury, and sought worker's compensation benefits related to the second injury.¹⁰⁸ Initially, the Worker's Compensation Board concluded that the second injury was related to the workplace injury and that she "was permanently and totally disabled."¹⁰⁹ That decision, however, was overturned on review by the full Worker's Compensation Board, which concluded that Stewart had suffered only a permanent partial impairment.¹¹⁰ No party appealed that ruling to the court of appeals, and the matter, instead, was remanded and went through a second proceeding which found Stewart was only partially impaired; Stewart sought judicial review after the full Board sustained the ruling of the second proceeding.¹¹¹

Before the court of appeals, Stewart argued that the Board had erred in determining that she was not permanently and totally disabled, while the School Corporation argued that Stewart had waived that argument by failing to seek judicial review of the Board's *initial* order remanding the matter to the hearing officer.¹¹² In addressing that question, the court concluded that it "must determine whether the Board's decision . . . was a final, appealable judgment."¹¹³ The court of appeals ultimately concluded that Stewart and the School Corporation had fully argued the question—"nothing remained to be addressed [on the question of total disability] after the Board issued its ruling."¹¹⁴ The court further noted that requiring judicial review following the Board's initial order would have made for a more orderly progression, as it would have eliminated the need for the second hearing, and subsequent additional review by the full Worker's Compensation Board.¹¹⁵ For these reasons, the court of appeals concluded that the Board's initial ruling reversing the finding of total disability was a final, appealable order subject to judicial review and that, by failing to seek that review, Stewart had waived her right to challenge any error in the finding.¹¹⁶

105. 964 N.E.2d 927 (Ind. Ct. App. 2012).

106. *Id.* at 928-29.

107. *Id.* at 929.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 929-30.

113. *Id.* at 930.

114. *Id.*

115. *Id.* at 930-31.

116. *Id.* at 931.

C. Properly Initiating Judicial Review

A party may attempt to initiate judicial review of an agency action after exhausting her available administrative remedies and obtaining a final, appealable, order. But, in order to do so, the party must properly follow certain procedures. As in an ordinary civil proceeding, one requirement to properly initiate judicial review is proper service on other required parties. The case of *Musgrave v. Squaw Creek Coal Co.*,¹¹⁷ is one which addresses several issues pertaining to judicial review of administrative actions, including the proper means to effect service of a petition for review.¹¹⁸

Musgrave reviews a decision of the Indiana Natural Resources Commission (“NRC”) vacating an order by the Department of Natural Resources (“DNR”) which released portions of a reclamation bond to the Squaw Creek Coal Company.¹¹⁹ As a short description of the facts, Squaw Creek operated the Squaw Creek Mine from roughly 1960 to 1987.¹²⁰ During a portion of that time, Alcoa, Inc., operating with the permission of the predecessor to the Department of Environmental Management, used the mine as a dumping site for waste generated at a nearby production facility.¹²¹

Following the termination of mining operations, Squaw Creek eventually sought release of a bond posted to secure performance of its reclamation plan for the mine.¹²² Following a public hearing and investigation, the DNR approved the release of the bond, and *Musgrave*, a former miner at the Squaw Creek Mine, sought review of the DNR’s decision through the NRC.¹²³ Ultimately, the NRC affirmed a portion of the DNR’s decision, but vacated the release of certain portions of the bond on the grounds that the waste dumped by Alcoa was migrating through the mine as a result of Squaw Creek’s reclamation efforts.¹²⁴

Squaw Creek sought judicial review of the NRC’s order, and the trial court eventually reversed the NRC’s decision.¹²⁵ *Musgrave* subsequently appealed the trial court’s order, arguing, in part, that the trial court did not have authority to review the NRC’s decision because Squaw Creek had provided him with inadequate summons and had not served summons on the DNR, the NRC, or the Attorney General.¹²⁶ *Musgrave* based his argument on the AOPA’s requirement that a petition for judicial review must be served “in the manner provided by the rules of procedure governing civil actions in the courts.”¹²⁷ This, according to

117. 964 N.E.2d 891 (Ind. Ct. App.), *trans. denied*, 975 N.E.2d 360 (Ind. 2012).

118. *Id.* at 896.

119. *Id.* at 894.

120. *Id.* at 894-95.

121. *Id.* at 894.

122. *Id.* at 895, 900-01.

123. *Id.* at 895.

124. *Id.*

125. *Id.* at 896.

126. *Id.*

127. *Id.* (quoting IND. CODE § 4-21.5-5-8 (2013)).

Musgrave, required that Squaw Creek comply with the provisions of Trial Rules 3 and 4, mandating the submission of summons to effectuate the necessary process to initiate a new action, while Squaw Creek argued that all that was required was service of the petition under Trial Rule 5.¹²⁸

The Indiana Court of Appeals, however, took a slightly different approach as it perceived Musgrave to be challenging the proper manner of service of process and the sufficiency of the process.¹²⁹ In resolving the question of sufficiency of process, the court noted that the AOPA sets forth the necessary content of a petition for judicial review, and the statute “says nothing of a summons.”¹³⁰ This, in the court’s view, meant that process was sufficient—provided that the petition itself complied with the statute and did not mandate the submission of a summons.¹³¹ The court further clarified that perfection of service of the process occurs so long as it is in compliance with the applicable trial rule for service on the party.¹³² Accordingly, the court of appeals concluded that to properly initiate judicial review, service of the petition in a manner consistent with the trial rules is all that the rule requires, and Squaw Creek’s mailing of the petition, even without summonses, was sufficient.¹³³

Although many of the requirements necessary to obtain judicial review of administrative proceedings are well established, as the decisions reviewed above illustrate, the twists and turns a case takes to get to judicial review can present new questions of how courts are to apply those rules. This constantly evolving body of decisional law presents interesting challenges for the courts and practitioners alike.

III. JUDGING AGENCY ACTIONS

Thus far, this Survey Article has examined cases concerning how courts approach judicial review of agency actions by exploring the level of deference afforded to agency decisions and cases addressing procedural barriers that may prevent a court from reviewing an agency decision. This section will review cases during the Survey Period on more general legal questions arising out of administrative decisions and the interplay between administrative decisions and those of the judicial branch.

A. Evaluating the Scope of Agency Authority

As creations of the General Assembly, the powers of administrative agencies are confined to those granted to them by the legislature.¹³⁴ Accordingly, one challenge to an agency decision is that the agency has exceeded the scope of its

128. *Id.* at 896-97.

129. *Id.* at 897-98.

130. *Id.* at 897.

131. *Id.*

132. *Id.* at 898.

133. *Id.*

134. *See* IND. CODE § 4-21.5-5-14(d) (2013) (providing limits on agency actions).

statutory authority.¹³⁵ In *Kranz v. Meyers Subdivision Property Owners Association, Inc.*,¹³⁶ the court of appeals addressed a challenge to an agency's action that established riparian rights of certain landowners.¹³⁷

The dispute in *Kranz* arose out of efforts by certain property owners in a subdivision to build a pier on Bass Lake.¹³⁸ Those owners possessed a narrow easement along the lakeshore that passes through the property owned by the Kranzes.¹³⁹ Although for decades the easement owners had placed a "Group Pier" at the end of the easement, in 2007 a dispute arose between the Kranzes, another property owner, and the easement holders over the placement of the pier.¹⁴⁰ A lengthy series of administrative proceedings followed in which an administrative law judge determined that the easement holders possessed the right to construct a Group Pier; the DNR denied an application for the construction of the pier; and the easement holders successfully pursued administrative review of the DNR's permit denial through the NRC, ultimately obtaining a permit to construct the Group Pier.¹⁴¹

The decision of the NRC, however, required that the Kranzes, and the adjoining property owner, move their own piers in order to accommodate the Group Pier.¹⁴² The Kranzes petitioned for judicial review, and the trial court upheld the NRC's decision.¹⁴³ Before the court of appeals, the Kranzes raised a number of arguments, including a challenge to the authority of the NRC to make "determination[s] of the respective parties' property rights."¹⁴⁴

Addressing that question, the court started by noting that "[t]he powers of administrative agencies are limited to those granted by their enabling statutes[,] and action in excess of the NRC's authority would be void."¹⁴⁵ The court then examined the authority of the DNR and the NRC to determine property rights, beginning with the understanding that the State has acted to take "full power and control of all of the public freshwater lakes in Indiana."¹⁴⁶ The court then noted

135. *See id.* § 4-21.5-5-14(d)(3) (providing that a decision of an agency may be overturned by a court if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

136. 969 N.E.2d 1068, 1074 (Ind. Ct. App.), *clarified on reh'g*, 973 N.E.2d 615 (Ind.), *trans. denied*, 980 N.E.2d 324 (Ind. 2012).

137. *Id.* at 1071. As a side note, the case actually involved the determination of certain rights along a lakeshore, which the court of appeals explained are properly referred to as "littoral rights" in contrast to true riparian rights, which are those "associated with owners of land abutting a river or stream." *Id.* at 1071 n.2.

138. *Id.* at 1070-71.

139. *Id.* at 1071.

140. *Id.*

141. *Id.* at 1071-74.

142. *Id.* at 1074.

143. *Id.*

144. *Id.* at 1075.

145. *Id.* (citing *Howell v. Ind.-Am. Water Co.*, 668 N.E.2d 1272, 1275 (Ind. Ct. App. 1996)).

146. *Id.* (quoting IND. CODE § 14-26-2-5(d)(1) (2013)).

that the DNR and NRC had been given the specific, statutory, responsibility of “implementing a permit process for placing structures in the lake or along the shoreline.”¹⁴⁷ This authority, the DNR argued, was sufficient to “authorize[] it to determine property and riparian rights to the extent necessary to implement the permit process.”¹⁴⁸ The Kranzes, not surprisingly, disagreed, arguing that the agencies did not have authority to determine property rights, but only to “regulate applicants who already have riparian rights.”¹⁴⁹

In resolving the dispute, the court of appeals was quick to dispel the notion “that jurisdiction must lie exclusively with the courts or exclusively with the NRC” and the DNR.¹⁵⁰ The court, however, was reluctant to “define the exact parameters of the NRC’s jurisdiction[,]” focusing on the fact that the case involved the “placement of a pier on a public freshwater lake.”¹⁵¹ The court noted that the DNR and NRC are responsible for permitting piers on such lakes, and that the DNR is charged by statute with a variety of tasks, including the authority to resolve disputes, in order to carry out that responsibility.¹⁵² The scope of this responsibility, the court determined, was enough to conclude that the NRC “has jurisdiction to determine the scope of a lake access easement . . . to the extent necessary to carry out the process of issuing permits.”¹⁵³ Thus, the court concluded that the trial court had not erred in affirming the NRC’s decision to the extent it was challenged on the grounds that the agency lacked authority.¹⁵⁴

While *Kranz* represents a case in which a court found that an agency had the authority to issue a ruling,¹⁵⁵ *Musgrave v. Squaw Creek Coal Co.*¹⁵⁶ illustrates an instance in which a court found at least a portion of an agency’s action to have exceeded the scope of its powers.¹⁵⁷

Musgrave, again, involved a judicial review of the NRC’s reversal of the DNR’s decision to release a reclamation bond to the Squaw Creek Mining Company.¹⁵⁸ The NRC’s decision was predicated upon its conclusion that the remediation efforts of Squaw Creek at a surface mine were facilitating the spread of waste deposited in sites within the former mine by a third party, Alcoa, Inc.¹⁵⁹

The court of appeals focused on the parties’ disagreement over whether Squaw Creek had a duty to remediate the mine and the DNR’s oversight

147. *Id.*

148. *Id.* at 1077.

149. *Id.*

150. *Id.* at 1078.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 1078-79.

155. *Id.*

156. 964 N.E.2d 891 (Ind. Ct. App.), *trans. denied*, 975 N.E.2d 360 (Ind. 2012).

157. *Id.* at 902.

158. *Id.* at 894.

159. *Id.* at 894-95.

responsibility.¹⁶⁰ As the court explained, before a reclamation bond can be released, the DNR must make an evaluation based, in part, on whether pollution is occurring or will occur following the remediation.¹⁶¹ The DNR must also be satisfied that the permit holder has met all statutory requirements, including the treatment or disposal of all “toxic materials” within the mine, and has taken steps to prevent the release of toxic mine discharge into the ground or surface waters.¹⁶²

Given Musgrave’s principal concern was the spread of the waste deposited in the mine by Alcoa, the question became whether the DNR and NRC had a responsibility to review the effect of such materials in evaluating whether to release the reclamation bond.¹⁶³ Although the NRC had sided with Musgrave, finding that the DNR’s obligation extended to evaluation of Alcoa’s waste within the mine, the court disagreed.¹⁶⁴ It did so on the grounds that the legislature had “given IDEM, not the DNR, the duty to regulate and require the proper and safe transportation, treatment, storage, and disposal of hazardous waste.”¹⁶⁵ As Alcoa had dumped the waste under the supervision of IDEM’s predecessor, and the agency continued to monitor potential migration of the waste, the court concluded that the DNR’s statutory jurisdiction did not extend to considering pollution or “toxic materials” beyond those created as a result of the mining operation itself.¹⁶⁶

B. Due Process Concerns Arising from Agency Actions

As bodies that render decisions affecting the rights of parties, administrative agencies are required to provide those affected by their decisions basic due process.¹⁶⁷ Although “notice and an opportunity to be heard” are the well known requirements of due process, during the Survey Period several cases addressed whether administrative agencies had met those requirements.¹⁶⁸

1. Just How Much Notice Is Necessary?—In *Perdue v. Gargano*,¹⁶⁹ the Indiana Supreme Court explored whether an agency’s notice to applicants denying certain welfare benefits was adequate to meet due process requirements.¹⁷⁰ *Perdue* involved a class action lawsuit challenging the Family and Social Services Administration’s (“FSSA”) use of an automated system to

160. *Id.* at 900-03.

161. *Id.* at 901 (discussing Indiana Code section 14-34-6-9).

162. *Id.* (quoting IND. CODE §§ 14-34-10-2(b)(13) & (17) (2013)).

163. *Id.* at 901-02.

164. *Id.* at 902.

165. *Id.* (quoting, in part, IND. CODE § 13-22-2-1 (2013) (internal quotation marks omitted)).

166. *Id.* The court also reasoned that by definition “toxic mine drainage” could refer only to “water discharged as a result of mining operations” and therefore did not include any discharge related to Alcoa’s dumping. *Id.*

167. *Perdue v. Gargano*, 964 N.E.2d 825, 832 (Ind. 2012).

168. See discussion *infra* Parts II.A-B.

169. 964 N.E.2d at 825.

170. *Id.* at 831.

process welfare claims.¹⁷¹ In particular, two classes of individuals who were denied benefits challenged the adequacy of the FSSA's denial notices on the grounds that the notices provided applicants only perfunctory, coded reasons explaining why they had been denied benefits together without "any additional explanation of the reasons for the denial."¹⁷²

The court began its review of the due process question by exploring fundamental principles of the due process requirement.¹⁷³ Citing the Supreme Court of the United States, the court began with the proposition that "the fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner."¹⁷⁴ This, the court explained, required some form of notice providing a detailed explanation of the reason for the agency's action.¹⁷⁵ Examining decisions by the Seventh Circuit, the Indiana Supreme Court concluded that the notice requirement demanded some individualized explanation for the denial of benefits beyond a statement of the agency's ultimate conclusion.¹⁷⁶ The court reviewed this reasoning against "[t]he touchstone of due process[,] which is the "protection of the individual against arbitrary action by government."¹⁷⁷ The Indiana Supreme Court noted that a hearing is the principal means of securing that protection¹⁷⁸ but reasoned that, "in the absence of an explanation of the reasons underlying the state's action, it is implausible to expect that an individual could prepare, let alone present, a sound defense" in any such hearing, and during judicial review of such an agency action.¹⁷⁹

Turning to the specific reason codes used by the FSSA, the court conceded that they "provide *some* information to applicants in that the codes offer, in brief and general terms, the intermediate conclusions necessitating a denial."¹⁸⁰ Nevertheless, the court found the codes failed "to provide any insight into the factual bases for the State's adverse benefit determinations."¹⁸¹ This, the court found, was inadequate to meet due process requirements as, at a minimum, it failed to "explain what the claimant was required by the regulation to do and

171. *Id.* at 828.

172. *Id.* at 831-32. The challenged reasons included: "Failure to cooperate in establishing eligibility"; "Failure to cooperate in verifying income"; "Failure to cooperate in verifying the value of resources"; "Failure to verify Indiana residency"; "Failure to cooperate in verifying assistance group composition"; and "Failure to submit medical information necessary to establish eligibility." *Id.*

173. *Id.* at 832.

174. *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)).

175. *Id.*

176. *Id.* at 834-35 (reviewing cases).

177. *Id.* at 835 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

178. *Id.* (collecting cases).

179. *Id.*

180. *Id.*

181. *Id.*

how his or her actions failed to meet this standard.”¹⁸²

The court also rejected the FSSA’s argument that the denial notices, combined with the application forms, provided constitutionally sufficient notice.¹⁸³ The court, however, rejected that argument.¹⁸⁴ In doing so, the court again emphasized that sufficient notice needed to provide the applicant of the actual reason for the denial of their benefits.¹⁸⁵ The FSSA’s argument failed because it simply provided a list of reasons from which an applicant could deduce the reason for the denial without actually explaining the basis for denial.¹⁸⁶ This was insufficient, the court concluded, because “[m]erely offering applicants information from which they could potentially deduce the reasons for a denial is no process at all.”¹⁸⁷ The supreme court thus concluded as a matter of law that the FSSA’s “reason codes” provided inadequate notice.¹⁸⁸

2. *When Has a Party Had an Opportunity to Be Heard?*—The Indiana Supreme Court’s decision in *Perdue* sets a clear and demanding standard by which an agency’s order denying relief is to be measured for purposes of notice,¹⁸⁹ but constitutionally adequate due process also requires an opportunity to be heard.¹⁹⁰ Indeed, the *Perdue* decision judged the adequacy of notice in part by its ability to prepare a party for hearing.¹⁹¹ The case of *Davis v. Review Board of the Indiana Department of Workforce Development*¹⁹² examined whether certain administrative procedures provided the affected party a constitutionally sufficient opportunity to be heard.¹⁹³

Davis involved what is becoming a seemingly common set of circumstances. Lisa Davis was terminated from her employment and sought unemployment benefits, which she was initially granted.¹⁹⁴ Her employer, however, appealed, and the matter was set for a telephonic hearing.¹⁹⁵ As part of its procedure, the Department sent notices to the parties advising them of their obligation to provide a telephone number to the ALJ conducting the hearing.¹⁹⁶ Davis did not provide the required contact information, and, following the hearing, the ALJ determined

182. *Id.* at 836 (quoting *Ortiz v. Eichler*, 616 F. Supp. 1046, 1061-62 (D. Del. 1985), *aff’d*, 794 F.2d 889 (7th Cir. 1986)).

183. *Id.* at 836-37.

184. *Id.* at 837.

185. *Id.* at 838.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 832.

191. *Id.* at 834-35.

192. 955 N.E.2d 790 (Ind. Ct. App. 2011).

193. *Id.* at 791.

194. *Id.*

195. *Id.*

196. *Id.* at 791-92.

that Davis was ineligible for benefits.¹⁹⁷ Davis subsequently appealed, arguing that the Department had erred in refusing to reinstate her appeal.¹⁹⁸

The sole reason offered by Davis in support of reinstating her appeal was “that she did not realize she was required to return a participation form in order to participate in the telephonic hearing.”¹⁹⁹ The court rejected this argument, noting that her she had a “affirmative duty” to return the participation slip, and that her inability “to participate in the telephonic hearing resulted entirely from her disregard for explicit instructions.”²⁰⁰ Interestingly, although Davis raised no due process argument, the court nevertheless took pains to compare the case to another that found no due process violation had occurred because any failure to be heard resulted from the applicant’s own “failure to participate in the telephonic hearing.”²⁰¹

3. *Promoting Administrative Transparency.*—Under the Indiana Access to Public Records Act (“APRA”), individual Hoosiers have access to a wide array of information in the possession of public agencies, including local government.²⁰² As set out in the APRA, the State establishes a “public policy . . . that all persons are entitled to full and complete information regarding the affairs of government” as “an essential function of a representative government.”²⁰³ Accordingly, under the APRA, any person is entitled to inspect most government records,²⁰⁴ provided that they “identify with reasonable particularity the record being requested.”²⁰⁵ An apparent case of first impression, *Jent v. Fort Wayne Police Department*,²⁰⁶ examined what constitutes “reasonable particularity.”²⁰⁷

In *Jent*, Mr. Michael Jent, who had been convicted of multiple felonies and sentenced to 238 years in prison, requested that the City of Fort Wayne’s Police Department (“FWPD”) provide him with “[d]aily incident report logs of [a specific array of] crimes committed from January 1st, 2001[,] through December 8th, 2005.”²⁰⁸ The police department responded to the request but ultimately declined to provide the materials because the electronic database containing the logs could not be searched using the parameters set by Jent, and the produced

197. *Id.* at 792.

198. *Id.* at 793-94.

199. *Id.* at 794.

200. *Id.* at 794-95.

201. *Id.* at 794-95 & n.5 (citing *T.R. v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 950 N.E.2d 792, 798 (Ind. Ct. App. 2011)).

202. *See* IND. CODE §§ 5-14-3-1 to -10 (2013).

203. *Id.* § 5-14-3-1.

204. Certain exemptions exist as set out in IND. CODE § 5-14-3-4 (2013).

205. *Id.* § 5-14-3-3(a)(1).

206. 973 N.E.2d 30 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012).

207. *Id.* at 33.

208. *Id.* at 31 (alteration in original). Mr. Jent’s convictions involved child molesting and criminal confinement. He requested documents pertaining to “crimes of abduction and sexual assault and/or attempted abduction and attempted sexual assault.” *Id.*

data contained investigatory records, which are exempt from disclosure at the discretion of the public agency.²⁰⁹

Jent subsequently filed a complaint with the Public Access Counselor who determined that the City had to produce the daily logs but reiterated that at least the material on incident logs could be withheld under the investigatory records exception.²¹⁰ Jent filed a declaratory judgment action to compel disclosure of the documents, but the trial court ultimately issued an order granting the City summary judgment, from which Jent appealed.²¹¹

In reviewing the trial court's order, the court of appeals noted that Indiana courts had yet to address the question of whether Jent's method of request was made with "reasonable particularity."²¹² The court analogized the situation to a request under the discovery rules where "reasonable particularity" is satisfied "if the request enables the subpoenaed party to identify what is sought and enables the trial court to determine whether there has been sufficient compliance with the request."²¹³ The City's argument was that Jent's request failed "the first part of that test, namely, that it does not enable the FWPD to identify the records sought."²¹⁴

The court concluded that the content of Jent's request was not determinative of whether it was "reasonably particular" because the contents of the request, although detailed, may not have been sufficient for the City to locate the records sought.²¹⁵ This became the focus of the court of appeal's affirmance of the trial court's grant of summary judgment; specifically, the FWPD could not search the database storing the logs using the parameters Jant provided.²¹⁶ As the court reasoned, the undisputed evidence showed that the FWPD could not locate the documents based off of the parameters of Jant's request, and thus, the court held that his request was not made with "reasonable particularity."²¹⁷

Another case during the Survey Period involving the APRA involved whether a third-party intervenor opposed to the disclosure of public records could be liable for attorney's fees following a successful challenge obtaining their disclosure.

In *Shepherd Properties Co. v. International Union of Painters and Allied Trades*,²¹⁸ the supreme court addressed, for the first time, whether a third party in an action seeking to compel the disclosure of public records could be held jointly and severally liable with the public agency for the prevailing party's attorney's fees.²¹⁹ In this case, the International Union of Painters and Allied Trades

209. *Id.* at 32.

210. *Id.* at 32-34.

211. *Id.* at 32.

212. *Id.* at 33.

213. *Id.*

214. *Id.*

215. *Id.* at 33-34.

216. *Id.*

217. *Id.* at 34-35.

218. 972 N.E.2d 845 (Ind. 2012).

219. *Id.* at 847-48.

(“Union”) sought disclosure of certain payroll records submitted by Shepherd Properties to a school district for its work on a public-works project.²²⁰ Both the school district and Shepherd Properties contended the payroll records constituted “‘trade secrets’ and confidential financial information[,]” making them “exempt from disclosure under the APRA.”²²¹

The Union ultimately filed a court action to compel disclosure of the documents, and while the trial court denied the school district’s motion to name Shepherd Properties as a necessary party, the company ultimately intervened in the proceeding.²²² On summary judgment, the trial court granted the Union’s motion compelling disclosure of the records, and, at a subsequent hearing, the court awarded the Union approximately \$20,000 in attorney’s fees assessed against both the school district and Shepherd Properties.²²³

On transfer, the Indiana Supreme Court noted that the case presented the first time that it had addressed whether third parties could be held liable for attorney’s fees under the APRA.²²⁴ The court, however, relied closely on two court of appeals decisions which had addressed the liability,²²⁵ or potential liability,²²⁶ of third parties under the APRA.²²⁷ In both cases, the court of appeals acknowledged that a third party could be liable for attorney’s fees if it unsuccessfully opposed the disclosure of public records.²²⁸ Applying the logic of those decisions, the Indiana Supreme Court concluded that, as an intervenor, Shepherd Properties could be held liable for attorney’s fees.²²⁹

The supreme court further supported its decision by reviewing the APRA.²³⁰ That review indicated that the legislature had intended to provide private parties the opportunity to intervene in a proceeding to compel disclosure in order to defend their own interests in preventing the disclosure of the records.²³¹ Given this intent, the court reasoned that shielding private parties from liability for attorney’s fees would “thwart, rather than further, the public policy underlying the APRA” of promoting greater public access to public records.²³² The court reasoned removing third parties from possible liability would allow those parties to assert claims or otherwise drive up costs of litigation and, thus, deter citizens

220. *Id.* at 847.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 849.

225. *Id.* (citing *Indianapolis Newspapers v. Ind. State Lottery Comm’n*, 739 N.E.2d 144 (Ind. Ct. App. 2000)).

226. *Id.* (citing *Knightstown Banner, LLC v. Town of Knightstown*, 882 N.E.2d 270 (Ind. Ct. App. 2008)).

227. *Id.* at 849-51.

228. *Id.* 849-50, 852.

229. *Id.* at 851-52.

230. *Id.* at 851.

231. *Id.* at 852.

232. *Id.*

from challenging a public agency's refusal to submit records for inspection.²³³ Therefore, the court ultimately concluded that the APRA permits recovery of attorney's fees from private parties who oppose disclosure of public records.²³⁴

C. *Is That Record Confidential?*

Last year's Survey Article reviewed several decisions by the Indiana Court of Appeals debating whether the state's appellate courts could reveal the names of parties in judicial review proceedings from the Department of Workforce Development, which are deemed confidential by statute.²³⁵ That debate focused on whether certain provisions of Indiana Administrative Rule 9, governing treatment of confidential material by courts, allowed for the disclosure despite the statutory requirement that the records be treated as confidential.²³⁶

During the current Survey Period, the Indiana Supreme Court weighed in on the issue. In *Recker v. Review Board of the Indiana Department of Workforce Development*,²³⁷ the court stated its position by citing to Administrative Rule 9(G)(1.2), concluding that when otherwise confidential information is presented in open court, it is excluded from public access only if the party affirmatively seeks to have the information remain confidential.²³⁸ The court then stated that in the absence of such a request, it would fully disclose the identities of participants in proceedings.²³⁹ The court also noted, with respect to the facts of the case and from the agency record, it would disclose the identities of proceeding participants under another exception built into Administrative Rule 9 as being "essential to the resolution of the litigation and appropriate to further the establishment of precedent and the development of the law."²⁴⁰

This would appear to have shut the door on this debate; however, a dissent in another case during the Survey Period raised a question as to whether the footnote in *Recker* will really end the debate. In *Alebro, LLC v. Review Board of the Indiana Department of Workforce Development*,²⁴¹ Judge Crone authored a dissent solely to address the court's disclosure of confidential information of the Department of Workforce Development in judicial opinions.²⁴² Judge Crone acknowledged the supreme court's treatment of the issue in *Recker* but respectfully disagreed that it reached the right result.²⁴³ Specifically, Judge Crone

233. *Id.*

234. *Id.*

235. See Joseph P. Rompala, *Survey of Indiana Administrative Law*, 45 IND. L. REV. 933, 956 (2012).

236. *Id.* at 956-57.

237. 958 N.E.2d 1136 (Ind. 2011).

238. *Id.* at 1138 n.4.

239. *Id.*

240. *Id.* (citing IND. ADMIN. R. 9(G)(3) & (4)(d)).

241. 968 N.E.2d 236 (Ind. Ct. App. 2012).

242. *Id.* at 241 (Crone, J., dissenting).

243. *Id.*

took issue with the reliance on Administrative Rule 9(G)(1.2) which, he argued, applies to the admission of evidence into court proceedings.²⁴⁴ Reasoning that appellate courts do not “conduct trials or evidentiary hearings and thus do not admit” the record into evidence, he did not consider reliance on that provision as a justification to disclose parties’ identities, stating that until Administrative Rule 9(G) is amended, he will “continue to use initials in unemployment cases that I write.”²⁴⁵

The supreme court’s footnote in *Recker* certainly raises a warning flag to those who seek judicial review of administrative orders containing confidential information. It also raises the very practical question of how a published case could be resolved without disclosing otherwise confidential factual information. Given Judge Crone’s position, this appears to be question that will not reach a “final” resolution in the near future.

CONCLUSION

Administrative law in the Hoosier State is a constantly growing and evolving body of legal discourse that adapts and changes as the work of administrative agencies expands into new areas of citizens’ lives. This Survey Article presents only a few of the reported decisions of Indiana’s appellate courts addressing administrative law. It by no means presents every decision of those courts and, certainly, does not address the myriad of decisions handed down by administrative agencies on a regular basis throughout the year.

Hopefully, however, this Article helps to show how the work of those agencies presents a fertile field for the development of law by Indiana’s judicial branch, as judges and lawyers work together to protect the rights of Hoosiers affected by the regulatory state.

244. *Id.* at 242.

245. *Id.*