

SURVEY OF INDIANA ADMINISTRATIVE LAW

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INTRODUCTION

Administrative agencies—performing quasi-judicial, legislative, and executive functions—serve as a direct link between Indiana’s citizens and their government. Because of this connection, agencies present the courts with a range of legal problems touching all corners of Indiana’s legal landscape and affecting wide-ranging interests. While courts have developed steadfast principles to address these issues, it is important to review how the courts apply those principles in the context of an evolving administrative state. That is the purpose of this survey Article.

I. ACCESS TO JUDICIAL REVIEW

A. Exhaustion of Administrative Remedies

An individual or entity aggrieved by the actions or inactions of the state must generally exhaust administrative remedies before seeking court intervention.¹ But in some instances, the aggrieved party can circumvent the administrative process. One such instance is when it is futile to seek recourse through that process.² Two recent cases, *Ellis v. State*³ and *Bragg v. Kittle’s Home Furnishings, Inc.*,⁴ demonstrate the intersection between the exhaustion requirement and the futility exception.

Ellis v. State involved the claim of an inmate for educational credit time based upon his completion of coursework while incarcerated.⁵ Ellis first submitted his request to the Department of Correction (DOC) facility program director, who instructed him to contact his case worker.⁶ He did so, and the caseworker responded that the inmate had “maxed out for any more time cuts per policy.”⁷ Ellis appealed to the Indiana State Prison superintendent, who denied the appeal.⁸ Ellis then submitted an appeal to the postconviction court alleging that he had exhausted his administrative remedies.⁹ The postconviction court denied the appeal without a hearing, finding the DOC had administrative

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1. IND. CODE § 4-21.5-5-4(a) (2016).

2. *See, e.g., Bragg v. Kittle’s Home Furnishings, Inc.*, 52 N.E.3d 908 (Ind. Ct. App.), *trans. denied*, 62 N.E.3d 1201 (Ind. 2016).

3. 58 N.E.3d 938 (Ind. Ct. App.), *trans. denied*, 64 N.E.3d 1205 (Ind. 2016).

4. *Bragg*, 52 N.E.3d 908.

5. 58 N.E.3d at 939-40.

6. *Id.* at 940.

7. *Id.*

8. *Id.*

9. *Id.*

responsibility over the award of credit time.¹⁰

At the Indiana Court of Appeals, the parties disputed whether Ellis had exhausted his administrative remedies, and thus whether the postconviction court had subject matter jurisdiction.¹¹ The court first clarified that exhaustion of administrative remedies is a question of procedural error, and that claims based on procedural defects do not implicate subject matter jurisdiction.¹² The court then explained that the DOC must implement grievance procedures that inmates are required to exhaust before they may appeal to the postconviction court.¹³ In this case, the appellate court found the postconviction court erred by denying the inmate's petition without considering whether he had exhausted his administrative remedies.¹⁴ On remand, the postconviction court was instructed to consider the exhaustion question and to dismiss the inmate's petition without prejudice if it found failure to exhaust.¹⁵ However, if the postconviction court determined on remand that the inmate did exhaust his remedies, it was instructed to hear the petition on its merits.¹⁶

Though the court of appeals in Ellis had explained that failure to exhaust does not implicate subject matter jurisdiction, the court of appeals reached the opposite conclusion in *Bragg v. Kittle's Home Furnishings, Inc.*¹⁷ *Bragg* involved a claim by a furniture sales employee for failure of her employer to pay commissions within the ten-day limit set forth in the Indiana Wage Payment Statute (Indiana Code section 22-2-5-1(b)).¹⁸ The case was brought both on behalf of the employee herself, as well as on behalf of a class of unknown current and former employees paid in a similar fashion.¹⁹ The plaintiff only alleged that the employer's payment of commissions was untimely, conceding that all amounts due were ultimately paid.²⁰

The trial court dismissed the claims of the unknown purported class members whose employment was involuntarily terminated prior to the complaint ("terminated class members"), finding that these members had failed to exhaust their administrative remedies under the Wage Claims Statute because their claims were not submitted to the Department of Labor ("DOL") prior to filing.²¹ The trial court also dismissed, on summary judgment, the claims of the remaining class members and the plaintiff herself, finding the commissions at issue did not

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 941.

14. *Id.*

15. *Id.* at 941-42.

16. *Id.* at 941.

17. 52 N.E.3d 908 (Ind. Ct. App.), *trans. denied*, 62 N.E.3d 1201 (Ind. 2016).

18. *Id.* at 911.

19. *Id.*

20. *Id.*

21. *Id.* at 913-14.

qualify as wages under the Wage Payment Statute.²²

On appeal, the employee argued that the claims of the terminated class members were governed by the Wage Payment Statute rather than the Wage Claims Statute.²³ The Indiana Court of Appeals disagreed, finding the determination of which statute applies depends on the employment status of employees at the time their claims are brought.²⁴ It concluded the Wage Claims Statute applies to any employee whose employment is involuntarily terminated prior to the filing of a complaint, and the Wage Payment Statute applies to other employees.²⁵

The plaintiff argued, in the alternative, that any failure of the terminated class members to exhaust administrative remedies is excusable on futility grounds because the DOL has no investigative or enforcement apparatus; therefore, its procedures would not have provided any benefit.²⁶ The court disagreed with her contention that the informal, nonbinding nature of the DOL's claim resolution process offered no benefit to the terminated class members.²⁷ The court explained that the DOL's dispute resolution procedures are in the nature of mediation, and that the procedures "promote judicial economy by allowing all wage claimants the opportunity to resolve their wage disputes at the administrative level first before engaging in the often time-consuming and expensive process of litigation."²⁸ The court concluded the trial court properly dismissed the claims of the terminated class members due to lack of subject matter jurisdiction, based on their failure to exhaust administrative remedies.²⁹

Finally, the court upheld the trial court's dismissal on summary judgment of the claims of the plaintiff and the remaining purported class members, finding the commissions at issue were not "wages" under the Wage Payment Statute, and therefore the statute's ten-day time limit did not apply.³⁰

II. SCOPE AND EFFECT OF AGENCY ACTIONS

A. Standard of Review and Deference to Agency Fact-finding Determinations

Courts review agency fact-finding determinations with deference. In *Marion County Assessor v. Simon DeBartolo Group, LP*, the Indiana Tax Court reviewed a decision by the Indiana Board of Tax Review (the "Board") involving the 2006 and 2007 valuation of the Lafayette Square Mall property in Indianapolis.³¹

22. *Id.* at 913.

23. *Id.* at 914.

24. *Id.* at 915.

25. *Id.*

26. *Id.* at 914, 918.

27. *Id.* at 917-18.

28. *Id.* at 918.

29. *Id.* at 912, 915, 918.

30. *Id.* at 912, 925-26.

31. 52 N.E.3d 65 (Ind. T.C. 2016).

Simon DeBartolo Group, LP, DeBartolo Realty Partnership, LP, and SPG Lafayette Square, LLC (collectively, “Simon”), owned the mall in 2006 and 2007.³² In December 2007, Simon sold the mall to the Ashkenazy Acquisition Corporation for \$18,000,000.³³ At that time, however, Simon had already initiated an administrative appeal challenging the mall’s assessed value of \$56,341,000.³⁴ While that appeal was pending before the Marion County Property Tax Assessment Board of Appeals (“PTABOA”), Simon appealed the mall’s 2007 assessment.³⁵

The PTABOA reduced the mall’s 2006 assessment to \$28,000,100 and its 2007 assessment to \$20,000,000 in two separate decisions.³⁶ Still unsatisfied with the values, Simon appealed to the Board.³⁷

At the Board hearing, Simon presented testimony “explaining that in the spring of 2007, it began to market the Mall for sale because it was suffering from vacancy and leasing issues and the property no longer fit Simon’s strategic investment mission.”³⁸ Ultimately, Simon closed on the sale with the highest bidder, Ashkenazy.³⁹ Simon also presented analysis prepared by Sara Coers, a certified general appraiser and an MAI (Coers Analysis).⁴⁰ The Coers Analysis “independently verified the terms of the Mall’s sale and concluded that it had been consummated in an arm’s-length transaction.”⁴¹ It also developed trending factors.⁴² The record showed that the Coers Analysis relied on a number of sources to develop these findings, including changes between January 2005 and December 2007 in the capitalization rates applicable to sales of regional malls, cost of consumer goods and services, and the cost to construct real property improvements.⁴³ In this case, Simon argued that the mall’s 2006 assessment

32. *Id.* at 66. All three are part of the Simon Property Group. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 66-67.

39. *Id.* at 67.

40. *Id.* “The MAI designation is held by individuals who are experienced in the valuation and evaluation of commercial, industrial, residential and other types of properties, and who advise clients on real estate investment decisions.” *Designation Requirements*, APPRAISAL INST., <http://www.appraisalinstitute.org/designation-requirements/> [https://perma.cc/2BHZ-J58Q] (last visited May 10, 2017).

41. *Simon*, 52 N.E.3d at 67.

42. *Id.* “A trend is the general direction the market is taking during a specified period of time. Trends can be both upward and downward, relating to bullish and bearish markets, respectively. While there is no specified minimum amount of time required for a direction to be considered a trend, the longer the direction is maintained, the more notable the trend.” *Trend Analysis*, INVESTOPEDIA, <http://www.investopedia.com/terms/t/trendanalysis.asp> [https://perma.cc/ZM65-BYJR] (last visited May 6, 2017).

43. *Simon*, 52 N.E.3d at 67 n.3.

should have been \$15,281,398 and its 2007 assessment should have been \$16,849,758.⁴⁴

The Marion County Assessor (“Assessor”), on the other hand, challenged whether the mall’s sale was an arm’s-length transaction because of the seemingly quick sale, the gradual declination of the mall’s value, the faulty calculation of the trending factors in the Coers Analysis, and that the sale price did not reflect value-in-use.⁴⁵ The Assessor submitted an income approach that she prepared valuing the mall at \$34,600,000 for 2006 and \$30,800,000 for 2007.⁴⁶

Following the hearing, the Board decided the mall’s December 2007 sales price of \$18,000,000 was “the best indication of its market value as of that date”⁴⁷ and that “Simon’s evidence established a *prima facie* case that its 2006 assessment should have been \$15,281,398 and its 2007 assessment should have been \$16,849,758.”⁴⁸ The Assessor appealed, arguing that the Board’s decision was contrary to law, or constituted an abuse of discretion because it was unsupported by substantial or reliable evidence.⁴⁹

The court summarily dismissed the Assessor’s argument that the Board’s decision was contrary to law.⁵⁰ The court noted that because the Assessor failed to present a sufficient legal analysis on the issue, it waived the argument.⁵¹ Next, the court addressed the Assessor’s claim that the Board’s decision was an abuse of discretion.⁵² To succeed, the Assessor had to show that the Board “either misinterpreted the law or acted clearly against the logic and effect of the facts and circumstances before it when it relied on the Mall’s sales price and the Coers Analysis to reduce the Mall’s assessed value.”⁵³ The Assessor argued that the Board erred because: (1) the mall’s 2007 sale was “too remote from either valuation date of January 1, 2005 or January 1, 2006 to be considered relevant[;]”⁵⁴ (2) the 2007 sale was only one sale and thus not indicative of the market;⁵⁵ (3) the valuation presented by Simon incorrectly included the Ayres (Macy’s) store and Michael’s Tire Improvements because the sale did not encompass those stores;⁵⁶ and (4) the analysis by Sara Coers was flawed because she failed to link the trending factors to the mall’s value and failed to take into account the declined value of the mall between January 2005 and December

44. *Id.* at 67.

45. *Id.*

46. *Id.* at 68.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 69.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 70.

56. *Id.* at 71-72.

2007.⁵⁷

The court was unpersuaded by these arguments.⁵⁸ First, the court noted the “administrative record in this case reveals that Simon presented evidence indicating that it sold the Mall to Ashkenazy for \$18,000,000 in a transaction” where the

buyer and the seller were typically motivated, well-informed, and acted in their own best interests; the Mall was exposed on the open market for a reasonable period of time; the payment for the Mall was made in terms of cash or a comparable arrangement; the Mall’s sales price was unaffected by any special financing or concessions; and Ashkenazy purchased the Mall with the intent to continue operating it as a mall.⁵⁹

The onus was, therefore, on the Assessor to submit evidence to the Board that demonstrated that the sale was not an arm’s-length transaction or that other comparable properties were selling for more than the sale price.⁶⁰ The Assessor could not meet its burden.⁶¹

Second, the court addressed the Assessor’s argument that the Coers Analysis did not support or relate the 2007 sales price to the valuation dates.⁶² In particular, the Assessor argued that the Coers evidence was improper because the Assessor showed: “1) the Mall declined in value between January 2005 and December 2007[;] 2) the trending factors contained in the Coers Analysis had no relevance to the Mall’s value; and 3) the trending factors were applied to the Mall’s sales price by Simon’s attorney and not by an appraiser.”⁶³ Again, the court was unconvinced.⁶⁴ The Coers Analysis was not meant to value the property, but to verify the terms of the sale and to develop trending factors.⁶⁵ In fact, “as a certified general appraiser . . . she could not—and would not—render any independent opinion as to the value of the Mall or whether the \$18,000,000 represented the value of the Mall.”⁶⁶ So, in other words, the Assessor argued that the Board could not rely on an opinion that Ms. Coers could not provide.⁶⁷

Third, the court rejected the Assessor’s claim of a gradual decline.⁶⁸ Although the Assessor argued that the Macy’s store and Michael’s Tire Superstore were not part of the transaction, the administrative record indicated otherwise.⁶⁹ And

57. *Id.* at 72.

58. *Id.* at 69-72.

59. *Id.* at 70.

60. *Id.* at 71.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 71-72.

65. *Id.* at 72.

66. *Id.*

67. *Id.* at 72-73.

68. *Id.* at 72.

69. *Id.*

because those stores were included in the sale, the declination of value calculation was more drastic than the Assessor presented.⁷⁰

Finally, the Assessor's argument about the trending factors was similarly unsupported.⁷¹ And because the court had no authoritative sources to indicate how they should be calculated, it held the Assessor failed to show the trending factors in the Coers Analysis were improper.⁷²

In sum, the court upheld the Board's factual determinations because the Assessor could not show, through authority or evidence, that the Board either "misinterpreted the law or acted clearly against the logic and effect of the facts and circumstances before it."⁷³

The same standards of review that apply to state agencies also apply to local agencies. The court of appeals' decision in *MacFadyen v. City of Angola*⁷⁴ is an example of the standard of review employed by courts to review agency decisions. This case brings to light the pervasiveness of the administrative state and the importance of the court's analysis of state agency and local agency decisions.⁷⁵

In *MacFadyen*, Trine University ("Trine") petitioned the Angola Plan Commission ("Commission") to vacate an unimproved portion of an alley on Trine property in the City of Angola.⁷⁶ The MacFadyens, who owned an adjacent portion of the alley, objected, even though Trine's petition did not involve the part of the alley along the MacFadyen's lot or cut off access to the MacFadyen property.⁷⁷ Trine presented evidence before the Commission that the value of the land that Trine did not own would not be diminished; in fact, Trine's activities in the area may have increased property values.⁷⁸ The MacFadyens disagreed.⁷⁹ Mr. MacFadyen testified that vacation of the "part of the alley on Trine's property would have 'substantial negative impact' on the value of his property because '[o]ne could drive west through the alley all the way to College (now University) [Street], or turn southbound to access Gale Street. [Trine] now seeks to cut off this access."⁸⁰ The Commission approved Trine's petition, and the MacFadyens sought judicial review, afforded to them through the relevant statute.⁸¹

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 69, 73.

74. 51 N.E.3d 322 (Ind. Ct. App. 2016).

75. *See generally id.*

76. *Id.* at 324.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Sometime after the MacFadyens sought judicial review, the legislature amended the statute at issue, Indiana Code section 36-7-4-1003, to remove the "aggrieved by" language. The legislature, however, kept untouched the party's right to seek judicial review of zoning decisions like the one at issue. *Id.* at 324 n.1.

On appeal, the court examined the MacFadyens' claim that the Commission's decision was clearly erroneous.⁸² The court also noted that "[w]hen reviewing a decision of a zoning board, we are bound by the same standard of review."⁸³ There is also a presumption that decisions of a zoning board, "as an administrative agency with expertise in the area of zoning problems[,] are correct and "should not be overturned unless they are arbitrary, capricious, or an abuse of discretion. A decision is arbitrary, capricious, or an abuse of discretion if it is not supported by substantial evidence."⁸⁴ This is identical to the court's review of a state agency decision under Indiana's Administrative Orders and Procedures Act.⁸⁵

Ultimately, the court ruled against the MacFadyens because they lacked standing: *viz.* they were not aggrieved by the Commission's decision.⁸⁶ The Commission heard evidence that the MacFadyens had access to the rear of their property and the value of the property was not diminished.⁸⁷ Because the court cannot reweigh evidence, it affirmed the decision.⁸⁸

B. Deference to Administrative Agencies' Interpretation of Statutes They Are Charged with Enforcing

As the *MacFadyen* case demonstrates, courts review the factual determinations of administrative agencies with deference.⁸⁹ Likewise, courts treat agency interpretations of the statutes they are charged with enforcing with deference.⁹⁰ When faced with "two imperfect constructions of an inartfully drafted statute" in *West v. Indiana Secretary of State*, the Indiana Supreme Court deferred to agency statutory interpretation.⁹¹ In *West*, an auto dealer with an existing facility in Madison County ("Madison Dealer") planned to relocate to Hamilton County—a county with over 100,000 people.⁹² The proposed location would be within a radius of more than six, but less than ten, miles from several other dealers ("Dealers").⁹³ The Dealers protested, seeking declaratory judgment from the Auto Dealer Services Division of the Office of the Indiana Secretary of State ("Division") pursuant to a statute that permits dealers to protest the establishment or relocation of a dealership, Indiana Code section 9-32-13-24.⁹⁴

82. *Id.* at 325.

83. *Id.*

84. *Id.* at 325-26.

85. *See* IND. CODE § 4-21.5-5-14(d) (2016).

86. *MacFadyen*, 51 N.E.3d at 326.

87. *Id.*

88. *Id.*

89. *Id.* at 325.

90. *See, e.g., West v. Ind. Sec'y of State*, 54 N.E.3d 349, 355 (Ind. 2016).

91. *Id.*

92. *Id.* at 351.

93. *Id.*

94. *Id.*

The manufacturer of the automobiles at issue filed a motion to dismiss.⁹⁵ The manufacturer claimed that the Dealers lacked standing because they were outside the “relevant market area,” as defined by Indiana Code section 9-32-2-20,⁹⁶ which defines “relevant market area” as follows:

- (1) With respect to a new motor vehicle dealer who plans to relocate the dealer's place of business in a county having a population of more than one hundred thousand (100,000), the area within a radius of six (6) miles of the intended site of the relocated dealer
- (2) With respect to a:
 - (A) proposed new motor vehicle dealer; or
 - (B) new motor vehicle dealer who plans to relocate the dealer's place of business in a county having a population of not more than one hundred thousand (100,000);the area within a radius of ten (10) miles of the intended site of the proposed or relocated dealer⁹⁷

The Division found the Dealers lacked standing because each dealer was outside of a six-mile radius.⁹⁸ The court of appeals reversed, finding the Division’s interpretation of the statute unreasonable.⁹⁹ The court of appeals determined the “proposed new motor vehicle dealer” language in subsection 20(2)(A) could not be limited to newly created dealerships since another statute, Indiana Code section 9-32-13-24(e), contemplates a proposed dealer’s move.¹⁰⁰ The court determined that “a proposed new motor vehicle dealer is simply ‘a dealer that proposes to enter a market where that dealer is not already doing business.’”¹⁰¹ The court further determined that the “in a county” language in sections 20(1) and 20(2)(B) must refer only to dealers making an intra-county move.¹⁰² The court concluded because the Madison Dealer was not making an intra-county move, it fit under subsection 20(2)(A).¹⁰³ Transfer was granted.¹⁰⁴

The Indiana Supreme Court first discussed the deference granted to administrative agencies, noting that judicial review of agency action is “intentionally limited” in recognition of the agency expertise in its field.¹⁰⁵ The court affirmed the familiar principle that an agency’s interpretation of a statute it is charged with enforcing is entitled to “great weight,” and that if the agency’s

95. *Id.*

96. *Id.*

97. IND. CODE § 9-32-2-20 (2016).

98. *West*, 54 N.E.3d at 351.

99. *Id.* at 352.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

interpretation is reasonable, courts stop their analysis and need not move forward with any other proposed interpretation.¹⁰⁶

The court then examined the language and legislative intent of the statute, and concluded the statute “reflects a legislative determination that relocating more than six miles away from another dealership in a densely populated area will not have such a negative effect on the market to allow incumbent dealers to stifle competition through the protest procedure.”¹⁰⁷ The court explained that “the Statute contemplates three types of market disruptions that yield a specified relevant market area: (1) dealers ‘who plan[] to relocate’ in large counties, (2)(A) ‘proposed’ dealers, and (2)(B) dealers ‘who plan[] to relocate’ in small counties.”¹⁰⁸ The protest range for dealers in the first category is six miles, whereas the protest range for the latter two categories results in a ten-mile area.¹⁰⁹ The court then upheld the Division’s determination that this case fits squarely into the first category, because the Madison Dealer planned to relocate into a large county.¹¹⁰

C. Agency Fact-Finding Procedures

Though the fact-finding decisions of agency decisions are treated with deference, agencies must nevertheless undergo proper fact-finding procedures. *Union Township v. Department of Local Government Finance*¹¹¹ illustrates this point. In 2012, Union Township (“Township”) in St. Joseph County requested permission from the Department of Local Government Finance (“DLGF”) to impose an excess property tax levy to make up for a \$40 million budget shortfall allegedly caused by an error in the calculation of the township’s net assessed valuation.¹¹² The shortfall depleted a local fire protection territory’s reserves, requiring the Township to utilize its own financial reserves to cover the territory’s operating expenses.¹¹³ The Township indicated that the shortfall occurred because the valuation used by St. Joseph County to issue the tax bills was lower than the Township’s 2011 DLGF-certified budget.¹¹⁴ The Township filed two appeals¹¹⁵ with the DLGF pursuant to Indiana Code section 6-1.1-18.5-12, which permits civil taxing units to seek relief by stating that the unit will be unable to carry out its governmental functions and by supporting its allegations with reasonably

106. *Id.* at 353.

107. *Id.* at 355.

108. *Id.* at 354 (quoting IND. CODE § 9-32-2-20 (2016)).

109. *Id.*

110. *Id.*

111. 45 N.E.3d 523 (Ind. T.C. 2015).

112. *Id.* at 524.

113. *Id.* at 527.

114. *Id.* at 524.

115. *Id.* The second appeal was sent because the Township presumably had not received a determination on the first appeal. The DLGF later indicated it did not receive the first appeal, so the Township resent it. *Id.* at 524 n.1.

detailed statements of fact.¹¹⁶ The DLGF denied the Township's first appeal on three alternative grounds: (1) because the Township failed to utilize the DLGF's prescribed appeal template; (2) because the Township failed to substantiate the alleged error; and (3) because the Township failed to request relief with sufficient specificity.¹¹⁷ The DLGF rejected the second appeal solely on the grounds that the Township failed to provide it with the actual county forms at issue.¹¹⁸

On appeal, the tax court determined the Township had provided documentation establishing the cause of the shortfall and the resulting impairment on the ability of the township and the fire protection territory to fund their operating budgets, thereby satisfying the Township's requirements under Indiana Code section 6-1.1-18.5-12.¹¹⁹ The tax court found nothing in the statute requires a township to utilize a particular form in presenting its excess levy appeal, and the DLGF had therefore erred in denying the Township's first appeal on this basis.¹²⁰

The court also rejected the DLGF's second argument that the Township had failed to substantiate the alleged error.¹²¹ The court noted the DLGF's contention that it was required to use a previous year's assessment was not on point, and observed that the DLGF has pointed to no evidence which would support a finding that the St. Joseph County Auditor had reduced the assessed valuation.¹²² The court pointed out that the DLGF failed to answer the "\$40 million question:" whether an "error" existed.¹²³

In addition, the court found the DLGF's third reason for denying the first appeal—that the Township failed to request relief with the requisite specificity—unpersuasive.¹²⁴ The court stated that "it is abundantly clear what relief Union Township seeks: it wants to recoup the \$51,992 in property tax revenue it was unable to collect in 2011 as a result of the \$40 million discrepancy."¹²⁵ Finally, with respect to the rejection of the second appeal, the court observed that the parties disagreed regarding whether the county forms had been provided, but explained it need not determine whether the DLGF erred in denying the Township's appeal for that reason.¹²⁶ The court described that both the first and second appeals to the DLGF hinge on whether a \$40 million error gave rise to a property tax revenue shortfall, which is a factual question appropriate for the DLGF, not the tax court.¹²⁷

The tax court reversed and remanded the case to the DLGF with instructions

116. *Id.* at 526.

117. *Id.*

118. *Id.* at 529.

119. *Id.* at 527.

120. *Id.*

121. *Id.* at 529.

122. *Id.* at 528.

123. *Id.*

124. *Id.* at 529.

125. *Id.*

126. *Id.* at 530.

127. *Id.*

that it determine whether an error occurred to cause the \$40 million discrepancy.¹²⁸ If so, the DLGF was ordered to issue a correction to be applied to the Township's levy limitations, and levy for the ensuing year to offset the cumulative effect caused by the error.¹²⁹ The court concluded by stating that "this case demonstrates yet another instance where infirmities in the DLGF's fact-finding process have hindered the tax court's review of the final determination and certified administrative record."¹³⁰ The court then "strongly encourage[d] the DLGF to correct these infirmities so that its adjudicatory process can develop all the relevant facts and legal arguments for possible review by the Court."¹³¹

D. Consideration of Evidence in Agency Proceedings

Administrative agencies apply different rules of evidence in certain contexts, such as the admissibility of hearsay evidence.¹³² *Blesich v. Lake County Assessor* provides an example of the intersection of the rules of evidence with administrative law.¹³³ Blesich and the St. John Township Assessor disagreed about the assigned value of a residential property.¹³⁴ After a failed attempt to come to an agreement, Blesich appealed to the Lake County Property Tax Assessment Board of Appeals ("PTABOA").¹³⁵ In April 2013, the PTABOA issued a Notification of Final Assessment Determination that reduced Blesich's assessment some \$25,000.¹³⁶ Blesich was still unsatisfied, and appealed to the Indiana Board of Tax Review (the "Board"), electing to litigate the appeal under the Board's small claims rules.¹³⁷

At the Board hearing, Blesich presented an appraisal that valued his property more than \$20,000 less than the PTABOA assessment, and he also presented a letter documenting the St. John Township Assessor's previous offer to reduce Blesich's assessment.¹³⁸ This is where the seemingly benign decision earns its place in this review. Naturally, the Lake County Assessor ("Assessor") objected to the appraisal and the letter, arguing that the appraisal was inadmissible hearsay and that the letter was irrelevant and concerned negotiations to which the Assessor was not a party.¹³⁹ And in response, the Assessor provided the Board with details of sales data for several comparable properties indicating that the

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *See, e.g., Blesich v. Lake Cty. Assessor*, 46 N.E.3d 1285 (Ind. T.C. 2015).

133. *Id.*

134. *Id.* at 1285.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1285-86.

139. *Id.* at 1286.

PTABOA's valuation was "more than fair."¹⁴⁰

The Board issued a final determination, "finding that the Appraisal was admissible hearsay evidence that was 'arguably probative' of the subject property's value"¹⁴¹ but that it could not be the sole basis for a reduction of Blesich's assessment because the Assessor had properly objected.¹⁴² The Board also found the settlement letter lacked probative value and ultimately decided that Blesich had not made a prima facie case for a reduction.¹⁴³ Blesich appealed.¹⁴⁴

On appeal, the Indiana Tax Court noted that it will reverse a final judgment of an agency if "it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of or short of statutory jurisdiction, authority, or limitations; without observance of the procedure required by law; or unsupported by substantial or reliable evidence."¹⁴⁵ Blesich's main argument on appeal was that the Board erred in disregarding his offered appraisal and the settlement letter.¹⁴⁶ He also complained that the Board failed to hold the administrative hearing in the time prescribed by statute.¹⁴⁷ The court disagreed with Blesich on all counts.¹⁴⁸

First, the court observed that because Blesich elected to litigate the case under the Board's small claims rules—those rules provide that hearsay is admissible—the Board's "final determination cannot be based solely upon hearsay evidence when it is properly objected to and does not fall within a recognized exception to the hearsay rule."¹⁴⁹ Here, the court decided the Board's decision to exclude the appraisal was proper.¹⁵⁰ The Assessor properly objected to the appraisal, and Blesich did not provide the court with an applicable hearsay exception to offering the appraisal without the availability of cross-examining the appraiser.¹⁵¹

Second, the court disagreed with Blesich's contention that the settlement letter should have been admitted.¹⁵² The court disposed of this issue in short order, noting that the Indiana Rules of Evidence "prohibit the use of settlement terms and settlement negotiations to prove either the liability for or the invalidity of a claim or its amount."¹⁵³

140. *Id.* The court also noted, in footnote 2, that Indiana Code section 6-1.1-15-3(b) required the County Assessor to defend the PTABOA's valuation of Blesich's property. *Id.* at 1286 n.2.

141. *Id.* at 1286.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 1286-87.

147. *Id.* at 1288.

148. *Id.* at 1287-88.

149. *Id.* at 1287.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1288 (citing IND. R. EVID. 408).

Third, the court rejected Blesich's argument that he was prejudiced by the Board's delay in holding a hearing.¹⁵⁴ Blesich pointed out that the relevant statute, Indiana Code section 6-1.1-15-4(e), provides that "absent an extension, the Indiana Board was to issue its final determination on [an appeal from the PTABOA] within 90 days of its hearing."¹⁵⁵ The Board did not comply with this section.¹⁵⁶ But despite Blesich's contentions, he was not prejudiced by the Board's delay.¹⁵⁷ Instead, he waited when he could have sought judicial review (as the statute permitted).¹⁵⁸ The court therefore affirmed the Board's final determination.¹⁵⁹

III. AGENCY TRANSPARENCY EXAMINED

The survey period has produced an unusual number of important and (in some cases) high-profile decisions concerning government transparency. In fact, there is a case currently pending that speaks to this very issue and concerns the Vice President of the United States.¹⁶⁰

The first of these cases is an Indiana Supreme Court decision that addressed separation of powers issues in connection with the Access to Public Records Act ("APRA"), Indiana Code section 5-14-3-1 to 5-14-3-10. In *Citizens Action Coalition v. Koch*,¹⁶¹ the Energy and Policy Institute had submitted three APRA requests to Indiana House Representative Eric Koch seeking correspondence with business organizations in relation to specific legislation.¹⁶² The first two requests were denied by the Chief Counsel of the Republican Caucus on the grounds that

154. *Id.* at 1289.

155. *Id.* at 1288.

156. *Id.*

157. *Id.* at 1289.

158. *Id.* at 1288-89.

159. *Id.* at 1289.

160. See Fatima Hussein, *Mike Pence's Redacted Emails Could Head to Indiana Supreme Court*, INDYSTAR, <http://www.indystar.com/story/news/politics/2017/02/07/mike-pences-redacted-emails-could-head-indiana-supreme-court/97570462/> [<https://perma.cc/TS7Z-KRTW>] (last updated Feb. 8, 2017, 8:12 PM). This case arose when Indianapolis labor attorney William Groth requested disclosure of communications and documents related to then-Governor Pence's decision to hire a private organization to pursue a lawsuit against the United States following an executive order by President Obama regarding immigration. *Id.* Groth filed a request under the Indiana Access to Public Records Act and received documents that were redacted. *Id.* Particularly at issue is a "white paper" that was not disclosed. *Id.* The court of appeals sided with the Governor's decision to withhold the document. *Id.* Groth has petitioned the Indiana Supreme Court for transfer. *Id.* Notably, however, the court of appeals' opinion stated that the *Citizens Action Coalition v. Koch* case does not apply to the facts at issue and the request directed to the Governor. *Groth v. Pence*, 67 N.E.3d 1104, 1109 (Ind. Ct. App. 2017).

161. 51 N.E.3d 236 (Ind. 2016), *reh'g denied*, (July 12, 2016).

162. *Id.* at 239.

it is “House tradition” to treat all correspondence as confidential.¹⁶³ A complaint was then filed with the Public Access Counselor, who concluded that although the APRA applies to the Indiana General Assembly, the majority of the information requested is exempted from disclosure under the APRA pursuant to the legislative work product exception.¹⁶⁴ A third request was made to Representative Koch and was again denied, this time also on grounds of legislative work product.¹⁶⁵ The Public Access Counselor again determined that the information sought in the third request was exemptible because the “disclosure or denial of the work product is at the discretion of the legislature.”¹⁶⁶

The Energy and Policy Institute, joined by Citizens Action Coalition of Indiana and the Common Cause of Indiana (“Plaintiffs”), filed a complaint in trial court against Representative Koch and the Indiana House Republican Caucus (“Defendants”).¹⁶⁷ Defendants moved to dismiss, arguing that the Plaintiffs’ requests should be found non-justiciable because they would “interfere with the internal workings of the legislature.”¹⁶⁸ Alternatively, Defendants argued that (1) two of the Plaintiffs lacked standing to sue; (2) neither Representative Koch nor the Republic Caucus is a “public agency” subject to the APRA; and (3) the Caucus was not a proper party because the requests were only made to Representative Koch.¹⁶⁹ The trial court granted the motion to dismiss finding the issue non-justiciable, without reaching the other arguments.¹⁷⁰ The Plaintiffs appealed and sought immediate review by the Indiana Supreme Court, which the Indiana Supreme Court granted.¹⁷¹

The Indiana Supreme Court first explained the distinction between jurisdiction and justiciability, noting that jurisdiction addresses the power of a court to decide a case or issue a decree, while justiciability addresses whether the issue is appropriate or suitable for adjudication by the court.¹⁷² The court explained that it has subject matter jurisdiction over the case pursuant to Indiana Appellate Rule 56(A), which permits the Indiana Supreme Court to accept jurisdiction over a case that would otherwise be at the court of appeals “upon showing that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination.”¹⁷³ Turning to the issue of justiciability, the court noted that it may determine that an issue over which it has subject matter jurisdiction is nevertheless non-justiciable

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 239-40.

170. *Id.* at 240.

171. *Id.*

172. *Id.*

173. *Id.* at 240-41.

“for prudential reasons.”¹⁷⁴ The court explained that it “should not intermeddle with the internal functions of either the Executive or Legislative branches of Government.”¹⁷⁵

The court examined the APRA and determined the General Assembly had not created an exemption reserving to the legislative branch the authority to determine whether the APRA would apply to the legislature, and also found that no constitutional provision expressly reserves this right to the legislative branch, either.¹⁷⁶ Accordingly, the court found the question of whether the APRA applies to the legislature to be justiciable.¹⁷⁷ The court then determined that the APRA clearly contemplates application to the General Assembly and its members because the statute contains a specific exemption for the work product of individual General Assembly members and partisan staffs.¹⁷⁸ Accordingly, the court held the APRA does apply to the General Assembly and its members.¹⁷⁹

The court then turned to the question of whether the requested information constitutes “work product” exemptible from disclosure under the APRA.¹⁸⁰ The court noted that “work product” is not defined by rule or statute.¹⁸¹ The court declined to implement a “court-created” definition of the word, explaining that “to define for the legislature what constitutes its own work product, and to then order the disclosure of such documents, would indeed be an interference with the internal operations of the General Assembly.”¹⁸² The court further explained that defining work product “falls squarely within a ‘core legislative function’” because only the General Assembly can properly define what work product may be produced while engaging in its legislative duties.¹⁸³ The court finally observed that the statute establishing the legislative work product exemption permits the exemption to be exercised “at the discretion of a public agency,” thereby expressly reserving to the General Assembly the authority to disclose or not disclose work product.¹⁸⁴

Justice Rucker submitted a separate opinion concurring in part and dissenting in part.¹⁸⁵ Justice Rucker agreed that APRA applied and that the question of whether it applied was justiciable.¹⁸⁶ However, he pointed out that though Representative Koch and the Republican Caucus made the “work product”

174. *Id.* at 241.

175. *Id.* (quoting *State ex rel. Masariu v. Marion Super. Ct.*, 621 N.E.2d 1097, 1098 (Ind. 1993)).

176. *Id.* at 241-42.

177. *Id.* at 241.

178. *Id.* at 242.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 243 (Rucker, J., concurring in part, dissenting in part).

186. *Id.*

argument originally in response to the APRA request, they did not make this argument on appeal: “[C]onspicuously absent from Defendants’ second reason is any mention whatsoever of ‘work product’ as a ground for dismissal.”¹⁸⁷

Justice Rucker noted that the majority attempted to circumvent this issue by citing authority for the proposition that the court “may affirm the grant of a motion to dismiss if it is sustainable on any theory.”¹⁸⁸ However, Justice Rucker pointed out that the trial court did not grant the motion to dismiss, but simply refused to address the issue on justiciability grounds.¹⁸⁹ As such, he concluded, it cannot be said that the court is affirming the trial court’s grant of a motion to dismiss.¹⁹⁰ He also pointed out that the trial court’s judgment must be supported by the evidence, noting “affirming the trial court on an alternative theory is appropriate only ‘where the parties have addressed themselves to the merits of the theory on which the judgment is ultimately sustained.’”¹⁹¹

Justice Rucker stated that while the APRA unquestionably exempts from disclosure the work product of the General Assembly, the Defendants did not raise this argument before either the trial court or the Indiana Supreme Court.¹⁹² He also noted that “Defendants never alleged a work product exemption or asserted emails, draft records, notes, minutes, scheduling records, text messages, and all other correspondence or records fall within the exemption umbrella.”¹⁹³ He concluded, “The majority’s ruling is not only premature, but it unfortunately weighs in on a significant separation of powers issue without an adequate record. I would refrain from so doing and instead remand this matter to the trial court for further proceedings.”¹⁹⁴

*ESPN, Inc. v. University of Notre Dame Police Department*¹⁹⁵ was one of the highest profile cases of the year, resolving a recurring and thorny public access issue; *viz.* whether a university police department is a “public agency” within the meaning of the APRA.¹⁹⁶ In this case, an ESPN investigative reporter requested information from the Notre Dame Security Police Department (“Department”) about 275 student-athletes.¹⁹⁷ The Department “was established in 1977 by Resolution of the University of Notre Dame trustees” and was granted general police powers.¹⁹⁸ The Department also enforces student code and other rules, offers private transportation to students with private needs, escorts students at night, and “coordinates internal disciplinary reviews, and implements safety

187. *Id.* at 244.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* (quoting *Havert v. Caldwell*, 452 N.E.2d 154, 157 (Ind. 1983)).

192. *Id.* at 244-45.

193. *Id.* at 245 (internal quotations omitted).

194. *Id.*

195. 62 N.E.3d 1192 (Ind. 2016).

196. *Id.* at 1196.

197. *Id.* at 1193-94.

198. *Id.* at 1193.

educational programs.”¹⁹⁹

The request was broad, encompassing all incident reports, whether the student-athlete was “named as a victim, suspect, witness, or reporting party.”²⁰⁰ The Department denied the request, relying on three previous Public Access Counselor (“PAC”) advisory opinions “that concluded private university police departments are not ‘lawful enforcement agencies’ under Indiana’s Access to Public Records Act.”²⁰¹ ESPN filed a formal complaint with the PAC, alleging a violation of the APRA.²⁰² The PAC deviated from his predecessors, deciding that the Department was a “public law enforcement agency” and thus subject to APRA’s disclosure requirements.²⁰³ In doing so, he reasoned that the “Department was acting under the color of law by enforcing the Indiana criminal code.”²⁰⁴ ESPN then renewed its request with the Department, which was again denied.²⁰⁵ ESPN made yet another request, albeit a more specific one, seeking daily logs.²⁰⁶ The Department denied the request, and ESPN filed a second formal complaint with the PAC.²⁰⁷ The PAC concluded the daily logs must be released, that incident reports may be released, and that the Department may withhold any investigatory records.²⁰⁸

ESPN then sued the Department.²⁰⁹ The trial court decided the Department was not a law enforcement agency under APRA, and was therefore not required to disclose the requested documents.²¹⁰ ESPN appealed.²¹¹ ESPN argued that the Department fits into three definitions of a “public agency”: “[I]t is a ‘law enforcement agency,’”²¹² it exercises executive powers of the state,²¹³ and it exercises traditional governmental power.²¹⁴ ESPN also argued that the PAC opinions were entitled to consideration in support of legislative acquiescence; namely, that the legislature was aware of the decisions interpreting APRA and did not take corrective action.²¹⁵ Presumably, none was needed. The court of appeals sided with ESPN and held the Department is a “law enforcement agency.”²¹⁶ The

199. *Id.* at 1193-94.

200. *Id.* at 1194.

201. *Id.* (citing IND. CODE § 5-14-3 (2014)).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* (citing IND. CODE § 5-14-3-4 (2014)).

209. *Id.*

210. *Id.* at 1194-95.

211. *Id.* at 1195.

212. *Id.* (citing IND. CODE § 5-14-3-2(n)(6) (2014)).

213. *Id.* (citing IND. CODE § 5-14-3-2(n)(1) (2014)).

214. *Id.* (citing IND. CODE § 5-14-3-2(n)(2)(C) (2014)).

215. *Id.*

216. *Id.*

court declined to apply the doctrine of legislative acquiescence because the PAC's opinions were not sufficiently long-standing.²¹⁷

The Department sought transfer, which the Indiana Supreme Court granted.²¹⁸ The court initially observed that the APRA was enacted with the purpose of providing transparency.²¹⁹ The court also observed that while APRA should be "liberally construed," that directive applied "in determining *what records* are subject to disclosure, not *who* is covered by APRA."²²⁰ It further noted its responsibility to give statutory language its "plain meaning" and "give effect to the intent of the legislature."²²¹

Turning to the argument that the Department is a law enforcement agency, the court looked to the definition of "law enforcement agency" in APRA.²²² The definition states,

An agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division²²³

ESPN argued that the Department is a "law enforcement agency" under this definition because it engages in government functions by exercising police powers.²²⁴ The Department, on the other hand, countered that it is not "any level of government" as required by a plain reading of the statute.²²⁵ The court agreed with the Department's take.²²⁶

The court observed that private educational institutions "have been granted statutory authority to appoint police officers to protect their campuses[,] that those officers are vested with general police powers, and that they are also "uniquely entrusted to enforce the rules and regulations of their appointing educational institution."²²⁷ Since the officers take an oath "in the form and manner prescribed by the appointing governing board,"²²⁸ the Department acts under the control of the trustees, who are free from government interference.²²⁹ As such, the Department cannot fit the plain language in APRA that the law

217. *Id.*

218. *Id.*

219. *Id.* at 1196 (citing IND. CODE § 5-14-3-1 (2014)).

220. *Id.* (citing IND. CODE § 5-14-3-1 (2014)).

221. *Id.* at 1195-96 (internal citations omitted).

222. *Id.* at 1196.

223. *Id.* (quoting IND. CODE § 5-14-3-2(n)(6) (2014)).

224. *Id.*

225. *Id.*

226. *Id.* at 1197.

227. *Id.* (citing IND. CODE § 21-17-5-2, -5-4(a)(1), (3) (2016)).

228. *Id.* (quoting IND. CODE § 21-17-5-3 (2016)).

229. *Id.*

enforcement agency be “of any level of government.”²³⁰ It is a university agency, not a state agency.²³¹

Next, the court turned to ESPN’s argument that the Department is a public agency because it exercises police powers.²³² ESPN tethered its argument to language in APRA that states, in relevant part, that a public agency includes “any . . . department, division, . . . agency, office, . . . by whatever name designated, exercising any part of the executive, . . . power of the state.”²³³ The Department, however, argued that it did not derive its power from the executive but from the trustees.²³⁴ The court took this argument to heart. Because the Department was exercising powers passed to it through the trustees, it was shielded from becoming a public agency despite the fact that the power the trustees were given came from the power of the state.²³⁵ Glossing over this point, the court continued and focused on the ancillary functions the Department performed.²³⁶ “While the trustees permit these officers to perform some traditional police functions, they are also tasked with many University-specific duties, for example, enforcing the student code, escorting students late at night, and acting as student caretakers.”²³⁷ Since there was no government control, the court noted, these “mere interconnections between a public and private entity are insufficient.”²³⁸

The court then cemented the issue using statutory interpretation principles.²³⁹ Specifically, the court opined that the Department could not be a public agency because to hold otherwise would be to interpret a statute in a way that renders a part of it meaningless or superfluous.²⁴⁰ And such an exercise is clearly antithetical to the goal of statutory interpretation to give words their plain meaning.²⁴¹

The court added that if it found the Department was a public agency, such a conclusion would lead to two absurd results.²⁴² First, because the Department is not separate from a private university, holding that the Department is a public agency would necessarily subject private universities to public scrutiny, which is clearly not intended under the law.²⁴³ Second, it would be absurd to count a law

230. *Id.*

231. *Id.* The court rejected precedent from Ohio that ESPN offered, noting the dissimilar language in the relevant statute. *Id.* at 1197-98.

232. *Id.* at 1198.

233. *Id.* (quoting IND. CODE § 5-14-3-2(n)(1) (2014)).

234. *Id.*

235. *Id.* at 1199.

236. *Id.*

237. *Id.*

238. *Id.* (citing *Perry Cty. Dev. Corp. v. Kempf*, 712 N.E.2d 1020, 1026-27 (Ind. Ct. App. 1999) (internal citation and explanatory parenthetical omitted)).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 1199-1200.

enforcement agency as a public agency because APRA requires disclosure of investigatory records, and those are expressly exempted for law enforcement agencies.²⁴⁴

The court, therefore, held the Department is not a public agency subject to APRA, and affirmed the decision of the trial court.²⁴⁵

Violations of APRA can, in some cases, entitle the requesting party to attorneys' fees.²⁴⁶ *Marion County Election Board v. Bowes*²⁴⁷ addressed that very issue and involved a pro se attorney's claim for attorney fees and expenses after the attorney brought a successful claim under the APRA on behalf of himself and others.²⁴⁸ The attorney had submitted a request to the Marion County Board of Voter Registration ("MCVR") for electronic records containing information on Marion County voters.²⁴⁹ The MCVR responded that it could not provide copies of voter registrations because the Marion County Election Board ("MCEB") had not yet adopted a uniform policy on the issues as required by Indiana law.²⁵⁰ The MCVR claimed that this was not a denial under the APRA, but rather an acknowledgement that a condition must be satisfied before the MCVR could respond more fully.²⁵¹ The attorney took the matter to the Indiana Public Access Counselor, who agreed that the MCEB needed to adopt a uniform policy, but advised that this action needed to be taken immediately because the MCEB may not refuse to adopt a policy as a way to avoid responding to an APRA request.²⁵²

After receiving the Public Access Counselor's advisory opinion, the attorney sued in trial court on behalf of other plaintiffs and himself.²⁵³ The trial court found in favor of the plaintiffs and set the matter for hearing on the issue of attorney fees and expenses.²⁵⁴ The attorney submitted evidence of \$975 in actual expenses for deposition transcripts and filing fees, as well as \$47,000 for his own attorney fees.²⁵⁵ The attorney, who had been practicing for over thirty years and had experience in APRA matters, calculated the fees based on his hourly rate of \$250.²⁵⁶ The trial court reduced the attorney's hourly rate as well as his time for work spent benefitting the other plaintiffs, ultimately finding him entitled to approximately \$7500 in attorney fees, plus all expenses.²⁵⁷ The trial court

244. *Id.* at 1200.

245. *Id.*

246. *See, e.g., Marion Cty. Election Bd. v. Bowes*, 53 N.E.3d 1203 (Ind. Ct. App.), *trans. denied*, 57 N.E.3d 817 (Ind. 2016).

247. *Id.*

248. *Id.*

249. *Id.* at 1205.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 1205-06.

255. *Id.* at 1206.

256. *Id.*

257. *Id.*

reasoned that the \$7500 compensated the attorney for missed work, other opportunities for employment, and time the attorney could have spent doing other activities.²⁵⁸

On appeal, the Indiana Court of Appeals explained that the general rule in the United States is that pro se litigants who are lawyers cannot earn attorney fees; independent counsel must be engaged.²⁵⁹ The court cited to *Kay v. Ehrler*,²⁶⁰ a U.S. Supreme Court case that explained the word “attorney” assumes an agency relationship.²⁶¹ *Kay* was quoted by the Indiana Supreme Court for the proposition that public policy supports creating an incentive to retain counsel, because ethical considerations may prohibit pro se attorneys from appearing as witnesses and because engaging independent counsel offers litigants the opportunity to evaluate the case through an independent third party.²⁶² The court distinguished the present case from a case in which an attorney, after successfully defending an allegedly frivolous Fair Debt Collection Protection Act claim by a former client, was awarded attorney fees in a subsequent malicious prosecution case.²⁶³ The court noted that the latter case involved damages allegedly suffered by the victim of a tort.²⁶⁴ In contrast, in the present case the court found the attorney fees were “speculative” because the attorney paid no money when he forewent potential business opportunities to pursue the litigation.²⁶⁵ The court reversed the portion of the trial court’s award of attorney fees, upholding only its award of \$975 in expenses.²⁶⁶

Indiana’s Open Door Law is meant to ensure that Hoosiers have access to the meetings of Indiana’s public agencies.²⁶⁷ *Warren v. Board of School Trustees of Springs Valley Community School Corp.*²⁶⁸ addresses the outside parameters of the Open Door Law.²⁶⁹ Warren was a second grade teacher at Springs Valley Elementary School until December 2012.²⁷⁰ The facts giving rise to this case occurred in November 2012.²⁷¹ In November, Warren reprimanded a student who failed to make an effort on an examination.²⁷² In fact, “[w]hen Warren discovered

258. *Id.*

259. *Id.* at 1207.

260. 499 U.S. 432, 435-36 (1991).

261. *Bowes*, 53 N.E.3d at 1207.

262. *Id.* at 1208 (citing *Miller v. West Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905, 906-07 (Ind. 1996)).

263. *Id.* at 1209.

264. *Id.*

265. *Id.* at 1210.

266. *Id.*

267. IND. CODE § 5-14-1.5-1 (2016).

268. 49 N.E.3d 559 (Ind. Ct. App. 2015), *reh’g denied*, (Apr. 15, 2016).

269. IND. CODE § 5-14-1.5 to -8 (2016).

270. *Warren*, 49 N.E.3d at 561.

271. *Id.*

272. *Id.*

the student's lack of effort, she took the student to see the school principal"²⁷³ and on the way to the principal's office, another teacher overheard Warren (who was crying and upset) say she was going to kill the student.²⁷⁴ When Warren arrived at the principal's office, she demanded to see an administrator but none were available.²⁷⁵ She exclaimed, "If you don't get me an administrator now, I'm going to kill her!"²⁷⁶ None of the secretaries believed the threat to be credible, but they nonetheless sent Warren home early.²⁷⁷

On November 26, 2012, Warren received written notice of the principal's preliminary decision to terminate her employment because of her violation of a school rule prohibiting threats or acts of violence.²⁷⁸ Warren requested a private conference with the superintendent in accordance with statutory termination procedures for teachers.²⁷⁹ After the conference concluded a few days later, the superintendent issued a recommendation to the Board of Trustees of the Springs Valley Community School Corporation ("Board") to terminate Warren.²⁸⁰ Warren then timely requested a private conference with the Board.²⁸¹ The superintendent responded to Warren with a notice outlining the time, place, and procedure for the Board conference, noting that a special meeting would be held following the executive session.²⁸² The Board also gave public notice of the meeting, which provided that the executive session would begin at 5:00 PM and that a regular session would begin at "7:00 P.M. or immediately following the Executive Session, whichever comes later."²⁸³

The Board conducted the private conference during an executive session at the time and place provided in the public notice.²⁸⁴ Warren attended with her attorney and a union representative and the Board heard testimony "from nine different witnesses and received twelve exhibits."²⁸⁵ After the conference, the Board left to deliberate.²⁸⁶ During that time, the Board's attorney offered a settlement, and Warren presented a counteroffer, remaining in a separate room "expecting to hear again from the school board attorney."²⁸⁷ Deliberations, however, continued for hours and Warren did not receive a response to her

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 562; *see also* IND. CODE § 20-28-7.5-2 (2016).

279. *Warren*, 49 N.E.3d at 562.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 563.

287. *Id.*

counteroffer.²⁸⁸ “Then, at approximately 2:30 A.M., Warren noticed through a window that cars were leaving the parking lot outside.”²⁸⁹ It turns out that the Board made its decision, held a public meeting and voted to terminate Warren’s contract without notifying Warren that the executive session had ended.²⁹⁰ The meeting memorandum stated that the Board’s regular (public) session began at 2:25 AM and voted to terminate Warren at 2:33 AM.²⁹¹ Warren was unaware of the public meeting, although several members of the public attended, including Warren’s sister and stepmother.²⁹²

Warren filed a claim for unemployment benefits, which the claims deputy denied because Warren was dismissed for cause; a decision the Review Board of the Indiana Department of Workforce Development affirmed.²⁹³ Warren also filed suit against the Board alleging violations of Indiana’s Open Door Law, which she later amended to include claims for breach of contract and defamation.²⁹⁴ The Board filed for summary judgment on all claims, noting specifically that Warren was estopped from asserting her breach of contract claim because of the court’s prior determination (in the unemployment benefits case) that she was terminated for just cause.²⁹⁵ The trial court granted the Board’s motion, and Warren appealed.²⁹⁶

On appeal, the court held neither Warren’s breach of contract claim nor her defamation claim were collaterally estopped by the decision of the Indiana Department of Workforce Development because that adjudication was “solely concerned with the existence of just cause.”²⁹⁷ Yet the court ultimately ruled for the Board on those claims: because Warren “failed to demonstrate the grant of summary judgment on these claims was otherwise improper”²⁹⁸ and because she “ma[de] no argument and provide[d] no citations to designated evidence showing a genuine issue of material fact relevant to these claims[,]”²⁹⁹ she waived appellate review.³⁰⁰

Turning to the Open Door Law claim, the court considered Warren’s argument that the Board provided inadequate notice of the date and time of the public meeting after the executive session, and the Board’s contention that even

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*; *see also* Warren v. Review Bd. of Ind. Dep’t of Workforce Dev., No. 93A02-1311-EX-949, 2014 WL 1390567 (Ind. Ct. App. May 7, 2014).

294. *Warren*, 49 N.E.3d at 563.

295. *Id.*

296. *Id.* at 563-64.

297. *Id.* at 564-65.

298. *Id.* at 566.

299. *Id.*

300. *Id.*

if there was a violation, it was merely a technical one.³⁰¹ The court held the public notice failed to satisfy the Open Door Law's notice requirement "because the School Board convened the meeting at a time unreasonably departing from the time stated in the notice."³⁰² Citing the purpose of the law, the court explained how the Board's public notice lacked sufficient specificity.³⁰³ The court stated, "[The Open Door Law] requires public notice of the 'date, time, and place of any meetings,' and 'whichever comes later' is not a concrete 'time' from the public's perspective."³⁰⁴ And, the court also expounded on the weakness of the Board's argument that the violation was merely a technical violation.³⁰⁵ Specifically, the court noted:

The notice for the meeting did not comply with the requirements of the Open Door Law, and the violation both impaired public access to the meeting and affected the substance of the final action taken at the meeting. The School Board voted to cancel Warren's contract by a 4-0-3 vote, with three members abstaining. Had the meeting been timely held with proper notice, the designated evidence shows Warren would have attended and objected to two of the board members voting, both of whom voted in favor of her termination.³⁰⁶

Thus, the meeting was "plainly contrary to the purpose of the Open Door Law."³⁰⁷ The court reversed the trial court's decision on the Open Door Law claim.³⁰⁸

An ancillary issue arose in this case that warrants some attention. Warren filed a "Motion to Compel Answers to Deposition Questions regarding communications that occurred during the School Board's executive session."³⁰⁹ The court noted that the Open Door law "permits public agencies to meet in executive session for limited purposes" but that it does not expressly address whether discussions during such sessions are privileged.³¹⁰ The court observed that Warren's discovery request "goes to deliberative processes of the School Board and its members[,]" which is improper.³¹¹ Thus, the court held the deliberations are not discoverable "because 'judicial inquiries into the private motivation or reasoning of administrative decisionmakers is a substantial

301. *Id.*

302. *Id.* at 567.

303. *Id.*

304. *Id.*

305. *Id.* at 568.

306. *Id.* (internal citations omitted).

307. *Id.*

308. *Id.* at 569.

309. *Id.*

310. *Id.*

311. *Id.* at 570 (citing *Med. Licensing Bd. of Ind. v. Provisor*, 669 N.E.2d 406, 409 (Ind. 1996) (holding there is a "general bar against probing the mental processes involved in administrative decision-makers' deliberations").

intrusion into the functions of the other branches of government.”³¹²

IV. PROCEDURAL DUE PROCESS

All administrative agencies must comport with traditional due process principles. The following cases are emblematic of how courts address these issues and continue to consistently apply due process principles despite the myriad of scenarios that come through the administrative process.

The Indiana Professional Licensing Agency (“IPLA”) filed an administrative complaint before the Indiana Athletic Trainers Board (“Board”) against an athletic trainer for engaging in a consensual sexual relationship with a nineteen-year-old high school student in her care.³¹³ The complaint alleged that the trainer “engaged in a course of lewd or immoral conduct in connection with delivery of services to the public” and that she “engaged in sexual contact with an athlete in her care,” thereby violating Indiana Code sections 25-1-9-4(a)(5) and 4(a)(11).³¹⁴

Due to embarrassment the trainer felt over the allegations and the fact that the Deputy Attorney General intended to display nude photographs that the trainer exchanged with the student, the trainer chose to send her attorney to appear on her behalf, and to admit the factual allegations but not the sanctions.³¹⁵ The Board determined the presence of only the trainer’s attorney was insufficient, and issued a Notice of Proposed Default.³¹⁶ After a hearing, the Board unanimously found the trainer in default and in violation of Indiana Code sections 25-1-9-4(a)(5) and 4(a)(11), and placed her on indefinite suspension for seven years.³¹⁷

The trainer filed a complaint under 42 U.S.C. § 1983, arguing the decision violated her constitutional rights, and she also sought administrative review under the AOPA.³¹⁸ The Board and the IPLA moved to dismiss the complaint on the grounds that the agency record was not filed within thirty-two days of the filing of the complaint.³¹⁹ After awaiting the decisions in *Teaching Our Posterity Success, Inc. v. Indiana Department of Education*, 20 N.E.3d 149 (Ind. 2014), and *First American Title Insurance Co. v. Robertson*, 19 N.E.3d 757 (Ind. 2014), *amended on reh’g*, 27 N.E.3d 768 (Ind. 2015),³²⁰ the trial court ultimately

312. *Id.* (quoting *Med. Licensing Bd.*, 669 N.E.2d at 409).

313. *Melton v. Ind. Athletic Trainers Bd.*, 53 N.E.3d 1210, 1212-13 (Ind. Ct. App. 2016).

314. *Id.*

315. *Id.* at 1213.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 1214 n.2. Both of these cases underscored the Indiana Supreme Court’s bright-line rule that failing to file the administrative record as defined by the AOPA results in dismissal of the petition for judicial review of an administrative decision. For a full review of these cases, see Joseph P. Rompala, *Survey of Indiana Administrative Law*, 48 IND. L. REV. 1147, 1157 (2015); see also Tabitha L. Balzer & Manny Herceg, *Survey of Indiana Administrative Law*, 49 IND. L. REV. 929 (2016).

dismissed both counts of the complaint.³²¹

The court of appeals reversed on due process grounds, without addressing the timing of the filing of the agency record.³²² The court explained that the due process claim required consideration of two factors: whether there was a deprivation of a constitutionally protected property or liberty interest, and if so, a determination of what procedural safeguards are required.³²³ The court found the first factor satisfied, explaining that the right of a person to a license for employment is a recognized property interest.³²⁴ The second factor turned on the proper interpretation of the word “party” in Indiana Code section 4-21.5-3-24, the statute governing default or dismissal under the AOPA.³²⁵ The court held the term “party” includes counsel, and the trial court therefore erred in entering its notice of default.³²⁶ To determine whether this error violated due process, the court then examined the three factor due process test:

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, along with the probable value, if any, of additional or substitute procedural safeguards; and
- (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.³²⁷

The court found the private interest at stake to be of paramount importance to the trainer, there was no government interest in disregarding the procedures established by the legislature, and the risk of erroneous deprivation was great because she was not entitled to any further process.³²⁸ The court concluded the trainer was denied an opportunity to be heard “at a meaningful time and in a meaningful manner,” the fundamental requirement of due process.³²⁹ The case was remanded with orders to vacate the Board’s decision and to provide the trainer with an administrative hearing that comports with the dictates of due process.³³⁰

In re F.S. addressed the issue of whether compelling a parent to permit the Department of Child Services (“DCS”) to interview her children based solely on the uncorroborated accusations of an undisclosed informant violates due process.³³¹ The mother had four children and was living with the father of her two

321. *Melton*, 53 N.E.3d at 1214.

322. *Id.* at 1212, 1220.

323. *Id.* at 1215.

324. *Id.* at 1216.

325. *Id.* at 1216-17.

326. *Id.* at 1218-19.

327. *Id.* at 1219 (citing *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976)).

328. *Id.* at 1220.

329. *Id.* (quoting *Mathews*, 424 U.S. at 333).

330. *Id.*

331. 53 N.E.3d 582, 585 (Ind. Ct. App. 2016).

youngest children.³³² The family had a history of DCS contacts, including a recent Child in Need of Services (“CHINS”) case, and the mother was on probation for theft.³³³ On four separate occasions within a month, an anonymous caller contacted DCS alleging drug use by the parents in the presence of the children, domestic abuse in front of the children, and an unsafe home environment.³³⁴ DCS investigated the first allegation by making a home visit, and found no evidence of drug use or an unsafe home.³³⁵ Though the mother refused a drug test, DCS ultimately closed the case after meeting with the mother again in the presence of her attorney and after the father took a drug test.³³⁶ DCS ruled the allegations unsubstantiated.³³⁷

The second anonymous report to DCS coincided with an anonymous report to the county probation department.³³⁸ The probation officer, a DCS case manager, and a police officer went to the home together to investigate the allegations.³³⁹ The mother denied entry to DCS but permitted the other two to enter.³⁴⁰ The probation officer requested a urine sample from the mother at the home, but rejected the sample given on grounds of color and temperature.³⁴¹ However, a second sample was taken at the police department and the screen came back clean.³⁴²

The probation officer told the DCS case manager that the home was in good shape, and the DCS case manager stated that she was satisfied there was no evidence of drug use in the home and that the children were safe.³⁴³ Despite this, DCS filed a motion to compel conduct, indicating that to complete an assessment, interviews with both parents and the children were needed.³⁴⁴ Prior to the hearing on the motion, another anonymous report was submitted to DCS, which alleged that the children were improperly disciplined in addition to the drug allegations.³⁴⁵ A DCS case manager investigated the home and determined it appropriate and that there was no evidence of domestic violence or drug abuse, though the mother did refuse a drug test.³⁴⁶

At the hearing, the mother’s counsel argued that “some quantum of evidence” was necessary for the children to be ordered to testify over their mother’s

332. *Id.*

333. *Id.*

334. *Id.* at 586-87, 598.

335. *Id.* at 586.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 587.

345. *Id.*

346. *Id.*

objection.³⁴⁷ DCS responded that interviews with the children were necessary to permit DCS to confirm or deny the allegations in the reports.³⁴⁸ The trial court issued an order allowing DCS to interview the oldest two of the four children, but stayed the order after the mother filed an appeal.³⁴⁹ Shortly thereafter while the appeal was pending, the mother was arrested after testing positive for methamphetamine and amphetamine.³⁵⁰ She signed a consent permitting her children to be interviewed, and the children were adjudicated CHINS after the mother admitted she was unable to care for the children while incarcerated.³⁵¹

DCS argued that these subsequent events mooted the mother's appeal.³⁵² However, the court of appeals heard the case on its merits anyway, finding that the case "involves a matter of constitutional proportions and is of great public interest."³⁵³ The court of appeals discussed both procedural due process (ensuring that a party will be given notice and an opportunity to be heard in a meaningful manner) and substantive due process (protection from laws that infringe upon a fundamental right or liberty interest deeply rooted in our nation's history and from laws that do not bear a substantial relation to permissible state objectives).³⁵⁴ The court explained that the sanctity of family is deeply rooted in this Nation's history and tradition, and therefore the Due Process Clause protects personal choice in family matters.³⁵⁵ This includes the rights of parents to raise their children without undue interference by the state, though the state has authority to intervene when parents neglect, abuse, or abandon their children.³⁵⁶

The court of appeals noted that DCS is statutorily required to investigate all reports of child abuse and neglect that it receives, but that the agency is not statutorily required to interview the child in all circumstances.³⁵⁷ A trial court may issue an order requiring children to be interviewed over the objection of their parents, but only if good cause is shown.³⁵⁸ To demonstrate good cause, DCS must allege more than merely that it needs to interview the child to complete its assessment; rather, DCS must show "some evidence beyond a report from an undisclosed source that neglect or abuse is occurring."³⁵⁹ The court determined that in the present case, no such evidence was produced.³⁶⁰

The court of appeals concluded that the procedure for assessing reports of

347. *Id.* at 588.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at 589-90.

352. *Id.*

353. *Id.* at 591.

354. *Id.* at 591-92.

355. *Id.* at 592.

356. *Id.*

357. *Id.* at 596-97.

358. *Id.*

359. *Id.* at 598.

360. *Id.*

child abuse and compelling interviews with children does not necessarily violate due process.³⁶¹ However, in the present case, the statutory procedure was not followed because DCS did not demonstrate any evidence that an interview was necessary.³⁶²

Accordingly, the court held that application of the law in the present case “impermissibly infringe[d] upon the parent’s fundamental right to raise her children without undue interference by the State.”³⁶³ The court concluded that the trial court erred by issuing an order requiring the mother to submit her children to an interview with DCS.³⁶⁴

CONCLUSION

This survey Article represents only a small number of decisions issued by Indiana’s appellate courts concerning, in one way or another, agency decisions and related issues. In other words, this Article is not comprehensive and only seeks to glean an understanding of how courts continue to address the diverse and complex issues arising out of the administrative process.

Despite its limited scope, this Article hopefully addresses—for scholars, students, and Hoosiers alike—the impact of administrative agencies on our daily lives and the courts’ diligence in its role.

361. *Id.* at 599.

362. *Id.*

363. *Id.*

364. *Id.*