

SURVEY OF INDIANA ADMINISTRATIVE LAW

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INTRODUCTION

The work of administrative agencies touches the lives of every Hoosier. Because administrative agencies have such a wide reach, and because they perform quasi-judicial, legislative, and executive tasks, varied and complex legal issues often arise. Although Indiana courts have established principles for addressing issues related to the functions of administrative agencies, courts are still called upon to decide whether those principles have been properly applied. Hence, the purpose of this survey Article is to provide a glimpse into how Indiana’s courts have addressed, refined, expanded upon, and otherwise commented on these issues in their most recent decisions.

I. ACCESS TO JUDICIAL REVIEW

In Indiana, judicial review of actions taken by administrative agencies is a constitutional right,¹ subject to certain statutory and common law requirements. For example, the Indiana Administrative Orders and Procedures Act (“AOPA”) establishes the requirements a party must satisfy to obtain judicial review of actions taken by most agencies.² Those include the general conditions under which judicial review is available,³ who has standing to seek judicial review,⁴ the time for filing a petition,⁵ the procedures for filing a petition,⁶ the standard of review a court is required to apply in reviewing an agency decision,⁷ and various other procedural requirements governing adjudications under the AOPA.⁸

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1. Bd. of Sch. Trs. of Muncie Cmty. Sch. v. Barnell *ex rel.* Duncan, 678 N.E.2d 799 (Ind. Ct. App. 1997).

2. Some Indiana administrative agencies, such as the State Board of Accounts, the Department of Workforce Development, the Unemployment Insurance Review Board of the Department of Workforce Development, the Worker’s Compensation Board, Indiana Utility Regulatory Commission, the Department of State revenue (except with respect to agency action related to licensing of private employment agencies) the Department of Local Government Finance, and the Indiana Board of Tax Review are not subject to the AOPA and have separate procedures. *See* IND. CODE § 4-21.5-2-4 (2015).

3. *Id.* § 4-21.5-5-2.

4. *Id.* § 4-21.5-5-3.

5. *Id.* § 4-21.5-5-5.

6. *Id.* § 4-21.5-5-6 to -8.

7. *Id.* § 4-21.5-5-14.

8. Some examples include: *id.* § 4-21.5-3-1 (notice of agency action); *id.* § 4-21.5-3-13 (qualifications of adjudicators); and *id.* § 4-21.5-3-25 (conduct of discovery).

Judicial review of administrative decisions is available if the party satisfies those requirements, and the review is highly deferential. The following cases illustrate several important issues related to judicial review, including: specific statutory and procedural bars to judicial review, the standard for judicial review, and the effect of administrative decisions on the jurisdiction of the reviewing court.

A. Exhaustion of Administrative Remedies

In most instances, a party must exhaust administrative remedies before seeking judicial review of an agency decision. Several cases addressed this issue in the survey period, and also addressed the fact that the failure to exhaust administrative remedies does not bar the reviewing court of subject matter jurisdiction.⁹ The latter issue has been the subject of some confusion by litigants in cases during the survey period.

The Indiana Court of Appeals decision in *Alkhalidi v. Indiana Department of Correction* illustrates both points. That case involved an attempt by a prisoner to recover property that was seized during a “strip cell” disciplinary action.¹⁰ Alkhalidi attempted to recover the seized property first through the grievance procedure with the Wabash Valley Correctional Facility where he was detained, and again with the Westville Correctional Facility where he was later transferred.¹¹ When he received no response to his grievances, he filed an administrative tort claim, but his claim was denied.¹² Alkhalidi then filed a small claims action against the Indiana Department of Correction (“DOC”) to recover the value of the unreturned property.¹³

DOC filed an Indiana Trial Rule 12(B)(6) motion to dismiss, which the small claims court denied.¹⁴ Following a bench trial, the DOC moved for a judgment on the evidence asserting Alkhalidi failed to exhaust his administrative remedies.¹⁵ The small claims court granted the DOC’s motion for judgment on

9. In *K.S. v. State*, the Indiana Supreme Court clarified jurisdiction concepts, holding: Like the rest of the nation’s courts, Indiana trial courts possess two kinds of “jurisdiction.” Subject matter jurisdiction is the power to hear and determine cases of the general class to which any particular proceeding belongs. Personal jurisdiction requires that appropriate process be effected over the parties. Where these two exist, a court’s decision may be set aside for legal error only through direct appeal and not through collateral attack. Other phrases recently common to Indiana practice, like “jurisdiction over a particular case,” confuse actual jurisdiction with legal error, and we will be better off ceasing such characterizations.

Rudisel v. State, 31 N.E.3d 984, 988 n.3 (Ind. Ct. App. 2015) (quoting *K.S. v. State*, 849 N.E.2d 538, 540 (Ind. 2006)).

10. *Alkhalidi v. Ind. Dep’t of Corr.*, 42 N.E.3d 562, 563 (Ind. Ct. App. 2015).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 564.

15. *Id.*

the evidence and held Alkhalidi's claim should be dismissed for lack of subject matter jurisdiction because he failed to exhaust his administrative remedies.¹⁶

On appeal, the court considered whether exhaustion of administrative remedies deprived the small claims court of subject matter jurisdiction, and whether Alkhalidi in fact exhausted his administrative remedies.¹⁷ Ultimately, the court of appeals held the issue of exhaustion of administrative remedies was a procedural error, and not a matter of subject matter jurisdiction.¹⁸ In reaching this holding, the court relied upon the Indiana Supreme Court's 2014 decision in *First American Title Insurance Co. v. Robertson*,¹⁹ which summarily upheld the portion of the court of appeals' opinion "that the exhaustion of administrative remedies under AOPA is a procedural error and does not implicate the trial court's subject matter jurisdiction."²⁰ The DOC argued that, despite the supreme court's decision in *First American*, it was unclear whether a failure to exhaust administrative remedies deprives the court of subject matter jurisdiction because the supreme court in *First American* only summarily affirmed the court of appeals' analysis of subject matter jurisdiction.²¹ But the supreme court was unconvinced by this approach.

Turning to whether Alkhalidi exhausted his administrative remedies, the court initially considered whether Alkhalidi or DOC had the burden of proof. The court decided a civil action (replevin) is more akin to a § 1983 claim by a prisoner, whereby DOC has the burden of proving failure to exhaust administrative remedies as an affirmative defense.²² The court noted, "[b]ecause exhaustion of remedies is not an element of Alkhalidi's replevin action, the exhaustion requirement is more appropriately considered an affirmative defense."²³

The record showed Alkhalidi filed two grievances and a tort claim prior to filing his small claims action.²⁴ As a result, the court held there was not enough evidence from the record to hold Alkhalidi failed to exhaust his administrative remedies and, consequently, the small claims' dismissal of the action was clearly erroneous.²⁵

Like *Alkhalidi*, the Indiana Court of Appeals' decision in *Northlake Nursing and Rehabilitation Center, L.L.C. v. Indiana Department of Health* reiterated the jurisdictional effect of a failure to exhaust administrative remedies, but it did so

16. *Id.*

17. *Id.*

18. *Id.* at 565.

19. 19 N.E.3d 757, 760 (Ind. 2014), *amended on reh'g*, 27 N.E.3d 768 (Ind. 2015).

20. *Id.*

21. *Alkhalidi*, 42 N.E.3d at 565.

22. *Id.* at 566.

23. *Id.* (citing *Willis v. Westerfield*, 839 N.E.2d 1179, 1185 (Ind. 2006) (explaining that an affirmative defense raises matters outside the scope of the prima facie case as opposed to controverting an element of a plaintiff's prima facie case)).

24. *Id.*

25. *Id.* at 566-67.

in the context of a res judicata analysis.²⁶ In *Northlake*, Northlake Nursing and Rehabilitation Center, L.L.C. (“Northlake”), which operated a nursing facility, received an “Emergency Order for Relocation of Residents of Northlake” (“Emergency Order”) from the Indiana State Department of Health (“ISDH”) on the heels of a Complaint and Consent Decree entered into by the parties a year prior that addressed a failure to comply with health facility regulations.²⁷ ISDH also issued a Notice of Non-Renewal of License (“Notice of Non-Renewal”).²⁸ Northlake sought a stay of the Emergency Order and argued Northlake,

was in substantial compliance when it filed its license application . . . and that the ISDH was required to issue a full license pursuant to the Consent Decree. After a hearing, the administrative law judge (“ALJ”) entered findings of fact and conclusions of law denying Northlake’s stay request and affirming the issuance of the Emergency Order.²⁹

Northlake petitioned for judicial review of the Emergency Order and Notice of Non-Renewal and requested a stay of both orders, arguing the orders were arbitrary and capricious and exhaustion of administrative remedies would be futile “because its Medicaid certification would be terminated before those remedies concluded, and it would suffer irreparable harm because all of the residents would have already moved to other nursing facilities.”³⁰ The trial court granted the stay.³¹ But Northlake’s facility closed in May 2010 and, shortly following the closure, Northlake’s counsel withdrew from the judicial review action and the trial court dismissed Northlake’s petition for judicial review for failure to appear at a Trial Rule 41(E) (failure to prosecute) hearing.³² In October 2010, ISDH issued a final order affirming the administrative law judge’s 2010 order regarding the Emergency Order, after which Northlake filed a second petition for judicial review.³³

In November 2013, the trial court granted the initial petition, holding the matter was not barred by res judicata, the action was not moot, and ISDH’s failure to issue a full license pursuant to the Consent Decree was “arbitrary, capricious and contrary to law.”³⁴ ISDH did not appeal.³⁵ Meanwhile, as the trial court considered Northlake’s second petition, Northlake pursued the administrative appeal of the Notice of Non-Renewal.³⁶ The administrative law

26. *Northlake Nursing & Rehab. Ctr., L.L.C. v. Ind. Dep’t of Health*, 34 N.E.3d 268 (Ind. Ct. App. 2015).

27. *Id.* at 270-71.

28. *Id.* at 271.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 272.

34. *Id.*

35. *Id.*

36. *Id.*

judge dismissed Northlake's administrative appeal because Northlake was "ineligible to receive a full license because it did not have at least four residents."³⁷ Northlake then filed yet another petition for judicial review.³⁸

The trial court entered findings of fact and conclusions of law denying Northlake's third petition.³⁹ It held the case was moot because "Northlake already brought a claim seeking review of the same underlying issue in a previous judicial review" and failed to prosecute that case, prompting a dismissal of the petition with prejudice.⁴⁰ Therefore, the court concluded the case was barred by *res judicata*, and Northlake appealed.⁴¹

On appeal, the court of appeals held the trial court properly found *res judicata* barred Northlake's petition for judicial review of the Notice of Non-Renewal denial.⁴² The court rejected Northlake's argument that the trial court lacked subject matter jurisdiction to issue the former judgment, thereby not meeting the first prong of the *res judicata* analysis which requires the former judgment to be rendered by a court of competent jurisdiction.⁴³ The court explained that "the exhaustion of administrative remedies under [the Administrative Orders and Procedures Act] is a procedural error and does not implicate the trial court's subject matter jurisdiction."⁴⁴ The court also rejected Northlake's argument that the prior judgment was not rendered on the merits, holding that an Indiana Trial Rule 41(E) dismissal operates as an adjudication upon the merits, unless specified otherwise.⁴⁵

B. Compliance with Procedural Requirements—the Record on Appeal

Failure to follow procedural requirements is another potential bar to judicial review of an administrative decision. The issue of failing to file the administrative record with the trial court was settled by the Indiana Supreme Court prior to the survey period. In *First American Title Insurance Co. v. Robertson* and *Teaching Our Posterity Success, Inc. v. Indiana Department of Education*, decided on the same day, the court issued a 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.⁴⁶

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 275.

43. *Id.* at 274.

44. *Id.* (quoting *First Am. Title Ins. Co. v. Robertson*, 19 N.E.3d 757, 760 (Ind. 2014), *amended on reh'g*, 27 N.E.3d 768 (Ind. 2015)).

45. *Id.*

46. This issue was discussed in detail in the survey article published in 2015. Joseph P. Rompala, *Survey of Indiana Administrative Law*, 48 IND. L. REV. 1147, 1157 (2015). Also, compare this case with the Indiana Court of Appeals decision in *Indiana Alcohol & Tobacco*

II. SCOPE AND EFFECT OF AGENCY ACTIONS

A. *Extent of Agency Authority*

Several cases during the survey period reviewed the bounds of agency authority and addressed the decisions made in the scope of that authority. One such case was the Indiana Supreme Court's decision in *Fishers Adolescent Catholic Enrichment Society, Inc. v. Bridgewater ex rel. Bridgewater*.⁴⁷ That case involved a claim before the Indiana Civil Rights Commission ("Commission") against FACES, a religious non-profit designed to "provide homeschool high schoolers with Catholic educational, spiritual, and social enrichment."⁴⁸ FACES planned a dinner-dance social event for its members as an alternative to the celebration of Halloween.⁴⁹ It refused multiple requests by a child's mother for an alternative meal to accommodate her daughter's life-threatening allergy, though it did permit the child to bring her own meal.⁵⁰ Ultimately, against FACES' instruction, the mother contacted the event venue directly and paid for the alternative meal herself.⁵¹ She also filed a complaint with the Commission for discrimination based on failure to make a reasonable accommodation in light of her daughter's disability.⁵² The child attended the dinner-dance without incident, but was expelled from FACES four days later.⁵³ The mother then filed a second complaint with the Commission alleging retaliation.⁵⁴

The Commission found FACES accommodated the girl's allergy, but that FACES was liable on the retaliation claim.⁵⁵ Both parties appealed, and the court of appeals upheld the Commission's decision in almost all respects.⁵⁶

The Indiana Supreme Court granted transfer and reversed.⁵⁷ The court

Commission, v. Lebamoff, 27 N.E.3d 802 (Ind. Ct. App. 2015); *see supra* Part III.A. That case discussed an earlier appeal by Lebamoff where the court allowed Lebamoff to proceed despite not meeting the requirements for filing an agency record. *Lebamoff*, 27 N.E.3d 802. The decision on that issue, however, was entered in 2013, prior to the Indiana Supreme Court's decision in *First American Title Insurance Co. See Teaching Our Posterity Success, Inc. v. Ind. Dep't of Educ.*, 20 N.E.3d 149 (Ind. 2014); *Lebamoff Enters., Inc. v. Ind. Alcohol & Tobacco Comm'n*, 987 N.E.2d 525, 526-27 (Ind. Ct. App. 2013), *appeal after remand*, 27 N.E.3d 802 (2015).

47. 23 N.E.3d 1 (Ind. 2015).

48. *Id.* at 2.

49. *Id.*

50. *Id.* at 2-3.

51. *Id.* at 3.

52. *Id.* at 2.

53. *Id.* at 3.

54. *Id.*

55. *Id.*

56. *Id.* The court of appeals reversed the Commission's order to the extent that it required FACES to publish the Order on multiple websites. *Id.*

57. *Id.* at 4.

explained the Indiana Civil Rights Law limits the Commission's jurisdiction to unlawful discriminatory practices, which must relate to "the acquisition or sale of real estate, *education*, public accommodations, employment, or the extending of credit."⁵⁸ The court also noted the Commission's power to remedy retaliation claims "should not be expansively construed to expand the powers of the Commission beyond the types of discrimination expressly enumerated in the Law."⁵⁹

The court found the dinner-dance event furthered the purpose of religious and social enrichment, not the teaching of academic subjects.⁶⁰ Additionally, the court observed to interpret the "education" language in the statute to apply to the dinner-dance event at issue "would convert almost every occasion of parental guidance and training into an activity 'related to education'" and "would eviscerate the function of 'related to education' as a legislative prerequisite for the Commission's enforcement powers."⁶¹ Because the disability discrimination claim was not related to education, the court concluded the Commission exceeded its statutory authority by adjudicating both the accommodation claim and the retaliation claim, and that its consideration of their merits was clearly erroneous.⁶²

The Indiana Supreme Court in *Indiana State Ethics Commission v. Sanchez* addressed several relevant issues including the effect of criminal evidentiary determinations on an agency, the amount of evidentiary support necessary for an agency decision, and the latitude an agency has to impose penalties.⁶³ In *Sanchez*, the Office of Inspector General ("OIG") filed an ethics complaint against Sanchez with the Commission following an investigation resulting from her dismissal from the Indiana Department of Workforce Development ("DWD").⁶⁴ The complaint centered on the OIG's allegation that Sanchez violated a rule prohibiting unauthorized personal use of state property.⁶⁵ The Commission initially found probable cause to support the complaint and set the matter for a hearing.⁶⁶ In the midst of her case before the Commission, Sanchez was the subject of a criminal investigation, which was later dismissed, and in which a suppression order was issued regarding some evidence obtained in a search because the search was stale.⁶⁷ Sanchez moved to suppress the evidence

58. *Id.* (quoting IND. CODE § 22-9-1-3(1) (2015)) (emphasis inserted by the court).

59. *Id.* at 5.

60. *Id.* at 4.

61. *Id.*

62. *Id.* at 4-5.

63. *Ind. State Ethics Comm'n v. Sanchez*, 18 N.E.3d 988 (Ind. 2014). A threshold issue was Sanchez's argument that because she prevailed at the trial court level (on judicial review) the Commission had the burden of proof on appeal. *Id.* at 991 n.1. The court declined Sanchez's invitation to divert from well-established precedent in the area. *Id.*

64. *Id.* at 991.

65. *Id.*

66. *Id.*

67. *Id.*

recovered from the search of the OIG's agent due to the criminal court's suppression order.⁶⁸ The Commission denied the motion and issued a final report finding she committed the violation and barred her from future state executive branch employment.⁶⁹ Following the administrative proceeding, the trial court granted Sanchez's petition for judicial review.⁷⁰ A panel of the court of appeals reversed.⁷¹

The Indiana Supreme Court granted transfer and ultimately held in favor of the Commission, finding there was sufficient evidence to support the Commission's determination and the sanction was within the Commission's discretion.⁷² In reaching its conclusion, the supreme court addressed several arguments. First, Sanchez argued the federal and state constitution protected her from the entire proceeding before the Commission due to the protections of double jeopardy.⁷³ The court quickly dismissed this argument because jeopardy attached when a jury has been impaneled and sworn, and Sanchez's criminal case was dismissed before a jury was impaneled and sworn.⁷⁴

Second, Sanchez argued the Commission lacked probable cause to issue the ethics complaint against her because a criminal court determined the search warrant that was issued, and through which the state property was found, was unsupported by probable cause.⁷⁵ In essence, Sanchez argued the criminal court's probable cause determination was binding upon the Commission.⁷⁶ The court disagreed and noted the probable cause affidavit for the ethics complaint referenced the violation of an administrative rule prohibiting unauthorized use of state property.⁷⁷ The court noted the question of whether Sanchez had the property in her possession at the time the State applied for the search warrant was not the same as whether she made unauthorized use of the property at some time during her employment with the State.⁷⁸ The search warrant in the criminal proceeding "alleged Sanchez had committed theft, a criminal offense."⁷⁹ And, in the trial court's suppression order, "the trial court noted about three months elapsed between the dates the items were found missing and the date the State applied for the warrant."⁸⁰ "Accordingly, it concluded the probable cause for that

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 994-95.

73. *Id.* at 992.

74. *Id.* (citing *Livingston v. State*, 544 N.E.2d 1364, 1366 (Ind. 1989) ("We start with the well established principle that a defendant is in jeopardy when the jury selected to try his cause is sworn.")).

75. *Id.* at 992-93.

76. *Id.*

77. *Id.* at 993.

78. *Id.*

79. *Id.*

80. *Id.*

warrant . . . was based on stale information.”⁸¹ In contrast, the probable cause affidavit for the Commission’s ethics complaint alleged Sanchez violated 42 Indiana Administrative Code section 1-5-12, which is an administrative rule prohibiting unauthorized personal use of state property.⁸² As a result, the court determined the two proceedings were independent despite arising out of related conduct.⁸³

Third, and following from her prior argument, Sanchez claimed the “Board should not have considered the evidence resulting from the search, and that without that evidence, the Commission’s decision lacks adequate evidentiary support.”⁸⁴ Again, the court disagreed and found substantial independent evidence even if the exclusionary rule applied to negate use of the State’s findings during the search that it lacked probable cause to institute.⁸⁵ In support, the court pointed to the public hearing before the Commission where the OIG agent testified he received information that certain items were missing and the DWD staff could not locate those items after Sanchez was dismissed.⁸⁶ Further, documentary evidence was presented at the hearing showing those items were state property, and Sanchez’s assistant testified Sanchez was the only one who used the television and had it at her home for a private party before she was fired.⁸⁷ Furthermore, the OIG agent representative stated at the public hearing, “We believe the eye witness testimony *or* the testimony on the search warrant alone will be sufficient to sustain our burden of proof in this matter”⁸⁸ The court agreed with this assessment.⁸⁹

Finally, the court found the sanctions imposed by the Commission, argued by Sanchez to be unconstitutionally excessive, were within the Commission’s discretion.⁹⁰ As a general matter, the court determined the Commission did not abuse its discretion in crafting the remedy since it is entitled to “considerable latitude” in that arena.⁹¹ The Court noted that “[i]f the Commission finds a violation of ‘a rule adopted under . . . IC 4-2-7’ it may ‘bar a person from future state employment.’”⁹² The court refused to substitute its judgment for

81. *Id.*

82. *Id.*

83. *Id.* at 994. The court compared the Ethics Commission to the Disciplinary Commission for members of the Indiana Bar, and repeated a long-held point: “Acquittal on criminal charges does not prohibit the filing of professional misconduct charges arising from the same conduct. A disciplinary action is not a criminal proceeding . . . even if the alleged professional impropriety involves criminal conduct.” *Id.* (quoting *In re Mears*, 723 N.E.2d 873, 874 n.2 (Ind. 2000)).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* (emphasis in opinion).

89. *Id.* at 994-95.

90. *Id.* at 995.

91. *Id.* (quoting *Ghosh v. Ind. State Ethics Comm’n*, 930 N.E.2d 23, 29 (Ind. 2010)).

92. *Id.* (quoting Ind. Code § 4-2-6-12(7) (2015)).

Commission's, which concluded Sanchez "'violated 42 IAC 1-5-12 when she removed state property . . . from DWD premises for personal use.'"93 The Court held that, since 42 Indiana Administrative Code section 1-5-12 was adopted pursuant to Indiana Code sections 4-2-7-3, -5, the Indiana Administrative Code authorizes the penalty the Commission imposed.94

B. The Deference Standard

As discussed above, agencies must stay within the scope of their authority when arriving at decisions. As a corollary, when agencies examine factual matters and statutes within the scope of their special expertise, courts apply a deferential standard of review.95 The court of appeals addressed the relationship between these issues in *NIPSCO Industrial Group v. Northern Indiana Public Service Company*, a case involving the Indiana Utility Regulatory Commission's ("IURC") interpretation of a new statute that permits gas and electric utilities to recover 80% of certain transmission, distribution, and storage system improvement charges ("TDSIC") through semiannual proceedings known as "trackers," rather than through traditional rate cases.96 As a prerequisite to recovery via tracker, TDSIC projects must be part of a seven year plan97 approved by the IURC as "reasonable"98 and the IURC must make a finding on the "best estimate" of costs.99 The statute contains a cap on recovery of costs, which prohibits the IURC from approving "a TDSIC that would result in an average aggregate increase in a public utility's total retail revenues of more than two percent (2%) in a twelve (12) month period."100 The statute also requires a TDSIC petition "use the customer class revenue allocation factor based on firm load approved in the public utility's most recent retail base rate case order."101

93. *Id.*

94. *Id.* Sanchez also argued the burden of proof shifted to the Board on appeal of an agency decision. *Id.* at 991 n.1 But the court dismissed this argument, noting "[t]he burden of demonstrating the invalidity of agency action is on the party seeking judicial review." *Id.* (citing Ind. Code § 4-21.5-5-14(a) (internal citation omitted)). That rule extends to further appeals.

95. *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 31 N.E.3d 1, 5-6 (Ind. Ct. App. 2015).

96. *Id.* at 4.

97. Ind. Code § 8-1-39-2(3)(A).

98. *Id.* § 8-1-39-9(b).

99. *Id.* § 8-1-39-10(b)(1).

100. *Id.* § 8-1-39-14(a).

101. *Id.* § 8-1-39-9(a)(1). Firm power is "[p]ower or power-producing capacity, intended to be available at all times during the period covered by a guaranteed commitment to deliver, even under adverse conditions." *Glossary – F*, U.S. Energy info. Admin., <http://www.eia.gov/tools/glossary/index.cfm?id=F> [perma.cc/X7T3-7P8K] (last visited May 10, 2016). This is in contrast to service taken pursuant to "interruptible" (aka "non-firm" or "curtailable") rates, in which,

in return for lower rates, the customer must either reduce energy demand on short notice or allow the electric or natural gas utility to temporarily cut off the energy

The statute is silent regarding whether a utility can continue to earn a return on older assets after those assets are replaced with newer assets recovered through the TDSIC tracker.¹⁰²

The IURC issued companion orders approving NIPSCO's seven year electric TDSIC plan and recovery of NIPSCO's costs through implementation of its tracker mechanism.¹⁰³ The IURC approved the plan despite finding NIPSCO had only provided sufficient detail for the first of the seven years of the plan.¹⁰⁴ The IURC established a "presumption of eligibility" for years two through seven and required NIPSCO to update the plan in the semiannual rider proceedings.¹⁰⁵ With respect to the 2% statutory cap on TDSIC costs, the IURC agreed with NIPSCO that the cap compared the revenue increase in a given year to the revenue increase of the previous twelve months, rather than capping the cumulative increase.¹⁰⁶ In addition, the IURC determined NIPSCO could continue to earn a return on older assets after their replacement by newer assets.¹⁰⁷ The IURC explained it found no statutory support for imposing a requirement that such investment be netted, and noted the TDSIC statute requires a general rate case before expiration of the seven year plan, "which provides a built in mechanism to update the net investment of the utility."¹⁰⁸

Finally, the IURC interpreted the allocation portion of the statute in light of the fact that the allocation factors in NIPSCO's last rate case had been established by a settlement agreement—rather than through a typical cost of service study¹⁰⁹—pursuant to which NIPSCO (1) allocated all transmission and distribution costs into one factor, and (2) moved all customers to firm rates, but gave them a credit for interruptible load.¹¹⁰ The IURC approved NIPSCO's proposal to remove TDSIC distribution costs from the revenue allocation factor

supply for the utility to maintain service for higher priority users. This interruption or reduction in demand typically occurs during periods of high demand for the energy (summer for electricity and winter for natural gas).

Glossary – I, U.S. Energy Info. Admin., <http://www.eia.gov/tools/glossary/index.cfm?id=I> [perma.cc/L5FP-JM2U] (last visited May 10, 2016).

102. *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 31 N.E.3d 1, 11, 13 (Ind. Ct. App. 2015).

103. *Id.* at 4.

104. *Id.*

105. *Id.* at 4, 7.

106. *Id.* at 10.

107. *Id.* at 11.

108. *Id.*

109. Cost of service is a

ratemaking concept used for the design and development of rate schedules to ensure that the filed rate schedules recover only the cost of providing the electric service at issue.

This concept attempts to correlate the utility's costs and revenue with the service provided to each of the various customer classes.

Glossary – C, U.S. Energy Info. Admin., <http://www.eia.gov/tools/glossary/index.cfm?id=C> [https://perma.cc/F75E-7RWM] (last visited May 10, 2016).

110. *NIPSCO Indus. Grp.*, 31 N.E.3d at 14.

applied to customers on transmission and sub-transmission rates.¹¹¹ The IURC explained this “is a reasonable method to accomplish the alignment of the cost causation with cost allocation” and observed that if costs had been allocated pursuant to a cost of service study rather than a settlement, separate allocation factors for distribution and transmission would have been used.¹¹² In addition, the IURC found the allocation factors in NIPSCO’s last rate case included non-firm load and, therefore, permitted NIPSCO to adjust the factors to remove non-firm load.¹¹³

On appeal, the Indiana Court of Appeals reversed the IURC’s approval of NIPSCO’s seven year plan.¹¹⁴ The court held the statute required the improvements to be “designated” in the plan, and the IURC did not have enough information to determine whether the plan was “reasonable” or to determine a “best estimate of the cost” of the improvements, as required by the statute.¹¹⁵ The court explained that though the rider updating process is designed to offer flexibility, it did not “relieve the utility of providing an initial seven-year plan that meets the statutory requirements.”¹¹⁶

The court also reversed the IURC for granting a “presumption of eligibility” to projects in years two through seven.¹¹⁷ The court found no statutory support for such a presumption, which inappropriately shifted the burden from NIPSCO to other parties.¹¹⁸ In addition, the court reversed the IURC regarding the removal of distribution costs from the allocation factor for transmission and subtransmission customers.¹¹⁹ The court indicated it did not find statutory support for the removal of such costs and concluded the IURC exceeded its statutory authority by permitting this adjustment.¹²⁰

The court of appeals, however, upheld the IURC’s decision on other issues.¹²¹ The court found the IURC did not err in interpreting the 2% cap, based on the court’s interpretation of the “plain language” of the statute.¹²² The court also upheld the IURC’s removal of the non-firm load portion of interruptible customers’ rates.¹²³ The court found statutory support for the removal and, therefore, concluded the removal was within the IURC’s discretion and expertise.¹²⁴

111. *Id.* at 14-15.

112. *Id.* at 15.

113. *Id.* at 14-15.

114. *Id.* at 17.

115. *Id.* at 8.

116. *Id.*

117. *Id.* at 9.

118. *Id.*

119. *Id.* at 16-17.

120. *Id.* at 17.

121. *Id.*

122. *Id.* at 10.

123. *Id.* at 16.

124. *Id.*

The court also upheld the IURC on the issue of whether NIPSCO could continue to earn a return on older assets that had been replaced with newer assets in the TDSIC tracker.¹²⁵ The court agreed with the IURC that the TDSIC statute does not specifically address this issue,¹²⁶ and found discretion in “may” language of the statute discussing the Commission’s determination of pretax return.¹²⁷ The court explained the IURC is given “great deference” to such matters within its special competence.¹²⁸ The appellees had challenged this portion of the IURC’s order based in part on previous cases involving the tracking of other types of costs in which the IURC prohibited utilities from earning a return on retired assets.¹²⁹ Though the court expressed “significant concerns over the allegedly inconsistent treatment of this subject” by the IURC, the court nevertheless found that “in light of the deference owed to the Commission, we cannot say that its methodology is erroneous given the lack of specificity in the statutes regarding this calculation.”¹³⁰

Though the courts apply a deferential standard to review factual matters within an agency’s expertise, the Indiana Court of Appeals reversed an agency on such a factual matter in *Esserman v. Review Board of Indiana Department of Workforce Development*.¹³¹ *Esserman* concerned the claim of a longtime IDEM employee who had been denied unemployment benefits by DWD.¹³² The employee had been responsible for supervising the review of claims from underground storage tank owners seeking reimbursements from the Excess Liability Trust Fund (“ELTF”).¹³³ Following a return from medical leave,¹³⁴ the employee was placed on a new work improvement plan to improve efficiency.¹³⁵ She succeeded in all categories except serving as backup to other senior level staff and special projects.¹³⁶

The employee supervised claim reviewers and was the last person to review

125. *Id.* at 17.

126. *Id.* at 11.

127. *Id.* at 13.

128. *Id.* (quoting *Duke Energy Ind., Inc. v. Office of Util. Consumer Counselor*, 983 N.E.2d 160, 170 (Ind. Ct. App. 2012); *Office of Util. Consumer Counselor v. Citizens Tel. Corp.*, 681 N.E.2d 252, 255 (Ind. Ct. App. 1997)).

129. *Id.*

130. *Id.* Compare this discussion of deference to *Indiana Department of Natural Resources v. Whitetail Bluff, LLC*, 25 N.E.3d 218 (Ind. Ct. App. 2015), discussed *infra*, in which the court concluded that IDNR’s statutory interpretation was not entitled to deference because the agency had changed its interpretation of the law.

131. *Esserman v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 23 N.E.3d 831 (Ind. Ct. App. 2014).

132. *Id.* at 832.

133. *Id.*

134. *Id.* at 838.

135. *Id.* at 833.

136. *Id.* at 832-33.

claims with the associated backup documentation before distribution of funds.¹³⁷ Prior to termination, the employee told her supervisors that reviewing the backup documentation was the best way to identify inappropriate payments, and thus, the misuse of taxpayer funds.¹³⁸ She also stated she had found discrepancies in claims from almost every claim reviewer whom she supervised, which would have resulted in several thousand dollars in overpayments.¹³⁹ She further explained she believed it was unethical to approve payments which she had not fully reviewed.¹⁴⁰

The employee was subsequently terminated for failure to meet work expectations.¹⁴¹ A deputy for DWD denied her unemployment benefits, finding the employee was discharged for just cause under Indiana Code section 22-4-15-1(d) for breach of duty owed to an employer by an employee.¹⁴² The employee appealed the decision to an administrative law judge (“ALJ”).¹⁴³ In proceedings before the ALJ, she testified, due to the imposition of quotas, a number of her subordinate claim reviewers were not looking at any backup documentation and at least one of them did not review the claims at all, simply approving all costs.¹⁴⁴ She added she repeatedly raised ethical and audit issues with her supervisor, told her supervisor she would do her very best to try to meet her goals, and was working off the clock to do so.¹⁴⁵ She further testified her employer had told her to “just sign off [on the claims] and get them off [her] desk.”¹⁴⁶

The ALJ affirmed the decision of the deputy, finding the employee had been discharged for lack of performance, which was caused by doing work that was not assigned to her.¹⁴⁷ The Board affirmed the ALJ’s decision, finding the employee’s failure to follow instructions caused her to have insufficient time to devote to her assigned tasks and she was discharged for just cause for failing to meet her employer’s performance expectations.¹⁴⁸

On appeal, the employee argued the evidence was undisputed that she always gave her best effort to meet her goals and it was unreasonable to conclude her conduct was so unacceptable to disqualify her for unemployment benefits.¹⁴⁹ She also argued she could have been held personally liable for presenting false claims to the State for repayment and she knew the claims reviewed by her subordinates

137. *Id.* at 833.

138. *Id.* at 833-34.

139. *Id.* at 833.

140. *Id.* at 834.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 835.

145. *Id.*

146. *Id.*

147. *Id.* at 836.

148. *Id.*

149. *Id.*

were inaccurate.¹⁵⁰ The Board responded the employee deliberately disobeyed instructions regarding the proper scope of her duties, her performance goals were reasonable, and she was never instructed to submit false claims.¹⁵¹

The court of appeals discussed the threefold standard of review of the Board's decision: "(1) findings of basic fact are reviewed for substantial evidence; (2) findings of mixed questions of law and fact—ultimate facts—are reviewed for reasonableness; and (3) legal propositions are reviewed for correctness."¹⁵² The court explained matters within the Board's special competence are given greater deference, broadening the scope of what can be considered reasonable.¹⁵³ The court further explained breach of duty owed to an employer is an "amorphous" ground, "without clearly ascertainable limits or definition, and with few rules governing its utilization."¹⁵⁴

The court of appeals reversed the Board, in spite of the deferential standard applicable to the Board's decision.¹⁵⁵ In reviewing the record, the court noted the employee had been working for her employer for nearly twenty-five years and when she returned from medical leave, two people were doing her job full time.¹⁵⁶ The court found although the employee had failed to meet her quotas, much of this is accounted for by her medical leaves.¹⁵⁷ The court also noted while "there will always be a balance between efficiency and thoroughness in administering programs," it was also in the employer's interest to limit improper distributions.¹⁵⁸ The court concluded,

[W]e cannot say that a reasonable employee would understand that attempting to process claims accurately leading to possibly significant savings to the ELTF, and especially considering that the employee would have been held responsible for inaccurate payments of claims or held liable or discharged for knowingly authorizing overpayments, would be considered a violation of a duty reasonably owed to Employer for the purpose of being ineligible for unemployment benefits.¹⁵⁹

The court held the employee was not discharged for just cause and was, therefore, entitled to unemployment benefits.¹⁶⁰

150. *Id.*

151. *Id.* at 837.

152. *Id.* (citing *Recker v. Review Bd. of Ind. Dep't of Workforce Dev.*, 958 N.E.2d 1136, 1139 (Ind. 2011)).

153. *Id.*

154. *Id.* (quoting *Recker*, 958 N.E.2d at 1140).

155. *Id.* at 839.

156. *Id.* at 838.

157. *Id.* at 839.

158. *Id.*

159. *Id.*

160. *Id.* In its conclusion, the court noted the claim in this case, brought under statutes and caselaw governing unemployment compensation, should not be confused with caselaw governing wrongful termination. *Id.* (citing *Conklin v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 966 N.E.2d

In *Indiana Alcohol and Tobacco Commission v. Lebamoff Enterprises, Inc.*, the Indiana Court of Appeals also addressed the deference applicable to an agency's interpretation of the statute it administers in the context of a comprehensive statutory scheme and express statutory purposes for the protection of the citizens of Indiana.¹⁶¹ In that case, the court reviewed the Indiana Alcohol and Tobacco Commission's ("ATC") determination that Lebamoff Enterprises, Inc. ("Lebamoff") violated the rules and regulations regarding the home delivery of wine.¹⁶²

Lebamoff, which held a liquor license, used common carriers to transport product (including wine) to customers.¹⁶³ The ATC cited Lebamoff six times for these actions.¹⁶⁴ Lebamoff appealed the citations and, in November 2011, an ALJ concluded Lebamoff violated the applicable statute by using common carriers to transport wine.¹⁶⁵ The ATC approved the ALJ's recommendations and issued a final order in February 2012.¹⁶⁶

Lebamoff then sought judicial review of the ATC's order, arguing the ATC's interpretation of the law governing the matter—Indiana Code section 7.1-3-10-7¹⁶⁷—was unreasonable.¹⁶⁸ The ATC responded arguing the issues raised by Lebamoff were barred by the doctrines of res judicata, collateral estoppel, and judicial estoppel.¹⁶⁹

On appeal, the court reversed, holding the ATC's interpretation of the provisions relating to a liquor dealer's permit was reasonable.¹⁷⁰ In reaching its conclusion, the court reviewed the relevant legal landscape regarding permitting

761, 766 (Ind. Ct. App. 2012)).

161. *Ind. Alcohol & Tobacco Comm'n v. Lebamoff Enters., Inc.*, 27 N.E.3d 802 (Ind. Ct. App. 2015).

162. *Id.* at 804.

163. *Id.* at 804-05.

164. *Id.* at 805.

165. *Id.*

166. *Id.*

167. The relevant statutory language reads:

A liquor dealer may deliver liquor only in permissible containers to a customer's residence or office in a quantity that does not exceed twelve (12) quarts at any one (1) time. . . . This delivery may only be performed by the permit holder or an employee who holds an employee permit.

IND. CODE § 7.1-3-10-7(c) (2015).

168. *Lebamoff*, 27 N.E.3d at 805.

169. *Id.* The ATC also requested the trial court dismiss the case for failure to file the administrative record. *Id.* The trial court granted the ATC's motion, and Lebamoff appealed. *Id.* On appeal of that decision, the court held the materials submitted were sufficient for judicial review of the legal question at issue, and remanded the case. *Id.* The trial court then held that the ATC's interpretation of Indiana Code section 7.1-3-10-7 was incorrect and the ATC's final order "amounted to an improper attempt to exercise the ATC's rulemaking function." *Id.*; see also *supra* Part I.B.

170. *Id.* at 816.

of alcoholic beverages in Indiana.¹⁷¹ The court noted the legislature set out statutory restrictions relating to the sale of alcoholic beverages in Indiana and further differentiated the scope of permissible actions through the permits available for the sale of liquor, beer, and wine.¹⁷² And the court noted the legislature “crafted different rules and regulations for each of the available permits.”¹⁷³

While *Lebamoff* includes an interesting and informative recitation of the alcoholic beverage permitting laws, this Article focus its attention to two main issues before the court: (1) whether the court’s review of the ATC’s interpretation of Indiana Code section 7.1-3-10-7(c) was reasonable; and (2) whether the ATC’s order reflected an improper attempt to create an agency rule.

First, the court addressed the ATC’s argument that Indiana Code section 7.1-3-10-7(c) did not allow *Lebamoff* to deliver wine to a customer’s residence by a common carrier.¹⁷⁴ The ATC argued the relevant statutory language was unambiguous and allowed for only one reasonable interpretation—a holder of a liquor permit cannot deliver wine via common carrier.¹⁷⁵ The court agreed.¹⁷⁶ Initially, the court noted the great care the Indiana General Assembly took “to differentiate the types of permits available for individuals, partnerships, or corporations that produce and sell alcoholic beverages in Indiana. Each specific type of permit has its own rules and regulations.”¹⁷⁷

Further, the court noted “that some rules and regulations are not commonly applied to all types of permits is evidence that the General Assembly intended to craft specific rules and regulations for each type of permit.”¹⁷⁸ Specifically, Indiana requires drivers employed by liquor retailers be trained and tested on the alcohol laws and in recognizing phony IDs.¹⁷⁹ The court recognized the distinction between wineries and liquor permit holders.¹⁸⁰ It noted Indiana allows direct deliveries by carriers to wine consumers, and winery employees are not required to undergo the same training as liquor employees.¹⁸¹ Wineries, however, must meet other statutory requirements to ensure proper age identification.¹⁸² The court found Indiana does not require the same training for drivers of motor carriers as it requires of liquor permit holders and its employees (or for wineries and their employees for that matter).¹⁸³ Therefore, despite the difference, the

171. *Id.* at 808-12.

172. *Id.* at 804.

173. *Id.*

174. *Id.* at 812.

175. *Id.*

176. *Id.* at 814.

177. *Id.* at 812.

178. *Id.*

179. *Id.* at 813-14 (citing IND. CODE §§ 7.1-3-1.5-1, -6, -13; IND. CODE § 7.1-3-18-9 (2015)).

180. *Id.* at 813.

181. *Id.*

182. *Id.*

183. *Id.* (citing IND. CODE § 7.1-3-26-9(1)(A) (2015); *Baude v. Heath*, 538 F.3d 608, 612 (7th

court found the ATC's rationale of preventing underage drinking through face-to-face age verification was preserved.¹⁸⁴

What is more, the express statutory language supported the ATC's interpretation.¹⁸⁵ The court observed where the legislature allowed delivery of an alcoholic beverage to a customer's residence, it restricted delivery to the "permit holder" or an employee.¹⁸⁶ The court then discussed the terms "permit holder" and "permittee."¹⁸⁷ Lebamoff argued "permit holder" is equivalent to the term "permittee" and would include the common carrier as an "agent . . . or other person acting on behalf of, a permittee, whenever a permittee is prohibited from doing a certain act under this title."¹⁸⁸

The court refused to accept Lebamoff's broad reading of the relevant code provision, especially because "[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself."¹⁸⁹ The court noted the express language of Indiana Code section 7.1-3-10-7(c) indicated the legislature intended a home delivery of wine to be limited to the "permit holder"—"the owner, partner, or manager of the package liquor store, or an employee of the permit holder, so long as the employee holds an employee permit."¹⁹⁰ If the legislature intended to allow for home delivery by a common carrier, it would have developed clear language as it did in other sections.¹⁹¹ Ultimately, the court held the ATC's interpretation of Indiana Code section 7.1-3-10-7(c) was reasonable and a liquor permit holder could not engage common carriers to deliver wine to consumers under the express language of the statute.¹⁹²

Second, turning to the issue of whether the ATC's order constituted an improper attempt to create an agency rule, the court relied on several factors.¹⁹³ Initially, the court noted "[i]t is undisputed that '[a]n administrative agency must follow the procedures outlined for it and the law which establishes the agency; an administrative agency can have no more or less power than the statute creating

Cir. 2008)). The court made an interesting point in dicta, observing that the case may be different if a motor carrier sought permission to opt-in to the training requirement. The court stated: "That would both weaken the attempt to justify the challenged law on the basis of the Twenty-First Amendment (which so far as relates to this case merely allows a state to take reasonable measures for preventing underage drinking), and discriminate without apparent justification against motor carriers." *Id.* at 813. Because no common carrier was a party to this case or seeking to opt into the training requirement, the court did not analyze the issue further. *Id.* at 813-14.

184. *Id.* at 814.

185. *Id.* at 812-14.

186. *Id.* at 812-13.

187. *Id.* at 814.

188. *Id.* (quoting IND. CODE § 7.1-1-3-30).

189. *Id.* at 807 (quoting *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000)).

190. *Id.* at 814.

191. *Id.* (citing IND. CODE § 7.1-3-26-9).

192. *Id.*

193. *Id.* at 815-17.

it grants.”¹⁹⁴ An administrative “rule” is defined in Indiana Code section 4-22-2-3(b) as “the whole or any part of an agency statement of general applicability that: (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency.”¹⁹⁵ The court may not reweigh the evidence—it must consider the record in the light most favorable to the ATC’s decision.¹⁹⁶ A “rulemaking action” is defined by the Indiana Code as “the process of formulating or adopting a rule[,]” and the agency must follow certain procedures when engaging in rulemaking.¹⁹⁷ By contrast, an administrative adjudication is “the administrative investigation, hearing, and determination of any agency of issues or cases applicable to particular parties.”¹⁹⁸

The court observed the ATC’s final order *retrospectively* determined whether six specific acts amounted to a violation of the applicable statutory authority.¹⁹⁹ There was an investigation, evidence was collected, and the ATC made findings based on the information learned during the investigation.²⁰⁰ Those actions are more akin to the adjudicatory function of the agency.²⁰¹ Hence, the ATC did not engage in rulemaking.²⁰² The court found Lebamoff’s reliance on prior cases was misplaced.²⁰³ Lebamoff primarily relied on *Miller Brewing Co. v. Bartholomew County Beverage Co.* for its argument that the “ATC’s final order reflected an improper attempt to create an agency rule without following the applicable rulemaking procedures.”²⁰⁴ In that case, there was a change in price promotion and volume discount allowance reimbursement programs.²⁰⁵ On appeal, the court concluded although it was termed an “order,” the IABC’s [the ATC’s predecessor] decision was a rule because it prescribed a “limit on inter- and intra-APR price discount differentials, and is a statement of general and prospective applicability.”²⁰⁶ The court held, unlike the decision in *Miller Brewing Company*, the ATC’s order in this case was “an interpretation of what we believe to be unambiguous existing statutory language[.]” and “the interpretation was necessary to retrospectively determine whether the specific alleged violations that were at

194. *Id.* at 815 (quoting *Ind. Air Pollution Control Bd. v. City of Richmond*, 457 N.E.2d 204, 206 (Ind. 1983)).

195. IND. CODE § 4-22-2-3(b).

196. *See Lebamoff*, 27 N.E.3d at 806-07 (discussing the standard of review).

197. IND. CODE § 4-22-2-3(c).

198. *Lebamoff*, 27 N.E.3d at 815 (quoting *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1374 (Ind. Ct. App. 1984)).

199. *Id.* (emphasis added).

200. *Id.*

201. *Id.* at 817.

202. *Id.*

203. *Id.* at 816.

204. *Id.*

205. *Miller Brewing Co. v. Bartholomew Cty. Beverage Co.*, 674 N.E.2d 193, 196 (Ind. Ct. App. 1997).

206. *Id.* at 202.

issues were in fact violations under the law.”²⁰⁷ As a result, the ATC’s decision was not improper rulemaking.²⁰⁸

In some instances, courts are reluctant to side with the agency’s decision when its actions are clearly outside the scope of its authority.²⁰⁹ That was the case in *Etzler v. Indiana Department of Revenue*.²¹⁰ In *Etzler*, the Indiana Department of Revenue (“Department”) filed tax warrants against an individual in Marshall County and obtained a judgment creating a lien on the individual’s property in that county.²¹¹ Later, in an attempt to collect unpaid taxes owed by the individual, the Department levied on money located in Marion County.²¹² It did not, however, have a judgment in Marion County, nor did it establish an interest in property located outside of Marshall County.²¹³

The court determined the Department was not authorized to levy on property on which a lien has not been established.²¹⁴ The Department sought, and the court granted, rehearing.²¹⁵ On rehearing, the court affirmed its prior decision that its reading of the relevant statutory authority, Indiana Code chapter 6-8.1-8, was correct.²¹⁶ In reaching that conclusion, the court considered the Department’s contentions that it must have wide authority to levy on property anywhere in the state and the expanded power comports with its charge to collect a person’s unpaid tax debt.²¹⁷ Moreover, the Department argued certain sections that provide it with authority to collect unpaid tax debts unilaterally “should be read independently of one another, and that county-specific limitations on the Department’s remedial measures do not exist unless specifically stated.”²¹⁸

In rejecting the Department’s arguments, the court relied on the well-established maxim that administrative agencies have: “[O]nly those powers conferred on [them] by the legislature, and unless [the court] find[s] the grant of powers and authority in the statute, we conclude that no power exists.”²¹⁹ The court did not find the existence of the power allowing the Department to levy on property throughout the State in the name of tax debt collection other than when the Department’s ability to collect is jeopardized.²²⁰ The court did not find that the Department’s ability to collect was jeopardized and upheld its decision on

207. *Lebamoff*, 27 N.E.3d at 816.

208. *Id.* at 817.

209. *See, e.g., Etzler v. Ind. Dep’t of Revenue*, 43 N.E.3d 250 (Ind. Ct. App. 2015).

210. *Id.*

211. *Id.* at 252.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 258.

217. *Id.* at 255.

218. *Id.*

219. *Id.* at 256.

220. *Id.*

rehearing.²²¹

C. Validity of Administrative Regulations

Just as administrative agencies must stay within the scope of the authority conveyed by statute in individual cases, they must also stay within the scope of their jurisdiction when enacting administrative regulations. In *Indiana Department of Natural Resources v. Whitetail Bluff, LLC*, the court of appeals addressed both the jurisdiction of the Indiana Department of Natural Resources (“IDNR”) over “high fence” hunting of deer, as well as the validity of administrative rules that it had passed on this issue.²²² In 1997, one of the appellees had contacted IDNR to determine the legality of establishing a business to permit the hunting of privately-owned deer enclosed within a nine foot fence.²²³ IDNR responded it found “nothing illegal or contrary to [its] hunting laws regarding [appellee’s] business proposal,” but warned appellee to “please be aware of the fact that state statutes and rules may change in the future that would disallow the type of business venture that you have described to us.”²²⁴ The appellee subsequently enclosed over 100 acres with a nine-foot fence, populated it with privately-owned deer, obtained a game breeder’s license, and commenced operations.²²⁵

In 2005, the Indiana General Assembly enacted Indiana Code section 14-22-20.5, governing the livestock operations of deer and other members of the cervidae family.²²⁶ Later that year, IDNR passed an emergency rule requiring anyone possessing Whitetail deer to hold a game breeder’s license, and prohibiting any holder of such a license from hunting them.²²⁷ IDNR issued a press release indicating the new legislation authorized cervidae farming, but specifically precluded the hunting of cervidae livestock, and the Indiana General

221. *Id.*

222. *Ind. Dep’t of Nat. Res. v. Whitetail Bluff, LLC*, 25 N.E.3d 218 (Ind. Ct. App.), *trans. denied*, 31 N.E.3d 977 (Ind. 2015).

223. *Id.* at 220.

224. *Id.* at 221.

225. *Id.* at 221-22.

226. The statute defined “cervidae livestock operation” as an operation that:

(1) has a game breeders license issued by the department of natural resources under IC 14-22-20;

(2) contains privately owned cervidae; and

(3) involves the breeding, propagating, purchasing, selling, and marketing of cervidae or cervidae products;

but does not involve the hunting of privately owned cervidae.

IND. CODE § 14-22-20.5-2 (2015). The statute also provided cervidae products were the property of the owner, and that meat from a cervidae livestock operation may be sold to the general public. *Id.* § 14-22-20.5-4, -5.

227. *Whitetail Bluff*, 25 N.E.3d at 222.

Assembly left the issue of high-fence hunting to IDNR.²²⁸ The press release also indicated high-fence hunting was currently occurring pursuant to a “loophole” in the Shooting Preserve Statute, which required IDNR to identify exotic mammals that can be hunted, though IDNR had never identified any such mammals.²²⁹ The emergency rule was thus designed to close any potential loopholes.²³⁰

Whitetail Bluff challenged the emergency rule and was granted summary judgment at the trial court.²³¹ On appeal, IDNR argued Indiana Code section 14-22-20.5-2 explicitly prohibits the hunting of privately owned deer, and that IDNR has authority over such operations pursuant to subsection (b) of Indiana Code section 14-22-1-1,²³² which provides that:

- (a) All wild animals, except those that are:
 - (1) legally owned or being held in captivity under a license or permit as required by this article; or
 - (2) otherwise excepted in this article;are the property of the people of Indiana.
- (b) The department shall protect and properly manage the fish and wildlife resources of Indiana.²³³

IDNR argued subsections (a) and (b) must be read independently from one another, such that IDNR has authority over all fish and wildlife, regardless of whether they are captive animals under subsection (a).²³⁴ Whitetail Bluff countered IDNR does not have jurisdiction over legally owned captive wild animals, and that Indiana Code section 14-22-20.5-2 does not prohibit the hunting of captive deer.²³⁵

The court of appeals affirmed in a divided opinion.²³⁶ The court rejected IDNR’s argument that subsections (a) and (b) of Indiana Code section 14-22-1-1 must be read independently of each other, noting that “[w]e are hard-pressed to understand why the exception described in subsection (a) was created if it was not to be understood in juxtaposition to the general conferral of authority set out in subsection (b).”²³⁷ Accordingly, the court held the statute does not confer jurisdiction on IDNR to protect and manage wild animals legally owned or held in captivity under a license or permit.²³⁸ The court also held Indiana Code section 14-22-20.5-2 is merely a definitional section that describes what a cervidae

228. *Id.* at 223.

229. *Id.*

230. *Id.*

231. *Id.* at 223-24.

232. *Id.* at 224.

233. IND. CODE § 14-22-1-1 (2015).

234. *Whitetail Bluff*, 25 N.E.3d at 224.

235. *Id.*

236. *Id.* at 229.

237. *Id.* at 226.

238. *Id.* at 227.

livestock operation is, and that it does not prohibit the activity of high-fence hunting.²³⁹ The court stated because IDNR altered its interpretation of the statute, the altered interpretation is not entitled to deference customarily extended to an administrative agency's interpretation.²⁴⁰ The court of appeals' statement that an agency is not entitled to deference when it changes its interpretation of a statute contrasts with the approach taken by the court of appeals in *NIPSCO Industrial Group v. Northern Indiana Public Service Co.*,²⁴¹ in which the court of appeals treated the IURC's interpretation of a regulation with deference despite expressing "significant concerns over the allegedly inconsistent treatment of this subject" by the IURC.²⁴²

The court also rejected the citations by amicus curiae to administrative rules passed by IDNR, stating the validity of such rules "depends entirely upon whether the subject matter addressed in those provisions falls within the scope of authority granted to the relevant agency by the General Assembly."²⁴³ Finally, the court indicated it did not consider any policy arguments on the issue of high-fence hunting because it found current law does not prohibit the practice.²⁴⁴

Chief Judge Vaidik dissented.²⁴⁵ She stated the subsections of Indiana Code section 14-22-1-1 should be read separately, with subsection (a) conferring ownership over all wild animals except those in captivity on the people of Indiana, and subsection (b) granting IDNR authority over all fish and wildlife resources, regardless of ownership.²⁴⁶ She also pointed to other statutes (Indiana Code sections 14-22-2-3 and 14-22-2-5) discussing IDNR's jurisdiction over wild animals on both public and private property, as well as statutes that specifically discuss IDNR's authority to regulate privately owned wild animals, including the game-breeders statute (Indiana Code section 14-22-20-1), the wild animal permit law (Indiana Code section 14-22-26), and the shooting preserves statute (Indiana Code section 14-22-31-7).²⁴⁷ She explained that "[t]hese varied examples show that the legislative scheme was to grant the State the authority to protect and manage animals both wild and domesticated, even those it does not own, and even when the animals are on private property."²⁴⁸ She further explained, "I believe that IDNR can regulate canned hunting and specifically Whitetail Bluff's high-fence hunting operation."²⁴⁹

Another example of a court invalidating an administrative regulation because it was outside the scope of the agency's authority can be found in *Lowe's Home*

239. *Id.*

240. *Id.* at 227-28.

241. *See supra* Part II.B and accompanying text.

242. *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 31 N.E.3d 1, 13 (Ind. Ct. App. 2015).

243. *Whitetail Bluff*, 25 N.E.3d at 228.

244. *Id.* at 228-29.

245. *Id.* at 229-32 (Vaidik, C.J., dissenting).

246. *Id.* at 230.

247. *Id.* at 229-31.

248. *Id.* at 231.

249. *Id.*

Centers, LLC v. Indiana Department of State Revenue.²⁵⁰ In that case, the Indiana Tax Court examined the validity of two administrative regulations in the context of determining whether, when Lowe's enters into contracts with customers to sell and install construction material, the retailer may self-assess and remit use tax, or whether it must collect sales tax from its customers.²⁵¹

Indiana law imposes sales tax on retail transactions in Indiana and a use tax is imposed on transactions that would have been subject to sales tax, but for some reason have escaped it.²⁵² Use tax also applies “on the addition of tangible personal property to a structure or facility, if, after its addition, the property becomes part of the real estate on which the structure or facility is located.”²⁵³ The Department of State Revenue (“Department”) contended Lowe's was required to collect sales tax using the retail price of the construction material from its customers for its installation contracts.²⁵⁴ Under this interpretation, the transaction was bifurcated into two events: “(1) [the] retail sale of tangible personal property subject to sales tax . . . and (2) the subsequent, non-taxable service of adding that tangible personal property to a structure or facility.”²⁵⁵ The Department also argued the “installation contracts were time and material contracts not lump sum contracts.”²⁵⁶ Its argument relied on two administrative regulations, 45 Indiana Administrative Code sections 2.2-3-9 and 2.2-4-22, which provide contractors owe no use tax when they enter into time and materials contracts “because [their] customer[s] [are] liable for the sales tax on any construction material supplied thereunder.”²⁵⁷ However, when contractors “use[] a lump sum contract, [they are] required to self-assess and remit use tax on the construction materials supplied.”²⁵⁸

Lowe's moved for summary judgment and the tax court granted the motion on several grounds.²⁵⁹ First, the court found customers entering into installment contracts are not only purchasing materials (such as tiles), but rather are purchasing completed projects (such as floors).²⁶⁰ Customers do not acquire title until after installation, at which point the materials have already become real property, which is not subject to sales tax.²⁶¹ The court concluded because Lowes did not transfer title to real property, it did not need to charge customers sales tax.²⁶²

250. 23 N.E.3d 52 (Ind. T.C. 2014), *trans denied.*, 31 N.E.3d 976 (Ind. 2015).

251. *Id.*

252. *Id.* at 54-55 (discussing IND. CODE §§ 6-2.5-2-1(a), -3-2(a) (2015)).

253. *Id.* at 55 (quoting IND. CODE § 6-2.5-3-2(c)).

254. *Id.* at 56.

255. *Id.*

256. *Id.* at 57.

257. *Id.*

258. *Id.* at 58.

259. *Id.* at 54, 58.

260. *Id.* at 56.

261. *Id.* at 57.

262. *Id.*

Second, the court rejected the distinction between lump sum contracts and time and materials contracts embodied in 45 Indiana Administrative Code sections 2.2-3-9 and 2.2-4-22.²⁶³ After noting Lowe's installment contracts were indeed lump sum contracts anyway, the court determined the regulations to be in conflict with the statute.²⁶⁴ The court explained "[t]he Department has created an artificial distinction between time and material contracts and lump sum contracts in its regulations to convert a contractor's use tax liability under Indiana code § 6-2.5-3-2(c) into a sales tax liability on the materials' higher retail price."²⁶⁵ The court discussed the scope of agency rulemaking authority, stating that:

The Department has the authority to adopt rules and regulations that enable it to put into effect the purposes of Indiana's sales and use tax statutes, but "it may not make rules and regulations inconsistent with the statute[s] which it is administering, it may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law."²⁶⁶

Finding that Indiana Code section 6-2.5-3-2(c) does not impose use tax liability contingent upon the type of contract a contractor uses, the court held the distinction contained in 45 Indiana Administrative Code sections 2.2-3-9 and 2.2-4-22 to be invalid.²⁶⁷

D. Agency Fact-finding Procedures

Administrative agencies must follow proper procedures at the fact-finding level so that interested parties have a full and fair opportunity to respond. Failure to follow those requirements may bar redress upon judicial review. *RJK Trust v. LaPorte County Assessor* addressed that issue. That case involved the failure to produce evidence in an administrative proceeding as a bar to relief upon judicial review.²⁶⁸ RJK Trust filed an appeal of its 2006 tax assessment by the Michigan Township Assessor ("Assessor").²⁶⁹ The LaPorte County Property Tax Assessment Board of Appeals (PTABOA) approved the assessment determination of the Michigan Township Assessor.²⁷⁰ RJK Trust then appealed, electing to have the case heard pursuant to the Indiana Board of Tax Review's

263. *Id.* at 59.

264. *Id.* at 58-59.

265. *Id.* at 59.

266. *Id.* (quoting IND. CODE §§ 6-8.1-1-1, -3-1, -3-3 (2014); *see also* Johnson Cty. Farm Bureau Coop. Ass'n v. Ind. Dep't of State Revenue, 568 N.E.2d 578, 587 (Ind. T.C. 1991) (citing Ind. Dep't of State Revenue v. Colpaert Realty Corp., 109 N.E.2d 415, 422-23 (Ind. 1952)), *aff'd* by 585 N.E.2d 1336 (Ind. 1992).

267. *Id.*

268. *RJK Trust v. LaPorte Cty. Assessor*, 43 N.E.3d 276 (Ind. T.C. 2015).

269. *Id.* at 277.

270. *Id.*

(“Board”) “small claims procedures.”²⁷¹

The Board held a hearing during which the Assessor submitted an independent appraisal report in support of its position.²⁷² The appraiser did not testify.²⁷³ RJK Trust submitted testimony and other evidence and the Board ultimately determined the Assessor’s appraisal “reflected the subject property’s market value-in-use” as of the relevant date.²⁷⁴

On appeal, RJK Trust argued that “the assessor utilized an appraisal report that was never previously produced[.]”²⁷⁵ The Tax Court reversed the Board’s decision.²⁷⁶ It held because RJK Trust never received the appraiser’s report (after requesting it in accordance with the regulations), it did not have an opportunity to prepare adequately.²⁷⁷ The court further noted RJK Trust’s failure to object to production of the Assessor’s appraisal did not waive the claim that the Board erred by not requiring the Assessor to produce its evidence prior to the hearing and using its discretion in excluding the evidence.²⁷⁸ The court held the “Board abused its discretion by making a determination that is clearly contrary to the logic and effect of the facts and the law because it is based on evidence tainted by the evils of unfair surprise.”²⁷⁹ As a corollary issue, the court observed the Board was permitted to base its finding solely on hearsay evidence (albeit it improper on other grounds) because RJK Trust failed to object to the admission of the evidence as hearsay.²⁸⁰

The court of appeals also addressed proper agency fact-finding procedures in *Citizens Action Coalition of Indiana, Inc. v. Duke Energy Indiana, Inc.*²⁸¹ *Citizens Action Coalition of Indiana* was the second appeal in the latest of a series of cases related to the construction of an integrated gasification combined cycle (“IGCC”) power plant in Edwardsport, Indiana, by Duke Energy.²⁸² Duke had been recovering the costs of the IGCC plant through a series of “rider”/“tracker” cases since construction began.²⁸³ In a previous rider case (“IGCC-4S1”), Duke and several consumer parties reached a settlement agreement that capped construction costs and prohibited recovery of certain other costs until the plant was placed “in-service” according to Federal Energy Regulatory Commission (“FERC”) guidelines and specific technological

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 279.

277. *Id.* at 278.

278. *Id.* at 279.

279. *Id.*

280. *Id.* at 279 n.2.

281. 44 N.E.3d 98 (*Citizens Action Coal. II*) (Ind. Ct. App. 2015).

282. *Id.* at 100.

283. *Id.* at 100, 106.

benchmarks.²⁸⁴ The settlement agreement was approved by the IURC over the objection of Citizens Action Coalition (“CAC”).²⁸⁵

In the ninth rider case (“IGCC-9”), CAC challenged Duke’s recovery of an alleged \$61 million in financing costs incurred as the result of a three-month delay in the commissioning of the plant, arguing Duke had failed to demonstrate the increased financing costs attributable to the three-month delay were reasonable and necessary.²⁸⁶ CAC also challenged Duke’s declaration that 50% of the plant was in-service for income tax purposes, even though the plant was undisputedly not in-service for ratemaking purposes under the IGCC-4S1 settlement agreement.²⁸⁷ In its IGCC-9 final order, the IURC approved Duke’s requested recovery, including the financing costs incurred during the three-month delay.²⁸⁸ However, the Commission did not make findings regarding the reasonableness of the delay or whether 50% of the plant was deemed to be in-service for tax purposes.²⁸⁹

CAC appealed, and the court remanded with instructions to the IURC to enter findings on two issues: “(1) ‘whether the three-month delay was chargeable to Duke, and if so, what impact that delay had on Duke’s customers’ rates,’ and (2) ‘a clear statement of the policy and evidentiary considerations underlying its determination regarding Duke’s request that 50% of the Plant be deemed to be in-service.’”²⁹⁰ The court did not state whether the IURC was required to reopen the record to receive new evidence on these issues.²⁹¹

On remand, the IURC determined reopening the record was unnecessary.²⁹² With respect to the delay issue, the IURC found that “based on the extensive evidence” previously offered, Duke’s actions were not unreasonable.²⁹³ With respect to the in-service issue, the IURC stated it had already explored and accepted the IGCC plant’s in-service date for tax purposes in two other unrelated²⁹⁴ rider cases (“ECR-19” and “ECR-20”).²⁹⁵ CAC appealed the remand

284. *Id.* at 101, 104, 108.

285. *Id.* at 101-02. The IURC’s decision was upheld on appeal in an unpublished disposition. *See Citizens Action Coal. of Ind., Inc. v. Duke Energy Ind., Inc.*, No. 93A02-1301-EX-76, 2014 WL 1092210, at *3 (Ind. Ct. App. Mar. 19, 2014).

286. *Citizens Action Coal. II*, 44 N.E.3d at 102-03.

287. *Id.*

288. *Id.*

289. *Id.* at 103.

290. *Id.* (quoting *Citizens Action Coal. of Ind., Inc. v. Duke Energy Ind., Inc.*, No. 93A02-1301-EX-76, 2014 WL 1092210, at *3 (Ind. Ct. App. Mar. 19, 2014) (known as *Citizens Action Coal. I*)); *see also* Rompala, *supra* note 46, at 1152-54 (discussing *Citizens Action Coal. I*).

291. *Citizens Action Coal. II*, 44 N.E.3d at 103.

292. *Id.*

293. *Id.*

294. The cases cited by the IURC on remand were its final orders in two Environmental Cost Recovery (“ECR”) rider cases, in which Duke had requested to continue to track certain costs associated with environmental projects at its older power plants. *Id.* at 109. Taxes related to the IGCC plant were addressed in the ECR cases because they affected the calculation of Duke’s

order on several grounds, including that Duke violated the IGCC-4S1 settlement agreement, the IURC's finding that Duke acted reasonably with respect to the three-month delay was insufficient and unsupported by the evidence, the IURC failed to consider the impact of the increase in rates caused by Duke's partial in-service declaration, and the IURC erred by failing to reopen the record.²⁹⁶

In reviewing the remand order, the court of appeals upheld the IURC's finding that Duke did not violate the IGCC-4S1 settlement agreement as well as its findings with respect to the three-month delay.²⁹⁷ The court found reopening the record was unnecessary because ample evidence had already been presented on the question of whether the delay was caused by Duke or its contractors.²⁹⁸ Examining the issue in the light most favorable to the IURC, the court held there was sufficient evidence to support the IURC's decision that Duke had acted reasonably.²⁹⁹

However, the court reversed the IURC's decision regarding the in-service declaration.³⁰⁰ The court found the IURC erred by relying on ECR orders that were not part of the IGCC-9 record.³⁰¹ No party had requested administrative notice of the ECR orders, nor had the Commission taken such notice *sua sponte*.³⁰² The court also disagreed with the IURC's conclusion that Duke had provided adequate notification of the impact of the in-service declarations on rates.³⁰³ The court noted although Duke had indicated the plant would be declared in-service for tax purposes, Duke did not clarify that its petition for recovery was affected by this determination until the filing of its rebuttal testimony one month before the hearing, and did not explain this would increase rates until the hearing itself.³⁰⁴ The court found, as it had in *Citizens Action Coalition I*, Duke's late clarifications "deprived the Intervenor of the opportunity to object to the rate implications of the partial in-service declaration and conduct discovery on Duke's calculations."³⁰⁵ In addition, the court held the IURC had made insufficient findings as to the value of the rate increases caused by the in-service declaration, as well as insufficient findings regarding whether the increases were reasonable.³⁰⁶ The court remanded the case a second time, ordering the IURC to reopen the record to take additional evidence on these issues.³⁰⁷

weighted average cost of capital and revenue conversion factors. *Id.* at 104.

295. *Id.*

296. *Id.* at 105-06, 108-09, 110.

297. *Id.* at 109-10.

298. *Id.* at 110.

299. *Id.* at 107.

300. *Id.* at 110.

301. *Id.* at 108.

302. *Id.*

303. *Id.*

304. *Id.* at 109.

305. *Id.*

306. *Id.* at 110.

307. *Id.*

Muir Woods, Inc. v. O'Connor addressed the efficacy of agency procedure for accepting evidence upon which the agency's decision is based.³⁰⁸ That case concerned a tax appeal of a decision by the Indiana Board of Tax Review dismissing taxpayer's petitions seeking redress from a property tax assessment.³⁰⁹ Specifically, the court considered the propriety of the agency accepting evidence through a show cause hearing and the compliance with the Board's prescribed procedures for appeal.³¹⁰ *Muir Woods*, a planned unit development, filed two Form 133s (complaint) with the Marion County Property Tax Assessment Board of Appeals (PTABOA) "asserting that the property taxes arising from 2004 and 2005 assessments of its common area land were illegal as a matter of law."³¹¹ "The PTABOA denied the Forms 133."³¹² *Muir Woods* then appealed with the Indiana Board of Tax Review (Board), again claiming the taxes were "illegal as a matter of law."³¹³ The Board issued an "Order to Show Cause Why Petitions Should Not be Dismissed On Grounds That They Allege Errors in Subjective Judgment (Show Cause Order)."³¹⁴ *Muir Woods* responded, and following a hearing, the Board dismissed *Muir Woods*' case.³¹⁵

On appeal, the court observed it "gives great deference to final determinations of the Indiana Board when it acts within the scope of its authority."³¹⁶ Although a taxpayer had two avenues to appeal a property tax assessment at the time of *Muir Woods*' initial claim, *Muir Woods* conceded that despite filing both a Form 131 and Form 133, "it was [only] pursuing the Form 133 appeal procedure."³¹⁷ *Muir Woods* sought reversal of the Board's decision

308. *Muir Woods, Inc. v. O'Connor*, 36 N.E.3d 1208, 1208 n.1 (Ind. T.C. 2015) (consolidating the following cases raising identical issues: *Sylvan Ridge Lakes Homeowners Ass'n, Inc. v. O'Connor*, No. 49T10-1302-TA-39; *Oakmont Homeowners Ass'n, Inc. v. O'Connor*, No. 49T10-1302-TA-40; *Spruce Knoll Homeowners Ass'n, Inc. v. O'Connor*, No. 49T10-1302-TA-41; *Muir Woods Section One Ass'n, Inc. v. O'Connor*, No. 49T10-1302-TA-42), *trans. denied*, 41 N.E.3d 691 (Ind. 2015)).

309. *Id.* at 1209.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at 1210. The court repeated the familiar standard that it would only reverse an agency's decision if it was:

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

Id. (quoting IND. CODE § 33-26-6-6(e)(1)-(5) (2015)).

317. *Id.* at 1209 n.2.

for several reasons.³¹⁸ Chief among those was it believed the Board had no legal authority to raise matters for dismissal *sua sponte*.³¹⁹ Muir Woods also argued before the Board could dismiss a case, it was required to conduct a full evidentiary hearing to comport with due process requirements.³²⁰ Because the Board failed to do that, Muir Woods contended, it erred in dismissing the case “because the errors in its assessments were susceptible to correction under the Form 133 appeal procedure.”³²¹

The court first determined, based on the Board’s regulations, the Board may dismiss a case on its own motion.³²² The relevant regulation provides,

- (a) The board may issue an order of default or dismissal as the result of:
 - (1) failure of the petitioner to state a claim on which relief can be granted; . . .
 - (b) The board may issue an order of default or dismissal on motion of a party or *on its own motion*.³²³

Thus, it was clear the Board’s regulations permitted its actions.

Second, the court held the plain language of Indiana Code section 6-1.1-15-4(a) required a hearing before the Board may correct any errors, but the Board met that requirement when it allowed Muir Woods to present evidence at the Show Cause Hearing.³²⁴

Finally, the Board addressed Muir Woods’ argument that the errors in its assessments could be corrected under the Form 133 appeal procedure, despite the Board’s contentions that the Form 133 appeal procedure was improper.³²⁵ The court sided with the Board.³²⁶ In reaching its conclusion, the court analyzed Muir Wood’s various contentions that its use of the Form 133 procedure was proper.³²⁷ Initially, the court addressed and rejected Muir Woods’ argument that the court should follow the Board’s prior determination of the issue.³²⁸ In doing so, it noted a former Board determination of the legality of an assessment is not binding on the court.³²⁹ The Tax Court reviews any questions of law arising from the Board *de novo*.³³⁰ This is in line with the standard of review of administrative agency

318. *Id.* at 1211.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* (quoting 52 IND. ADMIN. CODE § 2-10-2(a)(1), (b) (2012)).

324. *Id.* at 1211-12.

325. *Id.* at 1212.

326. *Id.*

327. *Id.* Although not germane to this Article, the court considered the use of the Form 133, the requirements of the appeal, whether the requests for correction can be based solely on objective facts, and past practice of the Assessor. *Id.* at 1213.

328. *Id.* at 1212-13.

329. *Id.*

330. *Id.* at 1213 (citing 6787 Steelworkers Hall, Inc. v. Scott, 933 N.E.2d 591, 595 (Ind. T.C. 2010)).

decisions.

The court also rejected Muir Woods' arguments that it properly used the Form 133 appeal procedure to claim the assessment was "taxed more than once" because it failed to raise the issue at any point prior to the appeal.³³¹ Hence, the argument was waived. The court affirmed the Board's decision holding the "Board acted within the scope of its authority."³³²

IV. PROCEDURAL DUE PROCESS

In exercising their authority, agencies must also ensure the procedural due process rights of those they regulate are respected. The court of appeals addressed this issue in *Indiana Bureau of Motor Vehicles v. Gurtner*,³³³ though it ultimately upheld the agency decision on exhaustion grounds. In *Gurtner*, the Bureau of Motor Vehicles ("BMV") suspended the license of a driver for failure to maintain insurance.³³⁴ The driver appealed the BMV suspension to the Superior Court of Marshall County and explained she paid for the insurance, but the insurance agent made a mistake and dropped her from coverage.³³⁵ Finding the BMV does not permit drivers an administrative hearing to explain the reasons for failing to maintain insurance, the court ordered the BMV to dismiss the suspension.³³⁶ The BMV appealed on the grounds the trial court lacked discretion to overturn the suspension.³³⁷

The court of appeals held the statute authorizing the BMV to suspend licenses for failure to provide proof of financial responsibility is excluded from review under AOPA.³³⁸ However, subsection (d) of the statute permits an affected person to file a petition for review under the same chapter.³³⁹ "Whatever can be said about the petition for judicial review called for in [the statute], we know that it is not the agency-deferential review set forth in the AOPA[.]" the court explained.³⁴⁰ The court also determined, under the plain language of the statute, the BMV does not have discretion in deciding whether to suspend a license.³⁴¹

The court then evaluated whether failing to provide the driver with

331. *Id.* The court also addressed Muir Woods' arguments regarding the effect and restrictions of using the Form 133 appeal procedure, the Assessor's alleged zero value determination, and a mathematical error in the adjustment of the base rate. The court rejected all of Muir Woods' arguments. *Id.* at 1213-14.

332. *Id.* at 1214.

333. *Ind. Bureau of Motor Vehicles v. Gurtner*, 27 N.E.3d 306 (Ind. Ct. App. 2015).

334. *Id.* at 308.

335. *Id.* at 309.

336. *Id.*

337. *Id.* at 308.

338. *Id.* at 309.

339. *Id.* (citing IND. CODE § 9-25-6-16(d) (2015)).

340. *Id.* at 309-10.

341. *Id.* at 310-11.

administrative review violated her due process rights.³⁴² The court observed that though driving is not a fundamental right, a driver may still bring a due process claim for the temporary taking of driving privileges.³⁴³ Citing U.S. Supreme Court precedent, the court held continued possession of a license, once issued, can become essential in the pursuit of a livelihood and, in such cases, licenses are not to be taken away without the “procedural due process required by the Fourteenth Amendment.”³⁴⁴

The court explained that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”³⁴⁵ As such, except in emergency situations, a court seeking to terminate an interest protected by due process “must afford notice and opportunity for hearing appropriate” to the case prior to the termination becoming effective.³⁴⁶ The court concluded because there was nothing in the present case to suggest an emergency, the State was required to afford the driver the opportunity of a pre-termination hearing.³⁴⁷

Although the court found post-suspension review only provides adequate due process if the effectiveness of the suspension is stayed pending the judicial hearing, it rejected the driver’s argument that the BMV should have offered her the opportunity to request a hearing to explain her failure to maintain insurance was not her fault.³⁴⁸ The court explained even if the BMV afforded her the opportunity for a hearing, it could not disregard the clear language in the statute and not suspend her license.³⁴⁹ The court further explained, “[The driver’s] complaint is essentially that the statute is unfair; but the BMV is required to apply the relevant statute whether or not it results in a perceived unfairness in a particular case.”³⁵⁰

The court observed although the BMV suspended the license before the petition for judicial review could be heard, the driver failed to request a stay of the suspension.³⁵¹ The court also pointed out the driver failed to seek relief under a statute that would have permitted her to request a “hardship” license from the trial court on the basis that her failure to maintain insurance was not her fault.³⁵²

342. *Id.* at 311.

343. *Id.* at 312-13.

344. *Id.* at 313 (quoting *Bell v. Burson*, 402 U.S. 535, 539 (1971)).

345. *Id.* (quoting *McKinney v. McKinney*, 820 N.E.2d 682, 688 (Ind. Ct. App. 2005) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976))).

346. *Id.*

347. *Id.*

348. *Id.* at 314.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* The court referenced Indiana Code section 9-24-15-1(1) as enacted at the time of Gurtner’s suspension. *Id.* The referenced statute was subsequently repealed, but a similar statute (Indiana Code section 9-30-16-3), which “allows a trial court to stay the effectiveness of a license suspension and grant ‘specialized driving privileges,’” was subsequently enacted. *Id.* at 314 n.3

The court held because the driver failed to avail herself of these provisions, she was not denied procedural due process.³⁵³

CONCLUSION

Administrative agencies play a critical role in our system of government, imparting their specialized expertise on the judicial, legislative, and executive responsibilities they are given. In turn, courts are entrusted with the critical responsibility of ensuring that administrative agencies stay within the scope of their statutory authority, and that the agencies follow the proper procedures in executing their responsibilities. This Article surveyed how courts have recently addressed the varied and complex issues that arise with administrative agencies.

(quoting IND. CODE § 9-30-16-3 (2015)).

353. *Id.* at 315.