# SURVEY OF INDIANA ADMINISTRATIVE LAW

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## INTRODUCTION

Modern Americans live in a regulatory state in which many aspects of our ordinary lives are, in one way or the other, affected by the actions of administrative agencies. Whether it is the mundane task of obtaining a driver's license, the now all too common prospect of applying for unemployment benefits, or even exhibiting an animal at the Indiana State Fair, our lives, and the role of various administrative agencies, are intertwined. With the reach of administrative agencies into our daily lives, and the breadth of work they undertake having grown substantially over the years, a body of law governing those agencies has likewise developed.

At this point, the basic principles of administrative law are well settled. But, like any area of law, there are always new ideas and approaches to be considered, novel questions to be answered, and new policies to be followed. The purpose of this survey Article is to review some of the opinions issued by Indiana's appellate courts reviewing agency actions and to consider how those courts have addressed not only those new and novel issues, but also how they have addressed the basic rules in the face of changing jurisprudence.

## I. JUDICIAL REVIEW OF AGENCY ACTIONS

Under long established Indiana law, most decisions of the State's administrative agencies are subject to judicial review.[1] This review is limited by statutory and common law requirements governing aspects of the process, such as who may seek review, what may be reviewed, when such review is available, and under what standard courts are to conduct the review.

In general, judicial review of agency actions is limited and deferential.[2] This limited scope of review is dictated, in part, by the nature of administrative

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1. The Indiana Supreme Court has held that there is a constitutional right to judicial review of agency decisions. Ind. Dep't of Highways v. Dixon, 541 N.E.2d 877, 880 (Ind. 1989) (citing State *ex rel.* State Bd. of Tax Comm'rs v. Marion Superior Court, 392 N.E.2d 1161 (Ind. 1979)). In many cases, the Indiana Administrative Orders and Procedures Act ("AOPA") sets out the conditions by which a party can obtain that review. AOPA is, however, not applicable to all agencies or even to all agency actions. For example, some agencies, such as the Indiana Utility Regulatory Commission and the Department of Workforce Development, are expressly exempted from AOPA, although judicial review is still available through other statutory grounds. *See, e.g.*, IND. CODE § 4-21.5-2-4 (2015); *id.* §§ 8-1-3-1 to -11; *id.* § 22-4-17-12. Only certain types of agency actions, such as an action "related to an offender within the jurisdiction of the department of correction," are expressly exempt from AOPA and judicial review. *See id.* § 4-21.5-2-5(6).

2. *See, e.g.*, *id.* § 4-21.5-2-4; *id.* §§ 8-1-3-1 to -11; *id.* § 22-4-17-12.

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agencies as executive bodies empowered by the legislature and is thus derived from the doctrine of the separation of powers.[3] While it does not apply to all agencies, Indiana's Administrative Orders and Procedures Act ("AOPA") sets out the basic, principled limitations placed on judicial review of administrative decisions by declaring that a court may only overturn a decision by an administrative agency when the decision is:

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

The following section reviews how courts have reviewed certain agency actions within this structure and how courts have drawn the line between the role of the court and the role of the agency.

### *A. Ascertaining the Scope of Agency Authority*

As creatures of statute, administrative agencies only have those powers delegated to them by the legislature.[5] In many instances resolving whether an agency has acted within its statutory authority is a relatively simple proposition that involves interpretation of the statute granting those powers. But in some instances, because of the breadth of issues some agencies address, there can be an overlap between the role of an agency and the role of the judicial branch in resolving various aspects of a dispute.[6] In these cases, the doctrine of "primary jurisdiction" comes in to play, as it did in *Moran Electric Service, Inc. v. Indiana Department of Environmental Management*.[7]

The case in *Moran* arose out of contamination on property owned by the Ertel Manufacturing Corporation.[8] As a result of that contamination, the City of Indianapolis ("the City") filed a civil case to compel Ertel to reimburse it for certain clean up costs.[9] Later, the Indiana Department of Environmental Management ("IDEM") brought a civil action against Ertel, seeking, among other relief, a declaration that "Ertel would be responsible to IDEM for past and future costs associated with the cleanup of hazardous substances at or flowing from the

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3. *See id.* § 4-21.5-2-5(6).

4. *Id.* § 4-21.5-5-14(d).

5. *See, e.g.*, State Bd. of Registration for Prof'l Eng'rs v. Eberenz, 723 N.E.2d 422, 426 (Ind. 2000). It is also appropriate to say that agencies possess the "implicit power as is necessary to effectuate the regulatory scheme outlined by the statute." *Id*. at 426-27 (quoting Barco Beverage Corp. v. Ind. Alcoholic Beverage Comm'n, 595 N.E.2d 250, 254 (Ind. 1992)).

6. *See e.g.*, 8 N.E.3d 698, 702-06 (Ind. Ct. App.), *aff'd on reh'g*, 13 N.E.3d 906 (Ind. Ct. App.), *trans. denied*, 21 N.E.3d 839 (Ind. 2014).

7. *Id.*

8. *Id.* at 701.

9. *Id*. at 700.

site."[10] Ultimately, Ertel reached agreement with IDEM, the City, and insurance companies regarding the litigation, and the parties entered into an Administrative Agreed Order and a settlement agreement.[11]

As part of the agreements, the parties established two escrow accounts, one to reimburse IDEM for past costs and the other to cover IDEM's future costs associated with remediation.[12] IDEM agreed to provide Ertel with a No Further Action letter ("NFA Letter") once the remediation goals set out in the settlement agreement were met.[13] The agreements were approved by the trial court presiding over the two civil actions.[14] In 2012, IDEM issued the NFA Letter, at which point $846,000.00 remained in the second escrow fund to cover future remediation costs.[15]

Shortly after IDEM issued the NFA Letter, Moran Electric Service, Inc. ("Moran"), an owner of property adjacent to the Ertel site, filed a petition with the Office of Environment Adjudication ("OEA") challenging the issuance of the letter on the grounds that IDEM had failed to consider "off-site migration of the contaminants that had occurred and was continuing to occur."[16] Moran was eventually joined by another party, Threaded Rod Company, Inc. ("Threaded Rod"), in that challenge.[17]

At approximately the same time, Threaded Rod and Moran filed petitions to intervene in the civil action between IDEM and Ertel and sought to prevent the distribution of the $846,000.00 in the second escrow account to the City as required under the agreements.[18] The trial court denied Moran and Threaded Rod's petitions to intervene, found that it did not have subject matter jurisdiction to address their arguments, and ordered that the funds be released to the City.[19]

On appeal, the court of appeals, in addressing the trial court's conclusion that it lacked subject matter jurisdiction to consider the claims, recognized that both the exhaustion of administrative remedies and the doctrine of "primary jurisdiction" were relevant considerations.[20] As the court explained, primary jurisdiction "comes into play when a claim is cognizable in a court but adjudication of the claim 'requires the resolution of issues with, under a regulatory scheme, have been placed within the special competence of an administrative body . . . ."[21] Under the doctrine "if at least one of the issues

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10. *Id*. at 700-01.
11. *Id*. at 701.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*. at 701-02.
19. *Id*. at 702.
20. *Id.*
21. *Id*. (quoting Austin Lakes Joint Venture v. Avon Utils., Inc., 648 N.E.2d 641, 645 (Ind. 1995)).

involved in the case is within the jurisdiction of the trial court, the entire case falls within its jurisdiction," and the trial court is "not ousted of subject matter jurisdiction by the presence in the case of one or more issues which arguably are within the jurisdiction of an administrative or regulatory agency."[22] In such a case, the court explained, the trial court should retain jurisdiction and refer the issues requiring administrative resolution to that agency.[23]

The court then noted that the key issue involved "whether the trial court properly ordered the remaining [escrow funds] distributed to the City, which is dependent upon whether IDEM properly issued a NFA Letter regarding the Ertel property."[24] Although the trial court had likened the case to that of *Indiana Department of Environmental Management v. Raybestos Products, Co.*[25] and *Indiana Department of Environmental Management v. NJK Farms, Inc.*,[26] the court of appeals ultimately found those cases distinguishable.[27] The court agreed with the reasoning of *Raybestos* and *NJK Farms* that despite the overlay between enforcement of the settlement in both the trial court and at IDEM, IDEM's action in issuing the NFA Letter "constitutes an agency action in the context of AOPA" requiring the issue to be addressed before the OEA.[28] The distinguishing feature of *Moran*, however, was the distribution of the escrow funds, which the court held "only the trial court had the ability to control."[29] As a result, unlike the facts in *Raybestos* and *NJK Farms*, the trial court had exclusive control over one portion of the litigation, even though the disbursement of funds depended on the OEA's ultimate determination of the propriety of IDEM's issuance of the NFA Letter.[30] Applying the doctrine of primary jurisdiction, the court of appeals thus concluded that the trial court had erred in dismissing the case, and it remanded the matter to the trial court.[31]

*Moran* is important because it illustrates the unique relationship between the judicial branch and administrative agencies.[32] It demarks the point at which judicial power is restrained by showing deference to agencies' unique competencies while highlighting the judiciary's retention of its independent power as a co-equal branch of government.[33]

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22. *Id*. at 703 (quoting *Austin Lakes*, 648 N.E.2d at 645-46).
23. *Id*.
24. *Id*.
25. 897 N.E.2d 469 (Ind. 2008).
26. 921 N.E.2d 834 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 818 (Ind. 2010).
27. *Moran*, 8 N.E.3d at 703-06.
28. *Id*. at 706.
29. *Id*. (citing IND. CODE § 13-25-4-10 (2014)).
30. *Id.* at 705.
31. *Id*. at 706, 708.
32. *Id.* at 706.
33. *Id.*

### *B. Analyzing an Agency's Findings of Fact*

Under AOPA, an agency's decision may be overturned by a court if the decision is "unsupported by substantial evidence."[34] Likewise, all agency orders must contain findings of fact, and the findings of "ultimate fact" must be supported by reference to the underlying basic facts supporting those findings.[35] This survey period includes a number of cases in which parties questioned whether an agency's order contained adequate findings and whether the findings were supported by the record.

One such case is *Terkosky v. Indiana Department of Education*.[36] In that case, Patricia Terkosky challenged the Department of Education's decision to suspend her teaching license for two years following allegations of "immorality and misconduct in office."[37] More specifically, the Department of Education suspended Terkosky's license after determining that Terkosky had used inappropriate punishments or excessive force numerous times in the course of her work with special needs students.[38] Before the court of appeals, Terkosky argued both that the agency order did not contain basic findings of fact and that the conclusions were not supported by substantial evidence.[39]

In contending that the agency's order lacked satisfactory findings of fact, Terkosky argued that the order contained only "findings which simply recite what the testimony was or what evidentiary documents contained" and was thus defective.[40] In rejecting this argument, the court set the stage by examining what does, and what does not, constitute a sufficient finding of fact.[41] In summarizing that review, the court noted that in order to be valid, "findings must be specific enough to provide the reader with an understanding" of the agency's reasoning "based on the evidence for its findings of ultimate fact."[42] Although mere "statements to the effect that 'the evidence revealed such and such . . . are not findings of basic fact in the spirit of the requirement,'"[43] their inclusion is "not harmless error" but "mere surplusage."[44]

The court then turned to the ALJ's findings and concluded that despite Terkosky's contention, they did contain specific findings, rather than simple summaries of the testimony.[45] With respect to certain findings which Terkosky

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34. IND. CODE § 4-21.5-5-14(d)(5) (2015).

35. *See id.* § 4-21.5-3-27.

36. 996 N.E.2d 832 (Ind. Ct. App. 2013).

37. *Id*. at 835.

38. *Id*. at 836-40.

39. *Id*. at 846.

40. *Id*. at 847 (quoting Brief for Appellant at 20, Terkosky v. Indiana Dep't of Educ., 996 N.E.2d 832 (Ind. Ct. App. 2013) (No. 49A02-1212-PL-01000), 2013 WL 2489571).

41. *Id*. at 847-48 (discussing Perez v. U.S. Steel Corp., 426 N.E.2d 29, 30-33 (Ind. 1981)).

42. *Id*. at 848 (quoting *Perez*, 426 N.E.2d at 33).

43. *Id*.

44. *Id*.

45. *Id.* at 849.

contended did not "determine or conclude" that the incidents occurred, the court noted that "the balance of the ALJ's findings appear to recite what the ALJ found to have happened" and that the few findings which merely repeat Terkosky's testimony "although perhaps surplusage, do not cast doubt on whether the ALJ in her order found that the incidents in question occurred."[46]

The second evidentiary contention raised by Terkosky was that the ALJ's order was not supported by the evidence.[47] This required an analysis of "whether the evidence was adequate to support the conclusion that Terkosky's conduct constituted immorality or misconduct in office" under the relevant statute and standard.[48] In addressing this argument, the court again turned to the ALJ's order, considered the ALJ's application of the facts to the appropriate legal standard, and concluded that any contention that the conclusions were unsupported by the evidence "amount[s] to an invitation to reweigh the evidence, which we may not do."[49] The court did not consider the fact that the ALJ's order did not "specifically identify whether Terkosky's actions were problematic under either the 'immorality' or 'misconduct in office' prongs" under the applicable statute to be reversible error.[50] Rather, the court reviewed the evidence in light of the relevant legal standard and concluded that the acts committed by Terkosky fell within the "misconduct" prong.[51] The court thus found no error in the trial court's affirmation of the agency's action.[52]

The *Terkosky* decision illustrates not only the sort of fact finding that an agency must undertake to conform to the appropriate standards applicable to agency actions but also the important role that adequate findings and an adequate record play in judicial review.[53] But what happens if the agency does not make any findings? That question was addressed in *Citizens Action Coalition v. Duke Energy of Indiana* ("*CAC*").[54]

The *CAC* case is one of a number of appeals related to Duke Energy's construction of a new powerplant in Edwardsport, Indiana, and associated efforts to obtain cost recovery from its ratepayers for the project.[55] The particular appeal here involved a decision by the Indiana Utility Regulatory Commission ("IURC") to approve Duke's recovery from ratepayers of all costs incurred over a six-month span between October 2011 and March 2012.[56] Of particular importance in the proceeding was whether Duke was entitled to recover all of its financing

46. *Id*.
47. *Id.* at 854.
48. *Id*.
49. *Id*. at 854-55.
50. *Id*. at 855.
51. *Id*. at 856-57.
52. *Id*. at 857.
53. *See id*.
54. 16 N.E.3d 449 (Ind. Ct. App. 2014).
55. *See id*. at 450-51.
56. *Id*. at 455.

costs despite a delay in commissioning the plant.[57]

In challenging the IURC's order, the CAC argued that the order was deficient because it failed "'to articulate the policy and evidentiary factors underlying its resolution of all issues which are put in dispute by the parties.'"[58] Duke, on the other hand, contended that the IURC's order was sufficient because it only needed to "contain specific findings on all factual determinations material to its ultimate conclusions."[59] Without resolving which standard was the appropriate standard to apply, the court of appeals concluded that the "Commission's order was deficient under both standards" because it "failed to articulate the policy and evidentiary factors . . . put in dispute" by the CAC, and "also failed to make adequate findings on all factual determinations material to its ultimate conclusions to allow Duke to pass along to ratepayers all" of Duke's costs.[60]

In reaching this conclusion, the court examined the IURC's order with respect to the approval of additional financing costs despite a three-month construction delay.[61] In doing so, it noted that the first paragraph of findings was "merely the Commission's reiteration" of the parties' testimony which 'contain[ed] no findings.'"[62] In fact, the court determined that the "only true finding" in the order was the IURC's conclusion that the CAC's concerns had been addressed in prior orders and that it was "not persuaded that evidence presented herein alters those findings."[63] The court then stated that the evidence "before the Commission did not support this finding."[64]

In support of this conclusion, the court of appeals examined evidence introduced during the hearing that the three-month construction delay, which CAC alleged led to at least some of the increased financing costs, was not caused by the same issues which caused the earlier delays addressed in the previous decisions referred to in the IURC's order.[65] This evidence, the court concluded, was "[c]ontrary to the Commission's statement" that the CAC's concerns had been "addressed in other proceedings" rendering that finding unsupported by the evidence.[66] With respect to the actual financial impact, if any, caused by the delay the court again noted that the IURC's order simply ignored the issue, making no finding on the presented evidence as to whether or not Duke's actions were the cause of the delay, and, accordingly, if Duke was therefore responsible for some of the costs associated with the delay.[67] Because of this complete

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57. *Id*.

58. *Id*. at 457 (quoting L.S. Ayres & Co. v. Indianapolis Power & Light Co., 351 N.E.2d 814, 830 (Ind. Ct. App. 1976)).

59. *Id*.

60. *Id* (emphasis omitted).

61. *Id*. at 457-60.

62. *Id*. at 458.

63. *Id*.

64. *Id*.

65. *Id*. at 458-59.

66. *Id*. at 459.

67. *Id.* at 459-60.

failure to include any findings supporting the IURC's ultimate findings, the court remanded the matter to the IURC to make such determinations.[68]

The decision in *CAC* underscores how important the role an agency's fact finding is in judicial review of agency decisions.[69] Indeed, the remand of the case to the IURC was predicated on the Commission's failure to make any findings that would support its ultimate determinations.[70] Although this is an extreme example, the agency's role as a fact finder can implicate serious procedural issues that can invalidate an agency's decision for other reasons as well.

One example of procedural defects invalidating an agency action is the case *Cardinal Ritter High School, Inc., v. Bullock*.[71] That decision involved review of a finding by the Indiana Civil Rights Commission ("ICRC") that Cardinal Ritter High School ("Ritter") had violated a student's rights when it did not select her as a member of the girls' varsity basketball team.[72] Although the court of appeals also addressed a challenge to the ICRC's jurisdiction over Ritter,[73] the court reviewed procedural inadequacies within the ICRC's review process.[74] First, the court noted that the process took roughly six years, which the court described as "an inordinate amount of time" during which two separate ALJs reviewed the matter, only one of whom actually conducted a hearing.[75]

The delay and the fact that the ALJ who ultimately issued the order did not conduct a hearing deeply troubled the court, noting that courts reviewing agency actions are "prohibited from reweighing the evidence or judging the credibility of witnesses and must accept the facts as found by the administrative body."[76] That "prohibition arises from the fact that the administrative agency[,]" through the ALJ, "is the party who heard directly the witnesses' testimony, observed their demeanor, and determined their credibility."[77] In this case, however, the ALJ who issued the order was "determining the credibility of witnesses she did not see"[78] so it was, effectively, impossible to rely on the findings of the ALJ.

This was especially true, the court noted, in this case which "hinges entirely

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68. *Id*. at 460. The court of appeals reached a similar conclusion on a different but related issue. *See id*. at 460-62. Although framed as being "contrary to law," the essential contention was the same: that the IURC failed to make any findings on a material issue. *Id.* Because the court again determined that the IURC's order simply ignored the issue and made no attempt to address the competing evidence introduced during the proceeding, that portion of the opinion is not reviewed here. *Id.* at 461-62.

69. *Id*. at 460.

70. *Id*.

71. 17 N.E.3d 281, 287-92 (Ind. Ct. App. 2014).

72. *Id*. at 282.

73. *See id*. at 287-90.

74. *Id*. at 290-92.

75. *Id*. at 290.

76. *Id*.

77. *Id*.

78. *Id*. at 291.

on credibility."[79] The danger of relying on an ALJ's findings who did not have the benefit of participating in the hearing "becomes apparent when one looks to the record in this case[,]" which the court determined showed significant erroneous conclusions based on the evidence presented.[80] This ultimately led the court to conclude that "when, as here, a case hinges entirely on credibility, the issuance of an order by an ALJ who did not hear the evidence . . . is not in accordance with law, is contrary to the constitutional rights of the parties, and is without observance of procedures required by law." [81] In other words, the evidentiary failing of the agency caused the procedure used to be sufficient to require the vacation of the order and a remand of the case for a new hearing.[82]

## II. STATUTORY COMPLIANCE TO OBTAIN JUDICIAL REVIEW

Except for those agencies and agency actions exempted from its requirements, AOPA "establishes the exclusive means for judicial review of an agency action."[83] Therefore, by statute, a party must follow the provisions of AOPA in order to obtain judicial review of an agency action, including satisfying a number of specific statutory requirements.[84]

One of those requirements is that before seeking judicial review, a party must exhaust its available administrative remedies.[85] The *First American Title Insurance Co. v. Indiana Department of Insurance* case addressed, in part, whether a party's failure to exhaust administrative remedies precluded judicial review.[86] This issue is not novel; a party's compliance with the exhaustion requirement is a long-standing, and oft litigated, issue in administrative law in no small part because there are numerous recognized exceptions to the requirement.[87] What makes the *First American* decision particularly interesting is the way in which the court of appeals analyzed the issue. As the court recognized, "the failure to exhaust administrative remedies—has often been described as implicating a court's subject matter jurisdiction."[88] That is, exhausting one's administrative remedies is a requirement that, if not fulfilled,

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79. *Id*.

80. *Id*. at 291-92.

81. *Id*. at 292.

82. *Id*.

83. IND. CODE § 4-21.5-5-1 (2015).

84. *See id.* § 4-21.5-5-2.

85. *Id.* § 4-21.5-5-4.

86. First Am. Title Ins. Co. v. Ind. Dep't of Ins., 990 N.E.2d 9, 13 (Ind. Ct. App.), *trans. granted*, 997 N.E.2d 356 (Ind. 2013), *vacated in part and aff'd in part*, 19 N.E.3d 757 (Ind. 2014). Although issued during the last survey period, transfer was granted in this case on November 7, 2013, and therefore it was not included in last year's survey. Because the court of appeals, and subsequently the Indiana Supreme Court, opinions address several issues of administrative law, the case is included here.

87. *See id*.

88. *Id.* (citing Johnson v. Celebration Fireworks, Inc., 829 N.E.2d 979, 984 (Ind. 2005)).

would deprive a reviewing court of the power to consider the case. Nevertheless, the court also noted that in other cases the exhaustion requirement had been treated as a "procedural and not jurisdictional error."[89] Following the reasoning of the Indiana Supreme Court's decision in *K.S. v. State* describing subject matter jurisdiction as "the power to hear and determine cases of the general class to which any particular proceeding belongs[,]" the court of appeals stated that it "is clear that the Marion Superior Court possessed jurisdiction over the general class of cases to which this petition belonged."[90] Thus, the court held that an argument that a party had failed to meet the statutory requirement to exhaust its administrative remedies raises a procedural error, not a jurisdictional one, which is, therefore, an error that could be waived.[91]

On transfer, the Indiana Supreme Court summarily affirmed the court of appeals on this issue.[92] It hastened to add that "a finding of waiver may not be appropriate in every instance" and that the "facts of a particular case may dictate otherwise."[93] The court then noted the many benefits that "accrue in requiring the exhaustion of administrative remedies" and concluded that in light of those benefits, "even where a claim of failure to exhaust administrative remedies has been raised untimely that fact alone does not necessarily dictate the court should declare the claim waived."[94]

The decision in *First American* with respect to the exhaustion requirement comes at a time when there seems to be some tension between requiring compliance with statutory provisions to obtain judicial review and allowing litigants more leniency by not treating imperfect compliance as an absolute bar to such review.[95] Indeed, as recently as last year, cases were reviewed as part of this survey in which parties seeking judicial review failed to comply with one or more of the statutory requirements with varying outcomes.[96] Recently, several Indiana Court of Appeals decisions addressed whether non-compliance with AOPA's procedures bars judicial review of an agency order with differing results.[97] Unlike its opinion in *First American* with respect to the exhaustion requirement, however, the Indiana Supreme Court found that, in respect to filing the agency record, full statutory compliance is a pre-requisite to judicial review.[98]

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89. *Id*. (citing Packard v. Shoopman, 852 N.E.2d 927, 932 (Ind. 2006)).

90. *Id*. (quoting K.S. v. State, 849 N.E.2d 538, 540 (Ind. 2006)).

91. *Id*.

92. First Am. Title Ins. Co. v. Ind. Dep't of Ins., 19 N.E.3d 757, 760 (Ind. 2014).

93. *Id*.

94. *Id.* at 761.

95. *See, e.g.*, Joseph P. Rompala, *Survey of Indiana Administrative Law*, 47 IND. L. REV. 943, 954-56 (2014).

96. *See, e.g.*, *id.*

97. *See generally* Teaching Our Posterity Success, Inc. v. Ind. Dep't of Educ., 3 N.E.3d 1042 (Ind. Ct. App.), *trans. granted*, 19 N.E.3d 764 (Ind.), *vacated in part and aff'd in part*, 20 N.E.3d 149 (Ind. 2014).

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

In *Teaching Our Posterity Success, Inc. v. Indiana Department of Education*, the court of appeals considered in part whether the trial court had properly dismissed Teaching Our Posterity Success' ("TOPS") petition for judicial review due to its failure to timely file the administrative agency record.[99] The court recognized the existence of a "split of authority as to the effect this failure should have on TOPS' petition for judicial review."[100] The court then briefly reviewed the Indiana Supreme Court's ruling in *Indiana Family & Social Services Administration v. Meyers*, in which the Indiana Supreme Court, evenly divided on the issue, concluded that "imperfect compliance with the filing requirement" is not necessarily a fatal defect provided that the portions of the agency record submitted to the trial court are sufficient "to accurately assess the challenged agency action."[101] The court of appeals noted that the supreme court "has recently granted transfer" in cases raising the issue and that "our currently-constituted supreme court may definitively resolve this issue one way or the other."[102] The court, however, concluded that although it may be the "best practice" to file the agency record, "dismissal of a petition for judicial review is not warranted" when the agency record is not filed and not necessary for the court to conduct judicial review.[103]

The court of appeals then proceeded to consider the question "whether TOPS presented sufficient documentation to the trial court to permit it to rule upon the petition for judicial review."[104] The only material from the administrative record that TOPS presented to the trial court was a copy of a letter from the Department of Education that was issued after TOPS sought internal review of a decision to remove TOPS from the list of approved Supplemental Educational Services providers.[105] The essence of TOPS' contention was that the letter "was defective for failing to contain any findings."[106] The court agreed, concluding that the letter was a final agency order "that is defective on its face for lacking any statutorily-mandated findings of fact and conclusions of law."[107] Consequently,

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99. *Teaching Our Posterity Success, Inc.*, 3 N.E.3d at 1043-44.

100. *Id*. at 1045.

101. *Id*. (quoting Ind. Family & Soc. Servs. Admin. v. Meyers, 927 N.E.2d 367, 371 (Ind. 2010)). The supreme court in *Meyers* was evenly divided because Justice Sullivan did not participate in the case. By rule, when the supreme court is evenly divided after transfer is granted, the decision of the court of appeals "shall be reinstated." IND. R. APP. PROC. 58C. Because the court of appeals had, in a split decision, reached the conclusion that untimely filing of the complete agency record did not require dismissal, the supreme court's even split left the court of appeal's result in place. *See Meyers*, 927 N.E.2d at 368-70 (for discussion of procedural status on transfer); *see also* 900 N.E.2d 74 (Ind. Ct. App. 2009) (for court of appeals opinions and dissent).

102. *Teaching Our Posterity Success, Inc*., 3 N.E.3d at 1045.

103. *Id.* (quoting Lebamoff Enter. Inc. v. Indiana Alcohol & Tobacco Comm'n., 987 N.E.2d 525, 530 (Ind. Ct. App. 2013)).

104. *Id.* at 1045.

105. *Id*. at 1043-44.

106. *Id*. at 1046.

107. *Id*.

with an order that "was facially defective," the court concluded that the entire agency record did not need to be submitted to the trial court and that the court had erred in dismissing TOPS' petition for judicial review.[108] Thus, the court remanded the matter to the agency to "provide it the opportunity to make the necessary findings."[109]

The Indiana Court of Appeals reached the same result in *First American*.[110] In that case, the court considered, in part, whether the trial court had erred in refusing to dismiss a petition for judicial review when the party seeking review failed to timely file the agency record.[111] Again, the court acknowledged the existence of a split of authority on the issue and considered whether the material submitted to the trial court was sufficient to conduct review.[112] In concluding that the record was complete enough, the court of appeals emphasized that the question on review was "a pure question of law"—namely whether the agency's failure to act within a statutory timeframe rendered its decision void—and that "[t]o the extent any facts were necessary [to resolve this question], they were included in the submitted materials."[113] The court also noted that because no evidentiary hearing was conducted before the administrative agency, "most of the materials typically included in an agency record" and required by AOPA to be filed with a reviewing court did not exist.[114] Emphasizing again the "narrow question of law presented to the trial court for judicial review[,]" the court of appeals concluded that the material presented to the trial court was sufficient to enable judicial review.[115]

The court of appeals reached a different result, however, in *Brown v. Department of Child Services*.[116] That case involved judicial review of a decision by the Department of Child Services ("DCS") in which it substantiated a claim that Brown, a foster parent, had abused a child placed in his care.[117] Among Brown's contentions before the trial court was that the agency had violated his constitutional rights by excluding him from the hearing room when his accuser testified to the abuse.[118] DSC filed a motion to dismiss the petition, arguing that

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108. *Id*.

109. *Id*. at 1047.

110. First Am. Title Ins. Co. v. Ind. Dep't of Ins., 990 N.E.2d 9 (Ind. Ct. App.), *trans. granted*, 997 N.E.2d 356 (Ind. 2013), *vacated in part and aff'd in part*, 19 N.E.3d 757 (Ind. 2014).

111. *Id*. at 10-11.

112. *Id*. at 13-14.

113. *Id*. at 14.

114. *Id*. at 14-15.

115. *Id*. at 15.

116. 993 N.E.2d 194 (Ind. Ct. App. 2013), *trans. denied*, 2 N.E.3d 1263 (Ind. 2014). Like *First American*, this case was originally decided by the court of appeals during the prior survey period. Transfer was subsequently granted, but, at the request of Brown, the appeal was subsequently dismissed, and the order granting transfer was vacated and transfer denied. *See Brown*, 2 N.E.3d at 1263; *see also supra* note 86.

117. *Brown*, 993 N.E.2d at 196-97.

118. *Id.* at 199.

Brown's failure to file the agency record precluded further review.[119] The trial court concluded otherwise, reasoning that the material presented by Brown was sufficient to conduct a review of a portion of the agency's action, including barring Brown from the hearing room.[120]

The court of appeals, however, ultimately agreed with DCS' position.[121] As in *TOPS* and *First American*, the court acknowledged the existence of a "division in both the Indiana Supreme Court and this Court as to what should happen when a petitioner fails to submit the agency record timely, but the documents filed with the petition for review may be sufficient for the trial to adjudicate the claims raised in the petition for review."[122] The court then reviewed the opinions in *Meyer* and *Lebamoff* before concluding that although there is "no consensus . . . one thing is certain: if the court needs the agency record to resolve an issue, then the petitioner's failure to file the agency record . . . means that the case must be dismissed."[123] Thus, the court of appeals turned its attention to what it deemed the "question in this case[,]" specifically "was the agency record needed to review Brown's claim that his constitutional rights were violated when he was not allowed in the hearing room."[124]

In answering this question, the court of appeals noted that a party's right to be present during all parts of trial under the Indiana Constitution was not absolute and that a party could waive the right or be excluded from the proceeding "under extreme circumstances."[125] Reviewing the ALJ's findings, the court noted that the ALJ had found the existence of such "extraordinary circumstances" to justify the exclusion of Brown from a portion of the hearing.[126] Reasoning that such a finding was "extremely fact sensitive" and that the ALJ's order relied on "the testimony and all evidence presented at the hearing," the court of appeals concluded that in this case "[w]ithout the agency record, there can be no judicial review of whether extraordinary circumstances existed that justified Brown's exclusion from the hearing."[127] Upon reaching that conclusion, the court held that in this case, because the record was necessary to facilitate judicial review, Brown's failure to timely file the record or request an extension to file it meant that the trial court erred in failing to dismiss the petition.[128]

The Indiana Supreme Court initially granted transfer in *TOPS*, *First American*, and *Brown*[129] and sought to "address the question of whether an official agency record is *required* to adjudicate a petition for review" under

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119. *Id.* at 197.
120. *Id*. at 198.
121. *Id.* at 196.
122. *Id*. at 201.
123. *Id*. at 201-02.
124. *Id*. at 202.
125. *Id.* at 202-03 (quoting Jordan v. Deery, 778 N.E.2d 1264, 1272 (Ind. 2002)).
126. *Id*. at 203.
127. *Id*.
128. *Id*.
129. *See supra* notes 86, 97, 116.

AOPA.[130] In reviewing this question, the court gave the most thorough treatment to the issue in *TOPS*, conducting a review of the prior decision in *Meyers*, which served as the basis for the decisions in each of the three underlying cases.[131] Following that review, the court noted that "[t]wo important facts distinguish *Meyer* from the case before us and from most AOPA appeals."[132] First was the fact that the contested issue in *Meyer* was "essentially an arithmetic error in the agency decision" and second, "and most importantly, the State *conceded its error* on the contested issue before it moved to dismiss for lack of a record."[133] These distinguishing characteristics led the court to state that "to the extent *Meyer* represents the possibility of an exception to the filing requirement, thus triggering the permissive 'cause for dismissal' language in AOPA 'any such exception is extremely narrow.'"[134]

The court then noted that its decisions "both before and after *Meyer* ha[ve] generated uncertainty on the question of how the statutory mandate for the filing of an agency record should be applied."[135] It then summarized "our existing case authority" to the effect that if judicial review could not be conducted on the agency record presented to it, "then 'cause for dismissal' is read to mean the appeal 'shall be dismissed,'" but if sufficient material was provided to the court to permit review, "then the lack of an official record simply permits dismissal but does not mandate it."[136] The supreme court commented that "at first blush" this rule makes sense as it promotes judicial economy by limiting the "time and resources" expended in compiling a potentially unnecessary agency record and by supporting the established "judicial preference to decide cases on the merits."[137] The court, however, recognized that an argument based on judicial economy "swings in the other direction" when the reviewing court is "put in the unenviable position of not only having to decide the merits of an administrative appeal but also determining just exactly what is relevant to its decision, without having access to the entire record to make that determination."[138]

The court thus concluded that "submitting the record up front diminishes the potential for time and resource-consuming satellite litigation" such as that in *TOPS*, *First American*, and *Brown*, and "further obviates the necessity for the trial court to ascertain blindly whether the documents before it are enough or whether other documents in the official record . . . are relevant to the issues on review."[139] Holding that a "bright-line approach best serves the goals of

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130. Teaching Our Posterity Success, Inc. v. Ind. Dep't of Educ., 20 N.E.2d 149, 151 (Ind. 2014).

131. *Id*. at 153-54.

132. *Id*. at 153.

133. *Id*. at 153-54.

134. *Id*. at 154.

135. *Id*.

136. *Id*.

137. *Id*.

138. *Id*. at 155.

139. *Id*.

accuracy, efficiency and judicial economy[,]" the court summarized its holding by stating that "a petitioner for review cannot receive consideration of its petition where the statutorily-defined agency record has not be filed."[140]

Even though the Indiana Supreme Court established a bright-line rule in *TOPS*, requiring the timely filing of the agency record to obtain judicial review, other decisions continue to align with the *First American* conclusion that exhaustion of administrative remedies is not a jurisdictional pre-requisite to relief.[141] These decisions suggest that failure to comply precisely with the provisions of AOPA is not fatal to a party's quest for judicial review.[142]

One such case is *HRC Hotels, LLC v. BZA*.[143] In that case, the Myers Y. Cooper Corporation ("Myers") requested, and received, a variance from the Marion County Board of Zoning Appeals to construct a pet day care facility adjacent to a hotel owned by a company called I-465 LLC.[144] Subsequent to the grant of the variance, I-465 LLC's parent company, HRC Hotels, filed a petition for judicial review.[145] Myers responded with a motion to dismiss, arguing that HRC lacked standing to petition for judicial review.[146] HRC, after the deadline to file the petition had passed, filed a motion to amend the petition to substitute I-465 LLC as the real party in interest.[147] The trial court ultimately dismissed the petition, reasoning that it did not need to consider HRC's attempt to substitute I-465 LLC, because it lacked subject matter jurisdiction to consider the petition in the first place as HRC lacked standing, as required by statute, to obtain judicial review.[148]

The court of appeals disagreed with the trial court's conclusion.[149] In reaching its decision, the court of appeals acknowledged that, by statute, "in order for a party to be entitled to judicial review" it must have standing and file a verified petition for judicial review within thirty days of the BZA's action.[150] The court also acknowledged that although the original petition had been filed within the thirty day time period, the motion to substitute I-465 LLC as the real party in interest was unquestionably made outside the statutory allotted time for an aggrieved party to file the petition.[151] Nevertheless, the court, relying on a

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140. *Id*. In reaching this conclusion, the supreme court recognized that not every item defined as part of the agency record by AOPA would exist in every case, but noted that the "parties may stipulate that certain records are not relevant to the agency action appealed in a particular case." *Id*. at 155 n.4.

141. *See* HRC Hotels, LLC v. BZA, 8 N.E.3d 203 (Ind. Ct. App. 2014).

142. *See id.*

143. *Id*.

144. *Id*. at 204.

145. *Id*.

146. *Id.* at 205.

147. *Id*.

148. *Id*.

149. *Id.* at 209.

150. *Id*. at 206.

151. *Id*.

number of decisions by the supreme court and court of appeals, determined that HRC's lack of standing was a procedural error, rather than a "real jurisdictional problem."[152] Specifically, the court concluded that because the trial court was the "correct court to rule on the verified petition for judicial review[,]" that "alone . . . is sufficient to establish that the trial court had subject-matter jurisdiction" to consider the case.[153] As a result, the court of appeals held that the trial court had erred in dismissing the petition and that it should have considered whether to permit the substitution of I-465 LLC after the statutory thirty-day deadline had passed.[154]

In considering that question, the court of appeals examined Trial Rule 17(A)(2), which requires that actions be prosecuted by the real party in interest.[155] In reviewing the rule, the court focused on two issues.[156] First, it emphasized that after Myers objected to HRC's lack of standing, "the rule permits a reasonable time for the real party in interest to be substituted into the lawsuit."[157] The court concluded that HRC had acted within a reasonable time of the motion to dismiss for lack of standing thus making the substitution timely.[158]

The court of appeals also responded to Myers' argument that HRC could not use Trial Rule 17 to amend the petition for review after the statutory thirty-day deadline had passed.[159] In rejecting this argument, the court examined other cases in which courts had allowed the amendment of petitions outside statutory time limits, but within the time limits set by court rule, to "relate back" to the original filing date of a petition.[160] Noting that "a court rule providing for time in addition to that permitted by AOPA is authorized by AOPA, and presents no conflict with the statute[,]" the court of appeals concluded that Rule 17 allowed for the substitution of the real party in interest following the timely filing of a petition for judicial review even if the petition had originally been filed by a party without standing as required by statute.[161]

As the foregoing cases illustrate, even though a bright-line rule has been imposed with regard to compliance with one statutory procedure to obtain judicial review, imperfect compliance with the statute is not always a bar to review.[162] Practitioners, however, would do well to note the repeated emphasis

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152. *Id*. at 207.

153. *Id*.

154. *Id*. at 207-08.

155. *Id*. at 208.

156. *See id.*

157. *Id*.

158. *Id*.

159. *Id.* at 209.

160. *Id*. at 208-09.

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

162. *See id.* (demonstrating that although a party failed to strictly comply with Trial Rule 17, the court may exercise discretion in allowing parties to amend petitions for judicial review).

in *TOPS*, *First American*, and *Brown* that the best practice is to comply with the terms of the statute, as doing so will clearly reduce the uncertain risk of satellite litigation over whether there has been *enough* compliance to protect a client's interests.

## III. DUE PROCESS CONSIDERATIONS IN ADMINISTRATIVE PROCEEDINGS

As state actors, administrative bodies are required to afford those appearing before them basic due process rights, including notice and an opportunity to be heard.[163] Failure of an agency to provide adequate notice of a hearing or to conduct a proper hearing is frequently raised in judicial review proceedings as a challenge to the validity of an agency's action.[164]

For example, *Saini v. Review Board of Indiana Department of Workforce Development* involved a challenge by Baldev Saini to a determination that he was ineligible for unemployment benefits.[165] Saini argued that the Review Board had erred in affirming the ALJ's determination without conducting a hearing to consider whether he had received adequate notice of the hearing.[166] The crux of Saini's argument was that he never received material instructing him to provide a telephone number through which he could participate in the hearing telephonically, and instead "received only a letter informing him that he 'might be getting a phone call'" around a specific time.[167] Because Saini never responded to the hearing notice by providing a phone number, the ALJ conducted the hearing without contacting him.[168] The Review Board rejected Saini's argument that he did not receive adequate notice of the hearing or instructions on how to participate, noting in its final order that the hearing notices that were sent to Saini should have included all of the material he claimed he did not receive.[169] Further, the Review Board noted that even if the specific document was missing from the packet sent to him, other material should have put Saini on notice of the procedures necessary to participate in the hearing.[170]

The court of appeals concluded that the Review Board was not required to conduct a separate hearing on whether Saini had received proper notice of the hearing before the ALJ.[171] In reaching that conclusion, the court began its analysis by noting that when "an administrative agency sends notice through the regular course of mail, a presumption arises that the notice was received."[172]

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163. IND. CODE § 4-21.5-3-25 (2015).

164. *See generally id.* (creating a statutory obligation to provide notice and adhere to due process considerations in administrative proceedings).

165. 5 N.E.3d 768, 769-70 (Ind. Ct. App. 2014).

166. *Id*. at 770.

167. *Id*. at 770-71.

168. *Id.* at 770.

169. *Id*. at 771-72.

170. *Id*.

171. *Id.*

172. *Id*. at 773.

Thus, the court turned to the question "has Saini presented sufficient evidence to prove that notice was not received?"[173] This, the court noted, was a question of fact that required an evidentiary basis to conclude whether a party had not received notice.[174]

With respect to the evidence available, the court of appeals noted that the record was "not entirely devoid of evidence that Saini received notice of the telephonic hearing before the ALJ."[175] More specifically, the court pointed to the cover letter sent by Saini to the Review Board seeking review of the ALJ's determination in which he "acknowledged receiving what clearly must have been the Notice of Hearing."[176] Like the Review Board, the court found compelling that even if the specific form Saini alleged he did not receive was missing from the materials sent to him, other material he acknowledged receiving would have put him on notice of the means to participate in the hearing, including contact information that would have allowed him to have any questions addressed.[177] Thus, the court of appeals concluded that there was sufficient evidence to support the Review Board's conclusion.[178]

The court also rejected any suggestion that due process had been violated because a separate hearing had not been held to resolve the question.[179] As it noted, "Saini was able to present the relevant evidence" regarding whether he received notice of the hearing when he initiated the appeal of the ALJ's decision at the Review Board.[180] The court went on to state that it could not "imagine what evidence Saini could present at a hearing" that would have "flatly contradict[ed] the dispositive evidence he has already offered, i.e., that he received the Notice of Hearing form."[181] In light of that conclusion, the court held that it would serve no purpose to remand the case to conduct a hearing "when the outcome is foreordained."[182]

Although the court of appeals in *Saini* determined that there was sufficient evidence to support the conclusion that Saini received notice of the hearing,[183] it reached the opposite result in *Digbie v. Review Board of Indiana Department of Workforce Development*.[184] *Digbie* presented essentially the same factual scenario as *Saini*.[185] Digbie was terminated from her employment and sought

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173. *Id*.
174. *Id*. at 773-74.
175. *Id*. at 773.
176. *Id*. at 774.
177. *Id*.
178. *Id.*
179. *Id.* at 774-75.
180. *Id*. at 774.
181. *Id*.
182. *Id*.
183. *Id.*
184. 9 N.E.3d. 254, 257 (Ind. Ct. App. 2014).
185. *Id.* at 255-56.

unemployment benefits.[186] After she was denied the unemployment benefits, Digbie contended that she did not receive notice of the hearing before the ALJ and sought further review.[187] As in *Saini*, the Review Board ultimately determined that the evidence supported the conclusion that Digbie had received notice of the initial hearing and affirmed the decision to deny her unemployment benefits.[188]

The court of appeals disagreed.[189] In reaching the opposite conclusion, it again focused on the rebuttable presumption that a party received notice of a hearing, which arises if that notice is sent by mail.[190] The court noted, however, that the presumption only arises if the agency first "demonstrate[s] that it actually sent the notice through regular mail."[191] Based on the court's review of the agency record, it concluded that the department had "failed to present any evidence to prove that it mailed Digbie notice" of the initial hearing.[192] The court also rejected the ALJ's finding that independent verification of the fact of mailing was necessary because the date on the hearing notice was sufficient to conclude it had been mailed, stating that to accept that conclusion "would permit countless letters to be deemed delivered simply because the letters themselves are written to say so."[193] Accordingly, even as it noted that proving the fact of mailing is "hardly difficult," the court remanded the matter to the Review Board, with instructions to conduct a hearing on the merits of Digbie's claim for unemployment benefits and expressly foreclosed any further challenge by the Board as to whether she had received the notice.[194]

The question of whether a party was denied due process when an agency did not conduct an evidentiary hearing was also addressed by the court of appeals in *Parker v. Indiana State Fair Board.*[195] That case involved a challenge by Parker to a decision by the Indiana State Fair Board imposing a number of penalties against him based on his alleged use of an improper feed additive in a lamb he exhibited at the State Fair, which won the title "Grand Champion Market Lamb."[196] The Parkers raised numerous challenges to the State Fair Board's decision and ultimately moved for summary judgment on the grounds that certain test results were inadmissible and that in the absence of any other evidence of use

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186. *Id.* at 255.

187. *Id*. at 255-56.

188. *Id*.

189. *Id.* at 256.

190. *Id*. at 256-57.

191. *Id*. at 257 (citing Abdirizak v. Review Bd. of Ind. Workforce Dev., 826 N.E.2d 148, 150 (Ind. Ct. App. 2005)).

192. *Id*.

193. *Id*.

194. *Id*. at 257 n.1.

195. 992 N.E.2d 969, 979-80 (Ind. Ct. App. 2013). As a matter of disclosure, the author's firm represented Parker throughout the course of the proceedings, including before the court of appeals.

196. *Id*. at 973-74.

of the feed additive, they were entitled to have the decision reversed.[197] The State Fair Board filed its own motion for summary judgment, and an argument on the motions was ultimately held before the ALJ.[198] Following that argument, the ALJ filed a "Recommended Order" granting summary judgment in favor of the Board, which was ultimately affirmed by the Board.[199]

Among the numerous arguments raised by the Parkers before the court of appeals was that they were denied due process because the Board failed to hold an evidentiary hearing, thus denying them "an opportunity to present a meaningful defense and to test the validity of the charges."[200] In considering this question, the court of appeals reviewed the content of the cross-motions for summary judgment filed by the Parkers and the Board and noted that they were only motions for *partial* summary judgment.[201] The court also noted that the ALJ's proposed order "did not address the Parkers' argument regarding the penalties" imposed by the Board.[202] As a result, the court of appeals concluded that the Board improperly granted *full* summary judgment in the case and remanded the matter for an evidentiary hearing "regarding the penalties imposed" on Parker.[203] However, the court strictly limited the scope of the hearing, concluding that the other issues raised by the Parkers had been "properly resolved in [the] summary judgment proceedings" and that, as a result, they could not re-litigate issues that already had been addressed on appeal.[204]

As these cases illustrate, core constitutional principles often are at issue in administrative proceedings and can play a key role in determining how a reviewing court dictates the course of any further proceedings.[205] This should serve as a reminder that administrative law is perhaps not as divorced from "ordinary" law as we sometimes think.

## IV. TRANSPARENCY IN ADMINISTRATIVE ACTION: OPEN DOOR LAW AND ACCESS TO PUBLIC RECORDS

Administrative agencies are to conduct "the business of the State of Indiana and its political subdivisions . . . openly so that the general public may be fully informed."[206] To enforce this simple injunction, the General Assembly enacted

197. *Id*.

198. *Id*. at 974.

199. *Id*. at 974-75.

200. *Id*. at 981-82.

201. *Id*. at 982.

202. *Id*.

203. *Id*.

204. *Id*.

205. *See id.*; *see also* Saini v. Review Bd. of Ind. Dep't of Workforce Dev., 5 N.E.3d 768 (Ind. Ct. App. 2014); Digbie v. Review Bd. of Ind. Dep't of Workforce Dev., 9 N.E.3d 254 (Ind. Ct. App. 2014).

206. City of Gary v. McCrady, 851 N.E.2d 359, 365 (Ind. Ct. App. 2006).

the Open Door Law[207] and the Access to Public Records Act ("ARPA")[208] to bring transparency to government meetings and to provide access to public records.[209] This section reviews several cases exploring the scope of that legislatively mandated open access.

Although *Gary Community School Corporation v. Lardydell*, does not involve an agency action directly, it does involve the limits protecting the decision making process of governmental agencies.[210] The case in *Lardydell* involved a suit against the Gary Community School Corporation ("GCS") that arose out of an attack on Lardydell while attending a high school operated by the GCS.[211] As part of the suit, Lardydell sought to introduce the testimony of Andrea Ledbetter, who was a member of the GCS board at the time of the attack, regarding certain proceedings that the GCS board conducted while in executive session.[212] The trial court admitted the testimony over GCS's objection and the school corporation raised the issue on appeal, arguing that the doctrine of "qualified privilege applies to all discussions held during its board's executive sessions."[213]

In examining whether the trial court abused its discretion in admitting the evidence, the court of appeals focused on the provisions of the Open Door Law.[214] The court noted that although the "primary purpose of Indiana's Open Door policy relating to public agencies is to keep Indiana citizens fully informed of any agency's activities," the act also contains "an extensive list of exceptions that a public agency may assert as privileged or confidential information, and generally, not available to public disclosure."[215] However, the court went on to point out that "in order to bring itself under the guise of said statutes," an agency must follow certain procedures and noted that the GCS "failed to cite to any authority or point to any evidence" supporting its position that Ledbetter's testimony fit within one of the statutory exceptions.[216] Indeed, the court noted that "the statute is silent as to whether discussions during executive sessions are privileged or whether persons present during an executive session can be barred from disclosing what occurred" during the session.[217]

In light of these factors and the absence of any authority supporting GCS's position, the court held that the trial court had not erred by admitting Ledbetter's

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207. IND. CODE §§ 5-14-1.5-1 to -8 (2015).

208. *Id.* §§ 5-14-3-1 to -10.

209. *See generally id*. §§ 5-14-1.5-1 to -8.

210. Gary Cmty. Sch. Corp. v. Lardydell, 8 N.E.3d 241, 243-46 (Ind. Ct. App.), *trans. denied*, 16 N.E.3d 980 (Ind. 2014).

211. *Id*. at 243-44.

212. *Id*. at 244-45.

213. *Id*. at 245.

214. *Id.*

215. *Id*.

216. *Id*.

217. *Id*.

testimony.[218] However, in reaching that conclusion, the court of appeals acknowledged that the trial court limited Ledbetter's testimony by preventing her from testifying about any communications during the course of the executive sessions.[219] The court allowed her to testify only about a video reviewed during an executive session and that GCS failed to disclose the video during the course of discovery.[220] This prevented her from testifying about "any communications, litigation strategies, or any other matters" discussed during the course of the executive session.[221] Thus, while the court of appeals' decision indicates that certain material discussed in executive session (i.e., outside of the view of the general public) may be disclosed, it is uncertain how far citizens may reach behind the closed door to bring such material to light.[222]

Just as the Open Door Law ensures that the actions of agencies are subject to public scrutiny, ARPA ensures that citizens have access to the records of those agencies.[223] In *Orbitz, LLC v. Department of Revenue*, the Indiana Tax Court considered whether certain material designated by Orbitz in support of a motion for summary judgment should be excluded from public access under ARPA and Indiana Administrative Rule 9.[224]

The case in *Orbitz* originally arose out of a dispute over the Department of Revenue's determination that Orbitz was deficient in remitting certain taxes based on Indiana hotel bookings made through the company.[225] On appeal to the tax court, Orbitz moved for summary judgment and sought an order protecting some of the designated evidence from public disclosure, alleging that the materials were trade secrets.[226] The tax court acknowledged that the provisions of ARPA and Administrative Rule 9 exclude certain public records from public access, including trade secrets, and that such exclusions were mandatory.[227] The court then stated that when faced with a request to "shield information from public access," a court must follow certain procedures, including holding a hearing on the request and issuing an order outlining "why the need for privacy outweighs the strong public policy that would otherwise allow access to such records."[228] However, it went on to note that when "documents sought to be protected fall within the mandatory exceptions set forth in ARPA or Administrative Rule 9, a court can seal those records without holding such a hearing and balancing the competing interests."[229] Reaching the conclusion that

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218. *Id*. at 245-46.
219. *Id*. at 246.
220. *Id*.
221. *Id*.
222. *See id*. at 241.
223. IND. CODE § 5-14-3-1 (2015).
224. 997 N.E.2d 98, 101-02 (Ind. T.C. 2013).
225. *Id*. at 99.
226. *Id*. at 99-100.
227. *Id*. at 100.
228. *Id*. at 101.
229. *Id*.

the materials were trade secrets, the tax court thus excluded them from public access.[230]

Although the tax court shielded Orbitz's trade secrets from public access, the court of appeals reached a very different result with regard to whether other public records are subject to disclosure in *Purdue University v. Wartell*.[231] That case involved an internal complaint brought by Michael Wartell, the chancellor of Indiana University – Purdue University Fort Wayne, against France Cordova, Purdue's president at the time, alleging harassment and discrimination.[232] Because of certain concerns Wartell expressed with the ordinary process for resolving such complaints, the university proposed a special process, in which a third party, "preferably an Indiana attorney," would independently investigate the complaint and submit a report to a panel that then would render a decision.[233]

The parties agreed to this procedure, and the University ultimately hired an attorney to conduct the investigation who then investigated the complaint, prepared a report, and submitted it to a panel that ultimately issued a decision.[234] Subsequent to the decision, Wartell filed a request, pursuant to ARPA, requesting a copy of the report and "'any other document'" prepared by the attorney.[235] Purdue's public records officer responded and refused to turn over the requested information asserting that the documents were protected from disclosure under ARPA's mandatory exception for privileged attorney-client communications and discretionary exception for attorney work-product.[236] Wartell filed a complaint with the state's public access counselor, who concluded that the key question was whether the attorney "was acting as the University's attorney during the investigation."[237] Although a "public access counselor is not a finder of fact," the access counselor concluded that the University's ability to properly assert ARPA's exceptions for attorney-client communications and attorney work-product depended on the outcome of that inquiry.[238]

Wartell then filed a lawsuit to compel disclosure of the material.[239] When the attorney and the university refused to answer discovery questions, asserting the attorney-client privilege and work-product doctrine, Wartell filed a motion to compel, asking that Purdue be estopped from asserting those claims to prevent disclosure of the report.[240] When the trial court granted the motion, Purdue appealed and the court of appeals took up the case as a discretionary

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230. *Id*. at 102.

231. 5 N.E.3d 797, 808-09 (Ind. Ct. App.), *trans. denied*, 16 N.E.3d 424 (Ind. 2014).

232. *Id*. at 801.

233. *Id*. at 801-02.

234. *Id*. at 802-03.

235. *Id*. at 802 (quoting Brief for Appellant at 21, Purdue University v. Wartell, 5 N.E.3d 797 (Ind. Ct. App. 2014) (No. 79A02-1304-PL-342), 2013 WL 5293584).

236. *Id*. at 803.

237. *Id*. at 804.

238. *Id*. at 804-05.

239. *Id*. at 805.

240. *Id*.

interlocutory appeal.[241]

The court of appeals readily acknowledged that "the attorney-client privilege and work-product doctrine have few recognized exceptions, and that equitable estoppel is not one of them."[242] However, the court noted that "evidentiary privileges created 'to shield selected information from discovery . . . may not be wielded as swords at the will of a party.'"[243] After reviewing the elements of equitable estoppel, the court concluded that based on the record before it, it was not necessary to determine if the attorney "was hired as Purdue's legal counsel, rather than simply as an independent investigator who happened to be an attorney."[244] Nevertheless, the court looked at the record and concluded that the attorney "conducted the investigation as an independent investigator" by "interviewing individuals, drafting a report, and submitting it to the Panel without disclosing an advocate role."[245] In such a circumstance, the court noted that the university could not assert either the attorney-client privilege or work-product doctrine exceptions in ARPA to shield the report for disclosure.[246]

However, the court of appeals considered the possibility that Purdue hired the attorney as its legal counsel and postulated that in such circumstances it could not find error in the trial court's conclusion that estoppel would apply.[247] This was particularly true given that "Purdue represented to Wartell that it would appoint" the attorney as an independent investigator "but then concealed from Wartell that it intended to retain" the attorney as its legal counsel.[248]

In one respect, *Wartell* can be read to recognize a new exception to the attorney-client privilege, which would be a serious and potentially very dangerous challenge to the attorney-client relationship.[249] But the case also can be read narrowly in the context in which it arose, as a public records request under ARPA.[250] Although ARPA is crafted specifically to exempt attorney-client communications from disclosure, it also is crafted to aid citizens in reviewing the actions of their government.[251] In that context, recognizing a narrow exception that acknowledges the distinction between an attorney acting as counsel for the government and one acting in another role may be important in preserving the appropriate balance between allowing the state to conduct its business and citizens to keep watch on that business.

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241. *Id*. at 805-06.

242. *Id*. at 806.

243. *Id*. at 807 (quoting Madden v. Ind. Dep't of Transp., 832 N.E.2d 1122, 1128 (Ind. Ct. App. 2005)).

244. *Id*. at 807.

245. *Id*. at 808.

246. *Id*.

247. *Id*. at 808-09.

248. *Id*.

249. *See id.* at 797.

250. *See id.*

251. *See* IND. CODE § 5-14-3-1 (2015).

## CONCLUSION

Administrative law is a continually evolving body of law that adapts and changes over time as the work of administrative agencies continues to grow. This survey presents only a few of the reported decisions by Indiana's appellate courts reviewing agency actions. It does not review the cases that end at the trial court or even the massive volume of decisions issued by administrative agencies on a regular basis.

The volume of work performed by agencies should challenge our constrained perception of "law" that focuses on a narrow range of sources including constitutions, statutes, and case law. Indeed, the world of administrative law is in some ways much bigger. Although agencies must act within the framework of the law, the sheer number of issues left to their control means that their work has a profound effect on the life of an average Hoosier. This makes it a significant area of law to which Indiana's judiciary and lawyers must pay attention as they work to protect the interest of their clients and the State's citizens.