II. Administrative Law

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A. *Scope of Judicial Review*

1. The Substantial Evidence Test.—The uncertainty and confusion created by differing interpretations of the "substantial evidence test" in different districts of the court of appeals, which were discussed in the 1979 Administrative Law Survey,[1] may have been resolved during the current survey period.[2] At issue was whether the reviewing court, in determining whether the administrative decision is supported by substantial evidence, must examine the whole record or merely the evidence most favorable to the successful party. As noted in the 1979 Survey, the second, third and fourth district courts of appeals follow the principle of whole record review, but the first district court of appeals adhered to one-sided review.[3]

In *Citizens Energy Coalition, Inc. v. Indiana & Michigan Electric Co.*,[4] the first district court of appeals, without mentioning its earlier decision which expressly followed the one-sided approach,[5] specifically adopted the standard of whole record review as enunciated in *L.S. Ayres & Co. v. Indianapolis Power & Light Co.*[6] and *City of Evansville v. Southern Indiana Gas & Electric Co.*[7] The court appropriately observed that the substantial evidence test is difficult to define (and to apply) but was perhaps best stated in *L.S. Ayres*:

> "[W]e conclude that the substantial evidence standard authorizes a reviewing court to set aside Commission findings of fact when *a review of the whole record* clearly indicates that the agency's decision lacks a reasonably sound

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[1]Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 39-42 (1980).

[2]The word "may" is used advisedly, for reasons which will appear below.

[3]Greenberg, *supra* note 1, at 39-42. The two cases which clarified the situation in the third and fourth districts, Indiana Civil Rights Comm'n v. Sutherland Lumber, 394 N.E.2d 949 (Ind. Ct. App. 1979), and Old State Utility Corp. v. Greenbriar Dev. Corp., 393 N.E.2d 785 (Ind. Ct. App. 1979), were both decided during the current survey period rather than the 1979 period, but were noted in the 1979 Survey because of their importance to resolution of the problem. *See* Greenberg, *supra* note 1, at 41 n.15.

[4]396 N.E.2d 441 (Ind. Ct. App. 1979).

[5]Indiana Civil Rights Comm'n v. Holman, 380 N.E.2d 1281, 1284 (Ind. Ct. App. 1978).

[6]169 Ind. App. 652, 663-65, 351 N.E.2d 814, 823-24 (1976).

[7]167 Ind. App. 472, 484, 339 N.E.2d 562, 572 (1975).

basis of evidentiary support. *See Universal Camera Corp. v. NLRB* (1951), 340 U.S. 474, 490, 71 S.Ct. 456, 95 L.Ed. 456."[8]

Unfortunately, uniformity among the districts which resulted from *Citizens Energy Coalition* was clouded by *Wilfong v. Indiana Gas Co.*,[9] in which a real estate developer challenged the Public Service Commission's decision authorizing the gas company to refuse to supply service to new customers. In reviewing the commission's decision, the fourth district court of appeals correctly observed that it could not disturb the decision if it was supported by substantial evidence and that the court cannot reweigh the evidence but is bound by the administrative findings of fact if they are supported by the evidence. The court then added, "We consider only the evidence favorable to the decision."[10]

Similarly, in *White v. Woolery Stone Co.*,[11] a worker's compensation disability case, the second district court of appeals stated: "On appeal, this court may not weigh the evidence and, where there is a conflict in the evidence, it can consider only the evidence which tends to support the Board's award."[12]

The same court made an almost identical statement in *Kuntz v. Review Board of Indiana Employment Security Division*,[13] to which the court added, "On appeal, we may only disturb the decision of the Review Board if reasonable persons would be bound to reach a different conclusion on the evidence in the record."[14]

Possible guidance out of this quandary may be gleaned from *Kuntz* and from *Penn-Dixie Steel Corp. v. Savage*,[15] also a worker's compensation case. The court reiterated that it "will not weigh the evidence and, where there is a conflict . . . will only consider the evidence which tends to support the [agency's] award and which is most favorable to the appellee."[16] However, the court continued that an appeal which challenges the sufficiency of the evidence on which the agency based its award

> "will be limited:
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> '. . . to an examination of the evidence to ascertain whether the finding . . . does not rest upon a substan-

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[8]396 N.E.2d at 447 (quoting L.S. Ayres & Co. v. Indianapolis Power & Light Co., 169 Ind. App. at 664, 351 N.E.2d at 823) (emphasis added.)

[9]399 N.E.2d 788, 790 (Ind. Ct. App. 1980).

[10]*Id.*

[11]396 N.E.2d 137 (Ind. Ct. App. 1979).

[12]*Id.* at 139 (citations omitted).

[13]389 N.E.2d 342 (Ind. Ct. App. 1979).

[14]*Id.* at 344 (citations omitted).

[15]390 N.E.2d 203 (Ind. Ct. App. 1979).

[16]*Id.* at 206 (citations omitted).

> tial factual foundation. We may reverse the award only . . (1) If it should appear that the evidence . . . was devoid of probative value; (2) That the quantum of legitimate evidence was so proportionately meager as to show that the finding does not rest upon a rational basis or; (3) That the result must have been substantially influenced by improper considerations.' Pollock v. Studebaker Corp. (1951), 230 Ind. 622, 625, 105 N.E.2d 513, 514.
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> On appeal, this Court cannot weigh the evidence . . . to determine for whom it preponderates, and only if reasonable men would be bound to reach the opposite conclusion from the evidence in the record, may the decision . . . be reversed."[17]

Taking all of these cases together, the proper approach appears to be (and should be) (1) that the court will look to the whole record to determine if substantial evidence, that is, "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'"[18] supports the agency's finding, and (2) that unless reasonable men would find to the contrary, the agency's decision must be sustained. If the inferences supporting the award are reasonable, the award will be sustained. If they are not, the court will not and should not permit those inferences to be drawn and will reverse the award unless other probative evidence supports it. The language about considering only those inferences which support the administrative decision or only that evidence favorable to the award winner tends to confuse and may be interpreted by some to suggest improperly the appropriateness of one-sided review.

As Professor Schwartz has stated, "The substantial evidence test is a test of the *reasonableness*, not of the *rightness*, of agency findings of fact."[19] The court should look to the whole record to determine if reasonable men could differ as to the evidence or if the evidence compels the agency's decision. In either event, the agency's decision should be affirmed.

2. *Standard of Review; Right to Review.*—The appellant claimed in *Salk v. Weinraub*[20] that the trial court had utilized the wrong standard in reviewing the propriety of approval of a downtown renewal project by the Fort Wayne Redevelopment Commission.

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[17] *Id.* at 206-07 (quoting Bohn Aluminum & Brass Co. v. Kinney, 161 Ind. App. 128, 134, 314 N.E.2d 780, 784 (1974)).

[18] Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

[19] B. SCHWARTZ, ADMINISTRATIVE LAW § 211, at 596 (1976) (emphasis in original).

[20] 390 N.E.2d 995 (Ind. 1979).

The applicable statute purported to limit review to the question of public utility and benefit.[21] The Supreme Court ruled, however, that there is a constitutional right to judicial review of administrative decisions in Indiana which may not be limited to questions of public utility and benefit.[22] Therefore, the trial court, in the sound exercise of its discretion, had properly applied the standard of review set forth in the Administrative Adjudication Act.[23] The court has made it quite clear that unlike federal administrative law, which does permit congressional limitations on judicial review of administrative decisions,[24] Indiana law precludes any such limitations.[25]

3. Review of Rulemaking.—In *Indiana Environmental Management Board v. Indiana-Kentucky Electric Corp.*,[26] the agency argued that Indiana courts have no authority to review quasi-legislative rulemaking; consequently, data supporting the validity of rules was not necessary.[27] To the contrary, replied the court, Indiana courts have historically reviewed the reasonableness of quasi-legislative regulations. Therefore, on appeal the regulation must be accompanied by supporting data to facilitate that review.[28]

Concern that the decision may lead to "judicial oversight of the reasonableness of administrative legislation," as expressed in the dissenting opinion,[29] apparently with the feared result that courts

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[21]IND. CODE § 18-7-7-15 (1976) provides: "The only ground of remonstrance which said [reviewing] court shall have the power or jurisdiction to hear shall be the question whether the proposed project will be of public utility and benefit . . . ."

[22]390 N.E.2d at 997.

[23]*Id.* The Administrative Adjudication Act, IND. CODE §§ 4-22-1-1 to -30 (1976) was intended to promote uniformity in the review of administrative decisions. The court noted that while the Redevelopment Commission is a local agency not within the Administrative Adjudication Act, the Act's standard of review, as set forth in IND. CODE § 4-22-1-18 (1976), was appropriate.

[24]The Administrative Procedure Act, 5 U.S.C. § 701(a) (1976), states that the provisions on judicial review apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

[25]A similar result was reached in Gerhardt v. City of Evansville, 408 N.E.2d 1308 (Ind. Ct. App. 1980), decided after the close of the survey period, in which the court declared unconstitutional a statutory limitation of judicial review to only those suspensions of police officers in excess of ten days. The case is discussed more fully at note 137, *infra.*

[26]393 N.E.2d 213 (Ind. Ct. App. 1979).

[27]*Id.* at 221. The brief of appellants, however, does not seem to go quite so far, the written argument apparently being that *findings of fact* are not required in rulemaking unless the rule-making procedure itself must, pursuant to statute, include an adjudicatory-type hearing. *See* Brief of Appellant at 15-28, Indiana Environmental Management Bd. v. Indiana-Kentucky Elec. Corp., 393 N.E.2d 213 (Ind. Ct. App. 1979) [hereinafter cited as Brief of Appellant].

[28]393 N.E.2d at 221.

[29]*Id.* at 222.

will supercede agency decisions as to what regulations are needed, is unfounded. One of the cases cited by the court for support clearly states that a quasi-legislative regulation "is subject to the same test as to reasonableness and the basic facts justifying the regulation as would be applied if the legislature had enacted the regulation as a statute."[30] Moreover, the Illinois case from which the court quoted extensively[31] emphatically declared that since the statute required the agency to take into account certain factors in adopting regulations, there must be some basis on which the court may determine if the agency indeed had adhered to the legislative mandate and had taken those factors into account. The wisdom of the regulation was not an issue.[32]

B. *The Requirement of Findings*

A basic issue in the *Indiana-Kentucky Electric Corp.* case[33] was whether the statute required the Environmental Management Board to make findings of fact in the course of rulemaking when it required the Board to "take into account" certain factors.[34] The court attributed to the phrase "taking into account" its "plain meaning" and construed the legislative intent as requiring only meaningful supporting data, as noted in the preceding section of this Article, rather than formal, quasi-adjudicatory findings of fact.[35]

Instead of flatly invalidating the majority of the Board's regulations because of the absence of the necessary supporting data, which

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[30]Florida Citrus Comm'n v. Owens, 239 So. 2d 840, 848 (Fla. Dist. Ct. App. 1969). The Florida court found the reasons expressed in support of a regulation of advertising and labeling insufficient to withstand an attack on equal protection grounds.

[31]Commonwealth Edison Co. v. Pollution Control Bd., 25 Ill. App. 3d 271, 323 N.E.2d 84 (1974), *rev'd in part on other grounds*, 62 Ill. 2d 494, 343 N.E.2d 459 (1976), *quoted in* 393 N.E.2d at 220.

[32]25 Ill. App. 3d at 287-88, 323 N.E.2d at 95.

[33]393 N.E.2d 213 (Ind. Ct. App. 1979).

[34]*See id.* at 219-21. IND. CODE § 13-7-7-2(b) (1976) states:

> In approving regulations and establishing standards, the board or an agency shall take into account all existing physical conditions and the character of the area affected; past, present and probable future uses of the area, including the character of the uses of surrounding areas; zoning classifications; the nature of the existing air quality or existing water quality, as the case may be; technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality; and economic reasonableness of measuring or reducing any particular type of pollution. The board and the agencies shall take into account the right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal or aquatic life, or to the reasonable enjoyment of life and property.

[35]393 N.E.2d at 220-21.

the Board could have supplied, the court remanded to the Board so that the agency could demonstrate that the appropriate factors had been taken into account.[36] Certain of the regulations, however, were invalidated because a single hearing officer had heard the matter and that officer had failed to report to the Board his "findings and recommendations" as required by the statute in those instances where only a single hearing officer presides.[37] In the absence of such findings, the regulations which resulted from such hearings could not stand.[38]

The necessity for and the adequacy of findings arise at two stages in the administrative process: first, when the agency renders its decision after hearing, and second, when a trial-level court reviews the agency's decision and rules thereon.

The courts have been quite emphatic that administrative agencies must make written findings.[39] In *Stokely-Van Camp, Inc. v. State Board of Tax Commissioners*,[40] an appeal from disallowance of a special valuation, the court held that despite the fact that the statute under which the Board conducted its reassessment did not specifically require written findings and despite the fact that the Board is excluded from the requirements of the Administrative Adjudication Act, "there is . . . ample authority for the concept that written findings should be required, regardless of whether the statute requires it."[41] In order for the court to perform its task of determining if substantial evidence supports the findings and decision of the agency and whether the agency acted arbitrarily and capriciously or abused its discretion, the courts must have written findings to review.[42]

What is required in satisfactory findings of fact was restated in *Penn-Dixie Steel Corp. v. Savage*[43]: "[A] simple, straight-forward statement of what happened . . . in sufficient relevant detail . . . so that the [reviewing] court may determine whether the [agency] has resolved [the contested issues] in conformity with the law."[44] The findings in *Penn-Dixie*, a disability compensation case, were characterized by the court as "skimpy" because it was difficult for

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[36]*Id.* at 222.

[37]*Id.* at 217; *see* IND. CODE § 13-7-7-1(c) (1976).

[38]393 N.E.2d at 216-17, 222.

[39]*See* Greenberg, *supra* note 1, at 51-52.

[40]394 N.E.2d 209 (Ind. Ct. App. 1979).

[41]*Id.* at 210. *Accord*, Connell v. City of Logansport, 397 N.E.2d 1058, 1062 (Ind. Ct. App. 1979).

[42]394 N.E.2d at 211.

[43]390 N.E.2d 203 (Ind. Ct. App. 1979).

[44]*Id.* at 205 (quoting Whispering Pines Home for Senior Citizens v. Nicolek, 333 N.E.2d 324, 326 (Ind. Ct. App. 1975)) (emphasis omitted).

the court to determine from those findings which injury had caused the claimant's disability.[45] However, the evidence was sufficient to support an award based on either injury, so the court found it unnecessary to remand for further proceedings.[46]

Old State Utility Corp. v. Greenbriar Development Corp.,[47] which involved administrative revocation of rights to render utility service, stated that findings are required in order "to facilitate accurate and expeditious judicial review of administrative proceedings," and must contain "specific, basic facts which are material to the ultimate facts upon which an order is based."[48]

If considered by themselves, the findings would not have been sufficient in *Connell v. City of Logansport*,[49] a police officer disciplinary case. The court noted, however, that the written reasons or charging document given to the officer prior to the hearing and referred to by the administrative agency in its findings did contain extensive statements and factual allegations of wrongdoing. Reading the charging document and the findings together, the court discerned sufficient specificity on which it could make an intelligent decision.[50]

The court of appeals distinguished *Connell* in *State v. Board of School Trustees*,[51] in which the Board cancelled the employment contract of a tenured teacher. The only finding made by the Board was that the reasons given in the charging specifications for cancellation of the contract had been proven.[52] This might have been sufficient under *Connell* had the charging specifications themselves been sufficiently specific. However, the court found that in those specifications, the Board had "failed and refused to advise [the teacher] specifically of the conduct it deemed to constitute 'insubordination, neglect of duty and undermining the public confidence in the normal education process.'"[53] Accordingly, the court remanded with directions either to make adequate findings of fact or to grant the teacher a new hearing.[54] The message to administrative agencies continues to be quite clear: be sufficiently specific in the findings of fact so as to advise the parties and the reviewing courts of the factual underpinnings for the conclusions and decision.

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[45]390 N.E.2d at 206.

[46]*Id.* at 208.

[47]393 N.E.2d 785 (Ind. Ct. App. 1979).

[48]*Id.* at 788.

[49]397 N.E.2d 1058 (Ind. Ct. App. 1979).

[50]*Id.* at 1062.

[51]404 N.E.2d 47 (Ind. Ct. App. 1980).

[52]*Id.* at 49.

[53]*Id.*

[54]*Id.*

Similarly, Indiana Trial Rule 52(A)(2) requires a trial court to make special findings of fact "in any review of actions by an administrative agency." The purpose is "to provide the parties and reviewing courts with the theory on which the judge decided the case in order that the right of review for error may be effectively preserved."[55] In *Salk v. Weinraub*,[56] a renewal project approval case, the supreme court ruled that mere recitation of the factual events leading to resolution of the issues—the identities of the parties and dates of events, etc.—followed by conclusions of law was insufficient. The court distinguished *Hawley v. South Bend Department of Redevelopment*,[57] commented upon in the 1979 Survey,[58] because in *Hawley* the trial court at least had set forth the ultimate facts, support for which could be found in the full and complete record of the case.[59] In *Salk*, not even the ultimate facts were stated. The supreme court did not deny the appeal, however, but retained control of the case and remanded to the trial court for adequate findings of fact.[60]

C. *Hearsay Evidence*

The "residuum rule"—that an administrative decision may not be based on inadmissible hearsay evidence admitted over objection unless supported by a "residuum" of competent evidence—which was reaffirmed in *C.T.S. Corp. v. Schoulton*[61] and was criticized in the 1979 Survey,[62] continues in full force and effect in Indiana.[63]

D. *Standing*

In *Lutheran Hospital Inc. v. Department of Public Welfare*,[64] three hospitals sought a declaratory judgment as to whether they were entitled to reimbursement from the county department of public welfare pursuant to the Hospital Commitment Act[65] for emergency treatment rendered (1) to pregnant indigents and (2) to indigents suffering from alcoholism, drug addiction, and emotional

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[55]Tippecanoe County Area Plan Comm'n v. Sheffield Developers, Inc., 394 N.E.2d 176, 183 (Ind. Ct. App. 1979).

[56]390 N.E.2d 995 (Ind. 1979).

[57]383 N.E.2d 333 (Ind. 1978).

[58]Greenberg, *supra* note 1, at 52.

[59]390 N.E.2d at 999; *see* 383 N.E.2d at 336.

[60]390 N.E.2d at 999.

[61]383 N.E.2d 293 (Ind. 1978).

[62]Greenberg, *supra* note 1, at 42-45.

[63]*See* Shoup v. Review Bd., 399 N.E.2d 771, 774 (Ind. Ct. App. 1980); Kriss v. Brown, 390 N.E.2d 193, 197 n.1 (Ind. Ct. App. 1979).

[64]397 N.E.2d 638 (Ind. Ct. App. 1979).

[65]IND. CODE § 12-5-1-1 (1976).

illness. The trial court held that the hospitals were entitled to reimbursement only for the second group. On appeal, the county challenged the constitutionality of the Act and the standing of the hospitals to bring the action. The hospitals, in turn, questioned the standing of the county to attack the constitutionality of the statute.

On the issue of the county's standing, the court of appeals declared that the rules of standing in Indiana require a party to demonstrate injury but that in this case the county neglected to allege any injury whatever. Accordingly, the county lacked standing to raise the constitutional issue.[66]

In order to demonstrate their own standing, the hospitals were required to show a substantial present interest and that their rights were directly affected by the county's policy of denying payment for the aforementioned groups of indigents. The court observed that the hospitals had expended $450,000 in rendering treatment, all of which would have been reimbursable if the indigents had been covered by the Act. This, the court held, constituted a sufficient present interest. The injury in fact resulting from no reimbursement was obvious.[67]

Lack of standing was the dispositive issue in *Aikens v. Alexander*,[68] in which members of the Public Employees Retirement Fund sought a mandatory injunction to compel transfer of funds into the Fund on the ground that the State Budget Agency had acted arbitrarily, capriciously, and in violation of the statutory funding requirements when the agency reduced the amount originally appropriated to the Fund. The court of appeals determined that "the trial court's findings of fact [did] not indicate demonstrable injury to a present and substantial interest"[69] of plaintiffs who, therefore, had no standing. The only effect of the failure to make the requested transfer of funds was the theoretical possibility that at some time in the future, payments might not be met, an effect characterized by the court as purely "speculative and conjectural."[70]

E. Finality

The Administrative Adjudication Act provides specifically that any person aggrieved by an order of an administrative agency shall be entitled to judicial review thereof in accordance with the provi-

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[66]397 N.E.2d at 645-46.

[67]*Id.* at 646.

[68]397 N.E.2d 319 (Ind. Ct. App. 1979).

[69]*Id.* at 324.

[70]*Id.* at 322-24.

sions of the Act.[71] However, the provisions may be invoked only if the action of the agency is "final," and in *South Bend Federation of Teachers v. National Education Association South Bend*,[72] the court found a lack of finality in the Indiana Education Employment Relations Board order, the effectuation of which NEA—South Bend sought to enjoin. Consequently, the appeal provisions of the Administrative Adjudication Act were inapplicable.[73] The court noted that a final order ends the proceedings and leaves nothing to be accomplished. In this case, the order merely directed the holding of a unit determination hearing and the conducting of an election if required; it was not final.[74]

F. Exhaustion

Further, because the order in *South Bend Federation of Teachers*[75] was not final, there remained the basic issue of whether the plaintiff-appellee should have been required to exhaust its administrative remedies prior to seeking judicial review. NEA—South Bend, the Federation, and the South Bend Community School Corporation had entered an election agreement in 1972 which set forth certain procedures for a new representation election that year and for any subsequent challenge to the winner of the election, which was NEA—South Bend. In 1973, the General Assembly enacted the Educational Employee Bargaining Act[76] which established somewhat less stringent procedures to be followed by a challenging organization prior to a new representation election.[77] The I.E.E.R.B. ordered a new election at the request of the Federation which had met the requirements of the Educational Employee Bargaining Act but not of the 1972 Agreement. NEA—South Bend sought to enjoin the election on the ground that the I.E.E.R.B. order was an unconstitutional impairment of NEA—South Bend's contract rights.

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[71]Ind. Code § 4-22-1-14 (1976) provides in part: "Any party or person aggrieved by an order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act."

[72]389 N.E.2d 23 (Ind. Ct. App. 1979).

[73]*Id.* at 29.

[74]*Id.*

[75]389 N.E.2d 23 (Ind. Ct. App. 1979).

[76]Ind. Code §§ 20-7.5-1-1 to -14 (1976 & Supp. 1980).

[77]The 1972 Agreement required that a challenging organization's petition for a new election be signed by thirty percent of the teachers in the bargaining unit and set forth specific language to be used to authorize the challenger to represent the signers. 389 N.E.2d at 25-26. The statute requires signatures of twenty percent of the teachers in the bargaining unit and less specific language of authorization. Ind. Code § 20-7.5-1-10 (1976).

The Federation argued that NEA—South Bend should have exhausted its administrative remedies by going through with the election and then by appealing should it lose; if NEA—South Bend should win, it would not have been harmed. Not so, responded the court. Ordinarily, the court is without jurisdiction to grant relief until administrative remedies have been exhausted. However, the requirement of exhaustion is relaxed where exhaustion would be futile or irreparable harm is likely to result.[78] In this case, even if NEA—South Bend were to win the election, its contract rights would be permanently impaired. The more stringent requirements of the 1972 Agreement, by its terms, applied only to a representation challenge to the winner of the 1972 election. Challenges to any winner of any later election would be governed by the less stringent statute. Thus, even if NEA—South Bend were to win a 1979 or 1980 election, it would lose its protection under the 1972 Agreement. Therefore, exhaustion was not required.[79] On the merits, the court of appeals affirmed the trial court's holding that the I.E.E.R.B. order unconstitutionally impaired NEA—South Bend's contract rights.[80]

A somewhat less clear result, which required that administrative remedies be exhausted, appears in *Southern Indiana Health Systems Agency, Inc. v. State Board of Health.*[81] An Evansville hospital requested approval of the Health Systems Agency (HSA) and the Board of Health for the purchase of an expensive piece of new equipment.[82] Such approval was required in order for the hospital to be reimbursed under certain federal programs. HSA recommended that the Board of Health disapprove the purchase, but the Board gave its approval and recommended to the Secretary of the United States Department of Health, Education and Welfare that the federal government reimburse the hospital if it should purchase the equipment.

The basic issue on HSA's petition for review of the Board's decision was whether HSA had failed to exhaust its administrative remedies. HSA contended that there was no administrative remedy available for it to exhaust: the review mechanism of the Health Act requires an HSA whose recommendation has been rejected by a

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[78]389 N.E.2d at 30.

[79]*Id.* at 31-32.

[80]*Id.* at 32.

[81]391 N.E.2d 845 (Ind. Ct. App. 1979).

[82]HSA was the designated planning agency for the Evansville area under the National Health Planning and Resources Development Act of 1974 (Health Act), 42 U.S.C. § 300*l*-4 (1976). The State Board of Health was conditionally designated the state health planning and development agency under the same Act, 42 U.S.C. § 300m (1976), and is the designated planning agency with regard to health care facilities in Indiana. Social Security Act § 1122, 42 U.S.C. § 1320a-1 (1976 & Supp. III 1979).

state agency such as the Board of Health to request review by another state agency designated by the Governor,[83] but the Governor had not designated any reviewing agency.

The court rejected HSA's argument that there was no administrative remedy to exhaust. "Even if no reviewing agency has been designated, it is by no means clear that a request for a review would not have prompted the Governor to designate an agency in time to conduct a review."[84] The dismissal of HSA's petition was therefore affirmed.[85] In this author's mind, it is by no means clear that a request for review would have prompted the Governor to do anything. In view of the notorious escalation of both government expenditures and medical costs, perhaps the better course would have been for the court to permit judicial review on the merits.

Similar in effect is *Indiana Forge & Machine Co. v. Northern Indiana Public Service Co.*,[86] in which the court held that a statute which limited review by the Public Service Commission of complaints about the reasonableness of utility rates to those complaints made by ten or more complainants,[87] did not deny redress to the plaintiff justifying the bypass of the administrative remedy.[88] If the allegedly unreasonable rate affected a significant number of customers, surely the statutorily required number of complainants could be found. If not, there was nothing to preclude the commission from initiating a review on its own motion after receiving a single complaint.[89]

Using quite forceful language, the court of appeals in *Thompson v. Medical Licensing Board*[90] required a physician to exhaust his administrative remedies rather than permit him, by way of suit for declaratory judgment or injunction, to challenge the Medical Licensing Board's proceeding to revoke or suspend his license. The court stated that the Administrative Adjudication Act "recognized the basic need for unfettered action by administrative agencies," that the Act restricts access to the courts so that "the exclusive path to the courts is *by review*," and that "if the administrative remedy has not been exhausted, a court does not have jurisdiction to take action."[91]

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[83]391 N.E.2d at 847; *see* 42 U.S.C. § 300m-1(b)(13) (1976).

[84]391 N.E.2d at 847-48.

[85]*Id.* at 848.

[86]396 N.E.2d 910 (Ind. Ct. App. 1979).

[87]IND. CODE § 8-1-2-54 (1976).

[88]396 N.E.2d at 913-14.

[89]*Id.* at 914.

[90]389 N.E.2d 43 (Ind. Ct. App.), *rehearing denied*, 398 N.E.2d 679 (Ind. Ct. App. 1979).

[91]389 N.E.2d at 46-47 (emphasis in original).

While the result in *Thompson* is sound, certain language in the opinion is troublesome in that it interprets the Administrative Adjudication Act as mandating exhaustion of administrative remedies even if the attack on the agency's action is of constitutional dimension.[92] Because *Thompson* involved mixed questions of both law and fact, for example, misconduct by the physician, bias of the trier of fact, dual functions of agency members, and vagueness, and because of the well established reluctance of courts to decide constitutional issues, the requirement of exhaustion was proper. Disposition of the factual issues could very well moot the constitutional issues. The clear implication of the court's opinion, however, is that even in a case which rests purely on constitutional grounds, exhaustion is required.[93]

In support of its position on this point, the court cited *State ex rel. Paynter v. Marion County Superior Court*,[94] but that case also involved questions of fact and law and did not rest solely on a constitutional challenge. *Paynter*, in turn, relied on *Myers v. Bethlehem Shipbuilding Corp.*,[95] the leading federal case on exhaustion, in which Mr. Justice Brandeis expressly noted that there was no contention that the statutory provisions and NLRB rules of procedure were illegal, only that the activity of respondent was outside NLRB jurisdiction, an issue dependent upon facts to be determined by the agency.[96]

The conclusion to be drawn from this analysis is that if the case involves only a question of constitutionality, with no facts to be

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[92]*Id.* at 47; see 389 N.E.2d at 51-52 (Sullivan, J., concurring), which expresses concern in this regard. The court's reasoning is based on §§ 3 and 14 of the Act. Section 3 states in part: "In every administrative adjudication in which the rights, duties, obligations, privileges or other legal relations of any person are required or authorized by statute to be determined by any agency the same shall be made in accordance with this act and not otherwise." IND. CODE § 4-22-1-3 (1976). Section 14 directs that the petition for appeal allege specifically how the agency's action is "contrary to constitutional right, power, privilege or immunity." *Id.* § 4-22-1-14(2).

[93]On the petition for rehearing, the physician contended that the court of appeals had failed to consider an issue at the initial stage of the appeal, namely, that a plaintiff who is suing under the U.S. Civil Rights Act, 42 U.S.C. § 1983 (1976), need not exhaust his administrative remedies, and that his suit to enjoin the disciplinary proceeding against him was indeed an action under § 1983. The court expressly held that although exhaustion of administrative remedies is not required if a § 1983 action is brought in the federal courts, the federal decisions are not applicable to § 1983 actions brought in state courts. Accordingly, the physician's failure to exhaust his administrative remedies precluded his suit. 398 N.E.2d at 680. *Cf.* Annot., 47 A.L.R. Fed. 15 (1980), which notes that the federal courts are divided on whether state administrative remedies must be exhausted before institution of a federal § 1983 action.

[94]264 Ind. 345, 344 N.E.2d 846 (1976).

[95]303 U.S. 41 (1938), *cited in* 264 Ind. at 353, 344 N.E.2d at 851.

[96]303 U.S. at 51-52.

found by the agency, and the other criteria for not requiring exhaustion are met,[97] exhaustion should not be required. The issue is not really one of review of agency action but of determining whether the agency may act at all.

The administrative agency in *Indiana Environmental Management Board v. Indiana-Kentucky Electric Corp.*[98] urged that the failure of the utility to apply for a variance from environmental regulations was a failure to exhaust administrative remedies which deprived the trial court of jurisdiction to review the validity of the regulations. The court of appeals rejected the argument because the statute which authorized variances from administrative regulations[99] did not provide for meaningful review of the validity issue. One need not seek a variance when the basic issue is validity of the legislation or regulation.[100]

In *Reidenbach v. Board of School Trustees*,[101] a non-tenure teacher instituted a grievance procedure after his allegedly wrongful termination in mid-year. Prior to the decision in an arbitration proceeding on the propriety of the termination, the school board notified the teacher that his contract would not be renewed for the coming school year. The arbitrator found that the teacher had indeed been wrongfully terminated. When the teacher presented himself for employment at the beginning of the new school year, the board refused to employ him, following which he instituted suit for wrongful refusal to renew his contract.

The collective bargaining agreement in effect at the time provided grievance procedures to which resort "may" be had in the event of non-renewal of a non-tenure teacher but which the teacher in *Reidenbach* had failed to follow. Specifically, he had failed to request an enumeration of the reasons for non-renewal. The court rejected his argument that the use of "may" gave him the option of following the grievance procedure or seeking immediate judicial relief. The use of "may" was interpreted as giving the complainant a choice between following the procedure or abandoning the claim.[102]

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[97][A] court should consider the following factors: the character of the question presented, *i.e.*, whether the question is one of law or fact; the adequacy or competence of the available administrative channels to answer the question presented; the extent or imminence of harm to the plaintiff if required to pursue administrative remedies, and; the potential disruptive effect which judicial intervention might have on the administrative process.

Wilson v. Review Bd., 385 N.E.2d 438, 441 (Ind. 1979).

[98]393 N.E.2d 213 (Ind. Ct. App. 1979).

[99]IND. CODE § 13-7-7-6 (1976). The court also noted that this was a rule-making procedure not covered by the Administrative Adjudication Act. 393 N.E.2d at 217-18.

[100]393 N.E.2d at 218.

[101]398 N.E.2d 1372 (Ind. Ct. App. 1980).

[102]*Id.* at 1374.

The teacher also argued that exhaustion of his administrative remedies under the grievance procedure would have been futile in light of his wrongful termination in mid-year, as found by the arbitrator, and the notice of his non-renewal by the board. Therefore, he claimed, there would be nothing to gain by going through the formal procedure, including a request for and the filing of written reasons for non-renewal (which were not to be arbitrary or capricious), and a board executive session at which the teacher could be represented by counsel. The court responded that the reasons for the termination might very well not have been the same reasons for the non-renewal, and it was necessary to make a record of the latter reasons in order for a court to review the non-renewal decision of the board. Anything less would be premature.[103]

This result is soundly based. Since the reasons for the initial termination had already been found by the arbitrator to have been arbitrary and capricious, the board's stating the same reasons for a refusal to renew the contract probably would have resulted in the same finding. New reasons for the board's action would have to be supported by the record, which the teacher would have an opportunity to refute. In either situation, exhaustion of administrative remedies would have greatly simplified the task of the reviewing court.

Finally, on the subject of exhaustion, in *Hazelett v. Blue Cross & Blue Shield of Indiana*,[104] the court of appeals held that a medical insurance policyholder need not challenge before the Insurance Commissioner a policy provision which she claimed violated public policy. The applicable statute[105] provided only for the Commissioner's approval before the insurance company could lawfully issue policies; it did not establish any type of administrative remedy for policyholders. Therefore, the policyholder could not be required to exhaust remedies which did not exist.[106]

G. *Primary Jurisdiction*

In *Indiana Forge & Machine Co. v. Northern Indiana Public Service Co.*,[107] the utility's customer sought from the trial court an injunction and damages for the utility's alleged breach of contract to supply natural gas. The real thrust of the complaint, however, was that the Public Service Commission's rules and regulations, on

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[103] *Id.*
[104] 400 N.E.2d 1134 (Ind. Ct. App. 1980).
[105] IND. CODE § 27-8-5-1 (1976).
[106] 400 N.E.2d at 1137.
[107] 396 N.E.2d 910 (Ind. Ct. App. 1979).

which the utility's emergency curtailment policy was based, were arbitrary and unreasonable.[108] The court held that the customer was not justified in by-passing procedures for complaint to the Public Service Commission even though the Commission had no power and therefore no jurisdiction to grant the requested relief. In affirming the trial court's dismissal of the action on jurisdictional grounds, the court of appeals utilized Professor Davis' analysis of the doctrine of primary jurisdiction:

> "The test is not whether some parts of the case are within the exclusive jurisdiction of the courts; the test is whether some parts of the cases are within the exclusive jurisdiction of the agency. Because of the purpose of the doctrine—to assure that the agency will not be by-passed on what is especially committed to it—and because resort to the courts is still open after the agency has acted, the doctrine applies even if the agency has no jurisdiction to grant the relief sought."[109]

Professor Davis has also explained that the doctrine of primary jurisdiction is intended to govern timing of judicial consideration of issues, not to allocate powers between agencies and courts, as is sometimes assumed incorrectly.[110] In essence, it is not that the court *could not decide* the issue presented to it, in *Indiana Forge* a breach of contract, but that there were subsidiary issues which *would be better decided* by the agency.

H. Procedural Due Process

1. Right to Hearing.—The protections of procedural due process apply when state action affects liberty or property interests, a principle reiterated by the court of appeals in *Kriss v. Brown.*[111] The plaintiff, Kriss, sought to enjoin the Indiana High School Athletic Association (IHSAA) from enforcing its order which had declared him ineligible to participate in interscholastic sports at the school to which he had transferred. The IHSAA had found, *inter alia*, that Kriss had been unduly influenced to transfer, that guardians had been appointed solely for the purpose of making him eligible at the new school, that he was still eligible to play at the school he had attended while living with his parents, and that the greater likelihood of winning an athletic scholarship to college while playing at the new school was no justification for waiving IHSAA rules.

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[108] *Id.* at 913.

[109] *Id.* (quoting 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.07 at 39 (1958)).

[110] K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 19.01 at 436 (1976).

[111] 390 N.E.2d 193 (Ind. Ct. App. 1979).

The court reaffirmed its ruling in *Haas v. South Bend Community School Corp.*[112] that (1) the IHSAA has such impact on the schools that its action should be considered "state action" and (2) there is no constitutional right to participate in interscholastic athletics.[113] Thus, Kriss had not suffered the loss of a property interest. Kriss also contended that he had been deprived of a liberty interest by virtue of damage to his name and reputation,[114] but there was no evidence to support his claim.[115] Moreover, the court of appeals observed that Kriss did receive a hearing before the IHSAA executive committee, at which he had the opportunity to refute the charges against him and which was sufficient to satisfy the due process requirement of "some kind of hearing,"[116] regardless of his dissatisfaction with that hearing. A full, judicial-type hearing was not required.[117]

A captain in the Michigan City fire department was held to have no property interest in his captaincy in *State ex rel. Austin v. Miller*[118] because the executive order which established the hearing procedure in demotion cases was invalid.[119] In the absence of a legislative or administrative direction that a hearing be held, a hearing was not required. Therefore, the court concluded that he did not possess a right to continued employment as captain.[120]

A different result was achieved in *State ex rel. Indiana State Employees' Association v. Boehning*,[121] because the Indiana State Highway Commission Bi-Partisan Personnel Act[122] and the Professional and Technical Employees Act,[123] construed together, made plain that *cause* was the sole reason for which the complaining employees could be demoted or dismissed. Consequently, the employees had a legitimate expectation of continued employment at the ranks which they each held (in other words, a property interest) when they were notified of a choice of demotion or transfer, with

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[112]259 Ind. 515, 520, 289 N.E.2d 495, 498 (1972).

[113]*Id.* at 521, 289 N.E.2d at 498.

[114]*See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

[115]390 N.E.2d at 199-200.

[116]Board of Regents v. Roth, 408 U.S. at 570.

[117]390 N.E.2d at 200-01.

[118]395 N.E.2d 830 (Ind. Ct. App. 1979).

[119]*Id.* at 832. The 1977 amendments to IND. CODE § 18-1-11-3 (1976), which extended notice and hearing provisions to demotions of firefighters, were conceded not to apply in this case. 395 N.E.2d at 831.

[120]395 N.E.2d at 832. The captain had claimed that his demotion was politically motivated. *Id.* at 831. In view of the recent United States Supreme Court decision in Branti v. Finkel, 100 S.Ct. 1287 (1980), it is entirely possible that he may have stated a cause of action for deprivation of a protected property interest based on his right not to be fired for political reasons.

[121]396 N.E.2d 422 (Ind. Ct. App. 1979).

[122]IND. CODE §§ 8-13-1.5-1 to -8 (1976).

[123]IND. CODE § 8-13-1-16 (1976), is also called the "Career Act."

reduction in pay, or dismissal. They could be demoted only for cause after a due process hearing.[124]

The secretary to a superintendent of schools was found to be only an employee at will, therefore without a property interest, in *McQueeney v. Glenn.*[125] Thus, she was not entitled to a due process hearing when offered a transfer or termination after her husband was elected to the school board. Further, even if she were tenured, she would not have had a property interest in a particular position unless so declared in contract or statute, which was not the case here.[126]

In *Parker v. State*,[127] the plaintiff was held not to have been deprived of due process although he had not received a hearing prior to his mandatory retirement at age seventy. The court considered his contention that he had a property interest "doubtful at best" and concluded that even if he could prove existence of a property interest, he was not entitled to a pre-retirement hearing.[128] The cost of holding a pre-retirement hearing for each retiree would far outweigh the harm to the retiree himself.[129] However, the case was remanded to the trial court in order to permit the plaintiff to prove his allegation that the deferred retirement provision of the compulsory retirement act[130] was being administered arbitrarily and discriminatorily, in violation of the equal protection of the laws.[131]

The court of appeals ruled in *State ex rel. Dunlap v. Cross*[132] that a police officer suspended for less than ten days without a pre-suspension hearing was not deprived of a property interest and thus was not entitled to due process of law.[133] While the ultimate conclusion that the officer was not entitled to a pre-suspension hearing may have been correct, the reasoning of the court in reaching the conclusion that no property interest was involved appears to be seriously flawed.

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[124]396 N.E.2d at 428-29.

[125]400 N.E.2d 806 (Ind. Ct. App. 1980).

[126]*Id.* at 811. The plaintiff had insisted on retaining her position in the central school board office despite the apprehension of the superintendent and other board members that there might be a conflict of interest because of the plaintiff's husband's membership on the board. *Id.* at 809.

[127]400 N.E.2d 796 (Ind. Ct. App. 1980).

[128]*Id.* at 805.

[129]*Id.* at 805-06 (quoting Johnson v. Lefkowitz, 566 F.2d 866 (2d Cir. 1977), *cert. denied*, 440 U.S. 945 (1979)).

[130]Ind. Code §§ 4-15-8-2, -5 (1976).

[131]400 N.E.2d at 803-05.

[132]403 N.E.2d 885 (Ind. Ct. App. 1980).

[133]*Id.* at 888-89.

The court based its conclusion on that part of the Tenure Act[134] which provides that an officer suspended "for any period in excess of ten [10] days" may obtain judicial review of that suspension.[135] From this provision, the court concluded that there was "a protectible [sic] property interest in job tenure, promotions, demotions and suspensions, in excess of 10 days."[136] To conclude that there is no property interest merely because there is no right to appeal is a non sequitur.[137]

Unfortunately, the court completely overlooked the earlier subsection of the very same statutory provision, which expressly enumerates the reasons for termination or suspension[138] thereby in-

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[134]IND. CODE §§ 18-1-11-1 to -17 (1971) (current version at *id.* §§ 18-1-11-1 to -17 (1976 & Supp. 1980)).

[135]403 N.E.2d at 888. IND. CODE § 18-1-11-3 (1971) (current version at *id.* § 18-1-11-3(b)). The current version of IND. CODE § 18-1-11-3(b) (Supp. 1980) provides in part:

> Any member of such fire or police force who is dismissed from such force, as aforesaid, or is suspended therefrom for any period in excess of ten (10) days or reduced in grade shall have the right to appeal to the circuit court or superior court of the county in which such city is located, from such decision of dismissal or suspension or reduction in grade by said board, but shall not have the right of appeal from any other decision.

[136]403 N.E.2d at 888.

[137]This analysis finds strong support in Gerhardt v. City of Evansville, 408 N.E.2d 1308 (Ind. Ct. App. 1980), which was decided and published well after the close of the survey period (decided August 26, 1980; published October 15, 1980). The suspended police officers in *Gerhardt* challenged the constitutionality of the limitation of judicial review to only those suspensions in excess of ten days, an issue not raised in *Dunlap*. The court of appeals held the review limitation unconstitutional and expressly distinguished between a right to appeal and a property interest, stating:

> The City confuses the due process right to notice and an opportunity to be heard based upon a protected property interest with the due process right to judicial review of administrative action. The City's argument is that the appellants do not have a sufficient interest in their employment and therefore cannot challenge the constitutionality of the statute. Regardless of whether they actually have a protected property interest in their employment, the appellants here are denied the opportunity to have the trial court determine whether the Commission has acted according to the law and within its power if there is no review of the Commission's action.

Id. at 1310-11. Accordingly, the court of appeals remanded the case to the trial court for a determination whether the suspended officers had a protected property interest, the issue decided in *Dunlap*.

[138]IND. CODE § 18-1-11-3 (1971) (current version at *id.* § 18-1-11-3(a) (Supp. 1980)). The current version now provides in part:

> [E]very member of the fire and police forces . . . shall hold office or grade until they are removed by said board. They may be removed for any cause other than politics, after written notice is served upon such member . . . . On the conviction in any court of a member of the said fire or police force, . . . of any crime, or upon a finding and decision of the board that any such member has been or is guilty of neglect of duty, or of the violation of rules, or neglect

dicating unmistakably that even a suspension can be only for cause. This provision creates the required expectation of continued and uninterrupted employment which was the foundation of the property interest protected by due process.[139] The question to be answered in *Dunlap* was not whether the officer was entitled to due process—the first level of inquiry—but whether she received all the process that was due—the second level of inquiry.

The notice of suspension given the officer recited the facts on which the suspension was based.[140] At a hearing subsequent to the suspension, the officer was able to present testimony in support of her position that the suspension had been improper.[141] The Police Civil Service Commission affirmed the suspension but concluded that further disciplinary action was not necessary.[142] The court of appeals should have directed its attention to whether this procedure was sufficient, taking into consideration the various decisions of the Supreme Court of the United States[143] as well as the nature of police work in general and the specific facts of the case before it.

2. *Fair Hearing.*—Once it is determined that a hearing must be held, the question remains: What kind of hearing? In *City of Ander-*

> or disobedience of orders, or of incapacity, or absence without leave, or immoral conduct, or conduct injurious to the public peace or welfare or conduct unbecoming an officer, or other breach of discipline, such commissioners shall have power to punish the offending party by reprimand, forfeiture, *suspension without pay*, dismissal, or by reducing him or her to a lower grade and pay.

Id. § 18-1-11-3(a) (Supp. 1980) (emphasis added).

[139] *See* Board of Regents v. Roth, 408 U.S. 564 (1972); State *ex rel.* Warzyniak v. Grenchik, 379 N.E.2d 997 (Ind. Ct. App. 1978).

[140] 403 N.E.2d at 886. The officer's brief quoted pertinent parts of the notice of suspension. *See* Brief of Appellant, *supra* note 27, at 5. The notice recited that the officer was being charged with neglect of duty because she was seen by three other officers playing pool while absent from her already short-handed shift.

[141] 403 N.E.2d at 886. *See* Brief of Appellant, *supra* note 27, at 13, which described the testimony as being that the officer should remain off the job, for safety reasons, but that she could shoot pool.

[142] 403 N.E.2d at 886.

[143] *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975), in which the Supreme Court overturned an Ohio statute which authorized public school principals to suspend students for up to 10 days without a hearing either before or after the suspension. The Court held that due process required at least notice of the reasons and an explanation of the evidence supporting suspension, plus an opportunity for the student to respond and explain, possibly with no delay between the notice and the explanation and response. *Id.* at 581-82. An added element in *Dunlap*, not present in *Goss*, was the evidentiary hearing following the suspension. Also, it is likely that the qualitative analytical differences between attendance at school and police work may justify police disciplinary suspensions for short periods without a prior hearing. The analysis should have been made by the court in *Dunlap*.

son v. State ex rel. Page,[144] the court stated that "'where the dismissal of a police officer is in question a hearing before the Board of Public Works and Safety must be full and fair, before an impartial body and conducted in good faith.'"[145] Furthermore, every party must be permitted to present direct and rebuttal evidence and to conduct cross-examination.[146] Both the trial court and the court of appeals found the "hearing" provided Officer Page prior to dismissal, was seriously lacking in the rudimentary requirements of due process and was neither full nor fair.[147] No exhibits or sworn testimony had been presented at the hearing, the only "evidence" being unauthenticated reports and statements which had been presented to the board prior to the hearing in the police officer's absence, thereby denying him the right to object or cross-examine.[148] Further, after the hearing the board held a "secret" meeting attended by the police chief and two city attorneys who discussed the evidence with the board.[149] Finally, the officer had never received any notice that he was being charged with mental incapacity, nor was the psychiatric report on which the charge was based made part of the record. Nevertheless, mental incapacity was listed by the board as one of the grounds for dismissal.

The *Page* case is unusual not because the courts found the described proceedings constitutionally insufficient but because the "fair hearing" provided by the administrative agency had been so blatantly unfair.

The hearing procedure in *Addison v. Review Board of the Indiana Employment Security Division*[150] was also held to be violative of due process. The unemployment compensation proceedings were split so that the former employee who was claiming compensation testified before one referee, and the employer presented his testimony of justification to a second referee. Without ever hearing the employer's evidence, the first referee found that the employee's absences had been for illness, but still he denied the claim because the employee had failed to protect his job when he did not indicate when he would return to work. This last fact was hotly contested by the parties whose respective testimonies were in direct conflict.[151]

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[144]397 N.E.2d 615 (Ind. Ct. App. 1979).

[145]*Id.* at 619 (quoting Guido v. City of Marion, 151 Ind. App. 435, 440, 280 N.E.2d 81, 84 (1972)). The statute, IND. CODE § 18-1-11-3 (1976 & Supp. 1980), sets forth the appropriate procedure in police dismissal situations, including an administrative hearing.

[146]397 N.E.2d at 619.

[147]*Id.* at 618.

[148]*Id.* at 619-20.

[149]*Id.* at 620.

[150]397 N.E.2d 1037 (Ind. Ct. App. 1979).

[151]*Id.* at 1038-39.

The court ruled that in a case such as this, where credibility of witnesses is the determinative factor, there can be no meaningful evaluation as required by due process unless the same referee hears all the conflicting testimony. A new hearing was mandated.[152]

I. Res Judicata

Indiana now follows the modern view that principles of res judicata should apply to administrative decisions of an adjudicatory nature. In *South Bend Federation of Teachers v. National Education Association—South Bend*,[153] the facts of which are discussed earlier in this Article,[154] a prior administrative hearing had resulted in a finding that the 1972 Election Agreement stated only the earliest possible date of an election under the Agreement's terms, not the date after which the terms would no longer apply. In the current proceeding, the Federation of Teachers attempted to relitigate the expiration date issue, but the court refused to permit it. The principles of res judicata, which protect against vexatious and repetitious relitigation of decided issues, should "apply to administrative proceedings judicial in nature, unless a convincing reason is advanced why the first proceeding should not be final."[155] In this case, nothing had changed since the first administrative decision, and there was no good reason why it should be overturned.

J. Equitable Estoppel

In *Tippecanoe County Area Plan Commission v. Sheffield Developers, Inc.*,[156] the approving commission required the developer to submit its subdivision plat plan four successive times. The court found that the commission had attempted to delay approval by citing new and different reasons for disapproval each time.[157] At the fourth commission meeting, the commission claimed that the developer had failed to furnish certain information required by the applicable subdivision control ordinance, but this objection had not been raised at the third meeting. The court stated that the developer had a reasonable expectation that all defects in the plat plan would have been revealed at the third meeting so that correction of the stated defects would necessarily result in approval of the

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[152]*Id.* at 1040-41.
[153]389 N.E.2d 23 (Ind. Ct. App. 1979).
[154]*See* notes 76-77 *supra* and accompanying text.
[155]389 N.E.2d at 34-35.
[156]394 N.E.2d 176 (Ind. Ct. App. 1979).
[157]*Id.* at 184.

plat,[158] particularly in view of a statute imposing a duty on the commission to inform a developer of all reasons for negative votes.[159] Accordingly, the court held that the commissioners had misled the developer to his detriment and were estopped from relying on the defect raised at the fourth meeting which had not been raised at the third meeting.[160]

K. *Mandamus*

Another question in *Sheffield Developers*[161] was the propriety of the trial court's order directing the commission to approve the developer's plat. The court of appeals ruled that if the plat complied with the appropriate statutes and ordinances, as found by the trial court, it became the mandatory duty of the commission to approve and the trial court had jurisdiction to mandate that approval.[162] The court rejected the commission's argument that approval had been properly denied because the commission could not muster a sufficient number of affirmative votes to fulfill its duty. Such a position could forever deny approval of a plat which met all of the legal requirements and was entitled to approval as a matter of law.[163]

The supreme court once again enforced the rule that a court may not mandate an agency to exercise its discretion in a particular way in *State ex rel. Indiana State Board of Finance v. Marion County Superior Court, Civil Division.*[164] A crime victim had sought compensation from the Violent Crime Compensation Division which although created by statute,[165] had not been funded by the General Assembly. The lower court directed the State Finance Board and the State Budget Agency to transfer the appropriate funds. Despite the statutory mandate creating the Violent Crime Compensation Division, there was no provision allocating any funds for its operation and no statutory duty imposed on any other agency to transfer funds to it, such powers to transfer being purely discretionary. Therefore, the lower court had no authority to mandate the transfer of funds.[166]

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[158] *Id.* at 185.

[159] IND. CODE § 18-7-4-58 (1976) (current version at IND. CODE § 18-7-4-708 (Supp. 1980)).

[160] 394 N.E.2d at 185.

[161] 394 N.E.2d 176 (Ind. Ct. App. 1979).

[162] *Id.* at 180.

[163] *Id.* at 180-81.

[164] 396 N.E.2d 340, 343 (Ind. 1979).

[165] IND. CODE §§ 16-7-3.6-1 to -20 (Supp. 1980).

[166] 396 N.E.2d at 343.

L. *Freedom of Information*

In *Gallagher v. Marion County Victim Advocate Program, Inc.*,[167] a private corporation formed to aid crime victims brought a mandamus action to compel access under the Hughes Anti-Secrecy Act[168] to certain police reports which were made at the scene of an incident and included a description of the incident as well as names of any victims, witnesses or suspects. Until issuance of an order by the police chief which denied access, the corporation had been allowed to review the reports.[169] The basic question in the case was whether the reports were "public records" within the statutory definition: "[A]ny writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation of any administrative body or agency . . . ."[170] Although the police handbooks distributed to all officers established the proper procedures for making the reports, the court held that the reports were not public records to be disclosed under the Act because they were not required by any rule or regulation of the police department promulgated pursuant to the rule making authority of the police chief.[171] Further, the reports were "not collected *in* the discharge of duty but *to aid* in the discharge of a duty."[172]

This reading of the statute seems unnecessarily narrow. The Act specifically provides that its provisions "shall be liberally construed with the view of carrying out the . . . declaration of public policy"[173] that "all of the citizens of this state are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those whom the people select to represent them as public officials and employees."[174] Nevertheless, the court took the position that this liberality of construction applies only after it interprets the term "public records,"[175] which it interprets most narrowly. The logic of the dissenting opinion,[176] which interpreted "public records" to include these reports and required disclosure, is far more compelling than that of the majority.

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[167]401 N.E.2d 1362 (Ind. Ct. App. 1980).
[168]IND. CODE §§ 5-14-1-1 to -6 (1976 & Supp. 1980).
[169]401 N.E.2d at 1363.
[170]IND. CODE § 5-14-1-2 (Supp. 1980).
[171]401 N.E.2d at 1368.
[172]*Id.* (emphasis in original).
[173]IND. CODE § 5-14-1-1 (1976).
[174]*Id.*
[175]401 N.E.2d at 1364.
[176]*Id.* at 1369-72 (Chipman, J., dissenting).

M. Warrantless Administrative Inspections

The warrantless inspection of a motor vehicle dealer's titles to vehicles was upheld by the Indiana Supreme Court in *State v. Tindell.*[177] The appropriate statute provides that any dealer, as a prerequisite to the issuance of his dealer's license, consents to an inspection of the titles of vehicles being held for resale, the inspection to be conducted during reasonable business hours.[178] After stopping a truck and noting irregularities in its license and title, a police officer went to the dealer's office, requested and was permitted to examine the dealer's titles, and found several violations of law which were the basis of the information filed against the dealer.

Basing its decision on *Marshall v. Barlow's, Inc.*,[179] in which the United States Supreme Court held a warrantless search of a business premise by an agent of the Occupational Safety and Health Administration to be violative of the fourth amendment's prohibition of unreasonable searches and seizures, the trial court sustained the dealer's challenge to the inspection and to the evidence thereby obtained. The Indiana Supreme Court reversed and remanded with instructions to reinstate the prosecution.[180] *Marshall* makes specific exception to the requirement of a warrant for inspections of those industries which have a long history of government control.[181] The motor vehicle industry is one such highly regulated industry and, therefore, falls within the exception to the requirement that a warrant be obtained prior to any search.[182]

In an obvious response to the increasing use of drugs by young people, particularly in the public schools, the General Assembly has added to the statute dealing with public school student discipline and due process a new section which states that a student using a school locker has no expectation of privacy therein and that school authorities may search such a locker and its contents at any time in accordance with rules governing the school.[183] While such procedures

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[177]399 N.E.2d 746 (Ind. 1980).

[178]IND. CODE § 9-1-2-3(b) (Supp. 1980).

[179]436 U.S. 307 (1978).

[180]399 N.E.2d at 748.

[181]436 U.S. at 313.

[182]399 N.E.2d at 747-48.

[183]IND. CODE § 20-8.1-5-17 (Supp. 1980) provides:

(a) A student using a locker that is the property of a school corporation is presumed to have no expectation of privacy in that locker or its contents.

(b) A principal or other member of the administrative staff of a school designated in writing by the principal may, in accordance with the rules of the governing body of that school corporation, search such a locker and its contents at any time. The school corporation shall provide each student and each students' [sic] parents a written copy of all the rules of the governing

have been criticized as violative of the students' right to privacy and to freedom from unreasonable searches under the fourth amendment,[184] warrantless searches of students' lockers have generally been upheld by the courts.[185] The issue has not yet been decided by the United States Supreme Court, but a confrontation in that Court between the proponents of students' rights to privacy and the proponents of effective drug control in the schools can be expected.

> body at that school corporation regarding searches of such lockers and their contents.
>
> (c) Other than a general search of lockers of all students, any search conducted under this section shall be, where possible, conducted in the presence of the student whose assigned locker is the subject of the search.
>
> (d) A law enforcement agency having jurisdiction over the geographic area in which is located the school facility containing such a locker may, at the request of the school principal and in accordance with the rules of the governing body of that school corporation, assist the school administrators in searching such a locker and its contents.

[184]*See, e.g.*, 3 W. LAFAVE, SEARCH AND SEIZURE § 10.11 (1978); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974).

[185]*See, e.g.*, People v. Lanthier, 5 Cal. 3d 751, 488 P.2d 625, 97 Cal. Rptr. 297 (1971); *In re* Christopher W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970); People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969); Buss, *supra* note 184, at 739 & n.1.