# II. Administrative Law

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## *A. Scope of Judicial Review*

Confusion and uncertainty continue as to the scope of judicial review of administrative decisions. As noted in the 1977 Administrative law Survey,[1] the source of the confusion is differing interpretations of the "substantial evidence test" by the various Indiana courts.[2] The question remains: In looking for substantial evidence to support an administrative ruling, does the court examine all the evidence or merely the evidence most favorable to the successful party; that is, is the review on the whole record or only one-sided?

The court of appeals for the second district continues its adherence to the principle of whole-record review as enunciated by it in *City of Evansville v. Southern Indiana Gas & Electric Co.*,[3] and repeated in *L.S. Ayres & Co. v. Indianapolis Power & Light Co.*[4] In *Podgor v. Indiana University*,[5] the second district panel again stated:

> It is equally well settled that in determining the "substantiality" of the evidence, the reviewing court must consider the evidence in opposition to the challenged finding of basic fact as well as the evidence which tends to support the finding. As Justice Frankfurter said: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB* (1951), 340 U.S. 474, 488 . . . .[6]

Conversely, the first district court of appeals follows the one-sided approach, which it set forth in *Indiana Civil Rights Commission v. Holman*:[7]

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[1]Utken, *Administrative Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 20 (1978).

[2]*Id.* at 23-27.

[3]339 N.E.2d 562, 573 (Ind. Ct. App. 1975), *discussed in* Shaffer, *Administrative Law, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 37, 37 (1976).

[4]351 N.E.2d 814, 823 (Ind. Ct. App. 1976), *discussed in* Utken, *supra* note 1, at 24.

[5]381 N.E.2d 1274 (Ind. Ct. App. 1978).

[6]*Id.* at 1280 (quoting L.S. Ayres & Co. v. Indianapolis Power & Light Co., 351 N.E.2d at 823-24; Southern Ind. Gas & Elec. Co., 339 N.E.2d at 573).

[7]380 N.E.2d 1281 (Ind. Ct. App. 1978).

> In a judicial review of an administrative proceeding a trial court is not free to weigh the evidence, but must look at the evidence most favorable to the party who prevailed in the administrative proceeding in an effort to determine whether or not there exists substantial and probative evidence which would support the findings and decision of the administrative agency.[8]

Further analysis of the substantial evidence test by the first district court of appeals in *State ex rel. Department of Natural Resources v. Lehman*[9] adds to the problem. In the 1977 Survey, the author observed that the first district court applied one-sided review of the record in *Indiana Education Employment Relations Board v. Board of School Trustees*[10] when it inquired whether there was "*any* evidence to support" the ruling of the administrative agency.[11] In *Lehman*, the court responded to the Survey author's observation:

> This is not to suggest that *any* evidence supportive of an agency's determination requires a reviewing court's affirmance; we are not expounding such a standard nor could we since [section] 4-22-1-18 requires "substantial evidence."
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> . . . .
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> In our opinion, where a reasonable person would conclude that the evidence as presented, with its logical and reasonable inferences, was of such a substantial character and probative value so as to support the administrative determination, then the substantial evidence standard required by [section] 4-22-1-18 has been met. Substantial evidence requires something more than a scintilla and something less than a preponderance of the evidence. The administrative determination must be soundly based in evidence and inferences flowing therefrom.[12]

The court's analysis does not really respond to the Survey comment, since the court's discussion can apply as well to a one-sided review as to a review of the whole record. Furthermore, since

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[8] *Id.* at 1284 (citing Department of Fin. Inst. v. State Bank of Lizton, 253 Ind. 172, 252 N.E.2d 248 (1969)).

[9] 378 N.E.2d 31 (Ind. Ct. App. 1978).

[10] 355 N.E.2d 269 (Ind. Ct. App. 1976).

[11] Utken, *supra* note 1, at 25.

[12] 378 N.E.2d at 36 (footnotes omitted). Section 18 of the Administrative Adjudication Act, IND. CODE § 4-22-1-18 (1976), mandates that if an agency's determination "is supported by substantial, reliable and probative evidence, . . . [it] shall not be set aside or disturbed." However, if the court finds, *inter alia*, that the determination is "[u]nsupported by substantial evidence, the court may order the decision or determination of the agency set aside."

*Holman* was decided approximately three months after *Lehman*, one-sided review appears to be firmly established as proper in the first district.

The court of appeals for the third and fourth districts also search for "any substantial evidence,"[13] but the third district, in *Johnson County REMC v. Public Service Commission*,[14] cited *L.S. Ayres* and *City of Evansville* and declared that the court must determine "whether there is substantial evidence in light of the whole record to support the Commission's findings of basic facts."[15]

Compounding the present confusion is *Capital Improvement Board of Managers v. Public Service Commission*,[16] in which a panel of judges from the first and third districts,[17] sitting as the second district court of appeals, cited a whole record review case, *L.S. Ayres*, as having restated the standard to be applied,[18] but then quoted from a one-sided review case, *Boone County REMC v. Public Service Commission*,[19] that under the substantial evidence test, " 'so long as there is *any* substantial evidence to support the rates fixed by the Commission as reasonable, the judicial branch of the government will not interfere with such legislative functions.' "[20]

Decisions of the Indiana Supreme Court offer little guidance. The leading case is *Department of Financial Institutions v. State Bank of Lizton*,[21] in which the court stated: "The court's only right or scope of review is limited to a consideration of whether or not there is *any* substantial evidence to support the finding and order of the administrative body."[22] But in the current survey period, the supreme court stated in *Hawley v. South Bend Department of Re-*

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[13]Indiana Educ. Emp. Rel. Bd. v. Board of School Trustees, 377 N.E.2d 414, 416 (Ind. Ct. App. 1978) (3d Dist.) ("If there is any substantial evidence to support the finding of the board or agency . . . ."); Indiana State Bd. of Reg. and Educ. for Health Facility Adm'rs v. Cummings, 387 N.E.2d 491, 493 (Ind. Ct. App. 1979) (4th Dist.) (quoting Department of Fin. Inst. v. State Bank of Lizton, 253 Ind. 172, 176, 252 N.E.2d 248, 250 (1969) (" 'whether or not there is any substantial evidence to support the finding and order of the administrative body.' ")).

[14]378 N.E.2d 1 (Ind. Ct. App. 1978).

[15]*Id.* at 6. Two cases decided after the survey period indicate rather clearly that the third and fourth district courts of appeals now adhere to whole record review. In Indiana Civil Rights Comm'n v. Sutherland Lumber, 394 N.E.2d 949, 952 (Ind. Ct. App. 1979), the third district repeated the whole record standard as well as the quotation from *City of Evansville* which appeared in *Podgor v. Indiana University*. *See* notes 3-6 *supra* and accompanying text. The fourth district cited both *City of Evansville* and *L. S. Ayres* and applied the whole record standard in Old State Utility Corp. v. Greenbriar Dev. Corp., 393 N.E.2d 785, 789 (Ind. Ct. App. 1979).

[16]375 N.E.2d 616 (Ind. Ct. App. 1978).

[17]Lybrook, P.J. (1st Dist.); Garrard, P.J., & Hoffman, J. (3d Dist.).

[18]375 N.E.2d at 622.

[19]239 Ind. 525, 159 N.E.2d 121 (1959).

[20]375 N.E.2d at 622 (quoting 239 Ind. at 532, 159 N.E.2d at 124) (emphasis added)).

[21]253 Ind. 172, 252 N.E.2d 248 (1969).

[22]*Id.* at 176, 252 N.E.2d at 250 (emphasis added).

*development:*[23] "So long as there is substantial evidence of probative value in the record to support the findings [of the administrative agency] . . . ,"[24] requirements of due process are satisfied. The uncertainty continues.

### *B. Hearsay Evidence in Administrative Proceedings*

*1. The Residuum Rule.*—In *C.T.S. Corp. v. Schoulton*,[25] the Indiana Supreme Court restated and reaffirmed the "residuum rule," which directs that an administrative decision not be based on inadmissible hearsay evidence admitted over objection unless there is a "residuum" of competent evidence to support the decision.[26] In this workmen's compensation case, the industrial board awarded benefits to the estate of a deceased employee after the board found that the employee had died as the result of over-exposure to toxic cleaning solvent fumes in an industrial accident. The only evidence of the accident was the treating physician's testimony that during the employee's hospitalization, he had asked the employee about exposure to solvents. The employee responded that he had spilled a container of solvent and "'that he got down an cleaned it up.'"[27] It was undisputed that a toxic solvent was used for many purposes in the employer's plant. Although the employee had a history of alcoholism and infectious hepatitis, the autopsy disclosed that neither was the cause of death.

The second district court of appeals, over a vigorous dissenting opinion by Chief Judge Buchanan, affirmed the award.[28] Citing to strong criticism of the residuum rule by Professor Davis[29] and the erosion of the rule in New York, where it originated,[30] the court of

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[23]383 N.E.2d 333 (Ind. 1978).

[24]*Id.* at 337.

[25]383 N.E.2d 293 (Ind. 1978). For additional discussion of *C.T.S. Corp. v. Schoulton*, see Arthur, *Workmen's Compensation, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 439, 447-55 (1980), and Karlson, *Evidence, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 260, 260-62 (1980).

[26]383 N.E.2d at 295-96.

[27]*Id.* at 294.

[28]354 N.E.2d 324 (Ind. Ct. App. 1976). It should be noted that in the course of his dissenting opinion, Chief Judge Buchanan stated: "This case possibly could be disposed of under an established exception to the Hearsay Rule for statements made to a treating physician concerning the cause or external source of an illness or condition made for the purpose of diagnosis and treatment." *Id.* at 331 (Buchanan, C.J., dissenting). The clear implication is that the residuum rule was not even applicable because the evidence was properly admissable. For additional discussion of this issue, see Karlson, *supra* note 25, at 260-62.

[29]*See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.10 (1958).

[30]*Compare* Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916) (the seminal case) *with, e.g.*, Altshuller v. Bressler, 289 N.Y. 463, 46 N.E.2d 886 (1943). The only evidence in *Atshuller* of the actual cause of the deceased employee's coronary occlusion was the hearsay testimony of his wife and another person that the decendent

appeals rejected the residuum rule and held that if reliance on hearsay is necessary and the hearsay itself is trustworthy, an award may be based on the hearsay evidence. The court found that the evidence in question satisfied both requirements: it was necessary because of the employee's death and the absence of other witnesses to the accident, and it was trustworthy because it was given in response to inquiry by the treating physician.[31]

The Indiana Supreme Court granted transfer, adopted the views of Chief Judge Buchanan, reversed the award, and remanded the matter for rehearing by the industrial board.[32] The court observed that under the residuum rule as applied in Indiana hearsay evidence may be admitted in an administrative hearing, and that, although such admission is improper, it will not be grounds for automatic reversal. When proper objection is made to evidence which is within the proscription of the hearsay rule, the evidence may not be the sole basis of the award. Rather, it must be supported by a residuum of competent evidence. However, if not objected to, the hearsay may form the basis of the decision just as it may in any courtroom proceeding.[33]

Professor Davis has long been a critic of the residuum rule.[34] His strongest argument against it is "the lack of correlation between reliability of evidence and the exclusionary rules of evidence."[35] Wigmore states, for the same reason, that the rule "is decidedly not the wise and satisfactory rule for general adoption."[36] Professor Cooper lists twenty-one states in which the residuum rule has some vitality, but expresses doubt about the rule's survival as a general requirement because, even in those states which follow the rule, the tendency is not to apply it rigidly.[37]

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told them he had lifted a heavy object. The medical evidence was that such lifting could cause an occlusion, and there was evidence that the employees did work with the object which the decedent was said to have lifted. The court stated that there was "no substantial testimony to show that an accident did not occur as narrated by the injured employee, and established 'facts and circumstances' leave little reasonable doubt that the narration is substantially true." 289 N.Y. at 470, 46 N.E.2d at 889.

There is no meaningful difference between *Altshuller* and *C.T.S. Corp. v. Schoulton.* Although the New York statute involved did require the hearing board to admit the hearsay evidence, it could not serve as the basis of the decision without corroboration. Similarly, in Indiana, once the hearsay is admitted, corroboration by a residuum of evidence is still required. Thus, even applying the residuum rule, it should have been possible for the court to affirm the award in *Schoulton.*

[31]354 N.E.2d at 327-29.

[32]383 N.E.2d at 294, 296-97.

[33]*Id.*

[34]*See* 2 K. DAVIS, ADMINISTRATIVE LAW TEXT § 14.09 (3d ed. 1972); 2 K. DAVIS, *supra* note 29, § 14.10; Davis, *The Residuum Rule in Administrative Law*, 28 ROCKY MTN. L. REV. 1 (1955).

[35]2 K. DAVIS, *supra* note 29, § 14.10, at 295.

[36]J. WIGMORE, 1 EVIDENCE IN TRIALS AT COMMON LAW § 4b, at 42 (3d ed. 1940).

[37]1 F. COOPER, STATE ADMINISTRATIVE LAW 406-11 (1965).

The fact that ordinarily incompetent hearsay may be relied upon when no objection is raised[38] indicates quite clearly that hearsay is neither inherently unreliable nor lacking in probative value.[39] The supreme court expressed concern that rejection of the residuum rule would conflict with the well-established principle that the appellate courts may not determine the weight of evidence or credibility of witnesses.[40] To the contrary, rejection of the residuum rule would not require courts to operate differently. Courts would continue their present practice of determining, without "weighing" the evidence, whether the administrative decision is supported by substantial evidence,[41] which is "'such relevant evidence as a reasonable mind might accept as sufficient to support a conclusion'"[42] and is "of such a substantial character and probative value so as to support the administrative determination."[43] If the hearsay is not trustworthy in the sense that a reasonable mind would not accept it, or if it is of little probative value, then it could not support the result whether or not the residuum rule applied. The reviewing court will not "weigh" the hearsay to any greater or lesser extent than it "weighs" other evidence in determining substantiality.

Furthermore, since it is improper, but not reversible error, to admit hearsay over objection,[44] it is illogical to convert improperly admitted evidence into the basis of an administrative decision because there is also a supporting residuum of evidence which, by definition, is less than the substantial evidence required to support the decision. If the residuum were substantial evidence, the residuum rule and the problems with it would be superfluous because there would be substantial evidence in the record, apart from the hearsay, to support the decision.

The residuum rule as applied in Indiana creates a further problem. Because the supreme court is unwilling to abolish the hearsay rule in administrative proceedings[45] (despite the legislative mandate that technical common law rules of evidence not be applied[46]), an administrative hearing officer may properly sustain an objection to

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[38]C.T.S. Corp. v. Schoulton, 383 N.E.2d at 297; Turentine v. State, 384 N.E.2d 1119, 1121-22 (Ind. Ct. App. 1979) (citing *Schoulton*).

[39]*See* Seymour Nat'l Bank v. State, 384 N.E.2d at 1121-22.

[40]383 N.E.2d at 296.

[41]*See* text accompanying notes 1-24 *supra.*

[42]Siddiqi v. Review Bd. of Ind. Employment Security Div., 388 N.E.2d 613, 618 (Ind. Ct. App 1979) (quoting Vonville v. Dexter, 118 Ind. App. 187, 208, 77 N.E.2d 759, 760 (1948)).

[43]Department of Natural Resources v. Lehman, 378 N.E.2d 31, 36 (Ind. Ct. App. 1978).

[44]383 N.E.2d at 296.

[45]*Id.*

[46]Administrative Adjudiciation Act, IND. CODE § 4-22-1-8 (1976).

and exclude plainly reliable and probative, although technically inadmissible, hearsay evidence either before or after the required residuum of competent evidence is in the record. The claimant would thus be precluded from proving his case by evidence which the supreme court has held may be a basis for an award because the supreme court has also stated that the administrative hearing officer may exclude that evidence. Such a result is patently illogical and unjust. Nevertheless, the residuum rule is in force in Indiana and will be applied in those cases which depend exclusively on hearsay evidence to justify the decision of the administrative officer.

*2. Expert Testimony.*—In *Capital Improvement Board of Managers v. Public Service Commission*,[47] intervenors opposing an increase in steam rates had objected to the testimony of an expert who had relied on a report prepared by others. Without referring to the residuum rule[48] by name, the court first observed that administrative action may not be based on hearsay alone, but must be corroborated by other competent evidence.[49] The court then restated the rule that "the opinion of an expert witness that is based in part on hearsay customarily relied upon by such experts is properly admissible."[50] In this case, the expert did not offer the earlier report as evidence but testified that he had used the report in compiling his own study. His testimony and his study were therefore admissible.

### *C. Procedural Due Process*

*Wilson v. Review Board of Indiana Employment Security Division*[51] was favorably reviewed in the 1978 Survey.[52] During the current survey period, the Indiana Supreme Court granted transfer, vacated, and remanded *Wilson*.[53] The appellant Wilson had begun receiving unemployment benefits in November 1976. In December, her former employer submitted a report stating that she had refused an offer of suitable work. When she appeared to file her weekly claim, a deputy informed her that her benefits were being

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[47]375 N.E.2d 616 (Ind. Ct. App. 1978).

[48]*See* text accompanying notes 25-46 *supra*.

[49]375 N.E.2d at 624.

[50]*Id.* at 626. Query: In C.T.S. v. Schoulton, was not the doctor's testimony that the employee had died as a result of over-exposure to toxic fumes rather than from cirrhosis or hepatitis admissible under this rule? And did not the evidence that the employee worked with that solvent at his job constitute a sufficient residuum?

[51]373 N.E.2d 331 (Ind. Ct. App. 1978), *vacated*, 385 N.E.2d 438 (Ind. 1979). See additional discussion in Darko, *Labor Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 295, 295-98 (1980).

[52]*See* Price, *Administrative Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND L. REV. 30, 41-42 (1979).

[53]385 N.E.2d 438 (Ind. 1979).

suspended effective immediately. Wilson filed a complaint seeking declaratory and injunctive relief, which the trial court dismissed. Concurrently, she requested a full hearing before a referee pursuant to the applicable administrative procedures. At that hearing, some thirty-six days after the suspension and twenty-three days after her request, the referee upheld the suspension, and was subsequently affirmed by the board.

The court of appeals held that Wilson had been deprived of a property right entitled to the protection of constitutional due process,[54] and that under the relevant statute[55] she was entitled to a hearing prior to termination of benefits.[56] Although based essentially on interpretation of the statute, the opinion also analyzed due process requirements in support of the decision.[57]

The Indiana Supreme Court vacated the opinion of the court of appeals and remanded to the trial court with instructions to enter judgment for the defendant-appellee.[58] The higher court agreed with the court of appeals that Wilson had a constitutionally protected property interest in continued receipt of unemployment benefits, but concluded that a prompt post-termination hearing is sufficient to meet the requirements of due process, and found the Indiana procedures to be sufficiently speedy.[59]

The supreme court's due process conclusion relies on two cases, *Torres v. New York State Department of Labor*[60] and *Fusari v.*

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[54]U.S. CONST. amend. XIV.

[55]IND. CODE § 22-4-17-2(e) (Supp. 1979). The statute provides, *inter alia*:

> In cases where the claimant's benefit eligibility or disqualification is disputed, the division shall promptly notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of . . . the cause for which the claimant left his work, of such determination and the reasons thereof. . . . Unless the claimant or such employer asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. . . . In the event a hearing is requested by an employer or the division after it had been administratively determined that benefits should be allowed to a claimant, entitled benefits shall continue to be paid to said claimant unless said administrative determination has been reversed by a due process hearing.

[56]373 N.E.2d at 340-44.

[57]*Id.* at 339.

[58]385 N.E.2d at 446.

[59]*Id.* at 443, 445-46. The supreme court did not deal directly with the statutory construction issue, which was the basis of the decision of the court of appeals. One can only infer from the fact that the supreme court reached the constitutional issue that it also disagreed with the court of appeals as to the proper interpretation of the applicable statute.

[60]333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd*, 405 U.S. 949 (1972). An earlier appeal in *Torres* had been remanded to the district court by the United States Supreme Court,

*Steinberg.*[61] Neither case directly addressed the constitutional issue or furnished a solid foundation for the supreme court's decision in *Wilson.* Although the court in *Wilson* characterized the New York procedure applicable in *Torres* as providing claimants "with a post-termination hearing in substantially the same manner as Indiana,"[62] the district court opinion in *Torres* stated unequivocally that there was also a pre-termination hearing:

> This decision [that benefits were not "due" under the Social Security Act] was made after a hearing procedure identical to that initially used to determine eligibility. The *hearing procedure prior to the suspension of benefits* involved an interview, at which claimant had an opportunity to present information favorable to his version of the facts or unfavorable to that of his employer, and to answer charges.[63]

No such procedure appeared in *Wilson.* The appellant was merely informed that her benefits were being suspended. As Justice DeBruler observed in his dissenting opinion, under the described Indiana procedure, "no requirement is imposed upon the deputy to weigh any answer given by the claimant to the charges of the employer . . . in the course of making a determination of ineligibility or disqualification."[64]

In *Wilson,* the court compared *Torres* with *California Department of Human Resources Development v. Java,*[65] in which the United States Supreme Court held that a hearing was required prior to termination of benefits "due" under the terms of the Social Security Act.[66] The *Wilson* court concluded, first, that the *Torres* court had distinguished *Java* because the benefits in *Torres* were not "due" under the Social Security Act and, second, that because *Torres* was more like *Wilson* than *Java, Torres* controlled.[67] Although the Supreme Court affirmed *Torres* summarily,[68] it has since cautioned that *Torres* should not be read broadly, because to do so would leave little vitality to *Java.* A narrow construction is

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402 U.S. 968 (1971), for reconsideration in light of California Dept. of Human Resources Dev. v. Java, 402 U.S. 121 (1971), which had construed the payment "when due" requirement of the Social Security Act, 42 U.S.C. § 503(a) (1976), as mandating a pretermination hearing when unemployment benefits were to be discontinued. *Torres* also depended on a construction of that language.

[61] 419 U.S. 379 (1975).

[62] 385 N.E.2d at 444.

[63] 333 F. Supp. at 344 (emphasis added).

[64] 385 N.E.2d at 446 (DeBruler, J., dissenting).

[65] 402 U.S. 121 (1971).

[66] *Id.* at 133. *See* 42 U.S.C. § 503(a) (1976).

[67] 385 N.E.2d at 444.

[68] 405 U.S. at 949.

more appropriate.[69] Moreover, the Court in *Fusari* refused to identify the factors in *Torres* which justified summary affirmance.[70]

In *Fusari*, the Connecticut procedure which provided for post-termination hearing was modified after the case had been appealed to the United States Supreme Court to provide more rapid, but still post-termination, hearings. The Supreme Court refused to rule on the merits, and remanded for reconsideration in light of the new state procedures.[71] The Indiana Supreme Court comment in *Wilson*, that had due process required a *pre*-termination hearing the United States Supreme Court would not have remanded,[72] ignores the statement in *Fusari* that the Court felt "compelled to re-examine a statutory claim that may be dispositive *before* considering a difficult constitutional issue."[73] *Fusari* expressly recognized that the record therein was an entirely inadequate basis on which to determine either the statutory or constitutional claim, and refused to do so.[74] In this posture, *Fusari* can hardly be read as implying either approval or condemnation of post-termination hearings under the due process clause.

*Fuentes v. Shevin*,[75] which held seizure of property by writ of replevin without hearing to be unconstitutional,[76] emphasized that notice and hearing must be granted when the deprivation of property can still be prevented.[77] This would seem to apply in *Wilson*, particularly since the governmental interest at stake, one of the elements to be evaluated in determining what process is due,[78] does not appear to outweigh the needs of the person whose unemployment benefits are summarily cut off.[79]

Unlike *Wilson*, several other cases decided during the survey period turned on whether the plaintiffs had a property interest protected by due process. In *State ex rel. Warzyniak v. Grenchik*,[80] the

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[69]*See* Fusari v. Steinberg, 419 U.S. at 388-89 n.15.

[70]*Id.*

[71]*Id.* at 389-90.

[72]385 N.E.2d at 445.

[73]419 U.S. at 388 n.13 (emphasis added).

[74]*Id.* at 388-89.

[75]407 U.S. 67 (1972).

[76]*Id.* at 81.

[77]*Id.* at 81-82.

[78]385 N.E.2d at 444.

[79]The *Wilson* opinion makes much of the fact that under applicable Indiana procedures the full hearing on termination of benefits occurs quite speedily, thereby depriving the claimant of her benefits for only a short time prior to that hearing. 385 N.E.2d 445-46. This same fact cuts against an overwhelming government interest that the benefits be terminated summarily.

[80]379 N.E.2d 997 (Ind. Ct. App. 1978). *See* discussion in Darko, *supra* note 51, at 295.

newly elected mayor of Whiting reorganized that city's police force and, without notice, hearing, or specification of cause, demoted many police officers to the rank of patrolman, with appropriate reductions in salary. The demoted officers sought reinstatement and damages. The court of appeals held that the officers had been deprived of due process of law.[81] The applicable municipal ordinance[82] authorized demotion only for violation of written rules and regulations, not for political reasons. Therefore, each officer had an expectation of continuation in rank unless he violated one of the rules or regulations.[83] The expectation constituted a property interest protected by the due process clause of the fourteenth amendment, as explained in the landmark case of *Board of Regents v. Roth*,[84] which has been impaired by demotion without notice, hearing, or cause.[85]

Two fire chiefs demoted for political reasons, without notice or hearing, did not fare as well in *Morris v. City of Kokomo*.[86] They were held not to have been deprived of a property interest because the statute[87] prohibited only *removal* for political reasons.[88] Nor had there been deprivation of a protected liberty interest, concluded the court, because under *Paul v. Davis*,[89] damage to one's reputation standing alone is not sufficient but must result in termination of employment.[90] The retention of the officers in this case substantially diminished any stigma. Moreover, the defamation had not been communicated to others.[91] However, the claim that the officers had been demoted because they had failed to support the mayor's re-election was held to state a claim of infringement of first amendment rights which was remanded for consideration by the trial court.[92]

A somewhat different situation arose in *Heyne v. Mabrey*,[93] in which the Indiana State Personnel Board reclassified thousands of state employees, some of whom were reduced in job classification, although none received a reduction in pay. A result of the classification was that these employees no longer had available to them fur-

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[81]379 N.E.2d at 1002.

[82]Whiting, Ind., Ordinance 1057, 14-108, § 8 (July 2, 1962), *as amended by* Ordinance 1083 (Nov. 1, 1965).

[83]379 N.E.2d at 1002.

[84]408 U.S. 564 (1972).

[85]379 N.E.2d at 1002.

[86]381 N.E.2d 510 (Ind. Ct. App. 1978).

[87]Act of April 7, 1971, Pub. L. No. 252, § 1, 1971 Ind. Acts 69 (current version at IND. CODE § 18-1-11-3 (Supp. 1979)).

[88]381 N.E.2d at 513-14.

[89]424 U.S. 693 (1976).

[90]*Id.* at 701.

[91]381 N.E.2d at 515-16.

[92]*Id.* at 516-18.

[93]383 N.E.2d 464 (Ind. Ct. App. 1978).

ther merit or step increases within a particular job classification. The employees contended that this action constituted a demotion; that is, a deprivation of property right without due process of law. The court of appeals ruled that reclassification and demotion are not synonymous in this context and that the anticipated step increases were mere expectancies, not property rights, because they depended both on performance and recommendations.[94]

A probationary police officer contended in *Gansert v. Meeks*[95] that the provisions of the Indiana Code[96] and the Allen County Police Department Merit Board Rules[97] violated his right to due process because they authorized discharge of probationary policemen without hearing or appeal. Not so, replied the court of appeals. As in the cases discussed above, to avail himself of procedural due process protections, the officer was required to demonstrate that he had protected property interest. This he was unable to do. Neither the fact that his probationary appointment was for one year nor the bare fact of his appointment created such an interest.[98]

A law student who had been classified as a non-resident by university authorities was found in *Podgor v. Indiana University*[99] to have a protected property interest based on her claim of entitlement to treatment under university regulations as a resident student and, consequently, to pay lower tuition.[100] However, the court ruled that she had received the appropriate notice and hearing prior to the time she would have been required to pay non-resident tuition fees, and that there was substantial evidence on the record to support her classification as a non-resident.[101]

### *D. Exhaustion of Remedies*

The Indiana Supreme Court, in *Wilson v. Review Board of Indiana Employment Security Division*,[102] discussed extensively in the preceding section,[103] was faced at the outset with the fact that Wilson had failed to exhaust her administrative remedies prior to bringing the action challenging the constitutionality of the pro-

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[94]*Id.* at 467.

[95]384 N.E.2d 1140 (Ind. Ct. App. 1979).

[96]IND. CODE §§ 17-3-14-6 to -7 (1976).

[97]ALLEN CTY., IND., POLICE DEPT. MERIT BD. RULES § J, ¶ 2 & § D, ¶ 7.

[98]384 N.E.2d at 1143. The court also rejected the argument that the equal protection clause of the fourteenth amendment prohibited a difference in procedure for discharge of permanent police officers and probationary officers. *Id.* at 1144-45.

[99]381 N.E.2d 1274 (Ind. Ct. App. 1978).

[100]*Id.* at 1281-82.

[101]*See* notes 1-24 *supra*, and accompanying text.

[102]385 N.E.2d 438 (Ind. 1979).

[103]*See* text accompanying notes 51-79 *supra*.

cedures for termination of her unemployment benefits. The Indiana Employment Security Act[104] mandates specific procedures for determination of eligibility, and decisions of the review board are reviewable only by the court of appeals.[105] The court rejected the claim that Wilson's failure to exhaust was fatal.[106]

The following factors were listed by the court for consideration in determining whether a plaintiff must exhaust administrative remedies before resort to the courts:

> [T]he 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.[107]

Because the issue in the case was of constitutional dimension, beyond the expertise of the administrative agency and more appropriate for judicial consideration, the supreme court held that the trial court erred in dismissing the complaint.[108] This analysis is sound and should not lead to any extensive circumvention of appropriate administrative procedures.[109]

### *E. Requirement of Specific Findings*

In several cases, the Indiana appellate courts admonished administrative agencies to make specific findings of fact on which to base their ultimate rulings. In *Board of Medical Registration v. Stidd*,[110] a podiatrist's license suspension case, the board merely recited the charges in the complaint against the licensee and found him guilty as charged. In *State ex rel. Sacks Brothers Loan Co. v. DeBard*,[111] in which a license to sell handguns at retail was denied, the decision of the administrative officer recited nothing more than that the evidence disclosed the applicant not to be a proper person for license. Finally, in *Yunker v. Porter County Sheriff's Merit Board*,[112] a police officer dismissal case, the board's only finding was

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[104]IND. CODE §§ 22-4-1-1 to -38-3 (1976).
[105]*Id.* § 22-4-17-12.
[106]385 N.E.2d at 441.
[107]*Id.*
[108]*Id.*
[109]*See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.10 (3d. ed. 1972).
[110]377 N.E.2d 896 (Ind. Ct. App. 1978).
[111]381 N.E.2d 119 (Ind. Ct. App. 1978).
[112]382 N.E.2d 977 (Ind. Ct. App. 1978).

a citation to the rules and regulations which the officer was found to have violated.

In each of these cases, the matter was remanded to the appropriate agency for specific findings of fact to support the administrative decision. As noted in *Yunker*, the absence of findings of the pertinent facts on which the administrative decision is based invites reweighing of the evidence on review, which the courts are not permitted to do.[113]

The message seems clear: specific findings of fact are required of all administrative agencies. However, in *Hawley v. South Bend Department of Redevelopment*,[114] despite the failure of the administrative agency to find specifically the facts underlying its ultimate findings, the Indiana Supreme Court stated that because the hearing had been fully transcribed, the trial court had no problem in reviewing the agency's action. The court held, therefore, that the administrative error in not stating the underlying facts was harmless.[115] The court's action in not remanding for specific findings seems inconsistent with its earlier statement in the same opinion that findings of fact are required "'so that this Court may intelligently review that specific decision without speculating as to the Board's reasoning.'"[116] In the context of the entire opinion, however, this action was proper because there appears to have been no evidence contrary to a finding of urban blight, and the opponents of the project basically attacked the admissibility of evidence, alleged procedural irregularities, and argued that the applicable statutory conditions had not been met. All arguments failed.

### *F. Immunity from Suit*

During the survey period, the Indiana Court of Appeals decided two noteworthy cases involving immunity from suit, one dealing with sovereign immunity from liability for acts of administrative officers, and the other involving immunity of the officer himself.

In *Seymour National Bank v. State*,[117] a state police patrol car, while in hot pursuit of a suspected felon, collided with a private automobile, the occupants of which were killed in the crash. The trial court held that the State was immune from suit under provisions of the Indiana Tort Claims Act[118] and granted summary judg-

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[113]*Id.* at 982.

[114]383 N.E.2d 333 (Ind. 1978).

[115]*Id.* at 336.

[116]*Id.* (quoting Kunz v. Waterman, 258 Ind. 573 , 577, 283 N.E.2d 371, 373 (1972)).

[117]384 N.E.2d 1177 (Ind. Ct. App. 1979).

[118]IND. CODE § 34-4-16.5-3 (1976) states in pertinent part: "A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from . . . (6) the performance of a discretionary function; (7) the adoption and the enforcement of or failure to adopt or enforce a law."

ment against the decedents' representative. The court of appeals reversed.[119]

Under the common law as it existed prior to the Tort Claims Act, a cause of action was stated if the plaintiff could show that the officer was acting in a ministerial capacity or owed a private duty of care to the plaintiff. Because under prior decisions drivers of speeding emergency vehicles owe a duty of care to others,[120] and an officer's duties are ministerial once he has determined to act,[121] a cause of action was stated under the common law in *Seymour National Bank*. Furthermore, stated the court, the Tort Claims Act is in harmony with the common law and does not change the result.[122] It is the decision to enforce the law which is the protected activity; the legislature did not intend the "enforcement" protected by the statute to protect negligent implementation of the decision as well. Otherwise, the result would be harsh and unjust.[123] The standard to be applied is whether the officer "exercised his duty with the level of care that an ordinary prudent person would exercise under the same or similar circumstances," keeping in mind the unique circumstances of police work.[124]

The Indiana Supreme Court held in *Foster v. Pearcy*[125] that a prosecuting attorney and his deputy enjoyed an asbolute immunity, not a qualified immunity, for statements made by the deputy to the press. It is the prosecutor's duty to inform the public of his activities, and he must be absolutely immune from suit in order to carry out this duty effectively. Moreover, under the Tort Claims Act,[126] the prosecutor's duty to inform the public is a discretionary action protected thereunder.[127] The supreme court specifically reserved opinion on acts outside the scope of the prosecutor's authority. For acts "reasonably within the general scope of authority granted to prosecuting attorneys," there is no liability.[128]

### *G. Administrative Interpretation of Statutes*

Cases frequently arise in which an application or interpretation of the statute under which the administrative agency operates

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[119]384 N.E.2d at 1177.

[120]Bailey v. L.W. Edison Charitable Found., 152 Ind. App. 460, 284 N.E.2d 141 (1972).

[121]Board of Comm'rs v. Briggs, 337 N.E.2d 852 (Ind. Ct. App. 1975).

[122]384 N.E.2d at 1186.

[123]*Id.*

[124]*Id.* at 1187.

[125]387 N.E.2d 446 (Ind. 1979). For a discussion of other aspects of this case, see Ratner, *Torts, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 399, 399-421 (1980).

[126]*See* note 118 *supra.*

[127]387 N.E.2d at 449.

[128]*Id.*

presents a new issue for judicial decision. In *Bender v. State ex rel. Wareham*,[129] the court of appeals reiterated the rule to be followed in such a situation:

> Where, as here, the applicability of a statute is in doubt a court may look to the interpretation placed upon the statute by an administrative agency charged with its enforcement. . . . Such an administrative interpretation is not binding on this Court, but it is entitled to a great weight. . . . Furthermore, where the legislature makes no change in the statutory provision in the face of a long-standing administrative interpretation, a presumption arises that the Legislature had acquiesced in that interpretation.[130]

The court applied this rule in a situation where the population of Allen County placed it within terms of conflicting statutes, one which required the appropriation of the exact amount of money needed to feed county prisoners,[131] and the other which permitted the sheriff to receive a flat fee per meal served.[132] The Indiana State Board of Accounts had long interpreted the flat fee system to apply, and although the legislature had twice amended the flat fee provision, it did not alter the population requirements,[133] thereby leaving Allen County within the ambit of both statutes. Under these circumstances, the flat fee system as applied by the board was held to control.[134]

### *H. Legislation*

As long as government exists, we shall have administrative agencies in one form or another and problems of administrative law to resolve. During the survey period, the Indiana Legislature enacted several statutes which deserve mention.

The Indiana Veterinary Practice Law,[135] enacted "to safeguard against the incompetent, dishonest, or unprincipled practitioner of veterinary medicine,"[136] establishes the Indiana Board of Veterinary Medical Examiners,[137] sets forth license and registration require-

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[129]388 N.E.2d 578 (Ind. Ct. App. 1979).

[130]*Id.* at 581 (citations omitted).

[131]IND. CODE § 17-3-75-2 (1976).

[132]*Id.* § 17-3-12-1.

[133]388 N.E.2d at 582 (citing Act of Mar. 9, 1961, ch. 261, 1961 Ind. Acts 590; Act of Mar. 4, 1967, ch. 62, 1967 Ind. Acts 129).

[134]388 N.E.2d at 581-82.

[135]IND. CODE §§ 15-5-1.1-1 to -35 (1976 & Supp. 1979).

[136]*Id.* § 15-5-1.1-1.

[137]*Id.* § 15-5-1.1-3.

ments for veterinarians and veterinary technicians,[138] and provides for discipline of licensees[139] and penalties for violation of the Act.[140]

In a sweeping revision of the criminal correction system, the legislature amended some existing statutes and enacted a new Corrections Code[141] which, *inter alia*, creates a new department of correction within the executive branch,[142] establishes a parole board within the department,[143] provides for correctional services and programs,[144] establishes correctional standards and procedures,[145] sets forth comprehensive procedures for probation and parole,[146] all to modernize the Indiana correction system. Although extensive analysis of the new Code is beyond the scope of this article, all practitioners and scholars who deal with matters of criminal law and procedure are urged to give their careful attention to this new statute.

In an obvious response to the refusal of the state attorney general to approve certain contracts, thereby bringing certain governmental activities to a halt,[147] the legislature has amended the Indiana Code to provide that failure of the attorney general to disapprove a state contract within ninety days of submission to him constitutes approval.[148]

Finally, the Indiana Open Door (or "Sunshine") Law, which requires that meetings of government bodies be open to the public,[149] has been amended to allow the court, in any action filed thereunder, to "award reasonable attorney fees, court costs, and other reasonable expenses of litigation to the prevailing party if (i) the plaintiff prevails and the court finds the defendant's violation is knowing and intentional, or (ii) the defendant prevails and the court finds the action is frivolous and vexatious."[150]

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[138] *Id.* §§ 15-5-1.1-9 to -21.

[139] *Id.* § 15-5-1.1-22.

[140] *Id.* § 15-5-1.1-34.

[141] *Id.* §§ 11-8-1-1 to -13-6-9 (1976 & Supp. 1979); *id.* §§ 17-3-5-7, -6.3-1; *id.* §§ 35-4.1-5-1 to -4; *id.* §§ 35-50-6-1 to -6.

[142] *Id.* §§ 11-8-2-1 to -10.

[143] *Id.* §§ 11-9-1-1 to -2-3.

[144] *Id.* §§ 11-10-1-1 to -12-4.

[145] *Id.* §§ 11-11-1-1 to -7-2.

[146] *Id.* §§ 11-13-1-1 to -6-9.

[147] *See* The Indianapolis Star, April 5, 1979, at 4, col. 3.

[148] IND. CODE 4-13-2-14 (Supp. 1979). Prior to the amendment, the statute required only that all contracts and leases be approved by the attorney general.

[149] *Id.* §§ 5-14-1.5-1 to -7 (1976 & Supp. 1979).

[150] *Id.* § 5-14-1.5-7(c) (Supp. 1979).