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SURVEY OF INDIANA ADMINISTRATIVE LAW

ALEXANDER CARLISLE* AND MANUEL “MANNY” HERCEG**

INTRODUCTION

This survey article provides a glimpse into the sweeping world of administrative law, which influences the lives of most Hoosiers. Indiana courts, which remain busy, have issued opinions during the survey period that are both interesting and informative; opinions that move the needle in the field of administrative law. Practitioners, academics, and every-day Hoosiers alike should take heed of these cases—the connective tissue between them and their government—so they can be better prepared to face the future and the ever-evolving administrative state.

I. ACCESS TO JUDICIAL REVIEW

A. Procedural Issues Concerning Petitions for Judicial Review

Perhaps signaling a breaking point in the application of bright-line rules in administrative cases, *Baliga v. Indiana Horse Racing Commission*¹ presents an acknowledgment of leniency by the court when confronted by a party’s failure to abide by procedural rules in the Administrative Orders and Appeals Act (“AOPA”) while maintaining the Act’s preeminence over agency regulations. The Court of Appeals in *Baliga* held that an entry of default judgment in administrative proceedings was subject to judicial review and that the administrative law judge and the Indiana Horse Racing Commission (“IHRC”) abused their discretion by finding and enforcing an entry of default despite a party’s failure to comply with certain filing requirements required by agency

* Associate, Lewis & Kappes, P.C. J.D., cum laude, 2017, Indiana University Robert H. McKinney School of Law; B.A., 2010, Indiana University—Bloomington.

** Manny Herceg is a Partner at the Indianapolis office of Taft Stettinius & Hollister LLP where he focuses his practice on civil litigation, multi-district litigation, and municipal law. He is a graduate of Indiana University and the Indiana University Robert H. McKinney School of Law.

1. 112 N.E.3d 731 (Ind. Ct. App. 2018), *reh’g denied*, 123 N.E.3d 140 (Ind. 2019); *cf.* Hunter v. State, Dep’t of Transp., 67 N.E.3d 1085 (Ind. Ct. App. 2016) (applying bright-line rule that judicial review is waived if a petition is not timely filed).

regulations.²

Dr. Joseph Baliga was a veterinarian specializing in the care and treatment of racehorses.³ While he was working at Hoosier Park in Anderson, Indiana, a security officer reported that Dr. Baliga gave a horse a banned substance. Under the IHRC's regulations, the IHRC could have brought two types of disciplinary proceedings against Dr. Baliga.⁴ One form consisted of proceedings by IHRC judges at the track, and the other consisted of proceedings by the IHRC itself. Both types of proceedings were initiated against Dr. Baliga, and the interplay of those two proceedings is at the crux of this decision.

Initially, the IHRC judges at Hoosier Park temporarily and summarily suspended Dr. Baliga's IHRC license pending a disciplinary hearing before the judges under 71 I.A.C. 10-2-3. Dr. Baliga requested a hearing and the judges obliged. But the IHRC attorney explained at the beginning of the hearing that it was not about the merits of the underlying case and that the merits hearing would be held at a later time. The purpose of the hearing before the IHRC judges was "only to consider whether it [was] appropriate for [Dr. Baliga] to remain suspended pending the hearing on any underlying charges."⁵ The judges refused to allow Dr. Baliga to testify about the incident in question.

Then, only 10 days after that hearing, the IHRC executive director initiated a second disciplinary proceeding against Dr. Baliga by filing an "Administrative Complaint" with the IHRC.⁶ Dr. Baliga appealed the summary suspension but did not make a separate request for a hearing on the administrative complaint. Six days after Dr. Baliga's deadline for making the request expired, the IHRC filed a Motion for Default against him, relying on 71 I.A.C. 10-3-20(d), which requires that a written request for a hearing be made within 20 days. It also provides that failure to make the request results in a waiver of any right to a hearing and judicial review.

Dr. Baliga filed a motion opposing the default, but the administrative law judge issued an order recommending to the IHRC that Dr. Baliga be found in default.⁷ The IHRC affirmed the order and issued a five-year suspension of his IHRC license, a \$20,000 fine, and a permanent ban on administering a particular type of medicine at Indiana race tracks.⁸ Dr. Baliga filed a petition for judicial review, and the IHRC filed a motion to dismiss arguing that its entry of default was not reviewable by the trial court. The trial court granted the motion to dismiss and Dr. Baliga appealed.⁹

On appeal, Dr. Baliga maintained the argument that he raised at the trial court

2. *Baliga*, 112 N.E.3d 731.

3. *Id.* at 732.

4. *Id.* at 732-33.

5. *Id.* at 733.

6. *Id.* at 734.

7. *Id.*

8. *Id.*

9. *Id.*

level: that the IHRC should not have found him in default.¹⁰ Specifically, Dr. Baliga argued that the IHRC's entry of default is subject to judicial review, and that the IHRC's entry of default was "contrary to constitutional right, power, privilege, or immunity" and an abuse of discretion.¹¹

The IHRC, however, argued that the Administrative Orders and Procedures Act "does not give the reviewing court discretion to excuse a party's default."¹² IHRC pointed to Indiana Code section 4-21.5-5-4(b)(2), which states, "[a] person . . . in default under this article . . . has waived the person's right to judicial review under this chapter."¹³ IHRC also relied on its regulations, particularly 71 I.A.C. 10-3-20(d), "which provides in part that a person's failure to request a hearing within twenty days of being served with an administrative complaint 'results in a waiver of a right to a hearing on the administrative penalty **as well as any right to judicial review.**'"¹⁴

The Court took issue with the IHRC's interpretation of the relevant AOPA provision and its interplay with the IHRC's regulations. Notably, the Court observed that while section 4-21.5-3-24 provides a mechanism and procedure for an entry of default if a party in an agency proceeding fails to file a responsive pleading, the ALJ *may* find that party in default.¹⁵ But the agency regulation at issue required a finding of default when a party fails to file a responsive pleading. Accordingly, the Court found the regulation invalid, noting that "[a]n agency may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law."¹⁶

After concluding that the IHRC's decision is subject to judicial review, it turned to the decision itself. The court, applying the principle that no deference is owed to the agency determination since the appellate court stands in the same position as the trial court, analyzed Dr. Baliga's arguments that the decision was contrary to constitutional right, power, privilege, or immunity and that it was an abuse of discretion to find him in default. The court did not opine on the constitutional issue because it ultimately found that the agency abused its discretion in entering the default.¹⁷

In so doing, the court acknowledged that Dr. Baliga did not file a direct response to the administrative complaint filed by the IHRC, but it did not matter. The court, more or less, noted that Dr. Baliga was misled because the same accusations that formed the summary suspension proceeding formed the administrative complaint, and that he was not allowed to testify in the summary suspension proceeding at the track because the merits of the accusations would be reached at a later date and hearing. But that hearing never came. Instead, the

10. *Id.* at 735.

11. *Id.* at 736.

12. *Id.* at 735.

13. *Id.* (internal quotations omitted).

14. *Id.* (emphasis in original) (citing 71 I.A.C. 10-3-20(d) (2018)).

15. *Id.* at 735-36.

16. *Id.* at 736 (internal citations omitted).

17. *Id.* at 737.

IHRC filed concurrent proceedings. Under the IHRC's regulations, it could (and did) proceed with a "Proceeding by Judges", which is a disciplinary proceeding conducted by on-site judges under 71 I.A.C. 10-2. It could also proceed (and did) with "Proceedings by the Commission" under 71 I.A.C. 10-3, which is a separate disciplinary proceeding by the IHRC or its executive director. But here, despite the "seemingly clear line" between these two proceedings, the court observed that line "was significantly blurred from the very beginning." It also noted "the IHRC was on notice that Dr. Baliga denied the accusation against him."¹⁸

The fact that the IHRC took a clear stance goes against the impression that the IHRC and the Hoosier Park proceedings would be consolidated, especially because Dr. Baliga was told by the judges at the Hoosier Park proceeding that "[t]he merits hearing will come later."¹⁹ Consequently, the court reversed the dismissal of Dr. Baliga's petition for judicial review and directed the trial court to remand the matter to the IHRC for a hearing on the merits.²⁰

*B. Incorporation by Reference of Extrinsic Materials
into Administrative Codes*

Bellwether Properties v. Duke Energy Indiana is an inverse condemnation case, but it touches on an issue related to access to justice before administrative agencies.²¹ Specifically, *Bellwether*, an opinion authored by Justice Slaughter for a unanimous court, casts doubt on the practice of incorporating by reference extrinsic materials into administrative codes where the extrinsic materials are not made accessible to the public.²²

The condemnation issue in *Bellwether* arose as a result of Duke Energy's compliance with the Indiana Utility Regulatory Commission's ("IURC") regulations regarding the proper installation, operation, and maintenance of overhead supply and communication lines.²³ IURC's regulations imposed a minimum twenty-three-foot-wide lateral clearance²⁴ for the maintenance of electrical lines, which regulation Duke Energy was required to heed.²⁵ However, the utility easement that had been granted in 1957 to Duke Energy's predecessor in interest, and which ran over Bellwether Properties' land, provided for only a ten-foot-wide access strip to maintain the electrical lines.²⁶ IURC's regulation thus required Duke Energy to use thirteen feet more land than provided for in the

18. *Id.*

19. *Id.*

20. *Id.* at 738.

21. 87 N.E.3d 462 (Ind. 2017). Statutory codes too often contain extrinsic materials incorporated by reference. *Id.* at 467-68.

22. *Id.* at 467-69.

23. *Id.* at 465.

24. A lateral clearance dictates "how close structures on the land can be to a utility's overhead lines." *Id.*

25. *Id.*

26. *Id.*

utility easement.²⁷ Bellwether Properties brought a claim against Duke Energy, arguing that IURC's regulations effected a taking of its property for which Bellwether Properties was entitled just compensation.²⁸

The applicable IURC overhead line regulations were included as part of a safety code published by the Institute of Electrical and Electronic Engineers, Inc. ("IEEE"), a private professional organization.²⁹ IURC adopted the IEEE safety code in 2002.³⁰ Upon promulgation of the IEEE safety code, IURC did not reproduce the text of the code within an administrative rule, but rather incorporated it there by reference, noting that "copies could be obtained from [IEEE] in New Jersey and the [IURC] in Indianapolis."³¹

Before the trial court, Duke Energy motioned to dismiss Bellwether Properties' claim under Ind. Trial R. 12(B)(6).³² Duke Energy argued that Bellwether's 2015 lawsuit was barred by the applicable six-year statute of limitations because IURC had adopted the IEEE safety code in 2002, more than six years before the lawsuit was filed, and thus plaintiff's claim accrued in 2002.³³ The trial court granted the motion, and the issues before the supreme court thus were whether Duke Energy's affirmative defense gave the trial court proper cause to dismiss where "the face of the complaint did not establish that the asserted claim was time-barred," and whether Bellwether Properties' claim for inverse condemnation accrued in 2002 upon IURC's adoption of the IEEE safety code, or else at another date.³⁴ The supreme court held that the dismissal was premature because the record did not establish when the landowner's claim accrued.³⁵

The merits holding was not the end of the matter, however. The court *sua sponte* raised the issue of whether Bellwether Properties had reasonable access to IURC's incorporated-by-reference IEEE overhead line regulations.³⁶ The court did not answer the question, but it provided a robust discussion of the incorporation by reference issue, suggesting the trial court take it up on remand.³⁷

The court began its discussion by affirming the bedrock legal presumptions that "citizens know the law and must obey it—on pain of losing their lives, liberty, or property for noncompliance," and that "man is free to steer between lawful and unlawful conduct."³⁸ It follows that citizens must have access to the

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* (citing 170 I.A.C. § 4-1-26(b) (2019)).

32. *Id.*

33. *Id.*

34. *Id.* at 464.

35. *Id.* at 465.

36. *Id.* at 467.

37. *Id.* at 465.

38. *Id.* at 467 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

laws they must obey in order to conform their conduct accordingly.³⁹ In the court's view, the practice of incorporating by reference extrinsic materials into administrative (and statutory) codes poses a threat to the citizen's ability to conform his conduct to the law because often the extrinsic materials are not available for reference.⁴⁰

The court noted that the practice of incorporation by reference has become a trend nationwide over the last fifty years, and it has been routine in Indiana since 1985, when the General Assembly authorized the practice.⁴¹ The incorporated materials usually include state and federal statutes and regulations, but they also include privately developed standards written by various industry and professional groups.⁴² In many cases these privately developed materials "are . . . beyond the technical expertise of government officials."⁴³ Although the court acknowledged that the government reaps certain efficiencies by permitting a "kind of rulemaking by proxy,"⁴⁴ the court expressed concern about the cost of the widespread incorporation of private standards, particularly in relation to copyrighted materials.⁴⁵ Often, incorporated copyrighted materials are "practically unavailable without the accompanying text, which can be difficult and expensive to obtain."⁴⁶

Turning to the IEEE safety code incorporated into IURC's overhead line regulations, the court found these regulations not readily accessible.⁴⁷ Indeed, the court described the difficulty a member of its staff faced when trying to access the IEEE safety code, a copy of which was not included in the record on appeal.⁴⁸ When the court's employee phoned IURC to request a copy of the IEEE safety code, an IURC representative informed her that "she could make an appointment to come in during office hours to *inspect* the [IEEE safety code]."⁴⁹ IURC did not make copies available for purchase, and the publisher's restrictions made it so that the court's employee could not check out a copy of the IEEE safety code anywhere.⁵⁰ The court eventually was able to locate a copy of the IEEE safety

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 468.

43. *Id.*

44. *Id.* Government need not, for instance, hire policy experts to craft standards when private actors, who are not subject to regulatory hurdles such as notice-and-comment rulemaking, can do so with less burden. *Id.*

45. *Id.* Technological advances have alleviated the cost in regard to non-copyrighted materials: "The cost [of incorporation by reference] may be negligible for regulations that incorporate federal statutes, regulations, and other open-source materials, much of which can now be viewed online for free with just a few extra mouse clicks." *Id.*

46. *Id.*

47. *Id.* at 468-69.

48. *Id.*

49. *Id.* at 468 (emphasis in original).

50. *Id.*

code online, though the court could not ascertain whether it was the version IURC incorporated in 2002.⁵¹

The administrative agency's incorporation by reference of a copyrighted safety code thus hindered judicial resolution of the *Bellwether Properties* dispute, and the court could only assume that others faced the same difficulty accessing the incorporated materials.⁵² The court urged IURC to make the incorporated material readily accessible on its website in order to avoid being "at odds with government's obligation to provide meaningful access to laws."⁵³

II. STANDARD OF REVIEW AT THE THRESHOLD

The Indiana Supreme Court addressed an issue during the survey period regarding what standard of review it should apply when reviewing an agency interpretation of a statute that fell within the agency's purview. While this issue arises in many administrative decisions, it is not usual for the standard of review to be a threshold issue for the court.

As often occurs in administrative law, *Moriarity v. DNR* presented the courts with an arcane question of regulatory minutiae: the central question in *Moriarity* was whether the Department of Natural Resources' ("DNR") interpretation of the word "stream" as used in the Dam Safety Act, Indiana Code section 14-27-7.5, constituted a reasonable interpretation of the word.⁵⁴ Unlike most administrative law cases, however, *Moriarity* exposed a potential rift in the Indiana Supreme Court's administrative law jurisprudence regarding the proper degree of deference courts should afford agency interpretations of statutes the agency is tasked with enforcing. The opinion also speaks to the proper role of the judiciary within the Indiana Constitution's separation of powers structure.⁵⁵

In the late 1990's, John and Mae ("Becky") Moriarity built a pond and dam on their Grant County property after receiving what they understood to be all necessary permitting from local, state, and federal regulators.⁵⁶ In 2002, DNR became aware of the pond and dam, and over the course of the next decade the department attempted to force the Moriaritys to correct "significant safety deficiencies" DNR had identified under the Dam Safety Act.⁵⁷ In 2012, DNR issued a notice of violation to the Moriaritys as a result of numerous violations

51. *Id.* at 469. The court noted that the copy of the IEEE safety code it obtained was marked as copyright protected, though the publisher had authorized governments to republish the code. *Id.*

52. *Id.*

53. *Id.* at 466.

54. *See Moriarity v. Ind. Dep't Nat. Res.*, 113 N.E.3d 614 (Ind. 2019).

55. "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." IND. CONST. art. 3, § 1.

56. *Moriarity*, 113 N.E.3d at 617.

57. *Id.* at 617-18.

of the Dam Safety Act.⁵⁸ The notice ordered the Moriaritys to alter the pond and dam, imposed a fine of \$35,000 for past existing violations of the Dam Safety Act, and imposed daily penalties for continuing violations.⁵⁹

Upon administrative and judicial review of the notice of violation, the Moriaritys argued, among other things, that DNR lacked regulatory jurisdiction over the dam.⁶⁰ Under the Dam Safety Act, DNR wields supervisory and enforcement power over those dams “in, on, or along the rivers, streams, and lakes of Indiana.”⁶¹ DNR asserted that it could exercise jurisdiction over the Moriaritys’ dam as a result of the presence of at least one stream on their property.⁶² DNR had not, however, previously defined the word “stream” via rulemaking or interpreted it in an adjudicative proceeding.⁶³ Rather, when it issued the notice of violation, DNR had unofficially adopted what it deemed to be the common, ordinary understanding of a stream: a stream is “flowing water through a defined channel,” without regard to size or consistency of water flow.⁶⁴

When confronted with DNR’s interpretation, the Moriaritys argued that DNR improperly defined the word “stream,”⁶⁵ and furthermore that “DNR, by failing to promulgate any regulations or guidance defining stream under the [Dam Safety] Act and relying solely on the statute, had not given any notice or fair warning that their dam would fall within DNR’s [regulatory] jurisdiction.”⁶⁶ According to the Moriaritys, DNR had failed to provide an ascertainable standard of what constitutes a “stream” for purposes of the Dam Safety Act,⁶⁷ and DNR’s enforcement action was therefore invalid under AOPA, which requires agency decisions to “be based on ascertainable standards in order to be fair and consistent rather than arbitrary and capricious.”⁶⁸

After a multi-part hearing, the presiding ALJ issued findings of fact, conclusions of law, and a non-final order in favor of the agency and enforcing

58. *Id.* at 618.

59. *Id.*

60. *Id.*

61. *Id.* at 620; IND. CODE § 14-27-7.5-8(a)(1).

62. *Moriarity*, 113 N.E.3d at 620. At oral argument, the Moriaritys’ counsel, William M. Home, represented that the pond became filled as a result of ground runoff and suggested there was no body of continuously running water located on the Moriaritys’ property. *Oral Arguments Online: John Moriarity, et al. v. Indiana Department of Natural Resources*, COURTS.IN.GOV (June 28, 2018, 9:45 AM), <https://mycourts.in.gov/arguments/default.aspx?&id=2233&view=detail&yr=&when=&page=1&court=&search=moriarity&direction=%20ASC&future=True&sort=&judge=&county=&admin=False&pageSize=20> [<https://perma.cc/SL73-RHD9>].

63. *Moriarity*, 113 N.E.3d at 621.

64. *Id.*

65. *Id.* at 620.

66. *Id.* at 621 (internal quotation and brackets omitted).

67. *Id.* at 620.

68. *Id.* at 621 (quoting *State Bd. of Tax Comm’rs v. New Castle Lodge #147, Loyal Order of Moose, Inc.*, 765 N.E.2d 1257, 1264 (Ind. 2002)).

DNR's notice of violation.⁶⁹ The Moriaritys appealed the ALJ decision to the Natural Resources Commission ("NRC"), which largely affirmed the ALJ's order, finding that "DNR's use of the common meaning of the word stream was proper and constituted an ascertainable standard for identifying a stream."⁷⁰ The trial court and the court of appeals both affirmed NRC's decision.⁷¹

The Moriaritys' petition to transfer presented the supreme court with the issue of whether DNR properly exercised jurisdiction over the Moriaritys' dam, which required the court to address whether DNR's interpretation of "stream" as used in the Dam Safety Act was reasonable, and whether the Moriaritys had sufficient notice of that interpretation.⁷² The supreme court granted transfer and upheld DNR's enforcement action in an opinion authored by Justice Goff, which Chief Justice Rush and Justice David joined. Justice Massa concurred in the majority opinion's result only.⁷³ Justice Slaughter entered a "resolute"⁷⁴ dissent, which highlighted a judicial philosophy less inclined to defer to agency interpretations of law.⁷⁵

The threshold issue the supreme court had to decide was which standard of review it should apply to the agency's interpretation of the Dam Safety Act, a statutory scheme the General Assembly entrusted DNR to enforce.⁷⁶ The majority explained that the court's review of agency action under AOPA "is intentionally limited" in light of an agency's subject matter expertise.⁷⁷ The court then affirmed principles of administrative review which dictate that (1) the courts defer to the agency's factual findings as long as they are supported by substantial evidence; and (2) although ordinarily the courts review the agency's determinations of law *de novo* and are not bound by the agency's conclusions of law, "[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself."⁷⁸ "In fact," the majority continued, "if the agency's interpretation is reasonable, [the courts] stop [their] analysis and need not move forward with any other proposed interpretation."⁷⁹

In dissent, Justice Slaughter rejected the majority's standard of review. Justice Slaughter would have opted to "give no deference" to DNR's interpretation of "stream" because "[t]he prerogative to interpret the law

69. *Id.* at 618.

70. *Id.*

71. *Id.*

72. *Id.* at 617.

73. *Id.*

74. *Id.* at 619 (majority's characterization of the dissenting opinion).

75. *Id.* at 624-26 (Slaughter, J., dissenting).

76. *Id.* at 620 (citing IND. CODE § 14-27-7.5-8(a)(1)-(2)).

77. *Id.* at 619.

78. *Id.* (citations omitted).

79. *Id.* (quoting *Jay Classroom Teachers Ass'n v. Jay Sch. Corp.*, 55 N.E.3d 813, 816 (Ind. 2016)).

authoritatively belongs to us,” that is, the judiciary.⁸⁰ Deferring to an agency’s interpretation of the law “disserve[s] separation-of-powers principles” and amounts to the courts permitting the executive branch “to usurp a core judicial function.”⁸¹

Further, the dissenting opinion explained that the court’s deferential standard in *Moriarity* could not be reconciled with the non-deferential standard the court adopted in a case decided only months before *Moriarity*: *NIPSCO Industrial Group v. Northern Indiana Public Service Company*.⁸² *NIPSCO Industrial Group* was an appeal of an order by the IURC preapproving broad categories of unspecified utility infrastructure enhancements under a statute permitting preapproval of specific, “designated” projects.⁸³ The industrial group appellants alleged that IURC’s approval plainly violated the clear language of the preapproval statute.⁸⁴ The supreme court agreed, finding that IURC’s preapproval decision was arbitrary and capricious and thus afforded the agency’s interpretation of the statute no deference.⁸⁵

The *Moriarity* dissent characterized the court’s unanimous holding in *NIPSCO Industrial Group* as follows:

[In *NIPSCO Industrial Group*,] we held unanimously that we review agencies’ legal determinations “de novo”; that we accord such determinations “no deference”; that plenary review of agency decisions is “constitutionally preserved” for the judiciary; that our separation-of-powers doctrine does not contemplate a “tie-goes-to-the-agency” standard for reviewing agency decisions on questions of law; and that we decide the statutory interpretation that is “best” and “do not acquiesce in the interpretations of others.”⁸⁶

In *Moriarity*, however, the dissent charged the majority with applying a standard that contradicted the holding in *NIPSCO Industrial Group*.⁸⁷ In contrast to *NIPSCO Industrial Group*, Justice Slaughter wrote, the *Moriarity* standard required the court to consider only whether the agency’s interpretation was reasonable, and if so, forced the court to stop its analysis and accept the agency’s interpretation, even if the agency’s interpretation was not the best interpretation of the statute.⁸⁸

The dissent went further. Justice Slaughter wrote that he could identify “no principled reason [that was] consistent with separation of powers” to reconcile

80. *Id.* at 624. (Slaughter, J., dissenting).

81. *Id.*

82. *Id.*; see also *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234 (Ind. 2018).

83. *NIPSCO Indus. Grp.*, 100 N.E.3d 234 (Ind. 2018) (interpreting IND. CODE § 8-1-39).

84. See generally *id.*

85. *Id.*

86. *Moriarity*, 113 N.E.3d at 624-25 (Slaughter, J., dissenting) (quoting *NIPSCO Indus. Grp.*, 100 N.E.3d at 241).

87. *Id.* at 625.

88. *Id.*

Moriarity with *NIPSCO Industrial Group*.⁸⁹ According to Justice Slaughter, both DNR and IURC are agencies falling within the executive branch, so the court should not afford them differing standards of review.⁹⁰ Further, the dissent explained, the court does not afford *Moriarity* deference to other government actors who exercise the state's executive power, such as prosecuting attorneys, who, as constitutional officers,⁹¹ "have greater standing to insist on deference when interpreting laws they enforce."⁹²

The dissent perceived *Moriarity*'s standard of review as a threat to the structural balance implicit in the government's separation of powers. As a result, Justice Slaughter would have insisted that the court's best interpretation⁹³ prevail over DNR's reasonable interpretation:

An agency interpretation that is "reasonable" but not the "best" is not good enough. Allowing an agency's reasonable interpretation to prevail over our best interpretation ignores our unique "law-giving function" . . . These rival standards of review—"only the best" vs. "reasonable will do"—are not only irreconcilable but proceed from very different visions of the role of the judiciary within our constitutional scheme. [*NIPSCO Industrial Group*] regards the judiciary as a vital, co-equal branch within our tripartite system of government with ultimate responsibility for interpreting the law. Today's decision, however, treats the judiciary as a bit player with a limited role vis-à-vis the other two branches. To be sure, judicial modesty has its place. But we should not confuse modesty with abdication. Our job is to interpret the law fully and faithfully—no more, no less. Today's standard does much less. It is a standard where judicial review is plenary in theory, deferential in name, and a rubberstamp in fact.⁹⁴

The majority rebutted that the standard of review it applied in *Moriarity* comported with the court's precedent, in particular, *NIPSCO Industrial Group*.⁹⁵ The majority characterized the *NIPSCO Industrial Group* decision not as "effecting a sea change" in its administrative law jurisprudence, but rather as applying a specific component of the standard of review—that it is the ordinary function of the court to review an agency's legal conclusions de novo—to the exclusion of the remainder of the standard of review employed in *Moriarity*—that

89. *Id.*

90. *Id.*

91. IND. CONST. art. 7, § 16.

92. *Moriarity*, 113 N.E.3d at 625. (Slaughter, J., dissenting) (explaining that the court's rule of lenity dictates that any ambiguity in a criminal statute should be construed in favor of the defendant).

93. Presumably, the best interpretation of the Dam Safety Act would have resulted in a finding that the *Moriarity*'s dam was not located in, or, or along a "stream"; however, the dissent did not explicitly identify the "best interpretation" of the act.

94. *Id.*

95. *Id.* at 619 (citing *NIPSCO Indus. Grp.*, 100 N.E.3d 234).

an agency's interpretation of a statute it has the duty to enforce is entitled deference unless the interpretation is inconsistent with the statute itself.⁹⁶ This is so because the court in *NIPSCO Industrial Group* held that the IURC's interpretation of the statute was "contrary to the statute itself, and thus necessarily unreasonable."⁹⁷ Therefore, the majority emphasized, in *NIPSCO Industrial Group*, the court did not have to consider the second component of the same standard of review it applied in *Moriarity*. The two cases are, so to speak, apple and orange.

The *Moriarity* majority acknowledged that the standard of review is usually outcome determinative: "Like many cases involving judicial review of agency action, the outcome here turns on this standard of review."⁹⁸ However, the majority opinion disagreed with the dissent that *Moriarity* deference constituted an abdication of the court's duties, diminished the role of the judiciary, or cast doubt on the rules of statutory construction by implication:

This [deferential] standard entails a fresh look at the dispute on appeal, including the agency's interpretation of the relevant statute, and allows us to continue to say what the law is. It retains for the judiciary the ultimate power to determine the outcome of the dispute based on the law and facts, but it also recognizes the expertise contained within a coequal branch of government and the value to the public in being able to rely on reasonable agency interpretations.⁹⁹

Thus, armed with its deferential standard of review, the court decided the merits of the case in favor of DNR.¹⁰⁰ The court held that DNR properly exercised jurisdiction over the Moriarity's pond and dam under the Dam Safety Act because DNR's interpretation of "stream" as "flowing water through a defined channel" was reasonable.¹⁰¹ The court looked to the plain, ordinary, and usual meaning of the word to help determine whether DNR's interpretation was reasonable, citing Webster's definition of "stream" as "a body of running water flowing in a channel on the surface of the ground."¹⁰² The court found no indication that the dictionary definition was inconsistent with the Dam Safety Act, and found further that DNR's definition was consistent with the plain, ordinary, and usual meaning of the word.¹⁰³ Therefore, it was unnecessary for the court to "move forward with any other proposed interpretation."¹⁰⁴

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* (The court also noted that the standard of review employed in *Moriarity* did not cast doubt on the continued validity of the rule of lenity.)

100. *Id.* at 620.

101. *Id.* at 620-21.

102. *Id.* at 621 (citing *Stream*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002)).

103. *Id.*

104. *Id.*

Next, the court held that DNR provided the Moriaritys adequate notice that their pond and dam were subject to DNR jurisdiction under the Dam Safety Act, and that the enforcement action was not arbitrary and capricious because it was based on ascertainable standards.¹⁰⁵ The court explained that although administrative action must “give fair warning as to what the agency will consider in making its decisions,”¹⁰⁶ the ascertainable standards requirement should not be interpreted so as to “unduly constrain” administrative action; agencies are entitled to “reasonable latitude” in exercising their authority.¹⁰⁷

In light of the reasonable degree of latitude afforded to administrative agencies, the court noted that an agency “is not required to promulgate regulations defining each word in a statute.”¹⁰⁸ Indeed, the court affirmed the “well-established rule” that where a word is undefined, it is to be given its “plain, ordinary, and usual meaning.”¹⁰⁹ In unofficially adopting the common meaning of stream, DNR thus provided the Moriaritys reasonable notice that their dam was subject to DNR’s jurisdiction.¹¹⁰

Furthermore, the court held, the Moriaritys’ “intense focus on the word stream and the lack of regulations defining the word” disserves the legislative purpose behind the Dam Safety Act, which “is all about the safety of dams.”¹¹¹ The Dam Safety Act, in other words, does not regulate streams, and it is improper to scrutinize one word in the act’s jurisdictional grant without considering the broader context of the act.¹¹² Within this broader context, the Moriaritys had ample notice of which dams fall within DNR’s purview under the act.¹¹³ Moreover, the court noted, the Dam Safety Act excludes dams that are less than twenty feet high and that do “not impound a volume of more than one hundred . . . acre-feet of water.”¹¹⁴ In proceedings below, the Moriaritys stipulated that parts of their dam were more than twenty feet high and that it impounded more than one hundred acre-feet of water.¹¹⁵ Therefore, they had sufficient notice that the dam fell within DNR’s jurisdiction.¹¹⁶

As to the merits, the dissent would have held that DNR did not properly

105. *Id.* at 621.

106. *Id.* (quoting *State Bd. of Tax Comm’rs v. New Castle Lodge #147, Loyal Order of Moose, Inc.*, 765 N.E.2d 1257, 1264 (Ind. 2002)).

107. *Id.* (quoting *State Bd. of Tax Comm’rs*, 765 N.E.2d at 1264 n.13).

108. *Id.* (the court did note that DNR could have avoided this protracted litigation had it defined the word “stream”).

109. *Id.* (quoting *State v. Hancock*, 65 N.E.3d 585, 587 (Ind. 2016)).

110. *Id.* at 621-22.

111. *Id.* at 622.

112. *Id.*

113. *Id.*

114. *Id.* (citing IND. CODE § 14-27-7.5-1(1) (2018)).

115. *Id.* (the court held that the Moriaritys could escape DNR’s jurisdiction if they, in the course of complying with the trial court’s order enforcing the DNR enforcement action, modified the dam so that it no longer exceeded twenty feet in height or one hundred acre-feet of water).

116. *Id.*

exercise jurisdiction over the Moriaritys' dam.¹¹⁷ This conclusion would have followed from the dissent's preference for a "more robust standard."¹¹⁸

III. BIAS DURING THE ADMINISTRATIVE ADJUDICATIVE PROCESS

In *Lockerbie Glove Factory Town Home Owners Association v. Indianapolis Historic Preservation Commission*, remonstrators living near Lockerbie Square in Indianapolis challenged official action taken by the Indianapolis Historic Preservation Commission ("IHPC"), claiming IHPC's decision to grant a developer a certificate of appropriateness was invalid on account of a commissioner's presumptive bias.¹¹⁹

IHPC's statutory scheme established a nine-member body, which is charged with preserving historically significant areas and structures in Indianapolis.¹²⁰ In furtherance of its charge, IHPC designates historic preservation areas within Indianapolis and adopts preservation plans for these districts, and, once a plan is established, the commission assumes design and zoning review jurisdiction within the districts.¹²¹ In order for a person to construct an exterior or architectural structure or feature within an historic preservation area, he must apply for and be granted a certificate of appropriateness from IHPC.¹²² Upon application for a certificate of appropriateness, "[a] final determination of [IHPC] . . . is subject to judicial review in the same manner and subject to the same limitations as a final decision of a board of zoning appeals under IC 36-7-4."¹²³

In 2016, a developer, Dan Jacobs, petitioned IHPC for a certificate of appropriateness for a mixed-use development project within the Lockerbie Square historic preservation district.¹²⁴ The mixed-use project was to be built on land owned by the Athenaeum Foundation.¹²⁵ A group of remonstrators, comprised of a neighborhood town homeowners association and its residents, objected to the

117. *Id.* at 624-26 (Slaughter, J., dissenting).

118. *Id.* at 626.

119. *Lockerbie Glove Factory Town Home Owners Ass'n, Inc. v. Indianapolis Historic Pres. Comm'n*, 106 N.E.3d 482, 484-85 (Ind. Ct. App. 2018).

120. *Id.* at 485 (IHPC's enabling legislation is codified at IND. CODE § 36-7-11.1.).

121. *Id.*

122. *Id.*

123. IND. CODE § 36-7-11.1-10(c) (The standard of review applicable to decisions of boards of zoning appeals mirrors the standard of review applicable to agency action under AOPA: The court "shall grant relief . . . only if the court determines that a person seeking judicial relief has been prejudiced by a zoning decision that is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence." IND. CODE § 36-7-4-1614(d); *cf.* IND. CODE § 4-21.5-5-14(d).).

124. *Lockerbie Glove Factory Town Home Owners Ass'n, Inc.*, 106 N.E.3d at 486.

125. *Id.*

project on various grounds.¹²⁶ The remonstrators' main objection to the proposed project was that it purportedly did not serve the purposes of the Lockerbie Square district's historic plan, which they argued limited all new development to residential development, thus precluding a mixed-use project.¹²⁷

Mr. Jacob's petition made it to a final hearing. The remonstrators' representative was present at the final hearing. One of the IHPC commissioners, Alex White, made the following comment at the hearing:

Mr. Jacobs, just one thing, you probably considered this. I was on the Athenaeum building committee for many years, and we had a devil of a time dealing with acoustics from the successful band shell and the interior theater. So I don't know if you have an [acoustician] on your consultant list yet, but that might be advice on how you treat this, especially the façade facing the Athenaeum.¹²⁸

IHPC approved the issuance of a certificate of appropriateness 5-1.¹²⁹

The remonstrators petitioned the Marion Superior Court for review of the IHPC's approval and issuance of a certificate of appropriateness.¹³⁰ While pending before the trial court, the remonstrators filed a motion to compel discovery from IHPC relating to the alleged bias of Commissioner White in favor of the Athenaeum, Mr. Jacobs, and the mixed-use project based on his statement at the final hearing.¹³¹ The trial court denied the motion and affirmed the IHPC's approval of a certificate of appropriateness.¹³² The court declined to reweigh the evidence, which it held was properly considered before the IHPC, and it affirmed IHPC's decision.¹³³

On appeal, the remonstrators argued that the IHPC's decision was invalid because Commissioner White was "presumptively biased" in favor of approval of the plan and issuance of a certificate of appropriateness, as demonstrated by the single statement related to the Athenaeum he made at the final hearing.¹³⁴

The court of appeals rejected the bias argument because the remonstrators, whose representative was present at the final hearing, failed to object to Commissioner White's participation in the final hearing and vote.¹³⁵ The court of appeals held that, where there is perceived bias by an administrative agency, "the best action is before the board itself, in the form of appropriate objections and/or motions for disqualifications."¹³⁶ In addition to preserving error for judicial

126. *Id.* at 486-87.

127. *Id.* at 487.

128. *Id.*

129. *Id.* at 487.

130. *Id.*

131. *Id.* at 487-88.

132. *Id.* at 488.

133. *Id.*

134. *Id.* at 489

135. *Id.*

136. *Id.* (quoting *Scheub v. Van Kalker Family Ltd. P'ship*, 991 N.E.2d 952, 959 (Ind. Ct.

review, objecting during the agency proceedings affords the board the opportunity to correct or prevent error resulting from bias.¹³⁷

Further, the court of appeals held that even if the remonstrators had not waived their bias argument, the reviewing court presumes that “an administrative board or panel will act properly and without bias or prejudice.”¹³⁸ The reviewing court thus will not invalidate an agency decision where the appellant has not demonstrated actual bias.¹³⁹ The court of appeals held that Commissioner White’s single statement at the final hearing was insufficient to establish actual bias, and, in light of the presumption against bias, the court rejected the remonstrators’ argument that IHPC’s action was arbitrary and capricious.¹⁴⁰

Finally, the court of appeals held that the trial court did not err in denying the remonstrators’ motion to compel discovery relating to the bias issue.¹⁴¹ The court held that supplementation of the agency record on review is permitted under Indiana Code section 36-7-4-1612 only “if the additional evidence could not, by due diligence, have been discovered and raised in the board proceedings giving rise to a proceeding for judicial review.”¹⁴² Commissioner White made the offending statement during a public hearing at which the remonstrators’ representative was in attendance, and the representative failed to raise the bias issue before the final vote.¹⁴³ Therefore, his failure to act when the issue was before the board waived the argument on appeal.

IV. SCOPE AND EFFECT OF AGENCY ACTIONS

A. Deference to Agency Decisions

Administrative law is mostly a creature of statute. Administrative agencies are empowered to act within the bounds of the statutes they are tasked with enforcing. In *Commissioner, Indiana Department of Insurance v. A.P.*¹⁴⁴ the Court of Appeals upheld a long-standing approach under Indiana administrative law that affords great deference to an agency interpretation of the statute it is charged with enforcing. This is so even in a case such as *A.P.* where the agency’s interpretation of an issue fell within the statute, but outside of its general expertise.

A.P. was a licensed bail agent. The Indiana Department of Insurance (“IDOI”) is charged with enforcing the rights and privileges of bail agents in the state. The Enforcement Division of the IDOI filed a Motion to Revoke Bail Agent

App. 2013)).

137. *Id.*

138. *Id.* (citing *Jandura v. Town of Schererville*, 937 N.E.2d 814, 819 (Ind. Ct. App. 2010)).

139. *Id.*

140. *Id.* at 490

141. *Id.*

142. *Id.* (quoting IND. CODE § 36-7-4-1612(a)).

143. *Id.*

144. 121 N.E.3d 548 (Ind. Ct. App. 2018).

License with the Commissioner alleging that Putnam “had been found guilty of battery as a class D felony”¹⁴⁵

The charges and A.P.’s eventual conviction arose from curious circumstances. A.P. inadvertently called a bank, and the bank’s recording system activated. The recording system captured A.P. striking his grandchild several times, with the child screaming in pain and, at one point, the child was coughing and screamed “[y]ou’re choking me!” The message lasted four minutes.

The Commissioner issued an order revoking A.P.’s license the same day and restricted reapplication for another license for ten years. Months after the decision, the Enforcement Division requested a modification of the Commissioner’s order because the sentence entered against A.P. was for a Class A misdemeanor, not a felony. The Commissioner then issued a modified order restricting the reapplication to five years finding that the conviction was entered as a class A misdemeanor battery, “which is a misdemeanor with an element of violence,” instead of the ten years required for a felony conviction. The statute governing the Commissioner’s decision, Indiana Code section 27-10-1-6 provides “‘Disqualifying offense’ means: (1) a felony; or (2) a misdemeanor if an element of the offense involves dishonesty, violence, or a deadly weapon.” Indiana Code section 35-42-2-1 provides that a person who “knowingly or intentionally touches another person in a rude, insolent, or angry manner . . . commits battery, a Class B misdemeanor” but that it becomes a “Class A misdemeanor if it . . . results in bodily injury to any other person.”¹⁴⁶ A.P. filed a motion requesting a hearing.

Following a hearing, the administrative law judge issued Findings of Fact, Conclusions of Law, and a Recommended Order concluding that “[A.P.’s] conviction of battery as a class A misdemeanor warrants the revocation of his bail agent license with a five-year waiting period.”¹⁴⁷ A.P. objected, and the Commissioner entered a Final Order adopting the ALJ’s findings and conclusions. A.P. timely sought judicial review and moved to stay the Commissioner’s final order.¹⁴⁸ A.P. argued that a conviction for battery as a class A misdemeanor does not include an element of violence.¹⁴⁹ Following a hearing, the trial court agreed, noting “that an A misdemeanor battery in the State of Indiana does not include an element of violence” and that the Commissioner’s revocation of Putnam’s license is, therefore, unsupported by Indiana law.¹⁵⁰ The Commissioner appealed after filing a motion to correct error.¹⁵¹

On appeal, the standard for review of an administrative decision is the same as that of the trial court.¹⁵² The court will “defer to the agency’s expertise and will

145. *Id.* at 550.

146. *Id.* at 553.

147. *Id.* at 551.

148. *Id.*

149. *Id.*

150. *Id.* (internal quotations and brackets omitted).

151. *Id.* at 552.

152. *Id.* at 553.

not reverse simply because” the court may have reached a different result.¹⁵³ “The burden of demonstrating the invalidity of agency action is on the party to the judicial review proceeding asserting invalidity.”¹⁵⁴ Further, the court will give “deference to an administrative agency’s findings of fact, if supported by substantial evidence, but review questions of law de novo.”¹⁵⁵

On appeal, the Commissioner argued that battery as a class A misdemeanor is within the definition of a disqualifying offense under Indiana Code section 27-10-1-6 because, if elevated to a class A misdemeanor due to bodily injury, “it can be reasonably found that battery as a class A misdemeanor has an element which involves violence. . . .”¹⁵⁶ Here, A.P. was convicted of a class A misdemeanor battery because he beat and choked his grandson, causing him physical injury.

A.P., on the other hand, maintained that violence is not a requirement of the battery statute and that the Commissioner’s interpretation was reading into the statute something that did not exist.

The court, however, ultimately reversed the trial court and held that the Commissioner’s interpretation of Indiana Code section 27-10-1-6 was reasonable, and thus the conviction served as grounds for revocation of A.P.’s bail agent license. The court observed that where the statute is ambiguous, “we defer to the agency’s reasonable interpretation even over an equally reasonable interpretation by another party.”¹⁵⁷ The court also gave credence to a long-standing administrative maxim that “an interpretation of a statute by an administrative agency charged with the duty of enforcing the statute ‘is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.’”¹⁵⁸

In another decision in the survey period, the court echoed and took another step in the deference afforded administrative agencies. In *City of Gary Police Civil Service Commission v. Robinson*,¹⁵⁹ the Indiana Court of Appeals confirmed that agency deference extends to allow an agency to redefine the discovery rule.

Robinson involved former Gary police officer Raymond Robinson. After his colleague David Finley was arrested on corruption charges, Robinson took action to protect and serve . . . his colleague. Robinson logged into his Gary Police Department account to conduct an unauthorized information search, looking for the Confidential Informant (“CI”) who was collecting information on Finley. Shortly after Robinson found the CI’s phone number, the CI began receiving threatening phone calls. The FBI tracked Robinson’s activities. When confronted, Robinson admitted that he accessed the database and saw the CI’s information, but said he did so out of curiosity.

Beginning in March 2013, Robinson received several demotions. Then, the

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 554.

158. *Id.*

159. *City of Gary Police Civil Serv. Comm’n v. Robinson*, 100 N.E.3d 271, 272 (Ind. Ct. App. 2018).

City of Gary filed a complaint against Robinson with the Gary Police Civil Service Commission, requesting that the Commission terminate Robinson's employment. Eventually, after a hearing, the Commission agreed that Robinson's employment should be terminated.

The Commission had promulgated its own internal rules of procedure limiting the time disciplinary proceedings could be commenced. Rule II(7)(A) says,

Except as otherwise provided, disciplinary proceedings must be commenced within one-hundred and twenty (120) days from *the date the alleged misconduct is discovered*. Disciplinary proceedings against a police officer are barred after the expiration of two (2) years from the date of the occurrence of the alleged misconduct, unless the misconduct would, if proved in a court of law, constitute a felony or a Class A misdemeanor in which case the disciplinary proceedings may be commenced at any time.¹⁶⁰

It was undisputed that the Commission's decision came over three hundred days after Robinson began receiving demotions for his conduct.¹⁶¹

Robinson and the City offered competing interpretations of the rule.¹⁶² Robinson argued that any misconduct he committed must have been "discovered" by March 2013, the date when the Gary Police Department began demoting him.¹⁶³ The Commission, on the other hand, argued that "is discovered" actually meant when the investigation was complete.¹⁶⁴ The trial court agreed with Robinson and found the Commission was powerless to take action against him.¹⁶⁵

The court of appeals found that the Commission waived or improperly made every argument attempted on appeal.¹⁶⁶ However, the Court revived an argument the Commission made at the trial court level. The trial court read the Commission's rule to be similar to the familiarity standard in tort law, namely that a party has "discovered" a fact when it learns enough that would cause a reasonable party to suspect an injury and begin to investigate.¹⁶⁷ The court of appeals disagreed, and it noted that the courts typically give great weight to an agency's interpretation of its own rules.¹⁶⁸ Since the Commission said that the rule meant one thing, the court was not inclined to disagree.

Moreover, the Court found that the 120-day requirement, if implemented as

160. *Id.* at 276 (emphasis in original).

161. *Id.* at 274.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 274-75.

167. *Id.* at 276; *see also* Jeffrey v. Methodist Hosps., 956 N.E.2d 151, 159 (Ind. Ct. App. 2011).

168. *Robinson*, 100 N.E.3d at 276 (citing West v. Ind. Sec'y of State, 54 N.E.3d 349, 353 (Ind. 2016)).

Robinson read it, would be impractical.¹⁶⁹ The Police Department receives allegations of misconduct daily, and it would impose intolerable costs on the Commission to have to come to a definitive employment decision within 120 days of the mere allegation of wrongdoing.¹⁷⁰ “As such, we agree with the Commission’s argument in the trial court with respect to the proper interpretation of Rule II(7)(A) and hold that the 120-day requirement began to run when the State Police first informed Chief Ingram that the FBI had substantiated the allegations against Robinson.”¹⁷¹

In short, judicial deference to an agency’s interpretation of its own rules can overrule widely-applied discovery rules from the common law, and in this instance administrative deference overruled the fact that the agency did not even make the argument on appeal.

In *Roman Marblene Co. v. Baker*,¹⁷² however, the court of appeals analyzed the agency’s role differently. In *Baker*, a company challenged a decision of the Indiana Civil Rights Commission, which found that the company engaged in unlawful discrimination against an African-American employee.¹⁷³ Roman Marblene manufactures molded bathroom fixtures in Corydon, Indiana. The company hired Reginald Baker in 1999; Baker worked in several manual labor jobs.¹⁷⁴ In 2005, the company’s ownership changed. Baker alleged that thereafter he was subjected to harassment and slurs.¹⁷⁵ In December 2009, Baker injured his hand in an automobile accident.¹⁷⁶ He was docked one day’s pay for failing to call in advance, but he alleged he was the first employee to be treated that way.¹⁷⁷

When he returned to work, he completed tasks using only one hand.¹⁷⁸ The new owner continued to give Baker tasks and then complained when Baker did not complete them.¹⁷⁹ There was evidence that the tasks were impossible to complete.¹⁸⁰ The owner put Baker on involuntary unpaid medical leave, and although Baker repeatedly asked to return to work he was never allowed to.¹⁸¹ Baker repeatedly attempted to return to work. He produced a doctor’s note that stated he was 100% ready to return to work. The owner never accepted his return.¹⁸²

Baker filed a charge with the Equal Employment Opportunity Commission,

169. *Id.* at 277.

170. *Id.*

171. *Id.*

172. 88 N.E.3d 1090, 1091 (Ind. Ct. App. 2017).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1093.

180. *Id.*

181. *Id.*

182. *Id.*

which was transferred to the Indiana Civil Rights Commission (“ICRC”).¹⁸³ The case first went before an Administrative Law Judge at the ICRC.¹⁸⁴ After the parties conducted discovery, the company moved for summary judgment.¹⁸⁵ Following a hearing, the ALJ awarded summary judgment to the company, finding no evidence that the company discriminated against Baker on the basis of race.¹⁸⁶ Baker objected to the summary judgment order, and the case was then submitted to the ALJ on the merits.¹⁸⁷ Following a two-day evidentiary hearing, the ALJ once again found that Baker did not show that the company discriminated against him on the basis of race.¹⁸⁸

Baker objected to the ALJ’s proposed findings of fact.¹⁸⁹ Following an oral argument, the full panel of the ICRC came to the opposite conclusion of the ALJ on both summary judgments and after hearing the evidence. The ICRC found Baker made his prima facie case that similarly situated Caucasians were allowed to keep their employment when they faced similar maladies.¹⁹⁰ Accordingly, the ICRC ordered the company to pay Baker his lost wages.¹⁹¹

On appeal, the company argued that the court should not defer to the agency’s decision, but the court rejected the argument.¹⁹² It is well-known that a trial court or appellate court will review an ALJ’s or an agency’s decision deferentially.¹⁹³ Reviewing courts are not in as good a position to judge facts and credibility; typically it is the ALJ who is present at the fact-finding proceedings.¹⁹⁴

The company also argued that the ALJ’s decision, and not the ICRC’s decision, deserved deference.¹⁹⁵ It was the ALJ who conducted the two-day fact finding hearing and weighed the credibility of the witnesses; the ICRC merely reviewed that paper record and held an oral argument thereon.¹⁹⁶ Thus, the ICRC, acting as an appellate tribunal, should have accorded deference to the ALJ’s

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1093-94.

189. *Id.* at 1094.

190. *Id.*

191. *Id.* at 1095.

192. *Id.* at 1096.

193. 255 *Morris, LLC v. Ind. Alcohol & Tobacco Comm’n*, 93 N.E.3d 1149, 1153 (Ind. Ct. App. 2018) (“Courts that review administrative determinations, at both the trial and appellate level, review the record in the light most favorable to the administrative proceedings and are prohibited from reweighing the evidence or judging the credibility of witnesses.”).

194. *Simila v. Astrue*, 573 F.3d 503, 517 (7th Cir. 2009) (“We review an ALJ’s credibility determination with deference, for an ALJ, not a reviewing court, is in the best position to evaluate credibility.”).

195. *Roman Marblene Co.*, 88 N.E.3d at 1096.

196. *Id.* at 1093-94.

findings of fact.

The court of appeals explained the error of that view. The court acknowledged that “courts that review administrative determinations, at both the trial and the appellate level, review the record in the light most favorable to the administrative proceedings and are prohibited from reweighing the evidence or judging the credibility of witnesses.”¹⁹⁷ However, “[n]o similar restriction is placed on the administrative agency, here the ICRC. It is well settled that administrative agencies can make findings on issues of credibility without taking live testimony, and moreover, the agency’s review board is the ultimate trier of fact and may weigh the evidence before it.”¹⁹⁸ Accordingly, AOPA explicitly permits the ultimate authority within an agency to affirm, modify, or dissolve an ALJ’s order.¹⁹⁹

In so holding, the Court was forced to distinguish a similar case that came to the opposite result. In *Stanley v. Review Board of Department of Employment & Training Services*,²⁰⁰ an agency review board reversed a referee’s ruling based solely on a “paper review” of the hearings before the referee.²⁰¹ Although the company argued that the ICRC took similar action in his case solely on a paper record, the court disagreed. The court found that *Stanley* involved “extremely narrow” circumstances, namely, that “the sole determinative factor” in *Stanley* was demeanor credibility of witnesses.²⁰² Since only the referee observed the credibility demeanor, it was improper for the Review Board to have displaced that finding.²⁰³

In contrast, in *Baker*, “demeanor credibility determinations were not the sole determinative factor involved in the ICRC’s decision here. The ICRC made thirty-five findings of fact, many of which involved undisputed facts as well as documentary evidence.”²⁰⁴ The court found that “the credibility of the witnesses was not the only basis from which the ICRC could draw its conclusion that Roman Marblene engaged in an unlawful discriminatory practice.”²⁰⁵

The company then directed the Court to substantial evidence supporting the ALJ’s initial determination.²⁰⁶ The Court did not disagree, but again found that the company misstated the standard of review. “As we have already stated, we review the record in the light most favorable to ICRC’s decision, and our review is restricted to determining whether there is substantial evidence to support the decision, primarily whether its decision was arbitrary, capricious, an abuse of

197. *Id.* at 1096.

198. *Id.*

199. IND. CODE § 4-21.5-3.29(b) (2019).

200. 528 N.E.2d 811 (Ind. Ct. App. 1988).

201. *Id.* at 813.

202. *Id.*

203. *Id.*

204. *Roman Marblene Co. v. Baker*, 88 N.E.3d 1090, 1097 (Ind. Ct. App. 2017).

205. *Id.*

206. *Id.*

discretion, or in excess of its statutory authority.”²⁰⁷

Finally, the company argued that the order was void because it was untimely.²⁰⁸ Indiana Code section 4-21.5-3-29(f) provides that a “final order disposing of a proceeding . . . shall be issued within sixty (60) days after the latter of (1) the date that the order was issued under section 27 of this chapter; (2) the receipt of briefs; or (3) the close of oral argument,” with certain exceptions.²⁰⁹ It was undisputed that the ICRC failed to issue its order within sixty days of the oral argument it held, the last date available.²¹⁰

The Court expressed sympathy for this argument, but found it had been foreclosed by previous case law that said,

Our review of subsection (f) leads us to believe that the legislature did not intend the prescribed time period to be essential to the validity of the Commission’s final order. As is evident from the statute, no consequences attach in the event of an untimely order and under no circumstances has the legislature deprived the Commission of its ultimate authority to issue its final order. The statute neither purports to restrain the Commission from issuing a final order outside of the prescribed time period nor specifies that “adverse or invalidating consequences follow.” Moreover, the purpose and intent of the sixty day time period is to promote the prompt and expeditious resolution of the administrative matters by the ultimate authority. The time period is not intended as a jurisdictional prerequisite to a valid final order. Accordingly, a mandatory construction of subsection (f) would thwart the intention of the legislature.²¹¹

Therefore, the court deferred to the ICRC and affirmed the agency’s action against the company.²¹²

B. Challenging Agency Rulemaking

Among an agency’s most important roles is the promulgation of rules. The Indiana Administrative Rules and Procedures Act governs this formulaic process, with an eye toward transparency. During the survey period, the Indiana Supreme Court decided a case where a prisoner challenged what he believed was an improper rule.

In *Ward v. Carter*,²¹³ Roy Ward challenged the State of Indiana’s procedure through which it created a chemical formula to kill him.

Ward sits on Indiana’s death row for a crime he committed nearly two

207. *Id.*

208. *Id.* at 1098.

209. IND. CODE § 4-21.5-3-29(f) (2019).

210. *Roman Marblene Co.*, 88 N.E.3d at 1098.

211. *Id.* (quoting *State v. Langen*, 708 N.E.2d 617, 622 (Ind. Ct. App. 1999)).

212. *Id.* at 1098-99.

213. 90 N.E.3d 660 (Ind. 2018),

decades ago.²¹⁴ In July 2001, Ward convinced 15-year-old Stacy Payne to let him into her house by pretending that he was looking for a lost dog.²¹⁵ He then brutally raped and murdered her—the police found him outside the house, covered in perspiration, holding the knife.²¹⁶

At his second trial in a new county,²¹⁷ Ward pleaded guilty to the crimes, putting his energies into defending the penalty phase.²¹⁸ The jury found the alleged aggravating circumstances proven beyond a reasonable doubt and decided Ward should receive the death penalty.²¹⁹ The trial entered the sentence as required, Ind. Code § 35-50-2-9(e)(2), and Ward appealed.²²⁰ Declining to revisit the constitutionality of the death penalty, finding irregularities in the jury selection harmless, and noting that the purported mitigating factors pale in comparison to the nature of the crime, the Supreme Court affirmed the death sentence.²²¹

The basis for Ward's challenges shifted from criminal law to civil administrative law in December 2015, when he filed an action "seeking declaratory and injunctive relief for violations of Plaintiff's substantive and procedural due process rights under the Indiana Administrative Rules and Procedures Act and the constitutions of the United States and the State of Indiana."²²² The Complaint cited to a May 2014 Associated Press article, which reported on Indiana's adoption of a new lethal injection protocol.²²³

The switch resulted from a shortage of sodium thiopental.²²⁴ The companies previously supplying this drug decided, as a matter of public relations, that it was best not to be associated with lethal injections.²²⁵ In the alternative, several states

214. *Id.* at 661.

215. *Ward v. State*, 810 N.E.2d 1042, 1044 (Ind. 2004), *cert. denied*, 546 U.S. 926 (2005).

216. *Id.*

217. Ward was convicted for the first time after an October 2002 trial. Nearly the entire jury pool, drawn from the local area, had read extensive news reports about the incident; roughly half of the empaneled jury told the Court during the venire process that they believed Ward was guilty before hearing the evidence. One empaneled juror even said she did not know whether she could base a verdict solely off of the evidence presented at trial. The Supreme Court reversed that conviction based on prejudicial pretrial publicity. *Ward v. State*, 810 N.E.2d 1042 (Ind. 2004).

218. *Ward v. State*, 903 N.E.2d 946, 950 (Ind. 2009), *aff'd on reh'g*, 908 N.E.2d 595 (Ind.).

219. *Ward v. Carter*, 90 N.E.3d 660, 661 (Ind. 2018).

220. *Id.*

221. Ward brought the case to the Indiana Supreme Court a third time, seeking post-conviction relief on the grounds that his counsel at the second trial had been ineffective for telling the jury that he was a psychopath; that appellate argument did not succeed at the state level, or the federal level. *Ward v. State*, 969 N.E.2d 46 (Ind. 2012); *Ward v. Neal*, 835 F.3d 698, 701 (7th Cir. 2016).

222. Complaint, *Ward v. Lemmon*, No. 46C01-1512-PL-2154 (Dec. 22, 2015).

223. *Id.*

224. See Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 14, 2016), <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html> [<https://perma.cc/ZE6Y-PFVX>].

225. *Id.*

adopted the electric chair, firing squad, or gas chamber as a means to execute criminals.²²⁶ Indiana went a different route, electing to replace sodium thiopental with Brevital, a similar drug.²²⁷

Ward's lawsuit alleged that the switch from one lethal cocktail to another amounted to an administrative rule change that needed to go through the typical process mandated by Indiana's Administrative Rules and Procedures Act.²²⁸ The complaint also alleged that no one had ever been executed using this proposed combination of drugs. The defendants filed a motion to dismiss, which the trial court granted.²²⁹

Ward appealed, and the Indiana Court of Appeals came to the opposite conclusion of the trial court.²³⁰ Judge Baker, writing for the panel, cited to the lethal injection statute, which says

- (a) The punishment of death shall be inflicted by intravenous injection of a lethal substance or substances into the convicted person:
 - (1) in a quantity sufficient to cause the death of the convicted person;
 - and
 - (2) until the convicted person is dead.

...

- (d) The department of correction may adopt rules under IC 4-22-2 necessary to implement subsection (a).²³¹

The court highlighted the word "may" in subsection (d) and found that while the Department of Correction need not promulgate any rule regarding lethal injections, *if* the Department of Correction chooses to do so, then the rules are to be adopted under Indiana Code chapter 4-22-2.²³² "The DOC's approach would require us to ignore ARPA altogether, which we may not and shall not do. The legislature has determined that DOC is not exempt from ARPA; consequently, when it adopts rules, it must comply with the procedures set forth in ARPA. What we must determine next, therefore, is whether the DOC's lethal injection protocol constitutes a rule."²³³

Under ARPA, a rule is defined as, "the whole or any part of an agency statement of general applicability that: (1) has or is designed to have the effect of

226. *Id.*

227. Kathleen Osborn, *Indiana Defends its Experimental Cocktail for Lethal Injections*, MSNBC (May 28, 2014), <http://www.msnbc.com/rachel-maddow-show/state-defends-new-drug-lethal-injections> [<https://perma.cc/MLH4-59XQ>].

228. *Ward v. Carter*, 90 N.E.3d 660, 661 (Ind. 2018). *See also* IND. CODE art. 4-22.

229. *Ward*, 90 N.E.3d at 661.

230. *Ward v. Carter*, 79 N.E.3d 383 (Ind. Ct. App. 2017).

231. *Id.* at 386 (quoting IND. CODE § 35-38-6-1 (2017)).

232. *Id.* at 386-87.

233. *Id.* at 387.

law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency.”²³⁴ Thus, “[a]n administrative rule is one that has (1) general applicability; (2) prospective application; (3) the effect of law; and (4) affects a class of individuals’ rights.”²³⁵

The court of appeals found that the new drug cocktail fell under the definition of a “rule” for purposes of ARPA.²³⁶ The drug protocol has general applicability and prospective application, and it affects a class of individual’s rights.²³⁷ Thus, the drug protocol was a “rule.”²³⁸ “As a matter of law, DOC must comply with ARPA when changing its execution protocol, and its failure to do so in this case means that the changed protocol is void and without effect.”²³⁹

The State defendants successfully petitioned for transfer, pointing out that the Department of Correction has carried out 20 executions under the current death penalty statute without ever having been expected to promulgate rules regarding the formula it used. The Indiana Supreme Court reversed the court of appeals on the ground that the Department of Correction’s injection protocol is not a “rule” under ARPA.²⁴⁰ The Court acknowledged that “this Court’s case law addressing the ‘effect of law’ has been limited to cases involving the reach of our court rules.”²⁴¹ So, the court looked to federal law. It cited *Chrysler Corporation v. Brown*,²⁴² where the United States Supreme Court wrote that a regulation gains the force and effect of law when it has “certain substantive characteristics,” namely, it must “affect[] individual rights and obligations.”²⁴³ Thus a regulation only gains the force of law when it proscribes individuals’ behavior or imposes obligations on them; not when it limits the actions of the agency itself.

The Indiana Supreme Court adopted the *Chrysler Corp.* analysis for the Department of Correction policy.²⁴⁴ It found that the injection protocol imposes standards on Department of Correction employees themselves but does not impose any obligations on individuals like Ward.²⁴⁵ “He is not faced with a choice of conforming his conduct to Department standards or foregoing a substantive right—his fate remains unaltered. Rather, the exhibits outline what Department personnel must do. They relate to the Department’s internal policies and procedures that bind Department personnel and no one else.”²⁴⁶ Because the lethal

234. IND. CODE § 4-22-2-3(b) (2019).

235. *Ward*, 79 N.E.3d at 388 (citing *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984)).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Ward v. Carter*, 90 N.E.3d 660, 666 (Ind. 2018).

241. *Id.* at 663.

242. 441 U.S. 281, 301–02 (1979).

243. *Ward*, 90 N.E.3d at 664 (quoting *Chrysler*, 441 U.S. at 301–02).

244. *Id.* at 665.

245. *Id.* at 666.

246. *Id.*

injection protocol did not impose binding standards of conduct for persons subject to agency authority, it was not a “rule,” and ARPA’s procedural requirements did not render the state’s lethal injection protocol null and void.

CONCLUSION

This survey article focuses on a handful of decisions of the many issued by the appellate courts. Beyond those decisions resulting in appeal, Indiana’s administrative agencies render on a daily basis decisions developing the law and affecting the lives of the thousands of persons and companies appearing before them.