

Indiana Law Review

Volume 16

1983

Number 1

Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its eighth annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1981, through May 1, 1982. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Administrative Law

SCOTT A. SMITH*

A. Due Process

1. *Right to Hearing.*—As noted in the 1982 Administrative Law Survey,¹ cases involving the due process rights of suspended, demoted or dismissed police officers occupied much of the courts' time in 1981. This trend continued unabated during this survey period. These cases generally raised one of two separate due process issues: the right of a suspended or demoted police officer to a due process administrative hearing and, should such a right exist, the stage of the administrative proceedings at which that hearing must take place.

In *Sheridan v. Town of Merrillville*,² the Merrillville police chief, Sheridan, was removed as chief and reinstated to his former rank of captain; his salary remained unchanged. No notice or opportunity for hearing was given to Sheridan prior to his removal as police chief.

*Associate with the firm of Ice Miller Donadio & Ryan. B.S., Cornell University, 1976; J.D., University of Michigan, 1979. The author wishes to acknowledge the technical support of Ice Miller Donadio & Ryan.

¹Lewis, *Administrative Law, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 1, 1-4 (1982).

²428 N.E.2d 268 (Ind. Ct. App. 1981).

Following an unsuccessful judicial review in an attempt to obtain reinstatement as chief, Sheridan appealed.

The first district of the Indiana Court of Appeals held that Sheridan's removal as chief without notice and opportunity for hearing did not violate Sheridan's due process rights.³ The court ruled that Sheridan did not have a property right in his continued tenure as police chief which would be protected by the due process clause of the fourteenth amendment to the United States Constitution,⁴ or by certain Indiana statutes⁵ and local ordinances.⁶ The key to the court's holding was that Sheridan simply was reinstated to the position he had held prior to his appointment as chief and suffered no demotion or cut in pay;⁷ therefore, Sheridan suffered no deprivation of a property right, and the failure to accord Sheridan an opportunity to be heard prior to his demotion was not improper.⁸

Conversely, in *Howard v. City of Kokomo*,⁹ the Kokomo police chief, Howard, was removed from office and demoted to patrolman; prior to his appointment as police chief, he had served as the assistant chief. Again, no notice or opportunity for an administrative hearing was accorded Howard prior to his demotion. Given these facts, and relying upon *Sheridan* and *State ex rel. Warzyniak v. Grenchik*,¹⁰ the fourth district court of appeals concluded that, although the board had the power to remove Howard as chief of police, the demotion to patrolman without an opportunity for a hearing violated Howard's due process rights.¹¹

Once it has been established that a demoted or discharged public employee has a due process right to notice and opportunity for an administrative hearing, at what stage of the administrative proceeding must the hearing occur? This issue was confronted by the first and fourth districts of the Indiana Court of Appeals during the survey period. In *Shoaf v. City of Lafayette*,¹² Shoaf, a Lafayette police officer,

³*Id.* at 272.

⁴*Id.* at 272 (citing U.S. CONST. amend. XIV, § 1).

⁵428 N.E.2d at 272 (citing IND. CODE §§ 19-1-25-1 to -4 (1976) (repealed 1981) (current version at *id.* §§ 36-8-9-1 to -6 (1982)).

⁶428 N.E.2d at 272 (citing Merrillville, Ind., Ordinance 72-15, § 4 (December 12, 1972)).

⁷428 N.E.2d at 272.

⁸The holding in *Sheridan* is in accord with the third district's holding in *State ex rel. Warzyniak v. Grenchik*, 379 N.E.2d 997 (Ind. Ct. App. 1978). The *Warzyniak* court found that a city ordinance creates an expectation on the part of the policemen, which in turn constitutes a property interest protected by the due process clause of the fourteenth amendment. *Id.* at 1002. However, this right does not apply to a police chief who has been appointed. A police chief may not, however, be demoted below his previously-held rank without a hearing. *Id.* at 1002.

⁹429 N.E.2d 659 (Ind. Ct. App. 1981).

¹⁰379 N.E.2d 997 (Ind. Ct. App. 1978).

¹¹429 N.E.2d at 661-62.

¹²421 N.E.2d 1168 (Ind. Ct. App. 1981).

was dismissed from the Lafayette police force pursuant to Indiana Code section 18-1-11-3.¹³ The record indicated that the Lafayette Police Civil Service Commission, after receiving a report of Shoaf's misconduct, elected at its next regular meeting to dismiss Shoaf and to allow him ten days during which he could present his case before the Commission to show cause why he should not have been terminated.¹⁴ Although Shoaf had been put on formal notice of his possible dismissal before the meeting at which he was discharged, he was not present at that meeting and had no notice that his potential dismissal was to be decided at that meeting. Shoaf timely requested the opportunity to present his case and, following an administrative hearing in which Shoaf was represented by counsel and a record was made, the decision to dismiss Shoaf was confirmed. After the reviewing court upheld the Commission's order of dismissal, Shoaf appealed.

The fourth district ruled that Shoaf was effectively discharged at the Commission's meeting, not at the subsequent administrative hearing, and that Shoaf's dismissal therefore violated the statutory requirement that a police officer may only be dismissed "for . . . cause . . . after written notice is served upon such member . . . and after an opportunity for a hearing is given."¹⁵ The court refused the invitation to treat the subsequent administrative hearing as a "cure" of any due process violations that may have occurred as a consequence of the Commission's summary dismissal of Shoaf; once the Commission made the decision to dismiss Shoaf, according to the court, it was without statutory authority or jurisdiction to conduct any further proceedings in Shoaf's case.¹⁶

In *Grisell v. Consolidated City of Indianapolis*,¹⁷ the first district approved the "cure" theory rejected by the fourth district in *Shoaf*. An Indianapolis policeman, Grisell, was demoted from sergeant to patrolman during a hearing, authorized by statute,¹⁸ before the Board of Captains for the Indianapolis Police Department. Grisell was not represented by counsel at the Board of Captains' hearing and no record of that hearing was made. Grisell then appealed to the Indianapolis Police Merit Board and, again pursuant to the statutory scheme, was given a *de novo* hearing on the charges brought against him. Grisell was represented by counsel at this second stage, and a full record was made. After Grisell's demotion was sustained by the Merit Board,

¹³*Id.* at 1169 (citing IND. CODE § 18-1-11-3 (1976) (repealed 1981) (current version at *id.* §§ 36-8-1-12, 36-8-3-4(b) to -4(m), 36-8-3-5 (1982)).

¹⁴421 N.E.2d at 1169.

¹⁵*See supra* note 13.

¹⁶421 N.E.2d at 1171-72.

¹⁷425 N.E.2d 247 (Ind. Ct. App. 1981).

¹⁸IND. CODE § 18-4-12-27 (1976) *repealed by* Act of Apr. 27, 1981, Pub. L. No. 316, 1981 Ind. Acts 3135, 3148 (repeal of statute does not take effect until Jan. 1, 1984).

Grisell sought judicial review of the Merit Board action, and subsequently appealed the trial court's adverse ruling.

On appeal, Grisell contended that his due process rights were violated at the Board of Captains' stage of the administrative process, inasmuch as he had not been represented by counsel, and no record of those proceedings had been made. The first district court of appeals ruled that Grisell's due process rights were not violated.¹⁹ Two elements of the case proved to be crucial. First, the court placed considerable emphasis upon the fact that the Board of Captains' findings, for which no record that could be reviewed existed, were not used as evidence at the Merit Board stage; rather, the city "developed its case anew" and introduced before the Merit Board the same substantive evidence upon which it relied at the Board of Captains' stage.²⁰ In this manner, according to the court, even if there had been a deficiency in the Board of Captains' hearing which could not be reviewed, the de novo hearing before the Merit Board cured any such deficiency:

The Merit Board's function in the disciplinary scheme in this respect is to insure that any prejudice suffered by an officer due to deficiencies in the earlier proceedings is cured. The constitutional problem raised by Grisell was not manifest in the instant action and he has suffered no prejudice by the manner in which the disciplinary proceedings were conducted. Due process requires only one full-blown, trial-type administrative hearing. To require counsel and record at the earlier non-binding proceeding would be duplicative and would result in unwarranted additional administrative time and expense.²¹

The second element of the case which the court found to be crucial was the fact that the Merit Board hearing satisfied all due process requirements.²² Grisell was represented by counsel; the proceeding was de novo; new findings of fact were entered; and a full record was made. Thus, any procedural defects that might have pervaded the first hearing were "cured" by the second hearing.²³

On the surface, *Grisell* and *Shoaf* may appear to be irreconcilable. However, a key distinction between the two cases is in the nature of the administrative hearing held in each. In *Grisell*, the first district emphasized that although Grisell had effectively been demoted at the

¹⁹425 N.E.2d at 254.

²⁰*Id.* at 253.

²¹*Id.* at 253-54.

²²*Id.*

²³*Id.* at 253.

first Board of Captains' hearing, the Merit Board hearing, which did comply with due process principles, was a true de novo proceeding and the burden remained upon the city to justify Grisell's demotion. In *Shoaf*, on the other hand, the subsequent administrative hearing was found not to be a true de novo proceeding in the sense that the burden at that hearing fell upon Shoaf to prove why he should not be dismissed.

Subsequent to *Grisell*, however, the fourth district served notice that it may have abandoned its position in *Shoaf* and that it may now subscribe to the "cure" theory advocated in *Grisell*. In *Natural Resources Commission of the Department of Natural Resources v. Sullivan*,²⁴ Sullivan, an employee of the Natural Resources Commission, was summarily demoted by the superintendent of Sullivan's division without notice or opportunity for a hearing. Pursuant to statute,²⁵ Sullivan requested a public hearing before the Commission. An evidentiary hearing was held, and Sullivan's demotion was approved by the hearing officer. Upon judicial review, although Sullivan did not object to the manner in which the evidentiary hearing was conducted, he did assert that his due process rights were violated by the initial decision to demote him summarily without notice or opportunity for a hearing. The trial court, upon review, agreed with Sullivan's position and directed that he be restored to his original rank with back pay.

In reversing the trial court's holding and reinstating the Commission's decision, the fourth district relied heavily upon *Grisell* in holding that Sullivan's due process rights were protected by the subsequent administrative hearing:

In accord with the Court in *Grisell*, we also hold that where an appeal is taken from a full administrative hearing and there is no demonstration that prejudice occurring in an earlier proceeding affected the later hearing, due process rights are adequately safeguarded. Even assuming, *arguendo*, Sullivan was wrongly denied an arraignment proceeding before the Superintendent ordered his demotion, such error was cured by the subsequent administrative hearing.²⁶

Thus, because Sullivan's rights were adequately safeguarded by the subsequent hearing, the fact that he was not afforded the opportunity for a hearing at the time his demotion first took effect was held not to be wrongful.²⁷ It is significant to note that the *Sullivan*

²⁴428 N.E.2d 92 (Ind. Ct. App. 1981).

²⁵IND. CODE § 14-3-4-7 (1982).

²⁶428 N.E.2d at 100.

²⁷The *Sullivan* decision also was concerned with the scope of judicial review. See *infra* notes 98-100 and accompanying text.

court quoted at length from *Grisell* in its opinion; *Shoaf*, on the other hand, was never mentioned by the court.

Although *Sullivan* certainly seems to implicitly repudiate *Shoaf*, a key distinction between the two cases must be noted. In *Sullivan*, according to the controlling disciplinary statute,²⁸ Sullivan was absolutely entitled to request a full due process hearing within ten days after the summary decision to demote him. Thus, the administrative agency in *Sullivan* was still acting within its statutory authority when it offered Sullivan the subsequent due process hearing. However, no such statutory authority existed in *Shoaf*; once the administrative agency had rendered its initial decision to discharge, according to the fourth district, the agency had no further jurisdiction to permit an administrative due process hearing. Thus, although the continued vitality of *Shoaf* is unclear, it should not be considered totally overruled by *Sullivan*.

2. *Right to Counsel*.—Two rulings of the third district of the Indiana Court of Appeals, issued approximately one month apart, raise interesting issues regarding the rights of parties to an administrative adjudication to be notified of their right to counsel. In *Gordon v. Review Board of the Indiana Employment Security Division*,²⁹ an unemployment compensation claimant's application for benefits was denied by a referee of the Indiana Employment Security Division. The referee's decision was affirmed by the full Review Board, and the claimant sought judicial review. The claimant admittedly was advised of her right to counsel prior to the referee's hearing;³⁰ however, she was not advised as to the availability of free legal counsel and, in fact, was not represented by an attorney at that hearing. The claimant contended that she was denied due process by the fact that she was indigent and did not know that free legal counsel existed.

The court held that, upon the facts of the case, due process did not require the claimant to be advised of the availability of free legal counsel.³¹ Despite the fact that she did not have counsel at the hearing, according to the court, the referee was under a statutory duty to conduct an independent examination of all witnesses to insure complete presentation of the claimant's case.³² The court held that the referee in *Gordon* fulfilled that statutory duty, and that the claimant's case was completely and adequately presented at the hearing, despite her lack of counsel; therefore, no due process violation occurred.

²⁸IND. CODE § 14-3-4-7 (1982).

²⁹426 N.E.2d 1364 (Ind. Ct. App. 1981).

³⁰*Id.* at 1367. The Indiana Court of Appeals has held that an unemployment claimant must be notified of his or her right to counsel before a hearing may occur. *Sandlin v. Review Bd. of the Ind. Employment Sec. Div.*, 406 N.E.2d 328 (Ind. Ct. App. 1980).

³¹426 N.E.2d at 1367.

³²*Id.* at 1366-67 (citing 640 IND. ADMIN. CODE § 1-11-3 (1979)).

The *Gordon* court's emphasis upon the referee's actual presentation of the claimant's case³³ raises two important questions. First, does a claimant in an administrative adjudication have a due process right to be notified of the availability of free legal counsel when the hearing officer is *not* under a statutory duty to insure complete presentation of the claimant's case; and second, does a hearing officer who actually conducts a complete presentation of a claimant's case, regardless of any statutory duty to do so, cure any due process violation that might otherwise have existed based upon lack of notice of availability of free legal counsel?

Although any guidance on the first question will necessarily have to wait for future cases, the *Gordon* court's reliance upon the referee's *actual presentation* of the claimant's case suggests that the second question may be answered in the affirmative; that is, if a claimant's case is completely presented, then due process is satisfied. Because whether a claimant's case has been fully presented by a hearing officer will necessarily depend upon the peculiar facts of each case, the consequence of *Gordon* is that the reviewing court must apply a case-by-case analysis in determining whether an agency's failure to notify an administrative claimant of the availability of free legal services violates due process.

In another unemployment compensation proceeding, *Alcoa v. Review Board of the Indiana Employment Security Division*,³⁴ the third district court had occasion to consider the employer's contention that it was denied due process by the referee's failure to inform it of its right to counsel before the referee's hearing.³⁵ The court quoted from *Goldberg v. Kelly*³⁶ and ruled that "the opportunity to be heard must be tailored to the capabilities and circumstances of those who are to be heard."³⁷ The court further found that Alcoa was situated differently than unemployment claimants generally, and the court ultimately decided that Alcoa's failure to be notified of its right to counsel did *not* violate Alcoa's due process rights.³⁸ Judge Garrard, however, refused to join in this portion of the majority's opinion.³⁹

Significantly, the third district's reliance upon the "capabilities and circumstances"⁴⁰ of Alcoa suggests that other respondents who are less capable may be entitled to notice of their right to counsel under certain circumstances. It would appear that, as in *Gordon*, the

³³426 N.E.2d at 1367.

³⁴426 N.E.2d 54 (Ind. Ct. App. 1981).

³⁵Again, unemployment *claimants* are absolutely entitled to such notice. *See supra* note 30.

³⁶397 U.S. 254 (1970).

³⁷426 N.E.2d at 59 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

³⁸426 N.E.2d at 59.

³⁹*Id.* at 60-61.

⁴⁰*Id.* at 59.

court has established another case-by-case test for determining whether an administrative party is entitled to notice of its right to counsel. Unfortunately, the *Alcoa* court did not set forth in its opinion the capabilities and circumstances upon which the employer's right to notification is based. It is hoped that future cases will establish these guidelines.

The case-by-case approach taken in both *Gordon* and *Alcoa* deserves additional comment. The most facile approach, from the standpoint of judicial and administrative economy, would be to require a hearing officer to notify *all* parties to any administrative adjudication of their right to representation by counsel or of the availability, if appropriate, of free counsel. Both *Gordon* and *Alcoa* force the reviewing court to examine, on a case-by-case basis, matters which are extrinsic to the merits of the agency's action and decision. It cannot be foretold at this point how much of a burden these case-by-case analyses of side issues will impose upon reviewing courts; the number of future cases where these analyses might become germane is uncertain.

3. *Double Jeopardy*.—In *Cross v. State ex rel. Linton*,⁴¹ Linton, a Michigan City police officer, was suspended unilaterally by the chief of the Michigan City police for ten days due to Linton's alleged neglect of duty. During his suspension, Linton was advised by the Michigan City Police Service Commission that a hearing would be held on the same charges which had resulted in Linton's suspension by the chief of police. The hearing was held subsequently, at which time the Commission elected to dismiss Linton permanently from the Michigan City Police Department. On judicial review, Linton failed to allege error in the police chief's ten-day suspension without prior opportunity for a hearing and, thus, waived that assertion of error. On appeal of the trial court's affirmance, the only argument available to Linton was that the doctrine of double jeopardy precluded the Commission from increasing the ten-day suspension originally imposed by the police chief.

The fourth district rejected Linton's argument and held that double jeopardy was no bar to Linton's discharge from the police force.⁴² Relying heavily upon an Illinois case which the court found to be directly on point,⁴³ the court ruled that the double jeopardy doctrine is inapplicable to civil proceedings, including administrative adjudications.⁴⁴

⁴¹419 N.E.2d 991 (Ind. Ct. App. 1981).

⁴²*Id.* at 996.

⁴³*Id.* at 995 (citing *Bart v. State Dep't of Law Enforcement (Div. of State Police)*, 52 Ill. App. 3d 487, 367 N.E.2d 773 (1977)).

⁴⁴419 N.E.2d at 995-96. For further discussion of the nonapplicability of double jeopardy to disciplinary hearings, see *In re Kesler*, 397 N.E.2d 574 (Ind. 1979).

4. *Applicability of Trial Rules.*—In *Josam Manufacturing Company v. Ross*,⁴⁵ the third district of the Indiana Court of Appeals held that the discovery provisions of the Indiana Trial Rules⁴⁶ are applicable to all adjudicatory hearings before administrative agencies.⁴⁷ Furthermore, the court indicated that Trial Rule 37,⁴⁸ which specifies sanctions for failure to comply with discovery requests, would be applicable to a party to an administrative hearing where the other party has improperly resisted discovery.⁴⁹

However, a majority of the third district held that where a party to an administrative adjudication is forced to maintain a civil action to compel the opposing party's compliance with the administrative agency's discovery orders, the petitioning party may not obtain attorney fees in conjunction with the civil action, absent an order for sanctions from the administrative agency.⁵⁰

Because the Industrial Board, the agency involved in *Ross*, has no authority to enforce its own orders,⁵¹ *Ross* suggests that the proper way to obtain a full range of sanctions for failure to comply with administrative discovery orders is to move the agency to order sanctions, and then to seek enforcement of the agency's order from the trial court.

B. *Exhaustion of Administrative Remedies*

One of the most time-honored maxims of administrative law is that an aggrieved party must exhaust all administrative remedies available to it before the party may seek judicial action. However, in *Town of St. John v. Home Builders Association of Northern Indiana, Inc.*,⁵² the third district court of appeals reiterated the equally well-recognized exception to this rule that where the validity of administrative quasi-legislation is at issue, administrative remedies need not be exhausted. In *Town of St. John*, the plaintiff filed a complaint for declaratory judgment asserting that the town's local building ordinance for the construction of one and two family dwellings was invalid. The town contended that the trial court had no jurisdiction over the case because the plaintiff had failed to exhaust its administrative remedies.

⁴⁵428 N.E.2d 74 (Ind. Ct. App. 1981).

⁴⁶*Id.* at 75 (citing IND. R. TR. P. 26-37).

⁴⁷428 N.E.2d at 77. IND. R. TR. P. 28(F) specifies that the discovery provisions of the Indiana Trial Rules may be employed by any party to an administrative adjudicatory hearing.

⁴⁸428 N.E.2d at 77 (citing IND. R. TR. P. 37).

⁴⁹428 N.E.2d at 77.

⁵⁰*Id.* at 77-78 & n.2. Judge Staton dissented from this portion of the court's opinion. *Id.* at 78-80.

⁵¹*Id.* at 78 n.2.

⁵²428 N.E.2d 1299 (Ind. Ct. App. 1981).

The third district, citing numerous cases in support of its position,⁵³ held that administrative remedies need not be exhausted where a party attacks an ordinance's validity in its entirety.⁵⁴

Another interesting issue pertaining to the exhaustion requirement arose in *Metropolitan Development Commission of Marion County v. Waffle House, Inc.*⁵⁵ In that case, Waffle House had applied for a permit to erect a pole sign upon its premises; eventually, Waffle House erected the sign without securing the permit. The Metropolitan Development Commission then filed a lawsuit against Waffle House requesting injunctive relief and the imposition of a fine. After a judgment in Waffle House's favor, the Development Commission appealed.

On appeal, the Development Commission proffered the novel argument that Waffle House should have been prevented from presenting evidence in defense of the lawsuit brought by the Development Commission on the ground that Waffle House had failed to exhaust its administrative remedies; in other words, Waffle House did not have its permit when it erected the sign. The second district concluded that, because in this case the administrative agency had hailed Waffle House into court, and not *vice versa*, the exhaustion doctrine was inapplicable.⁵⁶

The *Waffle House* court also discussed, at considerable length, the theoretical distinctions between the exhaustion principle and the "primary jurisdiction" doctrine.⁵⁷ The court pointed out that the exhaustion requirement deals with judicial self-limitation—the judiciary's refusal to pass upon issues that are capable of resolution by an administrative agency. The doctrine of primary jurisdiction, however, totally divests the judiciary of its right to hear a particular matter due to the desire and need for the administrative agency's expert judgment on a technical question.⁵⁸

⁵³*Id.* at 1303 (citing *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963), *appeal dismissed*, 379 U.S. 487 (1964); *State ex rel. City of South Bend v. St. Joseph Superior Court*, 238 Ind. 88, 148 N.E.2d 558 (1958); *Indiana Env'tl. Management Bd. v. Indiana-Kentucky Elec. Corp.*, 393 N.E.2d 213 (Ind. Ct. App. 1979)).

⁵⁴428 N.E.2d at 1303.

⁵⁵424 N.E.2d 184 (Ind. Ct. App. 1981).

⁵⁶*Id.* at 186-87.

⁵⁷*Id.* at 187. For a detailed discussion of the primary jurisdiction issues in *Waffle House*, see *infra* notes 59-62 and accompanying text.

⁵⁸424 N.E.2d at 187. This is directly contradictory to the definition of primary jurisdiction as defined by Kenneth Davis, an eminent scholar in the area. K. DAVIS, ADMINISTRATIVE LAW TEXT § 19.01 (3d ed. 1972). According to Davis, "[t]he doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue." *Id.* § 19.01, at 373.

C. Primary Jurisdiction

In *Metropolitan Development Commission of Marion County v. Waffle House, Inc.*,⁵⁹ wherein the Metropolitan Development Commission sought to force a business owner, Waffle House, to remove a pole sign for which Waffle House had been given no permit to erect,⁶⁰ the Development Commission asserted that Waffle House was prevented from presenting any defense to its complaint for injunctive relief, as a matter of law, based upon the doctrine of primary jurisdiction. The court noted that, unlike the usual situation, the administrative agency was the plaintiff and the agency had gone to court willingly in an attempt to halt what it perceived as a violation of administrative and statutory guidelines. The doctrine of primary jurisdiction, according to the court, loses all force and effect when the agency itself comes to court; in net effect, the agency is waiving its "special expertise" upon which the doctrine of primary jurisdiction is based.⁶¹ In so ruling, the second district stated the following:

[W]hen the agency itself prosecutes and as plaintiff initiates a law suit, and is present in court pursuing what it perceives to be its interests, it would be manifestly unfair to require a defendant in this posture to supinely accept damaging evidence presented by the agency without the opportunity to defend against that evidence.⁶²

In short, the clear import of *Waffle House* is that administrative agencies will not be permitted to hide behind principles of administrative law which are designed to prevent unwarranted judicial interference with the administrative process—in particular, exhaustion of administrative remedies and primary jurisdiction—where the agency is, itself, responsible for instituting the legal action. This result obviously is supported by fundamental principles of fairness.

D. The Requirement of Findings

During the 1982 survey period, the saga of Benedicto Perez, whose travels were well-documented in two separate Articles in last year's Survey,⁶³ finally came to an end. Perez, who sustained an industrial accident in 1970, sought benefits for total permanent disability before

⁵⁹424 N.E.2d 184 (Ind. Ct. App. 1981).

⁶⁰The facts of this case have been previously discussed at length. *See supra* notes 55-56 and accompanying text.

⁶¹424 N.E.2d at 187-88.

⁶²*Id.* at 188.

⁶³*See Leibman, Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 453, 455-58 (1982); Lewis, *supra* note 1, at 20-22.

the Indiana Industrial Board. After the Industrial Board ruled that Perez was not permanently totally disabled, Perez sought judicial review. The court of appeals ruled that the Industrial Board's findings of fact were inadequate and remanded the cause to the Industrial Board for more specific findings.⁶⁴ On remand, the Industrial Board reaffirmed its earlier award, and the court of appeals then affirmed the Industrial Board's decision based upon what the court perceived to be an appropriate record.⁶⁵ Perez then sought transfer to the Indiana Supreme Court.

In *Perez v. United States Steel Corp.*,⁶⁶ the Indiana Supreme Court granted transfer, ruled that the Industrial Board's findings of fact that the court of appeals had considered on the second appeal were still inadequate, and vacated the court of appeals' opinion and remanded the case to the Industrial Board for further findings of fact.⁶⁷ In so doing, the supreme court commented at length upon the specificity that findings of fact at the administrative level must meet. The court distinguished between findings of *basic* fact and findings of *ultimate* fact—the basic facts being those upon which the ultimate factual determinations rest—and ruled that agency findings of fact must contain *both* the basic and the ultimate facts supporting the administrative agency's decision.⁶⁸ The essence of the supreme court's holding is concisely summarized in a portion of the court's opinion as follows:

To elaborate, findings of basic fact must reveal the [agency's] analysis of the evidence and its determination therefrom regarding the various specific issues of fact which bear on the particular claim. The "finding of ultimate fact" is the ultimate factual conclusion regarding the particular claim before the [agency]; here, for example, that ultimate question is whether Perez is permanently totally disabled. The finding of *ultimate* fact may be couched in the legal terms and definitions which govern the particular case. In contrast, the specific findings of basic fact must reveal the [agency's] determination of the various relevant sub-issues and factual disputes which, in their sum, are dispositive of the particular claim or ultimate factual question before the [agency]. The findings must be specific enough to provide the reader with an understanding of the

⁶⁴*Perez v. United States Steel Corp.*, 172 Ind. App. 242, 359 N.E.2d 925 (1977) ("*Perez I*").

⁶⁵*Perez v. United States Steel Corp.*, 416 N.E.2d 864 (Ind. Ct. App. 1981) ("*Perez II*").

⁶⁶426 N.E.2d 29 (Ind. 1981) ("*Perez III*").

⁶⁷*Id.* at 33.

⁶⁸*Id.* at 32.

[agency's] reasons, based on the evidence, for its finding of *ultimate* fact.⁶⁹

The entire *Perez* history provides a clear example of the distinction between basic and ultimate findings of fact. In its second attempt at fact finding, the Industrial Board stated one of its factual findings to be the following: "In the Board's experience, the medical findings in the evidence in this case, from both Plaintiff's and Defendant's physicians, show that Plaintiff is capable of pursuing many normal kinds of occupations. He has a permanent partial impairment, but not a permanent total disability."⁷⁰

According to the court in *Perez III*, while this statement served as a finding of ultimate fact, neither this statement nor any of the Industrial Board's other findings disclosed any basic facts upon which that particular ultimate fact rested.⁷¹ What were the physician's specific findings regarding impairment? What was Perez's medical condition? What types of occupations was Perez, in his condition, able to perform? These were the basic facts upon which the ultimate fact of "no permanent total disability" rested, and, according to the supreme court, the absence of these basic facts from the findings of the Industrial Board rendered the record defective and incapable of review.⁷² Thus, agency findings of fact must include *both* the ultimate factual findings and the basic facts from which those ultimate findings stem.

After the *Perez III* decision, the Industrial Board, for the third time, entered written findings of fact and conclusions of law and reaffirmed its original award. These findings of the Industrial Board went back to the supreme court, and in *Perez IV*⁷³ the supreme court determined that the Industrial Board's third effort did, indeed, meet the criteria expressed in *Perez III*. Upon its review of the now complete findings, the supreme court affirmed the Industrial Board's award which denied Perez benefits for total permanent disability.⁷⁴

In a case decided the same day as *Perez III*, *Talas v. Correct Piping Company, Inc.*,⁷⁵ the supreme court served notice that the specificity of agency findings of fact which it set forth in *Perez III* would be strictly enforced. Despite the fact that the supreme court had earlier remanded *Talas* to the Industrial Board for more specific findings of fact,⁷⁶ the supreme court relied upon *Perez III* in determining that the

⁶⁹*Id.* at 33 (emphasis in original).

⁷⁰*Id.* at 30.

⁷¹*Id.*

⁷²*Id.* at 32-33.

⁷³*Perez v. United States Steel Corp.*, 428 N.E.2d 212 (Ind. 1981) ("*Perez IV*").

⁷⁴*Id.* at 216-17.

⁷⁵426 N.E.2d 26 (Ind. 1981).

⁷⁶In *Talas v. Correct Piping Co.*, 409 N.E.2d 1223 (Ind. Ct. App. 1980), the court of appeals affirmed the decision of the Industrial Board which had determined that

record was still deficient and remanded the case to the Industrial Board for the entry of findings of basic facts supporting the Industrial Board's ultimate factual holdings.⁷⁷ The clear guidelines set forth in *Perez III*, coupled with the lack of reluctance shown by reviewing courts in remanding agency adjudications for more specific findings, indicate that the *Perez III* standard will be strictly interpreted for all future agency decisions in this state.

However, according to two cases decided during this survey period, the severe specificity standards set forth for agency findings of fact in *Perez III* may not apply to findings of fact entered by the reviewing court. Under the Indiana Administrative Adjudication Act⁷⁸ and the Indiana Trial Rules,⁷⁹ a reviewing court at the trial level is also required to enter findings of fact in support of its decision upon review. However, in *Goffredo v. Indiana State Department of Public Welfare*,⁸⁰ the first district court of appeals held that the reviewing court need not discuss and summarize all the evidence presented to the agency; the reviewing court's findings were sufficient if they merely contained all necessary facts to support the court's conclusions of law.⁸¹ Similarly, in *Clarkson v. Department of Insurance*,⁸² the second district held that a single finding of fact made by the reviewing trial court complied with the requirement that the reviewing court enter findings of fact, where the single finding of fact, alone, was sufficient to support the trial court's affirmance upon review of the administrative agency's decision.⁸³ Thus, the "basic"—"ultimate" dichotomy appears not to apply to a trial court's findings upon review, a fact which will no doubt free the reviewing court from exhaustive and unnecessary examinations of all underlying evidence adduced at the administrative level.

E. Scope of Judicial Review

1. Right to Judicial Review.—Under Indiana principles of constitu-

Talas' employer was not required to pay for Talas' nursing care. Talas' petition for transfer was granted, and the supreme court remanded the case to the Industrial Board for specific findings of fact. *Talas v. Correct Piping Co.*, 416 N.E.2d 845 (Ind. 1981). The Industrial Board's second attempt at specific findings of fact was also adjudged to be insufficient by the supreme court. *Talas v. Correct Piping Co.*, 426 N.E.2d 26 (Ind. 1981). The conclusion of Talas' travels will be left to a subsequent survey.

⁷⁷426 N.E.2d at 28-29.

⁷⁸IND. CODE § 4-22-1-18 (1982).

⁷⁹IND. R. TR. P. 52(A).

⁸⁰419 N.E.2d 1337 (Ind. Ct. App. 1981).

⁸¹*Id.* at 1339.

⁸²425 N.E.2d 203 (Ind. Ct. App. 1981). For other issues considered by the court in *Clarkson*, see *infra* notes 85-90 and accompanying text.

⁸³425 N.E.2d at 206.

tional law, every administrative adjudication is judicially reviewable;⁸⁴ however, that does not mean that an aggrieved party's right to review cannot be waived. In *Clarkson v. Department of Insurance*,⁸⁵ an insurance agent whose license was revoked by the Indiana Insurance Commissioner filed his verified petition with the trial court, pursuant to statute,⁸⁶ for review of the Commissioner's decision. The trial court affirmed the Commissioner's decision, and the agent appealed.

On appeal, the second district of the Indiana Court of Appeals found that many of the issues for which the agent sought review were deemed to be waived as a matter of law due to substantive defects in the petition for review. The agent asserted, for instance, that the revocation of his license deprived him of equal protection under the law; however, the agent failed to allege any violation of equal protection in his petition, which "results in a waiver of that issue [that] may not be raised on appeal."⁸⁷

Additionally, the agent had asserted in his petition that the Commissioner's decision was arbitrary, capricious, and an abuse of discretion, but he cited no authority in support of his position. In holding that this claim of error was waived as well, the court of appeals held the following:

However, a bald assertion in the petition for review that the action of the agency is arbitrary, capricious, or an abuse of discretion does not create an issue. Rather, as earlier stated, the petition must specifically allege in what manner the order,

⁸⁴See *Warren v. Indiana Tel. Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940). The same right to judicial review is accorded under the Indiana Administrative Adjudication Act, IND. CODE § 4-22-1-14 (1982).

⁸⁵425 N.E.2d 203 (Ind. Ct. App. 1981).

⁸⁶IND. CODE § 4-22-1-14 (1982) provides in part:

Any party or person aggrieved by an order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act. Such review may be had by filing with the circuit or superior court of the county in which such person resides, or in any county in which such order or determination is to be carried out or enforced, a verified petition setting out such order, decision or determination so made by said agency, and *alleging specifically* wherein said order, decision or determination is:

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

Id. (emphasis added).

⁸⁷425 N.E.2d at 206.

decision, or determination is arbitrary, capricious, or an abuse of discretion, I.C. 4-22-1-14, and thereby raise an issue.⁸⁸

The message of *Clarkson* is obvious: the traditional doctrine of notice pleading in civil cases does *not* apply to judicial review of agency adjudications. Like a motion to correct errors under Trial Rule 59,⁸⁹ issues which are inadequately raised by a verified petition for review or are omitted altogether from the petition will not be reviewed by the court.⁹⁰ It is incumbent upon every party seeking review of an administrative adjudication to allege every possible error with as much specificity and factual and legal support as possible in the verified petition for review; otherwise, the risk of waiver is paramount.

The right to judicial review of adverse agency actions can also be waived by the *untimely* filing of a verified petition for review. In *Shettle v. Smith*,⁹¹ the first district court of appeals held that non-compliance with the fifteen-day limit⁹² for the filing of an action for judicial review is a fatal defect and deprives the reviewing court of all jurisdiction to hear the case.⁹³ The court's characterization of the nature of the error as jurisdictional again suggests that the verified petition for review is to be treated exactly like a motion to correct errors for the purposes of judicial review.⁹⁴ In other words, the time limit for filing a verified petition for review cannot, in all likelihood, be extended.⁹⁵ The practitioner should be alert to these precise prerequisites to the proper perfection of an action for judicial review.

2. *The Substantial Evidence Test.*—Past Administrative Law

⁸⁸*Id.* at 207.

⁸⁹IND. R. TR. P. 59.

⁹⁰Numerous decisions exist regarding the specificity required to sustain a motion to correct errors under Trial Rule 59. *See, e.g.,* *White v. Livengood*, 390 N.E.2d 696 (Ind. Ct. App. 1979); *State ex rel. Sacks Bros. Loan Co. v. DeBard*, 381 N.E.2d 119 (Ind. Ct. App. 1978). Arguably, these decisions apply to both the judicial review setting and the requirements of the verified petition for review.

⁹¹425 N.E.2d 713 (Ind. Ct. App. 1981).

⁹²*Id.* at 715. Indiana Code section 4-22-1-14 establishes a fifteen-day period for filing of a verified petition for review with the trial court, which runs from the date of receipt of notice of an agency final determination. Indiana Code section 4-22-1-14 applies only to administrative actions that fall within the purview of the Indiana Administrative Adjudication Act; agencies not bound by the Administrative Adjudication Act have established different time limits for filing. *See, e.g.,* IND. CODE §§ 22-3-4-8, 22-3-7-27 (1982) (thirty-day period for filing assignment of errors with the court of appeals in Industrial Board cases); IND. CODE §§ 8-1-3-1 to -12 (1982) (thirty-day period for filing assignment of errors with court of appeals in Public Service Commission cases).

⁹³425 N.E.2d at 715.

⁹⁴The sixty-day deadline for the filing of a motion to correct errors following an adverse civil judgment, Rule 59 of the Indiana Trial Rules, is also jurisdictional and noncompliance with it deprives the appellate court of jurisdiction to hear the appeal. *Gillian v. Brozovic*, 166 Ind. App. 682, 337 N.E.2d 152 (1975).

⁹⁵*See* *White v. Livengood*, 390 N.E.2d 696 (Ind. Ct. App. 1979).

Surveys have uniformly contained lengthy discussions upon the different versions of the substantial evidence test employed by the different districts of the Indiana Court of Appeals. All districts recognize that an administrative adjudication which is not supported by substantial evidence is subject to reversal and remand upon judicial review. In employing the substantial evidence test, however, may the reviewing court examine the *entire* administrative record in deciding whether an agency determination of fact is supported by substantial evidence, or is the reviewing court's examination of the record limited *only* to that evidence which supports the agency's determination? Previous authors of this section of the Survey, although guardedly optimistic in their hope that the different districts of the Indiana Court of Appeals were on the verge of uniformity in mandating "whole record" judicial review, have reported that the situation is far from settled. Cases decided during this survey period leave room for optimism—but unfortunately some confusion—on this point.

As reported in the 1981 Administrative Law Survey,⁹⁶ the fourth district, in *Wilfong v. Indiana Gas Co.*,⁹⁷ apparently departed from its prior holdings and ruled that judicial review of a Public Service Commission decision would be based only upon evidence favorable to the agency's position. In *Natural Resources Commission of the Department of Natural Resources v. Sullivan*,⁹⁸ however, the fourth district apparently reverted to its pre-*Wilfong* position and held that judicial review of an agency's demotion of one of its employees should be based upon the record as a whole. Relying upon *Universal Camera Corp. v. NLRB*,⁹⁹ the *Sullivan* court ruled that "the trial court must examine the *whole record* to determine whether 'the agency's decision lacks a reasonably sound basis of evidentiary support.'"¹⁰⁰

The third district, in three cases decided during the survey period, sent out conflicting signals as to whether it preferred "whole record" or "favorable evidence" review. In both *Alcoa v. Review Board of the Indiana Employment Security Division*¹⁰¹ and *L. W. Edison, Inc. v. Teagarden*,¹⁰² the third district ruled that it would consider only the evidence, and those reasonable inferences drawn therefrom, that tend to support the agency's decision.¹⁰³ In both cases, the agency's factual

⁹⁶Greenberg, *Administrative Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 65, 66 (1981).

⁹⁷399 N.E.2d 788 (Ind. Ct. App. 1980).

⁹⁸428 N.E.2d 92 (Ind. Ct. App. 1981). For other issues considered by the court in *Sullivan*, see *supra* notes 24-28 and accompanying text.

⁹⁹340 U.S. 474 (1951).

¹⁰⁰428 N.E.2d at 101 (emphasis added and citation omitted).

¹⁰¹426 N.E.2d 54 (Ind. Ct. App. 1981). For other issues considered by the court in *Alcoa*, see *supra* notes 34-40 and accompanying text.

¹⁰²423 N.E.2d 709 (Ind. Ct. App. 1981).

¹⁰³*Alcoa*, 426 N.E.2d at 59; *Teagarden*, 423 N.E.2d at 710.

determinations were found to be supported by substantial evidence and the administrative decisions were affirmed. However, in *State Board of Tax Commissioners v. South Shore Marina*,¹⁰⁴ the third district, in reversing a trial court's contrary ruling and reinstating a State Board of Tax Commissioners' final assessment, resorted to "whole record" review.¹⁰⁵

Because on various occasions the different districts of the court of appeals have espoused both "whole record" and "favorable evidence" review without apparent rhyme or reason, one has to wonder if there is more to these apparent inconsistencies than meets the eye. On the one hand, it is apparent that when administrative decisions are reviewed directly by the court of appeals, the various districts are much more inclined to resort to "favorable evidence" review; administrative findings of fact in workers' compensation and unemployment compensation cases, in particular, are reviewed under the "favorable evidence" standard. On the other hand, where the court of appeals, in its true appellate capacity, passes upon a trial court's judicial review of an agency determination, the different districts uniformly appear to employ the "whole record" standard of review.¹⁰⁶ Although it is difficult to justify the different standards of review of agency findings of fact based upon whether the court of appeals acts as a first tier or second tier of review, it is clear that these distinctions are being made and that the practitioner must be alert to them.

However, it is also submitted that there may be less to these apparent inconsistencies than is initially apparent. From a practitioner's standpoint, the differences between a "whole record" and "favorable evidence" review of the agency's findings of fact *may* be nothing more than a paper tiger.¹⁰⁷ As previously noted, every district of the court of appeals has, at one time or another, supported both "whole record" and "favorable evidence" review without any apparent reason for distinguishing between the two. More significantly, it is exceedingly difficult to conjure up a situation wherein a reviewing court exercising a "favorable evidence" standard of review would affirm an administrative agency decision that would have been remanded by a "whole

¹⁰⁴422 N.E.2d 723 (Ind. Ct. App. 1981). For further discussion of this case see Boyd, *Taxation, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 355, 367-70 (1983).

¹⁰⁵*Id.* at 731.

¹⁰⁶No attempt will be made to cite the large number of cases decided by the different districts of the court of appeals over the past few years which support this statement. The best indicia of this statement are the preceding Administrative Law Surveys wherein the cases and conflicts among and within the various districts of the court of appeals have been extensively analyzed. See Lewis, *supra* note 1, at 11-13; Greenberg, *supra* note 96; Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 39-42 (1980).

¹⁰⁷Like his predecessors, this author uses the term "may" advisedly.

record" reviewing court. Such a situation could arise, for instance, when the agency's record overwhelmingly, but not unanimously, points to one conclusion, and the agency reaches the opposite result. Not only is this scenario an unlikely one, but the different districts' willingness to resort to a "whole record" theory on occasion suggests that the reviewing court will examine the substantiality of *whatever* evidence, *pro or con*, the parties put before it.

At the very least, no decision reported during the last few survey periods has indicated that any district will *refuse* to consider contrary evidence if necessary to arrive at a just result. In this fact, Indiana's practitioners can probably take some solace.

3. *Review of Agency Legal Determinations and Interpretations.*— Unlike the issue of judicial review of agency findings of fact, which as noted above has resulted in conflicts among and often within the different districts of the court of appeals, the appropriate standard of judicial review to be applied to an agency's legal interpretations is well-settled. Cases decided during the survey period support the general principle that an agency's interpretation of the law, although entitled to some deference, is not sacrosanct, and that a reviewing court is free to reverse and remand agency decisions based upon the agency's erroneous interpretation or application of the law.

For instance, in *Johnson v. Moritz*,¹⁰⁸ the first district reviewed an agency's interpretation of an Indiana statute requiring the commissioners of a municipal housing authority to file an annual report with the municipal clerk.¹⁰⁹ Appellants, housing authority commissioners, were removed from office by the mayor for failing to file the statutorily required annual report within a reasonable time. The trial court affirmed the mayor's action. The court of appeals noted that, although "the interpretation of a statute by an administrative agency is entitled to great weight," the agency's interpretation is "not binding" upon a reviewing court when that interpretation is incorrect or is contrary to the obvious legislative will.¹¹⁰ The first district held that the mayor's interpretation of the relevant statute was erroneous and that the commissioners were entitled to reinstatement.¹¹¹

¹⁰⁸426 N.E.2d 448 (Ind. Ct. App. 1981).

¹⁰⁹*Id.* at 450 (citing IND. CODE § 18-7-11-21 (1976) (repealed 1981) (current version at *id.* § 36-7-18-36 (1982)).

¹¹⁰426 N.E.2d at 451.

¹¹¹*Id.* Three other first district cases decided during the survey period also support the position that erroneous agency interpretations of law may be reversed upon review. *Illinois-Indiana Cable Television Ass'n, Inc. v. Public Serv. Comm'n*, 427 N.E.2d 1100 (Ind. Ct. App. 1981); *Department of Fin. Insts. v. Beneficial Fin. Co. of Madison*, 426 N.E.2d 711 (Ind. Ct. App. 1981); *Southern Ry. v. Board of Comm'rs of Vanderburgh County*, 426 N.E.2d 445 (Ind. Ct. App. 1981).

Similarly, in *Shettle v. Shearer*,¹¹² the third district ruled that the superintendent of the Indiana State Police had acted contrary to law in failing to issue a handgun license.¹¹³ The superintendent's decision was based upon his construction of the handgun licensing statute, Indiana Code section 35-23-4.1-5(a),¹¹⁴ and Indiana common law.¹¹⁵ One dissenter in *Shearer* suggested, however, that the court's reversal of the superintendent's decision was not a review of agency legal interpretation, but that the court's action was an improper reversal of the agency's findings of fact which were supported by substantial evidence.

Shearer raises an important point: the characterization of an issue for judicial review as "legal" or "factual" may well be dispositive of the issue's outcome. Obviously, whether an applicant for a handgun permit meets the requirements for permit approval is ordinarily a question of fact, and the resulting permit approval or denial, as a factual determination, cannot be reversed by a reviewing court if supported by substantial evidence. However, by changing the focus of the inquiry to whether the superintendent's decision was *contrary to law*,¹¹⁶ as opposed to merely unsupported by substantial evidence, the *Shearer* court accorded itself the power to review, and ultimately reverse, the superintendent's decision. The moral of the story is clear—if it appears that an agency's resolution of a factual issue is supported by substantial evidence, one should attempt to convince the court that the factual issue is, in fact, a legal issue and that *de novo* review of the legal conclusion is appropriate.

The comparative ease with which reviewing courts may reverse erroneous agency interpretations of law, however, may be threatened by at least one case decided during the survey period dealing with the doctrine of legislative acquiescence. As expressed in *Baker v. Compton*,¹¹⁷ the doctrine of legislative acquiescence generally holds that an administrative agency's long-standing erroneous interpretation of a statute, which is subsequently not amended or altered by the legislature, becomes binding upon the agency; the presumption is that the legislature's inaction indicates its satisfaction with the agency's construction.¹¹⁸

¹¹²425 N.E.2d 739 (Ind. Ct. App. 1981).

¹¹³The court did rule, however, that the trial court erred in ordering the superintendent to issue the license. *Id.* at 741. The court pointed out that the only relief a trial court could grant when an administrative agency's decision is contrary to law is to vacate that decision and remand for further agency determinations. *Id.* at 741.

¹¹⁴425 N.E.2d at 740 (quoting IND. CODE § 35-23-4.1-5(a) (1982)).

¹¹⁵425 N.E.2d at 741 (citing *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. Ct. App. 1980)).

¹¹⁶"Contrary to law" is, of course, one of the grounds upon which a reviewing court may overturn an administrative decision. See IND. CODE § 4-22-1-18 (1982).

¹¹⁷247 Ind. 39, 211 N.E.2d 162 (1965).

¹¹⁸*Id.* at 42, 211 N.E.2d at 164.

In *Indiana Department of State Revenue v. General Foods Corp.*,¹¹⁹ however, the second district appeared to take the doctrine of legislative acquiescence one step further when it suggested in a footnote to its opinion that the doctrine of legislative acquiescence also applied to judicial review of agency interpretations of law, and that the agency's prior interpretations, even though perhaps erroneous, are binding upon the *reviewing court*.¹²⁰ Although the court emphasized that it did not decide whether the doctrine was strictly applicable,¹²¹ the clear implication of the footnote is that the doctrine of legislative acquiescence mandated that the State Board of Revenue's prior application of an Indiana income tax statute¹²² was binding. Although the *General Foods* decision was unanimous, the footnote in question was disavowed by Judge Sullivan.¹²³

By contrast, in *Beer Distributor of Indiana, Inc. v. State ex rel. Alcoholic Beverage Commission*,¹²⁴ the first district clearly indicated that the doctrine of legislative acquiescence does *not* force a reviewing court to affirm an agency's erroneous interpretation of law and that an administrative interpretation that violates applicable statutes, no matter how long-standing, is "entitled to no weight."¹²⁵ It is hopeful that future cases will resolve this issue and heal the apparent split between the first and second districts.

4. *Review of Agency Rule Making.*—In a case decided during this survey period, *Neswick v. Board of Commissioners*,¹²⁶ the fourth district reaffirmed the established rule that the quasi-legislative actions of administrative agencies are not judicially reviewable in the strict sense of the word.¹²⁷ However, the court also recognized that agency quasi-legislation which is unconstitutional or otherwise illegal can always be collaterally attacked through the procedural vehicle of a declaratory judgment action.¹²⁸ The *Neswick* court reversed a trial court's conclusion that it was without jurisdiction to consider the merits of a constitutional challenge to a local zoning ordinance.¹²⁹ In *City of Ander-*

¹¹⁹427 N.E.2d 665 (Ind. Ct. App. 1981).

¹²⁰*Id.* at 670-71 & n.1 (citing *Whirlpool Corp. v. State Board of Tax Comm'rs*, 167 Ind. App. 216, 338 N.E.2d 501 (1975)).

¹²¹427 N.E.2d at 670-71 n.1.

¹²²IND. CODE § 6-2-1-2 (1976) (repealed 1981) (current version at IND. CODE § 6-2.1-2-2 (1982)).

¹²³427 N.E.2d at 671.

¹²⁴431 N.E.2d 836 (Ind. Ct. App. 1982).

¹²⁵*Id.* at 840.

¹²⁶426 N.E.2d 50 (Ind. Ct. App. 1981).

¹²⁷*Id.* at 53. For an example of the established law, see *Indiana Waste Systems v. Board of Comm'rs of Howard County*, 389 N.E.2d 52 (Ind. Ct. App. 1979).

¹²⁸426 N.E.2d at 53.

¹²⁹*Id.* at 53-54.

son v. Associated Furniture & Appliances, Inc.,¹³⁰ without passing directly on the point, the Indiana Supreme Court also noted that agency rule making can always be attacked by the filing of a complaint for declaratory and injunctive relief wherein the jurisdiction of the court is based upon a constitutional claim.¹³¹

F. Delegation of Legislative Power

In *Stanton v. Smith*,¹³² the Indiana Supreme Court was faced with an alleged unconstitutional delegation of legislative power to an administrative agency. Plaintiff in that case was an AFDC recipient¹³³ who challenged the Indiana Department of Public Welfare's twenty-five percent rateable reduction of standards used to formulate minimum AFDC benefits.

Although maximum standards of AFDC assistance are determined by statute,¹³⁴ the Indiana General Assembly delegated to the Public Welfare Department the authority to establish minimum standards of AFDC assistance within the standards set forth in the statutes.¹³⁵ One of the standards established by the General Assembly was that the Public Welfare Department could affix a rateable reduction, not to exceed thirty-five percent, to the standards used to determine minimum AFDC requirements.¹³⁶ The Public Welfare Department established a twenty-five percent rateable reduction¹³⁷ which caused the plaintiff's AFDC benefits to be reduced correspondingly. The plaintiff thereafter brought a class action suit alleging that the Public Welfare Department's authority to establish the rateable reduction was improperly delegated to it by the General Assembly.

The trial court agreed with plaintiff's improper delegation argument and declared the twenty-five percent rateable reduction, and its enabling statute, to be unconstitutional. On appeal, however, the supreme court disagreed and held constitutional the delegation to the

¹³⁰423 N.E.2d 293 (Ind. 1981), *rev'g* 398 N.E.2d 1321 (Ind. Ct. App. 1980).

¹³¹423 N.E.2d at 294.

¹³²429 N.E.2d 224 (Ind. 1981). For further discussion of this case see Wright, *Social Security and Welfare, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 339, 346-47 (1983).

¹³³The statutory program for AFDC recipients (Aid to Families with Dependent Children) is codified at 42 U.S.C. § 601 (1976) (incorporated by reference at IND. CODE § 12-1-2-12, -13 (1982)).

¹³⁴See IND. CODE § 12-1-7-3 (1982).

¹³⁵See IND. CODE § 12-1-2-2(d) (1982).

¹³⁶Act of Apr. 26, 1973, Pub. L. No. 339, 1973 Ind. Acts 1887, 1933.

¹³⁷470 IND. ADMIN. CODE § 2-1-6 (1979). 470 IND. ADMIN. CODE § 10-3-6(2) (1979) indicates that the rateable reduction percentage of 25% was enacted by the General Assembly, not by administrative *fiat*; obviously, this statement is contrary to the basis for the whole dispute in *Stanton*.

Public Welfare Department of the power to determine a rateable reduction, up to thirty-five percent.¹³⁸ In so holding, the supreme court stated the following:

The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. *Blue v. Beach*, (1900) 155 Ind. 121, 56 N.E. 89. An administrative body can be delegated the responsibility, methods, or details necessary to implement the law enacted by the Legislature. This Court has held that the Legislature may delegate authority to an administrative agency if the Legislature lays down in the same statute a reasonable standard to guide that discretion. *Kryder v. State*, (1938) 214 Ind. 419, 15 N.E.2d 386.¹³⁹

Thus, despite the fact that the authority delegated to the Public Welfare Department by the General Assembly resulted in an enormous impact upon AFDC families across the state, so long as legislative guidelines existed to check the Public Welfare Department's authority, the delegation was constitutional.

G. Enforcement of Agency Orders

Under the Indiana Administrative Adjudication Act, an administrative agency is entitled to seek equitable relief in a court of law for enforcement of its final orders.¹⁴⁰ In *City of Gary v. Stream Pollution Control Board*,¹⁴¹ the fourth district had occasion to consider one of the most oft-pleaded reasons for noncompliance with adverse agency orders—the poverty defense. The Indiana Stream Pollution Control Board and the City of Gary entered into an agreed order which established certain standards for the operation of a refuse disposal facility located in Gary. Subsequently, the Board determined that the city was not in compliance with the agreed entry and sought preliminary and permanent injunctions against the city seeking to mandate the city's adherence to the refuse disposal standards. The city's defense to the injunction proceeding was that it did not have sufficient funds from revenue sharing and local property taxes to meet the costs of complying with the Board's order, and that the city's applications to the State Tax Control Board for excessive levies¹⁴² to pay for the increased costs of operating the facility had been denied by the Tax Control Board.

¹³⁸429 N.E.2d at 229.

¹³⁹*Id.* at 228.

¹⁴⁰IND. CODE § 4-22-1-27 (1982).

¹⁴¹422 N.E.2d 312 (Ind. Ct. App. 1981), *transfer denied*, October 27, 1981.

¹⁴²*Id.* at 314-15 (citing IND. CODE § 6-3.5-1-12 (1982)).

The fourth district found that the city's financial problems were not sufficient justification for the city's admitted noncompliance with the agreed entry of the Stream Pollution Control Board and, thus, affirmed the trial court's issuance of a preliminary injunction.¹⁴³ The court placed considerable emphasis upon the environmental nature of the case; while financial hardship may affect the *timetable* for compliance with the environmental decree, the *legality* of the agreed entry was in no way impaired by the city's lack of funds.¹⁴⁴ Secondly, the court ruled that the city's financial difficulties were foreseeable at the time of the order and, therefore, were no excuse for non-compliance with the terms of the agreed entry.¹⁴⁵ Finally, the court held that the city had not exhausted all possible avenues for financing the operation of the landfill and, in particular, noted that the Solid Waste Disposal Facilities Act provided for alternative methods of financing the operation of the disposal site which the city had not yet attempted.¹⁴⁶

¹⁴³422 N.E.2d at 318.

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 317.

¹⁴⁶*Id.* at 318 (citing IND. CODE §§ 19-2-1-1 to -32 (1976) (repealed 1981) (current version at *id.* §§ 36-9-30-1 to -35 (1982)). In particular, the city was statutorily authorized to issue revenue bonds, establish service charges and transfer budgets. IND. CODE §§ 19-2-1-3, -9, -10 (1976) (repealed 1981) (current version at *id.* §§ 36-9-30-3, -15, -16 (1982)).