

SURVEY OF INDIANA ADMINISTRATIVE LAW

JOSEPH P. ROMPALA*

There is a growing trend in American political discourse that gives voice to questions regarding the appropriate reach of the regulatory state into society at large. Such a debate is unquestionably important, but as it is carried out, all sides should bear in mind that administrative agencies already play a substantial role in shaping the relationship between the average citizen and the government. Indeed, whether determining a person's eligibility for a driver's license, protecting the rights of workers and the unemployed, or setting the retail price of electricity, the work of the State's administrative agencies frequently has a direct and profound impact on the daily life of the average Hoosier.

Administrative agencies are legislatively enabled executive branch bodies and often operate in executive, legislative and quasi-judicial capacities. The Indiana legislature and courts have developed a specialized body of law to review and assess the actions of Indiana administrative agencies, often acting in a complex and unique role that straddles all three branches of government. This survey article examines some of the decisions issued by Indiana's appellate courts as they conduct that review and considers how that review safeguards the interests of Indiana's citizens.

I. JUDICIAL REVIEW

With few exceptions, the decisions of Indiana's administrative agencies are ultimately subject to review by the State's courts.¹ Statutory and common law requirements limit judicial review by controlling the review process, restricting who may seek review, what a court may review, and the standard the court is to apply while undertaking the review. The section below examines how Indiana's courts address these, and other, questions related to the judiciary's review of agency actions.

A. *Standard and Scope of Review*

In general, Indiana courts take a deferential stance when reviewing agency actions.² This deference flows from the doctrine of the separation of powers, and is the result of the status of administrative agencies as executive bodies acting in

* Director, Lewis & Kappes, P.C., Indianapolis, Indiana.

1. The Indiana Supreme Court long ago held there is a constitutional right to judicial review of agency actions. *See State ex rel. State Bd. of Tax Comm'rs v. Marion Superior Court*, Civil Div., Room No. 5, 392 N.E.2d 1161, 1165 (Ind. 1979). The General Assembly also has enacted the Administrative Orders and Procedures Act ("AOPA"), which sets out the method and means by which such review, in most instances, is undertaken. *See infra* note 4. Judicial review of other agency actions, such as decisions by the Indiana Utility Regulatory Commission, do not proceed under AOPA, but rather through a separate statutory process. *See* IND. CODE §§ 8-1-3-1 to -12. Only certain agency actions, such as actions taken "related to an offender within the jurisdiction of the department of correction" are explicitly exempt from judicial review. *Id.* § 4-21.5-2-5(6).

2. *Ind. Horse Racing Comm'n v. Martin*, 990 N.E.2d 498, 503 (Ind. Ct. App. 2013).

legislative or executive capacities. The Administrative Orders and Procedures Act (“AOPA”),³ although not applicable to all agency actions, reflects the basic limitations the judicial branch exercises when reviewing the decision of an administrative body. Specifically, AOPA provides that a court may only overturn an administrative agency’s decision if it is

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

Although AOPA establishes the general standard applied by courts, the actual degree of deference a court owes an administrative agency’s decision varies according to a number of different factors.⁵

1. *Judicial Deference to Agency Statutory Interpretation.*—Courts generally have the sole responsibility of statutory interpretation. Nevertheless, administrative agencies often must engage in statutory interpretation when rendering a decision. In such instances, a reviewing court can be placed in a difficult position, needing to balance its judicial role in resolving questions of law against the deference owed to the other branches of government.

The court of appeals, in *Indiana Horse Racing Commission v. Martin*, illustrates how courts strike that balance when the statute subject to interpretation is one which the agency has a role in defining and enforcing. *Martin* addresses whether an individual needed a license from the Indiana Horse Racing Commission (“IHRC”) due to his position and work with the Indiana Thoroughbred Owners and Breeders Association (“ITOBA”).⁶ More specifically, the decision in *Martin* focuses on the proper interpretation of Indiana Code section 4-31-6-1, which requires that “[a] person must be a licensee in order to . . . participate in racing at a racetrack or at a satellite facility.”⁷ At the heart of the case, then, was whether the IHRC properly interpreted the phrase “participation in racing” to encompass a wide range of activities.

Edmund Martin served as the executive director and was a paid employee of ITOBA and performed a number of functions for the association, including attending meetings, lobbying on its behalf, planning and directing programs, and executing decisions of the board.⁸ The specific activities he undertook, included, among others, attending meetings at racetracks, participating in a horse sale, and “‘covering’ the ITOBA’s booth space at the Hoosier Horse Fair.”⁹

3. IND. CODE §§ 4-21.5-1-1 to -9 (2013).

4. *Id.* § 4-21.5-5-14(d).

5. *See Ind. Horse Racing Comm’n*, 990 N.E.2d at 503 (discussing the process a reviewing court uses to decide the amount of deference to accord an agency’s interpretation of statutes).

6. *Id.* at 499.

7. IND. CODE § 4-31-6-1 (2013).

8. *Ind. Horse Racing Comm’n*, 990 N.E.2d at 500.

9. *Id.*

In April 2010, the IHRC contacted Martin, indicating that he needed to apply for a license if “he intended to participate in horse racing activities.”¹⁰ At the time, Martin declined, telling the IHRC that he would not “have access to gaming funds and would not be handling ITOBA business” at racetracks.¹¹ Subsequently, in November 2010, the IHRC banned Martin from IHRC grounds until he obtained a valid license from the IHRC.¹² Martin sought administrative review of that decision, which was ultimately approved as a final order by the IHRC.¹³ He then sought judicial review of the IHRC’s decision, and the trial court overturned the agency determination.¹⁴ The trial court concluded that the activities Martin performed on behalf of the ITOBA did not require him to obtain a license from the IHRC because he was not participating in racing or “pari-mutuel racing,” or providing pari-mutuel related services under Indiana law.¹⁵

In reversing the trial court, the court of appeals began its analysis by reviewing the deference courts afford to agencies “in their interpretation of the statutes and regulations they are required to enforce.”¹⁶ Specifically, the court noted that the “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.”¹⁷ The court further explained that this deference “becomes a consideration when a statute is ambiguous and susceptible of more than one reasonable interpretation” such that a court “is faced with two reasonable interpretations of a statute, one which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency.”¹⁸

The court noted that the “Pari-Mutuel Wagering Act does not define the phrase ‘participate in racing,’” but considered the IHRC’s argument that its interpretation of the phrase “participate in racing” found in Indiana Code section 4-31-6-1 was reasonable in light of the “statutory requirement to conduct” horse racing “with the highest of standards and the greatest level of integrity.”¹⁹ Although both the court and the IHRC acknowledged that the definition of “participate in racing” used by the agency is broad, the court rejected Martin’s argument that the agency’s interpretation was “unreasonable, contrary to the law” and inconsistent with legislative intent.²⁰ Rather, the court, noting the unsavory

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 502.

15. *Id.*

16. *Id.* at 503.

17. *Id.* (quoting *Dev. Servs. Alts. Inc. v. Ind. Family & Soc. Servs. Admin.*, 915 N.E.2d 169, 181 (Ind. Ct. App. 2009)).

18. *Id.*

19. *Id.* at 504 (quoting IND. CODE § 4-31-1-2 (2013)).

20. *Id.* at 505-06.

reputation accompanying horse racing,²¹ found Martin's narrower interpretation to be "inconsistent with the General Assembly's decision to give the IHRC broad authority to promulgate rules to enforce the Pari-Mutuel Wagering Act."²²

The court of appeals thus concluded that "within the context of its charge by the General Assembly, the IHRC reasonably interpreted Indiana Code section 4-31-6-1" when it promulgated rules defining the persons that participate in racing and must, therefore, be licensed.²³

Although the court of appeals found the IHRC's interpretation of Indiana Code section 4-31-6-1 reasonable, the court did not defer to an administrative interpretation in *Indiana Public Employee Retirement Fund v. Bryson*.²⁴ *Bryson* involved a dispute over the proper interpretation of Indiana Code section 36-8-8-12.3(b), which defines various levels of impairment that qualify public employees for disability benefits.²⁵

Paul Bryson challenged the Public Employee Retirement Fund's ("PERF") determination that he suffered "Class 2 impairment" rather than "Class 1 impairment" under the statute.²⁶ This determination hinged on PERF's conclusion that the statutory language defining a Class 1 impairment as "the direct result of . . . [a] personal injury that occurs while the fund member is on duty," requiring "that the work injury be the 'sole and independent cause of the impairment.'"²⁷ Although PERF argued that this interpretation was reasonable and, therefore, subject to a high degree of deference, the court of appeals concluded otherwise.²⁸

Unlike the decision in *Martin*, the court of appeals in *Bryson* made a special note that, as a question of law, the judicial standard of review for an issue of statutory interpretation is *de novo*.²⁹ The *Bryson* court also cited several cases acknowledging the court's obligation to give deference to an agency's interpretation of a statute unless the interpretation is inconsistent with the statute or otherwise misconstrues the statute.³⁰ Without expressly stating so, the *Bryson* court concluded PERF's interpretation was in error, as it would produce a seemingly absurd result by "necessitat[ing] that the fund member [must be] perfectly healthy and without any pre-existing conditions . . . in order to qualify as [a] Class 1 impairment."³¹

Determining that PERF had misinterpreted the statute, the *Bryson* court held

21. *Id.* at 506.

22. *Id.*

23. *Id.*

24. 977 N.E.2d 374 (Ind. Ct. App.), *reh'g denied*, 983 N.E.2d 172 (2012).

25. *Id.* at 378-79.

26. *Id.* at 378.

27. *Id.*

28. *Id.* at 379.

29. *Id.* at 377-78.

30. *Id.* at 379 (quoting *Pierce v. State Dept. of Corr.*, 885 N.E.2d 77 (Ind. Ct. App. 2008); *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251 (Ind. 2000)).

31. *Id.*

that so long as the pre-existing condition did not prevent an individual from performing his job, and the individual becomes unable to perform the duties following an on the job injury, the impairment is a “direct result” of the on the job injury.³² Thus, the court concluded that Bryson, although suffering from a pre-existing degenerative back condition, nevertheless suffered Class 1 impairment because it was not until injuries occurred as a direct result of his work, that he became unable to perform his job.³³

2. *Defining the Scope of Judicial Review.*—In *Martin and Bryson*, we can see how the level of deference afforded an agency’s interpretation of a statute is greater, or lesser, depending on the reasonableness of the agency’s interpretation and the interpretation’s consistency within the overall statutory scheme. Courts, however, may also exercise greater, or lesser, deference to an agency action by defining the attendant scope of review.

For example, in *J.M. v. Review Board of the Indiana Department of Workforce Development*, the Indiana Supreme Court examined whether a court can look beyond the legal justification given by an agency to affirm the agency’s decision on other grounds.³⁴ *J.M.* involved an employee who was terminated “for his failure to follow the instructions of his supervisor regarding missed work time.”³⁵ Specifically, J.M. took a college class during normal work hours and, against the instruction of his supervisor, attempted to “make up” the time by working additional hours rather than using compensatory time, personal days, or vacation time.³⁶ The Review Board ultimately concluded that J.M. was terminated for just cause and, therefore, ineligible for unemployment benefits under Indiana Code section 22-4-15-1(d)(2) for violating a reasonable and “uniformly enforce rule of an employer.”³⁷ The court of appeals, reversed, concluding that there was no such violation.³⁸

The Indiana Supreme Court, however, pointed out that the court of appeals did not consider another section “because it was not named in the conclusions of law by the Review Board.”³⁹ Indiana Code section 22-4-15-1(d)(5) provides that a person is terminated for just cause if she is discharged for “refusing to obey instructions.” The Indiana Supreme Court noted that the court of appeals determined that it could not rely on that statutory grounds because, citing to prior authority, the scope of judicial review is “limited to determining whether the Board made sufficient findings to support the definition it selected to apply.”⁴⁰

32. *Id.*

33. *Id.* 379-80.

34. 975 N.E.2d 1283 (Ind. 2012).

35. *Id.* at 1285.

36. *Id.* at 1285-86.

37. *Id.* at 1286-87.

38. *Id.* at 1287.

39. *Id.*

40. *Id.* Here, the Indiana Supreme Court indicates that the court of appeals relied on *Ryan v. Review Board of the Indiana Department of Workforce Development*, 560 N.E.2d 112, 114 (Ind. Ct. App. 1990) (citing *Trigg v. Review Board of the Indiana Employment Security Division*, 445

The Indiana Supreme Court disagreed with the court of appeals' interpretation of the prior authority, citing to a concurrence in the underlying decision specifically rejecting the interpretation adopted by the court of appeals.⁴¹

Because the court concluded that the Review Board's findings of "basic fact" were based on substantial evidence and the Board's "ultimate finding" that "[J.M.] is not entitled to unemployment benefits" was reasonable," the court ultimately affirmed the Review Board's determination.⁴² Summarizing its conclusion succinctly, the Indiana Supreme Court stated that a court may "rely on a different statutory ground of a just cause finding than the one relied upon by the Review Board when, as here, the Review Board's findings of fact clearly establish the alternate subsection's applicability."⁴³ Interestingly, the court then drew a direct correlation between review of an agency action and a court decision when it likened the scope of review to the "deferential standard given to the trial courts of this state" by appellate courts which will affirm a judgment "if sustainable on any theory or basis found in the record."⁴⁴

In *Utility Center Inc. v. City of Fort Wayne*, the Indiana Supreme Court addressed the breadth of judicial review of a board's exercise of eminent domain.⁴⁵ Specifically, the court was asked to address what it means for a trial court to "rehear the matter of the assessment de novo," as required by Indiana Code section 32-24-2-11(a)⁴⁶ and, therefore, to consider the "method of procedure . . . whereby the authority must be exercised so as to protect the rights of property owners."⁴⁷

The Indiana Supreme Court began its analysis by noting that the condemnation procedures consist of two parts: first, the legislative decision to exercise eminent domain and, second, the "judicial determination of just compensation for the taking."⁴⁸ The court then poised the salient question, under Indiana Code section 32-24-2-11(a) "[w]hat does the Legislature intend" when it provided that the "court shall hear the matter de novo?"⁴⁹ The court suggested that "[a]t first blush it would appear that this case is a 'no brainer'" given the common meaning assigned to de novo review.⁵⁰

The court dismissed this notion, however, acknowledging that in the context of judicial review of administrative decisions, Indiana courts have "essentially determined that de novo review does not" carry with it the sense of a completely

N.E.2d 1010, 1013 (Ind. Ct. App. 1983) in reaching this conclusion).

41. *J.M.*, 975 N.E.2d at 1287 (citing *Trigg*, 445 N.E.2d at 1014-15 (Garrand, J., concurring)).

42. *Id.* at 1288.

43. *Id.* at 1289.

44. *Id.*

45. 985 N.E.2d 731 (Ind. 2013).

46. *Id.* at 734.

47. *Id.* at 733 (quoting *Vickery v. City of Carmel*, 424 N.E.2d 147, 148 (Ind. Ct. App. 1981)).

48. *Id.*

49. *Id.* at 734.

50. *Id.*

new hearing.⁵¹ Rather, the court noted that a large body of Indiana law has “confirmed the propriety of limited review of administrative decisions” even when a statute may call for de novo review.⁵² As the court put it, “our courts have long held that judicial review of administrative decisions is restrained and limited, even where statutory language suggests otherwise.”⁵³ Even as it reaffirmed this basic principle of administrative law governing judicial review, however, the Indiana Supreme Court recognized the need to dig further, choosing to consider “whether the Legislature intended this limited review under the facts presented here.”⁵⁴

In considering that issue, the court noted that the exercise of the State’s power of eminent domain has long been restricted, as the “inviolability of private property has been a central tenet of American life since before this country’s founding.”⁵⁵ Stating that “[b]ecause the determination of just compensation is a judicial rather than a legislative function” and that “the extent to which protecting the ownership of private property is woven into the fabric of our jurisprudence,” the court concluded that it was “not persuaded the Legislature intended a limited role of the judiciary” in conducting review under Section 11(a).⁵⁶

The court thus concluded that “the opposite is true”⁵⁷ and found further support for its conclusion after reviewing the general eminent domain statute which includes numerous additional procedural safeguards, including a full “trial and judgment as in civil actions.”⁵⁸ The court found that to provide those safeguards, and a “full trial” under the more general eminent domain statute, while also disallowing a “new hearing with trial and judgment as in all other civil actions” under the truncated procedure contained in Indiana Code sections 32-24-2-1 to -17, would be “inconsistent” on the part of the General Assembly.⁵⁹

The Indiana Supreme Court’s decisions in *J.M.* and *Utility Center* arguably expand the scope of judicial review over administrative decisions, to the extent the cases confirm the freedom of courts to assess not only the agency record, but in the case of *Utility Center*, to conduct an entire trial. These decisions serve as reminders that, while the judiciary remains deferential to agency actions, deference does not extend so far as to deprive Hoosiers of meaningful recourse when those actions impact them or their property.

51. *Id.*

52. *Id.* (quoting *City of Mishawaka v. Stewart*, 310 N.E.2d 65 (Ind. 1974) (concluding that although statute called for “de novo review” this was “not literally true”).

53. *Id.* at 735.

54. *Id.*

55. *Id.* (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 933, at 663-64 (1833)).

56. *Id.* at 736.

57. *Id.*

58. *Id.* at 736-37.

59. *Id.*

B. Access to Judicial Review

Parties seeking judicial review must, however, follow certain procedural steps to secure their right to judicial review. Indeed, AOPA establishes detailed statutory requirements parties must follow in order to have an agency action reviewed by a court.⁶⁰ Section B of this Article reviews cases addressing parties' compliance, or lack thereof, with such requirements.

1. The Exhaustion Requirement.—One general rule that governs a party's access to judicial review of an agency action is that before seeking relief from the courts, she must exhaust her available administrative remedies. The doctrine is

intended to defer judicial review until controversies have been channeled through the complete administrative process. The exhaustion requirement serves to avoid collateral, dilatory action . . . and to ensure the efficient, uninterrupted progression of administrative proceedings and the effective application of judicial review. It provides an agency with an opportunity “to correct its own errors, to afford the parties and the courts the benefit of [the agency’s] experience and expertise, and to compile a [factual] record which is adequate for judicial review.”⁶¹

Like almost every rule, however, there are exceptions to the exhaustion requirement. One such exception is the claim that pursuing available administrative processes would be futile, which requires a party to “show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances.”⁶² Although this presents a high bar, it is not impossible to overcome, as the following case illustrates.

In *Scheub v. Van Kalker Family Limited Partnership*,⁶³ the court of appeals addressed whether a trial court had properly denied a motion to dismiss based on lack of subject matter jurisdiction when a party had not exhausted their available administrative remedies.⁶⁴ In *Scheub*, a group, including the company Singleton Stone, LLC, (and therefore collectively referred to by the court as “Singleton”) sought to construct a stone quarry in Lake County.⁶⁵ During Singleton's request for a zoning change to allow for the quarry, Gerry Scheub, who served as a member of the Plan Commission and the Drainage Board, “was a vocal opponent of Singleton's petition” and “organized the opposition to the petition” ultimately “persuading the Plan Commission to issue an unfavorable recommendation to

60. See IND. CODE §§ 4-21.5-3-1 to -37 (2013).

61. *Johnson v. Celebration Fireworks*, 829 N.E.2d 979, 982 (Ind. 2005) (internal citations omitted).

62. *M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass'n*, 809 N.E. 2d 834, 840 (Ind. 2004) (quoting *Smith v. State Lottery Comm'n*, 701 N.E.2d 926, 931 (Ind. Ct. App. 1998) (external quotation marks omitted)).

63. 991 N.E.2d 952 (Ind. Ct. App. 2013).

64. *Id.* at 954.

65. *Id.*

Singleton's project."⁶⁶ After the Lake County Council approved the rezoning request, however, Singleton still needed to obtain a permit from the Drainage Board.⁶⁷

Expecting resistance from Scheub due to his opposition to the rezoning request, Singleton requested that Scheub recuse himself from considering the drainage permit.⁶⁸ Scheub declined, and Singleton filed a declaratory judgment action seeking a declaration that would prevent Scheub from being involved in the Drainage Board's decision-making process.⁶⁹ What followed was a twisted series of legal maneuvering that resulted in a settlement agreement whereby Scheub agreed to recuse himself from the Drainage Board's consideration of the permit application following a primary election in which he was seeking re-nomination as Lake County Commissioner.⁷⁰ Once the election was over, however, "Scheub's counsel announced that there was 'no deal' because Scheub had 'changed his mind.'"⁷¹

Singleton then filed a motion to enforce the settlement agreement. Following a hearing, the trial court granted that motion and denied a motion to dismiss filed by Scheub.⁷² Scheub then appealed, arguing that the trial court lacked subject matter jurisdiction to hear the case because Singleton had failed to exhaust its administrative remedies before the Drainage Board.⁷³ Singleton raised several arguments in opposition. First, it argued that the trial court had subject matter jurisdiction to enforce the settlement agreement as a contract.⁷⁴ Next, it claimed that Scheub had acquiesced to the court's subject matter jurisdiction.⁷⁵ Finally, Singleton argued that it was not required to exhaust its administrative remedies, in part because Scheub's bias made such an effort futile.⁷⁶

The court of appeals quickly dismissed Singleton's first two arguments, noting that parties cannot confer subject matter jurisdiction on the court.⁷⁷ The court concluded that unless the trial court had subject matter jurisdiction over the complaint in the first place, the trial court could not enforce the settlement agreement that arose out of the declaratory judgment action.⁷⁸ The court thus turned to the question of whether Singleton was required to exhaust its

66. *Id.*

67. *Id.*

68. *Id.* at 954-55.

69. *Id.* More specifically, Singleton sought a declaration that "Scheub's participation in or attempts to influence the Drainage Board's consideration of Singleton's permit application would deprive Singleton of due process and should be enjoined." *Id.* at 955.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 956.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 957.

78. *Id.* at 956-57.

administrative remedies.⁷⁹ In support of its position, Singleton argued that the question before the trial court, as a declaratory judgment action, did not need to be resolved by the administrative agency.⁸⁰ Moreover, any further action before the Drainage Board would be futile in light of its refusal to grant “the relief [Singleton] requested, *i.e.*, Scheub’s recusal due to bias.”⁸¹

The court of appeals readily acknowledged that in a number of cases, even when there was an allegation of bias, the State’s appellate courts had required a party to exhaust its administrative remedies.⁸² The court also rejected Singleton’s argument that the exhaustion requirement should be excused because the question presented to the trial court was one of law, noting that “whether Singleton can have a fair proceeding due to Scheub’s alleged bias is a mixed question of law and fact, and, quite likely, a pure question of fact.”⁸³ Nevertheless, the court examined the question of Scheub’s alleged bias, and found “that the record is replete with instances where Scheub interfered” with Singleton’s efforts to obtain the necessary permits and rezoning.⁸⁴

This, the court reasoned, made a case for the existence of actual bias, a ground that will otherwise serve to vacate an administrative decision.⁸⁵ The court then noted that Singleton had taken steps to secure the disqualification of Scheub based on that bias, but was denied.⁸⁶ At that point, the court concluded, “[A]ny further action by the Drainage Board became futile and of no value under the circumstances because any decision in which a biased Board Member participates will be vacated.”⁸⁷ Thus, the court of appeals found the exhaustion requirement excused and concluded that the trial court had subject matter jurisdiction over the declaratory judgment action.⁸⁸

As discussed above, one of the arguments raised in support of the trial court’s subject matter jurisdiction in *Scheub* was that the trial court was asked to address

79. *Id.* at 957.

80. *Id.*

81. *Id.* at 957-58.

82. *Id.* at 958-95.

83. *Id.* at 959-60 (distinguishing *Ind. Dep’t of Env’tl. Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839 (Ind. 2003)). As the court noted, the question in *Twin Eagle* was one of pure law, namely, whether the agency had statutory authority over the matter in the first place. *Id.* at 960. The application of this legal principle will be discussed in greater detail *infra*.

84. *Id.*

85. *Id.* (citing *Ripley Cnty. Bd. of Zoning Appeals v. Rumpke of Ind., Inc.*, 663 N.E.2d 198 (Ind. Ct. App. 1996), *trans. denied*). The court had earlier acknowledged the decision in *Rumpke*, noting that while the actual bias of a member of the administrative body would result in vacating the decision, it chose not to remand the case because the litigant had failed to request recusal of the biased individual from the decision-making process, “and thus had waived the error.” *Id.* at 959 (quoting *Rumpke*, 663 N.E.2d at 210).

86. *Id.* at 960.

87. *Id.*

88. *Id.*

a question of law.⁸⁹ Although the court of appeals rejected that argument, in another case during the survey period, *Walczak v. Labor Works-Fort Wayne, LLC*, the Indiana Supreme Court tackled the matter head on.⁹⁰ In doing so, the court focused on another exception to the exhaustion requirement, relying on the principle that when presented with certain jurisdictional questions, a court may make the legal determination as to whether it has subject matter jurisdiction over a case without first requiring a party to exhaust potential, alternative, administrative remedies.⁹¹

Walczak involved a dispute between Brenda Walczak, a day laborer, and Labor Works, a “day labor service” that assigns jobs to individuals like Walczak according to the number of positions it has been asked to fill on a daily basis.⁹² Walczak worked for Labor Works, sometimes receiving a work assignment, and sometimes not. She eventually filed a suit against the company under the Indiana Wage Payment Act.⁹³ Labor Works, however, sought summary judgment, arguing that the trial court lacked subject matter jurisdiction to hear her claim because she was “separated from employment” at the time she brought the suit.⁹⁴ This, Labor Works argued, meant Walczak had to proceed under the Indiana Wage Claims Act, not the Wage Payment Act, and was required to first submit her grievance to the Indiana Department of Labor for administrative review.⁹⁵

The Indiana Supreme Court explained the difference between the Wage Payment Act and Wage Claim Act, summarizing, “[I]t fairly can be said that the Wage Payment Act applies to, among others, those who keep or quit their jobs, while the Wage Claims Act applies to those who are fired, laid off, or on strike.”⁹⁶ Thus, for purposes of resolving whether the trial court had subject matter jurisdiction to hear the complaint, the “threshold matter” became whether Walczak had been “involuntar[ily] separated from the payroll and thus . . . required to bring her claim under the Wage Claims Act.”⁹⁷

The court likened the situation to that in *Twin Eagle*, in which the jurisdictional question was “whether IDEM had the authority to regulate ‘waters of the state.’”⁹⁸ This presented an issue of statutory construction, making the question of “whether an agency possesses jurisdiction over a matter . . . a question of law for the courts.”⁹⁹ As the court noted, whether Walczak was required to

89. *Id.*

90. 983 N.E.2d 1146 (Ind. 2013).

91. *Id.* at 1151-52.

92. *See id.* at 1150.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1149 (citing *J Squared, Inc. v. Herndon*, 822 N.E.2d 633, 640 n.4 (Ind. Ct. App. 2005)).

97. *Id.* at 1152.

98. *Id.* at 1152-53 (quoting *Ind. Dep’t of Env’tl. Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 849 (Ind. 2003)).

99. *Id.* at 1152 (quoting *Twin Eagle*, 798 N.E.2d at 844).

proceed under the Wage Claims Act or could proceed under the Wage Payment Act was jurisdictional, and hinged on the “what the drafters of the two statutes meant when they used the language ‘voluntarily leave employment’ [as in the Wage Payment Act] and ‘separates any employee from the pay-roll [as in the Wage Claims Act].’”¹⁰⁰ The court held that this was an “issue of statutory construction” that “therefore lies squarely within the judicial bailiwick,” making it entirely appropriate for the trial court to hear the matter in order to resolve the dispositive jurisdictional question.¹⁰¹

Having reached this conclusion, the Court examined the nature of Walczak’s employment with Labor Works and, determining that she was not separated from her employment, concluded that she could proceed under the Wage Payment Act without exhausting any administrative remedies required by the Wage Claims Act.¹⁰²

2. *Statutory Compliance as a Requisite to Review.*—*Scheub* and *Walczak* both address exceptions to the exhaustion requirement and more broadly provide insight into how courts assess their subject matter jurisdiction to hear a case that might first be addressed before an administrative body. However, exhausting available administrative remedies is not the only pre-requisite to obtaining judicial review. Under AOPA, a party is required to file the record of proceedings before the agency within thirty days of filing a petition for judicial review.¹⁰³ Several cases during the survey period explored whether non-compliance with this requirement precluded a party’s access to judicial review.

One such case is *Lebamoff Enterprises, Inc. v. Indiana Alcohol & Tobacco Commission*.¹⁰⁴ In that case, Lebamoff, a corporation that operates liquor stores in Indiana, sought judicial review of a number of citations issued by the Alcohol & Tobacco Commission (ATC).¹⁰⁵ Although Lebamoff filed its petition for judicial review on February 29, 2012, it had not filed the agency record by April 10, 2012, when the ATC filed a motion to dismiss based on the failure to file the agency record.¹⁰⁶

The court of appeals began by noting that while a petitioner can seek an extension of time to file the record, that motion must be made within the thirty day window to file the record itself.¹⁰⁷ The court also noted, however, that AOPA allows for extensions when good cause is shown, including the “[i]nability to obtain the record from the responsible agency within the time permitted.”¹⁰⁸ The court then turned to the circumstances surrounding Lebamoff’s failure to file the

100. *Id.* at 1153 (quoting IND. CODE §§ 22-2-5-1(b); 22-2-9-2(a) (2007)).

101. *Id.*

102. *Id.* at 1154-56.

103. IND. CODE § 4-21.5-5-13(a) (2007).

104. 987 N.E.2d 525 (Ind. Ct. App. 2013), *reh’g denied*.

105. *Id.* at 526-27.

106. *Id.* at 527.

107. *Id.* (citing *Ind. Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d 367, 370-71 (Ind. 2010)).

108. *Id.* (quoting IND. CODE § 4-21.5-5-13(b) (2013)) (alteration in original).

record and its justification for not seeking an extension. The court first addressed Lebamoff's claim that it had "followed the spirit of the statute" by stating in its petition for judicial review that it intended to submit the record within thirty days of it becoming available.¹⁰⁹ This, Lebamoff argued, "advance[d] judicial efficiency" by avoiding the need to file repeated motions for extensions.¹¹⁰

The court rejected this argument, however, concluding that the "more efficient tactic is to simply request an extension," which would "provide[] a record for the court and all parties as to what has been requested, what has been granted, and what deadlines have been set."¹¹¹ Adopting Lebamoff's position, the court of appeals explained further, stating it would be, "neither efficient nor fair to require the court and other parties to sift through the petition and other filings and guess at how they might be substituting for various other requests and motions."¹¹² The court of appeals was, however, equally "unimpressed" with the ATC's delay in preparing the record and in seeking a motion to dismiss for the failure to timely submit the record.¹¹³ This, the court stated, was the sort of action "that would begin to lend support to concerns that the AOPA could in some cases be a 'trap' for unwary litigants."¹¹⁴

Despite having determined that Lebamoff had failed to comply with statutory requirement to timely file the record, the court of appeals noted that dismissal was not a necessary result as "the filing of the record in an administrative review case is not jurisdictional."¹¹⁵ Thus the court considered whether review was still possible despite the lack of an agency record, or more precisely, whether the material submitted by Lebamoff was sufficient to permit judicial review of the agency's action.¹¹⁶ It ultimately concluded that such review was possible because the argument presented by Lebamoff was "a pure question of law," and that "[t]o the extent any facts are necessary [for review], they were included in the sparse findings of fact and conclusions of law written by the ALJ, which were submitted by Lebamoff with its petition."¹¹⁷ In reaching this conclusion, the court rejected the ATC's argument that the submission was insufficient, noting that the ATC "points to nothing in the record that would be required for review."¹¹⁸

This led the court to state that it was a "best practice to timely file the record." While the failure to file the record may subject a petition to dismissal, that "does not mean the case must be dismissed, especially where, as here, the

109. *Id.*

110. *Id.*

111. *Id.* at 528.

112. *Id.*

113. *Id.* at 528-29.

114. *Id.* at 529 (citing *Mosco v. Ind. Dep't of Child Servs.*, 916 N.E.2d 731, 735 (Ind. Ct. App. 2009)).

115. *Id.* (citing *Wayne Cnty. Prop. Tax Assessment Bd. of Appeals v. United Ancient Order of Druids-Grove No. 29*, 847 N.E.2d 924, 926 (Ind. 2006)).

116. *Id.* at 529.

117. *Id.* at 530.

118. *Id.*

record was not required for a ruling.”¹¹⁹

The question of whether the record was sufficient to permit judicial review was also at issue in *Howard v. Allen County Board of Zoning*.¹²⁰ In that case, Howard sought review of a decision by the Board of Zoning Appeals (BZA) to grant a zoning variance that would allow his neighbor to operate a tire business.¹²¹ Howard filed a petition for review pursuant to Indiana Code section 36-7-4-918.4 and, shortly after filing the petition, requested a certified record from the BZA.¹²² Although the BZA undertook steps to prepare the record, it was not ready within thirty days of the filing of the petition, and Howard did not seek an extension.¹²³ The party who had been granted the variance thus filed a motion to dismiss for failing to timely file the extension, which the BZA eventually joined.¹²⁴ After the motion to dismiss was filed, Howard sought an extension to file the record, and then filed an amended petition for review, incorporating a request for a thirty-day extension to file the record.¹²⁵ Although the record was eventually filed, the trial court dismissed the petition finding that it lacked jurisdiction because Howard had failed to timely file the record or to seek an extension.¹²⁶

Howard appealed and the court of appeals agreed that the failure to timely file the record was not jurisdictional, as described by the trial court, and thus the court found that portion of the trial court’s order to be in error.¹²⁷ The court, however, dismissed Howard’s contention that the decision in *Lebamoff* excused his untimely filing on the theory that he had submitted sufficient material to permit judicial review.¹²⁸ In doing so, the court took note that the materials submitted with Howard’s petition consisted only of “a list of individuals who presented evidence at the board hearing.”¹²⁹ This, the court held, was insufficient to permit review, because Howard challenged the “sufficiency of the evidence supporting the Board’s decision” and, thus, affirmed the dismissal.¹³⁰

Lebamoff illustrates that in some cases, non-compliance with the statutory requirements to access judicial review can be forgiven. *Howard*, however, reminds us that the “best practice” is to comply with those requirements in order to secure the right to review of an agency action.

3. *Nature of Agency Action Determinative of Right to Review.*—To this point, the cases in this section have addressed the steps a party must take in order

119. *Id.*

120. 991 N.E.2d 128 (Ind. Ct. App. 2013).

121. *Id.* at 129.

122. *Id.*

123. *Id.*

124. *Id.* In this instance, the requirement to file the record is established by Indiana Code section 36-7-4-1613 (2013), which is not materially different from AOPA’s requirement.

125. *Id.* at 129-30.

126. *Id.* at 130.

127. *Id.* at 130-31.

128. *Id.* at 131.

129. *Id.*

130. *Id.*

to secure judicial review. In some situations, however, whether judicial review is available depends on the nature of the agency action.

One such case is *Fayette County Board of Commissioners v. Price*.¹³¹ This case involved review of the Fayette County Commissioners' decision to terminate Price as the Director of Highway Operations.¹³² The decision came after the Board conducted two days of meetings in executive session to review Price's performance and after several motions to reappoint him as Director failed for lack of a second to the motion.¹³³ Price subsequently sought review of the Board's decision, and the Board sought to have the complaint dismissed.¹³⁴ The trial court, however, denied the motion on the grounds that the actions of the Board were "quasi-judicial in nature" and therefore subject to review.¹³⁵

The court of appeals began its analysis by noting that although Indiana Code section 36-2-2-27 provides a process for a party aggrieved by a county executive's decision to seek judicial review, that review is only available when the executive is acting in a "judicial" or "quasi-judicial" capacity.¹³⁶ The court acknowledged that it was "difficult to define quasi-judicial power" but stated that it is the "nature, quality, and purpose of the act performed, rather than the name or character of the officer or board which performs it that determines its character as judicial."¹³⁷ The court then noted that the "judicial function" has key characteristics, notably "(1) the presence of the parties upon notice; (2) the ascertainment of facts; (3) the determination of the issues; and (4) the rendition of a judgment or final order regarding the parties' rights, duties, or liabilities."¹³⁸

The court of appeals indicated that these characteristics were present in the Board's decision to terminate Price, as the Board had notified the parties of the executive sessions, held hearings and took evidence, ascertained facts, and ultimately "rendered a judgment regarding Price's position."¹³⁹ Consequently, the court determined that the trial court had not erred in concluding that the Board's actions were quasi-judicial in nature, and subject to review.¹⁴⁰

On transfer, however, the Indiana Supreme Court disagreed with the conclusion reached by the court of appeals.¹⁴¹ Although the Court examined the same four factors to determine whether the Board's action were quasi-judicial in nature,¹⁴² it found as a matter of law that the "nature, quality and purpose" of the

131. 988 N.E.2d 268 (Ind. Ct. App.), *vacated*, 992 N.E.2d 207 (Ind. 2013).

132. *Id.* at 268-69.

133. *Id.* at 269-70.

134. *Id.* at 270.

135. *Id.* at 270-71.

136. *Id.* at 271 (quoting *Great Lakes Transfer, LLC v. Porter Cnty. Highway Dep't*, 952 N.E.2d 235, 241 (Ind. Ct. App. 2011)).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. 9 N.E.3d 640 (Ind. 2014).

142. *Id.* at 642.

Board's process of selecting a Director of Highway Operations was not "equivalent to a court's adjudication of issues between opposing parties."¹⁴³ In this light, the Supreme Court concluded that the decision was neither a determination of issues nor a judgment or final order as the court of appeals concluded. Lacking those two "critical factors," the Supreme Court decided that the Board's decision was "administrative and ministerial, not quasi-judicial" and therefore not subject to judicial review.¹⁴⁴

II. JUDGING AGENCY ACTIONS: DUE PROCESS AND EQUITY IN ADMINISTRATIVE DECISIONMAKING

Although procedural and jurisdictional questions are often at issue during judicial review of agency actions, it is also clear that judicial review encompasses the substantive determinations made by an administrative agency. The cases in this section focus on how courts address those legal questions arising out of an agency's actions.

As decision-making bodies that issue orders affecting the rights of parties, administrative agencies are required to provide those who come before them with basic due process, including notice and an opportunity to be heard. Agencies may also, in some cases, be subject to equitable restraints that bar action which would produce unduly harsh results.

In *Hamilton Heights School Corp. v. Review Board of the Indiana Department of Workforce Development*,¹⁴⁵ the court considered whether notice of an administrative hearing was sufficient to comport with due process.¹⁴⁶ The case arose after the Hamilton Heights School Corporation ("School Corporation") terminated Sherri Stepp "following an on-the-job argument between Stepp and a co-worker."¹⁴⁷ Stepp sought unemployment benefits but was denied on the grounds that she was "terminated for just cause."¹⁴⁸ Stepp ultimately appealed the decision to the Review Board, which vacated the original decision because the record had been "inadvertently destroyed" prior to the review.¹⁴⁹ In vacating the decision, the Review Board indicated that a new hearing would be held, and an ALJ notified the parties that a new, in person hearing, would be held.¹⁵⁰

The notice, however, also included information suggesting that the hearing would be telephonic, not in person.¹⁵¹ As a result, on the date of the hearing, the School Corporation did not attend in person, but attempted to participate by

143. *Id.* (quoting *Great Lakes Transfer, LLC v. Porter Cnty. Highway Dep't*, 952 N.E.2d 235, 243 (Ind. Ct. App. 2011)).

144. *Id.* at 642-43.

145. 989 N.E.2d 1275 (Ind. Ct. App. 2013).

146. *Id.* at 1276.

147. *Id.*

148. *Id.*

149. *Id.* at 1277.

150. *Id.*

151. *Id.*

phone.¹⁵² Following the hearing, the ALJ concluded that Stepp was entitled to unemployment benefits because the School Corporation had failed participate and, thus, failed to “meet its burden to prove that Stepp’s employment was terminated for just cause.”¹⁵³

The School Corporation appealed that decision to the Review Board, indicating that the School Corporation was fully prepared to participate in the hearing by telephone, and it took steps to contact the ALJ during the hearing, only to be told that the hearing was already underway.¹⁵⁴ The Review Board, nevertheless, affirmed the decision of the ALJ, and the School Corporation sought judicial review.¹⁵⁵

The crux of the School Corporation’s argument was that the Review Board’s decision was erroneous, as the “deficient nature of the notice of the second hearing” was a violation of its due process rights.¹⁵⁶ In considering this argument, the court of appeals examined closely the form used by the Department to notify the parties of the second hearing.¹⁵⁷ This review led the court to the conclusion that “these documents are, at the very least, confusing as they include conflicting information. While on one hand, the documents state that the hearing will be conducted in-person . . . , they also suggest that the hearing will be conducted telephonically.”¹⁵⁸ The court then determined that when a prior hearing had been conducted telephonically “and no party has requested an in-person hearing, the conflicting nature of the information [in the notice] could lead a reasonable person to believe that the hearing would be conducted telephonically.”¹⁵⁹

The court then considered the procedural history that led to the confusion, noting that it was “especially troublesome” that the School Corporation could receive a favorable ruling after participating in the initial hearing only to have that decision “vacated through no fault of its own” and have the ALJ make an unfavorable determination against the school despite its reasonable efforts to participate in the hearing.¹⁶⁰ The court of appeals concluded that the procedural history and the confusing nature of the second notice violated the School Corporation’s due process rights through a denial of its opportunity to be heard.¹⁶¹

Judge Riley, however, issued a dissent, disagreeing with the majority’s reasoning leading to the conclusion that the ALJ’s determination violated the School Corporation’s that a due process rights.¹⁶² Specifically, she found it troubling that the majority’s opinion concluded “a simple failure to read [is]

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1277-78.

157. *Id.* at 1278-80.

158. *Id.* at 1280.

159. *Id.*

160. *Id.* at 1280-81.

161. *Id.* at 1281.

162. *Id.* (Riley, J., dissenting).

tantamount to a due process violation.”¹⁶³ In reaching that assessment, Judge Riley noted that the second notice “was sufficiently obvious to dispel any notion that the [hearing] was to be held by telephone.”¹⁶⁴ Unlike the majority, she found no confusion in the nature of the notice, as it clearly separated the applicable “in person” portion from more “general information pertaining to both telephone and in person hearings.”¹⁶⁵

Judge Riley also suggested that the majority’s decision was contrary to precedent, as “when matters coming within the control of a party prevent its participation in a hearing, this court has consistently found no denial of due process.”¹⁶⁶ She then reviewed a number of cases in which the court had found that a party, otherwise prepared to participate in an unemployment hearing, was not denied due process when its own actions prevented that participation.¹⁶⁷ As she stated, these cases “illustrate that matters within the control of the party that prevent them from participation in a hearing do not deprive that party of a fair hearing.”¹⁶⁸ Finally, Judge Riley addressed the equity of the situation.¹⁶⁹ She stated that while the School Corporation challenged the fairness of the decision to rule against it, it was actually inequitable to rule against Stepp¹⁷⁰ reasoning the School Corporation’s own “inattentiveness” resulted in its non-appearance, which effectively waived its right to a hearing.¹⁷¹

The question of fairness and the equity of an administrative decision were at the forefront of another case during the survey period. *Orndorff v. BMV*¹⁷² involved the review of an Indiana Bureau of Motor Vehicles (BMV) decision to suspend a person’s driver’s license for ten years, following an eight year delay in imposing the sanction.¹⁷³ The facts of *Orndorff* are fairly straightforward. Between 2002 and 2004, Leslee Orndorff committed sufficient driving offenses to qualify as a habitual traffic violator (HTV).¹⁷⁴ Despite this, the BMV issued her a driver’s license in 2008, but, four years later, and eight years after qualifying as an HTV, the BMV notified her that driving privileges would be suspended based on her status as an HTV.¹⁷⁵ Orndorff filed a complaint against the BMV seeking to apply laches to prevent the suspension of her license, and

163. *Id.*

164. *Id.*

165. *Id.* at 1282.

166. *Id.*

167. *Id.* at 1282-83 (summarizing cases).

168. *Id.* at 1283.

169. *Id.*

170. *Id.*

171. *Id.*

172. 982 N.E.2d 312 (Ind. Ct. App. 2012), *trans. denied*, 986 N.E.2d 819 (Ind. 2013).

173. *Id.* at 315.

174. *Id.* at 315-16. In fact, she had seventeen convictions, and had her driving privileges suspended eighteen times in that period. Among her convictions, three were for driving without a valid license, which qualified her as an HTV. *Id.* at 316.

175. *Id.* at 315-16.

requesting a preliminary injunction to stop the suspension.¹⁷⁶ The trial court denied the motion for a preliminary injunction, finding that she “did not have a reasonable likelihood of prevailing on the merits of her laches defense,” and that the BMV’s delay in acting to impose the sanction was “understandable.”¹⁷⁷

Orndorff appealed, arguing that laches should apply because the suspension would cause her to lose her employment, drive her and her family into poverty, and “threaten[] the public interest.”¹⁷⁸ In support of these claims, the record indicates that Orndorff was employed as a personal care attendant, a job which requires her to have a license to drive her clients, and for which she earns \$9.75 per hour.¹⁷⁹ On this income, she supports herself and two children, while receiving no child support and food stamps.¹⁸⁰ She also lives in subsidized housing, and is required to pay a portion of rent or face eviction.¹⁸¹ She also participates in a “five-year program designed to assist individuals in establishing financial independence and homeownership.”¹⁸² One of the requirements of remaining in the program is that she maintains her residency, which is only possible if she retains her job.¹⁸³ She would, however, lose her job without her driver’s license.¹⁸⁴

The court noted that, in addition to the ordinary requirements associated with laches, when asserting the defense against the government, a party has to “satisfy an additional requirement” because laches is applicable to the government “only under the clearest and most compelling circumstances.”¹⁸⁵ Such circumstances include when “extreme unfairness is shown,” which occurs “where the public interest would be threatened by the governments’ conduct.”¹⁸⁶ The court of appeals then considered what constitutes “the public interest” for the purpose of applying laches to the government. Ultimately, the court settled on a definition which requires “an articulable public policy reason which the court determines outweighs the public policy that supports” denying the application of an equitable defense to restrain government activity.¹⁸⁷

Although the court acknowledged that the impact of suspending her license would be “undeniably personal,” it also noted that “public policy interests are materially impacted” by the BMV’s decision to suspend Ms. Orndorff’s

176. *Id.* at 317.

177. *Id.* at 315.

178. *Id.*

179. *Id.* at 316.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 320 (internal citations omitted).

186. *Id.*

187. *See id.* at 321-23 (quotation from *Samplawski v. City of Portage*, 512 N.E.2d 456 (Ind. Ct. App. 1987)).

license.¹⁸⁸ Specifically, the court focused on the fact that “government agencies have been providing financial and structural support to Orndorff and her family” which “evidence a real and tangible public interest in reducing poverty.”¹⁸⁹ The court then found that if Orndorff had her license suspended now, the suspension would “derail” both her and the government’s efforts to “lift her family out of poverty” so that “instead of climbing out of poverty, she will be thrust back into poverty, and such event threatens the public interest.”¹⁹⁰

The court of appeals then weighed the “public interest in reducing poverty” against the “public interest in denying laches.”¹⁹¹ In conducting this assessment, the court noted that the “purpose of suspending driving privileges of an HTV is to protect the public from unsafe driver.”¹⁹² The court made a point of noting, however, that Orndorff’s qualifying convictions were for operating a vehicle without a license which poses a danger because a driver without a license “has not proven to the satisfaction of the BMV that he or she has mastered the rules of the road and knows how to safely operate a vehicle.”¹⁹³ That danger, however, had been “remedied in this case,” as Orndorff had, in fact, received a license from the BMV and had not received any violations since doing so.¹⁹⁴ The court concluded that “the public interest in keeping unsafe drivers off the road will not be served by suspending Orndorff’s driving privileges” thus establishing a “prima facie case of an articulable public policy interest that outweighs the public policy that supports denying laches.”¹⁹⁵ Based on this conclusion, and the finding that the BMV’s delay in suspending Orndorff’s license was inexcusable, the Court ultimately reversed the denial of the preliminary injunction.¹⁹⁶

Hamilton Heights and *Orndorff* thus illustrate how constitutional, as well as equitable, principles drive the course of review and serve to regulate the actions of administrative agencies.

III. TRANSPARENCY OF ADMINISTRATIVE ACTIONS

Underlying much of the work of administrative agencies is the basic principle that their work, or the “business of the State of Indiana and its political subdivisions be conducted openly so that the general public may be fully informed.”¹⁹⁷ The Open Door Law,¹⁹⁸ and the Access to Public Records Act

188. *Id.* at 323.

189. *Id.*

190. *Id.* at 324.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 324-26.

197. *City of Gary v. McCrady*, 851 N.E.2d 359, 365 (Ind. Ct. App. 2006); *see also* IND. CODE § 5-14-1.5-1 (2013).

198. IND. CODE §§ 5-14-1.5-1 to -8 (2013).

(“APRA”),¹⁹⁹ help ensure transparency by making government meetings and records available to the public. This section reviews several cases during the survey period that not only look at issues arising out of those statutes, but also evaluate the protection that should be given to certain public records.

A. Open Door and Access to Public Records

One case of note during the survey period is *Kreilein v. Common Council of the City of Jasper*.²⁰⁰ This case involved review of a declaratory judgment action by the group “Healthy Dubois County” (“HDC”) against the Common Council of the City of Jasper and the Jasper Utility Board (collectively, “Jasper”), seeking relief for alleged violations of the Indiana Open Door Law.²⁰¹ The case grew out of HDC’s opposition to Jasper’s plans to convert a “now-defunct coal-burning power plant”²⁰² in order to run on miscanthus grass.²⁰³ Despite the opposition, Jasper elected to proceed with the project, issuing requests for proposals and ultimately creating a “volunteer group” to negotiate the terms of a lease for the power plant.²⁰⁴

The volunteer group was “charged with negotiating the terms of the lease” and consisted of the mayor, a member of the city council, a member of the City’s Utility Service Board, the City Attorney, and a number of other individuals.²⁰⁵ The group conducted its meetings without providing notice to the public and without opening them to the public.²⁰⁶ Shortly after a final draft of the lease agreement was presented for approval by the City Council and Utility Board, HDC filed a declaratory judgment action on whether Jasper had violated the Open Door Law.²⁰⁷ Ultimately, and despite the pending action, the Council and Utility Board members voted, at a public meeting, to approve the lease agreement and a resolution was passed to enter into the agreement.²⁰⁸

At that point, HDC began conducting discovery and a series of procedural battles erupted between HDC and Jasper over discovery, the pace of the trial, and HDC’s efforts to amend its complaint.²⁰⁹ Ultimately, the trial court conducted a bench trial, after which the court issued several findings essentially concluding that the volunteer group was not subject to the Open Door Law.²¹⁰ The court of appeals identified the issue of “whether the volunteer group constituted a

199. *Id.* §§ 5-14-3-1 to -10.

200. 980 N.E.2d 352 (Ind. Ct. App. 2012).

201. *Id.* at 353.

202. *Id.*

203. *Id.* at 354.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 355.

208. *Id.*

209. *Id.* at 355-56.

210. *Id.* at 356-57.

governing body of a public agency under the Open Door Law” to be “at the heart of [the] appeal.”²¹¹

For purposes of the appeal, the court focused on the statutory requirement that “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.”²¹² The court was unable to resolve the issue at the “heart of [the] appeal,” because “there [was] nothing in the record explaining how the volunteer group was created and who assigned it the task to negotiate the lease agreement.”²¹³ Thus, the court could not render a decision on whether the volunteer group constituted a “governing body” as defined by Indiana Code section 5-14-1.5-2(b), and by extension, whether it was potentially subject to the Open Door Law.²¹⁴ Neither could the court of appeals state with certainty that the actions of the volunteer group fell within the definition of “official action” under Indiana Code section 5-14-1.5-2(d).²¹⁵ Although that question was left unanswered, the court of appeals nevertheless empowered the HDC to investigate the factual record by reversing the trial court’s decision, and remanding with instructions to compel discovery that might shed greater light on the actions of the volunteer group.²¹⁶

While *Kreilein* focused attention on providing the public reasonable insight into the decision-making process of government bodies, the case in *Anderson v. Huntington County Board of Commissioners*²¹⁷ focused on a private citizen’s right to access public records, and a public body’s obligation to provide them.²¹⁸ Under Indiana Code section 5-14-3-3, any person is entitled to inspect “the public records of any public agency” provided that the request “identify with reasonable particularity the record being requested.”²¹⁹

In this case, Seth Anderson submitted four requests “all seeking the emails sent or received within a four and one-half month time span” that were identical except for the individuals identified as the senders and recipients.²²⁰ This request was denied, as it failed to specify with “reasonable particularity” the documents sought, but the Commissioners’ also “assured Anderson that once he had described the requested public records with reasonable particularity” they would be provided.²²¹ Rather than clarify his request, Anderson filed a formal complaint with the Public Access Counselor who ultimately concluded that the “Commissioners had not violated the ARPA because they had not denied

211. *Id.* at 358.

212. *Id.* at 357 (quoting IND. CODE § 5-14-1.5-2(c) (2013)) (emphasis added).

213. *Id.* at 358.

214. *Id.*

215. *Id.*

216. *Id.* at 361.

217. 983 N.E.2d 613 (Ind. Ct. App.), *trans. denied*, 988 N.E.2d 797 (Ind. 2013).

218. *Id.* at 616.

219. IND. CODE § 5-14-3-3 (2013).

220. *Anderson*, 983 N.E.2d at 614.

221. *Id.* at 615.

Anderson's request outright but had requested Anderson revise his request."²²² The Public Access Counselor also provided a number of ways to clarify the request to meet the reasonably particular standard.²²³

Despite the determination of the Public Access Counselor, and despite the fact that the County eventually turned over approximately 9500 emails, Anderson filed a complaint to compel access to the public records, "defend[ing] the scope of his requests, maintaining that it was his right to look for 'unknown unknowns' in his effort to obtain information."²²⁴ The trial court issued an order concluding that the County had "not improperly den[ied] access to the records" as Anderson was not "reasonably particular" in his request.²²⁵ Anderson then appealed, essentially seeking a determination that his requests were "reasonably particular" within the meaning of Indiana Code section 5-14-3-3.²²⁶

This request required the court to consider what "reasonably particular" means as the phrase is not defined in the APRA.²²⁷ In addressing this question, the court of appeals drew similarities between this case and *Jent v. Fort Wayne Police Department*,²²⁸ in which another panel of the court "likened the reasonable particularity requirement to the discovery rules" and concluded that an item is "designated with 'reasonable particularity' if the request enables the subpoenaed party to identify what is sought and enables the trial court to determine whether there [is] sufficient compliance."²²⁹

To determine whether Anderson's request met this standard, the court of appeals also considered the decision by the Public Access Counselor.²³⁰ Although the court was required to conduct review of that decision de novo, the court clearly gave some deference "inasmuch as this was not the first time [the] Public Access Counselor had addressed this issue."²³¹ The court also expressed concern that the requests were not reasonably particular in that they "required that the Commissioners determine which emails were truly public records and which were not" forcing the Commissioners to undertake a process of redaction to protect non-disclosable material.²³² Ultimately, the court concluded that the requests were not reasonably particular and that the Commissioners had no legal obligation to respond to them.²³³

In short, the decisions in *Anderson* and *Kreilein* remind us that the citizens

222. *Id.* at 615-16.

223. *Id.* at 616.

224. *Id.*

225. *Id.*

226. *Id.* at 616-17.

227. *Id.* at 617.

228. 973 N.E.2d 30 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012).

229. *Anderson*, 983 N.E.2d at 617 (quoting *Jent*, 973 N.E.2d at 33) (internal quotation marks in the original).

230. *Id.*

231. *Id.*

232. *Id.* at 618.

233. *Id.*

have powerful tools at their disposal in keeping the work of agencies in the light of day. While the courts may not always allow searches for the “unknown unknowns” by reviewing the decisions of public bodies regarding disclosure of their official business, the courts help keep those tools focused in a manner that allows for transparency even as the tools allow the government to conduct its business in an efficient manner.

B. Confidential Treatment of Certain Records on Appeal

The last several survey articles discuss the interaction between Administrative Rule 9(G) and Indiana Code section 22-4-19-6, which excludes from public disclosure certain information regarding the identity of individuals appearing before the Department of Workforce Development.²³⁴ This battle appears to have yet to come to a final resolution.

For example, in *T.B. v. Review Board of the Indiana Department of Workforce Development*,²³⁵ the majority used the initials of the individual seeking unemployment compensation and the employer.²³⁶ The majority did so based in part on a portion of the Indiana Supreme Court’s decision in *J.M.*²³⁷ Judge Riley, however, concurred only with the result and took issue with the decision to use initials rather than full names, arguing that the majority’s reliance on the footnote in *J.M.* was inappropriate as the Indiana Supreme Court “does not decide important questions of law in footnotes.”²³⁸

In a case appearing later in the survey period, however, the court of appeals noted that while the version of *J.M.* that appears on the Indiana Supreme Court’s website stated that section 22-4-19-6(b) was “expressly implemented as to judicial proceedings” by Administrative Rule 9(G), the version of the same footnote appearing in the West Reporter conditioned the confidential treatment of claimant information on an affirmative request for such treatment.²³⁹ Despite the absence of any record in the clerk’s office of efforts to correct or amend that footnote, the court of appeals reasoned that as the West Reporter is the official reporter, the court was “required to follow West’s version of *J.M.*” and used the names of the litigants.²⁴⁰

This, of course, raises an interesting question: If the Indiana Supreme Court does not make pronouncements of law through footnotes, does either version of

234. See Joseph P. Rompala, *Survey of Indiana Administrative Law*, 45 IND. L. REV. 933 (2012); Joseph P. Rompala, *Survey of Indiana Administrative Law*, 44 IND. L. REV. 1010 (2011).

235. 980 N.E.2d 341 (Ind. Ct. App. 2012).

236. *Id.* at 343.

237. *Id.* at 343 n.1 (quoting *J.M. v. Rev. Bd. of Ind. Dep’t of Workforce Dev.*, 975 N.E.2d 1283, 1285 n.1 (2012)).

238. *Id.* at 346 (Riley, J. concurring in result) (quoting *Molden v. State*, 750 N.E.2d 448 (Ind. Ct. App. 2001)).

239. See *Albright v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 994 N.E.2d 745, 748 n.1 (Ind. Ct. App. 2013).

240. *Id.*

the footnote in *J.M.* matter for purposes of determining whether litigants should, or should not, be identified by name in court opinions? Stated differently, it would seem the question and controversy will live on.

CONCLUSION

This survey article reviewed only a small number of decisions issued by Indiana's appellate courts involving review of administrative agency actions. By design, this Article did not consider unreported cases, those resolved at the trial court without further review, or agency decisions from which no review was sought. In short, the article is by no means a comprehensive review of the ever evolving and ever growing body of administrative law.

Despite addressing only a tiny fraction of the work of administrative agencies, the article hopefully furthers meaningful dialogue, not only about the role of the regulatory state, but also the safeguards that exist to protect the rights of Hoosiers from unwarranted intrusion by administrative agencies.

Such protections do exist in the form of judicial review which has grown into a rich body of law built on basic principles of our Constitutional system, legislative enactments, and the common law. Judicial review of agency actions remains a fertile ground for further development, and one which should not be overlooked by the all too common assumption that "law" consists solely of judicial decisions and legislative acts.

