system. These include the classification of offenses according to the seriousness of each offense, the elimination of indeterminate sentences, the elimination of juries from the sentencing process, the adoption of presumptive sentencing, the emphasis on mandatory confinement and the inability to suspend confinement for various offenses and second felony convictions, the authorization of discretionary consecutive sentences, and the provision for an automatic parole for a limited period of time. All of these changes relate primarily to the sentencing process, but the code does contain other changes that are just as important, including: the provision for a general attempt offense, the revised homicide provisions, the new definitions of theft and arson, and the culpability provisions.

Most of the changes in the sentencing process were enacted in 1976 and were not substantially altered by the 1977 amendments; the provision concerning consecutive sentences is the primary exception. The other changes, however, were introduced in the 1976 version of the code but underwent substantial revisions before appearing in their final form in the 1977 amendments. Further revisions may be required from time to time as the code is implemented, but the new and revised code should provide a sound and workable framework for the state's criminal statutes for the foreseeable future.

II. Administrative Law

*Gregory J. Utken**

A. Administrative Rule Making

The federal government has long had a comprehensive system for the promulgation and publication of federal administrative rules and regulations. This system is comprised of the Federal Register and the Code of Federal Regulations. Indiana has now established a parallel promulgation and publication procedure for the state's administrative rules and regulations.[1] Prior to this time, Indiana only had a skeletal procedure for administrative rule making.[2] Recent legislation elaborated upon this procedure.

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[1] IND. CODE §§ 4-22-2-2 to -12 (Supp. 1977) (amending IND. CODE §§ 4-22-2-1 to -11 (1976)).

[2] *Id.* §§ 4-22-2-1 to -11 (1976) (amended 1977).

Pursuant to Indiana Public Law Number 38,[3] an Indiana Administrative Code and Indiana Register have been created. In January of 1978, the Indiana Secretary of State is to deliver a copy of every state administrative rule then in effect to the Indiana Legislative Council.[4] By January 1, 1979, the Legislative Council is to compile the rules in a numbered system and deliver a copy of the rules to each agency for certification.[5] After March 1, 1979, the certified rules will become the Indiana Administrative Code.[6]

The Indiana Register, which is to be the counterpart of the Federal Register, is to contain all executive orders, all agency notices concerning proposed new rules, and all of the texts of proposed and approved rules or their amendments.[7] It will also contain all of the legal notices from the state's agencies as well as their documents that interpret statutes. It will be published at least six times per year. The Indiana Legislative Council will be responsible for preparing and maintaining both the Indiana Administrative Code[8] and the Indiana Register.[9]

Before any state administrative agency adopts a rule, the agency must publish notice in a newspaper and in the Indiana Register at least twenty-one days prior to a hearing on the proposed rule.[10] On the day of the hearing, any interested party will be afforded the opportunity to participate in formulation of the rule. Once an agency has formulated a new administrative rule, it must first be submitted to the Indiana Attorney General for his approval and then be submitted to the Governor.[11]

After January 1, 1979, all rules, regulations, and policy documents intended to have the effect of law must conform to this

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[3]Act of Apr. 29, 1977, Pub. L. No. 38, 1977 Ind. Acts 226 (codified at IND. CODE §§ 4-22-2-2 to -12 (Supp. 1977)).

[4]IND. CODE § 4-22-2-2 (Supp. 1977). "Rule" is defined to mean any rule, regulation, standard, classification, procedure, or agency requirement that is intended to have the effect of law. Internal policy rules are not included. *Id.* § 4-22-2-3.

[5]*Id.* § 4-22-2-3.

[6]*Id.*

[7]*Id.* § 4-22-2-12.

[8]*Id.* § 4-22-2-2.

[9]*Id.* § 4-22-2-12.

[10]*Id.* § 4-22-2-4. The notice must include the time and place of the hearing and the subject matter of the rule, and must state that a copy of the proposed rule is on file at the appropriate agency's office.

[11]*Id.* § 4-22-2-5. The Attorney General must approve or disapprove the rule within 45 days of receipt. If he takes no action within that time period, the rule is deemed approved. The rule is submitted to the Governor after the 45-day period; he has 15 days to approve or disapprove it. However, the Governor may request additional time to consider the proposed rule, not to exceed 15 days. If the Governor takes no action within the allotted time periods, the rule is deemed approved.

procedure or they will be void.[12] Once a rule is recorded and published in the Administrative Code, it will be entitled to judicial notice, and the publication will be prima facie evidence of the rule's adoption.[13] The creation of this parallel to the federal administrative rule making process will be a welcome addition to Indiana administrative procedure.

B. Administrative Fact-Finding

The fact-finding responsibilities of an Indiana administrative agency were outlined by the Second District Court of Appeals in *V.I.P. Limousine Service, Inc. v. Herider-Sinders, Inc.*[14] In order to permit a court to properly review an administrative determination, the agency must submit sufficient factual findings. In 1972, the Indiana Court of Appeals painstakingly delineated these responsibilities in *Transport Motor Express, Inc. v. Smith.*[15] *V.I.P. Limousine* reaffirmed and elaborated on these guidelines.

In *V.I.P. Limousine*, the court observed that the Public Service Commission (PSC) had not made findings of basic facts in reaching its administrative determination. Furthermore, the court could not presume the existence of the basic facts necessary to support the ultimate conclusions from an agency's findings of ultimate facts.[16] The agency must make specific findings of the basic or underlying facts from which the ultimate findings are inferred.[17] This was the holding in *Transport Motor Express.*[18] However, *V.I.P. Limousine* went on to declare that in some cases, even specified findings of basic facts may not be enough, since an agency's mere recitation of

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[12] *Id.*

[13] *Id.* § 4-22-2-11.

[14] 355 N.E.2d 441 (Ind. Ct. App. 1976).

[15] 289 N.E.2d 737 (Ind. Ct. App. 1972), *rev'd on other grounds*, 262 Ind. 41, 311 N.E.2d 424 (1974). For discussions of these cases, *see* Taylor, *Administrative Law, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 12, 12-13 (1974) *and* Polden, Stone, Thar, & Vargo, *Administrative Law, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 2, 6-11 (1973).

[16] 355 N.E.2d at 443.

[17] In many instances, conclusions that are issues of fact may also be considered issues of law. If a conclusion were considered to be the latter, then arguably the agency would not have to make a specific finding, for as noted in *Transport Motor Express*, the agency's domain is the facts; the court's domain is the law. However, in *V.I.P. Limousine*, the court observed that even if this were true, in order to resolve legal issues, it must resort to facts, and therefore the agency must make findings of fact. 355 N.E.2d at 445.

[18] 289 N.E.2d at 745-47.

the factors considered and found to be true may not facilitate judicial review any more than would a sole finding of an ultimate fact. As a result, the court required not only findings of basic facts but also a statement of reasons for the agency's determination. According to the court, the statement of reasons should encompass not only a reference to the basic facts but also the relation between the basic and ultimate facts, all within a legal framework that defines the disputed issues.

The ultimate issue to be determined by the PSC in *V.I.P. Limousine* was the "public need" for issuance of a common carrier certificate. The court stated that even if PSC had made findings of basic facts, that alone would have been insufficient for meaningful judicial review. It declared that the agency must also state its reasoning and show why the findings of basic facts support the ultimate finding.[19] Because the PSC had failed to meet this requirement, the court remanded the issue to the Commission for further proceedings.

Transport Motor Express attempted to bring a greater degree of accountability to administrative agencies. *V.I.P. Limousine* indicates that the judiciary's vigor in seeking this goal has not been diminished. Such cases should result in more responsible and responsive administrative bodies in Indiana.

C. Scope of Review

A great deal of confusion can arise over the scope of judicial review of Indiana administrative rulings. The confusion centers upon whether judicial review of an agency's findings of facts is to be "one sided" or "upon the record as a whole." Much of the confusion results from the differing judicial statements regarding the proper scope of review. Indiana courts have stated the proper scope of review to be "substantial evidence,"[20] "substantial evidence on the record as a whole,"[21] "only the evidence and inferences most

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[19]355 N.E.2d at 445.

[20]*See* Uhlir v. Ritz, 255 Ind. 342, 264 N.E.2d 312 (1970); Department of Financial Inst. v. State Bank of Lizton, 253 Ind. 172, 252 N.E.2d 248 (1969); City of Evansville v. Nelson, 245 Ind. 430, 199 N.E.2d 703 (1964); Mann v. City of Terre Haute, 240 Ind. 245, 163 N.E.2d 577 (1960); Public Service Comm'n v. Indianapolis Rys., 225 Ind. 30, 72 N.E.2d 434 (1947); Indiana St. Bd. of Tax Comm'r v. Holthouse Realty Corp., 352 N.E.2d 535 (Ind. Ct. App. 1976).

[21]*See* L.S. Ayres & Co. v. Indianapolis Power & Light Co., 351 N.E.2d 814 (Ind. Ct. App. 1976); City of Evansville v. Southern Ind. Gas & Elec. Co., 339 N.E.2d 562 (Ind. Ct. App. 1975).

favorable" to the prevailing party,[22] or "any evidence of probative value."[23]

In last year's survey period, the Second District Court of Appeals discussed this issue with some specificity in *City of Evansville v. Southern Indiana Gas & Electric Co.*[24] and explicitly declared a rule for scope of review that it felt had been implicit in past Indiana decisions: If an administrative determination is supported by substantial evidence, it will not be disturbed.[25] In determining if substantial evidence exists, the court is to look at the entire record. This case was the first explicit recognition of "whole record" review in Indiana.[26]

In last year's administrative law survey discussion, the author stated it would be interesting to see if Indiana courts followed *City of Evansville*, ignored it, or limited it to its facts.[27] Ostensibly, the courts should have followed the decision since *City of Evansville* indicated that its holding had long been the implicit Indiana rule, and the decision was not explicitly limited to reviews of Public Service Commission determinations. However, cases decided prior to *City of Evansville* did not make it clear that "whole record" review was the implicit or explicit test applied. Unfortunately, the cases decided during this survey period have done little to clarify this issue.

In *L. S. Ayres & Co. v. Indianapolis Power & Light Co.*,[28] the Second District Court of Appeals quoted verbatim its entire discussion of scope of review from *City of Evansville* without citing the decision.[29] Like *City of Evansville*, *L. S. Ayres* involved the Public Service Commission. Thus, the Second District Court of Appeals has followed its pronouncements on "whole record" review expressed last year.

However, the First District Court of Appeals seemed to follow a substantial evidence rule contrary to the one defined in *City of Evansville*. In *Indiana Education Employment Relations Board v.*

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[22]*See* Youngstown Sheet & Tube v. Review Bd., 124 Ind. App. 273, 116 N.E.2d 650 (1954); Kemble v. Aluminum Co. of America, 120 Ind. App. 72, 90 N.E.2d 134 (1950); Emmons v. Wilkerson, 120 Ind. App. 100, 89 N.E.2d 296 (1949); Hollingsworth Tool Works v. Review Bd., 119 Ind. App. 191, 84 N.E.2d 895 (1949); Walter Bledsoe & Co. v. Baker, 119 Ind. App. 147, 83 N.E.2d 620 (1949).

[23]*See* Arthur Winer, Inc. v. Review Bd., 120 Ind. App. 638, 95 N.E.2d 214 (1950); Merkle v. Review Bd., 120 Ind. App. 108, 90 N.E.2d 524 (1950); Nelson v. Review Bd., 119 Ind. App. 10, 82 N.E.2d 523 (1948); Uland v. Little, 119 Ind. App. 315, 82 N.E.2d 523 (1948).

[24]339 N.E.2d 562 (Ind. Ct. App. 1976).

[25]*Id.* at 571.

[26]"Whole record" review has been the federal standard since the United States Supreme Court's decision in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[27]Shaffer, *Administrative Law, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 37, 40 (1976).

[28]351 N.E.2d 814 (Ind. Ct. App. 1976).

[29]*Id.* at 821-24.

Board of School Trustees,[30] the proper scope of review for a decision of the Indiana Education Employment Relations Board (IEERB) was before the court. IEERB found the defendant school corporation guilty of certain unfair labor practices. The school appealed the decision pursuant to the Indiana Administrative Adjudication Act.[31] In overturning the decision of the IEERB, the trial court reasoned that the evidence, and reasonable inferences to be drawn therefrom, were insufficient to establish the IEERB's case by a preponderance of the evidence.

The court of appeals overturned the trial court's decision because it had applied the wrong scope of review. The court observed that the well established rule on review of administrative decisions was the substantial evidence rule. Without saying more, arguably this could be consistent with *City of Evansville*. However, the court also stated that it was to review the record only to ascertain if there was *any* evidence to support the IEERB's decision. This would indicate application of an "any evidence" or "one sided review," and the reader is left to wonder what scope of review test was in fact applied.

The court of appeals found that the trial court had weighed the evidence to determine in whose favor it preponderated, rather than determining if there was substantial evidence to support the IEERB's decision. It had substituted its judgment for that of the IEERB, which the court found to be impermissible. *Board of School Trustees* is thus an example of what is prohibited by the "weighing of evidence" rule. This well established principle prohibits a court from weighing the evidence submitted by the parties to determine in whose favor it preponderates when reviewing an agency's decision.[32] The administrative agency is to weigh the conflicting evidence, draw inferences therefrom, and reach a conclusion on the evidence. The judicial function is said to be exhausted when substantial evidence is found to support the agency's determination.[33]

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[30]355 N.E.2d 269 (Ind. Ct. App. 1976).

[31]IND. CODE §§ 4-22-1-1 to -30 (1976).

[32]Prior Indiana decisions have likewise refused to allow the lower courts to weigh the evidence. *See, e.g.*, City of Mishawaka v. Stewart, 261 Ind. 670, 310 N.E.2d 65 (1974); Public Service Comm'n v. Chicago, Indianapolis & L. Ry., 235 Ind. 394, 134 N.E.2d 53 (1956); Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399 (1940); Aeronautics Comm'n v. Radio Indianapolis, Inc., 361 N.E.2d 1221 (Ind. Ct. App. 1977); Indiana Alcoholic Beverage Comm'n v. McShane, 354 N.E.2d 259 (Ind. Ct. App. 1976); Indiana Alcoholic Beverage Comm'n v. Johnson, 158 Ind. App. 467, 303 N.E.2d 64 (1973); City of Washington v. Boger, 132 Ind. App. 192, 176 N.E.2d 484 (1961).

[33]Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 478 (1947). The weighing of evidence rule should be distinguished from the substantial evidence rule. The latter rule requires a reviewing court to determine whether an administrative decision is

It is important to note that the proper scope of judicial review for determinations of certain Indiana agencies is specifically affected or governed by statute. When a statute limits the scope of review, courts must observe such limitations. A different scope of review has therefore been applied for review of the decisions of the Industrial Board and Employment Security Review Board.[34] The courts have applied a "one-sided" review to those agencies' findings of fact by considering only the evidence and inferences most favorable to those boards' factual decisions. This scope of judicial review for the Employment Security Review Board was reaffirmed during the survey period by the Third District Court of Appeals in *Skirvin v. Review Board of the Indiana Employment Security Division.*[35] In that case, the Employment Security Review Board affirmed a decision by an appellate claims referee that a claimant was not entitled to benefits, since he had been discharged from his employment for gross misconduct. The court of appeals affirmed the agency's determination. It cited the general rule for review of Employ-

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supported by substantial evidence; in determining the existence of substantial evidence a court is to look at the entire record. Such a rule is said to be necessary, since evidence that might be conclusive if unexplained may lose all probative value when explained or supplemented by other evidence.

However, the distinction between the substantial evidence rule as applied and the weighing of evidence rule may be more apparent than real. If a court reviews the *entire* record in determining whether an administrative decision is supported by substantial evidence, is it not, just by considering the evidence of both sides, in reality engaging in a process of weighing evidence? Query, at what point in reviewing the record does the court cease a search for substantial evidence and begin weighing the evidence?

[34]IND. CODE § 22-4-17-12 (1976), which deals with Employment Security Review Board decisions, states in pertinent part: "Any decision of the review board shall be conclusive and binding as to all questions of fact. Either party may . . . appeal the decision to the Appellate Court [Court of Appeals] for errors of law *under the same terms and conditions as govern appeals in ordinary civil actions.*" (Emphasis added.) Similarly, IND. CODE § 22-3-4-8 (1976), which deals with Industrial Board decisions, states in part: "An award by the full board shall be conclusive and binding as to all questions of (the) fact, but either party to the dispute may . . . appeal to the Appellate Court [Court of Appeals] for errors of law *under the same terms and conditions as govern appeals in ordinary civil actions.*" (Emphasis added.)

Another possible argument supporting the different standard of review used in these two agencies' cases is that Industrial Board and Review Board decisions are expressly excluded from the coverage of the Administrative Adjudication Act. IND. CODE § 4-22-1-2 (1976). *See* Burnett v. Review Bd., 149 Ind. App. 486, 489, 273 N.E.2d 860, 862 (1971). That Act requires agency decisions to be supported by substantial evidence. However, this argument loses any merit it might otherwise have had when one realizes that the Second District enumerated the whole record rule in *City of Evansville*, a PSC case. The PSC is also expressly excluded from coverage of the Administrative Adjudication Act. IND. CODE § 4-22-1-2 (1976).

[35]355 N.E.2d 425 (Ind. Ct. App. 1976).

ment Security Review Board's decisions: All findings of fact are conclusive and binding on the reviewing court; the court can only consider the evidence and reasonable inferences therefrom that are most favorable to the Review Board's decision.[36] On its face, this rule is contrary to the "substantial evidence on the whole record" rule enunciated by the Second District Court of Appeals in *City of Evansville.* However, it should not be viewed as contrary to that decision due to the specific statutory restrictions on the scope of review for Employment Security Review Board decisions, which make the decisions of the Review Board conclusive and binding as to all questions of fact.[37] Therefore, reviewing the record as a whole to determine if substantial evidence existed to support the agency's findings of fact would have been beyond the limitation placed upon reviewing courts.

III. Business Associations

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During the survey period five cases were decided that warrant discussion,[1] and there were several significant legislative developments.

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[36] *Id.* at 428.

[37] IND. CODE § 22-4-17-12 (1976).

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[1] There were three other decisions worth a passing reference. The first is Johnson v. Motors Dispatch, Inc., 360 N.E.2d 224 (Ind. Ct. App. 1977), affirming in part and reversing in part summary judgment for two trucking companies in a personal injury suit. The two companies were the owner and lessee of the rig. In turn the lessee's driver was on a "trip lease" from Motors Dispatch when the accident occurred. Under Interstate Commerce Commission rules, 49 C.F.R. § 1057.4(a)(4) (1976), Motors Dispatch was responsible for the driver's torts during the lease. However, a lessor can operate a truck for a lessee, Transamerican Freight Lines v. Brada Miller Freight Systems, 423 U.S. 28, 39 (1975), and the lessor can be liable under the doctrine of respondeat superior if it maintains a right to control the driver. Vance Trucking Co. v. Canal Ins. Co., 249 F. Supp. 33 (D. S.C. 1966), *aff'd,* 395 F.2d 391 (4th Cir.), *cert. denied,* 393 U.S. 845 (1968). The issue in *Johnson* was whether the two defendants possessed the right to control the driver's actions. The Court of Appeals held that the owner of the rig unquestionably had no right of control, so summary judgment in his favor was proper, but there was a genuine question of fact as to whether the lessee had surrendered control to Motors Dispatch under the borrowed servant doctrine. Under this doctrine the lending employer escapes liability if there is a transfer of control from the servant to the transferee. *See* W. SEAVEY, AGENCY § 86 (1964); RESTATEMENT (SECOND) OF AGENCY § 227 (1958). However, the court might have been contemplating the slightly different