statutes. The General Assembly will undoubtedly need to consider each of these areas carefully in order to decide what, if any, revisions are needed and whether any of the provisions should be included in the new code.

II. Administrative Law

*Gary P. Price**

A. Administrative Fact-Finding

In last year's administrative law Survey discussion, the author outlined *V.I.P. Limousine Service, Inc. v. Herider-Sinders, Inc.*,[1] which elaborated on fact-finding requirements for administrative agencies.[2] As noted by the author, *V.I.P. Limousine* demanded that the agency fact-finder state not only the ultimate facts upon which conclusions are based, but also the basic facts necessary to support the ultimate facts and conclusions thereon. In addition, the court stated that situations may arise in which the agency must go beyond fact-finding, and give a statement of reasons for the factual determination.[3]

Once again, the Indiana Court of Appeals has seen fit to elaborate on what exactly will be required of agency fact-finders. In *Wolfe v. Review Board of the Indiana Employment Security Division*,[4] the appellant challenged a denial of unemployment compensation by the Review Board, alleging *inter alia* that the Board "failed to make findings relative to each of the reasons he gave for leaving."[5] The appellant had raised eight specific grounds which he claimed constituted good cause for voluntarily leaving his employment. Although the Board had made findings specifically disposing of a number of appellant's claims, it was silent with respect to other allegations raised. The posture of the court of appeals, in responding to appellant's challenge and remanding for further findings on the issues not addressed by the Board, illustrates the clearest statement

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[1]355 N.E.2d 441 (Ind. Ct. App. 1976).

[2]*See* Utken, *Administrative Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 20, 22 (1977).

[3]355 N.E.2d at 445.

[4]375 N.E.2d 652 (Ind. Ct. App. 1978).

[5]*Id.* at 653.

to date of the appellate review standards regarding agency decision-making.

The court first noted that it would be bound by the Board's decisions on questions of fact, but stated that the issue in the instant case was a failure of the agency to decide all the facts. Citing *Cole v. Sheehan Construction Co.*,[6] an Indiana Supreme Court decision on the same question, the court of appeals held that, so long as the claimant has properly preserved error,[7] the reviewing court "*no longer may affirm by merely determining whether there was some evidence to support an award.*"[8]

Next, the court of appeals stressed the need for specific findings by an administrative board, citing *Transport Motor Express, Inc. v. Smith*[9] for the proposition that administrative appeals must focus on the sufficiency of the facts *found*, rather than the sufficiency of the *evidence* used to establish the facts. In language that portrayed a certain degree of peevishness, the court opined:

> Perhaps it is still the case that review boards do not know *how* to make specific findings. But, we believe that it is time the administrative boards learned. A finding of fact "must contain all the specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law."[10]

Finally, the court added a constitutional dimension to its decision by noting that the procedural due process provisions of *Goldberg v. Kelly*[11] require, at a minimum, a statement of the reasons for an agency decision and some indication of the evidence upon which the agency relied in arriving at that decision.[12] The court found the rationale of *Goldberg* particularly apropos to the case at bar. An individual who is denied statutory benefits, after asserting that he fulfills the requirements for those benefits, should be informed with particularity of all the material facts that led to the

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[6]222 Ind. 274, 53 N.E.2d 172 (1944), *cited in* Wolfe v. Review Bd. of the Ind. Employment Security Div., 375 N.E.2d at 654-55.

[7]The claimant must frame his appeal as being contrary to law.

[8]375 N.E.2d at 655.

[9]289 N.E.2d 737 (Ind. Ct. App. 1972), *vacated on other grounds*, 262 Ind. 41, 311 N.E.2d 424 (1974), *cited in* Wolfe v. Review Bd. of the Ind. Employment Security Div., 375 N.E.2d at 655.

[10]375 N.E.2d at 655-56 (citing Whispering Pines Home for Senior Citizens v. Nicalek, 333 N.E.2d 324 (Ind. Ct. App. 1975)).

[11]397 U.S. 254 (1970), *cited in* Wolfe v. Review Bd. of the Ind. Employment Security Div., 375 N.E.2d at 656.

[12]375 N.E.2d at 656.

denial. This requirement includes, at a minimum, a specific finding disposing of *each* material issue presented by a claimant, not findings on three of eight, or negative findings on some, but not all, of the material issues presented.[13]

The *Wolfe* decision represents an important development in administrative law for a number of reasons. First, it advocates protection of the claimant or aggrieved party in an agency hearing; the individual is often unrepresented by counsel and his real and substantial interests may be overshadowed by the inexorable process of the administrative machinery. Second, *Wolfe* sends a definite signal to agency review boards, requiring them to take an "active role" in ferreting out evidence sufficient to establish *all* the facts necessary to support a decision granting, or denying, benefits to a claimant. Last, but most important for the practitioner, the case indicates the standards agency decision-making must fulfill, and points out the framework for appeal of an adverse agency decision.[14]

B. Estoppel

Middleton Motors, Inc. v. Indiana Department of State Revenue[15] illustrates that the "king's men,"[16] as well as the private citizen, will sometimes be held accountable for words and actions which induce reliance on the part of another. In *Middleton*, the taxpayer had made arrangements to pay back taxes in installments and, at the same time, had been told by the deputy director, second in command at the Department of Revenue, that he had two years to sue for a refund of the contested taxes. This informal agreement was not honored, however, when the taxpayer later filed suit seeking a refund of the taxes paid after the state had denied his claim.

The state argued that the controversy was controlled by a statute[17] which precluded judicial jurisdicition of a refund suit if the complaint was not filed within "three (3) months" after notification of an adverse ruling by the Department of Revenue. Obviously, the three-month limitation of the statute was considerably different from the two-year period stated by the deputy director in his

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[13]*Id.*

[14]*Cf.* Zehner v. Indiana State Alcoholic Beverage Comm'n, 364 N.E.2d 1037 (Ind. Ct. App. 1977) (challenge of findings waived on appeal if not included in motion to correct errors pursuant to IND. R. TR. P. 59).

[15]366 N.E.2d 226 (Ind. Ct. App. 1977), *rev'd*, No. 978 S 192 (Ind. Sept. 14, 1978).

[16]*See* Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972). In severely limiting the defense of sovereign immunity, the *Campbell* court noted that the doctrine originated from the early common law principle that " 'the king could do no wrong.' " *Id.* at 57, 284 N.E.2d at 734.

[17]IND. CODE § 6-2-1-19 (1976).

negotiations with the taxpayer. Basing its decision on the statutory terms, the trial court granted the state's motion to dismiss.

The court of appeals reversed the decision of the trial court, holding that the doctrine of estoppel would apply to acts of a governmental unit, whether those acts be of a proprietary *or* governmental character.[18] The court premised this conclusion on the decision of the Indiana Supreme Court in *Campbell v. State.*[19]

Prior to *Campbell*, the doctrine of sovereign immunity protected the state from liability for those acts which involved governmental functions as compared to proprietary functions.[20] Noting that the distinction between governmental and proprietary functions has never been clearly defined, the *Campbell* court eliminated the distinction and concluded that the doctrine will be inapplicable where there has "been a breach of duty owed to a private individual" by the state.[21] The *Middleton Motors* court, therefore, concluded: "[T]he State must be held to the same standards as private citizens when dealing with other parties . . . ."[22] The court reasoned that this standard would require the application of the estoppel doctrine, if the trier of fact found all the elements to be present,[23] since the state's claim of immunity from estoppel was simply an "offshoot" of sovereign immunity.[24]

The supreme court, however, adopted a much narrower view of the issues involved and vacated the decision of the court of appeals.[25] The supreme court found that nothing in the briefs or pleadings filed by the Department of Revenue indicated that its defense to the estoppel issue emanated "from the defense of sovereign immunity."[26] Instead, the defense to Middleton's estoppel

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[18]366 N.E.2d at 228.

[19]259 Ind. 55, 284 N.E.2d 733 (1972), *cited in* Middleton Motors, Inc. v. Indiana Dep't of State Revenue, 366 N.E.2d at 228.

[20]*See* Perkins v. State, 252 Ind. 549, 251 N.E.2d 30 (1969), *discussed and limited in* Campbell v. State, 259 Ind. at 60, 284 N.E.2d at 736.

[21]259 Ind. at 63, 284 N.E.2d at 737.

[22]366 N.E.2d at 228.

[23]The court of appeals listed the elements as follows:

> " '(1) A representation or concealment of material facts; (2) The representation must have been made with knowledge of the facts; (3) The party to whom it was made must have been ignorant of the matter; (4) It must have been made with the intention that the other party should act upon it; (5) The other party must have been induced to act upon it.' "

Id. (quoting State *ex rel.* Crooke v. Lugar, 354 N.E.2d 755, 766 (Ind. Ct. App. 1976) (quoting Emmco Ins. v. Pashas, 140 Ind. App. 544, 551, 224 N.E.2d 314, 318 (1966))).

[24]366 N.E.2d at 228.

[25]No. 978 S 192 (Ind. Sept. 14, 1978) (Givan, C.J., Pivarnik & Prentice, J.J., concurring; DeBruler, J., dissenting with opinion, Hunter J., concurring in dissent).

[26]*Id.*, slip op. at 3.

argument was traced to the express language of Indiana Code section 6-2-1-19,[27] which established a statutory condition precedent to the right to bring a civil action in refund cases. Hence, the use of sovereign immunity as a defense to an assertion of estoppel was considered to be not fairly raised by the record, and was not treated in a substantive manner by the supreme court.

However, the supreme court, in holding that the court of appeals "erred in its application of estoppel to the facts herein,"[28] appeared to engage in an analysis of merits of the estoppel defense. According to the court, legislative enactments which establish conditions precedent to the exercise of a right or remedy can never be circumvented by the unauthorized acts of government officers or employees.[29] Further, the decision noted that all persons are charged with knowledge of rights and remedies prescribed by statute[30] and concluded that the taxpayer's reliance on the representations of the deputy director was unjustifiable.[31]

The issues left unresolved by *Middleton Motors* should be noted. First, it is unclear what position the supreme court would adopt if the issue of estoppel, and the state's ability to avoid the estoppel doctrine as a variant of its sovereign immunity, were raised by the record. Presumably, under the court's ruling in *Campbell*, the state's power to ignore the estoppel challenge would be abrogated by the demise of sovereign immunity. Second, the court looked to the facts of the case and relied, to a certain extent, on the adage that ignorance of the law is no excuse. One might conclude, therefore, that representations by the state of material facts peculiarly within the ambit of the governmental entity and *not* found in statutes equally accessible to all parties involved will present the factual context necessary for the invocation of estoppel against the state or its subdivisions.

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[27]IND. CODE § 6-2-1-19 (1976) states, in pertinent part:

> That except as hereinafter provided, no court shall have jurisdiction over any such suit unless the taxpayer shall show that the complaint therein was filed within three [3] months after he shall have received notification of the action of the department denying said petition for refund in whole or in part. In the event that the department shall take no action upon such petition for refund within six [6] months after the same shall have been filed, the taxpayer may elect to institute such suit for refund at any time thereafter, but not more than three [3] months after such claim shall have been denied in whole or in part, in no event more than three [3] years from the date of the filing of the claim for refund.

[28]No. 978 S 192, slip op. at 3.

[29]*Id.* (citing Walgreen Co. v. Gross Income Tax Div., 225 Ind. 418, 75 N.E.2d 784 (1947)).

[30]No. 978 S 192, slip op. at 3-4 (citing City of Evansville v. Follis, 315 N.E.2d 724 (Ind. Ct. App. 1974)).

[31]No. 978 S 192, slip op. at 4.

C. The Delegation Doctrine

A general principle of administrative law well known to both the student and the practitioner is the delegation, or rather the nondelegation, doctrine. Simply stated, the doctrine states that no legislative body may delegate to an administrative agency the legislative powers inherent to that body unless authorized by relevant constitutional provisions.[32] The theoretical underpinnings of the doctrine were based upon a fear that legislative powers would be displaced by the administrator, that the separation of powers would be diluted, or that the traditional democratic process would be supplanted by administrative fiat.[33] This doctrine, although a senior citizen of administrative law theory, was the focus of analysis in a recent Indiana decision.

Indiana University v. Hartwell[34] involved an appeal of an award of damages pursuant to a decision of the Human Rights Commission of the City of Bloomington. One of the issues raised[35] challenged the authority of the Commission to award damages under the terms of the pertinent enabling statute.[36] The court of appeals agreed with the cross-appellants (Hartwell, *et al.*) that the statute did grant the authority to award money damages, but left the cross-appellants with a Pyrrhic victory since it also determined that the language providing for such powers[37] went far beyond the range of delegable authority and violated the terms of the Indiana Constitution.[38]

The court of appeals stated that the natural sense of the words utilized in the statute leads "inescapably" to the conclusion:

> [T]he legislature has, unwittingly or not, arrayed the full panorama of powers of the State and has given any city,

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[32]*See, e.g.*, State *ex rel.* Standard Oil Co. v. Review Bd. of the Ind. Employment Security Div., 230 Ind. 1, 101 N.E.2d 60 (1951). *See generally* 1 AM. JUR. 2d *Administrative Law*, §§ 100-37 (1962); K. DAVIS, ADMINISTRATIVE LAW TEXT § 2.06 (3d ed. 1972).

[33]*See* authorities *cited in* note 32 *supra.*

[34]367 N.E.2d 1090 (Ind. Ct. App. 1977).

[35]Other issues raised in the case, and the legislature's response thereto, are discussed in *Constitutional Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 69, 69-71 (1978).

[36]IND. CODE § 22-9-1-12 (1976) (repealed 1978; re-enacted Act of Mar. 7, 1978, Pub. L. No. 123, § 2, 1978 Ind. Acts 1120 (codifed at IND. CODE § 22-9-1-12.1 (Supp. 1978))).

[37]IND. CODE § 22-9-1-12 (1976) read, in pertinent part, as follows:

> An ordinance enacted as provided in this section may impose penalties or grant such powers to the local commission agency as may be deemed necessary or appropriate to implement its purpose and objective, whether or not such powers are granted to the state commission under section 2 of this chapter including, but not limited to . . . .

[38]367 N.E.2d at 1093 (citing IND. CONST. art. 3, § 1; art. 4, § 1; art. 5, § 1; art. 7, § 1).

> town, or county uncontrolled discretion to select in smorgasbord fashion those powers "deemed necessary and appropriate" to implement the purpose and objective of the Civil Rights Act and to vest a local commission agency with such selected powers.[39]

The logic expressed by the court was that, although it was highly *improbable* that a governmental sub-unit would grant "the full panorama" of powers to a commission formed pursuant to the statute, it was clearly *possible* for a sub-unit to be invested with powers equal to or greater than the state itself, a legally impermissible result. Finding that no saving construction was possible, the court declared the statute unconstitutional and vacated the Commission award of damages which instigated the appeal.

The *Hartwell* decision is important not so much for what it does, since application of the nondelegation doctrine is a mainstay of state administrative law. *Hartwell* is important, nevertheless, because the decision, as the most recent pronouncement of Indiana law, steadfastly refused to adopt the so called "modern" approaches to the delegation problem in the administrative framework, approaches which have abandoned the clinical examination of statutory enactments in vacuo, and focused instead on the effect of the particular statute *as applied*. One author characterizes this shift as a requirement of administrative standards and argues that the nondelegation doctrine should not be applied until, and unless, the administrator fails to provide adequate procedural safeguards to the potentially defective statute.[40] The net result of *Hartwell* is a reaffirmation of traditional nondelegation theory in Indiana. The practitioner should also note that careful examination of the text of enabling statutes will often yield legal support in a challenge of an agency decision.

D. Administrative Duty—Mandamus

The principle that an administrative agency, or an official within such an agency, must perform those duties which statutory authorities require is clearly established.[41] When an administrative

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[39]367 N.E.2d at 1093.

[40]*See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 2.00, at 20 (1976). *See also* White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (holding due process requires administrator of state welfare funds to implement written standards governing disbursement).

[41]*See, e.g.*, Fromuth v. State, 367 N.E.2d 29 (Ind. Ct. App. 1977). *Fromuth* held that the State Personnel Director had a legal duty to follow and implement the decision of the Indiana State Employees Appeals Commission by virtue of IND. CODE § 4-15-2-35 (1976) which provided, in pertinent part: "[T]he appointing authority *shall* follow the recommendation of the commission" (emphasis added). 367 N.E.2d at 34. *See*

agency or official does not perform a duty which the law requires, the appropriate remedy is an action for mandate pursuant to Indiana Code sections 34-1-58-1 to 2.[42]

Indiana Alcoholic Beverage Commission v. State ex rel. Harmon[43] held that, in addition to a court order compelling the agency or official to do what the law requires, an award of damages may be properly included in the appropriate circumstances. The court of appeals, citing Indiana Code section 34-1-58-4[44] and relying upon *State ex rel. Cheeks v. Wirt*,[45] held that the statutory language authorizing damages "as in actions for false returns" was illustrative rather than restrictive and would support an award of damages in conjunction with the appropriate equitable relief for failure to perform a statutory duty.[46]

On grant of transfer, however, the Indiana Supreme Court recast the decision of the court of appeals.[47] The supreme court, recognizing that the relevant statutory language "has never been fully considered by this Court,"[48] undertook a clarification of the damages aspect of a mandamus action.

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also Grenchik v. State *ex rel.* Pavlo, 373 N.E.2d 189, 191 (Ind. Ct. App. 1978) (holding a municipality to be mere creature of the state and requiring conformance of its acts to statutory pronouncements); Indiana State Highway Comm'r v. Zehner, 366 N.E.2d 697, 701-02 (Ind. Ct. App. 1977) (ordering administrative bodies to perform discretionary acts if the bodies have abused their discretion, or have refused to use their discretion at all; holding that Indiana State Highway Commission must make "expeditious" determination of condemnation claim wrongfully delayed).

[42]IND. CODE § 34-1-58-1 (1976) provides as follows:

> Writs of mandate in the circuit and superior courts of this state are hereby abolished, and the causes of action heretofore remedied by means of such writs shall hereafter exist and be remedied by means of complaint and summons in the name of the state on relation of the party in interest, in the circuit, superior and probate courts of this state, as other civil actions, and shall be known as actions for mandate. Writs of mandate and prohibition may issue out of the Supreme and Appellate Courts of this state in aid of the appellate powers and functions of said courts respectively.

Id. § 34-1-58-2 (1976) provides as follows: "The action for mandate may be prosecuted against any inferior tribunal, corporation, public or corporate officer or person to compel the performance of any act which the law specifically enjoins, or any duty resulting from any office, trust or station."

[43]365 N.E.2d 1225 (Ind. Ct. App. 1977), *rev'd*, 379 N.E.2d 140 (Ind. 1978).

[44]IND. CODE § 35-1-58-4 (1976), *cited in* Indiana Alcoholic Beverage Comm'n v. State *ex rel.* Harmon, 365 N.E.2d at 1230. The statute provides, in pertinent part: "The court shall grant plaintiff such relief, and such only, as he may be entitled to under the law and facts in such action, together with damages as in actions for false returns . . . ."

[45]203 Ind. 121, 177 N.E. 441 (1931), *relied upon in* Indiana Alcoholic Beverage Comm'n v. State *ex rel.* Harmon, 365 N.E.2d at 1230.

[46]365 N.E.2d at 1231.

[47]379 N.E.2d 140 (Ind. 1978).

[48]*Id.* at 143.

The supreme court engaged in an extensive and well-reasoned chronological exegesis of the damages aspect of the mandamus remedy. The court quoted a predecessor version of the relevant statute[49] and concluded that the evolution of our present statute was designed in part to consolidate the right of action for a false return with the mandamus proceeding itself.[50] The court reasoned that the language preserved by the legislature in the contemporary counterpart statute—"as in actions for false returns"—was intended to preserve the common law need to show proof of false return.[51] In view of the fact that mandamus now proceeds through the summons, pleading of complaint, and answer, the court concluded: "[T]he Legislature intended to permit the successful plaintiff to recover damages if he is required to make proof on issues of fact in order to obtain a judgment compelling a defendant officer or body to comply with the law."[52]

The court then held that the "subjection of the plaintiff to the rigors, vexation and expense of trial" forms the basis of the award of damages, and the successful plaintiff is entitled to compensation for "all injuries flowing as a natural and probable consequence of the subjection to such trials."[53] It is apparent that the supreme court has, indeed, clarified the damages aspect of the mandamus remedy. It is equally clear that the prospect of compensatory liability, upon proper proof by a successful plaintiff in a mandamus action, should induce a more responsive attitude on the part of the agency or official who is petitioned to do something which the law clearly requires. Thus, for the practitioner litigating a mandamus action, proof of damages resulting from the necessity of trial should be a standard component of plaintiff's case in chief.[54]

E. Procedural Due Process

A relatively recent development in administrative law involves the application of procedural due process, *e.g.*, the right to notice

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[49]The quoted portion is as follows:

> In case a verdict shall be found for the plaintiff where the writ is in the alternative, or if judgment is given for him, he shall recover damages as in an action for a false return, against the party making the return, and a peremptory writ shall be granted without delay.

Act of Apr. 7, 1881, ch. 38, § 808, 1881 Ind. Acts 380, *quoted in* Indiana Alcoholic Beverage Comm'n v. State *ex rel.* Harmon, 379 N.E.2d at 143.

[50]379 N.E.2d at 143.

[51]*Id.* at 144.

[52]*Id.*

[53]*Id.*

[54]Given the rather murky history of damages in mandamus actions, the clarifying decision of the supreme court has, in essence, revitalized this remedial device and given the practitioner a powerful tool for both trial and negotiation.

and an opportunity to be heard, in those cases in which state action infringes upon alleged liberty or property interests.[55] The procedural due process theory has become embedded in the framework of the administrative appeal, and two cases decided during the survey period indicate the circumstances under which an argument for procedural due process will, or will not, receive a favorable reception in the appellate courts of Indiana.

In *Gardner v. Talley*,[56] the appellant challenged his dismissal from the Indiana State Highway Commission, claiming a constitutional right to a due process hearing prior to termination. The court of appeals rejected this contention, finding on the basis of a two-pronged test that the statute controlling appellant's employment neither expressly authorized a pre-termination hearing, nor created a property interest entitled to constitutional protections.[57]

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[55]*See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

[56]373 N.E.2d 175 (Ind. Ct. App. 1978).

[57]*Id.* at 177. The relevant statutes are as follows: IND. CODE § 8-13-1.5-5 (1976) (limitation of number of employees of same political affiliation):

> The highway commission shall not have more than sixty per cent (60%) of the employees covered by this chapter (8-13-1.5-1 to 8-13-1.5-8) in each pay classification, and insofar as practicable, as adherents to any one (1) political party. To meet the requirements of this section, the Commission is hereby authorized to discharge at least twenty per cent (20%) of all employees employed under the provisions of this chapter at the beginning of each Governor's administration. If, in the opinion of the Commission, rehiring of discharged employees is in the best interest of the Commission, such employees may be reinstated. Employees that are retained or employed under the provisions of this chapter may be dismissed, demoted, suspended or laid off because of their political affiliation in order to achieve the political balance require by this chapter. It is the intent of this chapter, however, to emphasize stability of government through continuity of employment and career opportunity.

Id. § 8-13-1.5-6 (dismissal of employees for cause):

> Any employee may be dismissed, demoted, suspended or laid off for cause. For the purpose of this chapter (8-13-1.5-1 to 8-13-1.5-8) *cause shall be* any action or inaction of any employee that produces, incurs or results in the substantial diminution of the employee's ability or willingness to perform his duties, impairs the ability or willingness of any other employee of the institution or agency of state government to perform his duties or brings discredit upon the State of Indiana. *Cause may include but shall not be limited to* the following: intoxication on the job; physical or mental inability to perform the job requirements; personality characteristics which substantially limit the employee's or his fellow employee's ability to perform his duties, or which severely handicap the administration of the commission; and, action or inaction which severely limits or prohibits the implementation of administrative policies.

(emphasis added).

The court first found that the terms of the Indiana State Highway Commission—Bi-Partisan Personnel System[58] "specifically limits an employee's expectation of continued employment to the term of the office of the governor of Indiana."[59] In addition, the statutory provision dealing with dismissal "for cause" defined the term in an extremely open-ended manner. The court, therefore, concluded: "The specificity demonstrated in other Acts is conspicuously lacking in the Bipartisan Personnel Act . . ."[60] and held that no property interest was created by the Act.[61] Thus, since the text of the Act itself was barren of any express or implied right to a pretermination hearing, and since no property interest was created, the court of appeals reversed the decision of the trial court and held that due process requirements did not require a hearing prior to dismissal.[62]

Interestingly, the Seventh Circuit Court of Appeals, in *Indiana State Employees Association v. Boehning*,[63] had earlier held that the Act did create a sufficient claim of entitlement to continued employment, a property interest, to require "notice and hearing before discharge."[64] The Seventh Circuit construed the Act as authorizing dismissal on two grounds: (1) Dismissal for cause under section 6[65] and (2) dismissal on account of political affiliation under section 5.[66] The court reasoned that, because only two types of grounds were specifically listed, the Act excluded dismissal for other grounds.[67] The court concluded: "[T]he limitation to these two types of grounds are sufficient to support a claim of entitlement under the principles stated in *Roth* and *Sinderman*."[68]

The decision of the Seventh Circuit appears to be well-reasoned, particularly in light of one of the Act's stated purposes: "It is the intent of this chapter, however, to emphasize stability of government through continuity of employment and career opportunity."[69] The

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[58]IND. CODE §§ 8-13-1.5-1 to 8 (1976). The ostensible purpose of the Act is to achieve a balance between the political affiliations of employees and to create a work force more responsive to the incumbent gubernatorial party.

[59]373 N.E.2d at 177.

[60]*Id.*

[61]*Id.*

[62]*Id.* at 178.

[63]511 F.2d 834 (7th Cir.), *rev'd on other grounds*, 423 U.S. 6 (1975).

[64]511 F.2d at 838.

[65]*Id.* at 837-38 (construing IND. CODE § 8-13-1.5-6 (1976)). *See* note 57 *supra.*

[66]511 F.2d at 837-38 (construing IND. CODE § 8-13-1.5-5 (1976)). *See* note 57 *supra.*

[67]511 F.2d at 838.

[68]*Id.* While the court's holding was not expressly limited to dismissals for cause, one should note that it did emphasize that the plaintiff was not dismissed for political reasons. *Id.*

[69]IND. CODE § 8-13-1.5-5 (1976).

Talley court was obviously not persuaded by the Seventh Circuit's construction of the Act. The court, noting that *Boehning* was reversed on the basis of abstention, stated that the case's impact had been severely limited.[70] Even if *Boehning* had not been subsequently appealed and reversed on other grounds, the decision would have had little precedential weight because the question of whether a "property interest" or a "claim of entitlement" has been created is a matter of state law and not federal constitutional law.[71]

In sharp contrast to *Talley* is *Wilson v. Review Board of the Indiana Employment Security Division.*[72] In *Wilson* the facts disclosed that the appellant (Wilson) had begun receiving benefits in November, 1976. In December, Wilson's former employer submitted a report indicating that Wilson had refused suitable employment. Subsequently, when Wilson appeared to file her weekly claim, a deputy informed her that her benefits had been suspended because of her refusal. On these facts, the court of appeals held that an insured worker, who is receiving benefits pursuant to the Indiana Employment Security Act,[73] possesses a claim sufficient to constitute a property interest entitled to the protection of constitutional due process.[74]

Yet, the gravamen of the opinion centered on the "specificity" of the relevant statute,[75] which included amended language that "benefits shall continue to be paid to said claimant unless said administrative determination has been reversed by a due process hearing."[76] The state had argued that the provision had no application

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[70]373 N.E.2d at 176.

[71]*See* Bishop v. Wood, 426 U.S. 341, 344 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[72]373 N.E.2d 331 (Ind. Ct. App. 1978).

[73]IND. CODE §§ 22-4-1-1 to 22-4-38-3 (1976 & Supp. 1978).

[74]373 N.E.2d at 338.

[75]IND. CODE § 22-4-17-2(e) (1976). The statute provides, in pertinent part, as follows:

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

[76]*Id. as amended by* Act of Feb. 17, 1972, Pub. L. No. 174, § 2, 1972 Ind. Acts 848.

since the decision of the deputy was a "new determination" rather than a decision affecting a pre-existing right. The court flatly rejected this argument, holding that the quoted amendment was a curative statute, which would be liberally construed and applied to situations involving interruption of benefits as well as disputes involving initial determination of eligibility.[77] Thus, the case was ultimately decided by reliance on the clear language of the legislative amendment expressly authorizing a pre-termination due process hearing, rather than on a constitutional basis.

Nevertheless, *Wilson* is an excellent review of procedural due process considerations, and is highly recommended to both the student and practitioner of administrative law. It is especially interesting because, although the decision was eventually anchored in statutory construction, the court actually structured, in the course of its opinion, a constitutional argument which supports the results achieved.

III. Civil Procedure and Jurisdiction

*William F. Harvey**

A. Jurisdiction and Service of Process

1. Waiver of Change of Venue.—In *Pruden v. Trabits*,[1] both the complaint and a motion for change of venue from the county were filed on the same day. The court granted the motion for change of venue and named five counties from which the plaintiff struck one. The defendants did not, however, strike any counties within the time limits in Trial Rule 76(9).[2]

The court of appeals held that Trial Rule 76(9) requires that the moving party inquire whether the other parties have struck any county,[3] and if they have not, then the moving party must timely re-

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[77]373 N.E.2d at 343-44.

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[1]370 N.E.2d 959 (Ind. Ct. App. 1977).

[2]IND. R. TR. P. 76(9) provides in part: "[T]he parties within seven [7] days thereafter, or within such time, not to exceed fourteen [14] days, as the court shall fix, shall each alternatively strike off the names of such counties."

[3]IND. R. TR. P. 76(9) also provides in part:

> If a moving party fails to so strike within said time, he shall not be entitled to a change of venue, and the court shall resume general jurisdiction of the