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Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its seventh annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1980, through May 31, 1981. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Administrative Law

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A. Procedural Due Process

1. Applicability of Due Process to Administrative Hearings.—The fourteenth amendment to the U.S. Constitution provides that "no state shall . . . deprive any person of life, liberty, or property, without due process of law."[1] A conflict arose in the Indiana Courts of Appeal beginning with *State ex rel. Dunlap v. Cross*[2] as to whether the suspension of a police officer for ten days or less constitutes the deprivation of a property interest which would entitle the officer to constitutional due process protections.

La Verne Dunlap, a Michigan City police officer, sought judicial review of a decision of the Police Civil Service Commission which suspended her from the police force for ten working days without pay. The third district court of appeals, after determining that she did not have a statutory right to judicial review under the Tenure

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[1]U.S. CONST. amend. XIV, § 1.

[2]403 N.E.2d 885 (Ind. Ct. App. 1980). *See* Greenberg, *Administrative Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 65, 82-84 (1981).

Act in effect at that time,[3] also held that her constitutional due process rights were not violated because a suspension which does not exceed ten days is not a protectible property interest.[4] Property interests require legal entitlements which may arise from statutes, ordinances, or contracts,[5] and are determined by reference to state law.[6] The *Dunlap* court reasoned that the statute which provided for appeals established the officer's property interest in her continued employment.[7] Because the statute applied to only those suspensions of *more* than ten days, a person suspended for ten days or less has no such property interest; and thus is without the protections of the due process clause of the fourteenth amendment.[8]

The fourth district took a somewhat different view of this question in *Gerhardt v. City of Evansville*.[9] In *Gerhardt*, two city police officers were suspended without pay by the Police Merit Commission.[10] The trial court dismissed on the grounds that the court lacked subject matter jurisdiction over the officers' complaint in which they sought judicial review of their suspensions. In doing so, the trial court relied upon the Tenure Act, and further held that the Act's ten day limitation was constitutionally proper.[11]

The fourth district held that a suspension for a period of up to ten days without a right of appeal and judicial review violated the petitioners' due process rights.[12] Agreeing that the Tenure Act does not provide for judicial review, the court found a constitutional right of judicial review of administrative decisions in the due process clause of the U.S. Constitution. The court relied upon *Warren v. Indiana Telephone Co.*[13] in holding that judicial review is available even when the statute does not provide for review or in fact prohibits it.[14] The court noted that *regardless* of whether the officers

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[3]IND. CODE § 18-1-11-3 (amended 1977, 1978, 1980) (repealed 1981) (current version at *id.* § 36-8-3-4(e) (Supp. 1981)).

[4]403 N.E.2d at 888.

[5]*Id.* (citing Gansert v. Meeks, 384 N.E.2d 1140 (Ind. Ct. App. 1979)).

[6]403 N.E.2d at 888 (citing Bishop v. Wood, 426 U.S. 341 (1976)).

[7]403 N.E.2d at 888.

[8]*Id.*

[9]408 N.E.2d 1308 (Ind. Ct. App. 1980), *rehearing denied*, 416 N.E.2d 142 (Ind. Ct. App. 1981).

[10]Paul Gerhardt and Clyde Carlile, members of the Evansville Police Department, were initially suspended for five days without pay, but their suspensions were reduced to three days by the Police Merit Commission of the City of Evansville. 408 N.E.2d at 1309.

[11]*Id.*

[12]*Id.* at 1310.

[13]217 Ind. 93, 26 N.E.2d 399 (1940).

[14]408 N.E.2d at 1310. This survey year, however, the Indiana Supreme Court held that "there is . . . no constitutionally protected right to judicial review of the decisions of fact-finding and appellate tribunals . . . conducting disciplinary proceedings within

have an actual property interest in their employment, they "are denied the opportunity to have the trial court determine whether the Commission has acted according to the law and within its power if there is no review of the Commission's action."[15] The court thereby distinguished the due process requirement of judicial review from the procedural due process requirements of notice and the opportunity for a hearing.[16] On a petition for rehearing,[17] the court directed itself to the conflict arising from its decision and the third district's holding in *Dunlap*.[18] The court, in a much stronger and clearer statement, reiterated that the lack of a property interest does not preclude a right to judicial review, but that "review is dependent upon agency action and not the existence of a protected property interest . . . ."[19]

The *Gerhardt* decisions, however, leave an important question unanswered. Despite its statement that judicial review is required to ensure that the requirements of due process have been met,[20] the fourth district did not determine whether the due process clause imposes any requirements other than judicial review. The court in *Gerhardt* addressed only one side of the issue raised in *Dunlap*—whether the absence of a property interest precludes judicial review. It did not examine the more important issue of whether a preclusion of judicial review, or a statutory intention to do so, means that there is no recognizable property interest which would trigger procedural due process requirements, including notice and the right to a hearing. In the first *Gerhardt* decision, the court remanded the case to the trial court to hear evidence on whether there existed a property interest sufficient to invoke constitutional protections. On petition for rehearing, the court noted that "[j]udicial review does not enlarge any protected interests or grant due process rights where they do not otherwise exist."[21] With the question squarely in front of them, the court should have ruled, or at least provided some guidance, as to what effect the statutory preclusion of review has on determining whether a property right exists.

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the prison system." Riner v. Raines, 409 N.E.2d 575, 579 (Ind. 1980). Conceding the applicability of due process requirements, the court noted that the various "levels of administrative review by policy makers and high executive officers" was adequate assurance of fair procedures and fair decisions. *Id.*

[15]408 N.E.2d at 1311.

[16]*Id.* at 1310-11.

[17]416 N.E.2d 142 (Ind. Ct. App. 1981).

[18]*Id.* at 143.

[19]*Id.*

[20]*Id.* at 143-44. Judicial review insures that "the requirements of due process have been met, the action is within the scope of authority and the action is according to law." *Id.*

[21]*Id.* at 144.

Last year's Survey Article correctly asserted that the *Dunlap* court erred in determining that the existence of the officer's property interest is established by the Tenure Act.[22] It was an earlier provision of the same Act which clearly indicated that a suspension can only be for cause,[23] and which created the required expectation of continued and uninterrupted employment which is the foundation of the property interest protected by due process.[24] This analysis finds support in two other cases decided this past survey year. In *City of Indianapolis v. Sherman*,[25] a case brought by a former police officer who was demoted from "Technical Captain" to "Captain," the court in construing Indiana Code section 19-1-7-6[26] held that due process protections attach "when such 'cause' is required before an employment relationship may be altered to the detriment of the employee."[27] In *Indiana Alcoholic Beverage Commission v. Gault*,[28] the court read Indiana Code section 7.1-2-2-12[29] as giving the Commission the authority to employ and remove, *at will*, members of the Indiana State Excise Police, and held that a member of that force with almost twenty years of service was not entitled to procedural safeguards when demoted from captain to officer.[30] The court stated that where one's employment is at the will of a government agency, that person has no property interest in a particular rank and is therefore not entitled to procedural due process protections.[31]

In determining whether a property interest exists, the courts should look to the nature of the public employment relationship, that is, whether one serves at will, giving the agency total discretion to alter or terminate the relationship, or whether one's status is protected by a requirement of cause, before changing the nature of the relationship in a manner detrimental to the employee.

2. Notification of the Right to Counsel.—Once the court has determined that a property or liberty interest exists which triggers the applicability of due process requirements, it must next examine what procedural safeguards are required under the circumstances of the individual case. Several cases in this survey year examined whether an applicant for unemployment compensation benefits is

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[22]Greenberg, *supra* note 2, at 83-84.

[23]IND. CODE § 18-1-11-3(a) (amended 1977, 1978, 1980) (repealed 1981) (current version at *id.* § 36-8-3-4(b) (Supp. 1981)).

[24]Greenberg, *supra* note 2, at 83-84.

[25]409 N.E.2d 1202 (Ind. Ct. App. 1980).

[26]IND. CODE § 19-1-7-6 (1976).

[27]409 N.E.2d at 1206.

[28]405 N.E.2d 585 (Ind. Ct. App. 1980), *transfer denied*, Nov. 14, 1980.

[29]IND. CODE § 7.1-2-2-12 (1976).

[30]405 N.E.2d at 590.

[31]*Id.* at 589.

denied due process[32] when the agency fails to inform him of his right to be represented by counsel before the hearing referee.

The fourth district of the Indiana Court of Appeals held in *Sandlin v. Review Board of the Indiana Employment Security Division*,[33] that due process "requires an administrative procedure reasonably calculated to inform a claimant of his right to appear by counsel."[34] Sandlin had been denied unemployment compensation benefits based upon a finding that he had voluntarily left work without good cause. There was no evidence that he had ever been informed, prior to or at the hearing, that he had a right to be represented by counsel. Near the end of the hearing, it also became evident that Sandlin could not read and had only progessed to the seventh grade.[35]

The court of appeals, using the balancing test developed by the Supreme Court in *Mathews v. Eldridge*,[36] found that a qualified applicant's substantial interest in unemployment compensation benefits,[37] coupled with the nature of the proceeding and the role that an attorney may play in effectively representing the claimant's position, outweighed the minimal administrative expense required to inform the claimant of his right to counsel.[38] The court pointed out that it was not necessary to inform the claimant on the record at the hearing, but rather the Board should do so when various forms and notices are supplied to the claimant informing him of his evidentiary hearing before the referee.[39] The court said that the agency could adopt any procedure it deemed appropriate to provide notice of the right to counsel, however, the notice must be in writing.[40]

The first and third districts reached somewhat different results

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[32]Indiana courts have determined that an applicant has a constitutionally protected "property interest" in the receipt of unemployment benefits and have thus recognized the applicability of procedural due process in proceedings before the Indiana Employment Security Division to establish eligibility. *See, e.g.*, Wilson v. Review Bd. of the Ind. Employment Security Div., 385 N.E.2d 438 (Ind.), *cert. denied*, 444 U.S. 874 (1979).

[33]406 N.E.2d 328 (Ind. Ct. App. 1980).

[34]*Id.* at 333.

[35]*Id.* at 329.

[36]424 U.S. 319 (1976). This case, dealing with Social Security disability benefits, established that the interest of the individual, the nature and effectiveness of the procedure in question, whether additional procedures would decrease the risk of error, and the interests of the government are the factors to be considered as to whether any given administrative procedure meets the due process requirements. *Id.* at 335.

[37]The court noted that during periods of economic hardship, unemployment compensation benefits might provide an individual or a family with the means of purchasing essentials such as food and housing. 406 N.E.2d at 332.

[38]*Id.* at 331-32.

[39]*Id.* at 332.

[40]*Id.* at 333.

on this issue. In *Walker v. Review Board of Indiana Employment Security Division*,[41] the third district affirmed the Board's decision to deny unemployment compensation benefits, holding that neither due process nor the rules of procedure governing hearings in unemployment compensation cases requires that the referee advise a claimant of his right to counsel.[42] "A fair hearing requires only that the parties be permitted to testify freely and that they not be deprived of their right to counsel or of their right to offer and cross-examine witnesses."[43] Because there was no evidence in this case that the referee *denied* claimant the opportunity to be represented by an attorney, no reversible error had been demonstrated.[44]

The first district in *Foster v. Review Board of Indiana Employment Security Division*,[45] recognized that under *Sandlin*, a party has a due process right to notice of the right to counsel.[46] Although *Sandlin* did not require the *referee* to provide such notice, *Foster* further noted that the record in the case before it was devoid of any notice "*at anytime*" having been given the claimant.[47] The first district held, however, that to be entitled to a new evidentiary hearing, the claimant must show that she was prejudiced by this error, that is, that the failure to notify her of her right to counsel affected substantial rights of the claimant.[48] The court found that the claimant had fully explained her reasons for leaving her employment and that it "would be a mere presumption" by the court to hold that counsel would have introduced further evidence to establish "her 'good cause' for leaving her job."[49] The court refused to remand on

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[41]404 N.E.2d 1363 (Ind. App. Ct. 1980), *transfer denied*, Dec. 12, 1980.

[42]*Id.* at 1364-65.

[43]*Id.* at 1364.

[44]The *Walker* case also dealt with an administrative rule which provides that when a party is not represented by an attorney, it is the duty of the referee "to examine that party's witnesses, and to cross-examine all witnesses of the other party, in order to insure complete presentation of the case." IND. AD. RULES & REGS. § (22-4-17-3)-1 (Burns 1976) (current version at 640 IND. AD. CODE § 1-11-3 (1979)). The court, after reviewing the entire record, held that the referee had carried out his duties when he asked pertinent questions of the claimant and gave the claimant the opportunity to tell his side of the story. 404 N.E.2d at 1364. Although the claimant alleged that the referee failed to ask enough questions regarding the circumstances surrounding the termination of his employment and to call a particular witness, the court held that the "presentation of evidence is within the sound discretion of the referee to be admitted as he deems necessary" and there was no showing here of abuse of that discretion. *Id.*

[45]413 N.E.2d 618 (Ind. Ct. App. 1980). The court of appeals eventually reversed the Review Board on a different issue. 421 N.E.2d 744 (Ind. Ct. App. 1981).

[46]413 N.E.2d at 620 (citing Sandlin v. Review Bd. of the Ind. Employment Security Div., 406 N.E.2d 828 (Ind. Ct. App. 1980)).

[47]413 N.E.2d at 620 (emphasis in original).

[48]*Id.* at 621.

[49]*Id.*

this issue for a new evidentiary hearing because no prejudicial error was established.[50]

The first district in *Foster* noted that the fourth district in *Sandlin* did not expressly discuss whether the failure to provide notice of the right to counsel requires automatic reversal, or whether it requires the claimant to show prejudicial error.[51] In fact, as *Foster* points out, Judge Chipman stated in *Sandlin* that " '[a]fter a review of the transcript of the referee's hearing, it is evident that Sandlin's . . . case was anemic; there is no doubt that an attorney could have better represented his interests,' " thereby suggesting that the claimant was in fact prejudiced.[52]

Any uncertainty as to whether the fourth district's decision to remand, although not stated as such, was based on the prejudice that resulted from the failure to notify the claimant of his right to counsel, was resolved in April 1981 when that court in *Leon-Roche v. Review Board of the Indiana Employment Security Division*,[53] refused to be persuaded or bound by *Foster*.[54] The fourth district expressly held that the right of an unemployment compensation claimant to be notified of the right to counsel is a basic procedural due process right and that there is no need to show prejudice in order to remand for a new evidentiary hearing.[55] The court quoted a District of Columbia Circuit Court case which stated that although " 'there is limited room in administrative law for the doctrine of harmless error this must be used gingerly, if at all, when basic procedural rights are at stake.' "[56]

Although the districts agree that an agency is required at some point to notify a claimant of his right to counsel at an evidentiary hearing, a split exists regarding whether failure to do so will automatically result in a remand or whether a showing of prejudicial error must be made. It would seem that when the court engages in the balancing test set forth in the numerous Supreme Court deci-

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[50]*Id.* The first district, relying on *Foster*, reached the same result a second time in Felders v. Review Bd. of the Ind. Employment Security Div., 419 N.E.2d 190 (Ind. Ct. App. 1981). Judge Young, sitting by designation from the fourth district, dissented, arguing that it was not necessary to show actual prejudice. *Id.* at 191-92 (Young, P.J., dissenting).

[51]413 N.E.2d at 620.

[52]*Id.* at 621 (quoting 406 N.E.2d at 333). It is also important to remember that Sandlin had a limited education and was unable to read. *See* text accompanying note 35 *supra*.

[53]419 N.E.2d 801 (Ind. Ct. App. 1981).

[54]*Id.* at 802.

[55]*Id.* at 803.

[56]*Id.* (quoting Yiu Fong Cheung v. Immigration and Naturalization Serv., 418 F.2d 460, 464 (D.C. Cir. 1969)).

sions concerning due process in administrative proceedings,[57] the claimant's interest in ensuring an effective presentation of his position would far outweigh the administrative burden to the state in notifying the claimant of the right to be represented by counsel. The threat of automatic remand would provide a strong incentive for the agency to provide such notice. It would also remove the necessity of judicial speculation as to whether prejudice has resulted from the failure to be represented by counsel.

3. Fair Hearing.—Whether certain procedures employed by administrative agencies were sufficient to protect due process rights or a statutory right to a fair hearing, was the subject of several Indiana cases this survey year.

In the *City of Hammond v. State ex rel. Jefferson*,[58] the court of appeals held that a firefighter suspended from employment for six months was not afforded the fair hearing required by law when the city attorney, whose office represented the city in the hearing before the Hammond Board of Public Works and Safety, also sat on that Board as a decisionmaker in the same case.[59] The court noted that the test of a fair hearing is not simply freedom from impropriety, but freedom from the appearance of impropriety.[60] The court held that the appearance of impropriety in this case was not cured by the fact that the vote of the city attorney was not necessary to constitute a quorum or to order the firefighter's suspension.[61] Nor was the appearance of impropriety cured because the case was not prosecuted personally by the city attorney but rather by his assistant.[62] That same court, however, in a similar case decided just one week later,[63] held that a police officer dismissed for conduct unbecoming an officer, who was apparently aware of the dual role of the city attorney[64] in his hearing before the Board but did not raise an objection to it, was deemed to have *waived* the objection that the arrangement denied him a fair hearing.[65]

In *Featherston v. Stanton*,[66] the Seventh Circuit Court of Appeals considered whether certain procedures employed by the Indi-

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[57]*See, e.g.*, Goss v. Lopez, 419 U.S. 565, 579-82 (1975); Goldberg v. Kelly, 397 U.S. 254, 264-66 (1970).

[58]411 N.E.2d 152 (Ind. Ct. App. 1981).

[59]*Id.* at 153.

[60]*Id.* at 154 (citing City of Mishawaka v. Stewart, 261 Ind. 670, 310 N.E.2d 65 (1974)).

[61]411 N.E.2d at 154. In fact the vote to suspend was unanimous.

[62]*Id.*

[63]Atkinson v. City of Marion, 411 N.E.2d 622 (Ind. Ct. App. 1980).

[64]The city attorney in *Atkinson* sat on the Board while the deputy city attorney prosecuted the case against the police officer. *Id.* at 624, 629.

[65]*Id.* at 629-30.

[66]626 F.2d 591 (7th Cir. 1980).

ana Department of Public Welfare in reviewing denials of Medicaid benefits, satisfied the constitutional and statutory requirements[67] for a "fair hearing."[68] The claimants first challenged the department's use of dental and medical review panels which provide the information necessary for the agency to determine eligibility for benefits, and the subsequent use of alternate dental and medical review panels which provide a post-hearing, off-the-record evaluation of the evidence presented at the hearing. In both instances, the claimants argued that because the panels were neither present at the hearing nor subject to subpoena, the claimants were denied their statutory right to confront and cross-examine adverse witnesses.

Considering first the dental and medical review panels, the court held that they were not "adverse witnesses" as envisioned by the regulations.[69] "Rather than functioning as adversaries to plaintiff's claims, the initial review panels act as impartial assessors of plaintiff's medical and social histories and as adjudicators of their entitlement to benefits."[70] The use of the review panels was consistent with federal procedures designed to promote efficiency while ensuring reliability and impartiality. The court did find, however, that the failure of the review teams to report reasons for their denial of plaintiff's claims did deprive claimants of their statutory right to a fair hearing. The court in holding that the claimants' procedural rights were violated wrote that, "[i]f the applicant is not made aware of the reasons for the agency's initial denial of his request, then he is not able to '[e]stablish all pertinent facts and circumstances' at his appeal hearing."[71]

Addressing next the use of alternate dental and medical review panels, the court held that "[w]hereas the first review teams act as adjudicators, the alternate panels act as expert witnesses or advisors to the DPW,"[72] and as such their assessments should be made part of the record of the hearing.[73] Because the panels which acted

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[67]The statutory requirements for "Fair Hearings for [Medicaid] Applicants and Recipients" are found in 42 C.F.R. §§ 431.200-.250 (1980).

[68]The court noted that because the federal regulations applicable to the social security claims at issue prescribe greater procedural safeguards than are mandated by the constitution and because it found that the Indiana procedures do not comply with those regulations, it need not address the constitutional claims. 626 F.2d at 593.

[69]*Id.*

[70]*Id.* at 594.

[71]*Id.* at 595 (quoting 42 C.F.R. § 431.242(c) (1980)).

[72]626 F.2d at 595.

[73]*Id.* The court supported its holding by citing 42 C.F.R. § 431.240(b) (1980), which provides:

> If the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report or a medical review team's decisions and if the hearing officer considers it necessary to have a medical assessment other

as experts to advise the hearing officer gave their opinions off the record, the court held that claimants were denied their statutory right to rebut the panels' opinions as well as their right to a decision based exclusively on evidence introduced at the hearing.[74] Accordingly, the court reversed the district court judgment which had found that the procedures employed by the department were procedurally sufficient, and enjoined the department from utilizing procedures which contravened federal regulations.[75]

Relying on *Addison v. Review Board of Indiana Employment Security Division*,[76] the court of appeals in *Tauteris v. Review Board of Indiana Security Division*,[77] said in dictum that the use of a split hearing to determine unemployment benefits was constitutionally deficient because it denied the claimant an opportunity to cross-examine the employer and to present evidence on his own behalf.[78] In *Tauteris*, however, even though a split hearing procedure was used, the court refused to order a new hearing because the claimant failed, without an adequate explanation, to appear at his scheduled hearing. Having not appeared, the court reasoned that he could not complain that he was prejudiced by the use of this procedure. The court noted that the "skimpy"[79] record before it on appeal was not due to the split hearing procedure nor to the lack of diligence on the part of the referee to develop a record, but rather to the claimant's failure to appear and present any evidence.[80]

This approach is similar to that taken by the first district in the notice of the right to an attorney cases.[81] Despite the recognition of a constitutionally deficient procedure, the court upholds the agency's decision by determining that no prejudice resulted from that defi-

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than that of the individual involved in making the original decision, such a medical assessment must be obtained at agency expense and made part of the record.

Id.

[74]626 F.2d at 595 (citing 42 C.F.R. § 431.242(e), .244 (1980)). The Administrator of the Department of Public Works wrote a letter requiring an end to the use of post hearing, off-the-record assessments by alternate review teams, but the court noted that a letter had no legal force and would not affect the disposition of this appeal. 626 F.2d at 596.

[75]*Id.*

[76]397 N.E.2d 1037 (Ind. Ct. App. 1979). "[W]here the material issue requires for its resolution a determination of the credibility of witnesses, due process requires a meaningful credibility evaluation by the administrative trier of fact." *Id.* at 1041 (footnote omitted). This could only be done at a hearing of all the evidence before the same referee. *Id. See also* Greenberg, *supra* note 2, at 85-86.

[77]409 N.E.2d 1192 (Ind. Ct. App. 1980).

[78]*Id.* at 1194.

[79]*Id.*

[80]*Id.* at 1195.

[81]*See* text accompanying notes 45-50 *supra*.

ciency.[82] Again, it can be argued that the court, once it establishes that an administrative procedure denies due process, has a responsibility to provide an incentive for the agency to discontinue that procedure or to modify it with additional constitutional safeguards. That incentive may take the form of remanding cases which, on the merits, the agency should not have to hear again.

B. Scope of Judicial Review

1. The Substantial Evidence Test.—For the past two years, the Administrative Law Survey has begun with a discussion of the potentially conflicting interpretations of the "substantial evidence test" by the different districts of the Indiana Courts of Appeals.[83] At issue was whether the reviewing court, in determining whether the administrative decision is supported by substantial evidence, must examine the whole record or merely the evidence most favorable to the successful party.[84] Prior to *Citizens Energy Coalition, Inc. v. Indiana & Michigan Electric Company*,[85] a first district case in which whole record review was apparently adopted,[86] the first district utilized the one-sided approach to review administrative decisions.[87] With *Citizens Energy Coalition*, however, last year's Survey celebrated, with admittedly some reservations, the resolution of this uncertainty and conflict which the differing interpretations had implanted in Indiana administrative law.[88] Two first district decisions during this survey period indicate that the celebration *may* have been somewhat premature.[89]

In *Talas v. Correct Piping Co.*,[90] a workman's compensation case in which the claimant appealed a decision by the Industrial Board, the court wrote that "on appeal, the court may not weigh the evidence and where there is a conflict it can only consider that evidence which tends to support the Board's award."[91] In *Wakschlag*

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[82]*Id.*

[83]Greenberg, *supra* note 2, at 65-67; Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 39-42.

[84]Greenberg, *supra* note 2, at 65-67.

[85]396 N.E.2d 441 (Ind. Ct. App. 1979), *discussed in* Greenberg, *supra* note 2, at 65-66.

[86]396 N.E.2d at 447.

[87]*See* Indiana Civil Rights Comm'n v. Holman, 380 N.E.2d 1281, 1284 (Ind. Ct. App. 1978).

[88]Greenberg, *supra* note 2, at 65-66.

[89]I, like Professor Greenberg, use the word *may* advisedly.

[90]409 N.E.2d 1223 (Ind. Ct. App. 1980), *vacated on other grounds*, 416 N.E.2d 845 (Ind. 1981). *See* Leibman, *Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND L. REV. 453, 455-58 (1981) for a detailed account of the facts of this case.

[91]409 N.E.2d at 1226.

v. Review Board of Indiana Employment Security Division,[92] an appeal from a decision of the Review Board denying the employee's claim for unemployment benefits on the grounds that the employee was discharged for the just cause, the court wrote that " '[i]n reviewing the evidence to support the Review Board's determination we may not weigh the evidence and may consider only that evidence and the reasonable inferences therefrom most favorable to the Board's decision.' "[93] This language tends to confuse the issue because it is not clear exactly what the court considered in affirming the agency determination.

In *Talas*, for example, the court refers to the existence of contradictory or "conflicting" evidence on the record.[94] The *Talas* court arguably can be said to have reviewed the record as a whole by taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, an approach based on *Universal Camera v. NLRB.*[95] However, the "review" in *Talas* consisted of little more than an assumption that if such evidence was present, the Board must have considered and weighed that evidence in making its decision. The first district then deferred to the Board on the basis of this implied determination and found the requisite "sufficient evidence" to support the findings made.[96] It is not entirely clear, however, whether the court really did consider only that evidence favorable to the Board's decision. As long as the courts continue to use language that indicates that they will only consider that evidence which tends to support, or is most favorable to, the agency determination, the issue of whether review on the whole record or one-sided review has been used, will remain unclear.

The third district used a similar approach in another decision involving the Review Board. In a footnote to *Russell* v. *Review Board of the Indiana Employment Security Division*,[97] the court wrote "[i]n reviewing the evidence to support the Board's determination, the court will examine only that evidence and the reasonable inferences therefrom favorable to the Review Board's decision."[98] Nevertheless, the court did not conclude that the Board's findings were supported by the evidence. The court noted that the transcript of the hearing

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[92]413 N.E.2d 1078 (Ind. Ct. App. 1980).

[93]*Id.* at 1082 (quoting Ervin v. Review Bd. of the Ind. Employ. Security Div., 173 Ind. App. 592, 598, 364 N.E.2d 1189, 1193 (1977)).

[94]409 N.E.2d at 1227-28.

[95]340 U.S. 474, 477-78 (1951).

[96]409 N.E.2d at 1228. The decision of the first district court of appeals was vacated by the supreme court because the Board failed to make specific, basic findings of fact to support its ultimate finding. 416 N.E.2d 845, 846 (Ind. 1981).

[97]415 N.E.2d 774 (Ind. Ct. App. 1981).

[98]*Id.* at 776 n.1 (citations omitted).

was so unintelligible as to leave the court "questioning how any factual findings may [have been] premised thereon."[99] The transcript, the "disorganized and vague nature of the questions posed, and the referee's apparent satisfaction with unresponsive and unintelligible answers," led the court to believe that an incomplete presentation of the case was made and that there was insufficient evidence in the record to support the Board's findings.[100]

2. Standard of Review.—The proper standard of review on questions of fact is that which considers the record as a whole to determine if there is substantial evidence of probative value to support the agency's findings. The court should not reweigh the evidence nor substitute its judgment for that of the agency. If there is substantial evidence, the court must uphold the agency's determination. It is only if "reasonable men would be bound to reach the opposite conclusion from the evidence in the record will the decision be reversed."[101] This limitation on the court's role in reviewing agency decisions, however, applies only to questions of fact. As to questions of law, the court may always inquire as to whether the agency determination was proper.[102]

A more difficult question arises in distinguishing between a question of law and a question of fact. In *Aaron v. Review Board of the Indiana Employment Security Division*,[103] the court of appeals reversed a decision of the Board because its conclusion of law was inconsistent with its finding of fact. The issue to be decided in *Aaron* was whether employees at an "exempt" plant, whose unemployment resulted from a selective strike of other plants in the labor union, could receive unemployment benefits. Although the Review Board found that curtailed production was caused by the union strike at other plants, it concluded, however, that those laid-off employees were nevertheless entitled to unemployment benefits because their unemployment was not due to a labor dispute at their

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[99]*Id.* at 777.

[100]*Id.* The court in *Russell* was especially concerned that the claimant was not represented by counsel. In such situations, the referee has a special duty to ensure the claimant's rights are protected. *A "review of the entire record"* led the court to believe that the referee had failed to fulfill that duty. *Id.* (emphasis added).

[101]Duncan v. George Moser Leather Co., 408 N.E.2d 1332, 1340 (Ind. Ct. App. 1980); *see also* Tauteris v. Review Bd. of the Ind. Employment Security Div., 409 N.E.2d 1192, 1195 (Ind. Ct. App. 1980).

[102]"Under a strictly judicial review . . . , in addition to determining whether or not the order of the Commission is supported by substantial evidence, there is another matter in which the court may always inquire, and that is the question whether or not the order is contrary to law." Public Serv. Comm'n v. City of Indianapolis, 235 Ind. 70, 82, 131 N.E.2d 308, 312 (1955), *quoted in* Goffredo v. Indiana State Dep't of Pub. Welfare, 419 N.E.2d 1337, 1338 (Ind. Ct. App. 1981).

[103]416 N.E.2d 125 (Ind. Ct. App. 1981).

own facilities.[104] The court of appeals noted that it had to accept the Board's findings without reweighing the evidence. The limitation on the court's scope of review would not permit the court to entertain any arguments regarding the cause of the unemployment at the exempt plants.[105] " 'At the first level of review, we examine only the relationship between the premises and the conclusion, and ask if the Board's deduction is 'reasonable'. . . . The inquiry at this first level of review may be termed a 'question of law.' "[106] In applying this first level of review, the court reversed the Board because its conclusion of law was inconsistent with its finding of fact.[107]

The "substantial evidence" test with respect to factual determinations, the "reasonableness" test (often used when policy determinations are at issue),[108] and the ability of a court to designate an issue as a question of law rather than a question of fact, make it extremely difficult to find consistent patterns in the judicial review of administrative decisions. There is a certain elasticity in each of these standards which allows a court to fashion the nature of its review and the degree of deference it grants to the agency's determination. It is often difficult to understand or predict the results when courts apply those standards in a practical context. The reasons for this problem are related to the nature of the issues involved in agency proceedings, the nature of the agencies invested with the power to make those decisions and the effect of those decisions on the various parties involved and on society as a whole. There is a certain tension between decisions affecting the social and economic welfare of our citizens are made by officials which are seemingly not always responsible to the elective process, and the need for the efficiency and specialized knowledge administrative agencies can provide. Despite the constant admonition that courts are not to substitute their views for that of the decisionmakers, there is a real difficulty in determining when a court will decide that there is enough information to conclude that a reasoned decision has been made and when there is not. Often that determination

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[104]*Id.* at 129.

[105]*Id.* at 133.

[106]*Id.* (citing Gold Bond Bldg. Prods. Div. v. Review Bd. of the Ind. Employment Security Div., 169 Ind. App. 478, 486, 349 N.E.2d 258, 263 (1976)).

[107]The court held that the employees were interested in the outcome of the strike in that they would benefit from its successful completion and, as the Board found, their unemployment was caused by the strike. 416 N.E.2d at 133. Thus, the court held that they were parties to a "labor dispute" at their "establishment" and were therefore ineligible for unemployment benefits. *Id.*

[108]Several cases during this survey period dealt with the reasonableness of agency policy decisions. *See, e.g.*, Indiana Dep't of Pub. Welfare v. Crescent Manor, 416 N.E.2d 470 (Ind. Ct. App. 1981); Puckett v. Review Bd. of the Ind. Employment Security Div., 413 N.E.2d 295 (Ind. Ct. App. 1980), *transfer denied*, April 29, 1981.

may depend upon the court's acceptance of the decision itself and its confidence in the agency that made it.

C. *The Requirement of Findings*

1. When Are Findings Required?—The requirement of specific findings on all the factual determinations material to the ultimate conclusions of the administrative body is critical to any judicial review of an administrative decision.[109] The policies underlying this requirement were discussed by the court of appeals in *Office of the Public Counselor v. Indianapolis Power & Light Co.*,[110] a challenge to an order of the Public Service Commission approving the power company's application for an increase in its charge for electrical service. The court first stated that formulating basic findings on all material issues assures a reasoned analysis of the request and avoids "arbitrary or ill-considered action."[111] Second, specific findings assure meaningful judicial review and diminish "the possibility of 'judicial substitution of judgment or [sic] complex evidentiary issues and policy determinations.' "[112] Further, without specific findings, the court cannot fulfill its standard of review which is to ensure that the "choice made by the Commission was based on a consideration of the relevant factors and was reasonably related to the discharge of its statutory duty."[113]

In *State ex rel. Newton v. Board of School Trustees*,[114] an action for reinstatement was brought by a tenured teacher whose contract had been cancelled.[115] The Indiana Court of Appeals held that specific findings must be made even though neither the applicable statute[116] under which the school board had cancelled the contract, nor the Administrative Adjudication Act, required specific findings.[117] The court wrote that an administrative body has a duty to make a finding of the pertinent facts on which its decision is based, regardless of any statutory requirement, in order to facilitate judicial review and "to preserve the limited scope of a reviewing court's inquiry."[118]

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[109]L.S. Ayres & Co. v. Indianapolis Power & Light Co., 169 Ind. App. 652, 661-62, 351 N.E.2d 814, 822 (1976).

[110]413 N.E.2d 672, 677 (Ind. Ct. App. 1980) (citing 169 Ind. App. 652, 351 N.E.2d 814).

[111]413 N.E.2d at 677.

[112]*Id.* (quoting 169 Ind. App. at 662, 351 N.E.2d at 822).

[113]413 N.E.2d at 678.

[114]404 N.E.2d 47 (Ind. Ct. App. 1980). *See* Greenberg, *supra* note 2, at 71.

[115]404 N.E.2d at 48.

[116]Act of Mar. 8, 1927, ch. 97, § 2, 1927 Ind. Acts 260 (amended 1933) (repealed 1976).

[117]404 N.E.2d at 48.

[118]*Id.* at 48-49.

Are there any situations in which findings will not be required by the courts? This issue arose in *Hills v. Area Plan Commission.*[119] In order to effectively analyze this case, however, it is first necessary to examine an earlier case decided during this survey year, *Schenkel v. Allen County Plan Commission.*[120] In *Schenkel*, several landowners challenged two decisions of the plan commission: (1) the Commission's approval of the *preliminary* plats and development plans for a proposed subdivision, and (2) their approval of the *final* plat and development plan. The trial court dismissed both challenges and the landowners appealed. The court of appeals affirmed the trial court's decision regarding the preliminary plan, holding that the decision lacked the element of finality that would subject it to judicial review.[121] The court noted that plan commissions have the authority to make two types of determinations: "recommendations" and "decisions." The court refused a literal reading of the applicable statute[122] which would have made the approval of the preliminary plat and plan a "decision", holding instead that the Commission's action was not subject to judicial review because it did not represent "a consummation of the administrative process."[123] The court, however, did remand the cause of action pending the Commission's approval of the final plat and development plans because that was a reviewable "decision" which required specific findings.[124]

In *Hills*, the first district court of appeals distinguished *Schenkel* and held that a plan commission is not required to make findings when it serves in an advisory capacity to a legislative body.[125] Elvin Hills filed a petition with the Area Plan Commission of Vermillion County requesting that his real estate be rezoned from agricultural to urban residential. Following a hearing, the Commission denied Hills' petition without making any findings of fact. Hills then submitted his application to the Board of County Commissioners, in effect requesting an amendment to the zoning ordinance. The Board also denied the petition after holding a public hearing, and again no specific findings of fact were made. The trial court determined that neither body had acted arbitrarily or capriciously, nor was either required to make written findings of fact.[126]

In distinguishing this case from *Schenkel*, the *Hills* court noted

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[119]416 N.E.2d 456 (Ind. Ct. App. 1981), *transfer denied*, June 17, 1981.

[120]407 N.E.2d 265 (Ind. Ct. App. 1980).

[121]*Id.* at 269.

[122]IND. CODE § 18-7-5-28(8) (1976) (repealed 1979) (current version at *id.* § 36-7-4-405(a)(2) (Supp. 1981)).

[123]407 N.E.2d at 268.

[124]*Id.* at 270.

[125]416 N.E.2d at 463.

[126]*Id.* at 459.

that in *Schenkel*, the Plan Commission had the ultimate authority to approve plats and plans for subdivision; the exercise of this authority constituted a "decision" and thus findings of fact were required. In *Hills*, however, the Plan Commission's role was purely advisory.[127] The Plan Commission in *Hills* conducted a hearing, made a "recommendation" regarding the feasibility of the requested rezoning, and reported this to the legislative body. The court held that a "recommendation" need not be accompanied by specific findings of fact.[128] The court went on to hold that the Board of County Commissioners in *Hills*, who acted upon the requested rezoning, was acting in a legislative capacity and also was not required to make findings of fact.[129] Therefore, no specific findings of fact were ever made by either body to support or explain the final determination.

This result, although probably correct because of the nature of municipal decisions concerning zoning, is nevertheless troubling. Findings, as has been noted,[130] are required in administrative proceedings to ensure the integrity of the decision making process. Although the Plan Commission did not make the "ultimate decision" in *Hills*, specific written findings would have ensured that the process before that body was fair, that the Commission's recommendation was based upon a consideration of relevant factors, and that it was not arbitrary or capricious.[131] More important, however, is the role of findings in ensuring meaningful judicial review. The trial court concluded that " 'there is no evidence that the action of the Vermillion County Area Plan Commission, in denying the petition of plaintiff, acted arbitrarily or capricious [sic] or outside the scope of its authority.' "[132] Although it could be argued that the Commission's action was not reviewable at all,[133] the court of appeals did not take that approach. Instead, the court combined its discussion of whether the decisions of the Board and the Commission were arbitrary and capricious. Having integrated their analysis, the limited scope of

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[127]*Id.* at 463.

[128]*Id.*

[129]*Id.*

[130]*See* text accompanying notes 110-13 *supra.*

[131]This is especially significant in light of Hills' contention, rejected by the court of appeals, that rezoning was approved in similar instances and that the Commission's and Board's actions therefore denied him equal protection rights. 416 N.E.2d at 458, 462.

[132]*Id.* at 459.

[133]The court discusses City Plan Comm'n v. Pielet, 167 Ind. App. 324, 338 N.E.2d 648 (1975), in which "the court said that a 'decision' of a plan commission was reviewable by certiorari proceedings, but a 'recommendation' was not, and held that a plan commission's recommendation to the city council that an application for a conditional use permit be denied was not a 'decision' reviewable by certiorari." 416 N.E.2d at 462 (quoting 167 Ind. App. at 327-28, 338 N.E.2d at 650-51).

review applicable to legislative decisions forced the court to conclude that the ultimate decision was a reasonable one.[134] If the court of appeals affirmed the conclusion of the trial court that the administrative body's decision or recommendation to deny the petition was not arbitrary or capricious, it did so without the benefit of specific findings of fact or reasons supporting that decision!

2. What Kinds of Findings Must be Made.—It is a basic rule of administrative law that findings of fact must contain all the specific facts relevant to the contested issue or issues in order that the court may determine whether the administrative body has resolved those issues in conformity with the law.[135] The findings must therefore be specific enough to ensure intelligent review by the courts.[136] Several cases this survey year discussed the types of issues which require findings of fact, the sufficiency of those findings, and the proper response of the courts when the administrative body has entered findings insufficient to support its ultimate conclusions.

In *Indiana State Board of Embalmers & Funeral Directors v. Keller*,[137] the Indiana Supreme Court was asked to review an action by the Board disapproving a stock sale transaction. The trial court issued a summary judgment against the Board because it was convinced that the Board had intended to prevent the proposed transfer of stock. The trial court held that this intent exceeded the Board's statutory authority.[138] The supreme court, however, was unsure what the Board had actually decided, and held that the trial court erred when it failed to remand the matter to the Board for a clearer statement of its decision and for more specific findings of fact.[139] The court wrote that "the controversy over the substance of the Board's decision illustrates the need for adequate findings of fact."[140]

Two decisions involving the Review Board of the Indiana Employment Security Division also indicate the types of findings required in agency determinations. In both *Foster v. Review Board of the Indiana Employment Security Division*,[141] and *Jones v. Review Board of the Indiana Employment Security Division*,[142] the courts

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[134]416 N.E.2d at 461-62.

[135]Whispering Pines Home for Senior Citizens v. Nicalek, 333 N.E.2d 324, 326 (Ind. Ct. App. 1975).

[136]Indiana Bell Tel. Co. v. Owens, 399 N.E.2d 443, 445 (Ind. Ct. App. 1980).

[137]409 N.E.2d 583 (Ind. 1980).

[138]*Id.* at 585. The supreme court agreed that the Board's enabling act did not grant it jurisdiction over a stock transaction. *Id.* (citing IND. CODE § 25-15-1-1 to -15 (1976 & Supp. 1981)).

[139]409 N.E.2d at 586.

[140]*Id.*

[141]413 N.E.2d 618 (Ind. Ct. App. 1980).

[142]405 N.E.2d 601 (Ind. Ct. App. 1980).

discussed the requirement that when a decision precludes an award, the findings of fact must exclude every possibility of recovery.[143]

The contested issue in *Jones* was whether the claimants were qualified for trade adjustment benefits by virtue of their being engaged in employment which was related to the production of steel plate and pipe tubing. Despite a discussion in the referee's findings of the claimant's connection with the production of steel plate and pipe tubing, the court complained that it was given no indication of the significance of those facts in the referee's determination.[144] Noting that two inferences could be drawn from the referee's conclusions, the court stated that "by leaving these equally plausible inferences unresolved the Board has not specifically excluded every possibility of recovery. It is not our function to determine if both avenues of recovery were resolved by the evidence presented."[145] The court also complained that the Board's findings failed to illuminate the reasoning processes used in concluding that claimants were ineligible for benefits. These uncertainties made it impossible for the court to "intelligently review the decision."[146]

In *Foster*, one issue was whether the claimant had left her employment for good cause.[147] She listed several reasons for leaving, but the Review Board's decision discussed only one of those reasons. The court held that these reasons were material segments of the issue because they might constitute good cause. It remanded the matter to the Review Board to make specific findings of fact upon all the reasons advanced by the claimant.[148]

In several cases during this survey year, the courts held that certain issues were material and therefore required that specific findings be made.[149] In *Hidden Valley Lake Property Owners Asso-*

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[143]413 N.E.2d at 622 (citing Wolfe v. Review Bd. of the Ind. Employment Security Div., 375 N.E.2d 652 (Ind. Ct. App. 1978)); 405 N.E.2d at 604-05 (citing 375 N.E.2d 652).

[144]405 N.E.2d at 605.

[145]*Id.*

[146]*Id.*

[147]*See also* notes 45-50 *supra* and accompanying text.

[148]413 N.E.2d at 622.

[149]Barnet v. Review Bd. of the Ind. Employment Security Div., 419 N.E.2d 249 (Ind. Ct. App. 1981) (no specific findings as to whether a rule prohibiting weapons in a factory was uniformly enforced and whether discharged employee knowingly violated rule); Warner Press Inc. v. Review Bd. of the Ind. Employment Security Div., 413 N.E.2d 1003 (Ind. Ct. App. 1980) (claimant's availability for work); Fayette City Dept. v. Health and Hospital Corp., 405 N.E.2d 919 (Ind. Ct. App. 1980) (whether a county welfare department was prejudiced by a hospital's delay in providing notice of indigency resulting in less than an "adequate opportunity to investigate and determine eligibility"); Raham v. Review Bd. of the Ind. Employment Security Div., 405 N.E.2d 606 (Ind. Ct. App. 1980) (manner in which employer was informed of employee's health problem, whether there was medical substantiation, and how the claimant made reasonable efforts to maintain the employment relationship).

ciation v. HVL Utilities, Inc.,[150] the court of appeals held that when an administrative agency decides that an issue is *immaterial*, it must also make a specific finding of immateriality and give its reasons for arriving at that conclusion.[151] Hidden Valley Lakes Utilities had petitioned the Public Service Commission for a certificate of public convenience and necessity, in order to provide water service to a portion of the Hidden Valley Lakes Subdivision. The property owners association intervened, claiming that the real estate developer was itself a public utility and thus a certificate could not be granted to a subsidiary (HVL Utilities) which the developer had created to operate the water and sewer system. The Commission found that it did not have sufficient information to determine whether the developer was a utility and declined to make a specific finding on the issue.

The court of appeals held that the Commission must "in one way or another address each issue raised by the parties before it."[152] If the Commission decides that an issue is immaterial, the agency must make a specific finding to that effect.[153] On petition for rehearing,[154] the court concluded that this requirement was not an unworkable, judicially imposed burden on the agency, nor was it burdensome to require the agency's reasoning as to immateriality. This reasoning would supply the court with "a more intelligible framework for judicial review and lessens the likelihood of judicial substitution of judgment on complex evidentiary issues and policy determinations. [They] also serve to aid the PSC in avoiding arbitrary or ill-conceived action."[155]

What form the findings must take was the subject of a judicial dispute in *Perez v. United States Steel Corp.*[156] Perez initiated a claim for worker's compensation which alleged that he was permanently totally disabled; however, the Industrial Board found he had only suffered a twenty percent permanent partial impairment. On his first appeal, the court of appeals,[157] noting the distinction be-

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[150]408 N.E.2d 622 (Ind. Ct. App. 1980).

[151]*Id.* at 626.

[152]*Id.*

[153]*Id.* Under the statutory language of Indiana Code section 8-1-2-86, which implies that a certificate should be issued unless there is already an existing utility providing the same service, it was quite possible that whether the developer was itself a utility was immaterial to a decision in whether to grant the certificate. 408 N.E.2d at 626-27 (quoting IND. CODE § 8-1-2-86 (1976)).

[154]Hidden Valley Lake Property Owners Ass'n v. HVL Utilities, Inc., 411 N.E.2d 1262 (Ind. Ct. App. 1980).

[155]*Id.* at 1263.

[156]416 N.E.2d 864 (Ind. Ct. App. 1981). *See* Leibman, *supra* note 90, at 453-55, for a more detailed discussion of this case.

[157]Perez v. United States Steel Corp., 172 Ind. App. 242, 359 N.E.2d 925 (1977).

tween impairment and disability,[158] remanded the matter for further proceedings because no express finding concerning disability had been made.[159] On remand, the Board concluded that Perez had not established total permanent disability and reaffirmed the prior award for partial impairment. Perez appealed again, challenging the sufficiency of the Board's findings.

The majority found that the portion of the Board's decision labelled "Findings" was deficient because it failed to reveal any factual basis for the Board's conclusion.[160] The court concluded, however, that the section denominated "Summary of Evidence," a recitation of medical testimony, was in reality the findings of fact which disclosed the basis for the Board's ultimate conclusion.[161] That this language had not appeared in an appropriate place did not prohibit the court from sustaining the Board's decision since it was merely a "defect in form."[162]

In a strong dissent, Judge Staton argued that the record constituted more than a "defect in form" which could not be cured by "the mere recitation of testimony,"[163] because this failed to attain the necessary standard of sufficiency for findings of fact set forth in *Whispering Pines Home For Senior Citizens v. Nicalek*.[164] Furthermore, he noted that when the Board issues a negative award, thereby precluding compensation, it must exclude every possibility of recovery.[165] The Board is required to make findings on every essential element of a claim for total permanent disability,[166] including a determination that the claimant is unable to " 'carry on reasonable

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[158]*Id.* at 244-47, 359 N.E.2d at 926-28.

[159]*Id.* at 249, 359 N.E.2d at 929.

[160]That portion of the decision labelled "Findings" indicated that the plaintiff was not permanently totally disabled within the meaning of the applicable definition. 416 N.E.2d at 865.

[161]*Id.* at 865-66.

[162]*Id.* at 866 (citing IND. R. APP. P. 15(E)).

[163]416 N.E.2d at 866 (Staton, J., dissenting).

[164]333 N.E.2d 324 (Ind. Ct. App. 1975), *quoted in* 416 N.E.2d at 866-67 (Staton, J., dissenting). *Whispering Pines* defined a sufficiently specific finding of fact in the following manner:

> It is a simple, straighforward statement of what happened. A statement of what the Board finds has happened; not a statement that a witness, or witnesses, testified thus and so. It is stated in sufficient *relevant* detail to make it mentally graphic, i.e., it enables the reader to picture in his mind's eye what happened. And when the reader is a reviewing court the statement 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.

333 N.E.2d at 326 (emphasis in original).

[165]416 N.E.2d at 867 (Staton, J., dissenting).

[166]*Id.*

types of employment.' "[167] Judge Staton would have remanded the matter to the Board with instructions to make specific findings in support of its entry of a negative award.[168] Interestingly, Judge Staton anticipated a potential criticism of his approach by noting that it is in the Board's best interest to make specific findings. This prevents the court from "wander[ing] aimlessly" through the record in search of a factual foundation for the award.[169] Administrative agencies have much to gain by making their findings specific and their reasoning clear. Specific findings and articulate explanations of the reasoning processes inspire public confidence in administrative decisions, and ensure meaningful and more limited judicial review.[170]

D. Reviewability of Agency Decisions

In *Jaymar-Ruby, Inc. v. FTC*,[171] a federal district court held that a determination by the Federal Trade Commission to release its investigative files containing confidential business information to state attorneys general was a nonreviewable discretionary administrative function, exempt under the Administrative Procedure Act.[172] The court said that although the subpoenaed information was received by the agency prior to the passage of the Federal Trade Commission Improvements Act of 1980,[173] which permits the disclosure of otherwise non-disclosable information to other law enforcement agencies upon certification that certain conditions have been met,[174] the Act was applicable here.[175]

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[167]*Id.* at 868 (quoting Perez v. United States Steel Corp., 172 Ind. App. 242, 246, 359 N.E.2d 925, 927 (1977)).

[168]416 N.E.2d at 870 (Staton, J., dissenting).

[169]*Id.*

[170]*Id.*

[171]496 F. Supp. 838 (N.D. Ind. 1980).

[172]*Id.* at 845 (construing 5 U.S.C. § 701(a)(2) (1976)).

[173]Pub. L. No. 96-252, 94 Stat. 374 (1980).

[174]The Federal Trade Improvements Act amended section 6(f) of the Federal Trade Commission Act (15 U.S.C. 46(f)) by adding:

> *Provided*, That the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.

Id.

[175]The court's reasoning was that even though the materials had been *submitted prior* to the effective date of the Act, the FTC sought to *disclose* the documents *after* its effective date. 496 F. Supp. at 843-45.

Having decided that the agency had the authority to release the information, the court examined whether the exercise of that authority was subject to judicial review. The court noted that judicial review will be precluded when an agency action has been committed by Congress entirely to administrative discretion.[176] This discretionary function exemption is narrow. Whether an administrative action falls within that exemption depends upon "(1) the appropriateness of the issues raised for review by the Courts; (2) the impact of review on the effectiveness of the agency . . .[177] and (3) the need for judicial supervision to safeguard the interest of the plaintiffs."[178] Applying these factors, and looking at the language of the statute, its statutory design and legislative history, the court held that it could not review the agency's decision to release the documents.[179]

This case could be extremely significant because of the strong presumption favoring judicial review of administrative decisions. This author believes, however, that the court's decisions will be limited to factual situations similiar to that of the instant case.[180]

E. Exhaustion

In *Bowen v. Sonnenburg*,[181] a class action suit was brought on behalf of patients in state institutions for the mentally handicapped and retarded to secure compensation for sevices rendered by them, in accordance with the minimum wage and overtime provisions of the National Labor Standards Act.[182] The state argued, *inter alia*, that the Patient's Remuneration Act[183] provided an administrative remedy that should have been utilized before any civil action was maintained.[184] The lower court, in granting partial summary judg-

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[176]*Id.* at 844.

[177]In applying this test, the court expressed more concern that review would undermine the orderly and effective conduct of *state* investigations than that it would adversely affect the processes of the FTC. *Id.*

[178]*Id.*

[179]*Id.* at 845.

[180]In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the Supreme Court held that an agency decision to disclose confidential business information was reviewable by the court because the Trade Secrets Act, 18 U.S.C. § 1905 (1976), made it a criminal offense for an agency employee to disclose confidential business information unless such disclosure was "authorized by law." 441 U.S. at 317-18. The court held that section 1905 and "any authoriz[ation] by law contemplated by that section place substantive limits on agency action," thus there is "law to apply" and the decision to disclose is therefore reviewable. *Id.* at 318.

[181]411 N.E.2d 390 (Ind. Ct. App. 1980).

[182]29 U.S.C. §§ 201-19 (1976 & Supp. III 1979).

[183]IND. CODE §§ 16-13-12.8-1, -4 to -8 (1976 & Supp. 1981).

[184]411 N.E.2d at 394.

ment to the plaintiff patients, determined that they were excused from having to exhaust the available administrative remedies. The court of appeals noted that exceptions to the exhaustion rule may include instances "where compliance with the rule would be futile, where the statute is charged to be void on its face, or where irreparable injury would result."[185] The facts and circumstances of the individual case, however, determine whether exhaustion would be a futile exercise, and this determination usually cannot be disposed of by summary judgment.[186] The court of appeals held that the trial court was premature in finding that exhaustion of administrative remedies would be futile.[187]

In *Indiana State Department of Welfare, Medicaid Divison v. Stagner*,[188] the court of appeals cited factors relevant to whether a party should be able to bypass available administrative channels.[189] These included the character of the question presented and the competency of the agency to answer that question, the avoidance of premature interruption of the administrative process before the agency can develop a factual record, the interest in the agency having a chance to correct its own errors, and the avoidance of deliberate or frequent flouting of established administrative processes.[190] Balanced against all these considerations is the extent or imminence of harm to the party if required to pursue the administrative remedies.[191]

Harold Stagner was a qualified provider of speech and hearing therapy who had been providing therapy to Medicaid patients in nursing homes throughout Indiana. Reimbursement for these services could be made only after a review by the Department of Welfare to determine whether the services provided were medically reasonable and necessary. Claims submitted for services rendered through January 1980 were paid without problem or delay, but approximately eighty percent of those submitted for February and March 1980 were denied because they were found to be medically unnecessary. Stagner filed suit requesting an injunction ordering payment pending resolution of his underlying suit to recover for unreimbursed claims. The Marion County Circuit Court granted the preliminary injunction and the state appealed, arguing that Stagner had failed to exhaust his administrative remedies.[192]

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[185] *Id.* at 403 (citing Indiana High School Athletic Ass'n v. Raike, 164 Ind. App. 169, 195, 329 N.E.2d 66, 82 (1975)).

[186] 411 N.E.2d at 403.

[187] *Id.*

[188] 410 N.E.2d 1348 (Ind. Ct. App. 1980).

[189] *Id.* at 1351.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 1349.

The court of appeals, applying the aforementioned factors, held that the policies reflected in the exhaustion requirement were disserved by permitting Stagner to bypass his administrative remedies.[193] The court found that an administrative remedy did exist despite the plaintiff's argument that the literal language of the statute providing for appeals applied only to disputes about the amount of the claim and not to cases in which the claim itself was denied.[194] Further, the court held that Stagner's inability to pay his staff or to meet continuing therapy obligations without immediate payment of his claims did not meet the test of irreparable harm that would overcome the requirement of exhaustion.[195] "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."[196] Finally, as to a claim that the administrative procedures utilized deprived Stagner of constitutional rights, the court refused to apply *Wilson v. Review Board of the Indiana Employment Security Division*,[197] which the *Stagner* court believed to have said that exhaustion is *not* required when "the *sole issue* presented to the court is the constitutional adequacy of the administrative procedures."[198] To apply this rule to every case in which a constitutional issue is raised "would permit circumvention of administrative processes by the mere allegation of a constitutional deprivation."[199]

F. Timely Appeals

Indiana courts issued several decisions during the survey year which interpreted statutory requirements that appeals of administrative decisions must be made within prescribed time limitations.

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[193]*Id.* at 1351.

[194]*Id.* at 1352.

[195]*Id.*

[196]Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958), *quoted in* 410 N.E.2d at 1353.

[197]385 N.E.2d 438 (Ind. 1979).

[198]410 N.E.2d at 1353 (emphasis in original).

[199]*Id.* A similar holding was made during the survey period in Evans v. Stanton, 419 N.E.2d 253 (Ind. Ct. App. 1981), where a Medicaid claimant whose benefits were terminated without a predetermination hearing because he failed to make a timely appeal, filed an action against the agency claiming the Board's regulations were improper and denied him constitutional due process rights. The court held that the claimant should have exhausted his administrative remedies and noted once again that merely raising a constitutional issue does not allow a party to bypass administrative procedures. *Id.* at 255. In fact, the claimant was granted a post-termination hearing to review his eligibility and the hearing officer determined that he was eligible for Medicaid benefits and reinstated his benefits retroactively to the time his benefits were terminated. *Id.* at 254.

The Administrative Adjudication Act (AAA)[200] provides that any person or party aggrieved by any agency order or determination is entitled to judicial review if a petition is filed within fifteen days after receipt of notice that such order, decision, or determination has been made.[201] Failure to file within the prescribed time terminates all rights to judicial review.[202] In *Warram v. Stanton*,[203] the court of appeals held that the Act's fifteen day limitation was applicable to a determination of eligibility and need for public assistance under the welfare laws.[204] It further ruled that the failure to comply with the statutory requirement divested the trial court of jurisdiction to review not only the administrative decision made with respect to the claimant herself, but the power to hear the action as a class action challenging the validity of the regulations determinative of the administrative action.[205]

Warram had applied for Medicaid benefits as a disabled person but her application was denied because she had transferred property in violation of agency regulations.[206] She received an administrative hearing before a hearing officer who upheld the decision of the Marion County Department of Public Welfare. Warram then appealed to the Indiana Department of Welfare which also decided against her claim. She received notice of the final agency decision in a letter dated May 10, 1976. On April 1, 1977, she filed a class action suit in the Marion Superior Court. The first count of her complaint sought judicial review of the final agency determination denying her application. The remaining counts challenged the validity of the regulations under which she was declared to be ineligible, and sought injunctive and declaratory relief. The trial court dismissed the first count because it was not timely filed in accordance with the fifteen day limitation of Indiana Code section 4-22-1-14.[207] A trial was had on the remaining counts and judgment was entered against Warram and the class. Warram appealed the decision regarding the validity of the challenged regulations.

The court of appeals wrote that even though the proceeding sought to be reviewed was not an administrative adjudication under the AAA,[208] the judicial review provision of the Act[209] "delineates

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[200]IND. CODE §§ 4-22-1-1 to -30 (1976).
[201]IND. CODE § 4-22-1-14 (1976).
[202]*Id.*
[203]415 N.E.2d 114 (Ind. Ct. App. 1981).
[204]*Id.* at 116.
[205]*Id.* at 116-17.
[206]*See* 470 IND. AD. CODE § 9-2 2(40) (1979).
[207]IND. CODE § 4-22-1-14 (1976).
[208]415 N.E.2d at 116 (citing IND. CODE § 4-22-1-2 (1976)).
[209]IND. CODE §§ 4-22-1-14 to -19 (1976).

the procedure for securing judicial review of all administrative orders, decisions, or determinations not clearly and unambiguously excepted therefrom."[210] Failure to comply with those requirements was jurisdictional and clearly foreclosed any review of the adverse administrative decision.[211] The court went on to address the issue of whether the class action challenging the validity of the regulation, and which requested injunctive and declaratory relief, could nevertheless stand. The court held that Warram could not avail herself of an equitable remedy because an adequate statutory means of review has been provided.[212] Furthermore, Warram, who individually was without a claim, could not represent a class. Thus the trial court erred in not dismissing her entire complaint.[213]

The AAA provides that the fifteen day time period specified in section 4-22-1-14, begins after receipt of notice of the final agency decision.[214] Notice is to be provided in accordance with the provisions of Indiana Code section 4-22-1-6.[215] In *Solar Sources v. Air Pollution Control Board*,[216] the court of appeals held that notice served upon the party's attorney does not meet the notice requirements of section 4-22-1-6 and start the fifteen day period for filing a petition for review.[217] Indiana Trial Rule 5(B),[218] which provides for the service of process upon the attorney of a party in civil litigation, is not applicable to proceedings before administrative agencies.[219] Further, the court regarded section 4-22-1-6 as unambiguous and mandatory language which must be taken at its plain meaning,[220] and would not allow the agency to argue substantial compliance, that is, that it had notified the attorney.[221] The court also considered that the time period was already short enough without adding the additional burden of having an attorney communicate with a client after receiving notice of the agency decision.[222]

In *O'Donaghue v. Review Board of the Indiana Employment*

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[210]414 N.E.2d at 116.

[211]*Id.*

[212]*Id.*

[213]*Id.* at 117.

[214]IND. CODE § 4-22-1-14 (1976).

[215]*Id.* § 4-22-1-6 (1976).

[216]409 N.E.2d 1136 (Ind. Ct. App. 1980).

[217]*Id.* at 1138.

[218]IND. R. TR. P. 5(B).

[219]409 N.E.2d at 1138.

[220]*Id.* at 1139.

[221]*Id.* The court noted that the petitioner was not allowed to argue substantial compliance; it had filed its petition on a Monday when the fifteen day period beginning from the notification of the attorney had ended on the preceding Friday. *Id.* n.3.

[222]*Id.* at 1139.

Security Division,[223] the court, addressing the issue of when the fifteen day period for filing an appeal provided for in Indiana Code section 22-4-17-3 begins to run, held that an unemployment compensation claimant had fifteen days after notification of the referee's decision, not merely fifteen days after the mailing thereof, within which to appeal to the full Review Board.[224] The court felt that its decision was justified by the ambiguous language of section 22-4-17-3,[225] the humanitarian purposes of the Act, and the rule of statutory construction which "seeks to avoid harsh, unjust, or absurd consequences."[226]

Finally, the court of appeals dealt with the appeal process concerning tax assessments in *City of South Bend v. Brooksfield Farm*.[227] Under the statutory scheme existing at that time under Indiana Code section 19-2-7-13, the city's board of public works was to "complete the roll and render its decision as to all the special benefits by modifying or confirming the assessment roll."[228] Its decision as to all benefits was final under then Indiana Code section 18-5-17-1, and not appealable to the courts unless "the owner has filed a written remonstrance with the board."[229] Section 18-5-17-1 also provided that any appeal allowed by law was to be taken by filing a complaint in the appropriate court within thirty days from the date of the challenged decision.[230] Brooksfield Farm sought a declaratory judgment invalidating an assessment made by the city for the construction of a sewer system. Brooksfield Farm alleged that the method of determining the assessment utilized in the proceeding

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[223]406 N.E.2d 1267 (Ind. Ct. App. 1980).

[224]*Id.* at 1267-68.

[225]IND. CODE § 22-4-17-3 (1976) provides in part:

> Unless such request for hearing is withdrawn, a referee, after affording the parties a reasonable opportunity for fair hearing shall affirm, modify or reverse the findings of fact and decision of the deputy. The parties shall be duly notified of such decision and the reasons therefore, which shall be deemed the final decision of the review board, *unless within fifteen (15) days after the date of notification or mailing of such decision*, an appeal is taken by the board or the director or by any party adversely affected by such decision to the review board.

Id. (emphasis added).

[226]406 N.E.2d at 1267. The court relied extensively on an earlier decision interpreting a similar requirement in IND. CODE § 22-4-17-2 (Supp. 1981). *See* Reece v. Review Bd. of the [Ind.] Employment Security Div., 172 Ind. App. 503, 360 N.E.2d 1262 (1977).

[227]418 N.E.2d 305 (Ind. Ct. App. 1981).

[228]IND. CODE § 19-2-7-13 (1976) (repealed 1981) (current version at *id.* § 36-9-21-13, -14) (Supp. 1981)).

[229]IND. CODE § 18-5-17-1 (1976) (repealed 1980) (current version at *id.* § 34-4-17.5-1 (Supp. 1981)).

[230]*Id.*

was defective because it failed to comply with applicable statutory requirements. Brooksfield Farm had filed neither a remonstrance with the board nor its complaint with the court within the thirty day period provided by statute. When the city failed to appear at the trial, the court granted a default judgment and declared the assessment to be invalid. The city appealed the judgment, arguing that the court lacked subject matter jurisdiction to consider the appeal from the board's decision because Brooksfield Farm had not followed the appellate process set forth in the statute.

The court of appeals noted that compliance with statutory requirements is a condition precedent to "review jurisdiction" by the trial court.[231] The court said that the appeal mechanism set forth in the statute was provided solely to challenge the amount of an assessment; it was not applicable to allegations that the statutory proceedings which validate the assessments were defective. As such neither Indiana Code section 19-2-7-13 nor 18-5-17-1 applied because the plaintiff's right to seek appellate review came not from the statutory scheme, but from the court's general ability to issue declaratory judgments.[232]

Presiding Judge Hoffman dissented, arguing that the fifteen day statutory provision which was applicable to "[a]ll appeals now allowed, or which may hereafter be allowed *by law* from any action or decision of the board of public works . . . ,"[233] included those appeals provided for not only by statute but by judicial decision as well.[234] He stated that "to hold that the thirty day limitation of IC 1971 18-5-17-1 does not apply to Brooksfield Farm is tantamount to holding that the pronouncements of the Indiana Supreme Court guaranteeing the right of judicial review are not law in this state."[235] He also expressed concern that the court's decision frustrated the legislative intent to ensure prompt review of agency decisions, which would allow a city to proceed with its projects at the end of the time period without fear of interruption and future suits.[236]

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[231]418 N.E.2d at 307.

[232]The court relied on the Uniform Declaratory Judgment Act, IND. CODE § 34-4-10-1 (1976), for its jurisdiction.

[233]IND. CODE § 18-5-17-1 (1976) (emphasis added) (repealed 1980) (current version at *id.* § 34-4-17.5-1 (Supp. 1981)).

[234]418 N.E.2d at 308. A number of earlier Indiana Supreme Court cases had decided that due process mandates that every decision of an administrative agency be reviewable by a court even if the legislature had failed to specifically provide for it. *See, e.g.*, Dortch v. Lugar, 255 Ind. 545, 266 N.E.2d 25 (1971); Mann v. City of Terre Haute, 240 Ind. 245, 163 N.E.2d 577 (1960); State ex rel. City of Marion v. Grant Cir. Ct., 239 Ind. 315, 157 N.E.2d 188 (1959).

[235]418 N.E.2d at 308.

[236]*Id.* at 309.