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SURVEY

SURVEY OF INDIANA ADMINISTRATIVE LAW

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This Article examines developments in administrative law before the Indiana Supreme Court, the Indiana Court of Appeals, and state agencies from 2020 to 2021. While not a comprehensive review of every administrative decision that occurred during this period, this Article does provide an overview of recent decisions and offers insight into the administrative process and guidance on practicing before the various state agencies.

I. AGENCY ADJUDICATION

A. "At any time" still has limitations.

In *Gilley's Antique Mall v. Sarver*, the Indiana Court of Appeals found that the ability to add additional defendants "at any time after [a] claim has commenced" is still subject to the applicable statute of limitations for bringing the claim.[1] Sarver was employed by Humphreys Construction, who was contracted to replace the roof for Gilley's Antique Mall.[2] Humphreys represented to the owners of Gilley's that Humphreys was fully insured.[3] While working, Sarver was injured after he fell through a foam board on the roof.[4] Sarver broke a rib and developed severe back pain.[5] After the roof was completed, Sarver filed with the Worker's Compensation Board against K&K Group to recover compensation for the injury he suffered when he fell through the roof.[6] A year later, Sarver amended his complaint to include Gilley's.[7] A year after that he added Hines, a part-owner of Gilley's.[8] Gilley's and Hines filed a motion to dismiss since Sarver

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1. 157 N.E.3d 549, 552 (Ind. Ct. App. 2020),
2. *Id.* at 551.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 552.

had failed to add them within the statute of limitations in Ind. Code § 22-3-3-3.[9] The motion to dismiss was granted by a single member; however, the full Board reversed and found that Sarver could add additional defendants at any time under 631 Ind. Admin. Code 1-1-7.[10]

On appeal, the Court found that the Board exceeded its statutory authority.[11] The Court begins with the statute of limitations, which "creates a right of action and has inherent in it the denial of a right of action."[12] However, the Board found that 631 Ind. Admin. Code 1-1-7 allows for joinder of defendants "at any time . . . when it deems the presence of the party necessary."[13] Although courts generally afford agencies great deference in interpreting a statute it enforces, an agency cannot "add to or detract from the law."[14] Therefore, the Board cannot increase the two-year limitation through its own regulations, and Sarver could not add Gilley's and Hines.[15]

B. Decisionmakers are still generally protected from suit.

Those that serve on the various boards and commissions that perform quasi-judicial functions should be comforted in knowing that their actions may be protected. In *Melton v. Indiana Athletic Trainers Board*, 156 N.E.3d 633, 640 (Ind. Ct. App. 2020), Melton filed a complaint for judicial review after her athletic trainer's license was suspended by the Indiana Athletic Trainers Certification Board. She also asserted claims under 42 U.S.C. § 1983 against the Board, the Indiana Professional Licensing Agency ("IPLA"), and the five members of the Board.[16] After the trial court reversed the Board's suspension, the Defendants filed a motion for summary judgment since they were, as relevant here, absolutely immune.[17] The trial court granted summary judgment and Melton appealed.[18]

After first deciding that the Board and IPLA were not "persons" under § 1983, the Court addressed when agency board members have an immunity protecting them from lawsuits.[19] The trial court found that the Board Members "were entitled to both absolute quasi-judicial immunity and qualified immunity."[20] The Court first explains that "[t]he underlying purpose of the

9. *Id.*
10. *Id.*
11. *Id.* at 553.
12. *Id.* (quoting Wawrinchak v. United States Steel Corp., Gary Works, 267 N.E.2d 395, 399-400 (Ind. Ct. App. 1971)).
13. *Id.*
14. *Id.* at 555.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 650.
20. *Id.* at 652.

immunity is to preserve judicial independence in the decision-making process."[21] When non-judicial officers perform quasi-judicial functions, the same rationale grants them absolute immunity.[22] To determine if a person is absolutely immune, the Court only looked at the nature of the function performed.[23] A quasi-judicial function is one in which the official resolves disputes or adjudicates private rights.[24]

The Court reasoned that this approach leads to "two overarching scenarios": either the direct adjudication of rights or carrying out the orders of a judicial officer.[25] The Court held that the Board Members fall within the first category.[26] The Court looked to Supreme Court precedent on granting quasi-judicial immunity to federal administrative agents.[27] In *Butz*, the Supreme Court held that the agency adjudication must "share[] enough of the characteristics of the judicial process" to be entitled to immunity.[28] The Supreme Court found those characteristics were presented when the agency adjudication shared judicial safeguards such as "the need to assure that the person can perform their functions without harassment or intimidation; insulation from political influence; the importance of precedent; the adversarial nature of the process; and the correctability of error on appeal."[29]

Here, the Court first found that an agency's revocation of a state license "is likely to stimulate a litigious reaction."[30] This threat of litigation creates "the need to assure that the person can perform their functions without harassment or intimidation."[31] Second, even though the Board Members are appointed by the governor, they are still insulated from political influence because they are independent decision makers.[32] Third, the Board's decision is reviewable under Ind. Code §§ 4-21.5-5-1 and 4-21.5-5-16.[33] Finally, the Board is also required by Ind. Code § 25-1-9-13 to be consistent and explain any departure from its prior decisions.[34] Therefore, the Court held that members of the Indiana Athletic Trainers Certification Board are entitled to quasi-judicial immunity.[35]

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21. *Id.* (quoting Droscha v. Shepherd, 931 N.E.2d 882, 889 (Ind. Ct. App. 2010)).
22. *Id.*
23. *Id.*
24. *Id.* at 653.
25. *Id.* (quoting D.L. v. Huck, 978 N.E.2d 429, 433 (Ind. Ct. App. 2012)).
26. *Id.*
27. *Id.*
28. Butz v. Economou, 438 U.S. 478, 513 (1978).
29. *Melton*, 156 N.E.3d at 654.
30. *Id.* (quoting Bettencourt v. Bd. of Registration in Med. of Commonwealth of Mass., 904 F.2d 772, 783 (1st Cir. 1990)).
31. *Id.*
32. *Id.*
33. *Id.* at 655.
34. *Id.*
35. *Id.* at 655-56.

C. Decision-makers are not the only ones protected.

In *Abbott v. Individual Support Home Health Agency, Inc.*, employees concerned about their employer's actions found that their complaints to a state agency were privileged. Home Health, which is regulated by the Indiana State Department of Health ("ISDH"), provides treatment to homebound patients.[36] Three employees of Home Health, Tiffany Abbot, Cathie Barnes, and Chandra Gray, (the "Defendants"), reported to the ISDH that Home Health employees had forged their signatures on patient documents.[37] Although the ISDH concluded the reports were unsubstantiated, the Defendants encouraged other employees to make false reports and to quit.[38] Home Health subsequently filed a complaint against the defendants alleging "defamation, tortious interference with a contract, and tortious interference with a business relationship."[39] The Defendants filed a motion to dismiss, arguing "that their statements to the ISDH were absolutely privileged."[40] When the trial court denied the motion to dismiss, the Defendants appealed.[41]

According to the Court, Indiana law recognizes an absolute privilege for "relevant statements made in the course of a judicial proceeding."[42] The Indiana Supreme Court has expanded this privilege to also cover quasi-judicial proceedings when there was an established complaint procedure at a university and deterrents to false reporting.[43]

Here, the ISDH created this complaint procedure to meet its statutory requirements. First, under Ind. Code § 16-27-1-7, the ISDH must adopt rules to "'[p]rotect the health, safety, and welfare of patients' and '[g]overn the procedure for issuing, renewing, denying, or revoking an annual license to a home health agency[.]'"[44] To protect patients and regulate agencies like Home Health, the ISDH relies on employee reports.[45] Furthermore, licensed healthcare professionals are deterred from false reporting because Ind. Code § 25-1-9-4(b) prohibits them from "engag[ing] in fraud or material deception in the course of professional services or activities[.]"[46] Violation of this statute can result in revocation, suspension, or imposition of a fine.[47] Finally, under 848 I.A.C. §§ 2-2-2(1)(11), the ISDH required the Defendants to report substandard care to the ISDH.[48] The

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36. 148 N.E.3d 1091, 1093 (Ind. Ct. App. 2020).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 1093 (quoting Hartman v. Keri, 883 N.E.2d 774, 777 (Ind. 2008)).
43. *Id.* at 1094.
44. *Id.*
45. *Id.*
46. *Id.* at 1095 (quoting IND. CODE § 25-1-9-4(b) (2022)).
47. *Id.*
48. *Id.* at 1096.

Court concludes that:

> Reports of patient injury or substandard care to the ISDH, which result in a "survey" or investigation by the ISDH, are governed by procedures that the ISDH has established pursuant to the Administrative Orders and Procedures Act, IC 4-21.5, as mandated by our General Assembly. *See* Ind. Code § 16-27-1-7.[49]

Therefore, these proceedings are quasi-judicial proceedings and all reports made as a part of those proceedings are protected by absolute privilege.[50]

D. There is a way to almost guarantee that an agency loses its authority over you.

In *Indiana Board of Pharmacy v. Elmer*, the Indiana Court of Appeals found that the Board of Pharmacy has no jurisdiction over a former licensee whose license had expired.[51] Paul J. Elmer was a licensed pharmacist in Indiana but was indicted in 2017 by a federal grand jury in the Southern District of Indiana for misuse of his pharmacy license.[52] A month later, the State filed with the State Pharmacy Board a petition to suspend Elmer's license due to the federal indictment, which the Board granted.[53] Although Elmer appealed his suspension, he failed to renew his pharmacist's license and "his license automatically expired and became invalid pursuant to Indiana Code Section 25-26-13-14(b)" in 2018.[54] A special judge subsequently overturned the Board's decision because it was unsupported by substantial evidence.[55] On April 18, 2019, the Board dismissed the suspension of Elmer's license.[56]

However, after Elmer was found guilty in April 2019, the State filed a complaint to revoke his license under Ind. Code § 25-1-9-4(a)(2)(A) since he "had been convicted of crimes that have a direct bearing on his ability to continue to practice competently."[57] Elmer filed a motion to dismiss since his license had expired and the Board lacked authority to discipline him.[58] The Board denied Elmer's motion to dismiss.[59] On December 19, 2019, the Board revoked Elmer's pharmacist's license.[60] Elmer appealed the Board's decision by filing a petition for judicial review under, as relevant here, the Administrative Orders and

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49. *Id.*
50. *Id.*
51. 171 N.E.3d 1045 (Ind. Ct. App. 2021).
52. *Id.* at 1046-47.
53. *Id.* at 1047.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 1047-48.
58. *Id.* at 1048.
59. *Id.*
60. *Id.*

Procedures Act (AOPA).[61] The trial court granted Elmer's petition for judicial review and found that the Board exceeded its authority.[62] The State appealed.[63]

The Court of Appeals held that the Board's decision was in excess of statutory authority because the applicable statutes do not authorize the Board to revoke an expired, invalid license.[64] The Court emphasized that "[a]n administrative agency has only those powers that the legislature has conferred to it."[65] The Court explained revocation cannot apply to Elmer since "'a pharmacist's license expires biennially . . . unless renewed before that date.'"[66] Furthermore, a license expires without any action by the Board.[67] The Court reasoned that, since Elmer's license was invalid, thus giving it "no legal effect or authority," none of the applicable statutes grants the Board any power over Elmer.[68]

II. SCOPE OF ENABLING STATUTE

A. Like Tom Petty and the Heartbreakers said, "The waiting is the hardest part."

Even the use of the word "shall" in a statute does not necessarily dictate a timeline for a decision. In *Wilson v. Wilkening*, Bowman filed an administrative complaint with the Indiana Civil Rights Commission[69] alleging that he faced "discrimination in the area of real estate on the basis of familial status."[70] The Commission filed an amended complaint against Wilkening for violating the IFHA.[71] However, in violation of Ind. Code § 22-9.5-6-8(b) and (c), the Commission had failed to make its determination of reasonable cause within 100 days or found that it could not determine reasonable cause in 100 days.[72] For this reason, *inter alia*, the trial court granted Wilkening's motion for judgment on the evidence.[73] After the final disposition of the case, the Commission appealed.[74]

On appeal, the Commission argued that the trial court erred because "shall"

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1052.

65. *Id.* (quoting Musgrave v. Squaw Creek Coal Co., 964 N.E.2d 891,902 (Ind. Ct. App. 2012)).

66. *Id.* at 1050 (quoting IND. CODE § 25-26-13-14(a) (2022)).

67. *Id.*

68. *Id.* at 1051.

69. The Author was appointed to the Indiana Civil Rights Commission by Governor Eric J. Holcomb in 2020, although he was not on the Commission at the time of this decision, nor did he participate in the subsequent appeal.

70. Wilson v. Wilkening, 175 N.E.3d 1169, 1171 (Ind. App. 2021),

71. *Id.* at 1172

72. *Id.*

73. *Id.*

74. *Id.* at 1173.

in Ind. Code § 22-9.5-6-8 should be interpreted as directory.[75] The Court had previously found that "shall" is directory when: "(1) the statute fails to specify adverse consequences; (2) the provision does not go to the essence of the statutory purpose; and (3) a mandatory construction would thwart the legislature purpose."[76]

Applying those factors, the Court found that the statute satisfies the first factor.[77] Similarly, since the purpose of the statute is to assure fair housing practices in Indiana, "compliance with the 100-day notice provision does not go to the essence of the statute's purpose."[78] Moreover, the time requirement was meant "to expedite, not preclude, the claims of persons who are discriminated against."[79]

Therefore, dismissal "based simply on the Commission's delay" would thwart the legislative purpose since the purpose of the IFHA is to prevent discrimination, not ensure speedy disposition.[80] The Court concluded that "shall" was directory, and that the Commission is not required to determine reasonable cause within 100 days.[81]

B. Even so, you are entitled to a decision.

In addition to the merits of a case, knowing where to bring the case is also important to obtaining justice. In *Muir Woods Section One Association v. Fuentes*, Muir Woods and Nantucket Bay (the "Homeowners Associations") each filed a complaint in the trial court alleging that they overpaid taxes for tax year 2006 and requesting an order that the Treasurer issue refunds.[82] The Taxing Authorities alleged that the trial court lacked subject matter jurisdiction since the Tax Court had exclusive jurisdiction over tax cases.[83] The trial court granted the motions to dismiss.[84] When the Homeowners Associations appealed, the Court of Appeals affirmed.[85]

The Homeowners Associations filed an amended complaint for mandamus alleging that "the Taxing Authorities had failed to fulfill their statutory duty of issuing rulings upon the Homeowners Associations' claims for refund."[86] The Taxing Authorities again asserted that the trial court lacked subject matter

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75. *Id.* at 1174-75.

76. *Id.* at 1174.

77. *Id.*

78. *Id.* at 1175.

79. *Id.* (quoting United States v. Beethoven Assocs. Ltd. P'ship, 843 F. Supp. 1257, 1262 (N.D. Ill. 1994)).

80. *Id.* at 1175.

81. *Id.* at 1176.

82. 164 N.E.3d 752, 753 (Ind. 2021).

83. *Id.*

84. *Id.*

85. *Id.* at 753-54.

86. *Id.* at 754.

jurisdiction.[87] After the trial court granted the dismissal, the Homeowners Associations appealed.[88]

The Homeowners Association argued that, under Ind. Code § 6-1.1-26, a taxpayer can request a refund for property tax already paid if he files a claim with the county auditor.[89] For the Homeowners Associations, the refund must also be either approved or disapproved by the county auditor, the county treasurer, and the county assessor.[90] If the refund is disapproved by the any of the county officials, the taxpayer can then appeal to the Indiana Board of Tax Review.[91] After the Board of Tax Review, the taxpayer can finally seek review in the Tax Court.[92] Since the Tax Court has final agency review, Ind. Code § 33-26-3-1 requires that the Tax Court make a final determination before the taxpayer can appeal to a district court.[93]

However, the Court explained that since the statute requires a local official to either approve or disapprove and the Taxing Authorities failed to act, the administrative agency "can confer jurisdiction on the trial court to order the agency to act."[94] The Court concluded that the Taxing Authorities conferred jurisdiction, and "any suit to enforce that duty must nonetheless be brought in a court of general jurisdiction because the 'final determination' jurisdictional requirement has not been met in order for the Tax Court to properly assume jurisdiction of the matter."[95]

C. Unless you have waited too long for that decision.

In *Daniels v. Case Review Panel*, the Indiana Court of Appeals determined that the public interest exception to the mootness doctrine does not apply when determining senior-year athletic eligibility for a student that has since graduated from high school.[96] Daniels, a high school wrestler, was found ineligible by the Indiana High School Athletic Association (IHSAA) after he transferred to another school during his senior year for primarily athletic reasons in violation of IHSAA Rule 19-4.[97] Daniels appealed to Case Review Panel (CRP) under Ind. Code § 20-

87. *Id.*

88. *Id.*

89. *Id.* at 755.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 754.

94. *Id.* at 756 (quoting State Bd. of Tax Comm'r v. Mixmill Mfg. Co., 702 N.E.2d 701, 704 (Ind. 1998)).

95. *Id.* at 756-57.

96. Daniels v. Case Review Panel, No. 21A-MI-430, 2021 Ind. App. LEXIS 359, at 11 (Ct. App. Oct. 29, 2021).

97. *Id.* at 4-5.

26-14-6.[98] The CRP upheld the IHSAA's ineligibility decision.[99] Daniels filed a complaint in the trial court for a temporary restraining order, a preliminary and permanent injunction, and declaratory judgment.[100] While the trial court granted the temporary restraining order, it denied the preliminary injunction.[101] Daniels appealed.[102] However, since Daniels had already graduated, the Court found the case to be moot.[103]

Nevertheless, in discussing whether Daniels's case fit within the public interest exception to the mootness doctrine, the Court reemphasized the standard of review to be used for reviewing a CRP decision.[104] Under Ind. Code § 20-26-14-7, the trial court clearly has the authority "to review the facts and issues involved in the CRP's decision."[105] The Court specifically says this is not *de novo* review.[106] Instead, the Court explains the standard of review is "a legislatively promulgated specific and limited standard of review."[107] However, in a footnote, the Court added that the standard of review is also not as highly deferential as the Court had previously held in IHSAA v. Watson.[108] Watson had previously held that the trial court must find that the CRP's decision was arbitrary or capricious to invalidate it.[109] Therefore, the Daniels court held that review of a CRP decision is entirely constrained to the six reasons outlined in Ind. Code § 20-26-14-7.[110] Despite the student's insistence that the issue is in need of judicial clarification, the Court disagreed and found "[i]n other words, just because they say it is so, does not make it so."[111]

CONCLUSION

The decisions made by Indiana's administrative agencies touch all of our lives. These range from issuing licenses, determining if a public utility may build a new power plant or raise its rates on consumers, or deciding whether someone's civil rights have been violated, among other things. While most of these decisions

98. *Id.* at 5.
99. *Id.* at 5-6.
100. *Id.* at *1-2.
101. *Id.* at *2.
102. *Id.*
103. *Id.*
104. *Id.* at 9.
105. *Id.* at 10-11.
106. *Id.* at 11.
107. *Id.*
108. *Id.* at 11-12 n.3 (citing IHSAA v. Watson, 938 N.E.2d 672, 680 (Ind. 2010)).
109. *Id.*
110. *Id.* at 11.
111. *Id.* at 9.

are never appealed, and are often only known to the participants in the proceedings, the opinions of our appellate courts do provide us with an opportunity to look deeper into not only how the agencies make their decisions, but also provide instruction on the elements or factors that should go into the decision-making process. Given the impact that these decisions have on our daily lives, we should continue to study them.