

SURVEY OF INDIANA ADMINISTRATIVE LAW

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INTRODUCTION

With the advent of the “regulatory state,” the work of administrative agencies has grown considerably as they struggle to serve the variety of legislative, executive, and quasi-judicial tasks that are assigned to them. Because administrative agencies are involved in nearly every aspect of the modern legal state, they are confronted by a variety of legal issues in nearly every conceivable field of law. While Indiana’s courts have developed well-settled principles for addressing the questions that arise out of administrative proceedings, it is important to review how those principles continue to be applied in an ever-shifting legal environment. The purpose of this survey article is, therefore, to provide a brief overview of how Indiana’s courts have addressed and adapted to the continually changing challenges presented by the State’s administrative agencies.

I. JUDICIAL REVIEW

A. *Standard of Review*

In most instances, judicial review of administrative actions is strictly limited and highly deferential. Several cases during the survey period help to illustrate the basic nature of judicial review of agency actions and some of its limitations.

Eastern Alliance Insurance Group v. Howell involved an appeal by a workers’ compensation insurer of a determination that it had acted with a “lack of diligence” in handling a worker’s compensation claim.¹ In the case, Elizabeth Howell suffered an injury while working for her employer in June 2005 and later suffered an aggravation of the injury in February 2007.² For most of that period, Eastern provided workers’ compensation insurance to Howell’s employer, but Eastern was replaced in October of 2006.³ Following the aggravation of her injury, Howell applied to both Eastern and her employer’s new carrier for medical compensation; however, a dispute between the two insurance companies prevented Howell from receiving compensation for nearly two and a half years.⁴ Ultimately, she “filed a an application for adjustment of claim for worker’s compensation benefits,” and following a hearing, the full Workers’ Compensation Board (the “Board”) issued a ruling finding, in part, that Eastern had acted with a “lack of diligence” in “adjusting or settling the claim for compensation.”⁵ The

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1. *E. Alliance Ins. Grp. v. Howell*, 929 N.E.2d 922 (Ind. Ct. App. 2010), *reh’g denied*.

2. *Id.* at 924.

3. *Id.*

4. *Id.*

5. *Id.* at 924-26.

Board thus imposed a penalty on Eastern for its lack of diligence, and Eastern appealed.⁶

In stating the standard of review, the court reiterated the longstanding process that is applicable to decisions of the Board; specifically, the record is first reviewed to “determine if there is any competent evidence of probative value to support the Board’s findings”, and then the court assesses “whether the findings are sufficient to support the decision.”⁷ In doing so, the court will “not reweigh the evidence or assess witness credibility.”⁸ In this case, an additional issue was presented for review, as the most central question in the appeal turned on whether the Board had properly interpreted Indiana Code section 22-3-4-12.1(a), which grants the Board authority to determine whether an insurer has “acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling a claim for compensation.”⁹ In addressing that question, the court recognized that on a question of interpretation of a statute the Board is charged with enforcing, the court “employs a deferential standard of review . . . in light of . . . [the agency’s] expertise in the given area.”¹⁰ Eastern contended that a penalty for “lack of diligence” should not be assessed when the insurer is ultimately proven not to be responsible for the payment of the benefits.¹¹ In essence, Eastern sought to “conflate[] ‘lack of diligence’ with ‘bad faith.’”¹²

The court, however, disagreed. As it noted, there is a distinction between “bad faith,” which requires some evidence of conscious wrongdoing, and “lack of diligence,” which does not require such a conscious act, but merely the “failure to exercise the attention and care that a prudent person would exercise.”¹³ Further, the court noted that the legislature had created a statutory distinction between “lack of diligence” and “bad faith” so that to adopt the position held by Eastern would “merge the two concepts and obviate the distinction.”¹⁴ Therefore, the court concluded that the Board had properly interpreted the statute.¹⁵

Nevertheless, the court also considered whether the Board’s conclusion that Eastern acted with a “lack of diligence” was supported by the evidence. In doing so, the court reviewed the Board’s findings and found that the Board’s conclusions were “not supported by the Board’s own findings.”¹⁶ Specifically, the court noted that Eastern “investigated the claim, reasonably determined that it had no liability in the matter, and even offered to split Howell’s medical costs

6. *Id.* at 925.

7. *Id.* (citing *Triplett v. USX Corp.*, 893 N.E.2d 1107, 1116 (Ind. Ct. App. 2008)).

8. *Id.* at 925-26.

9. *Id.* at 925 (quoting IND. CODE § 22-3-4-12.1(a) (2010)).

10. *Id.* at 926 (quoting *Christopher R. Brown, D.D.S., Inc. v. Decatur Cnty. Mem’l Hosp.*, 892 N.E.2d 642, 646 (Ind. 2008)).

11. *Id.*

12. *Id.* at 927.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 927-28.

with . . . [the new insurer].”¹⁷ These facts, the court concluded, established that Eastern had acted prudently and without a lack of diligence, and that therefore, the Board’s determination was contrary to law.¹⁸

Several interesting questions arose concerning the scope of judicial review in *Developmental Services Alternatives, Inc. v. Indiana Family & Social Services Administration*.¹⁹ Developmental Services Alternatives (DSA) purchased “sixteen intermediate care facilities for the mentally retarded” in June 2002.²⁰ After the purchase, DSA submitted the facilities’ Medicaid cost reports to the FSSA for rate-setting.²¹ The FSSA’s contractor, a company called Myers & Stauffer, LLC (“Myers”), subsequently issued a rate determination that excluded DSA’s “intangible assets” from its “capital return factor.”²² This, in turn, had an effect on the Medicaid reimbursement rates the facilities would receive, and DSA submitted a request for reconsideration to Myers, who reversed its initial disallowance and recalculated the capital return factor and reimbursement rates.²³

Another FSSA contractor, Clifton Gunderson, LLP, however, conducted its own audit of DSA and issued a preliminary report disallowing the intangible assets on January 7, 2005—after Myers reversed its disallowance.²⁴ Clifton Gunderson issued its final audit report on April 19, 2005 and subsequently issued a rate change notice based on the disallowed assets.²⁵ DSA then sought review through the FSSA’s appeals process, which upheld the disallowances, and ultimately sought judicial review of the final order.²⁶

On appeal, DSA raised a myriad of issues, but several are particularly interesting. First, DSA argued that the ALJ’s order violated the principles of res judicata and collateral estoppel “because Myers’s rate determination constituted a final agency action . . . thereby barring Clifton Gunderson’s subsequent rate adjustment.”²⁷ The court of appeals rejected this argument, noting that the Myers rate calculations were not final agency actions within the meaning of Indiana Code section 4-21.5-1-6.²⁸ As the court noted, under that code provision, an order is final only if it is designated as final or if it “disposes of all issues in a proceeding for all parties after the exhaustion of all available administrative remedies available concerning the action.”²⁹ Because DSA had recourse to further administrative remedies after the Myers rate determinations, the court

17. *Id.* at 928.

18. *Id.*

19. 915 N.E.2d 169 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 784 (Ind. 2010).

20. *Id.* at 173.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 174.

26. *See id.* at 174-76.

27. *Id.* at 178.

28. *Id.* at 179.

29. *Id.*

concluded that those determinations were not final agency actions.³⁰

In a somewhat related argument, DSA asserted that the reasons given by Clifton Gunderson for disallowing the intangible assets were not the same as those as contained in its preliminary report.³¹ Accordingly, DSA claimed that the ALJ's determination, which relied on the Clifton Gunderson final report, was based on post hoc rationalizations and therefore subject to reversal as being "arbitrary, capricious and in violation of legal principles."³² In rejecting this argument, the court closely examined the grounds for, and application of, the general rule that an agency cannot offer post hoc rationalizations to support its decision once the process of judicial review has begun. In doing so, the court properly noted that the rule is a corollary to another well-established rule of administrative review: that the judiciary is confined to the agency record and cannot substitute its own conclusions if the agency's basis is groundless.³³ This implies that an administrative decision must stand or fall on its own merits and cannot be supplemented through surprise by articulating a new basis for its decision that could have been previously asserted, which in turn promotes considered decisionmaking by the agency.³⁴

Recognizing that DSA was not challenging a post hoc rationalization offered to the trial court, but asking that the rule be applied to an agency "*before an agency has issued a final order* and to the agency decisionmaking process itself," the court firmly rejected DSA's contention.³⁵ In doing so, it concluded that such an application would mean that an agency would "have only one chance of getting the right answer and would have no opportunity for fully exploring all the ramifications of an action," which would obviously serve to frustrate the entire decisionmaking process itself.³⁶ Thus, while the court recognized that an agency could not offer post hoc rationalizations during judicial review (and a court could not consider such rationalizations), it also recognized that an agency itself, in formulating its final order, was not precluded from considering new or revised bases for its decisions.

B. Procedural Compliance to Obtain Judicial Review

The Indiana Supreme Court recognizes that Hoosiers have a constitutional right to judicial review of actions taken by administrative agencies.³⁷ In most instances, however, access to judicial review is limited by statute or other common law requirements. For example, although it does not apply to all of the

30. *Id.* at 180.

31. *See id.* at 183-84.

32. *Id.* at 183.

33. *Id.* at 187.

34. *See id.* at 186 (citing *Word of His Grace Fellowship, Inc. v. State Bd. of Tax. Comm'rs*, 711 N.E.2d 875, 878-79 (Ind. Tax. Ct. 1999)).

35. *Id.* at 187.

36. *Id.* at 189.

37. *Ind. Dep't of Highways v. Dixon*, 541 N.E.2d 877, 880 (Ind. 1989).

state's administrative bodies, Indiana's Administrative Orders and Procedures Act (AOPA) establishes the requirements a party must comply with in order to obtain judicial review.³⁸ These requirements including the general conditions under which judicial review is available;³⁹ who has standing to seek judicial review;⁴⁰ the time for filing a petition;⁴¹ the procedures for filing a petition for review;⁴² and the standard of review a court is to apply in reviewing an agency action.⁴³ Although these requirements are well-entrenched, in many cases courts are called upon to decide whether a party has met the preconditions for judicial review and is therefore entitled to review of the agency's action by a court.

C. Exhaustion of Administrative Remedies

One requirement that must typically be fulfilled before a party is entitled to judicial review is that she exhaust her administrative remedies before seeking relief in the courts.⁴⁴ The Indiana Supreme Court decision in *Carter v. Nugent Sand Co.*⁴⁵ illustrates that point, as the court dismissed a case based on the party's failure to exhaust its administrative remedies.

Nugent Sand Co. involved a situation in which the Nugent Sand Company ("Nugent") challenged conditions imposed on a permit issued by the Indiana Department of Natural Resources (DNR). In May of 1999, Nugent leased a substantial portion of land near the Ohio River that it intended to use in its business of "salt, sand, and gravel stockpiling and transportation."⁴⁶ As part of

38. Several agencies, including the Indiana Utility Regulatory Commission, the Indiana Department of Workforce Development, the Indiana Unemployment Review Board, and the Indiana State Board of Accounts, are expressly exempted from the AOPA. See IND. CODE § 4-21.5-2-4 (2011). Likewise, certain types of agency actions, such as an action "related to an offender within the jurisdiction of the department of correction," are expressly exempted from the terms of the AOPA as well. See *id.* § 4-21.5-2-5(6).

39. *Id.* § 4-21.5-5-2.

40. *Id.* § 4-21.5-5-3.

41. *Id.* § 4-21.5-5-5.

42. *Id.* §§ 4-21.5-5-6 to -8.

43. *Id.* § 4-21.5-5-14. A reviewing court can only set aside an agency decision if it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law; or

(5) unsupported by substantial evidence.

Id. § 4-21.5-5-14(d).

44. See, e.g., *Advantage Home Health Care, Inc. v. Ind. State Dep't of Health*, 829 N.E.2d 499, 503 (Ind. 2005).

45. 925 N.E.2d 356 (Ind. 2010).

46. *Id.* at 358.

its business, Nugent acquired permits from the Army Corps of Engineers as well as the DNR to construct a channel that would connect a large, man-made body of water located on the leased property with the Ohio River.⁴⁷ One of the conditions imposed by the DNR on the permit was that the Nugent “dedicate any water created to general public use.”⁴⁸

Sometime later, boaters began to enter the man-made lake through the channel that Nugent had constructed in order to allow its barges access to the Ohio River.⁴⁹ The boaters began to cause significant problems for Nugent’s operations as they obstructed barge traffic and led third-party barge operators to decline to work for Nugent.⁵⁰ After its own efforts failed to restrict the entry of the public into the channel, Nugent contacted the DNR, which informed Nugent that it considered the channel public and that it “did not intend to take action.”⁵¹ Eventually, Nugent filed a complaint seeking a declaration that the lake and the channel were private and an injunction preventing the DNR from stating that the water was open to the public.⁵² Despite a motion to dismiss by the DNR stating that Nugent had failed to exhaust its administrative remedies, the trial court ultimately granted summary judgment in Nugent’s favor.

The Indiana Supreme Court, however, considered the exhaustion issue to be dispositive in the case.⁵³ Despite Nugent’s argument that it had no notice of the need to invoke an administrative process, the DNR argued that the permit issued to Nugent clearly specified the conditions under which it was being granted and notified Nugent of its procedural remedies should it dispute one of those conditions.⁵⁴ The DNR also noted the existence of another administrative code provision which allowed Nugent to seek a “Quasi-declaratory judgment” in order to determine whether the conditions were applicable to Nugent’s specific case.⁵⁵

The supreme court concluded that unlike a situation where no administrative process existed, Nugent did have access to an administrative process to challenge the terms of the conditions.⁵⁶ Moreover, the court rejected the contention that Nugent lacked notice of the need to invoke administrative review, as “the terms imposed by DNR, ‘requiring all additional waters created by this project be dedicated to the public . . .’ were explicitly set forth” in the permits.⁵⁷ The supreme court also rejected Nugent’s contention that the trial court had discretion to retain or dismiss the case based on the decision in *Scales v. State*, 563 N.E.2d 664 (Ind. Ct. App. 1990), in which the court of appeals affirmed the dismissal of

47. *Id.*

48. *Id.* (quoting IND. CODE § 14-29-4-5(2)).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 359.

53. *See id.*

54. *Id.* at 359-60.

55. *Id.* at 360.

56. *Id.* at 360-61.

57. *Id.* at 361.

a declaratory judgment action brought while an administrative proceeding was already pending.⁵⁸ In rejecting this argument, the supreme court noted that while *Scales* set out an appropriate standard of review, the case stood for the larger proposition that courts should not “entertain requests for declaratory relief ‘if the result is to bypass available administrative procedures.’”⁵⁹ Regarding Nugent’s case, the court recognized that the declaratory judgment action was an attempt to bypass the available administrative remedies which were “ignored a decade ago” and therefore concluded that dismissal was the “appropriate outcome here.”⁶⁰

Although *Nugent Sand* illustrates the serious consequences that can arise if a party fails to exhaust administrative remedies before seeking judicial review of agency actions, there are certain circumstances when a party will be excused from doing so. The case of *Koehlinger v. State Lottery Commission*⁶¹ illustrates one such situation.

In that case, Mr. Koehlinger, on his own behalf and as a class representative, sued the State Lottery Commission of Indiana (the “Commission”) on a number of grounds related to the Commission’s handling of a scratch-off game called “Cash Blast.”⁶² The basis of the complaint arose from the fact that the Commission was forced to replace roughly two and a half million Cash Blast tickets due to a defect.⁶³ Although the Commission replaced the defective tickets, an error in its computer system for tracking unclaimed prizes treated the replacements as though they were new tickets.⁶⁴ This resulted in a subsequent error—namely, that the Commission’s website overstated the number of outstanding and unclaimed prizes available.⁶⁵ Mr. Koehlinger specifically wrote to the Commission requesting that his letter be treated as a request for administrative remedy or, alternatively, that if he needed to “complete some form other than this letter in order to invoke that procedure, [to] please send . . . [him] any such form.”⁶⁶ Despite his request, the Commission did not notify him of any available administrative remedy.⁶⁷ Similarly, other purchasers of Cash Blast tickets contacted the Commission to complain or otherwise request corrective action, and they were similarly not initially informed of an administrative process through which their complaints could be registered.⁶⁸ Eventually, however, the Commission instituted a program through which certain purchasers of Cash Blast tickets could redeem the ticket for a coupon to purchase another ticket.⁶⁹

58. *Id.* (citing *Scales v. State*, 563 N.E.2d 664, 665 (Ind. Ct. App. 1990)).

59. *Id.* (quoting *Scales*, 563 N.E.2d at 666-67).

60. *Id.* (internal citation omitted).

61. 933 N.E.2d 534 (Ind. Ct. App. 2010), *trans. denied*.

62. *Id.* at 536.

63. *Id.*

64. *Id.*

65. *Id.* at 536-37.

66. *Id.* at 537.

67. *Id.*

68. *Id.*

69. *Id.*

At roughly the same time that the Commission instituted its redemption program, Mr. Koehlinger brought suit against the Commission. Both parties eventually moved for summary judgment, which the trial court granted in favor of the Commission.⁷⁰ Despite prevailing at the trial court, the Commission contended on appeal that the trial court had erred in failing to grant it summary judgment on the grounds that the plaintiffs had not exhausted their administrative remedies before seeking judicial relief.⁷¹ In analyzing that contention, the court of appeals recognized the “strong bias” in favor of requiring the exhaustion of administrative remedies before permitting judicial review.⁷² However, the court also acknowledged that there are exceptions to that rule, including situations where the remedy is inadequate or would be futile to pursue.⁷³

In this case, the court expressed concern over whether an administrative remedy existed at all. As it stated, the “designated evidence contains myriad examples of persons attempting to contact the [l]ottery . . . and there is no indication that any of these contacts was successful in initiating any kind of administrative process.”⁷⁴ Thus, the court concluded that “the [l]ottery had no mechanism for addressing player concerns of this type at the time, leaving us in grave doubt as to the availability of an administrative remedy.”⁷⁵ The court of appeals was also not persuaded that the Commission’s decision to implement a redemption program was sufficient to create an administrative remedy for exhaustion purposes. While generally recognizing the value of allowing an agency to “correct its own errors” as a reason for requiring exhaustion, the court noted that “[i]f we allowed agencies to fashion post hoc remedies, however, it is difficult to see where it would all end; all an agency would ever have to do to avoid litigation or final resolution of any dispute would be to devise yet another ‘remedy’ to be exhausted.”⁷⁶ Stating that the “ship ha[d] sailed” with respect to the Commission’s ability to correct its error, the court ultimately concluded that the trial court had not erred in refusing to grant the Commission summary judgment on the basis of failure to exhaust administrative remedies.⁷⁷

70. *Id.* at 538.

71. *Id.* at 538-40. Although not explicitly stated in the opinion, it is not difficult to understand why the Commission might choose to pursue this particular claim. The failure to exhaust administrative remedies is not merely a procedural defect that can be waived or otherwise remedied. It is, rather, an issue of subject matter jurisdiction so that if the plaintiffs had failed to exhaust their administrative remedies, the trial court could not hear their claims in the first place. *See, e.g.*, *Austin Lakes Joint Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644 (Ind. 1995) (stating that if a party fails to exhaust its administrative remedies when required to do so, a reviewing court is “ousted” of subject matter jurisdiction to hear the claim).

72. *Koehlinger*, 933 N.E.2d at 538 (citing *Austin Lakes Joint Venture*, 648 N.E.2d at 649).

73. *Id.* (citing *Smith v. State Lottery Comm’n*, 701 N.E.2d 926, 931 (Ind. Ct. App. 1998)).

74. *Id.* at 539.

75. *Id.*

76. *Id.* at 540.

77. *Id.* at 540.

D. Filing an Administrative Appeal in a Timely Manner

As with the exhaustion requirement, compliance with other administrative procedures can jeopardize a party's right to review of an agency action. Such was the case in *T.C. v. Review Board of the Indiana Department of Workforce Development*.⁷⁸ In that case, the Indiana Family and Social Services Administration (FSSA) terminated the employment of T.C. in April 2009.⁷⁹ T.C. subsequently applied for, and was denied, unemployment benefits by the Indiana Department of Workforce Development ("Department").⁸⁰ The Department mailed a notice of that denial on July 15, 2009.⁸¹ Included in that mailing was information concerning how T.C. could appeal the decision of the Department's appeals division, and specifically the instruction that T.C. had to file that appeal "within the statutorily required thirteen (13) day time limit" from the date the determination was mailed.⁸²

After receiving the denial, T.C. filed a pro se appeal on July 29, 2009, arguing only that the original determination was improper and that she was seeking employment.⁸³ On August 10, 2009, the administrative law judge (ALJ) dismissed the appeal for lack of jurisdiction on the ground that T.C. had failed to file a timely appeal.⁸⁴ On August 17, 2009, T.C., again acting pro se, appealed the ALJ's determination to the full Review Board; again, she only asserted that the original denial of her claim was improper and that she was seeking employment.⁸⁵ This appeal was also dismissed.

T.C. subsequently sought review by the court of appeals, arguing that the Review Board erred in affirming the ALJ's dismissal based on the untimely filing of her appeal.⁸⁶ The court agreed with the Review Board that despite her status as a pro se litigant, this argument, which had not been raised in T.C.'s appeal to the full Review Board, was waived.⁸⁷ The court of appeals, however, addressed T.C.'s secondary contention that the Review Board improperly determined that the appeal was untimely.⁸⁸ In doing so, the court reiterated that "[w]here a statute is silent as to the method of computing time, Indiana Trial Rule 6(A) applies."⁸⁹ Therefore, the court concluded that the original appeal was due on July 28, 2009—or the day before T.C. filed her appeal with the appeals division—and

78. 930 N.E.2d 29 (Ind. Ct. App. 2010).

79. *Id.* at 30.

80. *Id.*

81. *Id.*

82. *Id.* (internal citation omitted).

83. *Id.* at 31.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 32 (citing *Bright PCS/SBA Commc'ns v. Seely*, 753 N.E.2d 757, 758 (Ind. Ct. App. 2001)).

further, that there was sufficient evidence in the record to support that conclusion.⁹⁰ Accordingly, the court of appeals affirmed the Review Board's dismissal of the appeal.

E. Timely Filing of the Agency Record

Another requirement that can preclude judicial review of an agency action is the timely filing of the agency record. Several cases during the survey period addressed the effect of noncompliance with this requirement on a party's access to judicial review.

The first case, *Mosco v. Indiana Department of Child Services*,⁹¹ arose out of a state investigation by the Indiana Department of Child Services (DCS) into Mosco, a licensed child care worker, and the allegation that she had spanked a child in her care.⁹² After an ALJ determined that the "alleged victim" was a "child in need of services," Mosco sought judicial review of DCS's determination.⁹³ That petition was filed on March 20, 2009, and on May 7, 2009, DCS moved to dismiss the case on the grounds that Mosco had failed to timely file the agency record.⁹⁴ The trial court ultimately granted that motion and dismissed the case.⁹⁵

On appeal, Mosco argued that she had "substantially complied"⁹⁶ with the requirements set forth in Indiana Code section 4-21.5-5-13, which, in relevant part, requires a petitioner seeking judicial review to transmit to the reviewing court the agency record within thirty days of filing the petition.⁹⁷ Although Mosco argued that her petition had sufficient documentation to permit judicial review of the agency action, the court of appeals disagreed. Noting that the ALJ's determination relied upon a hearing and the exhibits that were admitted during the course of the hearing, the court noted that the material attached to Mosco's petition for judicial review did not include all the material relied upon by the agency as required by statute.⁹⁸ As the court of appeals concluded, "in order to for the trial court to review the ALJ's findings, Mosco's agency record needed to include the transcript of the hearing and the admitted exhibits . . ."⁹⁹ Because that material was not presented to the trial court, the court could not review the agency action, and therefore, the court of appeals concluded that Mosco had not "substantially complied" with the filing requirements.¹⁰⁰

90. *Id.* at 32-33.

91. 916 N.E.2d 731, 732 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

92. *Id.* at 732.

93. *Id.* at 732-33.

94. *Id.* at 733.

95. *Id.* at 736.

96. *Id.* at 733.

97. IND. CODE § 4-21.5-5-13 (2011).

98. *Mosco*, 916 N.E.2d at 735.

99. *Id.*

100. *Id.* at 735-36.

The Indiana Supreme Court also addressed the question of whether a party had “substantially complied” with the requirement to file the agency record in *Indiana Family and Social Services Administration v. Meyer*.¹⁰¹ In that case, following the death of her husband, Alice Meyer formed a trust for the benefit of her descendants and provided the trust with a remainder interest in her family farm.¹⁰² Subsequently, Meyer sought Medicaid benefits but was denied based on her failure to “spend down” her assets.¹⁰³ Meyer sought a hearing with an ALJ, but she died before the process could be completed.¹⁰⁴ The trust continued the review process, and the ALJ ultimately issued a ruling assigning a value to the farm and imposing a penalty period that the trust disputed.¹⁰⁵ As the supreme court summarized the dispute, the “crux of the [t]rust’s argument” was that the ALJ and the FSSA, improperly calculated the value of the remainder, which imposed a longer penalty period than was appropriate.¹⁰⁶

The trust filed a petition for judicial review on December 8, 2006, and on January 5, 2007, it requested an extension of time to file the agency record.¹⁰⁷ Although this extension and a subsequent extension were granted, giving the trust until March 5, 2007 to file the agency record, the trust failed to file by that time.¹⁰⁸ On March 15, 2007, the FSSA admitted that it had erred in calculating the value of the remainder interest in the farm; but, roughly a month later, the FSSA sought to dismiss the case based on the trust’s failure to timely file the agency record.¹⁰⁹ The trust then requested and received permission to file the record belatedly.¹¹⁰ Ultimately, the trial court denied the motion to dismiss and ordered the FSSA to recalculate the penalty period using the proper value of the remainder interest in the farm.¹¹¹

The supreme court first addressed the question of whether a trial court could grant a motion for extension of time to file the agency record after the time for filing had passed. Looking at the statute, the court concluded that “the statute is clear. The statute places on the petitioner the responsibility to file the agency record timely . . . [and] does not excuse untimely filing or allow *nunc pro tunc* extensions.”¹¹² The court thus held that the trial court had erred in granting the extension after the March 5 deadline had passed.¹¹³

Nevertheless, the court then addressed the trust’s contention that filing the

101. 927 N.E.2d 367 (Ind. 2010).

102. *Id.* at 368.

103. *Id.*

104. *Id.*

105. *Id.* at 368-69.

106. *Id.* at 369.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 370.

113. *Id.* at 371.

full record was not necessary because the record presented to the agency was sufficient to permit judicial review of the salient question.¹¹⁴ On this point, the court agreed, stating that the “documents attached to the [t]rust’s timely petition for judicial review, taken together with [the] FSSA’s answer, were sufficient to decide the principal issue presented for judicial review.”¹¹⁵ As the court noted, although the filing of only select portions of the agency record is usually insufficient, “imperfect compliance with the filing requirement is not always fatal. A petition for review may be accepted if the materials submitted provide the trial court with ‘all that is necessary . . . to accurately assess the challenged agency action.’”¹¹⁶ The court thus concluded that due to the FSSA’s admission of error in calculating the value of the remainder interest, “there was nothing needed to resolve the valuation of the remainder interest beyond facts established by the petition and answer,” and that therefore, the trial court had properly denied the motion to dismiss.¹¹⁷

Chief Justice Shepard, with Justice Dickson, dissented with regard to whether “a petitioner can obtain judicial review under [the] AOPA without filing a certified record at all.”¹¹⁸ The Chief Justice emphasized that there was “little ambiguity on this aspect of [the] AOPA” and that he would “simply say that we ought to enforce the statute”¹¹⁹ This led the Chief Justice to question, apparently, the concept of “substantial compliance” with the filing requirement. As Chief Justice Shepard stated, “[w]hether under some theory a judicial review might proceed with a minimalist record, such a concept is plainly a slippery slope, setting in motion regular satellite litigation . . . in which private citizens and the taxpayers will spend time and money contesting whether a record is ‘complete enough.’”¹²⁰

Whether “substantial compliance” with the filing requirement remains a viable option after the *Meyer* case is yet to be decided. Nevertheless, both *Meyer* and *Mosco* illustrate the potential danger in failing to fully comply with the statute, and caution should be used in deciding whether to rely only on the documents “necessary” for judicial review rather than filing the complete agency record.

II. SCOPE AND EFFECT OF AGENCY ACTIONS

A. Breadth of Agency Authority

By nature, administrative agencies are statutory creations. Thus, it is axiomatic that they possess and can exercise only those powers that are conferred

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 372.

118. *Id.* (Shepard, C.J., dissenting).

119. *Id.*

120. *Id.* at 374.

upon them by the Indiana General Assembly. During the course of the survey period, a number of cases addressed whether an agency was entitled to act or whether its actions were consistent with its statutory mandate.

One such case was the Indiana Supreme Court's decision in *Leone v. Indiana Bureau of Motor Vehicles*.¹²¹ *Leone* arose out of the assertion that the Indiana Bureau of Motor Vehicles ("Bureau" or BMV) had overstepped its statutory authority by defining a person's "legal name" as the name on file with the Social Security Administration.

Beginning in May of 2007, the Bureau began sending notices to persons with discrepancies between the information contained on file with the Social Security Administration (SSA) and its own records.¹²² Among those who received those notices were a group of persons whose names did not match those on file with the SSA; these persons were notified that the failure to correct the discrepancy could result in the invalidation of their driver's licenses, and provided information on how to update or correct the information.¹²³ Second and third notices were sent to those persons who did not correct the information within the allotted time frame.¹²⁴

After the issuance of the second notice, Ms. Lyn Leone (ultimately joined by a number of other named plaintiffs), filed suit against the BMV seeking a declaration that the Bureau's actions were unlawful and entry of a preliminary injunction against enforcement of the policy.¹²⁵ Ms. Leone, like the other members of the certified class, had a name on her driver's license that did not match the name on file with the SSA.¹²⁶ After a hearing, the trial court denied the motion for preliminary injunction, and the matter was taken on interlocutory appeal.¹²⁷

In addressing the matter on appeal, the supreme court focused on whether the plaintiffs had established the requirements necessary for the issuance of a preliminary injunction and specifically, whether they had demonstrated a reasonable likelihood of success on the merits. On this issue, the plaintiffs, in part, argued that the "requirement that their names should match those found on their Social Security documentation established a new requirement contrary to Indiana law."¹²⁸

This dispute centered largely on whether the BMV had exceeded its statutory authority by defining "full legal name" to mean an "individual's first name,

121. 933 N.E.2d 1244 (Ind. 2010).

122. *Id.* at 1246.

123. *Id.* at 1246-47.

124. *Id.* at 1247.

125. *Id.*

126. *Id.* at 1247-48. Ms. Leone apparently received the notice from the BMV because although she uses the name "Lyn Leone" on her driver's license and has been known by that name during her adult life, her birth certificate and Social Security records list her name as "Mary Lyn Leone." *Id.* at 1247.

127. *Id.* at 1248.

128. *Id.* at 1249 (citation omitted).

middle name or names, and last name or surname, without the use of initials or nicknames.”¹²⁹ The BMV had adopted this rule because changes to the Indiana Code required that after December 31, 2007, any application for a driver’s license or identification card must include the “full legal name of the applicant.”¹³⁰ The Indiana Code further required the BMV to keep information on approved applications and to suspend or revoke driving privileges and identification cards of persons believed to have obtained the licenses or cards through fraudulent documentation.¹³¹ To facilitate this, the BMV required that names submitted with an application match those on a person’s SSA information.¹³²

The appellants argued that the Bureau had exceeded its authority by “redefining” the term “full legal name” and requiring that its records and those of the SSA match.¹³³ As the court summarized this position, “in . . . the absence of a stated definition, the statute incorporates the common law definition of a name,”¹³⁴ which Indiana common law allows a person to change freely. The court recognized that an agency ““may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law.””¹³⁵ Therefore, it engaged in a lengthy examination of whether the common law entitled a person to informally change his name and would require the state to recognize such a change.¹³⁶

The court ultimately concluded that even though “Hoosiers still may refer to themselves by any name they like,” courts “have a unique power to certify a name change.”¹³⁷ In other words, the supreme court concluded that a person does not have the power to “demand that government agencies begin using their new names without a court order.”¹³⁸ This led the court to the ultimate conclusion that statutes requiring “some formality” in applying for identification “neither obliterate common-law usage[,] nor are they driven by them.”¹³⁹ Based on this conclusion and the fact that the Indiana General Assembly anticipated the use of Social Security information to validate and verify identities, the court also concluded that BMV was “within its authority to depend on Social Security to maintain [a]ppellants’ verifiable names.”¹⁴⁰

129. *Id.* at 1249-50 (citing 170 IND. ADMIN. CODE 7-1.1-1(t)). This provision of the Administrative Code has since been repealed.

130. *Id.* at 1249 (citing IND. CODE §§ 9-24-16-2(b) & 9-14-9-2(b) (2011)).

131. *Id.* at 1250.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1250 (quoting *Lee Alan Bryant Health Care Facilities v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003)).

136. *Id.* at 1251-54.

137. *Id.* at 1254.

138. *Id.*

139. *Id.*

140. *Id.* at 1255.

Similarly, in *LaGrange County Regional Utility District v. Bubb*,¹⁴¹ the Indiana Court of Appeals addressed the scope of the Indiana Utility Regulatory Commission's (IURC) authority to issue an order after an "untimely" investigation into a petition for relief. The *LaGrange* decision had its genesis in March 2006, when the Bubbs filed a petition with the IURC's appeals division (CAD) under what was then a new statute that provided campground owners the right to petition the IURC for review of rate increases imposed by regional sewer districts.¹⁴² Despite early communication between the attorney for LaGrange and the IURC, it was not until a year after the petition was filed that the IURC's CAD informed the parties that it would conduct a review of the complaint pursuant to that statute (Indiana Code section 13-26-11-2.1.)¹⁴³

Roughly a month after the CAD informed the parties it would be conducting a review of the petition, LaGrange filed a motion to dismiss, asserting that because the IURC had not conducted a timely investigation, the agency had lost jurisdiction over the matter.¹⁴⁴ That motion was denied in May 2007, but the CAD did not issue its informal disposition until November 21, 2008—roughly thirty-two months after the initial petition was filed.¹⁴⁵ LaGrange appealed to the full IURC, arguing that the agency lacked jurisdiction over the dispute because of its failure to act in a timely manner.¹⁴⁶ The IURC ultimately determined that an agency rule which required action on certain petitions to be reviewed within twenty-one days did not apply and that the IURC retained jurisdiction over the dispute, as the CAD had acted within the scope of the statute.¹⁴⁷

On appeal, LaGrange raised two main arguments in support of its contention that the IURC had acted outside the scope of its authority. First, it pointed to title 170, rule 8.5-2-5 of the Indiana Administrative Code (pursuant to which LaGrange claimed the CAD had informed it the proceeding would be conducted), which required that the CAD conduct reviews of disputes with sewage disposal companies within twenty-one days.¹⁴⁸ The IURC determined that the rule did not apply because it governed sewage disposal companies, whereas LaGrange was a regional sewer district and, therefore, a political subdivision not encompassed by the rule.¹⁴⁹ The court of appeals agreed and went on to conclude that the IURC was not estopped from arguing that the rule was inapplicable because no significant evidence of record supported the contention that the CAD had represented that the rule would apply. Furthermore, the court was persuaded by LaGrange's inability to demonstrate any prejudice that arose from the failure to

141. 914 N.E.2d 807 (Ind. Ct. App. 2009).

142. *Id.* at 809.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 809-10.

147. *Id.* at 809, 815.

148. *Id.* at 810. 170 IND. ADMIN. CODE 8.5-2-5 has since been repealed.

149. 914 N.E.2d at 810-11.

apply the rule.¹⁵⁰

LaGrange also contended that because the statute at issue (Indiana Code section 13-26-11.2-1) requires that a review “must include a prompt and thorough investigation of the dispute,”¹⁵¹ and because the CAD did not conduct the investigation in a timely manner, the IURC was divested of jurisdiction.¹⁵² In reviewing this contention, the court of appeals reviewed a number of prior decisions in which the state’s appellate courts had considered whether the IURC lost jurisdiction over a case by failing to act within a prescribed time period.¹⁵³ The court of appeals ultimately concluded that section 13-26-11-2.1 did not require the IURC to lose jurisdiction if the investigation was less than prompt. The court based this conclusion on several points. First, it noted that the statute did purport to restrain the IURC from acting if the CAD failed to act in a prompt manner, and likewise, it did not set forth any adverse consequence should the petition be reviewed in an untimely manner.¹⁵⁴ Second, the court noted that the “prompt” requirement did not “go to the essence of the [s]tatute,” noting that it contained no specific time period in which to act.¹⁵⁵ Finally, the court concluded that if the IURC were to lose jurisdiction, the purpose of the statute would be frustrated, as the statute was meant to create a method of review for campground owners overcharged by regional sewer districts. Accordingly, depriving the IURC of jurisdiction would deprive those owners of their statutory right of review.¹⁵⁶ Therefore, the court ultimately concluded that the IURC acted within its jurisdiction in addressing the complaint.¹⁵⁷

In another supreme court decision, the court addressed the scope of agency actions when there were agencies with apparently overlapping authority. In *Ghosh v. Indiana State Ethics Commission*, the supreme court was asked to address “the jurisdiction of state agencies and the State Employee Appeals Commission (SEAC) to consider ethics code violations in ruling on terminations of state employees.”¹⁵⁸

Mr. Ghosh was a longtime engineer with the Indiana Department of Environmental Management (IDEM) who also owned an interest in a gas station in Beech Grove, Indiana.¹⁵⁹ In March of 2006, Mr. Ghosh was terminated by IDEM on the grounds that he had violated the state ethics policy by driving his state vehicle to that gas station, where he purchased gas and other items with a

150. *See id.* at 811.

151. IND. CODE § 13-26-11-2.1 (2011).

152. *LaGrange Cnty.*, 914 N.E.2d at 812.

153. *Id.* at 812-813 (*comparing* United Rural Elec. Membership Corp. v. Ind. & Mich. Elec. Co., 549 N.E.2d 1019 (Ind. 1990), *with* Hancock Cnty. Rural Elec. Membership Corp. v. City of Greenfield, 494 N.E.2d 1294 (Ind. Ct. App. 1986)).

154. *Id.* at 813.

155. *Id.* at 813-14.

156. *Id.* at 814.

157. *Id.* at 814-15.

158. *Ghosh v. Ind. State Ethics Comm’n*, 930 N.E.2d 23, 24 (Ind. 2010), *reh’g denied*.

159. *Id.* at 25.

state-issued credit card.¹⁶⁰ Ghosh appealed the termination decision to SEAC, which ultimately upheld his termination.¹⁶¹ The Office of the Inspector General, however, also filed a separate complaint with the Indiana State Ethics Commission alleging that he had violated the conflict of interest statute and misused state property in violation of the state ethics code.¹⁶² After the ethics commission determined that he had violated the conflict of interest statute, Ghosh sought judicial review of the decision, and at the same time, he attempted to challenge the termination decision by the SEAC on the grounds that it had no jurisdiction to affirm his dismissal.¹⁶³

On appeal, the Indiana Supreme Court specifically addressed whether Ghosh was collaterally estopped from reviewing the termination decision.¹⁶⁴ As the court noted, a critical component of the estoppel argument is that the “agency ruling to be given collateral estoppel effect is that ‘the issues sought to be estopped where within the jurisdiction of the agency.’”¹⁶⁵ This called into question whether IDEM had the authority to terminate Ghosh for a violation of the state’s ethics code. According to Ghosh, IDEM lacked the authority to terminate him “for cause” when the termination was premised upon a violation of the ethics code over which the State Ethics Commission has exclusive jurisdiction.¹⁶⁶ Consequently, he argued, because IDEM could not terminate him for violating the ethics code, SEAC “had no jurisdiction to address the . . . [termination].”¹⁶⁷

The supreme court disagreed, noting that under this argument, the State Ethics Commission would be required “to review any termination of a state employee when the basis for termination is an ethics violation.”¹⁶⁸ This, the court concluded, was contrary to the intent of the Indiana General Assembly, which had “unequivocally given agencies the authority to terminate their employees for ‘just cause.’”¹⁶⁹ As the court noted, under the state’s personnel policy, “‘just cause’ includes ‘violations of, or failure to comply with, [f]ederal or [s]tate laws, rules . . . dishonesty . . . [and] actions which bring the agency or the individual into

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* As explained by the court, Ghosh had already sought to challenge the SEAC’s termination decision but had that petition for judicial review dismissed for failure to timely file the agency record. *Id.*

164. *Id.* at 26.

165. *Id.* (quoting *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 394 (Ind. 1988)).

166. *Id.* at 26-27.

167. *Id.* at 27.

168. *Id.*

169. *Id.* This power arose from a 2005 amendment to the Indiana State Personnel Act, which authorized both the appointing authority and the ethics commission to discharge an employee “for cause.” See IND. CODE § 4-15-2-34 (2011).

disrepute or impair the effectiveness of the agency or individual.”¹⁷⁰ In the court’s view, this made it “clear that some acts that constitute just cause for termination are also ethics violations.”¹⁷¹ This led the court to conclude that “both the Ethics Commission and the appointing authority [are authorized] to address facts that constitute just cause for termination and also establish a violation of the Ethics Code” and that consequently, as IDEM had authority to terminate him, Ghosh was collaterally estopped from seeking review of his termination.¹⁷²

B. Effect of Administrative Proceedings on Judicial Proceedings

In some instances, administrative proceedings can be a prelude to, or proceed contemporaneously with, separate though related judicial proceedings. In such cases, the administrative proceeding can have interesting effects on the judicial process.

One example of this is the case of *Tony v. Elkhart County*.¹⁷³ In that case, Mr. Randy Tony was a former employee of the Elkhart County Highway Department.¹⁷⁴ During the course of his employment, Tony was injured on a number of occasions, and as a result, he faced harassment from his supervisors that included name-calling and assigning him to tasks that exceeded medical restrictions on the type of work he could perform.¹⁷⁵ This ultimately led Tony to walk off the job and seek unemployment benefits.¹⁷⁶ As part of the determination of his eligibility for unemployment, the ALJ found not only that he was “involuntarily unemployed due to a medically substantiated physical disability,” but also that the county knew of the medical condition.¹⁷⁷ Thereafter, Tony filed suit against the county alleging that he had been constructively discharged as retaliation for seeking workers’ compensation due to his injuries.¹⁷⁸ The county moved for and was granted summary judgment on the grounds that Tony could not establish that he had been constructively discharged.¹⁷⁹

On appeal, Tony claimed that the county was administratively collaterally estopped from asserting that he was not constructively discharged based on the ALJ’s determination that he was involuntarily unemployed.¹⁸⁰ The court of

170. *Id.* at 27-28. The court cited Indiana’s discipline policy statement, the updated version of which can be found at STATE OF IND., DISCIPLINE POLICY STATEMENT (2011), available at <http://www.in.gov/spd/files/discpol.pdf>.

171. *Id.* at 28.

172. *Id.*

173. 918 N.E.2d 363 (Ind. Ct. App. 2009).

174. *Id.* at 365.

175. *See id.* at 365-67.

176. *Id.* at 367.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 368.

appeals concluded, however, that the county was not collaterally estopped from denying that Tony was constructively discharged. It did so on several grounds, first noting that it was “unclear” that the standard the DWD applies in awarding unemployment benefits is “equivalent to the standard for establishing a constructive retaliatory discharge.”¹⁸¹ More importantly, however, the court noted that statutes relating to the decision and factual findings by the DWD’s ALJ are “not conclusive or binding and shall not be used as evidence in a separate or subsequent action . . . between an individual and the individual’s present or prior employer”¹⁸² Based on these statutes, the court thus determined that a DWD decision could not be used for collateral estoppel purposes in subsequent litigation.¹⁸³

Another case during the survey period addressed the authority of the judiciary to control for monitor administrative proceedings. *Indiana Department of Environmental Management v. NJK Farms, Inc.*¹⁸⁴ involved an appeal from a trial court’s determination that IDEM had breached a settlement agreement with NJK Farms. In that case, NJK Farms had purchased land on which to construct a landfill in Fountain County, Indiana and entered into an option agreement with a company called Triple G Landfills, Inc. for the purchase of the land.¹⁸⁵ Triple G’s application for a solid waste facility permit was denied in 1995 for failure to provide necessary information to IDEM.¹⁸⁶ Triple G then filed a petition for administrative review, in which NJK Farms filed a motion to substitute itself as the real party in interest on the grounds that Triple G had failed to make a payment under the terms of the option agreement.¹⁸⁷ That motion was denied in November 2000 along with Triple G’s petition for administrative review.¹⁸⁸

As a result, NJK Farms filed a petition for judicial review along with a complaint for damages against IDEM raising a variety of claims.¹⁸⁹ NJK Farms and IDEM eventually entered into a settlement agreement in September 2005 in which NJK Farms was permitted to file an application for the solid waste permit

181. *Id.* at 368-69.

182. *Id.* at 369 (citing IND. CODE §§ 22-4-17-12(h) and 22-4-32-9(b) (2011)).

183. *Id.* The court of appeals also acknowledged that in a similar case, *Uylaki v. Town of Griffith*, 878 N.E.2d 412 (Ind. Ct. App. 2007), it had concluded that collateral estoppel was appropriate based on an opinion by a DWD ALJ. *Id.* at 369 n.2. The court explained, however, that in *Uylaki*, neither party cited the applicable statutes, and it recognized that based on the statutes, it “must question” that case’s continued validity. *Id.* The court also suggested that an Indiana Supreme Court decision, *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988), should be called into doubt insofar as it recognized the potential for the decision of a DWD ALJ to have collateral estoppel effect in civil litigation. *Tony*, 918 N.E.2d at 369 n.2.

184. 921 N.E.2d 834 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 818 (Ind. 2010).

185. *Id.* at 836.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

if certain conditions were met.¹⁹⁰ Although NJK Farms met some of those requirements, it failed to file a completed application with IDEM until February 2008. As part of the permitting process, IDEM initiated a public comment period on the application, during which the Indiana General Assembly passed new legislation that “concerned permits for solid waste landfills in counties without comprehensive zoning regulations.”¹⁹¹ After the passage of the legislation, Fountain County passed zoning ordinances relating to landfills; more importantly, IDEM informed NJK Farms that based on the new legislation, the company would be required to file a new application, and IDEM would review it for compliance with any applicable zoning ordinances.¹⁹²

Rather than file a new application, NJK Farms filed a motion in the trial court, which had retained jurisdiction over the case pending final compliance with the settlement agreement, claiming that IDEM was in breach of the agreement.¹⁹³ IDEM also denied the original application based on NJK Farms’s failure to file a new application. Ultimately, the matter returned to the trial court, which determined that it had “exclusive jurisdiction to consider the proceedings incidental to this sole application” and found that the settlement agreement was a contract enforceable against IDEM.¹⁹⁴ The trial court further found IDEM in breach of the agreement and set the matter for trial.¹⁹⁵

On interlocutory appeal, IDEM contended that the trial court did not have subject matter jurisdiction to consider whether it had breached the settlement agreement.¹⁹⁶ In addressing this contention, the court of appeals recognized that although courts usually have authority to control the “carrying out of a settlement agreement” because the settlement at issue here involved an administrative agency, it carried a different connotation here because it “los[t] its status as a strictly private contract and . . . [took] on a public interest gloss.”¹⁹⁷ The court of appeals noted that this difference had been recently addressed by the Indiana Supreme Court in *Indiana Department of Environmental Management v. Raybestos Products Co.*¹⁹⁸

In *Raybestos Products Co.*, IDEM had entered into an agreed order with Raybestos for the clean-up of a site, but it petitioned the federal Environmental Protection Agency to require a more complete clean-up of the site than was required by the agreed order.¹⁹⁹ The Indiana Supreme Court ultimately concluded

190. *See id.* at 836-38.

191. *Id.* at 839.

192. *Id.*

193. *Id.* at 839-40.

194. *Id.* at 840 (citation omitted).

195. *Id.*

196. *Id.* at 840-41.

197. *Id.* at 842 (quoting *Ind. Bell Tel. Co. v. Office of Util. Consumer Counselor*, 725 N.E.2d 432, 435 (Ind. Ct. App. 2000) (internal citations omitted)).

198. *Id.* (citing *Ind. Dep’t of Env’tl. Mgmt. v. Raybestos Prods. Co.*, 897 N.E.2d 469 (Ind. 2008)).

199. *Raybestos Prods. Co.*, 897 N.E.2d at 472.

that as an “agency action,” the agreed order was subject only to challenge only under the AOPA, and therefore, it was not subject to challenge for breach of contract in a court.²⁰⁰

The Court rejected NJK’s contention that *Raybestos* was inapplicable, as that case involved an agreed order that arose out of an administrative proceeding rather than a judicial proceeding.²⁰¹ The court of appeals did so in part because under NJK’s interpretation of the law, the trial court would be vested with “exclusive jurisdiction over NJK’s entire permit application process” and therefore “immediate jurisdiction to review IDEM’s denial of NJK’s permit on any basis,” including technical requirements.²⁰² This, the court reasoned, would undermine two of the primary purposes underlying administrative review of agency decisions: the agency’s opportunity “to correct its own errors, [and] to afford the parties and the courts the benefit of [the agency’s] experience and expertise.”²⁰³ Further, as the court noted, the purpose of the original petition for judicial review was to review the denial of NJK’s motion to be substituted as the real party in interest and the denial of the permit application—matters that had been “‘resolved and settled’ by the parties.”²⁰⁴ Thus, the petition “did not confer jurisdiction on the Marion Superior Court to directly review all further actions of IDEM regarding NJK’s permit application.”²⁰⁵ Consequently, the court of appeals concluded that the AOPA provided the exclusive means for NJK Farms to challenge the decision of IDEM with respect to its permit, and the trial court lacked jurisdiction to consider NJK’s claims.²⁰⁶

C. Due Process Concerns in Administrative Proceedings

When filling a quasi-judicial function, administrative agencies have to make available the basic due process rights that ordinary litigants are entitled to, including notice and an opportunity to be heard.²⁰⁷ The following cases from the survey period consider situations where parties challenged whether they were afforded sufficient due process in an administrative proceeding.

In *Wolf Lake Pub, Inc. v. Indiana Department of Workforce Development*,²⁰⁸ the Indiana Court of Appeals addressed, in part, whether a party is denied due process when he cannot be reached for an administrative hearing due to bad cell phone reception. *Wolf Lake* involved an appeal from the dismissal of an

200. *Id.* at 474.

201. *See NJK Farms*, 921 N.E.2d at 844.

202. *Id.*

203. *Id.* (quoting *Austin Joint Lakes Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644 (Ind. 1995)).

204. *Id.* at 844 (citation omitted).

205. *Id.*

206. *Id.* at 845.

207. *See, e.g., NOW Courier, Inc. v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 871 N.E.2d 384, 387 (Ind. Ct. App. 2007).

208. 930 N.E.2d 1138 (Ind. Ct. App. 2010).

administrative appeal for failure to appear.²⁰⁹ In January 2009, the DWD determined that a former employee of Wolf Lake had not been terminated for just cause and, as a result, was “not disqualified from receiving unemployment compensation benefits.”²¹⁰ Wolf Lake appealed that determination and was forwarded instructions on how to participate in an appeal hearing, which included a return slip onto which Wolf Lake was to provide a telephone number where it could be reached at the time of the hearing.²¹¹ The owners and representatives of Wolf Lake returned the slip, providing the DWD with a cell phone number; however, on the date and time of the hearing, the hearing ALJ could not contact them and dismissed the appeal.²¹²

Wolf Lake applied for reinstatement of the appeal, stating that the pub’s owners and representatives had been on a long-planned vacation during the hearing, that they experienced unexpectedly unreliable cell phone reception, and that they witnessed an accident which prevented them from attempting to find better reception.²¹³ The ALJ refused to reinstate the appeal for failure to state good cause, and the full Board affirmed the ALJ’s determination.²¹⁴

Wolf Lake appealed, arguing that it had been denied due process by being refused a reasonable opportunity to participate in the hearing and that the Board abused its discretion in refusing to accept additional evidence.²¹⁵ The court of appeals was ultimately not persuaded by Wolf Lake’s arguments. As it noted, the material that Wolf Lake provided to the DWD regarding the motorcycle accident indicated that the accident actually occurred the day after the hearing, and therefore, unreliable cell phone reception—not the accident—was the cause of their failure to participate.²¹⁶ On that issue, the court noted that the notice of the appeal provided to Wolf Lake contained multiple warnings regarding having access to reliable phone communications as well as the consequences of not being available during the time of the scheduled call.²¹⁷ Taking the position that despite the warnings, the owners of Wolf Lake had taken their chances with cell phone reception, the court refused to conclude that they were “denied a reasonable opportunity to participate in a fair hearing.”²¹⁸

209. *Id.* at 1140.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 1140-41.

215. *Id.* at 1141.

216. *Id.* at 1142.

217. *Id.*

218. *Id.* As to the issue of whether the DWD abused its discretion in refusing to receive additional evidence, which included evidence regarding the termination of the employee, the court noted that under the applicable provision of the Indiana Administrative Code, such a submission requires a showing of “good cause together with a showing of good reason why the evidence was not presented to [the] ALJ.” *Id.* at 1143. As the “circumstance” of bad cell phone reception was within the control of Wolf Lake, the court concluded that this was neither good cause nor good

In *Value World Inc. of Indiana v. Indiana Department of Workforce Development*,²¹⁹ the court of appeals addressed whether a party that claimed not to have received notice of an appeal had been denied due process. In that case, a former employee of Value World appealed an initial determination that he had been terminated for just cause and was therefore ineligible for unemployment benefits.²²⁰ During the appeal, the ALJ noted that Value World had not submitted a contact number and was therefore not contacted; accordingly, the ALJ determined that Value World had not carried its burden of proof and allowed the former employee to draw unemployment benefits.²²¹

Value World then sought an appeal of the ALJ's determination, arguing that it had never received notice of the hearing.²²² During the hearing on Value World's appeal, its district manager testified that the company had not received notice of the appeal and that as far as he was aware, the company had experienced no problems with mail delivery.²²³ Although Value World claimed not to have received the notice, records existed at the DWD indicating that a notice had been mailed.²²⁴ The Board ultimately concluded that there was "insufficient evidence to prove that the hearing notice was not timely received" and therefore denied the appeal.²²⁵

On appeal, Value World argued that it had rebutted the presumption of receipt of notice that exists when an administrative agency sends the notice through the mail.²²⁶ The court of appeals certainly recognized that there existed a "difficulty in proving a negative" on the part of Value World, but it also recognized that the DWD (or an applicant for unemployment benefits) would face the same challenge if either were "required to disprove Value World's claim that it did not receive notice."²²⁷ The court noted that this and the reliability of mail service were the likely rationale behind the presumption.²²⁸ However, the court also recognized that the question was ultimately one of fact, and specifically, the "quantum of evidence" necessary to overcome that presumption.²²⁹ In this case, the court concluded that based on the testimony that Value World had received mail without incident, the manner in which it processed mail, and the "lack of any evidence to demonstrate a possible reason that the notice may not have successfully made it to Value World," the Review Board's decision to dismiss the

reason to allow additional evidence to be presented and that the DWD did not abuse its discretion in refusing to consider it. *Id.*

219. 927 N.E.2d 945 (Ind. Ct. App. 2010).

220. *Id.* at 946-47.

221. *Id.* at 947.

222. *Id.*

223. *Id.*

224. *See id.*

225. *Id.*

226. *Id.* at 948.

227. *Id.* at 949.

228. *Id.*

229. *See id.*

appeal was supported by substantial evidence.²³⁰

CONCLUSION

While administrative law in the Hoosier State is largely a settled frontier, the expansive tasks which such agencies are called upon to perform demand responses from Indiana's courts and lawyers to address what are sometimes difficult and perplexing questions. This article highlights only a very few of the reported decisions in Indiana's courts concerning administrative agencies and does not address the multitude of decisions rendered each year by the agencies themselves, which never see the inside of a courtroom. Nevertheless, the agencies fill important roles for all three branches of the government and continue to serve the people of Indiana to the best of their abilities even as they, like the courts, are confronted daily with new challenges and new opportunities.

230. *Id.* at 950.