2020

Judicial writing for administrative law proceedings

Indiana Continuing Legal Education Forum (ICLEF)

JUDICIAL WRITING FOR ADMINISTRATIVE LAW PROCEEDINGS

March 5, 2020

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INDIANA CONTINUING LEGAL EDUCATION FORUM

JUDICIAL WRITING FOR ADMINISTRATIVE LAW PROCEEDINGS

Agenda

1:00 P.M. Registration
1:15 P.M. Program Begins
2:45 P.M. Refreshment Break
4:30 P.M. Program adjourns

Faculty

Hon. Carrie Townsend Ingram
Director of Dispute Resolution
Indiana Education Employment Relations Board
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Hon. Loraine L. Seyfried
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March 5, 2020

Carrie Townsend Ingram

Indiana Education Employment Relations Board, Indianapolis

Carrie Ingram is the Director of Dispute Resolution for the Indiana Education Employment Relations Board. In this role, she oversees administrative proceedings involving school corporations and school employee organizations. Ms. Ingram previously served at the Department of Workforce Development as an Administrative Law Judge and manager. She also served at the Department of Child Services as a litigator, Administrative Law Judge and manager. Ms. Ingram received her law degree from the Touro College Jacob D. Fuchsberg Law School and her bachelor's degree from Indiana State University. Ms. Ingram studied at the University of Potsdam in Germany during law school and at Åbo Akademi in Finland during her undergraduate studies.

Ms. Ingram has served as the President of the Indiana Association of Administrative Law Judges (InAALJ) and is a member of the National Association of Administrative Law Judiciary (NAALJ). Ms. Ingram was the 2018 NAALJ Fellowship recipient and her fellowship article *Chevron Deference in the States: Lessons from Three States* was published in by the Journal of the National Association of Administrative Law Judiciary (published by the Pepperdine University School of Law). Ms. Ingram presented her fellowship research at the 2018 NAALJ Annual Conference, 2019 National Association of Unemployment Insurance Appeals Professionals Conference and 2019 InAALJ Conference. Ms. Ingram has presented several CLE courses on the topics of child hearsay in administrative proceedings, offers of proof, admission of electronic records, professionalism during administrative hearings and assessing credibility.

Ms. Ingram resides in Greenwood, Indiana with her husband and two children. Ms. Ingram is an active participant in her children's education at Center Grove School Corporation. She is on the Board of Directors and Executive Committee of the Center Grove Education Foundation, participates in the PTO and volunteers in her children's classrooms. She enjoys basketball, reading and boating.

Loraine L. Seyfried

Chief ALJ, Indiana Utility Regulatory Commission

Loraine Seyfried is the Chief Administrative Law Judge for the Indiana Utility Regulatory Commission. She leads the Commission's staff of Administrative Law Judges who, along with the Commissioners, preside over docketed proceedings. She assists in the management of the Commission's hearing docket by making initial recommendations for case assignments and procedure, overseeing the hearing process, and providing advice in the preparation and review of Commission decisions. She earned a Bachelor of Arts Degree from Purdue University and a juris doctor degree from Southern Illinois University School of Law.

Hon. Heather A. Welch

Judge, Marion Superior Court, Civil 1, Indianapolis

Hon. Heather A. Welch is a Judge in the Marion Superior Court, Civil Division, Room 1. She presides over civil matters and has been assigned to a civil courtroom since January of 2009. She presides over complex civil litigation which includes business/commercial litigation, medical malpractice cases, insurance coverage cases, negligence cases, mortgage foreclosure, and commercial/ individual collection cases. Judge Welch was formerly a Master Commissioner/Magistrate for six years and presided over major felony criminal cases and civil matters. Judge Welch attended Valparaiso University School of Law and she received her undergraduate degree from Indiana University School of Business.

Judge Welch serves the legal community in the following organizations and committees: American Bar Association: Executive Committee Member National Conference of State Trial Judges, Chair of the Judicial Division Communications Committee, and member of the Commission on the American Jury Project; Improvements in the Judiciary Committee, Indiana State Bar Association; Indianapolis Bar Association, Chair of the Indiana Judicial Center Professionalism and Ethics Committee to name a few.

Judicial Writing

FOR ADMINISTRATIVE LAW PROCEEDINGS

To create
well written decisions
that
withstand judicial review.

ALJ DECISION WRITING

STANDARD OF REVIEW

JUDICIARY REVIEW OF DECISIONS

QUESTIONS & PANEL DISCUSSION

Agenda

ALJ Decision Writing

Why Write a Decision?

Determine facts

Analyze law

Decide an issue

Explain purpose

Help parties understand

It's the law

Judicial Review

Who is the Reader?

Parties

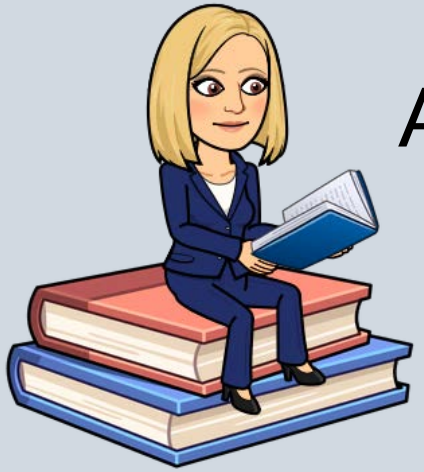
Attorneys

YOU

Judiciary

Other ALJs

Public



Agency Head

Commission

Agency employees

Board

Starting Point

- ❑ Hearing Notes
- ❑ Exhibits
- ❑ Law
- ❑ Template

Organization

I. Introduction
II. Findings of Fact
III. Conclusions of Law
IV. Decision/Recommendation
V. Appeal Rights

Introduction

A. Procedural History

B. Issue

C. Jurisdiction/Standard of Review

D. Ultimate Decision

Findings of Fact

- If it wasn’t in the record, it didn’t happen
- If it isn’t relevant, it shouldn’t be a finding
- If the sentence needs to be read twice to understand, it needs rewritten
- If it is reciting someone’s testimony, it isn’t a finding

Findings of Fact

Examples

The evidence revealed that the child had a bruise.

Better: The child had a bruise.

Mr. Jones testified that he saw a bruise on the child.

Better: The child had a bruise.

The ALJ finds that the Dr. Smith concluded that the bruise he saw on the child's face looked like a handprint.

Better: The child had a hand-shaped bruise on her face.

Findings of Fact

DO	DON'T
•Tell a chronological story •Use concise sentence structure •Explain necessary agency terminology •Use select canned paragraphs or boilerplate language •Rectify conflicting testimony •Make demeanor credibility findings	•Go on a tangent •Sacrifice details •Use shop talk •Adopt, wholesale, a party's brief or proposed findings •Use weak phrases: it seems, it appears •Call a witness a liar

Findings of Fact

"The Court of Appeals held that the Board's findings of fact with respect to [claimant's] claim…were inadequate to permit an informed and intelligent review…"

Perez v. U. S. Steel Corp., 426 N.E.2d 29, 30 (Ind. 1981)

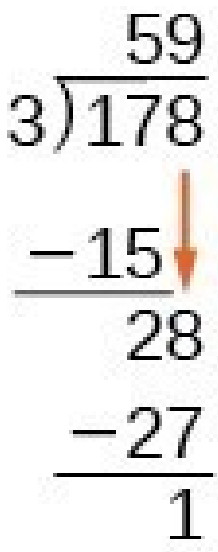
Findings of Fact

"We grant deference to the agency's findings of fact."

Nat. Res. Def. Council v. Poet Biorefining-N. Manchester, LLC, 15 N.E.3d 555, 561 (Ind. 2014)

Conclusions of Law

Long Division



Step 1: $5 \times 3 = 15$ and $17 - 15 = 2$
Step 2: Bring down the 8
Step 3: $9 \times 3 = 27$ and $28 - 27 = 1$

Answer: $59\ R\ 1$ or $59\frac{1}{3}$

Conclusions of Law

"We recognize an agency has expertise in its field and the public relies on its authority to govern in that area."

West v. Office of Indiana Sec'y of State, 54 N.E.3d 349, 352–53 (Ind. 2016).

Conclusions of Law

"An interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself."

LTV Steel Co. v. Griffin, 730 N.E.2d 1251, 1257 (Ind. 2000).

Decision/Recommendation

End Result

- Affirm
- Reverse
- Modify
- Remand

Appeal Rights

What happens next?

- Ultimate Authority
- Judicial Review

Standard of Review

Standard of Review

AOPA Agencies

Judicial review of disputed issues of fact must be confined to the agency record for the agency action…. The court may not try the cause de novo or substitute its judgment for that of the agency.

Ind. Code 4-21.5-5-11

The court may set aside an agency action 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.

Ind. Code 4-21.5-14(d)

Standard of Review

Non-AOPA Agencies

Generally found in enabling statutes and case law.

Examples

Indiana Utility Regulatory Commission

Ind. Code 8-1-3-1 and 8-1-3-7

Workforce Development

Ind. Code 22-4-17-12

Indiana Case Law

Indiana courts typically use a multi-tier standard of review – depending on whether the appeal concerns the agency's findings of fact, conclusions of law, or both.

U.S. Steel Corp. v. NIPSCO, 951 N.E.2d 542, 551 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1119 (Ind. 2012).

Indiana Case Law

This standard of review was most recently upheld in *Moriarity v. Ind. Dept. of Nat. Resources*, 113 N.E.3d 614 (Ind. 2019):

- Our review of agency action is intentionally limited, as we recognize an agency has expertise in its field and the public relies on its authority to govern in that area.
- We do not try the facts de novo but rather defer to the agency's findings if they are supported by substantial evidence.
- An agency's conclusions of law are ordinarily reviewed de novo. However, an interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.

Three Levels of Review

1. Basic facts are reviewed for substantial evidence.
2. Legal propositions are reviewed for their correctness.
3. Ultimate facts (mixed questions of law and fact) are generally reviewed for their reasonableness, with deference given to the agency if the issue is one within the agency's expertise.

McClain v. Review Bd. Of Ind. Dept. of Workforce Dev., 693 N.E.2d 1314, 1318 (Ind. 1998)

Basic Facts

A finding of fact must indicate, not what someone said is true, but what is determined to be true, for that is the trier of fact's duty.
Moore v. Ind. Family and Soc. Svcs. Admin., 682 N.E.2d 545, 547 (Ind. Ct. App. 1997).

An agency's decision must contain specific findings on all the factual determinations material to its conclusions.
City of Evansville v. SIGECO, 339 N.E. 2d 562 (Ind. Ct. App. 1975).

The court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the agency's findings.
Gen. Motors Corp. v. Review Bd. Of the Ind. Dept. of Workforce Dev., 671 N.E.2d 493, 496 (Ind. Ct. App. 1996).

Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
City of Evansville, 339 N.E.2d at 572, citing *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938).

Legal Conclusions

Legal propositions are reviewed for their correctness.
NIPSCO v. U.S. Steel Corp., 907 N.E.2d 1012, 1018 (Ind. 2009), citing *McClain* at 1016, 1018.

An agency's actions are always subject to *de novo* review to determine whether the actions were contrary to law. However, this *de novo* review is limited to whether the agency stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order.
Citizens Action Coalition of Ind. v. NIPSCO, 485 N.E.2d 610, 612-613 (Ind. 1985).

If not jurisdictional or contrary to law, an agency's reasonable interpretation of a statute it is charged with enforcing or implementing is entitled to great weight.
IDEM v. Steel Dynamics, 894 N.E.2d 271, 274 (Ind. Ct. App. 2008).

Ultimate Facts

Ultimate facts – findings on mixed questions of law and facts – are reviewed for their reasonableness, with deference owed depending on whether the issue falls, or does not fall, within the agency's expertise. *U.S. Steel Corp. v. NIPSCO* , 951 N.E.2d 542, 551 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1119 (Ind. 2012).

Example – Department of Workforce Development:
whether a workplace rule is "reasonable" – greater deference
whether the employee "voluntarily" left her job – less deference

The agency's decision must demonstrate a logical connection among the findings of basic facts, the law applied, and the inferences made therefrom in arriving at an ultimate finding. *NIPSCO v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1017 (Ind. 2009).

Summary Judgment

An appellate court typically reviews a trial court's order on summary judgment *de novo* because the reviewing court faces the same issues that were before the trial court and analyzes them the same way. However, because administrative agencies are executive branch institutions empowered by the General Assembly with delegated duties, agency decisions deserve a higher level of deference and therefore, reviewing courts will apply the same multi-tier standard of judicial review for agency decisions.

NIPSCO v. U.S. Steel Corp., 907 N.E.2d 1012, 1018 (Ind. 2009).

Judiciary Review of Decisions

Writing Effective & Easy to Read Agency Orders for the Trial Court

1) Knowing your audience

2) E-reading

3) Organizing and Structuring Findings of Fact and Conclusions of Law

Know your audience

1) Trial Court Judge, Court of Appeals, or Supreme Court

2) Judge’s caseload

3) Key is to educate your reader

- A) agency specific procedures: Does AOPA apply or other statutes?
- B) background facts on the agency
- C) important statutes

4) Remember as the ALJ you are the expert

5) How will you capture the Judge's attention and make it easier for the judge to follow and remember your findings, conclusions, and order

E-reading

Most of Indiana Trial Courts use Odyssey e-filing along with the Indiana Court of Appeals and Indiana Supreme Court.

What are Judges using to read the agency order and the parties' briefs?

New sense of impatience by the reader

New Type of Reader

1) Electronic filing has created a new type of reader and literature supports that writing for e-readers increases the likelihood they are reading the order/briefs and comprehending them.

2) Observations:

- A) Font type matters:
  - The truck rear-end the car.
  - The truck rear-end the car.

B) Headings, summaries, and structural cues

C) Use of white space

D) First paragraphs dominate

E) First sentences dominate

F) Problems with Footnotes

G) Use of hyperlinks

Is your Reader absorbing the content

1. Readers absorb information best if they understand its importance as soon as they read it.
2. The reader can do this if the writer provides an adequate context/framework before you discuss details.
   - put context/framework before details
   - Put familiar information before new information
3. Readers absorb sequences of information if it is presented consistently with the information's purpose
4. Readers absorb information better if it can be absorbed in relatively short pieces/paragraphs
   A. break the information into segments
   B. put the most important information first including issues, facts, and conclusions of law
   C. be concise

What Judges Like

- Clear organization
- Short, Clean headings
- Clear factual findings based on evidence
- Controlling law
  i.e.. Statutes, Indiana Administrative Code, or caselaw
- How and why you reach that decision

Organization and Structure

1) Relevant Procedural History
2) What are the Issues?
3) Relevant Findings of Facts
4) Provide specific citations to the record/exhibits
4) Substantive arguments
5) Holding/decision i.e.. order
6) Be concise

Example

ORDER DENYING PETITOIN FOR JUDICIAL REVIEW

Insert brief procedural history

FINDINGS OF FACT

Insert numbered findings of fact

CONCLUSIONS OF LAW

- I. Standard of Review: numbers paragraphs with the law.
- II. Issue 1
- III. Issue 2
  - A. Sub-issue 1
  - B. Sub-issue 2

ORDER

Provide a Roadmap for your Reader

1) Use pinpoint headings for complex facts

A. **The Parties**
B. **The Original Scrap Metal Agreement**
C. **Belson Becomes Involved in the Project**
D. **Dynamic's Performance**
E. **Issues with Three Gondolas**

Roadmap, cont'd

2) Use pinpoint headings for Conclusions of Law

A. *Whether the scrap metal was possessed by Belson at the time of removal?*
B. *Whether Eagle had the sufficient* mens rea *to find theft occurred as a matter of law?*

Roadmap, cont'd

3) Issues: The parties cross-moved on the following issues:

- Whether the 2015 Amended Operating Agreement is a valid, enforceable amendment to the parties 2002 Operating Agreement for X, LLC;
- Whether John is a Member or Assignee of X, LLC; and
- Whether Tom and Liz are Bankrupt Members under the X, LLC operating agreements.

Judging the Credibility of Witnesses

1. As the finder of fact, the ALJ should judge the credibility of the witnesses before finding the facts.
2. Include in Findings of Fact that after judging the credibility of the witnesses the ALJ finds issues the following Findings of Fact.
3. The trial court has great discretion in judging the credibility of witnesses. *Zimmer v. Davis*, 922 N.E.2d 68, 71 (Ind. Ct. App. 2010) ("[In an appeal of an injunction, appellate courts] cannot reweigh the evidence or judge the credibility of any witness.").

Questions & Panel Discussion

BEFORE THE
[AGENCY]

[Party Name], Petitioner/Appellant/Claimant v. [Party Name/Agency], Respondent/Appellee/Agency	Case Number:

[RECOMMENDED ORDER/FINAL ORDER]
FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Introduction

A. Procedural History

B. Issue(s)

C. Jurisdiction/Standard of Review

D. Ultimate Decision

II. Findings of Fact

A. [Issue #1]

B. [Issue #2]

III. Conclusions of Law

A. [Issue #1]

B. [Issue #2]

IV. Decision/Recommendation

V. Appeal Rights

So Ordered/Recommended: [Date]

_____

[Name]
Administrative Law Judge

Distribution:
Petitioner/Appellant/Claimant
Respondent/Appellee/Agency
Ultimate Authority [Board/Commission/Agency Head]

Standard of Judicial Review for Final Agency Actions

I. AOPA Agencies

A. Ind. Code § 4-21.5-5-11

Judicial review of disputed issues of fact must be confined to the agency record for the agency action…. The court may not try the cause de novo or substitute its judgment for that of the agency.

B. Ind. Code § 4-21.5-5-14(d)

The court may set aside an agency action 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.

II. Non-AOPA Agencies

Generally found in enabling statutes and case law.

Example: Indiana Utility Regulatory Commission - Ind. Code § 8-1-3-1 provides for an "appeal to the court of appeals of Indiana for errors of law under the same terms and conditions as govern appeals in ordinary civil actions…. An assignment of errors that the decision… is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the decision… and the sufficiency of the evidence to sustain the findings of fact upon which it was rendered." And, Ind. Code § 8-1-3-7(a) provides that, "No evidence beyond that contained in the record of the proceedings before the commission shall be considered or received by the court, except… where issues of confiscation or of constitutional right are involved…."

Example: Workforce Development – Ind. Code § 22-4-17-12(a) provides that "[a]ny decision of the review board shall be conclusive and binding as to all questions of fact." Subsection (f) further provides that "[a]n assignment of errors that the decision of the review board is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of fact."

III. Indiana Case law

For appeals of administrative decisions, Indiana courts typically use a multi-tier standard of review – depending on whether the appeal concerns the agency's findings of

fact, conclusions of law, or both. *U.S. Steel Corp. v. NIPSCO*, 951 N.E.2d 542, 551 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1119 (Ind. 2012).

As summarized in *McClain v. Review Bd. Of Ind. Dept. of Workforce Dev.*, 693 N.E.2d 1314, 1318 (Ind. 1998), basic facts are reviewed for substantial evidence, legal propositions are reviewed for their correctness. Ultimate facts or mixed questions of law and fact are generally reviewed for their reasonableness, with deference given to the agency if the issue is one within the agency's expertise.

The Indiana Supreme Court recently reaffirmed this standard of review in *Moriarity v. Ind. Dept. of Nat. Resources*, 113 N.E.3d 614 (Ind. 2019):

> With AOPA in mind, we note that "[o]ur review of agency action is intentionally limited, as we recognize an agency has expertise in its field and the public relies on its authority to govern in that area." *Ind. Alcohol and Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 375 (Ind. 2017) (quoting *West v. Office of Ind. Sec'y of State*, 54 N.E.3d 349, 352–53 (Ind. 2016)). We do "not try the facts de novo" but rather "defer to the agency's findings if they are supported by substantial evidence." *Id.* "On the other hand, an agency's conclusions of law are ordinarily reviewed de novo." *Id.* While "[w]e are not bound by the [agency's] conclusions of law, ... '[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.' " *Chrysler Grp., LLC v. Review Bd. of Ind. Dep't of Workforce Dev.*, 960 N.E.2d 118, 123 (Ind. 2012) (third alteration in original) (quoting *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000)). *See also Nat. Res. Comm'n v. Porter Cty. Drainage Bd.*, 576 N.E.2d 587, 588 (Ind. 1991) (stating that "the interpretation of a statute by the administrative agency charged with its enforcement is entitled to great weight"). "In fact, 'if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation.'" *Jay Classroom Teachers Ass'n v. Jay Sch. Corp.*, 55 N.E.3d 813, 816 (Ind. 2016) (citation omitted).

A. First Level of Review – Basic Facts

The first level requires a review of the entire agency record to determine whether there is substantial evidence to support the agency's basic findings of fact.

A finding of fact must indicate, not what someone said is true, but what is determined to be true, for that is the trier of fact's duty. *Moore v. Ind. Family and Soc. Svcs. Admin.*, 682 N.E.2d 545, 547 (Ind. Ct. App. 1997). An agency's finding that an individual testified to a particular thing or a document stated a certain thing is not a "finding of basic fact." However, the agency may provide such findings and then arrive at a conclusion as to which pieces of evidence are persuasive and constitute the facts upon which the decision is based. *Pack v. Ind. Family and Soc. Svcs. Admin.*, 935 N.E.2d 1218, 1223 (Ind. Ct. App. 2010). An agency's decision must contain specific findings on all the

factual determinations material to its conclusions. *City of Evansville v. SIGECO*, 339 N.E. 2d 562 (Ind. Ct. App. 1975).

An agency's decision will be reversed only if the evidence, when viewed as a whole, demonstrates that the conclusions reached by the agency are clearly erroneous. *Moriarity v. Ind. Dept. of Nat. Resources*, 113 N.E.3d 614 (Ind. 2019). In its analysis, the court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the agency's findings. *Gen. Motors Corp. v. Review Bd. Of the Ind. Dept. of Workforce Dev.*, 671 N.E.2d 493, 496 (Ind. Ct. App. 1996). A court may not reverse an agency simply because it would have reached a different result. *Ind. High School Athletic Assoc., Inc., v. Watson*, 938 N.E.2d 672 (Ind. 2010).

Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Evansville*, 339 N.E.2d at 572, citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

As a general rule, an agency's order will be upheld, unless:

(1) The evidence on which the agency based its findings was devoid of probative value;
(2) The quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding does not rest upon a rational basis;
(3) The result of the hearing before the agency was substantially influenced by improper considerations;
(4) There was not substantial evidence supporting the agency's findings;
(5) The order, the agency's judgment or finding, is fraudulent, unreasonable, or arbitrary.

McClain, 693 N.E.2d at 1317 n.2. The Court of Appeals in *McClain* noted this is not an exclusive list, but simply variations on what it means to review for substantial evidence.

B. Third Level of Review – Legal Conclusions

Legal propositions are reviewed for their correctness. *NIPSCO v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1018 (Ind. 2009), citing *McClain* at 1016, 1018.

An agency's actions are always subject to *de novo* review to determine whether the actions were contrary to law. However, this *de novo* review is limited to whether the agency stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order. *Citizens Action Coalition of Ind. v. NIPSCO*, 485 N.E.2d 610, 612-613 (Ind. 1985). Therefore, an agency's interpretation of statutes defining the limits of its jurisdiction is reviewed *de novo*. *U.S. Steel*, 951 N.E.2d at 551,

If not jurisdictional or contrary to law, an agency's reasonable interpretation of a statute it is charged with enforcing or implementing is entitled to great weight. *IDEM v. Steel Dynamics*, 894 N.E.2d 271, 274 (Ind. Ct. App. 2008). "Because the [Bureau of Motor Vehicles] is the agency charged with enforcing this statute, deference to its reasonable interpretation of the ambiguous statute is appropriate." *Ind. Bureau of Motor Vehicles v. McClung*, 2019 WL 6765836 (Ind. Ct. App. 2019).

NOTE: Justice Slaughter of the Indiana Supreme Court believes that no deference should ever be given to an agency's interpretation of the law. *See NIPSCO Indus. Grp. V. NIPSCO*, 100 N.E.3d 234, 241 (Ind. 2018) and his dissent in *Moriarity v. Ind. DNR.*

C. Second Level of Review – Ultimate Facts

Ultimate facts – findings on mixed questions of law and facts – are reviewed for their reasonableness, with deference owed depending on whether the issue falls, or does not fall, within the agency's expertise. *U.S. Steel Corp.*, 951 N.E.2d at 551.

The agency's decision must show a rational connection between the basic facts and the ultimate decision. Thus, the agency's decision must demonstrate a logical connection among the findings of basic facts, the law applied, and the inferences made therefrom in arriving at an ultimate finding. *NIPSCO v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1017 (Ind. 2009). Where the findings of ultimate fact reached by the agency are irrational in light of the relationship between the facts and the law, those findings are defective and must be reversed on appeal. *Pack*, 935 N.E.2d at 1223.

In reviewing conclusions of ultimate facts for reasonableness, courts generally give deference based on the amount of expertise exercised by the agency. If the subject is outside the agency's expertise, the court should give it less deference. Whereas, greater deference should be given to the agency when the order involves a subject within the agency's special competence. *McClain*, 693 N.E.2d at 1317-1318.

Example – Department of Workforce Development:

(1) whether a workplace rule is "reasonable" – greater deference
(2) whether the employee "voluntarily" left her job – less deference

IV. Summary Judgment

An appellate court typically reviews a trial court's order on summary judgment *de novo* because the reviewing court faces the same issues that were before the trial court and analyzes them the same way. However, because administrative agencies are executive branch institutions empowered by the General Assembly with delegated duties, agency decisions deserve a higher level of deference and therefore, reviewing courts will apply the same multi-tier standard of judicial review for agency decisions. *NIPSCO*, 907 N.E.2d at 1018 (Ind. 2009).

V. Examples

A. Arbitrary and Capricious

An administrative act is arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts and circumstances of the case, or without some basis that would lead a reasonable and honest person to the same conclusion. *Ind. Law Enforcement Training Bd. v. Comer*, 26 N.E.3d 57 (Ind. Ct. App. 2015). Here, the Board upheld an ALJ's decision to revoke a trainee's certification based on the ALJ's finding that the trainee falsely represented his military discharge was "honorable." The evidence showed trainee's discharge at time of his application was "honorable," but at some later point was amended to "other than honorable," which the trainee was appealing. Certification of a trainee is only prohibited for a "dishonorable discharge." Therefore, the court found the Board's decision to revoke the certificate was arbitrary and capricious because it was not supported by substantial evidence. No reasonable basis for finding the trainee lied on his application.

B. Abuse of Discretion

A decision constitutes an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances or the reasonable, probable, and actual deductions to be drawn therefrom. *Baliga v. Ind. Horse Racing Comm.*, 112 N.E.2d 731 (Ind. Ct. App. 2018). Dr. Baliga, a veterinarian, was accused of giving a banned substance to a racehorse. This exposed him to 2 disciplinary proceedings – one by the judges at the track and one by the Commission. The Commission participated in the proceeding by the judges and also took other actions that led to confusion about whether there was only one proceeding or two proceedings actually instituted against Dr. Baliga. Therefore, the court found the ALJ abused his discretion by issuing a default order against Dr. Baliga in the Commission proceeding, particularly when the Commission knew that Dr. Baliga contested the charges, was told a hearing on the merits would be scheduled later, and there was no evidence that the Commission would be prejudiced if a default was not entered.

C. Not in Accordance with Law

In *Ind. Dept. of Env't. Mgmt. v. AMAX*, 529 N.E.2d 1209 (Ind. Ct. App. 1988), the Court of Appeals upheld a trial court's determination that IDEM's decision to disallow tax exemptions was arbitrary, capricious, an abuse of discretion, and not in accordance with law. In this case, IDEM relied on an agency policy guideline when interpreting a statute to disallow tax exemptions for AMAX equipment used in grading and salvaging topsoil. The court recognized that an agency's interpretation of a statute is generally accorded great weight, but an incorrect interpretation is entitled to no weight. The statute provided a tax exemption for equipment used predominantly to prevent or control pollution. IDEM found that while the equipment was used in activities that prevented or

controlled pollution, such activities were undertaken to comply with state and federal law. Therefore, IDEM determined the predominant purpose of the equipment was compliance with the law, not preventing or controlling pollution. The Court found this interpretation was too narrow and inappropriately focused.

D. Contrary to Constitutional Right, Power, Privilege or Immunity

In that same case above (*Ind. Dept. of Env't. Mgmt. v. AMAX*), the Court also found that because IDEM's interpretation of the statute was not in accordance with law, but was instead accomplished by reliance on an agency policy guideline that had been adopted without public input, then IDEM's decision was contrary to constitutional right, power, privilege or immunity. The Court found that the agency policy guideline was not simply an internal policy, but was a policy that IDEM applied to external sources in evaluating tax exemptions and should have been properly promulgated as a rule.

E. In Excess of Statutory Jurisdiction, Authority, or Limitations

Ind. Civil Rights Comm'n v. Alder, 714 N.E.2d 632 (Ind. 1999), involved an appeal of an Indiana Civil Rights Commission order awarding economic, emotional, and punitive damages to tenants of a mobile home park for race-based housing discrimination. The statute at issue, Ind. Code 22-9-1-6(k)(A), authorized the Commission to "restore the complainant's losses incurred as a result of discriminatory treatment." The Court found that the plain language permits the Commission to award damages to compensate for both economic and emotional distress losses. However, because the purpose of punitive damages is not to compensate for injury or loss, but to penalize or punish, the Commission's award of punitive damages exceeded its statutory authority.

F. Without Observance of Procedure Required by Law

In *Ind. State Bd. of Health Facility Adm'rs v. Werner*, 841 N.E.2d 1196 (Ind. Ct. App. 2006), the State Board of Health Facility Administrators ("Board") adopted the ALJ's findings of facts and conclusions of law concerning a review of a health care administrator's license, but went on to impose, without explanation, a more severe punishment than was determined by the ALJ. The Court noted that Ind. Code 4-21.5-3-28(g) required the Board's final order to identify any differences between the final order and the non-final order of the ALJ. Because the Board's final order offered no explanation for the differences in its sanction to those recommended by the ALJ, the Board's decision was without observance of procedure required by law.

G. Unsupported by Substantial Evidence

In *Brown v. Ind. Family and Soc. Serv.'s Admin*, 45 N.E.3d 1233 (Ind. Ct. App. 2015), a Medicaid recipient (Brown) appealed an FSSA decision imposing a transfer penalty on the sale of a home that had been placed in an irrevocable trust 10 years prior to the sale. Under Medicaid, if a transfer of assets occurs within 60 months of a determination of eligibility, then a transfer penalty may be imposed. In this case, the ALJ

found that because there was no evidence that the sale proceeds were placed back into the trust, a transfer penalty should be imposed. The Court, after a review of the evidence, disagreed. The Court noted that Brown's counsel testified the sale proceeds were placed in the trust and the sale documents also reflect the funds were placed into the trust. No testimony or evidence was provided showing that the funds went anywhere other than the trust. Therefore, the Court found the ALJ's conclusions about the proceeds from the sale of the home were unsupported by substantial evidence.