

**FOR PUBLICATION**

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**IN THE  
COURT OF APPEALS OF INDIANA**

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SHENANDOAH SCHOOL CORPORATION, )  
BY AND THROUGH ITS BOARD OF )  
SCHOOL TRUSTEES, )

Appellant-Petitioner, )

vs. )

SHENANDOAH EDUCATION )  
ASSOCIATION, DARCI HILL, and )  
ADALU GRAY, )

Appellees-Respondents. )

No. 33A01-0809-CV-437

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APPEAL FROM THE HENRY CIRCUIT COURT  
The Honorable Mary G. Willis, Judge  
Cause No. 33C01-0803-PL-0001

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**January 9, 2009**

**OPINION - FOR PUBLICATION**

**BROWN, Judge**

The Shenandoah School Corporation (“School”) appeals the trial court’s denial of its motion to correct error and the trial court’s dismissal of its petition for judicial review

of a decision by the Indiana Education and Employment Relations Board (“IEERB”) in favor of the Shenandoah Education Association, Darci Hill, and Adalu Gray (“Teachers”). The School raises one issue, which we restate as whether the trial court abused its discretion by denying the School’s motion to correct error and by granting the Teachers’ motion to dismiss due to the School’s failure to timely file the agency record. The Teachers raise one issue, which we restate as whether they are entitled to attorney fees under Ind. Appellate Rule 66(E). We affirm.

The relevant facts follow. In February 2005, the Teachers filed an unfair labor practice claim against the School, and a hearing examiner found for the Teachers. On February 7, 2008, the IEERB upheld the hearing examiner’s order. On March 7, 2008, the School filed its petition for judicial review of the IEERB decision.

The School sent a letter to the IEERB’s general counsel requesting that the IEERB “prepare and file with the Henry County Circuit Court” a copy of the agency record. Appellant’s Appendix at 61. On April 8, 2008, the IEERB sent a letter to the School’s counsel indicating that the agency record had been prepared and that the record would be available to the parties after payment was made. The School’s counsel received his copies of the record on May 6, 2008, along with a certification by the IEERB Chairman dated March 25, 2008. The School filed the agency record on May 7, 2008.

The Teachers filed their motion to dismiss based upon Ind. Code § 4-21.5-5-13 because the School had failed to file a timely agency record. The trial court granted the Teachers’ motion to dismiss because the School had failed to file the agency record or

request an extension of time within thirty days of the filing of its petition for judicial review. The School then filed a motion to correct error, which was deemed denied.

## I.

The issue is whether the trial court abused its discretion by denying the School's motion to correct error and by granting the Teachers' motion to dismiss. The standard of appellate review of rulings on motions to dismiss on jurisdictional grounds depends on whether the trial court resolved disputed facts, and if so, whether the trial court conducted an evidentiary hearing or ruled on a paper record. Wayne County Property Tax Assessment Bd. of Appeals v. United Ancient Order of Druids-Grove No. 29, 847 N.E.2d 924, 926 (Ind. 2006). We review de novo a ruling on a motion to dismiss for lack of jurisdiction if the facts are not disputed or, as here, the court rules on a paper record. Id. Additionally, we review a trial court's decision to deny a motion to correct error for an abuse of discretion. Hockema v. J.S., 832 N.E.2d 537, 541 (Ind. Ct. App. 2005), reh'g denied, trans. denied.

We begin by noting that Ind. Code § 4-21.5-5-13, which governs the filing of an agency record in cases requesting judicial review of an agency decision, provides in part:

- (a) Within thirty (30) days after the filing of the petition, or within further time allowed by the court or by other law, the petitioner shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of:
  - (1) any agency documents expressing the agency action;
  - (2) other documents identified by the agency as having been considered by it before its action and used as a basis for its action; and

- (3) any other material described in this article as the agency record for the type of agency action at issue, subject to this section.
- (b) An extension of time in which to file the record shall be granted by the court for good cause shown. Inability to obtain the record from the responsible agency within the time permitted by this section is good cause. Failure to file the record within the time permitted by this subsection, including any extension period ordered by the court, is cause for dismissal of the petition for review by the court, on its own motion, or on petition of any party of record to the proceeding.
- (c) Upon a written request by the petitioner, the agency taking the action being reviewed shall prepare the agency record for the petitioner. If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties to the judicial review proceeding stipulate to omit in accordance with subsection (e).

The School filed its petition for judicial review on March 7, 2008, and was required to file the agency record or request an extension of time within thirty days. However, the School did not file the agency record until May 7, 2008. On appeal, the School argues that the IEERB failed to file the record with the trial court as the School had requested, that the IEERB failed to timely notify the School that the record was complete, and that the Teachers were not prejudiced by the delayed filing of the agency record.

We addressed a similar issue in Ind. State Bd. of Educ. v. Brownsburg Comm. Sch. Corp., 813 N.E.2d 330 (Ind. Ct. App. 2004). In Brownsburg, the school corporation filed a petition for judicial review on November 22, 2002, but did not timely file the agency record. 813 N.E.2d at 332. The State Board of Education filed a motion to

dismiss, which the trial court denied. Id. On appeal, we reversed, holding that the school corporation had failed to file a timely, complete agency record as required by the statute. Id. at 334.

[T]he statute provides that failure to file the agency record within the time permitted, including any extension period ordered by the court, is cause for dismissal of the petition for review by the court. [Ind. Code § 4-21.5-5-13(b)]. “It is well-established that the time provisions of I[ndiana] C[ode section] 4-21.5-5-13 are mandatory and a condition precedent to a court acquiring jurisdiction to consider a petition for judicial review.” Clendening v. Family & Soc. Servs. Admin., 715 N.E.2d 903, 904 (Ind. Ct. App. 1999) (citing Park v. Med. Licensing Bd. of Ind., 656 N.E.2d 1176, 1179 (Ind. Ct. App. 1995), trans. denied; Crowder v. Rockville Training Ctr., 631 N.E.2d 947, 948 (Ind. Ct. App. 1994), trans. denied; Indianapolis Yellow Cab, Inc. v. Ind. Civil Rights Comm’n, 570 N.E.2d 940, 942 (Ind. Ct. App. 1991), trans. denied). If the petitioner fails to either file the agency record within thirty days of filing their petition, or request and receive an extension of time within that thirty-day period, the trial court must dismiss the petition for review because it lacks further jurisdiction to consider it. Id. (citing Park, 656 N.E.2d at 1179; Crowder, 631 N.E.2d at 948).

Id. at 333.

We also rejected the school corporation’s argument that any deficiencies in its filing of the agency record were immaterial. Id. at 335. We concluded that the school corporation’s failure to comply with the statute was not an “immaterial variance.” Id. Thus, we held that the trial court lost jurisdiction to consider the school corporation’s petition for judicial review.<sup>1</sup> Id.

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<sup>1</sup> We note that the Indiana Supreme Court clarified jurisdiction concepts in K.S. v. State, 849 N.E.2d 538 (Ind. 2006). The Court held:

Like the rest of the nation’s courts, Indiana trial courts possess two kinds of “jurisdiction.” Subject matter jurisdiction is the power to hear and determine cases of

Similarly, here, under Ind. Code § 4-21.5-5-13(a), the *petitioner*, i.e., the School, had the duty to transmit the agency record to the trial court. If the School was unable to obtain the agency record from the IEERB in a timely manner, the statute allowed the School to request an extension of time. I.C. § 4-21.5-5-13(b). Failure to file the record or request an extension of time was cause for dismissal of the petition for judicial review. Id. Moreover, the School's failure to file the agency record until May 7, 2008, cannot be considered an immaterial variance.<sup>2</sup> We conclude that the trial court did not err by granting the Teachers' motion to dismiss and did not abuse its discretion by denying the School's motion to correct error. See, e.g., Brownsburg, 813 N.E.2d at 335 (holding that the school corporation's failure to timely file the agency record was fatal to its claim).

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the general class to which any particular proceeding belongs. Personal jurisdiction requires that appropriate process be effected over the parties.

Where these two exist, a court's decision may be set aside for legal error only through direct appeal and not through collateral attack. Other phrases recently common to Indiana practice, like "jurisdiction over a particular case," confuse actual jurisdiction with legal error, and we will be better off ceasing such characterizations.

849 N.E.2d at 540. The agency record filing requirements in Ind. Code § 4-21.5-5-13 implicate what courts have previously called "jurisdiction over a particular case" rather than subject matter or personal jurisdiction. See, e.g., Packard v. Shoopman, 852 N.E.2d 927 (Ind. 2006) (holding that statutory deadlines for filing a petition for judicial review in the Tax Court referred to what was previously known as "jurisdiction over a particular case"); United Ancient Order of Druids-Grove # 29, 847 N.E.2d at 926 ("The timing of filing the agency record implicates neither the subject matter jurisdiction of the Tax Court nor personal jurisdiction over the parties. Rather, it is jurisdictional only in the sense that it is a statutory prerequisite to the docketing of an appeal in the Tax Court."). Consequently, although the court in Brownsburg referred to this concept as jurisdiction, we will not do so.

<sup>2</sup> The School relies upon Izaak Walton League of America, Inc. v. DeKalb County Surveyor's Office, 850 N.E.2d 957 (Ind. Ct. App. 2006), reh'g denied, trans. denied, which reversed the trial court's dismissal of a petition for judicial review. We held in Izaak that the petitioner had submitted a timely and adequate agency record even though several documents were excluded where those documents concerned matters not relevant to the issue. Izaak is distinguishable from this case because, here, the School did not submit a timely agency record at all.

## II.

The Teachers argue that they are entitled to attorney fees pursuant to Ind. Appellate Rule 66(E). Ind. Appellate Rule 66(E) provides: “The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court’s discretion and may include attorneys’ fees. The Court shall remand the case for execution.” “[S]uch an award is discretionary and may be ordered when an appeal is replete with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.” Carter-McMahon v. McMahon, 815 N.E.2d 170, 179 (Ind. Ct. App. 2004). “However, we must use extreme restraint when exercising our discretionary power to award damages on appeal because of the potential chilling effect upon the exercise of the right to appeal.” Id. at 179-180. “The sanction of appellate damages for lack of merit should be applied only when the party’s contentions and arguments are utterly devoid of all plausibility.” Id.

Although the School’s arguments fail, we cannot say that its contentions and arguments were utterly devoid of all plausibility. Therefore, we conclude that an award of appellate attorney fees would be inappropriate. See, e.g., id. (holding that an award of appellate attorney fees was inappropriate).

For the foregoing reasons, we affirm the trial court’s denial of the School’s motion to correct error and the trial court’s grant of the Teachers’ motion to dismiss, and we deny the Teachers’ request for appellate attorney fees.

Affirmed.

ROBB, J. and CRONE, J. concur