BEFORE THE EXECUTIVE DIRECTOR
OF THE INDIANA PUBLIC RETIREMENT SYSTEM

JAN L. CHALFANT, Petitioner, v. INDIANA PUBLIC RETIREMENT SYSTEM, Respondent.	))))))))	JUDGES' RETIREMENT FUND

FINAL ORDER

The Board of Trustees ("Board") of the Indiana Public Retirement System ("INPRS") is the ultimate authority in administrative appeals brought by members of the Judges' Retirement Fund ("JRF") under IC 33-38-6-23(c) and IC 4-21.5-3-28. In the Statement of Board Governance, the Board delegates to the Executive Director the authority to conduct a final authority proceeding, or a review of decision points by the administrative law judge ("ALJ"), to issue a final order in this matter.

1. The ALJ entered a Decision and Order on Motions for Summary Judgment ("Order") in this matter on October 19, 2011, denying Petitioner's Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment.

2. Copies of the Order have been served upon the parties.

3. Pursuant to IC 4-21.5-3-29(d)(2) and Indiana Trial Rule 4.17(B)(2), it has been more than fifteen (15) days since the ALJ served the Order upon the parties.

4. No objections to the Order have been filed.

NOW THEREFORE the Decision and Order on Motions for Summary Judgment of the Administrative Law Judge is affirmed.

DATED November 10, 2011

Steve Russo, Executive Director
Indiana Public Retirement System
One North Capitol, Suite 001
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I certify that on the 10th day of November, 2011, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

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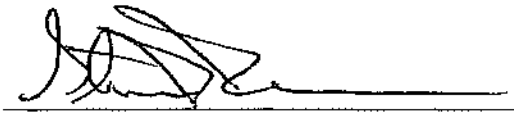

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BEFORE AN ADMINISTRATIVE LAW JUDGE
INDIANA PUBLIC RETIREMENT SYSTEM

JAN L. CHALFANT, Petitioner, v. INDIANA PUBLIC RETIREMENT SYSTEM, [1] Respondent.	)	JUDGES' RETIREMENT FUND

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Introduction

Petitioner Jan L. Chalfant appeals from an initial determination that an increase to his retirement benefit was incorrectly calculated. INPRS determined that his monthly benefit would be reduced to the correct amount, and further reduced to collect the resulting overpayment of $[redacted] Both parties filed summary judgment motions which are fully briefed and ready for decision. Neither party requested a hearing.

Findings of Undisputed, Material Facts

1. Jan Chalfant took office as Judge of the Randolph Circuit Court on January 1, 1993 (INPRS Ex. A-1), and thus became a member of the judges' retirement fund (JRF). Because he became a judge after August 31, 1985, his participation in the fund was mandatory and controlled by the terms of the 1985 Retirement, Disability, and Death System for judges ("1985 Plan"). Ind. Code § 33-38-8-10.

2. Before his planned retirement, Judge Chalfant met on multiple occasions with INPRS employee Thomas Parker to discuss his retirement plans, including the fact that Judge Chalfant would be entitled to benefits from other state retirement plans based on his prior service as a prosecuting attorney (covered by the Prosecuting Attorneys' Retirement Fund or PARF) and a deputy prosecuting attorney (covered by the Public Employees' Retirement Fund

[1] The judges' retirement fund was administered by the Board of Trustees of the Public Employees' Retirement Fund until July 1, 2011, when administration of several funds was consolidated as the Indiana Public Retirement System (INPRS) with one board. *See* Ind. P.L. 23-2011; Ind. Code §§ 5-10.5-2-2, 5-10.5-3-1. Both the current board and its predecessor will be referred to herein as INPRS.

or PERF). Judge Chalfant was told that Mr. Parker was the only employee who knew how to calculate his benefit. (Chalfant Aff. ¶¶ 4, 6.)

3. Judge Chalfant's last day in office was December 31, 2004, and he applied for retirement benefits on December 10, 2004 (INPRS Ex. A-2). His separation from service was certified on January 19, 2005 (*id.*).

4. Judge Chalfant began receiving a JRF retirement benefit of $[redacted] per month *effective* in January 2005, but his first check was a combined check for the first three months issued on March 15, 2005 (INPRS Ex. A-3).[2] He then received monthly checks of $[redacted] for four months (*id.*).

5. INPRS erroneously recalculated and increased Judge Chalfant's benefit in 2005. The increase was authorized only for participants in the 1977 Retirement, Disability, and Death System ("1977 Plan"), not participants in the 1985 Plan. (Parker Aff. ¶¶ 14-15; Chalfant Aff. ¶ 14.) INPRS characterizes the mistake as being due to "an administrative error" without further explanation (Parker Aff. ¶ 15).

6. As a result of the error, in August 2005, Judge Chalfant was issued a payment of $[redacted], followed by monthly checks of $[redacted] from September 2005 through December 2007 (INPRS Ex. A-3).

7. The changes in Judge Chalfant's benefit in 2005 were not explained to him, but he had no reason to believe that any of the checks was incorrect (Chalfant Aff. ¶ 8).

8. Cost of living increases were subsequently applied, resulting in monthly checks of [redacted] throughout 2008, and $[redacted] throughout 2009 and for the first eight months of 2010 (INPRS Ex. A-3).

9. An audit of Judge Chalfant's account was approved on March 9, 2010 (INPRS Ex. B-1).

10. By letter dated June 8, 2010, INPRS notified Judge Chalfant that a review of his benefit determined that it had been incorrectly calculated since 2005 and he had been receiving a greater benefit than he was entitled to. The letter stated that federal law required collection of any overpayments made to members, so INPRS would be required to collect $[redacted] To minimize the impact of its error, the overpayment would be collected over 216 months (18 years) with no interest. (INPRS Ex. B-2.)

11. The letter stated that starting with the July 2010 payment, Judge Chalfant's benefit would be reduced from $[redacted] to $[redacted] Confusingly, the letter said that this

[2] Judge Chalfant states that when checks did not arrive in January, February, and March 2005, and Mr. Parker would not return his calls, he contacted the governor's office and the combined check arrived in mid-April 2005 (Chalfant Aff. ¶ 7).

amount reflected both the "Monthly Benefit Less Repayment (5 years)" and "Future Monthly Benefit." (INPRS Ex. B-2.)

12. Upon receiving the letter, Judge Chalfant called INPRS and left a request to speak with Mr. Parker, but the call was not returned (Chalfant Aff. ¶ 10).

13. By letter dated June 30, 2010, Floyd Teamer of INPRS wrote that he and Judge Chalfant had discussed the matter and Judge Chalfant desired to appeal. Mr. Teamer explained that Judge Chalfant had been given the benefit of a 2005 benefit increase that applied only to participants in the 1977 Plan, not the 1985 Plan. Therefore, the larger checks that Judge Chalfant started receiving in 2005 were in error, resulting in a total overpayment of [redacted] (INPRS Ex. B-3.)

14. Mr. Teamer's letter of June 30, 2010, stated that it was an initial determination and explained Judge Chalfant's right to request administrative review (INPRS Ex. B-3).

15. By letter dated July 23, 2010, Judge Chalfant requested administrative review (INPRS Ex. B-4). INPRS concedes that the appeal was timely (Assignment Letter to ALJ Uhl, 7/28/10).

16. After reviewing additional documentation received from INPRS, the parties agreed that Judge Chalfant's benefit would be reduced to the corrected amount starting in September 2010, without prejudice to Judge Chalfant's appeal (Chalfant Aff. ¶ 14).

17. Subsequent to Mr. Teamer's June 2010 letter, INPRS has recalculated the total overpayment to be [redacted] (Parker Aff. ¶ 19; INPRS Ex. A-3). This recalculation is not contested.

18. Judge Chalfant states that in reliance on the amount of his pension benefits, "as projected by the Respondent in 2005 and paid" until the error was discovered, he purchased a duplex in Muncie, Indiana, and a condominium in Florida (Chalfant Aff. ¶ 15). Due to the collapse of the real estate market in Florida, the condominium has lost about 50 percent of its original value, so that it is worth less than the balance on the existing mortgage (*id.*).

19. Judge Chalfant has been paying income tax on his retirement benefits, estimating the rate of tax to be 20 percent (Chalfant Aff. ¶ 16).

20. A tax accountant has advised Judge Chalfant that repayments of the overpayment can be claimed as a deduction or credit in the year of repayment. Claiming them as a credit (which is usually of greater benefit) requires a "with or without" recalculation of taxes for the prior years in which the overpayments were received. The accountant estimates that this would require about 1.5 hours of additional tax preparation time at a cost of about [redacted] (Pet. Ex. D.) It is unclear whether the accountant's advice assumes a lump-sum

repayment by Judge Chalfant, or would also apply to INPRS's proposal of reducing Judge Chalfant's (taxable) benefit for the next 18 years.[3]

21. Judge Chalfant states that at the time of his affidavit in support of his motion for summary judgment, he had incurred about [redacted] in attorney fees to pursue this appeal (Chalfant Aff. ¶ 16).

22. Judge Chalfant states that the correction of his benefit reduced it by about [redacted] month, and further reduction to cure the overpayment "would cause my wife and me a significant financial hardship." (Chalfant Aff. ¶ 18.)

23. Any finding of fact inadvertently set forth in the Conclusions of Law below is incorporated herein.

Conclusions of Law

Legal standard

Summary judgment "shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code § 4-21.5-3-23(b) (2010).[4]

A genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and that he or she is entitled to a judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Comm'r, Indiana Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. Ct. App. 2005) (citing cases).

Contrary to federal practice, a moving party cannot simply allege that the absence of evidence on a particular element is sufficient to entitle that party to summary judgment—it

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[3] Judge Chalfant states in his affidavit that he believes his accountant would have to prepare and file amended tax returns for the years in which he received the overpayments (Chalfant Aff. ¶ 16), but that is not what the accountant says in his letter (Pet. Ex. D).

[4] Section 4-21.5-3-23 was amended effective July 1, 2011, to provide simply that summary judgment motions in administrative proceedings be treated the same as under Ind. Trial Rule 56. Ind. P.L. 32-2011, § 5. The parties' cross-motions in this case were filed before the effective date, but in any event the amendment does not dictate any different consideration of the motions.

must prove that no dispute exists on all issues. *Dennis v. Greyhound Lines, Inc.*, 831 N.E.2d 171, 173 (Ind. Ct. App. 2005), citing *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994).

An ALJ's review of an agency's initial determination is *de novo*, without deference to the initial determination. *Indiana Dep't of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 103-04 (Ind. 1993); *Jennings Water, Inc. v. Office of Environmental Adjudication*, 909 N.E.2d 1020, 1025 (Ind. Ct. App. 2009), *trans. denied*, 919 N.E.2d 556 (Ind. 2009); *Branson v. Public Employees' Retirement Fund*, 538 N.E.2d 11, 13 (Ind. Ct. App. 1989). *See also* Ind. Code § 4-21.5-3-10(d) (as amended effective July 1, 2011, Ind. P.L. 32-2011 § 3).

Issue

It is undisputed that Judge Chalfant was overpaid under the terms of the plan. He does not challenge the correction of future benefits or the amount of the overpayment. The sole issue, as framed by the parties, is whether INPRS is mandated to collect the overpayment, or whether equitable principles restrict INPRS's ability to do so.

Evidence

Neither party seeks exclusion of the evidence submitted by the other, nor does either party argue that there are disputes of material fact that prevent summary judgment. Instead, the parties dispute the relevance of certain facts. Those disputes do not require express rulings as to admissibility.

Discussion

The benefits for participants in the 1977 Plan are based on the salary actually being paid for their office, Ind. Code § 33-38-7-11(d), so even after they retire, a change in the salary for the office requires adjustment of the benefit. Benefits for participants in the 1985 Plan are based on their salary when they left office, Ind. Code § 33-38-8-14(c)(1), so no further adjustment is required even if the salary for the office changes. The salaries for judicial offices increased in 2005, requiring adjustment for participants in the 1977 Plan. Judge Chalfant was given an adjustment even though he is a participant in the 1985 Plan.

The error and resulting overpayment are not contested. The dispute is over the authority of INPRS to collect the overpayment from Judge Chalfant.

A. Authority to collect overpayment

INPRS contends that it must collect the overpayment, both because state law sets forth mandatory terms of the pension plan, and because the plan must strictly follow those terms or risk losing its tax-favored status as a qualified plan under the Internal Revenue Code (IRC).

Judge Chalfant does not appear to contest the general proposition that INPRS is authorized to collect overpayments, but argues that this authority is tempered by equitable principles that restrict recoupment based on the facts of a particular case.

The INPRS Board is granted broad authority to "[e]xercise all powers necessary, convenient, or appropriate to carry out and effectuate its public and corporate purposes and to conduct its business." Ind. Code § 5-10.5-4-2(a)(17). The board's powers shall be interpreted broadly to effectuate the purposes of the PERF law and not as a limitation of powers. Ind. Code § 5-10.5-4-3.[5] The statutes governing the JRF do not address the question of collecting erroneous overpayments.[6]

Despite the lack of express authority, the ALJ finds (and Judge Chalfant does not contest) that there is implicit authority to collect overpayments as a matter of common law. The JRF is construed as a trust. Ind. Code § 33-38-6-19. The law of trusts is that a trust beneficiary is liable for the amount of a payment to which he was not entitled, and his interest in the trust may be charged for the repayment, unless it would be inequitable to compel him to make repayment. *Restatement (2d) of Trusts* § 254 (1959).

Furthermore, under Indiana law, "if one party pays money to another party under a mistake of fact that a contract or other obligation required such payment, the payor is entitled to restitution." *St. Mary's Medical Center, Inc. v. United Farm Bureau Family Life Ins. Co.*, 624 N.E.2d 939, 941 (Ind. App. 1993), citing *Restatement of Restitution* § 18 (1937). This rule applies "even though the [payor] may have been careless and had failed to employ the means of knowledge which would have disclosed the mistake." *Century Bldg. Partnership, L.P. v. SerVaas*, 697 N.E.2d 971, 974 (Ind. App. 1998), citing *Monroe Financial Corp. v. DiSilvestro*, 529 N.E.2d 379, 383 (Ind. App. 1988), *trans. denied* (Ind. 1989).[7]

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[5] These provisions match powers granted to the predecessor PERF Board. Ind. Code §§ 5-10.3-3-8(a)(10) and (c) (2010).

[6] By contrast, the Teachers' Retirement Fund is expressly authorized to stop the benefit of a member who refuses to repay an overpayment, Ind. Code § 5-10.4-5-15(a)(3), and PERF is implicitly authorized to decrease a benefit "for error," Ind. Code § 5-10.3-8-8. Some other states statutorily authorize recovery of overpayments. *See Sola v. Roselle Police Pension Bd.*, 794 N.E.2d 1055, 1058 (Ill. App. 2003) (interpreting 40 Ill. Comp. Stat. § 5/3-144.2); *State ex rel. Public Employees Retirement Ass'n v. Longacre*, 59 P.3d 500 (N.M. 2002) (upholding constitutionality of New Mex. Stat. Ann. § 10-11-4.2(A), which authorizes collection of overpayment up to one year before it was discovered).

[7] The 1937 *Restatement of Restitution* and many cases draw a distinction between mistakes of fact and mistakes of law, holding that a payor is not entitled to restitution of overpayments induced solely by mistakes of law. *Restatement* § 45. Our Supreme Court, however, has expressed approval of the contemporary view that this distinction is "artificial" and restitution is available regardless of whether the mistake was one of fact or law. *Time Warner Entertainment Co., L.P. v. Whiteman*, 802 N.E.2d 886, 891 (Ind. 2004).

INPRS also argues that it has no discretion to decline to collect overpayments because Ind. Code § 33-38-6-13 requires the JRF to "satisfy the qualification requirements in Section 401 of the Internal Revenue Code." In order to meet those requirements, § 33-38-6-13 further requires the fund to meet several conditions, including (1) the corpus and income shall be distributed to members and their beneficiaries in accordance with the statutes governing the fund, (2) no part of the corpus or income of the fund may be used for or diverted to any purpose other than the exclusive benefit of the members and their beneficiaries, and (5) all benefits paid from the fund shall be distributed in accordance with the requirements of § 401(a)(9) of the IRC and regulations under that section.

Section 401 of the IRC, 26 U.S.C. § 401, provides favorable tax treatment to qualified plans, including deferred income taxation of employer contributions and income, and exemption from employment taxes on employer contributions. In order to be qualified, contributions to the plan must be made "for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust *in accordance with such plan.*" 26 U.S.C. § 401(a)(1) (emphasis added). The plan must also make it impossible to use the corpus and income for purposes other than for "the exclusive benefit of [the] employees or their beneficiaries." 26 U.S.C. § 401(a)(2).

Regulations promulgated by the United States Treasury Department repeat and refine the qualification requirements of § 401. A qualified pension plan must be "a definite written program." 26 C.F.R. § 1.401-1(a)(2). The plan must be established by an employer "for the exclusive benefit of his employees or their beneficiaries." 26 C.F.R. § 1.401-1(a)(3)(ii) and (iv). It must also be formed for the purpose of distributing the fund's corpus and income "in accordance with the plan." 26 C.F.R. § 1.401-1(a)(3)(iii).

Section 401 and the regulations do not expressly state that an overpayment of benefits to a member or beneficiary who is entitled to benefits necessarily violates the exclusive benefit requirement or constitutes operation not "in accordance with the plan," but that conclusion is reasonable if only because overpayments would violate the terms of the plan.

In further support, INPRS cites the IRS's unpromulgated system of correction programs for retirement plans that are intended to satisfy § 401(a) but "have not met these requirements for a period of time." IRS Revenue Procedure 2008-50 (eff. Jan. 1, 2009, published in Internal Revenue Bulletin 2008-35, pp. 464 *et seq.*, Sept. 2, 2008), § 1.01.[8] If the plan corrects a failure using these procedures, the IRS will not treat the plan as failing to meet § 401(a). *Id.* § 3.01.

[8] Rev. Proc. 2008-50, *available at* http://www.irs.gov/irb/2008-35_IRB/ar10.html#d0e747 (last viewed 10/18/11); IRB 2008-35, *available at* http://www.irs.gov/pub/irs-irbs/irb08-35.pdf (last viewed 10/18/11). Procedure 2008-50 modified and superseded the previous version cited by INPRS, Rev. Proc. 2006-27. Rev. Proc. 2008-50 § 2.01.

The Revenue Procedure defines an "operational failure" as a qualification failure to arises solely from the failure to follow plan provisions." *Id.* § 5.01(2)(b). An operational failure is one type of "qualification failure," which is defined as "any failure that adversely impacts the qualification of a plan." *Id.* § 5.01(2). The Revenue Procedure specifically defines an "overpayment" as "a payment being made to a participant or beneficiary that exceeds the amount payable to the participant or beneficiary under the terms of the plan . . .," and treats it as a qualification failure. *Id.* § 5.01(3)(c).

Apart from these circular definitions, the Procedure clearly contemplates that overpayments are failures that require correction. Section 6 sets forth the principles for correction of failures, and creates an exception to the general requirement of full correction by stating that a plan is *not* required to seek return of an overpayment of $[redacted] or less. *Id.* § 6.02(5)(c). Overpayments may be corrected by the procedure proposed by INPRS in this case, reduction of future benefits to recoup the overpayment on an actuarially adjusted basis. *Id.*, Appendix B, Correction Methods and Examples, § 2.04(1)(a)(ii).[9]

A revenue procedure is directory, not mandatory, and does not have the force of a promulgated rule. *Estate of Shapiro v. Commissioner*, 111 F.3d 1010, 1017-18 (2nd Cir. 1997), citing cases. Nevertheless, Rev. Proc. 2008-50 clearly indicates the IRS view that an overpayment like the one in this case would be considered a failure that could threaten PERF's qualification under IRC § 401.

INPRS has cited no cases holding that a pension plan risks losing its status as a qualified plan under the IRC if it fails to recover isolated overpayments. Nor is there evidence that the IRS has taken action to revoke a plan's qualified status under circumstances such as those presented here. Case law contains little discussion of the possibility, and then usually in the more extreme case where a non-employee was provided benefits. In *Flynn v. Hach*, 138 F.Supp.2d 334 (E.D. N.Y. 2001), for example, the court found that trustees of a pension plan did not act arbitrarily in refusing to deem the plaintiff an employee covered by the plan. As partial support for the trustees' position, the court accepted their argument that the plan would risk losing its qualified status under IRC § 401 if it included non-employees. *Id.* at 344-45.

The *Flynn* court cited *Thomas v. Bd. of Trustees of Intern. Union of Operating Engineers*, 1998 WL 334627 (E.D. Pa. 1998), in which the IRS audited pension funds and, upon learning that contributions had been received for non-employees including Thomas, threatened the funds with loss of their status as qualified trusts under IRC § 401. To avoid this result, the funds refunded the contributions and Thomas sued. The court held that the funds had properly refunded the contributions in the face of the threatened loss of their tax-exempt status. The court cited two older decisions for the proposition that plans providing benefits to non-employees are not qualified under IRC § 401. *Professional & Executive Leasing, Inc. v. Commissioner*, 862 F.2d 751, 752-54 (9th Cir. 1988); *Stochastic Decisions, Inc. v. Wagner*,

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[9] Appendix B, § 2.04(1) applies to correction of IRC § 415(b) excesses, but is adopted with respect to overpayment failures by Appendix B, § 2.05.

34 F.3d 75, 82 (2d Cir. 1994). And in *Redall Industries, Inc. v. Wiegand*, 870 F.Supp. 175, 179 (E.D. Mich. 1994), trustees of a pension plan seeking restitution of overpayments argued that the plan would lose its qualified status if restitution was not ordered, based on an expert's testimony that the plan's qualification would be "in question." The court did not resolve the question, finding that further proceedings were necessary as to whether it would equitable to permit restitution.

Against these few cases is a much larger body of cases, some cited later in this decision, in which courts applied equitable principles to determine whether correction and overpayment is allowed, without any discussion of the specter that the plan would lose its § 401 qualification.

The ALJ concludes that the requirement that the fund maintain its qualification under IRC § 401 does not prevent the application of equitable principles for a couple of reasons.

First, while IRC § 401 requires distributions "in accordance with [the] plan," the terms of this plan (the JRF) consist of both statutory provisions and the common law of Indiana. For example, constitutional and contractual principles have been held to prevent retroactive amendment to pension terms, if a vested interest has been found. *Bd. of Trustees of Public Employees' Retirement Fund v. Hill*, 472 N.E.2d 204 (Ind. 1985) (judges' retirement fund). As noted above, the judges' retirement fund is also a trust, operated by a board of trustees, and therefore subject to the common law of trusts.[10] Therefore, it does not violate the terms of the plan to apply equitable principles to an overpayment situation.

Second, even the facially heartless IRS procedure suggests some room for flexibility. Correction is not required where reduction and recoupment would be "unreasonable or not feasible" or would have "significant adverse effects on participants and beneficiaries of the plan." Rev. Proc. 2008-50, § 6.02(5) (although concededly the list of exceptions that follows, including the exception for overpayments of [redacted] or less, appears to be exclusive).

In sum, therefore, it is concluded that INPRS is authorized to collect the overpayment by deduction from future payments, but that collection is not mandatory if equitable principles would limit INPRS's authority depending on the facts of the particular case.

B. Equitable principles

Indiana common law recognizes at least three doctrines that potentially apply here. To a considerable extent, these doctrines overlap.

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[10] *Cf. Ogden v. Michigan Bell Telephone Co.*, 595 F.Supp. 961, 970 (E.D. Mich. 1984) (state law concepts which extend beyond the terms of a pension plan may be a proper reference in an action to enforce plan).

a. Restitution of mistaken payments. As noted above, the payor of mistakenly paid money is entitled to restitution. But this rule is subject to the limitation that "the party receiving the money must not have so changed his position so as to make it inequitable to require him to make repayment." *Monroe Financial*, 529 N.E.2d at 383. In *Monroe Financial*, the court held that investing the proceeds or using the proceeds as a down payment to incur new debt based on the proceeds was not sufficient to demonstrate a change of position that would bar restitution. *Id.* at 384-85.

b. Trustee's mistaken distribution of trust assets. Also as noted earlier, the JRF is a trust and a trust beneficiary is liable to refund a payment to which he was not entitled "unless he has so changed his position that it is inequitable to compel him to make repayment." *Restatement (2d) of Trusts* § 254 (1959). Whether it is inequitable to compel repayment is determined by examining "(1) what disposition has been made by the beneficiary of the amount by which he was overpaid; (2) the amount of the overpayment; (3) the nature of the mistake made by the trustee, whether he was negligent or not; (4) the time which has elapsed since the overpayment was made." *Id.*, cmt. d. The comment gives an example:

> Thus, if the trustee pays the beneficiary as income a large sum out of principal and the beneficiary believing that he was entitled to it spends it, and under the circumstances it would be a hardship upon him to compel him to repay the amount out of his own property, and to withhold it out of future income would result in his receiving no income over a long period, the trustee may be denied indemnity or the court may permit the trustee to retain a part of the income under the trust thereafter accruing from time to time to the beneficiary until the trustee is indemnified.

Id.

c. Equitable estoppel. "Equitable estoppel applies if one party, through its representations or course of conduct, knowingly misleads or induces another party to believe and act upon his or her conduct in good faith and without knowledge of the facts." *Terra Nova Dairy, LLC v. Wabash County Bd. of Zoning Appeals*, 890 N.E.2d 98, 105 (Ind. Ct. App. 2008), quoting *Steuben County v. Family Development, Ltd.*, 753 N.E.2d 693, 699 (Ind. Ct. App. 2001), *trans. denied* (2002).

Some cases use a three-element test, requiring the party asserting equitable estoppel to show "(1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially." *Story Bed & Breakfast, LLP v. Brown County Area Plan Commission*, 819 N.E.2d 55, 67 (Ind. 2004), quoting *City of Crown Point v. Lake County*, 510 N.E.2d 684, 687 (Ind. 1987).

Other cases state four elements: (1) a representation or concealment of material fact, (2) made by a person with knowledge of the fact and with the intention that the other party

should act upon it, (3) to a party ignorant of the matter, (4) which induced the other party to act upon it to his detriment. *Indiana Dep't of Environmental Management v. Conard*, 614 N.E.2d 916, 921 (Ind. 1993); *see also Wabash Grain, Inc. v. Smith*, 700 N.E.2d 234, 237 (Ind. App. 1998) (adding that the reliance element has two prongs, reliance in fact and right of reliance).

Under both versions, the party claiming estoppel has the burden to prove all facts necessary to establish it. *Story B&B*, 819 N.E.2d at 67; *Conard*, 614 N.E.2d at 921.

Even where the elements of estoppel can be established, the "general rule" is that equitable estoppel "will not be applied against governmental authorities." *Story B&B*, 819 N.E.2d at 67; *City of Crown Point*, 510 N.E.2d at 687. The reason for this is two-fold. "If the government could be estopped, then dishonest, incompetent or negligent public officials could damage the interests of the public. At the same time, if the government were bound by its employees' unauthorized representations, then government, itself, could be precluded from functioning." *Samplawski v. City of Portage*, 512 N.E.2d 456, 459 (Ind. App. 1987).

But estoppel against a governmental entity "may be appropriate where the party asserting estoppel has detrimentally relied on the governmental entity's affirmative assertion or on its silence where there was a duty to speak." *Equicor Development, Inc. v. Westfield-Washington Township Plan Commission*, 758 N.E.2d 34, 39 (Ind. 2001). The courts have used "public interest" or "public policy" in justifying this exception. *City of Crown Point*, 510 N.E.2d at 687 ("When the public interest would be threatened by the government's conduct, estoppel will be applied to bar that conduct."). What constitutes the public interest is not well defined. *Samplawski*, 512 N.E.2d at 459; *cf. Metropolitan Dev. Comm'n of Marion County v. Schroeder*, 727 N.E.2d 742, 752 (Ind. App. 2000) (discussing public interest in zoning enforcement cases, balancing equities to determine that threat to public by governmental conduct outweighed public interest in barring estoppel defenses against zoning violations).

Estoppel against government is particularly inappropriate where a party claiming to be ignorant of the facts had access to the correct information. *U.S. Outdoor Advertising Co., Inc. v. Indiana Dep't of Transportation*, 714 N.E.2d 1244, 1259-60 (Ind. App. 1999). All persons are charged with knowledge of rights and remedies prescribed by statute, and statutory procedures cannot be circumvented by unauthorized acts and statements of officers, agents or staff. *Id.*, citing *Middleton Motors, Inc. v. Indiana Dep't of State Revenue*, 269 Ind. 282, 380 N.E.2d 79, 81 (1978); *DenniStarr Environmental, Inc. v. Indiana Dep't of Environmental Management*, 741 N.E.2d 1284, 1289-1290 (Ind. App. 2001); *Hannon v. Metropolitan Development Comm'n of Marion County*, 685 N.E.2d 1075, 1080 (Ind. App. 1997).

Courts will not apply estoppel in cases involving unauthorized use of public funds. *City of Crown Point*, 510 N.E.2d at 688; *Samplawski*, 512 N.E.2d at 459; *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348, 354 (Ind. App. 1981) (courts are "particularly unsolicitous of estoppel" where "unauthorized acts of public officials somehow implicate government spending powers"). But estoppel may be appropriate where the pertinent limits on

governmental authority are not clear and unambiguous. *City of Crown Point*, 510 N.E.2d at 688; *Cablevision of Chicago*, 417 N.E.2d at 356.

d. Common law principles beyond Indiana. Judge Chalfant cites cases from other jurisdictions. Most recoupment of overpayment cases are decided under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* ERISA does not apply to plans established by states or their political subdivisions. 29 U.S.C. §§ 1002(32), 1003(b)(1). But these cases provide guidance because they apply various common law principles of equity, such as restitution, equitable estoppel, laches, and the law of trusts. They reach a variety of results depending on the individual circumstances. Several leading cases are set forth in the margin. [11] These cases reach differing results based on a wide variety of factors that a court of equity would consider in determining whether correcting a benefit payment and collecting overpayment are appropriate, largely consistent with the principles of Indiana law discussed above.

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[11] *Sheward v. Bechtel Jacobs Co. LLC Pension Plan*, 2010 WL 841301 (E.D. Tenn. 2010) (pension plan could recoup $114,370 in overpayments due to miscalculation); *Phillips v. Brink's Co.*, 632 F.Supp.2d 563 (W.D. Va. 2009) (employer could adjust future benefits but not recoup about $26,000 in overpayments); *Porter v. Hartford Life & Accident Ins. Co.*, 609 F.Supp.2d 817, 827-28 (E.D. Ark. 2009) (declining to permit recoupment); *Adams v. Brink's Co.*, 261 Fed. Appx. 583, 595-97 (4th Cir. 2008) (retiree not required to repay overpayment); *Johnson v. Retirement Program Plan*, 2007 WL 649280 (E.D. Tenn. 2007) (retiree required to repay $70,000 in erroneous overpayments); *Laborer's Dist. Council Pension Fund for Baltimore and Vicinity v. Regan*, 474 F.Supp.2d 279, 281 (D. N.H. 2007) (denying summary judgment because of factual disputes over whether payee's reliance on the overpayments was reasonable); *Lumenite Control Technology, Inc. v. Jarvis*, 252 F.Supp.2d 700, 706-07 (N.D. Ill. 2003) (pension fund is entitled to restitution of overpayment if (1) it has a reasonable expectation of repayment, (2) member should reasonably have expected to repay, and (3) society's reasonable expectations of person and property would be defeated by nonpayment, citing *Harris Trust & Sav. Bank v. Provident Life & Accident Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995)); *Phillips v. Maritime Association-I.L.A. Local Pension Plan*, 194 F.Supp.2d 549 (E.D. Tex. 2001) (reduction of benefits and recoupment of overpayments disapproved); *Kaliszewski v. Sheet Metal Workers' Nat'l Pension*, 2005 WL 2297309 (W.D. Pa. 2005) (recommending denial of summary judgment on disputed question of whether pension could reduce overpayments resulting from miscalculation); *Redall Industries, Inc. v. Wiegand*, 870 F.Supp. 175, 179 (E.D. Mich. 1994) (denying summary judgment as to whether equitable principles permitted recoupment of about $427,000 in overpayments); *Wells v. U.S. Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1250-51 (6th Cir. 1991) (laches and estoppel did not bar recoupment, but remanding for determination of whether recoupment would be inequitable under trust law); *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1354 (D.C. Cir. 1982).

C. Application of equitable principles

Judge Chalfant has the burden to prove that recoupment of the mistaken overpayment would be inequitable. Based on the undisputed evidence, he would not be able to carry that burden.

The evidence does not support a finding of equitable estoppel. INPRS did not commit the sort of culpable misrepresentation or concealment of fact that would support estoppel. While estoppel does not require an "actual false representation or concealment of existing material fact," the actor's conduct must be "sufficient to prevent inquiry, to elude investigation, or to mislead and hinder." *Little v. Progressive Ins.*, 783 NE 2d 307, 315 (Ind. Ct. App. 2003), citing *Paramo v. Edwards*, 563 N.E.2d 595, 599 (Ind. 1990). The basis for equitable estoppel is fraud, either actual or constructive, arising from conduct that would secure an unconscionable advantage. *Town of New Chicago v. City of Lake Station*, 939 N.E.2d 638, 653 (Ind. Ct. App. 2010), *trans. denied*, citing *Paramo*, 563 N.E.2d at 598.

The evidence here is that INPRS merely made a negligent error by applying the salary adjustment meant only for members of the 1977 Plan to a member of the 1985 Plan, and then unwittingly sent the increased payments to Judge Chalfant for five years until an audit caught the error. INPRS did not engage in any sort of representation or concealment in order to secure an unconscionable advantage. INPRS was unaware of the overpayments until early 2010 and took relatively prompt action to address the situation. This was not a situation in which the governmental entity made an affirmative assertion or was silent while under a duty to speak. *Equicor Development*, *supra.*

Even if there were evidence of misleading conduct by INPRS, Judge Chalfant's showing of detrimental reliance is insufficient. There is no evidence that INPRS assured Judge Chalfant of a particular benefit before he retired, and the only "assurance" received thereafter was the unexplained increase in benefit payments in August 2005. Judge Chalfant purchased a duplex in Muncie and a condominium in Florida, but the record does not show when he committed to those purchases or whether the increased benefit he started receiving in August 2005 was the basis for either his decision to purchase them or the extension of a mortgage based on presumed future income. In other words, there is no showing that he would *not* have made the purchases if he had been receiving the correct benefit.

In the absence of estoppel, the case turns on the principles of restitution and trusts outlined above. Under those doctrines, the overpayment was a windfall to Judge Chalfant and he must repay unless it would be inequitable to do so. INPRS's mere negligence in making the overpayment is immaterial.

Some of the factors discussed by the parties are generally neutral. There is no evidence that Judge Chalfant induced the error, or that he even suspected an error had been made yet acquiesced by receiving the checks without making an inquiry. INPRS argues (in the context of detrimental reliance) that Judge Chalfant, like all citizens, is presumed to know the law and

cannot be deemed to be at an unfair disadvantage on that score, but in the absence of an understanding or explanation for the benefit increase in 2005, Judge Chalfant had no reason to inquire as to whether the increase was legally correct.

To the extent that INPRS might be said to have breached a fiduciary duty, the breach was equally harmful to other participants who would suffer the actuarial loss of the overpayment from the corpus of the fund. "Forcing . . . a plan to pay benefits [that] are not part of the written terms of the program disrupts the actuarial balance of the Plan and potentially jeopardizes the pension rights of others legitimately entitled to receive them." *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Neurobehavioral Associates, P.C.*, 53 F.3d 172, 175 (7th Cir. 1995) (reversing and remanding dismissal of action in which plan sought restitution of overpayment after clerical error resulted in $10,000 payment when only $100 owed). *See also Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990).

Otherwise, the circumstances do not support a finding of financial hardship. In particular, as noted, Judge Chalfant has not shown that he changed his position by purchasing his retirement homes in reliance on the increased benefit or, more important, that he would not have purchased them had he been receiving the correct benefit. He does not contend that he will be unable to make mortgage payments or otherwise have trouble meeting his expenses. While it is unfortunate that the value of the condominium has dropped, it is unclear how that would make repayment of the overpayment inequitable, because the mortgage payments should remain the same. The fact that Judge Chalfant will have to spend $300 for additional accounting services in order to properly report the tax treatment of the recoupment is not the sort of inequitable hardship that equity is called upon to prevent.[12]

Furthermore, INPRS has offered to mitigate the hardship of repayment by not charging interest and accepting repayment by deduction over 18 years, reducing his monthly benefit by [redacted] or from [redacted] to [redacted] This is reasonable, and indeed is a solution suggested under trust law. *Restatement (2d) of Trusts* § 254, cmt. d (1959). Of course, if Judge Chalfant perceives any advantage to repaying sooner, he is free to do so.

[12] In any event, the tax reporting burden is not clear. Judge Chalfant paid income taxes on the overpayments from 2005 to 2010. If he were to repay that amount from his own funds he could then claim a deduction or credit for the income taxes paid on that amount in past years. This appears to be the accountant's assumption. But if the overpayment is refunded by reducing Judge Chalfant's future benefits, his future taxable income would likewise be reduced and no special reporting would be necessary. It would seem that he could claim a deduction or credit only if he actually refunded the overpayment from separate funds, and then only to the extent of the refund paid in any particular year.

The only factor that militates against recoupment is relative harm. The overpayment of [redacted] represents an infinitesimal percentage of the total assets of the JRF.[13] However, as noted above, even this small amount reflects an actuarial loss to other members. The negligible impact to the fund does not justify barring recoupment.

Order

Based upon the findings of undisputed facts and conclusions of law above, the summary judgment motion of petitioner Chalfant is denied and the summary judgment motion of respondent INPRS is granted. The initial determination of INPRS that the overpayment of [redacted] be recouped by reducing Judge Chalfant's future benefits over 18 years, or on other repayment terms mutually acceptable to the parties, is affirmed.

DATED: October 19, 2011.

Wayne E. Uhl
Administrative Law Judge
3077 E. 98th St., Ste. 240
Indianapolis, Indiana 46280
(317) 844-3830

STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The undersigned administrative law judge is not the ultimate authority, but was designated by the PERF Board to hear this matter pursuant to I.C. § 4-21.5-3-9(a). Under I.C. § 4-21.5-3-27(a), this order becomes a final order when affirmed under I.C. § 4-21.5-3-29, which provides, in pertinent part:

> (b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:
>
> (1) affirming;
>
> (2) modifying; or
>
> (3) dissolving;
>
> the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge

[13] As of June 30, 2010, the JRF had net assets of $208,395,000. 2010 Comprehensive Annual Financial Report at 32, *available at* http://www.in.gov/inprs/files/PerfCafr2010_Financial.pdf (last viewed 10/19/11).

for further proceedings.

(c) In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee shall affirm the order.

(d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:

(1) identifies the basis of the objection with reasonable particularity; and

(2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

(e) Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, **certified mail, return receipt requested**, postage prepaid, on October 19, 2011:

Jon H. Moll

[redacted]

Jaclyn Brinks, Staff Attorney
INPRS
1 N. Capitol Ave., Ste. 001
Indianapolis, IN 46204-2014

Wayne E. Uhl
Administrative Law Judge