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PUBLIC EMPLOYEES RETIREMENT FUND

BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND

IN THE MATTER OF JOAN M. COCHRAN, Petitioner.	))))	PUBLIC EMPLOYEES' RETIREMENT FUND

DECISION ON MOTION FOR SUMMARY JUDGMENT

Introduction

Joan M. Cochran appeals from the PERF Board's initial determination that her retirement benefit was miscalculated and that she was overpaid a total of $[redacted] from her retirement in July 2003 through December 2006. PERF determined that it would reduce her benefit to the correct amount, and reduce it further to collect the overpayment over five years, without interest.

In accordance with the schedule set by agreement of the parties, PERF filed a motion for summary judgment on July 18, 2007. Cochran did not file a response but filed documents on September 6, 2007, that the ALJ construed to be her response. (See Order of 9/12/07.) PERF filed a reply on September 25, 2007. PERF's motion is now fully briefed and ready for decision.

Findings of Undisputed Fact

1. Joan Marie Cochran was employed on July 7, 1986, by the Indiana State Housing Board. She immediately and automatically became a member of PERF. (PERF Ex. 1.) She did not list any prior PERF-eligible service. (Id.)

2. Cochran was born on October 28, 1947. (PERF Ex. 1, 2.)

3. Cochran applied for retirement benefits on November 26, 2002, anticipating an effective date of July 1, 2003. (PERF Ex. 2.)

4. The application listed the Indiana Family and Social Services Administration as Cochran's employer, and there is no evidence of a break in service.

5. The application indicated that Cochran was applying under a State Retirement Incentive Plan (SRIP). (PERF Ex. 2.) Such early retirement incentives are authorized by Ind. Code § 5-10.2-3-1.2, which permits a member to purchase one year of service credit for every five completed years of service, and permits the State to purchase that credit for the member.

6. Cochran did not have a meeting with a retirement counselor before she elected to retire because "they were too booked up to get me in," but she attended a meeting in an auditorium. She "never knew for certain" what she would be receiving in retirement. Cochran knew that her retirement would be reduced because of her age. She and some other employees worked out computations on the computer and determined that she would receive "about $[redacted] plus the annuity." (Letter to Ken Cochran, 4/2/07.)

7. Cochran has submitted two PERF Benefit Estimates, but she has written on each, "Never saw this until I requested it." This is interpreted to mean that she did not know these estimates had been prepared or were in PERF's files until after this appeal was filed and she requested a copy of her file from PERF counsel. (See Order of 3/16/07.) In the absence of evidence that Cochran was aware of these estimates at the time she elected to retire, these documents are not material.

8. Cochran selected retirement benefit Option 10, which was described as follows:

> **OPTION 10 – NORMAL RETIREMENT.** You will receive a monthly benefit for life. If you die before receiving benefits for five years, your beneficiary will receive either your monthly benefit for the remainder of those fiver years or the present value of those remaining payments in a lump sum.

(PERF Ex. 2.)

9. With respect to her annuity savings account (ASA), Cochran elected Choice 1, described as follows:

> ***Choice Number 1:*** I elect to receive the total amount of my Annuity Savings Account paid as a monthly benefit. I understand that I will not receive any distribution from my Annuity Savings Account other than this monthly benefit.

(PERF Ex. 2.)

10. Cochran's last day in pay status was June 6, 2003, and her retirement date was July 1, 2003. (PERF Ex. 2.)

11. PERF has given Cochran credit for 20.17 years of creditable service, presumably based on almost 17 years of service plus slightly more than three years of incentive credit. There is no dispute over this amount. (PERF Ex. 4, 7, 8.)

12. Cochran's age at her retirement date was 55 years, 8 months and 3 days.

13. The calculation of the retirement benefit is controlled by Ind. Code §§ 5-10.2-4-4 (retirement benefit calculation), -5 (early retirement percent reduction) and -7 (retirement benefit payment options). Some of these calculations are based on actuarial tables and an interest rate adopted by the PERF Board.

14. PERF miscalculated Cochran's retirement benefit and her annuity savings account payout.

15. Put simply, an early retirement benefit is calculated by reducing the member's benefit by a percentage based on the number of months younger than 65 the member is at retirement. Ind. Code § 5-10.2-4-5. PERF refers to this percentage as the "age reduction factor."

16. PERF correctly calculated that Cochran would have been entitled to a full base retirement benefit of $[redacted] per year, or [redacted] per month. (PERF Ex. 7.)

17. However, PERF failed to calculate and apply the "age reduction factor" of 0.7233. If the age reduction factor had been applied, Cochran's benefit would have been $[redacted] per month. (PERF Ex. 8, 9.)

18. Cochran's ASA payout was originally calculated to be $[redacted] per month. (PERF Ex. 7.) PERF contends that this amount was too low, and should have been $[redacted] per month. (PERF Ex. 4.)

19. Cochran's first monthly benefit check in July 2003 was $[redacted] after which she began receiving regular payments of $[redacted] (PERF Ex. 3.) This amount reflected the incorrect retirement benefit of $840.94 plus the incorrect ASA payout of $[redacted] for a gross benefit of $[redacted] less withheld taxes. (Electronic Fund Deposit Notice, 8/15/03.)

20. Due to cost-of-living increases, Cochran was receiving pre-tax monthly payments of $[redacted] by December 2006. (PERF Ex. 5.)

21. In letter dated January 5, 2007, PERF notified Cochran that "new leadership" had arrived at PERF in 2006, and that the State Board of Accounts identified that the prior administration had incorrectly calculated a number of benefit payments since 2002. Cochran's benefit had been recalculated, and it had been determined that her pension benefit had been overpaid and her ASA payout was underpaid. The letter stated that the net overpayment was $[redacted] and that her future benefit would be reduced to the correct amount of $[redacted] The letter stated that the overpayment would be paid back by installment reductions over five years without interest. Therefore, her monthly benefit would be reduced by an additional $[redacted] to $[redacted] per month for 60 months. (PERF Ex. 5.)

22. In response to Cochran's request for additional information, PERF sent her a letter dated February 5, 2007, explaining the calculation errors in more detail, and notifying her of her right to seek administrative review. (PERF Ex. 4.)

23. Cochran submitted a petition for review dated February 13, 2007. In her appeal letter, Cochran stated: "If I had known the correct amount of my pension according to the new calculations, I would ***not*** have retired when I did in 2003." (PERF Ex. 6.)

24. In a letter to PERF counsel, Cochran wrote: "This entire situation has put a heavy burden on our lives. My husband, age 63, had to go back to work in order to help me with my medical bills." (Letter to Linda I. Villegas, 5/31/07.)

25. There is evidence that Cochran suffered from serious psychological and medical problems both before and after her early retirement. Her youngest son died in 2001 and she suffered depression as a result. A supervisor suggested that she was not functional in the office. She had "blackouts," including one while driving with a co-worker, that later turned out to be transient ischemic attacks (TIAs). She recently wrote that she elected retirement at the urging of relatives, friends and co-workers. After the loss of her son, medical problems and due to the "strenuous pressures" of her job, she felt that retirement "was the best thing for me to do." She hoped that her health would improve, but it has not. (Letter to Dr. Donna Marie Darcy, 6/9/07.)

26. In August 2007, the Social Security Administration notified Cochran that she met the medical requirements for disability benefits. (SSA Letter, 8/21/07.) Her date of entitlement was May 8, 2003. (SSA Letter, 11/20/07.)

27. PERF concedes the timeliness of the petition for review. (Assignment Letter to ALJ Uhl, 3/1/07.)

28. Any legal conclusion stated below that should be designated as a finding of fact is incorporated by reference.

Analysis

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). This mirrors Ind. Trial R. 56(C). The standard for summary judgment under that rule is well-established:

> A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. . . . A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue.

McDonald v. Lattire, 844 N.E.2d 206, 210 (Ind. App. 2006).

The moving party has the burden of showing that no genuine issue of material fact exists. Only when the moving party has done so does the burden shift to the nonmovant to establish that a genuine issue of fact exists. 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 must prove that no dispute exists on all issues. Dennis v. Greyhound Lines, Inc., 831 N.E.2d 171, 173 (Ind. App. 2005), citing Jarboe v. Landmark Community Newspapers, 644 N.E.2d 118 (Ind. 1994).

Evidence

Neither party has objected to any of the evidence submitted by the opposing party. In particular, PERF has not objected to the unverified statements of fact in the documents submitted by Cochran in response to PERF's summary judgment motion. Although this evidence is not in the form of an affidavit as required by Ind. Code § 4-21.5-3-23(b), it will be presumed for the purposes of deciding the motion that Cochran would testify the same in an affidavit or at a hearing. Nor has PERF questioned the authenticity of Cochran's exhibits. Therefore, all of the evidence is deemed admissible.

Genuine disputes of material fact

Neither party has argued that there are disputes of material fact. Independent review of the evidence does not reveal any such disputes.

Issues

*1. **Recalculation.*** Cochran does not argue or suggest that PERF's recalculation of her benefit is incorrect. For example, she does not argue that the age reduction factor should not have been applied or that PERF has made math errors. Furthermore, review of PERF's materials indicates that the new calculation is both legally and mathematically correct.

2. Reduction of benefit and collection of overpayment. In her petition for review (PERF Ex. 6), Cochran challenges "the decision to reduce my retirement and to retrieve moneys due to miscalculations made on behalf of the State of Indiana." Therefore, both the reduction of the benefit to the correct amount and the collection of the overpayment will be considered.

3. Eligibility for disability retirement. Cochran's papers suggest that she asserts eligibility for disability retirement under Ind. code § 5-10.2-4-6. This issue will also be considered.

PERF's authority to correct benefit and collect overpayment

1. Statutory authority

The PERF 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 § 5-10.3-3-8(a)(10). 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 § 5-10.3-3-8(c).

The General Assembly has implicitly authorized correction of errors that might result in a reduction in a member's benefit: "The benefit may not be increased, decreased, revoked or repealed except for error or by action of the general assembly." Ind. Code § 5-10.3-8-8 (emphasis added). The statutes governing PERF do not directly address the question of erroneous overpayments of benefits paid to a member. [1]

The concept of adjusting a benefit to account for an under- or overpayment is endorsed in Ind. Code § 5-10.2-4-1.5, which authorizes PERF to pay an estimated benefit and temporarily adjust the benefit if necessary after the member's service records have been verified. This adjustment may be done "over a reasonable time,

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[1] At least two other states statutorily authorize recovery of overpayments. Sola v. Roselle Police Pension Bd., 794 N.E.2d 1055, 1058 (Ill. App. 2003) (interpreting 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 but only back to one year before it was discovered).

as determined by the board." Ind. Code § 5-10.2-4-1.5(c). Implicit authority to collect overpayments may also be found in Ind. Code § 5-10.3-8-12, which authorizes the board to stop a member's payment if, among other things, the member "[r]efuses to repay an overpayment of benefits."

PERF argues that further support for authority and a mandate to collect overpayments is found in Ind. Code § 5-10.2-2-1.5, which requires the fund to "satisfy the qualification requirements of Section 401 of the Internal Revenue Code." In order to meet those requirements, § 5-10.2-2-1.5 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 retirement fund law," (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 Internal Revenue Code (IRC) and the 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 <u>in accordance with such plan</u>." 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). [2]

These provisions 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.

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[2] PERF also cites "26 C.F.R. § 1.401-126." I could not find a provision of the Code of Federal Regulations with that citation.

In further support, PERF cites IRS Revenue Procedure 2006-27 (May 1, 2006, published in Internal Revenue Bulletin 2006-22, May 30, 2006) (PERF Ex. 10), which is the IRS's system of correction programs for retirement plans that are intended to satisfy § 401(a) but have not met those requirements for a period of time. (§ 1.01, Ex. 10 at 1.) If the plan corrects a failure using these procedures, the IRS will not treat the plan as failing to meet § 401(a). (§3.01, Ex. 10 at 5.)

PERF contends that the failure to collect overpayments like the one in this case is a "qualification failure," which is defined as "any failure that adversely impacts the qualification of a plan." (§ 5.01(2), Ex. 10 at 8.) Of the four types of qualification failures, PERF contends that overpayment is an "operational failure," defined as a qualification failure that "arises solely from the failure to follow plan provisions." (§5.01(2)(b), Ex. 10 at 8.)

The Revenue Procedure specifically defines an "overpayment" as "a distribution to an employee or beneficiary that exceeds the employee's or beneficiary's benefit under the terms of the plan . . .." (§ 5.01(6), Ex. 10 at 10.) The Procedure clearly contemplates that overpayments are failures that require correction. This can be seen from Section 6, which sets forth the principles for correction of failures. While it does not specifically state that overpayments are failures, it 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 $100 or less. (§ 6.02(5)(c), Ex. 10 at 15.) It further appears that overpayments may be corrected by the procedure used by PERF in this case, reduction of future benefits to both correct the error and recoup the overpayment on an actuarially adjusted basis. (Appendix B, Correction Methods and Examples, § 2.05, Ex. 10 at 62, which incorporates § 2.04(1) (correction of § 415(b) excesses), Ex. 10 at 57-60.) On the other hand, Section 6 also states generally that full correction may not be required "because it is unreasonable or not feasible," and that "the correction method adopted must be one that does not have significant adverse effects on participants and beneficiaries of the plan . . .." (§ 6.02(5), Ex. 10 at 15.)

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, Procedure 2006-27 clearly indicates the IRS view that the overpayment in this case would be considered a failure that would threaten PERF's qualification under IRC § 401.

PERF 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 overpayments, or that the risk justifies collection of overpayments. Nor has PERF provided evidence that the IRS has taken action to revoke a plan's qualified status under circumstances such as those presented here.

My own research disclosed very little discussion of the possibility, and then only 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 § 401 if it included non-employees.

The court cited Thomas v. Bd. of Trustees of Intern. Union of Operating Engineers, 1998 WL 334627 (E.D. Pa. 1998), in which the union made pension fund contributions for Thomas for 14 years when he was not the union's employee. The IRS audited the pension funds and, upon learning that contributions had been received for non-employees, threatened the funds with loss of their status as qualified trusts under § 401. To avoid this result, the funds refunded the contributions and Thomas sued. The court granted summary judgment to the union, holding 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 coverage to non-employees are not qualified under § 401. Professional & Executive Leasing, Inc. v. Commissioner, 862 F.2d 751, 752-54 (9th Cir. 1988); Stochastic Decisions, Inc. v. Wagner, 34 F.3d 75, 82 (2d Cir. 1994) (profit-sharing plan providing benefits to non-employee was not qualified under § 401, and therefore not exempt from claims of creditors).

Finally, 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 merely be "in question," the court found a dispute of material fact and denied summary judgment.

Against this are dozens of courts, some of them cited later in this decision, that considered whether to permit recoupment or not without reference to the prospect that the plan would lose its § 401 qualification, some of which denied recoupment.

2. Court decisions, common law restitution

Apart from statutory provisions, court decisions must be examined to determine whether and to what extent a public pension plan is authorized to recoup mistaken overpayments. Such decisions are important because, while PERF is a creature of statute, it is also subject to the constitution and common law of Indiana. To that extent, when determining whether PERF has acted "in accordance with the retirement fund law," Ind. Code § 5-10.2-2-1.5(1), or "in accordance with such plan,"

26 U.S.C. § 401(a), the "plan" includes principles of Indiana law beyond PERF's statutory terms. [3]

For example, Article 11, § 12 of the Indiana Constitution, before its amendment in 1996, prohibited PERF from investing in equity securities or stocks of private corporations. Bd. of Trustees of Public Employees' Retirement Fund v. Pearson, 459 N.E.2d 715 (Ind. 1984). 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). Because PERF is a trust, Ind. Code § 5-10.3-2-1(b), it is presumably also subject to the common law of trusts. And with respect to the possible application of equitable estoppel to this case, PERF does not argue that estoppel is absolutely prohibited, but only that it does not apply on the facts of this case. (PERF MSJ Mem. at 10-14.)

No Indiana court appears to have specifically decided the circumstances under which a pension or other trust can recover mistaken overpayments. There are many such cases from other jurisdictions that reach a wide variety of conclusions based on each case's particular facts. A strong theme in these cases, however, is the application of equitable principles to determine whether, depending on the standard of review involved, it is unreasonable, arbitrary or capricious for a pension to obtain recovery of overpayments.

Guidance as to how Indiana courts would address the question is found in cases discussing a party's right to restitution of a payment made by mistake. Indiana accepts the general rule that "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). [4]

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[3] 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).

[4] 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).

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, id. In that case, the court held that investing the proceeds or using the proceeds as a down payment to incur new debt based on the proceeds are not sufficient to demonstrate a change of position that would bar restitution. Id. at 384-85.

The overwhelming majority of these 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). Nevertheless, the cases provide guidance because they apply common law principles of equitable relief. See, e.g., Johnson v. Retirement Program Plan, 2007 WL 649280 (E.D. Tenn. 2007) (summary judgment granted for pension plan on challenge to collection of mistaken overpayments, based on ERISA, trust law and equitable estoppel); Phillips v. Maritime Association-I.L.A. Local Pension Plan, 194 F.Supp.2d 549 (E.D. Tex. 2001) (using equitable common law principles, pension plan cannot reduce benefits or recoup overpayments); 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).

Therefore, it is instructive if not binding that equitable principles of restitution have been applied in ERISA cases of mistaken overpayments:

> The Fund correctly points out that, generally speaking, "[w]hen a trustee overpays a beneficiary the trustee is entitled to recover the excess payment, even when it was the product of unilateral mistake on the part of the trustee." Hoffa v. Fitzsimmons, 673 F.2d 1345, 1354 (D.C. Cir. 1982). But, as Regan [the overpaid person] notes, "such recovery may not be permitted where the beneficiary has changed his position in detrimental reliance on the correctness of the overpayment; in such cases the beneficiary is entitled to retain part or all of the overpayment to the extent necessary to avoid injustice." Id. at 1354 n. 27. There appears to be no dispute that Regan changed his position in reliance on the correctness of what turned out to be a series of overpayments. The outcome of this motion thus turns on whether Regan reasonably believed that he was entitled to the payments he received.

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 Regan's reliance on the overpayments was reasonable). See also Lumenite Control Technology, Inc. v. Jarvis, 252 F.Supp.2d 700, 706-07 (N.D. Ill. 2003) (using three-part test, 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)).

Another line of authority uses a very similar analysis based on the law of trusts. See Ind. Code § 5-10.3-2-1(b) (PERF "is a trust"). The court in Johnson, supra, summarizing Sixth Circuit law, noted that if a trustee has made a payment out of trust property to a beneficiary who was not entitled to the payment, the beneficiary is subject to repayment unless doing so will result in hardship. In pension overpayment cases, therefore, the court must consider "the possible inequitable impact recoupment may have on individual retirees," including the beneficiary's disposition of the money, the amount of the overpayment, the nature of the mistake made by the trustee, the amount of time that has passed since overpayment was made, and the beneficiary's total income and effect recoupment would have on that income. Johnson, 2007 WL 649280 at *6-*7, citing cases and Restatement of Trusts (Second) § 250 (1959).

The application of equitable principles may not be a significant restriction of PERF's statutory authority to collect overpayments. As noted above, the IRS procedure upon which PERF relies so heavily does not require full correction where full correction would be "unreasonable or not feasible," and further provides that the correction method must "not have significant adverse effects on participants and beneficiaries of the plan . . .." (IRS Revenue Procedure 2006-27, § 6.02(5), PERF Ex. 10 at 15.) Apparently, therefore, PERF could decline to fully recoup an overpayment where recoupment would have a "significant adverse effect" on a member who unwittingly came to rely heavily on the overpayment.

3. *Equitable estoppel*

Cochran suggests that she would not have retired had she known the correct amount of her pension benefit. She also suggests that she and her husband are undergoing financial hardship. This is relevant to the equity of recoupment under the analysis discussed above. In addition, the argument suggests the related doctrine of equitable estoppel.

> Equitable estoppel is available if one party, through its representations or course of conduct, knowingly misleads or induces another party to believe and act upon his conduct in good faith and without knowledge of the facts. The elements of equitable estoppel are: (1) a representation or concealment of a material fact, (2) made by a person with knowledge of the fact and with the intention that the other party act upon it, (3) to a party ignorant of the fact, (4) which induces the other party to rely or act upon it to his detriment. The reliance element has two prongs: (1) reliance in fact and (2) right of reliance. In addition,

> estoppel exists only as between the same parties or those in legal privity with them.

Wabash Grain, Inc. v. Smith, 700 N.E.2d 234, 237 (Ind. App. 1998) (citations and quotation marks omitted).

Equitable estoppel cannot ordinarily be applied against governmental entities. City of Crown Point v. Lake County, 510 N.E.2d 684, 687 (Ind. 1987). 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 appellate courts have used "public interest" or "public policy" in justifying this exception, but what constitutes the public interest is not well defined. Samplawski, 512 N.E.2d at 459. Some principles can be distilled from the cases.

First, estoppel is particularly inappropriate where a party claiming to be ignorant of the facts had access to the correct information or where government could be precluded from functioning if it were bound by employees' unauthorized representations. U.S. Outdoor Advertising Co., Inc. v. Indiana Department 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 Department of State Revenue, 380 N.E.2d 79, 81 (Ind. 1978); DenniStarr Environmental, Inc. v. Indiana Dept. of Environmental Management, 741 N.E.2d 1284, 1289-1290 (Ind. App. 2001).

Second, 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").

Third, estoppel may be permitted only 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.

Finally, in the case of a pension fund, equitable considerations must include the obligation of the fund to all of its beneficiaries to maintain the integrity 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).

Because of this overriding obligation to protect other members and the actuarial soundness of the plan, some courts have held that estoppel based on statements of a plan representative will be enforced against the plan only where the statements interpreted an ambiguous provision of the plan, not where the statements were contrary to its clear provisions. E.g., Slice v. Sons of Norway, 866 F.Supp. 397, 405-06 (D. Minn. 1993), aff'd, 34 F.3d 630 (8th Cir. 1994); Strong v. State ex rel. Oklahoma Police Pension and Retirement Bd., 115 P.3d 889 (Okla. 2005) (including long list of cases on both sides of question at 895, n. 23); Borkey v. Township of Centre, 847 A.2d 807 (Pa. Cmwlth. 2004) (estoppel will not be applied to forbid plan from reducing benefit where plan's erroneous statements were contrary to "positive law," but recoupment of past overpayment barred as "unconscionable"); Romano v. Retirement Bd. of Employees' Retirement System of Rhode Island, 767 A.2d 35 (R.I. 2001); Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992) (estoppel applies only where the representations were interpretations of the terms of the plan about which reasonable persons could disagree, not modifications of the terms of the plan).

On the other hand, if the mistake was an isolated incident and involved a very small amount of funds in comparison with the overall assets of the fund, it seems that the actuarial impact of the non-collection of overpayments is practically nonexistent. [5]

A compelling analysis of the competing equitable considerations is presented by Johnson v. Retirement Program Plan, supra, in which Johnson was overpaid more than $[redacted] over a period of more than 10 years due to a miscalculation of his ex-wife's share of his pension benefit under a qualified domestic relations order. The court concluded that, notwithstanding Johnson's reliance on the money, the plan's decision to recoup the overpayment over a period of 11 years and nine months was not arbitrary and capricious.

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[5] According to its web site, PERF's assets at the end of 2006 were approximately $16.4 billion. Press release, "PERF Assets Topped $16.4 billion in March," http://www.in.gov/perf/agency/20070427b.html (last viewed 11/6/07).

4. Summary of principles

The PERF Board has the discretion and authority to correct unilateral errors and change payments to a member or beneficiary to the correct amount. The board also has the discretion and authority to collect overpayments by reducing the member or beneficiary's future payments until the overpayment is recovered.

Whether reduction of the benefit is appropriate in a particular case, however, is subject to equitable principles of Indiana law that are inherently part of the terms of the PERF pension plan. Because these principles are incorporated into the plan as a matter of law, their application does not threaten disqualification of the plan under § 401 of the IRC. In any event, IRS Revenue Procedure 2006-27 permits PERF to refrain from correcting failures if correction will result in "significant adverse effects" on fund members.

The cases cited above provide a kaleidoscope of equitable considerations that courts have used in circumstances similar or analogous to this case. Most important are the Indiana cases on restitution, which supply the most relevant source of authority on how Indiana courts would view this case.

5. Application of principles to this case

The question is whether it is inequitable to correct Cochran's retirement benefit and, if so, whether it is inequitable to collect the net overpayment of $

Certain factors weigh in favor of correction and recoupment. As noted above, it is the general rule that restitution and recoupment for careless mistakes is permitted, particularly where the mistaken payments are clearly contrary to law and the terms of the plan, which they were in this case. Having discovered the mistake, PERF had an obligation to correct it, and it would not be equitable to require PERF to continue to make erroneous payments for the rest of Cochran's life. The impact of the error on Cochran has been mitigated by PERF's decision to collect the overpayment over a period of five years without interest.

Few factors weigh in favor of declining to recoup the overpayment. Cochran did not induce the overpayments. Cochran has not specified the nature of the financial hardship that she will face if the overpayments are collected, except to say that her husband returned to work to cover her medical expenses. It is certainly feasible that a permanent income reduction of 21 percent, and a temporary income reduction of 36 percent, could have a serious and adverse financial impact on a retiree. The impact of the overpayment on PERF is infinitesimal.

There is no substantial evidence that Cochran made the decision to retire based on misinformation provided to her at the time. She says that she made her

own calculation that her pension benefit would be about $ a month, which was about $ more than the amount she should have received (but less than she actually received). Even if this information had been imparted by PERF, it cannot be inferred that this difference was necessarily significant in the retirement decision. Furthermore, there is strong evidence that Cochran made her retirement decision based on her health and other non-financial considerations, and that she would not have been capable of working much longer to reach full retirement. [6]

In summary judgment terms, PERF has shown that no genuine issue of material fact exists, and Cochran has failed to submit evidence showing a genuine issue of fact that is material to the legal questions presented. Under all the facts and circumstances of this case, as shown by the undisputed facts, Cochran would not be able to show that it is inequitable for PERF to exercise its right and obligation to correct her benefit and collect the overpayment. Therefore, PERF is entitled to summary judgment as a matter of law.

Eligibility for disability retirement

The papers Cochran has filed in this appeal suggest that she is seeking to receive disability retirement benefits under Ind. Code § 5-10.2-4-6. That statute provides that a disabled member may retire for the duration of the member's disability if the member becomes disabled while receiving a salary, while receiving employer-provided income protection benefits, or is on leave under the Family and Medical Leave Act. The member must have at least five years of creditable service and must have qualified for Social Security disability benefits.

Cochran has submitted letters from the Social Security Administration (SSA) notifying her that she meets the medical requirements for disability benefits, and that the effective date of her disability was May 8, 2003, one month before she left pay status.

In its brief, PERF argues that its regulations prevent granting Cochran disability retirement benefits. The cited regulation states:

> A member who is eligible for early retirement <u>and who has on file with the board a copy of application to Social Security for Social Security disability benefits</u> may file for early retirement and retain his right to disability benefits. Under such circumstances, when the member notifies the PERF board that he qualifies for Social Security

[6] Cochran would have had to work more than three additional years, until October 2006, to attain normal retirement at age 60 with at least 15 years of service. Ind. Code § 5-10.2-4-1(b)(2).

disability benefits, early retirement benefits shall cease and disability benefits shall begin.

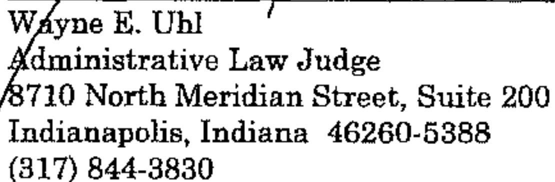
35 IAC 1.2-5-4(a) (emphasis added). PERF argues that "has on file" means that the member must have submitted the application to SSA and submitted a copy to PERF before the member retired. PERF states that it does not have such an application on file.

PERF's argument raises the question of the meaning of the administrative rule quoted above and whether that rule is within the scope of the statute. This question is not ripe for adjudication. The initial determination under review here involved only the decision to correct Cochran's benefit and collect the overpayment. (PERF Ex. 4.) It does not appear that Cochran has applied for disability benefits or that there has been formal action to deny such an application. There has been no "order" or petition for review of an order denying disability retirement. Therefore, the question of whether Cochran is entitled to disability retirement benefits is not before the ALJ and cannot be decided in this proceeding.

Order

PERF's motion for summary judgment is GRANTED. The initial determination correcting and reducing Cochran's benefit to the correct amount, and further reducing the benefit to collect the overpayment, is AFFIRMED.

DATED: November 26, 2007.



Wayne E. Uhl
Administrative Law Judge
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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 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 November 26, 2007:

Joan M. Cochran

Linda I. Villegas, Staff Counsel
PERF
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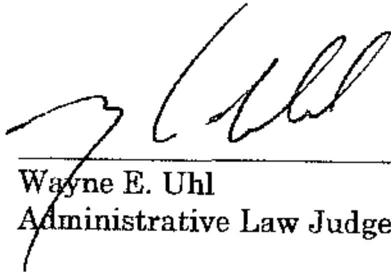

Wayne E. Uhl
Administrative Law Judge