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

IN THE MATTER OF RONALD E. HENDERSON, Petitioner.	))))	PUBLIC EMPLOYEES' RETIREMENT FUND

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Introduction

Ronald E. Henderson appeals from the PERF Board's initial determination that (1) his monthly retirement benefit was miscalculated and he was overpaid [redacted] from May 2003 through December 2006, and (2) he was not refunded the full balance of his annuity savings account. PERF determined that it would reduce Henderson's benefit to the correct amount, and reduce it further to collect the overpayments over five years, offset by the underpayment of the annuity savings account. Henderson challenges both the calculation of his benefit and the collection of the overpayment.

In accordance with the schedule set by agreement of the parties, Henderson filed a motion for summary judgment on May 14, 2007; PERF filed a motion for summary judgment on May 25, 2007; and PERF filed a response to Henderson's motion on June 11, 2007. The motions are now fully briefed and ready for decision.

Findings of Undisputed Fact

1. Ronald E. Henderson was employed on March 1, 1965, by Richmond State Hospital. He immediately became a member of PERF. He did not report any prior PERF service in his initial membership record. (PERF Ex. 1.)

2. Henderson was born on November 9, 1945. (PERF Ex. 1; Pet. Doc. 11.)

3. Henderson terminated his employment on April 29, 1966, and entered military service on May 5, 1966. (PERF Ex. 2, 3.)

4. At the time he entered military service, Henderson made a written claim for refund of the total contributions in his PERF Account. (PERF Ex. 3.) Henderson does not deny that he received this refund.

5. Henderson was honorably discharged from military service on May 2, 1969. (PERF Ex. 2.)

6. Henderson resumed employment at Richmond State Hospital on June 1, 1969, and worked continuously there until his retirement on April 30, 2003. (PERF Ex. 4.) In 2000, he was thanked for 35 years of service. (Pet. Doc. 5, 6, 7.)

7. PERF provided Henderson with a "benefit estimate," presumably sometime during the first four months of 2003. (Pet. Doc. 8.) The estimate was based on a presumed retirement date of May 1, 2003, and 38 years of service. It also presumed that an additional 7 years and 8 months of service would be purchased, for a total of 45 years and 8 months. It presumed an annuity savings account (ASA) balance of [redacted] and average annual compensation of [redacted]

8. The document estimated benefits under several scenarios. Relevant here, it estimated that if Henderson elected Option 30 (joint with full survivor benefit) and withdrew his ASA, he would receive a monthly pension benefit of [redacted] Upon his death, his beneficiary would receive the same for his or her lifetime. (Pet. Doc. 8.)

9. The benefit estimate stated that only verified service would be used in determining the benefit, and that service is verified at the time of benefit application. It also stated: "All information shown is an estimate only. Actual benefits will be computed based on certified data using the laws in effect at retirement. . . . This estimate is based on uncertified data." (Pet. Doc. 8.)

10. Henderson applied for retirement benefits on February 11, 2003, anticipating that his last day in pay status would be April 30, 2003, and the effective date of retirement benefit would be May 1, 2003. (PERF Ex. 5.)

11. For his retirement benefit, Henderson selected benefit Option 30, which was described as follows:

> **OPTION 30 – JOINT WITH FULL SURVIVOR BENEFITS.** You will be paid a monthly benefit for life. After your death, the same monthly benefit will be paid to your beneficiary for his/her life.

(PERF Ex. 5.)

12. As his beneficiary, Henderson designated his wife, Nancy Ann Henderson, whose date of birth is August 19, 1948. (PERF Ex. 5; Pet. Doc. 11.)

13. With respect to his ASA, Henderson elected Choice 2B:

> ***Choice Number 2B:*** I elect to have ALL of the taxable portion of my Annuity Savings Account paid in the form of a DIRECT ROLLOVER to an IRA or a Qualified Retirement Plan which has provisions allowing it to accept

the rollover on my behalf. The non-taxable portion will be ***paid directly to me.***

He designated an IRA held by Southern Farm Bureau Life Insurance (SFB). (PERF Ex. 5.)

14. On June 5, 2003, PERF sent $59,041.30 to SFB. (Pet. Doc. 15). This amount was [redacted] less than the actual balance of the ASA. (Pet. Doc. 17.)

15. Henderson apparently took advantage of an early retirement incentive. Such 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.

16. The record shows that Henderson had 35 years and one month of actual service:

3/1/65 to 4/29/66	=	1 year and 2 months
6/1/69 to 4/30/03	=	33 years and 11 months

Therefore, he must have been able to purchase, or the State purchased for him, up to seven additional years of service credit, for a total of 42 years and one month. PERF is currently using 42 years of service in its calculations. [1]

17. On the effective date of his retirement, May 1, 2003, Henderson was 57 years, five months and 29 days old. Nancy Henderson was 54 years, eight months and 12 days old.

18. 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.

19. PERF miscalculated Henderson's retirement benefit.

20. The base annual retirement benefit was correctly calculated following the formula prescribed by Ind. Code § 5-10.2-4-4(a), as follows:

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[1] At the outset of this appeal, PERF contended that there had been a one-month break in service in July 1970, which Henderson contested. PERF counsel later advised Henderson that verification of that month was found.

Average annual compensation	[redacted]
Multiplied by 1.1%	x .011
Multiplied by total creditable service	x 42
Annual benefit	[redacted]

21. The error was made in adjusting the benefit to account for Henderson's election of the full survivor option authorized by Ind. Code § 5-10.2-4-7(b)(1)(A), which must be the "actuarial equivalent" of the full benefit calculated above.

22. The PERF Board adopted mortality and actuarial factors for PERF in 1981. (PERF Ex. 13, 14, 15.) Those tables provide a conversion factor based on the ages of the member and the beneficiary. (PERF Ex. 15.) The ages are determined by the person's nearest birthday.

23. As of May 1, 2003, Ronald's age at his nearest birthday was 57 and Nancy's was 55.

24. When Henderson's benefit was originally calculated, his age of 57 was correctly used, but his wife's age was miscalculated to be 54. Furthermore, survivor benefit Option 50 was used instead of Option 30.

25. Based on these mistakes, PERF used the conversion factor for Option 50 where the member is 57 and the beneficiary is 54, 0.928569 (rounded to 0.9286). (PERF Ex. 15, p. 145.) Application of this conversion factor to the retirement benefit above mistakenly resulted in a monthly annual benefit of $[redacted] ([redacted] x 0.9286 = [redacted] /12 = [redacted]).

26. Henderson began receiving a pension benefit in 2003 at a monthly rate of $[redacted] (Pet. Doc. 12, 13, 15; PERF Ex. 11.)

27. The Option 30 conversion factor for a member who is 57 with a beneficiary who is 55 (Nancy's correct age) is 0.863072 (rounded to 0.8631). (PERF Ex. 15, p. 145.) If this factor had been used, Henderson's monthly benefit would have been $[redacted] ([redacted] x 0.8631 = [redacted] /12 = [redacted]).

28. Due to cost-of-living increases, Henderson was receiving gross monthly benefit payments of $[redacted] by December 2006. (PERF Ex. 11.)

29. By letter dated December 22, 2006, PERF notified Henderson that it had discovered the above errors, by which his pension benefit was overpaid and his ASA distribution was underpaid. The letter stated that there had been an overpayment of $[redacted] as of that date, and that the overpayment would be collected through deductions from future payments over a period of five years. (PERF Ex. 7.)

30. The letter further stated that Henderson's recalculated future monthly benefit would be [redacted] (as adjusted for cost-of-living increases), but for five years [redacted] a month would be deducted to recoup the overpayment, resulting in a temporary monthly benefit of $[redacted]. (PERF Ex. 7.) Sadly, these numbers turned out to be incorrect as well.

31. In response to a request for information from Henderson, PERF sent him a second letter dated February 6, 2007, explaining that calculation errors were brought to the attention of PERF management in 2005, purporting to explain the recalculation in more detail, and notifying him of his right to seek administrative review. (PERF Ex. 8.)

32. The letter also explained that Henderson did not receive credit for his military service because he requested a refund of his ASA at the time. (PERF Ex. 8.)

33. Unfortunately, the February 6 letter contained a calculation error, basing its calculation on 41.75 years of service rather than 42 years of service.[2] Therefore, the February 6 letter incorrectly stated that the original base monthly benefit should have been $[redacted] (PERF Ex. 8.)

34. Henderson filed an appeal from this determination dated February 12, 2007, and received by PERF on February 15, 2007. (PERF Ex. 9.)

35. PERF concedes that Henderson's appeal is timely. (Assignment letter to ALJ Uhl, 2/27/07.)

36. After the appeal was filed, by letter dated April 13, 2007, PERF counsel notified Henderson that it corrected his years of service to 42 from 41.75. PERF also explained that Henderson's ASA distribution was underpaid by [redacted] and that "this underpayment plus interest" had been credited against the overpayment. (Pet. Doc. 3.)

37. PERF concedes that after its recalculation of Henderson's benefit, the check issued to him on May 10, 2007, was [redacted] too high. That [redacted] was rolled into the remaining overpayment to be collected. (PERF Response Brief at 3-4.)

38. By letter dated May 18, 2007, PERF notified Henderson of the final recalculation of his benefit, this time using 42 years of service credit, and this time reaching [redacted] as what the original benefit should have been. This letter also explained that Henderson's ASA distribution was underpaid by $[redacted] and that PERF would give him credit for $[redacted] in interest on that amount, for a total of $[redacted] credited against the overpayment. (Pet. Doc. 17.)

[2] See footnote 1 above.

39. Taking into account two "13th checks" that were also overpaid, PERF now calculates that Henderson was overpaid a total of $[redacted] and underpaid a total of $[redacted] for a net overpayment of $[redacted] (Pet. Doc. 17; PERF Ex. 12.)

40. This net overpayment is now being recouped at a rate of $[redacted] a month (Pet. Doc. 17). This amount takes into account the too-high overpayment installments deducted in the first four months of 2007, and the $[redacted] miscalculation described in Finding 37 above.

41. In his appeal letter, in addition to arguing that it was "unfair" for retirees to bear the burden of PERF's mistakes, Henderson stated:

> I feel the correction and reduction in my Retirement Pension from the State of Indiana after serving the Richmond State Hospital faithfully from 1965 to 2003 has caused undue harm and hardship by the incorrect information that I was given.

(PERF Ex. 9.)

42. Any legal conclusion stated below that should have been 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).

Evidence

Neither party has challenged the admissibility of any of the evidence submitted by the opposing party. Therefore, all of the evidence is deemed admissible.

Genuine disputes of material fact

Neither party has argued that there are disputes of material fact, nor do any appear from my review of the evidence.

Issues

Henderson raises several issues in his appeal letter and his summary judgment motion. His appeal was filed largely because he had not received an adequate explanation of the recalculations. He has now received explanations, which prompted further recalculations. His remaining issues are restated as follows.

First, Henderson believes that he should be given credit for his military service.

Second, while he does not challenge PERF's authority to pay the correct benefit in the future, Henderson challenges, on multiple grounds, PERF's effort to collect the net overpayment. He argues that (1) it took PERF a full year after discovering the overpayments to notify Henderson and correct them; (2) it is unfair to place the burden of PERF's mistakes on a retiree; (3) the recoupment program will impose undue harm and hardship on Henderson; and (4) Henderson was not given the option of receiving the $703.39 under-distribution of his ASA as a lump sum rather than as a credit against the overpayment.

PERF argues in response that Henderson's benefit was correctly recalculated, that PERF is both authorized and required to collect overpayments, and that the doctrine of equitable estoppel should not be applied to prevent collection of the overpayment.

Calculation of benefit, military service

Henderson contends that he should receive service credit for his three years of military service. The statute controlling the plan dictates otherwise. It provides

that a PERF member who enters active military service is entitled to service credit only if he "leaves his contributions in the fund." Ind. Code § 5-10.3-7-5(a). It is undisputed that Henderson, upon leaving state employment to enter military service, asked to withdraw his contributions. He does not claim that his request was not honored, and there is no evidence to that effect. Therefore, he is not entitled to service credit.

The statute also provides that a member is entitled to service credit as required by the Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C. §§ 4301 et seq.). Ind. Code § 5-10.3-7-5(e). That federal law requires an employer to provide service credit in a pension plan only if the returning employee makes "catch-up" contributions within a specified period after re-employment. 38 U.S.C. § 4318(b)(2) (contributions must be made within the shorter of three times the military service or five years). There is no argument here that PERF was required by USERRA to afford service credit to Henderson.

Finally, the PERF statute permits the member to purchase service credit for military service under certain circumstances, one of which is that the credit be purchased before retirement. Ind. Code § 5-10.3-7-5(f) and (g). Regardless of whether he met all the requirements, there is no evidence or argument that Henderson purchased such additional credit before retirement.

Therefore, PERF correctly did not include Henderson's military service in its calculation of service credit. This is not to say that Henderson's service for his country is not valued. To the contrary, Henderson is entitled to our gratitude and honor for his sacrifice. However, the mandatory provisions of a pension plan cannot be overlooked.

Henderson does not appear to make any other challenge to the recalculation of his benefit. It appears that all of his questions about his benefit have been answered, and his questions have prompted review and correction of mistakes made. Although he has not questioned his credit for 42 years of service credit, my own review indicates that he may be entitled to 42 years and one month of credit. See Finding 16 above. This may not make a difference in his benefit. However, PERF should take one last look at its calculation and determine whether Henderson is in fact entitled to 42 years and one month of service credit, and whether this makes a difference in the benefit to which he is entitled.

PERF's authority to collect overpayment

1. Statutory authority

The first question is whether PERF is authorized to collect overpayments by deducting installments from future benefit payments. 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).

With one exception, the statutes governing PERF do not directly address the question of erroneous overpayments of benefits paid to a member or survivor. [3] The exception is Ind. Code § 5-10.2-4-1.5, which authorizes PERF to pay an estimated benefit to a member who has retired but whose membership records are incomplete or not yet certified. After the records have been submitted and certified and the actual retirement benefit has been determined, PERF must temporarily adjust the benefit to reconcile any underpayment or overpayment. This adjustment may be done "over a reasonable time, as determined by the board." Ind. Code § 5-10.2-4-1.5(c). This statute does not apply here because this case does not involve payment of estimated benefits, but the statute endorses the concept of collecting an overpayment by deductions from future benefits over a reasonable period of time.

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." This statute is not limited to overpayments of estimated benefits under Ind. Code § 5-10.2-4-1.5, and should be read to include overpayments made for any reason, including simple calculation errors.

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 and the regulations under that section.

Section 401 of the Internal Revenue Code, 26 U.S.C. § 401, provides favorable tax treatment to qualified plans, including deferred income taxation of employer

[3] 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).

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); see also § 1.401-2(a). 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). [4]

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.

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. 16), 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. 16 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. 16 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. 16 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. 16 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. 16 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

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[4] 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.

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. 16 at 15.) 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. 16 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. 16 at 62, which incorporates § 2.04(1) (correction of § 415(b) excesses), Ex. 16 at 57-60.)

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 § 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 cases, some of them cited later in this decision, in which courts considered whether to permit recoupment without any mention of the prospect that the plan would lose its § 401 qualification, some of which denied recoupment.

2. Court decisions, common law restitution

Neither party has cited a court decision on the question of whether a pension fund may collect mistaken overpayments by deduction from future benefit payments. 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. [5]

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 law of trusts. And with respect to the possible application of equitable estoppel to this case, PERF does not argue that estoppel could never apply, but only that it does not apply on the facts of this case. (PERF Memorandum in Support of Motion for Summary Judgment at 11-15.)

No Indiana court appears to have specifically decided the circumstances under which a pension or other trust can recover mistaken overpayments. There

[5] 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).

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.

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). ERISA cases are relevant, however, because in an action under ERISA, courts 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).

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). [6]

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

[6] 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).

the proceeds are not sufficient to demonstrate a change of position that would bar restitution. Id. at 384-85.

These 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 inconsistent with 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. 16 at 15.) Apparently, therefore, PERF could decline to collect an overpayment where collection would have a "significant adverse effect" on a member who unwittingly came to rely heavily on the overpayment.

3. Equitable estoppel

Henderson argues that he "made financial commitments" trusting the dependability of PERF, and that the recoupment of the overpayment "is and will continue to create a hardship for me." (Henderson MSJ at 5; see also PERF Ex. 9.) This will be considered in assessing the equity of recoupment under the analysis discussed above. In addition, the argument suggests the related doctrine of equitable estoppel. In Indiana:

> 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.

To this list should be added, in the case of a pension fund, 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 was 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 impact of the non-collection of overpayments is practically nonexistent.

A compelling analysis of the competing equitable considerations is presented by Johnson v. Retirement Program Plan, supra, in which Johnson was overpaid more than $70,000 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.

4. *Conclusion*

In summary, 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. The cases cited above provide a kaleidoscope of equitable considerations that courts have considered 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. Furthermore, even IRS procedures permit consideration of adverse effects on members when determining whether to correct overpayments.

In this case, the equities weigh strongly in favor of permitting PERF to recover the overpayments. The overpayments were clearly contrary to law and

modified the terms of the plan. While fault for the overpayments lies solely with PERF, Indiana law allows restitution even for careless mistakes. The mistakes in this case appear to have been mistakes of fact, not law (to the extent that the distinction has meaning). The overpayment to Henderson alone does not represent a significant proportion of the overall assets of PERF. [7] But Henderson was not the only member who was overpaid, and PERF was required to take a global view of the potential impact of all the overpayments on the integrity of the fund. Holding that overpayments cannot be collected penalizes other members of the fund and, to a small extent, may affect actuarial determinations.

Henderson argues that he "made financial commitments" in reliance on the inflated benefit payments. (Henderson MSJ at 5.) He does not state or offer evidence of what these commitments were, or whether he has been required to default on or renegotiate them. The amounts of the overpayments—from $[redacted] to $[redacted] a month—are not so large as to trigger suspicion of a substantial financial commitment. Furthermore, as noted above, using overpayments to incur new debt does not establish sufficiently detrimental reliance to defeat a claim for recoupment under Indiana law. Monroe Financial, supra.

Henderson also does not explain or submit evidence of "undue hardship" (PERF Ex. 9) that he will suffer by repaying the overpayments at a rate of $[redacted] a month. It is well understood that retirees are often limited to a fixed income, and certainly a reduction in that income will require adjustment. But the question in this case is whether it is inequitable to restore the parties to the positions they should have been in had PERF correctly calculated the benefit in the first place. PERF's offer to permit the recoupment to occur over a period of five years is very reasonable, and should minimize the impact on Henderson.

For all of these reasons, PERF's decision to collect the overpayment by reducing Henderson's future benefits over a period of five years was authorized, reasonable and not inequitable.

Finally, Henderson questions the decision to incorporate the underpayment of his ASA account balance and interest on the underpayment into the monthly repayment plan, rather than paying it to him or, perhaps, transferring it to his IRA with SFB. There is no question that Henderson was entitled to payment or transfer of his full ASA balance upon retirement. Of course, transferring the ASA balance plus interest at this time will increase the monthly deductions for recoupment of the overpayment. If Henderson still desires payment or transfer of the full $[redacted] to

[7] According to its web site, PERF's assets at the end of 2006 were approximately $16.1 billion. Press release, "PERF Assets Top $16 billion," http://www.in.gov/perf/agency/20070112.html (last viewed 10/14/07).

his IRA, with a full understanding of the potential tax consequences, PERF should make that payment or transfer and adjust the recoupment deduction accordingly.

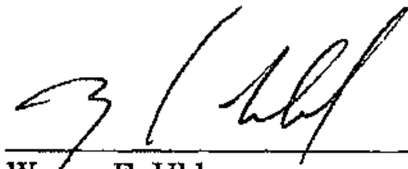
Order

Each party's motion for summary judgment is granted in part and denied in part.

PERF is entitled to judgment as a matter of law on the questions of calculation of Henderson's service credit and PERF's authority to collect the overpayments. However, PERF is ordered to check one last time to determine whether Henderson is entitled to 42 years and one month of service credit and, if so, to apply that amount of service credit to its recalculation of his benefit.

Henderson is entitled to judgment as a matter of law on the question of whether he should have been given the option to accept payment of his remaining ASA balance and interest or transfer into his IRA, or crediting that balance and interest against the overpayments. Within 15 days after this decision becomes a final order, PERF shall extend to Henderson, in writing, the option to accept payment or transfer of the $[redacted], with an explanation of the tax consequences of his decision and explanation of how such a payment or transfer will impact the remaining overpayment deductions.

DATED: October 15, 2007.



Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-5388
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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 October 15, 2007:

Ronald E. Henderson

Linda I. Villegas, Staff Counsel
PERF
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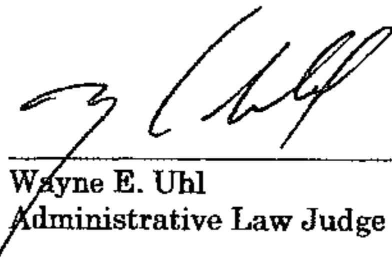

Wayne E. Uhl
Administrative Law Judge