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

DENNIS M. NEIDIGH, Petitioner,	)	PUBLIC EMPLOYEES' RETIREMENT FUND
	)	
v.	)	
	)	
PUBLIC EMPLOYEES' RETIREMENT FUND, Respondent.	)))	

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Introduction

Dennis Neidigh appeals from PERF's determination that his retirement benefit was incorrectly calculated, that the benefit would be reduced to the correct amount, and that he would be required to repay $ that was overpaid to him. The parties agreed that this amount would be repaid by deduction from Neidigh's monthly benefit over a period of 10 years, without interest, but the reduction of benefit has been delayed pending the outcome of this appeal.

Pursuant to a schedule agreed to by the parties, PERF filed a motion for summary judgment and Neidigh filed a cross-motion for summary judgment. The motions are fully briefed and ready for decision.

Findings of Undisputed Fact

1. Dennis Neidigh worked in PERF-covered positions for the State of Indiana from March 16, 1965, through September 12, 1967; and two tours for the City of Indianapolis, (1) from September 18, 1967 through November 30, 1979, and (2) from April 28, 1997 through January 31, 2000 (PERF Ex. 3-A, p. 8).

2. In August 2005, Neidigh prepared a document entitled "Retirement Planning" (Pet. Ex. P-5). At the time, Neidigh was working on contract for Crawford, Murphy & Tilly. He and his wife tentatively planned to retire in April 2008. They assumed they would need to move to a smaller home, a decision that would need to be made by mid-2007.

3. The Retirement Planning document (Pet. Ex. P-5) included an inventory of assets and liabilities including stock investments and individual retirement accounts valued at about $ and estimated home equity of

$[redacted] In addition, Neidigh estimated that PERF would pay "approximately $[redacted] per month" with a question as to whether this would be taxable. [1]

4. On October 26, 2005, Neidigh submitted an application for retirement benefits with an effective date of November 1, 2005. [2] He elected Option 50—Joint With One-Half Survivor Benefits. He elected to receive immediate distribution of that portion of his Annuity Savings Account (ASA) equal to the December 31, 1986 tax basis, and to receive the balance as part of his monthly benefit. (PERF Ex. 1-B.)

5. Also on October 26, 2005, an Estimate of Monthly Benefits was prepared setting forth estimates of the benefit Neidigh could receive under the many options available to him. The estimate stated:

> This estimate is based on uncertified data and is to be used for estimate of benefits only. PERF does not warrant the accuracy of this estimate for any other purpose. All service and salary information will be subject to verification at the time of retirement. All benefit calculations will be subject to the Indiana statutes and rules in effect at the time of retirement as well as any applicable federal regulations.

(PERF Ex. 1-A.)

6. Using the options that Neidigh selected, the estimate was that he would receive an ASA lump-sum distribution of $[redacted] a monthly pension benefit of $[redacted] and a monthly ASA distribution of $[redacted] for a total estimated monthly benefit of $[redacted] (with a one-half survivor benefit of $[redacted]. The estimate was based on a "Member's Final Average Salary (Hi-Five)" of $[redacted] and 17.4167 years of creditable service. (PERF Ex. 1-A.)

7. The City of Indianapolis reported and certified that Neidigh was engaged in active service or paid leave from September 18, 1967 through November 30, 1979, and again from April 28, 1997 through January 31, 2000 (PERF Ex. 1-C, 1-D). Therefore, the second tour of duty included ten full calendar quarters, with two partial quarters at the start and end.

8. The City also reported Neidigh's wages. [3] For his first tour of duty, the City reported that Neidigh started at an annual salary of $[redacted] in 1967, received

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[1] Apparently this was Neidigh's own estimate (Mem. Supp. Pet. MSJ at 4), but it is not known how he calculated it.

[2] Neidigh states in his unsworn brief that he met with a PERF representative on October 26 (Mem. Supp. Pet. MSJ at 4). Presumably Neidigh met with the representative, received the estimate, and filed his application at the same time.

[3] Salary figures are rounded to the nearest dollar.

several increases over the years, earned an annual salary of $ during the second half of 1978, $ for the first two weeks of 1979, and from January 13, 1979 through his resignation on November 30, 1979 (PERF Ex. 1-D). Therefore, it appears that in the last couple of years of his second tour, Neidigh was earning about $ to per quarter.

9. For his second tour of duty, the City reported that Neidigh earned in 1997 (eight months), in 1998, and $84,000 in 1999. On a quarterly basis, he earned $ in the second quarter of 1997 (April 28 through the end of the quarter), varying amounts from in each of the succeeding full quarters through the final quarter of 1999, in the first quarter of 2000 (the month of January), and in "termination and severance pay." (PERF Ex. 1-C, 1-D.)

10. The documents certifying the above information were received in December 2005 (PERF Ex. 1-C) and March 2006 (PERF Ex. 1-D).

11. PERF determined that Neidigh's eligibility date was May 1, 2005 (the month after his 65th birthday), so the effective date of his retirement was moved to that date from November 1, 2005. [4]

12. After the information from past employers was processed, in April 2006, PERF concluded that Neidigh was entitled to a lump sum of $ from his ASA, and monthly payments of $ in pension benefit and $ in ASA distribution, or $

13. Neidigh apparently received a single payment of $ in April 2006, representing the ASA distribution and 12 monthly payments retroactive to May 2005.

14. Starting in May 2006, Neidigh began receiving monthly payments of

15. Due to cost of living increases and other factors, by December 2008 the monthly payment had increased to pension + ASA).

[4] The evidence does not include a record of actual payments made to Neidigh, but includes a final benefit audit and analysis (FBAA) dated October 31, 2008 (PERF Ex. 3-A) that assumes or reports that benefit payments were retroactive to May 1, 2005. Neidigh appears to agree that his eligibility date was moved back to May 1, 2005 (Pet. Ex. P-4).

Likewise, the information in the next four paragraphs is based on the FBAA, not an actual record of payments made. The FBAA shows that the "retirement process date" was April 26, 2006, the large payment in April 2006, and the successive monthly payments.

16. In an unsworn brief, Neidigh states that in October 2007, he and his wife decided to downsize their residence in order to meet their budget, including the PERF benefit (Mem. Supp. Pet. MSJ at 4).

17. In an unsworn document, Neidigh states that in April 2008, he retired from Crawford, Murphy & Tilly (Pet. Ex. P-4).

18. A final benefit audit and analysis (FBAA) dated October 31, 2008, concluded that PERF had miscalculated Neidigh's benefit and overpaid him (PERF Ex. 3-A). There is no evidence as to when this miscalculation was first discovered, although it was presumably before this "final" audit and analysis was prepared.

19. One of the factors in calculating a member's retirement benefit is "average of the annual compensation" (AAC), defined by law as the annual compensation using the 20 highest full calendar quarters (referred to as "high-five"). The quarters do not have to be continuous but must be in groups of four consecutive quarters. Ind. Code § 5-10.2-4-3(a).

20. PERF member handbooks state that "final average salary" means the highest five years of compensation in a PERF-covered position, using a combination of 20 quarters in groups of four consecutive quarters, and adding up to $ of payments made upon termination. (PERF Ex. 2-A, 2-B.)

21. PERF made multiple errors in calculating Neidigh's AAC (PERF Ex. 3 and 3-A).

22. First, instead of using 20 quarters and dividing by five, PERF used 12 quarters and divided by three. In other words, it used high-three instead of high-five.

23. Second, PERF used Neidigh's compensation for quarters that were not full calendar quarters. Therefore, it used all 12 quarters of service from 1997 to 2000, including the partial quarters on either end. This error also meant that PERF used quarters that were not in a group of four.

24. Third, PERF incorrectly accounted for Neidigh's 2000 severance pay, *see* Ind. Code § 5-10.2-4-3(e), but the evidence is frankly unclear whether this error increased or decreased the AAC.

25. The 12 quarters of Neidigh's compensation used by PERF were all during his second tour of duty, when he was earning substantially more than his first tour. The result was an AAC of $

26. When PERF corrected for the above errors, the result was an AAC of $

27. In addition to the AAC errors, PERF incorrectly calculated that Neidigh had 17.42 years of service when he should have been credited with 17.58 years of service.

28. As noted above, Neidigh's *initial* benefit payments were [redacted] month ([redacted] pension + [redacted] ASA). The FBAA concluded that when corrected, the *initial* benefit should have been [redacted] month ($[redacted] pension + [redacted] ASA) (PERF Ex. 3-A, p. 5).

29. As noted above, Neidigh's benefit as of December 2008 was [redacted]/month ($[redacted] pension + [redacted] ASA). The FBAA concluded that it should have been [redacted] month ([redacted] pension + [redacted] ASA).

30. According to the final audit, Neidigh was overpaid $[redacted] from May 2005 through December 2008.

31. PERF's only explanation for the errors is that "all wage information was not researched and applied to Mr. Neidigh's account." (PERF Ex. 3, ¶ 13.)

32. By letter dated December 22, 2008, PERF notified Neidigh that two errors had been made in calculating his benefit: using highest three years instead of highest five, and failing to "break out" his severance pay from the last quarter of wages. The letter stated that his original monthly benefit should have been [redacted] (PERF Ex. 1-E.) [5]

33. The December 22 letter further stated that Neidigh had been overpaid [redacted] and that PERF was required to collect this overpayment (PERF Ex. 1-E). The difference between this amount and the amount of overpayment on the FBAA is not explained.

34. By letter dated December 23, 2008, PERF memorialized a meeting with Neidigh the day before at which the overpayment was discussed. The letter stated that Neidigh had instructed that the overpayment (of $[redacted]) be collected over a period of ten years, by reducing his pension payments by $[redacted] a month from January 2009 through December 2019. (Pet. Ex. P-2b.)

35. By letter dated January 6, 2009, Neidigh revoked those instructions and informed PERF that he planned to appeal its decision (Pet. Ex. P-3).

36. The $[redacted] repayment deduction was applied to Neidigh's January 2009 benefit payment. He called and discussed this with a PERF representative, who confirmed the deduction but told him that his pension benefit would not be

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[5] There may have been earlier notice to Neidigh, as the letter began, "You have requested information regarding how your pension benefit was calculated."

reduced pending the outcome of this appeal. PERF states that, as a result, an additional $[redacted] was overpaid through June 2009. (Sparks Aff., PERF Reply Ex. 1.) It is not clear whether repayment deductions continued after January 2009.

37. On January 23, 2009, Neidigh submitted a letter appealing PERF's determination concerning his retirement benefits. PERF concedes that the appeal is timely. (Letter to ALJ Uhl, 2/13/09.)

38. PERF is actuarially funded. Employer contribution rates and the actuarial funding status of the plan take into consideration future salary increases and projected benefit payouts based on a projected 20-quarter average salary. This means that a member's benefit is "prefunded" based on a 20-quarter average salary. An unfunded benefit will lead to an increase in unfunded actuarial liability, contribute to an increase in the employer contribution rate, and potentially affect the actuarial funded status of the plan. (Barley Aff., PERF Ex. 4.)

39. Any finding of fact that is included in the Conclusions of Law section below is incorporated by reference.

Conclusions of Law

Legal standard

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

As with motions under Ind. Trial Rule 56, a genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and that he or she is entitled to a judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Comm'r, Indiana Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. App. 2005) (citing cases).

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

When the parties have filed cross-motions for summary judgment, each motion is considered separately to determine whether the moving party is entitled to judgment as a matter of law, construing the facts most favorably to the non-moving party in each instance. *Keaton and Keaton v. Keaton*, 842 N.E.2d 816, 819 (Ind. 2006); *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154, 160 (Ind. 2005).

An ALJ's review of an agency's initial determination is *de novo*, without deference to the initial determination. *Indiana Dept. of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 103-04 (Ind. 1993); *Branson v. Public Employees' Retirement Fund*, 538 N.E.2d 11, 13 (Ind. App. 1989).

Evidence and Genuine Issues of Material Fact

Neither party argues that there are disputes of material fact. PERF objects to unsworn statements made by Neidigh in his brief on the ground that these statements "are not supported with properly designated evidence." PERF also objects to Neidigh's Exhibits P-4, P-5 and P-6 because they contain hearsay and have not been properly authenticated.

The designation requirement of T.R. 56(C) is not imposed by Ind. Code § 4-21.5-3-23. The statute does, however, requires that a motion for summary judgment be supported by "affidavits and other evidence permitted under this section," requires an opponent to serve "opposing affidavits," and states that summary judgment must be based on "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony." Ind. Code § 4-21.5-3-23(a) and (b).

The unsworn testimony and unauthenticated exhibits are technically inadmissible. However, none of the evidence would create a dispute of material fact even if sworn to or authenticated. The evidence will be considered as representing what Neidigh would testify to or introduce at an evidentiary hearing.

Issues

PERF contends that (1) Neidigh's original benefit was not calculated in accordance with law, (2) PERF is required to pay benefits in strict accordance with the plan provisions, (3) PERF is required by law to collect erroneous overpayments, and (4) PERF is not equitably estopped from reducing Neidigh's benefit and collecting the overpayment.

Neidigh contends that (1) he had no choice but to rely on the professional staff of PERF in making his decisions, (2) the time lag in notifying him of the error created a hardship to him, (3) he should not be required to repay the overpayment because PERF was negligent and requiring repayment would be unfair,

(4) overturning PERF's determination would not cause financial hardship to PERF, and (5) PERF should be held responsible for its errors as a matter of fairness and public policy.

Discussion

Recalculation of benefit. Neidigh does not dispute PERF's determination that his benefit was incorrectly calculated, the new calculation, or the amount of overpayment. He candidly concedes that he is not in a position to verify PERF's determinations or perform his own calculation. Nor is the ALJ, at least not based on the information presented.[6] Because Neidigh does not challenge the recalculation, that portion of PERF's determination is upheld.

PERF's authority to reduce benefit and collect overpayment. 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 reducing a member's benefit to correct error: "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.[7] 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, 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."

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[6] For example, the summary judgment record does not contain evidence of all 20 calendar quarters that are now being used by PERF, there is a [redacted] discrepancy (in Neidigh's favor) in the amount of the overpayment, and the final audit does not represent itself to be a record of the actual payment history.

[7] 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).

Internal Revenue Code mandate. PERF argues that it has no discretion to decline to correct errors and collect overpayments because Ind. Code § 5-10.2-2-1.5 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 *in accordance with such plan*." 26 U.S.C. § 401(a)(1) (emphasis added). The plan must also make it impossible to use the corpus and income for purposes other than for "the exclusive benefit of [the] employees or their beneficiaries." 26 U.S.C. § 401(a)(2).

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

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), 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. Rev. Proc. 2006-27, § 1.01. If the plan corrects a failure using these procedures, the IRS will not treat the plan as failing to meet § 401(a). *Id.* §3.01.

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." *Id.* § 5.01(2). 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." *Id.* § 5.01(2)(b).

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 . . .." *Id.* § 5.01(6). 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. *Id.* § 6.02(5)(c). 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. *Id.*, Appendix B, Correction Methods and Examples, § 2.05, which incorporates § 2.04(1) (correction of IRC § 415(b) excesses). 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 . . .." *Id.* § 6.02(5).

A revenue procedure is directory, not mandatory, and does not have the force of a promulgated rule. *Estate of Shapiro v. Commissioner*, 111 F.3d 1010, 1017-18 (2nd Cir. 1997), citing cases. Nevertheless, Rev. Proc. 2006-27 clearly indicates the IRS view that an overpayment like the one in this case would be considered a failure that could threaten PERF's qualification under IRC § 401.

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. Case law contains very little discussion of the possibility, and then usually in the extreme case where a non-employee was provided benefits.

In *Flynn v. Hach*, 138 F.Supp.2d 334 (E.D. N.Y. 2001), for example, the court found that trustees of a pension plan did not act arbitrarily in refusing to deem the plaintiff an employee covered by the plan. As partial support for the trustees' position, the court accepted their argument that the plan would risk losing its qualified status under § 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).

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 smattering of cases is a much larger body of case law, discussed below, in which courts apply equitable principles to determine whether correction and overpayment is allowed, without any discussion of the specter that the plan would lose its § 401 qualification. This suggests that while erroneous payments are qualification failures, application of equitable principles to mitigate the harm to the beneficiary does not threaten the plan's § 401 qualification.

Equitable principles embodied in Indiana law should be viewed as part of the pension plan, not departures from it. While PERF is a creature of statute, it is also subject to the constitution and common law of Indiana. 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. 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 Mem. Supp. MSJ at 8-11.)

Therefore, 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. [8]

In sum, the mandate to comply with the IRC does not leave PERF helpless but to compel reduction of benefit and collection of overpayment in every circumstance. The Revenue Procedure allows exceptions where reduction and recoupment would be "unreasonable or not feasible" or would have "significant adverse effects on participants and beneficiaries of the plan." Rev. Proc. 2006-27, § 6.02(5). Equitable principles of Indiana law are also incorporated into the terms of the plan, so application of those principles does not violate IRC § 401.

Equitable principles. Neidigh asks that a "principle of fairness" be applied to find that PERF should not be permitted to correct his benefit and collect the overpayment, citing his ignorance of the error, his reliance on the estimate and the payments, PERF's negligence in making the original benefit calculation, and PERF's delay in finding the error. PERF argues that it cannot award tort damages for negligence against itself, its delay in finding the error did not amount to a waiver of its obligation to correct the error, and that equitable estoppel does not apply because Neidigh has not shown detrimental reliance or a strong public policy militating against application of estoppel against government.

No Indiana court appears to have specifically decided the circumstances under which a pension or other trust can recover mistaken overpayments. Various equitable theories may apply, using factors that often overlap.

For example, Indiana courts have addressed a party's right to restitution of a payment made by mistake, accepting 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). [9]

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[8] *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).

[9] 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

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 was not sufficient to demonstrate a change of position that would bar restitution. *Id.* at 384-85.

PERF is also a trust under Indiana law, Ind. Code § 5-10.3-2-1(b). In the case of mistaken payments of trust assets, a trust beneficiary is liable for the amount of a payment to which he was not entitled, and his interest in the trust may be charged for the repayment, "unless he has so changed his position that it is inequitable to compel him to make repayment." *Restatement (2d) of Trusts* § 254 (1959). Whether it is inequitable to compel repayment is determined by examining "(1) what disposition has been made by the beneficiary of the amount by which he was overpaid; (2) the amount of the overpayment; (3) the nature of the mistake made by the trustee, whether he was negligent or not; (4) the time which has elapsed since the overpayment was made." *Id.*, cmt. d. The comment gives an example:

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

Id. (emphasis added). In other words, if immediate repayment would leave the beneficiary in a position of extreme hardship (no income), the erroneous payment may be recovered by partial reductions in benefits over time, the method used by PERF here.

A third equitable doctrine with potential application here is laches, which may be raised to stop a person from asserting a claim due to unreasonable delay in asserting it. Laches is composed of three elements: (1) inexcusable delay in asserting a right, (2) implied waiver arising from knowing acquiescence in existing circumstances, and (3) a change in circumstances causing prejudice to the adverse

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"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).

party. *SMDfund, Inc. Fort Wayne–Allen County Airport Authority*, 831 N.E.2d 725, 729 (Ind. 2005); *In re Paternity of J.A.P.*, 857 N.E.2d 1, 10 (Ind. App. 2006).

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

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

Other cases state four elements: (1) a representation or concealment of material fact, (2) made by a person with knowledge of the fact and with the intention that the other party should act upon it, (3) to a party ignorant of the matter, (4) which induced the other party to act upon it to his detriment. *Indiana Dep't of Environmental Management v. Conard*, 614 N.E.2d 916, 921 (Ind. 1993); *see also Wabash Grain, Inc. v. Smith*, 700 N.E.2d 234, 237 (Ind. App. 1998) (adding that the reliance element has two prongs, reliance in fact and right of reliance).

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

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

But estoppel against a governmental entity "may be appropriate where the party asserting estoppel has detrimentally relied on the governmental entity's affirmative assertion or on its silence where there was a duty to speak." *Equicor Development, Inc. v. Westfield-Washington Township Plan Commission*, 758 N.E.2d 34, 39 (Ind. 2001). The courts have used "public interest" or "public policy" in

justifying this exception. *City of Crown Point*, 510 N.E.2d at 687 ("When the public interest would be threatened by the government's conduct, estoppel will be applied to bar that conduct."). What constitutes the public interest is not well defined. *Samplawski*, 512 N.E.2d at 459. *Cf. Metropolitan Development Comm'n of Marion County v. Schroeder*, 727 N.E.2d 742, 752 (Ind. App. 2000) (discussing public interest in zoning enforcement cases, balancing equities to determine that threat to public by governmental conduct outweighed public interest in barring estoppel defenses against zoning violations).

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

Courts will not apply estoppel in cases involving unauthorized use of public funds. *City of Crown Point*, 510 N.E.2d at 688; *Samplawski*, 512 N.E.2d at 459; *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348, 354 (Ind. App. 1981) (courts are "particularly unsolicitous of estoppel" where "unauthorized acts of public officials somehow implicate government spending powers"). But estoppel may be appropriate where the pertinent limits on governmental authority are not clear and unambiguous. *City of Crown Point*, 510 N.E.2d at 688; *Cablevision of Chicago*, 417 N.E.2d at 356.

Beyond Indiana, the overwhelming majority of overpayment cases are decided under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* ERISA does not apply to plans established by states or their political subdivisions. 29 U.S.C. §§ 1002(32), 1003(b)(1). Nevertheless, these cases provide guidance because they apply various common law principles of equity, such as restitution, equitable estoppel, laches, and the law of trusts. They reach a variety of results depending on the individual circumstances. Several leading cases are set forth in the margin. [10]

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[10] *Phillips v. Brink's Co.*, 2009 WL 2014142 (W.D. Va. 2009) (employer could not recoup overpayments); *Porter v. Hartford Life & Accident Ins. Co.*, 609 F.Supp.2d 817, 827-28 (E.D. Ark. 2009) (declining to permit recoupment); *Adams v. Brink's Co.*, 261 Fed. Appx. 583, 595-97 (4th Cir. 2008) (retiree not required to repay overpayment); *Johnson v. Retirement Program Plan*, 2007 WL 649280 (E.D. Tenn. 2007) (retiree required to repay $70,000 in erroneous overpayments); *Laborer's Dist. Council Pension Fund for Baltimore and Vicinity v. Regan*, 474 F.Supp.2d 279, 281 (D. N.H. 2007) (denying summary judgment

Finally, in the case of a pension fund, and in addition to the factors discussed above, some courts give weight to 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).

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because of factual disputes over whether payee's reliance on the overpayments was reasonable); *Lumenite Control Technology, Inc. v. Jarvis*, 252 F.Supp.2d 700, 706-07 (N.D. Ill. 2003) (pension fund is entitled to restitution of overpayment if (1) it has a reasonable expectation of repayment, (2) member should reasonably have expected to repay, and (3) society's reasonable expectations of person and property would be defeated by nonpayment, citing *Harris Trust & Sav. Bank v. Provident Life & Accident Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995)); *Phillips v. Maritime Association-I.L.A. Local Pension Plan*, 194 F.Supp.2d 549 (E.D. Tex. 2001) (reduction of benefits and recoupment of overpayments disapproved); *Kaliszewski v. Sheet Metal Workers' Nat'l Pension*, 2005 WL 2297309 (W.D. Pa. 2005) (recommending denial of summary judgment on disputed question of whether pension could reduce overpayments resulting from miscalculation); *Wells v. U.S. Steel & Carnegie Pension Fund, Inc.*, 950 U.S. 1244, 1250-51 (6th Cir. 1991) (laches and estoppel did not bar recoupment, but remanding for determination of whether recoupment would be inequitable under trust law); *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1354 (D.C. Cir. 1982).

Application of principles to this case. The cases cited above provide a kaleidoscope of equitable considerations that courts have used in circumstances similar or analogous to this case. An administrative law judge is not a court of equity, but must attempt to anticipate how a court of equity would apply these considerations to reach a result.

To summarize the facts, Neidigh completed 17 and a half years of public service in 2000, continued to work in the private sector, and turned 65 in 2005. In August 2005, Neidigh and his wife made plans to downsize their residence in 2007 and retire in April 2008. One of their sources of retirement income would be PERF, which they estimated would provide $[redacted]/month or [redacted]/year.

A couple of months later, in October 2005, a PERF counselor provided a non-binding estimate that the one-half survivor option would provide Neidigh with an immediate partial ASA distribution of $5,598 and a monthly benefit of $[redacted]. On the same day, Neidigh applied for retirement benefits effective in November 2005, which was later made retroactive to his first month of eligibility, May 2005. In April 2006, PERF completed its calculation that Neidigh would be entitled to $[redacted]/month ($[redacted]/year). He received the ASA distribution and one year's worth of back benefits, and monthly payments began in May 2006.

Closely tracking their plan, Neidigh and his wife downsized their residence in October 2007 and Neidigh retired from private employment in April 2008. By the end of 2008, the PERF benefit had increased to $[redacted]/month ($[redacted]/year).

At the end of 2008, PERF notified Neidigh of the calculation error, which would immediately reduce his benefit to $[redacted]/month ($[redacted]/year), or a reduction of $[redacted]/year (19.4 percent). He was also notified that the overpayment of $[redacted] would be collected over 10 years by reducing his monthly benefit by another $[redacted]/month (8.2 percent), temporarily reducing his annual benefit to $[redacted]. Pending disposition of this appeal, the overpayment amount is growing at a rate of about $[redacted]/month.

Trust Law + Restitution-

Under both restitution and trust law, the general rule is that the beneficiary must repay incorrect payments, particularly where the mistaken payments are clearly contrary to law and the terms of the plan, which they were in this case. The exception is where the beneficiary has so changed his position that it would be inequitable to require repayment.

The record does not show that Neidigh changed his position at all in reliance on the estimate or wrongful payments. When he applied for PERF benefits in 2005, he had left government service and had no plan to return. Upon turning 65 and with no further creditable service to be earned, he had reached the point of maximum normal retirement benefit, so there was no marginal benefit to waiting

longer. This is not a situation where, in reliance on the hoped-for benefit, an employee retired earlier than necessary, or where waiting longer would have increased the benefit.

Nor does the evidence support a finding that Neidigh relied on the inflated payments to his detriment in any other way. He had already planned to downsize his residence and leave his private job in April 2008. He does not argue, nor does the evidence support, that any major life decisions would have been different had the initial benefit been correctly calculated to be [redacted]month less.

Because Neidigh has not shown that he changed his position at all in reliance on the inflated benefit, it follows that he did not change his position *so much* that it would be inequitable to require him to accept corrected payments and repay the overpayments.

If a balancing of the equities were called for, the evidence does not show that correction and collection would be inequitable. There is no showing of hardship. While a reduction of about [redacted]/year for 10 years and [redacted]/year thereafter is significant, it is not comparable to a situation where a beneficiary has lost all income or is placed in a circumstance of privation. PERF is not the sole source of Neidigh's retirement income.

The overpayment obligation is mitigated by PERF's agreement to collect it by deduction from plan income over 10 years, without interest. That does not mean that the impact to Neidigh could not be mitigated still further. PERF should consider extending the repayment period to 20 years if that is acceptable to Neidigh.

PERF has never given an explanation for the errors, but they appear to be the result of negligence, not intent. For this reason, laches does not apply because there is no evidence of knowing acquiescence, and equitable estoppel does not apply because there was no intent to mislead.

To be sure, Neidigh has every right to be indignant at the course of events, and some of the equities weigh in his favor. As he notes, PERF's initial estimate was in the same ballpark as his own, and the benefit he began receiving was even closer (although the evidence does not show how he made the same mistake that PERF made). Although the estimate was conditioned on final verification and calculation, the benefit itself was presumably the final word. He received the benefit for more than two years, from May 2006 to December 2008, before any notice from PERF that there was a problem.

While PERF pleads that its actuarial soundness is at risk, and failing to collect the overpayment could theoretically result in having to increase employer contributions (which themselves are supported by tax dollars), PERF must also

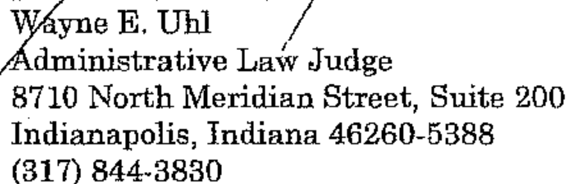
acknowledge that the impact of the errors in Neidigh's case is infinitesimal.[11] Let's hope that errors such as the ones made in this case are never so numerous that the actuarial soundness of the fund is significantly impacted.

While this is a regrettable and even maddening circumstance, the law is that where a payment was a clear mistake of law, the beneficiary is liable to repay it unless he changed his position in reliance on the wrongful payment so much that it would be inequitable to require repayment. Under all the facts and circumstances of this case, as shown by the undisputed facts, and even based on the technically inadmissible materials he has submitted, Neidigh would not be able to show that he changed his position in reliance on the miscalculated benefit or that it is inequitable for PERF to exercise its right and obligation to correct the benefit and collect the overpayment. Therefore, PERF is entitled to summary judgment as a matter of law.

Order

PERF's motion for summary judgment is granted and Petitioner's motion for summary judgment is denied. PERF's initial determination, correcting Neidigh's retirement benefit and collecting the overpayment by reduction of future income is affirmed. PERF is ordered to consider, in its discretion, whether it is able to further mitigate the harm to Neidigh, including by extending the repayment period, subject to Neidigh's agreement.

DATED: August 24, 2009.



Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
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[11] Of $15.7 billion in combined assets under management as of June 30, 2008, PERF accounted for $12.1 billion. *2008 PERF Comprehensive Annual Financial Report* p. 29, *http://www.in.gov/perf/files/2008_CAFR_financial_section.pdf* (viewed 8/23/09). The impact on PERF is negligible even if the overpayment is not collected and Neidigh's benefit is not reduced for 20 years, resulting in a loss to PERF of roughly

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 August 24, 2009:

Dennis M. Neidigh

Kathryn Morgan Cimera
General Counsel
PERF
143 W. Market St.
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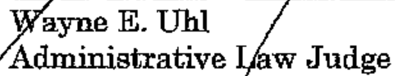

Wayne E. Uhl
Administrative Law Judge