

**BEFORE THE EXECUTIVE DIRECTOR
OF THE INDIANA PUBLIC RETIREMENT SYSTEM**

IN THE MATTER OF)	PUBLIC EMPLOYEES' RETIREMENT
CAROL SCHULTHEIS,)	FUND
Petitioner.)	
)	

FINAL ORDER

The Board of Trustees of the Indiana Public Retirement System (the "Board") is the ultimate authority in administrative appeals brought by members of the Public Employees' Retirement Fund ("PERF") under IC 4-21.5-3-28 and 35 IAC 1.2-7-1. In the Statement of Board Governance, the Board delegates to the Executive Director the authority to conduct a final authority proceeding, or a review of decision points by the administrative law judge ("ALJ"), to issue a final order in this matter.

1. The ALJ issued a Decision and Recommended Order on Motions for Summary Judgment ("Order") in this matter on July 19, 2011, granting PERF's motion for summary judgment and denying Petitioner's motion for summary judgment.
2. Copies of the Order have been delivered to the parties.
3. It has been more than fifteen (15) days since having received the ALJ's Order.
4. No objection to the ALJ's Order has been received.

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

DATED August 10, 2011



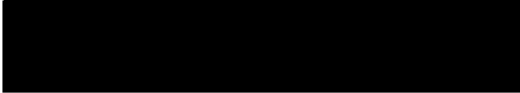
Steve Russo, Executive Director
Indiana Public Retirement System
One North Capitol, Suite 001
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

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

Distribution:

Carol Schultheis



Laureanne Nordstrom
Administrative Law Judge
7689 Briarstone Lane
Indianapolis, IN 46227

Thomas N. Davidson, General Counsel
Jaclyn M. Brinks, Staff Attorney
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A handwritten signature in black ink, appearing to read "Steve Russo", written over a horizontal line.

Steve Russo, Executive Director
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**BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND**

IN THE MATTER OF)
Carol Schultheis)
Petitioner.)

**DECISION AND RECOMMENDED ORDER ON
MOTIONS FOR SUMMARY JUDGMENT**

Introduction

Carol Schultheis appeals the initial determination of the Public Employees' Retirement Fund (PERF) that she must repay an overpayment of her PERF retirement benefits, totaling \$ [REDACTED]

Pursuant to the schedule agreed to by the parties and ordered by the ALJ, PERF filed a motion for summary judgment on May 27, 2011, and Schultheis filed a cross-motion for summary judgment on June 24, 2011. PERF filed a response in opposition to Schultheis's cross-motion on July 15, 2011. Neither party requested a hearing, so the motions are ripe for ruling.

Findings of Undisputed Material Fact

1. Carol Schultheis became a member of PERF on or about August 23, 1990.
2. On or about November 22, 2006, Schultheis submitted a PERF Application for Retirement Benefits, electing Option 61 retirement.
3. A member who elects Option 61 will receive a "larger monthly benefit before age 62. At age 62, [the member's] benefit will be reduced or terminated depending on [the member's] estimated monthly benefit at age 62 from Social Security."
4. Schultheis began receiving a monthly benefit of [REDACTED] on or about June of 2007.
5. When calculating Schultheis's retirement benefit, PERF used the Social Security benefit estimate amount for full retirement, [REDACTED]
6. PERF discovered it had made an error in calculating Schultheis's monthly benefit on or about July 13, 2009.
7. The Social Security amount for reduced retirement ([REDACTED]) not the amount for full retirement [REDACTED] should have been used.
8. Applying the reduced retirement amount, Petitioner's correct monthly benefit at retirement should have been [REDACTED]

9. Due to PERF's error in calculation, Schultheis was overpaid by approximately \$ [REDACTED] per month from June 2007 through September 2009.
 10. On or about October 22, 2009, Schultheis spoke to Ms. Payne from PERF regarding the overpayment. Ms. Payne informed Schultheis that paperwork would be sent to her.
 11. PERF sent Schultheis a letter regarding the overpayment on or about December 2, 2009. The letter gave Schultheis repayment options ranging from [REDACTED] per month for 24 months to [REDACTED] per month for 59 months and [REDACTED] for one month.
 12. Schultheis spoke to Ms. Payne of PERF on December 4, 2009. Schultheis was advised of the appeals process. Schultheis was also advised that the debt would continue to accrue.
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13. On or about December 22, 2009, PERF mailed Schultheis a letter regarding the overpayment. The letter gave Schultheis three repayment options. Schultheis did not respond to this letter.
 14. Schultheis received a monthly retirement benefit of \$861.98 plus applicable cost of living adjustments from June 2007 through October 2010.
 15. PERF reduced Schultheis's retirement benefit to the correct amount in November 2010.
 16. From June 2007 through October 2010, PERF overpaid Schultheis a total of [REDACTED].
 17. On or about February 22, 2011, PERF notified Schultheis that the total amount of the overpayment was [REDACTED]. PERF also notified Schultheis that it would offset Schultheis's monthly benefit beginning April 1, 2011 to begin collecting the overpayment. PERF also informed Schultheis of her appeal rights.
 18. After PERF reduced Schultheis's retirement benefit to recoup the overpayment, Schultheis could no longer afford to pay the required fees for the reduced medical treatment program she was participating in. Schultheis applied to and was approved for the Arizona Health Care Cost Containment System's emergency coverage.
 19. On March 10, 2011, Schultheis submitted a letter requesting administrative review of PERF's initial determination of the Public Employees' Retirement Fund (PERF) that she must repay an overpayment of her PERF retirement benefits, totaling \$ [REDACTED].

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 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. Indiana Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. App. 2005).

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, 103-104 (Ind. 1993); *Branson v. Public Employees’ Retirement Fund*, 538n N.E.2d 11,13 (Ind. App. 1989).

Evidence

No party has raised an objection to the admissibility of the evidence submitted.

Genuine disputes of material fact

While Schultheis, in her motion for summary judgment, disputed some of PERF’s statements of fact, as well as the affidavit of Charlene Payne, the ALJ concludes that Schultheis’s objections pertain to the way that certain conversations were held, rather than to the actual facts, and the ALJ concludes that Schultheis’s disputes are not related to facts that are material to the dispute.

Issues presented

PERF contends that 1) Schultheis’s original benefit was not calculated in accordance with law, 2) PERF is required to pay benefits in accordance with the plan provisions, 3) PERF is required to collect erroneous overpayments, and 4) PERF should not be estopped from collecting the overpayment.

Schultheis contends that 1) the delay in beginning the collection process has created a hardship for her, 2) overturning PERF's determination would not cause financial hardship for PERF, and 3) Schultheis should not be held responsible for PERF's errors.

Discussion

Recalculation of benefit. Schultheis does not dispute PERF's determination that her benefit was incorrectly calculated, the new calculation, or the amount of the overpayment. Therefore, this portion of PERF's determination is upheld.

Adherence to plan provisions. The PERF is mandated to comply with retirement fund law. Ind. Code § 5-10.2-2-1.5(1). 26 C.F.R. § 1.401(a). The retirement fund law governing PERF is referred to as PERF's "plan document" and includes Ind. Code §§5-10.2 and 5-10.3, Title 35 of the Indiana Administrative Code, and PERF Board of Trustees resolutions. Retirement fund law also requires PERF to be administered in accordance with Internal Revenue Code § 401 in order to maintain PERF's federal tax-favored status as a qualified retirement plan. PERF lacks the power or the discretion to deviate from restrictions placed upon the administration of a member's retirement benefit by retirement fund law. See Ind. Code § 5-10.2-2-1 (a). PERF can only pay those amounts which are due to a member in accordance with both federal and Indiana state law.

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 Indiana General Assembly has implicitly authorized reducing a member's benefit to correct an 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.

Although the statutes governing PERF do not directly address the question of erroneous overpayments of benefits paid to a member, 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 § 5-10.2-54-1.5 (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."

Equitable estoppel and laches. The ALI summarizes Schultheis's argument as follows. PERF should not be permitted to collect the overpayment because the delay in beginning the collection process causes a hardship for her, but would not cause financial hardship for PERF. Schultheis also argues that she should not be held responsible for PERF's errors. Schultheis cites her inability to continue to pay the required fees for the reduced medical treatment program she was participating in as a hardship she has incurred as a result of the reduction of her retirement benefits to recoup the overpayments. However, Schultheis applied to and was approved for the Arizona Health Care Cost Containment System's emergency coverage.

PERF is 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 (2) 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.*

An equitable doctrine suggested by Schultheis's argument 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 the following 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 party. *SMDfund, Inc. Fort Wayne-Allen County Airport Authority*, 831 N.E.2d 725, 729 (Ind. 2005).

Another equitable doctrine suggested by Schultheis's argument is 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). The "general rule," however, is that equitable estoppel "will not be applied against governmental authorities." *City of Crown Point v. Lake County*, 510 N.E.2d 684, 687 (Ind. 1987). Indiana courts will not apply estoppel in cases involving unauthorized use of public funds. *City of Crown Point*, 510 N.E.2d at 688; *Samplawski v. City of Portage*, 512 N.E.2d 456, 459 (Ind. App. 1987).

Finally, in the case of a pension fund, 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 [redacted] payment when only [redacted]wed).

Application of applicable law. Under trust law, the general rule is that the beneficiary must repay incorrect payments, particularly when the mistaken payments are clearly contrary to law and the terms of the plan, which they were in this case. The record supports a conclusion that Schultheis must repay the incorrect payments she received from PERF.

Nor does the record support a conclusion that laches should apply to prevent PERF from collecting the overpayment. PERF notified Schultheis of its error approximately 90 days after its discovery and proposed a repayment plan on December 2, 2009. Based on this, the ALJ is unable to conclude that PERF acquiesced in the existing circumstances.

Finally, equitable estoppel should not apply as PERF is a government agency managing public funds.

While this is an unfortunate result for Schultheis, the law is that, where a payment was a mistake of law, the beneficiary is liable to repay it.

Recommended Order

PERF's motion for summary judgment is granted, and petitioner Carol Schultheis's motion for summary judgment is denied. PERF's initial determination to collect the [REDACTED] overpayment of Schultheis's retirement benefit by reduction of future income is affirmed. PERF is ordered to consider, in its discretion, whether it is able to mitigate the impact on Schultheis, including by extending the repayment period, subject to Schultheis's agreement.

DATED: July 19, 2011



Laureanne Nordstrom, ALJ
7689 Briarstone Lane
Indianapolis, IN 46227

STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The undersigned administrative law judge is not the ultimate authority, but was designated by the IPRS Board to hear this matter pursuant to Ind. Code. § 4-21.5-3-9 (a). Under Ind. Code §4-21.5-3-27(a), this order becomes a final order when affirmed under Ind. Code § 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 59df) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

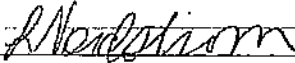
This means that any party who objects to this decision and recommended order must, within 15 days after service, file a written objection with the IPRS Board, c/o Thomas N. Davidson, General Counsel, 1

N. Capitol, Suite 001, Indianapolis In, 46204. The written objection must state the basis of the objection with reasonable particularity.

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, on the 19 day of July, 2011:

Carol Schultheis, [REDACTED]
Jaclyn Brinks, PERF, 1 N. Capitol, Suite 001, Indianapolis, IN 46204


Laureanne Nordstrom
Administrative Law Judge