Example

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

IN THE MATTER OF ELIZABETH WARD SWARENS, Petitioner.	))))	PUBLIC EMPLOYEES' RETIREMENT FUND

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Petitioner filed a motion for summary judgment and, in addition to responding, PERF cross-moved for summary judgment. The motions are fully briefed and ready for decision.

Findings of Undisputed Fact

The following facts are undisputed from the evidence submitted by the parties.

1. Petitioner Elizabeth Ward Swarens was Judge of the Circuit Court of Harrison County for six years, from January 1, 1987 through December 31, 1992.

2. Judge Swarens was automatically a member of the judges' retirement fund (JRF), *see* Ind. Code § 33-38-8-10. The JRF is funded by appropriations from the General Assembly and contributions of six percent of the judge's salary paid either by the judge or the judge's employer. I.C. §§ 33-38-6-17, 33-38-8-11. Contributions totaling $[redacted] were made to the JRF by Judge Swarens or on her behalf (Pet. Ex. A).

3. Michael Cherry, Chief Information Officer for PERF, sent a letter to Judge Swarens in Florida dated April 13, 1993. Cherry stated that he had enclosed a refund claim form for Judge Swarens to withdraw her JRF contributions. (Pet. Ex. C.)

4. Cherry wrote that a judge who has left the bench prior to being eligible to receive a judge's benefit may receive credit for the service in PERF. He noted that Judge Swarens had prior PERF service as a prosecutor and a teacher, which when added to her service as a judge would total 16 years and three months, more than the 15 years required for a PERF member to be vested and eligible for a reduced benefit as early as age 50. He estimated her monthly benefit would be $[redacted] under the Normal Retirement Option, and could begin on February 1, 1999 (after her 50th birthday). "This benefit is in addition to the funds in the Judges Retirement System. If you elected to become a member of PERF, these funds would be transferred to the PERF fund. If you withdraw your funds from the Judges Retirement System, you forfeit your right to this vested benefit." (Pet. Ex. C.)

5. The letter further noted that if Judge Swarens "were to return to a PERF covered position and contribute to the fund for a period of six months, the above creditable

service would be reinstated and you again would be eligible for a benefit after you reach your fiftieth birthday." (*Id.*)

6. Cherry asked that Judge Swarens sign and return a copy of the letter with her refund application to acknowledge her awareness that she would be forfeiting her right to a benefit if she withdrew her JRF contributions. At the bottom of the letter appeared the following acknowledgment followed by a signature line:

> I hereby acknowledge that I could transfer my service and contributions to the PERF and be vested for a PERF benefit which could be started as early as age 50. I further acknowledge that I am forfeiting the rights to this benefit by requesting a refund of my contributions to the Judges Retirement System.

(*Id.*)

7. A second version of the same letter appears in the record, dated June 2, 1993. However, the letter is not on letterhead and is not signed by Cherry. (Pet. Ex. D.)

8. Judge Swarens wrote a letter to Cherry dated June 18, 1993, showing a return address in Florida. She referenced several phone calls regarding refund of her JRF contributions and her "years of contributions to PERF." She then wrote:

> The purpose of this letter is to give the Judges' Retirement Fund and PERF notice that I want all of my contributions to the Indiana Judges' Retirement Fund and my years of service as an Indiana trial judge to count under PERF. I have no plans to return to Indiana within the next few years. I will give PERF notice with an application when I intend to retire and commence drawing retirement benefits.

(Pet. Ex. E.)

9. Cherry responded by letter dated July 7, 1993.[1] Cherry stated that his previous correspondence erroneously overstated Judge Swarens' years of service. Upon further review, Cherry stated that she actually had 12.5833 years of service creditable in PERF, consisting of five years of service in the Teachers' Retirement Fund (TRF), 1.5833 years of service as a prosecutor, and the six years of service as a judge. (Pet. Ex. F.)

10. The letter went on to say that 12 years and seven months of service would entitle her to a benefit only after her 65th birthday in 2013 (Pet. Ex. F). Attached to the letter (but not included in the record) was an estimate of the benefit. Also enclosed was a PERF employee handbook (Pet. Ex. B).

---

[1] The letter stated that it was responding to Judge Swarens' letter dated June 23, 1993. There is no letter of that date. Perhaps he was referring to the June 17 letter, which may have been received on June 23.

11. Because of the substantial change in the calculation of service, Cherry asked that Judge Swarens confirm in writing her intention to transfer her judges' retirement contributions to PERF. The letter further stated:

> If based on this corrected information, you elect to withdraw your funds from the Judges' Retirement System, those years of service will not be transferred currently and you would not be eligible for a benefit from PERF. However, if you were to return to work in a PERF-covered position and contribute to PERF for a period of six months, then your prior service with PERF and as a judge could be used in the calculation of a PERF benefit. . . . This procedure is consistent with any PERF member who upon termination from a PERF covered position withdraws their Annuity Savings Account and is later re-employed in a covered position for a period of six-months. There is no requirement in the PERF program to repay any contributions previously withdrawn to recover the prior service.

(Pet. Ex. F, emphasis in original.)

12. The PERF handbook provided by Cherry stated that a PERF member who receives a refund of his/her annuity savings account (ASA) forfeits all service credits and vested rights, but may reinstate PERF service credit by returning to work in a PERF-covered position and contributing to the fund for six consecutive months (Pet. Ex. B, p. 17). The handbook makes no mention of transfer of credits from other funds.

13. The record contains no further written record of Judge Swarens' actions. From later documents, however, it appears (and is undisputed by the parties) that she withdrew her contributions and rolled them into an Individual Retirement Account (IRA).

14. Two years later, on July 26, 1995, Judge Swarens wrote to Cherry acknowledging his earlier calculation that she had 12.5833 years of creditable service. "At the time, I did not contest your figures because I was interested in converting my retirement funds into a higher interest bearing IRA account." She went on to contend that his calculation omitted three years of teaching service in Utah and Maryland, and that she should receive total credit for 15 years. She asked what proof would be required to obtain credit for the out-of-state service. [2] She concluded:

> I understand that even if I have credit for my full fifteen years of service, I would still have to return to Indiana and work six months to reactivate my retirement system before I actually retire. If it is possible to pay back the funds withdrawn in order to avoid that requirement, I would like to do so. I believe

---

[2] By previous agreement of the parties and by order, the question of whether Judge Swarens should be permitted to purchase credit for her out-of-state teaching service is not before the ALJ.

> we operated on wrong information when I withdrew the retirement funds from the Judges Retirement Fund. If there is a way we can correct this, please let me know that, as well.

(PERF Ex. 1.) No response to this letter appears in the record.

15. Ten years later, on July 11, 2005, Judge Swarens sent a letter to Maurice Whittemore, Refund Analyst for PERF. Among other things, the letter referred to "my 6 years as Judge, which I previously elected to have included in my PERF account." Judge Swarens stated her expectation that the six years of service as a judge would be included in her PERF account, based on the 1993 correspondence with Cherry. In pertinent part, her letter stated:

> As you can see from my letters to and from Mr. Cherry . . ., I would not have withdrawn funds from the Judge's Retirement Account, if it had jeopardized my crediting the 6 years with PERF, upon my reemployment in a PERF position. Therefore, when I began working in the Prosecuting Attorneys Office again in January, 2001 my six years as judge would come back into the system. If I need to transfer the funds withdrawn from the Judge's Retirement Account into the PERF account, please let me know right away. Those funds are in an IRA and can be rolled over to the PERF annuity without delay.

(Pet. Ex. G.) Judge Swarens estimated that with the newly purchased out-of-state service, she should have more than 19 years of PERF creditable service, and that she planned to retire effective January 2006. (*Id.*)

16. By letter dated August 16, 2005, Linda Villegas, PERF staff attorney, responded that when Judge Swarens withdrew her contributions from the judges' retirement fund, she "forfeited [her] service credit under the Judges' Retirement Fund and that service cannot be reinstated." Villegas continued:

> There is no provision in the Judges' Retirement Fund that permits someone to repay their withdrawal of contributions and reinstate their service. When you withdrew your contributions you ceased to be a member of the Judges' Retirement Fund and you were paid out your creditable service
>
> The letter from Michael Cherry . . . dated April 13, 1993 made it clear that withdrawing your funds from the Judges' Retirement Plan resulted in your service being forfeited. Mr. Cherry's letter stated you could transfer your service to PERF ***or*** you could receive a refund of your contributions.

(Pet. Ex. H.)

17. Villegas further stated that PERF could not give Judge Swarens credit for the service, citing I.C. § 5-10.2-3-1(a), (h) and (i). (Pet. Ex. H.)

18. Villegas' letter stated that it was a preliminary determination that would become final unless Judge Swarens initiated an appeal within 15 days. (Pet. Ex. H.)

19. By letter dated August 29, 2005, Judge Swarens presented arguments and asked that the denial of crediting her six years of service as a judge be reconsidered.

20. By letter dated September 15, 2005, Villegas pointed out that Judge Swarens' letter did not comply with Ind. Code § 4-21.5-3-7(a)(1), but granted her 15 days to file an "amended response to comply with the appeal of an initial determination." Judge Swarens submitted a revised version of her appeal letter on September 27, 2005, which PERF has conceded to be timely. (Letter to ALJ Uhl, 10/21/05, and attachments.)

21. Any finding of fact stated as a conclusion of law below is incorporated herein.

Conclusions of Law

Legal standard

Summary judgment "shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code § 4-21.5-3-23(b). This mirrors Ind. Trial R. 56(C). The standard for summary judgment under that rule is well-established:

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

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

The moving party has the burden of showing that no genuine issue of material fact exists. Only when the moving party has done so does the burden shift to the nonmovant to establish that a genuine issue of fact exists. Contrary to federal practice, a moving party cannot simply allege that the absence of evidence on a particular element is sufficient to entitle that party to summary judgment—it must prove that no dispute exists on all issues. *Dennis v.*

Greyhound Lines, Inc., 831 N.E.2d 171, 173 (Ind. App. 2005), citing *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994).

Because both parties have moved for summary judgment, each of them bears the above burdens as to her/its motion. For the purposes of each motion, the evidence is construed in favor of the nonmovant and doubts are resolved against the moving party.

Evidence

PERF has made two evidentiary objections. First, PERF lodges a hearsay objection to Judge Swarens' assertion that her letter of June 18, 1993 (Pet. Ex. E) shows that her intent to transfer her contributions and years of service to PERF. The letter is hearsay because it contains out-of-court statements by Judge Swarens. Ind. Evidence Rule 801. But the letter falls under the exception of Evid. R. 803(3) because it states Judge Swarens' then-existing state of mind, *i.e.*, her intent. In any event, hearsay is admissible in administrative proceedings so long as it is not the sole basis for decision. I.C. § 4-21.5-3-26(a).

Second, PERF objects to Judge Swarens' assertion that she withdrew her contributions "[b]ased upon the advice of . . . Cherry." PERF argues that there is no evidence for this conclusion, and that reliance is a legal conclusion. This is not an objection to evidence, but rather an argument that the evidence does not support the inference or conclusion asserted by its proponent.

Genuine disputes of material fact

Neither party contends that there is a dispute of material fact that prevents summary judgment. Instead, each party contends the undisputed evidence supports summary judgment as a matter of law in that party's favor.

Discussion

A. Entitlement to service credit

Although presented as Judge Swarens' second issue, the first logical question to address is whether her withdrawal of JRF retirement contributions effected a forfeiture of her six years of credit for her service as a judge, or whether that service can be credited by PERF. If her service credit was forfeited, she has offered to return her retirement contributions, with interest, in order to reinstate or repurchase her service credit.

General provisions concerning the JRF are set forth at I.C. chap. 33-38-6. Specific provisions governing the membership of judges who began service after August 31, 1985, are

set forth at I.C. chap. 33-38-8. Judge Swarens' membership in the JRF was mandatory, I.C. § 33-38-8-10. [3]

It is undisputed that Judge Swarens withdrew her contributions to the JRF after six years of service as a judge. A participant who ceases service as a judge (other than by death or disability) and is not eligible for a benefit "is entitled to withdraw from the fund, beginning on the date specified by the participant in a written application." I.C. § 33-38-8-12(a). Upon withdrawal, the participant is entitled to receive all sums contributed. I.C. § 33-38-8-12(b). Judge Swarens was entitled to "withdraw from the fund" because her service ended other than by death or disability, and she did not have the minimum eight years of service required for eligibility for a retirement benefit, I.C. § 33-38-8-13(2).

The statutes governing the JRF contain no provisions authorizing resumption of membership after withdrawal or payback of contributions that were refunded upon withdrawal. All indications are that withdrawal is irrevocable. In the absence of such statutory authority, Judge Swarens' membership in the JRF cannot be reinstated.

It is true that there are circumstances under which a judge can make payments into the fund for service. For example, a judge who was a member of PERF before taking the bench can receive credit for that service in the JRF if both the state and the judge make up any difference in contributions. I.C. §§ 33-38-8-22 and -23. But these provisions do not apply here, and do not permit an inference that a judge who withdrew can purchase her way back into the JRF.

Judge Swarens is also a member of PERF by virtue of other public service. The next question, therefore, is whether her service as a judge can be credited along with her other PERF-covered service. A PERF member is entitled to receive service credit for certain non-PERF service as set forth by I.C. § 5-10.3-7-7:

> (a) A member with at least one (1) year of service in a position covered by the fund after January 1, 1946, shall receive credit for years of service at any time as any of the following:
>
> (1) A member of the general assembly.
>
> (2) An elected state official.
>
> (3) A prosecuting attorney of a judicial circuit.
>
> *(4) A judge who is covered by the judges' retirement system but who is ineligible for its benefits.*

[3] The statutes creating and governing the judges' retirement fund were recodified without substantive change or effect in 2004. Ind. P.L. 98-2004; I.C. §§ 33-22-1-1 *et seq.*

(5) A member of the armed services if the member joined the armed services while the member was a member of the general assembly, including credit for the unexpired term if the unexpired term of the member of the general assembly was longer than the armed service.

(Emphasis added.) Upon Judge Swarens' withdrawal from the JRF, she was no longer "covered by the judges' retirement system." Therefore, her service as a judge cannot be credited for the purposes of her PERF membership.

Judge Swarens points to provisions of the PERF law that permit a PERF member to suspend the membership and withdraw contributions to the ASA. I.C. §§ 5-10.2-3-5 and -6. The PERF Board has promulgated a rule that a suspension can be canceled if the member is re-employed in a PERF-covered position for at least six months. 35 IAC 1.2-3-2; Pet. Ex. B, p. 17. These provisions, however, apply only to PERF membership, service credit and the ASA, not credit in or contributions to another fund from which the member has withdrawn.

For these reasons, PERF's initial determination that Judge Swarens withdrew from the JRF when she applied for refund of her contributions, and that she cannot reinstate her membership or receive credit for her judicial service in PERF, is correct as a matter of law.

B. Equitable estoppel

Judge Swarens argues in the alternative that PERF is estopped to deny her credit for her six years of judicial service by the incorrect or misleading statements of Cherry, upon which she relied, to her detriment, in making the decision to withdraw her contributions in 1993.

1. Principles of equitable estoppel

The test for equitable estoppel has been variously stated. A three-part version is that the party asserting equitable estoppel must show its "(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 the test as having four elements, mixing in a requirement of intent on the part of the person making the misleading or false statement: (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).

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 appellate 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."). But what constitutes the public interest is not well defined. *Samplawski*, 512 N.E.2d at 459. In the context of zoning regulation, the Court of Appeals has articulated a list of public interest and equitable reasons not to allow the defense of estoppel in a zoning enforcement matter. *Metropolitan Development Comm'n of Marion County v. Schroeder*, 727 N.E.2d 742, 752 (Ind. App. 2000). In *Schroeder*, the court balanced the equities to determine whether the threat to the public by the governmental conduct outweighed the public interest in barring estoppel defenses against zoning violations. *Id.*

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 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 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"). 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.

In the case of a public pension fund, the public interest includes the fund's fiduciary obligation 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); *see also Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990).

Both parties raise questions about the above analysis of estoppel. Judge Swarens questions whether the public interest requirement survives. PERF suggests that its legal obligations preclude making an estoppel-based exception to the terms of the plan.

Judge Swarens is correct that recent Supreme Court decisions have not discussed the public interest requirement in deciding whether a governmental entity will be estopped. The reason for that omission in *Story B&B* was that the court found that the plaintiff failed to establish two elements of equitable estoppel, so there was no need for the court to address the additional showing required for governmental defendants. Likewise, in *Conard*, the court found lack of detrimental reliance, so it did not need to "decide whether the equities of this case warrant application of the estoppel doctrine." 614 N.E.2d at 921.

More difficult to reconcile is *Equicor Development*, in which the Supreme Court appears to have applied estoppel against a plan commission solely because the plaintiff relied to its detriment on the plan commission's silence when it gave preliminary approval to a development plan, but later raised an objection based on the number of parking spaces provided by the plan. The court cited two cases for the proposition that estoppel "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." 758 N.E.2d at 39, citing *State ex rel. Agan v. Hendricks Superior Court*, 250 Ind. 675, 235 N.E.2d 458 (1968), and *Tippecanoe County Area Plan Comm'n v. Sheffield Developers, Inc.*, 181 Ind. App. 586, 394 N.E.2d 176 (1979).[4]

Agan applied "estoppel or waiver" against the State where the State waited until the expiration of a time limit to file objections to an appraisers' report, luring its opponent into withdrawing her objections to the same report. While estoppel "ordinarily may not be evoked against the government," the State was estopped from changing its position under the "peculiar and particular facts and circumstances" of the case. 394 N.E.2d at 460. *Sheffield*, similar to *Equicor*, involved a plan commission that, on its fourth vote to approve a development, raised

[4] The court also cited *Story B&B* and *City of Crown Point*. Both cases denied estoppel for lack of detrimental reliance, so neither stands for the proposition that detrimental reliance alone justifies applying estoppel against a governmental entity. *City of Crown Point*, moreover, firmly stated the rule requiring a showing of public interest to apply estoppel.

a new objection. The court did not apply a public interest requirement in finding that estoppel required approval of the development.

A common thread in all three cases is evidence that the governmental entity changed its position intentionally to gain a tactical advantage (*Agan*) or to needlessly protract approval proceedings as a pretext (*Equicor* and *Sheffield*). In *Equicor*, there was plausible evidence that the last-minute objection to parking was a pretext for hostility to any form of cluster housing. The court found that such a pretext would not support reversal for arbitrary or capricious (or unconstitutional) decision-making, 758 N.E.2d at 38-39, but that equitable estoppel was appropriate because raising "a formal defect at the last moment permits agencies to fumble endlessly with proposals that are entirely lawful," *id.* at 39. In *Sheffield*, the court found " a course of conduct by the Plan Commission to 'draw out' the Developer's plat approval as long as possible by citing new and different reasons for negative votes." 394 N.E.2d at 184. So, while not explicitly analyzing whether the "public interest" would be served by applying estoppel, the courts implicitly relied on the public interest against "endless fumbling" or "drawing out" of zoning and planning decisions. *Cf. Schroeder*, 727 N.E.2d at 752-53 (development commission not estopped from enforcing zoning regulations, despite prior indications that plaintiff's property met regulations, where "any threat to the public by the Commission's conduct seems minimal when compared to the public interests served by barring equitable estoppel defenses against zoning violations.").

PERF notes that its retirement plans, in order to maintain their status as "qualified plans" able to defer the payment of taxes on contributions, are required to comply with Section 401 of the Internal Revenue Code. I.C. §§ 5-10.2-2-1.5 (PERF), 33-38-6-13 (JRF). One of the requirements of Section 401 is that the plan be administered "in accordance with such plan," *i.e.*, that the plan provisions be strictly followed. 26 U.S.C. § 401(a)(1); 26 C.F.R. § 1.401(a)(2) and (a)(3)(iii). The suggestion is that if PERF allowed an exception to the terms of the plans, its qualified status could be jeopardized.

The common law principle of equitable estoppel, however, can be applied without risking disqualification. The terms of any pension plan may include principles beyond statutory provisions. In Indiana, for example, Article 11, § 12 of the Indiana Constitution, before its amendment in 1996, prohibited public retirement plans 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). Because PERF and JRF are trusts, I.C. §§ 5-10.3-2-1(b) and 33-38-6-19, they are presumably also subject to the law of trusts. *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 pension plan may be proper reference in an action to enforce plan). Therefore, Indiana law of equitable estoppel is part of the plan, and whether it applies must be addressed.

2. *Elements of equitable estoppel in this case*

It is Judge Swarens' burden on summary judgment to show undisputed evidence of all the elements of equitable estoppel. It is PERF's burden on summary judgment to show undisputed evidence that Judge Swarens cannot establish those elements.

There is no question that Cherry made incorrect or misleading statements. Specifically, while he more or less clearly stated that Judge Swarens would forfeit her right to a benefit if she withdrew her JRF contributions, he twice stated that she could regain credit in PERF for her six years of judicial service if she were re-employed in a PERF-covered position for at least six months.

Cherry's letter dated April 13, 1993 (Pet. Ex. C) correctly stated that a judge who left the bench before becoming eligible for a benefit under JRF can receive credit for those years of service in PERF (Judge Swarens was already a member of PERF). *See* I.C. § 5-10.3-7-7. After estimating her monthly early-retirement PERF benefit (based on an incorrect service credit of 16 years and three months), Cherry muddied the waters somewhat by his statement that "this monthly benefit" would be "in addition to the funds in the Judges Retirement System," which he said would be transferred to PERF. He then more clearly stated: "If you withdraw your funds from the Judges Retirement System, you forfeit your right to this vested benefit."

But this was followed by the clearly incorrect statement that if Judge Swarens were to return to a PERF-covered position and contribute for a period of six months, her judicial service would be "reinstated" and she would again be eligible for a benefit after her fiftieth birthday (Pet. Ex. C).

Judge Swarens initially intended to have her contributions and judicial service transferred to and credited by PERF, as shown by her letter dated June 18, 1993 (Pet. Ex. E).

Cherry then sent the letter dated July 7, 1993 (Pet. Ex. F), in which he explained his error in calculating her total service. With only 12 months and seven months of service, he wrote, Judge Swarens would not be able to retire at age 50, but instead would be eligible only following her 65th birthday. He asked for written re-confirmation of her intent to transfer her JRF contributions and service to PERF in light of this new information.

Cherry's letter also repeated the clearly erroneous statement made in the earlier letter. After restating that withdrawal of Judge Swarens' JRF contributions would forfeit a PERF benefit, he wrote: "However, if you were to return to work in a PERF-covered position and contribute to PERF for a period of six months, then your prior service with PERF and as a **judge** could be used in the calculation of a PERF benefit." (Pet. Ex. F, emphasis in original.)

From her letter to Cherry two years later (PERF Ex. 1), we learn that Judge Swarens decided to withdraw her JRF contributions in 1993 in order to roll them into a higher-interest

IRA. But having had "time to reflect," she decided in 1995 to question Cherry's estimate of her creditable service, which she believed should total 15 years. She repeated Cherry's erroneous statement that she would have to return to Indiana and work in a covered position for six months to receive retirement benefits. She asked if she could avoid this requirement by paying back the JRF contributions she had withdrawn, and stated that she had acted on "wrong information" when she withdrew those contributions. The "wrong information" was Cherry's calculation of 12.5833 years of creditable service. She could not have been referring to his misstatement that she could recoup her service by working for six months, because she did not yet know that was wrong.

We are not privy to Cherry's response to the 1995 letter or any communications in the ensuing ten years. We only know that Judge Swarens returned to Indiana and began working for a prosecuting attorney in January 2001 (Pet. Ex. G). She later wrote that she thought, after six months of that employment, her judicial service would be counted in PERF. But apparently she was told in 2005 that PERF considered her to have forfeited her six years of judicial service. She stated in her letter of July 11, 2005 (Pet. Ex. G) that she would not have withdrawn her JRF funds "if it had jeopardized my crediting the 6 years with PERF, upon my reemployment in a PERF position."

PERF raises an issue of credibility here that prevents granting summary judgment for Judge Swarens on the question of detrimental reliance. There is no affidavit from Judge Swarens stating that she relied on Cherry's misstatements when she withdrew her contributions. PERF notes that Judge Swarens also took into account the higher rate of return her funds would earn in an IRA, as well as the fact that she was living in Florida and may not have had plans to return to Indiana to work in a PERF-covered position. There is also the fact that two years after withdrawing her JRF contributions, Judge Swarens reconsidered her decision based on the calculation of her years of service.

For the purposes of PERF's summary judgment motion, however, the evidence is construed in favor of the nonmovant. There is sufficient evidence of record to infer that Judge Swarens would not have withdrawn her JRF contributions but for the assurance that she could regain credit for her six years of judicial service at some future date. Detriment is presumed from the fact that Judge Swarens' retirement eligibility and benefit will be calculated on the basis of six fewer years of service.

The element of estoppel missing here is "lack of knowledge and of the means of knowledge as to the facts in question." (In the four-part test, this is the element of "ignorance" of the party who relied on the misstatement.) While it is frustrating that Cherry twice misstated the law as to whether Judge Swarens would be able to reinstate her service by becoming re-employed for six months, all persons are charged with knowledge of rights and remedies provided by statute, and Judge Swarens had available to her the information and resources to verify or dispute Cherry's statements. The facts are undisputed on this score.

Therefore, as a matter of law, Judge Swarens cannot establish the elements of equitable estoppel.

3. Application of estoppel against PERF

Even if Judge Swarens could make out the elements of equitable estoppel based on Cherry's misstatements, "the equities" would not "warrant application of the estoppel doctrine" against a governmental entity. *Conard*, 614 N.E.2d at 921.

On the question of competing public interests, both parties struggle to articulate public interests to balance. Judge Swarens argues that without enforcement of estoppel, PERF members would never be able to count on receiving reliable information from PERF. PERF responds that binding it to employees' incorrect statements threatens the financial integrity of the funds, at least where, as here, the member withdrew her contributions. PERF states that allowing Judge Swarens to pay back her contributions by rolling them from her IRA "will not adequately fund the six years of service credit she is seeking," but provides no evidence in support of this assertion. [5]

The public does have an interest in operation of the funds in accordance with the rules set out by the legislature. In individual cases, the financial impact of misstatements will almost always be negligible—Judge Swarens withdrew $[redacted] a molecule in the bucket of a fund valued a year ago at over $13 billion. [6] Of greater concern is the precedent that would be set by binding PERF to Cherry's misstatements. PERF employees surely make many statements to members on a daily basis about the terms of their plans and the consequences of decisions members make. To hold that a misstatement by an employee is binding on PERF threatens to subject every decision pertaining to the funds into a mini-lawsuit over what was said. Furthermore, such a holding would give PERF a perverse incentive to stop answering fund members' questions and simply refer them to the statutes and rules to figure it out for themselves. It is better to have advice that is occasionally wrong than to have no help at all.

There are no circumstances of this case that set it apart from any other case in which a government employee makes a negligent misstatement. There is no evidence that Cherry intentionally misled Judge Swarens in order to gain a tactical advantage, induce her to withdraw her JRF contributions, or otherwise deny her legal rights. Cherry was not interpreting ambiguous provisions of either the JRF or PERF retirement plan.

---

[5] It is not clear whether a judge's contributions to the JRF would be transferred to the corpus of PERF or to the judge's ASA. If the funds are deposited in the ASA, the presence or absence of those funds would have no financial impact on PERF, but instead would affect only the separate annuity paid from the ASA upon retirement.

[6] Of the $17.2 billion in combined assets under management as of June 30, 2007, PERF accounted for $13.3 billion. 2007 PERF Comprehensive Annual Financial Report, Financial Section, p. 26, *http://www.in.gov/perf/files/financial_final010308.pdf* (viewed 7/1/08).

This case illustrates the policies behind the rule against application of equitable estoppel to governmental entities. Statutory schemes can be complicated, so much so that even the persons charged with executing them can get it wrong. This is a classic case of a government employee negligently misstating the law. While it is unfortunate that the misstatement led Judge Swarens to withdraw her JRF contributions and forfeit her years of service, it is not in the public interest or otherwise required by equity that PERF be bound by Cherry's misstatements.

For these reasons, even construing the evidence most favorably to her position, Judge Swarens would be unable to show that the public interest or other equitable considerations merit an exception to the general rule that government is not estopped by incorrect statements of its employees.

Conclusion and Order

Petitioner's motion for summary judgment is denied. PERF's cross-motion for summary judgment is granted. The initial determination of PERF, denying petitioner's request that she be given credit for her six years of judicial service, is affirmed.

ORDERED on July 2, 2008.

Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-2331

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.