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PUBLIC EMPLOYEE'S RETIREMENT FUND

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

BETSY J. WATKINS-MATTHEWS, Petitioner, v. PUBLIC EMPLOYEES' RETIREMENT FUND, Respondent.	))))))))	PUBLIC EMPLOYEES' RETIREMENT FUND

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Introduction

Petitioner Betsy J. Watkins-Matthews appeals from PERF's determination that her retirement benefit was incorrectly calculated, that the benefit would be reduced to the correct amount, and that she would be required to repay $[redacted] that was overpaid to her. Pursuant to a schedule agreed to by the parties, both parties filed motions for summary judgment. A hearing was held on April 27, 2010. After the hearing, Petitioner sought leave to supplement the record, which PERF joined. That motion is granted. The motions are fully briefed and ready for decision.

Findings of Undisputed Material Fact

1. On January 5, 2003, Betsy Watkins-Matthews[1] completed an application to retire with an effective date of January 1, 2003. She was 59 years old at that time. (PERF Ex. 2.)[2]

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[1] Petitioner did not hyphenate her last name on her application, but it is hyphenated in all other papers filed in this proceeding including her affidavit. (Pet. MSJ Ex. X.)

[2] The parties submitted duplicates of some exhibits. Citation of one party's exhibit does not indicate a preference over the other party's identical exhibit. Petitioner filed two sets of exhibits, one with her summary judgment motion (which will be referred to as Pet. MSJ Ex. ___) and another with her response to PERF's motion (referred to as Pet. Resp. Ex. ___). PERF filed two affidavits two affidavits of Susan Sparks, Exhibit B to PERF's Motion for Summary Judgment (Sparks I) and Exhibit A to PERF's Response in Opposition to Petitioner's Cross-Motion for Summary Judgment (Sparks II).

2. She elected "Option 61 – Integration with Social Security," by which she would receive a larger benefit until age 62, at which time the benefit would be reduced to reflect the start of her Social Security benefit. She also elected to have her entire Annuity Savings Account (ASA) paid directly to her. (PERF Ex. 2.)

3. PERF began paying Watkins-Matthews a monthly benefit of $ (Sparks I, ¶ 5.)

4. Watkins-Matthews reached age 62 in October 2005. PERF notified her on October 7, 2005, that her benefit would be reduced to $ effective in November 2005. (Pet. MSJ Ex. T.)

5. Other documentation indicates that by December 2006, her monthly gross benefit had increased to $ probably due to cost-of-living increases. (PERF Ex. 4.)

6. Meanwhile, the State Board of Accounts (SBOA) discovered that PERF was not properly reviewing and recalculating benefits. (Sparks I, ¶ 6.) A private firm, Clifton Gunderson, was retained to conduct a final benefit analysis ("FBA") of accounts including Watkins-Matthews'. (*Id.* ¶ 7.)

7. Clifton Gunderson's FBA in December 2006 revealed that due to an error, Watkins-Matthews had been overpaid about $ a month for a total overpayment of $ But it was also discovered that, although her full ASA was supposed to be distributed to her, she had an ASA balance of $ due to a "trailing contribution" and interest.[3] These discrepancies were resolved by deducting the $ from the ASA and refunding the balance of the ASA, $ to Watkins-Matthews in January 2007.[4] (Sparks I, ¶¶ 10-13.)

8. On December 26, 2006, PERF staff made a computer notation titled "FBAA completed" and stating: "Retro check dated January 2007, net retro check amount of $ *new gross monthly pension amount of $* interest posted as retro COLA. Overpayment of pension and 13th check deducted from ASA." (Pet. MSJ Ex. P, emphasis added.) In other words, in January 2007, Watkins-Matthews would receive the "retro check" of $ less taxes for a net of $ and her new monthly pension benefit would be $

[3] The ALJ presumes that a "trailing contribution" is a contribution made after the ASA was disbursed.

[4] The first Sparks affidavit states that the balance in the ASA resulting from the trailing contribution and interest was $ and the remaining balance after deducting the $ was also $ (Sparks I, ¶¶ 12-13.) Other documentation shows that the ASA balance after deduction of the overpayment was actually $ (Pet. MSJ Ex. D.)

9. By letter dated January 5, 2007, PERF notified Watkins-Matthews that the SBOA had identified incorrect calculations in a number of benefit payments since 2002, that PERF had determined that she had been receiving a greater benefit that she was entitled to, but that "for a period of time you were also underpaid." The letter stated that her current monthly benefit of $ would be reduced to $ and that her next monthly benefit check would include a "one-time payment . . . which represents the total amount you were underpaid, plus interest." The letter also said, "Please be assured that current PERF management has corrected the problems that led to this error in your benefit payments." (PERF Ex. 4.)

10. If the letter's information had been implemented, all would be well. According to the affidavit of PERF team leader Susan Sparks, the FBA should have resulted in a reduced monthly benefit of $ (Sparks I, ¶ 17.) [5]

11. However, notwithstanding the information in the letter, Clifton Gunderson failed to perform a "manual override" to reflect the Option 61 decrease in benefit that had taken effect upon Watkins-Matthews reaching age 62. As a result, her new benefit was miscalculated to be $ (about double the correct amount). (Sparks I, ¶¶ 14-17.)

12. On January 12, 2007, Watkins-Matthews received a payment of $ The deposit advice showed that this payment consisted of a "Pension Amount" of $ plus an "Adjustment to Gross" of $ (the refund of the adjusted ASA described in paragraph 7 above), reduced by withholding of income taxes. (Pet. MSJ Ex. D.) The pension amount of $ was clearly inconsistent with the January 5 letter, which said that the pension amount going forward would be $

13. On February 15, 2007, Watkins-Matthews received a payment of $ The deposit advice showed that this consisted of "Pension Amount" of $ reduced by withheld taxes. This was again inconsistent with the January 5 letter stating that her new benefit going forward would be $

14. On February 16, 2007, Watkins-Matthews called PERF to learn why the payment was so large, asking, "Can you tell me why it was that big?" and saying, "I received an excess so I just wanted to be sure before I start writing checks." (Supplemental Transcript of Telephone Call.)

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[5] The January 5 letter said the new amount would be $ and Sparks now says that was the correct amount, but the December 26 computer entry said the new amount would be $. The difference is not explained, but it is exactly two percent, so it possibly reflects a two-percent cost-of-living adjustment effective January 1, 2007.

15. The PERF employee who took the call at first said that there was a cost-of-living adjustment, then noted that there had been "some type of retroactive adjustment in there in January." Watkins-Matthews confirmed that she had received a payment of $ on January 12, and "they said that was because they had audited."

16. Watkins-Matthews said she did not mind receiving extra money, but she wanted to know why the payment was $ more than what she had been told she would be receiving. The PERF employee said, "Unfortunately, to me I mean it looks like everything is fine." Watkins-Matthews asked, "Okay. So will it be $ next month again? How much?" The PERF employee responded, "I would think so, but I would just double check. . . . I don't know if that's the retro pay or if that is your actual payment I would just check next month and see."

17. The PERF employee next mentioned the fluctuation of the benefit when Watkins-Matthews turned 62. Watkins-Matthews confirmed that she received "900-and-some a month" until she turned 62, and then her benefit went down to $ She said that she did not think a cost-of-living adjustment would increase her payment to $

18. After further examination of the account, the PERF employee said, "I think what they are doing right there is you are getting a retro check of $ and that your new monthly pension next month is going to be $ " Watkins-Matthews asked for confirmation that she could write checks on the February deposit, and the PERF employee said, "Yeah, no, it's okay. I mean yes. Because it states that you should get a retro check of $ which is just right about that amount, I may be off a dollar or two. . . . But it states that you should get a retro check and that your new gross monthly pension of $ will be your new monthly payment."

19. Watkins-Matthews remarked that the February check was a belated Christmas present, and asked, "Is this happening every time there is a new retro?" The PERF employee responded, "No, it is just there was an audit and they found out they had underpaid you." Watkins-Matthews responded, "Well, I'm loving it. Now I can buy groceries."

20. After the call, the PERF employee made the following notation in the computer record: "member called in asking questions on her check – told her it was retro pay from the fbaa audit". (PERF Ex. 5.)

21. That assessment was incorrect, because in fact the "retro payment" had been made in January, and the higher pension amount was due to PERF's error in calculating the new payment. (Sparks I, ¶¶ 20-21.)

22. Watkins-Matthews states in her affidavit that she was told that $690.92 "was the correct amount." (Pet. MSJ Ex. X, ¶ 6.) The transcript of the

phone conversation, however, shows that she was told the payment represented a retroactive adjustment, and that her pension amount would be reduced to $[redacted] starting the following month.

23. Watkins-Matthews continued to receive payments based on a gross monthly benefit of $[redacted] She did not make any further contact with PERF to question this. (Pet. MSJ Ex. X, ¶ 8.)

24. Watkins-Matthews states that she "detrimentally relied" on the representations of the PERF employee she spoke to on February 16, 2007, as well as on her continued receipt of $[redacted] each month. (Pet. MSJ Ex. X, ¶ 6.)

25. Watkins-Matthews continued to receive monthly gross benefit payments of $[redacted] (Sparks I, ¶ 22.)

26. On August 2, 2007, PERF issued a letter verifying that Watkins-Matthews was receiving a monthly benefit of $[redacted] less withheld taxes. (Pet. MSJ Ex. B.) Sparks testifies that this was a form letter generated at the member's request, and merely verified the amount being paid without analysis of the correctness of the benefit. (Sparks II, ¶¶ 12-17.)

27. Watkins-Matthews states that she relied on the August 2, 2007 letter, and believed that her benefit would remain unchanged. (Pet. MSJ Ex. X, ¶¶ 4-5.)

28. In September to November 2007, an ASA Recalculation Project was performed. It appears that this analysis related only to the ASA, not the pension benefit. (Pet. MSJ Ex. F.)

29. In or around December 2008, PERF was "testing data" and discovered a "potential problem" with Watkins-Matthews' account. (Sparks II, ¶ 7.) By December 22, 2008, PERF became aware that her benefit "may have been overpaid." (*Id.* ¶ 8.) Once alerted, PERF examined many member accounts in order to further analyze the potential problems identified. (*Id.* ¶ 9.)

30. On January 15, 2009, a computer notation indicates that Watkins-Matthews was advised by PERF that her net benefit would increase to $[redacted] due to a cost-of-living adjustment. (Pet. MSJ Ex. K.)

31. As of January 2009, Watkins-Matthews was receiving a gross monthly benefit of $[redacted] ($[redacted] after withholding of taxes). (Pet. MSJ Ex. V.)

32. On January 26, 2009, PERF staff made a notation titled "Review of Account" and stating: "Member has been overpaid since 1/07 due to CG Correction. Member will be notified prior to decreasing payment and payment arrangements will be made for the overpayment." (Pet. MSJ Ex. J.)

33. On April 4, 2009, PERF staff made a notation titled "Overpayment" and stating: "The total overpayment through April 2009 is $[redacted] Mbr is currently receiving $[redacted] monthly. Mbr's correct benefit should be $[redacted]. BMS doubled taxable pension when the CG FBAA was completed. Contacted Call Ctr Manager to setup repayment plan." (Pet. MSJ Ex. I.)

34. On July 16, 2009, PERF staff made a computer note titled "Overpayment Summary Approved" but the full text of the text of the note is cut off. (Pet. MSJ Ex. H.)

35. In September 2009, a calculation was performed showing that Watkins-Matthews was receiving a gross benefit of $[redacted], the correct benefit should have been $[redacted], and the overpayment to date was $[redacted] (Pet. MSJ Ex. G.)

36. By letter dated October 22, 2009, PERF notified Watkins-Matthews that a review of her account had revealed an overpayment of $[redacted] which had occurred "during the processing of your retirement in 2003. The wrong taxable pension amount was used in completing your benefit." PERF stated that her monthly benefit would be reduced to $[redacted] and she was given four options to repay the overpayment by further reductions of her benefit payments over different periods of time. (PERF Ex. 3.)

37. By letter dated November 3, 2009, Watkins-Matthews requested review of PERF's determination and moved for stay of effectiveness pending the outcome of this proceeding. PERF conceded that the appeal was timely.

38. At the initial prehearing conference, the parties agreed to stay PERF's initial determination so that Watkins-Matthews' monthly benefit would not be reduced and no effort would be made to collect the overpayment pending disposition of this appeal. (ALJ Order, 12/1/09.)

39. Subsequently, on motion of Watkins-Matthews and by agreement of the parties, the stay was modified to apply only to collection of the overpayment, not reduction of the pension benefit. (ALJ Order, 1/5/10.) Therefore, the last alleged overpayment was in January 2010.

40. The total of overpayments from January 2007 through January 2010 (37 months) was $[redacted] (Sparks I, ¶ 23.)

41. According to Watkins-Matthews, her monthly PERF benefit as of October 2009 was approximately one-third of her income (Pet. MSJ Ex. X, ¶ 3.) Because her benefit was $[redacted] monthly, or $[redacted] annually, this is taken to mean that her gross annual income was about $[redacted] Thus, reducing her PERF benefit to $[redacted] would reduce her annual income to about [redacted]

42. Watkins-Matthews is disabled and has significant medical expenses. (Pet. MSJ Ex. X, ¶ 5.) Any repayment of benefits or reduction in her benefit "would result in prejudice to me." (*Id.* ¶ 9.)

43. 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 Dep't 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).

Issues

Watkins-Matthews contends that both the reduction of her monthly benefit and the collection of the overpayment should be reversed, that is, that she should continue to receive the incorrect benefit amount of $[redacted] a month and no effort should be made to collect the $[redacted] overpayment. She argues that PERF's violation of its statutory duty to correctly administer accounts means that PERF bears liability for its errors in doing so. In the alternative, she argues that PERF is barred from reducing her benefit or recouping the overpayment by the equitable doctrines of laches, waiver, and equitable estoppel.

PERF contends that it is statutorily required to reduce Watkins-Matthews' benefit and collect the overpayment, and that failure to do so risks the fund's tax-exempt status. PERF argues against application of the equitable doctrines relied upon by Watkins-Matthews.

Motions to Strike

Watkins-Matthews moved to strike the first affidavit of Susan Sparks (PERF MSJ Ex. B). Although she sets forth multiple grounds, her arguments all boil down to her contention that the affidavit contains conclusory statements that are not supported by documentary evidence. The motion to strike is denied.

The Administrative Orders and Procedures Act (AOPA) provides that affidavits supporting or opposing summary judgment must "(1) be made on personal knowledge; (2) set forth facts that are admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Ind. Code § 4-21.5-3-23(d). There is no requirement that matters stated in an affidavit be corroborated by documentary evidence. Watkins-Matthews cites no such requirement under the AOPA or Ind. Trial Rule 56.

Sparks' affidavits show that she is a PERF staff member who is knowledgeable about the matters stated in her testimony. As a corporate representative, and in the absence of evidence challenging her qualification to testify as she has, her testimony is therefore admissible and can be considered on summary judgment.

At the hearing, Watkins-Matthews' counsel argued that Sparks' testimony is insufficiently detailed to support some of her conclusions, such as the accuracy of the pension benefit that PERF now says is the right one. However, the correctness of the benefit has not been placed in issue here, so there is no reason for PERF to more specifically prove the arithmetic and statutory accuracy of its calculation. However, as discussed below, the ALJ recommends that a complete audit be performed to assure that the benefit and overpayment amount are correctly computed this time.

Watkins-Matthews also moved to strike all admissible hearsay. She argues that many statements in Sparks' affidavit appear to be based on hearsay. She acknowledges that hearsay is admissible in administrative proceedings, so long as it is not the sole basis for a decision. Ind. Code § 4-21.5-3-26(a). Therefore, as her counsel stated at the hearing, this motion is essentially an objection to sole reliance on hearsay. To that extent, the motion is granted. Hearsay evidence will be considered, but the ALJ's decision will not be based solely on such evidence.

Disputes of Material Fact

Both parties moved for summary judgment based on their versions of the facts. Neither party has identified a fact that is in dispute, that is, conflicting evidence as to a material fact. PERF contends that Watkins-Matthews has misstated record evidence (PERF Resp. to Petitioner's Cross-Motion for Summary Judgment at 1-3). Watkins-Matthews contends that the facts are in dispute, based on her objections and motion to strike the Sparks Affidavit, and based on her evidence of "additional" undisputed facts (Petitioner's Mem. in Resp. to Respondent's Motion for Summary Judgment).

The ALJ has taken the evidence at face value rather than relying on either party's characterization of it. The only potential dispute of material fact concerned what was said during the telephone conversation on February 16, 2007, but that was resolved by the parties' joint submission of a transcript. The ALJ concludes that the material facts, as outlined above, are not in dispute, that any lingering disputes are immaterial, and that judgment as a matter of law may be entered.

Discussion

Although the facts of this case appear complicated, the core facts are not. Watkins-Matthews retired in 2003 and, pursuant to her selection of Option 61, she began receiving a monthly benefit of $[redacted] When she reached age 62, her benefit was reduced to $[redacted] When a relatively minor correction was made in December 2006 (not at issue here), she was correctly informed that her monthly benefit would be reduced to $[redacted] and that she would receive a one-time corrective payment of $[redacted] in January 2007.

Due to an error, PERF began issuing pension payments based on a gross pension benefit of $[redacted] starting with the January 2007 payment which also included the $915.61 refund. After the second high payment in February 2007, Watkins-Matthews called to question whether the payment was too high. A PERF employee incorrectly told her that the February payment included the "retro" or corrective refund, and that her benefit the *next* month (March) would be reduced to [redacted] Watkins-Matthews reminded the employee that she had received a retro payment in January, but the employee said that the February payment was correct.

Watkins-Matthews continued receiving payments based on a gross pension amount of $ and did not question them. In August 2007 she requested and received a verification letter stating her pension benefit to be $

In December 2008, PERF had reason to suspect a miscalculation had occurred. Internal notations confirmed this in January, April, July and September 2009. Ten months after the error was first discovered, in October 2009, PERF notified Watkins-Matthews of the problem and demanded repayment of what was by then an overpayment of $ The overpayments ended in January 2010 with the partial lifting of a stay pending review, resulting in a total overpayment over 37 months of $

A. PERF's authority to reduce benefit and collect overpayment

PERF contends that it must correct a member's incorrectly calculated benefit and collect the overpayment. Watkins-Matthews contends that PERF has a statutory and fiduciary duty to correctly calculate the benefit, so that errors are chargeable to PERF. The ALJ concludes that PERF is authorized to correct erroneous benefits and collect overpayments, and that the member who receives overpayments is obligated to repay them in the absence of equitable reasons excusing repayment.

The PERF Board is granted broad authority to "[e]xercise all powers necessary, convenient, or appropriate to carry out and effectuate its public and corporate purposes and to conduct its business." Ind. Code § 5-10.3-3-8(a)(10). The board's powers shall be interpreted broadly to effectuate the purposes of the PERF law and not as a limitation of powers. Ind. Code § 5-10.3-3-8(c).

The General Assembly has implicitly authorized correcting a member's erroneous benefit: "The benefit may not be increased, decreased, revoked or repealed *except for error* or by action of the general assembly." Ind. Code § 5-10.3-8-8 (emphasis added).

The statutes governing PERF do not directly address the question of collecting erroneous overpayments.[6] Implicit authority to collect overpayments may 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

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[6] 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 40 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 up to one year before it was discovered).

overpayment of benefits." The concept of adjusting a benefit to account for an under- or overpayment is also endorsed by 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).

Against this, Watkins-Matthews does not cite a statute forbidding PERF from reducing a benefit or collecting an erroneous overpayment. She argues instead that PERF's fiduciary duty and statutory duty to correctly calculate members' benefits means that the fund bears liability for staff errors. There is no question that PERF is a trust, Ind. Code § 5-10.3-2-1, giving rise to a fiduciary duty on the part of the board. PERF has a duty to correctly calculate benefits in accordance with statutory mandates. But this does not mean that PERF bears the risk of erroneous payments. Watkins-Matthews cites no authority that the board is unable to correct errors or collect overpayments.

To the contrary, the law of trusts is that 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 it would be inequitable to compel him to make repayment. *Restatement (2d) of Trusts* § 254 (1959).

Furthermore, under Indiana law, "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). [7]

Watkins-Matthews' argument that fiduciary duty prevents correction and collection of overpayments is inherently flawed, because PERF owes an equal duty to *other* members of the fund not to overpay, and to correct the situation when it

[7] The 1937 *Restatement of Restitution* and many cases draw a distinction between mistakes of fact and mistakes of law, holding that a payor is not entitled to restitution of overpayments induced solely by mistakes of law. *Restatement* § 45. Our Supreme Court, however, has expressed approval of the contemporary view that this distinction is "artificial" and restitution is available regardless of whether the mistake was one of fact or law. *Time Warner Entertainment Co., L.P. v. Whiteman*, 802 N.E.2d 886, 891 (Ind. 2004).

does. Barring PERF from correcting and collecting harms other members because of actuarial changes in the value of the fund.[8]

PERF also 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.

Watkins-Matthews contests PERF's assertion that overpaying her subjects PERF to disqualification, arguing that the purpose of qualified status is to ensure that funds are not used for the principal benefit of highly paid employees, supervisors or non-employees. She argues that nothing in the regulatory scheme indicates that the overpayment to her violates that scheme or subjects PERF to loss of qualification.

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). These provisions are not limited to highly compensated employees.

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

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[8] *See Central States, Southeast & Southwest Areas Health & Welfare Fund v. Neurobehavioral Associates, P.C.*, 53 F.3d 172, 175 (7th Cir. 1995) ("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."); *Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990).

purpose of distributing the fund's corpus and income "in accordance with the plan." 26 C.F.R. § 1.401-1(a)(3)(iii). Again, these limitations apply to all beneficiaries of the plan, not just highly compensated employees.

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 an "operational failure" because it "arises solely from the failure to follow plan provisions." *Id.* § 5.01(2)(b). An operational failure is one type of "qualification failure," which is defined as "any failure that adversely impacts the qualification of a plan." *Id.* § 5.01(2).

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). There is nothing in the Revenue Procedure suggesting that only overpayments to highly compensated employees must be corrected.

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.

The provisions cited by Watkins-Matthews, forbidding discrimination in favor of owners or highly compensated employees, are not the exclusive restrictions on qualified plans. *See, e.g.*, 26 U.S.C. §§ 401(a)(3), (4), (5), (10), (17); 410(b); and

415(b); 26 C.F.R. § 1.401-3. A reasonable reading of the provisions discussed above indicates that any payment beyond the terms of the plan, even to a rank-and-file employee, is a potential qualification failure.

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. 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. *Id.* at 344-45.

The *Flynn* court cited *Thomas v. Bd. of Trustees of Intern. Union of Operating Engineers*, 1998 WL 334627 (E.D. Pa. 1998), in which the IRS audited pension funds and, upon learning that contributions had been received for non-employees including Thomas, 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 held 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 benefits 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).

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 be "in question." The court did not resolve the question, finding that further proceedings were necessary as to whether it would equitable to permit restitution.

Against these few cases is a much larger body of cases, some of which are cited below, in which courts applied 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 may be because the Revenue Procedure itself permits an exception where recoupment would be inequitable.

In summary, PERF is statutorily authorized and required to attempt to correct Watkins-Matthews' benefit and collect the overpayment. Its ability to do so, however, is limited by equitable principles.

B. Equitable Limitations

Watkins-Matthews argues that even if PERF is authorized to correct her benefit and collect the overpayment, equitable principles prevent it from doing so. She specifically argues laches, waiver and equitable estoppel. PERF does not argue that equitable principles have no application, but argues that they do not bar correction and recoupment here.

Before addressing the specific equitable doctrines invoked by Watkins-Matthews, it should be noted that there are standards specifically applicable to this situation.

First, the federal tax qualification and correction standards cited by PERF permit an exception if 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).

Second, as mentioned above, the common law of trusts requires a trust beneficiary to repay a payment to which he was not entitled "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.

Third, a party's right to restitution of a payment made by mistake 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, 529 N.E.2d at 383. 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.

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). But 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.[9] These cases suggest a wide variety of factors that a court of equity would consider in determining whether correcting a benefit payment and collecting overpayment are appropriate.

While this is not a court of equity, the ALJ concludes that such a court would not find the balance of equities to bar correction and recoupment in this case. The law requires repayment of a mistaken overpayment unless—and the burden is on

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[9] *Sheward v. Bechtel Jacobs Co. LLC Pension Plan,* 2010 WL 841301 (E.D. Tenn. 2010) (pension plan could recoup $114,370 in overpayments due to miscalculation); *Phillips v. Brink's Co.,* 632 F.Supp.2d 563 (W.D. Va. 2009) (employer could adjust future benefits but not recoup about $26,000 in 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 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); *Redall Industries, Inc. v. Wiegand,* 870 F.Supp. 175, 179 (E.D. Mich. 1994) (denying summary judgment as to whether equitable principles permitted recoupment of about $427,000 in overpayments); *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).

the recipient—it would be inequitable to require repayment. While Watkins-Matthews no doubt came to rely on the regular overpayments, her reliance was not detrimental in the sense that she inalterably changed her position—for example, by taking out a mortgage—and is now prejudiced. As a retiree on a fixed income, an income reduction of about $[redacted] a year from a total income of about [redacted] will no doubt be difficult, but it should be remembered that the benefit will return to about what it was from 2005 through 2006, and what Watkins-Matthews was told it would be at the start of 2007. As for the overpayment, PERF has offered to mitigate the impact by collecting it over a period of up to 17 years, or about $60 a month.

To be sure, some factors weigh in Watkins-Matthews' favor. PERF was been negligent at best and its handling of the matter is embarrassing. Practically simultaneously, PERF issued a letter stating the correct benefit amount and began paying twice that amount. PERF continued to pay the wrong amount even after Watkins-Matthews called to point out the discrepancy. Of particular concern to the ALJ is that PERF did not make any effort to address the problem until ten months after it was discovered. While the actuarial soundness of the fund is an issue to be considered, the incorrect benefit and overpayment would have negligible impact.[10]

Therefore, as a general matter, equitable limitations do not negate PERF's decision to correct the benefit moving forward and recoup the overpayment. We now turn to the specific equitable doctrines argued by Watkins-Matthews.

C. Laches

Watkins-Matthews invokes laches, which may be raised to estop 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 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).

The first question is when PERF became aware of the overpayment. Four possibilities exist:

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[10] Of $12.4 billion in combined assets under the PERF board's management as of June 30, 2009, PERF accounted for $9.4 billion. *2009 PERF Comprehensive Annual Financial Report* p. 30, *http://www.in.gov/perf/files/CAFR_financial_section.pdf* (viewed 6/11/10). Thus the impact is negligible even if the [redacted] overpayment is not collected and Watkins-Matthews' benefit is not reduced for 20 years, resulting in a total loss to PERF of roughly [redacted]

(1) Watkins-Matthews argues that PERF had notice that her benefit was incorrect in January 2007, but that was the first miscalculation. PERF did not have notice at that point that a second miscalculation occurred in implementing correction of the first error.

(2) PERF's second possible notice was Watkins-Matthews' telephone call on February 16, 2007, pointing out that her check was too large. However, PERF staff misread the record and concluded that the February check was the result of the "retro payment." Staff told Watkins-Matthews to call back the following month if the payment was still too high, but Watkins-Matthews did not do so. Therefore, this event does not constitute notice to PERF.

(3) Watkins-Matthews points to the ASA recalculation project in November 2007, but review of the ASA would not have led to discovery of the pension benefit miscalculation.

(4) PERF concedes that it had actual notice of the problem in or around December 2008, and no later than December 22, 2008.

Therefore, the question is whether PERF's ten-month delay from December 2008 to October 2009 was unreasonable or inexcusable.

PERF has not provided a reasonable explanation for the delay. PERF states only that after discovering that Watkins-Matthews "may have been overpaid," PERF "examined many member accounts in order to further analyze the potential problems identified" and "analyzed the problem within [Watkins-Matthews'] account." (Sparks II, ¶¶ 9-10.) Sparks implies that further analysis was required.

But the record does not show that PERF needed this additional time to analyze Watkins-Matthews' account. To the contrary, PERF staff noted on January 26, 2009, that Watkins-Matthews "has been overpaid since 1/07" and "will be notified prior to decreasing payment and payment arrangements will be made for the overpayment." About ten weeks later, on April 4, PERF staff wrote that the total overpayment was $█████ her correct benefit should be $█████ and the call center had been contacted to set up a repayment plan. On July 16, staff made a computer note titled "Overpayment Summary Approved." And in September, a calculation was performed showing that Watkins-Matthews was receiving a gross benefit of $█████ the correct benefit should have been $█████ and the overpayment to date was $█████ She was finally notified on October 22. Therefore, the delay from December 2008 to October 2009 was neither reasonable nor excusable, and PERF knowingly acquiesced in the circumstances.

It is true that "laches does not turn on time alone. 'A mere lapse in time is insufficient; unreasonable delay which causes prejudice or injury is necessary.'" *SMDfund*, 831 N.E.2d at 731, quoting *Shafer v. Lambie*, 667 N.E.2d 226, 231 (Ind. App. 1996). Successful invocation of the doctrine in civil cases has included proof that available witnesses did not have a distinct recollection of the details of the case or that they had no access to records which would disclose the same. *In re Siegel*, 708 N.E.2d 869, 871 (Ind. 1999), citing *French v. State*, 547 N.E.2d 1084, 1088 (Ind. 1989).

For the purposes of laches, the ALJ concludes that because PERF's delay in acting on its discovery was so clearly unreasonable and inexcusable, Watkins-Matthews should not be required to repay the overpayment that was permitted to accumulate from January 2009 through November 2009 (11 months). After November, Watkins-Matthews made the knowing decision to seek a stay of the reduction of her benefit, incurring the risk that the overpayment would continue to mount (see ALJ Order of 12/1/09, "petitioner accepts the risk that if the determination is affirmed, the overpayment amount will be increasing during the pendency of the proceeding).

D. Waiver

Watkins-Matthews next invokes the doctrine of waiver, which is the "intentional relinquishment of a known right, requiring both knowledge of the existence of the right and intention to relinquish it." However, "[w]aiver is an affirmative act and therefore, mere silence, acquiescence or inactivity does not generally constitute waiver." *City of Crown Point v. Misty Woods Properties, LLC*, 864 N.E.2d 1069, 1080 (Ind. App. 2007), citing *Pohle v. Cheatham*, 724 N.E.2d 655, 659 (Ind. App. 2000).

For the same reasons discussed above in connection with laches, the ALJ finds that from January through November 2009, PERF knowingly relinquished its right to collect the overpayment. Therefore, the doctrine of waiver also justifies barring PERF from collecting the overpayments made in January through November 2009.

E. Equitable Estoppel

Finally, Watkins-Matthews seeks the application of 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.

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 was owed). *See also Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990).

Because of this overriding obligation to protect other members and the actuarial soundness of the plan, some courts have held that estoppel based on statements of a plan representative will be enforced against the plan only where the statements interpreted an ambiguous provision of the plan, not where the statements were contrary to its clear provisions. *E.g.*, *Slice v. Sons of Norway*, 866 F.Supp. 397, 405-06 (D. Minn. 1993), *aff'd*, 34 F.3d 630 (8th Cir. 1994); *Strong v. State ex rel. Oklahoma Police Pension and Retirement Bd.*, 115 P.3d 889 (Okla. 2005) (including 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).

In this case, the evidence reveals two representations that could potentially support a claim that PERF intentionally misled Watkins-Matthews into thinking that $ was her correct benefit amount.

The first was the telephone conversation on February 16, 2007. To her substantial credit, Watkins-Matthews recognized that the payment she received that month was greater than the pension amount of $ in PERF's letter of January 5, 2007, and she called to alert PERF to the problem. Unfortunately, PERF's employee misinterpreted the computer record to conclude that the inflated February check included a one-time payment. However, the transcript of the phone call shows that the employee told Watkins-Matthews that this was a temporary increase, that her benefit should decrease to $ the next month, and that she should call again if it did not. The employee said, "I don't know if that's the retro pay or if that is your actual payment I would just check next month and see." She also said, "But it states that you should get a retro check and that your new gross monthly pension of $ will be your new monthly payment." These statements were inaccurate but not knowingly misleading.

The second statement was PERF's income verification letter in August 2007. The undisputed evidence is that this was nothing more than a routine certification of the amount that Watkins-Matthews was receiving, such as one might obtain upon leasing an apartment or applying for a credit card (the record does not reveal the reason she requested it). It was not a verification by PERF that the amount Watkins-Matthews was receiving was the correct calculation.

Because PERF did not make the sort of misleading statement that would support a claim of equitable estoppel, the additional elements and factors need not be assessed.

F. Correct Calculation

Because of the compounded errors made by PERF staff in this matter, it is appropriate to require a thorough review and recalculation of Watkins-Matthews' account to make absolutely sure that her benefit going forward and the overpayment are correct. In particular, the ALJ is concerned about Sparks' statement that Watkins-Matthews' benefit should have been starting in January 2007 (Sparks I, ¶ 17), when internal PERF records show that it should have been $354.87 (Pet. MSJ Ex. P). Subsequent COLAs would have been based on this amount. This calls into question Sparks' conclusion that the total overpayment was
Watkins-Matthews is entitled to be assured that current PERF management has

corrected the problems that led to this error in your benefit payments." (PERF Ex. 4.)

Recommended Final Order

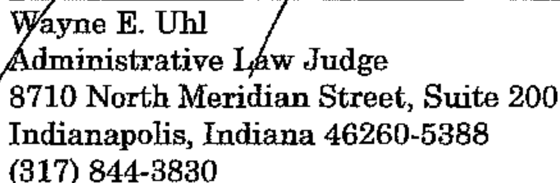
PERF's motion for summary judgment is granted in part and denied in part, and Petitioner's motion for summary judgment is granted in part and denied in part.

PERF's initial determination to correct Watkins-Matthews' retirement benefit going forward is affirmed.

PERF's initial determination to collect overpayments made from January 2007 through January 2010 is modified to deduct overpayments made in January through November 2009. Based on the record evidence, the ALJ believes these overpayments were [redacted] subject to the audit ordered [redacted]

PERF is ordered to promptly conduct a complete audit and review of Watkins-Matthews' retirement account in order to ascertain, once and for all, the correct amount of her benefit going forward, and the correct amount of overpayment that was made to her. PERF is further ordered to consider, in its discretion, the extent to which it is willing to mitigate the harm to Watkins-Matthews by extending the repayment period, subject to her agreement.

DATED: June 14, 2010.



Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
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STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

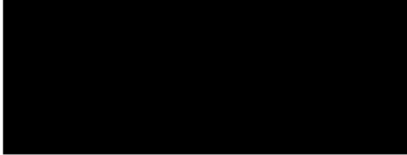
The undersigned administrative law judge is not the ultimate authority, but was designated by the PERF Board to hear this matter pursuant to I.C. § 4-21.5-3-9(a). Under I.C. § 4-21.5-3-27(a), this order becomes a final order when affirmed under I.C. § 4-21.5-3-29, which provides, in pertinent part:

> (b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:
>
> (1) affirming;
>
> (2) modifying; or
>
> (3) dissolving;
>
> the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge for further proceedings.
>
> (c) In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee shall affirm the order.
>
> (d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:
>
> (1) identifies the basis of the objection with reasonable particularity; and
>
> (2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.
>
> (e) Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, **certified mail, return receipt requested**, postage prepaid, on June 14, 2010:

Russell D. Millbranth



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