BEFORE THE EXECUTIVE DIRECTOR
FOR THE INDIANA STATE TEACHERS' RETIREMENT FUND

IN THE MATTER OF JAMES ASHBY, Petitioner v. INDIANA STATE TEACHERS' RETIREMENT FUND, Respondent,	))))))))))	THE INDIANA STATE TEACHERS' RETIREMENT FUND

FINAL ORDER

By Resolution No. 2009-03-01 of the Board of Trustees of the Indiana State Teachers' Retirement Fund (the "Fund") as the ultimate authority in this administrative review and pursuant to and in accordance with IC 4-21.5-3-28 and 550 IAC 2-2-2.5, the Board has directed the Executive Director to act as the Board's delegee and conduct final authority proceedings to issue a final order with respect to review and appeals of administrative action taken by the Fund and received by the Fund.

1. The Administrative Law Judge issued a Decision and Order in this matter on July 8, 2010 denying in part and granting in part the motions for summary judgment.

2. Petitioner owes Respondent the difference between the benefit amount he received under Option B-1 *with* Social Security Integration and the benefit amount he would have received had he elected Option B-1 *without* Social Security Integration, or [redacted]

3. Had Petitioner elected Option B-1 *without* Social Security Integration at retirement, his monthly benefit amount would have been [redacted]

4. Because Petitioner's benefit was stopped on October 1, 2008, had Option B-1 *without* Social Security Integration payments continued, Petitioner would have received four (4) payments of [redacted] and eighteen (18) payments of $[redacted] as of July 1, 2010. Therefore, Petitioner has already paid back [redacted] and owes the Fund [redacted]

5. Based upon the $[redacted] monthly benefit that Petitioner would be receiving had he elected Option B-1 *without* Social Security Integration, it will take Petitioner 154 months, or 12 years and 10 months, to repay the money owed to the Fund.

6. Therefore, subject to Indiana pension law, Petitioner's benefit will be reinstated in June 2023. Should Petitioner predecease this date, his survivor beneficiary will be entitled to a one hundred percent (100%) survivor benefit.

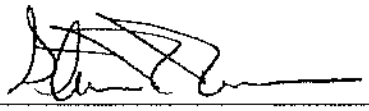
7. It has been more than fifteen (15) days since having received the Decision and Order of the Administrative Law Judge.

8. Copies of the Decision and Order having been delivered to the parties.

9. No objection to the Decision and Order of the Administrative Law Judge has been received.

NOW THEREFORE the Decision and Order of the Administrative Law Judge is affirmed.

DATED July 28, 2010



Steve Russo, Executive Director
Indiana State Teachers' Retirement Fund
150 West Market Street, #300
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I certify that on the 28th day of July, 2010, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

Distribution:

James Ashby
[redacted]

Kimberly A. Fidler
ISTA UniServ Director
Indiana State Teachers' Association
506 Jackson Street
Jasper, IN 47546

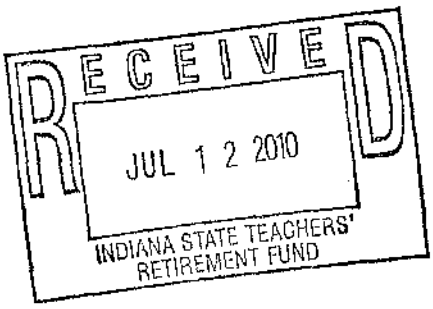
Thomas N. Davidson, General Counsel
Indiana State Teachers' Retirement Fund
150 West Market St., #300
Indianapolis, Indiana 46204

Wayne E. Uhl
Administrative Law Judge
8710 North Meridian St., #200
Indianapolis, IN 46260-5388

Steve Russo, Executive Director
Indiana State Teachers' Retirement Fund
150 W. Market St., #300
Indianapolis, IN 46204
(317) 232-3868

BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE INDIANA STATE TEACHERS' RETIREMENT FUND

JAMES ASHBY, Petitioner, v. INDIANA STATE TEACHERS' RETIREMENT FUND, Respondent.	))))))))



DECISION AND RECOMMENDED ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Introduction

James Ashby appeals the initial determination of the Teachers' Retirement Fund (TRF) that his gross monthly retirement benefit, effective on October 1, 2008, would be reduced from $[redacted] to [redacted]. Ashby retired effective [redacted] electing to receive an increased benefit until age 62, then a reduced benefit upon his eligibility for a Social Security retirement benefit. After he applied for retirement, he was told that his pre-62 monthly benefit would be $[redacted] and his post-62 reduced benefit would be [redacted] However, TRF admits that this was error, and he should have been told the post-62 benefit would drop to [redacted] Ashby seeks a determination that he receive the post-62 benefit that he was told he would receive in [redacted]

Pursuant to the schedule agreed to by the parties and ordered by the ALJ, TRF filed a motion for summary judgment and Ashby filed a cross-motion for summary judgment, both of which are fully briefed. Neither party requested a hearing.

Findings of Undisputed Material Fact

It is unusual that neither party has submitted an affidavit, deposition or interrogatory answer by which any person testifies as to the material events in this case. Instead, the parties have submitted uncertified copies of documents which they explain in their briefs. Some of the documents submitted by TRF have anonymous handwritten notes or highlights in red ink and yellow highlighter. These appear to be unverified, after-the-fact explanations of portions of the documents.

Administrative proceedings are informal, but Ind. Code § 4-21.5-3-23 requires that summary judgment motions be supported by affidavits or other evidence such as depositions, answers to interrogatories or admissions. Affidavits in particular show the judge how

witnesses would testify at hearing, and in this case would offer important testimony on issues such as communications between TRF and Ashby before his retirement, when estimates were prepared, and how benefits are calculated. Counsel's explanation of a document in a brief, in the absence of a witness's explanation, makes counsel a witness.

Nevertheless, neither party has objected to the other party's introduction of such documentary evidence. Therefore, the ALJ has attempted to glean from the documents facts that are not disputed for summary judgment purposes.

1. James Ashby was born in [redacted] (TRF Ex. 1.)

2. Ashby became a member of TRF in [redacted], upon employment by the North Central School Corporation in Harrison County. (TRF Ex. 1.) He apparently finished his teaching career at Tell City-Troy Township School Corporation, which certified that Ashby's last day of service there was M[redacted] and certified his contract and earned salaries from [redacted] through [redacted] (TRF Ex. F, p. 3.) There is evidence suggesting that Ashby accumulated 15 years of creditable service (TRF Ex. H), which would be consistent with his starting employment as a teacher in [redacted] and ending in [redacted]

3. A TRF member who has reached age 50 with at least 15 years of service is eligible for "early retirement with a reduced pension." Ind. Code § 5-10.2-4-1(c). The calculation of the reduced pension is prescribed by § 5-10.2-4-5.

4. Ashby reached age 50 in [redacted]

5. Ashby submitted an Application for Retirement Benefits signed by him on August 30, 1996, and received by TRF on September 13, 1996. (TRF Ex. F.)

6. In the application, Ashby elected "Alternative II," distribution of his entire Annuity Savings Account (ASA). (TRF Ex. F.)

7. In the section for election of benefits, Ashby checked box 17 indicating Option B-1, "100% Survivorship." (TRF Ex. F.) Although the explanations of the options are not in the record,[1] this corresponds to a statute providing that a member can elect a benefit that is actuarially adjusted so that after the member's death, the designated beneficiary (Ashby's wife) continues to receive the same benefit for her lifetime. Ind. Code § 5-10.2-4-7(b)(1).

8. Ashby also checked a box labeled "With A-4," meaning "Social Security equalization." (TRF Ex. F.) This corresponds to a statute providing that a member may elect to receive an increased benefit until the age of eligibility for Social Security benefits, and a

[1] TRF has filed only pages 7 and 8 of the application form. The form states that the instructions for election of benefit options is on page 5, which is not in the record.

decreased benefit after that age, "in order to provide a level benefit during the member's retirement." Ind. Code § 5-10.2-4-7(b)(3).[2]

9. TRF has submitted two sets of internal documents reflecting calculation of Ashby's benefit after he applied for retirement. Both documents are annotated with red ink and highlighting. The first set, dated September 30, 1996, show an "estimate" and a "retirement benefit authorization" run within minutes of each other. (TRF Ex. O.) These appear to be based on the elections made by Ashby in his application. They indicate that Ashby's regular monthly benefit with a 100% survivor benefit to his wife would be [redacted] but that with the Social Security option the pre-62 benefit would be [redacted] and the post-62 benefit would be [redacted]

10. The second document is a computer printout titled "Benefits Accepted Transaction Report" run on October 8, 1996. (TRF Ex. E.) This report appears to reflect the elections made by Ashby in his application. The report shows a "BENEFIT AMOUNT" of [redacted]" and an "AGE 62 PENSION AMT" of "[redacted]." A red ink annotation indicates that this is the post-62 monthly benefit, and that the dash or minus sign after the number indicates a negative value.

11. On October 9, 1996, the day after the above report was generated, TRF sent Ashby a letter advising that his application for retirement had been processed under Option B-1 plus A-4. The letter stated in pertinent part:

> Your monthly benefit has been determined to be $ [redacted] until age 62. After age 62, the monthly amount will be $ [redacted]
>
> If you elected a B option, upon your death the elected percent of your benefit entitlement will continue to your named co-survivor, if still living at the time of your death. After the death of both you and your named co-survivor, no benefit will be payable on your TRF account.
>
> You should be aware that the Social Security benefit at age 62 is estimated. The tables used to estimate the Social Security amount are based on an average Indiana teacher, and could vary significantly. You are encouraged to obtain an estimate of your entitlement from the Social Security Administration (Form SSA-7004-PC-OP 1).
>
> Your first benefit check from our Fund is due 11-01-1996, but before placing your account on retired status, we want to be sure that you understand the status of your account under the combination of B1 plus A-4. Therefore we request that you immediately sign both Affidavits (Form #12-A) which are enclosed.

---

[2] It is undisputed that Ashby's age of eligibility for Social Security benefits, at the time he retired, was 62. *See* 42 U.S.C. § 402(a).

One copy is to be returned to us. **Retain the other copy for your personal files.**

(TRF Ex. A.)

12. Ashby signed the "Affidavit" on October 11, 1996. The document read:

I hereby certify that I have requested my Indiana State Teachers' Retirement benefit under Option B1 plus A-4** and understand that the Indiana State Teachers' Retirement Fund will pay me an increased benefit of [redacted] per month until age 62 and that beginning with my age of 62, the Fund will pay me a reduced benefit of $[redacted].*

* Plus any future cost-of-living advances applicable.

** If B Option selected, correct percentage of monthly entitlement will be continued to co-survivor, if living, (with appropriate additional reduction at time I would have attached age 62 in event of my death prior to age 62) for life.

AFFIRMATION

I hereby verify and affirm the truth of the matters contained herein and that I am the above named affiant.

/s/ James D. Ashby

(TRF Ex. B.)

13. Presumably, on November 1, 1996, Ashby began receiving the promised retirement benefit of [redacted] per month. By 2008, probably due to cost-of-living increases, the gross monthly benefit was [redacted] (TRF Ex. 5.)

14. Ashby reached age 62 in August 2008.

15. By letter dated September 24, 2008, TRF notified Ashby that on October 1, 2008, his monthly benefit would be reduced pursuant to the A-4 Social Security Equalizer option. The letter stated: "Your gross monthly benefit will be reduced from [redacted] to [redacted]" The letter concluded, "When you receive your next benefit check or notification of deposit, you should examine the gross monthly payment information carefully. If the amount received differs from the amount listed above, please contact me . . .." (TRF Ex. 5.)

16. Ashby enlisted the assistance of Kimberly Fidler of the Indiana State Teachers' Association. She contacted TRF on Ashby's behalf. At first she was told that the benefit amount of [redacted] in the 1996 letter from TRF and affidavit presented to Ashby for signature should have been *negative* [redacted], and that instead of collecting this amount back from

Ashby, TRF was making his future payments [redacted]. Later she was told that the 1996 letter and affidavit should have shown Ashby's benefit after age 62 to be [redacted] (TRF Ex. 6.)

17. By letter dated December 21, 2009, TRF General Counsel Thomas Davidson stated that when TRF calculated Ashby's benefit in 1996, the actual calculation of the post-62 benefit was a *negative* [redacted], so the letter and affidavit should have shown the post-62 benefit to be [redacted]. Davidson then stated that TRF was required to pay the correct benefit of [redacted] notwithstanding the letter and affidavit, so Ashby's TRF benefit would remain [redacted] (TRF Ex. 7.) The letter gave Ashby notice of his right to seek administrative review.

18. Both Ashby and Fidler filed timely requests for administrative review. (TRF Ex. 8 and 9.) In his request (which is not verified), Ashby stated in pertinent part:

> I was given an amount and a plan worked up by the TRF staff. I signed the option & sent it in. I verified that it had been received. This was in 1996. . . . I based my retirement on this and other plans. . . . My plan & figures were worked up by TRF staff. I choose [*sic*] my plan on these figures.

(TRF Ex. 8.)

19. TRF has submitted an unverified document purporting to explain how Ashby's benefit should have been calculated, using the statutory formulas and various mathematical factors. (TRF Ex. C.) According to this document, the 100% survivor pension benefit for Ashby and his wife for their lives would have been [redacted] month.[3]

20. TRF then takes Ashby's estimated Social Security benefit (which was [redacted] month), and multiplies it by an "adjustment factor" of [redacted].[4] The result, [redacted], is further reduced by the joint and survivor reduction factor of [redacted]. This result, [redacted], is the "Social Security allowance." Before age 62, this allowance is added to the pension benefit: [redacted] + [redacted] = [redacted]

21. For the post-62 benefit, the estimated Social Security benefit ([redacted] month) is reduced by the survivorship factor, [redacted], and the resulting [redacted] is subtracted from the pre-62 benefit. Thus, [redacted] – [redacted] = -[redacted]

---

[3] The base benefit and early retirement reduction are calculated by statute, Ind. Code §§ 5-10.2-4-4 and -5. The optional benefits, such as the joint and survivor option and the Social Security option, are required to be the "actuarial equivalent" of the base benefit. Ind. Code § 5-10.2-4-7(b). It is the responsibility of the Board to determine these actuarial equivalents. For example, TRF used a factor of [redacted] to reduce Ashby's benefit so that it would continue to be paid to his wife after Ashby's death. Presumably this factor is based on the wife's date of birth and life expectancy. Its correctness is not at issue here.

[4] The source of this "adjustment factor" is unexplained except that it comes from a TRF internal policy. Again, it is presumed that this reflects an actuarial determination.

22. TRF has submitted several documents that purport to be computer-generated benefit estimates that were created at various times and based on a wide variety of assumptions from January 1988 to July 1996, before Ashby submitted his application for retirement. (TRF Ex. I, J, K, L & M.)

23. For example, an estimate printed on July 9, 1996 (TRF Ex. M), based on various assumptions that appear to be close to accurate,[5] estimated that if Ashby were to retire at age 50 and take lump-sum distribution of his ASA (as he did), his straight lifetime benefit would be [redacted] month, and his and his wife's lifetime 100% survivor benefit would be [redacted] month. With the Social Security option, the estimate showed that Ashby's pre-62 lifetime benefit would be [redacted] /month, or [redacted] month with a survivor benefit, but would drop to [redacted] after age 62 as to all options.

24. Many of the estimates were run without any survivor information, so they show no benefit under the survivor option. On one of them (in 1988), someone wrote, "Highly Hypothetical Est." (TRF Ex. I.) On another (in 1995), someone wrote, "Told him forfeit [redacted] & it would take him 19 yrs to recover same if he delayed to age 60." (TRF Ex. K.)[6] Most of the estimates have disclaimers about their accuracy.

25. There is absolutely no evidence as to why these estimates were produced or whether they were shown or explained to Ashby.

26. Any finding of fact inadvertently contained in the Conclusions 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).

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.

---

[5] Most of the assumptions such as highest five years of salary and years of service appear to be accurate, but Ashby's wife's birth date is one year later than shown on the retirement application. Furthermore, the estimates do not show Ashby's estimated Social Security benefit.

[6] It is not apparent from Ex. K what the author meant by "forfeit 47,520" as Ashby's ASA balance was $35,175.

Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Comm'r, Indiana Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. App. 2005) (citing cases).

Contrary to federal practice, a moving party cannot simply allege that the absence of evidence on a particular element is sufficient to entitle that party to summary judgment—it must prove that no dispute exists on all issues. *Dennis v. Greyhound Lines, Inc.*, 831 N.E.2d 171, 173 (Ind. App. 2005), citing *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994).

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

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

Evidence

Neither party has raised an objection to the admissibility of the evidence submitted.

Genuine disputes of material fact

No party has specifically argued that there is a genuine dispute of material fact that prevents summary judgment and requires a hearing.

In his response and cross-motion, Ashby argued that TRF did not provide an explanation for the manner in which his benefit was calculated, and therefore has never shown that the 1996 letter—showing a post-62 benefit of [redacted]/month—was "incorrect." He argues that he is not seeking more benefits than he is entitled to under the plan, but that the 1996 letter and affidavit establish the "correct amount" of his benefit. (Pet. Cross-Motion for Summary Judgment at 5-6.) TRF responded that the benefit calculation is a question of fact, but is immaterial because Ashby "did not previously raise the issue of accuracy of the calculations." (TRF Resp. in Opp. to Pet. Cross-Motion at 7.) TRF also then supplied its explanation of why the present calculation is correct. (*Id.* at 7-10.) Ashby replied that he did not raise the calculation issue in his prior dealings with TRF because he relied on the 1996 letter and affidavit. (Pet. Reply at 3-4.)

Regardless of whether Ashby raised the calculation issue previously, he has raised it in his cross-motion for summary judgment, and it is a legitimate issue for determination. It is a mixed question of fact and law.

Issue presented

The question presented is whether TRF must honor its October 1996 letter stating that Ashby's post-62 benefit would be [redacted]/month for life.

Discussion

This much is undisputed and clear: When Ashby chose to retire in 1996, he elected the 100% joint and survivor benefit with the Social Security option. When TRF's computer calculated Ashby's benefit, a printout showed that the option would provide him with a pre-62 benefit of [redacted]month, and a post-62 benefit of *negative* [redacted]month, which would have meant a benefit of [redacted] However, in a form letter sent to him after he submitted his application but before the effective date of his retirement, TRF told him in no uncertain terms—not in the form of an estimate—that his post-62 benefit would be [redacted]/month. He signed a document titled "Affidavit" acknowledging that fact.[7]

In addition, TRF has tendered unsworn evidence and the explanation of its counsel as to how the benefit was calculated and that a mistake was made. Ashby has not objected to this evidence and has not submitted evidence contradicting it, so for summary judgment purposes the evidence is accepted as undisputed.

The statutory mandate is to provide a "level benefit" in combination with Social Security. Ind. Code § 5-10.2-4-7(b)(3). This option must be the "actuarial equivalent" of the regular benefit. Ind. Code § 5-10.2-4-7(b). Therefore, TRF must devise a system with actuarial integrity that adjusts the benefit before and after age 62. Ideally, for example, if the base TRF benefit is going to be $600/month, and the anticipated Social Security benefit is going to be $500/month, the TRF benefit would be $800/month before 62 and $300/month after 62, resulting in a level benefit of $800/month for life.

In this case, however, Ashby's early retirement with 15 years of service gave him a TRF benefit that was lower than his anticipated Social Security benefit of [redacted]month, so much so that even when the adjustment was applied, his pre-62 benefit was less than his anticipated Social Security benefit. So it is not surprising that with a pre-62 benefit of [redacted]month, and an estimated Social Security benefit of [redacted]/month, it would be impossible to set up a level benefit. Indeed, the standard formula as applied to Ashby resulted in a negative amount after age 62.

---

[7] The document was not an affidavit because it was neither sworn to nor verified under penalties for perjury, *see* Ind. Trial Rule 11, but it served the purpose of confirming Ashby's understanding that his benefit would be reduced at age 62.

This created something of a windfall for Ashby. His retirement benefit without the Social Security option would have been [redacted]/month. Using the A-4 option, he received [redacted] month for 12 years, an increase of [redacted] plus cost-of-living increases over that period of time. By TRF's formula, "leveling" the benefit would require an adjustment of *negative* [redacted] month. Instead, TRF stated that it would simply stop paying a benefit to Ashby.

Ashby contends that he is entitled to the post-62 benefit stated in the October 1996 letter, [redacted] month. He makes several arguments in support of that contention.

First, Ashby argues that the 1996 letter and "affidavit" represented the correct calculation of his benefit. In response, TRF has provided an explanation of how Ashby's benefit should have been computed. (TRF Resp. at 7-10, TRF Ex. C.) Ashby has not objected to TRF's explanation nor has he provided evidence or argument that it is wrong. Frankly, it would be absurd to suggest that the correct monthly benefit would have been [redacted] for 12 years and [redacted] for the lifetimes of Ashby and his surviving spouse, where the unadjusted benefit would have been [redacted]

Ashby next argues that TRF's 1996 letter and his execution of the "affidavit" constituted an enforceable promise to him that he would receive [redacted] month after reaching age 62. TRF correctly responds that by law, it cannot pay a higher benefit than authorized by the terms of the plan, that is, the statutes and rules that govern the plan. Ind. Code § 5-10.2-2-1.5(1) (board must distribute assets of fund "in accordance with the retirement fund law"). Furthermore, TRF must satisfy the qualification requirements of Section 401 of the Internal Revenue Code, 26 U.S.C. § 401, which 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).

IRS regulations reinforce the requirement that a qualified plan must be based on a "definite written program" and assets distributed "in accordance with the plan." 26 C.F.R. § 1.401-1(a)(2) and (a)(3)(iii).

TRF also relies on Internal Revenue Bulletin 2006-27 (May 1, 2006, published in Internal Revenue Bulletin 2006-22, May 30, 2006, p. 945 [8]), 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. 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

[8] The bulletin may be found at http://www.irs.gov/pub/irs-irbs/irb06-22.pdf (last viewed 7/8/10).

of the plan . . .." *Id.* § 5.01(6). Overpayments and other qualification failures must be corrected to restore the plan and beneficiaries to the positions they would have held had the failure not occurred, *id.* § 6.02(1), but full correction may not be required where "it is unreasonable or not feasible," and "the correction method adopted must be one that does not have significant adverse effects on participants and beneficiaries of the plan . . .." *Id.* § 6.02(5).

Therefore, TRF is not authorized to pay more than the plan provides, and the 1996 letter was void as *ultra vires*. The principles articulated in *Haverstock v. Indiana Public Employees Retirement Fund*, 490 N.E.2d 357 (Ind. App. 1986), and relied on by both parties, have no application here. *Haverstock* concerned when legislative changes to a pension plan may be retroactively applied to members. *Haverstock* reaffirmed that an employee has no vested or contractual rights in a compulsory pension plan "until he fulfills all conditions existing at the time of his application for benefits." *Id.* at 361. The court cited the following language from an earlier Supreme Court decision: "Where the statutory conditions for retirement existing when the application is made have been met, and the award of the pension has been made, or as of right should have been made, the pensioner's interest becomes vested and takes on the attributes of a contract, which, in the absence of statutory reservations, may not legally be diminished or otherwise adversely affected by subsequent legislation." *Klamm v. State ex rel. Carlson*, 235 Ind. 289, 293, 126 N.E.2d 487, 489 (1955).

Ashby had attained vested status under these cases because, as of August 1996, he had met the statutory conditions (50 years old with 15 years of service) and had applied for retirement. But these cases mean only that the member gains a vested or contractual right to the benefit provided for by *statute*, not to a benefit erroneously promised by plan employees. *See Foley v. Consolidated City of Indianapolis*, 421 N.E.2d 1160 (Ind. App. 1981). Even if Ashby had paid consideration for a written promise to give him a higher benefit than allowed by statute, the contract would be void as beyond the authority of TRF officials. *City of Frankfort v. Logan*, 341 N.E.2d 510, 514 (Ind. App. 1976)

This case is therefore different from *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. App. 1959), cited by Ashby, in which an employer promised a longtime employee a lifetime of retirement pay, not as part of a pension plan but as a reward for her service. The question was whether the promise was a gift or an enforceable contract. The court held that the contract was enforceable based on promissory estoppel, because the promise was made with the expectation that the promisee would rely on it. Indiana also recognizes promissory estoppel in the absence of a contract. *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*, 644 N.E.2d 118 (Ind. 1994); *Hinkel v. Sataria Distribution & Packaging, Inc.*, 920 N.E.2d 766, 771 (Ind. App. 2010). In this case, however, the problem is not lack of consideration, but lack of authority. TRF is simply unable to promise members surplus benefits.

Ashby next argues that TRF, having promised him a benefit higher than statutorily authorized, is barred by equitable estoppel from paying him any less. "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); *see also State v. Roberts*, 226 Ind. 106, 134, 78 N.E.2d 440, 446 (1948).

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).

In the rare cases where estoppel has been applied against government, there is often an element of chicanery involved. In *State ex rel. Agan v. Hendricks Superior Court*, 250 Ind. 675, 235 N.E.2d 458 (1968), for example, the government changed its position to gain an advantage in litigation. And in *Equicor Development*, *supra*, and *Tippecanoe County Area Plan Comm'n v. Sheffield Developers, Inc.*, 181 Ind. App. 586, 394 N.E.2d 176 (1979), the evidence suggested that governmental bodies had changed their positions to needlessly protract or block development proposals.

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, 1289-90 (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.

In the case of a pension fund, 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); *Romano v. Retirement Bd. of Employees' Retirement System of Rhode Island*, 767 A.2d 35 (R.I. 2001); *Law v. Ernst & Young*, 956 F.2d 364 (1st Cir. 1992) (estoppel applies only where the representations were interpretations of the terms of the plan about which reasonable persons could disagree, not modifications of the terms of the plan).

On the undisputed facts and evidence presented by the parties, equitable estoppel does not apply to TRF's 1996 letter stating that Ashby's post-62 benefit would be [redacted] month. There is no evidence that TRF knowingly misled Ashby. To the contrary, it is clear that TRF's error was the result of the negligent omission of a minus sign before the number [redacted], or the failure to convert the negative value to a [redacted] possibly due to a glitch in the generation of a form letter.

The evidence of reliance is sparse. Ashby has submitted an unsworn statement that he "was given an amount and a plan worked up by the TRF staff" and he "based [his] retirement on this and other plans." It is unclear whether the "plan" is the October 1996 letter and affidavit or earlier communications not of record. The record includes several estimates prepared by TRF staff, but there is no evidence about whether or to what extent these were shared with Ashby. Ashby's *brief* states that he "spoke to an employee of [TRF] and relied upon the advice" of that employee (Pet. Reply at 6), but there is no evidence of such a conversation.

Ashby could not have relied on the October 1996 letter in electing the Social Security option, because he had already applied for retirement and made the election. There is no showing that he was given incorrect or misleading information before he applied for retirement. In fact, the many estimates that were printed out before Ashby's application in August 1996 correctly showed a post-62 benefit of zero, so if those estimates were discussed with Ashby he would have known that the estimated benefit would be [redacted]

Ashby has also failed to produce evidence that reliance by him on the [redacted] figure was detrimental, that is, that he changed his position to his prejudice based on the incorrect information. The vague and unverified assertion that he based his retirement on a "plan worked up by TRF staff," even if he is referring to the October 1996 letter, is insufficient to show the sort of prejudicial reliance required to invoke equitable estoppel.

Besides the lack of evidence that he relied in fact on the 1996 letter, Ashby cannot show right of reliance. While Ashby had no way to know what factors are used by TRF to calculate the Social Security benefit, it would have been patently unreasonable for him to expect that both his pre-62 and post-62 benefits would exceed the flat benefit he would have received had he not elected the Social Security option.

Moreover, Ashby has not shown reliance that was detrimental to his position over time. Ashby contends that if he had known that his post-62 benefit would be reduced to [redacted] he would not have chosen the Social Security option. (Pet. Cross-Motion at 7.) But this was not necessarily detrimental. As noted above, the Social Security option resulted in Ashby

receiving [redacted] *more* during the first 12 years of retirement than he would have received had he elected the regular survivor benefit. It would take more than 15 years of [redacted] benefit for the total benefits to equal what Ashby would have received if he had not elected the Social Security option in the first place.[9] In other words, at the regular benefit of $[redacted], Ashby would not have reached the amount of benefit he has already received [redacted] until 2024.[10]

Even if Ashby could show that he was knowingly misled and relied to his detriment on the October 1996 letter, he has not shown a public policy reason for application of estoppel against a governmental pension plan. The "public interest" in this case is the interest of the members and beneficiaries of TRF. That interest would be harmed by enforcing TRF's erroneous statement that Ashby would receive a post-62 monthly benefit of [redacted], upsetting the actuarial balance of the fund. This is not a situation in which a plan employee interpreted an ambiguous provision of the plan. Instead, a minus sign was accidentally omitted, possibly as the result of a simple word-processing error in the generation of a form letter.

For these reasons, equitable estoppel cannot be applied to enforce TRF's erroneous and unauthorized 1996 statement that Ashby's post-62 benefit would be [redacted]/month. However, there remains the question of whether a court of equity would, under these circumstances, cure the error by placing the parties in the positions they would have held without the error. The ALJ believes that is possible in this case.

Although TRF cannot honor the high benefit stated in the October 1996 letter, Ashby's assertion that he would not have selected the Social Security option can be accepted. If Ashby had elected the survivor benefit as he says he would have, his monthly benefit would have been [redacted]/month, and by his 62nd birthday he would have received [redacted] (plus cost-of-living increases). Instead, by choosing the Social Security option, he received [redacted]/month or a total of [redacted] (plus cost-of-living increases), a difference or surplus of more than [redacted]

There are two ways to restore Ashby to the position he would have held if he had not elected the Social Security option. The first would be to have him repay the surplus or difference between what he received and what he would have received with the regular survivor benefit, and pay him (and his survivor) the flat lifetime benefit effective August 2008. This is probably not feasible for him because it would require him to repay about [redacted]

The second option would be to pay no benefit until the surplus is eliminated, and then pay the regular survivor benefit to Ashby and his survivor. As indicated above, the ALJ estimates that it would take 15 to 16 years after Ashby's 62nd birthday to restore him to the position he and his wife would have held had he elected the regular survivor benefit. The exact time cannot be known because both past and future cost-of-living increases would have to

---

[9] [redacted] ÷ ([redacted] x 12) = 15.78 years.

[10] [redacted] ÷ [redacted] x 12) = 27.78 years. August 1996 + 27.78 years = May 2024.

be accounted for. The ALJ recognizes the administrative burden this would place on TRF to track Ashby's account, but it is a burden that must be imposed in order to cure TRF's error.

Recommended Order

The motions for summary judgment are granted in part and denied in part. Petitioner Ashby's motion is denied to the extent that he requests that he receive a post-62 benefit of [redacted] month. TRF's motion is denied to the extent that TRF requests affirmance of its initial determination that Ashby receive no benefit for the remainder of his and his survivor's lifetimes.

The ALJ finds that there is no genuine issue of material fact and orders the following relief as a matter of law: TRF shall calculate the total amount of pension benefit that Ashby actually received to date (the "actual benefit"). TRF shall also calculate the amount that Ashby would have received had he elected Option B-1, 100% Joint and Survivor *without* Option A-4, Social Security equalization, and continue to track the amount of benefit he would have received had he *not* elected the Social Security option, including cost-of-living increases (the "projected benefit"). TRF shall restart the 100% Joint and Survivor benefit at the point where the actual benefit and the projected benefits have equalized, again with any cost-of-living increases that have been granted.

DATED: July 8, 2010.

Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-5388
(317) 844-3830

STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The undersigned administrative law judge is not the ultimate authority, but was designated by the TRF 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.

This means that any party who objects to this decision and recommended order must, within 15 days after service, file a written objection with the TRF Board, c/o Thomas N. Davidson, General Counsel, 150 W. Market St., Ste. 300, Indianapolis, IN 46204. The written objection must state the basis of the objection with reasonable particularity.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, **certified mail, return receipt requested**, postage prepaid, on July 8, 2010:

James Ashby
[redacted]

Thomas N. Davidson, General Counsel
Jaclyn M. Brinks, Staff Counsel
Teachers' Retirement Fund
150 W. Market St., Ste. 300
Indianapolis, IN 46204

Kimberly A. Fidler
ISTA UniServ Director
Indiana State Teachers' Association
506 Jackson St.
Jasper, IN 47546

Wayne E. Uhl
Administrative Law Judge