BEFORE THE EXECUTIVE DIRECTOR
OF THE INDIANA PUBLIC RETIREMENT SYSTEM

In re: JAMES H. IRVIN, Member (Deceased). MIRDIE BAXTON, Petitioner, v. PUBLIC EMPLOYEES' RETIREMENT FUND, Respondent.	)))))))))))	PUBLIC EMPLOYEES' RETIREMENT FUND

FINAL ORDER

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

1. The ALJ entered a Decision and Order on Motion for Summary Judgment ("Order") in this matter on September 23, 2011, granting PERF's motion for summary judgment and affirming PERF's initial determination that Petitioner is not entitled to a survivor benefit upon the death of member James Irvin.

2. Copies of the Order have been served upon the parties.

3. Pursuant to IC 4-21.5-3-29(d)(2), 35 IAC 1.2-7-3(b)(7), and Indiana Trial Rule 4.17(B)(2), it has been more than fifteen (15) days since the ALJ served the Order upon the parties.

4. No objections to the Order have been filed.

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

DATED October 18, 2011

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

CERTIFICATE OF SERVICE

I certify that on the 18th day of October, 2011, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

Distribution:

Mirdie Baxton

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PUBLIC EMPLOYEE'S RETIREMENT FUND

BEFORE AN ADMINISTRATIVE LAW JUDGE
INDIANA PUBLIC RETIREMENT SYSTEM

In re: JAMES H. IRVIN, Member (Deceased).	))	PUBLIC EMPLOYEES' RETIREMENT FUND
MIRDIE BAXTON, Petitioner,	)))	
v.	))	
PUBLIC EMPLOYEES' RETIREMENT FUND, Respondent.	)))	

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Mirdie Baxton appeals from an initial determination that she is not entitled to survivor benefits after the death of her brother, James Irwin. PERF filed a motion for summary judgment which has been fully briefed. Neither party requested a hearing.

Findings of Undisputed, Material Facts

1. James Henry Irwin became a member of PERF upon employment by what was then called the Indiana State Highway Commission on February 22, 1973 (PERF Ex. A-1). He reported that he was single (*id.*). He nominated a brother as beneficiary in the event of his death (*id.*).

2. Irwin applied for retirement on November 26, 1991 (PERF Ex. A-2). The first page of the application required him to elect one of seven options for his retirement benefit. The form stated, "This is the final designation of your retirement option, and the option choice CANNOT be changed after PERF receives the completed application. I have read and understand the above statement." Irwin placed his initials indicating that he agreed with this. (*Id.*)

3. He also placed his initials in the box next to the following option:

> **OPTION 10 – NORMAL RETIREMENT.** You will receive a monthly benefit for life. If you die before receiving benefits for five years, your beneficiary will receive either your monthly benefit for the remainder of those five years or the present value of those benefits in a lump sum.

(*Id.*)

4. Other options listed on the form, not elected by Irwin, included an option with no guarantee for any payment after death, and options whereby the surviving beneficiary would continue to receive the member's benefit, two-thirds of the benefit, or one-half of the benefit after the member's death. (*Id.*)

5. The form explained that if Option 10 is elected, multiple beneficiaries could be named, and the beneficiary "may be changed if this change is received and approved by the PERF Board prior to your death." (*Id.*)

6. Irwin designated Mirdie Airleen Douglas of Evansville, identified as his sister, as his beneficiary. (*Id.*)

7. Irwin executed the application form under oath, verifying that he had carefully read the questions and answers and understood them. (*Id.*)

8. Irwin's employer, the Indiana Department of Transportation, certified that his last day in pay status was March 16, 1992. (*Id.*)

9. Irwin began receiving PERF benefits effective April 1, 1992, and continuously through January 2011 (PERF Ex. B, B-1).

10. Irwin died on January 15, 2011 (PERF Ex. A-3).

11. Mirdie Baxton notified PERF of her brother's passing in January 2011, and it appears that she had a telephone conversation with PERF staff as well (PERF Ex. A-5, Ex. A-6 attachment C). For the purposes of this motion, it is presumed that Mirdie Baxton is the same person identified in 1992 as Irwin's sister, Mirdie Airleen Douglas.

12. By letter dated February 25, 2011, the PERF Benefits Department notified Irwin's estate, in care of Mirdie Baxton, that under the benefit option chosen by Irwin at retirement, his benefits ceased upon death, and a check sent on January 15, 2011, would be the last PERF benefit payment (PERF Ex. A-4).

13. By letter dated March 9, 2011, Baxton objected, stating that her brother told her that she would receive his pension if anything should happen to him (PERF Ex. A-5).

14. By letter dated March 17, 2011, PERF counsel notified Baxton of PERF's initial determination that she was not entitled to receive any further benefit (PERF Ex. A-6). The letter notified Baxton of her right to seek administrative review (*id.*).

15. By letter dated March 28, 2011, and stamped received on April 6, 2011, Baxton requested review of the initial determination (PERF Ex. A-7). PERF does not contest the timeliness of the request (Letter to ALJ Uhl, 4/14/11).

16. Any finding of fact inadvertently included in the conclusions of law below is incorporated herein 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) (2010).[1]

As with motions under Ind. Trial Rule 56, a genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and that he or she is entitled to a judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Comm'r, Indiana Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. Ct. 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. Ct. App. 2005), citing *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994).

An ALJ's review of an agency's initial determination is *de novo*, without deference to the initial determination. *Indiana Dep't 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. Ct. App. 1989). *See also* Ind. Code § 4-21.5-3-10(d) (as amended effective July 1, 2011, Ind. P.L. 32-2011 § 3).

Issue

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[1] This section was amended effective July 1, 2011, to provide simply that summary judgment motions in administrative proceedings be treated the same as under Ind. Trial Rule 56. Ind. P.L. 32-2011, § 5. PERF's motion was filed before the effective date, but in any event the amendment does not dictate any different consideration of the motion, at least not in this case.

Whether James Irwin's designated beneficiary, Mirdie Baxton, is entitled to receive a continued benefit after Irwin's death in January 2011.

Evidence

Baxton's response in opposition to PERF's summary judgment motion consists of an unsworn letter in her hand making several statements to which PERF objects. In particular, she states that her brother "was convinced that I would receive his benefits, if he was to pass away," and that "he would of never, never have chosen" an option that would not result in her receiving a post-mortem benefit. She states that he never mentioned to her that she would not receive his benefit, and that he "was under the impression that I would receive his benefits right after his death and until my death." She concludes, "Once again, my brother would have never chosen that type of option."

Because these statements are not in the form of an affidavit or other evidence that may be considered on summary judgment, they are *per se* inadmissible. The statements imply that Baxton would testify that her brother told her these things. As such, they might be admissible over a hearsay objection, but PERF has not objected to them as hearsay.[2] Their possible materiality will be discussed below.

PERF also objects to Baxton's statement that her brother's election "should have been explained to him in full." This is not taken to be an attempt to prove that PERF failed to properly explain the election to Irwin. There is no evidence whatsoever regarding whether Irwin even consulted with PERF before making his election. This statement is taken to be offered as argument rather than evidence.

Disputes of Fact

Neither party expressly argues that there is a dispute of fact that prevents entry of summary judgment. Implicit in Baxton's response is her contention that her brother's actual intent or understanding was contrary to the election he made on the application form. This possibility will be discussed below.

Discussion

PERF benefits are set forth by statute. The default option is the one designated on Irwin's application as Option 10: "A member who retires is entitled to receive monthly retirement benefits, which are guaranteed for five (5) years or until the member's death, whichever is later." Ind. Code § 5-10.2-4-7(b).

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[2] Statements by a decedent as to intent, such as the present intent not to renew an insurance policy, are admissible under the hearsay exception for then-existing state of mind. *American Standard Insurance Co. of Wisconsin v. Rogers*, 788 N.E.2d 873, 878 n. 6 (Ind. Ct. App. 2003). In any event, hearsay is admissible in administrative proceedings, but cannot be the sole basis for a decision if objected to. Ind. Code § 4-21.5-3-26(a).

The same subsection sets forth "joint and survivor" options by which the beneficiary can receive benefits after the member's death, *id.*, described in the application as Options 30, 40 and 50. If one of these options is elected, the member receives a "decreased benefit" so that the total payout to both the member and survivor is the actuarial equivalent of the normal retirement benefit. *Id.*

Irwin's election was absolutely clear. He wrote his initials next to Option 10. Option 10 was explained very clearly on the form to mean that a benefit was guaranteed for only five years, and *if* Irwin died before receiving benefits for five years, his beneficiary would receive the benefit for the *remainder* of the five years (or the present value as a lump sum). He received the benefit for more than five years, so by operation of law, his beneficiary was not entitled to any continued benefit.

Baxton argues that Irwin *believed* that she would receive a survivor benefit. Of course, he would have been correct for the first five years after he retired. It would be difficult to believe that he held such a misunderstanding after the fifth year, given the very clear language of the application and his initials on it. But even assuming that Baxton could present admissible evidence to that effect, such as statements by him, such evidence would not change the result.

PERF points out that pensions are contractual in nature. If participation is voluntary, the plan is an "annuity" and a contractual relationship is formed when the member opts to join. *Board of Trustees of Public Employees' Retirement Fund v. Hill*, 472 N.E.2d 204, 208 (Ind. 1985). When participation is mandatory and the plan is offered as a gratuity, the plan is a "pension" and the employee has no vested rights until the employee fulfills all conditions existing at the time of applying for benefits. *Haverstock v. State Public Employees Retirement Fund*, 490 N.E.2d 357, 361 (Ind. Ct. App. 1986). In Irwin's case, he fulfilled the requirements and had a contractual right to the benefit, as defined by the statutory terms of the plan and his application form.

In Indiana, courts may reform written contracts only if (1) there has been a mutual mistake, or (2) one party makes a mistake while the other party commits fraud or inequitable conduct. *Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 490 (Ind. Ct. App. 2004), citing *Plumlee v. Monroe Guar. Ins. Co.*, 655 N.E.2d 350, 356 (Ind. Ct. App. 1995). A mutual mistake has occurred if "there has been a meeting of the minds, an agreement actually entered into, but the document in its written form does not express what the parties actually intended." *Estate of Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269, 1275 (Ind. Ct. App. 2001), quoting *Plumlee*. Furthermore, for contracts such as insurance policies and releases at issue in the cited cases, reformation for mistake is only available only for mistakes of fact, not mistakes of law, because "equity should not intervene and courts should not grant reformation where the complaining party failed to read the instrument, or, if he read it, failed to give heed to its plain terms." *Estate of Spry*, citing and quoting *Gierhart v. Consol. Rail Corp.-Conrail*, 656 N.E.2d 285, 287 (Ind. Ct. App. 1995).

Under this line of cases, there is no question that Baxton would not be entitled to reformation. If Irwin labored under the mistaken understanding that he had elected a joint and survivor benefit, it was not mutual nor was it induced by fraud or inequitable conduct on the part of PERF. Furthermore, his mistake was one of law, not fact, so reformation would not be available in any event. This is clearly a case of Irwin failing to read or understand the very plain terms of the application that he signed.

However, PERF is also a trust. Ind. Code § 5-10.3-2-1(b). While trusts (like contracts) may be reformed upon clear and convincing evidence of both a mistake and the original intent of the parties, mutuality of the mistake is not necessary required. "Because a settlor usually receives no consideration for the creation of a trust, a unilateral mistake on the part of the settlor is ordinarily sufficient to warrant reformation." *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E.2d 1191, 1199 (Ind. 2008). Furthermore, the Supreme Court in *Carlson* held that a testamentary trust can be reformed even if the mistake is one of law:

> As a practical matter most trust instruments are drafted by counsel, and the language in the instrument is the testator's only by adoption. In essence the testator informs counsel what she wants to accomplish and relies on counsel to carry out her wishes. If counsel makes a mistake in drafting and fails in this effort, then the testator's intent has not been realized. And this is so whether the mistake is one of fact or one of law. It appears to us that reformation is appropriate under such circumstances.

Id. at 1200.[3] This reasoning has also been applied to unilateral mistakes of law in deeds given as a gift. *Hardy v. Hardy*, 910 N.E.2d 851, 858-59 (Ind. Ct. App. 2009), citing *Wright v. Sampson*, 830 N.E.2d 1022, 1028 (Ind. Ct. App. 2005).

The ALJ was unable to find any Indiana cases discussing unilateral mistakes of law in applying for a pension or annuity. An illustrative case from another jurisdiction is *Ricks v. Missouri Local Gov't Employees' Retirement Sys.*, 981 S.W.2d 585, 593 (Mo. Ct. App. 1998), in which the member's widow contended that they had intended to elect a benefit with a survivor option. The appellate court held that rescission due to unilateral mistake would be permissible only where (1) enforcement would be unconscionable, or (2) the other party had reason to know of the mistake. *Id.* at 594, citing *Restatement (2d) Contracts*, § 153 (1981) and cases. The court found neither and concluded that the allegedly mistaken election must be honored.

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[3] The Supreme Court has also questioned the continued utility of the distinction between mistakes of fact and law, describing the distinction as "artificial" and contrary to "contemporary scholarly opinion" in the context of restitution for mistaken payments. *Time Warner Entertainment Co., L.P. v. Whiteman*, 802 N.E.2d 886, 891 (Ind. 2004).

In *Welsh v. State Employees' Retirement Bd.*, 808 A.2d 261, 265 (Pa. Commw. Ct. 2002), a member's beneficiary sought to change his retirement election from a single life annuity without a survivor benefit. The court held that the alleged mistake by the member would support relief only if it was mutual, or if it was unilateral and other party (the retirement board) knew or had reason to know of the member's mistake and the mistake was clearly shown. Despite evidence that the member was hard of hearing when he met with the retirement board representative, there was no evidence that the representative knew or should have known that the member was making a mistake when he elected the life benefit, so relief was properly denied. *Id.* at 264-65.

But in another similar case, *Honda v. Bd. of Trustees of the Employees' Retirement Sys.*, 118 P.3d 1155 (Haw. 2005), also following Section 153 of the *Restatement (2d) Contracts*, the court found in favor of a widow who claimed that her husband meant to elect an option with survivor benefits. The court, however, found that the retirement board had breached its fiduciary duty to clearly explain the options to the members and may have been at fault in the member's mistake.

The ALJ concludes that the Indiana courts would not treat this situation the same as the creation of a testamentary trust or a gift deed. Those are one-sided, gratuitous transactions on the part of the testator or donor, so it is less equitable to hold the donor strictly to the written terms of the bargain where those terms are clearly contrary to the donor's intent. Here, on the other hand, the transaction is between the member and a pension fund that must strictly follow statutory mandates and maintain its actuarial integrity for thousands of members based on elections clearly made. PERF must be able to rely on the clearly expressed elections of its members, without concern that they will later be reversed. Therefore, the principles of contract law apply, not the more lenient principles applicable to trusts.

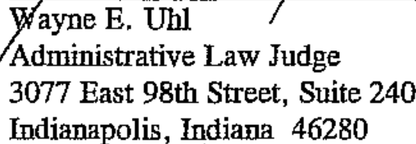
Even if Irwin told Baxton that he thought she would receive a benefit after the first five years, such evidence would not be "clear and convincing" evidence of a mistake in light of the unambiguous election made on the application form. But even if there were evidence of mistake, it was not mutual and there is no evidence that the mistake was the result of fraud or misrepresentation. PERF had no reason to believe that Irwin was mistaken when making his election. It is not unconscionable to enforce Irwin's election, given that he received a full pension benefit for almost 19 years after he retired. Indeed, it would be inequitable to require PERF to pay a survivor benefit to Baxton after paying Irwin his full normal benefit for two decades.

In its brief, PERF addresses questions of detrimental reliance and estoppel, but these issues need not be discussed in the absence of evidence that Irwin was misinformed by PERF.

Order

PERF's motion for summary judgment is GRANTED. PERF's initial determination that Mirdie Baxton is not entitled to a survivor benefit upon the death of member James Irwin is AFFIRMED.

ORDERED on September 23, 2011.



Wayne E. Uhl
Administrative Law Judge
3077 East 98th Street, Suite 240
Indianapolis, Indiana 46280

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 September 23, 2011:

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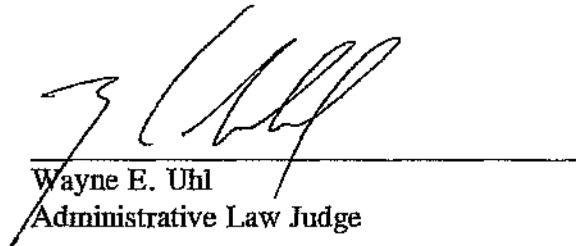

Wayne E. Uhl
Administrative Law Judge