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

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PUBLIC EMPLOYEES RETIREMENT FUND

IN THE MATTER OF	)	PUBLIC EMPLOYEES'
STEPHEN P. COBURN,	)	RETIREMENT FUND
	)	
Petitioner.	)	

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Introduction

Stephen P. Coburn appeals from the PERF Board's determination that his retirement benefit was miscalculated and that he was overpaid a total of [redacted] from his retirement in June 2003 through December 2006. PERF determined that it would reduce his benefit to the correct amount, and reduce it further to collect the overpayment over five years, without interest.

In accordance with the schedule set by agreement of the parties, both parties filed motions for summary judgment, responses and replies. Neither party requested a hearing. The motions are now fully briefed and ready for decision.

Findings of Undisputed Fact

1. Coburn was employed on July 1, 1963, by the Fort Wayne State School. He immediately and automatically became a member of PERF. He did not report any prior potential PERF-eligible service in his initial membership record. (PERF Ex. 1.)

2. Coburn was born on November 10, 1936. (PERF Ex. 1, 3.)

3. By 2003, Coburn was working at the Fort Wayne State Developmental Center, without any interruption in service. (Coburn Aff. ¶ 2, Pet. MSJ Tab 1.)

4. Coburn decided to retire on June 13, 2003, accepting a state retirement incentive program (SRIP) under which he would receive credit for additional years of service if he stopped working before June 14, 2003. (Coburn Aff. ¶ 3.)

5. Such retirement incentives are authorized by Ind. Code § 5-10.2-3-1.2, which permits a member to purchase one year of service credit for every five completed years of service, and permits the State to purchase that credit for the member.

6. Based on Coburn's 39 years and 11 months of service, the SRIP would award him 7 years and 10 months of additional credit, for a total of 47 years and 9 months.

7. Relevant here, the PERF statute provides for a retirement benefit for the member alone, Ind. Code §§ 5-10.2-4-4, and alternate payment options whereby the benefit is payable to the member and, upon the member's death, his/her beneficiary for the beneficiary's life, § 5-10.2-4-7. The survivor payment options must be the actuarial equivalent of the member-only benefit. As described in more detail later, PERF calculates the survivor option by applying an "option factor" to the base benefit.

8. Before he decided to retire, Coburn periodically received information from PERF, including two versions of a pamphlet entitled "Estimating Your Retirement Benefits." The pamphlets were prepared or revised in November 1986 and May 1996. (Coburn Aff. Ex. 2, 3.)

9. The introduction of the 1986 pamphlet stated, "You can calculate the retirement income that you expect to receive from PERF by using the benefit formula in this pamphlet." The pamphlet then set out a formula to be used to "estimate your benefits" and "estimate your monthly retirement benefits." Step 4 of the formula directed the user to enter a "pension factor" based on the retirement option from Table 2. Table 2, in turn, listed the factor for Option 30 (Joint with Full Survivor Benefits) as .85. The formula concluded with Step 6, Line M, labeled as "your estimated monthly benefit." (Coburn Aff. Ex. 2.)

10. Handwriting on the pamphlet indicates that Coburn used it at some time to estimate his benefit. It appears that this was several years before he retired, because he used an average salary of [redacted] (it is undisputed that his average annual salary at retirement was [redacted]. In Step 4, Coburn used a factor of 0.90, which was the listed factor for Option 40 (Joint with Two-Thirds Survivor Benefits). [1] (Coburn Aff. Ex. 2.)

11. The introduction of the 1996 pamphlet stated, "You can estimate the retirement income that you would receive from PERF by using the benefit formula in this booklet. To estimate your benefit, use your assumed age, salary and service at retirement." Like the 1986 pamphlet, the benefit formula was preceded by statements that it could be used to "estimate your benefits" and "estimate your monthly retirement benefits." Step 4 directed entry of a pension factor based on Table 3, which again listed the pension factor for Option 30 (Joint with Full

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[1] The factor he entered is not le[redacted] his entry on line G, 20002, and the result on line I, [redacted]

Survivor Benefits) as .85. The final step of the formula was labeled as "your estimated monthly benefit." (Coburn Aff. Ex. 3.)

12. There is no handwriting to indicate that Coburn actually used the 1996 pamphlet to calculate his expected retirement income.

13. Coburn used the information in the pamphlets in "making the decision as to the form of benefit that would be most appropriate for my wife and me at the time I applied for my pension benefit." (Coburn Aff. ¶ 7.) [2]

14. Coburn applied for retirement benefits on April 24, 2003, with a last day in pay status of June 13, 2003, and a retirement benefit effective date of July 1, 2003. (PERF Ex. 3.)

15. Coburn selected benefit Option 30, which was described as follows:

> **OPTION 30 – JOINT WITH FULL SURVIVOR BENEFITS.** You will be paid a monthly benefit for life. After your death, the same monthly benefit will be paid to your beneficiary for his/her life.

(PERF Ex. 3.)

16. Coburn designated his wife, Charlotte Coburn, as his beneficiary. (PERF Ex. 3.)

17. Charlotte was born on February 25, 1937. (PERF Ex. 3.)

18. Coburn elected to defer withdrawal or payment of his annuity savings account (ASA). (PERF Ex. 3.)

19. The application stated that Coburn could not change the benefit option, designation of beneficiary, or choice for payment of the ASA after the application was received by PERF. (PERF Ex. 3.)

20. After he submitted the application, including his election of Option 30, Coburn received a Benefit Estimate from PERF. (Coburn Aff. ¶ 5 & Ex. 1.) The estimate was based on a presumed retirement date of July 1, 2003; 39 years and 11 months of service; and 7 years and 10 months of incentive service.

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[2] Coburn has also submitted evidence of the same estimation formula published in a member newsletter in May 2000 (Pet. MSJ Resp. Tab 7) and on PERF's web site in March 2007 (Coburn Aff. ¶ 10 & Ex. 6, Pet. MSJ Tab 1). He does not state that he relied on either in making his retirement decisions. As discussed later in this decision, any dispute over the existence of these documents is immaterial.

21. The Benefit Estimate projected Coburn's benefits under several scenarios. Relevant here, the Benefit Estimate stated that selection of Option 30 would result in a monthly pension benefit of [redacted] (Coburn Aff. Ex. 1.)

22. The Benefit Estimate stated that it was based on unverified service data. It also stated: "All information shown is an estimate only. Actual benefits will be computed based on certified data using the laws in effect at retirement." (Coburn Aff. Ex. 1.)

23. As of his last day in pay status (June 13, 2003), Stephen Coburn's age was 66 years, 7 months, and 3 days. As of his retirement effective date (July 1, 2003), Coburn's age was 66 years, 7 months, and 21 days

24. As of Stephen's last day in pay status (June 13, 2003), Charlotte's age was 66 years, 3 months, and 18 days. As of Stephen's retirement effective date (July 1, 2003), Charlotte's age was 66 years, 4 months, and 6 days.

25. After he retired, Coburn began receiving monthly benefit payments of [redacted] (PERF Ex. 6.)

26. The State Board of Accounts (SBA) conducted an audit of PERF for the year ending on June 30, 2006. Its report, filed on November 28, 2006, noted that its prior three audits found various anomalies in the calculation of members' benefits and refunds, resulting in both underpayments and overpayments to members. These were mainly due to SIRIS programming anomalies, input errors, and incorrect data. The SBA noted that PERF was implementing steps to correct the errors, including hiring an accounting firm, Clifton Gunderson, to recalculate all benefits and refunds that were processed from April 2002 through June 2004. The accounting firm issued a final report in June 2006 and was under contract to complete member account adjustments during fiscal year 2007. (Pet. MSJ Tab 2.)

27. The status of the "corrections project" was presented to the PERF Board at its meeting on August 18, 2006. It was reported that Clifton Gunderson identified about [redacted] incorrect benefit payments during the period, with underpayments of [redacted] and overpayments of [redacted] Letters explaining the situation would be sent to members prior to their benefit being changed. In the case of overpayments, PERF would not recoup overpayments of less than [redacted] and for others PERF would extend an option to repay the overpayment over 60 months without interest. (Pet. MSJ Tab 3.)

28. By December 2006, due to cost-of-living and other adjustments, Coburn was receiving a monthly benefit payment of [redacted] (PERF Ex. 5.)

29. Coburn received a letter from PERF dated December 16, 2006. The letter informed him that the SBA found that PERF had "incorrectly calculated a number of benefit payments since 2002." The letter stated that Coburn's benefit

had been "recalculated" and the amount he had been receiving was greater than the amount to which he was entitled under law. The letter stated that his monthly benefit would be reduced to the correct amount of [redacted] The overpayment of [redacted] would be collected by further reduction of the monthly benefit to [redacted] for a period of five years, with zero interest. (PERF Ex. 5.)

30. In response to an inquiry from Coburn, PERF sent a letter dated February 19, 2007, explaining the recalculation in more detail. Specifically, the letter stated that when his benefit was originally calculated, PERF used a retirement option factor of 0.8268, and that it should have used a retirement option factor of 0.8157. The letter notified him of his right to seek administrative review. (PERF Ex. 6.)

31. Coburn's base annual retirement benefit was correctly calculated following the formula prescribed by Ind. Code § 5-10.2-4-4(a), as follows:

Average annual compensation	[redacted]
Multiplied by 1.1%	x .011
Multiplied by total creditable service	x 47.75
Annual benefit	[redacted]

32. As noted above, the PERF law requires PERF to offer options whereby the member receives a reduced benefit and his/her beneficiary then receives a continuing benefit after the member's death. These options must be the "actuarial equivalent" of the full benefit calculated above. Ind. Code § 5-10.2-4-7(b).

33. In 1981, the PERF Board adopted the UP-1984 mortality table for PERF. (PERF Ex. 8, 9, 17.) The table was created to provide a unisex actuarial basis for life insurance and pension plans. It was based on mortality observations in the late 1960s, and the values in the table assumed a population mix of 80% male and 20% female. The values were reduced by 10% to project the table to 1984 based on a presumed increase in life expectancy over that period. The values are subject to further adjustment based on the gender mix of the specific population to which the table was to be applied. (PERF Ex. 9.) [3]

34. Based on the UP-1984 table, PERF created a table of retirement option conversion factors for the three survivor options, based on the ages of the member and the beneficiary. (PERF Ex. 10, 17.)

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[3] UP stands for "unisex pension." A detailed explanation of the preparation and use of the UP-1984 mortality table can be found in McDaniel v. Chevron Corp., 203 F.3d 1099, 1104-06 (9th Cir. 2000).

35. PERF represents, but has not submitted evidence, that in determining the ages of the member and beneficiary, it uses the age at the "nearest birthday." For example, a person who is 55 years and 4 months is age 55, while someone who is 55 and 7 months is deemed age 56.

36. According to PERF, its original calculation of Coburn's benefit was incorrect because PERF considered him to be 66 years old. His age nearest birthday, however, was 67. PERF used Charlotte's correct age of 66. (See Findings 23 and 24 above.)

37. Where the member is age 66 and the beneficiary is age 66, the option conversion factor for Option 30 is 0.826775. (PERF Ex. 10 at p. 169.) This factor was rounded to four places (0.8268) and resulted in an incorrect benefit of [redacted] ([redacted] x 0.8268 = [redacted] / 12 = [redacted] (PERF Ex. 6.)

38. Where the member is age 67 and the beneficiary is age 66, the option conversion factor for Option 30 is 0.815713. (PERF Ex. 10 at p. 171.) PERF argues that this factor, when rounded to four places (0.8157), results in the correct benefit of [redacted] ([redacted] x 0.8157 = [redacted] / 12 = [redacted]. (PERF Ex. 6, 11.)

39. Coburn submitted an appeal from PERF's determination dated March 5, 2007, and received by PERF on March 7, 2007. (PERF Ex. 7.) PERF does not contest the timeliness of the appeal.

40. Any legal conclusion stated below that should be designated as a finding of fact 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). This mirrors Ind. Trial R. 56(C). The standard for summary judgment under that rule is well-established:

> A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. The court must accept as true those facts alleged by the nonmoving party, construe the evidence

> in favor of the nonmovant, and resolve all doubts against the moving party. . . . A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue.

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

The moving party has the burden of showing that no genuine issue of material fact exists. Only when the moving party has done so does the burden shift to the nonmovant to establish that a genuine issue of fact exists. Contrary to federal practice, a moving party cannot simply allege that the absence of evidence on a particular element is sufficient to entitle that party to summary judgment—it must prove that no dispute exists on all issues. Dennis v. Greyhound Lines, Inc., 831 N.E.2d 171, 173 (Ind. App. 2005), citing Jarboe v. Landmark Community Newspapers, 644 N.E.2d 118 (Ind. 1994).

Evidence

Neither party has objected to any of the evidence submitted by the opposing party. Therefore, all of the evidence is deemed admissible.

Genuine disputes of material fact

Neither party has argued that there are disputes of material fact. Coburn suggests that there is a fact dispute over the information on PERF's web site in 2007. (Pet. Reply at 4.) As discussed below, any such dispute is immaterial.

Issues

Coburn makes two legal arguments that may be restated as follows:

1. PERF "recalculated" Coburn's life expectancy after he retired, in violation of Ind. Code § 5-10.2-2-1.5(5)(A).

2. Coburn detrimentally relied upon PERF's representations that his benefit was subject to an option factor of 0.85. Therefore, PERF is estopped to change the benefit and is required to increase the benefit to reflect the option factor of 0.85.

PERF makes arguments that may be restated as follows:

1. The recalculation of Coburn's benefit is the correct calculation based on the UP-1984 mortality tables and PERF's option factor conversion

table, measuring the ages of the member and beneficiary by reference to their nearest birthday.

2. PERF is authorized and required by law to adjust erroneously calculated benefits and recoup erroneous overpayments.

3. Coburn's detrimental reliance argument fails because his alleged reliance on the 1986 and 1996 pamphlets was not reasonable, and because the doctrine of equitable estoppel does not apply on the facts of this case.

PERF did not recalculate or redetermine Coburn's life expectancy in violation of Ind. Code § 5-10.2-2-1.5(5)(A).

Ind. Code § 5-10.2-2-1.5 requires that PERF satisfy the qualification requirements of Section 401 of the Internal Revenue Code (IRC), 26 U.S.C. § 401. Section 401 of the IRC provides favorable tax treatment to qualified plans, including deferred income taxation of employer contributions and income, and exemption from employment taxes on employer contributions.

One of the requirements imposed by the state statute is: "The life expectancy of a member, the member's spouse, or the member's beneficiary may not be recalculated after the initial determination for purposes of determining benefits." Ind. Code § 5-10.2-2-1.5(5)(A). This is to comply with IRC § 401(a)(9)(D), which states that the life expectancy of a member or spouse may be "redetermined" no more frequently than annually except in the case of a life annuity. Coburn argues that PERF's recalculation of his benefit, using a different option factor, violated this proscription.

The terms "recalculated" and "redetermined" in the state and federal statutes denote a change in the assessment of the member's expected mortality, not the correction of an error in applying mortality determinations made before the member retired. PERF has shown that the mortality table and option factor conversion table in use in 2003 would have dictated an option factor of 0.8157 had Coburn's correct age been used in making the calculation. PERF did not change the mortality table or the option factor conversion table and attempt to retroactively apply the new tables to Coburn. Instead, an incorrect age was used so the wrong factor was applied. This was not a "recalculation" or "redetermination" of Coburn's life expectancy.

PERF is authorized to correct errors and recoup overpayments.

PERF argues that it was not only authorized to correct its error and collect the overpayment, but that it was required to do so by state law and IRS regulations. Coburn does not question PERF's authority to correct an error in benefits based on a failure to apply the terms of the pension plan. Rather, in essence, he argues that the error in this case was not one that was required to be corrected.

PERF's authority to correct errors and collect overpayments arises from two sources, statutes and common law.

1. Statutory authority

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 correction of errors that might result in a reduction in a member's benefit: "The benefit may not be increased, decreased, revoked or repealed <u>except for error</u> 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 erroneous overpayments of benefits paid to a member. [4]

The concept of adjusting a benefit to account for an under- or overpayment is endorsed in Ind. Code § 5-10.2-4-1.5, which authorizes PERF to pay an estimated benefit and temporarily adjust the benefit if necessary after the member's service records have been verified. This adjustment may be done "over a reasonable time, as determined by the board." Ind. Code § 5-10.2-4-1.5(c). Implicit authority to collect overpayments may also be found in Ind. Code § 5-10.3-8-12, which authorizes the board to stop a member's payment if, among other things, the member "[r]efuses to repay an overpayment of benefits."

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[4] At least two other states statutorily authorize recovery of overpayments. <u>Sola v. Roselle Police Pension Bd.</u>, 794 N.E.2d 1055, 1058 (Ill. App. 2003) (interpreting Ill. Comp. Stat. § 5/3-144.2); <u>State ex rel. Public Employees Retirement Ass'n v. Longacre</u>, 59 P.3d 500 (N.M. 2002) (upholding constitutionality of New Mex. Stat. Ann. § 10-11-4.2(A), which authorizes collection of overpayment but only back to one year before it was discovered).

PERF argues that further support for authority and, indeed, a mandate to collect overpayments is found in Ind. Code § 5-10.2-2-1.5, which (as discussed above) requires that the fund "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 IRC § 401(a)(9) and the regulations under that section.

To be qualified under IRC § 401, 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). 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).

Regulations promulgated by the United States Treasury Department repeat and refine the qualification requirements of IRC § 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 purpose of distributing the fund's corpus and income "in accordance with the plan." 26 C.F.R. § 1.401-1(a)(3)(iii).

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) (PERF Ex. 15), which is the IRS's system of correction programs for retirement plans that are intended to satisfy IRC § 401(a) but have not met those requirements for a period of time. (§ 1.01, Ex. 15 at 1.) If the plan corrects a failure using these procedures, the IRS will not treat the plan as failing to meet § 401(a). (§3.01, Ex. 15 at 5.)

PERF contends that the failure to collect overpayments like the one in this case is a "qualification failure," which is defined as "any failure that adversely impacts the qualification of a plan." (§ 5.01(2), Ex. 15 at 8.) Of the four types of qualification failures, PERF contends that overpayment is an "operational failure," defined as a qualification failure that "arises solely from the failure to follow plan provisions." (§5.01(2)(b), Ex. 15 at 8.)

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 . . .." (§ 5.01(6), Ex. 15 at 10.) 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. (§ 6.02(5)(c), Ex. 15 at 15.) Section 6 also states generally that full correction may not be required "because it is unreasonable or not feasible," and that "the correction method adopted must be one that does not have significant adverse effects on participants and beneficiaries of the plan . . .." (§ 6.02(5), Ex. 15 at 15.) It further appears that 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. (Appendix B, Correction Methods and Examples, § 2.05, Ex. 15 at 62, which incorporates § 2.04(1) (correction of § 415(b) excesses), Ex. 15 at 57-60.)

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, Procedure 2006-27 clearly indicates the IRS view that an overpayment in violation of the plan terms would be considered a failure that would threaten PERF's qualification under IRC § 401.

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, or that the risk justifies collection of 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.

My own research disclosed very little discussion of the possibility, and then only 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.

The court cited Thomas v. Bd. of Trustees of Intern. Union of Operating Engineers, 1998 WL 334627 (E.D. Pa. 1998), in which the union made pension fund contributions for Thomas for 14 years when he was not the union's employee. The

IRS audited the pension funds and, upon learning that contributions had been received for non-employees, 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 granted summary judgment to the union, holding 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 coverage 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) (profit-sharing plan providing benefits to non-employee was not qualified under § 401, and therefore not exempt from claims of creditors).

Finally, 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 merely be "in question," the court found a dispute of material fact and denied summary judgment.

Coburn does not question the general proposition that a plan that fails to follow its own terms risks losing its qualified status and must undertake correction under Revenue Procedure 2006-27. Instead, he argues that the failure in this case does not require such treatment because the "terms of the plan" or "plan provisions" do not require use of "age nearest birthday" in applying the option factor. Therefore, he argues, PERF's discretionary or even accidental use of his age at his most recent birthday was not a "qualification failure" because it did not violate the terms of the plan. He also argues that PERF did not violate the "exclusive benefit" requirement because of the de minimis nature of the error.

By statute, PERF must provide a member with a benefit that is guaranteed for five years or until the member's death, whichever is later. Ind. Code § 5-10.2-4-7(b). PERF is also required to offer alternate payment options, including the "joint with full survivor benefits option" elected by Coburn. "The amount of the optional payments shall be determined under rules of the board and shall be the actuarial equivalent of the benefit payable under sections 4, 5, and 6 of this chapter." Id.

To meet this obligation, PERF formally adopted the UP-1984 mortality table and derived from that table the option conversion factors set forth in PERF Exhibit 10. But there is no evidence that either of those tables dictates a particular determination of a person's age. Nor has PERF submitted any evidence on summary judgment that it has made a determination, either by formal board action or internal policy, that the conversion factors in Exhibit 10 were based on age nearest birthday in order to accomplish the legislative mandate of actuarial equivalence, or even that age nearest birthday is the rule that PERF consistently uses when applying the conversion factors.

On the other hand, Coburn has not proven or argued that PERF has applied the age-nearest-birthday rule arbitrarily or inconsistently. He argues only that the use of the rule is not mandated by the terms of the plan, so that the failure to use it in his case was therefore not a violation of IRC § 401.

For these reasons, I am unable to grant summary judgment on the narrow question of whether Ind. Code § 5-10.2-2-1.5 and IRC § 401 required PERF to correct its error in this case. However, this question is not dispositive because PERF has the discretion to correct the error without reference to the IRC.

2. *Common law authority*

Apart from statutory provisions, court decisions must be examined to determine whether and to what extent a pension plan is authorized to recoup mistaken overpayments. Such decisions are important because, while PERF is a creature of statute, it is also subject to the constitution and common law of Indiana. To that extent, when determining whether PERF has the authority to correct errors and recoup overpayments, the terms of the plan include principles of Indiana law beyond PERF's strict statutory terms. [5]

For example, Article 11, § 12 of the Indiana Constitution, before its amendment in 1996, prohibited PERF from investing in equity securities or stocks of private corporations. Bd. of Trustees of Public Employees' Retirement Fund v. Pearson, 459 N.E.2d 715 (Ind. 1984). Constitutional and contractual principles have been held to prevent retroactive amendment to pension terms, if a vested interest has been found. Bd. of Trustees of Public Employees' Retirement Fund v. Hill, 472 N.E.2d 204 (Ind. 1985) (judges' retirement fund). Because PERF is a trust, Ind. Code § 5-10.3-2-1(b), it is presumably also subject to the common law of trusts.

No Indiana court appears to have specifically decided the circumstances under which a pension or other trust can recover mistaken overpayments. There are many such cases from other jurisdictions that reach a wide variety of conclusions based on each case's particular facts. A strong theme in these cases, however, is the application of equitable principles to determine whether, depending on the standard of review involved, it is unreasonable, arbitrary or capricious for a pension to obtain recovery of overpayments.

Guidance as to how Indiana courts would address the question is found in cases discussing a party's right to restitution of a payment made by mistake.

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[5] Cf. Ogden v. Michigan Bell Telephone Co., 595 F.Supp. 961, 970 (E.D. Mich. 1984) (state law concepts which extend beyond the terms of a pension plan may be a proper reference in an action to enforce plan).

Indiana accepts the general rule that "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). [6]

But this rule 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, id. 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 are not sufficient to demonstrate a change of position that would bar restitution. Id. at 384-85.

Much of the law in this area is set forth in cases 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). Nevertheless, in an action under ERISA, courts apply common law principles of equitable relief. See, e.g., Johnson v. Retirement Program Plan, 2007 WL 649280 (E.D. Tenn. 2007) (summary judgment granted for pension plan on challenge to collection of mistaken overpayments, based on ERISA, trust law and equitable estoppel); Phillips v. Maritime Association-I.L.A. Local Pension Plan, 194 F.Supp.2d 549 (E.D. Tex. 2001) (using equitable common law principles, pension plan cannot reduce benefits or recoup overpayments); 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).

Therefore, it is instructive if not binding that equitable principles of restitution have been applied in ERISA cases of mistaken overpayments:

> The Fund correctly points out that, generally speaking, "[w]hen a trustee overpays a beneficiary the trustee is entitled to recover the

[6] 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).

> excess payment, even when it was the product of unilateral mistake on the part of the trustee." Hoffa v. Fitzsimmons, 673 F.2d 1345, 1354 (D.C. Cir. 1982). But, as Regan [the overpaid person] notes, "such recovery may not be permitted where the beneficiary has changed his position in detrimental reliance on the correctness of the overpayment; in such cases the beneficiary is entitled to retain part or all of the overpayment to the extent necessary to avoid injustice." Id. at 1354 n. 27. There appears to be no dispute that Regan changed his position in reliance on the correctness of what turned out to be a series of over-payments. The outcome of this motion thus turns on whether Regan reasonably believed that he was entitled to the payments he received.

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 Regan's reliance on the overpayments was reasonable). See also Lumenite Control Technology, Inc. v. Jarvis, 252 F.Supp.2d 700, 706-07 (N.D. Ill. 2003) (using three-part test, 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)).

Another line of authority uses a very similar analysis based on the law of trusts. See Ind. Code § 5-10.3-2-1(b) (PERF "is a trust"). The court in Johnson, supra, summarizing Sixth Circuit law, noted that if a trustee has made a payment out of trust property to a beneficiary who was not entitled to the payment, the beneficiary is subject to repayment unless doing so will result in hardship. In pension overpayment cases, therefore, the court must consider "the possible inequitable impact recoupment may have on individual retirees," including the beneficiary's disposition of the money, the amount of the overpayment, the nature of the mistake made by the trustee, the amount of time that has passed since overpayment was made, and the beneficiary's total income and effect recoupment would have on that income. Johnson, 2007 WL 649280 at *6-*7, citing cases and Restatement of Trusts (Second) § 250 (1959).

Finally, in the case of a pension fund, equitable considerations must include the fund's fiduciary obligation to all of its beneficiaries to maintain the integrity of the fund. "Forcing . . . a plan to pay benefits [that] are not part of the written terms of the program disrupts the actuarial balance of the Plan and potentially jeopardizes the pension rights of others legitimately entitled to receive them." Central States, Southeast & Southwest Areas Health & Welfare Fund v. Neurobehavioral Associates, P.C., 53 F.3d 172, 175 (7th Cir. 1995) (reversing and remanding dismissal of action in which plan sought restitution of overpayment after clerical error resulted in [redacted]payment when only [redacted]wed). See also Black v. TIC Investment Corp., 90[redacted]12, 115 (7th Cir. 1990).

As an aside, the application of equitable principles may not be inconsistent with the IRS regulations that PERF relies on so heavily in this case. Those regulations do not require full correction where full correction would be "unreasonable or not feasible," and provide that the correction method must "not have significant adverse effects on participants and beneficiaries of the plan . . .." (IRS Revenue Procedure 2006-27, § 6.02(5), PERF Ex. 15 at 15.) Perhaps, therefore, PERF could decline to collect an overpayment where collection would have a "significant adverse effect" on a member who unwittingly came to rely heavily on the overpayment. No such claim is made here.

3. Conclusion

PERF is authorized by statute and common law to correct a calculation error by reducing the member's benefit to the correct amount, and to collect any resulting overpayment by reducing the member's benefit until the overpayment is recouped. It cannot be determined on the evidence presented on summary judgment whether PERF was required by obeisance to the IRC to correct this particular error. However, PERF had the discretion to correct the error.

PERF's authority to correct an error and collect an overpayment is reined by equitable principles, including detrimental reliance, financial hardship, and other factors. This brings us to the only such argument made by Coburn, that he detrimentally relied on PERF's statements regarding the calculation of his benefit.

PERF is not barred from correcting its error by Coburn's reliance on its prior assurances regarding the amount of the benefit.

As noted above, a pension plan's right to restitution based on unilateral mistake is not absolute, but is restricted by equitable considerations. Coburn does not plead inequity in the sense that he will suffer financial hardship if his benefit is reduced and the overpayment is collected. Such an argument would be untenable where his monthly benefit will be reduced from [redacted] to [redacted] (a reduction of $[redacted] or [redacted]), and the overpayment of [redacted] will be recouped without interest over five years at a rate of [redacted] a month.

Instead, Coburn argues that he relied on pamphlets issued in 1986 and 1996 from which it could have been concluded that the option factor for the joint with full survivor benefits option was 0.85. This not only invokes the equitable considerations applied in restitution cases, see Monroe Financial, supra, but also suggests the doctrine of equitable estoppel.

> Equitable estoppel is available if one party, through its representations or course of conduct, knowingly misleads or induces another party to believe and act upon his conduct in good faith and without knowledge of the facts. The elements of equitable estoppel are: (1) a representation or concealment of a material fact, (2) made by a person with knowledge of the fact and with the intention that the other party act upon it, (3) to a party ignorant of the fact, (4) which induces the other party to rely or act upon it to his detriment. The reliance element has two prongs: (1) reliance in fact and (2) right of reliance. In addition, estoppel exists only as between the same parties or those in legal privity with them.

Wabash Grain, Inc. v. Smith, 700 N.E.2d 234, 237 (Ind. App. 1998) (citations and quotation marks omitted).

Equitable estoppel cannot ordinarily be applied against governmental entities. City of Crown Point v. Lake County, 510 N.E.2d 684, 687 (Ind. 1987). The reason for this is two-fold. "If the government could be estopped, then dishonest, incompetent or negligent public officials could damage the interests of the public. At the same time, if the government were bound by its employees' unauthorized representations, then government, itself, could be precluded from functioning." Samplawski v. City of Portage, 512 N.E.2d 456, 459 (Ind. App. 1987).

But estoppel against a governmental entity "may be appropriate where the party asserting estoppel has detrimentally relied on the governmental entity's affirmative assertion or on its silence where there was a duty to speak." Equicor Development, Inc. v. Westfield-Washington Township Plan Commission, 758 N.E.2d 34, 39 (Ind. 2001). The appellate courts have used "public interest" or "public policy" in justifying this exception, but what constitutes the public interest is not well defined. Samplawski, 512 N.E.2d at 459. Some principles can be distilled from the cases.

First, estoppel is particularly inappropriate where a party claiming to be ignorant of the facts had access to the correct information or where government could be precluded from functioning if it were bound by employees' unauthorized representations. U.S. Outdoor Advertising Co., Inc. v. Indiana Department of Transportation, 714 N.E.2d 1244, 1259-60 (Ind. App. 1999). All persons are charged with knowledge of rights and remedies prescribed by statute, and statutory procedures cannot be circumvented by unauthorized acts and statements of officers, agents or staff. Id., citing Middleton Motors, Inc. v. Indiana Department of State Revenue, 380 N.E.2d 79, 81 (Ind. 1978); DenniStarr Environmental, Inc. v. Indiana Dept. of Environmental Management, 741 N.E.2d 1284, 1289-1290 (Ind. App. 2001).

Second, 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").

Third, estoppel may be permitted only 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, as discussed above, equitable considerations must include the fiduciary obligation of a pension fund to maintain the integrity of the fund. This overriding obligation to protect other members and the actuarial soundness of the plan has led some courts to hold 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 long 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).

On the other hand, if the mistake was an isolated incident and involved a very small amount of funds in comparison with the overall assets of the fund, it seems that the impact of the non-collection of overpayments is practically nonexistent. [7]

A compelling analysis of the competing equitable considerations is presented by Johnson v. Retirement Program Plan, supra, in which Johnson was overpaid more than [redacted]over a period of more than 10 years due to a miscalculation of his ex-wife's share of his pension benefit under a qualified domestic relations order. The court concluded that, notwithstanding Johnson's reliance on the money, the

[7] According to its web site, PERF's assets at the end of 2006 were approximately $16.4 billion. Press release, "PERF Assets Topped $16.4 billion in March," http://www.in.gov/perf/agency/20070427b.html (last viewed 11/6/07). The evidence is that PERF overpaid about [redacted]

plan's decision to recoup the overpayment over a period of 11 years and nine months was not arbitrary and capricious.

In this case, the undisputed evidence shows that PERF's determination to correct and reduce Coburn's benefit and recoup the overpayment is not barred by equitable estoppel or other equitable considerations as a matter of law. Coburn's reliance on the 1986 and 1996 pamphlets is without merit for several reasons.

First, the pamphlets did not make a materially false representation. The pamphlets merely provided a means to estimate a member's retirement benefit. Both pamphlets were entitled "Estimating Your Retirement Benefits" and the introduction to the 1996 pamphlet stated that the formula in the pamphlet could be used to "estimate" retirement income. The formula in each pamphlet was twice preceded by statements that the formula could be used to "estimate" benefits, and the final step of the formula was labeled as "your estimated monthly benefit." Step 4 of the estimation formula was to enter an option factor from a table, and the table used 0.85 as the factor for Option 30. The tables were clearly intended to supply a factor for use in the estimation formula, not to independently represent the option factor that would be used in the final calculation.

For the same reason, Coburn's purported reliance on the pamphlets as assurance that the option factor would be 0.85 was not reasonable as a matter of law, and he did not have a "right of reliance" on the pamphlets. No reasonable person would have read the pamphlets as a promise that 0.85 would be the option factor for every retiree who selected Option 30.

Coburn has submitted a PERF member newsletter dated May 2000 and containing an estimation formula practically identical to the formula set forth in the pamphlets, including the multiple references to the formula providing an "estimate." (Pet. MSJ Resp. Tab 7.) Coburn does not say that he relied on this newsletter—he appears to have filed it to rebut PERF's argument that the 1986 and 1996 pamphlets were obsolete—but even if he had, it would not provide any more support than the pamphlets for his detrimental reliance argument.

Coburn also asserts that PERF's web site continued to display an estimate formula using 0.85 as the Option 30 factor as late as March 2007. (Coburn Aff. ¶ 10 & Ex. 6, Pet. MSJ Tab 1.) PERF contests that the "pension calculator" on its web site in 2007 would have displayed the factors. (PERF Ex. 14.) Frankly, the parties seem to be arguing over different things. Coburn does not say that he used the automated Benefit Estimate Calculator on the web site. [8] His Exhibit 6 appears to be nothing more than an identical reprint of page 3 of the May 2000 newsletter.

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[8] http://www.in.gov/perf_benefits/PerfBenefitCalculatorForm.html (last viewed 11/13/07).

The possibility that some version of the estimation formula from past pamphlets or newsletters lingered on PERF's website in 2007 is immaterial because the formula is clearly intended only to provide an estimate, and because Coburn could not have relied on the web site in 2007 when making decisions about his retirement in or before 2003.

Second, Coburn has not shown that he relied in fact on the 0.85 factor in making any key decisions regarding retirement. He does not claim that he decided to retire based on his understanding that the 0.85 factor would be used. [9] Instead, he testifies only that he relied on the pamphlets "in part" in making "the decision as to the form of benefit that would be most appropriate" for him and his wife. (Coburn Aff. ¶ 7.) Nor does he claim that he would have selected a different benefit option had he known that the option factor would be only 0.8157.

Coburn's reliance argument is further weakened by the fact that his calculations on the 1986 pamphlet show that he was considering Option 40, not Option 30. There are no marks on the 1996 pamphlet to indicate that Coburn actually made a calculation at that time.

Strong evidence against Coburn's claim of reliance on PERF's representations is the Benefit Estimate he received after he applied to retire. The estimate showed that Option 30 would result in a monthly benefit of [redacted]emarkably close to the [redacted] that he would have received if the correct option factor had been used, and [redacted]ess than the benefit he began receiving when he retired. It is possible that Coburn could not have changed his option election upon receiving the Benefit Estimate, but there is certainly no evidence that he inquired as to why the Option 30 estimate was lower than it would have been had a factor of 0.85 been used.

Third, Coburn has not presented evidence that his reliance on PERF's publications was "detrimental," i.e., that he changed his position in reliance on the pamphlets. Monroe Financial, supra. "At the heart of equitable estoppel is a change in the promisee's position, a change that the promisee made in reliance on the promissor's statements, resulting in an unjust detriment to the promisee if the promissor is not held to their statement." Weinig v. Weinig, 674 N.E.2d 991, 997 (Ind. App. 1996); see also Snodgrass v. Baize, 405 N.E.2d 48, 54 (Ind. App. 1980) (no estoppel where party asserting estoppel made no change in position, detrimental or otherwise).

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[9] Given the State's limited-time offer to receive more than seven additional years of service, it is extremely unlikely that Coburn would have passed up retirement in 2003 based on the small difference in the retirement option factor at issue here.

Order

PERF's motion for summary judgment is GRANTED. Coburn's motion for summary judgment is DENIED. The initial determination of PERF that Coburn's monthly retirement benefit be corrected and reduced to [redacted] and that the overpayment of [redacted] be collected by reduction of monthly benefit payments over a period of five years, is AFFIRMED.

DATED: November 15, 2007.

Wayne E. Uhl
Administrative Law Judge
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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 November 15, 2007:

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