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

BETTY GILLIARD, Petitioner, v. PUBLIC EMPLOYEES' RETIREMENT FUND, Respondent.	))))))))	PUBLIC EMPLOYEES' RETIREMENT FUND

RECOMMENDED DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Introduction

Betty Gilliard seeks administrative review of PERF's initial determination denying her request to change the method she selected for distribution of her annuity savings account (ASA) upon retirement. PERF contends that she elected monthly payments, that state law prohibits changing the election made by the member at the time of retirement, and that Ms. Gilliard signed paperwork acknowledging this. Ms. Gilliard contends that she desired all along to receive distribution of her ASA as a lump sum, but did not understand the paperwork she signed.

Ms. Gilliard filed papers which the ALJ construed as a motion for summary judgment. PERF filed a cross-motion for summary judgment. Neither party requested hearing. The motions are fully briefed and ready for decision.

Findings of Undisputed Fact

1. Betty Gilliard became a member of PERF when she was employed by Gary Community School Corporation (Gary Schools) on October 23, 1985.

2. On October 17, 2008, PERF employee D. Koers made a computer entry that she answered a question for Ms. Gilliard, processed an estimate of benefits, and faxed it to Ms. Gilliard. The data used to process the estimate included Ms. Gilliard's age, her average salary at the time, her service of 23 years and two months, and an ASA balance of [redacted]

3. On May 22, 2009, PERF employee K. Mayo made a computer entry that Ms. Gilliard gave her verbal permission to speak with a Ms. Cherry regarding her account. Employee Mayo also noted that she mailed a benefit estimate and gave figures for benefit Option 20. The information used to generate the estimate included Ms. Gilliard's age, her

average salary, creditable service of 23 years and 10 months, and an ASA balance of [redacted]

4. A copy of the estimate mailed to Ms. Gilliard was not retained. Based on the information used to generate the estimate on May 22, 2009, Option 20 was described as receiving a monthly benefit for life, with no pension payments to anyone after death, and with any remaining balance of the ASA refunded to the member's beneficiary or estate. The estimated monthly benefit for Option 20 was [redacted] "Without ASA," and [redacted] "With ASA."

5. On June 8, 2009, PERF received a Retirement Application bearing Ms. Gilliard's notarized signature dated May 22, 2009. The application designated a retirement date of September 1, 2009.

6. Page 2 of the application listed seven pension benefit options and some instructional material, including: "*Once you select a pension option, you cannot change it, except under certain circumstances (IC 5-10.2-4-7).*" (Emphasis in original.)

7. The only box checked on the pension option page was the box for the following:

> **Benefit with No Guarantee (Option 20):** You will receive a monthly benefit for life, but there are no monthly payments to anyone after your death. However, the balance of your Annuity Savings Account will be refunded to your beneficiary or estate if it is larger than the payments previously made to you. Only list beneficiary information in Step 4 if you choose to Leave Your Annuity Savings Account Invested with PERF OR Combine ASA with Lifetime Pension Benefit in Step 5.

8. Page 3 of the application, which would contain Step 4 (naming of a beneficiary for the ASA) is not included in the materials filed by PERF in support of its summary judgment motion. Therefore, it is unknown whether Ms. Gilliard named a beneficiary for the balance of her ASA.

9. Page 4 of the application contained the section labeled "STEP 5: Select Your Annuity Savings Account Payment Method – Required."

10. Step 5 had four choices with boxes to check. The first choice was "Elect Not to Receive Any ASA Distribution at this Time." This choice explained that the ASA balance would remain invested with PERF, but that distribution must begin at age 70½.

11. The second choice, checked by Ms. Gilliard, was "Combine ASA with Lifetime Pension Benefit" and explained:

> I choose to receive, as part of my monthly benefit, the total amount of my Annuity Savings Account. I understand that this monthly payment will continue

for my lifetime and that I will not receive any other distribution from my Annuity Savings Account.

12. The third choice was "Withdraw Entire ASA" with the explanation "I choose a complete distribution of my Annuity Savings Account as follows" followed by elections for the Taxable Portion and the 1986 Tax Basis (Non-taxable) Portion.

13. The fourth choice was "Withdraw 1986 Tax Basis (Non-taxable) Portion of ASA and Combine Taxable Portion with Pension Benefit."

14. The only box checked on under Step 5 was the box next to the second choice, "Combine ASA with Lifetime Pension Benefit."

15. On subsequent pages, Ms. Gilliard did not check any of the boxes that would be checked had she elected distribution of her ASA, such as an election for expedited payment or to have state income tax withheld.

16. Ms. Gilliard signed and printed her name before a notary public. The language above her signature included this statement: "I have carefully read the form and understand it, and I have read all of the information included with the application."

17. The signature page also included, in larger italics type, the following: "*I understand that after this application is processed, I cannot change the selections I have made, except in very limited circumstances.*"

18. Apparently (although not shown by the record), pursuant to the elections she made, upon her retirement on September 1, 2009, Ms. Gilliard began receiving a monthly benefit that included annuitized payments of her ASA.

19. Ms. Gilliard's communications with PERF before December 9, 2009, are not in the record, but apparently she complained that she had not received distribution of her entire ASA.

20. On December 1, 2009, PERF responded to a congressman who had written to PERF on Ms. Gilliard's behalf on October 23, 2009. PERF's letter stated that PERF processed her retirement based on the options she selected, and that state law prohibits a retiree from making changes after the retirement has been processed except under very limited circumstances not applicable to her situation. The letter stated that all communications with Ms. Gilliard had been over the telephone, and that she would be mailed an initial letter of determination with notice of her appeal rights.

21. PERF treated its letter to the congressman as its initial determination.

22. By letter dated December 9, 2009, Ms. Gilliard requested an appeal "to make changes in the distribution of my PERF funds." She stated that she wanted to "withdraw the full amounts credited to my Annuity Savings Account (less withholdings) upon separation of

employment." She further stated that she wanted her monthly pension benefits paid with Option 20 for life.

23. In support of her summary judgment motion, Ms. Gilliard has submitted her affidavit stating that when she originally filled out the application at the Gary Schools Business Office, a school employee advised her to use Option 20 "because she asked if I wanted everything that I could get, so I answered 'yes.' "

24. Ms. Gilliard thought she was electing an option that would allow her to receive monthly benefits and "a lump sum for my twenty-four years of service." She needed the "lump sum" for home repairs, medical bills and other financial obligations.

25. When the lump sum did not arrive, Ms. Gilliard went back to the school business office and asked the same employee who helped her about her lump sum, and the employee responded, "What lump sum?"

26. Ms. Gilliard testifies that she "did not fully understand the application options

[redacted]

27. Ms. Gilliard further states that she retired early due to a fall while at work,

[redacted]

[redacted]

29. Ms. Gilliard has also submitted the affidavit of Norma Flores, who states that she has known Ms. Gilliard for 25 years. She states in pertinent part:

[redacted]

So when Mrs. Gilliard says she did not understand, she truly did not.

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). Summary judgment may be rendered upon fewer than all the issues or claims. *Id.*

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. 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 and Genuine Issues of Material Fact

Neither party has challenged the admissibility of the opposing party's evidence. Nor has either party argued that there is a dispute of material fact that prevents summary judgment for the opposing party.

Issue

Whether the ASA distribution election made by Ms. Gilliard at the time she applied for retirement benefits may be changed.

Discussion

It is undisputed that when she filled out and signed her retirement application, and after selecting Option 20, Ms. Gilliard unambiguously checked the box electing to combine her ASA with her lifetime pension benefit in monthly payments, and she did not check the box for withdrawal of the entire ASA. She now states that her intention all along was to select Option 20 and request distribution of her entire ASA in a "lump sum."

By statute, the retirement benefit consists of a pension based on employer contributions and an annuity provided by the amount in the ASA. Ind. Code § 5-10.2-4-2(a). But a member who has not previously withdrawn the entire amount in the ASA may choose at retirement to receive a distribution of the entire amount in the ASA, or defer any distribution of the ASA. Ind. Code § 5-10.2-4-2(b) and (c). The PERF statute further provides:

> Except as provided in subsection (c) or section 7.2 of this chapter, a member who files for regular or disability retirement *may not change*:
>
> (1) the member's retirement option under subsection (b);
> *(2) the selection of a lump sum payment under section 2 of this chapter;* or
> (3) the beneficiary designated on the member's application for benefits if the member selects the joint and survivor option under subsection (b)(1);
>
> after the first day of the month in which benefit payments are scheduled to begin. For purposes of this subsection, it is immaterial whether a benefit check has been sent, received, or negotiated.

Ind. Code § 5-10.2-4-7(d) (emphasis added). When Ms. Gilliard retired, the phrase "lump sum" did not appear in § 5-10.2-4-2, so "selection of a lump sum payment" plainly referred to the election to withdraw the entire ASA upon retirement.[1]

Subsection (d)(2) could be read literally to apply only when the member *selects* a lump sum payment, which Ms. Gilliard did not do here. But the more natural reading is that the statute prevents the member from changing the selection of *whether* to take a lump sum payment. This is the better reading because the actuarial integrity of the fund may be impacted if the member changes her election after PERF has taken control of the ASA and annuitized it based on the member's life expectancy.

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[1] An amendment effective on January 1, 2010, added a sentence to § 5-10.2-4-2(a) permitting PERF to distribute an ASA of less than $1,000 in a "lump sum payment" regardless of the member's election. Ind. Pub. L. 115-2009, § 6. Because this language was added later, and because the member does not elect to receive this particular "lump sum," the restriction in § 5-10.2-4-7(d) is not limited to this narrow form of "lump sum."

Therefore, by statute, Ms. Gilliard cannot change her election to have her ASA distributed as an annuity. The next question is whether, as a matter of Indiana common law, Ms. Gilliard can rescind her election based on her alleged inability to understand what she was doing when she filled out and signed the retirement application.

There is no allegation that PERF supplied Ms. Gilliard with incorrect, misleading or incomplete information about her election. Therefore, the doctrine of equitable estoppel does not apply. The allegation is that, notwithstanding clear direction, Ms. Gilliard lacked the understanding to intelligently decide her retirement elections.

This appears to be a question of first impression in Indiana. PERF correctly points out that the courts of other jurisdictions have analyzed the capacity to make retirement elections under principles of contract law. Many such cases involved a putative beneficiary or estate claiming that a deceased member lacked the capacity to make an election that resulted in no benefit to the survivor. Leading cases include *Ortelere v. Teachers' Retirement Board of City of New York*, 250 N.E.2d 460 (N.Y. 1969); *Estate of McGovern v. State Employees' Retirement Board*, 517 A.2d 523 (Pa. 1986); and *Ex parte Employees' Retirement System Bd. of Control*, 767 So.2d 331, 335 (Ala. 2000).

The courts balance the unjustness of holding the member to ill-advised elections against the retirement fund's actuarial and administrative need for certainty in executing the written elections submitted.[2] Unless they are presumed valid, contracts become an unreliable method of business if each one is potentially unenforceable or subject to rescission based on a claim that the contracting party did not understand it.[3] Even the more lenient cases, such as *Ortelere*, require a showing that the retiree was mentally ill when she made her election and that the mental illness rendered her unable to understand what she was doing, or subject to an impulse to act irrationally. *Ortelere* quoted with approval the standard set forth in the *Restatement (2d) of Contracts* § 15 (1981):

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[2] As one court observed, the rules governing a retirement plan "are based on actuarial principles and must be strictly enforced in order to assure that funds will be available to pay all those relying on the plan. While the rule that an election, once made, is irrevocable, appears harsh in [some] circumstances . . ., PERS must enforce that rule in order to protect all members of the plan. *Willis v. Board of Administration, Public Employees' Retirement System*, 181 Cal.App.3d 779, 783, 226 Cal.Rptr. 567, 569 (1986). *See also Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1016 (3rd Cir. 1997) (barring post-retirement changes to a participant's election or joint annuitant designation is justified).

[3] Thus, a person is "assumed to have read and understood the documents he signed; a lack of understanding or failure to read the contract's provisions does not relieve a party from the terms of that agreement." *Colvin v. Larry E. Webb Construction Co.*, 542 F.Supp.2d 890, 896-97 (N.D. Ind. 2008) (applying common law in ERISA action).

(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect

(a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or

(b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

(2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.

The *Ortelere* court concluded with this eloquent policy statement:

> Nor should one ignore that in the relationship between retirement system and member, and especially in a public system, there is not involved a commercial, let alone an ordinary commercial, transaction. Instead the nature of the system and its announced goal is the protection of its members and those in whom its members have an interest. It is not a sound scheme which would permit 40 years of contribution and participation in the system to be nullified by a one-instant act committed by one known to be mentally ill. This is especially true if there would be no substantial harm to the system if the act were avoided. On the record none may gainsay that her selection of a 'no option' retirement while under psychiatric care, ill with cerebral arteriosclerosis, aged 60, and with a family in which she had always manifested concern, was so unwise and foolhardy that a factfinder might conclude that it was explainable only as a product of psychosis.

250 N.E.2d at 466.

At the other end of the spectrum, the Alabama Supreme Court held that where the retirement plan receives a clear and unambiguous election form, it is not required to look beyond the face of that form. "To permit a surprised, disappointed, or disgruntled beneficiary to change an ERS member's retirement-benefits election that is clear on its face, after events have made the election undesirable, would wreak havoc on the retirement system." *Ex parte Employees' Retirement System*, 767 So.2d at 335.

The Pennsylvania Supreme Court held in *Estate of McGovern* that it is presumed that an adult is competent to enter into an agreement, and a signed document gives rise to the presumption that it accurately expresses the intent of the signing party. This presumption may be rebutted by evidence of mental incompetence that is clear, precise and convincing. Mere

mental weakness, if it does not amount to inability to comprehend the contract, is insufficient to set aside the contract. A presumption of incapacity does not arise merely because of an unreasonable or unnatural disposition of property. The court emphasized that evidence of incompetence must be contemporaneous to the time at which the decision was made, which is given greater weight than evidence of the person's condition before or after. The court criticized and rejected the standard of the *Restatement of Contracts* (quoted above) as permitting *post-hoc* determinations of reasonableness.

Assuming that Indiana courts would also apply capacity-to-contract principles to this case, Indiana law is that "[t]he test for determining a person's mental capacity to contract is whether the person was able to understand in a reasonable manner the nature and effect of his act. . . . In order to avoid a contract, the party must not only have been of unsound mind, but also must have had no reasonable understanding of the contract's terms due to his instability." *Wilcox Mfg. Group, Inc. v. Marketing Services of Indiana, Inc.*, 832 N.E.2d 559, 562 (Ind. App. 2005), citing *Gallagher v. Central Indiana Bank, N.A.*, 448 N.E.2d 304, 307 (Ind. App. 1983). Evidence of the contracting party's mental condition both before and after the execution of the contract is admissible, and proof of unsoundness of mind of a permanent nature raises an inference that such condition continues until the contrary is shown. *Nichols v. Estate of Tyler*, 910 N.E.2d 221, 227 (Ind. App. 2009) (citing cases).

In *Gallagher*, a man was found by the trial court to be competent to understand and enter into a mortgage agreement, notwithstanding that he had suffered a stroke, his doctor testified that he was unable to understand a mortgage transaction, and a local judge opined that he was incompetent. The court gave greater weight to the fact that the man had participated in several relatively complex business transactions both before and after he signed the note at issue, and the appellate court affirmed. 448 N.E.2d at 306-07. In *Nichols*, however, expert medical testimony that a man was mentally incompetent at the time he signed a contract, plus an extensive history of mental illness, Alzheimer's Disease, and abnormal behavior were sufficient to support the trial court's finding that he was not competent to enter into a contract to purchase realty. 910 N.E.2d at 227-28.

Evaluating mental capacity to contract is closely akin to evaluating the capacity to make a will. *Nichols*, 910 N.E.2d at 227. In a testamentary capacity case, *Hays v. Harmon*, 809 N.E.2d 460 (Ind. App. 2004), summary judgment finding that the decedent was competent was granted and affirmed. Affidavits and depositions showed that the decedent fully understood his finances and was otherwise mentally competent. Evidence by the party opposing summary judgment that the decedent "had periods of time where he was zoned out" or behaved in a paranoid manner "for up to an hour a day" was insufficient to raise an issue of material fact as to testamentary capacity. *Id.* at 464-66.

In another testamentary capacity case, *Kronmiller v. Wangberg*, 665 N.E.2d 624 (Ind. App. 1996), summary judgment was granted in favor of finding the decedent competent. The court noted that every person is presumed to be of sound mind to execute a will until the contrary is shown. The estate submitted evidence that the decedent was competent when he

signed the will. The parties contesting the will submitted evidence that the decedent's house was filthy; there were vermin droppings in the kitchen; he mistreated his wife; he refused delivery of meals although his wife was very thin; he received a check but did not know what it was for; and he was seen driving his tractor in circles around the cornfield. The appellate court held that this evidence was insufficient to raise a genuine issue of material fact as to his competency. *Id.* at 628-29.

On the other hand, in *Gast v. Hall*, 858 N.E.2d 154 (Ind. App. 2006), the appellate court reversed the trial court's grant of summary judgment on the question of testamentary capacity. The party contesting the will tendered evidence that a court had appointed a guardian *ad litem* for the decedent three days before he signed the will; the decedent's will illogically bequeathed all his property to a nephew who was his adversary in litigation, superseding an earlier will in which he left none of his property to the nephew; the decedent did not even recognize the nephew when they attended a mediation in the earlier lawsuit; the decedent was fixated on a story about the sale of a horse that actually occurred 20 years earlier; and the decedent did not understand the nature of the earlier litigation based on his conduct during the mediation. This evidence created a genuine issue of material fact as to whether he was of sound mind when he executed the second will. *Id.* at 164-66.

In this case, PERF has shown that Ms. Gilliard submitted her retirement application with her choices clearly marked. The ASA distribution box that was checked clearly stated "Combine ASA with Lifetime Pension Benefit," and stated that the ASA would be received "as part of my monthly benefit" and that the "monthly payment will continue for my lifetime and that I will not receive any other distribution from" the ASA. Ms. Gilliard signed the form certifying that she had read and understood it, and that she would be unable to change her selections except in very limited circumstances. As noted above, there is no contention here that PERF misled Ms. Gilliard or that the form itself was confusing or unclear. There is, therefore, a strong presumption that Ms. Gilliard was mentally competent, and read and understood the selections she made.

Ms. Gilliard has the burden of overcoming this presumption with evidence that, at the time she made her elections, she lacked the mental capacity to validly enter into a contract. Under Indiana law, she must show both that she was of unsound mind and that she did not actually understand what she was signing. The evidence she has submitted does not create a dispute of material fact on this question.

Viewed in a light most favorable to her, the evidence indicates that when she signed the application in May 2009, Ms. Gilliard was in pain and on medication that "could have hindered [her] understanding" of her options and decisions. She relied on others to assist her with decisions. She gave PERF permission to communicate with Ms. Cherry at Gary Schools, and Ms. Flores apparently spent considerable time trying to explain her union's insurance coverage.

This evidence falls short of the showing required to invalidate a contract based on mental incapacity. There is no indication or medical evidence that Ms. Gilliard was mentally ill or of unsound mind. She is literate. She selected Option 20 which was the option she wanted. Ms. Flores' affidavit suggests that Ms. Gilliard is capable of understanding financial matters when they are properly explained, but she is too nervous or embarrassed to ask questions. The evidence also suggests that there was a miscommunication between Ms. Gilliard and Ms. Cherry who was assisting her in filling out the form, but that miscommunication by itself cannot be the basis for finding that Ms. Gilliard lacked the capacity to make the elections she made.

Because there is no dispute of material fact as to the elections Ms. Gillard made or her mental capacity to make them, the law does not permit her to change them, and summary judgment in favor of PERF is warranted.

Recommended Order

Petitioner Betty Gilliard's motion for summary judgment is denied, and PERF's cross-motion for summary judgment is granted. PERF's initial determination, denying Ms. Gilliard's request to change her election for distribution of her ASA, is affirmed.

DATED: May 18, 2010.

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 May 18, 2010:

Betty Gilliard
[redacted]

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Wayne E. Uhl
Administrative Law Judge