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

IN THE MATTER OF DELORES H. JACKSON, Petitioner v. INDIANA STATE TEACHERS' RETIREMENT FUND, Respondent,	))))))))))	INDIANA STATE TEACHERS' RETIREMENT FUND

FINAL ORDER

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

1. The Administrative Law Judge issued a Decision and Order in this matter on October 7, 2010 denying in part and granting in part the motions for summary judgment.

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

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

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

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

DATED October 29, 2010

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

CERTIFICATE OF SERVICE

I certify that on the 29th day of October, 2010, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

Distribution:

Delores Jackson

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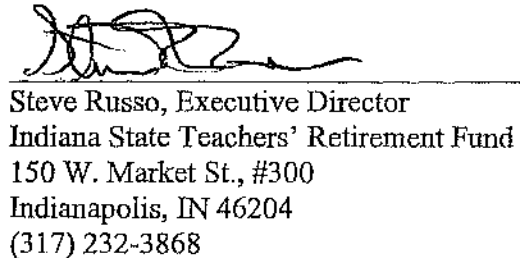
Indiana State Teachers' Retirement Fund
150 West Market St., #300
Indianapolis, Indiana 46204

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



Steve Russo, Executive Director
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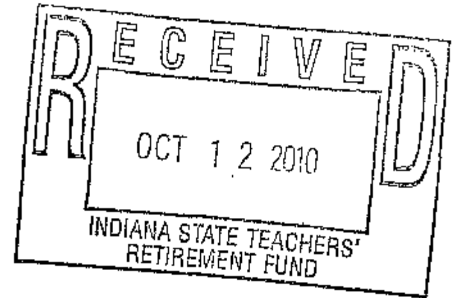
BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE INDIANA STATE TEACHERS' RETIREMENT FUND



DELORES H. JACKSON,)
Petitioner,)
)
v.)
)
INDIANA STATE TEACHERS')
RETIREMENT FUND,)
Respondent.)

DECISION AND RECOMMENDED ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Introduction

Delores Jackson seeks administrative review of TRF's initial determination that she was overpaid benefits in the amount of $ during the 2004-2005 school year, because her retirement benefit should have stopped when she exceeded a maximum of $ in earnings. In her summary judgment response, she seeks recovery of $ in benefits not paid to her after she reached the $ maximum in 2003-2004.

Pursuant to a schedule agreed to by the parties and later modified by order, TRF filed a motion for summary judgment to affirm its initial determination. Petitioner's response is treated as a cross-motion for summary judgment. Neither party requested a hearing and the motions are fully briefed.

Material Facts [1]

1. Petitioner was born in October 1940. While her certified service record has not been introduced, she has submitted documents indicating that she served as a teacher in the Evansville-Vanderburgh Schools (EVS) from 1971 to 2002, for Indianapolis Public Schools (IPS) from 2003-2005, and again for IPS from 2006-2007 (Pet. App. 1, Professional Profile).

2. Petitioner retired from EVS effective May 23, 2002 (Pet. App. 2).

3. Petitioner applied to TRF for regular retirement at the end of the 2001-2002 school year, listing her Evansville address (TRF Ex. A at 1). She selected a benefit option

[1] To the extent that duplicate exhibits were filed by both parties, citation to one party's exhibit does not reflect a preference over the other party's submission of the same exhibit.

whereby she would receive a monthly benefit for life with no post-mortem payments to a beneficiary (*id.* at 2). She elected to have all of the taxable portion of her annuity savings account (ASA) rolled over to an individual retirement account or qualified retirement plan, and the non-taxable portion paid directly to her (*id.* at 4). The application did not contain any notice or advice regarding re-employment after retirement.

4. TRF notified petitioner in July 2002 that her application was complete and she would begin receiving her benefits (Pet. App. 2). According to later correspondence written by an attorney for TRF, petitioner began receiving her TRF retirement benefit in October 2002 (TRF Ex. Q).

5. From other later correspondence, it appears that petitioner's ASA remained intact, neither rolled over nor distributed to her. (*See* TRF Ex. N, reporting an ASA balance of $[redacted] as of January 27, 2010.) The record does not reflect why the ASA was not distributed in accordance with the election made in the first retirement application.

6. In November 2002, petitioner submitted an application for direct deposit of her benefit to an account at the Evansville Teachers Federal Credit Union. This application continued to show her Evansville address. (Pet. App. 12.)

7. In 2002, Ind. Code §§ 5-10.2-4-8 and -10 provided that upon re-employment more than 90 days after retirement, the benefits of a retired member who had not attained the Social Security normal retirement age for unreduced benefits "shall stop" when the member has earned more than the "exempt amount," defined to be $[redacted], during the fiscal year. Employer contributions continued. Upon termination of the re-employment, the member would receive an additional retirement benefit. *See* Ind. P.L. 246-2001, §§ 6, 8 (SEA 107).

8. For a person born in 1940, the Social Security normal retirement age for unreduced benefits is 65 years 6 months (TRF Ex. C). Petitioner would reach this threshold in April 2006.

9. Petitioner was unaware of the income restriction (Pet. Resp. 1-2).[2]

10. TRF contends that members were made aware of the restriction in various ways. TRF's "common practice" was to send out retirement applications with a cover letter stating, "If you are under normal Social Security retirement age and you are re-employed in a position covered by this Fund or the Public Employees' Retirement Fund, your benefits will be suspended if you earn more than $[redacted] in a *fiscal* year." (TRF Ex. 1, Farley Affidavit ¶¶ 4–6 & Ex. 1-A.) But "common practice" does not mean that the blank application used by

[2] Petitioner's statement comes not only in her response to TRF's motion for summary judgment, but also in other correspondence that is part of the record. None of petitioner's statements is sworn or verified under penalties for perjury, but TRF has not objected to them on that basis so they will be accepted for the purposes of summary judgment.

petitioner was accompanied by the cover letter, especially given the possibility that petitioner obtained the application (without the cover letter) from her employer.

11. Katrina Farley testifies that the state form version number of the blank retirement application, R19/11-00 (Farley Ex. 1-A), is the same as the version number of the application petitioner actually submitted in 2002 (Farley Ex. 1-B), from which TRF draws the inference that petitioner's application also had the cover letter. However, the same version number appears on petitioner's second retirement application submitted in 2009 (TRF Ex. B), even though that application varies significantly from the first application. Thus, one cannot infer from the version number that documents were identical.

12. TRF issued member newsletters in Summer 2001 and Fall 2004, advising members of the income limitation (TRF Ex. U at 3; TRF Ex. V at 2). However, there is no evidence that petitioner received a copy of either newsletter. Furthermore, the Summer 2001 newsletter would have been published a full year before petitioner retired, and the Fall 2004 newsletter may have been sent to the wrong address (see below).

13. Petitioner never saw the newsletters (Pet. Resp. at 2).

14. TRF sent newsletters to employers advising them of the income restriction and requesting that TRF be notified immediately if a retired, re-employed member reached the limit (TRF Ex. 2, Horner Affidavit ¶¶ 10–14 & Exs. D, E). It cannot be inferred from newsletters sent to employers that employees had notice of their contents.

15. For these reasons, for the purposes of summary judgment, it is undisputed that petitioner did not have actual notice of the income restriction until 2009 (see below).

16. Petitioner was retired for one year, and then was employed by IPS in the fall of 2003. She moved to Indianapolis in September 2003. (Pet. Resp. at 5.)

17. On January 6, 2004, IPS reported to TRF that petitioner's earnings during the 2003-04 fiscal year had reached $[redacted] on December 15, 2003 (TRF Ex. 2, Horner Affidavit ¶ 5 & Ex. 2-A).

18. By letter dated January 9, 2004, and addressed to petitioner at her Evansville address, TRF notified petitioner that she was not entitled to retirement benefits for the remainder of the fiscal year, that $[redacted] of her January 2004 check must be refunded (reflecting overpayment after December 15, 2003), and that her benefit would resume in August 2004 (TRF Ex. 2, Horner Affidavit ¶ 6 & Ex. 2-B).

19. Petitioner did not receive the January 9, 2004 letter because she had moved to Indianapolis in September 2003 to teach at IPS, although she did receive some forwarded mail (Pet. Resp. at 5).

20. Petitioner was unaware that her retirement benefit stopped in February 2004 because her benefits were still being deposited in Evansville and she was not paying close

attention to the balance (Pet. Resp. at 6). Her credit union statement was being mailed to her Indianapolis address and clearly shows substantial activity (Pet. App. 13 at 3). Petitioner's Form 1099-R for the 2004 calendar year does reflect a substantial decrease in her TRF benefit from 2003 (Pet. App. 13 at 1).[3] She apparently received these forms even though they were mailed to her Evansville address. Nevertheless, for the purposes of summary judgment, it will be taken as undisputed that petitioner did not receive the letter dated January 9, 2004, and was unaware that her benefit stopped.

21. Petitioner's benefits were deemed to resume effective August 2004, and TRF deducted the $ from the August benefit payment (TRF Ex. F, H). However, the benefits for August through December 2004 were paid in a lump sum deposit of $ on December 1, 2004 (Pet. App. 13 at 3).[4]

22. If petitioner's benefit had not stopped due to the income limitation, and TRF had not collected the $ overpayment, petitioner would have received a total of $, or $ more than what she actually received.

23. Petitioner continued working for IPS in 2004-2005. There is no evidence that IPS notified TRF that petitioner reached the $ earnings limit during that year.

24. Petitioner did not work for IPS in 2005-2006, but IPS later reported that she received $ in salary as a "carryover from 04-05" (TRF Ex. A at 7). In any event, she did not approach the earnings limitation in 2005-2006, which by then had increased to $ Ind. P.L. 62-2005, § 3 (SEA 149).

25. Petitioner resumed full-time employment for IPS in October 2006 and was reported to have earned $ during 2006-2007 (TRF Ex. A at 7), but she had reached the Social Security normal retirement age in April 2006 so the limit was not an issue.

26. It appears that petitioner continued to receive her monthly retirement benefit after leaving IPS. By January 2010, the monthly benefit was $ (TRF Ex. P at 2.)

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[3] Petitioner's Forms 1099-R reflect that she received gross benefits of $ in calendar 2003 and $ in 2004 (Pet. App. 13).

[4] Exhibits F and H show that petitioner's gross (pre-tax) monthly benefit in 2004 was $ She received a payment in January 2004 and payments stopped. The first "resumed" benefit payment, for August, was reduced to $ by the $ overpayment. This is consistent with the Form 1099-R showing gross benefits of $ in 2004 (Pet. App. 13), because

Apparently the "resumed" benefits for August–December 2004 were paid in a lump sum of on December 1, 2004, as shown by a bank statement from petitioner's credit union (Pet. App. 13 at 3). The amount is consistent with the above analysis, because The lump sum is unexplained but immaterial.

27. In 2007 and 2008, the General Assembly made several amendments to Ind. Code §§ 5-10.2-4-8 and -10. *See* Ind. P.L. 72-2007, §§ 5, 7 (SEA 88); Ind. P.L. 76-2008, §§ 2, 4 (SEA 51); Ind. P.L. 130-2008, § 1 (HEA 1119). Relevant here, these amendments completely removed the earnings limitation and permitted petitioner, upon termination of her re-employment, to apply for the additional or supplemental retirement benefit.

28. Sometime before February 2009, petitioner was required to pay a refund to Social Security. She had orally informed Social Security of her re-employment and the checks stopped, but then resumed. She knew the checks were arriving but hoped that the law had changed in her favor. (Pet. Resp. at 6.)

29. On February 2, 2009, Petitioner applied for "second" retirement and the additional benefit based on her years of re-employment. She again selected a straight life benefit without any payment to a beneficiary. She made no election with respect to her ASA. (TRF Ex. B.) [5]

30. In support of the application, IPS reported that petitioner's salary paid was [redacted] in 2003-04 and $[redacted] in 2004-05. (TRF Ex. A at 7-8.)

31. Upon review of petitioner's salary history, TRF staff discovered that she had exceeded the $[redacted] limit in 2004-2005. By email dated February 21, 2009, TRF asked IPS for the date on which petitioner had reached the $[redacted] limit, and IPS responded two days later that she had reached the limit on November 25, 2004 (TRF Ex. G).

32. By email on February 23, 2009, TRF staff informed petitioner that her additional benefit for her three years of re-employment would be $[redacted] month (TRF Ex. I). TRF did not begin paying that additional benefit.

33. The same email informed petitioner that because she had earned more than $[redacted] in 2004-2005, and her retirement benefit should have stopped, she was overpaid $[redacted] The email stated that a repayment plan must be agreed to, and proposed two "possible" methods: (1) Reducing her monthly benefit by $[redacted] for five years, or (2) applying her ASA balance ($[redacted]) to the overpayment and reducing her monthly benefit by $[redacted] for five years. The email stated that other repayment methods could be used, and asked petitioner to contact TRF to discuss the alternatives.

34. TRF staff sent a second email dated March 7, 2009, stating that no response had been received from petitioner and asking that she make contact to discuss "payment alternatives" (TRF Ex. J).

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[5] The 2009 retirement application included express warnings about limitations on benefits after re-employment (TRF Ex. B at 5). Such warnings were not on the 2002 application that petitioner signed.

35. By letter dated April 23, 2009, TRF staff reiterated its conclusion that petitioner had been overpaid $[redacted] The letter added a third repayment option by which the accumulated additional benefit would also be applied to the overpayment. (TRF Ex. K.)

36. On May 7, 2009, petitioner responded by stating that she had been unaware of the earnings limitation and objecting to the determination that she owed repayment. She stated that she had not responded to the emails because she thought they were fraudulent. While she objected to the repayment, she stated, "About the $165.00 [additional benefit], I need it but will wait five years just to be cooperative." (TRF Ex. L.)

37. By letter dated October 30, 2009, TRF staff again notified petitioner of the need to repay $[redacted] The letter stated that petitioner's additional benefit (retroactive to June 1, 2007) had been withheld and so far had satisfied $[redacted] of the overpayment, leaving $[redacted] TRF "suggest[ed]" that petitioner's ASA ($[redacted]) be applied to the balance, and that the supplemental benefit of $[redacted] continue to be withheld, which would complete repayment without reduction of the original benefit by January 2011. Petitioner was asked to sign the letter and return it to indicate her agreement to this plan. (TRF Ex. M.)

38. By letter dated January 27, 2010, TRF staff again notified petitioner of the issue. By this time, the withheld additional benefit payments totaled about $[redacted], leaving a balance of about $[redacted] Again, TRF "suggest[ed]" application of the ASA [redacted] which would reduce the overpayment balance to $[redacted] The letter suggested repayment of this balance by reducing petitioner's monthly benefit by $[redacted] for one year. The letter again asked petitioner to sign and return it to indicate her agreement. It further stated: "If we do not receive a response by February 15, 2010, TRF will be forced to begin recovery of the overpayment." (TRF Ex. N.)

39. Petitioner responded by letter dated February 5, 2010. She again objected that she had no prior knowledge of the $[redacted] earnings limitation. She further stated that TRF did not have permission to take the retirement she had earned. Thus petitioner rejected all of the proposed repayment plans. (TRF Ex. O.)

40. On February 18, 2010, TRF counsel wrote a letter reiterating TRF's position that petitioner had been overpaid $[redacted] The letter concluded, "TRF will proceed with the recovery plan outlined in the January 27, 2010 letter to you . . . . Under this plan, TRF will apply the balance in your Annuity Savings Account (ASA) and the retroactive pension benefits from your second retirement date of June 1, 2007 to the total amount owed. The remainder will be deducted from your monthly retirement benefit in equal installments over the next year." (TRF Ex. Q.)

41. The February 18 letter notified petitioner of her right to seek judicial review within 15 days of receipt (TRF Ex. Q). She did so by petition and letter dated February 27, 2010 (TRF Ex. R).

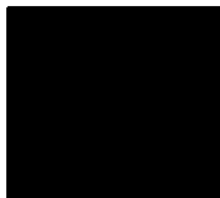
42. At a prehearing conference on April 1, 2010, TRF counsel stated that action had already been taken to implement the repayment plan, including transfer of petitioner's ASA on

TRF's books and adjustment of her monthly payment effective with her benefit check for March 1, 2010.

43. Petitioner's motion to stay implementation of the repayment plan was denied by the ALJ by order dated April 13, 2010. Because the repayment plan proposed to start payment of the supplemental benefit and then reduce the total benefit for one year, petitioner's benefit increased by $1 month starting on March 1, 2010. (TRF Ex. P.)

44. Under the TRF repayment plan implemented on March 1, 2010, the ongoing recoupment of the $ is proceeding as follows:

Overpayment
Withheld additional benefits (6/1/07–2/28/10)
Annuity savings account
Balance owed



To pay off this balance, starting on March 1, 2010, TRF started petitioner's additional benefit of about $167/month but reduced the benefit by $ so her benefit actually increased by Thus, effective March 1, 2011, the overpayment will be repaid and petitioner's benefit will increase to the full amount, approximately

45. Petitioner has submitted some documentation attempting to explain her current income and expenses, but the documentation is neither well-explained nor self-explanatory (Pet. App. 14, 15).

46. Petitioner has stated that she "takes home" about $ a month in TRF and Social Security benefits (TRF Ex. X at 2). One of her exhibits suggests that her total monthly income is (Pet. App. 14). Her TRF benefit (after withholding) appears to be about (Pet. App. 14). Her Social Security benefit is at least $[6]

47. Petitioner has various budgeted expenses and a regular charitable contribution that, not including her mortgage payment, appear to be about $ month (Pet. App. 14). Her monthly mortgage payment (including escrow) is $ (Pet. App. 15).[7]

[6] Petitioner's Social Security benefit in 2004 was $ month (Pet. App. 12).

[7] The mortgage statement shows that the June 2010 monthly payment was $ in principal, in interest, and for escrow, with a loan balance of (This is quite consistent with the principal and interest for a 30-year loan of .) It also shows that she made additional principal reduction payments of $ in May and $ n June. (Pet. App. 15.) Thus, when she states that she is budgeting varying amounts for her house note it appears that anything over month is discretionary principal reduction, not the minimum mortgage payment.

48. Any finding of fact inadvertently included in the Conclusions of Law below is incorporated by reference.

Conclusions of Law

Legal standard

Summary judgment "shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code § 4-21.5-3-23(b).

As with motions under Ind. Trial Rule 56, a genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and that he or she is entitled to a judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Comm'r, Indiana Dep't of Environmental Management*, 820 N.E.2d 771, 776 (Ind. App. 2005) (citing cases).

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

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

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

Issues

1. Whether petitioner was overpaid and is required to refund $[redacted] of benefits paid during the 2004-2005 school year?

2. Whether TRF is required to pay or credit petitioner for the $ [redacted] in benefit payments withheld from her during the 2003-2004 fiscal year?

3. If petitioner owes more than she is owed, whether TRF can collect the balance by reducing petitioner's monthly benefit and applying funds from her ASA?

Evidence

Neither party has objected to the admissibility of evidence relied upon by the other. They disagree as to the characterization of the evidence, but they do not argue that the evidence submitted by the opponent should not be considered by the ALJ because it is not in the form of affidavits or other permissible evidence, or because affidavits are not made on personal knowledge or set forth facts admissible in evidence. Ind. Code § 4-21.5-3-23. Therefore, both parties are deemed to have waived any objection to the admissibility of the evidence submitted, and all of the evidence will be considered.

Disputes of Material Fact

Neither party argues that there is a dispute of material fact that prevents summary judgment. TRF argues that petitioner has mischaracterized record evidence, but that the matters in dispute are not material.

Petitioner strongly contests whether she had notice of the income limitation. She denies that she signed an acknowledgement of the limit at the time of her first retirement in 2002, denies receiving TRF's letter notice in January 2004, and denies that she noticed that the benefit payments stopped from February through July 2004. TRF has not submitted evidence to the contrary. For the purposes of summary judgment, therefore, it is undisputed that she did not have actual notice.

Discussion

To condense the facts: Petitioner retired in Evansville in 2002 and began collecting a monthly benefit from TRF, but her ASA was not distributed or rolled over as she directed. Petitioner was unaware of the $ [redacted] income limit in place at the time.

In September 2003, petitioner was employed by IPS and moved to Indianapolis. In January 2004, TRF received notice that during the previous month petitioner exceeded the $25,000 income limit in place at the time. TRF notified petitioner that her benefit would stop and she owed a refund of $ [redacted] but she did not receive the notice, possibly because the letter was mailed to her Evansville address. She also did not realize that the payments stopped because they were being directly deposited to an Evansville credit union account. Her benefits were deemed to "resume" in August 2004, with the $ [redacted] deducted from the first month's check. The August–December benefits were paid in a lump sum on December 1, 2004.

Meanwhile, in November 2004, petitioner exceeded the $ income limit but TRF was not notified. In subsequent years, the income limit no longer applied to petitioner.

In February 2009, petitioner retired again and applied for an additional retirement benefit. Upon review of her earnings during re-employment, TRF discovered that she had exceeded the $ limit in 2004-2005. TRF notified her that she was obliged to repay $ and set forth alternatives for repayment, including reduction of her monthly benefit and/or application of her ASA balance. Petitioner objected and did not choose any of the options presented by TRF. TRF then began collection of the refund by both reducing the benefit and applying the ASA to the balance, and the ALJ denied petitioner's motion for stay.

1. Petitioner was overpaid and TRF is entitled to recovery because the limit on benefits during re-employment was statutory and mandatory.

TRF must administer the retirement plan in accordance with its terms. This is true for two reasons. First, it is axiomatic that TRF, a creature of statute, is bound to follow the statutes that define and circumscribe its powers. Petitioner does not argue that TRF is not required to follow the law.

Second, deviation from the terms of a tax-advantaged retirement plan can put at risk the plan's tax-exempt and tax-deferred status under the Internal Revenue Code (IRC), which is granted to plans that comply with 26 U.S.C. § 401 and regulations promulgated by the Internal Revenue Service (IRS). For that reason, Indiana law requires TRF to make sure that the plan remains qualified under IRC § 401. Ind. Code § 5-10.2-2-1.5. And IRC § 401 requires a qualified plan to distribute its corpus and income "in accordance with such plan." 26 U.S.C. § 401(a)(1); *see also* 26 C.F.R. § 1.401-1(a)(3)(iii) (IRS regulation that also requires distribution "in accordance with the plan"). So Indiana law requires that the plan follow federal law, which requires the plan to follow Indiana law.

TRF points out that the IRS treats an overpayment to a member as an "operational failure" that is also a "qualification failure," that is, a "failure that adversely impacts the qualification of a plan." IRS Revenue Procedure 2006-27, § 5.01(2) and (6) (May 1, 2006, published in Internal Revenue Bulletin 2006-22, May 30, 2006). If the failure is properly corrected, the plan will not lose its qualification. *Id.* § 3.01. Overpayments may be corrected by reduction of future benefits to recoup the overpayment. *Id.*, Appendix B, Correction Methods and Examples, § 2.05, which incorporates § 2.04(1) (correction of IRC § 415(b) excesses). On the other hand, 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 . . .." *Id.* § 6.02(5).

The earnings limit for retired members who were re-employed, found in Ind. Code §§ 5-10.2-4-8 (2002), was statutory and mandatory. Section 5-10.2-4-8(b) (2002) said

that when the retired member was re-employed in a covered position and reached the exempt amount of [redacted] the "retirement benefit shall stop." There is no ambiguity or discretion.

Petitioner does not argue otherwise. Instead she argues that she lacked notice of the limit. For summary judgment purposes it is undisputed that she did not have actual notice (notwithstanding TRF's efforts to notify retirees). But the statute did not require notice to the member, and in any event all persons are charged with knowledge of rights and remedies prescribed by statute. *U.S. Outdoor Advertising Co., Inc. v. Indiana Dept. of Transportation*, 714 N.E.2d 1244, 1259-60 (Ind. App. 1999), citing *Middleton Motors, Inc. v. Indiana Dept. of State Revenue*, 269 Ind. 282, 380 N.E.2d 79, 81 (1978).

Therefore, as a matter of law, TRF overpaid petitioner $[redacted] during the 2004-2005 fiscal year.

2. ***TRF correctly withheld benefits after petitioner reached the income limitation in 2003-2004, so petitioner is not entitled to those funds or an offset.***

Petitioner contends that stopping her benefit in 2004, after TRF learned that she had reached the [redacted] income limit for 2003-2004, was improper. She relies on the same arguments, that she did not have notice of the income restriction and did not receive the communications TRF sent her. The conclusions set forth above compel denial of this argument. The income limit was statutory and mandatory, so TRF had no choice but to stop the benefit. There is no requirement of prior notice to the member, and the member is deemed to be aware of the statutory provisions governing the plan.

TRF acted appropriately by alerting its members to the limitation in several different ways. TRF now has a notice about re-employment on the retirement application form, but the absence of a disclaimer on the form used by petitioner does not negate the statutory requirement. If petitioner did not receive the January 2004 letter, it was because she neglected to notify TRF of her new address in Indianapolis. If petitioner was unaware that her TRF benefit stopped for several months, it was because she neglected to check her own credit union account.

Having determined that petitioner was overpaid $[redacted] in 2004-2005, and is not entitled to payment of or credit for the [redacted] withheld in 2003-2004, the next question is the extent to which TRF can recoup the overpayment.

3. ***Collection of the refund by withholding or reducing benefits is authorized and equitable. Application of the ASA balance is not authorized.***

TRF is authorized by statute to collect overpayments by stopping the retirement benefit. Ind. Code § 5-10.4-5-15(a)(3) ("The board may stop a member's benefit if the member . . . (3) Refuses to repay an overpayment of benefits."). This statute implicitly permits TRF to reduce a member's benefit over a longer period of time rather than stop it. TRF has also

adopted a rule permitting the withholding of "benefit payments" to offset an overpayment to a member. 550 IAC 2-2-1. As discussed above, the IRS also endorses the collection of an overpayment by reduction of the benefit.

This power, however, is tempered by equitable principles. The terms of the TRF plan include the common law of Indiana, so the board's authority to collect an overpayment is subject to equitable restrictions. For example, 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). TRF is also a trust, operated by a board of trustees, and therefore subject to the common law of trusts.[8]

The IRS revenue procedure relied on by TRF is also tempered by the principle that collection of an overpayment need not be done where unreasonable or not feasible, or where it would have "significant adverse effects" on participants.

Under Indiana law, "if one party pays money to another party under a mistake of fact that a contract or other obligation required such payment, the payor is entitled to restitution." *St. Mary's Medical Center, Inc. v. United Farm Bureau Family Life Ins. Co.*, 624 N.E.2d 939, 941 (Ind. App. 1993), citing *Restatement of Restitution* § 18 (1937). This rule applies "even though the [payor] may have been careless and had failed to employ the means of knowledge which would have disclosed the mistake." *Century Bldg. Partnership, L.P. v. SerVaas*, 697 N.E.2d 971, 974 (Ind. App. 1998), citing *Monroe Financial Corp. v. DiSilvestro*, 529 N.E.2d 379, 383 (Ind. App. 1988), *trans. denied* (Ind. 1989).[9]

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.* But 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.

Very similar principles are present in the law of trusts. In the case of mistaken payments of trust assets, a trust beneficiary is liable for the amount of a payment to which the beneficiary was not entitled, and the beneficiary's interest in the trust may be charged for the

[8] *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).

[9] 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).

repayment, "unless he has so changed his position that it is inequitable to compel him to make repayment." *Restatement (2d) of Trusts* § 254 (1959). Whether it is inequitable to compel repayment is determined by examining "(1) what disposition has been made by the beneficiary of the amount by which he was overpaid; (2) the amount of the overpayment; (3) the nature of the mistake made by the trustee, whether he was negligent or not; (4) the time which has elapsed since the overpayment was made." *Id.*, cmt. d. The comment gives an example:

> Thus, if the trustee pays the beneficiary as income a large sum out of principal and the beneficiary believing that he was entitled to it spends it, and under the circumstances it would be a hardship upon him to compel him to repay the amount out of his own property, and to withhold it out of future income would result in his receiving no income over a long period, the trustee may be denied indemnity or the court may permit the trustee to retain a part of the income under the trust thereafter accruing from time to time to the beneficiary until the trustee is indemnified.

Id. In other words, if immediate repayment would leave the beneficiary in a position of extreme hardship (no income), the erroneous payment may be recovered by partial reductions in benefits over time.[10]

In this case, the evidence does not support an inference that reduction of petitioner's future benefit for some period of time to collect the $ overpayment would be inequitable. Any retiree comes to rely on the limited income that pension plans provide, but petitioner has not shown that she changed her position in reliance on the full TRF benefit, or that reduction will leave her in a state of extreme hardship. She states that when she moved to Alabama to be closer to family, she sold her home in Indianapolis at a loss of $ but was able to purchase a home in Alabama for $ less than market value (Pet. Resp. at 7). While she variously states her mortgage payment, it appears that the minimum mortgage payment of $ and other expenses of about $ are sufficiently within her monthly budget of about $ to permit some reduction of her TRF benefit without subjecting her to extreme hardship. Completely stopping the benefit to collect the overpayment in short order might be inequitable, but reducing it is not.

Even if petitioner claimed that she relied on the overpayment to incur her Alabama mortgage, that alone would not excuse repayment. *Monroe Financial*, *supra*. TRF was not negligent or culpable for the overpayment, having taken reasonable steps to notify members and employers about the income limit. TRF was dependent on employers to give notice when a re-employed member reached the income limit. Petitioner contributed to her lack of knowledge by failing to notify TRF of her new address and neglecting to check her Evansville

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[10] There are many cases, most decided under ERISA, that specifically discuss the equitable considerations that can be considered in a pension overpayment situation. The cases are too numerous to cite here. An excellent example is *Johnson v. Retirement Program Plan*, 2007 WL 649280 (E.D. Tenn. 2007).

credit union account. TRF acted promptly and diligently when the problem was discovered in February 2009. Reducing rather than stopping the benefit is the very approach endorsed by the *Restatement (2d) of Trusts* § 254.

Some of petitioner's arguments suggest the doctrines of equitable estoppel or laches, and TRF has addressed the former in its brief, but neither doctrine applies here.

Equitable estoppel applies "if one party, through its representations or course of conduct, knowingly misleads or induces another party to believe and act upon his or her conduct in good faith and without knowledge of the facts." *Terra Nova Dairy, LLC v. Wabash County Bd. of Zoning Appeals*, 890 N.E.2d 98, 105 (Ind. App. 2008), quoting *Steuben County v. Family Development, Ltd.*, 753 N.E.2d 693, 699 (Ind. App. 2001), *trans. denied* (Ind. 2002).

Laches applies where there is (1) inexcusable delay in asserting a right, (2) implied waiver arising from knowing acquiescence in existing circumstances, and (3) a change in circumstances causing prejudice to the adverse party. *SMDfund, Inc. Fort Wayne-Allen County Airport Authority*, 831 N.E.2d 725, 729 (Ind. 2005); *In re Paternity of J.A.P.*, 857 N.E.2d 1, 10 (Ind. App. 2006).

Extended discussion of these principles is not required, because there is no evidence that TRF knowingly misled petitioner, or knowingly or even negligently delayed its pursuit of recovery. There is no claim that TRF misled petitioner at all. As noted above, TRF was reliant on school employers and TRF acted diligently when it learned of the overpayment.

Therefore, TRF was authorized to collect the overpayment by withholding and reducing petitioner's benefit, and equitable principles do not restrict TRF's ability to do so in small enough increments so as not to cause undue hardship.

The alternate recoupment method proposed by TRF, application of petitioner's ASA to the unpaid balance, is not authorized by the statute, TRF rule or IRS revenue procedure discussed above. To the contrary, Ind. Code § 5-10.4-5-15(a), which authorizes stopping the member's "benefit" to collect an overpayment, can be interpreted to *disallow* any other method of recoupment under the principle of *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another"). Likewise, 550 IAC 2-2-1 authorizes the withholding of "benefit payments." The ASA is a separate account, not a "benefit."

Moreover, unlike the retirement allowance account (pension fund) which is subsidized by employer contributions, Ind. Code § 5-10.2-2-6, the ASA consists of contributions by the member (or the employer on the member's behalf), Ind. Code § 5-10.2-2-3. Like a § 401(k) or § 403(b) retirement account, the ASA belongs to the member and is merely held in trust by the board. The member directs the investment of the ASA. Ind. Code § 5-10.2-2-3. Upon suspension of membership, the member is entitled to withdraw the funds even if the member is not yet vested. Ind. Code § 5-10.2-3-6. Under some circumstances the ASA can be

withdrawn before termination of employment or retirement. Ind. Code § 5-10.2-3-6.5. Upon retirement, the member can withdraw the ASA as a lump sum or as an annuity. Ind. Code § 5-10.2-4-2.

Therefore, involuntarily applying a member's ASA to an unpaid balance is the equivalent of garnishing a bank account. By analogy, an employer that loans money to an employee cannot apply the employee's 401(k) account to repay the loan, at least not without the employee's agreement or some form of judicial process.

TRF has not provided specific authority for taking the ASA to recoup the overpayment, but argues that using the ASA ameliorates the harm to petitioner as compared with stopping her monthly benefit. (TRF Memorandum in Support of Summary Judgment at 12.) This is undoubtedly true, but in the absence of statutory authority and due to the nature of the ASA, this option can be exercised only with the member's express consent. The ALJ also notes that the ASA would not even be available if TRF had followed petitioner's direction in 2002 to disburse the ASA to her.

4. Relief.

Because TRF has already applied the ASA to the balance owed by petitioner, restoring the ASA would have effect of increasing the balance due. Petitioner should be given the choice of whether to apply the ASA balance. If she expressly chooses to do so, the current repayment plan implemented by TRF is equitable and should be carried to its conclusion in February 2011. In March 2011, petitioner's benefit will increase to the full amount.

If petitioner chooses to leave her ASA intact, or declines to make a choice, the ASA should be restored. However, petitioner should understand that this will increase the overpayment balance by $[redacted]

TRF already recovered $[redacted] of the overpayment by withholding petitioner's additional retirement benefit. TRF has recovered another $[redacted] by reducing the benefit by $[redacted] month for eight months starting in March 2010 [redacted]. At this writing, therefore, the remaining balance without the ASA is $[redacted]. If petitioner chooses not to apply her ASA to the overpayment, it would be equitable to readjust the repayment schedule by collecting the balance over 48 months starting November 1, 2010, which should reduce petitioner's full benefit by $[redacted] for 47 months and $[redacted] in the 48th month (October 2014).

Recommended Order

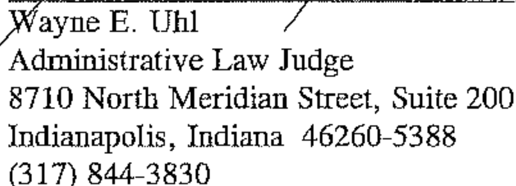
Based on the foregoing findings of undisputed fact and conclusions of law, each party's motion for summary judgment is GRANTED in part and DENIED in part. The initial determination of TRF that petitioner owes [redacted] in overpayments is affirmed and petitioner's claim that she is owed [redacted] is denied. TRF's initial determination that the

overpayment be collected by reduction in petitioner's benefit payments is affirmed, but the initial determination that the overpayment can be collected by application of petitioner's ASA is reversed.

When this recommended decision becomes a final determination, TRF shall present to petitioner the option to expressly consent to apply her ASA balance to the overpayment as TRF has already done, or to have her ASA distributed to her in accordance with her original election and her repayment schedule adjusted to be made over 48 months. These options shall be presented in a format that clearly explains them, including the amounts involved, and permits petitioner to check a box indicating her choice, sign the form and return it to TRF in a postage prepaid envelope.

If petitioner makes no choice within 10 days after being presented with her options, TRF shall restore the ASA and distribute it according to petitioner's original election, and shall adjust the repayment plan to occur over 48 months.

ORDERED on October 7, 2010.



Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-5388
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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 TRF Board to hear this matter pursuant to I.C. § 4-21.5-3-9(a). Under I.C. § 4-21.5-3-27(a), this order becomes a final order when affirmed under I.C. § 4 21.5-3-29, which provides, in pertinent part:

(b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:
(1) affirming;
(2) modifying; or
(3) dissolving;
the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge for further proceedings.

(c) In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee shall affirm the order.

(d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:

(1) identifies the basis of the objection with reasonable particularity; and
(2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

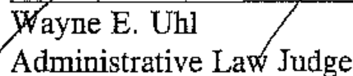
(e) Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

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 October 7, 2010:

Delores Jackson

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



Wayne E. Uhl
Administrative Law Judge