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

IN THE MATTER OF KENNETH SHORT, Member.	)	PUBLIC EMPLOYEES' RETIREMENT FUND
* * * * * * * * *	)	
MARCIA SHORT, Petitioner.	)	

DECISION ON MOTION FOR SUMMARY JUDGMENT AND ORDER

Introduction

Marcia Short appeals from the PERF Board's initial determination that she is not entitled to a survivor benefit upon the death of her husband and PERF member Kenneth Short.[1] PERF determined that Marcia is not entitled to a survivor benefit based on Kenneth's years of service and the fact that he died while still in service. Marcia does not contest that interpretation of the terms of PERF as set out in statute, but contends that she should be granted a survivor benefit because she and Kenneth relied on incorrect advice from a PERF employee that Kenneth did not need to resign in order for Marcia to receive a survivor benefit.

Both parties filed motions for summary judgment which are fully briefed. Argument was heard on August 19, 2008. A supplemental citation to authority was received from Petitioner on August 21, 2008.

Findings of Undisputed Fact

1. Kenneth Short was born on October 1, 1934 (PERF Ex. B-1).

2. Kenneth began employment by the City of Wabash on February 19, 1996 (PERF Ex. B-1).

3. When Kenneth began employment, he became a member of PERF. He completed a membership record that identified Marcia K. Short as his wife and designated her as his primary beneficiary. (PERF Ex. B-1, p. 3.)

[1] Without intending any disrespect, but for ease of reference, Kenneth Short and Marcia Short will usually be referred to by their first names in this decision.

4. Kenneth was continuously employed by the City of Wabash until his death (Marcia Short Affidavit ¶ 11).

5. Kenneth died on April 27, 2007 (PERF Ex. B-2).

6. At the time of his death, Kenneth had 11 years, two months and eight days of creditable service in PERF.

7. Before Kenneth died, he and Marcia did not know whether he would need to separate from employment in order for Marcia to receive a survivor benefit (Short Aff. ¶ 9).

8. Marcia called PERF and spoke to PERF employee Charlene Payne to ask whether Kenneth needed to separate from employment before his death in order for Marcia to receive a survivor benefit (Short Aff. ¶¶ 8–10). According to Marcia, Payne advised her that Kenneth did not have to separate from his employment with Wabash before his death in order for Marcia to receive a survivor benefit (*id.* ¶ 10).

9. Payne, whose job duties include assisting members who call the PERF call center, recalls a conversation with Marcia regarding Kenneth. Marcia stated that Kenneth was ill but was planning to return to work. Marcia asked if Kenneth needed to terminate his employment with Wabash in order for Marcia to receive a benefit. Payne informed Marcia that she would receive a benefit if Kenneth died without separating from service, information that Payne now acknowledges was incorrect. (Payne Affidavit, PERF Ex. B, ¶ 4.)

10. Payne did not inform Marcia about statutes or a PERF handbook, did not tell Marcia that a handbook was available on PERF's Web site, did not advise that PERF had a Web site, and did not offer to send a copy of the handbook (Short Aff. ¶¶ 13–14, 16).

11. The Shorts were otherwise unaware of statutes related to PERF, were unaware that a PERF handbook existed, did not have a copy of the handbook, and were unaware that PERF had a Web site or that the handbook was available on the Web (Short Aff. ¶¶ 15, 17).

12. The Shorts did not own a computer and had never used the Internet (Short Aff. ¶¶ 18–19).

13. The Shorts graduated from high school and Marcia had additional schooling in cosmetology (Short Aff. ¶¶ 4–5). The Shorts are not attorneys and had no training or experience in reading state statutes or rules and regulations related to PERF (Short Aff. ¶ 20).

14. The Shorts relied on the advice they received from Payne, and Kenneth did not separate from his employment before he died (Short Aff. ¶ 11).

15. If Payne had advised Marcia that Kenneth had to separate from employment before death to allow Marcia to receive a survivor benefit, he would have done so (Short Aff. ¶ 12).

16. PERF publishes a Member Handbook, the 2006-2007 edition of which is in evidence (Barton Aff., PERF Ex. A, ¶ 4; PERF Ex. A-1). The Handbook was accessible on PERF's Web site shortly after the print version was available to members (Barton Aff., PERF Ex. A, ¶ 5).

17. The PERF Member Handbook included sections titled "Death of a Member" and "Survivor Benefits Before Retirement" (PERF Ex. A-1, p. 17). The Handbook stated in pertinent part:

> Your surviving spouse and/or surviving dependent(s) may be entitled to survivor benefits:
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> - ***If you have fifteen (15) or more years of creditable service and die while in active service, or***
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> - ***If you would have been eligible to receive retirement or disability benefits but died while out of service and before applying for them.***
>
> If you meet these conditions, and you have been married for at least two years before your death, then your spouse qualifies for a monthly survivor benefit for life.

(*Id.*)

18. By letter dated November 27, 2007, PERF Legal Counsel Will Frayer, referring to earlier correspondence that is not in the record, informed Marcia of PERF's determination that she was not entitled to a survivor pension benefit. He further advised that this determination would become final within 15 days unless an appeal was filed. (Frayer Letter to Marcia Short, 11/27/07.)

19. By letter dated December 7, 2007, sent by certified mail, and received by PERF on December 11, 2007, Marcia requested review of PERF's determination (Short Letter to PERF, 12/7/07, Short Letter to Frayer, Appeal of PERF Determination and Request for Review).

20. PERF concedes that the request for review was timely (Letter to ALJ Uhl, 12/21/07).

21. Kenneth's annuity savings account (ASA) is being held by PERF pending the outcome of this appeal. The parties agree that if Marcia is not entitled to a survivor benefit, the ASA will be paid (oral stipulation of counsel at hearing).

22. Any finding of fact that is included in the Conclusions of Law section 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 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).

Genuine Issues of Material Fact

Neither party argues that there are disputes of material fact, and this was confirmed at the hearing.

Issues

PERF contends that (1) Kenneth (or his estate) was not entitled to a retirement benefit because he was still in service when he died; (2) Marcia is not eligible for a survivor benefit because Kenneth died while still in service and with less than 15 years of service; (3) PERF is prohibited from paying benefits not strictly permitted under the plan both as a matter of fiduciary duty and because doing so would violate PERF's statutory requirement to maintain the plan's qualification under Section 401 of the Internal Revenue Code (IRC); and (4) the incorrect advice given by a PERF employee does not equitably estop PERF from denying a survivor benefit to Marcia.

Marcia concedes that Kenneth was not entitled to a retirement benefit and she is not entitled to a survivor benefit under the written terms of the plan. She argues instead that PERF is equitably estopped from denying her the survivor benefit because the Shorts relied to their detriment on Payne's oral advice that Marcia would receive the benefit if Kenneth remained in service until he died.

Discussion

Eligibility for retirement. A member is "eligible" for retirement if the member has reached age 65 and has more than ten years of creditable service. I.C. § 5-10.2-4-1(a). A member who is eligible must then choose a retirement date on which the benefit begins, and the retirement date must be after the cessation of the member's service and the first day of a month. I.C. § 5-10.2-4-1(d)(2).

Thus Kenneth was "eligible" because he had 11+ years of service and was 72 years old. But he was still in service and had not applied for benefits. PERF argues, in essence, that a post-mortem retirement benefit was not payable to Kenneth's estate because he had not ceased service when he died. Marcia does not contest this.

Survivor benefit. Multiple statutes supply rules regarding benefits paid to survivors of members who die. Specific to the situation of a member who is not a member of the general assembly or the teachers' retirement fund, who is not eligible for disability retirement, and who has a surviving spouse to whom the member was married for at least two years:

The benefit provided by I.C. § 5-10.2-3-7.5 does not apply to Kenneth because he did not have at least 15 years of creditable service when he died in service. I.C. § 5-10.2-3-7.5(a)(2)(B).

The benefit provided by I.C. § 5-10.2-3-7.6 does not apply because Kenneth did not have at least 30 years of creditable service when he died in service. I.C. § 5-10.2-3-7.6(a)(2).

The benefit provided by I.C. § 5-10.2-3-8 requires that the member die "while not in service" and while "eligible to receive retirement . . . benefits . . ., but before applying for those benefits." I.C. § 5-10.2-3-8(a). When Kenneth died he was still in service, so this benefit does not apply.

The benefit described by I.C. § 5-10.2-3-9 applies to a member who dies "while receiving or while eligible to receive retirement benefits under IC 5-10.2-4-1 from the fund." I.C. § 5-10.2-3-9(a)(2). As discussed above, Kenneth was "eligible" for normal retirement under I.C. § 5-10.2-4-1(a). However, the benefit provided by this statute merely requires that survivors or the estate receive, at a minimum, the balance of the ASA less any benefits actually paid.

PERF argues, and Marcia does not contest, that because none of these circumstances applies to this case, Marcia is not entitled to a survivor benefit (beyond refund of the ASA) within the terms of the plan. Therefore, PERF can be required to pay the benefit based only on legal principles that supersede the written of the plan.

IRC qualification. PERF argues that equitable principles cannot be applied to create an exception to the strict terms of the plan because such an exception would risk the plan's status as a "qualified plan" under Section 401 of the IRC. I.C. §§ 5-10.2-2-1.5 (requiring trustees to keep plan qualified).[2] Qualification allows the deferral of federal income tax on contributions to and earnings within the plan. One of the requirements of Section 401 is that the plan be administered "in accordance with such plan," *i.e.*, that the plan provisions be strictly followed. 26 U.S.C. § 401(a)(1); 26 C.F.R. § 1.401(a)(2) and (a)(3)(iii).

Equitable estoppel can be applied to PERF without risking disqualification. The terms of any pension plan may include legal principles beyond statutory provisions. In Indiana, for example, Article 11, § 12 of the Indiana Constitution, before its amendment in 1996, prohibited public retirement plans 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

[2] Memorandum in Support of Respondent's Motion for Summary Judgment at 5.

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). PERF is a trust, I.C. § 5-10.3-2-1(b), so it is also subject to the common law of trusts. Concepts of state law that extend beyond the language of the plan itself are still part of the plan, so application of those concepts to administer the plan does not violate the rule requiring administration "in accordance with such plan." *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 pension plan may be proper reference in an action to enforce plan).

Fiduciary duty. PERF invokes its fiduciary duty to pay benefits in strict accordance with Indiana law.[3] This argument is a two-edged sword, however, because as PERF counsel acknowledged at the hearing, PERF's fiduciary obligation includes a duty to provide correct information to its members.

PERF is a trust. I.C. § 5-10.3-2-1(b). Thus the PERF Board has fiduciary duties to the members and beneficiaries at common law, including a duty to provide accurate information about the trust. *Restatement (3d) of Trusts* § 82(b) (2007); *Restatement (2d) of Trusts* § 173 (1959); *cf.* I.C. § 30-4-3-6(b)(7).[4] The more difficult question is whether an isolated oral misstatement by a ministerial employee constitutes a breach of that duty. This appears to be a question of first impression in Indiana.

Any effort to research the fiduciary duties of trustees of a pension plan runs up against the fact that the field has been subsumed by the 1974 enactment of the Employee Retirement Security Income Act (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). But decisions regarding fiduciary duty imposed by ERISA are informed—not determined—by the common law of trusts. *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996); *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814, 825 (7th Cir. 2000) (ERISA's fiduciary duty holds plan administrators to duty of loyalty "akin to that of a common-law trustee"). The case law over the past 34 years is so infused with ERISA that it is often difficult to tell whether common law or ERISA principles are the source of a decision. Nevertheless, ERISA decisions provide guidance.

In *Varity*, the court held that deliberate deception by a pension plan trustee violated the fiduciary duty of loyalty to the interests of the participants and

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[3] Memorandum in Support of Respondent's Motion for Summary Judgment at 5.

[4] The Indiana Trust Code is not cited here as being directly applicable to PERF, but merely as a reflection of the common law.

beneficiaries as a matter of common law, unchanged by ERISA. 516 U.S. at 506-07. The court did not reach the question of whether ERISA imposes an obligation on fiduciaries to "disclose truthful information on their own initiative, or in response to employee inquiries." *Id.* at 506.

Lower courts have developed a general rule, consistent with *Varity*, that a breach of duty occurs if the fiduciary misleads plan participants or misrepresents terms of the plan; that not every error in communicating information about a plan violates the duty; and that the duty to communicate material facts affecting the interests of plan participants or beneficiaries exists whether or not the participant or beneficiary requests the information. *Vallone v. CNA Financial Corp.*, 375 F.3d 623, 640-41 (7th Cir.), *cert. denied*, 543 U.S. 1021 (2004). Under this general rule, negligence in fulfilling the duty to provide accurate information is not a breach. Instead, the trustee must have set out to disadvantage or deceive the members. *Id.* at 642. The fiduciary duty does not require the plan administrator to investigate each participant's circumstances and prepare an advisory opinion for each of thousands of participants. *Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 817-18 (7th Cir. 1997). "Efforts to administer any complex plan fall short of the ideal. Some employees of a large firm will receive bad or misleading advice. Many ideas are hard to convey or grasp." *Frahm v. Equitable Life Assurance Society*, 137 F.3d 955, 959 (7th Cir.), *cert. denied*, 525 U.S. 817 (1998).

Furthermore, the misleading or misrepresentation must be directly attributable to the trustee. In a case bearing resemblance to this one, *Schmidt v. Sheet Metal Workers' National Pension Fund*, 128 F.3d 541 (7th Cir. 1997), *cert. denied*, 532 U.S. 1073 (1998), a terminally ill fund participant called the fund's administrative offices to change the sole primary beneficiary of his death benefit. An employee said that she understood his request but sent him the wrong form. He filled out the form showing his son as the primary beneficiary, but when he died, the fund refused to recognize the change. The appellate court agreed with the trial court in finding no breach of fiduciary duty, because the employee's mistake was not made by the trustees themselves. *Id.* at 547-48. Where the trustees have provided complete and correct information about the plan, such as a plan booklet distributed to all members, a ministerial employee's single negligent misstatement in response to a single question from a single participant is not a breach of fiduciary duty, in the absence of evidence that the trustees participated in the misstatement, or failed to exercise care in hiring or training the errant employee. 128 F.3d at 547-48.

The court noted that its resolution depended in large measure on the fact that the trustees provided complete and accurate information in the plan and plan booklet. *Id.* at 548. Thus, as the same court later held, a breach of fiduciary duty may be found where plan documents are inadequate and the ambiguity is exacerbated by incorrect and misleading answers by plan representatives. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 590-91 (7th Cir. 2000).

The undisputed evidence in this case does not permit an inference that PERF violated its fiduciary duty to the Shorts. Payne responded negligently to a single question from a single member. The terms of the plan were clear, and PERF had published a written handbook that adequately explained the relevant aspects of the plan. While the handbook was apparently not distributed to the Shorts, it was no doubt available through Wabash's personnel department, or written explanation could have been requested from PERF. There is no evidence of an intentional misrepresentation or misleading statement. There is no evidence that the PERF trustees participated in the misstatement or were negligent in hiring or training Payne. Therefore, breach of fiduciary duty is not a basis on which to grant relief.

Equitable estoppel – legal standards. Marcia argues that although she is not legally entitled to a survivor benefit, PERF is nonetheless required to pay her one because the Shorts relied to their detriment on Payne's incorrect oral advice that Marcia would receive a benefit if Kenneth did not resign his employment.

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

Some cases use a three-element test, requiring the party asserting equitable estoppel to show "(1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially." *Story Bed & Breakfast, LLP v. Brown County Area Plan Commission*, 819 N.E.2d 55, 67 (Ind. 2004), quoting *City of Crown Point v. Lake County*, 510 N.E.2d 684, 687 (Ind. 1987).

Other cases state the test as having four elements: (1) a representation or concealment of material fact, (2) made by a person with knowledge of the fact and with the intention that the other party should act upon it, (3) to a party ignorant of the matter, (4) which induced the other party to act upon it to his detriment. *Indiana Dep't of Environmental Management v. Conard*, 614 N.E.2d 916, 921 (Ind. 1993); *see also Wabash Grain, Inc. v. Smith*, 700 N.E.2d 234, 237 (Ind. App. 1998) (adding that the reliance element has two prongs, reliance in fact and right of reliance).

Under both versions, the party claiming estoppel has the burden to prove all facts necessary to establish it. *Story B&B*, 819 N.E.2d at 67; *Conard*, 614 N.E.2d at 921.

Even where the elements of estoppel can be established, the "general rule" is that equitable estoppel "will not be applied against governmental authorities." *Story B&B*, 819 N.E.2d at 67; *City of Crown Point*, 510 N.E.2d at 687. The reason for this is two-fold. "If the government could be estopped, then dishonest, incompetent or negligent public officials could damage the interests of the public. At the same time, if the government were bound by its employees' unauthorized representations, then government, itself, could be precluded from functioning." *Samplawski v. City of Portage*, 512 N.E.2d 456, 459 (Ind. App. 1987).

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. *City of Crown Point*, 510 N.E.2d at 687 ("When the public interest would be threatened by the government's conduct, estoppel will be applied to bar that conduct."). What constitutes the public interest is not well defined. *Samplawski*, 512 N.E.2d at 459. In the context of zoning regulation, the Court of Appeals has articulated a list of public interest and equitable reasons not to allow the defense of estoppel in a zoning enforcement matter. *Metropolitan Development Comm'n of Marion County v. Schroeder*, 727 N.E.2d 742, 752 (Ind. App. 2000). In *Schroeder*, the court balanced the equities to determine whether the threat to the public by the governmental conduct outweighed the public interest in barring estoppel defenses against zoning violations. *Id.*

Estoppel against government is particularly inappropriate where a party claiming to be ignorant of the facts had access to the correct information. *U.S. Outdoor Advertising Co., Inc. v. Indiana Dep't of Transportation*, 714 N.E.2d 1244, 1259-60 (Ind. App. 1999). All persons are charged with knowledge of rights and remedies prescribed by statute, and statutory procedures cannot be circumvented by unauthorized acts and statements of officers, agents or staff. *Id.*, citing *Middleton Motors, Inc. v. Indiana Dep't of State Revenue*, 269 Ind. 282, 380 N.E.2d 79, 81 (1978); *DenniStarr Environmental, Inc. v. Indiana Dep't of Environmental Management*, 741 N.E.2d 1284, 1289-1290 (Ind. App. 2001); *Hannon v. Metropolitan Development Comm'n of Marion County*, 685 N.E.2d 1075, 1080 (Ind. App. 1997).

Courts will not apply estoppel in cases involving unauthorized use of public funds. *City of Crown Point*, 510 N.E.2d at 688; *Samplawski*, 512 N.E.2d at 459; *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348, 354 (Ind. App. 1981) (courts are "particularly unsolicitous of estoppel" where "unauthorized acts of public officials somehow implicate government spending powers").

Estoppel may also be appropriate where the pertinent limits on governmental authority are not clear and unambiguous. *City of Crown Point*, 510 N.E.2d at 688; *Cablevision of Chicago*, 417 N.E.2d at 356.

In the case of a public pension fund, the public interest includes the fund's fiduciary obligation 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); *see also Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990).[5]

Equitable estoppel – application. This is a close case and in many ways the argument for application of estoppel is compelling. It is undisputed that the Shorts were given wrong advice and relied on that advice. It is also undisputed that had the Shorts been given the correct answer to their question, Kenneth would have resigned from service before he died, and Marcia would be receiving the survivor benefit under I.C. § 5-10.2-3-8. However, taking all of the facts of the case into consideration, and applying the legal standards summarized above, equitable estoppel is not supported.

For two reasons, the elements of equitable estoppel are not met.

First, the undisputed evidence does not support a finding that PERF "knowingly misled or induced" the Shorts. To the contrary, it is uncontested that Payne's incorrect advice was negligent, not intentional. In many of the Indiana cases applying estoppel against a governmental actor, there was evidence that the governmental body intentionally changed its position for improper purposes. *E.g.*, *Equicor*, 758 N.E.2d at 39 (raising "a formal defect at the last moment permits agencies to fumble endlessly with proposals that are entirely lawful"); *Tippecanoe County Area Plan Comm'n v. Sheffield Developers, Inc.*, 181 Ind. App. 586, 394

[5] ERISA decisions on equitable estoppel start from ERISA's rule that a covered plan can be modified only in writing, so oral representations rarely or never form the basis for estoppel, and in particular negligent oral misstatements do not estop administrators from enforcing a plan's written terms. *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 585-86 (7th Cir. 1999). ERISA decisions have rejected the view that "bad advice delivered verbally entitles plan participants to whatever the oral statement promised, when written documents provide accurate information." *Frahm, supra*, 137 F.3d at 961 (7th Cir. 1998), citing *Schmidt, supra*, 128 F.3d at 546. But equitable estoppel based on an oral misrepresentation may be applied where plan documents provided inadequate information. *Bowerman, supra*, 226 F.3d at 586-90. In *Schmidt*, the case in which a terminally ill member sought to change his beneficiary but was sent the wrong form, the trial and appellate courts rejected the beneficiary's equitable estoppel argument. 128 F.3d at 545-46.

N.E.2d 176, 184 (1979) (condemning plan commission's action to "draw out" approval of development as long as possible by citing new and different reasons for each negative vote); *State ex rel. Agan v. Hendricks Superior Court*, 250 Ind. 675, 235 N.E.2d 458 (1968) (governmental entity changed position to gain tactical advantage in litigation).

Second, the evidence does not show "lack of knowledge and of the means of knowledge as to the facts in question" or, in the words of the four-part test, "ignorance" of the party who relied on the misstatement. It is irrelevant that the Shorts lacked resources such as access to the Internet, the PERF Member Handbook, or the ability to research the Indiana Code on their own. All persons are charged with knowledge of statutory rights. Thus, for example, where a property owner was provided an outdated version of an ordinance by a governmental representative, and its application for a building permit was later rejected for failure to comply with the newer version, equitable estoppel did not apply because the property owner was charged with knowledge that the ordinance had been amended. *Terra Nova Dairy*, 890 N.E.2d at 106.

The mere fact that PERF theoretically had superior knowledge of the law does not mean that PERF's advice somehow prevented the Shorts from obtaining the correct information. Only if a governmental entity deliberately withholds the means of knowledge from a citizen will the test for equitable estoppel be met.

Marcia argues that a presumption of equal knowledge can be overcome, citing *Cablevision of Chicago*, 417 N.E.2d at 356. It is correct that the court in that case rejected the "simplistic rationale that all persons are charged with notice of statutes which limit governmental authority," but in a situation where the regulatory limitations on cable television in 1971 were ambiguous. In the absence of a well-defined statutory scheme, the court held that the parties may have been justified in relying on a procedurally defective local franchise ordinance. Here, on the other hand, the PERF statutes regarding survivor benefits are clear and unambiguous.

Even if the elements of equitable estoppel were met, this case does not present circumstances justifying an exception to the general rule against estoppel of a governmental entity.

First, this is a classic case in which government should not be bound to do the opposite of its statutory authority by the negligent advice of an employee who is not authorized to bind the agency and certainly not authorized to amend statutory provisions governing the pension plan.

Second, the cases applying estoppel do so against agency action through its governing body. Thus, for example, in *Equicor*, a plan commission was estopped by its preliminary approval of a development. Likewise, in *Sheffield Developers*, a plan

commission was estopped from raising a new objection on its fourth vote to approve a development. Here, on the other hand, the misinformation was provided by a call center employee, not the Board or executive staff of PERF.

Third, this is not a situation in which the statutory rights are ambiguous or subject to differing interpretations.

Finally, there has not been a showing that the public interest requires application of equitable estoppel. The public has an interest in operation of the funds in accordance with the terms set out by the legislature. In individual cases, the financial impact of misstatements will almost always be negligible.[6] Of greater concern is the precedent that would be set by binding PERF to employee misstatements. PERF employees surely make many statements to members on a daily basis about the terms of their plans and the consequences of decisions members make. To hold that a misstatement by an employee is binding on PERF threatens to subject every decision pertaining to the funds to a mini-lawsuit over what was said. Furthermore, such a holding would give PERF a perverse incentive to stop answering fund members' questions and simply refer them to the statutes and rules to figure it out for themselves, or to have a team of lawyers reviewing every call center response. It is better to have advice that is occasionally wrong than to have no help at all.

Order

PERF's motion for summary judgment is granted and Petitioner's motion for summary judgment is denied. PERF's initial determination, denying Marcia Short's request for a survivor benefit, is affirmed.

DATED: August 26, 2008.

Wayne E. Uhl
Administrative Law Judge
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[6] Of the $17.2 billion in combined assets under management as of June 30, 2007, PERF accounted for $13.3 billion. *2007 PERF Comprehensive Annual Financial Report*, Financial Section, p. 26, *http://www.in.gov/perf/files/financial_final010308.pdf* (viewed 7/1/08).

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 August 26, 2008:

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Wayne E. Uhl
Administrative Law Judge