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

IN THE MATTER OF KATHY A. STEFANATOS, Petitioner.	))))	PUBLIC EMPLOYEES' RETIREMENT FUND

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND ORDER SETTING PREHEARING CONFERENCE

Introduction

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

In accordance with the schedule set by agreement of the parties, PERF filed a motion for summary judgment on June 15, 2007, and Stefanatos filed a motion for summary judgment on June 18, 2007. PERF filed a response to Stefanatos' motion on July 23, 2007, and Stefanatos filed a response to PERF's motion on August 3, 2007. The motions are now fully briefed and ready for decision.

Findings of Undisputed Fact

1. Kathy Stefanatos (then her last name was Shaner) was employed on March 3, 1980, by the Indiana Employment Security Division. She immediately and automatically became a member of PERF. (PERF Ex. 1.)

2. Stefanatos reported prior potential PERF-eligible service in her initial membership record dating back to September 7, 1979. (PERF Ex. 1). It is not clear whether this additional five months was later deemed to be creditable, but there does not appear to be a dispute between the parties on this issue.

3. Stefanatos was born on January 11, 1947. (PERF Ex. 1, 4.)

4. Stefanatos transferred to the Division of Family and Children in 1995, and worked there until June 13, 2003. (Pet. MSJ at 2.) [1]

[1] Petitioner's motion states that she worked at DFC until June 13, *2007*. This is an obvious typographical error.

5. Stefanatos was earning $[redacted] annually when she stopped working. (Pet. MSJ at 2.)

6. Stefanatos applied for retirement benefits on April 9, 2003, anticipating an effective date of July 1, 2003. (PERF Ex. 4.)

7. The application indicated that Stefanatos was applying under a State Retirement Incentive Plan (SRIP). (PERF Ex. 4.) Such early retirement incentives are authorized by Ind. Code § 5-10.2-3-1.2, which permits a member to purchase one year of service credit for every five completed years of service, and permits the State to purchase that credit for the member.

8. Stefanatos states that at the end of 2002, the State offered such a retirement incentive program, under which eligible employees would be given a cash settlement and one year of service for each five years worked. (Pet. MSJ at 2.)

9. Stefanatos met with a PERF retirement counselor who stated that Stefanatos would receive an additional four years of service credit for a total of 27 years. (Pet. MSJ at 2.)

10. The retirement counselor gave Stefanatos a projection of what her retirement benefit would be. Stefanatos does not state what that projection was and does not submit any documentation of that conversation. Based on that projection, Stefanatos decided to take early retirement. (Pet. MSJ at 2.)

11. PERF concedes that the information given to Stefanatos was incorrect. (PERF MSJ Mem. at 10.)

12. Stefanatos selected benefit Option 10, which was described as follows:

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

(PERF Ex. 4.)

13. With respect to her annuity savings account (ASA), Stefanatos elected Choice 1, described as follows:

> ***Choice Number 1:*** I elect to receive the total amount of my Annuity Savings Account paid as a monthly benefit. I understand that I will not receive any distribution from my Annuity Savings Account other than this monthly benefit.

(PERF Ex. 4.)

14. Stefanatos' last day in pay status was June 13, 2003. (PERF Ex. 4.)

15. Stefanatos was given credit for 27.92 years of creditable service. (PERF Ex. 7, 9, 10.)

16. Stefanatos' age at retirement was 56 years, 5 months and 2 days.

17. The calculation of the retirement benefit is controlled by Ind. Code §§ 5-10.2-4-4 (retirement benefit calculation), -5 (early retirement percent reduction) and -7 (retirement benefit payment options). Some of these calculations are based on actuarial tables and an interest rate adopted by the PERF Board.

18. PERF miscalculated Stefanatos' retirement benefit. [2]

19. Put simply, an early retirement benefit is calculated by reducing the member's benefit by a percentage based on the number of months younger than 65 the member is at retirement. Ind. Code § 5-10.2-4-5. PERF refers to this percentage as the "age reduction factor."

20. PERF correctly calculated that Stefanatos would have been entitled to a full base retirement benefit of $ per year, or $ per month. (PERF Ex. 9.)

21. However, PERF failed to apply the "age reduction factor." If the age reduction factor had been correctly applied, Stefanatos' benefit would have been per month. (PERF Ex. 10, 11.)

22. Stefanatos' ASA payout was calculated to be $ per month. (PERF Ex. 7.)

23. Stefanatos began receiving monthly retirement benefit checks of $ after her retirement on June 13, 2003. (PERF Ex. 5, Pet. MSJ at 2.) This amount reflects the incorrect retirement benefit of $896.15 plus the ASA payout of probably reduced for withheld taxes.

24. Due to cost-of-living increases, Stefanatos was receiving pre-tax monthly payments of $ by December 2006. (PERF Ex. 6.)

25. In April 2004, the State Board of Accounts reported its audit of PERF's financial statements for the year ending June 30, 2003. The SBA found that 19

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[2] PERF also discovered a miscalculation in her ASA payout, but has waived collection of the very small overpayment that resulted. Order on Prehearing Conference (3/20/07).

percent of a sample of 53 retirees were being paid an incorrect monthly benefit, some overpaid and some underpaid. The errors appeared to be "due to errors in manual calculations or data entry." (Pet. Ex. A.) PERF responded that the errors were "related to problems with the implementation of the new IT system." (Id.)

26. In February 2005, the SBA reported its audit of PERF's financial statements for the year ending June 30, 2004. The SBA noted its prior finding, and further found that 15 percent of a new sample of 60 new retirees were paid an incorrect benefit, caused by a variety of calculation errors. The report noted that PERF had retained a CPA firm to recalculate all PERF benefits initiated after the SIRIS implementation in April 2002, a project that was in progress. (Pet. Ex. B.)

27. In December 2005, the SBA reported its audit of PERF's financial statements for the year ended June 30, 2005. The report noted prior findings of incorrect benefit calculations, including a prior finding of overpayments due to failure to apply the early retirement factor. The errors were attributed to "SIRIS programming anomalies, input errors, and incorrect data used for inputting." The errors were allowed to remain and grow "due to inadequate monitoring." The CPA firm had completed its recalculation but considered its results preliminary until they passed the firm's quality control process. PERF stated that once a final report was issued, it would implement appropriate corrections to its records and take appropriate actions for under- and overpayments to members. (Pet. Ex. C.)

28. On or about December 27, 2006, Stefanatos received a phone call from PERF notifying her that mistakes were found, she had been overpaid $ and her monthly pension amount would be reduced by $214.26. She was told that PERF was waiving interest on the overpayment and allow the overpayment to be repaid over the next 60 months. Therefore, her benefit would be reduced by an additional $ for 60 months. (Pet. MSJ at 2.)

29. A letter dated January 5, 2007, confirmed what Stefanatos had been told. It stated that her future monthly benefit would be reduced to from , and for five years would be further reduced to (PERF Ex. 6.)

30. PERF sent Stefanatos a letter dated February 5, 2007, explaining the calculation errors in more detail, and notifying her of her right to seek administrative review. (PERF Ex. 7.)

31. Stefanatos submitted a petition for review dated February 20, 2007. In her appeal letter, Stefanatos stated that the overpayment and reduction had "caused a hardship." She stated that PERF's failure to take action sooner had resulted in her losing the right to return to her job within two years of retirement. She stated that she had planned to work an additional three years so she would be eligible for full retirement, but she relied on the estimate provided by the retirement counselor in deciding to retire early. (PERF Ex. 8.)

32. In her summary judgment motion, Stefanatos repeats these contentions. In addition, she states that the reduction in her benefit is "serious for someone on a fixed income" and that PERF's error has "caused me financial hardship and loss of earnings for the rest of my life." (Pet. MSJ at 2, 3.)

33. In her response, Stefanatos states that she lost about $[redacted] by not working an additional three years (at her salary of [redacted]. She also states:

[redacted]

(Pet. MSJ Response at 1.)

34. PERF does not question the timeliness of the petition for review.

35. Any legal conclusion stated below that should be designated as a finding of fact is incorporated by reference.

Analysis

Legal standard

Summary judgment "shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code § 4-21.5-3-23(b). This mirrors Ind. Trial R. 56(C). The standard for summary judgment under that rule is well-established:

> A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. . . . A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue.

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

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

Lack of legal representation

Stefanatos was given express notice in the Notice of Prehearing Conference (March 10, 2007) of her right to retain counsel. At the initial prehearing conference on March 20, 2007, Stefanatos was expressly reminded of this right and she acknowledged it, stating that she would proceed without counsel. The ALJ then took pains to explain the summary judgment procedure as a means to resolve the case without a hearing, in the absence of a dispute of material fact. During the course of that explanation, the ALJ told her that her briefs did not have to be in any particular form, but that the purpose of the brief is to present the party's legal arguments. The ALJ specifically explained that summary judgment evidence would have to be in the form of affidavits and documents. Further explanation of the summary judgment process was provided in the Order on Prehearing Conference (3/20/07).

In her summary judgment response, Stefanatos states that she "was under the impression that legal representation was not necessary and these procedures could be done informally." (Pet. MSJ Resp. at 2.) This "impression" could not have been based on anything Stefanatos was told by the ALJ. The ALJ has never told a party that legal representation is "not necessary," except to simply say that a party has the choice to proceed without counsel. Nor did the ALJ tell Stefanatos that administrative proceedings are "informal" to the extent that legal requirements (as explained to her orally and in writing) could be dispensed with.

The ALJ has indulged and will continue to indulge Stefanatos' status as an unrepresented party more than required by law. See Steele v. McDonald's Corp., 686 N.E.2d 137, 140 (Ind. App. 1997) (pro se litigant must adhere to same procedural rules as a litigant represented by a licensed attorney); Wilhoite v. Melvin Simon & Associates, Inc., 640 N.E.2d 382, 384 (Ind. App. 1994) (pro se litigant not entitled to more lenient standard in review of pleadings).

Evidence

Neither party has objected to any of the evidence submitted by the opposing party. In particular, PERF has not objected to the unverified statements of fact

contained in Stefanatos' summary judgment motion and response. Although this evidence is not in the form of an affidavit as required by Ind. Code § 4-21.5-3-23(b), it will be presumed for the purposes of deciding the motions that Stefanatos would testify the same in an affidavit or at a hearing. Nor has PERF questioned the authenticity of Stefanatos' exhibits. Therefore, all of the evidence is deemed admissible.

Genuine disputes of material fact

Neither party has argued that there are disputes of material fact. Independent review of the evidence does not reveal any such disputes. However, as will be discussed below, there is an absence of evidence from either party that prevents the granting of summary judgment on all issues.

Issues

1. Recalculation. Stefanatos does not argue in her briefs that PERF's recalculation of her benefit is incorrect. For example, she does not argue that the age reduction factor should not have been applied or that PERF has made math errors. In her petition for review, Stefanatos stated that she had requested information so that she could reconcile PERF's calculations. At the initial prehearing conference on March 20, 2007, she stated that she would challenge the recalculation of the benefit. At the same conference, the parties reported that further information about the calculation had been provided. In her motion for summary judgment and response, Stefanatos makes no challenge to the new calculation of her benefit or the amount of overpayment asserted by PERF, and she does not question PERF's arguments that the recalculation is correct. Furthermore, review of PERF's materials indicates that the new calculation is both legally and mathematically correct.

2. Reduction of benefit and collection of overpayment. It is not clear that Stefanatos is arguing that PERF should be precluded from reducing her benefit to the correct amount—that is, that she is entitled to continue to collect the incorrectly calculated benefit for the rest of her life. Her arguments are clearly focused on PERF's decision to recoup the overpayment, but she also argues that she would not have taken early retirement had she known what the correct benefit would be. Therefore, both the reduction of the benefit to the correct amount and the collection of the overpayment will be considered.

PERF's authority to correct benefit and collect overpayment

1. Statutory authority

The first question is whether PERF is authorized to correct a benefit upon discovery of a mistake, and to collect overpayments by deducting installments from future benefit payments. The PERF Board is granted broad authority to "[e]xercise all powers necessary, convenient, or appropriate to carry out and effectuate its

public and corporate purposes and to conduct its business." Ind. Code § 5-10.3-3-8(a)(10). The board's powers shall be interpreted broadly to effectuate the purposes of the PERF law and not as a limitation of powers. Ind. Code § 5-10.3-3-8(c).

With one exception, the statutes governing PERF do not directly address the question of erroneous payments or overpayments of benefits paid to a member or survivor. [3] The exception is Ind. Code § 5-10.2-4-1.5, which authorizes PERF to pay an estimated benefit to a member who has retired but whose membership records are incomplete or not yet certified. After the records have been submitted and certified and the actual retirement benefit has been determined, PERF must temporarily adjust the benefit to reconcile any underpayment or overpayment. This adjustment may be done "over a reasonable time, as determined by the board." Ind. Code § 5-10.2-4-1.5(c). This statute does not apply here because this case does not involve payment of estimated benefits, but the statute endorses the concept of collecting an overpayment by deductions from future benefits over a reasonable period of time.

Implicit authority to correct benefits and collect overpayments may also be found in Ind. Code § 5-10.3-8-12, which authorizes the board to stop a member's payment if, among other things, the member "[r]efuses to repay an overpayment of benefits." This statute is not limited to overpayments of estimated benefits under Ind. Code § 5-10.2-4-1.5, and should be read to include overpayments made for any reason, including simple calculation errors.

PERF argues that further support for authority and a mandate to collect overpayments is found in Ind. Code § 5-10.2-2-1.5, which requires the fund to "satisfy the qualification requirements of Section 401 of the Internal Revenue Code." In order to meet those requirements, § 5-10.2-2-1.5 further requires the fund to meet several conditions, including (1) the corpus and income shall be distributed to members and their beneficiaries "in accordance with the retirement fund law," (2) no part of the corpus or income of the fund may be used for or diverted to any purpose other than the exclusive benefit of the members and their beneficiaries, and (5) all benefits paid from the fund shall be distributed in accordance with the requirements of § 401(a)(9) of the Internal Revenue Code (IRC) and the regulations under that section.

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

Section 401 of the IRC, 26 U.S.C. § 401, provides favorable tax treatment to qualified plans, including deferred income taxation of employer contributions and income, and exemption from employment taxes on employer contributions. In order to be qualified, contributions to the plan must be made "for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan." 26 U.S.C. § 401(a)(1) (emphasis added). The plan must also make it impossible to use the corpus and income for purposes other than for "the exclusive benefit of [the] employees or their beneficiaries." 26 U.S.C. § 401(a)(2).

Regulations promulgated by the United States Treasury Department repeat and refine the qualification requirements of § 401. A qualified pension plan must be "a definite written program." 26 C.F.R. § 1.401-1(a)(2). The plan must be established by an employer "for the exclusive benefit of his employees or their beneficiaries." 26 C.F.R. § 1.401-1(a)(3)(ii) and (iv). It must also be formed for the purpose of distributing the fund's corpus and income "in accordance with the plan." 26 C.F.R. § 1.401-1(a)(3)(iii). [4]

These provisions do not expressly state that an overpayment of benefits to a member or beneficiary who is entitled to benefits necessarily violates the exclusive benefit requirement or constitutes operation not "in accordance with the plan," but that conclusion is reasonable.

In further support, PERF cites IRS Revenue Procedure 2006-27 (May 1, 2006, published in Internal Revenue Bulletin 2006-22, May 30, 2006) (PERF Ex. 12), which is the IRS's system of correction programs for retirement plans that are intended to satisfy § 401(a) but have not met those requirements for a period of time. (§ 1.01, Ex. 12 at 1.) If the plan corrects a failure using these procedures, the IRS will not treat the plan as failing to meet § 401(a). (§3.01, Ex. 12 at 5.)

PERF contends that the failure to collect overpayments like the one in this case is a "qualification failure," which is defined as "any failure that adversely impacts the qualification of a plan." (§ 5.01(2), Ex. 12 at 8.) Of the four types of qualification failures, PERF contends that overpayment is an "operational failure," defined as a qualification failure that "arises solely from the failure to follow plan provisions." (§5.01(2)(b), Ex. 12 at 8.)

The Revenue Procedure specifically defines an "overpayment" as "a distribution to an employee or beneficiary that exceeds the employee's or beneficiary's benefit under the terms of the plan . . .." (§ 5.01(6), Ex. 12 at 10.) The Procedure clearly contemplates that overpayments are failures that require

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[4] PERF also cites "26 C.F.R. § 1.401-126." I could not find a provision of the Code of Federal Regulations with that citation.

correction. This can be seen from Section 6, which sets forth the principles for correction of failures. While it does not specifically state that overpayments are failures, it creates an exception to the general requirement of full correction by stating that a plan is not required to seek return of an overpayment of $100 or less. (§ 6.02(5)(c), Ex. 12 at 15.) It further appears that overpayments may be corrected by the procedure used by PERF in this case, reduction of future benefits to both correct the error and recoup the overpayment on an actuarially adjusted basis. (Appendix B, Correction Methods and Examples, § 2.05, Ex. 12 at 62, which incorporates § 2.04(1) (correction of § 415(b) excesses), Ex. 12 at 57-60.) 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 . . . ." (§ 6.02(5), Ex. 12 at 15.)

A revenue procedure is directory, not mandatory, and does not have the force of a promulgated rule. Estate of Shapiro v. Commissioner, 111 F.3d 1010, 1017-18 (2nd Cir. 1997), citing cases. Nevertheless, Procedure 2006-27 clearly indicates the IRS view that the overpayment in this case would be considered a failure that would threaten PERF's qualification under IRC § 401.

PERF has cited no cases holding that a pension plan risks losing its status as a qualified plan under the IRC if it fails to recover overpayments, or that the risk justifies collection of overpayments. Nor has PERF provided evidence that the IRS has taken action to revoke a plan's qualified status under circumstances such as those presented here.

My own research disclosed very little discussion of the possibility, and then only where a non-employee was provided benefits. In Flynn v. Hach, 138 F.Supp.2d 334 (E.D. N.Y. 2001), for example, the court found that trustees of a pension plan did not act arbitrarily in refusing to deem the plaintiff an employee covered by the plan. As partial support for the trustees' position, the court accepted their argument that the plan would risk losing its qualified status under § 401 if it included non-employees.

The court cited Thomas v. Bd. of Trustees of Intern. Union of Operating Engineers, 1998 WL 334627 (E.D. Pa. 1998), in which the union made pension fund contributions for Thomas for 14 years when he was not the union's employee. The IRS audited the pension funds and, upon learning that contributions had been received for non-employees, threatened the funds with loss of their status as qualified trusts under § 401. To avoid this result, the funds refunded the contributions and Thomas sued. The court granted summary judgment to the union, holding that the funds had properly refunded the contributions in the face of the threatened loss of their tax-exempt status. The court cited two older decisions for the proposition that plans providing coverage to non-employees are not qualified

under § 401. Professional & Executive Leasing, Inc. v. Commissioner, 862 F.2d 751, 752-54 (9th Cir. 1988); Stochastic Decisions, Inc. v. Wagner, 34 F.3d 75, 82 (2d Cir. 1994) (profit-sharing plan providing benefits to non-employee was not qualified under § 401, and therefore not exempt from claims of creditors).

Finally, in Redall Industries, Inc. v. Wiegand, 870 F.Supp. 175, 179 (E.D. Mich. 1994), trustees of a pension plan seeking restitution of overpayments argued that the plan would lose its qualified status if restitution was not ordered. Based on an expert's testimony that the plan's qualification would merely be "in question," the court found a dispute of material fact and denied summary judgment.

Against this are dozens of courts, some of them cited later in this decision, that considered whether to permit recoupment or not without reference to the prospect that the plan would lose its § 401 qualification, some of which denied recoupment.

2. *Court decisions, common law restitution*

Apart from statutory provisions, court decisions must be examined to determine whether and to what extent a public pension plan is authorized to recoup mistaken overpayments. Such decisions are important because, while PERF is a creature of statute, it is also subject to the constitution and common law of Indiana. To that extent, when determining whether PERF has acted "in accordance with the retirement fund law," Ind. Code § 5-10.2-2-1.5(1), or "in accordance with such plan," 26 U.S.C. § 401(a), the "plan" includes principles of Indiana law beyond PERF's statutory terms. [5]

For example, Article 11, § 12 of the Indiana Constitution, before its amendment in 1996, prohibited PERF from investing in equity securities or stocks of private corporations. Bd. of Trustees of Public Employees' Retirement Fund v. Pearson, 459 N.E.2d 715 (Ind. 1984). Constitutional and contractual principles have been held to prevent retroactive amendment to pension terms, if a vested interest has been found. Bd. of Trustees of Public Employees' Retirement Fund v. Hill, 472 N.E.2d 204 (Ind. 1985) (judges' retirement fund). Because PERF is a trust, Ind. Code § 5-10.3-2-1(b), it is presumably also subject to the common law of trusts. And with respect to the possible application of equitable estoppel to this case, PERF does not argue that estoppel is absolutely prohibited, but only that it does not apply on the facts of this case. (PERF MSJ Mem. at 10-11.)

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

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

The overwhelming majority of these are decided under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq. ERISA does not apply to plans established by states or their political subdivisions. 29 U.S.C. §§ 1002(32), 1003(b)(1). Nevertheless, the cases provide guidance because they apply common law principles of equitable relief. See, e.g., Johnson v. Retirement Program Plan, 2007 WL 649280 (E.D. Tenn. 2007) (summary judgment granted for pension plan on challenge to collection of mistaken overpayments, based on ERISA, trust law and equitable estoppel); Phillips v. Maritime Association-I.L.A. Local Pension Plan, 194 F.Supp.2d 549 (E.D. Tex. 2001) (using equitable common law principles, pension plan cannot reduce benefits or recoup overpayments); Kaliszewski v. Sheet Metal Workers' Nat'l Pension, 2005 WL 2297309 (W.D. Pa. 2005) (recommending denial of summary judgment on disputed question of whether pension could reduce overpayments resulting from miscalculation).

Guidance as to how Indiana courts would address the question is found in cases discussing a party's right to restitution of a payment made by mistake. Indiana accepts the general rule that "if one party pays money to another party under a mistake of fact that a contract or other obligation required such payment, the payor is entitled to restitution." St. Mary's Medical Center, Inc. v. United Farm Bureau Family Life Ins. Co., 624 N.E.2d 939, 941 (Ind. App. 1993), citing Restatement of Restitution § 18 (1937). This rule applies "even though the [payor] may have been careless and had failed to employ the means of knowledge which would have disclosed the mistake." Century Bldg. Partnership, L.P. v. SerVaas, 697 N.E.2d 971, 974 (Ind. App. 1998), citing Monroe Financial Corp. v. DiSilvestro, 529 N.E.2d 379, 383 (Ind. App. 1988), trans. denied (Ind. 1989).[6]

But this rule is subject to the limitation that "the party receiving the money must not have so changed his position so as to make it inequitable to require him to

[6] The 1937 Restatement of Restitution and many cases draw a distinction between mistakes of fact and mistakes of law, holding that a payor is not entitled to restitution of overpayments induced solely by mistakes of law. Restatement § 45. Our Supreme Court, however, has expressed approval of the contemporary view that this distinction is "artificial" and restitution is available regardless of whether the mistake was one of fact or law. Time Warner Entertainment Co., L.P. v. Whiteman, 802 N.E.2d 886, 891 (Ind. 2004).

make repayment." Monroe Financial, id. In that case, the court held that investing the proceeds or using the proceeds as a down payment to incur new debt based on the proceeds are not sufficient to demonstrate a change of position that would bar restitution. Id. at 384-85.

These equitable principles of restitution have been applied in ERISA cases of mistaken overpayments:

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

Laborer's Dist. Council Pension Fund for Baltimore and Vicinity v. Regan, 474 F.Supp.2d 279, 281 (D. N.H. 2007) (denying summary judgment because of factual disputes over whether Regan's reliance on the overpayments was reasonable). See also Lumenite Control Technology, Inc. v. Jarvis, 252 F.Supp.2d 700, 706-07 (N.D. Ill. 2003) (using three-part test, pension fund is entitled to restitution of overpayment if (1) it has a reasonable expectation of repayment, (2) member should reasonably have expected to repay, and (3) society's reasonable expectations of person and property would be defeated by nonpayment, citing Harris Trust & Sav. Bank v. Provident Life & Accident Ins. Co., 57 F.3d 608, 615 (7th Cir. 1995)).

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

The application of equitable principles may not be a significant restriction of PERF's statutory authority to collect overpayments. As noted above, the IRS procedure upon which PERF relies so heavily does not require full correction where full correction would be "unreasonable or not feasible," and further provides that the correction method must "not have significant adverse effects on participants and beneficiaries of the plan . . . ." (IRS Revenue Procedure 2006-27, § 6.02(5), PERF Ex. 12 at 15.) Apparently, therefore, PERF could decline to fully recoup an overpayment where recoupment would have a "significant adverse effect" on a member who unwittingly came to rely heavily on the overpayment.

3. *Equitable estoppel*

Stefanatos argues that in deciding to take early retirement, she relied on an incorrect estimate of benefits provided by a PERF retirement counselor. The estimate provided to her is not of record. [7] She states that had she known the correct amount, she would have declined the early retirement incentive and would have continued to work three years, which would have made her eligible for full retirement. [8] She further argues that had she learned within two years of retirement that her benefit had been incorrect, she could and would have returned to work. [9] She argues that she will suffer "financial hardship" and "extreme hardship." This will be considered in assessing the equity of recoupment under the analysis discussed above.

In addition, the argument suggests the related doctrine of equitable estoppel. In Indiana:

> Equitable estoppel is available if one party, through its representations or course of conduct, knowingly misleads or induces another party to

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[7] At the prehearing conference, not under oath, Stefanatos stated that the estimate was about [redacted] less than the monthly benefit she actually received. If so, the estimate was about [redacted] month or [redacted] year higher than what Stefanatos should have received.

[8] One scenario in which a member becomes eligible for full retirement benefits is when she is at least 55 years old and the sum of her age and years of creditable service is 85. Ind. Code § 5-10.2-4-1(b)(3). Had she continued working, Stefanatos would have reached this point around March 2006, after 26 years of service and at age 59.

[9] The source of this two-year right to return to work is not cited. The PERF law permits an employee to return to work at any time more than 90 days after retirement without penalty to benefits, except as may be imposed by federal tax law. See Ind. Code §§ 5-10.2-4-8 through -10.

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

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

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

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

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

Second, courts will not apply estoppel in cases involving unauthorized use of public funds. City of Crown Point, 510 N.E.2d at 688; Samplawski, 512 N.E.2d at 459; Cablevision of Chicago v. Colby Cable Corp., 417 N.E.2d 348, 354 (Ind. App.

1981) (courts are "particularly unsolicitous of estoppel" where "unauthorized acts of public officials somehow implicate government spending powers").

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

Finally, in the case of a pension fund, equitable considerations must include the obligation of the fund to all of its beneficiaries to maintain the integrity of the fund. "Forcing . . . a plan to pay benefits [that] are not part of the written terms of the program disrupts the actuarial balance of the Plan and potentially jeopardizes the pension rights of others legitimately entitled to receive them." Central States, Southeast & Southwest Areas Health & Welfare Fund v. Neurobehavioral Associates, P.C., 53 F.3d 172, 175 (7th Cir. 1995) (reversing and remanding dismissal of action in which plan sought restitution of overpayment after clerical error resulted in $[redacted] payment when only [redacted] owed). See also Black v. TIC Investment Corp., 900 F.2d 112, 115 (7th Cir. 1990).

Because of this overriding obligation to protect other members and the actuarial soundness of the plan, some courts have held that estoppel based on statements of a plan representative will be enforced against the plan only where the statements interpreted an ambiguous provision of the plan, not where the statements were contrary to its clear provisions. E.g., Slice v. Sons of Norway, 866 F.Supp. 397, 405-06 (D. Minn. 1993), aff'd, 34 F.3d 630 (8th Cir. 1994); Strong v. State ex rel. Oklahoma Police Pension and Retirement Bd., 115 P.3d 889 (Okla. 2005) (including long list of cases on both sides of question at 895, n. 23); Borkey v. Township of Centre, 847 A.2d 807 (Pa. Cmwlth. 2004) (estoppel will not be applied to forbid plan from reducing benefit where plan's erroneous statements were contrary to "positive law," but recoupment of past overpayment barred as "unconscionable"); Romano v. Retirement Bd. of Employees' Retirement System of Rhode Island, 767 A.2d 35 (R.I. 2001); Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992) (estoppel applies only where the representations were interpretations of the terms of the plan about which reasonable persons could disagree, not modifications of the terms of the plan).

On the other hand, if the mistake was an isolated incident and involved a very small amount of funds in comparison with the overall assets of the fund, it seems that the impact of the non-collection of overpayments is practically nonexistent. [10]

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[10] According to its web site, PERF's assets at the end of 2006 were approximately $16.1 billion. Press release, "PERF Assets Top $16 billion," http://www.in.gov/perf/agency/20070112.html (last viewed 11/1/07).

A compelling analysis of the competing equitable considerations is presented by Johnson v. Retirement Program Plan, supra, in which Johnson was overpaid more than $[redacted] over a period of more than 10 years due to a miscalculation of his ex-wife's share of his pension benefit under a qualified domestic relations order. The court concluded that, notwithstanding Johnson's reliance on the money, the plan's decision to recoup the overpayment over a period of 11 years and nine months was not arbitrary and capricious.

4. Summary of principles

In summary, the PERF Board has the discretion and authority to correct unilateral errors and change payments to a member or beneficiary to the correct amount. The board also has the discretion and authority to collect overpayments by reducing the member or beneficiary's future payments until the overpayment is recovered.

Whether reduction of the benefit is appropriate in a particular case, however, is subject to equitable principles of Indiana law that are inherently part of the terms of the PERF pension plan. Because these principles are incorporated into the plan as a matter of law, their application does not threaten disqualification of the plan under § 401 of the IRC. In any event, IRS Revenue Procedure 2006-27 permits PERF to refrain from correcting failures if correction will result in "significant adverse effects" on fund members.

The cases cited above provide a kaleidoscope of equitable considerations that courts have used in circumstances similar or analogous to this case. Most important are the Indiana cases on restitution, which supply the most relevant source of authority on how Indiana courts would view this case.

5. Application of principles to this case

The question is whether it is inequitable to correct Stefanatos' retirement benefit and, if so, whether it is inequitable to collect the overpayment of $[redacted]

Certain factors weigh in favor of correction and recoupment. It is the general rule that restitution and recoupment for careless mistakes is permitted, particularly where the mistaken payments are clearly contrary to law and the terms of the plan, which they were in this case. Having discovered the mistake, PERF had an obligation to correct it, and it would not be equitable to require PERF to continue to make erroneous payments for the rest of Stefanatos' life. The overpayment to Stefanatos represents only a miniscule percentage of PERF's assets (less than 0.000058 percent), but it also appears that PERF was dealing with many mistaken payments, the cumulative effect of which is not a matter of record.

It is also the general rule that all persons are charged with knowledge of the law, and Stefanatos had an obligation to understand and confirm the mistaken

calculation that was given to her. There is no evidence as to the amount that Stefanatos was told that she would receive, nor is there evidence regarding whether that estimate came with a disclaimer about its accuracy. Given the fact that such estimates are just that—estimates—Stefanatos did not have had a reasonable expectation that she would receive the amount projected.

Other factors weigh in favor of declining to recoup the overpayment. Stefanatos did not induce the overpayments. It is undisputed that Stefanatos relied on PERF's representations in making the major decision to retire early. She states that had she known the correct amount, she would have worked three more years in order to receive full benefits, or would have returned to work if she had been notified earlier. She also states that she will suffer financial hardship, although the nature of that hardship is not specified. It is certainly feasible that a permanent income reduction of 20 percent, and a temporary income reduction of 34 percent, could have a serious and adverse financial impact on a retiree. As noted above, the impact of the overpayment on PERF is infinitesimal.

Finally, certain factors cited by Stefanatos are neutral. The evidence shows that PERF knew of possible miscalculations as early as April 2004, but did not take action until December 2006. However, the same evidence shows that PERF retained an accounting firm to audit all potentially miscalculated benefits, but the firm's analysis was not final as of December 2005 (more than two years after Stefanatos retired).

After careful consideration, given the uncertainty and missing information in the evidence, especially regarding the nature and scope of the hardship that Stefanatos may suffer, summary judgment cannot be granted. As noted above, a genuine dispute of fact exists "where the undisputed material facts are capable of supporting conflicting inferences on such an issue." McDonald, supra. As a moving party, PERF has not refuted Stefanatos' claim that she detrimentally relied on the overpayments and will suffer severe financial hardship if they are corrected and collected. Stefanatos has submitted evidence of hardship but the extent of that hardship cannot be determined based on the evidence presented.

Order

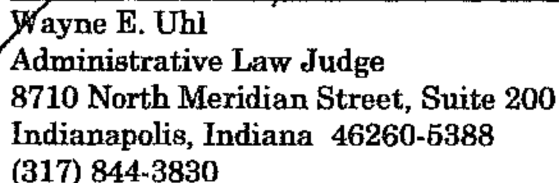
Summary judgment is granted in part and denied in part. See Ind. Code § 4-21.5-3-23(c).

PERF is entitled to judgment as a matter of law on the questions of whether PERF is authorized to correct Stefanatos' benefit and collect its overpayment of benefits to Stefanatos. On this legal question, PERF's motion for summary judgment is GRANTED and Stefanatos' motion for summary judgment is DENIED.

Both parties' summary judgment motions are DENIED on the question of whether, on the facts of this case, it is inequitable or will impose a significant adverse effect on Stefanatos if either her benefit is corrected and/or the full overpayment is collected.

This case is set for a prehearing conference, to be conducted by telephone, on **November 13, 2007, at 8:30 a.m.**, to discuss further proceedings including the setting of a hearing. Counsel for PERF will arrange the call.

DATED: November 2, 2007.



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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, postage prepaid, on November 2, 2007:

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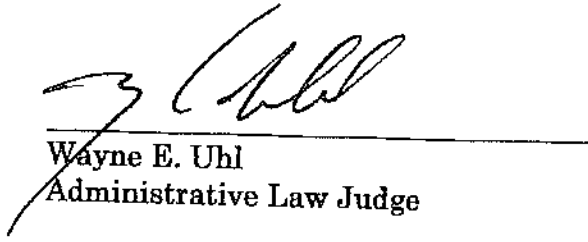

Wayne E. Uhl
Administrative Law Judge