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

IN THE MATTER OF	)	PUBLIC EMPLOYEES' RETIREMENT
STACY L. WALDEN,	)	FUND
	)	
Petitioner.	)	

DECISION ON MOTION FOR SUMMARY JUDGMENT

Introduction

Stacy L. Walden appeals from the PERF Board's determination that her monthly benefit was miscalculated and that she was overpaid $[redacted] as of December 31, 2006. PERF determined that it would reduce her benefit to the correct amount, and reduce it further to collect the overpayments over 37 years.

In accordance with the schedule set by agreement of the parties, PERF filed a motion for summary judgment with supporting evidentiary materials on March 29, 2007. Walden filed a one-page letter setting forth her position and acknowledging that she had not included any documentation in support. This letter will be treated as Walden's motion for summary judgment. PERF filed a response to Walden's letter on April 23, 2007. Walden filed a reply on May 8, 2007.

A hearing was held on May 15, 2007. The parties presented argument and Walden presented Exhibit P-1.

Findings of Undisputed Fact

1. John Ream was employed by the City of Bloomington and became a member of PERF on April 16, 1982. He was born in August 1959. He designated his wife, Stacy Lynn Ream, as his primary beneficiary. (PERF Ex. 1.)

2. John died on April 9, 2002, still in active, continuous service for Bloomington. (PERF Ex. 2.)

3. By statute, Stacy was entitled to a survivor benefit because John died after March 31, 1990, John had at least 15 years of creditable service, and they had been married for at least two years. Ind. Code § 5-10.2-3-7.5.

4. By letter dated May 20, 2002, PERF notified Stacy that because John was eligible to receive a PERF pension at the time of his death, she was entitled to a PERF survivor benefit. (PERF Ex. 4.)

5. The letter set forth two choices. Choice #1 was to receive a lifetime monthly benefit including an annuity based on contributions in John's annuity savings account (ASA). The monthly benefit would be "approximately [redacted]" (PERF Ex. 4.)

6. Choice #2 was to receive a lump sum distribution of the ASA and a reduced lifetime benefit. The lump sum payment would be "approximately [redacted]" and the reduced lifetime monthly benefit would be "approximately [redacted] (PERF Ex. 4.) As it turned out, this estimate was very close to correct.

7. Walden states that she did not receive the letter. She notes that it was addressed to her at "[redacted]" when in fact she lived at 1402 South Henderson Street. PERF counsel states that there is no evidence that the letter was delivered (it was not sent by certified mail) or that the letter was returned as undeliverable.

8. Stacy Ream applied for survivor benefits on July 2, 2002. (PERF Ex. 5.) Apparently she elected Choice #2 and received a lump sum distribution of John's ASA. [1]

9. On July 7, 2002, Stacy met with her financial advisor. He told her that a PERF representative had told him that her monthly benefit would be [redacted]

10. Stacy remarried in 2004 and changed her name to Stacy Walden. (PERF Ex. 8.)

11. Walden contends that she and her parents met with her financial adviser, Jim Spore, on July 7, 2002, and that Spore told her that a PERF represented told him that Walden would receive a monthly benefit of $[redacted] for the rest of her life. Her only tendered evidence of this is an email from her parents stating their recollection of the meeting. (Petitioner Ex. P-1.)

12. In fact, Walden began receiving monthly payments in that amount in 2002. PERF records show a payment of $[redacted] in November 2002 covering all prior months since John's death, followed by a payment of $[redacted] in December 2002. (PERF Ex. 6.)

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[1] Unfortunately, Exhibit 5 contains only the odd-numbered pages of the application, which do not show the election. PERF counsel advised that the even-numbered pages are not in PERF's records. However, other documentation indicates that the lump sum distribution was paid out. See PERF Ex. 7 (showing calculation based only on John's salary) and 15 (showing ASA balance of zero with the notation "Took withdraw").

13. Cost of living adjustments (COLAs) increased the benefit in subsequent years, so that by December 2006 the monthly benefit was [redacted] (PERF Ex. 9.)

14. At a pretrial conference, Walden stated that she relied on the benefit payment when she refinanced a mortgage in 2002, purchased or leased a car in 2002, upgraded her car in 2004, purchased a new home in 2005, and refinanced her mortgage in 2006. She has included the benefit in disclosing her income when applying for loans and financial aid for her daughter's college education. She has paid income taxes on the benefits. None of this evidence was introduced in the form of sworn testimony despite both oral and written notice that a summary judgment motion must be supported or opposed with admissible evidence such as affidavits. [2]

15. The survivor benefit to which Walden is entitled is the monthly retirement benefit that John would have received under the joint and survivor option upon the member's death following retirement at age 50 or the actual date of death, whichever is later. Ind. Code § 5-10.2-3-7.5.

16. The calculation of the 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.

17. Sometime before May 2005, an audit of Walden's benefit calculation was ordered. The audit recalculated Walden's benefit payments up to July 31, 2004, and was reviewed with PERF on or before May 11, 2005. (Exhibit A to Barley Affidavit, Ex. 16.) [3]

18. The audit showed that Walden's benefit had been miscalculated due to two errors. (Id.)

19. First, in calculating the retirement benefit to which John Ream would have been entitled, the joint and survivor option factor (which is based on actuarial tables and the ages of the member and surviving spouse) was based on incorrect ages. The original calculation used an age of 42 for John and 40 for Stacy (resulting

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[2] The summary judgment process was explained to the parties in detail at the pretrial conference on February 20, 2007, and an abbreviated written explanation was provided in the Order and Notice of Summary Judgment Hearing, citing Ind. Code § 4-21.5-3-23, on the same date. Walden was advised that she could file her own affidavit in support of her motion or in opposition to PERF's.

[3] Exhibit A to the Barley Affidavit, Ex. 16, appears to have been prepared by an independent auditor using data through July 31, 2004. A notation states: "Reviewed with MM on 5/11/05, client agrees with variance."

in an option factor of 0.932), while the new calculation uses age 43 for John and 41 for Stacy (resulting in an option factor of 0.9283). (Id.)[4]

20. Second, the audit showed that an age reduction factor should have been applied to reflect that John's benefit would have been considered "early retirement" and subject to the early retirement reduction formula set forth in Ind. Code § 5-10.2-4-5. No age reduction factor was applied to the original calculation. The recalculation applies a reduction of 0.44. (Id.; Exhibit E to Barley Aff., Ex. 16.)

21. The audit concluded that Walden's original monthly benefit should have been [redacted] increased to [redacted] by COLAs through mid-2004. (Id.)

22. PERF contends that with subsequent COLAs, Walden's monthly benefit at the end of 2006 should have been [redacted] (PERF Ex. 9).

23. At the time the audit was performed, it concluded that the overpayment was [redacted] up to July 31, 2004, and was accumulating at a rate of [redacted] a month. (Exhibit A to Barley Affidavit, Ex. 16.)

24. Although PERF had this information on or before May 11, 2005, the record does not reflect why PERF waited until January 2007 before taking action.

25. As of December 2006, Walden had been overpaid [redacted] (PERF Ex. 9.)

26. By letter dated January 5, 2007, PERF notified Walden of its discovery of the miscalculation and its conclusion that she had been overpaid [redacted] The letter stated that federal law requires PERF to collect overpayments, that her benefit would immediately be adjusted to the correct amount of [redacted] and that her benefit would be further reduced to $225.49 to collect the overpayment over a period of 37 years. (PERF Ex. 9.)

27. Walden states that she first learned of the reduction in her benefit before she received the letter, when the reduced payment was directly deposited in her bank account.

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[4] PERF refers to actuarial calculations contained in Exhibit B to the Barley Affidavit, Ex. 16, and specifically refers to page 109 of that table. This does not seem to square with Exhibit A to the Barley Affidavit, which states that the ages used to calculate the option factor were 50 for the member and 40.92 for the spouse, but which still shows an option factor of 0.9283. If John's age were presumed to be 50 and Stacy's age 41, the option factor would be 0.88606 (Ex. B at 127).

[5] Another calculation submitted by PERF concludes that the original amount should have been [redacted] a difference of three cents. (PERF Ex. 15.)

28. After Walden made both oral and written inquiries about the miscalculation, PERF offered, by letter dated January 23, 2007, to temporarily reinstate her benefit to the pre-correction amount of [redacted]or up to six months while Walden considered her option to appeal, although this would result in more overpayments and a further reduction of her monthly benefit to collect them. She was also given formal notice of her appeal rights. (PERF Ex. 11.)

29. In the letter of January 23, 2007, PERF stated that with a 2007 COLA, Walden's recalculated benefit will be [redacted]PERF Ex. 11.)

30. By fax dated February 1, 2007, Walden accepted the temporary reinstatement of her pre-correction benefit, and also appealed PERF's decision. (PERF Ex. 13.)

31. By letter dated February 6, 2007, PERF acknowledged Walden's acceptance of the temporary reinstatement of her benefit. (PERF Ex. 12.)

32. This means that, from Janua[redacted]h June 2007, Walden has continue[redacted]ayments of [redacted]which exceed her recalculated benefit of[redacted] This added [redacted]to the overpayment, for a total to date of [redacted]

33. PERF concedes that Walden's appeal is timely. (Assignment letter to ALJ Uhl, 2/12/07.)

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).

Genuine disputes of material fact

PERF contends that the material facts are not in dispute, and Walden has submitted no evidence contravening PERF's evidence. Despite two potential conflicts, I find that there is no genuine issue of material fact.

A potential conflict arises from Walden's assertion, supported by her Exhibit P-1, that a PERF representative told her financial adviser in 2002 that her monthly benefit would be [redacted] PERF objects to the exhibit on the ground of hearsay. Hearsay is [redacted] administrative proceedings so long as it is not the sole basis for an order. Ind. Code § 4-21.5-3-26(a). PERF's objection is therefore overruled in part. Exhibit P-1 is admitted into evidence and it will be assumed that the PERF representative made the statement in question, but this exhibit cannot be the sole basis for decision. In any event, to the extent that Walden is claiming detrimental reliance on PERF's original calculation, such reliance would be established by the fact that PERF proceeded to make monthly payments in that amount and COLA-adjusted amounts from 2002 through 2006, regardless of what a PERF representative might have said before the payments began.

Another potential conflict arises from the letter PERF sent to Walden in May 2002, setting forth her approximate benefit. (PERF Ex. 4.) Walden says that she did not receive the letter, although she has not provided admissible evidence in the form of an affidavit or otherwise. I will resolve this question against PERF as the moving party and presume that the letter was not delivered.

PERF's authority to collect overpayment

At the hearing, Walden stated that she is not challenging PERF's recalculation of her benefit, and concedes that the correct benefit of $272.91 should be paid to her in the future. The only issue, therefore, is her challenge to PERF's decision to collect the overpayment of $20,706.01 (to date).

The first question is whether PERF is authorized to collect overpayments in this manner. 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 overpayments of benefits paid to a member or survivor. [6] 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 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 and the regulations under that section.

Section 401 of the Internal Revenue Code, 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 <u>in accordance with such plan</u>." 26

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

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). [7]

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. 17), 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. 17 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. 17 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. 17 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. 17 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. 17 at 10.) The Procedure clearly contemplates that overpayments are failures that require correction. This can be seen from Section 6, which sets forth the principles for correction of failures. While it does not specifically state that overpayments are failures, it creates an exception to the general requirement of full correction by stating that a plan is not required to seek return of an overpayment of $100 or less. (§ 6.02(5)(c), Ex. 17 at 15.) Section 6 also states generally that full correction may

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[7] 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.

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. 17 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. 17 at 62, which incorporates § 2.04(1) (correction of § 415(b) excesses), Ex. 17 at 57-60.)

A revenue procedure is directory, not mandatory, and does not have the force of a promulgated rule. Estate of Shapiro v. Commissioner, 111 F.3d 1010, 1017-18 (2nd Cir. 1997), citing cases. Nevertheless, the procedure clearly indicates the IRS view that the overpayment in this case would be considered a failure that would threaten PERF's qualification under § 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 cases, some of them cited later in this decision, that considered whether to permit recoupment or not without reference to the prospect that the plan will lose its § 401 qualification, some of which denied recoupment.

Court decisions

Neither party has cited a court decision on the question of whether a pension fund may collect mistaken overpayments by deduction from future benefit payments. 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. [8]

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 law of trusts. And with respect to the possible application of equitable estoppel to this case, PERF does not argue that estoppel could never apply, but only that it does not apply on the facts of this case. (PERF Memorandum in Support of Motion for Summary Judgment at 12-14.)

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

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[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).

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, in an action under ERISA, courts apply common law principles of equitable relief. See, e.g., Johnson v. Retirement Program Plan, 2007 WL 649280 (E.D. Tenn. 2007) (summary judgment granted for pension plan on challenge to collection of mistaken overpayments, based on ERISA, trust law and equitable estoppel); Phillips v. Maritime Association-I.L.A. Local Pension Plan, 194 F.Supp.2d 549 (E.D. Tex. 2001) (using equitable common law principles, pension plan cannot reduce benefits or recoup overpayments); Kaliszewski v. Sheet Metal Workers' Nat'l Pension, 2005 WL 2297309 (W.D. Pa. 2005) (recommending denial of summary judgment on disputed question of whether pension could reduce overpayments resulting from miscalculation).

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). [9]

But this rule is subject to the limitation that "the party receiving the money must not have so changed his position so as to make it inequitable to require him to make repayment." Monroe Financial, id. In that case, the court held that investing the proceeds or using the proceeds as a down payment to incur new debt based on the proceeds are not sufficient to demonstrate a change of position that would bar restitution. Id. at 384-85.

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[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 sympathy for 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).

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 overpayments. 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).

Equitable estoppel

Another principle often discussed in cases of mistaken overpayment is the 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 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 "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.

To this list should be added, in the case of a pension fund, 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 $10,000 payment when only $100 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 minimized. According to its web site, PERF's assets at the end of 2006 were approximately $16.1 billion. [10]

Summary and decision

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 Internal Revenue Code. The cases cited above provide a kaleidoscope of equitable considerations that courts have considered 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.

Of the other cases, a most compelling analysis is presented by Johnson v. Retirement Program Plan, 2007 WL 649280 (E.D. Tenn. 2007), 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 relation 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.

In this case, the equities against recoupment include:

- PERF's mistake was entirely its own, not induced by misconduct of Walden in any respect. She had no notice that her benefit was too large, and no obligation to bring the error to PERF's attention or conduct further investigation to determine its correctness.
- During the four and one-half years that she received the benefit without any reason to doubt its correctness, Walden relied on it to make purchases and incur debt. However, in response to PERF's motion for summary judgment, she has not submitted competent, admissible evidence of the details of her reliance or the extent to which she changed her position.

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[10] Press release, "PERF Assets Top $16 billion," http://www.in.gov/perf/agency/20070112.html (last viewed 6/15/07).

- PERF knew of the possibility that the benefit was incorrect as early as 2004, and received confirmation in or before May 2005, but allowed the overpayment to accumulate until January 2007.
- An overpayment of [redacted] represents a very small amount in relation to the total assets of PERF (about 0.000129 percent).

On the other hand, the following factors counsel in favor of recoupment:

- Indiana law permits recovery of mistaken, even careless overpayments. This overpayment was apparently the result of negligence, not willful or reckless conduct. It was also based on a mistake of fact, not a mistake of law (to the extent that such a distinction has meaning).
- The overpayments were clearly contrary to law and modified the terms of the plan. They were not the result of interpretation of ambiguous provisions of the plan.
- To forbid the overpayment penalizes other members and beneficiaries and, to a small extent, may affect actuarial determinations.
- Walden did not make long-range pre-benefit plans based on the prospect of receiving the benefit. In fact, she stated at the hearing that she was surprised to learn that she would be receiving any benefit from PERF.
- PERF is permitting the overpayment to be repaid over a period of 37 years, or at the rate of about [redacted] a month. (The greater financial impact in this case is created by the correction of the benefit, which is not challenged by Walden.)
- PERF agreed to temporarily continue the overpayments for six months to allow Walden to take steps to adjust.
- This was not an isolated instance—several miscalculation cases have been assigned to the undersigned ALJ for adjudication.
- The mere fact that Walden used the proceeds to make purchases or incur debt is insufficient to establish detrimental reliance or that recoupment would be inequitable.
- Walden has not submitted evidence that she will suffer significant hardship in the future as a result of recoupment. In particular, there is no evidence of her other sources of income. (She stated at the hearing that she is employed.)
- While Walden stated that she just refinanced her house and has purchased a car based on the incorrect benefit, she has not stated or submitted evidence that she will have to default on these loans, and it seems unlikely that she will have to do so based on a drop of [redacted] in monthly income. To the extent that her children may have received less financial aid for higher

education (or some other government benefit based on income), she can plead changed circumstances.

Walden has argued that errors by PERF employees should be compensated by insurance or bonds on those employees, not the members who received and relied on overpayment as a result. There is no authority for the proposition that a pension fund's failure to insure itself against errors such as this is a factor to be considered.

Walden has also attacked the manner in which PERF notified her of its decision. Regardless of whether the notice should have been given before the reduced benefit actually arrived in her account, that has no bearing on the legal questions presented by this appeal.

In light of all of these factors, PERF's decision to collect the overpayment by reducing Walden's future benefits over a period of 37 years is reasonable and not inequitable.

Order

There is no genuine dispute of material fact and PERF is entitled to judgment as a matter of law. PERF's motion for summary judgment is GRANTED and Walden's motion for summary judgment is DENIED. PERF'S initial determination to reduce Walden's survivor benefit to the corrected amount and the reduce the benefit further to collect the mistaken overpayment is AFFIRMED.

DATED: June 18, 2007.

Wayne E. Uhl
Administrative Law Judge
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