PUBLIC EMPLOYEES RETIREMENT FUND
DEC 31 2007
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BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND

IN THE MATTER OF	)	PUBLIC EMPLOYEES'
BONITA J. KRUER,	)	RETIREMENT FUND
	)	
Petitioner.	)	

DECISION ON MOTION FOR SUMMARY JUDGMENT AND ORDER SETTING PREHEARING CONFERENCE

Introduction

Bonita Kruer appeals from the PERF Board's initial determination that her retirement benefit was miscalculated and that she was overpaid a total of $ 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 and modified by agreement of the parties, PERF filed a motion for summary judgment on August 13, 2007, Kruer filed a response on October 15, 2007, and PERF filed a reply on November 5, 2007. PERF's motion is fully briefed and ready for decision.

Findings of Undisputed Fact

1. Bonita Jean Kruer was employed on February 22, 1982, at the now-closed Silvercrest Children's Development Center, which was then operated by the Indiana Department of Health Facilities. She did not report any prior potential PERF-covered service. (PERF Ex. 1.) She later became an employee of the Floyd County Division of Family and Children. (PERF Ex. 3.)

2. Kruer was born on May 11, 1947. (PERF Ex. 1, 3; Pet. Ex. 13, ¶ 3.)

3. Kruer's salary when she retired in 2003 is not clear. She states variously that she was earning or and could have earned if she had not retired. (Pet. Ex. 13, ¶¶ 15, 25, 30.) Her average annual compensation for the 20 highest-paid quarters was (PERF Ex. 6, 8, 9).

4. Each year for five years before 2003, Kruer attended face-to-face retirement counseling sessions at the PERF office in Indianapolis to determine her future benefits. (Pet. Ex. 13, ¶ 15.) In 1998, 1999 and 2000 she received written estimates, all of which were accompanied by the disclaimer that "PERF does not warrant the accuracy of this data, however obtained." (Pet. Ex. 1.)

5. In 2002, the State offered employees an early retirement incentive as authorized by Ind. Code § 5-10.2-3-1.2, under which a member can purchase one year of service credit for every five completed years of service, and the State can purchase that credit for the member. [1]

6. According to Kruer, the incentive program included the right of the member to return to work without penalty, loss of seniority or job classification within 24 months after retirement. (Pet. Ex. 13, ¶ 9.)

7. On November 30, 2002, PERF retirement counselor Marge Warner mailed a "Benefit Estimate" to Kruer. The estimate assumed retirement on June 1, 2003, service of 21 years and 3 months, and incentive service of 4 years and 3 months (that is, total service of 25 years and 6 months). According to this estimate, Kruer would receive a monthly base pension benefit of [redacted] (Option 10, normal retirement). [2] The estimate included the following disclaimer:

> Only service which has been verified will be used in determining any benefit to which you are entitled. All service is verified at the time a benefit application is received from the member at which time creditable service will be calculated to the exact day. Therefore, this information is subject to review and revision at the time of retirement. All information shown is an estimate only. Actual benefits will be computed based on certified data using the laws in effect at retirement.

(Pet. Ex. 2, p. 1; Pet. Ex. 5, p. 2.)

8. The Benefit Estimate also showed that Kruer's annuity savings account (ASA) had a balance of [redacted] and that monthly withdrawals from the ASA would be [redacted]. (Pet. Ex. 2, p. 1.)

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[1] Kruer states that the incentive program was offered in "October 2003," but this must be a typographical error and presumably means October 2002. (Pet. Ex. 13, ¶ 16.)

[2] The document estimated benefits under a variety of scenarios depending on whether Kruer selected a survivor benefit option. Only the normal retirement option is relevant here.

9. Kruer had an appointment to meet with Warner on January 9, 2003. (Pet. Ex. 5, p. 1.) Handwritten notes on the Benefit Estimate that Warner mailed to Kruer in November include the following, apparently made during that meeting, calculating a bonus to be received as part of the early retirement incentive:

x
1-9-03 $ Bonus

10. On April 10, 2003, Kruer obtained an estimate of her benefit from the Retirement Benefits Calculator on PERF's Web site. The estimate was based on retirement at age 56 with 25 years of creditable service and an average salary of . The calculator estimated a monthly pension benefit of . The estimate included the following disclaimer:

> This benefits estimator has been prepared by the Public Employee's [sic] Retirement Fund for the convenience of the users of this website. It is for the purpose of estimating retirement or disability benefits only. PERF cannot and does not warrant the present or future accuracy of any information used herein. The user must understand that the information used in the formula is subject to constant statutory, regulatory or financial market change without notice due to circumstances beyond PERF's control, thus rendering any figure obtained through this estimator higher or lower than ultimately proved [sic] through actual retirement. The user must also understand that benefit calculations involve an estimation and use of future values of which [sic] there is no known way to accurately predict, PERF therefore assumes no liability and expressly disclaims any liability for any results based on any calculations made using this benefits estimator. Any reliance on information obtained through this benefits estimator must be done solely at the user's own risk. No decisions regarding actual retirement choices based in whole or in part upon information obtained through this benefits estimator should be made without the user first consulting a properly trained retirement counselor.

(Pet. Ex. 2, p. 2.)

11. On April 29, 2003, Kruer obtained another estimate from the Web site calculator based on the same criteria except with 26 years of service instead of 25. The calculator estimated a monthly pension benefit of . This estimate came with the same disclaimer quoted in the preceding paragraph. (Pet. Ex. 2, p. 5.)

12. Kruer's affidavit states that prior to June 1, 2003, "PERF advised me that I would be receiving monthly benefits in the amount of (Pet. Ex. 13,

¶ 11.) She does not state how this information was communicated or when it was received relative to the other estimates discussed above. But she also states that when the early retirement program was announced — "in October 2003" — it was "estimated by the PERF office that I would receive $645.98/mo in benefits for June 2003." This was upon the advice of a PERF retirement counselor, and Warner was the counselor Kruer spoke with most often. (Pet. Ex. 13, ¶ 16.) It has already been noted that the reference to October 2003 must be inaccurate. These paragraphs of Kruer's affidavit are inconsistent with her more specific and documented testimony about the Benefit Estimate she received from Warner in November 2002, which was discussed at their meeting in January 2003, which estimated Kruer's benefit at [redacted] (Pet. Ex. 2, p. 1.)

13. Before deciding to retire, Kruer and her husband considered whether they could afford to live based on the estimates provided by PERF, as well as information received at retirement planning seminars not conducted by the State or PERF. She knew that she would need to "tighten my budget" and decrease spending on family expenses, food, work-related travel, clothing and gifts. (Pet. Ex. 13, ¶¶ 12-15.)

14. Kruer applied for retirement benefits on May 29, 2003, anticipating an effective date of June 1, 2003. (PERF Ex. 3.)

15. Kruer selected benefit Option 10, 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 five years or the present value of those remaining payments in a lump sum.

(PERF Ex. 3.)

16. Kruer elected to defer any withdrawal or payment of her ASA. (PERF Ex. 3.)

17. Kruer's last day in pay status was May 29, 2003. (PERF Ex. 3.)

18. Kruer was given credit for 25.5 years of creditable service. (PERF Ex. 6, 8, 9.)

19. Kruer's age at retirement was 56 years and 20 days.

20. 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.

21. PERF miscalculated Kruer's retirement benefit by failing to account for the fact that she was younger than 65 when she retired.

22. 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."

23. PERF correctly calculated that Kruer would have been entitled to a full base retirement benefit of [redacted] per year, or [redacted] per month. (PERF Ex. 8, 9.)

24. However, PERF failed to apply the "age reduction factor" of 0.74. This would and should have resulted in an annual benefit of [redacted] or [redacted] per month. (PERF Ex. 8, 9.)

25. Kruer began receiving monthly retirement benefit checks of [redacted] after her retirement on June 1, 2003, reduced by withholding for federal and state income taxes. (Pet. Ex. 2, p. 3.)

26. Due to cost-of-living increases, Kruer was receiving monthly payments of [redacted] by December 2006. Had the benefit been correctly calculated, it would have been [redacted] (PERF Ex. 5.)

27. After retirement, Kruer reduced her living expenses. She was helping to care for her 87-year-old father and grandchildren with severe medical needs. She dropped her own life insurance coverage and continued to drive a six-year-old van. She purchased grave sites for a grandchild with a terminal disease and the child's parents. (Pet. Ex. 13, ¶¶ 17-22.)

28. In April 2004, the State Board of Accounts (SBA) released its audit of PERF for the year ending June 30, 2003. The audit tested the accuracy of benefits paid to 53 new retirees and found ten of them (19%) were wrong (five underpaid and five overpaid). These appeared to be due to "errors in manual calculations or data entry." PERF responded that the ten errors would be fixed. (Pet. Ex. 9, pp. 16, 32.)

29. In February 2005, the SBA reported its audit of PERF for the year ending June 30, 2004. Among other findings, the SBA found that five percent of tested new retirees were receiving full retirement benefits when they had retired under the conditions of reduced early retirement. This was because PERF's computer system (SIRIS) did not use the early retirement factor. The SBA advised that PERF seek reimbursement for the overpayments. (Pet. Ex. 10, p. 22.)

30. In another part of the same audit, discussing other benefit calculation errors, the SBA noted that PERF had retained a CPA firm to recalculate all PERF

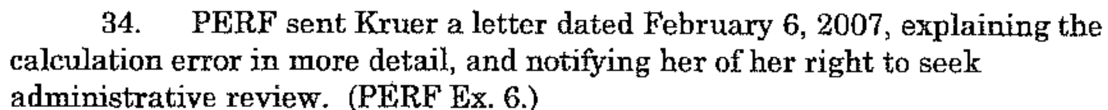
benefits initiated after the SIRIS implementation in April 2002, a project that was "in progress." (Pet. Ex. 10, p. 25.)

31. In December 2005, the SBA reported its audit of PERF for the year ended June 30, 2005. The report noted the SBA's prior findings of incorrect benefit calculations, including 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. 11, pp. 15-16.)

32. In September 2006, the SBA reported its audit of PERF for the year ended June 30, 2006. The SBA noted its earlier findings under the heading "Uncorrected Prior Errors." It reported that the CPA firm had issued a final report of overpaid and underpaid benefits but that corrections had not yet been made. A contract was in effect to complete member account adjustments during fiscal year 2007. (Pet. Ex. 12, p. 8.)

33. By letter dated January 5, 2007, Kruer was notified that her benefit had been incorrectly calculated and that she had been overpaid $ Her future monthly benefit would be reduced to the correct amount of Her monthly payment would be further reduced to to collect the overpayment, without interest, over the next 60 months. (PERF Ex. 5.) This letter was preceded by a phone call from PERF in December 2006. (Pet. Ex. 13, ¶ 14.)

34. PERF sent Kruer a letter dated February 6, 2007, explaining the calculation error in more detail, and notifying her of her right to seek administrative review. (PERF Ex. 6.)



36. Because PERF did not notify Kruer of the miscalculation within 24 months after retirement, she was not able to return to her job within the 24-month window provided under the early retirement incentive program. (Pet. Ex. 13, ¶ 30.)

37. Kruer submitted a request to appeal PERF's determination. The request was received by PERF on February 22, 2007. (PERF Ex. 7.)

38. PERF concedes the timeliness of the appeal. (Letter to ALJ Uhl, March 16, 2007.)

39. 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).

Evidence

Neither party has objected to any of the evidence submitted by the opposing party. Therefore, all of the evidence is deemed admissible.

Genuine disputes of material fact

Kruer argues that there are material facts in dispute (Pet. Resp. 4-5) and that "disputed and material issues of law and fact still exist" (Pet. Resp. 18). The evidence Kruer has filed does not conflict with PERF's evidence on the historical facts of this case, nor does PERF contest any of the historical facts posited by Kruer. As explained below, however, conflicting inferences may be drawn from the facts, preventing entry of summary judgment on all issues.

Issues

PERF argues that its recalculation of Kruer's pension benefit is correct, that PERF is required to correct the benefit prospectively and collect overpayments (relying heavily on PERF's obligation to maintain the qualification of the plan under the Internal Revenue Code), and that Kruer cannot rely on detrimental reliance or equitable estoppel to bar PERF from doing so.

In response, Kruer does not challenge the correctness of the recalculation or the general principle that PERF is required to correct errors and collect overpayments. Instead, Kruer argues that Indiana common law principles of equitable estoppel constitute an exception to that rule and, in this case, militate against correction and collection.

PERF is authorized to correct benefits and collect overpayment, but its authority is limited by equitable principles.

1. Statutory authority

It is uncontested that 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).

The statutes governing PERF do not expressly address correction of erroneous benefits or collection of overpayments. [3] Correction of errors is implicitly authorized by Ind. Code § 5-10.3-8-8: "The benefit may not be increased, decreased, revoked or repealed except for error or by action of the general assembly." (Emphasis added.)

Implicit authority to collect overpayments may 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." The concept of collecting an overpayment is also endorsed by Ind. Code § 5-10.2-4-1.5, which authorizes PERF to pay an estimated benefit before a member's records are complete and certified, and then adjust the benefit to reconcile any under- or overpayment "over a reasonable time, as determined by the board." Ind. Code § 5-10.2-4-1.5(c).

PERF argues that support for authority and a mandate to collect overpayments is also 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.

PERF argues that failing to correct Kruer's benefit and collect the overpayment would violate these conditions and subject the fund to loss of its qualified status. Although Kruer does not contest this general proposition, analysis of the federal tax provisions is required to assess her argument that they can be trumped by Indiana common law.

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

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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).

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. 11), 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. 11 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. 11 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. 11 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. 11 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. 11 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 $█ or less. (§ 6.02(5)(c), Ex. 11 at 15.) It further appears that overpayments may be corrected

[4] PERF also cites "26 C.F.R. § 1.401-126." There is no provision of the Code of Federal Regulations with that citation.

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. 11 at 62, which incorporates § 2.04(1) (correction of § 415(b) excesses), Ex. 11 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. 11 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, equitable considerations*

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 13-14.)

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 is the application of equitable principles to determine whether, depending on the standard of review

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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).

involved, it is unreasonable, arbitrary or capricious for a pension fund to recover overpayments.

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 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.

~~Much of the law in this area is set forth in cases 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).

[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). In any event, the mistaken payment in this case was based on a mistake of fact (the miscalculation), not a misinterpretation of the law.

Therefore, it is instructive if not binding that 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).

Finally, in the case of a pension fund, equitable considerations must include the fund's fiduciary obligation 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).

The application of equitable principles may actually be consistent with the IRS regulations that PERF relies on so heavily. Those regulations do not require full correction where full correction would be "unreasonable or not feasible," and provide 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. 11 at 15.) Perhaps, therefore, PERF could decline to collect an overpayment where collection would have a "significant adverse effect" on a member, and the failure to collect would not have such an adverse effect on other members.

A compelling and thorough 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.

3. *Equitable estoppel*

Kruer argues that in deciding to take early retirement, she relied to her detriment on incorrect estimates of benefits provided by PERF. The parties contest whether the facts of this case support application 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 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, as discussed above, equitable considerations must include the fiduciary obligation of a pension fund to maintain the integrity of the fund. This overriding obligation to protect other members and the actuarial soundness of the

plan has led some courts to hold 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.

PERF concedes that equitable estoppel can be asserted against a governmental entity if public policy reasons favor it. (PERF MSJ Mem. at 13-14.) Cases cited by PERF from other jurisdictions support the view that the application of estoppel depends on the circumstances. See Crumpler v. Board of Administration, 108 Cal. Rptr. 293 (Cal. Ct. App. 1973) (city estopped from reclassifying employees in retirement system retroactively, but not estopped from reclassifying them prospectively); Scheurer v. New York City Employees' Retirement Sys., 636 N.Y.S.2d 291 (N.Y. App. Div. 1996) (rejecting application of estoppel, but holding that estoppel can be applied in "unusual factual situations" and noting that plaintiff failed to show that he had suffered "manifest injustice").

PERF cites a Pennsylvania case holding that estoppel cannot bar a public retirement fund from correcting an estimated benefit to the amount required by statute. Bittenbender v. State Employees' Retirement Bd., 622 A.2d 403 (Pa. Cmwlth. 1992). That court noted, however, Pennsylvania precedent that while erroneous retirement benefits can be corrected, overpayments could not be collected. Kellams v. Public School Employees' Retirement Bd., 391 A.2d 1139 (Pa. Cmwlth. 1978), aff'd by equally divided court, 403 A.2d 1315 (Pa. 1979). Accord, Borkey, supra.

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 common 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 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. In rare cases, the more rigid doctrine of equitable estoppel may apply.

5. Application of principles to this case

The elements of equitable estoppel do not bar PERF from correction of Kruer's benefit and collection of the overpayment.

First, PERF did not knowingly misrepresent a material fact with the intention that the Kruer act upon it. In fact, the Benefit Estimate provided to Kruer by a PERF representative in November 2002 was low, underestimating Kruer's monthly benefit by $28.12 (Pet. Ex. 2, p. 1).[7] The more inflated pre-retirement estimates came from the Web site calculator, which included a clear and detailed disclaimer as to its accuracy (Pet. Ex. 3, pp. 2, 4, 5).

Kruer's statements that she was also told that her payments would be $645.78 or $645.98 (Pet. Ex. 13, ¶¶ 11, 16) are too indefinite and contradictory with her other evidence as to time and source to be the basis for a claim of equitable estoppel.

The benefit payments themselves were wrong, but there is no evidence that PERF knew they were wrong until SBA audits began to find mistakes and

[7] The Benefit Estimate projected a base pension benefit of [redacted] while the actual benefit should have been [redacted]

accountants were retained to recalculate the benefits of all members who retired after April 2002. PERF's knowledge that there were problems with some benefit calculations does not support an inference that PERF knew that Kruer's benefit was incorrect or that PERF intentionally induced Kruer to act upon an erroneous calculation.

Second, Kruer cannot meet the requirement of detrimental reliance in making her decision to retire. At most, Kruer has shown that she received widely different estimates of her benefit from a PERF representative [redacted], the Web site [redacted] and an unspecified PERF source [redacted] Given these variations and the elaborate disclaimers accompanying the estimates, it was simply not reasonable for Kruer to rely on the higher estimates when making the important decision whether to retire. Regardless of whether Kruer can show "reliance in fact," she cannot show "right of reliance" on the pre-retirement estimates.

The incorrect payments themselves did not start until after Kruer made the decision to retire. In one sense, Kruer remained retired in reliance on the payments instead of exercising her option to return to work, but this is no different than the decision to retire in the first place.

Third, the circumstances of this case are not so unjust as to overcome the general rule that a governmental entity cannot be estopped by erroneous statements of its employees.

Therefore, analysis turns on the more general equitable principles discussed at length above.

Some factors weigh against correction or recoupment of the overpayment. Kruer did not induce the overpayments. She states that had she been told of the incorrect payments within 24 months after retirement, she would have returned to work. She also states that she will suffer financial hardship, in the form of careful budgeting, curtailed entertainment, deferred medical tests, and incurring debt to pay for medical equipment expenses of her granddaughter. It is certainly feasible that a permanent income reduction of 26 percent, and a temporary income reduction of 44 percent, could have a serious and adverse financial impact on a retiree, if this were her sole or a primary source of income. The impact of the overpayment on PERF is infinitesimal. [8]

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[8] PERF reported that its assets at the end of 2006 were approximately $16.4 billion. Press release, "PERF Assets Topped $16.4 billion in March" (April 27, 2007), http://www.in.gov/perf/agency/20070427b.html (viewed 12/27/07). More recently, PERF described itself as a "$17.2 billion retirement fund." Press release, "Customer service drive nets results at PERF" (Nov. 16, 2007), http://www.in.gov/perf/agency/CSDriveNetsResults.html (viewed 12/27/07).

Other factors weigh in favor of correction and recoupment and against a finding of financial hardship. 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 Kruer's life. PERF's error was negligent, not intentional or even knowing. While the overpayment to Kruer represents a miniscule percentage of PERF's assets, it also appears that PERF was dealing with many mistaken payments, the cumulative effect of which is not a matter of record.

In arguing financial hardship, Kruer focuses on the drop in income from her job to retirement. But it is appropriate to note that she and her husband decided that they could afford for her to retire on [redacted] a year (based on the highest estimate she says she received). Obviously this was not their sole source of income. The correct benefit would have been $5,736.36 a year, a difference of [redacted] a year. After the cost-of-living increases, the change in benefit at the beginning of 2007 was [redacted] a year. It is not obvious that a [redacted] drop in pre-tax annual income would require the sort of drastic lifestyle changes suggested by Kruer's affidavit. The recoupment takes another [redacted] a year, but only for five years, and to repay money that Kruer had the use of for three and one-half years.

Certain factors 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, and the firm's analysis was not final until after December 2005, more than two years after Kruer retired.

Finally, potentially important information is missing. Kruer's total financial picture and sources of income or support should be considered. Although she says that she would have returned to her full-time job if advised of the error within 24 months, she does not say whether she is working or has applied for employment since learning of the error. There is no evidence as to whether Kruer has taken advantage of her ASA, which was not withdrawn upon retirement, and which was estimated to provide income of [redacted] a year if distribution had begun in June 2003.

After careful consideration, 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 the moving party, PERF has not refuted Kruer's claim that she has suffered and will continue to suffer financial hardship if the payments are corrected and the overpayment collected. While Kruer has failed to establish the elements of

equitable estoppel as a matter of law, the question of whether PERF's proposed action is equitable under the specific facts and circumstances of this case requires a hearing.

Order

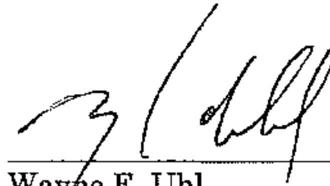
Summary judgment is granted in part and denied in part. See Ind. Code § 4-21.5-3-23(c).

PERF is entitled to judgment as a matter of law on the questions of whether PERF is authorized to correct Kruer's benefit and collect its overpayment of benefits to Kruer. PERF is also entitled to judgment as a matter of law on the question of whether its efforts to correct and collect are barred by the doctrine of equitable estoppel. On these legal questions, PERF's motion for summary judgment is granted.

PERF's summary judgment motion is denied on the question of whether, on the facts of this case, it is inequitable or will impose a significant adverse effect on Kruer 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 **January 10, 2008, at 11:00 a.m.**, to discuss further proceedings including the setting of a hearing. Counsel for PERF will arrange the call.

DATED: December 28, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on the following persons, by U.S. Postal Service priority mail, postage prepaid, on December 28, 2007:

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