

BEFORE AN ADMINISTRATIVE LAW JUDGE FOR THE INDIANA PUBLIC
RETIREMENT SYSTEM

IN THE MATTER OF)	PUBLIC EMPLOYEES'
ROBERT L. BARRETT)	RETIREMENT FUND
)	
Petitioner,)	Respondent

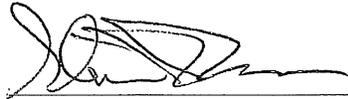
FINAL ORDER

The Board of Trustees ("Board") of the Indiana Public Retirement System ("INPRS") is the ultimate authority in administrative appeals brought by members of the Public Employees' Retirement Fund ("PERF") under IC 4-21.5-3-28 and 35 IAC 1.2-7-3. In the Statement of Board Governance, the Board delegates to the Executive Director the authority to conduct a final authority proceeding, or a review of decision points by the administrative law judge ("ALJ"), to issue a final order in this matter.

1. The ALJ entered a Decision and Recommended Order on Cross-Motions for Summary Judgment ("Order") in this matter on March 2, 2015, granting INPRS' motion for summary judgment.
2. Copies of the Decision and Order have been served upon the parties.
3. On March 11, 2015, Petitioner timely filed his objection to the ALJ's Order.
4. Pursuant to IC 4-21.5-3-29(d)(2), 35 IAC 1.2-7-3(b)(7), and Indiana Trial Rule 4.17(B)(2), it has been more than fifteen (15) days since the ALJ served the Order upon the parties.

NOW the Decision and Order Granting Motion for Summary Judgment of the Administrative Law Judge is hereby AFFIRMED.

DATED ~~April~~ ^{May} 4, 2015.



Steve Russo, Executive Director
Indiana Public Retirement System
One North Capitol, Suite 001
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document on the following persons, by US Postal Service first-class mail on the 4th day of May, 2015.

Distribution:

Robert Barrett



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A handwritten signature in black ink, appearing to read 'Steve Russo', written over a horizontal line.

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BEFORE AN ADMINISTRATIVE LAW JUDGE
INDIANA PUBLIC RETIREMENT SYSTEM

RECEIVED
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INDIANA PUBLIC
RETIREMENT SYSTEM

In the matter of)
ROBERT L. BARRETT,) PUBLIC EMPLOYEES'
Petitioner,) RETIREMENT FUND

DECISION AND RECOMMENDED ORDER ON
MOTION FOR SUMMARY JUDGMENT

Petitioner Robert Barrett challenges an initial determination of the Indiana Public Retirement System (INPRS) that his retirement benefit was correctly calculated, and that he is not entitled to receive a higher amount based on an estimate INPRS provided to him before he decided to retire.

The matter is before the ALJ on a motion for summary judgment timely filed by INPRS. Petitioner did not file a designation of evidence, response, or motion for extension of time within 33 days after service of the motion, so the motion must be decided only on the evidence submitted by INPRS. For the reasons set forth below, the ALJ finds that there is no genuine issue of material fact and INPRS is entitled to judgment as a matter of law, and recommends that the initial determination be affirmed.

Undisputed Material Facts

1. Petitioner Robert Barrett was born [REDACTED] and is a member of the Public Employees' Retirement Fund (PERF) (INPRS Ex. 1). The record evidence does not disclose his public employer or employers.

2. As of April 1, 2014, Barrett had [REDACTED] creditable years of service (Parker Aff. ¶ 6).

3. On February 11, 2013, INPRS received a Retirement Application from Barrett in which he stated a planned retirement date of May 1, 2013 (with a last day worked of [REDACTED]) (INPRS Ex. 1).

4. As will be explained in detail later, the PERF retirement benefit has two parts. The *pension* benefit is based on years of service and salary, with options that include providing for a survivor after the death of the member. The *annuity savings account* or ASA portion is based on the amount the member has in the ASA; the member has the option to have that amount converted to an annuity ("annuitized") and the payments added to the pension benefit.

5. In his application, Barrett chose the pension option of "Joint with Full Survivor Benefits (Option 30)" (INPRS Ex. 1, p. 2).

6. With respect to his ASA, Barrett chose “Combine ASA with Lifetime Pension Benefit” (INPRS Ex. 1, p. 5).

7. On February 14, 2013, INPRS received a handwritten letter from Barrett stating that he wished to “cancel” his retirement application and continue to work (INPRS Ex. 2).

8. On December 19, 2013, PERF provided Barrett with an estimate of his retirement benefit (INPRS Ex. 3).

9. At the top of the first page of the estimate was the following statement:

The PERF Retirement Benefit Calculator allows the calculation of an UNOFFICIAL PROJECTION for a future PERF retirement benefit. This calculator should only be used as a preliminary tool in helping understand potential PERF retirement benefits. The salary and service information used in this calculator reflects data that is currently in PERF’s records. If you believe that the information presented is incorrect, please contact our Customer Service area immediately with your concerns at 1-888-526-1687.

10. The estimate presumed a retirement date of April 1, 2014; an average salary of [REDACTED]; service credit of [REDACTED] years; and ASA balance of [REDACTED] (INPRS Ex. 3).

11. Relevant here, the estimate stated that if Barrett elected Joint with Full Survivor Benefits (Option 30) combined with annuitizing his entire ASA—the elections made in his original application—he would receive a monthly pension benefit of [REDACTED] and ASA annuity payment of [REDACTED] for a total monthly benefit of [REDACTED] (INPRS Ex. 3).¹

12. On December 26, 2013, seven days after the estimate, INPRS received a letter from Barrett stating that he would like to “reinstate” his retirement application with a retirement date of April 1, 2014 (INPRS Ex. 4).

13. The amount of the benefit Barrett began receiving when he retired on April 1, 2014, is not shown by record evidence. In his request for administrative review—which is part of his file but not submitted on summary judgment—he stated that his first benefit checks showed a pension benefit of [REDACTED] and ASA benefit of [REDACTED], for a total monthly benefit of [REDACTED]. This was [REDACTED] per month or [REDACTED] percent less than the estimate.

14. Barrett contacted INPRS to ask why his benefit was lower than the estimate (Parker Aff. ¶ 7).

¹ A copy of the estimate attached to the initial determination letter (INPRS Ex. 5) contained different values, using a projected ASA balance of [REDACTED], and therefore a reduced ASA annuity payment of [REDACTED], for a total monthly benefit of [REDACTED]. The reason for the difference is not apparent. Exhibit 3 is the estimate that was actually sent to Barrett because it matches information cited in his request for administrative review, so the estimate attached to Exhibit 5 is not relevant.

15. INPRS staff recalculated the benefit using Barrett's ASA balance as of the date it received Barrett's request to reinstate his retirement application (December 25, 2013), plus contributions received from December 30, 2013, to April 4, 2014, plus interest. The revised ASA balance was [REDACTED]. (Parker Aff. ¶¶ 8-9.)

16. Barrett began receiving a corrected payment on August 14, 2014, and was given a retroactive payment to reflect what he should have been receiving since his retirement (Parker Aff. ¶ 10). The amount of the corrected, increased payment is not reflected by the evidence.²

17. Meanwhile, on July 30, 2014, INPRS received a letter from Barrett seeking administrative review of the difference between the December 2013 estimate and his actual benefit. He stated that he had retired in reliance on the estimate, and that if he had known the actual amount of the benefit he would have continued working.

18. On August 15, 2014, INPRS counsel Thomas Davidson issued an initial determination letter (INPRS Ex. 5). Attorney Davidson noted that the ASA balance continues to remain invested as the member directs, and may fluctuate, until the ASA balance is transferred for distribution. He also stated that the estimate provided in December 2013 was flawed due to a "programming error" that caused an inflated estimate for the ASA payment when combined with Option 30. This programming error was corrected on December 31, 2013. The initial determination letter provided notice of Barrett's right to seek further administrative review.

19. By letter dated August 27, 2014, and received by INPRS on August 29, 2014, Barrett requested review of the initial determination.

20. Additional undisputed facts set forth below are incorporated.

Conclusions of Law

Issue

Is Barrett entitled to an increase in his retirement benefit based on the flawed, higher estimate provided in December 2013?

² In its brief, INPRS states that the recalculation resulted in a gross monthly benefit of [REDACTED], an increase of [REDACTED] (Mem. Supp. MSJ at 6). This is consistent with a statement in Barrett's letter seeking review that he received an increase of about [REDACTED] a month (Request for Administrative Review, 7/29/14).

Standard of Review

An ALJ's review of an agency's initial determination is *de novo*, without deference to the initial determination. Ind. Code § 4-21.5-3-14(d) (codifying prior law, *see Indiana Dep't of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 103-04 (Ind. 1993); *Branson v. Public Employees' Retirement Fund*, 538 N.E.2d 11, 13 (Ind. Ct. App. 1989)).

Summary judgment is authorized in administrative proceedings, and a motion for summary judgment is considered as a court would consider such a motion under Indiana Trial Rule 56. I.C. § 4-21.5-3-23(b). Trial Rule 56(C) provides that summary judgment shall be rendered "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In deciding a summary judgment motion, all reasonable inferences are drawn in favor of the non-moving party. A fact is "material" if its resolution would affect the outcome of the case, and an issue is "genuine" if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences. The initial burden is on the moving party to demonstrate the absence of a genuine issue of material fact, at which point the burden shifts to the non-movant to come forward with contrary evidence showing an issue for the trier of fact. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (citing *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)). While the federal standard permits the moving party to merely show that the party carrying the burden of proof lacks evidence on a necessary element, Indiana imposes a more onerous burden to affirmatively negate the opponent's claim. 15 N.E.3d at 1003 (citing *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*, 644 N.E.2d 118, 123 (Ind. 1994)). In *Hughley*, a "perfunctory and self-serving" affidavit was found sufficient to create a genuine issue of fact. 15 N.E.3d at 1004.

The standard does not, however, relieve the opposing party of its burden to come forward with at least a scintilla of evidence showing a dispute of material fact. *Cox v. Mayerstein-Burnell Co.*, 19 N.E.3d 799, 804 (Ind. Ct. App. 2014). A moving defendant is not required to anticipate and disprove alternative theories that were not pleaded. *Id.* at 807. In certain circumstances, the non-moving party is required to come forward with more than a merely self-serving affidavit, such as in a medical malpractice case in which the plaintiff must present expert evidence to defeat summary judgment. *Perry v. Anonymous Physician 1*, --- N.E.3d ---, 2014 WL 7335018, at *2 (Ind. Ct. App. Dec. 24, 2014), *trans. pending*.

Nor does the standard relieve the non-moving party of the requirement of Trial Rule 56(C) to *designate* the evidence relied upon to show a dispute of fact. *Pearman v. Jackson*, --- N.E.3d ---, 2015 WL 388389, at *6-*7 (Ind. Ct. App. Jan. 26, 2015) (citing *Filip v. Block*, 879 N.E.2d 1076 (Ind. 2008)).

Evidence

INPRS filed and served its motion and supporting evidence on December 15, 2014. Barrett was required, within 30 days after service, to “serve a response and any opposing affidavits” and to “designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.” Ind. T.R. 56(C). Three days are added because the motion was served by mail, and the deadline is further extended to the first day after any weekend days or legal holidays. I.C. § 4-21.5-3-2. Therefore, Barrett’s evidence and designation were due on January 20, 2015.

Barrett did not file any evidence in response to the motion. An extension of time can be granted only if the motion for extension was filed before the expiration of the time to respond. T.R. 56(I); *Mitchell v. 10th & The Bypass, LLC*, 3 N.E.3d 967, 971-73 (Ind. 2014). Thus the ALJ is limited to the properly designated evidence filed by INPRS

Discussion

PERF is divided into two sub-accounts, the retirement allowance account (RAA) and the annuity savings account (ASA). I.C. § 5-10.2-2-2(a). The RAA is funded by employer contributions, I.C. § 5-10.1-6-1, and the ASA is funded by member contributions that may be paid by the employer, I.C. § 5-10.2-1-10. The RAA functions as a defined benefit plan or traditional pension, while the ASA functions as a defined contribution plan owned by the member, *see* I.C. § 5-10.2-2-3. Not unlike many private employers’ plans under Section 401(k) of the Internal Revenue Code, 26 U.S.C. § 401(k), the member can direct ASA funds into a mix of individual investments.

Upon retirement, the benefit consists of a *pension* funded by the RAA and an *annuity* funded by the amount in the ASA. I.C. § 5-10.2-4-2. The pension portion is calculated by a formula based on years of service and compensation. I.C. § 5-10.2-4-4. The retiring member may choose other options including options that provide a guaranteed benefit for a term of years or continued benefits paid to a designated survivor. I.C. § 5-10.2-4-7.

The ASA portion of the benefit is also chosen by the retiring member, who can elect to have an annuity purchased by the ASA and combine the annuity payments with the pension benefit, receive a distribution of the entire ASA, or defer receiving any benefit from the ASA. I.C. § 5-10.2-4-2.

Barrett chose a survivor option for his pension and chose to annuitize his ASA. Although the summary judgment evidence does not show the actual benefit he received upon retirement or the benefit he is receiving now, it appears from his correspondence and INPRS’s brief that he initially received a total monthly benefit of [REDACTED], and that this was retroactively increased to [REDACTED] after later review. Barrett does not challenge the calculation of the benefit, but instead challenges the difference between the current amount and the estimate of [REDACTED] provided in December 2013.

The reason for that difference was a “programming error” that overstated the estimate, and this “programming error” affected only the ASA calculation. In fact, the estimate understated the pension portion of the benefit by [REDACTED] but overstated the ASA portion by [REDACTED].³ Barrett argued in his request for review that he retired in reliance on the estimate, and although he does not expressly state the relief he requests, it would appear that he wants INPRS to increase his benefit to the level of the estimate. In other words, he is arguing that INPRS is bound to pay the estimated benefit by the doctrine of equitable estoppel.⁴

INPRS argues that it is required by statute to maintain PERF’s status as a “qualified plan” entitled to favorable tax treatment under Section 401 of the Internal Revenue Code. I.C. § 5-10.2-2-1.5. Section 401 requires a qualified plan to distribute the corpus and income of the plan “in accordance with such plan.” 26 U.S.C. § 401(a)(1). Thus, INPRS argues that it must pay the correctly calculated benefit to a member notwithstanding any prior miscalculation of the benefit.

The ALJ concludes, however, that the “plan” includes not only the statutes setting out how a benefit is calculated, but common law and equitable principles that guide courts in the interpretation of the plan. *See, e.g., Bd. of Trustees of Public Employees’ Retirement Fund v. Hill*, 472 N.E.2d 204 (Ind. 1985) (applying doctrines of constitutional and contract law to prevent retroactive application of amendments to terms of plan); *cf. Ogden v. Michigan Bell Telephone Co.*, 595 F. Supp. 961, 970 (E.D. Mich. 1984) (state law concepts which extend beyond the terms of a pension plan may be a proper reference in an action to enforce plan). Thus, in an appropriate case, equitable doctrines such as estoppel may be applied.

“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 their conduct in good faith and without knowledge of the facts.” *Purdue University v. Wartell*, 5 N.E.3d 797, 807 (Ind. Ct. App. 2014), *trans. denied* (quoting *American Family Mutual Ins. Co.*, 803 N.E.2d 224, 234 (Ind. Ct. App. 2004), *trans. denied*). 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, and (4) which induces the other party to rely or act upon it to his detriment. *Id.*

³ INPRS’s initial determination made reference to the fact that Barrett’s ASA remained in non-guaranteed investments, so was subject to market fluctuation until his retirement date, but this does not appear to have contributed significantly to the low estimate. Barrett’s ASA balance dropped from [REDACTED] on the date of the estimate to [REDACTED] on his retirement date, but INPRS later recalculated the benefit based on an ASA balance of [REDACTED]. The shortfall between the estimate and the actual benefit, therefore, was due solely to the “programming error.”

⁴ Of course, Barrett did not use the term “equitable estoppel” in his request for review, but his assertion that he would not have retired if he had known the correct amount of his benefit was sufficient to put INPRS on notice that he was arguing equitable estoppel.

Estoppel will not be applied if the facts are equally known by or accessible to both parties, and all persons are charged with knowledge of the rights and remedies prescribed by statute. *Good v. Indiana Teachers Retirement Fund*, --- N.E.2d ---, No. 25A03-1408-MI-278, slip op. at 6 (Ind. Ct. App. Jan. 20, 2015) (citing several cases).

Estoppel is “not generally applicable against government entities for the actions of public officials.” *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 581 (Ind. 2007) (citing *Story Bed & Breakfast, LLP v. Brown County Area Plan Comm’n*, 819 N.E.2d 55, 67 (Ind. 2004); and *Muncie Industrial Revolving Loan Fund Bd. v. Ind. Construction Corp.*, 583 N.E.2d 769, 771 (Ind. Ct. App. 1991), *trans. denied*). “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.” *Biddle*, 860 N.E.2d at 581 (quoting *Samplawski v. City of Portage*, 512 N.E.2d 456, 459 (Ind. Ct. App. 1987)). On the other hand, equitable estoppel “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 Comm’n*, 758 N.E.2d 34, 39 (Ind. 2001). But the government will not be estopped in the absence of clear evidence that its agents made representations upon which the party asserting estoppel relied. *Story Bed & Breakfast*, 819 N.E.2d at 67 (citing *Indiana Dep’t of Environmental Mgmt. v. Conard*, 614 N.E.2d 916, 921 (Ind. 1993)).

The appellate courts have used “public interest” or “public policy” to assess whether to apply estoppel against a public entity. *City of Crown Point v. Lake County*, 510 N.E.2d 684, 687 (Ind. 1987) (“When the public interest would be threatened by the government’s conduct, estoppel will be applied to bar that conduct.”). What constitutes the public interest is not well defined. *Samplawski*, 512 N.E.2d at 459. In the context of zoning regulation, the Court of Appeals has articulated a list of public interest and equitable reasons not to allow the defense of estoppel in a zoning enforcement matter. *Metropolitan Development Comm’n of Marion County v. Schroeder*, 727 N.E.2d 742, 752 (Ind. Ct. App. 2000).⁵ In *Schroeder*, the court balanced the equities to determine whether the threat to the public by the governmental conduct outweighed the public interest in barring estoppel defenses against zoning violations. *Id.*

Applying these principles to the undisputed (and unchallenged) evidence in this case, INPRS is entitled to summary judgment. While it is undisputed that INPRS provided a substantially inaccurate estimate, off the mark by about nine percent, there is no evidence that

⁵ “This Court has recognized multiple public interest and equitable reasons not to allow the defense of equitable estoppel when a municipality elects to enforce zoning ordinances, including: 1) the purpose of zoning is to protect the public interest; 2) zoning regulations are created pursuant to the political process; 3) a particular city representative cannot waive the public’s right to enforce the ordinance; 4) the wrongdoer brought his condition on himself; and 5) allowing a balance of equities when enforcing violations would encourage violations and greatly debilitate any zoning policy.”

INPRS did so knowingly. Instead, the evidence is that the error was the result of a presumably negligent “programming error.”⁶

On the question of detrimental reliance, INPRS argues that reliance cannot be established as a matter of law if the information is equally accessible to both parties. *Good, supra*. That principle does not apply here because the correct calculation of Barrett’s ASA annuity was not readily ascertainable by statute. The statute provides that the annuity portion of the benefit is the amount “purchasable” by the amount in the ASA, “based on actuarial tables adopted by the board . . . at an interest rate determined by the board.” I.C. § 5-10.2-4-4(c). INPRS has adopted the 1984 Uninsured Pensioners Unisex Mortality Table (UP84) set back 2 years and a future value interest rate of 7.50 percent. 35 Ind. Admin. Code 1.2-8-5. It stretches the concept of presumed equal knowledge of statutory rights to charge Barrett with being able to calculate the benefit that would result from annuitizing his ASA. Indeed, even INPRS, with a computerized program for estimating the benefit, got it wrong.

But the record is also devoid of evidence that Barrett *in fact* relied on the erroneous estimate. Under *Hughley*, the burden is on INPRS to negate every element of Barrett’s case. But it is difficult to understand how INPRS, in moving for summary judgment, could have disproven detrimental reliance. A simple affidavit attesting to his reliance might have been sufficient to show a dispute of material fact, but Barrett’s failure to designate any evidence or file a brief in response to the summary judgment motion is fatal to the claim.

Because the evidence shows that INPRS did not knowingly provide the inaccurate estimate, and there is no evidence that Barrett detrimentally relied on the estimate, there is no need to balance the equities to determine whether public policy or public interest compel an exception to the general rule against applying estoppel against INPRS.

⁶ Cf. I.C. § 34-13-3-3(14) (governmental entity or employee not liable in tort for unintentional misrepresentation).

Conclusion and Recommended Order

There is no genuine issue of material fact and INPRS is entitled to judgment as a matter of law. It is recommended that the motion for summary judgment filed by INPRS be granted, and that the initial determination of INPRS finding that Barrett's retirement benefit was correctly calculated be affirmed.

ORDERED on March 2, 2015.

s/ Wayne E. Uhl

Wayne E. Uhl

Administrative Law Judge

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Indianapolis, Indiana 46280

Email: wuhl@stephlaw.com

STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The undersigned administrative law judge is not the ultimate authority, but was designated by the INPRS Board to hear this matter pursuant to I.C. § 4-21.5-3-9(a). Under I.C. § 4-21.5-3-27(a), this recommended order becomes a final order when affirmed under I.C. § 4-21.5-3-29, which provides, in pertinent part:

(b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:

- (1) affirming;
- (2) modifying; or
- (3) dissolving;

the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge for further proceedings.

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

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

- (1) identifies the basis of the objection with reasonable particularity; and

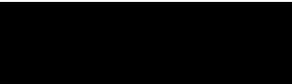
(2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

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

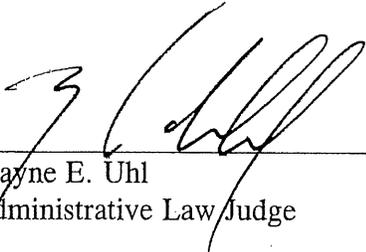
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, **certified mail, return receipt requested**, postage prepaid, on March 2, 2015:

Robert L. Barrett



Thomas N. Davidson, Senior Benefits Counsel
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Wayne E. Uhl
Administrative Law Judge