

**BEFORE THE EXECUTIVE DIRECTOR  
OF THE INDIANA PUBLIC RETIREMENT SYSTEM**

IN THE MATTER OF	)	PUBLIC EMPLOYEES' RETIREMENT FUND
ROBERT EFFNER,	)	
	)	
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 1.2-7-1. 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 issued a Decision and Recommended Order on Motions for Summary Judgment ("Recommended Order") in this matter on August 3, 2011, granting INPRS's motion for summary judgment.
2. Copies of the Recommended Order have been delivered to the parties.
3. On August 18, 2011, Petitioner filed with the final authority Petitioner's Objections to Decision and Recommended Order of the Administrative Law Judge, setting forth fourteen (14) objections to the Recommended Order.
4. It has been more than fifteen (15) days since having receiving the ALJ's Recommended Order.

NOW THEREFORE the Recommended Order of the Administrative Law Judge is affirmed.

DATED August 29, 2011



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

## CERTIFICATE OF SERVICE

I certify that on the 29<sup>th</sup> day of August, 2011, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

Distribution:

Robert O. Effner

Thomas N. Davidson, General Counsel  
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Laureanne Nordstrom  
Administrative Law Judge  
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FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND

PUBLIC EMPLOYEE'S  
RETIREMENT FUND

IN THE MATTER OF )  
ROBERT EFFNER )  
Petitioner. )

DECISION AND RECOMMENDED ORDER ON  
MOTIONS FOR SUMMARY JUDGMENT

Introduction

Robert Effner appeals the initial determination of the Public Employees' Retirement Fund (PERF) that Effner is not entitled to retirement benefits retroactive to August 1, 2006, but is entitled to retirement benefits effective June 1, 2010, which was six (6) months prior to the date Effner filed his retirement application.

Pursuant to the schedule agreed to by the parties and ordered by the ALJ, PERF filed a motion for summary judgment on April 15, 2011, and Effner filed a response to PERF's motion for summary judgment on May 16, 2011. PERF filed a reply to Effner's response to PERF's motion for summary judgment on May 31, 2011. Neither party requested a hearing, so the motions are ripe for ruling.

Findings of Undisputed Material Fact

1. Petitioner, Robert Effner (Effner), became a member of PERF on or about April 4, 1978.
2. Effner separated from PERF-covered service on November 30, 1997.
3. In 2007, PERF sent Effner an Annual Member Statement containing Effner's PERF account information as of December 31, 2006 (the "2006 AMS").
4. The third page of the 2006 AMS is entitled "Estimating Your PERF Benefits." This section states, "Each year you work in a PERF-covered position, you are earning creditable service towards a retirement from the fund. The tables below show the creditable service and average salary used to estimate your future pension benefit."
5. The first table is entitled "Your Account Information." The table contains the following statement: "Service used to calculate Your Estimated Benefits: 15 yrs. And 3 mo."
6. The second table is entitled "Your Estimated Benefits." The table contains the following information: "if you had retired as of December 31, 2006, your full monthly pension benefit would be approximately: [REDACTED] if you worked 5 additional years, you could be vested and eligible to receive a full monthly pension benefit of approximately: [REDACTED]"

7. Above the first table is the following statement in bold: **"We cannot provide your actual benefit amount until you apply for benefits when you choose to retire."**
8. Below the second table is the following statement in bold: **"Your actual benefit amount may differ from the estimate on this statement because: Your service credit history may need to be clarified further with current or previous employers."**
9. Effner also received Annual Member Statements as of December 31, 2007, December 31, 2008, and December 31, 2009. Each of these statements contained the same future benefit estimate in the same format as the 2006 AMS. Effner's future benefit estimates in the 2007, 2008, and 2009 Annual Member Statements did not change from the future benefit estimate in the 2006 AMS.
10. On November 20, 2010, PERF added creditable service to Effner's account for service performed as a county public defender from June 6, 1994 through November 30, 1997.
11. On November 12, 2010, Effner called PERF regarding his desire to receive benefits retroactive to August 1, 2006.
12. On November 16, 2010, Effner filed a PERF Retirement application, listing a retirement date of August 1, 2006.
13. PERF sent Effner a letter on November 22, 2010 advising Effner that PERF would only pay benefits retroactive six (6) months from the date PERF received Effner's retirement application. PERF stated that the earliest available date for Effner's retirement was June 1, 2010.
14. In a letter dated November 29, 2010, Effner requested administrative review of PERF's staff action denying him retirement benefits retroactive to August 1, 2006.
15. PERF issued an initial determination upholding the PERF staff action in a letter dated December 13, 2010.
16. On December 20, 2010, Effner appealed PERF's initial determination. Effner's appeal was timely.

#### **Conclusions of Law**

#### **Legal Standard**

Summary judgment "shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a

genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code §4-21.5-3-23(b).

As with motions under Ind. Trial Rule 56, a genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Indiana Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. App. 2005).

Contrary to federal practice, a moving party cannot simply allege that the absence of evidence on a particular element is sufficient to entitle that party to summary judgment – it must prove that no dispute exists on all issues. *Dennis v. Greyhound Lines, Inc.*, 831 N.E.2d 171, 173 (Ind. App. 2005), citing *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994).

When the parties have filed cross-motions for summary judgment, each motion is considered separately to determine whether the moving party is entitled to judgment as a matter of law, construing the facts most favorably to the non-moving party in each instance. *Keaton and Keaton v. Keaton*, 842 N.E.2d 816, 819 (Ind. 2006); *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154, 160 (Ind. 2005).

An ALJ's review of an agency's initial determination is *de novo*, without deference to the initial determination. *Indiana Dept. of Natural Resources v. United Refuse Company Inc.*, 615 N.E.2d 100, 103-104 (Ind. 1993); *Branson v. Public Employees' Retirement Fund*, 538n N.E.2d 11,13 (Ind. App. 1989).

#### **Evidence**

No party has raised an objection to the admissibility of the evidence submitted.

#### **Genuine disputes of material fact**

The ALJ concludes that Effner's response to PERF's motion for summary judgment contains no statements in which he disputes PERF's statement of material facts.

#### **Issues presented**

PERF contends that PERF cannot pay Effner retirement benefits retroactive to August 1, 2006 as a matter of law. Effner contends that PERF should be required to pay Effner retirement benefits retroactive to August 1, 2006 on the grounds of equitable estoppels, fraud, and promissory estoppel.

#### **Discussion**

Adherence to plan provisions. The PERF is mandated to comply with retirement fund law. Ind. Code § 5-10.2-2-1.5(1). 26 C.F.R. § 1.401(a). The retirement fund law governing PERF is to as PERF's "plan document" and includes Ind. Code §§5-10.2 and 5-10.3, Title 35 of the Indiana Administrative Code, and PERF Board of Trustees resolutions. Retirement fund law also requires PERF to be administered in accordance with Internal Revenue Code § 401 in order to maintain PERF's federal tax-favored status as a qualified retirement plan. PERF lacks the power or the discretion to deviate from restrictions placed

upon the administration of a member's retirement benefit by retirement fund law. See Ind. Code § 5-10.2-2-1 (a). PERF can only pay those amounts which are due to a member in accordance with both federal and Indiana state law.

According to Ind. Code § 5-10.2-4-1(d)(3), a PERF member who is eligible for normal retirement is entitled to choose a date upon which retirement benefits are to begin if the retirement date is not more than six (6) months before the date the member's retirement application is received by PERF. Therefore, by law, PERF is prohibited from paying a PERF member retirement benefits retroactive to a date more than six (6) months before the member's retirement application is received by PERF. The statute contains no exceptions to this rule.

Finally, in the case of a pension fund, some courts give weight to 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 (7<sup>th</sup> 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).

Equitable estoppel. Effner states that equitable estoppel should apply in this situation. "Equitable estoppel applies if one party, through its representations or course of conduct, knowingly misleads or induces another party to believe and act upon his or her conduct in good faith and without knowledge of the facts." *Terra Nova Dairy, LLC v. Wabash County Bd. Of Zoning Appeals*, 890 N.E.2d 98, 105 (Ind. App. 2008), quoting *Steuben County v. Family Development, Ltd.*, 753 N.E.2d 693, 699 (Ind. App. 2001), *trans. denied* (2002). The "general rule," however, is that equitable estoppel "will not be applied against governmental authorities." *City of Crown Point v. Lake County*, 510 N.E.2d 684, 687 (Ind. 1987). Equitable estoppel is not available against governmental authorities absent a strong public policy reason. *Izaak Walton League of Am. v. Lake County Prop. Tax Assessment Bd. of Appeals*, 2008 Ind. Tax LEXIS 5, \*13 (Ind. Tax Ct. 2008). Effner has not stated a strong public policy reason why equitable estoppel should be applied against PERF under these circumstances. Indiana courts will not apply estoppel in cases involving unauthorized use of public funds. *City of Crown Point*, 510 N.E.2d at 688; *Samplawski v. City of Portage*, 512 N.E.2d 456, 459 (Ind. App. 1987). The ALJ concludes that equitable estoppel does not apply.

Fraud. Effner also argues that PERF committed fraud. The essential elements of fraud are: 1) a material misrepresentation of past or existing facts; 2) which representation is false; 3) made with knowledge or ignorance of its falsity; 4) which causes reliance to the detriment of the person relying upon it. *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054 (Ind. 1992). Effner states that the 2006 AMS contains material misrepresentations of fact. The 2006 AMS states, "Each year you work in a PERF-covered position, you are earning creditable service towards a retirement from the fund." The 2006 AMS also states in bold, "We cannot provide your actual benefit amount until you apply for benefits when you choose to retire." The 2006 AMS statement also states, "Your actual benefit amount may differ from the estimate on this statement because: Your service credit history may need to be clarified further with current or previous employers." The 2006 AMS which Effner relies on as the source of the material misrepresentation of fact is clear that continued employment in a "PERF-covered position" will result in creditable service towards retirement from the fund. The AMS also makes it clear that the benefit amount cannot be provided until the retirement benefit application is submitted. The ALJ is unable to

conclude that PERF made a material misrepresentation of past or existing facts. The ALJ concludes that fraud does not apply.

Promissory estoppel. Finally, Effner argues that promissory estoppel should apply. The elements of promissory estoppel are 1) a promise by a promisor; 2) made with the expectation that the promisee will rely thereon; 3) which induces reasonable reliance; 4) of a definite and substantial nature; and 5) injustice can be avoided only by enforcement of the promise. *First National Bank of Logansport v. Logan Manufacturing Co.*, 477 N.E.2d 949, 954 (Ind. 1991). Effner states that he delayed his application for retirement benefits in reliance on a statement in the 2006 AMS that he could increase his pension by 33% by working five (5) more years. However, the 2006 AMS states, "We cannot provide your actual benefit amount until you apply for benefits when you choose to retire." The 2006 AMS also states, "If you worked 5 additional years, you could be vested and eligible to receive a full monthly pension benefit of approximately: [REDACTED]." The ALJ is unable to conclude that these statements were promises made with the expectation that Effner would rely on them. The statements were statements of possible alternatives and possible retirement benefit amounts. The ALJ concludes that promissory estoppel does not apply.

Pending Discovery. On May 6, 2011, a telephone conference call was held with Ms. Brinks of PERF and Mr. Effner. Mr. Effner identified certain portions of his discovery requests which he had not received from PERF. Mr. Effner identified the information he requested from PERF with more specificity. Ms. Brinks stated that she would provide the information requested that was in the possession of PERF. Ms. Brinks indicated that some items of information requested by Mr. Effner were not in the possession of PERF. The ALJ concludes that there was no evidence to show that PERF provided evasive or incomplete information. The ALJ concludes that PERF was attempting to cooperate with Mr. Effner's discovery request and provided responses to Mr. Effner's discovery requests that were in possession of PERF.

#### **Recommended Order**

PERF's motion for summary judgment is granted. PERF's initial determination dated December 13, 2010 is affirmed.

DATED: August 1, 2011

  
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Laureanne Nordstrom, ALJ  
7689 Briarstone Lane  
Indianapolis, IN 46227

#### **STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW**

The undersigned administrative law judge is not the ultimate authority, but was designated by the IPRS Board to hear this matter pursuant to Ind. Code, § 4-21.5-3-9 (a). Under Ind. Code § 4-21.5-3-27(a), this order becomes a final order when affirmed under Ind. Code § 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 59df) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

This means that any party who objects to this decision and recommended order must, within 15 days after service, file a written objection with the IPRS Board, c/o Thomas N. Davidson, General Counsel, 1 N. Capitol, Suite 001, Indianapolis In, 46204. The written objection must state the basis of the objection with reasonable particularity.

#### 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, on the 3 day of August, 2011:

Robert O. Effner, [REDACTED]  
Jaclyn Brinks, IPRS, 1 N. Capitol, Suite 001, Indianapolis, IN 46204

  
\_\_\_\_\_  
Laureanne Nordstrom  
Administrative Law Judge