BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE INDIANA PUBLIC RETIREMENT SYSTEM

IN THE MATTER OF ROSEMARY IGNEY, Petitioner.	))))	PUBLIC EMPLOYEES' RETIREMENT FUND

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 July 22, 2014, affirming INPRS' initial determination that Rosemary Igney is not eligible for a retirement/pension benefit.

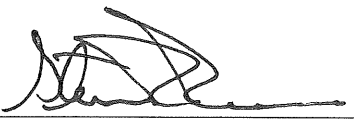
2. Copies of the Order have been served upon the parties.

3. Neither party filed Objections to the Order of the Administrative Law Judge.

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 THEREFORE the Decision and Order on Motion for Summary Judgment of the Administrative Law Judge is affirmed.

DATED AUGUST 13, 2014



Steve Russo, Executive Director
Indiana Public Retirement System
One North Capitol, Suite 001
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CERTIFICATE OF SERVICE

I certify that on the 13th day of August, 2014, 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.

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BEFORE AN ADMINISTRATIVE LAW JUDGE
INDIANA PUBLIC RETIREMENT SYSTEM

In re: ROSEMARY IGNEY, Petitioner.	))))	PUBLIC EMPLOYEES' RETIREMENT FUND

DECISION AND RECOMMENDED ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Petitioner Rosemary Igney challenges an initial determination of the Indiana Public Retirement System (INPRS) that she is not eligible for a retirement benefit from the Public Employees' Retirement Fund (PERF). Her age and years of service would qualify her for a normal retirement benefit, but INPRS denied her application because when she left employment, her membership was suspended and she withdrew her entire annuity savings account.

Both parties filed summary judgment motions which are fully briefed. Neither party requested a hearing. At the ALJ's request, the parties filed supplemental briefs. The ALJ now makes the following findings of undisputed material fact and conclusions of law, and recommends an order affirming the initial determination.

Undisputed Material Facts

1. Petitioner Rosemary Igney was born [redacted] (INPRS Ex. B).

2. Igney was employed by the [redacted], most recently at the [redacted] (INPRS Ex. A, p. 11.)

3. On multiple occasions Igney designated or changed her designation of a beneficiary. The forms had variations on language to the effect that a spouse named as beneficiary would be entitled to a benefit if the member had at least 15 years of service:

> Married persons should usually name the wife or husband as beneficiary in order to give them right to life pension. If you are deceased with fifteen (15) years or more of service. (Pet. Ex. A.)
>
> Married persons usually name the wife or husband as beneficiary in order to give them the right to a life-time pension should you die in service after completing 15 years of employment. (Pet. Ex. B & D.)
>
> A spouse, named as primary beneficiary, would be eligible for a lifetime benefit if the deceased member died in-service with 15 years or more of employment. (Pet. Ex. C.)

4. Igney's employment terminated [redacted] (INPRS Ex. A, p. 11).

5. When Igney's employment terminated, she had "approximately [redacted] years of creditable service" (Parker Affidavit ¶ 6).[1] She was [redacted] years old.

6. On [redacted], PERF received from Igney a Claim for Refund of Contributions and Suspension of Membership that she signed on [redacted] (INPRS Ex. A). The Claim for Refund sought to have the entire balance of her annuity savings account (ASA) distributed to her in the form of a rollover to an individual retirement account (IRA).

7. The first page of the Claim for Refund contained the following language:

SUSPENSION OF MEMBERSHIP AND REFUND REQUEST

Pursuant to IC 5-10.2-3-5 and 6, I hereby suspend my membership in the Fund and request a refund of my contributions plus interest to me. I am not employed in a position covered by PERF or by the Indiana Teachers' Retirement Fund. I am not continuing uninterrupted employment in any capacity (full-time or part-time, in a PERF-covered position or a position which is NOT covered by PERF) in any agency or department of my current employer. I have no plans to begin service in any PERF-covered position any time within thirty (30) days of this date of termination.

I understand fully that once this claim has been processed by PERF and I have received a refund check or warrant, this transaction may not be voided by a return of the check, warrant or money. *I further relinquish and waive all claims for service, membership credit, and benefits in the Fund unless I return to work in a PERF-covered position for six (6) consecutive months.*

Rosemary B. Igney
Employee's Signatures

(INPRS Ex. A, p. 1, emphasis added.)

8. The second page contained this language:

CERTIFICATION FOR 10-YEAR EMPLOYEES:

If you have ten (10) years of creditable service, this Claim for Refund will not be processed unless you acknowledge here that by receiving your contributions plus interest, you are forfeiting both your creditable service in PERF and also your ***vested rights*** to a pension benefit from PERF unless you return to work in a PERF-covered position for six (6) consecutive months.

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[1] Igney's start date is not clearly stated in any of the documents, but her first designation of a beneficiary was dated [redacted] (Pet. Ex. A). If her employment was continuous, this would mean that she had [redacted] of service.

I hereby acknowledge that I have read the above paragraph, that I understand the same, and that I hereby forfeit my creditable service earned to date and my ***vested rights*** to a pension benefit from PERF by applying for a refund of my contributions plus interest. I hereby release PERF from any liability for honoring this claim for refund and releasing to me my contributions and accrued interest. As a result, I will forfeit my ***vested rights*** to receive retirement benefits from PERF unless I return to work for a period of six (6) consecutive months in a PERF-covered position.

Employee's Initials: ***Rbi***

(INPRS Ex. A, p. 2, emphases in original.)

9. The Claim for Refund was signed by Igney under oath. The verification included a statement that "I have carefully read the form and understand the same" (INPRS Ex. A, p. 10).[2]

10. On [redacted] Igney filed a Retirement Application (INPRS Ex. B). She was [redacted] years old. She proposed a retirement date of [redacted] (*id.* p. 1). She elected Option [redacted] and elected to [redacted] her ASA [redacted] (*id.* pp. 2, 5). As indicated above, however, she had already received a refund of her entire ASA.

11. By letter dated June 11, 2013, INPRS informed Igney that she was not eligible for a PERF retirement benefit because she had relinquished all claims for service, membership credit, and benefits when she made her Claim for Refund (INPRS Ex. C).

12. On July 30, 2013, Igney requested administrative review in a letter received by INPRS on August 2, 2013 (INPRS Ex. D).

13. On August 20, 2013, INPRS issued its initial determination that Igney was not eligible for a benefit and giving her notice of her right to seek further review (INPRS Ex. E).

14. By letter dated August 29, 2013, and received on September 3, 2013, Igney requested administrative review of the initial determination (INPRS Ex. F).

15. Any finding of fact included in the conclusions of law below is incorporated herein.

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[2] The notary public who notarized her signature was the attorney who is representing her in this proceeding.

Conclusions of Law

Issue

Is Igney eligible for a retirement benefit notwithstanding her withdrawal of contributions and suspension of benefits?

Standard of Review

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. Ind. Code § 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."

A genuine issue of material fact exists where facts concerning an issue that 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 that he or she is entitled to a judgment as a matter of law. Once the moving party meets these two 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. Comm'r, Indiana Dep't of Environmental Management*, 820 N.E.2d 771, 776 (Ind. Ct. App. 2005) (citing cases).

The evidence is viewed in the light most favorable to the non-moving party. *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 855 (Ind. 1999), citing *Havens v. Ritchey*, 582 N.E.2d 792, 795 (Ind. 1991). When the parties have cross-moved 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. I.C. § 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)).

Evidence

Neither party has objected to the admissibility of the other party's evidence.

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. Like a private employer's Section 401(k) plan, the member can direct ASA funds into a mix of individual investments.

A member attains "vested status" upon accrual of 10 years of creditable service. I.C. § 5-10.2-1-8. Relevant here, a member who has reached 65 years of age and has at least 10 years of creditable service is eligible for normal retirement. I.C. § 5-10.2-4-1(a).

Upon retirement, the benefit consists of a pension provided by the employer contributions (the RAA) and an annuity provided 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 an option that provides a guaranteed benefit for five years and an option for 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 receive an annuity from the ASA, receive a distribution of the entire ASA, or defer receiving any benefit from the ASA. I.C. § 5-10.2-4-2. For all intents and purposes, the ASA program is completely separate from the RAA or pension program.

If Igney had simply left her ASA intact when she stopped working [redacted], she would have become eligible for normal retirement [redacted], when she reached [redacted] years of age and had more than 10 years of creditable service. The question is whether this changed by her decision [redacted] to withdraw her ASA. If so, Igney contends that she should not be bound by her decision because she did not understand the consequences.

A. Effect of suspension of membership and withdrawal of ASA

INPRS contends that Igney's withdrawal of her ASA [redacted] relinquished all rights to any benefit, even the RAA pension benefit, relying on Indiana Code §§ 5-10.2-3-5 and -6. As they read in [redacted], when Igney requested refund of her ASA, those statutes provided:

5-10.2-3-5 Suspension of membership

> Sec. 5. Suspension of Membership. (a) A member who is not eligible for retirement or disability retirement may suspend his membership if he terminates employment. After five (5) continuous years in which he performs no service, his membership shall be automatically suspended by the board unless he is vested status. The board may establish rule [*sic*] for deferring the effective date of a suspension of membership. The deferral may not be for more than six (6) months.

(b) On resuming service the member may claim as creditable service the period of employment before the suspension of membership.

5-10.2-3-6 Withdrawal of contributions

Sec. 6. Withdrawal of Contributions. (a) After a member suspends his membership, he is entitled to withdraw in a lump sum the amount of his contributions plus interest credited to him.

(b) If the member does not claim his moneys within five (5) years after the suspension, the moneys shall be credited to the retirement fund. The fund shall retain the moneys until the member claims them, with no further interest credits to the member after the moneys are credited to the fund.

I.C. §§ 5-10.2-3-5 and -6 (1993).

If a statute is clear and unambiguous, no construction is necessary except to give effect to the plain, ordinary and usual meaning of the language. Reference to legislative intent is unnecessary. *D.C. v. State*, 958 N.E.2d 757, 762 (Ind. 2011). A statute is ambiguous when "it is susceptible to more than one interpretation." *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.*, 746 N.E.2d 941, 947 (Ind. 2001).

Faced with an ambiguous statute, the courts turn next to other tools of construction. The "cardinal rule" and "main objective" is to determine and implement the intent of the legislature. In ascertaining this intent, the courts presume that the legislature did not enact a useless provision such that no part of a statute should be rendered meaningless but should be reconciled with the rest of the statute. The statute must be considered in its entirety, and the ambiguity construed to be consistent with the entirety of the enactment, allowing the court to better understand the reasons and policies underlying the act. *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828-29 (Ind. 2011) (citing many cases); *Rheem Mfg.*, 746 N.E.2d at 948.

In the public pension context, two potentially conflicting principles apply. The first is the principle of deference to the interpretation of an administrative agency charged with enforcing the statute under review. The agency's interpretation of a statute

> is entitled to great weight, and the reviewing court should accept the agency's reasonable interpretation of such statutes and regulations, unless the agency's interpretation would be inconsistent with the law itself. Indeed, when a court determines that an administrative agency's interpretation is reasonable, it should terminate its analysis and not address the reasonableness of the other party's interpretation. Terminating the analysis recognizes the general policies of acknowledging the expertise of agencies empowered to interpret and enforce statutes and increasing public reliance on agency interpretations.

Indiana Dep't of Environmental Mgmt. v. Steel Dynamics, Inc., 894 N.E.2d 271, 274 (Ind. Ct. App. 2008), *trans. denied* (citations, quote marks and footnote omitted) (cited and quoted with approval in *Ghosh v. Indiana State Ethics Comm'n*, 930 N.E.2d 23, 29 (Ind. 2010)).

This standard appears to be somewhat more deferential than stated in some earlier cases holding that while the agency's interpretation is given "some weight" or even "great weight," the courts are not bound by the agency's interpretation and the courts must resolve questions of statutory interpretation. *E.g.*, *Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 636 (Ind. 1999); *Miller Brewing Co. v. Bartholomew County Beverage Co., Inc.*, 674 N.E.2d 193, 200 (Ind. Ct. App. 1996). These standards can be reconciled by saying that courts have the ultimate, *de novo* responsibility to interpret statutes, but will be highly deferential to an agency where the agency's expertise or experience gives it an edge in figuring out what the statute means.

The second principle, however, is that ambiguous pension laws should be liberally construed in favor of the intended beneficiaries. *Fraternal Order of Police, Lodge No. 73 v. City of Evansville*, 829 N.E.2d 494, 496 (Ind. 2005) (citing *Schock v. Chappell*, 231 Ind. 480, 484, 109 N.E.2d 423, 424 (1952), and *State ex rel. Clemens v. Kern*, 215 Ind. 515, 523, 20 N.E.2d 514 (1939)). But "the underlying goal of construing the pension laws to favor beneficiaries 'is not a license to read into the act obligations against the pension trust funds and the taxpayers which the legislature did not intend.' " *Id.* at 498 (quoting *City of Ft. Wayne v. Ramsey*, 578 N.E.2d 725, 728 (Ind. Ct. App. 1991), in turn citing *Hilligoss v. LaDow*, 174 Ind. App. 520, 528, 368 N.E.2d 1365, 1370 (1977)).

The word "suspend" in § 5-10.2-3-5(a) (1993) plainly does not mean terminate. To suspend is to interrupt, postpone, or defer. *Black's Law Dictionary*, *s.v.* "suspend" (9th ed. 2009). A suspended employee is not yet fired; a suspended sentence is not yet served. This plain meaning is confirmed by other provisions. Subsection 5-10.2-3-5(b) provided that the suspended member may resume service with all prior service credit intact. Subsection 5-10.2-3-6(b) (1993) provided that the ASA of a member who does not withdraw the ASA is transferred to the RAA, and that PERF retains the moneys until claimed (but with no further interest). And § 5-10.2-3-8(b) (1993) provided that if the suspended member died before becoming eligible for a retirement benefit, "the sum payable upon suspension of membership shall be paid to the member's surviving designated beneficiary or to the member's estate if no beneficiary is designated."

INPRS argues that subsection (b) of § 5-10.2-3-5 would be meaningless unless the suspension of membership had worked a forfeiture of service credit. But subsection (b) does not imply that service credit was forfeited and then restored, only that it may be claimed if the member resumes service.

So the suspension itself does not effect a relinquishment of the benefits of the plan. Less clear is § 5-10.2-3-6(a), which provides that *after* suspension, the member may withdraw the ASA ("his contributions"). The section is silent as to whether withdrawing the ASA has the effect of forfeiting and terminating membership altogether, so the statute is ambiguous. Three clues suggest that the legislature intended that withdrawal of the ASA terminated membership.

First, in another section, the legislature appeared to consider suspension of membership and withdrawal of funds as a terminal event. Indiana Code § 5-10.2-2-3 (1993) provided in part:

> (f) When a member who has selected an alternative investment program retires, dies, *suspends membership and withdraws from the fund*, or transfers the amount credited to the member from one (1) alternative investment program to another, the amount credited to the member shall be valued at the market value of the member's investment.
>
> (g) When a member who participates in the guaranteed program retires, dies, *suspends membership and withdraws from the fund*, or transfers the amount credited to the member to an alternative investment program, the amount credited to the member in the guaranteed program is computed without regard to market value.

I.C. § 5-10.2-2-3(f) and (g) (1993) (emphasis added). The phrase "withdraws *from* the fund" implies withdrawal from PERF, not merely withdrawal of the ASA.

Second, INPRS (and PERF before it) interpreted the withdrawal of the ASA as terminating membership, as evidenced by the refund request form in use in 1994 (INPRS Ex. A). This form quite clearly advised the member that withdrawal of the ASA would waive all claims for service and benefits in the fund unless the member returned to work in a PERF-covered position for at least six months (INPRS Ex. A at 1, 2). INPRS also adopted a regulation providing that it would "cancel" a suspension after termination of employment and withdrawal of contributions if the member became re-employed in a covered position for at least six consecutive months. 35 Ind. Admin. Code 1.2-3-2(a).[3] This longstanding interpretation is entitled to deference, particularly in light of the fact that the General Assembly left these provisions intact for more than a decade. *Fishburn v. Indiana Public Retirement System,* 2 N.E.3d 814, 826-27 (Ind. Ct. App. 2014), *trans. denied.*

Third, in 2008 the legislature enacted Indiana Code § 5-10.2-3-6.5 (P.L. 115-2008 § 8), which expressly provides that a member such as Igney who has attained vested status and terminated employment, and withdraws the ASA, is still entitled to receive a retirement benefit based on the pension (RAA). This statute was effective after December 31, 2008, and applied only to members who made the election to withdraw their ASA after that date. Subsequent amendments may be useful to glean the legislature's initial intent. *Seymour Nat'l Bank v. State*, 422 N.E.2d 1223, 1226 (Ind. 1981); *International Union of Police Associations, Local No. 133 v. Ralston*, 872 N.E.2d 682, 688 (Ind. Ct. App. 2007). Here the fact that the General Assembly provided for withdrawal of the ASA without forfeiture of the pension benefit and expressly made

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[3] The authority to "cancel" a suspension and withdrawal is unclear. Rule 1.2-3-2(a) appears to implement former Indiana Code § 5-10.2-3-5(b) (now -5(d)) by allowing the re-employed member to claim prior service but imposing a six-month minimum, perhaps to avoid manipulation of the system by an employee who returns to work for only one day. That question is not presented here, the important point being that INPRS (and PERF before it) had a longstanding interpretation of withdrawal of the ASA as terminating membership.

that option effective only prospectively strongly suggests its understanding that this option did not previously exist.

Based on these indicia of legislative intent, the ALJ concludes that [redacted], the election of a suspended member to withdraw the member's entire ASA had the effect of terminating membership in PERF and forfeiting all service credit and eligibility for benefits.

B. Uninformed decision to withdraw, INPRS breach of duty

Igney argues that the forfeiture of a pension benefit should not be enforced against her because she did not understand that this would be the result of withdrawing and rolling over her ASA. Specifically, she argues that she mistakenly believed that she was not vested and had nothing to forfeit. She accuses INPRS of "gross neglect of communication and duty" to its members by not having a representative explain to her the consequences of her decision to seek a refund, which as a matter of "common sense" was not in her best interest. (Petitioner's Consolidated Response at 4-5.)

Igney's argument that INPRS breached a duty invokes the principle of fiduciary duty of a trustee to a beneficiary. PERF is a trust, Ind. Code § 5-10.3-2-1(b), so is subject to common law principles of trusts. The trustee owes a duty to a beneficiary "to communicate . . . all material facts in connection with the transaction which the trustee knows or should know." *Eddy v. Colonial Life Insurance Co. of America*, 919 F.2d 747, 751 (D.C. Cir. 1990) (quoting *Restatement (2d) of Trusts* § 173, cmt. d (1959)).

Deliberate deception by a pension plan trustee violates the common law duty of fiduciary loyalty to the interests of the participants and beneficiaries. *Varity Corp. v. Howe*, 516 U.S. 489, 506-07 (1996).[4] The Supreme Court in *Varity* did not address the obligation of the fiduciary to provide truthful information in the absence of a request from the participant, *id.* at 506, but lower courts have held that a breach of duty occurs if fiduciaries *mislead* plan participants or *misrepresent* terms of the plan; that not every error in communicating information about a plan violates the duty; and that the duty to communicate material facts affecting the interests of plan participants or beneficiaries exists whether or not the participant or beneficiary requests the information. *Vallone v. CNA Financial Corp.*, 375 F.3d 623, 640-41 (7th Cir.), *cert denied*, 543 U.S. 1021 (2004).

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[4] *Varity* and many other cases on pension plans arose under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, which imposes a fiduciary duty with respect to the administration of the plan, 29 U.S.C. § 1104(a). ERISA does not apply to plans established by states or their political subdivisions. 29 U.S.C. §§ 1002(32), 1003(b)(1). But ERISA codified and in some particulars expanded on the common law of trusts, so these cases are a helpful source for common-law principles. *Varity*, 516 U.S. at 496-97; *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985); *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814, 825 (7th Cir. 2000) (ERISA's fiduciary duty holds plan administrators to duty of loyalty "akin to that of a common-law trustee").

A restatement of the common law includes this comment:

> *d. Duty in the absence of a request by the beneficiary.* Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information. . . . In dealing with the beneficiary on the trustee's own account, however, he is under a duty to communicate to the beneficiary all material facts in connection with the transaction which the trustee knows or should know. See § 170(2). Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest. Thus, if the beneficiary is about to sell his interest under the trust to a third person and the trustee knows that the beneficiary is ignorant of facts known to the trustee which make the interest of the beneficiary much more valuable than the beneficiary believes it to be the trustee is under a duty to the beneficiary to inform him of such facts.

Restatement (2d) of Trusts, § 173, cmt. d (1959).

The undisputed facts of this case could not support a finding that a breach of fiduciary duty occurred. There is no evidence that Igney requested information or assistance from PERF when she made the decision to withdraw her ASA [redacted] PERF did not mislead her by providing inaccurate or untruthful information. To the contrary, PERF provided accurate information in two places on the refund form, both warning her quite clearly that withdrawal of her ASA would forfeit her creditable service and benefits.

The only evidence tendered by Igney is the designation of beneficiary forms which stated that her survivor would receive a benefit if Igney had at least 15 years of service (Pet. Ex. A, B, C, D). That information was and still is correct. I.C. § 5-10.2-3-7(a) (1978-1990); I.C. § 5-10.2-3-7.5(a) (since 1990). Nothing on these forms was misleading or false.

Notwithstanding any information that was on the designation of beneficiary forms, the law plainly provided that a PERF member was "vested" and eligible to receive a normal retirement benefit with 10 years of service. I.C. §§ 5-10.2-1-8, 5-10.2-4-1 (on the books since their original enactment in 1977, P.L. 53-1977, § 2). The refund form signed (under oath) by Igney included a section expressly directed to "10-year employees" and referring to the "vested rights" of members with 10 years of creditable service (INPRS Ex. A at 2). Even if Igney was under the mistaken impression that she needed 15 years to be vested, this section, which she initialed, should have caused her to at least question that impression.

Igney's argument that a "responsible representative" should have "discussed the consequences of Petitioner's actions" with her amounts to favoring oral information over written information, for which there is no basis in the law. It would also require PERF to cross the line from providing accurate information about her election to providing financial advice as to the prudence of the election. PERF cannot know or anticipate the particular circumstances of every

participant or assume a duty to contact the participant to make sure her decision is a good idea. To the extent that PERF had a duty to inform her, this duty was met and exceeded by the information on the claim form.

If PERF had given Igney misinformation about the consequences of her withdrawal of her ASA, and she had relied on that misinformation to her detriment, she might have an argument for the application of equitable estoppel. But equitable estoppel applies only if the defending party "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. Ct. App. 2008) (quoting *Steuben County v. Family Development, Ltd.*, 753 N.E.2d 693, 699 (Ind. Ct. App. 2001), *trans. denied*). While estoppel does not require an "actual false representation or concealment of existing material fact," the actor's conduct must be "sufficient to prevent inquiry, to elude investigation, or to mislead and hinder." *Little v. Progressive Ins.*, 783 N.E.2d 307, 315 (Ind. Ct. App. 2003) (citing *Paramo v. Edwards*, 563 N.E.2d 595, 599 (Ind. 1990)). The basis for equitable estoppel is fraud, either actual or constructive, arising from conduct that would secure an unconscionable advantage. *Town of New Chicago v. City of Lake Station*, 939 N.E.2d 638, 653 (Ind. Ct. App. 2010), *trans. denied* (citing *Paramo*, 563 N.E.2d at 598).

Much more can be written about equitable estoppel's application to governmental entities. *See, e.g., Story Bed & Breakfast, LLP v. Brown County Area Plan Commission*, 819 N.E.2d 55, 67 (Ind. 2004); *Equicor Development, Inc. v. Westfield-Washington Township Plan Commission*, 758 N.E.2d 34, 39 (Ind. 2001); *Samplawski v. City of Portage*, 512 N.E.2d 456, 459 (Ind. App. 1987). Detailed analysis is not required here, however, because the summary judgment evidence does not show a dispute as to whether Igney was in fact misled by INPRS.

Conclusion and Recommended Order

There is no genuine issue of material fact and INPRS is entitled to judgment as a matter of law. INPRS's motion for summary judgment is granted and Petitioner Igney's cross-motion for summary judgment is denied. The initial determination of INPRS that Igney is not eligible for a retirement/pension benefit is affirmed.

ORDERED on July 22, 2014.

Wayne E. Uhl
Administrative Law Judge
9077 East 98th Street, Suite 240
Indianapolis, Indiana 46280

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 July 22, 2014:

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Wayne E. Uhl
Administrative Law Judge