

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

BEVERLY SUE LASEK,)	PUBLIC EMPLOYEES' RETIREMENT FUND
Petitioner,)	
)	
)	
v.)	
)	
INDIANA PUBLIC)	
RETIREMENT SYSTEM,)	
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 Judges' Retirement Fund ("JRF") under IC 33-38-6-23(c) and IC 4-21.5-3-28. 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 Motions For Summary Judgment ("Order") in this matter on November 10, 2011.
2. Copies of the Order have been served upon the parties.
3. Pursuant to IC 4-21.5-3-29(d)(2) 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.
4. No objections to the Order have been filed.

NOW THEREFORE the Decision and Order of the Administrative Law Judge is affirmed.

DATED December 20, 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 20th day of December, 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:

Beverly Sue Lasek


Laureanne Nordstrom
Administrative Law Judge
7689 Briarstone Lane
Indianapolis, IN 46227

Thomas N. Davidson, General Counsel
Indiana Public Retirement System
One North Capitol, Suite 001
Indianapolis, Indiana 46204



Steve Russo, Executive Director
Indiana Public Retirement System
One North Capitol, Suite 001
Indianapolis, IN 46204
(317) 232-3868

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PUBLIC EMPLOYEES
RETIREMENT FUND

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

IN THE MATTER OF)
BEVERLY SUE LASEK)
Petitioner.)

DECISION AND RECOMMENDED ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

Introduction

Beverly Sue Lasek appeals the initial determination of the Public Employees' Retirement Fund (PERF) denial of her request to change her monthly pension option after the first day of the month upon which her retirement benefits were scheduled to begin.

Pursuant to the schedule agreed to by the parties and ordered by the ALJ, PERF filed a motion for summary judgment on August 15, 2011, and Lasek filed a response to PERF's motion for summary judgment on September 15, 2011. PERF filed a response in opposition to Lasek's response on September 30, 2011. Lasek attempted to file a "Reply to PERF's Motion for Summary Judgment" on October 14, 2011. This filing is not within the scope of the briefing schedule set forth in the order on prehearing conference dated July 5, 2011, and will not be accepted. Neither party requested a hearing, so the motions are ripe for ruling.

Findings of Undisputed Material Fact

1. On or about October 1, 1984, Lasek became a member of PERF.
2. In June and July 2005, Lasek met with her financial advisor, Grace Worley, prior to filing her PERF Application for Retirement Benefits, to discuss financial matters related to Lasek's impending retirement.
3. Lasek filed her PERF Application for Retirement Benefits on or about July 13, 2005.
4. On page two (2) of Lasek's Retirement Application, the following option was selected: Option 10, or Normal Retirement, which states, "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."
5. The Option 10 selection is indicated with an "X."
6. On the same page as that on which Option 10 was selected (page two (2) of the Retirement Application), Lasek signed and printed her name below the following statement, "This is the final designation of your pension option, and the option choice CANNOT be changed after PERF processes the completed application except under certain statutory conditions specified in IC 5-10.2-4-7 ... By signing below I acknowledge that I have read and understand this statement."

7. The selections on page three (3) of Lasek's Retirement Application, pertaining to the election for her annuity savings account, are also indicated with "X's."
8. Lasek signed and printed her name on page three (3) of her Retirement Application.
9. On page six (6) of the Retirement Application, Lasek signed the following oath: "I hereby submit this claim for retirement benefits from the Public Employees' Retirement Fund and say under oath: I am the person who completed this retirement application form. I have carefully read the form and understand the same, and that I have read all of the information I have been provided with this application, including all instructions and supplemental documents. I have provided all of the information requested, and answered all questions fully and truthfully, and that I have not concealed or omitted any material fact ... I understand that after this application is processed, I cannot change the selections I have made or beneficiaries I have selected except as provided by statute (Indiana Code 5-10.2-4-7)."
10. On August 1, 2005, Lasek began drawing PERF retirement benefits.
11. On January 22, 2010, Lasek contacted PERF regarding her retirement application. According to the notes of the PERF representative who spoke to Lasek on January 22, 2010, "adv she has opt 10 and cannot change beneficiary option mail pension option portion of rta."
12. On January 22, 2010, Lasek contacted PERF again regarding her retirement application. According to the notes of the PERF representative who spoke to Lasek on January 22, 2010, "went over mbr retirement options, went over est of benefits expl amount amount for op 20, went over deductions mailed out copy of est of benefits sent to mbr prior to retirement."
13. On February 22, 2011, Lasek contacted PERF again regarding her retirement application. According to the PERF representative who spoke to Lasek on February 22, 2011, Lasek felt "there was a mistake made, she meant to choose option 20."
14. On April 27, 2011, Lasek requested administrative review of PERF's determination that Lasek made an irrevocable benefit election at retirement.
15. In a letter dated May 17, 2011, PERF issued its initial determination upholding the PERF determination that Lasek made an irrevocable benefit election at retirement.
16. On or about June 3, 2011, Lasek appealed PERF's initial determination.
17. PERF was created by the Indiana General Assembly as a public trust fund to administer benefits pursuant to Indiana pension laws written and adopted by the Indiana General Assembly.

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*, 538 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

No party has argued that there is a genuine dispute of material fact.

Issue presented

The question presented is whether PERF's denial of Lasek's request to change her monthly pension option after the first day of the month upon which her retirement benefits were scheduled to begin is in accordance with the law.

Discussion

The PERF is mandated to comply with retirement fund law. Ind. Code § 5-10.2-2-1.5(1). The retirement fund law governing PERF is referred 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 is required by federal and state law to administer benefits in accordance with its plan documents set forth in Ind. Code §§ 5-10.2 and 5-10.3, Title 35 of the Indiana Administrative Code, and PERF Board of Trustees resolutions. See 26 U.S.C. § 401(a); Ind. Code §§ 5-10.2-2-1 (a) and 5-10.2-2-1.5 (a). Furthermore, the administrative law judge does not have the authority to pass on the validity of a statute. *Sunshine Promotions, Inc. v. Riddle*, 483 N.E.2d 761, 765 (Ind. App. 1985); *Bielski v. Zorn*, 627 N.E.2d 880, 887-888 (Ind. Tax 1994).

Retirement fund law allows a retired member to change her retirement option or beneficiary designation if: 1) the member is receiving a retirement benefit and the member's beneficiary dies; 2) the member and the member's beneficiary have been parties in an action for dissolution of marriage in which a final order has been issued after the member's first benefit payment is made; or 3) the member marries after the member's first benefit payment is made, and the member's designated beneficiary is not the member's current spouse or the member has not designated a beneficiary. Ind. Code § 5-10.2-4-7.2(b). Lasek does not allege any of the circumstances set out in the statute which would allow PERF to change her retirement option.

Lasek argues that "equity appears to favor Petitioner's position and correction of an error should always be available to make one whole." Lasek does not cite authority for her argument. 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). Lasek 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.

Lasek is asking that her Retirement Application be reformed to reflect Option 20. "Reformation is 'an extreme equitable remedy to relieve the parties of mutual mistake or fraud.'" *Meyer v. Marine Builders, Inc.*, 797 N.E.2d 760, 772 (Ind. Ct. App. 2003) (quoting *Estate of Reasor v. Putnam County*, 635 N.E.2d 153, 158 (Ind. 1994)). The remedy of reformation is extreme because written instruments are presumed to reflect the intentions of the parties to the instruments. *Id.* Therefore, courts in Indiana may reform written contracts only if: (1) there has been a mutual mistake; or (2) one party makes a mistake accompanied by fraud or inequitable conduct by the other party. *Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 490 (Ind. Ct. App. 2004). Lasek does not allege that a mutual mistake was made when the Retirement Application was completed, signed, and notarized. Nor does she allege that she made a mistake which was accompanied by fraud or inequitable conduct by the other party. Furthermore, "[e]quity should not intervene and courts should not grant reformation where the complaining party failed to read the instrument, or, if he read it, failed to give heed to its plain terms." *Langreck*, 816 N.E.2d at 490. The ALJ concludes that the reformation doctrine does not apply.

Recommended Order

PERF's motion for summary judgment is granted, and petitioner Beverly Sue Lysek's motion for summary judgment is denied. PERF's initial determination to deny Lasek's request to change her monthly pension option after the first day of the month upon which her retirement benefits were scheduled to begin is affirmed.

November 10, 2011



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 TRF 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 TRF Board, c/o Thomas N. Davidson, General Counsel, 1 North 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 10 day of NOV, 2011:

Beverly Sue Lasek, 7554 Ivywood Drive, Apt. D, Indianapolis IN 46250

Thomas Davidson, INPRS, 1 North Capitol, Suite 001, Indianapolis, IN 46204



Laureanne Nordstrom
Administrative Law Judge