

**BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE INDIANA PUBLIC RETIREMENT SYSTEM**

IN THE MATTER OF)	PROSECUTING ATTORNEYS'
ARNOLD L. MCGILL,)	RETIREMENT FUND
)	
)	
Petitioner.)	

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") and the Prosecuting Retirement Fund (PARF) 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 April 22, 2014, granting in part and denying in part each parties' cross-motions for summary judgment.
2. Copies of the Decision and Order have been served upon the parties.
3. On May 7, 2014, Petitioner timely filed his objection to the ALJ's Order, solely in regard to the finding that the "highest annual salary" is defined as the sum of the highest completed four (4) quarters of salary that was paid to the participant before retirement.
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 May 14, 2014.

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

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 ^{thi}s document on the following persons, by US Postal Service first-class mail on the 19th day of May, 2014.

Distribution:

Arnold L. McGill



Wayne E. Uhl
Administrative Law Judge
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A handwritten signature in black ink, appearing to read "Steve Russo", written over a horizontal line.

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INDIANA PUBLIC RETIREMENT SYSTEM**

IN THE MATTER OF)	PROSECUTING ATTORNEYS'
ARNOLD L. MCGILL,)	RETIREMENT FUND
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**DECISION AND RECOMMENDED ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Petitioner Arnold L. McGill challenges an initial determination of the Indiana Public Retirement System (INPRS) of his retirement benefit as both a participant in the Prosecuting Attorneys Retirement Fund (PARF) and a member of the Public Employees' Retirement Fund (PERF). The already complicated scenario presented by the case was complicated further by a change in a relevant statute while this appeal was pending.

Both parties filed summary judgment motions which were fully briefed on March 10, 2014. Neither party requested a hearing. The ALJ now makes the following findings of undisputed material fact and conclusions of law, and recommends an order reversing the initial determination in part.

Undisputed Material Facts

The parties agree that the material basic facts are not in dispute.

1. Petitioner Arnold McGill was born in March 1945 (INPRS Ex. B). At all times relevant (on and after July 1, 2010) he was at least 65 years old.
2. Mr. McGill served in an unspecified position covered by PERF from August 1, 1985, through December 31, 1986, a period of one year and four months (Ex. A).
3. Mr. McGill served in a position covered by PARF from January 1, 1987, through December 31, 1994, a period of eight years (Ex. A).¹

¹ Mr. McGill states in his brief that he was chief deputy prosecuting attorney for Dearborn County, and held the same position when he was briefly re-appointed in 2006. This is not shown by the record evidence, but the parties agree that the position he held was service under PARF.

4. On September 25, 2006, Mr. McGill was again appointed to a position covered by PARF through October 29, 2006, thus adding 39 days to his eight years of service (Ex. A).²

5. It is presumed that for all periods of PARF-covered service, Mr. McGill or his employer made the appropriate contributions to the fund.

6. Mr. McGill returned to a PERF-covered position, employed by Dearborn County, on January 1, 2009 (Ex. A). No termination date is shown.

7. On December 20, 2010, Mr. McGill submitted an application for PARF retirement benefits with a requested date of retirement of July 1, 2010 (Ex. B).

8. By letter dated April 5, 2011, INPRS staff notified Mr. McGill that he was not eligible for a PARF benefit because he had not accrued ten years of service. He was given the option of receiving a distribution of his PARF participant account balance, but thereby forfeiting his creditable service. (Ex. C.)

9. By letter dated January 24, 2013, Mr. McGill objected to the denial of his application (Ex. D).

10. By letter dated February 13, 2013, INPRS legal staff issued an initial determination upholding the prior staff determination that Mr. McGill was not entitled to a PARF benefit (Ex. E).

11. On February 27, 2013, Mr. McGill requested administrative review (Ex. F).

12. While this proceeding was pending, the General Assembly amended the PARF statute effective July 1, 2013. Ind. P.L. 160-2013 (HEA 1057), amending Ind. Code chapter 33-39-7.

13. On August 13, 2013, INPRS advised Mr. McGill that, under the amended law, he was eligible for a benefit under PARF, but with a retirement date of July 1, 2013 based on the effective date of the amendments. Moreover, his PARF benefit would be zero, completely offset by the benefit he would be entitled to receive as a member of PERF as of his PARF retirement date. (Ex. G.)

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

² He may be entitled to more than one month of service credit for his 39 days of service in September and October 2006. See I.C. § 33-39-7-16(c) (as amended in 2013) (partial year prorated based on "the number of months in the partial year"); cf. 35 Ind. Admin. Code § 1.2-3-4(a) and (b) (PERF service credit calculated in quarters except for first and last quarters, for which member receives one month of credit for each month in which member was employed at least one full day).

Conclusions of Law

Issues

1. Is Mr. McGill entitled to a retirement benefit from PARF starting on July 1, 2010, based on a 2006 amendment to the PARF eligibility criteria, or on July 1, 2013, based on the 2013 amendment?
2. What was Mr. McGill's "highest annual salary" for calculating his benefit?

Standard of Review

Summary judgment is authorized in administrative proceedings, and a motion for summary judgment is considered just as a court would consider such a motion under Ind. 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."

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).

Principles of Statutory Construction

This case requires interpretation of statutes. Both parties cite principles of statutory construction, which the Supreme Court has characterized as guidelines rather than rules.

Brownsburg Community School Corp. v. Natare Corp., 824 N.E.2d 336, 344 (Ind. 2005) (“Although we recognize the maxims of statutory construction involved here, we find them at best suggestions, and not directives.”).

If the 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, effect 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 which held 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)).

Interpretation of an ambiguous statute may also take into account the "consequences of a particular construction," including fiscal impact. *Mance v. Board of Directors of Public Employees' Retirement Fund*, 652 N.E.2d 532, 536 (Ind. Ct. App. 1995), *trans. denied*. *Mance* presented the question of whether a judge's "salary" for the purposes of calculating the retirement benefit under the Judges' Retirement Fund was limited to a judge's state-mandated salary or included any voluntary county supplement. The court considered the fact that contributions to the pension fund had been based on the state-mandated salary only, and expanding the definition of "salary" to include the county supplement would require the State to make up any resulting shortfall, which could be substantial. 652 N.E.2d at 536-37.

Legislative intent may be inferred from the legislature's acquiescence in a longstanding administrative interpretation of a statute of which it was aware. Under this doctrine, "a long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts." *Mance*, 652 N.E.2d 538 (quoting *Indiana Dep't of Revenue v. Glendale-Glenbrook Assocs.*, 429 N.E.2d 217, 219 (Ind. 1981)). In *Mance*, the court affirmed an internal PERF policy that had been applied for 18 years without legislative amendment. "Accordingly, the legislature is deemed to have acquiesced in the Board's construction of the retirement system statutes, and we must presume that the Board's construction was the meaning intended by the legislature." *Id.* More recently, in *Public Employees' Retirement Fund v. Shepherd*, 733 N.E.2d 987, 990 (Ind. Ct. App. 2000), *trans. denied*, the court affirmed PERF's interpretation of a statute based on 25 years of practice without change by the General Assembly.

But the doctrine will not be applied where the administrative interpretation is not long-standing. *Whinery v. Roberson*, 819 N.E.2d 465, 476 (Ind. Ct. App. 2004), *trans. dismissed* (citing *Miller Brewing Co. v. Bartholomew County Beverage Co.*, 674 N.E.2d 193, 206 n. 10 (Ind. Ct. App. 1996), *trans. denied*). Furthermore, an opposite inference may be drawn where the legislature amends a statute to clarify it. *Seymour Nat'l Bank v. State*, 422 N.E.2d 1223, 1226 (Ind. 1981) ("In cases of ambiguity, we may resort to subsequent amendments in order to

glean the Legislature's initial intent.”); *International Union of Police Associations, Local No. 133 v. Ralston*, 872 N.E.2d 682, 688 (Ind. Ct. App. 2007).

Evidence, Disputes of Fact

Only INPRS submitted evidence, there has been no objection to the admissibility of that evidence, and the parties agree that the material facts are undisputed. The ALJ also concludes that there is no genuine dispute of material fact.

Discussion

1. PARF statutes and amendments through 2013

Until January 1, 1990, prosecuting attorneys and their deputies were members of PERF. In 1989, the General Assembly created PARF, and its participants were prosecuting attorneys, their chief deputies, and other state-paid deputies who served on and after January 1, 1990. Ind. P.L. 62-1989 (SEA 484) (originally codified at Ind. Code chap. 33-14-9, now codified at chap. 33-39-7).

As originally enacted and until 2006, a non-disabled PARF participant was eligible for a benefit if the participant “is at least sixty-two (62) years of age and has at least ten (10) years of service credit.” Ind. P.L. 62-1989 § 3 (formerly I.C. § 33-14-9-13(2)(A) (1990)).

The original law defined “services” as “the period beginning on the *first day* upon which a person *first became* a prosecuting attorney or chief deputy prosecuting attorney . . .” Ind. P.L. 62-1989 § 3 (emphasis added). This language was retained until 2013. I.C. § 33-39-7-8(a) (2012).

Thus at the termination of his first tour of duty in 1994, Mr. McGill had eight years of service in PARF and nine years and four months of service in PERF. Because he did not have ten years of PARF service credit, Mr. McGill would not have been eligible for a benefit even after reaching age 62.

In 2006, the statute was amended by Indiana Public Law 33-2006 (SEA 85). In three locations, the eligibility requirement of ten years was reduced to eight years. The core eligibility provision quoted above was changed to require that the non-disabled participant “is at least sixty-two (62) years of age and has at least ~~ten (10)~~ *eight (8)* years of service credit.” Ind. P.L. 33-2006 § 1 (amending I.C. § 33-39-7-15(2)(A)). Similar changes were made to the sections on calculation of benefits (§ 33-39-7-16(b)) and spousal benefits (§ 33-39-7-19).

In Section 4 of P.L. 33-2006, the General Assembly further provided the following regarding application of the amendments:

IC 33-39-7-15, IC 33-39-7-16, and IC 33-39-7-19, all as amended by this act, apply to a participant in the prosecuting attorneys retirement fund who:

- (1) is serving on July 1, 2006; or
- (2) *begins service after July 1, 2006;*

in a position described in IC 33-39-7-8.

(Emphasis added.) This application section was not originally codified, but was quoted in the West and Burns annotations. It was later codified at I.C. § 33-39-7-0.1. Ind. P.L. 13-2011 § 11 (SEA 12); Ind. P.L. 220-2011 § 543 (SEA 490).

The original definition of “services” remained as the period starting with the first day upon which the participant “first became” a prosecutor. I.C. § 33-39-7-8(a) (2012).

In 2013, the General Assembly amended the now-codified application section, I.C. § 33-39-7-0.1, to provide:

The amendments made to sections 15, 16, and 19 of this chapter by P.L.33-2006 apply to a participant in the fund who:

- (1) is serving on July 1, 2006; or
- (2) ~~begins service~~ **serves** after July 1, 2006;

in a position described in section 8 of this chapter.

Ind. P.L. 160-2013 (HEA 1057) § 1. The legislature also changed the definition of “services” as follows:

(a) As used in this chapter, “services” means ~~the period beginning on the first day upon~~ **sum of all periods in which a person first became: is employed** as [a prosecutor].

Ind. P.L. 160-2013 § 2. The amendments were expressly made effective July 1, 2013.

2. Application of PARF statutes and amendments to Mr. McGill

At the start of 2006, Mr. McGill had eight years of service that ended in 1994, then briefly served in a PARF-covered position in September and October 2006 for an additional 39 days of service after July 1, 2006. He contends that because he “began service” after July 1, 2006 when he started his second stint, so he was entitled to a retirement benefit at his selected date, July 1, 2010.

INPRS contends, however, that Mr. McGill the 2006 amendment reducing to eight years the amount of credit necessary to receive a benefit because he did not “begin service” after July 1, 2006, but rather began service when he was first appointed in 1987. Therefore, says INPRS, he was not eligible for retirement on his desired date of July 1, 2010, because at that time he still needed ten years of service. Instead, INPRS argues that Mr. McGill first became eligible for a benefit on July 1, 2013, the effective date of the 2013 amendment that changed “*begins service* after July 1, 2006” to “*serves* after July 1, 2013.”

So the first question is whether a participant who was first appointed and served as a prosecutor from 1987 through 1994, then resumed service in September 2006, was someone who “begins service after July 1, 2006” under Indiana Code § 33-39-7-0.1 (2012).

The term “begins service” in isolation is ambiguous. As INPRS argues, the term can be read to refer to a person who has never before served as a prosecutor or deputy. As Mr. McGill argues, the term could be reasonably read to refer to a person like himself, who left service for several years and then returned to service. Faced with contrary reasonable meanings, the principles of statutory interpretation must be applied.³

It seems clear that the overriding intent of the General Assembly was that the 2006 amendment, reducing eligibility from ten to eight years, would not be retroactive to persons who had served and left service before July 1, 2006. Otherwise there would have been no reason to include the application restriction. The question is whether the legislature intended to include those who, like Mr. McGill, served previously and returned to serve again after July 1, 2006.

Context weighs in favor of INPRS’s interpretation. Even after the 2006 amendment, the PARF law defined “services” to mean “the period beginning on the *first day* upon which a person *first became* a prosecuting attorney or chief deputy prosecuting attorney . . .” I.C. § 33-39-7-8(a) (2012) (emphasis added). This strongly suggests an intent that “begins service” refers to the first time that a participant served in a covered position.

The legislative history of the 2006 amendment is also cited by INPRS. The General Assembly records very little legislative history from which intent might be gleaned. INPRS cites the initial Fiscal Impact Statement for the bill, prepared by the Legislative Services Agency, on November 21, 2005 (Pet. Ex. D).⁴ The initial FIS estimated that unfunded actuarial liabilities would increase by \$264,000 and annual employer contributions would increase by \$17,900 (from 1.1% to 1.2%). The FIS stated, “This proposal will affect prosecuting attorneys serving on or beginning service after June 30, 2006,” which merely

³ Mr. McGill’s contention that another PARF participant was treated differently will not be considered because there is no evidence on summary judgment to support it.

⁴ Available at <http://www.in.gov/legislative/bills/2006/PDF/FISCAL/SB0085.001.pdf> (last viewed 4/21/14).

repeats the bill's language. It further stated that as of July 1, 2003, PARF had 53 "vested active participants," 165 "nonvested active participants," and 17 "retired participants and beneficiaries receiving benefits."

LSA later updated the information in the FIS.⁵ The update reduced the estimated impact on unfunded liability from \$264,000 to \$153,000, and estimated that the employer contributions would actually be reduced by \$31,400 (from 5.7% to 5.5%). A new note indicated that "More PARF participants may become vested as a result of this proposal." The number of participants was also updated based on data as of July 1, 2005, to 77 "vested active participants," 143 "nonvested active participants," and 18 retirees and beneficiaries.

Noticeably absent was Mr. McGill's category, nonvested, *inactive* participants, who were presumably not part of the calculation of fiscal impact. This suggests that the LSA analyst did not consider the bill to affect them. But it is difficult to assign much weight to the fact that an LSA analyst thought the bill would not apply to inactive participants, or did not anticipate that some nonvested, inactive participants might try to gain eligibility by re-starting service. It is even more difficult to infer that legislators who voted for the bill (which passed both houses unanimously) contemplated this issue and voted as they did based on the FIS.

The interpretation of the statute by INPRS is entitled to some deference, but probably not "termination of analysis" deference under *Ghosh* and *Steel Dynamics* because the interpretive question here does not require agency expertise. Nevertheless, INPRS was certainly familiar with the circumstances under which the 2006 amendment was made, may have been involved in the drafting and passage of the amendment, and probably made its own assessment of the fiscal impact based on its understanding of what was intended.

Turning to the factors favoring Mr. McGill's interpretation, Mr. McGill also cites legislative intent. He contends that the legislature was attempting to align PARF with the retirement funds for judges, which for many years (and perhaps from the beginning) required only eight years for eligibility. I.C. § 33-38-7-11(b)(2)(A) (1977 judges' retirement fund); § 33-38-8-13(2)(A) (1985 judges' retirement system). He cites no evidence of this, nor does he proffer any reason for the General Assembly to have changed its mind to provide for alignment in 2006 when it could have done so when it created PARF in 1990. In any event, even if the General Assembly was seeking alignment, this does not answer the question of whether that alignment was intended to be retroactive to nonvested, inactive participants.

The more persuasive factor in favor of Mr. McGill's interpretation is the change made to the law in 2013. Legislative acquiescence does not apply here because the 2006 amendment had been on the books for only six years, and legislative awareness cannot be inferred in the

⁵ Available at <http://www.in.gov/legislative/bills/2006/PDF/FISCAL/SB0085.002.pdf> (last viewed 4/21/14) (copy attached). Seven subsequent updates changed information about the status of the bill but not the explanation of state expenditures.

absence of evidence that INPRS had been called upon to interpret the amendment as applied to previously active participants.

Instead, the opposite inference is supported by the General Assembly's amendment of the statute in 2013 to provide that the 2006 amendments applied to a participant who "serves" after July 1, 2006, rather than one who "begins service" after that date. The General Assembly also changed the definition of "services" from "the period beginning on the first day upon which a person first became" a prosecutor to "the sum of all periods in which a person is employed as" a prosecutor. This has all the earmarks of an effort by the General Assembly to clarify its intent in 2006. *Seymour, supra*. While the effective date of the amendment was July 1, 2013, it clearly reached back to change the application of the 2006 amendments.

The final FIS for P.L. 160-2013 stated: "The bill changes eligibility for retirement benefits in PARF for a participant in PARF serving prior to and after July 1, 2006." ⁶ To the extent that an FIS is evidence of legislative intent, it supports the view that the General Assembly intended in 2013 to express its intent in 2006 to apply the eight-year eligibility rule to participants who served previously, and then restarted their service after July 1, 2006. The General Assembly was aware of the fiscal impact of the bill as applied to those who, like Mr. McGill, served separate tours of duty before and after July 1, 2006.

The final factor, resolution of ambiguity in favor of a fund participant, militates in favor of Mr. McGill's interpretation.

Weighing all of these factors, the ALJ concludes that the 2006 amendments were intended to apply to participants who had served before July 1, 2006, and then restarted served after that date. Therefore, Mr. McGill was eligible to receive a benefit effective July 1, 2010, based on more than eight years of service.

3. Highest annual salary

The parties do not dispute that a PARF pension is offset by the amount of the pension, if any, that would be payable to the participant from PERF if the participant had retired from PERF on the date of the participant's retirement from PARF. I.C. § 33-39-7-16(e). The dispute is over the calculation of the PARF benefit.

The benefit for a PARF retiree who is at least 65 years old is calculated by multiplying "the highest annual salary that was paid to the participant before separation from service" by a percentage based on the years of service. I.C. § 33-39-7-16(c). The phrase "highest annual salary" is not defined. Mr. McGill contends that in his case, the "highest annual salary" is the

⁶ Available at <http://www.in.gov/legislative/bills/2013/PDF/FISCAL/HB1057.009.pdf>. Earlier versions of the FIS contained the same sentence, although the first version did not because the language at issue was not in the original bill. Unlike the 2006 FIS, the 2013 FIS actually cited a desire to align the prosecutors' and judges' retirement funds.

salary he was paid when he worked for 39 days in 2006, annualized. INPRS contends that it is the sum of the highest consecutive four quarters of salary in service as a prosecutor, which in Mr. McGill's case was four quarters in 1992 and 1993.⁷

Administrative agencies, including INPRS, are authorized to promulgate rules of general applicability that have the effect of law and implement, interpret, or prescribe law or policy. I.C. § 4-22-2-3(b). Indiana Code chapter 4-22-2 imposes procedural requirements for the adoption of rules, but with the reformation of INPRS in 2011 it was exempted from those requirements. I.C. § 5-10.5-4-2(a). Nevertheless, INPRS promulgated what is now 35 IAC 1.2-4-7:

(a) The highest annual salary is the sum of the highest completed consecutive four (4) quarters of salary that was paid to the participant before retirement.

(b) Notwithstanding subsection (a), once INPRS implements INPAS, the highest annual salary is the sum of the highest completed twelve (12) months of salary that was paid to the participant before retirement.

INPAS is a software application that apparently was not yet implemented at the time Mr. McGill's benefit was calculated in August 2013 (INPRS Ex. G).

Properly adopted administrative rules and regulations have the force and effect of law. *Miller Brewing Co. v. Bartholomew County Beverage Co.*, 674 N.E.2d 193, 205 (Ind. Ct. App. 1996), *trans. denied*. A rule is valid unless it is inconsistent with the statute being administered, adds or detracts from the law, or extends the agency's powers beyond those conferred upon it by law. *Indiana Dep't of State Revenue v. Colpaert Realty Corp.*, 231 Ind. 463, 479-80, 109 N.E.2d 415, 422-23 (1952). *See also Indiana High School Athletic Ass'n, Inc. v. Carlberg by Carlberg*, 694 N.E.2d 222, 234 (Ind. 1997) (agency rule is subject to judicial review analyzing whether it "(i) falls within the scope of the agency's enabling legislation, (ii) is arbitrary or unreasonable, (iii) is consistent and harmonious with the legislative pronouncement under which it operates, and (iv) does not expand or vary the legislature's enactment.").

In this case the rule adopted by INPRS is not inconsistent with the statute. The statutory word "annual" rather than "annualized" suggests that the calculation should be based on a year's worth of salary, not the highest month of salary multiplied by 12. As INPRS argues, any other interpretation would open the door to potential abuse by allowing a public employer to grant a very high salary for even one week or one month, or allowing a former employee to return to a position for a similarly brief time in order to "spike" the salary calculation. Contributions to the fund are based on a percentage of salary actually paid, I.C.

⁷ Unless his salary was reduced in 1994, the record does not reflect why the highest four quarters were in 1992-1993.

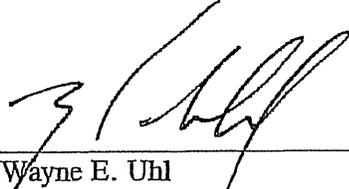
§ 33-39-7-12(a), so a benefit based on only one high month of salary would skew the actuarial soundness of the fund. INPRS's rule that "highest annual salary" means the highest four consecutive quarters of salary actually paid is not arbitrary or unreasonable, nor does it expand INPRS's powers beyond those conferred upon it by law.

When Mr. McGill's benefit is recalculated, INPRS shall apply 35 IAC 1.2-4-7 to determine his "highest annual salary" based on four consecutive quarters.

Conclusion and Recommended Order

The parties' cross-motions for summary judgment are each granted in part and denied in part. Petitioner McGill is entitled to a PARF retirement benefit as of July 1, 2010, based on his eight years and 39 days of service. His benefit shall be recalculated on that basis, using a highest annual salary based on the sum of the highest four consecutive quarters of salary paid to Mr. McGill in a PARF-covered position, offset by the amount of the PERF benefit he would have been entitled to if he had retired from PERF on July 1, 2010.

ORDERED on April 22, 2014.



Wayne E. Uhl
Administrative Law Judge
3077 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

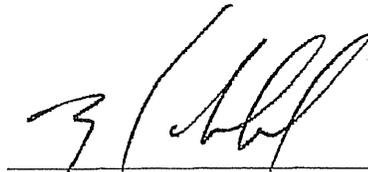
I hereby certify that I served a copy of this document on the following persons, by U.S. Postal Service first-class mail, **certified mail, return receipt requested**, postage prepaid, on April 22, 2014:

Arnold L. McGill



Lindsay Knowles, Attorney
INPRS
1 N. Capitol Ave., Ste. 001
Indianapolis IN 46204

Hon. Melvin Wilhelm
Prosecuting Attorney
459 Main Street
Brookville, IN 47012



Wayne E. Uhl
Administrative Law Judge

**LEGISLATIVE SERVICES AGENCY
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FISCAL IMPACT STATEMENT

LS 6062

BILL NUMBER: SB 85

NOTE PREPARED: Jan 24, 2006

BILL AMENDED:

SUBJECT: Prosecuting Attorneys' Pensions.

FIRST AUTHOR: Sen. Young R Michael

FIRST SPONSOR:

BILL STATUS: As Introduced

FUNDS AFFECTED: GENERAL
 DEDICATED
 FEDERAL

IMPACT: State

Summary of Legislation: This bill reduces from ten to eight the years of service credit required for a participant to vest in the Prosecuting Attorneys Retirement Fund (PARF).

(The introduced version of this bill was prepared by the Pension Management Oversight Commission.)

Effective Date: July 1, 2006.

Explanation of State Expenditures: (Revised) The estimated fiscal impact is the following:

Increase in Unfunded Actuarial Accrued Liabilities:	\$153,000*
Change in Annual Employer Contribution Amount:	\$(31,400)*
Change in Employer Contribution Percentage:	From 5.7% to 5.5%

*More PARF participants may become vested as a result of this proposal.

The fund affected is the state General Fund. This proposal will affect prosecuting attorneys serving on or beginning service after June 30, 2006.

Background Information: As of July 1, 2005, there were 77 vested active participants in PARF and 143 nonvested active participants in PARF. Furthermore, as of July 1, 2005, there were 18 retired participants and beneficiaries receiving benefits, with the average annual benefit amounting to \$13,830.

Explanation of State Revenues:

Explanation of Local Expenditures:

Explanation of Local Revenues:

State Agencies Affected: Public Employees' Retirement Fund as administrators of PARF.

Local Agencies Affected:

Information Sources: Doug Todd of McCready & Keane, Inc., actuaries for PERF and the PARF, 317- 576-1508.

Fiscal Analyst: James Sperlik, 317-232-9866.

DEFINITIONS

Contribution Rate: As to an employee, a factor, such as a percentage of compensation, used in determining the amounts of payments to be made by the employee under a contributory pension plan. As to the employer, a factor, calculated in an actuarial valuation, to be used in determining the employer's annual normal cost contribution under a pension plan. An employer's contribution rate may be either a percentage to be applied to the total compensation paid to covered employees for a particular year, or an amount in dollars to be applied to the total number of covered employees on a particular date. An employer's contribution rate may be either a percentage to be applied to the total compensation paid to covered employees for a particular year, or an amount in dollars to be applied to the total number of covered employees on a particular date.

Unfunded Actuarial Liability - Actuarial liability (sometimes called the unfunded liability) of a retirement system at any time is the excess of its actuarial liability as that time over the value of its cash and investments.