

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

IN THE MATTER OF WILLIAM SHININGER,   Petitioner.	) ) ) ) ) )	PUBLIC EMPLOYEES' RETIREMENT FUND
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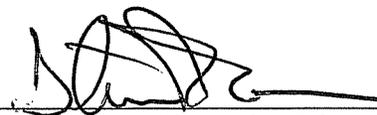
**FINAL ORDER**

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 Order Granting Motion for Summary Judgment (“Order”) in this matter on July 26, 2013, affirming INPRS’ initial determination that INPRS’ method of taxing retirement benefits is correct.
2. Copies of the Decision and Order have been served upon the parties.
3. On August 16, 2013, Petitioner filed with the ultimate authority Petitioner’s Objection to the ALJ’s Order.
4. Pursuant to IC 4-21.5-3-29(d)(2), 35 IAC 1.2-7-3(b)(7), and Indiana Trial Rule 4.17(B)(2), it has been more than fifteen (15) days since the ALJ served the Order upon the parties.

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

DATED September 6, 2013

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 this document on the following persons, by US Postal Service first-class mail on the 6<sup>th</sup> day of September, 2013.

Distribution:

William Shininger  
[REDACTED]

Robin C. Clay  
Administrative Law Judge  
Fleming Stage LLC  
310 North Alabama, Suite 300  
Indianapolis, IN 46204

Lindsay Knowles, Staff Attorney  
Indiana Public Retirement System  
One North Capitol, Suite 001  
Indianapolis, Indiana 46204



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

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

**IN THE MATTER OF  
WILLIAM SHININGER,  
Petitioner,**

**PUBLIC EMPLOYEES' RETIREMENT  
FUND**

v.

**INDIANA PUBLIC RETIREMENT  
SYSTEM,  
Respondent**

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INDIANA PUBLIC  
RETIREMENT SYSTEM

**DECISION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

Petitioner William Shininger appeals from an initial determination that explains the Indiana Public Retirement System's ("INPRS")<sup>1</sup> method of taxing retirement benefits. Mr. Shininger believes INPRS' procedures are inconsistent with the Internal Revenue Service's ("IRS") requirements for annuity and pension accounts. Mr. Shininger also appeals from INPRS' denial of his request to seek an updated IRS Private Letter Ruling. INPRS filed a motion for summary judgment. The issues have been fully briefed and are ripe for decision. Having carefully considered the arguments and information presented, and being duly advised in the premises, the Administrative Law Judge (ALJ) recommends that the agency enter the following order.

Findings of Undisputed Material Fact

1. William Shininger ("Shininger") retired as a public employee on or about [REDACTED] (Exhibit F).
2. As a public employee, Shininger is eligible to receive retirement benefits from the Public Employees' Retirement Fund ("PERF"). Shininger is eligible to receive a monthly pension benefit and a distribution of his annuity savings account ("ASA"). (INPRS Memorandum In Support of Motion for Summary Judgment, Material Fact No. 1).<sup>2</sup>

<sup>1</sup> Effective July 1, 2011, INPRS administers the Public Employees Retirement Fund. IC 5-10.5-2-2.

<sup>2</sup> INPRS identified eight paragraphs of material facts in Section III, Statement of Undisputed Material Facts, of its Memorandum In Support of Respondent's Motion for Summary Judgment. In Petitioner's Response to Motion for Summary Judgment, "Points of Agreement," Petitioner agreed with INPRS Facts 1-3, and 5-8.

3. In ██████████ Shininger communicated with INPRS staff and questioned whether the annuity and pension benefit should be considered a single account.<sup>3</sup> Shininger seems to believe the annuity and pension accounts should not be considered a single contract. During the ██████████ communications, Shininger also asked INPRS to request a new IRS Private Letter to address whether the investment options added by PERF since 1989 changed the characterization of the annuity into a separate account, and if so, what effect that would have on the taxation of a lump sum distribution. (Exhibit 1; Exhibit F).

4. PERF members generally have four choices regarding how to receive ASA benefits: (1) leave the ASA with PERF and defer distribution until age 70 ½; (2) combine the ASA with the lifetime pension benefit; (3) withdraw the entire ASA, either by complete withdrawal, a direct rollover, or a partial rollover of the taxable portion of the ASA to a qualified plan, and if applicable, one of the aforementioned choices for the non-taxable 1986 tax basis portion; or (4) withdraw the non-taxable 1986 tax basis portion of the ASA in the form of a complete distribution, direct rollover, or a partial rollover to a qualified plan, and combine the taxable portion of the ASA with the monthly pension benefit. (INPRS Memorandum In Support of Motion for Summary Judgment, Material Fact No. 2).

5. Any contributions to a PERF member's ASA made with after-tax dollars are considered "tax basis" because the member has already paid taxes on those dollars. (INPRS Memorandum In Support of Motion for Summary Judgment, Material Fact No. 3).

6. In June 1989, the IRS issued Private Letter Ruling ("PLR") 8935030 to INPRS which confirmed the federal tax treatment of certain contributions and distributions from the PERF plan under Section 72 of the Internal Revenue Code ("IRC"). PLR 8935030 concluded that the annuity and pension accounts constitute one program of interrelated contributions and benefits for purposes of IRC Section 72.<sup>4</sup> Therefore, the annuity does not constitute a separate contract under Section 72(d) or Section 1.72-2(a) of the IRS regulations. For distributions that are not made as an annuity payment and are received no later than coincident with the initial pension payment, such amount is taxed as part of a single contract with the pension, to the extent that the annuity payment exceeds the investment in the contract as of December 31, 1986. (Exhibit 4).

7. The filing fee for INPRS to secure a new PLR would be ██████████ and the agency estimates its attorney fees for effecting such a request would be in the ██████████ range. INPRS also estimates that it would take at least one year to receive such a ruling. (Exhibit 2).

8. On November 22, 2000, Former Congressman David McIntosh received a letter from Alan Tawashunsky, Acting Assistant Chief Counsel with the Department of the Treasury, regarding the taxation of "after-tax" contributions upon the distribution of benefits.<sup>5</sup> Mr.

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<sup>3</sup> In some of the communications between INPRS and Shininger, he indicates that the issue is whether the ASA and pension should be a single account, and in other communications, he refers to it as a single contract. (See Exhibit 1, referred to as "single contract." See also Exhibit F1, referred to as "separate account." Although perhaps not intentionally, Shininger appears to use the terms, "single contract" and "separate account" interchangeably.

<sup>4</sup> PLR 8935030 (Exhibit 4) refers to the pension benefits as Account Y, and the annuity benefit as Account Z.

<sup>5</sup> The Department of Treasury ("Treasury") letter (Exhibit 6) is considerably redacted and does not refer to the PERF retirement benefit plan by name, as redacted. However, Former Congressman David McIntosh was a member of the U.S. House of Representatives for Indiana's Second District from 1995-2001, and the letter that precipitated the

Tawashunsky explained that under the Internal Revenue Code, a participant's after-tax contributions (also referred to as the cost) to a qualified plan are not taxed upon distribution, so that each distribution contains a tax-free portion. Similarly, if a participant receives a nonperiodic distribution, he or she can prorate the distribution and exclude a portion of the distribution as a recovery of cost. Mr. Tawashunsky recognized that under some circumstances after-tax contributions can be treated as a separate contract and a distribution can be fully excluded from income. However, consistent with the June 1989 PLR, Mr. Tawashunsky stated that under PERF's program, the annuity account is not a separate contract. After-tax contributions are not to be treated as a separate contract and instead are taxed by the pro rata recovery rules. (Exhibit 6).

9. INPRS also received favorable IRS determination letters as a single qualified government employee plan on April 4, 1989, August 21, 2002, and August 15, 2012. (Exhibit 2; Exhibit 5).

10. Upon learning of the tax basis recovery method, Shininger filed a request for administrative review. (INPRS Memorandum In Support of Motion for Summary Judgment, Material Fact No. 6).

11. INPRS made its formal initial determination that provided a detailed explanation of the tax treatment of annuity and pension distributions and provided Shininger with his review rights on [REDACTED] (INPRS Memorandum In Support of Motion for Summary Judgment, Material Fact No. 7; Exhibit 2).

12. Shininger has not filed his retirement application; therefore, the method for distribution of his ASA is unknown at this time. (INPRS Memorandum In Support of Motion for Summary Judgment, Material Fact No. 5).

13. Any Conclusion of Law that should have been deemed a Finding of Undisputed Material Fact is hereby adopted as such.

#### Conclusions of Law

1. Summary judgment is proper if the designated evidentiary material demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); IC 4-21.5-3-23. The party moving for summary judgment bears the burden of making a *prima facie* case showing there are no genuine issues of material fact, and once the burden is met, the non-moving party must then show the existence of a genuine issue of material fact by setting forth specifically designated facts. *Indiana-Kentucky Electric Corp. v. Comm'r, Indiana Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. Ct. App. 2005).

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Treasury's response was written on behalf of his constituent. Therefore, based on the context of the letter and its reference to the June 1989 PLR, it is presumed that the letter refers to the PERF plan.

2. The issues to be decided are whether INPRS correctly classifies the annuity and pension benefits as a single contract and taxes them appropriately, and whether INPRS should have obtained a new PLR to address Shininger's concerns.
3. PERF was established to "pay benefits to officers and employees of the state and its political subdivisions after specified years of service and under other specified circumstances." Ind. Code § 5-10.3-2-1(a).
4. The INPRS Board has the authority to "[e]xercise all powers necessary, convenient, or appropriate to carry out its public and corporate purposes and to conduct its business." IC § 5-10.5-4-2(a)(17). The board's powers shall be interpreted broadly to accomplish the purpose of the Indiana Public Pension Modernization Act or applicable retirement law. IC § 5-10.5-4-3.
5. Retirement fund law requires PERF to be administered in accordance with IRC § 401. IC § 5-10.2-2-1.5. PERF is a qualified government employee plan because it is made for the purpose of distributing to its employees or their beneficiaries the corpus and income of the fund accumulated by the trust, pursuant to 26 U.S.C. § 401(a). (See also Exhibit 5). As a qualified employee plan, PERF receives favorable tax treatment, including deferred income taxation of employer contributions and income, and exemption from employment taxes on employer contributions. IRC § 401.
6. Shininger questions whether PLR 8935030 remains applicable to PERF's annuity and pension benefit system. (Exhibit 1). Shininger believes the post 1989 investment options may have altered the characterization of the annuity program. However, the alternative investment program was in use at the time PLR 8935030 ruled that the pension and ASA were to be considered one contract. (See Exhibit 2; See also Exhibit 4 ("*Participants can elect to have amounts in the separate account in a guaranteed program or an alternative investment program.*").). More importantly, the IRS did not indicate that the investment options were a determining factor in its ruling that the two accounts are one program, and thus one single contract. The relevant issues for the IRS' ruling were that both the pension and annuity account are administered by a single board of trustees, there was one determination letter previously issued to the plan as a whole (not separate letters for each program), and if the annuity is elected under the separate account, annuity and pension payments are made in one periodic check. (Exhibit 4). Of additional importance, was the fact that the amounts invested in the guaranteed fund are credited with a stated rate of interest, with earnings in excess of the stated rate placed in a reserve account to be used to fund other benefits under the plan.
7. There has been no relevant change to the pension and annuity program since 1989 such that its classification as a single contract should be changed. INPRS has appropriately relied on PLR 8935030 for guidance and instruction on how to administer its benefit program. A taxpayer can ordinarily rely on a private letter ruling subject to certain conditions and limitations that are not pertinent here. (Internal Revenue Bulletin 2013-1, Rev. Proc. 2013-1, Section 11 (January 2, 2013)).<sup>6</sup> A private letter ruling creates a binding agreement between the parties to the letter and

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<sup>6</sup> Internal Revenue Bulletin 2013-1, Rev. Proc. 2013-1, states that a taxpayer can generally rely on a PLR subject to the following conditions and limitations: (1) ruling will not apply to another taxpayer; (2) will be used in reviewing a taxpayer's return; (3) may be revoked or modified if found to be in error or there has been a change in law; (4) if

the government.<sup>7</sup> See *Meyers v. Comm'r of Internal Revenue*, 1996 U.S. App. Lexis 5744 \*5, (7<sup>th</sup> Cir. 1996).

8. The INPRS Board of Trustees has a fiduciary duty to carry out its corporate purpose and conduct its business in an appropriate manner. IC § 5-10.5-4-2. INPRS estimates it would spend as much as ████████ to obtain an updated PLR. (Exhibit 2). Under the circumstances, obtaining a new PLR to address the same issues that were addressed in 1989, with no relevant change in the structure of the annuity and pension programs, may not be a responsible exercise of the Board's fiduciary duty. Therefore, INPRS has no duty, and is not required to obtain a new PLR to address Shininger's concerns.

9. Shininger also argues that INPRS improperly uses the Simplified Method to calculate the tax free portion of the annuity distribution. However, Shininger fails to cite to any authority that would support his position that a lump sum payment is not subject to the Simplified Method tax calculation. There are two methods by which to determine the tax basis, either the General Rule or the Simplified Method. The Simplified Method is the default method and appropriate to use when the annuity is paid under a qualified plan such as PERF. (IRS Publication 575, p.11-12). The General Rule is typically not applicable to a qualified plan. Shininger has offered no evidence as to why the General Rule or any other tax calculation method is applicable.

10. Shininger also alleges that INPRS should not use IRS Form 1099R to report the annuity payments. Form 1099R is the appropriate form for distributions of pensions, annuities, retirement or profit-sharing plans, IRAs, and insurance contracts, for each person who receives a designated distribution of \$10 or more. (2013 Instructions for Forms 1099R and 5498).

11. According to this ALJ's interpretation of PLR 8935030, and the Treasury Department's letter, the pro rata method of calculating tax consequences for a lump sum payment is appropriate when there is a tax basis to recover, and the payment is made in connection with the commencement of an annuity. INPRS' interpretation and practices in administering the annuity payments appear consistent with federal retirement law. Shininger has failed to meet his burden of designating evidence that demonstrates the existence of a genuine issue of material fact, which would deny judgment in INPRS' favor. INPRS has exercised its due diligence and obtained the necessary IRS guidance and instruction to affirm that its practices are consistent with federal and state law.

12. Any Finding of Undisputed Material Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

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ruling is revoked or modified based on change in facts; (5) not generally revoked or modified for reasons other than a change in facts; (6) ruling issued on a particular transaction represents a holding on that transaction only; (7) retroactive effect of revocation or modification is applied to a series of actions; (8) ruling subject to a manufacturer's or retailer's excise tax may not retroactively revoke or modify a prior ruling; (9) ruling does not protect transactions occurring before the issuance of a PLR; and (10) taxpayer may request that retroactivity be limited.

<sup>7</sup> Shininger relies on IRS PLR opinions from other pension plans. However, a PLR is not applicable to other taxpayers. (See Footnote 6).

**Order**

Based on the Findings of Undisputed Material Fact and the Conclusions of Law stated above, INPRS' summary judgment motion is granted. Mr. Shinninger has failed to produce any evidence that indicates that INPRS' method of taxing ASA and pension benefits, whether distributed in a lump sum distribution or otherwise, is incorrect.

ORDERED: July 26, 2013

  
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Robin C. Clay, Administrative Law Judge  
310 N. Alabama Street, Suite 300  
Indianapolis, IN 46204

**PROCEDURES FOR REVIEW**

The administrative law judge is not the ultimate authority in this case, but was designated by INPRS to hear this proceeding pursuant to IC § 4-21.5-3-(9)(a). The order issued in this matter becomes a final order when affirmed under IC § 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 in section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

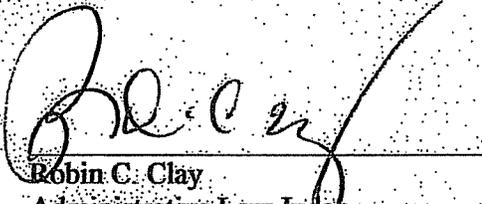
**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of this document, by U.S. First Class mail, postage prepaid, certified mail with return receipt requested, on this 26<sup>th</sup> day of July, 2013, upon:

**William Shininger**



**Lindsay R. Knowles, Staff Attorney  
Indiana Public Retirement System  
One North Capitol Ave., Suite 001  
Indianapolis, IN 46204  
Certified Mail # 7013 1090 0002 0200 5622**

  
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**Robin C. Clay  
Administrative Law Judge**