BEFORE THE EXECUTIVE DIRECTOR
OF THE INDIANA PUBLIC RETIREMENT SYSTEM

IN THE MATTER OF	)	1977 POLICE OFFICERS' AND
JASON A. FISHBURN,	)	FIREFIGHTERS' PENSION AND
	)	DISABILITY 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 1977 Fund members under IC 4-21.5-3-28 and 35 IAC 2-5-5(a)(7). Pursuant to 35 IAC 1.2-1-2, 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 Administrative Law Judge (ALJ) issued a Decision and Recommended Order ("Recommended Order") on Cross-Motions for Summary Judgment in this matter on January 23, 2012 affirming INPRS' revised initial determination that Petitioner's monthly disability benefit payment shall be [redacted]% of the monthly salary of a first class patrol officer in the year of the local board's determination of impairment.

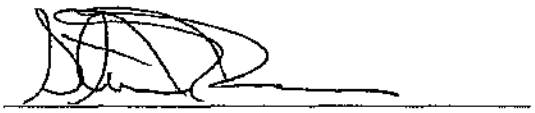
2. Copies of the Recommended Order have been delivered to the parties.

3. On February 8, 2012, Petitioner filed with the final authority Petitioner's Objections to the Administrative Law Judge's Decision and Recommended Order on Cross-Motions for Summary Judgment.

4. 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.

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

DATED March 23, 2012



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CERTIFICATE OF SERVICE

I certify that on the 23rd day of March, 2012, 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 THE MATTER OF	)	1977 POLICE OFFICERS' AND
JASON A. FISHBURN,	)	FIREFIGHTERS' PENSION AND
	)	DISABILITY FUND
Petitioner.	)	

DECISION AND RECOMMENDED ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Petitioner Jason A. Fishburn challenges an initial determination of the Indiana Public Retirement System (INPRS) of his disability benefit as a member of the 1977 Police Officers' and Firefighters' Pension and Disability Fund (1977 Fund).[1] Initially, the principal issue was the degree of impairment determined by INPRS, but that determination was revised and is no longer challenged by Officer Fishburn. The sole issue is the method by which INPRS calculates the benefit to be paid to Officer Fishburn.

Both parties filed summary judgment motions which are fully briefed. A hearing was held on January 17, 2012. The ALJ now makes the following findings of undisputed material fact and conclusions of law, and recommends an order granting summary judgment in favor of INPRS and against petitioner, thus affirming the initial determination.

Undisputed Material Facts

1. Officer Jason A. Fishburn, a member of the 1977 Fund and employee of the Indianapolis Metropolitan Police Department (IMPD), filed an application for disability benefits on April 7, 2011 (Resp. Ex. A-1).[2]

2. The application was supported by documentation that the IMPD Pension Board approved Officer Fishburn's request for a disability pension and determined that his impairment was a Class 1 impairment under Ind. Code § 36-8-8-12.5 (Resp. Ex. A-2).[3]

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[1] From its inception and when this matter arose, the 1977 Fund was administered by the Board of Directors of the Indiana Public Employees' Retirement Fund (PERF). Effective July 1, 2011, management of several public employee retirement and disability funds, including the 1977 Fund, was consolidated under a new entity, INPRS. Ind. Code ch. 5-10.5-2.

[2] Where both parties have filed the same document, citation to one party's exhibit does not indicate a preference over the other party's submission of the same exhibit.

[3] The excerpt of the local board minutes tendered by INPRS does not show the date of the meeting, but both parties contend that it occurred on March 7, 2011.

3. On April 13, 2011, the medical authority for the 1977 Fund, Omkar N. Markand, M.D., summarized the history of Officer Fishburn's impairment, which was caused [redacted] in the line of duty, and his current condition. Dr. Markand concurred with the local board's determination that the impairment fell into Class 1. He determined that the degree of impairment was 42% of the whole person. (Resp. Ex. A-3.)

4. On April 26, 2011, INPRS issued its initial determination that Officer Fishburn was eligible for disability benefits, there was no suitable and available work within IMPD, the degree of impairment was 42%, and the class of impairment was Class 1 (Resp. Ex. A-4). The determination letter stated that Officer Fishburn's disability benefit would be [redacted]% of the salary of a first class patrol officer, based on the following calculation:

Base Monthly Benefit Determined by Class of Impairment

Class 1	45% of first class salary

Additional Monthly Amount Determined by Degree of Impairment

[redacted]%	Degree of impairment determined by PERF's physician
= [redacted]%	Additional monthly amount based on degree of impairment

Benefit Amount

[redacted]%	Base monthly benefit determined by class of impairment
+ [redacted]%	Additional monthly amount determined by the degree of impairment
[redacted]%	Total Percent of First Class Salary

(Resp. Ex. A-4, p. 2.)

5. By letter dated May 2, 2011, Officer Fishburn requested administrative review of the initial determination (Resp. Ex. A-5).

6. On August 23, 2011, Dr. Markand revised his determination of Officer Fishburn's degree of impairment to [redacted]% of the whole person (Resp. Ex. A-6).

7. On August 24, 2011, INPRS issued a Revised Determination Letter based on the new degree of impairment determination (Resp. Ex. A-7). The letter stated that Officer Fishburn's benefit would be [redacted]% of first class salary, calculated as follows:

> Additional benefit percentage = (degree of impairment X .35) plus (10%).
>
> This percentage was determined by equating the 100% degree impairment with the 45% maximum and the 0% degree of impairment with the 10% minimum. The range between the degrees of impairment is 100 percent, and the range between the additional benefits are [*sic*] 35 percent. Thus, multiplying the degree of impairment by .35 yields the benefit percentage points equivalent to that degree of impairment. Add 10% for your minimum, and you have the additional benefit percentage.

(Resp. Ex. A-8.)

12. An INPRS staff member who was employed there at the time explains by affidavit that this formula is based on a mathematical calculation called "linear interpolation," which scales the member's degree of impairment to the range of minimum and maximum additional benefit allowed by the statute (10% to 45%). (Affidavit of R. Thomas Parker, Resp. Ex. A, at ¶ 25.) This benefit formula has been uniformly applied to calculate the disability benefits of fund members since its implementation in 1989. (*Id.* ¶ 27.)

13. Using the above formula, INPRS multiplied Officer Fishburn's degree of impairment, [redacted]%, by 0.35, which equals [redacted], and added 10, to reach an additional benefit amount of [redacted]%. When added to his base benefit of 45% (for a Class 1 impairment), the total is [redacted]% of the salary of a first class patrol officer.

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

Conclusions of Law

Legal standard

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 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. 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).

Issue

How is the "additional monthly amount" under I.C. § 36-8-8-13.5(f) calculated?

Evidence, Disputes of Fact

Neither party challenges the admissibility of the evidence submitted by the other, and neither party contends that there is a genuine dispute of material fact that prevents summary judgment. At the hearing, both parties agreed that there is no genuine dispute of material fact.

Discussion

Before 1990, upon permanent or temporary disability, the 1977 Fund provided a disability benefit equal to the benefit the member would have received if the member had retired, with a minimum of the pension due to a member who was at least 55 years old and had 20 years of service. I.C. § 36-8-8-12 (1988). Disability was defined simply as the inability to perform all suitable and available work with the police or fire department, except for disability resulting from self-inflicted injury, injuries sustained while committing a felony, or beginning within two years after entry into active service and caused by a pre-existing condition. *Id.*

In 1989, the legislature enacted the current disability scheme, effective January 1, 1990, for members who were hired after that date or opted into the new system. The local pension and disability board makes the initial decision whether the member is disabled (*i.e.*, has a "covered impairment"). I.C. § 36-8-8-12.3. If so, the local board also classifies the impairment as Class 1, Class 2, or Class 3. I.C. § 36-8-8-12.5(b). The classes represent the relationship between the impairment and the member's duties, with Class 1 being the most direct (including an on-duty injury such as that suffered by Officer Fishburn).

The local board's determination is submitted to INPRS, and the INPRS medical authority conducts an examination to determine whether there is a covered impairment. I.C. § 36-8-8-13.1(c). In addition, "the authority shall determine the degree of impairment." *Id.* The INPRS board is required to adopt rules establishing impairment standards. *Id.*

The base monthly benefit is determined by the class of the impairment. The base benefit for a Class 1 impairment is 45% of the salary of a first class patrol officer in the year of the local board's determination of impairment. I.C. § 36-8-8-13.5(b). The base benefits for Class 2 and Class 3 impairments are also based on percentages of the salary of a first class patrol officer, as well as other factors including the member's years of service and whether the member had a pre-existing excludable condition. I.C. § 36-8-8-13.5(c), (d), and (e). Degree of impairment plays no role in the base benefit.

If the member is entitled to a base benefit, the statute provides:

> (f) If a fund member is entitled to a monthly base benefit under subsection (b), (c), (d), or (e), the fund member is also entitled to a monthly amount that is no less than ten percent (10%) and no greater than forty-five percent (45%) of the monthly salary of a first class patrolman or firefighter in the year of the local board's determination of impairment. The additional monthly amount shall be determined by the PERF medical authority based on the degree of impairment.

I.C. § 36-8-8-13.5(f).

In December 1989, just before the new scheme became effective, PERF interpreted subsection (f) to mean that the additional benefit should be calculated in a way that provides a linear progression from 10% to 45%, so that a member with a degree of impairment of zero would receive the minimum 10% additional benefit, and a member with a degree of impairment of 100% would receive the maximum 45% additional benefit. Mathematically, this is accomplished by "linear interpolation," *i.e.*, multiplying the degree of impairment by 0.35 and then adding the 10% minimum.[5]

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[5] This decision was implemented by internal memorandum. At the time, it may have been subject to attack because it was not promulgated as a rule. I.C. § 4-22-2-3(b) (defining "rule" which must be promulgated as a statement of general applicability that has the effect of law and interprets a law). *See Dep't of Environmental Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839, 847-48 (Ind. 2003); *Indiana-Kentucky Electric Corp. v. Comm'r, Ind. Dep't of Environmental Mgmt.*, 820 N.E.2d 771, 779-81 (Ind. Ct. App. 2005); *Dep't of Environmental Mgt. v. AMAX, Inc.*, 529 N.E.2d 1209, 1212-13 (Ind. Ct. App. 1988); *cf.* I.C. § 4-22-2-13(c) (rulemaking requirement does not apply to a "resolution or directive of any agency that relates solely to internal policy, internal agency organization, or internal procedure and does not have the effect of law."). However, INPRS is exempted from the rulemaking requirement, I.C. § 5-10.5-4-2(a)(1), an exemption carried over from former I.C. § 5-10.3-3-8(a)(1) (2010).

Petitioner argues that the PERF (now INPRS) interpretation is erroneous. Petitioner contends that the statute means that the additional benefit is simply equal to the degree of impairment. In petitioner's view, a member with a degree of impairment of 45% or higher receives the maximum 45% additional benefit; a member with a degree of impairment between 10% and 45% receives that percentage of salary as the additional benefit; and a member with a degree of impairment of less than 10% receives the minimum 10% additional benefit.

In petitioner's case, the INPRS calculation yielded an additional benefit of [redacted]% of first class officer's salary, which when added to his 45% base benefit results in a total benefit of [redacted]% of salary. Petitioner would calculate the additional benefit to be the maximum 45%, which when added to the base benefit would result in a total benefit of [redacted]% of salary.

Both parties bring to bear the full armament of the "rules of statutory construction," although as the Supreme Court has candidly cautioned, they are not so much rules as they are guidelines. *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 addition to these general principles, the parties cite and debate the application of the principles more specific to this context. *See Fraternal Order of Police, Lodge No.73 v. City of Evansville*, 829 N.E.2d 494, 496 (Ind. 2005) ("The parties remind us of principles of statutory construction and, as parties often do, cite opposing maxims.").

One of these principles is 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).[6]

Another more specific principle is that ambiguous pension laws should be liberally construed in favor of the intended beneficiaries. *Fraternal Order of Police No. 73*, 829 N.E.2d at 496, 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)).

In *Hilligoss*, the court noted that the liberal construction rule is not to be applied indiscriminately, but must be considered in light of the purpose underlying the pension program. That purpose is not to reward police officers and firefighters *per se*—although that is a byproduct—but to attract competent persons and induce their loyal and continued service. This goal is ultimately directed to the general welfare of the taxpaying public. 174 Ind. App. at 529, 368 N.E.2d at 1370. *See also Klamm*, 235 Ind. at 291, 126 N.E.2d at 489 (primary object of pension is "public, not private"); *Clemens*, 215 Ind. at 523, 20 N.E.2d at 518 ("Notwithstanding the generous purposes of the police pension system, the Legislature took care to make the burdens placed upon the tax-paying public as light as it deemed practicable.").

Statutory 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

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[6] This standard appears to be somewhat more deferential than stated in earlier cases, which stress 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).

calculating the retirement benefit under the Judges' Retirement Fund was limited to the 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.

Likewise, in *Fraternal Order of Police No. 73*, the question was whether the "base salary" of a patrol officer for benefit calculation purposes under the 1977 Fund included incentive pay received by some officers assigned to the criminal investigation unit of their department. The Supreme Court found that PERF's narrower interpretation of "base salary" was supported by the fact that for 20 or more years, municipalities and members of the 1977 Fund had been contributing to the fund based on the officers' base salary without the incentive pay.

> Obviously, if we agreed with the plaintiffs the city would be not only entitled but also obliged to withhold at the higher rate from all current officers. Such a construction of the pension statute would require Indiana municipalities to collect a percentage of every patrolman's wage calculated on a corporal's salary even though many patrolmen are not receiving the higher wage. Either the officers or the taxpayers would have to bear the burden of the municipalities' past inadequate contributions. We do not think the legislature intended either result.

829 N.E.2d at 499.

Legislative intent may also be inferred from the legislature's presumed acquiescence in a longstanding administrative interpretation of a statute. 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 PERF Board in 1977 had adopted an internal policy of excluding the voluntary county supplement from the definition of salary, and the legislature did not amend the statute to change the definition in the 18 intervening years. "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 (Ind. Ct. App. 2000), *trans denied*, retirees challenged PERF's interpretation of former I.C. § 5-10-5.5-10(b) (2006), which provided that the retirement benefit (for members of the 1972 Excise Police and Conservation Enforcement Officers' Retirement Plan) would be 25% of the member's average annual salary, increased by 1⅔% of average annual salary for each year of service more than 10 years, and 1% of average annual salary for each year of service more than 25 years. The parties disputed whether a member with more than 25 years of service

should receive *both* the 1⅔% increase for years 11 to 25 *and* the 1% increase for years 26 and above, for a total increase of 2⅔%. After finding that the statute was ambiguous and required judicial interpretation, the court noted that PERF had consistently interpreted the statute to grant only the 1% increase for years 26 and above, and the General Assembly had not amended the statute since its origin in 1972. Accordingly, the court presumed that the General Assembly had acquiesced in PERF's construction of the statute, and that construction was the meaning intended by the legislature. 733 N.E.2d at 990.[7]

These principles compel the conclusion that the interpretation INPRS gave to I.C. § 36-8-8-13.5(f) in 1989, and has consistently applied since, is correct.

Section 36-8-8-13.5(f) is ambiguous. Every disabled member is entitled to a base benefit of up to 45% of the annual salary of a first class patrol officer based the class of impairment. The medical authority then determines the degree of impairment under I.C. § 36-8-8-13.1(c). Each member is then entitled to an "additional" benefit of between 10% and 45% of salary, to be "determined by the PERF medical authority based on the degree of impairment." I.C. § 36-8-8-13.5(f).

This last phrase is susceptible to differing interpretations, as demonstrated by the excellent briefs filed by the parties. Petitioner's interpretation is that the additional benefit would be equal to the degree of impairment. This is not unreasonable, but it is not clearly dictated by the words of the statute. If petitioner is correct, one wonders why the medical authority must make any separate determination at all, and why the statute says the benefit is "based on" rather than "equal to" the degree of impairment. Because the degree of impairment has already been determined by the medical authority, the statute need only have stated that the additional benefit would be the same percentage as the medical authority's degree of impairment (with a minimum of 10% and a maximum of 45%).

The INPRS interpretation is that it has the discretion to adopt a formula to convert the degree of impairment to a range of possibilities between 10% and 45%. This interpretation has merit as well, but again is not clearly supported by the statute's language. If application is so formulaic, one wonders what role the medical authority plays in determining the amount. The legislature could have expressed this more clearly, by stating that the benefit would be within a range from 10% to 45%, and proportionately based on the degree of impairment.

Upon concluding that the statute is ambiguous, application of the guidelines of statutory construction supports the INPRS interpretation for several reasons.

First, because INPRS is charged with implementation of the statute, its interpretation of is given great weight, and if that interpretation is reasonable the judicial construction inquiry ends without even considering the reasonableness of the other party's interpretation. *Steel*

[7] The General Assembly later eliminated the ambiguity by amending the statute to simply delete the 1% increase for more than 25 years. P.L. 180-2007 § 4.

Base Monthly Benefit Determined by Class of Impairment

Class 1	45% of first class salary

Additional Monthly Amount Determined by Degree of Impairment

[redacted]%	Degree of impairment determined by the INPRS physician
= [redacted]%	Additional monthly amount based on the degree of impairment

Benefit Amount

45%	Base monthly benefit determined by class of impairment
+ [redacted]%	Additional monthly amount determined by the degree of impairment
[redacted]%	Total Percent of First Class Salary

(Resp. Ex. A-7, p. 2.)

8. The focus of this appeal is the "additional monthly amount" in the above calculation.

9. By statute enacted in 1989,[4] a member hired after December 31, 1989, is entitled to a "monthly base benefit." In the case of a member who has a Class 1 disability, the monthly base benefit is 45% of the monthly salary of a first class patrol officer in the year of the local board's determination of impairment. I.C. § 36-8-8-13.5(b).

10. Added to the base benefit is an "additional monthly amount" that is no less than 10% and no more than 45% of the salary of a first class officer. This "additional monthly amount shall be determined by the PERF medical authority based on the degree of impairment." I.C. § 36-8-8-13.5(f).

11. A PERF internal memorandum dated December 8, 1989, stated in part:

> In order to facilitate the implementation of this new disability system, please use the following formula when calculating the additional benefit based upon degree of impairment.

[4] Ind. Public Law 311-1989, effective January 1, 1990.

Dynamics, 894 N.E.2d at 274, citing *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003) (in turn citing *Indiana Wholesale Wine & Liquor Co. v. State ex rel. Indiana Alcoholic Beverage Comm'n*, 695 N.E.2d 99, 105 (Ind. 1998)). The INPRS interpretation is reasonable because it reflects the most equitable method by which to determine the additional benefit within the range of 10% to 45%, and it is not clearly foreclosed by the statutory language.

Second, as in *Mance* and *Shepherd*, the General Assembly is presumed to have acquiesced in the longstanding and consistent interpretation given the statute by INPRS. PERF adopted its policy for calculation of the additional benefit shortly before the statute took effect at the start of 1990, and it has been unchanged since. Petitioner argues that INPRS is able to cite only one case in which a member disputed the calculation, but the case law does not require a showing of actual legislative awareness. The cases make a presumption of legislative acquiescence without any inquiry into actual awareness, which is really all that can be made where the General Assembly does not record legislative history other than bills introduced and action thereon. It is known that § 36-8-8-13.5 has been amended four times since its enactment in 1989, without any change to subsection (f). There is no evidence of an effort to amend subsection (f) since 1989.

Together, the doctrines of deference to the administrative agency and legislative acquiescence reflect practical realities. PERF officials were not only charged in 1989 with implementation of the new system for calculating disability benefits, they were likely involved in the drafting and consideration of the bill. In the absence of clear evidence of legislative intent such as a committee report, administrative interpretations can serve as a strong proxy.

Apart from deference and legislative acquiescence, the INPRS interpretation is supported by consideration of the adverse consequences of reversing course now. Accepting petitioner's interpretation would require INPRS to recalculate the benefits of all disabled members, and possibly to collect overpayments to those whose benefits are reduced under petitioner's formula. According to INPRS counsel at the hearing, contributions to the 1977 Fund over the past two decades have been based on the experience of the fund in paying out benefits under the INPRS formula. If the benefit for most disabled members must be adjusted upward, there will be a resulting fiscal impact.

Finally, and perhaps most important in determining legislative intent, the INPRS interpretation of § 36-8-8-13.5 is the more fair and consistent application, because it results in a linear scale of additional benefits from 10% to 45%. Petitioner's interpretation, on the other hand, results in an additional benefit of 10% for those with a degree of impairment from zero to 9%; a benefit that slides from 10 to 45% with the member's degree of impairment; and a flat 45% additional benefit for those with a degree of impairment above 45%. It is difficult to imagine that the legislature intended such a potentially inequitable distribution of benefits to the fund's disabled members.

INPRS cites and the parties debate the import of a PERF ALJ's decision in a case in which the member challenged the administrative method developed and used to convert his degree of impairment to a monthly benefit. *In re A.E.C.*, (PERF Nov. 14, 1996) (Resp. Ex. A-9). The ALJ reviewed PERF's methodology for calculating the additional benefit and found it "logical and just." (The record does not reflect what alternative method was urged by the member.) This decision does not stand as precedent because the record does not reflect that it was made a final order, and it is not shown that PERF (now INPRS) indexes all final orders by name and subject. I.C. § 4-21.5-3-32.[8] Nevertheless, the *A.E.C.* decision reflects the longstanding practice of PERF, as well as at least one other ALJ's conclusion that the INPRS interpretation is reasonable.

Finally, the principle of liberal construction in favor of members of the 1977 Fund is not persuasive. Liberal construction requires consideration of the impact of the statute on all members, not just a member who would fare better under a different interpretation. Here, petitioner's interpretation would result in a higher benefit for many disabled members of the fund, but a lower benefit for members with a degree of impairment less than 16%.

Conclusion and Recommended Order

Petitioner's motion for summary judgment is denied. The cross-motion for summary judgment of INPRS is granted. The revised initial determination of INPRS is affirmed. Officer Fishburn's monthly disability benefit payment shall be [redacted]% of the monthly salary of a first class patrol officer in the year of the local board's determination of impairment.

ORDERED on January 23, 2012.

Wayne E. Uhl
Administrative Law Judge
3077 East 98th Street, Suite 240
Indianapolis, Indiana 46280

[8] At the hearing, INPRS counsel stated that decisions are indexed only by the name of the member.

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 January 23, 2012:

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Wayne E. Uhl
Administrative Law Judge