BEFORE THE EXECUTIVE DIRECTOR
OF THE PUBLIC EMPLOYEES' RETIREMENT FUND

NED KOVACHEVICH, Petitioner, v. PUBLIC EMPLOYEES' RETIREMENT FUND, Respondent.	))))))))	PUBLIC EMPLOYEES' RETIREMENT FUND

FINAL ORDER

The Board of Trustees ("Board") of the Indiana Public Employees' Retirement Fund (PERF) is the ultimate authority in administrative appeals brought by PERF members under IC 4-21.5-3-28 and 35 IAC 1.2-7-1. In the PERF 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 issued a Findings of Undisputed Fact, Conclusions of Law, and Recommended Order on Motions for Summary Judgment ("Recommended Order") in this matter on October 27, 2010, granting PERF's motion for summary judgment and denying Petitioner's cross-motion for summary judgment.

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

3. It has been more than fifteen (15) days since having received the ALJ's Recommended Order.

4. No objection to the ALJ's Recommended Order has been received.

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

DATED November 15, 2010

Steve Russo, Executive Director
Public Employees' Retirement Fund
150 West Market Street, #300
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I certify that on the 15th day of November, 2010, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

Distribution:

Ned Kovachevich
[redacted]

Kathryn Cimera, General Counsel
Jaclyn M. Brinks, Staff Attorney
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Wayne E. Uhl
Administrative Law Judge
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BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND

NED KOVACHEVICH, Petitioner, v. PUBLIC EMPLOYEES' RETIREMENT FUND, Respondent.	))))))))	PUBLIC EMPLOYEES' RETIREMENT FUND

ORDER

A prehearing conference was conducted by telephone on June 14, 2010. Petitioner Ned Kovachevich appeared for himself. Attorneys Kathryn Cimera and Allison Murphy appeared for the PERF Board.

Appeal from April 9, 2010 determination. Ms. Cimera stated that the PERF Board adopted an interpretive rule that, in PERF's view, means that Mr. Kovachevich's re-employment did not void his retirement. PERF intends to withdraw its initial determination dated April 9, 2010, which will render Mr. Kovachevich's appeal from that determination moot. Upon receipt of notice that PERF has withdrawn its determination, the ALJ will issue an order dismissing that case only.

Appeal from January 22, 2010 determination. The ALJ and parties resumed discussion of the status of the first appeal. The ALJ explained his role in the process, and that he will make a recommended decision from which either party will be given an opportunity to object before it is adopted by the full PERF Board as its final decision. A party who has preserved its objections can then seek judicial review from the final determination.

The ALJ explained the summary judgment process, including the principle that summary judgment can be granted if the material facts are undisputed and the case presents questions of law. The parties are referred to Ind. Code § 4-21.5-3-23 and Ind. Trial Rule 56 for more information. Ms. Cimera stated that PERF intends to file a motion for summary judgment. Mr. Kovachevich stated that he will oppose summary judgment because he believes that the facts are in dispute, but this does not prevent him from moving for summary judgment based on facts that he contends are undisputed.

The parties discussed the need for discovery before a summary judgment motion is filed. Ms. Cimera stated that she will voluntarily provide to Mr. Kovachevich any evidence in PERF's possession which tends to show that he or Lake County employees in general were

given notice of their ability to make pre-tax contributions to their ASAs, or tell Mr. Kovachevich that PERF has no such evidence. PERF will not be seeking any discovery from Mr. Kovachevich. Mr. Kovachevich stated that he does not intend at this time to seek discovery from PERF, but he may submit public records requests to Lake County. Ms. Cimera advised Mr. Kovachevich that if he seeks information from PERF, he will get a more timely response if his request is submitted as a discovery request to PERF counsel rather than as a public record request.

Neither party is foreclosed from seeking discovery under Ind. Trial Rules 26-37. No discovery deadline will be set at this time.

PERF requested 30 days to file its motion for summary judgment. Therefore, the following schedule is ordered:

PERF shall file its summary judgment motion and supporting evidence no later than **July 16, 2010.**

Mr. Kovachevich shall file his response and any evidence in opposition to PERF's motion no later than **August 18, 2010.** He may also move for summary judgment in his favor. The papers need not be in any particular format, but attention is directed to Ind. Code § 4-21.5-3-23 for the standards for evidence submitted supporting or opposing summary judgment.

PERF shall file any reply or response to Mr. Kovachevich's filing no later than **September 7, 2010.**

If Mr. Kovachevich moved for summary judgment in his favor, he may file a reply in support of that motion no later than **September 24, 2010.**

Any party may request in writing that a hearing be held on the motion no later than **September 7, 2010**. If no such request is received, the motion will be taken under advisement and decided without a hearing.

The originals of materials submitted for the ALJ's consideration such as motions, responses and supporting evidence shall be mailed or delivered to the ALJ at the address below, and complete copies mailed or delivered to the opposing party or counsel (even if the opposing party already has a copy). Papers submitted by mail are deemed filed on the date of mailing as shown by the postmark. *See* Ind. Code § 4-21.5-3-1(f).

If there is any question or disagreement about the terms of this Order or any other matter, the parties shall first consult with each other to attempt to resolve the matter. If the matter cannot be resolved, a conference can be scheduled with the ALJ.

All prior orders with respect to the conduct of this matter shall remain in effect.

ORDERED on June 14, 2010.

Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-5388

Copies:

Ned Kovachevich
[redacted]

Kathryn Cimera, General Counsel
Allison A. Murphy, Staff Attorney
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BEFORE AN ADMINISTRATIVE LAW JUDGE
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NED KOVACHEVICH, Petitioner, v. PUBLIC EMPLOYEES' RETIREMENT FUND, Respondent.	))))))))	PUBLIC EMPLOYEES' RETIREMENT FUND

FINDINGS OF UNDISPUTED FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Petitioner Ned Kovachevich sought administrative review of PERF's initial determination that he is not eligible to make an irrevocable payroll deduction authorization for voluntary, pre-tax contributions to his annuity savings account. Pursuant to a schedule agreed to by the parties, the PERF Board filed a motion for summary judgment and petitioner filed a cross-motion for summary judgment. The motions are fully briefed. Neither party requested a hearing.

Findings of Undisputed, Material Fact [1]

1. Lake County, by its County Council, passed a resolution in December 1960 electing to participate in the Public Employees' Retirement Fund effective January 1, 1961. The resolution declared that "[a]ll employees of Lake County, Indiana, including all elected officials, except the deputy sheriffs employed thereby" would be covered by PERF. Lake County agreed to make required employer contributions to PERF, and to withhold mandatory three-percent member contribution from each employee's paycheck. (PERF Ex. 3-A.)

2. A PERF membership record was filed with PERF on January 24, 1983, establishing the membership of Ned Kovachevich. The record reported that he had been employed full-time since May 14, 1979, and that contributions would start on December 23, 1982. The record showed that his employer was "Lake County Plan Commission" with account numbe[redacted] The Certificate of Present Employer was signed by the Director of the Plan Commission. (PERF Ex. 1-A.)

[1] Where both parties have submitted the same document as an exhibit, reference to one party's exhibit does not indicate a preference over the other party's submission.

3. On January 2, 1996, PERF confirmed that petitioner's employer, Lake County, had verified 16.3333 years of service as of September 30, 1995, and advised him of his future eligibility for retirement including early retirement at age 50 with 15 or more years of creditable service (PERF Ex. 1-B).

4. PERF funds are separated into two accounts, the retirement allowance account and the annuity savings account (ASA). Ind. Code §§ 5-10.2-2-2(a), 5-10.3-5-1. In common parlance, the retirement allowance account is a defined benefit plan and the ASA is a member-directed defined contribution plan.

5. The retirement allowance account is funded by employer contributions determined by actuarial analysis of unfunded liability. Ind. Code §§ 5-10.2-2-6 and -11.

6. The ASA is funded by the three-percent member contributions. Ind. Code § 5-10.2-2-3(a). The employer may make all or part of the three-percent member contribution on behalf of its employees. Ind. Code § 5-10.3-7-9. Until distribution, the member directs investment of his or her ASA in a guaranteed fund and alternate investments such as an indexed stock fund and a bond fund. Ind. Code § 5-10.2-2-3.

7. The Internal Revenue Code (IRC) provides that employer contributions made to an employee's qualified retirement plan are not taxable until distributions are received. 26 U.S.C. § 402(a). Furthermore, in the case of a plan established by a governmental unit, where employer contributions are designated as employee contributions but are "picked up" by the employing unit, the contributions "so picked up" are treated as employer contributions, that is, are not taxed until withdrawn. 26 U.S.C. § 414(h)(2).

8. In 2000, the Indiana General Assembly amended Ind. Code § 5-10.2-3-2 to authorize a member to make additional contributions to the member's ASA (beyond the mandatory three percent), not to exceed ten percent of the member's compensation for that payroll period. In addition, the amended statute permitted employers to "pick-up" the employee contributions under IRC § 414(h)(2), subject to rules adopted by the PERF Board, approval of the PERF Board, and receipt of a favorable private letter ruling from the Internal Revenue Service. Ind. P.L. 53-2000 (HEA 1283).

9. On August 3, 2000, the PERF Board submitted to the IRS a draft resolution for employer pick-up of members' additional contributions to their ASAs, and requested a private letter ruling as to qualification under IRC § 414(h)(2) (Abbett Aff. ¶ 4). The original proposed resolution would have allowed members to make one election of pre-tax additional contributions within any 12-month period, and had no provision for employees who terminated service and returned to covered employment (Abbett Aff. ¶¶ 5-6, Ex. 4-A).

10. The IRS refused to approve the resolution as originally proposed (Abbett Aff. ¶ 7). Ensuing negotiations resulted in what is now 35 IAC 11-1-1 (Abbett Aff. ¶ 7, Ex. 4-A).

11. The IRS issued a favorable letter ruling on April 10, 2003, based on what became 35 IAC 11-1-1. That is, the IRS ruled that if employers picked up employee

contributions under the terms set forth in the proposed PERF rule, federal income tax on those contributions would be deferred. (Abbett Aff. ¶ 8, Ex. 4-B.)

12. On November 12, 2003, the Lake County Council adopted Resolution 03-94 to approve employer pick-up of additional employee contributions for all eligible and participating employees of Lake County, effective July 1, 2003 (PERF Ex. 3-B).

13. The PERF Board adopted 35 IAC 11-1-1 (filed 12/4/03, effective 1/2/04). *See* 27 Ind. Register No. 4, p. 1164 (1/1/04).

14. Pertinent here, the PERF rule (as approved by the IRS):

a. Requires a member to irrevocably elect to make additional contributions during a two-year window, from September 1 following the plan year in which the member completes five years of creditable service. 35 IAC 11-1-1(d).

b. For members who had already completed five years of service: "Members with at least five (5) years of creditable service as of June 30, 2003, may elect to make additional contributions . . . between September 1, 2003, and August 31, 2005." 35 IAC 11-1-1(h).

c. The election of a member who has five years of service, terminates employment, and returns to work for "the same employer" is immediately effective upon rehire. A member with five years of service who terminates employment, and then returns to work for "a different employer," may make the election within two years after September 1 following the plan year in which the member is recredited with the service. 35 IAC 11-1-1(e).

15. Eight employees of Lake County, working for different departments including the Plan Commission, and all of whom had more than five years of service in 2003, were never informed of an opportunity to participate in a payroll deduction program for pre-tax additional contributions to their ASAs (Pet. Ex. 1–8).

16. Petitioner's paycheck deposit receipts, from the Treasurer of Lake County, show that at the end of 2003, the three-percent mandatory deduction for PERF was being made from his salary. The last paycheck of 2004 shows that the deduction had increased to six percent, and the final paychecks for 2005 through 2009 show that it increased to ten percent. (Pet. Ex. 11.) Petitioner states that he understood the increased contributions to his ASA to be immediately taxable or "post-tax." (Pet. Resp. to PERF MSJ at 9.)

17. PERF published a 2004 Member Handbook that described the ability to make pre-tax voluntary contributions to a member's ASA. The handbook stated that the employer must have elected to participate in the program, the member must have five years of creditable service, the member must choose to make the voluntary contribution within two years following August 31 after the member reached five years of creditable service, and the percentage of wages chosen to contribute cannot change as long as the member works for the

same employer in a PERF-covered position.[2] It is PERF's "common practice" to post the handbook on its Web site shortly after it is made available to members. (Barton Aff. ¶¶ 4-6, Ex. 2-A at 4.)

18. PERF posted on its Web site a one-page description of the voluntary pre-tax contribution program, a "Questions and Answers" document last revised on October 31, 2003, and an undated PowerPoint® slide presentation. These documents were "ported" from PERF's older Web site when a new site was activated on February 12, 2009, but PERF has no record of when the documents were originally posted. (Barton Aff. ¶¶ 7-11, Exs. 2-B, 2-C, 2-D.)

19. The Q&A document described a two-year "election window" starting on September 1, 2003 and ending on August 31, 2005, for employees who had five years of service and whose employers approved participation by December 31, 2003 (PERF Ex. 2-C at 1-3). The Q&A document also stated that if the member leaves work and returns to the same employer, the member's election would stay in force, but if the member returns to work with a different employer, a two-year new election window would begin on the following September 1 (*id.* at 4).

20. PERF newsletters distributed to PERF members in January 2006 and Winter 2009 included descriptions of the voluntary pre-tax contribution program (Barton Aff. ¶¶ 13-17, Ex. 2-E, 2-F).

21. On May 6, 2009, petitioner submitted a retirement application stating that his employer was Lake County, his last day of work would be August 31, 2009, and his retirement date would be September 1, 2009 (PERF Ex. 1-E).

22. An Employer's Report of Separation from Employment was submitted by the Lake County Auditor on behalf of "Lake County Government," employer account 0582, certifying that petitioner's last day in pay status was August 31, 2009, and his last check date would be September 28, 2009 (PERF Ex. 1-D).

23. On December 4, 2009, PERF received from petitioner an Irrevocable Payroll Deduction Authorization signed by petitioner on December 1, 2009. The form directed the employer to make pre-tax deductions of ten percent of salary for the purpose of contributions to his ASA. However, the signature spaces for petitioner's employer information (Step 3) and employer payroll deduction agreement (Step 4) were blank. (PERF Ex. 1-G at 1-2.)

24. On December 8, 2009, PERF employee Janice Bell rejected the authorization. On the form, she marked that employer participation was verified, but that eligibility service and eligibility window were not (PERF Ex. 1-G at 3). A letter to petitioner explained that the application could not be approved because an authorized agent had not signed the Step 3 and

[2] The handbook may have said more than this, because PERF states that the description of the program was on pages 4-5, but PERF Ex. 2-A contains only the even-numbered pages.

Step 4 spaces on the form, and because PERF did not have a membership record showing petitioner's return to work (PERF Ex. 1-H).

25. On December 9, 2009, petitioner resubmitted the Irrevocable Payroll Deduction Authorization. Step 3 and Step 4 of the form were signed by Peggy Holinga Katona on behalf of employer "Lake County Government" with account number [redacted] (PERF Ex. 1-I.)

26. On December 10, 2009, petitioner signed a "Re-Employed Retiree Membership Record & Employer Certification of Eligibility." This form stated that petitioner had been re-employed on October 1, 2009, in the position of "Executive Director, Lake County Planning & Building Department." The employer certification, signed by Ms. Katona on December 10, 2009, identified the employer as "Lake County Government" with account number [redacted] (PERF Ex. 1-F.)

27. On December 17, 2009, PERF employee Bell rejected the authorization. On the form, under Step 5, she noted that petitioner's eligibility service and eligibility window could not be verified, with the notation, "Election Window Expire 8.31.05." (PERF Ex. 1-I at 3.) A letter gave the following explanation:

> Lake County adopted the resolution to allow employees to make voluntary pre-tax contributions on November 12, 2003. You were eligible to make this election until August 31, 2005. After the expiration of an individual's election period, a PERF fund member may only make a new election for voluntary pre-tax contributions if they become employed by a different PERF-covered employer. According to our records you retired August 31, 2009 from Lake County and have since become reemployed by Lake County. Therefore, you are not eligible to make an election for voluntary pre-tax contributions, and your application is being denied.

(PERF Ex. 1-J.)

28. By letter dated December 22, 2009, petitioner objected to PERF's rejection of his election (PERF Ex. 1-K).

29. By letter dated January 22, 2010, PERF General Counsel Kathryn Cimera responded to petitioner's objections and confirmed PERF's position that petitioner was ineligible to elect pre-tax additional contributions. The letter served as PERF's initial determination and gave petitioner notice of his right to seek administrative review. (PERF Ex. 1-L.)

30. By letter dated February 1, 2010, petitioner requested administrative review (PERF Ex. 1-M). PERF concedes the appeal was timely (Assignment Letter to ALJ Uhl, 2/12/10).

31. On February 15, 2010, PERF received a Membership Record reporting petitioner's re-employment effective October 1, 2009. Petitioner's signature on this form is

dated 10/1/09. The space for Employer Name contains both typed and handwritten words, as follows with the handwriting in bold italics:

Lake County Government
(Lake County Plan Commission *)*

The form is verified by Ms. Katona, as "LC Auditor," and also reports that the employer account number i[redacted] (PERF Ex. 1-C.) Although the ALJ is not a handwriting expert, it could easily be inferred that the typewritten form was prepared to show the employer to be Lake County Plan Commission, but that Auditor Katona added the handwritten notation that the employer was Lake County Government and parentheses around Lake County Plan Commission.

32. On February 17, 2010, the Lake County Plan Commission adopted Resolution 2010-001, which had been proposed by petitioner. The resolution stated, *inter alia*, that the Commission was established by the Lake County Council and met regularly since 1950; that it hires and fixes the compensation of its employees; that it is a "political subdivision" and an "employer" under Ind. Code § 5-10.3-1-6 and 35 IAC 1.2-1; and that it is a department of Lake County and receives revenue independently of or in addition to funds obtained from taxation. The Commission resolved to pick-up additional contributions of its employees. (PERF Ex. 3-C; *see* Pet. Ex. 9, 10.)

33. On March 17, 2010, the Lake County Board of Commissioners affirmed and ratified the Plan Commission resolution (Pet. Ex. 10).

34. By letter dated March 23, 2010, PERF notified the President of the Plan Commission that the Plan Commission is not a PERF-covered employer separate and apart from Lake County and that all Lake County employees, including Plan Commission employees, were covered by PERF under the County's resolution adopted in 1960. PERF advised that if the Plan Commission desired to become a covered employer separate from Lake County, the County would first have to withdraw any Plan Commission positions from PERF and contribute the amount necessary to fully fund vested benefits, then the Plan Commission would have to join PERF. (PERF Ex. 3-D.)[3]

35. Any finding of undisputed fact included in the conclusions of law set forth below is incorporated herein by reference.

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[3] In April 2010, PERF made an initial determination that petitioner's original retirement effective September 1, 2009, was void because he returned to work too soon. Petitioner sought administrative review. PERF later withdrew its determination and that appeal was dismissed as moot.

Conclusions of Law

Legal standard

Summary judgment "shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code § 4-21.5-3-23(b).

As with motions under Ind. Trial Rule 56, a genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and 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 Dept. of Environmental Management*, 820 N.E.2d 771, 776 (Ind. App. 2005) (citing cases).

Contrary to federal practice, a moving party cannot simply allege that the absence of evidence on a particular element is sufficient to entitle that party to summary judgment—it must prove that no dispute exists on all issues. *Dennis v. Greyhound Lines, Inc.*, 831 N.E.2d 171, 173 (Ind. App. 2005), citing *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994).

When the parties have filed cross-motions for summary judgment, each motion is considered separately to determine whether the moving party is entitled to judgment as a matter of law, construing the facts most favorably to the non-moving party in each instance. *Keaton and Keaton v. Keaton*, 842 N.E.2d 816, 819 (Ind. 2006); *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154, 160 (Ind. 2005).

An ALJ's review of an agency's initial determination is *de novo*, without deference to the initial determination. *Indiana Dept. of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 103-04 (Ind. 1993); *Branson v. Public Employees' Retirement Fund*, 538 N.E.2d 11, 13 (Ind. App. 1989).

Issue

Whether petitioner is eligible to make an irrevocable election to have additional contributions to his ASA deducted from his paycheck, in a manner that the contributions will be treated as "picked up" by his employer and tax-deferred under IRC § 414(h).

Evidence

Neither party objects to the admissibility of the other party's evidence, except to argue that the other party has submitted evidence that is irrelevant. Issues of relevance will be discussed below.

Disputes of Fact

Although each party disputes the other's characterization of the evidence, neither party argues that there is a dispute of material fact that prevents summary judgment and requires hearing. Furthermore, to the extent that the parties argue over the implications of the facts, the ALJ finds that the disputes are immaterial (interpreting the facts most favorably to the non-moving party) or are about the legal conclusions to be drawn from undisputed facts. These will be discussed in more detail below.

Summary of Basic Facts

To distill the basic and essential facts, Lake County became a PERF employer in 1961 and coverage included employees of the Lake County Plan Commission, including petitioner starting in 1983. The three-percent mandatory contribution was deducted from petitioner's salary and he accumulated creditable service.

In 2000, the General Assembly authorized post-tax contributions to ASAs, and pre-tax contributions to ASAs on the condition that the IRS would approve employer pick-up of those contributions. PERF and the IRS negotiated 35 IAC 11-1-1, which was adopted in 2003, effective January 2, 2004. Before the rule's effective date, Lake County approved employer pick-up for its employees.

The rule, as approved by the IRS and adopted by PERF, provides that employees who had already accumulated five years of service had a window to make the election for pre-tax contributions, through August 31, 2005. PERF did not give individual notice of the program to employees, but a description of the program was in a member handbook. Eight eligible Lake County employees were unaware of their ability to make the election. Petitioner began to make post-tax contributions starting in 2004, but did not submit an election to make pre-tax contributions during the window.

Petitioner retired on August 31, 2009, and returned to work on October 1, 2009. He attempted to elect to have pre-tax contributions deducted from his pay, but PERF rejected his attempt on the ground that his election window closed in 2005 and he had not returned to work for a different employer. The Plan Commission then passed a resolution to pick up its employees' contributions, which PERF rejected because the Plan Commission was not a PERF participating employer.

Application of 35 IAC 11-1-1

Analysis begins with the administrative rule, 35 IAC 11-1-1. The rule is unambiguous as applied to petitioner. First, he had five years of service as of June 2003, so his window to elect participation closed on August 31, 2005. 35 IAC 11-1-1(h). Second, when he returned to work on October 1, 2009, he did not get a new window because he returned to work for "the same employer," Lake County. 35 IAC 11-1-1(e).

Petitioner does not present any substantial argument contrary to this reading and application of the rule. Instead, he argues that his election in December 2009 should be honored by PERF because he had lacked notice that he could elect the pre-tax contribution program through August 2005. He also argues that the Plan Commission's 2010 resolution to pick up the contributions of its employees was effective to reopen his window.

Notice of Availability of Program

The parties strongly contest the notice issue and the extent to which petitioner had notice of the pre-tax program, although PERF argues that its disagreements with petitioner are immaterial for summary judgment purposes.

Petitioner submitted affidavits of eight employees who say they did not have notice of the option to elect pre-tax contributions before August 31, 2005. Conspicuously absent is petitioner's own affidavit to that effect, although he states unequivocally in his unsworn memoranda that he had no knowledge of the pre-tax program (Pet. Resp. PERF MSJ at 10; Pet. Resp. PERF Resp. Opp. Pet. MSJ at 5).

It is undisputed that petitioner had notice of the statutory change that allowed employees to make *post-tax* contributions to their ASAs, an option that he exercised starting in 2004. Therefore, his claim is not that he lacked notice of the statutory amendment, but that he lacked notice of the PERF rule and Lake County resolution by which employees could make the irrevocable election and have their contributions "picked up."

PERF does not present evidence that petitioner had actual notice of the pre-tax program, but PERF argues that he made an election not to participate in the same sense that a party to litigation may waive a right by inaction (PERF Resp. Opp. Pet. MSJ at 6, citing Ind. Code § 4-21.5-3-24). Waiver by inaction, however, can be inferred only if the party was on notice of its right in the first place. *City of Crown Point v. Misty Woods Properties, LLC*, 864 N.E.2d 1069, 1080 (Ind. App. 2007) ("Waiver is the intentional relinquishment of a known right, requiring both knowledge of the existence of the right and intention to relinquish it. . . . [W]aiver is an affirmative act and therefore, mere silence, acquiescence or inactivity does not generally constitute waiver."), citing *Pohle v. Cheatham*, 724 N.E.2d 655, 659 (Ind. App.2000). In the absence of evidence that petitioner knew about the program, there is no basis to conclude that petitioner elected not to participate. Rather, the undisputed evidence is merely that he did not elect to participate.

The parties also dispute the scope and significance of PERF's efforts to publicize the program by way of the 2004 Member Handbook, Q&A document, PowerPoint® presentation and newsletters. There is no evidence that any of the documents was on PERF's Web site before petitioner's election window closed on August 31, 2005. PERF says that it was "common practice" to post the Member Handbook on its Web site but there is no evidence that common practice was followed, so it is certain only that the handbook existed and could have been requested. The Q&A presentation purports to have been updated on October 31, 2003, but this does not show that it was posted to the Web site or otherwise available to petitioner. The PowerPoint® presentation is undated. PERF states with certainty only that the documents were moved to its new Web site in February 2009, but cannot say when they were posted to the old web site. The newsletters—the only documents actually sent to members—were both issued after petitioner's window closed.

So the most that can be said on summary judgment is that the handbook and Q&A document were created and were potentially available to members before August 31, 2005, but it is not known whether they were on the Web site. This evidence is insufficient to raise a dispute of material fact as to whether petitioner had actual notice of the program, that he had constructive notice of the program, or even that Lake County employees were generally aware of the program. [4]

Therefore, for the purposes of both parties' summary judgment motions, it must be taken as undisputed that petitioner did not have actual notice of the pre-tax program, and that PERF's efforts to publicize the program were insufficient to give him even constructive notice. The legal question, therefore, is whether this lack of notice requires PERF to accept petitioner's belated election to participate.

Petitioner argues that PERF had an obligation to make him aware of the program during the election window. He cites the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, for a requirement that all participants of a retirement plan be provided with updated plan summaries. He is apparently referring to ERISA's requirement that each participant be furnished a summary plan description (SPD). 29 U.S.C. §§ 1021(a), 1022, 1024(b). ERISA also imposes specific disclosure requirements triggered by amendments to pension plans. *See* 29 U.S.C. § 1053(c) (plan amendments altering vesting schedule); § 1054(h) (plan amendment that significant reduces rate of future benefit accrual). Finally, ERISA imposes a fiduciary duty with respect to the administration of the plan. 29 U.S.C. § 1104(a).

ERISA does not apply to plans established by states or their political subdivisions. 29 U.S.C. §§ 1002(32), 1003(b)(1). Therefore, specific ERISA requirements of SPDs or disclosure of amendments do not apply to PERF. But the concept of fiduciary duty is not

[4] PERF has not presented, for example, evidence that any eligible Lake County employees enrolled in the program before August 31, 2005.

exclusive to ERISA, in which Congress codified (but also expanded) the common law of trusts as applied to employee benefit plans. *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996); *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814, 825 (7th Cir. 2000) (ERISA's fiduciary duty holds plan administrators to duty of loyalty "akin to that of a common-law trustee"); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990), citing *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

PERF is a trust, Ind. Code § 5-10.3-2-1(b), so it is subject to common law principles of trusts. Therefore, it is appropriate to examine whether, although ERISA does not apply, there is a basis for concluding that Indiana trust law would impose a fiduciary duty on a pension plan administrator to notify beneficiaries of a new program by which they can voluntarily contribute funds to be treated as tax-deferred in addition to those the plan requires members to contribute.

In *Varity*, the court held that deliberate deception by a pension plan trustee violated the fiduciary duty of loyalty to the interests of the participants and beneficiaries as a matter of common law, unchanged by ERISA. 516 U.S. at 506-07. The court did not reach the question of whether ERISA imposes an obligation on fiduciaries to "disclose truthful information on their own initiative, or in response to employee inquiries." *Id.* at 506. The lower courts have developed a general rule, consistent with *Varity*, that a breach of duty occurs if fiduciaries *mislead* plan participants or *misrepresent* terms of the plan; that not every error in communicating information about a plan violates the duty; and that the duty to communicate material facts affecting the interests of plan participants or beneficiaries exists whether or not the participant or beneficiary requests the information. *Vallone v. CNA Financial Corp.*, 375 F.3d 623, 640-41 (7th Cir.), *cert denied*, 543 U.S. 1021 (2004).

A restatement of the common law includes this comment:

> *d. Duty in the absence of a request by the beneficiary.* Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information. As to his duty to render accounts, see § 172. In dealing with the beneficiary on the trustee's own account, however, he is under a duty to communicate to the beneficiary all material facts in connection with the transaction which the trustee knows or should know. See § 170(2). Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest. Thus, if the beneficiary is about to sell his interest under the trust to a third person and the trustee knows that the beneficiary is ignorant of facts known to the trustee which make the interest of the beneficiary much more valuable than the beneficiary believes it to be the trustee is under a duty to the beneficiary to inform him of such facts.

Restatement (2d) of Trusts, § 173, cmt. d (1959). This language strongly suggests that the trustee must provide information that would protect the beneficiary from harm in dealing with third parties, but does not suggest a duty that would compel individual notice of a potentially beneficial pre-tax contribution program.

The ALJ has been unable to find any case, under common law or based on common law codified by ERISA, suggesting that it is a breach of fiduciary duty for a plan administrator to fail to make members aware of a new program whereby they can tax-shelter funds in addition to those already contributed. Such a duty would go beyond cases finding a duty not to mislead or misrepresent, or not to withhold information that would prevent the beneficiary from making a harmful decision. *See, e.g.*, *Anweiler v. American Elec. Power Service Corp.*, 3 F.3d 986, 991-92 (7th Cir. 1993); *Eddy v. Colonial Life*, *supra*.

Each year the General Assembly passes many amendments to statutes, which are a matter of public record. Petitioner knew about the statute authorizing additional contributions. When PERF promulgated 35 IAC 11-1-1, it was required to publish notice of the proposed rule, permit notice and comment, and hold a public hearing. *See* Ind. Code §§ 4-22-2-23 *et seq.* The rule was published and a public hearing held in accordance with these requirements. *See* 27 Ind. Register No. 4, p. 1164 (1/1/04) (showing publication of notice of intent, publication of proposed rule, public hearing, approval by Attorney General and Governor, and filing of final rule). The Lake County Council's adoption of the resolution to pick up employee contributions in 2003 was required to be done at an open meeting with notice. While none of these procedures is as effective as mailing a notice directly to every citizen affected, they are legally sufficient.

For this reason, the general rule is that citizens are presumed to have notice of statutory rights and remedies. *See U.S. Outdoor Advertising Co., Inc. v. Indiana Dep't of Transportation*, 714 N.E.2d 1244, 1259-60 (Ind. App. 1999), citing *Middleton Motors, Inc. v. Indiana Dep't of State Revenue*, 380 N.E.2d 79, 81 (Ind. 1978); *see also DenniStarr Environmental, Inc. v. Indiana Dep't of Environmental Management*, 741 N.E.2d 1284, 1289-90 (Ind. App. 2001); *Hannon v. Metropolitan Development Comm'n of Marion County*, 685 N.E.2d 1075, 1080 (Ind. App. 1997). The same principle applies to administrative rulemaking and local government legislation. A citizen's failure to take advantage of a limited opportunity afforded by the law cannot be excused for lack of notice to every citizen who was eligible.

Government can and should make efforts to publicize such opportunities. PERF did make efforts to let its members know about the program through its handbook and information on its Web site. But it was not legally required to do so, and was not legally required to give individual notice to every member whose employer had opted into the pre-tax contribution program.

Thus it is irrelevant and immaterial whether petitioner and his fellow employees had actual notice of the program, and immaterial whether PERF's efforts to publicize the program in its Member Handbook or on its Web site were adequate. While petitioner did not make a

knowing waiver or election not to participate in the program, his lack of actual notice does not alter the fact that the mandatory election window closed without his having made the election, so he cannot participate.

Plan Commission's 2010 Resolution to Pick Up Contributions

Petitioner argues that the Plan Commission's adoption of Resolution 2010-001, resolving to "pick up" the contributions of Plan Commission employees, was effective to reopen the election window for him. He argues that any "employer" may pick up contributions, and that the Plan Commission is an "employer" and "political subdivision" as defined at Ind. Code §§ 5-10.3-1-2 and -6 and 35 IAC 1.2-2-1.

The question of whether a plan commission can qualify as a political subdivision for the purposes of participation in PERF need not be answered, because the pre-tax program is available only to political subdivisions that are already participating in PERF. Under 35 IAC 11-1-1(a), only "participating employers" may elect to pick up contributions. The entire subparagraph reads:

> (a) The purpose of this rule is to provide a pickup of member contributions by *participating employers* under Section 414(h)(2) of the Internal Revenue Code of 1986 for additional employee contributions made to the member's annuity savings account under IC 5-10.2-3-2(c) and IC 5-10.2-3-2(d). *Employers* may elect to participate in the pickup of additional employee contributions by a resolution adopting the provisions of this rule.

(Emphases added.) The logical reading of this provision is that only "participating employers" may pick up contributions, that is, employers that have elected to participate in PERF. *See* Ind. Code § 5-10.2-1-5 (defining "participating political subdivision" as a political subdivision that is participating in PERF); § 5-10.3-6-1(a) (political subdivision becomes a participant in PERF by ordinance or resolution of its governing body). The word "employers" in the second sentence refers to *participating* employers. Otherwise, the second sentence would authorize any political subdivision to pick up contributions, even if it never joined PERF in the first place.

It was Lake County that joined PERF in 1961, and its PERF coverage extended to employees of the Plan Commission including petitioner. Petitioner made contributions to PERF as a Lake County employee, and received service credit which allowed him to retire in August 2009. Although he works for the Plan Commission, he has been consistently identified as a Lake County employee for PERF purposes. The county auditor recognized this when she correctly certified petitioner's re-employment by Lake County (account number [redacted] in October 2009.

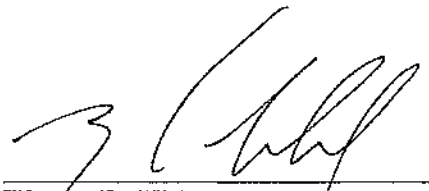
Because the Plan Commission was not a participating employer, its resolution to pick up the contributions of its employees under 35 IAC 11-1-1 was a nullity.

Recommended Order

There is no genuine dispute of material fact and PERF is entitled to prevail as a matter of law. Petitioner was and remains ineligible to elect to participate in the pre-tax contribution program because he did not make that election by August 31, 2005. His Irrevocable Payroll Deduction Authorization submitted on December 9, 2009, was ineffective to initiate his participation in the pre-tax contribution program authorized by the Lake County Council in 2003, and the Plan Commission's 2010 resolution to pick up its employees' contributions was a nullity.

PERF's motion for summary judgment is granted and petitioner's cross-motion for summary judgment is denied. PERF's initial determination is affirmed.

ORDERED on October 27, 2010.



Wayne E. Uhl
Administrative Law Judge
8710 North Meridian Street, Suite 200
Indianapolis, Indiana 46260-5388

STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW

The undersigned administrative law judge is not the ultimate authority, but was designated by the PERF 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 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 October 27, 2010:

Ned Kovachevich
[redacted]

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Wayne E. Uhl
Administrative Law Judge