

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

IN THE MATTER OF) PUBLIC EMPLOYEES' RETIREMENT FUND
JOANN LARABEE,)
)
Petitioner)
)

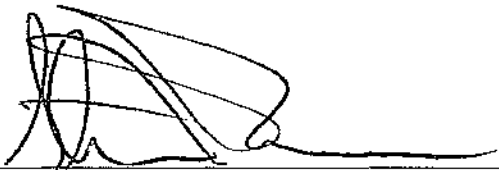
FINAL ORDER

The Board of Trustees ("Board") of the Indiana Public Retirement System ("INPRS") is the ultimate authority in administrative appeals brought by members of the Public Employees' Retirement Fund ("PERF") 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 Findings of Fact, Conclusions of Law and Recommended Order ("Order") in this matter on September 7, 2011, reversing and vacating PERF's determination that Petitioner Joann Larabee must repay the overpayment of disability benefits totaling \$ [REDACTED] from 1996 through 2009.
2. Copies of the Order have been served upon the parties.
3. 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.
4. No objections to the Order have been filed.

NOW THEREFORE the Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge is affirmed.

DATED September 26, 2011



Steve Russo, Executive Director
Indiana Public Retirement System
One North Capitol, Suite 001
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I certify that on the 26th day of September, 2011, service of a true and complete copy of the foregoing was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

Distribution:

Joann Larabee



Wayne E. Uhl
Administrative Law Judge
3077 East 98th Street, Suite 240
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A handwritten signature in black ink, appearing to read "Steve Russo", written over a horizontal line.

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RECEIVED

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BEFORE AN ADMINISTRATIVE LAW JUDGE
INDIANA PUBLIC RETIREMENT SYSTEM

PUBLIC EMPLOYEES' RETIREMENT FUND

JOANN B. LARABEE,)	PUBLIC EMPLOYEES' RETIREMENT
Petitioner,)	FUND
)	
v.)	
)	
PUBLIC EMPLOYEES')	
RETIREMENT FUND,)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

An evidentiary hearing was held on July 19, 2011. Joann Larabee was present and represented herself. PERF was represented by attorneys Jaclyn Brinks and Allison Murphy.

Petitioner Larabee called herself and Clara Larabee as witnesses. She introduced exhibits marked as documents 1 through 34. The exhibits were admitted into evidence without objection.

PERF called Joann Larabee, Randi Cobb, and Sherrie Shields as witnesses. PERF introduced Exhibits R-1 through R-17. The exhibits were admitted into evidence without objection.

Petitioner objected to PERF calling any witnesses on the ground that she did not receive PERF's prehearing list of witnesses. PERF counsel stated that the list was timely mailed on July 8, 2011. It is possible that the list arrived at petitioner's home after she left for Indiana. The ALJ took the objection under advisement. After hearing the testimony of the witnesses, the ALJ finds that petitioner was not prejudiced by lack of advance notice that these witnesses would be testifying, as they largely recounted telephone conversations that were recorded and transcribed, and their testimony outside the transcripts was not unduly prejudicial to petitioner. Therefore, her objection is overruled and the ALJ will consider the testimony of witnesses Cobb and Shields.

The parties stipulated to the facts that were found by the ALJ to be without dispute in the Order on Cross-Motions for Summary Judgment and the exhibits upon which those stipulated facts were based, with the following exceptions: Findings 9, 10, 11, and 27, and the Cobb Affidavit. These stipulations are reflected on the copy of the order introduced as Judge's Exhibit A.

The parties were given full opportunity to present evidence and cross-examine witnesses. The evidence having been taken and the hearing concluded, the ALJ now makes the following findings of fact and conclusions of law.

Findings of Fact

1. Joann Larabee began full-time employment with the Ripley County Welfare Department and became a member of the Public Employees' Retirement Fund (PERF) on January 21, 1987. (Stipulated; Membership Record, PERF Ex. R-1 at 1.)
2. Larabee reported prior service as a public school teacher from September 1969 through June 1970 and from September 1982 through January 1985. She also reported about seven months of prior service as a recreation aide at Muscatatuck State Hospital from May 1965 through January 1966. (Stipulated; PERF Ex. R-1 at 3.)
3. On August 9, 1992, the Social Security Administration (SSA) gave Larabee notice that she was entitled to monthly disability benefits. The notice stated that she became disabled on December 21, 1989, and that her federal benefit would be retroactive to June 1990. The notice also stated that Larabee's health was expected to improve, so her case would be reviewed in June 1993. (Stipulated; PERF Ex. R-2.)
4. On June 22, 1993, PERF received Larabee's Application for Disability Benefits. Larabee checked a box indicating that her SSA award letter had been submitted to PERF. She elected Option 71, Cash Refund Annuity, explained on the form as a lifetime annuity based on her age, salary, years of service and money in her annuity savings account (ASA). She also elected ASA Choice 2B, rollover of her ASA to an individual retirement account or qualified retirement plan (even though the form stated that this option was not available for those who chose benefit Option 71). (Stipulated; PERF Ex. R-3.)
5. By letter dated September 24, 1993, PERF notified Larabee that her application had been processed, subject to change if she could verify her salary at Muscatatuck. The letter stated that she would receive a benefit retroactive to January 1, 1990. (Stipulated; PERF Ex. R-4.)
6. PERF's member handbooks for 1993, 1995, and 1997 stated that members are eligible for disability benefits if they have five or more years of creditable service and are determined by SSA to be disabled while in active service. All three handbooks stated that PERF disability benefits would cease if the member's Social Security benefits are terminated. (Stipulated; PERF Ex. R-14 at 14; R-15 at 14; R-16 at 14-15.)
7. In 1994 or 1995, Larabee returned to work for a newspaper published by Register Publications in Dearborn County.

8. Larabee voluntarily notified SSA that she had resumed working. She received a letter from SSA notifying her that she was no longer eligible to receive a Social Security disability benefit.

9. Larabee called to notify PERF that she was now working and her Social Security eligibility had ended. She did not understand that she was required to do so, but called because it did not seem logical that she would continue to receive the benefit while working. The person she spoke to told her to send a copy of the SSA letter stopping her payments.

10. Larabee followed the employee's instruction and mailed a copy of the SSA letter to PERF. PERF's file does not contain a copy of the letter or any documentation of the information imparted by Larabee.

11. Larabee continued receiving PERF disability checks. She called PERF again to explain that she was working. A PERF employee told her that she remained eligible to receive the checks because she was working for a private employer.

12. Larabee told her mother, Clara Larabee, about this phone conversation although Clara was not present during the conversation.

13. In the summer of 1999, Larabee left Register Publications to take a position with Lawrenceburg Schools. In 1999 she again called PERF to report her new address and that she was now working for a public employer. A PERF employee stated that because Lawrenceburg Schools was a Teachers' Retirement Fund (TRF) employer, and the disability benefit was coming from PERF, Larabee should continue to receive the PERF benefit. Larabee is certain that she told the PERF representative that it was a disability benefit that she was receiving.

14. Larabee told Clara about the conversation in which she reported to PERF that she was now working for Lawrenceburg Schools, but Clara was not present during the conversation.

15. In mid-2000, Larabee left Indiana to take a job as a school librarian with Savannah-Chatham County Public School System in Georgia. She called PERF to notify PERF of her new address and stated that she would be working in Georgia, but did not specifically mention her disability benefit during this phone call because she believed, based on the earlier conversations, that she remained eligible to receive the benefit.

16. Larabee also called TRF with notice of her new address.

17. Larabee contacted PERF in 2003 or 2004 to give notice that she had moved to a new address in Georgia.

18. Before 2003, PERF staff did not make systematic notes or computer records of actions or contacts made with members.

19. PERF did not begin recording phone calls to its call center until 2004. (Stipulated; Pet. MSJ Ex. B-1.)

20. PERF has no record of Larabee contacting PERF to inform PERF that she was no longer eligible for Social Security disability benefits. (Stipulated.)

21. PERF's original paper member files have been "imaged" and the paper files were sent to storage. In testifying that PERF has no record of Larabee contacting PERF to report that she was employed and no longer receiving Social Security benefits, Randi Cobb relied on the computer image of Larabee's file. Cobb has not reviewed the paper file and she is unaware of whether the paper file was retrieved from storage.

22. Cobb has never seen pre-2003 notes of telephone contacts with members in any archived paper file. From this, the ALJ infers and concludes that if Larabee called three times before 2003 to report her status, it is unlikely that any documentation would have been made.

23. Cobb testified that, based on her review at the time the overpayment was discovered in 2009, PERF had no knowledge that Larabee had become ineligible for Social Security benefits in 1996. From this, the ALJ infers and concludes that from 1995 through 2009, PERF was not performing any verification of disability benefit recipients' continued eligibility as required by Ind. Code § 5-10.2-4-6(a)(3).

24. Starting in 2003, PERF employees made computer notes of actions and contacts with members. These notes record the following potentially pertinent events:

- 02/18/03 Form 1099 mailed to new address in Lawrenceburg, Indiana
- 02/21/03 Change of address form mailed out
- 05/15/03 PERF received change of address form, re-mailed Form 1099. "Sent ltr telling member how to change her last name and a new DD form as she wants to switch her account from IN to GA"
- 07/18/03 Returned mail from postal service
- 02/27/04 2003 Form 1099 not mailed, need address
- 11/18/04 Member's phone number found on whitepages.com, recording gave new number, staff called and left voice message
- 11/19/04 Member returned phone call, change of address form sent to new address in Savannah, Georgia

(Stipulated; Pet. MSJ Ex. E-1.)

25. On August 5, 2008, the Teachers Retirement System of Georgia notified Larabee that she was eligible to purchase credit for out-of-state (Indiana) service in 1970 and 2000. (Stipulated; Pet. MSJ Ex. F.)

26. On November 19, 2009, Larabee called PERF's member service center. She stated that she had 2.5 years of TRF service and a balance in her ASA with TRF, and she wanted to know whether she could use the TRF service to purchase service in Georgia, where she now lived and worked. She said that she had spoken to a TRF representative who told her that PERF had "taken" the TRF service when she "retired," and that someone was researching to confirm that. PERF representatives told Larabee that when she took disability retirement, any TRF service should have been combined with her PERF service to calculate her benefit, and it would be up to Georgia whether to permit her to purchase service for use in Georgia's retirement system. In fact, one of the PERF representatives was able to confirm that when Larabee retired in 1993, PERF used one and a half years of teacher service in calculating her disability benefit. Larabee was advised to contact TRF again to learn whether she had other service that was not transferred to PERF. (Stipulated; PERF Ex. R-13 at 3-18.)

27. Although Larabee did not expressly say that she had been working, she communicated that she was living in Georgia and had an account with the Georgia state teachers' retirement plan. (Stipulated; PERF Ex. R-13 at 3.) This information put PERF on notice (again) that she had been working while receiving a PERF disability benefit.

28. On November 23, 2009, PERF sent an email to SSA asking for verification that Larabee had been continuously eligible for Social Security disability benefits since her date of onset, December 21, 1989. (Stipulated; PERF Ex. R-5.)

29. SSA responded that Larabee had been terminated from its rolls in July 1997, and that she did not receive a cash benefit from SSA after December 1995 "because of her substantial gainful income." (Stipulated; PERF Ex. R-5.)

30. On December 8, 2009, the matter was referred to the PERF Call Center Manager to contact Larabee regarding termination of her benefit, and to the Overpayment Processor to calculate the overpayment. (Stipulated; PERF Ex. R-6.)

31. Larabee's benefit was suspended on December 14, 2009. (Stipulated; PERF Ex. R-7.)

32. On December 14 and 15, 2009, PERF employee Sherrie Shields called Larabee and left voice messages asking her to call about her December benefit, and stating in the second message that she would not be receiving a payment in December. (Stipulated; PERF Ex. R-13 at 18-20.)

33. By letter dated December 15, 2009, PERF notified Larabee that it had come to PERF's attention that her SSA benefit was terminated, that the termination may have resulted in overpayment by PERF, and that her PERF benefit had been suspended while the account was researched. (Stipulated; PERF Ex. R-8.)

34. On December 16, 2009, Larabee returned Shields' call. Shields informed Larabee that PERF was reviewing her case to see whether she would still qualify for PERF disability now that she was no longer on Social Security disability. (Stipulated; PERF Ex. R-13 at 21-22.) At first, Larabee denied that she had ever been on Social Security disability. (*Id.* at 22-23.) When Shields explained that Larabee could not have received PERF disability benefits without having been awarded SSA benefits, Larabee said:

But I wrote you guys way back then and told you that I was — the Social Security, if I remember correctly, had stopped and that I was going to be able to do some work again. And I was told that it didn't matter. That since I had retired from the state I would continue to receive my payments. So why now?

(*Id.* at 24.) Shields responded that Larabee would not have qualified for anything other than disability retirement because she had less than 10 years of service. (*Id.* at 24-25.) Later in the conversation, Larabee said:

I called the State and told you guys that I was back at work, so why didn't it stop? Are you going to hit me up for money now?

(*Id.* at 26.) Shields responded that the matter was being researched. (*Id.*)

35. On December 17, 2009, Larabee called and spoke again with Shields. Shields explained that PERF had only recently learned that Larabee's Social Security benefit stopped in 1997, but she did not know how PERF had learned it. Shields said that upon learning that the SSA benefit had stopped, PERF was required to stop Larabee's benefit while the matter was investigated. (Stipulated; PERF Ex. R-13 at 34-35.) Larabee asked why PERF had paid her the benefit for all those years, to which Shields responded that PERF was not aware that Larabee was no longer drawing a Social Security benefit and Social Security does not notify PERF. Larabee then said she had notified PERF, to which Shields responded that PERF had no record of that. Larabee responded:

Okay, but I did do that. So that obviously has gotten lost. And, also, I called to find out what I had to do and was told — actually, I was told on the phone to send in the letter, but I also was told then later when I continued to receive the check and I called back, that it was not relevant. That I was still disabled from the state job and would continue the check. And, no, I can't prove that, it's been, what, 20 years, 10 years, 15, whatever.

(*Id.* at 37-38.) Later in the conversation, Shields said that it is the member's responsibility to notify PERF if the member leaves Social Security, to which Larabee responded, "And I did." (*Id.* at 44-45.)

36. As a finding of ultimate fact, the ALJ credits Larabee's testimony that she called PERF on at least three occasions, twice around 1996 when her SSA benefit stopped and again in 1999, to report that she was no longer disabled and was no longer eligible for a Social

Security benefit. She called or contacted PERF on at least one other occasion after 1999 with information regarding her employment, which information should have put PERF on notice that Larabee was no longer disabled and triggered at least a review of her disability status. Her testimony is bolstered by her extemporaneous statements during the recorded telephone calls. The absence of documentation of these contacts in the PERF record does not negate Larabee's testimony, as the evidence indicates that PERF did not have a policy or practice of documenting telephone contacts before 2003. Therefore, PERF was on notice of the discontinuation of Larabee's disability.

37. Larabee has not carried her burden of proving that PERF received documentation of her ineligibility, because if PERF had received a copy of the SSA letter, it is highly likely that it would appear in her PERF file.

38. By letter dated March 20, 2010, PERF staff member Charlene Payne notified Larabee that review of her account showed an overpayment of \$ [REDACTED]. The letter stated that it had been reported that her SSA disability benefits terminated in December 1995, but this information had not been provided to PERF, so PERF continued to make monthly pension payments. The letter asked Larabee to call to discuss options for a repayment plan. (Stipulated; PERF Ex. R-9.)

39. The March 20 letter stated, "Please see enclosed the appeals process for this determination." (Stipulated; PERF Ex. R-9.) However, the exhibit does not include an enclosure or attachment, so there is no record that Larabee was given written notice of her appeal rights.

40. On March 31, 2010, Larabee called PERF and spoke to staff member Tamara. Larabee stated that she was calling about the letter she received from Charlene Payne, that she would not be able to make the repayment, and "I need someone to tell me now what is the next step." (Stipulated; PERF Ex. R-13 at 47-48.) Tamara stated that she would have a manager call her back. (Stipulated; PERF Ex. R-13 at 48-49.)

41. In a letter dated May 5, 2010, and received by PERF on May 10, 2010, Larabee confirmed her desire to appeal the initial determination that she owed repayment. (Stipulated; PERF Ex. R-11.)

42. PERF paid a total of \$ [REDACTED] in disability benefits to Larabee from January 1996 through November 2009. She was owed [REDACTED] due to a recalculation of her benefits received in 1994-1995, but this was never paid to her. (PERF Ex. R-12.) Therefore, the net amount overpaid to Larabee while she was ineligible for benefits is [REDACTED].

43. PERF does not contest the timeliness of Larabee's objection to its initial determination. (Stipulated; Letter to ALJ Uhl, 5/14/10.)

44. When Larabee first started receiving the disability benefit it was very small, barely enough for grocery money. She did not earmark the benefit for any particular purpose, and probably used it to contribute to her family's food expenses.

45. In 1996, the first year when she was ineligible, she received \$ [REDACTED] in PERF benefits while making about [REDACTED] a year at the newspaper. When she left the newspaper in 1999 she was making about \$ [REDACTED] and the PERF benefit was [REDACTED] that year.

46. When asked whether she ever changed her budget or spending habits based on the PERF benefit, Larabee responded that her family never had enough money because she was divorced, leaving her with three children and the mortgage on the family home. The benefit made it easier to buy food. Under the circumstances, she did not make any lifestyle changes based on the benefit.

47. She earned a higher salary at Lawrenceburg Schools in 1999-2000, about [REDACTED] year. Her PERF benefit was [REDACTED] in 1999 and [REDACTED] in 2000. (PERF Ex. R-12.)¹

48. Larabee's librarian job in Georgia started at [REDACTED] /year and her highest salary there was [REDACTED] year. During the period of 2001 through 2009, the PERF benefit paid from [REDACTED] to [REDACTED] annually.

49. The PERF benefit helped Larabee with transportation and groceries. She did not invest any of it.

50. When the benefit stopped in 2009, Larabee was still able to buy food.

51. Larabee retired from her job in Georgia in June 2011.

52. Now that she has retired, Larabee is not employed but plans to seek part-time employment. The Georgia Retirement System estimates that her retirement benefit will be about \$ [REDACTED] /month (Pet. Doc. 24). Indiana TRF estimates that her Indiana retirement benefit will be about [REDACTED] month.

53. Larabee will not be eligible for a full Social Security retirement benefit until she reaches age 66 in 2012. SSA estimates her full benefit at age 66 will be [REDACTED] /month, but if she starts taking the benefit early at age 65 it would be [REDACTED] month (Pet. Doc. 25).

54. Larabee and her husband jointly own a home on which the mortgage balance was [REDACTED] in March 2011, and monthly principal and interest payments are [REDACTED] month (Pet. Doc. 1, 2). They purchased the home for [REDACTED] but its tax-assessed value is [REDACTED] (less than the amount of the mortgage balance) (Pet. Doc. 5). They have been unable to sell it at the listing price of [REDACTED]

¹ This large jump in the benefit from 1999 to 2000 is due to a single monthly payment of [REDACTED] in January 2000. The monthly benefit fell back to less than [REDACTED] for the remainder of 2000 and continued at roughly that level afterward. The large payment in January 2000 is unexplained.

55. It appears that the current property taxes on the home are about \$ [REDACTED] year (Pet. Doc. 4).

[REDACTED]

[REDACTED]

58. Any finding of fact inadvertently contained in the conclusions of law is incorporated herein.

Conclusions of Law

A. Legal standard

The factual questions presented by this case are reviewed under the preponderance of the evidence standard. *Pendleton v. McCarty*, 747 N.E.2d 56, 64-65 (Ind. App. 2001). The ALJ, even where not the ultimate authority, performs a role similar to that of a trial judge sitting without a jury, and reviews the evidence *de novo* without deference to the agency's initial determination. *Indiana Department 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).

The burden of proof lies with Larabee because she is seeking exemption, by way of affirmative defenses, from PERF's legal obligation to collect overpayments. Ind. Code § 4-21.5-3-14(c); see *Indiana Department of Natural Resources v. Krantz Brothers Construction Corp.*, 581 N.E.2d 935, 938 (Ind. App. 1991) (party seeking exemption from general rule has burden of proof; both under I.C. § 4-21.4-3-14(c) and at common law).

Administrative decisions must be supported by "the kind of evidence that is substantial and reliable." I.C. § 4-21.5-3-27(d). In other words, the quality of evidence must be substantial and reliable. If both sides present evidence that is substantial and reliable, Larabee can prevail only if her evidence preponderates over the evidence submitted by PERF.

Hearsay evidence may be admitted and, if not objected to, may form the basis for an order. I.C. § 4-21.5-3-26(a). However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence. *Id.*

B. Issue

The sole issue is whether PERF is entitled to require repayment of the funds paid to Larabee after termination of her eligibility for Social Security disability benefits.

C. Discussion

The Order on Cross-Motions for Summary Judgment is incorporated herein, and the legal principles set forth in that order continue to control.

In sum, the ALJ found that Larabee was in fact overpaid because she was not eligible to receive a PERF disability benefit when her eligibility to receive an SSA benefit ended after December 1995. Therefore, her PERF benefit was correctly stopped in December 2009 when PERF researched the question. The ALJ further found that PERF is authorized and even required to collect overpayments, but that its power to collect is limited by equitable principles such as those governing restitution of mistaken payments or a trustee's recovery of mistaken payments to a trust beneficiary, as well as the equitable doctrines of laches and equitable estoppel.

Further analyzing those principles, the ALJ found disputes of material fact or absence of evidence on certain key questions, including the extent to which PERF was negligent in making the overpayments, whether PERF's delay in seeking recovery was excusable, whether PERF affirmatively misled Larabee into believing that she was entitled to the overpayments, whether Larabee changed her position in reliance on the payments, and whether it would be inequitable to recover the overpayments from PERF given the relative harms to PERF and Larabee. These disputes have been resolved by the evidence taken at the evidentiary hearing.

The evidence shows that PERF was negligent and its delay in discovering the overpayment was inexcusable. PERF was and is under a statutory obligation to verify the continued disability of the member at least annually. Ind. Code § 5-10.2-4-6(a)(3). PERF was not doing this, and no reason for this failure has been offered by PERF.

There is some evidence that PERF believed the burden of verification fell on its members, as stated by employee Shields in a telephone conversation with Larabee (PERF Ex. R-13 at 44-45). It is doubtful that any effort by PERF to shift the obligation to members would be effective, but there is no evidence that members were actually told that it was their responsibility to notify PERF if their SSA benefits stopped. The application signed by Larabee merely authorized SSA to release information to PERF. The PERF member handbooks stated that a member's PERF benefit would cease if the SSA benefit stopped, but did not instruct the member to report that fact to PERF.

Furthermore, the evidence shows that Larabee in fact notified PERF at least three times, yet PERF took no action on this information. To the contrary, PERF staff told Larabee that she was entitled to continue receiving the benefit, first because she was working for a

private employer and later because she was working for a TRF employer. To be sure, the PERF representatives may not have fully understood the situation—for example, may have thought she was receiving a regular retirement benefit instead of a disability benefit—but her calls should have prompted at least a minimal inquiry into the status of her account. The fact that PERF did not actually receive the copy of the SSA letter sent by Larabee does not mitigate PERF's negligence in this regard.

On the question of detrimental reliance, the evidence shows that PERF employees made statements to Larabee that she was entitled to continue receiving the disability benefit even after her disability ended. These statements were unauthorized and contrary to law. However, the evidence does not support the conclusion that she relied to her detriment on these statements. In fact, she found them counter-intuitive and she called back a couple of times because it did not make sense to her that she should continue to receive the benefit, finally giving up after the third call.

Larabee used the money for everyday expenses, but not to commit herself to a particular expense, obligation, or endeavor in reliance on the funds. There is no evidence, for example, that she took out a loan or mortgage in reliance on the benefit continuing into perpetuity. Frankly, the amount of the benefit, ranging from ██████████ a year, was too small to give rise to the sort of permanent commitment that would support a claim of detrimental reliance.²

Finally, the evidence shows that repayment of the ██████████ overpayment would impose a heavy financial burden on Larabee. Upon her recent retirement, she will be surviving on about ██████████ month in regular retirement benefits from the Georgia Retirement System and TRF. This will be supplemented in 2012 with her Social Security benefit of ██████████ month, for a total monthly pretax income of ██████████ (annually). She has only about ██████████ in individual retirement savings. She and her husband share a mortgage payment of ██████████ month and property taxes of ██████████ month, and she has personal debts. There is no specific evidence of day-to-day living expenses, but it is common sense that a fixed income of ██████████ after the mortgage payment and taxes, will be stretched thin to cover utilities, food, clothing, transportation, income and sales taxes, and other expenses. To repay the overpayment even over 10 years, with interest-free payments of ██████████ year, would reduce Larabee's pretax income by about 7%.

On the other hand, as noted in the summary judgment order, the inability to recover the overpayment will have only a negligible impact on PERF. As of June 30, 2010, PERF had net assets of more than \$10.58 billion. *2010 Comprehensive Annual Financial Report* at 32, http://www.in.gov/inprs/files/PerfCafr2010_Financial.pdf (viewed 9/6/11).

Having resolved the disputes of fact, it remains to analyze the results under the equitable principles outlined in the summary judgment order.

² This range excludes the unusual and unexplained benefit of ██████████ received in 2000.

a. Restitution of mistaken payments. As explained in the summary judgment order, the law of restitution requires the recipient of careless overpayments to repay them unless the recipient so changed her position in reliance on the payments as to make it inequitable to make repayment. The evidence does not show such detrimental reliance, so Larabee is not exempt from repayment on this basis.

b. Trustee's mistaken distribution of trust assets. The law of trusts permits that the *beneficiary's interest in the trust assets* be charged for the repayment in the absence of detrimental reliance. That is a difficult concept to apply in the case of a multibillion-dollar trust fund with thousands of vested beneficiaries. Indeed, as the ALJ understands it, Larabee has no vested interest in PERF.

As noted in the summary judgment order, whether it is inequitable to compel repayment of a trust overpayment is determined by examining (1) what disposition has been made by the beneficiary of the amount by which she was overpaid (Larabee spent it on everyday expenses); (2) the amount of the overpayment (██████████); (3) whether the trustee was negligent (PERF was negligent); and (4) the time which has elapsed since the overpayment was made (over a period of 15 years).

Although there is not a showing of detrimental reliance here, the four factors outlined above clearly militate against requiring repayment, either directly or by deduction from Larabee's future retirement benefit from TRF. Therefore, the ALJ concludes that Larabee is entitled to relief from repayment under the principles of mistaken payments from a trust.

c. Laches. This is the doctrine that most clearly applies to this case. Following the elements of laches, (1) PERF's delay in asserting its right to the overpayment was inexcusable in light of PERF's statutory obligation to annually verify Larabee's disability; (2) PERF knowingly acquiesced in the continued disability payments to Larabee notwithstanding her multiple notifications to PERF that she was no longer disabled; and (3) Larabee's circumstances have changed in that she is now retired, on a fixed income, and is no longer in a position to repay the overpayment.

For these reasons, the ALJ concludes that Larabee is entitled to relief from repayment under the doctrine of laches.

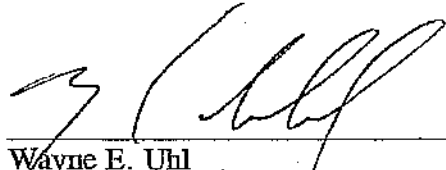
d. Equitable estoppel. As noted above, PERF staff gave Larabee incorrect and misleading information that she was entitled to continue to receive the disability benefit, but she has not shown that she relied on that information to her detriment. Therefore, the doctrine of equitable estoppel does not apply.

In conclusion, based on the law of trusts and the equitable doctrine of laches, the ALJ concludes that Larabee should not be required to repay the overpayment.

Recommended Order

Based on the foregoing findings of fact and conclusions of law, the determination of PERF that petitioner Joann Larabee must repay the overpayment of disability benefits totaling [REDACTED] from 1996 through 2009 is reversed and vacated, that she is relieved of any obligation to repay the overpayments. PERF shall take no further action to collect the overpayments, either by direct collection or deduction from any future INPRS benefit to which Larabee may be entitled.

ORDERED on September 7, 2011.



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.

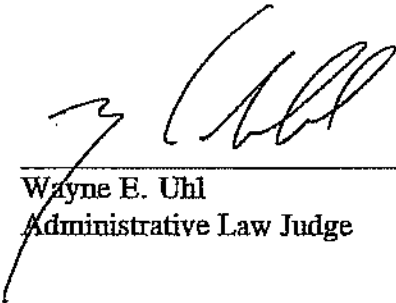
CERTIFICATE OF SERVICE

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 September 7, 2011:

Joann B. Larabee



Jaclyn M. Brinks, Staff Attorney
INPRS
1 N. Capitol Ave., Ste. 001
Indianapolis IN 46204-2014



Wayne E. Uhl
Administrative Law Judge

