

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DST 03598

<p>Joan Ruth Wall Hunter Petitioner,</p> <p>v.</p> <p>North Carolina Department of State Treasurer, Retirement Systems Division Respondent.</p>	<p>FINAL DECISION SUMMARY JUDGMENT</p>
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THIS MATTER is before the undersigned on the parties' cross Motions for Summary Judgment, both filed on October 8, 2019.

1. The Petitioner Joan Ruth Wall Hunter retired from State service with the Department of Motor Vehicles effective June 1, 1997, at age 59, after 22 1/3 years of credible service. She chose to receive her benefits accrued in the Teachers and State Employees' Retirement System of North Carolina (hereinafter, the "System"), administered by Respondent's Retirement Systems Division ("RSD"), under the "Social Security leveling option." N.C. Gen. Stat. § 135-5(g) Option 4. By this method, the system would pay higher benefits before Social Security eligibility and reduced amounts after, with the goal of allowing the retiree to receive the same amount of money monthly from the systems board before and after receipt of Social Security benefits. She received \$956.35 in her first month of retirement. On May 28, 2019, some 22 years later, RSD notified Petitioner that she had been erroneously paid approximately 35% of the benefits she had received during that period, and that it would halve her monthly take-home benefit – recouping \$524.46 per month -- until it had recovered \$145,110.64.

2. While carefully avoiding an admission that any recoupment is due, Petitioner argues that a statute of limitation bars Respondent from recovering any overpayment made more than three years prior to its demand. Respondent replies that, "RSD has not initiated an action, so a statute of limitations is not relevant here," and cites statutes providing that, "No ... State-funded entity may forgive repayment of an overpayment of State funds, but shall have a duty to pursue the repayment of State funds by all lawful means available," and the specific authorization to recover "any overpayment of benefits" by "offset against any retirement allowance." N.C. Gen. Stat. §§ 135-9; 143-64.80(b).

3. In support of her *Motion*, Petitioner offers the argument that most of the Respondent's proposed offsets constitute an "action" barred by a three-year statute of limitations:

No action shall be commenced against the State or the Retirement System by any retired member or beneficiary respecting any deficiency in the payment of benefits more than three years after such deficient payment was made, and no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made. This subsection does not affect the right of the Retirement System to recoup overpaid benefits as provided in G.S. 135-9.

N.C. Gen. Stat. §§ 135-5(n) (2019). Petitioner emphasizes that the last sentence was added after her pension rights had vested, and thus it can be argued that this amendment is “deal[ing] with a subject that was not intended to be covered by the earlier legislation” applicable to the Petitioner, prohibiting unlimited recoupment. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 217, 388 S.E.2d 134, 141 (1990).

4. However, our Court of Appeals has considered this argument, and came down firmly on the side of the Respondent.

We agree with the State that the term “action” in N.C. Gen. Stat. § 135-5(n) is inapplicable to the State's reduction of future state benefits. When used in this context, the phrase “no action shall be commenced” has a special meaning, drawn from N.C. Gen. Stat. § 1-2, which describes an action as “an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.” The State's reduction of Trejo's benefits to recoup the overpayment and apply the offset going forward is not a proceeding in a court of justice and thus is not the commencement of an action for purposes of the statute of limitations.

Moreover, N.C. Gen. Stat. § 135-9 permits the State to recoup any overpayment through the reduction of other state benefits owed to the recipient “[n]otwithstanding any provisions to the contrary” and N.C. Gen. Stat. § 135-5(n) provides that its three-year limitation “does not affect the right of the Retirement System to recoup overpaid benefits as provided in G.S. 135-9.” Thus, the State is permitted to use recoupment to recover an overpayment regardless of whether N.C. Gen. Stat. § 135-5(n) might limit the State's ability to recover that same overpayment through other legal means in a court proceeding. Accordingly, we reject Trejo's argument that the State's reduction in her benefits is time barred.

Trejo v. NC Dep't of State Treasurer Ret. Sys. Div., 808 S.E.2d 163, 168 (N.C. Ct. App. 2017), *review denied*, 813 S.E.2d 243 (N.C. 2018). Consequently, Petitioner's motion for summary judgment must be denied.

5. Based on the foregoing, Respondent asserts that unless Petitioner can show an error in the calculation of the amount it must recoup, that it is entitled to summary judgment.

6. Summary judgment is appropriate when the movant shows “that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). All evidence must be viewed in the light most favorable to the non-moving party, taking its asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “According to well-established North Carolina law, when a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party cannot rely on the allegations or denials set forth in her pleading, *Ind-Com Elec. Co. v. First Union Nat. Bank*, 58 N.C. App. 215, 217, 293 S.E.2d 215, 216–17 (1982), and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment.” *Steele v. Bowden*, 238 N.C. App. 566, 768 S.E.2d 47, 57 (2014). “An Administrative Law Judge may grant ...summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case.” N.C. Gen. Stat. § 150B-34(e).

7. The Respondent has carried its burden of showing the absence of a controversy over any genuine issue of material fact, the Petitioner has failed to forecast sufficient evidence to show the existence of such an issue.

FINAL DECISION

Consequently, the Petitioner’s motion for summary judgment is **DENIED**; and,

Respondent is entitled to summary judgment as a matter of law, and therefore the Petition must be, and hereby is, **DISMISSED**. N.C. Gen. Stat. §§ 1A-1, Rule 56; 150B-34(e); 26 NCAC 03 .0101(a).

NOTICE OF APPEAL

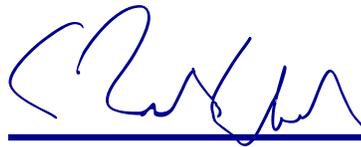
This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Final Decision.** In conformity with the Office of Administrative Hearings’ rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a

copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 15th day of November, 2019.



J Randolph Ward
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

David G Schiller
david@schillerfirm.com
Attorney For Petitioner

Katherine Adele Murphy
NC Department of Justice
kmurphy@ncdoj.gov
Attorney For Respondent

This the 15th day of November, 2019.



Daniel L. Chunko
Administrative Law Judge Assistant
N. C. Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Phone: 919-431-3000