

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
20 INS 01234

<p>Scott R Lassiter Petitioner,</p> <p>v.</p> <p>North Carolina State Health Care Plan for Teachers and State Employees Respondent.</p>	<p><b>FINAL DECISION</b></p>
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**THIS MATTER** is before the undersigned Administrative Law Judge on Respondent's Motion for Summary Judgment. This matter was initially set for an evidentiary hearing on July 24, 2020, on Petitioner's Petition for Contested Case Hearing. At the hearing, the Parties stipulated that there was no genuine issue of material fact and therefore a summary judgment hearing was appropriate. Upon consent of the Parties, the Undersigned allowed Respondent to make an oral Motion for Summary Judgment and heard arguments on the Motion. Both Parties submitted Proposed Final Decisions and have entered their exhibits into the record; therefore, this matter is ripe for adjudication.

Petitioner made novel arguments in support of his case and the Undersigned does want the "State to do right by its public servants" as Petitioner asks. However, the Undersigned is bound by the law underlying this case. Based on the below findings of facts and conclusions of law, Respondent's Motion for Summary Judgment is **GRANTED** and Petitioner's case is **DISMISSED**.

**APPEARANCES**

For Petitioner: Scott R. Lassiter, *pro se*  
209 Ronaldsby Drive  
Cary, NC 27511

For Respondent: Tamara M. Van Pala  
Special Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602-0629

**ISSUE**

Did the Respondent deprive Petitioner of his property or fail to act as required by law and rule when it denied Petitioner’s exception request to retroactively award him the tobacco premium credit for the 2020 plan year?

**RELEVANT STATUTES AND RULES**

(including but not limited to)

N.C. Gen. Stat. Chap. 135; N.C. Gen. Stat. Chap. 150B, Article 3  
N.C. Gen. Stat. § 1A-1, Rule 56

**EXHIBITS ADMITTED INTO EVIDENCE**

For the Petitioner:     None

For the Respondent:   Exhibits A-I (by stipulation)

**WITNESSES**

For the Petitioner:     Petitioner

For the Respondent:   Joy Roberson, Customer Experience Specialist  
                                  NC State Health Plan

**STANDARD OF REVIEW**

Summary judgment is proper when “the pleadings . . . together with the affidavits, if any, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). “Summary judgment is appropriate when movant proves that an essential element of a claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his claim.” *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 452 S.E.2d 233, 240 (1994). A non-movant “must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party’s case.” *Graham v. Hardee’s Food Sys., Inc.*, 121 N.C. App. 382, 386, 465 S.E. 2d 558, 560 (1996). “A fact is material only if it constitutes a legal defense to a charge, or would affect the result of the action, or its resolution would prevent the party against whom it is asserted from prevailing on the point at issue.” *Hilliard v. N.C. Dept. of Corr.*, 173 N.C. App. 594, 598, 620 S.E.2d 14, 18 (2005).

**DISCUSSION**

In the instant case, the uncontested facts show that the Plan, a division of the Department of State Treasurer, is a self-funded benefits program that provides health care benefits to eligible State teachers, employees, retirees, and dependents. N.C.G.S. § 135-48.42(e) states that “[eligible employees and retirees may only change their elections, including adding or removing dependents,

during the Plan year due to a qualifying event as defined under federal law.” The State Health Plan is a cafeteria plan as defined through the Internal Revenue Service Code (I.R.S.), Section 125. Plan members may change their health plan elections only during the annual open enrollment period or due to a qualifying life event, under 26 C.F.R. 1.125-4. The State Health Plan allows changes to plan elections in accordance with those events described in 26 C.F.R. 1.125-4. Failure to enroll in a particular plan or to complete wellness activities during the open enrollment period are not qualifying life events as set forth and defined in 26 C.F.R. 1.125-4.

As authorized by N.C. Gen. Stat. § 135-48.42, the Plan held its annual Open Enrollment from November 2, 2019, until November 19, 2019, during which time Plan members could enroll or make election changes in the Plan for the 2020 Plan year. Open Enrollment materials sent to Plan members, such as Petitioner, stated that all Plan members were given the option to act during Open Enrollment in order to reduce their healthcare costs. Plan members were notified that they were required to act during Open Enrollment in order to reduce their premiums. In particular, Plan members were informed they would be automatically enrolled in the 70/30 Plan at a monthly premium of \$85 unless they opted into the 80/20 Plan at a monthly premium of \$110. Plan members also were informed they could reduce their monthly premium by \$60 by attesting they either were tobacco-free or would participate in a tobacco-cessation program (“the tobacco premium credit”). Failure to take action during Open Enrollment would result in a Plan member being enrolled in the 70/30 Plan without the tobacco premium credit, as explained in the Open Enrollment materials.

Petitioner has acknowledged that he did not complete the tobacco attestation. As a result of not taking action during the Open Enrollment period, Petitioner was enrolled in the 70/30 Plan without the tobacco premium credit. Petitioner initiated an internal appeal with the Plan, asking to be reimbursed the tobacco premium credit. Petitioner’s internal appeal with the Plan was denied, and Petitioner initiated this contested case on March 19, 2020.

Petitioner admits in his Petition: “I failed to successfully finalize my NC Health Plan Smoking Attestation via the outline portal. I sincerely believed I did while training my staff-however, I was logged in as my secretary. This scrivener’s error was made in good faith with a true belief that I actually submitted it.” Petitioner states that the amount in controversy is \$600.00. Petitioner sought no further relief and did not submit his Petition on behalf of a class.

Moreover, Petitioner did not raise a constitutional argument until the hearing. At hearing, Petitioner argued that he should receive the tobacco premium credit because (1) he made an honest mistake and thought he had appropriately completed the tobacco attestation and (2) the Plan does not have a valid reason for requiring the tobacco attestation. In his Proposed Decision, Petitioner asks for a refund in the amount of \$720.00 for the amount of his tobacco premium credit for the 2020 Plan year. As part of his constitutional claim, Petitioner also asks the Undersigned to reverse the Plan’s use of the tobacco attestation requirement on behalf of approximately 13,000 State employees, whom he contends were harmed by the practice of the tobacco attestation.

Even if Petitioner makes a valid constitutional argument, this Tribunal cannot consider Petitioner’s constitutional claims. The Office of Administrative Hearings (“OAH”) does not have jurisdiction to determine those constitutional issues. The authority of OAH is set forth with

particularity in the North Carolina Administrative Procedure Act (“NCAPA”), N.C. Gen. Stat. § 150B-1, *et. seq.*” *Kelvin D Exum v. The North Carolina State Bar*, No. 19 BAR 06047 (OAH Jan. 13, 2020) (Overby, ALJ). “A contested case before the Office of Administrative Hearings in the executive branch is “not a not a proper method of challenging the constitutionality” of a statute. *Beard v. North Carolina State Bar*, 320 N.C. 126, 357 S.E.2d 694 (N.C., 1987) “[I]t is the province of the judiciary to make constitutional determinations.” *Meads v. North Carolina Dep’t of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); *Bailey v. State of North Carolina*, 330 N.C. 227, 246, 412 S.E.2d 295, 306 (1991), *cert. denied*, 504 U.S. 911, 112 S. Ct. 1942, 118 L.Ed.2d 547 (1992). An Administrative Law Judge follows the constitutional rulings of the Judicial Branch but does not make them.

The Office of Administrative Hearings is not a constitutional court, but rather is a quasi-judicial agency of state government. OAH is not a court of equity. It is totally a statutory creation. OAH has no authority other than those granted through legislation and stated in our general statutes or rules properly promulgated pursuant to the statutes. Unless specifically stated in other statutory enactments, the only authority of the Office of Administrative Hearings is found in N.C. Gen. Stat. § 150B.

*Hadijatou Joyce Jarra Administrator of the Estate of Brenda P Jarra v. North Carolina State Health Plan A Division of the Department of State Treasurer*, No. 18 INS 02781 (OAH Aug. 20, 2018) (Overby, ALJ).

This Tribunal may only grant Petitioner relief under N.C. Gen. Stat. § 150B-23 where the agency has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-23(a). Under Chapter 150B, an aggrieved person, such as Petitioner “may commence an administrative proceeding to determine the person’s rights, duties, or privileges.” N.C. Gen. Stat. § 150B-22(b). An Administrative Law Judge has only the power to “[d]etermine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.” N.C. Gen. Stat. § 150B-33(b)(9).

Petitioner argues that the Plan does not have the authority to require the tobacco attestation every time there is an Open Enrollment. Moreover, Petitioner cannot meet his burden of proving by a preponderance of the evidence that the Plan violated N.C. Gen. Stat. § 150B-23(a). *See* N.C. Gen. Stat. § 150B-34(a). The Plan’s tobacco attestation is an appropriate exercise of the Treasurer’s authority. The Treasurer and the Executive Administrator of the Plan are authorized to administer

and operate the Plan. N.C. Gen. Stat. § 135-48.30. The Treasurer is authorized to set premium rates and offer wellness incentives. N.C. Gen. Stat. §§ 135-48.30(a)(2) and (5). The Treasurer has the authority to offer the tobacco premium credit as a wellness incentive. N.C. Gen. Stat. § 135-48.30(a)(5). The tobacco premium credit is also included under the Treasurer's authority to set premium rates. N.C. Gen. Stat. § 135-48.30(a)(2). The Plan allows changes to members' Plan elections only during annual enrollment or pursuant to a qualifying life event. N.C. Gen. Stat. §§ 135-48.42 and -43. The Treasurer and Executive Administrator of the Plan have the fiduciary duty to enforce the tobacco attestation requirement. N.C. Gen. Stat. § 135-48.2. While the Plan could choose not to require a tobacco attestation every open enrollment, the fact that the Plan chooses to do is not a violation of N.C. Gen. Stat. § 150B-23.

Petitioner next argues that the Plan is impermissibly changing members' elections by defaulting them into a particular plan and not giving them the tobacco credit. The tobacco credit is a wellness incentive, so the Plan is not depriving them of choice and is taking nothing away. The Plan is offering a wellness incentive as an additional credit, pursuant to the Plan's explicit authority in N.C. Gen. Stat. § 135-48.30(a)(5). Similarly, the Plan offers a copay reduction if members act and select a primary care provider. As a matter of law, Petitioner has not been deprived as he asserts in his Petition. Rather, he has missed an optional opportunity for a reduction in his healthcare costs. Petitioner's case is about only the tobacco premium credit, not the choice of plan. Petitioner is not claiming that the Plan impermissibly defaulted him into the 70/30 Plan because it was his intention to elect the 70/30 Plan. While Petitioner's argument is novel, the issue of the Plan defaulting members into a particular plan is not before this Tribunal.

Essentially, Petitioner is arguing that the Plan's use of the tobacco attestation is unfair. Petitioner's claim for relief must be denied. The Plan has the following valid reasons supporting the tobacco attestation requirement: 1. requiring members to be accountable for their smoking status encourages public health and the welfare of members, 2. encourages members to stop smoking by offering a monetary incentive, and 3. encourages members to take an active role in their health. The smoking surcharge reflects the actuarial data that smokers cost the Plan more, and in turn, cost the North Carolina taxpayers more. Annual open enrollment is common in the insurance industry. Annual open enrollment is a fair way to organize enrollment because the Plan cannot make healthcare choices on behalf of its members, the members must make their elections themselves. By statute, the Plan operates as a business, and it makes good business sense for the Plan to offer an organizational structure for members to make elections. The Plan must enforce its rules in order to be fair but also as good business judgment. The Plan cannot offer waivers for honest mistakes because that would erode the process. The Plan cannot make these elections on behalf of their members. Most Plan members ask for an exception because of the minute clinic requirement, and most exception requests such as Petitioner's are not granted. Moreover, the data shows that Open enrollment works: 96% of members completed Open Enrollment and 94% of members completed the tobacco attestation.

Accordingly, the Plan's denial of Petitioner's request to retroactively be awarded the tobacco premium credit is not arbitrary and capricious. The Plan's tobacco attestation requirement likewise is not arbitrary, nor capricious. "The 'arbitrary or capricious' standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful

consideration or fail to indicate any course of reasoning and the exercise of judgment.” *Act-Up Triangle v. Comm’n for Health Services for the State of N.C.*, 354 N.C. 699, 707, 483 S.E.2d 388, 393 (1997).

Finally, Petitioner suggests that the Plan deliberately structured the annual smoker’s attestation requirement knowing that a number of members will inadvertently fail to complete the tobacco attestation. According to Petitioner, the Plan’s motivation for the tobacco attestation is to nefariously collect increased premiums from its 13,000 members who unwittingly fall victim to this ploy. However, Petitioner initiated this case as an aggrieved person, not as a class action. Procedurally, Petitioner may not argue for the return of all Plan members’ premiums or to overturn the tobacco attestation requirement on behalf of all Plan members and State employees. OAH lacks jurisdiction to hear Petitioner’s putative class claim that the tobacco attestation requirement is unconstitutional or to dismantle that process. *See generally White v. White*, 886 F.2d 721, 722-24 (4th Cir. 1989) (noting pleadings of *pro se* litigants are held to “less stringent standards” than those drafted by attorneys, but *pro se* litigants are still required to allege specific facts sufficient to support their claims).

Substantively, Petitioner concedes he did not complete the tobacco attestation. The Undersigned recognizes the amount of the premium credit for the year is not insubstantial and that this appears to have been an “honest mistake,” as there does not appear to be a dispute that Petitioner is a non-smoker. Nevertheless, Petitioner did not complete the tobacco attestation during Open Enrollment, as he and all other Plan members were instructed. Petitioner has advanced no legal argument entitling him to relief, and “[t]o the degree that Petitioner’s request seeks equity relief, this Tribunal is without authority to grant equitable relief.” *Wojcik v. N.C. State Health Plan*, No. 09 INS 6649 (OAH Apr. 6, 2010) (Overby, ALJ).

Having reviewed the record, the Undersigned finds and concludes that, by his own admission, Petitioner did not take action during Open Enrollment and did not complete the tobacco attestation; therefore, Petitioner was not awarded the tobacco premium credit. As there is no genuine issue of material fact, summary judgment for Respondent is proper.

### **FINAL DECISION**

Based upon the foregoing, the Undersigned hereby **GRANTS** Respondent’s Motion for Summary Judgment, and this contested case is **DISMISSED WITH PREJUDICE**.

### **NOTICE**

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

Under the provisions of N.C. Gen. Stat. § 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. Gen. Stat. § 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on 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 3rd day of August, 2020.



Stacey Bice Bawtinheimer  
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:

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Petitioner

Tamara Mary Van Pala  
NC Department of Justice  
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Attorney For Respondent

This the 3rd day of August, 2020.



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