

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DST 06915

<p>Dr. Robin P Gardner Petitioner,</p> <p>v.</p> <p>State of North Carolina Department of State Treasurer, Retirement Systems Division Respondent.</p>	<p>FINAL DECISION</p>
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This contested case was called for hearing before the undersigned on August 5, 2020, at the North Carolina Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

Mr. John P. Paschal
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Attorney for Petitioner

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Attorney for Respondent

EXHIBITS

For Petitioner: Exhibits 1-5

For Respondent: Exhibits 1-5

WITNESSES

For Petitioner: None

For Respondent: Patrick Kinlaw, Director of Policy, Planning, and Compliance, RSD

ISSUE

Whether Respondent correctly determined that it lacked discretion under N.C.G.S. 135-5(g) to allow Petitioner to void and/or change his previous election of retirement benefits payments after Petitioner received and negotiated his first retirement check.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the undersigned makes the following findings of fact and conclusions of law. In making the findings of fact, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner, Dr. Robin P. Gardner (“Petitioner”), is a former professor at North Carolina State University. Petitioner retired effective July 1, 2019 with more than 50 years of State service. Petitioner did not testify at this contested case hearing.
2. Petitioner is a vested member of North Carolina’s Teachers’ and State Employees’ Retirement System (“TSERS”). The Respondent Retirement Systems Division (“Respondent”) administers the benefits for all State retirement systems, including TSERS.
3. When a member of TSERS applies to retire, TSERS sends the member Form 6E. Respondent Exhibit 1. Form 6E is used for the member to select his or her retirement benefits payment option. The member must return the form to Respondent with a notarized signature.
4. Section C of Form 6E lists several options for payment of retirement benefits. These include a “Maximum Allowance” option, providing the highest possible monthly payment of benefits during the life of the member with no payments to any survivor beneficiary of that member, such as a spouse, on that member’s death. The other options provide for payments to survivor beneficiaries at various rates based on various contingencies, as well as a final option to cancel the member’s retirement application. Id.
5. Section D of Form 6E contains a space for the member to designate his or her survivor beneficiary if so chosen. Section D includes the beneficiary’s name, address, marital status with the member, Social Security number, date of birth, and contact information. Id.
6. Section E of Form 6E contains an advisory in boldface type: **“I understand that I cannot change the elected retirement payment option, nor can I change the beneficiary for**

the monthly survivorship benefit, except under the following conditions... .” Following this advisory are contingencies for such changes which do not apply to this case.

7. Petitioner completed Form 6E with his notarized signature dated June 28, 2019. Id. Petitioner selected the “Maximum Allowance,” defined in the form as “Basic straight life benefit with no right of survivorship.” Petitioner left Section D, for survivorship beneficiaries, completely blank. Id. Petitioner then sent the form to Respondent.
8. In correspondence dated July 8, 2019, Respondent acknowledged receipt of Petitioner’s executed Form 6E. Respondent Exhibit 2. This response confirmed Petitioner’s choice of the Maximum Allowance option with the amount listed “payable to any beneficiary after your death” as “0.00.” Id. Petitioner did not seasonably contact Respondent disputing this confirmation.
9. Following this confirmation, Respondent on July 25, 2019, tendered to Petitioner his first retirement benefits payment check under the “Maximum Allowance” option. Petitioner deposited this check, which cleared July 29, 2019. Respondent Exhibit 3; Patrick Kinlaw testimony.
10. As of June 28, 2019, when he executed Form 6E, Petitioner’s medical care providers had found that Petitioner suffered from mild dementia and resulting cognitive diminishment. Petitioner’s Exhibits 3, 4, and 5. No expert or lay witness testimony was offered with respect to these exhibits.
11. As of June 28, 2019, the day he executed Form 6E, Petitioner had not been adjudicated incompetent. No evidence was offered that Petitioner has been adjudicated incompetent between June 2019 and the present.
12. Following the deposit and the clearing of Petitioner’s first retirement benefits payment check, he and his spouse repeatedly requested that Respondent void Petitioner’s executed Form 6E and substitute it with a new Form 6E executed by Petitioner’s spouse, Dr. Linda Gardner, who had been appointed as Petitioner’s attorney-in-fact. Id. The basis for these requests was Petitioner’s diagnosis of dementia.
13. Dr. Linda Gardner did not testify at this contested case hearing.
14. Respondent determined, and informed Petitioner in both correspondence and an internal Final Agency Decision, that under law Respondent lacked discretion to void or change Petitioner’s previously executed Form 6E, as Petitioner had cashed his first benefits payment check. Respondent Exhibit 3 and 4, Kinlaw testimony.
15. Respondent’s Final Agency Decision informed Petitioner of his right to file a Petition for a Contested Case regarding Respondent’s determination that it lacked discretion to change Petitioner’s beneficiary designation. Id.

16. On December 20, 2019, Petitioner timely filed a Petition for a Contested Case in the Office of Administrative Hearings.

On the basis of these Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case. N.C.G.S. 150B, Article 3; N.C.G.S. 135-48.24.
2. All parties have been correctly designated and there is no question of misjoinder or nonjoinder.
3. Notice of Hearing was provided to all parties in accordance with N.C.G.S. 150B-23(b).
4. To the extent that the Findings of Fact contain Conclusions of Law and vice versa, they should be so considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946). A court or other hearing authority need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).
5. The burden of proof in this contested case is on the Petitioner. N.C.G.S. 150B-25.1.
6. Upon retirement, a vested member of TSERS is entitled to a benefit, referred to as the "maximum benefit," computed pursuant to the terms of N.C.G.S 135-5(b19),

[w]ith the provision that until the first payment on account of any benefit becomes normally due, or his first retirement check has been cashed, any member may elect to receive his benefits in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent of such retirement allowance in a reduced allowance payable throughout life under the provisions of one of the options set forth below.

N.C.G.S 135-5(g). "Such election may be revoked by the member prior to the date the first payment becomes normally due or until his first retirement check has been cashed." Id.

7. By the plain language of N.C.G.S 135-5(g), once a retiree has cashed his or her first retirement check, he or she may not change the existing survivor beneficiary option, barring specific statutory exceptions not present in this case.
8. Respondent contends that under N.C.G.S. 135-5(g) it lacks discretion to change that benefit option on the request of a retiree or his or her representative once that first check has been cashed. "An agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language." Hilliard v. N.C. Dep't of

Corrections, 173 N.C. App. 594, 598, 620 S.E.2d 14, 17-18 (2005); York Oil Co. v. N. Carolina Dep't of Env't, Health & Nat. Res., 164 N.C. App. 550, 554-55, 596 S.E.2d 270, 273 (2004).

9. Respondent's contention regarding its lack of discretion is neither clearly erroneous nor inconsistent with the plain language of N.C.G.S. 135-5(g) and its relevant rules. OAH has considered the issue of benefit changes under N.C.G.S. 135-5(g) previously. While these decisions are not binding, they are instructive:
 - A. Harris v. N.C. Retirement System, 04 DST 1229 (2005), concluded that under N.C.G.S. 135-5(g) once a retiree cashed her first benefit check, she was no longer able to change her benefit option.
 - B. Pender v. N.C. Retirement System, 04 DST 0027 (2004), concluded that under N.C.G.S. 135-5(g), "After having cashed her first retirement check, and received the second check in her bank account, the Petitioner is not entitled to change her election of retirement benefits."
 - C. In Trotter v. State Treasurer, State Retirement Systems Division, 14 DST 10143 (2015), granted summary judgment for the respondent when, "Based on the undisputed facts, petitioner did not request the change to his beneficiary designation on his Option 2 retirement benefits with the Teachers' and State Employees' Retirement System within the time allowed by statute [N.C.G.S. 135-5(g)]."
10. OAH also considered similar provisions of the North Carolina Local Governmental Employees' Retirement System at least two times:
 - A. Williams v. North Carolina Department of State Treasurer, 08 DST 0736 (2008), concluded that N.C.G.S. 128-27(g), which contains the same or similar language to N.C.G.S. 135-5(g), barred local a government retiree petitioner from changing his beneficiary once his first retirement check was cashed.
 - B. Estate of Stewart v. NC Department of State Treasurer, Retirement Systems Division, 13 DST 12408 (2013), concurred with Respondent that the Local Governmental Employees' Retirement System was required to continue payments to the former spouse of deceased retiree when the retiree died without changing his beneficiary following his divorce from that spouse.
11. Prior OAH review of N.C.G.S. 135-5(g) and similar provisions thus consistently holds that the statute prohibits any change in election of retirement benefits after a retiree cashes his or her first retirement check, barring statutory exceptions that do not apply to this case.
12. The most relevant appellate analysis of N.C.G.S. 135-5(g) is Powell v. Bd. of Trustees of Teachers' & State Emp. Ret. Sys., 3 N.C. App. 39, 41, 164 S.E.2d 80, 82 (1968). In Powell, the employee selected her spouse as surviving beneficiary of her retirement payments. Before retirement, the employee died. As she had not retired as of the date of her death, the

spouse was not entitled to benefits: “Within the option itself can be seen the legislative intent that the member must first retire before the death benefit to the nominee can become effective.” Id. at 42.

13. While Powell noted that, “It is clear that [the member] wished for plaintiff to have the benefit of the reduced retirement allowance in the event he outlived her,” it concluded, “The wishes of the deceased member cannot amend the clear provisions of the statutes. Nor can this Court amend the statutes to accommodate the wishes of the deceased member.” Id.
14. The OAH likewise cannot amend N.C.G.S. 135-5(g) or provide relief contrary to the plain language of the statute.
15. The distinguishing feature of this contested case from those discussed above is that Petitioner, due to dementia, claims a lack of capacity to understand the nature and consequences of his actions in executing Form 6E. Petitioner urges that principles of contract apply to this issue.
16. Vass v. Board of Trustees of Teachers’ and State Employees’ Comprehensive Major Medical Plan, 324 N.C. 402, 379 S.E.2d 26 (1989), supports the proposition that contract disputes “however styled” between a State agency and a person are subject to the North Carolina Administrative Procedure Act. See Wellpath Select, Inc. v. N.C. Teachers’ and State Employees’ Comprehensive Major Medical Plan, 01 INS 0388 (2001).
17. “A person has sufficient mental capacity to enter a contract if he is possessed of the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly.” Sprinkle v. Wellborn, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905); Ludwig v. Hart, 40 N.C. App. 188, 191, 252 S.E.2d 270, 273 (1979).
18. Petitioner was not adjudged incompetent when he executed Form 6E, nor is there any evidence that Petitioner has been adjudged incompetent to date.
19. The general presumption is that every adult person not otherwise adjudged incompetent is competent “and sane in the absence of evidence to the contrary,” O’Neal by & through Small v. O’Neal, 254 N.C. App. 309, 314, 803 S.E.2d 184, 188 (2017). The burden is on Petitioner to rebut that presumption by showing that as of June 28, 2019, Dr. Gardner lacked the capacity to understand the nature of his act in executing his notarized signature on Form 6E, submitting the form to Respondent, and the effect and consequences of his doing so.
20. Petitioner failed to meet his burden. Even assuming that Petitioner’s Exhibits 3, 4, and 5 (standing alone) establish diminishment of Petitioner’s mental faculties, they neither state

nor prove by the preponderance of the evidence that Petitioner was incompetent or that he lacked capacity to execute Form 6E on June 28, 2019.

21. Accordingly, Respondent has not deprived Petitioner of property or substantially prejudiced Petitioner's rights, nor has Respondent exceeded its authority or jurisdiction, acted erroneously; failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule by concluding that it lacks the discretion to provide the relief requested by Petitioner and his attorney-in-fact.

Based upon the above Findings of Fact and Conclusions of Law, the undersigned makes the following:

FINAL DECISION

After cashing his first retirement check, by operation of N.C.G.S. 135-5(g) Petitioner is not entitled to change his election of retirement benefits barring the presence of relevant statutory exceptions, and Respondent committed no error in determining that it lacked discretion to allow or accomplish such a change. Petitioner failed to meet his burden of proof that he lacked capacity on June 28, 2019 to execute Respondent's Form 6E making that election. Accordingly, Respondent's Final Agency Decision is UPHELD.

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 6th day of August, 2020.



Michael C. Byrne
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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This the 6th day of August, 2020.



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