

STATE OF NORTH CAROLINA  
COUNTY OF CHOWAN

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
20 DST 01914

<p>Kimberly Willis Beneficiary of Thomas Clayton Willis II Petitioner,</p> <p>v.</p> <p>NC Department of State Treasurer, Retirement Systems Division Respondent.</p>	<p style="text-align: center;"><b>FINAL DECISION</b></p>
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Upon consideration of Respondent's Motion for Summary Judgment pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure, the Memorandum of Law in Support of Respondent's Motion, the Affidavit of Patrick Kinlaw, Petitioner's Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment, and the Affidavits of Kimberly R. Willis and Dr. Howard Glasgow, M.D., Ph.D., the undersigned hereby **GRANTS** Respondent's Motion for the reasons below:

**APPEARANCES**

For Petitioner: M. H. Hood Ellis, Esq.  
Hornthal, Riley, Ellis & Maland, LLP

For Respondent: Katherine A. Murphy  
Special Deputy Attorney General  
N.C. Department of Justice

**ISSUE**

Whether Petitioner is entitled to receive a Survivor's Alternate Benefit pursuant to N.C. Gen. Stat. § 135-5(m)?

**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); see also N.C. Gen. Stat. § 150B-34(e).

"Summary judgment is appropriate when the 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, 351, 452 S.E.2d 233, 240 (1994).

### **UNDISPUTED FACTS**

1. Petitioner Kimberly Willis is the surviving spouse of Thomas Clayton Willis, II, who was a State employee of the North Carolina Department of Transportation (“NCDOT”) and a member of the Teachers’ and State Employees’ Retirement System (“TSERS”) at the time of his death on June 29, 2018. Mr. Willis was 46 years old at the time of his death.

2. Petitioner is the beneficiary nominated by Mr. Willis to receive the Return of Contributions, and Petitioner is the only such beneficiary.

3. Respondent, Department of State Treasurer, Retirement Systems Division (“RSD”), administers TSERS.

4. As a contributing member of TSERS, Mr. Willis earned 18 years, 1 month, of membership service during his employment with NCDOT.

5. Before his employment with NCDOT, Mr. Willis was employed by North Carolina State University (“NCSU”). Mr. Willis was initially hired as a temporary employee of NCSU on July 15, 1996. Mr. Willis completed one year of temporary employment with NCSU in that same position on July 15, 1997.

6. The employer classifies its positions. During this time period, and pursuant to a mandate by Dr. Molly Broad, President of the University of North Carolina, NCSU, was directed to provide permanent and full-time/full-benefit appointments to all non-professional, temporary employees who had worked for more than one year in such temporary positions.

7. Dr. Howard Glasgow, M.D., Ph.D., was Mr. Willis’ supervisor at NCSU. Shortly after July of 1997, Dr. Glasgow’s department head, Dr. Margo Daub, Ph.D., sent a written notice to Glasgow directing him to submit documentation outlining Mr. Willis’ duties and responsibilities for purposes of transitioning Mr. Willis’ employment from a temporary position to a permanent position at NCSU.

8. Due to circumstances over which Mr. Willis had no control, there was a delay in submitting the documentation to transition Mr. Willis from temporary employment status to permanent employment status which, in turn, delayed Mr. Willis’ classification as permanent employee to October 1, 1998 – almost 14 months from when Dr. Daub first requested such documentation. Mr. Willis was neither responsible for nor contributed to the delay in submitting the transition documentation.

9. Mr. Willis became a permanent employee of NCSU on October 1, 1998 and worked as a permanent employee until September 30, 1999.

10. Mr. Willis also became a member of TSERS on October 1, 1998, the same time at which he became a permanent employee of NCSU.

11. Although Mr. Willis was employed by NCSU prior to October 1998, he remained in a position that NCSU classified as temporary, and therefore, was not a contributing member of TSERS before October 1, 1998.

12. While Petitioner's evidence tends to show that Petitioner should have been classified and moved to a permanent position at NCSU sooner, Petitioner did not proffer evidence that would establish that Mr. Willis was a contributing member of TSERS prior to October 1, 1998.

13. Mr. Willis earned a total of one year of membership service in TSERS from October 1, 1998 through September 30, 1999 while employed by NCSU. Mr. Willis earned 18 years and 1 month of membership service in TSERS while employed at NCDOT.

14. Mr. Willis was never employed as a law enforcement officer. Mr. Willis did not have any prior service or service that would be allowed by N.C. Gen. Stat. § 135-4.

15. At the time of his death, Mr. Willis had a total of 19 years, 1 month of "membership service" in TSERS.

16. Mr. Willis had a total of 19 years, 1 month of "credible service."

17. The undisputed facts prove that conditions (2), (3), and (4) of N.C. Gen. Stat. § 135-5(m) are satisfied.

### **CONCLUSIONS OF LAW**

1. The parties are properly before the North Carolina Office of Administrative Hearings ("OAH"), and the OAH has subject matter jurisdiction over the matters raised in this contested case.

2. Orders granting summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Rule 56, do not normally contain detailed findings of fact. However, if the findings of fact are actually the trial court's summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. *Noel Williams Masonry, Inc. v. Vision Contractors*, 103 N.C. App. 597, 406 S.E.2d 605 (1991).

3. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

4. N.C. Gen. Stat. § 135-5(f) provides that, upon the death of a member of TSERS prior to retirement, the member's accumulated contributions shall be paid to the deceased member's nominated beneficiary ("Return of Contributions"), unless the nominated beneficiary "elects to receive the alternate benefit" provided by N.C. Gen. Stat. § 135-5(m).

5. Anyone who is a State employee is a member of TSERS. N.C. Gen. Stat. § 135-3(1).

6. The definition of "employee" for purposes of TSERS membership does not include temporary employees. N.C. Gen. Stat. § 135-1(10).

7. Every member of TSERS contributes to the retirement pension fund through mandatory deductions withheld by the employer from each paycheck. N.C. Gen. Stat. § 135-8(f)(1).

8. "Creditable service" is defined as "the total of 'prior service' plus 'membership service' plus service, both noncontributory and purchased, for which credit is allowable as provided in G.S. 135-4." N.C. Gen. Stat. § 135-1(8).

9. "Prior service" is defined as "service rendered prior to the date of establishment of the Retirement System for which credit is allowable under G.S. 135-4." N.C. Gen. Stat. § 135-1(17).

10. "Membership service" is defined as "service as a teacher or State employee rendered while a member of [TSERS] or membership service in a North Carolina Retirement System that has been transferred into [TSERS]." N.C. Gen. Stat. § 135-1(14).

11. N.C. Gen. Stat. § 135-5(m) provides for a "Survivor's Alternate Benefit" ("SAB"), which, if the eligibility requirements are satisfied, may be paid to the beneficiary in lieu of the Return of Contributions. N.C. Gen. Stat. § 135-5(m) provides in relevant part as follows:

Upon the death of a member in service, the beneficiary designated to receive a return of accumulated contributions shall have the right to elect to receive in lieu thereof the reduced retirement allowance provided by Option 2 of subsection (g) above computed by assuming that the member had retired on the first day of the month following the date of his death, provided that all four of the following conditions apply:

- (1) a. The member had attained such age and/or creditable service to be eligible to commence retirement with an early or service retirement allowance, or
- b. The member had obtained 20 years of creditable service in which case the retirement allowance shall be computed in

accordance with G.S. 135-5(b19)(1)b. or G.S. 135-5(b19)(2)c., notwithstanding the requirement of obtaining age 50, or

- b1. The member was a law enforcement officer who had obtained 15 years of service as a law enforcement officer and was killed in the line of duty, in which case the retirement allowance shall be computed in accordance with G.S. 135-5(b19)(1)b., notwithstanding the requirement of obtaining age 50.
  - c. Repealed by Session Laws 2010-72, s. 2(a), effective July 1, 2010.
- (2) At the time of the member's death, one and only one beneficiary is eligible to receive a return of his accumulated contributions.
  - (3) The member had not instructed the Board of Trustees in writing that he did not wish the provisions of this subsection to apply.
  - (4) The member had not commenced to receive a retirement allowance as provided under this Chapter.

N.C. Gen. Stat. § 135-5(m).

12. In order to be eligible for service retirement benefits, a member of TSERS "shall have attained the age of 60 years and have at least five years of membership service or shall have completed 30 years of creditable service." N.C. Gen. Stat. § 135-5(a)(1).

13. In order to show that Petitioner is entitled to the SAB, Petitioner must establish that all four conditions of N.C. Gen. Stat. § 135-5(m) are satisfied.

14. Respondent presented evidence to show that condition (1) of N.C. Gen. Stat. § 135-5(m) was not satisfied.

15. In addition, Petitioner failed to present evidence that condition (1)(a) of N.C. Gen. Stat. § 135-5(m) is satisfied. Condition (1)(a) states that "[t]he member had attained such age and/or creditable service to be eligible to commence retirement with an early or service retirement allowance."

- a. It is undisputed that Mr. Willis had not yet reached the age of 60 years and did not have 30 years of creditable service at the time of his death. Therefore, he was not eligible to retire with a service retirement allowance. See N.C. Gen. Stat. § 135-5(a)(1).
- b. Mr. Willis had not yet reached the age of 50 years, and Petitioner failed to rebut Respondent's evidence that Mr. Willis had fewer than 20 years of creditable service. Therefore, Petitioner cannot establish that Mr. Willis was

eligible to retire with an early retirement allowance. See N.C. Gen. Stat. § 135-5(a1).

- c. Condition (1)(b) states that “[t]he member had obtained 20 years of creditable service.” While Petitioner’s evidence tended to show that Petitioner should have been moved to a permanent position at NCSU sooner, Petitioner failed to present establishing that Mr. Willis was a contributing member of TSERS before October 1, 1998. Petitioner failed to rebut Respondent’s evidence that Mr. Willis had fewer than 20 years of creditable service, and thus, failed to prove that condition (1)(b) of N.C. Gen. Stat. § 135-5(m) was satisfied.

16. Condition (1)(b1) of N.C. Gen. Stat. § 135-5(m), which applies only to law enforcement officers, was not satisfied because it was undisputed that Mr. Willis was a not a law enforcement officer.

17. Based on the forecast of evidence, Petitioner will be unable to prove that condition (1) of N.C. Gen. Stat. § 135-5(m) was satisfied.

18. Petitioner has not proffered evidence sufficient to prove an essential element of her claim, and therefore, Respondent is entitled to summary judgment. *Holloway*, 339 N.C. at 351, 452 S.E.2d at 240.

### **FINAL DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, and pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, the undersigned hereby **GRANTS** Respondent’s Motion for Summary Judgment and **DISMISSES** Petitioner’s contested case with prejudice.

### **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.

This the 2nd day of December, 2020.



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Melissa Owens Lassiter  
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 2nd day of December, 2020.



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