

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 DST 00090

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| <p>Evelyn P Hammond Petitioner,</p> <p>v.</p> <p>North Carolina Total Retirement Plans Respondent.</p> | <p>FINAL DECISION</p> |
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THIS MATTER comes for consideration of cross-motions for summary judgment filed by Evelyn P. Hammond (“Petitioner”) and the North Carolina Department of State Treasurer, Retirement Systems Division (“Respondent” or “RSD”). After reviewing the Motions for Summary Judgment, Memoranda in support of each Motion, supporting Affidavits, and other relevant matters in the record, the Undersigned **GRANTS** summary judgment to the Respondent and **DENIES** Petitioner’s motion.

APPEARANCES

For Petitioner: Evelyn P. Hammond, *pro se*
211 November Drive
Durham, North Carolina 27712

For Respondent: Katherine A. Murphy
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

ISSUE

Whether Respondent is permitted by law to change Petitioner’s payment option under the Teachers’ and State Employees’ Retirement System?

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 - 3 - 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).

UNDISPUTED FACTS

1. Petitioner Evelyn P. Hammond is a member of the Teachers’ and State Employees’ Retirement System (“TSERS”) who retired effective July 1, 2015.

2. When a member retires from TSERS, she must elect one of several options for the payment of retirement benefits. For example, a member may elect to receive the maximum allowable benefit (in Petitioner’s case, the benefit calculated according to the statutory formula in N.C. Gen. Stat. § 135-5(b19)), or the member may choose to have a survivor benefit, meaning that when the retired member dies, her designated beneficiary continues receiving a benefit for the beneficiary’s life. In the latter case, the member receives less than the maximum allowable benefit (the member receives a “reduced retirement allowance”). See N.C. Gen. Stat. § 135-5(g).

3. The member must indicate her election, and identify the designated beneficiary, if applicable, before she may begin receiving retirement benefits.

4. Prior to her retirement, in May 2015, RSD informed Petitioner of the options and the amount her monthly benefit would be under each option. Petitioner elected Option 2, which includes a survivor benefit, and named Kennetta Perry, who was not her spouse, as her designated beneficiary.

5. Petitioner made her election on a form provided by RSD (“Form 6E – Choosing Your Retirement Payment Option”).

6. Section E on the Form 6E reads in relevant part:

Section E. Please authorize with your signature.

....

I understand that if I elected Option 2 or 3, and I named my spouse as monthly survivorship beneficiary, but my spouse dies, and I remarry, I may elect to name my new spouse as monthly survivorship beneficiary. ...

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:

- If the first retirement check has not been cashed, and it is prior to the 25th of the month following the month the first benefit check was mailed; and furthermore, the first check has been returned.
- If I have become divorced from my monthly survivorship beneficiary provided he/she was my spouse at the time of my retirement.
- If I return to employment covered by the retirement system under which I retired, and I contribute to a new account for at least three years.

I certify by my signature that I have read the Guides A (payment options), B (survivorship beneficiary requirements), and C (return-to-work laws), and have completed pages 1 and 2 of this form.

Kinlaw Aff. Ex. 1, p. 2 (emphasis in original)

7. Petitioner signed the signature line below the certification statement.

8. As part of the Form 6E, Petitioner by her signature, indicated that she understood she would not be able to change the selected payment option or the designated survivor beneficiary except under certain conditions. As explained on the Form 6E, those conditions involve a spouse as the designated beneficiary or a member returning to work.

9. Petitioner signed Form 6E, had it notarized, and returned it to RSD. RSD received Petitioner's notarized Form 6E on May 11, 2015. The first retirement check was mailed to Petitioner on July 24, 2015, and the check was cashed on July 31, 2015.

10. Several years after retiring, Petitioner requested that RSD allow her to change her option to the maximum allowance. Petitioner now contends that she did not understand that her election could not be changed.

11. RSD denied the request in a final agency decision issued on November 12, 2020, because RSD is not permitted by law to make the requested change.

12. Petitioner timely filed a petition for contested case hearing on January 8, 2021.

ANALYSIS

In its Motion for Summary Judgment, Respondent asserts that, by law, it cannot change Petitioner's retirement benefit's payment option. On the other hand, in support of her motion for summary judgment, Petitioner essentially makes three contentions: (1) Respondent did not explain the options to Petitioner; (2) Petitioner did not understand the options and her signature on the Form 6E did not confirm her understanding that she would not be able to change her option at a later date; and (3) Petitioner is not receiving all the benefits to which she is entitled.

The primary issue “in question” according to Petitioner, “was the N.C. Gen. Stat 135-5(g) was just above my signature in small print and was not called to my attention for a confirmation of understanding. That was the most important part of that signing session that impacted me.” Hammond Aff. ¶ 4. However, N.C. Gen. Stat 135-5(g) is not mentioned anywhere in Section E.

Instead, just above Petitioner’s signature, Section E states in plain language what Petitioner certified to by signing her name. Although Petitioner may not have understood the contents of G.S. Stat 135-5(g), she did not contest her understanding of the plain language in Section E of the retirement form.

Even if contentions (1) and (2) were true, it would not permit Respondent to change Petitioner’s election. Moreover, even if the Orange County Schools’ workshops Petitioner attended before retiring provided insufficient explanation of the various options, this cannot create an exception to the mandates of N.C. Gen. Stat. § 135-5(g). Similarly, the purpose of the block of text and signature requirement in Section E of the Form 6E is to call the prospective retiree’s attention to important information regarding the person’s retirement. If a prospective retiree fails to read the text, or reads but does not understand the text, this also does not create an exception to the operation of N.C. Gen. Stat. § 135-5(g).

Petitioner also suggests that Respondent takes half of a retiree’s yearly income and intentionally misleads retirees to make certain elections. Both of these are inaccurate.

First, pursuant to N.C. Gen. Stat. § 135-5(g), all of the options are actuarially equivalent to the maximum allowance. The maximum allowance is calculated according to statute. In Petitioner’s case, since she retired effective July 1, 2015 (and was not a law enforcement officer), the maximum allowance she was entitled to receive is calculated according to N.C. Gen. Stat. § 135-5(b19)(2)a, which provides for a retirement allowance equal to “1.82% of [her] average final compensation, multiplied by the number of years of creditable service.” Petitioner states that she was an educator for 25 years, which means her maximum allowance is approximately $(0.0182) \times (\text{average final compensation}) \times (25)$, which equals $(0.455) \times (\text{average final compensation})$, or 45.5% of her average final compensation. Thus, by statute—not by any action of the Respondent—the most Petitioner could receive in retirement is less than half of the salary she was earning when she retired.

As stated in the Final Agency Decision (Exhibit 2 to the Kinlaw Affidavit), if Petitioner had elected to receive the maximum allowance, she would have received \$2,807.69 per month, for every month of her life. Under Option 2, however, Petitioner will receive \$2,117.56 per month, for every month of her life, and then upon her death, Petitioner’s daughter will receive \$2,117.56 per month, for every month of her life. If Petitioner had elected the maximum allowance, Respondent would have expected to pay more per month for a shorter time period (Petitioner’s lifespan), whereas under Option 2 with Petitioner’s daughter named as the beneficiary, Respondent expects to pay less each month, but for a longer time period (the daughter’s lifespan).

Second, as required by statute, the monthly amounts are calculated according to actuarial principles so that the totals of the two amounts are expected to be the same. Respondent will pay the same amount under either option and has no incentive to push a retiree into one option over another.

In addition, Petitioner, together with the beneficiary Petitioner designated, will receive the full amount that Petitioner is entitled to receive under N.C. Gen. Stat. § 135-5.

Respondent is constrained by N.C. Gen. Stat. § 135-5(g) regarding changes that can be made to an election after the first retirement check has been cashed.

While the Undersigned is sympathetic to Petitioner's situation, it is undisputed that Petitioner's situation does not fit within any of the exceptions provided by section 135-5(g). Therefore, Respondent cannot make the change Petitioner requests, and Respondent is entitled to judgment as a matter of law.

FINAL DECISION

There are no genuine issues of material fact that Respondent is not permitted by law to change Petitioner's payment option under the Teachers' and State Employees' Retirement System; therefore, summary judgment is **GRANTED** to Respondent and Petitioner's Motion for Summary Judgment is **DENIED**. This contested case is **DISMISSED 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.

IT IS SO ORDERED.

This the 15th day of June, 2021.



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.

Evelyn P Hammond
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Durham NC 27712
Petitioner

Katherine Adele Murphy
North Carolina Department of Justice
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Attorney for Respondent

This the 15th day of June, 2021.



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