

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 INS 01327

<p>Patricia J Slagter van Tryon, Petitioner,</p> <p>v.</p> <p>NC State Health Plan for teachers and State Employees, Respondent.</p>	<p>FINAL DECISION ORDER OF DISMISSAL</p>
--	---

Respondent filed a Motion for Summary Judgment on June 29, 2021. Petitioner was provided the time by law to respond and filed a response on July 13, 2021. The motion is ripe for disposition.

ISSUES

1. Did Respondent deprive Petitioner of her property or act erroneously when it denied Petitioner's request to retroactively be enrolled in the 80/20 Plan and receive the \$60/month Wellness Credit for the Tobacco Attestation?
2. Are there any genuine issues of material fact in this case, and is Respondent entitled to summary judgment as a matter of law?

STANDARD OF REVIEW

N.C.G.S. § 150B-34(e) permits an administrative law judge to grant summary judgment pursuant N.C.G.S. § 1A-1, Rule 56. 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).

FINDINGS OF FACT

1. In general, findings of fact in a summary judgment order are “ill advised” because they indicate that a question of fact was presented to and resolved by the trial court. Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 511, 349 S.E.2d 889 (1986). The findings here involve uncontested or indisputable matters and are intended primarily as a guide to the Tribunal’s reasoning.
2. Respondent’s motion is supported by the Affidavit of Caroline Smart, an employee of the Plan. Petitioner submitted no affidavits in opposition to the Motion, nor has she presented other sworn testimony in her filings. Petitioner’s response in opposition is likewise not in the form of an affidavit.
3. Respondent, a division of the Department of State Treasurer, administers a self-funded benefit program (“Plan”) that provides health care benefits to eligible state teachers, employees, retirees, and dependents.
4. The Plan held annual Open Enrollment from October 15, 2020, until October 31, 2020 (“2021 Open Enrollment”) during which time eligible employees, teachers, and retirees (“Plan members”) could enroll or make election changes in the Plan for the 2021 plan year.
5. For 2020, the Plan cut the Open Enrollment period in half, from 30 days to 15 days. Respondent did increase (during Open Enrollment) the hours of operations for the Eligibility and Enrollment call center, where members could call to enroll telephonically or ask questions. The call center was open Monday-Friday, 8:00 a.m. to 10:00 p.m., and on Saturday, 8:00 a.m. to 5:00 p.m. The online enrollment portal, eBenefits, opened at 12:00 a.m. on October 15, 2020, and was available until 11:59 p.m. October 31, 2020. Smart affidavit.
6. Plan members were offered an 80/20 Plan and a 70/30 Plan for the 2021 Plan year. The employee-only monthly premium for the 80/20 Plan was \$110, and the employee-only monthly premium for the 70/30 Plan was \$85. Plan members were offered the opportunity to reduce their employee-only monthly premium by \$60 by attesting they either were tobacco-free or would participate in a tobacco-cessation program (“the tobacco premium credit”). With the tobacco premium credit, the 80/20 Plan would cost a Plan member \$50 per month and the 70/30 Plan would cost \$25 per month. Id.
7. All Plan members were automatically enrolled in the 70/30 Plan for the 2021 plan year, and if a Plan member wanted to receive the tobacco premium credit, the member was required to complete the tobacco attestation either electronically on eBenefits or telephonically by calling the Eligibility and Enrollment Support Center during the Open Enrollment period. Id.

8. Plan members were informed that they had to take action to receive the tobacco attestation. Plan members, including Petitioner, were mailed information about the Open Enrollment process for the 2021 plan year that contained information regarding the dates of Open Enrollment, the various health plan offerings, how to enroll electronically and telephonically, how to complete the tobacco attestation to receive premium credits, as well as the contact information and hours of operation for the Eligibility and Enrollment Support Center. The Plan also had webinars and posted instructional videos, Open Enrollment decision guides, rate sheets, comparison charts, benefit booklets, and summaries of coverage documents on its website. Id.
9. The first page of the Open Enrollment Decision Guide mailed to all enrolled employees, as well as other Open Enrollment information, notified members that the dates for 2021 Open Enrollment were October 15-31, 2020. The materials informed members that they were required to complete the tobacco attestation to receive the premium credit, regardless of which plan they choose. The materials also informed members that they could call the Eligibility and Enrollment Support Center during its extended hours to enroll telephonically. Id.
10. Petitioner, per the Plan, is currently enrolled in the 70/30 PPO Plan for the 2021 plan year and did not take action to receive the non-tobacco user wellness activity premium credit. The eligibility and enrollment system, eBenefits, records all enrollment elections that are made and saved by the user. Based on a review of Petitioner's enrollment history, Petitioner did not log into eBenefits during the 2021 Open Enrollment Period. Id.
11. Likewise, neither the Plan's Eligibility and Enrollment vendor, Benefitfocus, nor the State Health Plan's third-party administrator, Blue Cross Blue Shield of North Carolina have record of any calls made by Petitioner to the Plan during 2021 Open Enrollment. Id.
12. Petitioner requested an exemption and retroactive placement in her former 80/20 plan as well as a tobacco premium credit. Respondent denied these requests. This case followed.
13. Petitioner's contested case petition reveals that she is employed at East Carolina University, and states in pertinent part:

I have missed open enrollment for the first time in 13 years of employment and I do ask for kind consideration for this error on my part. I do believe that the NC State Health Care Plan acted arbitrarily on a number of issues here and one being only having the window open to enroll be 15 days as it has always been 30 days. To do this in a time of crisis with the Pandemic is acting arbitrarily.

Petition (emphasis supplied).

14. In Petitioner's Prehearing Statement, she states, again in pertinent part:

I do believe that I have not been heard though as in each of my appeal responses, I have just been continually told that I have missed the deadline for open enrollment. I have never argued this fact. I was asked by [Respondent] to provide additional supporting evidence which, I had, however, there was never any mention of consideration or no consideration only yet another letter saying that I have missed the deadline. **I do wonder why I am given the opportunities to appeal if anything I write is never acknowledged and responses only state the fact that I missed the deadline?**

Prehearing Statement, May 10, 2021.

15. Petitioner admits (see Petition and Prehearing Statement) that she failed to take any action during the Open Enrollment period to make any changes to the default “selection” of Respondent’s 70/30 plan. Petitioner likewise did not make a Tobacco Attestation to get a tobacco premium credit. As a result, Petitioner incurred not insubstantial additional costs by her failure to make a Tobacco Attestation.
16. Petitioner’s pleadings repeatedly raise (in addition to what Petitioner perceives as cursory treatment of her exception requests) the issue of whether Respondent’s shortening of Open Enrollment from its previous 30 days to half that time, which Respondent’s filings do not dispute, is arbitrary or capricious given that action was taken during the COVID-19 pandemic. The Tribunal takes official notice (see N.C.G.S. 150B-33) that during the pandemic, many if not most State agencies extended or waived deadlines. That includes the Office of Administrative Hearings.
17. The Respondent, by contrast, cut in half a critical deadline for employees to make crucial decisions about their health care coverage. Though Respondent makes various claims in its filings such as “Open Enrollment works” (Motion, p. 8), Respondent fails to explain why it would make this significant reduction in the Open Enrollment period in the midst of the COVID pandemic, other than in the Smart affidavit which references “feedback from employing units.” Smart, paragraph 4(c). While Respondent states (Motion, p. 8) that “Shortened enrollment periods are not unusual in the insurance industry,” Respondent is not “the insurance industry.” It is a division of the State Treasurer, an agency of the State of North Carolina.
18. In short, nothing in Respondent’s filings gives any real indication of its course of reasoning, let alone its fair and careful consideration, regarding its slashing the Open Enrollment period in half in the midst of the COVID pandemic or the effects that may have on the State employees it serves.

CONCLUSIONS OF LAW

1. The Plan’s annual open enrollment and use of the tobacco attestation wellness incentive complies with North Carolina statutes. The Treasurer and the Executive Administrator of the Plan are authorized to administer and operate the Plan, pursuant to N.C.G.S. § 135-

48.30. The Treasurer is authorized to offer different health plans, set premium rates, and offer wellness incentives, pursuant to N.C.G.S. § 135-48.30(a)(2) and (5). Members can change their elections only during annual Open Enrollment or pursuant to a qualifying life event as defined by federal law. N.C.G.S. §§ 135-48.42, 135-43; 26 C.F.R. 1.125-4. The Treasurer and Executive Administrator of the Plan have the fiduciary duty to enforce Open Enrollment rules and the tobacco attestation requirement, pursuant to N.C.G.S. § 135-48.2.

2. Petitioner's pleadings allege that Respondent's actions were arbitrary or capricious. Had Petitioner responded to the Motion with some sort of sworn evidence in the form of an affidavit, that would likely create a different outcome. "Arbitrary or capricious" is a fact-based inquiry. "The 'slightest doubt' as to a material fact entitles a party opposing summary judgment to trial, Adventure Travel World, Ltd. v. Gen. Motors Corp., 107 N.C. App. 573, 577, 421 S.E.2d 173, 176 (1992).
3. While the burden to establish summary judgment is on Respondent, the burden of proof in this contested case is on the Petitioner. N.C.G.S. 150B-25.1.
4. However, "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).
5. Petitioner, having admitted that she failed to take any action during the Open Enrollment period or to use any resources provided by Respondent, cannot establish a genuine issue of material fact by conclusory, unsworn statements that truncating Open Enrollment in the midst of the COVID pandemic meets the arbitrary and capricious legal standard. "Factual allegations in Defendants' unverified answer are not competent evidence." Brown v. Refuel Am., Inc., 186 N.C. App. 631, 634, 652 S.E.2d 389, 392 (2007); "In opposing a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e). Dixon v. Hill, 174 N.C. App. 252, 261-62, 620 S.E.2d 715, 721 (2005).
6. While Petitioner's situation is sympathetic, even taking her unsworn statement as true Petitioner requests equitable relief based on fairness and compassion. OAH lacks jurisdiction to consider equitable arguments. Schauer v. N.C. State Health Plan, No. 18 INS 02058 (OAH Aug. 20, 2018) (Bawtinheimer, ALJ) (quoting Wojcik v. N.C. State Health Plan, No. 09 INS 6649 (OAH Apr. 6, 2010) (Overby, ALJ)) ("'[T]o the degree that Petitioner's request seeks equity relief, this Tribunal is without authority to grant equitable relief.'").

7. It is likewise not the function of OAH to make policy judgments on the wisdom, or unwisdom, of an agency charged with a fiduciary duty to the State employees it serves reducing its Open Enrollment period by half in the midst of a worldwide pandemic. OAH can rule only on matters of law. Based on the evidence (the lack of admissible evidence from the Petitioner, in this case), the Tribunal cannot conclude that Respondent's action in denying Petitioner's request for exemption is arbitrary and capricious or otherwise in violation of the factors set out in N.C.G.S. 150B-23. Accordingly, Respondent is entitled to summary judgment.

FINAL DECISION

Respondent's Motion for Summary Judgment is **ALLOWED**. This contested case is **DISMISSED** with prejudice.

SO ORDERED.

This the 13th day of July, 2021.



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:

Patricia J Jean Slagter van Tryon
East Carolina University
slagtervantryonp@ecu.edu
Petitioner

Tamara Mary Van Pala
NC Department of Justice
tvanpala@ncdoj.gov
Attorney For Respondent

This the 13th day of July, 2021.



Anita M Wright
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 919-431-3000