

STATE OF NORTH CAROLINA  
COUNTY OF IREDELL

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 DST 00387

<p>Jesus Lopez JR. Petitioner,</p> <p>v.</p> <p>Dept of State Treasurer Retirement Respondent.</p>	<p><b>FINAL DECISION AND ORDER FOR SUMMARY JUDGMENT</b></p>
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THIS MATTER comes before the Honorable Selina M. Brooks, Administrative Law Judge presiding, for consideration of Respondent's Motion for Summary Judgement filed with the Office of Administrative Hearings ("OAH") on November 6, 2015, as well as Respondent's Brief In Response to Bench Question. This matter is properly before the OAH for consideration and disposition.

Respondent's Final Agency Decision Letter, the basis of this contested case, states the facts as follows:

I have thoroughly reviewed your file and find that you retired effective July 1, 1991. At the time of your retirement you elected to receive your monthly benefits under Option Six-Two which provides for a monthly benefit to the designated survivorship beneficiary should you predecease the designated beneficiary. Option Six-Two also provides that if the designated survivorship beneficiary predeceases the retiree, the retiree's monthly retirement benefit would increase to the Maximum Allowance for the remainder of the retiree's life. According to our records you designated Mr. Larry J. Lopez as the survivorship beneficiary under Option Six-Two.

On September 25, 1997, our office received a Certificate of Death showing Ms. Betty Sue Cannon Lopez died on April 19, 1997. In November 1997 our office erroneously changed your monthly retirement benefit from Option Six-Two to the Maximum Allowance retroactively to May 1, 1997, assuming your spouse was the designated survivorship beneficiary under Option Six-Two. This change caused your monthly retirement benefit to increase from \$913.58 per month to \$1,259.78 per month.

On July 23, 2014 you contacted our office to inquire about changing your beneficiary for your monthly retirement benefit. It was at that time our office discovered the error that was made in November 1997, which has created an overpayment of monthly benefits in the gross amount of \$92,031.86. Effective December 2014 your monthly retirement

benefit will be in the gross amount of \$1,271.65. In January 2015 we will begin deducting \$200.00 per month towards the repayment of the overpayment. Upon your death, if Mr. Larry J. Lopez is still living, we will apply the entire monthly benefit towards the repayment of the overpayment until the overpayment has been paid in full.

Respondent's Motion For Summary Judgment is supported by the Affidavit of Thomas Causey which affirms the facts stated in the Final Agency Decision Letter.

It is clear from Respondent's Final Agency Decision Letter and Respondent's Motion For Summary Judgment that it is solely Respondent's error and mistake that Petitioner was overpaid and that all fault for the overpayment is with the Respondent.

After reviewing Respondent's Motion For Summary Judgment, the Undersigned sent a Bench Question To Respondent concerning the application of the statute of limitations to the particular facts of this contested case. Respondent timely filed a Brief In Response To Bench Question.

In a nutshell, it is Respondent's position that the statute of limitations set forth in N.C. Gen. Stat. §135-b(n) only applies to proceedings in a court of justice and does not apply to contested cases before the Office of Administrative Hearings. This provision of the statute provides:

No action shall be commenced against the State or the Retirement System by any retired member or beneficiary respecting any deficiency in the payment of benefits more than three years after such deficient payment was made, and no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made.

N.C. Gen. Stat. § 135–5(n) (1995) (state government employees).

The Undersigned carefully reviewed Respondent's moving papers, legal authorities referenced therein, and then reviewed decisions in other contested cases. Respondent recently made this same argument in a similar contested case hearing before the Honorable Donald W. Overby in Healy v NC Department of State Treasure, Retirement Services Division, 14 DST 6764 (2015).

The Undersigned agrees with the legal analysis and reasoning of Judge Overby in the Healy case and incorporates and adopts herein the following paragraphs verbatim from that decision.

In the Empire Power Co. case, the North Carolina Supreme Court observed that the Administrative Procedure Act ("APA" or the "Act") both confers procedural rights as well as imposes procedural duties. Included among those rights conferred is "the right to commence an administrative hearing to resolve disputes between an agency and a person involving the person's rights, duties, or privileges." The APA defines those rights, duties, or privileges which provide the grounds for an administrative hearing in the event of an alleged breach. The Supreme Court affirms that the Act confers upon any "person

aggrieved” the right to commence an administrative hearing to resolve a dispute with an agency involving that person's rights, duties, or privileges. Empire Power Co. v. N. Carolina Dep't of Env't, Health & Natural Res., Div. of Env'tl. Mgmt., 337 N.C. 569, 583-84, 447 S.E.2d 768, 776-77 (1994)

Thus Empire Power Co. holds that the Administrative Procedures Act sets out procedures that govern the relationship between the agencies and citizens affected by agency action. “The basic purpose of a comprehensive administrative procedure act (APA) is to provide minimum uniform standards to govern administrative action.” (Citing Daye, Administrative Procedure, p. 835, 837). Id. at 586.

It is concluded as a matter of law that: Petitioner is a “person aggrieved” by the “agency action” of Respondent’s attempt to recover the monies paid to Petitioner. This contested case was properly brought before the OAH pursuant to the procedural process as limitations in N.C. Gen. Stat. § 135–5(n) is applicable to this contested case. To hold otherwise is to render the statute of limitations as mere surplusage. Therefore, Respondent is limited to recovery of “any overpayment of benefits or contributions more than three years after such overpayment was made.”

After reviewing all filings in this contested case, the Undersigned takes particular note of the following:

The facts are uncontroverted;

Respondent affirmatively states that Petitioner made no error or mistake; and

Respondent admits that all errors and mistakes were made by Respondent.

Even though Respondent admits that all errors and mistakes were made by Respondent and that Petitioner has made no error or mistake, Respondent contends that the applicable law, the statute of limitations, should not be applied to the State and that Petitioner, alone, should bear the harsh consequences of Respondent’s error and mistake.

Respondent’s interpretation of the law works an injustice to the Petitioner.

### **DECISION AND ORDER**

Based upon the foregoing, the Undersigned hereby determines that the three-year statute of limitations set forth in N.C. Gen. Stat. § 135-5(n) applies to contested cases before the Office of Administrative Hearings.

Therefore, Respondent may only recoup an overpayment that is calculated for the period beginning three years prior to the date of July 23, 2014 when Respondent first became aware of Respondent’s error and mistake and it is hereby ORDERED that Respondent’s recovery is limited to that three-year period.

## NOTICE

**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 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 17th day of February, 2016.

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Selina M Brooks  
Administrative Law Judge