

STATE OF NORTH CAROLINA
COUNTY OF ROWAN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DST 01151

<p>Revonda E Nance Petitioner</p> <p>v.</p> <p>NC DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS Respondent</p>	<p>FINAL DECISION GRANTING SUMMARY JUDGMENT FOR RESPONDENT</p>
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This matter is before the undersigned on Respondent's dispositive Motions, including a Motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

From the submissions of the parties, it appears to be indisputable that the Teachers and State Employees Retirement System (TSERS) mistakenly overpaid Ms. Nance \$52,874.78 since 2002. Two objections are interposed against, causing Petitioner the inevitable hardship of recovering such a sum from a retiree on a fixed, and very modest, income.

The first is that Ms. Nance was not at fault in the error, and reasonably relied on those who were, because they were in an excellent position to know what she was eligible to receive, i.e., it was their job. In the absence of some ambiguity in the statutes, TSERS is not estopped from the asserting doctrine of *ultra vires* -- that the State employees involved were simply not empowered by law to make the payments -- and to recover the overpayment in full. *Bowers v. City of High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994); *King v. Town of Chapel Hill*, 743 S.E.2d 666, 672 (N.C. Ct. App.) *review allowed, writ allowed, appeal dismissed*, 367 N.C. 253, 749 S.E.2d 844 (2013) and *aff'd in part, rev'd in part*, 367 N.C. 400, 758 S.E.2d 364 (2014). To the degree that Petitioner might show that she is damaged by the error, she is in the wrong forum. The N.C. Industrial Commission has primary jurisdiction over the claims against the State, based on allegations of negligence by State employees, permitted by the State Tort Claims Act, § 143-291, *et seq.*

Secondly, since the decision causing the overpayment was made in 2002, Petitioner pleads the three-year statute of limitation imposed by N.C. Gen. Stat. § 1-52. However, the doctrine of "*nullum tempus* ... applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State." *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 8, 418 S.E.2d 648, 653 (1992). The doctrine originated from "the reasoning that the king, who was preoccupied with weighty affairs, 'should [not] suffer by negligence of his officers.'" In *Rowan*, § 1-52 was specifically at issue. *Id.*, 332 N.C. at 6, 418 S.E.2d at 652. Since compensating its employees is an appurtenant "governmental function," the limitation of § 1-52 does not run against State. *Id.*, 332 N.C. at 9, 418 S.E.2d at 654; *Town of Black*

Mountain v. Lexon Ins. Co., 768 S.E.2d 302, 306 (N.C. Ct. App. 2014) *review denied*, No. 28P15, 2015 WL 1809356 (N.C. Apr. 9, 2015).

It is noted that, based on a telephone conversation, Respondent thought that Ms. Nance was agreeable to the amount it intends to withhold from Ms. Nance's monthly retirement benefit. It is not difficult to believe that she did not understand that she was assenting to the deduction of \$551 -- 44% of her \$1,245 monthly check. She now says she "cannot live on" the remaining \$694 per month. The recitation of the facts in Petitioner's Prehearing Statement suggests that she attained the age of 50 years in 2002. The statutory mortality table at N.C. Gen. Stat. § 8-46, which may be relied upon in the absence of other evidence, suggests that Petitioner will be receiving 226 more retirement checks. (That is a conservative estimate, given that this is a "combined" table, including both men and women, and does not account for the fact that women, on average, live significantly longer than men.) TSERS could recover the entire sum in 226 deductions at the rate of \$ 233.96 per month -- still, an onerous 19% of Ms. Nance's check.

It appearing that there is no genuine issue as to any material fact and that Respondent is entitled to judgment as a matter of law, Respondent's Motion for Summary Judgment hereby is GRANTED.

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.

This the 27th day of May, 2015.

J. Randolph Ward
Administrative Law Judge