

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 DST 03954

<p>Laurence A. Cobb, Petitioner,</p> <p>v.</p> <p>North Carolina Department of State Treasurer, Respondent.</p>	<p>FINAL DECISION GRANTING SUMMARY JUDGMENT FOR RESPONDENT</p>
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THIS MATTER comes before the Undersigned on the parties' cross Motions for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. All parties having been given an opportunity to be heard, the Motions are therefore ripe for adjudication.

After careful consideration of the parties' submissions, the undersigned **GRANTS** Respondent's Motion for Summary Judgment and **DENIES** Petitioner's Motion for Summary Judgment.

APPEARANCES

For Petitioner: R. Daniel Boyce
S. Austin King
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For Respondent: Katherine A. Murphy
Special Deputy Attorney General
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STATEMENT OF THE CASE

On September 10, 2021, Petitioner Laurence Cobb ("Petitioner") filed a Petition for Contested Case Hearing in the Office of Administrative Hearings. The matter was set for hearing on February 21, 2022. On February 8, 2022, Respondent filed a Motion for Summary Judgment. On February 9, 2022, Petitioner filed a cross Motion for Summary Judgment. Respondent filed its Response to Petitioner's Motion on February 14, 2022, and Petitioner filed his Response to Respondent's Motion on February 18, 2022. The undersigned removed this case from the hearing calendar pending a ruling on the cross-motions for summary judgment.

On March 10, 2022, counsel for the parties participated in a telephonic conference call with the Tribunal, during which the Tribunal invited counsel to submit supplemental briefs on the issue of the legal requirements of the disbursement request form used in conjunction with the NC 457 Plan, as well as the legal burden borne by the drafter of such forms. On March 18, 2022, Petitioner submitted his Supplemental Brief in Support of his Motion for Summary Judgment. Respondent did not file a supplemental brief.

On April 22, 2022, counsel for the parties participated in a remote hearing during which the Tribunal requested supplemental briefing on whether federal tax law prohibited Respondent from accepting a return of monies to Petitioner's NC 457 Plan account absent a mistake on Respondent's part. In response to the Tribunal's request, Petitioner filed Petitioner's Second Supplemental Brief on May 4, 2022. On May 12, 2022, Respondent filed a Response to Petitioner's Second Supplement Brief and Petitioner filed a Reply to Respondent's Response.

ISSUE

Whether Respondent's failure to reverse a disbursement from Petitioner's NC 457 Plan account and failure to issue a revised IRS Form 1099-R were erroneous, arbitrary and capricious acts, or constituted a failure to follow proper procedure.

SUMMARY OF UNDISPUTED FACTS

1. Findings of fact are neither necessary nor desirable when ruling on a motion for summary judgment, *Hyde Ins. Agency, Inc. v. Dixie Leading Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975), and OAH decisions granting such motions need not include such findings. N.C. Gen. Stat. § 150B-34(e). The Tribunal does not make findings of fact on motions for summary judgment; rather, the Tribunal summarizes material facts it considers to be uncontested. *See, e.g., Vizant Techs., LLC v. YRC Worldwide, Inc.*, 373 N.C. 549, 551, 838 S.E.2d 616, 617 (2020). The Tribunal summarizes the following undisputed facts to provide context for its ruling. *Hyde Ins. Agency, Inc.*, 26 N.C. App. at 142, 215 S.E.2d at 165.

2. The North Carolina Supplemental Retirement Plans ("SRP") are administered by the Department of State Treasurer and the Supplemental Retirement Board of Trustees. One of the plans included in SRP is the NC 457 Plan, which is a State-sponsored defined contribution retirement plan.

3. SRP contracts with Prudential Retirement Insurance and Annuity Company ("Prudential") to provide services for its various retirement plans, including the NC 457 Plan. These services include, among others, hosting the NC 457 Plan's participant website, providing account statements, accepting, and processing contributions from employers, and processing distributions.

4. Prior to his retirement, Petitioner served in the General Assembly, and participated in the NC 457 Plan, making contributions during his employment to his NC 457 account ("General Assembly Account").

5. Petitioner became the beneficiary of another account created under the NC 457 Plan (“Spousal Beneficiary Account”), following the death of his spouse in 2018.

6. NC 457 Plan participants, such as Petitioner, are required by federal law to take required minimum distributions (“RMD”) yearly from their NC 457 Plan accounts.

7. Unless a participant takes total distributions from his NC 457 Plan account during the year at least equal to the RMD, Prudential issues the RMD in one disbursement from each account at the end of the calendar year.

8. With their summary judgment motions, both parties submitted a recording of a telephone call that took place between Petitioner and a Prudential representative on July 20, 2018 (the “Call”). During the Call, Petitioner asked the Prudential representative if he could have his annual RMD paid out monthly instead of annually.

9. During the Call, the Prudential representative explained that an RMD “can only be set up as annual,” but Petitioner could use Prudential’s “Request for Systematic Disbursement” form to request regular payments. The representative did not explicitly tell Petitioner he had to include a specific amount for the systematic disbursement. The representative explained that if the total of the payments requested at the end of the year were sufficient to satisfy the RMD, then no additional distribution would be required for the RMD. Petitioner stated that his RMD was \$15,900 and asked if he could request a payment of \$1,200 per month. The Prudential representative told him he could request any amount. The representative then offered to send Petitioner the Request for Systematic Disbursement form and Petitioner acquiesced.

10. At no time did during the Call did Petitioner suggest he intended to liquidate his General Assembly Account.

11. Approximately three months after the Call, on or about October 16, 2018, Petitioner completed and submitted the form to Prudential for processing.

12. The Request for Systematic Disbursement form provides that “[t]his form should be used to request installment payments as a distribution option . . .” There is no mention of RMDs on the form.

13. The Request for Systematic Disbursement form provides two options for distributions in the section labelled “Systemic Election: (Choose One).” The first option offers the person completing the form a box to check next to the words “Dollar Amount” and a blank line between the phrases “Please issue \$” and “per payment.” Petitioner did not check the box requesting the disbursement of a dollar amount and left the line blank where the amount per payment could be specified. The second option offers the person completing the form a box to check next to the words “Number of Payments” and a blank line between the words “Please issue” and “number of payments.” Petitioner checked this box and wrote in “4” on the blank line. The next section, labelled “Payment Frequency and Start Day” offers the person completing the form a box to check next to each of the words “Monthly,” “Quarterly,” “Semi-annually,” and

“Annually.” Petitioner checked the box next to “Quarterly.” He wrote in “03” for the month the payments were to begin.

14. Petitioner’s intent was to request that his RMD be paid in quarterly payments, not that his entire account be paid out in four quarterly payments.

15. The Request for Systematic Disbursement form states, “In the event that an overpayment is credited to the financial institution account listed above, I hereby authorize and direct the financial institutional designated above to debit my account and refund any overpayment to Prudential.”

16. Prudential processed the form submitted by Petitioner as a request for disbursement of his entire General Assembly Account in four equal, quarterly payments. On March 11, 2019, Prudential deposited \$69,335.50 (the “March Distribution”), 25% of the General Assembly Account balance, into Petitioner’s checking account.

17. After becoming aware of the deposit, Petitioner contacted Prudential and stated Prudential had made a mistake in the distribution of his RMD. A Prudential representative (the “Second Prudential Representative”) stated she would investigate.

18. On or about April 1, 2019, the Second Prudential Representative contacted Petitioner as promised and advised him that Petitioner’s Request for Systematic Distribution form was processed correctly and the recording of the Call confirmed the Prudential representative he spoke to did not make any mistakes in answering Petitioner’s questions or instructing Petitioner regarding proper use of the form. The Second Prudential Representative explained the March Distribution could not be reversed because it had been made according to the Request for Systematic Distribution form completed by Petitioner, rather than Prudential error.

19. Later that month, Ms. Mary Conti, a Client Service Manager with Prudential, contacted Petitioner and advised Petitioner that he could do an “indirect rollover” of the March Distribution that was in excess of his RMD.

20. Following Petitioner’s completion of the documentation of the indirect rollover under Prudential’s direction, Prudential notified Petitioner that his indirect rollover in the amount of \$51,730.12 was processed on or about May 2, 2019.

21. Included in Petitioner’s responses to discovery, which Respondent filed contemporaneously with its Motion for Summary Judgment, is a handwritten note written by Petitioner. The note reflects Petitioner was informed that the IRS Form 1099-R would not reflect the indirect rollover. Petitioner does not dispute Respondent’s assertion that a Prudential representative explained to Petitioner that Prudential was required to issue a Form 1099-R for the entire amount of the March Distribution, \$69,335.50.

22. Prudential did not issue a revised or amended Form 1099-R for Petitioner’s General Assembly Account. The Form 1099-R Prudential provided to Petitioner shows a distribution of \$69,335.50.

23. On his 2019 tax return, Petitioner neither declared as income the \$51,730.12 rolled over into his General Assembly Account, nor documented the indirect rollover.

24. On or about December 2, 2019, Petitioner notified Prudential he had been overpaid by \$8,390.26 from his Spousal Beneficiary Plan. Prudential determined Petitioner was correct. Prudential informed Petitioner that it had made a calculation error resulting in the overpayment and advised Petitioner to return the overpayment. Shortly thereafter, Prudential confirmed receipt of the overpayment from Petitioner and the deposit of the monies into the Spousal Beneficiary Plan. Subsequently, Prudential issued a Form 1099-R reflecting the proper distribution amount, which did not include the overpayment amount.

25. Prudential Retirement documents provide, “Prudential will issue a corrected 1099-R in the event of a tax error.” (Pet. Ex. J).

26. On May 6, 2021, Petitioner contacted Prudential, stating that he had received notification from the U.S. Internal Revenue Service that he owed taxes, interest, and penalties resulting from the March Disbursement.

CONCLUSIONS OF LAW

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

2. To the extent the findings of fact contain conclusions of law or 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).

3. Petitioner has the burden to prove, by a preponderance of the evidence, that he has established his claim. N.C. Gen. Stat. §150B-25.1(a).

4. This Tribunal is authorized to grant summary judgment. N.C. Gen. Stat. § 150B-34(e).

5. The purpose of summary judgment is to bring litigation to an expeditious and efficient conclusion on the merits “where only a question of law on the indisputable facts is in controversy.” Summary judgment is proper under Rule 56 of the North Carolina Rules of Civil Procedure if “there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56 and 26 N.C. Admin. Code 03 .0101(b).

6. Summary judgment “is an extreme remedy and should be awarded only where the truth is quite clear.” *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 103 (1970). “[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

7. The moving party “bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact.” *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citing *Caldwell*, 288 N.C. at 378, 218 S.E.2d at 381). “The movant may meet his or her burden by proving that an essential element of the opposing party’s claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]” *Webb v. Wake Forest Univ. Baptist Med. Center*, 232 N.C. App. 502, 505, 756 S.E.2d 741, 743 (2014) (alteration in original) (citation omitted); *Holloway v. Wachovia Bank & Trust Co., N.A.*, 339 N.C. 338, 351, 452 S.E.2d 233, 240 (1994) (citation omitted).

8. “[W]hen a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the nonmoving party cannot rely on the allegations or denials set forth in her pleading, and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment.” *Steele v. Bowden*, 238 N.C. App. 566, 577, 768 S.E.2d 47, 57 (2014) (internal citation omitted). The nonmovant must “set forth specific facts showing that there is a genuine issue for trial.” *Holloway*, 339 N.C. at 351, 452 S.E.2d at 240 (quoting N.C. R. Civ. P. 54(e)).

9. “An issue is genuine if it can be proven by substantial evidence.” *Webb*, 232 N.C. App. at 504-05, 756 S.E.2d at 743 (citation and internal quotation marks omitted). A fact is “material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.” *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

10. Where the trier of fact can reasonably come to two different conclusions based upon the parties’ forecasts of evidence, summary judgment is not proper as a genuine issue of material fact remains. *Creech*, 347 N.C. at 526-28, 495 S.E.2d at 911-12. Summary judgment is also inappropriate “where matters of credibility and determining the weight of the evidence exists.” *Davis v. Lake Junaluska Assembly, Inc.*, ___ N.C. App. ___, 2022-NCCOA-28, ¶ 13 (citation omitted).

11. Respondent owes a fiduciary duty to Petitioner, as a participant in the NC 457 Plan, to administer the NC 457 Plan properly and in his best interest as a plan participant. *See e.g.*, N.C. Gen. Stat. § 147-69.7.

12. Respondent is limited by federal law from accepting contributions into the NC 457 Plan. Generally, Respondent may accept only (1) deferrals from compensation, 26 U.S.C. § 457(b); 26 C.F.R. § 1.457-2(a), (b)(1); (2) contributions from an employer, 26 C.F.R. § 1.457-2(a), (b)(1), (i); and (3) rollovers from an eligible retirement plan, 26 U.S.C. § 457(e)(16), 26 C.F.R. §§ 1-457.2(a), 1.457-4(c)(1)(iii), 1.457-10(e).

13. The Internal Revenue Service has acknowledged an exception to the general limitations described in Conclusion of Law 12, above, to correct a “Qualification Failure” which is a mistake that “adversely affects the qualification of a plan.” Rev. Proc. 2019-19, § 5.01(2).

14. Errors by Respondent or its agents in distributing amounts in excess of RMD or distributions requested by a NC 457 Plan account holder may be corrected by redeposit of the improperly distributed amounts into the account holder's account and the issuance of an amended IRS Form 1099-R.

15. The dispute presented by this contested case proceeding is whether Prudential made an overpayment, as argued by Petitioner, or a systematic distribution, as argued by Respondent. As explained below, Petitioner failed to establish that a genuine issue of material fact remains, as an overpayment by Prudential cannot be sustained or proven by substantial evidence in the record.

16. During the Call, a Prudential representative informed Petitioner the RMD can only be issued on an annual basis.

17. The Prudential representative further explained that systematic disbursements would count against Petitioner's RMD, and, if the total systematic disbursements taken in a year satisfied the RMD, the RMD would not be issued at the end of the calendar year.

18. Petitioner's description of how he could fill out the Request for Systematic Distribution form during the Call demonstrated Petitioner understood that he could request a specific monthly amount to count against the RMD and the proper way to do this.

19. Where the language of a document is unambiguous, the construction of the agreement and the intent of the parties are questions of law. *See Martin v. Ray Lackey Enterprises, Inc.*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990); *N.C. State Bar v. Merrell*, 243 N.C. App. 356, 370-71, 777 S.E.2d 103, 114 (2015).

20. Where intent is a question of law, a court may not look outside the four corners of the document to determine the intent of the parties. *Bank of America, N.A. v. Rice*, 230 N.C. 450, 456, 750 S.E.2d 205, 210 (2013) (citation omitted).

21. The Request for Systematic Disbursement form is unambiguous on its face. The form does not reference RMDs and provides, "This form should be used to request installment payments as a distribution option available only to terminated participants (or sole beneficiaries) under the NC 457 Plan."

22. The Request for Systematic Disbursement form that was submitted by Petitioner to Prudential, as filled out by Petitioner, was a request that the entire balance of the General Assembly Plan be disbursed in four quarterly payments.

23. Prudential processed the Request for Systematic Disbursement form submitted by Petitioner in accordance with the instructions provided by Petitioner on the form. Four quarterly installment payments of Petitioner's General Assembly Account were scheduled in accordance with the completed form.

24. Petitioner has not established any basis in law by which Prudential should be charged with knowledge of Petitioner's intent outside of that shown within the four corners of the Request for Systematic Disbursement form Petitioner submitted.

25. Petitioner has not proffered evidence that Prudential committed any error in its explanation to Petitioner during the Call. The Prudential representative explained how to use the Request for Systematic Disbursement form to satisfy Petitioner's goal of periodic disbursement of his RMD. Although Petitioner argues that the Request for Systematic Distribution Form could not be used to accomplish Petitioner's intent, arguments are not evidence. *Basmas v. Wells Fargo Bank Nat. Ass'n*, 236 N.C. App. 508, 513, 763 S.E.2d 536, 539 (2014) (citations omitted). Petitioner has the burden of forecasting evidence that he could make a *prima facie* case of his claim.

26. Statements by agents of Respondent that the Systemic Distribution form "is not clear" and "I see this as a broken process with a high likelihood o[f] errors" are not substantial evidence that Respondent is responsible for the March Disbursement being in excess of what Petitioner subjectively intended to request. There was no evidence that Respondent's agents who made these statements had reviewed the instructions on form completion provided to Petitioner during the Call, nor Petitioner's statements during the Call evincing his correct understanding on how to complete the form to accomplish his subjective intent.

27. Likewise, evidence presented by Petitioner that Respondent has altered the Request for Systematic Distribution form to encourage NC 457 Plan account holders to complete the form only while engaged in a telephone conversation with Prudential representatives is not substantial evidence of Respondent's error. As a matter of law, this Tribunal finds the Request for Systematic Distribution form provided to Petitioner was not ambiguous and Respondent had properly instructed Petitioner in the use of the form.

28. Respondent has met its burden of establishing a lack of any triable issue, as Petitioner cannot produce evidence establishing an erroneous overpayment by Prudential from the General Assembly Account. Accordingly, there are no genuine issues of fact present in this contested case that preclude an award of summary judgment.

29. Petitioner has not proffered evidence sufficient to satisfy, by the preponderance of the evidence, that Prudential committed any error in processing the Request for Systematic Disbursement form.

30. Petitioner has not met his burden, by establishing by a preponderance of evidence, that the March Disbursement was the result of any error by Prudential.

31. Because Prudential committed no errors, it is not required to reverse the transaction or to issue a Form 1099-R reflecting the reversal. Respondent fulfilled its fiduciary duty to Petitioner by following the law and NC 457 Plan documents in refusing to recontribute funds to the General Assembly Account absent the documented roll-over.

32. The evidence in the record shows Prudential made a systematic distribution, rather than an overpayment. Accordingly, Respondent met its burden of demonstrating Petitioner cannot establish all elements of his claim. *Webb*, 232 N.C. App. at 505, 756 S.E.2d at 743. Although Petitioner did not intend to request a disbursement of \$69,335.50 from his General Assembly Account in March 2019, the plain language of the completed Request for Systematic Disbursement form is controlling. Thus, Petitioner did not meet his burden of establishing he could make out a *prima facie* case at trial.

33. It was not arbitrary and capricious of Prudential to refuse to reverse the March Disbursement, even though Prudential accepted Petitioner's redeposit of the overpayment from the Spousal Beneficiary Account. Prudential did not make an error in calculating the amount of the March Disbursement. Prudential did make an error in calculating the amount to be disbursed from the Spousal Beneficiary Account.

34. Respondent did not fail to follow established procedure when it refused to reverse the March Disbursement. The proper procedure, reflected in the treatment of the disbursement from the Spousal Beneficiary Account, is to reverse overpayments disbursed because of Prudential's error, not legal disbursements made pursuant to an account holder's legal request.

FINAL DECISION

The Tribunal concludes that there is no genuine issue of material fact and Respondent is entitled to judgment as a matter of law. Therefore, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, the undersigned hereby **GRANTS** Respondent's Motion for Summary Judgment and **DENIES** Petitioner's Motion for Summary Judgment. This contested case is therefore **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 9th day of June, 2022.

Linda F. Nelson

Linda F. Nelson
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 which subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 9th day of June, 2022.



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