

Mail Date:

MAR 20 2018

Mail Date: _____

**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF RYAN A. LUBIN
DOCKET NO. 2016-19
CLAIM OF RYAN A. LUBIN

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has before it a Motion for Summary Judgment filed by the Public School Employees' Retirement System ("PSERS") in the above-referenced administrative appeal. PSERS requests dismissal of Ryan A. Lubin's ("Claimant") Appeal and Request for Administrative Hearing, which seeks permission to elect Class T-F membership after the statutory deadline, asserting that there is no issue of material fact and thus PSERS is entitled to summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on November 21, 2017, and served a copy by First Class Mail on Claimant as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35-33.36. By letter dated November 21, 2017, PSERS notified Claimant that he had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. Claimant's response, therefore, had to be filed on or before December 21, 2017. See 1 Pa. Code §§ 31.11, 31.12, and 33.34. Claimant did not file a response.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. The function of a summary judgment motion is to eliminate the needless use of time and resources of the litigants and the Board in cases where an evidentiary administrative hearing would be a useless formality. See *Liles v. Balmer*, 567 A.2d 691 (Pa. Super. 1989). The Board's regulations authorize the use of summary judgment where there are no genuine issues of material fact. 22 Pa. Code § 201.6(b); Pa.R.C.P.

Nos. 1035.1-1035.5. To determine whether the party moving for summary judgment has met its burden, the Board must examine the record in the light most favorable to the non-moving party and give him the benefit of all reasonable inferences. See *Thompson v. Nason Hosp.*, 535 A.2d 1177, 1178 (Pa. Super. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991). Any doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *El Concilio De Los Trabajadores v. Commonwealth*, 484 A.2d 817, 818 (Pa. Cmwlth. 1984). Summary judgment may be entered against a party who does not respond.” Pa.R.C.P. 1035.3(d).

In responding to a motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response identifying “(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion . . . , or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.” Pa.R.C.P. No. 1035.3(a). “An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence.” Pa.R.C.P. No. 1035.3(b).

Claimant did not respond to PSERS’ motion and, therefore, he has not disputed any of the facts set forth therein nor has he identified any additional facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board in this matter. Consequently, the Board finds that there are no disputed material facts. The Board further finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimant is eligible to elect Class T-F membership after the 45-day statutory deadline.

FINDINGS OF FACT

Based on the record, the Board finds the following relevant facts not in dispute:

1. In September 2014, Claimant was first enrolled in PSERS through his part-time, per diem employment with the New Castle Area School District (“New Castle SD”).

2. Claimant's address at the time of his enrollment with PSERS was [REDACTED] [REDACTED]. (PSERS' Motion for Summary Judgment at ¶ 1)
3. On August 24, 2015, Claimant began working for the New Castle SD as a full-time, salaried employee. (PSERS' Motion for Summary Judgment at ¶ 3)
4. On August 27, 2015, the New Castle SD updated Claimant's mailing address with PSERS to [REDACTED] (hereinafter "[REDACTED]"). (PSERS' Motion for Summary Judgment at ¶ 4)
5. At all relevant times, Claimant's parents resided at [REDACTED]. (PSERS-2)
6. By correspondence dated August 28, 2015, PSERS mailed a *T-F Membership Class Election Form, Choosing Your Membership Class* handout, an "IMPORTANT: Decision Required!" handout, and a cover letter addressed to Claimant at [REDACTED] [REDACTED] (PSERS-1)
7. The August 28, 2015 cover letter to the *T-F Membership Class Election* stated as follows:

Dear Mr. Ryan Lubin:

Congratulations on becoming a member of the Public School Employees' Retirement System (PSERS). As a member of PSERS, you are required to make contributions which will be withheld from your pay. In addition, each of your Pennsylvania public school employers will make employer contributions toward your PSERS retirement benefit. The amount of money withheld from your pay and the factors used to determine a retirement benefit when you retire are determined by your membership class.

There are two classes of membership (T-E and T-F) that will determine the amount of money withheld from your paychecks and the amount of your retirement benefit when you retire.

You are automatically enrolled as a Class T-E member and need not take any action if you choose to remain as a Class T-E member. As such, your benefit if you retire at your normal retirement age will be your years of service times your final average salary times a 2 percent multiplier. Your employee contributions are subject to change every three years but will

not be less than 7.5 percent nor more than 9.5 percent of your salary, based on the investment performance of the Retirement Fund.

If you wish to elect to become a Class T-F member, you must sign and return to PSERS the enclosed *T-F Membership Class Election* (PSRS-1318) form by October 21, 2015. The form must be received by PSERS by that date. As a Class T-F member your benefit if you retire at your normal retirement age will be your years of service times your final average salary times a higher 2.5 percent multiplier. Your employee contributions are subject to change every three years but will not be less than 10.3 percent nor more than 12.3 percent, based on the investment performance of the Retirement Fund.

* * *

At this time you should:

- Review the *Choosing Your Membership Class* handout included in this packet.
- Decide whether you wish to remain a Class T-E member. If you wish to remain a Class T-E member, you do not have to take any action.
- If you wish to elect Class T-F, **PSERS must receive your form by October 21, 2015.** If the form is received after that date, you will remain Class T-E and will not have the opportunity to elect Class T-F in the future.

Your decision to remain Class T-E by doing nothing, or to elect Class T-F by filing the enclosed form, is final and binding.

(PSERS-1)

8. The *T-F Membership Class Election* form warned “**PSERS must receive this form by October 21, 2015.**” (PSERS-1)

9. The August 28, 2015 *T-F Membership Class Election* form and cover letter were received by Claimant’s parents at [REDACTED] prior to October 21, 2015. (PSERS-2, § D at ¶ 4 and § F)

10. By letter dated September 27, 2015, PSERS mailed a follow-up letter addressed to Claimant at [REDACTED] reminding him of the deadline to elect Class T-F membership:

Dear Ryan Lubin:

The Public School Employees' Retirement System (PSERS) previously sent you a *T-F Membership Class Election* (PSRS-1318) form.

We are providing you this reminder because your decision to remain a Class T-E member, or to change to a Class T-F member, is final and binding. If you wish to remain as a Class T-E member, you do not have to take any action.

If you wish to remain a Class T-E member, you need to do nothing; Class T-E membership is the automatic membership class. If you would like to change your membership to Class T-F, you must do so by October 21, 2015. PSERS sent you a mailing approximately 30 days ago that included a *T-F Membership Class Election* (PSRS-1318) form and an informational handout describing the differences between Class T-E and Class T-F membership.

Please note that in order to elect Class T-F membership, the form must actually be received on or before the due date.

* * *

If you wish to elect Class T-F membership, you must file the *T-F membership Class Election* (PSRS-1318) form no later than October 21, 2015.

* * *

(PSERS-3)

11. PSERS' September 27, 2015 letter was received by Claimant's parents at [REDACTED] prior to October 21, 2015. (PSERS-2 at § D at ¶ 6 and § F)

12. Claimant was living with friends when PSERS' August 28, 2015 and September 27, 2015 T-F membership election letters were received by Claimant's parents at [REDACTED] (PSERS-5)

13. By correspondence dated November 7, 2015, and addressed to Claimant at [REDACTED], PSERS informed Claimant that he would permanently remain a Class T-E member because he did not elect Class T-F membership by the election deadline. (PSERS-4)

14. Claimant's parents received PSERS' letter dated November 7, 2015 at [REDACTED] [REDACTED]. (PSERS-5)

15. In early November 2015, Claimant submitted a change to his home address with the New Castle SD, changing it from [REDACTED] to [REDACTED] [REDACTED]. (PSERS-2 at § D at ¶ 8)

16. On November 9, 2015, the New Castle SD updated Claimant's address with PSERS to [REDACTED]. (PSERS' Motion for Summary Judgment at ¶ 16)

17. On November 19, 2015, Claimant appealed PSERS' November 7, 2015 determination to the ESRC. (PSERS- 5)

18. By letter dated August 30, 2016, the ESRC denied Claimant's appeal, explaining that the T-F election correspondence was sent to Claimant's last known address on file with PSERS. (PSERS-6)

19. On September 26, 2016, Claimant appealed the ESRC's decision. (PSERS-2)

20. On October 10, 2016, PSERS filed an Answer.

21. On November 21, 2017, PSERS filed a Motion for Summary Judgement.

22. Claimant did not respond to PSERS' Motion.

23. This matter is ripe for Board adjudication.

DISCUSSION

The Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8101 et seq., requires that a person who first becomes a school employee and an active member on or after July 1, 2011 is enrolled in PSERS as a Class T-E member. 24 Pa.C.S. § 8305(d). Such T-E member, however, may elect to become a Class T-F member provided the Class T-E member files a written election with PSERS within 45

days of notification by PSERS. 24 Pa.C.S. §§ 8305(e) and 8305.2(b).¹ If a member fails to timely file an election to become a Class T-F member, the Retirement Code mandates that “the member shall be enrolled as a member of Class T-E and the member shall never be able to elect Class T-F service, regardless of whether the member terminates service or has a break in service.” 24 Pa.C.S. § 8305.2(d). Thus, there are no exceptions to the Class T-F election deadline.

In September 2014, Claimant was first enrolled in PSERS through his part-time, per diem employment with the New Castle SD. His address at the time was [REDACTED]. In August 2015, Claimant began working for the New Castle SD as a full-time, salaried employee, and the New Castle SD updated Claimant’s address with PSERS to [REDACTED]. By letters dated August 28, 2015 and September 27, 2015, PSERS mailed notice of Class T-F membership and the October 21, 2015 election deadline to Claimant at [REDACTED]. Claimant’s parents received the notices at [REDACTED] prior to Claimant’s deadline to elect Class T-F membership. Claimant, however, did not elect Class T-F membership on or before October 21, 2015, and PSERS subsequently notified him that he would permanently remain a Class T-E member.

Claimant appeals that determination, arguing that: (1) he was not made aware of Class T-E and Class T-F membership by the New Castle SD when he was hired; (2) he “was not looking out for information on [his] retirement” when he was hired; (3) he was no longer living at [REDACTED] when PSERS’ Class T-F notices were delivered to his parents at that address, who were not educators and did not realize the importance of the letters; and (4) he did not close on a new residence until October 1, 2015 and, therefore, he was unable to provide a new address to the New Castle SD or PSERS until that date.

¹ Class T-E membership provides a benefit accrual rate of 2% and a contribution rate of at least 7.5%. Class T-F membership provides a benefit accrual rate of 2.5% and a contribution rate of at least 10.3%. 24 Pa.C.S. § 8102 (definitions of “basic contribution rate” and “standard single life annuity”).

Claimant implies that relief is warranted because the New Castle SD did not inform him of Class T-E and Class T-F membership when he was hired. This argument is also without merit. The Retirement Code directs PSERS to provide members with notice of the opportunity to elect Class T-F: “A member must elect to become a Class T-F member by filing a written election with the board within 45 days of notification by the board that such member is eligible for such election.” 24 Pa. C.S. § 8305.2(b) (emphasis added). The New Castle SD had no corresponding duty to do so. See *Account of Elijah B. Skinner*, Docket No. 2016-11, at *11 (PSERB Jan. 26, 2018) (“[T]here is no equivalent provision in the law that requires that an employer take on PSERS’ duty to provide its members with Class T-F election notice....”).

With respect to Claimant’s remaining arguments, the Retirement Code directs PSERS to provide members with notice of the opportunity to elect Class T-F. 24 Pa. C.S. § 8305.2(b). Notice must be given just once, and notice is satisfied when mailed via first class mail to a member’s last known address. *Id.*; see *Higgins v. Public School Employees’ Retirement System*, 763 A.2d 745, 752-753 (Pa. Cmwlth. 1999). If the notice is not returned as undeliverable, PSERS may presume that the member received it. See *In re Cameron Estate*, 130 A.2d 173, 177 (Pa. 1957); *Higgins*, 736 A.2d at 755. Importantly, a PSERS member does not need to receive the notice *personally* for notice requirements to be satisfied. See, e.g., *Wert v. Department of Transportation*, 468 A.2d 542 (Pa. Cmwlth. 1983) (notice was sufficient despite the lack of personal receipt because the delay was the result of the third party whom Wert had chosen to receive his mail); *Commonwealth of Pennsylvania v. One 1991 Cadillac Seville*, 853 A.2d 1093 (Pa. Cmwlth. 2004) (brother had apparent authority to receive notice on behalf of sister at her last known address); *Account of Michael J. Spinka*, Docket No. 2015-03 at *15 (PSERB May 27, 2016) (claimant’s parents had apparent authority to receive PSERS’ Class T-D election notifications that were mailed to the address PSERS had on file for the claimant); *Account of Elijah B. Skinner*, Docket No. 2016-11, at *10-11.

The record demonstrates that PSERS mailed two notices to Claimant to advise him of his right to elect Class T-F membership. Claimant admits that PSERS mailed the notices to his last known address of [REDACTED] in August 2015 and

September 2015, and he does not dispute that he did not change his address with the New Castle SD until November 2015. Claimant also does not dispute that his parents received PSERS' notices at [REDACTED] prior to the Class T-F election deadline of October 21, 2015. Nor does Claimant challenge the contents of the notices.

Claimant's asserted entitlement to Class T-F membership is based primarily upon his claim that he did not *personally* receive the notices that PSERS mailed to him at the address that he represented was his place of residence in a timely manner. Claimant, however, authorized the use of his parents' address of [REDACTED] as a means of communicating with him prior to, at least, early November 15. Claimant's parents, therefore, were authorized to accept the Class T-F notification on Claimant's behalf. Moreover, Claimant does not dispute that he maintained [REDACTED] as his home address with both New Castle SD and PSERS until early November 2015. Therefore, up and until at least November 2015, PSERS was properly directing Claimant's mail to [REDACTED], including the Class T-F election notices. His reasons for not changing his address sooner are irrelevant. Because PSERS mailed the Class T-F notices to the address it had on file for Claimant and Claimant's parents received notice at that address prior to the Class T-F election deadline, PSERS' notice was sufficient to satisfy the notice requirements of the Retirement Code.

Claimant's assertion that his parents did not understand the importance of the notices and his claim that he was not looking out for information regarding his retirement when he was hired do not change the outcome. Although the Board must liberally administer the system, it does not have the authority to deem a late-filed Class T-F membership election as timely. See *Allen v. Public Sch. Employees' Ret. Bd.*, 848 A.2d 1031, 1033 (Pa. Cmwlth. 2004); *Forman v. Public Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); see also *Harasty v. Public Sch. Employees' Ret. Bd.*, 945 A.2d 783, 788 (Pa. Cmwlth. 2008). Such action would be tantamount to circumventing the express language of the Retirement Code, which the Board cannot do. *Dowler v. Public Sch. Employees' Ret. Bd.*, 620 A.2d 639 (Pa. Cmwlth. 1993); *Marinucci v. State Employees' Ret. Sys.*, 863 A. 2d 43 (Pa. Cmwlth. 2004). Thus, there is no exception,

statutory or otherwise, to the deadline for electing Class T-F membership. See *Harasty*, 945 A.2d at 788.

Accordingly, Claimant's appeal must be dismissed.

CONCLUSION

For the above stated reasons, the Board finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether to accept Claimant's untimely request to elect Class T-F membership with PSERS. Accordingly, PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DENIED.

**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF RYAN A. LUBIN
DOCKET NO. 2016-19
CLAIM OF RYAN A. LUBIN

ORDER

AND NOW, upon consideration of Claimant's Request for Administrative Hearing and PSERS' Motion for Summary Judgment:

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa. Code § 201.6(c), as no genuine issue of material fact exists and PSERS is entitled to judgment as a matter of law. As a result, this Board denies Claimant's request to elect Class T-F membership after the statutory deadline.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: March 9, 2018

By: Melva S. Vogler
Melva S. Vogler, Chairman