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

IN RE: ACCOUNT OF PATRICK FUHRMAN
DOCKET NO. 2022-16
CLAIM OF PATRICK FUHRMAN

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, requesting that Patrick Fuhrman's ("Claimant") Appeal and Request for Administrative Hearing be dismissed because there is no issue of material fact and PSERS is entitled to summary judgment as a matter of law.

PSERS filed its Motion for Summary Judgment on April 23, 2024, and served a copy by First Class Mail on Claimant as is required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35, 33.36. By letter dated April 23, 2024, PSERS notified Claimant that he had thirty 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 May 23, 2024. See 1 Pa. Code §§ 31.11, 31.12, 33.34. Claimant did not file a response to PSERS' motion.

Where no factual issues are in dispute, no evidentiary hearing is required under 2 Pa.C.S. § 504. A motion for summary judgment eliminates 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. No. 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).

Because Claimant did not respond to PSERS' motion and, therefore, has not identified any facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board in this matter, 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 permitted to change his PSERS membership from Class T-G to Class DC after the statutory class election deadline. For the reasons set forth below, the Board grants PSERS' motion.

FINDINGS OF FACT

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

1. In October of 2021, Claimant became a PSERS member through his employment with the Erie City School District ("District"). (PSERS' Memorandum of Facts ¶ 1).

2. Pursuant to Section 8305(f) of the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8305(f), Claimant was automatically enrolled in PSERS as a Class T-G member. (PSERS-2, PSERS-3; Memorandum of Facts ¶¶ 2, 4-5).

3. At all times between October 2021 and October 5, 2022, Claimant's mailing address was 19 West 35th St., Erie, PA 16508. (Memorandum of Facts ¶ 3).

4. By correspondence dated October 30, 2021, PSERS mailed a "TG Member Enrollment Welcome Packet" to Claimant at 19 West 35th St., Erie, PA 16508, that stated as follows with respect to electing class membership:

As a member of PSERS, you are automatically enrolled in Class T-G and you do not need to take any action to retain this classification. You have an opportunity, however, to make a one-time choice of two other retirement plan options. **Your decision is permanent and irrevocable.**

Your action is required for the time-sensitive materials listed below. Please read carefully to ensure that you meet the **required deadlines** associated with the following:

- ***Election of Membership Class T-H or Class DC.*** As a new PSERS member, you are defaulted to the higher guaranteed retirement benefit of Class T-G. If choosing to elect a new membership class, you must do so through your PSERS MSS account. **You must complete your online election within 90 days or you will permanently remain a Class T-G member.** For more information on the retirement plan options, please refer to the Membership Class Overview document in the Welcome Packet.

(Emphasis in original). (PSERS-2; Memorandum of Facts ¶ 4).

5. By correspondence dated October 30, 2021, PSERS also mailed a "Class Election from TG Cover Letter," with enclosures, to Claimant at 19 West 35th St. Erie, PA 16508, that stated, in pertinent part, as follows with respect to electing class membership:

You are automatically enrolled in Class T-G and you do not need to take any action if you choose to retain this classification. Your defined benefit

(DB) component of your retirement is based on your years of service times your final average salary times a 1.25% multiplier and any early retirement factors, as applicable. Your DB contribution rate is subject to change every three years, based on the investment performance of the fund. Based on investment returns, your DB contribution rate may change by .75% every three years but could never increase or decrease by more than 3% of your base rate. Specifically, the total member contribution rate for Class T-G will not be less than 2.5% nor more than 8.5%.

Please carefully review the enclosed handout to compare your membership options. ***Remember, your election is irrevocable.***

You must make your class election before January 28, 2022 by:

- Doing nothing. Taking no action will have you remain in the default option of Class T-G.
- Electing Class T-H or Class DC membership through your Member Self-Service (MSS) account on the PSERS website. If you have not yet created your MSS account with PSERS, you may do so by selecting the MSS icon on the PSERS website at www.psers.pa.gov.
- If you are unable to access your MSS account, you may also request *Act 5 Membership Class Election Form Class T-G Member Only* (PSERS-1418) by contacting PSERS directly.

PSERS has included an informational handout to assist you in making this decision. **While PSERS cannot offer financial advice for your particular situation, you may contact PSERS if you have questions about the differences between Class T-G, Class T-H, and Class DC.**

(Emphasis in original). (PSERS-3; Memorandum of Facts ¶ 5).

6. Claimant received the October 30, 2021 “TG Member Enrollment Welcome Pack” and the “Class Election from TG Cover Letter,” with enclosures. (Memorandum of Facts ¶ 6).

7. Claimant’s deadline to elect Class DC was January 28, 2022. (PSERS-3; Memorandum of Facts ¶ 5).

8. Claimant never submitted a class election to PSERS. (Memorandum of Facts ¶¶ 7-10).

9. By failing to elect Class T-H or Class DC by the January 28, 2022 deadline, Claimant irrevocably elected to remain a Class T-G member. (Memorandum of Facts ¶ 8).

10. By correspondence dated February 13, 2022, PSERS mailed a "Confirmation of Participation in Class TG-TH-DC" letter to Claimant at 19 West 35th St., Erie, PA 16508 that stated as follows with respect to his membership class:

Congratulations on your choice to retain Class T-G membership, which is irrevocable. Class T-G provides a higher guaranteed retirement benefit and is a combination of a defined benefit (DB) and a defined contribution (DC) component. Your total contribution rate to your retirement will be 9.00% of your salary, with 6.25% attributable to your DB component and 2.75% to your DC component. In addition, your employer will contribute an amount equal to 2.25% of your salary to the DC component. You will be eligible to receive your employer's DC contributions when you terminate employment, provided you have at least three eligibility points. Because the value of the contributions credited to your DC component will fluctuate based on the performance of those investment(s), you will have an opportunity to determine where your DC contributions are invested.

(PSERS-4; Memorandum of Facts ¶ 9).

11. Claimant first contacted PSERS about changing his class election, by telephone, on March 14, 2022. (Memorandum of Facts ¶ 10).

12. On March 15, 2022, through an appeal to PSERS' Executive Staff Review Committee ("ESRC"), Claimant requested that PSERS allow him to elect Class DC. (PSERS-5; Memorandum of Facts ¶ 11).

13. By letter dated August 17, 2022, the ESRC denied Claimant's appeal because PSERS did not receive a class election from Claimant by his January 28, 2022 statutory deadline. (PSERS-6; Memorandum of Facts ¶ 12).

14. On September 16, 2022, Claimant filed an Appeal and Request for Administrative Hearing. (PSERS-7; Memorandum of Facts ¶ 13).

15. On October 5, 2022, PSERS filed an Answer and New Matter to Claimant's Appeal and Request for Administrative Hearing. (PSERS-1; Memorandum of Facts ¶ 14).

16. Claimant did not respond to PSERS' New Matter. (Memorandum of Facts ¶¶ 15-16).¹

17. On April 23, 2024, PSERS filed a Motion for Summary Judgment.

18. Claimant did not file a required response to PSERS' motion. See Pa.R.C.P. 1035.3(a).

19. The matter is ripe for Board adjudication.

DISCUSSION

The Retirement Code requires that a person who first becomes a school employee and an active member on or after July 1, 2019, be enrolled in PSERS as a Class T-G member. 24 Pa.C.S. § 8305(f). Such T-G member, however, may elect to become a Class DC participant provided the Class T-G member files a written election with PSERS within ninety days of notification by PSERS. 24 Pa.C.S. § 8305.4(a), (b); 24 Pa.C.S. § 8305(g)(2).² If a member fails to timely file an election to become a Class DC participant, the Retirement Code mandates that "the member shall be enrolled as a member of Class T-G, and the member shall never be able to elect to become a Class DC participant, regardless of whether the member terminates service or has a break in service." 24 Pa.C.S. § 8305.4(d) (emphasis added). Thus, there are no exceptions to the Class DC election deadline.

¹ Because Claimant did not respond to PSERS' New Matter, the Board may deem those facts admitted and not disputed. See Pa.R.C.P. 1029(b) ("Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication.").

² Such T-G member also has the option to file an election to become a member of Class T-H within the same statutory deadline. See 24 Pa.C.S. § 8305.3. Claimant did not file a written election with PSERS electing Class T-H. Nor does Claimant request Class T-H membership.

Claimant first enrolled in PSERS in October of 2021 through his employment with the District. On October 30, 2021, PSERS mailed Claimant a "TG Member Enrollment Welcome Packet" that informed him that he was automatically enrolled in PSERS as a Class T-G member, stated that no action was needed to retain this classification, explained the differences between Class T-G, Class T-H, and Class DC, and notified him of the 90-day deadline to elect to become a Class DC participant. On October 30, 2021, PSERS also mailed Claimant a "Class Election from TG Cover Letter" with enclosures. The "Class Election from TG Cover Letter" reiterated that Claimant was automatically enrolled in Class T-G membership and that no action is needed to retain this classification. The correspondence informed Claimant that his class election deadline was January 28, 2022, and it explained the steps to take to make elect Class T-H or Class DC. The enclosure also explained the differences between the classes. Claimant did not elect to become a Class DC participant on or before his January 28, 2022 deadline. By letter dated February 13, 2022, therefore, PSERS congratulated Claimant on his irrevocable decision to remain a Class T-G member. Thereafter, on March 15, 2022, Claimant called PSERS requesting to become a Class DC participant for the first time.

Claimant does not dispute that PSERS mailed, and that he timely received, the statutorily required class election notice. Nor does he dispute that he failed to elect to become a Class DC participant on or before the statutory deadline. Claimant never submitted a class election to PSERS. Rather, Claimant requests an exception to the statutory deadline because, after consulting with a financial advisor, he feels he made a mistake by remaining in Class T-G membership. Claimant's appeal must be denied as a matter of law.

Being overwhelmed, confused, or mistaken by the membership options does not excuse a member from the deadline imposed by the Retirement Code. *See Account of Raymond F. Medice*, Docket No. 2016-25 (Jan. 26, 2018); *Account of Andrew Lyle*, Docket No. 2014-18 (PSERB June 14, 2016); *Account of Alexander M. Peluso*, Docket No. 2013-28 (PSERB Oct. 8, 2014); *see also Account of Gary L. Lose*, Docket No. 2013-23 (PSERB Oct. 8, 2014) (denying claimant's request to revoke his T-F

Membership Class Election form even though he claimed he did not understand the contribution rate and alleged it caused financial hardship).³ Similarly, statutory deadlines are strictly enforced despite changes in a member's financial circumstances or allegations of financial hardship. See *Account of Alan L. Pastore*, Docket No. 2019-01 (PSERB June 17, 2020); *Account of Rodney D. Hawkins*, Docket No. 2015-17 (PSERB Mar. 17, 2016); *Account of Adam D. Smith*, Docket No. 2015-06 (PSERB Aug. 7, 2015).

Although the Board must liberally administer the system, it does not have the authority to deem a late-filed Class DC membership election as timely. See *Allen v. Pub. Sch. Emps.' Ret. Bd.*, 848 A.2d 1031 (Pa. Cmwlth. 2004); *Forman v. Pub. Sch. Emps.' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); *Harasty v. Pub. Sch. Emps.' 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. See *Forman*, 778 A.2d at 780; *Marinucci v. State Emps.' Ret. Sys.*, 863 A.2d 43 (Pa. Cmwlth. 2004). There is no exception, statutory or otherwise, to the deadline for electing Class DC, and thus, the Board is not authorized to grant Claimant the relief he requests because it is not specifically entitled to do so by the Retirement Code.

There is no dispute that PSERS provided Claimant with notice of the Class DC participation election deadline through correspondence dated October 30, 2021, and Claimant has never averred that he did not receive the notices or that the notices provided to him were insufficient. In essence, Claimant changed his mind about his Class T-G membership after the statutory deadline, and that does not provide grounds to allow him to make an untimely election to Class DC. Accordingly, Claimant's appeal must be dismissed as a matter of law.

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

³ Board adjudications are available on the PSERS' website.

issue of whether to accept Claimant's untimely request to elect Class DC participation with PSERS. Accordingly, PSERS' Motion for Summary Judgment is GRANTED and Claimant's Appeal and Request for Administrative Hearing is DENIED.

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ORDER

AND NOW, upon consideration of Claimant's Appeal and 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 compliance 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. Accordingly, this Board denies Claimant's request to elect Class DC participation.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 10/25/2024

By: 
Richard Vague, Chairman