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

**IN RE: ACCOUNT OF ANGELA BRIGIDO
DOCKET NO. 2012-10
CLAIM OF ANGELA BRIGIDO**

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs, the Opinion and Recommendation of the Hearing Examiner, Claimant's Brief on Exceptions to the Opinion and Recommendation of the Hearing Examiner, and PSERS' Brief Opposing Claimant's Exceptions.

The issue in this appeal is whether to grant Angela Brigido's ("Claimant") request to elect Class T-F membership with PSERS. The Hearing Examiner recommends that Claimant's request should be denied because PSERS properly notified Claimant of her right to elect Class T-F membership and Claimant failed to elect Class T-F membership within forty-five (45) days from receipt of such notice.

Claimant excepts to the Hearing Examiner's Opinion and Recommendation on the basis that: (1) PSERS cannot invoke the presumption under the mailbox rule that the Class T-F notices were received by Claimant because such presumption is based on a presumption that the Class T-F notices were properly mailed by Pitney Bowes Service, Inc., and, relying on the "missing evidence rule," PSERS' failure to provide testimony from Pitney Bowes Service, Inc., proves that the notices were not properly

mailed; and (2) the notices of Claimant's right to elect Class T-F membership should have been sent by the Board, not PSERS.

PSERS responds that the "missing evidence rule," which states that if a party fails to call a witness or other evidence that is essential to its case and such evidence is within his or her control, the fact finder may be permitted to draw an adverse inference, is not applicable to this matter because it essentially requires PSERS to prove that Pitney Bowes Service, Inc., did not violate its contract with the Commonwealth of Pennsylvania. PSERS argues that Pitney Bowes Service, Inc., is not under the exclusive control of PSERS or an agent of PSERS.

To benefit from the mailbox rule, a party must provide evidentiary proof that the notice was: (1) signed in the usual course of business; (2) addressed to the last known address on record; (3) prepaid and placed in the regular place of mailing; and (4) not returned as undeliverable. *Whitmore v. Dwelling House Ins. Co.*, 23 A. 1131 (Pa. 1892); *Beeman v. Supreme Lodge*, 64 A. 792 (Pa. 1906); *In re Cameron Estate*, 130 A.2d 173 (Pa. 1957); *Sheehan v. Workmen's Compensation Appeal Board (Supermarkets General)*, 600 A.2d 633 (Pa. Cmwlth. 1991), *appeal denied*, 609 A.2d 170 (Pa. 1992); *Chartiers Industrial and Commercial Development Authority v. The Allegheny County Bd. of Property Assessment*, 645 A.2d 944, 946 (Pa. Cmwlth. 1994).

"[E]vidence of actual mailing is not required." *Commonwealth Dep't of Transp. v. Brayman Constr. Corp.*, 513 A.2d 562, 566 (Pa. Cmwlth. 1986). Rather, under the mailbox rule, the party who is seeking the benefit of the presumption must show that the letter was "written and signed in the usual course of business and placed in the regular

place of mailing, evidence of the custom of the establishment as to the mailing of such letters is receivable as evidence that it was duly mailed.” *Christie v. Open Pantry Food Marts Inc. of Delaware Valley*, 352 A.2d 165, 166-67 (Pa. Super. 1975). Indeed, to require a party to track every piece of mail from inception to delivery is to place an undue burden upon such party, one that violates the very purpose of the mailbox rule.

As discussed in the Hearing Examiner’s Opinion and Recommendation, PSERS provided evidence that the Class T-F notices were initiated, printed and placed in the regular place of mailing. Such evidence is sufficient to entitle PSERS to assert the presumption under the mailbox rule. Contrary to Claimant’s assertion, PSERS was not required to provide evidence of whether Pitney Bowes Service, Inc., complied with its contract with the Commonwealth of Pennsylvania. Moreover, Pitney Bowes Service, Inc., is not an agent of PSERS and was equally available to both parties to call as a witness. Accordingly, the missing evidence rule is not applicable.

Claimant’s remaining arguments merely reargue issues previously raised in her brief. Such issues have been adequately addressed by the Hearing Examiner based on the record developed at the administrative hearing in this matter. Accordingly, the Board generally finds appropriate the Hearing Examiner’s Findings of Fact, Conclusions of Law, and Discussion, attached hereto, with the following modification to Finding of Fact

Number 10:

10. The October 23, 2011 Welcome Packet, the October 23, 2011 Class T-F membership election form, and the November 22, 2011 Class T-F Election follow-up letter were all mailed to Claimant by first class mail at her address of record with the School District at 726 Alder Street, Scranton, PA 18505. (PSERS-5, 6 and 7; PSERS-11; N.T. 50-51, 54)

With the above modification, we hereby adopt the Hearing Examiner's Opinion and Recommendation as our own, and accordingly:

IT IS HEREBY ORDERED that Claimant's request to elect Class T-F membership is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: October 7, 2014

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

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

In Re: :
Account of Angela Brigido : Docket No. 2012-10
Claim of Angela Brigido :

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EXECUTIVE OFFICE

OPINION AND RECOMMENDATION

Date of Hearing: August 22, 2013
Hearing Examiner: Suzanne Rauer, Esquire
For the Claimant: Elliot A. Strokoff, Esquire
For PSERS: Jennifer Mills, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board (Boârd) on an appeal filed by Angela Brigido (Claimant) from a decision of the Executive Staff Review Committee (Committee) of the Public School Employees' Retirement System (PSERS). Claimant was notified by correspondence from PSERS on December 31, 2011 that she was a Class T-E member and would remain so permanently because she did not elect Class T-F membership by the election deadline. Claimant appealed that decision, and received notice from the Committee that her request to change PSERS membership from Class T-E Locked to Class T-F was denied.

Claimant was notified of the Committee's decision by letter dated June 4, 2012. Claimant was further notified that if she wished to appeal the Committee's decision to the Board she must file an appeal and request a formal administrative hearing within 30 days of the date of the letter. On July 2, 2012, Claimant requested an extension of time to file an appeal and request a formal administrative hearing due to a personal emergency. That request was granted on July 17, 2012, and Claimant was ordered to file her appeal and request for administrative hearing on or before August 6, 2012. That deadline was later extended to August 23, 2012. Claimant filed her appeal and request for an administrative hearing via fax on August 21, 2012, with the original appeal and request for administrative hearing filed via mail on August 24, 2012. On September 5, 2012, Jennifer A. Mills, Assistant Counsel, filed an Answer with New Matter to Claimant's appeal on behalf of PSERS. Claimant filed a Reply to New Matter on October 3, 2012. An Entry of Appearance was filed on October 4, 2012 on behalf of Claimant by Elliot A. Strokoff, Esquire.

On July 30, 2013, Suzanne Rauer, Esquire was appointed by Secretary Jeffrey B. Clay to act as hearing examiner for Claimant's administrative hearing and to file a proposed opinion and recommendation with Secretary Clay, in accordance with 22 Pa. Code §201.11(a) and (b).

On July 30, 2013, a hearing notice was issued by PSERS scheduling the administrative hearing on Claimant's appeal for August 22, 2013 in Harrisburg, PA. The hearing was held as scheduled at 5 North Fifth Street, Harrisburg, PA. Elliot A. Strokoff, Esquire appeared at the hearing on behalf of Claimant, who was also present. Jennifer A. Mills, Esquire, appeared at the hearing on behalf of PSERS.

Following the close of testimony, the parties were granted the opportunity to file post-hearing briefs. On October 9, 2013, upon receipt of the hearing transcript, the hearing examiner issued a briefing schedule requiring Claimant to file her post hearing brief on or before November 8, 2013, and requiring PSERS to file its post hearing brief on or before December 9, 2013. Claimant's reply brief was due no later than December 24, 2013.

The matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant is a member of the Public School Employees' Retirement System (PSERS) by virtue of her employment as a teacher for the Scranton School District (School District) beginning on September 1, 2011. (N.T. 17; Claimant's Exhibit 1)¹
2. When Claimant entered employment with the School District on September 1, 2011, her address of record with the School District was [REDACTED], which was the residence of her cousin, [REDACTED], who was also a member of PSERS; Claimant relocated from Florida to accept the School District position and was living with [REDACTED] until she found housing in Scranton. (N.T. 14, 18, 20, 25, 27)
3. By correspondence dated October 23, 2011 and mailed to Claimant on October 24, 2011, PSERS notified Claimant that she qualified for membership in PSERS, and provided Claimant with a Welcome Packet which included an Active Member Handbook, multiple service form, PSERS Field Services Division form, and the beneficiary nomination form. (PSERS-5; N.T. 39, 49-50)
4. By correspondence dated October 23, 2011 and mailed to Claimant on October 24, 2011, PSERS notified Claimant that she was automatically enrolled as a Class T-E member, but could elect to become a Class T-F member by signing and returning to PSERS the enclosed *T-F Membership Class Election (PSRS-1318)* by December 16, 2011. (PSERS-6; N.T. 39, 50-51)
5. The October 23, 2011 Class T-F Election cover letter provided in pertinent part as follows:

Dear Ms. Angela Brigido:

Congratulations on becoming a member of the Public School Employees' Retirement System (PSERS).

¹ N,T, refers to Notes of Transcript from the administrative hearing held in this matter on August 22, 2013.

* * *

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 December 16, 2011. 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 of 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.

PSERS has included an informational handout, *Choosing Your Membership Class*, 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-E and Class T-F membership.**

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 take any action.
- If you wish to elect Class T-F, **PSERS must receive your form by December 16, 2011.** 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-6 (emphasis in original).

6. The *T-F Membership Class Election (PSRS-1318)* form likewise discussed the election and stated in pertinent part as follows:

PSERS must receive this form by December 16, 2011. Please note that the form must actually be received on or before the due date if you wish to elect Class T-F membership. A postmark on the envelope will not determine the filing date of your Class T-F election form. The form itself must actually be received by PSERS headquarters or at one of PSERS' regional offices on or before December 16, 2012. You may also hand deliver your Class T-F election form to PSERS headquarters in Harrisburg or at one of PSERS' regional offices on or before December 16, 2011. Be sure to obtain a date-stamped copy of the form from the PSERS office as proof of your filing. If this form is received by PSERS after the deadline, it will not be effective and you will permanently remain as a Class T-E member.

(PSERS-6)(emphasis in original)

7. PSERS is statutorily required to give new members 45 days² to make an election to Class T-F. (N.T. 53)

8. By correspondence dated November 22, 2011, PSERS again advised Claimant via a Class T-F Election follow-up letter that Claimant had until December 16, 2011 to elect to become a Class T-F member. (PSERS-7, PSERS-8; N.T. 51-52)

9. The November 22, 2011 Class T-F Election follow-up letter stated in pertinent part as follows:

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

² Because PSERS understands that there is a time lag between generation and mailing of the Class T-F election form to the member, and additional lag time to deliver the election form from the member to PSERS, PSERS adds five days to the beginning of the process and five days to the end of the process so that the member actually has 55 days to make an election to Class T-F. (N.T. 53)

like to change your membership to Class T-F, you must do so by December 16, 2011.

(PSERS-7)

10. The October 23, 2011 Welcome Packet, the October 23, 2011 Class T-F membership election form, and the November 22, 2011 Class T-F Election follow-up letter were all mailed to Claimant at her address of record with the School District at [REDACTED]

[REDACTED]. (PSERS-5, 6 and 7; PSERS-11)

11. By correspondence dated December 31, 2011, PSERS advised Claimant that her "membership class with PSERS will permanently remain as Class T-E because you did not elect Class T-F membership by the election deadline." (PSERS-9; N.T. 53-54)

12. The December 31, 2011 correspondence from PSERS was mailed to Claimant at her address of record with the School District at [REDACTED]. (PSERS-9; N.T. 54)

13. The October 23, 2011 Welcome Packet, the October 23, 2011 Class T-F membership election form, the November 22, 2011 Class T-F Election follow-up letter, and the December 31, 2011 were all produced in the normal course of PSERS business in accordance with PSERS' standard business practice and placed in the regular place of mailing. (N.T. 44-45, 49, 52-53, 97-99; PSERS-1, 3, 4, 8)

14. The October 23, 2011 Welcome Packet, the October 23, 2011 Class T-F membership election form, the November 22, 2011 Class T-F Election follow-up letter, and the December 31, 2011 were not returned to PSERS from the United States Postal Service as undelivered or undeliverable. (N.T. 57)

15. On February 15, 2012, Claimant moved to an apartment at [REDACTED]
[REDACTED], where she continued to reside at the time of the hearing in this matter, but

the School District did not report her change of address to PSERS until June 28, 2012. (N.T. 19; PSERS-11)

16. Claimant testified that she did not receive October 6, 2011 correspondence from PSERS verifying her personal information, or the October 23, 2011 Welcome Packet, the October 23, 2011 Class T-F membership election form from PSERS, or the November 22, 2011 Class T-F Election follow-up letter sent from PSERS to the [REDACTED] address. (Claimant 1; N.T. 19-20, 21)

17. Claimant testified that she did receive the December 31, 2011 Class T-E determination letter from PSERS, as well as credit card bills, Christmas cards, and her Pennsylvania driver's license that were all addressed to the [REDACTED] address. (N.T. 21-22, 25, 26)

18. By letter dated January 24, 2012, Claimant appealed the December 31, 2011 determination letter to the Committee. (Claimant 3)

19. By correspondence dated June 4, 2012, PSERS' Executive Director notified Claimant that the Committee denied her request to elect Class T-F membership because she did not file an election by December 16, 2011. (Claimant 4; PSERS-12)

20. Claimant was advised of her right to appeal this determination to the Public School Employees' Retirement Board ("Board"). (Claimant 4; PSERS-12)

21. On August 24, 2012, PSERS received Claimant's appeal and request for an administrative hearing. (PSERS-13)

22. On September 5, 2012, PSERS filed its Answer and New Matter to Claimant's appeal and request for administrative hearing. (PSERS-14)

23. On October 4, 2012, Claimant, through counsel, filed a reply to PSERS' New Matter. (PSERS-15)

24. An administrative hearing on Claimant's appeal was held on August 22, 2013 before Suzanne Rauer, Esquire. (Transcript, *passim*)

25. Claimant and counsel were present for her hearing, and Claimant had an opportunity to be heard; to cross-examine witnesses; to make a closing statement for the record; and, to file a post-hearing brief in support of her appeal. (Transcript, *passim*).

CONCLUSIONS OF LAW

1. PSERS' members have only those rights recognized by statute and none beyond. *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).
2. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991)
3. Claimant was afforded an opportunity to be heard in connection with her appeal. (Findings of Fact Nos. 18-25)
4. 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).
5. Such Class 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 forty-five (45) days of notification by PSERS³. 24 Pa.C.S. §§ 8305(e) and 8305.2(b).⁴
6. If a member fails to file the election in time, the Retirement Code directs that "the member shall never be able to elect Class T-F service[.]" 24 Pa.C.S. § 8305.2(d).
7. In the absence of specific statutory notice provisions, what is required of a governmental unit is that which is sufficient to provide the person to be notified with actual or constructive notice of his or her rights. *Higgins v. Public School Employees' Retirement System*, 736 A.2d 745 (Pa. Cmwlth. 1999).

³ PSERS is the administrative arm of the Board. See 24 Pa.C.S. § 8521(f) ("By the name of 'The Public School Employees' Retirement System' or 'The Public School Employees' Retirement System' all of the business of the system shall be transacted . . .") and 71 P.S. § 72 ("The heads of the . . . several independent administrative boards . . . shall, subject to the approval of the Executive Board, establish such bureaus or divisions in their respective departments, boards, or commissions, as may be required for the proper conduct of the work of such departments, boards or commissions.")

⁴ Class T-E membership provides a benefit accrual rate of 2% and a contribution rate of at least 7 1/2%. Class T-F membership provides a benefit accrual rate of 2.5% and a contribution rate of at least 10.30%. 24 Pa.C.S. § 8102 (definitions of "basic contribution rate" and "standard single life annuity").

8. Notice sent by first class mail is deemed to be sufficient notice under the law. *Id.*
9. PSERS notified Claimant of her right to elect Class T-F membership. (Findings of Fact Nos. 4-22)
10. Claimant has failed in her burden to establish that she did not receive actual notice of her right to elect Class T-F membership. (Findings of Fact Nos. 4-22)
11. Claimant is not entitled to elect Class T-F membership under the Retirement Code in that she did not file her election within forty-five (45) days from receipt of notice. (Findings of Fact Nos. 4-22)

DISCUSSION

It is well settled in Pennsylvania that Claimant bears the burden of establishing the facts necessary to sustain her claim. See *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991). While a member is entitled to a liberal construction of the Retirement Code, she has only those rights created by the retirement statutes and none beyond. *Burriss v. State Employees' Retirement Board*, 745 A.2d 704 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992); *Hughes v. Public School Employees' Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 1995), *allocator denied*, 668 A.2d 1139 (Pa. 1996). The agency must construe its enabling statute according to its plain meaning and in such a manner as to give effect to all of its provisions. 1 Pa. C.S. §1921(a), (b). PSERS has no authority to grant rights beyond those specifically set forth in the Retirement Code. *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Cmwlth. 2001).

The Retirement Code provides 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 forty-five (45) days of notification by PSERS. 24 Pa.C.S. §§ 8305(e) and 8305.2(b). If a member fails to file the election within the time period specified, the Retirement Code directs that "the member shall never be able to elect Class T-F service[.]" 24 Pa.C.S. § 8305.2(d). The relevant provisions of the Retirement Code are as follows:

§ 8305. Classes of service

* * *

(d) Class T-E membership.--Notwithstanding any other provision, a person who first becomes a school employee and an active member, or a person who first becomes a multiple service member who is a State employee and a member of the State Employees' Retirement System, on or after the effective date of this subsection shall be classified as a Class T-E member upon payment of regular member contributions and the shared-risk contributions.

(e) Class T-F membership.--Notwithstanding any other provision, a person who first becomes a school employee and an active member, or a person who first becomes a multiple service member who is a State employee and a member of the State Employees' Retirement System, on or after the effective date of this subsection and who is eligible to become a Class T-E member shall have the right to elect into Class T-F membership, provided the person elects to become a Class T-F member pursuant to section 8305.2 (relating to election to become a Class T-F member), upon written election filed with the board and payment of regular member contributions and the shared-risk contributions.

§ 8305.2. Election to become a Class T-F member

(a) General rule.--A person who first becomes a school employee and an active member, or a person who first becomes a multiple service member who is a State employee and a member of the State Employees' Retirement System, on or after the effective date of this subsection and who is eligible to become a Class T-E member may elect to become a member of Class T-F.

(b) Time for making election.--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. A school employee who is eligible to elect to become a Class T-F member who begins USERRA leave during the election period without having elected Class T-F membership may make the election within 45 days after being reemployed from USERRA leave.

(c) Effect of election.--An election to become a Class T-F member shall be irrevocable and shall commence from the original date of eligibility. A member who elects Class T-F membership shall receive Class T-F service credit on any and all future service, regardless of whether the member terminates service or has a break in service.

(d) Effect of failure to make election.--If a member fails to timely file an election to become a Class T-F member, then 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.

At the hearing in this matter, there was extensive testimony regarding the general business procedures employed in contacting PSERS members in general, as well as testimony regarding those same procedures as they applied to correspondence sent by PSERS to Claimant at her [REDACTED] address. Without belaboring the extensive testimony elicited about how PSERS mailings to new PSERS members are initiated, generated, printed and mailed through PSERS' V3 (the Benefit Administration System), Cypress (software product) and Gunther (post-processing equipment), the evidence and testimony clearly show that a PSERS Welcome Packet, which included a cover letter, a member handbook, multiple service form, PSERS Field Services Division form, and beneficiary nomination form, were initiated, prepared and printed for Claimant on October 23, 2011 and subsequently mailed to Claimant at her [REDACTED] address on October 24, 2011. The testimony and evidence also shows that the Class T-F membership election form was initiated, prepared and printed for Claimant on October 23, 2011 and subsequently mailed to Claimant at her [REDACTED] address on October 24, 2011. The Class T-F membership election form is mailed separately from the Welcome Packet because the Class T-F election process is "a very short and very precise time frame, and we felt that it needed to be called out so that it was brought to the member's attention more than just being an insert inside of a flat envelope full of papers." (N.T. 50-51) Deborah L. Garraway, Director of Information Management for PSERS, testified that each mailing was prepared in the normal course of PSERS business in accordance with PSERS' standard business practice and placed in the regular place of mailing. Ms. Garraway further testified that neither the October 23, 2011 Welcome Packet nor the October 23, 2011 Class T-F membership election form, were returned to PSERS from the United States Postal Service as undelivered or undeliverable.

Ms. Garraway also testified that a follow-up letter was initiated, prepared and printed by PSERS for Claimant on November 22, 2011 and mailed to Claimant at her [REDACTED] address, in that PSERS had not received a response from Claimant regarding the Class T-F election. This is a courtesy extended to all new PSERS members as a reminder so that they do not miss the 45 day Class T-F election time frame. The November 22, 2011 follow-up correspondence was prepared in the normal course of PSERS business in accordance with PSERS' standard business practice. The Class T-F election follow-up letter mailed to Claimant at her [REDACTED] address was not returned to PSERS from the United States Postal Service as undelivered or undeliverable. Then, on December 31, 2011, PSERS sent correspondence to Claimant at her [REDACTED] address, advising her that her membership class with PSERS will permanently remain as Class T-E because she did not elect Class T-F membership within the 45 day time frame provided in the statute. The December 31, 2011 Class T-E membership letter was prepared in the normal course of PSERS business in accordance with PSERS' standard business practice.

Fred Hechler, PSERS' former mailroom supervisor and post-processing mail and imaging manager, testified that once a document was printed and placed in an envelope with postage through Gunther, the envelope is placed in mail trays and picked up by Pitney Bowes Service, Inc. to be transferred to the mail distribution center to be sorted out by zip code and mailed the same day. Mr. Hechler testified that Pitney Bowes Service, Inc. is a vendor contracted by the Commonwealth of Pennsylvania, on behalf of all Commonwealth agencies, to pick up mail and drop it off at the mail distribution center.

Claimant testified that she did not receive October 6, 2011 correspondence from PSERS verifying her personal information as reported by the School District, which was sent to her

██████████ address. Claimant also testified that she did not receive the October 23, 2011 Welcome Packet from PSERS, the October 23, 2011 Class T-F membership election form from PSERS, or the November 22, 2011 Class T-F Election follow-up letter sent from PSERS to her ██████████ address. Claimant testified that she did receive the December 31, 2011 Class T-E determination letter from PSERS that was sent to the ██████████ address, and that she did receive credit card bills, Christmas cards, and her Pennsylvania driver's license that were all addressed to the ██████████ address.

Claimant first argues that she did not receive notification of her Class T-F membership eligibility from the Public School Employees' Retirement Board, as required under 24 Pa.C.S.A. §8505(1), which states as follows:

§ 8505. Duties of board regarding applications and elections of members

* * *

(l) Notification of Class T-F membership.--The board shall inform any eligible school employee of the right to elect Class T-F membership.

Claimant argues that because the notice for Class T-F membership which she claims not to have received came from PSERS (the Public School Employees' Retirement System) instead of the Public School Employees' Retirement Board, Claimant "never received notification of her Class T-F membership election opportunity by the Public School Employees' Retirement Board, as required by 24 Pa.C.S. §8305.2" and 24 Pa.C.S. §8505. (Brief on Behalf of Claimant at p. 5) Given, however, that PSERS is the administrative arm of the Public School Employees' Retirement Board (*see* 24 Pa.C.S. §8521(f)), PSERS is correct in alluding to Claimant's argument that such notification must come from the Board as a red herring. (Public School Employees' Retirement System's Brief to the Hearing Examiner at p. 10, fn. 2) Accordingly, that argument is deemed specious and will not be considered further.

Claimant further argues, citing *Beard v. Motorists Mutual Ins. Co.*, 9 Pa. D. & C. 321, 326 (Pa. Ct. of Common Pleas 1978)(internal citations omitted), that Pennsylvania recognizes the Mailbox Rule, which provides a presumption that a letter properly mailed was received by the addressee may be rebutted by evidence showing that the letter was in fact not received. Claimant further cites *Geise v. Nationwide Life and Annuity Co. of America*, 939 A.2d 409, 425 (Pa. Super. 2007), citing *Commonwealth v. Thomas*, 814 A.2d 754, 758-59 (Pa. Super. 2002), for the proposition that “[a] presumption that a letter was received cannot be based upon a presumption that the letter was properly mailed. A presumption cannot be based upon a presumption.” Claimant argues that PSERS only presented testimony as to how letters in general were processed, and how Claimant’s October 23, 2011 Class T-F election notice and the November 22, 2011 Class T-F election reminder notice were supposed to be internally processed and then picked up by an outside contractor, Pitney Bowes Service, Inc., for mailing. Claimant argues that PSERS cannot benefit from the presumption under the Mailbox Rule because such presumption is based on a presumption that Pitney Bowes Services, Inc. mailed the Class T-F Election Packet, and that that this is not adequate to meet the requirements of the Mailbox Rule. Claimant further argues that Claimant’s uncontradicted evidence that she did not receive those PSERS notices regarding Class T-F election refutes any presumption that she received the notices.

On the other hand, PSERS argues that, in the absence of specific statutory notice provisions, what is required of a governmental unit is that which is sufficient to provide the person to be notified with actual or constructive notice of his or her rights. *Higgins v. Public School Employes’ Retirement System*, 736 A.2d 745 (Pa. Cmwlth. 1999). Notice requirements are satisfied under the Mailbox Rule when proper notice of the action is mailed to an interested

party's last known address. *Milford Twp. Board of Supervisors v. Department of Environmental Resources*, 644 A.2d 217, 218 (Pa.Cmwlth. 1994). Notice sent by first class mail is deemed to be sufficient notice under the law to satisfy the notice requirement for PSERS members. *Higgins*, supra; see also, *Tyson v. Public School Employes' Retirement System*, 737 A.2d 325 (Pa. Cmwlth. 1999).

The Mailbox Rule provides that the fact of depositing in the mail a properly addressed, prepaid letter, raises a rebuttable presumption that it reached its destination by due course of mail. *Whitmore v. Dwelling House Ins. Co.*, 23 A. 1131 (Pa. 1892); *Beeman v. Supreme Lodge*, 64 A. 792 (Pa. 1906); *In re Cameron Estate*, 130 A.2d 173 (Pa. 1957); *Sheehan v. Workmen's Compensation Appeal Board (Supermarkets General)*, 600 A.2d 633 (Pa. Cmwlth. 1991), appeal denied, 609 A.2d 170 (Pa. 1992); *Chartiers Industrial and Commercial Development Authority v. The Allegheny County Bd. of Property Assessment*, 645 A.2d 944, 946 (Pa.Cmwlth. 1994). As the Commonwealth Court explained, however, "evidence of actual mailing is not required." *Commonwealth Dep't of Transp. v. Brayman Constr. Corp.*, 513 A.2d 562, 566 (Pa. Cmwlth. 1986) Under the Mailbox Rule, in order for the presumption of receipt of a letter to be triggered, "the party who is seeking the benefit of the presumption must adduce evidentiary proof that the letter was signed in the usual course of business and placed in the regular place of mailing." *Commonwealth of Pennsylvania v. Thomas*, 814 A.2d 754 (Pa. Super. 2002); *Commonwealth of Pennsylvania, Department of Transportation v. Brayman Construction Corporation*, 513 A.2d 562 (Pa. Cmwlth. 1986) (emphasis added). The Superior Court has held that "when a letter has been written and signed in the usual course of business and placed in the regular place of mailing, evidence of the custom of the establishment as to the mailing of such letters is

receivable as evidence that it was duly mailed.” *Christie v. Open Pantry Food Marts Inc. of Delaware Valley*, 352 A.2d 165, 166-67 (Pa. Super. 1975).

PSERS has more than adequately and painstakingly proven that each of the Class T-F election notices were initiated, generated, printed and mailed to Claimant at her address of record with PSERS, the [REDACTED] address, in a timely fashion and in the normal course of PSERS business in accordance with PSERS’ standard business practice and placed in the regular place of mailing. Neither of the Class T-F election notices was returned to PSERS as undeliverable. Claimant presented no evidence that Pitney Bowes Service, Inc. breached its contract with the Commonwealth by not delivering either the October 23, 2011 Class T-F election form or the November 22, 2011 follow-up reminder letter to the distribution center for mailing. To require that a Commonwealth agency be required to track every piece of mail from inception to delivery is to place an undue burden upon the Commonwealth, one that should not be imposed. PSERS has more than adequately proven its compliance with the Mailbox Rule in this matter, and should not be held to any higher standard.

Claimant has failed to sustain her burden of proving that the October 23, 2011 and November 22, 2011 notices for Class T-F election were not generated and mailed in the normal course of PSERS business. Accordingly, the following recommendation will be made to the Board:

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re: :
Account of Angela Brigido : Docket No. 2012-10
Claim of Angela Brigido :


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PSERB
EXECUTIVE OFFICE

RECOMMENDATION

AND NOW, this 3rd day of April, 2014, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Examiner for the Public School Employees' Retirement System recommends that Claimant's request to elect Class T-F membership after the 45-day statutory deadline be **DENIED**.


Suzanne Rauer
Hearing Examiner

Dated: April 3, 2014