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

IN RE: ACCOUNT OF ANDREW LYLE
DOCKET NO. 2014-18
CLAIM OF ANDREW LYLE

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 Andrew Lyle's ("Claimant") Appeal and Request for Administrative Hearing requesting to elect Class T-F membership after the statutory deadline 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 December 9, 2015, 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 December 9, 2015, 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 January 11, 2016. See 1 Pa. Code §§ 31.11, 31.12 and 33.34. Claimant did not file a response to the motion.

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).

Because Claimant did not respond and, therefore, has not 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, 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 elect Class T-F membership after the statutory deadline.

FINDINGS OF FACT

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

1. Claimant was first enrolled in PSERS on September 13, 2013, by virtue of his employment with the Pittsburgh School District. PSERS-1 and -2.

2. By letter dated October 2, 2013, PSERS advised Claimant that the Pittsburgh School District enrolled Claimant in PSERS as a full-time hourly employee. PSERS-1.

3. Beginning in October 2013, the Pittsburgh School District began deducting member contributions from Claimant's pay and remitted such contributions to PSERS on November 6, 2013. (Official Notice, PSERS' Records.)¹

4. By letter dated November 10, 2013, PSERS mailed Claimant a welcome packet stating, among other things, "Welcome to the Public School Employees' Retirement System (PSERS). Based on the information supplied by your employer(s), you have now qualified for membership in PSERS." PSERS-2.

5. On the same date, PSERS mailed Claimant a *T-F Membership Class Election* form, including a cover letter dated November 10, 2013, and an informational page entitled, *Choosing Your Membership Class*. PSERS-3 and PSERS-4.

6. The cover letter to the *T-F Membership Class Election* form provided, in pertinent part, as follows:

Dear Mr. Andrew Lyle:

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

* * *

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.

¹ The Board can take official notice of such matters that might be judicially noticed by the courts or of matters that the agency may, by reason of its function, be an expert. 1 Pa.Code § 35.173. Here, the Board can properly take judicial notice of its own records of when the Pittsburgh School District began remitting member contributions to PSERS on behalf of Claimant.

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 January 4, 2014. 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 January 4, 2014.** 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.

If you have any questions, please contact the PSERS Member Service Center by calling toll-free 1-888-773-7748 (1-888-PSERS4U). . . For more general information, you may visit PSERS online at: www.psers.state.pa.us.

PSERS-3 (emphasis in original).

7. The *T-F Membership Class Election* form likewise discusses the election

and explains:

PSERS must receive this form by January 4, 2014. 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 January 4, 2014. 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 January 4, 2014. 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.

The decision to elect a Class T-F membership instead of remaining as a Class T-E member is irrevocable.

PSERS-4 (emphasis in original).

8. Because Claimant did not respond within thirty (30) days, PSERS mailed Claimant a follow-up letter on December 11, 2013, and another *T-F Membership Class Election* form reminding Claimant of the deadline to elect Class T-F membership. The reminder letter provided, 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 like to change your membership to Class T-F, you must do so by January 4, 2014. 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.

* * *

If you have any questions, please contact the PSERS Member Service Center by calling toll-free 1-888-773-7748 (1-888-PSERS4U). . . For more general information, you may visit PSERS online at: www.psers.state.pa.us.

PSERS-5.

9. By letter dated January 18, 2014, 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-6.

10. On February 14, 2014, Claimant appealed PSERS' determination that he would permanently remain a Class T-E member to the Executive Staff Review Committee ("ESRC"). PSERS-7.

11. Claimant admits receiving the November 10, 2013, Welcome Packet, T-F election cover letter and *T-F Membership Class Election* form, and the December 11, 2013, follow-up letter, but did not believe he could elect Class T-F membership because his employer told him that he was not entitled to any "benefits" as a substitute cleaner, to wit:

I was hired as a substitute cleaner in September of 2013 by the Pittsburgh Board of Education (PBOE). It was made very clear at that time that I was hired on as a substitute cleaner with **no benefits** until I was put on regular full time employee.

In November, I received a packet containing information on multiple service membership and naming a beneficiary. Since I was to receive no benefit, which I thought included retirement benefits, and I was never told to the contrary that I was entitled to retirement benefits, I disregarded the letter.

I received a letter in late December, telling me that I had until early January to designate which retirement class I wished to be place in. Again, even after making some inquiries I did not believe it applied to me since I was told I had no benefits and would not receive any until I was hired full time.

In January, I received a letter telling me that I was automatically enrolled in a class T-E retirement package do (sic) to a failure to reply. This is not what I wanted when the time came to enroll in PSERS, which I was led to believe would not be until I was hired full time. I then read that it was past the date in which I could change this and I was locked in to the T-E plan and it couldn't be changed.

(PSERS-7) (emphasis in original).

12. Despite the apparent conflict between the aforementioned communications from PSERS and what Claimant believed, Claimant did not contact PSERS to confirm or correct his enrollment with PSERS as a Class T-E member or the January 4, 2014, election deadline.

13. By letter dated October 17, 2014, the ESRC denied Claimant's request to change his PSERS membership from Class T-E to Class T-F, explaining as follows:

You were enrolled as a Class T-E member of PSERS in September 2013. You had the choice to remain a Class T-E member or to file a *T-F Membership Class Election* form by January 4, 2014. PSERS did not receive a completed *T-F Membership Class Election* form from you. PSERS does not have the authority to permit a member to elect Class T-F membership after the statutorily prescribed deadline. You will, therefore, permanently remain a Class T-E member.

PSERS-8.

14. Claimant timely appealed the ESRC's decision and requested an administrative hearing asserting that:
 - a. Mr. Thomas Meider, district manager, stated: "substitute workers receive no benefits."
 - b. Annemarie Reckhouse of Human Resources, did not provide me with any written material concerning retirement eligibility or options when I filled out the employment paperwork. She stated the duties of the position for which I was being hired, and that no benefits, vacation days, sick days were available until full employment was achieved.
 - c. The Pittsburgh Board of Education failed to provide information as to how to access online payroll information until late January, 2014. Therefore, the retirement deduction from my pay was unknown.
 - d. Inquiries to several people, including my immediate supervisors, district managers, and Human Resources failed to provide answers as to whether retirement benefits were in fact available to substitute employees.

PSERS-9.

15. On December 2, 2014, PSERS filed its Answer to Claimant's appeal and request for an administrative hearing.
16. On March 30, 2015, Jennifer A. Mills, Esquire, filed a Substitution of Counsel Without Leave of Court, entering her appearance on behalf of PSERS.
17. On December 9, 2015, PSERS filed a Motion for Summary Judgment.
18. Claimant did not file a response to PSERS' motion.
19. 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).² 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).

In September 2013, Claimant was reported to PSERS by the Pittsburgh School District as a full-time hourly employee. PSERS-1. See 24 Pa.C.S. § 8301 (a)(2) (PSERS membership is mandatory for, among others, school employees who are employed on a per diem or hourly basis for 500 hours or more during any fiscal year). On November 6, 2013, the Pittsburgh School District remitted member contributions to PSERS from Claimant's pay. Accordingly, by letter dated November 10, 2013, PSERS mailed Claimant a welcome packet that included a cover letter notifying him of his PSERS membership:

Welcome to the Public School Employees' Retirement System (PSERS). Based on the information supplied by your employer(s), you have now qualified for membership in PSERS. As a new member to PSERS, we would like to inform you of the benefits that you will receive so that you can make informed decisions about your retirement account. At this time, your membership will require you to take some action to formalize the establishment of your account.

PSERS-2 (emphasis added). On that same day, PSERS mailed Claimant a *T-F*

Membership Class Election form and cover letter. PSERS-3. The cover letter to the *T-*

² 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").

F Membership Class Election form congratulated Claimant on becoming a PSERS member, explained the differences between Class T-E and Class T-F membership, and notified Claimant of the January 4, 2014, deadline to elect Class T-F membership:

Dear Mr. Andrew Lyle:

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

* * *

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 January 4, 2014. 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.

* * *

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-3 (bold emphasis in original; underlined emphasis added). The enclosed *T-F Membership Class Election* form also notified Claimant that PSERS “must receive this form by January 4, 2014.” PSERS-4. Both cover letters included PSERS’ contact information for members with questions.

Thirty days later, by letter dated December 11, 2013, PSERS mailed a follow-up letter to Claimant reminding him of the January 4, 2014, deadline to elect Class T-F membership and again explained the differences between Class T-E and Class T-F membership:

Dear Mr. Andrew Lyle:

* * *

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 would like to change your membership to Class T-F, you must do so by January 4, 2014.

* * *

If you retire at your normal retirement age, your benefit as a Class T-E member will be your years of services times your final average salary times a 2 percent multiplier. Your employee contributions are subject to change every three years but will be not less than 7.5 percent nor more than 9.5 percent, based on the investment performance of the Retirement Fund.

If you sign and file the Class T-F membership election, 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.

PSERS-5 (emphasis in original). The letter also contained PSERS' contact information.

Claimant requests the opportunity to elect Class T-F membership now despite the fact that he did not elect Class T-F membership within forty-five (45) days from notification that he was eligible to elect. Claimant does not contend that he did not receive notice. On the contrary, Claimant admits to receiving each of the mailings sent by PSERS about his PSERS' membership and his right to elect Class T-F membership. Claimant's sole excuse for not filing timely is that employees of the school district gave him "inaccurate and incomplete information regarding [his] membership eligibility." PSERS-9. Claimant asserts that "[i]nquiries to several people, including [his] immediate

supervisors, district managers, and Human Resources failed to provide answers as to whether retirement benefits were in fact available to substitute employees.” *Id.*

Claimant further contends that he “was never told to the contrary that [he] was entitled to retirement benefits [so he] disregarded the [Class T-F] letter.” PSERS-7. As PSERS correctly asserts, Claimant’s argument is a request for *nunc pro tunc* relief, and is only available if the untimely filing was the result of fraud, a breakdown in the courts, or negligence on the part of a third party. *Forman v. Public School Employees’ Retirement Board*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001), citing *Bass v. Commonwealth*, 401 A.2d 1133 (Pa. 1979).

Section 8305.2(b) provides that 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). If a member fails to do so, the Retirement Code unequivocally states 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[.]” 24 Pa.C.S. § 8305.2(d) (emphasis added). Claimant was notified of his opportunity to elect Class T-F membership and the associated January 4, 2014, deadline, and he failed to make the election in a timely manner. He did not request Class T-F membership with PSERS until February 14, 2014. *See* PSERS-7.

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. *Harasty v. Public Sch. Employees’ Ret. Bd.*, 945 A.2d 783, 788 (Pa. Cmwlth. 2008); *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). The Commonwealth Court held in *Harasty* that the Retirement Code does not permit the Board to enlarge a statutory time frame set forth in the Retirement Code; nor does the Board have the authority to grant *nunc pro tunc* relief for class elections.³ 945 A.2d at 788. Such action

³ Sections 8305.1(b) and (d) of the Retirement Code, 24 Pa.C.S. §8305.1, are similar to Sections 8305.2(b) and (d):

* * *

(b) *Time for making election.* --The member must elect to become a Class T-D member by filing a written notice with the board on or before December 31, 2001,

would be tantamount to circumventing the express language of the Retirement Code, which the Board cannot do. *Dowler v. Public Sch. Employes' 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.

Even if the Board could entertain Claimant's request, Claimant has not established fraud, a court breakdown or third-party negligence. The Pittsburgh School District enrolled Claimant in PSERS as a full-time hourly employee in September 2013 and began withholding member contributions from his pay in October 2013. Such actions of the Pittsburgh School District contrast with Claimant's allegations. More importantly, Claimant was told on four separate occasions that he was a member of PSERS and had a right to elect Class T-F membership. See PSERS-1, PSERS-2, PSERS-3, PSERS-4, and PSERS-5. Despite the notifications, Claimant did not elect Class T-F membership on or before January 4, 2014, nor did Claimant contact PSERS about the notifications he received.

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.

or before the termination of school service or State service as applicable, whichever first occurs.

* * *

(d) *Effect of failure to make election.* --If the member fails to timely file an election to become a Class T-D member, then all of the member's Class T-C school service shall be credited as Class T-C service, and said service shall not be eligible for Class T-D service credit upon termination of service and subsequent employment as an active member.

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

IN RE: ACCOUNT OF ANDREW LYLE
DOCKET NO. 2014-18
CLAIM OF ANDREW LYLE

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: June 10, 2016

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