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

IN RE: ACCOUNT OF ELIJAH B. SKINNER
DOCKET NO. 2016-11
CLAIM OF ELIJAH B. SKINNER

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 Elijah B. Skinner'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 August 11, 2017, and served a copy by First Class Mail on Claimant's counsel as required by the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 33.32, 33.35-33.36. By letter dated August 11, 2017, PSERS notified Claimant's counsel that Claimant had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. On September 11, 2017, Claimant, through counsel, filed 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).

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).

In responding to PSERS’ Motion, Claimant asserts there is an issue of fact as to whether sufficient notice of Class T-F election was provided to Claimant. Claimant does not dispute that PSERS sent notice of Class T-F election and the statutory election deadline of November 13, 2015 to Claimant at his address on file with both PSERS and Claimant’s employer, the Mifflin County School District (“Mifflin County SD”), by letters dated September 20, 2015 and October 20, 2015. Claimant also does not dispute that his mother received the letters at that address before the deadline to elect Class T-F membership. Rather, Claimant states that he did not receive sufficient notice of his right to elect Class T-F membership because: (1) the Mifflin County SD failed to provide him with Class T-F election notice; and (2) the Mifflin County SD failed to timely notify PSERS of his address change.

A review of the record, however, establishes that there are no material facts in dispute and that the issue before the Board is one of law, not fact. 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 May 2013, Claimant was first enrolled in PSERS through his part-time, hourly employment with the Williamsburg Area School District, but he did not qualify for membership with PSERS during the 2013-2014 or 2014-2015 school years. (PSERS' Motion for Summary Judgment at ¶ 1; Claimant's Response to PSERS' Memorandum of Facts at ¶ 1)

2. All correspondence that PSERS sent to Claimant between May 2013 and December 2015 was mailed to Claimant at the address [REDACTED] (PSERS-1 at ¶ 6; PSERS-2 at ¶ 6)

3. Between May 2013 and December 2015, Claimant received correspondence from PSERS at [REDACTED] including correspondence informing him of a return of contributions, contract record confirmation letters, Form 1099-Rs, and statements of account. (PSERS-1 at ¶ 5, ¶ 6; PSERS-2 at ¶ 5, ¶ 6)

4. At the beginning of the 2015-2016 school year, Claimant began working for the Mifflin County SD as a full-time, salaried teacher and he first qualified for PSERS membership as a Class T-E member. (PSERS-1 at ¶ 8; PSERS-2 at ¶ 8)

5. Prior to the start of the 2015-2016 school year, Claimant informed the Mifflin County SD that his home address was [REDACTED] (PSERS-1 at ¶ 2; PSERS-2 at ¶ 2)

6. In July 2015, the Mifflin County SD enrolled Claimant with PSERS and provided PSERS with Claimant's home address, which converted in PSERS' computer system to [REDACTED] (PSERS' Motion for Summary Judgment at ¶ 6; Claimant's Response to PSERS' Memorandum of Facts at ¶ 6)

7. The addresses [REDACTED] and [REDACTED] [REDACTED] are for the same residence (hereinafter "[REDACTED]"), and both addresses are valid with the United States Post Office. (PSERS-1 at ¶ 3, ¶ 4; PSERS-2 at ¶ 3, ¶ 4)

8. At all relevant times, Claimant's mother has resided at [REDACTED] (PSERS-1 at ¶ 7; PSERS-2 at ¶ 7)

9. At all relevant times, Claimant did not reside at [REDACTED] (Claimant's Response to PSERS' Memorandum of Facts at ¶ 8 and ¶ 20)

10. By correspondence dated September 20, 2015, PSERS mailed for the first time a *T-F Membership Class Election Form*, a *Choosing Your Membership Class* handout, an "IMPORTANT: Decision Required!" handout, and a cover letter addressed to Claimant at [REDACTED] (PSERS-1 at ¶ 9; PSERS-2 at ¶ 9; PSERS-3; Claimant's Response to PSERS' Memorandum of Facts at ¶ 10)

11. The September 20, 2015 cover letter from PSERS stated as follows:

Dear Mr. Elijah Skinner:

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 November 13, 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 November 13, 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-3)

12. The September 20, 2015 *T-F Membership Class Election* form warned "**PSERS must receive this form by November 13, 2015.**" (PSERS-3)

13. The envelope for the September 20, 2015 *T-F Membership Class Election* form correspondence had the following warning printed on the outside: "TIME SENSITIVE-IMPORTANT BENEFIT INFORMATION." (PSERS-4)

14. The September 20, 2015 *T-F Membership Class Election Form* and the cover letter were received by Claimant's mother in September 2015 at [REDACTED] (PSERS-1 at ¶ 10; PSERS-2 at ¶ 10)

15. Claimant did not personally receive the September 20, 2015 *T-F Membership Class Election Form* and the cover letter in September 2015. (Claimant's Response to PSERS' Memorandum of Facts at ¶ 9, ¶ 11, and ¶ 13)

16. By letter dated October 20, 2015, PSERS mailed a follow-up letter addressed to Claimant at [REDACTED] reminding him of the deadline to elect Class T-F membership:

Dear Mr. Elijah Skinner:

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 November 13, 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 November 13, 2015.

* * *

(PSERS-1 at ¶ 11; PSERS-2 at ¶ 11; PSERS-5)

17. PSERS' October 20, 2015 letter was received by Claimant's mother at [REDACTED] prior to October 30, 2015. (PSERS-1 at ¶ 12; PSERS-2 at ¶ 12)

18. Claimant did not personally receive the October 20, 2015 cover letter in October 2015. (Claimant's Response to PSERS' Memorandum of Facts at ¶ 14 and ¶ 16)

19. On October 30, 2015, Claimant first notified the Mifflin County SD that his address had changed from [REDACTED] to [REDACTED]

(PSERS-1 at ¶ 13; PSERS-2 at ¶ 13; Claimant's Response to PSERS' Memorandum of Facts at ¶ 17, ¶ 21, and ¶ 22)

20. The Mifflin County SD did not provide Class T-F election notice to Claimant. (Brief of Claimant in Support of Response to PSERS' Motion for Summary Judgment at p. 4)

21. PSERS provided Class T-F election notice to Claimant before November 13, 2015. (PSERS-3 and PSERS-5)

22. Claimant did not elect Class T-F membership on or before November 13, 2015. (PSERS-1 at ¶ 14; PSERS-2 at ¶ 14)

23. By correspondence dated November 28, 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-1 at ¶ 15; PSERS-2 at ¶ 15; PSERS-6)

24. PSERS' November 28, 2015 letter was received by Claimant's mother at [REDACTED] (PSERS-1 at ¶ 16; PSERS-2 at ¶ 16)

25. On December 3, 2015, the Mifflin County SD changed Claimant's address with PSERS to [REDACTED] (PSERS-1 at ¶ 17; PSERS-2 at ¶ 17)

26. On December 18, 2015, Claimant reviewed PSERS' September 20, 2015, October 20, 2015, and November 28, 2015 letters while visiting his mother at [REDACTED] (PSERS-1 at ¶ 18; PSERS-2 at ¶ 18; Claimant's Response to PSERS' Memorandum of Facts at ¶ 23)

27. Prior to December 18, 2015, Claimant did not claim any mail addressed and delivered to him at [REDACTED] (PSERS-1 at ¶ 19; PSERS-2 at ¶ 19; Claimant's Response to PSERS' Memorandum of Facts at ¶ 24)

28. On December 28, 2015, Claimant timely appealed PSERS' November 28, 2015 determination that he was to permanently remain a Class T-E member to the Executive

Staff Review Committee (“ESRC”), and he attached the T-F Membership Class Election form that PSERS had sent to [REDACTED] (PSERS-7)

29. By letter dated May 19, 2016, the ESRC denied Claimant’s appeal because the T-F election correspondence was mailed to Claimant’s last known address on file with PSERS. (PSERS-8)

30. On June 16, 2016, Claimant appealed the ESRC’s decision. (PSERS-9)

31. On July 6, 2016, PSERS filed an Answer and New Matter. (PSERS-1)

32. On July 26, 2016, Claimant, through counsel, filed a response to PSERS’ New Matter. (PSERS-2)

33. On August 11, 2017, PSERS filed a Motion for Summary Judgement.

34. On September 11, 2017, Claimant filed a response to PSERS’ Motion for Summary Judgment.

35. 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

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”).

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.

At the beginning of the 2015-2016 school year, Claimant began working for the Mifflin County SD as a full-time, salaried teacher and he first qualified for PSERS membership as a Class T-E member. Prior to the start of the 2015-2016 school year, Claimant informed the Mifflin County SD that his address was [REDACTED]. In July 2015, the Mifflin County SD enrolled Claimant with PSERS and provided PSERS with Claimant’s home address, which converted in PSERS’ computer system to [REDACTED]. The addresses [REDACTED] and [REDACTED] are for the same residence (hereinafter “[REDACTED]”), and both addresses are valid with the United States Post Office. At all relevant times, Claimant’s mother resided at [REDACTED] but Claimant did not.

By letters dated September 20, 2015 and October 20, 2015, PSERS mailed notice of the Class T-F membership and the November 13, 2015 election deadline to Claimant at [REDACTED] which was the address both PSERS and the Mifflin County SD had on file for Claimant at the time. Claimant’s mother received the notices in a timely manner at [REDACTED] but Claimant did not retrieve the notices from his mother until after the November 13, 2015 deadline. Consequently, Claimant did not elect Class T-F membership on or before November 13, 2015 and PSERS subsequently notified him that he would permanently remain a Class T-E member.

Claimant appeals that determination, arguing that the Mifflin County SD failed to notify him of his right to elect Class T-F membership and to timely notify PSERS of his October 30, 2015 address change. Claimant believes that he would have been able to timely elect Class T-F membership if the Mifflin County SD had notified him of the election deadline rather than PSERS. Claimant further asserts that the Mifflin County SD’s delay in notifying PSERS of his address change from [REDACTED] to [REDACTED] resulted in his inability to meet the deadline. Both arguments fail as a matter of law.

Preliminarily, Claimant admits that he did not update his address with the Mifflin County SD until October 30, 2015. Therefore, up and until at least that date, PSERS was properly directing Claimant's mail to [REDACTED], including the Class T-F election notices that PSERS sent to him. Thus, whether Mifflin County SD delayed its notification to PSERS of Claimant's address change *between October 30, 2015 and December 3, 2015* is immaterial to the issue before the Board.

Claimant's argument that he is entitled to relief because the Mifflin County SD "failed to take proactive steps to notify Claimant of his duty to elect Class T-F membership" by not providing him with Class T-F election notice is also without merit. The Retirement Code explicitly 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). 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).

The record demonstrates that PSERS mailed two notices to Claimant to advise him of his right to elect Class T-F membership. Claimant readily admits that the notices

were mailed to his last known address of [REDACTED] in September 2015 and October 2015, which was prior to his address change. Claimant further admits that he reported that address to Mifflin County SD as his address upon his employment, but failed to return to that address to pick up the mail that he was having directed there until December 3, 2015. Claimant does not dispute that his mother received such notice at the address prior to November 13, 2015. The contents of the notices are also not in dispute.

In this case, Claimant's asserted entitlement to Class T-F membership is based entirely upon his claim that he did not timely receive the notices that PSERS mailed to him at the address that he represented was his place of residence. Claimant, however, authorized the use of his mother's address of [REDACTED] as a means of communicating with him prior to, at least, October 30, 2015. Claimant's mother, therefore, was authorized to accept the Class T-F notification on Claimant's behalf. Because PSERS mailed the Class T-F notification to the address it had on file for Claimant and Claimant's mother received it in a timely manner at that address, PSERS' notice was sufficient to satisfy the notice requirements of the Retirement Code.

Claimant's assertion that this situation is similar to *Higgins* and the Mifflin County SD had a duty to notify him of the Class T-F election is incorrect. In *Higgins*, Section 8506(g) of the Retirement Code was at issue, which mandates that an employer advise certain employees of their right to elect multiple service membership and advise the Board of the election. 736 A.2d at 749-750; 24 Pa.C.S. § 8506(g). In *Higgins*, the employer failed to provide Section 8506(g) notice of multiple service to an employee. The Court held that, because the Retirement Code provides that, in the event an employer fails to comply with its duties under Section 8506, then the "Board shall perform such duties," the time period to elect multiple service did not begin until either the employer or PSERS provided notice of multiple service. 736 A.2d at 750. Here, the duty to provide notice lies with PSERS, not the employer. PSERS provided such notice. Moreover, there 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 under Section 8305.2. See 24 Pa.C.S. § 8101, et seq. Thus, *Higgins* is inapposite to this appeal.

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 ELIJAH B. SKINNER
DOCKET NO. 2016-11
CLAIM OF ELIJAH B. SKINNER

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:

Jan 18, 2018

By:

Melva S. Vogler
Melva S. Vogler, Chairman