

**Mail Date:**

Mail Date: JUN 17 2020

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

IN RE: ACCOUNT OF ALAN L. PASTORE  
DOCKET NO. 2019-01  
CLAIM OF ALAN L. PASTORE

**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 Alan L. Pastore's ("Claimant") Appeal and Request for Administrative Hearing, which seeks permission 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 February 20, 2020, 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 February 20, 2020, PSERS notified Claimant that he had 30 days to respond to PSERS' motion under Pa.R.C.P. No. 1035.3. On March 23, 2020, Claimant 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 does not dispute any material facts averred in PSERS’ motion. Nor has Claimant identified any additional facts remaining to be determined at an evidentiary hearing that would be material to the legal issue before the Board. Consequently, the Board finds that there are no disputed material facts. The Board further finds that the applicable law is clear and that the facts contained in the record are sufficient for the Board to resolve the legal issue of whether Claimant should be permitted 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. Claimant was first reported to PSERS in April 2015 through his part-time hourly employment with the Bensalem Township School District (“District”). (PSERS’ Motion for Summary Judgment at ¶ 1).

2. During fiscal years 2015, 2016, and 2017, Claimant did not work sufficient hours to qualify for membership with PSERS. (PSERS' Motion for Summary Judgment at ¶ 2).

3. Claimant first qualified for membership with PSERS on April 2, 2018, through his full-time hourly employment with the District. (PSERS' Motion for Summary Judgment at ¶ 3).

4. Pursuant to Section 8305(d) of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. ("Retirement Code"), Claimant was automatically enrolled in PSERS as a Class T-E member.

5. At all times between April 15, 2018 and January 3, 2019, Claimant's mailing address was [REDACTED]. (PSERS' Motion for Summary Judgment at ¶ 17).

6. By correspondence dated April 15, 2018, PSERS mailed a *T-F Membership Class Election* form, *Choosing Your Membership Class* handout, and cover letter to Claimant at [REDACTED]. (PSERS-1).

7. The April 15, 2018 cover letter informed Claimant of his opportunity to elect Class T-F membership:

Dear Mr. Alan Pastore:

Congratulations on becoming a member of the Public School Employees' Retirement System (PSERS). As a member of PSERS, you are required to make contributions and elect a membership class. 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 as well as the factors used to determine a retirement benefit for you when you retire are determined by your membership class.

\* \* \*

You are automatically enrolled in Class T-E and need not take any action should you choose to retain this classification. Your retirement benefit will be based on your years of service times your final average salary times a 2.0 percent multiplier and any early retirement factors, as applicable. 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.

You may make your Class T-F election by June 11, 2018 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 Member Self Service icon on the PSERS website at [www.psers.state.pa.us](http://www.psers.state.pa.us)
- Signing and returning to PSERS the enclosed *T-F Membership Class Election* (PSRS-1318) form. The document may be mailed to the office, faxed to PSERS at 717.772.3860; or hand delivered to PSERS headquarters in Harrisburg or to one of PSERS' regional offices on or before June 11, 2018. The form itself must actually be received at PSERS headquarters or at one of PSERS' regional offices on or before June 11, 2018; a postmark on an envelope will not determine the filing date of your Class T-F election form.

If you hand deliver the form, you may wish 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 valid and you will permanently remain as a Class T-E member.

As a Class T-F member, your benefit will be based on your years of service times your final average salary times a 2.5 percent multiplier and any early retirement factors, as applicable. 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. If electing to become Class T-F, you will need to make additional contributions retroactive to your first day of paid service. These retroactive payments represent the difference between your initial contributions at the Class T-E rate and the Class T-F rate.

\* \* \*

At this time you should:

- Review the *Choosing Your Membership Class* handout included in this packet.

- Access the Class T-F Election Resources link on PSERS' website at [www.psers.state.pa.us](http://www.psers.state.pa.us) to view additional information about Class T-E and Class T-F.
- Decide whether you wish to remain a Class T-E member or elect Class T-F.
  - 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 membership, elect through your MSS account on the PSERS website or have your **completed form to PSERS by June 11, 2018**. 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 or to elect Class T-F by completing and submitting the enclosed form by the due date, is final and binding.**

(PSERS-1 ((emphasis in original))).

8. The April 15, 2018 *T-F Membership Class Election* form notified Claimant that he must make the election through his Member Self Service (MSS) account or by submitting the *T-F Membership Class Election* form to PSERS on or before June 11, 2018. (PSERS-1).

9. By correspondence dated May 17, 2018, and mailed to Claimant at [REDACTED] PSERS reminded Claimant of the June 11, 2018 deadline to elect Class T-F membership and enclosed a duplicate copy of the *T-F Membership Class Election* form. (PSERS- 2).

10. PSERS' May 17, 2018 letter provided, in pertinent part, as follows:

Dear Mr. Alan Pastore:

The Public School Employees' Retirement System (PSERS) previously sent you a *T-F Membership Class Election* (PSRS-1318) form. Because this decision is final and binding, we are providing you this reminder.

If you would like to change your membership to Class T-F, you must do so by June 11, 2018. 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. For your convenience, we've enclosed a duplicate copy of the T-

*F Membership Class Election* (PSRS-1318) form. Class T-E membership is the automatic membership class, if you wish to remain a Class T-E member, no action is required by you.

\* \* \*

(PSERS-2).

11. PSERS maintains a record of mail that is returned as undeliverable.

(PSERS' Motion for Summary Judgment at ¶ 18).

12. PSERS mailed the April 15, 2018 and May 17, 2018 letters to Claimant in the normal course of business, and the letters were not returned to PSERS as undeliverable. (PSERS' Motion for Summary Judgment at ¶ 19).

13. Prior to June 11, 2018, Claimant received PSERS' notices dated April 15, 2018 and May 17, 2018, which informed him of the Class T-F election and his deadline to elect Class T-F membership.

14. Claimant did not elect Class T-F membership on or before June 11, 2018.

(PSERS' Motion for Summary Judgment at ¶ 12).

15. By letter dated June 24, 2018, which was mailed to Claimant at [REDACTED]

[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-3).

16. Claimant received PSERS' June 24, 2018 letter and, on July 23, 2018, he timely appealed PSERS' determination that he was a Class T-E member. (PSERS-4).

17. By letter dated December 4, 2018, the ESRC denied Claimant's appeal, explaining that PSERS did not receive a completed *T-F Membership Class Election* form from Claimant by the statutory deadline. (PSERS-5).

18. On January 3, 2019, Claimant appealed the ESRC's decision, filing an *Appeal and Request for Administrative Hearing*. (PSERS-6).

19. Claimant enclosed with his January 3, 2019 *Appeal and Request for Administrative Hearing* a completed *T-F Membership Class Election* form, which was the actual form PSERS mailed to Claimant in the April 15, 2018 and May 17, 2018 correspondence. (PSERS-6; PSERS' Motion for Summary Judgment at ¶ 16).

20. On January 10, 2019, PSERS filed its Answer. (PSERS-7).

21. On May 31, 2019, Claimant terminated employment with the District. (PSERS' Motion for Summary Judgment at ¶ 21).

22. On February 20, 2020, PSERS filed a Motion for Summary Judgment.

23. On March 23, 2020, Claimant filed a response to PSERS' motion.

24. This matter is now 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 of PSERS between July 1, 2011 and July 1, 2019 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).<sup>1</sup> If a member fails to file a timely 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

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<sup>1</sup> 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").

whether the member terminates service or has a break in service.” 24 Pa.C.S. § 8305.2(d). Thus, there are no exceptions to the Class T-F election deadline.

Claimant first enrolled in PSERS in April 2018, as a full-time hourly employee with the District. On April 15, 2018, PSERS mailed Claimant a *T-F Membership Class Election Form*, a *Choosing Your Membership Class* handout, and cover letter. The cover letter congratulated Claimant on becoming a PSERS member, explained the differences between Class T-F and T-E membership, and notified him of the June 11, 2018 deadline to elect Class T-F membership. The enclosed election form also notified Claimant of the deadline. On May 17, 2018, PSERS sent a follow-up letter to Claimant reminding him of the deadline. Claimant did not elect Class T-F membership on or before the June 11, 2018 deadline.

Claimant does not dispute that PSERS mailed, and that he timely received, the statutorily-required Class T-F election notice. Nor does he dispute that he failed to elect Class T-F membership on or before the June 11, 2018 statutory deadline. Rather, Claimant asks that he be permitted to make an untimely election because he has since filed other documents in a timely manner. Specifically, Claimant argues he should be granted relief because he timely appealed from PSERS’ June 24, 2018 letter advising him that he would permanently remain a Class T-E member; he timely appealed from the ESRC’s December 4, 2018 determination; and he submitted his *T-F Membership Class Election* form with his timely-filed *Appeal and Request for Administrative Hearing* with this Board. Claimant also claims relief is warranted because he has worked hard (like his friend who is a policeman and receiving a pension), his request involves a small amount of money, and he will need the additional funds in retirement. Claimant argues that the Board may make a decision and grant him relief without reference to the law. Claimant’s appeal must be denied as a matter of law.

The April 15, 2018 and May 17, 2018 letters that PSERS sent to Claimant notified him that he qualified for membership with PSERS, that he had the opportunity to elect Class T-F membership, and that the deadline to make such election was June 11, 2018. PSERS warned him that, if he did not make a timely election, his decision to



remain a Class T-E member was final and binding. Claimant did not make a timely election and, therefore, he is prohibited from doing so now. See Pa.C.S. § 8305.2(d).

Claimant's timely appeal to the ESRC and the Board, and his late submission of his *T-F Membership Class Election* form with his appeal to the Board, are not relevant. A timely appeal of a PSERS' determination does not change the Class T-F election deadline. See 24 Pa.C.S. § 8305.2(d); *Account of Valerie H. Watrous*, Docket No. 2013-10, at \*7 (PSERB Aug. 9, 2013). Nor does it cure Claimant's failure to file the election prior to the deadline. *Account of Valerie H. Watrous*, Docket No. 2013-10, at \*8. Claimant argues that the purpose of an appeal is to request a change. The right to appeal, however, does not mean the right to relief. Claimant appears to request a hearing. As explained above, however, Claimant has not raised any issue of material fact that would require an evidentiary hearing. When no material facts are in dispute and the issue is one of law, a determination on motion for summary judgment is appropriate. See 22 Pa. Code § 201.6(b); Pa.R.C.P. Nos. 1035.1-1035.5; *Allen v. Public Sch. Employees' Ret. Bd.*, 848 A.2d 1031, 1034 (Pa. Cmwlth. 2004) (holding that the Board did not err in granting summary judgment when the Board was without authority to grant the requested relief and there was no genuine issue of material fact); see also *Liles*, 567 A.2d at 692.

Claimant's arguments that he needs additional money in retirement, he has worked hard, and his request involves a small amount of money are similarly unavailing. Claimant is, ostensibly, requesting equitable relief, and the Retirement Code does not authorize such relief. Indeed, 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 *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001); see also *Account of Christian Miller*, Docket No. 2012-52 (PSERB May 1, 2013); *Account of Adam D. Smith*, Docket No. 2015-06 (PSERB Aug. 7, 2015); *Account of Andrew Lyle*, Docket No. 2014-18 (PSERB Jun. 14, 2016); see generally *Allen*, 848 A.2d at 1033; *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. See *Forman*, 778 A.2d

at 780; *Marinucci v. State Employees' Ret. Sys.*, 863 A. 2d 43 (Pa. Cmwlth. 2004). There is no exception, statutory or otherwise, to the deadline for electing Class T-F membership, and, thus, the Board is not authorized to grant Claimant the relief he requests.

Finally, Claimant's argument that this Board should make the decision notwithstanding the law must be rejected. The "retirement system is a creature of the legislature," and accordingly, "its members have only those rights created by the retirement benefit statute." *Forman*, 778 A.2d at 780 (citing *Cosgrove v. State Employees' Ret. Bd.*, 665 A.2d 870 (Pa. Cmwlth. 1995)). This Board does not have authority to grant relief contrary to the express terms of the law. See *id.*

Here, there is no dispute that PSERS notified Claimant of the opportunity to elect Class T-F membership and of the election deadline through PSERS' April 15, 2018 and May 17, 2018 mailings, and that Claimant did not timely elect Class T-F membership. 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 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 ALAN L. PASTORE  
DOCKET NO. 2019-01  
CLAIM OF ALAN L. PASTORE

**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: 6/12/20

By:   
Christopher SantaMaria, Chairman