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

IN RE: ACCOUNT OF LUKE LUBICH
DOCKET NO.: 2013-03
CLAIM OF LUKE LUBICH

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

PSERS filed its Motion for Summary Judgment on August 26, 2013, and served a copy 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 August 26, 2013, 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 September 25, 2013. 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).

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 timely elected Class T-F membership.

FINDINGS OF FACT

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

1. Claimant was enrolled in PSERS as a result of his full time employment with the Agora Cyber Charter School as of January 31, 2012.
2. By letter dated March 31, 2012, PSERS mailed to Claimant at 122 Millsboro Road, Rices Landing, Pennsylvania 15357, a *T-F Membership Class Election* (PSRS-1318) form, cover letter and a *Choosing Your Membership Class* insert. (See PSERS-1)
3. The March 31, 2012 cover letter to the *T-F Membership Class Election* (PSRS-1318) form provided, in pertinent part, as follows:

Dear Mr. Luke Lubich:

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 May 25, 2012. 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 to take any action.
- If you wish to elect Class T-F, **PSERS must receive your form by May 25, 2012.** 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-1) (emphasis in original)

4. The T-F Membership *Class Election* (PSRS-1318) form stated in pertinent part:

PSERS must receive this form by May 25, 2012. 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 May 25, 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 May

25, 2012. 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-1) (emphasis in original)

5. Claimant received the March 31, 2012 cover letter and *T-F Membership Class Election* (PSRS-1318) form. (See PSERS-8)

6. By letter dated April 30, 2012, PSERS mailed a follow-up letter to Claimant at 122 Millsboro Road, Rices Landing, Pennsylvania 15357, reminding him of the deadline to elect Class T-F membership. (See PSERS-2)

7. The April 30, 2012 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 May 25, 2012.

(PSERS-2)

8. The March 31, 2012 cover letter and the April 30, 2012 letter included PSERS' contact information for members who had questions. (See PSERS-1 and PSERS-2)

9. Claimant did not elect Class T-F membership on or before May 25, 2012. (See PSERS-3 and PSERS-4)

10. Claimant was aware on May 23, 2012 – two days prior to the deadline for action – that his status had not been changed to Class T-F. (See PSERS-8)

11. Despite knowledge on May 23, 2012 that his status remained at T-E, Claimant did not contact PSERS regarding his status until June 8, 2012.

12. PSERS first received Claimant's executed *T-F Membership Class Election* (PSRS-1318) form on June 8, 2012, via fax. (See PSERS-3)

13. PSERS also received Claimant's executed *T-F Membership Class Election* (PSRS-1318) form on June 11, 2012, via U.S Mail. (See PSERS-4)

14. By letter dated June 16, 2012, 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. (See PSERS-5)

15. Throughout Claimant's enrollment with PSERS, Claimant's mailing address has been 122 Millsboro Road, Rices Landing, Pennsylvania 15357.

16. On June 25, 2012, Claimant appealed PSERS' determination that he could not elect Class T-F membership to the Executive Staff Review Committee ("ESRC") claiming that he executed and mailed his form on April 5, 2012 and requesting a change to his PSERS membership from Class T-E to Class T-F. (See PSERS-6)

17. By letter dated January 18, 2013, the ESRC denied Claimant's request to change his PSERS membership from Class T-E Locked to Class T-F, explaining as follows:

You were enrolled as a Class T-E member of PSERS in January 2012. You had the choice to remain a Class T-E member or to file a *T-F Membership Class Election* form by May 25, 2012. On June 8, 2012, PSERS received your *T-F Membership Class Election* form dated April 5, 2012, and there is no evidence that your form was received prior to that date. You will, therefore, permanently remain a Class T-E member.

(PSERS-7)

18. Claimant appealed the ESRC's decision on February 7, 2013. (See PSERS-8)

19. On February 26, 2013, PSERS filed an Answer and New Matter with a Notice to Plead. (See PSERS-9)

20. PSERS' Answer and New Matter was served on Claimant by regular first class mail in accordance with 1 Pa.Code § 33.32. (See PSERS-9)

21. Claimant was required to plead to PSERS' New Matter within twenty days after service. 1 Pa.Code § 35.35. (See PSERS-9)

22. Claimant did not file a response to PSERS' New Matter.¹
23. On August 26, 2013, PSERS filed a Motion for Summary Judgment.
24. Claimant did not file a response to PSERS' Motion for Summary Judgment.
25. This matter is ripe for Board adjudication.

¹ Claimant did not respond to PSERS' New Matter and, therefore, the facts set forth in the New Matter may be deemed admitted. See 1 Pa.Code §§ 35.35 and 35.39.

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 An election to become a Class T-F member is irrevocable for all future service, regardless of whether the member terminates service or has a break in service. 24 Pa.C.S. § 8305.2(c). The Retirement Code further mandates that: "[i]f 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." 24 Pa.C.S. § 8305.2(d).

Claimant first became a school employee and active member of PSERS in January 2012 and was enrolled as a Class T-E member. By letter dated March 31, 2012, PSERS notified Claimant that, as a Class T-E member, he was eligible to elect Class T-F membership. The March 31, 2012 letter stated in pertinent part, that "If you wish to elect Class T-F, **PSERS must receive your form by May 25, 2012.** 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." (PSERS-1) (emphasis in original)

By letter dated April 30, 2012, PSERS sent a follow-up letter to Claimant reminding him that "[i]f [he] would like to change [his] membership to Class T-F, [Claimant] must do so by May 25, 2012." (PSERS-3)

Claimant does not dispute that he received the March 31, 2012 letter, nor does he claim that he was unaware of the May 25, 2012 deadline. Rather, Claimant alleges

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 10.30%. See 24 Pa.C.S. § 8102 (definitions of "basic contribution rate" and "standard single life annuity").

that he executed and mailed his *T-F Membership Class Election* (PSRS-1318) form on or around April 5, 2012. Consequently, Claimant asserts that his election should be deemed timely. PSERS, however, did not receive the form until it was faxed by Claimant to PSERS June 8, 2012, fourteen days after the due date of May 25, 2012. (See PSERS-3 and PSERS-4)

The general rule for documents received by mail is clear: a document sent to an agency by mail is deemed filed on the date that the agency *actually receives* the document. 1 Pa.Code § 31.11; *see also Harasty v. Pub. Sch. Employees' Ret. Bd.*, 945 A.2d 783, 788 (Pa.Cmwlt. 2008) ("the timeliness of any document filed with PSERS is governed by the *actual receipt* of the document, rather than the date of mailing.") (emphasis in original); *Coleman Appeal*, 33 Pa. D. & C.2d 191 (C.P. Dauphin 1963) (even a beneficiary designation that has been completed by the member will not supersede an existing designation unless actually filed (i.e. received and accepted) with the Board prior to the member's death). Thus, the "mailbox rule" which stands for the proposition that "[d]epositing in the post office a properly addressed, prepaid letter raises a presumption that it reached its destination by due course of mail," cannot be invoked to prove timely receipt of a document filed with PSERS. *Harasty*, 945 A.2d at 787.

In *Harasty*, the Commonwealth Court addressed whether the member timely filed his Class T-D election form with PSERS. In 2001, a new class of service was created, the Class T-D membership, which provided members with an enhanced benefit formula at a higher contribution rate, provided the member elected Class T-D membership on or before December 31, 2001. *Harasty* claimed that he mailed his Class T-D election form prior to the December 31, 2001 deadline. PSERS, however, never received his election form. The Court determined that the timeliness of any document filed with PSERS is governed by the actual receipt of the document, rather than the date of mailing. 945 A.2d at 788. *Harasty* argued that the form must have been lost by the postal service or by PSERS. The Court stated, however, that the burden of proof is on the member to establish that the election form was not only mailed, but that PSERS actually received it. *Id.* Mere testimony of *mailing*, therefore, as Claimant has proffered, does not meet the statutory standard of *filing* a document with PSERS.

Here, Claimant may have mailed the *T-F Membership Class Election* (PSRS-1318) form prior to the due date; but PSERS did not receive the form until after the due date. 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. Pub. Sch. Employees' Ret. Bd.*, 848 A.2d 1031, 1033 (Pa.Cmwlt. 2004); *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa.Cmwlt. 2001); see also *Harasty*, 945 A.2d at 788. Such action would be tantamount to circumventing the express language of the Retirement Code of which the Board cannot do. See *Dowler v. Pub. Sch. Employes' Ret. Bd.*, 620 A.2d 639, 644 (Pa. Cmwlt. 1993); *Marinucci v. State Employees' Ret. Sys.*, 863 A. 2d 43, 47 (Pa. Cmwlt. 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.

Nor does Claimant argue that he was unaware that his form needed to be received by PSERS, and not merely postmarked, on or before the deadline. This is because the *T-F Membership Class Election* (PSRS-1318) form that Claimant signed stated in pertinent part:

PSERS must receive this form by May 25, 2012. 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 July 20, 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 July 20, 2012. 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-2) (emphasis in original)

The Pennsylvania Supreme Court has held that delays in the U.S. mail are both foreseeable and avoidable. *Criss v. Wise*, 781 A.2d 1156, 1160 (Pa. 2001). Such failure to anticipate a potential delay in the mail does not entitle Claimant to relief of a statutory deadline.

Further, Claimant admits in his appeal that he was aware on May 23, 2012 – two days prior to the deadline for action – that his status had not been changed to Class T-F. (See PSERS-8 at Section F (“Not until May 23, 2012 did I have any knowledge that my T-E status was not changed to T-F Status”)) Claimant, however, did not contact PSERS regarding his status until June 8, 2012. Moreover, the *T-F Membership Class Election* (PSRS-1318) form suggested other methods of delivery which would have provided confirmation of PSERS’ receipt of his election form prior to the deadline. Yet, despite the knowledge that his status had not been changed, at no time did Claimant avail himself of any additional methods of delivery that would have ensured receipt by PSERS.

Finally, neither PSERS nor the Board is authorized to enlarge the time required to file an election as set forth in the Retirement Code. See *Allen*, 848 A.2d at 1033; *Forman*, 778 A.2d at 780. The Commonwealth Court held in *Harasty* that there is no *nunc pro tunc* filing allowed for the Class T-D election. 945 A.2d at 788. The same is true for Class T-F election. If a member, like Claimant, who was eligible, failed to timely elect Class T-F membership, the law precludes PSERS from taking an untimely application and deeming it as timely filed. 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

To elect Class T-F membership, a member who first becomes a school employee and an active member on or after July 1, 2011 and who is eligible to become a Class T-E member must elect to become a member of Class T-F within 45 days of notification by PSERS. As a matter of law, there is no exception to the deadline for electing Class T-F membership. Although Claimant may have mailed the election form prior to the due date, PSERS did not receive the form until June 8, 2012, fourteen days after the due date. Claimant’s appeal, therefore, does not contain any facts, which, if proven, would form a basis for the conclusion that Claimant timely filed his *T-F Membership Class Election* (PSRS-1318) form by May 25, 2012. Because there does not appear to be a

disputed issue of relevant fact, the Board may address the legal arguments of the parties without the need for an administrative hearing to determine the facts.

For the above stated reasons, Claimant did not timely 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 LUKE LUBICH
DOCKET NO.: 2013-03
CLAIM OF LUKE LUBICH

ORDER

AND NOW, upon consideration of Claimant's Appeal and Request for Administrative Hearing and PSERS' Motion for Summary Judgment:

IT IS HEREBY ORDERED, that PSERS' Motion for Summary Judgment is GRANTED, and Claimant's Appeal and Request for Administrative Hearing is DISMISSED in accordance with 22 Pa.Code §201.6(b), 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: 12/10/2013

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