

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

IN RE: ACCOUNT OF COURTNEY M. HENRY  
DOCKET NO. 2016-04  
CLAIM OF COURTNEY M. HENRY

**OPINION AND ORDER OF THE BOARD**

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Hearing Examiner's proposed Opinion and Recommendation. No exceptions to the proposed Opinion and Recommendation were filed.

The Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation with the following corrections:

1. Paragraph 6 on page 4 is amended to read: "On July 26, 2015, at 3:08 a.m., PSERS produced a Welcome Packet dated July 26, 2015, informing Claimant of her retirement benefits and certain actions that need to be taken when becoming a PSERS member, including the submission of a designation of beneficiaries form, and PSERS mailed the Welcome Packet, by First Class Mail, Postage Prepaid, to Claimant addressed to [REDACTED] on July 28, 2015."
2. In Paragraph 9 on page 5, the phrase "Also on July 26, 2015" is amended to "Also on July 28, 2015."
3. Paragraph 22 on page 7 is amended to refer to "PSERS Exhibits -2, -3, -4, and -5."
4. The citation in Paragraph 3 on page 9 is amended to refer to *Wingert v. State Employees Retirement Board*, 589 A.2d 269 (Pa.Cmwlt. 1991).

5. The first full paragraph on page 14 is amended to refer to the mailing date of both Claimant's Welcome Packet and the T-F Class Election Packet as July 28, 2015.
6. The second to last paragraph on page 15 is amended to refer to "PSERS Exhibits -2, -3, -4, and -5."

With the above corrections, 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 after the 45-day statutory deadline is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: September 15, 2017

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

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PSERB  
EXECUTIVE OFFICE

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re:

Account of Courtney M. Henry, }  
Claim of Courtney M. Henry, }  
Claimant }  
}

Docket Number 206-04

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OPINION AND RECOMMENDATION

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Christopher K. McNally  
Hearing Examiner

Commonwealth of Pennsylvania  
Governor's Office of General Counsel  
Department of State  
Office of Hearing Examiners  
P.O. Box 2649  
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## HISTORY

This case comes before the Office of Hearing Examiners upon delegation from the Public School Employees' Retirement System (PSERS) to determine whether to grant or deny the claim of Courtney M. Henry (Claimant) under Sections 8305(e) and 8305.2 of the Public School Employees' Retirement Code<sup>1</sup> (Retirement Code), 24 Pa.C.S. § 8305(e), 8305.2, for election of membership in the T-F class.

On October 3, 2015, PSERS notified Claimant that she was enrolled as a Class T-E member because she had not elected Class T-F membership by the election deadline of September 18, 2015. On October 28, 2015, Claimant filed with the Executive Staff Review Committee (ESRC) of the Public School Employees' Retirement Board (PSERB) a Request to Change PSERS membership from Class T-E to Class T-F. On December 21, 2015, the ESRC reviewed Claimant's request and voted to deny the change of membership class. By correspondence dated February 3, 2016, the Deputy Executive Director of PSERS issued a notice of the denial with an explanation of Claimant's right to appeal, and her right to file a written request for an administrative hearing.

On March 1, 2016, Claimant, by and through her counsel, Ronald J. Saffron, Esq., filed an Appeal and Request for Administrative Hearing. Claimant asked that the decision of the ESRC be vacated and that PSERS be ordered to provide Claimant with proper notice or enroll her as a Class T-F member. On March 15, 2016, PSERS, by and through its counsel, Kathrin V. Smith, Esq., filed an Answer to the Appeal.

On August 5, 2016, the Executive Director of PSERS and Secretary of PSERB delegated this matter to the Office of Hearing Examiners, which assigned this case to Hearing Examiner Christopher K. McNally, Esq. with instructions to conduct a formal hearing and issue a proposed

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<sup>1</sup> The act of October 2, 1975, P.L. 298, No. 96. 24 Pa.C.S. §§ 8101 – 8536.

opinion and recommendation in accordance with the Retirement Code, PSERB regulations,<sup>2</sup> and the Administrative Agency Law.<sup>3</sup> By separate correspondence of the same date, PSERB notified Claimant's counsel of the hearing date and procedures for the hearing.

Following a continuance requested by Claimant, on December 15, 2016, the Hearing Examiner convened the hearing as scheduled. Claimant appeared with counsel. Assistant Counsel Kathrin V. Smith, Esq. represented PSERS. Claimant testified on her own behalf and called her parents as witnesses. Counsel for PSERS offered documentary evidence and direct testimony of PSERS employees, John Tucker and Dennis Filipovich. All witnesses were subject to cross-examination.

On December 16, 2016, the Hearing Examiner issued an Order Scheduling Post-Hearing Briefs. The court reporter filed the hearing transcript on January 3, 2017. In accord with the scheduling order, Claimant filed a post-hearing brief on February 15, 2017. PSERS filed its brief on March 15, 2017. Claimant filed a reply brief on April 15, 2017.

The hearing examiner now files this opinion and recommendation with PSERB, together with the transcript of testimony, exhibits and briefs, all of which shall become part of the record. 22 Pa.Code § 201.11. The hearing examiner will serve copies upon all parties and staff counsel. *Id.*

Any party may file exceptions in accordance with 1 Pa. Code §§ 35.211 and 35.212 (relating to procedure to except to proposed report; and content and form of briefs on exceptions). 22 Pa.Code § 201.11(d). PSERB may adopt or reject, in whole or in part, or supplement the proposed opinion and recommendation or issue its own opinion and order, whether or not exceptions to the proposed opinion and recommendation are filed by any party. If exceptions are

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<sup>2</sup> 22 Pa.Code §§ 201.1 – 201.12.

<sup>3</sup> The act of April 28, 1978, P.L. 202, No. 53, § 5, as amended. 2 Pa.C.S. §§ 501 – 508.

filed, PSERB will rule on the exceptions. 22 Pa.Code § 201.11(c).

Pursuant to 1 Pa. Code §§35.211-35.214, any party who wishes to appeal all or part of the Opinion and Recommendation to PSERB shall file exceptions in the form of a Brief on Exceptions within thirty (30) days after service of a copy of the Opinion and Recommendation. A Brief Opposing Exceptions may be filed in response to a Brief on Exceptions within twenty (20) days of receipt of the Brief on Exceptions.

Briefs on Exceptions and Briefs on Opposing Exceptions should be filed with Laura Vitale, Appeal Docket Clerk, Public School Employees' Retirement Board, 5 North Fifth Street, Harrisburg, PA 17101, with copies to opposing counsel.

## FINDINGS OF FACT

1. Courtney M. Henry (Claimant) is a member of PSERS. (*Hearing Transcript, Claimant Exhibit 1.*)

2. In June 2015, Claimant qualified for PSERS membership as an employee of the Blairsville-Saltsburg School District. (*Hearing Transcript, page 11, 21, 46, 82; Appeal and Request for Administrative Hearing.*)

3. Claimant's correct mailing address is [REDACTED] where she resides with her parents. (*Hearing Transcript, pages 18 to 19.*)

4. PSERS maintains records in its normal course of business that track every piece of mail produced by PSERS until it reaches the United States Post Office. (*Hearing Transcript, page 45 to 47.*)

5. In January 2015, Claimant began employment with the Blairsville-Saltsburg School District, was employed at Indiana University of Pennsylvania at the co-op store in July and early August, and returned to employment with the school district at the end of August 2015. (*Hearing Transcript, page 20, line 13 to page 21, line 20.*)

6. On July 26, 2015, at 3:08 a.m., PSERS produced a Welcome Packet dated July 26, 2015, informing her of her retirement benefits and certain actions that need to be taken when becoming a member, including a designation of beneficiaries mailed by First Class Mail, Postage Prepaid, to Claimant addressed to [REDACTED] (*Hearing Transcript, page 52, line 14 to page 57, line 15; Exhibits PSERS-1, -2; Claimant Exhibit 1.*)

7. Claimant received the Welcome Packet. (*Hearing Transcript, pages 12, 22; Claimant Exhibit 1.*)

8. Claimant did not file a beneficiary nomination form as required by the PSER Code

and as notified in the Welcome Packet. (*Hearing Transcript, pages 23, 57.*)

9. Also on July 26, 2015, PSERS mailed to Claimant by First Class Mail, Postage Prepaid, addressed to [REDACTED], a T-F Membership Class Election (PSRS-1318) form, a cover letter dated July 26, 2015, and an informational page entitled “Choosing Your Membership Class” (T-F Class Election Packet). (*Hearing Transcript, page 58, line 1 to page 60, line 10; Exhibit PSERS-3.*)

10. The cover letter to the T-F Class Election Packet provided notice to Claimant that: (a) there are two classes of membership, T-E and T-F, (b) the class of membership would determine the amount of her retirement benefit, (c) she was automatically enrolled in Class T-E, (d) Class T-E retirement benefit would be calculated based on a specified contribution rate and formula, (e) she had a right to elect to become a Class T-F member, (f) she was required to follow a procedure to exercise her right to elect Class T-F membership, (g) September 18, 2015, was the deadline for exercise of her right of election, (h) her Class T-F retirement benefit would be calculated based upon a specified contribution rate and formula, (i) PSERS enclosed additional information, instructions and the T-F Membership Class Election form (PSRS-1318), and (j) her decision would be final and binding to remain in Class T-E by doing nothing or to elect Class T-F by timely filing the enclosed Class Election form. (*Hearing Transcript, page 60, lines 12 – 16; Exhibit PSERS-3.*)

11. The T-F Membership Class Election form (PSRS-1318) likewise discussed the election and explained:

**PSERS must receive this form by September 18, 2015.** 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 September 18, 2015. 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 September 18, 2015. 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.

*(Hearing Transcript, Exhibit PSERS-3.) (Bold face in original)*

12. PSERS has a business practice by which if PSERS does not receive a response from the member within 30 days of the generation of the T-F Class Election Packet, as a courtesy, PSERS mails out a second letter to the member reminding the member of the deadline to elect Class T-F membership (Second T-F Election Notice). *(Hearing Transcript, page 62, lines 18 – 22.)*

13. Because Claimant did not respond within 30 days of mailing the T-F Class Election Packet, by correspondence dated August 24, 2015, PSERS mailed Claimant by First Class Mail, Postage Prepaid, the Second T-F Election Notice addressed to [REDACTED] PA 15748, and again notified Claimant of the deadline to elect Class T-F membership. *(Hearing Transcript 60, line 20 to page 62, line 10; Exhibits PSERS-1, -4.)*

14. The Second T-F Election Notice 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 September 18, 2015.

*(Hearing Transcript, Exhibit PSERS-4.)*

15. Claimant received the Welcome Packet, T-F Class Election Packet, and the T-E Determination Notice. *(Hearing Transcript, page 65, lines 13 - 19.)*

16. Claimant did not elect Class T-F membership on or before September 18, 2015. *(Hearing Transcript, page 63, lines 12 – 14; Exhibits PSERS-5, -6.)*

17. By letter dated October 3, 2015 (T-E Determination Notice), and sent by First Class

Mail to Claimant at [REDACTED], PSERS informed Claimant that she would permanently remain a Class T-E member because she did not elect Class T-F membership by the election deadline. (*Hearing Transcript, page 63, line 15 to page 65, line 5; Exhibit PSERS-5.*)

18. PSERS notified Claimant of her right to appeal PSERS' determination to the ESRC. (*Hearing Transcript, page 63, line 15 to page 65, line 5; Exhibit PSERS-5.*)

19. Claimant received the T-E Determination Notice. (*Hearing Transcript, page 16, lines 12 – 21.*)

20. Claimant denies receiving the T-F Class Election Packet and the Second T-F Election Notice. (*Hearing Transcript, pages 14, 16, 20.*)

21. The Welcome Packet, T-F Class Election Packet, the Second T-F Election Notice, and the T-E Determination Notice were produced by PSERS and sent to Claimant by first class mail in the ordinary course of PSERS' business and placed in the regular place of mailing, with the Welcome Packet, T-F Class Election Packet, Second T-F Election Notice, and T-E Determination Notice, addressed to Claimant at [REDACTED]. (*Hearing Transcript, pages 65, lines 13 – 16; 81, line 7 to page 82, line 11; Exhibits PSERS-1 through 5, 8 through 19.*)

22. PSERS maintains a file for "undeliverable mail" returned from the post office, and there is no evidence that any of PSERS Exhibits -1, -2, and -3, all of which were mailed to Claimant at the [REDACTED] address, were ever returned by the post office. (*Hearing Transcript, page 65, lines 20 – 25; 81, line 9 to 82, line 8.*)

23. On October 28, 2015, Claimant filed with the Executive Staff Review Committee (ESRC) of the Public School Employees' Retirement Board (PSERB) a Request to Change PSERS

membership from Class T-E to Class T-F. (*Hearing Transcript, Exhibit PSERS-6; Claimant Exhibit 3.*)

24. On December 21, 2015, the ESRC reviewed Claimant's request and voted to deny the change of membership class. (*Hearing Transcript, Exhibit Claimant 2.*)

25. By correspondence dated February 3, 2016, the Deputy Executive Director of PSERS issued a notice of the denial mailed by Certified Mail, Return Receipt Requested (Article Number 7013 2250 0000 5625 0701) with an explanation of Claimant's right to appeal, and her right to file a written request for an administrative hearing. (*Hearing Transcript, Exhibit PSERS-7; Claimant Exhibit 2.*)

26. On March 1, 2016, Claimant, by and through her counsel, Ronald J. Saffron, Esq., filed an Appeal and Request for Administrative Hearing. (*Docket entries.*)

27. On March 15, 2016, PSERS, by and through its counsel, Kathrin V. Smith, Esq., filed an Answer to the Appeal. (*Docket entries.*)

28. On August 5, 2016, the Executive Director of PSERS and Secretary of PSERB delegated this matter to the Office of Hearing Examiners. (*Docket entries.*)

29. An administrative hearing on Claimant's appeal was held on December 15, 2016 before Hearing Examiner Christopher K. McNally, Esq. (*Hearing Transcript, passim*)

30. Claimant was present for her hearing represented by counsel, and had an opportunity to be heard, to cross-examine witnesses, to make a closing statement for the record, and filed a post-hearing brief in support of her appeal. (*Hearing Transcript, passim.*)

## CONCLUSIONS OF LAW

1. PSERB has jurisdiction in this matter. (*Finding of Fact Numbers 1, 2, 18, 19.*)
2. Claimant had adequate notice of the adverse determination and was given an opportunity to be heard in accordance with the Retirement Code and the Administrative Agency Law, 2 Pa.C.S. § 504. (*Findings of Fact Numbers 18, 19, 25 - 28.*)
3. Claimant bears the burden of proof in this proceeding. *Tingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa.Cmwlt. 1991).
4. The preponderance of the evidence standard is the correct burden of proof to be applied in this administrative action. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa.Cmwlt. 1990), *petition for allowance of appeal denied*, 602 A.2d 863 (Pa. 1998); *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriffs Education and Training Board*, 885 A. 2d 678 (Pa.Cmwlt. 2005).
5. The preponderance of the evidence standard has been explained as "such proof as leads the fact-finder. . . to find that the existence of a contested fact is more probable than its nonexistence." *Sigafoos v. Pennsylvania Board of Probation and Parole*, 503 A.2d 1076, 1079 (Pa.Cmwlt. 1986).
6. Claimant has only those rights recognized by statute and none beyond. *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa.Cmwlt. 1992).
7. The authority of the PSERB to grant or deny Claimant's request to elect Class T-F membership is limited to the provisions of the Retirement Code; PSERB has no authority to grant rights beyond those specifically set forth in the Retirement Code or to enlarge a statutorily mandated election period. *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa.Cmwlt. 2001); *Burris v. State Employees' Retirement Board*, 745 A.2d 704, 706 (Pa.Cmwlt.

2000); *Bittenbender*, 622 A.2d 403.

8. 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).

9. Act 120 permits a T-E member to 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).

10. If a Class T-E member fails to file an election to Class T-F membership within 45 days of notification by PSERS, “the member shall never be able to elect Class T-F service[.]” 24 Pa.C.S. § 8305.2(d).

11. 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.Cmwlt. 1999).

12. Notice requirements are satisfied when proper notice is mailed to an interested party’s last known address by first class mail even if she did not personally receive the mailing. *Higgins v. Public School Employes’ Retirement System*, 736 A.2d 745, 753 (Pa.Cmwlt. 1999); *see also Tyson v. Public School Employes’ Retirement System*, 737 A.2d 325 (Pa.Cmwlt. 1999); *Berkowitz v. Mayflower Sec., Inc.*, 317 A.2d 584, 585 (Pa. 1974); *Milford Twp. Bd. of Supervisors v. Dep’t of Env’tl. Resources*, 644 A.2d 217, 218-219 (Pa.Cmwlt. 1994).

13. 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.Cmwlt. 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.Cmwlt. 1994).

14. Under the mailbox rule, 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 A2d 562 (Pa.Cmwlt. 1986).

15. Evidence of actual mailing is not required. *Commonwealth Dep't of Transp. v. Brayman Constr. Corp.*, 513 A.2d 562, 566 (Pa.Cmwlt. 1986).

16. Mere denial of receipt is not sufficient to establish that notice was not provided. *Chartiers*, 645 A.2d at 946.

17. PSERS notified Claimant of her right to elect Class T-F membership when it mailed her the T-F Class Election Packet and reminder letter via first class mail to her correct address. (*Findings of Fact Numbers 1 - 21.*)

18. Claimant is not eligible for Class T-F membership because she received notice of her right to elect Class T-F membership by notice dated July 26, 2015, and failed to elect Class T-F membership on or before September 18, 2015, which is more than 45 days from the date of notification by the board. (*Findings of Fact Numbers 1 - 24*)

19. PSERS and PSERB are precluded from taking an untimely application and deeming it as timely filed. *Forman*, 778 A.2d 778.

20. Claimant is not entitled to elect Class T-F membership under Section 8305(e) of the Retirement Code, 24 Pa.C.S. § 8305(e), because she did not file her election within 45 days of notification by PSERB, as required by Section 8305.2(b). 24 Pa.C.S. § 8305.2(b). (*Findings of Fact Numbers 1 – 17, 24, 25.*)

## DISCUSSION

### Governing Law

On November 23, 2010, the General Assembly enacted Act 120,<sup>4</sup> which, *inter alia*, created two new classes of membership: (1) Class T-E membership that provides a benefit accrual rate of 2% and a contribution rate of at least 7.5%; and (2) Class T-F membership that provides a benefit accrual rate of 2.5% and a contribution rate of at least 10.3%.

Under Act 120, a person who 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). However, a person who is eligible to become a Class T-E member has the right to 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(a), (b).

A member's decision is irrevocable. If the member properly elects Class T-F membership, the member 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. 24 Pa.C.S. § 8305.2(c). Conversely, if a member fails to file her election in time, she may not elect Class T-F service at any time in the future, even if she terminates service or has a break in service. 24 Pa.C.S. § 8305.2(d).

### Facts

In June 2015, Claimant qualified for PSERS membership as an employee of the Blairsville-Saltsburg School District. Throughout the period relevant to this case, Claimant's home address

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<sup>4</sup> The act of November 23, 2010 (P.L. 1269, No. 120). For purposes of this case, the pertinent parts of Act 120 include Sections 1, 3 and 4, each of which amended Title 24 of the Pennsylvania Consolidated Statutes. Section 1 of Act 120 amended Section 8102, relating to definitions, by amending definitions of the terms "basic contribution rate" and "standard single life annuity." Section 3 of Act 120 amended Section 8305 by adding subsection (d), relating to Class T-E membership, and subsection (e), relating to T-F membership. Section 4 of Act 120 added Section 8305.2, relating to election to become a Class T-F member. Section 29(1)(i), (iv), and (v) of Act 120 sets July 1, 2011 as the effective date for Sections 1, 3 and 4.



was [REDACTED], where she resided with her mother and father.

On July 26, 2015, PSERS mailed by First Class Mail, Postage Prepaid, to Claimant addressed to [REDACTED], a Welcome Packet dated July 26, 2015, informing her of her retirement benefits and certain actions that need to be taken when becoming a member. Also on July 26, 2015, PSERS separately mailed to Claimant at her home address a T-F Class Election Packet, which included a T-F Membership Class Election (PSRS-1318) form, a cover letter dated July 26, 2015, and an informational page entitled, "Choosing Your Membership Class."

The cover letter to the T-F Class Election Packet provided notice to Claimant that there are two classes of membership, T-E and T-F, and explained the difference. The notice also stated that Claimant was required to exercise her election by September 18, 2015, and instructed her to use the T-F Membership Class Election form (PSRS-1318) to make the election. Finally, the notice explained that Claimant's decision would be final and binding to remain in Class T-E by doing nothing or to elect Class T-F by timely filing the enclosed Class Election form.

PSERS has a business practice by which if PSERS does not receive a response from the member within 30 days of the generation of the T-F Class Election Packet, as a courtesy, PSERS mails out a second letter to the member referred to as the Second T-F Election Notice, that reminded the member of the deadline to elect Class T-F membership. Because Claimant did not respond within 30 days of mailing the T-F Class Election Packet, by correspondence dated August 24, 2015, PSERS mailed to Claimant at her home address the Second T-F Election Notice.

On October 3, 2015, PSERS mailed the T-E Determination Notice to Claimant at [REDACTED], PSERS informed Claimant that she would permanently remain a Class T-E member because she did not elect Class T-F membership by the election

deadline.

PSERS maintains detailed records in its normal course of business that track every piece of mail produced by PSERS until it reaches the United States Post Office. The Welcome Packet, the T-F Class Election Packet, the Second T-F Election Notice, and the T-E Determination Notice are documented in PSERS' records. The Hearing Examiner finds that these documents were produced by PSERS and sent to Claimant by first class mail in the ordinary course of PSERS' business and placed in the regular place of mailing to Claimant's address on [REDACTED] Street.

There is no dispute that Claimant did not elect Class T-F membership on or before September 18, 2015. Rather, Claimant contends that although she received the Welcome Packet, she did not receive the T-F Class Election Packet or the Second T-F Election Notice. Her contention is based upon her testimony and the testimony of her parents that she did not receive these documents in the mail. Their testimony relies upon their household routine for handling mail and their appreciation of the importance of an election of the T-F Class. They cited two other examples in thirty years of residence at the same address when they did not receive important pieces of mail.

The Claimant's evidence is unpersuasive. PSERS maintains a file for "undeliverable mail" returned from the post office. There is no evidence that any of PSERS Exhibits -2, -3, or -5, all of which were mailed to Claimant at the [REDACTED] Street address, were ever returned by the post office.

There is no dispute that Claimant received the Welcome Packet and the T-E Determination Letter. Despite clear instructions that she needed to designate her beneficiaries, Claimant failed to do so. The Hearing Examiner finds that Claimant also received the T-F Class Election Packet and the Second T-F Election Notice. The PSERS records are meticulous and detailed. There is no evidence to rebut the presumption that these documents were mailed and therefore received by

Claimant.

By correspondence dated February 3, 2016, PSERS' Deputy Executive Director notified Claimant that the ESRC denied her request to elect Class T-F membership because she did not file an election by September 18, 2015. PSERS advised Claimant of her right to appeal to PSERB. Claimant filed her appeal through counsel. PSERS filed an Answer and substantially denied the grounds for appeal. The hearing in this matter followed.

### Analysis

Claimant contends that the testimony of John Tucker and Dennis Filipovich is insufficient to establish a presumption that the T-F Class Election Packet and the Second T-F Class Notice were mailed and sent. Claimant frames the issue as whether the practice of PSERS to hand over its mail to another party, Pitney Bowes or DGS, satisfies the requirement of a regular place of mailing for purposes of the mailbox rule. Citing *Geise v. Nationwide Life & Annuity Co. of America*, 939 A.2d 409 (Pa.Super. 2007) and *Carnathan v. Ohio Nat'l Life Ins. Co.*, 2008 WL 2578919 (U.S.D.C. M.D.Pa. 2008), Claimant argues that the fact finder may determine that the mailing procedures are inadequate to establish the fact of mailing.

*Geise* and *Carnathan* are distinguishable. In *Geise*, the issue related to the adequacy of jury instructions on the Mailbox Rule. The party that invoked the Mailbox Rule, the defendant insurance company, asserted that the judge improperly instructed the jury. Based upon the purportedly erroneous jury instruction, the jury found that there was not sufficient evidence that the insurance company deposited the disputed items in the regular place of mailing. The Superior Court affirmed the lower court and reasoned that a "presumption cannot be based on a presumption." In *Geise*, the Superior Court found that the jury reasonably concluded that the insurer could only *presume* that the documents were mailed. *Geise*, 939 A.2d at 425.

In *Carnathan*, a federal district court denied summary judgment to the defendant insurance company that relied upon the Mailbox Rule. However, the court expressly declined to decide whether the evidence was sufficient to establish the fact of mailing by the insurance company. The court cited the plaintiff's evidence of its own business practices for receipt and handling of incoming mail. That evidence showed that the item that was mailed had not been received. Therefore, the court held that the plaintiff's evidence created a genuine issue of material fact that would allow a fact finder to rebut the presumption of mailing. *Carnathan*, at page 5.

This case is nearly identical to *Osgood v. Public School Employees' Retirement Board*, 2015 WL 6600575 (Pa.Cmwlth. 2015). In *Osgood*, the court held that PSERS made the required showing for the Mailbox Rule. PSERS offered the testimony of John Tucker, apparently the same witness who testified in this case.

Tucker's testimony in *Osgood* tracked his testimony in this case, with some insignificant differences in detail. He explained that PSERS maintains, in the ordinary course of business, a record of the members to whom mailings were sent. In *Osgood*, the record was microfilm, and in this case it is a computer file. As he did for Claimant, Tucker identified the actual record that identified Osgood by name and address where the mailing was sent. And like this case, Tucker testified that any mailing returned to PSERS as undeliverable would have been documented in the particular member's file, and stated that he had reviewed Osgood's file and found no notice therein regarding the return of undeliverable mail. Although Tucker was not employed by PSERS at the time when the notices were sent, he had access to PSERS' records and familiarity with the relevant law and the notices and mailings that were sent to members regarding the PSER Code. *Osgood v. Public School Employees' Retirement Bd.*, 2015 WL 6600575, at page 4 (Pa.Cmwlth. 2015).

Tucker's testimony was further supported by the testimony of Dennis Filipovich, who was

involved in the mailroom and printing operations. Filipovich personally handled the T-F Class Election Packet that was mailed to Claimant. Filipovich produced a contemporaneous record in his own handwriting that showed that he placed in the regular place of mailing the same batch of documents that included Claimant's notice. *Hearing Transcript, page 105, Exhibit PSERS-11*. He was also able to identify the handwriting of his subordinate, Lori McKenna, who handled the batch that included the Second T-F Class Election Notice and who placed it in the regular place of mailing. *Hearing Transcript, page 121, Exhibit PSERS-17*. The only evidence that is more direct would be a written record that confirmed each individual item that was mailed. On August 26, 2015, for example, that would mean a separate record for each of the 1,364 pieces of mail that were posted.

Unlike *Geise*, PSERS has direct evidence from Filipovich that he and his subordinates placed mail, correctly addressed to Claimant, in the regular place of mailing, *i.e.*, its mail contractor. Unlike *Carnathan*, Claimant offered no evidence of a mail log or other documentation of mail received during July and August 2015 to rebut the presumption of delivery.

Claimant also argues that the practice of PSERS to deliver its mail to Pitney Bowes or the Department of General Services, which in turn placed the mail with the United States Postal Service, is too attenuated to permit direct evidence that the mail was placed in the regular place of mailing. The Hearing Examiner disagrees. *Carnathan, supra*, cited by Claimant explains the historical origin and rationale for the Mailbox Rule. The court quoted *Meierdierck v. Miller*, 394 Pa. 484, 487, 147 A.2d 406, 408 (1959), in which the Supreme Court wrote, "The overwhelming weight of statistics clearly indicates that letters properly mailed and deposited in the post office are received by the addressee." *Carnathan, at page 3*. The overwhelming weight of statistics is not diminished by the fact that the regular place of mailing is a third-party contractor or another

state agency, which delivers the items to the post office.

For these reasons, the Hearing Examiner concludes that PSERS has established ample direct evidence that the T-F Class Election Packet and the Second T-F Class Election Notice were deposited in the regular place of mailing. Therefore, there is a presumption that the notices were received by Claimant and she failed to provide adequate evidence to rebut the presumption.

Accordingly, based upon the foregoing findings of fact, conclusions of law, and discussion, the following proposed order shall issue:

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JUN 20 2017

PSERB  
EXECUTIVE OFFICE

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re:


Account of Courtney M. Henry, }  
Claim of Courtney M. Henry, }  
Claimant }  
}

Docket Number 2016-04

RECOMMENDATION

AND NOW, this 19<sup>th</sup> day of June, 2017, having duly reviewed and considered the entire record, and based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Officer for the Public School Employees' Retirement System recommends that Claimant's appeal from the February 3, 2016, determination of the PSERS' Executive Staff Review Committee be **DENIED**.

BY ORDER:

  
\_\_\_\_\_  
Christopher K. McNally  
Hearing Examiner

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Agency Clerk:

Laura Vitale

Date of Mailing:

June 20, 2017