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

IN RE: ACCOUNT OF GARY L. LOSE
DOCKET NO.: 2013-23
CLAIM OF GARY L. LOSE

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 Gary Lose'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 May 8, 2014, 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 May 8, 2014, 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 June 7, 2014. 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 can revoke his Class T-F membership election.

FINDINGS OF FACT

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

1. On December 2, 2012, Gary L. Lose ("Claimant") began working for the Bald Eagle Area School District as full-time, salaried employee and was enrolled in PSERS as a result.
2. On December 23, 2012, PSERS mailed to Claimant at [REDACTED], a welcome packet that included a cover letter that identified the location of regional offices, provided the phone number and hours of operation for PSERS' call center, and listed PSERS' website address. (See PSERS-1).
3. By cover letter dated December 23, 2012, PSERS mailed to Claimant at [REDACTED], a *T-F Membership Class Election* form. (See PSERS-2).
4. The December 23, 2012, cover letter to the *T-F Membership Class Election* form congratulated Claimant on becoming a member of PSERS and notified Claimant that he was "automatically enrolled as a Class T-E member and need not take any action if [he] choose to remain a Class T-E Member." It further informed Claimant that if he wished "to elect to become a Class T-F member, [he] must sign and return to

PSERS the enclosed *T-F Membership Class Election* (PSRS-1318) form by February 15, 2013.” It also stated that if he wished “to remain a Class T-E member, [he] did not have to take any action.” Moreover, Claimant was informed by the cover letter that “[His] decision to remain Class T-E by doing nothing, or to elect Class T-F by filing the enclosed form, is final and binding.” (See PSERS-2) (emphasis in original).

5. The December 23, 2012, *T-F Membership Class Election* form instructed Claimant to “[u]se this form only to elect T-F membership. If you wish to remain a Class T-E member[,] **do not** file this form with the Public Employees’ Retirement System (PSERS).” It further informed Claimant that “[t]he decision to elect Class T-F membership instead of remaining as a Class T-E member is irrevocable.” Finally, Claimant was instructed to “Read Before Signing Below” and asked to acknowledge that by returning this form he understood, among other things, that “[he was] electing to change [his] membership class from T-E to T-F, [he had] carefully read the enclosed cover letter and the Choosing Your Membership Class handout, [and] this decision was final and binding.” (See PSERS-2) (emphasis in original).

6. The December 23, 2012, letter enclosed with the *T-F Membership Class Election* form also contained a “Choosing Your Membership Class” handout. (See PSERS-3).

7. The December 23, 2012, cover letters included PSERS’ contact information for members who had questions. (See PSERS-1, PSERS-2.)

8. Claimant received the December 23, 2012, *T-F Membership Class Election* form and cover letter. (See PSERS-4).

9. On January 7, 2013, PSERS received a *T-F Membership Class Election* form signed by Claimant and dated January 4, 2013. (See PSERS-4).

10. A January 12, 2013, letter informed Claimant that he chose to become a Class T-F member, which was a permanent and irrevocable decision, and what the specific implications of his Class T-F membership would be (i.e., increased withholdings and a higher pension benefit multiplier). (See PSERS-5).

11. On January 17, 2013, Claimant appealed PSERS' determination that he could not revoke his Class T-F membership election to the Executive Staff Review Committee ("ESRC"). (See PSERS-6).

12. By letter dated July 30, 2013, (PSERS-7), the ESRC denied Claimant's request to revoke his PSERS Class T-F membership, explaining as follows:

PSERS received your completed *T-F Membership Class Election* from on January 7, 2013. Your election is irrevocable and retroactive to your first day of qualifying membership in PSERS, and you are required to make retroactive contributions that are owed as a result of the higher contribution rate.

13. Claimant appealed the ESRC's decision on August 22, 2013. (See PSERS-8).

14. On September 10, 2013, PSERS filed an Answer and New Matter and Notice to Plead. (See PSERS-9).

15. 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 - Certificate of Service).

16. Claimant was required to plead to PSERS' New Matter within 20 days after service. 1 Pa.Code § 35.35. (See PSERS-9 - Notice to Plead).

17. PSERS was not served with an answer to its New Matter, and the docket entries do not reflect that any answer to PSERS' New Matter has been filed.¹

18. On May 8, 2014, PSERS filed a Motion for Summary Judgment.

19. Claimant did not file a response to PSERS' Motion for Summary Judgment.

20. This matter is ripe for Board adjudication.

¹ Because Claimant did not respond to PSERS' New Matter, 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 and [] commence[s] from the original date of eligibility." 24 Pa.C.S. § 8305.2(c).

On December 2, 2012, Claimant began working for the Bald Eagle Area School District as a full-time, salaried employee. By letter dated December 23, 2012, PSERS mailed Claimant a welcome packet that included a cover letter notifying him of his PSERS membership. See PSERS-1; see also 24 Pa.C.S. § 8301 (a)(2) (PSERS membership is mandatory for school employees). On that same day, but by separate cover letter, PSERS also mailed Claimant a *T-F Membership Class Election* form. See PSERS-2. The cover letter congratulated Claimant on becoming a PSERS member, explained the differences between Class T-E and Class T-F membership, and notified Claimant of the implications of remaining a Class T-E member and of electing Class T-F membership. *Id.*

Dear Mr. Gary Lose:

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.

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").

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 February 15, 2013. 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 February 15, 2013.** 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.

* * *

Id. (emphasis in original).

The enclosed *T-F Membership Class Election* form also notified Claimant at the top and in bold letters to “[u]se this form only to elect Class T-F membership. If you wish to remain a Class T-E member do not file this form with the Public School Employee’s Retirement System (PSERS).” *Id.* (emphasis in original). It further informed Claimant that “[t]he decision to elect Class T-F membership instead of remaining as a Class T-E member is irrevocable.” *Id.* (emphasis in original). Claimant was also instructed to “**Read Before Signing Below[,]**” which then listed several acknowledgements including that by returning this form he understood, among other things, that “[he was] electing to change [his] membership class from T-E to T-F, [he had] carefully read the enclosed cover letter and the Choosing Your Membership Class handout, [and] this decision was final and binding.” *Id.* (emphasis in original). Furthermore, the enclosed “Choosing Your Membership Class” handout explained Class T-E and T-F membership and warned Claimant that his timely election of Class T-F is binding, once his class was determined it would be permanent, and there would not be an opportunity in the future to change class membership. See PSERS-3.

Claimant received the December 23, 2012, letters and the *T-F Membership Class Election* form.³ With the benefit of thorough explanations of the two membership classes, numerous, conspicuous warnings about the irrevocable effects of signing and filing the *T-F Membership Election* form, Claimant signed and timely filed the *T-F Membership Election* form. PSERS-4. Under Pennsylvania law, there is a presumption

³ Claimant signed and filed with PSERS the *T-F Membership Class Election* form, which was mailed to the same address on the same day as the cover letters, welcome packet, and “Choosing Your Membership Class” handout.

that a signed document accurately expresses the state of mind of the signing party. *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001), citing *Estate of McGovern v. State Employees' Retirement Board*, 517 A.2d 523, 526 (Pa. 1986). Moreover, even if claimant was mistaken about the purpose of the T-F Membership Election form, it would not form a basis for relief. See *McFadden v. American Oil Company*, 257 A.2d 283, (Pa. Super 1969) ("Generally, if a mistake is not mutual, but unilateral, and is not due to the fault of the party not mistaken, but to the negligence of the one who acted under the mistake, it affords no basis for relief...").

As noted above, if a member elects Class T-F membership within 45 days of notification from PSERS that they are eligible to make the election, the Retirement Code directs that the "election to become a Class T-F member shall be irrevocable. . ." 24 Pa.C.S. § 8305.2(c) (emphasis added). There are no exceptions. Here, Claimant was thoroughly informed of the distinctions between the T-E and T-F membership classes and conspicuously warned of the effects of filing the *T-F Membership Election* form, including making an irrevocable election into T-F membership. See PSERS-2; PSERS-3; PSERS-4.

Claimant made an irrevocable election into Class T-F membership by signing and filing with PSERS the *T-F Membership Election* form before the February 15, 2013, deadline but wants the Board to overlook these facts based on the following allegations: (1) he misread the *T-F Membership Election Form* and (2) the increased contribution rate of T-F membership coupled with his salary and family size creates a financial hardship. See PSERS-8. Claimant's alleged misunderstanding of the effect of filing the *T-F Membership Election* form and claims of financial hardship, however, do not change the result.

Preliminarily, PSERS provided numerous and conspicuous notification to Claimant of the distinctions between the two membership classes, warnings about the irrevocable effects of signing and filing the *T-F Membership Election* form, and methods of contacting a PSERS representative to answer any member questions. See PSERS-2; PSERS-3; PSERS-4. More specifically, PSERS warned him that if he made a timely election of Class T-F membership, his decision would be binding and irrevocable. See

id. Claimant was also conspicuously advised on the very form he claims to have misread that if he wished “**to remain a Class T-E member, do not file this form with the Public School Employees’ Retirement System (PSERS).**” PSERS-2 (emphasis in original); PSERS-4 (emphasis in original). In the December 2012 correspondence, PSERS provided Claimant with its contact information in the event he had any questions. See PSERS-1; PSERS-2; PSERS-3. Finally, financial hardship caused by the increased contribution rate for irrevocable T-F membership, while lamentable, is simply not grounds for appeal.

The Retirement Code unequivocally provides that if a member files a timely election with PSERS for Class T-F membership, his election “shall be irrevocable. . .” 24 Pa.C.S. § 8305.2 (b) and (c) (emphasis added). There are no exceptions (equitable or otherwise) to the irrevocable election of class T-F membership. Although the Board must liberally administer the system, it does not have the authority to revoke an irrevocable election. See *Finnegan v. Public School Employees’ Retirement Board*, 560 A.2d 848 (Pa. Cmwlth. 1989), *aff’d*, 591 A.2d 1053 (Pa. 1991).

CONCLUSION

A member who first becomes a school employee and an active member on or after July 1, 2011, who is eligible to become a Class T-E or Class T-F member and elects to become a member of Class T-F by signing and timely filing with PSERS a *T-F Membership Election* form, may not later revoke the irrevocable election into Class T-F membership. As a matter of law, there is no exception to the irrevocable election of Class T-F membership. Claimant’s appeal, therefore, does not contain any facts that, if proven, would establish a legal basis for the Board to accept his request to revoke Class T-F membership with PSERS. Because there does not appear to be a disputed issue of material fact, the Board may address the parties’ legal arguments without the need for an administrative hearing.

For the above stated reasons, Claimant may not revoke his Class T-F membership election. 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 GARY L. LOSE
DOCKET NO.: 2013-23
CLAIM OF GARY L. LOSE

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 revoke his election of Class T-F membership.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: October 7, 2014

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