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

IN RE: ACCOUNT OF PATTI SURUSKIE
DOCKET NO.: 2013-08
CLAIM OF PATTI SURUSKIE

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 Patti Suruskie'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 16, 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 May 16, 2013, PSERS notified Claimant that she 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 17, 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.Cmwth. 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 first enrolled in PSERS in April 2012 through her part-time employment with Exeter Township School District.
2. By letter dated May 26, 2012, PSERS mailed Claimant a *T-F Membership Class Election* (PSRS-1318) form and cover letter. (See PSERS-1; PSERS-2)
3. The May 26, 2012 cover letter to the *T-F Membership Class Election* form (PSRS-1318) provided, in pertinent part, as follows:

Dear Ms. Patti Suruskie:

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 July 20, 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 take any action.
- If you wish to elect Class T-F, **PSERS must receive your form by July 20, 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 July 20, 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)

5. Claimant received the May 26, 2012 cover letter and *T-F Membership Class Election* (PSRS-1318) form. (PSERS-6; PSERS-8)

6. By letter dated June 26, 2012, PSERS mailed Claimant a follow-up letter, reminding Claimant of the deadline to elect Class T-F membership, stating, 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 July 20, 2012.

(PSERS-3)

7. Claimant signed the *T-F Membership Class Election* (PSRS-1318) form on July 15, 2012. (PSERS-4; see also PSERS-6; PSERS-8 at p. 4)

8. Claimant mailed the *T-F Membership Class Election* (PSRS-1318) form on Tuesday, July 17, 2012. (PSERS-6; PSERS-8 at p.4)

9. On July 24, 2012, PSERS received Claimant's *T-F Membership Class Election* form. (PSERS-4)

10. When PSERS receives mail in the normal course of business, all incoming documents are time stamped at the time of receipt showing the date PSERS received the document. The document is then scanned into PSERS' imaging system. (PSERS' Memorandum of Facts at p. 3, ¶11)

11. Claimant did not file her *T-F Membership Class Election* form with PSERS on or before July 20, 2012. (PSERS-4)

12. By letter dated July 28, 2012, 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-5)

13. By letter dated August 7, 2012, Claimant appealed the July 28, 2012 letter to PSERS' Executive Staff Review Committee ("ESRC"). (PSERS-6)

14. By letter dated March 5, 2013, the ESRC denied Claimant's request to change her PSERS membership from Class T-E to Class T-F, stating:

You were enrolled as a Class T-E member of PSERS in April 2012. You had the choice to remain a Class T-E member or to file a *T-F Membership Class Election* form by July 20, 2012. PSERS did not receive a completed *T-F Membership Class Election* form from you until July 24, 2012. You will, therefore, permanently remain a Class T-E member.

(PSERS-7)

15. Claimant filed an appeal and request for an administrative hearing on April 2, 2013. (PSERS-8)

16. On April 19, 2013, PSERS filed its Answer to Claimant's appeal and request for an administrative hearing. (PSERS-9)

17. On May 16, 2013, PSERS filed a Motion for Summary Judgment.

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

19. This matter is ripe for Board adjudication.

DISCUSSION

The Public School Employees' Retirement Code, 24 Pa.C.S. §8101 et seq., ("Retirement Code"), requires that a person who first becomes a school employee and an active member on or after July 1, 2011 is enrolled in PSERS as a Class T-E member. 24 Pa.C.S. §8305(d). Such T-E member, however, may elect to become a Class T-F member provided the Class T-E member files a written election with PSERS within 45 days of notification by PSERS. 24 Pa.C.S. §§8305(e) and 8305.2(b).¹ 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, however, that: "If 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).

Here, Claimant first became a school employee and active member of PSERS in April 2012 and was enrolled as a Class T-E member. By letter dated May 26, 2012, PSERS notified Claimant that, as a Class T-E member, she was eligible to elect Class T-F membership. The May 26, 2012 letter warned her that, if she wanted to elect Class T-F membership, PSERS had to receive her election by July 20, 2012:

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 July 20, 2012. The form must be received by PSERS by that date.

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 take any action.

¹ Class T-E membership provides a benefit accrual rate of 2% and a contribution rate of at least 7 1/2%. Class T-F membership provides a benefit accrual rate of 2.5% and a contribution rate of at least 10.30%. 24 Pa.C.S. §8102 (definitions of "basic contribution rate" and "standard single life annuity").

- If you wish to elect Class T-F, **PSERS must receive your form by July 20, 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)

By letter dated June 26, 2012, PSERS sent a follow-up letter to Claimant reminding her that “[i]f [she] would like to change [her] membership to Class T-F, [Claimant] must do so by July 20, 2012.” (PSERS-3)

Claimant does not dispute that she received the notices and knew of the July 20, 2012 deadline to elect Class T-F membership. Rather, Claimant alleges that because she mailed her *T-F Membership Class Election* (PSRS-1318) form prior to the July 20, 2012 deadline, that her election should be deemed as timely filed, even though the form was not received by PSERS until July 24, 2012, four days after the due date of July 20, 2012.² (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. The date of deposit in the mail is not determinative. *Id.*; *see also Harasty v. Public School Employees' Retirement Board*, 945 A.2d 783 (Pa. Cmwlth. 2008) (“the timeliness of any document filed with PSERS is governed by the *actual receipt* of the document, rather than the date of mailing.”); *Coleman Appeal*, 33 Pa.D. & C.2d 191 (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

² When PSERS receives mail in the normal course of business, all incoming documents are time stamped at the time of receipt showing the date PSERS received the document. The document is then scanned into PSERS’ imaging system.

course of mail," cannot be invoked to prove timely receipt of a document filed with PSERS. *Harasty*, 945 A.2d at 788.³

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. Members had to elect 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 an 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. *Harasty*, 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.*; see also *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). 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

³ Sections 8305.1(b) and (d) of the Retirement Code, 24 Pa.C.S. §8305.1, are similar to Sections 8305.2(b) and (d):

* * *

(b) *Time for making election.* --The member must elect to become a Class T-D member by filing a written notice with the board on or before December 31, 2001, or before the termination of school service or State service as applicable, whichever first occurs.

* * *

(d) *Effect of failure to make election.* --If the member fails to timely file an election to become a Class T-D member, then all of the member's Class T-C school service shall be credited as Class T-C service, and said service shall not be eligible for Class T-D service credit upon termination of service and subsequent employment as an active member.

authority to deem a late-filed Class T-F membership election as timely. See *Allen v. Public School Employees' Ret. Bd.*, 848 A.2d 1031, 1033 (Pa.Cmwlt. 2004); *Forman v. Public School 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. *Dowler v. Public School Employees' Retirement Board*, 620 A.2d 639 (Pa. Cmwlt. 1993); *Marinucci v. State Employees' Retirement System*, 863 A. 2d 43 (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.

Claimant also argues in her appeal that: "While I know there is no guarantee on USPS regular mail, I truly, 'in good faith' believed that it would arrive in your office by the due date of July 20, 2012, and I cannot believe that it took a full week to arrive at your office." (PSERS-8 at p. 4)(emphasis in original) Essentially, Claimant is requesting *nunc pro tunc* relief. Such relief, however, is not available here. Generally, a request for *nunc pro tunc* relief is only available if an untimely filing was the result of fraud, a breakdown in the courts, or negligence on the part of a third party. *Forman* at 780, citing *Bass v. Commonwealth*, 401 A.2d 1133 (Pa. 1979). The Commonwealth Court has held, however, that *nunc pro tunc* relief is not available for class membership election. See *Harasty*, 945 A.2d at 788, citing *Allen*, 848 A.2d at 1033 (holding that there are no exceptions to the statutory deadline in 24 Pa.C.S. §8305.1(b)).

Moreover, even if the Board could grant *nunc pro tunc* relief, Claimant is not entitled to such relief because 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 [is] not such a non-negligent circumstance for which an appeal *nunc pro tunc* may be granted." *Id.*

Notably, Claimant does not argue that she was not aware of the requirement that her election form needed to be *received by PSERS*, not merely postmarked, on or before the July 20, 2012 deadline. Indeed, the *T-F Membership Class Election* (PSRS-

1318) form specifically notified her of that requirement and suggested a number of methods for delivery confirming receipt:

PSERS must receive this form by July 20, 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)

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 July 24, 2012. Claimant's appeal, therefore, does not contain any facts, which, if proven, would form a basis for the conclusion that Claimant timely filed her *T-F Membership Class Election* (PSRS-1318) form by July 20, 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

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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: August 7, 2013

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