

PSERB Resolution 2024-64

**Re: Account of Annette Patterson, Docket No. 2021-16
October 25, 2024**

RESOLVED that, in the matter of Annette Patterson, Docket No. 2021-16, the Public School Employees' Retirement Board accepts the recommendation of the Benefits and Appeals Committee and adopts the attached Opinion and Order of the Board and dismisses Claimant's appeal with prejudice.

Mail Date: _____

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

IN RE: ACCOUNT OF ANNETTE PATTERSON
DOCKET NO. 2021-16
CLAIM OF ANNETTE PATTERSON

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the proposed Opinion and Recommendation of the Hearing Examiner. We note that neither party filed Exceptions to the proposed Opinion and Recommendation. The Board finds appropriate the proposed Opinion and Recommendation, and, accordingly, we hereby adopt it as our own.

IT IS HEREBY ORDERED that Claimant's request to elect Class T-D membership after the statutory deadline is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: _____

By: _____
Richard Vague, Chairman



RECEIVED

JAN 03 2024

PSERB
EXECUTIVE OFFICE

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF GENERAL COUNSEL**

Peter D. Kovach
Hearing Examiner

pkovach@pa.gov
Office of Hearing Examiners

January 3, 2024

Annette Patterson

REDACT

Dwight A. Decker, Esquire
Pennsylvania Public School Employees'
Retirement System
Office of Chief Counsel
5 N 5th St
Harrisburg, PA 17101

**In RE: Account of Annette Patterson, Claim of Annette Patterson
PSERS Docket No. 2021-16**

Dear Mrs. Patterson and Attorney Decker:

Enclosed is the Opinion and Recommendation in this matter.

Thank you for your consideration.

Sincerely,

Peter D. Kovach
Hearing Examiner

PDK/pdk

Enclosure (Opinion and Recommendation)

CC w/original Opinion and file contents: Laura Vitale, Docket Administrator

**DEPARTMENT OF STATE / OFFICE OF HEARING EXAMINERS
2601 NORTH 3RD STREET / P.O. BOX 2649 / HARRISBURG, PA 17105-2649
PHONE: 717.772.2686 / FAX: 717.772.1892 / WWW.DOS.PA.GOV**



Protecting public health and safety.
Preserving the integrity of every vote.
Promoting business excellence.

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

**IN RE: Account of Annette Patterson,
Claim of Annette Patterson**

Docket No. 2021-16

PROPOSED OPINION AND RECOMMENDATION

**Peter D. Kovach
Hearing Officer**

**Date of Hearing: September 14, 2023
Hearing Officer: Peter Kovach
For Claimant: *Pro se*
For PSERS: Dwight A. Decker, Jr., Esquire**

BACKGROUND AND PROCEDURAL HISTORY

This matter comes before the Public School Employees' Retirement Board ("Board") based upon an appeal and request for hearing filed by Annette Patterson ("Claimant") on September 2, 2021. Claimant appealed the August 5, 2021 decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") which denied Claimant's request to change her PSERS membership from Class T-C to Class T-D. On September 16, 2021, PSERS filed its Answer to Claimant's appeal.

By letter dated July 20, 2023 Board Secretary Terrill J. Sanchez appointed the undersigned Hearing Examiner to act as the Hearing Officer for Claimant's administrative appeal. By letter of the same date, the Board's Appeal Docket Clerk notified Claimant that the administrative hearing regarding her appeal had been scheduled for Thursday, September 14, 2023, at the offices of PSERS in Harrisburg.

The hearing was held as scheduled. Claimant attended the hearing and elected to proceed *pro se*. Dwight A. Decker, Jr., Esquire, represented PSERS. Claimant testified on her own behalf and also offered the testimony of her husband, Lindsay Patterson. Claimant offered no exhibits into evidence. PSERS presented its case through twenty-six (26) exhibits and the testimony of the John Tucker, Regional Office Administrator, Southcentral Regional Office.

At the end of the hearing, Claimant waived the opportunity to file a primary brief on the record. PSERS indicated it did wish to file a brief. Under the circumstances, the parties were advised that a scheduling order would be issued after the transcript was docketed which would set forth the due date for PSERS brief, as well as the date by which Claimant could file a reply brief, if she desired.

The hearing transcript was filed on October 6, 2023. On October 19, 2023, the hearing officer issued an *Order Establishing Briefing Schedule* (the “Briefing Order”) which set forth the briefing requirements, established the filing deadline for PSERS primary brief, and also established December 4, 2023 as the filing deadline for Claimant to file a brief in reply to PSERS brief, if Claimant elected to do so. PSERS timely filed its post-hearing brief on November 13, 2023. Claimant did not file a reply brief as authorized by the October 19, 2023 Briefing Order; therefore, on December 11, 2023, an *Order Closing Record* was issued. Accordingly, the matter is now ripe for disposition.

FINDINGS OF FACT

CLAIMANT'S INITIAL PSERS MEMBERSHIP

1. Claimant became an active member of PSERS on April 19, 1991, by virtue of her employment with the School District of Philadelphia ("SDP"). (Notes of Testimony ("N.T.") 19, 40).

2. Claimant's initial classification by PSERS was as a member of Class T-C because claimant's employment with the SDP started prior to July 1, 2001. (N.T. 36).

3. Members of PSERS classified as Class T-C service for retirement purposes receive a maximum single-life annuity retirement benefit calculated as two percent (2.0%) of the final average salary multiplied by the years of service (assuming no withdrawals or debts). (N.T. 37).

4. Individuals in Class T-C membership are/were required to pay a contribution rate of 6.25%. (N.T. 36, 61).

CLAIMANT'S ADDRESS AND MAIL

5. From 1999 through 2016, Claimant's address of record with the SDP, and consequently PSERS, was 50 Woodhurst Drive, Voorhees, New Jersey (the "Voorhees address"). (N.T. 17-18, 25, 41, 63).

6. Claimant and her husband separated for a period of time in 2001 and 2002. (N.T. 18).

7. Claimant temporarily moved from the Voorhees address while separated from her husband. (N.T. 25.).

8. Despite temporarily moving from the Voorhees address in 2001 and 2002, Claimant's "primary address," and the address that she kept on file with SDP and PSERS, remained the Voorhees address from 1999 to beyond 2010. (N.T. 18, 25, 32).

9. During their separation, Claimant's husband continued to receive Claimant's mail at their home at the Voorhees address and would place it in a pile for Claimant to get at a later time. (N.T. 30, 32).

10. Claimant knew her husband was receiving her mail at the Vorhees address and would retrieve it from him. (N.T. 25).

11. Despite their period of separation, Claimant and her husband remained married and moved together from the Voorhees address to Delaware in 2016 or 2017. (N.T. 17, 30-31).

PSERS DIRERCT MAILINGS

12. During the 2001-2002 school year, Claimant worked full-time for SDP and was an active member of PSERS on June 30, 2001 and July 1, 2001. (N.T. 19-20).

13. On May 22, 2001, PSERS mailed a letter (the "May 2001 letter") to all active members, including Claimant, informing them of legislation which had passed which could affect their retirement benefits. (N.T. 43-47; PSERS-1).

14. The May 2001 letter advised PSERS members, among other things, that:

a. a new membership would become effective July 1, 2001 under which retirement benefits would be calculated with a 2.5% multiplier instead of the [then-]current 2%,

b. to receive the higher benefit formula, the member's contribution rate would change to 6.50% (if [then-]currently contributing 5.25%) or 7.50% (if [then-]currently contributing 6.25%) effective January 1, 2002; and

c. to receive the higher benefit formula, the member must file a written election with PSERS by December 31, 2001.

(PSERS-1; *See also* N.T. 36, 61).

15. The May 2001 letter was sent on behalf of PSERS by a vendor named elections.com. (N.T. 45-46).
16. The May 2001 letter was sent by first-class mail. (N.T. 45).
17. The vendor maintained a listing of the members to whom the May 2001 letter was sent as well as the address to which the letter was sent. (N.T. 45-46; PSERS-1).
18. PSERS also received a report of any mailings which were returned as undeliverable. (N.T. 46).
19. The May 2001 letter sent to Claimant was not returned to PSERS as undeliverable. (N.T. 46).
20. On or about September 10, 2001, PSERS mailed a letter (the "September 2001 letter") to Claimant and all other eligible PSERS members, concerning the Act 9 legislation and included an election form if the member wished to elect Class T- D membership. (N.T. 47-50; PSERS-2).
21. The outside of the envelope containing PSERS-2 was printed in multiple colors and notified members of the deadline to elect T-D membership. (N.T. 50, PSERS-2).
22. The September 2001 letter was sent by first-class mail (N.T. 47).
23. The September 2001 letter sent to Claimant was sent to the Vorhees address. (N.T. 47, PSERS-2).
24. The September 2001 letter not returned to PSERS as undeliverable. (N.T. 47).
25. On or about November 16, 2001, PSERS mailed another copy of the September 2001 letter and election form to approximately 40,000 members who had not responded to the September 2001 letter; that list included Claimant. (N.T. 50-51; PSERS-3).

26. The outside of the envelope containing PSERS-3 was printed in multiple colors and notified members of the deadline to elect T-D membership. (N.T. 50-51, PSERS-3).

27. On or about November 30, 2001, PSERS mailed Claimant an estimate (the "November Estimate"), specific to Complainant, explaining the effects of electing or not electing Class T-D membership and reminded Complainant of the impending December 31, 2001 deadline. (N.T. 51-54; PSERS-4).

28. Both the second mailing of the September 2001 letter (sent on November 16, 2001), as well as the November estimate, were sent to Claimant at the Voorhees address via first class mail and were not returned as undeliverable. (N.T. 50-54, 70; PSERS-1 through PSERS-4).

29. Claimant's husband surmises that he probably received the Act 9 mailings because he was the individual who handled the household finances, including pensions and insurance. (N.T. 29, 32).

30. Claimant's husband's experience with his father's pension and his work as president of a union led him to believe that people automatically qualified for the maximum pension. (N.T. 29).

PSERS NEWSLETTERS AND WEBSITE

31. During the summer of 2001, PSERS sent a newsletter to all members, including Claimant, that provided further notice of the impending deadline to elect Class T-D membership. (N.T. 54-55; PSERS-5).

32. During the fall of 2001, PSERS sent another newsletter to all members, including Claimant, that provided further notice of the impending deadline to elect Class T-D membership. (N.T. 55-56; PSERS-6).

33. During the relevant time period, PSERS' website also contained information about the Act 9 legislation and the deadline to elect Class T-D membership. (N.T. 57; PSERS-7).

34. Claimant has never filed an election form to elect Class T-D membership. (N.T. 67).

STATEMENTS OF ACCOUNT

35. Beginning December 6, 2002, and continuing through November 9, 2019, PSERS mailed Claimant an annual Statement of Account. (N.T. 59-60; PSERS-8 through PSERS-25).

36. The Statements of Account indicate Claimants total years of service earned, the class of service, her contributions and interest earned, and the contribution rate, each calculated/determined as of June 30 of the year associated with the respective Statement of Account. (N.T. 59-60; PSERS-8 through PSERS-25).

37. Each of the 18 Statements of Account sent to Claimant between 2002 and 2019 indicate that Claimant's years of service were credited by PSERS as Class T-C service, with a contribution rate of 6.25%. (N.T. 61- 63; PSERS-8 - PSERS-25).

38. Claimant recalls receiving Statements of Account from PSERS but could not identify which particular documents she recalled receiving. (N.T. 20-24).

REQUEST TO CHANGE CLASS AND APPEAL PROCESS

39. By letter dated, June 9, 2020, Claimant first contacted PSERS requesting to elect Class T-D membership. (N.T. 67-69).

40. By letter dated August 5, 2021, the Executive Staff Review Committee ("ESRC") denied Claimant's request, explaining that she is permanently a Class T-C member because she did not file a written election to become a Class T-D member by the December 31, 2001 deadline. (N.T. 65-66, 69; PSERS-26).

41. Claimant filed an appeal from the decision of the ESRC and requested an administrative hearing. (N.T., *passim*; Docket at 2021-16).

42. Claimant was afforded notice of the hearing and appeared at the hearing held on September 14, 2023 before Hearing Examiner Peter Kovach, Esquire; during the hearing Claimant was provided the opportunity to testify on her own behalf and to admit evidence and call witnesses to testify on her behalf; Claimant was given the opportunity to object to the testimony and evidence presented by PSERS; and Claimant was offered the opportunity to file post-hearing briefs in support of her appeal. (N.T., *passim*; Docket at 2021-16).

CONCLUSIONS OF LAW

1. Claimant was afforded notice of ESRC's determination and was provided an opportunity to be heard in connection with her appeal. (N.T., *passim*; Findings of Fact ("F.F.") 40-42).

2. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991).

3. The burden of proof to be applied in this administrative action is the preponderance of the evidence standard. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A. 2d 600 (Pa. Cmwlth. 1990), petition for allowance of appeal denied, 602 A. 2d 863 (Pa. 1998); *Suber v. Pennsylvania Commission on Crime and Delinquency*, 885 A. 2d 678 (Pa. Cmwlth. 2005).

4. Claimant has only those rights recognized by statute and none beyond. *Bittenbender v. State Employees' Retirement Board*, 622 A. 2d 403 (Pa. Cmwlth. 1992).

5. The authority of the Board to grant or deny Claimant's request to elect Class T-D membership is limited to the provisions of the Retirement Code; the Board 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. Cmwlth. 2001); *Burris v. State Employees' Retirement Board*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender*, 622 A.2d 403.

6. Because Claimant was hired by the SDP prior to July 1, 2001, Claimant was classified as a Class T-C member when she became a member of PSERS. (F.F. Nos. 1, 2; 24 Pa.C.S. § 8305(a)).

7. As a member of PSERS Class T-C, Claimant would be eligible to receive a maximum single-life annuity retirement benefit calculated as two percent (2.0%) of the final average salary

multiplied by the years of service (assuming no withdrawals or debts). (F.F. 3, 14; 24 Pa.C.S. § 8102 at Basic contribution rate, Standard single life annuity); *See also* 24 Pa.C.S. § 8305(a).

8. Individuals in Class T-C membership are/were required to pay a contribution rate of 6.25%. (F.F. 14; 24 Pa.C.S. § 8102 at Basic contribution rate).

EFFECT OF ACT 9

9. The act of May 17, 2001, P.L. 26, No. 9 ("Act 9") provided, among other changes, an opportunity for PSERS members to become members of a newly created Class T-D under which retirement benefits would be calculated with a 2.5% multiplier. (F.F. 14; 24 Pa.C.S. §§ 8102 at Standard single life annuity. 24 Pa.C.S. § 8305.1).

10. Individuals who elected Class T-D membership are/were required to pay a contribution rate of 7.5%. (F.F. 14; 24 Pa.C.S. § 8102 at Basic contribution rate, 24 Pa.C.S. § 8305.1(c).

11. Act 9 required eligible members wishing to elect Class T-D membership to file "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." (F.F. 14; 24 Pa.C.S. § 8305.1(b)).

12. If a member failed to timely file an election to become a Class T-D member, then all of the member's Class T-C school service is to be credited as Class T-C service, and the service is not eligible for Class T-D service credit upon termination of service and subsequent employment as an active member." (24 Pa.C.S. § 8305.1(d)).

13. As an active Class T-C member of PSERS on July 1, 2001, Claimant had until December 31, 2001 to elect to become a Class T-D member. (Conclusion of Law ("CoL") 6; 24 Pa. C.S. §8305.1(b)).

14. PSERS was not required to give notice of the Act 9 Class T-D election period, but when notice was provided to some members, PSERS was required to effectuate notice to all members in the same manner. Cardella v. Public School Employees' Retirement Board, 827 A.2d 1277 (Pa. Cmwlth. 2003).

15. Notice requirements are satisfied when proper notice of an action 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 Employees' Retirement System, 736 A.2d 745, 753 (Pa. Cmwlth. 1999); see also Tyson v. Public School Employees' Retirement System, 737 A.2d 325 (Pa. Cmwlth. 1999); Berkowitz v. Mayflower Sec., Inc., 317 A.2d 584, 585 (Pa. 1974); Milford Twp. Bd. of Supervisors v. Dep't of Envtl. Resources, 644 A.2d 217, 218-219 (Pa. Cmwlth. 1994); Kobylski v. Milk Marketing Bd., 516 A2d 75 (Pa. Cmwlth. 1986).

16. The mailbox rule provides that evidence of having deposited in the mail a properly addressed, prepaid letter, raises a rebuttable presumption that it reached its destination by due course of mail. In re Cameron Estate, 130 A.2d 173 (Pa. 1957); Sheehan v. Workmen's Compensation Appeal Board (Supermarkets General), 600 A.2d 633 (Pa. Cmwlth. 1991), appeal denied, 609 A.2d 170 (Pa. 1992); Chartiers Indus. & Commercial Dev. Auth. v. Allegheny County Bd. of Property Assessment, 645 A.2d 944,946 (Pa. Cmwlth. 1994); See also Guss v. City of Philadelphia Bd. of Pensions & Ret., 2020 WL 3639999 (Pa.Cmwlth. 2020)¹.

17. Proof of mailing is not a requirement for a party to prove that a document was actually mailed; instead, evidence of the custom of the establishment as to the mailing of such letters is receivable as evidence that it was mailed. See Com., Dep't of Transp. v. Brayman Const. Corp.-Bracken Const. Co., 99 Pa.Cmwlth. 373, 513 A.2d 562,566 (1986); Guss, 2020 WL 3639999.

¹ As an unreported panel decision of the Commonwealth Court, the case is cited for its persuasive value, but not as binding precedent. See section 414 of the Commonwealth Court's internal operating procedures

18. Mere denial of receipt is not sufficient to establish that notice was not provided. Chartiers Indus. & Commercial Dev. Auth. v. Allegheny Cnty. Bd. of Prop. Assessment, Appeals & Review, 165 Pa.Cmwlth. 671, 674, 645 A.2d 944, 946 (1994).

19. When notice is mailed to party's last known address and is not returned by the post office, the party is presumed to also have received notice. John Kenneth, Ltd. v. Unemployment Compensation Board of Review, 66 Pa.Cmwlth. 377, 444 A.2d 824 (1982).

20. PSERS provided proper notice to Claimant of her right to elect Class T-D membership when it sent, via first-class mail to Claimant's Voorhees address, three (3) Act 9 notices in May 2001, September 2001, and November 2001, as well as a personalized estimate in November 2001 that also included notice of the December 31, 2001 deadline. (F.F. Nos. 5-10, 13-29).

21. Claimant did not timely request to convert her membership from Class T-C to Class T-D. (N.T. 34, 39; CoL 6, 11-13)

22. Claimant failed to meet her burden of establishing that PSERS did not provide her proper notice of her right to elect Class T-D membership as it did for other eligible members, or that PSERS mailed the Act 9 notices to the wrong address. (F.F. Nos. 5-10, 13-29).

23. The PSERS and the Board are precluded from taking an untimely application and deeming it as timely filed. Forman, 778 A.2d 778.

24. The ESRC properly denied Claimant's request to change her membership class from Class T-C to Class T-D because she did not file a written election to become a Class T-D member by the December 31, 2001 deadline. (F.F. 34, 39-40; CoL 2 - 23).

DISCUSSION

In this matter, Claimant comes before the Board based upon a request made in 2020 that she be allowed to change her PSERS membership from Class T-C to Class T-D. Most of the operative facts are not in dispute. Claimant became a member of PSERS in 1991 when she started teaching for the School District of Philadelphia (“SDP”). At the time she became a member of PSERS, she was placed into the then-applicable membership class for new members, Class T-C. Members of Class T-C, like Claimant, were/are required to contribute 6.25%² of their salary into the PSERS system (F.F. 4). In return, upon retirement vested members of Class T-C are eligible for a maximum single-life benefit which is calculated utilizing a two percent (2.0%) multiplier times final average salary times the number of years of service (F.F. 3).

In May 2001, Act 9 was enacted and signed into law. Act 9, among other things, provided then-currently active PSERS members with the option to elect a new membership class, Class T-D. (F.F. 9). For those who elected to become part of the new Class T-D, two changes relevant to Claimant’s appeal would occur. First, the members of Class T-D would become eligible for benefits based upon a two and one-half percent (2.5%) multiplier (F.F. 14) instead of the two percent (2.0%) multiplier which was applicable to members of Class T-C. (F.F. 3, 14). *However*, in order to receive the benefit of that enhanced multiplier, members who elected to switch to Class T-D would simultaneously agree to the burden of making all future contributions based at the rate of seven and one-half percent (7.5%) of their salary (F.F. 14) instead of the maximum six and one-quarter percent (6.25%) contribution rate (F.F. 3, 14) which applied to those who did not elect Class T-D and remained under Class T-C.

² There was testimony and evidence that some members of Class T-C contributed at a level of 5.25%, based upon the member’s entry into service. (N.T.36; *See also*, PSERS-1). There appears to be no dispute that the Class T-C contribution level which applied to Claimant was 6.25%.

The provisions of Act 9 did not automatically convert Class T-C members to Class T-D, nor were eligible individuals provided an open-ended opportunity to elect Class T-D. Instead, Act 9 created a new Section 8305.1 within the Public School Employee Retirement Code, and set forth the following relevant provisions with respect to electing to become a Class T-D member:

§ 8305.1. Election to become a Class T-D member.

(a) General rule.--A person who is:

* * * * *

(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.

24 Pa.C.S. § 8305.1 (emphasis added). As set forth in Section 8305.1(d), 24 Pa.C.S. § 8305.1(d), those members who failed to file the election form by December 31, 2001 would have all of their school service credited as Class T-C service.

Claimant's appeal does not dispute that she did not file a class election form prior to December 31, 2001 – in fact, testimony during the hearing from a PSERS employee who had reviewed Claimant's account indicated that Claimant has never filed a class change election form (F.F. 34). Claimant did not dispute that assertion (N.T. *passim*). Instead, the genesis of this appeal is Claimant's letter dated June 9, 2020 to PSERS and Claimant's assertion that she did not know about the option to elect Class T-D.

During the hearing, John Tucker, a regional office administrator for the south central region of PSERS, credibly testified about the procedures utilized by PSERS to send out the various notices to its members. In summary, a vendor contracted by PSERS initially sent out a mass mailing in May 2001 to active members of PSERS advising them of the passage of Act 9. Those mailings were sent by first-class mail. (F.F. 16). PSERS received and has maintained a report of all members to whom the mailing was sent, as well as the address to which the mailing was sent. (F.F. 17). PSERS also received information regarding mailings which were returned as undeliverable. (F.F. 18). Claimant's mailing was not returned marked as undeliverable. (F.F. 19).

PSERS followed up the May 2001 mailings with a September 2001 letter with an included class election form. (F.F. 20). That mailing was sent by first-class mail, was in colorful envelope, and information about the election deadline was printed on the outside of the envelope. (F.F. 21-22). The September 2001 letter was also sent to Claimant's Vorhees address and not returned as undeliverable. (F.F. 23-24).

Approximately 40,000 individuals (including Claimant) did not respond to the September 2001 letter/election form packet and in mid-November 2001, PSERS mailed the September 2001 packet again to those individuals. (F.F. 25). That mailing was sent by first-class mail, was in a colorful envelope, and information about the election deadline was printed on the outside of the envelope. (F.F. 26, 28). The mid-November re-mailing of the September 2001 letter was also sent to Claimant's Vorhees address and not returned as undeliverable. (F.F. 28).

Finally, PSERS sent the November estimate to Complainant at the end of November 2001 explaining the difference in benefits available if Claimant remained under Class T-C vs changing to Class T-D. (F.F. 27). The November estimate was likewise sent by first-class mail to Claimant at the Vorhees address and not returned as undeliverable. (F.F. 28).

On top of the May 2001 letter, the September 2001 letter , remailing of the September 2001 letter to non-responders in mid-November 2001, and the November estimate sent by first-class mail to Respondent, PSERS also provided general notices about Act 9 and the need to make an election by December 31, 2001 in several newsletters issued in 2001 (F.F. 29 - 32), as well as on the PSERS website (F.F. 33). Finally, PSERS sent to Claimant an annual Statement of Account each year from 2002 through at least 2019; each provides information about her total service credits; each indicates that all service credits were allocated to Class "TC". (F.F. 35-37).

Complainant and her husband both credibly testified that during the time period in 2001 when PSERS sent the May 2001 letter, the September 2001 letter, remailed the September 2001 letter to non-responders in mid-November 2001, and the personalized November estimate, Claimant was separated from her husband and was not living at the Vorhees address. (F.F. 6-7). Despite not living at the Vorhees address during the separation, Claimant acknowledged that she did not change her registered address on file with her employer - the SDP, or with PSERS. (F.F. 8). Instead, Claimant's address on file with both the SDP and PSERS remained the Vorhees address from 1999 through 2016. (F.F. 5).

Claimant's husband testified that during the period while he and Claimant were separated, he would place mail received at the Vorhees address which was addressed to Complainant in a pile for Claimant to get at a later time. (F.F. 9). Claimant acknowledged that she was aware her husband was receiving her mail at the Vorhees address and also acknowledged that she would retrieve it from him. (F.F. 10). Claimant's husband speculated that he probably did get the mailings sent by PSERS; he generally took care of insurance and pensions and those types of things. (F.F. 29). Claimant's husband also noted that his experience with his father's pension and

his work as president of a union in a steel mill was that people automatically qualified for the maximum. (F.F. 34).

Despite all of the attempts by PSERS to directly notify Claimant of her ability to elect Class T-C prior to the deadline, the indirect messaging through newsletters and the PSERS website (F.F. 31-38), as well as all of the post-deadline account statements which referenced Claimant as being a member of Class T-C, Claimant made no inquiries or attempts to change her class until she made inquiries with PSERS in June 2020 – almost two (2) decades after the statutorily set deadline to make her election had passed. (F.F. 39, CoL 13).³

It is well established that Claimant bears the burden of establishing the facts necessary to sustain her claim. See, Gierschick v. State Employees' Ret. Bd., 733 A.2d 29, 32 (Pa. Cmwlth. 1999); Wingert v. State Employees' Ret. Bd., 589 A.2d 269, 271 (Pa. Cmwlth. 1991). Further, it is well established that the PSERS is a creature of the legislature, and its members only have those rights created by the Retirement Code and none beyond. See, e.g., Burris v. State Employees' Ret. Bd., 745 A.2d 704, 706 (Pa. Cmwlth. 2000); Bittenbender v. State Employees' Ret. Bd., 622 A.2d 403, 405 (Pa. Cmwlth. 1992); Hughes v. Public Sch. Employees' Ret. Bd., 662 A.2d 701, 706 (Pa. Cmwlth. 1995), *allocator denied*, 668 A.2d 1139 (Pa. 1996). While a member is entitled to a liberal construction of the Retirement Code, PSERS has no authority to grant rights beyond those specifically set forth in the Retirement Code. Bittenbender, 622 A.2d at 405; Forman v. Public Sch. Employees' Ret. Bd., 778 A.2d 778, 779 (Pa. Cmwlth. 2011). Equitable relief is not an

³ Even had Claimant requested conversion to Class T-D shortly after the deadline, her ability to elect Class T-D membership after the deadline had passed appears in serious doubt. See e.g., Allen v. Public School Employees' Retirement Bd., 848 A.2d 1031, 1033 (Pa. Cmwlth. 2004) (holding that there is no *nunc pro tunc* filing allowed for Class T-D election and that there are no exceptions to the statutory deadline in 24 Pa.C.S. § 8305.1(b)). See also Harasty v. Public School Employees' Retirement Bd., 945 A.2d 783 (2008).

available remedy under the Retirement Code. Finnegan v. Public School Employes' Ret. Bd., 560 A.2d 848, 851 (Pa. Cmwlth. 1989), *aff'd*, 591 A.2d 1053 (Pa. 1991).

The Hearing Officer is sympathetic to Claimant's plea, as the annual difference in retirement benefits which are available to her under Class T-C versus those which might have been available to her under Class T-D are not insignificant. However, the facts produced during the hearing demonstrated that PSERS had an established procedure for transmitting written notifications by first-class mail directly to its to its members regarding the potential effects of Act 9. Those notices including notice of the statutory deadline and the importance of making an election before that deadline. The credible testimony and evidence produced by PSERS during the hearing indicated that those notification procedures were followed, not once, but multiple times prior to the deadline.

The notifications were sent to the address which Claimant acknowledged was her registered address with her employer and therefore also with PSERS. (F.F. 8). Both Claimant and her husband testified that despite their temporary separation, Claimant's husband would hold Claimant's mail for her which was received at the registered address. (F.F. 9). Claimant acknowledged that she did, in fact, pick up mail which had been held for her by her husband. (F.F. 10). PSERS provided credible testimony that none of the mailings were returned; consequently, there was no reason for PSERS to question whether Claimant was receiving the notifications sent to her Vorhees address.

Absent a statutory or regulatory provision to the contrary (and none are known to apply in this case), there are certain presumptions and rules in the law regarding items mailed through the United States Postal Service. One of those is a rebuttable presumption that a properly addressed, prepaid letter deposited in the mail will reach its destination in due course. (CoL 16). Another is

that notice mailed to a party's last known address and not returned by the post office creates a presumption that the party received the notice. (CoL 19). Evidence of the custom of an organization regarding the mailing of letters and notices may be received as evidence to show that it was properly mailed, even without direct proof that a specific piece of mail was mailed (CoL 17). Finally, and of most significance to this matter, the mere denial of receipt of a letter by an intended recipient is insufficient to rebut the presumption that the letter or notice was not received. (CoL 18).

Under the circumstances of this case, Claimant has failed to rebut the presumption that she received the notices and that PSERS acted appropriately when sending them. On the contrary, it seems more likely than not that the various notification letters and the November estimate sent to Claimant in mid-to-late 2021 were actually delivered to the Vorhees address, even if Claimant and her husband truthfully testified that they have no independent recollection of having received those communications today.

Without any clear evidence to show known and demonstrable issues with the United States Postal Service failing to properly deliver mail to Claimant's home or neighborhood, that an incorrect address was utilized by PSERS, etc., twenty-plus years on one is forced to resort to speculation as to what may have happened with the letters and the November estimate. It is certainly plausible that the PSERS mailings may have been intermingled in a stack of other bills and correspondence set aside by Claimant's husband and simply discounted or overlooked by Claimant while dealing with what appeared to more pressing matters. Perhaps in the midst of the separation and Claimant's need to live outside the marital residence, Claimant was also undergoing the financial upheaval that frequently accompanies separations and Claimant made a hasty and quickly forgotten decision to forego the option to change her retirement class because she could

not afford to have additional money withheld from her paycheck at that time (6.25% vs 7.5%). Perhaps Claimant's husband received the letters (as he speculated might have occurred during the hearing), did not understand that public sector pension benefits and rules are set by statute instead of negotiation, and based upon a mistaken assumption that Claimant would automatically be moved into the most beneficial class he treated the letter in the same manner as junk mail.

Again, at this point, 20 years later and without any evidence to show that PSERS did not properly transmit the pre-deadline notification letters and the November estimate, or that PSERS knew that they were not delivered to the Vorhees address, everyone is left to speculate what truly did occur. Regardless of the actual reason(s) why Claimant does not recall the communications, ultimately Claimant had the burden of proof in this matter to show that PSERS acted inappropriately. She failed to meet that burden of proof and with it, failed to show that the ESRC's determination that she was ineligible to retroactively convert her Class T-C membership to Class T-D membership was wrong. Therefore, based upon all of the foregoing, the following recommendation will be made to the Board:

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

**IN RE: Account of Annette Patterson,
Claim of Annette Patterson**

Docket No. 2021-16

RECOMMENDATION

AND NOW, this 3rd day of **January 2024**, upon consideration of the foregoing findings of fact, conclusions of law and discussion, the Hearing Officer for the Public School Employees' Retirement Board ("Board") recommends that the Board **DENY CLAIMANT'S APPEAL** of the determination made by the Public School Employees' Retirement System Executive Staff Review Committee that Claimant was ineligible to elect Class T-D membership because her request was received after the statutory deadline.

NOTICE

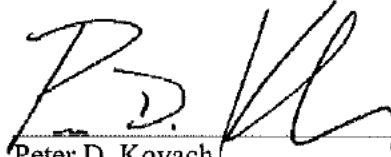
A party may file exceptions to this proposed opinion and recommendation in accordance with 1 Pa. Code §§ 35.211 and 35.212 (relating to procedure to except to proposed report; and content and form of briefs on exceptions). *See* 22 Pa. Code § 201.11(d). **Exceptions shall be filed with the below-noted Appeal Docket Administrator** and must be received **by Friday, February 2, 2024**, 30 days after the mailing date of this proposed opinion and memorandum. *See* 1 Pa. Code § 35.211 (participant desiring to appeal to the agency head shall, within 30 days after the service of a copy of a proposed report or such other time as may be fixed by the agency head, file exceptions to the proposed report or part thereof in brief on exceptions; brief opposing exceptions may be filed in response to briefs on exceptions within 20 days after the time limited for the filing of briefs on exceptions or such other time as may be fixed by the agency head).

If exceptions are filed, the Board will rule upon the exceptions. The Board 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. See 22 Pa. Code § 201.11(c).

A legal assistant for the Office of Hearing Examiners will distribute this proposed opinion and recommendation to the Appeal Docket Administrator and the parties.

BY ORDER:



Peter D. Kovach
Hearing Examiner

Claimant:

Annette Patterson

REDACT

For the Retirement System:

Dwight A. Decker, Esquire
Pennsylvania Public School Employees'
Retirement System
Office of Chief Counsel
5 N 5th St
Harrisburg, PA 17101
dwhighdecke@pa.gov

Appeal Docket Administrator:

Julie Vitale, Appeal Docket Administrator
Pennsylvania Public School Employees'
Retirement System
Office of Chief Counsel
5 N 5th Street
Harrisburg, PA 17101-1905
jvitale@pa.gov

Date of Mailing:

January 3, 2024

Mail Date: _____

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

IN RE: ACCOUNT OF ANNETTE PATTERSON
DOCKET NO. 2021-16
CLAIM OF ANNETTE PATTERSON

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the proposed Opinion and Recommendation of the Hearing Examiner. We note that neither party filed Exceptions to the proposed Opinion and Recommendation. The Board finds appropriate the proposed Opinion and Recommendation, and, accordingly, we hereby adopt it as our own.

IT IS HEREBY ORDERED that Claimant's request to elect Class T-D membership after the statutory deadline is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: _____

By: _____
Richard Vague, Chairman