COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

 One Congress Street, 11th Floor

 Boston, MA 02114

 (617) 626-7200

 Fax: (617) 626-7220

**MARIE ROSE-BERNADETTE** **www.mass.gov/dala**

**DESIRÉ,** Docket No. CR-14-200

Petitioner July 7, 2017

*v.*

**MASSACHUSETTS TEACHERS’**

**RETIREMENT SYSTEM,**

Respondent

**Appearance for Petitioner:**

 Ashley Call, Esq.

 Massachusetts Teachers Association

 2 Heritage Drive, 8th Floor

 Quincy, MA 02171

**Appearance for Respondent:**

 James H. Salvie, Esq.

 Massachusetts Teachers’ Retirement System

 500 Rutherford Avenue, Suite 210

 Charlestown, MA 02129

**Administrative Magistrate:**

Angela McConney Scheepers, Esq.

**SUMMARY**

 Petitioner cannot enroll in the Retirement Plus program under G.L. c. 32 § 5(4)(i) because she missed the statutory deadlines. G. L. c. 32 § 5(4)(i); Acts 2004, c. 149, § 397.

**DECISION**

The Petitioner, Marie Rose-Bernadette Desiré, appealed timely under G.L. c. 32, § 16(4), the April 14, 2014 decision of the Respondent, Massachusetts Teachers’ Retirement System (MTRS), denying her application for late entry into Retirement Plus. G. L. c. 32, §5(4)(i). I held an evidentiary hearing on November 3, 2016 at the offices of the Division of Administrative Law Appeals (DALA), One Congress Street, Boston, MA 02109. Several exhibits were admitted into evidence at the hearing (Exhibits 1-12). The hearing was digitally recorded. I admitted Exhibits 13 and 14 after the hearing on November 17, 2016, and the omitted document from Exhibit 9 was admitted on February 17, 2017. I marked the Petitioner’s Pre-hearing Memorandum “A” for identification. I marked the Respondent’s Pre-hearing Memorandum “B” for identification. The Petitioner called Yvon L’Amour and Karen Griffith, and also testified on her own behalf. The Petitioner submitted her Post-hearing Memorandum on February 21, 2017. The Respondent submitted its Post-hearing Memorandum on February 21, 2017, whereupon the administrative record closed.

**FINDINGS OF FACT**

Based on the documents admitted into evidence and the testimony presented at the hearing, I make the following findings of fact:

1. Marie Desiré has been teaching in the Cambridge Public School District (CPSD) since 1988. She became a member of the Massachusetts Teachers’ Retirement System (MTRS) at that time. (Exhibit 11; Testimony of Desiré.)
2. The enhanced alternative superannuation retirement program, otherwise known as Retirement Plus, was created in 2001 and codified at G. L. c. 32 § 5(4)(i) and 5(4)(ii). After this codification, MTRS began transitioning members to the new program by mailing Retirement Plus election packages to all active and inactive members in February 2001. MTRS also sent these election packages to payroll offices at public schools and made the Retirement Plus information available on its website. (Exhibit 10.)
3. The Retirement Plus election package contained a “RetirementPlus Election Form” that stated in part, “Submit this entire form to your PAYROLL OFFICIAL for his or her acknowledgement and signature” in boldface. The next boldface sentence stated, “Return your completed Election Form in the official RetirementPlus reply envelope by the date indicated above.” The package also contained other information on the application process, a Member Form for the member’s records, and a Notice to Employer Form to be sent to the school’s payroll office with instructions to deduct the new 11 % on all regular compensation. Both the Election and Member Forms required that the Election Form be returned to MTRS before the deadline of June 30, 2001. (Exhibit 9.)
4. In an affidavit signed November 2, 2016, Susan Theil, the Director of Communications for MTRS, stated that a copy of the Retirement Plus package was sent to Ms. Desiré at her address at the time, 222 Putnam Avenue, Cambridge, MA, 02139. (Exhibit 10.)
5. While Ms. Desiré testified that she never received this information in the mail, she did hear about the new retirement program at her school from her coworker Ms. Griffith, who suggested Ms. Desiré enroll in Retirement Plus. (Testimony of Desiré.)
6. On April 6, 2001, Ms. Desiré, Ms. Griffith and Mr. L’Amour all filled out what they believed were election forms. Ms. Griffith hand-delivered all of their forms to the central administration building on Thorndike Street due to the unreliability of interoffice mail. (Exhibits 13 and 14; Testimony of Desiré, Griffith and L’Amour.)
7. Ms. Desiré had filled out the “Member Information” portion of the form, and kept it for her records as advised on the form. She had also completed the “Notice to Employer” form and given it to Ms. Griffith to deliver to the payroll office. (Exhibit 3; Testimony of Desiré.)
8. While Ms. Griffith and Mr. L’Amour did not receive any confirmation from their payroll office or MTRS, they noted that the new 11% rate was deducted from their paychecks in the fall. (Exhibits 13 and 14; Testimony of Griffith and L’Amour.)
9. After April 6, 2001 but before the June 30, 2001deadline, Ms. Desiré received a note via interoffice mail from JoAnn Campbell, the CPSD payroll manager. That note stated, “I need original forms and I need the official 8 ½ x 11 form to fill out section 4.” Ms. Desiré interpreted that to mean that Ms. Campbell needed the “Member Information” form as well, so she took that form, attached it to the “Notice to Employer” section that was sent back to her, and sent Ms. Campbell the newly constructed 8 ½ x 11 form via interoffice mail. She did not receive any further communication from Ms. Campbell or MTRS. (Exhibits 1, 2 and 3; Testimony of Desiré.)
10. In 2004, due to the complications that arose from the CPSD payroll office taking responsibility for mailing in Retirement Plus election forms, MTRS, through an internal policy, and the Legislature, through 2004 Mass. Ch. 149 § 397, created an exception to any late forms sent by payroll offices and an opportunity for members to refile if needed. MTRS contacted teachers directly through US Mail, sent out a “broad cast email,” sent a press release to the Massachusetts Teachers Association, and posted a helpful quiz on the MTRS website to inform teachers of this new opportunity. (Exhibits 4 and 7.)
11. In 2012, Ms. Desiré spoke with a financial advisor and was informed that the 11% rate was not being taken deducted from her wages as reflected on her paystub. After that meeting, Ms. Desiré followed up with MTRS and was informed in July 2013 that she was not enrolled in Retirement Plus. (Testimony of Desiré.)
12. The CPSD payroll office has no record of Ms. Desiré election of Retirement Plus. (Exhibits 8 and 12.)
13. Ms. Desiré timely appealed MTRS’s denial on April 22, 2014. (Exhibits 5 and 6.)

**CONCLUSION AND ORDER**

 After careful consideration of the evidence presented, the Board’s denial of Ms. Desiré’s Retirement Plus election is affirmed.

 The Retirement Plus program is codified in G. L. c. 32 § 5(4)(i) and reads in pertinent part:

There is hereby established an alternative superannuation retirement benefit program for members of the teachers’ retirement system and teachers who are members of the Boston retirement system. Participation in said program shall be mandatory for all teachers hired on or after July 1, 2001. Such members shall make contributions to the teachers’ retirement system or to the Boston retirement system at the rate of 11 per cent on all regular compensation. Any member of the teachers’ retirement system or any teacher who is a member of the Boston retirement system before July 1, 2001may elect to participate in the alternative superannuation retirement benefit program. *Said election shall be made on or after January 1, 2001 and before July 1, 2001.*

(Emphasis added.)

 Ms. Desiré did not make an election to MTRS before the July 1, 2001 deadline for the Retirement Plus program, and there is also no record of her Election Form at the CPSD payroll office. DALA Magistrates have interpreted the statute and MTRS procedures strictly even when presented with the most sympathetic of circumstances. *See Brennan v. Teachers’ Ret. Sys.*, CR-01-994 (DALA 2004) (petitioner’s election denied even though she was suffering from depression during the election period); *Ostrowski v. Teachers’ Ret. Bd.*, CR-01-1043 (DALA 2002) (petitioner’s election denied when she failed to mail the election form in the midst of her mother and husband’s failing health); *Jean-Baptiste v. Mass. Teachers’ Ret. Bd.*, CR-01-957 (DALA 2002) (petitioner’s election denied although a multitude of personal tragedies kept her from following up with the payroll office).

 Ms. Desiré argues that there should be some leniency in her case because of the Legislature’s response to issues that arose in the CPSD when its payroll office assumed responsibility of sending completed applications to MTRS. Chapter 149, § 397 of  of the Acts of 2004provides:

Any member of the teachers’ retirement system … who filed *an election form* to participate in the alternative superannuation retirement benefit program … prior to July 1, 2001 with an officer of the city, town or school district in which such teacher was employed may elect to participate in the alternative superannuation retirement benefit program by filing an application with the state teachers’ retirement board … no later than October 1, 2004, on such form as the state teachers’ retirement board or the State-Boston retirement board shall prescribe, with a certificate of the officer of the city, town or school district confirming that the member had filed an election form … prior to July 1, 2001. The election to participate in the alternative superannuation retirement benefit program shall be irrevocable and shall be subject to clause (i) of said subsection (4) of section 5 of chapter 32.

(Emphasis added.)

As Ms. Desiré contends, this statute demonstrates the Legislature’s cognizance that the payroll offices of CPSD and other school districts created complications leading to the delay in filing many applications and that a general remedy was needed. “The legislation passed in 2004 was designed for the purpose of allowing members who mistakenly failed to submit their election forms to the Board, although they had filed election forms with their employers, to participate in Retirement Plus.” *Small v. Teachers’ Ret. Sys.*, CR-05-103 (DALA 2006). *See also* *Machon v. MTRS*, CR-05-139 (DALA 2006) (this law was enacted for a small number of members who mistakenly filed their Retirement Plus applications with their respective school payroll offices, and not the MTRS, by the June 30, 2001 deadline.) However, Ms. Desiré never turned in the Election Form to the CPSD, failed to reapply for Retirement Plus as the statute allowed, and once again missed the stated deadline.

 Ms. Desiré contends that the internal exception policy created by MTRS also warrants leniency in her case. The “Late Retirement Plus Election Exceptions” states:

In some districts, payroll officers expressly assumed responsibility for mailing in the completed *Retirement Plus election forms* to the Board. If the *payroll officer mailed the forms late*, and acknowledges in writing his/her assumption of responsibility, the form is considered timely.

(Emphasis added.)

First, because Ms. Desiré’s completed Retirement Plus election forms were not mailed in late by the payroll officer as the policy requires, this particular exception does not apply. Second, Ms. Desiré only filled out the Member Form and Notice to Employer, not the actual Election Form that was required by MTRS in the instructions on the forms sent out in February 2001 and through the subsequent late Retirement Plus Exceptions policy. The importance of the Election Form was clear. The Member Form that Ms. Desiré did complete advised that the member submit the Election Form to MTRS. Both Mr. L’Amour and Ms. Griffith, who sent in their applications at the same time as Ms. Desiré, completed and submitted the Election Form. Even after Ms. Campbell’s note, Ms. Desiré failed to submit an Election Form.

 Another exception in the “Late Retirement Plus Election Exceptions” policy stated, “A Retirement Plus election can be made on any writing sent to the MTRB … Necessary elements are: election and signature.” (Exhibit 4.) Ms. Desiré argues that her Notice to Employer form should count as her election since it contained her signature, an election into Retirement Plus, and was sent to MTRS from the CPSD Human Resources Department. Her signature and election are apparent on the form, but the Notice to Employer form was only submitted to MTRS in 2014 when this issue arose. Shortly after the statutory deadline had run in 2001, it was critical for MTRS to address the copious late applications sent in from CPSD’s payroll office. However, to extend this deadline to include receipt of an election and signature thirteen years after the original statutory deadline is untimely and contrary to the clear language in the statute.

DALA has adjudicated dozens of cases that reflect the myriad mistakes teachers made in filing their Retirement Plus election forms. Unfortunately, Chapter 32 does not have a provision for mercy. “The filing date for election to participate in the ‘Retirement Plus Program’ is statutory.  Neither the Teachers’ Retirement Board, nor this Board can act contrary to the specific mandates of G. L. c. 32, s. 5(4)(i).” *Boland v. MTRS*, CR-01-823 (DALA 2001), *aff’d* (CRAB 2002).

 While it is regrettable, MTRS never received notification of election into Retirement Plus from either Ms. Desiré or the CPSD payroll office. Even though there were exceptions created by the Legislature and MTRS, based on a careful consideration of their language and purpose, I find that they do not cover Ms. Desiré’s situation.

 Accordingly, the decision of the Massachusetts Teachers’ Retirement System denying Marie Rose-Bernadette Desiré’s petition for election into Retirement Plus is affirmed.

SO ORDERED.

Division of Administrative Law Appeals

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Angela McConney Scheepers, Esq.

Administrative Magistrate

DATED: July 7, 2017