

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Kim Dwyer,
Petitioner,

No. CR-23-0459

Dated: September 13, 2024

v.

**Massachusetts Teachers' Retirement
System,**

Respondent.

Appearances:

For Petitioner: Ashley F. Walter, Esq.

For Respondent: James C. O'Leary, Esq., Lori Curtis Krusell, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

The petitioner is a teacher who failed to enroll in the benefits program known as Retirement Plus during the six-month election window afforded to her by statute in 2001. A preponderance of the evidence does not establish that the petitioner received inadequate "notice" about Retirement Plus within the meaning of the applicable administrative precedents. There was therefore no error in the respondent's determination that the petitioner is not entitled to join Retirement Plus belatedly.

DECISION

Petitioner Kim Dwyer appeals from a decision of the Massachusetts Teachers' Retirement System (MTRS) determining that she is not entitled to be enrolled in the benefits program known as Retirement Plus. A consolidated evidentiary hearing on May 15, 2024 addressed both this appeal and *Simonds v. Massachusetts Teachers' Retirement System*, No. CR-23-0140. Ms. Dwyer testified on her own behalf. MTRS called two of its officers, David Percoco and Erika Glaster. I admitted into evidence Mr. Percoco's affidavit and exhibits marked 1-16, 18, 20 and A-C.

Findings of Fact

I find the following facts:

1. Ms. Dwyer is a teacher. She became a member of MTRS in 1994. She continues to teach today. (Dwyer.¹)

2. Ms. Dwyer took maternity leave in late 1999. She stopped being employed as a teacher and stopped making retirement contributions around that time and through August 2007. (Dwyer; exhibit 1.)

3. Until July 2001, Ms. Dwyer resided in Rochester, MA. Her mailbox was located along with her neighbors' boxes at the end of a shared driveway. Ms. Dwyer and her husband were in the habit of retrieving mail from the mailbox approximately on a daily basis. They did not experience any recurring problems with their mail. In July 2001, Ms. Dwyer and her family relocated to Mattapoisett, MA. (Dwyer.)

4. The Legislature established the benefits program known as Retirement Plus through Acts 2000, c. 114, § 2. MTRS planned and executed a campaign to alert and educate its members about this development. MTRS conducted seminars about Retirement Plus, aired information about the program on local television, and arranged for posters about the program to be exhibited at schools statewide. (Glaster; exhibits 3-6.)²

¹ The testimony is cited by witness name.

² Prior decisions have addressed certain of the factual matters discussed in paragraphs 4-8. See *Kannler v. Massachusetts Teachers' Ret. Syst.*, No. CR-06-1135 (DALA July 3, 2007, *aff'd*, CRAB Nov. 21, 2007); *Quinney v. Massachusetts Teachers' Ret. Syst.*, No. CR-05-274 (DALA Jan. 11, 2007); *Young v. Massachusetts Teachers' Ret. Syst.*, No. CR-03-181 (DALA June 18, 2004). Under principles of preclusion, those decisions are not binding on Ms. Dwyer. See *Duross v. Scudder Bay Cap., LLC*, 96 Mass. App. Ct. 833, 836-37 (2020); *Brennan v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 1108, slip op. at n.5 (2005). The parties agreed at the hearing that the decisions are competent evidence under G.L. c. 30A, § 11(2). The decisions' findings are materially consistent with those of the current decision.

5. MTRS prepared five different mailings to its members about Retirement Plus: an initial flyer (August 2000), an insert accompanying a periodic MTRS newsletter (fall 2000), a reminder postcard (January 2001), the Retirement Plus “election packet” (February 2001), and a final notice enclosed with each member’s annual statement (April 2001). (Glaster; exhibits 1, 2, 3, 7, 8, 10, 11.)

6. MTRS endeavored to distribute each of the five Retirement Plus mailings to all of its members, both active and inactive. Those members numbered approximately 95,000 in all. MTRS contracted with one or more vendors to print and mail its mailings. Each vendor was given a database containing the members’ addresses. (Glaster.)

7. The vendor hired to distribute the February 2001 election packets was Triad Direct, Inc. Each of the packets Triad mailed out included an informational flyer, a CD, a multipart election form, and a return envelope. Triad printed the addresses it received from MTRS onto specially produced envelopes. The envelopes prominently announced on their exteriors that they related to Retirement Plus. The postage of the mailings was prepaid. (Glaster; Percoco; Percoco aff. ¶ 3; exhibits 10, 13.)

8. MTRS hired another vendor to process members’ election responses (both yeses and noes). That vendor was LHS Associates, Inc. LHS received election forms from approximately 57,000 members. Using a set of coded abbreviations, LHS entered the status of each member’s election into a database. The code ND denoted members whose election packets were returned by the postal service undelivered. The code RPNR denoted members who were eligible to make elections but did not mail back their forms. (Glaster; Percoco; exhibits 9, 12, 14.)

9. As of late 2000 and early 2001, MTRS's systems correctly listed Ms. Dwyer's residence in Rochester as her address. MTRS provided that address to its mailing vendors, including Triad. Ms. Dwyer does not recall receiving any notices or materials about Retirement Plus. She did not mail back an election form. The code assigned to her in LHS's database is RPNR. (Dwyer; Percoco; Percoco aff. ¶ 6; exhibit 20.)

10. In late 2023, Ms. Dwyer asked MTRS to enroll her in Retirement Plus. MTRS declined. Ms. Dwyer timely appealed. (Dwyer; exhibits 1-2.)

Analysis

The retirement law determines the retirement benefits and contributions of Massachusetts public employees. The program known as Retirement Plus reflects the Legislature's judgment that the usual formulas may not be optimally suited to teachers. Participants in Retirement Plus are entitled to advantageous benefit calculations that may facilitate early retirement. In exchange, they make enlarged contributions of 11%. G.L. c. 32, § 5(4)(i).

Retirement Plus took effect in mid-2001. The enacting statute prescribed the methods by which several categories of teachers could become enrolled. Individuals already serving as teachers in 2001 were afforded an election window running from January 1 through July 1 of that year. Acts 2000, c. 114, § 2. An "election" in this context is a form or other writing delivered to MTRS. *See Fillmore v. Massachusetts Teachers' Ret. Syst.*, No. CR-23-358, 2024 WL 277245 (DALA Jan. 5, 2024).

It has become clear over time that large numbers of eligible teachers inadvertently failed to find out about Retirement Plus's existence and to make timely elections. Under general legal principles, such individuals would not be eligible for judicial or administrative relief. Statutes ordinarily take effect upon being duly enacted, irrespective of any efforts by state agencies to keep their constituents informed. *See Clothier v. Teachers' Ret. Bd.*, 78 Mass. App. Ct. 143, 146

(2010). A board's failure to inform a member about the particulars of the member's entitlements ordinarily does not impact the substance of those entitlements. *See Awad v. Hampshire Cty. Ret. Bd.*, No. CR-08-621, 2014 WL 13121791, at *3 (CRAB Dec. 19, 2014); *Roussin v. Boston Ret. Syst.*, No. CR-23-28, 2024 WL 2956657, at *2 (CRAB June 3, 2024).

The case law of the Contributory Retirement Appeal Board (CRAB) carves out a narrow exception to these principles in the specific context of Retirement Plus. The member in *Davey v. Massachusetts Teachers' Retirement System*, No. CR-01-914 (CRAB Jan. 31, 2003), "was an inactive member of [MTRS] having terminated service . . . in November 2000, and did not receive notification of eligibility to elect to participate." *Id.* at *2. Upon the member's return to active service, CRAB allowed him to enroll in Retirement Plus belatedly, i.e., after the end of the statutory six-month window. *Id.*³

MTRS characterizes *Davey* as a disregardable "outlier." A general problem with that approach is that appellate tribunals retain the prerogative to overrule their own precedents. *See IA Auto, Inc. v. Dir. of Off. of Campaign & Pol. Fin.*, 480 Mass. 423, 431 (2018); *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993). A more specific problem is that CRAB recently forwent a ready opportunity to overrule *Davey*. The member in *Simonet v. Massachusetts Teachers' Retirement System*, No. CR-18-164, 2021 WL 12298083 (CRAB Oct. 28, 2021), also had been inactive throughout the original election window. Declining to allow her to enroll belatedly, CRAB offered the following explanation:

[O]ne dispositive factor is present in Ms. Simonet's case that was absent in *Davey*: notice. . . . Mr. Davey . . . was notified of the program only after becoming an active member Here, it is not disputed that Ms.

³ Neither party interprets *Davey* as requiring a new election under that decision to be made within 180 days of the member's return to active membership. Further investigation into this aspect of *Davey*, *supra*, at *2, is unnecessary for purposes of the current decision.

Simonet received notice in 2001 and did not elect into Retirement Plus within the statutorily prescribed election period.

2021 WL 12298083, at *1. *Simonet* treats *Davey* as good law. The combined upshot of the two decisions is that a teacher who missed the enrollment window of 2001 may enroll belatedly if two conditions are both satisfied: the member “[was] inactive throughout the first half of 2001 and received no notice about the . . . program.” *In the Matter of Enrollment in Retirement Plus*, No. CR-21-369, 2023 WL 5332723, at *3 (DALA Aug. 7, 2023). In recent months, hundreds of appeals have been settled or dismissed on the basis of the foregoing reading of the case law.

There is no dispute that Ms. Dwyer was inactive during the original Retirement Plus enrollment period. *See* G.L. c. 32, § 3(1)(a). The appeal revolves around whether she received the requisite notice about the program.

The concept of “notice” in this context warrants further discussion. Generally speaking, notice to a particular person about particular facts may mean: (a) that the person is actually, subjectively aware of the facts; or (b) that information about the facts has been delivered to the person on an individual basis; or (c) that the person would have been able to ascertain the facts by consulting some public source of information. *See Black's Law Dictionary* 1227 (10th ed. 2014). The parties disagree about the form of notice that *Davey* and *Simonet* envision.

Information about Retirement Plus was publicly available through the formal publication of the enacting statute, as well as on MTRS's website. *Davey* and *Simonet* could not have viewed such circumstances as providing teachers with the requisite “notice,” or notice would not have been deficient in *Davey*. It is almost as unlikely that CRAB used the term “notice” to denote actual, subjective knowledge. A rule requiring such knowledge would be unmanageable for MTRS to administer in the first instance and for DALA and CRAB to apply on appeal.

The plausible interpretation that remains is that notice under *Davey* and *Simonet* refers to information about Retirement Plus being delivered to the pertinent individual member. That is probably the most common usage of the term “notice.” See *Costello v. Board of Appeals of Lexington*, 3 Mass. App. Ct. 441, 443 (1975). Useful guidance to the same effect is also drawable from G.L. c. 32, § 16(4), which starts the clock on appeals from the retirement boards’ decisions upon “notification” to the member. “Notification” under § 16(4) occurs when a decision “is delivered to the petitioner’s home or is available to the petitioner.” *Bailey v. State Bd. of Ret.*, No. CR-07-724, 2012 WL 13406339, at *2 (CRAB Nov. 16, 2012). CRAB likely had the same ideas in mind when it spoke about “notice” in *Davey* and *Simonet*.

The pivotal question is therefore whether information about Retirement Plus was delivered to Ms. Dwyer. She bears the burden of proof as to “all issues determining entitlement.” *Goldstein v. Massachusetts Teachers’ Ret. Syst.*, No. CR-03-176, at *4 (CRAB Feb. 4, 2005). In support of its view that Ms. Dwyer received the requisite notice, MTRS also relies on the law’s presumption that the mails operate regularly, i.e., properly. See *Commonwealth v. Barboza*, 68 Mass. App. Ct. 180, 185 (2007).

Ms. Dwyer disputes the applicability of that presumption here. She points to the holding that “it must be shown that a letter properly directed, postage prepaid, has been deposited in the mail before the inference can be drawn that it reached the addressee.” *Commonwealth v. Orlor*, 252 Mass. 55, 63 (1924). Ms. Dwyer emphasizes that no MTRS witnesses actually saw its envelopes entering a mailbox bearing proper addresses and postage.

On close analysis, the rule described in *Orlor* is not as inflexible as Ms. Dwyer suggests. The rule’s essential point is that the regularity of the mails is immaterial unless the letter was actually mailed. Evidence about the act of mailing may take multiple forms. The individual who

placed the envelope in the mailbox is not invariably required to testify. In another older case, a bank's treasurer dictated a letter, signed it, "did not know if it was actually mailed," but recalled that "he gave it to a clerk to mail." *Prudential Tr. Co. v. Hayes*, 247 Mass. 311, 313 (1924). The Supreme Judicial Court was satisfied, reasoning that "in large banks and business houses, it must often be practically impossible to honestly obtain more definite evidence as to mailing than the delivery of letters to the mailing clerk." *Id.* at 315.

The same principle extends to the modern circumstances of an agency undertaking a large-scale mailing project with assistance from a vendor. Testimony about the detailed instructions provided to and accepted by the vendor may serve as the equivalent of the bank treasurer's report that he "gave [the letter] to a clerk to mail." *Hayes*, 247 Mass. at 313. The testimonies of MTRS's officers suffice to establish that Triad agreed to mail MTRS's election packets to the addresses appearing in MTRS's database using preprinted and prepaid envelopes. It is a reasonable inference that Triad, like the mail clerk, complied with its obligations. That inference is further supported by the fact that tens of thousands of MTRS members received their election packets and mailed back executed forms.

Even once the presumption of the regularity of the mails arises, that presumption may be rebutted. *See Commonwealth v. Crosscup*, 369 Mass. 228, 240 (1975). But Ms. Dwyer's evidence does not rebut the presumption. Although she sincerely believes that she never received MTRS's communications about Retirement Plus, a preponderance of the evidence does not establish the accuracy of that belief. Ms. Dwyer's mail service generally operated properly. During the pertinent period, she and her husband were caring for a small child and preparing for a move. And it is the rare individual who can confidently recount the mail that she did *not* receive more than twenty years ago. In the end, it is more likely than not that MTRS's

correspondence arrived at Ms. Dwyer's residence, was available to her there, but escaped her attention. The result is that the demand for lack of "notice" posed by *Davey* and *Simonet* is not satisfied here.

Conclusion and Order

MTRS's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate