THE COMMONWEALTH OF MASSACHUSETTS

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

Gail England,

 **Petitioner**

v. Docket No. CR-14-18

 DATED: December 2, 2016

State Board of Retirement,

 **Respondent**

**Appearance for Petitioner:**

Nicholas J. Morana, Esquire

12 Phillips Avenue

Shrewsbury, MA 01545

**Appearance for Respondent:**

Salvatore Coco, Esquire

State Board of Retirement

One Winter Street, 8th FL

Boston, MA 02108

**Administrative Magistrate:**

Judithann Burke

 **Case Summary**

The Petitioner is not entitled to repurchase her refunded service in the Worcester Superior Court at the buyback interest rate. Section 9 of Chapter 176 of the Acts of 2011 requires that she be billed at the actuarial assumed interest rate.

 **DECISION**

The Petitioner, Gail England, is appealing from the December 30, 2013 decision of the Respondent, State Board of Retirement (SBR), denying her request to purchase previously refunded service at the lower buyback interest rate. (Exhibit 1.) The appeal was timely filed on January 13, 2014. (Exhibit 2.) I held a hearing on June 7, 2016 at the offices of the Worcester Registry of Deeds, 90 Front Street, Worcester, MA. I marked Exhibits 1-18. The Petitioner testified. The Respondent called no witnesses. The parties submitted pre-hearing memoranda of law. (SBR-Attachment A; Petitioner-Attachment B.) The hearing was digitally recorded.

 **FINDINGS OF FACT**

 Based upon the testimony and documents submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Petitioner, Gail England, 58 y.o.a., was employed by the Worcester Superior Court from on or about September 1, 1976 to her resignation on March 31, 1986. During this time period, she was a member of the Worcester County Regional Retirement System. (Exhibit 11.)
2. On or about January 30, 1989, the Petitioner submitted a Withdrawal Notice and she requested a return of her total accumulated deductions. The Notice also included the following language, “[i]n consideration of such payment, all other rights and privileges to which I was entitled as a member of such Retirement System are hereby surrendered and I understand that upon such payment, my membership in the Retirement System will terminate.” (*Id.*)
3. Pursuant to the Petitioner’s request for a return of her accumulated deductions, she was paid the amount of $10,930.24 on or about February 17, 1989. This amount represented both the accumulated deductions and interest. (*Id.* and Exhibit 12.)
4. On or about February 22, 1999, the Petitioner became an employee of the Worcester County Juvenile Court and a member of the Massachusetts State Employees’ Retirement System. (SRS). (*Id.*)
5. In a letter dated May 3, 2006, the Petitioner requested to purchase her previously refunded service with the Superior Court from September 1976 through April 1986. (Exhibit 9.)
6. On May 9, 2006 and July 18, 2006, the SBR issued bills to the Petitioner associated with her request to purchase her refunded service. (Exhibit 10.)
7. The buyback bill was cancelled on September 26, 2006 when the Petitioner failed to make the purchase. (*Id.*)
8. In Winter 2011, the SBR released its Active Member News Letter, “Winter 2011, Volume 6, issue 1.” The Newsletter was posted on the SBR website. The Winter 2011 Newsletter indicated “Governor Patrick has filed *An Act Providing for Additional Pension Reform and Benefits Modernization*” and the “Proposed changes include:

**Buyback Timing and Interest Rate**

In order to complete a buyback of prior service, you would need to enter into a payment agreement within one year of your date of reinstatement or re-entry or within one year after July 1, 2011, whichever is later, in order to be entitled to the buyback interest rate. **You would otherwise have to pay actuarial assumed interest on all make-up payments.** (Emphasis added.) (Exhibit 13.)

1. In Winter 2012, the SBR released its Active Member Newsletter, Winter 2012,

Volume 7, Issue 1. The Newsletter was posted on the SBR website. The

 Winter 2012 Newsletter indicated that

“[o]n November 18, 2011, Governor Patrick signed into law Chapter 176 of the Acts of 2011” and “some provisions of the law will affect current members…” The Winter 2012 Newsletter also indicated: “Employees wishing to buyback prior public service will have one year from April 2, 2012 or one year from the date of re-entry, whichever is later, to buyback the service at the regular buyback interest rate, currently 4.125% (half the actuarial assumed interest rate of 8.25%.) **After the one year time frame has passed the interest rate will be the full actuarial assumed interest.**” (Emphasis added.) (Exhibit 14.)

1. On March 2, 2012, PERAC issued “Memorandum #23, 2012.” The legal changes that were the result of Section 9 of Chapter 176 of the Acts of 2011 were delineated therein. Page 2, Paragraph 1 of the Memorandum reads, “Retirement Boards are encouraged to contact members and make them aware of these changes as soon as possible in order for members to have the opportunity to maximize the period in which such members can make the purchase and take advantage of the lower buyback interest rate.” (Exhibit 17.)
2. In a letter dated March 5, 2012, the Petitioner again requested to buyback her previously refunded service. (Exhibit 6.)
3. Pursuant to her request, a bill was issued on March 7, 2012 for $27,887.83. It provided the option to enter a repayment plan. The Petitioner was also advised that her response was due on or before April 11, 2012, and, that additional interest would be charged on all portions of the bill that did not include military service if she failed to pay by April 11, 2012. (Exhibit 7.)
4. On April 2, 2012, Section 9 of Chapter 176 of the Acts of 2011 amended Paragraph (b) of subdivision (8) of section 3 of G.L. c. 32, by inserting the following language after the third sentence:

“Notwithstanding any provision of this chapter to the contrary, a member who is reinstated to, or re-enters the active service of a governmental unit, or who is eligible to receive credit for other service under this section, and who does not, (i) pay into the annuity savings fund of the system make-up payments of an amount equal to the accumulated regular deductions withdrawn by the member, together with buyback interest; or (ii) make provision for the repayment in installments, upon such terms and condition as the board may prescribe, to pay into the annuity savings fund of the system make-up payments of an amount equal to the accumulated regular deductions withdrawn by the member, together with buyback interest, within one year from the date of reinstatement or re-entry or **within 1 year after April 2, 2012,** whichever is later, **shall pay actuarial assumed interest instead of buyback interest on all make-up payments to be entitled to creditable service resulting from the previous employment.**”

(Emphasis added.)

1. The Petitioner opted not to purchase her prior service in April of 2012. She had two children who were attending college at that time. (Petitioner Testimony.)
2. On May 16, 2012, a second bill was issued related to the Petitioner’s buyback request. This bill reflected that the cost to purchase her prior service was $28, 077.60. Once again, she was provided the option to enter into a repayment plan. She was further advised that her response was due by June 20, 2012 and, that if she failed to pay by June 20, 2012, additional interest would be charged. (Exhibit 8.)
3. On July 25, 2012, after receiving no response from the Petitioner, the SBR cancelled the buyback bill. (Exhibit 10.)
4. The Petitioner’s pay advice for September 28, 2012 included the following language:

The State Retirement Board invites you to Smart Retirement and beyond, a retirement planning seminar series exclusively for Massachusetts State Employees.

 Employees were directed to go to “Mass.Government” for locations and registration. (Exhibit 18.)

1. On a Buyback Request Form dated September 5, 2013, the Petitioner again requested to purchase her prior service with the Worcester Superior Court. (Exhibit 3.)
2. On September 12, 2013, the SBR issued a bill to the Petitioner which indicated that the amount to purchase her requested service would be $77,304.68. She was offered the option of entering into an installment payment plan. She was further advised that her response was due by October 17, 2013. Included with this bill was a document entitled “Important Information Concerning Your Service Purchase” wherein she was informed of the change in the law as a result of the enactment of Section 9 of Chapter 176 of the Acts of 2011. (Exhibits 15 and 16.)
3. In a letter dated October 29, 2013, but received by the SBR on November 23, 2013, the Petitioner requested that the SBR permit her to use the lower buyback interest rate to purchase her prior service rather that the actuarial assumed interest. (Exhibit 5.)
4. At its meeting on December 19, 2013, the SBR voted to deny the Petitioner’s request to use the lower buyback interest rate to repurchase her service. In a letter dated December 30, 2013, the Petitioner was notified of the denial and of her right to appeal to the Contributory Retirement Appeal Board. (Exhibit 1.)
5. The Petitioner filed a timely appeal of the SBR decision on January 13, 2014. (Exhibit 2.)

**CONCLUSION**

 The Petitioner is not entitled to prevail in this appeal. The legislature, not the SBR, enacted Section 9 of Chapter 176 of the Acts of 2011. The SBR is obligated to follow the statutory mandate. The SBR advised members of the pending change in both its Winter 2011 and Winter 2012 Newsletters. It also offered Smart Retirement seminars to members. The Petitioner was unaware of and/or did not avail herself of these resources. Nonetheless,

“[t]he statute itself provides full notification to the Petitioner” and the “Retirement board is not required to give legal advice to members.” *See James M. Whalen v. State Board of Retirement,* CR-04-555 (Division of Administrative Law Appeals 11/23/2012; no Contributory Retirement Appeal Board Decision.)

The Petitioner has not demonstrated any arbitrary or capricious actions, mistakes or other wrongdoing of the SBR, which has a fiduciary duty to all of its members. This duty is not breached if a retirement board does not personally inform every member of a potential change, so long as it does not mislead its members. The Petitioner was not misled by the SBR in this case. The SBR has applied the principles of law correctly in this case.

It should be noted that neither G.L. c 32, § (8)(b) or § 25 (5])(c)(3) provide for any equitable remedies, although no equitable considerations are due in this case. *See Bristol County Retirement Board v. Contributory Retirement Appeal Board,* 65 Mass. App. Ct. 413 (2006) and *Petrillo v. Public Employee Retirement Administration*, CR-92-731 (Contributory Retirement Appeal Board 1993).

 The Petitioner made three separate buyback requests in 2006, 2012, and 2013. She failed to respond to any of the bills she received as a result of the 2006 and 2012 requests. She was advised in those bills that additional interest would be charged on all portions that were not part of a purchase of military service. She failed to respond. When she made the third request to repurchase the service in 2013, she was not entitled to have her buyback calculated using the lower buyback interest rate as a matter of law.

In conclusion, the SBR has acted within the boundaries of retirement law in billing the Petitioner for her former service at the actuarial assumed interest rate.

So ordered.

BY:

Division of Administrative Law Appeals,

Judithann Burke

Administrative Magistrate

DATED: December 2, 2016