

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

In the Matter of
Enrollment in Retirement Plus

No. CR-21-369

Concerning: various 2001 appeals¹

Dated: August 30, 2023

PROCEDURAL ORDER ON APPEALS
ASSERTING *DAVEY* CLAIMS

This docket has formally and informally consolidated appeals and issues relating to teachers excluded from the benefits program established by G.L. c. 32, § 5(4). The governing statute required individuals who were teachers as of 2001 (2001 teachers) to enroll in the § 5(4) benefits program during the first half of that year. As a general rule, 2001 teachers who missed the original deadline cannot join the § 5(4) benefits program at any later date.

As described in a memorandum and order dated August 7, 2023, the general rule appears to recognize an exception: A 2001 teacher may be able to enroll belatedly in the § 5(4) program *if* he or she was a member “inactive”² during the first half of 2001 *and* he or she received no “notice” about the commencement of the § 5(4) benefits program. This exception derives from *Davey v. MTRS*, No. CR-01-914 (CRAB Jan. 31, 2003), as refined by *Simonet v. MTRS*, No. CR-18-164 (CRAB Oct. 28, 2021).

¹ Listed in Appendix A.

² The category of members inactive is defined by G.L. c. 32, § 3(1)(a)(ii). It includes members who have retired with allowances, members “whose employment has been terminated and who may be entitled to . . . any retirement allowance or . . . return of . . . deductions,” and members on certain types of “authorized leave of absence without pay.” Members on certain other types of leave, including leaves of up to one year, continue to be regarded as “members in service.” *See* § 3(1)(a)(i).

This order concerns a group of appeals that appear to state claims under the *Davey* rule. At this juncture, consolidated proceedings concerning these appeals may conserve resources, promote uniformity, and otherwise serve fairness and speediness. It is therefore ORDERED as follows:

1. The appeals listed in Appendix A (consolidated appeals) shall be, or shall continue to be, consolidated and governed by the orders and submissions filed in this consolidated docket. Appendix B collects copies of the notices of appeal and certain other submissions in the consolidated appeals.

2. The Massachusetts Teachers Association represents several of the petitioners in the consolidated appeals. In recent consolidated proceedings, MTA has provided skillful and zealous advocacy on behalf of a large universe of teachers. MTA is asked to consider—in its discretion—whether it is able and willing to appear on behalf of any additional petitioners in the appeals consolidated here.

3. Within 30 days, each petitioner shall file one or more affidavits in support of the claims: (a) that the petitioner was a member inactive during the first half of 2021; and (b) that the petitioner received no notice that the § 5(4) benefits program was commencing. Each affidavit shall be organized in numbered paragraphs, shall be signed by hand, and shall state the affiant's acknowledgement that he or she is executing the affidavit under the penalties of perjury.

4. Within 60 days, MTRS shall file a memorandum that: (a) states, as to each appeal, whether the appeal is meritorious, whether it must be tried at an evidentiary hearing, or whether it may be decided on summary decision; and (b) describes in broad strokes—if any cases must be tried—the nature of the evidence that MTRS would present at the hearing(s),

explaining whether such evidence would be case-specific or generally applicable to the various appeals.

5. Various teachers in the Boston Retirement System have filed appeals from decisions excluding them from TARP, BRS's version of the § 5(4) benefits program. As a result, BRS has recently taken part in this docket's consolidated proceedings. It appears at this juncture that no pending appeals of BRS members make claims under *Davey*. BRS is therefore permitted but not required to file a concise memorandum addressing the issues outlined in this order. Any such memorandum shall be filed no later than the deadline for MTRS's memorandum as required by paragraph 4.

6. This order will be served on MTA, MTRS, and BRS by email, and on each unrepresented petitioner by U.S. Mail.³ All future submissions relating to these appeals shall be made by email to dalapleadings@mass.gov. Upon receipt of this order, each unrepresented petitioner shall provide DALA with his or her email address forthwith, by submitting an email that names the petitioner, identifies the docket number of his or her appeal, and states that the petitioner's email is being submitted in accordance with a consolidated order in *In the Matter of Enrollment in Retirement Plus*, No. CR-21-369.

7. Any petitioner's failure to comply with paragraphs 3 or 6 may result in dismissal of that petitioner's appeal based on failure to prosecute. MTRS's failure to comply with paragraph 4 may result in decisions by default. *See* G.L. c. 30A, § 10; 801 C.M.R. § 1.01(7)(g)(2).

³ For purposes of economy, Appendix B will be omitted from the copies of the order transmitted by paper mail. It will be available electronically upon request.

8. The parties are invited to propose any additional or alternative procedures designed to facilitate the fair and efficient adjudication of these appeals. They also are invited to propose any modifications to the universe of cases consolidated pursuant to this order. Any such proposals shall be made without delay and shall follow conferral with the other parties to the extent practicable.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate

Appendix A
(Consolidated Appeals)

Amy DeFeudis v. MTRS, 18-0210

Michael Murphy v. MTRS, 18-0565

Patricia Moore v. MTRS, 21-0291

Rebecca Blouwolf v. MTRS, 21-0668

Meredith Costa v. MTRS, 23-0098

Debra Carnevale v. MTRS, 23-0109

Catherine Lee v. MTRS, 23-0136*

Linda Simonds v. MTRS, 23-0140*

Holly Breen v. MTRS, 23-0156*

* These petitioners state that they were on maternity or “child-rearing” leave during the pertinent period. *See supra* note 2.

Appendix B
(Copies of Submissions)