

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
CLAIMING TIMELY ELECTIONS

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 to elect to participate in the § 5(4) benefits program during the first half of that year. The great majority of the appeals concerning the § 5(4) benefits program assert that, although the petitioners missed the original deadline, they should be permitted (for various reasons) to join the program at a later date.

The current order concerns teachers whose submissions—liberally construed—present different claims altogether: that these teachers *did* file elections to participate in Retirement Plus before the original deadline.² In broad strokes, the archetype of these petitioners' claims is that they executed valid election forms; placed those forms in correctly addressed, prepaid envelopes; and deposited those envelopes in the mail. *If* the petitioners are able to establish these factual

¹ Listed in Appendix A.

² Some of these petitioners also assert that either the percentages of their retirement contributions or communications from their boards led them to believe that they were successfully enrolled in the § 5(4) benefits program. Such arguments may carry intuitive force. But under Massachusetts law, a government agency that makes an error in a person's favor must correct that error, even if the person has relied on the mistake in the meantime. *See* G.L. c. 32, § 20(5)(c)(2); *Clothier v. Teachers' Ret. Bd.*, 78 Mass. App. Ct. 143, 146 (2010); *Hunter v. Contributory Ret. Appeal Bd.*, 80 Mass. App. Ct. 257, 263 (2011); *Watson v. State Bd. of Ret.*, No. CR-21-0105, 2023 WL 4846319, at *3 (DALA July 21, 2023).

predicates, then a rebuttable presumption may arise to the effect that their election forms were duly delivered to the addressee retirement boards. *See Commonwealth v. Barboza*, 68 Mass. App. Ct. 180, 185 (2007); *Commonwealth v. Orlor*, 252 Mass. 55, 63 (1924); *Prudential Tr. Co. v. Hayes*, 247 Mass. 311, 314-15 (1924). On the other hand, the law also rebuttably presumes that the records of a public agency are “regular,” i.e., sound. *See City of Newburyport v. Thurlow*, 324 Mass. 40, 44 (1949); *Whelan v. Division of Med. Assistance*, 44 Mass. App. Ct. 663, 668 (1998); Gerald A. McDonough, *Administrative Law and Practice* § 7:15 (2d ed. 2016).

At this juncture, consolidated proceedings relating to this group of 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. Both MTRS and the Boston Retirement System will be treated as respondents in these proceedings.
3. The Massachusetts Teachers Association represents at least one petitioner 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.
4. Within 30 days, each petitioner shall file one or more affidavits that describe:
 - (a) the affiant’s best recollection, with the greatest possible specificity, of the details surrounding

the petitioner's efforts to file a Retirement Plus or TARP enrollment form before the original deadline; and (b) any additional facts or evidence tending to confirm that the affiant's recollection is accurate. 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.

5. Within 60 days, each respondent shall file a memorandum that: (a) states the respondent's position as to whether, in principle, a member should be enrolled in the § 5(4) benefits program if the member is able to establish that he or she properly mailed an executed election form to the respondent before the applicable deadline; (b) states, as to each appeal relating to the respondent, whether the appeal is meritorious, whether it must be tried at an evidentiary hearing, or whether it may be decided on summary decision; and (c) describes in broad strokes—if any cases must be tried—the nature of the evidence that the respondent would present at any evidentiary hearing(s), explaining (in MTRS's case) whether such evidence would be primarily case-specific or generally identical as to each of the appeals.

6. This order will be served on MTRS, BRS, and MTA 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.

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.

7. Any petitioner's failure to comply with paragraphs 4 or 6 may result in dismissal of that petitioner's appeal based on failure to prosecute. Any respondent's failure to comply with paragraph 5 may result in decisions by default. See G.L. c. 30A, § 10; 801 C.M.R. § 1.01(7)(g)(2).

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)

Gina Flanagan v. MTRS, 20-0397

Tracey Hartman v. MTRS, 21-0146

Roger Tait v. MTRS, 22-0029

Colleen Whitman v. MTRS, 22-0118

Leela Bakshi v. MTRS, 22-0135

Timothy Sigda v. MTRS, 22-0173

Linda Leger v. MTRS, 22-0289

Tara Degirolamo v. MTRS, 22-0367

Maureen Lavin v. MTRS, 22-0418

Bonnie Antkowiak v. MTRS, 22-0629

Colleen Murray v. MTRS, 23-0036

Karen Hurley Cudmore v. MTRS, 23-0065

Carlene Hackett v. MTRS, 23-0192

Chris Baratta v. Boston Retirement System, 23-0216

Roberta Fillmore v. MTRS, 23-0358

Appendix B
(Copies of Submissions)