

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Jennifer Pelletier,
Petitioner,

No. CR-19-301

Dated: May 8, 2023

v.

**Massachusetts Teachers' Retirement
System,**
Respondent.

Appearance for Petitioner:

Ashley F. Walter, Esq.
Quincy, MA 02171

Appearance for Respondent:

James O'Leary, Esq.
Charlestown, MA 02129

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

Acts 2022, c. 134, § 3 creates a six-month window during which certain teachers may enroll in the benefits program known as Retirement Plus. The window is restricted to teachers who did not previously “provide a written election to participate” in Retirement Plus. The petitioner satisfies that condition, having previously provided only an election *not* to participate in the program.

DECISION

Petitioner Jennifer Pelletier appeals from a decision of the Massachusetts Teachers' Retirement System excluding her from the benefits program known as Retirement Plus. *See* G.L. c. 32, § 5(4). She is one of several hundred teachers pursuing such appeals. *See In the Matter of Enrollment in Retirement Plus*, No. CR-21-369.

In April 2021, Ms. Pelletier was ordered to show cause why her appeal should not be dismissed for failure to state a claim. *See* 801 C.M.R. § 1.01(7)(g)(3). She filed a response, and

the parties have since filed additional memoranda. Because the material facts are undisputed, the appeal is being decided on the written submissions. *Id.* § 1.01(10)(c).

Findings of Fact

The following facts are undisputed.

1. Ms. Pelletier originally was a member of the Needham Retirement System. In approximately 2009, she transferred into MTRS. In 2010, Ms. Pelletier filed a form declining to participate in Retirement Plus. At some point, she began to direct her retirement contributions to MTRS.

2. In 2019, MTRS issued a decision to Ms. Pelletier stating that she is not entitled to be enrolled in Retirement Plus. She timely appealed.

3. While the appeal was pending, Ms. Pelletier asked MTRS for a new opportunity to enroll in Retirement Plus, citing Acts 2022, c. 134, § 3 (discussed *infra*). MTRS declined.

Analysis

I

Retirement Plus took effect on July 1, 2001. Participants in the program make enlarged retirement contributions of 11% and enjoy advantageous retirement-allowance computations. *See* G.L. c. 32, § 5(4). Retirement Plus is restricted to MTRS’s teachers, while a parallel program applies to teachers in the Boston Retirement System.

The statute that enacted Retirement Plus prescribed three methods by which teachers could become enrolled. Enrollment was automatic for individuals hired as teachers on or after the July 1, 2001 “kick-off” date. Individuals already serving as teachers on the kick-off date received a six-month window to enroll, from January to June of 2001. Individuals serving in other retirement systems and transferring into MTRS could enroll in the program within 180

days of “establishing membership.” The statute provided that “[t]he election to participate in [Retirement Plus] shall be irrevocable.” G.L. c. 32, § 5(4)(i) (as in effect until Aug. 2, 2022).

A statute enacted in late 2022 modified the rules governing enrollment in Retirement Plus for teachers transferring into MTRS from other systems. Acts 2022, c. 134. For teachers transferring after mid-2022, the statute makes participation in Retirement Plus automatic. *Id.* § 1.¹ In addition, the 2022 statute provides that certain teachers “shall have a new 1 time opportunity to elect to participate in [Retirement Plus].” *Id.* § 3(a). This new enrollment “window” is open during the first half of 2023; it is available to any MTRS member who:

(i) is a teacher; (ii) transferred from another contributory retirement system . . . ; (iii) became eligible for membership in [MTRS] on or after July 1, 2001 . . . ; (iv) began contributing to [MTRS] on or after July 1, 2001 . . . ; and (v) did not provide a written election to participate in [Retirement Plus] to [MTRS] on or before December 31, 2022.

Id.

The question here is whether Ms. Pelletier is eligible for the 2023 enrollment window. The parties agree that she satisfies the first four applicable requirements: she is a teacher who transferred into MTRS from another system after mid-2001, and she began to make MTRS contributions during the requisite time period.

The dispute revolves around the final condition, which restricts the 2023 enrollment window to individuals who “did not provide a written election to participate in [Retirement Plus] to [MTRS] on or before December 31, 2022.” Acts 2022, c. 134, § 3(a)(v). MTRS’s position is that Ms. Pelletier fails this requirement because of her 2010 “negative” election, i.e., her election *not* to participate in Retirement Plus.

¹ Teachers transferring with prior service predating mid-2022 now receive an opportunity to opt *out* of Retirement Plus. Acts 2022, c. 134, § 4.

II

“[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result.” *Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644, 648 (2012) (quoting *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001)). “Where the statutory language is ‘clear and unambiguous and leads to a workable result, we need look no further.’” *Harmon v. Commissioner of Correction*, 487 Mass. 470, 479 (2021) (quoting *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth.*, 392 Mass. 407, 415 (1984)). Then again, courts “avoid literal interpretations contradictory of the visible purpose of a provision.” *Costa v. Fall River Hous. Auth.*, 71 Mass. App. Ct. 269, 277-78 (2008) (collecting cases).²

The pertinent portion of the 2022 statute makes the 2023 enrollment window available to members who made no previous “election to participate” in Retirement Plus. Acts 2022, c. 134, § 3(a)(v). On a plain-language reading, the significance of this provision couldn’t be clearer. An “election to participate” is the *opposite* of an election *not* to participate. In ordinary English, it is impossible to say that Ms. Pelletier made an “election to participate in [Retirement Plus].”

The plain-language interpretation of the phrase “election to participate”—as limited to “positive” elections—also would yield a “workable result.” *Harmon*, 487 Mass. at 479. By design, the 2022 statute imposes difficult demands on MTRS. MTRS is already processing hundreds of Retirement Plus enrollments from teachers who previously made no effective

² MTRS, the Boston Retirement Board, CRAB, and PERAC all are charged with administering the Retirement Plus statutes. In these circumstances, the deference owed to MTRS’s interpretation of the statutes is measured. *See Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644, 648 n.7 (2012); *Pelonzi v. Retirement Bd. of Beverly*, 451 Mass. 475, 478 n.8 (2008). *See also Kaufman v. Nielsen*, 896 F.3d 475, 483 (D.C. Cir. 2018); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L.J. 833, 849 n.85 (2001).

election (one way or the other). This major undertaking would change only slightly if MTRS were to accommodate certain additional enrollees who previously determined that Retirement Plus does not suit their needs.³

It is more difficult to say whether the plain meaning of the 2022 statute matches the underlying “aim of the Legislature.” *Rotondi*, 463 Mass. at 648. Prior and pending DALA appeals reveal that a significant number of teachers transferring into MTRS intended to enroll in Retirement Plus but failed to do so effectively. Likewise, a statute enacted longer ago created its own short-term election window for certain teachers whose enrollment efforts had failed. *See Acts 2004, c. 149, § 397; Desiré v. MTRS*, No. CR-14-200, 2017 WL 6335487 (DALA July 7, 2017); *Sabella v. MTRS*, No. CR-05-133, 2006 WL 4211623 (DALA Aug. 29, 2006). It is plausible that the specific problem of such teachers—not teachers who made intentional negative elections—was the “mischief or imperfection” that the 2022 statute intended to remedy. *See State Bd. of Ret. v. Finneran*, 476 Mass. 714, 719 (2017).

On the other hand, the 2022 statute tends to reflect the general legislative view that Retirement Plus is a suitable program for teachers. Beyond the 2023 enrollment window, the statute’s permanent provisions are designed to skyrocket the rate of Retirement Plus participation among teachers transferring into MTRS.⁴ A Legislature so inclined might have been willing to grant another shot at enrollment to teachers who previously made negative elections. It would therefore be too strong to say that the plain-language construction of the 2022 statute—with

³ With respect to the potential tax implications of a statute permitting enrollments by members who previously made negative elections, see *infra* pp. 7-8.

⁴ MTRS theorizes that only constitutional concerns stopped the Legislature from imposing Retirement Plus on *all* teachers. *See Opinion of the Justices*, 364 Mass. 847 (1973).

“elections to participate” read to mean “elections to participate”—contradicts the statute’s “visible purpose.” *Costa*, 71 Mass. App. Ct. at 277.⁵

III

Apart from the 2022 statute, another statutory clause and an MTRS regulation require close attention.

A

The statutory clause is the pronouncement in the original Retirement Plus statute that Retirement Plus elections are “irrevocable.” G.L. c. 32, § 5(4)(i) (as in effect until Aug. 2, 2022). MTRS contends that this pronouncement bars any change to Ms. Pelletier’s original negative election.

The most serious problem with this argument is that even the original statute, read in plain English, limited the irrevocability rule to “election[s] to participate in [Retirement Plus]”—i.e., positive elections. On this point, MTRS argues essentially that a literal reading of the statutory language would be unworkable. *See Harmon*, 487 Mass. at 479. MTRS cautions that havoc would ensue if members who have made negative elections could change their minds at any time. MTRS cites a number of DALA precedents refusing to allow members to join

⁵ Arguably, on its plain-language reading, the passage “did not provide a written election to participate in [Retirement Plus]” may border on surplusage—because any member who *did* previously provide such an election would have no reason to do so again. *See Plymouth Ret. Bd. v. Contributory Ret. Appeal Bd.*, 483 Mass. 600, 607 (2019). But statutory language lacking operative consequences “may in fact perform[] a significant function simply by clarifying.” *Public Citizen, Inc. v. Rubber Manufacturers Ass’n*, 533 F.3d 810, 818 (D.C. Cir. 2008). *See also Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004); *Postal Police Officers Ass’n v. United States Postal Serv.*, 502 F. Supp. 3d 411, 420 n.1 (D.D.C. 2020). It is § 3(a)(v) that explains the point of the 2023 election opportunity, namely, to offer a reprieve to members who previously failed to enroll.

Retirement Plus after they originally failed to do so. *See, e.g., Small v. MTRS*, No. CR-05-103 (DALA Sept. 11, 2006); *Duff v. MTRS*, No. CR-01-1070 (DALA Oct. 1, 2003).

While facially appealing, MTRS’s argument overestimates the role of the irrevocability clause in the orderly administration of Retirement Plus elections. As described *supra*, some teachers have no choice but to participate in Retirement Plus; other teachers receive a limited window of six months or so to make their elections. The applicable deadlines are inflexible. *See Lamour v. TRB*, No. CR-01-1004 (CRAB Nov. 6, 2003); *Pearlmutter v. TRB*, No. CR-01-1044 (CRAB Nov. 6, 2003); *Boland v. TRB*, CR-01-823 (CRAB July 31, 2002); *Miller v. MTRS*, No. CR-07-791 (DALA Dec. 22, 2011) (collecting cases). In practical effect, the deadline’s expiration prevents each member from revisiting his or her election. A “revocable” negative election thus would be less-than-final only until the deadline—or in the rare event of a newly legislated election opportunity.

Another aspect of statutory workability merits discussion. An interpretation of a retirement-law provision may be unworkable if it would frustrate key tax-law features of the retirement scheme. *See Whipple v. MTRS*, No. CR-07-1136 (CRAB Dec. 19, 2014). At Retirement Plus’s inception, MTRS took pains to ensure that the IRS would treat Retirement Plus contributions as tax-deferred, “employer pick-up” contributions. *See* 807 C.M.R. § 9.03; I.R.S. Priv. Ltr. Rul. 200116049 (Jan. 23, 2001). *See generally* IRS, Employer “Pick-Up” Contributions to Benefit Plans, <https://www.irs.gov/government-entities/federal-state-local-governments/employer-pick-up-contributions-to-benefit-plans> (Mar. 9, 2023). The IRS would likely change its mind—and might take adverse action against MTRS—if members were able to undo their agreements to have the enlarged, 11% contributions withheld from their pay. *See* Priv. Ltr. Rul. 200116049, *supra*; *Smith v. MTRS*, No. CR-01-232 (DALA May 25, 2001);

Gallucio v. MTRS, No. CR-03-749 (DALA June 18, 2004). It does not appear, however, that any comparable consequences attach to the revocability or irrevocability of a member's decision to opt *out* of Retirement Plus.

The plain meaning of the original statute's irrevocability clause is therefore workable. On that reading, the only elections that become irrevocable immediately are "election[s] to participate in [Retirement Plus]"; negative elections become irrevocable upon the expiration of the applicable deadlines. As a result, the irrevocability clause does not interfere with Ms. Pelletier's eligibility for the 2023 window under the 2022 statute.⁶

B

The potentially pertinent MTRS regulation discusses the "transferees" into MTRS who are entitled to an opportunity to enroll in Retirement Plus. The regulation states:

Because an election opportunity⁷ is irrevocable, any Transferee into the MTRS who . . . has made an election to participate or not participate in RetirementPlus (or who failed to so elect when an opportunity was available), shall not have another Election Opportunity.

807 C.M.R. § 13.04(2). *See Nelson v. MTRS*, No. CR-16-578, at 9 (DALA Dec. 8, 2017). This regulation would be presumed valid in the courts, and cannot be annulled in an administrative

⁶ Even if MTRS is correct that the irrevocability clause extends to negative elections, the 2022 statute might have intended to make a partial, temporary exception to that rule. MTRS suggests that this construction of the interplay between the statutes would mean that the Legislature "hid an elephant in a mousehole." *See Entergy Nuclear Generation Co. v. Department of Env'tl. Prot.*, 459 Mass. 319, 333 (2011). But a provision making certain negative elections revocable for six months is not much of an "elephant"; and it is now difficult to view the irrevocability clause as a keystone of Retirement Plus's statutory scheme, given that the 2022 statute has eliminated that clause altogether. *See Acts 2022, c. 134, § 1.*

⁷ Presumably the phrase "election opportunity" is intended to cover both elections and failures to make timely elections.

tribunal. *Massachusetts Teachers' Ret. Sys. v. Contributory Ret. Appeal Bd.*, 466 Mass. 292, 296-97 (2013); *Pepin v. Div. of Fisheries & Wildlife*, 467 Mass. 210, 214 (2014).

Carefully read, § 13.04 does not conflict with the plain meaning of the 2022 statute's § 3(a)(v). A “transferee” within the meaning of the regulation is “any member of another . . . retirement system *who is transferring* his or her membership to the MTRS.” 807 C.M.R. § 13.02 (emphasis added). The grammatical tense of this definition makes clear that § 13.04 specifically governs the enrollment rights that may open up before a teacher on the occasion of his or her transfer. *See Soucy v. Contributory Ret. Appeal Bd.*, 69 Mass. App. Ct. 558, 564 (2007) (courts “give tenses their ordinary significance”). The regulation’s operative instruction is that the transfer itself does not bestow an enrollment opportunity on a teacher who previously made a negative election. That rule is consistent with the plain meaning of the 2022 statute.⁸

It is true that § 13.04 starts with the words, “Because an election opportunity is irrevocable” But this passage cannot bear much practical weight. A plain reading reveals it to be explanatory rather than operative in nature. Further, the explanation the passage offers is virtually always true—given the firm deadlines that govern election opportunities—even if no literal irrevocability rule covers negative elections. Finally, the point of the 2022 statute is to create a “1 time opportunity” for certain members to join Retirement Plus *despite* the usual rules that otherwise would exclude them. It is natural to interpret the statute’s short-term leniency as intended to override the permanent provisions of not only G.L. c. 32, § 5(4) but also § 13.04. And there is no reason to read § 13.04 as less amenable than its progenitor statute to exceptional, temporary legislative intervention.

⁸ It is less clear whether, overall, § 13.04 squares with the Retirement Plus scheme as in effect after the 2022 statute.

Conclusion and Order

Ms. Pelletier is entitled to enroll in Retirement Plus through the election opportunity enacted by Acts 2022, c. 134, § 3. MTRS's contrary decision is REVERSED. Ms. Pelletier's challenge to MTRS's earlier decision excluding her from Retirement Plus is MOOT.⁹

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate

⁹ A separate order will issue in docket no. CR-21-369 to address this decision's implications for individuals other than Ms. Pelletier.