COMMONWEALTH OF MASSACHUSETTS

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

**Nancy Perrault,**

Petitioner

v. Docket Nos. CR-15-32

 Date Issued: Jul. 21, 2017

**Massachusetts Teachers’**

**Retirement System,**

Respondent

**Appearance for Petitioner:**

 Daniel Fogarty, Esq.

 Sandulli Grace, P.C.

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**Appearance for Respondent:**

 James O’Leary, Esq.

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**Administrative Magistrate:**

 **Kenneth J. Forton, Esq.**

**SUMMARY**

 Petitioner is not entitled to the special buyback interest rate when purchasing her prior service because she did not make payment by the deadline stated in the MTRS invoice, and the applicable interest rate had since been increased by the Legislature to the twice-as-high actuarial assumed rate. *See* G.L. c. 32, § 3(8)(b); Acts 2011, c. 176, § 9. MTRS owed Petitioner no duty to confirm receipt of the invoices that it sent her.

**DECISION**

 On April 13, 2016, the Petitioner, Nancy Perrault, timely appealed under G.L. c. 32, § 16(4) the decision of the Respondent, Massachusetts Teachers’ Retirement System, denying the Petitioner’s request to adjust her creditable service buyback interest rate. On November 23, 2015, DALA ordered the parties to submit evidence in support of their positions. Petitioner filed her pre-hearing memorandum, which I marked “A” for identification, and ten proposed exhibits on December 23, 2015. On March 16, 2016, the Respondent submitted a response to the Petitioner’s pre-hearing memorandum, which I marked “B” for identification, and five proposed exhibits.

I held an evidentiary hearing on April 13, 2016, at DALA, One Congress Street, Boston, Massachusetts; I digitally recorded it. I admitted 17 documents into evidence. (Exhibits 1-17.) The Petitioner testified, as did her husband Alan Perrault. The Board called no witnesses. The administrative record closed upon receipt of the parties’ post-hearing briefs, which I have marked “C” and “D” for identification.

**FINDINGS OF FACT**

Based on the evidence presented by the parties, I make the following findings of fact:

1. Nancy Perrault is a first grade teacher in the Town of Methuen. (N. Perrault testimony.)
2. After she graduated college, in 1977, 1978, and 1979, Ms. Perrault worked as a substitute teacher and as an instructional assistant in Methuen Public Schools. She was not eligible for membership in MTRS or in her local retirement system during this period. (N. Perrault testimony; Ex. 3.)
3. After that, she taught at a parochial school, St. Augustine’s School, in Lawrence for six and a half years. (N. Perrault testimony.)
4. When she began teaching full-time in Methuen she became a member of MTRS. (Stipulation.)
5. Ms. Perrault was notified by the Marlborough Educators Association and the Massachusetts Teachers’ Association at an informational meeting that changes had been made to the retirement law that could affect creditable service purchases. The interest rate applicable to service purchases was increasing from the then-current 4.125% buyback rate to the 8.25% actuarial rate as of April 2, 2013. *See* Acts 2011, c. 176, § 9. (N. Perrault testimony.)
6. To take advantage of the lower rate, Ms. Perrault applied to purchase her 1977-1979 Methuen substitute and part-time service. She submitted her application on March 1, 2013; it was received by MTRS on March 7, 2013. (Exs. 3, 6.)
7. On May 24, 2013, MTRS sent Ms. Perrault a confirmation letter that her application was received and that the estimated processing time was “12 months or longer.” The letter stated in bold, “because your application was filed before or on April 2, 2013 – you have reserved your right to an initial invoice at the lower ‘buyback’ interest rate.” It further explained:

When you receive your initial invoice, you will have until your invoice due date (60 days from the date we issue your invoice), EITHER to pay in full for your purchase OR to submit both your signed installment plan agreement and your first annual installment payment. If you *either* do not take either action by your invoice due date, *or* you default on your installment agreement, and you later wish to purchase this service, you will be subject to the interest rate in effect at that time, which will be actuarial interest.

(Ex. 5.) (emphasis in original.)

1. To cope with in excess of 20,000 applications to purchase creditable service that were filed to avoid the increasing interest rate, MTRS adopted a policy of charging the buyback rate as long as the application was postmarked by April 2, 2013 and the member paid the invoice in full or made the first installment payment by the invoice due date, which was 60 days from the date the invoice was issued. This policy was memorialized in a memorandum dated December 20, 2013. (Ex. 16.)
2. On or about February 21, 2014, MTRS generated an invoice for Ms. Perrault’s purchase request. Following MTRS’s usual business practices, it was promptly mailed in a windowed envelope with bright, hot pink inserts detailing the need to select a payment plan before the interest rate doubles. (Exs. 13, 14, and 15.)
3. MTRS calculated that she was entitled to 1.4083 years of service; Ms. Perrault does not dispute this calculation. (Ex. 8.)
4. The invoice directed Ms. Perrault to either make a lump-sum payment of $1,816.92 or make her first of five installment payments of $393.34 no later than April 20, 2014. Next to the box that detailed the payment options, there was a block of text that read:

PLEASE NOTE: INTEREST INCREASE ALERT! If you do not EITHER pay the lump-sum amount OR pay the first installment amount BY THE LATEST DUE DATE AT RIGHT, and you later wish to purchase this service, you will be charged the higher actuarial interest rate.

(Ex. 6.) (emphasis in original). If Ms. Perrault did not submit payment by the deadline, the invoice advised her: “you may still purchase this service credit at some time prior to your date of retirement, but at a higher cost due to added interest charges. If you delay payment and the last due date passes, please contact our office for a revised invoice.” These alerts were consistent with the policy adopted by the Board. (Ex. 6.)

1. Ms. Perrault and her husband have lived in a single-family home in Methuen, Massachusetts for 28 years. At the end of their driveway, they have a single mailbox that does not lock. Mr. Perrault is retired and usually picks up the mail once it is delivered. If not, Ms. Perrault gets it on her way into the house after work or after it comes on the weekends. Their mail is then placed on a counter inside, and their mailbox is not used for any purpose other than normal ingoing and outgoing mail. (N. Perrault and A. Perrault testimony.)
2. Around October 2014, Ms. Perrault called MTRS to check on her application and was told by a representative to just wait her turn and be patient. (N. Perrault testimony; Ex. 9.)
3. On January 6, 2015, Ms. Perrault contacted MTRS again and spoke to another representative about her file. She informed Ms. Perrault that an invoice was sent to her on February 21, 2014 with a due date of April 20, 2014, and, since she did not respond to it, Ms. Perrault was no longer entitled to the lower buyback interest rate. (N. Perrault testimony; Ex. 7.)
4. On January 8, 2015, MTRS denied Ms. Perrault’s request to apply the lower buyback interest rate to her service purchase and instead generated a new invoice dated January 8, 2015 applying the twice-as-high actuarial interest rate. Ms. Perrault received this invoice in the mail. (N. Perrault testimony; Exs. 8, 9.)
5. By letter dated January 15, 2015, Ms. Perrault appealed MTRS’s decision to apply the actuarial interest rate. (Ex. 9.)

**CONCLUSION AND ORDER**

 For the reasons stated below, MTRS’s denial of the Petitioner’s request to pay the lower buyback interest rate on her service purchase is affirmed.

 Ms. Perrault argues that she is entitled to purchase prior non-membership substitute and part-time service at the former buyback interest rate of 4.125% instead of the twice-as-high actuarial assumed rate. G.L. c. 32, § 3(5) allows a member of a Chapter 32 retirement system who “rendered service in any governmental unit other than that by which [she] is presently employed, in a temporary, provisional, or substitute position and who was excluded from membership by the rules of any board” to purchase her prior service. The interest rate applicable to the purchase is determined by G.L. c. 32, § 3(8)(b), which provides:

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 conditions 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 1 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).

 In response to the overwhelming number of service purchase applications to purchase prior service before the interest rate increased, MTRS adopted a policy of applying the lower buyback rate to any service purchases applied for by April 2, 2013. Members were still required to follow the instructions on the invoices that directed them to either pay the lump sum or the first installment payment within 60 days of the date of the invoice. This forgiving policy allowed members to make their purchases at the buyback rate and not be penalized by MTRS’s inability to process the deluge of applications by April 2, 2013 statutory deadline. While Ms. Perrault did file her application by April 2, 2013, she did not pay or arrange for payment of the invoice within the sixty-day window listed in the invoice. She is therefore not entitled to the buyback interest rate and must instead pay the actuarial assumed rate.

Ms. Perrault makes several claims on appeal. First, she claims that she did not receive the February 21, 2014 invoice and argues that she would have seen it if it had been delivered, since Ms. and Mr. Perrault have a regular mail routine and were anticipating the invoice. In Massachusetts the regular course of the mails is presumed. *See* *Holiver v. Dep’t of Public Works*, 333 Mass. 18, 21 (1955); *Federal Ins. Co. v. Summers*, 403 F.2d 971, 975 (1968) (Massachusetts law does not require evidence or judicial notice of regularity of mails because it is presumed). Therefore, proof of mailing alone is prima facie evidence that it was received. *See* *Anderson v. Inhabitants of Town of Billerica*, 309 Mass. 516, 518 (1941). In this case, there is little reason to doubt that MTRS followed its standard business practice of mailing the invoices directly after they were generated, since it is likely that “one regularly entrusted with a routine [employment] duty will perform it in a particular instance.” *See Id.* at 518; *Santarpio v. New York Life Ins. Co.*, 301 Mass. 207, 209 (1938); *Swampscott Machine Co. v. Rice*, 159 Mass. 404 (1893). Additionally, Ms. Perrault received, and produced at the hearing, other MTRS mailings sent to her same home address that was printed on the February 2014 invoice. (Exs. 4, 5, 6, 7, and 8.) These factors are strong evidence that the invoice was mailed to Ms. Perrault. Ms. and Mr. Perrault’s testimony regarding their personal mail practices, alone, is not enough to tip the scales in their direction.

Ms. Perrault also asserts that MTRS has a flawed system that makes no attempt to confirm receipt of MTRS invoices. MTRS generates and sends invoices through the United States Postal Service and owes Ms. Perrault no duty to confirm receipt of a sent invoice. The duties and responsibilities of a retirement board are statutorily defined in Chapter 32, and MTRS’s general powers and duties are set out in Section 20(5). That provision imposes no general fiduciary duty in administration of the system. This does not mean that retirement board members and staff do not do their utmost to ensure that all members are informed of their rights and benefits under the system. They do. However, they do not have a general fiduciary duty that is breached if they do not inform a member of every potential benefit, especially in this case where Ms. Perrault had already been informed of the invoice due date via the application confirmation letter. *See* *Abele v. Newton Ret. Bd.*, CR-08-495 (DALA 2009); *Thorburn v. Worcester Reg. Ret. Bd.*, CR-07-424 (DALA 2008); *Benoit v. Bristol County Ret. Bd.*, CR-04-291 (CRAB 2006). MTRS’s duty is one not to mislead. Ms. Perrault’s October 2014 call to MTRS could be considered misleading, as MTRS could have checked its records and told her that the February 2014 invoice had already been sent to her. But, by that point she had already missed the invoice deadline and was subject to the higher rate. This arguably misleading advice to wait her turn had no tangible effect on her rights.

Next, Ms. Perrault asserts that she should pay the buyback rate because an MTRS regulation, 807 CMR 23.02, states: “The interest rate applicable to a service purchase is the interest rate as of the date of application.” On the day that she applied, the buyback rate was still in effect; therefore, according to her, she is entitled to that rate. This conclusion is obviously appealing to her, but read along with the rest of the regulation, G.L. c. 32, § 3(8)(b), and the legislative and regulatory history, it turns out to be wrong.

At first glance, 807 CMR 23.02 possibly contradicts § 3(8)(b), which requires that members pay in a lump sum or make provision for installment payments either one year after their reinstatement or by April 2, 2013, whichever is later. Section 3(8)(b) does not say that the applicable rate is based on the date of application. MTRS, however, saw § 3(8)(b) as sufficiently ambiguous so as to require some clarification in its internal policies and in a regulation.

MTRS did two things. First, it realized that the rate change would generate more applications for creditable service than it could process by April 2, 2013. As mentioned above, to address the problem, the MTRS Board agreed to charge the buyback interest rate on all section 3 service purchases as long as the application was filed by April 2, 2013, and the member paid the invoice in a lump sum or made her first installment payment by the invoice due date (60 days from the date of issue). This internal MTRS policy was meant to help its members meet the statutory deadline without holding them individually responsible for the systemic deluge of applications, while at the same time accomplishing the purpose of the statute: to limit the use of the buyback interest rate and thus more fully fund members’ retirement allowances with their own contributions. It was not meant to allow members to file an application before the deadline and then pay the invoice anytime that she wanted before her retirement. That interpretation would frustrate the purpose of the law. The amendment to § 3(8)(b) addressed the long-standing practice of members waiting to purchase service until near retirement at a rate that was significantly lower than the rate of return that the retirement system would have earned on the contributions if they were made contemporaneous with the service itself. Waiting that long to purchase service resulted in members, in effect, underfunding their retirement allowances. *See* G.L. c. 32, §§ 22(3)(b), 22(8)(a), (b), and (e).

Second, MTRS enacted a regulation meant to ensure that, after the amendment, members would pay the lowest interest rate permissible under § 3(8)(b), while at the same time streamlining the process at MTRS. 807 CMR 23.01 explains: “When interest rates reduce, significant administrative inefficiency and delay may result from members withdrawing their outstanding applications and re-applying in order to take advantage of the lower rate. To resolve this problem 807 CMR 23.02 pegs the interest rate to the “date of application,” and 807 CMR 23.03 provides that “the ‘date of application’ will be presumed to be the date of invoicing in cases where the member could have withdrawn his/her service purchase application and re-applied, and where doing so before the date of invoicing would have resulted in a reduction in the applicable interest rate.” In other words, the rate ends up being the lower of the rate on the date of application and the rate on the date of invoicing.

This regulation does not anywhere exempt members from the instructions included on the service purchase invoices. To allow a member to secure an interest rate, only to act on it years later, as the Petitioner’s interpretation of 807 CMR 23.02 would allow, is counter to the purpose of G.L. c. 32 § 3(8)(b). The statute limits the availability of a lower buyback interest rate to those who have applied *and* made some kind of payment or payment arrangement; it does not extend it. Thus, the lower buyback interest rate was forfeited by Ms. Perrault’s nonresponse to the February 2014 invoice.

Finally, even if Ms. Perrault did not receive the invoice, I cannot employ an equitable remedy contrary to the clear language of the statute. *See Petrillo v. Public Employee Retirement Admin.*, CR-92-731, (CRAB 1993) (CRAB does not have the “authority to employ an equitable remedy in the face of specific statutory language [to the] contrary.”); *Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 451-52 (2006) (same). Unfortunately, the clear language of G.L. c. 32, § 3(8)(b), as implemented by MTRS, does not permit a member to receive the buyback rate if she does not make payment or arrange to make payment within the time specified, regardless of that member’s efforts. *See* *Turner v. Contributory Retirement App. Bd.*, Civil No. 1581CV06993, Mem. Of Decision and Order on Cross-Motion for Judgment on the Pleadings (Middlesex Super. Ct., Jun. 5, 2017), *affirming Turner v. Mass. Teachers’ Retirement System*, CR-13-305, CR-13-428, at \*12 (DALA Feb. 11, 2015), *aff’d* (CRAB Dec. 2, 2015). Because Ms. Perrault did not make any payment or arrangements within sixty days after the February 21, 2014 invoice was presumed to be sent out and received, she is not entitled to the lower interest rate.

For the foregoing reasons, the Petitioner’s appeal fails and the decision of MTRS is AFFIRMED.

SO ORDERED.

Division of Administrative Law Appeals

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Kenneth J. Forton, Esq.

Administrative Magistrate

DATED: Jul. 21, 2017