

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Linda Simonds,
Petitioner,

No. CR-23-0140

Dated: September 13, 2024

v.

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

Appearances:

For Petitioner: Ashley F. Walter, Esq.

For Respondent: James C. O'Leary, Esq., Lori Curtis Krusell, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

The petitioner is a teacher who failed to enroll in the benefits program known as Retirement Plus during the six-month election window afforded to her by statute in 2001. A preponderance of the evidence does not establish that the petitioner received inadequate "notice" about Retirement Plus within the meaning of the applicable administrative precedents. There was therefore no error in the respondent's determination that the petitioner is not entitled to join Retirement Plus belatedly. A more detailed analysis of the pertinent issues is presented in *Dwyer v. Massachusetts Teachers' Retirement System*, No. CR-23-459 (DALA, issuing today).

DECISION

Petitioner Linda Simonds appeals from a decision of the Massachusetts Teachers' Retirement System (MTRS) determining that she is not entitled to be enrolled in the benefits program known as Retirement Plus. G.L. c. 32, § 5(4). A consolidated May 15, 2024 evidentiary hearing addressed both this appeal and *Dwyer v. Massachusetts Teachers' Retirement System*, No. CR-23-0459. Ms. Simonds testified on her own behalf. MTRS called two of its officers, Erika Glaster and David Percoco. I admitted into evidence Mr. Percoco's affidavit and exhibits marked 1-16, 18, 20, and A-B.

Findings of Fact

I find the following facts:

1. Ms. Simonds is a teacher. She became an MTRS member in 1995. She continues to teach to this day. (Simonds.¹)

2. From December 2000 until June 2002, Ms. Simonds took maternity leave followed by “childbearing” leave. In addition to her newborn, Ms. Simonds also had a toddler at home. She received pay amounts from her employer until April 2001. The remainder of her leave was unpaid. (Simonds; exhibit 15.)

3. Through April 2001, Ms. Simonds resided in Douglas, MA. Her mailbox was located along with her neighbors’ boxes at the end of a shared driveway. Ms. Simonds, her husband, and her mother were collectively in the habit of retrieving mail from the mailbox on a near-daily basis. They did not experience any recurring problems with their mail. In April 2001, the family relocated to Uxbridge, MA. (Simonds.)

4. The Legislature established the benefits program known as Retirement Plus through Acts 2000, c. 114, § 2. MTRS planned and executed a campaign to alert and educate its members about this development. (Glaster; exhibits 3-6.)²

5. MTRS prepared five different mailings to its members about Retirement Plus: an initial flyer (August 2000), an insert accompanying a periodic MTRS newsletter (fall 2000), a reminder postcard (January 2001), the Retirement Plus “election packet” (February 2001), and a

¹ The testimony is cited by witness name.

² Prior decisions relating to the matters discussed in paragraphs 4-8 are competent evidence but are not binding on Ms. Simonds. *See Dwyer v. Massachusetts Teachers' Ret. Syst.*, No. CR-23-459, at 2 n.2 (DALA, issuing today).

final notice enclosed with each member's annual statement (April 2001). (Glaster; exhibits 1, 2, 3, 7, 8, 10, 11.)

6. MTRS endeavored to distribute each of the five Retirement Plus mailings to all of its members, both active and inactive, approximately 95,000 individuals in all. MTRS contracted with one or more vendors to print and mail its mailings. Each vendor received a database containing the members' addresses. (Glaster.)

7. The vendor hired to distribute the February 2001 election packets was Triad Direct, Inc. Each of the packets Triad mailed out included an informational flyer, a CD, a multipart election form, and a return envelope. Triad printed the addresses it received from MTRS onto specially printed envelopes. The envelopes prominently announced on their exteriors that they related to Retirement Plus. The mailings' postage was prepaid. (Glaster; Percoco; Percoco aff. ¶ 3; exhibits 10, 13.)

8. MTRS hired another vendor to process members' election responses (both yeses and noes). That vendor was LHS Associates, Inc. LHS received election forms from approximately 57,000 members. Using a set of coded abbreviations, LHS entered the status of each member's election into a database. The code ND denoted members whose election packets were returned by the postal service undelivered. The code RPNR denoted members who were eligible to make elections but did not mail back their forms. (Glaster; Percoco; exhibits 9, 12, 14.)

9. As of late 2000 and early 2001, MTRS's systems correctly listed Ms. Simonds's residence in Douglas as her address. MTRS provided that address to its mailing vendors, including Triad. Ms. Simonds does not recall receiving any notices or materials about

Retirement Plus. She did not mail back an election form. The code assigned to her in LHS's database is RPNR. (Simonds; Percoco; Percoco aff. ¶ 6; exhibit 8.)

10. Since Ms. Simonds's return from leave in 2002, retirement deductions have been taken from her pay at the standard, non-Retirement Plus rate, i.e., 9% of her entire salary plus 2% of pay amounts exceeding \$30,000 per year. For many years, Ms. Simonds did not realize that she was not paying the special Retirement Plus contribution rate, which is 11% of the member's entire salary. *See* G.L. c. 32, §§ 5(4)(i), 22(1)(b)(vi), (b½). (Simonds; exhibit 15.)

11. In early 2023, Ms. Simonds learned that MTRS's records do not identify her as a participant in Retirement Plus. She asked MTRS to amend her enrollment status and to collect any necessary make-up contributions from her. MTRS declined, and Ms. Simonds timely appealed. (Simonds; exhibits A-B.)

Analysis

This appeal is controlled by the analysis stated today in *Dwyer, supra*. An abridged version of that analysis follows.

Retirement Plus is an alternative benefits program that allows teachers to retire early. In return, participants in the program make enlarged retirement contributions of 11%. G.L. c. 32, § 5(4)(i). The program took effect in mid-2001. Individuals who were then teachers and MTRS members were afforded a six-month period to enroll, from January 1 through July 1 of that year. Acts 2000, c. 114, § 2.

The general rule is that teachers who missed the July 1, 2001 deadline cannot enroll at a later date. An exception to this rule arises under *Davey v. Massachusetts Teachers' Retirement System*, No. CR-01-914 (CRAB Jan. 31, 2003), and *Simonet v. Massachusetts Teachers' Retirement System*, No. CR-18-164, 2021 WL 12298083 (CRAB Oct. 28, 2021). Those decisions remain good law. Read together, they allow teachers who missed the original mid-

2001 deadline to enroll belatedly if they were “inactive throughout the first half of 2001 and received no notice about the . . . program.” *In the Matter of Enrollment in Retirement Plus*, No. CR-21-369, 2023 WL 5332723, at *3 (DALA Aug. 7, 2023). A teacher received “notice” within the meaning of the *Davey* and *Simonet* decisions if timely information about Retirement Plus was delivered to her. *Dwyer, supra*, at 6-7 (citing cases).

The pivotal question is thus whether information about Retirement Plus was delivered to Ms. Simonds.³ She bears the difficult burden of establishing that the answer is no. *See Goldstein v. Massachusetts Teachers' Ret. Syst.*, No. CR-03-176, at *4 (CRAB Feb. 4, 2005). On balance, Ms. Simonds does not carry that burden. The evidence establishes that Triad agreed to mail MTRS's election packets to the addresses appearing in MTRS's database, using preprinted and prepaid envelopes. The database listed a then-current address for Ms. Simonds. It is a reasonable inference that Triad complied with its instructions. *Compare Commonwealth v. Orlor*, 252 Mass. 55, 63 (1924), *with Prudential Tr. Co. v. Hayes*, 247 Mass. 311, 313 (1924). The law presumes that papers properly placed in the mail are then duly delivered. *See Commonwealth v. Barboza*, 68 Mass. App. Ct. 180, 185 (2007).

Although the presumption of the mail's regularity is rebuttable, Ms. Simonds does not rebut the presumption. She sincerely believes that she never received MTRS's communications about Retirement Plus. But a preponderance of the evidence does not establish the accuracy of that belief. Ms. Simonds's mail service generally operated properly. During the pertinent

³ MTRS raises a colorable argument to the effect that Ms. Simonds was not “inactive” during the 2001 election period, in the sense that she was paid by her employer during a portion of it. *See supra* p. 2, ¶ 2. This argument relies on the definitions of “active” and “inactive” membership appearing in G.L. c. 32, § 3(1)(a). It is not necessary to determine here whether *Davey* had those definitions in mind, or whether the Contributory Retirement Appeal Board there used the term “inactive” more loosely to denote the member's absence from work.

period, the adult members of Ms. Simonds's household were caring for two small children; they were also preparing to move. It is the rare individual who can confidently recall the mail that she did *not* receive more than twenty years ago. In the end, it is more likely than not that MTRS's correspondence arrived at Ms. Simonds's residence, was available to her there, but escaped her attention. The result is that the demand for lack of "notice" posed by *Davey* and *Simonet* is not satisfied here.

Conclusion and Order

In view of the foregoing, MTRS's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate