COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.	**Division of Administrative Law Appeals**
In the Matter of **Enrollment in Retirement Plus**	No. CR-21-369
Concerning: all 2001 appeals	Dated: August 7, 2023

MEMORANDUM AND ORDER ON LATE ELECTIONS BY 2001 TEACHERS

I

The retirement law recognizes that the usual formula for calculating public employees' retirement benefits may not be optimally suited to teachers. The law therefore provides for a teacher-specific "alternative superannuation retirement benefit program." G.L. c. 32, § 5(4). The § 5(4) benefits program came into effect on July 1, 2001. The version of the program administered by MTRS is known as Retirement Plus. The version administered by the Boston Retirement System is known as TARP.

Hundreds of teachers have filed appeals from decisions stating that they are not entitled to be enrolled in the § 5(4) benefits program. Consolidated proceedings concerning such appeals have been ongoing in this docket since late 2021.[1]

Approximately 180 pending appeals concern individuals who were teachers as of the benefits program's start-date (2001 teachers). MTRS, BRS, and the Massachusetts Teachers Association have filed helpful briefs discussing the overarching legal issues that generally control these appeals.

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[1] Key orders in the consolidated proceedings are available online at https://www.mass.gov/lists/general-jurisdiction-recent-decisions#retirement-plus-orders-.

II

The governing statute allowed all 2001 teachers to "elect to participate" in the § 5(4) benefits program. G.L. c. 32, § 5(4)(i) (as in effect until Aug. 2, 2022). The elections were required to be made "on or after January 1, 2001 and before July 1, 2001." *Id.*

During early 2001, MTRS and BRS made efforts to notify their eligible members about the opportunity to enroll in the § 5(4) benefits program. *See* Affidavit of Erika M. Glaster, Aug. 4, 2023; *Tolman v. TRB*, No. CR-02-1305 (DALA Dec. 12, 2003); *Quinney v. TRB*, No. CR-05-274 (DALA Jan. 11, 2007). In the overwhelming majority of the 2001 teachers' pending appeals, the main or only argument presented is that the petitioner may not have received his or her system's mailed notices.

CRAB has held that the mid-2001 election deadline is not extendable based on fairness- or sympathy-oriented considerations. *See Pearlmutter v. TRB*, No. CR-01-1044 (CRAB Nov. 6, 2003); *Lamour v. TRB*, No. CR-01-1004 (CRAB Nov. 6, 2003); *Hale (Robinson) v. TRB*, No. CR-01-861 (CRAB Jan. 31, 2003); *Boland v. TRB*, CR-01-823 (CRAB July 31, 2002).[2] DALA decisions have concluded more specifically that the statutory deadline bars late entry into the § 5(4) benefits program even as to teachers who did not receive notices about the program from

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[2] Among the fairness-oriented problems that administrative tribunals are not permitted to rectify is the predicament of members who receive, and rely upon, incorrect information from representatives of their retirement boards. "Because the [retirement statute] defines and limits the benefits to which [members] are entitled, those benefits are a legal determination that may not be enlarged, even by an erroneous interpretation by [a board] or any of its employees." *Clothier v. Teachers' Ret. Bd.*, 78 Mass. App. Ct. 143, 146 (2010). This rule is an offshoot of the principle that "the doctrine of estoppel is not applied against the government in the exercise of its public duties." *Risk Mgmt. Found. of Harvard Med. Institutions, Inc. v. Commissioner of Ins.*, 407 Mass. 498, 509-10 (1990). *See DiGianni v. Contributory Ret. Appeal Bd.*, 421 Mass. 350, 356 (1995). The foregoing cases foreclose MTA's reliance on *Ayers v. MTRS*, No. CR-03-650 (CRAB July 5, 2005), and *Bradley v. State Emps. Ret. Bd.*, No. 226170, 2002 WL 482569 (Mich. Ct. App. Mar. 29, 2002) (unpublished opinion).

their retirement systems. *See Tolman*, *supra*; *Miller v. MTRS*, No. CR-07-791 (DALA Dec. 22, 2011); *Hart v. MTRS*, No. CR-01-1061 (DALA Nov. 26, 2002); *Barry v. MTRS*, No. CR-01-933 (DALA Sept. 30, 2002).

The logic of these decisions is compelling. When the retirement law wishes for a time period to begin running from the date of notice to the member, it says so. *See* G.L. c. 32, § 4(1)(h½) (purchase of vocational-school service must be made within 180 days of notice); § 4(s) (same for purchase of service in a contract position); Acts 1996, c. 71, § 3 (same for purchase of military service); G.L. c. 32, § 12(2)(d) (election to settle a deceased member's account must be made within 90 days of notice). Here the Legislature stated instead that the 2001 teachers must make their elections "before July 1, 2001." *See Tolman*, *supra*, at *7. That clear, unambiguous, workable language is conclusive. *See generally Harmon v. Commissioner of Correction*, 487 Mass. 470, 479 (2021).

An analogous issue has arisen in the context of G.L. c. 32, § 3(2)(a)(vi), which permits elected officials to establish retirement-system membership "within ninety days after the date of assuming office." Some elected officials, having failed to comply with this deadline, have complained that their retirement systems did not notify them about it. CRAB's response has been that lack of notice does not relax the deadline's force. *Awad v. Hampshire Cty. Ret. Bd.*, No. CR-08-621 (CRAB Dec. 19, 2014). *Accord Levesque v. Essex Cty. Ret. Bd.*, No. CR-95-571 (CRAB Oct. 7, 1996).

In turn, *Awad*'s holding is consistent with the more general rule that a member's right to "written notice of the benefits to which [he or she] is or may be entitled" arises specifically "[u]pon the written request of [the] member." G. L. c. 32, § 20(k). *See also Patton v. Essex*

Reg'l Ret. Syst., No. CR-13-511, at *6 (DALA Jan. 16, 2015, *aff'd*, CRAB Sept. 30, 2016).[3] Even when a retirement system possesses sound practical and legal reasons to reach out to its members with information about their retirement-law rights, the system's failure to do so cannot change or enlarge the member's entitlements. *See* § 20(k); *Awad*, *supra*; *Clothier*, 78 Mass. App. Ct. at 146.

The general rule is therefore that a 2001 teacher cannot join the § 5(4) benefits program after missing the mid-2001 deadline, even in sympathy-provoking cases, and even if the teacher received no notice about the § 5(4) program from his or her retirement system.

III

The general rule is tested by the holdings of *Davey v. MTRS*, No. CR-01-914 (CRAB Jan. 31, 2003), and *Simonet v. MTRS*, No. CR-18-164 (CRAB Oct. 28, 2021). Both cases involved 2001 teachers who failed to elect into the § 5(4) benefits program during the January-June 2001 election period.

The members in *Davey* and *Simonet* were "members inactive" during the first half of 2001, i.e., they were not working as teachers then. *See* G.L. c. 32, § 3(1)(a)(ii). In *Davey*, CRAB permitted the member to join the § 5(4) benefits program soon after he resumed his teaching job. In *Simonet*, CRAB declined to reach that result, explaining as follows:

> [O]ne dispositive factor is present in Ms. Simonet's case that was absent in *Davey*: notice. . . . Mr. Davey . . . was notified of the program only after becoming an active member . . . . Here, it is not disputed that Ms. Simonet received notice in 2001 and did not elect into Retirement Plus within the statutorily prescribed election period.

Id. at 2.

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[3] For other specific situations in which a board is required to notify its members of certain entitlements, facts, or actions, see G.L. c. 32, §§ 11(1)(b), 15(2), 16(1)(b)(iv), 18(1).

It may be tempting to extrapolate a sweeping rule from *Simonet*'s language: that only teachers who were "notified of the [§ 5(4)] program" may be excluded from it based on their failure to make timely elections. But it is highly unlikely that *Simonet* intended to so hold. Section 5(4) is among a very large number of retirement-law provisions that do not say that their consequences hinge on notice to the affected individuals. It is not CRAB's practice to read notification requirements into such proceedings. *See Awad*, *supra*; *Levesque*, *supra*. Indeed, it is now settled that statutory terms are enforced as written even when a retirement board misleads members about their content. *See supra* note 2; *Clothier*, 78 Mass. App. Ct. at 146; *Moynahan v. Essex Cty. Ret. Bd.*, 9 Mass. L. Rptr. 232 (Essex Super. 1998). It would be illogical for a different outcome—namely, a departure from the statute's terms—to result from a board's failure to say anything at all.

A holding that a silent statute is effective only as to members who have received notice of it would upend the case law's usual outlook. Many public employees likely aren't forewarned about the "anti-spiking" adjustments that may impact their pension calculations. *See* G.L. c. 32, § 5(2)(f). Many employees may not realize that their job titles will affect their "group" classification for retirement purposes. § 3(2)(g). Many may not know that applications to retire for accidental disability must be filed within two years of the incapacitating injury or hazard. 7(1). There is no trace of a suggestion in the case law that notice to the member about such provisions is a prerequisite to their force.[4]

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[4] With the more general statutory landscape in mind, it should be clear that a member has no constitutional due-process right to be notified about the details of his or her various entitlements. MTA cites federal case law indicating that an "applicant for benefits" may be entitled to due process. *See Jones-Booker v. United States*, 16 F. Supp. 2d 52, 60 (D. Mass. 1998). *Cf.* G.L. c. 30A, § 13; *Massachusetts Outdoor Advert. Council v. Outdoor Advert. Bd.*, 9

CRAB would not have adopted a ground-shifting theory without substantial analysis. It is therefore improbable that *Davey* and *Simonet* meant to say that § 5(4)'s deadline skips over all members who received no contemporaneous notice. The more realistic reading of the cases is that *Simonet* only narrows *Davey*'s holding: the two decisions together mean that *even* a teacher who was inactive throughout the first half of 2001 cannot be admitted late into the § 5(4) benefits program if he or she "received notice in 2001" and made no timely election. *Simonet*, *supra*, at 2.[5]

IV

For the foregoing reasons, it is hereby ORDERED as follows:

1. This memorandum and order will be published online. Copies will be delivered to MTRS, BRS, MTA, and CRAB.

2. As a rule, appeals of 2001 teachers seeking late entry into the § 5(4) benefits program based on equitable considerations or lack of notice will be dismissed. The orders of dismissal will cross-reference this memorandum and order. Each dismissal will be deferred for a brief period, during which each petitioner will be permitted to move for reconsideration.

3. Further proceedings may be scheduled as to any appeals of teachers who assert that they were inactive throughout the first half of 2001 *and* received no notice about the § 5(4) benefits program. Further proceedings also may be scheduled as to appeals that revolve around unusual claims not contemplated by this memorandum and order.

Mass. App. Ct. 775, 790 (1980). But such cases do not suggest that all individuals possess due-process rights to be notified about all entitlements that they may or may not wish to pursue.

[5] *Simonet* also may signify that CRAB would have decided *Davey* differently today. But appellate tribunals reserve the prerogative to overrule their own precedents. *See 1A Auto, Inc. v. Dir. of Off. of Campaign & Pol. Fin.*, 480 Mass. 423, 431 (2018); *Briggs v. Worcester Reg'l Ret. Bd.*, No. CR-20-384, 2022 WL 9619041, at *3 (DALA Mar. 11, 2022).

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate