

Decision Type: **CRAB**
Docket No.: **CR-02-1305**
Date: **December 12, 2003**
Parties: **Laura Tolman v. Teachers' Retirement Board**
Appearance for Petitioner: Laura Tolman, pro se
 20 Black Brook Road
 South Easton, MA 02375
Appearance for Respondent: Robert G. Fabino, Esq.
 Teachers' Retirement Board
 69 Canal Street
 Boston, MA 02114
Administrative Magistrate: Sarah H. Luick, Esq.

DECISION

Pursuant to G.L.c.32, s.16(4), the Petitioner, Laura Tolman, is appealing the October 22, 2002 decision of the Respondent, Teachers' Retirement Board, denying her request for election into the Retirement Plus Program. (Ex. 2) The appeal was timely filed. (Ex. 1) A hearing was held October 23, 2003, at the offices of the Division of Administrative Law Appeals (DALA), 133 Portland Street, 3rd Floor, Boston, MA 02114, pursuant to G.L.c.7, s.4H, and 801 CMR 1.01, et seq.

Various documents are in evidence. (Exs. 1 - 5) One tape was used. The Petitioner testified. Both parties made arguments on the record. The record was held open for the Respondent to provide further information and argument. (Exhibit 5 is the

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affidavit of Susan Theil, received December 3, 2003.) The record closed December 3, 2003.

FINDINGS OF FACT

1. Laura Tolman, d.o.b. 3/22/69, started working as a teacher in the Walpole School System for the 1995-1996 school year. She became a member of the Teachers' Retirement System. ("A". Testimony)

2. Ms. Tolman stopped this teaching job in March 1998. She did not withdraw her accumulated total deductions. ("A". Testimony)

3. Ms. Tolman began employment in the private sector. (Testimony)

4. From June 1997 until the end of May 2001, Ms. Tolman resided in the same home. It was a two family house, and she was friendly with the landlord who also lived there. At times, she and the landlord would have mail mix-ups, but they would always be easily resolved. Ms. Tolman's address was; 23 Oak Road, Norwood. The landlord's address was 20 Oak Road. The landlord was not a family member. (Ex. 1. Testimony)

5. Ms. Tolman's son was born in August 2000. In December 2000, she was working three days a week at her home, into March 2001. (Testimony)

6. Ms. Tolman and her husband always have paid careful attention to their retirement planning. (Testimony)

7. Ms. Tolman would typically open the mail before her husband would. They had a routine of placing the mail on a particular desk. (Testimony)

8. In August 2000, the Teachers' Retirement Board mailed out "over 95,000 copies" of a brochure that detailed how the Board would be

implementing the Retirement

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Plus plan. This was sent to "all active and inactive members, school representatives and constituent groups." For the inactive members, "all mailings were sent to their last known mailing address." (Ex. 5)

9. Then, in September 2000, the Teachers' Retirement Board "mailed 95,000 copies of the Fall 2000 issue of the MTRB Advisor announcing the upcoming regional member workshops to all active and inactive members." And, in January 2001, the Board "mailed over 95,000 oversized postcards to all active and inactive members as a reminder that election materials would arrive soon, and that a response was due by June 30, 2001." (Ex. 5)

10. During the time period of February 21 - 26, 2001, the Teachers' Retirement Board mailed a Retirement Plus Program election package of information and forms to Ms. Tolman, mailing it to her at 23 Oak Road, Norwood, MA 02062. Ms. Tolman was not contacted by telephone or otherwise in connection with the Retirement Plus Program. (See, Exs. 4 & 5. "A". Testimony)

11. The Teachers' Retirement Board mailed a Retirement Plus package of information and forms for electing into it to all its active and inactive members, such as Ms. Tolman, between February 21 - 26, 2001. It was not sent by certified mail, return receipt requested. The Board hired a mailing house, Triad Direct, to accomplish this mailing. A database was maintained as to who was mailed a package and as to who responded to the package or otherwise elected Retirement Plus. The Board hired a processing firm, LHS Associates, "to receive and organize the completed election forms." LHS Associates employed a subcontractor who "electronically imaged the front of each form to a CD-ROM that can be searched by member name or Social Security number."

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The subcontractor also "created a database of all members to whom election forms were sent that indicated whether the form was received before June 30 and, if so, whether the member elected 'yes' or 'no'." If a member did not answer by June 30, 2001, the due date for a response being postmarked, the response received later "was listed as 'Retirement Plus - no Response'." If forms were returned to the Boston office of the Board, these also were electronically imaged into the database and CD-ROM. (Ex. 4)

12. For Ms. Tolman, the CD-ROM database indicates that Ms. Laura Tolman was mailed the package at 23 Oak Road, Norwood, MA 02062, and that this entry was coded, "RPNR" which means no response was received by June 30, 2001. ("A")

13. When Ms. Tolman moved at the end of May 2001, she left a forwarding address. In addition, her landlord would save any mail received at the 23 Oak Road address and give it to her. A new tenant moved in a few months after Ms. Tolman and her family had left. (Testimony)

14. Ms. Tolman returned to teaching for the 2002-2003 school year for the Norwood Public Schools. ("A". Testimony)

15. Sometime in 2002, she met with the Benefits Administrator/Personnel Director for the Norwood Public Schools. She was shown the Retirement Plus package. In or around early August 2002, Ms. Tolman wrote to the Teachers' Retirement Board concerning the Retirement Plus package. ("A") She explained:

I am writing to request my acceptance into the Retirement Plus program. I was a teacher in the Walpole Public School system from 9/95 through 3/98. I have just accepted a teaching position

in the Norwood Public School system which will begin this September. When I met with Personnel Director she mentioned the Retirement Plus program. I had never heard of it and she informed me a packet was sent out to

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all members of the MTS. I have moved since I first began teaching and do not recall receiving the packet in the mail. I can only guess the forwarding order on my old address had expired when the packets were sent out. I understand the date to enroll has since passed, but was hoping you would consider this request as I had never received the packet and was not aware of the program until now. (Ex. 3)

16. Ms. Tolman called the Teachers' Retirement Board to be sure the Board had her new address, 20 Black Brook Road, South Easton, MA 02375. (Testimony)

17. By letter to Ms. Tolman of October 22, 2002, her request for late acceptance into the Retirement Plus Program, was denied. The Board explained:

You stated that you never received the numerous Retirement Plus mailings that were sent by the Board to your last known address. While we empathize with your situation, please be advised that the Board has neither the discretion nor the statutory authority to grant your request. The statute is quite clear that the election must be made before July 1, 2001. (Ex. 2)

18. Ms. Tolman filed a timely appeal. (Ex. 1)

Conclusion

It may very well be that Ms. Tolman never became aware of the Retirement Plus Program and in addition, any need to respond to become a part of it by July 1, 2001. She was an inactive member at the time of the information mailings and Retirement Plus election form and package. Her son was born in August 2000. She has no recollection of ever seeing any information about Retirement Plus until she was with the Benefits Administrator/Personnel Director of the Norwood Public Schools in 2002 who then provided her with the information about the Program. Once having viewed the information, she wanted to elect into the program and sent in her election, late, in 2002.

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Her contention that she never received anything from the Teachers' Retirement Board about Retirement Plus, is hard to fathom in light of her own testimony that she had no particular problems receiving mail during the pertinent time period, and that her landlord and she would be sure to give one another misdelivered mail. The address the Board had during this time period, was the proper one as well. And, the Board sent out a number of pieces of information about Retirement Plus; in August and September 2000, and the package with election form in February 2001. No evidence shows their database is fraught with errors, or that the mailing company failed to properly mail out the Retirement Plus information.

But, even if she did not receive the information, the record shows the Teachers' Retirement Board acted properly in connection with sending information to inactive member Laura Tolman during 2000-2001, so that the Board is not responsible for her failure to file the election form on

time. There is no legal basis presented to have required that the Board send the package out to all active and inactive members by certified mail, return receipt requested. In *Hobart-Farrell Plumbing & Heating Co., Inc. v. Klayman et al*, [302 Mass. 508](#) (1939), the Court held that mailing a properly addressed and postpaid letter "does not merely create a presumption but rather constitutes 'prima facie evidence' of delivery to the addressee in the ordinary course of mail." Moreover, the record shows no reason to believe the three mailings were not sent to Ms. Tolman or to all the members, active and inactive as the Teachers' Retirement Board contracted with companies to carry out and keep track of. What happen to each of these mailings so that Ms. Tolman never read them, is not known, but is not the fault of the Board.

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The July 1, 2001 deadline for receipt of the election form is found in the statute that sets up the Program, so that there is no ability of the Teachers' Retirement Board to alter that deadline. And, the Board is correct, that the statute contains no provision requiring some notice efforts on the part of the Board to inform members about it. But, even if it is common sense for the Board to have undertaken a notice process, the record shows the Board has done enough.

G.L.c.5(4)(i) was enacted on June 22, 2000 by Chapter 114 of the Acts of 2000. It creates an alternative superannuation retirement benefit plan for teachers, but it is optional for any teachers who became members prior to July 1, 2001. It is otherwise, mandatory. And, once an election is made to join it, that election cannot be revoked. As to the filing deadline, the statute simply states and without exception:

Any member of the teachers' retirement system ... before July 1, 2001, may elect to participate in the alternative superannuation retirement benefit program. Said election shall be made on or after January 1, 2001 and before July 1, 2001.

Caselaw deciding issues involving failing to meet the July 1, 2001 filing deadline, support the determination that no waiver as to filing can be given to Ms. Tolman. See, *Barry v. Teachers' Retirement Board*, CR-01-933 (9/30/02) (Petitioner was on an unpaid one year leave of absence September 2000 - June 30, 2001, and was in New Mexico with her mail being forwarded to her there, but she did not receive the Retirement Plus package. She was not allowed to file late to participate.); *Benson v. Teachers' Retirement Board*, CR-01-841 (7/29/02) (Retirement Plus package was mailed to Petitioner's old address in 2000, with her receipt delayed until late July 2001. She was not allowed to participate in the Program.); *Robinson v. Teachers' Retirement Board*,

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CR-01-801 (5/23/02) (Petitioner's serious complications from pregnancy delayed her mailing of the election form until July 3, 2001. This did not excuse the late filing.); and, *Boland v. Teachers' Retirement Board*, CR-01-823 (11/9/01) (Due to daughter's serious illness, Petitioner understandably missed the filing deadline, but his late filing was not acceptable.)

As stated in *Adoph Petrillo v. PERAC*, CR-92-731 (CRAB, 10/22/93):

Unfortunately, G.L.c.32 contains no provision for compassion.

While we may empathize with the Appellant's situation, we have been unable to locate any statutory or case law indicating that this Board has the authority to employ an equitable remedy

in the face of specific statutory language contrary to the position fostered by the Appellant.

For these reasons, the decision of the Teachers' Retirement Board denying Ms. Tolman the right to participate in the Retirement Plus Program, is affirmed. SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS
/s/Sarah H. Luick, Esq.
Administrative Magistrate

End Of Decision

HOBART-FARRELL PLUMBING & HEATING CO. vs. WILLIAM KLAYMAN & others.

HOBART-FARRELL PLUMBING & HEATING CO. vs. WILLIAM KLAYMAN & others.

302 Mass. 508

March 7, 1939 - March 8, 1939

Norfolk County

Present: FIELD, C.J., DONAHUE, LUMMUS, QUA, & RONAN, JJ.

Upon introduction of evidence that a letter, containing a statement of a claim under a bond given by a contractor for a public work, properly addressed and with postage prepaid, failed to reach its destination, the artificial compelling force of the mailing as prima facie evidence of delivery disappeared, the issue was left to be decided on all the evidence without artificial weight given to either side of the balance, and a finding of nondelivery was not disturbed.

PETITION, filed in the Superior Court on October 4, 1937.

From decrees, entered by order of Williams, J., the petitioner appealed.

G. W. Arbuckle, (O. V. Fortier with him,) for the petitioner.

S. Macmillan, (F. L. Wiegand, Jr., with him,) for the respondent Seaboard Surety Company.

J. L. Sheehan, for the respondent town of Avon.

LUMMUS, J. This is a petition in equity to obtain the benefit of a surety company bond given as security under G.L. (Ter. Ed.) c. 149, Section 29 (St. 1935, c. 472, Section 2), to the respondent town by a contractor for the repair of a schoolhouse. The contractor owes the petitioner for labor furnished and materials used in installing a heating system in the schoolhouse. The statute cited provides that "to obtain the benefit of such

security the claimant shall file in the office of the . . . town clerk a sworn statement of his claim" within a certain time. The only question is, whether such a statement was filed.

The evidence is not reported, and the master's conclusions do not appear to be based exclusively upon subsidiary findings stated. The master found that the petitioner's attorney mailed a sufficient statement, postage prepaid,

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properly addressed to the town clerk, in season to be delivered in the ordinary course of mail within the time allowed by the statute. Though the return address of the attorney was on the envelope, it has never been returned. But the town clerk, whose office was at his house, testified that when asked to produce the statement he searched for one among his files and found none, and that "to the best of his knowledge" he never received such a statement. The master found that no such statement was ever received by the town clerk or his wife, who was his only assistant.

If neither the town clerk nor his only assistant ever received the statement, it could not have been filed in his office, for filing requires the placing of the document filed in the official custody of the filing officer. *Reed v. Acton*, 120 Mass. 130 . *Gorski's Case*, 227 Mass. 456 , 460. *Greenfield v. Burnham*, 250 Mass. 203 , 210. *Powers Regulator Co. v. Taylor*, 225 Mass. 292 , 298. *Otis Elevator Co. v. Long*, 238 Mass. 257 , 267. *McClintic-Marshall Co. v. New Bedford*, 239 Mass. 216 , 222. *United States v. Lombardo*, 241 U.S. 73, 76. *In re Gubelman*, 10 Fed. (2d) 926, 929. *Berlin v. Commissioner of Internal Revenue*, 59 Fed. (2d) 996, 997. *Commercial Standard Ins. Co. v. Garrett*, 70 Fed. (2d) 969, 975. *Poynor v. Commissioner of Internal Revenue*, 81 Fed. (2d) 521.

After an interlocutory decree confirming the master's report, a final decree was entered, dismissing the petition as against the town and the surety company. The petitioner appealed from both decrees. It contends that on the facts found the conclusion was required that the statement was received by the town clerk.

The mailing of a letter properly addressed and postpaid (*Schneider v. Boston Elevated Railway*, 259 Mass. 564 , 566) does not merely create a presumption (*Del Vecchio v. Bowers*, 296 U.S. 280; *New York Life Ins. Co. v. Gamer*, 303 U.S. 161; *Tyrrell v. Prudential Ins. Co.* 109 Vt. 6) but rather constitutes prima facie evidence (*Cook v. Farm Service Stores, Inc.* 301 Mass. 564) of delivery to the addressee in the ordinary course of mail. *Huntley v. Whittier*, 105 Mass. 391 . *Tobin v. Taintor*, 229 Mass. 174 , 176.

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Eveland v. Lawson, 240 Mass. 99 , 103. Avisais's Case, 285 Mass. 56 , 58. Liberty Mutual Ins. Co., petitioner, 298 Mass. 75 . As soon as evidence is introduced that warrants a finding that the letter failed to reach its destination, the artificial compelling force of the prima facie evidence disappears, and the evidence of nondelivery has to be weighed against the likelihood that the mail service was efficient in the particular instance, with no artificial weight on either side of the balance. That was the case here. The evidence presented a pure question of fact. The master, who saw and heard the witnesses, found against delivery, and we cannot disturb his finding.

Interlocutory decree affirmed.

Final decree affirmed with costs.