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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA JUL 13 2007

THIRD JUDICIAL DISTRICT AT KENAI ATTORNEY GENERALS OFFICE JUNEAU

R [REDACTED] A. L [REDACTED],)
Appellant,)
v.)
STATE OF ALASKA, DEPARTMENT)
OF REVENUE,)
Appellee.)

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State of Alaska
Office of Administrative Hearings

Case No.: 3KN-06-[REDACTED] CI

MEMORANDUM DECISION AND ORDER

Appellant R [REDACTED] L [REDACTED] did not get his Permanent Fund Dividend (PFD) in 2005. Pursuant to directions from the PFD Division, Mr. L [REDACTED] re-applied and then appealed the rejection of the late filing. The Division denied his informal appeal, stating that Mr. L [REDACTED]'s evidence was not credible enough compared to the evidence against him. Mr. L [REDACTED] appealed. Administrative Law Judge Christopher Kennedy made a narrow ruling, holding that the "affidavits" filed in support of the appeal failed to comply with 15 AAC 23.103(h). Judge Kennedy declined to get into the issue of credibility. Mr. L [REDACTED] appealed to this court.

The primary issue on appeal is the validity "affidavits" filed in support of Mr. L [REDACTED]'s claim. Mr. L [REDACTED] needed to file something in his appeal that complied with 15 AAC 23.103(h). Subsections (h)(1) and (2) were clearly not met. The issue is whether (h)(3) was met. Subsection (h)(3) requires either "notarized affidavits" or "other documentation". Mr. L [REDACTED] filed three documents he alleged were "affidavits". Judge Kennedy disagreed and also found that this evidence was not "other documentation" as

required by the regulation. While this Court agrees that the evidence does not constitute affidavits, this Court finds that the evidence does constitute "other documentation" under 15 AAC 23.103(h)(3). Therefore, Judge Kennedy's ruling is REVERSED and this case is REMANDED. On remand, the Division must consider the "affidavits" as "other documentation" in support of Mr. L■■■■'s appeal.

BACKGROUND

On November 10, 2005, R■■■■ L■■■■ called the PFD Division to find out why he had not received a 2005 dividend. The parties differ on what happened during the phone conversation.

According to Mr. L■■■■, he first told the Division that he thought he had filed his initial application online. After being told there was no record of an online filing, he claims he said "if I'm mistaken about filing online, then I must have mailed it, and I will certainly have to look into it further." He then asked about the procedures for reapplying and proving the initial mailing of the application. He was told he could submit another application by December 31, 2005, which would be denied due to late filing, and then he could appeal the decision. He requested a new application to start this process. The Division told him they would send him one.

According to the Division, Mr. L■■■■ told the Division that he had filed an application for his dividend online. The Division advised Mr. L■■■■ there was no record of his filing an application online. The Division also advised Mr. L■■■■ that he could not late file without a confirmation page to confirm that he had filed online. Mr. L■■■■ then inquired if it would make a difference if he had mailed his application to the Division. After being advised of the process for late filing applications lost in the mail, Mr. L■■■■

told the Division he had mailed his application to the Division. In sum, the Division argues that Mr. L [REDACTED] untruthfully claimed that he mailed his application after learning that, if this was the case, he could re-apply and appeal.

After that conversation, Mr. L [REDACTED] eventually obtained and filed an application, which was denied due to late filing. An informal appeal was filed on January 26, 2006, and Mr. L [REDACTED] submitted three "affidavits". Two were signed by people declaring that they witnessed Mr. L [REDACTED] mail the PFD application at Fred Meyer in Soldotna in March of 2005. The other was signed by Mr. L [REDACTED] and stated that he mailed the application at the same location and time.

On the informal appeal, the Division upheld the original denial of a dividend noting that the affidavit witnesses were only declared under "penalty of unsworn falsification." The Division held that the lack of penalty of perjury statements invalidated the affidavits. The Division further claimed that because Mr. L [REDACTED] first told the Division that he thought he had filed his initial application online, rather than mailing, this outweighed the statements on the affidavits.

Mr. L [REDACTED] then filed a Request for Formal Hearing. On July 27, 2006, Judge Christopher Kennedy upheld the denial of Mr. L [REDACTED]'s dividend based on the lack of a penalty of perjury statement in the affidavits. Judge Kennedy held that the affidavits failed to meet the requirements of 15 AAC 23.103(h)(3) and thus "are not true affidavits" or "other documentation."¹ Judge Kennedy chose not to rule on the credibility of Mr. L [REDACTED]'s claim that he timely mailed his application. The Division adopted Judge Kennedy's decision.

¹ *In the Matter of R [REDACTED] A. L [REDACTED]*, OAH No. 06-0320-PFD, Agency No. 06001945-3, at 1, 3 (June 12, 2006).

DISCUSSION

A. The "Affidavits"

Mr. L■■■ appeals Judge Kennedy's decision that the "affidavits" failed to meet the requirements of 15 AAC 23.103(h)(3). There are two issues. First, whether Mr. L■■■'s documents were "notarized affidavits" or, second, whether Mr. L■■■'s documents satisfied the requirement of "other documentation." The Alaska Administrative Code provides at 15 AAC 23.103(h):

(h) If an individual has timely filed an application but the department does not have that application on file, the individual may submit a request to reapply on or before December 31 of the dividend year. A request to reapply must be accompanied by one of the following forms of evidence that an application was timely filed with the department:

- (1) a mailing receipt;
- (2) a mailing return receipt documenting delivery to the department or other evidence of receipt by the department; or
- (3) a notarized affidavit or other documentation showing that an individual or the individual's sponsor timely filed, unless a request to reapply was filed in a prior year.

1. "Notarized Affidavits"

In his decision, Judge Kennedy held:

[T]he items Mr. L■■■ submitted were not affidavits. "By definition, an affidavit is a sworn document, declared to be true under the penalties of perjury." Mr. L■■■ and his witnesses have carefully refaced their affidavits with the statement that they are made only "under penalty of unsworn falsification." The notary's use of an acknowledgement rather than a jurat in his notarization further undermines the significance of the documents as evidence.²

Mr. L■■■ argues that it was the Notary's responsibility, not his, for any deficiencies in the affidavits. Mr. L■■■ also argues that the Division misled him about

² *Id.* at 3 (citation omitted).

what is required regarding steps to take in the re-application process. The Court declines to examine these issues. If the documents are not affidavits, this problem is not solved by the fact that someone else may be responsible for the deficiencies.

Mr. L■■■■'s primary argument is that his submissions are affidavits. He argues that affidavits do not have to contain penalty of perjury statements to be valid. Mr. L■■■■ cites two definitions of "affidavit".³ Mr. L■■■■ notes that neither mentions the requirement of a penalty of perjury statement. However, one definition he cites requires the declaration to be "sworn"⁴ and both definitions include the word "oath". Mr. L■■■■ acknowledges the use of "oath", and then cites a definition of "oath"⁵ and argues the definition does not imply the requirement of a penalty of perjury statement. However, the definition of "oath" includes the requirement of "a swearing". Thus, both definitions of "affidavit" include or incorporate the requirement that an affidavit be sworn. Mr. L■■■■'s filings were written "under penalty of *unsworn* falsification." Therefore, this Court agrees with Judge Kennedy's holding that these filings were not affidavits.

2. "Other Documentation"

The issue remains whether the evidence constitutes "other documentation" as used in subsection (h)(3). Judge Kennedy held:

[E]ven though Mr. L■■■■ did not submit any affidavits, one might argue that the unsworn statements he provided suffice as "other documentation." Such an argument would not be persuasive. When read in context, the intent of the provision for "other documentation" is to allow documentation of the same level of reliability as a U.S. Postal Service receipt or a statement made by someone willing to submit himself to the penalty for the felony of perjury. This might include, for example, a Federal Express delivery receipt. It would not make sense for the

³ BLACK'S LAW DICTIONARY 58 (7th ed. 1999); Hearing Officer's Manual, State of Alaska B-12 (5th ed. 2002).

⁴ BLACK'S LAW DICTIONARY 58.

⁵ BLACK'S LAW DICTIONARY 1099 (7th ed. 1999).

department to make a specific provision for submission of a "notarized affidavit" if it were sufficient to submit an unsworn statement.⁶

In response to Mr. L■■■■'s arguments against such an interpretation, the Division construes "other documentation" to allow the submission of an "unsworn" statement only when a notary public is unavailable and the document submitted is the equivalent of an affidavit. The Division argues that there is too great an opportunity for fraud if the evidence submitted by Mr. L■■■■ suffices as other documentation. The Division claims that its views are supported when you read "other documentation" in the context of what else is allowed under the Code.

Judge Kennedy and the Division both provide inadequate support for their narrowed construction of "other documentation". The Court declines to set arbitrary parameters to the construction of "other documentation" where there is no sufficient evidence supporting a limited interpretation. The Division's concerns regarding too broad of an interpretation are addressed by the weight the Division can give to the "other documentation". The less credible the "other documentation", as the Division is concerned about here, the less weight they can give it.

For these reasons, this Court holds that the evidence submitted by Mr. L■■■■ constitutes "other documentation" that the Division must consider. Judge Kennedy's decision is reversed and the case is remanded.

B. Credibility of Mr. L■■■■'s Claim

The Division does raise an additional argument. It claims that this Court can affirm the Division's denial based upon either the findings of Judge Kennedy or the Division's original findings from the informal appeal. In other words, if this Court agrees

⁶ *In the Matter of R■■■■ A. L■■■■*, OAH No. 06-0320-PFD at 3.
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with the Division's informal appeal decision, which included consideration of the "affidavits", then it need not reverse and remand this case.

In support of the Division's theory, it cites *Carlson v. State*,⁷ for the rule that appellate courts may uphold the decision they are reviewing if there is any ground which, as a matter of law, would support the result reached. Such action is not appropriate in this case. This Court has not had the ability to hear argument on all of the issues in this case nor weigh the credibility of the witnesses and their evidence. Further, Mr. L [redacted]'s appeal is based solely on Judge Kennedy's ruling. As a result, while both parties did in fact raise some arguments surrounding credibility, they have not had an opportunity to fully brief this and related issues. These are issues that the Division will be able to consider fully upon remand.

DATED in Kenai, Alaska, this 2nd day of July, 2007.

[Redacted Signature]

CHARLES HUGUELET
Superior Court Judge

I certify that a copy of the foregoing was mailed/faxed/placed in box in the Clerk's Office to the following at their addresses of record:

Dept of Revenue, [Redacted]

Date: 7/9/07 Clerk: [Redacted]