**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF REVENUE**

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| In the Matter of | ) | |
| | ) | |
| R. A. L. | ) | OAH No. 06-0320-PFD |
| | ) | Agency No. 06001945-3 |
| 2005 Permanent Fund Dividend | ) | |

**DECISION AND ORDER AFTER REMAND**

## I. Introduction

The deadline to apply for a 2005 permanent fund dividend (PFD) was March 31, 2005. After failing to receive a dividend the following October, R. L. initially contended that he had previously applied on line and then subsequently claimed that a prior paper application had been mailed in March of 2005. He submitted a late application on December 12, 2005. The Permanent Fund Dividend Division disbelieved his contention that he had applied previously and denied the application initially and at the informal appeal level on the basis of untimeliness. Mr. L. requested a formal hearing by correspondence.

After a hearing on written submissions, Mr. L.'s appeal was initially rejected on a procedural ground that turned on the interpretation of a Department of Revenue regulation. Mr. L. appealed to the Superior Court, which disagreed with the interpretation of the procedural regulation and remanded the case for a decision on the merits. For the reasons explained below, after an evaluation of the credibility of the evidence that Mr. L. has chosen to submit, the division's denial of Mr. L.'s application is affirmed.

## II. Facts and Procedural History

R. L. has lived in Alaska for many years, and he spent 2004, the qualifying year for the 2005 dividend, in the state.[1] There are no issues regarding his eligibility for the 2005 dividend, provided he applied timely.

In November of 2005, Mr. L. apparently noticed that he did not receive his dividend payment and he telephoned the PFD division. The conversation was memorialized in a contemporaneous file entry by division employee Catherine Troyer.[2] Mr. L. said he knew he had applied on line. Ms. Troyer told Mr. L. that the division had no application on file for him. After some discussion of the options available in the situation he had described, Mr. L. "then

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1 Exhibit 1, p. 1 (2005 Adult Application).

2 Exhibit 2.

tried to say he mailed it."[3] The division informed him that he could submit a new application (which would be denied as untimely) and then appeal the denial to assert that he had previously filed on time. He submitted the late application the following month,[4] which was duly denied as untimely on January 11, 2006.

Mr. L. filed an informal appeal.[5] With his appeal papers, he supplied for the first time three documents labeled as "affidavits." One of them was signed by himself and stated that he had mailed an application in Soldotna "before the deadline in March, 2005."[6] A second, signed by E. C., affirmed that she saw him "prepare and mail" his application "before the end of March, 2005."[7] A third, by D. K., made a similar corroborating statement.[8] Each of the three documents stated in the first line that it was a declaration "under penalty of unsworn falsification." Each was executed in front of notary J. R. E., II. The notarization Mr. E. used did not record an oath, but rather was an acknowledgement of the kind used on real estate documents. It stated that the signer was "personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same in their authorized capacity, and that by their signature on the instrument, the persons, or the entities on behalf of which these persons acted, executed the instrument."[9]

The division denied the informal appeal because it did not find Mr. L.'s assertion of a timely filing by mail to be credible.[10] It noted that he had initially told a division employee by phone that he had applied on line.

This appeal followed the denial of the informal appeal. Mr. L. checked a box on his formal appeal form indicating that he would like to conduct the appeal solely by written correspondence.[11] Both Mr. L. and the division submitted written arguments, neither of them offering any new evidence.

In a decision and order adopted in July of 2006, this office and the Department of Revenue upheld the denial on the basis that Mr. L. had submitted an impermissible type of evidence under a Revenue regulation, former 15 AAC 23.103(h), and therefore had failed to

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3 *Id.*
4 *Id.*; Exhibit 1.
5 Exhibit 4 (Request for Informal Appeal).
6 Exhibit 4, p. 5 ("Affidavit of Mailing").
7 Exhibit 4, p. 4 ("Affidavit of Witness").
8 Exhibit 4, p. 3 ("Affidavit of Witness").
9 Exhibit 4, pp. 3-5.
10 Exhibit 5 (Informal Appeal Decisions).
11 Exhibit 6, p. 1 (Request for Formal Hearing).

demonstrate that he made a timely filing. The 2006 decision made no credibility determinations about Mr. L.'s evidence.

Mr. L. appealed to the Superior Court. There, Judge Huguelet overturned Revenue's interpretation of its procedural regulation and determined that Mr. L.'s evidence was eligible for consideration. This ruling removed the legal underpinning for Revenue's prior decision, but did not establish the final outcome of the case. Because he had "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,"[12] Judge Huguelet remanded the case for further proceedings.

On remand, the administrative law judge (ALJ) held a planning conference and asked Mr. L., "Do you want to rest on [the written record] or would you like to offer anything else?" explaining, "It would be my preference, Mr. L., for us to actually be able to talk to the witnesses."[13] The ALJ further observed that a problem with purely paper appeals was "trying to figure out whether you believe the people or not," and live testimony "puts a lot more flesh on the bones in terms of making a credibility determination."[14] Both the PFD Division and Mr. L. appeared to assent to a supplemental proceeding with live testimony, and a hearing was scheduled. Mr. L. was to arrange telephonic testimony by himself and any witnesses he wished, and the division was to offer for cross-examination its own personnel involved in the case.

Shortly before the hearing, Mr. L. filed a "Motion to Bar Introduction of New Testimony." He argued that taking testimony would "overstep[] the boundaries of due process and the guidelines issued by Judge Huguelet."[15] Though acknowledging that "one may argue that [Judge Huguelet's order] allows the ALJ broad discretion to consider new evidence and testimony," Mr. L. contended that "[t]his assumption . . . is predicated on a mis-statement in Judge Huguelet's last paragraph."[16] Mr. L. took the position that Judge Huguelet misunderstood the posture of the case, and that when this misapprehension was corrected the ALJ ought to disregard the seemingly open-ended language of the remand order.

The ALJ rejected Mr. L.'s reading of the remand order and declined to grant the motion to bar testimony.[17] He determined, however, that Mr. L. is essentially the master of his own

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12 *L. v. State, Dep't of Revenue*, 3KN-06-000 CI, Memorandum Decision and Order at 7 (July 2, 2007).
13 Digital recording, Sept. 12, 2007.
14 *Id.*
15 Motion to Bar Introduction of New Testimony at 1 (Sept. 26, 2007).
16 *Id.*
17 Order on Motion to Bar Introduction of New Testimony (Oct. 26, 2007).

appeal and that he could elect to offer no further evidence if he so desired. Mr. L. eventually communicated his desire that no further evidence be taken.[18]

### III. Discussion

A regulation in effect in 2005, 15 AAC 23.103(h), provided a procedure when "an individual has timely filed an application but the department does not have that application on file." Such individuals were permitted to reapply up to December 31 of the dividend year, but the reapplication had to be accompanied by one of several specified "forms of evidence that an application was timely filed." The acceptable types of evidence were a mailing receipt, a return receipt, or "a notarized affidavit or other documentation showing that an individual or the individual's sponsor timely filed."[19]

The items Mr. L. submitted were not affidavits. "By definition, an affidavit is a sworn document, declared to be true under the penalties of perjury."[20] Mr. L. and his witnesses carefully prefaced their affidavits with the statement that they were 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.[21] However, as the Superior Court has held, the documents do qualify as "other documentation" whose credibility may be weighed. In an appeal weighing this evidence, Mr. L. has the burden of proof.[22]

There are essentially three possibilities in this case: (1) that Mr. L. and the individuals from whom he has obtained unsworn statements are giving accurate information; (2) that Mr. L. and the other individuals believe they are telling the truth but are in fact mistaken; and (3) that Mr. L. and those giving written statements are providing information they know to be incorrect. If the first possibility is more likely than the second two combined, Mr. L. should prevail on his appeal. If the likelihood of the second two possibilities in combination equals or exceeds that of the first possibility, Mr. L. has failed to carry his burden of proof.

The first possibility is certainly plausible. It is quite possible for mail to go astray, both in transit and after delivery. Mr. L. has two individuals who, nine months later, were willing to say they remembered him mailing an application before the March PFD deadline. Their

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[18] Response to Procedural Notice (Nov. 29, 2007).

[19] Former 15 AAC 23.103(h)(3). The regulation has been altered effective January 1 of 2006. For 2006 and future dividend years, it will no longer be possible to use an affidavit or "other documentation" to account for an application that is purportedly lost in the mail; a mailing or delivery receipt will be needed.

[20] 11 Moore's Federal Practice, § 56.14[1][b] (Matthew Bender 3d ed.); *see also* AS 09.63.020.

[21] For the difference between a jurat and an acknowledgement, *see* Alaska Notary Handbook, p. 18.

statements and that of Mr. L. offer little detail about who they are, their relationship to Mr. L., how they knew what he was mailing, and so forth, but they are not inherently incredible.

The second possibility is one that has been demonstrated in some PFD appeals; it seems to occur because filing for a PFD is not a particularly complex or memorable act but it is an act that people repeat over and over as the years go by. When told in the autumn that one's application is not in the system, it is easy for a person to remember submitting a PFD in an earlier year and transpose that memory to the most recent winter or spring. There has been no opportunity to explore this possibility in the present case.

The third possibility, though unattractive, is one made more likely in this case than it might otherwise be by the following circumstances:

1) *Mr. L.'s change of recollection during his initial telephone call with the division:* At first Mr. L. said he was certain he filed on line. After hearing about the difficult appeal process, he proposed that he had mailed an application. We have not been able to explore through testimony why this change in tack occurred, but one possibility is that, having heard the discouraging prognosis for appeals of allegedly missing on-line applications, he thought the dividend might be paid more readily in the context of a "lost in the mail" claim.

2) *Mr. L.'s explanation for his change of recollection:* In his written statement to this office in June of 2006, Mr. L. said that after his conversation with Ms. Troyer he "later found out by talking to people" that he had in fact mailed his application.[23] This is not consistent with Ms. Troyer's contemporaneous record of the conversation, however, which records that he immediately—without talking to others—"tried to say he mailed it."[24] Ms. Troyer's record is credible because (a) it is contemporaneous and (b) Mr. L., by electing not to have live testimony on remand, chose not to cross-examine her.

3) *Mr. L.'s odd submission of unsworn affidavits:* Mr. L. has never offered a satisfactory explanation for these strange documents. Notably, after the initial proposed decision came out identifying their defects, Mr. L. submitted a "proposal for action" under AS 44.64.060(e) that attached several pages of new evidence—but did not submit or offer to submit real affidavits from himself or either of his witnesses.

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[22] 15 AAC 05.030(h).
[23] L. statement of June 8, 2006 (R. 18).
[24] Exhibit 2.

4) *Mr. L.'s reluctance to subject himself, and any of his witnesses who remain available, to cross-examination:* When expressly offered the chance to present live, sworn testimony through a telephonic hearing, Mr. L.'s response was a vigorous motion to prevent such testimony from occurring. The witnesses were apparently available to him, however; he had revealed in a conference that one of them was still living locally and another could be reached in Oregon.

Weighing all of these circumstances, the administrative law judge finds possibility number (1) above to be no more likely than the combined likelihood of possibilities (2) and (3). Mr. L. has therefore failed to meet his burden of proof.

Past motion practice in this case suggests that Mr. L. may contend to the final decisionmaker and to any reviewing court that it is improper to draw inferences against him from his decision not to accept the invitation for testimony on remand. The undersigned believes such inferences are proper. [25] Although the Department of Revenue customarily offers appellants the option of conducting their PFD appeals by written correspondence—a procedure particularly well suited to the large number of PFD appeals that present only legal questions—it makes no guarantee that, in the evaluation of a case that presents credibility issues, the written submissions will be found credible or that a party's avoidance live questioning will not be a factor in the evaluation. In appropriate cases, this office can, and has, encouraged parties checking the "written submissions only" box to submit to live questioning. What is unusual in this case is Mr. L.'s strenuous opposition to that procedure.

## IV. Conclusion

Because Mr. L.'s application on file was submitted after the deadline and he did not demonstrate that he had previously mailed a timely application, Mr. L.'s application should be denied.

[25] Because of the chance that a later decisionmaker may disagree, it makes sense to make an alternative finding of fact with the inferences removed, thereby avoiding the need for a second remand. If not permitted to consider Mr. L.'s avoidance of live testimony and cross-examination, the ALJ would find, by the thinnest of margins, that Mr. L. more likely than not mailed a 2005 PFD application prior to the end of March, 2005.

## V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the applications of R. A. L. for a 2005 permanent fund dividend is AFFIRMED.

DATED this 19th day of December, 2007.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

## Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of January, 2008.

By: *Signed*
Signature
Jerry Burnett
Name
Director, Admin Services
Title

[This document has been modified to conform to technical standards for publication.]