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

IN THE MATTER OF	)	
G. W. & M. E.	)	
	)	
	)	Case No. OAH 07-0605-PFD
2006 Permanent Fund Dividend	)	

DECISION

I. Introduction

G. W. and M. E. appealed the decision of the Permanent Fund Dividend (PFD) Division to deny their applications for a 2006 PFD as untimely. They mailed applications in February 2006, but the division has no record of receiving them and instead has on file only reapplications filed more than a year later. The division denied those reapplications initially and at the informal appeal level. Mr. W. and Ms. E. requested a formal hearing.

Though they were able to show that they had placed their initial applications in their residential mailbox before the filing deadline for the 2006 PFD, Mr. W. and Ms. E. were unable to provide sufficient evidence that the applications had been received by the Department of Revenue. Any presumption of receipt that arguably arose from their mailing of the applications was rebutted by the division's evidence to the contrary. The division's decision to deny the applications of Mr. W. and Ms. E. for the 2006 PFD, therefore, is affirmed.

II. Facts

On February 3, 2006, Mr. W. and Ms. E. mailed a single envelope containing a paper application for the 2006 PFD for each of them by placing the envelope in their residential mailbox for pickup by the mail carrier.[1] Ms. E. has lived in her current house since 1999.[2] In front of her house is a standard, postmaster-approved mailbox that Ms. E. has used since she began living in the house.[3] She testified that she has not experienced problems with mail service at the house and is unaware of any incidents in her neighborhood involving vandalism to mailboxes or stolen mail.

Ms. E. recalled that she and Mr. W. filled out their applications at the same time, naming each other as verifiers of their residency. Ms. E. explained that she put the two applications in the pre-printed, self-addressed envelope provided by the division, without sealing it, and placed it in an

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[1] December 14, 2007 Testimony of M. E. (E. Testimony) (describing her act of placing the envelope in the mailbox) & G. W. (W. Testimony) (describing his observation of Ms. E. taking the envelope to the mailbox); *also* October 1, 2007 Affidavit of G. W. (Division Ex. 5 at 12).

[2] E. Testimony.

[3] *Id.*

area where she was accustomed to placing outgoing mail. Ms. E. recalled that she mailed the envelope on the first Friday of February, which in 2006 would have been February 3. Ms. E. recalled that she picked up the envelope on her way out to work at about 8:15 a.m., sealed it with the two applications inside, and placed it in her mailbox and raised the flag. Ms. E. testified that typically the postal service picks up the mail around 10:00 a.m.

Mr. W. could not remember the date he signed his initial 2006 application, but he did recall that he and Ms. E. had filled out their applications at the same time while sitting at their dining room table.[4] He did not recall seeing Ms. E. put the applications into the envelope, but he did remember seeing the envelope sitting in the place for outgoing mail, unsealed with the two applications in it. He testified that he was aware Ms. E. had put the applications in the mailbox on the first Friday in February of 2006, and that he went out to the mailbox around 10:15 or 10:30 a.m. that day and saw that the flag was down and that no mail was in the box.

The division does not dispute that Ms. E. placed the applications in the mailbox when and as described. Apart from the fact that the division could find no record that the Department of Revenue ever received them, nothing in the record raises any question about the veracity of the accounts by Mr. W. and Ms. E.. Both were credible witnesses. More likely than not, one envelope containing a 2006 PFD application for each of the two applicants was placed in their residential mailbox on February 3, 2006, several weeks ahead of the March 31 deadline.

While traveling in October of 2006, Ms. E. learned by calling their bank that 2006 PFDs for her and Mr. W. had not been directly deposited as expected.[5] Ms. E. testified that after waiting for the second direct deposit date to pass, and learning that the PFDs still had not been deposited into the account, she called the division before the end of October and was told that the division had no record of receiving a 2006 application for her or Mr. W.. She asked what she could do about the fact that her application appeared to have been lost. She testified that the division employee described the kind of evidence necessary to establish that the applications had in fact been mailed. Ms. E. and Mr. W. did not have a mailing receipt or any other tangible evidence of mailing, so they decided at that time not to file duplicate applications.

Several months later, in March of 2007, they saw a news item reporting that the division had lost 2006 application data due to a computer problem and began to wonder whether the division

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4 W. Testimony.

5 E. Testimony.

might have lost their applications.[6] They decided to refile and prepared new application forms (reapplications), which the division received on March 23, 2007.[7]

Mr. W. testified that after he received a denial letter for his reapplication, they waited some time and then called the division to inquire as to the status of Ms. E.'s reapplication and were initially told that her reapplication appeared to have been lost. Eventually, Ms. E.'s reapplication was located and denied. Mr. W.'s reapplication was denied on May 9, 2007, and Ms. E.'s was denied on June 6, 2007.[8] The stated ground for denial was the failure to file applications before March 31, 2006.[9] Both applicants timely requested informal appeals.[10] The resulting decisions stated the following ground for denial: "Your application was not postmarked or delivered until after March 31, 2006."[11]

The informal appeal decisions' reasoning focused on the facts that the applications were signed and received in March 2007, and the decisions concluded that Mr. W. and Ms. E. had not "delivered applications to the post office in sufficient time to be postmarked before the end of the application period…."[12] The decisions did not acknowledge that these were reapplications, intended to trigger an opportunity to prove timely filing of initial applications not on file, except indirectly, by noting that no evidence was submitted to substantiate the claim that applications had been mailed before the deadline.[13] As such, the informal appeal decisions did not address compliance with a December 31 reapplication deadline.[14]

This formal appeal followed. An in-person evidentiary hearing was held. Mr. W. and Ms. E. were represented by counsel. Prior to the hearing, the division made available internal documents concerning the computer problem that had been reported in the news. At the hearing, a division employee, Amy Skow, testified in detail about that problem and related aspects of the division's application handling processes. Unless the context or citations indicate otherwise, the following facts are taken from Ms. Skow's testimony.

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6 W. Testimony; *also* Division Ex. 5 at 3 (asserting in statement of issues that a March 18, 2007 news article about the computer problem led them to suspect their applications had been received but lost).

7 Division Ex. 1 (March 2007 reapplications). The March 2007 applications are referred to as "reapplications" to distinguish them from the February 2006 initial applications.

8 Division Ex. 2.

9 *Id*.

10 Division Ex. 3.

11 Division Ex. 4 at 1 & 5.

12 *Id*. at 2 & 6.

13 Division Ex. 4.

14 The reapplication deadline is imposed by a regulation, 15 AAC 23.103(h), which will be addressed in Part III.A below.

The division maintains two related computer information databases. The first of these is called the "mainframe" database. This system is a typical database made up of fields for various kinds of data. When the division receives a paper application in the mail, an employee creates an electronic file in the mainframe system and types information from the application into the electronic file in the fields. The electronic file contains a field for each relevant piece of data, including the applicant's name, the applicant's address, and the answers to every question asked on the application form. The electronic file also contains fields for the date the application was received, the current status of the application, and other information.

The second database is called the DAIS, or "Dividend Application Imaging System." After an employee has typed information into the mainframe database, the paper application and any related or supporting documents are scanned and saved as images. The images are saved in the DAIS, cataloged, and linked to other related documents. The original paper materials are then boxed up and stored in a secure locked archive building. For 2006, the archived applications and related paperwork filled approximately 300 boxes.

If a division employee wishes to look at an applicant's application, the employee can look up the person by name, social security number, or other reference data and view a list of documents the division has received for that person. By clicking on the listing for a particular document, the employee can view that document image on the employee's computer screen, without having to call up boxed files from the archives. The employee also can quickly retrieve images of documents from previous years, which allows for easy comparison of a wide range of documents if the employee is investigating the applicant's eligibility.

In July 2006, a division technician made a serious error when working on the DAIS system. While attempting to repair a minor problem in the system, the technician inadvertently lost all of the scanned images in the system for the year 2006 up to the date the data was lost. The backup systems in place failed as well. Despite the help of outside experts, the images could not be recovered. The division recalled all of the boxed paper material from the archive. Using some rehired temporary employees who had worked to scan in the documents the first time and many of the regular division employees, the division rescanned the documents so the images would be available and cataloged in the system.

For the most part, all applications were processed on time. No original documents were lost. Lost was the labor and time the division had invested in scanning and organizing a vast collection of

documents in the first instance, but the documents themselves were not lost due to the image and backup systems failures. In the process of rescanning the paper documents for 2006, the division found some documents that had stuck to other documents in the original scanning process.[15] Because the division processes applications received in the same envelope together, it is unlikely that both Mr. W.'s and Ms. E.'s February 2006 applications could have gotten stuck to an unrelated document and missed either the initial scanning or the rescanning if they were among the paper documents processed by the division in 2006.

The loss of images in the DAIS system did not affect the mainframe database system.[16] If the division had received an application in the mail and recorded its arrival according to standard procedures, evidence of the application would have remained intact in the mainframe database even after the loss of images from the DAIS. Before a new image was created to replace the lost one by scanning an archived document, a technician could have learned from the mainframe database the date the application was received and all the information typed into the mainframe database. Only if the technician wanted to see the application itself would it have been necessary to recall the paper document from the archives in the interim until the division finished rebuilding the DAIS database for 2006.

The vast majority of applications the division had received in 2006 had already been approved for payment when the DAIS information was lost. All of the timely filed applications had been uploaded into the mainframe database. The mainframe database contained information identifying which applications had already been approved. About 10,000 applications had been denied. Another approximately 28,000 applications were still under review, and though the scanned images for them were lost, the mainframe database information was available for use in continuing the review process. The approximately 582,000 applications not rejected or still under review could have been paid based on the mainframe database information, if the division had decided not to reconstruct the DAIS. The division did decide to reconstruct the entire DAIS image database for all

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[15] Ms. Skow estimated the documents located this way to number between one-half dozen and 100.

[16] In their post-hearing brief, Mr. W. and Ms. E. assert that the division "admits that '[i]n July 2006…all of the 2006 paper application data that had been keyed into the system was lost.'" December 14, 2007 Appellant's Memorandum at 10. The quote they took from an excerpt of the change-of-administration transition report (Division Ex. 8) may have misled them to believe that literally "all" data—including mainframe database information—from paper applications was lost. Their brief also cites Ms. Skow's October 24, 2007 affidavit (Division Ex. 6) in support of their assertion. The affidavit makes no such admission. Rather, it simply includes the same transition report quote as a touchstone for Ms. Skow's explanation that documents other than the transition report better describe the July 2006 computer problem. The W.-E. post-hearing brief does not acknowledge Ms. Skow's detailed, in-person testimony, which was quite credible on the point that only the DAIS data was lost, not the mainframe database information.

applications, in large part to recapture in electronic form all of the documents submitted by first-time applicants or in response to requests for additional documentation, so that applicants would not have to duplicate efforts to provide necessary documentation in the future. The reconstruction took about two and one-half months.

The division has no information in either the mainframe or DAIS database indicating that it received an application for either Mr. W. or Ms. E. during the 2006 application period.[17] The division searched both databases using various methods.[18] For the division to have received and then lost the applications, it would have had to lose them shortly after the mail was received, before data had been typed into the mainframe database. If the division received the applications shortly after they were mailed in February 2006, the loss of the DAIS information months later, in July 2006, would have had no effect on any record of receipt in the mainframe database. If they had been received, the two applications likely would have been among the approximately 582,000 in the mainframe database awaiting payment at the time the DAIS problem developed.[19]

It is possible that the February 2006 applications were received in the mail by the Department of Revenue and then lost immediately, before a division employee could generate a record of them in the mainframe database. It is equally possible that they were lost at any one of several points along the way—i.e. by a mail carrier meant to deliver them to the department, by the post office while at the mail processing site, or by the mail carrier who pick them up at the house—or even that they were taken from the mailbox by a third person. More likely than not, the July 2006 loss of images from the DAIS and the resulting work required to rescan the paper documents, which took place months after applications mailed across town in February should have arrived, did not increase the likelihood of the applications going missing at the department rather than before delivery to the department.

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[17] December 14, 2007 Testimony of Susan Pollard (Pollard Testimony) (describing her search of the databases and the results showing that for the 2006 PFD, the division's databases show only the reapplications); *also* Division Ex. at 4-7 (displaying screen prints from the mainframe and DAIS databases, side-by-side for each of the two applicants, and revealing that only the applications received March 23, 2007 for the 2006 dividend year).

[18] Pollard Testimony.

[19] The division had no reason other than untimely filing to question Mr. W.'s or Ms. E.'s eligibility for 2006 PFDs. Thus, it is more likely that the initial applications (if they had been received shortly after mailing) would have been among the 582,000 than among the 28,000 still in review or the 10,000 denied.

III. Discussion

By statute, a resident must file an application between January 1 and March 31 of the dividend year to receive a PFD.[20] Also by statute, the Department of Revenue was required to adopt regulations on proof of eligibility and applying for PFDs, and to "establish procedures and time limits for claiming a permanent fund dividend."[21]

By regulation, the department prescribed application requirements, including that the application "must be received by the department or postmarked during the application period set by AS 43.23.011 [January 1-March 31] to be considered timely filed."[22] Also by regulation, the department provided for the contingency in which "an individual has timely filed an application but the department does not have that application on file…."[23] When that situation arises, an applicant may request to reapply if the applicant can provide specified types of evidence to establish that the initial application was timely filed, and the request is made by December 31 of the dividend year.[24]

Prior to 2006, a notarized affidavit showing that the individual timely filed the initial application was one type of evidence (along with mailing receipts and "other documentation") that could establish timely filing using the reapplication option.[25] Through an amendment that took effect January 1, 2006, the regulation was changed to exclude affidavits, leaving only mailing receipts and "other evidence of receipt by the department …" as acceptable proof of timely filing when the department does not have the application on file.[26] Since that amendment took effect, many decisions have been issued from formal appeals construing "mailing receipt" and "other evidence of receipt by the department" in specific contexts.[27] Collectively, those decisions establish

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[20] AS 43.23.011(a). The requirement to file between January 1 and March 31 is subject to some exceptions that are not applicable to Mr. W. and Ms. E.. For instance, AS 43.23.011(b)&(c) provides exceptions for active duty military members and 15 AAC 23.133 provides for children and disabled persons to apply at a later time for a prior year's dividend under some circumstances.

[21] AS 43.23.015(a)&(b); AS 43.23.055(2).

[22] 15 AAC 23.103(a).

[23] 15 AAC 23.103(h).

[24] *Id.*

[25] 15 AAC 23.103(h)(1)-(3) (2005).

[26] 15 AAC 23.103(h), as amended January 1, 2006, provides as follows:

> 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 document delivery to the department or other evidence of receipt by the department[.]

[27] OAH No. 07-0222-PFD (holding that a mother's testimony that she mailed her own and her son's applications before the deadline is insufficient to prove timely filing); OAH No. 07-0380-PFD (holding that contemporaneous written documentation of mailing by an unrelated third party is the substantial equivalent of a mailing receipt); OAH

that though an applicant who delivers the application to the department might succeed in using self-interested but credible testimony as other evidence of receipt, an applicant that mails the application needs a mailing receipt or the "substantial equivalent" of a mailing receipt.[28]

The department does not have on file the applications Mr. W. and Ms. E. mailed in February 2006. Instead, it has only the March 2007 reapplications filed pursuant to 15 AAC 23.103(h), as amended in 2006. This appeal, therefore, asks whether Mr. W. and Ms. E. provide acceptable proof under section 103(h) that they timely filed their initial applications.

First, however, it is necessary to address whether the timing of the W.-E. reapplications bars this appeal of the division's decisions that Mr. W. and Ms. E. are not eligible for 2006 PFDs due to failure to timely file the initial applications.

A. THIS APPEAL IS NOT BARRED BY THE LATE REAPPLICATIONS.

Mr. W. and Ms. E. argued that 15 AAC 23.103(h) should be construed broadly enough to allow the evidence of their February 2006 mailing of initial applications, taken in light of the common-law mailbox rule, to constitute "other evidence of receipt by the department" under section 103(h)(2). One difficulty with this argument is that they did not reapply until March 2007, well past the December 31, 2006 deadline for use of the reapplication option.

Based on communications with the division in October of 2006, Mr. W. and Ms. E. considered reapplying at that time. They decided not to reapply because a division employee explained that to be eligible they would need to produce one of the kinds of evidence specified in 15 AAC 23.103(h), which they concluded they did not have. After they read about the division's computer problem, and learned that having late applications on file would ease the process for the

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No. 07-0398-PFD (holding written assertion of timely mailing in request for hearing by correspondence insufficient to prove timely filing); OAH No. 07-OAH No. 0400-PFD (holding affidavit by postal service official constituted a "mailing receipt" within the meaning of amended 15 AAC 23.103(h); OAH No. 07-0426-PFD (holding amended 15 AAC 23.103(h) puts the risk of loss of mailed application on the applicant, if applicant did not obtain mailing receipt); OAH No. 07-0441-PFD (holding applications untimely filed despite sworn, but unofficial, testimony from postal worker who witnessed mailing); OAH No. 07-0446-PFD (holding self-interested testimony of application's personal delivery to the division, without received-stamped copy or other corroboration, insufficient to constitute other evidence of receipt by the department); OAH No. 07-0484-PFD (holding self-interested testimony that applications were deposited in postal service mail collection box insufficient); and OAH No. 07-0485-PFD (holding persuasive testimony of application's hand delivery to division office sufficient to constitute other evidence of receipt by the department).

[28] *See* OAH No. 07-0485-PFD (persuasive testimony of application's hand delivery constituted other evidence of receipt); *but cf.* OAH No. 07-0446-PFD (testimony of application's personal delivery insufficient without received-stamped copy or other corroboration); OAH No. 07-0380-PFD (establishing standard for substantial equivalent of a mailing receipt).

next year, even if they still did not receive 2006 PFDs, they decided to reapply and did so in applications dated March 22 and 23, 2007.[29]

Because their reapplications were not filed until after December 31, normally Mr. W. and Ms. E. would not be entitled to relief under section 103(h) even if they had tangible evidence, such as a mailing receipt, that they timely filed their February applications. Late filing of the reapplications relative to the December 31 deadline was not given as a reason for denial in the division's informal conference decision, even though Mr. W. and Ms. E. asserted in their requests for informal conference that they had filed their initial 2006 applications before the March 31 deadline and then filed the second applications on instruction from the division.[30] The timeliness of the reapplications was not raised as an issue until the evidentiary hearing, when the parties' representatives were asked to address section 103(h)'s December 31 deadline.

The division's representative responded to the effect that the December 31 deadline might not have been given as a reason for the denials because the division sometimes exercises discretion to pay the dividend despite the late reapplication if an individual can produce a mailing receipt after the December 31 deadline.[31] The division's post-hearing brief reconfirmed that "lack of evidence of timely mailing" of the applications, not failure to meet the December 31 reapplication deadline, was the basis for the division's decision.[32] Counsel for Mr. W. and Ms. E. argued orally that the division waived the December 31 deadline by failing to raise it as a reason for denying them the 2006 PFD, but he did not address this issue in the post-hearing brief.[33]

Whether strict enforcement of the December 31 reapplication deadline has been waived as to the reapplications need not be decided to reach Mr. W.'s and Ms. E.'s core argument that they should be presumed to have timely filed initial applications. The section 103(h) reapplication was a formality they had to satisfy to be able to appeal, and through the appeal process attempt to prove they had timely filed their initial applications. The division has indicated it sometimes exercises discretion to consider proof of timely filing notwithstanding the lateness of reapplications, and it has

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[29] Mr. W. testified that he understood the March 2007 reapplications to be for the purpose of easing future applications by not having a gap in the application history. Ms. E. did not recall being told that.

[30] *Compare* Division Ex. 4 *with* Division Ex. 3 at 2 & 4.

[31] December 14, 2007 Recording of Hearing, Statement of Susan Pollard.

[32] January 14, 2008 Post Hearing Memo at 2 (suggesting that strict application of the December 31 deadline would be at odds with the lack of authority to reject an application and not enter it into the system).

[33] December 14, 2007 Recording of Hearing, Statement of Gregory Cook; December 14, 2007 Appellants' Memorandum (filed January 14, 2008, in accordance with oral order allowing time following the hearing for the parties to address issues raised during the hearing).

not sought to have the appeal dismissed due to the lateness of the reapplications. Assuming (without ruling), therefore, that the December 31 reapplication deadline does not bar this specific appeal, the February 2006 applications would be timely filed if Mr. W. and Ms. E. proved those initial applications were received by the department before March 31, 2006. This proof, they assert, lies in a presumption arising under the common-law mailbox rule.

B. THE FEBRUARY 2006 APPLICATIONS WERE NOT TIMELY FILED.

Mr. W. and Ms. E. argue that the common-law mailbox rule should be applied and that, because they placed their applications in their mailbox in February 2006, "it is more likely than not that the [Department of Revenue] actually received the appellants' 2006 PFD applications in a timely fashion."[34] Because they have no mailing receipt or substantial equivalent, their argument essentially asserts that an applicant who chooses to mail a PFD application without getting such a receipt nevertheless can prove timely filing through testimony coupled with a common-law rule. In effect, it asserts that the mailbox rule converts evidence of mailing into evidence of actual receipt.

The mailbox rule provides a method of determining the date of delivery of a mailed document when physical delivery by a deadline is required.[35] It comes into play for mailed documents when a postmark is not available (or not allowed) to substitute for proof of physical delivery—i.e., of timely receipt by the addressee.[36] To use the mailbox rule, the sender may be required to provide evidence other than his or her own testimony that the document was mailed in time to be received by the deadline.[37] "[The rule] does not ignore the physical delivery requirement, but merely creates a presumption that physical delivery occurred in the ordinary time after mailing."[38] The mailbox rule raises a presumption that the postal service "delivered the document to the addressee in the usual time[,]" if the document was properly mailed, but the presumption can be rebutted by evidence that the document was not received by the deadline.[39]

Under 15 AAC 23.103(a), a physical delivery rule applies to the filing of paper PFD applications, but a postmark can be used as an alternative means of proving timely filing. If an

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34 December 14, 2007 Appellant's Memorandum at 15.

35 *Philadelphia Marine Trade Ass'n v. Commissioner of Internal Revenue Service*, 523 F.3d 140, 147 (3rd Cir. 2008) (describing the development of the mailbox rule in the context of a tax refund dispute the resolution of which depended on when the IRS received a letter).

36 *Id*. at 148 (discussing a federal statute that allows a postmark date to substitute for a delivery date).

37 *Id*. at 147 (holding that a sender not relying on a postmark alternative to show the date of delivery "may avail itself of the mailbox rule [if the sender] produces evidence beyond its own testimony that it mailed the … document early enough to allow timely receipt by the [addressee] in the regular course of United States Post Office business").

38 *Id.*

39 *Id*.

applicant chooses to file a paper application, and to do so by mail, the application must be "delivered to the post office in sufficient time to be postmarked before the end of the application period."[40] The proof lies in the postmark. The applicant, not the postal service, bears the "responsibility to ensure that an application is timely delivered to the department."[41] The applicant bears the risk of loss when choosing to mail an application without getting a mailing receipt because, without a postmark or a mailing receipt, when a mailed application goes missing proof of actual physical delivery to the department before the filing deadline is necessary.

The postmark alternative to proving physical delivery does not exist for Mr. W. and Ms. E. because no evidence of a postmark for the missing February 2006 applications could be presented. They did not obtain a mailing receipt, or the substantial equivalent of one. The mailbox rule might aid them in the effort to prove timely physical delivery of their applications, but only if that rule applies.

1. The mailbox rule does not apply.

Mr. W. and Ms. E. argue that the common-law "mailbox rule applies to PFD applications, absent clear statutory abrogation of the rule."[42] That is not entirely correct. Alaska law provides that

> [s]o much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.[43]

Inconsistency with a "law passed by the legislature" (a statute) is enough.[44] A common-law rule need not be abrogated explicitly or in a specific way. It can be abrogated by a statute that addresses the subject matter more broadly than the common-law rule did.[45] The intent to abrogate a common-

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40 15 AAC 23.103(g).

41 *Id*.

42 December 14, 2007 Appellant's Memorandum at 6.

43 AS 01.10.010.

44 The 1952 U.S. Supreme Court case (*Isbrandtsen Co., Inc., v. Johnson*, 343 U.S. 779) cited by Mr. W. and Ms. E. for the notion that the mailbox rule applies "absent clear statutory abrogation of the rule" does not require more than the inconsistency contemplated by AS 01.10.010. In disposing of an action under the maritime laws of the U.S., the court wrote that "[s]tatutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Id*. at 783. The court articulated a rule of statutory construction and applied it to federal laws. It did not purport to dictate how states should handle incorporation or rejection of common law principles. Even so, the rule of statutory construction articulated by the court recognized that a contrary statutory purpose could overcome "long-established and familiar principles[.]"

45 *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 760-761 (Alaska 1999) (concluding that by imposing statutory strict liability for oil spill response and cleanup the legislature had abrogated the common-law rule under which the public would have to bear the costs of responding to an emergency); *Linne v. State*, 674 P.2d 1345, 1350

law rule can be made very clear by the use of language such as "notwithstanding any other provision or rule of law" in the statute.[46] The intent to abrogate a specific common-law rule need not be stated that clearly to be given effect. Indeed, a common-law rule can be abrogated by implication.[47]

Laws passed by Alaska's legislature—specifically, AS 43.23.005(a)(1), AS 43.23.011(a) and AS 43.23.015(a)&(b)—together provide that to be eligible for a PFD, an individual must file an application, in a form prescribed by the Department of Revenue, between January 1 and March 31 of the dividend year, and that the Revenue Commissioner must adopt regulations for determining whether individuals are eligible. It would be inconsistent with those statutes to apply a common-law rule to reach a PFD eligibility determination different from the result dictated by regulations adopted to implement the statutes. Indeed, doing so would, in effect, be declaring duly adopted regulations invalid as contrary to common law.

Title 15, chapter 23 of the Alaska Administrative Code contains a comprehensive set of regulations implementing the statutory direction that the department set rules for determining whether an individual is eligible for a PFD, which necessarily includes whether the individual has timely applied. The department's regulations created a physical delivery requirement, and a postmark alternative, in 15 AAC 23.103(a)&(g). For paper applications such as those prepared by Mr. W. and Ms. E., section 103(g) specifically requires delivery either to the department during normal business hours or the post office in time to be postmarked before the end of the application period. The regulation then addresses in section 103(h) what happens if the department does not have an application on file but the individual claims to have timely filed one: it allows the individual a limited opportunity to prove that the department likely received the application. This can be done through mailing receipts or "other evidence of receipt," but not by a presumption of fact inconsistent with the regulation.

Section 103 as a whole, and particularly subsection (h), prescribes what an applicant can and must do to establish timely filing of a mailed application. The PFD statutes and their implementing

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(Alaska 1983) (concluding that the common-law crime of theft by false pretenses was abrogated by a broader theft by deception statutory scheme).

[46] *E.g., Kodiak Island Borough*, 991 P.2d at 761 (explaining that such "language evinces the legislature's intent to abrogate all otherwise applicable common-law doctrines").

[47] *Aleut Corp. v. Arctic Slope Regional Corp.*, 424 F.Supp. 397, 398-400 (D. Alaska 1976) (applying Alaska state law to determine whether sequestration, a common-law remedy, was available and concluding that by implication the common-law rule had been preempted because the legislature developed detailed procedures for other provisional remedies but did not do likewise for sequestration).

regulations, taken together, fully occupy the subjects of when and how an application must be filed and what methods may be used to prove that a mailed application has been timely filed. The manner in which the department implemented its statutory mandate to set rules for determining eligibility, and the statutes that required it to do so, therefore, have abrogated the common-law mailbox rule as applied to PFD applications.

2. A presumption of physical delivery is not proof of timely filing.

Even if the common-law mailbox rule applied to mailed PFD applications, the presumption arising from Ms. E.'s act of mailing her and Mr. W.'s February 2006 applications would not prove timely filing. They have not provided circumstantial evidence beyond their own testimony that they mailed applications in February 2006 and, in any event, the division's evidence rebutted any presumption of timely receipt arising under the mailbox rule, due to lack of actual receipt, not late mailing.

As a general matter, it is questionable whether the mailbox rule's presumption can be triggered when the only evidence of mailing is the testimony of the person seeking to raise the presumption.[48] In the specific context of PFD appeals for dividend years 2006 and after, it is even more questionable because the amendment to 15 AAC 23.103(h) eliminated affidavit testimony and "other documentation" from the types of proof of timely filing allowed. Permitting a 2006 PFD applicant to invoke the mailbox rule on the strength of self-interested testimony (however credible) would be at odds with the regulation's amendment.

Mr. W. and Ms. E. have, in effect, argued that the 2006 computer problem should be treated as circumstantial evidence supporting a finding that they mailed their February 2006 applications early enough that the applications should be presumed under the mailbox rule to have been received before the March 31 deadline but then lost. The mailbox rule establishes a rebuttable presumption as to ***when*** physical delivery occurred (if it occurred), not that the mailed documents were in fact received.[49] Further,

> [t]he Government is free to produce evidence that the document failed to arrive on time. If it does so convincingly, the [individual's] claim to timeliness under the common-law mailbox rule will fail.[50]

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48 *Philadelphia Marine Trade Ass'n*, 523 F.3d at 147-152 & n. 6 (holding that a taxpayer which had produced circumstantial evidence beyond its own testimony could "avail itself of the mailbox rule" and noting that the court need not decide whether someone "whose evidence of mailing consists entirely of the [person's] own testimony may put in play the presumption provided by the mailbox rule" because that case did not present those facts).

49 *Id*. at 151 (explaining that the mailbox rule "does not excuse untimely delivery; it is simply a method for determining when, under the physical delivery rule, a document is physically delivered").

50 *Id.*

The PFD division produced convincing evidence that the 2006 computer problem did not increase the likelihood that applications mailed across town in February were received but lost. The images were not lost until July, after most applications received would have been approved for payment. Though the images were lost, the data typed into the mainframe database was not. Though the images were lost, the paper applications were not destroyed. When the paper applications were rescanned, some images were produced that had been missed in the initial scans. Though this suggests that similar pages-stuck-together errors could have occurred during the rescanning, the division's testimony showed it is unlikely both Mr. W.'s and Ms. E.'s applications, which were mailed in the same envelope and would have been processed together, could have been stuck together with a third party's documents.

In sum, the 2006 computer problem increased the handling of the paper applications but not the likelihood that the W.-E. applications were received before the March 31 deadline and then lost. Because of the timing of the DAIS failure, it is no more likely in 2006 than any other year that applications mailed from one Juneau address to another in early February were received before March 31 by the department and then lost before the division could enter the information into the mainframe database. The envelope containing the W.-E. applications could have been lost at that point, but it just as likely could have been lost by the mail carrier or the post office, or could have been stolen out of the curbside residential mailbox while awaiting mail carrier pickup. The division's evidence, including the search results for the mainframe database, therefore, was sufficiently convincing to rebut the presumption (if any) arising under the common-law mailbox rule that the February 2006 applications were received.

IV. Conclusion

The common-law mailbox rule does not apply. Even if it did, the presumption arising from Ms. E. placing an envelope containing the February 2006 applications in the mailbox with the flag up, before the mail carrier was due to come by, would serve only to establish a presumed date of physical delivery, not that delivery of the applications to the department actually occurred. Such a presumption can be, and was in this case, rebutted by convincing evidence from the division's record search that no 2006 PFD applications were received for Mr. W. and Ms. E., other than the March 2007 reapplications. The division's decision to deny the reapplications of G. W. and M. E.

for 2006 permanent fund dividends, therefore, is AFFIRMED.

DATED this 9th day of October, 2008.

By: ___Signed_____
Terry L. Thurbon
Chief 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14th day of November, 2008.

By: Signed
Signature
Jerry Burnett
Name
Acting Deputy Commissioner
Title