

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

In the Matter of)	
J. J. G.)	
)	OAH No. 09-0363-PFD
<u>2007 Permanent Fund Dividend</u>)	PFD No. 2007-061-9278

DECISION GRANTING MOTION TO DISMISS

I. Introduction

J. G. appealed the Permanent Fund Dividend (PFD) division’s denial of his application for a 2007 PFD, but he filed the appeal nearly two years late. The division filed a motion asking that Mr. G.’s appeal be dismissed because it was late. Mr. G. (participating through his attorney in fact, K. G.¹) opposed the motion in an oral hearing held July 23, 2009.

Though Mr. G.’s delay in filing the appeal could be excused for three or four months after the deadline under the circumstances that existed then, a delay of nearly two years cannot, especially in light of how his circumstances and length of delay compare to those in prior cases denying waivers of the appeal deadline. The division’s motion, therefore, is granted and the appeal is dismissed.

II. Facts

Mr. G. left Alaska in January 2007 to attend basic training for the U.S. Army and then an intense army-provided training course meant to lead to his becoming a physician’s assistant.² Prior to that he had lived in Alaska for more than 20 years, ever since he was a young child, and had applied for PFDs most of those years.³

Mr. G. timely filed an on-line application for the 2007 PFD.⁴ He answered “no” to the question regarding intent to return to Alaska to reside in the state indefinitely.⁵ That answer

¹ See July 9, 2009 General Power of Attorney at ¶¶ 4 & 7 (authorizing Ms. G. to appear in litigation and to act to recover money on behalf of Mr. G.). Mr. G. is in military service and has been deployed from his usual duty station at Fort Lewis, Washington, in support of Operation Iraqi Freedom pursuant to a July 8, 2009 deployment order.

² Exhibit 1, p. 2 (showing beginning absence of January 17, 2007 for basic training); Exhibit 3, p. 3, ¶ 5 (explaining that Mr. G. left Alaska to join the U.S. Army after losing his school district job in late 2006); *also* July 23 2009 Testimony of K. G. (K. G. Testimony).

³ Exhibit 3, p. 3, ¶ 3 (stating that Mr. G. had “lived in the state of Alaska for 26 years” as of his April 2009 informal appeal request); K. G. Testimony (stating that Mr. G. moved to Alaska at the age of five years and, in answer to a cross-examination question about why PFD applications were not on file for Mr. G. for 1997-2003, explaining he told the witness (his wife) that at one point he stopped filing for the PFD because he did not feel right about taking free money).

⁴ Exhibit 1 (showing March 24, 2007 filing of 2007 Adult Web Application).

caused the division to deny his application, which it did in a May 23, 2007 letter mailed to Mr. G.'s address of record in Anchorage.⁶

In May of 2007, Mr. G. was in Texas, attending the intense training course, which ran from April 2 to September 15, 2007.⁷ He was in classes from 6:00 a.m. to 9:00 p.m. most days and had little free time to attend to personal matters.⁸ He did not receive the denial letter, which was forwarded from Anchorage, until just a few days before the June 22 appeal deadline listed on the appeal request form the division included with the letter.⁹ He "was unable to fill out and obtain supporting documents within the few days [he] had before the deadline given."¹⁰

When his training program concluded, Mr. G. was posted to Fort Lewis, Washington, and joined by his family. Immediately after the training, things were hectic while the family made the moves from Texas and Alaska.¹¹ Once things settled down, he did not file an appeal because he did not know that a waiver of the June 22 deadline might be available.¹² His wife learned from the division in March 2009 that late appeals are sometimes accepted.¹³ Mr. G. then filed an appeal request dated April 20, 2009 (which the division received May 4, 2009).¹⁴

The division denied Mr. G.'s appeal at the informal conference level, reasoning that he "did not appeal before [his] informal appeal rights expired."¹⁵ Mr. G. timely filed a request for formal hearing.¹⁶ The division filed the motion to dismiss and the hearing on that motion followed.

⁵ Exhibit 1, p. 3; Exhibit 2 (stating that the PFD division's denial determination was based on the "no" answer to the supplemental schedule question "that asked if [the applicant is] returning to Alaska to reside indefinitely").

⁶ See Exhibit 2.

⁷ Exhibit 3, p. 3, ¶ 5; Exhibit 5, p. 3.

⁸ Exhibit 3, p. 3, ¶ 5; Exhibit 5, p. 3.

⁹ Exhibit 5, p. 3.

¹⁰ Exhibit 3, p. 3, ¶ 5.

¹¹ K. G. Testimony.

¹² K. G. Testimony; also Exhibit 3, p. 3, ¶ 5.

¹³ Exhibit 3, p. 3, ¶ 5; K. G. Testimony.

¹⁴ Exhibit 3.

¹⁵ Exhibit 4, p. 1.

¹⁶ Exhibit 5.

III. Discussion

The time limit to file a first-level appeal (informal conference) is 30 days after the date of the notice disallowing a PFD application.¹⁷ When, as here, the PFD applicant misses the deadline and files a late appeal, if the division denies the informal appeal because of the lateness, the PFD applicant can appeal that decision at the formal appeal level.¹⁸ Once the appeal makes its way to the second-level (formal appeal), the person hearing the appeal on behalf of the Commissioner of Revenue can waive the original deadline if “strict adherence to the deadline ... would work an injustice[.]”¹⁹

Whether strict adherence would work an injustice depends on the circumstances of the particular appeal and how they compare to other waiver-of-appeal-deadline cases. One factor sometimes considered in assessing the injustice of adhering strictly to the deadline is whether the PFD applicant has a good chance of proving that he or she is eligible for the PFD if allowed to go forward with an appeal.²⁰ That this factor has sometimes been considered, however, does not dictate that it must be considered by taking evidence and making fact findings based on the evidence.

Instead, it can be assumed (without being decided) that the PFD applicant might well succeed in proving that he or she is eligible for the PFD in question if given the opportunity to do so at a hearing on eligibility. To focus the waiver inquiry on the reasons for the applicant’s delay in filing the appeal, the following question can be asked: even if the applicant will be denied a PFD for which he or she might have been proven eligible in a timely-filed appeal, would strict enforcement of the appeal deadline work an injustice? To determine whether the appeal deadline will be waived in Mr. G.’s case, therefore, it is assumed that he might succeed in proving that his “no” answer to the intent-to-reside-indefinitely question was a mistake and does not make him ineligible for the 2007 PFD, and that he might not receive a PFD for which he was eligible if the deadline is not waived.

When an applicant denied a PFD delays appealing until long after circumstances that prevented filing by the deadline have ceased to exist, strict enforcement of the deadline does not

¹⁷ 15 AAC 05.010(b)(5). “AAC” refers to the Alaska Administrative Code, which contains the regulations governing PFD applications and appeals.

¹⁸ 15 AAC 05.020(c).

¹⁹ 15 AAC 05.030(k).

²⁰ *Matter of B.S.*, OAH No. 05-0320-PFD at 3 (October 3, 2005) (finding no interests of justice requiring waiver of deadline, despite applicant’s health issues, because there was not a reasonable chance of applicant prevailing at a hearing).

work an injustice.²¹ This is so even if that means the applicant misses out on a PFD he or she might have received through a timely appeal. “The deadline for initiating an appeal serves an important purpose. It prevents the unlimited revisiting of decisions long in the past.”²² Waiver of the deadline may be appropriate for a short period to allow a military person in intensive training to appeal after returning from the training, but in a case very much like Mr. G.’s, a delay of fifteen months was not excused.²³

In that case (*Matter of J.C.*) the PFD applicant received the appeal form just a day before going into a period of military training during which he had no access to postal services. He did not file his appeal until fifteen months after completing the training. During part of that period, he was working long (twelve hour) days and recovering from a divorce. That combination of circumstances was not considered sufficient to justify the fifteen-month delay, especially since the appeal form is relatively simply to complete.²⁴ The decision in that case suggests that had the appeal been filed within a few weeks after the training concluded, the lateness would have been excused. Because the delay was so long, however, no injustice was found in “preventing him from reopening this [2004 PFD] matter in late 2006.”²⁵

The same is true in Mr. G.’s case. He, too, could have been excused for the initial delay in appealing while he was tied up in the intensive training. Owing to the disruption of the move to Fort Lewis, a little more delay after the September conclusion of the training course might have been excused as well. Filing nearly two years late, however, puts Mr. G.’s appeal in a category similar to that of J.C., who delayed fifteen months. If enforcing the appeal deadline in *Matter of J.C.* did not work an injustice, then doing so in Mr. G.’s case does not either. Indeed, it arguably would work an injustice to other PFD applicants such as J.C., who have been held to the deadline, if the deadline were waived for Mr. G.

IV. Conclusion

Mr. G. filed his appeal late. He had a good reason for missing the filing deadline initially but not for the delay of nearly two years in filing the appeal. It does not work an injustice to

²¹ *Matter of J.C.*, OAH No. 06-0742-PFD at 4-5 (December 19, 2006) (recounting history of some cases granting and denying waivers and denying waiver for 15-month delay), *adopted* (Comm’n of Revenue January 31, 2007); *Matter of D.M.*, OAH No. 05-0152-PFD at 2 (September 9, 2005) (granting motion to dismiss appeal filed nearly three months late without adequate explanation for the delay).

²² *Matter of J.C.*, OAH No. 06-0742-PFD at 4.

²³ *Matter of J.C.*, OAH No. 06-0742-PFD at 4-5.

²⁴ *Matter of J.C.*, OAH No. 06-0742-PFD at 4.

²⁵ *Matter of J.C.*, OAH No. 06-0742-PFD at 5.

strictly enforce the deadline as to Mr. G. because it has been strictly enforced for others in similar situations.

The PFD division's motion to dismiss, therefore, is granted and the appeal is dismissed. This decision is limited to enforcement of the appeal deadline in the context of the 2007 PFD. This decision does not contain or constitute a ruling on whether Mr. G. has maintained his residency status for PFD purposes.

DATED this 28th day of July, 2009.

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 24th day of August, 2009.

By: Signed
Signature
Virginia Blaisdell
Name
Director, Administrative Services Division
Title

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