

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

IN THE MATTER OF)
)
 G. C.)
) Case No. OAH 09-0436-PFD
2005 Permanent Fund Dividend)

DECISION

I. Introduction

G. C. submitted a 2004 application form on December 30, 2004, that he intended to be processed as an application a 2005 permanent fund dividend. The Permanent Fund Dividend Division (“the division”) determined that Mr. C. was not eligible, and it denied the application initially and at the informal appeal level. At Mr. C.’s request, a formal hearing was held on September 24, 2009. Mr. C. appeared by telephone. PFD Specialist Peter Scott represented the division.

While he did not meet the requirements for filing during the 2005 application period, Mr. C.’s application should be granted under the doctrine of equitable estoppel.

II. Facts

The facts are not in dispute. At the end of 2004, Mr. C. was preparing for military service in Kosovo. Near the end of December, 2004, Mr. C. was in California, from where he was to be dispatched to Germany and then on to serve in the military peacekeeping mission. Because he would be traveling all through the 2005 application period, Mr. C. submitted an application for a 2005 dividend near the end of 2004, using the only application form available to him, which was a 2004 application. Mr. C. signed the form on December 25, 2004, and mailed it on December 27, 2004. Mr. C. did not anticipate that the Postal Service would get the envelope to the division in Alaska before New Year’s Day, but in fact the division received the application on December 30, 2004.

The division describes its handling of Mr. C.’s application as follows:

After receipt by the Division, an eligibility technician quickly determined Mr. C. had already received a 2004 dividend and “invalidated” the duplicate 2004 application. Included as Exhibit 9 is the Division's DAIS Eligibility history - which indicates on January 3, 2005 PFD Technician Myrna Scott “invalidated” the application using an issue resolution of 41/D2 - which was a “Problem Code” designation used during 2005 to invalidate duplicate applications. For all intents and purposes the Division considered Mr. C.'s duplicate 2004 application a closed case as of January 3, 2005. No denial letter or other correspondence

was issued to notify Mr. C. a duplicate 2004 application had been received and invalidated – as was the Division's procedure in 2005.

Mr. C. had been receiving hostile fire pay while he was in Kosovo. When he returned from overseas, Mr. C. was not immediately aware that he had not received a 2005 dividend. It was not until 2007, when he was trying to resolve issues regarding his 2006 dividend, that Mr. C. realized he had never received the 2005 dividend.

III. Discussion

Applications must be received during the application period running from the beginning of January through March of the dividend year.¹ If a military applicant is eligible for hostile fire pay during the application period, the applicant may apply after the application period, but no more than 90 days after the person's eligibility for hostile fire pay ends.²

Mr. C.'s first application was received two business days before the beginning of the 2005 application period. Because he was not aware that his attempt to file a 2005 dividend had been "invalidated," Mr. C. did not file another application within the 90 days allowed after the end of the period of hostile fire or imminent danger pay.

According to the terms of the applicable statute, Mr. C. is not eligible for a 2005 dividend because he did not file an application during the application period. While Mr. C. is not eligible as a matter of law, as a matter of equity his application should not be denied. The Supreme Court has stated that

estoppel may apply against the government and in favor of a private party if four elements are present: (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.³

The first element of equitable estoppel is the most difficult to prove in this case. The division clearly did not assert a position by words; the problem is the opposite, that the division took action without expressing to Mr. C. that his application was defective and had been affirmatively "invalidated," either because it was on a 2004 form or because it was filed two days early. In *Crum v. Stalaker*, the court found that inaction can constitute conduct asserting a position, even when the agency has not made any statements at all:

The Division...argues that because it never made any statements "inconsistent" with the statute, it did not mislead Crum into filing his claim late. It contends that its "omission does not rise to the level of misconduct necessary for estoppel." We disagree. In light of the

¹ AS 43.23.011. In 2005 the application period began on January 2.

² AS 43.23.011(b).

³ *Crum v. Stalaker*, 936 P.2d 1254, 1257 (Alaska 1997).

Division's obligation, its "omission" in failing to provide a form or clear notice of the claims procedure satisfies the first element of the four-part test outlined above for applying estoppel against the government.⁴

In this case, the division received Mr. C.'s application and took action on it. The division did not merely ignore the application, it evaluated the application and officially "invalidated" it without notifying Mr. C. Upon receiving a completed application form for a dividend, the division's decision to send no notice of defect or denial was an act consistent with approval of the application. By not sending Mr. C. any notice that there was a problem with his application and that action had been taken adverse to his interests, the division created at least an implication that the application was complete and had been routinely approved, thus meeting the first element of four-part test for equitable estoppel described in *Crum v. Stalnak*er.

The remaining elements are not difficult to identify. Having submitted an application for a dividend and having received no notice that the application had been denied or was in any way defective, Mr. C. was justified in taking no further action during the application period or within 90 days of his return from deployment in a war zone. Had Mr. C. been timely notified that his application had been "invalidated," there would have been ample time for him to correct the problem by resubmitting the correct 2005 form during the application period or within 90 days of his return from the war zone. In reasonable reliance on the division's silence, Mr. C. waited for his dividend check to arrive at the end of the year. By becoming legally ineligible, Mr. C. has suffered resulting prejudice. The interest of justice is served by limiting injury to members of the public who are unaware of problems or defects with their PFD applications, who innocently and reasonably rely on the division to timely notify them when the division has taken action adverse to their interests.

IV. Conclusion

The division is equitably estopped from denying Mr. C.'s application for a 2005 dividend. The application of G. C. for a 2005 permanent fund dividend shall be granted.

DATED this 8th day of December, 2009.

By: Signed
DALE WHITNEY
Administrative Law Judge

⁴ *Crum v. Stalnak*er at 1258.
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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 7th day of January, 2010.

By: Signed
Signature
Dale Whitney
Name
Administrative Law Judge
Title

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