

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

In the Matter of)	
)	
H. W. B.)	
)	OAH No. 10-0578-PFD
<u>2010 Permanent Fund Dividend</u>)	Agency No. 2010-012-2026

DECISION

I. Introduction

H. B. challenges the division’s denial of his application for a 2010 permanent fund dividend (PFD). The division denied Mr. B.’s application because, on the date of application, he no longer had the requisite intent to be an Alaska resident. Mr. B. filed a request for formal hearing 78 days after the regulatory deadline. In response, the division filed a motion to dismiss asserting that the appeal is untimely and Mr. B. has not established he should receive a waiver of the filing deadline. A formal hearing was held December 15, 2010. Mr. B. and the division representative, Bethany Chase, participated by telephone. The record closed February 4, 2011, without further participation from Mr. B.

II. Facts

Mr. B. timely applied for 2010 PFD. The application contains a series of questions to determine if the applicant meets all of the eligibility requirements for that year’s PFD. One such question asks whether the applicant intends to remain in Alaska indefinitely. To this question Mr. B. answered “no.” At the time he completed his application, Mr. B. was in Washington state attending college. He intended to become a Washington state resident so he could receive instate tuition.¹ He later changed his mind and has since returned to Alaska. When he filed, he thought he would not be eligible for a 2011 PFD but would receive the 2010 PFD because he remained a state resident throughout the qualifying year, 2009.²

Based on his “no” answer, the division denied his application and upheld its denial at the informal appeal level. Included with the letter informing Mr. B. the division was denying his informal appeal was a form entitled “Request for Formal Hearing.” This form cautioned Mr. B.

¹ Barnett Testimony.
² *Id.*

that his request for formal hearing must be received or postmarked before August 15, 2010.³ Mr. B. did not return this form until 78 days after the appeal deadline, November 1, 2010.

Mr. B. explained that he submitted the form late because he thought he had to have an education verification form completed and ready to submit before he could file his appeal and the university lost or misplaced his first request for verification causing a delay while the second form was obtained and completed. He testified that he was told by the division representatives that he needed to have the education verification form completed and he had to submit it with his appeal. The division has no record of the calls and asserted that such an instruction would be contrary to division policy.

III. Discussion

To be eligible for a PFD, the applicant must meet several eligibility requirements. One requirement is that “the individual is a state resident on the date of application.”⁴ When the division considered Mr. B.’s application it concluded he did not meet all of the eligibility requirements. Mr. B. appealed this decision 108 days after the date the decision was issued. By regulation, the time limit to further appeal an informal appeal decision is “within 30 days after the date the . . . decision is issued.”⁵ There is no dispute that Mr. B. missed that deadline or that on the date he filed his application, he intended to claim Washington residency to obtain instate tuition. However, the regulations also provide that “[t]he hearing officer may waive any . . . deadline established in [the appeal regulations] if it appears to the officer that strict adherence to the deadline . . . would work an injustice.”⁶

When assessing whether adhering strictly to the deadline will work an injustice, one factor to consider 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. Here, the parties presented evidence and testimony on the underlying substantive appeal. Therefore, whether Mr. B. would succeed on the underlying merits is easily addressed.

To receive a PFD the applicant must be a state resident on the date of application.⁷ A person, such as Mr. B., who established residency in Alaska may remain a resident while

³ Exh. 7 at 1. The form has the deadline information redacted with what appears to be a black pen. Mr. B. did not challenge the division’s assertion that the form sent to Mr. B. was not redacted and contained the deadline.

⁴ AS 43.23.005.

⁵ 15 AAC 05.030(a).

⁶ 15 AAC 05.030(k). The division initially asserted that a recent amendment to 15 AAC 05.010(b)(5) superseded and removed from the administrative adjudicator the ability to waive the deadline. It has since withdrawn that argument. Division Response dated January 28, 2011.

physically absent from the state as long as they retain the intent to return to Alaska to remain indefinitely.⁸ The division specifically asked Mr. B. if at the time he completed his application he intended to return to Alaska and remain indefinitely. Mr. B. answered truthfully – “No.” It is undisputed that at the time he completed his application Mr. B. intended to become a Washington State resident so he could obtain instate tuition. Once he made up his mind to claim Washington residency he severed his Alaska residency and has failed to meet all eligibility requirements of a 2010 PFD. Therefore, Mr. B. is not likely to prevail at hearing.

Another factor considered is the reason for the delay. In general, waivers have been available where the conduct of the division caused the confusion that contributed to delay in starting an appeal, and even then the amount of extra time granted has not been unlimited.⁹ Mr. B. has not established that it is more likely than not that the division caused the confusion that contributed to the delay in filing. Mr. B.’s assertion that he spoke to division personnel who told him he could not file without the education verification form is not corroborated. The division has no record of the calls nor does Mr. B. Additionally, Mr. B. did not raise the defense that he was acting as instructed by the division when he spoke with Ms. Chase about the circumstances surrounding his late appeal. Mr. B. agreed with the division’s recitation of the phone conversation with Ms. Chase set forth in the division’s motion. It is reasonable to conclude that had Mr. B. believed he was misled by the division, he would have raised the issue at that time with Ms. Chase.

Therefore, Mr. B. has not established strict adherence to the filing deadline would work an injustice as required by regulation.

⁷ AS 43.23.005(a)(2).

⁸ AS 43.23.095(7).

⁹ *In re N.*, OAH No. 05-0595-PFD (2006,) (six-month delay in filing appeal not excused when military member was busy training and preparing for deployment in Iraq); *In re B.*, Caseload No. 040286 (2004), (delay of a week or two might have been excused but the one year delay was not excused even though division’s denial had errors that may have caused confusion about appeal deadline); *In re G.*, Caseload No. 030739 (2004) (one year delay in filing not excused when applicant missed deadline because he failed to give division a change of address); *In re H.*, Caseload No. 040315 (2004), (two-and-a-half month delay in properly initiating appeal was excused when applicant was misled by confusing PFD division paperwork and mistakenly believed an appeal was already pending); *In re S.*, Caseload No. 040154 (2004) (six-month delay in properly initiating appeal was excused after division reversed itself twice, causing confusion about whether applicant needed to initiate a new appeal).

IV. Conclusion

Because Mr. B.'s request for a formal appeal was filed after the deadline in 15 AAC 05.030(a), and because he has not established that failure to waive the deadline would work an injustice, the division's motion to dismiss is GRANTED and Mr. B.'s formal appeal of the denial of his 2010 PFD is DISMISSED.

DATED this 8th day of February, 2011.

By: Signed
Rebecca L. Pauli
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 7th day of March, 2011.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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