

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

In the Matter of:	)	
	)	
M M	)	
	)	OAH No. 12-0033-PFD
<u>2010 Permanent Fund Dividend</u>	)	Agency No. 2010-053-0753

**DECISION**

**I. Introduction**

M M applied for a 2010 Permanent Fund Dividend (PFD).<sup>1</sup> The Permanent Fund Dividend Division (division) denied her application because she was absent from Alaska while attending the College of Southern Nevada, where she paid tuition as a Nevada resident.<sup>2</sup>

Ms. M requested an informal appeal.<sup>3</sup> The division’s initial decision was upheld at the informal appeal level,<sup>4</sup> and Ms. M requested a formal hearing. The division filed a Formal Hearing Position Statement as well as a Motion to Dismiss Late Appeal Request.<sup>5</sup>

A hearing was scheduled for March 13, 2012. On March 7, 2012, Ms. M was e-mailed a copy of the Notice of Hearing and Notice of Assignment.<sup>6</sup> On March 9, 2012, she was e-mailed a copy of the exhibits, the division’s motion prehearing position statement, and the division’s motion to dismiss.<sup>7</sup> Ms. M was not available at the phone number she had provided for the hearing. She was called twice, and a voice mail message was left asking her to contact the Office of Administrative Hearings. She has not responded to that voice mail or otherwise contacted the Office of Administrative Hearings.

**II. Facts**

Ms. M has lived in Alaska since 1994.<sup>8</sup> She left Alaska on May 18, 2009, to obtain a postsecondary degree and had not returned to Alaska as of the date of her application.<sup>9</sup> An

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<sup>1</sup> Exhibit 1.

<sup>2</sup> Exhibit 5.

<sup>3</sup> Exhibit 6B.

<sup>4</sup> Exhibit 8.

<sup>5</sup> The record does not contain a certificate of service for the Motion to Dismiss. That document was e-mailed by the Office of Administrative Hearings to Ms. M on March 9, 2012.

<sup>6</sup> These had been previously sent to her by U.S. Mail, but had been returned as undeliverable.

<sup>7</sup> These documents had also been previously sent to Ms. M by U.S. Mail or e-mail.

<sup>8</sup> Exhibit 1, page 1.

<sup>9</sup> Exhibit 1, page 2.

Education Verification Form signed by the registrar of the College of Southern Nevada shows that she was enrolled as a full time student from June 8, 2009 through August 15, 2009, and from August 31, 2009, through December 19, 2009. Thus, she was absent from Alaska for 227 days during 2009, 194 of which were for attendance at the College of Southern Nevada as a full time student.<sup>10</sup>

### **III. Discussion**

#### **A. *Non-Appearance at Hearing***

Ms. M requested this appeal, and provided a telephone number and e-mail address with her request.<sup>11</sup> The Notice of Hearing that was mailed and e-mailed to her specifically stated that the hearing would be held at 11:00 a.m. Alaska time. Ms. M did not answer when called at the time set for this hearing.

When the person who requested the hearing does not appear, the hearing officer may issue a decision without taking evidence from that person, unless the person, within 10 days after the date scheduled for hearing, shows reasonable cause for failure to appear.<sup>[12]</sup>

Ms. M has not provided any explanation for her failure to appear. At the scheduled hearing, the division's representative stated that the division had received information that Ms. M might be incarcerated. If true, that could establish good cause for her failure to appear.<sup>13</sup> It is not known, however, whether Ms. M was actually incarcerated on the day of the hearing. Neither Ms. M nor anyone else on her behalf has contacted the Office of Administrative Hearings to ask that the hearing be rescheduled. Without more definite information as to why she was not available, no determination can be made that she had good cause for not being available by telephone at the time of her scheduled hearing. Pursuant to 15 AAC 05.030(j), a decision will be issued without Ms. M's testimony.

#### **B. *Motion to Dismiss Late Appeal***

The division filed a motion to dismiss the appeal because the request for hearing was filed late. The informal appeal decision was dated September 2, 2011.<sup>14</sup> Ms. M's request for a

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<sup>10</sup> Dates between academic terms are counted as being absent as a full time student as long as the student is enrolled as a full time student during both terms. *In re J.D.C.*, OAH No. 09-0122-PFD (Dept. of Revenue 2009), pages 2 – 3.

<sup>11</sup> Exhibit 9, page 1.

<sup>12</sup> 15 AAC 05.030(j).

<sup>13</sup> With advance knowledge of the need to do so, the Office of Administrative Hearings is usually able to schedule telephonic hearings with incarcerated individuals.

<sup>14</sup> Exhibit 8, page 2.

formal hearing was therefore due by October 3, 2011.<sup>15</sup> Ms. M dated her request October 18, 2011, and there are two date stamps indicating the form was received by the division's Anchorage office on October 20, 2011.<sup>16</sup> There is a third date stamp showing receipt by the Juneau office on January 31, 2012. For purposes of this hearing, however, the earlier date will be used as the date Ms. M's request was received.<sup>17</sup>

Ms. M's request was dated 15 days after it was due, and was received by the division 17 days after it was due. The division has the discretion to accept a late request for a hearing if the applicant demonstrates reasonable cause for the late request.<sup>18</sup> The division determined that reasonable cause does not exist, and asks that her request for a hearing be dismissed.<sup>19</sup>

When considering whether to accept a late appeal, an administrative law judge is not limited to only deciding whether the division erred in determining that reasonable cause to accept a late request did not exist. An ALJ may also consider waiving the deadline if "strict adherence to the deadline ... would work an injustice[.]"<sup>20</sup>

A deadline for appealing the division's determination avoids the need to revisit decisions from long in the past.<sup>21</sup> Ms. M's appeal was only a few days late. There is a statement in the division's motion to dismiss asserting that Ms. M called on October 14, 2011, to say she had not received her "2010 letter of uphold."<sup>22</sup> This conversation is reflected in notes kept by the division.<sup>23</sup> If she had not received this notice, that would be a legitimate reason for some delay in requesting a hearing. Because she did not appear for the hearing, however, the only evidence that she did not receive notice that her informal appeal had been denied is the hearsay statement she purportedly made to the division's staff member.<sup>24</sup> Exhibit 12 was not authenticated, and the

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<sup>15</sup> 15 AAC 05.030(a) (request for formal hearing must be made within 30 days of the date the decision from the informal appeal is issued).

<sup>16</sup> The year is difficult to read, but since the form also has stamped on it the due date of October 3, 2011, the year it was received could not have been earlier than 2011.

<sup>17</sup> The division's briefing questions the validity of the October 20 date stamp, but there is no sworn testimony or other evidence from which it can be determined that the document was not received on the date the date stamp shows it was received.

<sup>18</sup> 15 AAC 05.010(b)(5).

<sup>19</sup> Motion to Dismiss, page 3.

<sup>20</sup> 15 AAC 05.030(k).

<sup>21</sup> *See In re J.A.C., Jr.*, OAH No. 06-0742-PFD (Dept. of Revenue 2007).

<sup>22</sup> Motion to Dismiss, page 1. The letter of uphold referred to appears to be Exhibit 8, the Informal Appeal Decision dated September 2, 2011, which upheld the prior decision to deny her a 2010 PFD.

<sup>23</sup> Exhibit 12.

<sup>24</sup> *See* Exhibit 12.

hearsay within that document is not considered reliable.<sup>25</sup> Thus, no finding is made as to whether Ms. M did or did not receive this notice prior to calling the division on October 14<sup>th</sup>.

Another factor considered in deciding whether adherence to the deadline would work an injustice is whether the applicant has grounds to prevail on the merits of her appeal. Where the applicant cannot prevail on the merits, there is no injustice in refusing to allow a late appeal.<sup>26</sup> In this case, the evidence in the record strongly suggests that Ms. M could not prevail on the merits even if her late appeal is considered.

In order to be eligible for a PFD, one must be a resident of Alaska and meet several other eligibility criteria. One requirement is to be physically present during the entire qualifying year, or if absent, absent for an allowable reason.<sup>27</sup> One of those allowable reasons is “receiving secondary or postsecondary education on a full-time basis.”<sup>28</sup> A person who is absent for this reason may be out of Alaska for the number of days he or she is receiving education on a full-time basis plus an additional 120 days.<sup>29</sup> Receiving education on a full time basis is defined as “enrollment and attendance in good standing as a full-time student where participation requires absence from this state . . . .”<sup>30</sup>

There is no dispute in this case that Ms. M was enrolled as a full time student. However, she did pay resident tuition at the College of Southern Nevada.

An individual is not eligible for a dividend if, at any time from January 1 of the qualifying year through the date of application, the individual has

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- (11) accepted admission under resident tuition provisions to a college or university in another state or country, unless
  - (A) There was no difference between resident and nonresident tuition;
  - (B) nonresident tuition was waived as part of an interstate exchange agreement such as the Western Interstate Commission for Higher Education (WICHE) student exchange program or the Washington Wyoming Alaska Montana Idaho (WWAMI) medical education program;or

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<sup>25</sup> 15 AAC 05.030(h) (hearsay is only admissible if it is the kind of evidence responsible persons would rely on in the conduct of serious affairs).

<sup>26</sup> *In re T.D.*, OAH No. 11-0293-PFD (Dept. of Revenue 2011), page 3. *But cf. In re J.J.G.*, OAH No. 09-0363-PFD (Dept. of Revenue 2009), pages 3 – 4 (no injustice to refuse to allow late appeal even assuming applicant could otherwise prevail on the merits).

<sup>27</sup> AS 43.23.005(a)(6).

<sup>28</sup> AS 43.23.008(a)(1).

<sup>29</sup> AS 43.23.008(a)(17)(B).

<sup>30</sup> 15 AAC 23.163(c)(1).

(C) the individual was granted admission under resident tuition provisions for any other reason that did not require the individual to be a resident of the state or country in which the college or university is located[.<sup>31</sup>]

Ms. M does not claim that resident and nonresident tuition is the same, nor that she is part of a student exchange program that waives nonresident tuition. She does assert that she fits within the third exception that allows payment of resident tuition when there is no requirement that the applicant be a state resident to benefit from the lower resident tuition rate.

As part of her request for an informal appeal, Ms. M stated

Community College of Southern Nevada has a policy that if you have been in school for more than four quarters that you do not get charged out of state tuition even if you are a resident of another state. This is my circumstance and the standard payment is the same for all students.<sup>[32]</sup>

In requesting a formal appeal hearing, Ms. M stated: “When out of state residents receive scholarship funding CSN has a policy that recipients of scholarship funding automatically receive in state tuition.”<sup>33</sup> As evidence that she remains an Alaska resident, she submitted her application for admission into the Health Science Program at the College of Southern Nevada, where she used an Anchorage address as her mailing address.<sup>34</sup>

The Education Verification Form sent to the division from the College of Southern Nevada shows that Ms. M was receiving resident tuition. The registrar answered ‘Yes’ to the question “Does resident tuition mean that this student is a resident of the state or country where your institution is located?”<sup>35</sup> Exhibit 10 is information from the College of Southern Nevada that shows there is a difference between resident and nonresident tuition and fees. Although she believes there are situations where a non-resident may be allowed to pay resident tuition at the College of Southern Nevada, there is no evidence in the record to support Ms. M’s belief.

The applicable regulation states that a person who pays resident tuition is not eligible to also receive a PFD.<sup>36</sup> There is no evidence that Ms. M fits within any of the exceptions to that regulation. Although she has asserted that her school has policies to allow her to receive Nevada resident tuition while maintaining her Alaska residency, she has not submitted copies of those

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<sup>31</sup> 15 AAC 23.143(d).

<sup>32</sup> Exhibit 6B, page 4.

<sup>33</sup> Exhibit 9, page 2.

<sup>34</sup> Exhibit 9, page 3.

<sup>35</sup> Exhibit 4, page 1.

<sup>36</sup> 15 AAC 23.143(d)(11).

policies or testimony concerning them. Accordingly, she would be unlikely to prevail on the merits even if she were allowed to proceed with her late appeal.

Based on the evidence in the record, strict adherence to the appeal deadline would not work an injustice in this case. Similarly, the division did not err in deciding that Ms. M did not have reasonable cause for submitting her request for a hearing late.

**IV. Conclusion**

The division's motion to dismiss is GRANTED. No ruling is made as to whether Ms. M remains an Alaska resident or would have been eligible for a 2010 PFD had she filed a timely appeal.

Dated this 28<sup>th</sup> day of March, 2012.

*Signed* \_\_\_\_\_  
Jeffrey A. Friedman  
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 27<sup>th</sup> day of April, 2012.

By: *Signed* \_\_\_\_\_  
Signature  
Kay L. Howard  
Name  
Administrative Law Judge  
Title

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