

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

In the Matter of :	)	
	)	
K T	)	
	)	OAH No. 12-0126-PFD
<u>2011 Permanent Fund Dividend</u>	)	Agency No. 2011-026-0481

**DECISION ON MOTION TO DISMISS**

**I. Introduction**

K T filed an untimely request for an informal appeal from the denial of her application for the 2011 Alaska Permanent Fund Dividend (PFD). When her request for an informal appeal was denied because it was not timely, Ms. T requested a formal appeal hearing by correspondence. The Permanent Fund Dividend Division filed a motion to dismiss the formal appeal because the informal appeal request was untimely and there was no reason to waive the filing deadline. Ms. T submitted an untimely response to the motion.<sup>1</sup>

An untimely filing of an appeal may be excused if failure to waive the deadline would work an injustice. Here, Ms. T has not established that the extension of the time for filing an appeal is necessary in order to avoid an injustice. Accordingly, the division's motion is granted, and this case is dismissed.

**II. Facts**

K T was born in Alaska and has received a PFD every year from 1985 through 2000.<sup>2</sup> She also received a PFD in 2004 and 2012.<sup>3</sup> During the intervening years she either did not apply or was found ineligible.<sup>4</sup> This appeal concerns the division's denial of her application for a 2011 PFD.

In 2003, Ms. T left Alaska to attend school. During her absence she stored most of her belongings at her father's house in No Name. In 2009, Ms. T attended California State

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<sup>1</sup> On June 1, 2012, an Order Regarding Procedure On Motion to Dismiss (order) was issued. The order informed Ms. T that she had until June 11, 2012 to file her opposition. A letter from Ms. T dated July 18, 2012 was received at the Office of Administrative Hearings on July 24, 2012. This is the only correspondence from Ms. T after the order regarding procedure was issued. Therefore, it will be considered her opposition to the Division's Motion to Dismiss and, even though untimely, is considered in this decision.

<sup>2</sup> Exh. 1 at 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

University. She was a full-time student paying resident tuition from January through May 2010.<sup>5</sup> She was a part-time student from May through August paying non-resident tuition. Ms. T returned to Alaska in October 2010.<sup>6</sup> On November 4, 2010, she obtained an Alaska driver license.<sup>7</sup>

Ms. T submitted an online application for the 2011 Alaska Permanent Fund Dividend on January 13, 2011.<sup>8</sup> In support of her application she submitted an Education Verification Form to be completed by the registrar.<sup>9</sup> The form submitted is partially complete but contains no signature of the registrar or other indication that the information was, as required by the form, provided by the registrar. This form has a handwritten notion next to the box indicating resident tuition that reads “My mom works for UC system and made it so I didn’t have to pay out of state tuition.”<sup>10</sup> The date next to Ms. T’s signature on the form authorizing the release of information is the same as the date of her application. Ms. T provided additional information throughout the summer.<sup>11</sup>

On October 14, 2011 Ms. T wrote to the division expressing her frustration with a division representative regarding the division’s inquiry into attendance at other schools. She informed the division that her

Mother and Grandmother live in California and my mother works for the University of California. I placed my grandmother’s address on my application/registration in 2009 . . . The out of state tuition for any school is minimum twice as much as in[-]state tuition. At the time of enrolling at CSUB I had not even thought I was going to be back in Alaska at the time and did not file for the 2009 PFD.<sup>12</sup>

By notice dated October 21, 2011 Ms. T was notified that her application for a 2011 PFD was denied because she paid resident tuition in 2010. She was not allowably absent, and at some point during her absence she severed her Alaska residency, which was not re-established until late 2010.<sup>13</sup> The notice was mailed to the address Ms. T provided and informed Ms. T that she had until November 20, 2011 to request an informal appeal.

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<sup>5</sup> Exh. 2 at 4.

<sup>6</sup> Exh. 2 at 3; Exh. 3 at 1.

<sup>7</sup> Exh. 5 at 3. Ms. T has not disputed this factual assertion by the division.

<sup>8</sup> Exh. 1.

<sup>9</sup> Exh 2 at 1.

<sup>10</sup> *Id.*

<sup>11</sup> *E.g.*, Exh. 4.

<sup>12</sup> Exh. 4 at 14.

<sup>13</sup> Exh. 10.

The request for an informal appeal was received by the division on December 6, 2011 with postage due and no return address.<sup>14</sup> The date October 25, 2011 is written next to her signature on the request for an informal appeal.<sup>15</sup> She elected mail as the preferred method for the division to contact her with any questions regarding her appeal.<sup>16</sup> In support of her informal appeal Ms. T wrote that she was not a California resident, but that her “tuition rate was based on receiving mail at my grandmother’s house whom is a CA resident.”<sup>17</sup> The informal appeal was denied on April 23, 2012 because it was untimely.<sup>18</sup>

Ms. T then timely filed her formal appeal arguing that she knows of others who pay in-state tuition and receive a PFD. She also wrote that she mailed the informal appeal form before November 20, 2011 but was unaware that there was postage owing. She reasoned lack of postage must have been the reason for the delay.

A formal hearing by correspondence was initiated and the division filed a motion to dismiss, arguing that failure to waive the filing deadline would not work an injustice. Ms. T argued that she did not receive the notice until after Thanksgiving. She alleged that she has had difficulty receiving mail from the division in the past.

### **III. Discussion**

An appeal from the denial of an application for a permanent fund dividend must be filed within thirty days of the date of denial.<sup>19</sup> The administrative law judge may extend the time for filing an appeal when “strict adherence to the deadline...would work an injustice.”<sup>20</sup> Ms. T has the burden of proving both her eligibility and that the delay should be overlooked.<sup>21</sup>

Whether dismissal based on an untimely appeal will work an injustice depends on two factors: the individual’s apparent eligibility, and the reasons for delay in filing the appeal. Where the undisputed evidence establishes that an individual is ineligible, there is no injustice in dismissing an untimely appeal based on a procedural technicality. By contrast, where the evidence is inconclusive, but indicates that an individual may be eligible, dismissal of an

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<sup>14</sup> Exh. 5 at 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Exh. 5 at 2.

<sup>18</sup> Exh. 6. The date of mailing cannot be ascertained from the envelope and there is no return address on the envelope so it could not be returned to her for the additional postage. Exh. 5 at 8.

<sup>19</sup> 15 AAC 05.010(b)(5).

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

<sup>21</sup> 15 AAC 05.030(h); 2 AAC 64.280(e).

untimely appeal may work an injustice, depending on the circumstances.<sup>22</sup> The relevant circumstances include, but are not limited to, the reasons for the delay and the length of the delay.<sup>23</sup> Another factor to consider is whether the division's conduct, or the applicant's, is primarily responsible for the delay.<sup>24</sup> The appeal deadline serves an important purpose, and waivers are not granted for insubstantial reasons.<sup>25</sup>

A. Apparent Eligibility

The division stated three grounds for denial: (1) Ms. T received resident tuition during the qualifying year for the 2011 PFD;<sup>26</sup> (2) Ms. T failed to timely file her informal appeal;<sup>27</sup> (3) Ms. T was not allowably absent during the qualifying year;<sup>28</sup> and (4) Ms. T had not remained a resident throughout the qualifying period.<sup>29</sup> If Ms. T is ineligible under any one of the four grounds, she is ineligible for a 2011 PFD.

It is undisputed that Ms. T paid resident tuition in 2010. By regulation an applicant 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 ... accepted admission under resident tuition provisions . . . .”<sup>30</sup> The qualifying year for the 2011 PFD was 2010.<sup>31</sup> There are three exceptions to this disqualifying action: (1) if there is no difference between resident and nonresident tuition; (2) the nonresident tuition is waived as part of an exchange program; or (3) the applicant was given resident tuition for any reason that did not require the individual to be a resident in which the school is located.

Ms. T has claimed the third exception, that because of her mother, she received resident tuition and was not required to be a resident of California. The challenge presented by this case

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<sup>22</sup> See, e.g., *In Re J.M.Y.*, OAH No. 07-0282-PFD at 2 (Commissioner of Revenue 2007).

<sup>23</sup> Cf. *In Re A.B.H.*, OAH No. 07-0655-CSS at 2 (Commissioner of Revenue 2007); *In Re L.A.*, OAH No. 06-0610-CSS at 3 (Commissioner of Revenue 2006).

<sup>24</sup> See, e.g., *In Re J.A.C., Jr.*, OAH No. 06-0742-PFD (Commissioner of Revenue 2007) (review of cases, concluding: “In general, waivers have been available where the conduct of the division caused confusion that contributed to delay in starting an appeal, and even then the amount of extra time granted has not been unlimited”).

<sup>25</sup> See, e.g., *In Re D.S.* at 4, 5, OAH No. 09-0033-PFD (Commissioner of Revenue 2009) (historically, waivers granted for “particularly compelling circumstances”; deadline’s “important purpose” is to “prevent...the unlimited revisiting of decisions long in the past”); *In Re S.R.* at 2, OAH No. 08-0561-PFD (Commissioner of Revenue 2008) (as result of lengthy delay, in that case “information needed to evaluate eligibility will now be stale and difficult to obtain”).

<sup>26</sup> 15 AAC 23.143(d)(11).

<sup>27</sup> 15 AAC 05.010; 15 AAC 05.020.

<sup>28</sup> Ex. 5, p. 2. See AS 43.23.008(a).

<sup>29</sup> Ex. 5, p. 2. See AS 43.23.005(a)(2), (3).

<sup>30</sup> 15 AAC 23.143(d)(11).

<sup>31</sup> AS 43.23.095(6).

is that Ms. T elected a hearing by correspondence. Had she elected a hearing in person or by telephone, questioning may have reconciled the contradicting evidence and argument provided by Ms. T. Had she testified, she could have explained why she did not receive resident tuition when she went to school part-time. Regardless, it is Ms. T's burden to establish that it is more likely true than not true that she paid resident tuition for any reason that did not require her to be a resident of California.

The evidence presented by Ms. T is a hand written notation on the education verification form, and a written statement to the division at the informal appeal level. After receiving resident tuition for full-time attendance, she paid nonresident tuition for part-time attendance. The latter could, with further explanation, have been persuasive because the change to nonresident tuition leaves open the possibility that Ms. T's mother was no longer employed at the University, or that to receive the resident tuition, an employee's child must attend full-time. However, this is only speculation and not supported by evidence.

This leaves the self serving statements of Ms. T which are unpersuasive. Neither statement is sworn, nor are these statements corroborated in the record. As discussed below, Ms. T's contradictory explanations for why her appeal was untimely detracts from her credibility. Finally, Ms. T's October 14, 2011 written correspondence to the division contends that her resident tuition made sense because nonresident tuition was high and she had "not even thought I would be back in Alaska at the time and did not file for the 2009 PFD." This statement dampens the persuasiveness of Ms. T's assertion that she received resident tuition without claiming residency. This statement could also support a finding that Ms. T claimed California resident tuition because she did not intend to return to Alaska and did not want to pay the high nonresident tuition.

Because Ms. T has not established by a preponderance of the evidence that she falls within an exception to the disqualifying act of paying resident tuition in California, she is ineligible for a 2011 PFD and it is not necessary to address the other reasons given for the initial denial.

#### B. Reasons For And Length Of Delay

Here, the length of delay was not great but it is more likely than not that Ms. T's conduct is responsible for the delay. Ms. T offers several conflicting reasons for the delay in filing her request for informal appeal: (1) she did not file a timely appeal because she did not receive the

notice of denial until after the time for filing had expired; (2) she has had difficulty receiving written correspondence from the division; (3) she timely mailed the application but delivery was delayed because of postage owed. Unfortunately, Ms. T's lack of credibility detracts from her proffered explanations.

The initial denial notice was mailed on Thursday, October 21, 2011. The signature is dated Tuesday, October 25, 2011. This would seem to indicate Ms. T signed the request for an informal appeal upon receiving the notice of denial and could have even been timely mailed, but the delay was due to lack of postage. Also, she asserts that delay in filing should be excused because an appeal form did not accompany the notice of denial. The Informal Appeal form contradicts this because in the upper right hand corner is a type written date indicating that the appeal will be denied if postmarked after November 20, 2011. If it were true that the division failed to provide Ms. T with an appeal form, then the form filed by Ms. T would not have this computer-generated date printed on it.

Moreover, it is difficult to understand why she would select "mail" as her preferred method of contact from the division if, as Ms. T claimed in one explanation, the delay in filing was due to poor mail service. Also, Ms. T did not mention the delay in receipt under other considerations. If a person had not timely received notice of their denial and because of late notice was forced to file an untimely appeal, it is reasonable to expect the appellant would inform the division that any delay was caused by the mail.

Ms. T could argue that she did not know the appeal was untimely until her informal appeal was denied for this reason. This argument, if it had been made, would not be convincing based on the evidence presented. Both the denial notice and the request for informal appeal clearly provide that the appeal will be denied if untimely. In her formal appeal, when asked to address facts that were not true, she wrote "I sent the appeal in before Nov. 20." This is undermined by assertions contained in her opposition letter dated July 18, 2012, that when she did receive the notice, there was no appeal form and she believed it did not arrive until after Thanksgiving.<sup>32</sup> In 2011, Thanksgiving, the fourth Thursday in November, fell on November 24.

Ms. T has failed to establish that the reason for the delay was attributable to other than her own actions or lack thereof.

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<sup>32</sup> July 18, 2012 Letter to PFD Appeals.

#### IV. Conclusion

Ms. T has not shown good cause for her failure to file a timely appeal. She has not shown that strict adherence to the time limit for filing an appeal will work an injustice. Therefore, Ms. T's appeal is dismissed.

DATED this 28<sup>th</sup> day of August 2012

Signed  
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Rebecca 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 24<sup>th</sup> day of September, 2012.

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

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