

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

In the Matter of)		
)	OAH No.	16-0057-PFD
J Z)	Agency No.	2014-054-6366
)		
<u>2014 Permanent Fund Dividend</u>)		

DECISION AND ORDER

I. Introduction

J Z applied for a 2014 Permanent Fund Dividend (PFD).¹ The Permanent Fund Dividend Division (Division) denied her application because it appeared to the Division that she had established residency in Oregon.²

Ms. Z appealed the denial and requested a “hearing by correspondence.” After a schedule was set for the parties to submit written briefs, the Division filed a Motion to Dismiss the appeal, based on Ms. Z’s failure to file her informal appeal request by the appeal deadline.³ Ms. Z did not file a brief by the deadline, nor did she file a response to the Division’s motion by the deadline to file responses.

Because Ms. Z’s request for informal appeal was not timely filed, and she failed to make out a strong enough case for waiver of the appeal deadline, the Division’s Motion to Dismiss is granted.

II. Facts

Ms. Z is a long-time resident of Alaska. On March 21, 2014, the date that Ms. Z applied for a 2014 PFD, however, she was living in Eugene, Oregon and attending school at No Name Community College.⁴ Because she was out of state when she applied, she was required to submit additional information regarding her absence from Alaska. The Division and Ms. Z then exchanged email correspondence for much of 2014, in which Ms. Z explained that during calendar year 2013 (the qualifying year for 2014 dividends) she had “claimed Oregon residency” in order to pay in-state tuition at the college.⁵

¹ Exhibit 1.
² Exhibit 3.
³ Division’s Motion to Dismiss Appeal Request, 2/25/16.
⁴ Exhibit 1, p. 1; exhibit 2, p. 2.
⁵ Exhibit 7.

Division records show that Division staff emailed Ms. Z on November 25, 2014, to inform her that her application was denied.⁶ The Division subsequently sent her a formal notice of denial on December 5, 2014; the notice was mailed to Ms. Z at the mailing address she had provided to the Division, her parents' address in No Name, Alaska.⁷ The notice stated that her application was denied because she had "obtained a benefit as the result of establishing ... a claim of residency outside of Alaska at some time after December 31, 2012," she had paid resident tuition in Oregon "which required a claim of residency in another state," and that doing so "makes an individual not eligible for a dividend."⁸ The notice informed her that "[i]f either the facts or the application of the law are incorrect, you have 30 days from the date of this letter to file a Request for Informal Appeal."⁹ An informal appeal form was also included, and it informed Ms. Z of the appeal filing deadline, clearly stating on the first page: "This Appeal Request Will Be Denied if Received or Postmarked after January 4, 2015."¹⁰

Ms. Z filed her informal appeal on July 21, 2015, approximately 198 days, or more than six and a half months, after the deadline.¹¹ Her appeal documents did not provide any explanation for why she had filed late. Division staff contacted Ms. Z by telephone to ask her about the late filing, and according to Division records she explained that the denial letter had been received by her parents at the No Name address, and they apparently had not forwarded the letter to her.¹²

The Division denied Ms. Z's informal appeal by letter dated November 6, 2015.¹³ The letter stated the denial was based on (1) Ms. Z had not filed the appeal "before [her] appeal rights expired," and she had failed to "demonstrate a reasonable cause for why [she] did not file [her] appeal by the required due date;" and (2) she was "unallowably absent for over 180 days during calendar year 2013 – the qualifying year for the 2014 [PFD]."¹⁴ The denial letter included a

⁶ Exhibit 7, p. 23; Exhibit 10, p.1.

⁷ Exhibit 3.

⁸ *Id.*, p. 1.

⁹ *Id.*

¹⁰ Exhibit 4, p.1 (underlining in original).

¹¹ Exhibit 4.

¹² Exhibit 8, p.1.

¹³ Exhibit 8.

¹⁴ *Id.*, p. 1. Apparently the issue regarding Ms. Z claiming Oregon residency in order to pay in-state tuition "was resolved favorably for Ms. Z;" but the Division also determined that the unallowable absence issue caused her to be ineligible for the PFD. Division's Motion to Dismiss, p. 4; Exhibit 5, p.3.

“request for formal hearing” appeal form, and it stated on the first page: “DEADLINE This Form Must Be Received or Postmarked on or Before: DEC 06 2015.”¹⁵

At some point during 2015, Ms. Z’s application for a 2015 PFD was also denied. Subsequently, on January 15, 2016, 40 days after the deadline, Ms. Z submitted this appeal, requesting a formal hearing “by written correspondence,” and listing both the 2014 and 2015 PFDs on her appeal form.¹⁶ However, when the Division referred the appeal to the Office of Administrative Hearings (“OAH”), the referral document included a statement from Division staff to the effect that only the 2014 PFD formal hearing was being referred to OAH. This is because the 2015 PFD appeal is subject to the requirement that an informal appeal must first be filed and decided before a formal hearing can be requested, and apparently, Ms. Z has never submitted an informal appeal of the denial of her 2015 PFD. Therefore, this decision only addresses the denial of Ms. Z’s 2014 PFD.

The Division filed its Motion to Dismiss the appeal on February 25, 2016 (the deadline for filing appeal briefs). Ms. Z did not file an appeal brief or any written filing in support of her appeal by that deadline. She did file a short letter on March 17, 2016, one week after the deadline to file a response to the Motion to Dismiss. Her letter, however, discussed her absences from the state during 2014 and 2015, rather than the calendar year at issue here, 2013. She also stated in the letter “I was attending college as a full time student at No Name Community College,” without specifying which year she was referring to or specific timeframes within any given year.¹⁷ The letter contains no explanation for the late filing of her informal appeal.

III. Discussion

The Division moved to dismiss Ms. Z’s appeal because her request for an informal appeal was 198 days late. A request for an informal appeal must be filed within 30 days after notice that the PFD has been denied.¹⁸ 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.¹⁹ Once the appeal makes its way to the second-level (formal appeal), the person hearing the appeal on behalf of the Commissioner of Revenue

¹⁵ Exhibit 9, p.1.

¹⁶ *Id.*

¹⁷ Ms. Z’s March 17, 2016 letter, p. 1.

¹⁸ 15 AAC 05.010(b).

¹⁹ 15 AAC 05.020(c).

can waive the original deadline if “strict adherence to the deadline ... would work an injustice[.]”²⁰

The length of the delay is an important factor that is considered when deciding whether strict adherence to the filing deadlines would work an injustice.²¹ Whether strict adherence would work an injustice depends on the circumstances of the particular appeal and how those circumstances 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 would be eligible for the PFD if allowed to go forward with an appeal.²² 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 would be 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 Ms. Z’s case, therefore, it is assumed that she could succeed in proving that she maintained her Alaska residency for purposes of her eligibility for the 2014 PFD, and that if the deadline is not waived she will not receive a PFD for which she would otherwise be eligible.

A key consideration in this context was summarized in another PFD appeal decision. “The deadline for initiating an appeal serves an important purpose. It prevents the unlimited revisiting of decisions long in the past.”²³ Historically, because of this consideration, waivers of the appeal deadlines have been granted only in particularly compelling circumstances. The following summaries of prior cases give a sense of the showing needed to justify a waiver:

²⁰ 15 AAC 05.030(k).

²¹ See *In re S.O.*, OAH No. 09-0497-PFD (Commissioner of Revenue 2010), page 2, *In re J.G.*, OAH No. 09-0363-PFD (Commissioner of Revenue 2009), page 4.

²² *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).

²³ *Matter of J.C.*, OAH No. 06-0742-PFD (2007) at 4.

In re J.G., OAH No. 09-0363-PFD (2009): Military member was on active duty and in busy training period, and then moved several times before learning that a waiver of filing deadline might be available. **22 month delay** in filing appeal **not excused**.

In re J.C., OAH No. 06-0742-PFD (2007): Military member was on active duty and in busy training period, and had recently undergone a divorce. **15 month delay** in filing appeal **not excused**.

In re N., OAH No. 05-0595-PFD (2006): Military member was in busy preparation and training period before deploying to Iraq, and missed appeal deadline. **Six-month delay** in filing appeal **not excused**.

In re B., Caseload No. 040286 (2004): Division's denial had errors that may have caused confusion about appeal deadline. Delay of "a week or two" might have been excusable. **One year delay** in appeal **not excused**.

In re G., Caseload No. 030739 (2004): Applicant missed deadline because he failed to give Division a change of address. **One year delay** in appeal **not excused**.

In re H., Caseload No. 040315 (2004): Military officer was misled by confusing PFD Division paperwork and mistakenly believed an appeal was already pending. **Two-and-a-half month delay** in properly initiating appeal was **excused**.

In re S., Caseload No. 040154 (2004): Division reversed itself twice, causing confusion about whether applicant needed to initiate a new appeal. **Six-month delay** in properly initiating appeal was **excused**.

These cases indicate that waiver of the deadline may be appropriate for a short period to allow a person experiencing life upheavals to file a late appeal. In addition, where the conduct of the Division caused confusion that contributed to delay in starting an appeal, a waiver may be appropriate; but even then the amount of extra time granted has not been unlimited. In general, more lengthy delays are not waived, absent **extremely compelling** circumstances. In one of the cases summarized above, a delay similar in length to Ms. Z's delay was allowed; but in that case (*In re S.*) the Division gave contradictory information to the applicant about whether he needed to file a new appeal. Under those circumstances, because the Division at least in part caused the late filing, the delay was excused.²⁴ In another case involving a similar delay, however, the six-month delay was not excused, even though the applicant was serving in the armed forces and preparing to deploy to Iraq (circumstances which might be considered fairly compelling).²⁵

Here, however, Ms. Z has provided no compelling explanation for why her informal appeal was filed over six months past the deadline. In fact, Ms. Z's only justifications are that, generally speaking, mail is slow in Bush Alaska, and that her parents apparently failed to

²⁴ *In re S., Caseload No. 040154 (2004)*.

²⁵ *In re N., OAH No. 05-0595-PFD (2006)*.

forward the denial letter to her.²⁶ On the other hand, the record is clear that Ms. Z had been in direct communication with Division staff during the period leading up to the issuance of the denial letter, and she had already been notified 10 days earlier via email that her application was denied. She could have followed up with the Division via email to inquire about the appeal process, to obtain another copy of the denial letter, or to change her mailing address with the Division. She also could have monitored her mail through her parents and reminded them to forward the letter to her. Under these circumstances, it would arguably work an injustice to other PFD applicants who have been held to the deadline, if the deadline were waived for Ms. Z and her lengthy delay in filing were excused.

An applicant's busy or challenging life is not ordinarily a basis to waive the appeal deadline. This is natural, since many Alaskans work extremely hard but are able to find the time needed to fill out an appeal form.²⁷ In this case, Ms. Z argues the appeal deadline should be waived because "appeal letters take time to and from the village and (weather permitting) also when sent to address where attending school outside of Alaska."²⁸ This explanation must be viewed against previous PFD cases involving late appeals, and it must be weighed against the Division's legitimate interest in not having to look back and attempt to address stale eligibility issues many months or years after the fact.²⁹ When viewed in this light, Ms. Z's mail-forwarding challenges simply do not add up to the type of circumstances that are compelling enough to justify waiving the filing deadline for an over six-month delay.

As mentioned above, another 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 she would be eligible for the PFD if allowed to go forward with the appeal. In this case, the undisputed facts are that Ms. Z was absent from Alaska for a total of 243 days during 2013.³⁰ Of that period of absence, 76 days were an allowed absence, because she was enrolled as a full-time student in Oregon. The remaining 167 days, however, would not be considered an allowed absence, as Ms. Z was either a part-time student or away from Alaska for other miscellaneous

²⁶ It must also be noted that a Division regulation, 15 AAC 05.010(c), provides that if an "individual's mailing address changes ... during the appeal ... process, the individual must notify the department in writing of the change in address."

²⁷ *Matter of J.C.*, OAH No. 06-0742-PFD (2007) at 4.

²⁸ Ms. Z's Request for Formal Hearing, exhibit 9, p. 2.

²⁹ *In re J.G.*, OAH No. 09-0363-PFD (2009) at 4.

³⁰ Exhibit 1, p. 4.

purposes.³¹ Under these circumstances, Ms. Z would not be deemed eligible for the 2014 PFD, even if the late-filing of her informal appeal would have been excused.³²

IV. Conclusion

Because Ms. Z's request for informal appeal was filed well after the deadline set by Division regulation at 15 AAC 05.010(b), and because she has not established a basis for a more than six month waiver of the deadline under 15 AAC 05.030(k), her formal appeal of the denial of her 2014 PFD should be dismissed.

V. Order

IT IS HEREBY ORDERED that the Division's Motion to Dismiss Ms. Z's appeal regarding the 2014 PFD is GRANTED.

DATED this 29th day of April, 2016.

By: Signed
Andrew M Lebo
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 May, 2016.

By: Signed
Signature
Andrew M. Lebo
Name
Administrative Law Judge
Title

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

³¹ *Id.*

³² AS 43.23.008(a)(17)(B).