

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

In the Matter of:)	
)	
D W,)	OAH No. 16-0219-PFD
As sponsor of six minor children)	Agency No. 2015-067-7482, -7483,
_____)	-7484, -7485, -7486, -7487

DECISION

I. Introduction

The issue in this case is whether the Permanent Fund Dividend Division (Division) was correct to deny the 2015 Permanent Fund Dividend (PFD) applications of D W's six minor children because the applications were filed after the 2015 PFD application filing deadline. The Division denied the W children's applications because they were not received by the Division until October 1, 2015, six months after the 2015 PFD's March 31, 2015 filing deadline, and because the applications did not qualify for any exception to the deadline. Mr. W asserts, however, that the late filing of his children's applications should be excused because he was misinformed by the Division's staff, in January 2015, regarding whether he needed to file separate applications for his children, in addition to his own application, in order to obtain PFDs for his children.

The preponderance of the evidence shows that Mr. W misunderstood the PFD filing requirements for his minor children due to language barriers rather than because of any misinformation given by the Division's staff. Further, as a matter of law, the inability to understand English is not a defense to enforcement of otherwise applicable statutes and regulations. Accordingly, the Division was correct to deny the 2015 PFD applications of Mr. W's six children based on their untimely filing. The Division's denial of the six applications is therefore affirmed.¹

II. Facts

A. *The W Family's PFD Applications*

Mr. W's primary language is Hmong; although he speaks some English, it is sometimes challenging for him to understand exactly what an English-speaker is saying.² Mr. W has a girlfriend, T U, and six minor children: N, E, Q, A, B, and S.³ In 2014 Mr. W applied for the 2014

¹ This does not mean, however, that Mr. W's children must forever forfeit their 2015 PFDs. Pursuant to 15 AAC 23.133(b), (c), Mr. W's children may reapply for the 2015 PFD during the two year period between their 18th and 20th birthdays.

² Administrative law judge's observations at hearing; D W's hearing testimony.

³ D W's hearing testimony; Ex. 1 pp. 1 - 12.

PFD on behalf of each of his children.⁴ The children's 2014 applications were approved, and their 2014 PFDs were subsequently paid.⁵

At some time during the first three weeks of January 2015, Mr. W completed applications for the 2015 PFD for himself, his girlfriend, and his six minor children.⁶ Mr. W's girlfriend witnessed his completion of the applications.⁷ On January 21, 2015, Mr. W drove from his home in No Name to the Division's Anchorage office, carrying with him his family's eight 2015 PFD applications, intending to file them with the Division.⁸

When Mr. W reached the counter at the PFD office, he first tendered his application and his girlfriend's application, and these were both accepted.⁹ Mr. W testified that, when he tendered his children's applications to the counterperson at the PFD office, he was told that his children were already "in the system," that their applications were "not needed," and that his children would definitely receive their PFDs in October 2015. Mr. W understood this to mean that he did not need to submit his children's applications in order for them to receive the 2015 PFD. Accordingly, Mr. W did not submit his children's 2015 PFD applications at that time.

On October 1, 2015, the date the 2015 PFDs were scheduled to be direct-deposited to recipient bank accounts, Mr. W checked the status of his account.¹⁰ He discovered that his PFD and his girlfriend's PFD had been deposited into his account, but his children's six PFDs were not. He then immediately went to the Division's Anchorage office and turned-in his children's 2015 PFD applications.

B. The Division's Relevant Application Processing Procedures

When the Division hires a new employee to work at the counter of the Anchorage PFD office, the employee receives a minimum of three months of training on policy and procedure prior to having any contact with the public.¹¹ After that training, the new employee does not begin to assist customers immediately, but instead shadows a more experienced employee for a period of time to observe how the later interacts with customers.

When an applicant personally files an application at the Anchorage PFD office, the Division's policy, during the PFD filing season (January through March of each year), is to accept

⁴ Chang W's hearing testimony; Ex. 1 pp. 1 - 12.

⁵ D W's hearing testimony.

⁶ D W's hearing testimony.

⁷ D W's hearing testimony; stipulation as to testimony of T U.

⁸ D W's hearing testimony. The applications (Ex. 1, pp.1 - 12) are all dated January 21, 2015.

⁹ All factual findings in this paragraph are based on D W's hearing testimony.

¹⁰ All factual findings in this paragraph are based on D W's hearing testimony.

¹¹ All factual findings in this paragraph are based on Jennifer Cason's hearing testimony.

all applications tendered, write the name and date of birth of each applicant on a receipt, date-stamp the receipt, and give the receipt to the applicant.¹² Once the Division's employee has the application in his or her hands, the application is date stamped, and a block square is stamped next to the date.

During the month of January, each Anchorage PFD office counterperson will typically serve 75 - 125 customers per day.¹³ During January 2015, the Division had a particularly seasoned group of employees working the counter at its Anchorage office, with each of the six employees having at least three years of experience in that position.

Where (as here) a sponsor submits his children's PFD applications, and those applications are approved, information concerning the children remains in the Division's database during subsequent years.¹⁴

C. Relevant Procedural History

The Division received the 2015 PFD applications of Mr. W's children on October 1, 2015.¹⁵ On November 6, 2015 the Division issued notices denying each of the six children's applications because their applications had not been received by March 31, 2015.¹⁶ On November 13, 2015 Mr. W filed forms requesting an informal appeal on behalf of each of his children.¹⁷ On February 5, 2016 the Division issued decisions, as to each informal appeal, affirming the denials of the W children's 2015 PFDs based on untimely filing.¹⁸ On March 6, 2015 Mr. W requested a formal hearing to contest the Division's decision.

Mr. W's hearing was held on April 11, 2016. Mr. W was represented by attorney Darryl Thompson. Mr. W attended the hearing and testified using a Hmong interpreter.¹⁹ The Division was represented by Bethany Thorsteinson, who participated in the hearing by phone. Jennifer Cason participated in the hearing by phone and testified on the Division's behalf. At the end of the hearing the record closed and the case became ripe for decision.

¹² All factual findings in this paragraph are based on Jennifer Cason's hearing testimony.

¹³ All factual findings in this paragraph are based on Jennifer Cason's hearing testimony.

¹⁴ All factual findings in this paragraph are based on Jennifer Cason's hearing testimony.

¹⁵ Ex. 1 pp. 1 - 12.

¹⁶ Ex. 2 pp. 1 - 12.

¹⁷ Ex. 4 pp. 1 - 12.

¹⁸ Ex. 5 pp. 1 - 30.

¹⁹ Mr. W's girlfriend, and one of his children, also attended the hearing, but they did not participate.

III. Discussion

A. *The Alaska Permanent Fund Dividend Program*

In 1967 large oil reserves were discovered on state-owned land in Prudhoe Bay, resulting in a substantial increase in state revenue from the taxes levied on the oil.²⁰ It was decided that part of the income generated by these oil reserves, and by Alaska's other natural resources, should be invested to maximize the state's long-term income.²¹ In 1976 the Alaska Constitution was amended to establish the Alaska Permanent Fund.²² The amendment requires 25 percent of the state's mineral income to be deposited into the Permanent Fund.²³

In 1980, the Alaska legislature enacted a program under which a portion of the Permanent Fund's earnings are distributed, on an annual basis, to Alaska residents who meet certain eligibility requirements.²⁴ These earnings are distributed in the form of dividends (PFDs). The Department of Revenue (DOR) administers the PFD program through its Permanent Fund Dividend Division.²⁵

B. *Was the Division Correct to Deny the W Children's 2015 PFDs?*

By statute, an application for a PFD must be filed between January 1st and March 31st (inclusive) of that dividend year.²⁶ The legislature provided only four exceptions to this rule. To be eligible for the first two, the applicant must be both a member of the armed services, and eligible for "hostile fire" or "imminent danger" pay.²⁷ To qualify for the third exception, the applicant must apply as an adult for a PFD which was not applied for while the applicant was a minor.²⁸ Finally, to fall within the fourth exception, the applicant must be the authorized representative of a disabled person who failed to apply for a prior year's PFD.²⁹

Mr. W does not contest the fact that his children's 2015 PFD applications were not filed by the March 31st deadline. Rather, Mr. W asserts that a Division employee advised him that it was not necessary for him to file his children's 2015 PFD applications because they were "already in the

²⁰ *Zobel v. Williams*, 457 U.S. 55, 56 (1982).

²¹ *Id.* at 57; *see also Harrod v. State*, 255 P.3d 991 (Alaska 2011).

²² Alaska Constitution, Article IX, Section 15; *see also Harrod v. State*, 255 P.3d 991 (Alaska 2011).

²³ Alaska Constitution, Article IX, Section 15.

²⁴ AS 43.23.005(a); *Zobel*, 457 U.S. at 57, *cited in Harrod*, 255 P.3d 991 (Alaska 2011).

²⁵ AS 37.13.040.

²⁶ AS 43.23.011(a). The Department of Revenue has promulgated regulations concerning how the March 31st deadline will be applied. Under 15 AAC 23.103(a), the application "must be received by the department or postmarked during the application period set by AS 43.23.011 to be considered timely filed." Another regulation, 15 AAC 23.103(g), states that "[i]t is an individual's responsibility to ensure that an application is timely delivered to the department," and that "[a] paper application must be timely delivered to the department during normal business hours or delivered to the post office in sufficient time to be postmarked before the end of the application period."

²⁷ AS 43.23.011(b), (c).

²⁸ AS 43.23.055(3).

system"; that he relied on this advice; and that, but for his reliance on this advice, he would have timely filed his children's 2015 PFD applications.

Mr. W's argument is essentially that the Division is estopped from enforcing its filing deadline against Mr. W because Mr. W would have timely filed his children's applications but for erroneous information provided to him by Division personnel. It is true that the doctrine of equitable estoppel can be asserted against the state.³⁰ However, equitable estoppel applies against the government, and in favor of a private party, only if (1) the government 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) estoppel serves the interest of justice so as to limit public injury.³¹ Because estoppel is an affirmative defense, the claimant asserting it against the government "bears the burden of proof to show the existence of all the necessary elements."³²

In this case, it is likely that the second, third, and fourth elements of estoppel would be satisfied *if the first element was satisfied*. I find, however, that the first element has not been proven here. I *am* convinced that Mr. W left the Anchorage PFD office on January 21, 2015 with a misunderstanding of what actions were necessary to perfect the filing of his children's 2015 PFD applications. However, I *am not* convinced that Mr. W's misunderstanding was caused by misinformation provided by the PFD office's personnel.

There is no question that state employees sometimes provide incorrect information to the public; I have personally seen numerous instances of this in other cases that I have heard. However, it is more likely than not that the PFD office's employees did not provide bad information in this case. First, there was credible testimony that all of the Division employees who were working the counter at the Anchorage PFD office in January 2015 were experienced. While an *inexperienced* employee might provide incorrect information to a customer, it is much less likely that an employee with three or more years of experience would do so.

Second, the fact that English is not Mr. W's first language makes it more likely that Mr. W simply misunderstood the Division's employees, and less likely that the Division's employees gave Mr. W incorrect information. "It is a truism that life is more difficult in an English speaking

²⁹ AS 43.23.055(7).

³⁰ *Alaska Department of Commerce & Economic Development, et. al. v. Schnell*, 8 P.3d 351, 355 (Alaska 2000).

³¹ *Allen v. State, Dept. of Health & Social Services, Div. of Public Assistance*, 203 P.3d 1155 (Alaska 2009).

³² *Duran v. City and Borough of Juneau*, 2005 WL 1540493 (Alaska 2005). Mr. W also bears the burden of proving the elements of estoppel, by a preponderance of the evidence, under 2 AAC 64.290(e) and 15 AAC 05.030(h).

country for a person who does not speak English."³³ However, it is equally true that a person's difficulty with understanding English generally does not excuse an untimely filing.³⁴

This is an unfortunate case. However, the Department of Revenue is bound by its own regulations, and has no discretion in this matter.³⁵ It is not allowed to make exceptions to its PFD eligibility or filing criteria no matter how deserving the claimant or how sympathetic the case. Accordingly, it cannot grant Mr. W's children a dividend at this time.

IV. Conclusion

The preponderance of the evidence indicates that Mr. W's mistaken understanding, that he did not need to file his children's 2015 PFD applications, was due to a misunderstanding on his part, rather than any misinformation provided by the Division. Accordingly, the criteria for applying the doctrine of equitable estoppel against the Division in this case are not satisfied. Given no estoppel, and no dispute that Mr. W did not file his children's 2015 PFD applications until October 1, 2015, the Division was correct to deny the applications under A.S. 43.23.011(a) and 15 AAC 23.103. The Division's decision denying the W children's six 2015 PFD applications, based on untimely filing, is affirmed.³⁶

DATED this 15th day of June, 2016.

By: Signed _____
Jay Durych
Administrative Law Judge

³³ *Guerrero v. Carleson*, 512 P.2d 833, 836 (Cal. 1973).

³⁴ See generally *Hernandez v. Department of Labor*, 416 N.E.2d 263 (1981); *Quinones v. Board of Review, Illinois Dept. of Labor*, 104 Ill.App.3d 227, 231 (1982) (tardy application for unemployment benefits); *Figueroa v. City of New York*, 460 N.Y.S.2d 119 (N.Y.A.D. 1983).

³⁵ An administrative agency is "bound by [its] regulations unless and until it repeals or amends the regulation[s] ... just as the public is bound by them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010).

³⁶ Again, this does not mean that Mr. W's children must forever forfeit their 2015 PFDs. As mentioned above, pursuant to 15 AAC 23.133(b), (c), Mr. W's children may reapply for the 2015 PFD during the two year period between their 18th and 20th birthdays.

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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 28th day of June, 2016.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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