

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

In the Matter of)	
)	
E T)	OAH No. 17-0826-PFD
_____)	Agency No. 2016-067-1676

DECISION

I. Introduction

E T applied for a 2016 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (“Division”) denied her application, because it was postmarked after the March 31, 2016 deadline. Ms. T filed a late request for informal appeal, which the Division denied based on both its untimely filing and the late postmark on her application. She then filed a timely request for a formal hearing, which was held on September 5, 2017. Ms. T participated by telephone, and PFD specialist Bethany Thorsteinson represented the Division and also participated by telephone. The Division moved to dismiss the case, based on the lateness of her informal appeal request. The Division’s motion is granted. In addition, the denial of Ms. T’s PFD is affirmed on the merits.

II. Procedural background

The Division sent Ms. T a letter dated May 20, 2016, providing notice that her 2016 PFD application was denied.¹ Subsequently, Ms. T did not file a request for informal appeal, the required first step in the PFD appeal process, until December 27, 2016,² approximately 191 days after the June 19, 2016 deadline. The Division eventually denied her informal appeal on June 21, 2017, based in part on the lateness of her informal appeal request.³ Ms. T then filed a timely formal appeal.⁴

The hearing was held on September 5, 2017. After both sides presented their evidence and arguments during the hearing, Ms. T requested additional time to present evidence that she said was unavailable to her prior to the hearing. Therefore, it was agreed that the record would

¹ Exh. 2.
² Exh. 4.
³ Exh. 9, p. 1.
⁴ Exh. 10.

be kept open for about a month, until October 4, 2017, to give her an opportunity to obtain the desired evidence and submit it to the administrative law judge (ALJ).⁵

Later in September, while the record was still open, Ms. T contacted the Office of Administrative Hearings (OAH) and spoke with OAH staff regarding her problems obtaining evidence. Accordingly, the ALJ held a status conference with Ms. T and Ms. Thorsteinson on September 28, 2017. After a lengthy discussion regarding the evidence already presented in the case and the additional evidence she had been trying to obtain, Ms. T stated that she no longer wished to present any new evidence.⁶ Ms. T consented to the record being closed at that time; the ALJ explicitly confirmed her consent to the closing of the record at the end of the status conference, which was audio recorded.

Subsequently, Ms. T contacted OAH staff again and requested another opportunity to speak with the ALJ. Another status conference was held on October 27, 2017, with both Ms. T and Ms. Thorsteinson appearing by telephone. Ms. T stated that she had changed her mind, and she strenuously requested that the record be reopened so that she could obtain subpoenas and serve them on the U.S. Postal Service, to obtain information relating to the postmarking of her PFD application on April 1, 2016. Over the Division's objection, the record was reopened until December 15, 2017. A written order was issued to that effect, and it explicitly stated that Ms. T would be allowed to submit subpoenas to the ALJ that would "be issued if they are narrowly tailored to issues pertinent to the postmarking of her PFD application."⁷

Ms. T, however, never submitted any subpoenas for issuance by the ALJ.⁸ The record was closed on December 15, 2017.

III. Facts

Ms. T's 2016 PFD application was denied because it was postmarked April 1, 2016, one day after the March 31, 2016 deadline.⁹ Pertinent to this issue, Ms. T testified that she filled out

⁵ September 5, 2017 Scheduling Order. Ms. T indicated that she wanted to present, among other things, (a) an audio recording of a conversation she'd had with a postal service manager, but the recording was on her computer that was in the custody of the Alaska State Troopers, and (b) a letter from her doctor describing her mental health disability and how it prevented her from timely filing her PFD application.

⁶ Ms. T said that she felt that she had already presented sufficient evidence regarding the postal service postmarking issue, and that she had decided not to obtain a letter regarding her disability from her doctor, because she was physically capable of timely delivering her application to the Division.

⁷ October 27, 2017 Scheduling Order.

⁸ Instead, on or about December 15, 2017 Ms. T submitted about 250 pages of documents which were either irrelevant to the issues presented for decision, or were duplicates of documents already in the record.

⁹ Exh. 1, p. 3 (copy of envelope showing April postmark in Anchorage, Alaska). It is undisputed that the application was postmarked April 1, 2016; on the copy submitted as an exhibit one cannot read the full date, but the

her application on the day of the deadline, and she gave it to her friend E M to mail it for her.

Ms. M wrote a letter on Ms. T's behalf for this appeal, stating as follows:

I am notoriously always running last minute with my dividend applications! ... I went to work – of course running late as usual so could not take to post office in the a.m. I took my lunch break around 12:45 – 1:45 and that is when I dropped E's mail off at the No Name Post Office, her dividend application. I have no receipts – I already had stamps, dropped her application inside the mail box on the [sic] in the No Name Post Office on the 31st of March.^[10]

Ms. T testified that she was later informed by postal service employees that the No Name post office collects mail that is deposited after about 2:00 p.m. in its outside mailboxes and sends it out to be processed and postmarked in Anchorage. She also acknowledged that there is a sign posted outside of the No Name post office informing customers that mail deposited in outside mailboxes will be processed in Anchorage. Ms. T, however, never provided any written documentation from the postal service regarding its general mail-handling practices or its processing of mail on March 31, 2016.

IV. Discussion

A. Ms. T's untimely informal appeal

As mentioned above, the Division filed a motion to dismiss Ms. T's formal appeal, based on the fact that she had filed her informal appeal 191 days past the deadline. In her informal appeal filings, Ms. T presented a somewhat rambling explanation for the lateness of her appeal request; the primary reasons that can be discerned for her late filing are as follows: (1) she "did not receive the appeal form until after the 30 day filing date, as [she] was not aware that there was a problem with [her] PFD...;" and (2) she had been previously represented by an attorney in a conservatorship proceeding who had "assured [her] that he was going to take care of the appeal," and that "after waiting over two months" the attorney advised her that he would not be able to assist with the PFD appeal.¹¹ Throughout the subsequent formal appeal process, Ms. T submitted no additional evidence or argument regarding the lateness of her informal appeal.

The Division's regulations require that informal appeal requests must be filed within 30 days after the denial notice, and further that late appeals will not be accepted "unless the

month "APR" is clearly visible. Ms. Thorsteinson testified credibly that the original envelope showed a postmark of April 1, 2016, and her testimony was accepted by the ALJ.

¹⁰ Exh. 4, pp. 4-5. Ms. T testified that she chose not to have Ms. M testify at the hearing because she didn't want to interrupt Ms. M's work day. At the September 28, 2017 status conference, Ms. Thorsteinson confirmed that the Division did not dispute the facts recited in Ms. M's letter.

¹¹ Exh. 4, p. 1.

individual demonstrates a reasonable cause for failure to file within this period.”¹² The Division’s position here is that Ms. T failed to demonstrate that her informal appeal request forms were late due to any reasonable cause, because she failed to show that she “truly experienced personal circumstances beyond [her] control that have clearly resulted in the late appeal request.”¹³

The Division is correct - neither of Ms. T’s justifications justify the late filing. The first justification, that she allegedly didn’t “receive” the appeal form in a timely manner, appears to incorporate the false assumption that the 30-day clock would not start running until someone provided the informal appeal form to her.¹⁴ Notably, Ms. T does not allege that the Division sent her denial notice to an incorrect address; in fact, it appears that she simply failed to pick up her mail for a lengthy period of time. Once Ms. T’s PFD application was denied, the 30 days started to run, and it was incumbent on her to timely file the informal appeal within that timeframe, absent some extraordinary circumstance that may have prevented her from doing so. Failure to “receive” the appeal form is not such a circumstance.

As to Ms. T’s second justification, that her former attorney had promised to help her with her PFD appeal, there are several problems. First, she failed to provide any further explanation, elaboration, or supporting evidence on this issue during the formal hearing. Second, Ms. T’s advocacy on her own behalf during the formal hearing process demonstrated that she was capable of handling her appeal without the aid of an attorney. Third, and most importantly, documents in the record demonstrate that her attorney was not appointed to represent her in the conservatorship proceeding until September 6, 2016, about two and a half months after the informal appeal deadline.¹⁵ Thus, even if the attorney promised to help her with this appeal, this justification fails to address why Ms. T was prevented from timely filing her informal appeal prior to the June 19, 2016 deadline.

Based on Ms. T’s failure to demonstrate “a reasonable cause for failure to file within [the 30-day informal appeal] period,” as required by the regulations,¹⁶ the Division’s motion to

¹² 15 AAC 05.010(b)(5). An additional regulation allows the ALJ to relax the filing deadline “if it appears to the officer that strict adherence to the deadline or requirement would work an injustice.” 15 AAC 05.030(k).

¹³ Division’s motion to dismiss, p. 3.

¹⁴ It is the Division’s standard practice to provide informal appeal forms to a PFD applicant along with the letter giving notice of denial of their application.

¹⁵ Exh. 3, p. 2.

¹⁶ 15 AAC 05.010(b)(5).

dismiss her appeal is granted. Even if the motion were denied, however, Ms. T's formal appeal would fail on the merits, as further discussed below.

B. Ms. T's untimely PFD application

Although the Division did not dispute the facts presented by Ms. T regarding the mailing of her application on March 31, 2016, the Division disputed the legal import of those facts. In essence, the Division argued that even if all of Ms. T's factual assertions were true, her 2016 PFD application was still correctly denied.

The Division's regulations regarding the timely filing of PFD applications leave no room for misunderstanding or misinterpretation. A person's application "must be received by the department or postmarked during the application period ... to be considered timely filed."¹⁷ This regulation makes it clear that simply placing an application in the mailbox on March 31 does not amount to timely filing of the application. To further ensure that there can be no misunderstanding or misconstruing of this requirement, the regulation goes on to state as follows:

It is an individual's responsibility to ensure that an application is timely delivered to the department. 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. The department will deny a paper application postmarked after the application period, unless the individual provides the department with an official statement from the United States Postal Service ... that describes the specific circumstances under which the postal service incorrectly posted the individual's application or caused a delay in posting.^[18]

Read together, these provisions of the Division's regulation at 15 AAC 23.103 mean that it was Ms. T's responsibility to ensure that her application was postmarked no later than March 31, 2016 in order to receive her 2016 PFD.

During the September 5, 2017 hearing, as well as the subsequent status conferences, Ms. T focused on the fact that her application was dropped in the mailbox at the No Name post office before 2:00 p.m. on March 31; she argued that she was told that the postal service's policy is that only mail dropped after 2:00 p.m. will be sent on to Anchorage before being postmarked, and therefore it must have been postal service error that caused her application to be postmarked on April 1. She fervently and repeatedly asserted that her argument should fulfill the requirement of

¹⁷ 15 AAC 23.103(a).

¹⁸ 15 AAC 23.103(g) (emphasis added).

the regulation quoted above, that “the postal service incorrectly posted the individual's application or caused a delay in posting.”¹⁹ The Division responded to this argument by pointing out that the postal service was simply following its standard operating procedure of sending mail in batches to Anchorage for processing and postmarking, and that this is a far cry from the postal service committing error in its handling of Ms. T’s application.

However, regardless of whether the postal service committed mail-handling error, as asserted by Ms. T, or was simply following its standard mail-handling practices, as argued by the Division, Ms. T’s failure to submit a written statement from the postal service is fatal to her claim. The regulation clearly and explicitly states that “[t]he department **will deny** a paper application postmarked after the application period, unless the individual provides the department with an official statement from the United States Postal Service ... that describes the specific circumstances under which the postal service incorrectly posted the individual's application or caused a delay in posting.”²⁰ This language means that without the required official postal service statement, the regulation gives the Division absolutely no discretion to grant an application postmarked after the deadline.

As previously discussed, the record was kept open for a lengthy period, over the Division’s objection, to allow Ms. T to obtain subpoenas and serve them on the postal service, in order to obtain an official written statement regarding the April 1, 2016 postmarking of her PFD application. Presumably Ms. T made this request after being unable to persuade postal service officials to provide a written statement to her. In any event, for unknown reasons Ms. T failed to submit any subpoenas to the ALJ. In the absence of a written statement from the postal service describing “incorrect posting” or a “delay in posting,” i.e., postal service error, the applicable regulations provide the Commissioner of Revenue no discretion to grant Ms. T’s appeal.

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Id.

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Id. (emphasis added).

V. Conclusion

Ms. T’s formal appeal of the denial of her 2016 PFD is dismissed due to her untimely filing of her informal appeal. In addition, the Division’s denial of her PFD is affirmed on the merits, based on the postmarking of her 2016 application after the March 31, 2016 deadline.

DATED: January 16, 2018.

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 9th day of February, 2018.

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

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