

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

In the Matter of	)	
	)	
H B S	)	OAH No. 20-0843-PFD
	)	Agency No. 2019-014-8386
<u>2019 Permanent Fund Dividend</u>	)	

**I. Introduction**

H B S applied for a 2019 Permanent Fund Dividend (PFD). At the time of her application, she was in the process of seeking permanent residency in the U.S., having originally come to Alaska from the Philippines in 2015. The Permanent Fund Dividend Division (Division) sought additional information to confirm that she sufficiently established residency ties to Alaska prior to January 1, 2018. Although additional information and documentation was provided, Mrs. S’s application for a PFD was denied for failure to prove that she timely established Alaska residency.

Mrs. S then requested an informal appeal. Although additional documentation was provided, her informal appeal was also denied on the same basis as her original application. Following that, she then requested a hearing by written correspondence. That request was received 166 days past the deadline.

The Division seeks to dismiss this appeal because of her untimely hearing request. It also contends that she failed to sufficiently establish timely residency ties to Alaska to be eligible for the 2019 PFD.

This decision rejects the Division’s motion to dismiss based on untimeliness of Mrs. S’s formal hearing request. Further, based on a totality of the evidence and documentation presented, Mrs. S has met the eligibility requirements entitling her to a 2019 PFD. The Division’s denial of her 2019 PFD application is REVERSED.

**II. Facts**

Mrs. S filed an electronic 2019 PFD application on January 21, 2019.<sup>1</sup> With her application, she also supplied supplemental information. Her application and this supplemental information explained that while she was not a U.S. Citizen, she originally came to the U.S. on a K-1 fiancé visa and had married her husband, D S, a resident of Alaska and the United States, in

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<sup>1</sup> Exs. 1 and 2.

August 2015.<sup>2</sup> She had resided in Alaska since her arrival in May 2015 and was living in a home owned by the couple in City A, Alaska.<sup>3</sup> She also provided an explanation for her absences during the 2018 qualifying year.<sup>4</sup> She explained that after originally applying for permanent residency with the United States Citizenship and Immigration Services (USCIS) in 2015, her application was initially denied because her processing payment was incorrect and also, she and her husband had not been married within the requisite time-frame. All of this forced her to reapply for permanent residency status in August 2018.<sup>5</sup> In addition to this explanation, Mrs. S also supplied extensive documentation of her ties to Alaska, including a birth certificate for a child born to her and her husband in City A, Alaska on August 14, 2016,<sup>6</sup> and utility, license, and financial records showing that she had been residing in Alaska for several years.<sup>7</sup>

The Division subsequently requested additional immigration status information and documentation from Mrs. S.<sup>8</sup> This was promptly provided.<sup>9</sup> As Mrs. S explained, she no longer possesses a copy of the USCIS application documentation because it was all provided to the USCIS itself. However, she does possess and did provide copies of notices and confirmations received from USCIS via email, showing beyond question that she applied for both permanent residency and employment authorization with USCIS in the summer of 2017 and proceeded with follow-up appointments to pursue those two applications.<sup>10</sup>

Following submission of this documentation, the Division denied Mrs. S's application on September 20, 2019, citing her insufficient residency ties prior to January 1, 2018.<sup>11</sup> As a result of the denial, Mrs. S filed a timely request for informal appeal.<sup>12</sup> In doing so, she supplied additional supporting documentation, including more evidence of having used the City A address as her home.

Ultimately, Mrs. S's informal appeal was denied by the Division on March 23, 2020 on

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<sup>2</sup> Ex. 1, pp. 1, 3, and 4; Ex. 3.

<sup>3</sup> Ex. 1, p. 4; Ex. 3.

<sup>4</sup> Ex. 1, p. 3; Ex. 3, p. 2. Mrs. S explained that her and her husband travel out-of-state for several months in the winter to visit her husband's son in Washington state and to attend sport shows. The Division has not alleged that these absences exceed those statutorily allowed to PFD applicants.

<sup>5</sup> Ex. 3.

<sup>6</sup> Ex. 3, p. 3.

<sup>7</sup> *E.g.*, Ex 3, p. 9; *see also* Ex. 9, p. 5.

<sup>8</sup> Ex. 5.

<sup>9</sup> Ex. 6.

<sup>10</sup> Ex. 6, pp. 2-8.

<sup>11</sup> Ex. 8.

<sup>12</sup> Ex. 9.

the same basis as her original denial.<sup>13</sup> Her subsequent request for a formal hearing was not dated until September 30, 2020, and was not received by the Division until October 5, 2020, or 166 days past the request for formal hearing deadline. In her request, Mrs. S sought a hearing by written correspondence.<sup>14</sup>

### III. Discussion

In determining whether Mrs. S is entitled to a 2019 PFD, there are two issues for analysis. First, does reasonable cause exist to justify accepting her request for a formal hearing 166 days after the deadline? Second, has Mrs. S demonstrated that she sufficiently established residency ties to Alaska prior to January 1, 2018? Mrs. S prevails on both issues.

#### A. Reasonable Cause for Late Appeal

The appeal notice to Mrs. S in the Division's informal appeal decision is flawed in the manner it notifies her of the ability to request a formal hearing. Because of this, reasonable cause exists for her late-filed request for formal hearing.

Per 15 AAC 05.010(b)(5), a request for appeal must be filed within 30 days of a notice of disallowance unless reasonable cause for the failure is shown.<sup>15</sup> This deadline is waivable by the administrative law judge on the similar but perhaps not identical basis that adhering to it would "work an injustice."<sup>16</sup> Generally, "waivers have been available where confusing circumstances, particularly if contributed to by the Division, were a factor in the delay in starting an appeal..."<sup>17</sup> Though not addressing adherence to or waiver of deadlines, an Alaska statute specifies what must be done to appeal a decision from the Division regarding PFD eligibility. Specifically, AS 43.23.015(g) provides:

[i]f an individual is aggrieved by a decision of the department determining the individual's eligibility for a permanent fund dividend or the individual's authority to claim a permanent fund dividend on behalf of another, the individual may, upon payment of a \$25 appeal fee, request the department to review its decision.<sup>18</sup>

The law further provides that when interpreting statutes like this, which allow for the review of

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<sup>13</sup> Ex. 11.

<sup>14</sup> Ex. 12, p. 1.

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

<sup>16</sup> 15 AAC 05.030(k). The regulation appears to delegate the decision to the ALJ hearing the case.

<sup>17</sup> *In re D.E.*, OAH No. 16-1348-PFD (Commissioner of Revenue, January 2017)(available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5751>).

<sup>18</sup> AS 43.23.015(g).

decisions, they must be construed with strict fidelity to their terms.<sup>19</sup>

The Division has previously been alerted to problems regarding the appeal language contained in its denial notices.<sup>20</sup> Here, the Division appears to place some weight on the fact that Mrs. S never asserted that she possessed reasonable cause for her late filed hearing request.<sup>21</sup> But, her failure to assert reasonable cause does not cure the notice deficiencies.

Based on a plain reading of the appeal statute, all an applicant must do to secure their right to appeal is make a request and submit the appeal fee.<sup>22</sup> However, that is not what the Division's informal appeal decision suggests. Instead, it instructs that:

**If either the facts or the application of the law is incorrect; a Request for Formal Hearing Form must be completed and postmarked, or received by the Permanent Fund Dividend Division within 30 days of this decision (form enclosed).**

**You are also encouraged to provide the following additional documentation, either with your Request for Formal Hearing or submitted at a later date, in order to help us evaluate and resolve your appeal.**

**Provide proof you established Alaska residency, in your name, by submitting sufficient evidence that proves you formed an acceptable residence tie to Alaska prior to January 1, 2018.**<sup>23</sup>

The problem with the Division's notice is that it attempts to link an applicant's right to appeal with a requirement that the applicant also determine that the facts or the law in the decision are incorrect. The notice also implies a need for the applicant to supply additional documentation.<sup>24</sup>

However, contrary to what the Division's notice suggests, even if the Division is correct in its recitation of the law and facts, an applicant still possesses a right to appeal. In such a circumstance, an applicant may even prevail on an appeal, because the Division might have erred in its analysis or in its application of the law to the facts.

The appeal statute also does not mention a need by the applicant to submit further proof

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<sup>19</sup> *Stone v. I.N.S.*, 514 U.S. 386 (1995).

<sup>20</sup> *In re D. Q-E.*, OAH No. 20-0254-PFD (Commissioner of Revenue, June 2020)( available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=6601>) at 4-6; *In re L.P.*, OAH 20-0350-PFD (Commissioner of Revenue, June 2020)(available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=6599>) at 4-7.

<sup>21</sup> *See generally*, Motion to Dismiss Late Appeal Request/Position Statement, dated October 23, 2020, at 3.

<sup>22</sup> AS 43.23.015(g).

<sup>23</sup> Ex. 11, p. 3 (emphasis in original).

<sup>24</sup> Ex. 11, p. 3.

or evidence to confirm their entitlement to a hearing.<sup>25</sup> Instead, all that an applicant is required to do is pay the necessary fee and submit an appeal request.<sup>26</sup> Here, the notice says “you are encouraged” to provide additional documentation to assist the Division.<sup>27</sup> While it does not literally require the additional documentation and does not tell the applicant that they will lose if they don’t provide it, it does imply as much.

It is also problematic because it states that the additional documentation is to help “us evaluate and resolve your appeal.”<sup>28</sup> This wrongly suggests it is the Division who resolves factual and legal issues at the formal hearing stage, rather than the Office of Administrative Hearings. This is troubling because it infers that the Division, who already denied their PFD application, and denied their informal appeal, will also decide the factual and legal issues at the applicant’s formal hearing. This could have a chilling effect on those wishing to seek a formal hearing.

Based on these shortcomings, the Division’s hearing request notice is flawed in that an applicant may reasonably construe that it takes more to initiate an appeal than is practically or legally required. The notice language also wrongly suggests that it is the Division who may be the ultimate arbiter of the dispute. Due to these problems, the notice may act as an improper deterrent to appeals.

Because the Division’s informal appeal decision misinformed Mrs. S regarding what was required to perfect her formal hearing request, reasonable cause exists for extension of the deadline *on that basis alone*. Further, based on these same facts, enforcement of the deadline would, more likely than not, work an injustice. Accordingly, the Division’s motion to dismiss Mrs. S’s late-filed formal hearing request is denied and the case will be considered on the merits.

*B. Evidence of Mrs. S’s Alaska Residency Prior to January 1, 2018*

One does not need to be a United States citizen to receive a PFD. Aliens are also eligible to receive a PFD if they are 1) lawfully admitted for permanent residence in the United States; 2) an alien with refugee status; or 3) an alien granted asylum under federal law.<sup>29</sup> An alien who has not yet been granted permanent residence in the United States may

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<sup>25</sup> AS 43.23.015(g).

<sup>26</sup> AS 43.23.015(g).

<sup>27</sup> Ex. 11, p. 3.

<sup>28</sup> Ex. 11, p. 3.

<sup>29</sup> AS 43.23.005(a)(5).

also be eligible to receive a PFD if she “has taken a significant step to convert or adjust to a permanent or indefinite status. *A significant step includes the filing of a petition or an application with the USCIS.*”<sup>30</sup> In essence, an alien cannot show the required intent to remain indefinitely until taking some step towards obtaining permanent residency status.

The qualifying year for the 2019 PFD was 2018.<sup>31</sup> To be eligible for the 2019 PFD, Mrs. S must show that she was an Alaska resident during all of the qualifying year.<sup>32</sup> To be an Alaska resident, she must intend to remain in Alaska indefinitely.<sup>33</sup> Therefore, Mrs. S has the burden of proof in showing, by a preponderance of the evidence, that she took significant steps to obtain permanent status prior to January 1, 2018.<sup>34</sup>

The documentary evidence strongly corroborates Mrs. S’s written assertions that her home is in Alaska.<sup>35</sup> She moved to Alaska in 2015 on a K-1 fiancé visa,<sup>36</sup> married her husband, an Alaska resident, in 2015,<sup>37</sup> where they continue to reside and own a home.<sup>38</sup> She originally applied for permanent residency status in Alaska and the United States on June 15, 2017.<sup>39</sup> Not only did she apply for permanent residency status in the United States in 2017, but she took the second step of seeking employment authorization the same year,<sup>40</sup> and attended follow-up appointments.<sup>41</sup>

Mrs. S and taken multiple important steps, before January 1, 2018, in establishing Alaska as her permanent residence. While Mrs. S failed to succeed at her permanent residency application on her first attempt in 2017, the regulations do not require that she have obtained permanent residency status to receive a PFD. Instead, they simply require that she have taken significant steps in that regard, including having filed a petition or an application with the USCIS.<sup>42</sup>

It is true that any one of the above-referenced steps, in and of itself, might have been

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<sup>30</sup> 15 AAC 23.154(d) (emphasis added).

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

<sup>32</sup> AS 43.23.005(a)(3).

<sup>33</sup> AS 43.23.095(7).

<sup>34</sup> 15 AAC 05.030(h).

<sup>35</sup> Ex. 1, p. 4.

<sup>36</sup> Ex. 6, pp. 7-8.

<sup>37</sup> Ex. 1, pp. 1, 3, and 4; Ex. 3.

<sup>38</sup> Ex. 1, p. 4.

<sup>39</sup> Ex. 6, p. 6.

<sup>40</sup> Ex. 6, p. 4.

<sup>41</sup> Ex. 6, pp. 5-6.

<sup>42</sup> 15 AAC 23.154(d) (emphasis added).

insufficient to reach the conclusion that Mrs. S has taken sufficient steps prior to January 1, 2018 to establish Alaska residency. However, when the evidence is analyzed as a whole, it convincingly demonstrates that she intended to remain in Alaska indefinitely prior to that date.

#### **IV. Conclusion**

The Division's motion to dismiss the appeal on grounds of untimeliness of Mrs. S's hearing request is DENIED. Applying the appeal deadline in these circumstances is unreasonable and would work an injustice because the Division's notice was flawed. Further, Mrs. S has also established Alaska residency prior to January 1, 2018, entitling her to a 2019 PFD. Accordingly, the Division's denial of her 2019 PFD application is REVERSED.

DATED December 28, 2020.

By Signed \_\_\_\_\_  
Z. Kent Sullivan  
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 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 20<sup>th</sup> day of January, 2021.

By: Signed \_\_\_\_\_  
Signature  
Z. Kent Sullivan \_\_\_\_\_  
Name  
Administrative Law Judge \_\_\_\_\_  
Title

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