

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

In the Matter of)	
)	
B A)	OAH No. 20-0966-PFD
)	Agency No. 2018-040-6261
<u>2018 Permanent Fund Dividend</u>)	

DECISION

I. Introduction

The Permanent Fund Dividend Division denied B A’s application for a 2018 permanent fund dividend (PFD) because she failed to demonstrate she was an Alaska resident for PFD purposes during the qualifying year. Further, because she submitted her request for an informal hearing 526 days past the deadline, the Division filed a motion to dismiss her appeal due to untimeliness.

A telephonic hearing was held. Ms. A testified and offered evidence, as did the Division. Because the Division’s notice of the procedures for filing an appeal are misleading, the Division’s motion to dismiss for untimeliness is rejected. The evidence and testimony, however, showed that Ms. A did not qualify because she moved from Alaska during the qualifying year and did not have the requisite intent to return. Therefore, the Division’s denial of Ms. A’s 2018 PFD application is affirmed.

II. Facts

Ms. A’s application history spans three years, beginning in 2016 and ending with the application at issue, filed on-line on March 5, 2018.¹ The application was filed from City A, Utah, listed her mailing and physical address as City A, Utah, indicated that she was not in Alaska at the time of filing, and had been absent from Alaska for 90 days. Under the absence section, it said that she had been gone from Alaska for 104 days, beginning on September 18, 2017. In the explanation for her 104 days of absence, she indicated that she “left for the winter.”² She also answered “no” to the question regarding whether she was returning to Alaska and included the following explanation as to why: “Staying out of Alaska for a year or more due to my sister having a baby and to be with family.”³

¹ Ex. 1.
² *Id.* at 4-5.
³ *Id.* at 3.

Ms. A’s application was originally denied on August 31, 2018.⁴ The notice of denial specified that to have it reversed, the Division must receive a request for informal appeal, together with separately specified items of “proof,” all by September 30, 2018.⁵ Ms. A emailed several documents to the Division more than seven months afterwards.⁶ These documents were treated by the Division as an ‘attempt’ to request and informal appeal. As a result, it mailed her another letter with specific instructions on how to submit a request for formal appeal and provided a 15-day response deadline.⁷ When that deadline passed, the Division sent out a notice advising Ms. A that her request for informal appeal was invalidated because she failed to submit the proper form, and appeal fee or waiver request.⁸

The Division’s next contact with Ms. A occurred 343 days later when she mailed a request for informal appeal to the Division together with the \$25 appeal fee.⁹ Although her first informal appeal attempt was invalidated by the Division, this second submission was processed and the Division entered an informal appeal decision, denying her appeal request on the basis that her appeal rights had expired. The informal appeal decision specified that to have it reversed, the Division must be provided a request for formal hearing, together with two separately specified items of “proof,” all by May 30, 2020.¹⁰

Following another delay of 215 days, Ms. A submitted several additional documents, including a request for formal hearing. The request was made 185 days after the formal appeal deadline.¹¹

At the hearing, Ms. A testified that she filled-out the PFD application because it was her understanding that if you live in Alaska nine out of 12 months during the year, you remain eligible to receive a PFD. As such, she was under the impression that even if she moved, as long as she was in Alaska for the requisite period of time during the qualifying year, she would still remain eligible. That is why she applied for the PFD, and why she responded to the application questions the way she did, despite having moved from Alaska by the time of her application. She also testified that she had a great deal of confusion regarding how to file her informal

⁴ Ex. 2.
⁵ Ex. 2, p. 2.
⁶ Ex. 3.
⁷ Ex. 4 at 1.
⁸ Ex. 4 at 2.
⁹ Ex. 5.
¹⁰ Ex. 6.
¹¹ Ex. 8.

hearing and formal hearing requests and the information sought by the Division. She said she tried repeatedly to get in touch with Division representatives, both by telephone and mail, and struggled to get in touch with them and obtain clarification regarding the evidence the Division required. She testified this is why her appeal requests were late.¹²

Following the hearing, the record was kept open to allow Ms. A and the Division to submit additional documentation. This documentation was marked by the Division and included as part of the record.¹³ The record in this case is now complete and it is ripe for ruling.

III. Discussion

In determining whether Ms. A is entitled to a 2018 PFD, there are two issues to address. First, does reasonable cause exist to justify accepting her request for a formal hearing 185 days after the deadline? Second, has she demonstrated the requisite intent to indefinitely remain an Alaska resident for purposes of 2018 PFD eligibility? While she prevails on the first issue, Ms. A fails as to the second issue.

A. Reasonable Cause for Late Appeal

As explained below, the Division included a flawed notice of the right to appeal in its informal appeal decision. The notice misstates the circumstances under which a person may 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.¹⁴ 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.”¹⁵ 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.”¹⁶

The requirements for filing an appeal are clearly stated in AS 43.23.015(g):

[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

¹² Testimony of Ms. A.

¹³ Ex. 9.

¹⁴ 15 AAC 05.010(b)(5).

¹⁵ 15 AAC 05.030(k). The regulation appears to delegate the decision to the ALJ hearing the case.

¹⁶ *In re D.E.*, OAH No. 16-1348-PFD, p. 4 (Dep't of Rev., January 2017) (available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5751>).

department to review its decision.¹⁷

Statutes that set procedures for the review of decisions must be construed with strict fidelity to their terms.¹⁸

The Division has previously been alerted to concerns regarding the appeal language contained in its denial and informal appeal decision notices.¹⁹ Based on a plain reading of the appeal statute and its interpreting regulation, all an applicant must do to secure his or her right to appeal is make a request, submit the appeal fee, and state the grounds for the appeal or objection.²⁰ 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 (copy 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.

- Proof that you mailed or delivered your Request for Informal Appeal on or before October 1, 2018, or that there is a reasonable cause to accept your late filed appeal.
- Proof you met all eligibility requirements for the 2018 PFD.²¹

The problem with the Division's notice is that it adds new conditions to an applicant's right to appeal. It links an applicant's right to appeal with a requirement that the applicant also conclude that the facts or the application of the law in the decision are incorrect. While an applicant does need to state the grounds for his or her appeal, that is not the same as requiring an applicant to first conclude that the decision's "facts or the application of the law" are incorrect before an appeal is appropriate.²² This is because contrary to what the Division's notice suggests, even if the Division is correct in its recitation of the facts or application of the law, it still may have reached the wrong decision. For instance, it may have failed to consider *all*

¹⁷ AS 43.23.015(g).

¹⁸ *Stone v. I.N.S.*, 514 U.S. 386 (1995).

¹⁹ *In re D. Q-E.*, OAH No. 20-0254-PFD, pp. 4-6 (Dep't of Rev., June 2020) (available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=6601>); *In re L.P.*, OAH 20-0350-PFD pp. 4-7 (Dep't of Rev., June 2020) (available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=6599>).

²⁰ AS 43.23.015(g); 15 AAC 05.010(a)(2).

²¹ Ex. 6, pp. 1-2 (emphasis in original); *See also*, Ex. 2, pp. 1-2.

²² Ex. 6, p. 2.

necessary facts or applicable law, it may have improperly weighed consideration of certain facts or law, or it might have simply reached the wrong outcome for whatever reason. Irrespective, an applicant still has a right to appeal. In such a circumstance, an applicant may even prevail on an appeal, because an Administrative Law Judge may conclude the Division erred in its analysis or in its application of the law to the facts.

Based on this, requiring an applicant to generally state the grounds for an appeal is wholly different and distinct from imposing a requirement that they must first conclude that the Division's facts or application of the law are incorrect. The latter is not required anywhere in statute or regulation and it is inappropriate for the Division's notice to suggest that such an obligation exists before an applicant can appeal from a Division decision.

The notice is also problematic because it states that the additional documentation is to help "us evaluate and resolve your appeal."²³ This wrongly suggests that 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 implies that the Division, who already denied the PFD application, and denied the 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 informal appeal decision notice is flawed in that an applicant may reasonably construe that it takes more to request a formal hearing 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 concerns the notice may act as an improper deterrent to appeals.

The Division asserts, among other things, that Ms. A has not demonstrated good cause for her late appeal request.²⁴ But, she testified that she had a great deal of confusion regarding how to file her informal and formal hearing requests, including as to the facts alleged the documents and about the information requested by the Division. She also testified that she tried repeatedly to get in touch with Division representatives seeking clarification of these issues but was unable to do so.²⁵

²³ Ex. 6, p. 2.

²⁴ Division Motion to Dismiss Appeal Request, December 30, 2020, at pp. 2-3.

²⁵ Testimony of Ms. A.

Because the Division's informal appeal decision misinformed Ms. A regarding what was required to perfect her formal hearing request, reasonable cause exists for extension of the deadline. Accordingly, the Division's motion to dismiss Ms. A's late-filed formal hearing request is denied and the case will be considered on the merits.

B. Evidence of Ms. A's Alaska Residency Prior to January 1, 2018

As Ms. A testified, she was under the belief that if she maintained her residence in Alaska for a sufficient length of time during the qualifying year, she would continue to remain eligible for a PFD.²⁶ However, such a belief is mistaken. It confuses the required intent to remain an Alaska resident throughout the qualifying year with certain statutory absences allowed to Alaska residents for PFD purposes per AS 43.23.008.

The qualifying year for the 2018 PFD was 2017.²⁷ To be eligible for the 2018 PFD, Ms. A must show that she was an Alaska resident during *all of the qualifying year*.²⁸ To be an Alaska resident, she *must intend to remain in Alaska indefinitely*.²⁹ Therefore, Ms. A has the burden of proof in showing, by a preponderance of the evidence, that she was and continued to be an Alaska resident prior to January 1, 2018.³⁰ Per 15 AAC 23.143:

- (a) An individual's intent to establish residency, remain indefinitely in Alaska, or to return to Alaska and remain indefinitely is demonstrated through the establishment and maintenance of customary ties indicative of Alaska residency and the absence of those ties elsewhere. Acts that are required by law or contract or are routinely performed by temporary residents of Alaska are not by themselves evidence of residency. In evaluating whether an individual claiming Alaska residency has demonstrated an intent to remain indefinitely in Alaska, the department will consider whether or not an individual has:
 - (1) taken steps to establish Alaska residency and sever residency in a previous state or country;
 - (2) ties to another state or country that indicate continued residency in the other state or country; and
 - (3) taken other action during the qualifying year, through the date of application, that is inconsistent with an intent to remain in Alaska indefinitely.

In this instance, the testimony and documentary evidence fail to support any suggestion

²⁶ Testimony of Ms. A.

²⁷ AS 43.23.295(6).

²⁸ AS 43.23.005(a)(3) (emphasis added).

²⁹ AS 43.23.295(7).

³⁰ 15 AAC 05.030(h).

that Ms. A's continued to maintain her Alaska residency after moving from the state in September 2017. Instead, her PFD application and her testimony indicate she had no specific intent to return to Alaska after her move.³¹ She also testified that she took steps to secure long-term employment out-of-state before she left and continued that full-time employment after leaving.³² Under the regulation, her move from Alaska, lack of specific intent to return, and her actions regarding employment mean that Ms. A is not eligible for the 2018 PFD.

IV. Conclusion

The Division's motion to dismiss the appeal on grounds of untimeliness of Ms. A'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. However, because Ms. A moved from Alaska during the qualifying year and failed to maintain the requisite intent to remain indefinitely, the Division's decision denying her application for a 2018 Permanent Fund Dividend is AFFIRMED.

DATED this 25th day of February, 2021.

By: Signed _____
Z. Kent Sullivan
Administrative Law Judge

³¹ Ex. 1, p. 3. Ms. A did testify, however, that she ultimately intended to return to Alaska at some point. But it is important to avoid confusing intent with desire. To a great extent, that is what the PFD statutes and regulations accomplish. *See In re R.M.*, OAH No. 09-0147-PFD at p. 2 (Dep't of Rev., Aug. 2009) (available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=5352>).

³² Testimony of Ms. A.

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 18th day of March, 2021.

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

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