

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

In the Matter of	)	
	)	
X & D K and	)	
W K (minor)	)	OAH No. 19-0155-PFD
	)	Agency Nos. 2018-066-
<u>2018 Permanent Fund Dividends</u>	)	8406/8407

**DECISION**

**I. Introduction**

The 2018 Permanent Fund Dividend (PFD) applications for D K, X K, and their young daughter W K arrived at the Department of Revenue six days after the application period had closed, bearing a postmark four days after the deadline. The Permanent Fund Dividend Division has denied the applications on the basis of untimeliness. Mr. and Mrs. K filed informal appeals for themselves (but not for W), and the Division upheld its prior denials.

Mr. and Mrs. K requested a formal hearing for all three applications. A hearing was held on April 5, 2019. Each of the adults testified at the hearing.

After considering the evidence available, the only honest conclusion that can be reached is that X and D K's applications were probably mailed too late to meet the filing deadline. For most people, including the two adult applicants here, there is nothing that can be done if the deadline is missed. This is a sad outcome, but the PFD law does not give any leeway to avoid it.

With respect to W, the formal appeal must be dismissed due to failure to go through the informal appeal process. However, her application seems to have been sent in the same envelope as her parents', which suggests that an appeal probably would not have done any good. Fortunately, W should be able to receive a 2018 dividend if she applies for it on her own when she turns 18.

D K feels terrible that she may have been responsible for the applications being late, and was understandably tearful in the hearing. Hopefully she can be comforted by the fact that thousands of Alaskans have been in the same situation at least once in their lives.

## II. Facts

X and D K are a young couple, each of whom have received the PFD every year since birth.<sup>1</sup> They not appear to be disabled in any way, and no claim of disability has been made on their behalf. They have not claimed active duty service in the armed forces in 2018.<sup>2</sup>

At the time they applied for the 2018 PFD, the K family lived in City A, which has a post office that is not open on Saturdays.<sup>3</sup> City A is not on the road system.

The K family PFD applications were submitted on paper, all mailed in together in a single envelope.<sup>4</sup> The envelope has a generic “Alaskan Frontier” postmark on it, corresponding to all zip codes in Alaska outside the panhandle.<sup>5</sup> The cancellation occurred at the USPS City B plant, but this does not mean the envelope was mailed from City B.<sup>6</sup> It “could have been mailed from City A” or from City C.<sup>7</sup> The date of the postmark is April 4, 2018, which was a Wednesday.<sup>8</sup> The envelope arrived at the PFD office in Juneau on April 6, 2018.<sup>9</sup>

X K says the postmaster was not there to take his PFD application, so he left it with his wife and went to work to City D.<sup>10</sup> He indicates that she was going to mail it “in City C.”<sup>11</sup> D K is fairly sure that she mailed the applications in City A, rather than City C, although she did travel to City C around the weekend that the applications were due.<sup>12</sup>

Mr. and Mrs. K have a picture of a note on the door of the City A post office. It is dated April 2, 2018 (Monday), and indicates the postmaster was not feeling well that day and would not be providing window service.<sup>13</sup> The fact that they have this photograph is an indication that they were trying to mail their applications in Fort Yukon on April 2.

Mrs. K does not have a clear recollection of the mailing, and she is quite honest about that.<sup>14</sup>

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<sup>1</sup> Ex. 1, pp. 3, 6.

<sup>2</sup> Ex. 1, pp. 1, 4. *Cf.* AS 43.23.011(c).

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

<sup>4</sup> Testimony of D K; Ex. 1, p. 7.

<sup>5</sup> Ex. 1, p. 7.

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

<sup>7</sup> *Id.*

<sup>8</sup> Ex. 1, p. 7.

<sup>9</sup> *Id.*

<sup>10</sup> Ex. 3, p. 2.

<sup>11</sup> *Id.*

<sup>12</sup> Testimony of D K.

<sup>13</sup> Ex. 5, p. 5.

<sup>14</sup> Testimony of D K (overall impression); Ex. 3, p. 4.

### III. Discussion

#### A. *X and D K*

In formal hearings regarding PFDs, the individual challenging the Division’s initial decision “has the burden of proving that the action . . . is incorrect.”<sup>15</sup> This has to be proven by the preponderance of the evidence,<sup>16</sup> meaning that Mr. and Mrs. K must show that the Division’s conclusion that his application was untimely was *probably* incorrect.

An Alaska Statute, AS 43.23.011, sets the application period for dividends. The period for applying for a dividend ends on March 31 of the dividend year. In passing the statute, the legislature provided only two exceptions. To be eligible for either of them, the applicant has to be both a member of the armed services and eligible for hostile fire or imminent danger pay.<sup>17</sup> The K family were not in the armed forces, and so the March 31 deadline was absolute for them. Elsewhere in the PFD statutes, there are provisions that effectively allow certain minors and disabled people to apply after the deadline,<sup>18</sup> but again, the two adults in the K household were not in these categories and thus must show they applied by March 31 of the dividend year.

Through regulations, the Department of Revenue has set out the details of how the March 31 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.” The K applications were neither received nor postmarked during the application period.

Another regulation indicates that an application is timely if it was “delivered to the post office in sufficient time to be postmarked before the end of the application period,” which, in some circumstances, is slightly different from actually *being* postmarked during the application period.<sup>19</sup> That regulation goes on to provide that an application postmarked after the deadline will be denied unless the applicant produces “an official statement” from the postal authorities describing the “specific circumstances under which the postal service incorrectly posted the individual’s application or caused a delay in posting.”<sup>20</sup>

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

<sup>16</sup> 2 AAC 64.290(c).

<sup>17</sup> AS 43.23.011(b), (c).

<sup>18</sup> *See* AS 43.23.055(3), (7).

<sup>19</sup> 15 AAC 23.103(g).

<sup>20</sup> *Id.*

There is a statement from the Postal Service in the record for this case, but it does not indicate that there was incorrect posting. The USPS official did determine that the envelope “could have been mailed from City A on Saturday the 31<sup>st</sup> by dropping it into the collection box,” in which case it would not have left City A for the plant until April 2. However, since the City A post office is never open on Saturdays, this scenario would not have constituted “deliver[y] to the post office in sufficient time to be postmarked before the end of the application period.”

In any event, what most likely happened is that Mrs. K attempted to mail the envelope on Monday, April 2, and found the post office unexpectedly closed. That is why she has a picture of the postmaster’s note. At some point thereafter she did get the envelope in the mail. But all of this occurred after the deadline had already gone by.

Based on the totality of this evidence, I find that Mr. and Mrs. K have not met their burden of showing by a preponderance of the evidence that they put their applications in the mail early enough that they ought to have been postmarked before the March 31 deadline.

*B. WK*

The application of W K, who was then age four, had the same history as her parents’ applications. D K served as her sponsor.

The Request for Formal Hearing filed by the K family on February 11, 2019 included W as one of the requesting parties.<sup>21</sup> However, W’s application had never gone through the informal appeal process, since no request for informal appeal had been submitted for her.<sup>22</sup> Under Department of Revenue regulations, a person who has not first requested an informal appeal on a PFD denial does not have a right to pursue a formal appeal.<sup>23</sup>

Upon receiving the joint request from all three family members, the PFD Division could have denied W’s request for a hearing. By law, this would have had to occur within ten days of receiving the Request for Formal Hearing and would have had to have been done “in writing.”<sup>24</sup> Further, the Division would have had to immediately give notice of the denial to the appealing

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<sup>21</sup> Ex. 5, p.1.

<sup>22</sup> Testimony of Peter Scott at hearing. The testimony was not disputed.

<sup>23</sup> 15 AAC 05.010(h).

<sup>24</sup> AS 44.64.060(b).

party and to the Office of Administrative Hearings (OAH).<sup>25</sup> A denial of this kind would also need to provide appeal rights to Superior Court.<sup>26</sup>

The PFD Division has a regular procedure for doing this, which involves a letter to the applicant, copied to the Chief Administrative Law Judge. In this case, no such letter was sent within the ten-day window, nor up to the time of the hearing and the close of the evidence on April 5, 2019. The Division did make a note at the bottom of the referral form originally sending the case to OAH, saying: “Minor child W [*sic*] K is not eligible for Formal Hearing. [15 AAC 05.0109h)]”. However, this could simply be construed as a request for partial dismissal, which would have been another, perfectly reasonable way to handle a situation where part of the dispute on a single appeal form was not yet ripe for a hearing.

The PFD Division eventually sent a “Notice of No Referral” on April 8, 2019, after this case was already submitted for decision. A nonreferral notice sent at that stage of a case is ineffective.<sup>27</sup> The most straightforward way to handle the minor procedural irregularities that have occurred here is for OAH to accept the February 11 referral as an undivided referral of the whole Request for Formal Hearing, and then to process W’s portion of the appeal by means of a dismissal. A sufficient record was developed at the hearing to be able to reach that result. W’s appeal will be dismissed below for failure to comply with 15 AAC 05.010(h). Appeal rights to Superior Court will then be undivided for the entire family, and will be granted in accordance with 15 AAC 05.040(a).

#### **IV. Conclusion**

The decision of the Permanent Fund Dividend Division to deny the 2018 dividend to D and X K is affirmed. The appeal of W K is dismissed.

This decision does not affect the ability of any members of the K family to qualify in 2019 or future years. It also does not affect W K’s right to return to the PFD Division and be paid the 2018 dividend when she turns 18.

Dated this 8<sup>th</sup> day of April, 2019.

By: Signed  
Christopher Kennedy  
Administrative Law Judge

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *See* AS 44.64.080(c).

## 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 2<sup>nd</sup> day of May, 2019.

By: Signed  
Signature  
Lawrence A. Pederson  
Name  
Administrative Law Judge  
Title

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