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

In the Matter of	)	
	)	
PERSEVERANCE THEATRE	)	OAH No. 24-0427-PFC
	)	

DECISION

I. Introduction

Perseverance Theatre applied to be included in the list of charities eligible for the Pick.Click.Give program. Perseverance's payment of the fee that had to be included with the application was late. Because the payment was late, the Permanent Fund Division of the Alaska Department of Revenue denied Perseverance's application. Perseverance appealed.

The Division and its agent that administered the program had a practice of accepting late payments when the charity let it know that the payment would be late and the payment arrived in about a week after the due date. Perseverance did not have notice of this practice. Because Perseverance did not have notice of the circumstances under which its late payment would be accepted, it would be an abuse of discretion to deny Perseverance's application. Accordingly, the denial is reversed.

II. Facts

Perseverance Theatre is a nonprofit corporation located in Douglas, Alaska. Its mission is to "create professional theatre by and for Alaskans."[1]

For many years, Perseverance has participated in the "Pick.Click.Give" program operated by the Permanent Fund Division of the Department of Revenue. This program was adopted in statute in 2008 to allow Alaskans who receive the permanent fund dividend from the state to donate some or all of their dividend to participating charitable organizations.[2] Pick.Click.Give is popular with the public because it provides an easy way to make donations with pre-tax income. It is popular with charities because it provides an easy way to raise funds for their mission.

Charities wishing to participate are required to submit an application each year.[3] The application is due on March 31st of the qualifying year for inclusion in the next year's dividend application.[4] As allowed under statute, the Division has employed a nonprofit contractor, the Alaska Community Foundation, to collect applications and determine eligibility.

---

1 Division's Ex. 2 at 11.
2 AS 43.23.130.
3 AS 43.23.130(d)(1).
4 *Id.*

In recent years, the application has been in electronic form.[5] The application requires applicants to show that they meet the requirements for eligibility. This means that applicants must upload some documentation with their electronic application.[6]

In addition to proving eligibility, charities seeking to be included on the list are also required to pay a fee of $250.[7] The application informs applicants that "[y]our application is not complete until payment is processed and received."[8] It tells applicants that they can pay by check or pay electronically by credit card.[9]

In 2024, Perseverance submitted its application for the 2025 dividend year on March 29th. As with other years, Perseverance's 2024 application met the requirements for documenting its eligibility.[10] Perseverance did not, however, submit the $250 application fee before March 31st.

Benjamin Brown, the Development Director for Perseverance Theatre, explained that when he submitted the application electronically on March 29th, he saw the option for submitting payment electronically. Because this option had an additional charge of $7.75, however, he chose the other option, which was to pay by check.

On the day that Mr. Brown completed the application, he received two emails from the Foundation. First, at 3:48 p.m., Jessie LaVoie, of the Foundation's Pick.Click.Give team, sent him a "friendly reminder" that Perseverance's application was still in draft and that it needed to be submitted. The body of this message included a reminder about the payment "Please remember to either pay by check (post marked no later than March 31st) or electronically by the link in your application."[11] Then at the bottom of the message, underlined and in red, was the following:

> FINAL REMINDER: all required documentation and payment is due 11:59pm on March 31st.[12]

The second email was sent at 7:21 p.m., shortly after Mr. Brown had finally successfully submitted Perseverance's application. This email thanked him for submitting the application, and noted that "You may still need to pay your nonrefundable $250 fee before determining eligibility."[13] This email again mentioned the two payment options, but did not mention that there was a March 31st deadline for the payment.

---

5 Lavoie testimony; Brown testimony.
6 Division Exhibit 2.
7 AS 43.23.130(f).
8 Division Exhibit 2 at 6.
9 *Id.*
10 Lavoie testimony; Div. Exhibit 2 at 7.
11 Division Exhibit 3 at 4.
12 *Id.* (emphasis and capitalization in original).
13 Division Exhibit 3 at 5.

Because March 29th was a Friday, and it was evening when he finally successfully submitted the application, Mr. Brown waited until the next week to process the payment, when he could ask Perseverance's accountant to mail the check. He was not certain when the check went out, but he thought it was no later than the day that the check was dated, April 5th.[14] Although the postmarked envelope in which the check was sent was included in the record, the postmark is illegible. [15] The Foundation stamped the check "received" on April 22nd.[16]

After receiving the check, Ms. Lavoie determined that it was too late. She testified that the Foundation had a practice of accepting some checks that were postmarked after March 31st.[17] In general, however, it would accept late checks only when the charity called and explained that the check was coming, and the check arrived within about a week of the deadline. She testified that the Division approved of this practice.[18] She explained that this policy did not apply to Perseverance's check because it was much too late. Consequently, she voided it and sent it back to Perseverance with a letter explaining that the Foundation could not accept the payment. The letter explained that the final eligibility determination would be made later, after the Foundation determined whether Perseverance may have perfected its payment some other way.[19]

On May 14, 2024, the Foundation sent an email to Mr. Brown stating that "Your application to be included in the charitable contribution list on next year's Permanent Fund Dividend (PFD) electronic application **has been denied.**"[20] This email explained that to appeal the decision, "please see the attachment."[21] The email did not state that there was a deadline for the appeal or that the email triggered the deadline. The attachment to the email was a "Request for Appeal" form.[22] Up at the top right corner of the form was text box that contained the following:

---

[14] Brown testimony. Mr. Brown had a copy of the check with him at the hearing, but he did not submit it as an exhibit.

[15] Division Exhibit 3 at 7.

[16] *Id.*

[17] Lavoie testimony. The Division's representative was surprised by this testimony, which came after the witness had been recalled to clarify an earlier remark. Neither party requested more detail about the policy. I have been informed that in a different matter the Division created a more detailed record that revealed that the policy of accepting late applications in certain circumstances was instituted at the direction of the Division. Although that testimony is not part of this record, nothing in this record or decision contradicts the testimony in the other matter.

[18] Lavoie testimony.

[19] Division Exhibit 1 at 7.

[20] Division Exhibit 3 at 8 (bolding in original).

[21] *Id.*

[22] Division Exhibit 1 at 1-2; Perseverance Exhibit 2.

DEADLINE
This Form Must Be
Received or Postmarked on or Before:[23]

This text box, however, was not filled in. No deadline for filing the appeal was written in the box or anywhere else on the form.[24] Ms. Lavoie explained that the absence of a deadline was a mistake, due to a miscommunication between the Foundation and the Division. Normally, the Division calculates the due date for the Foundation, and the form would have an appeal deadline written in the box.[25]

Mr. Brown stated that when he received the form, the only deadline he saw was the statement on the form that "[t]he deadline for resolving the appeal is October 1, 2024."[26] He assumed that if he filed an appeal by the end of the fiscal year he would be timely.[27] He testified that he remembered hand delivering the form to the Permanent Fund Division at the end of June.[28]

The appeal was referred to the Office of Administrative Hearings. At a prehearing conference, the Division moved to have the appeal dismissed because it was not filed within the 15-day deadline for filing an appeal of a denial of an application for inclusion on the Pick.Click.Give list. The parties agreed that the motion, as well as the merits of Perseverance's argument that its payment was timely, would be addressed at the hearing. An in-person hearing was held on July 24, 2024. Mr. Brown represented Perseverance Theatre and Peter Scott represented the Division.

III. Discussion

The first issue to be addressed here is the Division's argument that Perseverance's appeal should be rejected because it was filed late. Second, we will turn to Perseverance's argument that its application should not have been rejected.

A. Should Perseverance's appeal be rejected because Perseverance missed the 15-day deadline for filing of an appeal?

Under the department's regulations, if an applicant wants to appeal the rejection of its Pick.Click.Give application, "the department must receive the appeal within 15 days after the date

---

23 *Id.* at 1 (formatting in original).
24 *Id.*
25 Lavoie testimony.
26 Brown testimony; Division Exhibit 1 at 1.
27 Brown testimony.
28 Brown testimony. The date on the appeal form is June 28th. It has a date stamp of July 1, 2024. Division Exhibit 1 at 1. Whether it was filed on June 28th or July 1st is not important for the purposes of this decision.

of the notice of the department's decision."[29] Perseverance argues that its appeal should be considered timely. It cites to the doctrine of equitable estoppel. It argues that the Division's failure to give notice of the deadline was an assertion by the Division that there was no deadline. Because it relied on this assertion, it asserts that the Division is estopped from imposing the appeal deadline on its appeal.

The Division argues that ignorance of the law is no excuse. In its view, Perseverance should have known (or found by research or inquiry) about the deadline in regulation, and that Perseverance's failure to comply with the deadline means its appeal cannot go forward.

Unlike other deadlines, however, where the burden is often on the applicant to know the law, when dealing with administrative appeals, courts place responsibility on the administrative agency to communicate the deadline. In an appeal from a final agency decision to the courts, for example, the Alaska Supreme Court requires that "an agency must clearly indicate that its decision is a final order and that the claimant has thirty days to appeal."[30] If an agency fails to do so, the appeal deadline must be relaxed, without regard to any duty the applicant would otherwise have to know the law.[31]

Here, as already noted, the Foundation's May 14th email did not inform Perseverance that the deadline for appeal was 15 days, that the appeal clock started ticking with this notice, or that the deadline was a "received" deadline rather than a "postmarked" deadline. Although the cases on appeals to court are not directly controlling in this appeal, the court's underlying concern is the same: a simple notice here from the government would prevent an applicant's right to redress being snuffed by a default judgment.

The Division's agent testified that the failure to provide notice of the appeal deadline was a mistake. This means that other appellants received this notice, but not Perseverance. The combination of admitted error and the unfairness that would result from that error are reasons to relax the 15-day deadline here.[32] Accordingly, Perseverance's appeal will be accepted.

---

29 15 AAC 23.340(a).

30 *Manning v. Alaska R.R. Corp.,* 853 P.2d 1120, 1124 (Alaska 1993).

31 *Id.* ("Because (the agency's) letter failed to note either of these two things, Appellate Rule 602(a)(2)'s thirty-day appeal deadline must be relaxed.").

32 Under the department's regulations, "The hearing officer may waive any requirement or deadline established in 15 AAC 05.010 - 15 AAC 05.030 if it appears to the officer that strict adherence to the deadline or requirement would work an injustice." 15 AAC § 05.030(k). This regulation does not apply here because the 15-day deadline is established under 15 AAC 23.340. Although the concern about injustice might be invoked by analogy to 05.030(k), here we are relying the special rules for notice of appeals rather than on the issue of unfairness.

Moreover, in this case there are several additional factors that make it clear that notice in these circumstances is critical. First, the 15-day deadline is expedited when compared to other appeal deadlines.[33] This means that the charities need notice of the short deadline to have time to submit the appeal. Second, the applicants for inclusion on the Pick.Click.Give lists are often charities run by volunteers. For many reasons, volunteers are less likely to be aware of the shortened time limit. Third, although the Division certainly has reason for expediting appeals relating to the list (so that it can prepare the dividend application in time to release it by January 1st of the dividend year), here it is not prejudiced by the short delay in Perseverance's appeal. Thus, in the absence of notice of the appeal deadline, Perseverance's late-filed appeal will be allowed to go forward.

B. Does Perseverance's failure to send a check by the March 31st deadline mean that its application must be rejected?

Turning to the merits of Perseverance's appeal, Perseverance argues that its check was timely. Perseverance points out that the governing statute only requires that the *application* (not the check) be filed by March 31st.[34] Although the statute also requires payment of a fee, it does not contain any deadline for the filing of the fee.[35] Furthermore, the regulation that requires a "complete and timely" application, 15 AAC 23.310, defines "complete" to mean all of the substantive requirements for eligibility (such as tax and audit documentation) but does not include the fee.[36] Perseverance acknowledges that 15 AAC 23.263(e) requires that the application "must be accompanied by a nonrefundable fee of $250." It argues, however, that this requirement does not set out a deadline of March 31st. In its view, a check sent shortly after the application could meet the requirement that the check accompany the application.

---

33 *Compare, e.g.,* 15 AAC 15.010 (deadlines of 30 days and 60 days in dividend and tax appeals) *with* 15 AAC 23.340(a) (15-day deadline in Pick.Click.Give appeals).

34 AS 43.23.130(d)(1) ("the department may include an educational organization, community foundation, or charitable organization on the contribution list for a current dividend year only if the organization (1) before March 31 of the qualifying year, files an application for inclusion on the list for that dividend year on the form required by the department").

35 *Id.* at (f) ("The department shall charge an application fee of $250 for each educational organization, community foundation, or charitable organization that files an application under (d) of this section or for each university campus that files an application under (l) of this section.").

36 15 AAC 23.310(c) ("For the purposes of AS 43.23.130(d)(1), the department will consider an educational organization, community foundation, or charitable organization to have filed an application only if that application is complete and timely. For the purposes of this subsection, an application is (1) timely if it is postmarked on or before March 31 of the qualifying year; and (2) complete if, when considered along with documents submitted with an application that established eligibility for a prior dividend year, it contains all the information required for the department to make the determinations required by AS 43.23.130(d)(2) - (9), including copies of documents necessary to determine eligibility.").

The Division, however, points out that two administrative decisions by the Commissioner of Revenue have held that the requirement in 15 AAC 23.263(e) (that the check must accompany the application) effectively establishes a March 31st deadline for payment of the $250 fee.[37] The law established by the decisions in *Alaska Mountain Rescue* and *Interior Alaska Land Trust* is that "for an application to be both timely and complete, it must contain the completed application form, the necessary documents to satisfy the requirements of 15 AAC 23.310, **and** the application fee required by 15 AAC 23.263(e), by March 31 of the qualifying year."[38] The Division asserts that this decision must follow these binding precedents.

In spite of Perseverance's valiant effort to distinguish these two cases, had the Division and its agent followed these precedents, this decision would follow suit.[39] Here, however, the Foundation's testimony that it would accept some payments mailed after the deadline application (those that arrived within one week, especially when the charity called to say that the check was coming), turned the outcome topsy-turvy.

The biggest problem for the Division is that Perseverance did not have notice of this one-week rule of thumb.[40] Moreover, although the Foundation's approach was approved by the Division, and no doubt based on a good-faith effort to be accommodating to charities, this approach changed the rules for applicants. An agency, however, generally can only make rules that affect the public by adopting regulations.[41]

---

37 *In re Alaska Mtn. Rescue Group,* OAH No. 21-1744-PFC (Dep't of Rev. 2021), *available at* https://aws.state.ak.us/OAH/Decision/Display?rec=7028; *In re Interior Alaska Land Trust,* OAH No. 21-1745-PFC (Dep't of Rev. 2021), *available at* https://aws.state.ak.us/OAH/Decision/Display?rec=7029.

38 *Alaska Mountain Rescue* at 4.

39 Among other arguments, Perseverance asserts that the physical impossibility of a check "accompanying" an electronic application means that its check being sent after March 31st should be allowed. This argument, however, is not persuasive. Consistent with *Alaska Mountain Rescue,* a check that is postmarked before the March 31st deadline would be deemed to accompany the electronic application. Perseverance also notes that the Division allows electronic payments, which is contrary to 15 AAC 23.263(e)'s explicit language: "A payment required under this subsection must be made by check or money order." In Perseverance's view, this means that because the Division has accepted payments that did not conform to the regulation, then the Division must accept Perseverance's late payment (which also does not conform to the regulation). This argument, however, is not germane to this case. Perseverance did not use the electronic payment and electronic payment is a different issue than timeliness. Although it appears that Perseverance may well be correct that the Department should update its regulations, that is something to be addressed by the Department and its legal advisors, not this decision.

40 *Cf., e.g., Noey v. Dep't of Env't Conservation,* 737 P.2d 796, 805 (Alaska 1987) ("DEC acted arbitrarily in its dealings with Noey by failing to notify him earlier of its objection to the soil data and by failing to give him an opportunity to provide additional data, particularly since DEC admitted it has given notice and opportunity to submit new data on other occasions."); *In re Sodexo,* OAH No. 18-0397-TAX (Office of Adm'n Hr'gs 2019) *available at:* https://aws.state.ak.us/OAH/Decision/Display?rec=7036 (holding that an agency "must give entities regulated by the agency proper notice and a meaningful opportunity to adjust" to changes in legal standards (quoting *Alabama v. Shalala,* 124 F.Supp.2d 1250, 1264 (M.D. Ala. 2000))).

41 *See, e.g., Jerrel v. State, Dep't of Nat. Res.,* 999 P.2d 138, 139 (Alaska 2000) ("Because DNR's ad hoc interpretation of the livestock marking requirement is a regulation that was not adopted in accordance with the

The reason that notice is critical is that a charity must have notice of the rules that affect its application so that it can conform to those rules. Mr. Brown's testimony leaves no doubt that if Perseverance had been told that its check would be accepted only if he called to say that it had been sent and would arrive within about a week, he would have taken steps to ensure that the check could meet this rule of thumb.[42] Not giving Perseverance the benefit of this rule of thumb would be arbitrary and an abuse of discretion.[43] Accordingly, this decision will reverse the denial of Perseverance's application.

To be clear, this decision does not hold that the decision to accept late checks in some circumstances is allowable. It does not overrule or undercut *Alaska Mountain Rescue* and *Interior Alaska Land Trust.* This decision rests solely on the lack of notice to Perseverance that in qualifying year 2024 the Foundation would follow a rule of thumb not provided in regulation.

IV. Conclusion

Perseverance Theatre met all substantive requirements for inclusion on the list of charities eligible to participate in the Pick.Click.Give program. Its application was denied solely because its check for the required $250 fee was late. Perseverance, however, did not have notice that its check would have been considered timely if it had called to say that the check was coming and the check would arrive in about a week. Because it did not have notice of this requirement, Perseverance did not have the opportunity to conform to this ad-hoc rule. Given that Perseverance met all other requirements for inclusion on the list, the denial of Perseverance's application is reversed.

DATED: July 31, 2024.

By: *Signed*
Stephen Slotnick
Administrative Law Judge

Administrative Procedure Act, we reverse."); *see also, e.g., Stefano v. Dep't of Corr.,* 539 P.3d 497, 499 (Alaska 2023) (disallowing "a *changed* interpretation of existing regulation" because it "had to be adopted through rulemaking"); *Noey,* 737 P.2d at 805 ("The regulation does not contain a provision giving DEC discretion to use informal "rules of thumb" for making determinations to reduce burdens of proof for soil data based upon factors such as lot size and remoteness.").

42 Brown testimony.

43 *Sodexo*, OAH No. 18-0397-Tax (holding that the Department of Revenue abused its discretion by not giving notice to taxpayer regarding new interpretation and enforcement of obscure tax penalty regulation and explaining that the "abuse of discretion standard applies to 'discretionary actions that do not require formal procedures under the arbitrary and capricious or abuse of discretion standard'" (quoting *State, Dep't of Health & Soc. Servs. v. Valley Hosp. Ass'n, Inc.,* 116 P.3d 580, 584 (Alaska 2005))). *Cf. also e.g., Noey,* 737 P.2d at 805-06.

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 day of August, 2024.

By: *Signed*
Signature
Adam Crum
Name
Commissioner of Revenue
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]