

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

In the Matter of)	
)	
W. E. H.,)	
B. A. H.,)	
A. A. H.,)	
W. E. H. III and)	
L. A. H.)	OAH No. 09-0206-PFD
)	Agency No. 2008-064-8532
<u>2008 Permanent Fund Dividend</u>)	

DECISION

I. Introduction

W. and B. H. and their three minor children, all of C. C., seek to establish that they timely applied for 2008 Permanent Fund Dividends (PFDs). The Permanent Fund Dividend Division, having no timely applications in its files, denied their application initially and at the informal appeal level. The H.s requested a formal hearing. The hearing convened on June 4, 2009, with Mr. H. attending in person and PFD Specialist Kimberly Colby participating by telephone. Mr. H. testified on behalf of the family; Ms. Colby gave testimony on behalf of the PFD Division.

The Division's denial is affirmed because the only applications on file were submitted late and the H.s do not have the proof of timely mailing or delivery required by law. Although it is probable that Mr. H. mailed the family's five applications on February 14 or 19, 2008, well in advance of the filing deadline, and that the applications simply became lost, Department of Revenue regulations provide no discretion to grant a dividend in this unfortunate situation.

II. Facts

W. and B. H. and their three children are lifelong Alaskans who have always received dividends.¹ Apart from the question of timeliness of their applications, there is no dispute that they met all eligibility requirements for the 2008 dividend.

Mr. H. is an articulate individual and there is no evidence that he is now, or was in 2008, mentally or physically disabled in a way that affected his ability to file for a PFD.² There is

¹ Testimony of W. H.; Ex. 3, p. 2 (statement with Request for Informal Appeal); Ex. 9, p. 2 (Affidavit of Kimberly Colby).

² Observations at hearing; review of record; testimony of Mr. H.

likewise no evidence that Mrs. H. had such a disability. The H.s were not serving on active duty as members of the armed forces of the United States in 2008.³

Between 2000 and 2006, the H.s typically filled out paper applications early in the application period and then waited a long time—sometimes as much as two months—to send them in.⁴ The applications were all timely, however. In 2007, the H.s for the first time submitted on-line applications.⁵ In 2008, they reverted to paper applications. Mr. H. remembers sending in all five of the family’s paper 2008 applications in connection with a specific trip to the C. C. Post Office in February of 2008.⁶ Although the matter is not completely free from doubt in light of his confusion about other matters (discussed below), his testimony on this point is, on balance, credible. It is more likely than not that Mr. H. did mail five 2008 application as he remembers, prior to the filing deadline. He did not use a certified or return receipt service.⁷

In May or June of 2008, Mr. H. checked the status of his PFD application on line and became concerned because, although other people’s applications were listed as “received,” he recalls his being listed as “pending.” He reports that he telephoned the PFD Division. He currently remembers that he was told that the applications were still being processed, but that the PFD technician seemed to have information about his direct deposit instructions that he had only given for the first time in the 2008 applications. Another account, apparently given to Representative Harris, was that there were two calls; in the first Mr. H. was told that his applications had been received and the technician confirmed his deposit information; in the second, he was told his forms were pending.⁸

The PFD Division has no record of this call or calls, but it does have a record of a call from Mr. H. to technician Elizabeth Ladewig on August 4, 2008. In that call, Mr. H. related that he had called a few weeks ago “and was told everything was good to go.”⁹ Ms. Ladewig, however, could find no PFD applications on file for the H. family. What is somewhat difficult to square is why Mr.

³ Exhibit 1, pp. 1, 3 (2008 Adult Applications); testimony of Mr. H.

⁴ Ex. 9, p. 2.

⁵ Ex. 9, p. 2.

⁶ At the hearing, Mr. H. gave the date as February 19, but he has more commonly reported it as February 14.

See Ex. 6, p. 1 (PFD telephone log); Ex. 7 (Legislative Fax Request for Assistance).

⁷ Testimony of Mr. H. Mr. H. currently acknowledges this. However, in his Request for Formal Hearing (Ex. 5, p. 2), he denied that he did not have proof of mailing and stated that he “mailed all postage proof with second and third sets of applications.”

⁸ Ex. 7. The account to Representative Harris also relates a third call which corresponds to the August 4 call, detailed below.

⁹ Ex. 6, p. 1.

H. would have telephoned Ms. Ladewig in August if his call or calls earlier in the summer had indeed indicated the applications were received and on track.

Mr. H. testified at the hearing that on August 12 he mailed in a second set of applications.¹⁰ He has some documentation that he mailed an item in C. C. that day.¹¹ In April of 2009 his recollection was somewhat different, however: at that time he remembered sending in two sets of duplicate applications during the summer, the first of which was sent in early July at the request of the PFD Division.¹² Sending in a duplicate set of applications in early July would not be consistent with being told in his initial phone contact with the Division (that is, the call or calls prior to being told on August 4 that the applications could not be found) that his February applications had been received.

An additional possibility is that Mr. H. sent in no duplicate applications during the summer, but instead confused other actions—filling out of form for the Legislative Information Office, sending in a Resource Rebate Application for Veterans—with sending in duplicate applications. His conversations with PFD technicians later in the process caused them to surmise that he may have done this.¹³

In any event, whether the H.s mailed two, one, or zero sets of duplicate applications during the summer, no duplicate applications were logged in at the PFD office. A PFD representative sent Mr. H. a set of late-distribution applications at the end of October.¹⁴ The H.s filled out these forms on October 28 and mailed them by regular mail on November 17.¹⁵ The PFD Division received them on November 20.¹⁶ This set of applications formed the basis for a file that led to the present appeal.

The Division denied the October/November applications because they were not filed by the March 31, 2008 deadline and the H.s did not qualify for any exception to the filing deadline. The Division checked its records by social security number and by name and found that the only 2008 application it had for any of the H.s was the October/November application.¹⁷

¹⁰ Testimony of Mr. H..

¹¹ Ex. A.

¹² Ex. 5, p. 2.

¹³ Ex. 6, p. 1; *cf.* Ex. 7.

¹⁴ Ex. 6, p. 1.

¹⁵ Ex. 1, pp. 1, 3, 5, 7, 9, 11.

¹⁶ *Id.* (see intake stamp).

¹⁷ Testimony of Ms. Colby.

III. Discussion

In general, applications for PFDs must be received or postmarked between January 2 and March 31 of the dividend year.¹⁸ The only exceptions to the filing deadline allowed by law are for certain disabled people when their disability prevents timely filing, for certain children when their parents or guardians do not timely apply on their behalf, and for certain military members who were eligible for imminent danger or hostile fire pay during the application period.¹⁹ Since neither of the two adult H.s is in one of these categories, the March 31 deadline was absolute for them.

Whether an application is considered timely delivered is established by a regulation, 15 AAC 23.103(g), the relevant portion of which reads:

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 an application postmarked after the application period, unless the individual provides the department with an official statement from the United States Postal Service or a foreign postal service that describes the specific circumstances under which the postal service incorrectly posted the individual's application or caused a delay in posting.

Alternatively, under 15 AAC 23.103(h), if an application was timely mailed but the Division does not have the application on file, an applicant may request to reapply on or before December 31 of the dividend year if the request to reapply is accompanied by a mailing receipt, a mailing return receipt, or other evidence of *receipt* by the department.²⁰

The PFD Division has established that it does not have the H.s' February applications. Mr. and Mrs. H. do not have a mailing receipt or return receipt, and they do not have an official statement from the Postal Service showing that incorrect handling by the Postal Service caused the original applications to become delayed or lost.

The H.s can also prevail by presenting "other evidence of receipt by the department." Mr. H.'s recollection that the PFD division indicated to him that it had received the papers—specifically, the recollection that he spoke to a PFD representative in June or July and she appeared to have access to information found only in the 2008 applications—qualifies as "other evidence of

¹⁸ Alaska Statute 43.23.011(a); 15 AAC 23.103(a).

¹⁹ Alaska Statute 43.23.011(a); 15 AAC 23.103(a); 15 AAC 23.133.

²⁰ 15 AAC 23.103(h). The department has interpreted this regulation to encompass certain records that are the "substantial equivalent" of a mailing receipt. *See, e.g., In re G.W. & M.E.*, OAH No. 07-0605-PFD (adopted Nov. 14, 2008) and the cases summarized in footnote 27 of that decision (<http://aws.state.ak.us/officeofadminhearings/Documents/PFD/PFD070605.pdf>).

receipt.” However, as discussed above, this evidence is not quite convincing; I find it more likely than not that insofar as Mr. H. had a conversation with a PFD representative prior to August 4, 2008, there was a misunderstanding and the PFD representative did not in fact have 2008 applications or 2008 information from the H. family.

The Department of Revenue is bound by its own regulations. Since the department does not have the applications—for whatever reason, whether it be that they were never mailed, that the sender erred in some other way, that the Postal Service erred, that the PFD Division erred, or that something happened beyond the control of any of them²¹—the dividends can be paid only if the H.s produce one of the specified kinds of evidence. To the limited extent that they have done so, the evidence is not convincing. The regulations do not permit any discretion in this situation and the H.s’ 2008 PFD applications cannot be considered timely. The Department of Revenue has been consistent in its application of the statutes and regulations regarding timeliness.²²

Government officials can only pay a dividend to people who qualify and who either make a timely application or can show, through a limited range of largely indisputable means, that they correctly took the steps to make a timely application. For 2008, Mr. and Mrs. H. did not make that showing, and therefore they do not fall among those to whom the officials can make the payment.

The situation is slightly different for their three children. It will still probably be possible for each child to receive a 2008 PFD, but payment will be long delayed. Assuming they are not emancipated sooner, A. should qualify between April 20, 2016 and April 19, 2018, W. III between May 30, 2018 and May 29, 2020, and L. between June 26, 2023 and June 25, 2025 as follows:

- (b) An individual who has reached majority, or who is an emancipated minor, may apply to the department for a prior year dividend if
 - (1) the individual had not reached majority by the end of the application period for the dividend year for which the individual is applying;
 - (2) a complete application . . . was not timely filed . . .; and
 - (3) the individual would have qualified for a dividend had an eligible sponsor applied on the individual’s behalf during the pertinent dividend year.

²¹ Mr. H. could have, in effect, purchased insurance against such an event by sending the application by certified mail.

²² The department’s decisions on this topic can be found among the cases linked at <http://www.state.ak.us/local/akpages/ADMIN/oah/pfd.html>.

(c) An individual who qualifies under (b) of this section must file, before the individual reaches 20 years of age, an application prescribed by the department.^[23]

Each child will have to reapply on his or her own behalf during that two-year window to qualify for this payment. It would be wise for Mr. and Mrs. H. to retain this decision so that the children can attach it to their applications.

IV. Conclusion

Because the H.s' only applications on file were submitted after the deadline and they did not meet any of the exceptions to the filing deadline, their applications were properly denied. This decision does not affect their status as residents or their eligibility for 2009 and future dividends. The decision of the Permanent Fund Dividend Division to deny the applications of W. E. H., B. A. H., A. A. H., L. A. H., and W. E. H. III for 2008 Permanent Fund Dividends is AFFIRMED.

DATED this 5th day of June, 2009.

By: Signed
Christopher Kennedy
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 6th day of July, 2009.

By: Signed
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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

²³ 15 AAC 23.133(b) and (c).