State of Alaska
Ombudsman

INVESTIGATIVE REPORT

(Finding of Record and Closure)

PUBLIC REPORT PER AS 24.55.200

Ombudsman Complaints A2015-1199, A2015-1374
May 12, 2016
[*This investigative report has been edited and redacted to remove information made confidential by Alaska Statute and to protect privacy rights.*]

SUMMARY OF THE COMPLAINT

In Alaska, employers pay quarterly taxes to fund the state's Unemployment Insurance (UI) program. The tax program is administered by the Employment Security Tax Section (EST) within the Department of Labor & Workforce Development Division of Employment and Training Services (Labor). Like any taxing agency, EST has taxpayers who have not honored their obligations. In EST's case, some of those unpaid tax debts date back to the 1980's. These accounts had gone without collection efforts for decades. In at least one case, the account was actually labeled "uncollectible." But these accounts remained on the books.

In 2014, EST staff began collections on these old tax accounts, with the goal of collecting at least some money and then settling the accounts. EST indicated that there are hundreds of old unpaid tax files, and that the agency has been fairly successful in obtaining money from these collection efforts.

In 2015, three individuals contacted the ombudsman regarding EST's collection program, two of whom provided sufficient information for the ombudsman to review their complaints. All three were former business owners who allegedly failed to pay unemployment insurance taxes in the 1980's or 1990's. The two individuals who pursued ombudsman complaints had both been employers in the 1980's, and both had gone out of business. EST recorded tax liens in the 1980s, but took no action for many years. Both debtors have been in Alaska for most of the last 30 years and have collected numerous Permanent Fund Dividends (PFDs). They also bought and sold property without EST attempting to foreclose on the tax liens.

The ombudsman opened an investigation into the following allegations, stated in terms conforming to AS 24.55.150:

> ***ALLEGATION 1: ARBITRARY: The Department of Labor & Workforce Development Employment Security Tax Section is calculating accrued interest on all pre-1999 accounts as if the taxes were due in 1998, regardless of the actual age of the tax debt.***
>
> ***ALLEGATION 2: UNFAIR: The Department of Labor & Workforce Development Employment Security Tax Section is assessing interest that accrued for decades while the agency treated the accounts as uncollectible.***

Assistant Ombudsman Beth Leibowitz investigated these allegations and offered a preliminary opinion and suggestions to the EST supervisor, Virginia Calloway on August 6, 2015. EST's September 11, 2015 response did not fully address the concerns noted in the August 6, 2015, letter. Ombudsman Linda Lord-Jenkins then provided a confidential preliminary finding to Heidi Drygas, Commissioner of the Department of Labor and Workforce Development; Mike Andrews, Director of the Division of Employment and Training Services; and Virginia Calloway, supervisor of the Employment Security Tax Section. Commissioner Drygas responded on behalf of the Department of Labor and Workforce Development on January 28, 2016. The commissioner accepted the ombudsman's findings and agreed to comply with the recommendation that EST write off accrued interest on pre-1999 tax delinquencies.

The complaints have been closed as **justified**, but **rectified** by the Department's implementation of a remedy.

INVESTIGATION

Debtor #1: Ombudsman Complaint A2015-1199

Mr. F. owned a construction business in Southeast Alaska, but went out of business in the mid-1980s. He thought that events from 30 years ago were of no interest to anyone, but he learned that he was wrong when EST contacted him.

Mr. F.'s current tribulations began with a form letter dated October 30, 2014. It was titled "Statement of Account" and claimed that "Our records indicate you have an outstanding balance due for the quarter(s) indicated. If payment is not received by 11/14/2014, a Notice of Assessment may be issued for the amount due plus interest." It claimed that $12,320.91 was due from the fourth quarter of 1998, with interest amounting to $23,356.39, for a total of $35,677.30.

Mr. F. objected that he was not even in business in 1998. EST clarified that the debt was actually based on their records of tax returns filed, but not paid, by Mr. F. in 1983 and 1984. The actual tax returns were long gone, but EST offered the following records documenting the tax debt:

- A recorded tax lien, titled "Notice of Assessment and Tax Lien" recorded in 1987 for UI taxes that Mr. F. apparently failed to pay in 1983 and 1984, plus interest and penalties accruing through the date of the lien, for a total of $19,353.35. The lien also claimed "accruing additional interest and penalty as provided by (AS 23.20.185a and 23.20.190a (sic)) from 11-20-87, until paid."
- A table showing taxes due by quarter and payments received on Mr. F.'s account (including a payment dated October 27, 1994), showing an outstanding amount due of $12,320.91.
- EST's computerized contact notes, indicating verbal contacts with Mr. F. in 1994-1995, in which Mr. F. and his then-bookkeeper had several conversations with EST regarding settling the

> outstanding tax debt. There is no indication in these notes that Mr. F. completed any written settlement offer or that EST accepted a settlement offer from him. There is a note regarding a telephone call on September 27, 1995; the next computerized entry is dated October 15, 2014, nineteen years later.

After sending the "Statement of Account" to Mr. F. in 2014, EST Field Auditor Julie Atkinson had several contacts with him. In January 2015, Mr. F. told Ms. Atkinson that he was out of the country and would respond when he returned in March. According to Ms. Atkinson, Mr. F. did not contact the agency in March nor did he respond to a "reminder" letter sent to him two months later. In June, Ms. Atkinson requested a bank levy and attached all the money available from Mr. F.'s bank account. This was apparently done to get Mr. F.'s attention. On June 17, 2015, Ms. Atkinson released the money back to Mr. F.'s bank and sent him the following email:

> From: Atkinson, Julie M (DOL)
> Subject: RE: Alaska Employment Security Tax [Account # redacted]
> To: [Debtor]
> Date: Wednesday, June 17, 2015, 3:25 PM
>
> Mr. [F.]
> We have faxed a levy release to Wells Fargo. It does take them 48-72 business hours to put the funds back in your account.
> I will go ahead and prepare an account history to send to you, as well as a copy of the tax lien filed for the dues for your review. Please contact me no later than July 15, 2015 to discuss your account and payment options to avoid further collection action in the future.
>
> Thank you,
> Julie Atkinson
> (907) 465-5900

Mr. F. filed his complaint with the ombudsman on the day Ms. Atkinson notified him she had reversed the levy. He said it was simply unfair to try to collect this money after 30 years. He claimed he never received the 1987 Notice of Assessment, and that he no longer had any documentation that would allow him to evaluate whether EST's claim was accurate or not, because the business records in question were from 30 years ago. He said he thought he had paid the amount due, but could no longer prove it.

In October 2015, EST collected $2,072 (minus administrative fees charged by the PFD Division) by attaching Mr. F.'s Permanent Fund Dividend. EST also collected $306 by a bank levy to empty any Alaskan bank accounts held by Mr. F.

Debtor #2: Ombudsman Complaint A2015-1374

Mr. X. also owned a construction company that went out of business in the 1980's, and actually went bankrupt. Decades after his bankruptcy, on July 21, 2015, Mr. X. received a notice from EST titled "Statement of Account." The statement, addressed to Mr. X. and his former business, claimed that $11,850.44 was due, originating from nonpayment of taxes in the fourth quarter of 1998. The breakdown was: $3,973.37 in principal and $7,877.07 in interest.

Mr. X.'s business, like Mr. F.'s, had collapsed in the mid-1980s, so the account statement claiming UI taxes due from 1998 made no sense. Mr. X. said that his sole proprietorship went out of business in

1985, and Mr. X. went bankrupt. In the mid-1980s, he left Alaska. He later returned to Alaska and has been a state resident since some point in the 1990s. He said he believed the tax debt had been settled long ago in his bankruptcy, because the State of Alaska had been noticed as a creditor. He said the July 2015 notice from EST was his first hint that the State thought he still owed money despite his 1985 bankruptcy. Mr. X. pointed out that he has not been hard to find in the last decade or two: he has been an employer with a UI tax account for a new, unrelated business, a recipient of Permanent Fund Dividends, and had been in the news for several years.

Mr. X. indicated that he had complained to Labor Commissioner Heidi Drygas, and provided emails he sent to her. The ombudsman is unaware of any response to the emails Mr. X. sent.

The ombudsman checked for recorded tax liens filed against Mr. X. in the Department of Natural Resources State Recorder's Office online database. The ombudsman's search turned up four UI tax liens, all recorded in 1985; however, two of the tax liens were released in 1986 (the releases were also recorded). The extant UI tax liens totaled $1,667.29 "with accruing additional interest and penalty as provided by (AS 23.20.185a and 23.20.190a)." The amounts were apparently based on returns Mr. X. filed for the second and fourth quarters of 1984 and the first quarter of 1985, along with interest and penalties assessed through the date of lien. Each lien was titled "Notice of Assessment and Tax Lien."

The ombudsman then requested documentation from EST to support the "Statement of Account" mailed to Mr. X. Ms. Atkinson provided the following:

- The four tax liens filed by EST in 1985, but not the releases filed for two of the liens in 1986.
- A table showing taxes due and payments made. This showed balances due of $808.14 for the third quarter of 1984; $327.16 due for the fourth quarter of 1984; $1,351.46 due for first quarter of 1985; and $1,486.61 due for the second quarter of 1985, with a note that that quarter was an "estimated report" and could be removed if Mr. X. had not actually had any employees during the second quarter. The table also showed that EST had attached Mr. X.'s 1985 Permanent Fund Dividend and applied it to the tax debt. The total claimed according to this document was $3,973.37, considerably more than the two extant liens. A large part of the difference was the "estimated" amount from the second quarter of 1985, when Mr. X. had not filed a UI tax return. EST indicated that it would remove that amount if Mr. X. explained that he was out of business by that time.
- Computerized case notes indicating that this file was reviewed during a 2010 audit of UI tax contributions for an unrelated employer that Mr. X. was involved in starting in the late 1990's. An email from Virginia Calloway dated June 16, 2010, reads in relevant part: "[Business name redacted]/Ch 7: This account has been closed as of [1985]. **The account is in Uncollectable status** with a balance of $3,973.37 plus interest and penalties. **The agency has not taken any collection action since November 1988**. However, we do have liens on his personal property." (Emphasis added).

In 2015, for the first time in 30 years, EST attached Mr. X.'s Permanent Fund Dividend, obtaining $2,072 (minus administrative fees charged by the PFD Division.) Mr. X. then offered to settle the debt for $1,135.30, and requested that EST return the remaining $936.70 of his PFD. The agency agreed to do so and closed this account for $1,135.[1]

[1] Email from Julie Atkinson, Department of Labor & Workforce Development, to Mr. X., September 28, 2015. EST recorded releases of the two remaining tax liens on October 13, 2015.

Unemployment Insurance Tax and the Statute Of Limitations

Both of the complainants wanted to know why such ancient debts were not barred by a statute of limitations. According to a 1984 Alaska Attorney General's Opinion (File No: 366-261-84)(Appendix A), the relevant statute of limitations is Alaska Statute 23.20.270(a):

> **AS 23.20.270. Limitation of actions and uncollectible accounts**.
>
> (a) **The department shall begin action** for the collection of contributions, including interest and penalties, imposed by this chapter **by assessment or suit within five years after a return is filed.** A proceeding for the collection of these amounts may not be begun after the expiration of this period. In case of a false or fraudulent return with intent to evade contributions, or in the event of a failure to file a return, the contributions may be assessed, or a proceeding in court for the collection of the contributions may be begun, at any time.
>
> (b) The department may charge off as uncollectible and no longer an asset of the unemployment compensation fund a delinquent contribution after five years from the date of delinquency, if the department is satisfied that there are no available means by which the contribution may be collected. [Emphasis added]

The opinion interprets the statute as requiring only that EST serve a Notice of Assessment within five years after the employer's return is filed, after which the agency has an indefinite time for collection efforts. The agency is not required to actually file a lawsuit like a private-sector creditor.

The process for tolling the statute of limitations by serving a notice of assessment is as follows:

> **AS 23.20.205. Notice of assessment, distraint, seizure, and sale.**
>
> (a) If the department finds that a contribution including interest or penalty on the contribution is delinquent, the department may issue a notice of assessment specifying the amount due and may serve it on the delinquent employer. The notice must inform the employer of the department's rights under (c) of this section. A peace officer or an authorized representative of the department may serve the notice personally or the department may mail the notice by certified or registered mail with return receipt requested.
>
> (b) If the notice is served by mail the notice must be deposited in the post office, addressed to the delinquent employer at the employer's last address of record and the postage paid. The date of service is considered to be the day of delivery shown on the delivery receipt. However, if it appears the addressee is deliberately avoiding service, then the date of service is the day of mailing.
>
> (c) Unless an appeal is filed under AS 23.20.220, if the amount assessed is not paid within 30 days after personal service or mailing of the notice as required by (a) of this section, the department may collect the amount stated in the assessment by the distraint, seizure, and sale of the property, goods, chattels, and effects of the delinquent employer. Goods and property exempt from execution under the laws of this state are exempt from distraint and sale under this section.

Service by mail is specified as "certified or registered mail with return receipt requested." Unless the employer is deliberately avoiding service – which has not been argued so far – the date of service is the date shown on the delivery receipt.

Once service has been accomplished, after 30 days Labor is granted fairly drastic collection powers to seize property. The statutes do not set any time limit on enforcement actions. The attorney general's opinion suggests that legislative intent was to allow a "reasonable" time for collections, while declining to quantify "reasonable." However, the longest gap in enforcement discussed in the opinion was approximately seven years. In Mr. F.'s case, collection efforts were nonexistent from 1995 to 2014 (19 years); in Mr. X.'s case, collection efforts were dormant from 1988 to 2015 (27 years).

Interviews and Correspondence with Agency Staff

Assistant Ombudsman Leibowitz interviewed Julie Atkinson, EST's primary employee assigned to collection of the old tax debts. Ms. Atkinson said that EST began this collections program in October 2014 to "clean up" old delinquent accounts from the 1980's and 1990's. She said that there were hundreds of 1980's/1990's delinquent UI tax accounts on EST's books, and she was issuing about 25 bank levies per week. She said that most debtors would call EST because of the bank levy, and she would then release the bank levy if they expressed willingness to pay at least part of the outstanding tax. She said that EST also provides an "offer and compromise" packet that takes into account the individual's current ability to pay; however, that requires the debtor to provide the last two years of income tax returns, and to list assets and expenses. If EST's staff is convinced that the documentation shows inability to pay, the debt may be "compromised" for zero dollars, i.e. written off as uncollectible.

Ms. Atkinson said that she offered Mr. F. such a packet, because he said he was ill and unable to pay. (Later, Mr. F. told Ms. Leibowitz that he refused to list his assets for EST or provide any other documentation related to his ability to pay.)

One of the questions Ms. Leibowitz asked EST was why EST's "Statement of Account" notices stated that the taxes were from 1998, because that was not true. Ms. Atkinson said that when EST changed its software in 2004, all pre-1999 accounts were lumped together as being from the fourth quarter of 1998. Also, the penalties and interest accrued up through 1998 were deleted. Then interest accrual started over in 1999, at 12 percent per year, the interest rate provided by AS 23.20.185(a). Each "Statement of Account" was inaccurate about the quarters for which UI tax was due, as all pre-1999 delinquencies were attributed to the fourth quarter of 1998, and the statements omitted accrued interest for a varying number of years, depending on how many years prior to 1999 the debt had actually accrued. In other words, choices made for a data migration in 2004 made the electronic account statements incorrect as to both the amount and date of any pre-1998 tax delinquency.

Despite the inaccurate statements of account generated by one part of the computer system, EST has apparently maintained enough records to reconstruct which quarters of tax were actually unpaid. This information was contained in the tables prepared for those debtors who questioned the initial form letter. Those amounts were not exactly the same as the amounts recorded in the various liens: the tables included payments made after the liens were recorded, but excluded interest that had been assessed and included on the tax liens.

Ms. Leibowitz then asked about the service of the original notices of assessment. In order to avoid the statute of limitations, EST was required to serve a notice of assessment within five years of the filed tax return. While EST had, in these cases, *recorded* a "Notice of Assessment and Tax Lien" within five years of the tax returns, recording is not equivalent to the service of a notice of assessment under

AS 23.20.205, and assessment within five years is required to avoid the statute of limitations under AS 23.20.270. Ms. Atkinson said that agency practice in the 1980's was to mail the Notice of Assessment and Tax Lien to the employer's address of record via certified mail at the same time as recording the lien.

However, for most of these cases, including the complainants' accounts, EST no longer has any proof of mailing – the paper records, such as any certified mail receipt, are lost or destroyed. They apparently were not copied to microfiche or other media. (Similarly, the actual tax returns are long gone.) Ms. Atkinson said that the files which survived do contain certified mail receipts, which she took as evidence that this was the standard practice followed with all of the files.

Ms. Atkinson's supervisor, Virginia Calloway, also met with Ms. Leibowitz. Ms. Calloway said that EST's goal was to obtain at least some money from these old accounts and then close them. She did not think it was appropriate to simply write off the old accounts, because EST has a responsibility to keep the unemployment compensation fund solvent, and nonpaying employers drive up the rates for those who do pay. When asked about the propriety of trying to collect money after 20 years (or more) of inaction, Ms. Calloway admitted that she did not expect to obtain payment of decades' worth of accrued interest. She was not convinced that efforts to collect the interest would look good if challenged in court, and she said that EST did not really expect to get more than the principal on most of these accounts – if even that much. The overall goal was to settle each account for what the debtor appeared able to pay.

PRELIMINARY FINDING AND AGENCY RESPONSE

AS 24.55.150 authorizes the ombudsman to investigate administrative acts that the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous. AS 24.55.180 provides that the ombudsman may issue a confidential preliminary opinion to the agency that is the subject of the complaint.

On August 6, 2015, Ms. Leibowitz provided EST with a preliminary opinion regarding EST's collection efforts. The opinion was emailed to Virginia Calloway and Julie Atkinson. The ombudsman asked EST to obtain advice from the Department of Law regarding the legality of these collection efforts, given that EST lacked actual proof of service of the notices of assessment in these cases (as compared to assuming that historic office practice was followed and therefore the notice of assessment was served). The ombudsman asked that EST take the following steps:

- Stop sending "Statement of Account" notices that were on their face inaccurate due to attributing all old taxes to the fourth quarter of 1998.
- Stop attempting to collect interest that accrued during years of unexplained neglect by EST, in particular interest accrued from 1999-2014. (Although Ms. Calloway and Ms. Atkinson both indicated that they did not seriously expect to collect the interest, EST continued to send statements including the interest, and presumably accepted payments of interest from any debtors frightened or gullible enough to pay without negotiating.

The ombudsman’s August 2015 letter also discussed whether EST could rely on the recorded tax liens to support the bank levies and other enforcement efforts that follow service of a Notice of Assessment, concluding that the tax lien alone (without service of the Notice of Assessment) could not support bank levies and other summary enforcement methods. In addition, the ombudsman noted Mr. X.’s argument

that his 1980's bankruptcy discharged his unemployment insurance taxes, but concluded that Mr. X.'s argument did not appear supported by the federal laws limiting which UI tax debts are actually dischargeable in bankruptcy.

EST's response, dated September 11, 2015, and signed by Julie Atkinson, is included on the following pages:

> Dear Ms. Leibowitz,
>
> This is in response to your August 6, 2015 letter regarding current efforts by the Employment Security Tax Section [Footnote omitted] ("EST") to collect on unpaid unemployment insurance taxes. EST has reviewed your comments and concerns regarding these collection practices and has endeavored to address each of the points raised, as discussed below.
>
> First, your letter discusses EST's current practice of mailing statements of account to debtors. EST mails statements of account to notify businesses and individuals of outstanding balances owed for unpaid unemployment insurance taxes. EST has consulted state Assistant Attorney General Siobhan McIntyre, and Ms. McIntyre has opined that neither state nor federal law prohibit EST from sending statements of account to these debtors and requesting payment of due and owing unemployment insurance taxes.
>
> Regarding time limitations applicable to this practice, as highlighted in your letter, AS 23.20.270(a) requires that EST must "begin an action for the collection of contributions . . . by assessment or suit within five years after a return is filed." EST is mindful of this limitation and only sends statements of account when evidence demonstrates that a notice of assessment was sent by certified mail within five years after filing, as prescribed by AS 23.20.270(a).
>
> EST also recognizes that AS 23.20.205 describes the process for issuing notices of assessment, including that "the department may mail the notice by certified or registered mail with return receipt requested." While return receipts certainly provide strong evidence of mailing and receipt, they are not the only evidence courts have found to establish that parties have substantially complied with statutory notice requirements. *See Blood v. Kenneth A. Murray Insurance, Inc.*, 151 P.3d 428 (Alaska 2006); *Martens v. Metgar*, 524 P.2d 666 (Alaska 1974). [Footnote omitted]
>
> As outlined in your letter, EST has evidence that both Mr. [X.] and Mr. [F.] were sent notices of assessment within five years of filing based on 1) the existence of timely recorded notices of assessment and tax liens and 2) the agency's standard practice to mail notices of assessment and tax liens to the employer at the employer's address of record by certified mail. EST recognizes that AS 23.20.205 provides separate requirements for issuing notices of assessment, compared to the requirements outlined in AS 23.20.200 for filing and recording tax liens. EST does not rely on the existence of the recorded lien as conclusive proof of notice under AS 23.30.205. Instead, EST relies on its historic practice of sending a copy of the

"Notice of Assessment and Tax Lien" by certified mail to the debtor at the same time a copy was sent to the recorder's office for recording.

EST policy is that EST does not pursue collection efforts on accounts where there is no evidence to support that an individual or business was served with a Notice of Assessment, as required by AS 23.20.270(a) and AS 23.30.205.

Second, your letter addresses EST's efforts to collect interest on unpaid unemployment insurance taxes. AS 23.20.185(a) provides that unpaid unemployment insurance taxes bear an interest rate of 12 percent per year from the date due until payment is received by EST. Although interest would accrue for the entire period an amount due remains unpaid, EST maintains that it may negotiate the payment of principle and interest with debtors in order to carry out its duty to assess and collect unemployment insurance taxes. [Footnote omitted]

Third, your letter raises concerns that EST's current statements of account do not provide an accurate representation of a debtor's outstanding balance. Although EST maintains that its ability to send statements of accounts and request payment from debtors complies with statutory requirements, EST recognizes that the statements of account, as currently provided, may cause confusion and appreciates your bringing this to our attention. EST is currently providing a clarifying message on the statement of account. EST is in the process of reviewing statements of account to reflect the exact time period for which unpaid contributions are due and owing and the period for which interest is assessed. In regards to the clause addressing notices of assessment, these statements are redundant and unnecessary; as EST does not send statements of account to debtors without evidence that the debtor has already been sent a notice of assessment as prescribed by AS 23.20.205.

Finally, your letter highlights important considerations when handling collection accounts when a debtor has gone into bankruptcy. EST is mindful of the complexity of these cases and reviews these matters on a case-by-case basis. EST has confirmed that Mr. [X.'s] bankruptcy occurred within one year of his unpaid tax return and agrees with your analysis that, under 11 U.S.C. § 507(a)(8)(E), Mr. [X.'s] contribution amounts are nondischargeable.

EST appreciates your efforts in these matters. Should you have further questions or concerns, please feel free to contact me at (907) 465-5900.

Sincerely,

[Signature]

Julie Atkinson
Collection Supervisor

In short, EST indicated that their attorney advised them that the collection efforts (including bank levies) were legal, despite the lack of documentation of service for the notices of assessment. The ombudsman investigator inquired further on September 24, 2015 and Ms. Atkinson responded:

> As for our historic practice of sending Notice of Assessments by certified mail, I have attached a section of the Field Auditor's Handbook from April 1979, a section of the collection flow chart dated October 8, 1990 and a sample Notice of Assessment that was

> sent during the times in question (the form date is July 1982). I have also found signature cards for Notice of Assessments sent certified in the 1980's in other employers' files from that timeframe. Employees which were here during the 1980's also confirmed this was our common practice as is required by Alaska Statute.

The ombudsman believes that it is *likely* that the complainants were sent timely notices of assessment; however, the ombudsman remains unconvinced that "likely" is enough to prove service of the assessment and prevent a statute of limitations from running.

For purposes of AS 23.20.270(a), the service of the notice of assessment is treated as equivalent to the filing of a lawsuit. Where the debtors did not respond to the allegedly-served assessment, the result is equivalent to a default judgment upon which the agency can execute by attaching bank accounts and other assets. Obtaining a default judgment requires proof of service, and testimony about general office practice is not proof of service for the purposes of obtaining a default judgment. However, if the Department of Law has advised EST that there is adequate proof of service, then EST is entitled to rely on its attorney's advice. The ombudsman defers to the Department of Law, which will be obliged to defend the EST's position if any of the debtors challenge it in court.

Regarding the use of Statement of Account forms that misrepresented the quarter from which taxes were due, as well as erroneously claiming that EST would issue a "Notice of Assessment" (which cannot be done 30 years after the tax return), EST responded:

> EST recognizes that the statements of account, as currently provided, may cause confusion and appreciates your bringing this to our attention. EST is currently providing a clarifying message on the statement of account. EST is in the process of reviewing statements of account to reflect the exact time period for which unpaid contributions are due and owing and the period for which interest is assessed.

EST acknowledged that warning debtors that a Notice of Assessment could be issued is "redundant."

Because of limitations on the agency's computer system, EST has not been assessing statutory interest from the date of nonpayment. Instead EST has been sending out notices charging interest accruing since the fourth quarter of 1998, regardless of the actual date of the delinquent tax amount. That means, for example, that an unpaid quarter of UI tax dating from 1984 is charged the same interest as a delinquency originating in 1998.

EST's most recent response regarding interest affirmed that EST is continuing this practice:

> From: Atkinson, Julie M (DOL)
> Sent: Friday, October 09, 2015 4:19 PM
> To: Beth Leibowitz
> Cc: Calloway, Virginia A (DOL)
> Subject: RE: ombudsman complaints A20151199, A20151374
> Ms. Leibowitz,
>
> We are willing to collect interest as required by statute; however, as our Statements of Account only reflect interest accrued from the 4th quarter of 1998 forward, this is the amount we are attempting to collect at this time. We do review each individual's circumstances to determine if any of the dues can be waived or reduced.
> Thank you,
> Julie Atkinson
> (907) 465-5900

ANALYSIS AND FINDINGS

The ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid. Conversely, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is *justified* and that the complainant's action or inaction materially affected the agency's action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

The standard used to evaluate all Ombudsman complaints is **the preponderance of the evidence**. If the preponderance of the evidence indicates that the administrative act took place and the complainant's criticism of it is valid, the allegation should be found justified.

The ombudsman may investigate to find an appropriate remedy.

> ***ALLEGATION 1: ARBITRARY: The Department of Labor & Workforce Development Employment Security Tax Section is calculating accrued interest on all pre-1999 accounts as if the taxes were due in 1998, regardless of the actual age of the tax debt.***

The email from EST on October 9, 2015 is succinct:

> We are willing to collect interest as required by statute; however, as our Statements of Account only reflect interest accrued from the 4th quarter of 1998 forward, this is the amount we are attempting to collect at this time. We do review each individual's circumstances to determine if any of the dues can be waived or reduced.

In other words, due to a software inadequacy, EST is not actually collecting interest "as required by statute." The statute, AS 23.20.185 reads:

> **AS 23.20.185**. Interest on past due contributions.
>
> (a) If contributions are not paid on the date on which they are due, the amount remaining unpaid bears interest at the rate of 12 percent per year from the due date until payment plus accrued interest is received by the department. Interest collected under this section shall be deposited in the clearing account of the unemployment compensation fund.
>
> (b) Interest does not accrue on contributions from an estate in the hands of a receiver, executor, administrator, trustee in bankruptcy, common law assignee, or other liquidating officer after the date when the officer qualifies. However, contributions accruing with respect to employment of a person by the officer are due and draw interest in the same manner as contributions due from other employers.
>
> (c) Payments of contributions erroneously paid to an unemployment compensation fund of another state which should have been paid to this state and which are refunded by the other state and paid by the employer to this state shall be considered paid to this state at the date of payment of the other state.

> (d) Interest collected under this section shall periodically be transferred from the clearing account to the training and building fund.

Interest accrues "at the rate of 12 percent per year from the due date until payment plus accrued interest is received by the department." There is an exception for time in bankruptcy, along with other forms of liquidation. There is nothing in the statute authorizing the Department to decide, based on incomplete electronic recordkeeping, that interest on old accounts will accrue starting at the end of 1998, regardless of the actual age of the account. Under this method, $5,000 in delinquent tax due in 1984 bears the same interest as $5,000 in delinquent taxes due in 1998. This makes sense only if poor data maintenance trumps the statute.

AS 23.20.185 does not provide any method for reducing the interest assessment. However, other sections of AS 23.20 allow EST to settle the delinquent tax for less than the full interest amount, based on the debtor's inability to pay or on EST's determination that there are no available means to collect the money. AS 23.20.255(a) states that the Department "may compromise a claim for contributions, interest, or penalties existing or arising under this chapter in any case where collection of the full claim would result in the insolvency of the employing unit or individual from whom the contributions, interest, or penalties are claimed." AS 23.20.270(b) allows the Department to "charge off as uncollectible and no longer an asset of the unemployment compensation fund a delinquent contribution after five years from the date of delinquency, if the department is satisfied that there are no available means by which the contribution may be collected." Neither of these statutory provisions has anything to do with idiosyncrasies of the electronic billing system used to generate the "Statement of Account" letters.

The ombudsman finds Allegation 1 ***justified.***

Agency Response to Preliminary Finding in Allegation 1

Commissioner Drygas responded on behalf of the Department:

> The Department agrees that records for interest on past due contributions that accrued prior to the fourth quarter of 1998 are inconsistent and consequently calculating accrued interest on all pre-1999 accounts as if the taxes were due in 1998 regardless of the actual age of the tax is arbitrary.

*

ALLEGATION 2: UNFAIR: The Department of Labor Employment Security Tax Section is assessing interest that accrued for decades while the agency treated the accounts as uncollectible.

The Alaska Ombudsman Act allows the ombudsman to criticize administrative acts that are "unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law." See AS 24.55.150(a). The Office of the Ombudsman's policy manual describes an "unfair" administrative act as one that "violated some principle of justice." Even though the Department of Law has advised EST that it is not barred by a statute of limitations from pursuing these collection actions that does not mean that these practices are just.

In common law, the courts use the doctrine of laches to deter gross delay in pursuing a claim, especially if the delay has made the defendant worse off than he or she would have been if the claim were pursued within a reasonable time. In cases discussing laches and its application to government agencies, the Alaska Supreme Court has stated:

> The doctrine of laches "creates an equitable defense when a party delays asserting a claim for an unconscionable period." To bar a claim under laches, "[a] court must find both an unreasonable delay in seeking relief and resulting prejudice to the defendant." "Laches is usually invoked to bar a claim because the plaintiff has unreasonably delayed seeking relief or protecting a known right." The superior court has "broad discretion to sustain or deny a defense based on laches."[2]

Although the statutes (AS 23.20) entitle EST to statutory interest, laches still bars collection if the delay is unconscionable and harmful.

The first element is delay. Both cases brought to the ombudsman's office originated no later than 1985. In Mr. F.'s case, EST apparently attached his Permanent Fund Dividend in 1994.[3] EST had some contacts with him through 1995, in which Mr. F. mentioned settling the tax debt but made no further payments. EST took no further action of any kind until sending Mr. F. a form letter in October 2014, 19 years later.

In Mr. X.'s case, EST collected his Permanent Fund Dividend in 1985. In 2010, EST noted that this file was in "uncollectable status" and that the most recent collection effort was in 1988. The nature of that collection effort is unspecified. Although EST staff reviewed this debt in 2010 and were in contact with Mr. X. regarding an unrelated audit, EST took no action on the old debt until 2015, 27 years after the last effort noted in EST's records. Most civil judgments must be executed on within five years, unless a court finds "just and sufficient reasons for the failure to obtain the writ of execution within five years."[4] Even the Internal Revenue Service (IRS) has a general 10-year time limit for collection of assessed income taxes.[5] In summary, a delay of 19 years looks bad, and 27 years looks, and is, far worse.

Further, while there are probably some UI tax debtors actively evading collection efforts, the complainants in this report have been in plain sight for decades, collecting Permanent Fund Dividends, running businesses, and buying and selling property. For example, PFD garnishment is one of the easiest judgment collection mechanisms available, but there is no indication that EST even tried to use that mechanism more than once or twice in the last 30 years – until 2015.

However, common law also requires showing prejudice to the defendant. The defendant has to be harmed by the delay rather than simply indignant at having the past come back to bite him. The ombudsman does not consider the debtors to be necessarily prejudiced by being expected to pay their original UI tax returns. But the interest assessments are another matter.

Under AS 23.20.185, the delinquent taxes accrue interest from the date of delinquency until payment, at a rate of 12 percent per year. Currently, EST is sending out statements assessing interest beginning with the fourth quarter of 1998. Interest accruing from January 1999 through December 2015 results in 17 years of interest accumulation. At 12 percent per year of simple interest, every $1,000 of unpaid taxes results in an additional $2,040 of interest, tripling the original debt. It is inequitable for a state agency to leave accounts dormant since the 1980's or 1990's – in Mr. X.'s case, the account was actually labeled "uncollectible" – and then seek triple the original amount.

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2 See *Offshore Systems-Kenai v. State of Alaska, Department of Transportation and Public Facilities*, 282 P.3d 348 (Alaska 2012).

3 EST's spreadsheet shows a payment received on Mr. F.'s account on October 27, 1994. Although there is nothing specifying the source of the payment, the amount ($979.90) matches the Permanent Fund Dividend for that year.

4 AS 09.35.020.

5 See 26 U.S.C. § 6502(a).

Of course, AS 23.20 does not state that interest may be waived simply because of delay. The doctrine of laches, however, may still render the interest uncollectible. Uncollectible amounts may be written off by EST under AS 23.20.270(b).

The ombudsman acknowledges that EST appears to have been settling most of these tax debts for principal, or part of the principal. That said, EST is still sending out statements claiming 17 years of interest. When asked whether the agency has accepted payments that included all (or even a significant portion) of the interest, Ms. Atkinson wrote that she could not answer that question. The email correspondence is set forth below:

> From: Beth Leibowitz
> Sent: Friday, October 09, 2015 4:53 PM
> To: Atkinson, Julie M (DOL)
> Subject: RE: ombudsman complaints A20151199, A20151374
>
> Have you had any cases where the debtor paid the post-1998 interest, in full or in substantial part?
>
> From: Atkinson, Julie M (DOL)
> Sent: Tuesday, October 13, 2015 4:14 PM
> To: Beth Leibowitz
> Cc: Calloway, Virginia A (DOL)
> Subject: RE: ombudsman complaints A20151199, A20151374
>
> Ms. Leibowitz,
>
> I am not the only one who is working or has worked these old accounts and we do not maintain that type of statistical data.
>
> Thank you,
> Julie Atkinson
> (907) 465-5900

The ombudsman infers that EST is not expecting to collect interest in most of these cases, but is perfectly willing to accept payment from debtors frightened enough to pay the stated amount without negotiating. Because the ombudsman believes it is inappropriate for EST to benefit from such extended abandonment of these accounts, the ombudsman finds it is unfair for EST to send out statements claiming 17 years of interest, especially considering that most or all of these accounts were dormant – or labeled uncollectible – for at least 16 or those years (1999-2014). Receipt of any interest for those years rewards EST for leaving the accounts in the "uncollectible" bin for a decade or two, and then seeking payment a generation later.

The ombudsman finds Allegation 2 ***justified.***

Agency Response to Preliminary Finding in Allegation 2.

The commissioner responded:

> The Department agrees that collection activity was, in fact, sporadic and inconsistent for a number of accounts with past due contributions on quarters prior to the fourth quarter of

1998. The Employment Security Tax Section has implemented policy and procedures that eliminate the inconsistencies and alleviate any unfair practices.

RECOMMENDATION:

The ombudsman is mandated to investigate to find an appropriate remedy. AS 24.55.150. In this case, the problem is EST billing for interest that has accrued mostly because of the extraordinarily long period of inaction by the State on these accounts. Therefore the ombudsman offers the following recommendation:

> ***RECOMMENDATION: EST should write off as uncollectible the accrued interest on all pre-1999 tax delinquencies.***

Currently, EST's statements of account are claiming 17 years of accrued interest on all pre-1999 tax delinquencies, regardless of either the actual age of the account or the length of time that EST abandoned the account. This method has no particular logic or fairness to it.

Given that EST's supervisor, Ms. Calloway, stated that the agency does not actually expect to collect much of the assessed interest on these ancient accounts, EST should consider writing off interest on these accounts and confining its collection efforts to the principal owed. Currently, EST appears to be using the huge interest amounts primarily to frighten debtors, although EST has certainly left itself the option of collecting an entire 17 years of so of interest on accounts. (Again, EST claimed that it did not know whether some individuals had actually paid the 17 years of interest billed to them). If EST does not expect to collect the interest, EST would do better to stop hammering debtors with statements claiming three times the original debt, especially because a court might well bar EST from collecting that interest, or even bar collection of both principal and interest, due to laches.

Ombudsman Note: On December 23, 2015, Commissioner Drygas met with Jim Whitaker, Chief of Staff to Governor Bill Walker, and Angela Hull, the Governor's Public Records Specialist. They discussed the issues presented by the EST's attempts to collect Mr. F.'s delinquent taxes as well as the general collection efforts. Ms. Hull later notified Ms. Leibowitz that Commissioner Drygas was not fully aware of how these recovery efforts had been implemented, nor was she previously aware of the Ombudsman's impending report and the counsel provided by the Department of Law. Ms. Hull also stated:

> . . . these extremely old case recovery efforts have been suspended for the time being, while Commissioner Drygas is out of the office. The general consensus in the meeting was that departmental policy needed to be reviewed and revised immediately.

***

Agency Response to Ombudsman Recommendation

Commissioner Drygas accepted the recommendation:

> The Department agrees and will comply with the recommendation. The Department will consult with the Department of Law to get further clarification on collection efforts.

FINDING OF RECORD AND CLOSURE

The ombudsman found the allegations against EST justified, and made one remedial recommendation. The Department of Labor and Workforce Development agreed to implement the recommendation, and accepted the findings. The complaints are closed as ***justified*** and ***rectified***.

MEMORANDUM State of Alaska

TO: John W. Shay, Jr.
Director
Employment Security Division
Department of Labor

DATE: February 29, 1984

FILE NO: 366-261-84

TELEPHONE NO: 465-3603

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Statute of limitations for collections

By: Linda Scoccia
Assistant Attorney General
Human Services-Juneau

You have asked us to review two memoranda issued by our office regarding interpretation of AS 23.20.270(a). That section provides:

> The department shall begin action for the collection of contributions (including interest and penalties) imposed by this chapter by assessment or suit within five years after a return is filed. No proceeding for the collection of these amounts may be begun after the expiration of this period. In case of a false or fraudulent return with intent to evade contributions, or in the event of a failure to file a return, the contributions may be assessed, or a proceeding in court for the collection of the contributions may be begun, at any time.

The earlier memorandum, dated November 22, 1966, concluded that a notice of assessment filed within the five-year period stops the running of the statute. The later memorandum, dated April 24, 1979 opined that the failure to renew a notice of assessment or take further action to collect the contributions owed within five years of filing of the notice of assessment barred the department from taking any further action to collect the contributions.

We concur in the reasoning and conclusion of the earlier opinion, and believe that the latter opinion is in error. Therefore, please disregard the opinion on April 24, 1979. We have attached a copy of the November 22, 1966 memorandum for your reference.

LS:bap
Attachment
cc: Rudy Isturis

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Attachment to 366-261-84 2/29/84

November 22, 1966

M E M O R A N D U M

TO: P. A. Hansen
Employment Security Division
Department of Labor

FROM: Warren C. Colver
Attorney General

By: Dickerson Regan DR
Acting Deputy Attorney General

RE: Room and Board Accounts;
Statute of Limitations

You have asked whether the filing of a Notice of Assessment is sufficient to stop the running of the statute, AS 23.20.270(a), limiting the period during which collection proceedings can be begun. AS 23.20.270(a) provides:

> (a) The department shall begin action for the collection of contributions (including interest and penalties) imposed by this chapter by assessment or suit within five years after a return is filed. No proceeding for the collection of these amounts may be begun after the expiration of this period. . . . (Emphasis added)

Since a Notice of Assessment is the basis from which your division proceeds to exercise the summary collection remedies of distraint, seizure and sale, it is our opinion that action for collection is commenced by filing the Notice of Assessment, and the limitation statute no longer runs after such filing.

You have also asked whether an "action for collection" commenced by Assessment must be continuously prosecuted or completed within a certain time, since in some of your accounts no

collection has been made or attempted for approximately three ye
Essentially the question you raise is whether failure to exercis
your summary collection remedies within a given period will be c
strued as an abandonment of your action for collection and allow
the statute to run once more. In our opinion this will not occu
AS 23.20.270(a) does not require your Division to press its col-
lection remedies continuously, nor does it require that collecti
be completed within a certain time. If the Legislature had in-
tended that your action for collection should be deemed abandoned
after a certain period of inactivity, it could well have so pro-
vided. This was not done.

Presumably the Legislature was aware that collection i
often delayed due to budget and staff limitations, administrativ
uncertainty (such as resulted in this room and board matter becau
of the Worthington litigation), or the insolvency of a delinquent
employer. There is no indication in the statute that the Legis-
lature intended to deny the Division a reasonably time of effect
collection.

What the Legislature obviously intended was that action
should be commenced, the amount of the delinquency clearly deter-
mined, and the employer put on notice of his obligation before th
records and witnesses upon which an employer might base a defens
became lost, destroyed or scattered. In short, the statute is in
tended to prevent the attempted collection of ancient and stale
obligations, the exact amounts of which are uncertain in the mind
of the employer, and against which he has not a ready defense.
Therefore, once the Assessment is served the purpose of the statu
is accomplished and the limitation period will not begin to run
again.

Construing AS 23.20.270(a) so as to allow a reasonable,
possibly even a fairly long period during which to effect collec-
tion is not only reasonable in the light of the statutory langua
it is in accord with established principles of law. Limitations
such as this historically do not run against the sovereign, and
where, by statute, the sovereign permits such a limitation to be
raised against it, the statute is to be strictly construed in fa
of the sovereign. Dupont De Nemours & Co. v. Davis, 264 U.S. 456
68 L.Ed 788, 791 (1923); Lewis v. Moore, 199 F.2d 745, 749 (10th
Cir. 1952); U. S. v. Valndza, 81 F.2d 615 (3rd Cir. 1932).

Since a conststruction of AS 23.20.270(a) which would
work an abandonment of an action for collection would not favor
the sovereign, and since the statute is silent on this point, we
conclude that once it is tolled, the limitation period may never
again begin to run, and a reasonable time should be allowed for
collection.

In view of the uncertainty surrounding the collection
these contributions, and since the delay has not worked an undue
hardship upon the subject employers, it is our opinion that you
should proceed to collection with all your room and board accoun
in which Notice of Assessment was timely served.

Attachment to 366-261-84 2/29/

TO: Guy B. Asher
Supervising Field Auditor
Div. of Employment Security
Department of Labor

DATE: April 24, 1979

FILE NO: J-22-201-79

TELEPHONE NO: 465-3674

FROM: AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: State v. Glascow

By:
Norman E. Staton, Jr.
Assistant Attorney General

This memo is in regard to our conversation of April 24, 1979, concerning collection of contributions, penalties and interest due to the Unemployment Compensation Fund by Frank Glascow, d b a Seward Bakery.

After reviewing the file we concluded that the last assessment made on Frank Glascow was on March 28, 1972, when a Notice and Order of Jeopardy Assessment was filed. There had been no renewal of the assessment or action to collect the owed contributions within five years of March 28, 1972. As a result, AS 23.20.270(a) prohibits us from initiating any proceeding for the collection of the owed contributions because of the expiration of the five-year-limitation period.

Therefore, the State cannot bring an action to collect the contributions. Pursuant to AS 23.20.270(b), your department may charge off as uncollectable the delinquent contributions of Frank Glascow, if there are no assets to which any existing liens attach.

NES:dlm