

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

IN THE MATTER OF

J.N.

Case No. OAH 05-0025-PFD

2004 Permanent Fund Dividend

DECISION & ORDER

I. Introduction

J.N. timely applied for a 2004 permanent fund dividend. The Permanent Fund Dividend Division determined that Mr. N. was not eligible, and it denied the application initially and at the informal appeal level. Mr. N. requested a formal hearing. Administrative Law Judge Dale Whitney heard the appeal on February 23, 2005. Mr. N. appeared by telephone. Susan Lutz represented the PFD Division by telephone. The administrative law judge affirms the division's decision.

II. Facts

Mr. N. is a long-time Alaska resident. He registered to vote in Alaska in 1968, maintains an Alaska driver's license, and owns a home in Alaska. Mr. N. testified that he has reached the stage of life where a person likes to travel and see the world a bit, and also where a person needs to attend to medical issues more often. For these reasons, Mr. N. was absent from Alaska in 2003 on five occasions, for a cumulative total of 188 days.

The dates and reasons for Mr. N.'s absences from Alaska in 2003 are as follows:

January 5 - March 19 (73 days). Mr. N. originally reported that this absence was for vacation, but he later reported that for three of these days his wife was in the hospital, and that he visited doctors on January 7, February 11, March 12 and March 13.

April 8 - June 13 (66 days). Mr. N. underwent knee replacement and physical therapy. Although he was not actually in the hospital this entire time, this trip was essentially for the purpose of continuous medical treatment.

August 17 - August 25 (8 days). On his application, Mr. N. described this trip as both to have his knee checked and for vacation.

October 7 - October 8 (1 day). This trip appears to be for a one-day vacation.

October 10 - November 19 (40 days). On his application Mr. N. described this trip as a vacation, but he later provided evidence that on November 8-9 and November 18-19 he was at doctor appointments.

III. Discussion

Mr. N. takes issue both with the way AS 43.23.008(a) (hereinafter "the statute") was applied to his case, and with the constitutionality of the statute itself. The statute lists fourteen reasons a person may be absent from Alaska without violating the physical presence requirement of AS 43.23.005(a)(6).

The last of the fourteen listed absence reasons actually contains its own list of three reasons a person may be absent from Alaska and still qualify for the next year's dividend. The first of these three reasons, (14)(A), allows a person to be absent for 180 days for any reason consistent with Alaska residency. In 2004 this absence could not be combined with any other kind of absence. If a person claimed, for example, an absence for continuous medical treatment under subparagraph (3) of the statute, that person could not claim 180 days in addition to any medical time; under subparagraph (14)(A), the applicant's total absences for all reasons cannot exceed 180 days. In 2005 this subparagraph was amended to allow it to be combined with any time the applicant was absent for active duty in the armed forces.

Because Mr. N.'s total absences during the qualifying year exceed 180 days, absence reason (14)(A) does not apply to him. Mr. N.'s briefing suggests he may have understood that the 180 days could be combined with other kinds of allowable absences. But a person claiming a 180-day absence under subparagraph (14)(A) cannot claim any other kind of absences, such as for continuous medical treatment.

Subparagraph (14)(B) of the statute allows the applicant 120 days of absence for general reasons in addition to any time the person is receiving secondary, postsecondary or vocational education on a full-time basis. Because Mr. N. has not claimed any time for educational absences, this provision does not apply to him.

Subparagraph (14)(C) of the statute allows an absence of up to 45 days for general reasons in addition to absences claimed for reasons listed under subparagraphs (4) - (13) of the statute. Absences for continuous medical treatment are allowed under subparagraph (5). There is some dispute as to how much of Mr. N.'s absences are properly considered to be for continuous medical treatment. In some instances Mr. N. visited the doctor on one day during a vacation, and the division questions whether such a day can be considered devoted to continuous medical

treatment. At other times, Mr. N. did not see a doctor at all, but it was not feasible for him to return to Alaska while awaiting his next appointment.

It is not necessary to examine each of these occasions in detail and make a determination of precisely how much of the absence time is attributable to continuous medical treatment. Mr. N. does not dispute that on his first trip out of the state in 2003, more than 45 days were devoted exclusively to vacationing and volunteer work. If Mr. N. claims that some of the time he was absent was for continuous medical treatment, then any time in excess of 45 days of this trip for vacationing or general absence reasons would not be allowable. Under the provisions of the statute, some portions of Mr. N.'s absence in 2003 are not allowable, and therefore he is not eligible for a 2004 dividend.

Mr. N. argues that the statute is unconstitutional, because it allows medical patients, students, and military personnel to claim different periods of absences for general reasons in addition to the other time that is allowable for these various categories of applicants. Mr. N. cites Article I, § 1 of the Alaska Constitution and argues that "the courts will rule in my favor that being absent to attend school should be no different than receiving medical treatment or accompanying a spouse who could die in her sleep because of a medical condition." Mr. N. notes that "the legislature seems to have made different rules for different circumstances."

PFDs are merely an economic interest, and as such they compel the minimal level of scrutiny for constitutionality.¹ Under the minimum level of scrutiny, the state only needs to show that the "challenged enactment was designed to achieve a legitimate governmental objective, and that the means bear a 'fair and substantial' relationship to the accomplishment of that objective."² In the case of *Church v. State*, the Alaska Supreme Court noted that "the fair and substantial relationship test does not mean that there has to be a perfect fit between the government's actions and its objectives." The court found that ensuring that dividends are distributed only to residents is a legitimate government interest, and that streamlining the application process and promoting government efficiency is also a legitimate government interest.

In *Church*, the court found that the legislature had the authority to grant broad discretion in determining who was an Alaska resident and in implementing laws designed to make sure that dividends are paid only to residents. The court found that "allowing only enumerated excusable absences unless a person has been in the state more than half a year bears a fair and substantial

¹ *Church v. State of Alaska; Department of Revenue*, 973 P.2d 1125 (Alaska 1999).

² *Id.*, citing *Underwood v. State*, 881 P.2d 322, 325 (Alaska 1994) and *Cosio v. State*, 858 P.2d 621, 629 (Alaska 1993).

relationship to ensuring that the dividend goes only to permanent residents." This is not precisely the same point that Mr. N. raises. Considering the court's reasoning, however, I conclude that the legislature has broad discretion to determine that the likelihood of a person being an Alaska resident is indicated by different lengths of absence time for different kinds of absences. The legislature may use its wisdom, for example, to determine that a student who stays out of Alaska all through summer vacation, up to 120 days, is likely to still be an Alaska resident, while a person who needs medical treatment but stays out of the state for more than 180 days total, or 45 days more than the time actually receiving medical treatment, is not likely to still be an Alaska resident.

Statutes are presumed to be constitutional.³ In reviewing PFD eligibility laws, the Alaska Supreme Court has relied on the well-established principles that a party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation.⁴ A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality. The party attacking a statute has the burden to "negative every conceivable basis which might support it."⁵

The parties have not briefed the issue of an administrative law judge's authority to review statutes for constitutionality, but in this case the statute does not appear to be in conflict with principles of equal protection. Mr. N. has the burden of proving that the division's decision was in error;⁶ I find that he has not met that burden.

IV. Conclusion

Mr. N.'s cumulative absences in 2003 exceeded 180 days, and the days he was absent for vacation exceeded 45 days in addition to the time he was absent for continuous medical treatment and to accompany his spouse as she received continuous medical treatment. The division was correctly following the law when it made the decision to deny Mr. N.'s 2004 PFD application.

³ *State, Dept. of Revenue v. Andrade*, 23 P.3d 58 (Alaska 2001).

⁴ *Id.*

⁵ *Id.*

⁶ 15 AAC 05.030(h).

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of J.N. for a 2004 permanent fund dividend be AFFIRMED.

DATED this 16th day of September, 2005.

By: DALE WHITNEY
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010.1, Dale Whitney, Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order relating to the eligibility of J.N. for a 2004 permanent fund dividend be adopted and entered in his file as the final administrative determination in this appeal.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the date of this decision, pursuant to 15 A A C 05.035(a). The motion must state specific grounds for relief, and, if mailed, should be addressed to: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 25.27.210 within 30 days of the date of this decision.

DATED this 16th day of September, 2005.

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

PFD Division
9/16/05

By: DALE WHITNEY
Administrative Law Judge