

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

In the Matter of	)	
	)	
P. and E. E.	)	
	)	
<u>2007 Permanent Fund Dividend</u>	)	OAH No. 08-0668-PFD Agency No. 2007-044-7140

**DECISION**

**I. Introduction**

The Reverend P. and E. E. timely applied for 2007 permanent fund dividends. The Permanent Fund Dividend Division determined that the E.s were not eligible, and it denied the application initially and at the informal appeal level. The E.s requested a formal hearing which was held January 13, 2009. The E.s appeared by telephone. PFD Specialist Peter F. Scott represented the PFD Division and appeared by telephone. A preponderance of the evidence shows that the E.s are not eligible for a 2007 dividend, and that the division was correctly applying the law when it made the decision to deny their applications.

**II. Facts**

There is no dispute that the E.s are Alaska residents who live in No Name City. As they had done in years past, in November of 2005 the E.s left Alaska for an extended vacation to visit family who lived in Wisconsin. While in Wisconsin, on May 17, 2006, Ms. E. underwent a routine physical examination. She was found to have a suspicious lesion and was diagnosed with cancer. Ms. E. underwent surgery on June 26, 2006, and was subsequently referred to an oncologist on July 11, 2006, completed treatment and was released to travel on August 16, 2006. The E.s returned to Alaska on August 24, 2006.

Reverend E. testified that he contacted the division shortly after Ms. E. was diagnosed to inquire about their eligibility under these circumstances. He stated that contrary to what has occurred, he was told by a division representative that their absences would not be a problem. He testified that they took this information into consideration when they made the decision to stay in Wisconsin for treatment after the surgery along with other factors including the need to travel for treatment and proximity to family members.

If they were to return to Alaska, they would need to travel 000 miles from No Name City to Anchorage for treatment. Conversely, if they stayed in Wisconsin it was a short drive to the hospital and they would have the benefit of family.

The division does not dispute that all of the E.s' absences from May 17, 2006 through August 24, 2006 were for the purpose of receiving continuous medical treatment. The total number of days that the E.s were absent from Alaska before the date of the diagnosis and for travel was 144 days, and the number of days they were absent after the diagnosis and while Ms. E. received continuous medical treatment was 91 days. The E.s were absent for a total of 235 days in 2006.

### **III. Discussion**

In order to qualify for a permanent fund dividend, the applicant must have either been present in Alaska all through the qualifying year, or have only been absent for reasons listed in AS 43.23.008.<sup>1</sup> There are sixteen reasons listed that a person may be absent from Alaska and still qualify for a dividend the next year. Reason number (5) is an absence for someone who is "receiving continuous medical treatment recommended by a licensed physician or convalescing as recommended by the physician who treated the illness if the treatment or convalescence is not based on a need for climatic change."<sup>2</sup> Reason number (13) is an absence for someone who is "accompanying another eligible resident who is absent for a reason permitted under (1), (2), (5) – (12), or (16) of this subsection as the spouse, minor dependent, or disabled dependent of the eligible resident." It is clear that the portion of absences after May 16, 2006, would be allowable under these provisions: Ms. E.'s under AS 43.23.008(5) and Reverend E.'s under AS 43.23.008(16).

The difficult part of this case and what has been described in prior decisions as "counterintuitive"<sup>3</sup> comes in addressing the first portion of the E.s' absence of 136 days while they were on vacation and visiting family before the medical treatment began. An absence for vacation and visiting family members is not necessarily an allowable absence, but it can fall within three kinds of absence allowed for any reason at all, so long as the absence is consistent with continuing Alaska residency. These three absence types are listed together in the statute as reason number 16:

(16) for any reason consistent with the individual's intent to remain a state resident, provided the absence or cumulative absences do not exceed

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<sup>1</sup> AS 43.23.005(a)(6).

<sup>2</sup> AS 43.23.008(a)(5).

<sup>3</sup> *IMO S.H.*, OAH No. 08-0113-PFD at 3 (2008); *IMO C.S.*, OAH No. 05-219-PFD at 3 (2005).

(A) 180 days in addition to any absence or cumulative absences claimed under (3) of this subsection if the individual is not claiming an absence under (1), (2), or (4) - (15) of this subsection;

(B) 120 days in addition to any absence or cumulative absences claimed under (1) – (3) of this subsection if the individual is not claiming an absence under (4) - (15) of this subsection but is claiming an absence under (1) or (2) of this subsection; or

(C) 45 days in addition to any absence or cumulative absences claimed under (1) - (15) of this subsection if the individual is claiming an absence under (4) - (15) of this subsection.

It should be noted that these three choices are conjoined with the word "or" at the end of subparagraph (B). This means that an applicant may choose an absence under any one of these choices, but the three kinds of absences may not be combined. Applicants must decide under which one of these three categories they will claim an absence.

Subparagraph (A) allows a person up to 180 days for any reason in addition to any days the person may have claimed for a military absence, so long as no other kind of absence is claimed. Since the E.s were not in the military, this option allows them to claim up to 180 days during the year for any reason, but not in combination with a medical absence under (5). Since the E.s were absent for a total of 235 days during the qualifying year, claiming an absence under this option will not make them eligible for a 2007 dividend.

Subparagraph (B) allows the applicant up to 120 days for any reason in addition to any time the person was absent for educational reasons under (1) or (2), so long as the person is not claiming any other kind of absence. Since the E.s were not absent for educational reasons, this choice allows only 120 days, and is less favorable than choice (A).

Subparagraph (C) allows absences of up to 45 days in addition to any other claimed absences, including medical absences claimed under (5). Because the time the E.s were absent unassociated with Ms. E.'s medical treatment was 144 days in addition to the medical absence time, their nonmedical absence is not allowable under this provision either. However, one looks at the case, some portion of the E.s absences in 2006 is not allowable.

Under the law, a person could be absent from the state on vacation for 180 days, and the entire absence would be allowable. A person could be absent from the state for 365 days for medical reasons, and the absence would be allowable. But a person who takes a 46-day trip early in the year for a vacation or other non-allowable reasons, and then suffers an unforeseen

accident or illness requiring an absence of more than 135 days later in the same year would not be eligible. The total absence in that case would be 181 days, and 46 days in addition to the medical absence. Therefore, the Reverend and Ms. E. are precluded by law from receiving a 2007 PFD.

Mr. E. has testified that he was told their absences for medical reasons would not preclude them from PFD eligibility and this was a consideration in their decision to stay and receive treatment in Wisconsin. However when questioned at hearing whether, had he been informed they would not be eligible if they stayed for treatment beyond 180 days, would they have come back to Alaska, he answered that he did not know. The E.s were honest and forthright witnesses, their frustration is understandable. However, it is more likely than not that the representation of the division employee was not a deciding factor. Rather, it is more likely that the ability to be with family, have their support and the proximity to the hospital, not PFD eligibility, were the relevant persuasive factors when they decided to receive treatment in Wisconsin. As stated in Mr. E.'s request for formal hearing, "returning to Alaska for surgery was not reasonable."<sup>4</sup>

The E.s were kept away from Alaska by unfortunate, unforeseen and understandable circumstances. However, there is no provision in the law that allows the division or the administrative law judge to consider extenuating circumstances, such as these, on a case-by-case basis.

#### **IV. Conclusion**

The Reverend P. and E. E. were absent from Alaska for more than 45 days in addition to the time Ms. E. was receiving continuous medical treatment. The division is correct that some part of their cumulative absences in 2006 is not allowable, and therefore, REVEREND P. E. and E. E. are not eligible for a 2007 PFD. The decision of the Permanent Fund Dividend Division to deny the applications of REVEREND P. E. and E. E. for a 2007 permanent fund dividend is AFFIRMED. This decision does not impact their status as residents or their eligibility for future PFDs.

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<sup>4</sup> Exhibit 11 at 2.

DATED this 24<sup>th</sup> day of March, 2009.

By: Signed  
Rebecca L. Pauli  
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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 20<sup>th</sup> day of April, 2009.

By: Signed  
Signature  
Rebecca L. Pauli  
Name  
Administrative Law Judge  
Title

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