

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

IN THE MATTER OF )  
 )  
 N. C. & )  
 M. S. )  
 ) Case No. OAH 09-0063-PFD  
2008 Permanent Fund Dividend )

**DECISION**

**I. Introduction**

N. C. and M. S. timely applied for 2008 permanent fund dividends. The Permanent Fund Dividend Division (“the division”) determined that the applicants were not eligible, and it denied the application initially and at the informal appeal level. At the applicants’ request, a formal hearing was held on March 9, 2009. Mr. S. appeared by telephone. PFD Specialist Peter Scott represented the division.

Mr. S. and Ms. C. were absent from Alaska more than 180 days during the qualifying year, and more than 45 days in addition to the time they were settling the estate of a parent. The applicants are therefore not eligible for 2008 dividends.

**II. Facts**

The facts are not in dispute. During 2007, the qualifying year, Mr. S. and Ms. C. were absent from Alaska for a total of 197 days. Of these days, one hundred were spent vacationing and 97 were spent settling the estate of Ms. C.’s father.

Mr. S. and Ms. C. took their vacation time before Ms. C.’s father passed away. They had planned to be on vacation for about 120 days, and did not anticipate the need to settle the estate before they left the state.

**III. Discussion**

In order to qualify for a permanent fund dividend, the applicant must have been physically present in Alaska all through the qualifying year, or only absent as allowed by AS 43.23.008.

According to AS 43.23.008(a),

...an otherwise eligible individual who is absent from the state during the qualifying year remains eligible for a current year permanent fund dividend if the individual was absent...

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(8) settling the estate of the individual's deceased parent, spouse, sibling, child, or stepchild, provided the absence does not exceed 220 cumulative days;

\* \* \* \* \*

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

(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) - (16) 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) - (16) 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) - (16) of this subsection if the individual is claiming an absence under (4) - (16) of this subsection.

The division asserts that because the applicants were absent more than 180 days, their cumulative absences were not allowable under AS 43.23.008(a)(17)(A). The division argues that 97 days spent settling the estate was allowable under AS 43.23.008(a)(8), but that only 45 days of the 100 vacation days would be allowable under AS 43.23.008(a)(17)(C).<sup>1</sup>

The applicants argue that their case presents unusual circumstances because they did not know that Ms. C.'s father would pass away before they decided to take a long vacation. They argue that vacation time taken before time to settle an estate should be distinguished from vacation taken afterwards, because one cannot predict when one might need to take time to settle an estate. In response to the division's position, Mr. S. stated at the hearing that:

A careful reading of AS 43.23.008 reveals no language that supports this very narrow and rigid interpretation. There is no mention of any prohibition of a more liberal interpretation. We find no wording that states that special and unusual circumstances cannot be considered. This is purely an administrative decision that is not bound by statute. Further, there is no mandate that the additional 45-day absence must include time taken before a specifically excused absence. The statute clearly provides for interpretation either way.

Whether vacation time is taken before or after time is taken to settle an estate is not relevant. The statute refers only to time taken during the qualifying year in addition to any time to settle an estate. The statute does not distinguish between vacation time taken before or taken after time taken to settle an estate. Any time spent vacationing out of state during the qualifying year, before or after time taken to settle an estate, will make the applicant ineligible if it exceeds 45 days, unless the total

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<sup>1</sup> The parties agree that, because Mr. S. and Ms. C. are a married couple who accompanied each other during all absence time, if Ms. C.'s absences were allowable then Mr. S.'s would be also because he was a spouse accompanying an eligible applicant under AS 43.23.008(a)(13).

combined absences are less than 180 days. The division has not read the statute with a “very narrow and rigid interpretation.” The statute is unambiguous, and only subject to one interpretation. The fact that the legislature has not provided language prohibiting variation from the plain language of the statute does not mean that the division or the commissioner has authority to apply the statute differently than it is written.

Mr. S. argued at the hearing that either the statute is unconstitutional as written or that the division’s application is unconstitutional. Mr. S. argues that the state constitution’s guarantee of equal protection is violated because a person who takes a vacation of more than 45 days early in the year will have less time left to settle an estate than a person who has not taken such a vacation. At the hearing, Mr. S. pointed out an interesting effect of the statute:

A citizen who has accumulated over 45 days of vacation before leaving Alaska to settle an estate is allowed only 180 days of total absence. Thus the time allowed to settle an estate becomes 180 days less the previously taken vacation time. On the other hand, a person with less than 45 days of vacation time before settling an estate is allowed 220 days to settle the estate, plus an additional 45 days of vacation.

Mr. S. also argues that he and Ms. C. have been denied due process for the loss of either vacation time or time to settle a parent’s estate, and that the applicants have been the victims of an ex post facto law. Mr. S. further argues that he and Ms. C. have been denied due process: Mr. S. asserts that he has been denied either vacation time or time to settle an estate without a hearing or notification.

According to the Alaska Supreme Court, “a duly enacted statute is entitled to a presumption of constitutionality.”<sup>2</sup> The presumption of constitutionality extends to any duly enacted law, rule, or ordinance.<sup>3</sup> The Supreme Court has found that PFDs represent a mere economic interest, and that constitutional challenges to their denial, at least on equal protection grounds, are reviewed under minimum scrutiny.”<sup>4</sup>

Determining whether the legislature has adopted laws that violate the Constitution is primarily the province of the judicial branch of government. As part of the executive branch, the division’s duty is to execute the law as the legislature intended, and the administrative law judge’s principal role is to review the division’s action for compliance with that duty. The division has

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<sup>2</sup> *State v. Metcalfe*, 110 P.3d 976, 980 (Alaska 2005).

<sup>3</sup> *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004).

<sup>4</sup> *Church v. State, Dept. of Revenue*, 973 P.2d 1125,1130 (Alaska 1999), citing *State v. Anthony*, 810 P.2d 155, 158 (Alaska 1991).

applied the relevant statutes in accordance with their plain language and the apparent intent of the legislature.

Even if a constitutional review were appropriate at the administrative level, no constitutional violations are apparent in the way the division has applied the statutes. AS 43.23.008 does not distinguish between separate classes of citizens; all Alaskans face the risk that they will be ineligible for the next year's dividend if they vacation extensively early in the year. The applicants have not been denied vacation time or time to settle a parent's estate. The fact that their absences might disqualify them for a dividend does not mean the applicants have been denied anything, other than dividend itself. All Alaskans are provided notice and an opportunity to comment on dividend eligibility laws before they are adopted. Denial of a dividend does not criminalize any disqualifying action, whether the action was taken before or after the laws were adopted; there are thus no potential *ex post facto issues* in this case.

#### **IV. Conclusion**

The applicants' total absences in 2007 exceeded 180 days, and the number of days they were absent in 2007 in addition to time they were settling a parent's estate exceeded 45 days. Either way it is looked at, some portion of the absences were not allowable under AS 43.23.008. The applicants are therefore not eligible for 2008 permanent fund dividends.

DATED this 26<sup>th</sup> day of June, 2009.

By: Signed \_\_\_\_\_  
DALE WHITNEY  
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 27<sup>th</sup> day of July, 2009.

By: Signed  
Signature  
Dale Whitney  
Name  
Administrative Law Judge  
Title

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