

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

In the Matter of :	)	
	)	
Q. H.	)	
	)	OAH No. 09-0260-PFD
<u>2008 Alaska Permanent Fund dividend</u>	)	DOR No. 2008-044-7433

**DECISION**

**I. Introduction**

Q. H. filed a timely application for a 2008 Alaska Permanent Fund dividend. The Permanent Fund Dividend Division denied the application on the ground he had been absent from the state for more than the period of time required for eligibility.<sup>1</sup>

Mr. H. filed a timely appeal which was referred to the Office of Administrative Hearings, and the assigned administrative law judge conducted a telephonic hearing on June 15, 2009. Mr. H. participated and the division was represented by Pete Scott.

The division's decision is sustained.

**II. Facts**

Q. H. is an Alaska resident; he is also a world-class biathlete (a sport which combines cross country skiing and shooting). At the start of 2007, Mr. H., then age 23, was enrolled as a full time student at D. C. in New Hampshire. In the spring of 2007, after completing his college courses for graduation, Mr. H. became a full time member of the U.S. N. B. T., with the goal of being named a member of the 2010 U. S. O. T., which will be nominated in January, 2010, and will be formally constituted just in advance of the 2010 Olympic Games scheduled for February, 2010.

As a member of the national team, Mr. H. trains in residence at the team facilities in Lake Placid, New York, and competes throughout Europe and North America. Because of his training regimen and competition schedule, he is only rarely able to visit Alaska. In 2007, in addition to the time he was attending school, Mr. H. was absent from Alaska while training and competing for the national team for more than 180 days.

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<sup>1</sup> Ex. 3, p.1.

### III. Discussion

It is undisputed that Mr. H. was absent from Alaska for more than 180 days in 2007 while training and competing as a member of the U. S. N. B. T., with the expectation of being named a member of the 2010 U. S. O. T.. AS 43.23.008(a)(15) provides that an Alaska resident may be absent from the state and retain eligibility for an Alaska Permanent Fund dividend if absent “because of training or competing as a member of the U. S. O. T.”

Mr. H. argues that his absence should be deemed within the scope of AS 43.23.008(a)(15) because for many sports, including biathlon, members of the Olympic team are chosen only a few weeks before the games begin, and must be absent for long periods of time prior to their selection in order to train and compete in their sport and thus retain the prospect of eventually being named to the Olympic team. Limiting the scope of AS 43.23.015(a)(15) to only the short period that the Olympic team actually exists effectively denies eligibility even to Olympic team members, Mr. H. points out, because of these training and competition demands.

Whether an allowable absence under AS 43.23.008(a)(15) includes members of a national team prior to selection of the Olympic team is a question of statutory construction. Generally, a statute is construed in accordance with the plain meaning. In this case, the plain meaning of the phrase “member of the U. S. O. T.” does not include a member of a United States national team.

Mr. H. suggests that the statutory language provides little or no benefit to most members of an Olympic team, who will have been absent from the state for a much greater period than allowed by law. The Alaska Supreme Court has stated, ““We will ignore the plain meaning of an enactment...where that meaning leads to absurd results.””<sup>2</sup> In addition, it is true that statutory language is presumed not to be superfluous, and language that has no actual effect in practice is superfluous. It is possible, thus, that AS 43.23.008(a)(15) does not mean what it says, and that the legislature intended it to have a broader scope than the plain meaning would suggest.

However, the legislative history tells us that the legislature meant what it said. As the division points out, prior to 1999 the legislature had authorized the Commissioner of Revenue to

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<sup>2</sup> Martinez v. Cape Fox Corp., 113 P.3d 1226, 1230 (Alaska 2005) (quoting Davenport v. McGinnis, 522 P.2d 1140, 1144 Note 15 (Alaska 1974)).

create categories of allowable absence by regulation.<sup>3</sup> Pursuant to that authority, the commissioner promulgated 15 AAC 23.163(c)(14), which created an allowable absence for an Alaska resident who is “actively participating on a United States National athletic team.”<sup>4</sup> Effective January 1, 1999, however, the legislature removed the commissioner’s authority to establish allowable absences by regulation.<sup>5</sup> Instead, the legislature enacted AS 43.23.008(a)(1)-(13), effective January 1, 1999, providing a list of statutory allowable absences, which did not include Olympic team or United States national team membership.<sup>6</sup> Consistent with the legislature’s decision to eliminate the commissioner’s authority to establish additional allowable absences by regulation, the commissioner repealed 15 AAC 23.163(c)(14), also effective January 1, 1999.<sup>7</sup> Thus, as of January 1, 1999, neither Olympic nor United States national team members were provided an allowable absence for time spent outside the state training or competing.

These matters stood until 2006, when the legislature enacted current AS 43.23.008(a)(15), creating an allowable absence for Alaska residents who are absent “because of training or competing as a member of the U. S. O. T.”<sup>8</sup> AS 43.23.008(a)(15) was enacted as part of Senate Bill 104. But that particular provision was not part of Senate Bill 104 as it was originally introduced. As introduced and as initially passed by the Senate, Senate Bill 104 addressed fraud in the Alaska Permanent Fund dividend program and made no mention of allowable absences. Allowable absences were the subject of a different bill pending in the same legislature, House Bill 127.

House Bill 127, as introduced, added allowable absences for service in the Peace Corps and in the diplomatic corps. When House Bill 127 reached the House floor on April 1, 2005, several additional allowable absences were proposed by amendment. Representative Croft offered an amendment to add an allowable absence for “Olympians and national-team athletes.”<sup>9</sup> Representative McGuire, the sponsor of House Bill 127, objected, and offered an amendment to Rep. Croft’s proposed amendment that would delete “national-team athletes” from his proposed

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<sup>3</sup> Former AS 23.43.095(8)(F), in effect through December 31, 1998. Position Statement at 3. *See* Ex. 8, p.

<sup>3.</sup>  
<sup>4</sup> Position Statement at 3. *See* Ex. 8, p. 4.

<sup>5</sup> §§7, 8 ch. 44 SLA 1998.

<sup>6</sup> §5 ch. 44 SLA 1998.

<sup>7</sup> Register 148.

<sup>8</sup> §§20, 21 ch. 42 SLA 2006 (effective May 26, 2006).

amendment.<sup>10</sup> Rep. McGuire's change was adopted without any objection, and Rep. Croft's proposed amendment, now restricted to Olympians, was then adopted, by a vote of 28-5. Thus, House Bill 127 as passed out of the House of Representatives created a new allowable absence for Olympians, after a proposal to include national team members had been specifically rejected on the floor of the House of Representatives.

On May 2, 2005, Senate Bill 104, which had passed the Senate on March 7, 2005, came before the House Judiciary Committee for consideration. Rep. McGuire, chair of the committee, saw an opportunity to speed the progress of her own legislation, House Bill 127, by adding language contained in that bill to the Senate bill that was pending before her committee.<sup>11</sup> She asked the members of the committee to incorporate the language from House Bill 127 adding allowable absences for Peace Corps volunteers and Olympians into the version of Senate Bill 104 to be passed out of the committee.<sup>12</sup> The committee agreed, and passed out Senate Bill 104 with the new language, taken from House Bill 127, adding the language finally enacted as AS 43.23.008(a)(15).

Senate Bill 104, with the allowable absences provisions included in it, passed the House of Representatives on May 7, 2005. Because the House and Senate versions of the bill differed, a conference committee was appointed to reconcile the two bills for final passage. The conference committee met on May 3, 2006. Senator Seekins, chair of the conference committee, noted that "just members of the U.S. Olympic team are included and members of other national teams are not under consideration in SB 104."<sup>13</sup> Rep. McGuire, a member of the conference committee, noted that this distinction reflected the action taken on the House floor.<sup>14</sup> The reference to Olympic team members was left unchanged, and Senate Bill 104 as finally passed included the language as set forth in AS 43.23.008(a)(15).

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<sup>9</sup> April 1, 2005 House Journal (Amendment No. 3).

<sup>10</sup> April 1, 2005 House Journal (Amendment No. 1 to Amendment No. 3).

<sup>11</sup> All bills must pass both the House and the Senate. House Bill 127 had passed the House, but had only just been transmitted to the Senate. Adding language from House Bill 127 to Senate Bill 104 meant that the added language would not have to work its way through the Senate as part of House Bill 127; rather, as part of Senate Bill 104, which had no further committee referrals in the House, the added language would go directly to the floor of the House of Representatives as part of a bill that had already passed the Senate.

<sup>12</sup> House Judiciary Committee Minutes, May 2, 2005. The allowable absence for members of the diplomatic corps had been stripped from House Bill 127 in the first committee of referral, the House State Affairs Committee. *See* CSHB 127 (STA).

<sup>13</sup> SB 104 Conference Committee Minutes, May 3, 2006.

<sup>14</sup> SB 104 Conference Committee Minutes, May 3, 2006.

This legislative history clearly and unequivocally establishes that AS 43.23.008(a)(15) was not intended to include members of United States national teams. It may be, as Mr. H. suggests, that an allowable absence for Olympic team members is of little or no practical value to Alaskans whose membership on an Olympic team is but a small portion of the time they spend out of the state training and competing as members of the United States national team during the years prior to the selection of the Olympic team. The legislative process that that led to adoption of that specific exemption was truncated. It may be that the legislature was not fully informed regarding the issue and that a more deliberative process would have yielded different legislation.<sup>15</sup> But the law is what it is, not what it might have been. It is clear, in light of the legislative history, that the legislature did not intend United States national team members to be included within the scope of AS 43.23.008(a)(15).

#### **IV. Conclusion**

Q. H. was absent from the state during the qualifying year for more than the time allowed under AS 43.23.008. He is therefore ineligible for the 2008 dividend. The division's decision to deny his application is AFFIRMED.

DATED September 16, 2009.

Signed

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Andrew M. Hemenway  
Administrative Law Judge

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<sup>15</sup> As Rep. McGuire noted, adding language from House Bill 127 to Senate Bill 104 meant that the added language would receive relatively little public scrutiny before final passage. House Judiciary Committee Minutes, May 2, 2005. She therefore did not add the more complex matters contained in House Bill 127 to Senate Bill 104. *Id.* Mr. H.'s observations suggest that even the seemingly simple matter of adding membership on an Olympic team as an allowable absence may not be as simple as it seems. That particular provision, having been added to House Bill 127 on the House floor, and then immediately incorporated into a Senate Bill that was ready for final action in the House of Representatives, received little legislative or public attention prior to final passage.

## 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 16<sup>th</sup> day of October, 2009

By: Signed  
Signature  
Andrew M. Hemenway  
Name  
Administrative Law Judge  
Title

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