

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

In the Matter of)	
)	
W. H. and E. G. S.)	OAH No. 09-0308-PFD
)	Agency No. 2008-040-4713
<u>2008 Permanent Fund Dividends</u>)	Agency No. 2008-040-4714

DECISION

I. Introduction

W. H. and E. G. S., husband and wife, timely filed their respective 2008 permanent fund dividend (PFD) applications. The Permanent Fund Dividend Division denied their applications initially and at the informal appeal level. The S.s requested a formal hearing which was held on July 9, 2009. They participated in person with Mr. S. as the spokes person. PFD Specialist Peter F. Scott represented the division and participated by telephone.

The evidence shows that the division was correctly applying the law when it made the decision to deny the S.s' 2008 applications.

II. Facts

The material facts are not in dispute. The S.s are long term Alaska residents having resided in Alaska since 1961 and remain Alaska residents for purposes of PFD eligibility. The S.s and the division agree that the S.s were absent a total of 196 days in 2007.

S.s' Absences¹

Beg. Date	End Date	Reason	Number of Days
1/9/07	4/5/07	Vacation	86
4/6/07	4/23/07	Caring for Terminally Ill Parent	18
4/24/07	5/4/07	Settle Estate	10
9/17/07	12/8/07	Vacation	82
Total Days Absent			196

The S.s left Alaska on January 9, 2007 to visit relatives and vacation. While on vacation they were called to Idaho to assist in the care of Mr. S.'s terminally ill mother. When it seemed as if Mr. S.'s mother had stabilized, the S.s drove back to Alaska. Upon their arrival they were informed that Mr. S.'s mother had passed away. The S.s immediately returned to Idaho where they remained to help settle the estate. They returned to Alaska on May 4, 2007 and did not leave again until their fall vacation.

¹ See Exh. 1 at 5-6.

Believing that the PFD program allowed a resident to be absent for up to 180 days for vacation and that the time spent caring for Mr. S.'s mother and settling her estate were allowable and therefore would not be counted against them, the S.'s planned their fall vacation leaving on September 17, 2007 and returning December 8, 2007 bringing their days absent for vacation in 2007 to 168 days and their total days absent in 2007 to 196. Had they known how allowable absences are calculated, the S.s would have planned their vacation to ensure their total number of days absent would not be more than 180.²

Because they did not understand the interplay between the different types of allowable absences and it was unclear from the PFD application exactly how allowable absences may or may not be combined, the S.s believe that they should receive 2008 PFDs. They gave up a lot to help Alaska grow. As one example Mr. S. described the difficulty and expense associated with keeping in touch with family during the 1960s. As another example, he described how his working conditions resulted in him suffering frostbite. Mr. S. emphasized that the PFD application does not educate an applicant on how absences are counted. He noted that when he spoke to others, they were unaware of how the division calculated allowable absences. They feel the PFD program was never intended to be applied in the manner advocated by the division because it would result in otherwise eligible Alaskans being deprived of a PFD because of an honest mistake. They did not intend to defraud the PFD program.

III. Discussion

The S.s' testimony is honest and forthright. Had they understood the PFD rules applying to absences, there is very little doubt that they would have adjusted the length of their vacation to assure all days absent were allowable and they remained eligible for 2008 PFDs. However, as a general rule, people are presumed to know the law.³ Consequently, an applicant's claim that they were unaware of statutory requirements is not persuasive. The S.s do not deny that they were absent in excess of 180 days. Therefore the only question is whether the absence was allowable.

In order to qualify for a permanent fund dividend, the applicant must have either been physically present in Alaska all through the qualifying year, or have been absent only for reasons

² Testimony of Mr. S.

³ *Hutton v. Realty Executives, Inc.*, 14 P.3d 977, 980 (Alaska 2000), citing *Ferrell v. Baxter*, 484 P.2d 250, 265 (Alaska 1971).

listed in AS 43.23.008.⁴ The qualifying year for the 2008 PFD is 2007.⁵ The legislature has identified and set forth in AS 43.23.008(a) seventeen reasons that a person may be absent from Alaska and still qualify for a dividend the next year. Reason number (7) is an absence for someone who is "providing care for the individual's terminally ill family member." Reason number (8) is "settling the estate of the individual's deceased parent...provided the absence does not exceed 220 cumulative days." Reason number 13 is an absence "accompanying another eligible resident who is absent for a reason permitted under (1), (2), (5) – (12), (16), or (17) of this subsection as the spouse." Reason number (17) is "for any reason consistent with an individual's intent to remain a state resident..."

Reason number (17) may be used in conjunction with the other specifically identified 16 allowable absences, however, the number of days allowed under number (17) varies from 180 days to 45 days depending on which one of the other 16 allowable absences with which it is combined. It is clear that some portions of the absences identified by the S.s in 2007 would be allowable under AS 43.23.008(a)(7), (8), (13) and (17).

The difficult part of this case and what has been described in prior decisions as "counterintuitive"⁶ comes in understanding the interplay between the many categories of absences for purposes of PFD eligibility.⁷ As discussed in more detail below, 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 would include 46 days in addition to the medical absence.

An absence for vacation, work, or medical treatment of less than 180 days 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

⁴ AS 43.23.005(a)(6).

⁵ AS 43.23.095(6).

⁶ *IMO S.H.*, OAH No. 08-0113-PFD at 3 (2008); *IMO C.S.*, OAH No. 05-219-PFD at 3 (2005).

⁷ *See also IMO J. and D.H.*, OAH No. 06-0859-PFD (2007); *IMO R.L.H.*, OAH No. 07-0243-PFD (2007); *IMO P. and E.E.*, 08-0668-PFD (2009).

absence types are listed together in the statute as reason number (17) which provides that an absence is allowable:

... 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.⁸

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 choices 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 S.s are not in the military, this option allows them to claim up to 180 days of allowable absences during the year for any reason, but not in combination with an absence caring for a parent under subsection (a)(7), settling an estate under subsection (a)(8), or accompanying an eligible spouse under subsection (a)(13). Since the S.s were absent in excess of 180 days during the qualifying year, claiming an absence under this option will not make them eligible for a 2008 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 S.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 a absences claimed under (7), (8), and (13). Because the time the S.s were absent on vacation was in excess of 45 days in addition to any allowable time, their vacation time

⁸ AS 43.23.008(16).

is not allowable under this provision either. However one looks at the case, some portion of the S.s' absences in 2007 are not allowable.

In this case, the S.'s combined absences exceed 180 days and they spent more than 45 days vacationing out of Alaska in addition to their absences associated with Mr. S.'s mother's illness and death. Therefore, the S.s are precluded by law from receiving 2008 PFDs.

IV. Conclusion

Although they remained Alaska residents for purposes of the PFD program during their absence, W. H. S. and E. G. S. were absent from Alaska in excess of the maximum allowable days which made them ineligible to receive 2008 PFDs. Accordingly, the division's decision to deny S.'s applications for 2008 PFDs is AFFIRMED.

DATED this 31st day of, 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 28th day of August 2009.

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

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