

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

In the Matter of:	)	
	)	
M. A. R.	)	
	)	OAH No. 09-0319-PFD
<u>2008 Permanent Fund Dividend</u>	)	Agency No. 2008-049-0260

**DECISION**

**I. Introduction**

When M. A. R., an air cargo pilot, applied for a 2008 permanent fund dividend (PFD), the PFD division denied his application initially and at the informal appeal level on the basis that he spent more than 180 days outside the state during the qualifying year while not on an allowable absence. At Mr. R.'s request, this office held a formal hearing on July 27, 2009, at which he was represented by his counsel, Bryon Collins.

The denial is affirmed because Mr. R.'s absence was not an allowable one by statute. His constitutional argument is not one that can be addressed at the administrative level.

**II. Facts**

The facts of this case are undisputed, with only their legal consequences at issue.

M. R. is a longtime Alaskan whom maintains his principal home in Anchorage.<sup>1</sup> Apart from the cumulative length of his absences from the state during 2007, the division concedes that he meets all of the factual requirements to be eligible for a 2008 PFD.

In 2007 Mr. R. was absent from Alaska for a total of 188 days.<sup>2</sup> All of the days of absence were attributable to his work as a pilot for A. A. C.<sup>3</sup>

A. A. C. is part of the Civil Reserve Air Fleet (CRAF).<sup>4</sup> The CRAF, like the United States Merchant Marine, is a civilian transportation auxiliary to the military services. More than 50 percent of Mr. R.'s work for A. is under orders from the Air Mobility Command of the Department

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<sup>1</sup> Exhibit 1, p. 1 (2008 Adult Web Application); Exhibit 11 (Eligibility Record).

<sup>2</sup> Exhibit 1, pp. 2-4.

<sup>3</sup> Testimony of Mr. R.

<sup>4</sup> *Id.*; Exhibit A (U.S. Air Force website description of CRAF).

of Defense.<sup>5</sup> He flies to military bases all over the world, and potentially into war zones.<sup>6</sup> He is not, however, an active-duty member of the armed forces.<sup>7</sup>

### III. Discussion

The qualifying year for the 2008 dividend was 2007.<sup>8</sup> To be eligible for a 2008 dividend, Mr. R. could not be absent from Alaska for more than 180 days unless he fitted one of certain allowable absence categories listed in the PFD statutes.<sup>9</sup> The single allowable absence provision at issue in this case, found in AS 43.23.008(a), is the following:

Subject to [certain conditions not at issue here], 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

\* \* \*

(4) serving under foreign or coastal articles of employment aboard an oceangoing vessel of the United States merchant marine . . . .

Mr. R. suggests that this provision ought to be construed to encompass the absences of air crew enrolled in the CRAF. He points out that the purpose of the CRAF is essentially the same as the military role of the merchant marine,<sup>10</sup> and that over time air transport has simply supplanted sea transport for many military needs, with no difference underlying function.

It is not possible to construe the above language to encompass air crew. The legislature's use of the terms "oceangoing vessel" and "merchant marine," as well the maritime law term "articles,"<sup>11</sup> makes it perfectly clear that the legislature was writing an exception for a certain class of seamen. There is no ambiguity in the statute.

Mr. R. challenges the constitutionality of AS 43.23.008(a)(4) on the basis that it violates the principles of due process and equal protection under the law because it is irrationally underinclusive. An underinclusiveness challenge to a statute is a facial challenge to the statute.<sup>12</sup>

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<sup>5</sup> It is not clear whether this work is, strictly speaking, under the auspices of the CRAF, as opposed to a private military contract obtained (perhaps under a CRAF preference) at a time when the CRAF was not formally activated. The distinction is not material to this decision.

<sup>6</sup> Testimony of Mr. R.

<sup>7</sup> *Id.*; Exhibit 1, p. 1.

<sup>8</sup> AS 43.23.095(6).

<sup>9</sup> See AS 43.23.008.

<sup>10</sup> "The merchant marine of this country is made up primarily of private vessels, their distinguishing characteristics being that they are under U.S. registry and therefore fly the American flag. Section 902 of the Merchant Marine Act of 1936 made these vessels subject to requisition during national emergencies." *In re G.L.W.*, OAH No. 07-0667-PFD (Dep't of Revenue 2008).

<sup>11</sup> See *Black's Law Dictionary* (5<sup>th</sup> ed.) at 102.

<sup>12</sup> See, e.g., *Khodara Environmental, Inc. ex rel. Eagle Environmental LLP v. Beckman*, 237 F.3d 186, 193 (3d Cir. 2001).

Because the executive branch of government must follow laws enacted by the legislature, not nullify them, facial constitutional challenges of statutes are solely the province of the courts, and cannot be addressed at this level.<sup>13</sup>

**IV. Conclusion**

M. R. was absent from Alaska in 2007 for more than 180 days. His cumulative absences exceeded the allowable amount and disqualified him from eligibility for a 2008 PFD.

The decision of the Permanent Fund Dividend Division to deny the application of M. A. R. for a 2008 permanent fund dividend is AFFIRMED.

DATED this 5<sup>th</sup> day of October, 2009.

By: Signed  
Christopher Kennedy  
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 2<sup>nd</sup> day of November 2009.

By: Signed  
Signature  
Christopher Kennedy  
Name  
Deputy Chief Administrative Law Judge  
Title

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

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<sup>13</sup> See *In re Holiday Alaska, Inc.*, OAH No. 08-0245-TOB (Commissioner of Commerce, Community & Econ. Dev., adopted Sept. 4, 2009), at 5 (<http://aws.state.ak.us/officeofadminhearings/Documents/TOB/TOB080245.pdf>).