

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

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G W, )  
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 Appellant, )  
vs. )  
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 )  
 STATE OF ALASKA, )  
 DEPARTMENT OF REVENUE )  
 Appellee. )

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Case No. 3AN-10-9839 CI

**DECISION ON APPEAL**

**I. INTRODUCTION**

Mr. B H. W, an Alaska State Resident, died on October 29, 2008. He had been applying and receiving his Permanent Fund Dividend (PFD) for years without being denied.<sup>1</sup> On March 23, 2009, G W, Mr. W's widow, filed an application for a dividend on behalf of Mr. W. The Permanent Fund Dividend Division determined that Mr. W did not qualify to collect that year's dividend because he had passed away during the qualifying year and denied the application. Mrs. W appealed that decision through the Division's Informal Appeal Process and again through the Formal Process in front of the Office of Administrative Hearings. Administrative Law Judge (ALJ) Friedman upheld the decision of the Division. Mrs. W has appealed that decision to this Court. For the reasons set forth below, the Department's dividend denial is upheld.

**II. FACTS**

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<sup>1</sup> See Exc: 000060 (Current Eligibility Record-Application History); Exc: 000061 (Alaska Department of Revenue Permanent Fund Dividend Division Formal Hearing Position Statement).

B W established residency in 1997 according the dividend application records, and filed his first application for a PFD in 1999.<sup>2</sup> Mr. W filed every year through 2008 and was never denied in that time.<sup>3</sup> Mr. W died in October 2008. His widow, Mrs. W, filed an application on Mr. W's behalf, dated March 23, 2009. Mrs. W indicated that she was filing on Mr. W's behalf on the application below her signature.<sup>4</sup>

To be eligible to receive one permanent fund dividend, an individual must meet several requirements including, but not limited to, being "a state resident on the date of application," and being "a state resident during the entire qualifying year."<sup>5</sup> A state resident is "an individual who is physically present in the state with the intent to remain indefinitely."<sup>6</sup> 15 AAC 23.103(b) states that

[a]n individual who dies before the application period set by AS 43.23.011 is not eligible for a dividend. An application may not be made on behalf of an individual after that individual has died, unless the application was signed by the individual or the individual's authorized representative before the individual's death, or unless the individual died during the application period set by AS 43.23.011.

The Division denied Mr. W a 2009 dividend and argued that Mr. W was not a state resident under the statutes and code section above.

### **III. STANDARD OF REVIEW**

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<sup>2</sup> Exc: 000061 (Alaska Dept. of Revenue, Permanent Fund Dividend Division Formal Hearing Position Statement).

<sup>3</sup> Exc: 000061 (Alaska Dept. of Revenue, Permanent Fund Dividend Division Formal Hearing Position Statement).

<sup>4</sup> See Exc: 000001 (Office of Administrative Hearings Decision); Exc: 000089 (Mr. W's 2009 PFD application).

<sup>5</sup> AS 43.23.005(a)(2), (3).

<sup>6</sup> AS 43.23.095(7).

The Alaska Supreme Court articulated, in *Griswold v. City of Homer*, four standards of review that are applied to administrative decisions.<sup>7</sup> They are: “(1) the substantial evidence test for questions of fact; (2) the reasonable basis test for questions of law involving agency expertise; (3) the substitution of judgment test for questions of law where no expertise is involved; and (4) the reasonable and not arbitrary test for review of administrative regulations.”<sup>8</sup> The first, third, and fourth tests apply to this case.

### **Reasonable and Not Arbitrary Test**

When the Court determines whether a regulation is valid, it applies the reasonable and not arbitrary test.<sup>9</sup> The court shall

ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of the review insures that the agency has not exceeded the power delegated by the legislature. Second, [the Court shall] determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment.<sup>10</sup>

### **Substitution of Judgment or Independent Judgment Test**

The Alaska Supreme Court in *Harrod v. State, Dept. of Revenue*,<sup>11</sup> explained that “[i]ssues of statutory interpretation ordinarily raise questions of law that do not involve agency expertise.” In such cases courts “apply an independent judgment

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<sup>7</sup> 252 P.3d 1020, 1025 (Alaska 2011).

<sup>8</sup> 252 P.3d at 1025.

<sup>9</sup> See *Wilbur v. State, Commercial Fisheries Entry Com'n*, 187 P.3d 460 (Alaska 2008) (“Successful challenges under this standard are usually process oriented. That is, courts find that the entity promulgating the regulation failed to consider some important factor. However, sometimes enactments are simply so unfair or so remotely related to reasonable objectives that they must be considered arbitrary and unreasonable on substantive grounds.”).

<sup>10</sup> *State, Dept. of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 624 (Alaska 1993) (quoting *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971)).

<sup>11</sup> 255 pP3d 991 (Alaska 2011).

standard of review seeking to adopt the rule of law that is most persuasive in light of precedent, reason, and policy.”<sup>12</sup>

### **Substantial Evidence Test**

When reviewing an agency's factual determinations, the court applies the “substantial evidence” test. Substantial evidence, as defined in *Bostic v. State, Dept. of Revenue, Child Support Enforcement Div.*, is

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The [agency's] decision need not be the only possible solution to the problem, for it is not the function of the court to reweigh the evidence or choose between competing inferences, but only to determine whether such evidence exists.<sup>13</sup>

### **IV. DISCUSSION**

Three issues are presented by appellant: whether 15 AAC 23.103(b) exceeds statutory authority; whether the Administrative Law Judge exceeded his authority by providing research positive for the division; and whether the ALJ's decision is supported by the evidence.

#### **The Validity of 15 AAC 23.103(b)**

The department was given statutory authority by AS 43.23.015(a) and AS 43.23.055(2) to adopt regulations to determine whether individuals are eligible to receive a permanent fund dividend.<sup>14</sup> Pursuant to this authority, the Department adopted 15 AAC 23.103(b). Whether the promulgation and application of 15 AAC

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<sup>12</sup> *Id.*

<sup>13</sup> 968 P.2d 564 (Alaska 1998) (quoting *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974)).

<sup>14</sup> AS 43.23.015(a); AS 43.23.055(2); *see also* *State v. Andrade*, 23 P.3d 58, 72 (Alaska 2001); *Cosio*, 858 P.2d at 625 (“One objective of section .015(a) is to require the commissioner to make substantive regulations resolving questions as to who is and who is not a permanent resident.”)

23.103(b) is valid is determined by applying the reasonable and not arbitrary test. The court must “ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency” and “determine whether the regulation is reasonable and not arbitrary.”<sup>15</sup> The court presumes the regulation is valid and reviews the regulation with considerable deference.<sup>16</sup>

The Alaska Supreme Court, in *Cosio*, stated that “the commissioner has the authority to promulgate a regulation excluding permanent fund dividend applicants who arguably fall within the statutory definition of eligible applicants.” Here, the Department adopted 15 AAC 23.103(b), not to exclude applicants that arguably fall within the statutory definition, but rather to clarify “the eligibility and residency statutes enacted by the legislature.”<sup>17</sup> It explains that applicants who die during the qualifying year are not eligible for a dividend because they do not meet the statutory requirements and definitions of eligible applicants under AS 43.23.005(a)(2), (3) and AS 43.23.095(7). Because the regulation merely clarifies the statutes already in place concerning eligibility the court finds that the regulation is consistent with the purposes of the statutory provisions conferring rule making authority on the agency.<sup>18</sup>

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<sup>15</sup> *Cosio*, 858 P.2d at 624 (Alaska 1993).

<sup>16</sup> 858 P.2d at 624 (Alaska 1993) (*citing* Alaska Int’l Indus v. Musarra, 602 P.2d 1240, 1245 n.9 (Alaska 1979); Kelly v. Zamarello, 486 p.2d 906, 911 (Alaska 1971)).

<sup>17</sup> Exc: 000002 (Office of Administrative Hearings Decision).

<sup>18</sup> 858 P.2d at 624 n.1 (explaining that if a “proper nexus” is found between the regulation and statutory purpose, then the court does not generally require a showing of reasonable necessity).

Next, the court finds that the regulation is reasonable and not arbitrary. The objective of AS 43.23.005(a)(2) and (3) is to limit the dividend to state residents, as defined in AS 42.23.095(7). Those applicants who have passed away during the qualifying year can reasonably be seen to fall outside the category of eligible individuals that were both physically present in the state with the intent to remain indefinitely on the date of their application, and were physically present in the state with the intent to remain indefinitely for the entire qualifying year.<sup>19</sup> 15 AAC 23.103(b) clarifies the meaning of this statutory requirement when considering the statutory definition of “state resident” for purposes under Title 43, Chapter 23 of the Alaska Statutes. For this reason the court finds the regulation to be reasonable. Because the regulation is consistent with the purposes of the statutory provisions conferring rule making authority on the agency, and because the regulation is reasonable and not arbitrary, the court finds that the regulation is valid.

#### **Mr. W’s Eligibility for a 2009 Dividend under the Statutes**

Mr. W did not meet the eligibility requirements of 15 AAC 23.103(b), nor did he meet the eligibility requirements of the statutes that this regulations clarified, AS 43.23.005. The Court exercises independent judgment in interpreting statutes when reviewing administrative decisions and “adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy.”<sup>20</sup> Mr. W was not a state resident for the entire qualifying year or on the date of his application, as a deceased individual cannot be deemed a state resident (i.e., a deceased individual

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<sup>19</sup> See AS 43.23.005(a)(2), (3); AS 43.23.095(7).

<sup>20</sup> Harrod v. State, Dept. of Revenue, 255 p.3d 991 (Alaska 2011).

cannot possess the requisite intent to remain indefinitely). For these reasons the Court finds that the department properly denied Mr. W's application for the 2009 dividend.

### **The Administrative Law Judge's Reliance on Arguments not Made by Either Party**

Mrs. W argued that the Administrative Law Judge exceeded his authority when he affirmed the Department's denial on legal arguments not raised by the parties. However, a reviewing court is not bound by reasoning articulated by the lower court or the parties.<sup>21</sup> Therefore, the ALJ did not abuse his discretion, or exceed his authority, in affirming of the Department's decision based on a legal theory not presented. Additionally, the Alaska Supreme Court stated, in *Demoski v. New*, "[a]n appellee may seek to defend a judgment on any basis established by the record, whether or not it was relied on" by the lower court or even raised by the parties.<sup>22</sup> For this reason, the Department's use of and this Court's reliance on that argument are also not an abuse of discretion.

### **Substantial Evidence Supports the Administrative Law Judge's Decision**

The Court reviews factual determinations made by the agency under the "substantial evidence" test.<sup>23</sup> Substantial evidence, as explained above, is "such relevant evidence as a reasonable mind might accept as adequate to support a

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<sup>21</sup> *Atcherian v. State, Dept. of Revenue, Child Support Enforcement Div.*, 14 P.3d 970 (Alaska 2000); *see Foster v. Foster*, 684 P.2d 869, 871 (Alaska 1984).

<sup>22</sup> 737 P.2d 780, 786 (Alaska 1987).

<sup>23</sup> *Bostic v. State, Dept. of Revenue, Child Support Enforcement Div.*, 968 P.2d 564, 567 (Alaska 1998); *State, Dept. of Rev. Permanent Fund Dividend Div. v. Wilder*, 929 P.2d 1280, 1282 (Alaska 1997).

conclusion.”<sup>24</sup> The Alaska Supreme Court explained, in *Interior Paint Co. v. Rodgers*, that the Court does not reweigh evidence or “choose between competing inferences.”<sup>25</sup> The facts of this case are uncontested; Mr. W died on October 29, 2008. A reasonable mind would accept this as adequate evidence to support the Department’s conclusion that Mr. W did not meet the eligibility requirements and definitions set forth in 15 AAC 23.103(b), AS 43.23.005(a)(2), (3) and AS 43.23.095(7). Therefore, there was enough relevant evidence for the ALJ to affirm the Department’s decision and for this Court to affirm the Department’s decision to deny Mr. W a 2009 dividend.

## V. CONCLUSION

The Court finds that 15 AC 23.103(b) is valid under the reasonable and not arbitrary test analysis and that the Administrative Law Judge did not abuse his discretion in upholding the Division’s decision based on grounds not presented by the parties. Additionally, there is substantial evidence to support the Department’s decision to deny Mr. W a 2009 dividend. Therefore the Department’s dividend denial is AFFIRMED.

DATED at Anchorage, Alaska, this 6<sup>th</sup> day of September, 2011.

*Signed*

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Philip R. Volland  
Superior Court Judge

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

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<sup>24</sup> *Bostic*, 968 P.2d at 567 (quoting *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974)); *Wilder*, 929 P.2d at 1282.

<sup>25</sup> 522 P.2d 164, 170 (Alaska 1974).