

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

In the Matter of :                     )  
  )  
L F   ) OAH No. 11-0472-PFD  
\_\_\_\_\_ ) DOR Nos. 2010-051-4208/2009-036-2742/2008-035-7085

**DECISION**

**I. Introduction**

L F applied for and was paid 2008 and 2009 Alaska Permanent Fund dividends. She subsequently applied for a 2010 dividend.<sup>1</sup> After an investigation, the Permanent Fund Division denied her application for a 2010 dividend<sup>2</sup> and issued notices purporting to retroactively deny her applications for the 2008 and 2009 dividends and demanding repayment by assessment of the dividend amounts.<sup>3</sup> The same day, the Division issued an order of forfeiture as to the 2008-2010 dividends, together with loss of eligibility for the 2011-2015 dividends, and imposition of a civil fine of \$640.<sup>4</sup> Following an informal conference, the Division issued decisions sustaining those actions.<sup>5</sup> Ms. F appealed and requested a hearing by correspondence.<sup>6</sup>

The preponderance of the evidence is that Ms. F was eligible for the 2008 and 2009 dividends, but not for the 2010 dividend. Accordingly, the assessment of the 2008 and 2009 dividend amounts is reversed. The denial of the 2010 dividend is affirmed, and the order imposing a civil fine and forfeiture of future dividends is affirmed.

**II. Facts**

L F moved to Alaska and obtained full time employment as a young woman in 1982.<sup>7</sup> In 1999, she left Alaska<sup>8</sup> and after her application for a 1999 Alaska Permanent Fund dividend was denied, she stopped applying for the dividend.<sup>9</sup>

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<sup>1</sup> Ex. 11, p. 1 (online application dated March 21, 2010).

<sup>2</sup> Ex. 14, pp. 1-3.

<sup>3</sup> Ex. 4, pp. 1-5 (2008); Ex. 9, pp. 1-4 (2009). The 2008 dividend amount included \$1,200 as the Alaska Resource Rebate. See 2008 Session Laws of Alaska, Fourth Special Session, Ch. 2 §5(a).

<sup>4</sup> Ex. 28.

<sup>5</sup> Ex. 7, pp. 1-4 (2008); Ex. 10, pp. 1-4 (2009); Ex. 15, pp. 1-4 (2010).

<sup>6</sup> Ex. 17, p. 1.

<sup>7</sup> Ex. 1, p. 3.

<sup>8</sup> Ex. 5, p. 2 (“left in 99 came back 2006”; “I moved here in 82 and left in 99 back 06-07”).

<sup>9</sup> Ex. 2, p. 3; Ex. 19.

On July 1, 2006, at a time when was staying at her mother's residence in Washington, Ms. F was arrested in Oregon on a charge of driving under the influence.<sup>10</sup> She appeared in court for proceedings on August 24 and September 21,<sup>11</sup> but was excused from an appearance on November 2.<sup>12</sup> Before the end of 2006, Ms. F returned to Alaska.<sup>13</sup>

In January, 2007, following a trial at which she was present, Ms. F was convicted in Oregon of the driving under the influence charge and was placed on court (unsupervised) probation.<sup>14</sup> In the first part of 2007, Ms. F maintained a low profile.<sup>15</sup> In February, 2007, she found a place to live on a boat in No Name.<sup>16</sup> On May 4, 2007, at a time when Ms. F was staying at her sister's residence in Idaho, she was arrested again on a charge of driving under the influence.<sup>17</sup> In July, she renewed her Alaska identification and voter registration.<sup>18</sup> In September, Ms. F pleaded guilty to the Idaho charge and served a week in jail.<sup>19</sup> On October, she travelled back to Alaska with her horse and the rest of her household goods.<sup>20</sup> Upon her return she got a job at a store in No Name, and she remained employed in No Name from October, 2007, through mid-September, 2009.<sup>21</sup> Her applications for the 2008 and 2009 dividends were filed, and the 2008 dividend was paid, while she was living in Alaska and working full time.<sup>22</sup>

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<sup>10</sup> Ex. 22 (statement of Ms. F to Division representative); Ex. 24, p. 1.

<sup>11</sup> Ex. 24, p. 3.

<sup>12</sup> *Id.* Ms. F was not present in court on December 28 for a trial readiness hearing. *See* Ex. 24, p. 4.

<sup>13</sup> Ex. 5, p. 2. *See* Ex. 4, p. 2 (noting statement of Eligibility Technician Vos that she "had known [Ms. F] since approximately July 2006."); Ex. 17, p. 3 (noting Ms. Vos had vouched for her eligibility for the 2008 dividend).

<sup>14</sup> Ex. 4, p. 3; Ex. 17, p. 3; Ex. 21 (court probation is unsupervised); Ex. 24, p. 2 (noting, "Probation to Court"); Ex. 24, p. 4-5.

<sup>15</sup> Ex. 5, p. 2 ("In hiding").

<sup>16</sup> Ex. 1, p. 3; Ex. 8, p. 3 (Question 2B).

<sup>17</sup> Ex. 22 (statement of L. F to Division representative); Ex. 27, p.2.

<sup>18</sup> Ex. 5, p. 2 ("I renewed my ID in July of 2007"); Ex. 8, p. 3.

<sup>19</sup> *See* Ex. 27, p. 2.

<sup>20</sup> Ex. 5, p. 2 ("I had horses in Idaho went back a[nd] forth once to bring them back in 2007 Oct.").

<sup>21</sup> Ex. 5, p. 2 ("Moved back Oct 2007 stayed and worked for Safeway from Oct 2007-Sept 2009"). *See* Ex. 4, p. 2 (Alaska Department of Labor records); Ex. 16, p. 11 (last day worked September 10, 2009). Although she was living and working in Juneau, Ms. F's household belongings evidently remained on board the boat in Sitka. *See* Ex. 1, p. 3.

<sup>22</sup> *See* Ex. 4, p. 2; Ex. 3, p. 1 (2008); Ex. 16, p. 14 (full time work). About half of the 2008 dividend amount was garnished by the Child Support Services Division (\$1,386.51) and City and Borough of Juneau (\$390.00). *See* Ex. 20, p. 1. It is unclear whether the 2009 dividend was paid; the Division's records indicate that a warrant was issued but do not indicate that the warrant was redeemed. *See* Ex. 20, p. 2.

In September, 2009, Ms. F quit her job and moved back to Oregon, taking her horse with her, without having a firm plan as to when she would return.<sup>23</sup> Her horse died, and Ms. F found herself dealing with legal issues from her past that were unresolved,<sup>24</sup> namely, her status as a probation violator, after she was arrested on an Oregon bench warrant on November 24, 2009.<sup>25</sup>

While absent from Alaska, on March 21, 2010, Ms. F filed an online application for the 2010 dividend, falsely asserting that she was physically in Alaska at the time.<sup>26</sup> In May, 2010, her Oregon probation was revoked based on Ms. F's submission of false treatment documentation, and Ms. F was convicted of possession of a forged instrument.<sup>27</sup> During the time this appeal was pending, Ms. F was arrested, convicted, and jailed in Oregon on a felony charge for drug possession.<sup>28</sup> She plans to return to Alaska when her troubles are over.<sup>29</sup>

### III. Discussion

#### A. Applicable Provisions of Law

The Division took two separate actions, governed by different provisions of law. First, the Division determined that its payment of the dividends for 2008-2009 was in error, because Ms. F was, in fact, ineligible for those dividends, and it issued an assessment for the amounts paid, referencing AS 43.23.035(b), and demanded repayment.<sup>30</sup> Second, the Division found that Ms. F had willfully misrepresented, exercised gross negligence with respect to, or recklessly disregarded material facts pertaining to her eligibility for the 2008-2010 dividends, and it issued an order of forfeiture and a civil fine, under authority of AS 43.23.035(c).<sup>31</sup>

##### 1. *AS 43.23.035(b)*

AS 43.23.035(b) states in relevant part:

If the commissioner determines that a permanent fund dividend should not have been...paid to an individual, the commissioner may use all collection procedures or remedies available for the collection of taxes under this title to recover the payment of a permanent fund dividend that was improperly made. ...

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<sup>23</sup> Ex. 5, p. 2 (“Left Sept 2009 for animal health reasons with full intentions of returning at some point”); Ex. 4, p. 3 (Ms. F stated that “vet had told [her that her] horse needed to be moved to a warmer climate”).

<sup>24</sup> Ex. 5, p. 2 (“Animal passed have had to deal with my past that I ran away from”).

<sup>25</sup> See Ex. 4, p. 3; Ex. 24, p. 6.

<sup>26</sup> Ex. 11, p. 1 (Q2).

<sup>27</sup> Ex. 4, p. 3; Ex. 9, p. 2; Ex. 24, p. 2 (“bench probation REVOKED”). Charges of felony theft of identity and forgery were dismissed at the time of the conviction. Ex. 25, pp. 1-2.

<sup>28</sup> Ex. 26.

<sup>29</sup> Ex. 5, p. 2 (“Have done so still intend to return ASAP”); Ex. 17, p. 3 (“It has always been my intention to move back home to Alaska as soon as this crisis was over.”).

<sup>30</sup> Ex. 4, p. 4 (2008); Ex. 7, p. 4 (2008); Ex. 9, p. 3 (2009); Ex. 10, p. 4 (2009).

<sup>31</sup> Ex. 28.

The “collection procedures or remedies available for the collection of taxes” under Title 43 are set out in AS 43.05.220-.290. The Division’s notices referencing AS 43.23.035(b) do not expressly invoke any of the procedures or remedies set out in AS 43.05.220-.290. However the notices include notice of assessment, and they demand payment.<sup>32</sup> It would appear that the Division’s notices are intended to use the collection procedure specified in AS 43.05.245, which provides for an assessment in the form of a notice and demand for payment,<sup>33</sup> and for collection of the amount due by way of levy or a proceeding in court.<sup>34</sup> After assessment and prior to collection by way of levy or a court proceeding, however, a dividend recipient is entitled to an informal conference<sup>35</sup> and subsequently to an appeal to the Office of Administrative Hearings, pursuant to AS 15 AAC 05.010 and AS 44.64.030(a)(30).<sup>36</sup>

To warrant reversal of the Division’s decision to assess her dividends, Ms. F must, by a preponderance of the evidence, establish facts<sup>37</sup> demonstrating the Division’s decision was erroneous,<sup>38</sup> either because (1) she was eligible for the dividends;<sup>39</sup> or (2) the Division should not exercise its discretion to assess the dividends that it has already paid.<sup>40</sup>

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<sup>32</sup> Ex. 4, pp. 1, 4 (2008); Ex. 9, pp. 1-4 (2009) (document titled “Notice of Denial and Assessment”; reference to AS 43.23.03b(b), demanding repayment and stating, “If you do not respond to this assessment...the division will collect the amount due through collections actions.”). The Division documents also purport to retroactively deny the dividends, but they do not cite to any statute or regulation providing the Division with authority to retroactively deny a dividend after a final administrative decision granting an application and payment of the dividend amount. AS 43.23.035(b) provides authority for the assessment of the amount paid, but says nothing about retroactive denial.

<sup>33</sup> AS 43.05.245 states:

If a taxpayer...makes an erroneous or fraudulent return, the department shall proceed to assess the...tax, penalties, or interest.... The assessment...occurs when the department issues a notice and demand for payment.... Penalties and interest assessed under this title shall be collected in the same manner as provided in this title for the collection of tax or license fees.

<sup>34</sup> AS 43.05.270. A “levy” has been defined as “the seizure of property under a writ of attachment, garnishment, execution, or any similar legal or equitable process issued for the purpose of collecting an unsecured debt.” AS 09.38.500(10).

<sup>35</sup> See AS 43.05.245 (following assessment, the taxpayer [dividend recipient] may provide evidence at an informal conference under AS 43.05.240).

<sup>36</sup> See AS 15.05.010(a)(3)(B), (b)(5), (h) (stating procedural requirements for appeal from dividend assessment, including prior request for informal conference). Pre-collection appeals of tax assessments also are before the Office of Administrative Hearings, but not under AS 44.64.030. See AS 43.05.241; AS 43.05.405.

<sup>37</sup> 2 AAC 64.290(e).

<sup>38</sup> 15 AAC 05.030(h).

<sup>39</sup> AS 43.23.035(b) provides authority to recover payment if the dividend “should not have been...paid.” Since payment of a dividend to eligible applicants is non-discretionary, all eligible applicants must be paid. Thus, under AS 43.23.035(b), the commissioner’s authority to recover payment is limited to situations in which the applicant was, in fact, ineligible (including ineligibility for failure to comply with application requirements).

<sup>40</sup> See, e.g., *In Re D.R.W.*, at 2 OAH No. 08-0253-PFD (Commissioner of Revenue 2008) (“While in many cases it will be good policy to recover dividends that have been paid in error, the department is never compelled by law to do so.”).

2. AS 43.23.035(c)

AS 43.23.035(c) provides that the department may order forfeiture of a dividend, imposition of a civil fine, and the loss of eligibility for the next five dividends:

if the department finds that an individual, in claiming a permanent fund dividend, ... willfully misrepresents, exercises gross negligence with respect to, or recklessly disregards a material fact pertaining to, eligibility...

An individual who is the subject of such an order has the right to appeal to the Office of Administrative Hearings.<sup>41</sup>

To warrant reversal of the Division's decision to order a forfeiture of future dividend eligibility and to impose a civil fine, Ms. F must, by a preponderance of the evidence, establish facts demonstrating that the Division's decision was erroneous, either because (1) she did not willfully misrepresent, exercise gross negligence with respect to, or recklessly disregard a material fact pertaining to her eligibility for the 2008-2010 dividends, or (2) the Division should not exercise its discretion to order a forfeiture and impose a fine.

C. 2008 Eligibility

The Division's informal conference decision asserts that Ms. F's application for the 2008 dividend should have been denied for three reasons: (1) failure to provide requested information within 30 days;<sup>42</sup> (2) failure to remain a state resident as defined by law throughout the qualifying year and on the date of application;<sup>43</sup> and (3) intentional, grossly negligent, or reckless misrepresentation of material facts, including failing to disclose reportable absences.<sup>44</sup>

(1) Failure to Provide Information

15 AAC 23.173(d) provides that if an individual has not timely "provided all information for processing requested by the department..., the application will be denied." In this case, the information that the Division contends was not timely provided consists of court documents that were requested on September 27, 2011, more than two years after the application process had been completed and a final administrative decision on the application had been issued.<sup>45</sup> It is

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<sup>41</sup> AS 43.23.035(e); AS 43.23.035(g); AS 44.64.030(a)(30).

<sup>42</sup> Ex. 7, p. 1 (Issue F).

<sup>43</sup> Ex. 7, p. 1 (Issues B, C, D, E).

<sup>44</sup> Ex. 7, p. 1 (Issue A).

<sup>45</sup> Position Statement, p. 5. See Ex. 18, p. 2.

unclear whether that information was submitted by Ms. F<sup>46</sup> or was independently obtained by the Division, but in any event it is presently in the record.<sup>47</sup>

15 AAC 23.173(d) provides for denial of a dividend when as a result of the applicant's failure to provide requested information "for processing" an application, the Division is unable to determine eligibility. The purpose of the regulation is to provide for denial of an application in the absence of relevant information, not to penalize the applicant for failing to submit it. It is well established that 15 AAC 23.173(d) does not authorize denial of an application when the information requested is submitted by the applicant prior to the conclusion of an appeal.<sup>48</sup> Similarly, it does not authorize the denial of an application when the Division independently obtains the information requested before the conclusion of the appeal process, much less the retroactive denial of an application after the application process has been completed, a final decision on the application has been issued, and no appeal has been filed. Because the Division granted her application and no appeal was filed, and because the information requested is currently in the record, Ms. F is not disqualified from eligibility for the 2008 dividend under 15 AAC 23.173(d).

## (2) State Residence

Because Ms. F had moved out of Alaska in 1999 and established residence in another state, she needed to return to Alaska and re-establish residence before January 1, 2007, in order to be eligible for the 2008 dividend. The Division asserts that she did not do so, based on the fact that in July, 2006, when she was arrested in Oregon, she was "staying with" her mother in Battle Ground, Washington, and that in January, 2007, she was physically present in Oregon when she was convicted on that same charge.<sup>49</sup>

Ms. F has asserted that she returned to Alaska in 2006, and a Division employee (an eligibility technician) vouched for Ms. F's eligibility on the basis of her personal acquaintance with Ms. F since July, 2006. The Division's own employee's corroboration of Ms. F's eligibility for the 2008 dividend is sufficient to establish Ms. F's presence in the state prior to January 1, 2007, for purposes of this appeal.

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<sup>46</sup> See Ex. 18, p. 4.

<sup>47</sup> Ex. 24-27.

<sup>48</sup> See, e.g., *In Re C.M.*, at 2-3, OAH No. 08-0398-PFD (Commissioner of Revenue 2009). See 15 AAC 23.173(c).

<sup>49</sup> Position Statement, p. 3.

The Division also argues that even if Ms. F was in Alaska prior to January 1, 2007, she could not legally have intended to remain in the state indefinitely through the date her application was complete, because prior to the date on which her application was complete Ms. F's Oregon probation had been revoked and a warrant for her arrest in that state had been issued.<sup>50</sup>

The Division has not cited to any prior case stating that an individual who is subject to arrest in another state may not legally maintain the intent to remain in Alaska indefinitely. A non-resident alien whose visa status precludes formation of the intent to become a resident of the United States is for that reason legally incapable of forming the intent to become a resident of Alaska.<sup>51</sup> But the legal status of a non-resident alien is not remotely comparable to the legal status of a citizen of the United States who resides in one state and is arrested in another. The Division has not asserted that the conditions of Ms. F's probation in Oregon barred her from living in another state, and she was not a resident of Oregon when arrested there. That Ms. F was subject to arrest in Oregon for an alleged violation of the terms of her probation does not mean that she could not legally maintain the intent to remain in another state indefinitely: it simply means that her physical presence her state of residence was subject to interruption for court proceedings and a potential jail term. The Division has not shown that Ms. F's legal status in 2008 precluded her from retaining the intent to return to Alaska and remain indefinitely after her court appearances in Oregon and any resulting jail term.

### (3) Intentional Provision of Deceptive Information

On appeal, the Division asserts that Ms. F was absent for more than 90 days in 2007, the qualifying year for the 2008 dividend, and because she failed to disclose this in her application for the 2008 dividend she was ineligible for that dividend pursuant to 15 AAC 23.103(j),<sup>52</sup> which provides:

The department will deny an application if the department determines that an individual has intentionally provided deceptive information such as failing to disclose a reportable absence to the department.

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<sup>50</sup> Position Statement, pp. 3-4.

<sup>51</sup> See generally, State v. Andrade, 23 P.3d 58 (Alaska 2001).

<sup>52</sup> Position Statement, pp. 4-5. The informal conference decision, and the caption to the Division's argument in the Position Statement, reference willful misrepresentation or gross negligence with respect to material facts pertaining to eligibility. *Id.* at 4. Those phrases do not govern eligibility; they govern forfeiture under AS 43.23.035(c). The applicable rule for purposes of eligibility is that stated in 15 AAC 23.103(j).

The necessary premise for the Division’s argument is that Ms. F was, in fact, absent for more than 90 days in 2007. In support of that premise, the Division points to her physical presence in Oregon in early January, when she was convicted of driving under the influence, and her presence in Idaho on May 4, when she was arrested in Idaho on a similar charge, and in September, when she was convicted on the Idaho charge and served a week in jail in that state.<sup>53</sup>

That Ms. F was present in Oregon in early January for a court trial, in Idaho in May when arrested, and again in Idaho in September for court hearing and to serve a one-week jail term, is not persuasive evidence that she was absent from Alaska for more than 90 days in 2007. Ms. F has stated that during 2007 she was “travelling in and out of Alaska.”<sup>54</sup> Ms. F’s attendance at court proceedings in Oregon in January and in Idaho in September were required appearances, and Ms. F had no choice but to go to those states for those trials, whether she was living there or not. Her only known absence from Alaska during 2007 that was not compelled was in May, 2007, when she was arrested in Idaho and stated that she was “staying with” her sister in that state. That she was “staying with” her sister is entirely ambiguous; it is a phrase that is typically used to connote a temporary living arrangement rather than a permanent place of abode.

As noted above, the preponderance of the evidence, corroborated by the Division’s employee, is that Ms. F had returned to Alaska in 2006; in 2007, Ms. F states, she lived on a boat in No Name beginning in February and she renewed her driver’s license and voter registration in July, and it is undisputed that she obtained full time work in No Name in October. These dates are entirely consistent with sporadic absences in January, May, and September, two of which were compelled. In view of the fact that the Division’s own employee vouched for Ms. F’s eligibility, and in the absence of evidence of an extended period of absence, the preponderance of the evidence is that Ms. F was not absent for more than 90 days in 2007.

#### D. 2009 Eligibility

The Division’s informal conference decision asserts that Ms. F’s application for the 2009 dividend should have been denied for the same three reasons as her 2008 dividend: (1) failure to provide requested information within 30 days;<sup>55</sup> (2) failure to remain a state resident as defined by law throughout the qualifying year and on the date of application;<sup>56</sup> and (3) intentional,

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<sup>53</sup> Position Statement, p. 4-5.

<sup>54</sup> Ex. 22.

<sup>55</sup> Ex. 10, p. 1 (Issue E).

<sup>56</sup> Ex. 10, p. 1 (Issues B, C, D).



grossly negligent, or reckless misrepresentation of material facts, including failing to disclose reportable absences.<sup>57</sup>

(1) Failure to Provide Information

The Division makes the same argument on appeal that it made with respect to Ms. F's eligibility for the 2008 dividend.<sup>58</sup> For the reasons previously stated, that argument fails.

(2) State Residence

The Division repeats an argument that it made with respect to the 2008 dividend: that Ms. F could not legally have intended to remain in Alaska indefinitely through the date her application was complete, because prior to the date on which her application was complete Ms. F's Oregon probation had been revoked and a warrant for her arrest in that state had been issued.<sup>59</sup> Because, as previously stated, Ms. F was not legally incapable of intending to remain an Alaska resident, this argument fails.<sup>60</sup>

(3) Intentional Provision of Deceptive Information

The Division argues that Ms. F knew, or should have known, that due to the outstanding arrest warrant in Oregon she "could not legally form the intent to remain an Alaska resident" and that because she could not, she was ineligible for the 2009 dividend.<sup>61</sup> The Division's position supposes that ignorance or mistake of law constitutes intentional deception. That is certainly not the case. In any event, Ms. F's claim of residence was, as previously explained, legally permissible.

E. 2010 Eligibility

The Division's informal conference decision asserts that Ms. F was ineligible for the 2010 dividend for three reasons that it maintains on appeal: (1) failure to provide requested

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<sup>57</sup> Ex. 10, p. 1 (Issue A).

<sup>58</sup> Position Statement, p. 6.

<sup>59</sup> Position Statement, p. 5.

<sup>60</sup> The informal conference decision asserts that Ms. F "maintained a claim of residence in another state during calendar year 2008." Ex. 10, p. 1 (Issue B). The Division did not make that argument on appeal. In any event, it is not persuasive. A person who claims residence in another state while absent is no longer an Alaska resident. See AS 01.10.055(c). The only evidence that Ms. F claimed residence in another state while absent is that her address of record in the Oregon court proceedings was in Washington. *Id.*, at p. 2 (Fact 4). That is not claim of residence within the meaning of AS 01.10.055(c). Cf. In Re L.H., at 4 OAH No. 07-0324-PFD (Commissioner of Revenue 2007) (noting dictionary definition of "claim" as "[t]o demand as one's own or as one's right; to assert; to urge; to insist.").

<sup>61</sup> Position Statement, p. 6. The Division's Position Statement uses the language stated in AS 43.23.035(c) for forfeitures. As previously noted, the applicable rule, for purposes of eligibility, is that stated in 15 AAC 23.103(j).

information within 30 days;<sup>62</sup> (2) failure to remain a state resident as defined by law throughout the qualifying year and on the date of application;<sup>63</sup> and (3) intentional, grossly negligent, or reckless misrepresentation of material facts, including failing to disclose reportable absences.<sup>64</sup>

(1) Failure to Provide Information

The Division makes the same argument on appeal that it made with respect to Ms. F's eligibility for the 2008 dividend.<sup>65</sup> For reasons previously stated, that argument fails.

(2) State Residence

The Division repeats the argument that Ms. F could not legally have intended to remain in the state indefinitely through the date her application was complete.<sup>66</sup> For the reasons previously stated, that argument fails.

The Division also argues that Ms. F did not retain the intent to return to Alaska after she left in September, 2009, noting that when she filed for unemployment compensation, Ms. F stated that had moved to Oregon on September 15, and explained that she "quit the job in Alaska to work in another job in Oregon."<sup>67</sup>

After her eligibility for the 2010 dividend was questioned, Ms. F stated that she left "because [her] vet told [her that her] horse needed to be moved to a warmer client,"<sup>68</sup> an assertion that is consistent with the fact that her new job was at a horse ranch. Subsequently, however, she asserted that she left "temporarily...due to a family health crisis,"<sup>69</sup> and stated that she was "caring for my sickly grandchild and father."<sup>70</sup>

In view of her conflicting explanations, and in the absence of any showing that at any time Ms. F had a specific plan to return, Ms. F has not established that she maintained the intent to return to Alaska from the time she left through the date her application was complete.<sup>71</sup>

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<sup>62</sup> Ex. 15, p. 1 (Issue F).

<sup>63</sup> Ex. 15, p. 1 (Issues B, D, E).

<sup>64</sup> Ex. 15, p. 1 (Issue A).

<sup>65</sup> Position Statement, p. 8.

<sup>66</sup> Position Statement, p. 6. The Division adds that Ms. F's commission of a crime in Oregon in March, 2010, prior to the date her application was complete, prevents her from having the intent to be a resident of Alaska, because it made her subject to arrest for her criminal conduct. *Id.* That is a frivolous argument. The commission of a crime in another state does not terminate Alaska residence.

<sup>67</sup> Position Statement at 7. *See* Ex. 16, pp. 14-15.

<sup>68</sup> Ex. 4, p. 3 (October 10, 2010 statement to Inv. Damerval). *See also* Ex. 5, p. 2.

<sup>69</sup> Ex. 17, pp. 2, 3 (December 1, 2011 statement) ("moved back fall 2009 due to family illness").

<sup>70</sup> Ex. 17, p. 2.

<sup>71</sup> The Division's informal conference decision also asserts that Ms. F is ineligible for the 2010 dividend because she maintained her principal home in another state after moving from Alaska in September. Ex. 15, p. 1

### (3) Intentional Provision of Deceptive Information

An individual who intentionally provides deceptive information to the Division that is relevant to the determination of eligibility is ineligible.<sup>72</sup> The Division argues that Ms. F intentionally failed to disclose her absence from Alaska on the date she filed her application, and intentionally failed to disclose an absence in excess of 90 days after she quit her job in Alaska and moved to Oregon in September, 2009.<sup>73</sup>

Ms. F has not asserted that she mistakenly answered the questions on her online application, and she has admitted that she was not actually in Alaska when the online application was filed<sup>74</sup> and that she left Alaska in September.<sup>75</sup> In the absence of any indication that the online application form was misleading or ambiguous, or that at the time she filed her application she had forgotten that she had left Alaska in the middle of September, the preponderance of the evidence is that Ms. F intentionally provided deceptive information regarding both absences when she submitted the 2010 application.

#### F. Forfeiture and Fine

##### 1. *Ms. F Intentionally Misrepresented Material Facts*

The Division is authorized to order a civil fine and the forfeiture of dividends following a year in which the Division finds that the applicant, in claiming a dividend, willfully, with gross negligence, or recklessly misrepresents a material fact pertaining to eligibility.<sup>76</sup>

With respect to the 2008 and 2009 dividends, on appeal the Division relies on the same grounds for forfeiture that it relied on to establish her ineligibility for those dividends.<sup>77</sup> As previously explained, Ms. F was eligible for the 2008-2009 dividends, and did she did not misrepresent the facts that the Division identified on appeal as warranting forfeiture of those dividends. Forfeiture of the 2008 and 2009 dividends is therefore not warranted.<sup>78</sup> As for the 2010 application, on appeal the Division has specifically identified Ms. F's failure to disclose

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(Issue C). The Division did not make that argument on appeal, but it is an independent ground for finding her ineligible for the 2010 dividend, without regard to her status as a resident.

<sup>72</sup> 15 AAC 23.103(j).

<sup>73</sup> Position Statement, pp. 6-7.

<sup>74</sup> Ex. 11, p. 3 (October 20, 2011 Supplemental Schedule).

<sup>75</sup> Ex. 6, p. 3 (“I’ve had a truly [sic] tough time since I left Alaska Sept of 09”); Ex. 6, p. 4 (“Left Sept 2009 for animal health reasons”); Ex. 11, p. 3 (left September 20, 2009).

<sup>76</sup> AS 43.23.035(c)(3).

<sup>77</sup> See Position Statement, pp. 4, 6, 8; notes 52, 61, *supra*.

<sup>78</sup> Because forfeiture of those dividends is not warranted, it is not necessary to consider whether AS 43.23.035(c) authorizes retroactive forfeiture or only prospective forfeiture, with retroactive action being limited to assessment under AS 43.23.025(b).

absences as grounds for forfeiture.<sup>79</sup> As previously explained, Ms. F intentionally failed to disclose her absence from Alaska on the date of her online application and an absence of more than 90 days during the dividend qualifying year. Intentional conduct is willful. Accordingly, the Division has discretion to impose a civil fine and to order a forfeiture of the 2010 dividend (and subsequent dividends) if the fact of her absences is material.

For purposes of AS 43.23.035(c), a material fact is a fact that is important in determining whether an applicant is qualified for the dividend<sup>80</sup> and that the Division has asked about.<sup>81</sup> A fact can be material in that sense, even if it is not a disqualifying fact.<sup>82</sup> Answering the questions on the application form that inquire about absences “yes” triggers a requirement to submit a supplemental schedule which provides additional information regarding the absences. The facts regarding absence from Alaska provide information that the Division considers important in deciding whether to grant or deny an application, and which it has specifically and expressly asked to be provided. The facts elicited by the answers to the questions regarding absences from Alaska are material within the meaning of AS 43.23.035(c) even if they do not change the outcome of the application process. Accordingly, the Division has established grounds to order forfeiture of the 2010 dividend and the succeeding dividends.

## 2. *A Civil Fine And Forfeiture Are Warranted*

As with the assessment of a previously-paid dividend, the Division is under no legal compulsion to impose a fine or seek forfeiture of future dividend eligibility in every case in which an individual has willfully, with gross negligence, or recklessly provided misleading information about a material fact pertaining to eligibility. Those sanctions are discretionary.

The Division asserts that imposition of a civil fine of \$640 is appropriate in light of the “considerable time and expense by the Criminal Investigations Unit in investigating the

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<sup>79</sup> Position Statement at 7.

<sup>80</sup> See Cousineau v. Walker, 613 P.2d 608, 613 (Alaska 1980) (material fact, for purposes of rescission of contract, is one that would influence someone’s judgment).

<sup>81</sup> See In Re Cooper, at 11, OAH No. 10-0148-MED (Medical Board 2010) (“Information requested on an application is material because the Board expressly asked for it.”), citing, In Re Kohler, at 16, OAH No. 07-0367-MED (Medical Board 2007). The degree of specificity in the question asked that is required is less in the context of an application for a dividend than it would be in the context of, for example, an application for an occupational license. See In Re Smith, at 13, OAH No. 08-0424-GUI (Big Game Commercial Services Board 2009) (because occupational license is an “important property interest”, “the question must be specific and unequivocal”);

<sup>82</sup> By contrast, in the context of summary adjudication a material fact is one which, if otherwise than as asserted, will make a difference in the outcome. See Sonneman v. State, 960 P.2d 632, 635-636 (Alaska 1998), citing Whaley v. State, 438 P.2d 718, 720 (Alaska 1968).

allegations of fraud” and the alleged scope of Ms. F’s misrepresentations.<sup>83</sup> A forfeiture of future dividends is appropriate, the Division asserts, “to affirm that fraud in applying for the Alaska Permanent Fund Dividend will be prosecuted to the fullest.”<sup>84</sup> Ms. F, in opposing a fine or forfeiture, asserts that she did not intend to mislead the Division, and that she still wants to return to Alaska but “[n]ow I don’t even know if I can.”<sup>85</sup>

Given the existence of a willful, grossly negligent, or reckless misrepresentation of fact pertaining to eligibility, imposition of a civil fine proportionate to the expense of an investigation is appropriate.<sup>86</sup> Ms. F has not shown that a fine of \$640 is disproportionate.

As for forfeiture, in this case Ms. F intentionally deceived the Division about material facts pertaining to her eligibility for the 2010 dividend. Intentional deception is more culpable than grossly negligent or reckless conduct. In addition, because Ms. F had moved to another state, accepted full time employment there, and was maintaining her principal home there, there is no question but that she was ineligible for the 2010 dividend without regard to her residence. Finally, because she had no firm plan to return it is unlikely she would have been deemed to have retained her status as an Alaska resident. Where the applicant has intentionally deceived the Division regarding material facts, is clearly ineligible, and does not provide persuasive evidence of continuing Alaska residence while absent, forfeiture of future dividends is appropriate.<sup>87</sup>

#### **IV. Conclusion**

The preponderance of the evidence is that Ms. F was eligible for the 2008 and 2009 dividends, and that she was ineligible for the 2010 dividend and intentionally deceived the Division regarding material facts pertaining to her eligibility for that dividend. Imposition of a fine and forfeiture is appropriate under the facts of this case. Accordingly, the Division’s decision to assess and order forfeiture of the 2008 and 2009 dividends is **REVERSED**, and the order imposing a civil fine and forfeiture of future dividends for 2011-2015 is **AFFIRMED**.

DATED April 25, 2012.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

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<sup>83</sup> Position Statement at 8.

<sup>84</sup> Position Statement at 9.

<sup>85</sup> Ex. 17, p. 3.

<sup>86</sup> 15 AAC 23.263(d).

<sup>87</sup> Because forfeiture is appropriate under the facts of this case, it is not necessary to consider whether forfeiture would be appropriate under other circumstances.

## 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 24<sup>th</sup> day of May, 2012.

By: Signed  
Signature  
Angela M. Rodell  
Name  
Deputy Commissioner  
Title

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