

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

In the Matter of:)	
)	
J S)	
)	OAH No. 12-0122-PFD
<u>2011 Permanent Fund Dividend</u>)	Agency No. 2011-057-8909

DECISION

I. Introduction

J S applied for a 2011 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division (division) denied his application because Mr. S had been absent from the state for more than 180 days during the 2010 qualifying year.¹ The division did not modify its determination during the informal appeal process, and Mr. S requested a formal hearing.

The hearing in this matter was conducted by correspondence. The division supplemented the material in the record with a Formal Hearing Position Statement. Mr. S did not submit any additional material, and this decision is based on the information he provided with his application, and during the informal appeal process.

Based on the evidence in the record, and controlling law, Mr. S is not eligible to receive a 2011 PFD.

II. Facts

Most of the relevant facts are outlined in a letter from Mr. S to the division dated October 5, 2011.² Mr. S is an Alaska resident who lives in Anchorage. He and his wife own a home in Anchorage which is their primary and only residence. Mr. S is a commercial pilot, and his employer allows him to live anywhere; he chooses to live in Alaska. He is rarely out of the state for more than 20 days at a time. Mr. S is registered to vote in Alaska, has an Alaska driver license, and his vehicle is registered in Alaska.

Although living in Alaska, Mr. S's job takes him out of the state often. He reported those absences on his application.³ The division calculated these absences as totaling 231 days during

¹ The qualifying year is the year immediately preceding the dividend year. 15 AAC 23.993(a)(11). The dividend year is the year in which the dividend is declared. 15 AAC 23.993(a)(7). In this case, the qualifying year is 2010 for the PFD declared and applied for in 2011.

² Exhibit 4, page 3. Unless otherwise noted, the factual findings are based on this letter.

³ Exhibit 1, page 2.

the qualifying year.⁴ Mr. S does not dispute that he was absent from the state for a total of 231 days.⁵

III. Discussion

Alaskans are eligible to receive a PFD each year if they meet certain requirements specified in state law. One requirement is that the applicant “was, at all times during the qualifying year, physically present in the state or, if absent, was absent only as allowed in AS 43.23.008[.]”⁶ The allowable absences enumerated in statute include a catch-all allowance:

- (17) For any reason consistent with the individual’s intent to remain a state resident, 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.^[7]

This catch-all provision allows an applicant an additional 45 days of absence for any reason if he or she is also claiming an absence for reasons 4 through 16 of AS 43.23.008(a). It allows for an additional 120 days if the applicant is also claiming an educational absence under reasons 1 or 2, and it allows for 180 days of additional absence if the applicant is also claiming a military allowance under reason 3. Significant to the present case, this provision allows up to 180 days of cumulative absences for any reason if an applicant is not claiming any absence under any of the other enumerated reasons.

Mr. S was not physically present in Alaska during the entire qualifying year. Thus, he is only eligible for a PFD if he was absent for an allowable reason.⁸ Mr. S’s absence was not due to any of the enumerated reasons set out in AS 43.23.008(a)(1) – (16). Thus, his absence is only allowable if it fits within the requirements of AS 43.23.008(a)(17). Mr. S’s absences totaled

⁴ Exhibit 5, page 2. This amount was incorrectly stated as 2,231 days on page 1 of Exhibit 5. That was clearly an error as there are only 365 days in a year, except for leap years.

⁵ Exhibit 1, page 2; Exhibit 6, page 2.

⁶ AS 43.23.005(a)(6).

⁷ AS 43.23.008(a)(17).

⁸ AS 43.23.005(a)(6).

more than 180 days. Accordingly, it was not an allowable absence, and he is not eligible to receive a PFD under AS 43.23.008(a)(17).

Mr. S's appeal notes "I am well aware that many pilots live in Alaska and are frequently out of the state as often as I am, and still receive the PFD."⁹ There may be individuals in situations similar to Mr. S's position who receive a PFD. If so, they risk significant penalties.¹⁰ That some people improperly receive a PFD does not, however, justify allowing others to receive a PFD if they are not themselves eligible.

Mr. S also states:

I believe the statute is biased towards my profession when it allows for many other absences, even for some to be completely out of the state for over a year such as students, military, peace-corps programs, Olympic training, etc.^[11]

Mr. S is correct that this statute does allow for lengthy absences for some types of employees, but not for others. For example, a staff member for a U.S. Senator can be out of state for the entire year, and may still be eligible to receive a PFD.¹² The Alaska Supreme Court has reviewed these requirements in the past, and held that these different eligibility requirements are permissible.¹³ For example, in *Church v. State*,¹⁴ the court found that regulations that allowed some absences, but disallowed an absence of 274 days for an applicant who was out of state caring for his dying mother were permissible. The court held that the requirement that individuals be in the state for a set period of time if the absence was not within the otherwise permitted absences was a reasonable interpretation of the applicable statute.¹⁵ It also found that this requirement was not a substantive due process violation,¹⁶ nor was it a violation of the applicant's equal protection rights.¹⁷

*Eldridge v. State*¹⁸ involved a situation very close to Mr. S's claim. Mr. Eldridge was out of state for most of the year while on a temporary assignment from his employer.¹⁹ The court noted that its decision was largely controlled by its earlier ruling in *Church*, and said

⁹ Exhibit 4, page 3.

¹⁰ See AS 43.23.035.

¹¹ Exhibit 4, page 3.

¹² AS 43.23.008(a)(10). Such a person may lose his or her eligibility under other statutory or regulatory provisions.

¹³ At the time of these prior decisions, the allowable absences were in regulation rather than statute.

¹⁴ 973 P.2d 1125 (Alaska 1999).

¹⁵ *Church*, 973 P.2d at 1129.

¹⁶ *Church*, 973 P.2d at 1130.

¹⁷ *Church*, 973 P.2d at 1130 – 1131.

¹⁸ 988 P.2d 101 (Alaska 1999).

We are sympathetic to the Eldridges' particular circumstances; there is strong evidence that they intended to return to Alaska after the Anacortes assignment. However, under a minimum scrutiny analysis, we do not determine if a regulation is perfectly fair to every individual to whom it is applied, but rather, as previously noted, we must decide only if the regulation bears a fair and substantial relationship to a legitimate government objective. The regulation here precludes receipt of a dividend by the Eldridges, but would have allowed it if Steve Eldridge had been employed by the State. While the regulation as applied under the facts of this case may seem harsh, there is a fair and substantial relationship generally between the regulation and the State's legitimate interests in promoting Alaska residency, preventing fraud in the distribution of PFDs, and simplifying its adjudication procedures. There is not a perfect fit between means and ends, as this case probably demonstrates, but there need not be a perfect fit for the regulation to pass the relatively low constitutional test applied when the individual's interest is economic.^[20]

The allowable absences have been moved from regulations written by the Department of Revenue to statutes enacted by the Legislature since the *Church* and *Eldridge* decisions, but that does not affect the central rulings from those cases. It is permissible for the state to create allowable absences that are not a perfect fit with the state's interests in promoting Alaska residency, preventing fraud, and simplifying adjudications. The division and the commissioner must follow existing state law as well as the Alaska Supreme Court's interpretations of that law. Unless invalidated by a court of law, or modified by the legislature, AS 43.23.008(a) must be followed as written. Under current law, Mr. S's absence from the state during 2010 was not an allowable absence. He is not eligible for a 2011 PFD.

Finally, Fact 7 of the Informal Appeal Decision states that voice mail messages were left at two different phone numbers for Mr. S to offer him an option to withdraw his appeal.²¹ Mr. S's phone records for one of those phones do not show any phone call from the division on that date.²² Mr. S believes the Informal Appeal Decision is not valid because he was not contacted.²³

The division's factual findings should never state that a voice message was left when it was not.²⁴ However, any error in not contacting Mr. S before issuing the Informal Appeal Decision was harmless error in this case. To the extent that he had additional information to

¹⁹ *Eldridge*, 988 P.2d at 102.

²⁰ *Eldridge*, 988 P.2d at 103 – 104 (emphasis added, internal footnotes omitted).

²¹ Exhibit 5, page 3.

²² Exhibit 6, page 4.

²³ Exhibit 6, page 2.

²⁴ It is not necessary to make a factual finding in this case as to whether a voice mail message was or was not left at one or both of Mr. S's phone numbers.

change the division's determination, Mr. S had the opportunity to provide that information during the formal appeal process. Speaking with the division prior to the issuance of the Informal Appeal Decision would not have changed the final result in this matter.

IV. Conclusion

Mr. S was absent from Alaska for a total of more than 180 days during the 2010 qualifying year. None of these absences were allowable under AS 43.23.008(a). Accordingly, he is not eligible for a 2011 PFD.

Dated this 26th day of June, 2012.

Signed

Jeffrey A. Friedman
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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 23rd day of July, 2012.

By: Signed

Signature
Jeffrey A. Friedman

Name
Administrative Law Judge

Title

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