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

In the Matter of:	)	
	)	
B R and E,	)	
M & A R (minors)	)	
	)	OAH No. 13-0811-PFD
2012 Permanent Fund Dividends	)	Agency No. 2012-050-9245

DECISION

I. Introduction

This case relates to the 2012 Permanent Fund Dividend (PFD) of Lieutenant Colonel B R, as well as of his three children for whom he submitted applications. The Permanent Fund Dividend Division found the R's ineligible, and it denied their applications initially and at the informal appeal level. Col. R requested a formal hearing. The matter was submitted on agreed facts. The parties provided briefing and oral argument on the central legal issue that, in the Division's view, disqualified the family in the year at issue.

This case turns on the proper application of a statutory provision that the legislature repealed in 2013. The last dividend to which it applied was 2012. Col. R sought to apply the provision according to its literal language, while the Division sought to apply it according to its intent. This decision concludes that, on balance, the Division's approach to the statute is the more persuasive one in the present context, and that the Division was therefore correct to deny the Res' 2012 applications.

II. Facts[1]

B R was born and raised in Alaska. In 1990 he left the state to attend the U.S. Naval Academy. After he was commissioned, he made a career as a Marine Corps officer. He has served continuously to the present day, including six overseas deployments. Although he has never been stationed in Alaska, he has maintained his Alaska residency. Indeed, his ties to Alaska—through real estate ownership, family relationships, and many other connections—are extremely strong. The Division does not contest that Col. R and his children are legal residents of Alaska.

[1] As stipulated by the parties, the facts are drawn from the summary prepared by Col. R and included in the record at Ex. 4, pp. 12-13, as modified by the amendments recorded in the Order Setting Briefing Schedule of July 2, 2013.

For many years, Col. R sought to be posted in Alaska. There are not many placements for Marine officers in Alaska, and these efforts were unsuccessful. At the present stage of his career, his seniority and other factors effectively make it impossible that he will serve in Alaska prior to his retirement. He intends to return to Alaska when he retires.

Since joining the military, Col. R has visited Alaska as follows:

Year	**Days in Alaska**
1990	12
1991	60
1992	40
1993	49
1994	33
1995	Unable to return
1996	16
1997	10
1998	13
1999	4
2000	23
2001	8
2002	Unable to return
2003	13
2004	9
2005	Deployed to Iraq
2006	34
2007	17
2008	13
2009	Unable to return
2010	20
2011	11
2012	33

Col. R received a PFD every year from the inception of the program in 1980 through 2008. For the 2009, 2010, and 2011 PFDs, he applied but was determined to be ineligible, and he has not been paid those dividends. These ineligibility determinations were based on the "10-year rule" statute that first became effective in connection with the 2009 dividend. Col. R's ineligibility in 2009 has been finally determined after the exhaustion of appeals through the Alaska Supreme Court.[2]

As will be discussed in Part III below, the present case involves a specific legal issue which might be shorthanded as the "one-time exclusion issue." The first dividend for which the one-time

[2] *See R v. State, Dep't of Revenue*, 292 P.3d 906 (Alaska 2013) [*R I*].

exclusion issue became important was the 2010 dividend. Col. R appealed the denial of his dividend for that year to the Office of Administrative Hearings. In a decision authored by Administrative Law Judge Jeffrey Friedman and adopted as the Department's decision by Deputy Commissioner Jerry Burnett, the one-time exclusion issue was evaluated and resolved against Col. R.[3] Col. R appealed to the Superior Court. He lost again there, although, for reasons that are unclear, the decision entered by Superior Court Judge Gregory Miller did not address the one-time exclusion issue.[4] Col. R has a further appeal pending in the Alaska Supreme Court, which is fully argued and ripe for decision.[5] It is unknown whether Col. R raised and briefed the one-time exclusion issue at that level.

III. Discussion

The four PFDs at issue in this case all depend on the eligibility of Col. R. The eligibility of the R children is derivative from their father's eligibility.[6]

There is only one contested legal question in this case, the previously mentioned "one-time exclusion issue." It turns on whether the "10-year rule" statute is to be applied according to its literal meaning or according to its intent.

At all times relevant to this appeal, the 10-year rule statute read, in pertinent part, as follows:

> An otherwise eligible individual who has been eligible for the immediately preceding 10 dividends despite being absent from the state for more than 180 days in each of the related 10 qualifying years is only eligible for the current year dividend if the individual was absent 180 days or less during the qualifying year.[7]

The first dividend to which this exclusion applied was the 2009 dividend.[8]

The one-time exclusion issue arises as follows. If read literally, the quoted provision only applies to "[a]n otherwise eligible individual who has been eligible for the immediately preceding 10 dividends despite being absent from the state for more than 180 days in each of the related 10 qualifying years." In other words, for the provision to be relevant to a person's application at all, the person would have to (1) be *otherwise* eligible this year and (2) have been *actually* eligible for each of the preceding 10 years and (3) have been absent for more than 180 days in the qualifying year corresponding to each of those previous ten years. This would effectively turn the provision

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3 *In re B.R.*, OAH No. 11-0222-PFD (adopted Sept. 1, 2011).
4 *State v. R*, No. 3AN-11-11280 (Aug. 13, 2012).
5 *R v. State, Dep't of Revenue*, No. S14879 [*R II*].
6 *See R I*, 292 P.3d at 915.
7 Former AS 43.23.008(c).
8 *R I*, 292 P.3d at 908; § 9, ch. 44, SLA 1998 (subsection (c) applies to qualifying year 1998 and succeeding qualifying years). The eleventh qualifying year subject to the statute was 2008, corresponding to the 2009 dividend.

into a one-time exclusion. The first time someone's eligibility was eliminated by the 10-year exclusion, the clock would reset. The following year, that person would not have been "eligible for the immediately preceding 10 dividends," and hence the 10-year exclusion, by its literal terms, would no longer apply to that person, even if the person had not returned to live in Alaska.[9]

Col. R's history provides the perfect illustration. From 1999 through 2008, he was eligible for, and received, a PFD. In the qualifying year for each of those years (1997-2007), he had been absent more than 180 days. With regard to the 2009 dividend, he was "otherwise" eligible—that is, he was eligible in every way except for the possible application of the 10-year exclusion—and the other two prerequisites were also present. Hence, the 10-year exclusion plainly applied to Col. R in 2009. In 2010, however, it could no longer be said that Col. R had "been eligible for the immediately preceding 10 dividends." After all, he had been ineligible just one year previously, in 2009. Likewise, in 2012, the year at issue in the present case, Col. R cannot be said to have "been eligible for the immediately preceding 10 dividends." The department has found him to be ineligible for three of those dividends (2009, 2010, and 2011). Applying AS 43.23.008(c) very literally, the provision would not apply in 2012 and Col. R would be eligible for a 2012 dividend.[10]

There is really no question that the Legislature *intended* the 10-year rule to operate as an ongoing bar, not as a one-time exclusion. The Department of Revenue has so held in two formal decisions that examined the relevant context and legislative history.[11] Col. R has not argued otherwise in the present case; he appears to concede that the Legislature meant to create an ongoing bar to eligibility to individuals who had lived more than ten years outside the state, effective until they returned for an extended period. The problem is one of poor drafting.

Intent is normally the touchstone for interpreting statutes. There are times, however, when the intent of a law, however clear, cannot overcome the plain meaning of its language. The Alaska Supreme Court recently made this plain in the case of *State, Department of Commerce, Community*

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[9] It would theoretically apply, and act as a disqualification, every eleven years—in year 11, 22, 33, and so on.

[10] The Division has stated in this case, seemingly at every opportunity, that "[t]he Division is required to apply the law as it is written." *E.g.*, Division's Position Statement at 3. This mantra is oddly out of place in this litigation. If the law were applied as written, Col. R and his family would receive a 2012 PFD.

The Division has also alluded to a regulatory definition, 15 AAC 23.163(k). That definition, which has its own drafting error, does nothing to resolve the one-time exclusion issue. For a discussion of the regulation, *see In re B.R.*, OAH No. 11-0222-PFD (adopted Sept. 1, 2011), at 4 (http://aws.state.ak.us/officeofadminhearings/Documents/PFD/PFD110222%20appeal%20pending%20Supreme%20Court.pdf).

[11] *In re N.W.*, OAH No. 10-0612-PFD (adopted Feb. 11, 2011), at 2-3 (http://aws.state.ak.us/officeofadminhearings/Documents/PFD/PFD100612.pdf); *In re B.R.*, OAH No. 11-0222-PFD (*supra* note 10), at 3-4.

and Economic Development v. Alyeska Pipeline Service Co.[12] *Alyeska* was decided too recently to have been mentioned or considered in the prior Revenue decisions applying the 10-year rule.

In *Alyeska*, an insurance law was drafted with the objective of prohibiting an arrangement known as an "OCIP,"[13] unless it was approved by the Director of Insurance in one limited context. The language enacted, however, contained a definition that plainly confined the coverage of the prohibition to construction OCIPs, not all OCIPs. The Alaska Supreme Court was unwilling to disregard the definition, because that would be "to reform the statute, not interpret it."[14] To interpret the statute in a way that disregarded this explicit definition would "invade the legislature's province," and any remedy for the misdrafting would have to be taken up with that body.[15]

Several factors make Col. R's argument in the present case less compelling than that of the prevailing party in *Alyeska*. First, the statute at issue in *Alyeska* was not irrational, nor even remotely odd, when applied literally. Thus, a member of the regulated public reading that law, substituting the legislative definitions for their defined terms, would have had no reason to doubt that the resulting, precise meaning was one he or she could rely on, and no reason to delve into legislative history in search of potential clarification. In the present case, in contrast, a literal reading leads to an odd and counterintuitive result that would puzzle any reader: long-absent applicants would lose their eligibility in year eleven of their extended absence, and then—without doing anything to bolster their connection to the state—would vault back into eligibility in year twelve.[16] Second, *Alyeska* involved a statutory prohibition, with the potential for enormous civil fines and other adverse consequences should a member of the public inadvertently run afoul of it.[17] In the case of the 10-year rule, in contrast, people who read it literally faced no punishment, and no adverse consequence beyond being ineligible for a public benefit for which they hoped to be eligible. Finally, *Alyeska* involved a first-time construction of a statute by the administering agency. Here, there is a consistent agency interpretation, adopted at the commissioner level two years ago, affirmed in a Superior Court appeal, and readily available to anyone seeking clarification on the meaning of the statute.

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12 262 P.3d 593 (Alaska 2011).

13 An OCIP is an owner-controlled insurance program.

14 262 P.3d at 597.

15 *Id.* at 597-8.

16 Courts generally will not adhere to the "plain meaning" of statutory language if it would lead to an absurd result. *FDIC v. Laidlaw Transit, Inc.*, 21 P.3d 344, 351 & n.27 (Alaska 2001).

17 *Cf. Alaska Public Offices Comm'n v. Stevens*, 205 P.3d 321, 326 (Alaska 2009) ("imprecise . . . regulatory requirements must be strictly construed in favor of the [person accused of violating them]").

Although the issue is not free from doubt, it seems likely that the Alaska Supreme Court would interpret the 10-year rule in AS 43.23.008(c) according to its intent, rather than according to its literal meaning. Accordingly, the Department of Revenue's prior interpretations of that provision should not be disturbed, and the "one-time exclusion issue" should be resolved against Col. R. The 10 years of absences exceeding 180 days from 1998 to 2007 rendered Col. R ineligible in 2009 and continued to do so thereafter until the 10-year rule was repealed.

IV. Conclusion

Because of extended absence from the state, the Legislature intended that applicants in the position of Col. R would not be eligible for a 2012 PFD. In the present circumstances, the Legislature's intent should control. The decision of the Permanent Fund Dividend Division to deny the applications of Col. R and his children is AFFIRMED.

DATED this 4th day of October, 2013.

By: *Signed*
Christopher Kennedy
Deputy Chief 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 15th day of November, 2013.

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

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