

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

In the Matter of)	
)	
M E &)	
C M)	
)	OAH No. 13-1625-PFD
2010 Permanent Fund Dividends)	Agency Nos. 2010-011-7427/7386
<u>2011 Permanent Fund Dividends</u>)	Agency Nos. 2011-049-8264/8278

DECISION

I. Introduction

M E and C M are a married couple who applied for both the 2010 and 2011 Permanent Fund Dividends (PFDs). The 2010 dividend was paid to each of them, but the Permanent Fund Dividend Division subsequently denied it retrospectively and assessed the payments, seeking reimbursement of \$2,562 from the couple. The 2011 dividend was denied before payment was complete. The couple disputed these actions, receiving a formal hearing by telephone on December 16, 2013.¹

The basis for the assessments and denials was that the division believed the applicants had made inaccurate answers on their 2010 and 2011 applications, thereby concealing reportable absences of over 90 days during the qualifying years and misrepresenting their whereabouts at the time of application. The evidence at the formal hearing showed that Mr. E’s and Ms. M’s dividends for 2010 ought to be recovered, and that neither applicant should receive a 2011 dividend.

II. Facts

M E and C M are longtime Alaskans who have received dividends for a number of years.² They are “snowbirds,” spending about 190 days per year in the state. They were out of state in 2009 until May 17 of that year, and then absent again from November 27, 2009 to May 10, 2010 and from December 7, 2010 to May 27, 2011.³

¹ The civil appeal process did not begin until 2013, due to a criminal investigation.
² See Ex. 13.
³ Ex. 2, pp. 2, 14.

Ms. M is now 81 years old, while Mr. E is twelve years younger.⁴ Mr. E took care of the 2010 and 2011 PFD applications for both of them.⁵ There is, however, no evidence, other than mere age, that Ms. M is unable to manage her own affairs. She apparently chose to delegate the handling of her PFD to her husband.

All four dividend applications were submitted on line. On his own 2010 application, submitted January 10, 2010, Mr. E claimed that he was “physically present in Alaska today,” and he denied that he was “gone from Alaska more than 90 days total” in 2009.⁶ Mr. E now admits that these answers were false. Mr. E made the same false statements in his wife’s application.⁷ In his own 2011 application, submitted March 20, 2011, Mr. E again claimed he was in Alaska on that date and denied that he had been out of the state for more than 90 days in 2010.⁸ Again, these were both false statements. As he did the previous year, Mr. E made identical misstatements on his wife’s application.⁹ All of the applications prominently informed the applicant that “Failure to disclose absences may result in the denial of your application.”¹⁰

Mr. E has offered slightly varying accounts of how these false answers came about, but the gist of them is the same. The person entering data into the applications was Mr. E’s son L, who was in Alaska. Mr. E talked to him on the telephone about the applications. As Mr. E related in a recorded interview with an investigator:

I just said put yes or whatever is was on those things and send it in for me.
I didn’t pay any attention because I knew I had my time.¹¹

Mr. E is a former criminal investigator.¹² He has demonstrated in the correspondence about this case that he is capable of being articulate and meticulous.¹³

The PFD Division paid the 2010 dividends. It blocked payment of the 2011 dividends pending investigation.¹⁴ All of the applications were ultimately denied on the basis of the false answers, with the Division demanding repayment of the 2010 dividends. The decisions to deny

⁴ Ex. 1.

⁵ Testimony of Mr. E.

⁶ Ex. 1, p. 1 (application); Ex. 16, p. 10 (screen print of questions presented to applicant when applying on line).

⁷ Ex. 1, p. 2.

⁸ Ex. 1, p. 3; Ex. 17, p. 3.

⁹ Ex. 1, p. 4.

¹⁰ Ex. 16, p. 10; Ex. 17, p. 3.

¹¹ Ex. 20.

¹² Cross-examination of Mr. E.

¹³ See, e.g., Ex. 6, p. 9.

¹⁴ This occurred in an unusual manner, through a reversal of an electronic transfer (see Ex. 12). All that matters for this decision is that Mr. E and Ms. M did not get the PFD funds.

and assess the dividends remained unchanged through the informal appeal process, and this formal appeal followed.

III. Discussion

A. Denial of 2011 Dividends

It is important to the integrity of the PFD program that answers given on PFD applications be accurate. The application asks about current location and about absences totaling more than 90 days so that the PFD Division can evaluate circumstances that may affect residence or eligibility. Those who do not report their location or their absences interfere with the division's ability to perform this task.

The Department of Revenue has provided by regulation that it “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.”¹⁵ The answers Mr. E and Ms. M gave regarding their physical location and regarding 90 days of absence were inaccurate and thus deceptive to the division.

The Department of Revenue regulation regarding deceptive information on applications authorizes denial only when the deception has been found intentional, however.¹⁶ The central question is therefore whether Mr. E's deception (on his own behalf and on behalf of his wife) was intentional.

The truth of the matter seems to be that Mr. E simply did not care if his answers were accurate. He told his son to “put yes or whatever” and “didn't pay any attention” to what the questions were that his son was answering. In law, when one gives false information because of a reckless indifference to whether it is true or false, the misrepresentation is intentional.¹⁷ When Mr. E gave deceptive answers because he told his son to put “whatever,” he “intentionally provided deception information” within the meaning of that phrase in the regulation. Accordingly, the 2011 applications must be denied.

B. Assessment of 2010 Dividends

Assessment of a PFD that has already been paid, but paid in error, is a matter of discretion. Alaska Statute 43.23.035(b) provides that if the commissioner determines that a dividend should not have been paid, he “may” recover the payment. Likewise, 15 AAC

¹⁵ 15 AAC 23.103(j).

¹⁶ *Id.*

¹⁷ *See, e.g., Jones v. Koons Automotive, Inc.*, 752 F. Supp. 2d 670, 686 (D. Md. 2010).

23.233(a) permits the department “in its discretion” to elect to take steps to recover a dividend paid to an individual who was not eligible. 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.

Mr. E and Ms. M were ineligible for the 2010 dividend because each of their applications contained two intentional misrepresentations, as discussed above in connection with the 2011 dividends. However, the 2010 dividends have already been paid, and so an additional decision is required as to whether the department should force their repayment.

In past cases involving whether to assess a paid dividend for repayment, the Department of Revenue has considered surrounding circumstances including:

- (1) the passage of time since the dividend was paid;
- (2) whether there is room for argument that the applicant’s action was not legally disqualifying;
- (3) whether the applicant erroneously reported the disqualifying information on the PFD application;
- (4) whether the applicant should have known at the time of application that he or she was ineligible; and
- (5) whether the applicant received a financial benefit from the allegedly disqualifying act.¹⁸

With respect to both applicants, these factors generally point toward recovery. It has been three-and-a-half years since the dividends were paid, but Mr. E and Ms. M would have been on notice that there was a problem only one year after they were paid, since their 2011 dividends were stopped on the same basis. Factor 1 is therefore relatively neutral. Turning to the remaining factors, the intentional nondisclosures were unarguably disqualifying and are misconduct that the applicant should have known was disqualifying (factors 2 and 4). There was erroneous information on the applications (factor 3). There was no financial benefit from the disqualifying items, but there was some non-monetary benefit—avoidance of paperwork and avoidance of scrutiny—from the nondisclosure (factor 5).

¹⁸ See *In re D.R.W.*, OAH No. 08-0253-PFD (Dept. of Revenue 2008) (all factors favored applicant; assessment overturned); *In re E.L.K.*, OAH No. 06-0785-PFD (Dept. of Revenue 2007) (factors 2, 3, and 4 weighed against applicant; assessment upheld); *In re R.E.*, OAH No. 06-0385-PFD (Dept. of Revenue 2006) (where factors 1 and 3 favored the applicant but 2, 4, and 5 weighed against, case close but assessment upheld in deference to PFD Division’s judgment to assess; for other dividends where there was uncertainty under 2 and 4 and no benefit under 5, assessment overturned).

On balance, it is fair and appropriate, and in keeping with upholding the integrity of the program, for the department to reclaim the dividends paid to Mr. E and Ms. M in 2010.

IV. Conclusion

(1) the assessments of the previously-paid 2010 Permanent Fund Dividends to M A. E and C M are AFFIRMED;

(2) the decision of the Permanent Fund Dividend Division to deny the applications of M A. E and C M for a 2011 Permanent Fund Dividend is AFFIRMED.

DATED this 17th day of March, 2014.

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 22nd day of April, 2014.

By: Signed
Signature
Angela M. Rodell
Name
Commissioner
Title

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