

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

In the Matter of)	
)	
C & N X)	OAH No. 17-0948-PFD
_____)	Agency No. 2017-035-3444

DECISION

I. Introduction

C and N X applied for the 2017 Permanent Fund Dividend (PFD or dividend). The Permanent Fund Dividend Division (the Division) denied their application initially and at the informal appeal level because the X were absent from Alaska for more than 45 days in addition to documented allowable absences of 112 days for Mr. X’ continuous medical treatment. The X appeal that decision.

As explained below, a preponderance of the evidence shows that the X are not eligible for the 2017 PFD and thus, they have not met their burden of proving the Division’s decision was in error. Accordingly, the decision to deny C and N X’ 2017 PFD applications is affirmed.

II. Facts and Procedural History

The material facts are undisputed. C and N X are long-time Alaska residents who have applied for and received permanent fund dividends since the inception of the program in 1982 until 2017, when their applications were denied.¹

The X were absent from Alaska on vacation for 89 days from January through March 2016.² Although some of the days during that absence may have been spent at medical appointments, the X did not provide verification of ongoing medical treatment for any days during that period.³ In addition to the 89 days of vacation earlier in the year, the X planned to take a vacation to Utah in October 2016, then go to Seattle for several medical appointments, including cataract surgery for Mr. X.⁴ They would have been absent from Alaska for an additional 91 days from October 1 to December 26, 2016.⁵ The total time that the X planned to be absent from the state in 2016 was 180 days. But on September 1, 2016, Mr. X was diagnosed

¹ Ex. 1 at 6; Ex. 18 at 6.

² Ex. 1 at 2; Ex. 18 at 2.

³ See Ex. 14 at 3-4. Mr. X determined that it would be a waste of time to obtain verifications from his doctors as he could only verify ongoing medical treatment for 30 days of the absence, and that would still leave an additional 59 days of absences from Alaska. Ex. 14 at 4.

⁴ Ex. 1 at 2; Ex. 18 at 2.

⁵ Ex. 4 at 5.

with male breast cancer, and his surgeon recommended a mastectomy, chemotherapy, and radiation as soon as possible.⁶ Accordingly, the X changed their reservations, and left Alaska on the ferry on September 10, 2017.⁷ Because of Mr. X’ health, the X were absent from Alaska for an additional 112 days from September 10, 2016 to March 28, 2017.⁸ They were absent from Alaska for a total of 201 days in 2016, the qualifying year for the 2017 PFD.⁹

The X filed their 2017 PFD Adult Applications and Adult Supplemental Schedules on February 19, 2017.¹⁰ Both disclosed that they were not physically in Alaska at the time of filing. They reported absences totaling 201 days during 2016, using absence code “I-Vacationed” for 89 days of absences, “D-Medical Treatment” for 112 days of absences for Mr. X, and “A-Accompanying Eligible Resident” for 112 days of absences for Ms. X.¹¹ Mr. X described the vacation absences as “mostly vacation.”¹² But he also reported that he had infusions every 8 weeks that he fit into his vacations.¹³

On March 17, 2017, the Division requested a “Medical Treatment Verification Form” to verify that Mr. X’ claimed absence for medical treatment was allowable under the statutes and regulations governing the PFD program.¹⁴ Before requesting the verification form, the Division advised Mr. X that the applications would probably be denied because of the number of days and classification of their absences.¹⁵ Mr. X contacted his legislators and sent a series of emails complaining about the verification procedure and requesting a “waiver” for his absences.¹⁶ The Division sent Mr. X an email explaining the law and the appeal process.¹⁷

On April 14, 2017, the Division denied the X’ applications, reasoning that the X were absent for more than 45 days during 2016 for unallowable reasons in addition to their absences for Mr. X’ continuous medical treatment.¹⁸

⁶ Ex. 4 at 5.
⁷ Ex. 4 at 5.
⁸ Ex. 1 at 4; Ex. 18 at 4; Ex. 4 at 4-7.
⁹ Ex. 1 at 4; Ex. 18 at 4.
¹⁰ Ex. 1 at 1; Ex. 18 at 1.
¹¹ Ex. 1 at 4; Ex. 18 at 4.
¹² Ex. 1 at 2; Ex. 18 at 2.
¹³ Ex. 1 at 2; Ex. 18 at 2.
¹⁴ Ex. 2; Ex. 6 at 1; Ex. 8 at 1.
¹⁵ Ex. 4.
¹⁶ Ex. 4 at 5-6.
¹⁷ Ex. 4 at 1-2.
¹⁸ Ex. 3; *see also* Ex. 6 at 21.

The X filed a Request for Informal Appeal on May 4, 2017.¹⁹ They did not dispute that they were absent from the state for more than 45 days in addition to their allowable absence for medical treatment.²⁰ Instead, they argued that they attempted to arrange their vacation schedule so that they were not absent for more than 180 days, and the 45-day rule should not apply to absences from Alaska that occur *before* a life-threatening illness.²¹ They reasoned that their 89-day vacation from January through March 2016, was not the reason their absences exceeded 180 days.²² They argued that it was, instead, Mr. X's subsequent life-threatening illness that required them to be absent from the state longer than the 180-day threshold.²³ The X argued that the 45-day rule, under circumstances like his, is unjust.²⁴

The Division re-reviewed the X's applications and documentation and sent Mr. X an email, explaining the law.²⁵ The Division invited Mr. X to provide additional documentation about his medical treatment that could affect his and his wife's eligibility for the 2017 PFD.²⁶ Specifically, given the X's disclosure that some of their vacation time was spent at medical appointments, the Division gave them an opportunity to supplement their application with verification of continuous medical treatment.²⁷ Mr. X responded that he did not know whether he and his wife qualified for any other allowable absences, and maintained that the law is unjust, inequitable, and discriminatory.²⁸ After a few emails about the law and its application to his case, Mr. X did not provide any additional documentation.²⁹

On August 14, 2017, the Division issued an Informal Appeal decision upholding the denial and confirming that the X's absences for more than 45 days in addition to his allowable medical treatment absence made them ineligible for the 2017 PFD.³⁰

¹⁹ Ex. 9.
²⁰ Ex. 9.
²¹ Ex. 9 at 2, 3.
²² Ex. 9 at 2, 3.
²³ Ex. 9 at 2, 3.
²⁴ Ex. 9 at 2, 3.
²⁵ Ex. 10.
²⁶ Ex. 10.
²⁷ Ex. 10 at 1; Ex. 12 at 1.
²⁸ Ex. 11; Ex. 12.
²⁹ Ex. 12; Ex. 14.
³⁰ Ex. 13.

After the X' Informal Appeals were denied, the X filed a timely request for hearing by written correspondence.³¹ In their request, the X did not dispute the facts.³² They instead argued that the 45-day rule is “unjust and unconstitutionally discriminates against senior retired Alaskans” and that the “restrictions are arbitrary and do not apply equally to all Alaskans.”³³ A hearing by correspondence was scheduled, and the parties were ordered to submit any additional documents or explanations by October 11, 2017. The X did not file a position statement or any additional documents. PFD Appeals Manager Robert Pearson filed a position statement on behalf of the Division. The hearing record closed on October 25, 2017.

III. Discussion

The issue in this case is whether the Division was correct to deny the X' applications for the 2017 PFD. The X have the burden of proving by a preponderance of the evidence that they meet the eligibility requirements for a PFD.³⁴ Under this standard, the X must prove that it is more probable than not that their absences from Alaska during the qualifying year were allowable.³⁵ The X do not dispute that they were absent from Alaska for a total of 201 days and that 89 of those days were for vacation. They, instead, argue that the 45-day rule should not apply to their situation, and that if it does apply, the law is arbitrary and discriminatory against senior Alaskans.

A. *The X' absences from Alaska during the qualifying year exceeded the allowable limit set in AS 43.23.008(a)(17), and thus, under the PFD statutes, they were not eligible for the 2017 PFDs.*

To qualify for a Permanent Fund Dividend, the applicant must have either been physically present in Alaska throughout the qualifying year, or have been absent only for one of the allowable reasons listed in AS 43.23.008.³⁶ The qualifying year for the 2017 dividend was 2016.³⁷

³¹ Ex. 17.

³² Ex. 17 at 1-2.

³³ Ex. 17 at 2.

³⁴ 15 AAC 05.030(h).

³⁵ Preponderance of the evidence is defined as: “Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. *Black's Law Dictionary* 1064 (5th Ed. 1979).

³⁶ AS 43.23.005(a)(6).

³⁷ AS 43.23.095(6).

The Alaska legislature has identified seventeen reasons that a person may be absent from Alaska and still qualify for a dividend the next year.³⁸ Three of those reasons are applicable here. First, a person may be absent for “continuous medical treatment recommended by a licensed physician” or for “convalescing as recommended by the physician who treated the illness if the treatment or convalescence is not based on a need for climatic change.”³⁹ Second, a person may be absent to accompany “another eligible resident who is absent [for continuing medical treatment or convalescence under AS 43.23.008(a)(5)] as the spouse, minor dependent, or disabled dependent of the eligible resident.”⁴⁰ Finally, the statute provides a catch-all reason for absences—“any reason consistent with the individual’s intent to remain a state resident.”⁴¹

There is no dispute that the X’ 122-day absence from the state after September 10, 2016, was allowable under AS 43.23.008(5) and (13). Mr. X provided verification that he was absent due to continuous medical treatment and convalescence. And Ms. X accompanied Mr. X for that medical treatment and convalescence.

So, the dispute in this case arises from the first portion of the X’ absences—the 89 days for vacation from January through March 2016. Vacations may fit under the catch-all provision that allows absences for any reason consistent with Alaska residency.⁴² And the catch-all provision may be combined with the other sixteen specifically identified allowable absences.⁴³ But the number of days allowed for vacation or other absences included in the catch-all provision varies from 180 days to 45 days, depending on which of the other sixteen allowable absences it is combined.⁴⁴ Specifically, the maximum length of vacation or other catch-all absences decreases to 45 days if an applicant is claiming an absence under the provision for continuous medical treatment or the provision for accompanying a spouse for continuous medical treatment.⁴⁵

Accordingly, under the PFD statutes, a person could be absent from the state on vacation for 180 days, and the entire absence would be allowable.⁴⁶ A person could also be absent from

³⁸ AS 43.23.008(a).
³⁹ AS 43.23.008(a)(13).
⁴⁰ AS 43.23.008(a)(5).
⁴¹ AS 43.23.008(a)(17).
⁴² AS 43.23.008(a)(17).
⁴³ AS 43.23.008(a)(17).
⁴⁴ AS 43.23.008(a)(17)(A)-(C).
⁴⁵ AS 43.23.008(a)(17)(C).
⁴⁶ AS 43.23.008(a)(17)(A).

the state for 365 days for medical reasons, and the absence would be allowable.⁴⁷ But a person who takes a 46-day vacation outside of Alaska, and then suffers an unforeseen accident or illness requiring an absence of more than 135 days later in the same year would not be eligible.⁴⁸ The total absence in that case would be 181 days, and would include 46 days in addition to the medical absence.

In this case, the X' combined absences of 201 days exceeded 180 days. They spent more than 45 days vacationing outside of Alaska in addition to their absences for Mr. X' medical reasons. Although the X did not intend to be absent from Alaska longer than the statute allows, and their absences were caused by unfortunate circumstances beyond their control, the law does not allow the Division or an administrative law judge to consider extenuating circumstances on a case-by-case basis.⁴⁹ Instead, the X' absences must fit into one of the actual categories the Legislature has provided.

Because they spent 201 days outside Alaska in the qualifying year for the 2017 dividend, and more than 45 days of those absences were not allowable, there is no legal basis to grant the X a 2017 dividend.

B. An executive branch decisionmaker does not have the authority to nullify a statute.

The X argue that the 45-day rule should not apply to their situation, and that if it does apply, the law itself is arbitrary and discriminatory against senior Alaskans. But a party challenging the constitutionality of a statute bears the burden of demonstrating the constitutional violation.⁵⁰ And statutes are presumed constitutional with any doubt resolved in favor of constitutionality.⁵¹

The Division responds that “questions of whether the law is unjust and/or arbitrary are not at issue in this administrative hearing.”⁵² This raises a question about the Commissioner’s jurisdiction to hear the X’ Equal Protection claim. On one hand, an executive branch decisionmaker does not have the authority to decide a “facial challenge” to a statute. In other words, where neither the statute in question nor a virtually identical statute has previously been

⁴⁷ AS 43.23.008(a)(5) & (13).

⁴⁸ AS 43.23.008(a)(17)(C).

⁴⁹ *In re S.H.*, OAH No. 08-0113-PFD (Commissioner of Revenue 2008), at 4.

⁵⁰ *Harrod v. State, Dept. of Revenue*, 255 P.3d 991, 1000 (Alaska 2011).

⁵¹ *Harrod*, 255 P.3d at 1001.

⁵² Formal Hearing Position Statement at 3.

ruled unconstitutional by the judicial branch, it would not be appropriate for an executive branch decisionmaker to rule on a constitutional challenge that seeks to nullify the statute.⁵³ Under the doctrine of separation of powers, that function is reserved for the judicial branch, and unless and until judicial invalidation occurs the executive branch must obey the statute.⁵⁴ On the other hand, when a party brings an “as applied” challenge to the constitutionality of a statute, the agency may initially rule on the challenge.⁵⁵ Put another way, an executive branch decisionmaker has jurisdiction to review an agency’s exercise of its discretion under the law and to determine whether the agency implemented the law consistent with constitutional limits.⁵⁶ This allows executive branch agencies to correct any errors they have made in applying a constitutional mandate in an unconstitutional manner.⁵⁷

The X do not claim or even allege that the Division has singled them out for disproportionate, selective application of the PFD allowable absences provision. Indeed, the preponderance of the evidence indicates that the Division correctly and consistently applied its regulations and statutes. Instead, it appears that the X’ claim that AS 43.23.008(a)(17) is arbitrary and invalid on its face and that the executive branch therefore should not follow the law the legislature laid down. This office does not have the authority to decide that issue. Because the Division followed its statutes, and because those statutes are presumed constitutional, the decision to deny C and N X’ 2017 PFD applications is affirmed.

IV. Conclusion

A preponderance of the evidence shows that the X spent 201 days outside Alaska in the qualifying year for the 2017 dividend, and more than 45 days of those absences were not allowable. Accordingly, they are not eligible for the 2017 PFD. Because the Division followed its statutes, and because those statutes are presumed constitutional, the decision to deny C and N X’ 2017 PFD applications is affirmed.

Dated: December 6, 2017

Signed

Jessica Leeah
Administrative Law Judge

⁵³ *In re Holiday Alaska, Inc.*, OAH No. 09-0245-TOB at 5 (Commissioner of Commerce, Comm. & Econ. Dev. 2009) (discussing OAH jurisdiction over constitutional questions and citing *Richardson v. Tennessee Bd. Of Dentistry*, 913 S.W.2d 446, 455 (Tenn. 1995)).

⁵⁴ *In re Holiday Alaska, Inc.*, OAH No. 09-0245-TOB at 5.

⁵⁵ *In re Holiday Alaska, Inc.*, OAH No. 09-0245-TOB at 8; *see also Holding v. Municipality of Anchorage*, 63 P.3d 248, 250 (Alaska 2003).

⁵⁶ *In re Holiday Alaska, Inc.*, OAH No. 09-0245-TOB at 8-9; *see also Holding*, 63 P.3d at 250.

⁵⁷ *In re Holiday Alaska, Inc.*, OAH No. 09-0245-TOB at 8.

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 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 8th day of January, 2018.

By: Signed
Signature
Jessica Leeah
Name
Administrative Law Judge
Title

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