

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

In the Matter of	)	
	)	
T D	)	OAH No. 17-1098-PFD
_____	)	Agency No. 2016-003-7709

**DECISION AND ORDER**

**I. Introduction**

T K D appeals the denial of his 2016 Permanent Fund Dividend (PFD) application, the imposition of a civil fine, and a five-year bar on future PFDs. The denial and sanctions had been imposed based on a conclusion by the Permanent Fund Dividend Division that Mr. D had made false statements on his 2016 PFD application and on an appeal from the denial of that application. This decision concludes that Mr. D’s willful and material misrepresentations concerning his out of state absences on his 2016 PFD application justify the Division’s denial of his 2016 application and recoupment of the 2016 dividend paid in error. This decision further concludes that the five-year ban on future dividends is an appropriate sanction for Mr. D’s willful misrepresentations; however, the Division’s imposition of a civil is reversed due to the lack of evidence in the record as to the basis of the fine.

**II. Facts**

A. Background

T K D was raised in Alaska and first received a PFD in 1984, at age 14. He lived in Utah for part of college and for law school, then returned to Alaska after his law school graduation in 2001 for a judicial clerkship in No Name City. From 2001 until 2015, Mr. D, his wife S, and their growing family lived in the No Name City area.<sup>1</sup>

At some point, the Ds began contemplating leaving Alaska, at least temporarily, for Mrs. D to pursue an advanced nursing degree. To further the possibility of this plan, Mr. D sought and obtained licensure by the Utah State Bar in 2010.

Wanting to time their departure from Alaska to minimize the disruption for their school-age children, the family did not actually leave Alaska until 2015. They had originally planned to relocate to Texas and for Mrs. D to attend school there. However,

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<sup>1</sup> Ex. 6, pp. 1-2; Ex. 7, p. 9.

because Mr. D was unable to obtain a Texas bar license, they settled on Utah, where he was already licensed.<sup>2</sup> In the summer of 2015, the family drove their RV from Alaska to Utah, settling in No Name City 2, Utah.<sup>3</sup> They kept their house in No Name City, using it as a rental property.

B. The house in No Name City 2

The Ds, who have minor children, had difficulty locating appropriate rental housing for their large family.<sup>4</sup> They learned of a possible opportunity to enter into a contract for deed on a home that would meet their needs.<sup>5</sup> With the help of a realtor, they made an offer on the home.<sup>6</sup>

The offer was presented on a Utah Association of Realtors six-page “Real Estate Purchase Contract” form, which noted at the outset that “this is a legally binding real estate purchase contract.”<sup>7</sup> The first section, titled “Offer to Purchase and Earnest Money Deposit,” defined the term “Buyers” as “T K and S D.”<sup>8</sup> The offer identified an earnest money requirement, a purchase price, a settlement date, and cash due at settlement.<sup>9</sup> Paragraph 8.3 of the offer, in a section titled “Buyer’s Conditions of the Purchase,” provided that “Buyer’s obligation to purchase the property is not conditioned upon obtaining the loan referenced in Section 2b.”<sup>10</sup>

A two-page form addendum was titled “Seller Financing Addendum to Real Estate Purchase Contract.” The Addendum provided for two years of seller financing at 4.5% interest, after which the entire remaining balance would come due.<sup>11</sup>

Along with their offer, the Ds submitted a letter that began, “Dear Home Seller, Thank you for considering our offer to purchase your home.” The letter espoused the Ds’ fondness of and strong ties to Utah, and happiness at having been able to return, providing this description of the reasons for their return:

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<sup>2</sup> D brief, p. 2.

<sup>3</sup> Ex. 7, p. 9.

<sup>4</sup> D brief, p. 3; D testimony; Ex. 7, p. 9.

<sup>5</sup> D brief, p. 3; D testimony; Ex. 7, p. 9.

<sup>6</sup> D brief, p. 3; D testimony; Ex. 7, pp. 9-10.

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

<sup>8</sup> Ex. 7, p. 1.

<sup>9</sup> Ex. 7, pp. 1-2.

<sup>10</sup> Ex. 7, p. 3.

<sup>11</sup> Ex. 7, p. 7.

We loved our time in Utah and were sad to leave, but K was offered a job as a law clerk after graduation so we headed back to Alaska. As time passed we watched for opportunities to return to Utah[.] So K applied for and received his Utah bar license in 2010 and we looked to the summer of 2015 [when a move would not be disruptive to their children’s schooling]. We are excited to be returning to Utah ... We have missed being close to family who live in Provo and Logan. ... We are all anxious to get settled in to our new home and begin our life in Utah.<sup>12</sup>

They described their plans for Mr. D to wind down his Alaska practice and open a practice in Utah: “He is currently making the transition to open his practice in Utah, while finishing Alaska cases, and hopes to have the transition complete by the end of the year or early 2016.”<sup>13</sup> They also described their plans to sell their home in Alaska, and then obtain traditional financing on the Utah home.<sup>14</sup>

Their offer was accepted, and the Ds moved into the home.

C. Employment in Utah

Mrs. D began attending school in Utah full-time in January 2016.<sup>15</sup> During the fall of 2015, Mr. D traveled back and forth between Alaska and Utah while mostly winding down his Alaska law practice. He eventually rejoined his family in Utah towards the end of that year.

Mr. D began looking for employment in Utah during the spring of 2016, but was unable to find full-time work, and eventually began doing contract work for a Salt Lake City law firm, X and Counsel.<sup>16</sup> The X law firm listed Mr. D as “of counsel” on its website, but paid him as an independent contractor.<sup>17</sup> Although the website gave (and still gives) the impression that Mr. D is a full-time employee, he contends he has never been an employee (only an independent contractor), and has never worked close to full-time.

Mr. D’s affiliation with the X firm ended in the fall of 2016 when the firm merged with another firm.<sup>18</sup> Mr. D now works as a partner in a start-up company.<sup>19</sup> Additionally, throughout his time living in Utah, Mr. D has continued to represent some Alaska clients.

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<sup>12</sup> Ex. 7, p. 9.

<sup>13</sup> Ex. 7, p. 9.

<sup>14</sup> Ex. 7, p. 9.

<sup>15</sup> See Ex. 13, p. 4.

<sup>16</sup> D brief, pp. 1-2 and Ex A.

<sup>17</sup> Ex. 8; D brief, pp. 1-2 and Ex. A.

<sup>18</sup> D brief, p. 1. For reasons that are unclear, the X firm website still exists and still lists Mr. D as “of counsel,” but elsewhere on the webpage reflects that Mr. X has joined another firm.

<sup>19</sup> D brief, p. 2.

At the time of his appeal, he had traveled back to Alaska for work “three times in the last five months.”<sup>20</sup> Most of the family’s living expenses have been paid by income from retirement disbursements and Mr. D’s Alaska-based law practice.<sup>21</sup>

As of the time of the hearing in this appeal, Mr. D said he expected the family to return to the No Name City area in about 18 months, when his wife finishes her schooling, although he also said he doesn’t know many details of how her academic program works or when she might finish her degree.<sup>22</sup>

D. PFD applications and appeals

1. *Mr. D’s application for the 2016 PFD*

On January 4, 2016, Mr. D applied for a 2016 Permanent Fund Dividend.<sup>23</sup> His application acknowledged that he was not physically present in Alaska, but listed his “physical address” (and that of his wife) as the family’s home in No Name City.<sup>24</sup>

In a required listing of absences during 2015, Mr. D characterized his numerous out of state absences as “driving vacations,” “travel to Utah” and “vacation for Christmas in Utah, Nevada & California.”<sup>25</sup> He identified the following periods of absence from Alaska, classifying each as a “vacation”:

- February 19 – 27, 2015: “Vacation in Mexico”
- July 20, 2015 – August 2, 2015: “Driving vacation to Texas”
- September 5, 2015 – October 12, 2015: “Travel to Salt Lake City and Texas”
- November 1, 2015 – November 11, 2015: “Travel to Utah”
- November 15, 2015 – December 10, 2015: “Travel to Utah for Thanksgiving”
- December 15, 2015 – December 31, 2015: “Vacation for Christmas in Utah, Nevada, & California[.]”

Mr. D did not indicate that any of these absences were related to relocating to Utah, or that his December “vacation in Utah” was in any way distinguishable from his February “vacation in Mexico.”<sup>26</sup>

At the same time, however, on the Supplemental Schedule to his application, Mr. D checked “yes” in response to the question, “At any time since December 31, 2014, has the

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<sup>20</sup> D brief, p. 2.  
<sup>21</sup> D brief, p. 2.  
<sup>22</sup> D testimony.  
<sup>23</sup> Ex. 1.  
<sup>24</sup> Ex. 1, p. 1.  
<sup>25</sup> Ex. 1, p. 2.  
<sup>26</sup> See Ex. 1, p. 3.

applicant maintained principal home outside of Alaska?”<sup>27</sup> And he provided the address of the family’s home in No Name City 2, Utah as his “Principal Home Address” (although he described the “home status” as “lease or rent”).<sup>28</sup> On this form, Mr. D indicated that he had departed Alaska on December 15, 2015, and intended to return to Alaska to remain indefinitely on May 1, 2018.<sup>29</sup>

2. *The Division’s denial of Mr. D’s 2016 PFD application, and his appeal*

The Division denied Mr. D’s application for a 2016 PFD, citing his having maintained a principal residence outside Alaska.<sup>30</sup> The Division’s denial letter cited AS 43.23.008(a) and 15 AAC 143(a) and (d)(1) for the proposition that “maintaining a principal home outside of Alaska makes an individual not eligible for a dividend.”<sup>31</sup>

Mr. D appealed the denial.<sup>32</sup> He relied on the fact that the regulations cited by the Division in its denial letter provide that maintaining a principal home outside of Alaska is not a barrier to eligibility where an individual is on a long-term absence from the state for certain allowable reasons.<sup>33</sup>

Mr. D’s appeal argued that he was accompanying his wife on allowable absence, and had kept ties to Alaska, including voter registration, driver’s license, vehicle titles, still owning a home in No Name, storing belongings in-state, and continuing to represent clients in Alaska.<sup>34</sup> Mr. D described the situation with the Utah house as follows:

We have several daughters attending college in Utah, and we have a house that we pay the owners mortgage on. We have not sought financing to purchase the home, but have a contract with the first right to purchase in several years if we want to. Regardless of whether we purchase the home for our college age students to live in, we expect we will be returning to Alaska as soon as my spouse obtains her master’s degree in a few years.<sup>35</sup>

In an informal appeal decision dated June 24, 2016, the Division granted Mr. D’s informal appeal, and he was issued a 2016 PFD.<sup>36</sup>

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<sup>27</sup> Ex. 1, pp. 3, 5.

<sup>28</sup> Ex. 1, pp. 3, 5.

<sup>29</sup> Ex. 1, p. 5.

<sup>30</sup> Ex. 2.

<sup>31</sup> Ex. 2, p. 1.

<sup>32</sup> Ex. 4.

<sup>33</sup> 15 AAC 143(d)(1)(A), (B); Ex. 2.

<sup>34</sup> Ex. 4, p. 2.

<sup>35</sup> Ex. 4, p. 2.

<sup>36</sup> Ex. 4, p. 3.

On January 10, 2017, Mr. D applied for the 2017 PFD.<sup>37</sup> He listed 348 days of absence from the state, and categorized them as accompanying his spouse while she attended an out of state college.<sup>38</sup>

3. *The Division's February 2017 reopening of Mr. D's 2016 application*

In February 2017, the Department of Revenue's Criminal Investigations Unit received a report that the Ds might be fraudulently obtaining PFDs. In the investigation that followed, the CIU learned of the seller financing agreement and the home purchase and obtained a copy of the September 18, 2015 "Dear Home Seller" letter.<sup>39</sup> The CIU also determined that Mr. D was listed as "of counsel" at a Utah law firm.<sup>40</sup> These discoveries led the CIU to refer the matter back to the Division to reexamine Mr. D's eligibility for the 2016 dividend.

The CIU's referral summarized its findings that Mr. D had "established a pattern of carelessness or dishonesty when applying for his PFD."<sup>41</sup> The referral pointed to three concerns: (1) what it termed a "materially false statement" in the April 2016 request for informal appeal that the family had not sought financing for a home purchase; (2) failure to disclose full-time employment on his 2017 PFD application; and (3) characterizing all 2015 out of state travel as "vacation" travel, "when in fact, a contract to purchase a home on contract for deed was signed 9/18/15."<sup>42</sup> The referral also noted that the Ds' September 2015 "Dear Home Seller" letter suggested a longstanding intent to leave Alaska and relocate to Utah, as well as actions (such as seeking Utah Bar licensure in 2010) consistent with such an intent.<sup>43</sup>

On February 27, 2017, the CIU remanded the matter to the Division for a renewed eligibility determination and recommended "imposition of civil penalties."<sup>44</sup> On September 22, 2017, PFD Division Director Sara Race issued Mr. D a "2016 Permanent Fund Dividend Notice and Order Assessing Penalties." The Notice stated:

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<sup>37</sup> Ex. 12.  
<sup>38</sup> See Ex. 6, p. 6.  
<sup>39</sup> Ex. 6, 9, 10.  
<sup>40</sup> Ex. 8.  
<sup>41</sup> Ex. 6, p. 2.  
<sup>42</sup> Ex. 6, p. 2.  
<sup>43</sup> Ex. 6, p. 2.  
<sup>44</sup> Ex. 6, p. 3.

[A]n administrative determination has been made pursuant to AS 43.24.035(c) that sufficient cause exists to repay your 2016 Permanent Fund Dividend; and forfeit your eligibility to receive a Permanent Fund Dividend (PFD) for the following years: 2017, 2018, 2019, 2020, and 2021; and to impose a civil fine of \$720.00.<sup>45</sup>

The notice further found that Mr. D’s application and appeal documents contained false statements and misrepresentations rising to the level of unsworn falsification.<sup>46</sup> The specific false statements identified by the Division were:

- Mischaracterizing of his out of state absences as “vacations” on his 2016 PFD application;
- Denying on his 2016 PFD application that he had obtained full-time employment outside of Alaska; and
- Denying in his appeal request that he had sought financing on a home in Utah.<sup>47</sup>

On the same day, the Division separately issued Mr. D a “2016 Permanent Fund Dividend Denial and Assessment Letter.”<sup>48</sup> The Denial and Assessment letter informed Mr. D that his 2016 PFD application approval was being rescinded, and that he would have to repay the amount previously paid. The bases given for the denial were identical to those listed in the Notice and Order Assessing Penalties.<sup>49</sup>

E. Mr. D’s formal appeal

Mr. D requested a formal hearing. Both parties filed prehearing position statements and exhibits, which were admitted at hearing without objection. The hearing was held on November 29, 2017. Mr. D represented himself and testified on his own behalf. PFD Appeals Manager Robert Pearson represented the Division. PFD Specialist Peter Scott and CIU Investigator Nathan Imes testified on the Division’s behalf.

At the hearing, Mr. D minimized the “Dear Home Seller” letter as having been written simply to appease the homeowners, insisting that the family has always intended to return to Alaska once his wife finishes her schooling. But some of his testimony was difficult to reconcile with the record evidence. Mr. D testified that the letter to the homeowners was written to place the family in the most favorable light, and denied the

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<sup>45</sup> Ex. 9, p. 1.

<sup>46</sup> Ex. 9, p. 3.

<sup>47</sup> Ex. 9, p. 2.

<sup>48</sup> Ex. 10.

<sup>49</sup> Compare Ex. 9, p. 2 with Ex. 10, pp. 1-2.

letter was “deceptive.” But his testimony about it, and the contract, was not always straightforward or convincing. In response to the question whether the letter reflected his true intent at the time it was written, he demurred, saying, “That’s hard to say; I don’t have it in front of me.” It is difficult to credit the testimony of a licensed and experienced attorney who fails to bring a key document to the hearing, and then purports to be unable to answer questions about whether it was truthful.

Mr. D also continued to maintain that the family had not made an offer to purchase the home – a denial that simply lacks credibility in the face of a signed offer on an 8-page MLS form titled “Real Estate Purchase Contract.” Mr. D’s characterization of the offer as “really an offer to rent and then purchase” was simply not credible or accurate in light of the record evidence to the contrary.

Nor could I accept Mr. D’s insistence that the family had never “sought financing” on the home, where the letter expressly requests seller financing, and the offer was submitted with an addendum MLS form titled “Seller Financing Addendum to Real Estate Purchase Contract.”

Towards the end of his testimony, Mr. D admitted that his statements in his appeal paperwork were “obviously” not accurate, although he denied having intended to deceive. Following the hearing, the record was held open at Mr. D’s request to enable him to submit an affidavit from his wife, who Mr. D had indicated “could testify to the letter that was drafted, and also her intent in what we were going to do with the home in Alaska and her view of whether it’s financing.” But on December 8, 2018, Mr. D emailed the Division to state he would not be submitting an affidavit from Mrs. D, because:

[S]he has no recollection of either drafting, approving, or sending the letter, regarding what led us to be looking for a house in Utah, to be able to corroborate my testimony.<sup>50</sup>

The Division had no further substantive response to this email, and the record closed on December 8, 2017.

### **III. Discussion**

#### **A. Applicable law**

An individual is eligible to receive a Permanent Fund Dividend each year if the individual meets certain requirements, including being a state resident both on the date of

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<sup>50</sup> D email, Dec. 8, 2017.



the application and during the entire preceding year (the “qualifying year”) and being physically present in the state during that qualifying year except as “allowably absent.”<sup>51</sup>

Allowable absences are defined in AS 43.23.008(a). They include being absent for purposes of receiving a postsecondary degree, and accompanying a degree-seeking spouse.<sup>52</sup> But such absences are only allowable for purposes of PFD eligibility if the applicant otherwise remains an Alaska resident, including, if absent, having an intent to return to the state and to remain indefinitely.

Certain actions preclude PFD eligibility for some but not all absent applicants. For example, an individual is not eligible for a dividend if the individual has “maintained the individual’s principal home in another state or country,” *unless* the individual was allowably absent under certain provisions of AS 43.23.008(a) – including the provisions for educational absences and for accompanying a degree-seeking spouse.<sup>53</sup> Similarly, an individual is not eligible for a dividend if the individual has accepted full-time permanent employment in another state or country, *unless* the individual is allowably absent under provisions including AS 43.23.008(a)(1) and (a)(13).<sup>54</sup>

As to the question of residency – defined, for those not physically present in the state, as having an intent to return to the state and to remain indefinitely – AS 43.23.008(e) provides a non-exhaustive list of five factors relevant to this determination.<sup>55</sup> In making this assessment, the department considers “all relevant factors, including:

- (1) the length of time the individual was absent from the state compared to the length of time the individual was physically present in the state;
- (2) the frequency and duration of voluntary return trips to the state during the past five years;
- (3) whether the individual’s intent to return to and remain in the state is conditioned on future events beyond the individual’s control;
- (4) the ties the individual has established with the state or another jurisdiction, as demonstrated by
  - (A) maintenance of a home;
  - (B) payment of resident taxes;
  - (C) registration of a vehicle;
  - (D) registration to vote and voting history;

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<sup>51</sup> AS 43.23.005(a)(2), (a)(3), (a)(6).

<sup>52</sup> AS 43.23.008(a)(1), (a)(13).

<sup>53</sup> 15 AAC 23.143(d)(1).

<sup>54</sup> 15 AAC 23.143(d)(4).

<sup>55</sup> AS 43.23.095(7); *see also*, AS 01.10.055.

- (E) acquisition of a driver’s license, business license, or professional license; and
  - (F) receipt of benefits under a claim of residency in the state or another jurisdiction;
- (5) the priority that the individual gave the state on an employment assignment preference list, including a list used by military personnel.<sup>56</sup>

The department’s regulations provide the following additional guidance:

An individual’s intent [to] return to Alaska and remain indefinitely is demonstrated through the establishment and maintenance of customary ties indicative of Alaska residency and the absence of those ties elsewhere. Acts that are required by law or contract or are routinely performed by temporary residents of Alaska are not by themselves evidence of residency. In evaluating whether an individual claiming Alaska residency has demonstrated an intent to remain indefinitely in Alaska, the department will consider whether or not an individual has: (1) taken steps to establish Alaska residency and sever residency in a previous state or country; (2) ties to another state or country that indicate continued residency in the other state or country; and (3) taken other action during the qualifying year, through the date of application, that is inconsistent with an intent to remain in Alaska indefinitely.<sup>57</sup>

In addition to satisfying substantive standards for eligibility, PFD applicants must satisfy various procedural requirements, including providing truthful, accurate, and complete information during the application process. Failure to do so is grounds for denial, even if an individual otherwise qualifies for the PFD.

The department will deny an application if the department determines that an individual intentionally, recklessly, or negligently provided false information or omitted material facts, including failure to disclose a reportable absence to the department.<sup>58</sup>

Further, if the department finds that an applicant has either “willfully misrepresented,” “exercised gross negligence with respect to,” or “recklessly disregarded” a material fact pertaining to eligibility, it may issue an order against the applicant requiring “(1) forfeiture of the dividend; (2) imposition of a civil fine up to \$3,000; and (3) loss of eligibility to receive the next five dividends following the forfeited dividend.”<sup>59</sup>

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<sup>56</sup> AS 43.23.008(e); *see also*, AS 01.10.055(c).

<sup>57</sup> 15 AAC 23.143(a).

<sup>58</sup> 15 AAC 23.103(j).

<sup>59</sup> AS 43.23.035(c).

B. Did Mr. D meet his burden of showing that his application for the 2016 dividend should be granted?

The first question is whether the Division erred in determining that Mr. D's application for the 2016 dividend should be denied. The Division's determination that Mr. D should not receive his 2016 PFD was based on the conclusion that he had made false or misleading statements about material facts pertaining to eligibility. Mr. D bears the burden of proof on this issue, and he did not meet that burden.

As a preliminary matter, in determining whether the Division appropriately denied Mr. D's 2016 PFD based on misleading statements, it is not necessary to determine whether Mr. D was otherwise eligible for the 2016 PFD. Mr. D's constellation of misleading responses to application and informal appeal questions – characterizing his 2015 absences as temporary vacations; listing his and Mrs. D's physical address as the home in No Name City; and denials about having sought financing on a home in Utah – warrant a denial regardless of whether he is otherwise eligible.

On his initial application, Mr. D was deceptive in how he characterized his out of state absences, both in classifying the absences as "vacations," and in describing them in terms of "travel" and "vacation" – inaccurate descriptions that obscured the actual purpose and nature of that travel. Mr. D was also deceptive in listing his and his wife's "physical address" as the No Name City home, at a time when they had purchased and were living in the Utah home. As to both of these parts of the 2016 application, it is more likely than not that Mr. D gave deceptive answers in order to increase his chances of obtaining a dividend, even though he and his family had moved out of state during 2015. This deception is grounds to deny the 2016 application.<sup>60</sup>

As to the ownership and financing of the Utah home, the evidence is less clear, but establishes that Mr. D was negligent, if not reckless, with regard to the truth. It is simply impossible to believe that Mr. D – a trained and licensed attorney – did not understand his real estate purchase offer to be an offer to purchase the home, and did not understand the offer for seller financing to be a method of financing the home. This is particularly so where the Ds penned – or at least signed – a letter addressed to "Dear Home Seller," thanking the sellers "for

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<sup>60</sup> Mr. D did show that the Division erred when it concluded that he falsely represented his employment status. Mr. D presented credible testimony and a 1099 form supporting his claim that the work he did for the X firm never rose to the level of full-time employment status. On a more likely than not basis, Mr. D did not obtain full-time employment in Utah during the qualifying year for the 2016 dividend. However, the other misleading statements in his application nonetheless justify denial of the application.

considering our offer to purchase your home,” and explaining “why we would like to have seller financing.”<sup>61</sup> Mr. D’s assurance at the hearing that his wife would support his version of events, followed by his email saying his wife instead has no recollection of the events, raises further questions about the credibility of this story.<sup>62</sup>

Of note, none of these facts, had they been provided as required, would necessarily bar Mr. D’s application.<sup>63</sup> But his misleading responses warrant denial. The department’s regulations provide that an application will be denied “if the department determines that an individual intentionally, recklessly, or negligently provided false information or omitted material facts, including failure to disclose a reportable absence to the department.”<sup>64</sup> The evidence is clear that Mr. D’s 2016 application and informal appeal submissions contained multiple misleading statements that satisfy these criteria. Accordingly, the Division’s determination that Mr. D is ineligible for the 2016 dividend is upheld.

C. Should Mr. D be required to repay his 2016 dividend?

Where a dividend has been paid to an ineligible individual, the Department of Revenue may, but is not required to, take steps to recover the dividend.<sup>65</sup> Whether the department should exercise its discretion to recoup previously paid dividends turns on the totality of the surrounding circumstances, including:

- (1) How much time has elapsed since the dividend was paid;
- (2) Whether there is room for argument that the applicant’s action was not legally disqualifying;

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<sup>61</sup> Ex. 7, p. 9.

<sup>62</sup> Prior cases have applied the evidentiary principle that “where relevant evidence which would properly be part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.” *In re: K.D., U.D., and six minor children*, OAH No. 13-1492-PFD (Commissioner of Revenue 2014) (quoting *Henderson v. Tyrrell*, 910 P.2d 522, 532 (Wash. App. 1996)).

<sup>63</sup> At the same time, nothing in this decision should be construed as determining that Mr. D would otherwise be eligible for a 2016 PFD. Pete Scott, the PFD Eligibility Technician who overturned the initial denial, had been unaware of the seller financing agreement, and had not seen the Ds’ accompanying “Dear Home Seller” offer letter. When Mr. D’s 2016 application was reopened, his review of the letter left Mr. Scott with significant doubts about Mr. D’s eligibility – specifically, about whether the Ds have demonstrated an intent to return to Alaska and remain indefinitely. Scott testimony. As noted above, it is not necessary to resolve this question here, however, because Mr. D’s misleading statements make him ineligible for a 2016 PFD. Even if the Ds only wrote or signed off on a version of their story that tilts towards Utah for the purpose of persuading the sellers to accept their offer, and even if they do intend to return to Alaska and remain indefinitely notwithstanding the “Dear Home Seller” letter, Mr. D still gave sufficiently misleading responses on his application to render him ineligible for the 2016 dividend.

<sup>64</sup> 15 AAC 23.103(j).

<sup>65</sup> AS 43.23.035(b); 15 AAC 23.233(a).

- (3) Whether the applicant erroneously reported the disqualifying information on the PFD application;
- (4) Whether the applicant should have known at the time of the application that he was ineligible; and
- (5) Whether the applicant received a financial benefit from the allegedly disqualifying act.<sup>66</sup>

Here, each of these factors favor requiring repayment. The dividend, having been initially denied, was only paid in the second half of 2016 – within the last 18 months. Recoupment now – based on a notice issued in September 2017 – would not unfairly prejudice Mr. D.

As to the second factor, there is no room for argument that Mr. D misrepresented his circumstances on his initial application – referring to his time in Utah as a “vacation” when he and his wife were actively involved in setting up a household there, and listing his and his wife’s physical address as No Name City when they were living in a home in Utah. Nor is there a reasonable basis for an outside observer to doubt that Mr. D was probably being deceptive when he denied having sought financing to purchase the home.

The third factor also favors repayment because – at least as to the statements on the application – the evidence supports the conclusion that Mr. D intentionally made misleading statements on his application to minimize the impact of his out of state absences. Even if Mr. D’s statements about the home financing might conceivably have been a result of a tremendous misunderstanding of legal principles coupled with inadvertent misrepresentations about the situation, it is impossible to imagine a scenario in which the misclassification of the out of state absences was anything but intentional. There is certainly nothing in the record credibly supporting such a scenario.

The fourth factor is less clear because of the unusual posture of this case. Unlike cases where a misleading statement on an application masks the applicant’s ineligibility, here, but for his misleading statements, Mr. D may well have been eligible for a dividend because he was accompanying his wife on what may have been an allowable absence. It was the misleading statements – such as suggesting that he was vacationing when in fact he was relocating to Utah – that gave rise to his ineligibility. Nonetheless, Mr. D knew or should have known that falsely describing his lengthy absences as vacations was grounds for ineligibility.

The final factor also favors repayment. The D family has received and continues to receive a significant financial benefit from the PFD despite both parents and minor children all

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<sup>66</sup> *In re: M.E. and C.M.*, OAH No. 13-1625-PFD (Commissioner of Revenue 2014) at pp. 3-5.

living out of state, and despite at least equivocal evidence of their intent to return. The significant financial impact of these dividends cannot be overlooked in asking whether Mr. D obtained or stood to obtain financial gain from any misrepresentations on his PFD application.

Based on the totality of the circumstances, it is appropriate for the department to exercise its discretion in recovering the 2016 dividend paid to Mr. D.

D. Should Mr. D be required to pay a civil fine and/or forfeit future dividends?

In addition to allowing denial of a dividend – and recoupment of a wrongly paid dividend – based on negligent misrepresentations, “the Division is authorized to order a civil fine and 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>67</sup> While an applicant has the burden of proof in eligibility appeals, in appeals of civil fines and forfeitures the burden of proof is appropriately placed on the Division, not the applicant.<sup>68</sup>

The first question here is whether Mr. D, in claiming the 2016 dividend, “willfully, with gross negligence, or recklessly misrepresent[ed] a material fact pertaining to eligibility.” The answer to that question is yes. The Division cited three separate facts allegedly misrepresented by Mr. D: denial of full-time employment in Utah, denial of having sought financing to purchase a home in Utah, and misrepresenting his out of state absences in 2015. As to the final of these facts, the Division has met its burden of proof.

The Division did not meet its burden of showing that Mr. D misrepresented his employment status. The evidence strongly suggests that he did not, in fact, ever have full-time employment in Utah during the time period at issue.

As to the home in Utah, the evidence does not clearly establish that Mr. D intentionally misrepresented the situation with the house in Utah, although his misrepresentations may well rise to the level of at least gross negligence. Although Mr. D was clearly incorrect when he denied ever having “sought financing” on the home, he seemed credible in his genuine misunderstanding about that issue. Whether his misrepresentation of the facts amounts to gross negligence (where he, as a licensed attorney, signed a legally binding document clearly doing

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<sup>67</sup> *In re: L.F.*, OAH No. 11-0472-PFD, at 11 (Commissioner of Revenue 2012) (citing AS 43.23.035(c)).

<sup>68</sup> *See, e.g., In re: H.C.*, OAH No. 16-1502-PFD (Commissioner of Revenue 2017). To the extent other prior decisions have assumed the burden of proof remains with the applicant – *see, e.g., In re: L.F.*, OAH No. 11-0742-PFD at 5 – such an approach is simply inconsistent with well-established adjudicatory principles and principles of due process when the agency is imposing a civil fine or other punitive measures.

what he claimed not to have done), it is not clear that this fact is material in any event, given the plausibility that the Ds' purchase of the home in No Name City 2 is for their use in the short term, and for the use of their adult children in the longer term. Because the home financing question was not material to eligibility, Mr. D's statements on this issue do not support a violation of AS 23.43.035(c).

However, the preponderance of the evidence supports the conclusion that Mr. D willfully misrepresented his out of state absences when he classified them as vacations and described them as "vacation" and "travel." It is far more likely than not that Mr. D chose these words to minimize the appearance that he had been moving his family out of state, which, in fact, he had. The number of trips, and the consistently inaccurate wording he chose to describe them, makes it virtually impossible that this was simply negligence or even recklessness. As to the out of state absences, I find Mr. D's misrepresentations to have been willful, and to warrant sanctions under AS 43.23.035(c).

The final question is what level of sanctions is warranted. The Division imposed a civil fine of \$720 and a five-year ban on future dividends based on a finding of three separate material misrepresentations. Although this decision has found in Mr. D's favor on two of the three alleged misrepresentations, it does not necessarily follow that the sanction must be reduced. Alaska Statute 43.23.035(c) vests the Commissioner with discretion on whether and to what extent to sanction an individual who has recklessly or willfully misrepresented material facts as to eligibility.

[I]f the department finds that an individual, in claiming a Permanent Fund Dividend, or an individual, in certifying another person's eligibility, willfully misrepresents, exercises gross negligence with respect to, or recklessly disregards a material fact pertaining to, eligibility, the department may issue an order against the individual for the:

- (1) forfeiture of the dividend;
- (2) imposition of a civil fine up to \$3,000; and
- (3) loss of eligibility to receive the next five dividends following the forfeited dividend.

As to the Division's imposition of a five-year ban on future dividends, the language of the statute does not clearly allow a range of time periods. That is, the statute provides that the department may impose a range of fines, and it may impose a five-year ban on future dividends. The intentional misrepresentations in Mr. D's application were serious enough to warrant a ban

on future dividends, and, under the statute, the ban must last for five years. Accordingly, the ban imposed by the Division is upheld.

As to the civil fine, however, there is insufficient evidence in the record to support this sanction. Specifically, 15 AAC 23.263(d) advises that the fine for a violation under AS 43.23.035(c) must be set based on the cost of investigating and processing the violation.

The amount of a civil fine imposed for a violation found under AS 43.23.035(c) will be based on the cost incurred by the department for investigating and processing the violation. Costs incurred by the department may include personal services, travel, and research fees.

The Division's Notice indicates that the \$720 fine was set based on "the time spent investigating this matter and other relevant factors in accordance with policy."<sup>69</sup> There is no further evidence in the record about the basis for the fine. On the one hand, the Division no doubt incurred expense in investigating and processing Mr. D's 2016 application, and the fine imposed is on the low end of the available range. At the same time, however, the language of the regulation expressly directs that the fine be based on costs incurred. The record is devoid of evidence of those costs, and, more troubling, the Notice suggests that other unspecified factors were used in calculating the fine. Because there is insufficient evidence linking the civil fine to the Division's costs as directed in 15 AAC 23.263(d), the Division's imposition of a civil fine is reversed.

#### **IV. Conclusion**

Mr. D is not eligible for a 2016 PFD, and must repay the dividend paid in error because he willfully misrepresented his out of state absences on his application. The same misrepresentations justify a five-year ban on future dividends. However, the imposition of a \$720 civil fine is reversed due to the lack of evidentiary basis in the record.

Dated: January 31, 2018.

*Signed*  
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Cheryl Mandala  
Administrative Law Judge

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<sup>69</sup> Ex. 9, p. 3.



## 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 9<sup>th</sup> day of March, 2018.

By: Signed  
Signature  
Sheldon Fisher  
Name  
Commissioner, Department of Revenue  
Title

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